

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for emergency variance from or
waiver of Rule 25-6.049(5)-(6), F.A.C., by
Casa Devon Venture, LP.

DOCKET NO. 20200175-EU
ORDER NO. PSC-2020-0295-PAA-EU
ISSUED: September 2, 2020

The following Commissioners participated in the disposition of this matter:

GARY F. CLARK, Chairman
ART GRAHAM
JULIE I. BROWN
DONALD J. POLMANN
ANDREW GILES FAY

NOTICE OF PROPOSED AGENCY ACTION
ORDER DENYING PETITION FOR EMERGENCY VARIANCE FROM OR WAIVER OF
RULE 25-6.049(5)-(6), F.A.C., BY CASA DEVON VENTURE, LP

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code (F.A.C.).

I. 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 we do not grant the variance, we 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.

A. 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 individual metering requirement in Rule 25-6.049(5), F.A.C., is based on our 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 (FEECA). 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. 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.

Rule 25-6.049(5), F.A.C., 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 purpose of FEECA 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.

B. 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 additional 16 years, guaranteeing affordable housing at the facility until December 31, 2055. Exhibit A to the Petition shows that, 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.

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 we do not grant its request for variance or waiver, Casa Devon asks us 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.

C. 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, we published notice of receipt of the

emergency petition on our 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. On July 27, 2020, FPL filed comments opposing Casa Devon's waiver request. Even though FPL filed its comments after this 5-day period, there was sufficient time for the comments to be reviewed and addressed. In addition, both FPL and Casa Devon representatives participated at the Agenda Conference. We have jurisdiction pursuant to Sections 120.542, 366.04, 366.05, and 366.81, F.S.

II. Discussion

A. Legal Standard for Rule Waivers or Variances

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, our 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.

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

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.

(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.

B. Request to Consider the Petition on an Emergency Basis

Casa Devon requests that its petition be considered on an emergency basis. Casa Devon states that in May 2020, it was advised by FPL that FPL 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 states that 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.

Casa Devon has the burden of demonstrating specific facts that make the situation an emergency and show that the petitioner will suffer an immediate adverse effect unless the variance or waiver is issued more expeditiously than the time frames provided for non-emergency requests. We find that the situation that Casa Devon finds itself in was of its own making. Casa Devon should have become aware of the Commission rules and known that it needed a rule waiver prior to May 2020, and should have come to the Commission requesting a waiver prior to entering into the HUD contract. For this reason, we deny Casa Devon's request to consider the petition on an emergency basis.

C. 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 the Casa Devon apartment tenants are individually metered today, and that Casa Devon could install solar panels and employ a number of different designs, the most common of which would involve the use of micro-inverters or string inverters to allow each of the 210 residents to decide whether they want to net meter, while retaining their existing individual meter.

FPL argues that the fundamental deficiency in Casa Devon’s request for a waiver or variance of Rule 25-6.049, F.A.C., lies in the consideration of the purpose of the rule. FPL states that the Commission has been clear for decades that the purpose of the individual metering requirement, consistent with Section 366.81, F.S., of FEECA, lies in the desire to promote energy conservation with regard to energy consumption, and this energy conservation cannot be achieved in temporarily occupied units. FPL states that the Casa Devon apartment does not have temporarily occupied units, and thus the rationale for allowing a waiver is not present because the permanent residents have no motivation to save energy if they are not individually metered. FPL states that the Casa Devon tenants currently have the typical motivation to save energy and reduce their electric bills as individually metered customers because they can control their consumption and save energy.

In order to be granted a variance to the individual metering requirement of Rule 25-6.049(5), F.A.C., Casa Devon has the burden of demonstrating that it will achieve the purpose of the rule’s underlying statutes by other means. The purpose the individual metering requirement of Rule 25-6.049(5), F.A.C., comes from the direction of Section 366.081, F.S., which is part of FEECA. Casa Devon tenants currently have the typical motivation to save energy and reduce their electric bills as individually metered customers because they can control their consumption and save energy. Casa Devon has not shown that the Casa Devon apartment tenants will benefit from changing to master metering.

We find that Casa Devon has not met its burden of demonstrating that it will achieve the purpose of the rule’s underlying statute by other means. Casa Devon has not shown that changing from individually metered apartments to master metered apartments will promote energy conservation with regard to energy consumption.

D. 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 would 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 very large 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 approximately \$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. At the Agenda Conference, Casa Devon specified that individual metering of customers was not a feasible alternative with the solar energy system it planned to install.

FPL argues that Casa Devon's purported need for a waiver, professed economic hardship, and need to rely on principles of fairness have been caused by its own actions. FPL states that Casa Devon's petition reflects that Casa Devon negotiated its agreement with HUD, including an agreement to master meter, without first consulting our rules to determine whether it could in fact do so. FPL argues that a party who enters into an agreement first, makes financial commitments, and then comes to us to request a waiver inappropriately places us in the unenviable position of deciding whether to grant the requested relief knowing that the petitioner has already made financial commitments.

As previously stated, FPL argues that as an alternative to master metering, Casa Devon could install its solar panels and employ a number of different designs, the most common of which would involve the use of micro-inverters or string inverters to allow each of the 210 residents to decide whether they want to net meter, while retaining their existing individual meter. At the Agenda Conference, FPL stated that Casa Devon's solar panels can be

accommodated through individual metering, which would be the optimal solution from a physical, electrical, energy conservation, and precedent preserving perspective. With regard to the \$300,000 Solar Tax Credit, FPL stated that the tax credit is based on the cost of the solar system so that individually metering using all the solar panels should not affect that aspect of Casa Devon's project. FPL also stated that based on a review of HUD's website, HUD accepts individual metering, so it is not a HUD requirement that the apartments be master metered.

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

In addition to its other comments, FPL states that based upon the materials filed with us, 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. FPL notes 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.

Casa Devon has the burden of demonstrating that application of the individual metering requirement of Rule 25-6.049(5), F.A.C., would create a substantial hardship or violate principles of fairness. Based on the facts before us, we find that Casa Devon's need for a waiver and any economic or legal hardship was caused by its own actions. In particular we note that Casa Devon negotiated its agreement with HUD, including an agreement to master meter, without first consulting the Commission's rules and requesting a waiver or variance. Moreover, FPL states that Casa Devon could install its solar energy system to allow each resident to decide whether they want to net meter, while retaining their existing individual meter. Thus, we find that Casa Devon has not met its burden of demonstrating that application of Rule 25-6.049(5), F.A.C., to its situation would create a substantial hardship or violate principles of fairness.

III. Conclusion

For the reasons stated above, we deny Casa Devon's petition for emergency variance from or waiver of Rule 25-6.049(5), F.A.C. 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, and that request is therefore denied.

Further, Casa Devon requested, alternatively, that if we do not grant a variance or waiver from the individual metering requirement, we 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. Casa Devon's alternative request for us to give our 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 reason, we are not considering Casa Devon's alternative relief request.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Casa Devon Venture, LP's emergency petition for variance from or waiver of Rule 25-6.049(5)-(6), F.A.C., is denied for the reasons set forth in the body of this Order. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that if no timely protest is received to the proposed agency action, a Consummating Order shall be issued upon the expiration of the protest period, and this docket shall be closed.

By ORDER of the Florida Public Service Commission this 2nd day of September, 2020.



ADAM J. TEITZMAN
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
www.floridapsc.com

Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

DISSENTS

Commissioners Julie I. Brown and Andrew Giles Faye dissent from the Commission's decision.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on September 23, 2020.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.