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February 15, 2008

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**VIA FEDERAL EXPRESS**

Ann Cole  
Division of Commission Clerk and  
Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

RE: Case 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.

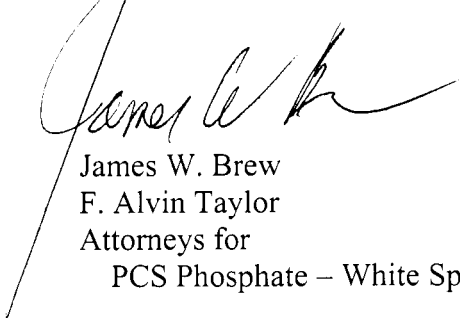
Dear Ms. Cole:

Enclosed please find for filing in the above-referenced case an original and fifteen (15) copies of the *Direct Testimony of Martin J. Marz on behalf of White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs*.

Copies have also been served to all other parties and staff, as shown on the attached Certificate of Service, in accordance with Order No. PSC-07-0962-PCO-EQ.

If you have any questions, please give me a call.

Very truly yours,

  
James W. Brew  
F. Alvin Taylor  
Attorneys for  
PCS Phosphate – White Springs

Enclosures: a/s

Cc: Active Parties

- CMP \_\_\_\_\_
- COM 5
- CTR 1
- ECR 2
- GCL 2
- OPC \_\_\_\_\_
- RCA \_\_\_\_\_
- SCR \_\_\_\_\_
- SGA \_\_\_\_\_
- SEC \_\_\_\_\_
- OTH \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Direct Testimony of Martin J. Marz, on behalf of White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs, was served by U.S. mail this 15<sup>th</sup> day of February, 2008, to the following:

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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.**

**DOCKET NO. 070235-EQ**

**Filed: February 18, 2008**

**DIRECT TESTIMONY OF  
MARTIN J. MARZ**



**J . P O L L O C K  
I N C O R P O R A T E D**

**ON BEHALF OF  
WHITE SPRINGS AGRICULTURAL CHEMICALS, INC.  
D/B/A PCS PHOSPHATE – WHITE SPRINGS**

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FPSC-COMMISSION CLEAR

1    **1.    INTRODUCTION, QUALIFICATIONS AND PURPOSE**

2    **Q.    Please state your name and business address.**

3    **A.    Martin J. Marz; 1525 Lakeville Drive, Suite 217, Kingwood, Texas 77345.**

4    **Q.    What is your occupation and by who are you employed?**

5    **A.    I am an Energy Advisor and Senior Consultant for J. Pollock Incorporated.**

6    **Q.    What is your educational background?**

7    **A.    I have a Bachelor of Arts in Political Science from the University of Akron, and a**  
8        *Juris Doctor* from the University of Akron School of Law.

9    **Q.    Please describe your professional experience.**

10   **A.    During my 27 years of experience in the energy industry, I have represented**  
11        marketers and producers (both in gas and electric matters), pipelines, local  
12        distribution companies, and state regulatory agencies in contractual and regulatory  
13        matters. During my years in the industry, I have been involved in every major  
14        regulatory change that has occurred in the natural gas industry, beginning with  
15        Order No. 436 and its progeny and extending through Order No. 636.

16                Before joining J. Pollock Incorporated in July 2007, I was employed by  
17        BP in Houston, Texas, where I worked for the natural gas and power trading and  
18        marketing operations as Senior Attorney, as a Trade Regulation Manager  
19        (compliance) and as a Director of State Regulatory Affairs. In my legal capacity,  
20        I was responsible for, and engaged in, the negotiation of numerous power and gas  
21        purchase and sales contracts, including financial agreements, and even producer  
22        agreements. Similarly prior to joining BP, I had been involved in contract

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1 negotiations and drafting on behalf of energy marketers, pipelines and distribution  
2 companies.

3 Prior to BP, I was a member of the Staff of the Public Utilities  
4 Commission of Ohio (PUCO), participating in rate and regulatory matters before  
5 the PUCO as well as proceedings before the Ohio Supreme Court and the FERC.  
6 Prior to joining the PUCO Staff, I worked for the Ohio Office of Consumer's  
7 Counsel on cost of service, cost of equity and rate design matters involving gas  
8 local distribution companies, electric utilities, and pipeline companies.

9 **Q. On whose behalf are you testifying in this proceeding?**

10 **A.** I am testifying on behalf of White Springs Agricultural Chemicals, Inc. d/b/a PCS  
11 Phosphate – White Springs (PCS Phosphate). PCS Phosphate is a manufacturer  
12 of fertilizer products with plants and operations in or near White Springs, Florida  
13 that are located in Progress Energy Florida's (PEF) electric service area. PCS  
14 Phosphate uses waste heat recovered from the manufacture of sulfuric acid to  
15 cogenerate electricity.

16 **Q. What is the purpose of your testimony?**

17 **A.** I was asked to review the PEF Standard Offer Contract for Renewable Energy  
18 Producers or Qualifying Facilities less than 100 KW. Based on that review, and  
19 consistent with the existing administrative rules, I am recommending changes to  
20 the contract in order to further the State of Florida's objective to encourage  
21 renewable energy generation. My testimony is not intended to provide an  
22 exhaustive review of each and every element of PEF's Standard Offer Contract,

1 but does provide an assessment of the most serious issues presented by the  
2 Standard Offer Contract.

3 **2. SUMMARY**

4 **Q. Please summarize your conclusions and recommendations.**

5 **A.** Florida has enacted a state policy to promote the development of renewable  
6 energy sources. Utility standard offer contracts are the basic vehicle for  
7 facilitating that development. The State's program aims to allow a renewable  
8 energy producer either to accept a standard offer contract or negotiate a project  
9 specific contract that satisfies the requirements of the Commission's rules. Both  
10 options should be viable choices. The problem is that PEF's Standard Offer  
11 Contract is not designed to be acceptable to any renewable energy producer. As I  
12 explain, the PEF contract contains provisions that are unreasonable, overly one-  
13 sided, not consistent with reasonable commercial practice, and are overly  
14 complex. Additionally, certain of the price terms require a level of performance  
15 well in excess of that achieved by PEF's existing combined cycle generating  
16 facilities and actually serve as a barrier to renewable energy development.

17 PEF maintains that it intends its Standard Offer Contract to be the starting  
18 point for negotiating a project specific arrangement. This approach, however,  
19 both defeats the basic purpose of a standard offer contract and forces an extended  
20 and unwarranted negotiation over the removal or modification of the one-sided  
21 standard offer terms and conditions. My testimony recommends basic revisions  
22 that are required for the Standard Offer Contract to serve its intended purpose.

1 These recommendations do not unduly burden PEF as they are consistent with  
2 standard industry practice and PEF's own practice in a non-standard offer context.

3 **Q. Please summarize your conclusions and recommendations.**

4 **A.** My conclusions and recommendations are as follows:

5 Price Terms

- 6 1. The required performance capacity factor of 71% (Section 4) is  
7 inconsistent with the avoided unit (estimated capacity factor of 62.9%)  
8 and with the operation of PEF's existing combined cycle units (which  
9 operate at a capacity factor of approximately 50%);
- 10 2. The proposed Availability Factor (Section 4) is mis-specified because  
11 it would require the renewable energy producer<sup>1</sup> to achieve a minimum  
12 91% annual capacity factor rather than require the renewable energy  
13 producer to make capacity available 91% of the time to obtain a  
14 capacity payment.
- 15 3. As proposed by PEF, in order to receive the full capacity payment, a  
16 renewable energy producer must satisfy a 91% capacity factor, not just  
17 the minimum capacity factor of 71%. The 91% capacity factor is  
18 excessively high.
- 19 4. A renewable energy producer should be entitled to a full capacity  
20 payment if it is available for generation in a manner consistent with  
21 PEF's own units and achieves the same annual capacity factor as the  
22 avoided unit would have.

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<sup>1</sup> I will refer to both renewable energy resources and small qualifying facilities of less than 100 Kw as renewable energy producers.

1                    Non-price Terms

2                    1. The imposition of a Right of First Refusal (ROFR) that PEF demands  
3                    for Renewable Energy Credits owned by a renewable producer is not  
4                    justified.

5                    2. Capacity Testing –

6                    i. These provisions appear to be predicated upon a combined cycle  
7                    unit, and ignore the distinctive features and requirements of most  
8                    renewable energy producer facilities;

9                    ii. PEF should be required to provide written notice of the requested  
10                    test, and to pay for test energy delivered during the test.

11                    3. Creditworthiness Provisions –

12                    i. These provisions are one-sided and are not consistent with  
13                    established commercial practice and thus must be revised to  
14                    provide protection to both parties in the transaction.

15                    ii. The collateral requirements are onerous and do not appropriately  
16                    reflect default risk for both parties.

17                    4. PEF’s inspection of the generation elements of a renewable energy  
18                    producer should be subject to reasonable notice and a normal business  
19                    hours requirement.

20                    5. The default provisions of the Standard Offer Contract are one-sided  
21                    and do not provide reciprocal rights to claim an event of default for  
22                    such matters as non-payment, breach of representations and



1 warranties, failure to comply with obligations under the terms of the  
2 contract and creditworthiness.

3 6. A renewable energy producer should be provided a corresponding  
4 opportunity to examine the books and records of the buyer (who will  
5 be handling billing and payment). Also, PEF's inspection of books  
6 and records should be subject to a reasonable notice and a normal  
7 business hours requirement.

8 7. The contract's assignment limitation is one-sided and is not  
9 commercially reasonable. This provision needs to be revised to permit  
10 either party to assign with approval from the other party, or, in the  
11 event of certain corporate reorganizations, without the other party's  
12 approval.

13 8. Representations and warranties are one-sided and not commercially  
14 reasonable. This section needs to be revised so that PEF provides  
15 standard commercial representations and warranties.

16 9. The conditions precedent need to be revised to more accurately reflect  
17 the timing necessary to obtain the necessary approvals and to  
18 acknowledge that certain of the items are not within control of the  
19 renewable energy producer.

20 10. The force majeure provisions needs to be revised to reflect a balanced  
21 commercial approach to the concept.

22 11. Annual plan (i.e., renewable energy performance estimates) provisions  
23 (Section 10.1) must be more must be more reasonable and flexible.

1                   They must recognize the nature of renewable production and should be  
2                   predicated upon good faith estimates of energy to be delivered.

3                   12. The insurance provisions in Section 17 need to be removed given that  
4                   the provision is tied to the construction of the Facility’s  
5                   interconnection and not the Facility itself. This provision is more  
6                   appropriate in the interconnection agreement.

7                   13. The maintenance scheduling provisions of Section 10.2 should be  
8                   removed because they are inappropriate for renewable energy  
9                   producers, which tend to be much smaller in size than utility avoided  
10                  generating facilities. It is reasonable to require renewable energy  
11                  producers to provide planned maintenance information, including  
12                  subsequent updates as they become known, and I have added  
13                  provisions to that effect in Section 10.1.

14                  14. The requirement that a renewable energy producer take firm standby  
15                  service from PEF (Section 8.2) is not justified and should be deleted.

16   **3.   REASONABLENESS OF STANDARD OFFER CONTRACT AND**  
17   **LIKELIHOOD THAT THE STANDARD OFFER CONTRACT WILL BE**  
18   **USED BY RENEWABLE PRODUCERS.**

19   **Q.   Does the Standard Offer Contract serve the purpose of being an agreement**  
20   **that anyone is likely to enter into without serious negotiations?**

21   **A.**   No. PEF witness David W. Gammon testifies that the Standard Offer Contract  
22   provides a “first draft” against which negotiated contracts are developed.  
23   Gammon Testimony at 2. Having reviewed the Standard Offer Contract, I

1 understand fully why he makes that statement. As I discuss, the Standard Offer  
2 Contract has numerous provisions that would discourage a renewable energy  
3 producer from accepting the Standard Offer Contract. The areas that are one-  
4 sided in favor of PEF extend across many aspects of the general terms and  
5 conditions. Given the nature of the Standard Offer Contract, I would not expect  
6 any renewable energy producer to enter into the agreement on an “as is” basis.  
7 Presenting an unbalanced standard offer contract of this nature defeats the  
8 intended purpose of such a contract.

9 **Q. What should be the purpose of a Standard Offer Contract?**

10 **A.** In my estimation, a standard contract is one that sets out the general terms and  
11 conditions of the agreement in a balanced manner and permits the parties to focus  
12 on items critical to each party that may require more extensive negotiations.  
13 Prime examples of such agreements include the Edison Electric Institute Master  
14 Power Purchase and Sale Agreement (“EEI Master Agreement”), the North  
15 American Energy Standards Board Base Contract for the Sale and Purchase of  
16 Natural Gas (“NAESB Agreement”) and even the International Swaps and  
17 Derivatives Association’s ISDA Master Agreement (“ISDA Master”) covering  
18 swaps and derivative transactions. The above all fit into the category of  
19 “standardized agreements” that are comparable in purpose to the PEF Standard  
20 Offer Contract, that is, standardized commercial agreements that are susceptible  
21 to being entered into without major negotiations and redrafts of the general terms  
22 and conditions, such as creditworthiness, default, representations and warranties,  
23 assignment and audit provisions.

1 **Q. Were those contracts designed to serve the same purpose as a Standard Offer**  
2 **Contract for the purchase of electricity and capacity from renewable energy**  
3 **producers?**

4 **A.** In many respects, yes. Those contracts were designed to make it easier for a  
5 diverse group of parties, including regulated utilities, power marketers,  
6 independent power producers, and commodities traders to enter into a number of  
7 transactions providing for the sale, purchase and delivery of electricity and natural  
8 gas under standardized terms other than price. The agreements all share a similar  
9 objective, which is to provide commercially-reasonable protection to both sides  
10 while ensuring the quick consummation of transactions on a relatively uniform  
11 basis. A Standard Offer Contract for renewable energy producers should  
12 accomplish the same objective. It should not take extensive negotiations or  
13 substantial redrafting to achieve a workable agreement.

14 **Q. Should the PEF Standard Offer Contract be revised in a manner that makes**  
15 **it more amenable to a less complex negotiation and drafting process?**

16 **A.** Yes, and with that objective in mind, I have reviewed the Standard Offer Contract  
17 and set forth my proposed changes that I explain below in Exhibit MJM-1, a  
18 redlined version of PEF's Standard Offer Contract, dated May 22, 2007.<sup>2</sup> In this  
19 exhibit, I have only corrected the provisions in the contract itself, and have not

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<sup>2</sup> Because an editable version of the Standard Offer Contract was not available, I converted the document available on PEF's website (<http://www.progress-energy.com/aboutenergy/rates/tariffctstdoffer.pdf>) to an editable format. Due to the lack of preciseness in such a conversion process, some transpositions are included in my exhibit.

1 edited the appendices included with the contract. PEF should incorporate  
2 corresponding changes to those appendices.

3 **4. PRICE TERMS**

4 **Q. What is the PEF avoided cost unit?**

5 **A.** According to the Standard Offer Contract, the avoided unit is a natural gas  
6 combined cycle plant with a capacity of 618 MW. This unit is scheduled to enter  
7 commercial operations in 2013. However, specific details regarding this unit,  
8 such as its location, are not specified in PEF's 2007 Ten Year Site Plan.

9 **Q. What does PEF specify as the minimum availability factor to qualify for a**  
10 **capacity payment in the Standard Offer Contract?**

11 **A.** The minimum availability factor required to qualify for a capacity payment is  
12 71%. *See* Standard Offer Contract Original Sheet No. 9.415.

13 **Q. Does a renewable energy producer that achieves an availability factor of**  
14 **71% receive a full capacity payment?**

15 **A.** No. To receive a full monthly capacity payment, the renewable energy unit must  
16 achieve an availability rate of 91% for the month.

17 **Q. Please discuss the availability factor described in the Standard Offer**  
18 **Contract.**

19 **A.** The calculation of the capacity payment in the Standard Offer Contract is not  
20 predicated upon the availability rate of a facility, as it should be, but rather upon a  
21 capacity factor. Appendix A to the Standard Offer Contract establishes the  
22 manner for calculating the capacity payment. It provides that "[i]n the event that

1 the [Annual Capacity Billing Factor (“ACBF”)] is less than 71%, then no  
2 Monthly Capacity Payment shall be due.” See Standard Offer Contract, Original  
3 Sheet 9.442. The ACBF is derived by dividing electric energy actually received  
4 by PEF from the renewable energy producer by the sum of the Committed  
5 Capacity and the hours in the period. See Standard Offer Contract, Original Sheet  
6 9.443. This is the formula for the calculation of a capacity factor, which is quite  
7 distinct from an availability factor.<sup>3</sup>

8 It appears that PEF has confused the concept of availability factor with a  
9 capacity factor. The difference between the two factors is important to renewable  
10 energy producers. An availability factor defines a unit’s availability to provide  
11 energy to the system, not how or when it actually generates the energy. A unit’s  
12 availability factor is the sum of the service hours plus reserve stand-by hours  
13 divided by period hours times 100. See North American Electric Reliability  
14 Corporation, Generation Availability Data System, GADS Data Reporting  
15 Instruction, F-9. Service hours are those hours when the unit is synchronized with  
16 the transmission system, and reserve shut down hours are those hours where the  
17 unit is available to generate but is not synchronized with the system.<sup>4</sup>

18 In contrast, a capacity factor is the product of the MWs of generation  
19 during the period divided by the committed capacity times the period hours,

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<sup>3</sup> GADS indicates that a Net Capacity Factor is calculated as follows:  
Net Actual Generation / (Period Hours\*Net Maximum Capacity) \* 100.  
See GADS Data Reporting Instructions, Page F-10, 1/2008.

<sup>4</sup> There are other methods of calculating equivalent availability factors that take into account scheduled and unscheduled deratings, some of which are for maintenance derates. See generally, GADS Data Reporting Instructions.

1           expressed as a percentage. Thus, a capacity factor addresses the actual unit usage,  
2           whereas an availability factor addresses a unit’s potential to produce energy.

3   **Q.   How does the “availability factor” in the Standard Offer Contract compare**  
4   **to the capacity factor of the avoided unit and PEF’s existing combined cycle**  
5   **units?**

6   **A.**   According to PEF’s Ten Year Site Plan, the capacity factor for the avoided unit,  
7           “uncommitted #1” is 62.9%, which is less than the “availability factor” required  
8           in the Standard Offer Contract for a renewable producer to qualify for any level of  
9           a capacity payment. Moreover, PEF’s existing combined cycle units, the Hines  
10          Energy Facility and the Tiger Bay Facility, only achieved a weighted average  
11          capacity factor of 49.5% in 2006. *See* Exhibit MJM–2. Similarly, for the period  
12          2004-2006, the average PEF combined cycle capacity factor averaged slightly  
13          above 47%. *Id.* The avoided unit’s estimated capacity factor and the average  
14          capacity factor for PEF’s existing combined cycle plants are well below the  
15          capacity factor that PEF expects a renewable energy producer to achieve in order  
16          to qualify for a capacity payment of less than 100%. To achieve a full capacity  
17          payment, the renewable facility must achieve a capacity factor of 91%. The  
18          requirement in the Standard Offer Contract that a renewable energy producer  
19          must achieve a 91% capacity factor to receive a full capacity payment is  
20          unreasonable in light of, and inconsistent with, the capacity factor of PEF’s  
21          existing combined cycle units. This imposes upon renewable energy producers a  
22          standard that PEF does not achieve in its own operations. The high capacity

1 factor requirement serves to discourage renewable producers from entering into a  
2 Standard Offer Contract.

3 **Q. What is your understanding of the purpose of a capacity payment?**

4 **A.** A capacity payment is simply a payment made to reserve the right to call upon a  
5 particular asset to provide the payer with service when required.

6 **Q. How should the appropriate capacity factor be determined for purposes of  
7 making a capacity payment to a renewable energy producer?**

8 **A.** A renewable energy producer should receive a capacity payment equal to 100% of  
9 the avoided cost capacity amount calculated on PEF Appendix D as long as the  
10 renewable energy producer achieves an availability factor no less than the  
11 availability factor of the avoided unit.

12 Payments should be based on a correctly calculated unit availability factor.  
13 If payments, however, are based upon a capacity factor, as I explain above, PEF  
14 has established the capacity factor at an unreasonable level that even its own units  
15 do not achieve. In fact, if the capacity factor that PEF proposes to apply to  
16 renewable producers was applied to PEF's own facilities, the utility would not  
17 receive a capacity payment for any of its own combined cycle generation. If this  
18 method is followed rather than basing payments on availability, I recommend that  
19 the appropriate capacity factor should be the average of PEF's existing combined  
20 cycle units over a three year period.



1 **5. NON-PRICE TERMS**

2 **Q. When you speak of non-price terms, what do you mean?**

3 **A.** My references to the “general terms and conditions” of a contract include items of  
4 general applicability such as credit protection, default, audit of billing  
5 information, representations and warranties, assignment, planning (which in a  
6 number of contracts includes nominations and scheduling) and force majeure. In  
7 addition, I also address certain items that are non-price related, but are peculiar to  
8 renewable contracts, such as the right to retain the renewable energy credits,  
9 capacity testing and insurance.

10 **Q. Please discuss PEF’s request for a Right of First Refusal of a renewable**  
11 **producer’s Renewable Energy Attributes.**

12 **A.** The Standard Offer Contract at Section 6.2 provides PEF with the right of first  
13 refusal to purchase any Renewable Energy Attributes associated with the Facility,  
14 and also limits the price that the seller may otherwise obtain in the market to a  
15 price no less than the price at PEF has purchased such credits.

16 **Q. Does PEF witness Gammon address the renewable energy attributes and the**  
17 **right of first refusal in his testimony?**

18 **A.** Yes. At pages 4 and 5 of his testimony, he acknowledges that the Commission’s  
19 rules provide that “Renewable Energy Credits (“RECs”) remain the exclusive  
20 property of the Renewable [energy producer].” Gammon Testimony at 5. At  
21 page 11 of his testimony, Mr. Gammon explains that the right of first refusal  
22 option simply is a provision that PEF has included in previous Standard Offer

1           Contracts. That is the sum total of PEF’s justification for the ROFR provision in  
2           the Standard Offer Contract. Mr. Gammon’s testimony does not attempt to justify  
3           the price floor on the sale of RECs by a renewable energy producer.

4   **Q.    Is the PEF proposal a reasonable provision that should be permitted in the**  
5   **Standard Offer Contract?**

6   **A.**   No. The provision seeks something of value to PEF (i.e., the right of first refusal  
7           for the purchase of the RECs) that is totally unrelated to PEF’s avoided costs and  
8           for which PEF provides no compensation to the renewable energy producer. PEF  
9           similarly has not justified the price floor at which a renewable energy producer  
10          could sell its RECs. There is no rationale for either provision. This can only be  
11          explained by the fact that PEF, as the entity drafting the Standard Offer Contract,  
12          was free to ask for something to which it is not entitled. This provision should be  
13          deleted.

14 **Q.    Turning next to the provisions governing capacity test periods and annual**  
15 **capacity testing once the Facility is running, do you have any comments**  
16 **regarding those provisions of the agreement?**

17 **A.**   Yes. In this instance, the provisions (Sections 7.4 and 8.2) do not recognize that  
18          facilities that produce renewable energy are not, by definition, natural gas-fired  
19          combined cycle units. Renewable production facilities should not be required to  
20          operate the same, in all respects, as a standard gas-fired combined cycle facility.  
21          Wind, solar, biomass and facilities which rely upon waste heat produced in the  
22          manufacturing process to produce steam and electricity, like PCS Phosphate’s, all  
23          have different performance characteristics. To encourage the development of the

1 renewable energy technologies, the Standard Offer Contract needs to establish  
2 reasonable, technology-appropriate testing requirements. In fact, PEF has  
3 recognized that capacity testing period may need to be different depending upon  
4 the facility. For example, in Exhibit M of PEF's contract with Vandolah Power  
5 Company L.L.C. (Vandolah), PEF only requires the capacity test to be run for a  
6 period of four hours, or less if agreed to by the parties. *See* Exhibit MJM-3.  
7 Thus, the twenty-four hour test period set forth in the Standard Offer Contract  
8 needs to be revised to be responsive to the needs of renewable energy producers  
9 and consistent with the flexibility PEF has exhibited with Vandolah.

10 **Q. Have you proposed changes to the capacity testing period?**

11 **A.** Yes. The proposed changes are contained in Exhibit MJM-1 at Section 8.2. The  
12 proposed provision takes into account the specific nature of the renewable  
13 resource being used to provide the energy. I have not designated a specific  
14 uniform testing time period because I am not seeking to target any one type of  
15 resource. Rather the testing procedure should be one that is amenable to different  
16 types of resources. By doing so, it makes the Standard Offer Contract more user  
17 friendly and more likely to be utilized by renewable energy producers.

18 **Q. Do you have any other comments with regard to the annual capacity testing**  
19 **provisions in the Standard Offer Contract?**

20 **A.** Yes. I have concerns regarding the proposed Committed Capacity Test provisions  
21 found in Section 7.4. These are also inappropriately one-sided, and do not  
22 provide for a designated notice period or payment for the energy produced during  
23 testing. The buyer should be required to provide reasonable notice of the

1 requested test date, and also should be required to pay for the test energy. In turn,  
2 the seller should be responsible for all other costs associated with the initial test,  
3 and permit buyer's representative to be on-site if the buyer so requests. To the  
4 extent either party requests a second test during the year, it should be at the  
5 expense of the requesting party. My proposed changes, including a ten (10)  
6 Business Day notice requirement for scheduling a test, are reflected in Section 7.4  
7 of Exhibit MJM-1.

8 **Q. Does the right of inspection contained within the Standard Offer Contract**  
9 **require revision?**

10 **A.** Yes. The right of inspection contained in the Standard Offer Contract is not in  
11 any way limited. Under the terms of the Standard Offer Contract an inspection  
12 could literally occur at any time, day or night, of PEF's choosing. Limitations  
13 need to be placed upon the right to enter upon the renewable energy producer's  
14 site and inspect its facility. For example, such entry should also be upon  
15 reasonable notice. Again the proposed changes are found in Exhibit MJM-1.

16 **Q. Why are such limitations necessary?**

17 **A.** Entry of any third party personnel onto a facility such as PCS Phosphate's site  
18 raises numerous safety and liability issues. Notice must be provided so that the  
19 appropriate personnel can be available to escort the inspectors through the  
20 property to ensure adherence to all safety and other applicable on-site rules for  
21 third party visitors.

1 **6. GENERAL TERMS AND CONDITIONS THAT ARE NORMALLY**  
2 **RECIPROCAL IN COMMERCIAL AGREEMENTS FOR THE**  
3 **PURCHASE AND SALE OF ENERGY PRODUCTS**

4 **Q. What will you be addressing in this section of your Testimony?**

5 **A.** This section addresses general terms and conditions that should be reciprocal and  
6 are regularly found in standardized commercial agreements providing for the sale  
7 of energy and energy products (which would include financial and derivative  
8 products such as swaps and futures). Such items include credit and collateral  
9 requirements, default, contract assignment, representations and warranties,  
10 conditions precedent and force majeure.

11 **Q. In reviewing the Standard Offer Contract what have you concluded with**  
12 **regard to the above mentioned general terms and conditions?**

13 **A.** The provisions are one-sided, giving PEF a particular right without providing the  
14 renewable energy producer with the corresponding right, or imposing an  
15 obligation on the renewable energy producer without imposing a reciprocal  
16 obligation upon PEF. There are times where it is appropriate to provide one party  
17 with a right or obligation and not the other party, but in terms of the general terms  
18 of a commercial agreement, items such as credit and collateral requirements,  
19 default, assignment, representations and warranties, conditions precedent (I would  
20 note that there may be more conditions precedent applicable to one party versus  
21 the other) and force majeure should be reciprocal. The failure to include these  
22 provisions in a reciprocal format is not conducive to achieving the objective of the  
23 use of a Standard Offer Contract, nor is it commercially reasonable.

1 **Q. Do typical energy purchase and sale agreements (power, gas and financial**  
2 **transactions) customarily include symmetrical provisions that address the**  
3 **items you have mentioned above?**

4 **A.** Yes. As examples, the EEI Master Agreement, the NAESB Agreement and the  
5 ISDA Master all include provisions that address credit and collateral  
6 requirements, default, assignment, representations and warranties, conditions  
7 precedent and force majeure as they apply to both parties. Likewise, in reviewing  
8 the documents provided by PEF, its negotiated contracts also have included  
9 reciprocity with respect to the above mentioned provisions. One expects all  
10 commercial agreements for the purchase and sale of energy products (physical or  
11 financial) to include such provisions on a reciprocal basis.

12 **Q. Are the credit provisions within the Standard Offer Contract what you**  
13 **would expect in a typical power purchase agreement?**

14 **A.** No. Typical provisions that require each party to establish its creditworthiness are  
15 completely absent from the Standard Offer Contract. The Standard Offer  
16 Contract requires a renewable energy producer to post security upon execution of  
17 the Standard Offer Contract and maintain such security until well after completion  
18 of the renewable unit and the initial capacity test (Section 11). It also requires the  
19 renewable energy producer to provide security to cover a “termination fee”  
20 (Section 12). However, there are no provisions that require PEF to establish its  
21 creditworthiness, permit the seller to review PEF’s credit status or permit the  
22 seller to request collateral if PEF’s creditworthiness is not, or falls below,  
23 investment grade.

1 **Q. Do you recommend that Commission require PEF to revise the Standard**  
2 **Offer Contract to incorporate reciprocal creditworthiness and collateral?**

3 **A.** Yes, each party in a commercial agreement should be required to meet  
4 creditworthiness standards and be subject to a collateral posting requirement if the  
5 party's creditworthiness is insufficient to support unsecured credit in an amount  
6 exceeding the potential liability to the other party. Such provisions are customary  
7 and generally included in all electric and gas purchase and sale contracts. Further,  
8 in typical commercial contracts, the point at which collateral is required is tied to  
9 the creditworthiness of the entity. There is usually an established threshold  
10 amount set such that once an entity's exposure to the other party reaches a certain  
11 level, collateral is required to be posted if the exposure exceeds that level (the  
12 threshold amount). The stronger the creditworthiness of a company, usually  
13 measured by the company's rating by Moody's, Standard & Poor's or Fitch, the  
14 higher the threshold amount (the threshold amount being the amount of unsecured  
15 credit a company is given). Under this type of arrangement, each company's  
16 exposure would be the amount of any termination payment it would be owed  
17 upon an early termination of the agreement and all of the transactions under that  
18 agreement.

19 **Q. What does the Standard Offer Contract require?**

20 **A.** Section 11 requires a renewable energy producer, upon execution of the  
21 agreement, to post collateral referred to as performance collateral. The amount of  
22 such collateral is contained in a chart in the Standard Offer Contract. There is,  
23 however, no indication of how the level of required security is calculated or what

1 it is based upon. The calculation of performance security should always be  
2 directly related to the potential loss incurred by non-performance by each side. In  
3 this instance, it is impossible to know or understand the manner in which the level  
4 of performance security was determined. The performance security requirement  
5 must be associated with the expected level of loss.

6 **Q. What are you proposing for the Standard Offer Contract?**

7 **A.** In Exhibit MJM-1 after existing Section 11, I have incorporated creditworthiness  
8 provisions taken from an existing PEF power supply agreement with the City of  
9 Mount Dora, Florida. I have chosen that particular provision because it is one that  
10 was acceptable to PEF and employs a simpler form than the EEI Master  
11 Agreement. My objective is to simplify the Standard Offer Contract and make it  
12 fairer for renewable energy producers. The provisions I propose do not  
13 differentiate between credit standing once an entity achieves investment grade.  
14 Although I do not recommend it, a more complex formula could be used, which  
15 establishes a threshold level of unsecured credit which, if exposure exceeds the  
16 threshold amount, collateral is required to be posted. If there is a preference for  
17 such an approach, the EEI Master Agreement provides an excellent model.

18 **Q. Does the Standard Offer Contract include default provisions?**

19 **A.** Yes, it does, but once again the default provisions found in Section 14 of the  
20 Standard Offer Contract are one-sided and not reciprocal. The only party that can  
21 breach the agreement and be subject to termination for such a breach is the  
22 renewable energy producer. There are no provisions that permit a declaration of  
23 default by the renewable energy producer against the buyer, PEF.



1 **Q. What types of circumstances may give rise to a default by either party to an**  
2 **electric or gas purchase and sale agreement?**

3 **A.** In a typical agreement, the following are items which could give rise to an event  
4 of default by the buyer or the seller: 1) failure to make a payment when due, and  
5 such failure is not corrected within a specified period of time following notice of  
6 such failure; 2) any representation or warranty that is false or misleading in any  
7 material respect when made; 3) failure to perform any covenant or obligation  
8 under the agreement; 4) a party becomes bankrupt; 5) a party fails to satisfy the  
9 creditworthiness provisions; 6) a party merges or consolidates with another entity  
10 and such remaining entity does not assume all the obligations under the  
11 agreement; or 7) a guarantor breaches its guarantee, fails to make payment on its  
12 guarantee or the guarantor becomes bankrupt.

13 **Q. Do you propose to revise the Standard Offer Contract to make the default**  
14 **provision reciprocal?**

15 **A.** Yes. In Exhibit MJM-1 at Section 14, I have inserted default language based  
16 upon the language found in the EEI Master Agreement. In doing so, I have  
17 retained provisions found in the original Standard Offer Contract that are  
18 specifically applicable to renewable energy producers because there may be  
19 certain conditions of default that apply specifically to renewable generators and  
20 not to PEF. The addition of the reciprocal default provisions serves to make the  
21 contract more balanced, without denigrating the protections for PEF's customers.

1 **Q. Do you propose other changes to the section governing default?**

2 **A.** Yes. There are several provisions that are events of default that are sprinkled  
3 throughout the Standard Offer Contract. I have consolidated those provisions  
4 within the Section governing Default. From a contract drafting and  
5 implementation perspective, it is more efficient to locate all items giving rise to a  
6 claim of default in one central location. The provisions I moved are (i) Section  
7 5(e), which deals with a renewable energy producer's ability to meet the initial  
8 capacity test date and the completion of the interconnection to the delivery point;  
9 (ii) Section 5(d); (iii) the last sentence of Section 7.7; and (iv) the last sentence of  
10 Section 3 of the Standard Offer Contract. All of these provisions addressed the  
11 obligation of a renewable energy producer to meet the avoided unit in-service  
12 date.

13 **Q. Are there provisions contained within the default section dealing with**  
14 **calculating payments between the parties in the event of an early termination**  
15 **of the agreement?**

16 **A.** Yes. There is a provision for a termination payment contained in the Standard  
17 Offer Contract. According to PEF witness Gammon, the Termination Fee is  
18 required by Rule 25-17.0832(4)(e)(10), and it is simply included pursuant to such  
19 section. Gammon Testimony at 17. The cited Rule permits the imposition of a  
20 provision to "ensure repayment of payments to the extent that annual firm  
21 capacity and energy payments made to the qualifying facility in any year exceed  
22 that year's annual value of deferring the avoided unit specified in the contract in  
23 the event that the qualifying facility fails to perform pursuant to the terms and

1 conditions of the contract.” However, the amount of the Termination Security  
2 that PEF may retain should be limited to its potential liability arising from any  
3 early capacity payments. Also, there is no provision for a termination fee should  
4 the buyer default. Should the buyer (PEF) default, the renewable energy provider  
5 should also be entitled to damages under the contract.

6 **Q. Does the Standard Offer Contract provide for the right of inspection of**  
7 **books and records?**

8 **A.** Yes, it does, but once again the provision is one-sided, permitting only PEF the  
9 right to inspect the books and records of the renewable energy producer.

10 **Q. Should the renewable energy producer have the right of inspection for books**  
11 **and records, and right of audit?**

12 **A.** Yes, the renewable energy producer must have a right of inspection and audit of  
13 books and records that allows it to inspect and audit records regarding delivery of  
14 the product and pertaining to billing and payment. Providing utility access to the  
15 customer’s records also must be limited to regular business hours and undertaken  
16 only upon reasonable notice to avoid disturbing normal operations of the business.  
17 In short, such right of audit should be predicated upon reasonable notice, occur  
18 during normal business hours and at the expense of the party seeking to undertake  
19 the audit.

20 **Q. Why are the above modifications appropriate?**

21 **A.** A renewable energy producer relies upon PEF to calculate the payment amounts  
22 for capacity and energy. As such, the right to inspect and audit those calculations

1 is important to the seller. Second, from a commercial perspective, having  
2 reciprocal rights to inspect and audit the payment and receipts is standard  
3 commercial practice. Third, in the case of an inspection or audit of the books and  
4 records, the party undertaking the inspection or audit is required to pay for the  
5 cost of inspection or audit.

6 **Q. Are the proposed assignment provisions found in Section 20.4 reciprocal and**  
7 **reasonable?**

8 **A.** No. This is another example of a one-sided provision that solely benefits PEF.  
9 Restrictions on any party's ability to assign an agreement may be reasonable, but  
10 such restriction should be reciprocal.

11 **Q. Have you proposed revisions to the assignment language?**

12 **A.** Yes. The proposed language is found in Exhibit MJM-1 at Section 20.4. The  
13 suggested language permits assignment by either party with prior written consent,  
14 which consent is at the sole discretion of the consenting party and also specifies  
15 certain exceptions as identified above.

16 **Q. Are the representations and warranties section of the Standard Offer**  
17 **Contract reciprocal?**

18 **A.** No. the representations and warranties section of the Standard Offer Contract  
19 requires only the renewable energy producer to provide representations and  
20 warranties. A number of the representations and warranties are included in the  
21 earlier referenced standardized form agreements, but unlike the PEF Standard  
22 Offer Contract, such representations and warranties are given by each party to the

1 other party to the contract. Specifically, it should be expected that each party is  
2 able to represent and warrant that (i) it is an organization in good standing and  
3 qualified to do business in Florida, (ii) that the contract is duly authorized, and  
4 that there are no approvals required or if so, that such approvals have been  
5 obtained, (iii) that there are no defaults that prohibit performance under the  
6 agreement, (iv) that the party is in compliance with all applicable laws, (v) that no  
7 suits are pending that would have a material adverse affect on the party's ability  
8 to perform and (vi) that all government approvals have or will be obtained and  
9 remain in force and effect. These representations and warranties are contained in  
10 existing PEF agreements that were provided to PCS Phosphate in this proceeding.  
11 I have proposed conforming changes in the representations and warranties section  
12 of Exhibit MJM-1 to make certain of them reciprocal.

13 **Q. Do you have any comments on the provision governing force majeure?**

14 **A.** Yes. The Standard Offer Contract language is one-sided and does not correspond  
15 to what is found in the existing master agreements. Specifically, the Standard  
16 Offer's provision requires that a renewable energy producer "conclusively  
17 demonstrate" to PEF's satisfaction that an event was not due to negligence or  
18 foreseeable. This language places a difficult burden on the renewable energy  
19 producer and grants PEF with a substantial amount of discretion. Likewise, the  
20 force majeure right is one that PEF may exercise, but it is not required to meet the  
21 same standard as the renewable energy producer in terms of establishing its claim  
22 of force majeure.

1 Further, there are certain provisions that have become standard in force  
2 majeure clauses that are missing in this particular provision. For example,  
3 typically, it is not an event of force majeure if the buyer suffers a loss of market or  
4 is unable to economically resell the power, or if the seller loses supply or has the  
5 opportunity to resell the product at a higher price. Neither is it an event of force  
6 majeure if delivery is interrupted due to transmission curtailment, unless the party  
7 claiming force majeure due to a transmission curtailment had obtained firm  
8 transmission service and curtailment is due to force majeure or uncontrollable  
9 force.

10 **Q. Do you have any suggested revisions to the Standard Offer Contract in this**  
11 **regard?**

12 **A.** Yes, consistent with the discussion above, I have provided changes to the force  
13 majeure language found in Section 18 of Exhibit MJM-1. I have removed the  
14 obligation to “conclusively demonstrate” that the event is not caused by the  
15 negligence of the party making the claim, nor is the event foreseeable. In its  
16 place, parties are required to “reasonably demonstrate” the nature of the event  
17 Additionally, I have provided language to exclude from the definition of Force  
18 Majeure the loss of market or supply, or price differences from the purchase or  
19 sales price.

1 **Q. Do you have any concerns regarding the Conditions Precedent in the**  
2 **Standard Offer Contract?**

3 **A.** Yes. Again these provisions only provide conditions precedent for one party, the  
4 renewable energy provider. Generally, there are also frequently conditions  
5 precedent that apply to both parties. An example in the Standard Offer  
6 Agreement is Section 5(a)(vi) requiring originally only the renewable energy  
7 producer to produce corporate constitutional documents, approvals and the like to  
8 PEF. I have made this item reciprocal. Additionally, certain of the items  
9 contained within this section of the Standard Offer Contract are not conditions  
10 precedent, such as Section 5(d), which requires the capacity delivery date to occur  
11 prior to the avoided unit's in-service date. This item actually should be in the  
12 Default provisions, because unexcused failure to achieve the capacity delivery  
13 date prior to the avoided unit's in-service date is an event of default. Likewise,  
14 Section 5(e) is another item that more appropriately belongs as an event of  
15 default.

16 **Q. Turning to Section 10.1, the provision governing the Annual Plan, what does**  
17 **the section require of a renewable energy producer?**

18 **A.** It requires that 60 days prior to the Capacity Delivery Date, and also prior to  
19 October 1 of each year thereafter, that the renewable energy producer submit "in  
20 writing a detailed plan of the amount of electricity to be generated . . . and  
21 delivered to PEF for each month of the following calendar year, including the  
22 time, duration and magnitude of any scheduled maintenance periods) or  
23 reductions in capacity." Standard Offer Contract, Original Sheet No. 9.421. PEF

1 witness Gammon describes the provision as simply requiring an estimate of  
2 deliveries to be made so that PEF can coordinate planned outages with outages at  
3 its own and other contracted providers of capacity. Gammon Testimony at 14.  
4 However, the contractual language requires a detailed monthly plan of energy  
5 delivered.

6 **Q. Is it reasonable to expect that renewable energy producers are able to meet**  
7 **the detailed plan requirements set out in Section 10.1?**

8 **A.** No. Renewable energy producers relying on wind, solar power or excess waste  
9 heat from a manufacturing process cannot predict weather or plant operations  
10 with precision for up to fifteen months in advance. If, as PEF asserts, the  
11 intended purpose of this provision is to assist in planning functions, adjustments  
12 to the contract are needed. I have proposed these changes on Exhibit MJM-1.  
13 With the changes proposed, I recommend that renewable producers provide PEF  
14 with a schedule describing when the renewable energy producer plans to take its  
15 facility down for maintenance during the year. Additionally, for information  
16 purposes only, the renewable energy producer would also be required to submit a  
17 good faith estimate of capacity and energy to be delivered to PEF. Deviations  
18 from these estimates should not be the basis for contract default. This approach  
19 would provide PEF with sufficient information concerning expected renewable  
20 energy production without imposing an unreasonable burden on renewable energy  
21 producers.



1 **Q. Section 17 addresses the insurance requirement for a renewable energy**  
2 **producer. According to PEF, why is the provision included in the Standard**  
3 **Offer Contract?**

4 **A.** According to PEF witness Gammon, insurance is required by Rule 25-17-087(5)  
5 (c). Gammon Testimony at 17. However, that particular rule governs the  
6 interconnection process, not the Standard Offer Contract. In my estimation, the  
7 insurance provisions that specifically apply to interconnection should be included  
8 in the interconnection agreement and not in the Standard Offer Contract. I have  
9 removed this provision from the Standard Offer Contract.

10 **Q. Does the limitation restricting scheduled maintenance to fifteen days per year**  
11 **have the potential to cause a problem for the renewable energy producer?**

12 **A.** Yes, Section 10.2, the section dealing with this issue, is unnecessary and unduly  
13 restrictive. This is another element that fails to acknowledge the distinctive  
14 nature of different renewable energy technologies. In its current form, the  
15 Standard Offer Contract allows PEF to object to a renewable energy producer's  
16 proposed maintenance schedule and gives the utility substantial control over the  
17 timing of the renewable energy producer's maintenance outages with no  
18 obligation to consider how that change affects the renewable energy facility or  
19 any associated commercial/ manufacturing facility. While scheduled maintenance  
20 of large utility scale generators normally aims to avoid peak periods, renewable  
21 energy producers' facilities are often sufficiently small that they should not  
22 materially affect PEF's planned operation of its own units. Except for very large  
23 (over 50 MW) facilities for which scheduling maintenance could be a legitimate

1 planning concern, it should be sufficient for an renewable energy producer to  
2 provide a good faith estimate of its maintenance plans, with an obligation to  
3 update that information as changes become known.

4 **Q. Please discuss PEF’s scheduled maintenance requirements for combined**  
5 **cycle units?**

6 A. First, it is difficult to determine what PEF envisions as the expected scheduled  
7 maintenance requirements of the avoided unit as PEF has provided no evidence  
8 on this subject. However, an examination of PEF’s tolling agreement with  
9 Vandolah provides insight as to the nature of the maintenance of these natural  
10 gas-fired units. In Section 4.3(1)(b) of the tolling agreement, PEF “acknowledges  
11 that Seller must perform Routine Maintenance Outages and Planned Maintenance  
12 Outages at the Facility” and that “[s]uch Planned Maintenance Outages and/or  
13 Routine Maintenance Outages include, but are not limited to, the Unit  
14 manufacturer’s recommended and required maintenance, . . .”<sup>5</sup> See Exhibit  
15 MJM-3. In addition, unlike its apparent treatment of scheduled maintenance days  
16 for renewable energy producers, PEF agreed that “[t]he Facility and/or a Unit  
17 shall not be considered unavailable during Planned Maintenance Outages for  
18 purposes of calculating Monthly Capacity Payment.” *Id.* at Section 4.3(1)(a).

19 Thus, because PEF has failed to address the nature of renewable energy  
20 generators or even act consistent with its treatment of combined cycle units, I  
21 recommend that Section 10.2 be deleted in its entirety, and I have revised Section

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<sup>5</sup> The precise number of scheduled maintenance days PEF grants Vandolah cannot be determined since PEF redacted that information from the document provided to PCS Phosphate, even though PEF has not requested confidential treatment of that document in this proceeding.

1 10.1 to include more planned maintenance estimates and updates as discussed  
2 above.

3 **Q. Is PEF's requirement that a renewable energy producer utilize firm standby**  
4 **service for start up service reasonable?**

5 **A.** No. PEF offers both firm and interruptible standby service (rate schedules SS-1  
6 and SS-2). Under each Rate Schedule, facilities with on-site generation are  
7 eligible for service. PEF offers no valid reason for denying renewable energy  
8 producers access to SS-2 service. This contractual limitation serves only to  
9 increase the cost of standby service for a renewable energy producer. Section 6.3  
10 of the Standard Offer Contract provides no significant benefit to the system, while  
11 increasing a renewable energy producer's cost of purchasing power from PEF.

12 **Q. Please briefly summarize any other changes you have made to the Standard**  
13 **Offer Contract.**

14 **A.** In Section 8.2, in addition to changing the test period to reflect the generator  
15 manufacturer's testing recommendations, I have also inserted the requirement that  
16 the Committed Capacity Test results be adjusted to reference environmental  
17 conditions. This adjustment is needed to reflect how test results are impacted by  
18 ambient weather conditions. A similar provision was apparently accepted by PEF  
19 in its agreement with Vandolah.

20 In Section 9.1.3, I deleted the provision that no billing arrangement can  
21 result in a renewable energy producer selling more than the Facility's net output  
22 because no such restriction is contained in the applicable Commission rule (FPSC

1 Rule 25-17.082). Also, the term “net output” is undefined and could thus cause  
2 unnecessary confusion.

3 I deleted Section 10.5.6, which required a renewable energy producer to  
4 have a three day fuel supply on-site. Such a requirement is not applicable to most  
5 renewable generators and thus should not be included in a standard offer contract.

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

7 **A.** Yes, it does.

# **Exhibit MJM-1**

to the

DIRECT TESTIMONY OF  
MARTIN J. MARZ

ON BEHALF OF  
WHITE SPRINGS AGRICULTURAL CHEMICALS, INC.  
D/B/A PCS PHOSPHATE – WHITE SPRINGS

## **Proposed Changes to PEF's Standard Offer Contract**

Docket No. 070235-EQ  
Filed: February 18, 2008

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

STANDARD OFFER CONTRACT FOR THE PURCHASE OF FIRM CAPACITY AND  
ENERGY FROM A RENEW ABLE ENERGY PRODUCER  
OR QUALIFYING FACILITY LESS THAN 100 KW

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STANDARD OFFER CONTRACT FOR THE PURCHASE OF FIRM CAPACITY AND  
ENERGY FROM A RENEWABLE ENERGY PRODUCER  
OR QUALIFYING FACILITY LESS THAN 100 KW

between

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and

PROGRESS ENERGY FLORIDA

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**STANDARD OFFER CONTRACT FOR THE PURCHASE OF FIRM CAPACITY  
AND ENERGY FROM A RENEWABLE ENERGY PRODUCER OR QUALIFYING  
FACILITY LESS THAN 100 KW**

**THIS STANDARD OFFER CONTRACT FOR THE PURCHASE OF FIRM CAPACITY AND ENERGY (hereinafter referred to as the "Contract")** is made and entered this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ (hereinafter referred to as the "Execution Date"), by and between \_\_\_\_\_ (hereinafter the Renewable Energy Provider/Qualifying Facility ("RF/QF"), and Florida Power Corporation d/b/a Progress Energy Florida (hereinafter "PEF"), a private utility corporation organized and existing under the laws of the State of Florida. The RF/QF and PEF shall be individually be identified herein as the "Party" and collectively as the "Parties". This Contract contains five Appendices which are incorporated into and made part of this Contract: Appendix A: Monthly Capacity Payment Calculation; Appendix B: Termination Fee; Appendix C: Detailed Project Information; Appendix D: Rate Schedule COG-2; Appendix E: Agreed Upon Payment Schedules; and Appendix F: Florida Public Service Commission ("FPSC") Rules 25-17.080 through 25-17.310, F.A.C.

**WITNESSETH:**

**WHEREAS**, the RF/QF desires to sell, and PEF desires to purchase electricity to be generated by the RF/QF consistent with Florida Statutes 366.91 (2006) and FPSC Rules 25-17.080 through 25-17.310 F.A.C.; and

**WHEREAS**, the RF/QF has acquired an interconnection/transmission service agreement with the utility in whose service territory the Facility is to be located, pursuant to which the RF/QF assumes contractual responsibility to make any and all transmission-related arrangements (including ancillary services) between the RF/QF and the Transmission Provider for delivery of the Facility's firm capacity and energy to PEF. The Parties recognize that the Transmission Provider may be PEF and that the transmission service will be provided under a separate agreement; and

**WHEREAS**, the FPSC has approved this Contract for the Purchase of Firm Capacity and Energy from a Renewable Energy Producer; and

**WHEREAS**, the RF/QF guarantees that the Facility is capable of delivering firm capacity and energy to PEF for the term of this Contract in a manner consistent with the provision of this Contract;

**NOW, THEREFORE**, for mutual consideration the Parties agree as follows:

## 1. Definitions

"AFR" means the Facility's annual fuel requirement.

"AFTR" means the Facility's annual fuel transportation requirement

"Annual Capacity Billing Factor" or "ACBF" means 12 month rolling average of the Monthly Availability Factor as further defined and explained in Appendix A.

"Appendices" shall mean the schedules, exhibits, and attachments which are appended hereto and are hereby incorporated by reference and made a part of this Contract. Such Appendices include:

"Appendix A" sets forth the Monthly Capacity Payment Calculation.

"Appendix B" sets forth the Termination Fee.

"Appendix C" sets forth the Detailed Project Information.

"Appendix D" sets forth Rate Schedule COG-2.

"Appendix E" sets forth the Agreed Upon Payment Schedules and Other Mutual Agreements

"Appendix F" sets forth Florida Public Service Commission ("FPSC") Rules 25-17.080 through 25-17.310, F.A.C.

"As-Available Energy Rate" means the rate calculated by PEF in accordance with FPSC Rule 25-17.0825, F.A.C., and PEF's Rate Schedule COG-I, as they may each be amended from time to time

"Authorization to Construct" means authorization issued by any appropriate Government Agency to construct or reconstruct the Facility granted to RF/QF in accordance with the laws of the State of Florida and any relevant federal law.

"Avoided Unit" means the electrical generating unit described in Section 4 upon which this Contract is based.

"Avoided Unit Energy Cost" has the meaning assigned to it in Appendix D.

"Avoided Unit Fuel Cost" has the meaning assigned to it in Appendix D.

"Avoided Unit Heat Rate" means the average annual heat rate of the Avoided Unit as defined in Section 4.

"Avoided Unit In-Service Date" means the date upon which the Avoided Unit would have started commercial operation as specified in Section 4.

"Avoided Unit Life" means the economic life of the Avoided Unit.

"Avoided Unit Variable O&M" means the Avoided Unit variable operation and maintenance expenses as defined in Section 4. This rate will escalate annually based upon CPI-U The annual escalation will begin in the payment for January deliveries.

"Base Capacity Payment" or "BCP" means capacity payment rates defined in Appendix D and further defined by the selection of Option A,B,C or D in Section 9.2.

"Base Performance Security Amount" means the dollar amount per MW listed in the Table 2 in Section 11 for years 1-5 associated with the applicable credit class of the Party.

"Base Year" means the year that this Contract was approved by the FPSC.

"Business Day" means any day except a day upon which banks licensed to operate in the State of Florida are authorized, directed or permitted to close, Saturday, Sunday or a weekday that is observed as a public holiday in the State of Florida.

"CAMD" means the Clean Air Markets Division of the Environmental Protection Agency or successor administrator (collectively with any local, state, regional, or federal entity given jurisdiction over a program involving transferability of Environmental Attributes).

"Capacity" means the minimum average hourly net capacity (generator output minus auxiliary load) measured over the Committed Capacity Test Period.

"Capacity Delivery Date" means the first calendar day immediately following the date of the Facility's successful completion of the first Committed Capacity Test.

"Capacity Payment" means the payment defined in Section 9.2 and Appendix A.

"Committed Capacity" or "CC" means the capacity in MW that the RF/QF commits to sell to PEF, the amount of which shall be determined in accordance with Section 7 and Appendix D.

"Committed Capacity Test" means the testing of the capacity of the Facility performed in accordance with the procedures set forth in Section 8.

"Committed Capacity Test Period" means a test period of twenty-four (24) consecutive hours.

"Completed Permits Date" means the date by which the RF/QF must complete licensing, certification, and all federal, state and local governmental, environmental, and licensing approvals required to initiate construction of the Facility. This date is specified in Section 4.

"Completion/Performance Security" means the security described in Section 11.

"Conditions Precedent" shall have the meaning assigned to it in Section 5.

"Contract" means this standard offer contract for the purchase of Firm Capacity and Energy from a Renewable Energy Producer or Qualifying Facility with a nameplate capacity of less than 100 kW.

"CPI-U" means the revised monthly consumer price index for All Urban Consumers, U.S. City Average (CPI-U) (All Items 1982-84 = 100) promulgated by the Bureau of Labor Statistics of

the United States Department of Labor.

**"Creditworthy"** with respect to a Party or its credit support provider, as applicable, means a party is rated by at least two (2) of the three (3) following rating agencies Standard & Poor's (S&P), Moody's Investor Services (Moody's) and Fitch Rating Services (Fitch). Rating shall be the unsecured, senior long-term debt or deposit obligations (not supported by third party credit enhancement). Both ratings (if company is only rated by 2 of the 3 agencies) or at least two (2) of the three (3) (if company is rated by all three agencies) must be (i) BBB- or greater from S&P (ii) Baa3 or greater from Moody's (iii) BBB- or greater from Fitch.

**"Demonstration Period"** means a sixty-hour period in which the Committed Capacity Test must be completed.

**"Distribution System"** means the distribution system consisting of electric lines, electric plant, transformers and switchgear used for conveying electricity to ultimate consumers, but not including any part of the Transmission System.

**"Dispute"** shall have the meaning assigned to it in Section 20.9.

**"Drop Dead Date"** means the date which is twelve (12) months following the Execution Date                     200                    .

**"Eastern Prevailing Time"** or **"EPT"** means the time in effect in the Eastern Time Zone of the United States of America, whether Eastern Standard Time or Eastern Daylight Savings Time.

**"Effective Date"** has the meaning assigned to it in Section 5.

**"Electrical Interconnection Point"** means the physical point at which the Facility is connected with the Transmission System or, if RF/QF interconnects with a Transmission System other than PEF's, PEF's interconnection with the Transmission Provider's Transmission System, or such other physical point on which RF/QF and PEF may agree.

**"Eligible Collateral"** means (i) a Letter of Credit from a Qualified Institution or (ii) cash deposited into a PEF Security Account by RF/QF or RF/QF Security Account by PEF, as the case may be, or (iii) RF/QF Guarantee or PEF Guarantee or a combination of (i) , (ii) and/or (iii) as outlined in Section 11.

**"Energy"** means megawatt-hours generated by the Facility of the character commonly known as three-phase, sixty hertz electric energy that is delivered at a nominal voltage at the Electrical Interconnection Point.

**"Environmental Attributes"** means all attributes of an environmental or other nature that are created or otherwise arise from the Facility's generation of electricity from a renewable energy source in contrast with the generation of electricity using nuclear or fossil fuels or other traditional resources. Forms of such attributes include, without limitation, any and all environmental air quality credits, green credits, renewable energy credits ("RECs"), carbon credits, emissions reduction credits, certificates, tags, offsets, allowances, or similar products or rights, howsoever entitled, (i) resulting from the avoidance of the emission of any gas, chemical, or other substance, including but not limited to, mercury, nitrogen oxide, sulfur dioxide, carbon dioxide, carbon monoxide, particulate matter or similar pollutants or contaminants of air, water or soil gas, chemical, or other substance, and (ii) attributable to the generation, purchase, sale or use of Energy from or by the Facility, or otherwise attributable to the Facility during the Term. Environmental Attributes include, without limitation, those currently existing or arising during the Term under local, state, regional, federal, or international legislation or regulation relevant to the avoidance of any emission described in this Contract under any governmental, regulatory or voluntary program, including, but not limited to, the United Nations Framework Convention on Climate Change and related Kyoto Protocol or other programs, laws or regulations involving or administered by the Clean Air Markets Division of the Environmental Protection Agency ("CAMD") or successor administrator (collectively with any local, state, regional, or federal entity given jurisdiction over a program involving transferability of Environmental Attributes,).

**"Event of Default"** has the meaning assigned to it in Section 14.

**"Execution Date"** has the meaning assigned to it in the opening paragraph of this Contract.

**"Exemplary Early Capacity Payment Date"** means the exemplary date used to calculate Capacity Payments for Option Band D. This date is specified in Section 4. The actual Capacity Payments for Option Band D will be calculated based upon the Capacity Delivery Date.

**"Standard Offer Expiration Date"** means the final date upon which this Contract can be executed. This date is specified in Section 4.

**"Facility"** means all equipment, as described in this Contract, used to produce electric energy and, and all equipment that is owned or controlled by the RF/QF required for parallel operation with the Transmission System. In the case of a cogenerator the Facility includes all equipment that is owned or controlled by the RF/QF to produce useful thermal energy through the sequential use of energy.

**"Financial Closing"** means the fulfillment of each of the following conditions:

- (a) the execution and delivery of the Financing Documents; and
- (b) all Conditions Precedent to the initial availability for disbursement of funds under the Financing Documents (other than relating to the effectiveness of this Contract) are satisfied or waived.

"Financing Documents" shall mean documentation with respect to any private equity investment in RF/QF, any loan agreements (including agreements for any subordinated debt), notes, bonds, indentures, guarantees, security agreements and hedging agreements relating to the financing or refinancing of the design, development, construction, Testing, Commissioning, operation and maintenance of the Facility or any guarantee by any Financing Party of the repayment of all or any portion of such financing or refinancing.

"Financing Party" means the Persons (including any trustee or agent on behalf of such Persons) providing financing or refinancing to or on behalf of RF/QF for the design, development, construction, testing, commissioning, operation and maintenance of the Facility (whether limited recourse, or with or without recourse).

"Firm Capacity and Energy" has the meaning assigned to it in Appendix D.

"Firm Capacity Rate" has the meaning assigned to it in Appendix D.

"Firm Energy Rate" has the meaning assigned to it in Appendix D.

"Force Majeure" has the meaning given to it in Section 18.

"FPSC" means the Florida Public Service Commission or its successor.

"Government Agency" means the United States of America, or any state or any other political subdivision thereof, including without limitation, any municipality, township or county, and any domestic entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government, including, without limitation, any corporation or other entity owned or controlled by any of the foregoing.

"Governmental Approval" means any authorization, consent, approval, license, ruling, permit, exemption, variance, order, judgment, instruction, condition, direction, directive, decree, declaration of or regulation by any Government Agency relating to the construction, development, ownership, occupation, start-up, Testing, operation or maintenance of the Facility or to the execution, delivery or performance of this Contract as any of the foregoing are in effect as of the date of this Contract.

"Gross Domestic Price Implicit Price Deflator" or "GDPIPD" has the meaning assigned to it in Section 11.

"IEEE" means the Institute of Electrical and Electronics Engineers, Inc.

"Indemnified Party" has the meaning assigned to it in Section 16.

"Indemnifying Party" has the meaning assigned to it in Section 16.

"Initial Reduction Value" has the meaning assigned to it in Appendix B.

~~"Insurance Services Office" has the meaning assigned to it in Section 17.~~

"KVA" means one or more kilovolts-amperes of electricity, as the context requires.

"kW" means one or more kilowatts of electricity, as the context requires.

"kWh" means one or more kilowatt-hours of electricity, as the context requires.

"Letter of Credit" means a stand-by letter of credit from a Qualified Institution that is acceptable to PEF whose approval may not be unreasonably withheld.

"LOI" means a letter of intent for fuel supply.

"Material Adverse Change" means as to PEF, that PEF or PEF Guarantor, if applicable, or, as to RF/QF, that RF/QF or RF/QF Guarantor, if applicable, any of the following events; (a) such party is no longer Creditworthy or (b) the party of Party's guarantor, if applicable, defaults on an aggregate of fifty million dollars (\$50,000,000) or five percent (5%) of equity, whichever is less.

"MCPC" means the Monthly Capacity Payment for Option A.

"Monthly Billing Period" means the period beginning on the first calendar day of each calendar month, except that the initial Monthly Billing Period shall consist of the period beginning 12:01 a.m., on the Capacity Delivery Date and ending with the last calendar day of such month.

"Monthly Availability Factor" or "MAP" means the total energy received during the Monthly Billing Period for which the calculation is made, divided by the product of Committed Capacity times the total hours during the Monthly Billing Period.

"Monthly Capacity Payment" or "MCP" means the payment for Capacity calculated in accordance with Appendix A.

"MW" means one or more megawatts of electricity, as the context requires.

"MWh" means one or more megawatt-hours of electricity, as the context requires.

"Option A" means normal Capacity Payments as described in Appendix D.

"Option B" means early Capacity Payments as described in Appendix D.

"Option C" means levelized Capacity Payments as described in Appendix D.

"Option D" means early levelized Capacity Payments as described in Appendix D.

"Party" or "Parties" has the meaning assigned to it in the opening paragraph of this Contract.

"PEF" has the meaning assigned to it in the opening paragraph of this Contract.

"PEF Entities" has the meaning assigned to it in Section 16.



"PEF Guarantee" means a guarantee provided by PEF Guarantor that is acceptable to RF/QF whose approval may not be unreasonably withheld.

"PEF Guarantor" means a party that, at the time of execution and delivery of its PEF Guarantee is a direct or indirect owner of PEF and is (a) Creditworthy or is (b) reasonably acceptable to RF/QF as having verifiable Creditworthiness and a net worth sufficient to secure PEF's obligations.

"PEF Security Account" means an account designated by PEF for the benefit of PEF free and clear of all liens (including liens of any lenders) to be established and maintained at a Qualified Institution pursuant to a control agreement in a form and substance acceptable to PEF whose cost is to be borne by the RF/QF.

"Person" means any individual, partnership, corporation, association, joint stock company trust, joint venture, unincorporated organization, or Governmental Agency (or any department, agency, or political subdivision thereof).

"Project Consents" mean the following Consents, each of which is necessary to RF/QF for the fulfillment of RF/QF's obligations hereunder:

- (a) the Authorization to Construct;
- (b) planning permission and consents in respect of the Facility, and any electricity substation located at the Facility site, including but not limited to, a prevention of significant deterioration permit, a noise, proximity and visual impact permit, and any required zoning permit; and
- (c) any integrated pollution control license.

"Project Contracts" means this Contract, and any other contract required to construct, operate and maintain the Facility. The Project Contracts may include, but are not limited to, the turnkey engineering, procurement and construction contract, the electrical interconnection and operating agreement, the fuel supply agreement, the facility site lease, and the operation and maintenance agreement.

"Prudent Utility Practices" means any of the practices, methods, standards and acts (including, but not limited to, the practices, methods and acts engaged in or approved by a significant portion of owners and operators of power plants of technology, complexity and size similar to the Facility in the United States) that, at a particular time, in the exercise of reasonable judgment in light of the facts known or that should reasonably have been known at the time a decision was made, could have been expected to accomplish the desired result and goals (including such goals as efficiency, reliability, economy and profitability) in a manner consistent with applicable facility design limits and equipment specifications and applicable laws and regulations. Prudent Utility Practice is not intended to be limited to the optimum practice, method or act to the exclusion of all others, but rather to be a spectrum of acceptable practices, methods or acts in each case taking into account the Facility as an independent power project.

"Qualifying Facility" or "QF" means a cogenerator, small power producer, or non-utility generator that has been certified or self-certified by the FERC as meeting certain ownership, operating and efficiency criteria established by the Federal Energy Regulatory Commission pursuant to the Public Utility Regulatory Policies Act of 1978 ("PURPA"), the criteria for which are currently set forth in 18 C.F.R. § 292, *et seq.* (2006), Section 210 of PURPA, 16 U.S.C. § 824a-3 (2005), 16 U.S.C. 796 *et seq.* (2006), and Section 1253 of EPAct 2005, Pub. L. No. 109-58, § 1253, 119 Stat. 594 (2005) or, alternatively, analogous provisions under the laws of the State of Florida.

"Qualified Institution" means the domestic office of a United States commercial bank or trust company or a foreign bank with a United States branch with total assets of at least ten billion dollars (\$10,000,000,000) (which is not an affiliate of either party) having a general long-term senior unsecured debt rating of A- or higher (as rated by Standard & Poor's Ratings Group), A3 or higher (as rated by Moody's Investor Services) or A- or higher (as rated by Fitch Ratings).

"Rate Schedule COG-I" means PEF's Agreement for Purchase of As-Available Energy and/or Parallel Operation with a Qualifying Facility as approved by the FPSC and as may be amended from time to time.

"REC" means renewable energy credits, green tags, green tickets, renewable certificates, tradable renewable energy credits ("T-REC") or any tradable certificate that is produced by a renewable generator in addition to and in proportion to the production of electrical energy.

"Reduction Value" has the meaning assigned to it in Appendix B.

"Renewable Facility" or "RF/QF" means an electrical generating unit or group of units at a single site, interconnected for synchronous operation and delivery of electricity to an electric utility, where the primary energy in British Thermal Units used for the production of electricity is from one or more of the following sources: hydrogen produced from sources other than fossil fuels, biomass, solar energy, geothermal energy, wind energy, ocean energy, hydroelectric power or waste heat from a commercial or industrial manufacturing process.

"RF/QF Entities" has the meaning assigned to it in Section 16.

"RF/QF Guarantee" means a guarantee provided by RF/QF Guarantor that is acceptable to PEF whose approval may not be unreasonably withheld.

"RF/QF Guarantor" means a party that, at the time of execution and delivery of its RF/QF Guarantee is a direct or indirect owner of RF/QF and is (a) Creditworthy or is (b) reasonably acceptable to PEF as having verifiable Creditworthiness and a net worth sufficient to secure RF/QF's obligations.

~~"RF/QF Insurinee" has the meaning assigned to it in Section 17.~~

"RF/QF Performance Security" has the meaning assigned in Section 11.

"RF/QF Security Account" means an account designated by the RF/QF for the benefit of the RF/QF free and clear of all liens (including liens of any lenders) to be established and maintained at a Qualified Institution pursuant to a control agreement in a form and substance acceptable to RF/QF whose cost is to be borne by PEF.

"Security Documentation" has the meaning assigned to it in Section 12.

"Supplemental Eligible Collateral" means additional collateral in the form of Letter of Credit or cash to augment the RF/QF Performance Security in the event of a Material Adverse Change.

"Term" has the meaning assigned to it in Section 3.

"Termination Date" means the date upon which this Contract terminates unless terminated earlier in accordance with the provisions hereof. This date is specified in Section 4.

"Termination Fee" means the fee described in Appendix B as it applies to any Capacity Payments made under Option B, C or D.

"Termination Security" has the meaning assigned to it in Section 12.

"Transmission Provider" means the operator(s) of the Transmission System(s) or any successor thereof or any other entity or entities authorized to transmit Energy on behalf of RF/QF from the Electrical Interconnection Point.

"Transmission System" means the system of electric lines comprised wholly or substantially of high voltage lines, associated system protection, system stabilization, voltage transformation, and capacitance, reactance and other electric plant used for conveying electricity from a generating station to a substation, from one generating station to another, from one substation to another, or to or from any Electrical Interconnection Point or to ultimate consumers and shall include any interconnection owned by the Transmission Provider or PEF, but shall in no event include any lines which the Transmission Provider has specified to be part of the Distribution System except for any distribution facilities required to accept capacity and energy from the Facility.

**2. Facility; Renewable Facility or Qualifying Facility Status**

The Facility's location and generation capabilities are as described in Table 1 below.

**TABLE 1**

<b>TECHNOLOGY AND GENERATOR CAPABILITIES</b>	
Location: Specific legal description (e.g., metes and bounds or other legal description with street address required)	City: County:
Generator Type (Induction or Synchronous)	
Technology	
Fuel Type and Source	
Generator Rating (KVA)	
Maximum Capability (kW)	
Net Output (kW)	
Power Factor (%)	
Operating Voltage (kV) \	
Peak Internal Load kW	

The RF/QF's failure to complete Table 1 in its entirety shall render this Contract null and void and of no further effect.

~~The RF/QF shall use the same fuel or energy source and maintain the status as a Renewable Facility or a Qualifying Facility throughout the term of this Contract. RF/QF shall at all times keep PEF informed of any material changes in its business which affects its Renewable Facility or Qualifying Facility status. PEF shall have the right at all times to inspect the Facility and to examine any books, records, or other documents of the RF/QF that PEF deems necessary to verify the Facility's Renewable Facility or Qualifying Facility status. On or before March 31 of each year during the term of this Contract, the RF/QF shall provide to PEF a certificate signed by an officer of the RF/QF certifying that the RF/QF continuously maintained its status as a~~

~~Renewable Facility or a Qualifying Facility during the prior calendar year.~~

**3. Term of Contract**

Except as otherwise provided herein, this Contract shall become effective immediately upon its execution by the Parties and shall end at 12:01 a.m. on the Termination Date, (the "Term") unless terminated earlier in accordance with the provisions hereof. ~~Notwithstanding the foregoing, if the Capacity Delivery Date of the Facility is not accomplished by the RF/QF before the Avoided Unit In-Service Date (or such later date as may be permitted by PEF pursuant to Section 7), this Contract shall be rendered null and void and PEF's shall have no obligations under this Contract.~~

**4. Minimum Specifications and Milestones**

As required by FPSC Rule 25-17.0832(4)(e), the minimum specifications pertaining to this Contract and milestone dates are as follows:

Avoided Unit	Natural Gas Combined Cycle
Avoided Unit Capacity	618 MW
Avoided Unit In-Service Date	June 1, 2013
Avoided Unit Heat Rate	7,442 BTU/kWh
Avoided Unit Variable O&M	\$0.194 per kWh in mid-2013 dollars escalating annually at 2.25%
Avoided Unit Life	25 years
Capacity Payments begin	Avoided Unit In-Service Date unless Option B, C, or D is selected
Termination Date	May 31, 2023 (10 years)
Minimum Performance Standards – On Peak Availability Factor*	94__%
Minimum Performance Standards – Off Peak Availability Factor	94__%
Minimum Availability Factor Required to qualify for a Capacity payment	74__%
Expiration Date	April 1, 2008
Completed Permits Date	June 1, 2012
Exemplary Early Capacity Payment Date	January 1, 2008

\*RF/QF performance shall be measured and/or described in Appendix A.

**5. Conditions Precedent**

- (a) Unless otherwise waived in writing by ~~the other Party~~ PEF, on or before the Drop Dead Date, ~~each Party~~ RF/QF shall satisfy the following Conditions Precedent, ~~as applicable~~:
- (i) RF/QF shall have obtained firm transmission service necessary to deliver Capacity and energy from the Facility to the Electrical Interconnection Point, ~~in a form and substance satisfactory to RF/QF in its sole discretion~~;
  - (ii) RF/QF shall have obtained the Project Consents and any other Consents for which it is responsible under the terms hereof, ~~in a form and substance satisfactory to RF/QF in its sole discretion~~;
  - (iii) RF/QF shall have entered into Financing Documents relative to the construction of the Facility and have achieved Financial Closing, ~~in a form and substance satisfactory to RF/QF in its sole discretion~~;
  - (iv) RF/QF shall have entered into the Project Contracts, ~~in a form and substance satisfactory to RF/QF in its sole discretion~~;
  - (v) ~~RF/QF shall have obtained insurance policies or coverage in compliance with Section 17;~~
  - (vi) ~~RF/QF~~ ~~each Party~~ shall have delivered to ~~PEF~~ ~~the other Party~~ (i) a copy of its constitutional documents (certified by its corporate secretary as true, complete and up-to-date) and (ii) a copy of a corporate resolution approving the terms of this Contract and the transactions contemplated hereby and authorizing one or more individuals to execute this Contract on its behalf (such copy to have been certified by its corporate representative as true, complete and up-to-date);
  - (vii) ~~in the event the RF/QF is a Qualifying Facility, RF/QF obtaining Qualifying Facility status from either the FPSC or FERC.~~
- (b) Promptly upon satisfaction (or waiver by ~~PEF~~ in writing) of the Conditions Precedent ~~to be satisfied by RF/QF, PEF~~ ~~the Party having satisfied same~~ shall deliver to RF/QF ~~the other Party~~ a certificate evidencing such satisfaction. Subject to there being no Event of Default which has occurred and/or is continuing as of the date upon which the last of such certificates is delivered, the date of such last certificate shall constitute the effective date of this Contract (the "Effective Date").
- (c) ~~If one Party does not satisfy~~ ~~Unless all applicable Conditions Precedent are satisfied by~~ ~~RF/QF on or before the Drop Dead Date or such Conditions Precedent are not waived in writing by the other Party~~ PEF, the other Party may, in its sole discretion, terminate this Contract ~~upon no less than five (5) days written notice shall terminated on such date and~~ neither Party shall have any further liability to the other Party hereunder.
- (d) ~~RF/QF shall achieve the Capacity Delivery Date on or before the Avoided Unit In-Service Date.~~

- (c) RF/QF shall ensure that before the initial Committed Capacity Test:
- ~~(a) the Facility shall have been constructed so that the Committed Capacity Test may be duly and properly undertaken in accordance with Section 7; and~~
  - ~~(b) an operable physical connection from the Facility to the Transmission System shall have been effected in accordance with the electrical interconnection and operating agreement required by the Transmission Provider, provided, however, that such physical connection shall be made consistent with the terms hereof.~~

**6. Sale of Electricity by the RF/QF Scheduling**

- ~~6.1 Consistent with the terms hereof, the RF/QF shall sell to PEF and PEF shall purchase from the RF/QF electric power generated by the Facility. The purchase and sale of electricity pursuant to this Contract shall be a ( ) net billing arrangement or ( ) simultaneous purchase and sale arrangement; provided, however, that no such arrangement shall cause the RF/QF to sell more than the Facility's net output. The billing methodology may be changed at the option of the RF/QF, subject to the provisions of Appendix D. [Moved to Section 9.1.3]~~
- ~~6.2 Ownership and Offering For Sale Of Renewable Energy Attributes~~

The RF /QF shall retain any and all rights to own and to sell any and all Environmental Attributes associated with the electric generation of the Facility, provided that: (i) PEF shall have a right of first refusal with respect to any and all bona fide offers to purchase any Environmental Attributes; and (ii) the RF/QF shall not sell Environmental Attributes to any party at a price less than that charged by PEF. PEF must respond to an offer by a bona fide offer within thirty (30) days of notification by the RF/QF.
- ~~6.3 The RF/QF shall not rely on interruptible standby service for the start up requirements (initial or otherwise) of the Facility.~~
- ~~6.4 The RF /QF shall be responsible for the scheduling of required transmission and for all costs, expenses, taxes, fees and charges associated with the delivery of energy to PEF. The RF/QF shall enter into a transmission service agreement with the Transmission Provider in whose service territory the Facility is to be located and the RF/QF shall make any and all transmission-related arrangements (including ancillary services) between the RF/QF and the Transmission Provider for delivery of the Facility's firm Capacity and energy to PEF. The Capacity and energy amounts paid to the RF/QF hereunder do not include transmission losses. The RF/QF shall be responsible for transmission losses that occur prior to the point at which the RF/QF's energy is delivered to PEF. The Parties recognize that the Transmission Provider may be PEF and that if PEF is the Transmission Provider, that the transmission service will be provided under a separate agreement.~~

**7. Committed Capacity/Capacity Delivery Date**

- 7.1 In the event that the RF/QF elects to make no commitment as to the quantity or timing of its deliveries to PEF, then its Committed Capacity as defined in the following Section 7.2 shall be zero (0) MW. If the Committed Capacity is zero (0) MW, Sections 7.2 through Section 7.7 and all of Section 8 shall not apply.
- 7.2 If the RF/QF commits to sell capacity to PEF, the amount of which shall be determined in accordance with this Section 7 and Appendix D. Subject to Section 7.4, the Committed Capacity is set at kW, with an expected Capacity Delivery Date on or before the Avoided Unit In-Service Date.
- 7.3 Capacity testing of the Facility (each such test a Committed Capacity Test) shall be performed in accordance with the procedures set forth in Section 8. The Demonstration Period for the first Committed Capacity Test shall commence no earlier than ninety (90) days before the expected Capacity Delivery Date and testing must be completed before the Avoided Unit In-Service Date. The first Committed Capacity Test shall not be successfully completed unless the Facility demonstrates a Capacity of at least one hundred percent (100%) of the Committed Capacity set forth in Section 7.2. Subject to Section 8.1, the RF/QF may schedule and perform up to three (3) Committed Capacity Tests to satisfy the requirements of the Contract with respect to the first Committed Capacity Test.
- 7.4 In addition to the first Committed Capacity Test, PEF shall have the right to require the RF/QF, after notice no less than 10 Business Days prior to such proposed test, to validate the Committed Capacity by means of a Committed Capacity Test at any time, up to two (2) times once per year, the results of which shall be provided to PEF within seven (7) calendar days of the conclusion of such test. On and after the date of such requested Committed Capacity Test, and until the completion of a subsequent Committed Capacity Test, the Committed Capacity shall be set at the lower of the Capacity tested or the Committed Capacity as set forth in Section 7.2. PEF shall pay for test energy generated during such Committed Capacity Test and RF/QF shall be responsible for other costs of such test. To the extent a second Committed Capacity Test is sought during the year, the Party requesting such test shall be responsible for the costs of such second test.
- 7.5 Notwithstanding anything contrary to the terms hereof, the Committed Capacity may not exceed the amount set forth in Section 7.2 without the consent of PEF, which consent shall be granted in PEF's sole discretion.
- 7.6 Unless Option B, C, or D as contained in Appendix D is chosen by RF/QF, in no event shall PEF shall make no Capacity Payments to the RF/QF prior to the Capacity Delivery Date.
- 7.7 The RF/QF shall be entitled to receive Capacity Payments beginning on the Capacity Delivery Date, provided the Capacity Delivery Date occurs before the Avoided Unit In-Service Date (or such later date permitted by PEF). If the Capacity Delivery Date does not occur before the Avoided Unit In-Service Date,



PEF shall immediately be entitled to draw down the Completion/Performance Security in full.

## 8. Testing Procedures

- 8.1** The Committed Capacity Test must be completed successfully within the Demonstration Period, which period, including the approximate start time of the Committed Capacity Test, shall be selected and scheduled by the RF/QF by means of a written notice to PEF delivered at least thirty (30) calendar days prior to the start of such period. The provisions of the foregoing sentence shall not apply to any Committed Capacity Test ordered by PEF under any of the provisions of this Contract. PEF shall have the right to be present onsite to monitor firsthand any Committed Capacity Test required or permitted under this Contract.
- 8.2** The Committed Capacity Test results shall be based on the manufacturer's recommendations for testing the Facility or such other procedures as agreed upon by the Parties and adjusted to Reference Conditions on a test period of twenty-four (24) consecutive hours (the "Committed Capacity Test Period") at the highest sustained net kW rating at which the Facility can operate without exceeding the design operating conditions, temperature, pressures, and other parameters defined by the applicable manufacturer(s) for steady state operations at the Facility. The Committed Capacity Test Period shall commence at the time designated by the RF/QF pursuant to Section 8.1 or at such time requested by PEF pursuant to Section 7.4; provided, however, that the Committed Capacity Test Period may commence earlier than such time in the event that PEF is notified of, and consents to, such earlier time.
- 8.3** Normal station service use of unit auxiliaries, including, without limitation, cooling towers, heat exchangers, and other equipment required by law, shall be in service during the Committed Capacity Test Period.
- 8.4** The Capacity of the Facility shall be the minimum average hourly net output in kW (generator output minus auxiliary) measured over the Committed Capacity Test Period.
- 8.5** The Committed Capacity Test shall be performed according to standard industry testing procedures for the appropriate technology of the RF/QF.
- 8.6** The results of any Committed Capacity Test, including all data related to Facility operation and performance during testing, shall be submitted to PEF by the RF/QF within seven (7) calendar days of the conclusion of the Committed Capacity Test. The RF/QF shall certify that all such data is accurate and complete.

## 9. Payment for Electricity Produced by the Facility

### 9.1 Energy

9.1.1 PEF agrees to pay the RF/QF for energy produced by the Facility and delivered to PEF in accordance with the rates and procedures contained in PEF's approved Rate Schedule COG-1 if the Committed Capacity pursuant to Section 7.2 is set to zero. If the Committed Capacity is greater than zero MW, then PEF agrees to pay the RF/QF for energy produced by the Facility and delivered to PEF in accordance with the rates and procedures contained in Appendix D, as it may be amended from time to time. The Parties agree that this Contract shall be subject to all of the provisions contained in Rate Schedule COG-1 or Appendix D whichever applies as approved and on file with the FPSC.

9.1.2 PEF may, at its option, limit deliveries under this Contract to 110% of the Committed Capacity as set forth in Section 7. In the event that PEF chooses to limit deliveries, any energy in excess of 110% of the Committed Capacity will be paid for at the rates defined in Rate Schedule COG-1 and shall not be included in the calculations in Appendix A hereto.

~~9.1.3 Consistent with the terms hereof, the RF/QF shall sell to PEF and PEF shall purchase from the RF/QF electric power generated by the Facility. The purchase and sale of electricity pursuant to this Contract shall be a ( ) net billing arrangement or ( ) simultaneous purchase and sale arrangement; provided, however, that no such arrangement shall cause the RF/QF to sell more than the Facility's net output. The billing methodology may be changed at the option of the RF/QF, subject to the provisions of FPSC Rule 25-17.082 Appendix D. [Moved from Section 6.1]~~

### 9.2 Capacity

PEF agrees to pay the RF/QF for the Capacity described in Section 7 in accordance with the rates and procedures contained in Appendix D, as it may be amended and approved from time to time by the FPSC, and pursuant to the election of Option \_\_\_\_ of Appendix D. The RF/QF understands and agrees that Capacity Payments will only be made if the Capacity Delivery Date occurs before the Avoided Unit In-Service Date and the Facility is delivering firm Capacity and Energy to PEF. Once so selected, this Option, the Firm Capacity Rate and/or the Firm Energy Rate cannot be changed for the term of this Contract.

### 9.3 Payments for Energy and Capacity

9.3.1 Payments due the RF/QF will be made monthly, and normally by the twentieth Business Day following the end of the billing period. The kilowatt-hours sold by the RF/QF and the applicable avoided energy rate

at which payments are being made shall accompany the payment to the RF/QF.

- 9.3.2 Payments to be made under this Contract shall, for a period of not longer than two (2) years, remain subject to adjustment based on billing adjustments due to error or omission by either Party, provided that such adjustments have been agreed to between the Parties.

**10. Estimated Electricity Production and Plant Maintenance Schedule**

10.1 No later than sixty (60) calendar days prior to the Capacity Delivery Date, and prior to October 1 of each calendar year thereafter during the term of this Contract, the RF/QF shall submit to PEF in writing a good-faith estimated~~detailed~~ plan of the amount of electricity to be generated by the Facility and delivered to PEF for each month of the following calendar year, including the time, duration and magnitude of any scheduled maintenance period(s) or reductions in Capacity. An RF/QF agrees to provide updates to its planned maintenance periods as they become known. The Parties agree to discuss coordinating scheduled maintenance of electric production equipment.

~~10.2 By October 31 of each calendar year, PEF shall notify the RF/QF in writing whether the requested scheduled maintenance periods in the detailed plan are acceptable. If PEF does not accept any of the requested scheduled maintenance periods, PEF shall advise the RF/QF of the time period closest to the requested period(s) when the outage(s) can be scheduled. The RF/QF shall only schedule outages during periods approved by PEF, and such approval shall not be unreasonably withheld. Once the schedule for the detailed plan has been established and approved, either Party requesting a subsequent change in such schedule, except when such change is due to Force Majeure, must obtain approval for such change from the other Party. Such approval shall not be unreasonably withheld or delayed. Scheduled maintenance outage days shall be limited to fifteen (15) days per calendar year in accordance with manufacturer's specifications. In no event shall maintenance periods be scheduled during the following periods: June 1 through September 15 and December 1 through and including the last day of February.~~

10.3 The RF/QF shall comply with reasonable requests by PEF regarding day-to-day and hour-by-hour communication between the Parties relative to electricity production and maintenance scheduling.

10.4 The Parties recognize that the intent of the availability factor in Section 4 of this Contract includes an allowance for scheduled outages, forced outages and forced reductions in the output of the Facility. Therefore, the RF/QF shall provide PEF with notification of any forced outage or reduction in output which shall include the time and date at which the forced outage or reduction occurred, a brief description of the cause of the outage or reduction and the time and date when the forced outage or reduction ceased and the Facility was able to return to normal

operation. This notice shall be provided to PEF within seventy-two (72) hours of the end of the forced outage or reduction.

The RF/QF is required to provide the total electrical output to PEF except (i) during a period that was scheduled in Section 10.2, (ii) during a period in which notification of a forced outage or reduction was provided, (iii) during an event of Force Majeure or (iv) during a curtailment period as described in Section 10.5.5. In the event that the RF/QF does not deliver its full electrical output to PEF during an hour not excluded in the previous sentence then the RF/QF shall be charged a rate equal to the PEF's Rate Schedule COG-1 times the difference between the Committed Capacity and the actual energy received by PEF in that hour. If, in PEF's sole judgment, it is determined that the normal operation of the RF/QF requires it to cease operation or reduce its output, the charges in this Section 10.4 may be waived.

### **10.5 Dispatch and Control**

**10.5.1** Power supplied by the RF/QF hereunder shall be in the form of threephase 60 hertz alternating current, at a nominal operating voltage of \_\_\_\_\_ volts ( \_\_\_\_\_ kV) and power factor dispatchable and controllable in the range of 90% lagging to 90% leading as measured at the interconnection point to maintain system operating parameters, including power factor, as specified from time to time by PEF.

**10.5.2** The RF/QF shall operate the Facility with all system protective equipment in service whenever the Facility is connected to, or is operated in parallel with, PEP's system, except for normal testing and repair in accordance with good engineering and operating practices as agreed by the Parties. The RF/QF shall provide adequate system protection and control devices to ensure safe and protected operation of all energized equipment during normal testing and repair. All RF/QF facilities shall meet IEEE and industry standards. The RF/QF shall have independent, third party qualified personnel test, calibrate and certify in writing all protective equipment at least once every twelve (12) months in accordance with good engineering and operating practices. A unit functional trip test shall be performed after each overhaul of the Facility's turbine, generator or boilers and results provided to PEF in writing prior to returning the equipment to service. The specifics of the unit functional trip test will be consistent with good engineering and operating practices as agreed by the Parties.

**10.5.3** If the Facility is separated from the PEF system for any reason, under no circumstances shall the RF/QF reconnect the Facility to PEF's system without first obtaining PEF'S specific approval.

**10.5.4** During the term of this Contract, the RF/QF shall employ qualified personnel for

managing, operating and maintaining the Facility and for coordinating such with PEF. The RF/QF shall ensure that operating personnel are on duty at all times, twenty-four (24) hours a calendar day and seven (7) calendar days a week. Additionally, during the term of this Contract, the RF/QF shall operate and maintain the Facility in such a manner as to ensure compliance with its obligations hereunder and in accordance with applicable law and Prudent Utility Practices.

**10.5.5** PEF shall not be obligated to purchase, and may require curtailed or reduced deliveries of energy to the extent allowed under FPSC Rule 2517.086 and under any curtailment plan which PEF may have on file with the FPSC from time to time.

~~10.5.6 During the term of this Contract, the RF/QF shall maintain sufficient fuel on the site of the Facility to deliver the capacity and energy associated with the Committed Capacity for an uninterrupted seventy-two (72) hour period. At PEF's request, the RF/QF shall demonstrate this capability to PEF's reasonable satisfaction. During the term of this Contract, the RF/QF's output shall remain within a band of plus or minus ten percent (10%) of the daily output level or levels specified by the plant operator, in ninety percent (90%) of all operating hours under normal operating conditions. This calculation will be adjusted to exclude forced outage periods and periods during which the RF/QF's output is affected by a Force-Maj-eure event.~~

**11. Completion/Performance Security**

~~11.1 Simultaneous with the execution of this agreement Upon satisfaction of the Conditions Precedent, RF/QF shall deliver to PEF Eligible Collateral in an amount according to Table 2. RF/QF's Performance Security shall be maintained throughout the Term although until completion of the Facility and demonstration that the Facility can deliver the amount of capacity and energy specified in the Contract, the amount of Eligible Collateral shall be adjusted from time to time in accordance with Table 2 and Section 11.4. The listed amounts are considered the initial amounts and use 2006 as the Base Year, with all amounts expressed in US Dollars. [Adjusted to conform to rule 25-17.0832(4)(f)(1).]~~

Note: The amounts in the following Table are for 2006 and are subject to change based on utility cost estimates for any year subsequent to the Base Year.

**TABLE 2**

Credit Class	Amount per MW	
	Years 1 - 5	Years 6 - 10
A- And Above	\$45,000	\$30,000
BBB+ to BBB	\$65,000	\$55,000
BBB -	\$90,000	\$80,000
Below BBB-	\$135,000	\$90,000

**11.2** In the event that a Material Adverse Change occurs in respect of RF/QF, then within two (2) Business Day(s) RF/QF shall deliver to PEF Supplemental Eligible

Collateral equal to 50 percent of the current Eligible Collateral amount, provided however, that in the PEF's sole discretion, based on a review of the overall circumstances of RF/QF's Material Adverse Change, the total of the Eligible Collateral and the Supplemental Eligible Collateral may be reduced but in no event shall the amount be less than the Base Performance Security Amount.

- 11.4** Performance Security Annual Adjustments - The RF/QF Performance Security shall be adjusted on an annual basis beginning January 1, 2007 and each year of *during the term of the Agreement*. The values in Table 2 will be adjusted using the change in the Gross Domestic Price Implicit Price Deflator (GDPIPD) between the Base Year and each year during the term as reported in the Survey of Current Business published in January each year and revised thereafter, by the Bureau of Economic Analysis, United States Department of commerce, Washington, D.C. using the following formula: Current Performance Security amount (CPSA) multiplied by one plus the change in the GDPIPD,  $(CPSA \times (1 + \Delta GDPIPD))$
- 11.5** Replacement Collateral, Release of Collateral - Upon any reduction of the amount of RF/QF Performance Security pursuant to Section 11.2 or 11.3 the beneficiary thereof shall upon two (2) Business Days written request by the other Party release any Eligible or Supplemental Eligible Collateral that is no longer required. The choice of the type of Eligible Collateral by a Party may be selected from time to time by such Party and upon receipt of substitute Eligible Collateral, the holder of the Eligible Collateral for which the substitution is being made shall promptly release such Eligible Collateral. Following any termination of this agreement, the Parties shall mutually agree to a final settlement of all obligations under this Agreement which such period shall not exceed 90 days from such termination date unless extended by *mutual agreement between the Parties*. After such settlement, any remaining Eligible Collateral posted by a Party that has not been drawn upon by the other Party pursuant to its rights under this Contract shall be returned to such Party. Any dispute between the Parties regarding such final settlement shall be resolved according to applicable procedures set forth in Section 20.9.
- 11.6** Draws, Replenishment - A Non-Defaulting Party may draw upon Eligible Collateral or Supplemental Eligible Collateral provided by the other Party following the occurrence of an Event of Default by such other Party or pursuant to the other provisions of *this Agreement in order to recover any damages to which such Non-Defaulting Party is entitled to under this Contract*. In the event of such a draw then, except in the circumstance when this Contract otherwise terminates, the Defaulting Party shall within two (2) Business Days replenish the Eligible Collateral or Supplemental Eligible Collateral to the full amounts required by Table 2.
- 11.7** Reporting - RF/QF shall promptly notify PEF of any circumstance that results in RF/QF's failure to be in compliance with the RF/QF Performance Security Requirements of Section 11. From time to time, at PEF's written request, RF/QF

shall provide PEF with such evidence as PEF may reasonably request, that RF/QF and any RF/QF Guarantor RF/QF Guarantee, Letter of Credit or Security Account is in Full Compliance with this agreement.

xx. Creditworthiness

- xx.1 The Parties shall at all times each maintain acceptable creditworthiness or shall provide performance assurance to the non-affected Party. To maintain acceptable creditworthiness, the Parties shall not be in default of any payment obligations set out in this Agreement, and:
- (i) each Party shall maintain either a credit rating (i.e. the rating assigned to its unsecured senior long-term debt obligations or underlying rating if there is no secured senior long-term debt) by Standard & Poor's of at least BBB- and/or a Long Term Issuer or Underlying Rating, if there is no Long Term Issuer Rating from Moody's Investor Services of at least Ba3; or
  - (ii) If a Party does not have commercial credit ratings set out in subsection (i), the Party shall provide three (3) years of its most recent financial statements to the other Party which will be evaluated in a commercially reasonable manner to demonstrate to the other Party's reasonable satisfaction that the Party meets standards that are at least equivalent to the standards underlying the credit ratings set out in subsection (i).
- xx.2 Performance assurance shall mean one of the following: (a) as to either Party, an unconditional and irrevocable letter of credit or cash deposit equal to the amount that the Parties estimate that the Party providing performance assurance would owe to the non-defaulting Party.
- xx.3 If a Party that originally demonstrates acceptable creditworthiness subsequently fails to maintain acceptable creditworthiness or suffers a material adverse change, then the non-affected Party may notify the other Party that it no longer meets the creditworthiness standards and may request performance assurance from the affected Party. Such assurances shall be provided within five (5) days of the written request for such performance assurances.

**12. Termination Fee**

**12.1** In the event that the RF/QF receives Capacity Payments pursuant to Option B, Option C, or Option D of Appendix D or any Capacity Payment schedule in Appendix E that differs from a Normal Capacity Payment Rate as calculated in FPSC Rule 25-17.0832(6)(a), then upon the termination of this Contract, the RF/QF shall owe and be liable to PEF for the Termination Fee. The RF/QF's obligation to pay the Termination Fee shall survive the termination of this Contract. PEF shall provide the RF/QF, on a monthly basis, a calculation of the Termination Fee.

**12.1.1** The Termination Fee shall be secured by the RF/QF by: (i) an

unconditional, irrevocable, direct pay letter(s) of credit issued by a financial institution(s) with an investment grade credit rating in form and substance acceptable to PEF (including provisions (a) permitting partial and full draws and (b) permitting PEF to draw upon such Letter of Credit, in full, if such Letter of Credit is not renewed or replaced at least ten (10) Business Days prior to its expiration date); (ii) a bond issued by a financially sound company in form and substance acceptable to PEF; or (iii) a cash deposit with PEF (any of (i), (ii), or (iii), the "Termination Security"). The specific security instrument selected by the RF/QF for purposes of this Contract is:

- Unconditional, irrevocable, direct pay letter(s) of credit.
- Bond.
- Cash deposit(s) with PEF.

**12.1.2** PEF shall have the right and the RF/QF shall be required to monitor the financial condition of (i) the issuer(s) in the case of any Letter of Credit and (ii) the insurer(s), in the case of any bond. In the event the senior debt rating of any issuer(s) or insurer(s) has deteriorated to a level below investment grade, PEF may require the RF/QF to replace the letter(s) of credit or the bond, as applicable. In the event that PEF notifies the RF/QF that it requires such a replacement, the replacement letter(s) of credit or bond, as applicable, must be issued by a financial institution(s) or insurer(s) with an investment grade credit rating, and meet the requirements of Section 12.1.1 within thirty (30) calendar days following such notification. Failure by the RF/QF to comply with the requirements of this Section 12.1.2 shall be grounds for PEF to draw in full on any existing Letter of Credit or bond and to exercise any other remedies it may have hereunder.

**12.1.3** After the close of each calendar quarter (March 31, June 30, September 30, and December 31) occurring subsequent to the Capacity Delivery Date, upon PEF's issuance of the Termination Fee calculation as described in Section 12.1, the RF/QF must provide PEF, within ten calendar (10) days, written assurance and documentation (the "Security Documentation"), in form and substance acceptable to PEF, that the amount of the Termination Security is sufficient to cover the balance of the Termination Fee. In addition to the foregoing, at any time during the term of this Contract, PEF shall have the right to request and the RF/QF shall be obligated to deliver within five (5) calendar days of such request, such Security Documentation. Failure by the RF/QF to comply with the requirements of this Section 12.1.3 shall be grounds for PEF to draw in full on any existing Letter of Credit or bond or to retain any cash deposit, and to exercise any other remedies it may have hereunder.



**12.1.4** Upon any termination of this Contract following the Capacity Delivery Date arising from an Event of Default of the RF/QF, PEF shall be entitled to receive (and in the case of the letter(s) of credit or bond, draw upon such letter(s) of credit or bond) and retain ~~one hundred percent (100%) such portion of the Termination Security sufficient to cover any liability arising from early payments under Options B, C, or D of Appendix D.~~

### **13. Performance Factor**

PEF desires to provide an incentive to the RF/QF to operate the Facility during on-peak and off-peak periods in a manner that approximates the projected performance of the Avoided Unit. A formula to achieve this objective is attached as Appendix A.

### **14. Default**

#### **14.1 Events of Default**

With respect to each Party, the occurrence of any of the following shall constitute an Event of Default:

- (a) the failure to make, when due, any payment required pursuant to this Agreement if such failure is not remedied within three (3) Business Days after written notice;
- (b) any representation or warranty made by such Party herein is false or misleading in any material respect when made or when deemed made or repeated;
- (c) the failure to perform any material covenant or obligation set forth in this Agreement if such failure is not remedied within three (3) Business Days after written notice;
- (d) such Party becomes Bankrupt;
- (e) the failure of such Party to satisfy the creditworthiness/collateral requirements agreed to pursuant to Section hereof;
- (f) with respect to such Party's Guarantor, if any:
  - (i) if any representation or warranty made by a Guarantor in connection with this Agreement is false or misleading in any material respect when made or when deemed made or repeated
  - (ii) the failure of a Guarantor to make any payment required or to perform any other material covenant or obligation in any guaranty made in connection with this Agreement and such failure shall not be remedied with three (3) Business Days after written notice;
  - (iii) a Guarantor becomes Bankrupt;
  - (iv) the failure of a Guarantor's guaranty to be in full force and effect for purposes of this Agreement (other than in accordance with its terms) prior to the

satisfaction of all obligations of such Party under this Agreement without the written consent of the other Party; or

(v) \* Guarantor shall repudiate, disaffirm, disclaim, or reject, in whole or in part, or challenge the validity of any guaranty.

#### **14.2 Event of Default with respect to RF/QF**

Notwithstanding the occurrence of any Force Majeure as described in Section 18, each of the following shall constitute an Event of Default:

- (a) the RF/QF changes or modifies the Facility from that provided in Section 2 with respect to its type, location, technology or fuel source, without the prior written approval of PEF;
- (b) after the Capacity Delivery Date unless otherwise excused by Force Majeure or waiver, the Facility fails for twelve (12) consecutive months to maintain an Annual Capacity Billing Factor, as described in Appendix A, of at least seventy one percent (71%);
- (c) the RF/QF fails to satisfy its obligations to maintain sufficient fuel on the site of the Facility to deliver the capacity and energy associated with the Committed Capacity for an uninterrupted seventy-two (72) hour period under Section 10.5.6 hereof;
- (d) the RF/QF fails to provide the Completion/Performance Security and the Termination Fee and to comply with any of the provisions of Sections 11 and 12 hereof [covered as an Event of Default in 14.1]
- (e) the RF/QF, or the entity which owns or controls the RF/QF, ceases the conduct of active business; or if proceedings under the federal bankruptcy law or insolvency laws shall be instituted by or for or against the RF/QF or the entity which owns or controls the RF/QF; or if a receiver shall be appointed for the RF/QF or any of its assets or properties, or for the entity which owns or controls the RF/QF; or if any part of the RF/QF's assets shall be attached, levied upon, encumbered, pledged, seized or taken under any judicial process, and such proceedings shall not be vacated or fully stayed within thirty (30) calendar days thereof; or if the RF/QF shall make an assignment for the benefit of creditors, or admit in writing its inability to pay its debts as they become due; [covered as an Event of Default in 14.1]
- (f) the RF/QF fails to give proper assurance of adequate performance as specified under this Contract within thirty (30) calendar days after PEF, with reasonable grounds for insecurity, has requested in writing such assurance; [covered as an Event of Default in 15.1]

- (g) ~~the RF/QF fails to achieve licensing, certification, and all federal, state and local governmental, environmental, and licensing approvals required to initiate construction of the Facility by no later than the Completed Permits Date;~~
- (h) the RF/QF fails to comply with the provisions of Section 20.3 hereof;
- (i) ~~any of the representations or warranties made by the RF/QF in this Contract is false or misleading in any material respect as of the time made;~~  
[covered as an Event of Default in 14.1]
- (j) if, at any time after the Capacity Delivery Date, the RF/QF reduces the Committed Capacity due to an event of Force Majeure and fails to repair the Facility and reset the Committed Capacity to the level set forth in Section 7.2 (as such level may be reduced by Section 7.4) within twelve (12) months following the occurrence of such event of Force Majeure; or
- (k) ~~the RF/QF breaches any material provision of this Contract not specifically mentioned in this Section 14;~~ [covered as an Event of Default in 14.1]

## 15. ~~PEF's Rights in the Event of Default~~

15.1 Upon the occurrence of any of the Events of Default in Section 14, ~~PEF the non-defaulting Party~~ may, at its option:

15.11 ~~immediately terminate this Contract, without penalty or further obligation, except as set forth in Section 15.2 by written notice to the RF/QF other Party, and offset against any payment(s) due from to PEF to the RF/QF the defaulting Party, any monies otherwise due from the RF/QF to PEF the defaulting Party.~~

15.12 enforce the provisions of the Termination Security requirement pursuant to Section 12 hereof; and

15.13 exercise any other remedy(ies) which may be available to ~~PEF such Party~~ at law or in equity.

15.2 Termination shall not affect the liability of either Party for obligations arising prior to such termination or for damages, if any, resulting from any breach of this Contract.

## 16. Indemnification

16.1 PEF and the RF/QF shall each be responsible for its own facilities. PEF and the RF/QF shall each be responsible for ensuring adequate safeguards for other PEF customers, PEF's and the RF/QF's personnel and equipment, and for the protection of its own generating system. Each Party (the "Indemnifying Party") agrees, to the

extent permitted by applicable law, to indemnify, pay, defend, and hold harmless the other Party (the "Indemnified Party") and its officers, directors, employees, agents and contractors (hereinafter called respectively, "PEF Entities" and "RF/QF Entities") from and against any and all claims, demands, costs or expenses for loss, damage, or injury to persons or property of the Indemnified Party (or to third parties) directly caused by, arising out of, or resulting from:

- (a) a breach by the Indemnifying Party of its covenants, representations, and warranties or obligations hereunder;
- (b) any act or omission by the Indemnifying Party or its contractors, agents, servants or employees in connection with the installation or operation of its generation system or the operation thereof in connection with the other Party's system;
- (c) any defect in, failure of, or fault related to, the Indemnifying Party's generation system;
- (d) the negligence or willful misconduct of the Indemnifying Party or its contractors, agents, servants or employees; or
- (e) any other event or act that is the result of, or proximately caused by, the Indemnifying Party or its contractors, agents, servants or employees related to the Contract or the Parties' performance thereunder.

**16.1** Payment by an Indemnified Party to a third party shall not be a condition precedent to the obligations of the Indemnifying Party under Section 16. No Indemnified Party under Section 16 shall settle any claim for which it claims indemnification hereunder without first allowing the Indemnifying Party the right to defend such a claim. The Indemnifying Party shall have no obligations under Section 16 in the event of a breach of the foregoing sentence by the Indemnified Party. Section 16 shall survive termination of this Agreement.

~~17. Insurance~~

~~17.1 The RF/QF shall procure or cause to be procured and shall maintain throughout the entire Term of this Contract, a policy or policies of liability insurance issued by an insurer acceptable to PEF on a standard "Insurance Services Office" commercial general liability form (such policy or policies, collectively, the "RF/QF Insurance"). An original certificate of insurance shall be delivered to PEF at least fifteen (15) calendar days prior to the start of any interconnection work. At a minimum, the RF/QF Insurance shall contain (a) an endorsement providing coverage, including products liability/completed operations coverage for the term of this Contract, and (b) a broad form contractual liability endorsement covering liabilities (i) which might arise under, or in the performance or nonperformance of, this Contract and the Interconnection Agreement, or (ii) caused by operation of the Facility or any of the RF/QF's equipment or by the RF/QF's failure to maintain the Facility or the RF/QF's equipment in satisfactory and safe operating condition. Effective at least fifteen (15) calendar days prior to the synchronization of the Facility with PEF's system, the RF/QF Insurance shall be amended to include coverage for interruption or curtailment of power supply in accordance with industry standards. Without limiting the foregoing, the RF/QF Insurance must be reasonably acceptable to PEF. Any premium assessment or deductible shall be for the account of the RF/QF and not PEF.~~

~~17.2 The RF/QF Insurance shall have a minimum limit of one million dollars (\$1,000,000.00) per occurrence, combined single limit, for bodily injury (including death) or property damage.~~

~~17.3 To the extent that the RF/QF Insurance is on a "claims made" basis, the retroactive date of the policy(ies) shall be the Effective Date of this Contract or such other date as may be agreed upon to protect the interests of the PEF Entities and the RF/QF Entities. Furthermore, to the extent the RF/QF Insurance is on a "claims made" basis, the RF/QF's duty to provide insurance coverage shall survive the termination of this Contract until the expiration of the maximum statutory period of limitations in the State of Florida for actions based in contract or in tort. To the extent the RF/QF Insurance is on an "occurrence" basis, such insurance shall be maintained in effect at all times by the RF/QF during the term of this Contract.~~

~~17.4 The RF/QF Insurance shall provide that it may not be cancelled or materially altered without at least thirty (30) calendar days' written notice to PEF. The RF/QF shall provide PEF with a copy of any material communication or notice related to the RF/QF Insurance within ten (10) Business Days of the RF/QF's receipt or issuance thereof.~~

~~17.5 The RF/QF shall be designated as the named insured and PEF shall be designated as an additional named insured under the RF/QF Insurance. The RF/QF Insurance shall be endorsed to be primary to any coverage maintained by PEF.~~

## 18. Force Majeure

- 18.1 "Force Majeure" is defined as an event or circumstance that is not reasonably foreseeable, is beyond the reasonable control of and is not caused by the negligence or lack of due diligence of the Party claiming Force Majeure or its contractors or suppliers and ~~adversely affects~~ prevents one Party from the performance by that Party of performing its obligations under or pursuant to this agreement. Such events or circumstances may include, but are not limited to, actions or inactions of civil or military authority (including courts and governmental or administrative agencies), acts of God, war, riot or insurrection, blockades, embargoes, sabotage, epidemics, explosions and fires not originating in the Facility or caused by its operation, hurricanes, floods, strikes, lockouts or other labor disputes or difficulties (not caused by the failure of the affected party to comply with the terms of a collective bargaining agreement). Force Majeure shall not be based on (i) the loss of PEF's markets; (ii) PEF's inability economically to use or resell the capacity and energy purchased hereunder; or (iii) RE/QF's ability to sell the capacity at a price greater than the price herein. ~~RE/QF's~~ 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 control of a Party, or Party's a RE/QF failure to obtain on a timely basis and maintain a necessary permit or other regulatory approval, shall not be considered an event of Force Majeure, unless the RE/QF such Party can reasonably conclusively demonstrate, to the reasonable satisfaction of the non-claiming Party PEF, that the event was not reasonably foreseeable, was beyond the RE/QF's Party's reasonable control and was not caused by the negligence or lack of due diligence of the RE/QF the Party claiming Force Majeure, or its agents, contractors or suppliers and adversely affects the performance by that Party of its obligations under or pursuant to this agreement.
- 18.2 Except as otherwise provided in this Contract, each Party shall be excused from performance when its nonperformance was caused, directly or indirectly by an event of Force Majeure.
- 18.3 In the event of any delay or nonperformance resulting from an event of Force Majeure, the Party claiming Force Majeure shall notify the other Party in writing within five (5) Business Days of the occurrence of the event of Force Majeure, of the nature cause, date of commencement thereof and the anticipated extent of such delay, and shall indicate whether any deadlines or date(s), imposed hereunder may be affected thereby. The suspension of performance shall be of no greater scope and of no greater duration than the cure for the Force Majeure requires. A Party claiming Force Majeure shall not be entitled to any relief therefore unless and until conforming notice is provided. The Party claiming Force Majeure shall notify the other Party of the cessation of the event of Force Majeure or of the conclusion of the affected Party's cure for the event of Force Majeure in either case within two (2) Business Days thereof.

- 18.4** The Party claiming Force Majeure shall use its best efforts to cure the cause(s) preventing its performance of this Contract; provided, however, the settlement of strikes, lockouts and other labor disputes shall be entirely within the discretion of the affected Party and such Party shall not be required to settle such strikes, lockouts or other labor disputes by acceding to demands which such Party deems to be unfavorable.
- 18.5** If the RF/QF suffers an occurrence of an event of Force Majeure that reduces the generating capability of the Facility below the Committed Capacity, the RF/QF may, upon notice to PEF temporarily adjust the Committed Capacity as provided in Sections 18.5 and 18.6. Such adjustment shall be effective the first calendar day immediately following PEF's receipt of the notice or such later date as may be specified by the RF/QF. Furthermore, such adjustment shall be the minimum amount necessitated by the event of Force Majeure.
- 18.6** If the Facility is rendered completely inoperative as a result of Force Majeure, the RF/QF shall temporarily set the Committed Capacity equal to 0 kW until such time as the Facility can partially or fully operate at the Committed Capacity that existed prior to the Force Majeure. If the Committed Capacity is 0 kW, PEF shall have no obligation to make Capacity Payments hereunder.
- 18.7** If, at any time during the occurrence of an event of Force Majeure or during its cure, the Facility can partially or fully operate, then the RF/QF shall temporarily set the Committed Capacity at the maximum capability that the Facility can reasonably be expected to operate.
- 18.8** Upon the cessation of the event of Force Majeure or the conclusion of the cure for the event of Force Majeure, the Committed Capacity shall be restored to the Committed Capacity that existed immediately prior to the Force Majeure. Notwithstanding any other provisions of this Contract, upon such cessation or cure, PEF shall have right to require a Committed Capacity Test to demonstrate the Facility's compliance with the requirements of this Section 18.8. Any such Committed Capacity Test required by PEF shall be additional to any Committed Capacity Test under Section 7.4.
- 18.9** During the occurrence of an event of Force Majeure and a reduction in Committed Capacity under Section 18.4 all Monthly Capacity Payments shall reflect, pro rata, the reduction in Committed Capacity, and the Monthly Capacity Payments will continue to be calculated in accordance with the ~~pay-for-performance~~ provisions in Appendix A.

18.10 The RF/QF agrees to be responsible for and pay the costs necessary to reactivate the Facility and/or the interconnection with PEF's system if the same is (are) rendered inoperable due to actions of the RF/QF, its agents, or Force Majeure events affecting the RF/QF, the Facility or the interconnection with PEF. PEF agrees to reactivate, at its own cost, the interconnection with the Facility in circumstances where any interruptions to such interconnections are caused by PEF or its agents.

19. **Representations, Warranties, and Covenants of ~~RF/QF~~**

~~The RF/QF~~ Each Party hereto represents and warrants that as of the Effective Date:

19.1 Organization, Standing and Qualification

~~The RF/QF~~ It is a \_\_\_\_\_ (corporation, partnership, or other, as applicable) duly organized and validly existing in good standing under the laws of \_\_\_\_\_ and has all necessary power and authority to carry on its business as presently conducted to own or hold under lease its properties and to enter into and perform its obligations under this Contract and all other related documents and agreements to which it is or shall be a Party. ~~The RF/QF~~ Party is duly qualified or licensed to do business in the State of Florida and in all other jurisdictions wherein the nature of its business and operations or the character of the properties owned or leased by it makes such qualification or licensing necessary and where the failure to be so qualified or licensed would impair its ability to perform its obligations under this Contract or would result in a material liability to or would have a material adverse effect on ~~PEF~~ the other Party.

19.2 Due Authorization, No Approvals, No Defaults

Each of the execution, delivery and performance ~~by the RF/QF~~ of this Contract has been duly authorized by all necessary action on the part of ~~the RF/QF~~ such Party, does not require any approval, except as has been heretofore obtained, of the \_\_\_\_\_ (shareholders, partners, or others, as applicable) of ~~the RF/QF~~ such Party or any consent of or approval from any trustee, lessor or holder of any indebtedness or other obligation of ~~the RF/QF~~ such Party, except for such as have been duly obtained, and does not contravene or constitute a default under any law, ~~the~~ \_\_\_\_\_ (articles of incorporation, bylaws, or other ~~as-applicable governing document~~) of ~~the RF/QF~~ such Party, or any agreement, judgment, injunction, order, decree or other instrument binding upon ~~the RF/QF~~ such Party, or subject the Facility or any component part thereof to any lien other than as contemplated or permitted by this Contract.



### 19.3 Compliance with Laws

~~The RF/QF~~Each Party has knowledge of all laws and business practices that must be followed in performing its obligations under this Contract. ~~The RF/QF~~Each Party is in compliance with all laws, except to the extent that failure to comply therewith would not, in the aggregate, have a material adverse effect on the ~~RF/QF or PEF~~such Party.

### 19.4 Governmental Approvals

Except as expressly contemplated herein, neither the execution and delivery by ~~the RF/QF~~Each Party of this Contract, nor the consummation by ~~the RF/QF~~Each Party of any of the transaction contemplated thereby, requires the consent or approval of, the giving of notice to, the registration with, the recording or filing of any document with, or the taking of any other action with respect to governmental authority, except with respect to permits (a) which have already been obtained and are in full force and effect or (b) are not yet required (and with respect to which the RF/QF has no reason to believe that the same will not be readily obtainable in the ordinary course of business upon due application therefore).

### 19.5 No Suits, Proceedings

There are no actions, suits, proceedings or investigations pending or, to the knowledge of ~~the RF/QF~~Each Party, threatened against it at law or in equity before any court or tribunal of the United States or any other jurisdiction which individually or in the aggregate could result in any materially adverse effect on ~~the RF/QF's~~each Party's business, properties, or assets or its condition, financial or otherwise, or in any impairment of its ability to perform its obligations under this Contract. ~~The RF/QF~~Each Party has no knowledge of a violation or default with respect to any law which could result in any such materially adverse effect or impairment.

### 19.6 Environmental Matters

To the best of its knowledge after diligent inquiry, ~~the RF/QF~~Each Party knows of no (a) existing violations of any environmental laws at the Facility, including those governing hazardous materials or (b) pending, ongoing, or unresolved administrative or enforcement investigations, compliance orders, claims, demands, actions, or other litigation brought by governmental authorities or other third parties alleging violations of any environmental law or permit which would materially and adversely affect the operation of the Facility as contemplated by this Contract.

## **20. General Provisions**

### **20.1 Project Viability**

To assist PEF in assessing the RF/QF's financial and technical viability, the RF/QF shall provide the information and documents requested in Appendix C or substantially similar documents, to the extent the documents apply to the type of Facility covered by this Contract and to the extent the documents are available. All documents to be considered by PEF must be submitted at the time this Contract is presented to PEF. Failure to provide the following such documents may result in a determination of non-viability by PEF.

### **20.2 Permits**

The RF/QF hereby agrees to obtain and maintain any and all permits, certifications, licenses, consents or approvals of any governmental authority which the RF/QF is required to obtain as a prerequisite to engaging in the activities specified in this Contract.

### **20.3 Project Management**

If requested by PEF, the RF/QF shall submit to PEF its integrated project schedule for PEF's review within sixty (60) calendar days from the execution of this Contract, and a start-up and test schedule for the Facility at least sixty (60) calendar days prior to start-up and testing of the Facility. These schedules shall identify key licensing, permitting, construction and operating milestone dates and activities. If requested by PEF, the RF /QF shall submit progress reports in a form satisfactory to PEF every calendar month until the Capacity Delivery Date and shall notify PEF of any changes in such schedules within ten (10) calendar days after such changes are determined. PEF shall have the right to monitor the construction, start-up and testing of the Facility, either on-site or off-site. PEF's technical review and inspections of the Facility and resulting requests, if any, shall not be construed as endorsing the design thereof or as any warranty as to the safety, durability or reliability of the Facility.

The RF/QF shall provide PEF with the final designer's/manufacturer's generator capability curves, protective relay types, proposed protective relay settings, main one-line diagrams, protective relay functional diagrams, and alternating current and direct elementary diagrams for review and inspection at PEF no later than one hundred eighty (180) calendar days prior to the initial synchronization date.

### **20.4 Assignment**

~~The RF/QF may not assign this Contract, without PEF's prior written approval, which approval may be withheld at PEF's sole discretion.~~

Neither Party shall assign this Agreement or its rights hereunder without the prior written consent of the other Party, which consent may be withheld in the exercise of its sole discretion; provided, however, either Party may, without the consent of the other Party (and without relieving itself from liability hereunder), (i) transfer, sell, pledge, encumber or assign this Agreement or the accounts, revenues or proceeds hereof in connection with any financing or other financial arrangements, (ii) transfer or assign this Agreement to an affiliate of such Party which affiliate's creditworthiness is equal to or higher than that of such Party, or (iii) transfer or assign this Agreement to any person or entity succeeding to all or substantially all of the assets whose creditworthiness is equal to or higher than that of such Party; provided however, that in each such case, any such assignee shall agree in writing to be bound by the terms and conditions hereof and so long as the transferring Party delivers such tax and enforceability assurances as the non-transferring Party may reasonably request.

### 20.5 Disclaimer

In executing this Contract, PEF does not, nor should it be construed, to extend its credit or financial support for benefit of any third parties lending money to or having other transactions with the RF/QF or any assigns of this Contract.

### 20.6 Notification

All formal notices relating to this Contract shall be deemed duly given when delivered in person, or sent by registered or certified mail, or sent by fax if followed immediately with a copy sent by registered or certified mail, to the individuals designated below. The Parties designate the following individuals to be notified or to whom payment shall be sent until such time as either Party furnishes the other Party written instructions to contact another individual:

For the RF/QF:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

For PEF:

Progress Energy Florida  
Cogeneration Manager PEF 155  
299 First Avenue North  
St. Petersburg, FL 33701

Contracts and related documents may be mailed to the address below or delivered during normal business hours (8:00 a.m. to 4:45 p.m.) to the visitors' entrance at the address below:

Florida Power Corporation  
d/b/a Progress Energy Florida, Inc.  
299 First Avenue North  
St. Petersburg, FL 33701

Attention: Cogeneration Manager PEF 155

**20.7 Applicable Law**

This Contract shall be construed in accordance with and governed by the laws of the State of Florida, and the rights of the parties shall be construed in accordance with the laws of the State of Florida.

**20.8 Taxation**

In the event that PEF becomes liable for additional taxes, including interest and/or penalties arising from an Internal Revenue Services determination, through audit, ruling or other authority, that PEF's payments to the RF/QF for Capacity under Options B, C, or D of the Appendix D are not fully deductible when paid (additional tax liability), PEF may bill the RF/QF monthly for the costs, including carrying charges, interest and/or penalties, associated with the fact that all or a portion of these Capacity Payments are not currently deductible for federal and/or state income tax purposes. PEF, at its option, may offset or recoup these costs against amounts due the RF/QF hereunder. These costs would be calculated so as to place PEF in the same economic position in which it would have been if the entire Capacity Payments had been deductible in the period in which the payments were made. If PEF decides to appeal the Internal Revenue Service's determination, the decision as to whether the appeal should be made through the administrative or judicial process or both, and all subsequent decisions pertaining to the appeal (both substantive and procedural), shall rest exclusively with PEF.

**20.9 Resolution of Disputes**

**20.9.1 Notice of Dispute**

In the event that any dispute, controversy or claim arising out of or relating to this Contract or the breach, termination or validity thereof should arise between the Parties (a "Dispute"), the Party may declare a Dispute by delivering to the other Party a written notice identifying the disputed issue

**20.9.2 Resolution by Parties**

Upon receipt of a written notice claiming a Dispute, executives of both Parties shall meet at a mutually agreeable time and place within ten (10) Business Days after delivery of such notice and thereafter as often as they reasonably deem necessary, to exchange relevant information and to attempt to resolve the Dispute. In such meetings and exchanges, a Party shall have the right to designate as confidential any information that such Party offers. No confidential information exchanged in such meetings for the purpose of resolving a Dispute may be used by a Party in litigation against the other party. If the matter has not been resolved within thirty (30) Days of the disputing Party's notice having been issued, or if the

Parties fail to meet within ten (10) Business Days as required above, either Party may initiate binding arbitration in St. Petersburg, Florida, conducted in accordance with the then current American Arbitration Association's ("AAA") Large, Complex Commercial Rules or other mutually agreed upon procedures.

#### **20.10 Limitation of Liability**

**IN NO EVENT SHALL PEF, ITS PARENT CORPORATION, OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS BE LIABLE FOR ANY INCIDENTAL, INDIRECT, SPECIAL, CONSEQUENTIAL, EXEMPLARY, PUNITIVE, OR MULTIPLE DAMAGES RESULTING FROM ANY CLAIM OR CAUSE OF ACTION, WHETHER BROUGHT IN CONTRACT, TORT (INCLUDING, BUT NOT LIMITED TO, NEGLIGENCE OR STRICT LIABILITY), OR ANY OTHER LEGAL THEORY.**

#### **20.11 Severability**

If any part of this Contract, for any reason, is declared invalid or unenforceable by a 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.

#### **20.12 Complete Agreement and Amendments**

All previous communications or agreements between the Parties, whether verbal or written, with reference to the subject matter of this Contract are hereby abrogated. No amendment or modification to this Contract shall be binding unless it shall be set forth in writing and duly executed by both Parties. This Contract constitutes the entire agreement between the Parties.

#### **20.13 Survival of Contract**

Subject to the requirements of Section 20.4, this Contract, as it may be amended from time to time, shall be binding upon, and inure to the benefit of, the Parties' respective successors-in-interest and legal representatives.

#### **20.14 Record Retention**

~~The RFOF Each Party shall maintain for a period of five (5) years from the date of termination hereof all records relating to the performance of its obligations hereunder, and to cause all RFOF Entities to retain for the same period all such records.~~

#### **20.15 Audit and Facility Inspection**

Each Party has the right, upon reasonable notice of not less than seven (7) Business Days, at its sole expense and during normal working hours, to examine the records of the other Party to the extent reasonably necessary to verify the accuracy of any statement, charge, payment or computation made pursuant to this Agreement.

Except in the case of an electrical emergency at or in proximity to RF/QF's site that is impacting PEF's system, PEF shall have the right upon no less than ten (10) business days prior written notice to inspect the Facility during normal business hours. In the case of an emergency as described above, PEF shall make reasonable efforts to contact the Facility and make arrangements for an emergency inspection. Such contact may be by phone call or e-mail.

#### **20.15 No Waiver**

No waiver of any of the terms and conditions of this Contract shall be effective unless in writing and signed by the Party against whom such waiver is sought to be enforced. Any waiver of the terms hereof shall be effective only in the specific instance and for the specific purpose given. The failure of a Party to insist, in any instance, on the strict performance of any of the terms and conditions hereof shall not be construed as a waiver of such Party's right in the future to insist on such strict performance.

#### **20.16 Set-Off**

PEF may at any time, but shall be under no obligation to, set off or recoup any and all sums due from the RF /QF against sums due to the RF /QF hereunder without undergoing any legal process.

#### **20.17 Change in Environmental Law or Other Regulatory Requirements**

- (a) As used herein, "Change(s) in Environmental Law or Other Regulatory Requirements" means the enactment, adoption, promulgation, implementation, or issuance of, or a new or changed interpretation of, any statute, rule, regulation, permit, license, judgment, order or approval by a governmental entity that specifically addresses environmental or regulatory issues and that takes effect after the Effective Date.
- (b) The Parties acknowledge that Change(s) in Environmental Law or Other Regulatory Requirements could significantly affect the cost of the Avoided Unit ("Avoided Unit Cost Changes") and agree that, if any such change(s) should affect the cost of the Avoided Unit more than the Threshold defined in Section 20.17(c) below, the Party affected by such

change(s) may avail itself of the remedy set forth in Section 20.17(d) below as its sole and exclusive remedy.

- (c) The Parties recognize and agree that certain Change(s) in Environmental Law or Other Regulatory Requirements may occur that do not rise to a level that the Parties desire to impact this Agreement. Accordingly, the Parties agree that for the purposes of this Agreement, such change(s) will not be deemed to have occurred unless the change in Avoided Cost resulting from such change(s) exceed a mutually agreed upon amount. This mutually agreed upon amount is attached to this Contract in Appendix E.
- (d) If an Avoided Unit Cost Change meets the threshold set forth in Section 20.17(c) above, the affected Party may request the avoided cost payments under this Contract be recalculated and that the avoided cost payments for the remaining term of the Contract be adjusted based on the recalculation. Any dispute regarding the application of this Section 20.17 shall be resolved in accordance with Section 20.9.

**IN WITNESS WHEREOF**, the RF/QF and PEF executed this Contract on the later of the dates set forth below.

**RF/QF**

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

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

# **Exhibit MJM-2**

to the

DIRECT TESTIMONY OF  
MARTIN J. MARZ

ON BEHALF OF  
WHITE SPRINGS AGRICULTURAL CHEMICALS, INC.  
D/B/A PCS PHOSPHATE – WHITE SPRINGS

## **Capacity Factor of PEF's Combined Cycle Units**

Docket No. 070235-EQ  
Filed: February 18, 2008

DOCUMENT NUMBER-DATE

01231 FEB 18 08

FPSC-COMMISSION CLERK



**PROGRESS ENERGY FLORIDA, INC.**  
**Progress Energy Florida Combined Cycle Plants 2004 - 2006**

<u>Line</u>	<u>2004</u> (1)	<u>2005</u> (2)	<u>2006</u> (3)	<u>Average</u> (4)
1 Annual MWhs	5,885,806	6,956,112	8,173,754	7,005,224
2 Operating Capacity	1,334	1,916	1,885	1,712
3 Weighted Heat Rates (1)	7,476	7,305	7,272	7,351
4 Weighted Capacity Factors (1)	50.40	41.49	49.52	47.14

---

Source: SNL Financial

(1) Weighted by annual MWhs

DOCUMENT NUMBER-DATE

01231 FEB 18 8

FPSC-COMMISSION CLERK

# **Exhibit MJM-3**

to the

DIRECT TESTIMONY OF  
MARTIN J. MARZ

ON BEHALF OF  
WHITE SPRINGS AGRICULTURAL CHEMICALS, INC.  
D/B/A PCS PHOSPHATE – WHITE SPRINGS

## **Excerpts from Vandolah Power and PEF Tolling Agreement**

Docket No. 070235-EQ  
Filed: February 18, 2008

DOCUMENT NUMBER-DATE

01231 FEB 18 08

FPSC-COMMISSION CLERK

**REDACTED**

**Docket No. 070235-EQ  
Excerpts from the Vandolah Power  
and PEF Tolling Agreement  
Exhibit MJM-3, Page 1 of 17**

**TOLLING AGREEMENT**

Between

**VANDOLAH POWER COMPANY L.L.C.**

And

**FLORIDA POWER CORPORATION,**

d/b/a

**PROGRESS ENERGY FLORIDA, INC.**

August 29, 2007

DOCUMENT NUMBER-DATE  
01231 FEB 18 08  
FPSC-COMMISSION CLERK

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EXHIBITS

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EXHIBIT R	PERFORMANCE MONITORING INFORMATION

TOLLING AGREEMENT

THIS TOLLING AGREEMENT (this "Agreement") entered into as of the 29th Day of August, 2007, (the "Agreement Date"), by and between Vandolah Power Company L.L.C. ("Seller"), a Delaware limited liability company, and Florida Power Corporation, d/b/a Progress Energy Florida, Inc. ("Buyer"). Seller and Buyer may be individually referred to herein as a "Party" and, collectively, as the "Parties."

RECITALS:

- (A) Seller owns the Vandolah electric generating facility located in Hardee County, Florida as more particularly described in Exhibit A;
- (B) Seller and Buyer desire to enter into a tolling arrangement whereby Buyer will deliver Fuel to Seller's Vandolah electric generating facility and Seller will convert such Fuel into Energy and/or Ancillary Services when scheduled by Buyer; and
- (C) The Parties desire to enter into this Agreement to set forth their respective rights and obligations in connection with this tolling arrangement.

NOW, THEREFORE, in consideration of the mutual promises and agreements set forth herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

1. DEFINITIONS

1.1 Defined Terms.

The following terms shall have the meanings set forth below.

- (1) "Acceptable Credit Rating" means, with respect to any Person, Party or any entity a credit rating, on any date of determination, the respective ratings then assigned to such Party's or entity's unsecured, senior long-term debt (not supported by third party credit enhancement) of at least BBB- by S&P or Baa3 by Moody's. If there is no senior long term debt then the long term issuer rating for Moody's and the credit rating for S&P will be substituted. In the event of any inconsistency in ratings by the two rating agencies (a "split rating"), the lowest assigned rating shall control.
- (2) "Acceptable Guarantor" means a Person that has an Acceptable Credit Rating and that is acceptable, as determined in a commercially reasonable manner, to the Secured Party.
- (3) "Affiliate" means any Person that directly or indirectly controls, is controlled by, or is under common control with the Person in question.
- (4) "AGC" means automatic generation control, which is the capability to make automatic adjustments to generation output in response to system changes through the use of a digital computer. This control is based on such factors as load, frequency, cost, and tie line flows.

the Operational Limitations herein provided. Buyer hereby acknowledges Seller's obligation and agrees to dispatch the Facility and to perform its duties and responsibilities under this Agreement consistent with Seller's obligation in this Section 4.2.

#### 4.3 Maintenance Outages.

##### (1) Schedule of Planned Maintenance Outages.

(a) Seller shall not be obligated to deliver Energy and/or Ancillary Services pursuant to this Agreement during Planned Maintenance Outages. The Facility and/or a Unit shall not be considered unavailable during Planned Maintenance Outages for the purposes of calculating the Monthly Capacity Payment. Notwithstanding anything in this Section 4.3 or in any other provision of this Agreement, the duration of the Planned Maintenance Outages during any calendar year shall be limited as provided in Section 4.3(2) below, and the duration of any Planned Maintenance Outages which exceed the durations specified in Section 4.3(2), shall be deemed a Forced Outage, unless otherwise excused as an Excusable Event, as herein provided.

(b) Buyer acknowledges and agrees that Seller must perform Routine Maintenance Outages and Planned Maintenance Outages at the Facility in an effort to reduce and prevent Forced Derates and/or Forced Outages and to maintain the efficiency, performance, reliability and availability of the Units. Such Planned Maintenance Outages and/or Routine Maintenance Outages include, but are not limited to, the Unit manufacturer's recommended and required maintenance, Compressor Washes and any preventive maintenance that maintains or improves or that is reasonably anticipated to maintain or improve the efficiency, performance, reliability and availability of the Facility, or any Unit thereof. The Planned Maintenance Outage schedule (intervals and duration) shall be based on (i) the Unit manufacturer's equivalent start and run time guidelines, (ii) Prudent Industry Practice, (iii) any long-term service agreements and/or major maintenance agreements for the Units, (iv) the actual dispatch of the Units, (v) the Unit's point in the maintenance cycle and the potential impacts to the Unit and costs if the maintenance schedule is changed, (vi) technical bulletins and/or technical information letters from the Unit manufacturer, and (vii) all testing of the Units as herein specified or as otherwise necessary, in the reasonable discretion of Seller, for the efficiency, performance, reliability and availability of the Units (with items (i) through (vii) inclusive being collectively defined as "Guidelines For Planned Maintenance"). On or before March 31, 2011 and on or before each March 31<sup>st</sup> thereafter during the Contract Term, based on the foregoing Guidelines for Planned Maintenance, Seller shall provide to Buyer, in writing, its proposed schedule of Planned Maintenance Outages for the next calendar year and the reason for such Planned Maintenance Outages, and the expected duration thereof. Seller shall not schedule Planned Maintenance Outages during the Peak Months without Buyer's prior written consent. Notwithstanding the foregoing, Seller shall have the right to perform Routine Maintenance Outages at any time, subject to the prior consent of Buyer, at its sole discretion. The Parties shall have the right to mutually agree on reasonable adjustments to the Planned Maintenance Outage schedules at least forty-five (45) Days in advance of each Planned Maintenance Outage. No such 45-Day notice requirement shall be applicable in the case of the discovery of Emergent Work, as herein provided.

(c) Notwithstanding the provisions of 4.3(1)(b), if, based on a new technical bulletin and/or a new technical information letter, or other written notice from any original equipment manufacturer, including the Unit manufacturer, such original equipment manufacturer recommends that one or more Units (or any material component thereof) undergo an immediate and an unanticipated or unscheduled outage or derate, then Seller shall notify Buyer of the circumstances surrounding such maintenance and Seller will work together with Buyer to schedule the Planned Maintenance Outage notwithstanding the short notice involved. Subject to any mutual, written agreement regarding such maintenance, including the scope and duration of such maintenance, the Planned Maintenance Outage schedule for such year may be amended by mutual agreement to include the mutually agreed duration of such outage under the terms of Section 4.3(2) below. To the extent that the Parties do not mutually agree to add the duration of such work to the agreed durations of the Planned Maintenance Outages as specified in Section 4.3(2) below, then such work shall be treated as Emergent Work under the terms specified in Section 4.3(2) below. Notwithstanding the provisions of 4.3(1)(b), in no event shall Seller be required to keep a Unit in service after the manufacturer's recommended service interval for maintenance, and if a Unit reaches its service interval limit at any time, Seller may schedule a Planned Maintenance Outage, without Buyer's prior written consent. In any such case, once the maintenance is complete, the Seller's obligation to obtain Buyer's consent of any such Planned Maintenance Outages, as herein provided, shall resume.

(d) While in no event shall Seller schedule any Planned Maintenance Outages during the Peak Months as provided in Section 4.3(1)(b) above, to the extent the Facility or a Unit experiences a Forced Outage during a Peak Month and the anticipated duration of the Forced Outage is sufficient to allow for certain maintenance to be performed (that was otherwise scheduled as a future Planned Maintenance Outage), and if such maintenance will not extend the duration of the Forced Outage, then Seller, at its election, may perform such planned maintenance during the Forced Outage, with Buyer's prior written consent, not to be unreasonably withheld, and Seller shall have the right to treat such Forced Outage Days as Planned Maintenance Outage Days.

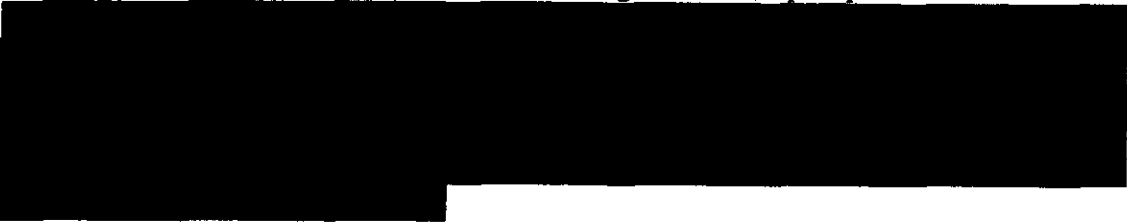
(2) **Duration of Planned Maintenance Outages.** Based on the Guidelines for Planned Maintenance, and unless otherwise agreed to by Buyer, Planned Maintenance Outages shall be limited to

[REDACTED]

If a Combustion Inspection and a Hot Gas Path Inspection are to be performed on a Unit during the same calendar year, the limits in Section 4.3(2)(iii) shall apply. If a Combustion Inspection and/or a Hot Gas Path Inspection are to be performed on a Unit during the same calendar year as a Major Inspection, the limits in Section 4.3(2)(iv) shall apply. Seller shall use commercially reasonable efforts to complete or cause to be completed any Planned Maintenance Outage within the schedule and time period agreed with the Unit manufacturer or otherwise agreed in the schedule of Planned Maintenance Outages. During each Planned Maintenance Outage, Seller shall keep Buyer apprised of the status and the expected duration of the Planned Maintenance Outage, and shall notify Buyer of the discovery of any Emergent Work, as applicable. To the extent that Seller utilizes less than the

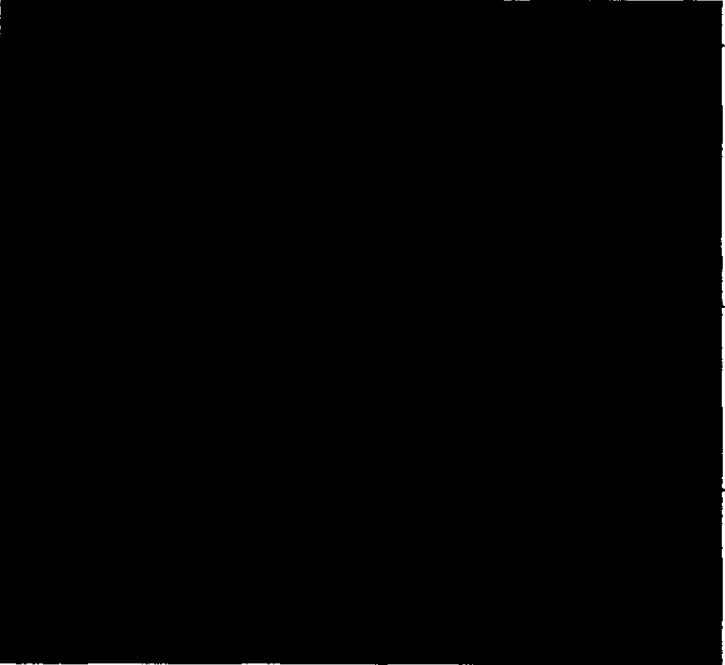


maximum number of Days permitted for Planned Maintenance Outages during a calendar year, or in the event that during a calendar year the planned maintenance is accelerated such that permitted Days of Planned Maintenance Outage remain in a calendar year, then Seller may utilize the balance of such Days to perform such Emergent Work, upon prior written notice to Buyer.



(3) **Compressor Wash.** If the maintenance schedule from the Unit manufacturer requires Seller to perform a Compressor Wash during a Peak Month, then Seller shall schedule each such Compressor Wash during the Non-Peak Hours of such Peak Month.

(4) **Maintenance-Related Charges.** If Seller is required to start and operate a Unit for maintenance purposes, then Buyer commits to work with Seller (both Parties exercising commercially reasonable efforts) so that such maintenance related start and operation can be completed when the Energy and/or Ancillary Services from the Facility are being dispatched by the Buyer for economic reasons, to the extent possible. Buyer shall provide, at its expense, all Fuel required for the start and operation of the Unit and schedule the quantity of Energy and/or Ancillary Services produced during such operation in a commercially reasonable manner. Buyer shall be entitled to all revenues associated with the sale of Energy and/or Ancillary Services from the Facility during the period of time the Unit is being operated for maintenance purposes, as herein provided. If, notwithstanding the Parties' commercially reasonable efforts, the Parties are unable to complete the maintenance related start and operation during a time when the Buyer has dispatched the Facility for economic reasons, then Seller shall provide reasonable notice to Buyer of the date of the maintenance related start and operation, and Buyer shall nevertheless issue a Dispatch Notice accordingly.



4.4 Station Load.

Seller shall be responsible for Station Load at all times including during all Planned Maintenance Outages, Forced Derates, and Forced Outages, and during start up and shut down of a Unit, and any periods when the Facility has not been dispatched. The Parties further agree that Seller will net Station Load from the maximum capacity of the Facility to determine the Demonstrated Capacity of the Facility as provided in Exhibit M.

4.5 Demonstrated Capacity and Heat Rate Tests.

(1) In [REDACTED] of the Delivery Term thereafter, or any date as mutually agreed by the Parties, Seller shall conduct a performance test of the Facility to calculate the Demonstrated Capacity and the Heat Rate of the Facility. The Demonstrated Capacity Test and the Heat Rate Test will be performed in accordance with the requirements of the Test Procedures in Exhibit M, and Buyer, its representatives and designees shall be permitted to attend each Demonstrated Capacity Test and/or Heat Rate Test, at Buyer's sole cost, and provided no such tests shall be postponed or rescheduled on account of the inability of Buyer, its representatives and designees to attend, after Buyer receiving not less than ten (10) Days prior notice of such tests. The Compliance/Relative Accuracy Test Audits (RATA) test and any other tests which may be necessary to satisfy operational, vendor warranty, or Permit requirements such as Continuous Emissions Monitoring Systems (CEMS) tests, and all of the tests described in this Section 4.5, shall be known collectively as the "Facility Tests" and each as a "Facility Test". The Parties acknowledge and agree that it is the stated purpose and goal of the Parties to schedule the Facility Tests simultaneously and in the background of the dispatched operation of the Facility, at a time when the full output of the Facility would reasonably be expected to be dispatched by Buyer (for economic reasons) to serve load for the hours of the test. To the extent that the full output of the Facility cannot be dispatched by Buyer for economic reasons as herein contemplated, then Seller shall cooperate with Buyer to have the Units tested sequentially, as herein provided. If the Facility is not dispatched by Buyer for its economic purposes during a Facility Test (with Buyer being obligated to issue a Dispatch Notice to cover such Facility Test, as requested by Seller, even if such dispatch is un-economic to Buyer, to allow for the tagging and scheduling of the Energy produced during such Facility Test), then Seller shall reimburse Buyer as provided in Section 4.3(4) above.

(2) Buyer will have the right to request during the Delivery Term, upon not less than ten (10) Days prior written notice to Seller, that Seller conduct up to two (2) additional re-tests of the Heat Rate Test and/or the Demonstrated Capacity Test within 12 months of the last Facility Test, all in accordance with the requirements of Test Procedures. Buyer, its representatives and designees shall be permitted to attend each such re-test, to the extent herein provided. If Buyer requests that Seller conduct an additional Demonstrated Capacity Test and/or an additional Heat Rate Test, then the date of any such re-test properly requested by Buyer shall be established by the mutual agreement of the Seller and the Buyer, provided such test shall be at least ten (10) Days after Buyer's written request and not more than thirty (30) Days after Buyer's request. At

**EXHIBIT M**

**TEST PROCEDURES**

**EXHIBIT M**

1. General.

All tests pursuant to the Agreement shall be conducted by Seller. Seller shall give Buyer reasonable notice of the time and scope of all such tests, and Buyer and/or its designee shall have the right to be present and observe all test procedures and results, as further provided in Section 4.5(1) of the Agreement to which this Exhibit M is attached. To the extent that Buyer is permitted to request a re-test as provided in Section 4.5(2) of the Agreement, then the timing of such re-test will be determined as provided in Section 4.5(2) of the Agreement.

The Parties agree that, if possible, the Demonstrated Capacity Test and Heat Rate Test will be performed with all four Units operating simultaneously. However, to the extent that there are constraints that prevent this, including for example electricity transmission constraints, or, in the absence of constraints, to the extent that the Parties mutually agree, the Demonstrated Capacity Test and Heat Rate Test may be performed in a staggered fashion (including the possibilities that a Unit is tested alone, or simultaneously with one or two other Units) but with all four Units ultimately being tested. In this event, the results of each of the tests performed will be combined as described below to determine the Demonstrated Capacity and Tested Heat Rate (as herein defined) for the entire Facility as if all four Units had been tested simultaneously.

The Buyer agrees to issue a Dispatch Notice for all Energy produced during the Demonstrated Capacity Test and Heat Rate Test, and to the extent that no Dispatch Notice is issued, Buyer shall nevertheless take the Energy generated during the Facilities Tests, and Seller shall reimburse the Buyer for a portion of the costs as more particularly provided in Section 4.3(4) of the Agreement.

During the performance of all tests conducted pursuant to the Agreement, the Facility and equipment shall be operated as follows:

- a. Utilizing the normal Facility operating and maintenance staff, except that additional personnel may be used for data collection, if required,
- b. Utilizing permanent Facility equipment,
- c. Within equipment design limits and in a manner consistent with equipment operating manuals,
- d. In compliance with all applicable laws and Permit requirements,
- e. Utilizing normal plant operating procedures and equipment configurations,

- f. The Facility shall be tested on Gas only with all equipment in the normal operating condition, including the evaporative coolers and Gas heaters. To assure a proper test on the evaporative coolers, the Facility shall be tested when the ambient temperature is greater than or equal to 75°F, barometric pressure shall be assumed to be standard (14.7 psia).
- g. Seller's instruments that measure the following conditions will be calibrated, if possible, prior to testing:
  - ambient temperature
  - relative humidity
- h. Each Unit must be at full 100% load, with internal heat saturation demonstrated such that wheel space temperature shall not have changed by more than 5°F between successive fifteen (15) minute periods.
- i. Data will be recorded by the plant historian electronically.
- j. The electric grid must be in a stable condition. Abnormal conditions, such as the need for unusually high volt-amperes reactive (VAR) support, which may arise during the performance of any test will need to be evaluated by both Parties and may require the invalidation of the test. Such invalidation if required will not count as one of the limited re-tests for either Buyer or Seller.
- k. All Facility systems must reach a steady state before the start of each test. Systems designed to operate intermittently shall be deemed to be in steady state of operation as long as the conditions which start and stop the operation of the system are not exceeded during the test period and the system is available for operation as designed.

Buyer and Seller shall mutually agree when situations arise during the conduct of any test that may warrant deviations from approved test procedures. Agreements reached during these consultations (such as whether to discard erroneous data) shall be recorded, acknowledged in writing, and shall be binding for all Parties.

## 2. Demonstrated Capacity Test.

The Demonstrated Capacity Test shall be conducted for the purpose of determining the Facility's net capacity at Reference Conditions.

To be completed, the Demonstrated Capacity Test shall be conducted on a Facility basis (although as described below it is possible that all four Units may not be tested simultaneously). The Facility's net electrical output shall be determined using the Energy Meters, as more specifically provided in Section 5.9.

The procedure to be used for the performance of the Demonstrated Capacity Test will depend on whether (A) all four Units are tested simultaneously, or (B) less than four Units are tested simultaneously.

Upon completion of the Demonstrated Capacity Test, Seller shall perform all calculations necessary to determine Demonstrated Capacity, and shall provide Buyer with the data used to perform such calculations, the source of such data, the resulting calculations, and the Demonstrated Capacity.

A. During the Demonstrated Capacity Test of all four Units simultaneously:

The Facility shall be started on Gas and all Units loaded to one hundred percent (100%) load. When the Units are operating at steady state, the test shall be initiated and shall run for a period of four (4) hours (or less, if mutually agreed by Buyer and Seller). Readings will be taken by the Historian from the Energy Meters and Gas Meter(s) at the beginning of each hour during the test period, and at the end of the final hour. Simultaneously with the data collection intervals above the plant Historian will record the ambient temperature and relative humidity. The Historian will provide these readings on an hourly average basis.

The Demonstrated Capacity shall be determined as follows. The average total net electrical output as measured by the Energy Meters during each hour shall be corrected from average ambient conditions during that hour to the Reference Conditions using the correction curves agreed to by Seller and Buyer and shown in Curve C1 in this Exhibit. The hourly readings will then be averaged over the total hours included in the test period to determine the Demonstrated Capacity of the Facility.

B. During a staggered test of the four Units to determine Demonstrated Capacity, the following additional criterion will be used:

The parasitic loads attributable to the non-running Units, as shown in Table T1, will be added to the Electrical Interconnect Meter readings prior to corrections for Demonstrated Capacity.

The Demonstrated Capacity of the Unit(s) tested will then be calculated as shown in the sample analysis sheet provided in Table T2. At the completion of the testing of all four Units, the corrected results from each test will be summed to determine the final Demonstrated Capacity of the Facility.

C. The dispatch of any additional Unit(s) during a Demonstrated Capacity Test:

If, during any portion of the Demonstrated Capacity Test, an additional Unit(s) is dispatched by Buyer, that portion of the Demonstrated Capacity Test will be voided, irrespective of whether it was being performed in conjunction with or absent a dispatch by Buyer. If that portion of the Demonstrated Capacity Test was being performed absent a dispatch by Buyer, any costs incurred by Seller for Gas or for a Start Charge, will be refunded by Buyer. The voided test will not count as a portion of a retest for either Party.

3. Heat Rate Test.

The Heat Rate Test shall be conducted for the purpose of determining the Facility's net heat rate at Reference Conditions (the "Tested Heat Rate" or "THR"). To the extent possible, the Heat Rate Test shall be conducted concurrently with the Demonstrated Capacity Test, even if the testing of Units is staggered. The Heat Rate Test shall be conducted solely on Gas.

The procedure used for the performance of the Heat Rate Test will depend on whether (A) all four Units are tested simultaneously, or (B) less than four Units are tested simultaneously.

Upon completion of the Heat Rate Test, Seller shall perform all calculations necessary to determine the Tested Heat Rate, and shall provide Buyer with the data used to perform such calculations, the source of such data, the resulting calculations, and the Tested Heat Rate.

A. During a Heat Rate Test of all four Units simultaneously, the THR will be determined as follows:

The total Gas use (in MMBtu on a HHV basis) measured each hour during the test period shall be divided by the total net electrical output (in MWh), during that hour. The resultant value shall be corrected from average ambient conditions during that hour to the Reference Conditions using the correction curve shown as C2 in this Exhibit. The corrected hourly readings shall be averaged to determine the Tested Heat Rate.

B. During a staggered test of the four Units to determine Demonstrated Capacity, the following additional criterion will be used to determine the Tested Heat Rate:

The parasitic loads attributable to the non-running Units, as shown in Table T1, will be added to the Electrical Interconnect Meter readings prior to making the corrections to Reference Conditions for Tested Heat Rate.

The Heat Rate of the Unit(s) tested will then be calculated as shown in the sample analysis sheet provided in Table T2. At the completion of the testing of all four Units, the corrected results will be averaged to determine the Tested Heat Rate.

C. The dispatch of any additional Unit(s) during a Demonstrated Capacity Test:

If, during any portion of the Heat Rate Test, an additional Unit(s) is dispatched by Buyer, the test will be voided, irrespective of whether the test was being performed in conjunction with or absent a dispatch by Buyer. If the test was being performed absent a dispatch by Buyer, any costs incurred by Seller for Gas or Start Charges will be refunded by Buyer. The voided test will not count as a retest for either Party.

Exhibit M Attachments:

Table T1	Parasitic Loads
Table T2	Sample Analysis Report
Curve C1	553HA3298 Sheet 2 Effect of Ambient Temperature and Humidity on Output
Curve C2	553HA3298 Sheet 3 Effect of Ambient Temperature and Humidity on Heat Rate.

Table 11					
Equipment parasitic load data:					
		KW load by Units not in operation			
Equipment:	Area	Load in KW: (per component)	3	2	1
Aux Lube Oil Pump	Unit Specific	105	315	210	105
Aux Hydraulic Pump	Unit Specific	63.06	189.18	126.12	63.06
Mist Eliminator	Unit Specific	5.5	16.5	11	5.5
L/O Skid Cooling Fan	Unit Specific	12.2	36.6	24.4	12.2
Turning Gear Motor	Unit Specific	11.15	33.45	22.3	11.15
Potable Water Pump	Commons	6	4.5	3	1.5
Jockey pump	Commons	3.8	2.85	1.9	0.95
Air Compressor	Commons	73.3	54.9	36.6	18.3
UPS	Commons	20	15	10	5
Admin Building / CB / HVAC	Commons	120	90	60	30
Service water pump	Commons	22.8	17.1	11.4	5.7
Miscellaneous	Commons	125	93.75	62.5	31.25
		Assumed Parasitic Load	868.83	579.22	289.61
TBD based on transformer loading and respective losses, not applicable to unit(s) in operation.					
GSU	Unit Specific	86	258	172	86
Aux Transformer	Unit Specific	15	45	30	15
		Transformer Losses	303	202	101
TBD based on equip running during test based on actual run time.					
Well water Pump	Commons	485.5			
Evap Pump	Unit Specific	13.8			
Glycol pump	Unit Specific	379.6			
Glycol Fans	Unit Specific	191.25			
Exciter	Unit Specific	700			
Comp Vent Fans	Unit Specific	6.6			
Exhaust Frame Blowers	Unit Specific	65			
#2 Bearing Area Blower	Unit Specific	7.2			
		Total Additional Parasitic load	1171.830	781.220	390.610

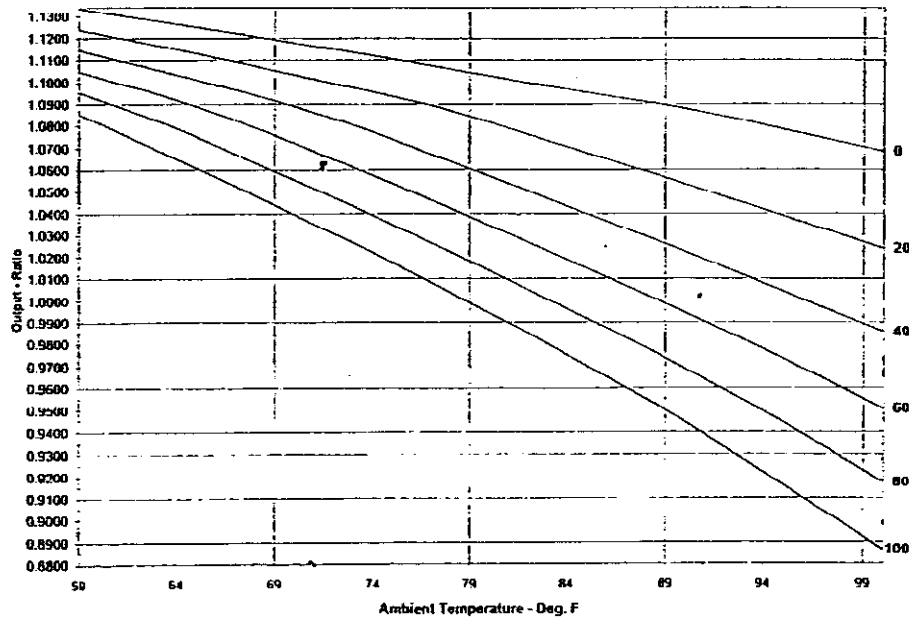


Table T2 (Sample Only)											
Vandolah Power Plant Dedicated Capacity/Tested Heat Rate Test Staggered Operation											
SAMPLE ONLY											
UNIT(s) Tested: <u>1</u>				Date: <u>June 5, 2012</u>							
	Net Energy	Parasitic Load BOP	Net Tested Energy	Fuel Gas	Measured Heat Rate	Weather Data		Effect of Ambient Temperature and humidity on Output	Effect of Ambient Temperature and humidity on Heat Rate	Results	
						Ambient Air temp	Ambient Humidity			Dependable Capacity	Tested Heat Rate (THR)
	a	b	c	d	e	f	g	h	i	j	k
	MW from Interconnect Meter	Table T1	a+b	DTH from Interconnect Meters	MMbtu/MW (d/c)	From Plant Weather Station		Curve C1	Curve C2	MW (c/h)	MMbtu/MW (e/f)
9:00 AM	161.38	1.18	162.56	1707.90	10.51	86.97	50.34	102.0%	99.6%	159.37	10.55
10:00 AM	161.50	1.18	162.68	1707.90	10.50	88.36	50.78	101.4%	99.7%	160.43	10.53
11:00 AM	160.00	1.18	161.18	1693.67	10.51	88.79	50.83	101.1%	99.7%	159.42	10.54
12:00 PM	160.38	1.18	161.56	1692.66	10.48	89.53	48.03	101.3%	99.7%	159.48	10.51
										159.68	10.53

**Curve C1**  
 553HA3293 Sheet 2  
 Effect of Ambient Temperature and Humidity on Output

**General Electric Model PG7241(FA) Gas Turbine**  
**VANDOLAH GR0682**

**E n P r f o r n c a**  
 Effect of Ambient Temperature and Humidity on Output  
 Design Values Referenced on 553HA3298 Rev  
 Fuel: Natural Gas  
 Mode: Base



		Ambient Temperature - Deg. F									
		59.0	63.6	68.1	72.7	77.2	81.8	86.33	90.89	95.44	100.00
Relative Humidity - Percent	0	1.133609	1.127101	1.120622	1.113891	1.107321	1.100452	1.093481	1.086471	1.077429	1.068463
	20	1.123963	1.115783	1.107287	1.098287	1.088932	1.076801	1.063985	1.050916	1.037559	1.023922
	40	1.114379	1.104589	1.093978	1.081396	1.066509	1.051204	1.035441	1.019241	1.002573	0.985408
	60	1.104999	1.093360	1.078954	1.062429	1.045369	1.027744	1.009571	0.990826	0.971436	0.950563
	80	1.095547	1.080679	1.062983	1.044667	1.025708	1.006120	0.985932	0.964612	0.941998	0.917277
	100	1.085602	1.067078	1.047867	1.027944	1.007336	0.986101	0.963552	0.939675	0.913355	0.886419

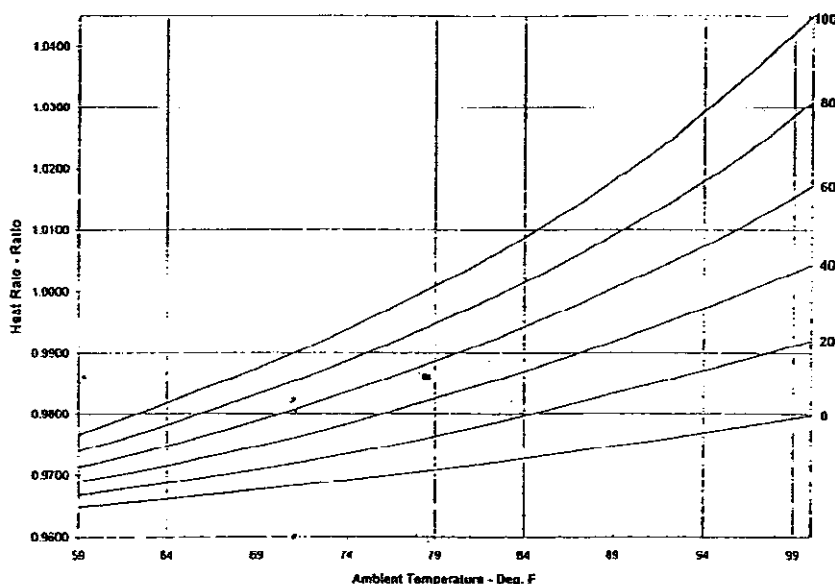
F. Mendez  
 02/06/02

553HA3298 Rev -  
 Sheet 2

Curve C2  
 553HA3298 Sheet 3  
 Effect of Ambient Temperature and Humidity on Heat Rate

General Electric Model PG7241(FA) Gas Turbine  
 VANDOLAH GR0682

Estimated Performance  
 Effect of Ambient Temperature and Humidity on Heat Rate  
 Design Values Referenced on 553HA3298 Rev  
 Fuel: Natural Gas  
 Mode: Base



		Ambient Temperature - Deg. F									
		59.0	63.6	68.1	72.7	77.2	81.8	86.33	90.89	95.44	100.00
Relative Humidity - Percent	0	0.964776	0.965952	0.967243	0.968649	0.970146	0.971808	0.973592	0.975432	0.977542	0.979692
	20	0.966730	0.968459	0.970400	0.972662	0.975162	0.978116	0.981306	0.984692	0.988296	0.992122
	40	0.968910	0.971212	0.974010	0.977238	0.980946	0.984947	0.989271	0.993928	0.998954	1.004352
	60	0.971242	0.974335	0.978007	0.982200	0.886768	0.991744	0.997151	1.003028	1.009475	1.017045
	80	0.973859	0.977715	0.982215	0.987150	0.992559	0.998472	1.004896	1.012263	1.020673	1.030865
	100	0.976615	0.981276	0.986417	0.992082	0.998303	1.005088	1.012934	1.021894	1.032940	1.044968

F. Mendez  
 02/06/02

553HA3298 Rev.  
 Sheet 3