

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ASSOCIATION OF HOMES  
AND SERVICES FOR THE AGING, INC.  
d/b/a LEADINGAGE FLORIDA,

Case No. \_\_\_\_\_

Petitioner,

v.

AGENCY FOR HEALTH CARE  
ADMINISTRATION, AND  
DEPARTMENT OF ELDER AFFAIRS,

Respondents.

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PETITION TO CHALLENGE EMERGENCY RULES  
58AER17-1 and 59AER17-1

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Florida Association of Homes and Services for the Aging, Inc. d/b/a LeadingAge Florida ("LeadingAge") petitions for formal administrative proceedings pursuant to Sections 120.54(4), 120.56(1) and (5), Florida Statutes. LeadingAge seeks a determination that emergency rules proposed by the Agency for Health Care Administration ("Agency") and the Department of Elder Affairs ("Department") are invalid exercises of delegated legislative authority and that the Agency and Department have failed to demonstrate that emergency rules are unnecessary. In particular, LeadingAge challenges the validity of the Department's Rule 58AER17-1, "Procedures Regarding Emergency Environmental Control for Assisted Living Facilities," and the Agency's Rule 59AER17-1, "Nursing Home Emergency Power Plan," because they require long term care providers to implement new emergency plans within an impossible time frame.

**I. The Parties**

1. Petitioner is a Florida not-for-profit corporation established in 1963. LeadingAge is comprised of approximately 250 elder care organizations operating in Florida, including more than 100 nursing homes and assisted living facilities.

2. LeadingAge advocates on behalf of its members before the legislature and state agencies, including the Agency for Health Care Administration and the Department of Elder Affairs. A substantial number of LeadingAge's members are substantially affected by both Rule 58AER17-1 and 59AER17-1, both of which have already taken effect. The emergency rules that are the subject of this petition fall within the general scope of advocacy that LeadingAge offers its member nursing homes and assisted living facilities.

3. LeadingAge maintains offices at:

Leading Age Florida  
1812 Riggins Road  
Tallahassee, Florida 32308  
(850) 671-3700

4. However, for purposes of this petition, the Petitioner may be contacted through their undersigned counsel:

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215 South Monroe Street  
Tallahassee, Florida 32301  
(850) 681-0191  
[sfrazier@phrd.com](mailto:sfrazier@phrd.com)

5. The agencies affected by this petition are the Agency for Health Care Administration and Department of Elder Affairs.

6. The Agency maintains offices at :

Agency for Health Care Administration  
2727 Mahan Drive  
Tallahassee, Florida 32308  
(850) 412-3689

7. The Department maintains offices at:

Department of Elder Affairs  
4040 Esplanade Way, Ste. 315  
Tallahassee, Florida 32399-7000  
(850) 414-2000

## **II. The Emergency Rules**

8. The subjects of this petition are two emergency rules published by the Agency and the Department: Rule 58AER17-1, titled "Procedures Regarding Emergency Environmental Control for Assisted Living Facilities," was published by the Department and Rule 59AER17-1, titled "Nursing Home Emergency Power Plan," was published by the Agency.

9. On September 16, 2017, following the deaths of a number of residents of a nursing home located in Broward County, Florida, Gov. Scott issued a press release announcing that, at his direction, the Agency and Department would issue the emergency rules which are the subject of this proceeding. Based on information and belief, a number of state and local agencies are conducting criminal and administrative investigations to determine how these deaths occurred and the criminal and civil liability for the responsible parties.

10. The Agency first announced the emergency rules in a press release and publication on its web site on Saturday, September 16, 2017. See <http://ahca.myflorida.com/>. The Department offered a similar press release on that same day. See <http://elderaffairs.state.fl.us/index.php>

11. On Monday, September 18, 2017, the Agency and the Department published notice of the emergency rules in the Florida Administrative Register. See 43 Fla. Admin. Reg.,

No. 180, pp. 4002-4005 (Sept. 18, 2017). A copy of the Agency's and Department's concurrent Notice is attached as Exhibit "A."

12. Neither the Agency nor the Department conducted any public workshops or hearings regarding the emergency rules prior to their publication. LeadingAge and its member assisted living facilities and nursing homes received notice of the Emergency Rule through press reports beginning on September 16, 2017, and through the publication of the Emergency Rules on September 18, 2017

**A. Specific Reasons for Emergency Publication**

13. In a preamble to Rule 58ER17-1, the Department provided the following bases for the emergency nature of its rule:

**SPECIFIC REASONS FOR FINDING AN IMMEDIATE DANGER TO THE PUBLIC HEALTH, SAFETY OR WELFARE:** The State has experienced extreme shortages of electrical power that have jeopardized, and continue to jeopardize, the health, safety and welfare of residents in Florida's assisted living facilities. According to the United States Census Bureau, Florida has the largest percentage of residents age 65 and older in the nation. According to the Centers for Disease Control and Prevention, people age 65 years or older are more prone to heat-related health problems. An incompetent response by a nursing facility to a loss of air conditioning after Hurricane Irma resulted in the tragic loss of eight senior citizens at the Rehabilitation Center at Hollywood Hills. Thousands of frail seniors reside in assisted living facilities in Florida. Ensuring assisted living facilities maintain sufficient resources to provide alternative power sources during emergency situations mitigates the concerns related to the health, safety and welfare of residents in those assisted living facilities that experience loss of electrical power. This emergency rule establishes a process by which assisted living facilities shall obtain sufficient equipment and resources to ensure that the ambient temperature of assisted living facilities will be maintained at or below 80 degrees Fahrenheit within the facilities for a minimum of ninety-six (96) hours in the event of the loss of electrical power. Prompt implementation of this rule is necessary to ensure continuity of care and to ensure the health, safety and welfare of residents of Florida's assisted living facilities.

Ex. "A," 17 Fla. Adm. Reg., No. 180, p. 4002.

14. The Agency's explanation of the emergency that necessitated the publication of Rule 59AER17-1 is nearly identical to the Department's statement made in support of Rule 58ER17-1. *See* 43 Fla. Adm. Reg. No. 180, p. 4004 (Sept. 18, 2017).

15. Thus, the Agency's and the Department's bases for declaring an emergency for all assisted living facilities and nursing homes in Florida are: (1) that Florida has a large number of elderly residents; (2) that elderly residents are more prone to heat-related health problems; (3) that a single nursing home incompetently responded to a loss of power resulting in a tragic loss of life; (4) that thousands of elderly citizens reside in assisted living facilities; and (5) that the rule's requirements will mitigate health concerns in the event that an assisted living facility loses power.

16. Florida has maintained a large population of elderly for many years, and thousands of those residents have resided safely in assisted living facilities and nursing homes in Florida. Only the recent events at a single nursing home in Broward County are cited as the basis for declaring an immediate threat to the public's health and safety. The Agency and Department have not made any findings that indicate that the actions taken at that nursing home, which both agencies describe as an "incompetent response by a nursing facility to a loss of air conditioning after Hurricane Irma" are present in any other nursing home or in any assisted living facility in Florida.

17. Hurricane Irma made landfall in Florida on September 11, 2017, and has since subsided. Hurricane Irma no longer presents an emergency. Additionally, the Hurricane Season in Florida ends on November 30, 2017. The next hurricane season will not begin until June 1, 2018. The Emergency Rules require compliance no later than December 1, 2017. Thus, the Emergency Rules cannot be intended to address an emergency created by the current Hurricane

Season in Florida, as the Rules are not enforceable until after the Hurricane Season has ended, and the next season will not begin for more than six months.

**B. The Agency's Existing Rules**

18. The Agency has already promulgated rules addressing the disaster preparedness and generator requirements for all Florida assisted living facilities and nursing homes.

19. The Agency's Florida Administrative Code Rule 59A-4.126, titled "Disaster Preparedness" already requires Florida nursing homes to have an emergency plan, filed with local emergency management agencies. *See Fla. Admin. Code R. 59A-4.126(2)-(5).*

20. Florida nursing homes are also already required to have available generators and to regularly study their effectiveness. *See Fla. Admin. Code Rule 59A-4.134(12)(h).*

21. The Agency has also promulgated rules regarding the construction standards and operational requirements for assisted living facilities. *See Fla. Admin. Code Rule 58A-5.023, "Physical Plant Standards."* Likewise, assisted living facilities are already required to maintain an emergency management plan, including emergency power plans, pursuant to Florida Administrative Code Rule 58A-5.026.

**C. Rule 58AER17-1**

22. Rule 58AER17-1 requires all assisted living facilities in Florida to provide a detailed, written plan for the acquisition of sufficient generators to ensure ambient temperatures of 80 degrees for 96 hours in the event of a power loss. *See 58AER17-1(1)(a).* That plan must be submitted to the Department of Elder Affairs and local emergency management agencies within 45 days of the rule's filing with the Department of State, creating a deadline of October 31, 2017. The Emergency Rule also requires all assisted living facilities to acquire and maintain sufficient fuel to power such generators. *See Rule 58AER17-1(1)(b).*

23. Rule 58AER17-1(2) then requires assisted living facilities to implement the required plan within 60 days of the Rule's filing, creating a deadline of November 15, 2017 for all assisted living facilities to obtain all necessary regulatory approvals, purchase adequate generators, and install generators.

24. The penalties for failing to comply with the Emergency Rule are severe. If an assisted living facility is unable to obtain and install generators in the time required by the Emergency Rule, the Agency may revoke its license. *See* Rule 58AER17-1(9). The Emergency Rule also requires the Agency to impose fines of \$1,000 per day for failure to comply. *See* Rule 58AER17-1(10).

25. LeadingAge and its assisted living facility members have explored the feasibility of compliance with the emergency rule's requirements. It is not feasible or possible to comply with the emergency rule within the time frame the Rule requires.

**D. Rule 59AER17-1**

26. Rule 59AER17-1 requires all nursing home in Florida to provide a detailed, written plan for the acquisition sufficient generators to ensure ambient temperatures of 80 degrees for 96 hours in the event of a power loss. *See* 59AER17-1(1)(a). That plan must be submitted to the Agency for Health Care Administration and local emergency management agencies within 45 days of the rule's filing with the Department of State, creating a deadline of October 31, 2017. The Emergency Rule also requires all Florida nursing homes to acquire and maintain sufficient fuel to power newly required generators. *See* Rule 59AER17-1(1)(b).

27. Rule 59AER17-1(2) then requires nursing homes to implement the required plan within 60 days of the Rule's filing, creating a deadline of November 15, 2017 for all nursing

homes to obtain all necessary regulatory approvals, purchase adequate generators, and install generators.

28. The penalties for failing to comply with the Emergency Rule are severe. If a nursing home is unable to obtain and install generators in the time required by the Emergency Rule, the Agency may revoke its license. *See* Rule 59AER17-1(9). The Emergency Rule also requires the Agency to impose fines of \$1,000 per day for failure to comply. *See* Rule 59AER17-1(10).

29. LeadingAge and its nursing home members have explored the feasibility of compliance with the emergency rule's requirements. It is not feasible or possible to comply with the Emergency Rule within the time frame the Rule requires.

### **III. A Substantial Number of LeadingAge's Members are Substantially Affected by the Emergency Rules, as the Emergency Rules Impose Impossible Deadlines.**

30. The Emergency Rules apply to all assisted living facilities and nursing homes in Florida. LeadingAge represents and advocates on behalf more than 100 assisted living facilities and nursing homes.

31. LeadingAge has investigated whether it will be possible for its member assisted living facilities and nursing homes to comply with the Emergency Rules. That investigation demonstrates that: (1) custom generators could not be ordered, delivered and installed in time to comply with the Emergency Rules; (2) local zoning and other approvals needed before new generators may be installed cannot be obtained in time to comply with the Emergency Rules; (3) not all nursing homes and assisted living facilities can obtain permission to store adequate amounts of fuel required by the Rules within the time required by the Emergency Rules; and (4)



upon information and belief, the Agency does not have sufficient personnel to review the thousands of emergency management plans in the time required by the Emergency Rules.

32. Because compliance within the timeframes set forth in the Emergency Rules is not possible, each of those assisted living facilities and nursing homes face the likelihood of license revocation and fines of \$1,000 per day, no matter how diligently they attempt to comply with the Emergency Rules. Thus, a substantial number of LeadingAge's members are substantially affected by the Agency's Emergency Rules.

33. Additionally, the Emergency Rules will substantially affect the care of elderly populations that the Rule is intended to protect. By imposing impossible, arbitrary, and capricious deadlines, the Agency's Rules create a likelihood that assisted living facilities and nursing homes will have their licenses revoked. In the event of license revocation, assisted living facilities and nursing homes are not permitted to provide services to their residents. A plan of evacuation and relocation will become necessary.

34. If even a fraction of all assisted living facilities and nursing homes are required to relocate their residents due to license revocation, then Florida will experience a shortage of available nursing homes and assisted living facilities that might receive those displaced residents. For example, the average occupancy of Florida nursing homes in 2016 was greater than 86%. *See Florida Nursing Home Utilization by District, Jan. – Dec. 2016*, AHCA, p. 6. If just 20% of all Florida nursing homes are unable to comply with the Emergency Rule requirements, there will be no available nursing home beds for those displaced residents.

35. The disruption caused by relocating residents may present a greater threat to those residents' health, safety and welfare than the threat identified as a basis for the Emergency Rules.

#### **IV. Disputed Issues of Material Fact**

36. Disputed issues of material fact include, but are not limited to:
- (a) whether assisted living facilities in Florida can obtain and install new generators within 60 days;
  - (b) whether nursing homes in Florida can obtain and install new generators within 60 days;
  - (c) whether assisted living facilities in Florida are permitted to store fuel reserves on-site, as required by the Emergency Rules;
  - (d) whether nursing homes in Florida are permitted to store fuel reserves on-site, as required by the Emergency Rules;
  - (e) whether the Agency and Department have adequate resources to review and approve emergency plans from all nursing homes and assisted living facilities in Florida within the timeframes required by the Emergency Rules;
  - (f) whether shortages of electrical power have jeopardized and continue to jeopardize, the health, safety and welfare of residents in Florida's nursing homes and assisted living facilities;
  - (g) whether local emergency management agencies have the resources necessary to review revised emergency plans from every nursing home and assisted living facility in the State of Florida within the times required by the Emergency Rules
  - (h) whether the State Fire Marshall may complete required inspections of all nursing homes and assisted living facilities within the time required by the Emergency Rules;
  - (i) whether the Emergency Rules take only the action necessary to protect the public interest under the emergency procedure;

(j) whether the Agency and the Department published an adequate statement of facts and reasons for finding an immediate danger to public health safety and welfare;

(k) whether the Agency adequately stated reasons for concluding that the procedure used is fair under the circumstances;

(l) whether the Department adequately stated reasons for concluding that the procedure used is fair under the circumstances;

(m) whether prompt implementation of the Emergency Rules is necessary to assure continuity of care and to ensure the health, safety and welfare of residents of Florida's nursing homes and assisted living facilities; and

(n) whether the Department or Agency did any fact-finding to determine that less onerous alternatives than the Emergency Rules that address the stated emergency.

**V. Specific Laws and Rules that Warrant the Rules' Invalidity**

37. Rule 58AER17-1 indicates that it is intended to implement Section 429.19, 429.28, and 429.41, Florida Statutes

38. Section 429.19, Florida Statutes lists licensure violations for assisted living facilities and provides authority for the Agency to impose fines and other penalties. The law does not address emergency power plans or generator requirements.

39. Section 429.28, Florida Statutes sets forth assisted living facility Resident Bill of Rights. Those rights include the right to live in a safe and decent living environment, and to receive at least 45 days' notice before a resident may be relocated. Section 429.28 does not address emergency plans or generator requirements.

40. Section 429.41, Florida Statutes authorizes the Agency, in consultation with the Department, to adopt reasonable rules establishing, among other things, facility standards. This

statute addresses the preparation and annual update of comprehensive emergency management plans for Florida assisted living facilities, including the provision of emergency power. The law requires that such emergency plans be reviewed by local emergency management agency, and that the agency ensure that input is received from the Department of Elder Affairs, the Department of Health, the Agency for Health Care Administration and the Division of Emergency Management. *See* § 429.41(1)(b), Fla. Stat.

41. Section 429.41(1)(b), Florida Statutes grants local emergency management agencies 60 days to complete their review of facility emergency plans. The Emergency Rules shorten this time period to 15 days, in violation of the statute.

42. Rule 59AER17-1 indicates that it is intended to implement Sections 400.23, 408.819 and 408.821(4), Florida Statutes. Rule 59AER17-1 indicates that it is intended to implement those same laws.

43. Section 400.23, Florida Statutes authorizes the Agency to create rules that ensure quality care is offered to residents. The statute authorizes the Agency to adopt and enforce rules related to "the equipment essential to the health and welfare of the residents." *See* § 400.23(2)(d), Fla. Stat.

44. Section 400.23 also allows the Agency to adopt rules related to a facility's comprehensive emergency management plan, including emergency power. Such plans are "subject to the review and approval by local emergency management agenc[ies]." *See* § 400.23(2)(g), Fla. Stat. Specifically, the law requires:

During its review, the local emergency management agency shall ensure that the following agencies, at a minimum, are given the opportunity to review the plan: the Department of Elderly Affairs, the Department of Health, the Agency for Health Care Administration, and the Division of Emergency Management. Also, appropriate volunteer organizations must be given the opportunity to review the

plan. The local emergency management agency shall complete its review within 60 days and either approve the plan or advise the facility of necessary revisions.

§ 400.23(2)(g), Fla. Stat.

45. The Emergency Rules violate the requirements of Section 400.23, Florida Statutes by shortening the statutorily required time for review of emergency management plans. Under the Emergency Rules, local emergency management agencies are only provided 15 days to review the revised plans of every assisted living facility and nursing home in the State of Florida. *See* Rule 58AER17-1(1) and (2) and 59AER17-1(1) and (2). Given the number of facilities that must comply with the Rule, it may not be possible for emergency management agencies to provide any meaningful review, nor coordinate its review with other state agencies.

Section 408.819, Florida Statutes authorizes the Agency to adopt rules as necessary for licensing. The law specifically grants licensees adequate time to comply with new requirements. The statute provides:

**408.819 Rules.—The agency is authorized to adopt rules as necessary to administer this part. Any licensed provider that is in operation at the time of adoption of any applicable rule under this part or authorizing statutes shall be given a reasonable time under the particular circumstances, not to exceed 6 months after the date of such adoption, within which to comply with such rule, unless otherwise specified by rule.**

408.8019, Fla. Stat. (emphasis added).

46. Thus, Florida law requires that assisted living facilities and nursing homes be "given reasonable time under particular circumstances" with which to comply with new rule requirements. The Emergency Rules violate this law by imposing unreasonable, and impossible, time requirements.

47. Section 408.821(4), Florida Statutes grants the Agency the power to adopt emergency management planning rules, but it does not authorize the imposition of impossible deadlines:

(4) The agency may adopt rules relating to emergency management planning, communications, and operations. Licensees providing residential or inpatient services must utilize an online database approved by the agency to report information to the agency regarding the provider's emergency status, planning, or operations.

48. This proceeding also involves the application of Section 120.54(4). That statute provides the procedures applicable to any attempt to adopt emergency rules:

(4) EMERGENCY RULES.—

(a) If an agency finds that an immediate danger to the public health, safety, or welfare requires emergency action, the agency may adopt any rule necessitated by the immediate danger. The agency may adopt a rule by any procedure which is fair under the circumstances if:

1. The procedure provides at least the procedural protection given by other statutes, the State Constitution, or the United States Constitution.

2. The agency takes only that action necessary to protect the public interest under the emergency procedure.

3. The agency publishes in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. In any event, notice of emergency rules, other than those of educational units or units of government with jurisdiction in only one or a part of one county, including the full text of the rules, shall be published in the first available issue of the Florida Administrative Register and provided to the committee along with any material incorporated by reference in the rules. The agency's findings of immediate danger, necessity, and procedural fairness shall be judicially reviewable.

§ 120.54(4)(a)1.-3., Fla. Stat.

49. LeadingAge respectfully suggests that the Emergency Rules violate Section 120.54(4)(a)1. and 2. by providing inadequate procedural protections. The Emergency Rules

impose impossible standards and then authorize revocation and require fines of assisted living facility and nursing home licensure when those impossible deadlines are not met.

50. The Emergency Rules also take action beyond that which is necessary to protect the public interest.

51. The Agency's explanation of the emergency which led to the publication of the Emergency Rules is inadequate to demonstrate an immediate threat to the public health safety and welfare.

52. Finally, this rule challenge involves Sections 120.56(1) and (5) Florida Statutes, which set forth the requirements for challenges to emergency rules, including that this Petition be assigned to an administrative law judge within 7 days and that a final hearing be conducted within 14 days of that assignment, and that a decision will be rendered by the judge 14 days after the final hearing.

## **VI. Statement of Ultimate Fact that Warrant a Declaration that the Emergency Rules are Invalid**

53. There is no emergency that requires the imposition of an impossible deadline and the imminent revocation and imposition of fines on assisted living facility and nursing home licenses throughout the state. The Emergency Rules would create an emergency rather than solve one. LeadingAge respectfully suggests that the Agency's goal of requiring additional generator facilities may be accomplished by proposing rules pursuant to Section 120.54, Florida Statutes, providing a reasonable and achievable time frames for compliance, and without resorting to a declaration that emergency rules are required.

**VII. Relief Sought**

LeadingAge requests:

(a) that formal administrative proceedings be conducted in accordance with Sections 120.54(4), 120.56(1) and 120.56(5), Florida Statutes;

(b) that Emergency Rules 58AER17-1 and 59AER17-1 be determined to be invalid exercise of delegated legislative authority and lack a documented, immediate threat to public health safety or welfare required to justify the use of emergency rules.

Respectfully submitted,



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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that the foregoing was filed with:

Division Clerk  
Division of Administrative Hearings  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060

*Via Electronic Filing*

And that a copy of the forgoing was delivered by electronic mail to:

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*Via Electronic Mail*

this 26th day of September.

  
Seann M. Frazier

selling status, or this rule (or certain provisions herein) is replaced with a subsequent rule declaring its obsolescence, whichever occurs first, except as provided in paragraph (2)(c) below.

(c) The Florida Lottery reserves the right to make a case-by-case determination as to whether the retailer's non-selling status is for reasons not attributable to Hurricane Irma, in which case the weekly service charge will be assessed in the regular manner.

**(3) Electronic Funds Transfer (EFT) Delinquency Penalty.**

(a) Except as provided in paragraph (3)(b) below, a penalty for an EFT delinquency as set forth in Rule 53ER17-55, Florida Administrative Code, shall be waived until such time as the retailer regains its selling status and is no longer prevented from making bank deposits for reasons attributable to Hurricane Irma, or this rule (or certain provisions herein) is replaced with a subsequent rule declaring its obsolescence, whichever occurs first, except as provided in paragraph (3)(b) below.

(b) The Florida Lottery reserves the right to make a case-by-case determination as to whether an EFT delinquency penalty assessed to a retailer shall be waived and whether it shall be counted towards the number of delinquency returns in a twelve-month period and associated penalties. (Example: the retailer EFT delinquency occurrence is for reasons not attributable to Hurricane Irma.)

**(4) Lost, Stolen or Damaged Instant Lottery Ticket Service Fees and Charges.**

(a) Any service fee for books of Scratch-Off lottery tickets (also known as instant lottery tickets) reported as lost, stolen, or damaged as set forth in Rule 53ER08-43, Florida Administrative Code, that were in received status as of September 8, 2017, shall be waived except as provided in paragraph (4)(b) below.

(b) The Florida Lottery reserves the right to make a case-by-case determination as to whether the retailer's reporting of inactive lost, stolen, or damaged books is for reasons not attributable to Hurricane Irma, in which case the service fee will be assessed in the regular manner.

(c) Active books of lost, stolen or damaged tickets will be handled in accordance with subsection (3) of Rule 53ER08-43, Florida Administrative Code, except as follows. If the timing or circumstances surrounding the reporting of stolen books are determined by the Florida Lottery to be primarily attributable to Hurricane Irma, any associated charges will be waived.

(d) The fee waiver set forth in this subsection shall remain in effect until such time as this rule (or certain provisions herein) is replaced with a subsequent rule declaring its obsolescence.

**(5) Retailer Application Fee - Change of Location.**

(a) The \$10.00 fee for retailers that apply for a change of

location as set forth in Rule 53ER17-42, Florida Administrative Code, shall be waived except as provided in paragraph (5)(b) below.

(b) The Florida Lottery reserves the right to make a case-by-case determination as to whether the retailer's change in location is for reasons not attributable to Hurricane Irma, in which case the fee will be assessed in the regular manner.

(c) The fee waiver set forth in this subsection shall remain in effect until such time this rule (or certain provisions herein) is replaced with a subsequent rule declaring its obsolescence. Rulemaking Authority 24.105(9)(j), 24.109(1), 24.112(1) FS. Law Implemented 24.105(9)(j), 24.112(1) FS. History-New- 9-14-17.

THIS RULE TAKES EFFECT UPON BEING FILED WITH THE DEPARTMENT OF STATE UNLESS A LATER TIME AND DATE IS SPECIFIED IN THE RULE.  
EFFECTIVE DATE: 9-14-17.

**DEPARTMENT OF ELDER AFFAIRS**

**Federal Aging Programs**

RULE NO.: RULE TITLE:

58AER17-1: Procedures Regarding Emergency

Environmental Control for Assisted Living Facilities

SPECIFIC REASONS FOR FINDING AN IMMEDIATE DANGER TO THE PUBLIC HEALTH, SAFETY OR WELFARE: The State has experienced extreme shortages of electrical power that have jeopardized, and continue to jeopardize, the health, safety and welfare of residents in Florida's assisted living facilities. According to the United States Census Bureau, Florida has the largest percentage of residents age 65 and older in the nation. According to the Centers for Disease Control and Prevention, people age 65 years or older are more prone to heat-related health problems. An incompetent response by a nursing facility to a loss of air conditioning after Hurricane Irma resulted in the tragic loss of eight senior citizens at the Rehabilitation Center at Hollywood Hills. Thousands of frail seniors reside in assisted living facilities in Florida. Ensuring assisted living facilities maintain sufficient resources to provide alternative power sources during emergency situations mitigates the concerns related to the health, safety and welfare of residents in those assisted living facilities that experience loss of electrical power. This emergency rule establishes a process by which assisted living facilities shall obtain sufficient equipment and resources to ensure that the ambient temperature of assisted living facilities will be maintained at or below 80 degrees Fahrenheit within the facilities for a minimum of ninety-six (96) hours in the event of the loss of electrical power. Prompt implementation of this rule is necessary to ensure continuity of care and to ensure the health, safety and welfare of residents of Florida's assisted living facilities.



**REASON FOR CONCLUDING THAT THE PROCEDURE IS FAIR UNDER THE CIRCUMSTANCES:** The procedure used to adopt this emergency rule is fair as the State of Florida is under a declaration of emergency due to the massive destruction caused by Hurricane Irma, and it is essential to ensure as soon as possible that temperatures in assisted living facilities are maintained at a level providing for the safety of the residents residing therein; provides at least the procedural protection given by other statutes, the State Constitution, or the United States Constitution; and takes only that action necessary to protect the public interest under the emergency procedure.

**SUMMARY:** This emergency rule establishes a process for the Department of Elder Affairs to ensure that licensees of assisted living facilities develop and implement plans that ensure ambient temperatures will be maintained at or below 80 degrees Fahrenheit or less for a minimum of ninety-six (96) hours in the event of the loss of electrical power to an assisted living facility. **THE PERSON TO BE CONTACTED REGARDING THE EMERGENCY RULE IS:** Jeanne Curtin, Senior Attorney, Department of Elder Affairs, Office of the General Counsel, curtinj@elderaffairs.org, (850)414-2096, 4040 Esplanade Way, Tallahassee, FL 32399-7000.

**THE FULL TEXT OF THE EMERGENCY RULE IS:**

(1) Assisted living facilities shall, within forty-five (45) days of the effective date of this emergency rule provide, in writing, to the Department of Elder Affairs at ALFEMP@elderaffairs.org and to the local emergency management agency for review and approval, a detailed plan which includes the following criteria:

(a) The acquisition of a sufficient generator or sufficient generators to ensure that current licensees of assisted living facilities will be equipped to ensure ambient temperatures will be maintained at or below 80 degrees Fahrenheit for a minimum of ninety-six (96) hours in the event of the loss of electrical power.

(b) The acquisition and safe maintenance of sufficient fuel to ensure that in the event of the loss of electrical power the generators will maintain ambient temperatures at or below 80 degrees Fahrenheit for a minimum of ninety-six (96) hours after the loss of electrical power.

(c) The acquisition of services necessary to install, maintain, and test the equipment and its functions to ensure the safe and sufficient operation of the generator system installed in the assisted living facility.

(2) Each assisted living facility shall, within sixty (60) days of the effective date of this rule, have implemented the plan required under this rule.

(3) If the facility's initial submission of the plan is denied, then the local emergency management agency shall report the

denial to the Florida Division of Emergency Management and the facility within forty-eight (48) hours of the date of the denial.

(4) Within ten (10) business days of the date of the local county emergency management agency's notice of denial, the facility shall resubmit their plan.

(5) The county shall post all approved facility emergency management plans to their website within ten (10) days of the plan's approval.

(6) Within forty-eight (48) hours of the approval of the plan from local emergency management agency, the facility shall submit in writing proof of approval to the Agency for Health Care Administration and the Department of Elder Affairs.

(7) The State Fire Marshall shall conduct inspections to ensure compliance with this rule within fifteen (15) days of installation.

(8) Each assisted living facility shall develop and implement written policies and procedures to ensure that the facility can effectively and immediately activate, operate and maintain the generators and alternate fuel required for the operation of the generators.

(9) The Agency for Health Care Administration may revoke the assisted living facility's license for failure to comply with this rule.

(10) In addition to other remedies provided by law, violation of this rule shall result in a fine or sanction as provided in Section 429.19, F.S. of \$1,000 per day.

Rulemaking Authority 429.41, FS. Law Implemented 429.19, 429.28, 429.41, FS. History – New 9-16-17.

THIS RULE TAKES EFFECT UPON BEING FILED WITH THE DEPARTMENT OF STATE UNLESS A LATER TIME AND DATE IS SPECIFIED IN THE RULE.

EFFECTIVE DATE: 9/16/2017

**AGENCY FOR HEALTH CARE ADMINISTRATION**

**Health Facility and Agency Licensing**

RULE NO.: RULE TITLE:

59AER17-1 Nursing Home Emergency Power Plan

**SPECIFIC REASONS FOR FINDING AN IMMEDIATE DANGER TO THE PUBLIC HEALTH, SAFETY OR WELFARE:** The State has experienced extreme shortages of electrical power that have jeopardized, and continue to jeopardize, the health, safety, and welfare of residents in Florida's nursing homes. According to the United States Census Bureau, Florida has the largest percentage of residents age 65 and older in the nation. According to the Centers for Disease Control and Prevention, people age 65 years or older are more prone to health-related problems. An incompetent response by a nursing facility to a loss of air conditioning after Hurricane Irma resulted in the tragic loss of eight senior citizens at the Rehabilitation Center at Hollywood Hills. Thousands of frail

seniors reside in nursing homes in Florida. Ensuring that nursing homes maintain sufficient resources to provide alternative power sources during emergency situations mitigates the concerns related to the health, safety, and welfare of residents in those nursing homes that experience loss of electrical power. This emergency rule establishes a process for certain nursing homes to obtain sufficient equipment and resources to ensure that the ambient temperature of the nursing homes will be maintained at 80 degrees or less within the facilities for a minimum of ninety-six (96) hours in the event of the loss of electrical power. Prompt implementation of this rule is necessary to ensure continuity of care and to ensure the health, safety, and welfare of residents of Florida's nursing homes.

**REASON FOR CONCLUDING THAT THE PROCEDURE IS FAIR UNDER THE CIRCUMSTANCES:** The procedure used to adopt this emergency rule is fair, as the State of Florida is under a declaration of emergency due to the massive destruction caused by Hurricane Irma, and it is essential to ensure as soon as possible that temperatures in nursing homes are maintained at a level providing for the safety of the residents residing therein; provides at least the procedural protection given by other statutes, the State Constitution, or the United States Constitution; and takes only the action necessary to protect the public interest under the emergency procedure.

**SUMMARY:** This emergency rule establishes a process for the Agency for Health Care Administration to ensure that licensees of nursing homes develop and implement plans that ensure ambient temperatures will be maintained at 80 degrees or less for a minimum of ninety-six (96) hours in the event of the loss of electrical power to a health care facility.

**THE PERSON TO BE CONTACTED REGARDING THE EMERGENCY RULE IS:** Kimberly Stewart, Agency for Health Care Administration, Division of Health Quality Assurance, Bureau of Health Facility Regulation, 2727 Mahan Drive, MS# 28A, Tallahassee, FL 32308.

**THE FULL TEXT OF THE EMERGENCY RULE IS:**

59AER17-1 Nursing Home Emergency Power Plan

(1) Procedures Regarding Emergency Environmental Control for Nursing Homes. Nursing homes shall, within forty-five (45) days of the effective date of this emergency rule, provide in writing, to the Agency for Health Care Administration and to the local emergency management agency for review and approval, a detailed plan which includes the following criteria:

(a) The acquisition of a sufficient generator or sufficient generators to ensure that current licensees of nursing homes will be equipped to ensure ambient temperatures will be maintained

at 80 degrees or less for a period of a minimum of ninety-six (96) hours in the event of the loss of electrical power.

(b) The acquisition and safe maintenance of sufficient fuel to ensure that in an emergency situation the generators can function to maintain ambient temperatures at 80 degrees or less for a period of a minimum of ninety-six (96) hours in the event of the loss of electrical power.

(c) The acquisition of services necessary to install, maintain, and test the equipment and its functions to ensure the safe and sufficient operation of the generator system installed in the nursing home

(2) Each nursing home shall, within sixty (60) days of the effective date of this rule, have implemented the plan required under this rule.

(3) If the facility's initial submission of the plan is denied, then the local emergency management agency shall report the denial to the Florida Division of Emergency Management and the facility within forty-eight (48) hours of the date of denial.

(4) Within ten (10) business days of the date of the local county emergency management agency's notice of denial, the facility shall resubmit their plan.

(5) The county shall post all approved facility emergency management plans to their website within ten (10) days of the plan's approval.

(6) Within forty-eight (48) hours of the approval of the plan from the local emergency management agency, the facility shall submit in writing proof of approval to the Agency for Health Care Administration.

(7) The State Fire Marshall shall conduct inspections to ensure compliance with this rule within fifteen (15) days of installation.

(8) Each nursing home facility shall develop and implement written policies and procedures to ensure that the facility can effectively and immediately activate, operate and maintain the generators and alternate fuel required for the operation of the generators.

(9) The Agency for Health Care Administration may revoke the nursing home's license for failure to comply with this rule.

(10) In addition to other remedies provided by law, violation of this rule shall result in a fine or sanction of \$1,000 per day.

(11) The facility shall implement policies and procedures to ensure that the health care facility can effectively and immediately activate and maintain the generators and alternate fuel required for the operation of the generators.

Rulemaking Authority 400.23, 408.819, 408.821(4) FS. Law Implemented 400.23, 408.819, 408.821(4) FS. History – New 9/

THIS RULE TAKES EFFECT UPON BEING FILED WITH THE DEPARTMENT OF STATE UNLESS A LATER TIME AND DATE IS SPECIFIED IN THE RULE.

EFFECTIVE DATE: September 16, 2017

### Section V Petitions and Dispositions Regarding Rule Variance or Waiver

DEPARTMENT OF ENVIRONMENTAL PROTECTION

RULE NO.: RULE TITLE:

62-210.300 Permits Required

The Department of Environmental Protection hereby gives notice that it has issued an order on September 15, 2017, granting CEMEX Construction Materials Florida, LLC's Petition for a Waiver. The waiver concerns the Brooksville North Cement Plant in Hernando County, Facility ID: 0530010, operating pursuant to Title V Permit No. 0530010-045-AV. Petition was received on July 6, 2017. Notice of receipt of this Petition was published in the Florida Administrative Register on July 14, 2017; Volume 43, Number 136. The petition requested a waiver of the maximum renewal period for Air Operation Permits under Rule 62-210.300, F.A.C. No comments were received. The Order, OGC Case No. 17-0886, granted the Petition for a waiver from Rule 62-210.300, F.A.C., based on the Petitioner's demonstration that a strict application of the rule would result in substantial hardship to the Petitioner and that the purpose of the underlying statute will be or has been achieved by other means.

A copy of the Order may be obtained by contacting: Hastings Read, Department of Environmental Protection, Division of Air Resource Management, 2600 Blair Stone Road, M.S. 5500, Tallahassee, FL 32399-2400; (850)717-9017; [Hastings.Read@dep.state.fl.us](mailto:Hastings.Read@dep.state.fl.us) during normal business hours, 8:00 a.m. – 5:00 p.m., Monday through Friday, except legal holidays.

### Section VI Notice of Meetings, Workshops and Public Hearings

DEPARTMENT OF STATE

Division of Cultural Affairs

The Florida Division of Cultural Affairs announces a telephone conference call to which all persons are invited.

DATE AND TIME: October 3, 2017, 9:00 a.m. until conclusion. This meeting was rescheduled from September 18, 2017 due to Hurricane Irma.

PLACE: Teleconference; dial: 1(888)670-3525, then participant code: 6583652830#

GENERAL SUBJECT MATTER TO BE CONSIDERED: To review and score grant applications for the 2018-2019 Presenter 3 grants under the General Program Support and Specific Cultural Project Grant Programs.

A copy of the agenda may be obtained by contacting: the Division of Cultural Affairs at (850)245-6470 or by visiting our website: [www.florida-arts.org/calendar](http://www.florida-arts.org/calendar).

Pursuant to the provisions of the Americans with Disabilities Act, any person requiring special accommodations to participate in this workshop/meeting is asked to advise the agency at least 48 hours before the workshop/meeting by contacting: Rachelle Ashmore at [Rachelle.Ashmore@dos.myflorida.com](mailto:Rachelle.Ashmore@dos.myflorida.com). If you are hearing or speech impaired, please contact the agency using the Florida Relay Service, 1(800)955-8771 (TDD) or 1(800)955-8770 (Voice).

For more information, you may contact: Hillary Crawford at (850)245-6462 or [Hillary.Crawford@dos.myflorida.com](mailto:Hillary.Crawford@dos.myflorida.com).

DEPARTMENT OF STATE

Division of Cultural Affairs

The Florida Division of Cultural Affairs announces a telephone conference call to which all persons are invited.

DATE AND TIME: October 3, 2017, 2:00 p.m. until conclusion. This meeting was rescheduled from September 18, 2017 due to Hurricane Irma.

PLACE: Teleconference; dial: 1(888)670-3525, then participant code: 6583652830#

GENERAL SUBJECT MATTER TO BE CONSIDERED: To review and score grant applications for the 2018-2019 Literature grants under the General Program Support and Specific Cultural Project Grant Programs.

A copy of the agenda may be obtained by contacting: the