

In re: Petition for waiver of or
variance from individual
metering requirements of Rule
25-6.049(5), F.A.C., by 18001
Collins Avenue Condominium
Association, Inc.

DOCKET NO. 020944-EU
ORDER NO. PSC-02-1624-PAA-EU
ISSUED: November 25, 2002

The following Commissioners participated in the disposition of
this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
MICHAEL A. PALECKI
RUDOLPH "RUDY" BRADLEY

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

The petitioner, 18001 Collins Avenue Condominium Association,
Inc. (CCA), 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 seeks a waiver from this requirement for Trump
International Sonesta Beach, Resort, a Condominium (Sonesta). If

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granted, the waiver would allow the installation of a master meter to measure usage for all of the units in the condominium. The waiver is sought because CCA contends that, although the Sonesta will be a condominium, it will operate in a manner similar to that of 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 September 20, 2002. No comments concerning the petition were filed in the 14-day comment period provided by Rule 28-104.003, Florida Administrative Code.

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), Florida Administrative Code

The petitioner is a not-for-profit corporation which was formed to operate Sonesta, a 400-unit condominium scheduled to be built in Sunny Isles Beach, Florida. Florida Power & Light Company (FPL) will serve the condominium.

CCA asserts that Sonesta 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 Declaration of Condominium, Section 15.9, states: "It is intended that the Units may be used for transient and/or hotel rentals."

CCA indicates that up to a maximum of 5% of the units (20 of the 400 units) can be designated by the developer for permanent occupancy. This limitation on permanent occupancy is contained in the Declaration of Condominium, Section 15.1, which states in part that ". . . the Developer may not designate more than five (5%)

percent of the total number of Units as Units which may be occupied as permanent residences."

CCA asserts that the remaining 95% or more of the unit owners will not occupy their units on a year-round basis, but will treat their units as investments that are let on a daily or weekly basis to vacationers. CCA represents that the Sonesta Beach Resort will maintain a registration desk and lobby where guests are required to check in and check out, a valet service to handle vehicle parking, and a central telephone switchboard. The condominium will be in direct competition with hotels and motels in the area.

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).

CCA seeks a waiver that would allow them to install a master meter that would serve all of the condominium units, instead of installing individual meters on each unit. This would allow CCA to be billed under a single commercial account, instead of the 400 separate residential accounts that would be required under the rule. This consolidation will likely result in lower electricity costs to Sonesta.

A. Standard for Granting a Rule Waiver

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 Purpose of the Underlying Statute

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.

Section 366.05(1), Florida Statutes, states in pertinent part:

In the exercise of such jurisdiction, the commission shall have power to prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, and service rules and regulations to be observed by each public utility

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 primary objective of this individual metering requirement is to promote conservation. When unit owners are responsible for

paying for their actual electricity consumption, they are more likely to conserve in order 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, it is not practical to attribute usage to individual occupants. 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 time-share 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 CCA, we believe that the same reasoning applies to Sonesta, because the condominium will be operated in a manner similar to that of timeshare plans, hotels and motels. According to CCA, 95% or more of the condominium unit owners will not occupy their units on a permanent basis but will offer them for transient rental purposes. CCA states that the transient occupants of the units will pay a bundled rental rate for the unit, and will not be billed based on the actual amount of electricity they consume.

We believe that if, as a condition of the waiver, CCA is required to allocate FPL's billed cost of electricity to the condominium unit owners using a reasonable apportionment method, the purpose of the statute will be fulfilled.

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

CCA asserts that application of the rule will create a substantial hardship because it will place Sonesta at a competitive disadvantage with respect to the motels and hotels with which CCA 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 CCA 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.

CCA asserts, and we agree, that the application of the rule in this particular instance results in different treatment to similarly situated facilities. CCA contends that Sonesta 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.

D. Conclusion

We find that the requested rule waiver is hereby granted, provided that:

1. CCA allocates 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, CCA must immediately inform the utility, at which time the utility will install individual meters on all the occupancy units.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the request for waiver of Rule 25-6.049(5), Florida Administrative Code, by 18001 Collins Avenue Condominium Association, Inc. is hereby granted. It is further

ORDER NO. PSC-02-1624-PAA-EU

DOCKET NO. 020944-EU

PAGE 8

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

ORDERED that if no timely protest is filed, this docket shall be closed upon the issuance of a Consummating Order.

By ORDER of the Florida Public Service Commission this 25th day of November, 2002.

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

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

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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.

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 December 16, 2002.

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.