

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

**DUKE ENERGY FLORIDA, LLC'S
POST-HEARING STATEMENT AND BRIEF**

Duke Energy Florida, LLC ("DEF" or the "Company"), submits its Post-Hearing Statement of Issues, Positions, and Brief in this matter and states as follows:

I. Introduction

Contrary to intervener¹ arguments, because DEF's Demand Side Management ("DSM") goals were set using the Rate Impact Measure ("RIM") cost-effectiveness test, there is no need to allow any customers to opt out of paying for Energy Efficiency ("EE") measures. By definition, all measures that pass the RIM test benefit all customers (participants and non-participants). So the interveners' argument that they should not pay for energy efficiency, in which they do not or cannot participate, is misplaced. It does not matter whether any commercial or industrial customer participates in a particular EE measure or program, because the benefits inure to all customers.

Furthermore, although Walmart and FIPUG claim that their proposals are not intended to shift costs among customers or harm customers who cannot or do not opt out, their proposals lack consistent and clear mechanisms to actually achieve the stated goal. It is easy to claim to have a "hold harmless" opt out proposal, but it is much harder to actually craft the clear

¹ For clarity, when the term "intervenors" is used, it is intended to refer to the three intervener parties who have indicated support for the creation of an opt out policy: Wal-Mart Stores East, LP and Sam's East, Inc. (collectively "Walmart"), the Florida Industrial Power Users Group ("FIPUG"), and White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate ("PCS Phosphate").

standards to achieve that objective. Even if the Commission wanted to implement an opt out policy, it simply does not have sufficient record evidence to make the necessary findings to direct the utilities to implement the standards necessary to ensure the remaining customers are not harmed by some customers opting out.

II. There is no need for an opt-out policy with RIM-based goals.

In Order No. PSC-14-0696-FOF-EU, the Commission approved DSM goals for DEF based on measures and programs that pass the RIM test. As that order sets forth: “By definition, any participation in a measure that passes the Participants Test and the RIM Test is beneficial both to participants and the non-participants.” (*Id.* at p. 35). The Commission further stated: “We find [it] appropriate to establish goals for the FEECA Utilities based upon a cost-effectiveness analysis that allows all ratepayers, participants and non-participants, to benefit from the Utilities’ demand-side management programs.” (*Id.* at p. 40). As Mr. Duff testified, the RIM test “is also known as the ‘no-losers test’ because all customers are better off when a DSM program passes the RIM test, both participants and non-participants.” (See Tr. Vol. II, p. 234, ll. 7-9²).

Walmart and FIPUG’s arguments center around a “we know our business better than anyone” theme, thereby suggesting that there is no place for utility-sponsored energy efficiency programs. (*See, e.g.*, Tr. Vol. I, p. 15, ll. 10-17; *id.* at p. 16, ll. 3-15; *id.* at p. 19, ll. 15-24; *id.* at pp. 21-22; *id.* at p. 25, ll. 1-6; *id.* at p. 52, ll. 15-17; *id.* at p. 73, ll. 6-12; Tr. Vol. IV, p. 510, ll. 10-15). All interveners, either through testimony or via cross examination of witnesses, argued or suggested that it was not fair for large commercial or industrial customers to pay for the EE programs since very few of the utility-offered EE programs apply to those customers.. (Tr. Vol.

² Citations to the record are to Transcript Volume number, Page(s), and Line(s) in the following format: (Tr. Vol. xx, pp. yy, ll. zz). Exhibits are numbered as provided in Staff’s Comprehensive Exhibit List.

II, p. 67, ll. 8-11; *id.* at p. 312, ll. 13-17; Tr. Vol. IV, p. 506, ll. 15-21; *id.* at p. 507, ll. 5-10; *id.* at ll. 18-23; *id.* at p. 509, ll. 11-15). They further argue that certain commercial and industrial customers should be permitted to take the money they would save by not paying the EE portion of each utility's charges and use that money to invest in company-specific EE measures. (*See, e.g.*, Tr. Vol. I, p. 46, ll. 9-14; *id.* at pp. 50-51; *id.* at p. 52, ll. 13-21; *id.* at p. 57, ll. 10-14; *id.* at pp. 64-65; *id.* at p. 77, ll. 5-13) However, this argument misses the point that it does not matter whether a customer can or does participate in a measure – with RIM-based programs, the benefits of avoiding future generating units are shared by all customers. In addition, DEF offers programs that even large commercial and industrial customers could participate in – most notably the Florida Custom Incentive program. (Tr. Vol. II, p. 310, ll. 12-18; Ex. 27, Bates Label 00121-22)

So not only is the interveners' argument that it is unfair for them to pay for programs in which they cannot participate irrelevant, it is also based on an incorrect assumption – there are opportunities for all customers to participate in DEF's EE programs. Indeed, as Mr. Duff testified, the custom program is designed to provide customers, including industrial and commercial customers, with the opportunity to develop EE ideas and submit them to DEF for consideration. (Tr. Vol. II, pp. 310-11). In this manner, customers can work with DEF to design customized program incentives that will specifically work for their particular business needs.

The interveners also pointed to the prevalence of opt out policies in other states to support their proposal for Florida to implement an opt out. (*See, e.g.*, Tr. Vol. I, p. 54, ll. 11-19; *id.* at p. 68, ll. 5-12; *id.* at p. 80, ll. 1-11; *id.* at pp. 84-85; Tr. Vol. II, p. 263, ll. 2-6; Tr., Vol. IV, pp. 511-13). DEF does not dispute that other states have implemented opt outs for certain customers. However, just because an opt out makes sense for other jurisdictions does not mean

that those same opt out policies can or should be applied to Florida. There are different considerations in each jurisdiction with respect to developing and implementing an opt out. For example, as Mr. Duff indicated, the opt out policy in almost all of Duke Energy's other jurisdictions was implemented by statute. (Tr. Vol. II, pp. 263-64) In addition, none of the other Duke Energy jurisdictions set EE goals in the manner that Florida does, and none of them base their measures and programs on the RIM cost-effectiveness test. (*See id.* at pp. 262-63)

PCS Phosphate appears to suggest that a special opt-out provision should be available to DEF's phosphate mining customers. (Tr. Vol. I, p. 27, ll. 12-16). Apparently, because DEF only has a few phosphate mining customers, and because those few customers are subject to fierce competition and economic pressures, PCS Phosphate argues that an opt-out program for those limited customers would not be administratively burdensome and would help those businesses compete. (*See id.* at pp. 27-29). This argument is a slippery slope, however, because similar arguments could be made for various other commercial and even residential customers. The question facing the Commission in this proceeding is whether an opt-out policy is necessary or equitable when the utilities' portfolios of EE programs pass the RIM test, rather than a larger social policy question as to whether the Commission should implement a policy to provide economic assistance to the mining industry.

III. An opt-out policy must hold all customers harmless, but there is insufficient record evidence to fully develop and describe the guidelines necessary to achieve that objective.

As explained in the first section, the implementation of an opt-out policy is not logically sound under the current DSM framework in which goals are set based on measures that have passed the RIM cost-effectiveness test. If the Commission wants to make the policy decision to implement an opt-out policy, however, there must be clear guidelines to ensure that all customers

and the utility are held harmless from certain customers being able to opt out of paying for the EE charges. (Tr. Vol. II, p. 235, ll. 1-7; *id.* at p. 237, ll. 1-4) DEF included various suggestions in its testimony of specific items that would be necessary to ensure that the “hold harmless” objective is met. (*See id.* at p. 235, ll. 9-20) But these suggestions are basic guidelines and are not fleshed out to the level of specificity that would be required to actually implement an opt-out policy. This section briefly discusses each major guideline that would need to be fully developed if the Commission orders DEF to implement an opt-out policy, and explains why there is insufficient record evidence to develop those guidelines.

A. The Costs for Implementing and Administering the Opt-Out Program must be Clearly Identified and Charged to the Opting-out Customers

DEF provided an estimate of the one-time and on-going costs associated with implementing an opt-out policy. (Ex. 27, Bates Label 112-113 and Bates Label 121-123; Tr. Vol. II, pp. 315-19). This was a high-level estimate that required DEF to make certain assumptions based on the vague requirements set out by the interveners in their proposals. (*See id.* at p. 318, ll. 4-10). Unless and until an actual, fully-defined program is implemented, DEF cannot fully and accurately estimate the required actions and costs needed to administer the program. Even Mr. Pollock recognizes that the ultimate administrative costs will depend on how the program is implemented. (Tr. Vol. IV, pp. 523-24). However, regardless of the actual program costs and manner of calculation, any incremental costs associated with implementing any opt-out program should be borne by the cost-causer, the opting out customer. (Tr. Vol. II, p. 319, ll. 8-11). There are real costs associated with any opt-out program and the interveners have presented no plan to ensure that those costs are not paid for by those customers who cannot or have not opted out.

Instead of addressing the actual incremental costs, the interveners simply make vague statements that their proposals are not intended to result in cost shifting from opting out customers to remaining customers. (*See, e.g.*, Tr. Vol. I, p. 61, ll. 3-7; *id.* at p. 76, ll. 5-17; *id.* at p. 78, ll. 1-25; *id.* at pp. 102-105; *id.* at p. 122, ll. 1-22; Tr. Vol. IV, pp. 519-520; *id.* at p. 521, ll. 19-25). They suggest that the utilities can simply count energy savings from the opting out customer and then reduce their other program costs, thereby spending less to achieve the same amount of savings. (*Id.*). This is an overly simplified view of how DEF and the other utilities set their programs to meet the Commission-approved goals. Indeed, even Mr. Pollock acknowledges it is uncertain whether allowing savings to be counted towards goals will actually offset administrative costs. (“This argument [that an opt-out provision will result in higher costs] ignores the *potential* benefit that a successful opt-out provision *should* allow the utility to reduce its EE budget because it can count the savings from opt-out customers toward meeting its goal. This *could* more than offset any additional administrative costs that an opt-out provision may require.” (Tr. Vol. IV, p. 523, ll. 21-24 (emphasis added)). Walmart attempted to provide additional evidence that its opt out proposal would not result in cost shifting by introducing two late exhibits³ into the proceeding. (Ex. 38 and 39). These exhibits were admitted into evidence over the utilities’ objections, and DEF renews those objections. DEF will not re-argue those points, but would note that when the exhibits were admitted, Madam Chairman indicated that the Commission would give the exhibits the weight they were due. (Tr. Vol. I, p. 136, ll. 3-9). As set forth below, the exhibits do not deserve much weight.

Exhibit 38 is intended to address the issue of cost shifting. In this analysis, Mr. Baker calculates the percentage contribution to the utility gwh goal for an opt-out customer that reduces

³ Because Exhibit 39 contains confidential information, this brief will focus on the numbers in Exhibit 38 because the arguments relate to both equally.

energy usage by the same percent as the utility's gwh goal is to total energy sales. He then estimates the percent decrease in ECCR revenues that will occur due to the opt-out customer. Mr. Baker compares these results and concludes that cost shifting is not a concern because the opt-out customer's percent contribution to the utility's gwh goal is greater than the percent reduction in ECCR revenues attributable to the opt-out customer. This analysis is misleading because Mr. Baker has overlooked or failed to consider some important elements. First, the example includes a contribution by the opt-out customer only toward the energy goal for the EE programs. The analysis fails to consider that the utility's EE programs are designed to achieve both energy and demand goals. Accordingly, unless the opt-out customer also contributes to DEF's demand goals, costs will shift to the other customers. Additionally, Mr. Baker understates the percent reduction in ECCR EE revenues attributable to the opt-out customer because he calculates the reduction in revenue as the percent decrease in total ECCR revenues, which includes the cost of both EE programs and demand response programs, rather than the percent decrease in revenues for EE programs alone.

In any event, it is clear even from Mr. Baker and Mr. Chriss that this analysis is rudimentary and overly simplistic. It makes a number of assumptions about perfect ratemaking and all things being equal, when in reality those certainties will not occur. (Tr. Vol. I, pp. 80-81; *id.* at pp. 102-105; *id.* at pp. 127-132). In addition, the analysis does not include the incremental up-front and incremental recurring costs that DEF would necessarily incur to administer and implement the opt-out program. (*See, e.g.*, Ex. 27, Bates Label 112-113 and Bates Label 121-123; Tr. Vol. II, p. 238, ll. 13-24).

B. DEF must be allowed to count energy savings from the opt-out customer towards its DSM goal.

DEF developed its DSM plan, with measures and programs, designed to achieve the Commission-ordered goals. If certain customers are allowed to opt out of paying for EE measures, then DEF must be able to take credit for the energy and demand reductions that the opting out customer claims to have achieved. (Tr. Vol. II, p. 69, ll. 13-17; *id.* at p. 73, ll. 8-13). The interveners agree that the utilities should be permitted to count these savings. (Tr. Vol. I, p. 59, ll. 6-8; *id.* at p. 61, ll. 12-16; *id.* at p. 62, ll. 4-6; *id.* at pp. 74-75; Tr. Vol. IV, p. 511, ll. 6-8; *id.* at p. 520, ll. 19-23). However, there is insufficient information as to the parameters for the utility to count the savings. Specifically, there are no details as to how DEF would determine and verify the level of kwh savings to count for a particular EE measure that an opting out customer implements. For example, it is not clear whether the opting out customer would provide the amount of savings, or whether DEF would need to develop some method to determine the amount of savings. Mr. Pollock does indicate that the opting out customer must provide an engineering analysis to support the energy savings level, but he does not provide any standards that the third party engineer must use to develop the energy savings level. (Tr. Vol. IV, p. 516, ll. 3-7).

When the Commission considers what level of energy savings to count towards DEF's goals, it should also consider the impact of the payback screen. Specifically, Walmart's and FIPUG's proposals do not take into account the impact of free ridership and the payback screen. (Tr. Vol. II, pp. 283-84). When DEF's goals were set, DEF used a two-year payback screen to remove those measures that customers could reasonably be expected to implement without utility incentives based on the short payback period of the measure. (*Id.*). Accordingly DEF's goals do not include any potential savings associated with those measures that were screened out, and DEF's DSM plan does not include those measures or expected savings. (*Id.*). If opting out

customers install EE measures that have less than a two-year payback, such that those measures would have been excluded from the calculation of DEF's approved goals, then opting out customers should not be allowed to rely on those measures to opt out and provide DEF with a credit for those EE savings. (Tr. Vol. II, p. 285, ll. 1-2). Doing so would result in "double-dipping," as the amount of EE included in the Company's approved program plan was already reduced to not reflect those measures that had less than a two-year payback. (*See id.* at p. 244, ll. 10-12). The Commission should therefore consider developing a guideline to account for the payback screen.

C. There must be clear criteria as to what customers are eligible for opt out, including size and amount of required energy efficiency.

Walmart and FIPUG have proposed different eligibility criteria for opting out customers. (Tr. Vol. I, pp. 53-54; *id.* at pp. 67-68; Tr. Vol. IV, p. 513-16). With respect to measuring the energy threshold for opt out customers, it is more appropriate to measure usage in kilowatt-hours rather than megawatts (as Mr. Pollock suggests), because Mr. Pollock has proposed an opt-out of only EE charges. (Tr. Vol. II, p. 237, ll. 18-22). In addition, contrary to Walmart's and FIPUG's suggestion, opt-out customers should not be permitted to aggregate usage across multiple locations in a utility's service territory. (*Id.* at pp. 237-238). As explained by Mr. Duff, permitting aggregation increases the administrative burden of implementing an opt-out policy, and there is no logic in permitting such aggregation in any event. (*Id.*). Although Mr. Pollock claims that it is likely that opt-out customers would have robust company-wide EE programs that would limit free ridership among separate customer accounts, he does not propose a requirement that companies prove that they in fact have such a robust program. (Tr. Vol. IV, p. 524, ll. 10-16). So it is likely that, by allowing the aggregation of usage among several locations, a customer could implement EE measures at only one location but be permitted to avoid EE

charges at other locations that have not implemented any EE measures at all. This adds more complexity to the process. (Tr. Vol. II, p. 320, ll. 2-17). And while each state's policy is unique, as Mr. Duff noted, none of the other Duke Energy jurisdictions that have an opt-out policy permit aggregation among non-contiguous customer properties. (*Id.* at p. 271, ll. 15-17).

Any opt-out policy should also include clear guidelines as to the amount and type of EE measures a customer must complete to qualify to opt out. Walmart's and FIPUG's witnesses do not agree as to the threshold EE and the process that must be used to determine whether a particular customer meets the criteria. (Tr. Vol. I, p. 67, ll. 3-12; *id.* at pp. 85-87; Tr. Vol. II, p. 236, ll. 1-24). Based on Walmart's and FIPUG's extensive questioning of Mr. Duff regarding the opt out policies and forms applicable to other Duke Energy jurisdictions, it appears that they will point to these other states as potential starting points for this Commission to develop and adopt an opt out form. (*See, e.g.*, Tr. Vol. II, pp. 248-249; *id.* at pp. 260-264; *id.* at pp. 265-280; *id.* at p. 290-292; *id.* at pp. 294-296; *id.* at pp. 299-303). However, as Mr. Duff pointed out, each of those other jurisdictions had a particular set of circumstances that led to the development of each particular form. In other words, what works for North Carolina and Indiana may not work for Florida. One of the most important differences is that none of the other Duke Energy jurisdictions set DSM goals through a robust process like Florida does, so the need to account for energy and demand savings from the opt-out customer relative to the DSM goals is unique to Florida. (Tr. Vol. II, pp. 212-213; *id.* at p. 263, ll. 9-23).

The opt-out policy should also include restrictions regarding the period of time for which the opting out customer must remain opted out, without being able to take advantage of a utility-sponsored EE program. (Tr. Vol. II, p. 239, ll. 16-21). This helps ease the administrative burden of administering the program, and it also prevents customers from "gaming" the system. (*Id.*).

The Commission should also impose a restriction such that the opting out customer must not have received a utility rebate for an EE measure for some time period before the opt out period begins. (*Id.*).

D. There is insufficient record evidence for the Commission to develop the necessary guidelines for an opt-out policy.

As demonstrated in the above sections A-C, a successful opt-out policy requires clear guidelines so that all parties are treated fairly and so that DEF and the other utilities can implement the policy appropriately. In this proceeding, there is insufficient record evidence upon which the Commission can make a decision as to the guidelines for an opt-out policy. Even FIPUG's witness Pollock could not answer the question as to what the Commission should do with respect to implementing an opt out policy:

I think maybe we have another, you know, series of discussions to make it happen, but I think if you say, okay, we think an opt-out is a good thing, we want to try it, but here are the --- here are guidelines for doing it, then I think that's the way --- that's a path forward. . . . I think the general guidelines are in the testimony that you have in terms of overall, you know, qualification criteria, what a customer has to do. You know, obviously we want to know, okay, what proof the utilities have to have in order to call these dependable savings that they can count for planning purposes. You know, I think all these things are legitimate, you know, next step issues, you know, once we have, you know, something to work with. (Tr. Vol. IV, pp. 549-551).

Mr. Pollock also suggested that, if the Commission wanted more information, the Commission could ask additional questions and request testimony from the parties regarding those specific questions. (*Id.* at p. 551, ll. 20-25). However, all parties were given the opportunity to provide testimony to respond to the issues set forth in this proceeding.

Given the state of the record evidence in this proceeding, the Commission should decline to implement the opt-out policy at this time. However, if the Commission would like to move forward with an opt-out policy, then DEF recommends that the Commission set up a workshop or rulemaking proceeding for all interested parties to discuss the specific details of the policy. (Tr. Vol. II, p. 237, ll. 2-6). Mr. Pollock agrees with DEF's recommendation for a workshop, and even notes several areas that need to be discussed before an opt-out can be implemented (e.g. protocols for documenting customer savings, whether accounts should be aggregated, and impact on existing EE programs). (Tr. Vol. IV, p. 526, ll. 8-18).

Post Hearings Statement of Issues and Positions

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?

No, separating the expenditures in this way is not necessary. However, if the Commission intends to implement an opt-out policy that only applies to Energy Efficiency programs, DEF would be able to separate the charges with little difficulty.

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?

No. Because DEF's goals are set based on programs that are cost-effective under the RIM test, all customers, both participants and non-participants, will benefit from all Energy Efficiency programs. It is therefore not necessary to permit certain customers to opt out of paying for the Energy Efficiency program costs.

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.

Any opt out policy should be designed to not result in any cost-shifting to customers who do not or cannot opt out. There is insufficient evidence in this record for the Commission to meet this objective and specifically determine the criteria for determining eligibility for opt out customers.

RESPECTFULLY SUBMITTED this 20th day of August, 2015.

/s/ Dianne M. Triplett

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on the following via electronic mail this 20th day of August, 2015.

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