BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement regarding Rule 25-6.049(5)(b), F.A.C, by EcoSmart Solution, LLC.	Docket No. 20220017-EU Filed: January 31, 2022

MOTION FOR LEAVE TO INTERVENE AND RESPONSE TO PETITION FOR DECLARATORY STATEMENT BY DUKE ENERGY FLORIDA, LLC

Duke Energy Florida, LLC ("DEF or the "Company"), pursuant to sections 120.565, 120.569, 120.57 Florida Statutes, and Rules 28-105.0027 and 28-106.205, Florida Administrative Code ("F.A.C."), through its undersigned counsel, hereby moves for leave to intervene in the above-referenced docket because DEF's substantial interests are subject to determination or will be affected by the Florida Public Service Commission's (the "Commission") declaration regarding EcoSmart Solution, LLC's ("EcoSmart") request to master meter and for confirmation that EcoSmart would not be a public utility under Chapter 366, Florida Statutes. DEF also provides a Response to the Petition for Declaratory Statement. While the Petition lacks sufficient detail, it appears that the load proposed to be master metered and served by EcoSmart's Geothermal Grid System (the "System") does not meet the requirements of the master meter rule, because it is not just the central HVAC load the System proposes to serve but also other common area loads and individual energy requirements. Moreover, the request appears to violate the Commission's net metering rule and raises questions as to whether EcoSmart would be inappropriately engaging in the retail sale of electricity. In support thereof, DEF states as follows:

I. MOTION TO INTERVENE

A. BACKGROUND

1. DEF, the Movant, is the utility primarily affected by the proposed request. DEF is an investor-owned electric utility and is a wholly owned subsidiary of Duke Energy Corporation. DEF serves approximately 1.9 million retail customers in Florida and is the main service provider in the city of Apopka. DEF's name and address are:

   Duke Energy Florida, LLC
   299 1st Avenue North
   St. Petersburg, Florida 33701
   Telephone: (727) 820-4692

2. The name and address of counsel for Movant, authorized to receive all notices, pleadings, and other communications in the docket is:

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3. DEF received notice of the petition for declaratory statement through publication of such notice in the Florida Administrative Register on January 14, 2022.

B. STANDARD FOR INTERVENTION

4. Pursuant to Rules 28-106.205 and 28-105.0027, F.A.C., persons, other than the original parties to a pending proceeding, who have a substantial interest in the proceeding and who desire to become parties may move for leave to intervene. Motions for leave to intervene must be filed within twenty-one (21) days after publication in the Florida Administrative Register and must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected by the declaratory statement.
5. To show a "substantial interest" sufficient to have standing, the intervenor must meet the two-prong test set forth in *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). Pursuant to the *Agrico* test, the intervenor must show that: (1) they will suffer injury in fact that is of sufficient immediacy to entitle the intervenor to a Section 120.57, F.S., hearing; and (2) the substantial injury is of a type or nature that the proceeding is designed to protect. The "injury in fact" must be both real and immediate and not speculative or conjectural. *International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission*, 561 So. 2d 1224, 1225- 26 (Fla. 3d DCA 1990).

C. DEF IS ENTITLED TO INTERVENOR STATUS

6. Petitioner EcoSmart alleges to be "an experienced renewable energy service provider, specializing in integrating sustainable infrastructure in real estate developments." (Pet. at

p. 2). EcoSmart further asserts that it is proposing a multi-family residential development and "Electricity used to operate the geothermal system will be included as part of the common electricity load in each of the buildings while electricity used to operate lighting, appliances, and other devices in each apartment unit will be separately measured by a separate utility meter for each apartment." (Pet. at p. 3). EcoSmart claims that its proposed arrangement meets the requirements of Rule 25-6.049(5)(b), F.A.C., which allows for the use of a master meter in certain limited instances.

7. DEF's substantial interests will be affected by this proceeding because, although the specific address of the proposed development is not provided, the Petition indicates that it is in Apopka, and DEF provides the majority of electric service in Apopka. It is therefore likely that DEF will be the electric service provider for this developer[1], and the Petitioner is requesting the Commission to make a statement regarding master metering and possibly net metering. Thus, DEF's substantial interests will be determined in this proceeding as DEF will be required to implement the Commission's decision. Even if DEF is not the electric service provider, its substantial interests are still affected because the precedent set by this declaratory statement, if granted, would have impact on DEF's other customers, as well as other customers and utilities within the state.

II. RESPONSE TO AMENDED PETITION FOR DECLARATORY STATEMENT

[1] Indeed, a representative from EcoSmart contacted DEF in 2021 to inquire about availability of rates and net metering requirements. The presumption, which can be confirmed via discovery, is that the proposed apartment building is within DEF's service territory.

1. DEF hereby files this Response to EcoSmart Solution, LLC's Petition for Declaratory Statement and states as follows:

A. MASTER METERING EXCEPTION REQUEST

2. Rule 25-6.049(5) provides "Individual electric metering by the utility shall be required for each separate occupancy unit of new commercial establishments, residential buildings, condominiums, cooperatives, marinas, and trailer, mobile home and recreational vehicle parks." There are limited enumerated exceptions to the requirement of individual electric meters. EcoSmart claims that it meets the exception for master meters noted in 5(b): "For electricity used in central heating, ventilating and air conditioning systems, or electric back up service to storage heating and cooling systems." However, by the plain language of EcoSmart's petition, the electricity will be used not only for central heating, it will actually be used for the heating energy needs of individual apartments and common area electricity. (Pet. at p. 6, p. 7 and Ex. B). This is exactly what Rule 25-6.049(5) was intended to prevent – the energy used for each individual apartment must be separately metered and charged to the individual tenants. In addition, EcoSmart fails to explain why it cannot separately meter the individual heating and air conditioning loads from each separate apartment.
3. The Petition attempts to circumvent this requirement of the rule by alleging that "the geothermal system heat pumps and domestic hot water heaters are fully interconnected with one another, such that all of the individual residential units share the central service that is provided by the single geothermal system for the building. Therefore, the electricity used to operate the geothermal system will be interconnected with a common building or energy center meter in each building that will separately measure electricity used by the

geothermal system supplying each building." (Pet. at p. 9). Under this logic, any electric load could be considered "common load" and master metered under the rule simply by connecting individual apartment electric loads into the central load and calling it all central load. EcoSmart is expanding the common areas' heating and air conditioning load (like hallways and common areas that would be properly master metered under the rule) by reaching out to include the individual heating and air conditioning loads from each separate apartment. This essentially amounts to an end-run around the rule; therefore, EcoSmart's petition should be denied.

4. The master meter will also be interconnected to the utility's system (presumably DEF's) as a net metering installation. (Pet. at pp. 4-5). There are insufficient details in the Petition on what exactly will be interconnected as a net metering installation. What size will be the installation be? Is the renewable energy source solar energy or the geothermal energy? Who will be the customer of record (EcoSmart, the landlord, or some other party)? How will the system be sized to ensure that it is designed to offset only the expected usage of the geothermal system (especially given that EcoSmart or the landlord will be unable to determine the individual electric requirements of each apartment)? While EcoSmart includes the net metering rule, 25-6.065, F.A.C., in its list of Commission rules and orders applicable to the jurisdictional question raised in the Petition, it fails to provide any details on the proposed net metering interconnection, or indeed how exactly the net metering rule applies at all to the questions raised in the Petition.

5. Additionally, if one assumes that EcoSmart will be the customer of record that is providing the net metering, EcoSmart is requesting that it be allowed to own the entire geothermal load and then install their own solar panels to take credit under net metering for all the load,

including the end users' load (i.e., the individual apartment owners/tenants). EcoSmart would be applying the net metering benefits (in the form of assumed reduced electric rates) to those who do not own the system. EcoSmart in essence would become an electricity provider, in contravention of Florida law. Specifically, Rule 25-6.065(2)(a) defines "customer owned renewable generation" as "an electric generating system located on a ***customer's premises*** that is primarily intended to offset part or all of the ***customer's electricity requirements*** with renewable energy." (emphasis added). EcoSmart's Petition, if granted, would allow this customer (EcoSmart or the landlord) to offset more than its own electricity requirements, because it will allow the heating and cooling energy requirements of the individual tenants to also be offset.

6. Said differently, EcoSmart wants to use a geothermal grid to provide all residents hot water and heating, and they want those residents to share in the electrical cost of the pumps through a master meter. But by utilizing solar panels to offset that master metered load, EcoSmart proposes to spread out the output from the solar. This essentially amounts to a community solar project and that is not permitted under Florida law. *See In Re: Petition of PW Ventures, Inc. For Declaratory Statement in Palm Beach County*, Order No. 18302A, issued Oct. 22, 1987 (holding that the provision of electricity to one end-user constitutes supplying electricity to or for the public and would subject the provider to the jurisdiction of the Commission).
7. The goal of Rule 25-6.049's requirement to install individual meters is to give a price signal to the individual customer, to conserve electricity. Under EcoSmart's proposed master metering scheme, a tenant is not incented to limit their use of hot water. To the contrary, they could run the water all day and, because the Petition does not include details on how

the bills are apportioned, it is not clear if that tenant receives a higher bill because of their additional use. EcoSmart may claim that the purpose of FEECA is met because they are proposing to use renewable energy to meet that load. However, that argument fails because the net metered installation must be sized to offset the expected load, which would presumably be based on a typical amount of hot water, not 24 hours a day worth. Accordingly, in the example above, if the tenant uses that much hot water, the solar panels should not be sized large enough to offset that usage. The additional power would come from the electric company, and this is not consistent with the requirement to send a price signal and conserve electricity.

8. Even assuming that the Petition demonstrated compliance with the requirements to master meter, which as demonstrated above it does not, there are insufficient details to demonstrate compliance with Rule 25-6.049(9). EcoSmart must do more than simply claim that it will comply. The Petition is completely void of any details on how the electricity charges from the utility/DEF will be prorated among the individual tenants to ensure that only the actual electricity cost, as laid out in Rule 25-6.049, F.A.C., is included in the charges. The Petition cites the correct standard, that only actual electricity costs may be recovered. But it just says that the actual costs will be charged without any details and further ensures the Commission knows there are exclusions to the costs. (Pet. at p. 9). Will there be submeters? How will this allegedly complex geothermal, EcoSmart GeoGrid system (Pet. at p. 5) differentiate between the electricity cost used for each individual apartment? Given that the system may be net metered, how will EcoSmart or the landlord apportion any credits or offsets against each tenant's usage, and how could it do so consistent with the requirement that the credits are only permitted to offset the customer's own usage? The

Commission should deny the Petition on this ground; otherwise, these customers may be charged higher rates than they would be charged if DEF or some other utility were their provider. By EcoSmart's own request in its Petition, the Commission would not have jurisdiction over it to intervene and enforce this rule on behalf of these tenants.

B. ECOSMART WILL BECOME A PUBLIC UTILITY SUBJECT TO THE COMMISSION'S JURISDICTION

9. In addition to the complication discussed above regarding improper net metering, and the fact that makes EcoSmart a public utility, there is another interesting facet to this question. EcoSmart cites the *Monsanto* order regarding when the sale of electricity to a third person occurs.[2] The *Monsanto* order is one of several Commission orders involving the question of whether various contractual arrangements give rise to non-utilities selling electricity in contravention of Florida law. Often, as in *Monsanto*, cogeneration equipment is leased by one party (that wishes to self-generate electricity to serve its own load) from another party (who owns the equipment). The law is clear that under certain conditions a party can generate its own electricity to meet its own energy needs. However, if that party utilizes equipment owned by another party, and the transaction is not properly structured, the other party could be deemed to be selling electricity in violation of Florida law.

10. The EcoSmart Petition includes several statements that are questionable in terms of whether the relationship between EcoSmart and the owner/landlord of this development will result in the unauthorized sale of electricity. The Petition provides that EcoSmart

[2] *In re: Petition of Monsanto Company for a declaratory statement concerning the lease financing of a cogeneration facility,* Order No. 17009, issued December 22, 1986.

"works with developers to design and install the renewable systems used in the developments, and EcoSmart operates the systems once installed." And ultimately, the Petition requests that the proposed arrangement "do[es] not render EcoSmart or the landlord to be deemed an electric or public utility." (Pet. at p. 10). Beyond these broad statements, however, there are no details about the contractual relationship or arrangement between the landlord and EcoSmart. If EcoSmart is owning and operating the geothermal system, it will be important for the Commission to determine the payment structure between the landlord and EcoSmart to determine whether EcoSmart is engaging in the illegal sale of electricity. DEF recognizes that Rule 25-6.065(2)(a) "does not preclude the customer of record from contracting for the purchase, lease, operation, or maintenance of an on-site renewable generation system with a third-party under terms and conditions that do not include the retail purchase of electricity from the third party." The issue here is that the Commission has zero details on the specific terms and conditions to confirm that the arrangement does not involve the retail purchase of electricity. DEF's concern applies both to whatever solar or geothermal generation that may be subject to the net metering rule, as well as any other geothermal system or components that may not be interconnected but are apparently acting as a cogeneration resource. *See In Re: Petition for declaratory statement regarding co-ownership of electrical cogeneration facilities in Hendry County by Southeast Renewable Fuels, LLC*, Order No. PSC-2013-0652-DS-EQ, issued Dec. 11, 2013 (declining to issue the declaratory statement because the petition failed to provide sufficient facts).

III. REQUEST TO ADDRESS THE COMMISSION

As stated above, DEF has a substantial interest in this matter and requests to address the Commission at the Agenda Conference to further clarify and/or answer any questions regarding its position.

IV. CONFERRAL

Pursuant to Rule 28.106.204(3), F.A.C., DEF has conferred with the attorney for EcoSmart regarding the contents of this Motion, and as of the filing of this Motion, EcoSmart had not provided a position on the Motion.

V. RELIEF SOUGHT

WHEREFORE, for all the reasons provided in this Motion and Response, DEF respectfully requests that the Commission grant DEF's Motion for Leave to Intervene, deny EcoSmart's Petition for Declaratory Statement, and allow DEF the opportunity to address the Commission when the Petition is considered at Agenda Conference.

RESPECTFULLY SUBMITTED this 31st day of January, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE
Docket No. 20220017-EU

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to the following this 31st day of January, 2022.

s/ Dianne M. Triplett
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