

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: July 25, 2019

TO: Office of Commission Clerk (Teitzman)

FROM: Office of the General Counsel (King, Cowdery) *AK*
Division of Economics (Guffey, Redda) *IR*
MS
SKG *ED* *qth*

RE: Docket No. 20190094-EU – Petition for variance from or waiver of Rule 25-6.049(5) and (6), F.A.C., by Calypso Tower III, LLC.

AGENDA: 08/06/19 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Fay

CRITICAL DATES: October 8, 2019 – The Commission must grant or deny the petition by this date.

SPECIAL INSTRUCTIONS: None

Case Background

On April 17, 2019, Calypso Tower III, LLC (the developer) filed a petition for a waiver of or variance from Rule 25-6.049(5) and (6), Florida Administrative Code (F.A.C.). The rule requires condominiums to individually meter electricity usage for each of its units. The developer is constructing a new condominium it is calling Calypso Tower III (Calypso) that will be subject to the rule. As its name implies, Calypso is the third tower in a three-tower resort called Calypso Resort and Towers (the resort). Calypso's two sister towers are already built and are currently operating under the resort name. The petition and this recommendation only apply to the third tower.

On April 29, 2019, staff sent a letter to the developer pursuant to Section 120.542(8), Florida Statutes (F.S.), seeking additional information necessary to dispose of the petition. The developer

responded in part on May 16, 2019, and completed its response on June 6, 2019. However, the developer's responses raised additional questions, so staff sent the developer a second request for information on June 13, 2019. The developer responded to that second request on July 10, 2019. The developer's completed petition is deemed filed on July 10, 2019. *See* § 120.542(8), F.S.

Gulf Power filed comments on July 12, 2019. In those comments, the company expressed concern about the petition but did not expressly object to it.

Notice of the developer's petition was published in the April 24, 2019 edition of the Florida Administrative Register, Vol. 45, No. 80, as required by Section 120.542(6), F.S. In accordance with Section 120.542(8), F.S., the petition is deemed approved if the Commission does not approve or deny it by October 8, 2019, which is 90 days after the developer filed its final response to staff's data requests.

This recommendation addresses whether the Commission should grant the developer's petition. The Commission has jurisdiction under Sections 120.542, 366.04, and 366.05, F.S.

Discussion of Issues

Issue 1: Should the Commission grant the developer's petition for a waiver of subsections (5) and (6) of Rule 25-6.049, F.A.C.?

Recommendation: Yes. The petition should be granted because the developer has demonstrated that the purpose of the underlying statutes will be achieved by other means and that application of the rule would create a substantial hardship and violate principles of fairness. However, the waiver should be subject to the following four conditions: (1) within one year of the closing of sale of its first residential unit, Calypso must be a licensed public lodging establishment under Sections 509.241 and 509.242, F.S.; (2) 92 percent of the residential units sold must be used solely for overnight occupancy; (3) Calypso must allocate the cost of electricity to the individual owners using a reasonable apportionment method; and (4) Calypso must file a report with the Commission 12 months after the date of closing of the sale of the first residential unit. The report must include the number of units sold and, of those, the number of units that are solely used for overnight occupancy as defined in Rule 25-6.049(8)(b), F.A.C. The report must also include a copy of Calypso's public lodging license. The Commission should also put Calypso on notice that should Calypso ever fail to comply with these conditions, the rule waiver will cease to be effective and Calypso will be responsible for all costs associated with the conversion to individual metering. (King, Cowdery, Guffey, Redda)

Staff Analysis: Under Rule 25-6.049(5), F.A.C., each of Calypso's individual units is required to have its own electric meter. Seven exemptions to that requirement are contained in Rule 25-6.049(5)(a)–(g), F.A.C. For example, paragraph (5)(d) provides an exemption for hotels, and paragraph (5)(g) provides an exemption for condominiums that meet three specific criteria. One, the declaration of condominium must require that 95 percent of the units are used solely for overnight occupancy. Two, the condominium must maintain a registration desk, lobby, and central telephone switchboard. Three, the condominium must keep a record of guests' check in and check out dates as well as the name of the individuals registered to occupy the unit.

In addition, Rule 25-6.049(6), F.A.C., provides initial and ongoing reporting requirements for condominiums that seek an exemption to the individual metering rule under Rule 25-6.049(5)(g), F.A.C. The rule also allows the condominium's electricity provider to inspect the condominium and collect evidence to assess whether the condominium has satisfied the criteria for the exemption. Lastly, the rule provides provisions that apply if the condominium fails to meet the requirements for the exemption in Rule 25-6.049(5)(g), F.A.C.

Calypso does not qualify for any of the exemptions in the rule, so it is seeking a waiver.

Legal Standard for Rule Waivers

Section 120.542(2), F.S., lays out a two-prong test for granting waivers to administrative rules. If the petitioner satisfies both prongs, the Commission must grant the 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

Date: July 25, 2019

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.

The individual metering requirement in Rule 25-6.049(5), F.A.C., is based on the Commission’s authority to prescribe rate classifications and service rules for investor-owned electric utilities included in Sections 366.05(1) and 366.06(1), F.S., and it implements the conservation policies in Sections 366.81 and 366.82, F.S., also known as the Florida Energy Efficiency and Conservation Act, or FEECA.

Under Section 120.542(1), F.S., the Commission can grant conditional waivers so long as the conditions are necessary to ensure the purposes of the underlying statutes are achieved.

The Developer’s Petition

According to the developer’s petition and the declaration of condominium it provided in response to staff’s data requests, Calypso is the third and final tower in the Calypso Resort and Towers development. Calypso is currently under construction and will include 250 residential units and 13 commercial units. It is located on the north side of Front Beach Road, across the street from its two sister towers, which are currently operating under the resort name. The developer states that when Calypso becomes a part of the resort, it will be managed by the same company managing the resort. According to the developer, the resort management and staff will conserve energy by ensuring that all electrical components are turned off when guests are not present. The developer further states that the building will use motion sensing technology to turn certain fixtures and appliances off automatically, and the resort staff will also maintain that equipment to ensure it is functioning properly.

The developer states that ownership of Calypso’s 250 dwelling units will be structured as a condominium under Chapter 718 of the Florida Statutes, but the developer envisions Calypso will operate “as a resort or similar to a hotel/resort in most cases with short term rentals for beach vacations.” The developer predicts that “all or substantially all of the units will be used for transient rentals.” The developer initially claimed it would apply for a public lodging license, but it expressly retracted that commitment in its response to staff’s first data request. Staff questioned the developer as to the reason for the retraction and asked whether the developer intended for Calypso to “share” the resort’s public lodging license, which at the time was active but delinquent. In its responses, the developer expressed no intent for Calypso to obtain a public lodging license, and the resort’s license recently expired.

The developer also asserts the existence of several facts that support its position that Calypso is similarly situated to other resort hotels and that all or substantially all of Calypso’s units will be used for transient rentals. The developer submitted its Panama City Beach building permits for Calypso, which showed that it paid a recreational impact fee for “[l]odging hotel, resort, resort condo.” Though Calypso is still under construction, the developer claims it is planning to use “nationally known reservation software” along with a rental pool agreement to help keep guest rooms filled and the resort operating in an orderly fashion. To aid in keeping the guest rooms filled, the developer also plans to advertise with travel agents and at trade conferences. The developer plans to have a hospitality area for guests to check in and out. The developer has also designed all rooms to be ADA compliant. Staff has further discovered that the online advertising

for Calypso's resort units includes an estimate of the number of seasonal rentals each floorplan could expect and an estimate of the revenue from those rentals.¹

Finally, the developer claims that by accepting electricity through a master meter, Calypso will pay Gulf Power's rates for Large Power Service (LP) rather than Residential Service (RS). It also supplied staff with Gulf Power's estimate that each individual unit would demand an average of 5 kW.

The developer argues that it is entitled to a waiver because application of the rule violates principles of fairness and creates a substantial hardship. The developer intends for Calypso to operate as a resort hotel and will directly compete with other resort hotels. The developer claims that if it is not permitted to receive electricity through a master meter and pay the lower commercial rate, it will be forced to incur electricity expenses far above those incurred by the resort hotels it will compete with. The crux of the developer's argument is that this cost difference puts it at a significant competitive disadvantage. This demonstrated economic hardship, according to the developer, amounts to a substantial hardship under Section 120.542(2), F.S. Similarly, the developer argues that application of the rule violates principles of fairness because Calypso will be similar to resort hotels but will be treated differently.

The developer further avers that it will comply with Rule 25-6.049(9)(a), F.A.C., in utilizing a reasonable apportionment method to allocate electricity costs amongst the individual unit owners based on the square footage of their individual units.

Gulf Power's Comments

Gulf Power expressed two main concerns with the developer's petition, but it stopped short of objecting to the petition.

Gulf Power's first concern is that there is no way for anyone to know if Calypso's units will in fact be used for overnight occupancy because the declaration of condominium does not require any unit owner to rent its unit on a short-term basis. Gulf Power noted that the Commission has granted only a few waivers for condominiums without language in the declaration of condominium requiring a certain percentage of the units to be used for overnight occupancy, and in those cases there were other "forms of assurance that the condominium would, as a matter of fact, be operated as a transient lodging facility."²

Second, Gulf Power expressed concern about the developer's intent to not seek a public lodging license from the Department of Business and Professional Regulation. It noted that such a license submits the licensee to safety regulations typical for transient lodging facilities, and the Commission has never granted a petition for a waiver from the individual metering requirement where the condominium did not intend to apply for and maintain a public lodging license.

¹ Rental Projections, Calypso Tower III, http://www.calypsotoweriii.com/wp-content/uploads/2018/08/rental_projection_all.pdf (Last accessed July 16, 2019).

² Document No. 05500-2019 at 2 n3.

Staff's Analysis of the Developer's Petition

Staff recommends that the developer has established the statutory requirements for a waiver of Rule 25-6.049(5) and (6), F.A.C. However, due to the unique circumstances of this case, staff recommends the Commission order Calypso to satisfy certain conditions going forward in order for the waiver to remain in effect.

Literal Application of the Rule Would Violate Principles of Fairness and Create a Substantial Hardship for Calypso

The developer's argument that application of the rule will violate principles of fairness rests on the premise that, when construction is complete, Calypso will function as a hotel and should be entitled to an exemption to the individual metering requirement just as hotels are. Staff has determined that it is highly probable that Calypso's resort units will be used for transient rental purposes for all the reasons stated in the developer's petition and responses to staff's data requests. In sum, Calypso will become part of a larger resort that is already functioning as a hotel. The developer's website advertises Calypso's individual units as rental investments, and the developer intends to advertise Calypso as a resort with travel agents and trade shows. The developer stated that Calypso's guests will be served by the resort staff. The developer has also shown that it paid impact fees for a resort when obtaining its building permits, and it stated that Calypso is being constructed to meet the ADA requirements for a resort. Thus, Calypso will be similarly situated to other hotels and resorts in the area, and application of the individual metering requirement would violate principles of fairness.

By extension, the developer has also established that application of the rule will cause it substantial hardship. Staff estimates that the unit owners of Calypso will save, collectively, approximately \$38,000 a year in electricity costs by being able to take advantage of Gulf Power's LP rates. Cost savings alone do not amount to a demonstrated economic hardship, but when coupled with the fact that the resort will directly compete with neighboring hotels, which are allowed to take advantage of the cost savings realized through master metering, the developer has demonstrated an economic hardship.

Calypso will Achieve the Purposes of the Underlying Statutes by Other Means

The purpose of FEECA is to promote energy conservation in Florida. The individual metering requirement of Rule 25-6.049(5), F.A.C., is designed to achieve that purpose by directly linking the amount customers pay for electricity to the amount of electricity the customer uses. This incentivizes customers to conserve electricity in order to minimize their electricity bills. However, the individual metering requirement no longer achieves FEECA's purpose when a customer loses control over how much electricity is consumed within the unit. A customer that owns a condominium unit and rents the unit to others on a short-term basis for a flat per-night or per-week fee loses control over how much electricity is used in the unit. Thus, where the vast majority of a condominium's residential units are rented out on a short-term basis for a flat fee, the individual metering requirement does not incentivize conservation.

Condominiums that function in this manner usually have a management team and staff that serve the renters, maintain the individual units, and maintain the common areas. The management and

staff are also in the best place to conserve electricity.³ They can set air conditioners at appropriate levels and make sure lights and appliances are turned off when units are unoccupied. They can also maintain windows, doors, and appliances to ensure energy efficiency. The developer has stated that the resort management and staff will ensure the efficient day to day operations of the entire resort, including taking steps to ensure electricity is conserved where it can be. Thus, the developer has demonstrated that it will achieve the purpose of the underlying statute by other means.

Recommended Conditions for the Developer's Waiver

Assuming all or substantially all of Calypso's residential units are used solely for overnight occupancy as the developer envisions, the developer 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. Therefore, the Commission should grant the petitioner a waiver to Rule 25-6.049(5) and (6), F.A.C. However, because whether Calypso's residential units are used solely for overnight occupancy is dependent solely on the independent decisions of future, unknown owners of those units, staff recommends the waiver be subject to the following four conditions.

One, Calypso must apply for a public lodging license within one year of the closing of the sale of the first of its residential units. Calypso must also maintain this license for as long as this waiver is effective. The Commission has made the maintenance of a public lodging license a condition of every one of the waivers it has previously granted.⁴ Section 509.013(4)(a), F.S., defines a public lodging establishment as any unit or group of units advertised or held out to the public as a place regularly rented to guests. And such establishments are required to be licensed under Section 509.241(1), F.S. In short, if the developer asserts that Calypso will function like a hotel, it should be licensed like a hotel.

Two, 92 percent of the residential units sold must be used solely for overnight occupancy as that term is defined in Rule 25-6.049(8)(b), F.A.C. The Commission has routinely conditioned similar waivers on "all or substantially all" of the condominium's units being used on a "transient basis." But whereas the term "transient basis" is neither used nor defined in Rule 25-6.049, F.A.C., "overnight occupancy" is both used and defined within the rule. Therefore, using the latter of those two terms leads to greater clarity. Additionally, the term "all or substantially all" does not provide a measurable standard in this particular case. Calypso currently has no residential unit owners, and the declaration of condominium does not require any future owner to use its unit solely for overnight occupancy. Therefore, there is no evidence to establish what percentage would constitute "substantially all." An analysis of the Commission's past waivers shows that those condominiums receiving waivers from the individual metering rule have demonstrated that, on average, 92.5 percent of their individual units were either currently being

³ E.g., Order No. PSC-2018-0351-PAA-EU, issued July 18, 2018, in Docket No. 20180113-EU, *In re: Petition for variance from or waiver of individual metering requirements of Rule 25-6.046(5) and (6), F.A.C., by 4000 South Ocean Property Owner, LLLP.*; Order No. PSC-15-0565-PAA-EU, issued Dec. 15, 2015, in Docket No. 20150222-EU, *In re: Petition for variance from or waiver of Rule 25-6.049(5) and (6), F.A.C., by 4111 South Ocean Drive, LLC.*

⁴ E.g., Order No. PSC-98-1193-FOF-EU, issued Sept. 8, 1998, in Docket No. 19980667-EU, *Petition by Holiday Villas II Condominium Association, Inc., for variance from or waiver of Rule 25-6.049(5)(a), F.A.C., Regarding Electric Metering.*

Date: July 25, 2019

used on a transient basis or would be used on a transient basis. Therefore, 92 percent should be achievable.⁵

Three, Calypso must allocate the cost of electricity to the individual owners using a reasonable apportionment method. This is a requirement of Rule 25-6.049(9)(a), F.A.C., and has been incorporated into previous waivers.⁶

Four, Calypso must file a report with the Commission 12 months after the date of closing of the sale of the first residential unit. The report must include the number of units sold and, of those, the number of units that are solely used for overnight occupancy as defined in Rule 25-6.049(8)(b), F.A.C. The report must also include a copy of Calypso's public lodging license. This condition is necessary because Calypso is still under construction, and in the future no residential unit owner will be required to use its unit for overnight occupancy. Thus, there is some uncertainty as to whether Calypso will in fact function like a hotel once it is occupied. The Commission has made this same requirement in two similar waiver cases.⁷

Conclusion

Staff recommends granting the developer's petition for a waiver of Rule 25-6.049(5) and (6), F.A.C., with the following conditions:

1. Within one year of the closing of sale of its first residential unit, Calypso must be a licensed public lodging establishment under Sections 509.241 and 509.242, F.S. Calypso must also continually maintain that license.
2. On an average annual basis, 92 percent of the residential units sold must be used solely for overnight occupancy.
3. Calypso must allocate the cost of electricity to the individual owners using a reasonable apportionment method.
4. Calypso must file a report with the Commission 12 months after the date of closing of the sale of the first residential unit. The report must include the number of units sold and, of those, the number of units that are solely used for overnight occupancy as defined in Rule 25-6.049(8)(b), F.A.C. The report must also include a copy of Calypso's public lodging license.

⁵ As discussed above, the first criterion for an exemption from the individual metering requirement for condominiums is that the declaration of condominium requires 95 percent of the condominium's individual units be used solely for overnight occupancy. Rule 25-6.049(5)(g)1., F.A.C.

⁶ E.g., Order No. PSC-11-0253-PAA-EU, issued June 13, 2011, in Docket No. 20110063-EU, *In re: Petition for variance from or waiver of individual metering requirements of Rule 25-6.049(5)(a), F.A.C., by Destin Gulfgate Owners Association, Inc.*

⁷ Order No. PSC-05-1261-PAA-EU, issued Dec. 27, 2005, in Docket No. 20050601-EU, *In re: Petition for variance or waiver from individual metering requirements of Rule 25-6.049(5)(1), F.A.C., by Fontainebleau Florida Tower 3, LLC d/b/a Fontainebleau III Ocean Club*; Order No. PSC-03-0195-PAA-EU, issued Feb. 10, 2003, in Docket No. 20021005-EU, *In re: Petition for emergency variance from or waiver of individual metering requirement of Rule 25-6.049(5)(a), F.A.C., by Luxury Resorts International, Inc. d/b/a The Atlantic.*

Date: July 25, 2019

The Commission should also put Calypso on notice that should Calypso ever fail to comply with these conditions or file the report, the rule waiver will cease to be effective and Calypso will be responsible for all costs associated with the conversion to individual metering.

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. (King, 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.