

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for emergency
variance from or waiver of
individual metering requirement
of Rule 25-6.049(5)(a), F.A.C.,
by Luxury Resorts International,
Inc. d/b/a The Atlantic.

DOCKET NO. 021005-EU
ORDER NO. PSC-03-0195-PAA-EU
ISSUED: February 10, 2003

The following Commissioners participated in the disposition of
this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

NOTICE OF PROPOSED AGENCY ACTION
ORDER GRANTING RULE WAIVER

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service
Commission that the action discussed herein is preliminary in
nature and will become final unless a person whose interests are
substantially affected files a petition for a formal proceeding,
pursuant to Rule 25-22.029, Florida Administrative Code.

I. Background

Luxury Resorts International, Inc. (LRI), the developer of a
proposed condominium in Ft. Lauderdale, Florida, requested a waiver
of the requirements of Rule 25-6.049(5)(a), Florida Administrative
Code. The rule sets forth the conditions under which individual
occupancy units in residential and commercial buildings must be
metered for their electricity use. The rule specifically states
that all occupancy units in condominiums must be individually
metered by the utility. The petitioner sought a waiver from this
requirement for The Atlantic Hotel Condominium (The Atlantic). If
granted, the waiver would allow the installation of a master meter

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to measure usage for all of the units in the condominium. The waiver is sought because LRI contends that, although The Atlantic will be a condominium, it will operate in a manner similar to hotels and motels, which are not required to be individually metered.

Pursuant to Section 120.542(6), Florida Statutes, notice of the petition was published in the Florida Administrative Weekly on October 18, 2002. No comments concerning the petition were filed and the comment period has expired.

We have jurisdiction over this matter pursuant to Sections 366.04, 366.05, and 366.06, Florida Statutes, as well as Section 120.542, Florida Statutes.

II. Request for Waiver of Rule 25-6.049(5)(a)

The petitioner is the developer of the Atlantic Hotel Condominium, a 129-unit condominium scheduled to be built in Fort Lauderdale, Florida. The condominium will be located in FPL's service area, and consists of 124 residential units, one hotel unit, and four commercial units. The units will be served by a central heating, ventilation, and air-conditioning system.

The hotel unit consists of the business offices of the hotel, the parking areas, the pool, the lobby, the hallways, the meeting rooms, the exercise room, and common areas meant for the use of the hotel guests and unit owners. Ownership and control of the hotel unit will remain with LRI.

Unit owners who choose to participate in the voluntary rental program make their units available for short-term transient rental purposes, in a manner similar to that of conventional hotel rooms. LRI states that it anticipates that 100% of the condominium unit owners will opt to participate. We have reviewed the sales materials provided to prospective owners, and they contain clear representations that the property will be operated as a hotel.

LRI represents that The Atlantic will be operated as a luxury hotel. It will be registered with and licensed by the Florida Department of Business and Professional Regulation to engage in the business of transient lodging, and will be registered with the

Florida Department of Revenue to collect and remit sales taxes on revenue realized from providing such transient accommodations. The Atlantic will maintain a registration desk and lobby where guests are required to check in and check out, a valet service to handle vehicle parking, a concierge, and a central telephone switchboard. The condominium will be in direct competition with hotels and motels in the area.

LRI states that the Fort Lauderdale City Commission granted a beach development permit to the petitioner for the construction of a hotel, restaurant, and retail facility on the site of the development on September 9, 1999. LRI further indicates that the zoning of the site allows only for commercial and transient usage.

Specifically, the relevant section of the Fort Lauderdale zoning ordinance that enumerates the permitted uses of the property states that only hotels, restaurants, moped/scooter rentals, commercial retail, parking garages, parking lots, accessory buildings and structures, automobile rental sites of 12 cars or less, and other uses catering to tourists are allowed. In response to a staff data request, LRI stated that it believed that it must operate a hotel and restaurant facility or be in violation of the zoning requirements. LRI also stated that some units could possibly be used for year round occupancy, so long as ". . . the facility in general is operated as a hotel."

Rule 25-6.049(5) (a), Florida Administrative Code, requires the utility to individually meter condominium units:

(5) (a) Individual electric metering by the utility shall be required 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.

(Emphasis added.)

LRI seeks a waiver that would allow it to be billed under a master meter that would serve all of the condominium units, instead of individual meters. This would allow LRI to be billed under a single commercial account, instead of 124 separate residential

accounts. This consolidation will likely result in lower electricity costs to The Atlantic.

A. Requirements of Section 120.542(5), Florida Statutes

Section 120.542(1), Florida Statutes, provides a two-pronged test for determining when waivers 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.)

B. The Purposes of the Underlying Statutes

Pursuant to Section 120.542, Florida Statutes, 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, Florida Administrative Code, implements Section 366.05(1), Florida Statutes, and Sections 366.81 and 366.82, Florida Statutes.

Section 366.05(1), Florida Statutes, gives the Commission the authority to prescribe rate classifications and service rules and regulations to be observed by the investor-owned electric utilities. Rule 25-6.049, Florida Administrative Code, implements this statute by setting forth the circumstances under which individual occupancy units must be metered by the utility.

Sections 366.81 and 366.82, Florida Statutes, are known collectively as the Florida Energy Efficiency and Conservation Act, or FEECA. This statute directs the Commission to adopt goals and approve plans related to the conservation of electric energy. Rule 25-6.049(5)(a), Florida Administrative Code, implements this

statute by setting forth the conditions under which individual occupancy units must be metered by the utility:

(5)(a) Individual electric metering by the utility shall be required 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.

The requirement that individual occupancy units be individually metered serves the conservation goals of FEECA because when unit owners are responsible for paying based on their actual electricity consumption, they are more likely to conserve to minimize their bills.

Rule 25-6.049(5)(a), Florida Administrative Code, provides certain exemptions from the individual metering requirement for facilities such as hospitals, nursing homes, college dormitories, convents, fraternity and sorority houses, hotels, and motels. The types of facilities exempted from the individual metering requirement are those in which, due to their nature or mode of operation, attributing usage to individual occupants is not practical. For example, hotels and motels are commercial enterprises in which the occupants of the units are not billed for their use of electricity, but pay a bundled rate for the use of a room for a limited time.

The rule also exempts timeshare plans from the individual metering requirement. In a timeshare plan, owners purchase the right to use a unit for a specified period of time, typically one week. The units are not used for permanent occupancy, and operate in a manner similar to hotels and motels. The owners do not directly pay for the electricity used during their stay. Instead, the cost of electricity is treated as a common expense that is apportioned based on ownership interest. Residents of nursing homes and similar care facilities also typically are not billed for their individual use of electricity, but pay a bundled price.

In each exemption, there is little or no conservation incentive gained by requiring individual metering, because the occupants of the units do not pay directly for the electricity they

use. Based on the representations of LRI, we believe the same reasoning applies to The Atlantic, because LRI has represented that the condominium will be operated in a manner similar to that of timeshare plans, hotels, and motels. Conservation efforts in such cases are more effectively carried out by the building manager, who can implement measures to reduce the overall electricity consumption of the facility.

Rule 25-6.049(6)(a), Florida Administrative Code, states that if master metering is used, the cost of electricity must be allocated to the individual occupancy units using a "reasonable apportionment method." LRI states that if the waiver is granted, the cost of electricity for The Atlantic will be recovered from the unit owners through the Condominium Association's Shared Expenses Budget. These expenses are recovered through a monthly charge, and each unit owner's pro rata share of the expenses is based on the square footage of the unit. We find that such an apportionment method is reasonable, and that the purpose of Section 366.05(1), Florida Statutes, will be fulfilled if such a method is used.

We believe that the purpose of FEECA is also fulfilled in this case. Because of the nature of the operation of The Atlantic and similar facilities, conservation efforts are most effectively carried out by the building manager.

C. Substantial Hardship and Principles of Fairness

Pursuant to Section 120.542, Florida Statutes, 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, technologic, 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.

1. Substantial Hardship

LRI asserts that application of the rule will create a substantial hardship because it will place The Atlantic at a

competitive disadvantage with respect to the motels and hotels with which LRI competes for guests.

Because motels and hotels are exempt from the individual metering requirement, they benefit from the lower electricity costs of master metering. If LRI is required to individually meter, they will incur higher costs than its competitors. We believe that the application of the rule in this instance will result in economic hardship as defined in Section 120.542(2), Florida Statutes.

2. Principles of Fairness

Section 120.542(2), Florida Statutes, states that 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.

LRI asserts, and we agree, that the application of the rule in this particular instance results in different treatment to similarly situated facilities. LRI contends that The Atlantic will be operated in a manner similar to that of timeshare plans, hotels, and motels, which are exempted from the individual metering requirement.

We believe that the disparate treatment of similar facilities that results from the application of the rule constitutes a violation of the principles of fairness as defined in Section 120.542(2), Florida Statutes.

III. CONCLUSION

Section 120.542(1), Florida Statutes, allows us to place conditions and time limits on waivers. Accordingly, we grant the waiver requested by LRI subject to the conditions and time limitations set forth below:

1. LRI must allocate the cost of electricity to the individual condominium unit owners using a reasonable apportionment method, as required by Rule 25-6.049(6)(a), Florida Administrative Code.

2. The Waiver is effective only so long as the condominium is operated and licensed as a transient occupancy facility. At such time the condominium is no longer so operated and licensed, LRI must immediately inform the utility, at which time the utility must install individual meters on all the occupancy units. In the event such a conversion to individual metering is required, The Atlantic will be solely responsible for the cost of such conversion.
3. The Waiver is effective only so long as all or substantially all of the units are operated on a transient basis.
4. LRI must file a report with the Commission 12 months after the date of closing of the sale of the first unit. The report must include the number of units sold and, of those, the number of units participating in the voluntary rental program.
5. The waiver shall continue until the Commission acts otherwise, and so long as LRI continues to be operated and licensed as a transient occupancy facility.

Based on the foregoing, it is

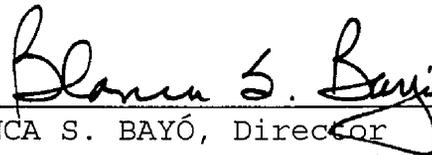
ORDERED by the Florida Public Service Commission that Luxury Resorts International, Inc. d/b/a The Atlantic's request for waiver of Rule 25-6.049(5), Florida Administrative Code, is hereby granted subject to the conditions and time limitations as set forth in the body of this Order. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDER NO. PSC-03-0195-PAA-EU
DOCKET NO. 021005-EU
PAGE 9

ORDERED that in the event this Order becomes final, this docket shall be closed.

By ORDER of the Florida Public Service Commission this 10th day of February, 2003.



BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

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DISSENT

Chairman Jaber dissents from the majority's decision in this matter.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

ORDER NO. PSC-03-0195-PAA-EU
DOCKET NO. 021005-EU
PAGE 10

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on March 3, 2003.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.