Ruth Nettles

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Sent: Monday, September 17, 2007 1:56 PM
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Subject: FICA's Amended Petition in Docket No. 070234-EQ: FPL Standard Offer Contract
Attachments: 091707~1.DOC

1. Attorney responsible for this electronic filing:

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

DOCKET NO. 070234-EQ -- In re: Petition for approval of renewable energy tariff standard offer contract, by Florida Power & Light Company

3. Party on whose behalf this filing is submitted:

The Florida Industrial Cogeneration Association

4. Total number of pages in filing:

24 (twenty four) 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.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of renewable Energy standard offer contract, by Florida Power & Light Company

Docket No. 070234-EQ

Filed: September 17, 2007

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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-07-0492-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-07-0492-TRF-EQ which preliminarily approved Florida Power and Light Company's (FPL) 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
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3. Copies of all correspondence, pleadings, and other documents should be provided to:

Florida Industrial Cogeneration Association
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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 FPL standard offer contract and is directly related to the terms and conditions of the standard offer contract FPL 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 FPL'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. FPL 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 FPL's contract *without hearing* pursuant to the Proposed Agency Action (PAA) process. The Commission must consider all the issues raised herein, including issues arising out of these issues, because they relate to FPL's proposed standard offer

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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.

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 has followed the very procedure Mr. Harris described to the Commission.

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 FPL'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, Florida Statutes. Accordingly, FPL'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 FPL 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 FPL "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, FPL's proposed contract[7] must comply with the explicit purpose of the rules and the statute it implements. The following provisions of the FPL proposed standard offer contract and tariff 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. **FPL's standard offer contract is not continuous**. FPL has failed to make a contract continuously available for renewable generators. FPL does not propose to offer a renewable standard offer contract until mid-2015. In the contract the Commission preliminarily approved, FPL based its standard offer on a 1219 MW combined cycle unit with an in-service date of June 1, 2015. This is not a "continuous" offer, as renewable generators must wait almost eight years until a FPL standard offer contract becomes available. This eight-year hiatus contravenes the statute that the Commission rule is intended to implement and the rule itself that requires that the development of renewable energy be promoted. Not only will this **not** encourage the development of renewable energy, it will actively discourage it as the renewable industry has no opportunity to develop projects in Florida for almost a decade.

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[7] In the following subparagraphs, FICA has described in detail the contractual provisions with which it takes issue, subject to its reservation to raise and/or refine such issues as new information becomes available. These allegations raise issues of disputed fact 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 QS-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.*

b. **FPL understates avoided costs on which its proposed contract is based.**

1. FPL's explanation of avoided cost for both energy and capacity appear in Appendix A, QS-2, Standard Rate Schedule for Purchase of Capacity and Energy. The costs provided for the combined cycle avoided unit used to determine capacity payments to renewable generators are understated because, among other things:

(i) FPL demonstrated to the Commission in its "Petition to Determine Need for FPL Glades Power Park Units 1 and 2 Electrical Power Plant"[9] that additional electric generating capacity was required on its system in 2013 – fully two years earlier than what is indicated in the standard offer subject it filed in this proceeding, making the in-service date of the avoided unit as well as the technology of the avoided unit subject to factual dispute.

(ii) the standard offer contract applies a significant pricing discount based on the location of a renewable generator within FPL's system – a discount that is not supported by factual evidence in the record but merely by FPL assertions. Such pricing discount has not been subject to any formal scrutiny by this Commission, and the formula inputs and assumptions are subject to factual dispute.

(iii) the performance requirements imposed on a renewable generator in order to receive capacity payments are not consistent with the energy payments to be paid – i.e., although the renewable generator is required to maintain a very high availability (97% over all hours) to qualify for capacity payments, the associated avoided unit energy payments would be paid only when FPL in its sole discretion deems to have operated the avoided unit (a "dispatch hour") – thus resulting in a mismatch between mandatory performance requirements and energy payments. Because such requirements and energy payment calculations have not

[9] Docket No. 070098-EI.

been subject to any formal scrutiny by this Commission or any party these matters are subject to factual dispute.

(iv) the description/provisions regarding energy payments after the in-service date of the "avoided unit" are ambiguous and based only on FPL's assurances that they will be made in accordance with Commission rules with no explanation, detail or example of how they are to be determined. For example, Sheet 10.353 of QS-2 at paragraph (2) provides:

> *For any Dispatch Hour the firm energy rate shall be, on an hour-by-hour basis, the Company's Avoided Unit Energy Cost. For any other period during which energy is delivered by the QS to FPL, the firm energy rate in cents per kilowatt hour (¢/KWh) shall be the following on an hour-by-hour basis: the lesser of (a) the as-available energy rate calculated by FPL in accordance with FPSC Rule 25- 17.0825, FAC., and FPL's Rate Schedule COG-1, as they may each be amended from time to time and (b) the Company's Avoided Unit Energy Cost.*

Section 8.4.7 of the standard offer contract provides that:

> *[a]ny clock hour for which FPL requests the delivery of such capacity and energy shall be referred to herein as a "Dispatch Hour."*

Accordingly, a renewable energy facility's energy payments will be controlled based on when or if FPL, apparently in its sole discretion, chooses to request delivery of capacity and energy, barring which the energy payment reverts to the lesser of as-available energy cost and the avoided unit energy cost for each hour. A renewable energy facility is therefore held completely in-the-dark and at the mercy of FPL as to expected energy payments and whether or not FPL will dispatch its energy and capacity. Such rates, calculations, assumptions, determinations and discretionary decisions of FPL have not been subject to any formal scrutiny by this Commission and therefore are subject to factual dispute.

(v) None of the underlying or related calculations, derivations, formulas or assumptions used or to be used by FPL 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 subject to factual dispute.

2. FPL's energy payments associated with capacity payments in Appendix A, QS-2, Standard Rate Schedule for Purchase of Capacity and Energy, are understated because, as noted above, there can be a mismatch between capacity performance requirements and energy payments based on the "dispatch hours" that are determined by FPL without explanation, justification or any factual evidence whatsoever. Renewable generators are asked to trust FPL to properly determine and calculate energy payments and dispatch hours. Such matters, including underlying or related calculations, derivations or assumptions, have not 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 subject to factual dispute.

3. FPL's estimates of as-available energy rates, as well as the actual payments to renewable generators as provided for in Appendix A, QS-2, are, in the words of FPL, *". . . calculated by the Company in accordance with FPSC Rule 25-17.0825, F.A.C."* FPL provides no further information regarding the calculation rendering it impossible for FICA or the Commission to determine if FPL's calculations are indeed in accordance with Rule 25-17.0825. Further, such rates and calculations have not been subject to any formal scrutiny by this Commission and the formula inputs and assumptions are subject to factual dispute.

4. FPL's "location penalty" appearing in Appendix III to its QS-2 rate schedule is unreasonable, unfairly penalizes renewable generators, and actively discourages the development of renewable resources contrary to the statute and implementing rules. To FICA's knowledge, the location penalty has not been subject to any recent formal scrutiny by this Commission or any affected party and therefore is subject to factual dispute.

c. **FPL's contract contains numerous unreasonable terms and conditions.**[10]

FPL'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 FPL's part. Further, many of the proposed conditions may be implemented at FPL'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**. The second whereas clause of FPL'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 in section 17.7 of the proposed contract. Inability to reach a reasonable interconnection agreement with FPL will result in a renewable generator being foreclosed from contracting at all with FPL. This undisclosed additional required agreement will impede the promotion of renewable energy.

2. **Unreasonable fuel use limitation.** Section 1(a) requires that the sole source of fuel shall be sources defined in Section 366.91 (2) (a) and (b), Florida Statutes, ignoring the fact that many renewable energy facilities require natural gas, oil or other fuel for facility startup. FPL's unreasonable restriction would prohibit sale of energy produced whenever any startup fuel is used. This is an unreasonable and technically burdensome situation what would arguably require that electricity be "dumped" to a resistance heat sink to dissipate the "unqualifying" energy.

[10] The vast majority of the terms and conditions included in FPL'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.

3. **Unreasonable performance requirements.** Section 3. 5 requires the renewable generator to maintain a 97% availability over both On-Peak and All Hours. This is an unreasonable requirement that provides additional basis for FPL to game the system by holding a renewable energy facility in default for failing to be available during low load periods when other lower cost generating capacity is available to meet load. This provision serves no legitimate purpose other than to provide an additional basis on which FPL may declare a renewable generator to be in default, terminate the contract and collect termination fees.

4. **Unreasonable right to all energy and capacity.** Section 4.1 entitles FPL to purchase and receive all energy and capacity produced by a renewable generator, thereby depriving such generator of the ability to make sales to multiple purchasers where it is economically advantageous to do so. This requirement has no basis in the rules and is punitive and unreasonable.

5. **Unreasonable prohibition on the use of interruptible standby**. Section 4.2 prohibits the use of interruptible standby power for facility startup. Such a prohibition is unreasonable and FPL has provided no factual basis, logic or justification for this restriction.

6. **Unreasonable capacity testing requirements**. Section 5.2 requires the renewable generator to demonstrate to "FPL's satisfaction" that it can make available 100% of its committed capacity.[11] Again, there are no parameters on "FPL's satisfaction" and thus this is a wholly subjective and unreasonable standard. The 100% capacity requirement is also unreasonable because it allows no opportunity for even moderate adjustment and requires the renewable generator to perform at a level that exceeds the performance of FPL's own units. Further, the provision in section 5.3 permitting FPL to require additional capacity tests at its "sole discretion," even apparently when there has been no indication of a problem, is an unreasonable contract term. And,

[11] See also, section 9.7, which authorizes FPL to immediately access the posted security if the 100% capacity requirement is not met.

section 6.5 provides that the committed capacity test must be performed according to prudent industry procedures "satisfactory to FPL." FPL has given itself unbridled and unilateral discretion. Such unreasonable terms are inconsistent with the requirement of the section 366.91 and implementing rules requiring the promotion of the development of renewable energy.

7. **Unreasonable lack of protection from change in law.** Sections 7.1 and 7.2 allow FPL to modify payments to the renewable generator if the approved payment schedule is amended and/or approved by the Commission. The significant risk that payment may be unilaterally altered by FPL constitutes an impediment to the promotion of renewable energy.

8. **Unreasonable and unilateral ability to veto renewable generator's maintenance schedule**. Section 8 of the proposed contract addresses Electricity Production and Plant Maintenance Schedule. The renewable generator is required to submit a maintenance schedule to FPL and FPL then determines if the generator's plans are "acceptable" (section 8.2). Additionally, the renewable generator may schedule maintenance only during periods "approved by FPL."[12] Further, FPL seeks to unreasonably limit the number of maintenance days as well as when such days may occur. (See, section 8.2). Such provisions are unreasonable and FPL 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**. Section 8.4.4 of FPL's proposed standard offer contract requires that facilities bigger than 10 MW have personnel on the premises around the clock, 7 days a week. It is unreasonable for FPL to dictate to the renewable generator how it must staff its facility. Such operational decisions are the province of the

[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 FPL's demands.

renewable generator not FPL, and FPL has provided no basis 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. **FPL's unilateral right not to make purchases**. Section 8.4.6 of FPL's proposed standard offer contract gives FPL the right not to purchase renewable energy from a renewable generator in circumstances where, according to FPL, it would cost FPL more to buy from the renewable generator. FPL'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. **Unilateral right to require the renewable facility to reduce output.** Section 8.4.8 of FPL's proposed standard offer contract permits FPL to unilaterally require a renewable generator to reduce its output up to 18 times per year, apparently for any reason. Such required reductions have no parameters, but simply occur at FPL's unbridled discretion. 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. **FPL's declaration that actions under section 8 do not constitute a breach of contract**. Section 8.4.9 of FPL's proposed contract provides that FPL's actions under section 8 – whether it is an unreasonable request for the generator to reduce output or where FPL simply decides not to purchase at all – are automatically (*in advance* of the occurrence of any particular factual situation) *not* a breach of contract and cannot give rise to *any liability* on FPL's part. Thus, the proposed contract gives FPL total discretion to take actions that may harm the renewable generator and at the same time totally insulates FPL from any liability whatsoever. Such

unreasonable contract terms do not encourage renewable generation, as the statute and rule require and, as discussed below, make the proposed standard offer contract unfinanceable.

13. **Burdensome and unreasonable completion and performance security requirements.** Section 9 of the proposed FPL contract requires $30/kw to be delivered to FPL within 30 days after the contract is executed as security. Not only is the amount required excessive, so is the requirement that it be provided within 30 days of contract execution. Such inflated amounts and the unreasonable time requirement will discourage renewable projects and are not necessary to secure performance. Further, such 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 FPL unlawfully withholds capacity or energy payments. While FPL may "immediately" draw upon the security if there is a default, the renewable generator has no such protection. Additionally, the many "monitoring" provisions contained in this section are unreasonable and contrary to the goals of the statute and rule. Reasonable, bilateral requirements should be provided instead.

14. **Burdensome and unreasonable termination fee.** As in the case of the completion and security provisions discussed above, FPL has included a burdensome and one-sided termination fee in its proposed contract. Section 10 assesses a termination fee to the renewable generator in the event of contract termination but contains no similar provision in the event FPL terminates the contract unlawfully. The termination fee contains the same burdensome "monitoring" provisions discussed above regarding the completion and performance security clauses. (See also, Appendix C to the QS-2 rate schedule.) 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.

15. **Unreasonable and unilateral default provisions**. Section 12 contains a myriad of provisions that relate to when a *renewable generator* will be found in default

of the contract, followed by a long list of the rights FPL has if there is a default. (See, section 13). Further, the section contains no provision relating to a time frame during which the renewable generator may cure any alleged default. But of most concern is the fact that the default section is totally one-sided in favor of FPL. It contains *no* provisions related to any instance of FPL default. A reasonable commercial contract requires that both parties be protected in the event that either party defaults on the contract. FPL'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. As one example, Section 12.(o) even makes an otherwise legitimate "Force Majeure" a default condition if the time to make necessary repairs or otherwise cure the Force Majeure will exceed 12 months. This provision is commercially unreasonable on its face given that a Force Majeure event is unpredictable by its very nature. Imposing a time certain by which an as yet unknown Force Majeure event must be cured is simply another of the many onerous burdens and conditions contained in the standard offer. Thus, these slanted provisions will actively discourage rather than encourage renewable resources.

16. **Unreasonable rights of FPL in event of default.** Section 13.1 allows FPL, if it determines the renewable generator is in default, to, among other things, terminate the contract, collect termination fees and exercise *". . . any other remedy(ies) which may be available to FPL at law or in equity."* Adding further to these already onerous provisions, FPL goes on to add the provision in section 13.2 that would allow it to pursue an action for specific performance and specifically requires the renewable generator to waive its right to defend against such action. In short, FPL could terminate the contract, collect the termination fee, but yet attempt to secure a court order requiring the renewable energy facility to perform – presumably without payment and without the ability to defend its rights in court. Clearly such a provision is intended to do little else but act as a deterrent to the development of renewable energy in Florida.

17. **Unreasonable and unilateral insurance requirements**. Section 15 of the proposed contract addresses the insurance requirements FPL seeks to impose on the renewable generator. Again, FPL has unilateral discretion. Section 15.1 requires the renewable generator to procure insurance from an insurer "acceptable to FPL." No parameters are imposed on FPL's discretion. Again, there is no mirror provision requiring FPL 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.

18. **Unilateral Representations, Warranties and Covenants**. Section 17 contains a long list of representations and warranties the renewable generator must provide to FPL. FPL makes *no* representations or warranties to the renewable generator. One-sided representations and warranties are commercially 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.

19. **Onerous and unreasonable limitations on Force Majeure.** Section 16 contains a definition of Force Majeure that is anything but standard in the industry. 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. Such events or circumstances can include equipment failures, explosions, fires, natural events, and so forth. However, FPL again using its unbridled discretion, excludes from the definition and protection of Force Majeure the following:

- Equipment breakdown or inability to use equipment caused by its design, construction, operation, maintenance or inability to meet regulatory standards, or otherwise caused by an event originating in the Facility; and,
- A failure of performance of any other entity, including any entity providing electric transmission service to the QS, except to the extent that such failure was caused by an event that would otherwise qualify as a Force Majeure event.

The exclusion of such a broad range of events from the traditional definition of Force Majeure is unreasonable, discriminatory, unduly burdensome, and contrary to the encouragement of renewable energy in Florida – especially since these are the types of events/circumstances for which Force Majeure relief from contract obligations is intended to address. When combined with the additional "time" limitation contained in Section 12 (referred to previously) that allows FPL to declare a renewable generator to be in default if it suffers a Force Majeure event that would take more than 12 months to repair, even if it is an otherwise legitimate "Force Majeure", only adds insult to injury. Inclusion of these and other such provisions that typify FPL's standard offer contract serve no other purpose than to actively discourage, rather than encourage, renewable resources in Florida.

20. **Excessive time frame for right of first refusal as to sale of renewable energy attributes**. Section 17.6.2 recognizes that the renewable generator retains the right to own and sell all environmental attributes. However, FPL seeks the right of first refusal as to those attributes for *30 days* after receiving notice that such attributes are available. Such environmental attributes are often sought at auction in time frames much shorter than 30 days. The 30-day time frame is too long and may prevent the generator from realizing the full value of the assets it owns. Additionally, providing a right of first refusal would arguably vest FPL with "legal rights" that could be used for coercion or to interfere with the renewable generators ability to sell environmental attributes. Further, FPL 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 FPL. Since the environmental assets belong to the generator, FPL 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 requirements of section 366.91 and the rules implementing the statute that require the promotion of the development of renewable energy.

21. **Burdensome and unreasonable requirements for "project viability" submissions**. Section 18.1 requires the renewable generator to provide the extensive and excessive information about its project included in Appendix D to the proposed contract. Appendix D is a four-page document requiring extremely detailed and commercially sensitive information about every aspect of the project to be provided to FPL. 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. FPL, 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 FPL contains so many protections, fees, penalties and legal waivers that evaluation of project viability by FPL is unnecessary as it will be incumbent upon the QS to assure its 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.

22. **Excessive and burdensome project management requirements**. Section 18.3.1 seeks to give FPL the ability to monitor every aspect of the construction, startup and testing of the renewable facility and is excessively broad and overreaching. 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.

23. **Restrictive and one-sided assignment provision**. Section 18.4 provides that the renewable generator may not assign the contract without FPL's permission, which "may be withheld in FPL's *sole discretion*." Not only is such a provision contrary to black letter contract law, which generally provides that permission to assign a contract may not be unreasonably withheld, but it gives FPL absolute veto authority – for a bogus reason or no reason at all – to withhold assignment approval. Such a provision is unreasonable on its face and is certainly not required by the Commission's rules. Further, there is no restriction on FPL's assignment of the contract. 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.

24. **Unreasonable assignment of tax liability**. Section 18.10 provides that if FPL 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.

25. **Unreasonable and one-sided record retention requirements**. Section 18.14 requires the renewable generator to retain all records regarding its performance under the contract for five years. Inexplicably, there is no corresponding requirement that FPL 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.

26. **Unilateral set off rights**. Section 18.16 allows FPL to set off sums due from the renewable generator from sums FPL owes to the generator, but does not provide the renewable generator 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.

27. **Provision of financial information to FPL**. Section 18.17 concerns Financial Accounting Standards Board Interpretation No. 46. If this standard comes into play, section 18.17 requires the renewable generator to provide to FPL ". . . all financial data and other information, *as deemed necessary by FPL.*" This section also provides that the renewable generator may have to provide FPL with ". . . financial statements, together with other required information, *as determined by FPL . . .*" and in a timeframe "at FPL's *discretion.*" Importantly, FPL, 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 FPL 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.

d. **Inability to Finance the FPL Standard Offer Contract**. The unreasonable rates, terms and conditions discussed above make it very unlikely that a renewable generator will be able to procure financing for a renewable facility based on FPL'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 FPL proposes, as well as the many provisions that leave important matters to FPL's sole discretion,

greatly interfere with the needed predictability. The onerous terms, including FPL's unilateral authority to change contract requirements in numerous situations at its discretion, will preclude renewable generators from obtaining financing in the marketplace. In addition, financeable contracts cannot contain provisions, such as those in the FPL contract delineated above, which permit FPL 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 FPL 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) FPL's proposed standard offer contract is not a continuous offering;

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

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

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

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

[13] Section 12 of the proposed contract contains 15 separate default provisions, with no cure ability.
[14] The specific facts supporting these Ultimate Facts are included in the prior section titled Disputed Issues of Material Fact.

(f) FPL'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 FPL 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 on this 17th day of September, 2007.

/s/ *Richard A. Zambo*

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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:

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