

BEFORE THE PUBLIC SERVICE COMMISSION

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.

DOCKET NO. 050010-EU
ORDER NO. PSC-05-0258-PAA-EU
ISSUED: March 8, 2005

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON
LISA POLAK EDGAR

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

Beach House Owners Association, Inc. (BHOA), a not-for-profit corporation which operates a condominium in Destin, 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. BHOA seeks a waiver from this requirement for the Beach House Resort Condominium (Beach House). 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 BHOA contends that, although Beach House is a condominium, it operates 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 January 28, 2005. No comments concerning the petition were filed. 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.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

II. Request for Waiver of Rule 25-6.049(5)(a), Florida Administrative Code

The petitioner, BHOA, is the operator of the Beach House Resort Condominium in Destin, Florida. The condominium is located in Gulf's service area. The condominium consists of 106 residential units that are individually metered by the utility.

BHOA asserts that its condominium is operated and licensed as a "resort condominium" as defined in Section 509.242(1), Florida Statutes. BHOA indicated that only six of the 106 units are used for permanent occupancy. It asserts that the remaining unit owners do not occupy their units on a year-round basis, but treat their units as investments which are let on a daily or weekly basis to vacationers. BHOA maintains a registration desk and lobby where guests are required to check in and check out, and a central PBX telephone system. The units also have common water and sewer, cable, and housekeeping services.

Abbot Realty administers 81 of the 100 units offered for rent. Individual owners and real estate brokers manage the remaining 19 rental units. The units are available for short-term transient rental purposes, in a manner similar to that of conventional hotel rooms. Unit owners whose units are administered by Abbot Realty sign a 3-year contract that renews automatically for one year intervals unless a written 120-day notice of cancellation is given. All participants in the Abbot rental group must provide a standardized set of linens for their units and make their units available for rent for a period of no less than 8 weeks from June 1 to August 31 of each year.

The condominium documents contain no restrictions on year-round occupancy by the unit owners. However, based on the representation that 94% of all owners have elected to participate in rental programs or are offering their units for rent, we believe that it is highly probable that the facility will be used primarily for transient rental purposes for the foreseeable future.

BHOA represents that Beach House is operated as a hotel. It is registered with and licensed by the Florida Department of Business and Professional Regulation to engage in the business of transient lodging, and is registered with the Florida Department of Revenue to collect and remit sales taxes on revenue realized from providing such transient accommodations. 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.)

BHOA seeks a waiver that would allow it to be billed under a master meter that would serve all of the condominium units, instead of an individual meter on each unit. This would allow the residential units to be billed under a single commercial account, instead of 106 separate residential accounts. This consolidation will likely result in lower electricity costs to Beach House.

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. 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 us 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 must be metered by the utility. Sections 366.81 and 366.82, Florida Statutes, are known collectively as the Florida Efficiency and Conservation Act, or FEECA. This statute directs us 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 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 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 BHOA, we believe the same reasoning applies to Beach House, 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(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.” BHOA states that if the waiver is granted, the cost of electricity for Beach House will be recovered from the unit owners through a pro rata apportionment based on square footage, or through submetering, or by another reasonable apportionment method as required by Rule 25-6.049(6)(a), Florida Administrative Code. We believe that if BHOA chooses a reasonable apportionment method, the purpose of Section 366.05(1), Florida Statutes, will be fulfilled.

We believe that the purpose of FEECA is also fulfilled in this case. Because of the nature of the operation of Beach House 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

BHOA asserts that application of the rule will create a substantial hardship because it will place Beach House at a competitive disadvantage with respect to the motels and hotels with which Beach House 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 BHOA is required to individually meter, it 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.

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

We find that the disparate treatment of similar facilities that results from 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 BHOA provided that:¹

1. BHOA shall allocate the cost of electricity to the individual owners using a reasonable apportionment method, as required by Rule 25-6.049(6)(a), Florida Administrative Code.
2. BHOA shall be responsible for all of the costs associated with the conversion from individual metering to master metering.

¹ These conditions are similar to those the Commission required in Order No. PSC-03-1472-PAA-EU, issued December 30, 2003, in Docket No. 030974-EU, In Re: Petition for variance from or waiver of Rule 25-6.049(5)(a), F.A.C., by St. Maarten at Silver Shells Condominium Association, Inc., p. 8, and in Order No. PSC-04-0861-PAA-EU, 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., p. 6.

3. 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, BHOA shall immediately inform Gulf, at which time Gulf shall install individual meters on all the occupancy units. In the event such a conversion to individual metering is required, Beach House shall be solely responsible for the cost of such conversion.
4. The Waiver is effective only so long as all or substantially all of the units are operated on a transient basis.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Beach House Owners Association, Inc.'s request for waiver of Rule 25-6.049(5)(a), Florida Administrative Code, is hereby granted subject to the conditions and time limitations set forth in the body of this Order. It is further

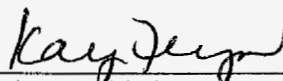
ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of the Commission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

ORDERED that if no timely protest is received to the proposed agency action, a Consummating Order shall be issued upon the expiration of the protest period, and this docket shall be closed.

By ORDER of the Florida Public Service Commission this 8th day of March, 2005.

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

By:



Kay Flynn, Chief
Bureau of Records

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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 March 29, 2005.

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.