

State of Florida



# Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** July 7, 2005

**TO:** Director, Division of the Commission Clerk & Administrative Services (Bayó)

**FROM:** Office of the General Counsel (Gervasi, Halloran) *GH*  
Division of Economic Regulation (Kummer) *K*  
Division of Regulatory Compliance & Consumer Assistance (Plescow) *CP* *JD RH*

**RE:** Docket No. 040208-EI – Consumer complaint against Florida Power & Light Company by Leticia Callard.

**AGENDA:** 07/19/05 – Regular Agenda – Posthearing Decision - Participation is limited to Commissioners and Staff

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Administrative

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\040208.RCM.DOC

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## Case Background

On October 4, 2002, Mr. Jorge Callard filed a complaint with the Commission's Division of Consumer Affairs (CAF) on behalf of his wife, Mrs. Leticia Callard (customer of record) against Florida Power & Light Company (FPL or utility). According to Mr. Callard, FPL had inappropriately backbilled the Callard residence at 7860 SW 18th Terrace, Miami, Florida, in the amount of \$9,398 for alleged unbilled energy, when the Callards had not diverted or otherwise tampered with the meter.

In response to the complaint, FPL stated that upon finding physical evidence of meter tampering, it backbilled Mrs. Callard's account from January 2, 1997, when a noticeable and

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FPSC-COMMISSION CLERK

Date: July 7, 2005

sustained drop in consumption began, until July 24, 2002, when a new meter was installed. The original billing for this period, totaling \$8,660.82, was canceled and rebilled at \$17,591.79, showing a difference of \$8,930.97, plus investigative charges of \$348.21. The total backbilled amount in dispute was \$9,279.18 (\$8,930.97 + \$348.21).

Upon review of the complaint and FPL's documentation and calculations provided in response thereto, by letter dated December 24, 2002, CAF advised Mrs. Callard that it appeared that FPL had backbilled her account in compliance with Commission rules and that no adjustment was appropriate. An informal conference was requested and held on June 25, 2003. Mrs. Callard asserted that she had paid FPL what she owed the company and that she would not pay any additional amount. No agreement was reached.

By Proposed Agency Action Order No. PSC-04-0397-PAA-EI, issued April 16, 2004 (PAA Order), the Commission found there to be sufficient cause to determine that meter tampering occurred at the Callard residence to allow FPL to backbill the Callard account for unmetered kilowatt hours, and that because the account was in Mrs. Callard's name during the entire period, she should be held responsible for a reasonable amount of backbilling. The Commission determined the reasonable amount of backbilling to be in the amount of \$9,279.18, which included investigative costs of \$348.21. Moreover, the Commission encouraged the customer to contact FPL immediately to make payment arrangements in order to avoid discontinuance of service without notice, which is authorized pursuant to Rule 25-6.105(5)(i), Florida Administrative Code. Finally, the Commission placed the customer on notice that pursuant to Rule 25-6.105(5)(f), Florida Administrative Code, FPL was also authorized, upon sufficient notice, to refuse or discontinue service for neglect or refusal to provide safe and reasonable access to the utility for the purpose of reading meters or inspection and maintenance of equipment owned by the utility.

The deadline for the filing of a petition for a formal proceeding in protest of the PAA Order was May 7, 2004. On May 5, 2004, Mrs. Callard faxed a letter of protest to the Division of the Commission Clerk and Administrative Services. Although the facsimile was received within the protest period, the Commission does not accept filings by facsimile. On May 12, 2004, five days after the protest period expired, Mrs. Callard filed a copy of the letter of protest in the docket file. FPL did not file any type of responsive pleading to the request for hearing. On August 3, 2004, the Commission issued Order No. PSC-04-0743-PCO-EI granting the late-filed request for hearing.

On November 29 and December 30, 2004, the case was heard before an Administrative Law Judge (ALJ) at the Division of Administrative Hearings. A full evidentiary hearing was conducted by video teleconference at sites in Miami and Tallahassee. On May 13, 2005, the ALJ entered his Recommended Order, a copy of which is attached to this recommendation as Attachment A. The ALJ determined that it was more likely than not that meter tampering had occurred, which prevented FPL from fully charging Mrs. Callard for her actual electricity consumption. Yet, the ALJ also determined that FPL's estimate of the amount of unmetered electricity significantly overstated Mrs. Callard's probable actual usage and was not reasonable, a violation of Rule 25-6.104, Florida Administrative Code.

On May 31, 2005, FPL submitted exceptions to the Recommended Order. Mrs. Callard submitted exceptions to the Recommended Order on June 2, 2005. This recommendation addresses whether the Commission should adopt the ALJ's Recommended Order or accept the parties exceptions to the Recommended Order.

Section 120.57(1)(l), Florida Statutes, establishes the standards an agency must apply in reviewing a Recommended Order following a formal administrative proceeding. The statute provides that the agency may adopt the Recommended Order as the Final Order of the agency or may modify or reject the Recommended Order. An agency may only reject or modify an Administrative Law Judge's findings of fact if, after a review of the entire record, the agency determines and states with particularity that the findings of fact were not based on competent, substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law.<sup>1</sup>

Section 120.57(1)(l), Florida Statutes, also states that an agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and the interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.<sup>2</sup>

In regards to parties' exceptions to the ALJ's Recommended Order, section 120.57(1)(k), Florida Statutes states that an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.<sup>3</sup>

The Commission has jurisdiction pursuant to Sections 366.05, 120.569, and 120.57, Florida Statutes, and administers consumer complaints pursuant to Rule 25-22.032, Florida Administrative Code.

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<sup>1</sup> § 120.57(1)(l), F.S. (2004).

<sup>2</sup> § 120.57(1)(l), F.S. (2004).

<sup>3</sup> § 120.57(1)(k), F.S. (2004).

## DISCUSSION OF ISSUES

**ISSUE 1:** Should the Commission accept Mrs. Callard's exceptions to the Recommended Order?

**RECOMMENDATION:** No. Mrs. Callard's exceptions should be rejected. Mrs. Callard has failed to demonstrate that the factual findings in the Recommended Order are not based on competent, substantial evidence.

**STAFF ANALYSIS:** In the exceptions to the Recommended Order, a copy of which is attached to this recommendation as Attachment B, Mrs. Callard disagreed with the ALJ's factual findings that concluded meter tampering had occurred at her residence beginning in January 1999. She claims that "FPL failed to provide any evidence of tampering or failed to show any evidence of any back reading of the meter."<sup>4</sup> In *Heifetz v. Dept. of Business Reg.*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985), the First District Court of Appeal held that "factual issues susceptible of ordinary methods of proof that are not infused with policy considerations are the prerogative of the hearing officer as the finder of fact." In the Recommended Order, the ALJ concluded that FPL had provided enough credible evidence to allow the determination that "more likely than not, meter #5C35633 was tampered with, preventing FPL from fully charging Callard for her actual electricity consumption."<sup>5</sup> Mrs. Callard's exceptions to the Recommended Order directly contradict the ALJ's factual findings. However, the ALJ's findings of fact on the issue of whether or not meter tampering occurred are susceptible to ordinary methods of proof and are not infused with policy considerations. Thus, Mrs. Callard's exceptions should not be substituted for the ALJ's judgment of the facts.

Furthermore, Mrs. Callard's exceptions were not properly cited to the record, as required by section 120.57(1)(k), Florida Statutes. Nine of the eleven exceptions filed by Mrs. Callard included no citations to the record whatsoever.<sup>6</sup> Therefore, the Commission is not legally required to rule on these exceptions.

The two exceptions that are cited to the record, however, are improperly taken out of context. In Exceptions 9 and 12, Mrs. Callard cites a portion of the record she claims illustrates that the Recommended Order found no meter tampering to have occurred. However, her assertion is based on an incomplete quote from paragraph 8 of the endnotes of the Recommended Order. In full, paragraph 8 reads:

It is noted that the EAUs for January 2001, March 2001, April 2002, and May 2002 are greater than 31128 and hence out of the range established by the July 2001 check readings and the initial reading of the replacement meter in August 2002. The undersigned considers it possible that Callard tampered with the meter during these months and (whether by accident or design) overstated her true usage. Because there is no evidence suggesting that such occurred, however, the

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<sup>4</sup> Leticia Callard's Exceptions to the Recommended Order.

<sup>5</sup> Recommended Order, paragraph 12 at 6.

<sup>6</sup> Leticia Callard's Exceptions to the Recommended Order, No. 1-8, 10.

undersigned has decided that treating the 'as billed' kwhs for these months as true and correct figures is more reasonable than any alternative.<sup>7</sup>

All of Mrs. Callard's exceptions are generally inconsistent with the fact that the ALJ had found there to be sufficient evidence that meter tampering had occurred at the Callard residence beginning in January 1999, as noted above. The question at issue in paragraph 8 cited by Mrs. Callard regarded when meter tampering began, not if meter tampering had occurred. While Mrs. Callard cited Exceptions 9 and 12 to a specific part of the record, the exceptions should be disregarded as being insufficient rejections of the ALJ's factual findings.

Finally, Exceptions 9 and 12 largely recast facts that were presented to the ALJ for consideration at the administrative hearing. Most of the issues raised by the exceptions are addressed in the factual findings made by the ALJ. While the ALJ did not share Mrs. Callard's view as to the significance of certain matters, it was entirely appropriate for the ALJ to make his own independent judgment as to the relevant and persuasive portions of the evidence presented. Despite Mrs. Callard's wishes, review of the ALJ's Recommended Order by the Commission is not an opportunity to reconsider or re-weigh the evidence.<sup>8</sup>

Mrs. Callard has not demonstrated that the ALJ's findings of fact were not based on competent, substantial evidence, and her version of the facts should not be substituted for the ALJ's factual findings. Furthermore, the exceptions primarily re-weigh the evidence presented at the administrative hearing and are improperly cited to the record. Thus, staff recommends that the exceptions to the Recommended Order be denied.

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<sup>7</sup> Recommended Order, paragraph 8 at 26.

<sup>8</sup> McDonald v. Dept. of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977).

**ISSUE 2:** Should the Commission accept FPL's exceptions to the Recommended Order?

**RECOMMENDATION:** No. FPL's exceptions should be rejected. FPL has failed to demonstrate that the factual findings in the Recommended Order are not based on competent, substantial evidence. Furthermore, FPL has failed to show that the ALJ's conclusions of law erroneously apply the relevant law.

**STAFF ANALYSIS:** On May 31, 2005, FPL filed exceptions to the Recommended Order, a copy of which is attached to this Recommendation as Attachment C. FPL contested the ALJ's findings of fact in regards to the methodology used in calculating the backbill for the Callards' unmetered electricity. FPL also claimed that the ALJ departed from the law when he ruled that it was not legally entitled to recover the costs of investigating the meter tampering at the Callard residence.

In regards to methodology, FPL contested the ALJ's use of the Callard's Percentage of Annual Use, Monthly (PAUM), instead of the Seasonal Average Percentage Use method, to calculate the reasonable amount that should be backbilled. FPL cited eleven cases where the Commission employed the Seasonal Average Percentage Use method, which utilizes average FPL customer's PAUM to calculate a reasonable estimate of the amount that should be charged to individuals in backbilling cases. However, Rule 25-6.104, Florida Administrative Code, under which FPL based its claim in the record, does not specify one specific method which must be employed. Thus, it was the prerogative of the ALJ as the fact-finder to choose the method he believed was best suited to the specific facts in the record. Using the customer's own PAUM numbers may be a different method than the Commission typically employs, but with no rule specifying one particular method over another, it cannot be said that the ALJ's determination is an invalid departure from the law. Therefore, staff recommends that the Commission find that FPL did not meet the standard for rejecting the methodology used by the ALJ to calculate the reasonable amount to be backbilled because it did not show that the ALJ's factual findings were not based on competent, substantial evidence in the record.

In its exceptions, FPL also contested the ALJ's conclusions of law in regards to the issue of \$348.21 in costs incurred while investigating the meter tampering at the Callard residence. In the record of the case, FPL relies solely on Rule 25-6.104, Florida Administrative Code, which is silent on the issue of investigative costs. Thus, the ALJ held that the rule under which FPL was traveling did not provide a valid, legal basis for awarding such costs.<sup>9</sup>

However, FPL argued that it did provide sufficient legal basis for the award. FPL first claimed that awarding investigative costs was established Commission policy and procedure, as illustrated in Order No. PSC-96-1216-FOF-EI.<sup>10</sup> Yet, in the Recommended Order, the ALJ pointed out that the Commission did not cite any legal authority when proposing that FPL recover investigative charges in that case. Furthermore, there is at least one case where the

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<sup>9</sup> Recommended Order, paragraph 59 at 23.

<sup>10</sup> Issued September 24, 1996, in Docket No. 960903-EI, In re: Complaint of Mrs. Blanca Rodriguez against Florida Power & Light Company regarding alleged current diversion/meter tampering rebilling for estimated usage of electricity.

Commission has refused to grant investigative costs in a backbilling case because the utility failed to admit sufficient evidence into the record.<sup>11</sup> See Order No. PSC-87-17850-FOF-EI.

FPL then argued that it was entitled to recover the extra expenses incurred pursuant to its tariff on file with the Commission. FPL specifically cited tariff provisions 1.7 and 5.2, which state that the customer must pay for all extra expenses incurred on account of violations of the tariff or rules and regulations established by the PSC.<sup>12</sup> However, FPL failed to include these tariff provisions in the record for consideration by the ALJ at the administrative hearing. Only in its exceptions, filed two weeks after the full evidentiary hearing, did FPL cite the tariff agreements as a ground for recovery of investigative costs. Thus, staff recommends that it is not necessary for the Commission to rule on FPL's exceptions to the Recommended Order in regards to investigative costs, as the tariff provisions were not properly contained in the record pursuant to section 120.57(1)(k), F.S.

Staff believes that FPL has not demonstrated that the ALJ's findings of fact were not based on competent, substantial evidence. Furthermore, FPL's exceptions fail to meet the standard for properly rejecting an ALJ's conclusions of law, since a valid, legal basis for awarding investigative costs was not contained in the record. FPL has not presented any legally justifiable basis for deviating from or modifying any portion of the Recommended Order. Therefore, staff recommends that FPL's exceptions to the Recommended Order be denied.

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<sup>11</sup> Issued July 15, 1987, in Docket No. 860091-EI, In re: Petition of Kenneth Tuch to Initiate Formal Complaint Against Florida Power and Light Company on Backbilling Charges.

<sup>12</sup> FPL's Exceptions to the Recommended Order at 3.

**ISSUE 3:** Should the Administrative Law Judge's Recommended Order be adopted as the Commission's Final Order in this case?

**RECOMMENDATION:** Yes. The Administrative Law Judge's Findings of Fact are based on competent, substantial evidence in the record. The Conclusions of Law appropriately apply the provisions of the Florida Statutes and the Florida Administrative Code.

**STAFF ANALYSIS:** At the formal hearing, the ALJ heard testimony from seven witnesses and received seven exhibits into evidence. After considering the weight of the evidence, the ALJ concluded that it was more likely than not that the Callards' meter had been tampered with, preventing FPL from fully charging the accurate amount of electricity consumed.<sup>13</sup> However, the ALJ also determined that FPL's estimate of the amount of unmetered electricity significantly overstated the Callards' probable actual usage, and hence, was not reasonable.<sup>14</sup> In the Recommended Order, a copy of which is attached to this Recommendation as Attachment C, the ALJ recommended that the Commission enter a Final Order "authorizing FPL to retroactively bill Mrs. Callard \$3,975.66 for the unmetered energy she used from January 1999 through July 2002."<sup>15</sup>

The ALJ used a different method to compute the Callard's unmetered energy than what has typically been employed by FPL in backbilling cases. FPL typically uses the Seasonal Average Percentage Use method for calculating the amount of energy used in backbilling cases. The Seasonal Average Percentage Use method factors in the PAUM of an average FPL customer. PAUM shows what part of an average FPL customer's annual energy consumption occurred in a given month. This number is then used to compute what a typical level of energy consumption would have been during the months when meter tampering was occurring. The average FPL customer PAUM typically forms the basis for the amount of unmetered electricity consumption for which an individual customer is backbilled in meter tampering cases.

In this particular case, however, the ALJ found that FPL had not provided competent, substantial evidence in the record to support the use of the FPL average customer PAUM. Yet, the ALJ did believe that FPL introduced enough data into the record for the fact-finder to reasonably determine the amount of unmetered electricity that the Callards consumed between January 1999 and July 2002. Thus, the ALJ estimated and employed the Callard's own PAUM, as opposed to the average FPL customer's PAUM, to compute more precisely the amount of unmetered electricity that should be backbilled.

In its exceptions, FPL contested the findings of fact in regards to the methodology used by the ALJ. Yet, the rule on which FPL based its claim does not explicitly require one method over another. Rule 25-6.104, Florida Administrative Code, provides that "in the event of unauthorized or fraudulent use, or meter tampering, the utility may bill the customer on a reasonable estimate of the energy used."<sup>16</sup> The ALJ determined that using the Callards' PAUM, instead of the average FPL customer's PAUM, was most appropriate in this particular case.

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<sup>13</sup> Recommended Order, paragraph 12 at 6.

<sup>14</sup> Recommended Order, paragraph 15 at 7.

<sup>15</sup> Recommended Order at 24.

<sup>16</sup> Rule 25-6.104, Florida Administrative Code.



Since the rule does not specify one specific method that must be employed, it was the prerogative of the ALJ as the fact-finder to choose the method he believed was best suited to the specific facts in the record. Using the customer's own PAUM may be a different method than the Commission has typically employed, but with no rule specifying one particular method over another, it cannot be said that the ALJ's determination is an invalid departure from the law. Adopting the ALJ's Recommended Order does not set a precedent for the calculation of a customers' PAUM in future backbilling cases because the decision on the PAUM method was based on the particular facts introduced into the record in this case. Therefore, the ALJ's methodology need not be used by the Commission or FPL on a going forward basis. Nonetheless, the ALJ's factual findings are supported by competent, substantial evidence in the record and should be accepted.

FPL also contested the ALJ's determination that it was not entitled to recover investigative costs as a matter of law. However, the ALJ correctly observed that there is nothing in Rule 25-6.104, Florida Administrative Code, that requires that investigative costs be granted. Furthermore, although the Commission has previously granted investigative costs in meter tampering cases, as mentioned by FPL, it did not cite legal authority when granting the award. Thus, the ALJ's decision to deny investigative costs in this case was not an invalid departure from the law.

Upon review of the record, staff believes the Administrative Law Judge's findings of fact are based on competent, substantial evidence in the record. The conclusions of law appropriately apply the provisions of the Florida Administrative Code. Therefore, staff recommends that the Commission adopt the ALJ's Recommended Order as its Final Order.

Docket No. 040208-EI  
Date: July 7, 2005

**ISSUE 4:** Should this docket be closed?

**RECOMMENDATION:** Yes. The docket should be closed after the time for filing an appeal has run.

**STAFF ANALYSIS:** The docket should be closed after the time for filing an appeal has run.

DOCKET NO. 040208-EI  
Date: July 7, 2005  
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ATTACHMENT A

State of Florida  
Division of Administrative Hearings

ORIGINAL

**Jeb Bush**  
Governor  
**Robert S. Cohen**  
Director and Chief Judge  
**Ann Cole**  
Clerk of the Division



**Harry L. Hooper**  
Deputy Chief  
Administrative Law Judge  
**Steven Scott Stephens**  
Deputy Chief Judge  
Judges of Compensation Claims

May 13, 2005

Blanco Bayo, Director of Records and Reporting  
Public Service Commission  
Capital Service Office Center  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

040208-EI

Re: LETICIA CALLARD vs. FLORIDA POWER & LIGHT COMPANY,  
DOAH Case No. 04-2758

Dear Mr. Bayo:

Enclosed is my Recommended Order in the referenced case. Also enclosed is the three-volume transcript, together with the Petitioner's Exhibits lettered A, B, D, G-1, G-2 and I and the Respondent's Exhibits 1-2. Copies of this letter will serve to notify the parties that my Recommended Order and the hearing record have been transmitted this date.

- CMP \_\_\_\_\_
- COM \_\_\_\_\_
- CTR \_\_\_\_\_
- ECR \_\_\_\_\_
- GCL \_\_\_\_\_
- OPC \_\_\_\_\_
- MMS \_\_\_\_\_
- RCA \_\_\_\_\_
- SCR \_\_\_\_\_
- SEC   1
- OTH \_\_\_\_\_

As required by Subsection 120.57(1)(k), Florida Statutes, you are requested to furnish the Division of Administrative Hearings with a copy of the Final Order within 15 days of its rendition.

Sincerely,

JOHN G. VAN LANINGHAM  
Administrative Law Judge

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JVL/lid  
Enclosures

cc: Richard D. Melson, General Counsel  
Leticia Callard  
David M. Lee, Esquire  
William D. Talbott, Executive Director

DOCUMENT NUMBER-C/

DOCKET NO. 040208-EI

Date: July 7, 2005

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ATTACHMENT A

ORIGINAL

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LETICIA CALLARD, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 04-2758  
 )  
 FLORIDA POWER & LIGHT COMPANY, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing on November 29, 2004, and on December 30, 2004. The first day of hearing was conducted by video teleconference at sites in Tallahassee and Miami, Florida. The second and final day of hearing was held at the courthouse in Miami, Florida.

APPEARANCES

For Petitioner: Leticia Callard, pro se  
7860 Southwest 18th Terrace  
Miami, Florida 33155

For Respondent: David M. Lee, Esquire  
Florida Power & Light Company  
Law Department  
700 Universe Boulevard  
Juno Beach, Florida 33408

DOCUMENT NUMBER-DATE

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STATEMENT OF THE ISSUES

The issues in this case are whether Petitioner tampered with her electricity meter and, if so, whether Respondent has established a reasonable estimate of the un-metered electricity consumed, for which Petitioner could be retroactively billed.

PRELIMINARY STATEMENT

On April 16, 2004, the Florida Public Service Commission ("PSC") issued a Notice of Proposed Agency Action Order Approving Billing Due to Meter Tampering ("Proposed Agency Order") wherein it made the following pertinent findings of fact:

[M]eter tampering occurred at Mrs. Leticia Callard's address, . . . [which] warrant[s] backbilling. . . . [T]he amount of reasonable backbilling of Mrs. Callard's account is \$9279.18 for unbilled consumption from January 2, 1997, to July 24, 2002, including \$348.21 for investigative charges.

The PSC "encouraged [Mrs. Callard] to contact [Respondent] Florida Power & Light Company immediately to make payment arrangements . . . in order to avoid discontinuance of [electricity] service without notice."

Petitioner Leticia Callard disputed the aforementioned fact-findings and timely requested a formal hearing. On August 4, 2004, the PSC referred the case to the Division of Administrative Hearings for further proceedings. An Administrative Law Judge was assigned to preside in the matter.

The final hearing took place on November 29, 2004, and December 30, 2004. Petitioner called her husband, Jorge Callard, as her only witness and introduced Petitioner's Exhibits A, B, D, G-1, G-2, and I into evidence. Respondent presented the testimony of its employees Chase Vessels, Edward List, Bert Cunill, James Bartlett, and Linda Cochran. In addition, Respondent offered Respondent's Exhibits 1 and 2, which were received in evidence.

The final hearing transcript, comprising three volumes, was filed on March 9, 2005. Each party filed a proposed recommended order ahead of the enlarged deadline, which was April 5, 2005.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2004 Florida Statutes.

FINDINGS OF FACT

1. Respondent Florida Power & Light Company ("FPL") is a utility that sells electricity to residential and commercial customers in Florida; as such, FPL is subject to the PSC's regulatory jurisdiction.

2. FPL measures the amount of electricity used by its residential customers in kilowatt-hours ("kWhs"). A customer's cumulative electricity usage is recorded on a meter. Each month, a meter reader looks at a customer's meter and records the current cumulative total of kWhs consumed. From the current cumulative total of kWhs is subtracted the previous month's

cumulative total, which equation produces the number of kWhs used during the preceding month, for which amount the customer is then billed.

3. For example, if a meter read on May 5, 2005, shows a current cumulative total of 6950 kWhs, and if the same meter, when read on April 5, 2005, had shown 5750 kWhs, then the customer's usage, for the 30-day period from April 5, 2005, to May 5, 2005, is 1200 kWhs. The customer will then be sent a bill for May 2005 reflecting the cost of 1200 kWhs of electricity.

4. Petitioner Leticia Callard ("Callard") is one of FPL's residential customers. Years before the present dispute arose, FPL installed meter #5C35633 at the house in Miami, Florida, where Callard resides.

5. Meter #5C35633 has five dials on its face that display kWhs. The dials are protected under a glass canopy, which is sealed to the meter to guard the meter's integrity. The dials cannot be accessed without breaking the seal.

6. On July 5, 2001, a meter reader conducted a regularly scheduled reading, for billing purposes, of meter #5C35633. (A customer's monthly invoice from FPL tells which day the meter reader will next look at the customer's meter.) He recorded a cumulative total of 5361 kWhs. This was a red flag because the previous reading, taken on June 5, 2001, had been 5733 kWhs.

Thus, the meter appeared to have run backwards. This is known as a "regressive reading." A regressive reading is suspicious because the dials on a properly functioning meter should move in only one direction—forward. When a regressive reading is taken, FPL investigates further to determine if meter tampering has occurred.

7. Accordingly, FPL sent an investigator named Chase Vessels to the Callard residence to conduct an unscheduled reading of meter #5C35633. (An unscheduled reading—that is, one taken between the normal monthly meter-read dates—is called a "check reading." Check readings are useful in investigating possible meter tampering because they occur without advance warning to the customer.) Mr. Vessels read the meter on July 6, 2001, which then showed 5497 kWhs. This, too, was a regressive reading relative to that taken on June 5, 2001.

8. Mr. Vessels discovered that the seal on meter #5C35633 was broken and had been "rigged" to appear intact. Mr. Vessels also noticed that there were smudges on the face of the meter around the dials, suggesting that someone might have been manipulating the dials.

9. Another check reading was taken on July 16, 2001, at which time Callard's meter showed 6515 cumulative kWhs. Thereafter, Mr. Vessels attempted to make additional check readings but was unable to access the meter without alerting the



customer. He finally saw the meter again on June 27, 2002. On that date, Mr. Vessels again noted the rigged seal and the smudges on the meter's face, near the dials.

10. Believing that tampering likely had taken place, FPL directed Edward List to remove meter #5C35633 and replace it with another one, which he did on July 24, 2002. Mr. List also observed the rigged seal and the smudges around the dials on meter #5C35633. When he removed the meter, Mr. List placed a sticker on the canopy, which he initialed, identifying the date of removal and the location from which the meter was taken. Mr. List then sent meter #5C35633 back to FPL for testing.

11. At FPL's Meter Technology Center, James Bartlett inspected and tested meter #5C35633. He confirmed that the seal was broken, and that the meter's face was scratched and smudged. Further, when Mr. Bartlett tested the meter, he found that it was "off scale," meaning that it was not measuring kWhs as accurately as it should have been.

12. Based on the above facts, which are established by credible and persuasive evidence in the record, the undersigned finds and determines that, more likely than not, meter #5C35633 was tampered with, preventing FPL from fully charging Callard for her actual electricity consumption. Specifically, it is determined that Callard (or someone) physically manipulated the

meter's dials, rolling them backwards to reduce the cumulative total of kWhs used and hence understate usage.

13. More difficult to determine is when this tampering occurred. As FPL acknowledges, tampering of this sort is episodic, and affects only the instant billing cycle. That is, if a customer were to tamper with his meter on, say, May 15, 2005, then the bill covering the period that includes May 15, 2005, would be inaccurate, but future bills would be correct (assuming no further tampering), just as bills covering earlier periods would be accurate or not depending on whether tampering had previously occurred during those periods. To come up with a reasonable estimate of the energy used but not paid for, then, it is necessary to establish, in some reasonable fashion, the period(s) affected by the tampering.

14. FPL estimates that from the billing cycle which ended on January 2, 1997,<sup>1</sup> until July 5, 2002, Callard used a total of 101623 kWhs for which she was not billed, due to meter tampering. The cost of this amount of electricity, according to FPL, is \$8,930.97.

15. For reasons that will be discussed later, it is determined that FPL's estimate of the amount of "un-metered" electricity significantly overstates Callard's probable actual usage and hence is not reasonable. FPL has introduced enough data into the record however, for the fact-finder to make a

reasonable determination of the amount of un-metered electricity that Callard used.

16. As a starting point, the evidence shows the total kWhs for which Callard was actually billed each month from January 1997 to July 2002. Thus, Callard's annual "as billed" electricity usage for each of the years in question, expressed in kWhs, can easily be ascertained. The figures are as follows:

1997:	23899
1998:	27483
1999:	13383
2000:	14840
2001:	14134

In addition, from January 2002 to July 2002, Callard was billed for 8395 kWhs, according to readings taken from meter #5C35633.

17. It does not take a trained eye to spot the dramatic difference between the years 1997 and 1998, on the one hand, and 1999 through 2001 (and 2002) on the other. Based on these figures, the undersigned made the tentative determination that the tampering probably began in 1999.

18. To confirm or falsify this preliminary determination, the undersigned considered the concept of Percentage of Annual Usage, Monthly ("PAUM"). PAUM shows what part of a customer's annual energy consumption occurred in a given month; it is calculated by dividing the year's total usage (in kWhs) into the

subject month's usage. Thus, for example, if a customer consumed 30000 kWhs in 2004, and if his usage in May 2004 was 3000 kWhs, then the customer's PAUM for May 2004 would be 0.10, or 10 percent.

19. PAUM is a useful datum because residential customers tend to use more or less energy depending on the time of year. As Floridians know from common experience, for example, electricity usage in this state tends to increase in the hot summer months, when air conditioners are running, and decrease in the milder autumn or winter months, when windows are open.

20. To estimate un-metered electricity usage, FPL employs a methodology that factors in the PAUMs of an average customer for each of the months during which tampering is suspected to have occurred. Thus, in this case, FPL produced numbers that purportedly are the average customer's PAUMs for every month from January 1997 through July 2002. The following table shows the PAUMs of an average customer, according to FPL.

	1997	1998	1999	2000	2001	2002
JAN	6.84	6.88	7.51	6.57	7.43	7.43
FEB	6.59	5.75	6.32	5.79	6.48	6.48
MAR	7.03	5.82	5.72	6.13	6.78	6.78
APR	6.96	6.23	7.04	6.73	7.08	7.08
MAY	7.65	7.38	8.12	9.44	7.26	7.26
JUN	9.41	9.90	9.06	10.09	9.24	9.24
JUL	10.35	10.93	9.77	10.54	10.14	10.14
AUG	10.59	10.71	11.23	10.54	10.20	
SEP	10.26	10.82	10.81	10.43	11.01	
OCT	9.50	9.99	9.70	9.54	9.15	
NOV	7.82	8.08	7.78	7.29	7.73	
DEC	7.00	7.52	6.94	6.91	7.50	

21. Using an average customer's PAUMs, it is possible to calculate an actual customer's estimated annual usage ("EAU") even if there is a paucity of reliable data concerning the actual customer's true usage. Suppose, for example, that FPL suspects Smith is tampering with his meter and, as a result, conducts check readings on May 10, 2000, and May 20, 2000, recording cumulative totals of 7250 kWhs and 8420 kWhs, respectively. This tells FPL that Smith used 1170 kWhs in 10 days, or 117 kWhs per day. The June 2000 billing cycle is 30 days, so FPL can estimate that Smith's actual usage for that month should be approximately 3510 (30 x 117).<sup>2</sup> If the average customer's PAUM for June 2000 is 10.09 percent, then FPL can calculate an EAU for Smith, based on the two check readings. The formula is:

$$\text{EAU} = \frac{\text{kWhs(JUN2000)}}{\text{PAUM(JUN2000)}}$$

In this example, therefore, EAU would be  $3510 \div 0.1009$ , which equals 34787. If Smith were billed for only 27500 kWhs in 2000, then the estimated amount of un-metered electricity for that period, based on an EAU of 34787, would be 7287 kWhs (34787 - 27500).

22. Here, FPL failed to introduce any evidence explaining how the average customer's PAUMs were derived, or by whom. Moreover, there is no evidence shedding light on whether the

average PAUMs were based on usage data collected in a particular county or counties, or throughout the state. Nor does the evidence show whether the usage data from which the average customer's PAUMs were derived reflect the consumption patterns of FPL customers specifically, or some other, broader group of electricity consumers.<sup>3</sup> The undersigned therefore has determined that it would be unreasonable to apply these average PAUMs against Callard to determine EAUs for the years in question, except as a last resort, in the absence of better data.

23. As it happens, there might be better data concerning Callard's usage patterns. Using the kWhs for which Callard was actually billed for each of the months in issue, it is possible to calculate Callard-specific PAUMs.

24. Based on the number of kWhs for which Callard was billed each month from January 1997 through July 2002, Callard's PAUMs were as follows:

	1997	1998	1999	2000	2001	2002
JAN	5.10	5.27	10.16	4.10	18.25	6.88
FEB	5.04	3.21	4.86	4.55	0.06	6.91
MAR	4.23	3.60	4.55	5.16	10.26	6.30
APR	4.14	3.60	6.55	4.75	6.86	9.75
MAY	4.47	4.78	7.96	5.60	6.19	10.68
JUN	11.00	10.09	8.13	7.96	7.33	10.57
JUL	14.40	15.14	9.86	11.93	4.05	8.37
AUG	14.75	14.68	22.54	8.42	11.70	
SEP	15.25	14.73	5.75	23.09	9.67	
OCT	10.24	11.51	5.56	10.16	8.98	
NOV	6.59	8.32	5.51	7.94	8.79	
DEC	4.78	5.07	8.57	6.34	7.87	

25. Once again, the figures show a marked difference between the years 1997 and 1998, on the one hand, and 1999 through July 2002 on the other. The PAUMs for 1997 and 1998 are consistent with one another and indicate practically identical seasonal usage patterns. In contrast, from 1999 forward, the PAUMs are punctuated with several facially anomalous figures, as well as a number of irregular seasonal figures.

26. Beginning with the facial anomalies, note the extremely high PAUMs for August 1999 and September 2000—22.54 percent and 23.09 percent, respectively. These numbers are plainly out of line with the corresponding PAUMs for 1997 and 1998. Further, it seems unlikely that a customer would consume nearly one quarter of her entire annual electricity demand in one month. The same observations can be made about January 2001, whose PAUM, at 18.25 percent, is not only inconsistent with the corresponding PAUMs for 1997 and 1998, but also suggests, implausibly, that Callard used nearly one-fifth of a year's worth of electricity in one month. The PAUM for February 2001 is facially anomalous, too, but for the opposite reason: it is highly unlikely that a customer would use so little electricity (just 1/1667th of a year's supply) in a given month.

27. The seasonal abnormalities are nearly as striking. Take the PAUMs for January 1999; July 1999; September 1999; October 1999; August 2000; March 2001; July 2001; April 2002;

May 2002; and July 2002. None of these is consistent with the putatively normal seasonal use patterns reflected in the PAUMs for 1997 and 1998. Plus, the undersigned considers it highly improbable, for example, that Callard used just 4.04 percent of her annual energy demand in the hot summer month of July 2001 or, conversely, consumed a heavy 10.26 of her annual usage that year in the usually mild month of March. These figures, in short, are not believable.

28. The likeliest explanation for the anomalous PAUMs during the years 1999 through 2002 is that meter tampering skewed the usage percentages. Thus, the undersigned believes that Callard's PAUMs, as calculated based on "as billed" kWhs, buttress his preliminary determination that the tampering began in 1999, raising the inference that Callard's PAUMs for 1997 and 1998, as shown in the table above, likely reflect her actual seasonal usage patterns for those years.

29. To verify the validity of such an inference, the undersigned compared the average of Callard's PAUMs for 1997 and 1998 to the average of the average customer's PAUMs for the same years as reported by FPL. The table below shows the numbers.

	Callard	FPL
JAN	5.19	6.86
FEB	4.13	6.17



MAR	3.92	6.43
APR	3.87	6.60
MAY	4.63	7.54
JUN	10.55	9.66
JUL	14.77	10.64
AUG	14.72	10.65
SEP	14.99	10.54
OCT	10.88	9.75
NOV	7.46	7.95
DEC	4.93	7.26

30. Comparing one column to the other reveals that Callard's seasonal usage patterns mirror those of FPL's average customer; the energy consumption of both rises and falls in tandem throughout the year. Indeed, the PAUMs for January, June, October, and November are quite close (within about one percentage point, on average). To be sure, these figures reveal that Callard used about four percent more electricity than the average customer during the hottest summer months (July, August, September) and approximately two-and-a-half percent less during the milder winter and spring months. But the undersigned considers such disparities to be of far less consequence than the identity of the usage patterns.<sup>4</sup>

31. In sum, the comparison of Callard's average PAUMs for 1997 and 1998 to the average of FPL's average customer's PAUMs for those same years persuades the undersigned that the average PAUMs for Callard reasonably reflect her true usage patterns.

32. Thus, the undersigned finds and determines that, more likely than not, the tampering began in 1999—and that Callard is not liable for un-metered electricity usage during 1997 and 1998.

33. From the foregoing determination it is possible to home-in on a reasonable EAU for Callard. A good starting point is the average of Callard's total kWhs for 1997 and 1998, which is 25691.<sup>5</sup> As an average of true annual usage figures (i.e. numbers untainted by tampering), this number should be a reasonably accurate predictor of Callard's probable annual usages in the years 1999 to 2002. Comparing this average figure to the EAUs that can be derived from meter readings taken in subsequent years at times when tampering is not suspected should either confirm the reliability of 25691 as a valid predictor of subsequent annual usage, or invalidate it.

34. Recall the check readings of 5497 and 6515, respectively, that were taken on July 6, 2001, and July 16, 2001. These readings show that Callard consumed 1018 kWhs in 10 days, or 101.8 kWhs per day during the August 2001 billing cycle. Since that was a 29-day billing period, it is reasonable

to infer that Callard should have been billed for approximately 2952 kWhs in August 2001 ( $29 \times 101.8$ ). Because Callard's average PAUM for August is 14.72 percent, the EAU based on these check readings is 20054 ( $2952 \div 0.1472$ ).

35. Next, there is a reading of 1774 kWhs, which was taken on August 5, 2002, from the replacement meter that had been installed on July 24, 2002. This reading demonstrates that Callard used 1774 kWhs in 12 days, or 147.8 kWhs per day during the August 2002 billing cycle. This was a 31-day cycle, so it is reasonable to infer that Callard should have consumed 4582 kWhs in August 2002.<sup>6</sup> Because Callard's average PAUM for August is 14.72 percent, the EAU based on this initial reading from the replacement meter is 31128 ( $4582 \div 0.1472$ ).

36. The average of the respective EAUs based on the check readings from July 2001 and the reading of the replacement meter on August 5, 2002, is 25591 kWhs<sup>7</sup>—which is remarkably similar to the average of Callard's total kWhs for 1997 and 1998. (The latter figure, again, is 25691.) That these averages are so close not only reconfirms the undersigned's determination that no tampering occurred in 1997 and 1998, but also persuades him that in any month where the number of Callard's "as billed" kWhs produces an EAU within the range of 20054 kWhs to 31128 kWhs, tampering is unlikely to have occurred.

37. Using the "as billed" kWhs for each month from January 1999 to July 2002, and applying the average of Callard's PAUMS for 1997 and 1998 as shown in paragraph 29 above, the undersigned calculated an EAU for every month in which tampering might have occurred. The results are set forth in the table below.

	1999	2000	2001	2002
JAN	26204	11715	49692	18728
FEB	15738	16344	194	23632
MAR	15536	19541	36990	22679
APR	22661	18217	25065	35556
MAY	23002	17948	18098	32570
JUN	10313	11204	9820	14142
JUL	8937	11984	3873	8003
AUG	20489	8485	11230	
SEP	5137	22855	9119	
OCT	6838	13860	11664	
NOV	9879	15804	16662	
DEC	23266	19087	22556	

38. It is easy to spot, in the above figures, the months where tampering likely occurred: they are the months whose "as billed" kWhs number produces an EAU of less than 20054 (usually quite a bit less). Likewise, the months where tampering probably did not occur are readily distinguished: they are the ones where the EAU is greater than 20054. As it happens, there are not many close calls. The figures for most months either reflect obvious tampering or clearly appear to be legitimate.

39. Based on the above data, the undersigned finds and determines that, in all likelihood, tampering did not occur in

the following 14 months: January, April, May, August, and December 1999; September 2000; January, March, April, and December 2001; and February, March, April, and May 2002.<sup>8</sup>

40. The average EAU for these 14 months is 27658. Therefore, the undersigned finds and determines that a reasonable EAU for 1999, 2000, and 2001 is 27658 (a figure, incidentally, that differs little from Callard's actual annual usage in 1998).

41. To determine an EAU for the first seven months of 2002, the undersigned added Callard's average PAUMs for those months and found that Callard used, on average, 47.06 percent of her annual electricity consumption during the months from January to July. Thus, it is found and determined that a reasonable EAU for the first seven months of 2002 is 13016 ( $27658 \times 0.4706$ ).

42. With these numbers in hand, the reasonable amount of un-metered electricity consumption for which Callard is liable can now be ascertained, as shown in the following table:

	EAU	"As Billed" Usage	Difference (Un- Metered Usage)
1999	27658	13383	14275
2000	27658	14840	12818
2001	27658	14134	13524
2002	13016	8385	4621

It is found and determined that from January 1999 to July 2002, Callard consumed a total of 45238 kWhs of electricity for which she was not billed, due to meter tampering.

43. The value of 45238 kWhs of electricity, delivered during the period at issue, is \$3,975.66.<sup>9</sup>

44. It was previously found that FPL's estimate of the amount of Callard's un-metered electricity usage was unreasonable. The undersigned will now summarize the reasoning behind this determination.

45. FPL's first methodological flaw was assuming, without proving, that the meter tampering began in January 1997. In this regard, FPL offered no evidence—at least none that was persuasive—that Callard's meter was tampered with that year, or in 1998 for that matter. In fact, contrary to FPL's assumption, the data in evidence persuasively establish that no meter tampering occurred during 1997 and 1998. Thus, it would be unreasonable to retroactively bill Callard for the months from January 1997 through December 1998, as FPL proposes to do.

46. FPL's second methodological flaw was assuming, without proving, that the average customer's PAUMs (which figures were not really properly proved, either) could reasonably be applied to Callard. The unreasonableness of this particular assumption is magnified by the fact that there exists reliable data (from 1997 and 1998, when no tampering occurred) about Callard's

actual PAUMs, making resort to the average customer's PAUMs unnecessary.

47. These two flaws led FPL to derive an EAU for Callard for the years in question (including, erroneously, 1997 and 1998) that significantly and unreasonably overstated her probable usage. To calculate an EAU, FPL first assumed that tampering had not occurred in July 1998, September 1998, November 1998, or during the initial 12 days' service of the replacement meter, from July 24, 2002 to August 5, 2002. (FPL did not persuasively explain its selection of the particular months of 1998, but for reasons already detailed, the undersigned agrees and has found that no tampering occurred then—or at any other time in 1998.)

48. Next, FPL calculated an EAU for each of the foregoing periods, using the "as billed" kWhs for the chosen months of 1998 and a projected monthly total for August 2002, to each of which was applied the average customer's PAUM for the respective period. The following table shows the numbers.

Month/Year	KWhs	Avg. FPL Customer's PAUM	EAU
July 1998	4160	10.93	38060
September 1998	4048	10.82	37412
November 1998	2286	8.08	28292
August 2002	4440 <sup>10</sup>	10.20	43529

49. Taking the average of the foregoing EAUs, FPL concluded that Callard's true annual usage from January 1997 to July 2002 averaged 36824 kWhs. (This figure is substantially greater than the amount the undersigned ultimately has determined reflects Callard's average annual usage—27658.)

50. As an aside, the undersigned observes that if accurate PAUMs are applied to reliable figures for monthly kWhs consumption, then the resulting EAUs, as calculated from the periodic readings, should be fairly close to one another. With this in mind, notice what happens when Callard's average PAUMs (based on 1997 and 1998 usages) are substituted for the average customer's PAUMs in FPL's equations:

Month/Year	KWhs	Callard's Avg. PAUM	EAU
July 1998	4160	14.77	28165
September 1998	4048	14.99	27005
November 1998	2286	7.46	30643
August 2002	4440	14.72	30163

51. Using Callard's average PAUMs for the periods in question produces EAUs that are, more so than FPL's numbers, fairly close to one another, which outcome persuasively reestablishes that Callard's average PAUMs are true numbers, and hence more reasonably applied in this case than the average FPL customer's PAUMs.<sup>11</sup>



52. Indeed, a comparison of the two preceding tables underscores the unreasonableness of FPL's methodology. Notice that FPL happened to pick the three peak summer months (July, August, and September), when Callard's usage exceeds the average customer's by 4.2 percent on average. FPL's approach has a built-in bias against Callard and is guaranteed to produce inflated EAUs.

53. At any rate, once FPL had concluded that Callard's average annual usage should be 36824 kWhs, it multiplied that figure times the average customer's PAUM for each of the 67 months from January 1997 to July 2002, producing monthly "re-bill" amounts of kWhs. For example, the average customer's PAUM for December 2001 is 7.5 percent. Thus, FPL contends that Callard should have been billed for 2762 kWhs that month ( $36824 \times .075$ ); it refers to this figure (2762) as the "re-bill" amount for December 2001. FPL then added together all the "re-bill" figures, subtracted therefrom the aggregate of the "as billed" numbers, and came up with a difference of 101623 kWhs, for which FPL contends Callard is liable.

54. This amount, however, exceeds a reasonable estimate of the un-metered energy consumed, by 56385 kWhs. The undersigned therefore rejects FPL's calculation.

55. As a final point, FPL claims that it is entitled to recover from Callard \$348.21 as reimbursement for investigative

costs. FPL failed to offer any proof, however, concerning the goods and/or services upon which it spent this sum.

Consequently, while the amount requested is neither shocking nor unreasonable on its face, there is no evidential basis on which the undersigned can make a finding that the sum of \$348.21 is reasonable in this case.

CONCLUSIONS OF LAW

56. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569, and 120.57(1), Florida Statutes.

57. Florida Administrative Code Rule 25-6.104 provides as follows:

In the event of unauthorized or fraudulent use, or meter tampering, the utility may bill the customer on a reasonable estimate of the energy used.

58. The burden of proving meter tampering and a reasonable estimate of the un-metered energy used was on FPL. See Rodriguez v. Florida Power and Light Co., et al., DOAH Case No. 96-4935, 1997 WL 1052759, \*3 (Fla.Div.Admin.Hrgs. May 21, 1007).

59. Rule 25-6.104, under which FPL is traveling, plainly does not authorize the utility to recover investigative costs, as FPL has sought to do here. In support of this particular claim, FPL relies on In Re: Complaint of Mrs. Blanca Rodriguez against Florida Power & Light Company regarding alleged current

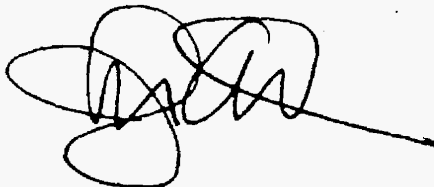
diversion/meter tampering rebilling for estimated usage of electricity, Docket No. 960903-EI, Order No. PSC-96-1216-FOF-EI (PSC Sept. 24, 1996), where the PSC proposed that FPL recover a sum for investigative charges. In Rodriguez, however, the PSC did not cite any law supporting its award.

60. Based on the unambiguous language of Rule 25-6.104, the undersigned concludes that no legal basis exists for awarding investigative costs to FPL in this matter.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Commission enter a final order authorizing FPL to retroactively bill Callard \$3,975.66 for the un-metered energy she used from January 1999 through July 2002.

DONE AND ENTERED this 13th day of May, 2005, in Tallahassee, Leon County, Florida.



---

JOHN G. VAN LANINGHAM  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
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www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 13th day of May, 2005.

ENDNOTES

<sup>1/</sup> The evidence shows that FPL generally took its regular reading of Callard's meter during the first week of each month, typically on or before the fifth day. For convenience, the undersigned henceforth will refer to the billing cycle that ended on January 2, 1997 (or February 4, 1998, etc., as the case may be), simply as the "January 1997 bill" (or "February 1998 bill," etc.), or words to that effect, even though, in reality, the time period covered by the January 1997 bill was mostly December 1996. Similarly, references herein to electricity used in a particular month, say January 1997, are intended to mean electricity used during the billing cycle that ended that month, even though, given the usual meter-read date, most of that electricity likely would have been consumed in the immediately preceding month.

<sup>2/</sup> The assumption here is that tampering has not occurred between the check readings, on the theory that the customer, who would not be expecting the unscheduled meter-reads, would fail to roll back the meter dials ahead of the check readings.

<sup>3/</sup> Detailed information about the usage data underlying the average PAUMs, which is not available in the instant record, might have provided a basis for determining whether the average customer's PAUMs could fairly be applied in calculating Callard's un-metered energy consumption. This is because the more the average customer resembles Callard, the likelier the average customer's PAUMs will match Callard's. But the converse is true as well. It is commonly known in this state, for example, that the climate of North Florida differs from that of South Florida. One would expect, therefore, that the seasonal usage patterns of a Jacksonville resident would differ from those of a Miami resident, reflecting the climatic differences between the two regions. Thus, if the average customer's PAUMs were based on data collected statewide, then the average customer probably lives in a somewhat less tropical environment than Callard, and accordingly probably has somewhat different seasonal usage patterns.

<sup>4/</sup> As mentioned previously, FPL offered no evidence in support of its average PAUMs, and consequently the undersigned does not

know what the profile of the average customer is. As a result, there is no reason for the undersigned not to assume that the average customer enjoys somewhat milder summers (which would tend to reduce energy consumption) and faces somewhat colder winters (which would tend to increase energy consumption) than Callard typically experiences in Miami, Florida. Consequently, the undersigned does not view Callard's deviations from the average percentages as evidence of meter tampering.

<sup>5/</sup> This figure was obtained by adding 23899 and 27483 and dividing the resulting sum by two.

<sup>6/</sup> Basing the EAUs on, say, a 30-day billing cycle, instead of, as above, 29 and 31 days, respectively, would obviously produce different numbers from the ones shown—but not materially different numbers. Because the outcome is not affected one way or the other, the undersigned has opted simply to use the actual number of days in the relevant cycle for his calculations.

<sup>7/</sup> This figure was obtained by adding 20054 and 31128 and dividing the resulting sum by two.

<sup>8/</sup> It is noted that the EAUs for January 2001, March 2001, April 2002, and May 2002 are greater than 31128 and hence out of the range established by the July 2001 check readings and the initial reading of the replacement meter in August 2002. The undersigned considers it possible that Callard tampered with the meter during these months and (whether by accident or design) overstated her true usage. Because there is no evidence suggesting that such occurred, however, the undersigned has decided that treating the "as billed" kWhs for these months as true and correct figures is more reasonable than any alternative.

<sup>9/</sup> This dollar amount was arrived at by multiplying the known cost of one kilowatt-hour, which is approximately 8.8 cents ( $\$8,930.97 \div 101623$ ) times the amount of un-metered usage (45238 kWhs).

<sup>10/</sup> The figure of 4440 kWhs was based on the assumption that Callard had used 148 kWhs per day throughout the August 2002 billing cycle. See paragraph 35 in the text, supra. FPL multiplied 148 kWhs/day times 30 days to arrive at an estimate of 4440 kWhs for the month of August 2002.

040208

ORIGINAL

ELECTRICITY CENTER

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23-May-05

DOAH  
John G. Van Laningham  
1230 Apalachee Parkway  
The Desoto Bldg.  
Tallahassee, Fl. 32399-3060

Case# 04-2758

Leticia Callard -Petitioner vs.  
Florida Power & Light Co-Respondent

We are in receipt of the recommended order by your honor in reference to the above case. We continue to disagree with the findings for we feel that FPL failed to provide any evidence of tampering or failed to show any evidence of any back reading of the meter.  
( refer to p.26 paragraph #8 " No evidence suggesting that such occurred")

Facts-

1. Mr. Vessel testified that the meter's seal was on the back in which any one could not visibly see any seal broken. The meter was not removed by the meter reader.
2. The smudges on the meter were so called noticed when FPL removed a glass cover upon their investigation in which was handled by various personnell and later displayed to us open and unsealed.
3. The bill for June 5, and July 5 was never presented to us as evidence. Fpl Co. showed no such records.
4. FPL failed to show the average PAUMS for the household.
5. The following corrections were done to the home to conserve elcticity:
  - a. The electric stove was replaced by gas
  - b. The water heater is gas
  - c. Fpl energy saver program
  - d. Door Guards- drafts
  - e. Seals on all outlets
  - f. New insulation installed
  - g. energy saving bulbs
  - h. Tinted windows throughout yhe home
  - i. High efficiency air conditioner
  - j. Air conditioning duct system installed

JMP \_\_\_\_\_

COM \_\_\_\_\_

CTR \_\_\_\_\_

ECR \_\_\_\_\_

GCL \_\_\_\_\_

OPC \_\_\_\_\_

MMS \_\_\_\_\_

RCA \_\_\_\_\_

SCR \_\_\_\_\_

SEC   1  

OTH \_\_\_\_\_

6. FPL cannot calculate what my usage should be based on they do not know what my lifestyle is.

7. We have limited air conditioning use-( sporadically depending on one or 2 days if at all during the month.

8. FPL presented inflated EAUS as to over charge.

9. FPL failed to show any tampering took place. (Refer to #38)

10. The meter# 5C46714- 24146714 was place at our home for 1 month and this meter was programed to ~~run~~ at a very high speed as to inflate our usage to the point that the monthly bill was over \$ 400.00 in which we filed our complaint with the PSC office. ~~...~~ FPL removed this meter not allowing us to present it as evidence that they had programed it in there favor.

12. Please refer to Ppage 26 paragraph #8 Which clearly states " There is no evidence suggesting that such tampering took place.

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FPSC-COMMISSION CL

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ATTACHMENT B

Date: July 7, 2005

Page: 39



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Date: July 7, 2005

Page: 40

ATTACHMENT C

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\*\*\*Matilda Sanders\*\*\*

ORIGINAL

Matilda Sanders

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 Sent: Tuesday, May 31, 2005 2:26 PM  
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 Subject: Electronic Filing for Docket No. 040208-EI / FPL's Exceptions to the May 13, 2005 Recommended Order Issued by Administrative Law Judge John G. Van Laningham

Attachments: FPL's Exceptions to May 13, 2005 Recommended Order Issued by Judge Van Laningham.doc



FPL's  
Exceptions to May 13  
Electronic Filing

a. Person responsible for this electronic filing:

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b. Docket No. 040208-EI

In re: Complaint of Mrs. Leticia Callard against Florida Power & Light Company regarding backbilling.

c. Documents being filed on behalf of Florida Power & Light Company.

d. There are a total of 10 pages in the attached document.

e. The document attached for electronic filing is Florida Power & Light Company's Exceptions to the May 13, 2005 Recommended Order Issued by Administrative Law Judge John G. Van Laningham.

(See attached file: FPL's Exceptions to May 13, 2005 Recommended Order Issued by Judge Van Laningham.doc)

Thank you for your attention and cooperation to this request.

Sincerely,

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ATTACHMENT C

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Mrs. Leticia Callard )  
against Florida Power & Light Company ) Docket No. 040208-EI  
regarding backbilling. )  
\_\_\_\_\_ ) Filed May 31, 2005

FLORIDA POWER & LIGHT COMPANY'S EXCEPTIONS TO THE  
MAY 13, 2005, RECOMMENDED ORDER ISSUED BY  
ADMINISTRATIVE LAW JUDGE JOHN G. VAN LANINGHAM

Florida Power & Light Company ("FPL") submits the following Exceptions to the  
May 13, 2005, Recommended Order Issued by Administrative Law Judge John G. Van  
Laningham.

I. Exceptions.

1. Investigative Costs

Administrative Law Judge John G. Van Laningham departed from the law when  
he ruled that FPL had no legal basis for recovering investigative costs in this case. *See*  
Recommended Order Paragraphs 59 and 60 (hereinafter cited to as R.O.). As FPL  
pointed out to Judge Van Laningham, the Florida Public Service Commission (hereinafter  
"PSC) has previously ruled that FPL is entitled to recover investigative charges for meter  
tampering cases. *See In re: Complaint of Mrs. Blanca Rodriguez against Florida Power  
& Light Company regarding alleged current diversion/meter tampering rebilling for  
estimated usage of electricity*, Docket No. 960903-EI, Order No. PSC-96-1216-FOF-EI  
(PSC September 24, 1996). Without valid reason, the PSC should not change its decision  
that a utility is entitled to recover investigative charges for meter tampering cases. *See*  
*Cleveland Clinic v. Agency for Hlth. Care*, 679 So. 2d 1237, 1241-42 (Fla. 1st DCA  
1996) (reversing AHCA decision simply changing its mind, with no good reason,

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STATE OF FLORIDA PUBLIC SERVICE COMMISSION

regarding established policy, practice and procedure); Peoples Gas System, Inc. v. Mason, 187 So. 2d 335, 339-40 (Fla. 1966) (reversing a Commission order that modified an earlier final order because there was not a finding based on adequate proof that modification was necessary in the public interest because of changed conditions or other circumstances that were not present in the earlier proceedings); Order No. PSC-95-1319-FOF-WS, Docket No. 921237-WS (issued Oct. 30, 1995) (while "[a] change in circumstances or great public interest may lead an agency to revisit an order" ... "there must be a terminal point where parties and the public may rely on an order as being final and dispositive.") There is nothing in the record demonstrating a valid reason for departing from the established ruling of the PSC that FPL is entitled to recover investigative costs for meter tampering cases. Therefore, the PSC should adhere to its prior ruling, that a utility is entitled to recover investigative charges for meter tampering.

In addition, pursuant to the tariff filed by FPL with the PSC, FPL is entitled to recover extra expenses incurred as a result of the customer's meter tampering. As the PSC is aware, FPL is a public utility as defined by Florida Statute §366.02(1) and is regulated by and under the jurisdiction of the PSC. Pursuant to Florida Statute §366.05(1), the PSC is empowered to "prescribe...service rules and regulations to be observed by each public utility; ...and to prescribe all rules and regulations reasonably necessary...for the administration and enforcement of this chapter." The rules and regulations prescribed by the PSC are contained in the Florida Administrative Code, Chapter 25-6.

Florida Administrative Code, Chapter 25-6.33, mandates that utilities file tariffs containing "rules with which prospective customers must comply as a condition to

receive service and the terms of the contract required." Pursuant to this mandate by the PSC, FPL promulgated its tariff which, in pertinent parts, provides as follows:

1.7 Reimbursement for Extra Expenses: The Customer may be required to reimburse the Company for **all extra expenses incurred by the Company on account of violations by the Customer of agreements with the Company or the Rules and Regulations of the Company.** (emphasis added).

5.2 Damage to Company's Property: In the event of any loss or damage to property of the Company caused by or arising out of carelessness, neglect or misuse by the Customer, the cost of making good such loss or repairing such damage shall be paid by the Customer.

Under these Tariff provisions, FPL is not required to demonstrate the reasonableness of the incurred expenses. Rather, the Customer must pay FPL for all expenses incurred as a result of the violation of the Tariff and/or Rules and Regulations promulgated by the PSC. Clearly, metertampering/current diversion is a violation of Florida Administrative Code provisions allowing the utility to disconnect service to a customer. See F.A.C. Rule 25-6.105(5)(i). It is only fair and equitable that a Customer tampering with their meter, or benefiting from it, be required to reimburse FPL for the costs of investigating this deceptive behavior. The alternative would be to require the rate payers as a whole to bear the costs of the transgressions of individual rate payers.

It is well established that the provisions of a Tariff are binding on a Customer, regardless of his/her knowledge or assent thereto. Landrum v. FPL, 505 So.2d 552 (Fla. 3rd DCA 1987); Western Union Tel. Co. v. Esteve Bros. and Co., 256 U.S. 566, 41 S. Ct. 584, 65 L.Ed. 1094 (1921); Florida Power Corp. v. Continental Laboratories, Inc., 243 So.2d 195 (Fla. 4th DCA 1971).

Tariffs are even recognized as having the force and effect of law. Landrum, supra; Carter v. American Tel. and Tel. Co., 365 F.2d 486 (5th Cir. 1966); cert. denied, 385 U.S. 1008, 87 S.Ct. 714, 17 L.Ed.2d 547 (1967). A justification for an electric company filing a tariff with the PSC is to regulate the rate practices for the services furnished. Florida Power & Light Company v. State ex rel Malcolm, 107 Fla. 317, 144 So. 657 (1932); Landrum, supra. "Therefore, a tariff validly approved by the Public Service Commission, including a limitation of liability for ordinary negligence,...is valid." Landrum, supra; (citations omitted).

Bert Cunill testified that FPL incurred \$348.21 of investigative costs as a result of the meter tampering that occurred at Leticia Callard's residence. (Record of Court Reporter Diana Kelly dated November 29, 2004, page 87, line 25 – page 88, line 6). He testified that total included the "field investigation activity, the meterman's activity, the actual cost of the meter test, [and his] time." (Record of Court Reporter Diana Kelly dated November 29, 2004, page 88, lines 3-6) As Judge Van Laningham stated, the amount of FPL's costs were not unreasonable on their face. (R.O. paragraph 55). As 1.7 of FPL's Tariff states, FPL can recover "all extra expenses incurred by the Company on account of violations by the Customer of agreements with the Company or the Rules and Regulations of the Company." Based upon the foregoing, FPL is legally entitled to recover the \$348.21 in investigative charges from the Petitioner, Leticia Callard. Therefore, Judge Van Laningham departed from the law when he ruled that FPL was not legally entitled to recover the costs of investigating the meter tampering from the Petitioner, and the PSC should decline to follow the Recommended Order of Judge Van Laningham in that regard.

2. Reasonableness of FPL's method of calculating Backbill

Administrative Law Judge John G. Van Laningham departed from the law when he ruled that FPL's method of calculating the backbill for Petitioner's meter tampering was unreasonable. Rule 25-6.104, F.A.C., provides that when there has been meter tampering, "the utility may bill the customer on a reasonable estimate of the energy used." The Commission has repeatedly approved the Average Percentage Use method for calculating a reasonable estimate of energy used. See In re: Complaint of Mrs. Blanca Rodriguez against Florida Power & Light Company regarding alleged current diversion/meter tampering rebilling for estimated usage of electricity, Docket No. 960903-EI, Order No. PSC-96-1216-FOF-EI (PSC September 24, 1996); In re: Complaint of Mr. Mario Martinez against Florida Power & Light Company regarding alleged current diversion/meter tampering rebilling for estimated usage of electricity, Docket No. 980332-EI, Order No. PSC-98-1078-FOF-EI (PSC August 10, 1998); In re: Complaint of Thomas W. Hart against Florida Power & Light Company regarding backbilling, Docket No. 970047-EI, Order No. PSC-97-0215-FOF-EI (PSC February 24, 1997); In re: Complaint of Jorge Morales against Florida Power & Light Company regarding alleged current diversion/meter tampering rebilling for estimated usage of electricity, Docket No. 961381-EI, Order No. PSC-97-0010-FOF-EI (PSC January 2, 1997); In re: Complaint of Francisco Mesa against Florida Power & Light Company regarding alleged unjustified charges for current diversion, Docket No. 961179-EI, Order No. PSC-96-1333-FOF-EI (PSC November 5, 1996); In re: Complaint of Mr. Michael Gizewski against Florida Power & Light Company regarding alleged current diversion/meter tampering rebilling for estimated usage of electricity, Docket No.

950673-EI, Order No. PSC-95-1309-FOF-EI (PSC October 25, 1995); In re: Complaint of Mark Shoff against Florida Power & Light Company regarding current diversion backbilling, Docket No. 911040-EI, Order No. PSC-92-0795-FOF-EI (PSC August 11, 1992); In re: Complaint of Janet Knauss against Florida Power & Light Company regarding Rebilling for Estimated usage of Electricity, Docket No. 910583-EI, Order No. PSC-92-0681-FOF-EI (PSC July 21, 1992); In re: Complaint of Jesus Fernandez against Florida Power & Light Company regarding current diversion/meter tampering rebilling for estimated usage of electricity, Docket No. 910670-EI, Order No. PSC-24767 (PSC July 8, 1991); In re: Complaint of Ms. Gloria Blair Against Florida Power & Light Company Regarding Backbilling, Docket No. 900689-EI, Order No. PSC-23669 (PSC October 25, 1990); and In re: Complaint of Herbert Wilson Against Florida Power & Light Company Regarding Backbilling Charges, Docket No. 870991-EI, Order No. PSC-19380 (PSC May 26, 1988). The PSC's is granted great deference in interpreting the laws and rules over which it governs. Pan Am World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983).

Without valid reason, the PSC should not change its decision that a utility is entitled to recover investigative charges for meter tampering cases. See Cleveland Clinic v. Agency for Hlth. Care, 679 So. 2d 1237, 1241-42 (Fla. 1st DCA 1996) (reversing AHCA decision simply changing its mind, with no good reason, regarding established policy, practice and procedure); Peoples Gas System, Inc. v. Mason, 187 So. 2d 335, 339-40 (Fla. 1966) (reversing a Commission order that modified an earlier final order because there was not a finding based on adequate proof that modification was necessary in the public interest because of changed conditions or other circumstances that were not

present in the earlier proceedings); Order No. PSC-95-1319-FOF-WS, Docket No. 921237-WS (issued Oct. 30, 1995) (while “[a] change in circumstances or great public interest may lead an agency to revisit an order” ... “there must be a terminal point where parties and the public may rely on an order as being final and dispositive.”) There is nothing in the record demonstrating a valid reason for departing from the established rulings and policy of the PSC that FPL is entitled to calculate unmetered usage utilizing the Seasonal Average Percentage Use Method. The PSC should adhere to its prior rulings and established policy, that a utility’s use of the Seasonal Average Percentage Use Method is a reasonable method of calculating the backbill for unmetered usage in a tampering case. As stated in Florida Administrative Code, Rule 25-6.104, F.A.C., FPL is entitled to recover a reasonable estimate of the energy used from the Petitioner. Since the PSC has repeatedly approved FPL’s utilization of the Seasonal Average Percentage Use Method, the Commission should reject the decision by Judge Van Laningham to disregard this methodology.

3. **Time Period Meter Tampering Occurred**

FPL does not agree with Judge Van Laningham’s decision that meter tampering probably began in 1999. However, for the purposes of this case, FPL will not challenge this finding before the PSC. Therefore, FPL only seeks to recover the backbilled amount as calculated by FPL using the Seasonal Average Percentage Use Method, for the time period beginning January 1999, through August 5, 2002. For the reasons stated above, FPL believes this method of calculation was both reasonable and justified. Calculation of the backbill from January 1999 through August 5, 2002 is easily obtained by reviewing FPL’s Exhibit 1 introduced in evidence (without objection from the Petitioner) before

Judge Van Laningham. FPL's Exhibit 1, shows that, using the Seasonal Average Percentage Use Method, FPL should be entitled to rebill 134,906 kwh.<sup>1</sup> Subtract from the rebilled kwh, the kwh actually billed during that time span, 55,156 kwh<sup>2</sup>, and you reach the total amount of 79,750 kwh, which represents the reasonable estimate of unmetered electricity usage. When multiplying 79,750 kwh by .08476 per kwh<sup>3</sup>, the total of \$6,759.61 is reached. This represents the reasonable backbill for unmetered usage by the Petitioner from January 1999 through August 5, 2002. As previously discussed, this is a reasonable estimate of the unmetered usage by the Petitioner, and the failure of Judge Van Laningham to award this amount was a departure from the law. Therefore, the PSC should order the Petitioner to pay FPL \$6,759.61 for the unmetered usage from January 1999 through August 5, 2002.

WHEREFORE Florida Power & Light Company respectfully requests that the Florida Public Service Commission find that Administrative Law Judge John G. Van Laningham's Recommended Order departed from the law in failing to award FPL investigative costs and finding the Seasonal Average Percentage Use Method was not reasonable, and the Public Service Commission should enter an Order awarding FPL \$348.21 in investigative costs and \$6,759.61 in unmetered usage for a total backbill of \$7,107.82, and all other relief deemed just and proper.

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<sup>1</sup> Figure obtained by adding the Kwh Rebill column from January 1999 through August 5, 2002, from FPL's Exhibit 1 in evidence before Judge Van Laningham.

<sup>2</sup> Figure obtained by adding the Kwh Asbill column from January 1999 through August 5, 2002, from FPL's Exhibit 1 in evidence before Judge Van Laningham.

<sup>3</sup> Figure represents an average of the kwh rate during the applicable time period. This figure is less than the 8.8 cents per kwh used by Judge Van Laningham.



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ATTACHMENT C

Respectfully submitted,

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Date: July 7, 2005

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ATTACHMENT C

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Exceptions to the May 13, 2005, Recommended Order Issued by Administrative Law Judge John G. Van Laningham has been furnished by United States Mail this 31st day of May, 2005, to the following:

Leticia Callard  
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