

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: October 11, 2013

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Page) *PHP*
Division of Economics (Rome) *CMC* *EJD* *JWD*

RE: Docket No. 130224-EU – Petition for variance from or waiver of Rule 25-6.049(5) and (6), F.A.C., by PRH-2600 Hallandale Beach, LLC

AGENDA: 10/24/13 – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: 11/19/13 – 90-day rule waiver deadline

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\130224.RCM.DOC

Case Background

By petition filed on August 21, 2013, PRH-2600 Hallandale Beach, LLC (PRH), a developer in Miami, Florida, requests a variance from or waiver of the requirements of Rule 25-6.049(5), and (6) Florida Administrative Code (F.A.C.). Rule 25-6.049(5), F.A.C., sets forth the conditions under which individual occupancy units in residential and commercial buildings must be metered for their electricity use and establishes criteria for exemptions to the individual metering requirement. Rule 25-6.049(5), F.A.C., also requires that all occupancy units in condominiums must be individually metered by the utility unless they meet one of the exemptions set forth in paragraphs (a) through (g) of the rule. Rule 25-6.049(6), F.A.C., states that in addition to satisfying the criteria in Rule 25-6.049(5)(g), F.A.C., the owner or developer of the condominium must attest to the utility that the criteria for the exemption have been met. PRH seeks a waiver of the individual metering requirement for Beachwalk Condominium,

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planned for construction in Hallandale Beach, Florida. If granted, the rule waiver would allow the installation of a single master meter to measure usage for all units in the condominium. The waiver is sought because PRH contends that, although Beachwalk Condominium will be a condominium, it will operate in a manner similar to hotels and motels, which, under paragraph (d) of Rule 25-6.049(5), F.A.C., are not required to be individually metered. The Commission designated Mr. Marc Mazo as a qualified representative to represent the interests of PRH in this docket by Order No. PSC-13-0392-FOF-OT, issued August 26, 2013.

Notice of the petition was published in the Florida Administrative Register on August 28, 2013. The comment period expired on September 11, 2013, and no comments were received. The Commission has jurisdiction pursuant to sections 366.04, 366.05, and 366.06, Florida Statutes (F.S.), as well as section 120.542, F.S.

Discussion of Issues

Issue 1: Should the Commission grant PRH's request for waiver of the requirements of Rule 25-6.049(5) and (6), F.A.C., for Beachwalk Condominium?

Recommendation: Yes. Staff recommends that the requested waiver of Rule 25-6.049(5) and (6), F.A.C., be granted, provided that: 1) Beachwalk Condominium allocates the cost of electricity to the individual condominium unit owners using a reasonable apportionment method, consistent with Rule 25-6.049(9)(a), F.A.C.; and 2) the waiver is effective for 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, Beachwalk Condominium must inform Florida Power & Light Company (FPL) within 10 days and request FPL to install individual meters on all the occupancy units. In the event such a conversion is required, Beachwalk Condominium will be solely responsible for the cost of such conversion, consistent with Rule 25-6.049(7), F.A.C. (Page, Rome)

Staff Analysis: The petitioner, PRH, is the developer of Beachwalk Condominium, which is located in FPL's service area. The condominium consists of 303 units, of which 216 are designated for transient lodging. PRH states that 84 of the Beachwalk Condominium units are identified as permanent occupancy units. PRH projects, however, that less than 10 percent of these 84 units will be used for permanent occupancy. The remaining three units are designated as commercial units.

Beachwalk Condominium will maintain a lobby, registration desk for check-in and check-out, and central telephone switchboard in compliance with Rule 25-6.049(5)(g)2. and 3., F.A.C. Customary hotel services, including concierge and housekeeping, will be made available.

PRH asserts that Beachwalk Condominium will be operated and licensed as a hotel condominium as defined in section 509.242(1), F.S. Gemstone Hotels and Resorts will manage Beachwalk Condominium as a first class hotel. Beachwalk Condominium will be registered with the Florida Department of Business and Professional Regulation as a hotel. Beachwalk Condominium will be in direct competition with hotels and motels in the area.

Rule 25-6.049(5), F.A.C., requires utilities to individually meter each separate condominium unit. PRH seeks a waiver that would allow Beachwalk Condominium to be billed under a master meter that would serve all of the condominium units instead of based on an individual meter on each unit. This would allow the residential units to be billed under a single commercial account, instead of separate residential accounts. This consolidation will likely result in lower electricity costs to Beachwalk Condominium. Although PRH projects annual savings in the amount of \$57,738, staff's calculation of Beachwalk Condominium's estimated annual savings is approximately \$84,010, using FPL's current Commission-approved tariffs.

Rule 25-6.049(5)(g), F.A.C., provides for an exception to the individual metering requirement for condominiums that meet the following three criteria: 1) the declaration of condominium requires that at least 95 percent of the units are used solely for overnight occupancy as defined in paragraph (8)(b) of this rule; 2) a registration desk, lobby and central telephone switchboard are maintained; and 3) a record is kept for each unit showing each check-

in and check-out date for the unit, and the name(s) of the individual(s) registered to occupy the unit between each check-in and check-out date. PRH seeks a waiver of Rule 25-6.049(5)(g), F.A.C., for Beachwalk Condominium because only 72 percent, not 95 percent, of the units will be used solely for overnight occupancy. Beachwalk Condominium meets the two other criteria contained in Rule 25-6.049(5)(g), F.A.C.

PRH also requests a waiver of Rule 25-6.049(6), F.A.C. Rule 25-6.049(6), F.A.C., requires the customer to attest to the utility that the criteria in paragraph (5)(g) have been met. As indicated above, PRH cannot attest to the (5)(g) requirements, and that is why it is requesting a waiver of Rule 25-6.049(6), F.A.C.

Requirements of Section 120.542, F.S.

Section 120.542(2), F.S., provides a two-pronged test for determining when waivers of 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).

A. Purpose of the Underlying Statutes

Pursuant to section 120.542, F.S., 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, F.A.C., implements section 366.05(1), F.S., and sections 366.81 and 366.82, F.S. Section 366.05(1), F.S., 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(5), and (6), F.A.C., implements this statute by setting forth the conditions under which individual occupancy must be metered by the utility. Sections 366.81 and 366.82, F.S., are known collectively as the Florida 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), F.A.C., implements this statute by setting forth the conditions under which individual occupancy units must be metered by the utility. 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), F.A.C., 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 for which it is not practical to attribute usage to individual occupants due to their nature or mode of operation.

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 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 PRH, staff believes the same reasoning applies to Beachwalk Condominium, because 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(9)(a), F.A.C., states that if master metering is used, the cost of electricity may be allocated to the individual occupancy units using “reasonable apportionment methods.” Consistent with this rule, PRH states that if the waiver is granted, the cost of electricity to Beachwalk Condominium will be recovered from the unit owners through a pro rata apportionment based on square footage of the units as compared to the total square footage of all units. This is the same apportionment method as will be used for other common expenses which are not consumed by and metered to individual units. Staff believes that this apportionment method is reasonable and fulfills the purpose of section 366.05(1), F.S.

Staff believes that the purpose of FEECA is fulfilled in this case. Because of the nature of the operation of Beachwalk Condominium and similar facilities, conservation efforts are most effectively carried out by the building manager.

B. Substantial Hardship and Principles of Fairness

Pursuant to section 120.542, F.S., 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, technological, 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. Staff believes that PRH has demonstrated that application of the rule creates a substantial hardship and violates principles of fairness.

Substantial Hardship. PRH asserts that application of the rule will create a substantial hardship because it will place Beachwalk Condominium at a competitive disadvantage with respect to the motels and hotels with which it competes for guests. Because motels and hotels are exempt from the individual metering requirement under paragraph (d) of Rule 25-6.049(5), F.A.C., they benefit from the lower electricity costs of master metering. If Beachwalk Condominium is required to individually meter, it will incur higher costs than its competitors.

Staff believes that the application of the rule in this instance will result in substantial economic hardship.

Principles of Fairness. Section 120.542(2), F.S., 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.

PRH asserts, and staff agrees, that the application of the rule in this particular instance results in different treatment to similarly situated facilities. PRH contends that Beachwalk Condominium will be operated in a manner similar to that of timeshare plans, hotels, and motels, which are exempt from the individual metering requirement under Rule 25-6.049(5)(d), F.A.C.

Staff believes 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), F.S.

Conclusion

Based upon the foregoing, staff believes that the petitioner, PRH, has demonstrated that the purpose of the underlying statutes will be achieved by other means by Beachwalk Condominium and that application of the rule would both create a substantial hardship and violate principles of fairness. Therefore, staff recommends that the requested rule waiver be granted, provided that:

- 1) Beachwalk Condominium allocates the cost of electricity to the individual owners using a reasonable apportionment method, consistent with Rule 25-6.049(9)(a), F.A.C.; and
- 2) The waiver is effective for 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, Beachwalk Condominium must inform FPL within 10 days and request FPL to install individual meters on all the occupancy units. In the event such a conversion to individual metering is required, Beachwalk Condominium will be solely responsible for the cost of such conversion, consistent with Rule 25-6.049(7), F.A.C.

The recommended conditions are similar to those the Commission required in Order Nos. PSC-05-0258-PAA-EU,¹ PSC-04-0861-PAA-EU,² PSC-03-1472-PAA-EU,³ and PSC-11-0253-PAA-EU.⁴ These dockets addressed waivers of the individual metering requirement for similar hotel/condominium facilities.

¹ Issued March 8, 2005, in Docket No. 050010-EU, In Re: Petition for variance from or waiver of metering requirement of Rule 25-6.049(5)(a), F.A.C., by Beach House Owners Association, Inc.

² Issued September 3, 2004, in Docket No. 040525-EU, In Re: Petition for variance from or waiver of metering requirement of Rule 25-6.049(5)(a), F.A.C., by Jetty East Condominium Association, Inc.

³ Issued December 30, 2003, in Docket No. 030974-EU, In Re: Petition for variance from or waiver of individual metering requirement of Rule 25-6.049(5)(a), F.A.C., by St. Maarten at Silver Shells Condominium Association, Inc.

⁴ Issued June 13, 2011, in Docket No. 110063-EU, In Re: Petition for variance from or waiver of individual metering requirements of Rule 25-6.049(5)(a), F.A.C., by Destin Gulfgate Owners Association, Inc.

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Issue 2: Should this docket be closed?

Recommendation: Yes, if no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, this docket should be closed upon issuance of a consummating order. (Page)

Staff Analysis: If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, this docket should be closed upon the issuance of a consummating order.