

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition for a limited proceeding to : **DOCKET NO. 20200176-EI**
approve clean energy connection program :
and tariff and stipulation, by Duke Energy :
Florida, LLC. : **Filed: November 10, 2020**

**WALMART INC.'S RESPONSE IN OPPOSITION TO
LEAGUE OF UNITED LATIN AMERICAN CITIZENS'
MOTION TO COMPEL AND MOTION FOR PROTECTIVE ORDER**

Walmart Inc. ("Walmart") by and through its undersigned counsel, pursuant to Rule 1.380 and 1.380, Florida Rules of Civil Procedure, and Rule 28-106.206, Florida Administrative Code, and the Florida Public Service Commission's ("Commission" or "PSC") Order Establishing Procedure PSC-2020-0324-PCO-EI, and hereby serves its Response in Opposition to League of United Latin American Citizens' ("LULAC") Motion to Compel ("Motion") discovery from Walmart which consists largely of confidential settlement documents and information exchanged among the Duke Energy Florida, LLC ("DEF"), Walmart, Southern Alliance for Clean Energy ("SACE"), and Vote Solar (collectively, "Parties to the Stipulation"), the production of which would impact all the Parties to the Stipulation and stifle incentives for parties to negotiate and present the Commission with settlements for its consideration. Walmart further submits its own Motion for Protective Order, pursuant to Rule 1.280(c), Florida Rules of Civil Procedure.

Discovery Background

1. In the Commission's Procedural Order for this Docket, Order No. PSC-2020-0324-PCO-EI, the deadline to complete discovery was November 2, 2020.
2. On October 12, 2020, LULAC served discovery on Walmart, attached as Exhibits 1 and 2 to LULAC's Motion, which responses were due on November 2, 2020.

3. On November 2, 2020, Walmart served its Objections and Responses to LULAC's discovery, attached as Exhibits 3 and 4 to LULAC's Motion.
4. Also on November 2, 2020, Walmart's counsel advised LULAC's counsel that there was confidential information requested in the discovery, but that some additional information could be provided upon the execution of a Non-Disclosure Agreement ("NDA").
5. To date, LULAC has not signed the NDA that Walmart's counsel circulated on November 4, 2020, which Walmart believes is substantively similar to the one LULAC entered into with DEF.
6. Additional communication between counsel for Walmart and LULAC was exchanged November 3-5, 2020, wherein no agreement was reached for the production of the requested information, or information subject to an NDA without execution of same.
7. At close of business on November 5, 2020, LULAC filed its Motion.

Walmart's Objections to LULAC's Discovery

As a threshold matter, LULAC's Motion was filed after the discovery cutoff date. Therefore, LULAC's Motion is untimely and should be denied. *See In re: Application of Southern States Utilities, Inc. for Increased Water and Wastewater Rates in Collier County (Marco Island Systems)*, Docket No. 920655-WS, Order No. PSC-93-0463-PCO-WS (issued Mar. 25, 1993) (denying as untimely a motion to compel and request for in camera inspection filed after the discovery deadline). Even if LULAC's Motion had been timely, it should be denied as outside the scope of allowable discovery, as set forth below.

Discovery is limited to those matters relevant to the litigation as framed by the Petition, Tariff, and Stipulation. Pursuant to Fla. Stat. Sect. 366.093(3), "[d]iscovery in any docket or

proceeding before the commission shall be in the manner provided for in Rule 1.280 of the Florida Rules of Civil Procedure." Rule 1.280(b)(1) restricts the scope of discovery to information "relevant to the subject matter of the pending action." Not all of LULAC's discovery requests were so limited.

To justify its discovery requests to Walmart, LULAC claims in its Motion, without record support, that "Walmart stands to make tens of millions of dollars guaranteed by the general body of ratepayers, including LULAC's members, from the approval of this program. Since Walmart is asking that LULAC's members' bills increase to make payments to Walmart – and insists that it is in the public interest to do so – it is only fair to ask how much Walmart stands to make." These claims misconstrue the way the Clean Energy Connection ("CEC") Program is structured, and are false as to Walmart, a member of the general body of ratepayers who is but one of many DEF customers interested in participating in the CEC Program. Moreover, these statements are not supported by LULAC's own witness.¹ Walmart has valid reasons to limit production of requested information or to withhold the requested information.

First, Walmart offered to produce information sought in response to Interrogatory No. 4, but LULAC has not yet signed the NDA that Walmart circulated. Contrary to what LULAC states, the information is not in the public domain. DEF did not identify the referenced customers in its discovery responses, Exhibit 5 to LULAC's Motion. The fact that LULAC is compiling information from Walmart's and DEF's filings to "assume" the identity of a DEF

¹ LULAC witness Karl Rabago was deposed on October 29, 2020. Walmart's examination of Mr. Rabago appears at pages 99-110 of the deposition, which pages are attached as **Exhibit A**. In response to questions about LULAC's Prehearing Statement that "Wal-Mart alone stands to make over \$35 million from this program through bill credits paid for by the general body of customers," Mr. Rabago stated, "I don't actually have the math for that statement in my head, so I don't know if I agree or not . . . I don't remember personally doing an analysis." Rabago Deposition ("Dep."), page 103, line 8 through page 104, line 2. Rabago further admitted that "the relative distribution of credits is ultimately dependent upon the number of kilowatt hours that each facility [in the CEC Program] produces." Rabago Dep., page 102, lines 7-24.

customer does not make a difference. Walmart remains willing to produce this information subject to an NDA.

Second, Walmart objected to Interrogatory Nos. 1, 2, 5, and 6, and Requests for Production Nos. 1 and 2 on the grounds that settlement discussions, including documents exchanged in furtherance of settlement negotiations, are confidential among settling parties. As a matter of public policy, forcing one member of a group of settling parties to divulge confidential negotiations or draft agreements, tariffs, or other documents created as part of the settlement negotiation process would have a chilling effect on settlements. In turn, fewer settlements in otherwise contested dockets would likely increase the administrative burdens on the Commission.

Third, LULAC's Interrogatory Nos. 5 and 6, and Requests for Production Nos. 1 and 3, seek financial and business information from Walmart irrelevant to the PSC's consideration of the Petition, Tariff, and Stipulation. It would be improper for LULAC to ask DEF to divulge billing arrangements with its customers, DEF has protected customer privacy, and LULAC should not be permitted to solicit that information by singling out Walmart, just one of thousands customers that DEF anticipates participating in the CEC Program, and thirty Educational, Commercial and Industrial customers that pre-registered for the Program.² Documents and information related to these Interrogatories and Requests for Production are confidential and competitively sensitive to Walmart.

Finally, as to LULAC Interrogatory Nos. 5 and 6, the information LULAC is requesting fits within the definition of "[p]roprietary confidential business information" under Fla. Stat. Section 366.093(3)(a) and (e) (2020) and within the definition of "trade secret" under Fla. Stat.

² Rebuttal Testimony of Lon Huber (Oct. 19, 2020), p. 3, line 5 through p. 4, line 4.

Section 688.002(4) (2020). Therefore, the information is not discoverable per Fla. R. Civ. P. 1.280(c)(7) and Fla. R. Evid. 90.506. *See also In re: Complaint of Consolidated Minerals, Inc. Against Florida Power & Light Company for Failure to Negotiate Cogeneration Contract*, Docket No. 911103-EI, PSC Order PSC-92-0077-PCO-EI (issued Mar. 18, 1992) (identifying trade secret information of non-utility participating party). Further, Walmart objected to these Interrogatories to the extent they seek work product information that is not discoverable pursuant to Fla. R. Civ. P. 1.280 and F.S. 366.093.

Walmart's Motion for Protective Order

Pursuant to Rule 1.280(c), Walmart moves, for good cause shown and set forth above, for a protective order

(1) that the discovery not be had; ... (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; ... (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

As to the information requested by Interrogatory No. 4, Walmart moves for an Order that the discovery may be had upon LULAC's entry of an NDA.

As to the information requested by Interrogatory Nos. 1, 2, 5, and 6, and Requests for Production Nos. 1 and 2, Walmart moves that the discovery not be had as those requests related to settlement negotiations among Parties to the Stipulation.

As to the information requested by Interrogatory Nos. 5 and 6, and Requests for Production Nos. 1 and 3, Walmart moves that the discovery either not be had, or if the Commission requires its production, that it be treated as confidential pursuant to Order PSC-2020-0324-PCO-EI. *See, e.g., In re: Petition for a limited proceeding to recover incremental*

storm restoration costs, capital costs, revenue reduction for permanently lost customers, and regulatory assets related to Hurricane Michael, by Florida Public Utilities Company, Docket No. 20190156-EI, PSC Order No. PSC-2020-0179-CFO-EI (issued June 9, 2020).

CONCLUSION

Walmart respectfully requests that LULAC's Motion to Compel be denied in its entirety, except for the production of information responsive to Interrogatory No. 4, pursuant to the entry of an NDA between LULAC and Walmart. Further, Walmart moves that its Motion for Protective Order be granted, and that (a) discovery requested by LULAC's Interrogatory Nos. 1, 2, 5, and 6, and Requests for Production Nos. 1 and 2 related to the parties' settlement negotiations not be had, and (b) that discovery requested by LULAC's Interrogatory Nos. 5 and 6, and Requests for Production Nos. 1 and 3 related to Walmart' internal financial calculations not be had or if the Commission orders production, that the information be treated as confidential pursuant to Order PSC-2020-0324-PCO-EI. LULAC did not request oral argument, and Walmart further requests that the Commission rule on the written submissions before the commencement of the Hearing on November 17, 2020, so the parties can prepare accordingly.

Respectfully submitted this 10th day of November, 2020.

By /s/Stephanie U. Eaton

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EXHIBIT A

1 BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

2 Docket No. 20200176-EI

3 —

4 DEPOSITION OF: KARL RABAGO, October 29, 2020

5 In Re: Duke Energy Florida, LLC's Petition for a
6 limited proceeding to approve clean energy connection
7 program and tariff and stipulation

8 PURSUANT TO NOTICE, the Deposition of
9 KARL RABAGO was taken on behalf of Duke Energy Florida,
10 LLC, on October 29, 2020, at 12:01 p.m., via
11 RemoteDepo, before Jacquelyn R. Gallo, Registered
12 Professional Reporter and Notary Public within
13 Colorado, appearing remotely from Adams County,
14 Colorado.

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25

1 MS. EATON: Okay.

2 EXAMINATION

3 BY MS. EATON:

4 Q. Sir, first off, I will say our power has gone
5 on and off all day, our phones are off, so I am on my
6 personal hotspot and everything. I hope that I can ask
7 these few questions without anything going wrong, but
8 if I get cut off, I will call right back. And please
9 tell me if you can't hear me, okay? Like the
10 questions -- or the things Dianne said earlier,
11 technology, if you can't hear me or whatever, let me
12 know right away.

13 Okay. My questions refer to the prehearing
14 statement that was submitted yesterday by LULAC. Have
15 you had a chance to review that, or did you review that
16 before it was submitted?

17 A. I have not reviewed it.

18 Q. Okay. There were just two sentences in that
19 filing that I will read to you -- and, Bradley, if I am
20 reading them wrong, please step in -- but the reason is
21 that I want to get your input on them.

22 The first sentence was on page 3 of the
23 prehearing statement, and it says this -- and I am
24 referring to CEC and program just as we have been doing
25 all day. It says, "CEC will unjustly and unreasonably

1 benefit participating customers, like Wal-Mart, at the
2 expense of nonparticipants where hundreds of millions
3 of dollars of essentially guaranteed subsidies will
4 bill credits paid for by the general body of customers,
5 including low income customers and LULAC members."

6 Do you agree with that statement?

7 A. Yes, I believe -- you're asking me, again,
8 right?

9 Q. Yes, I am.

10 A. Yes, I believe that is a good summary, even
11 if it's a pretty long sentence, of what I said out of
12 my testimony.

13 Q. Sure. And I was going to ask, is that
14 consistent with your testimony?

15 A. Yes, ma'am.

16 Q. Okay. And I believe that you have talked a
17 little bit about the \$291 million number throughout the
18 day. I am not going to ask you a lot more about that.
19 But I did want to ask, would you -- other than your
20 testimony, your direct testimony and your exhibits and
21 anything you have referenced in your direct testimony,
22 would you rely on any other document or analysis for
23 your opinion in this case?

24 A. No, nothing that I haven't disclosed, shared,
25 or generated.

1 Q. Okay. Now on that particular statement or
2 sentence that I just read really singled out Wal-Mart.
3 Are you opining about any other customers that received
4 what seemed to be unjustly or unreasonable benefits?

5 A. Yes, and I kind of want to apologize to you
6 and to the company in particular. And unfortunately, I
7 fall into a societal tendency of using Wal-Mart as a
8 broad brush, and I do not -- and I am using it in that
9 sense here. I am not singling Wal-Mart out. It is --
10 I have struggled to stay with participants and non-
11 participants. And I know it's not worth anything in
12 general, but in specific, you know, I have had a
13 wonderful relationship working with Wal-Mart in other
14 jurisdictions where they have been a true leader in
15 advancing solar markets, and I admire and recognize the
16 company's commitment to clean energy and to advancing
17 its reliance on carbon-free sources of electricity.

18 So I do apologize for that, and when I cite
19 Wal-Mart, it should be as an example that is more
20 accurately meant to portray participants versus non-
21 participants.

22 Q. Okay. Thank you, I appreciate that. And
23 also along the lines of participants and non-
24 participants, but would you agree that the participants
25 in the CEC program if it is passed were also members of

1 the general body?

2 A. You got a little garbled there at the very
3 end there. Would I agree the participants --

4 Q. Are also members of the general body of rate
5 payers.

6 A. Oh, yes, of course. Thank you, yes.

7 Q. And then the other part of that statement or
8 that sentence that I wanted to ask you about, and this
9 may be or may not be your wording, and so that is why I
10 am asking you, it said, quote, quote, "Hundreds of
11 millions of dollars are essentially guaranteed
12 subsidies..." and my question to you is what are
13 essentially guaranteed subsidies? What would you
14 characterize as essentially guaranteed?

15 A. Well, as to nominal amount and as a
16 cents-per-kilowatt-hour basis, but as company's
17 counsel, Ms. Triplett, pointed out a few minutes ago,
18 the relative distribution of credits is ultimately
19 dependent upon the number of kilowatt hours that each
20 facility produces.

21 So to the extent there is a risk of under-
22 production against forecast, there is -- it is not
23 absolute guarantees of subsidies. It is only
24 essentially guaranteed.

25 Q. Okay. Thank you for that. And by facilities

1 in your answer just then, you're speaking of the ten
2 solar facilities that are anticipated to come online in
3 the program if this approves?

4 A. Yes, ma'am, the 748 megawatts or the
5 additional solar bill that is proposed through this
6 program.

7 Q. Okay. Thank you.

8 There is another sentence which appears on
9 pages 3 and 4 of the prehearing statement. And again,
10 I will just read verbatim, it says, "Wal-Mart alone
11 stands to make over \$35 million from this program
12 through bill credits paid for by the general body of
13 customers."

14 Would you agree with that statement?

15 A. I actually don't have the math for that
16 statement in my head, so I don't know whether I agree
17 or not.

18 Q. Okay. Well, do you remember doing an
19 analysis to come up with an amount that singling
20 Wal-Mart out of that particular company would make from
21 the program?

22 A. I am drawing a blank. I don't remember
23 personally doing an analysis. I don't remember if I --
24 you know, remember seeing information that would
25 support that analysis or, you know, did it as a

1 percentage or something of the total subscription, so,
2 no, I do not.

3 Q. Okay. Are you familiar with the term
4 capacity factor?

5 A. Yes, I am.

6 Q. And would you agree capacity factor is a way
7 to predict performance of a program over time?

8 A. Not really.

9 Q. And how would you --

10 A. It's often used, but for purposes like this,
11 it's much more important to use the capacity value,
12 which is a mapping of output to pricing as it varies
13 over the hours of the year. Capacity factor is a crude
14 average of KWH out against name plate possibility or
15 potential across the course of the year. And with
16 solar in particular, it tends to vastly undervalue
17 solar's contribution to peak cost reductions.

18 Alternatively, I have also recommended the
19 value of solar analysis use effective load carrying
20 capability as a way of calculating capacity value for
21 incremental solar. And I would point out that you
22 could look no further than even PJM where -- the PJM
23 market for a place in which the capacity credit
24 assigned to variable renewables is much higher than the
25 so-called capacity factor.

1 Q. And you're saying the capacity value is
2 higher than the capacity factor?

3 A. Right, when you weigh the output by the value
4 of the hours during which the facility is generated.

5 Q. Are you familiar with the National Renewable
6 Energy Laboratory or NREL?

7 A. I used to be their biggest funder when I was
8 a deputy assistant secretary and their neighbor here in
9 the Denver area, so I am very aware of them.

10 Q. And are you familiar with NREL's Solar
11 Estimator?

12 A. Yes, I have heard of it generally. I
13 probably have plugged numbers into it once or twice in
14 my life.

15 Q. Have you done the analysis or calculation for
16 what the capacity factor is per NREL's central watts
17 for Florida?

18 A. I am not aware of it.

19 Q. Do you agree that if one were just doing a
20 capacity factor analysis, that if you use a lower
21 capacity factor, it can -- the factor number, the
22 percentage number using that number higher or lower can
23 impact the results?

24 A. The results of what?

25 Q. Of trying to give out the capacity factor.

1 A. Okay. I am sorry.

2 MR. MARSHALL: Objection as to form.

3 Q. (BY MS. EATON) I am sorry. I am asking it
4 really confusing. Sorry. I will ask another way.

5 If you were to view the capacity factor to do
6 an analysis, over what period of time would you want to
7 do it, if you were doing that sort of analysis for the
8 CEC program?

9 A. If you are trying to determine the output of
10 a solar generator in order to estimate sort of the
11 value of the amount of energy created, then differences
12 in the assumed capacity factor, the efficient -- the
13 effective conversion ratio over -- you know, as related
14 to hours of sunlight will change the estimate of -- and
15 in order to calculate sort of a total value of the
16 estimated output, you would use a timed scale that, as
17 I -- and I believe I think I said before should match
18 the useful life of the resource.

19 So with solar, I, you know, generally feel
20 comfortable when a 25-year analysis is used. Does that
21 answer your question?

22 Q. It does. I think earlier, you said something
23 about 30 years. I know that was the life of the
24 program here.

25 A. Right.

1 Q. Would you find fault if someone was doing
2 that analysis over the course of 30 years of the life
3 of the program?

4 A. No. Some friends of mine at NREL, the
5 National Renewal Energy Lab, have told me that we're
6 seeing 40-year and 45-year life on solar systems.

7 I would assume that if a utility was
8 operating it, that it would be well maintained and
9 should meet and exceed its warrantied life. So I
10 think -- I don't think 30 years is unreasonable at all
11 given relatively few moving parts.

12 Now with your variable tilt systems, you've
13 got to make sure you keep those -- those are operating
14 parts. You've got to make sure those are working.
15 There are some contingencies out there, and there are
16 also other variables that might be unknowns. But I
17 will sum up by saying I think with a good utility
18 managed solar facility or one managed by any other, you
19 know, good owner or host or service company, 30 years
20 is not unreasonable.

21 Q. Do you have any information regarding
22 Wal-Mart's proposed subscription level in the CEC over
23 30 years?

24 A. I am not recalling specifically. I do know
25 that somehow that number is related to an estimate of

1 sort of the values based on some assumptions and
2 subscription level, but I don't have it in my head.

3 Q. Okay. Would you accept, subject to check,
4 that Wal-Mart would pay nearly a quarter of a billion
5 dollars into the program at its preferred subscription
6 level over 30 years?

7 A. I accept that, subject to check. I don't
8 know what it means in relation to the total electric
9 and energy bills of Wal-Mart, which must be many orders
10 of magnitude bigger than that because of the size of
11 the company, but I will accept that number, subject to
12 check.

13 Q. And would you agree that there are no bill
14 credit guarantees inherent in the program for
15 participating customers?

16 A. Well, I think that there are -- the proposed
17 tariff does have a bill credit and does have an
18 increment of it going up and it's promised as part of
19 the program. Is there an ultimate out on that? I
20 assume so, but it's designed to provide a bankable
21 bill solar credit and solar credit escalator by the
22 terms of the tariff as I recall it. So we might be
23 saying slightly different things.

24 Q. Would you agree if the capacity factor is
25 lower, then the bill credits would be lower?

1 A. Because the bill -- because of the number of
2 the -- sort of the numerator of the bill credits is
3 going -- the number of bill credits that is generated
4 changes with the output level that a -- it should be a
5 direct correlation. Fewer units of output means
6 fewer -- lower bill credits to distribute and share.
7 Higher output leaves higher credits to distribute and
8 share.

9 Q. And so the credit issue comes down to unit
10 performance?

11 A. It does not just come down to unit
12 performance because it is a bill credit and -- a bill
13 credit and escalator are set in the tariff. So it is
14 that times that. It also comes down to facility
15 maintenance, it comes to the tilt, it comes down to
16 solar radiance levels and whether those change over
17 time that may change that may accompany global warming
18 over the life of 30 years. So there is a lot of other
19 things, but definitely I agree with you, performance is
20 a big factor.

21 Q. And would you consider, you know, maintenance
22 being tied to performance?

23 A. Yes. Maintenance is tied to performance,
24 especially if there are -- if there is a risk of a lot
25 of dust accumulation on the panels, if there are moving

1 parts, such as single-axis tilt mechanisms.

2 Q. Right, so in essence, the tilt and the
3 maintenance you are speaking of really do, as a whole,
4 would go into the performance of the actual roof?

5 A. Yes, somebody ought to keep the thing running
6 in tip-top condition. There is also inverter
7 maintenance and replacement. Inverters fail more
8 frequently or on shorter time scales than modules do,
9 so there is that as well, and keeping the fire ants out
10 of the electrical boxes, a whole bunch of other things.

11 Q. Sure. And would you agree that what is
12 guaranteed under the program are the subscription
13 payments made by the participants?

14 A. The payments are set, the credits are set --
15 you made it sound like that was exclusive. The
16 payments are set, the credits are set, and the fact
17 that nonparticipating customers must bear any of the
18 risk of fuel price, gas generation, or carbon value
19 risk. That is also set by the structure of the tariff.

20 MS. EATON: Okay. Thank you. Those are all
21 the questions I have. Thank you.

22 THE DEPONENT: Thank you. We survived. Where
23 are you located? Are you in Bentonville?

24 MS. EATON: No, I am in North Carolina.

25 THE DEPONENT: I heard there is big rain.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to the following parties this 10th day of November, 2020.

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