

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 TL Fontainebleau Tower
Limited Partnership, a Florida
Limited Partnership, d/b/a
Fontainebleau II.

DOCKET NO. 030557-EU
ORDER NO. PSC-03-0999-PAA-EU
ISSUED: September 5, 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

TL Fontainebleau Tower Limited Partnership, a Florida Limited
Partnership, d/b/a Fontainebleau II (TLFP), the developer of a
condominium in Miami Beach, Florida, is requesting 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

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occupancy units in condominiums must be individually metered by the utility. TLFP sought a waiver from this requirement for the Fontainebleau II Condominium (Fontainebleau II). If granted, the waiver would allow the installation of a single master meter to measure usage for all of the residential units in the condominium. The waiver is sought because TLFP contends that, although the Fontainebleau II 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 120.546(6), Florida Statutes, notice of the petition was published in the Florida Administrative Weekly on July 11, 2003. 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)

TLFP is the developer of the Fontainebleau II Condominium, a 463-unit condominium under construction in Miami Beach, Florida. The condominium is located in FPL's service area, and consists of 462 residential units and one hotel unit. The units will be served by a central chilled water 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 the developer.

Unit owners who opt 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. The rental program will be administered by Hilton Hotels, and unit owners sign a 1-year contract that renews automatically unless a 60-day notice of cancellation is given. All participants in the rental program must buy a furniture package that provides a standardized set of furnishings. TLFP states that it anticipates that 100% of the condominium unit owners will opt to participate.

The decision to participate in the rental program is made at the time the buyer closes on the sale of the unit. The buyers cannot close on the units until construction of the building has been completed, and a certificate of occupancy is issued. TLFP has stated that as of May 29, 2003, 376 of the 462 units are under contract for sale, and 100% of the buyers have elected to purchase the hotel furniture package.

The condominium documents contain no restrictions on year-round occupancy by the unit owners. However, based on the representation that all buyers to date have elected to purchase the hotel furniture package, we believe that it is highly probable that the facility will be used primarily for transient rental purposes.

TLFP represents that the Fontainebleau II 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 Fontainebleau II will be located adjacent to the Fontainebleau Hilton Hotel, an existing hotel/resort complex. The Fontainebleau II will share the check-in facilities for guest registration with the Fontainebleau Hilton Hotel. It will have a valet service to handle vehicle parking, a concierge, a central telephone switchboard, and will share a general manager with the Fontainebleau Hilton Hotel. The condominium will be in direct competition with hotels and motels in the area. TLFP states that an agreement with Hilton Hotels Corporation has been signed to operate Fontainebleau II. We have reviewed the sales materials provided to prospective owners, and they contain clear representations that the property will be 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.)

TLFP seeks a waiver that would allow them to be billed under a master meter that would serve all of the condominium units, instead of individual meters. This would allow the residential units to be billed under a single commercial account, instead of 462 separate residential accounts. This consolidation will likely result in lower electricity costs to Fontainebleau II.

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 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. 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 TLFP, we believe the same reasoning applies to the Fontainebleau II, 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 25¹-6.049(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." TLFP states that if the waiver is granted, the cost of electricity for the Fontainebleau II 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 Fontainebleau II 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

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

TLFP asserts, and we agree, that the application of the rule in this particular instance results in different treatment to similarly situated facilities. TLFP contends that the Fontainebleau II 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 TLFP subject to the conditions and time limitations set forth below:

1. TLFP 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 or until the Commission acts otherwise. At such time the condominium is no longer so operated and licensed or the Commission has acted otherwise, TLFP must immediately inform FPL, at which time FPL must install individual meters on all the occupancy units. In the event such a conversion to individual metering is required, the Fontainebleau II 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. TLFP must file a report which shall include the number of units sold and, of those, the number of units entered into the voluntary rental program, within 12 months after the first unit closes.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that TL Fontainebleau Tower Limited Partnership, a Florida Limited Partnership, d/b/a Fontainebleau II'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

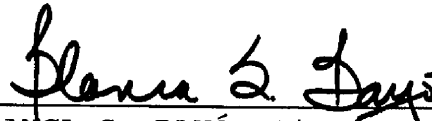
ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of the Commission Clerk and

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

By ORDER of the Florida Public Service Commission this 5th Day of September, 2003.



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

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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 September 26, 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.