

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request to opt-out of cost recovery for investor-owned electric utility energy efficiency programs by Wal-Mart Stores East, LP and Sam's East, Inc. and Florida Industrial Power Users Group.

DOCKET NO. 140226-EI

FILED: August 20, 2015

POST-HEARING BRIEF OF THE OFFICE OF PUBLIC COUNSEL

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to the Order Establishing Procedure in this docket, Order No. PSC-15-0149-PCO-EI, issued April 1, 2015, submit this Post-Hearing Brief.

STATEMENT OF BASIC POSITION

The Florida Industrial Users Group (FIPUG) and Walmart (collectively "Proponents") submitted proposals in the 140002-EI, Energy Conservation Cost Recovery (ECCR) docket, to opt-out of the utility-sponsored energy efficiency measures and related costs in the ECCR clause. (TR 58, 513) Proponents put forward two different proposals which in essence would allow the opt-out eligible customers to implement, or plan to self-implement, energy efficiency measures and after a verification process opt-out of the energy efficiency related ECCR charges. Neither Proponent proposes to opt-out of the demand-side management programs. (TR 52, 513)

Under the Florida Energy Efficiency and Conservation Act (FEECA) and Section 366.82, Florida Statutes, the Commission is charged with adopting appropriate goals for increasing the efficiency of energy consumption and demand-side renewable energy systems. Further, Section 366.82(2), Florida Statutes, permits the Commission to allow efficiencies within the user base.

However, these efficiencies are subject to the Commission's goal setting. In setting the efficiency goals, Section 366.82(3)(a)-(d) requires the Commission to consider the following:

- (a) The costs and benefits to customers participating in the measure.
- (b) The costs and benefits to the general body of ratepayers as a whole, including utility incentives and participant contributions.
- (c) The need for incentives to promote both customer-owned and utility-owned energy efficiency and demand-side renewable energy systems.
- (d) The cost imposed by state and federal regulations on the emission of greenhouse gases.

The Proponents do not appear to have established, at a minimum, that their opt-out proposals meet the Commission's approved cost-effectiveness test, which is the Rate Impact Measure or "RIM." This casts doubt on the underlying basis which would tend to support separation of the ECCR expenditures into two categories for Energy Efficiency and Demand Side Management programs. Further, the evidence offered by the Proponents' to support the opt-out proposals seems to have fallen short of meeting the burden of proof that the opt-out proposals adequately safeguard the interests of the general body of ratepayers and various rate classes against undue rate impacts while achieving the intent of FEECA and Section 366.82(2), Florida Statutes, utilizing the Commission's approved cost-effectiveness test (RIM) or other Commission approved tests.

Should the Commission nevertheless approve, in concept, an opt-out procedure, any eligibility criteria should at a minimum take measures to adequately safeguard the interests of the remaining general body of ratepayers and various rate classes against undue rate impacts while achieving the intent of FEECA and Section 366.82(2), Florida Statutes. Additionally, any eligibility criteria should require that any qualifying proposals meet the Commission's approved cost-effectiveness test (RIM), or other Commission approved tests.

POSITIONS AND ARGUMENT ON DISPUTED ISSUES:

ISSUE 1: Should the Commission require the utilities to separate their Energy Conservation Cost Recovery expenditures into two categories, one for Energy Efficiency programs and the other for Demand Side Management programs?

OPC: * Since the Proponents' opt-out proposals do not appear to clearly and convincingly established that they meet, at a minimum, the Commission's approved cost-effectiveness test, RIM, there appears to be an insufficient basis for the Commission to consider separating the ECCR expenditures into separate categories for Energy Efficiency and Demand Side Management programs.*

FIPUG and Walmart put forward two different proposals which would in essence allow eligible customers to implement, or plan to self-implement, energy efficiency measures and after a verification process opt-out of the energy efficiency related ECCR charges. (TR 52, 513) Since the Proponents propose to continue participating in the demand-side management component of the ECCR, their proposals, if adopted, would require that the ECCR costs be split into energy efficiency programs and demand-side management programs. (TR 50)

However, splitting the ECCR into two separate categories may be inconsistent with the fundamental basis of the ECCR charges. FPL Witness Koch suggested that “. . . both proposals rely on the flawed premise that utility-sponsored DSM measures benefit only the participants, or the rate class in which the participants take service.” (TR 143) He further noted that “. . . all customers (whether participating in a DSM program or not) benefit from shared system cost savings stemming from peak demand and energy reductions created by the participating customers.” *Id.* The Commission uses the RIM test to ensure that the general body of ratepayers benefit from the approved programs. (TR 143, 144, 243, 338, 443)

While both FIPUG and Walmart assert that their proposals “. . . minimize the risk that non-opt out customers will be burdened with higher rates” or “. . . will not adversely impact the utility's

remaining customers,” the information provided by the utilities in response to OPC discovery tends to indicate that cost shifting may well take place assuming no changes in the programs. (TR 61, 521, H.E.s 34, 35, 36, 37) Further, Hearing Exhibit 38 introduced by Walmart during redirect appears to indicate that cost shifting could take place without a change in the programs. (H.E. 38, TR 132)

OPC notes that there may be some merit to FPL Witness Koch’s observation in his testimony that “. . . because all customers share in the benefits of approved DSM programs, there is no justification for allowing certain groups of customers to opt-out of paying for those programs.” (TR 143) It would seem inconsistent with the Commission’s application of FEECA to separate expenditures into two categories for energy efficiency and demand-side programs, so that only certain customers could opt-out of paying for the energy efficiency programs while still receiving the benefit of these programs. Further, since the Proponents have not clearly established that their opt-out proposals meet, at a minimum, the Commission’s approved RIM cost-effectiveness test, there does not appear to be a compelling reason for the Commission to consider separating the ECCR expenditures into two categories for Energy Efficiency and Demand Side Management programs.

ISSUE 2: Should the Commission allow pro-active non-residential customers who implement their own energy efficiency programs and meet certain other criteria to opt out of the utility’s Energy Efficiency programs and not be required to pay the cost recovery charges for the utility’s Energy Efficiency programs approved by the Commission pursuant to Section 366.82, Florida Statutes?

OPC: * The Proponents do not appear to have fully met their burden of demonstrating that their opt-out proposals adequately safeguard the interests of the general body of ratepayers and various rate classes against undue rate impacts while achieving the intent of FEECA and Section 366.82(2), Florida Statutes, utilizing the Commission’s approved RIM cost-effectiveness test or other Commission approved tests.*

Under FIPUG and Walmart’s proposals, the Proponents would implement self-directed energy efficiency measures and would opt-out of the energy efficiency related ECCR charges after

some verification process. Neither Proponent proposes to opt-out of the demand-side management programs. (TR 52, 513) FIPUG argues that requiring energy-efficient customers to also pay for utility-sponsored energy efficiency programs, in which they may not be eligible to participate, is unfair, counter-productive and out of step with a majority of states. (TR 507) Walmart contends that allowing certain eligible customers to meet their own energy efficiency responsibilities, through implementation of their own energy efficiency measures while being exempted from the energy efficiency portion of the ECCR charge, benefits the network and all customers with no cost to those customers. (TR 46-47)

However, for several reasons, FIPUG's and Walmart's proposals as presented appear to fall short in meeting the Proponents' burden of demonstrating that the proposals would be fair to the general body of ratepayers. In this regard, under the opt-out proposals, the Proponents have not convincingly demonstrated that cost shifting will not occur. Based on Hearing Exhibits 34, 35, 36, and 37 provided by the utilities in response to OPC discovery, it appears that cost shifting may well occur assuming no other changes in the utilities' current DSM programs. (H.E. 34, 35, 36, 37)

Witness Pollock asserts that cost shifting would occur only if “. . . the utility ignores the documented savings from the opt-out customers and continues to incur the same level of EE program costs” and “. . . ignoring documented EE program savings from the opt-out customers would not be prudent.” (TR 521) Walmart witness Baker also contends that “. . . the utilities will no longer have to include programs or measures for opt out customers in their annual ECCR filings, which should reduce programs costs and, as a result, reduce overall ECCR revenue requirements.” (TR 61) Both Proponents assume that the energy efficiency gains made by the self-implemented energy efficiency programs could be counted toward the utilities' Commission-approved DSM goals. (TR 61, 521)

However, the underlying assumption that implementation of the opt-out programs would result in the elimination or reduction of the utilities' current DSM programs is not generally accepted by the utilities charged with implementing the programs for the benefit of all customers. Gulf witness Floyd raised a concern that the Commission must consider that the proposal process:

. . . could not feasibly predict which customers may, during that five year period, choose to opt-out of participation in the Gulf's DSM programs. In the absence of any feasible way to reduce achievable potential for prospective opt-outs, goals would presumably be set based on the full achievable potential of DSM in Gulf's service area. While goals would be based on projections of full achievable potential, Gulf's ability to achieve those goals would be reduced by the aggregate of all customers who choose to opt-out.

(TR 342) In addition, given the strict eligibility criteria proposed by the Proponents for opt-out proposals, there could be commercial and industrial customers who would not be eligible for the opt-out, yet would remain eligible for the Commission approved DSM programs. Thus, it appears unlikely that the Commission approved DSM programs currently in place would be eliminated or reduced. Without a clear and convincing demonstration in the Proponents' proposals that a reduction in DSM energy efficiency program costs will result, the likelihood that cost shifting will occur cannot be ignored.

Second, the proposals assume that unless someone directly participates in a program, there is no benefit to that customer. As witness Koch testified ". . . all customers (whether participating in a DSM program or not) benefit from shared system cost savings stemming from peak demand and energy reductions created by the participating customers." (TR 143) To ensure that the general body of ratepayers benefit from approved programs, the Commission applies the RIM test. (TR 143, 144, 243, 338, 443) However, satisfaction of the RIM test – in and of itself – does not mean that the benefit of cost-effective energy efficient programs equally applies to all customers on a per-kilowatt hour basis. Such test-passage only demonstrates that on an overall basis, the general body of

ratepayers benefit. (TR 522) Witness Chriss acknowledged on cross examination that Walmart's opt-out proposal does not use a RIM test. (TR 128) The lack of application of a RIM test to the proposals tends to demonstrate that the general body of ratepayers will not benefit from these proposals. Also, at least in theory, when these energy efficiency programs have passed RIM (resulting in programs that benefit the general body of ratepayer), the ability of the utilities to reduce these RIM-passing programs and their resulting costs as a consequence of implementing an opt-out is highly questionable.

In conclusion, the opt-out proposals as presented may fall short in mitigating cost shifting to the remaining general body of ratepayers and do not clearly show that the overall costs of the DSM programs would be reduced as a result. Further, neither opt-out proposal identifies the specific conservation measures that would be undertaken such that the RIM test could be applied. This makes it less clear that the Proponents have met their requisite burden of proof. Accordingly, it is questionable whether the opt-out proposals as presented conform to the Commission approved RIM test or other Commission approved tests that would achieve the underlying intent of FEECA. Thus, the Proponents could be deemed to have fallen short of meeting their burden to show, at a minimum, that they adequately safeguard the interests of the non-opting-out general body of ratepayers and various rate classes against undue rate impacts while achieving the intent of FEECA and Section 366.82(2), Florida Statutes, utilizing the Commission's approved RIM cost-effectiveness test or other Commission approved tests.

ISSUE 3: If the Commission allows pro-active customers to opt out of participating in, and paying for, a utility's Energy Efficiency's programs, what criteria should the Commission apply in determining whether customers who wish to opt out are eligible to do so.

OPC: * While OPC has reservations about whether the opt-out programs as presented should be approved, at a minimum, the interests of the general body of ratepayers and various rate classes should be adequately safeguarded against undue rate impacts while achieving the intent of FEECA and Section 366.82(2), Florida Statutes, and the Commission should require that any qualifying proposals meet its approved cost-effectiveness test (RIM), or other Commission approved tests.*

OPC has reservations about whether the opt-out programs as presented should be approved. However, should the Commission wish to move forward with an opt-out program in the future, it should look to FEECA for the criteria to be used to determine the parameters of such opt-out program and who should be eligible for the program. The Commission should consider the same criteria used to assess goals when evaluating any opt-out program. Section 366.82(3)(a)-(d) requires the following criteria in setting goals:

- (a) The costs and benefits to customers participating in the measure.
- (b) The costs and benefits to the general body of ratepayers as a whole, including utility incentives and participant contributions.
- (c) The need for incentives to promote both customer-owned and utility-owned energy efficiency and demand-side renewable energy systems.
- (d) The cost imposed by state and federal regulations on the emission of greenhouse gases.

As noted in the previous issues, the RIM test has been the Commission's approved methodology for demonstrating whether a DSM program benefits the general body of ratepayers. (TR 143, 144, 243, 338, 443) Since all customers benefit from DSM programs that pass RIM, all customers should pay for the implementation of said programs. Prior to approval of any opt-out program, that program should pass the RIM test.

Thus, at a minimum, the Commission should ensure the interests of the general body of ratepayers and various rate classes are adequately safeguarded against undue rate impacts while achieving the intent of Florida Energy Efficiency and Conservation Act (FEECA) and Section

366.82(2), Florida Statutes, and should require that any qualifying proposals meet the Commission's approved RIM cost-effectiveness test or other Commission approved tests.

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CERTIFICATE OF SERVICE
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I HEREBY CERTIFY that a true and correct copy of the foregoing Citizens' Post- Hearing Brief has been furnished by electronic mail to the following parties on this 20th day of August, 2015.

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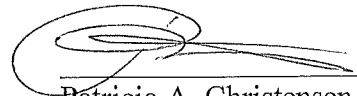
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