BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Re: Petition by Florida Power & Light Company for Approval of FPL SolarTogether Program and Tariff.	DOCKET NO. 20190061-EI FILED: January 9, 2020

CITIZENS' RESPONSE IN OPPOSITION TO DUKE ENERGY FLORIDA, LLC'S MOTION FOR LEAVE TO FILE AMICUS CURIAE COMMENTS

The Citizens of the State of Florida ("Citizens"), by and through the Office of Public Counsel ("OPC"), pursuant to Rule 28-106.204(1), Florida Administrative Code, file this response in opposition to the Motion for Leave to File Amicus Curiae Comments filed by Duke Energy Florida, LLC ("Duke"). Citizens state as follows:

This case was filed ten months ago by the largest electric utility in the state – Florida Power & Light Co., ("FPL"). Additionally, a leading international retailer[1] and two major energy advocacy groups have intervened in the case, filed testimony, and participated in almost a year of litigation. The latter three parties have joined the side of FPL, as evidenced by their proposed Joint Settlement.

Amicus curiae filings "should not be used to simply give one side more exposure than the rules contemplate." *See Liberty Counsel v. Fla. Boar Bd. of Governors*, 12 So. 3d 183, 186, n. 9 (Fla. 2009) (citation omitted)(*quoting Ciba-Geigy Ltd. v. Fish Peddler*, 683 So. 2d 522 (Fla. 4th DCA 1996)).

Amicus filings which merely duplicate the arguments already made by litigants are an "abuse" and "should not be allowed." *Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997), *cited by*

[1] "Today, Walmart operates over 11,300 retail units under 58 banners in 27 countries and eCommerce websites in 10 countries." https://corporate.walmart.com/our-story/our-locations (last visited Jan. 9, 2020).

Rathkamp v. Dept. of Community Affairs, 730 So. 2d 866 (Fla. 3rd DCA 1999)(denying motion to appear and file amicus brief, stating "we fully endorse and adopt" the principles stated in the *Ryan* opinion). *See also*, *Chacon v. State*, 102 So. 2d 593, 593 (Fla. 1958)(denying amicus filing because the movant's issue was "amply presented" by a party before the court and the movant lacked consent from all parties).

In direct contravention of the case law it cited, Duke does not seek to provide *additional* information to help the tribunal. Each and every topic Duke seeks to belatedly insert and argue via its "Comments" has already been raised in testimony by multiple intervenors. Duke not only duplicates the subject matter, but also simply parrots the exact language of FPL and its allies. For example, in the Motion at issue, Duke merely repeats *ad nauseum* FPL's well-worn talking point about the alleged "innovative" aspect of its proposal; Duke replicates FPL's claims regarding innovation and creativity no less than five times within three pages of argument.

The examples of Duke's needless repetition of arguments already made by litigants in testimony and deposition are too numerous to list here. A few examples of places where the same information is already in the record in the other litigants' testimony and experience regarding technology, customers' goals regarding clean energy sources, and climate change / emissions include the following: FPL - Valle Direct at 6-8, Brannen Direct at 7-8; SACE - Jacob Direct at 2, 4-5; Vote Solar - Cox Direct at 11, 15-16; Walmart - Chriss Direct at 3.

An amicus filing might be allowed "when a party is not represented competently or is not represented at all …" *Ryan* at 1063; *see also, State v. United States HHS*, 2010 U.S. Dist. LEXIS 152369 at 7 (N.D. Fla. 2010)(explaining "[i]t is 'particularly questionable' to allow an amicus brief when the existing parties are 'already well represented.'")(*quoting Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970).

Duke has failed to show that FPL, Wal-Mart, Vote Solar and Southern Alliance for Clean Energy ("SACE") were *all* either unqualified, unable to fully represent themselves, or unable to present arguments on the issues. An international business with the vast resources commanded by Walmart does not need Duke to assist in explaining its interests, reasons, or goals in how it obtains its energy. Moreover, SACE's expert who filed testimony specifically lists his corporate experience in climate protection, risks and mitigation (SACE Direct at 2). Therefore the docket is not so bereft of access to information on climate change or customer preferences that a second utility needs to supplement the filings made by the largest utility in the state, Walmart, SACE and Vote Solar. Duke also failed to make any showing that the issues before the Commission are so difficult that none of the four litigants listed above could capably assist in resolving this case. Duke's reliance on Order No. PSC-13-0508-PCO-EQ regarding Southeast Renewable Fuels, LLC's Petition for Declaratory Statement is misplaced. The movant requesting to appear as amicus in that case was the trade association which represented almost all of Florida's electric cooperatives, whereas Duke is one utility which does not even represent the majority of electric customers in the state. Duke is less likely to be able to assist the Commission with new information than an association with statewide reach, as demonstrated by Duke's repetition of the information already provided by the well-represented litigants in this case. Moreover, declaratory statement cases are not adversarial hearings such as this one, and instances where the Commission allowed amicus filings in declaratory statement cases do not provide a basis for granting relief in this case. The other orders cited by Duke do not contain sufficient factual detail in their reasoning to determine how the movants' participation was determined to be beneficial.

Duke could have sought to intervene and participate at any time over the last 9 months, but failed to do so, and instead now wants to insert arguments at the 11th hour, days before the hearing,

to effectively influence the outcome by injecting alleged facts into the record at a point where there is no procedure for a party to respond. Duke's behavior is tantamount to filing testimony after the end of the discovery period and on the eve of trial, to which OPC cannot meaningfully respond, contrary to the Order Establishing Procedure in this docket. This Commission has previously denied leave for an amicus filing where a movant sought participation too late in a case. *See In Re: Investigation regarding the appropriateness of payment for Dial-Around (10XXX, 950, 800) compensation, et al.*, Order No. PSC-1993-1032-FOF-TP, at 2-3, Docket No. 19920399-TP; 1993 Fla. PUC LEXIS 874, *4 (Fla. P.S.C. July 13, 1993)(also indicating the movant's arguments were already effectively made by other litigants).

Moreover, if as Duke claims, the matter has such general public interest importance, Duke's arguments suggest rulemaking is the better option than litigating a tariff which amounts to a *de facto* substantive public policy change via piecemeal litigation. Duke "believes that its customers may be interested in a program similar to that proposed by FPL," and states its interest in the construction of Florida Statutes in relation to PSC orders. Mot. 1-2. As an entity regulated by the PSC and one which claims to have a substantial interest in the action, Duke has demonstrated its standing for rulemaking. Section 120.54(7)(a), Florida Statutes. Perhaps what Duke is really suggesting is that the Commission should shut down this tariff proceeding based on FPL-specific facts, and convene a rulemaking to consider whether the Commission can change policy or even the term of art related to the Legislature's expectation of what "need" is being determined in the context of the statute governing the Commission's exclusive role in determinations of need under the Electrical Power Plant Siting Act, Section 403.519, Fla. Stat. (2019).

Duke admits that the SolarTogether program "may result in a policy shift." Motion at 2. However, the PSC does not have the authority to allow a utility to make an end-run around a statute enacted by the Legislature, particularly where said statute was never intended to allow rampant, unilateral additions to rate base by a private company based on expressions of customer desire. The statutory revision required to approve the facilities related to the SolarTogether program may only be made by the Legislature, not the PSC.

Because Duke's "Comments" amount to duplicative, sycophantic praise which simply parrots FPL's and other parties' pleadings, it is clear Duke's proposed "Comments" offer no substantive benefit to the Commission in this proceeding, so Duke's motion should be denied, and its improperly-filed Comments should be stricken from the docket. Duke has made absolutely no factual showing of how its Comments will be beneficial, assist the Commission in its deliberations, or tell the Commission anything it does not already know. Instead, Duke's Comments are merely repetitive, and as such they fail to meet the standard required of amicus filings. "Piling on" filings by allies which simply amount to "me too" affirmations of litigants' arguments, but which attempt to masquerade as "amicus curiae" filings are improper wastes of time and Commission staff resources. *See, e.g., State v. U.S. HHS, supra*.

Wherefore, OPC respectfully requests the Commission deny Duke's Motion for leave to file Amicus Comments and strike from the docket Duke's "Comments in Support of Florida Power & Light Company" which Duke improperly filed in the docket before it was granted leave to do so.

Respectfully submitted,

J. R. Kelly
Public Counsel
Charles J. Rehwinkel
Deputy Public Counsel

s/Stephanie A. Morse
Stephanie A. Morse
Associate Public Counsel
Florida Bar No. 0068713

Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, FL 32399-1400

Attorneys for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Citizens' Response in Opposition to Duke Energy Florida, LLC's Motion for Leave to File Amicus Curiae Comments has been furnished by electronic mail on this 9th day of January 2020, to the following:

Florida Industrial Power Users Group
Jon C. Moyle, Jr.
Myndi Qualls
Karen A. Putnal
Ian E. Waldick
c/o Moyle Law Firm, PA
118 North Gadsden Street
Tallahassee FL 32301
jmoyle@moylelaw.com
mqualls@moylelaw.com
kputnal@moylelaw.com
iwaldick@moylelaw.com

Florida Power & Light Company
Kenneth A. Hoffman
134 W. Jefferson Street
Tallahassee FL 32301
ken.hoffman@fpl.com

Florida Power & Light Company
Maria Jose Moncada
Will P. Cox
700 Universe Boulevard
Juno Beach FL 33408
maria.moncada@fpl.com
will.p.cox@fpl.com

Richard A. Zambo, P.A.
2336 S.E. Ocean Boulevard, #309
Stuart FL 34996
richzambo@aol.com
Represents: Vote Solar

Rutledge Law Firm
Marsha E. Rule
119 South Monroe Street, Suite 202
Tallahassee FL 32301
marsha@rutledge-ecenia.com
Represents: Vote Solar

Southern Alliance for Clean Energy
George Cavros
120 E. Oakland Park Blvd., Suite 105
Fort Lauderdale FL 33334
george@cavros-law.com

Spilman Law Firm
Stephanie U. Eaton
Carrie Harris Grundmann
110 Oakwood Drive, Suite 500
Winston-Salem NC 27103
seaton@spilmanlaw.com
cgrundmann@spilmanlaw.com
Represents: Walmart, Inc.

Spilman Law Firm
Derrick Price Williamson
1100 Bent Creek Boulevard, Suite 101
Mechanicsburg PA 17050
dwilliamson@spilmanlaw.com
Represents: Walmart, Inc.

Vote Solar
Katie Chiles Ottenweller
Tyler Fitch
151 Astoria Street SE
Atlanta GA 30316
katie@votesolar.org
tyler@votesolar.org
Represented by: Richard A. Zambo; Rutledge Law Firm

Advanced Energy Economy
Dylan Reed
Caitlin Marquis
dreed@aee.net
cmarquis@aee.net

Jennifer Green
P.O. Box 390
Tallahassee FL 32302
office@libertypartnersfl.com
Represents: Liberty Partners

Sierra Club
Diana Csank
50 F Street NW, Eighth Floor
Washington DC 20001
Diana.Csank@sierraclub.org

Kristen Simmons
Walter Trierweiler
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
ksimmons@ psc.state.fl.us
wtrierwe@psc.state.fl.us

s/Stephanie A. Morse
Stephanie A. Morse
Associate Public Counsel
Florida Bar No. 0068713