



Public Service Commission

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DATE: August 24, 2000

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

FROM: DIVISION OF APPEALS (BELLAK) *RCB RCB MDES DW RNT*
DIVISION OF ECONOMIC REGULATION (WHEELER) *TQD*

RE: DOCKET NO. 000643-EU - PETITION FOR DECLARATORY STATEMENT REGARDING APPLICABILITY OF INDIVIDUAL METER RULE EXEMPTION IN RULE 25-6.049(5)(A)3, F.A.C., TO VALENCIA AREA CONDOMINIUM ASSOCIATION, INC.

AGENDA: 9/5/00 - REGULAR AGENDA - DECISION ON DECLARATORY STATEMENT - PARTIES MAY PARTICIPATE AT THE COMMISSION'S DISCRETION

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\APP\WP\000643.RCM

CASE BACKGROUND

On May 25, 2000, Valencia Area Condominium Association, Inc. (Valencia) filed a petition for declaratory statement regarding the applicability of Rule 25-6.049(5)(a)3, Florida Administrative Code. On June 23, 2000, Florida Power & Light Company (FPL) filed a Petition to Intervene and Request for Informal Administrative Hearing. On July 5, 2000, Valencia filed a Response in Opposition to FPL's Petition to Intervene and Request for Hearing.

Valencia is the not-for-profit condominium association responsible for the operation of Valencia A-I, a residential condominium located at Kings Point at Delray Beach, Florida. The condominium is served by FPL, and its units are currently individually metered and billed under FPL's residential rate schedule. Valencia seeks a declaratory statement from the

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Commission indicating that Valencia A-I is exempt from the individual metering requirement in Rule 25-6.049(5)(a), Florida Administrative Code, and thus is eligible for metering through a single master meter.

In its Petition to Intervene and Request for Informal Hearing, FPL argued, inter alia, that the allegations of Valencia did not support its petition for declaratory statement or eligibility for master metering pursuant to Rule 25-6.049(5)(a)3. FPL also stated that if Valencia's Petition is granted, that should not prejudice FPL's legal right to challenge any request by Valencia to FPL for master metering by raising disputed issues of material fact in administrative hearings. On August 1, 2000, Valencia filed an Amended Petition for Declaratory Statement.

ISSUE 1: Should the Commission grant Florida Power & Light's petition to intervene?

RECOMMENDATION: Yes. FPL's petition to intervene should be granted.

STAFF ANALYSIS: While Valencia argues persuasively that, as a general matter, other parties affected by its petition for declaratory statement can intervene, its inconsistent claim that FPL's interest is so speculative as to require denial of intervention is unpersuasive. As noted in Issue 3, staff's analysis of the petitioned-for statement is that it has the potential for broadening out the Rule 25-6.049(5)(a)3 exception to include all condominiums. This result would certainly affect FPL's substantial interests. The claim that only one building is potentially involved is a pre-Chiles view at odds with the holding therein that

[a]nother party can expect the agency to apply the rationale for its declaratory statement consistently...

711 So. 2d at 155.¹

Staff reads Chiles as requiring the same practical and realistic treatment of intervention motions in declaratory statement petition proceedings as is due the declaratory statement petitions themselves.

¹Chiles v. State, Division of Elections, 711 So. 2d 151 (1 DCA 1998)

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ISSUE 2: Should the Commission conduct an informal hearing regarding Valencia's request for declaratory statement?

RECOMMENDATION: No. The request for an informal hearing should be denied.

STAFF ANALYSIS: Only an informal hearing considering legal issues, rather than factual issues, is available pursuant to Uniform Rule of Procedure 28-105.003 concerning declaratory statements. Therefore, unless the Commission believes that the presentation of the legal issues in the filings of the petitioner and intervenor are insufficient to decide this matter, a separate hearing, as such, should not be scheduled. Rule 28-105.003 contemplates that in the case of an agency headed by a collegial body, action on a petition for declaratory statement should only be taken at a duly noticed public meeting. The Commission's agenda conference would qualify to meet that requirement.

ISSUE 3: Should the Commission grant Valencia Area Condominium Association's petition for declaratory statement?

RECOMMENDATION: No. (WHEELER)

STAFF ANALYSIS: Rule 25-6.049(5)(a), Florida Administrative Code, requires individual electric metering by the utility for each separate occupancy unit of commercial establishments, residential buildings, condominiums, cooperatives, marinas, and trailer, mobile home and recreational vehicle parks. Paragraphs 1 through 5 of the rule, however, describe certain circumstances under which individual metering is not required. Paragraph three of the rule states that individual metering by the utility is not required:

For electricity used in specialized-use housing accommodations, such as hospitals, nursing homes, living facilities located on the same premises as, and operated in conjunction with, a nursing home or other health care facility providing at least the same level and types of service as a nursing home, convalescent homes, facilities certificated under Chapter 651, Florida Statutes, college dormitories, convents, sorority houses, fraternity houses, motels, hotels, and similar facilities

Valencia requests that the Commission issue a declaratory statement determining that Valencia A-I is a "similar facility" as discussed in Rule 25-6.049(5)(a)3, Florida Administrative Code, and thus is exempt from the individual metering requirement. Such an exemption would allow the condominium to be served by a single master meter. Because FPL's Residential rate schedule is applicable only to individually metered residences, installation of a master meter would entail placing the condominium on a commercial rate schedule. Such a rate, depending on the load characteristics of the facility, may result in lowered electricity costs compared to the residential rate.

Valencia contends that its residents have "aged in place" and have health conditions and limited life expectancies similar to those of residents of facilities certified under Chapter 651, F.S. Chapter 651 outlines the requirements for the certification of continuing care facilities. Some condominium unit owners at Valencia A-I have arranged with Easy Living, Inc., a Delaware corporation, to provide them "personal services." These services are defined in Section 400.402(17), Florida Statutes (Nursing Homes and Related Health Care Facilities) as:

direct physical assistance with or supervision of the activities of daily living and the self-administration of medication and other similar services which the department may define by rule. "Personal Services" shall not be construed to mean the provision of medical, nursing, dental, or mental health services.

Such services may be provided to residents of continuing care facilities that are certificated pursuant to Chapter 651. Valencia argues that because their residents have contracted for such services, they are a "similar facility" for the purposes of the rule.

Valencia further argues that they are a similar facility because, like the facilities enumerated in the exemption (i.e. nursing homes, college dormitories, fraternity and sorority houses, motels, and hotels) the term of residence of their occupants is limited due to their limited life expectancies.

Finally, Valencia argues that they are similar to the non-licensed facilities listed in the rule, such as convents, fraternity houses and sorority houses, in that they are subject to oversight and control by some entity, such as the church or a state or national fraternity. In Valencia's case they are subject to a condominium association.

Staff does not believe, based on the facts as presented by the petitioner, that Valencia qualifies for an exemption from the individual metering requirement based on the provisions of Rule 25-6.049(5)(a)3, Florida Administrative Code. Valencia A-I is a residential condominium in which the residents own and occupy their units. As such, Rule 25-6.049(5)(a), Florida Administrative Code, requires that they be individually metered.

The fact that some of the unit owners buy services that may also be provided by continuing care facilities does not transform them into a "specialized-use housing facility" such as a nursing home or continuing care facility. Anyone may contract for non-medical in-home assistance. The simple fact that some Valencia residents are purchasers of such services does not in itself make the condominium a "similar facility."

The types of facilities that are exempted from the individual metering requirement are those in which, due to their nature or mode of operation, it is not practical to attribute usage to individual occupants. The units in Valencia are individually metered, and thus each unit owner pays for the electricity they

consume. There is no ambiguity as to who is responsible for the electricity used, and no difficulty in measuring and billing such customers. By contrast, hotels and motels are commercial enterprises in which the occupants of the units are not billed for their use of electricity, but rather pay a bundled rate for the use of a room for a limited time. Rule 25-6.049(5)(a)(5), Florida Administrative Code, exempts time-share plans from the individual metering requirement for similar reasons. Owners of time-share plans typically have the right to use their unit for only one week in the year, and it is not practical to bill them for the electricity they consume for that one week. Instead, the cost of electricity is treated as a common expense that is apportioned to the owners on a pro-rata ownership basis. Residents of nursing homes and similar care facilities also typically are not billed for their individual use of electricity, but pay a bundled price.

Staff does not believe that Valencia qualifies for an exemption from the individual metering requirement based on the fact that its owners have limited life expectancies. Again, staff believes that the nature of the facility and its mode of operation are relevant. Unlike motel and hotel guests, the owners of units in Valencia reside full-time in their units, and there is no difficulty in attributing and billing their usage of electricity.

With regard to Valencia's argument that they are similar to the non-licensed facilities listed in the rule, in that they are subject to oversight and control by some entity (i.e., the condominium association), staff does not believe that this is relevant. If this standard were applied, no condominium would be required to be individually metered, since all condominiums are required by law to be operated by a condominium association. Clearly, the exemptions in paragraph three were not intended to apply so broadly.

Analogous to the argument made by Valencia that declaratory statements are "a favored remedy," the Commission's rules and policy favor individual metering, with exceptions from that policy based on individual metering being impractical in those specified given instances. Therefore, unless and until that policy changes, it is consistent with that policy to deny Valencia's instant petition because, as noted, there is no practical problem in implementing individual metering of Valencia A-I condominium.

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ISSUE 4: Should this docket be closed?

RECOMMENDATION: Yes, unless post-decision motions are filed.

STAFF ANALYSIS: Unless a motion for reconsideration is filed subsequent to the Commission's decision, this docket may be closed.