BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to Compel Florida Power & Light to Comply With Fla. Stat. §366.91 and Rule 25.6-065	)))	Docket No. Date: September 23, 2019

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PETITIONERS' RESPONSE IN OPPOSITION TO FPL'S MOTION TO DISMISS

Floyd Gonzales and Robert Irwin ("Petitioners"), through their undersigned Counsel, hereby files this Response in Opposition to Florida Power & Light Co.'s ("FPL") Motion to Dismiss ("Motion"), stating in support as follows:

Introduction

1. This action concerns the size limits imposed by FPL for customer-owned renewable power generation systems that qualify for its net metering programs. In particular, the Petition concerns the fact that FPL imposes limits that are far more restrictive than those established by the FPSC and that, per statute, FPL has no authority to disregard the FPSC's rules governing same.

2. Notably, FPL's Motion ignores this central issue completely. FPL does so because there is no way of construing its consumption-based limit as consistent with the FPSC's capacity-based limit, or explaining how it can usurp the FPSC's legislatively-delegated scope of authority. Equally impossible is squaring FPL's more restrictive limits with the Legislature's goal underlying its mandate that Florida utilities must provide net metering for its customers, which is to "promote the development of renewable energy resources in this state." 366.91(1), Fla. Stat.

3. Regardless, FPL's Motion makes three arguments (one definition-based, one notice-based, and one based on damages) for why the Petition fails to state a claim, and alternatively argues that the Petition actually seeks a declaratory statement under 28-105.001, F.A.C. rather than stating a complaint under 25-22.036, F.A.C. Not so, and each argument fails as a matter of law.

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Argument

i. The Definition of 'Customer-Owner Renewable Generation' Does Not Include the Limits Sought to be Imposed by FPL.

4. FPL's first argument is based on the statutory definition of "customer-owned renewable generation." That provides: "'Customer-owned renewable generation' means an electrical generating system located on a customer's premises that is primarily intended to offset part or all of the customer's electricity requirements with renewable energy." 366.91(2)(b), Fla. Stat. FPL focuses on the "part or all" language and claims that "[t]he only logical interpretation of the phrase "part or all" of a customer's electricity requirements is that the customer's system should not exceed 100% (or "all") of the customer's kilowatt hour ("kWh") consumption." MTD, p. 8. FPL's self-serving interpretation fails on numerous levels.

5. First, FPL's definition-based argument fails *in toto* because it is based on facts beyond the four corners of the petition. FPL argues that "ignoring this definition and allowing customers to send large, unknown, and unplanned excess amounts of electricity back to the grid would result in operational safety issues, as FPL would have limited visibility into the energy being delivered into its system." MTD p. 8. There is, however, no basis to presume that anything beyond 100% would result in "large, unknown, and unplanned excess amounts of electricity[.]" The Petition does not admit this and, in fact, the opposite must be true. In terms of "unplanned" or "excess" power, FPL has no way of knowing how much, if any, electricity will be sent back to its grid from any given power generation system on any given day. There are myriad factors that increase or decrease production of renewable power generation, none of which FPL can control or plan for.

6. FPL then supports its definition-based argument by claiming that "[a]ny other interpretation would completely ignore the specific words chosen by both the legislature and the Commission defining 'customer-owned renewable generation' for purposes of net metering." *Id.*

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But FPL ignores the Legislature's specific delegation of rule-making authority to the FPSC and its express mandate that utilities must offer net metering programs to achieve their goal of "promot[ing] the development of renewable energy resources in this state." 366.91(1), Fla. Stat.

7. FPL's argument also fails because it ignores other equally reasonable interpretations of the "part or all" language. To begin, the definition provides that offsetting "part or all" of a customer's electricity needs is *a primary*, but not *the exclusive*, intent. Thus, there must be other intents the legislature seeks to achieve. Most obvious among these is the primary intent of promoting the development of renewable energy resources underlying the Legislature's requirement that utilities offer net metering in the first place. Accordingly, every interpretation must be viewed through the lens of what the Florida Legislature deemed to be its *overarching* goal when requiring utilities to offer net metering; and that is to *encourage* - not *impede* - the development customer owned renewable power generation. Here, FPL's limit impedes rather than encourages such development.

8. Along the same lines, FPL's argument presumes that the intent to offset "part or all" of a customer's electricity needs is strictly limited to a customer's historic consumption. However, nowhere does the Legislature nor the FPSC limit the relevant time period. To the contrary, with the goal of encouraging development, it makes more sense that the relevant time period would be a forward-looking and expansion-friendly perspective.

ii. FPL Ignores its Lack of Authority to Impose Limits Different than the FPSC's, Instead Arguing its Limit is Somehow Proper Because it Gives Customers Notice.

9. FPL's second argument in support of dismissal relates to the manner in which it imposes its more restrictive limit. Although the point made by the Petition is that FPL has no authority to disregard the FPSC's qualification rules, FPL seems to justify its surreptitious imposition of the 115% limit by arguing that its customers have "notice of the permitted size of systems qualifying as customer-owned renewable generation, both through a plain reading of Rule 25-6.065, F.A.C.,

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and the FPL communication attached to the Petition as Exhibit A." *Motion*, ¶ 9. This misses the point entirely and mischaracterizes the issue raised by the Petition.

10. The Petition argues that FPL does not have the authority to impose net metering limits that are more restrictive than those established by the FPSC. Whether or not FPL may do so is not a matter of notice to its customers, but a matter of if it may disregard the authority of the Legislature and FPSC. The Petition illustrates the surreptitious nature of FPL's more restrictive limit by pointing out that "FPL's standardized interconnection agreement that was approved by the FPSC makes no mention of its arbitrary limitation[,]" *Petition* ¶ 9, and that, under the controlling statute, "FPL … has no … authority to disregard the FPSC's criteria for acceptance." *Id*. at ¶ 8.

11. This is the crux of the Petition and, glaringly, FPL ignores it entirely because it has no legal basis for usurping the FPSC's exclusive rule-making authority as to who qualifies for expedited approval and inclusion in a utility's net metering program.

iii. Damages Need Not be Specific and Are Adequately Alleged in the Petition.

12. FPL's third argument for the Petition's failure to state a claim pertains to the allegations of damages, claiming that the request for same is speculative and uncertain. This also fails because (a) it relies on facts beyond the scope of the Petition (what and how much) and (b) there is no rule cited by FPL that obligates Petitioners to specify the precise amount sought.

iv. Petitioners Adequately State a Claim Under Rule 25-22.036.

13. Finally, FPL alternatively argues that the Petition actually states a request for declaratory statement under 28-105.001, F.A.C. Again, not so. Rule 25-22.036, F.A.C., requires Petitioners to state (1) the rule that has been violated, (2) the actions constituting the violation, (3) the name and address of the person against whom the complaint is lodged, and (4) the specific relief requested, including any penalties sought. That is all alleged here.

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14. The Petition states that (1) FPL is violating "§366.91 and Rule 25-6.065," *Petition,* ¶ 3, (2) FPL is violating the statute and rule by "impos[ing] its own arbitrary and far more restrictive limitations based on a property's historical energy consumption rather than utility distribution service rating as the FPSC requires[,]" *Id.* at ¶ 8, (3) the complaint is against FPL, and (4) seeks an order compelling FPL's compliance with the FPSC's rules and reimbursement.

15. Moreover, by the plain language of the Petition, Petitioners do not seek an interpretation of any rule; the relevant language is plain an unambiguous, it does not need interpreting, they need enforcing. The Petition plainly seeks an order finding that FPL's imposition of its more restrictive, self-serving limit violates the FPSC's rules governing qualifications and acceptance into any utility's net-metering program, compelling FPL to grant Petitioners' application, and an award reimbursing them for their electric bills.

16. Further, FPL's argument that this seeks a declaratory statement would render pointless the administrative rule for Formal Proceedings, 25-6.065. By FPL's argument, any violation alleged by a customer would be rendered a request for a declaratory statement as to whether FPL violated a given rule and would rob the customer of their ability to seek reimbursement or penalty for FPL's violative conduct, as Rule 28-105.001 does not have an allowance for seeking any remedy (i.e. penalty/reimbursement) as part of the relief sought.

WHEREFORE, Petitions respectfully request that FPL's Motion be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *Response in Opposition to FPL's Motion to Dismiss* has been furnished via electronic service on Kenneth M. Rubin, Esq., at ken.rubin@fpl.com, counsel for FPL, on this 23rd day of September 2019.

Respectfully submitted,

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