

State of Florida



Public Service Commission

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RECORDS AND REPORTING

DATE: FEBRUARY 8, 2001

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF ECONOMIC REGULATION (WHEELER) *DRW CSR RM Tgo*
DIVISION OF LEGAL SERVICES (WALKER) *Kow RVE*

RE: DOCKET NO. 001543-EU - PETITION FOR VARIANCE FROM OR WAIVER OF RULE 25-6.049(5)(A), F.A.C., BY SUNDESTIN INTERNATIONAL HOMEOWNERS ASSOCIATION, INC.

DOCKET NO. 001544-EU - PETITION FOR VARIANCE FROM OR WAIVER OF RULE 25-6.049(5)(A), F.A.C., BY DUNES OF PANAMA OWNERS ASSOCIATION, INC.

AGENDA: 02/20/01 - REGULAR AGENDA - RULE WAIVER - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: 90-DAY PERIOD PRESCRIBED BY SECTION 120.542, FLORIDA STATUTES (WAIVED BY PETITIONER)

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\ECR\WP\001543.RCM

CASE BACKGROUND

on October 9, 2000, the petitioners, Sundestin International Homeowners Association (SI) and Dunes of Panama Owners Association, Inc. (DP) filed requests for 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 by the utility. The rule specifically states that all occupancy units in condominiums must be individually metered by the utility. The petitioners both seek waivers from this requirement. If granted, the waivers would allow the conversion of the existing individual meters in their condominiums to master meters which would measure usage for all of the units. The waivers are sought because the petitioners contend

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that, although their facilities are condominiums, they operate in a manner similar to hotels or motels, which are not required to be individually metered.

The Commission has jurisdiction over this matter pursuant to Sections 366.04, 366.05 and 366.06, Florida Statutes, as well as in Section 120.542, Florida Statutes.

Notice of the petitions was published in the Florida Administrative Weekly on November 22, 2000. The comment period expired on December 13, 2000 and no comments were received.

ISSUE 1: Should the Commission grant Sundestin International Homeowners Association's request for waiver of the requirements of Rule 25-6.049(5)(a), Florida Administrative Code?

RECOMMENDATION: Yes. Staff believes that the requested rule waiver should be granted, provided that SI allocates the cost of electricity to the individual unit owners using a reasonable apportionment method, as required by Rule 25-6.049(6)(a), Florida Administrative Code, and provided that 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, SI must immediately inform the utility, at which time the utility will install individual meters on all the occupancy units. [WHEELER, WALKER]

STAFF ANALYSIS: The petitioner is a not-for-profit corporation which operates Sundestin International Condominium, a 280-unit condominium located in Destin, Florida. Gulf Power Company (Gulf) serves the condominium. Currently, the occupancy units of the condominium are individually metered, and bills for electric service are sent to and paid by the individual unit owners. The units are billed under Gulf's residential rate schedule.

SI asserts that its condominium 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. In response to staff discovery, SI indicates that only two of the 280 units are used for permanent occupancy. They assert 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. SI maintains a registration desk and lobby where guests are required to check in and check out, and a central telephone switchboard. The condominium is 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. The relevant portion of the rule reads as follows:

(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.)

SI now seeks a waiver which would allow the condominium to convert to a small number of master meters which would serve all of the occupancy units. This conversion would allow SI to switch from 280 separate residential accounts to a few commercial accounts, which would likely result in lower electricity costs.

I. 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 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. THE PURPOSES OF THE UNDERLYING STATUTE

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, requires SI, as a condominium, to be served through individual meters placed on each occupancy unit:

(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.)

The primary objective of this individual metering requirement is to promote conservation. When unit owners are directly responsible for paying for their 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 that are 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 rather 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 utilized 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 the case of each of the exemptions, 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 the petitioner, staff believes that the same reasoning would apply to SI, because its facility is operated in a manner similar to timeshare plans, hotels and motels. According to the petitioner, most unit owners do not occupy their units. SI states that transient occupants of the units pay a bundled rate for the unit, and are not billed based on the amount of electricity they consume.

If the individual metering rule requirement is waived for SI, the individual occupancy units will no longer be metered and billed by Gulf. 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. Staff believes that if, as a condition of the waiver, SI is required to allocate Gulf's billed cost of electricity to the unit owners using a reasonable apportionment method, the purpose of the statute will be fulfilled.

B. SUBSTANTIAL HARDSHIP/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.

SI believes that it is at a competitive disadvantage because it is not allowed to convert to master metering. Rule 25-6.049, Florida Administrative Code, specifically exempts hotels and motels from the individual metering requirement. SI requests a waiver from the individual metering requirement for as long as they are licensed and operated as a transient occupancy facility. In response to interrogatories, SI indicates that it intends to allocate costs to the individual unit owners using a reasonable apportionment method, which may include sub-metering or a formula based on square footage weighted for occupancy.

Staff believes that the application of Rule 25-6.049, Florida Administrative Code, in this particular instance, results in different treatment to similarly situated facilities. SI contends that it operates in a manner similar to timeshare plans, hotels, and motels, which are exempted from the master metering requirement. Staff believes that this disparity, and the higher cost paid by SI constitutes a substantial hardship within the meaning of Section 120.542, Florida Statutes. Staff believes that the similarities of the facilities are sufficient to grant SI's request for a waiver of Rule 25-6.049(5)(a), Florida Administrative Code.

II. CONCLUSION

Staff believes that the requested rule waiver should be granted, provided that:

1. SI allocates the cost of electricity to the individual unit owners using a reasonable apportionment method, as required by Rule 25-6.049(6)(a), Florida Administrative Code.

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

ISSUE 2: Should the Commission grant Dunes of Panama Owners Association, Inc.'s request for waiver of the requirements of Rule 25-6.049(5)(a), Florida Administrative Code?

RECOMMENDATION: Yes. Staff believes that the requested rule waiver should be granted, provided that SI allocates the cost of electricity to the individual unit owners using a reasonable apportionment method, as required by Rule 25-6.049(6)(a), Florida Administrative Code, and provided that 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, SI must immediately inform the utility, at which time the utility will install individual meters on all the occupancy units. [WHEELER, WALKER]

STAFF ANALYSIS: The petitioner is a not-for-profit corporation which operates Dunes of Panama Condominium, a 274-unit condominium located in Panama City, Florida. Gulf Power Company (Gulf) serves the condominium. Currently, the occupancy units of the condominium are individually metered, and bills for electric service are sent to and paid by the individual unit owners. The units are billed under Gulf's residential rate schedule.

DP asserts that its condominium 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. In response to staff discovery, DP indicates that only 21 of the 274 units are used for permanent occupancy. They assert 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. DP maintains a registration desk and lobby where guests are required to check in and check out, and a central telephone switchboard. The condominium is 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. The relevant portion of the rule reads as follows:

(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

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home and recreational vehicle parks for which construction is commenced after January 1, 1981. (Emphasis added.)

DP now seeks a waiver which would allow the condominium to convert to a small number of master meters which would serve all of the occupancy units. The petitioner contends that this conversion would allow DP to switch from 274 separate residential accounts to a few commercial accounts, which would likely result in lower electricity costs.

I. 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 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. THE PURPOSES OF THE UNDERLYING STATUTE

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, requires DP, as a condominium, to be served through individual meters placed on each occupancy unit:

(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.)

The primary objective of the individual metering requirement is to promote conservation. When unit owners are directly responsible for paying for their 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 that are 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 rather 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 utilized for permanent occupancy, and operate in a manner similar to hotels and motels. DP states that 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 the case of each of the exemptions, 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 the petitioner, staff believes that the same reasoning would apply to DP, because its facility is operated in a manner similar to timeshare plans, hotels and motels. According to DP, most unit owners do not occupy their units. The transient occupants of the units pay a bundled rate for the unit, and are not billed based on the amount of electricity they consume.

If the individual metering rule requirement is waived for DP, the individual occupancy units will no longer be metered and billed by Gulf. 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. Staff believes that if, as a condition of the waiver, DP is required to allocate Gulf's billed cost of electricity to the unit owners using a reasonable apportionment method, the purpose of the statute will be fulfilled.

B. SUBSTANTIAL HARDSHIP/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.

DP contends that it is at a competitive disadvantage because it is not allowed to convert to master metering. Rule 25-6.049, Florida Administrative Code, specifically exempts hotels and motels from the individual metering requirement. DP requests a waiver from the individual metering requirement for as long as they are licensed and operated as a transient occupancy facility. In response to interrogatories, DP indicates that it intends to allocate costs to the individual unit owners using a reasonable apportionment method, which may include sub-metering or a formula based on square footage weighted for occupancy.

Staff agrees that the application of Rule 25-6.049, Florida Administrative Code, in this particular instance results in different treatment to similarly situated facilities. DP operates in a manner similar to timeshare plans, hotels, and motels, which are exempted from the master metering requirement. Staff believes that this disparity, and the higher cost paid by DP constitutes a substantial hardship within the meaning of Section 120.542, Florida Statutes. Staff believes that the similarities of the facilities are sufficient to grant DP's request for a waiver of Rule 25-6.049(5)(a), Florida Administrative Code.

II. CONCLUSION

Staff believes that the requested rule waiver should be granted, provided that:

1. DP allocates the cost of electricity to the individual unit owners using a reasonable apportionment method, as required by Rule 25-6.049(6)(a), Florida Administrative Code.

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

ISSUE 3: Should these dockets be closed?

RECOMMENDATION: Yes, if no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, these dockets should be closed upon the issuance of a consummating order. [WALKER]

STAFF ANALYSIS: At the conclusion of the protest period, if no protest is filed, these dockets should be closed upon the issuance of a consummating order.