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State of Florida



Public Service Commission

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

DATE: November 18, 2015

TO: Office of Commission Clerk (Stauffer)

FROM: Division of Economics (Rome, Guffey) *CRK SKG PD E.D. GJB*
Office of the General Counsel (Harper) *AT SMC.*

RE: Docket No. 150222-EU – Petition for variance from or waiver of Rule 25-6.049(5) and (6), F.A.C., by 4111 South Ocean Drive, LLC.

AGENDA: 12/03/15 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Brown

CRITICAL DATES: Commission must grant or deny the petition by January 11, 2016, pursuant to Section 120.542(8), F.S.

SPECIAL INSTRUCTIONS: None

Case Background

4111 South Ocean Drive, LLC, Inc. (the “Developer”), the developer of the condominiums located at 4111 South Ocean Drive, Hollywood, Florida 33019 (“4111”), requests a waiver of the requirements of Rule 25-6.049(5) and (6), 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 at 4111 must be individually metered by the utility unless 4111 meets one of the exemptions set forth in paragraphs (a) through (g) of the rule. The Developer seeks a waiver from this requirement for 4111. If granted, the rule waiver would allow the installation of a single master meter to measure usage for all of the residential units at 4111. The waiver is sought because the Developer contends that 4111 will operate in a manner similar to hotels and motels, which, under paragraph (d) of the rule, are not required to be individually metered. The Commission

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designated Mr. Marc Mazo as a qualified representative to represent the interests of the Developer in this docket by Order No. PSC-15-0352-FOF-OT, issued September 1, 2015.

Notice of the petition was published in the Florida Administrative Weekly on October 14, 2015. The comment period expired on October 28, 2015, and no comments were received.

This recommendation addresses whether the Commission should grant the petition for rule waiver. The Commission has jurisdiction pursuant to Sections 366.05, and 366.81, 366.82, Florida Statutes (F.S.), and Section 120.542, F.S.

Discussion of Issues

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

Recommendation: Yes. The petitioner has demonstrated that the purpose of the underlying statutes will be achieved by other means and that application of the rule would both create a substantial hardship and violate principles of fairness for 4111. The petitioner should be put on notice that as a master meter customer: 1) 4111 must allocate the cost of electricity to the individual 4111 unit owners using a reasonable apportionment method, consistent with Rule 25-6.049(9)(a), F.A.C.; 2) 4111 will be 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 will be effective for only so long as all or substantially all of the units are operated on a transient basis and 4111 is operated and licensed as a transient occupancy facility. At such time 4111 is no longer so operated and licensed, 4111 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, 4111 will be solely responsible for the cost of such conversion, consistent with Rule 25-6.049(7), F.A.C. (Rome, Guffey, Harper)

Staff Analysis: The petitioner, the Developer, is the operator of 4111 South Ocean Drive, Hollywood, Florida, which is located in Florida Power & Light Company's (FPL) service area. The Developer states 4111 is under construction and that before or upon its completion, 4111 will be named Hyde Resort and Residences and will register and be licensed as a hotel and resort as defined in Section 509.242(a), F.S. Upon receiving its registration and license by the Florida Department of Business and Professional Regulation to engage in the business of transient lodging, 4111 will register with the Florida Department of Revenue to collect and remit sales taxes on revenue realized from providing such transient accommodations. 4111 will be in direct competition with hotels, motels, and resorts in the area.

The Developer states that 4111 will consist of 367 "resort" units, which are restricted by the City of Hollywood to stays of no more than 150 days in any consecutive 12 month period by the same occupant. No permanent residency will be allowed in the 367 resort units. Additionally, there will be 40 traditional condominium units, which will be sold with the intent to operate as a part of the hotel. There will also be 3 commercial units, which could potentially be a restaurant, café, or bakery. 4111 seeks waiver of Rule 25-6.049(5), F.A.C., because only 90 percent, not 95 percent, of the units will be used solely for overnight occupancy. 4111 meets the other criteria in Rule 25-6.049(5)(g), F.A.C.

4111 will be managed by Gemstone Hotel and Resorts (Gemstone), which is a full service hotel management company specializing in luxury, urban hotels and resorts. Gemstone will manage the rentals of 4111 units on a daily and weekly basis to the traveling public, similar to hotels, motels, and resorts throughout Florida. Gemstone will provide management personnel for the resort, including a General Manager, Assistant Manager, Front Desk Manager and Night Manager to oversee sales and marketing, guest services, accounting, security and the general safety and wellbeing of guests.

In addition, Gemstone will provide certain hotel-type services to all 4111 units which include but are not limited to: concierge services, day porter services, housekeeping, linen services, marketing and advertising, laundry and dry cleaning, transportation, and business service center. Gemstone will also maintain a lobby, front desk in the lobby area for guest registration and check-out, and a central telephone switchboard. Gemstone will assist with advertising and utilize a nationally known reservation software program to help keep the units at 4111 occupied. Rule 25-6.049(5), F.A.C., requires utilities to individually meter each separate 4111 unit. The Developer seeks a waiver that would allow 4111 to be billed under a master meter that would serve all of 4111's 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 separate residential accounts. These consolidations will likely result in lower electricity costs to 4111. Projected annual savings are approximately \$111,129 per year.

Requirements of Section 120.542, F.S.

Section 120.542, F.S., provides a two-pronged test for determining when waivers and variances from agency rules shall be granted. Section 120.542(2), F.S., states:

Variations 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. 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. For purposes of this section, "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.

(Emphasis added).

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 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 Energy 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 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, because the owners purchase the right to use a unit for a specified period of time, typically one week. Timeshare owners do not directly pay for the electricity used during their stay. Instead, the cost of electricity is apportioned based on ownership interest. Similarly, 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. Thus, 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(5)(d), F.A.C., provides individual electric meters shall not be required for lodging establishments such as hotels, motels, and similar facilities which are rented, leased, or otherwise provided to guests by an operator providing overnight occupancy as defined in paragraph (8)(b) of the rule. Rule 25-6.049(8)(b), F.A.C., states overnight occupancy means use of an occupancy unit for a short term such as per day or per week where permanent residency is not established.

Based on the representations of the Developer, staff believes the exemption provided by Rule 25-6.049(5)(d), F.A.C., is applicable to 4111's units because 4111 will be operated in a manner similar to that of hotels, motels, and resorts, with no permanent residency. Moreover, 4111 meets the criteria in Rule 25-6.049(5)(g), F.A.C., which includes maintaining a registration desk, lobby and central telephone switchboard and recording the names of individual occupying the units between each check-in and check-out date. Additionally, staff believes that the purpose of FEECA will be fulfilled and, because of the nature of the operation of 4111, conservation efforts will be effectively carried out by the General Manager, Assistant Manager, Chief Engineer, and Director of Housekeeping.

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, the Developer states that if the waiver is granted, the cost of electricity to 4111 will be recovered from the unit owners through a pro rata apportionment based on the square footage of the unit as compared to the total square footage of all units. Staff believes that this apportionment method is reasonable and fulfills the purpose of Section 366.05(1), F.S.

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. As discussed below, staff believes that the Developer has demonstrated that application of the rule creates a substantial hardship and violates principles of fairness.

The Developer asserts that application of the rule will create a substantial hardship because it will place 4111 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 (5)(d) of the rule, they benefit from the lower electricity costs of master metering. 4111 estimates that without being allowed to master meter, 4111 will pay more for the same electric service to operate its transient rental business than other hotels, motels, and similarly situated resorts that have been master metered. Staff believes that the application of the rule in this instance will result in substantial economic hardship.

The Developer asserts that the application of the rule in this particular instance results in different treatment to similarly situated facilities. The Developer contends that 4111 will be operated in a manner similar to that of hotels and motels, which are exempt from the individual metering requirement under paragraph (5)(d) of the rule. Thus, 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 recommends that the request for waiver of Rule 25-6.049(5) and (6), F.A.C., be granted. Staff believes that the petitioner has demonstrated that the purpose of the underlying statutes will be achieved by other means and that application of the rule would both create a substantial hardship and violate principles of fairness for 4111. The petitioner should be put on notice that as a master meter customer:

1) 4111 must allocate the cost of electricity to the individual 4111 unit owners using a reasonable apportionment method, consistent with Rule 25-6.049(9)(a), F.A.C.;

2) 4111 will be 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 will be effective for only so long as all or substantially all of the units are operated on a transient basis and 4111 is operated and licensed as a transient occupancy facility. At such time that 4111 is no longer so operated and licensed, 4111 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, 4111 will be solely responsible for the cost of such conversion, consistent with Rule 25-6.049(7), F.A.C.

The recommendation is similar to Commission Orders PSC-05-0258-PAA-EU,¹ PSC-04-0861-PAA-EU,² and PSC-13-0579-PAA-EU.³ Those dockets addressed waivers of the individual metering requirement for similar hotel/condominium facilities.

¹ 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.

² 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.

³ Issued October 21, 2013, in Docket No. 130224-EU, In Re: Petition for variance from or waiver of metering requirement of Rule 25-6.049(5)(a), F.A.C., by Hallandale Beach, LLC.

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. (Harper)

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.