

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 20200176-EI

Dated: November 10, 2020

**DUKE ENERGY FLORIDA, LLC'S RESPONSE IN OPPOSITION TO
LEAGUE OF UNITED LATIN AMERICAN CITIZENS' MOTION TO COMPEL**

Duke Energy Florida, LLC ("DEF"), pursuant to Rule 28-106.204, Florida Administrative Code, hereby responds in opposition to the Motion to Compel Discovery Responses from Walmart, Inc. ("Motion") filed by the League of United Latin American Citizens ("LULAC") in this docket on November 5, 2020. In support thereof, DEF states as follows:

On July 1, 2020, DEF petitioned the Public Service Commission (the "Commission") for a limited proceeding to approve DEF's new voluntary Clean Energy Connection Program and Tariff, as well as a Stipulation negotiated between DEF, Vote Solar, Southern Alliance for Clean Energy, and Walmart, Inc. LULAC intervened in the proceeding and served written discovery on Walmart "to discover Walmart's financial interest in the program, its role in the formation of the program and Stipulation, and the circumstances under which the program and Stipulation . . . came to be." Motion, p. 2. Walmart objected to the discovery, and LULAC moved to compel.

As a threshold matter, LULAC's Motion is procedurally improper. The Commission's Order Establishing Procedure ("OEP") in this docket expressly set November 2, 2020 as the date by which all discovery must be completed. LULAC did not file its Motion until November 5, 2020 (i.e., three days after the discovery deadline). Accordingly, the Motion is untimely and should be denied on that basis. *See In re: Application of Southern States Utilities, Inc. for Increased Water and Wastewater Rates in Collier County (Marco Island Systems)*, Order No. PSC-

93-0463-PCO-WS (Fla. PSC Mar. 25, 1993) (denying as untimely a motion to compel and request for in camera inspection filed after the discovery deadline).

In addition to this procedural infirmity, the Commission should deny the Motion because LULAC is not entitled to the discovery it seeks to compel. Indeed, LULAC's attempts to discover information regarding formation of the Stipulation are wholly improper, as this information is the product of confidential settlement negotiations. Under Florida law, "[e]vidence 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 a claim or its value." Fla. Stat. § 90.408 (emphasis added). "Evidence of statements made during settlement negotiations" is also inadmissible. *Rubrecht v. Cone Distrib.*, 95 So. 3d 950, 955 (Fla. 5th DCA 2012). The purpose of this evidentiary exclusion is two-fold: (1) the evidence is irrelevant; and (2) public policy "favors amicable settlement of disputes and the avoidance of litigation." *Johnson v. State*, 625 So. 2d 1297, 1299 (Fla. 1st DCA 1993).

LULAC argues that it is entitled to the discovery because the information requested "goes to the bias and credibility of Walmart's sponsored witness." Motion, p. 3. But LULAC's argument directly contradicts well-established case law. The Florida Supreme Court addressed this issue – whether evidence of settlement can be used to impeach a witness – and unequivocally held that section 90.408, Florida Statutes, "admits no exceptions." *Saleeby v. Rocky Elson Constr.*, 3 So. 3d 1078, 1080 (Fla. 2009). Further, the Court held that "violation of the prohibition is reversible error." *Id.* In so doing, the Supreme Court quashed a decision from the Fourth District Court of Appeal that allowed settlement evidence to be "offered for other purposes, such as proving witness bias or prejudice." *Saleeby v. Rocky Elson Const.*, 965 So. 2d 211, 215 (Fla. 4th DCA 2007).

LULAC should be familiar with this holding, as it cites the Supreme Court’s decision in its own Motion.

Finally, LULAC argues that section 90.408, Florida Statutes, does not apply because LULAC is not seeking evidence “to prove liability, absence of liability, or the value of a claim.” Motion, pp. 3-4. The Commission has rejected this narrow reading of section 90.408, finding it “detrimental to the negotiation and settlement process.” *See In re: Petition to resolve territorial dispute with Gulf Coast Electric Cooperative, Inc. by Gulf Power Company*, Order No. PSC-94-1191-PCO-EU (Fla. PSC Sept. 29, 1994) (striking testimony related to settlement negotiations over objection that “Section 90.408 does not apply to the testimony in question because that testimony does not relate to the liability of either party”). As the Commission has previously recognized, permitting discovery into otherwise confidential settlement discussions “would have a chilling effect on parties’ settlement efforts.” *Id.* The Commission should deny LULAC’s Motion to avoid setting a dangerous precedent that would directly contradict the Commission’s long-standing practice of encouraging parties to settle contested dockets when possible.

WHEREFORE, for the foregoing reasons, DEF respectfully requests that the Commission deny LULAC’s Motion as untimely and on the basis that LULAC is not entitled to the discovery it seeks to compel.

Respectfully submitted this 10th day of November, 2020.

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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to the following this 10th day of November, 2020.

/s/ Dianne M. Triplett

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