

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, L.P.

Docket No: 20200175-EU

Date: October 21, 2020

**FLORIDA POWER & LIGHT COMPANY'S
PREHEARING STATEMENT**

Florida Power & Light Company ("FPL"), by and through its undersigned counsel, hereby submits this Prehearing Statement pursuant to Order No. PSC-2020-0335-PCO-EU, and states:

1. FPL WITNESSES

No pre-filed testimony or pre-filed exhibits were submitted in this proceeding. Casa Devon Venture, L.P. ("Casa Devon") has the burden of proof in this proceeding pursuant to Section 120.542(2), Florida Statutes ("F.S."), not FPL. FPL has issued discovery to Casa Devon, but responses to FPL's discovery requests remain pending. As such, it is not known at this time whether FPL witnesses will be necessary to respond to the testimony intended to be offered by Casa Devon at the hearing and, if so, which witnesses will be called by FPL. FPL expressly reserves the right to call any witnesses necessary to support its direct case and/or respond to witness testimony introduced by Casa Devon.

2. EXHIBITS

At this time, it is unknown what exhibits FPL intends to introduce at the hearing. There was no pre-filed testimony or pre-filed exhibits in this proceeding, and responses to FPL's discovery requests remain pending. As such, FPL expressly reserves the right to introduce any exhibits at the hearing as necessary to support its direct case, as well as for cross-examination or impeachment. FPL also reserves the right to utilize any exhibit introduced by any other party.

3. STATEMENT OF BASIC POSITION

In this de novo proceeding, Casa Devon requests the Commission to grant an emergency variance from or waiver of the individual metering requirements set forth in Rule 25-6.049(5), Florida Administrative Code (“F.A.C.”), so that it can master meter an apartment building that is currently individually metered.¹ In order to be entitled to the requested variance or waiver, Casa Devon has the statutory burden of proof to demonstrate (1) that the purpose of the underlying statute will be or has been achieved by other means by the person, and (2) that application of the rule would create a substantial hardship or would violate principles of fairness. *See* Section 120.542(2), Fla. Stat. FPL submits that the record evidence will demonstrate that Casa Devon has not and cannot satisfy either of these statutorily required elements for the requested variance or waiver of the individual metering requirements set forth in Rule 25-6.049(5), F.A.C.

The evidence in this proceeding will show that Casa Devon’s request to master meter the 210 apartment units housing 210 individual FPL customers fails to satisfy any of the exemptions from individual electric metering expressly enumerated in Rule 25-6.049, F.A.C. The evidence will also show that Casa Devon’s request to master meter these 210 apartment units would not achieve the underlying purpose of the Florida Energy Efficiency and Conservation Act (“FEECA”), Sections 366.81, *et seq.*, to promote individual customers’ efforts to conserve energy, which is the enabling statute for Rule 25-6.049, F.A.C. (“the Rule”). The evidence will further show that Casa Devon’s purported hardship resulting in the claimed need for a waiver or variance was caused by its own failure to seek a waiver or variance from the Commission to even allow

¹ Although not plead or requested as relief in their Corrected Petition, Casa Devon has asked the staff to add an issue in this proceeding that would allow alternative relief in the form of a finding that the apartment building qualifies for master metering as a specialized use housing accommodation under subsection (5)(c) of Rule 25-6.049, F.A.C. FPL does not agree that this issue has been preserved, nor does the record support the applicability of Rule 25-6.049(6), F.A.C. to the proceeding at issue.

master metering for a facility with long term rental agreements with tenants who are not transient in nature. This is a determination over which the Commission has exclusive jurisdiction, and Casa Devon failed to seek or secure permission from the Commission to master meter prior to entering into an agreement with the U.S. Department of Housing and Urban Development (“HUD”). Instead, Casa Devon bypassed the Commission and entered into the agreement with HUD to master meter the apartment building, an agreement that neither Casa Devon nor HUD had authority to execute. The master metering provisions in the Casa Devon/HUD Agreement could only be lawfully entered into by first securing a waiver from the Commission’s duly promulgated and binding individual metering rule, specifically, Rule 25-6.049 (5), F.A.C.

For these reasons, as will be further explained through the evidence introduced at the hearing and in FPL’s post-hearing brief, Casa Devon’s petition must be denied.

4. STATEMENT OF ISSUES AND POSITIONS

A. Staff’s Proposed Issues

Issue No. 1: Has Casa Devon Venture, LP (“Casa Devon”) demonstrated that the purpose of the statutes underlying Rule 25-6.049(5), F.A.C., will be or has been achieved by other means by Casa Devon?

FPL Position: No. The evidence will show that Casa Devon’s request to master meter these 210 apartment units would not achieve the purpose of the statutes underlying Rule 25-6.049(5), F.A.C., including FEECA, Sections 366.81, *et seq.*, which is to promote individual customers’ efforts to conserve energy. Specifically, if Casa Devon’s request to master meter the 210 apartment units, which currently are individually metered as required by Rule 25-6.049(5), F.A.C., is granted, these individual customers will not be aware of their individual electrical usage and will have no incentive to conserve their electric energy usage and reduce electric consumption.

Issue No. 2: Has Casa Devon demonstrated that application of Rule 25-6.049(5), F.A.C., would create a “substantial hardship,” as defined by Section 120.542(2) Fla. Stat., to Casa Devon?

FPL Position: No. According to Casa Devon’s Corrected Petition, the application of Rule 25-6.049(5), F.A.C., would create the following alleged hardships for Casa Devon: (1) an inability to master meter residents’ electrical usage, which Casa Devon asserts constitutes a default under Casa Devon’s housing assistance payment (“HAP”) contract with HUD; (2) a negative change in the current operating budget projections; and (3) a loss of Solar Investment Tax Credits for the Project. Casa Devon’s alleged hardships were all caused solely by Casa Devon’s own failure to conduct proper diligence to understand the requirements of the law and the Commission’s rules regarding master metering before it entered into the HAP contract with HUD and otherwise agreed to commitments that were directly contrary to law. The purported hardships created by Casa Devon arose as a direct and proximate result of Casa Devon’s failure to undertake the necessary due diligence regarding the Commission’s regulatory rules governing the limited nature of master metering of multi-tenant buildings. Had such due diligence been conducted, Casa Devon would have or certainly should have reasonably concluded, as the Commission did in its PAA Order, that their apartment building did not qualify to be master metered under the Rule. Had Casa Devon, or their agents or representatives, timely undertaken the due diligence to determine whether their proposal to master meter complied with all applicable laws and regulations, including Rule 25-6.049(5), F.A.C., or whether any waivers or variances were required before it could even entertain the possibility of master metering as part of the HAP contract with HUD, the hardships alleged by Casa Devon would simply be nonexistent. As a matter of law, Casa Devon cannot create the alleged substantial

hardship required by Sec. 120.542 (2), Fla. Stat., to grant a rule waiver by ignoring the Commission's exclusive jurisdiction and rules, enter into an agreement that is in direct violation of those rules, and then claim that it is the rule, rather than their own actions, that creates a substantial hardship.

Issue No. 3: Has Casa Devon demonstrated that application of Rule 25-6.049(5), F.A.C., would violate "principles of fairness," as defined by Section 120.542(2) Fla. Stat., for Casa Devon?

FPL Position: No. Pursuant to Section 120.542(2) Fla. Stat., "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. In this case, Casa Devon is asking the Commission to treat it differently than all other similarly situated apartment complexes in which non-transient residents reside, and grant Casa Devon a special exception from the individual metering requirements that is not available to any other similarly situated apartment complexes. Granting Casa Devon's request would: (1) be discriminatory as against other similarly situated apartment complexes; (2) violate principles of fairness; and (3) undermine the goals of FEECA to promote energy conservation which are at the heart of Rule 25-6.049(5), F.A.C.

Issue No. 4: Should the Commission grant the petition for emergency variance from or waiver of Rule 25-6.049(5), F.A.C., Measuring Customer Service, by Casa Devon?

FPL Position: No. For the reasons stated in FPL's positions under Staff's proposed Issue Nos. 1-3, the evidence in the proceeding will demonstrate that Casa Devon has not and cannot meet the statutory elements required in order for the Commission to have authority to grant a variance or waiver of Rule 25-6.049, F.A.C.

Issue No. 5: In the alternative, if the Commission denies Casa Devon’s petition for emergency variance from or waiver of Rule 25-6.049(5), F.A.C., should the Commission find that Casa Devon should be allowed to master meter the Casa Devon apartment building as a specialized-use housing accommodation pursuant to Rule 25-6.049(5)(c), F.A.C.?

FPL Position: No. As a preliminary matter, FPL does not agree that this issue has been preserved for the reasons set forth in FPL’s position below under “Casa Devon Contested Issue B,” which is fully incorporated herein. Notwithstanding and without waiver of any objections, specialized-use housing is defined in Rule 25-6.049(5)(c), F.A.C., as “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.” Casa Devon, a commercial property that owns and operates an apartment complex with 210 individual non-transient rental units, satisfies none of the criteria enumerated by the rule, nor is it in any way “similar” to a medical or medical-related facility, a convent, or college housing.

Issue No. 6: Should this docket be closed?

FPL Position: Yes, upon the issuance of an appropriate order denying Casa Devon’s Corrected Petition.

B. Contested Issues

FPL Contested Issue A (FPL proposed issue 4): Can a petitioner requesting a waiver of or variance from a rule satisfy the statutory requirement to demonstrate a “substantial

hardship,” as defined by Sec. 120.542(2), Fla. Stat., through the petitioner’s own failure to timely request a waiver or variance from a Commission rule?

FPL Position: FPL submits that its proposed Contested Issue A is an important and separate issue that the Commission must, as a matter of law, decide in this case. The record evidence in this proceeding will establish that Casa Devon’s claimed hardship was a direct result of its own failure to recognize and understand: (1) that the apartment building at issue does not qualify for master metering under Rule 25-6.049(5), F.A.C.; (2) that only the Commission may grant a waiver of the requirement that the facility be individually metered; and, (3) that it could not “self-help” its way to the granting of a waiver of the individual metering rule requirement rule by proceeding forward with a HUD Agreement without first seeking a rule waiver from the Commission. For these reasons alone, Casa Devon’s Corrected Petition and request to master meter must be denied. FPL submits that it is important for the Commission to include this issue as a specifically listed issue in the prehearing order so that the Commission will then specifically address its resolution of this issue in its final order. By doing so, the Commission will be squarely addressing a fundamental issue and concern (as recognized by Commissioners Polmann and Graham at the August 18, 2020 agenda conference) in this proceeding and provide guidance for any future rule waiver requests that arise from a similar set of facts as to the Commission’s interpretation and application of Sec. 120.542(2), Fla. Stat. Simply put, by maintaining this legal issue as a separate and distinct issue, the Commission will be able to make clear its position on whether a party can create a “substantial hardship” and then rely upon that “substantial hardship” to obtain a variance or waiver from a Commission rule.

Casa Devon Contested Issue A (*Casa Devon proposed issue 1*): Whether the purpose of the statute underlying Rule 25-6.049, F.A.C., the Florida Energy Efficiency and Conservation Act, is to promote energy conservation and reduce electricity consumption?

FPL Position: FPL objects to Casa Devon proposed Contested Issue A as a separate issue in this proceeding. The “issue” is unnecessary. First, it is a given, a fact, that at least one of the purposes of FEECA, since its adoption some forty years ago, is to promote energy conservation and reduced electricity consumption. See Sec. 366.81, Fla. Stat. To the extent Casa Devon wishes to assert otherwise, such arguments can be raised under Staff proposed Issue No. 1. In the event that Casa Devon proposed Contested Issue A is allowed as a separate issue in this proceeding, FPL incorporates its position under Staff proposed Issue No. 1.

Casa Devon Contested Issue B (*Casa Devon proposed issue 6*): Does Casa Devon constitute a “specialized-use housing accommodation” or “similar facility[y]”, as set forth in Rule 25-6.049(5)(c), F.A.C., such that Casa Devon should be exempt from the individual metering requirement?

FPL Position: FPL objects to Casa Devon proposed Contested Issue B as a separate issue in this de novo proceeding. Casa Devon proposed Contested Issue B (i.e., whether the Casa Devon apartment complex satisfies one of the exemptions from master metering enumerated in Rule 25-6.049(5), F.A.C.) was not properly raised in Casa Devon’s Corrected Petition filed on September 17, 2020, requesting this de novo proceeding. Absent an amendment to Casa Devon’s Corrected Petition, the issue of whether the apartment complex meets one of the enumerated exemptions is beyond the scope of this proceeding. To the extent that Casa Devon’s proposed Contested Issue B is allowed as an issue in this proceeding, FPL contends that the Casa Devon apartment complex does not qualify for any exemptions from the individual metering requirement based on the plain

language of Rule 25-6.049, F.A.C., and the exemptions enumerated thereunder, as more fully explained in FPL's position above under Staff's proposed Issue No. 5, which is incorporated herein.

5. STIPULATED ISSUES

FPL is not aware of any stipulated issues at this time. However, FPL remains willing and available to discuss settlement and/or stipulated facts and issues with the parties.

6. PENDING MOTIONS

As of the date of this filing, FPL is not aware of any motions that are pending.

7. PENDING REQUESTS FOR CONFIDENTIALITY

As of the date of this filing, FPL is not aware of any Requests for Confidential Classification that remain pending.

8. OBJECTIONS TO WITNESS QUALIFICATIONS AS AN EXPERT

FPL has issued discovery regarding the witnesses Casa Devon intends to call, including whether such witnesses will be called as an expert and, if so, information on the witness's qualifications as an expert. Responses to these discovery requests remain pending. Therefore, as of the time of this filing, it is unknown what witnesses Casa Devon intends to call to testify at the hearing or whether such witnesses will be offered as an expert witness. Accordingly, FPL expressly reserves the right to object to a witness's qualifications as an expert and reserves the right to conduct voir dire of any witnesses offered at the hearing by Casa Devon as expert witnesses.

9. **REQUEST FOR SEQUESTRATION OF WITNESSES**

None at this time.

10. **STATEMENT OF COMPLIANCE WITH ORDER ESTABLISHING PROCEDURE**

There are no requirements of the Order Establishing Procedure with which FPL cannot comply.

Respectfully submitted this 21st day of October, 2020,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic delivery this 21st day of October, 2020 to the following:

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