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# Public Service Commission

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CLERK

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

**DATE:** May 12, 2011

**TO:** Office of Commission Clerk (Cole)

**FROM:** Division of Economic Regulation (Draper, A. Roberts)  
Office of the General Counsel (Gervasi)

*EDP* *CS* *WAB* *SMC* *[Signature]*

**RE:** Docket No. 110063-EU – Petition for variance from or waiver of individual metering requirements of Rule 25-6.049(5)(a), FAC, by Destin Gulfgate Owners Association, Inc.

**AGENDA:** 05/24/11 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Balbis

**CRITICAL DATES:** 06/20/11 – 90-day rule waiver deadline

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\ECR\WP\110063.RCM.DOC

### Case Background

Destin Gulfgate Owners Association, Inc. (DGOA), a not-for-profit corporation which operates a condominium in Destin, Florida, requests a waiver of the requirements of Rule 25-6.049(5), Florida Administrative Code (F.A.C.). 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 requires that all occupancy units in condominiums must be individually metered by the utility unless they meet one of the exemptions set forth in paragraphs (a) through (g) of the rule. DGOA seeks a waiver from this requirement for the Destin Gulfgate Condominium (Destin Gulfgate). If granted, the rule waiver would allow the installation of a single master meter to measure usage for all of the residential units in the condominium. The

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waiver is sought because DGOA contends that, although Destin Gulfgate is a condominium, it operates in a manner similar to hotels and motels, which, under paragraph (d) of the rule, are not required to be individually metered. The Commission designated Mr. Marc Mazo as a qualified representative to represent the interests of DGOA in this docket by Order No. PSC-11-0171-FOF-OT, issued March 22, 2011.

Notice of the petition was published in the Florida Administrative Weekly on March 18, 2011. The comment period expired on April 1, 2011, and no comments were received.

The Commission has jurisdiction pursuant to sections 366.04, 366.05, and 366.06, Florida Statutes (F.S.), as well as section 120.542, F.S.

### **Discussion of Issues**

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

**Recommendation:** Yes. Staff recommends that the requested rule waiver be granted, provided that: 1) DGOA allocates 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.; 2) DGOA is responsible for all of the costs associated with the conversion from individual metering to master metering, consistent with Rule 25-6.049(7), F.A.C.; and 3) the waiver is effective for only so long as all or substantially all of the units are operated on a transient basis and the condominium is operated and licensed as a transient occupancy facility. At such time the condominium is no longer so operated and licensed, DGOA must inform Gulf Power Company (Gulf or utility) within 10 days and request Gulf to install individual meters on all the occupancy units. In the event such a conversion to individual metering is required, DGOA will be solely responsible for the cost of such conversion, consistent with Rule 25-6.049(7), F.A.C. (Draper, Gervasi)

**Staff Analysis:** The petitioner, DGOA, is the operator of Destin Gulfgate, which is located in Gulf's service area. The condominium consists of 66 residential units that are individually metered by the utility.

DGOA states that only four of the 66 units, or 6 percent of the units, are used for permanent occupancy. However, this number can change at any time as the condominium documents do not require any particular percentage of the units to be used for overnight occupancy.<sup>1</sup> The remaining unit owners employ DGOA to manage the rentals of their units on a daily and weekly basis to the traveling public, similar to hotels and motels throughout Florida. DGOA maintains a front desk in the lobby area for guest registration, where all rental guests must check in and check out in the same manner as in a hotel or motel. There is no central telephone switchboard.<sup>2</sup> However, individual telephones are provided in each unit for local or emergency calls.

DGOA asserts that its condominium is operated and licensed as a hotel and resort condominium as defined in section 509.242(1)(c), F.S. 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 is in direct competition with hotels and motels in the area.

Rule 25-6.049(5), F.A.C., requires utilities to individually meter each separate condominium unit. DGOA seeks a waiver that would allow it to be billed under a master meter that would serve all of the condominium units instead of an individual meter on each unit. This would allow the residential units to be billed under a single commercial account, instead of 66

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<sup>1</sup> Rule 25-6.049(5)(g)1., F.A.C., exempts condominiums from the individual metering requirements of the rule when the declaration of condominium requires that at least 95 percent of the units are used solely for overnight occupancy.

<sup>2</sup> Rule 25-6.049(5)(g)2., F.A.C., exempts condominiums from the individual metering requirements of the rule when a registration desk, lobby and central telephone switchboard are maintained.

separate residential accounts. This consolidation will likely result in lower electricity costs to Destin Gulfgate. DGOA projects its annual savings to be approximately \$44,000.

Requirements of Section 120.542(5), F.S.

Section 120.542(1), F.S., 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. Purpose of the Underlying Statutes

Pursuant to section 120.542, F.S., 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, F.A.C., implements section 366.05(1), F.S., and sections 366.81 and 366.82, F.S. Section 366.05(1), F.S., 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(5), F.A.C., implements this statute by setting forth the circumstances under which individual occupancy must be metered by the utility. Sections 366.81 and 366.82, F.S., 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), F.A.C., implements this statute 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), 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 types of facilities exempted from the individual metering requirement are those for which it is not practical to attribute usage to individual occupants due to their nature or mode of operation. 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 DGOA, staff believes the same reasoning applies to Destin Gulfgate, 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(9)(a), F.A.C., states that if master metering is used, the cost of electricity may be allocated to the individual occupancy units using “reasonable apportionment methods.” Consistent with this rule, DGOA states that if the waiver is granted, the cost of electricity to Destin Gulfgate will be recovered from the unit owners through a pro rata apportionment based on square footage, or through submetering, or by some other reasonable apportionment method. In response to a Staff Data Request, DGOA stated that the cost of electricity for each owner will be apportioned based on the actual KWH usage of each individual unit. Moreover, the common areas, including the lobby, meeting rooms, pool, hallways, parking areas, maintenance areas, and resort grounds, which are available to tenants, will not be separately metered if they can be included in the master meter. The unit owners currently share the costs of the common areas, and will continue to do so. Staff believes that this apportionment method is reasonable and fulfills the purpose of Section 366.05(1), F.S.

Staff believes that the purpose of FEECA is also fulfilled in this case. Because of the nature of the operation of Destin Gulfgate 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, F.S., 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. Staff believes that DGOA has demonstrated that application of the rule creates a substantial hardship and violates principles of fairness.

Substantial Hardship. DGOA asserts that application of the rule will create a substantial hardship because it will place Destin Gulfgate at a competitive disadvantage with respect to the motels and hotels with which it competes for guests. Because motels and hotels are exempt from the individual metering requirement under paragraph (d) of the rule, they benefit from the lower electricity costs of master metering. If DGOA is required to individually meter, it will incur higher costs than its competitors.

DGOA estimates that without being allowed to master meter, Destin Gulfgate will pay 25 to 30 percent more for the same electric service to operate its transient rental business as other hotels, motels and similarly situated resort condominiums that have been master metered. Staff believes that the application of the rule in this instance will result in substantial economic hardship.

Principles of Fairness. 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.

DGOA asserts, and staff agrees, that the application of the rule in this particular instance results in different treatment to similarly situated facilities. DGOA contends that Destin Gulfgate will be operated in a manner similar to that of timeshare plans, hotels, and motels, which are exempt from the individual metering requirement under paragraph (d) of the rule.

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), F.S.

### Conclusion

Based upon the foregoing, staff believes that the petitioner has demonstrated that the purpose of the underlying statutes will be achieved by other means by DGOA and that application of the rule would both create a substantial hardship and violate principles of fairness. Therefore, staff recommends that the requested rule waiver be granted, provided that:

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- 1) DGOA 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) DGOA is responsible for all of the costs associated with the conversion from individual metering to master metering, consistent with Rule 25-6.049(7), F.A.C.; and
- 3) The waiver is effective for only so long as all or substantially all of the units are operated on a transient basis and the condominium is operated and licensed as a transient occupancy facility. At such time the condominium is no longer so operated and licensed, DGOA must inform Gulf within 10 days and request Gulf to install individual meters on all the occupancy units. In the event such a conversion to individual metering is required, DGOA will be solely responsible for the cost of such conversion, consistent with Rule 25-6.049(7), F.A.C.

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The recommended conditions are similar to those the Commission required in Order Nos. PSC-05-0258-PAA-EU,<sup>3</sup> PSC-04-0861-PAA-EU,<sup>4</sup> and PSC-03-1472-PAA-EU.<sup>5</sup> Those dockets addressed waivers of the individual metering requirement for similar hotel/condominium facilities.

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<sup>3</sup> Issued March 8, 2005, in Docket No. 050010-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.

<sup>4</sup> Issued September 3, 2004, in Docket No. 040525-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.

<sup>5</sup> 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.

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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. (Gervasi)

**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 the issuance of a consummating order.