

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition for variance or waiver from individual metering requirements of Rule 25-6.049(5)(a), F.A.C., by Fontainebleau Florida Tower 3, LLC d/b/a Fontainebleau III Ocean Club.

DOCKET NO. 050601-EU
ORDER NO. PSC-05-1261-PAA-EU
ISSUED: December 27, 2005

The following Commissioners participated in the disposition of this matter:

RUDOLPH "RUDY" BRADLEY, Chairman
J. TERRY DEASON
LISA POLAK EDGAR
ISILIO ARRIAGA

NOTICE OF PROPOSED AGENCY ACTION
ORDER GRANTING PETITION FOR 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.

On September 12, 2005, Fontainebleau Florida Tower 3, LLC (Fontainebleau), the developer of a proposed condominium in Miami Beach, Florida, requested a variance or waiver from the requirements of Rule 25-6.049(5)(a), Florida Administrative Code, which would allow the installation of a single master meter to measure usage for all of the residential units in the condominium. Notice of Fontainebleau's petition was published in the Florida Administrative Weekly on September 30, 2005. The comment period expired on October 14, 2005, and no comments were received.

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. For the reasons set forth below, we grant Fontainebleau's petition.

The petitioner, Fontainebleau, is the developer of the proposed Ocean Club Condominium in Miami Beach, Florida. The condominium will be located in FPL's service area. According to the petition, the condominium has not yet been built, but will consist of 286 residential units and one hotel unit. The units will be served by large central chillers, condensers, and compressors controlled by an automated energy management 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 health clubs and spas, and common areas meant for the use of

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the hotel guests and unit owners. Ownership and control of the hotel unit will remain with the developer.

Fontainebleau asserts that Ocean Club will be operated and licensed as a "resort condominium" as defined in Section 509.242(1), Florida Statutes, and that none of the 286 units are intended for permanent occupancy. Fontainebleau further states that the City of Miami Beach's zoning designation for the property, RM-3, permits only transient occupancy and does not allow owners to use the units as a permanent residence. Ocean Club will maintain a registration desk and lobby where guests are required to check in and check out, a concierge service, a doorman and valet, and a central PBX telephone system. The units will also have common water and sewer, cable, pest control, and housekeeping services. Fontainebleau states that the hotel unit owner will contract with an outside firm to administer all of the 286 units that will be offered for rent.

Unit owners will make their units available for rental either through a voluntary rental program administered by the hotel unit owner, or by offering rental independently. The rental program administered by the hotel unit owner requires a specified initial term and then subsequent renewal terms of one year, unless a 60-day notice of cancellation is given. All unit owners at Ocean Club must buy a standard set of furniture and furnishings for their units.

Fontainebleau has incorporated restrictions on occupancy into the Ocean Club Declaration of Condominium to insure that the units will be available for short-term transient rental purposes only, in a manner similar to that of conventional hotel rooms. At page 29, paragraph 16, subsection 1, the Declaration states that "no unit owner nor any member of the unit owner's family, nor any person legally dependent upon the unit owner may establish a permanent residence at the unit or any real property contiguous thereto." The Declaration states on page 4, paragraph A, subsection 2 that unit owners will make their units available for transient rental purposes more than 3 times per year for periods of less than thirty days or one calendar month, limiting year round occupancy.

Fontainebleau represents that Ocean Club will be operated like a hotel. It will register with and be licensed by the Florida Department of Business and Professional Regulation to engage in the business of transient lodging and will register 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.

Based on the restrictions in the Declaration of Condominium and the representation that 100% of all owners must participate in the rental program or will be offering their units for rent, we find it highly probable that the facility will be used primarily for transient rental purposes for the foreseeable future.

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

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.)

Fontainebleau seeks a waiver of this rule provision so that it will be permitted to take service via a master meter that will serve all of the condominium units, instead of taking service through individual meters for each unit. This will allow the residential units to be billed under a single commercial account, instead of 286 separate residential accounts. This consolidation will likely result in lower electricity costs to Ocean Club.

Section 120.542(2), Florida Statutes, provides a two-pronged test for determining when waivers and variances from agency rules shall be granted:

Variances and waivers 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 a rule would create a substantial hardship or would violate principles of fairness.

Purposes Of The Underlying Statutes

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 investor-owned electric utilities. Sections 366.81 and 366.82, Florida Statutes, became law as part of the Florida Energy Efficiency and Conservation Act, or FEECA. These statutes direct the Commission to adopt goals and approve plans related to the conservation of electric energy. Rule 25-6.049(5)(a) implements these statutes 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)(a) 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, 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 Fontainebleau, we believe the same reasoning applies to Ocean Club, 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.” Fontainebleau states that if the waiver is granted, the cost of electricity for Ocean Club 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). We find that if Fontainebleau chooses a reasonable apportionment method, the purpose of Section 366.05(1), Florida Statutes, will be fulfilled.

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

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. The statute defines substantial hardship a demonstrated economic, technologic, legal, or other type of hardship to the person requesting the waiver. The statute 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.

Fontainebleau asserts that application of the rule will create a substantial hardship because it will place Ocean Club at a competitive disadvantage with respect to the motels and hotels with which Ocean Club 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 Ocean Club is required to individually meter, it will incur higher costs than its competitors. We find that strict application of the rule in these circumstances will result in economic hardship to Ocean Club as defined in Section 120.542, Florida Statutes.

Further, Fontainebleau asserts that application of the rule in this particular instance results in different treatment to similarly situated facilities. Fontainebleau contends that Ocean Club will be operated in a manner similar to that of timeshare plans, hotels, and motels, which are exempted from the individual metering requirement. We agree and find that the disparate treatment of similar facilities that results from the literal application of the rule constitutes a violation of the principles of fairness as defined in Section 120.542, Florida Statutes.

In conclusion, we grant Fontainebleau's petition for rule waiver, subject to the following terms:

1. Fontainebleau will 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. The waiver is effective only so long as the condominium is operated and licensed as a transient occupancy facility or until this Commission acts otherwise. At such time the condominium is no longer so operated and licensed or this Commission has acted otherwise, Ocean Club 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, Ocean Club 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.

These conditions are similar to those that we have required in prior, similar cases. See Order No. PSC-02-1624-PAA-EU, issued November 25, 2002, in Docket No. 020944-EU, 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., p. 7; and Order No. PSC-03-0999-PAA-EU, issued September 5, 2003, in Docket No. 030557-EU, 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, p. 8. These cases addressed waivers of the individual metering requirement for the Sonesta Beach Resort and Fontainebleau II Condominiums, similar hotel/condominium facilities which had not been built or completed as of the time of the request for the waiver.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Fontainebleau Florida Tower 3, LLC's petition for variance or waiver of Rule 25-6.049(5)(a), Florida Administrative Code, is granted subject to the terms 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 in the event this Order becomes final, this docket shall be closed.

By ORDER of the Florida Public Service Commission this 27th day of December, 2005.

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

By: Kay Flynn
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.

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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 January 17, 2006.

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.