

FLORIDA PUBLIC SERVICE COMMISSION
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MEMORANDUM

February 26, 1998

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FPSC - Records/Reporting

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

FROM: DIVISION OF APPEALS (HELTON) *Mat DES, JN a*
DIVISION OF ELECTRIC & GAS (GOAD, *26* WHEELER) *JOS*

RE: DOCKET NO. 971542-EI - FLORIDA POWER CORPORATION -
PETITION FOR DECLARATORY STATEMENT REGARDING ELIGIBILITY
OF PRE-1981 BUILDINGS FOR CONVERSION TO MASTER METERING
BY FLORIDA POWER CORPORATION

AGENDA: 3/10/98 - REGULAR AGENDA - DECISION ON DECLARATORY
STATEMENT - PARTICIPATION IS LIMITED TO COMMISSIONERS AND
STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\APP\WP\971542DE.RCM

CASE BACKGROUND

On November 24, 1997, Florida Power Corporation (FPC) filed a Petition for Declaratory Statement with the Commission. On January 16, 1998, Redington Towers One Condominium Association, Inc. (Redington Towers One) filed a "Brief for Declaratory Statement," which addressed FPC's petition. By letter dated January 21, 1998, FPC waived the 90-day statutorily required time to respond to its petition for declaratory statement. On February 20, 1998, Redington Towers Three Condominium Association, Inc. (Redington Towers Three) also filed a "Brief for Declaratory Statement."

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FPSC-RECORDS/REPORTING

DOCKET NO. 971542-EI
DATE: February 26, 1998

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Florida Power Corporations's petition for declaratory statement?

RECOMMENDATION: Yes, the Commission should grant the petition for declaratory statement in the affirmative.

STAFF ANALYSIS: Section 120.565, Florida Statutes, provides in pertinent part:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

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.

(Petition at 2)

FPC alleges that it has received several requests from condominium associations and shopping malls to convert from

DOCKET NO. 971542-EI
DATE: February 26, 1998

individual to master meters for buildings constructed prior to 1981. (Petition at 2) In particular, FPC has received requests from Redington Towers One and Three to convert from individual to master meters. FPC acknowledges that it incorrectly converted Redington Towers Two, a sister condominium association to Redington Towers One and Three, to master meters. (Petition at 3)

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." (Petition at 4) FPC argues that paragraph (5)(a) should be read to be consistent with the underlying purpose behind the rule, which is to require individual metering. Staff agrees. 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." (Petition at 5)

Moreover, as argued by FPC, 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, the Commission declined to amend Rule 25-6.049 to allow buildings that are currently required to be individually metered by the utility to be master metered, and then sub-metered. Among the reasons for declining to amend the rule was the mismatch that would result from residential customers taking service under a commercial rate. As the Commission stated,

[t]he rates charged to the various classes of customers are based on the unique usage characteristics of each class. We do not believe it would be appropriate to allow customers whose usage is residential in nature to take service under a commercial rate.

micromETER at 1:452. The micromETER petition was also denied because it was not clear whether master metered residential condominium units would qualify for residential conservation programs. Id. In the micromETER order, the Commission affirmed its policy to require condominium units to be individually metered. Id. at 1:453.

Based on the above discussion, FPC's petition for declaratory statement should be granted in the affirmative. The Commission should declare, as requested by FPC, that:

[a] building or facility listed in paragraph (5)(a) of the Master Metering Rule that currently has individually

DOCKET NO. 971542-EI
DATE: February 26, 1998

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.

(Petition at 2)

ISSUE 2: Should the Commission accept the "Briefs for Declaratory Statement" filed by Redington Towers One Condominium Association, Inc. and Redington Towers Three Condominium Association, Inc.?

RECOMMENDATION: Yes, the Commission should accept these briefs and include them in the record and treat them as permissible communications in declaratory statement proceedings.

STAFF ANALYSIS: On January 16, 1998, Redington Towers One filed a "Brief for Declaratory Statement." Redington Towers Three, a sister condominium association, filed essentially the same brief on February 20, 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, it is appropriate to include them in the record of this proceeding for the Commission's consideration. The Commission has 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.

Staff does not find these arguments to be persuasive. Moreover, the reading of the rule sought by Towers One and Three would result in an interpretation in which buildings constructed prior to 1981 could switch back and forth between individual and master meters. This is not what the Commission 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

DOCKET NO. 971542-EI
DATE: February 26, 1998

master metered to avoid retroactive application of the rule.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: If the Commission accepts staff's recommendation in Issue 1, this docket should be closed.

STAFF ANALYSIS: If the Commission accepts staff's recommendation in Issue 1, a final order can be issued disposing of the petition and the docket be closed.