

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition to Compel Florida Power & Light  
to Comply With Fla. Stat. §366.91 and  
Rule 25-6.065

Docket No. 20190167-EI

Filed: January 9, 2020

**FLORIDA POWER & LIGHT COMPANY'S RESPONSE IN OPPOSITION TO ACHIM  
GINSBERG-KLEMMT'S PETITION FOR LEAVE TO INTERVENE**

Florida Power & Light Company ("FPL"), the Respondent in this pending proceeding filed on behalf of FPL customers Gonzales and Irwin, hereby files its response in opposition to Achim Ginsberg-Klemmt's ("Mr. Ginsberg-Klemmt") Petition to Intervene filed January 6, 2020. Mr. Ginsberg-Klemmt lacks standing to intervene in this proceeding. Additionally, the Petition to Intervene requests relief which is inappropriate and unauthorized, and attempts to collaterally attack and re-litigate the Commission's decision in Docket No. 20190176-EI, a proceeding in which Mr. Ginsberg-Klemmt was a named petitioner and which he has appealed to the Florida Supreme Court.<sup>1</sup>

The appeal of the decision rendered in Docket No. 20190176-EI challenges the Commission's denial of Mr. Ginsberg-Klemmt's Joint Petition for Approval of Regulatory Improvements for Decentralized Solar Net-Metering Systems in Florida, and involves the same statute and rule under consideration in this case, as well as the interpretation and application of that statute and rule.<sup>2</sup> The Docket No. 20190176-EI petition, treated by the Commission as a Petition to Initiate Rulemaking, raised a number of issues including the allowable size of net metered systems under Florida law and Commission rules, and FPL's application of the net

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<sup>1</sup> Following denial of his Motion for Reconsideration and Request for Oral Argument in Docket No. 20190176-EI, on November 4, 2019 Mr. Ginsberg-Klemmt initiated an appeal to the Florida Supreme Court (Case No. SC19-1873, Achim Ginsberg-Klemmt v. Art Graham etc., et al.) of Commission Order No. PSC-2019-0410-FOF-EI. The appeal was filed approximately 2 months before Mr. Ginsberg-Klemmt sought to intervene in this pending proceeding. Notwithstanding the pendency of that appeal, he attempts to collaterally attack and re-litigate the Commission's decision in Docket 20190176-EI through this Petition to Intervene in the instant proceeding.

<sup>2</sup> The enabling statute at issue is §366.91, Florida Statutes; the rule is Rule 25-6.065, F.A.C.

metering statute and rule. The Supreme Court appeal remains pending, with Mr. Ginsberg-Klemmt's initial brief on the merits due to be filed on or before February 24, 2020. Notwithstanding that fact, and although he lacks standing, he seeks to intervene here – in an unrelated case where the customers' solar PV system has been interconnected based on facts and circumstances which are unique to those customers – in an attempt to litigate the same issues expected to be raised in the appeal, while also requesting additional relief which is inappropriate and unauthorized.

For the reasons stated herein, FPL objects to Mr. Ginsberg-Klemmt's Petition for Leave to Intervene and respectfully requests the Commission to deny his request.

### **Background**

1. On August 26, 2019, FPL customers Floyd Gonzales and Robert Irwin, through counsel, petitioned the Commission for an order compelling FPL to comply with Section 366.91, Florida Statutes, and Rule 25.6-065, F.A.C., to allow for approval of their application for inclusion into FPL's net metering program (the "Gonzales-Irwin Petition").

2. On September 16, 2019, FPL filed a motion to dismiss the Gonzales-Irwin Petition, or in the alternative to treat the petition as a request for a declaratory statement.

3. Thereafter Commission Staff initiated discovery in an effort to identify and understand the positions of the parties.

4. During the pendency of this proceeding, the customers' electricity consumption increased to a level that allowed them to qualify for interconnection as Tier 2 net metering customers. That interconnection occurred in early December of 2019.

5. On January 2, 2020, Commission Staff issued a recommendation that the Commission deny the Gonzales-Irwin Petition. The recommendation recognized that FPL has

complied with the applicable rule and statute governing net metering, has processed the Gonzales and Irwin application for inclusion in FPL's net metering program, and is currently net metering Mr. Gonzales and Mr. Irwin's system. The recommendation further stated that FPL's actions do not warrant a refund, that refunds are inappropriate under the circumstances presented, and the Commission has no jurisdiction to make such an award even if one was merited. In sum, Commission Staff has recommended denial of the Gonzales-Irwin Petition and its accompanying request for a refund.

6. The Commission is scheduled to consider the Staff's Recommendation during its January 14, 2020 Agenda Conference.

7. On January 6, 2020, following the issuance of Staff's recommendation, Mr. Ginsberg-Klemmt filed his Petition to Intervene in this proceeding.

#### **Mr. Ginsberg-Klemmt Lacks Standing to Intervene**

8. In order to establish standing, a petitioner seeking intervention must satisfy the requirements set forth in *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981).<sup>3</sup> Under *Agrico*, before a potential intervenor "can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." *Agrico* at 482. 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.

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<sup>3</sup> See also *Florida Home Builders*, 412 So. 2d at 353-54, and *Farmworker Rights Organization, Inc. v. Department of Health and Rehabilitative Services*, 417 So. 2d 753, 754 (Fla. 1st DCA 1982), which are based on the basic standing principles established in *Agrico*, *infra*.

2d 1224, 1225-26 (Fla. 3d DCA 1990). *See also: Village Park Mobile Home Assn., Inc. v. State Dept. of Business Regulation*, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), *rev. den.*, 513 So. 2d 1063 (Fla. 1987) (speculation on the possible occurrence of injurious events is too remote).

9. Mr. Ginsberg-Klemmt has failed in all material respects to sufficiently allege that he will sustain any injury in fact through the litigation of the pending proceeding, nor can he. He alleges that he currently operates two rooftop solar net metering systems in Sarasota County, and adds that he has had an application for a third system denied.<sup>4</sup> He claims that at some point in the future he plans to seek approval of additional net metering systems (Petition at page 4, paragraph 20). The outcome of the present proceeding will not impact his ability to do so. At most Mr. Ginsberg-Klemmt's assertions seem to suggest the speculative, remote and uncertain possibility that at some yet to be determined point in the future, he may apply to FPL to net meter at additional sites, and that FPL will reject those prospective applications.<sup>5</sup> The fact that there is a net metering system size limitation set forth in statute and rule, that Mr. Ginsberg-Klemmt's potential future applications may not comply with those legal requirements, and that FPL follows the law and the rule in assessing applications for net metering, does not constitute an injury in fact, nor can it.

10. In addition to the absence of any injury in fact, any alleged prospective, speculative injury on the part of Mr. Ginsberg-Klemmt is clearly not of a type or nature which the proceeding is designed to protect. The instant proceeding – involving a dispute between a specific FPL customer and FPL regarding a unique set of facts and circumstances – is designed to obtain a

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<sup>4</sup> It should be noted that Mr. Ginsberg-Klemmt has not sought relief from the appropriate denial of the application for the third net metered system, and instead seeks to intervene in this proceeding which involves the resolution of a dispute involving unrelated customers' efforts to interconnect and participate as a Tier 2 net metering FPL customer, under unique facts and circumstances in no way related to Mr. Ginsberg-Klemmt.

<sup>5</sup> If any such applications are submitted to FPL, they will be reviewed, processed, and either approved or rejected, consistent with Florida law, Commission rules, and FPL's policies and practices.

Commission decision on that specific customer's issue.<sup>6</sup> The request for relief in the Gonzales-Irwin Petition asks the Commission to order "FPL to approve Petitioner's application for inclusion into FPL's net metering program, refunding Petitioners all money unnecessarily spent on electricity...." (Gonzales-Irwin Petition at 3). Thus, from the outset, the scope and purpose of the instant proceeding has been, and remains, specific to the individual system owned by Mr. Gonzales and Mr. Irwin. The fact that Mr. Ginsberg-Klemmt has views on how the Commission should rule on the Gonzales-Irwin Petition, or feels that additional discovery should be undertaken before a decision is rendered, does not somehow transform the Gonzales-Irwin proceeding into the type of proceeding designed to protect Mr. Ginsberg-Klemmt's interests.

11. To the extent Mr. Ginsberg-Klemmt is attempting to claim an injury based on the fact that he is not allowed to overbuild a net metering system, it is well established in the law and Commission rules that an individual cannot intentionally overbuild a net metering system to generate excess electricity above and beyond the customer's consumption at the net metered premise. This was clearly articulated in Order No. PSC-2019-0410-FOF-EI, where the Commission stated:

Based on their arguments, it appears that Petitioners may be seeking to generate electricity at a capacity that is beyond what is currently needed to offset part or all of their individual electricity requirements. If the intent of this surplus generation is to become supply-side independent power producers by installing systems that are intended to generate in excess of customer load, Petitioners' request would be outside of the purpose of our interconnection and net metering rule. In fact, during the rulemaking proceedings to amend Rule 25-6.065, F.A.C., our staff stated that certain provisions of the rule were meant to ensure that customers will not intentionally

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<sup>6</sup> As noted by the Staff Recommendation, once Mr. Gonzales and Mr. Irwin's usage reached a level qualifying for Tier 2 net metering, the customers' solar PV system was interconnected so that they could begin to net meter. The remaining issue involves the customers' claim for a refund. Staff's recommendation states that the pending petition should be denied, and the request for a refund should similarly be denied.

oversize their systems for the primary purpose of selling energy to the utility or becoming an independent power producer.<sup>7</sup>

12. Mr. Ginsberg-Klemmt has failed to satisfy the standing requirements enunciated in *Agrico* and its progeny. He has not and cannot carry the burden to show that he has a substantial interest, that he will suffer an injury in fact through the litigation of this proceeding, or that his alleged prospective injury is of a type that the Gonzales-Irwin case is designed to protect. As a result, Mr. Ginsberg-Klemmt has failed to establish that he has standing to participate as an intervenor in this docket.

**The Petition to Intervene Seeks to Re-Litigate Issues Previously Addressed by the  
Commission**

13. Mr. Ginsberg-Klemmt seeks to intervene in this unrelated customer complaint in an effort to re-litigate issues he previously raised (unsuccessfully) as a named petitioner in Docket No. 20190176-EI. In that petition, filed September 3, 2019, Mr. Ginsberg-Klemmt explicitly requested that the Commission “allow net-metering customers or their contractors to freely choose the size of their net-metering systems...”<sup>8</sup> And, although FPL was not a party to Docket No. 20190176-EI, the petition nonetheless directly criticized FPL’s practice of evaluating applications for net metering to assure their compliance with the law and Commission rules. This criticism was a central theme of Mr. Ginsberg-Klemmt’s presentation at the Commission’s October 3, 2019 Agenda Conference. In short, one of Mr. Ginsberg-Klemmt’s primary arguments in Docket 20190176-EI was an attack on the process FPL uses to comply with the Commission rule on net metering, wherein FPL seeks assurance that energy produced by a renewable generator does not

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<sup>7</sup> Order No. PSC-2019-0410-FOF-EI at 4, issued October 10, 2019 in Docket No. 20190176-EI, where Mr. Ginsberg-Klemmt was a named petitioner.

<sup>8</sup> Joint Petition at 3.

exceed 115 percent of the customer’s annual kWh consumption.<sup>9</sup> In Order No. PSC-2019-0410-FOF-EI, the Commission denied the Docket No. 20190176-EI petition, stating that “[i]f ... Petitioners intend to generate electricity at a capacity that is beyond what is needed to offset part or all of their individual electricity requirements, their requested relief is outside of the scope and purpose of our interconnection and net metering rule.”<sup>10</sup> Mr. Ginsberg-Klemmt, ignoring the Commission’s earlier ruling, is again questioning in his current Petition to Intervene the net metering system sizing requirements, which he now refers to as “FPL’s corporate 115% Past Power Consumption doctrine”. (Petition at 2). Given that Mr. Ginsberg-Klemmt’s assertions regarding system sizing were raised and addressed in the 20190176-EI docket, and are currently the subject of an ongoing appeal at the Florida Supreme Court, the Commission should not permit his intervention here, which would result in yet another review of the arguments previously made by Mr. Ginsberg-Klemmt and rejected by the Commission.

14. Additionally, in Docket No. 20190176-EI, Mr. Ginsberg-Klemmt sought to revise the Commission’s net metering rules, or at least the interpretation of those rules, such that net metering system approvals would no longer be administered by the utility.<sup>11</sup> In his Petition to Intervene in this pending proceeding, he seeks to reintroduce that argument. He writes that “No Florida rule or statute authorizes this private corporation to act as a regulatory agency and no Florida rule or statute authorizes the Public Service Commission to delegate their regulatory powers and discretionary authority affecting the denial or approval of net-metering applications to a private corporation.” (Petition at 3). The Commission has already rejected this argument, and there is no place in this proceeding for reconsideration of that position.

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<sup>9</sup> Docket No. 20190176-EI, Transcript, Commission Conference Agenda Item No. 6 at 12-13 (October 3, 2019).

<sup>10</sup> Order No. PSC-2019-0410-FOF-EI at 5.

<sup>11</sup> See *In re: Joint Petition for Approval of Regulatory Improvements for decentralized Solar Net-Metering Systems in Florida*, Docket No. 20190176, Joint Petition at ¶ 11 (Sept. 3, 2019) (*hereinafter* “Joint Petition”).

**The Additional Relief Sought by Mr. Ginsberg-Klemmt is Inappropriate and Inapplicable  
to the Current Proceeding**

15. The relief sought by Mr. Ginsberg-Klemmt is inappropriate and inapplicable to this proceeding. In his Petition to Intervene, Mr. Ginsberg-Klemmt asks that he be allowed to “rectify the Commission Staff’s oversights concerning the missing responses” to staff data requests issued in the docket, which he views as being incomplete (Petition at 5).<sup>12</sup> He also requests that FPL provide copies of computer code sections related to net metering program approvals or denials. (*Id.*). These requests for relief, completely inappropriate, inapplicable and unnecessary in the context of this case, would add nothing to the proceeding. Moreover, FPL has provided extensive detail on its process used to assess, evaluate, approve or deny interconnection applications, all in accordance with Florida law and Commission rule. These steps have been clearly articulated in filed responses to Staff’s data requests, and are available on the publicly accessible Commission website.

**CONCLUSION**

Mr. Ginsberg-Klemmt lacks standing to intervene in this case, and is seeking to use this proceeding to collaterally attack the Commission’s decision in Docket No. 20190176-EI, while simultaneously challenging that same Commission decision at the Florida Supreme Court. Additionally, he seeks relief which is inappropriate and unauthorized through intervention. The Commission should reject this attempt for a second bite at the apple for the reasons stated herein.

WHEREFORE, FPL respectfully requests that the Commission deny Mr. Ginsberg-Klemmt’s Petition to Intervene in Docket No. 20190167-EI.

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<sup>12</sup> Neither Staff nor counsel for Mr. Gonzales and Mr. Irwin contested the adequacy of FPL’s responses to Data Requests answered during the course of this proceeding.



Respectfully submitted this 9th day of January 2020.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**  
**Docket No. 20190167-EI**

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished  
by electronic service on this 9th day of January 2020 to the following:

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