Ruth Nettles

090109-EI

From: Rhonda Dulgar [rdulgar@yvlaw.net]

Sent: Thursday, October 22, 2009 1:16 PM

To: James D. Beasley; Lee L. Willis; Filings@psc.state.fl.us; Jean Hartman; Paula Brown; James Leary; Schef Wright

Subject: Electronic Filing - Docket 090109-EI

Attachments: 090109.Energy5.0.AmicusMotion.10-22-09.pdf

a. Person responsible for this electronic filing:

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b. 090109-EI

In Re: Petition of Tampa Electric Company for Approval of Solar Energy Power Purchase Agreement with Energy 5.0, LLC.

c. Document being filed on behalf of Energy 5.0, LLC.

d. There are a total of 22 pages.

e. The document attached for electronic filing is Energy 5.0 LLC's Motion for Leave to Appear as *Amicus Curiae* and for Leave to File Memoranda of Law in Support of Petition for Approval of Solar Energy Power Purchase Agreement.

(see attached files: 090109.Energy5.0.AmicusMotion.10-22-09.pdf)

Thank you for your attention and assistance in this matter.

Rhonda Dulgar
Secretary to Jay LaVia
Phone: 850-222-7206
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Dne 10/22/09 RVN.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Tampa Electric Company For Approval of Solar Energy Power Purchase Agreement with Energy 5.0, LLC	))))	Docket No. 090109-EI Filed: October 22, 2009

ENERGY 5.0 LLC's MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE* AND FOR LEAVE TO FILE MEMORANDA OF LAW IN SUPPORT OF PETITION FOR APPROVAL OF SOLAR ENERGY POWER PURCHASE AGREEMENT

ENERGY 5.0, LLC ("Energy 5.0"), by and through its undersigned counsel, respectfully files this motion for leave to appear in the capacity of *amicus curiae* in the above-styled docket and its incorporated motion for leave to file two memoranda of law relevant to the Commission's consideration of Tampa Electric Company's ("Tampa Electric" or the "Company") petition for approval of the Contract for the Purchase by Tampa Electric Company of Renewable Energy from Energy 5.0, LLC ("Contract"), that is the subject of this proceeding, together with the attached memoranda. In summary, as the supplier of renewable solar energy to Tampa Electric under the Contract, Energy 5.0's interests are subject to determination in this proceeding, but Energy 5.0 prefers to participate as *amicus curiae* at this time. As explained briefly below, Energy 5.0 supports the Company's Petition and believes that the Commission should consider the legal analysis in the attached memoranda, which demonstrate that (1) the Commission has ample authority to approve the Contract, (2) that approving the Contract is in the public interest as articulated in Chapter 366, Florida Statutes, and (3) that the federal Public Utility Regulatory Policies Act of 1978 does not, in any way, bar the Commission's approval of the negotiated Contract.

Energy 5.0, LLC is a Florida limited liability company with its headquarters at 1601 Forum Place (Suite 1010), West Palm Beach, Florida 33401. Energy 5.0 and its principals have significant experience and success in the development, financing and operation of renewable energy and conventional production projects. Energy 5.0 is developing the Florida Solar I

Facility, a 25 MW photovoltaic electric generating station, which is described in more detail in the Company's Petition.

The Contract awarded to Energy 5.0 as the successful bidder in the Company's 2007 Renewable Generation Request for Proposals provides for Tampa Electric to purchase the entire net electrical output of Energy 5.0's Florida Solar I Facility ("Facility") for a period of twenty-five (25) years at a negotiated fixed price per kilowatt-hour. The Contract is the product of a competitive solicitation by Tampa Electric and reflects pricing that is competitive against many known solar projects and purchase offerings in Florida elsewhere.

The attached memoranda address the Commission's authority to approve the Contract, and whether PURPA operates as a bar to the negotiated fixed pricing under the Contract. As to the Commission's authority, the Contract and the Florida Solar I Facility will serve the public interest as described by the Florida Legislature in various sections of Chapter 366, Florida Statutes, as well as promote the pro-renewable policies declared by the Governor of Florida in executive orders. The Contract and the Facility will provide long-term protection to Tampa Electric and its customers from exposure to volatile natural gas and oil costs and from exposure to uncertain, potentially high-cost, and potentially volatile costs of meeting RPS-type mandates and greenhouse gas reduction mandates. Second, the Contract's long-term fixed pricing, which was specifically negotiated by Tampa Electric and Energy 5.0, is not in any way barred or preempted by PURPA.

Tampa Electric supports Energy 5.0's request to appear as an *amicus curiae* in this docket and also supports Energy 5.0's motion for leave to file the two memoranda of law.

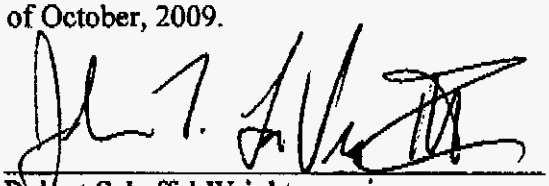
CONCLUSION AND RELIEF REQUESTED

Energy 5.0, LLC is the supplier of renewable, Florida-based solar power to Tampa Electric Company pursuant to the Contract, and as such is entitled to address the Commission on

this critical public interest issue. Accordingly, the Commission should grant Energy 5.0's motion for leave to appear as *amicus curiae*. Substantively, the Solar Energy Contract between Tampa Electric Company and Energy 5.0, LLC is in the public interest of the State and all Floridians, as well as in the best interests of the Company and its customers. Pursuant to Sections 366.01, 366.91, 366.92, and 366.82, Florida Statutes, the Commission has ample authority to approve the Contract for cost recovery as prayed by Tampa Electric, and in the public interest, the Commission should exercise its authority to do so.

WHEREFORE, Energy 5.0, LLC respectfully moves the Commission to grant this motion for leave to appear as *amicus curiae* in this proceeding, to grant the incorporated motion for leave to file memoranda of law in support of Tampa Electric's Petition herein, and to consider the analysis in those memoranda in making its decision to approve the Contract for cost recovery as prayed by the Company.

Respectfully submitted this 22nd day of October, 2009.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic delivery and U.S. Mail this 22nd day of October, 2009, to the following:

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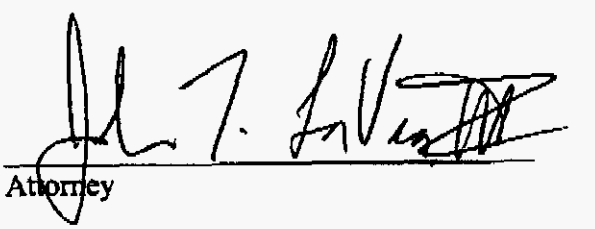

Attorney

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Tampa Electric Company For Approval of Solar Energy Power Purchase Agreement with Energy 5.0, LLC	))))	Docket No. 090109-EI Filed: October 22, 2009

MEMORANDUM

On March 9, 2009 Tampa Electric Company filed with the Florida Public Service Commission ("Commission" or "PSC") a petition for approval of the Contract for the Purchase by Tampa Electric Company of Renewable Energy from Energy 5.0, LLC (the "Tampa Electric-Energy 5.0 Solar PPA", "Solar PPA" or "Contract"). Through the Solar PPA, Tampa Electric will receive all of the electricity, and all of the Renewable Energy Credits, carbon allowances, and other Environmental Attributes associated with the solar power produced by the Energy 5.0 facility for 25 years at a fixed price. Tampa Electric selected Energy 5.0's solar renewable energy proposal through a competitive bid solicitation and the Solar PPA was executed following intensive and extensive negotiations between the parties. This memorandum addresses the Commission's authority to approve the Solar PPA under current Florida law.

SUMMARY

The Florida Public Service Commission has the authority to approve the Solar PPA. The Commission has this power through its authority to approve power purchase agreements with renewable energy suppliers and other Qualifying Facilities, consistent with the Legislature's specific policy directives to promote renewable energy, the Legislature's specific determinations that promoting Florida renewable energy resources is in the public interest, and with the Legislature's over-arching mandate that the PSC is to carry out its regulatory activities to promote the public interest.

Although the fixed price of the solar electricity under the Tampa Electric-Energy 5.0 Solar PPA is greater than Tampa Electric's currently projected, and conventionally calculated, "avoided cost" in its early years, the Solar PPA provides Tampa Electric and its customers a 25-year commitment of Florida-generated solar power at a fixed price that will promote all the Legislature's specific goals for renewable energy development in Florida and serve the public interest in many ways. The specific benefits that the Solar PPA will provide include protecting Tampa Electric's customers for 25 years against fuel cost volatility, protecting Tampa Electric's customers against the uncertainty and volatility of the costs that Tampa Electric will face to comply with federal (or state) requirements to reduce greenhouse gas emissions and federal (or state) Renewable Energy Standard or Renewable Portfolio Standard mandates, and providing Florida and Tampa Electric's service area with the considerable environmental benefits of energy generation with zero emissions and zero consumptive water use.

DISCUSSION

The balance of this memorandum discusses the specific statutory provisions involved, explains why and how the approval of the Tampa Electric-Energy 5.0 PPA sought by Tampa Electric is consistent with applicable law and how the Solar PPA and the Project substantively promote the public interest of Florida.

I. Approving the Tampa Electric-Energy 5.0 PPA Will Promote the Public Interest and the Florida Legislature's Specific Policy Goals and Directives for Solar Power in Florida.

The Commission should approve the Tampa Electric-Energy 5.0 Solar PPA because it is in the public interest, as set forth specifically by the Legislature both generally and specifically, and as further supported by a directly relevant executive order issued by the Governor of Florida.

A. The PSC's Fundamental Mandate to Promote the Public Interest.

The PSC's basic mandate is to regulate in the public interest. As stated clearly in Section 366.01, Florida Statutes,

> The regulation of public utilities . . . is declared to be in the public interest and this chapter shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for the accomplishment of that purpose.

B. The Florida PSC Has the Authority to Approve Renewable Energy Power Purchase Agreements.

The Florida PSC has the authority to approve, for cost recovery purposes, agreements for the purchase of renewable energy by Florida investor-owned utilities. This authority flows from the Commission's mandate to implement its electric regulatory statute, Chapter 366, Florida Statutes, in the public interest, and to promote renewable energy pursuant to the Legislature's intent set forth at Sections 366.91 and 366.92, Florida Statutes. The Commission's Rule 25-17.240, Florida Administrative Code, which authorizes the PSC to review and approve negotiated renewable energy PPAs, cites as substantive authority Sections 366.051, 366.81, 366.91, and 366.92, Florida Statutes; the Rule also cites Sections 366.05(1) and 350.127, Florida Statutes as authority for the Commission to promulgate these rules.

C. Native Florida Solar Power from the Florida Solar 1 Project Will Provide Numerous Legislatively Recognized Public Interest Benefits to Florida and Floridians.

The Tampa Electric-Energy 5.0 PPA and the Florida Solar 1 Project specifically promote and serve the public interest as defined and described by the Florida Legislature. In Sections 366.91 and 366.92, Florida Statutes, the Legislature has specifically recognized several factors and potential attributes of Florida renewable energy resources that are in the public interest.

Section 366.91, Florida Statutes, provides in relevant part as follows:

> **366.91 Renewable energy.—**
>
> (1) The Legislature finds that it is **in the public interest to promote the development of renewable energy resources** in this state. Renewable energy resources have the potential to **help diversify fuel types** to meet Florida's growing dependency on natural gas for electric production, **minimize the volatility** of fuel costs, **encourage investment** within the state, **improve environmental conditions**, and **make Florida a leader in new and innovative technologies.**

(Emphasis supplied.)

The Commission's approval of the Solar PPA will promote every specific goal set forth by the Legislature in Section 366.91, Florida Statutes, as follows.

1. The Solar PPA and the energy produced by the Facility will help diversify the fuel mix of Tampa Electric's and Florida's generating fleet.
2. The Solar PPA and the energy produced by the Facility will reduce Florida's growing dependency on natural gas for electric production.
3. The Solar PPA and the energy produced by the Facility will minimize the volatility of fuel costs for Tampa Electric and its customers, and for the State as a whole.
4. Approving the Solar PPA will encourage investment within the state.
5. The Solar PPA and the energy produced by the Facility will improve environmental conditions by reducing emissions of carbon dioxide, sulfur dioxide, nitrogen oxides, particulates, and other pollutants.
6. Approving the Solar PPA will make Florida a leader in new and innovative technologies.

The Florida Legislature has spoken further on the benefits of renewable energy, including solar power, and regarding the Legislature's intent to promote the development of renewable energy in Florida. Section 366.92, Florida Statutes, provides in relevant part as follows:

> **366.92 Florida renewable energy policy.—**
>
> (1) It is the intent of the Legislature to **promote the development of renewable energy**; protect the economic viability of Florida's existing renewable energy facilities; **diversify the types of fuel used to generate electricity** in Florida; **lessen Florida's dependence on natural gas and fuel oil** for the production of electricity; **minimize the volatility of fuel costs**; **encourage investment within the state**; **improve environmental conditions**; and, at the same time, minimize the costs of power supply to electric utilities and their customers.

The Legislature's policy declarations must be taken as additional statements of what it considers to be in the public interest. Approving the Tampa Electric-Energy 5.0 Solar PPA will promote the Legislature's goals articulated in Section 366.92, Florida Statutes, as it promotes those set forth in Section 366.91, Florida Statutes. Specifically, when the Commission approves the Solar PPA, it will be acting to diversify the fuel mix of Florida's electricity supply, reducing the State's dependence on natural gas and fuel oil, minimizing the volatility of fuel costs, encouraging substantial investment in Florida, and improving environmental conditions by reducing emissions produced from conventional electricity generation.

The issue of cost minimization is discussed further below, but in brief summary here, the Commission must, in the public interest, weigh the benefits to be realized by Tampa Electric, Tampa Electric's customers, and the State as a whole along with the costs and prices under the Solar PPA. The Commission must also consider the long-term economic and energy security benefits to be provided by the Solar PPA and the Facility in terms of reduced fuel cost volatility, enhanced energy security to be provided by native Florida-based solar generation that does not

depend on imported fuels, and certainty of Tampa Electric's costs of obtaining a significant part of its anticipated renewable energy requirements and valuable environmental attributes in terms of reducing Tampa Electric's costs of complying with greenhouse gas reduction mandates.[1] The Commission also has the authority to consider all long-term factors, including minimizing Tampa Electric's reasonably expected costs not only of simply obtaining electric energy, but also minimizing Tampa Electric's exposure to volatile natural gas and oil costs and its exposure to uncertain, potentially high-cost, and potentially volatile costs of meeting RPS-type mandates and greenhouse gas reduction mandates.

D. The Commission Has Recognized the Benefits of Solar Power.

The Florida Public Service Commission has expressly recognized the benefits to be provided by solar-generated electricity when it proposed, in the public interest, a Renewable Portfolio Standard framework that would give preference to solar and wind power, as Class I renewable energy resources in the proposed RPS Rule that the Commission sent to the Legislature. The Commission's proposed RPS Rule would have required Florida's public utilities to meet a 7 percent RPS by 2013 and higher standards in later years, including substantial contributions from solar and wind power. Moreover, as noted above, it appears highly likely that the Congress will enact, and that the President will sign into law, federal legislation requiring RPS-type achievements by electric utilities and potentially imposing carbon emissions regulation. Approving the Tampa Electric-Energy 5.0 Solar PPA will put Tampa Electric, and

[1] On May 21, 2009, the House Energy and Commerce Committee of the U.S. Congress passed H.R. 2454, the American Clean Energy and Security Act. The President and many members of the Congress favor this legislation, and most observers believe that legislation including some form of renewable energy standard or renewable portfolio standard, and potentially including a carbon regulation regime, will be enacted during 2009.

Florida, on a track to meet these likely requirements and also to be a leader in meeting these goals and requirements.

E. Additional Authority: The Tampa Electric-Energy 5.0 Solar PPA Will Also Promote the State's Energy Policy Goals Set Forth In Governor Crist's Executive Order No. 07-127.

While the Commission, as an arm of the Legislature pursuant to Section 350.001, Florida Statutes, is not bound by executive orders issued by the Governor of Florida, the Governor's policy directives are powerful statements of the State's policies and also, at a minimum, persuasive authority that must inform the Commission's decisions. With regard to State policy favoring renewable energy, Governor Crist signed Executive Order Number 07-127 in 2007. In that Executive Order, Governor Crist established greenhouse gas reduction targets for the State of Florida, including reducing the State's emissions of such gases to 2000 levels by 2017, and further to 1990 levels by 2025. Again, the Commission is not bound by the Governor's Executive Order, but as the state agency charged with promoting the public interest with regard to electricity supply issues, the Governor's policy declarations must inform the Commission's decisions on this important matter. These policy statements strongly support the Commission's approving the Solar PPA as requested by Tampa Electric.

II. The PSC Has the Authority to Approve, and Should Approve, the Tampa Electric-Energy 5.0 Solar PPA, Notwithstanding the Fact that the Fixed Pricing Under the PPA is Above Tampa Electric's Near-Term Avoided Cost.

The Commission has the authority to approve renewable energy PPAs and contracts between public utilities and solar electricity producers generally. Rule 25-17.240, F.A.C.; see also the discussion at section I.B of this memorandum above. In this context, approving the Tampa Electric-Energy 5.0 Solar PPA is demonstrably in the public interest because it promotes all of the specific factors set forth by the Legislature in Sections 366.91 and 366.92, Florida

Statutes, as well as the Governor's policy declarations in Executive Order Number 07-127. There remains the possibility that some party might assert that the last phrase of Section 366.92 should be applied to deny approval to the Solar PPA through a restrictive interpretation of the phrase "at the same time, minimize the costs of power supply to electric utilities and their customers." By hypothesis, this phrase might be construed to deny approval because the pricing under the Solar PPA is greater than Tampa Electric's currently projected, and conventionally calculated, avoided cost of producing electricity from fossil-fuel-fired generating resources. The argument might also be made that Commission Rule 25-17.240(2), F.A.C., requires that result by virtue of that Rule's provision that renewable energy PPAs will be considered prudent for cost recovery purposes if they defer capacity and are not likely to cost more than the purchasing utility's avoided cost, strictly defined.

The Commission should reject this hypothetical interpretation because the public interest is paramount, and because the Commission should give substantial weight to the long-term risk protection benefits that Tampa Electric seeks to obtain for its customers and for the State through the Solar PPA, specifically the protection, for the life of the fixed-price contract, against exposure to volatile natural gas and oil costs and against exposure to uncertain, potentially high-cost, and potentially volatile costs of meeting RPS-type mandates and greenhouse gas reduction mandates.

Statutes clearly supersede rules, and the public interest is the paramount mandate of Chapter 366, Florida Statutes. Here, Sections 366.91 and 366.92 set forth numerous public interest purposes, all of which are served by the Florida Solar 1 Project and the Solar PPA. Interpreting these statutes or applying Rule 25-17.240 to deny approval of the Solar PPA would be contrary to the public interest and accordingly, such an interpretation must be rejected.

Tampa Electric's petition for approval of the Solar PPA poses a different case than the conventional case of a PPA, in which the PPA is typically evaluated by the binary analysis of whether its pricing is above or below conventionally calculated avoided cost.

Tampa Electric is before the Commission seeking approval of the Solar PPA in order to secure benefits for its customers against very likely contingencies that will almost certainly have substantial costs attached to them. Tampa Electric thus seeks to secure price certainty of meeting a likely Florida or federal renewable portfolio standard or renewable energy standard, and also to secure price certainty with respect to potential carbon regulation. In so doing, Tampa Electric also seeks to serve the Legislature's clear policy mandates, and the Governor's equally clear policy directives, promoting Florida renewable energy projects such as the Florida Solar 1 Project and the Solar PPA.

In this context, where the utility, Tampa Electric, has evaluated renewable energy options through its competitive solicitation process, and where the utility has determined that its customers' best interests, and the public interest, will be served through the Solar PPA, applying the conventional binary avoided cost analysis is not appropriate, and would, in fact, produce results contrary to the public interest and the interests of the utility's customers. The values of energy security, price certainty, protection against fuel cost volatility, and protection against future regulatory cost contingencies, are difficult to estimate, but the Commission should make the decision that promotes the public interest and that respects Tampa Electric's determination to execute the Solar PPA to procure all of these benefits.

Although negative inferences are inherently weaker than positive expressions, it is worth noting that nothing in Section 366.91 or 366.92, Florida Statutes, requires strict adherence to a rigid, short-term avoided cost standard where the Commission determines that the vast public

interest benefits of renewable power to be provided under a specific PPA, executed by a utility pursuant to a competitive procurement process, outweigh short-term cost considerations. Section 366.92, Florida Statutes, is, on its face, policy legislation that articulates the benefits of renewable energy and likewise articulates the policy that the Commission should be mindful of cost. If the Legislature had meant to prohibit negotiated contracts with pricing greater than the utility's strictly defined avoided cost, without regard to the many other public interest benefits to be provided by renewable energy projects, it could have, and presumably would have, done so; it did not. On their face, the statutes promote and support renewable power as promoting the public interest, and nothing therein prohibits the Commission from approving Tampa Electric's request for approval of the Solar PPA.

Similarly, the absence of a presently binding renewable portfolio standard is no impediment to approving the Solar PPA. Most observers expect that an RPS will become effective in the relatively near future. The Florida Legislature enacted Section 366.92, Florida Statutes, mandating such a standard, though it did not ratify the PSC's proposed rules. The U.S. House of Representatives has enacted legislation that would impose a similar standard. Tampa Electric sees the train coming and seeks approval of the Solar PPA to further its own progress down the track.

It is important to distinguish the posture of Tampa Electric's petition for approval of the Solar PPA from consideration of a mandate by the Commission that Tampa Electric, or any other utility, enter into a power purchase contract: the issue before the Commission with regard to the Solar PPA is not whether to impose a mandate on a public utility, but rather whether to grant the public utility's – Tampa Electric's – specific request that it be allowed to obtain the solar electricity to be provided under the Tampa Electric Energy 5.0 Solar PPA and to perform its

duties under the Solar PPA. The Commission should interpret Section 366.92, in light of Section 366.01, as giving the Commission the authority to weigh all factors in the public interest, such that the Commission would not impose mandatory purchases of renewable energy on public utilities, e.g., through standard offer contracts, while at the same time giving the Commission the authority to approve specific requests by public utilities for approval of specific negotiated contracts.

CONCLUSION

The Florida Public Service Commission has the authority to approve the Tampa Electric-Energy 5.0 Solar PPA because it is in the public interest. The Commission's over-arching mandate is to promote the public interest, and the Solar PPA will specifically promote all of the public interest criteria and goals set forth by the Legislature in relevant provisions of Florida Statutes. The Solar PPA will also promote the specific energy policy goals set forth by Governor Crist.

In brief, the Commission should approve the Solar PPA because the promotion of the public interest, including all of the Legislature's and Governor's specific policy goals, and the long-term protection that the Solar PPA will provide to Tampa Electric and its customers from exposure to volatile natural gas and oil costs and its exposure to uncertain, potentially high-cost, and potentially volatile costs of meeting RPS-type mandates and greenhouse gas reduction mandates, outweighs the concern regarding the relatively higher pricing for the solar power. Even in that regard, the Commission must recognize that the Solar PPA's pricing is fixed for the life of the contract, thereby ensuring the long-term protections against volatility identified above. In this regard, the Commission must also observe that the fixed price feature of the Solar PPA

means that the real price of renewable energy purchased under the PPA will decline over the PPA's life, regardless of what happens in world energy markets.

Finally, the Commission is not being asked to impose the Solar PPA on Tampa Electric, but rather to approve Tampa Electric's specific request that it be allowed to obtain the benefits of the Solar PPA and to perform its duties under the PPA, with the benefit of the Commission's approval of the Solar PPA for cost recovery purposes. The sought-after approval is not prohibited by any provision of the Florida Statutes, and it is in the public interest. Accordingly, the Commission should grant Tampa Electric's petition.

CHADBOURNE
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memorandum

MEMORANDUM OF LAW

To Bud Cherry/Energy 5.0

From Adam Wenner

Date September 9, 2009

Re PURPA Prohibitions on Payments Exceeding Avoided Cost

This memorandum addresses the question of whether the Public Utility Regulatory Policies Act of 1978 ("PURPA") or the regulations implemented by the Federal Energy Regulatory Commission (the "FERC") prohibit Tampa Electric Company ("TECO") from paying purchase rates to a 25 MW solar project (the "Project" or the "Project Company," as appropriate) that is a qualifying small power production facility ("QF"), where the rate was established through a competitive bidding process and exceeds TECO's "avoided cost," as determined pursuant to PURPA, the FERC's regulations, and the Florida Public Service Commission ("FPSC"). Our understanding of the facts is that TECO conducted a competitive bid, with the encouragement of the FPSC, but the FPSC did not require TECO to conduct the bid or to pay any specified rate or minimum payment to the bidders selected.

In summary, our response is that (i) although there are state commission decisions holding that the PURPA permits states to compel utilities to pay rates higher than avoided costs to a QF, FERC has held otherwise, specifically that a state law requiring purchases above avoided costs is preempted by PURPA and therefore is invalid; (ii) it is not a violation of PURPA for a utility to *voluntarily* agree to pay a rate in excess of avoided costs to a QF, where there is no state law or state commission requirement that it does, and in these circumstances, it is appropriate to characterize the Project/TECO arrangement as a voluntary agreement; (iii) the FERC has indicated, but not formally found, that the results of a competitive bid can be used to establish avoided costs; and (iv) the Project Company is an Exempt Wholesale Generator ("EWG") as well as a QF, and there is no restriction on a utility agreeing to pay a rate in excess of avoided cost to an EWG.

I. State Law Requirements That Utilities Pay Rates That Exceed Avoided Costs

In response to a challenge that a New York statute required utilities to pay QFs and other types of power producers a flat rate of 6 cents per kWh, which exceeded utility avoided

cost, the New York Court of Appeals held that, as confirmed by FERC in its order adopting regulations implementing PURPA,[1] PURPA does not preempt a state from requiring utilities to pay rates that are higher than avoided costs.[2] However, in other cases, the FERC has ruled that a Connecticut state law that required utilities to pay rates to QFs in excess of avoided costs violates PURPA, since PURPA was intended to preempt the area of mandated utility purchases from QFs.[3]

Since the agency charged with implementing the PURPA statute has construed the statute as prohibiting states from requiring utilities to purchase power from QFs at rates that exceed avoided costs, it should be assumed that the FERC would make a similar ruling, if a Florida law or a ruling by the FPSC *compelled* TECO to purchase power from the Project at a rate that was admittedly in excess of avoided costs.

II. Negotiated and Non-State Imposed Rates That Exceed Avoided Costs

In its order adopting regulations implementing Section 210 of PURPA, which deals with arrangements between utilities and QFs, FERC characterized the right of a QF to compel a utility to purchase its output and to pay rates based on full avoided cost as an available remedy that "buttressed" the ability of a QF to negotiate with an electric utility.[4] Order No. 69 states that "[a]greements between an electric utility and a [QF] for purchases at rates different than rates required by [the FERC's avoided cost] rules...do not violate the [FERC's] rules under Section 210 of PURPA."[5] FERC codified this provision in Section 292.301(b) of its PURPA regulations, which states:

> (b) *Negotiated rates or terms.* Nothing in this subpart:
>
> (1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions

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[1] *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Pub. Util. Regulatory Policies Act of 1978*, Order No. 69, 45 Fed. Reg. 12,214 (Feb. 25, 1980) ("Order No. 69").

[2] *In re. Consol. Edison Co. of New York, Inc. v. Pub. Serv. Co. of State of New York*, 472 N.E.2d 981 (N.Y. 1984).

[3] *Conn. Light & Power Co.*, 70 FERC ¶ 61,012, *recons. denied*, 71 FERC ¶ 61,035 (1995).

[4] Order No. 69 at 12,217.

[5] *Id.* at 12,217.

relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart; or

(2) Affects the validity of any contract entered into between a qualifying facility and an electric utility for any purchase.[6]

Accordingly, a QF and a utility are free to enter into a contract that establishes a rate that exceeds avoided cost, without violating PURPA, so long as the agreement is voluntary and is not mandated by the state or state commission.[7] TECO's agreement to purchase power from the Project resulted from TECO's decision to purchase power and to do so at a price resulting from a competitive bid and that TECO was not required to purchase or to pay a specified rate by Florida law or by the FPSC. Based on that understanding, the arrangement falls within the "negotiated rate" provision of Order No. 69 and 18 CFR § 292.301(b), and irrespective of whether or not the rate exceeds TECO's avoided cost, the rate is not prohibited by PURPA.

III. Competitive Bid Used to Establish Avoided Cost

The FERC proposed, but ultimately chose not to revise its PURPA regulations to expressly provide that avoided costs can be determined by the results of a competitive bid. In 1988 the FERC issued proposed rulemakings and policy papers, one of which, *Regulations Governing Bidding Programs*,[8] the Commission issued a Notice of Proposed Rulemaking proposing to adopt regulations that would allow bidding procedures to be used in establishing rates for purchases from QFs. The Commission noted that its existing rules provided for rates for purchases from QFs that would, as a general proposition, be set at the purchasing utility's full avoided cost. The proposed regulations provided for non-mandatory bidding procedures to determine avoided cost as an alternative to using an administratively determined avoided cost.

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[6] 18 C.F.R. § 292.301(b).

[7] The FERC regulations address the question of the authority of a state commission to disallow cost recovery for payments by a utility to a QF. In effect, Order No. 69 provides that so long as the rate paid to the QF does not exceed avoided costs, the state is required to permit the purchasing utility to recover it through its rates. In contrast, if the rate exceeds avoided costs, the state commission may, but is not obligated to allow the utility to recover its payments to a QF in the utility's retail rates.

[8] 53 Fed. Reg. 9,324 (Mar. 22, 1988) ("Bidding NOPR").

However, in September 1993, the FERC chose to terminate the proceeding, rather than issuing a final version of its rules. FERC's decision was based on its conclusion that the FERC and state regulation of the electric utility industry, as well as the industry itself has evolved substantially since the Bidding NOPR was issued.[9] Specifically, FERC cited the Energy Policy Act of 1992,[10] which created "exempt wholesale generators" ("EWGs"), a category of generating plants that is not entitled to PURPA benefits but is able to participate in competitive bidding, and which was the basis for FERC's Order No. 888,[11] which required utilities to grant open transmission access, which further facilitated competitive bidding.

FERC further observed that when it issued its proposal Bidding NOPR in 1988, only a few states had taken steps to allow competitive bidding, but as of September 1993, thirty states use competitive bidding (*i.e.*, either the state has adopted provisions for utilities to use bidding or the state at least permits utilities to use bidding). FERC concluded that "both state regulatory commissions and utilities appear to be making substantial progress without the need for additional Commission guidance"[12] and that "[m]atters and concerns that were relevant in 1988, and that fostered the need for the NOPRs, have been or are being addressed in other fora."[13] As a result, it terminated the rulemaking procedure.[14]

Another Notice of Proposed Rulemaking issued by the FERC in 1988, *Administrative Determination of Full Avoided Costs, Sales to Qualifying Facilities, and Interconnection*

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[9] *Cogeneration; Small Power Production – Notice of Pub. Conference and Request for Comments; Regulations Governing Indep. Power Producers; Regulations Governing Bidding Programs; Regulations Governing the Pub. Util. Regulatory Policies Act of 1978*, Order Terminating Proceedings, 64 FERC ¶ 61,364 (1993) ("Initial Termination Order").

[10] Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992).

[11] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Servs. by Pub. Utils. & Recovery of Stranded Costs by Pub. Utils. & Transmitting Utils.*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998).

[12] Initial Termination Order at 63,491.

[13] *Id.*

[14] *Id.*

Facilities, was similarly terminated based on the FERC's conclusion that events had overtaken the need for it to rule.[15] This Termination Order stated that:

> well over half the states now use competitive bidding to one degree or another in setting avoided cost rates. Indeed, in a number of cases, the Commission itself has considered rates resulting from competitive bidding and negotiation in which QFs were active participants. Accordingly, the industry itself appears to have made substantial progress regarding the determination of avoided costs and the setting of avoided cost rates.[16]

Based on the above, we conclude that if the question were presented, FERC would rule that PURPA and the FERC's regulations do not prohibit, and in fact permit, avoided costs to be based on the results of a competitive bid.

IV. As an EWG with Market-Based Rate Authorization, It Can Sell at Any Mutually Acceptable Rate

In order to be an EWG, an entity must (i) own or operate, or both own and operate, a generating project that is used exclusively for wholesale sales; and (ii) be engaged exclusively in the business of selling power at wholesale. The Project will not engage in retail sales, but only in sales to TECO, and the Project Company will not be engaged in activities other than owning or operating, or both owning and operating, the Project and selling power at wholesale. There is no size limit or fuel type restriction on the ability of an entity to be an EWG. FERC has interpreted its rules to provide that an entity that satisfies the EWG standards is an EWG; it has the option of filing a Notice of Self-Certification as an EWG or seeking a FERC determination that it is an EWG.

If a generator or power marketer demonstrates that it lacks market power in the relevant market, and satisfies other conditions not relevant to the Project, FERC will authorize it to charge "market-based rates" ("MBR"). An entity with MBR authority is free to sell its power at any price on which it and the purchaser agrees. As a 25 MW generator in the TECO "balancing authority area" (*i.e.*, the TECO control area), the Project clearly satisfies the FERC's thresholds for lacking market power. As a result, the Project Company

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[15] 53 Fed. Reg. 9,331 (1988); Order Terminating Proceeding, 84 FERC ¶ 61,265 (1998) ("Termination Order").

[16] Termination Order at 62,301.

could obtain MBR authority and, since it is not required as a condition to the bid process or otherwise to be a QF, it can claim status as an EWG and sell at the rate established through the competitive bid process without any requirement for the rate not to exceed avoided costs. The Project Company intends to file a notice of self-certification as an EWG upon receipt of FPSC approval of the pending TECO petition.