

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for a limited proceeding to approve clean energy connection program and tariff and stipulation, by Duke Energy Florida, LLC.

DOCKET NO. 20200176-EI  
ORDER NO. PSC-2020-0438-PCO-EI  
ISSUED: November 16, 2020

ORDER DENYING IN PART AND GRANTING IN PART  
LEAGUE OF UNITED LATIN AMERICAN CITIZENS'  
MOTION TO COMPEL DISCOVERY FROM WALMART INC.

On July 1, 2020, Duke Energy Florida, LLC (Duke) filed a Petition for a Limited Proceeding to Approve The Clean Energy Connection Program (CEC Program) and Tariff and Stipulation. The Clean Energy Connection Program is proposed by Duke as a voluntary community solar program that would allow participating customers to pay a subscription fee in exchange for receiving bill credits related to solar generation produced by solar facilities.

Walmart Inc. (Walmart), Vote Solar, and the Southern Alliance for Clean Energy (SACE) are signatories to the Stipulation submitted by Duke, and have intervened in support of Duke and approval of the Stipulation, Tariff, and Program. The League of United Latin American Citizens of Florida (LULAC) intervened and opposes Commission approval. The Office of Public Counsel (OPC) has also intervened.

By Order No. PSC-2020-0324-PCO-EI, issued September 22, 2020, a procedural schedule was established for this proceeding, including dates and procedures for conducting discovery and scheduling an administrative hearing from November 17-18, 2020.

This Order is issued pursuant to the authority granted by Rule 28-106.211, Florida Administrative Code (F.A.C.), which provides that the presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of the case.

Motion to Compel and Responses

On November 5, 2020, LULAC filed a Motion to Compel Discovery Responses from Walmart (Motion). The Motion requests that the Commission compel Walmart to answer five interrogatories and produce documents pursuant to several related requests for production. On November 10, 2020, Duke filed a response in opposition to LULAC's Motion. On the same day, Walmart separately filed a response in opposition to the Motion and a motion for protective order.

The disputed discovery requests propounded by LULAC to Walmart in this docket focus on three general areas: (1) "Walmart's financial interest in the program," (2) Walmart's "role in

the formation of the program and Stipulation,” and (3) “The circumstances under which the program and Stipulation . . . came to be.” Motion at 2.

Interrogatories 1 & 2

LULAC seeks in these interrogatories to discover the substance of settlement negotiations surrounding the Stipulation. LULAC alleges that such discovery is relevant to whether the Stipulation was the result of adversarial positions and may also be used to impeach Walmart witnesses. Walmart objects to these interrogatories on the ground that settlement discussions are not properly the subject of discovery. Walmart separately objects that several aspects of the discovery seek confidential business and proprietary information. Duke also objects to the discovery of these matters on the ground that they are protected by Section 90.408, Florida Statutes (F.S.).

Interrogatory 4

LULAC seeks in this interrogatory to discover whether Walmart has preregistered for the Clean Energy Connection Program at issue in this proceeding, and, if so, to further discover certain specifics related to the preregistration. Walmart does not object to producing this information, subject to a non-disclosure agreement. Duke did not file a separate response on this issue.

Interrogatories 5 & 6

LULAC seeks in these interrogatories information from Walmart regarding its anticipated bill credits and return on investment from participation in the program. Walmart objects to these requests on the ground that they seek confidential information. Walmart alternatively moved for a protective order with respect to this information, and requests that it be treated as confidential if ordered to be provided. Duke did not file a separate response on this issue.

Decision<sup>1</sup>

The information sought by LULAC in interrogatories 1 and 2 and the related requests for production falls squarely within the scope of Section 90.408, F.S.

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]

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<sup>1</sup> The undersigned decision has considered and rejects the arguments made by Walmart and Duke as to the timeliness of LULAC’s Motion to Compel. The discovery objections were served on the last day of the discovery period. The brief delay in filing the Motion was due to LULAC immediately conferring with the affected parties and attempting to address this matter amicably. Strict application of the prehearing cutoff date to prohibit consideration of LULAC’s Motion is not warranted in these circumstances.

LULAC's argument that the information should not be subject to this prohibition because it is proposed to be used for impeachment, not to prove liability or the absence of liability, is unavailing. In *Saleeby v. Rocky Elson Construction*,<sup>2</sup> the Florida Supreme Court quashed a decision of the Fourth District, and ruled that allowing the use of settlement negotiations to show bias or prejudice is reversible error. *Id.* While the decision in *Saleeby* also involved the joint tortfeasor statute, which provides independent protections for settling parties, the Court's ruling on the scope of Section 90.408, F.S., is dispositive of LULAC's argument.

In essence, LULAC argues for a limited exception to the protections provided by Section 90.408, F.S., if parties before the Commission propose settlement of a docket. Because parties must file a settlement or stipulation for Commission consideration, this "exception" would potentially apply to every docket where there is a settlement. Once the settlement was filed with the Commission, the parties would thereafter have their negotiations open to discovery if an opposing intervenor alleged a lack of adversity. Whether applied to parties who settle before filing a limited petition and engaging opposition or those who settle after some period of litigating with intervenors, this exception is not found in Section 90.408, F.S., or Commission precedent. Most importantly, the Court in *Saleeby* cautioned that Section 90.408, F.S., provides "no exceptions." 3 So. 3d at 1080. To create such an exception here would be contrary to this decision, and is contrary to Commission precedent.

As established in Prehearing Order No. PSC-2020-0430-PHO-EI, issued November 10, 2020, the issue to be litigated in this docket is whether the Stipulation, taken as a whole, is in the public interest. That question is answered by examining the Stipulation, Tariff, and Program; that is, the result of the negotiations, not the substance of the negotiations themselves. The result of the negotiations as they specifically relate to Walmart are the subject of interrogatory 4, which reads as follows:

Please explain whether Walmart has preregistered to participate in the Program. If so, please provide the size of the subscription, and please explain how many kWh are projected to be produced annually by that subscription size. Please provide how this compares to Walmart's total kWh annually purchased from Duke as a percent (for example, whether it is expected to cover 100%, 50%, or some other number of Walmart's electricity consumption).

Walmart has agreed to provide this information subject to LULAC executing a non-disclosure agreement (NDA). LULAC objects to signing the NDA on the ground that it "is simply seeking confirmation of information that is already public." Motion at 5. The information that LULAC alleges is public is the identity of an entity identified by Duke in interrogatory responses only as "Customer 19." Motion at 5. LULAC alleges that the identity of Customer 19 is public because other discovery information and the process of elimination make the identity obvious. Motion at 5-6. However, a request to confirm or deny the result of a party's back-solving effort is not the equivalent of a request to confirm or deny a conclusion that exists in the

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<sup>2</sup> 3 So. 3d 1078, 1080 (Fla. 2009).

public realm. LULAC has not presented a persuasive argument that disclosure of this information should not be kept confidential and withheld from LULAC until the parties execute an NDA.

In interrogatories 5 and 6, LULAC seeks information from Walmart regarding its anticipated bill credits and return on investment from participation in the program. Walmart contends that the information is proprietary confidential business information<sup>3</sup> and trade secret<sup>4</sup> and, therefore, not discoverable. Walmart alternatively argues that any information that is produced should be maintained as confidential pursuant to Order PSC-2020-0324-PCO-EI.

The information sought by LULAC in Interrogatories 5 and 6 may ultimately be relevant to a determination of whether the Stipulation, taken as a whole, is in the public interest. Walmart does not argue persuasively otherwise, but does argue persuasively that the materials should be maintained as confidential.

Having considered the arguments of the parties, I find that LULAC's Motion to Compel Discovery from Walmart shall be denied in part and granted in part, as set forth below.

Based on the foregoing, it is

ORDERED by Commissioner Donald J. Polmann, as Prehearing Officer, that the Motion to Compel Discovery from Walmart, Inc., filed by the League of United Latin American Citizens of Florida is hereby denied as to Interrogatories 1 and 2 and related Requests for Production 1, 2, and 3 as they relate to these Interrogatories. It is further

ORDERED that the Motion to Compel filed by LULAC is granted as to Interrogatories 4, 5 and 6, and related Requests for Production 1 and 3. Walmart shall provide the requested information to LULAC by no later than 5:00 p.m. (EST) on November 16, 2020, subject to any claim of confidentiality pursuant to Section 366.093, F.S., and LULAC's execution of an appropriate nondisclosure agreement.

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<sup>3</sup> Section 366.093(3)(a) & (e), F.S.

<sup>4</sup> Section 688.002(4), F.S.

By ORDER of Commissioner Donald J. Polmann, as Prehearing Officer, this 16th day of November, 2020.



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DONALD J. POLMANN, Ph.D., P.E.  
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

SPS

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.