

ORIGINAL

PETITION FOR DECLARATORY STATEMENT
BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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-~~11~~
Filed July 28th, 2008

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AMENDED PETITION FOR DECLARATORY STATEMENT

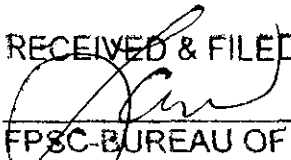
Pursuant to Section 120.565, Florida Statutes ("F.S."), and Rule 28-105.002, Florida Administrative Code ("F.A.C."), Petitioner, Valencia Area Condominium Association, Inc. ("Valencia"), hereby petitions the Florida Public Service Commission ("PSC," "Commission") for a Declaratory Statement concerning the applicability of the individual meter rule exemption, Rule 25-6.049(5)(a)3., F.A.C., as it applies to Petitioner in its particular set of circumstances. As grounds for this Petition, Petitioner states the following:

Valencia is Substantially Affected by the Rule

1. Petitioner, Valencia, is the residential association for buildings known as Valencia A-I, which are located at Kings Point at Delray Beach, Florida. Valencia's address is 7000 West Atlantic Avenue, Delray Beach, FL 33446. Valencia represents the interests, including consumer-related interests, of the residents of Valencia A-I, all of whom are members of Valencia.

2. Valencia's members are elderly individuals who, as Valencia A-I residents, may receive "personal services" through healthcare and household service providers, including Easy Living, Inc., a Delaware corporation engaged in the business of implementing technology and support services that enable the scheduling, coordination, and delivery of "personal services" under

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Section 400.402(17), Florida Statutes (1999). "Personal services" are defined in Section 400.402(17), F.S., as "direct 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."

3. Valencia's residents, 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 their residential units, and, accordingly, their 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 such, Valencia's members suffer an injury in fact due to their higher electric bills, and this injury is within the zone of interest of this proceeding, which is designed to address whether the master meter rule applies to Valencia A-1 to afford them relief. Therefore, Valencia's members are substantially affected by Rule 25-6.049(5)(a), F.A.C. Florida Optometric Ass'n. v. Dep't. of Professional Reg., 567 So. 2d 928 (Fla. 1st DCA 1990)(the "substantially affected" standard for purposes of having standing to obtain a declaratory statement is the same as the "substantially affected" standing standard applicable to rule challenges proceedings).

4. Obtaining a declaratory statement from the Commission concerning the applicability of the individual meter exemption in Rule 25-6.049(5)(a)3., F.A.C., to Valencia A-I, as a facility that qualifies for the exemption, will provide Valencia's members clear direction regarding the rule's effect on them. Further, because Valencia's members are similarly situated with respect to the rule's effect on them, it is much more efficient and cost-effective, both for Valencia's members and for the Commission, for Valencia to obtain the requested declaratory

statement on behalf of its members, rather than requiring each individual member to seek his or her own declaration from the Commission as to the rule's effect. Accordingly, Valencia is the appropriate entity to obtain a declaratory statement on behalf of its members in this case. Under Florida Home Builders Ass'n v. Dep't. 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 request the Commission to issue the declaratory statement in this proceeding.

**Valencia A-I is a "Similar Facility" Within
the Meaning of Rule 25-6.049(5)(a)3., F.A.C.**

5. Rule 25-6.049(5)(a)3., F.A.C., applies in this case to exempt Valencia A-I from the individual meter requirement in Rule 25-6.049, F.A.C. The individual meter exemption in Rule 25-6.049(5)(a)3., F.A.C., provides that individual electric meters are not required as follows:

3. 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 services 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 ...

Rule 25-6.049(5)(a)3., F.A.C. (emphasis added)....

For the reasons discussed herein, Valencia A-I is a "similar facility" within the meaning of the individual meter requirement exemption in Rule 25-6.049(5)(a)3., F.A.C.

6. First, Valencia is an age restricted facility whose residents must be at least 55 years of age. A substantial number of Valencia's residents have "aged in place," and have health conditions and limited life expectancies similar to those of residents of facilities certificated under

Chapter 651, F.S. Valencia's residents are being provided "personal services" on a regular basis, just as those services are provided to residents of facilities certificated under Chapter 651, F.S., who require or want such service. Furthermore, like the personal services provided at many continuing care retirement communities certificated under Chapter 651, F.S., and other similar facilities at which a range of care is provided, residents of Valencia are able to access and coordinate such personal services, through Easy Living's technology and support services. Through EZ Link and personal caregivers, Valencia's residents are provided a continuum of personal services and care keyed to the individual resident's needs. Because Valencia is a multi-unit residential facility whose residents have a similar composition of residents who are provided "personal services," Valencia is a "similar facility" to facilities certificated under Chapter 651, F.S., for purposes of qualifying for the individual meter exemption in Rule 25-6.049(5)(a)3., F.A.C.

7. Furthermore, Valencia is a "specialized-use housing accommodation" within the meaning of Rule 25-6.049(5)(a)3., F.A.C. The rule lists hospitals, nursing homes and other facilities offering nursing services, college dormitories, sorority and fraternity houses, motel, hotels, and other types of facilities as qualifying for the individual meter exemption. The common element among the listed types of facilities is that the term of residency of their residents is limited -- just as the term of residency of the elderly residents in Valencia is limited. The term of occupancy of the Valencia A-1 residents is comparable in duration to that of residents of many of the listed facilities -- college dormitories, sorority and fraternity houses, and nursing homes or similar nursing facilities, to name a few. The point is, master meters are permitted and are appropriate when the residents of the master metered housing accommodations are not extended

in nature, as is the case with Valencia's residents. Based on the individual meter exemption rule's intent, which is to allow master metering of residences whose occupants are not necessarily long term in nature, Valencia qualifies as a "similar facility" to those expressly listed in the rule for purposes of qualifying for the exemption in Rule 25-6.049(5)(a)3., F.A.C.

8. Valencia also is similar to non-licensed facilities that are listed in Rule 25-6.049(5)(a)3., F.A.C., such as convents, sorority houses, and fraternity houses, in that while these types of facilities are not subject to licensure under Chapter 651, F.S., the facilities nonetheless are subject to oversight and control by some entity, such as the church or a state or national fraternity organization, or, in the case of Valencia, a condominium association. This is one more means through which Valencia is a "similar facility" for purposes of qualifying for a master meter pursuant to Rule 25-6.049(5)(a)3., F.A.C.

9. In sum, because master metering is permitted for facilities certificated under Chapter 651, F.S., that provide the same or similar levels and types of service as are provided to Valencia's residents, and because of the limited life expectancy of Valencia's residents is similar to that of the residents of facilities that are expressly exempt from individual metering by Rule 25-6.049(5)(a)3., F.A.C., Valencia A-1 is a "similar facility" for purposes of Rule 25-6.049(5)(a)3., F.A.C., and therefore qualifies for an exemption from the individual meter requirement.

10. Accordingly, for the reasons set forth in this Petition, Valencia requests the Commission to issue a declaratory statement under Section 120.565, F.S., determining that Valencia A-I is exempt from the individual meter rule, pursuant to Rule 25-6.049(5)(a)3., F.A.C.

Case Law Directs Issuance of the Declaratory Statement

11. Recent case law rendered by the Florida Supreme Court authorizes and directs issuance of a declaratory statement under the circumstances set forth in this Petition. In Florida Department of Business and Professional Regulation v. Investment Corp. of Palm Beach, 747 So. 2d 374 (Fla. 1999), the Florida Supreme Court held that agencies are authorized to issue declaratory statements even when the statement may affect more persons or entities than only the petitioner. The Court cited with approval the First District Court of Appeals' opinion in Chiles v. Department of State, Div. of Elections, 711 So. 2d 151 (Fla. 1st DCA 1998), wherein that court had noted that the Florida Legislature, in 1996, deleted the term "only" from Section 120.565, F.S.¹ The Florida Supreme Court stated: "[t]he deletion of the word 'only' signifies that a petition for a declaratory statement need not raise an issue that is unique....[w]hile the issue must apply in the petitioner's particular set of circumstances, there is no longer a requirement that the issue apply only to the petitioner." Id. at 380, citing Chiles, 711 So. 2d at 154-55. The Court recognized that:

in enacting Section 120.565, F.S., the Legislature created an important tool to vindicate the individual 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....It renders the statute nearly useless to say ... that the agency cannot issue a declaratory statement if it will impact on anyone other than the petitioner.

Id. at 377.

12. This principle recently was reiterated in 1000 Friends of Florida v. Department of

¹ Prior to the 1996 amendments to Chapter 120, F.S., Section 120.565 allowed a petition for declaratory statement "as it applies to the petitioner in his or her particular set of circumstances only." Section 120.565, F.S. (1995)(emphasis added).

Community Affairs, 25 Fla. L. Weekly, D283 (Fla. 1st DCA Jan. 25, 2000), wherein the First District Court of Appeal reversed the Department of Community Affairs' dismissal of a petition for declaratory statement by an environmental organization that would affect not only the organization's members but also a local government and a state agency. In that case, the court cited the Florida Supreme Court's determination in Florida Department of Business and Professional Regulation v. Investment Corp. of Palm Beach, 747 So. 2d 374 (Fla. 1999), that declaratory statements appropriately may affect the interests of others than only the petitioner, and remanded the case and directed the Department of Community Affairs to issue the declaratory statement.

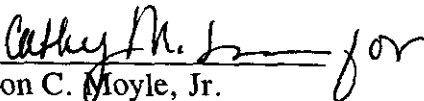
13. Under the circumstances discussed in this Petition, and pursuant to the Florida Supreme Court's and First District Court of Appeal's recent pronouncements on the legality, propriety, and desirability of agency issuance of declaratory statements to guide substantially affected persons, Valencia is entitled to a declaratory statement in this case on the question it has presented for the Commission to determine.

Conclusion

WHEREFORE, Petitioner, Valencia Area Condominium Association, Inc., hereby respectfully requests the Commission to issue a declaratory statement determining that the individual meter rule exemption in Rule 25-6.049(5)(a)3., F.A.C., applies to Valencia, so that it may, if it so chooses, have a master meter installed. It is Valencia's intent, should the Commission issue a declaratory statement determining that it qualifies for a master meter and should Valencia act to install a master meter, to continue to encourage energy conservation by continuing to

measure the usage of electricity by the individual residential units in Valencia A-I. The prohibition against the utilization of a master meter should not be construed to apply to Valencia, pursuant to Rule 25-6.049(5), F.A.C., and Valencia properly seeks a declaratory statement to this effect.

Respectfully submitted this 28th day of July, 2000.

 for

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