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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

IN THE MATTER OF PROPOSED  
AMENDMENT OF RULE 25-6.049,  
F.A.C., MEASURING CUSTOMER  
SERVICE

Docket No. 981104-EU  
Filed: January 21, 2000

**BRIEF OF VALENCIA AREA CONDOMINIUM ASSOCIATION  
AND POINT MANAGEMENT, INC.**

This brief is filed at the request of Public Service Commission ("PSC") staff who conducted the public hearing requested by Valencia Area Condominium Association and Point Management, Inc. in the above-styled matter.

Valencia Area Condominium Association and Point Management, Inc. believe that the proposed rule change which is the subject of this above-styled docket should not go forward for the reasons set forth below:

1. The PSC has asserted that this rule change is a mere clarification. Even if the proposed rule is intended to be a "mere clarification" of the existing rule, that "clarification" is not authorized under Chapter 120, Florida Statutes (1999). In 1999, the Florida Legislature amended Section 120.54(1)(f), Florida Statutes, to expressly state that: "[a]n agency may not adopt retroactive rules, including retroactive rules intended to clarify existing law, unless that power is expressly authorized by statute." Fla. CS for HB 107 (Enrolled), Section 4, at 9

(1999). The Legislature's intent in enacting that provision, as explained in the House of Representatives Final Legislative Staff Analysis for CS/HB 107, p. 4, June 30, 1999 (hereinafter "Staff Analysis" attached with amended Section 120.54(1)(f) as Exhibit 1), was to prohibit the retroactive application of rules and amendments, including "clarifying" amendments to existing rules. The Legislature amended Section 120.54(1)(f) specifically to

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legislatively negate the holding in Environmental Trust v. Department of Environmental Protection, 714 So. 2d 493 (Fla. 1<sup>st</sup> DCA 1998), wherein the court had approved the retroactive application of rules adopted to “merely clarify” existing rules, as long as the new rules did not establish new requirements. Staff Analysis, p. 8. The circumstances in the Environmental Trust case are precisely those at issue in this proceeding.

Here, the Commission proposes to adopt a rule for the purpose of “merely clarifying” an existing rule, and seeks to retroactively apply that rule to Valencia Area Condominium Association and Point Management, and similarly situated parties. There is no express authority in Chapter 366, Florida Statutes, or in any other statute, for the Commission to adopt the proposed master meter rule amendments and to retroactively apply these amendments. Thus, the Commission proposes to take action in this proceeding that is in patent disregard and contravention of Section 120.54(1)(f), Florida Statutes (1999), and the Legislature’s expressed intent in enacting that provision. As such, the proposed rule constitutes an invalid exercise of delegated legislative authority and is subject to invalidation in a Section 120.56 rule challenge proceeding.

2. Metering of customer service, including master metering and individual metering, is the subject of a generic investigation that has not yet been concluded. (See Docket No. 990188-EI.) Indeed, PSC staff has recently made certain requests for information from the state’s utilities. To date, this information has not been provided to PSC staff.

It is unwise to go forward with this proposed rule change when the results of the Commission’s generic investigation into master metering is unknown. Indeed, the results of the Commission’s generic investigation may run counter to the proposed rule amendments that are

the subject of this docket. For example, judicial notice should be taken that Joe Jenkins, the Director of the PSC's Electric and Gas Division, suggested at a public workshop in Docket No. 990188-EI held on April 14, 1999 that the entire master metering rule should be abolished since there is no credible evidence that individual metering saves electricity as compared to master metering.

3. The proposed rule enlarges, modifies and contravenes a specific provision of the law implemented by the proposed rule, something that runs afoul of section 120.52(8)(c), Florida Statutes. Specifically, section 366.05(3) provides the Commission only with the ability to "provide for the examination and testing of all meters used for any product or service of a public utility" and does not purport to address, in any way, the issue of individual metering versus master metering. The Legislature has not provided the Commission with specific authority for the adoption of the proposed rule as required by the 1996 amendments to the state's Administrative Procedures Act. Accordingly, the proposed rule is improper and an invalid exercise of delegated legislative authority. While that issue is not necessarily ripe for determination in this proceeding, this should be pointed out nevertheless since PSC staff suggested it would be considered in making recommendations to the Commission. (See public hearing transcript at page 86, line 21 to page 87, line 3.)

4. The policy of the rule as stated in the Commission's statement of estimated regulatory costs is that "individual meters would encourage conservation." This policy was affirmed at the public hearing by PSC witness Wheeler. (See public hearing transcript, page 40, lines 9-16.) There is little evidence that this stated policy is achieved by the proposed rule. At the recent rule hearing, the PSC witness who appeared in support of the rule, Mr. Wheeler

testified that there were no studies done within the last 10 years which proved energy savings resulted from individual metering versus master metering. More strikingly, the PSC, who is proposing this rule for the stated purpose of energy conservation, has never done a study which establishes that requiring individual meters rather than master meters results in energy conservation. (See testimony of witness Wheeler at page 55 of the public hearing transcript.) Accordingly, the proposed rule is not supported by competent substantial evidence and should be withdrawn.

5. The regulated public would be better served by having the rule withdrawn. The documents entered into the record with respect to the Reddington Towers Two case, in which a condominium was allowed to convert from individual metering to master metering, proves, at a minimum, that in situations involving customers of Florida Power Corporation, ratepayers may realize a savings of up to 38% off their electric bill by converting from individual meters to a master meter. (See Exhibit 7.) These are significant and considerable savings that should be considered before adopting the proposed rule amendments.

6. The proposed rule is not a mere clarification of the rule as some have suggested. Indeed, Mr. Wheeler was unable to point to anything in the record of the original rule proceeding that established the exemption from individual metering only applied to buildings constructed prior to 1981 that were also master metered. The plain language of the rule goes no further than providing for an exemption from individual metering for those buildings constructed prior to 1981. Even counsel for Florida Power Corporation recognized this when he stated:

Mr. Moyle made it clear in his questioning to Mr. Wheeler that this dual criteria was not before the Commission in 1980 — by dual criteria, I mean that

the building to be exempt had to be constructed prior to 1981 and had to have been — had to have been master metered at the time. (See transcript of public hearing at page 74, lines 8-14)

Since the proposed rule is a significant change from the original rule, it should be recognized as such and not termed a mere “clarification.”

7. The statement of estimated regulatory costs dated May 19, 1999 is fundamentally flawed given that it views the entire proposed rule as a “clarification”. The proposed rule greatly expands Rule 25-6.049(5)(a) as it currently exists. In light of the Reddington Towers situation discussed at the public hearing, wherein ratepayers realized significant savings on their electric bill, this proposed rule change will have a significant fiscal impact upon the ratepayers. The proposed change is likely to materially impact the residents of Reddington Two Condominium if forced to install individual meters. PSC staff was not sure at the public hearing whether or not the rule would apply to these individuals and could not answer the question about impacts on the residents of Reddington Two Condominium. (See public hearing transcript at page 38, line 13, through page 39, line 11.) Again, evidence provided at the public hearing established that the Reddington Two ratepayers saved 38 percent off their electric bill after switching from individual meters to a master meter. The Statement of Estimated Regulatory Costs (“SERC”) dismisses this impact upon individual ratepayers with a summary statement that, “Although it has been reported that this [conversion to master meter] has reduced the monthly electric bills for these condominium customers, a complete cost/benefit study has not been performed.” The purpose of the SERC is to examine this issue and, if necessary, perform a cost/benefit study. Failing to perform such a study, and thus being unaware of a rule’s impact upon ratepayers is

inconsistent with section 120.541 which calls for a properly prepared SERC.

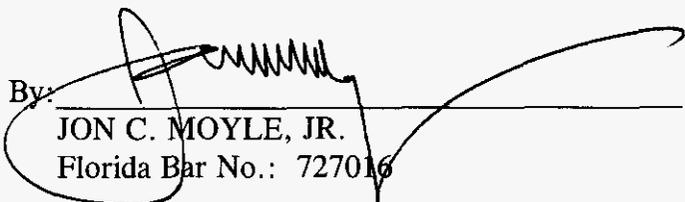
Wherefore, for the reasons set forth above, the proposed rule should be withdrawn until the outcome of the generic investigation into master metering is known. Additionally, the rule should be withdrawn because it is an invalid exercise of delegated legislative authority, it will prevent certain ratepayers from achieving significant cost savings off their electric bill, is not merely a clarifying amendment as has been previously stated, and contains an erroneous Statement of Regulatory Costs.

Dated this 21<sup>st</sup> day of January, 2000.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Brief of Valencia Area Condominium Association and Point Management, Inc. has been furnished by hand delivery\* or by U.S. Mail to the following parties of record this 21<sup>st</sup> day of January, 2000:

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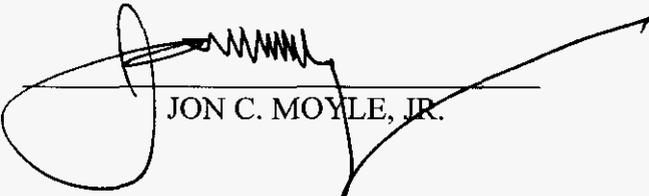
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