

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: June 27, 2018

TO: Office of Commission Clerk (Stauffer)

FROM: Office of the General Counsel (Page) *PHP*
Division of Economics (Guffey) *SKG GFC SML ELD*

RE: Docket No. 20180113-EU – Petition for variance from or waiver of individual metering requirements of Rule 25-6.049(5) and (6), F.A.C., by 4000 South Ocean Property Owner, LLLP.

AGENDA: 07/10/18 – Regular Agenda – Proposed Agency Action - Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Clark

CRITICAL DATES: Commission must grant or deny the Petition by August 9, 2018, pursuant to Section 120.542(8), F.S.

SPECIAL INSTRUCTIONS: None

Case Background

On May 7, 2018, 4000 South Ocean Property Owner, LLLP (Owner), pursuant to Section 120.542, Florida Statutes (F.S.), filed a Petition for Variance or Waiver (Petition) from Rule 25-6.049(5) and (6), Florida Administrative Code (F.A.C.), on behalf of Hyde Beach House Resort and Residences (Hyde Beach House). The Owner is the developer of Hyde Beach House, an oceanfront resort condominium to be operated in Hollywood, Florida. Hyde Beach House is in Florida Power & Light Company's (FPL) service territory.

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 electricity use and establishes the criteria for exemptions to the individual metering requirement. Rule 25-6.049(5), F.A.C., also

requires that all occupancy units in condominiums 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) and (6), F.A.C., the owner or developer of the condominium, the condominium association, or the customer must attest to the utility that the criteria for the exemption have been met.

The Owner seeks a waiver of the individual metering requirement for Hyde Beach House. If granted, the rule waiver would allow the installation of a single master meter to measure usage for all units in the condominium. The Owner states that although Hyde Beach House will be a condominium, the Owner contends that it will operate in a manner similar to hotels and motels, and that pursuant to subparagraph (5)(d) of Rule 25-6.049, F.A.C., individual metering is not required.

Notice of the Petition was published in the Florida Administrative Register on May 15, 2018, Vol. 44/95. The comment period expired on May 30, 2018, and no comments were received. The Commission has jurisdiction pursuant to Sections 366.05, 366.81, 366.82, 120.542, F.S.

Discussion of Issues

Issue 1: Should the Commission grant the Owner's request for waiver of the requirements of Rule 25-6.049(5) and (6), F.A.C.?

Recommendation: Yes. The Owner has demonstrated that the purpose of the underlying statutes will be achieved by other means and the application of the rule would create both a substantial hardship and a violation of the principles of fairness. The Owner, as a master meter customer, should be put on notice that: 1) Hyde Beach House must allocate the cost of electricity to the individual condominium unit 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 Hyde Beach House is operated and licensed as a transient occupancy facility. At such time as the condominium is no longer so operated and licensed, Hyde Beach House must inform FPL of this fact within 10 days and request that FPL install individual meters on all the occupancy units. In the event such a conversion is required, Hyde Beach House will be solely responsible for the cost of such conversion, consistent with Rule 25-6.049(7), F.A.C. (Page, Guffey)

Staff Analysis: The Hyde Beach House property consists of one building containing 345 units of which 265 are resort units and 77 are traditional units. The 265 resort units are restricted by the City of Hollywood Zoning Ordinance to stays of no more than 150 days in any consecutive twelve month period by the same occupant. There is no permanent residency allowed in the 265 resort units. The remaining 77 units are not restricted as to use, however, all units are sold with the intent to operate as a part of a hotel, and it is estimated that less than 10 percent of these 77 units will be used for permanent occupancy.

The Owner asserts that Hyde Beach House will be operated and licensed as a hotel condominium as defined in Section 509.242(1), F.S. Gemstone Hotels and Resorts will manage Hyde Beach House as a first class resort hotel. Pursuant to Section 509.242(1)(a), F.S., Hyde Beach House will be registered with the Florida Department of Business and Professional Regulation as a hotel. According to the Owner, Hyde Beach House will be in direct competition with hotels and motels in the area.

Rule 25-6.049(5), F.A.C., requires that utilities individually meter each separate condominium unit. The Owner seeks a waiver that would allow electricity usage by Hyde Beach House to be billed under a master meter serving all condominium units instead of an individual meter for each unit. This would allow the residential units to be billed on a single commercial account basis, instead of separate residential accounts. This consolidated approach to metering would likely result in lower electricity costs to Hyde Beach House. Although the Owner projects annual savings in the amount of \$42,809.28, staff's calculation of Hyde Beach House's estimated annual savings is approximately \$122,019 using FPL's current Commission-approved tariffs.¹

¹ Staff's calculation compares 342 annual residential bills (assuming 1,200kwh per bill) to one annual bill on the commercial GSLD-1 rate (assuming 1,200kwh and 900kw), using FPL's rates effective June 2018.

Rule 25-6.049(5)(g), F.A.C., provides an exception to the individual metering requirement for condominiums that meet the following three criteria:² (1) the declaration of condominium requires that at least 95 percent of the units are used solely for overnight occupancy as defined in subparagraph (8)(g) of the rule; (2) a registration desk, lobby and central telephone switchboard are maintained; and (3) a record is kept for each unit showing every check-in and check-out date for the unit, including the name(s) of the individual(s) registered to occupy the unit between each check-in and check-out date. Hyde Beach House fails to satisfy all criteria for master metering stated in Rule 25-6.049(5)(g), F.A.C. The condominium documents do not require that 95 percent of the units be used solely for overnight occupancy as set forth in Rule 25-6.049(5)(g), F.A.C. The condominium documents require only 77 percent³ of the units to be used solely for overnight occupancy. Hyde Beach House meets the other two criteria contained in Rule 25-6.049(5)(g)2.and 3., F.A.C., because it will have a registration desk and a registry with a check-in and check-out date.

Statutory Requirements for a Waiver

Section 120.542(2), F.S., establishes the circumstances 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 a rule would create a substantial hardship or would violate principles of fairness.

Purpose of the Underlying Statute

Pursuant to Section 120.542, F.S., the petitioner seeking a rule waiver must demonstrate that the purpose of the underlying statute will be or has been achieved by other means. Rule 25-6.049, F.A.C., implements Sections 366.05(1), 366.81, and 366.82, F.S. Section 366.05(1), F.S., grants 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(5) and (6), F.A.C., implements these statutes by setting forth the conditions 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 (FEECA) and direct the Commission to adopt goals and approve plans related to the conservation of electric energy. The requirement that individual occupancy units be individually metered serves the conservation goals of FEECA because if unit owners are responsible for costs based on their actual electricity consumption, they are more likely to conserve energy in order to minimize the cost of energy.

Staff believes that master metering also serves the intent of FEECA. Because of the nature of Hyde Beach House's operation, conservation efforts are most effectively carried out by the

² In addition, 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 rule also exempts timeshare plans from the individual metering requirement.

³ Staff calculations show an actual percentage rate of 77.5%.

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building manager. Based on the representations of the Owner, staff believes that Hyde Beach House 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.

If master metering is implemented, Rule 25-6.049(9)(a), F.A.C., provides that the cost of electricity may be allocated to individual occupancy units using “reasonable apportionment methods.” The Owner states that if the requested waiver is granted, the cost of electricity to Hyde Beach House will be recovered from the unit owners through a pro rata apportionment. This is the same apportionment method that will be used for other common expenses which are not consumed by and metered to individual units. Staff believes that this apportionment method is reasonable and meets the purpose of Section 366.05(1), F.S.

Substantial Hardship or Violation of Principles of Fairness

Pursuant to Section 120.542, F.S., a petition for variance or waiver must also demonstrate that application of the rule would create a substantial hardship or 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. Staff believes that the Owner has demonstrated that when the rule is applied to Hyde Beach House, a substantial hardship occurs and there is a violation of the principles of fairness.

The Owner asserts that application of the rule will cause a substantial hardship for Hyde Beach House because it will place Hyde Beach House at a competitive disadvantage in regard to the motels and hotels with which it will compete 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. The Owner states that if Hyde Beach House is required to individually meter, it will incur higher energy costs than its competitors. Staff believes that the application of the rule in this instance will result in substantial economic hardship for Hyde Beach House.

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. The Owner asserts that Hyde Beach House will operate in a manner similar to other hotels and motels in the area. Staff believes that applying the rule to Hyde Beach House in this particular instance will result in treatment that is disparate. Staff believes that the different treatment of similar facilities resulting from the application of Rule 25-6.049(6), F.A.C., to Hyde Beach House constitutes a violation of the principles of fairness as defined in Section 120.542(2), F.S.

Conclusion: Based upon the foregoing, staff believes that the Petition should be granted. The Owner has demonstrated that the purpose of the underlying statutes will be achieved by means other than the individual metering rule and that application of Rule 25-6.049(5) and (6), F.A.C.,

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would create a substantial hardship and violate principles of fairness for Hyde Beach House. Therefore, staff recommends that the requested rule waiver be granted, provided that:

- 1) Hyde Beach House 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.;
- 2) The waiver is effective for only so long as the condominium is operated and licensed as a transient occupancy facility. At such time as the condominium is no longer so operated and licensed, Hyde Beach House 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, Hyde Beach House will be solely responsible for the cost of such conversion, pursuant to Rule 25-6.049(7), F.A.C.

These recommended conditions are similar to those the Commission set forth in Order Nos. PSC-05-0258-PAA-EU,⁴ PSC-04-0861-PAA-EU,⁵ PSC-03-1472-PAA-EU,⁶ PSC-11-0253-PAA-EU,⁷ PSC-15-0363-PAA-EU,⁸ and PSC-15-0565-PAA-EU⁹ that address waivers of the individual metering requirement for condominium facilities.

⁴ Issued March 8, 2005, in Docket No. 20050010-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.*

⁵ Issued September 3, 2004, in Docket No. 20040525-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.*

⁶ Issued December 30, 2003, in Docket No. 20030974-EU, *In Re: Petition for variance from or waiver of individual metering requirement of Rule 25-6.049(5)(a), F.A.C., by St. Maarten at Silver Shells Condominium Association, Inc.*

⁷ Issued June 13, 2011, in Docket No. 20110063-EU, *In Re: Petition for variance from or waiver of individual metering requirements of Rule 25-6.049(5)(a), F.A.C., by Destin Gulfgate Owners Association, Inc.*

⁸ Issued September 8, 2015, in Docket No. 20150142-EU, *In re: Petition by Wiccan, LLC for waiver of Rule 25-6.049(5), Florida Administrative Code.*

⁹ Issued December 15, 2015, in Docket No. 20150222-EU, *In re: Petition for variance from or waiver of Rule 25-6.049(5) and (6), F.A.C., by 4111 South Ocean Drive, LLC.* This waiver was granted to the same Owner as in this Petition. The properties are located across the street.

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 issuance of a consummating order. (Page)

Staff Analysis: 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 issuance of a consummating order.