

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: August 6, 2020

TO: Office of Commission Clerk (Teitzman)

FROM: Office of the General Counsel (Cowdery) *SMC*
Division of Economics (Coston, Guffey, Hampson) *EJD*
Division of Industry Development & Market Analysis (Hinton, Vogel) *CH*

RE: Docket No. 20200175-EU – Petition for emergency variance from or waiver of Rule 25-6.049(5)-(6), F.A.C., by Casa Devon Venture, LP.

AGENDA: 08/18/20 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Polmann

CRITICAL DATES: August 18, 2020 (30-day statutory deadline for the Commission to grant or deny the petition or determine it is not an emergency has been waived until this date)

SPECIAL INSTRUCTIONS: None

Case Background

On July 1, 2020, Casa Devon Venture, LP (Casa Devon) filed an emergency petition for a variance from or waiver of the individual electric metering requirement of Rule 25-6.049(5) and (6), Florida Administrative Code (F.A.C.), so that it can master meter its Casa Devon apartment building. As alternative relief, Casa Devon asks that if the Commission does not grant the variance, it should find that Casa Devon does not need a rule variance or waiver because the Casa Devon apartment falls within one of the individual metering requirement exceptions described in Rule 25-6.049(5)(c) or (d), F.A.C.

Rule 25-6.049, F.A.C.

Rule 25-6.049(5), F.A.C., requires individual electric metering by the utility for each separate occupancy unit of new commercial establishments, residential buildings, condominiums, cooperatives, marinas, and trailer, mobile home and recreational vehicle parks. The purpose of these provisions is to promote energy conservation in Florida by directly linking the amount customers pay for electricity to the amount of electricity the customer uses.

The rule states that the individual metering requirement does not apply to certain listed situations, including:

(c) For electricity used in specialized-use housing accommodations such as hospitals, nursing homes, living facilities located on the same premises as, and operated in conjunction with, a nursing home or other health care facility providing at least the same level and types of services as a nursing home, convalescent homes, facilities certificated under chapter 651, F.S., college dormitories, convents, sorority houses, fraternity houses, and similar facilities; and

(d) 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).

In addition, individual metering is not required for condominiums that meet certain criteria set out in sections (5)(g) and (6) of the rule. These exceptions are based on the concept that the individual metering requirement no longer achieves the Florida Energy Efficiency and Conservation Act's purpose when a customer, such as a condominium or nursing home owner, rents the unit or charges for the room on a short-term basis for a flat per-night or per-week fee. In those cases, the customer cannot control how much electricity is used in the unit or room.

The individual metering requirement in Rule 25-6.049(5), F.A.C., is based on the Commission's authority under Sections 366.05(1) and 366.06(1), Florida Statutes (F.S.), to prescribe rate classifications and service rules for investor-owned electric utilities. The rule also implements the conservation policies in the Florida Energy Efficiency and Conservation Act. Section 366.81, F.S., of that act states the Legislature's finding that it is critical to utilize the most efficient and cost-effective conservation systems in order to protect the health, prosperity, and general welfare of Florida and its citizens. The statute states that since solutions to Florida's energy problems are complex, the Legislature intends that the use of solar energy should be encouraged. Section 366.81, F.S., further states that the Legislature finds and declares that the statute should be liberally construed in order to meet the complex problems of reducing and controlling the growth rates of electric consumption, increasing the overall efficiency and cost-effectiveness of electricity, and conserving expensive resources.

Casa Devon's Petition

Casa Devon states that it is the owner and developer of the Casa Devon apartment building, an existing 210-unit apartment in Miami that provides low-income, affordable housing to senior citizens through the Federal Department of Housing and Urban Development (HUD). Casa Devon seeks a variance or waiver from the individual electric metering requirement of Rule 25-

6.049, F.A.C., so that it can convert its apartment building from individually metered apartments to being master metered. Casa Devon requests that the variance or waiver be permanent with the condition that Casa Devon continue to operate as a specialized-use HUD housing facility with a solar energy system achieving energy conservation through reduced electricity purchases from the utility.

Casa Devon states that it has a Housing Assistance Payment contract with HUD that sets rental rates such that tenants pay thirty percent of their gross income toward rent and the remainder is paid for by HUD or a Public Housing Agency through subsidies or vouchers. According to Casa Devon, under the current arrangement, rent amount includes a utility allowance for water, wastewater, and electricity that varies by individual unit owner, but that Casa Devon estimates to average about \$58 per unit. The petition shows that the Casa Devon apartment tenants are currently individually metered by Florida Power & Light Company (FPL).

Casa Devon states that on January 1, 2020, the Housing Assistance Payment contract was renewed by HUD for a new twenty-year term with an agreement to automatically renew for an addition 16 years, guaranteeing affordable housing at the facility until December 31, 2055. In addition to other renovation conditions, the contract renewal requires that:

The Owner [Casa Devon] will also convert the Project [Casa Devon apartment building] to be master metered, which will result in tenants no longer paying for electricity. After completing the master meter conversion, the Owner will then add a solar panel system that will offset approximately 75% of the total electrical load.

Petition, Exhibit A.

Casa Devon states that it agreed to this arrangement, whereby it covers the cost of electricity, because of the benefits of installing the planned solar energy system. Casa Devon will get a Solar Investment Tax Credit for installing the solar energy system, through which it expects to receive a tax deduction of more than \$300,000. Further, the solar energy system is predicted to offset 65 to 75 percent of the total annual electrical load to the Casa Devon apartment building. Casa Devon states that this arrangement gives the residents a significant benefit of not having to pay electric bills. Casa Devon alleges that it is required by HUD to finish the construction, installation, and approval of permitting of the solar energy system by December 31, 2020.

As an alternative request, if the Commission does not grant its request for variance or waiver, Casa Devon asks the Commission to find that it should be allowed to master meter the apartment building under either the “specialized-use housing” exception of paragraph (c) of Rule 25-6.049(5) or because it is similar to a hotel or hotel-condominium and therefore falls under the Rule 25-6.049(5)(d) exception. Casa Devon argues that the apartment building should be considered a specialized-use exception because it is not an ordinary housing arrangement, but is a specialized arrangement provided through the Federal government to provide housing for fixed-income or low-income senior citizens who will not be paying for electricity usage. Casa Devon argues that the load characteristics and usage patterns of the Casa Devon apartments will be more similar to other specialized-use housing or hotels than those of typical residential customers because the residents will not be paying for utilities.

Florida Power & Light Company's Comments

On July 27, 2020, FPL filed comments regarding Casa Devon's petition. FPL states that Casa Devon's "purported need" for a waiver and "professed economic hardship" were caused by Casa Devon's own action because it entered into the HUD agreement to master meter and install a solar energy system without first consulting the Commission's rules. FPL states that if the Commission were to grant the waiver, it would establish a factual predicate for others to ignore Commission rules, engage in a prohibited activity, and then ask the Commission for relief.

FPL believes that, instead of master metering and installing its planned solar energy system, Casa Devon could allow its 210 residents the option to either individually net meter using solar through the use of micro-inverters or string inverters, or keep their current individually metered service with FPL. In addition, FPL states that there is no way to determine whether all 210 residents have agreed to terminate their service with FPL, or whether FPL could safely deliver electricity to the apartment building if master metering is permitted.

With regard to Casa Devon's alternative request for relief, FPL argues that the Casa Devon apartment building does not qualify for master metering as specialized-use housing or housing similar to a hotel or hotel-condominium under Rule 25-6.049(5)(c) or (d), F.A.C. FPL argues that the Casa Devon apartment residents are permanent occupants and therefore the rationale for allowing master metering for overnight or temporary occupancy is simply not present.

Procedural Matters

Under Section 120.542, F.S., and Uniform Rule of Procedure Rule 28-104.005(1), F.A.C., an agency must give notice of receipt of a petition for emergency variance or waiver on its website within 5 days of receipt. On July 1, 2020, the Commission published notice of receipt of the emergency petition on its website. Notice of the emergency petition was also published in the July 2, 2020 edition of the Florida Administrative Register (FAR), Vol. 45, No. 80, as required by Section 120.542(3), F.S., and Uniform Rule of Procedure Rule 28-104.005(1), F.A.C. Rule 28-104.005(1), F.A.C., provides that interested persons may submit comments within 5 days after publication of the notice in the FAR. Even though FPL filed its comments after this 5-day period, there was sufficient time for staff to review the comments and address them in this recommendation. In addition, this item is noticed that interested persons may participate at the Agenda Conference.

Pursuant to Rule 28-104.005(2), F.A.C., a petition for emergency variance or waiver must be granted or denied, or the request must be determined not to be an emergency, within 30 days of its receipt by the agency, or it is deemed approved, unless the time limit is waived by the petitioner. Casa Devon waived the 30-day deadline until the August 18, 2020 Commission Conference. Thus, the petition will be deemed approved if the Commission does not grant or deny the petition or determine that it is not an emergency by August 18, 2020.

This recommendation addresses whether the Commission should grant the emergency petition for variance or waiver by Casa Devon. The Commission has jurisdiction under Sections 120.542, 366.04, 366.05, and 366.81, F.S.

Discussion of Issues

Issue 1: Should the Commission grant the petition for emergency variance from or waiver of Rule 25-6.049(5), Measuring Customer Service, F.A.C., by Casa Devon Venture, LP?

Recommendation: Yes, Casa Devon’s petition for emergency variance from or waiver of Rule 25-6.049(5), F.A.C., should be granted subject to the condition that Casa Devon install the solar energy system in the apartment building substantially as described in the petition and the system remains in operation and achieves energy conservation through reduced electricity purchases from the utility. If these conditions are not met, the variance or waiver should cease to be effective. Casa Devon should be put on notice that if the variance or waiver ceases to be effective, it will be responsible for the cost of converting the Casa Devon apartment building from master metering to individual metering pursuant to Rule 25-6.049(7), F.A.C. (Cowdery, Coston, Guffey, Hampson, Hinton, Vogel)

Staff Analysis: Casa Devon is asking the Commission for an emergency variance from or waiver of Rule 25-6.049(5) and (6), F.A.C., so that it can convert the Casa Devon apartment building from individual metering to master metering. If the Commission does not grant it a variance or waiver from the rule, Casa Devon requests as alternative relief that the Commission find that the Casa Devon apartment building falls under an exception to individual metering under Rule 25-6.049(5)(c) and (d), F.A.C. Casa Devon asks the Commission to consider its petition on an emergency basis.

Legal Standard for Rule Variances and Waivers

Section 120.542(1), F.S., states that the purpose of a rule variance or waiver¹ is to provide relief to persons subject to regulation in cases where strict application of rule requirements can lead to unreasonable, unfair, and unintended results in particular circumstances. Section 120.542(2), F.S., sets forth a two-prong test for granting variances or waivers to rules. If the petitioner satisfies both prongs of the test, the agency must grant the variance or waiver.

First, the petitioner must show that “application of [the] rule would create a substantial hardship or would violate principles of fairness.” A “substantial hardship” is a “demonstrated economic, technological, legal, or other type of hardship.” 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.” Second, the petitioner must demonstrate that it will achieve the purpose of the underlying statutes by other means.

Each petitioner for rule variance or waiver has the burden of proving its entitlement to a variance or waiver under its particular circumstances. Thus, the Commission’s determination as to whether a petitioner should be granted a variance or waiver is based on whether the legal test has been met under the specific circumstances of each petitioner.²

¹ A waiver is a decision by an agency not to apply all or part of a rule to a person who is subject to the rule. Section 120.52(22), F.S. A variance is an agency decision to grant a modification to all or part of the literal requirements of an agency rule to a person who is subject to the rule. Section 120.52(21), F.S.

² Compare this to declaratory statements by agencies under Section 120.565, F.S., where an agency gives its opinion as to the applicability of a statute, rule, or order of the agency to the petitioner’s particular set of circumstances.

Section 120.542(2), F.S., authorizes the filing of emergency petitions for rule variances and waivers. In order to be considered on an emergency basis, Uniform Rule of Procedure Rule 28-104.004(2), F.A.C., requires a petition for emergency variance or waiver to identify:

- (a) The specific facts that make the situation an emergency; and
- (b) The specific facts to show that the petitioner will suffer an immediate adverse effect unless the variance or waiver is issued more expeditiously than the time frames provided in Section 120.542, F.S.

The time frame for processing an emergency petition for variance requires that the agency publish notice of the petition in the FAR within 5 days of filing, compared to 15 days for a non-emergency petition. For an emergency petition, an agency must grant, deny, or find that a petition is not an emergency within 30 days of the petition's filing, unless the 30 days is waived by the petitioner. In contrast, a non-emergency petition must be granted or denied within 90 days after receipt of the original petition, the last item of timely requested additional information, or the petitioner's written request to finish processing the petition.

Request to Consider the Petition on an Emergency Basis

Casa Devon states that in May 2020, FPL advised Casa Devon that it would not permit master metering of the apartment building. Casa Devon states that since that time, the apartment renovation project has been on hold because Casa Devon cannot move forward with master metering the apartment or installing the solar energy system. Casa Devon is requesting that its petition be considered on an emergency basis because rehabilitation and renovation to the Casa Devon apartments must be completed by December 31, 2020 under HUD requirements, and those renovations cannot be completed without the variance or waiver of the individual metering requirement. Casa Devon states that if its petition is heard on an emergency basis, Casa Devon and the solar subcontractor believe that the two-month delay caused by Casa Devon's inability to master meter can be made up and the project finished on time. However, Casa Devon states that it does not believe there will be enough time to complete the installation of the solar energy system by December 31, 2020, if its petition is not heard on an emergency basis.

Staff believes that Casa Devon has demonstrated that an emergency situation exists. The petition alleges that rehabilitation and renovation to Casa Devon apartments must be completed by December 31, 2020 under HUD requirements and that there will not be enough time to complete the installation of the solar energy system by that date if the petition is not heard on an emergency basis. The Commission has recognized that a contract deadline can be a factor forming the basis for considering a petition for waiver on an emergency basis. E.g. In re Petition for emergency temporary waiver by BellSouth Telecommunications, Inc., Docket No. 20040659-TL, Order No. PSC-04-0793-PAA-TL, issued August 12, 2004 (granting emergency consideration of a rule waiver petition where an upcoming contract termination date and potential work stoppage would impact BellSouth's ability to comply with certain Commission rules).

Unlike a proceeding on a petition for variance or waiver, substantially affected persons may intervene in a declaratory action proceeding. This is because the agency's interpretation of the applicability of its statute, rule, or order has precedential effect and may determine the substantial interests of other persons in similar circumstances.

Casa Devon states that it would suffer an immediate adverse effect if the petition is not heard expeditiously because by failing to meet the December 31, 2020 completion date, it would be in default of its agreement with HUD, causing HUD to potentially terminate the contract or seek other relief such as rescinding or reducing its monthly rental payments to the property. Further, Casa Devon alleges that it would also fail to meet the energy savings requirements it agreed to in order to receive the tax incentives, which could result in a financial loss of in excess of \$200,000. Casa Devon states that failure to finish the project by December 31, 2020, would also impact senior citizens in Miami-Dade County who need the 210 affordable housing-units that the Casa Devon apartments provide. Staff agrees that these facts demonstrate that Casa Devon will suffer an immediate adverse effect unless the variance or waiver is issued expeditiously.

Based on the specific facts provided, staff recommends that the Commission consider the petition for rule variance or waiver on an emergency basis. Staff notes that even if Casa Devon had not requested emergency treatment of its petition, staff would have brought this petition to the August 18, 2020 Commission Conference.³ The petition contains the information required by Rule 28-104.002, F.A.C., and staff did not need any additional written information to complete its review. Further, given the nature of the apartment building at issue, low income housing for senior citizens in Miami that Casa Devon is restoring and renovating to include an extensive solar energy system, staff believes it is in the public interest to consider the petition in a timely manner.

The Purpose of the Underlying Statutes

Casa Devon states that the purpose of the underlying statutes implementing Rule 25-6.049, F.A.C., is to give the conditions under which individual metering and master metering must be used to ensure fair and reasonable rates/charges and energy conservation. Casa Devon states that it believes the underlying purpose of this law, promotion of energy conservation, will be achieved through its requested variance or waiver because master metering the apartment building and installation of the solar photovoltaic system will offset 65 to 75 percent of the apartment building's total annual electric load, therefore reducing electricity purchases from the utility.

Casa Devon further states that “[without] master metering, Casa Devon cannot install the solar energy system and would not be able to offer the fair and reasonable rates it is offering to these residents - \$0 for utilities.” FPL disagrees with this statement, arguing that Casa Devon could install solar panels without master metering, possibly using micro-inverters or string inverters, to allow each of the 210 residents to make their own choice to net meter, or to keep their current service with FPL through their existing individual meter.

FPL's suggested alternative does not show that Casa Devon's petition does not meet the purposes of the rule's underlying statutes. Instead, FPL's argument seems to take issue with whether the installation of solar is technically feasible without master metering. But whether or not the installation of solar is technically feasible without master metering is not relevant to deciding whether Casa Devon's proposed master metering project meets the purpose of the underlying statutes. Further, the HUD project is dependent on master metering, the primary

³ If Casa Devon's petition for variance was not considered on an emergency basis, the Commission would need to grant or deny the petition within 90 days of the filing of the petition, which would be September 29, 2020.

energy source of which is solar, which is dependent on receiving the Solar Investment Tax Credit for the solar energy system installation. The Solar Investment Tax Credit and estimated energy cost savings are the basis for Casa Devon's agreement to pay all the apartment building's electric utility costs, instead of apartment renters paying for their individually metered electricity. In the absence of master metering, it appears that Casa Devon would not be able to economically undertake the restoration project as designed or economically offer solar energy.

Casa Devon has demonstrated that it will achieve the conservation purpose of the Florida Energy Efficiency and Conservation Act by means other than the individual metering requirement of Rule 25-6.049(5), F.A.C. Under Section 366.81, F.S., of the Florida Energy Efficiency and Conservation Act, the Legislature finds that it is critical to utilize the most efficient and cost-effective conservation systems in order to protect the health, prosperity, and general welfare of Florida and its citizens. The statute states that the Legislature intends that the use of solar energy should be encouraged and that the statute should be liberally construed in order to meet the complex problems of reducing and controlling the growth rates of electric consumption, increasing the overall efficiency and cost-effectiveness of electricity, and conserving expensive resources. Staff believes the underlying purpose of the Florida Energy Efficiency and Conservation Act will be achieved through master metering because installation of the solar photovoltaic array is projected to offset 65 to 75 percent of the apartment building's load resulting in lower electricity purchases from the utility.

Substantial Hardship

Casa Devon alleges that it will incur a substantial hardship if Rule 25-6.049, F.A.C., is applied to require individual metering because that would cause Casa Devon to violate its agreement with HUD, in which Casa Devon agreed to pay for the apartment building's electricity through master metering. Casa Devon states that the inability to master meter will constitute a default under the Housing Assistance Payment contract that would cause HUD to potentially terminate the contract or seek other relief such as rescinding or reducing its monthly rental payments to the apartment building.

Additionally, Casa Devon states that the decision to pay for the apartment building's electricity was predicated on Casa Devon's ability to master meter the project so that it could install a solar energy system that would offset 65 to 75 percent of the total electrical load. Casa Devon states that, by installing the solar energy system, it would receive a Solar Investment Tax Credit which would offset the cost of it paying for the residents' electricity. Casa Devon states that if the apartment building is required to keep the existing individual metering, the solar energy system planned to be installed – for which engineering fees have been paid and panels already procured – will not offset the tenant electrical loads. Casa Devon alleges that the solar energy system cannot be installed without master metering because the planned size of the solar energy system is necessary to achieve the 65 to 75 percent reduction in electric load.

If master metering is not allowed, Casa Devon states that it will need to develop a new solar energy approach to include individual systems for each apartment's meter to ensure that the peak monthly generation of each system does not exceed the consumption of its corresponding meter. Casa Devon alleges that this would also require additional costs for electrical cable management, smaller inverters to be installed at the individual meters, and a multitude of other considerations

and components that will offset any cost savings realized through the system. Casa Devon alleges that if it were to operate the solar energy system on individual meters, there would be decreased energy conservation and increased operation reporting requirements. Casa Devon alleges that individual metering would result in a loss of roughly 60 to 70 percent of the planned energy load reduction because the only financially viable solar energy system to use with individual metering would offset only the electricity load in common areas instead of the entire apartment building.

Casa Devon states that individual metering would result in the loss of the Solar Investment Tax Credit that was a huge factor in incentivizing investors to fund the comprehensive rehabilitation of the Casa Devon apartment building. Casa Devon states that if this much smaller solar energy system were installed, the tax credit deduction would be reduced to around \$24,000, which would be completely nullified by the significant financial commitments Casa Devon has made for the restoration and rehabilitation of the Casa Devon apartment building. Additionally, there would be a negative financial impact on the current operating budget projections that currently assume a 65 to 75 percent load reduction.

FPL states that Casa Devon's alleged economic hardship was caused by its own actions of entering into the HUD agreement without first consulting the Commission's rules to determine whether it could master meter. FPL states that if the Commission were to grant the waiver, it would establish a factual predicate for others to ignore Commission rules, engage in a prohibited activity, and then ask the Commission for relief. FPL states that the Florida Supreme Court addressed this very situation in affirming the Commission's denial of a rule waiver in Panda Energy International v. Jacobs, 813 So. 2d 46 (Fla. 2002).

The Commission proceeding giving rise to the Panda Energy appeal was a need determination case.⁴ On the day after the prehearing conference, Panda filed a petition to intervene in the proceeding. After being granted intervention, and two days before the hearing, Panda filed a motion for a continuance of the hearing. As part of its motion, Panda addressed Rule 25-22.080, F.A.C., which requires that the hearing be conducted within 90 days of the filing of the need petition. Panda argued that because Rule 25-22.080, F.A.C., was a procedural rule, the Commission could waive its requirements for good cause.

Florida Power Corporation (FPC) filed a Response in Opposition to Panda's Motion for Continuance. As part of FPC's response, it argued that granting the continuance would violate Rule 25-22.080, F.A.C., and that the requirements of Rule 25-22.080, F.A.C., could be waived only through a variance procedure of Section 120.542, F.S., and Rule 28-104.002, F.A.C., which, it stated, Panda did not address in its motion.

The motion for continuance was heard by the Commission at the beginning of the need determination hearing. The Commission denied Panda's motion for continuance on the ground that Panda did not show good cause for a continuance as required by Rule 28-106.210, F.A.C. In denying Panda's motion for continuance, the Commission did not address FPC's argument about the need for a Rule 25-22.080, F.S., rule waiver under Section 120.542, F.S.

⁴ Petition for determination of need for Hines Unit 2 Power Plant by Florida Power Corporation, Docket No. 20001064-EI.

On appeal, the Court held that the Commission did not abuse its discretion in denying Panda's motion for continuance. In addition, the Court stated that in order to obtain a continuance, Panda would need a waiver from the Commission's rule implementing the statutory deadlines for need proceedings. The Court found that because the limited amount of time for preparing for hearing was a direct result of Panda's decision to delay intervening, Panda did not demonstrate either a substantial hardship or a violation of principles of fairness. Panda Energy, 813 So. 2d at 51.

Staff disagrees with FPL's statement that "the Supreme Court addressed this very situation in affirming the Commission's denial of a rule waiver" in Panda Energy. As explained above, the Florida Supreme Court in Panda Energy affirmed the Commission's denial of Panda's motion for continuance on the basis that Panda had not shown good cause as required by Rule 28-106.210, F.A.C. The Court's additional finding that Panda did not meet the requirements of a rule waiver was based on the fact that Panda chose to delay intervening in the case, which was why Panda had a limited amount of time to prepare for the hearing. The fact pattern in Panda Energy concerning a motion for continuance of a hearing is very different from Casa Devon's facts showing substantial hardship if a rule variance is not granted to allow master metering.

Staff also disagrees with FPL's statement that if the Commission were to grant the waiver, it would establish a factual predicate for others to ignore Commission rules, engage in a prohibited activity, and then ask the Commission for relief. To begin with, there is no indication that Casa Devon engaged in any prohibited activity. Further, as explained above, petitions for rule waivers are decided based upon whether a petitioner meets the statutory requirements of Section 120.542, F.S. If Casa Devon demonstrates that application of the individual metering requirement of Rule 25-6.049(5), F.A.C., would create a demonstrated economic, technological, legal, or other type of hardship and that it will achieve the purpose of the underlying statutes by other means, then a waiver or variance must be granted. See Section 120.542(2), F.S. Each petitioner for rule variance or waiver has the burden of proving its entitlement to a variance or waiver under its particular circumstances.

Further, FPL appears to conflate Casa Devon's request that the Commission consider the petition on an emergency basis with Casa Devon's showing of substantial hardship to obtain a rule waiver or variance. The determination of substantial hardship in this case is not based upon the emergency nature of the filing or when the filing of the petition occurred. It does not matter whether Casa Devon filed a petition for waiver or variance before it entered into the HUD contract or afterwards. What matters is whether the facts presented by Casa Devon meet the requirements for a rule waiver or variance, including a showing of substantial hardship or violation of principles of fairness and that the underlying purpose of the statutes will be met.

In addition to its other comments, FPL states that based upon the materials filed with the Commission, along with information provided by Casa Devon to FPL during the past few months, FPL cannot say with any degree of certainty that the apartment building can be master metered, noting that FPL has not received any electrical engineering plans and that the local building official would need to sign off on the delivery system beyond FPL's point of delivery. These issues are not relevant to the Commission's decision as to whether the petition meets the statutory requirements for a rule waiver, that is, whether Casa Devon has shown that application

of the rule would create a substantial hardship or would violate principles of fairness and that the purpose of the underlying statutes will be achieved by other means.

Staff believes that Casa Devon has demonstrated that it will incur substantial hardship if it is not granted a variance from or waiver of the individual metering requirement of Rule 25-6.049(5), F.A.C. If Casa Devon is not granted a variance and is not allowed to master meter its apartment building, it will not be feasible to install the solar energy system it has contracted for, the estimated 65 to 75 percent load reduction will not occur, and it will not qualify for the Solar Investment Tax Credit that was intended to offset Casa Devon's agreement to cover the cost of tenant utilities through master metering. This argument for substantial hardship would have been essentially the same if the petition for variance had been filed before Casa Devon entered into the HUD contract. In addition, under the facts of this case, the inability to master meter will constitute a default under the Housing Assistance Payment contract, which requires master metering and the installation of a solar panel system that will offset approximately 75% of the total electrical load, that would cause HUD to potentially terminate the contract or seek other relief such as rescinding or reducing its monthly rental payments to the property.

Conclusion

Staff recommends that Casa Devon's petition for emergency variance from or waiver of Rule 25-6.049(5), F.A.C., should be granted subject to the condition that Casa Devon install the solar energy system in the apartment building substantially as described in the petition and the system remains in operation and achieves energy conservation through reduced electricity purchases from the utility. If these conditions are not met, the variance or waiver should cease to be effective. Casa Devon should be put on notice that if the variance or waiver ceases to be effective, it will be responsible for the cost of converting the Casa Devon apartment building from master metering to individual metering pursuant to Rule 25-6.049(7), F.A.C.

However, by granting the rule waiver, it does not mean that FPL is required to master meter the Casa Devon apartment building if it is not technically feasible and safe to do so. It is up to Casa Devon and FPL to work together to determine the technical feasibility of master metering the apartment building based upon electrical engineering plans and other relevant information.

Casa Devon also requested a variance of or waiver from Subsection (6) of Rule 25-6.049, F.A.C. However, Subsection (6) applies only to master-metered condominiums, so it does not apply to Casa Devon's apartment building.

Further, Casa Devon requested, alternatively, that if the Commission does not grant a variance or waiver from the individual metering requirement, it should interpret the exemptions from individual metering in paragraphs (c) and (d) of Rule 25-6.049(5), F.A.C., as applying to Casa Devon's apartment building so that it can master meter. If the Commission grants Casa Devon's petition for variance/waiver, this request for alternative relief is moot and should not be considered. Moreover, Casa Devon's alternative request for the Commission to give its opinion as to the applicability of the provisions of Rule 25-6.049(5)(c) and (d), F.A.C., to Casa Devon's particular set of circumstances is, in effect, a request for a declaratory statement. See Section 120.565, F.S. Casa Devon's petition for variance or waiver did not request a declaratory statement and does not meet the Rule 25-105.002, F.A.C., filing requirements for a petition for

declaratory statement. For this additional reason, the Commission should not consider Casa Devon's alternative relief request.

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, a consummating order should be issued and this docket should be closed. (Cowdery)

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, a consummating order should be issued and this docket should be closed.