Ruth Nettles

From: Richzambo@aol.com
Sent: Monday, September 17, 2007 1:56 PM
To: Filings@psc.state.fl.us
Cc: Lorena Holley; sclark@radeylaw.com; bryan_anderson@fpl.com; bill_walker@fpl.com
Subject: FICA's Amended Petition in Docket No. 070236-EQ -- TECO Standard Offer Contract
Attachments: 091707~2.DOC

1. Attorney responsible for this electronic filing:

Rich Zambo
Richard A. Zambo, P.A.
2336 S.E. Ocean Boulevard, #309
Stuart, Florida 34996
Phone: 772 225 5400
Mobile: 954 224 5863
email: richzambo@aol.com

2. Docket numbers and titles in which filing is submitted:

DOCKET NO. 070236-EQ -- In re: Petition for approval of standard offer contract for small qualifying facilities and producers of renewable energy, by Tampa Electric Company

3. Party on whose behalf this filing is submitted:

The Florida Industrial Cogeneration Association

4. Total number of pages in filing:

25 (twenty five) pages

5. Document attached:

Amended Petition For Formal Hearing and For Leave to Intervene

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If you have any questions or require anything further in this regard, please do not hesitate to let us know immediately.

Rich Zambo
Richard A. Zambo, P.A.
Attorneys and Counsellors
2336 S.E. Ocean Boulevard, #309
Stuart, Florida 34996
Phone: 772 225 5400
FAX: 772 232 0205
Cell: 954 224 5863
email: richzambo@aol.com

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of standard offer for small qualifying facilities and producers of renewable energy, by Tampa Electric Company
____________________________________/

Docket No. 070236-EQ

Filed: September 17, 2007

The Florida Industrial Cogeneration Association's
Amended Petition For Formal Hearing and For Leave to Intervene

Pursuant to Sections 120.569(1) and 120.57, Florida Statutes, Rules 25-22.029 and 28-106.201, Florida Administrative Code, and in accordance with the provisions of Order Nos. PSC-07-0494-TRF-EQ and PSC-07-0724-PCO-EQ, the Florida Industrial Cogeneration Association (FICA) and its members, by and through their undersigned attorneys, file this Amended Petition For Formal Hearing and For Leave to Intervene to protest Order No. PSC-07-0494-TRF-EQ which preliminarily approved Tampa Electric Company's (TECO) Standard Offer Contract for the purchase of energy and capacity from renewable energy facilities. In support thereof, FICA says:

Introduction

1. The name and address of the agency affected is:

The Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

2. The name, address, and telephone number of the Petitioners are:

Florida Industrial Cogeneration Association
c/o Richard A. Zambo
Richard A. Zambo, P.A.
2336 S.E. Ocean Boulevard, #309
Stuart, Florida 34996
Telephone: (772) 225-5400
Facsimile: (772) 232-0205

DOCUMENT NUMBER-DATE
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3. Copies of all correspondence, pleadings, and other documents should be provided to:

Florida Industrial Cogeneration Association
c/o Richard A. Zambo
Richard A. Zambo, P.A.
2336 S.E. Ocean Boulevard, #309
Stuart, Florida 34996
Telephone: (772) 225-5400
Facsimile: (772) 232-0205

Jon C. Moyle, Jr.
118 N. Gadsden Street
Tallahassee, Florida 32301
Telephone: (850) 681-3828
Facsimile (850) 681-8788

Notice of Receipt of Agency Action

4. Petitioners received notice of the agency's proposed decision on or about June 12, 2007.

Background

5. Section 366.91, Florida Statutes, was enacted by the Florida Legislature expressly to "promote the development of renewable energy resources in this State." In furtherance of this express legislative goal, the Commission engaged in rulemaking and adopted amendments to its rules. The investor-owned utilities then filed standard offer contracts and tariffs in alleged compliance with those rules. On July 2, 2007, FICA filed a Petition for Formal Hearing and Leave to Intervene protesting and challenging such filings.

6. Order No. PSC-07-0724-PCO-EQ dismissed FICA's initial protest and petition challenging the utilities' filings without prejudice based on a determination that FICA's filing did not comply with the pleading requirements of rule 28-106.201, Florida Administrative Code. Without conceding this point[1], FICA files this amended petition that clearly meets such

[1] FICA wishes to make it clear that it does not accede to or accept the Commission's interpretation and application of *Brockwood Extended Care Center of Homestead, LLP v. Agency for Healthcare Administration*, 870 So.2d 834 (Fl. 3rd

requirements. The amended petition specifically identifies the specific issues and ultimate facts that warrant reversal of the Commission's preliminary decision to approve the TECO standard offer contract and is directly related to the terms and conditions of the standard offer contract TECO has proposed and which the Commission *preliminarily* approved.

7. In *Brockwood Extended Care Center of Homestead, LLP v. Agency for Healthcare Administration*, 870 So.2d 834, 841 (Fl. 3rd DCA 2003), the court stated:

> . . . [A] petitioner's efforts to comply with the . . . statutory [pleading] requirements should be viewed for substantial compliance so as to allow the opportunity and resolution of the matter on the merits. . . .

And, as Judge Cope stated in his concurring opinion in *Brockwood* at 842: "Because of due process considerations, if there is any doubt about the sufficiency of the petition, the doubt must be resolved in favor of granting the hearing." FICA has more than clarified any "doubt" about its petition through this amendment that sets out the disputed factual and legal issues.

8. Further, and most importantly, this is the *only* opportunity FICA has to challenge the numerous and detailed provisions of TECO's standard offer contract, many of which are contrary to section 366.91, Florida Statutes, and the Commission rules implementing that statute and most of which appear *nowhere* in the Commission's rules at all. TECO may not include contractual provisions which are contrary to the purpose and intent of the statute and rule simply because the rule does not explicitly prohibit them. The matters raised in FICA's amended petition should be resolved on the merits in this case.

9. The Commission approved TECO's contract *without hearing* pursuant to the Proposed Agency Action (PAA) process. The Commission must consider all the issues raised herein, including those arising out of these issues, because they relate to TECO's proposed standard

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DCA 2003), to this case. FICA explicitly reserves and does not waive the right to raise the Commission's misapplication of this case at the conclusion of this matter.

offer contract and have been fully presented in a timely-filed protest. Failure to grant a hearing on FICA's petition would contravene established due process precepts and the requirements of the Administrative Procedure Act.

10. Finally, in the rule adoption docket[2], when discussing what should be included in the amended rules, Commissioner Carter commented that: *"It seems to me that a lot of what I'm hearing, the level of details don't lend themselves to be in the rule. They lend themselves to be in contracts."*[3] When the Commission considered and voted on the proposed rules, Commissioner Tew asked Staff how contract issues, such as the equity penalty, would be addressed. Staff Counsel, Mr. Harris, replied that if a contract term to which a party objected was included in a tariff, the party "*has the opportunity to file a request for hearing on that tariff, and it goes to an evidentiary hearing.*"[4] FICA is simply attempting to follow the very procedure Mr. Harris described to the Commission and on which FICA relied as a means to redress its objections to contract terms.

Statement of Substantial Interests

11. FICA is a trade association of Florida industrial cogenerators the members of which purchase and consume substantial amounts of electricity and cogenerate substantial amounts of electricity and thermal energy (combined heat and power) using renewable energy resources.

12. FICA members produce and consume large quantities of electricity, the cost of which comprises a substantial portion of their manufacturing costs. The Commission's decision in this proceeding on the rates, terms and conditions contained in TECO's proposed standard offer contract will determine the extent to which renewable energy resources are promoted and developed in the State and will affect the availability, cost and reliability of the supply of electricity to FICA members.

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[2] *In re: Proposed amendments to Rule 25-27.0832, F.A.C., Firm Capacity and Energy Contracts*, Docket No. 060555-EI.
[3] Rule workshop transcript, November 9, 2006 at 171.
[4] Agenda transcript, January 9, 2007 at 63.

13. FICA members own and operate cogeneration (combined heat and power) facilities that utilize recovered waste heat from the manufacturing processes to produce electricity and useful thermal energy. Such recovered waste heat is considered a renewable energy resource pursuant to Chapter 366.91, F.S. Accordingly, TECO's proposed renewable energy contract that is the subject of these proceedings will apply to FICA's members and their generating facilities that produce electricity from waste heat thereby further affecting the substantial interests of FICA's members.

14. The TECO proposed contract contains unduly burdensome and onerous terms and conditions and inadequate payments that will affect FICA members' substantial interests and that will discourage rather than encourage the development of renewable energy, in direct contravention of section 366.91, the very section the Commission's new rules are designed to implement.

15. The substantial interests of FICA's members will be directly affected by the Commission's decision in this proceeding and are the type of interests that this proceeding is designed to protect. *See, e.g., Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So.2d 478 (Fla. 2d DCA 1981).

Disputed Issues Of Material Fact and Law[5]

16. FICA's allegations of disputed issues of fact and law include, but are not limited to, the issues delineated below.[6] Rule 25-17.200, Florida Administrative Code, delineates the Application and Scope of the rules relevant to this proceeding. Rule 25-17.200 states that the purpose of the Commission's renewable energy rules is to:

[5] Order No. PSC-07-0724-PCO-EQ provided FICA with the opportunity to amend its initial petition, which FICA has done herein. However, as more facts regarding FPL's intent and interpretation of its contract are revealed through discovery and testimony in this matter, FICA reserves the right to amend and/or refine the issues in dispute. At this point in the proceeding, FICA has only the bare contract on which to base its pleading on; no doubt FPL will provide more information bearing on its filing as this docket progresses. Further, as is the Commission's practice, the issues will be further refined through the issue identification process prior to the submission of expert testimony.
[6] These disputed facts put TECO "on notice as to what portions of [its contract] FICA finds objectionable." Order No. PSC-07-0724-PCO-EQ at 4.

> *promote the development of renewable energy; protect the economic viability of Florida's existing renewable energy facilities; diversify the types of fuel used to generate electricity in Florida; lessen Florida's dependence on natural gas and fuel oil for the production of electricity; minimize the volatility of fuel costs; encourage investment within the state; improve environmental conditions; and, at the same time, minimize the costs of power supply to electric utilities and their customers.*

Thus, TECO's proposed contract[7] must comply with the explicit purpose of the rules and the statute it implements. The following provisions of the TECO proposed standard offer contract and rate schedule COG-2 fail to comply with the explicit purpose of the rules and the statute and thus the Commission's decision to approve the contract must be reversed[8].

a. **TECO's standard offer contract is not continuous**. TECO has failed to make a contract continuously available for renewable generators. TECO does not propose to offer a renewable standard offer contract until mid-2010 – and bases the contract on a low capacity cost natural gas-fired peaking combustion turbine unit even though it has requested the Commission to determine the need for a 632 MW integrated gasification combined cycle (IGCC) base load power plant fired by coal, pet-coke and biomass planned be in-service in 2013[9]. In contrast, the standard offer the Commission preliminarily approved is based on a meager 47 MW combined cycle unit with an in-service date of January 1, 2010. This is not a "continuous" offer, as renewable generators must wait almost over two years until a TECO standard offer contract becomes available, thereby contravening the statute that the Commission rule is intended to implement and the rule itself that requires that the development of renewable energy be promoted. (Presumably the 47 MW

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[7] In the following subparagraphs, FICA has described in detail the contractual provisions with which it takes issue. These allegations raise issues of disputed fact (including additional issues that may arise out of these) that the Commission must consider pursuant to the Administrative Procedures Act.

[8] Some of the issues of material fact and/or law that are presented herein arise from the proposed standard offer contract, from proposed rate schedule COG-2, or from both documents. To the extent an issue is raised in both documents, for the sake of brevity and to avoid repetitive argument, such issue(s) may be addressed only as a contract issue or as a rate schedule issue and doing so shall not be deemed to be or to constitute a waiver of such issue by FICA for purposes of the other document. FICA will endeavor to provide reference by Sheet numbers of TECO's documents, however, where an issue may be raised in more than one place in the documents, for the sake of brevity, FICA will not refer to all such references but TECO will nonetheless be on notice as to the issues raised and FICA's objections.

[9] Docket No. 070467-EI

avoided unit is a "gap-filler" until the IGCC unit becomes available. A standard offer based on the IGCC would similarly work as a gap-filler, thus meeting TECO's needs while also offering the necessary encouragement to renewable generators. TECO's proposed standard offer is not the type of offer that will encourage the development of renewable energy. A standard offer based on the IGCC plant would provide a much more stable and significant stream of revenues which would actively encourage it renewable energy – especially when viewed in contrast to the extremely low prices that a renewable generator would receive for capacity and energy based on the proposed avoided unit. (See further discussion in this regard, below.)

b. **<u>TECO understates avoided costs on which its proposed contract is based.</u>**

1. TECO's explanation of the derivation of avoided costs for both energy and capacity appear in rate schedule COG-2 beginning at Sheet 8.284 and also appearing elsewhere in TECO's documents. The costs provided for the combustion turbine peaking unit used to determine capacity payments to renewable generators are misleading and understated because, among other things:

(i) TECO is in the process of demonstrating to the Commission that it has a need for 632 MW of IGCC generating capacity in 2013. Accordingly, limiting its standard offer to the 2010 combustion turbine technology rather than the fossil fuel portfolio promised by the Commission's recently adopted renewable energy rules raises, among other things, issues that are subject to factual dispute.

(ii) the performance requirements imposed on a renewable generator in order to receive capacity payments are unreasonable and totally inconsistent with operational characteristics of a combustion turbine peaking unit. More specifically, as provided in Appendix C to Rate Schedule COG-2, TECO would require a capacity factor of 80% or higher and an availability of at least 90% in order for a renewable generator to qualify for avoided capacity

payments. In contrast, combustion turbine based peaking units typically operate at capacity factors in the range of 5% to 15%. In addition, energy payments based on the avoided unit's energy costs would be paid to the renewable generator only when TECO in its sole discretion determines – on a daily basis – whether or not it would have operated the avoided unit - thus resulting in a serious mismatch between mandatory performance requirements and energy payments. TECO does not describe much less justify the basis on which it will determine in its sole discretion when or if the avoided unit would have been operated, thereby leaving the renewable generator at the mercy of the TECO. TECO could essentially require the renewable generator to perform as if it were operating as a base load unit, while being paid only peaking capacity payments and less than avoided unit energy payments. Because such requirements, energy payment calculations, assumptions, and avoided unit dispatch discretion have not been subject to any formal scrutiny by this Commission or any party, these matters are all subject to factual dispute.

(iii) the description/provisions regarding energy payments after the in-service date of the "avoided unit" are based on TECO's interpretation of applicable Commission rules and TECO's assurances that they will be accordance with those rules, with no explanation, detail or examples of how avoided unit dispatch would be determined or whether there may be loopholes in TECO's interpretation that could allow it to "game" avoided energy payments to renewable generators. For example, Sheet 8.296 at paragraph 2. b. provides:

> *To the extent that the Designated Avoided Unit is dispatched by the Company and, operates, the Unit Energy Payment Rate in $/kWh will apply and shall be based on the Designated Avoided Unit's energy cost (fuel and variable operation and maintenance expense). Otherwise, when not dispatched by the Company, the As-Available Energy Payment Rate will apply to the CEP when operating and will be based on the Company's actual hourly avoided energy cost.*

Sheet 8.296 at paragraph 2. a. of rate schedule COG-2 provides that:

> *The methodology to be used in the calculation of the avoided energy costs is described in Appendix B.*

Accordingly, a renewable generator's energy payments will be totally controlled by TECO via its sole discretion in determining when or if it chooses to request delivery of capacity and energy from the renewable generator, barring which the energy payment reverts to the lesser of as-available energy for each such hour and the avoided unit energy cost, while still forcing the renewable generator to operate at an 80% capacity factor in spite of the deeply discounted energy payments the renewable generator would receive during hours when TECO deems not to dispatch the avoided unit. Moreover, the determination of the as-available energy payment/price would be pursuant to a methodology set forth in rate schedule COG-2 but which has not been subject to any formal scrutiny in this proceeding – or to FICA's knowledge, since 1990. A renewable generator would effectively be kept completely in-the-dark and at the mercy of TECO with respect to the value of expected energy payments and whether or not TECO will dispatch its energy and capacity[10]. Such rates, calculations, assumptions, methodologies, determinations and discretionary decision-making of TECO have not been subject to any formal scrutiny by this Commission and therefore are all subject to factual dispute.

(iv) None of the underlying or related calculations, derivations, formulas or assumptions used or to be used by TECO have been subject to any formal scrutiny by this Commission or by any affected party and each of the elements that affect the payment/cost components – including those that may be uncovered in the discovery process – are all subject to factual dispute.

[10] See also Appendix A beginning on Sheet 8.344. The calculations, assumptions , formulas, derivations, exclusions, and conclusions contained therein are also issues subject to factual dispute in this proceeding.

2. TECO's energy payments associated with capacity payments are greatly understated because, as noted above, there can be a mismatch between capacity factor performance requirements and energy payments based on the "dispatch hours" that are determined in TECO's sole discretion without explanation, justification or any factual evidence whatsoever. Renewable generators are asked to trust TECO to properly determine and calculate energy payments and dispatch hours. Such matters, including underlying or related calculations, derivations, exclusion and assumptions, have not been subject to any formal scrutiny by this Commission or by any affected party in this proceeding and each of the elements that affect the payment/cost components – including those that may be uncovered in the discovery process - are all subject to factual dispute.

3. TECO's avoided unit and as-available energy rates - as well as the actual payments to be made to renewable generators provided for in rate schedule COG-2, are – in the words of TECO *". . . calculated by the Company in accordance with FPSC Rule 25-17.0825, F.A.C."* But the rule provides no clear guidance on when an avoided unit should have been dispatched, nor does it provide detailed guidance on what costs should be included in and what methodologies, assumptions, formulas and exclusions may be used in the determination of as-available energy prices. TECO for its part, references the rule yet fails to describe the method by which dispatch will be determined. Although TECO provides its interpretation of the rules as to the determination of hourly avoided as-available energy costs, that interpretation, as well as other such rates, calculations, formulas, assumptions, exclusions and exercise of discretion affecting payments to renewable generators have not been subject to hearing or scrutiny in this proceeding by the Commission or any party and are all subject to factual dispute.

c. **TECO's contract contains numerous unreasonable terms and conditions.**[11] TECO's proposed contract contains many unreasonable, burdensome and commercially unsupportable terms and conditions. Most of the onerous conditions are completely one-sided, applying only to the renewable generator with no corresponding obligation on TECO's part. Further, many of the proposed conditions may be implemented at TECO's unbridled discretion. These impediments to entering into a commercially reasonable agreement are roadblocks to the development of renewable generation and do not encourage the development of renewable energy in Florida. Such impediments include:

1. **Vague and unspecified interconnection requirements**. Sheet 8.202, in the fourth whereas clause of TECO's proposed contract references a signed interconnection agreement as a condition precedent to the signing of a standard offer contract for renewable energy but fails to set forth the terms or conditions of any such required agreement. A similar requirement appears elsewhere in the filed documents. Inability to reach a reasonable interconnection agreement with TECO will result in a renewable generator being foreclosed from contracting at all with TECO. This undisclosed additional required agreement will impede the promotion of renewable energy.

2. **Confusing Definitions section.** Sheet 8.204, paragraph 1. defines various terms but confusingly includes within some of the definitions substantive contractual provisions and conditions with the definitions of certain word and terms. For example, the definition of Contracted Capacity goes on to include a substantive prohibition on the sale of energy to a third party where TECO has elected not to accept or purchase such energy. Further, the definition of Extended Facility In-Service Date includes substantive provisions relating to the

[11] The vast majority of the terms and conditions included in TECO's standard offer contract are not mentioned at all in the Commission's rules, are not required by such rules, and have not been subject to a hearing.

renewable generator's liability for Completion Security. Combining substantive provisions with what are identified as definitions can be confusing and act as a deterrent to the development of renewable energy.

3. **Unreasonable limitation on sale of energy not purchased by TECO.** Sheet 8.206, paragraph 1. g. prohibits a renewable generator from selling energy that TECO elects not to purchase, without TECO's prior written consent. This is an unreasonable and arbitrary provision that serves no purpose other than to discourage renewable energy.

4. **Unreasonable limitation on changing the location of a renewable energy facility.** Sheet 8.212, paragraph 2., prohibits, without reasonable justification or rationale, a renewable generator from changing the location of its facility throughout the term of the contract. Such a restriction is unreasonable and discriminatory, especially if a change in location would have no adverse impact on TECO and if a change in location is reasonably necessary to accommodate the needs of the renewable energy generator. The only purpose such a provision serves is to allow TECO an additional basis on which to default a renewable generator without regard to the impact of a change in location on TECO or the renewable generator.

5. **Unreasonable and mismatched avoided energy payments.** Sheet 8.216, paragraph 6.a.i. provides that the renewable generator will be paid the avoided unit's energy costs during those times when the avoided unit would have operated as determined by TECO. During all other hours the renewable generator will be paid TECO's as-available energy price. This provision, along with the mandatory 80% capacity factor and 90% availability creates a substantial mismatch between the peaking unit capacity payments and the discounted energy payments. For example, how or when the avoided unit would have been operated appears to be determined solely at the discretion of TECO without any explanation of the methodology used to determine when or if such unit would be operated. Therefore, although the renewable generator

will be forced to operate at an 80% capacity factor, TECO may determine that the avoided unit would only operate at a 5% capacity factor – thus forcing the renewable generator to operate like a base-load power plant but be paid less than a peaking power plant. The methodology used by TECO to determine dispatch hours is not divulged or explained, nor is the disparity between the mandatory 80% capacity factor and TECO's discretion to determine when the avoided unit would have been dispatched. These convoluted and inconsistent requirements have no basis in the rules, are punitive and unreasonable and will not advance the encouragement of renewable energy as required by statute and rule.

6. **Burdensome and unreasonable completion and performance security requirements.** Sheet 8.224, paragraph 8.a. requires $30/kw to be delivered to TECO within 60 days after the contract is executed as completion security. Not only is the amount required excessive, so is the requirement that it be provided within 60 days of contract execution. Such inflated amounts and the unreasonable time requirement will discourage renewable projects and are not necessary to secure performance. Similarly, Sheet 8.226, paragraph 8.b. requires 30/kw to be delivered to TECO within 60 days after the contract is executed as performance security. Refund of the performance security is tied to the renewable generator maintaining both a 90% availability and a 80% capacity factor, with as discussed previously are unreasonable, discriminatory and inconsistent with the selection of a combustion turbine peaking unit as the avoided unit. Further, such security requirements are entirely one-sided, as there is no requirement that any performance amount be posted in favor of the renewable generator in the event TECO unlawfully withholds capacity or energy payments. While TECO may draw upon the security and terminate the contract if there is a default, the renewable generator has no such protection.

7. **Burdensome and unreasonable liquidated damages.** Sheet 8.226, paragraph 9., allows TECO to default a renewable generator for failing to meet the facility

in-service date or to meet the minimum performance standards (90% availability and 80% capacity factor) and retain any security deposits posted by the renewable generator as liquidated damages. TECO is essentially insulated from any obligation it may otherwise have to attempt, where it may be reasonable and prudent to do so, to accommodate a renewable generator that is having difficulty in meeting its in-service date. Further, allowing TECO to retain security deposits for failure to meet unreasonable, burdensome, discriminatory and mismatched minimum performance standards is punitive and serves no legitimate purpose except to discourage development of renewable energy.

8. **Unreasonable and unilateral ability to veto renewable generator's maintenance schedule**. Sheet 8.228, paragraph 10., addresses production and plant maintenance schedule. The renewable generator is required to submit a maintenance schedule to TECO and TECO then determines if the generator's plans are "acceptable" (10.b.). Additionally, the renewable generator may schedule maintenance only during periods "approved by TECO"[12] and TECO may thereby unreasonably limit the number of maintenance days as well as when such days may occur. Such provisions are unreasonable and TECO has provided no basis to support them. Further, such provisions are inconsistent with the requirement of the section 366.91 and the rules implementing the statute that require the promotion of the development of renewable energy.

9. **Unreasonable operating personnel requirements**. Sheet 8.228, paragraph 10.c., requires that the renewable generator have personnel on the premises at all times, twenty-four clock hours per calendar day and seven calendar days per week. It is unreasonable for TECO to dictate to the renewable generator how it must staff its facility, especially since all the risk of failure to perform lies with the renewable generator – not with TECO. Such operational decisions are the province of the renewable generator not TECO, and TECO has provided no basis

[12] While the contract notes that such approval shall not be "unreasonably withheld," this verbiage is of little comfort to a small facility whose maintenance plans may differ significantly from TECO's demands.

for this requirement. Further, this provision is inconsistent with the requirement of the section 366.91 and the rules implementing the statute that require the promotion of the development of renewable energy.

10. **TECO's unilateral right not to make purchases**. Sheet 8.228, paragraph 10.d., gives TECO the right to curtail or reduce the purchase renewable energy from a renewable generator in circumstances where, according to TECO, it is necessary in order to maintain reliability and integrity of the system, avoid endangering of life or property, avoid disruption of electric service, or to continue to purchase would result in higher costs to buy from the renewable generator. TECO's unilateral right not to purchase appears to be at its discretion and is not subject to the rights of the renewable generator. This provision is inconsistent with the requirement of the section 366.91 and the rules implementing the statute that require the promotion of the development of renewable energy.

11. **Excessive time frame for right of first refusal as to sale of renewable energy attributes**. Sheet 8.238, paragraph 15., recognizes that the renewable generator retains the right to own and sell all environmental attributes. However, TECO seeks the right of first refusal as to those attributes for 5 days after receiving notice that such attributes are available. Because such environmental attributes are often sold at auction, TECO's right of first refusal will surely chill bids by legitimate buyers who are not willing to invest the time and effort in an auction process knowing that TECO can exercise its first refusal rights to the attributes at the best price bid. Additionally, providing a right of first refusal would arguably vest TECO with "legal rights" that could be used for coercion or to interfere with the renewable generators ability to sell environmental attributes. Further, TECO seeks to constrain the generator as to the price at which it may sell its own assets by requiring it to not sell those assets at a price less than it would charge TECO. Since the environmental assets belong to the generator, TECO should not be permitted to dictate for how

much they may be sold or have the ability to legally interfere with or otherwise delay the sale of such attributes. This provision is inconsistent with the requirement of the section 366.91 and the rules implementing the statute that require the promotion of the development of renewable energy.

12. **Unreasonable and unilateral default provisions**. Sheet 8.242, paragraph 18., contains provisions that relate to when a renewable generator shall or may be found in default of the contract, followed by a description of TECO's remedy in the event of a default. Significantly, the renewable generator is not afforded any opportunity to cure an alleged default or to be notified by TECO of an impending default – indicating that perhaps the main purpose of the provisions are to default the renewable generator rather than to encourage the development or renewable energy. Notably, Section 18. a. iv. identifies as a mandatory default the failure to perform in accordance with 7.b., but Section 7, which appears on Sheet 8.222, does not appear to have a subsection b. Adding to the unreasonableness of TECO's default provisions is a "catch-all" provision that allows TECO – at its option – to declare a default if:

> *"the CEP refuses, is unable or **anticipatorily breaches** its obligation to deliver the entire amount of Contracted Capacity after [fill in the date – presumably the in-service date of the avoided unit "*

In other words, TECO may declare the renewable generator to be in default if TECO simply "anticipates" that it might be unable to fulfill its contractual obligations. Again, there does not appear to be any obligation to notify the renewable generator of a pending default, or to provide the renewable generator with an opportunity to correct the situation. Such a provision is commercially unreasonable and unduly burdensome on the renewable generator who may unwittingly be in anticipatory breach of the contract. Moreover, the default section is totally one-sided in favor of TECO. It contains *no* provisions related to any instance of TECO default. A reasonable commercial contract requires that both parties be protected in the event that either party defaults on the contract. TECO's lopsided view of the transaction is commercially indefensible and provides a

real bar to a renewable facility signing such a contract, let alone achieving financing for it in the real world. Thus, these slanted provisions will actively discourage rather than encourage renewable resources.

13. **Unreasonable and unilateral insurance requirements**. Sheet 8.244, paragraph 19.c., addresses the insurance requirements TECO seeks to impose on the renewable generator. There is no mirror provisions requiring TECO to procure insurance as to the renewable generator. This provision is inconsistent with the requirement of the section 366.91 and the rules implementing the statute that require the promotion of the development of renewable energy.

14. **Onerous and unreasonable limitation on Force Majeure.** Sheet 8.246, paragraph 19. d., contains a definition of Force Majeure. Typically, a Force Majeure is defined as an event or circumstance that is not within the reasonable control of, or the result of the negligence of, the affected party, and which, by the exercise of due diligence, the affected party is unable to overcome, avoid, or cause to be avoided in a commercially reasonable manner. Importantly, the special treatment afforded a Force Majeure is intended to provide protection from being held in default or breach of contract when a party finds itself in a circumstance beyond its control or anticipation. However, TECO proposes to exclude from the definition and protection of Force Majeure any interruption in fuel supply. Fuel supply is obviously crucial to the generation of electricity – whether by TECO or a renewable generator. Events beyond the reasonable control of a renewable generator can interrupt fuel supply and should be recognized as a traditional event of Force Majeure. For example, hurricane Katrina disrupted natural gas supplies to areas beyond those directly impacted by that natural disaster. Exclusion of fuel supply interruption from the definition of a Force Majeure event was done so without rationale or justification and serve no purpose other than to discourage rather than encourage renewable resources in Florida.

15. **Unilateral Representations, Warranties and Covenants**. Sheet 8.248, paragraph 19. e., contains a list of representations and warranties the renewable generator must provide to TECO. TECO makes *no* representations or warranties to the renewable generator. One-sided representations and warranties are unreasonable and inconsistent with the requirement of the section 366.91 and the rules implementing the statute that require the promotion of the development of renewable energy.

16. **Burdensome and unreasonable conditions precedent.** Sheet 8.252, paragraph 19. f., establishes a TECO dictated schedule of dates by which the renewable generator much accomplish certain items – generally within 9 (nine) months of execution of the contract. Because the schedule and dates are established without regard to the in-service date of the avoided unit or the renewable generator they are unreasonable and discriminatory. Although the section provides that TECO may, in its sole discretion, extend the dates included in the schedule little comfort can be derived by the renewable generator in knowing it must rely on the beneficence of TECO. This provision is unreasonable, unrealistic and unduly burdensome and does not encourage renewable energy in Florida.

17. **Unreasonable lack of protection from change in law.** Sheet 8.256, paragraph 19. j. requires that the renewable generator accept changes in laws, rules, etc. regardless of the impact of such changes on the economics of the contract. Specifically, TECO requires that:

> *This Contract shall be governed by and construed and enforced in accordance with the laws, rules, and regulations of the State of Florida and the Company's Tariff as may be modified, changed, or amended from time to time.*

This would essentially allow TECO to modify payments to the renewable generator if the rules, regulations or Company's [TECO's} tariff is modified, changed or amended. The significant risk

that payment may be unilaterally altered by TECO constitutes an impediment to the promotion of renewable energy.

18. **Unreasonable assignment of tax liability**. Sheet 8.258, paragraph 19. k., provides that if TECO cannot deduct the payments to the renewable generator, the renewable generator is responsible for any resulting tax liability, including interest and penalties. Such a one-sided allocation of risk is unreasonable. This provision is inconsistent with the requirement of the section 366.91 and the rules implementing the statute that require the promotion of the development of renewable energy.

19. **Unreasonable severability provisions.** Sheet 8.258, paragraph l., provides that:

> *If any part of this Contract, for any reason, be declared invalid, or unenforceable by a court or public authority of appropriate jurisdiction, then such decision shall not affect the validity of the remainder of the Contract, which remainder shall remain in force and effect as if this Contract had been executed without the invalid or unenforceable portion.*

This provision would require a renewable generator to continue to provide capacity and energy even if the payments agreed upon are suspended because they were declared invalid or unenforceable. The better approach would be to give the renewable generator the option to terminate the contract rather than insist that the contract – as modified – would continue to remain in force and effect. The risk of such a provision will have a chilling affect on the willingness of renewable generators to contract for the provision of firm energy and capacity, is unreasonable and will discourage the development of renewable energy in Florida.

20. **Unreasonable and one-sided record retention requirements**. Sheet 8.262, paragraph 19. p., requires the renewable generator to retain all records regarding its performance under the contract for five years. Inexplicably, there is no corresponding requirement that TECO maintain such records for five years. This one-sided obligation is not warranted and is

inconsistent with the requirement of the section 366.91 and the rules implementing the statute that require the promotion of the development of renewable energy.

21. **Unilateral set off rights**. Sheet 8.262, paragraph 19. r., allows TECO to set off sums due from the renewable generator from sums TECO owes to the generator, but does not provide the renewable generator to with the same set off rights. This one-sided provision is unreasonable and is inconsistent with the requirement of the section 366.91 and the rules implementing the statute that require the promotion of the development of renewable energy.

22. **Provision of financial information to TECO**. Sheet 8.262, paragraph 19. s.. concerns Financial Accounting Standards Board Interpretation No. 46. If this standard comes into play, the renewable generator is required to provide to TECO "all financial data and other information, "*as deemed necessary by the Company [TECO].*" This paragraph also provides that the renewable generator may have to provide TECO with "financial statements, together with other required information, "*as determined by the Company [TECO'. . ..*" and in a timeframe "*. . . to be determined at the Company's [TECO's] discretion.*" Importantly, TECO, and/or its affiliates, as competitors in the development of renewable energy facilities must not be allowed to require or acquire proprietary, confidential, or trade secret information under the guise of seeking financial information. These clauses, giving TECO unbridled discretion to seek information and receive it in a timeframe of its own choosing, are unreasonable on their face and inconsistent with the requirement of section 366.91 and the rules implementing the statute that require the promotion of the development of renewable energy.

23. **Burdensome and unreasonable "project evaluation" requirements**. Sheets 8.266 through 8.282 require a renewable generator to provide extensive and excessive information about its project. These four pages require that extremely detailed and commercially sensitive information about every aspect of the project be provided to TECO.

Required information includes, among other things, the provision of information in great detail about project participants, fuel supply, plant dispatchability/controllability, siting and licensing, facility development and performance, project revenues and expenses and financing. TECO, and/or its affiliates, as competitors in the development of renewable energy facilities must not be allowed to require or acquire proprietary, confidential, or trade secret information under the guise of evaluating project viability. The standard offer contract proposed by TECO contains so many protections, fees, penalties and legal waivers that project evaluation and determination of project viability by TECO is unnecessary as it will be incumbent upon the renewable generator to assure its own viability. The requirement for the provision of such detailed information goes far beyond the requirements of rule 25-17.0832(4)(e),(f), is burdensome and excessive, and will not promote the development of renewable energy in the state.

24. **Unreasonable performance requirements.** Sheet 8.414, at numbered paragraph 2., provides that a renewable generator shall provide capacity into the Company's electric grid in order to meet or exceed a Monthly Capacity Factor of 80%. This is an unreasonable requirement given the fact that the avoided unit and the avoided cost to be paid to the renewable generator is based on a natural gas-fired combustion turbine "peaking" plant. Such plants typically operate at capacity factors in the 5% to 15% range. Moreover, since TECO will determine on a daily basis when to dispatch the renewable generator, the requirement of an 80% capacity factor is without rational basis. For example, Sheet 8.406 of Appendix C provides:

> *The CEP [renewable generator] shall provide peaking capacity to the Company on a firm commitment, first-call, on-call, as-needed basis. In order to receive Contracted Capacity Payment for each calendar month that the Facility is to be dispatched, the CEP [renewable generator] must meet or exceed both the minimum Monthly Availability and Monthly Capacity Factor requirements.*

Inexplicably, TECO requires that the renewable generator maintain both an 80% capacity factor and be on-call on an as-needed basis. Thus, a renewable generator may meet the 80% capacity factor but fail to be available when TECO "calls". Conversely, the renewable generator may be called on only 5% of the time by TECO but nonetheless is required to operate 80% of the time. As discussed elsewhere herein, such a mismatch between required capacity factor and TECO dispatch can substantially reduce energy payments to the renewable generator. Clearly, the competing and/or mutually exclusive requirements sought to be imposed by TECO are, on their face, unreasonable, unduly burdensome and punitive. They appear to be nothing more than a means of providing an additional basis by which TECO may game the system and defaulting a renewable energy facility for failing to be available during periods of time when other capacity is available and would be more appropriate to meet load. These requirements serve no legitimate purpose other than provide additional basis on which TECO may declare a renewable generator to be in default.

d. **Inability to Finance the TECO Standard Offer Contract**. The unreasonable rates, terms and conditions discussed above, as well as others that may arise in the discovery and expert analysis processes, make it very unlikely that a renewable generator will be able to procure financing for a renewable facility based on TECO's proposed standard offer contract – again, a result which is the antithesis of the statute and rule. Lenders rely upon the revenue stream the standard offer contract will generate when determining whether to provide financing for a project. This revenue stream must be predictable; however, the many one-sided provisions TECO proposes, as well as the many provisions that leave important matters to TECO's sole discretion, greatly interfere with the needed predictability. The onerous terms, including TECO's unilateral authority to control when/if the renewable generator will receive energy payments equal to the higher avoided unit energy cost or the lower as-available avoided energy cost, and to decided how those costs – especially avoided as-available energy costs –derived, developed and calculated, will

preclude renewable generators from obtaining financing in the marketplace. In addition, financeable contracts cannot contain provisions, such as those in the TECO contract delineated above, which permit TECO to withhold payment or otherwise put a renewable generator in default, especially without any cure provisions, which are standard in commercial contracts.[13] Contractual terms must be fair, equitable, and balanced between the parties. The one-sided contract TECO has drafted is inconsistent with the requirement of the section 366.91 and the rules implementing the statute that require the promotion of the development of renewable energy and will have the opposite effect.

Statement of Ultimate Facts[14]

17. Without waiving or relinquishing the right to allege additional ultimate facts should they become known through discovery or otherwise, FICA's allegations of ultimate facts include the following:

(a) TECO's proposed standard offer contract is not a continuous offering;

(b) TECO's avoided costs for capacity, energy associated with capacity, and as-available energy are understated, resulting in the payment of below avoided cost;

(c) TECO's proposed standard offer contract contains terms and conditions that are burdensome, onerous, one-sided, and commercially unreasonable;

(d) TECO's proposed standard offer contract contains terms and conditions that are not standard in the industry;

(e) TECO's proposed standard offer contract is not financeable;

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[13] The proposed contract contains default provisions, including default by the anticipation of TECO but provides no notice or cure requirements.

[14] The specific facts supporting these Ultimate Facts are included in the prior section titled Disputed Issues of Material Fact.

(f) TECO's proposed standard offer contract will not encourage the development of renewable resources in the state as section 366.91, Florida Statutes, and the Commission's rules require, but discourage such development.

Thus, reversal of the Commission's proposed action approving the contract is warranted.

Statement of Specific Rules and Statutes
Requiring Reversal of the Agency's Decision

18. FICA is entitled to relief pursuant to:

a. Sections 120.569 and 120.57, Florida Statutes, which entitle FICA to a hearing when its substantial interests are affected as they are in this matter;

b. Sections 366.91, 366.92, Florida Statutes, which require promotion of the development of renewable energy in the state; and

c. Rules 25-17.200–25-17.310, Florida Administrative Code, via which the Commission is to require and encourage the development of renewable energy in the state.

Relief Requested

Wherefore, FICA requests that:

a. It be permitted to intervene as a full party in this matter;

b. The Commission conduct an evidentiary hearing to determine and require TECO to adopt terms and conditions in its standard offer contract which are reasonable and which will encourage the development of renewable energy in the state of Florida pursuant to the mandate of section 366.91, Florida Statutes, and rule 25-17.200, Florida Administrative Code.

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Respectfully submitted this 17th day of September, 2007.

/s/ *Richard A. Zambo*

Richard A. Zambo
Florida Bar No. 312525
2336 S.E. Ocean Boulevard, #309
Stuart, Florida 34996
Phone: (772) 225-5400, FAX: (772) 232-0205
Email: richzambo@aol.com

Jon C. Moyle, Jr.
118 N. Gadsden Street
Tallahassee, Florida 32301
Phone: (850) 681-3828, FAX: (850) 681-8788
Email: jmoylejr@moylelaw.com

Attorneys for:
Florida Industrial Cogeneration Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically, by hand delivery, or by U.S. mail this 17th day of September, 2007, to the following:

Lorena Holley
Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399
lholley@psc.state.fl.us

Susan F. Clark
Donna E. Blanton
Radey Thomas Yon & Clark
301 S. Bronough Street, Suite 200
Tallahassee, FL 32301
sclark@radeylaw.com

Lee L. Willis/James D. Beasley
Post Office Box 391
Tallahassee, FL 32302
Phone: 850-224-9115
FAX: 222-7560
jbeasley@ausley.com

Ms. Paula K. Brown
Regulatory Affairs
P. O. Box 111
Tampa, FL 33601-0111
Phone: (813) 228-1444
FAX: (813) 228-1770
regdept@tecoenergy.com

/s/ *Richard A. Zambo*

Richard A. Zambo
Florida Bar No. 312525