State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE:	September 9, 2008
TO:	Ann Cole, Commission Clerk - PSC, Office of Commission Clerk
FROM:	Karen W. Webb, Economic Analyst, Office of Strategic Analysis and Governmental Affairs
RE:	Docket file for Docket No. 080503-E1 - Establishment of rule on Renewable Portfolio Standard

Please place the attached letter from Cob Creations in the docket file.

KWW
Attachment

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Rule Development proceedings re Proposed Renewable Portfolio Standard Rules 25-17.400; 17-410 and, 17-420 F.A.C	Docket No. 080503-EI Dated: September 5, 2008 (due-date extended by PSC)

CCLLC COMMENTS WITH RESPECT TO PROPOSED RPS RULES

COB Creations, LLC, a renewable energy technology vendor, through its CEO, has attended and participated in workshops on Energy Efficiency and Renewable Energy hosted by the Commission. COB has been actively involved in shepherding renewable energy proposals throughout the state of Florida for more than two years. These proposals included presenting investors directly to BOCC and Chamber of Commerce meetings in political sub-divisions to make them aware of offers to underwrite renewable energy facilities in the state of Florida. Every political sub-division was made fully aware that not a single tax dollar would be required to obtain the $50 million dollar facilities that would convert their communities to clean energy, remediate landfill waste that must no longer be put near the water table for the safety of the people, provide new industry for the local population and even offer an operatorship revenue-stream if so desired by the public utility. No less than five political sub-divisions have full proposals, which they refuse to answer in any way, shape or form, thus choosing to make their decisions by omission so that there is no public record of their refusal to accept out-of-state renewable energy investment. A portion of our intellectual property is contributed by Los Alamos National Laboratory, the most respected "combustion" laboratory in our country. However, not one representative from Florida, including the DEP environmental engineers who committed to do so, actually did call or accept invitations to attend multi-state phone conferences with the world-respected physicists to confirm, as by due diligence research from these respected third party experts, our Zero Emissions technology.

Your state is violently and with insult refusing renewable energy investors and thus renewable energy technologies; your political sub-divisions are in collusion with your IOUs.

COB also made the PSC aware of the previous performance of Southern Company which in 2006 fully ASTM tested our Process Engineered Fuel. The results showed a stunning, clean near-zero emissions energy product which we offered at BTU-pricing (in order to be exactly equal to the $/BTU of coal). Via Tom Johnson (one of Southern's contacts on *your* Energy Efficiency and Renewable Energy conference contact list) Southern Company would not agree to provide even a contingent contract while via Southern's leadership later paid millions of dollars to scuttle the federal RPS on the grounds that it was "not affordable." Is there any reasonable explanation that they

should state that paying exactly the same for clean energy is "not affordable," except to preserve their ability to speculate with their currently non-transparent practices?

Notwithstanding all our efforts, the political entities of Florida have, by their own admission, entirely fought any investment into renewable energy facilities in the whole state. The staff of one assistant county commissioner admitted to intersecting and removing all our communications to the BOCC, other staffers have admitted calling all recipients of communications to nix our investment proposals. Politicians have simultaneously pushed publicly for the RPS legislation that appears to be designed to have one purpose- to transfer the public money to the utilities in order to buy the renewable energy capital equipment, so that the public should fund the utilities' new revenue streams at the public expense all under the guise of "converting to renewable." I deduce this because so many political sub-divisions have refused to allow *investors* to pay for the renewable energy conversion. The second purpose might be to limit the amount of renewable energy that is allowed into the state, mandating that utilities need accept *only* the small percentages so that they can continue for as long as possible to benefit from prices that have been rising due to energy product speculation which have in turn been raising electricity prices (via the BTU-all-in calculation). For as long as the FL IOUs can remain connected to fuels that are "speculatable" the FL IOUs can continue to charge the highest prices to rate-payers. When the energy is entirely RPS converted, the FL IOUs will not be able to make the claim that the sun, wind or MSW have gone *up in price*. Speculation will be impossible, to the utilities' investors' chagrin.

I have challenged the Florida PSC to write the first fair RPS Rule in the United States. To that end, I have re-written your strawman to comport with fair policy and mindfulness of the public. The original version gave all advantage to the utilities (and all disadvantage to the rate-payers) which rate-payers I am certain have not been acquainted with the many offers to finance renewable energy in this state *without* their money.

This RPS Rule modification which I have written is the path that takes no dollars from the people, and holds the rates to market, the only equitable solution. When rates are held to the market, the people will know they can afford it.

- **ALL NOTIONS OF RPS% FAILURE FEES AND PERCENTAGE REQUIREMENTS MUST BE REMOVED. THE UTILITY CANNOT HAVE ANY PUNISHMENT ASSESSED WHERE NO RPS ENERGY WAS MADE.**

It is my opinion that utilities are justified in their objection to RPS thresholds. Let all fees for failing to meet any threshold be removed. This eliminates discussions of multipliers, preference and tiers are only recognized by the attribute of requiring or not-requiring an Air Permit. When all energy is renewable, the electricity rates will decrease further and further as facilities satisfy debt and technology advances coupled with zero fuel costs, making Florida residents richer/increasing wages by counter-inflation of the "raw material" we call energy.

- **THE RPS ENERGY SOURCES SHALL NOT BE LIMITED. THERE SHALL BE NO % LIMIT AT WHICH AN IOU MAY "CAP" RENEWABLE ENERGY, UNTIL ALL ENERGY IN FLORIDA IS RENEWABLE.**

By this rule, the only actual RPS requirement is the order of energy in the queue: Energy made from RPS sources without any Air Permit requirement (Tier 1) to be placed into transmission prior to RPS energy made requiring an Air Permit (Tier 2) and all pollution-based non-renewable energy to follow that, until entirely replaced. This is simply a "green-priority" RPS.

- **ENTIRELY REMOVE THE ABILITY OF ANY UTILITY TO CONTINUE TO PREVENT THE FINANCING OF RENEWABLE ENERGY FACILITIES THROUGH THEIR INSISTANCE ON UN-BANKABLE PPAs.**

"Bankable" can have several meanings. The meaning of "bankable" from one unknown speaker in the RPS meetings concerned the RECs in Florida, and used "bankable" applied to RECs to mean "money forwarded as cash into a financing structure (equity) rather than as debt" which might also be known as "tax-credit monetization." This is not the customary use of "bankable" in finance.

A "bankable contract" or derivative contract is a futures contract agreement to purchase commodities that is "benchmarked" on both ends (producer's price to buyer's price) and periodically marked to the market. This is the only kind of contract our government recognizes as sound in facility financing. I have included with my comment-submission the actual description as provided by the US Treasury Office of the Controller of the Currency in letter #1051. The current contracts posted at the PSC by the utilities are unbankable in that they do not tie the price earned by the power producer to the price paid by the rate-payer; they only agree on price between the producer and the *utility* (who is not the consumer). The contract is deliberately faux- the utilities certainly minutely track the revenue sources from each kwh but they do not transparently pass through "rate."

The STANDARD Utility OFFER CONTRACTS (and modified renewable offer contracts currently on file with the PSC) are not benchmarked, and not marked to market, and don't even pretend to do this. Rather, the language in them marks the price paid to the renewable power generator to a price that the *utility* buys it at, entirely obscuring the market from the interaction. This is why an IOU can pay a power generator $.07 kwh but could charge the rate-payer $.11 kwh or even $.20 kwh or $.30 kwh or more. Without tying the prices together the **IOUs are empowered to inflate the energy price in a manner invisible to the public** and has been doing so. The renewable energy providers have no recourse and could not even defend themselves against the IOUs as RECs (bought by the IOUs) necessarily transfer all media rights. Utilities could cry that renewables are staggeringly expensive and raise prices to the rate-payers while forcing renewables by competition to be paid *less and less* from the utilities. By the reading of this RPS strawman that appears to be the intention.

I am fully aware that we are requesting revolutionary changes. Back in the 1980s, independent natural gas operators noticed that the utilities were charging a 40x remarketing price (or in other words a forty-fold increase in the price sold at market from the price sold from the independents, which is what happens when prices are not marked to the market!!) Naturally, the independent natural gas operators wanted to re-negotiate.

The pursuit of financial transparency was afoot. The utilities made a defensive move, informing all independent natural gas operators that their Take or Pay contracts would

not be honored. A federal judge ruled on a class-action basis against the utilities and refineries granting Open Access to the interstate pipeline pursuant to FERC order 488. The judge ruled that the pipelines only allowed to utilities to charge a transmission tariff, not prohibit use of the pipeline. The utilities countered that any end user or commercial or industrial buyer wishing to purchase natural gas from the independent producers must provide a *ten year advance* notice, effectively routing the judge's fair ruling in favor of utilities in order to destroy the competition from the independents who were demanding transparency. More disgraceful, in certain instances pipelines were suddenly condemned to stop open access (El Paso natural gas), bankrupt the independent operations (by which they secured their monopoly again) and without scrutiny or competition they raised prices.

To my knowledge, no independent or renewable energy operator has ever achieved a bankable contract with a utility and no PSC has yet prevailed against them.

Failure to require OCC #1051-compliant bankable contracts has had the following effects:

A. Banks are hard-pressed to finance any renewable facilities because the contracts are entirely illegitimate, a primary reason there are no renewable facilities currently in Florida.

B. Illegitimate contracts preclude any opportunity for investors, rather than the people of Florida, to foot the bill to the renewable conversion (via securitization of the debt to investors from the capital markets rather than taxation or rate-increase of the people). This has forced vendors such as COB to consider "merchant" structures with no PPAs whatsoever in order to collect payment via the FERC requirement rather than allow the FL IOUs to again block renewables or unnecessarily thieve from the public.

C. Assists the utilities in presenting a high-price estimate for renewable conversion because of inability for anyone *but* utilities to finance the facilities with the worthless agreements that only state finance banks will fund **due to the investment grade credit rating of the IOU** (and the high-price estimates include taxation of the people as well as cost recovery and increased rate-payments to satisfy debts without, as we have proposed, the healthy injection of investment dollars first) when in fact the renewable conversion could be Florida's best economic development strategy in the last 50 years, if our write-up is adopted. Utilities have used this dirty fact to elicit the collusion of state finance entities to repress the competition which, obviously, is competition to what is essentially then state debt paper, which debt products the state has no wish to inform the public have been forwarded only on the basis *of a credit rating that assumes continual monopoly* and without any true collateral (such as a legitimate dNPV derived from a bankable contract, matched to "plant and equipment"). When the state has done something wrong with the tax and pension money, it becomes the utilities' "friend" forever, or at least for longer than the term of the debt paper. We estimate from SEC and Q-10 filings of the utilities that 90% or more of conventional technology facilities are financed using the public "credit card" all without true collateral. A reasonable person would conclude 1) all utility-owned facilities truly belong to the state, which belongs to the people and 2) the people should be getting a monthly check *from* their utilities. A clear view of the dynamic suggests that un-bankable contracts, smiled upon by PSCs

that are peopled with former utility officers, are the true source of all government collusion to repress renewables.

D. Utilities have been using un-bankable contracts, a self-produced financing obstacle, to increase energy prices (opaque contract practices assisting in obscuring detection of energy speculation which has caused Florida's energy prices to rise even *without* a single renewable facility!) to frighten the public from the renewable conversion America requires. Proof of this propaganda on the part of Southern Company, parent company to Florida IOU Gulf Power, has already been submitted to the PSC.

- **ABOVE ALL, *PROTECT THE PUBLIC* BY BENCHMARKING AND MARKING BOTH THE ENERGY PRICE AND THE REC PRICE TO MARKET, TO GUARANTEE THAT IN NO WAY WILL THE PEOPLE OF FLORIDA BE ADVERSELY AFFECTED WHILE THE ENERGY IS CONVERTED TO RENEWABLE SOURCES.**

The number one fear that the utilities have injected into our communities is that renewable conversion will bankrupt the average man, knowing full well that all conversions could be financed through capital markets and other sources, and that rates and RECs could be marked to market thresholds (which is exactly the same as "what you can afford"). This chicanery needs to stop in Florida.

- **COST RECOVERY**

Why would the PSC consider cost recovery from the public when there are alternatives *without* cost recovery from the public such as tax credit monetization, dNPV cash forwarding and the capital markets among other options if the PSC requires bankable contracts for both RECs and electricity? Who is favored by the transfer of funds from the rate-payers to the utilities?

- **UNDER NO CIRCUMSTANCES COULD ANY RENEWABLE SOURCE BE REASONABLY EXPECTED TO ALLOW THE UTILITIES TO OPERATE THE RECs MARKET.**

Considering the consistently wrongful behavior we have documented from your IOUs, who have sent representatives to speak regularly in your meetings about RPS compliance while hypocritically and simultaneously refusing to provide bankable contracts, this trust in highly inappropriate. Would you recommend that I put control of *my* REC revenue stream into the hands of that Southern fox, Tom Johnson, or should I prefer his lying lobbyist/politician-paying bosses? Further, we note that all the utilities have expressed general approval of your strawman, which we do not find surprising as it (or most probably the original from which this draft was borrowed) was written for their benefit.

One of the world's top currency traders with 35 years of direct oil & gas experience reviewed your RPS language and provided the statement, "My comment on the draft is that it is still wholly inadequate, unfair, and slanted in favor of the IOUs. Their aim is to avoid or pass on compliance to the consumer and give up monopoly power as their means of last resort."

I urge the PSC to *be* the PUBLIC SERVICE COMMISSION and act for the public's good in this matter, and further (please forgive our presumption, but we've seen nothing but collusion, evasion and omission by so many in Florida and please know that we look forward to an entirely different experience with the FL PSC) **we require explicit written response from the PSC on each topic presented or alternately we would be glad to attend a public meeting on our alternative strawman.**

We are happy to provide any documentation by request.

Respectfully submitted

Марни Золлингер
Marni Zollinger

I. Renewable Portfolio Standard

17.400 Florida Renewable Portfolio Standard

(1) Application and Scope.

(a) The Commission shall establish a Renewable Portfolio Standard Rule (hereafter called "RPS Rule") that is equitable to the rate-payers, the utilities, and renewable energy resources, that will protect and promote the development of renewable energy, protect the economic viability of existing renewable energy facilities, diversify the types of fuel used to generate electricity in Florida, lessen Florida's dependence on fossil fuels for the production of electricity, minimize the volatility of fuel costs, encourage investment into the state, improve environmental conditions, and minimize the costs of power supplies to the electric utilities and their customers in all classes (residential, commercial and industrial)..

(b) After approval of the RPS Rule, the Commission shall review and the RPS Rule at least once every five years. The Commission on its own motion, or upon petition by a substantially affected person or a utility or renewable energy resource, shall initiate a proceeding to review and, if appropriate, modify the RPS Rule from time to time or at any time not less frequently than on a 5 year basis. All modifications of the approved renewable portfolio standards and the associated compliance plans shall only be on a prospective basis.

(2) Definitions.

(a) "Florida renewable energy resources," means electrical, mechanical, or thermal energy produced from a method that uses one or more of the following fuels or energy sources: hydrogen, biomass, solar energy, geothermal energy, wind energy, ocean energy, waste heat, or hydroelectric power that was produced in Florida or imported when and if the power has been produced with least emissions (NOx, SOx, CO, CO2, Dioxans, Furans, and carcinogens)

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Deleted: (c) In a proceeding to establish or modify the renewable portfolio standards, each investor-owned electric utility shall propose numerical renewable portfolio standards based on an analysis of the technical and economic potential for Florida renewable energy resources to provide reasonably achievable and affordable annual energy (KWH) savings.¶

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for which stack results must be tested and supplied to the PSC by menas of SCADA or semi-annual settlement tests.

(b) "Renewable energy," means electrical energy produced from a method that uses one or more of the following fuels or energy sources: hydrogen produced from sources other than fossil fuels, biomass, solar energy, geothermal energy, wave energy, wind energy, ocean energy, and hydroelectric power. The term includes the alternative energy source, waste heat, from sulfuric acid manufacturing operations.

(c) "Biomass," means a power source that is comprised of, but not limited to, combustible residues or gases from forest products manufacturing, agricultural, horticultural, or industrial BTU convertible waste streams, or co-products from agricultural and orchard crops, waste or co-products from livestock and poultry operations, waste or byproducts from food processing, urban wood waste, municipal solid waste, municipal liquid waste treatment operations, and landfill gas.

(d) "Class I renewable energy source," means Florida renewable energy resources derived from wind or solar energy systems or any source that does not required an Air Permit in the State of Florida.

(e) "Class II renewable energy source," means renewable energy derived from Florida renewable energy resources other than Class I renewable energy sources.

(f) "Renewable Energy Credit," means a financial instrument that represents the unbundled, separable, renewable attribute of renewable energy or equivalent solar thermal energy produced in Florida and is equivalent to one megawatt-hour of electricity generated by a source of renewable energy asset physically located in Florida.

(g) "Renewable Portfolio Standard," means the RPS Rule made by this committee.

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(h) "Solar Energy System," means equipment that provides for the collection and use of incident solar energy for water heating, space heating or cooling, or other applications that would normally require a conventional source of energy such as petroleum products, natural gas, or electricity that performs primarily with solar energy. In other systems in which solar energy is used in a supplemental way, only those components that collect and transfer solar energy shall be included in this definition.

(i) "Solar Photovoltaic System," means a device that converts incident sunlight into electrical current.

(j) "Solar thermal system," means a device that traps heat from incident sunlight in order to heat water.

(k) "Equivalent Solar Thermal Energy," means the conversion of the thermal output, measured in British Thermal Units, of a solar thermal system to equivalent units of one megawatt-hour of electricity otherwise consumed from or output to the electric utility grid.

(3) RPS RULE:

(a) Each investor-owned utility shall be required to wheel any RPS energy into the transmission lines for sale to rate-payers prior to wheeling any non-RPS energy to the rate-payers.

(b) The RPS energy resource shall be paid per kwh at the rate benchmarked to the market (and thus controlled by the market and market thresholds in order to protect the rate-payers of Florida) in each IOU service area. Rates shall be marked to market every 15 minutes.

(c) RPS energy shall be transmitted without tariff, as the public (which owns the transmission lines) has established a preference for clean energy, which shall be expressed as tariff-free use of the transmission lines.

(d) Each investor-owned utility shall pay the REC for each MW placed into the transmission

Deleted: enewable Portfolio Standard. Within 90 days of the effective date of this rule, and not less than every five years thereafter, each investor-owned electric utility shall file for approval by the Commission proposed renewable portfolio standards based on an analysis of the technical and economic potential of Florida renewable energy resources for each utility's service area. ¶

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lines by each RPS energy resource.

For the purpose of encouraging energy with the least Air Quality negative impact, all energy from Tier 1 resources shall be placed into the transmission queue prior to any energy from a Tier 2 resource, followed by energy from all other sources.

(4) Compliance.

(a) While no fees are assigned to the Florida investor-owned utilities for failing to encourage sufficient RPS energy in their services areas, a fine of $10,000 US (ten thousand US dollars) per MWh shall be assigned to any Florida investor-owned utility for failing to place RPS energy first in the transmission queue, failing to mark to market, or failing to purchase a REC. This fine shall be paid out of dividends from the Florida investor-owned utilities to investors, and not out of rate-payers revenues.

(b) Each Florida investor-owned utility shall offer and sign bankable contracts Power Purchase Contracts (#OCC 1051 compliant) which do not in any way pierce the 17 year protection on intellectual property by mandating inspections beyond the meter and switchgear.

(c) Each Florida investor-owned utility shall, notwithstanding the above, provide a public affirmation to obey the RPS Rule described in section 3, whether or not a PPA has been or will be signed, to any RPS energy resource to invite them to place RPS energy in the transmission lines.

(d) Each Florida investor-owned utility to waive all transmission feasibility fees and approve all requested access by an RPS energy resource to the public transmission lines in support of FERC 888. Any FL investor-owned utility found to be preventing access to the transmission lines through any dilatory procedural delay to be fined $50,000,000 US (fifty million US dollars) which fine shall be delivered entirely to the

Deleted: submit proposed annual renewable portfolio standards which meet or exceed the following long term standards through the production or purchase of renewable energy credits pursuant to Rule 17.410, F.A.C.:¶
1. by January 1, 2010: 2 percent of the prior year's retail electricity sales;¶
2. by January 1, 2017: 3.75 percent of the prior year's retail electricity sales;¶
3. by January 1, 2025: 6 percent of the prior year's retail electricity sales;¶
4. by January 1, 2050: 20 percent of the prior year's retail electricity sales.

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Options for Wind & Solar Preference:¶
OPTION I:¶
(b) By January 1, 2017, a minimum of 25% of the renewable portfolio standard shall be provided from Class I renewable energy sources;¶
OPTION II:¶
(b) By January 1, 2017, a minimum of 20% of the renewable portfolio standard shall be provided from Class I solar photovoltaic or solar thermal systems and 5% of the renewable energy portfolio standard shall be provided by Class I wind energy systems;¶
OPTION III:¶
(b) For purposes of compliance with the renewable portfolio standards, a multiplier of 5 shall be applied to all renewable energy credits produced from Class I renewable energy sources until the first year in which they represent, in aggregate, 25% of the annual Renewable Portfolio Standard.

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(c) Each investor-owned electric utility proposed renewable portfolio standard filing shall, at a minimum, contain the following:¶
1. Current and ten-year forecast of installed capacity in kilowatts for each Florida renewable energy resource;¶
2. Levelized life-cycle cost in cents per kilowatt-hour for each Florida renewable energy resource;¶
3. Current and ten-year forecast of the effects of the renewable portfolio standard on the reduction of greenhouse gas emissions in Florida;¶
4. Current and ten-year forecast of the effects of the renewable portfolio standard on economic development in Florida; and¶
5. Current and ten-year forecast of the estimated retail rate impact for each class of customers of the proposed renewable portfolio standard.¶

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RPS energy resource from the dividends of the FL investor-owned utility.

(e) An RPS resource may choose to forward-sell electricity and/or RECs as far as twenty years in advance. If this is desired by the RPS resource, utilities must purchase the electricity and/or RECs with a futures derivative agreement that benchmarks electricity prices per the NYMEX for electricity and the Green Exchange for RECs, but marks to market at 15 minute intervals to prevent unsupportable agreements. If the RPS resource requests a cash dNPV (discounted Net Present Value) of the electricity or RECs sales agreement, the FL investor-owned utilities will provide said cash according to the discount rate set in latest rendition of the Tristone Energy Lending Price Survey (currently set at 9%)- this requirement to be modified by mutual agreement if and when any condition exists wherein a FL investor-owned utility declares the transactions to impose a financial hardship on the investor-owned utility and for relief seeks a hearing to request the assistance of the Florida DEP which can, in turn, arbitrate or mediate the financial transaction (bankable contracts) through to the US Treasury for financing with the Federal Finance Bank, or the Institutional Capital or Credit Markets in order to prevent the economic hardship from being transferred to the FL investor-owned utility's rate-payers.

Specific Authority 350.127(2), 366.05(1), FS. Law Implemented 366.02(2), 366.04(2)(c), (5), (6), 366.041, 366.05(1), 366.81, 366.82(1),(2), 366.91(2), 366.92 FS. History–New XX-XX-08.

II. Florida Renewable Energy Credit Market

17.410 Florida Renewable Energy Credit Market (hereafter called"RECs market").

Deleted: <#>In approving the proposed renewable portfolio standards and enforcing compliance with the approved renewable portfolio standards, the Commission shall consider excusing an investor-owned electric utility from compliance with any renewable portfolio standard based upon a showing that:¶
. 1. the supply of renewable energy or renewable energy credits is not adequate to satisfy the demand for such energy; or¶
. 2. the cost of securing renewable energy or renewable energy credits was prohibitive such that the total costs for compliance with the renewable portfolio standard exceeded one percent of the investor-owned electric utility's total annual retail revenues.¶
(b) Any utility requesting to be excused from meeting its renewable portfolio standard must submit its request along with the annual report required by Rule 25-17.400(6), F.A.C.¶
(5) Cost Recovery. Reasonable and prudent costs associated with the provision or purchase of renewable energy credits to meet the utility's renewable portfolio standards, including administrative costs of the Florida Renewable Energy Credit Market, shall be recovered through the Environmental Cost Recovery clause. ¶
(6) Reporting Requirements. Each investor-owned electric utility shall file with the Commission an annual report no later than April 1 of each year for the previous calendar year. Each investor-owned electric utility's report shall include the following:¶
(a) the retail sales of the prior year in megawatt-hours;¶
(b) the quantity of self-generated renewable energy in megawatt-hours separated by fuel type;¶
(c) the quantity of renewable energy purchased in megawatt-hours, separated by type of ownership and fuel type;¶
(d) the quantity and vintage of self-generated renewable energy credits;¶
(e) the quantity and vintage of renewable energy credits purchased;¶
(f) the fuel type and ownership of the Florida renewable energy resource associated with each renewable energy credit;¶
(g) a statement as to whether it was in compliance with the renewable portfolio standard in the previous calendar year; and ¶
(h) the utility's plan for additional generation or procurement to meet the renewable portfolio standard for the current calendar year and the following two years.¶

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(1) An electronic Florida RECs Market shall be established. The renewable energy credit market shall allow for the production, transparent buying/selling/trading of renewable energy credits used to comply with the RPS Rule. All records associated with the production of and the buying/selling/trading of renewable energy credits shall be available to the Commission for audit purposes. All prices out to the latest-vintage sale shall be electronically posted, which prices shall reflect the average price, not the highest or lowest price, per REC for that quarter. The electronic platform shall allow for the option of registration of renewable energy credits for sale directly and without brokers by the RPS energy resources.

(a) The RECs Market shall be developed, administrated and maintained by an independent not-for-profit corporation which shall be governed by a board that with representation (roughly) as follows:

55% renewable energy resources, activists, technologists

20% renewable energy financiers, brokers, traders, market analysts

25% utilities and FL Public Service Commission.

Board membership requirements shall be strictly enforced.

(b) Municipal electric utilities and rural electric cooperative utilities are required to participate in the Florida RECs Market inasmuch as they purchase RECs from RPS energy resources when RPS energy is wheeled to their service areas, which shall be in exact per capita ratio as the FL investor-owned utilities.

(c) The administrative costs associated with the electronic Florida RECs Market shall be collected either through membership dues, certification fees, or administrative fees assessed to the Florida investor-owned utilities until such time as the 20% RPS goal is met in Florida, and following the achievement of that goal, the cost shall be sustained through an automatic 1% removed from each REC transaction, from utility and RPS energy resource equally.

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(2) The following entities are eligible to produce renewable energy credits:

1. Investor-owned electric utility Florida owned renewable energy resources;

2. Municipal electric utility and rural electric cooperative utility owned Florida renewable energy resources;

3. Non-utility (distributed generator, independent operator, joint venture, public-private enterprise, private equity or any other) Florida-located renewable energy resources providing net capacity and energy to the Florida electric utility or to a municipal utility or to a rural electric cooperative utility transmission lines, regardless of an existing PPA;

4. Non-utility Florida renewable energy resources or producers greater than 2 megawatts providing on site generation to offset all or a part of the customer's electrical needs.

5. Non-utility Florida renewable energy resources greater than 2 megawatts providing equivalent solar thermal energy to offset all or a part of the customer's electrical needs;

6. Customer-owned Florida renewable energy resources, 2 megawatts or less, that have not received incentives from a Commission-approved demand-side conservation program pursuant to the Florida Energy and Efficiency Conservation Act, Sections 366.80-.85 and 403.519, F.S.

(3) A renewable energy credit is retained by the owner of the eligible Florida renewable energy resource from which it was derived unless specifically sold or transferred.

(a) The only instance in which renewable energy may be wheeled to out-of-state rate-payers is if all energy in Florida is renewable, or during a condition of force majeure, necessitating temporary (less than 3 months) power infusion to a neighboring location or "affected area". In this case, power generated by non-renewable sources of Florida must be deemed insufficient

Deleted: Each investor-owned electric utility shall comply with the renewable portfolio standards approved by the Commission pursuant to Rule 25-17.400, F.A.C., through the production or purchase of renewable energy credits.¶ (a)

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to meet the needs of the rate-payers of the affected area by the FERC or any federal or state disaster management office, in which case the FL transmission entity (FL investor-owned utility or otherwise) must mark the energy price to the destination market price and the RECs may or may not be separately marketed as deemed fit by the RPS energy resource.

(b) A renewable energy credit shall be valid per tax legislation and shall be deemed valid for two years after the date the corresponding megawatt-hour or equivalent solar thermal energy was generated. A renewable energy credit from a customer-owned renewable system less than 2 megawatts shall be valid for tax purposes two years after the date the renewable energy credit is certified. However, a renewable energy credit shall be retired after it is used to comply with any regional, other state's RPS or federal renewable portfolio standard.

(c) Any Florida rate-payer in any class (residential, commercial, industrial or other) who opts to purchase a REC from the RECs Market or opts to pay any premium in rate-paying price that bears any suggestion to be supporting renewable energy, must receive the tax credit associated with the premium paid.

(3) Initially, the price of each renewable energy credit shall be capped at the equivalent of $16 per ton of net greenhouse gas emissions (GHG) reduced or avoided by Florida renewable energy resources relative to the GHG emissions otherwise emitted by the utility. The price cap shall be removed after one year and replaced by the market-based mechanism of supply and demand in transparent transactions, with FL RECs prices no higher than 2x the national compliance average REC price. The REC price is also subject to any subsequent federal cap and trade system.

(4) Within 90 days from the effective date of this rule, the not-for-profit organization to administrate the electronic RECs Market shall file for Commission approval the structure, governance, and procedures for administering the RECs market. The compliance filing shall,

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Deleted: (d) Renewable energy credits shall not be used for compliance with the Florida renewable portfolio standard if the renewable energy credit or its associated energy has already been counted toward compliance with any other state or federal renewable portfolio standard.¶

Deleted: (e) Renewable energy credits shall not be used for compliance with the Florida renewable portfolio standard if the renewable energy credit results from a Commission-approved demand-side conservation program pursuant to the Florida Energy Efficiency and Conservation Act, Sections 366.80-.85 and 403.519, F.S.¶

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at a minimum, provide provisions for the following:

(a) a mechanism to buy, sell, and trade renewable energy credits generated by Florida renewable energy resources regardless of ownership of the asset;

(b) the aggregation of renewable energy credits for customer-owned Florida renewable energy resources;

(c) the certification and verification of renewable energy credits as defined in Rule 25-17.400(2)(f), F.A.C., including renewable energy credits resulting from Equivalent Solar Thermal Energy as defined in Rule 25-17.400(2)(k), F.A.C.;

(d) an accounting system to verify compliance with the RPS Rule; and

(e) a method to record each transaction instantaneously, and to indicate whether the renewable energy credit is associated with a Class I or Class II renewable energy source as defined this RPS Rule.

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Specific Authority 350.127(2), 366.05(1), FS. Law Implemented 366.02(2), 366.04(2)(c), (5), (6), 366.041, 366.05(1), 366.81, 366.82(1),(2), 366.91(2), 366.92 FS. History–New XX-XX-08.

III. Municipal and Rural Electric Coop Reporting

25-17.420 Municipal Electric Utility and Rural Electric Cooperative Renewable Energy Reporting

(1) Each municipal electric utility and rural electric cooperative utility shall file with the Commission an annual report no later than April 1 of each year for the previous calendar year. Each utility's report shall include the following:

(a) the retail sales of the prior year in megawatt-hours;

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(b) the quantity of self-generated renewable energy in megawatt-hours separated by fuel type;

(c) the quantity of renewable energy purchased in megawatt-hours, separated by type of ownership and fuel type;

(d) the quantity and vintage of self-generated renewable energy credits;

(e) the quantity and vintage of renewable energy credits purchased;

(f) the fuel type and ownership of the Florida renewable energy resource associated with each renewable energy credit;

Specific Authority 350.127(2), 366.05(1), FS. Law Implemented 366.02(2), 366.04(2)(c), (5), (6), 366.041, 366.05(1), 366.81, 366.82(1),(2), 366.91(2), 366.92 FS. History–New XX-XX-08.

Deleted: (g) a statement as to whether the utility has adopted a renewable portfolio standard, or has any plans to conduct a proceeding to establish a renewable portfolio standard in the upcoming year.¶

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I. Renewable Portfolio Standard

17.400 Florida Renewable Portfolio Standard

(1) Application and Scope.

(a) The Commission shall establish a Renewable Portfolio Standard Rule (hereafter called "RPS Rule") that is equitable to the rate-payers, the utilities, and renewable energy resources that will protect and promote the development of renewable energy, protect the economic viability of existing renewable energy facilities, diversify the types of fuel used to generate electricity in Florida, lessen Florida's dependence on fossil fuels for the production of electricity, minimize the volatility of fuel costs, encourage investment into the state, improve environmental conditions, and minimize the costs of power supplies to the electric utilities and their customers in all classes (residential, commercial and industrial)..

(b) After approval of the RPS Rule, the Commission shall review and the RPS Rule at least once every five years. The Commission on its own motion, or upon petition by a substantially affected person or a utility or renewable energy resource, shall initiate a proceeding to review and, if appropriate, modify the RPS Rule from time to time or at any time not less frequently than on a 5 year basis.. All modifications of the approved renewable portfolio standards and the associated compliance plans shall only be on a prospective basis.

(2) Definitions.

(a) "Florida renewable energy resources," means electrical, mechanical, or thermal energy produced from a method that uses one or more of the following fuels or energy sources: hydrogen, biomass, solar energy, geothermal energy, wind energy, ocean energy, waste heat, or hydroelectric power that was produced in Florida or imported when and if the power has been produced with least emissions (NOx, SOx, CO, CO2, Dioxans, Furans, and carcinogens)

for which stack results must be tested and supplied to the PSC by menas of SCADA or semi-annual settlement tests.

(b) "Renewable energy," means electrical energy produced from a method that uses one or more of the following fuels or energy sources: hydrogen produced from sources other than fossil fuels, biomass, solar energy, geothermal energy, wave energy, wind energy, ocean energy, and hydroelectric power. The term includes the alternative energy source, waste heat, from sulfuric acid manufacturing operations.

(c) "Biomass," means a power source that is comprised of, but not limited to, combustible residues or gases from forest products manufacturing, agricultural, horticultural, or industrial BTU convertible waste streams , or co-products from agricultural and orchard crops, waste or co-products from livestock and poultry operations, waste or byproducts from food processing, urban wood waste, municipal solid waste, municipal liquid waste treatment operations, and landfill gas.

(d) "Class I renewable energy source," means Florida renewable energy resources derived from wind or solar energy systems or any source that does not required an Air Permit in the State of Florida.

(e) "Class II renewable energy source," means renewable energy derived from Florida renewable energy resources other than Class I renewable energy sources.

(f) "Renewable Energy Credit," means a financial instrument that represents the unbundled, separable, renewable attribute of renewable energy or equivalent solar thermal energy produced in Florida and is equivalent to one megawatt-hour of electricity generated by a source of renewable energy asset physically located in Florida.

(g) "Renewable Portfolio Standard," means the RPS Rule made by this committee.

(h) "Solar Energy System," means equipment that provides for the collection and use of incident solar energy for water heating, space heating or cooling, or other applications that would normally require a conventional source of energy such as petroleum products, natural gas, or electricity that performs primarily with solar energy. In other systems in which solar energy is used in a supplemental way, only those components that collect and transfer solar energy shall be included in this definition.

(i) "Solar Photovoltaic System," means a device that converts incident sunlight into electrical current.

(j) "Solar thermal system," means a device that traps heat from incident sunlight in order to heat water.

(k) "Equivalent Solar Thermal Energy," means the conversion of the thermal output, measured in British Thermal Units, of a solar thermal system to equivalent units of one megawatt-hour of electricity otherwise consumed from or output to the electric utility grid.

(3) RPS RULE:

(a) Each investor-owned utility shall be required to wheel any RPS energy into the transmission lines for sale to rate-payers prior to wheeling any non-RPS energy to the rate-payers.

(b) The RPS energy resource shall be paid per kwh at the rate benchmarked to the market (and thus controlled by the market and market thresholds in order to protect the rate-payers of Florida) in each IOU service area. Rates shall be marked to market every 15 minutes.

(c) RPS energy shall be transmitted without tariff, as the public (which owns the transmission lines) has established a preference for clean energy, which shall be expressed as tariff-free use of the transmission lines.

(d) Each investor-owned utility shall pay the REC for each MW placed into the transmission

lines by each RPS energy resource.

For the purpose of encouraging energy with the least Air Quality negative impact, all energy from Tier 1 resources shall be placed into the transmission queue prior to any energy from a Tier 2 resource, followed by energy from all other sources.

(4) Compliance.

(a) While no fees are assigned to the Florida investor-owned utilities for failing to encourage sufficient RPS energy in their services areas, a fine of $10,000 US (ten thousand US dollars) per MWh shall be assigned to any Florida investor-owned utility for failing to place RPS energy first in the transmission queue, failing to mark to market, or failing to purchase a REC. This fine shall be paid out of dividends from the Florida investor-owned utilities to investors, and not out of rate-payers revenues.

(b) Each Florida investor-owned utility shall offer and sign bankable contracts Power Purchase Contracts (#OCC 1051 compliant) which do not in any way pierce the 17 year protection on intellectual property by mandating inspections beyond the meter and switchgear.

(c) Each Florida investor-owned utility shall, notwithstanding the above, provide a public affirmation to obey the RPS Rule described in section 3, whether or not a PPA has been or will be signed, to any RPS energy resource to invite them to place RPS energy in the transmission lines.

(d) Each Florida investor-owned utility to waive all transmission feasibility fees and approve all requested access by an RPS energy resource to the public transmission lines in support of FERC 888. Any FL investor-owned utility found to be preventing access to the transmission lines through any dilatory procedural delay to be fined $50,000,000 US (fifty million US dollars) which fine shall be delivered entirely to the

RPS energy resource from the dividends of the FL investor-owned utility.

(e) An RPS resource may choose to forward-sell electricity and/or RECs as far as twenty years in advance. If this is desired by the RPS resource, utilities must purchase the electricity and/or RECs with a futures derivative agreement that benchmarks electricity prices per the NYMEX for electricity and the Green Exchange for RECs, but marks to market at 15 minute intervals to prevent unsupportable agreements. If the RPS resource requests a cash dNPV (discounted Net Present Value) of the electricity or RECs sales agreement, the FL investor-owned utilities will provide said cash according to the discount rate set in latest rendition of the Tristone Energy Lending Price Survey (currently set at 9%)- this requirement to be modified by mutual agreement if and when any condition exists wherein a FL investor-owned utility declares the transactions to impose a financial hardship on the investor-owned utility and for relief seeks a hearing to request the assistance of the Florida DEP which can, in turn, arbitrate or mediate the financial transaction (bankable contracts) through to the US Treasury for financing with the Federal Finance Bank, or the Institutional Capital or Credit Markets in order to prevent the economic hardship from being transferred to the FL investor-owned utility's rate-payers.

Specific Authority 350.127(2), 366.05(1), FS. Law Implemented 366.02(2), 366.04(2)(c), (5), (6), 366.041, 366.05(1), 366.81, 366.82(1),(2), 366.91(2), 366.92 FS. History–New XX-XX-08.

II. Florida Renewable Energy Credit Market

17.410 Florida Renewable Energy Credit Market (hereafter called"RECs market").

(1) An electronic Florida RECs Market shall be established. The renewable energy credit market shall allow for the production, transparent buying/selling/trading of renewable energy credits used to comply with the RPS Rule. All records associated with the production of and the buying/selling/trading of renewable energy credits shall be available to the Commission for audit purposes. All prices out to the latest-vintage sale shall be electronically posted, which prices shall reflect the average price, not the highest or lowest price, per REC for that quarter. The electronic platform shall allow for the option of registration of renewable energy credits for sale directly and without brokers by the RPS energy resources.

(a) The RECs Market shall be developed, administrated and maintained by an independent not-for-profit corporation which shall be governed by a board that with representation (roughly) as follows:

55% renewable energy resources, activists, technologists

20% renewable energy financiers, brokers, traders, market analysts

25% utilities and FL Public Service Commission.

Board membership requirements shall be strictly enforced.

(b) Municipal electric utilities and rural electric cooperative utilities are required to participate in the Florida RECs Market inasmuch as they purchase RECs from RPS energy resources when RPS energy is wheeled to their service areas, which shall be in exact per capita ratio as the FL investor-owned utilities.

(c) The administrative costs associated with the electronic Florida RECs Market shall be collected either through membership dues, certification fees, or administrative fees assessed to the Florida investor-owned utilities until such time as the 20% RPS goal is met in Florida, and following the achievement of that goal, the cost shall be sustained through an automatic 1% removed from each REC transaction, from utility and RPS energy resource equally.

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(2) The following entities are eligible to produce renewable energy credits:

1. Investor-owned electric utility Florida owned renewable energy resources;

2. Municipal electric utility and rural electric cooperative utility owned Florida renewable energy resources;

3. Non-utility (distributed generator, independent operator, joint venture, public-private enterprise, private equity or any other) Florida-located renewable energy resources providing net capacity and energy to the Florida electric utility or to a municipal utility or to a rural electric cooperative utility transmission lines, regardless of an existing PPA;

4. Non-utility Florida renewable energy resources or producers greater than 2 megawatts providing on site generation to offset all or a part of the customer's electrical needs.

5. Non-utility Florida renewable energy resources greater than 2 megawatts providing equivalent solar thermal energy to offset all or a part of the customer's electrical needs;

6. Customer-owned Florida renewable energy resources, 2 megawatts or less, that have not received incentives from a Commission-approved demand-side conservation program pursuant to the Florida Energy and Efficiency Conservation Act, Sections 366.80-.85 and 403.519, F.S.

(3) A renewable energy credit is retained by the owner of the eligible Florida renewable energy resource from which it was derived unless specifically sold or transferred.

(a) The only instance in which renewable energy may be wheeled to out-of-state rate-payers is if all energy in Florida is renewable, or during a condition of force majeure, necessitating temporary (less than 3 months) power infusion to a neighboring location or "affected area". In this case, power generated by non-renewable sources of Florida must be deemed insufficient

to meet the needs of the rate-payers of the affected area by the FERC or any federal or state disaster management office, in which case the FL transmission entity (FL investor-owned utility or otherwise) must mark the energy price to the destination market price and the RECs may or may not be separately marketed as deemed fit by the RPS energy resource.

(b) A renewable energy credit shall be valid per tax legislation and shall be deemed valid for two years after the date the corresponding megawatt-hour or equivalent solar thermal energy was generated. A renewable energy credit from a customer-owned renewable system less than 2 megawatts shall be valid for tax purposes two years after the date the renewable energy credit is certified. However, a renewable energy credit shall be retired after it is used to comply with any regional, other state's RPS or federal renewable portfolio standard.

(c) Any Florida rate-payer in any class (residential, commercial, industrial or other) who opts to purchase a REC from the RECs Market or opts to pay any premium in rate-paying price that bears any suggestion to be supporting renewable energy, must receive the tax credit associated with the premium paid.

(3) Initially, the price of each renewable energy credit shall be capped at the equivalent of $16 per ton of net greenhouse gas emissions (GHG) reduced or avoided by Florida renewable energy resources relative to the GHG emissions otherwise emitted by the utility. The price cap shall be removed after one year and replaced by the market-based mechanism of supply and demand in transparent transactions, with FL RECs prices no higher than 2x the national compliance average REC price. The REC price is also subject to any subsequent federal cap and trade system.

(4) Within 90 days from the effective date of this rule, the not-for-profit organization to administrate the electronic RECs Market shall file for Commission approval the structure, governance, and procedures for administering the RECs market. The compliance filing shall,

at a minimum, provide provisions for the following:

(a) a mechanism to buy, sell, and trade renewable energy credits generated by Florida renewable energy resources regardless of ownership of the asset;

(b) the aggregation of renewable energy credits for customer-owned Florida renewable energy resources;

(c) the certification and verification of renewable energy credits as defined in Rule 25-17.400(2)(f), F.A.C., including renewable energy credits resulting from Equivalent Solar Thermal Energy as defined in Rule 25-17.400(2)(k), F.A.C.;

(d) an accounting system to verify compliance with the RPS Rule; and

(e) a method to record each transaction instantaneously, and to indicate whether the renewable energy credit is associated with a Class I or Class II renewable energy source as defined this RPS Rule.

Specific Authority 350.127(2), 366.05(1), FS. Law Implemented 366.02(2), 366.04(2)(c), (5), (6), 366.041, 366.05(1), 366.81, 366.82(1),(2), 366.91(2), 366.92 FS. History–New XX-XX-08.

III. Municipal and Rural Electric Coop Reporting

25-17.420 Municipal Electric Utility and Rural Electric Cooperative Renewable Energy Reporting

(1) Each municipal electric utility and rural electric cooperative utility shall file with the Commission an annual report no later than April 1 of each year for the previous calendar year. Each utility's report shall include the following:

(a) the retail sales of the prior year in megawatt-hours;

(b) the quantity of self-generated renewable energy in megawatt-hours separated by fuel type;

(c) the quantity of renewable energy purchased in megawatt-hours, separated by type of ownership and fuel type;

(d) the quantity and vintage of self-generated renewable energy credits;

(e) the quantity and vintage of renewable energy credits purchased;

(f) the fuel type and ownership of the Florida renewable energy resource associated with each renewable energy credit;

Specific Authority 350.127(2), 366.05(1), FS. Law Implemented 366.02(2), 366.04(2)(c), (5), (6), 366.041, 366.05(1), 366.81, 366.82(1),(2), 366.91(2), 366.92 FS. History–New XX-XX-08.

Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Interpretive Letter #1051
March 2006
12 USC 24(7)

February 15, 2006

Re: [ ] ("Bank")

Dear [ ]:

The Bank is seeking confirmation that it is permissible for the Bank to enter into contingent credit default swaps ("C-CDS") and hold below-investment grade debt to hedge and manage the counterparty credit risks and liability exposures that arise from its derivatives activities. For the reasons discussed below, we conclude that the Bank may engage in the hedging and risk management transactions it proposes, provided the Bank's examiner-in-charge is satisfied that the Bank has adequate risk management and measurement systems and controls to conduct the activities on a safe and sound basis.

Background

The Bank has an active and growing derivatives business. Counterparty credit risk is an important risk of the derivatives business, and the Bank establishes credit limits to control such exposures. When a new derivative transaction would create a potential credit exposure beyond the limit for a client, the Bank may approve the transaction subject to the condition of dynamic management of the resulting exposure. By dynamically managing the credit exposures of the incremental derivative transaction, through a series of credit default swap ("CDS") and bond transactions, the Bank can manage counterparty credit risk more effectively and maintain potential credit exposure within approved limits.

The Bank may hedge the *price* or *market* risk of an incremental derivative transaction by executing a similar transaction in the opposite direction with a third party in the market ("Market

Risk Hedge").[1] Although this transaction protects the Bank from market risks, the Bank continues to face *credit* risk[2] if the counterparty defaults and owes payments to the bank. The Bank also faces a *liability* risk, *i.e.*, it has the obligation to make a cash payment to the counterparty if the Bank is out-of-the-money on the derivative when the counterparty defaults.

The Bank proposes to manage the counterparty credit and liability exposures related to a single OTC derivative contract or a portfolio of OTC derivative contracts in a more cost effective manner, both before and after downgrades by rating agencies,[3] by using CDS and debt instruments. To implement effectively the dynamic management of the underlying exposures requires the ability to purchase and sell securities issued by the derivatives counterparty as credit exposure changes. As a result, the Bank seeks authority to acquire below-investment grade debt.[4] Under the proposed dynamic credit hedging program, the Bank seeks to be economically indifferent whether the Bank owes or is owed money by a defaulting counterparty.

The Bank first hedges its counterparty credit exposure for the original trade by buying a C-CDS ("Asset Hedge"). A C-CDS resembles a traditional CDS. Both instruments settle in the same way. If a credit event occurs, the protection buyer delivers to the protection seller debt issued by the reference entity with a total face amount equal to a notional amount. In return, the protection seller pays the protection buyer an amount in cash equal to the same notional amount. There is an important distinction between the two instruments. While the notional amount of a CDS remains constant over the life of the contract, the notional amount of a C-CDS will change to reflect the current mark-to-market value of a specified reference derivative. The notional amount of a C-CDS is fixed only if and when the specified reference entity defaults on its debt obligations and the reference derivative has positive value for the bank. If the reference entity does not default on its debt obligations over the life of the C-CDS, then the instrument will expire at maturity.[5]

The Asset Hedge protects against the risk that the original trade may be in-the-money to the Bank when the counterparty defaults and the counterparty is unable to pay at settlement on the

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[1] Price risk is the risk to earnings or capital arising from changes in the value of traded portfolios of financial instruments. *See* Comptroller's Handbook: *Community Bank Supervision* (2003) at p. 156.

[2] Credit risk is the current and prospective risk to earnings and capital arising from an obligor's failure to meet the terms of any contract with the bank or otherwise to perform as agreed. *See* Comptroller's Handbook: *Community Bank Supervision* (2003), at p. 141.

[3] The Bank represents that statistically, in a portfolio of investment grade names, a small percentage will migrate to below-investment grade status over time as a result of downgrades by the rating agencies. For example, a company with a BBB rating has more than a 15% chance of becoming below-investment grade over a period of five years. As a result, the Bank wishes to hedge the credit risk of its counterparty, notwithstanding the counterparty's below-investment grade rating, or any subsequent downgrade to below-investment grade.

[4] The Bank currently uses CDS, C-CDS, and investment grade bonds to help manage credit and liability risks arising from derivative transactions.

[5] The C-CDS will also not have value to the bank if the reference entity defaults while the reference derivative transaction has negative value to the bank, *i.e.*, the bank has a negative mark-to-market on the transaction.

trade. In an Asset Hedge, the Bank purchases credit protection through a C-CDS from a third party or an affiliate[6] where the reference entity is the counterparty to the original trade. If the reference entity defaults on its debt obligations, and the reference derivative is in-the-money to the bank, the protection seller pays the Bank cash in an amount equal to the notional amount (i.e., the in-the-money amount of the reference derivative) of the C-CDS. In return, the Bank delivers to the protection seller bonds issued by the reference entity with a total face amount equal to this same notional amount. At the time of the reference entity's default, the Bank will need to obtain the requisite amount of bonds to meet this obligation. The ability to realize the value of credit protection on a credit derivative contract requires a protection buyer to purchase below-investment grade debt securities of an issuer that has had a credit event, such as a bankruptcy filing. The Bank can recover all or a portion of the cost of the Asset Hedge by selling credit protection to a third party or an affiliate through another C-CDS ("Liability Hedge").

In a Liability Hedge, the Bank manages the risk of owing money to its counterparty on the original trade by selling credit protection to a third party or an affiliate through a second C-CDS where the reference entity is the counterparty to the original trade, and the reference derivative is the Market Risk Hedge. If the reference entity defaults on its debt obligations, and the reference derivative is in-the-money (*i.e.*, the original client trade is out-of-the-money to the Bank), the Bank pays the protection buyer cash in an amount equal to the notional amount of this second C-CDS. In return, the protection buyer delivers to the Bank bonds issued by the reference entity with a total face amount equal to this same notional amount. Since the Bank is now the current holder of these bonds, the Bank has a claim against the issuer (which is also the counterparty on the original derivative) equal to the face amount of the bonds. If the Bank owes on the original trade at the time of default, the Bank can set-off its claim on the bonds against the amount that the Bank owes the counterparty under the original trade. This set-off can occur with any counterparty, either investment grade or below-investment grade, under the relevant derivative contract.[7] The Bank represents that purchases and sales of below-investment grade debt are essential to administering and maintaining effective Liability and Asset Hedges that enable the Bank to be economically indifferent whether the Bank owes or is owed funds when the counterparty defaults.

There is a concern that, where a counterparty on the original trade is insolvent at the time of default, and the Bank does not hold the bonds it receives in the Liability Hedge at least 90 days before the reference entity's bankruptcy filing date or insolvency, the Bank may be precluded under the U.S. Bankruptcy Code from exercising its right to set-off the bonds it received through the Liability Hedge against amounts the Bank may owe under the original trade. Therefore, to achieve the economically indifferent position it seeks in structuring these transactions, the Bank represents that it must purchase the bonds whenever necessary (including when it enters into the original trade with its counterparty and subsequently). The Bank will periodically adjust its bond

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[6] The Bank represents that all transactions with affiliates will be consistent with sections 23A and 23B of the Federal Reserve Act, 12 U.S.C. 371c and 371c-1, and the Federal Reserve Board's Regulation W, 12 CFR part 223.

[7] The Bank represents that each of its counterparties on the original derivative trades has previously agreed to the Bank's right of set-off in the relevant derivative contract.

holdings throughout the life of the original trade to reflect any changes in the Bank's 90-day VAR model amount and the mark-to-market of the derivative. While it holds legal title to the bonds, the Bank will use a total return swap to neutralize the economic risk of holding the bonds.

Discussion

Longstanding OCC precedent establishes that national banks may engage in certain customer-driven derivative transactions as part of a financial intermediation business, subject to safety and soundness parameters.[8] National banks also may manage risks arising from permissible derivatives activities as an essential part of the activities.[9] For example, national banks use credit derivative transactions, including a CDS and C-CDS, to manage credit risks arising from a permissible derivatives business.[10] A C-CDS is identical to a common CDS, except that the notional amount is variable at inception and becomes fixed only upon the default of a reference entity, if a specified reference derivative has positive value. These differences do not affect the ability of a national bank to engage in a C-CDS to manage risks arising from permissible banking activities. National banks can engage in a variety of transactions where one (or more) of the key terms is variable.[11] Further, the OCC has specifically permitted national banks to use below-investment grade debt to hedge the risks arising from bank-permissible derivative activities.[12]

A national bank may use derivatives to hedge the risks arising from the gamut of activities that are reflected on the Bank's balance sheet and income statement, including holding assets, taking liabilities, assuming off-balance sheet risks, and hedging the market risk associated with investment advisory fee income.[13] For example, in *MII Deposit*, the OCC authorized a national bank to purchase equity index futures to hedge interest rate exposures on deposit accounts with interest rates tied to movements in the S&P 500 Index.[14] The OCC noted that national banks are permitted and even encouraged to manage prudently the exposures arising from bank activities and they must be allowed the flexibility to use the most suitable risk management tool. In *DPC Shares*, the OCC permitted a national bank to buy and sell options to manage market risks associated with changes in the value of shares of a company the bank had acquired in satisfaction

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[8] *See* 12 U.S.C. 24(Seventh).

[9] *See* OCC Interpretive Letter No. 892 (Sept. 8, 2000).

[10] National banks have engaged in credit derivative transactions since at least 1996. *See* OCC Bulletin 96-43 (Aug. 12, 1996).

[11] *See, e.g., Decision of the Office of the Comptroller of the Currency on the Request by Chase Manhattan Bank, N.A. to Offer the Chase Market Index Investment Deposit Account* (Aug. 8, 1988) ("*MII Deposit*"), 1988 OCC Ltr. LEXIS 266 (deposit rates tied to performance of S&P 500 Index).

[12] *See* OCC Interpretive Letter No. 935, (May 14, 2002).

[13] *See* OCC Interpretive Letter No. 1037 (Aug. 9, 2005).

[14] *MII Deposit, supra.*

of a debt previously contracted.[15] The OCC found the hedging strategy helped the bank reduce credit risk by protecting against fluctuations in the value of the shares. A national bank may use derivatives to hedge a variety of financial risks, besides price or market risk, that may arise in connection with permissible banking activities.

The Bank already has authority to use below-investment grade debt as a risk management tool and it engages in a variety of customer-driven credit derivative transactions, including credit default swaps.[16] The primary difference between the Bank's current activities and its proposal is the types of risk that the bank would hedge or manage through the use of use below-investment grade debt. Here the Bank proposes to manage both credit and liability risks arising from permissible derivative activities. Banks have long had authority and recognized expertise in managing credit risk.[17] The Bank has designed the Asset and Liability Hedges specifically to manage both credit exposures and liabilities to counterparties, so that the Bank is economically neutral to counterparty performance on the derivative transaction. The Bank represents that purchases and sales of below-investment grade debt are essential to administering those hedges and maintaining their effectiveness. When viewing the Bank's risk management model as a whole, the use of below-investment grade debt in the manner proposed is an essential part of that strategy of managing risks associated with its derivatives business and therefore is permissible.

Safety and Soundness Requirements

For the Bank to engage in the proposed activity, the Bank's risk management and measurement capabilities must be of appropriate sophistication to ensure that the activity can be conducted in a safe and sound manner and in accordance with applicable law. Accordingly, the Bank must demonstrate to the satisfaction of its examiner-in-charge that the Bank has established an appropriate risk management and measurement process for the proposed activity. As detailed further in the OCC Handbook: *Risk Management of Financial Derivatives*[18] and OCC Banking Circular No. 277,[19] an effective risk measurement and management process includes managerial and staff expertise, comprehensive policies and operating procedures, risk identification and measurement, and management information systems, as well as an effective risk control function that oversees and ensures the appropriateness of the risk management process. Moreover, the Bank should ensure that the reputation and other risks presented by this program are assessed and reviewed by personnel from appropriate risk management areas within the Bank. We note that the Bank's proposed risk management activities raise unique reputation risk issues because the Bank may use below investment grade debt instruments, with market values below par, to offset payments that the Bank would otherwise owe to the counterparty. The Bank's risk

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[15] *See* OCC Interpretive Letter No. 961 (Mar. 17, 2003) ("*DPC Shares*").

[16] *See* OCC Interpretive Letter No. 935, *supra.*

[17] *See, e.g.*, OCC Interpretive Letter No. 1019 (Feb. 10, 2005).

[18] OCC Handbook: *Risk Management of Financial Derivatives* (Jan. 1997).

[19] OCC Banking Circular No. 277 (Oct. 27, 1993).

management systems should include appropriate controls and disclosures to manage those reputation risks.

The Bank may not commence the proposed activities unless and until its examiner-in-charge has expressed no supervisory objection based on these criteria.

Conclusion

We conclude that the Bank may engage in the transactions it proposes, provided the Bank's examiner-in-charge is satisfied that the Bank has adequate risk management and measurement systems and controls to conduct the activities on a safe and sound basis. The OCC views expressed in this letter are based specifically on the Bank's representations and written submissions describing the facts and circumstances of the Bank's proposed hedging and risk management transactions. Any change in the facts or circumstances could result in different conclusions. If you have any questions concerning this letter, please contact Donald N. Lamson, Assistant Director, Securities and Corporate Practices Division, at (202) 874-5210.

Sincerely,

signed

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel