



Public Service Commission

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DATE: AUGUST 19, 1999

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF APPEALS (BELLACK, HELTON)
DIVISION OF AUDITING AND FINANCIAL ANALYSIS (HEWITT)
DIVISION OF ELECTRIC AND GAS (WHEELER)
DIVISION OF LEGAL SERVICES (JAYE)

RE: DOCKET NO. 981104-EI - PROPOSED AMENDMENT OF RULE 25-6.049, F.A.C., MEASURING CUSTOMER SERVICE.

AGENDA: 8/31/99 - REGULAR AGENDA - RULE WITHDRAWAL - INTERESTED PERSONS MAY PARTICIPATE

RULE STATUS: WITHDRAWAL MAY BE DEFERRED

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\APP\WP\981104WD.RCM

CASE BACKGROUND

The genesis of this docket was the Commission's Order on Declaratory Statement construing, at Florida Power Corporation's (FPC's) request, the grandfather clause in Rule 25-6.049(5)(a), Florida Administrative Code. In re: Petition for Declaratory Statement Regarding Eligibility of Pre-1981 Buildings for Conversion to Master Metering by Florida Power Corporation, Order No. 98-0449-FOF-EI, 98 F.P.S.C. 3:389 (1998). Paragraph (5)(a) of Rule 25-6.049 currently requires individual electric metering by a utility:

[F]or each separate occupancy unit of new commercial establishments, residential buildings, condominiums, cooperatives, marinas, and trailer, mobile home and recreational vehicle parks for which construction is commenced after January 1, 1981.

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Rule 25-6.049(5) (a), Florida Administrative Code.

FPC sought a declaration from the Commission that individually metered buildings, which were constructed prior to 1981, did not automatically become eligible for master metering simply because of the construction date. FPC argued that the concept of grandfathering simply tolerates pre-existing non-conforming uses, it does not condone the creation of new ones. 98 F.P.S.C. at 3:390.

The Commission did not make the declaration sought by FPC because it was too broad. Instead, the Commission tailored its declaration to the two condominium associations at issue, and declared:

[T]he individually metered occupancy units in Redington Towers One and Three are not eligible for conversion to master metering pursuant to Rule 25-6.049 by virtue of having been constructed on or before January 1, 1981.

Id. at 391. The Commission also directed staff to "initiate the rulemaking process to determine whether paragraph (5) (a) of Rule 25-6.049 should be amended." Id.

The staff initiated rulemaking, and published a notice of proposed rule development to clarify the rule. At staff's recommendation, the Commission proposed the following amendment to paragraph (5) (a) to clarify the language in the rule:

Individual electric metering by the utility shall be required for each separate occupancy unit of ~~new~~ commercial establishments, residential buildings, condominiums, cooperatives, marinas, and trailer, mobile home and recreational vehicle parks ~~for which construction is commenced after January 1, 1981.~~ Individual electric meters shall not, however, be required:

1. For each separate occupancy unit of commercial establishments, residential buildings, condominiums, cooperatives, marinas, and trailer, mobile home and recreational vehicle parks for which construction commenced prior to January 1, 1981 and which are not currently individually metered.

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Valencia Condominium Association and Point Management, Inc. (the condominium associations) requested a hearing on the proposed rule, recommended as a lower cost alternative that the Commission not adopt the proposed amendments, and requested a Statement of Estimated Regulatory Costs be prepared.

A Section 120.54, Florida Statutes, rulemaking hearing was held on March 15, 1999, and continued on May 5, 1999, before an attorney from the Division of Appeals acting as the hearing officer. Representatives from Florida Power and Light Company (FPL), Florida Power Corporation (FPC), Tampa Electric Company (TECO), Commission staff, and the condominium associations participated in the hearing. FPL, staff, and the condominium associations filed post-hearing comments. The utilities and staff supported adoption of the proposed amendment arguing that the Commission was simply clarifying its already existing policy. The condominium associations opposed adoption of the proposed amendment arguing that the amendment constitutes an invalid exercise of delegated legislative authority because it contravenes the statute implemented and it is not based on competent substantial authority. The condominium association urged the Commission to withdraw the proposed amendment until the outcome of the generic investigation in Docket No. 990188-EI - Generic Investigation Into Requirement for Individual Electric Metering by Investor-Owned Electric Utilities Pursuant to Rule 25-6.049(5)(a), Florida Administrative Code.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission withdraw the proposed amendments to Rule 25-6.049, F.A.C., Measuring Customer Service?

RECOMMENDATION: Yes, the proposed amendments to Rule 25-6.049, F.A.C., should be withdrawn because the rulemaking process exceeded the statutory time limits set out in Section 120.54(3)(e)2., Florida Statutes. Staff should reconsider its recommendation to propose the clarifying amendment to Rule 25-6.049(5)(a) in the ongoing Docket No. 990188-EI - Generic Investigation Into Requirement for Individual Electric Metering by Investor-Owned Electric Utilities Pursuant to Rule 25-6.049(5)(a), Florida Administrative Code.

STAFF ANALYSIS: When staff established the rulemaking hearing schedule for the proposed amendment, it was unaware that the Joint Administrative Procedures Committee (JAPC) interprets Section

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120.54(3)(e)2., Florida Statutes, to require publication of notice of the agenda conference at which the Commission votes to adopt a rule if the proposed rule will not be adopted within 90 days of the first notice proposing the rule or 45 days from the date of the last noticed hearing. No such notice was published, and the time for doing so has expired. JAPC will not certify the rule amendment, and the Secretary of State will not accept the rule amendment. The only further action that the Commission can take is to withdraw the rule and start the rulemaking process over again.

Staff recommends that the Commission withdraw the proposed amendments to Rule 25-6.049. In proposing the rule amendment considered in this docket, staff believed it was simply implementing the Commission's decision in the Redington Towers docket on the application of the individual metering requirement to pre-1981 construction. Subsequent discussions have raised additional issues which Staff believes should be more thoroughly explored before making a decision on any rule amendments. Therefore, instead of repropounding the amendment at this time, staff recommends that the question of the need for the clarifying amendment be merged into the ongoing generic investigation in Docket No. 990188-EI. A workshop has already been held in the generic docket and the participants have answered data requests. Staff would like additional time to analyze cost savings and other factors before making a recommendation to the Commission concerning the master metering policy.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes, the rule should be withdrawn and the docket closed. The issue of the need for the clarifying amendment should be merged into the ongoing Docket No. 990188-EI - Generic Investigation Into Requirement for Individual Electric Metering by Investor-Owned Electric Utilities Pursuant to Rule 25-6.049(5)(a), Florida Administrative Code.

STAFF ANALYSIS: After a Notice of Withdrawal is published in the Florida Administrative Weekly, the docket may be closed. The issue of grandfathering should be merged into the generic Docket No. 990188-EI.