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**PROGRESS ENERGY FLORIDA  
DOCKET NO. 050001-EI  
FUEL ADJUSTMENT PROCEEDINGS  
DIRECT TESTIMONY OF  
SAMUEL S. WATERS**

1 **Q. Please state your name, employer, and business address.**

2 **A.** My name is Samuel S. Waters and I am employed by Progress Energy  
3 Carolinas (PEC). My business address is 410 S. Wilmington Street, Raleigh,  
4 North Carolina, 27602.

5  
6 **Q. Please tell us your position with PEC and describe your duties and  
7 responsibilities in that position.**

8 **A.** I am Manager of Resource Planning for Progress Energy Florida (PEF or the  
9 Company) and Progress Energy Carolinas. I am responsible for directing the  
10 resource planning process for both companies. Our resource planning  
11 process is an integrated approach to finding the most cost-effective  
12 alternatives to meet each company's obligation to serve, in terms of long-term  
13 price and reliability. We examine both supply-side and demand-side  
14 resources available and potentially available to the Company over its  
15 planning horizon, relative to the Company's load forecasts. In my capacity

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1 as Manager of Resource Planning, I oversaw the completion of the  
2 Company's most recent TYSP document filed in April 2005.

3

4 **Q. Please summarize your educational background and employment**  
5 **experience.**

6 **A.** I graduated from Duke University with a Bachelor of Science degree in  
7 Engineering in 1974. From 1974 to 1985, I was employed by the Advanced  
8 Systems Technology Division of the Westinghouse Electric Corporation as a  
9 consultant in the areas of transmission planning and power system analysis.  
10 While employed by Westinghouse, I earned a Masters Degree in Electrical  
11 Engineering from Carnegie-Mellon University.

12 I joined the System Planning department of Florida Power & Light  
13 Company (FPL) in 1985, working in the generation planning area. I became  
14 Supervisor of Resource Planning in 1986, and subsequently Manager of  
15 Integrated Resource Planning in 1987, a position I held until 1993. In late,  
16 1993, I assumed the position of Director, Market Planning, where I was  
17 responsible for oversight of the regulatory activities of FPL's Marketing  
18 Department, as well as tracking of marketing-related trends and  
19 developments.

20 In 1994, I became Director of Regulatory Affairs Coordination, where  
21 I was responsible for management of FPL's regulatory filings with the FPSC  
22 and the Federal Energy Regulatory Commission (FERC). In 2000, I returned  
23 to FPL's Resource Planning Department as Director.

1 I assumed my current position with Progress Energy in January of  
2 2004. I am a registered Professional Engineer in the states of Pennsylvania  
3 and Florida, and a Senior Member of the Institute of Electrical and  
4 Electronics Engineers, Inc. (IEEE).

5  
6 **Q. Have you previously testified before this Commission?**

7 **A.** Yes. I have testified in several dockets related to resource planning and the  
8 need for power.

9  
10 **Q. What is the purpose of your testimony in this proceeding?**

11 **A.** My purpose in this testimony is to support the Company's request for  
12 approval of a recent long term purchase agreement with Central Power &  
13 Lime, Inc. (CPL). The agreement calls for the delivery of firm capacity and  
14 energy during the period December, 2005 through December, 2010. The  
15 purchase is a component of the resource plan to meet our obligation to  
16 provide adequate and reliable electric service to our customers. Specifically  
17 this agreement is needed to maintain the 20 percent reserve margin. In  
18 addition to needing this power for system reliability, the fact that the energy  
19 comes from a coal-based resource provides substantial system fuel savings  
20 over the term of the contract. In his testimony, Mr. Portuondo discusses the  
21 appropriate recovery mechanism for recovery of energy and capacity  
22 payments as power is delivered under the agreement.

23

1 **Q. Are you sponsoring any exhibits to your testimony?**

2 **A.** Yes. I am sponsoring Exhibit No. \_\_\_ (SSW-1) - Agreement between  
3 Central Power & Lime, Inc. and Florida Power Corporation, d/b/a  
4 Progress Energy Florida, Inc.

5

6 **Q. Please describe the new agreement.**

7 PEF has entered into an agreement with CPL to purchase the output of a  
8 facility nominally rated at 133 MW, for the period December 1, 2005 through  
9 December 31, 2010. This purchase is needed to maintain a 20% reserve  
10 margin for the PEF system during that timeframe, and provides a valuable  
11 source of coal-fired energy during that period. A copy of the Power Purchase  
12 Agreement with CPL is provided in my Exhibit No. \_\_\_ (SSW-1).

13

14 **Q. Please describe the contract with CPL in more detail.**

15 **A.** The agreement with CPL is a purchase of firm capacity and energy from the  
16 CPL facility, located in Brooksville, Florida. The facility is a coal-fired  
17 electric cogeneration plant with a net output to PEF of 133 MW. The  
18 purchase price for the firm capacity is \$█/kW-month, which is fixed for  
19 the term of the agreement, and energy is priced at \$█/MWh, escalating at █%  
20 per year. The agreement further specifies an availability target of █%,  
21 excluding planned outages. Provisions for scheduling unit energy provide  
22 flexibility for PEF to take less than the full output of the unit if needed.

1 **Q. Please describe the scheduling provisions of the agreement in more**  
2 **detail.**

3 **A.** As described in Exhibit F, the agreement provides 3 cases under which PEF  
4 may adjust the schedule of delivered power from CPL. The first case allows  
5 PEF to extend an outage which has been scheduled in advance, in accordance  
6 with the provisions outlined for the mutually agreed upon scheduling of  
7 planned outages. The second case allows PEF to reduce the scheduled output  
8 of the unit to no less than [REDACTED], with [REDACTED] notice. The third case  
9 allows PEF to take the unit offline, with a minimum of [REDACTED] notice, and  
10 a minimum [REDACTED] notice to bring the unit back on line. In each of these cases,  
11 CPL will charge PEF for MWh not delivered as follows:

12  
13 Case 1 - \$[REDACTED]/MWh for each MWh not delivered less than the  
14 unit's capability.

15 Case 2 - \$[REDACTED]/MWh for each MWh not delivered less than the  
16 unit's capability.

17 Case 3 - \$[REDACTED]/MWh for each MWh not delivered less than the  
18 unit's capability. An additional charge of \$[REDACTED] per  
19 start up would also apply.

20  
21 **Q. Will these provisions affect the economics of the purchase in any**  
22 **significant way?**

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1    **A.**    No, but they do provide exceptional flexibility considering the power is being  
2           provided by a coal-fired cogeneration plant. Using our current projections of  
3           oil and gas prices, we would expect to be buying energy from this facility in  
4           every hour it is available. We do not expect to need the exercising of the  
5           provision at this time.

6  
7    **Q.**    **Does the agreement provide for an adjustment to capacity payments to**  
8           **CPL based on the availability target?**

9    **A.**    Yes. The agreement specifies that, in the event that CPL does not perform up  
10          to the ■% target in a given year, CPL will refund ■% of the capacity  
11          payments for each ■% actual availability falls below ■%, down to ■%. For  
12          each ■% below ■%, CPL will refund ■% of the capacity payment for the  
13          year. Performance below ■% would be a condition of default.

14  
15   **Q.**    **Does this contract provide savings to PEF customers?**

16   **A.**    Yes. In the absence of power provided by this agreement, PEF would have to  
17          acquire an equivalent amount of firm capacity and energy in the summers of  
18          2006 and 2007, and add a combustion turbine to meet demand in the summer  
19          of 2009.

20  
21   **Q.**    **Does this contract provide other benefits to PEF customers?**

22   **A.**    Yes. In addition to the economics of the purchase, the contract will provide  
23          energy from coal-fired generating capacity, providing low-cost energy and

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1 serving to reduce the price volatility of PEF's fuel mix, and, since the  
2 capacity and energy prices are specified over the term of the contract, there is  
3 no uncertainty as to what price will be paid at any point in time.

4

5 **Q. What action should the Commission take at this time regarding this**  
6 **agreement?**

7 **A.** The Commission should find that entering into this agreement at this time is a  
8 reasonable and prudent action by the Company to maintain a 20% reserve  
9 margin over the contract term and stabilize energy costs to customers.  
10 Recovery of energy and capacity costs pursuant to the agreements would be  
11 permitted subject to a finding of reasonableness and prudence at the time the  
12 expenses are presented for cost recovery.

13

14 **Q. Does this conclude your testimony?**

15 **A.** Yes.

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**Exhibit \_\_\_\_ (SSW-1)**

**POWER PURCHASE AGREEMENT**

**BETWEEN**

**FLORIDA POWER CORPORATION,  
d/b/a PROGRESS ENERGY FLORIDA, INC.**

**AND**

**CENTRAL POWER & LIME, INC.**



EXECUTION COPY

**POWER PURCHASE AGREEMENT**  
**BETWEEN**  
**FLORIDA POWER CORPORATION,**  
**d/b/a PROGRESS ENERGY FLORIDA, INC.**  
**AND**  
**CENTRAL POWER & LIME, INC.**

**DATED AS OF AUGUST 23, 2005**

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**POWER PURCHASE AGREEMENT**

**THIS POWER PURCHASE AGREEMENT** (the "Agreement") is made and entered into as of this 23RD day of AUGUST, 2005, between Florida Power Corporation d/b/a Progress Energy Florida, Inc. ("Progress Energy Florida"), a Florida corporation with its principal place of business in St. Petersburg, Florida and Central Power & Lime, Inc. ("CP&L"), a Florida corporation with its principal place of business in Brooksville, Florida. Progress Energy Florida and CP&L shall individually be referred to as a "Party" and collectively as the "Parties."

**WITNESSETH**

**WHEREAS**, CP&L is the sole lessee of a 133 MW coal-fired electric cogeneration plant located in Brooksville, Florida (the "Plant"); and

**WHEREAS**, CP&L proposes to enter into a power purchase agreement with Progress Energy Florida for the purchase and sale of 133 MW of purchase power capacity and associated energy from the Plant; and

**WHEREAS**, the Parties desire to set forth in writing their respective rights and obligations with respect to the purchase and sale of such capacity and energy;

**NOW, THEREFORE**, in consideration of the mutual obligations and undertakings herein contained and intending to be legally bound hereby, the Parties hereto agree as follows:

**ARTICLE I  
DEFINITIONS AND RULES OF INTERPRETATION**

**1.01 Defined Terms.**

[REDACTED]

1

[REDACTED]

2

"Affiliate" shall mean (i) any Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with a Party, and (ii) any Person that, directly or indirectly, is the beneficial owner of ten percent (10%) or more of any class of equity securities of, or other ownership interests in, a Party or of which the Party is directly or indirectly the owner of ten percent (10%) or more of any class of equity securities or other ownership interests.

"Agreement" shall have the meaning given in the preamble.

"Annual Scheduled Maintenance" shall have the meaning given in Section 5.03(a).

"Authorization" shall mean any license, permit, approval, filing, waiver, exemption, variance, clearance, entitlement, allowance, franchise, or other authorization, whether corporate, governmental or otherwise.

"Business Day" shall mean every day other than a Saturday, Sunday or any day that is a legal holiday in the State of Florida.

"Capacity Payment" shall mean the payment to be made by Progress Energy Florida to CP&L in accordance with the provisions of Section 4.03(b) and Exhibit B(2).

"Center for Public Resources" shall have the meaning given in Section 10.04(c).

"Claim" shall have the meaning given in Section 9.02(a).

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"Contract Capacity" shall mean 133 MW.

"Contract Year" shall mean any calendar year during the Term.

"CP&L" shall have the meaning given in the preamble.

"Delivered Energy" shall mean the actual amount of Energy, expressed in MWh, delivered to Progress Energy Florida at the Point of Delivery under this Agreement in any month of the Term.

"Designated Representative" shall have the meaning given in Sections 6.01(f) and 6.02.

"Due Date" shall have the meaning given in Section 4.06(a).

"Effective Date" shall mean the date on which this Agreement is executed by the Parties.

"Energy" shall mean electric energy generated by the Plant.

"Energy Payment" shall mean the payment to be made by Progress Energy Florida to CP&L in accordance with the provisions of Section 4.03(a) and Exhibit B(3).

"Energy Rate" shall have the meaning given in Section 4.03(a).

"EPA" shall have the meaning given in Section 3.02(a).

"Equivalent Availability Factor" (EAF) shall mean the percentage of time the Plant is available to produce energy at the equivalent of its Contract Capacity, derived as follows:

EAF = [REDACTED]

7  
8

Where:  
[REDACTED]

9

[REDACTED]

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[REDACTED]

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[REDACTED]

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"Event of Default" shall have the meaning given in Section 10.01(a).

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[REDACTED]

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"Extension Period" shall have the meaning given in Section 3.03.

"Financing Parties" shall mean institutions (including any trustee or agent on behalf of such institutions) leasing the Plant to CP&L or providing financing or refinancing to CP&L in connection with the ownership, operation, maintenance or leasing of the Plant, including General Electric Capital Corporation.

"Forced Outage" shall mean a full or partial interruption of the generating capability of the Plant which is not an Excused Outage and which is not otherwise permitted under this Agreement.

"FPSC" shall have the meaning given in Section 3.02(c).

"Fuel" shall mean coal used by the Plant to produce Energy.

"Generating Capability" shall mean the level at which the Plant is capable of producing Energy in an hour, taking into consideration any partial outage, but not greater than 133 MW.

"Governmental Authority" shall mean the federal government of the United States, and any state, county or local government or regulatory department, body, political subdivision, commission, agency, instrumentality, ministry, court, judicial or administrative body, taxing authority, or other authority thereof (including any corporation or other entity owned or controlled by any of the foregoing) having jurisdiction over either Party, the Plant, the site, or the Point of Delivery, whether acting under actual or assumed authority.

"Indemnifiable Cost" shall mean any cost, expense, damage, fine, penalty, liability or other loss, including reasonable legal, accounting, consulting, engineering, investigatory, and other expenses.

"Indemnified Party" shall have the meaning given in Section 9.02(d).

"Indemnifying Party" shall have the meaning given in Section 9.02(d).

"Late Payment Rate" shall mean, for any period, [REDACTED] determined as of the date the obligation to pay interest arises, but in no event more than the maximum rate permitted by applicable Law. 1

"Law" shall mean (i) any law, legislation, statute, act, rule, ordinance, decree, treaty, regulation, order, judgment, or other similar legal requirement, or (ii) any legally binding announcement, directive or published practice or interpretation thereof, enacted, issued or promulgated by any Governmental Authority.

"Maintenance Schedule" shall have the meaning given in Section 5.03(a).

"Party" and "Parties" shall have the meaning given in the preamble.

[REDACTED]

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"Person" shall mean any individual, corporation, partnership, joint venture, trust, unincorporated organization or Governmental Authority.

"Plant" shall have the meaning given in the introductory paragraphs of this Agreement.

"Point of Delivery" shall mean Progress Energy Florida's 115 KV metering station located within the CP&L switch yard at the designated generator breaker # OCB-1 as indicated on the Plant diagram attached hereto as Exhibit E.

"Prime Rate" shall mean the prime rate under "Money Rates" as reported in The Wall Street Journal on the first Business Day of each month.

"Progress Energy Florida" shall have the meaning given in the preamble.

[REDACTED]

7

"Proprietary Information" shall have the meaning given in Section 12.05(f).

"Prudent Operating Practice" shall mean any of the practices, methods, standards and acts (including, but not limited to, the practices, methods and acts engaged in or approved by a significant portion of owners and operators of coal fired power plants of technology, complexity and size similar to the Plant in the United States) that, at a particular time, in the exercise of reasonable judgment in light of the facts known or that should reasonably have been known at the

time a decision was made, could have been expected to accomplish the desired result and goals (including such goals as efficiency, reliability, economy and profitability) in a manner consistent with applicable facility design limits and equipment specifications and applicable Law and Authorizations. Prudent Operating Practice is not intended to be limited to the optimum practice, method or act to the exclusion of all others, but rather to be a spectrum of acceptable practices, methods or acts in each case taking into account the Plant as an independent power project.

"Purchaser Assignee" shall have the meaning given in Section 7.02.

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"Seller Assignee" shall have the meaning given in Section 7.03.

"Short Term Scheduled Maintenance" shall have the meaning given in Section 5.03(c).

"System Emergency" shall mean a determination by the operator of the control area or the reliability council in which the Plant is located or other governing body (i) that such control area is in danger of imminent voltage collapse or uncontrollable cascading outages; (ii) that the delivery of the Energy is prohibited or is required to preserve the integrity of, or prevent or limit any instability on, the Progress Energy Florida system; or (iii) that the delivery of the Energy is prohibited or is required because of an emergency condition.

"Technical Specifications" shall mean the technical capabilities of the Plant regarding such matters as ramping capabilities, start-up times, and related technical or operating characteristics. The Technical Specifications shall be as set forth in Exhibit A as such Exhibit may be modified by CP&L.

"Term" shall mean the duration of this Agreement as specified in Article III.

"Transferee" shall have the meaning given in Section 12.05(a).

"Transferor" shall have the meaning given in Section 12.05(a).

"Transmission Provider" shall mean Progress Energy Florida or any successor thereto that provides electric transmission services over the Progress Energy Florida system.

1.02 Rules of Interpretation.

- a. Unless otherwise required by the context in which any term appears:
  - i. Capitalized terms used in this Agreement shall have the meanings specified in this Article.



- ii. The singular shall include the plural and the masculine shall include the feminine and neuter.
- iii. The words "herein," "hereof" and "hereunder" shall refer to this Agreement as a whole and not to any particular section of this Agreement; the words "include," "includes" or "including" shall mean "including, but not limited to;" and the words "best efforts" shall mean a level of effort which, in the exercise of reasonable judgment in the light of facts known at the time a decision is made, can be expected to accomplish the desired result at a reasonable cost, consistent with Prudent Operating Practice.
- iv. The term "negligence" shall mean negligence of a person, including negligence arising from or as a result of the negligence of an officer, director, manager, foreman, or other employee or agent of the person, in each case acting within the scope of their authority in the course of their employment; and the term "willful misconduct" shall mean action taken or not taken by a person, including action taken or not taken by an officer, director, manager, foreman, or other employee of the person, in each case acting in the course of their employment, which action is knowingly or intentionally taken or not taken: (i) with intent that injury or damage would result therefrom, or (ii) with actual knowledge at the time of taking or not taking such action that such action taken or not taken is or shall be a material default under this Agreement, or with conscious indifference to the consequences thereof, or in knowing violation of any Law. Without limiting the foregoing definition in any way, willful misconduct does not include any act or failure to act which is involuntary, accidental, unintentional, or negligent, based on any theory of negligence.
- v. All accounting terms not specifically defined herein shall be construed in accordance with Generally Accepted Accounting Principles in the United States of America, as sanctioned by the Financial Accounting Standards Board, consistently applied.
- vi. All references to a particular entity shall include such entity's successors and permitted assigns.

b. The titles of the articles and sections herein have been inserted as a matter of convenience of reference only and shall not control or affect the meaning or construction of any of the terms or provisions hereof.

c. This Agreement was negotiated and prepared by both Parties with advice of counsel to the extent deemed necessary by each Party; the Parties have agreed to the wording of this Agreement; and none of the provisions hereof shall be construed against one Party on the ground that such Party is the author of this Agreement or any part thereof.

d. The Parties shall act reasonably and in accordance with the principles of good faith and fair dealing in the performance of this Agreement. Unless expressly provided otherwise in this Agreement, (i) where the Agreement requires the consent, approval, or similar action by a Party, such consent or approval shall not be unreasonably withheld, conditioned or delayed, and (ii) wherever the Agreement gives a Party a right to determine, require, specify or take similar action with respect to a matter, such determination, requirement, specification or similar action shall be reasonable.

## **ARTICLE II REPRESENTATIONS AND WARRANTIES**

2.01 Representations and Warranties of Progress Energy Florida. Progress Energy Florida makes the following representations and warranties to CP&L, each of which is true and correct on the Effective Date:

a. Progress Energy Florida is a corporation duly organized and existing in good standing under the Laws of the State of Florida, and it is duly qualified to do business and in good standing in all other jurisdictions where the nature of its properties or the conduct of its business so requires.

b. Progress Energy Florida possesses all requisite corporate power and authority to enter into and perform this Agreement and to carry out the transactions contemplated herein. Progress Energy Florida has all legal power and authority to own and use its properties and to transact the business in which it engages or proposes to engage, and holds or expects to obtain all Authorizations necessary and required therefor.

c. Progress Energy Florida's execution, delivery and performance of this Agreement have been duly authorized by, and are in accordance with, its articles of incorporation and by-laws; this Agreement has been duly executed and delivered for it by the signatories so authorized; and this Agreement constitutes its legal, valid, and binding obligation, enforceable against it in accordance with the terms hereof, except as such enforceability may be limited by applicable bankruptcy Laws, or by general principles of equity (regardless of whether such enforcement is considered in equity or at law).

d. Progress Energy Florida's execution, delivery and performance of this Agreement (i) will not result in a breach or violation of, or constitute a default under, any Authorization, or any contract, lease or other agreement or instrument to which it is a party, or by which it or its properties may be bound or affected; and (ii) does not require the consent, authorization or notification of any other Person, or any other action by or with respect to any other Person (except for consents or authorizations already obtained, notifications already delivered, or other actions already taken).

e. No suit, action or arbitration, or legal, administrative or other proceeding is pending or has been threatened against Progress Energy Florida that would affect the validity or enforceability of this Agreement or the ability of Progress Energy Florida to fulfill its commitments hereunder, or that would, if adversely determined, have a material adverse effect on the business or financial condition of Progress Energy Florida.

f. Progress Energy Florida is not in breach of, in default under, or in violation of, any applicable Law, or the provisions of any Authorization, or in breach of, in default under, or in violation of, any provision of any promissory note, indenture or any evidence of indebtedness or security therefor, lease, contract, or other agreement by which it is bound, which reasonably could be expected to have a material adverse effect on the business or financial condition of Progress Energy Florida or its ability to fulfill its commitments hereunder.

**2.02 Representations and Warranties of CP&L.** CP&L makes the following representations and warranties to Progress Energy Florida, each of which is true and correct on the Effective Date:

a. CP&L is a Florida corporation duly organized and existing in good standing under the Laws of the State of Florida, and it is duly qualified to do business and in good standing in all other jurisdictions where the nature of its properties or the conduct of its business so requires.

b. CP&L possesses all requisite corporate power and authority to enter into and perform this Agreement and to carry out the transactions contemplated herein. CP&L has all legal power and authority to own or lease and to use its properties and to transact the business in which it engages or proposes to engage, and holds or expects to obtain all Authorizations necessary and required therefor.

c. CP&L's execution, delivery and performance of this Agreement have been duly authorized by, and are in accordance with, its articles of incorporation and by-laws and this Agreement has been duly executed and delivered for it by the signatories so authorized; and this Agreement constitutes CP&L's legal, valid and binding obligation, enforceable against it in accordance with the terms hereof, except as such enforceability may be limited by applicable bankruptcy Laws, or by general principles of equity (regardless of whether such enforcement is considered in equity or at law).

d. CP&L's execution, delivery and performance of this Agreement (i) will not result in a breach or violation of, or constitute a default under, any Authorization, or any contract, lease or other agreement or instrument to which it is a party, or by which it or its properties may be bound or affected; and (ii) does not require the consent, authorization or notification of any other Person, or any other action by or with respect to any other Person (except for consents or authorizations already obtained, notifications already delivered, or other actions already taken).

e. No suit, action or arbitration, or legal, administrative or other proceeding is pending or has been threatened against CP&L that would affect the validity or enforceability of this Agreement or the ability of CP&L to fulfill its commitments hereunder, or that would, if adversely determined, have a material adverse effect on the business or financial condition of CP&L.

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**ARTICLE III  
TERM AND TERMINATION**

**3.01 General.**

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**3.02 Early Termination.**

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**c. Authorization by the Florida Public Service Commission.**

Progress Energy Florida shall, as soon as reasonably possible after the Effective Date, make application to the Florida Public Service Commission ("FPSC") for permission to pass through to its retail customers the costs that Progress Energy Florida will incur pursuant to this Agreement. If, within 90 days following submission of such application, the FPSC issues a final order disallowing the pass-through of all such costs, Progress Energy Florida may terminate this Agreement by giving CP&L written notice of termination not later than ten days after the issuance of such order; and if the FPSC does not issue an order addressing the merits of Progress Energy Florida's application by December 1, 2005, Progress Energy Florida may terminate this Agreement by giving CP&L written notice not later than the earlier of (i) December 5, 2005 and (ii) the Commencement Date.

**d. Event of Force Majeure.**

Either Party may terminate this Agreement as a result of an Event of Force Majeure pursuant to and in accordance with Section 8.05 of this Agreement.

3.03 Contract Term Extension

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**ARTICLE IV  
SALE AND PURCHASE OF ELECTRIC ENERGY AND CAPACITY**

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4.01 Purchase and Sale of Energy and Capacity. Starting on the Commencement Date and during each hour of the Term thereafter, CP&L shall commit, sell, and arrange for delivery to the Point of Delivery of an amount of Energy scheduled by CP&L up to the Contract Capacity and Progress Energy Florida agrees to purchase, accept and pay for such Energy at the Point of Delivery in accordance with the terms and conditions of this Agreement.

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4.02 Scheduling.

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4.03 Price.

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4.04 Availability Guarantee.

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4.05 Billing.

a. Progress Energy Florida shall read the meters at the Point of Delivery on the first (1st) Business Day of each month, and shall promptly notify CP&L in writing and retain a record of each such reading. The amount of Delivered Energy delivered to Progress Energy Florida during the preceding month shall be determined from such readings, as such readings are adjusted as contemplated by Section 5.04. CP&L shall have the right to have a representative present at any time that any meter is to be read.

b. Bills for amounts due to CP&L hereunder shall be rendered by CP&L on or before the tenth (10th) day of each month and shall be prepared in accordance with the provisions of Exhibit B hereto.

4.06 Payment and Interest.

a. Payment.

- i. All payments shown to be due on a bill shall be due and payable by the later of (A) the twenty-eighth (28<sup>th</sup>) day of the month in which the bill is rendered and (B) the twentieth (20<sup>th</sup>) day after receipt (the "Due Date").
- ii. If the paying Party, in good faith, disputes a portion of any bill, the paying Party shall provide written notice of the specifics of such dispute to the other Party contemporaneously with its payment of the undisputed portion of the invoice. The Parties shall meet promptly after any notice of a dispute to attempt to resolve the matter.
- iii. If any errors or misstatements should arise in connection with any portion of a bill delivered hereunder, the Parties shall proceed in good faith to resolve such errors or misstatements expeditiously. Adjustments to prior months' bills shall be added to or credited against the next monthly bill.
- iv. The paying Party shall render payment by wire transfer, Automatic Clearing House or such other payment method as the Parties mutually agree upon.

b. Interest.

- i. If the paying Party fails to pay all or a portion of the undisputed amounts billed within the time stated in Section 4.06(a) hereof, the paying Party shall owe interest on the



unpaid portion of the bill, which interest shall accrue daily at the Late Payment Rate, from the Due Date until paid.

- ii. If any portion of a disputed amount is ultimately determined to be due to the billing Party, such amount shall be due and payable not later than ten (10) days after resolution of the dispute, and the paying Party shall owe interest on such portion of such disputed amount to the extent that such portion is determined to be due and owing to the billing Party, which interest shall accrue daily at the Late Payment Rate, from the original Due Date of such amount until such amount is paid.

**4.07 Suspension of Capacity Payments.**

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**4.08 No Set-off.** All payments made by either Party shall be free and clear of, and without any deduction for or on account of, any set-off, counterclaim, or other liability to the billing Party, except to the extent required by Law.

**ARTICLE V  
DELIVERY OF POWER**

**5.01 Electric Characteristics.** Energy to be furnished hereunder shall be in the form of three-phase, sixty (60) Hertz alternating current, at a nominal voltage of one hundred and fifteen kilovolts (115 kV).

**5.02 Point of Delivery.**

a. Title to all Energy delivered to Progress Energy Florida hereunder and full responsibility therefor and risk of loss with respect thereto, shall pass to and vest in Progress Energy Florida at the Point of Delivery.

b. CP&L shall be responsible for the scheduling of required transmission and for all costs, expenses, taxes, fees and charges associated with the delivery of Energy up to the Point of Delivery.

c. Progress Energy Florida shall be responsible for the scheduling of required transmission and for all costs, expenses, taxes, fees and charges associated with the receipt of Energy at the Point of Delivery and the delivery of Energy from the Point of Delivery.

d. Either Party, upon written request of the other, shall provide a certificate of exemption or other reasonably satisfactory evidence of exemption if either Party is exempt from taxes, and shall use all reasonable efforts to obtain and cooperate with obtaining any exemption from or reduction of any taxes.

5.03 Scheduled Maintenance.

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5.04 Metering.

a. Energy delivered by CP&L to Progress Energy Florida hereunder shall be measured by electric watt-hour meters located at the Point of Delivery.

b. Progress Energy Florida's metering of the output of the Plant shall be conducted pursuant to a generator interconnection agreement to be entered into by Progress Energy Florida and CP&L. If upon testing carried out pursuant to the terms of the interconnection agreement, metering equipment is found to be inaccurate and measurements for the period in which metering equipment was in error (or for one-half of the time from the date of the last previous test of the metering equipment) are adjusted in accordance with the terms of the interconnection agreement, then retroactive billing adjustments for such errors shall be made accordingly. All metering equipment shall be arranged so that none of the Energy produced by the Plant that is used to supply station services to the Plant shall be registered by such metering equipment as having been furnished by CP&L to Progress Energy Florida hereunder.

c. CP&L shall have the right to install, at its own expense, metering equipment capable of measuring Energy on an hourly basis at the Point of Delivery. In such event, CP&L shall provide to Progress Energy Florida, at Progress Energy Florida's request, records of the delivery of energy to the Point of Delivery as recorded on such meters and a copy of the record of each test of such meters.

**ARTICLE VI  
RIGHTS AND OBLIGATIONS**

6.01 Rights and Obligations of CP&L.

a. CP&L shall operate and maintain the Plant in accordance with Prudent Operating Practice and the terms of this Agreement.

b. CP&L shall obtain, or cause to be obtained, all Authorizations, leases, easements, or rights-of-way necessary for the operation or maintenance of the Plant. CP&L shall keep Progress Energy Florida informed of the status of all applications for Authorizations by Governmental Authorities to operate the Plant and shall promptly inform Progress Energy Florida of any decision of a Governmental Authority that materially affects the right of CP&L to operate the Plant or substantially affects the cost of operating the Plant.

c. CP&L shall use its best efforts to give advance notice to Progress Energy Florida in the event of either an interruption in the delivery of Energy or a significant variation in the quantity of Energy delivered, in each case from previously scheduled deliveries. During any Annual Scheduled Maintenance, Short-Term Scheduled Maintenance or Forced Outage, CP&L shall keep Progress Energy Florida informed of the status of its maintenance activities and the date on which it expects the Plant to return to service.

d. CP&L shall allow Progress Energy Florida's employees to have access to the Plant site, upon advance notice and during normal business hours, to observe and to make inspections and obtain information required in connection with this Agreement. While at the Plant site, such representatives shall observe such safety precautions as may be required by CP&L and

shall conduct themselves in a manner that will not interfere with the ownership or leasing, or operation or maintenance of the Plant.

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f. CP&L shall designate one or more representatives (each a "Designated Representative") to maintain communications with Progress Energy Florida's Designated Representatives and to facilitate coordination between Progress Energy Florida and CP&L during the Term.

6.02 Rights and Obligations of Progress Energy Florida. Progress Energy Florida shall designate one or more representatives (each a "Designated Representative") to maintain communications with CP&L's Designated Representatives and to facilitate coordination between Progress Energy Florida and CP&L during the Term.

#### ARTICLE VII SALE, TRANSFER OR ASSIGNMENT

7.01 Generally. This Agreement may not be assigned, in whole or in part, by either Progress Energy Florida or CP&L without (i) the prior written consent of the other Party, which consent shall not be unreasonably withheld, and (ii) the written agreement of the assignee whereby such assignee expressly assumes and agrees to perform each and every obligation of the assignor under this Agreement, and any assignment in violation hereof shall be null and void.

7.02 Assignment to Purchaser Assignee. Notwithstanding the foregoing Section 7.01, Progress Energy Florida shall have the right, upon written notice to CP&L, to assign this Agreement to an Affiliate or a party with which it forms a joint venture, merges, sells a substantial part of its assets, or sells a substantial part of its assets pertaining to this Agreement (a "Purchaser Assignee") without CP&L's consent provided that (a) the Purchaser Assignee shall have, at the time of assignment, a long term debt credit rating which is equal to or above the long term debt credit rating of Progress Energy Florida as of the Effective Date, (b) the Purchaser Assignee shall be in substantially the same business as Progress Energy Florida and shall have a demonstrated capability to satisfy the obligations it shall be assuming hereunder, and (c) the Purchaser Assignee shall assume all of the obligations of Progress Energy Florida under this Agreement.

7.03 Assignment to Seller Assignee. Notwithstanding the foregoing Section 7.01, CP&L shall have the right, without Progress Energy Florida's consent, upon 15 days prior written notice to Progress Energy Florida, to assign this Agreement to (i) an Affiliate or a party with which it forms a joint venture, merges, sells a substantial part of its assets, or sells a substantial part of its assets pertaining to this Agreement (a "Seller Assignee") provided that (a) the Seller Assignee shall have at the time of assignment creditworthiness equal to or greater than that of the assignor, (b) the Seller Assignee shall be in the business of owning or operating power plants and shall have a demonstrated capability to satisfy the obligations it shall be assuming hereunder, and (c) the Seller Assignee shall assume all of the obligations of CP&L under this Agreement or (ii) a

Seller Assignee who shall own the Plant provided the Seller Assignee shall assume all of the obligations of CP&L under this Agreement.

7.04 Assignment to Financing Entities. Notwithstanding Section 7.01 above, without the consent of Progress Energy Florida, CP&L may assign, mortgage, hypothecate, pledge or otherwise encumber all or any portion of CP&L's interest in and to this Agreement in favor of any Financing Party and its successors and assigns. Notwithstanding Section 7.01 above, without the consent of Progress Energy Florida, any such Financing Party may assign such interest in and to this Agreement to any subsequent assignee in connection with the sale, transfer or exchange of its rights under this Agreement or assume this Agreement and be deemed Progress Energy Florida's counterparty hereunder in place and in lieu of CP&L in connection with the exercise of its rights and enforcement of its remedies against the Plant under any mortgage, deed of trust or other security instrument creating a lien in its favor or as a result of termination of the lease of the Plant. Without limiting any of the foregoing, Progress Energy Florida agrees to execute and deliver to CP&L's Financing Parties a consent to assignment reasonably similar to other consents executed in connection with non-recourse project financings and which provides, among other things, that CP&L's Financing Parties will receive notice of and a reasonable opportunity to cure any CP&L Events of Default under this Agreement.

## **ARTICLE VIII FORCE MAJEURE**

8.01 Force Majeure Events. As used in this Agreement, an event of Force Majeure means a System Emergency or an event or circumstance beyond the reasonable control of the affected Party which causes the affected Party to experience a delay or failure in performing its obligations under this Agreement, including: acts of God; fire; flood; hurricane; tornado; earthquake; weather conditions which are abnormal for the geographic area in which the Plant is located (but not normal weather conditions for that geographic location, including normal levels and occurrences of rain, wind, and snow); war; riots; strike; the binding order of any Governmental Authority (provided that such order has been resisted in good faith by all reasonable legal means); the failure to act on the part of any Governmental Authority (provided that such action has been timely requested and diligently pursued); the adoption of or change in any Law (including any change in the interpretation thereof) by any Governmental Authority. Notwithstanding the foregoing, neither Party shall be entitled to Force Majeure relief in respect of an event for which this Agreement may be terminated pursuant to Sections 3.02(a) or 3.02(b).

8.02 Excuse for Failure or Delay Caused by Force Majeure. The Party affected by the Event of Force Majeure shall be excused from its failure to perform in strict compliance with the requirements of this Agreement provided that the following conditions are met:

a. The affected Party must give the other Party written notice of the Event of Force Majeure within five (5) Business Days after it becomes aware that its performance has been affected by an Event of Force Majeure, describing the occurrence, the efforts being undertaken to overcome the occurrence, and the anticipated duration of the delay.

b. The affected Party must exercise all reasonable efforts to overcome or minimize the effects of the Event of Force Majeure, consistent with Prudent Operating Practices.

c. The affected Party shall give the other Party written notice as soon as it is able to resume performance.

d. The Event of Force Majeure must not be caused by any negligent or intentional acts, errors, or omissions of the affected Party or its Affiliates, and shall not be caused by any failure to comply with any Law by the affected Party or its Affiliates, or any breach or default of this Agreement by the affected Party.

8.03 Effect of Force Majeure on Payment Obligations.

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8.04 Settlement of Strikes. Notwithstanding Section 8.02(b), neither Party shall be required to settle any strike or other labor disturbance except on terms satisfactory to such Party.

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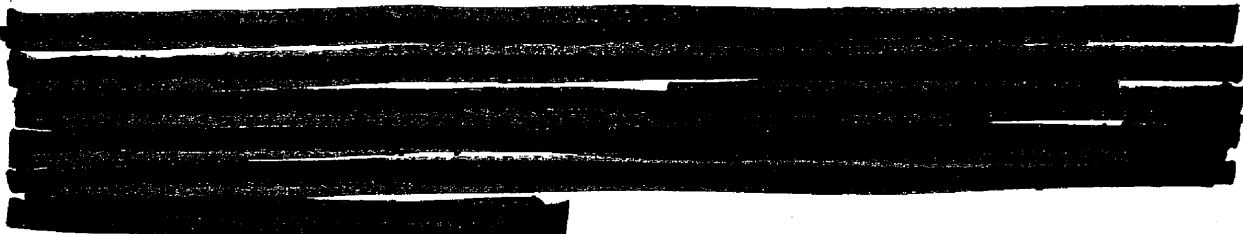
8.05 Termination. Should an Event of Force Majeure delay or prevent performance of any material obligation of a Party under this Agreement for a continuous period exceeding six (6) months, then the other Party may thereafter terminate this Agreement at any time during the continuation of the effect of the Event of Force Majeure by providing written notice to the non-performing Party, provided, however, that if (i) the Event of Force Majeure could not reasonably be remedied in such six (6) month period, (ii) the Event of Force Majeure is susceptible of cure within an additional period, and (iii) the affected Party is proceeding with diligence and in good faith to remedy the effects of the Event of Force Majeure, then such six (6) month period shall be extended by up to an additional six (6) months as shall be necessary to remedy the effects of such Event of Force Majeure.

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8.06 Extension in the Event of Force Majeure:

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**ARTICLE IX  
RISK OF LOSS AND INDEMNIFICATION**

**9.01 Risk of Loss.**

a. CP&L. CP&L shall be responsible for and shall bear the full risk of loss (i) with respect to any loss of or damage to the Plant; and (ii) with respect to any personal injury or death, or loss of or damage to any other property (A) arising out of the ownership or leasing, operation or maintenance of the Plant, or (B) caused by electric power produced by the Plant and occurring on CP&L's side of the Point of Delivery, provided, however, that CP&L shall not be responsible for any loss, damage, or injury arising out of the fault, negligence or willful misconduct of Progress Energy Florida.

b. Progress Energy Florida. Progress Energy Florida shall be responsible for and shall bear the full risk of loss (i) with respect to any loss of or damage to any property located on Progress Energy Florida's side of the Point of Delivery; and (ii) with respect to any personal injury or death, or loss of or damage to any other property (A) arising out of the construction, ownership, operation or maintenance of any property on Progress Energy Florida's side of the Point of Delivery, or (B) caused by electric power produced by the Plant and occurring on Progress Energy Florida's side of the Point of Delivery, provided, however, that Progress Energy Florida shall not be responsible for any loss, damage, or injury arising out of the fault, negligence or willful misconduct of CP&L.

**9.02 Indemnification.**

a. General. Each Party shall protect, indemnify and hold harmless the other Party, its parent company, Affiliates and their respective directors, officers, employees, agents and representatives from and against any Indemnifiable Cost arising out of any injury, bodily or otherwise, to, or death of, persons, or for damage to, or destruction of, property belonging to or leased by the other Party (each a "Claim"), resulting from or attributable to the fault, negligence or willful misconduct of such Party, or resulting from, arising out of, or in any way connected with the performance of the Party's obligations under this Agreement.

b. By Progress Energy Florida and CP&L. If, due to the joint, concurring, comparative or contributory fault, negligence or willful misconduct of the Parties, either Party incurs any Indemnifiable Cost arising out of any Claim, such Indemnifiable Cost shall be allocated between CP&L and Progress Energy Florida in proportion to their respective degrees of fault, negligence or willful misconduct contributing to such Claim.

c. Employees. Neither Party shall be deemed an employee of the other Party. Neither Party shall bring any claim against the other Party with respect to any liability for

compensation under any applicable state or federal Worker's Compensation Act, including Worker's Compensation and/or employer's liability claims of employees. Each Party shall be liable for all claims of the Party's own employees arising out of any provision of any Workers' Compensation Law.

d. Notice and Participation.

- i. If any Party entitled to indemnification hereunder (the "Indemnified Party") intends to seek indemnification under this Article from any other Party (the "Indemnifying Party") with respect to any Claim, the Indemnified Party shall give the Indemnifying Party notice of such Claim upon the receipt of actual knowledge or information by the Indemnified Party of any possible Claim or of the commencement of such Claim, which notice shall in no event be later than the lesser of (i) fifteen (15) Business Days prior to the last day for responding to such Claim or (ii) one-half of the period allowed for responding to such Claim. The Indemnifying Party shall have no liability under this Article for any Claim for which such notice is not provided.
- ii. The Indemnifying Party shall have the right to assume the defense of any Claim, at its sole cost and expense, with counsel designated by the Indemnifying Party and reasonably satisfactory to the Indemnified Party; provided, however, that if the defendants in any such proceeding include both the Indemnified Party and the Indemnifying Party, and the Indemnified Party shall have reasonably concluded that there may be legal defenses available to it which are different from or additional to those available to the Indemnifying Party, the Indemnified Party shall have the right to select separate counsel at the Indemnifying Party's expense, to assert such legal defenses and to otherwise participate in the defense of such Claim on behalf of such Indemnified Party.
- iii. Should any Indemnified Party be entitled to indemnification under this Article as a result of a Claim by a third party, and should the Indemnifying Party fail to assume the defense of such Claim, the Indemnified Party may, at the expense of the Indemnifying Party, contest or, with or without the prior consent of the Indemnifying Party, settle such Claim.
- iv. Except to the extent expressly provided herein, no Indemnified Party shall settle any Claim with respect to which it has sought or is entitled to seek indemnification pursuant to this Article unless (i) it has obtained the prior written consent of the Indemnifying Party, or (ii) the



Indemnifying Party has failed to provide security, in a form reasonably satisfactory to the Indemnified Party, securing the payment of any Indemnifiable Cost, up to the amount of the proposed settlement.

- v. Except to the extent expressly provided herein, no Indemnifying Party shall settle any Claim with respect to which it may be liable to provide indemnification pursuant to this Article without the prior written consent of the Indemnified Party, provided, however, that if the Indemnifying Party has reached a bona fide settlement agreement with the plaintiff(s) in any such proceeding, which settlement includes a full release of the Indemnified Party for any and all liability with respect to such Claim, and the Indemnified Party does not consent to such settlement agreement, then the dollar amount specified in the settlement agreement, plus the Indemnified Party's legal fees and other costs related to the defense of the Claim prior to the date of such settlement agreement, shall act as an absolute maximum limit on the indemnification obligation of the Indemnifying Party with respect to the Claim, or portion thereof, that is the subject of such settlement agreement.

e. Net Amount. In the event that an Indemnifying Party is obligated to indemnify and hold any Indemnified Party harmless under this Article, the amount owing to the Indemnified Party shall be the amount of such Indemnified Party's actual Indemnifiable Cost, net of any insurance or other recovery actually received by the Indemnified Party.

f. Assertion of Claims. No Claim of any kind shall be asserted against either Party, whether arising out of contract, tort (including negligence), strict liability, or any other cause of or form of action, unless it is filed in a court of competent jurisdiction, or a demand for mediation is made, within the applicable statute of limitations period for such Claim.

g. No Release of Insurers. The provisions of this Article shall not be deemed or construed to release any insurer from its obligation to pay any insurance proceeds in accordance with the terms and conditions of valid and collectible insurance policies.

h. Survival of Obligation. The duty to indemnify under this Article shall continue in full force and effect notwithstanding the expiration or termination of this Agreement, with respect to any Indemnifiable Cost arising out of an event or condition which occurred prior to such termination.

9.03 Limitation of Liability. Notwithstanding anything in this Agreement to the contrary, neither Party shall be liable to the other Party for any indirect, incidental, special, punitive, multiple, exemplary, or consequential damage, cost, expense or other liability, including loss of revenue or profits (other than payments expressly required and properly due under this Agreement), whether arising out of contract, tort (including negligence), strict liability, or any

other cause of or form of action whatsoever; provided, however, that this provision shall not limit either Party's obligation to indemnify, defend and hold harmless the other Party for any Claim against such other Party.

9.04 Damage, Destruction, or Condemnation of the Plant.

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**ARTICLE X  
EVENTS OF DEFAULT AND REMEDIES**


10.01 Events of Default.

a. A Party's failure to perform its obligations under this Agreement upon the occurrence of any of the following events or conditions, each of which shall be an "Event of Default" for purposes of this Agreement unless cured within the time, if any, allowed under Section 10.01 (b):

- i. A Party's liquidation or dissolution, unless such liquidation or dissolution is in connection with a restructuring or reorganization of the Party, and upon the consummation of such restructuring or reorganization this Agreement has been assigned to an Affiliate in compliance with Section 7.01.
- ii. A Party's failure to make any payment to the other Party required under this Agreement, excluding payments that the Party notifies the other Party in writing that it disputes in good faith.
- iii. Except as may be excused by an event of Force Majeure, a Party's failure to comply with any material provision of this Agreement.
- iv. Any material misrepresentation by a Party under Article II.
- v. The filing of a case or proceeding under any bankruptcy Law by or against a Party as debtor that could materially impact the Party's ability to perform its obligations hereunder, provided, however, that the Party shall be given one hundred and twenty (120) days after such filing by a third party in

which to obtain a stay or dismissal prior to this provision constituting an Event of Default.

vi. Any material failure by either Party to comply with any Law or the terms of any Authorization, if such failure prevents such Party from complying with its obligations as required under this Agreement.

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b. Cure periods for any default under this Agreement that is specified in Section 10.01(a) shall be as follows:

- i. With respect to any event listed in Section 10.01(a)(ii), a Party shall be given five (5) Business Days after written notice from the other Party in which to cure such default before such event shall constitute an Event of Default.
- ii. With respect to any event listed in Sections 10.01(a)(iii), (iv) or (vi), the defaulting Party shall be given thirty (30) days after written notice from the other Party in which to cure such default before such event shall constitute an Event of Default; provided, however, that if the defaulting Party has initiated a cure reasonably satisfactory to the other Party within such thirty (30) day period, and after having diligently pursued such cure is unable to implement it within such thirty (30) day period, then such event shall not constitute an Event of Default so long as the defaulting Party diligently and continuously pursues such cure until it is fully implemented to the other Party's reasonable satisfaction, provided that such cure is fully implemented no later than twelve (12) months after notice.
- iii. The events listed in Sections 10.01(a)(i), (v), or (vii) shall constitute Events of Default upon their occurrence and no cure period shall be applicable.

**10.02 Remedies Upon Default.** Upon the occurrence of an Event of Default or if otherwise permitted under this Agreement, the non-defaulting Party may exercise any one or more of the following remedies:

a. Exercise all remedies available at law or at equity or other appropriate proceedings, including bringing an action or actions from time to time for recovery of amounts due and unpaid by the other Party, and/or for damages and expenses resulting from the Event of

Default, which shall include all costs and expenses reasonably incurred in the exercise of its remedy (including reasonable attorney's fees).

b. Without recourse to legal process, terminate this Agreement by delivery of a written notice to the other Party declaring termination.

#### 10.03 Election of Remedies.

a. Except as specifically limited in this Agreement, each and every right, power and remedy of a Party, whether specifically stated in this Agreement, or otherwise existing, may be exercised concurrently or separately, from time to time, and so often and in such order as may be deemed expedient by the exercising Party, and the exercise or the beginning of the exercise of any such right, power or remedy shall not be deemed a waiver of the right to exercise, at the same time or thereafter, any other right, power or remedy. No delay or omission of a Party in the exercise of any right, power or remedy shall impair or operate as a waiver thereof or of any other right, power or remedy then or thereafter existing.

b. Notwithstanding any other provision of this Article, neither Party shall terminate this Agreement following the occurrence of an Event of Default by the other Party if, prior to the defaulting Party's receipt of a notice of such termination, and notwithstanding the expiration or unavailability of any cure period provided under this Agreement, the defaulting Party shall have cured the Event of Default.

#### 10.04 Dispute Resolution.

a. The Parties shall settle any dispute arising out of or relating to this Agreement through the step negotiation and non-binding mediation set forth herein prior to the initiation of any litigation. Good faith participation in these procedures shall be a condition precedent to any litigation. All negotiations pursuant to this Article shall be confidential and shall be treated as compromise and settlement negotiations for purposes of the Federal Rules of Evidence and State Rules of Evidence.

b. All applicable statutes of limitation and defenses based upon the passage of time shall be tolled while the procedures specified in this Article are pending. The Parties shall take such action, if any, required to effectuate such tolling.

c. Either Party may give the other Party written notice of any dispute not resolved in the normal course of business. Executives of both Parties shall meet at a mutually acceptable time and place within ten (10) days after delivery of such notice and thereafter as often as they reasonably deem necessary, to exchange relevant information and to attempt to resolve the dispute. If the matter has not been resolved by these persons within thirty (30) days of the disputing Party's notice, or if the Parties fail to meet within ten (10) days, either Party may initiate mediation as provided hereinafter. The mediation proceeding shall be conducted in accordance with the then current Center for Public Resources ("CPR") Model Procedure for Mediation of Business Dispute or other mutually agreed upon procedures, with the following exceptions:

- i. if the Parties have agreed to pursue mediation but have not agreed within thirty (30) days of the request for mediation

on the selection of a mediator willing to serve, the CPR, upon the request of either Party, shall appoint a member of the CPR Panel of Neutrals as the mediator; and

- ii. efforts to reach a settlement shall continue until the conclusion of the proceeding, which is deemed to occur upon the earliest of: (a) a written settlement is reached, (b) the mediator concludes and informs the Parties in writing that further efforts would not be useful, (c) the Parties agree in writing that an impasse has been reached, or (d) the date which is thirty (30) days from the day on which a notice is delivered under Section 10.04(c) above. Neither Party may withdraw before the conclusion of the proceeding.

d. If the Parties are unable to resolve the disputes and litigation proves necessary, either party may initiate such litigation. The exclusive venue for any such litigation shall be the Circuit Court of Hernando County, Florida. The Parties expressly consent to the jurisdiction of such Circuit Court and to its exclusivity of venue.

e. The Parties hereby expressly agree that all disputes, claims, and counterclaims relating to this Agreement and the project shall be litigated, adjudicated, or otherwise resolved without a jury. The Parties expressly, voluntarily, and unequivocally waive any right they may have to a jury trial in connection with all disputes, claims and counterclaims relating to this Agreement.

## **ARTICLE XI INSURANCE**

11.01 Coverage and Amounts. CP&L, and all contractors and subcontractors performing any services in connection with the operation or maintenance of the Plant, shall obtain and maintain in force comprehensive general liability insurance, public liability coverage and property insurance for injury to persons and property, automobile liability insurance and workman's compensation insurance, all in amounts and under terms which are generally carried by owners or lessees, operators or maintainers of equipment similar to the Plant. In the event that any insured Party reasonably determines that any such policy of insurance is no longer available at commercially reasonable rates, such insured Party shall not be obligated to continue to carry such insurance, and shall obtain substitute insurance which is as nearly identical as possible to the policy of insurance which it is intended to replace.

## **ARTICLE XII MISCELLANEOUS**

12.01 Applicable Law. This Agreement is executed in accordance with and is intended to be construed under the Laws of the State of Florida, excluding any Law related to conflict or choice of Law which would result in the application of any Law to this Agreement other than the Laws of the State of Florida.

12.02 Notice and Service. Any notice, demand, request, consent, approval, confirmation, communication, or statement which is required or permitted under this Agreement, shall be in writing, except as otherwise provided, and shall be given or delivered by personal service, telecopy, telegram, Federal Express or comparable overnight delivery service, or by deposit in any United States Post Office, postage prepaid, by registered or certified mail, addressed to the Party at the address set forth below. Changes in such address shall be made by notice similarly given.

If to Progress Energy Florida:

Progress Energy Florida, Inc.  
410 South Wilmington Street  
Raleigh, North Carolina 27601  
Attention: Vice President of Regulated Commercial Operations  
Telephone Number: 919-546-4552  
Facsimile Number: 919-546-4640

and

Progress Energy Florida, Inc.  
410 South Wilmington Street  
Raleigh, North Carolina 27601  
Attention: General Counsel  
Telephone Number: 919-546-5362  
Facsimile Number: 919-546-3805

If to CP&L:

Central Power & Lime, Inc.  
10311 Cement Plant Road  
Brooksville, FL 34601  
Attention: President  
Facsimile Number: 352-799-3508

With copies to:

DPC Atlantis, LLC  
67 Park Place East  
Morristown, NJ 07960  
Attention: General Counsel  
Facsimile Number: 973-889-0020

And

Skadden, Arps, Slate, Meagher & Flom LLP  
1440 New York Avenue, NW  
Washington, DC 20005  
Attention: Martin Klepper  
Facsimile Number: 202-393-5760

Notices shall be deemed to have been received, and shall be effective, upon receipt. Notices of changes of address by either Party shall be made in writing no later than ten (10) days prior to the effective date of such change.

12.03 Amendment. This Agreement is intended as the final expression of the Parties' agreement and it is the complete and exclusive statement of the terms thereof. No statements or agreements, oral or written, made prior to the date hereof, shall vary or modify the written terms set forth herein, and neither Party shall claim any amendment, modification, or release from any provision hereof by reason of a course of action or mutual agreement unless such agreement is in writing signed by both Parties and specifically states it is an amendment to this Agreement. Except as otherwise provided in this Agreement, absent agreement of the Parties to a proposed change, the standard of review for changes to this Agreement proposed by a Party, a non-Party or the Federal Energy Regulatory Commission acting *sua sponte* shall be the "public interest" standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (the "*Mobile-Sierra*" doctrine).

12.04 Maintenance of Records. Both CP&L and Progress Energy Florida shall keep a record of all invoices, receipts, charts, computer printouts, punch cards or magnetic tapes related to the volume or price of capacity sales made under this Agreement. Such records shall be made available for inspection by either Party upon reasonable notice at the principal place of business of the non-requesting Party during regular business hours. All such materials shall be kept on record for a minimum of [REDACTED] from the date of their preparation.

12.05 Confidentiality.

a. Any Proprietary Information of a Party (the "Transferor") which is disclosed to or otherwise received or obtained by the other Party (the "Transferee") incident to this Agreement shall be held in confidence, and the Transferee shall not publish or otherwise disclose any Proprietary Information to any Person for any reason or purpose whatsoever, or use any Proprietary Information for its own purposes or for the benefit of any Person, without the prior written approval of the Transferor, which approval may be granted or withheld by the Transferor in its sole discretion. Without limiting the generality of the foregoing, each Party shall observe the same safeguards and precautions with regard to Proprietary Information which such Party observes with respect to its own information of the same or similar kind.

b. Each Party agrees that it will make available Proprietary Information received from the other Party to its own personnel only on a need-to-know basis, and that all Persons to whom such Proprietary Information is made available will be made aware of the confidential nature of such Proprietary Information, and will be required to agree to hold such Proprietary Information in confidence under terms substantially identical to the terms hereof.

c. Notwithstanding the foregoing:

- i. A Transferee may provide any Proprietary Information to any Governmental Authority having jurisdiction over or asserting a right to obtain such information, provided that (i)

such Governmental Authority orders that such Proprietary Information be provided, and (ii) the Transferee promptly advises the Transferor of any request for such information by such Governmental Authority and cooperates in giving the Transferor an opportunity to present objections, requests for limitation, and/or requests for confidentiality or other restrictions on disclosure or access, to such Governmental Authority.

- ii. CP&L may disclose Proprietary Information to any Governmental Authority in connection with the application for any Authorization for the Plant.
- iii. A Transferee may disclose Proprietary Information to any assignee or potential assignee in connection with an assignment of this Agreement permitted by the terms of Article VII above provided that the Transferee shall disclose Proprietary Information to a potential assignee only if the Transferee enters into an agreement with the assignee or potential assignee that obligates the assignee or potential assignee to comply with confidentiality undertakings substantially similar to those set forth in this Section 12.05.

d. In the event of a breach or threatened breach of the provisions of Section 12.05 (a) by any Transferee, the Transferor shall be entitled to an injunction restraining such Party from such breach. Nothing contained herein shall be construed as prohibiting the Transferor from pursuing any other remedies available at law or equity for such breach or threatened breach of this Agreement.

e. The obligation to retain information in confidence shall continue in full force and effect during the Term and for a period of [REDACTED] thereafter, notwithstanding the expiration or termination of this Agreement, with respect to any information obtained by any Party prior to such termination. 1

f. Definition of Proprietary Information:

- i. The term "Proprietary Information" means all information, written or oral, which has been or is disclosed by the Transferor, or by any Affiliate of the Transferor, or which otherwise becomes known to the Transferee, or to any Affiliate of such Transferee, or any other party in a confidential relationship with, the Transferee, and which (A) relates to matters such as patents, trade secrets, research and development activities, draft or final contracts or other business arrangements, books and records, budgets, cost estimates, pro forma calculations, engineering work product, environmental compliance, vendor lists, suppliers, manufacturing processes, energy consumption, pricing



information, private processes, and other similar information, as they may exist from time to time, or (B) the Transferor expressly designates in writing to be confidential. Proprietary Information shall also include information regarding the terms of this Agreement, including the Energy Rate, the Capacity Payment, and other commercial terms hereof.

- ii. Proprietary Information shall exclude information falling into any of the following categories:
  - A. Information that, at the time of disclosure hereunder, is in the public domain, other than information that entered the public domain by breach of this or any other agreement, or in violation of any Law;
  - B. Information that, after disclosure hereunder, enters the public domain, other than information that entered the public domain by breach of this or any other agreement, or in violation of any Law;
  - C. Information, other than that obtained from third parties, that prior to disclosure hereunder, was already in the recipient's possession, either without limitation on disclosure to others or subsequently becoming free of such limitation;
  - D. Information obtained by the recipient from a third party having an independent right to disclose the information; or
  - E. Information that is available through independent research without use of or access to the Proprietary Information.

**12.06 No Partnership.** Notwithstanding any provision of this Agreement, CP&L and Progress Energy Florida do not intend to create hereby any lease, joint venture, partnership, association taxable as a corporation, or other entity for the conduct of any business for profit. Neither Party shall have any right, power or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as or be an agent or representative of, or to otherwise bind, the other Party.

**12.07 No Duty To Third Parties.** Except as provided in Articles VII and IX, this Agreement is for the sole benefit of the Parties hereto, and nothing in this Agreement or any action taken hereunder shall be construed to create any duty, liability or standard of care to any person not a Party to this Agreement. Except as specifically provided herein, no person shall have any rights or interest, direct or indirect, in this Agreement or the services to be provided hereunder, or both, except Progress Energy Florida and CP&L. Except as provided in Articles VII and IX, the Parties specifically disclaim any intent to create any rights in any person as a third-party beneficiary to this Agreement or the services to be provided hereunder, or both.

12.08 Counterparts. This Agreement may be executed simultaneously in two (2) or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

12.09 Severability. If any provision of this Agreement shall be determined to be unenforceable, void or otherwise contrary to Law, such condition shall in no manner operate to render any other provision of this Agreement unenforceable, void or contrary to Law, and this Agreement shall continue in force in accordance with the remaining terms and provisions hereof, unless such condition invalidates the purpose or intent of this Agreement. In the event that any of the provisions, or portions or applications thereof, of this Agreement are held unenforceable or invalid by any court of competent jurisdiction, the Parties shall negotiate in good faith to attempt to implement an equitable adjustment in the provisions of this Agreement with a view toward effecting the purposes of this Agreement by replacing the provision that is unenforceable, void, or contrary to Law with a valid provision the economic effect of which comes as close as possible to that of the provision that has been found to be unenforceable, void, or contrary to Law.

12.10 Audit Rights. Each Party shall have the right throughout the Term, upon reasonable prior notice, to audit the other Party's books and records to the limited extent necessary to verify the basis for any claim by either of the Parties for payments hereunder or to determine the other Party's compliance with the terms of this Agreement. The audited Party shall make such records available at its office during normal business hours and the auditing Party shall reimburse the other Party for reasonable costs incurred by the audited Party in connection with the audit, as supported by appropriate documentation.

12.11 Successors and Assigns. Except to the extent otherwise indicated herein, all the rights, benefits, duties, liabilities and obligations of the Parties hereto shall inure to the benefit of and be binding upon their respective successors and permitted assigns.

12.12 Integration. There are no understandings between the Parties as to the subject matter of this Agreement other than as set forth herein, and this Agreement represents the entire understanding between the Parties in relation to the subject matter hereof. This Agreement supersedes any and all previous agreements, arrangements or discussions between the Parties (whether written or oral) in respect of the subject matter hereof, all of which are hereby abrogated and withdrawn.

12.13 Survival. The provisions of Article IX, Section 10.2 and Section 12.05 shall continue in effect after the termination of this Agreement and the performance by the Parties of their obligations hereunder.

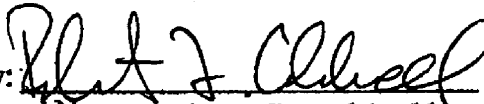
12.14 No Recourse. No recourse shall be had for the payment or performance of any of CP&L's obligations, covenants or agreements under this Agreement, against any incorporator, direct or indirect shareholder, member, partner, officer, director or Affiliate, (whether past, present or future) of CP&L or any Affiliate thereof, whether by virtue of any constitutional provision, statute or rule of law, or by the enforcement of any assessment or penalty or otherwise.

IN WITNESS WHEREOF, the Parties have caused the signatures of their authorized officers and their seals to be affixed as of the day and year first above written.

**FLORIDA POWER CORPORATION, D/B/A  
PROGRESS ENERGY FLORIDA, INC.**

**ATTEST:**


Linda Norberg

By:   
Typed Name: Robert F. Caldwell  
Title: Vice President  
Date: August 23, 2005

**CENTRAL POWER & LIME, INC.**

**ATTEST:**

C. Thomas Pauk

By:   
Typed Name: ROBERT R. NOBLE  
Title: President CP&L, Inc.  
Date: August 23, 2005

[REDACTED]

[REDACTED]

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**EXHIBIT A  
TECHNICAL SPECIFICATIONS**

The Plant is located approximately 7.5 miles from the Florida Power Corporation ("FPC") 115 kV Brookridge Substation. Major Plant equipment includes a 930,000 pounds per hour Babcock & Wilcox pulverized coal boiler, 43.5 MVA GE HP steam turbine and a 112.5 MVA GE LP steam turbine.

The Plant is permitted to operate up to [REDACTED] hours per year.

Electrical interconnection of the Plant with FPC at the 115kV Brookridge Substation is made via a 7.5-mile transmission line that is owned and maintained by the Plant.

**Operating Limits:**

Minimum Operating Level [REDACTED] MW (net)

Hot Start:           Resynchronize  
                          Minimum Output  
                          Maximum Output

Warm Start:         Resynchronize  
                          Minimum Output  
                          Maximum Output

Cold Start:         Resynchronize  
                          Minimum Output  
                          Maximum Output

Ramp Up (above Min. Output)         [REDACTED] MW per minute

Ramp Down (above Min. Output)       [REDACTED] MW per minute

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**EXHIBIT B  
INVOICES**

1. Each monthly bill prepared by CP&L and delivered to Progress Energy Florida pursuant to the provisions of Section 4.05 shall include a summary of the quantities of Delivered Energy delivered by CP&L to the Point of Delivery during such month and any Energy Payments and Capacity Payments due to CP&L.

2. Each monthly Capacity Payment shall be calculated as follows:

CP = [REDACTED]

Where:

[REDACTED]

[REDACTED]

3. Each monthly Energy Payment shall be calculated as follows:

EP = [REDACTED]

Where:

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4. [REDACTED]

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EXHIBIT C

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**EXHIBIT D**

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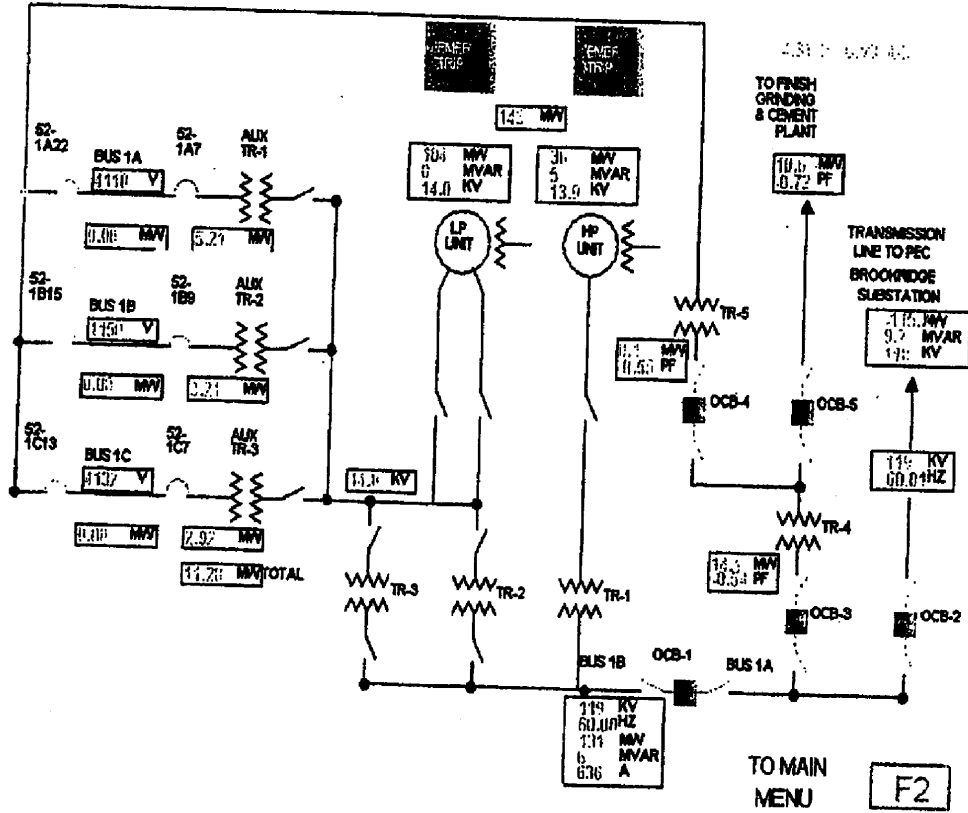
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# EXHIBIT E PLANT DIAGRAM



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EXHIBIT F  
SCHEDULING FLEXIBILITY OPTIONS

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