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**Subject:** FICA's Amended Petition in Docket No. 070235-EQ -- PEF 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. 070235-EQ -- In re: Petition for approval of standard offer contract for purchase of firm capacity and energy from renewable energy producer or qualifying facility less than 100 kW tariff, by Progress Energy Florida, Inc.

**3. Party on whose behalf this filing is submitted:**

The Florida Industrial Cogeneration Association

**4. Total number of pages in filing:**

13 (thirteen) pages

**5. Document attached:**

Amended Petition For Formal Hearing and For Leave to Intervene

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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DOCUMENT NUMBER-DATE

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition for approval of standard offer contract for purchase of firm capacity and energy from renewable energy producer or qualifying facility less than 100 kW tariff, by Progress Energy Florida, Inc.

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Docket No. 070235-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-07-0493-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-07-0493-TRF-EQ which preliminarily approved Progress Energy Florida's (PEF) 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  
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DOCUMENT NUMBER-DATE

08477 SEP 17 07

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

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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<sup>1</sup>, FICA files this amended petition that clearly meets such

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<sup>1</sup> 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. 3<sup>rd</sup>

requirements. The amended petition specifically identifies the specific issues and ultimate facts that warrant reversal of the Commission's preliminary decision to approve the PEF standard offer contract and is directly related to the terms and conditions of the standard offer contract PEF 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. 3<sup>rd</sup> 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 PEF'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. PEF 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 PEF'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 PEF'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<sup>2</sup>, 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."*<sup>3</sup> 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."*<sup>4</sup> 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 PEF'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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<sup>2</sup> *In re: Proposed amendments to Rule 25-27.0832, F.A.C., Firm Capacity and Energy Contracts*, Docket No. 060555-EI.

<sup>3</sup> Rule workshop transcript, November 9, 2006 at 171.

<sup>4</sup> 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, PEF'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 PEF 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**<sup>5</sup>

16. FICA's allegations of disputed issues of fact and law include, but are not limited to, the issues delineated below.<sup>6</sup> 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:

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<sup>5</sup> 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.

<sup>6</sup> These disputed facts put PEF "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, PEF's proposed contract<sup>7</sup> must comply with the explicit purpose of the rules and the statute it implements. The following provisions of the PEF 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<sup>8</sup>.

a. **FICA avers, alleges and adopts as its own PCS Phosphate's filings.** (i) the issues of material fact and law set forth by PCS Phosphate in its July 2, 2007 Petition in this proceeding<sup>9</sup>; and the issues, arguments and contents of PCS Phosphate – White Springs' response to PEF's motion to strike the aforementioned petition in this proceeding<sup>10</sup>.

b. **FICA avers, alleges and adopts issues raised in its filing in related proceedings.** To the extent applicable, without reference to specific page and reference numbers within the PEF documents, FICA avers, alleges and adopts the issues of material fact and law and associated arguments contained in its related and substantially similar filings submitted to the FPSC on this day in Dockets relating to the proposes standard offer contracts of FPL<sup>11</sup> and TECO<sup>12</sup>.

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<sup>7</sup> 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.

<sup>8</sup> 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 PEF'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 PEF will nonetheless be on notice as to the issues raised and FICA's objections.

<sup>9</sup> July 2, 2007 Petition to Intervene, Protest of Proposed Agency Action and Petition for Formal Administrative Hearing of White Springs Agricultural Chemical, Inc. d/b/a PCS Phosphate – White Spring filed in Docket 070235-EQ.

<sup>10</sup> September 5, 2007 PCS Phosphate – White Springs' Response to Motion to Strike of Progress Energy Florida.

<sup>11</sup> In re: Petition for approval of renewable Energy standard offer contract, by Florida Power & Light Company.

<sup>12</sup> In re: Petition for approval of standard offer for small qualifying facilities and producers of renewable energy, by Tampa Electric Company



c. **PEF's avoided cost capacity and energy payments and the associated provisions and requirements are unreasonable, discriminatory and underpay renewable generators.**

PEF's explanation (or lack thereof) of the derivation of avoided costs for both energy and capacity appear in rate schedule COG-2 beginning at Sheet 9.542 and also appear elsewhere in PEF's documents. The costs and performance parameters provided for the combustion turbine-based combined cycle unit used to determine capacity and energy payments to renewable generators are misleading, unduly burdensome, discriminatory and misplaced because, among other things:

- (i) The description of energy payments when viewed in light of the performance requirements PEF seeks to impose on a renewable generator in order to receive capacity payments are unreasonable at worst and ambiguous at best. For example, at Sheet 9.456 PEF provides that:

*"The calculation of payments to the RF/QF for energy delivered to PEF on and after the Avoided Unit In-Service Date shall be the sum, over all hours of the Monthly Billing Period, of the product of (a) each hour's **Firm Energy Rate** ( $\$/kWh$ ); and (b) the amount of energy ( $kWh$ ) delivered to PEF from the Facility during that hour.*

*The **Firm Energy Rate** shall be, on an hour-by-hour basis, PEF's Avoided Unit Energy Cost. For any other period during which energy is delivered by the RF/QF to PEF, 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 and (b) the Avoided Unit Energy Cost. The Avoided Unit Energy Cost, in cents per kilowatt - hour ( $\$/kWh$ ) shall be defined as the product of (a) the Avoided Unit Fuel Cost and (b) the Avoided Unit Heat Rate; plus (c) the Avoided Unit Variable O&M."(emphasis supplied)*

An important issue raised here deals with when a renewable generator can expect, if at all, to receive the "greater" price as opposed to the "lesser". The reference in this provision to during "any other period" is vague and unclear because no period appears to have been initially defined or identified at all. There is little doubt that if PEF had built the avoided unit, it would expect to recover the "avoided unit energy cost". But the language of this

provision is too convoluted to allow a renewable generator and/or its lenders to determine with any confidence what the energy payments would be during any given hour. Moreover, because PEF requires the renewable generator to maintain a capacity factor of 91% or higher in order to receive the full (as opposed to discounted capacity payment) one would assume that during all those operating hours necessary to achieve the 91% capacity factor, the renewable generator would be compensated for energy delivered at the avoided unit energy cost. The proposed contract appears to be silent on this issue, leaving renewable generators at the mercy of PEFs interpretation of Commission rules dealing with avoided energy payments. Accordingly, this is an issue – a combination of issues actually – that are subject to material dispute.

(ii) At Sheet 9.405, PEF defines the “As-Available Energy Rate” “. . . to mean “the rate calculated by PEF in accordance with FPSC Rule 25-17.0825, F.A.C., and PEF's Rate Schedule COG-1, as they may each be amended from time to time.” But the rule provides no case-by-case guidance on when avoided unit energy cost vs. as-available energy cost should be paid or detailed guidance on what costs should be included in and what methodologies, assumptions, formulas and exclusions may be used in the determination of the avoided unit fuel cost or the as-available energy rate. PEF references the rule yet fails to describe the method by which energy payments will be determined. Again, the proposed contract would leave renewable generators at the mercy of PEFs interpretation of Commission rules dealing with avoided energy payments – an interpretation which may be in the best interests of PEF but not necessarily in the best interests of renewable generators or in advancement of the Commission’s intent to encourage renewable energy in Florida. 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.

(iii) Sheet 9.442 requires a renewable generator to maintain a capacity factor of 71% or greater in order to qualify for a capacity payment, and a capacity factor of 91% or greater in order to qualify for the full capacity payment. Imposing such a capacity factor without assurances that the renewable generator will be paid at the avoided unit energy cost is unreasonable, unfair, discriminatory and contrary to the encouragement of renewable energy in Florida. Basically PER is asking the renewable generator to operate in a way that PER itself would be unable to operate. For example, without the guarantee that the avoided unit energy cost would be paid during the operating hours necessary to meet the mandatory capacity factor requirement, PEF could force a renewable generator to produce energy at coal prices or nuclear energy prices - when such units were on the margin - because those units' fuel cost would then be the basis for the as-available energy rate and would be less than the avoided unit energy cost. Because of such performance requirements and uncertainty/disagreement over energy payments, calculations, and assumptions, these matters are all subject to factual dispute.

d. **PEF's contract contains numerous unreasonable terms and conditions.**<sup>13</sup>

PEF'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 PEF's part. Further, many of the proposed conditions may be implemented at PEF's unbridled discretion. These impediments to entering into a commercially reasonable agreement are roadblocks to the development of renewable

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<sup>13</sup> Many of the terms and conditions included in PEF'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.

generation and do not encourage the development of renewable energy in Florida. Such impediments include:

e. **Inability to Finance the PEF 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 PEF'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 PEF proposes, as well as the many provisions that leave important matters to PEF's sole discretion, greatly interfere with the needed predictability. The onerous terms, including PEF'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 decide 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 PEF contract delineated above, which permit PEF to withhold payment or otherwise put a renewable generator in default, especially without any cure provisions, which are standard in commercial contracts.<sup>14</sup> Contractual terms must be fair, equitable, and balanced between the parties. The one-sided contract PEF 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.

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<sup>14</sup>The proposed contract contains default provisions, including default by the anticipation of PEF but provides no notice or cure requirements.

**Statement of Ultimate Facts**<sup>15</sup>

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

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

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

(d) PEF's proposed standard offer contract is not financeable;

(e) PEF'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

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<sup>15</sup> The specific facts supporting these Ultimate Facts are included in the prior section titled Disputed Issues of Material Fact.

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 PEF 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.

Respectfully submitted this 17<sup>th</sup> 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 17<sup>th</sup> day of September, 2007, to the following:

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