

State of Florida



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Public Service Commission

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

DATE: August 13, 2015

TO: Office of Commission Clerk (Stauffer)

FROM: Office of the General Counsel (Gervasi) *peg sml.*
Division of Economics (Draper, Rome) *DR*
EID

RE: Docket No. 150142-EU – Petition by Wiscan, LLC for waiver of Rule 25-6.049(5), Florida Administrative Code.

AGENDA: 8/27/15 – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: 9/8/15 – 90-day Rule Waiver Deadline¹

SPECIAL INSTRUCTIONS: None

Case Background

By *pro se* petition filed on May 11, 2015, Mr. Ken Wegner requests a waiver of Rule 25-6.049(5), Florida Administrative Code (F.A.C.), Measuring Customer Service, for his private company, Wiscan, LLC (Wiscan). In 2014, Wiscan purchased a building previously known as the Sun Resorts Trading Post (Store). The Store is situated in Duke Energy Florida's (DEF) service territory in Apopka, Florida. The Store has been closed since 2011 and the building has not had electric service since that time. It was previously sub-metered behind a master meter arrangement between the Clarcona Resort Condominium Association, Inc. (Clarcona) and DEF's predecessors (Florida Power Corp. and Progress Energy Florida).

Wiscan specifically requests a waiver of the provision of Rule 25-6.049(5) that requires individual metering for an occupancy unit unless it "has received master-metered service

¹ The 90-day timeframe commenced on June 10, 2015, the date the petition was completed upon the Commission's receipt of the additional data staff timely requested pursuant to section 120.542(8), F.S.

continuously since January 1, 1981.” Wiscan also requests a waiver from DEF’s Tariff, Section IV, Sheet 4.032 (3rd revised), § 3.02, which requires the applicant, in this case Wiscan, to clear any new line extension route to the Store of all trees, tree stumps and other obstructions before DEF starts construction, and provides that DEF will use private property for any such extension or upgrade once an easement suitable to DEF is granted to the applicant by the owner of such private property, without cost to DEF.

The materials attached to the petition show that Commission staff and DEF informally addressed this matter before the petition was filed. By e-mail dated February 23, 2015, staff noted that Clarcona would not agree to reinstate the historical master-metered arrangement for electric service to the Store. Staff informally opined that the Store must be individually metered pursuant to Rule 25-6.049(5), F.A.C., because it has not received master-metered service continuously since January 1, 1981, and because it does not qualify for any of the individual metering exemptions listed in Rule 25-6.049(5)(a) – (g), F.A.C. Staff suggested that Wiscan file a petition for declaratory statement if it wished to obtain a formal Commission decision. By letter dated March 12, 2015, DEF advised Wiscan that it could not provide service under the terms of Wiscan’s proposal, which is discussed in Issue 1 of this recommendation, for the same reasons informally expressed by staff.

Wiscan thereafter filed a letter expressing an interest in obtaining a waiver from Rule 25-6.049(5), F.A.C. Because the letter did not meet the filing requirements of Rule 28-104.002, F.A.C., Petition for Variance or Waiver, staff provided Wiscan with information on how to properly file a petition for rule waiver. This docket was opened upon the filing of the petition.

Notice of the petition was published in the Florida Administrative Register on May 14, 2015. DEF timely filed comments on the petition on May 28, 2015. No other comments were received, and the comment period expired on May 28, 2015. The Commission has jurisdiction pursuant to sections 366.04, 366.05, and 366.06, Florida Statutes (F.S.), as well as section 120.542, F.S.

Discussion of Issues

Issue 1: Should the Commission grant Wiscan's petition for waiver of Rule 25-6.049(5), F.A.C., and for waiver of DEF's Tariff, Section IV, Sheet 4.032 (3rd revised), § 3.02?

Recommendation: No, Wiscan's petition for waiver of Rule 25-6.049(5), F.A.C., should be denied because it does not meet the requirements of section 120.542, F.S., and the Commission should decline to rule on a request to waive a tariff provision that mirrors a Commission rule absent a ruling on a request for waiver of the rule itself. (Gervasi, Draper, Rome)

Staff Analysis:

Petition

Rule 25-6.049(5), F.A.C.

Rule 25-6.049(5), F.A.C., requires individual electric metering for each separate occupancy unit of new commercial establishments, residential buildings, condominiums, cooperatives, marinas, and mobile home and recreational vehicle parks, but does not require individual metering "for any such occupancy unit for which a construction permit was issued before, and which has received master-metered service continuously since January 1, 1981." This grandfather provision allows master-metered buildings constructed before 1981 to remain master metered, in order to avoid retroactive application of the rule.²

Rule 25-6.049(5)(a) – (g), F.A.C., establishes criteria for exemptions to the individual metering requirement for certain specialized-use housing accommodations such as hospitals and nursing homes, and lodging establishments such as hotels, motels, and condominiums that provide overnight occupancy. The Store does not fit within any of the exemptions set forth in the rule.

The Facts

The facts as contained in the petition and supporting documentation filed in the docket show that the Store was built in 1970 and is surrounded or "landlocked" by property owned or controlled by Clarcona. From 1970 until 2011, the Store was sub-metered behind a master meter. Clarcona was formed in 1982 and took over the master meter sometime thereafter. In 2011, Clarcona had the Store sub-meter disconnected due to litigation which was settled in 2014.³ Thus, the Store did not have electric service when Wiscan purchased it at a tax deed sale in September 2014, and it currently remains without service.

In the petition, Wiscan states that the provision of Rule 25-6.049(5), F.A.C., requiring individual metering for an occupancy unit unless it "has received master-metered service continuously since

² See Order No. PSC-98-0449-FOF-EI, issued March 30, 1998, in Docket No. 971542-EI, In Re: Petition for declaratory statement regarding eligibility of pre-1981 buildings for conversion to master metering by Florida Power Corporation.

³ As part of a settlement of a circuit court action by Clarcona against Technology Property, LLC, in which ownership of the Store was at issue, the parties stipulated to a final judgment quieting title and declaring Technology Property, LLC, to be the legal and equitable owner of the Store.

January 1, 1981” interferes with its plans to reopen the Store. Wiscan requests that the rule be waived in order to implement its proposal to be reconnected behind Clarcona’s master meter. However, Wiscan further states that Clarcona refuses to reconnect the Store sub-meter for billing, collection and maintenance reasons. Therefore, Wiscan’s specific proposal is for the Commission to waive the rule in order to allow DEF to provide a separate meter at the Store connected to Clarcona’s existing supply line and to bill the Store separately and then deduct the amount billed to the Store from the amount billed to Clarcona. Wiscan alternatively proposes to become the master-metered customer and render sub-metered bills to Clarcona.

According to the petition, DEF could reconnect the Store to Clarcona’s master-metered facilities in less than an hour, whereas the provision of separate electric service to the Store would require running new power supply lines below ground at considerable expense to Wiscan. In addition, because the Store is “landlocked” by Clarcona property, the provision of separate electric service to the Store would require Wiscan to obtain easements from Clarcona. Therefore, Wiscan also requests a waiver from DEF’s Tariff, Section IV, Sheet 4.032 (3rd revised), § 3.02, which requires the applicant, in this case Wiscan, to clear the new line extension route of all trees, tree stumps and other obstructions before DEF starts construction, and provides that DEF will use private property for any such extension or upgrade once an easement suitable to DEF is granted to the applicant by the owner of such private property, without cost to DEF. Wiscan does not believe that Clarcona would willingly grant it an easement in order for the Store to receive separate service from DEF.

In response to staff’s data request for more information concerning the costs of obtaining retail electric service to the Store, Wiscan estimated the cost to be \$40,000 for legal, engineering, permitting, and construction, and that it would take one year to complete the connection, including 11 months to obtain three required easements. Construction would involve going several blocks under two roads in an area with many existing obstacles and unmapped underground services, and would traverse areas where future construction and occupancy is anticipated. Wiscan states that this solution would create a financial hardship, as the initial costs and implementation time are significant and success is not guaranteed. Wiscan is a small private company. A one year delay and a \$40,000 investment for electric service would double its initial investment in purchasing the Store, and there is no financing available from DEF or outside investors. Moreover, if Clarcona delays approval of the easements and the delay results in a court action,⁴ or the actual routing of the underground lines is more complex due to special requirements or electrical safety rules and regulations that Wiscan is presently unaware of, the estimated costs could easily double or triple.

Staff offered to meet with representatives of Wiscan and Clarcona in an attempt to assist them in reaching a mutually agreeable solution to the issues raised in this docket. Clarcona declined the offer, stating that because the Store is located on land that is not part of the Association, any power problems would lay with the owner of the Store and not with Clarcona.

⁴ The Commission does not have the authority to grant easements. Section 366.04(1), F.S., provides generally that “the Commission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service.” See *Southern States Utils. v. FPSC*, 714 So. 2d 1046, 1051 (Fla. 1st DCA 1998) (finding the Commission’s powers and authority to be those and only those that are conferred expressly or impliedly by statute).

DEF's Comments

In its comments on the petition, DEF states that if the Commission were to grant the relief Wiscan requests, multiple issues would still remain that would substantially impede DEF's ability to provide service under the proposal identified in the petition. Those impediments are as follows:

- Wiscan's proposal to have DEF reduce Clarcona's bill to account for Wiscan's separately metered usage and render separate bills to both entities would violate Rule 25-6.100(2)(a), F.A.C., with regards to Clarcona's bills. Rule 25-6.100(2)(a) requires each customer's bill to include "the meter reading and the date the meter is read, in addition to the meter reading for the previous period." Under Wiscan's proposal, Clarcona's bill would instead include an adjusted meter reading and an adjusted previous period reading.
- DEF's Tariff, Section IV, Sheet 4.090 (3rd revised), § 9.01 states that "[e]lectric service furnished to a customer shall be rendered directly to the Customer through the Company's individual meter and shall be solely for the Customer's own use." Wiscan's proposal would violate this provision because a portion of the electric service flowing through Clarcona's meter would not be consumed by Clarcona but instead by a different customer (Wiscan).
- DEF's billing system is not designed to render bills as Wiscan proposes. Bills are computer generated for each metered account. Wiscan's proposal would require DEF to hold each bill for Clarcona and Wiscan's accounts to manually perform the computations necessary to render the bills, and then manually generate bills for each customer.
- In the event of disconnection of Clarcona, DEF would not be able to disconnect Clarcona without affecting Wiscan, or would be forced to continue providing service to the former to avoid affecting the latter.
- Clarcona rents the facilities behind its meter and would need to give consent for their use by Wiscan. DEF's point of delivery is Clarcona's meter and DEF is not responsible for facilities behind the meter. Therefore, DEF could not guarantee service reliability to Wiscan under its proposed scenario.
- DEF's tariff requirement that customers provide the necessary easements for DEF's facilities is the embodiment of long-standing Commission policy that a customer who causes an incremental cost should bear that cost rather than it being borne by the entire body of customers. If Wiscan cannot be included in Clarcona's master-metered account as the petition states, then new facilities will be needed to provide electric service and those facilities will have to be located on Clarcona's property. DEF cannot locate its facilities on a third party's property without permission.

In response to a staff request for further information, DEF advised that it could design an overhead solution in order to provide retail electric service to the Store, but it would require that some facilities be installed underground to meet clearances and to avoid the bisecting and crossing of existing facilities. This potential new service configuration would require the

installation of 4 poles and spans of single phase overhead primary for approximately 530 feet, a termination and bore of underground single phase primary for approximately 300 feet, and the installation of a new 25KVA single phase transformer. Duke estimates the cost of this work to be \$20,000, not including any costs associated with resolving the easement issue.

Requirements of Section 120.542, F.S.

Section 120.542(2), F.S., provides a two-pronged test for determining when waivers of and variances from agency rules shall be granted:

. . . when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of the rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, “substantial hardship” means demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver.

(Emphasis added.)

Purpose of the Underlying Statutes

Pursuant to section 120.542, F.S., the petitioner must demonstrate that the purpose of the underlying statute will be or has been achieved by other means by the person. Rule 25-6.049, F.A.C., implements sections 366.05(1) and 366.06(1), F.S., and sections 366.81 and 366.82, F.S. Section 366.05(1), F.S., gives the Commission the authority to prescribe rate classifications and service rules and regulations to be observed by investor-owned electric utilities and section 366.06(1), F.S., prohibits investor-owned electric utilities from charging or receiving any rate not on file with the Commission for the particular class of service involved, or from making a change in any schedule. Rule 25-6.049(5), F.A.C., implements these statutes by setting forth the conditions under which individual occupancy units must be metered by the utility.

Sections 366.81 and 366.82, F.S., are known collectively as the Florida Energy Efficiency and Conservation Act (FEECA). These statutes direct the Commission to adopt goals and approve plans related to the conservation of electric energy. Rule 25-6.049(5), F.A.C., also implements FEECA by setting forth the conditions under which individual occupancy units must be metered by the utility. Moreover, the requirement for individual occupancy units to be individually metered serves the FEECA conservation goals because individual metering promotes energy conservation. When unit owners are responsible for paying for their actual consumption, they are more likely to conserve to minimize their bills.⁵

Staff believes that if Wiscan could implement either of its proposals for the Store to be reconnected to the existing facilities behind the master meter, either proposal would achieve the

⁵ See Order No. PSC-13-0579-PAA-EU, issued October 31, 2013, in Docket No. 130224-EU, In Re: Petition for variance from or waiver of Rule 25-6.049(5) and (6), F.A.C., by PRH-2600 Hallandale Beach, LLC, consummated by Order No. PSC-13-0616-CO-EU, issued November 22, 2013 (granting rule waiver petition upon finding that the exemptions from the individual metering requirement contained within Rule 25-6.049(5)(a) – (g) are for the types of facilities for which it is not practical to attribute usage to individual occupants due to their nature or mode of operation, and that there is little or no conservation incentive gained by requiring individual metering when the occupants of the units do not pay directly for the electricity they use).

purpose of FEECA because it would involve Wiscan being billed for its actual electric consumption. However, Wiscan has not demonstrated that it can implement either proposal such that the purpose of FEECA will, in turn, be achieved by other means in this case. The facts show that Clarcona is DEF's customer of record. Clarcona rents the facilities behind the master meter from DEF and allocates the cost of the electricity consumed to the individually sub-metered units within the Association. Clarcona has stated its unwillingness to reconnect the Store to its facilities. The Store is not located on property owned by Clarcona, and as DEF points out in its comments, DEF's Tariff, Section IV, Sheet 4.090 (3rd revised), § 9.01 requires that the electric service furnished to Clarcona through the master meter is to be solely for Clarcona's own use. Wiscan's proposal would violate that provision because a portion of the electric service flowing through Clarcona's meter would not be consumed by Clarcona, but instead by Wiscan. Therefore, Wiscan cannot implement either of its proposals as set forth in its petition and consequently, cannot achieve the purpose of the FEECA statute by other means.

Substantial Hardship or Principles of Fairness

Pursuant to section 120.542, F.S., the petitioner must also demonstrate that application of the rule would create a substantial hardship or would violate principles of fairness. Substantial hardship is defined as a demonstrated economic, technological, legal or other type of hardship to the person requesting the waiver. Principles of fairness are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

Wiscan has shown that it will be more costly for the Store to receive individually metered service rather than sub-metered service behind Clarcona's master meter. However, staff does not believe that this demonstrates that application of the rule would create a substantial hardship or violate principles of fairness. Wiscan cannot implement either of its proposals as set forth in its petition for the above-stated reasons, notwithstanding the individual metering requirements of Rule 25-6.049(5). Therefore, Wiscan will need to incur the same costs of obtaining retail electric service as any other new customer would incur under DEF's Commission-approved tariffs and rate schedules.

Tariff Waiver Request

Regarding Wiscan's request for a waiver from DEF's Tariff, Section IV, Sheet 4.032 (3rd revised), § 3.02, requiring Wiscan to secure the necessary easements in order for DEF to use Clarcona property for the new service connection to the Store, this requirement is also contained in Rule 25-6.076, F.A.C. Rule 25-6.076, F.A.C., states that "[r]ights of way and easements suitable to the utility must be furnished by the applicant in reasonable time to meet service requirements and must be cleared of trees, tree stumps, paving and other obstruction, . . . before the utility will commence construction, all at no charge to the utility." Staff agrees with DEF that this requirement embodies the Commission's long-standing policy that a customer who causes an incremental cost should bear that cost rather than it being borne by the entire body of customers.⁶ Moreover, Wiscan did not petition for a waiver of Rule 25-6.076, F.A.C., in this

⁶ See, e.g., Order No. PSC-14-0036-TRF-EI, issued January 14, 2014, in Docket No. 130223-EI, In Re: Petition for approval of optional non-standard meter rider, by Florida Power & Light Company (finding that the option to opt-out from the standard smart meter would require FPL to incur incremental costs, which would appropriately be borne by the cost causer and not the general body of ratepayers).

docket, and the Commission should decline to rule on a request to waive a tariff provision that mirrors a Commission rule absent a ruling on a request for waiver of the rule itself.

Conclusion

Section 120.542, F.S., requires Wiscan to demonstrate two things in order for the Commission to grant its petition for rule waiver in this case. Wiscan must demonstrate that the purpose of the underlying statute will be or has been achieved by other means by Wiscan, and that application of the rule would create a substantial hardship or violate principles of fairness. Wiscan is unable to make the requisite showings because it has not demonstrated that it can implement either of its proposals to have retail electric service to the Store using Clarcona's master meter facilities. Therefore, staff recommends that Wiscan's petition for waiver of the requirements of Rule 25-6.049(5), F.A.C., should be denied.

Moreover, the Commission should decline to rule on Wiscan's request for a waiver from DEF's Tariff, Section IV, Sheet 4.032 (3rd revised), § 3.02. Wiscan did not petition for a waiver of Rule 25-6.076, F.A.C., in this docket, and the Commission should decline to rule on a request to waive a tariff provision that mirrors a Commission rule absent a ruling on a request for waiver of the rule itself.

Issue 2: Should this docket be closed?

Recommendation: Yes, if no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, this docket should be closed upon issuance of a consummating order. (Gervasi)

Staff Analysis: If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, this docket should be closed upon issuance of a consummating order.