BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Florida Power & Light Company's Sunshine Energy Program.	DOCKET NO. 070626-EI ORDER NO. PSC-08-0833-PAA-EI ISSUED: December 23, 2008

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

NOTICE OF PROPOSED AGENCY ACTION
ORDER ACCEPTING AUDIT RESULTS

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

BACKGROUND

By Order No. PSC-06-0924-TRF-EI, issued on November 6, 2006, in Docket No. 060577-EI, we approved Florida Power & Light Company's (FPL) green pricing program, the Sunshine Energy Program or (Program), and the associated tariff. The Sunshine Energy Program was a voluntary program, in which participating residential and commercial customers were charged $9.75 per month in addition to each customer's charges under the applicable rate schedule. In return for each $9.75 customer contribution, the renewable energy credits associated with 1,000 kilowatt-hours (kWhs) of renewable energy would be purchased.[1] By that order, FPL committed to develop 150 kW of in-state photovoltaic capacity for every 10,000 participating residential customers. In addition, the order also contemplated that FPL would develop three new projects with Green Mountain Energy Company (Green Mountain), such as a 250 kW solar array in Sarasota's Rothenbach Park, four schools in Broward County for the SunSmart School Program, and approximately 90 homes for photovoltaic production. Under the Sunshine Energy Program's tariff, participants could make multiple contributions of $9.75 per month, for each of which an additional 1,000 kWh blocks of renewable energy credits (RECs) would be purchased.

[1] The Commission terminated the program effective July 29, 2008, by Order No. PSC-08-0600-PAA-EI, issued September 16, 2008, in this docket.

We note that FPL's Sunshine Energy Program is similar to a demand-side management program (DSM), in that once a DSM program and its associated tariff are approved by us, the utility may execute its program by in-house means or it may enter into contracts with non-regulated entities. In this instance, FPL chose to enter into a contract with Green Mountain, a non-regulated entity, to implement its Commission-approved Sunshine Energy Program. The order approving the Sunshine Energy Program did not incorporate the contract by reference; thus, the contract between FPL and Green Mountain Energy Company (Green Mountain) is not part of our order.

In 2007, our staff opened a docket to review FPL's Sunshine Energy Program. On September 27, 2007, our staff filed a recommendation that certain modifications should be made to the Sunshine Energy Program. On October 4, 2007, FPL requested that the recommendation be deferred in order for FPL to address the issues raised in staff's recommendation. Subsequently, over the following eight-month period, FPL provided verbal updates to our staff on the status of its efforts to renegotiate its contract with Green Mountain.

When no resolution was forthcoming by the Spring of 2008, our staff also initiated an audit for the purpose of identifying, to the extent possible, how the voluntary contributions were being used and whether there was a clear and transparent accounting for the monies. This initial audit effort was completed on May 30, 2008.

On June 5, 2008, FPL filed a petition to modify the Sunshine Energy Program. The petition included a proposed revised tariff sheet no. 8.841. On June 16, 2008, FPL filed a response to staff's audit of the Sunshine Energy Program.

On June 23, 2008, our staff filed a recommendation which addressed concerns regarding FPL's implementation of its existing Sunshine Energy Program, as well as FPL's petition to modify the program and the associated tariff. This recommendation was considered at the July 1, 2008, Agenda Conference. At that conference, we denied FPL's request to modify the Sunshine Energy Program and directed staff to provide an analysis of issues associated with possible termination of the program. On July 15, 2008, our staff provided us an analysis entitled "Issues Associated with Termination of the Sunshine Energy Program."

On July 29, 2008, we terminated the program and directed our staff to complete the audit of the costs incurred by Green Mountain Energy. During the July 29, 2008 Agenda Conference, Green Mountain committed to open its books and records to our audit staff.

In August 2008, our staff auditors continued their audit of Green Mountain. This audit included an on-site review at Green Mountain's headquarters in Austin, Texas. The audit was completed and the audit report was filed on September 8, 2008. We considered staff's recommendation on the audit results at the September 29, 2008 Agenda Conference. This order addresses the audit results and the close-out of the Sunshine Energy Program. We have jurisdiction over this matter under Sections 366.04, 366.05, 366.06, 366.80, 366.81, and 366.82, Florida Statutes (F.S.).

GREEN MOUNTAIN AUDIT RESULTS

At the July 29, 2008 Agenda Conference, we instructed our staff to complete the unfinished part of the financial audit conducted in this case. This includes auditing the administrative and marketing costs incurred by Green Mountain. As of May 2008, our staff had been unable to complete the audit because Green Mountain was unwilling or unable due to contract provisions with FPL to provide access to basic records and limited access to supporting detail associated with REC purchases. However, at the July 29, 2008 Agenda Conference, Green Mountain offered staff's auditors access to its records.

Audit Results

The purpose of the audit was to identify how Green Mountain expended monies received from FPL and whether the expenditures related to the Sunshine Energy Program. The audit did not address whether such expenditures were reasonable and prudent as Green Mountain's expenditures related to Sunshine Energy Program activities were subject to a turn-key performance-based contract.

The final audit report was issued on September 8, 2008. All of Green Mountain's transactions from 2003 to July 31, 2008, were subject to audit. A representative sample was taken to verify these costs. The auditors checked to ensure adequate supporting documentation existed and that these costs related to the Florida program and not one of the other Green Mountain programs.

Noted in the audit report was a multi-million dollar future liability recorded by Green Mountain due to the termination of the Program. The major portion of the liability is associated with the 250 kw solar array at Rothenbach Park in Sarasota, Florida. Subsequent to the filing of the audit report, Green Mountain informed staff that it has exercised its option under the FPL and Green Mountain Services Agreement to assign to FPL all of Green Mountain's rights and obligations under the Solar Tag Agreement. The Solar Tag Agreement is an agreement between Green Mountain and the owner-developer of the Rothenbach Park Project. Based on this recent assignment to FPL, Green Mountain no longer has a liability associated with this project.

The following conclusions are based on the actual costs incurred through July 31, 2008:

- The overall level of administrative and marketing expense for the life of the Program was about 74% based on the initial audit and changed to 69% in the final audit due to the inclusion of 2008 activity.

- The level of marketing expense was high in the early years (2003-2005) and significantly dropped off in 2006 and 2007 as the Program and customer base matured.

- Based on the audit results, all of the Program revenues were used for purposes related to the Sunshine Energy Program.

- 73% of Green Mountain's administrative and marketing costs involve third party contracts, whereas the other 27% of these costs relate to Green Mountain's internal costs.

- Green Mountain's operating profit as a percentage of revenue fluctuated from year to year and was minimal over the life of the Program.

Conclusion

In conclusion, the audit results indicate Green Mountain used the monies for purposes related to the Sunshine Energy Program. While we believe that FPL's level of administrative and marketing costs was high, we believe that FPL complied with the related tariff.

Although the Sunshine Energy Program was improving in the last year or so in terms of contributions to renewable energy, the Sunshine Energy Program was terminated because it no longer served the interests of its participants and no longer aligned with state renewable energy policies. FPL will make the necessary adjustments so that total 2007 and 2008 net Energy Conservation Cost Recovery Clause (ECCR) expense recovery associated with the Sunshine Energy Program equals zero. Additionally, FPL will not seek current or future clause or base cost recovery for the obligations and attributes of the Rothenbach Park solar facility. We also direct our staff to work with the parties to address any fallout technical issues.[2]

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the audit results indicate that all monies expended by Green Mountain Energy Company were used for purposes related to the Sunshine Energy Program. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that if no person whose substantial interests are affected by the proposed agency action issues files a protest within 21 days of the issuance of the order, a Consummating Order will be issued; however, the docket shall remain open for Commission staff to address any fallout issues. Once the fallout issues are addressed, the docket shall be closed administratively.

ORDERED that in the event this Order becomes final, this docket shall remain open pending the resolution of any fallout technical issues.

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[2] Staff will work with the parties to address the escrow of the voluntary contributions collected as of July 29, 2008, and beyond, pursuant to Order No. PSC-08-0600-PAA-EI.

By ORDER of the Florida Public Service Commission this 23rd day of December, 2008.

ANN COLE
Commission Clerk

(SEAL)

KEF

DISSENT BY: COMMISSIONER SKOP

COMMISSIONER SKOP, dissenting with the following opinion:

I respectfully dissent from the majority view to the extent that accepting the FPL proposal effectively precluded further consideration of the following issues:

1. Did FPL make full disclosure of the material facts regarding the utilization of funds associated with the Sunshine Energy® program? Specifically, did FPL disclose to consumers, and to this Commission, that the vast majority of funds contributed to the Sunshine Energy® program would be spent on marketing and administrative expenses instead of renewable energy?

2. Was FPL prudent in the management of the Sunshine Energy® program? Specifically, did FPL prudently manage the performance of Green Mountain Energy in accordance with the provisions of the contract?

3. What refunds, if any, were due to the voluntary ratepayers who participated in the Sunshine Energy® program?

4. The disposition of any Sunshine Energy® program cost recovery claims through the ECCR.

Each of these respective issues presented a genuine question of material fact that was sufficient to warrant an evidentiary hearing.

Furthermore, I firmly believe that the Commission should have rejected the FPL proposal for the following reasons:

The FPL Proposal Offers No Value to Consumers Without Additional Safeguards

Within its proposal, FPL agreed that it would not seek recovery from the general body of ratepayers for certain expenses associated with the termination of the Sunshine Energy® program totaling approximately $2.1 million dollars.[3] The majority of the expenses which FPL agreed to take as "below-the-line" adjustments were related to an alleged future liability associated with purchasing the renewable attributes generated by the Rothenbach Park Solar Array under a "Solar Tag Agreement". While FPL asserted a future liability of approximately $1.75 million dollars related to this expense, without additional safeguards imposed by the Commission, there is no guarantee that FPL will ever incur the alleged future liability. As an illustrative example, if FPL assigns its alleged future liability obligation under the "Solar Tag Agreement", which FPL assumed from Green Mountain Energy via a conveniently timed contractual assignment,[4] then the future liability alleged by FPL would no longer exist and there is no corresponding financial obligation.[5] Accordingly, the alleged $1.75 million dollar future liability only exists on paper and offers no real value to consumers without the Commission imposing a non-assignment clause and prohibition on the sale of the attributes as a condition of acceptance. During the Agenda Conference discussion, FPL adamantly refused to be bound by such safeguard requirements which would effectively commit FPL to the full amount of the future liability asserted by FPL.[6] It is also interesting to note, that FPL was paid almost a million dollars to manage the Sunshine Energy® program during the 4 ½ year period that the program was in effect. Therefore the net value, if any, of the concessions outlined within the FPL proposal would only total $1.1 million dollars.

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[3] As discussed below, the general body of ratepayers should not be required to pay for the management oversight problems associated with the FPL Sunshine Energy® program. Accordingly, the illusory FPL proposal offers no real value to the general body of ratepayers, nor does it provide any compensatory value to the voluntary ratepayers who participated in the program.

[4] Green Mountain Energy response to Question 1 of Staff's Second Data Request, dated September 15, 2008 (On September 11, 2008, Green Mountain Energy terminated the Trademark License and Services Agreement between FPL and Green Mountain Energy due to FPL's failure to cure certain defaults under the Trademark License and Services Agreement. Green Mountain Energy also exercised its option under Section 15.12(b) of the Trademark License and Services Agreement to assign to FPL all of Green Mountain Energy's rights and obligations under the Solar Tag Agreement). The record evidence, however, clearly disputes the Green Mountain Energy assertion that FPL was the defaulting party under the Trademark License and Services Agreement. In this regard, it is highly questionable why FPL would willingly accept the assignment of a $1.75 million dollar future liability obligation from Green Mountain Energy.

[5] In light of the fact that the "Solar Tag Agreement" has been previously assigned twice to date, there is nothing to prevent FPL from doing the same.

[6] Transcript (page 29, lines 1-7) from Item 10 of Agenda Conference; September 29, 2008. The unwillingness of FPL to accept additional safeguards imposed by the Commission speaks to the disingenuous substance of the FPL proposal.

Based on the above, the FPL proposal offers no true value to consumers without additional safeguards.

FPL Wrongfully Assumes That the Alleged Expenses Were Prudently Incurred and Recoverable

Within its proposal, FPL agreed that it would not seek recovery from the general body of ratepayers for certain expenses associated with the termination of the Sunshine Energy® program totaling approximately $2.1 million dollars. The rationale which FPL asserted in its proposal is misguided in several aspects. First, the general body of ratepayers should not be required to pay for the management oversight problems associated with the voluntary FPL Sunshine Energy® program. Therefore, the FPL agreement to not seek cost recovery from the general body of ratepayers is a false concession having no merit.[7] Second, the mere fact that FPL alleges to incur certain expenses associated with the termination of the Sunshine Energy® program does not imply that such expenses were prudently incurred and recoverable. As an illustrative example, the unit cost of each voluntary renewable attribute under the "Solar Tag Agreement" was far greater than the current cost of any renewable attribute (whether compliance or voluntary) in the United States.[8] Accordingly, FPL would bear the significant burden of demonstrating that the attribute pricing was prudent. Third, in light of the record evidence, it remains highly questionable why FPL would willingly accept the assignment of a $1.75 million dollar future liability obligation from Green Mountain Energy.[9] If FPL defaulted as claimed by Green Mountain Energy, then FPL, not the general body of ratepayers, should bear the financial consequences of the FPL default. The record evidence, however, clearly disputes the Green Mountain Energy assertion that FPL was the defaulting party under the Trademark License and Services Agreement. Furthermore, FPL would be estopped from adopting the Green Mountain Energy position.

The FPL Proposal Was Not Adequately Reviewed Prior to Acceptance

In typical fashion, FPL made a last minute submittal, used artful showmanship, and leveraged inadequate review time to force a decision by the Commission and gain approval of the FPL proposal. In the instant case, the record clearly reflects the fact that the FPL proposal was not adequately reviewed prior to acceptance. Specifically, in relation to the alleged $1.75 million dollar future liability under the "Solar Tag Agreement", the terms and conditions, as well as the rights and financial obligations of

[7] Simply put, FPL has no basis to seek cost recovery from the general body of ratepayers for a voluntary program that was mismanaged by FPL.

[8] As an illustrative cost comparison, the maximum price of a Solar Compliance REC in the State of New Jersey is currently capped at $711 per REC.

[9] The prudency of the contractual provision requiring FPL to accept a financial obligation owed to a third party is also implicated.

the parties under the agreement, were not adequately reviewed by staff prior to Commission acceptance of the FPL proposal.[10] Furthermore, although Public Counsel supported the FPL proposal[11], the record equally reflects the fact that Public Counsel had not taken the opportunity to read the "Solar Tag Agreement".[12] Accordingly, it is disappointing that valid concerns regarding the need for additional safeguards to commit FPL to the full amount of the future liability asserted by FPL were rejected in favor of accepting the FPL proposal.[13]

With respect to the Sunshine Energy® program itself, it suffices to say that no reasonable person would have contributed to the Sunshine Energy® program had they known that approximately 71% of the contributions would be spent on marketing and administrative expenses instead of renewable energy.[14] In reaching this conclusion, it is important to recognize that FPL was paid an administrative fee to manage the Sunshine Energy® program.[15] Therefore, FPL was best positioned to know that the vast majority of the contributions that it collected from the voluntary ratepayers during the 4 ½ year period that the program was in effect were not being spent on renewable energy. Accordingly, FPL had a fiduciary duty to disclose this material fact to the customers that were solicited to participate in the program, to the program participants, and to this Commission. It is clear to me that FPL failed to make this disclosure. Furthermore, one need only look as far as the Frequently Asked Questions section of the FPL Sunshine Energy® webpage to appreciate how consumers could have been misled with respect to how their contributions would be spent under the program.[16] Based upon the above, I firmly believe

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[10] Transcript (page 14, lines 6-13) from Item 10 of Agenda Conference; September 29, 2008.

[11] Transcript (page 9, lines 1-4) from Item 10 of Agenda Conference; September 29, 2008.

[12] Transcript (page 13, lines 9-13) from Item 10 of Agenda Conference; September 29, 2008.

[13] Imposing a non-assignment clause and a prohibition on the sale of the attributes as a condition of Commission acceptance of the FPL proposal would have provided appropriate safeguards.

[14] Final Audit Report, Florida Power and Light Company Sunshine Energy Program Audit (for the 12 months ended July 31, 2008), Green Mountain Revenue and Expenses Spreadsheet, Document Number 08330, dated September 8, 2008 (concluding that 29.3% of the total Sunshine Energy® program revenues during the period of 2004-2008 were spent on TREC(s) and solar projects). Accordingly, this directly implies that 70.7% (100% - 29.3%) of the total revenue during this period was spent on marketing and administrative costs for the Sunshine Energy® program.

[15] FPL retained an administrative fee in the amount of $0.65 from each monthly $9.75 contribution to manage the Sunshine Energy program.

[16] Excerpt from Frequently Asked Questions section of the FPL Sunshine Energy® webpage:

Q: "What does the additional cost pay for?"

A: "The charge goes toward the purchase of renewable resources for the program and **nominal** administrative costs to operate the program." **(Emphasis Added).**

that FPL should be held accountable for failing to fully disclose material facts associated with the utilization of funds associated with this program and that refunds are warranted.[17]

Notwithstanding the aforementioned, an essential part of managing the Sunshine Energy® program was the FPL obligation to manage the performance of Green Mountain Energy under the contract.[18] In this regard, Green Mountain Energy clearly failed to perform its obligations under the contract as follows:

Section 13.1

Green Mountain Energy failed to enroll 25,000 new customers per year (on a year-to-year basis). Green Mountain Energy alleges that it spent millions of dollars on marketing, yet enrollment from program inception to termination over a period of 4 ½ years totaled less than 39,000 customers. This number represents less than 1% of the overall FPL customer base which reflects upon the overall effectiveness and management oversight of the Green Mountain Energy marketing effort.

Section 18.1

Green Mountain Energy failed to perform its contractual obligation under Section 18.1 of the contract. Section 18.1 sets forth the General Commitment of Green Mountain Energy with respect to the construction of the solar resource projects.[19] The record clearly establishes that Green Mountain Energy did not meet this requirement in accordance with the provisions of the contract. Total installed solar capacity to date during the years of 2005 and 2006 was zero.[20] Additionally, the net metered, residential PV solar

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[17] The issue of refunds was never formally addressed by the Commission. As stated during the bench discussion, I believe that FPL should be ordered to pay a Contribution in Aid of Construction (CIAC) in the amount of six million dollars ($6,000,000) toward the construction of the FPL solar projects (110 MW) that were recently approved by this Commission. I believe that this remedy would provide a "win-win" situation for all parties in resolution of this matter recognizing the potential difficulty of refunding the voluntary contributions that were collected over a multi-year period.

[18] Trademark License and Services Agreement, by and between Florida Power and Light Company and Green Mountain Energy Company, dated 30 July, 2003. It is interesting to note that Florida Power and Light Company represented to Green Mountain Energy Company that it owned the federally registered Sunshine Energy® trademark at the time it entered the contract (see Section 1.21 and Schedule II of the contract). United States Trademark and Patent Office (USPTO) records, however, clearly indicate that Florida Power and Light Company did not own the Sunshine Energy® trademark as of the date of the contract. In fact, the Sunshine Energy® trademark was owned by FPL Energy Services, Inc. (an unregulated subsidiary of FPL Group, Inc., and an affiliate of Florida Power and Light Company) and was not legally conveyed to Florida Power and Light Company until April 5, 2004 (as recorded by the USPTO on May 10, 2004).

[19] Green Mountain Energy committed to supplying FPL with 150 kW of solar capacity in Florida for every 10,000 Customers enrolled in the program within one year after meeting each Customer enrollment threshold.

[20] Notwithstanding this fact, FPL sought approval from this Commission to make the Green Pricing Program permanent during the fourth quarter of 2006. The FPL petition failed to disclose that Green Mountain Energy was not meeting its solar construction obligation, and that no solar capacity had been installed to date. The FPL petition also did not disclose amendments to the underlying contract. Review of the transcript also indicates that FPL did

installations that Green Mountain Energy and FPL are claiming credit for under the Solar Capacity Commitment do not meet the requirement of provision 18.1(i) of the contract which requires FPL to purchase "all energy generated", NOT "net energy delivered" (from each solar resource project) under a Power Purchase Agreement (PPA).[21] As an illustrative example, the Rothenbach Park solar array clearly meets this requirement as reflected within the PPA for the project; while the net metered installations claimed for the Quarry subdivision and Sun Funds projects do not.[22] Furthermore, Green Mountain Energy had the sole obligation for meeting the Solar Capacity Commitment under the contract. FPL, however, is counting the Miami Science Museum solar array (2 kW), an array developed and paid for by FPL, toward meeting the solar obligation of Green Mountain Energy under the contract. In this regard, it is uncertain why FPL seems to be performing an obligation of Green Mountain Energy under the contract.[23] Such actions would not be necessary if FPL properly managed the performance of Green Mountain Energy under the contract.

Section 18.2

Green Mountain Energy failed to perform its contractual obligation under Section 18.2 of the contract. Section 18.2 sets forth the Initial Commitment of Green Mountain Energy with respect to the construction of the solar resource projects.[24] Through its own

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not disclose these material facts during the Agenda Conference discussion. Despite the fact that Green Mountain Energy was not meeting its solar construction obligation, and that no solar capacity had been installed to date, FPL continued to allow the solicitation of consumers during this period.

[21] Transcript (page 96, lines 18-23) from Item 11 of Agenda Conference; July 1, 2008.

[22] In these instances, voluntary contributions were being used for private residences which may not have even been enrolled in the Sunshine Energy® program. Additionally, the Sun Funds rebates were never approved by this Commission, and were offered only after this Commission began its formal review of the Sunshine Energy® program in 2007. Despite the spin and rhetoric, this appears to be an attempt by Green Mountain Energy to meet its long overdue solar capacity obligations as quickly and cheaply as possible, but does not meet the requirements of provision 18.1(i) of the contract. Accordingly, by failing to manage the performance of Green Mountain Energy in accordance with provision 18.1(i) of the contract, FPL is effectively allowing Green Mountain Energy to meet each new incremental solar capacity commitment at a mere fraction of the cost (150 kW = for a one-time total cost of only $225,000 - less the value of the retained TRECs) that Green Mountain Energy alleges to incur for a compliant project (i.e., the $22,000/month obligation that Green Mountain Energy claims to incur for the Rothenbach Park project through 2015).

[23] FPL has also recently committed to provide FAU with funding in the amount of $34,000 towards the completion of a 34 kW solar photovoltaic facility. To the extent that FPL is not attempting to count this project toward meeting the solar capacity obligation of Green Mountain Energy under the contract, I wholeheartedly support, encourage, and commend FPL's on-going efforts to support renewable energy projects in partnership with Florida's public schools and State universities.

[24] Green Mountain Energy committed to FPL that it would cause a solar project with a minimum capacity of 50 kW to be built in Florida within one year after the program start date.

admission, the record clearly establishes that Green Mountain Energy did not meet this requirement in accordance with the provision of the contract.[25]

Based upon the above, it is evident that Green Mountain Energy failed to fully perform its contractual obligations, and that FPL failed to manage the performance of Green Mountain Energy in accordance with the provisions of the contract.

Finally, in an attempt to divert attention away from the undisputed fact that the vast majority of contributions to the Sunshine Energy® program were not being spent on renewable energy, FPL focuses upon NREL rankings, the Tariff, and TREC(s) purchases as the basis for asserting why the Sunshine Energy® program was successful. Such arguments are not persuasive and should be rejected for the following reasons:

Discussion of NREL Rankings

FPL and Green Mountain Energy both cite NREL rankings as a basis for asserting why the Sunshine Energy® program was successful. The mere fact that a green program can achieve a top 5 status by spending only 29.3% of the total funds collected on renewable energy leaves much to be said about the inherent value and overall quality of such rankings.[26] It further stands to reason that the expected benefit to the environment is not maximized when the vast majority of contributions to such programs are spent on marketing and administrative costs. Based upon the above, I would respectfully suggest that the NREL rankings provide a false sense of authenticity to such programs which may not directly translate into value for consumers.

Discussion of Tariff

The FPL assertion that it should be relieved from regulatory accountability merely because it technically met the requirements of the Green Power Pricing Tariff is equally misguided and should be rejected. First, FPL wrote the Tariff that was filed for approval. Second, FPL knew, or should have known, that the Tariff was defective to the extent that the Tariff did not incorporate the solar capacity requirement that FPL openly represented as an inducement to the consumers that were solicited to participate in the Sunshine Energy® program and to this Commission.[27] Third, technically meeting the requirements

[25] Transcript (page 85, lines 18-20) from Item 11 of Agenda Conference; July 1, 2008.

[26] Final Audit Report, Florida Power and Light Company Sunshine Energy Program Audit (for the 12 months ended July 31, 2008), Green Mountain Revenue and Expenses Spreadsheet, Document Number 08330, dated September 8, 2008 (concluding that 29.3% of the total Sunshine Energy® program revenues during the period of 2004-2008 were spent on TREC(s) and solar projects). Accordingly, this directly implies that 70.7% (100% - 29.3%) of the total revenue during this period was spent on marketing and administrative costs for the Sunshine Energy® program.

[27] FPL never sought to correct the defective Tariff by seeking to amend it; yet FPL is apparently content to argue behind the same Tariff using it as a shield.

of a defective Tariff is not dispositive to the controlling questions of whether FPL made full disclosure of material facts regarding the Sunshine Energy® program, and whether FPL was prudent in the management of the Sunshine Energy® program.

Discussion of TREC(s)

FPL further cites the cumulative number of TREC(s) purchased as an additional basis for asserting why the Sunshine Energy® program was successful. In the instant case, the record clearly reflects that only 25.1% of the total funds collected were spent on TREC purchases.[28] It further stands to reason that the expected benefit to the environment is not maximized when the vast majority of contributions to the Sunshine Energy® program were spent on marketing and administrative costs. Additionally, if carbon reduction was truly a goal of the program, then it is quite evident that a far greater number of TREC(s) could have actually been purchased under the program. Therefore, the FPL argument, while colorable, lacks substantial merit upon further review and scrutiny.

Finally, although the question of whether the Sunshine Energy® program purchased the required number of TREC(s) under the contract was never at issue in this proceeding, I remain concerned by the fact that Green Mountain Energy significantly decreased its purchase of Florida generated TREC(s) for the Sunshine Energy® program, on a year-to-year basis from 2006 to 2007. While substantially decreasing its purchase of Florida generated TREC(s) in 2007, Green Mountain Energy conveniently purchased 74,658 TREC(s) from the FPL Energy Horse Hollow wind project in Texas via a third party transaction. At that time, Green Mountain Energy could have chosen to purchase the same number of TREC(s) originating from a non-FPL affiliated source, but did not do so. Accordingly, the Green Mountain Energy preference appears to favor an unregulated subsidiary of FPL Group.

In summary, no reasonable person would have contributed to the Sunshine Energy® program had they known that approximately 71% of the contributions would be spent on marketing and administrative expenses instead of renewable energy.[29] As the program manager, FPL was best positioned to know that the vast majority of the contributions that it collected from

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[28] Final Audit Report, Florida Power and Light Company Sunshine Energy Program Audit (for the 12 months ended July 31, 2008), Green Mountain Revenue and Expenses Spreadsheet, Document Number 08330, dated September 8, 2008 (concluding that 25.1% of the total Sunshine Energy® program revenues during the period of 2004-2008 were spent on TREC purchases). Approximately 6.27% (25.1% - 18.83%) of the total TREC purchases occurred during the first half of 2008 alone as Green Mountain Energy engaged in a window dressing effort to significantly increase renewable expenditures in light of pending Commission action.

[29] Final Audit Report, Florida Power and Light Company Sunshine Energy Program Audit (for the 12 months ended July 31, 2008), Green Mountain Revenue and Expenses Spreadsheet, Document Number 08330, dated September 8, 2008 (concluding that 29.3% of the total Sunshine Energy® program revenues during the period of 2004-2008 were spent on TREC(s) and solar projects). Accordingly, this directly implies that 70.7% (100% - 29.3%) of the total revenue during this period was spent on marketing and administrative costs for the Sunshine Energy® program.

the voluntary ratepayers during the 4 ½ year period that the program was in effect were not being spent on renewable energy. Accordingly, FPL had a fiduciary duty to disclose this material fact to the customers that were solicited to participate in the program, to the program participants, and to this Commission. It is clear to me that FPL failed to make this disclosure. Furthermore, an essential part of managing the Sunshine Energy® program was the FPL obligation to manage the performance of Green Mountain Energy under the contract. As discussed above, it is clearly evident that Green Mountain Energy failed to fully perform its contractual obligations, and that FPL failed to manage the performance of Green Mountain Energy in accordance with the provisions of the contract. Based upon the above, I firmly believe that FPL should be held accountable for the lack of disclosure and management oversight problems associated with Sunshine Energy® program and that refunds are warranted.[30]

[30] The issue of refunds was never formally addressed by the Commission. As stated during the bench discussion, I believe that FPL should be ordered to pay a Contribution in Aid of Construction (CIAC) in the amount of six million dollars ($6,000,000) toward the construction of the FPL solar projects (110 MW) that were recently approved by this Commission. I believe that this remedy would provide a "win-win" situation for all parties in resolution of this matter recognizing the potential difficulty of refunding the voluntary contributions that were collected over a multi-year period.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on January 13, 2009.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.