

State of Florida



Public Service Commission
CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: OCTOBER 24, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF ECONOMIC REGULATION (BAXTER, WHEELER) *BAXTER WHEELER*
OFFICE OF THE GENERAL COUNSEL (ECHTERNACHT) *ECHTERNACHT*

RE: DOCKET NO. 020944-EU - 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.

AGENDA: 11/05/02 - REGULAR AGENDA - PROPOSED AGENCY ACTION - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NOVEMBER 28, 2002 - STATUTORY DEADLINE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\ECR\WP\020944.RCM

CASE BACKGROUND

The petitioner, 18001 Collins Avenue Condominium Association, Inc. (CCA), 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 occupancy units in condominiums must be individually metered by the utility. The petitioner seeks a waiver from this requirement for Trump International Sonesta Beach Resort, a Condominium (Sonesta). If granted, the waiver would allow the installation of a master meter to measure usage for all of the units in the condominium. The waiver is sought because CCA contends that, although the Sonesta will be a condominium, it will operate in a manner similar to that of hotels and motels, which are not required to be individually metered.

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FPSC-COMMISSION CLERK

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Notice of the petition was published in the Florida Administrative Weekly on September 20, 2002. The comment period expired on October 4, 2002, and no comments were received.

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

ISSUE 1: Should the Commission grant 18001 Collins Avenue Condominium Association, Inc's request for waiver of the requirements of Rule 25-6.049(5)(a), Florida Administrative Code?

RECOMMENDATION: Yes. Staff recommends that the requested rule waiver be granted, provided that: (1) CCA allocates 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; and (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, CCA must immediately inform the utility, at which time the utility will install an individual meter on each occupancy unit. (BAXTER, WHEELER, ECHTERNACHT)

STAFF ANALYSIS: The petitioner is a not-for-profit corporation which was formed to operate Sonesta, a 400-unit condominium scheduled to be built in Sunny Isles Beach, Florida. Florida Power & Light Company (FPL) will serve the condominium.

CCA asserts that Sonesta 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. Remit sales taxes on revenue realized from providing such transient accommodations. The Declaration of Condominium, Section 15.9, states: "It is intended that the Units may be used for transient and/or hotel rentals."

CCA indicates that up to a maximum of 5% of the units (20 of the 400 units) can be designated by the developer for permanent occupancy. This limitation on permanent occupancy is contained in the Declaration of Condominium, Section 15.1, which states in part that, ". . . the Developer may not designate more than five (5%) percent of the total number of Units as Units which may be occupied as permanent residences."

CCA asserts that the remaining 95% or more of the unit owners will not occupy their units on a year-round basis, but will treat their units as investments that are let on a daily or weekly basis to vacationers. CCA represents that the Sonesta Beach Resort will maintain a registration desk and lobby where guests are required to check in and check out, a valet service to handle vehicle parking,

and a central telephone switchboard. 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.

CCA seeks a waiver that would allow them to install a master meter that would serve all of the condominium units, instead of installing individual meters on each unit. This would allow CCA to be billed under a single commercial account, instead of the 400 separate residential accounts that would be required under the rule. This consolidation will likely result in lower electricity costs to Sonesta.

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 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. 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.

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, 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 primary objective of this individual metering requirement is to promote conservation. When unit owners are responsible for paying for their actual 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 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 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 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 CCA, staff believes that the same reasoning applies to Sonesta, because the condominium will be operated in a manner similar to that of timeshare plans, hotels and motels. According to CCA, 95% or more of the condominium unit owners will not occupy their units on a permanent basis but will offer them for transient rental purposes. CCA states that the transient occupants of the units will pay a bundled rental rate for the unit, and will not be billed based on the actual amount of electricity they consume.

Staff believes that if, as a condition of the waiver, CCA is required to allocate FPL's billed cost of electricity to the condominium unit owners using a reasonable apportionment method, the purpose of the statute will be fulfilled.

B. 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.

Substantial Hardship. CCA asserts that application of the rule will create a substantial hardship because it will place Sonesta at a competitive disadvantage with respect to the motels and hotels with which CCA 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 CCA is required to individually meter, they will incur higher costs than its competitors. Staff believes that the application of the rule in this instance will result in

economic hardship as defined in Section 120.542(2), Florida Statutes.

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.

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

Staff believes 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.

II. CONCLUSION

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

1. CCA allocates 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. At such time the condominium is no longer so operated and licensed, CCA must immediately inform the utility, at which time the utility will install individual meters on all the occupancy units.

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ISSUE 2: Should this docket 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, this docket should be closed upon the issuance of a Consummating Order. (ECHTERNACHT)

STAFF ANALYSIS: 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, this docket should be closed upon the issuance of a Consummating Order.