



Public Service Commission

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DATE: SEPTEMBER 14, 2000
TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)
FROM: DIVISION OF APPEALS (BELLAK) *RCB RCB/DES*
DIVISION OF ECONOMIC REGULATION (WHEELER) *DPW SMT RNT*
RE: DOCKET NO. 981104-EU - PROPOSED AMENDMENT OF RULE 25-6.049, F.A.C., MEASURING CUSTOMER SERVICE.
AGENDA: SEPTEMBER 26, 2000 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE
RULE STATUS: PROPOSAL MAY BE DEFERRED
SPECIAL INSTRUCTIONS: NONE
FILE NAME AND LOCATION: S:\PSC\APP\WP\981104.RCM

CASE BACKGROUND

The staff recommendation filed February 3, 2000 (Recommendation) proposing amendment of Rule 25-6.049 noted that the genesis of this docket was the Commission's Order and Declaratory Statement construing, at Florida Power Corporation's (FPC) request, the grandfather clause in Rule 25-6.049(5)(a), Florida Administrative Code. In re: Petition for Declaratory Statement Regarding Eligibility of Pre-1981 Buildings for Conversion to Master Metering by Florida Power Corporation, Order No. 98-0449-FOF-EI, 98 F.P.S.C.3:389 (1998) (Attachment I).

The recommendation further noted that FPC

sought a declaration from the Commission that individually metered buildings, which were constructed prior to 1981, did not automatically become eligible for master metering simply because they were constructed before 1981. FPC argued that the concept of

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grandfathering simply tolerates pre-existing non-conforming uses, it does not condone the creation of new ones.

Recommendation, p. 1-2

The Order on Declaratory Statement adopted that rationale, stating that

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. [e.s.]

Attachment I, p. 3

As noted in the February 3, 2000 Recommendation and in the Order on Declaratory Statement itself at Attachment I, p.3, the Commission believed that the declaration sought by FPC was "too broad" and instructed staff to initiate the rulemaking process. This resulted in a clarifying amendment to Rule 25-6.049(5)(a) embodying the rationale stated in the Order on Declaratory Statement. That rule amendment is the subject of a pending rule challenge before the Division of Administrative Hearings.

About six weeks after the Commission's March 30, 1998, Order on Declaratory Statement was issued, the First District Court of Appeal issued its May 12, 1998, opinion in Chiles v. State Division of Elections, 711 So. 2d 151 (1 DCA 1998). Therein, the Court noted that a 1996 statutory revision of Section 120.565 had removed the word "only" from the sentence therein which had formerly read:

a declaratory statement shall set out the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to the petitioner in his or her particular set of facts only ... [e.s.]

Section 120.565, Florida Statutes (1995).

The Court concluded that

the deletion of the word "only" signifies that a petition for declaratory statement need not ... apply only to the petitioner. [e.s.]

711 So. 2d at 154.

The Court also stated that

the reasoning employed by the agency in support of a declaratory statement may offer useful guidance to others ... in similar circumstances. Another party can expect the agency to apply the rationale for its declaratory statement consistently

711 So. 2d at 154-5.

Staff believes that these conclusions of the Court in Chiles, had they been available to the Commission when it issued its Order on Declaratory Statement, would have obviated the concern that the statement requested by FPC was too broad. In any event, those conclusions have now eliminated the need for this rulemaking docket. Though the Order on Declaratory Statement provides an explanation of Rule 25-6.049, it does not establish an agency statement of general applicability beyond that of Rule 25-6.049 itself. Therefore, additional rulemaking is not required.

DISCUSSION OF ISSUES

ISSUE 1: Should the amendment to Rule 25-6.049, F.A.C., be withdrawn?

RECOMMENDATION: Yes. The amendment to Rule 25-6.049, F.A.C., should be withdrawn.

STAFF ANALYSIS: As indicated, the rulemaking process that resulted in this amendment was initiated because the Commission believed, as of March 30, 1998 when it issued its Order on Declaratory Statement, that declaratory statements had to be limited to the circumstances of the petitioners only. As explained by the Court in Chiles, that limitation had actually not been in effect since the 1996 revision of the Administrative Procedures Act.

Since, as noted by the Court, "[a]nother party can expect the agency to apply the rationale for its declaratory statement consistently . . .," the Order on Declaratory Statement provides as much explanation as the proposed rule amendment, thereby rendering the rule amendment unnecessary. The Commission's statement that what Rule 25-6.049(5)(a) intended "was to allow master metered buildings constructed before 1981 to remain master metered" and not to allow "an interpretation in which they could switch back and forth between individual and master meters simply because they were constructed prior to 1981", needs no additional clarification.

It should also be noted that the application of the requirement of individual metering to specified buildings "for which construction is commenced after January 1, 1981," as stated in Rule 25-6.049(5)(a), had the reasonable purpose of advancing conservation while, at the same time, avoiding the retroactive imposition of individual metering retrofit costs on buildings constructed as master-metered buildings prior to adoption of the rule. The Redington Towers argument rejected by the Commission in the Order on Declaratory Statement is illogical because no costs would be imposed on pre-1981 buildings which were already individually metered. That accounts for the fact that they are not addressed explicitly in the rule, not Redington Towers' theory that pre-1981 buildings are forever exempted from the policy of conservation.

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September 14, 2000

ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes. This docket should be closed.

STAFF ANALYSIS: Upon providing notice of the withdrawal of the amendment of Rule 25-6.049, F.A.C., this docket may be closed.

RCB:wt

Attachment

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ATTACHMENT I

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

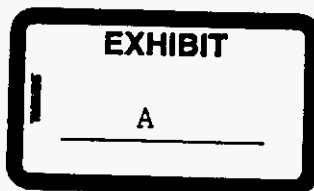
BY THE COMMISSION:

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:

[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 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.

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It is therefore

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

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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

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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 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.