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Florida Power
CORPORATION

JAMES A. MCGEE
SENIOR COUNSEL

January 21, 2000

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 981104-EI

Dear Ms. Bayó:

Enclosed for filing in the subject docket are an original and fifteen copies of the Post-Hearing Comments of Florida Power Corporation.

Please acknowledge your receipt of the above filing on the enclosed copy of this letter and return to the undersigned. Also enclosed is a 3.5 inch diskette containing the above-referenced document in WordPerfect format. Thank you for your assistance in this matter.

Very truly yours,

James A. McGee

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One Progress Plaza, Suite 1500 • Post Office Box 14042 • St. Petersburg, Florida 33733-4042
Phone: (727) 820-5184 • Fax: (727) 820-5519 • Email: james.a.mcgee@fpc.com
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Docket No. 981104-EU

In re: Proposed amendment of Rule 25-6.049, F.A.C., *Measuring Customer Service.*

POST-HEARING COMMENTS OF FLORIDA POWER CORPORATION

Florida Power Corporation (Florida Power) supports and urges the Commission's adoption of the proposed amendment of Rule 25-6.049(5)(a), F.A.C., as set forth in the Commission's Notice of Rulemaking, Order No. PSC-99-2010-NOR-EU, issued in this docket on October 15, 1999.

The purpose of the proposed amendment is clear, narrow and uncomplicated; to codify a clarification of the rule already made by the Commission in a prior declaratory statement proceeding.[1] In that proceeding, the Commission found that the requirement of paragraph (5)(a) of the rule to individually meter separate occupancy units in buildings constructed after January 1, 1981 was intended to "grandfather" master-metered buildings constructed before 1981 and allow them to remain master-metered, thus avoiding a retroactive application of the rule and the potential hardship of mandatory conversions to individual metering. With this clarification made, the Commission reached the obvious conclusion that the *individually metered* condominium buildings subject to that proceeding were not eligible for conversion to master metering pursuant to the rule simply because they had been constructed before 1981. The Commission should now take the next logical step

[1] Order No. PSC-98-0449-FOF-EI, issued March 30, 1998 in Docket No. 971542-EI; In re: Petition for declaratory statement regarding eligibility of pre-1981 buildings for conversion to master metering by Florida Power Corporation.

and embody this clarification within the rule so that utilities and other affected persons can gain a proper understanding of the rule's individual metering requirement from the rule itself, rather than on a case-by-case basis through future declaratory statement proceedings arising from the kind of misunderstandings that led to the prior declaratory statement.

The only persons requesting a hearing on, or objecting to, the proposed rule amendment were Valencia Condominium Association and its management company, Point Management, Inc. (collectively, Valencia). Valencia has raised two objections to the clarification of Rule 25-6.049(5)(a), both of which were rejected by the Commission in approving the proposed rule amendment at its Agenda Conference on October 5, 1999, an action supported by the record developed in this proceeding.

First, Valencia suggests the Commission should decline to adopt the clarifying amendment in this docket and, instead, defer the matter for consideration in the Commission's generic investigation into the requirement for individual metering, Docket No. 990188-EI. For good reason the Commission rejected this course of action at its October 5, 1999 Agenda Conference and again directed Staff to proceed with the clarifying amendment in this docket. Having now done so, the reasons for rejecting Valencia's "defer and delay" approach are all the stronger. The generic investigation is a broad-based review of the overall rule requiring individual metering, including a host of policy considerations surrounding individual versus master metering (*e.g.*, conservation effects, consumer protection issues, cost of service and rate design implications, etc.). The investigation is only in its preliminary stage, and any rulemaking that may result would not be initiated until after its conclusion. The instant clarifying amendment, on the other hand, is essentially a housekeeping matter that the Commission directed Staff to undertake as a follow-up to its

clarification of the rule's grandfather provision in the prior declaratory statement proceeding. Unlike the subject matter of the generic investigation, the clarifying amendment is devoid of policy issues and is ripe for Commission action, now that the final stage of this long-pending docket has been reached.

Valencia's second objection is that the proposed amendment of Rule 25-6.049(5)(a) is a retroactive rule prohibited by recently enacted Section 120.54(1)(f), F.S., which states that:

> (f) An agency may adopt rules authorized by law and necessary to the proper implementation of a statute prior to the effective date of the statute, but the rules may not be effective until the statute upon which they are based is effective. An agency may not adopt retroactive rules, including retroactive rules intended to clarify existing law, unless that power is expressly authorized by statute. (Emphasis added.)

Valencia's objection is meritless. The proposed amendment simply has no retroactive effect. The Commission rejected this same argument at the October 5, 1999 Agenda Conference. As Commissioner Deason succinctly stated:

> COMMISSIONER DEASON: Mr. Moyle, I don't see where this is a retroactive application. We have had the policy in effect since the rule was adopted. The rule proposed would just simply clarify and is totally consistent with that. There is no change in that in trying to reach back in time and apply that in a retroactive fashion. (Agenda Conference transcript, Item 3, page 28; Hearing Exhibit 3.)

Consistent with Commissioner Deason's statement is the observation of counsel for Staff at the December 2, 1999 rule hearing:

> MR. BELLACK: The Staff would note that what's prohibited in the statute [§120.54(1)(f)] are not rules intended to clarify existing law, but only retroactive rules intended to clarify existing law. And that raises the question as to whether this is a retroactive rule. And based on the arguments noted

previously, this is not a retroactive rule in the understanding of the Commission Staff, because it's not intended to have any retroactive effect, because it doesn't differ from the policy already in place. (Hearing transcript, pages 24 and 25.)

If Valencia's interpretation of Section 120.54(1)(f) were accepted, the Commission would be unable to clarify the language of its rule regarding the applicability of the individual metering requirement to pre-1981 buildings, but yet would be free to achieve the same result (albeit, less efficiently) on a case-by-case basis under the Commission's authority to issue declaratory statements "concerning the applicability of statutory provisions, rules, or orders over which the agency has authority."[2] Such an untenable and counter-productive result speaks loudly to the lack of merit in Valencia's position.

Clearly the Commission has authority to clarify and improve language in its rules where experience has shown the language to be susceptible to misunderstanding. This is simply good administrative practice -- a practice that legislative oversight would seek to encourage, not prohibit. Moreover, such a clarification does not somehow take on a retroactive effect simply because the language in question happens to include a prior date, as Valencia seems to suggest.[3] To the contrary, the clarifying amendment at issue will provide an interested person with a better understanding of how the restrictions on master metering affects him or her *today.*

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[2] Rule 28-105.001, F.A.C.; Section 120.565(1), F.S.

[3] At the October 5th Agenda Conference, Mr. Moyle contended that: "Obviously I would argue that [§120.54(1)(f) is applicable] when you have a staff recommendation before you today that says that this rule [amendment] is intended to clarify a rule and the rule has this 1981 date in it, and then the legislature says, [quotes last sentence of §120.54(1)(f)]." (Agenda Conference transcript, Item 3, page 28; Hearing Exhibit 3.) (Emphasis added.) Commissioner Deason's response to this contention by Mr. Moyle is quoted on page 3 above.

Accordingly, Florida Power urges the Commission to again reject the ill-conceived objections of Valencia and adopt the proposed clarifying amendment to Rule 25-6.049(5)(a), F.A.C., as set forth in the Commission's Notice of Rulemaking.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Post-Hearing Comments of Florida Power Corporation was furnished by U.S. Mail to the following on January 21, 2000.

Mary Anne Helton, Esquire
Division of Appeals
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399

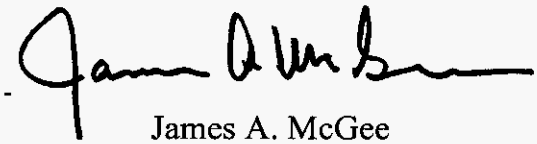
Kenneth A. Hoffman, Esquire
Rutledge, Ecenia, Purnell & Hoffman
215 South Monroe Street
Suite 420
Tallahassee, FL 32301

Richard Bellack, Esquire
Division of Appeals
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399

Jon C. Moyle, Jr., Esquire
Moyle, Flanigan, Katz, Kolins,
Raymond & Sheehan
118 North Gadsden Street
Tallahassee, FL 32301

James D. Beasley, Esquire
Ausley & McMullen
227 South Calhoun Street
Tallahassee, FL 32301

Debra Swim, Esquire
114-E Thomasville Road
Tallahassee, FL 32303-6290



James A. McGee