BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement regarding co-ownership of electrical cogeneration facilities in Hendry County by Southeast Renewable Fuels, LLC.	DOCKET NO. 130235-EQ ORDER NO. PSC-13-0652-DS-EQ ISSUED: December 11, 2013

The following Commissioners participated in the disposition of this matter:

RONALD A. BRISÉ, Chairman
LISA POLAK EDGAR
ART GRAHAM
EDUARDO E. BALBIS
JULIE I. BROWN

ORDER DENYING PETITION FOR DECLARATORY STATEMENT

BY THE COMMISSION:

Case Background

On September 12, 2013, pursuant to Section 120.565, Florida Statutes (F.S.), and Rule 28-105.002, Florida Administrative Code (F.A.C.), Southeast Renewable Fuels, LLC (Southeast) filed a Petition for Declaratory Statement (Petition) seeking a declaration that the receipt and use of electricity by Southeast and its business partner who wishes to remain anonymous (Confidential Partner) from their jointly-owned electrical generating equipment 1) will not result in or be deemed to constitute an unlawful sale of electricity; 2) will not cause either Southeast or its Confidential Partner to be deemed a public utility as that term is defined in Section 366.02(1), F.S.; and 3) will not cause either Southeast or its Confidential Partner to be subject to Commission regulation. Notice of the Petition was published in the September 17, 2013, edition of the Florida Administrative Register.

On October 8, 2013, pursuant to Rule 28-105.0027, F.A.C., Glades Electric Cooperative, Inc. (Glades) timely filed a Motion for Leave to Intervene in the docket along with a Motion to Address the Commission and a Response to the Petition. Also on October 8, 2013, Tampa Electric Company (TECO), Florida Power & Light Company (FPL), and Gulf Power Company (Gulf), collectively referred to as "the IOUs," jointly filed a Motion for Leave to Appear as Amici Curiae and to File Memorandum of Law, along with a Motion to Address the Commission and a Memorandum of Law addressing the Petition. The Florida Electric Cooperatives Association, Inc. (FECA) similarly filed on October 8, 2013, a Motion for Leave to Appear as Amicus Curiae and to File Memorandum of Law, along with a Motion to Address the Commission and a Memorandum of Law addressing the Petition. On October 9, 2013, the Florida Municipal Electric Association filed a letter voicing safety concerns about the business arrangement described in the Petition.

On October 15, 2013, pursuant to Rule 28-105.0027(3), F.A.C., Southeast timely filed a Response and Incorporated Memorandum of Law to the Motions to File Amicus Briefs and to Glades' Motion for Leave to Intervene and Response to the Petition.

On October 28, 2013, the Prehearing Officer 1) granted Glades' Motion for Leave to Intervene by Order No. PSC-13-0507-PCO-EQ; 2) granted the IOUs' Joint Motion for Leave to Appear as Amici Curiae and to File Memorandum of Law by Order No. PSC-13-0509-PCO-EQ; and 3) granted FECA's Motion for Leave to Appear as Amicus Curiae and to File Memorandum of Law by Order No. PSC-13-0508-PCO-EQ.

On October 31, 2013, Southeast filed its Responses to a Staff Data Request propounded and filed on October 22, 2013, seeking clarification of the ownership arrangement of the electrical generating equipment described in the Petition.

We granted Glades, the IOUs, and FECA's Motions to Address the Commission and allowed 20 minutes per side at our December 3, 2013 agenda conference for the parties and amici curiae to make their presentations on the merits of the Petition. We have jurisdiction pursuant to Section 120.565 and Chapter 366, F.S.

Petition for Declaratory Statement

I. Governing Law

Declaratory statements are governed by Section 120.565, F.S., and Rule 28-105, F.A.C. Section 120.565, F.S., provides, in pertinent part, that:

> (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.
>
> (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances.

Rule 28-105.001, F.A.C., Purpose and Use of Declaratory Statement, provides that:

> [a] declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to a petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

Rule 28-105.002, F.A.C., requires a petition for declaratory statement to include a description of how the statutes, rules, or orders on which the declaratory statement is sought may substantially affect the petitioner in the petitioner's particular set of circumstances.

Pursuant to Rule 28-105.003, F.A.C., an agency may rely on the statements of facts contained in a petition for declaratory statement without taking a position on the validity of the facts. In making our decision in this instance, we rely on the statements of facts contained in Southeast's Petition in accordance with Rule 28-105.003, F.A.C., as clarified by the Responses to our Staff Data Request filed by Southeast on October 31, 2013.[1]

II. Statutes Relevant to Petition

Section 366.02(1), F.S., provides, in relevant part, that "'[p]ublic utility' means every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas . . . to or for the public within this state."

Section 366.04(1), F.S., confers upon us the "jurisdiction to regulate and supervise each public utility with respect to its rates and service."

III. Petition and Response to Staff Data Request

A. Southeast's Statements of Fact

1. Description of Project

In its Petition, Southeast states that it and its Confidential Partner are developing an integrated renewable energy production complex in Hendry County that will produce ethanol, carbon dioxide, and potentially other products from renewable energy sources. Southeast will own and operate the ethanol plant and the Confidential Partner will own and operate the carbon dioxide plant. The ethanol plant will produce ethanol from sugars derived from sweet sorghum, which will be grown in the general vicinity of the project site. The carbon dioxide plant will recover and refine carbon dioxide from the ethanol plant's fermentation process. The complex will include a cogeneration facility fueled also by sweet sorghum, which will produce electricity and useful thermal energy in the form of steam for use in the ethanol and carbon dioxide plants.

Southeast will seek certification of the project as a Qualifying Facility (QF) pursuant to applicable rules of the Federal Energy Regulatory Commission. The QF will include the electrical generating equipment, related electrical transmission, distribution, switching, and control equipment (also referred to as "power plant"), and the cogeneration equipment. Ground was broken on the project in March 2013, and at least the ethanol plant and the electrical generating and cogeneration equipment are expected to be in commercial operation in early 2015.

2. Joint Ownership Arrangement

Southeast states that it and its Confidential Partner will jointly own the electrical generating equipment of the cogeneration facility via undivided ownership interests, with their

[1] To the extent the agency does not have enough facts to make a decision on a petition for declaratory statement, it may request additional information from the petitioner. See Adventist Health Sys./Sunbelt, Inc. v. Agency for Health Care Admin., 955 So. 2d 1173, 1176-77 (Fla. 1st DCA 2007).

ownership shares being at least as great as their respective maximum electrical requirements. Southeast and the Confidential Partner will enter into a Joint Venture Agreement, not yet developed, that will provide for the specifics of the arrangement. The electrical generation capacity of the project is initially projected to be 25 megawatts (MW). In its Response to the Staff Data Request, Southeast states that at least initially, it will own a minimum of 5.5 MW,[2] or 22 percent of the total generating capacity, and the Confidential Partner will own a minimum of 1.5 MW, or 6 percent of the total generating capacity of the electric generating plant. Correspondingly, each will be able to receive and use up to its respective share of the electrical energy produced over any period of time.

In its Response to the Staff Data Request, Southeast clarifies that the joint owners will each be entitled to receive and use defined amounts of the electric generating plant's capacity and electrical energy produced according to their ownership percentages of the jointly owned generating equipment. Ownership of the additional capacity will be negotiated and specified in the Joint Venture Agreement. Any electricity generated above the needs of Southeast and the Confidential Partner will be sold at wholesale to a Florida utility, e.g., Glades or Seminole Electric Cooperative, pursuant to standard offer contracts or through negotiated contracts for the sale of firm or as-available energy. Each joint owner would be entitled to its share of the revenues from such sales in accordance with its ownership interest.

Southeast and the Confidential Partner do not expect that their respective electric demands will exceed either of their allocated portions of the output of the electric generating plant. In the Response to the Staff Data Request, Southeast clarifies that if that event were to occur, that joint owner would obtain the additional electricity by purchasing it as supplemental power from Glades. The Joint Venture Agreement will explicitly provide that neither of the joint owners can use more than their percentage ownership share of electrical energy at any time. The Joint Venture Agreement may provide that each joint owner must demonstrate that its total connected load is no greater than its ownership share by way of having an engineer certify each of the ethanol and carbon dioxide plant's maximum possible load. Another less desirable possibility, due to the extra expense involved, would be for each joint owner to have a circuit breaker or relay switch at its meter that would break the circuit if its load were to reach the kilowatt (kW) value of its ownership share.

3. Capacity and Demand

The electrical generation capacity of the project will be capable of expansion from 25 MW to 50 MW. In its Response to the Staff Data Request, Southeast states that the anticipated expansion will not change any of the facts set forth in the Petition that are relevant to the requested declaratory statement, and that it will still be true that each joint owner will own an undivided ownership interest in the electric generating plant that is greater than or equal to its maximum load. The power block will utilize a conventional boiler in which sorghum bagasse will be burned to produce steam, which will drive a steam turbine generator to produce

[2] This is a corrected maximum electric demand provided by Southeast. In its Petition, Southeast originally stated that it would have a maximum electric demand of 10 MW.

electricity. The boiler will also use small amounts of propane, fuel oil, or natural gas as startup fuel.

4. O&M Company

The electrical generating equipment will be operated by an Operation and Management (O&M) Company, which will be engaged by contract with, and paid by, Southeast and the Confidential Partner. In its Response to the Staff Data Request, Southeast states that the details of the compensation structure for the O&M Company have not been finalized, but Southeast and the Confidential Partner contemplate that the O&M Company will be compensated on a pre-determined monthly or annual fee basis, and that the O&M Company will not be paid for specific amounts of energy produced by the power plant or consumed by either of the joint owners.

B. Southeast's Legal Analysis

1. Declaratory Statements Requested

Southeast states that because it and its Confidential Partner will co-own the electrical generating equipment, it believes that their respective use of the electricity produced by that equipment is self-supply, or self-service, and does not involve either the supply of electricity to or for the public, or the retail sale of electricity by one party to another. Southeast believes that consistent with applicable precedents discussed below, the contemplated transactions, including the co-ownership of the electrical generating equipment in the cogeneration facility, will not subject either of them to Commission regulation as a public utility.

However, as this Commission has never addressed the precise question presented here, Southeast requests that we declare that the receipt and use of electricity by Southeast and its Confidential Partner from their jointly-owned electrical generating equipment 1) will not result in or be deemed to constitute an unlawful sale of electricity; 2) will not cause either Southeast or its Confidential Partner to be deemed a public utility as that term is defined in Section 366.02(1), F.S.; and 3) will not cause either Southeast or its Confidential Partner to be subject to Commission regulation.

2. Substantial Interests

Pursuant to Rule 28-105.002(5), F.A.C., Southeast states that the substantial interests of it and its Confidential Partner will be directly affected by our declaration of their status because it will determine whether they are subject to Commission regulation, which in turn will determine whether they can pursue their joint ownership business arrangement, and could even determine whether the carbon dioxide plant is developed at all. According to Southeast, it and its Confidential Partner's investments in the renewable energy complex are significant, and they need the requested declaratory statements in order to assure them and financing parties that the transactions will not result in unexpected regulatory consequences.

3. Relevant Orders

Southeast states that several Commission orders are relevant to the requested declaratory statement. By Order No. 17009, issued December 22, 1986, in Docket No. 860725-EU, In re: Petition of Monsanto Company for a declaratory statement concerning the lease financing of a cogeneration facility (Monsanto), this Commission stated that "[a] customer can clearly choose to serve himself and 'so long as a customer serves himself without the involvement of regulated utilities, the Commission has no interest in the matter.'" (citation omitted) See also Order No. 18302-A, issued October 22, 1987, in Docket No. 870446-EU, In re: Petition of PW Ventures Inc., for declaratory statement in Palm Beach County, aff'd sub nom., PW Ventures v. Nichols, 533 So. 2d 281 (Fla. 1988) (PW Ventures) (finding that "[h]ad Pratt and Whitney embarked on this venture under its own auspices, no jurisdictional question would be presented, as jurisdiction attaches to the supply of electricity to another but not to oneself").

Moreover, Southeast states that in PW Ventures, we stated that our "jurisdiction does not turn on the size of the territory or the number of customers but, more simply, on the supply of electricity to an unrelated entity." We have focused on how closely related the supplier-producer entity and the consumer entity were in determining how closely the proposed transaction was to self-service. In Monsanto, the owner of the electrical generating equipment was not the same as the consumer, Monsanto, who leased the equipment. However, we determined that no sale to an unrelated entity would occur because Monsanto was leasing equipment that produced electricity rather than buying electricity that the equipment generated. See also Order No. 23729, issued November 7, 1990, in Docket No. 900699-EQ, In re: Petition of Seminole Fertilizer Corporation for a declaratory statement concerning the financing of a cogeneration facility (Seminole Fertilizer) (finding that the lessee/QF and the partnership/lessor were so related that the arrangement surmounted the jurisdictional boundary identified in PW Ventures, and that there was no retail sale, but rather self-service generation and the sale of electricity to a utility via the partnership). Cf. Order No. PSC-94-0197-DS-EQ, issued February 16, 1994, in Docket No. 931190-EQ, In re: Petition for a declaratory statement concerning financing and ownership structure of a cogeneration facility in Polk County, by Polk Power Partners, L.P. (Polk Power Partners) (finding that unlike in Monsanto and Seminole Fertilizer, the power producer, Polk, proposed to supply power which would then be consumed by an unrelated lessee in return for payment, causing Polk to be deemed a public utility subject to Commission regulation).

Southeast further states that in evaluating the relatedness of supplying and consuming entities, we have also examined whether the risks of ownership were borne by the consuming entity, as an indicator of relatedness. In Monsanto, in determining that the relationship between the lessor-owner of the generating equipment and the lessee-consumer of the electricity to be non-jurisdictional, we noted that all the risks of operation of the facility were retained by Monsanto. And in PW Ventures, we noted that "there is a significant difference between assumption of the financial and production risks associated with a cogeneration project and simply purchasing electricity."

Southeast also cites to Order No. 17251, issued March 5, 1987, in Docket No. 861621-EU, In re: Petition of Timber Energy Resources, Inc., for a declaratory statement concerning sales as "private utility" status (Timber Energy Resources), in which the petitioner owned a QF

that generated electricity and requested this Commission to declare that it could sell electricity to tenants of its industrial park without becoming a public utility. We concluded that such activity would render the petitioner a public utility subject to Commission regulation.

Southeast argues that the above-cited cases infer that the provision of electricity by an entity to itself from electrical generating equipment owned by that entity is not jurisdictional, and that even supply to a related entity can be non-jurisdictional, as we determined in Monsanto and in Seminole Fertilizer. Southeast asserts that in the instant case, where the electricity will be produced by generating equipment that is jointly owned by Southeast and the Confidential Partner in proportions that are at least as great as their respective maximum electrical demands, and where Southeast and the Confidential Partner respectively own the electricity produced from the jointly owned equipment in those proportions and bear all risks of ownership, there is only the self-supply of electricity to the ethanol and carbon dioxide plants, and possible wholesale sales of excess electricity to a utility. Southeast avers that because no retail sale to or for the public will take place, we should declare that the joint owners are engaged in self-service and are thus exempt from Commission regulation as public utilities.

IV. Responses to Petition

A. Glades' Response

1. Entities are Unrelated

Glades argues that we should declare that Southeast's petition describes a retail sale of electricity that would subject it and its Confidential Partner to our jurisdiction. Glades states that we have firmly rejected efforts to circumvent the no-sale rule through creative business arrangements. Timber Energy Resources (determining that the provision of electricity by the owner of a generator to tenants in an industrial park would subject the owner to Commission jurisdiction as a public utility). Glades further states that in Polk Power Partners, we held that the lease of an ethanol plant to an unrelated operator on a "utilities included" basis would similarly constitute a sale, even though lease payments would not vary based on the amount of electricity or other utilities the tenant consumed.

Glades states that our decision in Polk Power Partners is particularly instructive in that Polk unsuccessfully sought to exempt from Commission jurisdiction transactions between completely unrelated entities, as Southeast attempts to do here. We firmly rejected Polk's proposal, explaining that the Monsanto arrangement did not result in a sale because the lessee produced and consumed its own power using leased assets, while the Seminole transactions between corporate alter egos were not between "unrelated entities." Glades argues that the Petition clearly demonstrates that Southeast seeks an exemption for two completely unrelated entities to join together in a de facto partnership to jointly generate electricity for their individual consumption.

2. Partial Ownership Interests

Glades also argues that we have already determined that generation is not "self-generation" where the end-user consumer of electricity "had only a partial ownership interest" in the generating facility. Order No. 17510, issued May 5, 1987, in Docket No. 860786-EI, In re: Petition of Metropolitan Dade County for expedited consideration of request for provision of self-service transmission (Metropolitan Dade). According to Glades, Southeast's discussion of the risks its unrelated partner will assume is therefore irrelevant. As we held in PW Ventures, "the jurisdictional boundary is marked by the separateness of the supplier and consumer of electricity." This Commission examines assignment of risk only as between related parties, and only to determine whether the existence of separate entities has jurisdictional significance. Glades states that we have never implied that otherwise-unrelated entities may become related or create the requisite unity of interest and evade our jurisdiction simply by agreeing to jointly generate electricity for their individual consumption and contractually assigning or assuming production risk.

3. Grid, Duplication of Service, and Safety Issues

Glades argues that if we declare that the arrangement proposed by Southeast is beyond our regulatory jurisdiction, we will, in essence, authorize the creation of privately-held "utilities" that are immune from Commission jurisdiction. A residential or office condominium association could, for example, elect to build and own generating facilities as a "common element" to serve the apartments or offices individually owned by its members. Glades opines that this would result in our being unable to properly provide for the planning, development and maintenance of Florida's electric power grid, address territorial disputes between such customers and electric utilities, and enforce safety standards for the transmission and distribution facilities of such users. Moreover, it states that such users would not be required to pay regulatory assessment fees, which are necessary to support our regulatory role.

4. "Barriers to Entry" Issue

Glades further argues that in PW Ventures, 533 So. 2d at 283, the Florida Supreme Court recognized that authorization of non-jurisdictional private "utilities" could result in cream-skimming of high-use customers, to the detriment of the customers served by regulated utilities. As the Court explained, "[t]he expertise and investment needed to build a power plant, coupled with economies of scale, would deter many individuals from producing power for themselves rather than simply purchasing it." Id. at 284. Glades argues that these barriers to entry will not exist if we permit unrelated parties to jointly generate power to meet their individual needs.

5. Petition Not Well-Plead

Alternatively, Glades argues that if we determine that there is an insufficient factual basis to declare that the Petition describes a retail sale of electricity, we should deny the Petition and decline to answer it because it is not well-plead. Glades argues that the most glaring void in the Petition is its failure to provide any details regarding the parties' business arrangements, such as the form of their business organization, the terms of the contractual relationships between them,

the basis for payment both for expenses and between the parties, assignment of operating risks, maintenance of and control over the facility, and disposition of the facility at the conclusion of the arrangement. Glades states that this information was essential to our determination that the carefully-structured arrangements in Monsanto and Seminole Fertilizer constituted financing vehicles between business entities with a "unity of interest" rather than a retail sale, and is equally essential to our determination herein. As Attachments A and B to its Response, Glades attached diagrams of the factual arrangements at issue in the Seminole Fertilizer, Monsanto, and PW Ventures petitions.

Glades also argues that Southeast fails to identify its Confidential Partner, specify exactly what equipment would be co-owned, identify the parties' relative responsibility for the costs and expenses associated with the equipment, or provide sufficient detail from which we could determine whether such financial responsibility is related to the consumption of energy. Further, Southeast fails to identify the owner(s) of the facility in which the jointly owned generating equipment will be installed, the owner of the land on which the facility will be built, or the owner of the related transmission, distribution, switching and control equipment.

Moreover, Glades argues that administrative agencies may look to case law on declaratory judgments in civil proceedings for guidance in resolving petitions for declaratory statements. Couch v. State, 377 So. 2d 32, 33 (Fla. 1st DCA 1979). Glades states that we have done so in the past, noting that an entity seeking a declaratory statement must show that there is an "actual, present and practical need for the declaration," which must address a "present controversy."[3] Glades argues that the Petition should be denied because Southeast seeks to have us define and limit the parameters of our jurisdiction over Southeast's proposed business plan without the benefit of any specific facts, similar to our decision in Order No. 25328, issued November 12, 1991, in Docket No. 880069-TL, In re: Petitions of Southern Bell Telephone and Telegraph Company for a rate stabilization and implementation orders and other relief (denying Petition for Declaratory Statement as not well-plead, noting that it appeared to be an effort to have us define the parameters of our jurisdiction regarding "special needs projects" without the benefit of any specific facts regarding such "special needs").

B. IOUs' Amici Curiae Memorandum of Law

1. "Unity of Interest Test"

The IOUs argue that we should deny the Petition because it appears to describe an ownership structure that does not have sufficient "unity of interest" to conclude that the situation described is self-generation. The IOUs alternatively argue that we should dismiss the Petition because it fails to disclose the relevant facts necessary to make a careful analysis of the proposal. According to the IOUs, because the transaction has not been negotiated, much less committed to a contract, it can only be described by Southeast in very generalized terms which conveniently avoid any comparison of the proposal with the clear case law addressing what constitutes the

[3] See, e.g., Order No. PSC-04-0063-FOF-EU, issued January 22, 2004, in Docket No. 013017-EU, In re: Request for declaratory statement by Tampa Electric Company regarding territorial dispute with City of Bartow in Polk County (citing Couch and Sutton v. DEP, 654 So. 2d 1047, 1048 (Fla. 5th DCA 1995)).

retail sale of electricity in Florida. However, if we elect to proceed, we should find that the proposed transaction involves a retail sale of electricity or will be implemented in a way that would affect the retail sale of electricity between two or more entities.

The IOUs argue that our decision in PW Ventures, affirmed by the Florida Supreme Court, instructs that the sale of electricity to only one customer constitutes selling to the public. See also Timber Energy Resources (determining that a small power producer could not supply electrical power to a group of unrelated entities, all of whom were located in a specific industrial power park, without being regulated as a public utility), and Order No. 18554, issued December 16, 1987, in Docket No. 871066-EU, In re: Petition of the University of Florida for a declaratory statement concerning proposals for a cogeneration project (determining that a proposed sale of electricity to the University of Florida from a cogeneration facility built, owned and operated by Gainesville Regional Utilities on land leased from the University of Florida would constitute a retail sale).

The IOUs note that in Monsanto, we determined that jurisdiction did not attach when the cogenerator entered into a conventional lease financing arrangement for the construction of the cogeneration facility, and that the lease payments did not vary in accordance with the amount of electricity consumed by Monsanto. They also note that in Seminole Fertilizer, we deemed Seminole Fertilizer and the lessor of the equipment to have a "unity of interest" due to the fact that Seminole Fertilizer's wholly-owned subsidiary was the general partner of the lessor limited partnership, and that in both of those cases, the end user retained all financial and operating risks associated with the production of electricity.

The IOUs argue that the focus of the analysis in the foregoing precedents was the determination of what would be considered self-service generation, a nonjurisdictional activity, as opposed to the sale of electricity to an unrelated entity, a regulated activity. In drawing the line between the two, the "unity of interest" between the entity providing the electricity and the consumer of the electricity and the degree to which the consumer bore the financial and production risks attendant to the generation of the electricity were key elements of our determination.

The IOUs also argue that the Petition suggests there will be two distinct entities forming a third entity to own and operate a generating facility, and that therefore, the "unity of interest test" is not met. The IOUs state that unlike in Seminole Fertilizer, this is not a case of a wholly-owned subsidiary being the sole general partner of the generation provider, nor is the joint ownership arrangement being proposed solely for financial and tax reasons.

According to the IOUs, simple "shared ownership" cannot be the basis for "unity of interest," as was shown by our decision in Order No. PSC-95-1623-DS-PU, issued December 29, 1995, in Docket No. 951347-PU, In re: Petition for declaratory statement regarding public utility status of affiliates involved in gas supply arrangements, by Tampa Electric Company (TECO Affiliates). In that case, we found that it was not clear that the affiliate would have a "unity of interest" with TECO that was found to be the case in Seminole Fertilizer. Seminole Fertilizer's wholly-owned subsidiary was the general partner of the limited partnership, whereas in TECO Affiliates, the general partner of the gas supply entity would be shared by TECO and another

investor. See also Metropolitan Dade (determining that the transmission service requested was not self-service transmission because the consumer of the electricity was not identical to the generator of the electricity and other entities also owned some portion of the QF facility).

2. Joint Ownership Issues

The IOUs note that the Petition presents a case of two joint owners, and ask whether three, ten or twenty joint owners would be permissible if the joint ownership here is considered to be self-service. They also ask what portion of the generating facility must each joint owner own and whether one percent is sufficient. The IOUs argue that once the determination is made that joint ownership is permissible, there is no end to the combinations that can be devised to allow what is in reality an unlawful retail sale of electricity. This would open the door for other industrial parks to build generating plants to serve unrelated tenants and owners of industrial sites within the park, thus circumventing our decision in Timber Energy Resources. The park owner could simply require owners and tenants within the park to become part owners of the generating plant. Likewise, shopping malls or commercial office buildings could install generating facilities to provide unregulated service to their tenants by simply requiring them to assume some portion of ownership in the facilities as a condition to leasing them space. This would result in the "cherry-picking" of large commercial and industrial customers to the detriment of the remaining customers, the uneconomic duplication of electric facilities, territorial disputes that we may have no authority to resolve, and a patchwork of electric service providers that will make it difficult to plan, develop and maintain a coordinated electric grid within the state.

The IOUs argue that if we conclude that some form of joint ownership is permissible, the question becomes whether the ownership of the generating facility becomes so tenuous or de minimus that there is no financial or operational risk borne by the individual owners, but instead simply a retail sale and purchase. According to the IOUs, this dilemma is solved by recognizing that any form of joint ownership fails to have the requisite "unity of interest" to be determined to be self-service generation. While the Petition involves new load and renewable generation facilities, any decision to allow unregulated service through a joint ownership arrangement cannot be limited to new load or facilities involving renewable resources. The IOUs state that the determination of whether the transaction is permissible as self-service generation turns on the details of the transaction, not whether it involves new load or renewable generation.

3. Request is Premature

According to the IOUs, the details of the transaction allow for no conclusion with respect to the financial and operating risks of the electric generation to be borne by each joint owner. The Petition does not indicate who will own what percentage of the generating capacity, or who will get the power when the generating equipment generates less than the joint owners use for their own respective needs. The IOUs note that the Joint Venture Agreement does not yet exist, and that is the document that will provide all the specifics of how the arrangement will operate. Nor does the contract with the O&M Company exist. Therefore one can only speculate as to exactly how Southeast and its Confidential Partner intend to utilize the electrical output of the proposed generation equipment. If the parties sell power to each other, it would clearly involve a

retail sale by the party with excess generation to the party who falls short. The IOUs assert that because we do not have before us the yet to be drafted agreement, we cannot verify the provisions that will or will not be included.

Like Glades, the IOUs argue that courts have held that because a declaratory statement proceeding is similar to an action for declaratory judgment in circuit court, the declaratory judgment statute and case law interpreting it may be used as guidance. See, e.g., Couch, 377 So. 2d at 33. Thus, individuals seeking a declaratory statement must show that there is a bona fide, actual, present, and practical need for the declaratory statement and that the declaration deals with a present controversy as to a state of facts. See, e.g., Sutton, 654 So. 2d at 1048. The IOUs state that here, there is no present, justiciable controversy as to a state of facts for us to address, as there is not yet a state of facts. They assert that at best, it would be premature to attempt to issue a declaratory statement based on the currently unsettled circumstances.

4. Project Likely to Involve Retail Sale Transaction

The IOUs also argue that the Petition qualifies for denial on the merits based on what it does disclose. The proposed Joint Venture Agreement and the proposed contract with the O&M Company will have to describe numerous metering, accounting and monetary exchange provisions which, more likely than not, will push the project in the direction of a retail sale transaction. The parties would have to keep track of the electricity produced by the plant and the amount that each partner consumes. The IOUs assert that disparities may occur in the amounts of electricity each party consumes relative to its alleged entitlement, and it is only rational to assume that the Joint Venture Agreement would provide for balancing compensation which could easily constitute retail sales by one of the partners to the other.

5. Determination of Confidential Partner's Conduct

Moreover, the IOUs argue that the Petition should be dismissed or denied for its attempt to have us determine the rights and/or legal status of the Confidential Partner. Rule 28-105.001, F.A.C., states that "[a] declaratory statement is not the appropriate means for determining the conduct of another person."

6. Encouraging Renewable Generation

Finally, the IOUs note that this Commission recognizes the need to encourage renewable generation and that Rules 25-17.210 through 25-17.310, F.A.C., provide favorable treatment for power purchases from renewable facilities. The IOUs state that denial of the Petition would not preclude the building of the renewable energy facility as described in the Petition, and that Southeast has the option of owning and operating the electric generating facility and cogeneration facility and selling the excess power to an electric utility while still providing recovered carbon dioxide from the ethanol fermentation process and steam energy to the Confidential Partner.

C. FECA's Amicus Curiae Memorandum of Law

1. Project Is Jurisdictional

FECA states that Southeast appears to be asking us to take the unprecedented step of determining that there can be electric utilities in Florida that are not under our jurisdiction if they "self-serve" two, or potentially more, users. FECA argues that this would fly in the face of Section 366.02, F.S., which defines the utilities under our regulatory control, and Section 366.04, F.S., the "Grid Bill," and would result in this Commission not having jurisdiction over the Petitioner's facilities to protect the public by prescribing and enforcing safety standards for the transmission and distribution facilities, to avoid territorial disputes and the uneconomic duplication of facilities, and to oversee a coordinated power grid throughout Florida.

With regard to the facts of the Petition, FECA states that there is very limited information about the electric generation equipment or the ownership of that equipment, other than the statements that Southeast and the Confidential Partner will both own an undivided interest with each party's ownership share being "at least as great as its maximum power requirements," and that the equipment will be operated by a third party that will be paid by both Southeast and the Confidential Partner. FECA argues that there is no information about how each party will connect to or take service from the generator, and that both parties will necessarily have to be electrically connected to the electric generator through some form of distribution and/or transmission facilities. Connecting two or more customers is much more complicated than self-service involving just one entity, and the facilities involved in this case surely would be "transmission or distribution facilities" as those terms are used in Section 366.02(2), F.S.

With respect to the law pertaining to the Petition, FECA states that Section 366.02, F.S., describes two types of electric utilities, "electric" and "public." Pursuant to Section 366.02(2), "electric utility" means any municipal or investor-owned electric utility or rural electric cooperative that owns, maintains, or operates an electric generation, transmission, or distribution system within the state. The definition of "public utility" in Section 366.02(1), however, is not as specific. FECA argues that it includes investor-owned utilities but could also include some other, unspecified type of entity that supplies electricity other than an electric cooperative or a municipality. Ownership of the transmission and distribution facilities alone could render investors in these facilities an "electric utility" under Section 366.02(2), F.S., and the Petition fails to provide any information that would permit us to conclude that these facilities will not be owned by investors.

2. Safety Issues

Further, the Petition does not reveal whether either party will take backup or standby service from the local electric utility to provide cold start power to the generator, or for their individual use when their generator is not operating. FECA argues that this lack of information should be especially troubling in light of our exclusive jurisdiction over safety in Section 366.04(6), F.S., which requires us "to prescribe and enforce safety standards for transmission and distribution facilities of all public electric utilities, cooperatives organized under the Rural Electric Cooperative Law, and electric utilities owned and operated by municipalities." FECA

believes this could be the first time that two or more separate customers would be electrically interconnected behind the retail meter of an electric utility in Florida. This will require an innovative system protection scheme for the utility, and, more importantly, it will likely not allow a single disconnect switch, which firefighters depend on for their safety. Moreover, if Southeast and/or the Confidential Partner take backup service, they will probably have to take that service directly from the local utility and could not rely on the backup service to their generator because most, if not all, electric utilities prohibit the resale of the electricity they furnish. See Order No. 4874, issued April 23, 1970, in Docket No. 69319-EU, In re: Investigation of the practice, policy and procedures of public utilities engaged in the sale of electricity to be resold.

3. Unity of Interests

FECA also argues that there is no unity of interests between Southeast, the Confidential Partner, and whatever the entity that jointly owns the generation equipment and distribution and/or transmission facilities will become. There is nothing to indicate that the parties are related at all except for their alleged plans to jointly own a power plant through an arrangement that will be a third legal entity.

FECA argues that we have determined that a single entity that owns and operates an electric generator for its own use is not necessarily a public utility. However, in this case, there are at least two distinct and separate end-users and an electric generator that is not wholly-owned by either of them and is operated by a third party. FECA states that it appears that we already deemed this type of scheme to be jurisdictional in PW Ventures. According to FECA, Southeast argues that our orders that clearly are limited to a single end-user/generation owner stand for the proposition that "self-serve" electricity does not render it a public utility if the multiple end-users simply have an undivided ownership interest in the generator. FECA argues that Southeast is incorrect, and that taken to its extreme, that argument could be used to say that electric cooperatives should be exempt from Commission jurisdiction since the members of an electric cooperative each have an undivided ownership interest in the cooperative.

FECA argues that the "self-serve" scheme described in the Petition, with multiple end users and a third-party operator of the electric generator, does not fit any of the exceptions to the Supreme Court's ruling in PW Ventures. Rather, the Petition describes an electric utility, as it will own and operate generation and it must own and operate distribution and/or transmission facilities in order to serve Southeast and the Confidential Partner. Therefore, FECA states that we should deny the relief requested and declare that the electric generation and "self-serve" scheme would be an electric utility.

V. Southeast's Response and Incorporated Memorandum of Law

A. Description of Project

In its Response and Incorporated Memorandum of Law to the responses to the Petition by Glades, the IOUs, and FECA (collectively referred to as "the opponents"), Southeast states that it and its Confidential Partner will produce, from native Florida renewable energy resources,

ethanol for use as motor fuel, renewable electricity produced from the combustion of sorghum bagasse, steam produced in the electricity generation process that will be recovered and used in cogeneration applications, and food-grade carbon dioxide refined from the ethanol production byproducts. Southeast and the Confidential partner will jointly own the electrical generation equipment that will be used to serve their respective electrical needs.

B. Project Is Self-Generation

Southeast argues that the opponents mischaracterize the arrangement presented by Southeast by concocting many hypothetical facts and scenarios that might, were they not contradicted by the facts presented in the Petition, lead to a different result. In discussing what we have done in previous declaratory statements on this subject where the owners and consumers of electric generation equipment were not identical, the opponents generally talk around our fundamental holding, which is that a customer can clearly choose to serve himself.

Southeast states that its Petition alleges sufficient facts upon which we can grant its request. It asserts that because this is simple, straightforward joint ownership of the power plant, there is no need to create a nexus between non-identical owners and consumers, as was the case in Seminole Fertilizer. Where there is identity of the owners of the power plant and the consumers of that plant's output is specifically structured to ensure that each will own at least as much of the plant's capacity as its maximum electrical requirements, as well as all of the electricity produced by each joint owner's share of the plant, there is only self-generation.

Southeast's form of business organization is joint ownership and jointly held legal title to all of the electrical generation equipment. Southeast states that the opponents' assertions that there will be some other entity created to own the generating equipment are fabricated, conclusory assumptions that are contradicted by the facts presented in the Petition. It is the supply of electricity to or for the public that determines our jurisdiction. Therefore, Southeast asserts that there is no need for the Petition to state who owns the building or land where the electrical generation equipment is located. The Petition states what the joint owners' respective maximum power usages will be and that they will each own at least as much of the generating equipment and the electricity as they each consume.

C. Request Is Not Premature

Regarding the opponents' arguments that the Joint Venture and O&M Agreements have not yet been developed, Southeast argues that in Monsanto and Seminole Fertilizer, we rendered declaratory statements while expressly recognizing that we did not have the relevant operative documents and that we did not know the identities of parties to those arrangements. In Monsanto, we held that a "yet-to-be-selected manufacturer/lessor" of cogeneration equipment would not "be deemed a public utility under Florida law." And in Seminole Fertilizer, we declared that the proposed financing and ownership structure presented would not cause the petitioner or a yet-to-be-formed partnership/lessor or the not-yet-identified individual partners in that partnership to be subject to Commission regulation.

Moreover, Southeast states that the requested declaratory statement does not even address the O&M Company. It asserts that the O&M Company will clearly not own the generating equipment, so there is no issue as between owner and consumer. Southeast states that the IOUs cannot properly create hypothesized facts contrary to those presented in the Petition and then argue that we should deny the requested statements because something different from those facts might occur. It is well settled that declaratory statements are inherently limited to the facts upon which they are based. See Seminole Fertilizer. Therefore, Southeast concludes that all the different facts hypothesized and concocted by the opponents have no relevance to the declaratory statement requested.

D. "Unity of Interest Test" Inapplicable

Southeast argues that in relying heavily on the "unity of interest test," the IOUs fail to recognize that it is only applicable where the producing and consuming entities are not identical and the possibility exists that the arrangement could result in the producing entity supplying electricity to or for the public. Unlike this case, PW Ventures, Timber Energy Resources, Monsanto, and Seminole Fertilizer were all cases that involved supply by a generation owner that was not identical to the consumer of the power generated. Southeast states that it is clear that in this case, Southeast and the Confidential Partner will have a unity of interest in their joint ownership of the power plant upon which they will both depend for the operation of their ethanol and carbon dioxide plants. It states that whether they will use their jointly owned electrical generating equipment to operate their separate industrial facilities is irrelevant.

E. Grid Issues

Southeast argues that all of the various hypothetical consequences that the opponents assert could result to our jurisdiction if we grant the requested declaratory statement are misplaced. It asserts that our jurisdiction over the grid is no more threatened by the proposed arrangement between Southeast and its Confidential Partner than it is by any other self-generating customer or complex industrial load that is partially or principally served by a customer's self-service generation. Any affected utilities will have ample notice of the proposed generating equipment and its capacity and configuration by virtue of required interconnection agreements and, where applicable, advance transmission service requests. They will also have advance notice of anticipated service requirements for interconnecting self-generators who request standby service. The electrical loads of the ethanol and carbon dioxide plants will be what they are regardless of who owns what, and utilities know how to plan to serve standby service loads. Southeast further states that they also know how to consider in their planning both firm capacity and as-available energy supplied. As Attachment A to its Response, Southeast attached an excerpt from FPL's Ten Year Power Plant Site Plan as an example. Adequate knowledge of generation that will be connected to the grid, the loads that the utility will be expected to serve, and the facilities and equipment involved are all that is required to ensure the coordinated planning, development, and maintenance of the grid. Glades would have this knowledge, as would FPL or any other IOU pursuant to its Open Access Transmission Tariff.

F. Safety Issues

Southeast argues that neither public safety nor our safety jurisdiction will be impaired if we grant the Petition. Pursuant to Section 366.04(6), F.S., our safety jurisdiction extends only to electric utilities. Nevertheless, Southeast and its Confidential Partner's nonjurisdictional installations would be subject to either or both of the National Electrical Safety Code or the National Electrical Code, as well as most likely IEEE Standard 1547, applicable to distributed generation resources interconnected to utility systems. Southeast states that we can and should rely on the utilities themselves to police the installations.

Southeast points out that, for example, Glades' tariff includes its "Net Metering Interconnection Agreement for Member-Owned Renewable Generation Systems," Tariff Sheet Nos. 20.0 through 20.7. As Attachment B to its Response, Southeast attached a copy of these tariff sheets. While this particular tariff agreement only provides for facilities with up to 100 kW of capacity, it shows that Glades has the ability to know exactly what is being installed and to ensure the safety of such self-service generation installations. It requires, among other safety related provisions, that "[t]he Member shall, at the Member's expense, install and maintain a manual disconnect switch to provide a separation point between the AC power output of the RGS and any Member facilities connected to GEC's electrical system (between the inverter and A.C. breaker feeding the inverter)."[4] Southeast argues that it would seem to be a simple matter for Glades to modify its existing interconnection agreement to address larger generators. Glades will necessarily have to approve any interconnection arrangements beforehand, and under normal practice, Southeast and the Confidential Partner will have to pay for the interconnection facilities. Finally, Southeast states that if we were concerned that an electric utility such as Glades might not adequately provide for safe operation of self-generators with whom the electric utility was interconnected, we could impose our interconnection standards rules on electric utilities. See, e.g., Rule 25-17.087, F.A.C., Interconnection and Standards.

G. Other Issues

1. Duplication of Service

Southeast argues that territorial disputes can only be raised between electric utilities. Where there is no retail sale, there is no utility and no territorial dispute can exist. Here, Southeast requests us to declare that the proposed self-service generation by Southeast and its Confidential Partner will not render either of them a public utility. Southeast states that the opponents focus on many assumed hypothetical facts that might, if they were to exist, create a jurisdictional retail sale that would make the supplying entity a utility subject to Commission jurisdiction. Glades would always retain the right to pursue a territorial dispute complaint if it had a good-faith reason to believe that the facts "on the ground" were different from those presented in the Petition such that they would render Southeast and its Confidential Partner a public utility.

[4] Original Sheet No. 20.2.

2. Regulatory Assessment Fees

Where there is nothing to regulate, this Commission need incur no expense to regulate. Southeast states that Glades' argument that we might not realize additional revenues is misplaced and adds nothing to the discussion or analysis of whether Southeast and its Confidential Partner's joint ownership self-service arrangement is or is not jurisdictional.

3. Determination of Confidential Partner's Conduct

Southeast argues that the IOUs blatantly ignore our holdings in two cases that the IOUs themselves cited in their Amici brief. In Monsanto and Seminole Fertilizer, we determined that as-yet-unknown and unidentified parties would not be deemed to be public utilities under Chapter 366, F.S.

4. Standby Service

FECA criticizes the Petition because it does not reveal whether either party will take backup or standby service from the local electric utility. Southeast states that while it is virtually certain that it and its Confidential Partner will request standby service from Glades, this criticism is irrelevant because we have specifically stated that standby service issues are not appropriate for a declaratory Statement. In Monsanto, we stated that

> [w]e do not consider [the standby service] issue to be an appropriate one for resolution in a declaratory statement. There is no question or doubt that pursuant to the controlling Federal Energy Regulatory Commission Rule 18 CFR 292.305(b) and 292.393(b) implementing the Public Utilities Regulatory Policies Act (PURPA) and Rule 25-17.084, [F.A.C.], Gulf Power Company must provide "standby" electric power at applicable non-discriminatory tariff rates to Monsanto in its capacity as operator of the proposed qualifying facility.

Southeast argues that Glades would be required to provide standby service at reasonable rates consistent with FERC's PURPA rules and our statutory jurisdiction over the rate structure of electric utilities such as Glades.

5. Promotion of Renewable Energy

Southeast notes that the IOUs raise an issue regarding the promotion of renewable energy resources by arguing that denial of the Petition would not preclude Southeast from building the project. The IOUs argue that Southeast has the option of owning and operating the electric generating and cogeneration facilities, and selling any excess power under applicable as-available or firm capacity purchase tariffs or contracts. In response, Southeast argues that the rates for such power purchases by Florida utilities are very low, much lower than the value of the power to Southeast and its Confidential Partner. Moreover, Southeast states it did not invoke our express statutory mandates to promote renewable energy pursuant to Sections 366.91 - .92, F.S., because it is not the determinative issue here. Southeast contends that the determinative issue is

whether we will recognize Southeast and its Confidential Partner's joint ownership arrangement, wherein each will own its share of electrical generating equipment and its share of the electricity produced by that equipment, as non-jurisdictional self-service generation.

6. FECA's "Electric Utility" Argument

Section 366.02(3), F.S., defines "electric utility" as being "any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state." Southeast argues that it is clear that neither Southeast nor its Confidential Partner, as the joint owners of the generating equipment or possibly of the wires connecting the ethanol and carbon dioxide plants to the generating equipment, will be either a municipal electric utility or a rural electric cooperative. Therefore, Southeast states that the Petition asks the correct question as to whether the joint ownership arrangements described therein would cause either of them to be a public utility.

7. "Barriers to Entry" Issue

Glades argues that the "barriers to entry" issue discussed in PW Ventures, 533 So. 2d at 294, that "[t]he expertise and investment needed to build a power plant, coupled with economies of scale, would deter many individuals from producing power for themselves rather than simply purchasing it," would not be present under the joint ownership arrangements planned by Southeast and its Confidential Partner. Southeast argues that this is, at best, an ancillary policy argument that does not address the core question as to whether the joint ownership of the generating equipment and the individual ownership of the electricity produced by that equipment by each of the joint owners constitutes the supply of electricity to or for the public. Moreover, Southeast argues that this argument is substantively erroneous and misplaced because those "barriers to entry" will be surmounted if we grant the Petition. Southeast and the Confidential partner both put up the up-front capital to construct the facility and they both bear the risks of ownership.

VI. Findings and Conclusion

We disagree with Southeast that the business arrangement described in the Petition is simple and straightforward self-service. The Responses in opposition to the Petition show that ambiguities exist with respect to whether the business arrangement between Southeast and its Confidential Partner would give rise to the possibility of a retail transaction between unrelated entities, thereby meeting the definition of a public utility and invoking our regulatory jurisdiction. We find that the Petition and response to our Staff Data Request do not provide sufficient facts upon which to issue a declaratory statement in this instance. We therefore deny the Petition, recognizing that Southeast may file a new Petition in the future with additional clarifying information if it so chooses.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Petition for Declaratory Statement filed by Southeast Renewable Fuels, LLC is hereby denied. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 11th day of December, 2013.

Carlotta S Stauffer

CARLOTTA S. STAUFFER
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
www.floridapsc.com

Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

RG

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.