

PETITION FOR DECLARATORY STATEMENT  
BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

In re: Petition for Declaratory Statement  
Regarding Applicability of Individual Meter Rule  
Exemption in Rule 25-6.049(5)(a)3.,  
Florida Administrative Code, to  
Valencia Area Condominium Association, Inc.

Docket No. 000643-EU  
Filed July 5, 2000

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**VALENCIA AREA CONDOMINIUM ASSOCIATION'S  
RESPONSE IN OPPOSITION TO  
FLORIDA POWER & LIGHT COMPANY'S  
PETITION TO INTERVENE AND REQUEST FOR HEARING**

Petitioner, Valencia Area Condominium Association, Inc. ("Valencia"), pursuant to Rule 28-106.204, F.A.C., hereby files this Response in Opposition to Florida Power & Light Company's Petition to Intervene and Request for Hearing, and in support thereof, states the following:

**Valencia is Entitled to a Declaratory Statement in this Proceeding**

1. Florida Power & Light Company challenges the propriety of Valencia seeking a declaratory statement under Section 120.565, F.S., in this proceeding, yet cites cases in its Petition that are replete with language providing that declaratory statements are a remedy that

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agencies are to grant when a petitioner seeks to have the agency issue an opinion as to the applicability of a statute or agency rule or order as it applies to the petitioner in his particular set of circumstances. The Florida Supreme Court in Florida Department of Business and Professional Regulation v. Investment Corp. of Palm Beach, 24 Fla. L. Weekly S521, 1999 WL 1018661 (Fla.

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Nov. 4, 1999), with approval Judge Cope's clear exposition from his dissent in *Investment Corp. of Palm Beach v. Division of Pari-Mutuel Wagering*, 714 So. 2d 589 (Fla. 3d DCA 1998) regarding when declaratory statements are appropriately issued and an agency's duty to issue declaratory statements when the petitioner meets the minimum requirements for obtaining one:

The point is, in enacting section 120. 565, the Legislature created an important tool to vindicate the rights of individual citizens. The citizen has a right under the statute to get a clear, binding answer from the agency on how the agency's statute and rules apply to that individual citizen. The citizen not only has a right to an answer, but also a right to an answer within a time certain: ninety days.... Agencies are required to give declaratory statements to persons who meet the minimum access standard.... It renders the statute nearly useless to say, as the majority does, that the agency cannot issue a declaratory statement if it will impact on anyone other than the petitioner.

*Id.* at 1018661, p. 3 (citations omitted).

2. Moreover, in *Chiles v. Department of State*, 711 So. 2d 151 (Fla. 1<sup>st</sup> DCA 1998), the court noted the notice provision in Section 120.656(2), F.S., which requires the agency to give notice of the filing of each petition for declaratory statement in the Florida Administrative Weekly. The court stated: "This provision accounts for the possibility that a declaratory statement may, in a practical sense, affect the rights of other parties.... Any substantially affected party can intervene in a declaratory statement proceeding before the agency...." *Id.* at 154.

3. Per this authority, Valencia is legally entitled under Section 120.565 F.S. to this Commission's interpretation and opinion as to how Rule 25-6.049(5)(a)3., F.A.C. affects its eligibility for a master meter under Rule 25-6.049, F.A.C. As the Supreme Court and First District Court of Appeal recently have expressly recognized, the mere fact that persons other than only Valencia may be affected by a declaratory statement issued by this Commission on the question does not militate or authorize dismissal of Valencia's request for a declaratory statement.

Only when a request for a declaratory statement would necessarily required the Commission to render a statement so broad and unconfined to specific facts that such statement would be tantamount to a rule would dismissal be appropriate. Clearly, in this case, Valencia's request is narrowly tailored to its particular set of circumstances, and therefore does not require a broad statement of general applicability in response. Again, the fact that, as a practical matter, others may be affected by the Commission's determination of the applicability of it rules to Valencia does not warrant the Commission's refusal to issue the requested declaratory statement. Persons whose substantial interests are affected in this case have a remedy: they may intervene in this proceeding, as FPL itself seeks to do.

4. FPL appears to argue that the declaratory statement Valencia seeks will violate Rule 28-105.001 because it will "determine the conduct of another person" — in this case, FPL. That is simply not the case. Valencia seeks in its declaratory statement to obtain the Commission's interpretation of Rule 25-6.049(5)(a)3., F.A.C., to it only, and does not ask the Commission to order FPL or any other utility, based on its declaratory statement, to install a master meter for Valencia, or to anyway "determine" FPL's conduct. Again, to the extent FPL or other persons believe they may be affected by Valencia's request for a declaratory statement, their remedy is to attempt to intervene -- not to seek Commission refusal of a request for declaratory statement to which Valencia is legally entitled under Section 120.565, F.S. See 1000 Friends of Florida v. Department of Community Affairs, 25 Fla. L. Weekly D283a (Fla. 1<sup>st</sup> DCA January 25, 2000), clarified sub. nom. 25 Fla. L. Weekly D991 (Fla. 1<sup>st</sup> DCA April 20, 2000) (1000 Friends of Florida was permitted to seek a declaratory statement determining whether under a local comprehensive plan, improvements to be made by the Florida Department of Transportation must

be included in the local government's comprehensive plan).

5. FPL also argues that a declaratory statement is not appropriate in this case because Valencia allegedly has circumvented some "standard practice" -- without citation to any statute, rule or case law identifying or requiring said "standard practice" -- by seeking a declaratory statement from this Commission instead of first applying for a master meter with FPL, getting turned down for said master meter, and then filing a Complaint with this Commission. This ignores that one of the key reasons for obtaining declaratory statements is to help avoid costly litigation. Chiles, 711 So. 2d at 154. In fact, FPL appears to advocate just such litigation when it argues that Valencia's query would be better resolved in a formal administrative hearing, ostensibly because there are numerous disputed issues of fact. But this position ignores that Rule 28-105.003, F.A.C., expressly states that "the agency may rely on the statements of fact set out in the petition without taking any position on the validity of the facts." Per this provision, the agency is to take the facts alleged in the Petition as true -- which is the reason why when hearings are conducted at all in declaratory statement proceedings, they are conducted under Section 120.57(2), F.S. Clearly, a declaratory statement is valid and applicable only to the particular facts and circumstances on which it is based. Accordingly, if a petitioner were to misrepresent its particular set of facts and circumstances, the petitioner clearly would not be able to rely on a declaratory statement predicated on the facts and circumstances set forth in the petition, to the extent they differed with those actually existing with respect to the petitioner, and Valencia is well aware of that. Again, in this case Valencia seeks the Commission's interpretation of provisions of its master meter rule to Valencia in its particular set of facts and circumstances, and under Section 120.565, F.S., Valencia is entitled to a declaratory statement, regardless of any other

unidentified "standard practice" that may exist with respect to applying to utilities for master meters. There is absolutely no "exhaustion" requirement under Section 120.565, F.S., that would require a substantially affected person to first seek a master meter from a utility and be turned down and go to formal administrative hearing. For FPL to suggest otherwise ignores that the Florida Supreme Court and other courts clearly have pronounced that declaratory statements are a favored remedy that are to be rendered when a requesting party meets the minimum standards for such a request, as Valencia has done in this case.

6. Finally, FPL alleges that Valencia has predicated its standing in its challenge to the proposed amendments to Rule 25-6.049(5)(a), F.A.C., on a claim that it is entitled to a master meter under Rule 25.-60.49(5)(a)3., F.A.C. As Valencia has informed FPL and the Commission, both in its Response in Opposition to FPL's Petition to Intervene filed in that proceeding, and in Valencia's Amended Petition for Administrative Determination of Invalidity of Proposed Rule, attached as Exhibit A, that citation to paragraph 3 of Rule 25-6.049(5)(a) was an inadvertent typographical error of which the Administrative Law Judge and FPL previously have been made fully aware, and which will be corrected if the Administrative Law Judge grants Valencia leave to file its Amended Petition correcting the error.

7. Valencia brings to the Commission's attention its prior Order on Declaratory Statement issued in Docket No. 971542-EI, attached as Exhibit B, in which the Commission declined to issue a broad declaratory statement with respect to conversion of all pre-1981 buildings to master meters, but instead issued a declaratory statement directed specifically to two buildings. Valencia's request for declaratory statement is tailored narrowly to obtain precisely the same type of narrow response as this Commission previously has rendered with respect to the master meter

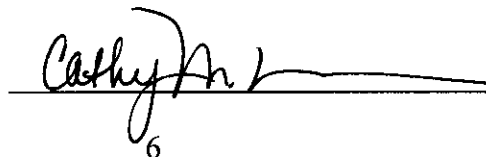
issue.

**FPL Lacks Standing to Intervene in this Proceeding**

8. FPL lacks standing to intervene in this proceeding because it is not a substantially affected person. In order to be substantially affected for purposes of being entitled to intervene and participate, it must demonstrate that issuance of the declaratory statement would (1) cause it to suffer in fact of sufficient immediacy to entitle it to participate; and (2) that its injury would fall within the zone of interest this proceeding is designed to protect. Village Park Mobile Home Owners Ass'n. v. Department of Business Regulation, 506 So. 2d 426 (Fla. 1<sup>st</sup> DCA 1987). In this case, FPL does not satisfy the injury-in-fact requirement to have standing. By its own admission, FPL acknowledges that Valencia has not applied for a master meter. Even if the Commission were to determine that Valencia is eligible for a master meter under Rule 25-6.049(5)(a)3., F.A.C., that determination would not require FPL to install a master meter in Valencia's condominium units. Indeed, Valencia would have to apply for the meter — which to date Valencia has not done, and may never do. Accordingly, FPL's alleged injury in this case is speculative, and FPL lacks standing.

WHEREFORE, Petitioner Valencia Area Condominium Association, Inc., respectfully requests the Commission to deny Florida Power & Light Company's Petition to Intervene and Request for Informal Hearing, and to issue the requested declaratory statement in this proceeding.

Respectfully submitted this 5<sup>th</sup> day of July, 2000.

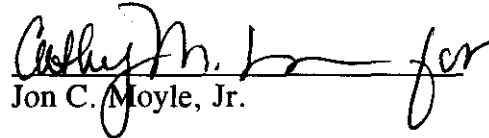
  
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Attorneys for Petitioner,  
Valencia Area Condominium Association Inc.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the foregoing was served by U.S. Mail to Kenneth A. Hoffman and J. Stephen Menton, Rutledge, Ecenia, Purnell & Hoffman, P.A., P.O. Box 551, Tallahassee, FL 32302, and to Richard Bellak, Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0862, this 5<sup>th</sup> day of July, 2000.

Respectfully submitted,

  
Jon C. Moyle, Jr.



STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

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DIVISION OF  
ADMINISTRATIVE  
HEARINGS

VALENCIA AREA CONDOMINIUM  
ASSOCIATION INC.,

Petitioner,

vs.

DOAH Case No. 00-1752-RP

FLORIDA PUBLIC SERVICE COMMISSION,

Respondent.

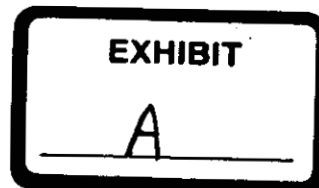
AMENDED PETITION FOR ADMINISTRATIVE DETERMINATION  
OF INVALIDITY OF PROPOSED RULE

Petitioner, Valencia Area Condominium Association, Inc. (hereafter "Valencia"), pursuant to Sections 120.56(1) and (2), Florida Statutes (1999), hereby requests an administrative determination of the invalidity of a rule proposed by the Florida Public Service Commission to amend Rule 25-6.049(5)(a), Florida Administrative Code. In support of this Petition, Valencia states the following:

Identification of the Parties

1. The name and address of the affected agency is the Florida Public Service Commission (hereafter "Commission" or "PSC"), 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and the Commission's file or identification number is Docket No. 981104-EU.
2. Petitioner, Valencia Area Condominium Association, Inc. (hereafter "Valencia"),

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is the residential association for condominium buildings known as Valencia A-I. Valencia's address is 7000 W. Atlantic Avenue, Delray Beach, Florida 33446, and its telephone number is (561) 499-3335. For purposes of this proceeding, Valencia's address and telephone number should be considered those of its undersigned attorneys.

### **Identification of the Challenged Rule**

3. This Petition challenges the validity of the Commission's proposed amendment to Rule 25-6.049, F.A.C., entitled Measuring Customer Service, and specifically to the proposed amendment to Rule 25-6.049(5)(a), F.A.C., to strike existing rule language and add a new paragraph 1. to the rule.

4. The proposed amendment to Rule 25-6.049(5)(a), F.A.C., was noticed by publication in Volume 25, No. 42, *Florida Administrative Weekly*, dated October 22, 1999. A copy of the proposed rule amendment and notice is attached hereto and incorporated as Exhibit "A." Following publication of the proposed rule, a hearing was held on December 2, 1999 pursuant to Section 120.54(3)(c)1., F.S. The Commission voted to adopt the rule as proposed, with a modification that was supported by Commission staff and the Legal Environmental Assistance Foundation. The proposed amendment to Rule 25-6.049(5)(a), F.A.C., thus was modified, and that modification was noticed pursuant to a Notice of Change published in Volume 26, No. 14, *Florida Administrative Weekly*, dated April 7, 2000. A copy of the Notice of Change is attached hereto and incorporated as "Exhibit B."

5. This Petition is filed as provided in Section 120.56(2)(a), F.S., which states in pertinent part that any "substantially affected person may seek an administrative determination of the invalidity of any proposed rule by filing a petition seeking such a determination with the

division within ... 20 days after the date of the publication of the notice required by s. 120.54(3)(d), F.S."

**Facts Demonstrating that Valencia is Substantially Affected by the Proposed Amendment to Rule 25-6.049(5)(a), F.A.C.**

6. Valencia is the residential association for the residents of Valencia A-I. As such, Valencia represents the residence-related interests, including related consumer interests, of the residents of Valencia A-I, all of whom are members of Valencia.

7. Valencia's members, the great majority of whom live on fixed income, receive their electric service from Florida Power & Light Company. Currently, Valencia's members' electric service is measured by individual meters in each of the residential units. Accordingly, Valencia's members' monthly electric bills are greater -- in many cases, substantially greater -- than if electric services provided to the units in Valencia A-I were measured by a master meter, as is currently allowed under the individual meter exemption in effect pursuant to Rule 25-6.049(5)(a), F.A.C.

8. The proposed amendment to Rule 25-6.049(5)(a), to strike existing rule language in Rule 25-6.049(5)(a) and to add new paragraph 1. would have the effect of rendering Valencia ineligible for master metering because Valencia A-I was constructed prior to 1981 and currently does not have a master meter in place, even though it is eligible for a master meter under the existing rule, pursuant to the current individual meter exemption in Rule 25-6.049(5)(a), F.A.C. for buildings constructed before 1981. The proposed rule would preclude Valencia's members from realizing savings that could be achieved through the conversion from individual electric meters in the residents' units to a master meter for the Valencia A-1 buildings. This would effect a significant adverse impact on Valencia's members. Accordingly, a substantial number -- in this

case, all -- of Valencia's members are substantially affected by the proposed amendment to Rule 25-6.049(5)(a), F.A.C.

9. As previously stated, Valencia represents the interests, including residential consumer-related interests, of its members, all of whom are residents of Valencia A-I. The proposed rule amendment will significantly impact the monthly electricity charges to which Valencia's members may be subject. As such, the subject matter of the proposed rule amendment is within Valencia's general scope of interest and activity.

10. Moreover, because Valencia's members are similarly situated with respect to the proposed rule's effect on them, it is cost-effective, efficient, and desirable for Valencia to represent its members and to receive the relief it has requested in this case, which is invalidation of the proposed amendment to Rule 25-6.049(5)(a), F.A.C.

11. Accordingly, under Florida Home Builders Ass'n v. Department of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982), Valencia has standing in this case on behalf of its members, who are substantially affected by the individual meter rule, to challenge the proposed amendments to Rule 25-6.049(5)(a), F.A.C.

12. Moreover, the Commission itself previously determined Valencia's interests were substantially affected for purposes of having standing to intervene and participate as a party in the Commission's generic investigation into the requirement for individual electric metering by investor-owned electric utilities pursuant to Rule 25-6.049(5)(a), F.A.C., the same rule the proposed amendment to which is being challenged in this Petition. Order Granting in Part and Denying in Part Petition for Intervention, Order No. PSC-99-1474-PCO-EI, Docket No. 990188-E1, July 29, 1999). A copy of the order finding Valencia had standing is attached as Exhibit C.

**Facts Demonstrating Invalidity of Proposed Rule  
and Entitling Valencia to the Relief Requested**

13. The proposed amendment to Rule 25-6.049(5)(a), F.A.C., is an invalid exercise of delegated legislative authority, as that term is defined in Section 120.52(8), F.S., for the following reasons:

a. The proposed rule enlarges, modifies or contravenes a specific provision of the law implemented by the proposed rule. Specifically, Section 366.05(3), F.S., authorizes the Commission only to "provide for the examination and testing of all meters used for any product or service of a public utility" and does not purport to address, in any way, the issue of individual versus master metering. The Legislature has not granted the Commission specific authority to adopt the proposed rule, and such specific authority is required pursuant to Section 120.536(1), F.S.

b. The proposed rule is arbitrary or capricious because no rational basis has been established or demonstrated to suddenly begin disallowing conduct -- conversion of buildings on which construction commenced prior to January 1, 1981 from individual metering to master metering -- that heretofore has been authorized for years under the existing rule.

c. The proposed rule is not supported by competent substantial evidence. The Commission's ostensible policy reason for the proposed amendment to Rule 25-6.049(5)(a), as stated in its statement of estimated regulatory costs, is that "individual meters would encourage conservation." There is little to no evidence in the record supporting this premise. The Commission has not performed any studies or otherwise provided any competent substantial

evidence to demonstrate that requiring individual meters, rather than allowing master meters, would result in energy conservation.

e. The Commission has exceeded its grant of rulemaking authority, in that it is attempting to adopt a retroactive rule in violation of Section 120.54(1)(f), F.S. The plain language of the existing rule provides an exemption from individual metering for specified types of buildings if construction commenced prior to 1981; the rule does not impose any other requirements on these buildings in order to be eligible for the exemption. The proposed rule amendment would impose a new and additional limitation on the use of master meters for buildings constructed prior to 1981 -- specifically, that the building must already have a master meter as of the effective date of the rule amendment. Therefore, buildings on which construction commenced prior to 1981 but that do not yet have a master meter as of the rule amendment's effective date would no longer be eligible for master metering. As such, the proposed rule goes far beyond mere "clarification" of the existing rule, and instead reaches back in time to capture buildings constructed before 1981 for purposes of subjecting them and their residents to a new requirement that heretofore did not apply. The retroactive and inequitable effect of the proposed rule amendment becomes particularly clear when one considers that buildings built before 1981 that already use master meters may continue to use them, while buildings meeting the exact same construction date requirements that are not currently using master meters could not use master meters once the rule becomes effective. This imposes a new requirement on buildings not previously subject to that requirement. For these reasons, the proposed rule amendment contravenes Section 120.54(1)(f), F.S., which expressly provides that "[a]n agency may not adopt retroactive rules, including retroactive rules intended to clarify existing law, unless that power is

expressly authorized by statute." Nothing in Section 366.05, F.S., or any other statute expressly authorizes the Commission to retroactively impose new rule requirements to the use of master metering for buildings built before 1981.

f. The proposed rule imposes regulatory costs on regulated persons, including Valencia and its members, that could be reduced by the adoption of less costly alternatives, including not adopting the proposed rule. As discussed in paragraph c., above, there is no competent basis for concluding that the adoption of the proposed rule will achieve the purported energy conservation objectives of the rule, so that not adopting the rule will achieve the same result, at substantially lower cost to regulated persons.

14. Valencia states, as ultimate fact, that the proposed rule amendment to Rule 25-6.049(5)(a), F.A.C., is an invalid exercise of delegated legislative authority, as that term is defined in Section 120.52(8), F.S., and therefore Valencia is entitled to the relief requested herein, including invalidation of the proposed rule, pursuant to Section 120.56(1) and (2), F.S., and Section 366.05, F.S., the authority of which is exceeded by the proposed rule. Questions of law and fact addressed herein should be determined in Valencia's favor.

#### **Disputed Issues of Fact or Law**

15. The disputed issues of fact or law include the following:

a. Whether the proposed rule amendment enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by Section 120.54(3)(a)1., F.S.

b. Whether the proposed rule amendment is arbitrary or capricious.

c. Whether the proposed rule amendment is supported by competent substantial

evidence.

d. Whether the Commission has exceeded its grant of rulemaking authority, citation to which is required by Section 120.54(3)(a)1., F.S.

e. Whether the proposed rule amendment imposes regulatory costs on regulated persons, including Valencia, that could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

**Demand for Relief**

WHEREFORE, Petitioner, Valencia, respectfully requests that:

a. A hearing be conducted on this Petition in accordance with Section 120.56, F.S., and Sections 120.569, and 120.57, F.S.;

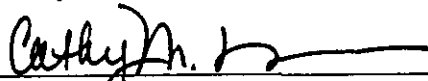
b. The Administrative Law Judge determine that the proposed rule amendment constitutes an invalid exercise of delegated legislative authority;

c. The Administrative Law Judge enter a Final Order invalidating the proposed rule amendment at issue in this Petition;

d. The Administrative Law Judge award attorney fees and reasonable costs to Valencia; and

e. Valencia be granted such other relief as may be deemed appropriate.

Respectfully submitted this 27<sup>th</sup> day of June, 2000.



Jon C. Moyle, Jr.  
Florida Bar No. 727016  
Cathy M. Sellers  
Florida Bar No. 784958  
MOYLE, FLANIGAN, KATZ, KOLINS  
RAYMOND & SHEEHAN, P.A.

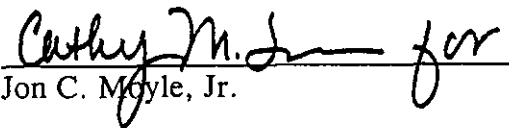


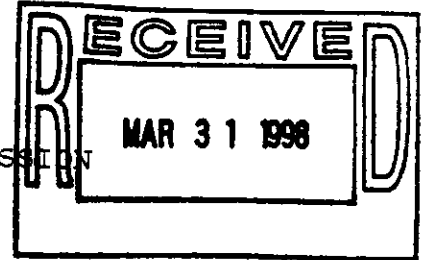
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Attorneys for Petitioner,  
Valencia Area Condominium Association Inc.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the original and one copy of the foregoing have been furnished by hand delivery to Clerk, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida, 32399, and copies were furnished by hand delivery to Richard Bellak, Esquire, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0862; Kenneth A. Hoffman, Esquire and J. Stephen Menton, Esquire, Rutledge, Ecenia, Purnell, and Hoffman, P.O. Box 551, Tallahassee, FL 32302; and James D. Beasley and Lee Willis, Ausley and McMullen, P.O. Box 391, Tallahassee, FL 32302 this 27<sup>th</sup> day of June, 2000.

Respectfully submitted,

  
\_\_\_\_\_  
Jon C. Mcyle, Jr.



BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Declaratory Statement Regarding Eligibility of Pre-1981 Buildings for Conversion to Master Metering by Florida Power Corporation.

DOCKET NO. 971542-EI  
ORDER NO. PSC-98-0449-FOF-EI  
ISSUED: March 30, 1998

The following Commissioners participated in the disposition of this matter:

- JULIA L. JOHNSON, Chairman
- J. TERRY DEASON
- SUSAN F. CLARK
- JOE GARCIA
- E. LEON JACOBS, JR.

ORDER ON DECLARATORY STATEMENT

BY THE COMMISSION:

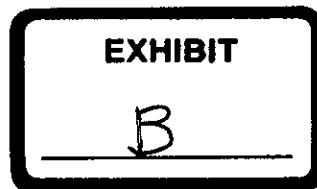
Pursuant to Section 120.565, Florida Statutes, and Rule 25-22.020, Florida Administrative Code, Florida Power Corporation (FPC) filed a Petition for Declaratory Statement with the Commission on November 24, 1997. By letter dated January 21, 1998, FPC waived the 90-day statutorily required time to respond to its petition for declaratory statement.

FPC seeks a declaration concerning Rule 25-6.049(5)-(7), Florida Administrative Code, as it applies to its particular circumstances. Paragraph (5)(a) of the rule requires individual electric metering by the utility

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.

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

FPC seeks the following declaration:



J. McGee  
T. Klammer

[a] building or facility listed in paragraph (5)(a) of the Master Metering Rule that currently has individually metered occupancy units, does not become eligible for conversion to master metering under the Rule by virtue of having been constructed on or before January 1, 1981.

FPC alleges that it has received several requests from condominium associations and shopping malls to convert from individual to master meters for buildings constructed prior to 1981. In particular, FPC has received requests from Redington Towers One Condominium Association, Inc. (Redington Towers One) and Redington Towers Three Condominium Association, Inc. (Redington Towers Three) to convert from individual to master meters. FPC acknowledges that it incorrectly converted to master meters the Redington Towers Two Condominium Association, Inc., a sister condominium association to Redington Towers One and Three.

In support of its requested declaration, FPC argues that "it was not pre-1981 buildings that were intended to be grandfathered by the Master Metering Rule -- it was the non-conforming use to which those buildings were put that the Rule grandfathered." FPC also argues that paragraph (5)(a) should be read to be consistent with the underlying purpose behind the rule, which is to require individual metering. As stated by FPC, "[t]he concept of grandfathering simply tolerates pre-existing non-conforming uses, it does not condone the creation of new ones."

In addition, FPC argues that the declaration sought by FPC is consistent with In re: Petition to Initiate Changes Relating to Rule 25-6.049, F.A.C., Measuring Customer Service, by micromETER Corporation, Order No. PSC-97-0074-FOF-EU, 97 F.P.S.C. 1:450 (1997). In micromETER, we declined to amend Rule 25-6.049 to allow buildings that are currently required to be individually metered to be master metered, and then sub-metered. Among our reasons for declining to amend the rule was the mismatch that would result from residential customers taking service under a commercial rate. Id. at 1:452. We also denied the micromETER petition because it was not clear whether master metered residential condominium units would qualify for residential conservation programs. Id. One of the primary reasons we originally required individual metering was to advance conservation. In the micromETER order, we affirmed our policy to require condominium units to be individually metered. Id. at 1:453.

On January 16, 1998, Redington Towers One filed a "Brief for Declaratory Statement." Redington Towers Three filed essentially the same brief on February 19, 1998. FPC has not responded to either filing. Section 350.042(1), Florida Statutes, allows a commissioner to hear communications concerning declaratory

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PAGE 3

statements filed under Section 120.565, Florida Statutes. Because these condominium associations could have made their comments directly to the members of the Commission, we find it appropriate to include them in the record of this proceeding for our consideration. We have also considered such comments in prior declaratory statement proceedings. In re: Petition of Florida Power and Light Company for a Declaratory Statement Regarding Request for Wheeling, 89 F.P.S.C. 2:298, 300 (1989).

Concerning the merits of FPC's petition, Redington Towers One and Three argue that FPC's interpretation is arbitrary and discriminatory. In particular, the Towers One and Three argue that FPC's reference to In re: Request for amendment of Rule 25-6.049, F.A.C., Measuring Customer Service, by 38 tenants of record at Dunedin Beach Campground, Order No. 97-1352-FOF-EU, 97 F.P.S.C. 10:634 (1997), on page 4 of its petition is misleading. In addition, the Towers One and Three argue that the micrometer case is not controlling here.

We do not find these arguments to be persuasive. Moreover, the reading of the rule sought by Redington Towers One and Three would result in an interpretation in which they could switch back and forth between individual and master meters simply because they were constructed prior to 1981. This is not what we intended by paragraph (5)(a) of Rule 25-6.049. Instead, what was intended was to allow master metered buildings constructed before 1981 to remain master metered to avoid retroactive application of the rule.

While we agree with the arguments raised by FPC, we believe the declaration requested by FPC is too broad. See Regal Kitchens, Inc. v. Florida Department of Revenue, 641 So. 2d 158, 162 (Fla. 1st DCA 1994); Florida Optometric Association v. Department of Professional Regulation, Board of Opticianry, 567 So. 2d 928, 936-937 (Fla. 1st DCA 1990). Instead, we declare that the 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.

In addition, we instruct our staff to initiate the rulemaking process to determine whether paragraph (5)(a) of Rule 25-6.049 should be amended.

It is therefore

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ORDERED by the Florida Public Service Commission that Florida Power Corporation's petition for declaratory statement is granted as modified above. It is further

ORDERED that the Florida Public Service Commission staff shall initiate the rulemaking process as discussed above. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission, this 30th day of March, 1998.

/s/ Blanca S. Bayó  
BLANCA S. BAYÓ, Director  
Division of Records and Reporting

This is a facsimile copy. A signed copy of this order maybe obtained by calling 1-850-413-6770

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

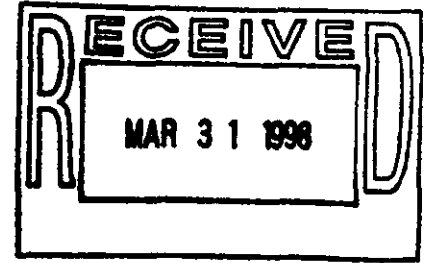
The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance

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of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

# STATE OF FLORIDA



## PUBLIC SERVICE COMMISSION

**2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850**

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To: Mr. James A. McGee

Date: 3-31-98

From: Records Fax Server

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