

State of Florida



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

DATE: November 22, 2005

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

FROM: Division of Economic Regulation (Baxter) *Baxter*
Office of the General Counsel (C. Keating) *WCK* *JDS*

RE: Docket No. 050601-EU – 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.

AGENDA: 12/06/05 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

CRITICAL DATES: December 11, 2005 – STATUTORY DEADLINE

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\050601.RCM.DOC

Case Background

On September 12, 2005, Fontainebleau Florida Tower 3, LLC (Fontainebleau), the developer of a proposed condominium in Miami Beach, Florida, requested 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. Fontainebleau seeks a waiver from this requirement for the Fontainebleau III Ocean Club Condominium (Ocean Club). 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 Fontainebleau contends that, although Ocean Club will be a condominium, it will operate 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 September 30, 2005. The comment period expired on October 14, 2005, and no comments were received.

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Docket No. 050601-EU
Date: November 22, 2005

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 Fontainebleau'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) Ocean Club 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; and (3) 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, Ocean Club must immediately inform Florida Power & Light Company (FPL), at which time FPL will install individual meters on 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. (BAXTER, C. KEATING)

Staff Analysis: 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. The condominium has not yet been built, and 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 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. Page 29 of the

Declaration, paragraph 16, subsection 1 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. 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, staff believes that it is highly probable that the facility will be used primarily for transient rental purposes for the foreseeable future.

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.

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.)

Fontainebleau seeks a waiver that will allow it to be billed under a master meter that will serve all of the condominium units, instead of individual meters on 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.

I. REQUIREMENTS OF SECTION 120.542(2), FLORIDA STATUTES

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. .

A. THE PURPOSES OF THE UNDERLYING STATUTES

Pursuant to Section 120.542, Florida Statutes, the petitioner must demonstrate that the purpose of the statute underlying the rule at issue either will be or has been achieved by other means. 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), Florida Administrative Code, 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), 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 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, staff believes 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), Florida Administrative Code. Staff believes that if Fontainebleau 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 Ocean Club 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. 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. 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. Fontainebleau asserts, and staff agrees, 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.

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. 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 the Commission acts otherwise. At such time the condominium is no longer so operated and licensed or the 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 the Commission required in 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 in 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 dockets 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.

Docket No. 050601-EU
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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. (C. KEATING)

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.