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Subject:	Docket No. 130235-EQ - Amici Curiae Memorandum of Law
Attachments:	Amici Curiae Memo of Law.pdf

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b. Docket No. 130235-EQ – In re: Petition of Southeast Renewable Fuels, LLC, for a Declaratory Statement Regarding Co-Ownership of Electrical Cogeneration Facilities in Hendry County.

c. Document being filed on behalf of Tampa Electric Company, Florida Power & Light Company, and Gulf Power Company.

d. There are a total of 19 pages.

e. The document attached for electronic filing is Tampa Electric Company's, Florida Power & Light Company's and Gulf Power Company's Amici Curiae Memorandum of Law Addressing Southeast Renewable Fuels, LLC's Petition for a Declaratory Statement.

(See attached file: Amici Curiae Memo of Law)

Thank you for your assistance in this matter.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Southeast Renewable Fuels, LLC, for a Declaratory Statement Regarding Co-Ownership of Electrical Cogeneration Facilities in Hendry County.	)	DOCKET NO. 130235-EQ
	)	FILED: October 8, 2013

TAMPA ELECTRIC COMPANY'S, FLORIDA POWER & LIGHT COMPANY'S, AND GULF POWER COMPANY'S AMICI CURIAE MEMORANDUM OF LAW ADDRESSING SOUTHEAST RENEWABLE FUELS, LLC'S PETITION FOR DECLARATORY STATEMENT

INTRODUCTION

Tampa Electric Company ("Tampa Electric"), Florida Power & Light Company ("FPL") and Gulf Power Company ("Gulf Power") (collectively "Joint Movants") have requested leave to file this Amici Curiae legal memorandum addressing the substantive arguments raised in the Petition of Southeast Renewable Fuels, LLC ("Southeast") for a Declaratory Statement in an effort to assist the Florida Public Service Commission ("Commission") in its consideration of Southeast's Petition. The question before the Commission is one of great concern to the Joint Movants and their customers and it is the Joint Movants' hope that the matters contained herein will provide the Commission assistance in disposing of Southeast's Petition.

The case law on what constitutes a public utility in Florida is clear. The Petition before the Commission is anything but clear as to what is being proposed. 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 retail sale of electricity in Florida. Because of the lack of specificity in the Petition, there are many unanswered questions which should cause the

Commission on its own motion to dismiss the Petition. However, if the Commission elects to proceed, a careful reading of the Petition, both as to what it says and does not say, along with a thorough review of the Commission's prior decisions in this area and case law, demonstrate that the proposed transaction on its face involves a retail sale of electricity or will most certainly be implemented in a way that would effect the retail sale of electricity between two or more entities. These facts call for either a denial of the Petition or a granting of the Petition in the negative; that is, a finding that the transaction proposed by Southeast will result in the unlawful sale of electricity.[1]

This Commission has been very diligent over the years in its analysis of proposed ventures involving the generation and consumption of electricity in this state to ensure against the unregulated retail sale of electricity by one entity to another. The Commission has done so to preserve the protections of the public interest that are incorporated in Chapter 366, Florida Statutes, and the Florida Electrical Power Plant Siting Act, Section 403.501 – 403.518, Florida Statutes. Those protections include the planning, development and maintenance of a coordinated and safely operated electric power grid throughout Florida, the avoidance of territorial disputes and the avoidance of further uneconomic duplication of generation, transmission and distribution facilities, all of which are designed to provide all Floridians safe, reliable and reasonably priced electric service. Indeed, the Commission's regulatory diligence in these areas has enabled Floridians to enjoy safe, reliable and reasonably priced electric service for many years.

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[1] See, 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., Order No. PSC-94-0197-DS-EQ, Order Granting Petition for Declaratory Statement in the Negative, issued February 16, 1984, Docket No. 931190-EQ.

PUBLIC UTILITY STATUS IN FLORIDA

Section 366.02, Florida Statutes, defines "public utility" to mean ". . . 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; . . ." The statute goes on to make certain exclusions that do not apply here and which Southeast has not claimed to rely on. A brief review of decisional law interpreting the above definition will provide a basis for analyzing Southeast's Petition.

The polestar case on retail sales issues is In re: PW Ventures, Inc. Petition for Declaratory Statement Concerning Proposed Cogeneration Project in Palm Beach County, FPSC Docket No. 870446-EU. This case was decided on October 16, 1987, in Commission Order No. 18302. In that case PW Ventures (a Florida corporation jointly owned by a Florida Power & Light affiliate and a wholly-owned subsidiary of Combustion Engineering, Inc.) proposed to develop a cogeneration facility at an existing industrial plant of Pratt & Whitney in Palm Beach County. The output of the facility would be sold to Pratt & Whitney under a long-term take or pay contract. The Commission concluded that PW Ventures would be selling electricity to Pratt & Whitney, an end-use retail customer. Thus, the Commission concluded this would make PW Ventures a public utility subject to state regulation under Chapter 366, Florida Statutes.

PW Ventures was unsuccessful in its contention that selling to only one customer would not be selling to the public. The statutory definition of a public utility, PW Ventures argued, includes the requirement that electricity be sold to the public. The Commission rejected this argument saying that its 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. The Commission said:

> We hold that the statutory language 'to the public' does not permit us to find that service to one, or a few, or some members of the public is nonjurisdictional for once embarked on that course the statute does not tell us where to draw the line.

The Commission's decision was affirmed by the Supreme Court of Florida in PW Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988).

In another earlier case, In re: Petition of Timber Energy Resources, Inc. for a Declaratory Statement Concerning Sales as "Private Utility" Status, Orders Nos. 17251 and 17523, issued in Docket No. 861621-EU on March 5 and May 7, 1987, respectively, the Commission determined 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.

See, also, In re: Petition of the University of Florida for a Declaratory Statement Concerning Proposals for a Cogeneration Project, Order No. 18554 issued in Docket No. 871066-EU on December 16, 1987. In that case the Commission determined that a proposed sale of electricity by Gainesville Regional Utilities to the University of Florida ("UF") from a cogeneration facility built, owned and operated by GRU on land leased from UF would constitute a retail sale by a municipal utility, subject to the Commission's limited regulation of municipal rate structure under §366.04(2), Florida Statutes.

In an earlier decision, In re: Petition of Monsanto Company for a Declaratory Statement Concerning the Lease Financing of a Cogeneration Facility, Order 17009, issued December 22, 1986, Docket No. 860275-EU, the Commission held that a proposed cogeneration financing arrangement would not effect a retail sale of electricity by a lessor of cogeneration facilities to Monsanto, the lessee of those facilities. Therefore, Commission jurisdiction did not attach when the cogenerator entered into a conventional lease financing arrangement for the construction of

its cogeneration facility. The Commission noted in the PW Ventures case that Monsanto Company retained all of the risks of production associated with the facility. That case involved a straight lease with the lease payments not varying in accordance with the amount of electricity consumed by Monsanto. Thus, neither the lessee (Monsanto) nor its lessor were subjected to the regulation by the Commission.

In a case decided November 7, 1990, In re: Petition of Seminole Fertilizer Corporation for a Declaratory Statement Concerning the Financing of a Cogeneration Facility, Seminole proposed to finance an expansion of its cogeneration facilities by creating a limited partnership to own the equipment and lease it to Seminole, thus allowing for "off balance sheet" financing. In the Seminole case the Commission deemed Seminole and the lessor of the equipment (the limited partnership) to have a "unity of interest" due to the fact that Seminole's wholly-owned subsidiary was the general partner of the lessor limited partnership. Thus, neither Seminole nor the limited partnership were deemed to be a public utility and none of the participants would become subject to the PSC jurisdiction solely because of such transaction.

In the Seminole case, as in earlier decisions, the end user retained all financial and operating risks associated with the production of electricity. Seminole only made fixed lease payments which did not vary with the amount of electricity Seminole consumed. Seminole also was responsible for all repair, maintenance, replacement and operation of the cogeneration equipment.

The focus of the analysis in each of 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 the Commission's determination. Furthermore, each was decided after the Commission's careful review of all relevant facts bearing upon how the arrangement would operate, including the assignment of financial and operational risks and the basis for any compensation as between the participating parties.

On its face, the Petition appears to describe an ownership structure that does not have sufficient "unity of interest" to conclude the situation described is one of self-generation and on that basis the Commission should deny (or grant in the negative) the Petition and find that the proposed ownership structure is not self-service generation, but instead a retail sale. Alternatively, the Commission should dismiss the Petition because, unlike the precedents discussed above, the Petition in this case fails to disclose the relevant facts necessary to make a similar careful analysis of the instant proposal. Southeast's Petition fails to state any facts warranting its reliance on any of the foregoing precedents finding no retail sale, and that failure likewise precludes Southeast from distinguishing its proposal from those previously found to effect retail sales. Southeast essentially seeks a regulatory blank check from the Commission.

THE LACK OF "UNITY OF INTEREST" BETWEEN THE GENERATOR OWNER AND THE ENERGY USERS PRECLUDES THE CONCLUSION THAT THE FACTS DESCRIBE AN INSTANCE OF SELF-SERVICE GENERATION

As precedent describes, it is only when an entity is self-service generating that jurisdiction as a public utility does not attach, and the structure contemplated by Southeast and its Confidential Partner does not describe an instance of self-service generation. Rather, the Petition suggests there will be two distinct entities forming a third entity to own and operate a

generating facility. Under the bare bones description in the Petition, the "unity of interest" test is not met.

The facts described in the Petition are unlike those present in the Seminole case. 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" as it was in Seminole. This is a case of two distinct entities (apparently two although it is not clear from the petition that Southeast and the Confidential Partner will be the only owners) that have no "unity of interest" one with the other or with the jointly–owned generating facility.

That simple "shared ownership" cannot be the basis for "unity of interest" is borne out by a later Commission decision interpreting Seminole. In re: Petition for Declaratory Statement Regarding Public Utility Status of Affiliates Involved in Gas Supply Arrangements by Tampa Electric Company, Order No. PSC-95-1623-DS-PU, issued December 29, 1995, Docket No. 951347-PU[2] In that case, Tampa Electric was requesting a declaratory statement that a proposed gas supply arrangement for the company's Polk Power Station "would not subject the Company's proposed gas supply affiliate to [the Commission's] regulation as a public utility engaged in supplying gas to or for the public." Order at 1. The affiliate supplying the gas would have other investors and Tampa Electric's ownership interest would not exceed 50%. With respect to this proposal Tampa Electric asked whether "the affiliate and Tampa Electric have a 'unity of interest' such that no sale of gas to the public is at issue." In addressing that question the Commission stated:

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[2] See, also, In re: Petition of Metropolitan Dade County for Expedited Consideration of Request for Provision of Self-Service Transmission, Order No. 17510, issued May 5, 1987, in Docket No. 860786-EI. The Commission determined 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; other entities also owned some portion of the QF facility.

> First, it is not clear that the entity at issue here would have a "unity of interest" with Tampa Electric that Seminole Sub L.P. was found to have with Seminole. In the latter instance, a wholly-owned subsidiary of Seminole was the General Partner of Seminole Sub L.P. whereas in this case, the general partner of the gas supply entity will be shared by Tampa Electric and another investor."

Order at 3 (emphasis in the original.)

The Petition in this proceeding presents a case of two joint owners, but if two joint owners are permissible why not more? Are three, ten or twenty permissible? Moreover, what portion of the generating facility must each joint owner own? Is one percent sufficient? 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, nor can a joint ownership structure be limited to new load as is the case in this Petition.

A decision granting Southeast's vague Petition 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 the Commission's decision in the Timber Energy case described above. 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 tenants assume some portion of ownership in the facilities as a condition to leasing them space. The result of such transactions will be 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 the Commission 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 dilemma described in the PW Ventures case over where to draw the line regarding what constitutes a sale "to the public" has applicability here. If the Commission concludes some form of joint ownership is permissible the question devolves into 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. That 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 facts described in the Petition involve 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 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.

SOUTHEAST'S PETITION FAILS TO STATE SUFFICIENT FACTS TO SUPPORT A DETERMINATION THAT THE PROPOSED TRANSACTION WILL NOT RESULT IN THE UNLAWFUL SALE OF ELECTRICITY OR CAUSE SOUTHEAST OR ITS "CONFIDENTIAL PARTNER" TO BE DEEMED A "PUBLIC UTILITY" AS DEFINED IN SECTION 366.02(1), FLORIDA STATUTES, OR SUBJECT EITHER OF THEM TO REGULATION BY THE COMMISSION

Beyond the lack of "unity of interest" in the ownership structure, 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. Southeast's Petition describes the proposed transaction in the vaguest of terms when it comes to how the proposed generation will be owned, operated and utilized. Paragraph 13 of the Petition alleges that each party's interest (ownership share) in the electrical generation equipment will be "at least as great as its maximum power requirements." This does not indicate who will own what percentage of the generating capacity.

One is left to speculate as to what is meant by "as least as great" or "maximum power requirements." The latter term, maximum power requirements, is vague in and of itself. Does this mean maximum demand in a given period, maximum energy used during a given period or some combination of the two? The Petition does not state whether each party's ownership share of the generating equipment may change over time depending upon each party's "maximum power requirements."

The Petition further states in paragraph 13 that each partner will own title to the electricity produced by its share of the generating equipment. This is equally vague because there is no certainty as to what percentage of the equipment each party will own nor is there any proposed means of accounting for each party's share of the electricity.

The Petition says, at the top of page 12, that it is "likely that, much of the time, the generating equipment will generate more power than the joint owners will use for their own respective needs." This statement allows for the fact that it is likely that some of the time the generating equipment will generate less power than the joint owners use for their own respective needs. When this is the case, who gets the power when it is less than their combined needs? What if the joint venture agreement says the parties will decide who has the most pressing need, and one party may opt to defer to the other party's usage of the limited supply, for compensation to be agreed upon by the parties?

The obvious key missing element here is the Joint Venture Agreement between Southeast and the Confidential Partner. Southeast concedes on page 12 of its Petition that the Joint Venture Agreement does not yet exist and that it is that document that will provide all of the specifics of how the arrangement will operate.

The Petition also discloses in paragraph 14 that the electrical generation equipment will be operated by an "Operation and Management Company," which will be engaged by a contract with, and paid by, Southeast and the Confidential Partner. Presumably this contract does not yet exist either as it is referred to in the future tense in paragraph 14.

Given the non-existence of the Joint Venture Agreement and the contract with the proposed Operation and Management Company one can only speculate as to exactly how Southeast and its undisclosed Confidential Partner intend to utilize the electrical output of the proposed generation equipment. One can assume the parties are not sure what their precise load requirements will be until their respective facilities are up and running. They might, therefore, include a provision in the Joint Venture Agreement providing something along the lines of the following:

> The parties are not sure of their ultimate electrical needs. If it turns out that either of the parties needs more power than previously anticipated and the other party turns out to need less, they may opt to sell power from the one who has an excess interest in the electrical output to the one who doesn't – to meet and balance their respective power requirements, before any excess over their combined needs is sold at wholesale.

The above scenario clearly involves a retail sale by the party with excess generation to the party who falls short.

As stated earlier, the Petition leaves the Commission and all affected persons with no means other than speculation to assess how the proposed transaction will actually be carried out. Southeast and Confidential Partner could, for example, reserve on a monthly, weekly or day ahead basis what they project their electrical needs will be and agree to pay the Operation and

Management Company a demand and energy based monthly compensation to cover the cost of the power actually utilized. Although Southeast attempts to rely upon the Monsanto decision, that case involved a straight lease with the lease payments not varying in accordance with the amount of electricity consumed by Monsanto. To the extent that the financial obligations between Southeast, Confidential Partner and the proposed Operation and Management Company depend upon the amount of electricity consumed by Southeast and Confidential Partner, Monsanto provides no support for a determination that the vaguely described proposal would not constitute a retail sale of electricity subjecting the parties to regulation by the Commission.

On page 18 of its Petition, Southeast focuses on "risks of ownership" citing Monsanto. However, in the Monsanto decision the Commission focused on the risks of operation of the facility, all of which were retained by Monsanto. In this regard, Southeast and Confidential Partner could include in their future contract with the "Operation and Management Company" a provision stating that the operator will lease the equipment from Southeast and Confidential Partner and will be responsible for all of the risks associated with operating the equipment and producing a contracted level of generation. That operation agreement could further state that the operator will provide power to each of Southeast and Confidential Partner on an as-needed basis and on a demand and energy cost-plus basis, with the amount of power provided to each party being based on their respective requirements without regard to the relative ownership interests of the two owners, with anything they don't consume being sold at wholesale. This is not to say that such a provision will necessarily be included in the contract with the Operation and

Management Company. The point is the Commission does not have before it the yet to be drafted agreement and, therefore, cannot verify that such provisions will not be included.[3]

Section 120.565, Florida Statutes, governs declaratory statements by agencies. Subsection (2) of that statute states:

> (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. (Emphasis supplied)

It is clear that Southeast's Petition is anything but clear and fails to state with particularity the manner in which the proposed "sharing" of electric power will operate.

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 v. State, 377 So.2d 32 (Fla. 1st DCA 1979). 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 v. Department of Environmental Protection, 654 So.2d 1047 (Fla. 5th DCA 1995). There is no present, justiciable controversy as to a state of facts for the Commission to address, as there is not yet a state of facts.

The Commission cannot meaningfully address the hypothetically and vaguely stated facts in the Petition. Whether the transaction will result in a retail sale is almost entirely dependent upon the details of how the transaction is formulated. Those details are not yet established.

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[3] Even assuming an agreement could be drafted in a way that sets out terms satisfying the Monsanto and Seminole requirements, the possibility exists that the agreement is subsequently changed such that is no longer satisfies those requirements and the arrangement becomes an unlawful sale of electricity

There is no "bona fide, actual, present and practicable need for the declaratory statement," and an attempt to issue such a statement based on the currently unsettled circumstances would be, at best, premature. In essence, there are no facts alleged in the Petition that would support:

- A determination of the specific amount of electrical output from the proposed power plant Southeast and Confidential Partner will each be entitled to receive.

- A determination that neither Southeast nor Confidential Partner will compensate each other or the Operating and Management Company based on the units of electricity each consumes.

- A determination that neither Southeast nor Confidential Partner will, during any given period, utilize greater than its specific share of the output of the plant.

- A determination that neither Southeast nor Confidential Partner will compensate each other for power intentionally or inadvertently consumed from the other partner's share based on the amount of power thus consumed.

- A determination that the yet to be developed Joint Venture Agreement and the contract with the Operating and Management Company will be structured in such a way as to preclude what amounts to retail sales between and among the two partners or by the Operating and Management Company to Southeast and Confidential Partner.

- A determination that, assuming the declaratory statement is granted, the agreement between Southeast and Confidential Partner cannot be later amended to bring in one or more additional parties, thereby expanding this new electric utility providing retail service within the existing territorial boundaries of an existing electric utility.

- A determination that Southeast and Confidential Partner, as opposed to the Operating and Management Company, will bear all risks of production and then only as to their respective shares of the output of the proposed plant.

Unless and until the Commission is presented with a definitive Joint Venture Agreement and the proposed contract with the Operation and Management Company, the Commission will lack the facts needed to determine whether the proposed arrangement will effect the retail sale of electricity by one entity to one or more others, subjecting the selling entities to this

Commission's regulatory jurisdiction under Chapter 366, Florida Statutes. Given these deficiencies, the Commission should, on its own motion, dismiss the Petition for its failure to state with particularity all of the facts needed to make such a determination.

IF THE COMMISSION DOES NOT DISMISS THE PETITION, IT SHOULD DENY THE PETITION AS DESCRIBING A RELATIONSHIP THAT MORE LIKELY THAN NOT WILL EFFECT A PROHIBITED RETAIL SALE OF ELECTRICITY

As indicated earlier, the Petition should be dismissed based on what is fails to allege. However, it also qualifies for denial on the merits based on what it actually discloses. As vaguely as the proposed partnership arrangement is described in the Petition, one thing is for certain: the proposed Joint Venture Agreement and the proposed agreement with the Operation and Management Company will have to describe numerous metering, accounting and monetary exchange provisions which, more likely than not, will push this project in the direction of a retail sale transaction. The parties to any agreement of the type vaguely described in the Petition would have to keep track of the electricity produced by the plant and the amount which each partner consumes. We also have to assume that Southeast, the Confidential Partner and any operating company dealing with the two all know the value of a dollar and will take steps to ensure that each dollar they put into this arrangement and each dollar they are entitled to receive by virtue of the arrangement will be accounted for and assigned to the party entitled to that benefit. If there is a downturn in the CO_2 market and an uptick in the ethanol market, disparities may occur in the amounts of electricity each party consumes relative to the party's alleged entitlement. It is only rational to assume that the Joint Venture Agreement would address these potential impacts and provide for balancing compensation which can easily constitute retail sales by one of the partners to the other or vice versa. Given the possibility that this would occur, the

lack of specificity in the Petition making clear that it cannot, and the other deficiencies cited in support of dismissing this matter on the Commission's own motion, the Petition should be denied.

SOUTHEAST'S PETITION ERRONEOUSLY SEEKS TO DETERMINE THE RIGHTS OF A PERSON OR PERSONS OTHER THAN THE PETITIONER

On its face the Petition seeks to determine the rights and/or legal status of the Confidential Partner, asking the Commission to determine that it would not be a "public utility" subject to regulation by the Commission. Rule 28-105.001, Florida Administrative Code, in defining the purpose and use of declaratory statements, specifically states:

> A declaratory statement is not the appropriate means for determining the conduct of another person.

The identity of the anonymous "Confidential Partner" is unknown, but one thing is for sure – it is not Southeast. The Petition should be dismissed or denied for its attempt to have the Commission determine the conduct or legal status of another person within a vaguely described set of circumstances.

DENIAL OF THE PETITION DOES NOT PRECLUDE THE BUILDING OF THE RENEWABLE ENERGY FACILITY

Denial of the Petition would not preclude the building of the renewable energy facility as described in the Petition.[4] Southeast has the option of owning and operating the renewable 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.

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[4] The Petition at page 10 acknowledges Southeast is moving forward with building the ethanol plant and the electrical and cogeneration facilities.

The Commission has recognized the need to encourage renewable generation and through its rules has provided favorable treatment for power purchases from renewable facilities. Rules 25-17.210 through 25-17.310, Florida Administrative Code, of which Southeast can take advantage, provide for a variety of capacity payments, a reopening of the contract if new environmental or regulatory requirements change the purchasing utility's avoided costs and for the ownership of tradable renewable energy credits by the renewable generator.

Structuring the transaction as described above will avoid the unlawful sale of electricity while still providing the opportunity for the economic and employment benefits described in the Petition to come to fruition.

CONCLUSION

The Petition filed in this proceeding asks the Commission to disavow its jurisdiction over a proposed transaction so hypothetically and vaguely described as to preclude the Commission from making a reasoned analysis of the transaction in question. What is clear is there is no "unity of interest" between the supplier of electricity and the consumers of electricity; this is not self-service generation. On that basis the Commission should grant the Petition in the negative finding the proposed transaction would result in an unlawful retail sale of electricity.

Alternatively, the Commission should recognize and declare the above-described deficiencies in Southeast's Petition and either dismiss it upon the Commission's own motion or deny the Petition for its failure to comply with the requirements applicable to petitions for declaratory statements.

If the Commission were to find that the proposed transaction would not effect a retail sale, there would be serious repercussions within the existing regulatory scheme in Florida. Such a determination would encourage other non-utility generators to file similarly vague petitions for

declaratory statement in hopes of gaining the opportunity to "cherry pick" large industrial and commercial customers through similar arrangements thereby subverting the established regulatory scheme and jeopardizing the delivery of safe, reliable and reasonably priced electric service to Floridians.

DATED this 8th day of October 2013.

Respectfully submitted,

s/ Susan F. Clark
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ATTORNEYS FOR TAMPA ELECTRIC COMPANY, FLORIDA POWER & LIGHT COMPANY, AND GULF POWER COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum of Law, filed on behalf of Tampa Electric Company, Florida Power & Light Company, and Gulf Power Company has been furnished by electronic mail on this 8th day of October 2013, to the following:

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