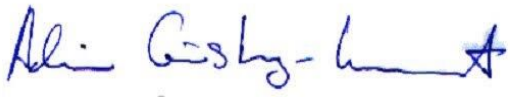
IN THE SUPREME COURT OF FLORIDA

ACHIM GINSBERG-KLEMMT	)	
	)	
Appellant,	)	
	)	SC19-1873
v.	)	Lower Case Docket No. 20190176-EI
	)	
ART GRAHAM, ETC., ET AL.,	)	
	)	
Appellees.	)	

REGULATORY IMPROVEMENTS FOR DECENTRALIZED SOLAR NET-METERING SYSTEMS IN FLORIDA

APPELLANT'S AMENDED REPLY BRIEF

ON APPEAL FROM THE Order No. PSC-2019-0410-FOF-EI



Achim Ginsberg-Klemmt, Pro Se
3364 Tanglewood Drive
Sarasota FL 34239
(941) 923 2419
achim@srqus.com

TABLE OF CONTENTS **Page**

TABLE OF CITATIONS

OTHER AUTHORITIES

- Intervenor Achim Ginsberg-Klemmt's Protest and Opposition to NERA's Petition for Declaratory Order

https://elibrary.ferc.gov/IDMWS/common/OpenNat.asp?fileID=15557957

- Lead Article PV-Magazine May 21st 2020

https://pv-magazine-usa.com/2020/05/21/florida-man-takes-fpl-to-court-alleging-the-utility-acts-like-a-net-metering-regulator/

- Land Use Requirements for Solar Power Plants in the United States (2013)

https://www.nrel.gov/docs/fy13osti/56290.pdf

- Rooftop Solar Photovoltaic Technical Potential in the United States (2016)

https://www.nrel.gov/docs/fy16osti/65298.pdf

- Rooftop Solar Technical Potential for Low to Moderate Income Households in the United States (2018)

https://www.nrel.gov/docs/fy18osti/70901.pdf

- SEIA Percentage of State's Electricity from Solar – State by State

https://www.seia.org/states-map

- Florida's Utilities Keep Homeowners From Making the Most of Solar

https://www.nytimes.com/2019/07/07/business/energy-environment/florida-solar-power.html

THE COMMISSION NEITHER CONTESTS NOR QUESTIONS FLORIDA POWER & LIGHT'S EFFECTIVE ROLE AS A REGULATOR FOR SOLAR NET-METERING SYSTEMS

The 43-page Answer Brief submitted by the Commission through its attorney team contains no justifications and no explanations for why the Commission tolerates and endorses Florida Power & Light's active role as a regulatory authority, or their ability to arbitrarily deny or accept net-metering applications based on 115% past annual electricity usage[1].

The Commission fails to explain why the principal pass-fail criterion for net-metering applications is based on a corporate guideline issued by FPL and not based on an official rule properly ratified by the Commission.

[1] https://www.fpl.com/clean-energy/net-metering/guidelines.html

The Commission is equally silent about the reason it tolerates deviation by FPL from this unratified pass/fail permitting criterion on a discretionary basis.

The Florida legislature did not task the Commission to promulgate FPL's corporate guidelines and allow FPL to bend these guidelines for certain applicants; the Commission was tasked to promulgate Florida Laws and Statutes.

The current solar net-metering approval process is therefore not in compliance with chapter 120.52 (8) F.S. :

> *"Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:*
>
> *(a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;*
>
> *(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;*
>
> *(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;*
>
> *(e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational;*

and not in compliance with chapter 120.57 (3) F.S. :

> *"[..] An unadopted rule shall not be presumed valid. The agency must demonstrate that the unadopted rule:*
>
> *c. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency.*
>
> *d. Is not arbitrary and capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; A rule is capricious if it is adopted without thought or reason or is irrational."*

In its Answer Brief, the Commission expressed the wish that Ivan Penn's

compelling *New York Times* article as well as the Gonzales/Irwin petition be excluded from this case, and misconstrued the facts, by stating that Appellant intends to appeal the Gonzales/Irwin petition. Appellant filed a Petition to Intervene [2] in order to be able to appeal the Gonzales/Irwin petition, but the Commission blocked this initiative. The Gonzales/Irwin case can now serve as another completed instance where the Commission openly endorsed FPL's function as a net-metering regulator and where the Commission openly tolerates when FPL deviates from the 115% past annual consumption guideline on a discretionary basis by shortening the relevant timespan used as principal permitting criterion from one year to three months.

This honorable court may ignore that the Commission did not follow through by awaiting the production of the officially requested documents concerning the active Pass/Fail algorithm used by the FPL permitting website and the Court may ignore the compelling *New York Times* article, but the underlying fact pattern contained in these cases is identical to this case. Compliance with Florida Statutes should not be discretionary for the Commission.

INSURANCE REQUIREMENTS FOR SOLAR NET-METERING SYSTEMS LARGER THAN 10KW REMAIN UNSUBSTANTIATED

The Commission's Answer Brief devoted ample attention to justify why the current rules concerning the unnecessary insurance requirements are not equally

[2] http://www.floridapsc.com/library/filings/2020/00076-2020/00076-2020.pdf

applied throughout the state by insisting that Investor Owned Utilities ("IOU") are "Public Utilities" while municipality owned utilities do not qualify as "Public Utilities."

As bewildering as this might sound, no rationale was offered by the Commission as to why the unscientific insurance requirement exists at all.

The lack of rationale for the existing insurance rules implies that the expense imposed on the customers is unnecessary and excessive and should therefore be discontinued to comply with chapter 120.52 (8) (e) & (f) F.S. :

> *"Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:*
>
> *(e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or*
>
> *(f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.*

Compliance with Florida Statutes should not be optional for the Commission.

THE COMMISSION OFFERS NO EXPLANATION WHY THE COMPENSATION RATE FOR ELECTRICITY PRODUCED BY SOLAR SYSTEMS EXCLUDES GREENHOUSE GAS EMISSIONS AND ELECTRICITY PRODUCTION DURING ON-PEAK HOURS.

Greenhouse gas emissions pose one of the most significant threats for future generations, but the Commission cannot explain why the current As-Available compensation rate for solar electricity does not consider this critical factor. To excuse the lack of consideration, the Commission offers the following rationale on

page 13 of the Answer Brief:

> *"[..]The rate of payment in the investor-owned utility's avoided energy cost as defined in chapter 366.051, Fla. Stat., and subsection (2) of the As-Available Energy Rule, less certain specified costs. Fla. Admin Code R. 25-17.0825(1)(a). Thus customers who produce solar energy for themselves under the Net Metering Rule are reimbursed at the same rate that investor-owned utilities pay cogenerators and small power producers."*

The Commission admits in the above statement that not only net-metering customers suffer from the lack of consideration for greenhouse gas emissions. Cogenerators and Small Power Producers are affected by the same non-conforming compensation rules.

A just compensation rate would implicitly include the modification of the As-Available rate or other equivalent measures to account for greenhouse gas emissions and the full technical potential of demand-side renewable energy systems. However, Appellant never asked the Commission for a "*premium*" compensation rate as repeatedly claimed in the Answer Brief. Appellant's original request can be found in the record under [R.6].

By law, and explicitly according to Florida Statute 366.82 (3), the Commission must take the full technical potential of demand-side renewable energy systems and greenhouse gas emissions into consideration:

FS 366.82 (3) Definition; goals; plans; programs; states:
[..]In developing the goals, the ***commission shall evaluate the full technical potential of all available demand-side*** *and supply-side conservation and efficiency measures,* ***including demand-side renewable energy systems****. In establishing the goals, the commission shall take into consideration:*
(d) The costs imposed by state and federal regulations on the ***emission of***

greenhouse gases*. (emphasis added)*

The Commission failed to evaluate the full technical potential of all available demand-side renewable energy systems and the Commission failed to consider greenhouse gas emissions when it dismissed Appellant's petition for regulatory improvements. Compliance with Florida Statutes should not be discretionary for the Commission.

FLORIDA STATUTES DO NOT LIMIT DEMAND-SIDE SOLAR GENERATION

The Commission's final ruling in this case states as follows: [R.64]
"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 oversize their systems for the primary purpose of selling energy to the utility or becoming an independent power producer."

During the public hearing on October 9th, 2019, Comm. Pohlman acted as police officer who is trying to prevent larger solar net-metering systems which might include a secondary purpose as independent power producer or cogenerator:

R[P. 80]: COMM. POLMANN: You have, apparently, requested of your utility an opportunity to generate additional electricity. What is your purpose for generating additional electricity beyond what you are currently generating? Is it your intent to generate that power, that electricity, in excess of your own demand?

R[P. 81]: COMM. POLMANN: And I'm inferring from your answer, with your simple use of the word "surplus," that you want to generate surplus energy. And that answers my question, even though you have not done an adequate job to inform me. I stand down, Mr. Chairman. That's all I have. Hopefully, we can close this matter.

A 2013 study by the National Renewable Energy Laboratory (NREL) concluded that only 0.5% of the land area covered by the continental United States

would need to be equipped with solar panels to cover the entire national electricity demand[3]. This area would be the equivalent of 21250 square miles or a square with 145 miles on each side. In 2016, NREL also investigated the potential of rooftop solar systems and found that distributed rooftop solar systems would be able to supply 39% of the national electricity sales[4]. The numbers differ from state to state. Rooftop solar systems in California could generate 74% of the electricity sold by utilities, while Florida can offset 47% of its total electricity consumption despite having an average household consumption of 130% of the national average. A newer study in 2018 study found that the national solar rooftop potential overall[5] would lie at about 75% of the residential electric energy consumption.

Florida Statutes do not prohibit the simultaneous operation of solar net-metering systems and small power producers or cogenerators at the same location at the demand-side of the electric meter. Instead, chapter 366.82 (3) Florida Statute requires that the Commission shall take this vast technical potential into consideration:

Florida Statute 366.91: Renewable energy.
(1) The Legislature finds that it is in the public interest to promote the development of renewable energy resources in this state. Renewable energy resources have the potential to help diversify fuel types to meet Florida's growing dependency on natural gas for electric production, minimize the volatility of fuel costs, encourage investment within the state, improve environmental conditions, and ***make Florida a leader in new and innovative technologies.***

[3] https://www.nrel.gov/docs/fy13osti/56290.pdf
[4] https://www.nrel.gov/docs/fy16osti/65298.pdf
[5] https://www.nrel.gov/docs/fy18osti/70901.pdf

Florida Statute 366.82 (3) Definition; goals; plans; programs; states:
[..]In developing the goals, the ***commission shall evaluate the full technical potential of all available demand-side*** *and supply-side conservation and efficiency measures,* ***including demand-side renewable energy systems****. In establishing the goals, the commission shall take into consideration:* [..]s
(d) The costs imposed by state and federal regulations on the ***emission of greenhouse gases****. (emphasis added)*

Rooftop solar systems do not require the usage of additional real-estate like utility scale solar farms and demand-side systems do not require that all ratepayers have to cover the financial burden for land acquisition or lease fees and operational costs accrued by the utility through mandated "capacity charges".

It is Appellant's primary need to reduce greenhouse gas emissions and to reduce excessive, mandated financial expenses to subsidize utility owned solar farms by leveraging the full technical potential offered by privately owned demand-side solar systems.

Neither the Commission nor Florida Power & Light are authorized by Florida Statutes to define or limit Appellant's need to produce regenerative solar electricity. Appellant feels confident that he can define his own electricity needs without regulatory interference by these entities.

THE RANGE BOUNDARY BETWEEN TIER 1 AND TIER2 CATEGORIES IS NOT BASED ON LOGICAL REASONING

The Commission's final order in this case states as follows [R.64]:

"We find that the allowable range for Tier 1 customers should not be amended. The tiers were developed to carve out different levels of customer-owned renewable generation that can be treated differently for purposes of fees, testing, interconnection studies, and insurance. The current allowable range for Tier 1

captures the vast majority of residential systems within the state. Moreover, customer-owned renewable generation within Florida has grown from 577 customers in 2008, when the provisions of Rule 25-6.065, F.A.C., were adopted, to 37,862 customers in 2018; the majority of which are Tier 1 customers. The increasing number of small customer-owned renewable generation indicates that the purpose of the rule is being met under the current tier structure."

Using the Commission's logic used in the final order, one could say, "The purpose of spaying/neutering cats is to reduce the number of strays/wild cats. The number of strays and wild cats is increasing, therefore spaying/neutering doesn't work or should stop." In reality, the Commission is ignoring other factors at play. What the Commission is stating here is, in effect, that the Commission believes the rules are perfectly optimized and that ANY change would reduce the number of customer-owned renewable generation systems. Logic and natural law dictates that this is absurd over any significant period of time.

In Q4 2019, SEIA's statistical data[6] places Florida as number 19 compared to other states as a solar energy producer, while Florida has the 8th largest potential[7] compared to all other states for solar energy. Pages 17-19 of Appellant's Initial Brief show why the Commission's conclusion concerning the purpose of the rule is unsubstantiated. Florida should place at least as number 8 in the nation compared to the other states if the current rules were adequate.

In addition, the Commission confuses cause and effect. The vast majority of residential solar systems are smaller than 10KW because the financial burden to build larger systems caused by the unjustified insurance requirement can easily

[6] https://www.seia.org/states-map

[7] https://neo.ne.gov/programs/stats/inf/201.htm

render larger solar systems into expensive hobbies without economical benefits for the operator.

The Commission's further claims on page 7 is not factual:
"The memorandum in opposition did not argue that the Commission should amend the As-Available Energy rule or the liability insurance requirements in the Net-Metering Rule for Tiers 2 and 3."

Raising the Tier 1 threshold from 10KW to 50W would also affect the Tier 2 rule implicitly, otherwise the Tier 1 & 2 categories would overlap and automatically cause ambiguous rules. The Commission failed to bring the Tier 1 and Tier 2 categories into compliance with chapter 120.52 (8) (e)&(f) F.S. when it rejected this Petition for Regulatory Improvements:

> *"Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:*
>
> > *(e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or*
> > *(f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.*

Florida Statutes Compliance should not be discretionary for the Commission.

4 MINUTES 31 SECONDS UNDISTURBED TIME IS INSUFFICIENT TO DISCUSS THE COMMISSION'S STATUTORY VIOLATIONS AND INSUFFICIENT TIME TO ARGUE THE NECESSARY IMPROVEMENTS TO FLORIDA'S NET-METERING REGULATIONS

The principal undersigner of the Commission's Answer Brief herself assured Appellant directly before the public hearing that there would be no time limitation to his presentation before the Commission on October 9th 2019.

Commissioner Clark, who chairs the Florida Public Service Commission in 2020, confirmed during the public hearing how he feels about the scope of this case and where he stands:

R[P. 82]: COMMISSIONER CLARK: Thank you, Mr. Chairman, I debated getting into the -- thought, in my own mind, about getting into this debate. I -- I don't think we want to. This is -- I don't think we want to -- I don't think anybody here wants to open the net-metering issue because I don't think a lot of folks are going to like where I stand on that issue.

NERA, an interest group from New England who shares Commissioner Clark's views on net-metering has recently taken the leap ahead to open this crucial debate before the Federal Energy Regulatory Commission FERC and the flood of docket entries available under EL20-42 confirms that Commissioner Clark might be correct in his assessment about where he stands.

NextEra Energy Inc. (NEE) owns two out of five Investor Owned Utility corporations covering Florida's most populated urban areas: Gulf Power Company and Florida Power & Light. The history of electricity and NextEra Energy's (NEE) dominant role as a vertical monopolist for the vast majority of all Floridian households have core relevance to this Petition for Regulatory Improvements. Discussing history and future of electricity generation and discussing the market

dominance of vertically integrated monopolists must therefore be included in the scope of this case. Appellant describes the detailed reasons in his comments as Intervenor against NERA's Petition for Declaratory Order before the Federal Energy Regulatory Commission FERC in Docket EL20-42[8].

The Commission abused its discretion by repeatedly silencing Appellant's presentation during the public hearing without offering any compelling reasons.

CONCLUSION

Appellant respectfully asks this honorable Court to grant the relief requested in the Initial Brief on Merits.

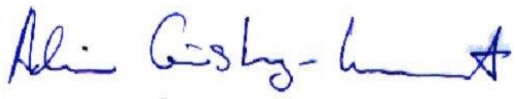
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy and correct copy of the foregoing was served electronically on Ms Margo DuVal. Esq., mduval@psc.state.fl.us, Keith Hetrick, khetrick@psc.state.fl.us, Ms Kathryn Cowdery Esq., kcowdery@psc.state.fl.us, on this 4th day of July, 2020.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Rule 9.210(a)(2), Florida Rules of Appellate Procedure, that this brief was prepared using Times New Roman 14-point typeface or Courier New 12-point.

Respectfully submitted,



Achim Ginsberg-Klemmt, Pro Se
3364 Tanglewood Drive
Sarasota FL 34239
(941) 923 2419
achim@srqus.com

[8] https://elibrary.ferc.gov/IDMWS/common/OpenNat.asp?fileID=15557957