

State of Florida



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COMMISSION
CLERK

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

DATE: August 5, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Division of Economic Regulation (Baxter) *DW*
Office of the General Counsel (Fleming) *KEF Matt G JOJ 198*

RE: Docket No. 040525-EU – Petition for variance from or waiver of metering requirement of Rule 25-6.049(a), F.A.C., by Jetty East Condominium Association, Inc.

AGENDA: 08/17/04 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

CRITICAL DATES: August 31, 2004

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\040525.RCM.DOC

Case Background

Jetty East Condominium Association, Inc. (JECA), a not-for-profit corporation which operates a condominium in Destin, Florida, 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. JECA seeks a waiver from this requirement for the Jetty East Condominiums (Jetty East). 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 JECA contends that, although Jetty East is a condominium, it operates in a manner similar to hotels and motels, which are not required to be individually metered.

Notice of the petition was published in the Florida Administrative Weekly on June 18, 2004. The comment period expired on July 2, 2004, and no comments were received.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

Docket No. 040525-EU

Date: August 5, 2004

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.

Discussion of Issues

Issue 1: Should the Commission grant JECA'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) JECA 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) JECA is responsible for all of the costs associated with the conversion from individual metering to master metering; (3) the waiver is effective only so long as the condominium is operated and licensed as a transient occupancy facility; and (4) all or substantially all of the units are operated on a transient basis. At such time the condominium is no longer so operated and licensed, JECA must immediately inform Gulf Power Company (Gulf), at which time Gulf will install individual meters on the occupancy units. In the event such a conversion to individual metering is required, JECA will be solely responsible for the cost of such conversion. (BAXTER, K. FLEMING)

Staff Analysis: The petitioner, JECA, is the operator of the Jetty East Condominium in Destin, Florida. The condominium is located in Gulf's service area. The condominium presently exists and consists of 198 residential units that are individually metered by the utility.

JECA asserts that its condominium is operated and licensed as a "resort condominium" as defined in Section 509.242 (1), Florida Statutes. JECA indicated that only 8 of the 198 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. JECA 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.

JECA administers all of the 190 units offered for rent. 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 Jetty East Condominium Association sign a 1-year contract that renews automatically unless a written 90-day notice of cancellation is given. All participants in the rental group must provide a standardized set of linens for their units.

The condominium documents contain no restrictions on year-round occupancy by the unit owners. However, based on the representation that 96% of all owners have elected to participate in rental programs or are offering their units for rent, staff believes that it is highly probable that the facility will be used primarily for transient rental purposes for the foreseeable future.

JECA represents that Jetty East 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.)

JECA seeks a waiver that would allow it to be billed under a master meter that would serve all of the condominium units, instead of individual meters on each unit. This would allow the residential units to be billed under a single commercial account, instead of 198 separate residential accounts. This consolidation will likely result in lower electricity costs to Jetty East.

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 STATUTES

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 the 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, 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 the Commission 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 in 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 JECA, staff believes the same reasoning applies to Jetty East, 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." JECA states that if the waiver is granted, the cost of electricity for Jetty East 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. Staff believes that if JECA chooses a reasonable apportionment method, the purpose of Section 366.05 (1), Florida Statutes, will be fulfilled.

Staff believes that the purpose of FEECA is also fulfilled in this case. Because of the nature of the operation of Jetty East 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, 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. JECA asserts that application of the rule will create a substantial hardship because it will place Jetty East at a competitive disadvantage with respect to the motels and hotels with which Jetty East 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 JECA is required to individually meter, it 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.

JECA asserts, and staff agrees, the application of the rule in this particular instance results in different treatment to similarly situated facilities. JECA contends that Jetty East 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 recommends that the requested rule waiver be granted, provided that:

1. JECA allocates 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. JECA is responsible for all of the costs associated with the conversion from individual metering to master metering.

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, JECA must immediately inform Gulf, at which time Gulf must install individual meters on all the occupancy units. In the event such a conversion to individual metering is required, Jetty East will 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.

These conditions are similar to those the Commission required in Order No. PSC-03-0323-CO-EU, issued September 8, 1998, in Docket No. 021005-EU, In Re: Petition for variance from or waiver of Rule 25-6.049 (5) (a), F.A.C., Regarding Electric Metering, by Holiday Villas II Condominium Association, Inc., p. 5 and in Order No. PSC-01-0626-PAA-EU, issued March 14, 2001 in Docket No. 001543-EU, In Re: Petition for variance from or waiver of Rule 25-6.049 (5) (a), F.A.C., by Sundestin Homeowners Association, Inc., pgs. 10-11 and 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. These dockets addressed waivers of the individual metering requirement for Holiday Villas II Condominium, Sundestin International Condominium, Dunes of Panama Condominium, and St. Maarten at Silver Shells Condominium, similar hotel/condominium facilities.

Docket No. 040525-EU

Date: August 5, 2004

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. (FLEMING)

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.