

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for variance from or waiver of  
Rule 25-6.049(5) and (6), F.A.C., by PRH-  
2600 Hallandale Beach, LLC.

DOCKET NO. 130224-EU  
ORDER NO. PSC-13-0579-PAA-EU  
ISSUED: October 31, 2013

The following Commissioners participated in the disposition of this matter:

RONALD A. BRISÉ, Chairman  
LISA POLAK EDGAR  
ART GRAHAM  
EDUARDO E. BALBIS  
JULIE I. BROWN

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

By petition filed on August 21, 2013, PRH-2600 Hallandale Beach, LLC (PRH), a developer in Miami, Florida, requested 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, 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. A waiver has been 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. We 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. We have jurisdiction pursuant to sections 366.04, 366.05, and 366.06, Florida Statutes (F.S.), as well as section 120.542, F.S.

## II. Request for Rule Waiver

The petitioner, PRH, is the developer of Beachwalk Condominium, which will be located in Florida Power and Light Company's (FPL) service area. The condominium will consist 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 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 and resort condominium as defined in section 509.242(1)(c), 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 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 separate residential accounts. This consolidation will likely result in lower electricity costs to Beachwalk Condominium. If FPL's current Commission-approved tariffs are used, Beachwalk Condominium's estimated annual savings are approximately \$84,010.

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 names 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.



III. 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 this 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), F.A.C., implements this statute by setting forth the circumstances under which individual occupancy must be metered by the utility. Sections 366.81 and 366.82, F.S., are known collectively as the Florida Energy 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), 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. 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.

Rule 25-6.049(5), F.A.C., 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, we find that 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. We find that this apportionment method is reasonable and fulfills the purpose of section 366.05(1), F.S.

We further find that the purpose of FEECA is also 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. We find 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. We find 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 we agree, 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 paragraph (d) of the rule. We find 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.

#### IV. Conclusion

Based upon the foregoing, we find that the petitioner 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, we hereby grant the requested rule waiver, 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.

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

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that PRH-2600 Hallandale Beach, LLC's request for waiver of Rule 25-6.049(5) and (6), Florida Administrative Code, is hereby granted subject to the conditions 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

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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.

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



the Office of Commission Clerk, 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 31st day of October, 2013.



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ANN COLE  
Commission Clerk  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399  
(850) 413-6770  
www.floridapsc.com

Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

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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 Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on November 21, 2013.

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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.