BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Duke Energy Florida, LLC's Petition for a limited proceeding to approve Clean Energy Connection Program and Tariff and Stipulation	DOCKET NO. 20200176-EI

LEAGUE OF UNITED LATIN AMERICAN CITIZENS' POST-HEARING STATEMENT AND BRIEF

The Florida League of United Latin American Citizens ("LULAC"), by and through its undersigned counsel, and pursuant to Order No. PSC-2020-0324-PCO-EI, Order Establishing Procedure, hereby submits its Post-Hearing Issue Statement and Brief.

EXECUTIVE SUMMARY

Duke Energy Florida, LLC's ("Duke") proposed Clean Energy Connection ("CEC") Program has been promoted by evidence and testimony by two, and only two corporations that both will make tens of millions of dollars in profit if this program is approved. Duke admits that it will make tens of millions of dollars from rate-basing additional solar panels, and although Walmart tries to hide how much money it would be taking from ratepayers, it is obvious in a world where 2 plus 2 still equals 4 that Walmart would take over $35 million from Duke's customers to participate in this program and claim that it has gone green. Coupled with the amount Walmart is being paid to participate in Florida Power & Light's ("FPL") SolarTogether program, Walmart is going to be paid over $125 million from Floridians across the state for Walmart to be able to claim it has gone green if this program is approved. Although Walmart has attempted to hide that it would be ripping off ratepayers—and this Commission has supported Walmart's claims of confidentiality—basic math proves this information to be true. No other investment provides the kind of virtually guaranteed return that this does for large

corporations like Walmart – approximately $135 for every $1 Walmart invests upfront. Duke and Walmart are looking out for their own financial interests as profit-making corporate entities. That is why it is the job of this Commission to ensure that fair rates are being created, and that the public interest is not confused with the financial interests of Duke and Walmart.

The CEC Program is not a true community solar program, despite being characterized as such, but rather, was requested by and designed for large customers such as Walmart. After FPL filed its SolarTogether program last year, Duke received inquiries from its large customers seeking a similar program. Duke then met with over 65 large customers to better understand their demand for a program like this, engaged in discussions with large corporations such as Walmart in the formulation of the program, and marketed the program to industrial and commercial customers. Large customer demand drove the program size and customer type allocations, which are not representative of Duke's overall customer base and demonstrate that this program was designed for large customers such as Walmart.

Following stakeholder input seeking a local government carve-out, the proposed CEC Program was apportioned as follows: 65% for large industrial and commercial customers, 10% for local governments, and 25% for residential and small business customers. Meanwhile, residential customers alone make up 53% of all of Duke's sales, while commercial and industrial customers – including small businesses – comprise only 39% of Duke's total sales. Low-income customers make up 15% of all Duke's sales yet have access to only 3.47% of the CEC Program. This translates to roughly 1% of low-income customers having access to the CEC Program, while the other 99% face higher utility bills to enable Duke to make bill credit payments to corporations such as Walmart. Meanwhile, Walmart's subscription, as just one customer, represents more than three times the entire allocation reserved for low-income customers. Such

a program cannot be deemed "fair, reasonable, and just" within the meaning of Section 366.06, Florida Statutes.

The split of costs, benefits, and risk prove that this program is not meant to serve the general body of ratepayers, but rather is designed to keep select customers like Walmart happy to ensure that there is no defection from Duke's monopoly through self-installation of distributed solar. Although Duke claims that the participants pay for the project, this simply is not true. Instead, the participants are essentially guaranteed to be paid almost $300 million. Looking at each individual year proves that the participants make no significant contribution to the project. During the initial years of the project, the only time participants contribute more to the costs of the project than they receive in bill payments, participants still contribute less than 1% of the costs to the project each year. The general body of ratepayers have no choice but to cover the remaining 99% plus of the costs. After the initial years, the participants get paid through bill credits that are guaranteed to escalate at 1.5% per year, even while Duke's own (virtually impossible) projections still have the general body of ratepayers facing net costs – costs exacerbated by needing to pay direct bill credits to participants. The more solar that is subscribed, the higher the cost to the general body of ratepayers. Eventually, in the late 2030's, Duke's projections do have the general body of customers breaking even, and eventually saving money. However, all the risk that Duke's cost-effectiveness projections are not realized are borne by the general body of ratepayers. If savings from Duke's carbon costs fail to materialize, fuel price projections are incorrect, or the alternative resource plan is wrong, all of the risk is on the ratepayers who paid for over 99% of the costs of the solar arrays, not the participants.

While the general body of ratepayers essentially guarantees almost $300 million in bill credit payments to participants, premised only on the solar panels operating as designed, the

projected benefits that Duke predicts for the general body are entirely premised on non-existent carbon costs, higher fuel projections, and a resource plan that has Duke continuing to make expensive investments in gas infrastructure through the 2040s, even though Duke's own assumed carbon costs are designed to drive its resource fleet to net zero emissions by 2050. In response to LULAC's argument that the likelihood of Duke's cost-effectiveness projections playing out are virtually impossible, Duke conceded that these scenarios were unlikely. Duke, in projecting the cost-effectiveness benefits of the CEC program, only compares these solar arrays with gas combustion turbines built in a regulatory regime that imposes such a high cost on emissions as to essentially outlaw those same combustion turbines. This is not an apples-to-apples comparison of likely future power generation since the resource plan does not include other forms of generation that do not have a carbon cost, notwithstanding that Duke would pursue these alternative forms of power generation with or without the CEC program. Solar arrays as part of the CEC program would obviously look economically beneficial in a stand-alone comparison to combustion turbines that are subject to projected high carbon costs. This is an inaccurate and misleading way to calculate the true economic benefits of the CEC program. Instead, to evaluate the true cost of the program, Duke should have simply compared the total costs of the CEC program with the total costs to build and rate-base the entire 749 MW of proposed solar *without* the Clean Energy Connection program.

Any open-eyed comparison of the costs of building Duke's proposed solar with the program versus without it must conclude that the CEC tariff and its cross-subsidized bill credits are unnecessary and counter-productive to adding this new solar capacity to Duke's grid. The CEC program is unnecessary because Duke's own numbers show that it is the panels, not the program, that are cost-effective. If the alleged benefits of building the panels exceed the costs of

its construction—over 99% of which are paid by the general body of customers, not by participant fees—the bill credit system is unnecessary at best. The CEC program is likewise counter-productive because no matter what benefits actually materialize, the $290.6 million in bill credits and $16.8 million in administrative costs the program exacts from the general body of customers leaves captive ratepayers over $300 million dollars worse off than if Duke simply built the panels without CEC. If Duke is serious about adding this new solar capacity, it should do so in way where all customers equitably share the benefits and burdens, such as in Duke's fully rate-based SoBRA projects.

However, even if Duke were to construct the proposed solar equitably, it should nonetheless comply with the Power Plant Siting Act ("PPSA"), which requires review of new solar projects of 75 MW or greater. Duke has filed a single petition for a comprehensive program and acknowledges that participants would subscribe to a single 749 MW program, not to individual 74.9 MW plants. Duke's own expert acknowledges that 74.9 MW size of the program's identical solar plants was selected precisely to evade review under the PPSA. It is inappropriate for the Commission to allow a utility project nearly ten times greater than the PPSA's jurisdictional threshold to completely flout that law through the fiction that these interrelated arrays, pitched as part of one unified program, are somehow discrete.

The approval of FPL's similar SolarTogether program, besides being explicitly non-precedential, not legally binding, and given the two programs' differences, should have no bearing here. Duke's program, given the relative size of the utilities, is twice as big as FPL's. The rate impact on the general body of ratepayers is thus twice as big. The risk of Duke's cost-projections not coming true, a reality that will very likely play out, is therefore twice as large. Participants in Duke's program contribute less towards the costs of the solar than participants in

FPL's program. Paying corporations to "participate" in a solar project should not be an unlimited license to rate base endless billions of solar panels with no consideration for the impact on ratepayers. To many LULAC members, every dollar matters, and the fact that LULAC's non-participating Duke customers would pay twice as much as FPL's customers, on average over $25 per year for this program in 2024, shows that these programs cannot be allowed to keep doubling in size without consideration of the impact on the utility's customers.

Notwithstanding the numerous aforementioned contested issues raised in this proceeding, Duke maintains that the entire case boils down to whether the pre-filed Stipulation is in the public interest. This is a fundamentally inappropriate lens through which to view this proceeding because the pre-filed Stipulation is not a valid settlement agreement within the ordinary meaning of the law. The Stipulation was developed prior to the filing of the petition to approve the CEC program, making it impossible for the Commission to know whether the parties were actually adverse or if the compromises struck were reasonable. Both Duke and Walmart describe the program developments as resulting from "informal conversations." This aligns with the fact that other changes to the program design reflected in the Stipulation were clearly the result of market outreach and stakeholder input, rather than negotiations during an ongoing legal proceeding. Therefore, the Stipulation is not a "settlement," and the Public Interest Test, which collapses all issues considered by a settlement agreement into a universal yes-or-no evaluation of the agreement, cannot apply here.

To approve an agreement between parties who were not adverse—with the parties who stand to make tens of millions of dollars from this program, Duke and Walmart, having their interests aligned—would go against established precedent, violate the Administrative Procedure Act, and set a dangerous precedent against the public interest. If the Commission approves this

scheme, it would create a perverse incentive for utilities to simply find one or two friendly parties to sign off on a secret pre-filed stipulation in every docket, thus destroying public participation and denying review of the particular issues implicated by the proposed stipulation.

STATEMENT OF ISSUES AND POSITIONS

ISSUE 1: Should the Commission approve the Stipulation for approval of the Duke Energy Florida, LLC, Clean Energy Connection Program and Tariff, when taken as a whole, as in the public interest?

LULAC: *No. The Commission should not approve the Stipulation. As a matter of law, the "public interest, when taken as a whole" standard for approving a universal settlement does not and cannot apply to a pre-filed stipulation that was not the result of an actual adversarial proceeding. Furthermore, the Stipulation and proposed tariff are against the public interest. Approving Duke's program would lead to unfair and discriminatory rate structures that harm Duke's customer base, particularly low-income customers, while awarding participating customers hundreds of millions of dollars of energy credits. As designed, the program depends on allocating all risk to non-participants.*

ISSUE 2: Is DEF's proposed Clean Energy Connection Program and Tariff an appropriate mechanism to seek approval for the construction of 749 MW of new solar generation facilities?

LULAC: *No. Duke plans to construct 749 MW of new arrays as a single program, but treats the individual sites as discrete to evade a determination of need for this new generation.*

ISSUE 3: Does DEF's proposed Clean Energy Connection Program and Tariff give any undue or unreasonable preference or advantage to any person or locality or subject the same to any undue or unreasonable prejudice or disadvantage in any respect, contrary to Section 366.03, Florida Statutes?

LULAC: *Yes. Duke's proposed program would involve fees to subscribers that do not meaningfully contribute to the cost true cost of the program, while simultaneously forcing non-participating ratepayers to pay participants $290,600,000 in energy credits. While Duke's proposed program unfairly prejudices all non-participants, the proposed tariff would particularly harm low-income customers, only 1.1% of whom would be able to participate in the program, despite comprising roughly 15% of Duke's total sales. Conversely, 65% of the program is carved out for large commercial and industrial users, even though these segments represent less than 39% of Duke's total sales.*

ISSUE 4: Should the Commission allow recovery of all costs and expenses associated with DEF's proposed Clean Energy Connection Program and Tariff in the manner proposed by DEF?

LULAC: *No. It is fundamentally inappropriate to recover the cost of a "community" solar program from the general body of ratepayers, while the only benefits that are guaranteed—292 million in bill credits—flow exclusively to participants. In addition, Duke stands to add billions of dollars to the rate base. The Commission should not allow Duke to add any generating asset to the rate base unless its benefits and burdens are equitably distributed. *

ISSUE 5: Should the Commission approve DEF's proposed Clean Energy Connection Program and Tariff?

LULAC: *No. Not only does the Commission's approval of FPL's somewhat similar program SolarTogether have no precedential value in the present docket, FPL's program is distinguishable because in the near-term Duke's proposed tariff would roughly double the impact on ratepayers as compared to FPL's program.*

ISSUE 6: Should this docket be closed?

LULAC: *Yes, after the Commission denies approval of the proposed program.*

ARGUMENT

I. Tens of Millions of Dollars in Profit from Ratepayers for Duke and Walmart Means Their Interests are Not the Public's Interests.

Two parties promoting the proposed Clean Energy Connection program offered evidence at the hearing – Duke and Walmart.[1] Duke plans to rate base the proposed $2.7 billion solar fields connected with the proposed CEC program. Exhibit 8 (Row "CEC Capital, O&M," Column "Nominal Total"); Foster, Vol. 1 at 204. As such, Duke will make tens of millions of dollars of profit for its shareholders. Foster, Vol. 1 at 206.[2] Walmart itself stands to make over

[1] Although certain clean energy advocates support the Clean Energy Connection program, they had no witnesses and offered no evidence at the hearing.

[2] Q: . . . over the life of the program, Duke would expect to make . . . tens [of] millions of dollars for its investors.
A: . . . I haven't done the calculation, but yes.

$35 million from approval of the program, even though it has tried to hide this fact from the public, convincing the Commission that such information is confidential business information as contemplated in the Commission's rules.[3] The evidence these two parties offered in support of the program needs to be weighed against the strong financial interest both of these entities have in seeing this program approved.

It is no wonder Walmart tried to hide how much it would make if this program were approved, as Walmart stands to make over $91 million from its participation in the SolarTogether program, for a total of over $125 million from Duke and Florida Power & Light Co. ratepayers.[4] This is an incredible investment opportunity for Walmart and the other

[3] Although Walmart has tried to hide how much money it stands to make from approval of this program, there is only one commercial customer that has subscribed to the program that matches Walmart's energy usage, a fact Walmart itself made public. That customer will make over $35 million in net bill credits through approval of this program. *See* Exhibit 27 at 2 (customer 19); Huber, Vol. 1 at 129 (admitting that Customer 19's usage is over 290 million kWh and no other commercial customer that has subscribed to that amount even comes close to that usage, and that Walmart has subscribed to the program); Exhibit 30 at 4 (showing Walmart's electricity usage is over 290 million kWh); Chriss, Vol. 2 at 282, 290 (admitting that Walmart is a commercial customer and has usage of over 290 million kWh). It cannot be disputed based on this information that Walmart is customer 19. *See also* objections of Walmart's attorney, Mr. Naum, Vol. 2 at 286, to amount Walmart would make coming into evidence based on confidentiality grounds. Given that these figures are readily ascertainable from the publicly available information, Walmart's claims of confidentiality over this information lack merit. Pursuant to section 366.093(3), Florida Statutes, in order to make a claim that data is proprietary confidential business information, the information must be "owned or controlled by the person or company, is intended to be and is treated by the person or company as private in that the disclosure of the information would cause harm to the ratepayers or the person's or company's business operations, and has not been disclosed." The information here meets none of these criteria – how much Walmart is being paid by Duke is not owned or controlled by Walmart, disclosing the information would not harm the company's business operations (any reputational harm to Walmart for supporting a program odious to the public has been waived by Walmart's participation in this proceeding and the fact that the information has already been disclosed), and the information has already been disclosed to the public.

[4] Given the continuous comparisons of Clean Energy Connection to SolarTogether, pursuant to sections 90.202(6) (records of the Public Service Commission), 90.202(11) (facts not subject to dispute because known within jurisdiction of the Public Service Commission), and 90.202(12)

corporate participants – for every dollar the participants are able to invest in the program, they receive a virtually guaranteed (subject to only the solar panels performing as expected) $135 back over the term of the program.[5] There are very few investments that offer a virtually guaranteed 135 to 1 return on an investment. Unfortunately, this guarantee is funded entirely by Duke's general body of ratepayers. In addition to this magnificent return for Walmart, Walmart also gets to claim the renewable energy credits, which have significant value to Walmart's ability to claim progress toward its sustainability goals. Chriss, Vol. 2 at 291-92. Any program that results in such a financial windfall to one customer of a utility, where such windfall is entirely funded by the general body of ratepayers, cannot be in the public interest, and cannot be a fair and non-discriminatory rate.

(facts not subject to dispute because they are capable of accurate and ready determination), Florida Statutes, LULAC asks the Commission to take judicial notice of the following facts presented in that docket: 1) Walmart presubscribed to the SolarTogether program (R. Vol. III, page 619, line 10 (Testimony of Walmart Witness Steve W. Chriss), available at http://www.psc.state.fl.us/library/filings/2020/00430-2020/00430-2020.pdf; 2) Walmart's energy usage in FPL's service territory is more than 650 million kWh (Walmart Petition to Intervene at 2, available at http://www.psc.state.fl.us/library/filings/2019/05755-2019/05755-2019.pdf); 3) Only commercial customer 34, who subscribed to 200 MW from SolarTogether, matches that energy usage of over 650 million kWh (and the number of meters is similar to the number of facilities that Walmart has in FPL's territory) (Exhibit 38, FPL Response to Staff's First Set of Interrogatories, Interrogatory No. 125, attachment No. 1, available at http://www.psc.state.fl.us/library/filings/2020/00454-2020/Support/Exhibit%2038/125/20190061%20-%20Staff's%201st%20INT%20No.%20125%20-%20Attachment%20No.%201.xlsx); 3) non-low-income participants are going to be paid net credits of over $662 million (Exhibit 46, FPL Response to Staff's 9th Set of Interrogatories, No. 235, Attachment No. 1, tab "Annual and CPVRR," sum of columns "Participant SolarTogether Charges" and "Participant SolarTogether Credits," available at http://www.psc.state.fl.us/library/filings/2020/00454-2020/Support/Exhibit%2046/235/); 4) 200 MW out of 1,452.5 MW available (37.5 MW out of the 1490 MW was for the low-income program) is 13.8% of the non-low-income subscription available – 13.8% of the credits paid to participants is $91.2 million (nominal).

[5] Exhibit 29 (non-low-income participants on net invest $2,128,910 (cumulative) through the year 2025, and in return, receive $286,401,820 (cumulative) over the program (the $2,128,910 invested back plus an additional $284,272,910 over the life of the program) (286,401,820 divided by 2,128,910 equals 134.53).

LULAC, on the other hand, favors solar investments, but not at the expense of increasing the energy burden on low-income customers with large cross-subsidies to wealthy corporations. Unlike Duke and Walmart if this program is approved, LULAC does not stand to benefit financially if this program is not approved. The only financial benefit LULAC would see from the rejection of this program is its members' rates not going up to fund payments to large corporations like Walmart for subscribing to solar arrays – solar arrays built almost entirely with general ratepayer money, including that of LULAC members.

II. The CEC Program Allocations in Favor of Large Commercial and Industrial Customers Demonstrate This Program is Not Fair, Reasonable, or Just.

The CEC Program is not a true community solar program, despite being characterized as such, but rather, was requested by and designed for large customers such as Walmart. The fact that the program design favors one segment of Duke's customer base, who would make millions of dollars from this program at the expense of the remaining customer base, demonstrates that this program is unjustly discriminatory and not fair, reasonable, or just within the meaning of Section 366.06, Florida Statutes.

A. The CEC Program Allocations Show the Program was Developed by and for Large Commercial and Industrial Customers and Does Not Represent Energy Usage by Duke's Overall Customer Base.

The evidence before the Commission demonstrates that large commercial and industrial customers' interests are at the center of the CEC Program. Duke's witness Lon Huber, who is responsible for developing the CEC Program, explained in his direct testimony that after Florida Power & Light ("FPL") filed its SolarTogether program last year, Duke received inquiries from its large customers seeking a similar program. Duke then met with "over 65 large customers to better understand their sustainability goals and how they can be achieved," engaged in discussions with large corporations such as Walmart in the formulation of the program, and

marketed the program to industrial and commercial customers.[6] Huber, Vol. 1 at 73, 112-16. *See also* Chriss, Vol. 2 at 255 ("Walmart works with its utility partners to develop useable commercial and industrial programs and economic structures[,]" and "Walmart works to ensure that its programs it assists to develop can be used by the broader group of large commercial and industrial customers[.]"). Indeed, in Mr. Huber's own words, "large customer sustainability goals helped drive the overall program size and customer type allocations." Huber, Vol. 1 at 76.

The program's customer allocations, when compared with energy usage by Duke's overall customer base, further demonstrate that this program was designed for large customers such as Walmart. The proposed CEC Program is apportioned as follows: 65% for large industrial and commercial customers, 10% for local governments, and 25% for residential and small business customers. In comparing the program allocations to Duke's overall customer base, the allocations are not representative of Duke's customer base. Residential customers are allocated about 12.5%[7] of the CEC Program, yet make up 53% of all of Duke's energy sales. Rábago, Vol. 2 at 386. Large commercial and industrial customers, on the other hand, are allocated 65% of the CEC Program, yet comprise less than 39% of Duke's total sales, when

[6] "DEF conducted an email campaign to approximately 2000 (sic) industrial, commercial and local government customers to invite them to a webinar and launched a large customer and local government specific CEC Program website[.]" Huber, Vol. 1 at 73-74.

[7] Duke assumes that the 25% allocation for residential and small business customers will be split evenly, reserving 12.5% of the program for residential customers and 12.5% of the program for small businesses. This 50-50 split is an assumption, however, and not a feature of the program. It is entirely possible that residential customers will have access to less than 12.5% of the program. According to Duke, surveys showed "high degree of interest" from the small business sector in the CEC Program. Huber, Vol. 1 at 123. Moreover, the sheer number of business customers who would only be eligible for the residential and small business allocation suggests residential customers – whether immediately or at some point throughout the life of the program – could have access to less than half of the 25% allocation. According to Duke, "[o]f the 178,036 commercial customers, 154,061 customers would be eligible for the small customer allocation which includes residential and small and medium businesses." Exhibit 27.

considering that the data on industrial and commercial sales also includes small businesses. Rábago, Vol. 2 at 386. Additionally, the program did not contemplate a carve-out for local governments at the outset and would have allocated even more to large industrial and commercial customers. It is only after "informal conversations" and stakeholder feedback that the 10% carve-out for local governments was included. Huber, Vol. 1 at 76.

B. The Low-Income Allocation Further Demonstrates Why the CEC Program Should Be Denied as Unjustly Discriminatory and Not Fair, Reasonable, or Just.

Low-income customers' limited access to the CEC Program, notwithstanding that they bear the risk in ensuring bill credit payments to participants of the program, further demonstrates how this program is unjustly discriminatory and not fair, reasonable, or just under Section 366.06, Florida Statutes. According to Duke, 27.7% of its residential customers are low-income. Huber, Vol. 1 at 80. Therefore, low-income customers make up 15% of all Duke's sales, yet have access to only 3.46% (26 MW) of the CEC Program. Rábago, Vol. 2 at 403 n. 19 ("27.7% of 53% is about 15%"); Huber, Vol. 1 at 119-20 (27.7 % of the assumed 12.5% allocation for residential customers is about 3.5%). This translates to roughly 1% of low-income customers having access to the CEC Program, while the other 99% face higher utility bills to enable Duke to make bill credit payments to corporations such as Walmart, who on its own stands to net 35 million dollars from this program. *See* Rábago, Vol. 2 at 387; Exhibit 27 at 2 (Customer 19). Meanwhile, Walmart's subscription, as just one customer, represents more than three times the entire allocation reserved for low-income customers. *See* Exhibit 27 at 2 (Customer 19). For these reasons, the CEC Program should be denied approval pursuant to Section 366.06, Florida Statutes, as unjustly discriminatory in favor of large commercial and industrial customers, and fundamentally not fair, reasonable, or just to Duke's remaining customer base who guarantee the fixed bill credits to program subscribers.

III. Because All of the Guaranteed Benefits Go to Participants, While Over 99% of the Costs Are Paid For By the General Body of Ratepayers, Duke's Proposed Rate Structure Is Discriminatory.

The breakdown of costs, benefits, and risk prove that this program is not meant to serve the general body of ratepayers, but rather is designed to benefit customers like Walmart and to ensure that there is no defection from Duke's monopoly through self-installation of distributed solar.

A. Participants Get Paid Almost $300 Million to Subscribe to Program.

In one of the most egregious cross-subsidies to ever be proposed to the Commission for approval, Duke has proposed a scheme where participants, for very little money upfront, will get paid almost $300 million. Exhibit 8 (Participant Net Distribution, Nominal Total is $290.6 million). The bill credit and subscription rate are fixed by the Tariff, with the bill credits set to escalate at a guaranteed 1.5% per year. Exhibit 9. These bill credits are paid for by the general body of ratepayers through the fuel clause. Foster, Vol. 1 at 208. This is the best example of an "undue or unreasonable preference or advantage to any person" that is forbidden by section 366.03, Florida Statutes. The only way that these credits could fall short is if the solar fields do not perform as expected in terms of their capacity factor output, and as noted by Duke's own witness, they are confident the capacity factor output will be met, if not exceeded, as it already has been in many solar projects Duke has already installed. Stout, Vol. 1 at 181. If the capacity factor is exceeded, then the bill credits to participants paid for by the general body of customers would increase. Meanwhile, these bill credits are not impacted if the carbon pricing by Duke does not materialize, Borsch, Vol. 2 at 318, if the fuel pricing by Duke does not materialize, Borsch, Vol. 2 at 320, or if Duke decides to build just as many unnecessary gas plants. *See* Borsch, Vol. 2 at 331, 332, 431. In other words, if Duke's cost-effectiveness evaluation is as

unlikely as Duke's witness Mr. Borsch concedes, Borsch, Vol. 2 at 331,[8] and the solar ends up costing significantly more than projected, those bill credits are not impacted.

Such a design provides program participants an almost guaranteed payback after seven years. Huber, Vol. 1 at 79; Foster, Vol. 1 at 223. However, the general body of ratepayers is not so lucky. Even in Duke's base case, which assumes continued construction of gas infrastructure, no solar alternative, higher fuel prices, and carbon taxes driving the system to net-zero emissions by 2050, the general body of customers do not see a payback until the late 2030s. Exhibit 31; Foster, Vol. 1 at 223. As has been noted before, if Duke's cost-effectiveness projections are incorrect, this could be pushed back into the 2040s, or perhaps never, while participants' payback period will remain fixed at seven years.

Even in Duke's low-fuel/no carbon pricing scenario, the proposed solar arrays are not cost-effective, but rather, cost $25 million in cumulative present value revenue requirements ("CPVRR"). Exhibit 4. However, what Duke fails to account for in that $25 million figure is the actual cost of the CEC program. When adding in the costs of the net bill credits to subscribers, the cost of the program goes up by $67.6 million in CPVRR, *see* Exhibit 8, "Participant Net Distribution (Payment)," totaling over $92 million in this low-fuel/no carbon scenario. Borsch, Vol. 2 at 323. That over $92 million figure still does not account for the $7.3 million in CPVRR administrative costs of the program. Exhibit 8. Adding it together, although the solar plants themselves only cost $25 million in CPVRR in Duke's low-fuel/no carbon scenario, the actual cost to the general body of ratepayers is $100 million in CPVRR. If fuel

[8] Q: If the carbon costs that Duke projects are realized, you would agree that it seems unlikely that Duke will be building combined cycle and combustion turbines in the 2040s, as you have here?
A: I think so . . . .

prices go below the low-fuel amount, the total cost of the program would be even higher. Borsch, Vol. 2 at 320.

Another way the solar arrays would not be cost-effective is if Duke simply constructs combustion turbines, which it has refused to commit to deferring and which account for $353.5 million of projected savings in CPVRR. Borsch, Vol. 2 at 328, 332, 431; Exhibit 8 (System Benefits, CPVRR). If Duke does not voluntarily choose to defer gas infrastructure, in the low-fuel/no carbon scenario, the cost of the CEC program reaches over $450 million in CPVRR: $100 million plus $353.5 million no longer being saved.

Yet another way the solar arrays could not be cost-effective is if they cost significantly more than Duke projects, and there are no cost controls in the Stipulation or anywhere else. Foster, Vol. 1 at 234-35 (testimony that costs still need to be prudent); Borsch, Vol. 2 at 346-50. Nevertheless, the bill credits to participants would not be impacted, even as the general body of ratepayers would face ever higher bills while also having to pay participants' bill credits for a wholly unnecessary program. To be clear, LULAC supports solar investments, just not in this way. Given that the general body of ratepayers would be paying for the solar arrays and the bill credits to participants, it is fundamentally unfair to ask the general body of ratepayers to shoulder the entirety of the economic risk of the CEC program as well.

B. Participants Pay Essentially Nothing Towards the Costs of the Project.

Duke's witnesses repeatedly state that participants pay for 104.9% of the fixed revenue costs. Huber, Vol. 1 at 86, 94, 105; Foster, Vol. 1 at 199, 201; Foster, Vol. 2 at 440, 443. This is misleading, first because that 104.9% includes the $353.5 million Duke projects to save from deferral of gas infrastructure, which Duke simultaneously refuses to commit to deferring. Borsch, Vol. 2 at 328, 331, 332, 431; Exhibit 8 (System Benefits, CPVRR). Second, and more

importantly, that 104.9% completely ignores the bill credit payments that participants receive. Table 1, below, shows the participant contributions after accounting for the bill credits.

Table 1: Nominal Contributions of Participants (millions)[9]

	2021	**2022**	**2023**	**2024**	**2025**	**2026-53**
Total DEF CEC Costs	$1.0	$31.5	$87.8	$139.0	$132.0	$2353.9
Participant Contribution/(Payout)	—	$0.1	$0.5	$0.8	$0.2	($292.2)
% of Cost Paid by Participants	0%	0.32%	0.56%	0.60%	0.15%	- 12.41%

For example, if a participant pays $100 to subscribe to the program one month, and is paid $105 to subscribe that same month via a bill credit, that 104.9% figure completely ignores the amount paid back to the participant and recognizes only the $100 the participant has paid towards the cost of the program. When factoring in the bill credit payments to participants, it is false for Duke to claim that participants pay the total cost of the program.

Operating under this fiction, Duke could easily claim that participants pay 209.8% - rather than 104.9% - of the total program costs, by doubling the subscription fees and increasing the bill credits to keep the net difference the same as it is under the current proposal. In such a scenario, the net difference of $300 million paid to participants over the life of the program

[9] All figures taken from Exhibit 8. To facilitate an uncluttered comparison of who actually pays for the cost of the new solar generation, "Total DEF CEC Costs" refers to the same Exhibit 8 row, which is the cost of the program without Duke's claimed fixed or variable savings associated with the proposed solar. "Participant Contribution/(Payout)" is the *net* payment of participants toward capital costs, which is reflected at Exhibit 8, "Participant Net Distribution (Payment)," but instead here looks at participant contributions to the program by subtracting Bill Credits (paid to participants by the general body of ratepayers) from Subscription Fees. Clearly, any fees that participants "pay" toward capital costs, but which are in fact reimbursed to participants by the general body, cannot be counted as being paid by participants. Beginning in year 2026 and continuing through the end of the program, participant "contributions" to capital costs are negative; these years are combined above.

would still be the same, demonstrating that the 104.9% figure Duke continuously touts is meaningless when factoring in the bill credits. In this hypothetical and looking at TGF-1, "Participant Subscription Fees and Bill Credits," for the year 2026, subscription fees would be doubled to $150 million, and Duke could set the bill credits to $150.6 million. This would still leave a net difference of $500,000 (due to rounding) payment to participants that year, the same net difference currently proposed by Duke. Doing this for every year would lead to subscription fees, present value, of $1,666.8 million (double as proposed), 209.8% of the total fixed revenue requirements of the program. Because, in this hypothetical, bill credits, present value, would be $1,734.4 million (net of $67.7 million, present value, same as proposed), at the end of the year, no one will be better off or worse off. Participants will still get paid almost $300 million over the life of the program, the cost to the general body of ratepayers will be the same, and nothing about how the program works will have changed (the difference between bill credits and subscription fees could change in individual months for participants but would be net out to be the same on an annual basis), yet now Duke could claim, using its method, that participants pay for more than double the cost of the fixed revenue requirements. Without accounting for the bill credits, the 104.9% figure continuously touted by Duke is meaningless.

Looking at the net payments each year towards the costs of the program demonstrates how little participants contribute. The initial years are especially telling, as they do not include carbon costs in the first few years, and do not include avoided generation as a system benefit. Exhibit 8. Furthermore, fuel prices are more certain in these years. Therefore, it is fair to expect the initial years to have the most accurate projections, with the later years (with benefits including projected system benefits (not guaranteed), currently non-existent carbon pricing, and higher fuel costs. Exhibit 8. In 2022, the first real year of the program, net revenue requirements

are expected to be $21.7 million. Exhibit 8. Of that, $21.6 million will come from the general body of ratepayers, and $0.1 million (less than 0.5% of the costs) from participants. Exhibit 8. In 2023, with expected net costs of $59.6 million, $0.5 million (about 0.8% of the costs) will come from participants and $59.2 million from the general body of ratepayers. Costs reach a peak in 2024, as do the contributions from the participants. That year, with revenue requirements of $85 million, participants contribute $0.8 million (less than 1% of the costs), while the general body of ratepayers pays $84.2 million. According to Duke's own numbers, in each of these early years of the program, participants pay less than $1 million and less than 1% toward the cost of the program.

By 2025, Duke starts projecting savings from avoided carbon costs. Exhibit 8. So, although Duke projects $73.9 million in revenue requirements in 2025, if the $5 million in emissions savings do not materialize, this will actually be $78.9 million in revenue requirements. In either case, participants contribute $0.2 million towards the costs that year (less than 0.3% of the costs, even in the scenario where carbon taxes are being avoided), while the general body of ratepayers is paying $73.7 million. By 2026, Duke projects $61.1 million in costs (over $69 million without the emissions savings), but participants actually start getting paid that year (net), taking $500,000 from the general body of ratepayers, making the cost of the program $61.6 million to the general body (about $70 million without the emissions savings). Exhibit 8. Every year thereafter, because of the guaranteed bill credit escalator, net payments to participants increase, reaching over $1 million by 2027, and rapidly increasing into the multi-millions per year, for a net of $290.6 million (including the years when the participants actually had a small, net contribution to the program). Exhibit 8. In no year do the participants make a significant contribution to the revenue requirement costs of the program, never contributing even 1% of the

program costs. Exhibit 8; Foster, Vol. 2 at 447; Huber, Vol. 1 at 133 (conceding participants do not significantly contribute to the costs of the program in the early years on net).

Duke cites the anchor tenant theory to support the idea of a disproportionate allocation to large customers. Huber, Vol. 1 at 101-02. However, the more that people subscribe, the more the program costs the general body of ratepayers. If people do not subscribe, the blocks are simply rate-based under the program. Duke Petition to Approve Clean Energy Connection Program and Tariff and Stipulation ("Petition") at 5. If the administrative fees were similarly reduced, the general body of ratepayers would save about $300 million (nominal) if participants did not subscribe. Exhibit 8. If a potential participant truly wanted to support solar while supporting the general body of ratepayers, the best thing they could do would be to not participate in this program.

The PSC has previously held that "a rate reduction for select customers . . . would create unduly discriminatory rates." *In re: Complaint of South Florida Hospital and Healthcare Association, et al. Against Florida Power & Light Company, Request for Expeditions Relief, and Request for Interim Rate Procedures with Rates Subject to Bond,* Docket No. 010944-EI, Order No. PSC-01-1930-PCO-EI at 11 (Fla. P.S.C. Sept. 25, 2001), *aff'd S. Fla. Hosp. & Healthcare Ass'n v. Jaber*, 887 So. 2d 1210 (Fla. 2004). Participants, through bill credits, are select customers receiving a rate reduction funded by non-participating customers. The proposed rate structure for this program is unfair, unjust, and unduly discriminatory.

IV. Duke's Cost-Effectiveness Projections Are Based on Tenuous Assumptions That Will Not Play Out.

While the general body of ratepayers essentially guarantees almost $300 million in bill credit payments to participants (only premised on the solar panels operating as designed), the projected benefits that Duke predicts for the general body are entirely premised on non-existent

carbon costs, higher fuel projections, and a resource plan that has Duke continuing to make expensive investments in gas infrastructure through the 2040s, even though Duke's own assumed carbon costs are designed to drive its resource fleet to net zero emissions by 2050.

A. Currently Non-Existent Carbon Costs Provide Bulk of Projected Savings from Solar Arrays.

Duke assumes carbon pricing will be imposed to such a degree as to drive emissions to net-zero by 2050. Borsch, Vol. 2 at 318, 356, 429. The savings thus projected from not burning carbon-based fuels for the 750 MW of solar to be built is $434.1 million cumulative present value. Exhibit 28 at 3 (column CO2 Emission (Millions), last row). Avoided carbon taxes, on their own, represent the bulk of the $465.1 million cumulative present value in savings to the general body of customers from this program; however, no such carbon regulations or restrictions currently exist. Exhibit 8. Therefore, in the event these savings do not materialize, but assuming all of Duke's other projections come true, the general body of customers will expect savings of only $31 million,[10] present value, (breaking even in the late 2040s), while participants will still receive $67.6 million, present value in net bill credits while still paying less than 1% of the costs of the projects. The bill credits to participants are not impacted whether the projected carbon taxes come into existence or not. Borsch, Vol. 2 at 318. Because no such current carbon regulations exist, Duke's carbon cost projections are therefore completely speculative. Borsch, Vol. 2 at 318, 436.

B. Fuel Prices May Not Rise.

Duke used three fuel cases to project cost savings from adding solar to their resource mix – a mid-case, high case, and low case. The high case diverges from the mid-case by twice as

[10] $465.1 (currently projected savings) minus $434.1 (amount of savings from avoided carbon taxes).

much as the low case diverges from the mid-case. Rábago, Vol. 2 at 394; Borsch, Vol. 2 at 429. All three cases have fuel prices increasing substantially from where they are now. Exhibit 3. Even in Duke's low-fuel case, natural gas prices more than triple from $2.41/MMBTU in 2020 to $7.60/MMBTU in 2053. Exhibit 3. Duke tries to explain that there is more room on the upside of the projection than the downside as a reason for allowing the high fuel prices to diverge from the mid-case twice as much as the low-fuel prices do, *see* Borsch, Vol. 2 at 429, however, if fuel prices stay low, the cost-savings from the solar panels will stay lower too. Borsch, Vol. 2 at 320, 429. As with all of Duke's projections, if the projections do not come true, the entire risk is on the general body of ratepayers, not the participants whose bill credits will not be impacted even if fuel prices never rise. Borsch, Vol. 2 at 320.

Projected fuel savings account for $826.9 million in cumulative present value from the solar arrays, almost twice as much as the carbon pricing is expected to project to save. Exhibit 8. Even in Duke's low-fuel case, Duke projects the solar arrays will save $702 million. Exhibit 4. But if solar prices and battery prices continue to decrease as they have been, the demand for gas will also decrease, and gas prices will not triple, then fuel prices will be lower than the "low-fuel" scenario, possibly substantially lower. If we assume the solar arrays will save $402 million from avoided fuel, if carbon taxes (and the assumed resulting savings) do not materialize, the CEC program will cost the general body of ratepayers $400 million[11] in CPVRR. In such a scenario, the general body of ratepayers will still have to pay CEC program participants $67.6

[11] $25 million (low-fuel, no carbon scenario, Exhibit 4) plus $300 million (less fuel cost being avoided ($702 million minus $402 million)) plus $67.6 million net bill credits to participants (never changes no matter the economic scenario) plus $7.3 million (program administrative costs, Exhibit 8).

million CPVRR, significantly increasing the costs of the program. All of the risk of differing fuel prices is on the general body of ratepayers.

C. Duke's Scenario of Building Gas Power Plants in 2040s with Net-zero Carbon Pricing Is Not Possible.

Duke's alternative resource plan if CEC solar arrays are not constructed is more gas infrastructure, making Duke project $353.5 million in cumulative present value system savings from avoided gas infrastructure. However, Duke makes no commitments to actually avoiding gas infrastructure, Borsch, Vol. 2 at 331-32, 431, therefore, these projected system benefit savings are illusory without such a commitment. As with all the other economic projections, the risk is on the general body of ratepayers should Duke's system benefit projections not be realized. *See* Foster, Vol. 1 at 210 (if fixed revenue requirement estimates are incorrect, impact is on general body of ratepayers); Borsch, Vol. 2 at 333 (economic benefits of deferral included in calculating overall economic benefits of program).

There is good reason to think that the system benefit projections of Duke will definitely not be realized. The system benefit projections are based on the resource plans presented in Exhibit 5. Borsch, Vol. 2 at 315. These resource plans were modeled based on Duke's projected resource needs. *Id*. However, Duke did not allow solar to be considered as a resource option, specifically restricting the model from choosing solar. Borsch, Vol. 2 at 328-29. The reason was that installing solar at a later date could drive the cost-effectiveness of the model. Borsch, Vol. 2 at 329-30. Solar, of course, is expected to continue to decrease in price, and the later it is installed, the more it can be deferred, the more cost-effective it is in today's dollars. Duke artificially constrained its resource model from choosing the most cost-effective options. Furthermore, the model did not include the possibility of pairing solar and battery storage. Borsch, Vol. 2 at 330-31. It also did not include the impact of Duke's carbon forecasting, which

is designed to drive Duke's system to net zero emissions by 2050. Borsch, Vol. 2 at 330. Duke admitted that in such a carbon pricing scenario, the construction of combustion turbine and combined cycle plants – as the resource plans in Exhibit 5 present – would be unlikely. Borsch, Vol. 2 at 331-332. LULAC submits that with such high carbon taxes projected, a resource plan making continued investments in gas in the 2040s would be impossible to justify. Duke also admitted that solar paired with storage could be significantly more cost-effective than gas investments. Borsch, Vol. 2 at 331 ("I think many people would consider it a likelihood).

Not only is Duke's projection of $353 million in savings from deferred generation based on an almost impossible scenario, the resource plan used here (high carbon costs with all investments in high-carbon infrastructure) also was used as the basis for generating Duke's projected fuel and carbon cost savings. Borsch, Vol. 2 at 327. In other words – all of Duke's projected cost savings from implementation of the Clean Energy Connection program from the installation of 750 MW of solar – fuel, carbon savings, generation savings – are based on an almost impossible resource plan that assumes high carbon costs will be instituted but Duke would continue to make all future investments in high-carbon gas infrastructure – and paying the price in terms of fuel, carbon costs, and additional capital generation costs. LULAC submits that the Commission will not allow Duke to make such wasteful investments and should therefore not allow Duke the benefit here of assuming it will waste ratepayer money on bad investments. Instead, as suggested below, the assumed alternative should be solar, not expensive gas infrastructure made significantly more expensive by prohibitive gas prices, which Duke assumes prohibitive in the literal sense, since its assumed gas prices are meant to prohibit net carbon emissions by 2050.

Duke, in projecting the cost-effectiveness of the CEC program, makes contradictory assumptions designed to increase the apparent appeal of the program to provide cover for the large subsidies and rate reductions being provided to participants. While it is hard to predict the future, it is safe to say that Duke's predictions regarding high-priced fuel, greater reliance on fossil fuel generation (with no additional solar), and high carbon prices designed to drive emissions to net-zero by 2050, will not happen.

V. If the Proposed 749 MW of New Solar Generation is Cost-Effective, Duke Should Build the Solar Projects Without the Unnecessary CEC Program and in Accordance with the Power Plant Siting Act.

Recognizing the urgency of climate change and the environmental injustices caused by fossil-fueled electricity generation, LULAC endorses Duke's aspiration to bring more solar power into its generation mix. In addition to climate mitigation and numerous pollution-abating benefits, LULAC even agrees that increasing the share of solar power on Duke's grid may offer potential economic savings to Duke's customers. In order to unlock these benefits, Duke has repeatedly suggested the CEC program is the only means by which new solar projects can be funded. *See, e.g.*, Huber, Vol. 1 at 79 (lines 17-18). However, this is patently false, as Duke's own documents show that the CEC program funnels money from ratepayers to participants, not participants to project capital costs. Moreover, the potential of these benefits does not justify imposing a disproportionate and preferential transfer program on its customers.

As has already been made abundantly clear in Part III.B, *supra*, Duke's own petition reveals that its scheme of subscribers and energy credit is unnecessary, as it is the bills of the general body of customers, not the de minimus contributions of participant fees, that will pay for the proposed arrays. It is the not participants' total subscription fees that are the measure of their contribution to the program, since before 2026 nearly all of that money is reimbursed through

ratepayer funded bill credits to participants, and from 2026 on participants are charged less in fees than the credits that are returned to them at the expense of the general body. *See* Exhibit 8, section "Variable," all rows (showing that the cost of bill credits is added to the revenue requirement assessed to the general body). Only the net participant contribution—the difference between subscription fees they pay and bill credits they receive—may be counted toward paying down program costs. To suggest otherwise strains credibility.

Participants only make net positive contributions toward the cost of the solar panels in the four early years of the program—summing to merely $1.6 million total towards the $2.728 *billion* fixed capital cost. *See* Exhibit 8 at row "Participant Net Distribution (Payment)", years 2022-2025. In the years that participants actually contribute to the program on net, years 2026-2053, their subscription fees cover a combined 0.05% of the fixed program costs of the program,[12] a universe away from Duke's deceptive assertion that participants pay 104.9% of those costs. Duke argues that adding the new solar is cost effective. This may well be, but the fact that Duke's own numbers show that the general body of customers pay over 99% of the costs of building the solar belies any claimed need for the CEC program to afford the new solar. If instead the CEC program is rejected, and the full generation project is rate-based with 100% of its benefits correspondingly allocated to the general body, Duke's customers would more equitably share the benefits without having to pay almost $300 million in bill credits to program participants.

Moreover, worse than a solution to a problem that does not exist, the CEC Program takes a potentially beneficial system upgrade to solar and uses it to inflict hundreds of millions of dollars of harm on Duke's general body of customers. This is because from 2026 through the

[12] ($1.6 million divided by $2.7283 billion) multiplied by 100 equals 0.0586%.

end of the program, the total subscription fees collected from participants are eclipsed by the credits paid to participants from the general body of ratepayers. *Id.* (years 2027-2053). Therefore, under the CEC program, not only do participants fail to pay a meaningful share of capital costs, their "participation" actually results in an unnecessary $290.6 million increase in costs paid by the general body, as compared to the revenue requirement of building the proposed solar projects without the CEC program. *See* Exhibit 8, row "Participant Net Distribution (Payment)." This is in addition to the otherwise needless $7.3 million in administrative costs.[13] as Tables 2 & 3 below illustrate.

Table 2: Comparison of CEC to Solar Without CEC Program—Nominal Value (millions)[14]

Solar Only	**Solar + CEC**	
$2,728.3	$2,728.3	Capital Cost of Solar Projects + Operation & Maintenance
—	$290.6	Net Energy Credits Paid *by* General Body *to* Participants
—	$16.8	CEC Program Administrative Costs
($307.4)	**$307.4**	Comparative Excess Cost/(Savings) to General Body

Table 3: Comparison of CEC to Solar Without CEC Program—Present Value (millions)[15]

Solar Only	**Solar + CEC**	
$1,140,3	$1,140,3	Capital Cost of Solar Projects + Operation & Maintenance
—	$67.7	Net Energy Credits Paid *by* General Body *to* Participants
—	$7.3	CEC Program Administrative Costs
($75)	**$75**	Comparative Excess Cost/(Savings) to General Body

[13] The additional administrative cost of running the program may be insignificant compared to the total CEC cost, but that $7.3 million still represents over 4.5 times as much as the net total that participants are slated to contribute. More to the point, it represents millions of dollars in costs to ratepayers that would be avoided by simply building the solar without the CEC program.
[14] All figures taken from Exhibit 8. The "Solar Only" cost is calculated by subtracting Duke's "Program Administrative Costs" from its total "CEC Capital, O&M" cost.
[15] All figures taken from Exhibit 8. The "Solar Only" cost is calculated by subtracting Duke's "Program Administrative Costs" from its total "CEC Capital, O&M" cost.

Crucially, by rejecting the CEC program and pursuing new solar projects alone, ratepayers will be spared this unnecessary $307.4 million dollars in extra costs regardless of future fuel and carbon prices. Under the CEC program, because bill credits to participants are not tied to real-world fuel and carbon prices, customers are certain to be $307.4 million dollars worse off no matter what future prices on carbon emissions and fuel inputs ultimately come to pass. Conversely, by denying Duke's petition, the general body of ratepayers is guaranteed to do better no matter how accurate (or not) time shows Duke's predictions to be. The dubious likelihood of Duke's forecasts transpiring as it has alleged, *see* Part IV, *supra*, provides yet another reason the CEC program should be decoupled from the solar generation and denied.

Duke, and this Commission are already well-versed in the addition of new solar projects to the grid—without imposing discriminatory and unlawfully preferential rate design—most notably through SoBRA. Indeed, Duke's expert Stout recounts Duke's extensive work on creating new plants through the SoBRA model in testimony for this proceeding. Stout, Vol. 1 at 167-174. Mr. Stout notes in particular that its experience with "SoBRA projects provided [Duke] with a set of best practices and strong partners to advance the next ten projects under the CEC program." *Id.* at 174 (lines 3-4). However, on cross, Mr. Stout conceded that Duke has not relied on a subscription model to fund a solar project (particularly one involving cross-subsidized bill credits as here). Stout, Vol. 1 at 184.

VI. Duke Must Comply with the Power Plant Siting Act, Which Governs its Proposed 749 MW Solar Project.

Florida's Power Plant Siting Act ("PPSA"), Fla. Stat. §§ 403.501-403.518, was enacted to create a uniform procedure for developing new power plants, in recognition of the "significant impact upon the welfare of the population, the location and growth of industry, and the use of the natural resources of the state" posed by such developments. *Id.* § 403.502. The PPSA is a

mandate to "ensure . . . that the location and operation of electrical power plants will produce minimal adverse effects on human health, the environment . . . and will not unduly conflict with the goals established by the applicable local comprehensive plans." *Id.* Under the act, if a new or expanded power plant meets threshold criteria, no construction may occur until the plant has been reviewed and certified according to detailed procedures. *Id.* § 403.506(1). Taking into account the ratemaking authority of this Commission, activities falling within the scope the PPSA will also trigger a need determination. *Id.* § 403.519. Solar power plants of 75 MW or greater are subject to the PPSA. *Id.* § 403.503(14).

Duke's 749 MW project of proposed solar generation exceeds the threshold 75 MW by nearly tenfold, and is thus subject to the PPSA. That Duke has suggested this block of new solar generation is ten plants of 74.9 MW, and not a single 749 MW program is hardly dispositive. The CEC tariff rider included in Mr. Huber's pre-filed testimony shows that participants "subscribe to a portion of universal solar capacity built for the benefit of the Program." Exhibit 9 at 1 (emphasis added). At the hearing, Duke's expert, Mr. Stout, clarified that customers subscribe to the entire program, not to any particular solar array. Stout, Vol. 1 at 180. In fact, Mr. Stout acknowledged that the very size of each of the proposed 74.9 MW sites was selected precisely to avoid triggering obligations and scrutiny under the PPSA. Stout, Vol. 1 at 179.

The Commission should not approve Duke's attempt to de facto violate the PPSA and undermine the Commission's jurisdiction over new generation construction and siting by finding that this petition seeks anything other than a universal block of 749 MW of new solar capacity. As has been emphasized elsewhere, there are good reasons to move forward with the construction of solar arrays without the CEC project. However, the potential benefits of the proposed solar do not exempt Duke from meeting the requirements of the PPSA. If the solar

generation proposed in Duke's petition is needed and truly in the public interest, the mandatory review and certification under the PPSA should pose no problem to Duke's planned solar expansion. Because Duke has not complied with the PPSA, the CEC Program should not be approved.

VII. Commission Approval of SolarTogether Does Not Suggest That the Commission Should Approve Clean Energy Connection with Double the Rate Impacts.

FPL's SolarTogether program employs a similar scheme of having the general body of customers pay for the solar panels while also paying bill credits to participants. There are key differences, however. First, participants in SolarTogether actually contribute more than 1% of the costs of the solar panels in the initial years. In 2020, 2021, and 2022, participants, accounting for net bill credits, actually contribute to close to 3% of the SolarTogether solar costs. Exhibit 14.[16] By contrast, in the same equivalent years, participants in Clean Energy Connection would contribute less than 1%, about two-thirds less towards the costs of the program as participants in SolarTogether. Exhibit 8.[17] It is not LULAC's position that a 3% contribution towards the costs of the solar arrays justifies a massive return to the participants guaranteed by the general body of ratepayers. However, Duke's proposed program is three times as unjust toward the general body of ratepayers, with a less than 1% contribution by the participants towards the costs.

[16] In 2020, SolarTogether Participants contribute $1.5 million (Participant Net Payment) out of $52.2 million in costs (Net Revenue Requirements), Exhibit 14, which equates to 2.9%. In 2021, Participants contribute $3.5 million (Participant Net Payment) out of $182.6 million in costs (Net Revenue Requirements), Exhibit 14, which equates to 2.7%. In 2022, Participants contribute $2.4 million (Participant Net Payment) out of $108.6 million in costs (Net Revenue Requirements), Exhibit 14, which equates to 2.2%.

[17] In 2022, Clean Energy Connection participants contribute 0.5% ($0.1 million out of $21.7 million). Exhibit 8. In 2023, participants contribute 0.8% ($0.5 million out of $59.6 million). Exhibit 8. In 2024, participants contribute 0.9% ($0.8 million out of $85 million). Exhibit 8.78-EI

Second, the rate impact from CEC is expected to be about twice that of FPL's SolarTogether program. Rábago, Vol. 2 at 377; Foster, Vol. 1 at 211 ("Q: [T]hat short-term [rate] difference is higher, as in upward, for Duke's customers as compared to FPL's? A: I would agree with that . . . ."). By the year 2024, even under Duke's optimistic economic projections, the retail rate impact is expected to be $2.07 per 1,000 kWh. Exhibit 28 at 4. In 2024, Duke expects the average residential customer to consume 12,194 kWh. Exhibit 16 at 17. This means that from this program alone, Duke's average residential customer can expect their bills in 2024 to increase by over $25. Many low-income customers in Duke's service territory already struggle to pay their bills, and many have higher than average energy use. The reason Duke's rate impacts are so much higher than FPL's is because 1) Duke's program is about twice as big given the relative size of the utilities, Rábago, Vol. 2 at 377; Foster, Vol. 1 at 211, and 2) Duke's expected solar array costs are significantly higher than FPL's. FPL expects the nominal total of the 1,490 MW to cost $4.1446 billion. Exhibit 14. This works out to a cost of $2.78 million per MW. By contrast, for 749 MW, Duke expects to spend $2.7283 billion (nominal). Exhibit 8. This works out to a cost of $3.64 million per MW, over 30% more than FPL. Of note is that Duke makes no guarantees that its costs will not increase over what it has projected in Exhibit 8. Foster, Vol. 1 at 209.

Legally, a prior administrative action that has not been appealed is not binding in any way on a party that did not participate in that action. Moreover, by its very terms, the Settlement Agreement that the Commission approved in SolarTogether explicitly stated that "Nothing in the Agreement will have precedential value." *In re: Petition for approval of FPL SolarTogether program and tariff, by Florida Power & Light Company,* Docket No. 20190061-EI, Order No. PSC-2020-0084-S-EI at 11 (Fla. P.S.C. March 20, 2020). The Commission approved the entire

Settlement Agreement, including that provision. *Id.* at 5. Even if the decision was somehow precedential, it by no means allows a utility to double-down on the rate impacts to the general body of ratepayers, double-down on the economic risks to the general body of ratepayers, triple-down on the lack of contributions from participants, and double-down on the amount that the utility gets to rate base through this type of program. To many LULAC members, every dollar matters, and the fact that they are paying twice as much, on average over $25 per year for this program in 2024, shows that these programs cannot be allowed to keep doubling in size, without considering the impact on the utility's customers.

VIII. The Pre-Filed Stipulation is Not a Legal Settlement and the Public Interest Test Therefore Does Not Apply; To Find Otherwise Would Go Against Established Precedent and Violate Public Policy.

Despite the numerous and substantiated contested issues raised in this proceeding, Duke maintains that the entire case boils down to whether the pre-filed Stipulation is in the public interest. This is a fundamentally inappropriate lens through which to view this proceeding because the pre-filed Stipulation was not the result of an adverse legal proceeding and is therefore not a settlement agreement within the ordinary meaning of the law. As a result, the Public Interest Test – which collapses all issues considered by a settlement agreement into a universal yes-or-no evaluation of the agreement – cannot apply here. To approve the Stipulation under the Public Interest Test would go against established precedent; violate the Administrative Procedure Act, section 120.57, Florida Statutes; violate principles of due process; and set a dangerous precedent against the public interest. If the Commission approves this scheme, it would create a perverse incentive for utilities to simply find one or two friendly parties to sign off on a secret pre-filed stipulation in every docket, effectively denying due process by

precluding public participation and denying meaningful testing of the particular issues implicated by the proposed Stipulation.

A. Under Established Precedent, the Pre-Filed Stipulation is Not a Settlement Agreement; Therefore, the Public Interest Test Does Not Apply.

In this matter, Duke entered into a Stipulation with parties prior to the filing of the petition for approval of the CEC Program, in which it requests that the Stipulation be approved as being in the public interest. By proceeding in this manner, Duke attempts to have its cake and eat it too by citing policy reasons in favor of parties settling "contested proceedings whenever possible," while simultaneously settling all "contested" matters prior to the commencement of said proceeding. *See* Petition at 6, paragraph 13. On its face, such a pre-filed stipulation cannot be considered a settlement in a contested proceeding in the ordinary understanding of a legal settlement, and the Public Interest Test therefore would not apply.[18]

In the cases in which the Commission has approved a settlement applying the Public Interest Test, those cases did not contemplate a stipulation entered into prior to the commencement of the proceeding. Rather, court opinions or dockets reflect that the settlements were developed following commencement of the proceeding by petition, intervention of the parties through which their adverse positions were made known, extensive discovery, development of numerous contested issues, and in certain cases, evidentiary hearings. *See, e.g., Sierra Club v. Brown*, 243 So. 3d 903, 905-907, 909 (Fla. 2018); *Citizens of State v. Fla. Public Service Com'n,* 146 So. 3d 1143, 1147-1149 (Fla. 2014); *In re: Petition for Rate Increase by*

[18] Without waiving its position that the pre-filed Stipulation is not a settlement agreement within the meaning of the law and the public interest test would not to apply, if the Commission were to find otherwise, LULAC requests that Duke's petition to approve the CEC Program, Tariff, and Stipulation be denied as contrary to the public interest for the reasons stated in this brief and in LULAC's Petition to Intervene, Pre-filed Testimony of Karl Rábago, Prehearing Statement, Post-Hearing Brief and during the prehearing conference and final hearing.

Gulf Power Co., Order No. PSC-17-0178-S-EI (Fla. P.S.C. May 16, 2017);[19] *In re: Application for Rate Increase by Fla. Pub. Utilities Co.*, Order No. PSC-14-0517-S-EI (Fla. P.S.C. Sept. 29, 2014);[20] *In re: Petition for Increase in Rates by Fla. Power & Light Co.*, Order No. PSC-13-0023-S-EI (Fla. P.S.C. Jan. 14, 2013);[21] *In re: Application for Increase in Wastewater Rates in Lee Cty. by Utilities, Inc. of Eagle Ridge*, Order No. PSC-12-0346-FOF-SU, (Fla. P.S.C. July 5, 2012);[22] *In re: Petition for Increase in Rates by Fla. Power & Light Co.*, Order No. PSC–11–0089–S–EI (Fla. P.S.C. Feb. 1, 2011);[23] *In re Petition for Rate Increase by Progress Energy Fla., Inc.*, Order No. PSC–05–0945–S–EI (Fla. P.S.C. Sept. 28, 2005).[24]

Unlike the present case, the above-cited settlements were pursuant to an actual legal dispute within the meaning of section 120.57(1), Florida Statutes, in which a party commenced a legal action and adverse parties intervened afterwards, making known their disputed claims. Absent the commencement of a legal proceeding, i.e. the filing of a petition, there can be no legal dispute that presupposes a legal settlement. This assumed procedural requirement is further evidenced by citations in other administrative law contexts to section 120.57(4), Florida Statutes, which allows informal disposition of "any proceeding by stipulation, agreed settlement, or consent order." § 120.57(4), Fla. Stat. (emphasis added). At the time the Stipulation was signed, there was no proceeding. Title XIX of the Florida Statutes, for example, regarding conducting business with public entities, contains two provisions governing section 120.57(1) disputed hearings to place businesses on a discriminatory vendor list or a convicted vendor list. *See* §

[19] PSC Docket No. 160186-EI
[20] PSC Docket No. 140025-EI
[21] PSC Docket No. 120015-EI
[22] PSC Docket No. 110153-SU
[22] PSC Docket No. 080677-EI
[23] PSC Docket No. 050078-EI

287.133-134, Fla. Stat. As to the issue of whether it is "in the public interest" to place an entity on either list, both provisions state that "[a]t any time after the filing of the petition, informal disposition may be made pursuant to s. 120.57(4)." §§ 287.133(3)(e)(2), 287.134(3)(d)(2) (emphasis added). That stipulations or settlements in other administrative law contexts are permissible after the filing of a petition, coupled with the procedural precedent of cases before the Commission reflecting the same when deciding whether a settlement is in the public interest, make clear that Duke's pre-filed Stipulation cannot be considered a valid legal settlement subject to a yes-or-no determination of whether it is in the public interest.

That this is not a legal settlement is further evidenced by the fact that both Duke's witness Mr. Huber and Walmart's witness Mr. Chriss—representing the two parties who stand to make millions of dollars in this proceeding—described the process by which terms of the Stipulation were developed as following "informal conversations." Huber, Vol. 1 at 76 (lines 2-7); Chriss, Vol. 2 at 269. Mr. Huber's direct testimony further demonstrates that what Duke seeks to characterize as settlement negotiations were instead market outreach where it solicited feedback to make the CEC program more appealing to a broader cross-section of stakeholders. *See* Huber, Vol. 1 at 75 (line 20), 76 (lines 1-7), 77 (lines 21-23), 80 (lines 8-10), 116-18. The Stipulation is a meeting of the minds, but not as a result of an adversarial legal proceeding. Rather, it is a memorialization of feedback and input as the CEC program was being developed, well in advance of the commencement of any legal proceeding. Any attempts to re-package this process as a legal settlement should be rejected by the Commission.

Because the Stipulation cannot be classified as a settlement agreement in keeping with aforementioned precedent and standard practices of contested proceedings in the PSC,

the Commission is precluded from simply ruling yes or no on whether it is in the public interest. There is no basis in the law to allow the Commission to act otherwise.

B. To Find That the Pre-Filed Stipulation is a Settlement Agreement Subject to the Public Interest Test Would Set an Unjust Precedent Contrary to Section 120.57, Florida Statutes, and Established Principles of Due Process.

To treat a stipulation developed prior to the commencement of a legal proceeding as though it were a true legal settlement subject to the Public Interest Test would set a dangerous and unlawful precedent against the public interest. By upholding a stipulation prepared prior to the commencement of a legal proceeding, a cloak of confidentiality over all circumstances surrounding the so-called settlement preclude meaningful inquiry and review of otherwise discoverable information, destroying public participation in the proceeding and prohibiting parties and the Commission from properly evaluating issues implicated by the proposed Stipulation.

This is especially the case in the present matter, where LULAC was denied the ability to engage in discovery and cross-examination to assess the parties' claimed adverse interests and potential biases, in violation of section 120.57(1), Florida Statutes and its due process rights. Fla. Stat. § 120.57(1)(b) (in hearings involving disputed issues of material fact, "[a]ll parties shall have an opportunity to respond, to present evidence and argument on all issues involved, [and] to conduct cross-examination and submit rebuttal evidence[.]"). *See also, e.g.*, *Machules v. Dep't of Admin.*, 523 So. 2d 1132, 1136–37 (Fla. 1988) (noting that the Florida Administrative Procedure Act "was intended. . . to provide the public with a more certain administrative procedure, thereby insuring that the public would receive due process and significantly improved fairness of treatment[.]"). If there were no pre-filed Stipulation, LULAC would have had the opportunity to test how Walmart was adverse to Duke, based on a petition to intervene laying out

Walmart's position and the ability to conduct discovery on Walmart. The ability to understand the adverse positions of parties to a settlement is a vital baseline in being able to assess the positions compromised, and in turn, whether a settlement is in fact in the public interest. Moreover, if there were no pre-filed Stipulation in this proceeding, a petition to intervene by Walmart may have revealed that it was in favor of the program and not adverse to Duke in any way, and LULAC could have engaged in discovery and cross-examination to uncover any potential biases or motivations underlying Walmart's claims in the program's support. Instead, citing to an inapplicable "settlement negotiation privilege," the Commission denied LULAC the opportunity to understand how Walmart was adverse to Duke in any way as a party to the Stipulation or any biases on Walmart's part in support of the CEC Program, despite the fact that Walmart will make tens of millions of dollars at the expense of the general body of ratepayers and intervened in this proceeding in support of the CEC Program. *See* Order Denying in Part and Granting in Part League of United Latin American Citizens' Motion to Compel Discovery from Walmart Inc., Order No. PSC-2020-0438-PCO-EI, (Fla. P.S.C. Nov. 16, 2020); Chriss, Vol. 2 at 272-80, 282-90.

In mediations or in civil matters regarding liability or the financial value of a claim —and only in those contexts—does Florida law seal off settlement negotiations to encourage parties to come to an expedient resolution of contested issues. *See* § 90.408, Fla. Stat. ("Evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value.") (emphasis added); § 44.405, Fla. Stat. ("[A]ll mediation communications shall be confidential"). *See also Saleeby v. Rocky Elson Const.*, 3 So. 3d 1078, 1083 (Fla. 2009) ("The meaning of [§ 90.408] is equally clear. No

evidence of settlement is admissible at trial on the issue of liability.") (emphasis added). No such issues are present in any way in this or any typical docket before the Commission. To extend a veil of confidentiality over the formation of the pre-filed Stipulation in this case unlawfully denies LULAC, the Office of Public Counsel, and the public at large, any ability to meaningfully confront and evaluate the proposal before this Commission.

CONCLUSION

Investments in solar should not require ratepayers to pay twice – once for the solar panels, and a second time to pay participants to claim credit for those solar panels. Solar investments should promote equity – not destroy it by making regular and low-income customers subsidize lower electric rates for a few select large corporations like Walmart. If increasing the bills of regular and low-income customers in order to provide payments to large corporations of Walmart on the scale of tens of millions of dollars is not unfair, unjust, and discriminatory, then no rate structure would violate the mandate for fair and nondiscriminatory rates.

RESPECTFULLY SUBMITTED this 9th day of December, 2020

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy and correct copy of the foregoing was served on this 9th day of December, 2020, via electronic mail on:

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