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August 12, 2016

BY ELECTRONIC FILING

Ms. Carlotta Stauffer, Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: **Docket No. 160074-EQ: Petition for approval of new standard offer rate schedule for energy purchases from cogenerators and renewable facilities and for approval of standard offer contract for purchased of firm capacity and energy, by Florida Public Utilities Company.**

Dear Ms. Stauffer:

Attached for electronic filing, please find Florida Public Utilities Company's responses to Staff's Third Set of Data Requests in the referenced docket.

As always, thank you for your assistance in connection with this filing. If you have any questions whatsoever, please do not hesitate to let me know.

Sincerely,

Beth Keating
Gunster, Yoakley & Stewart, P.A.
215 South Monroe St., Suite 601
Tallahassee, FL 32301
(850) 521-1706

Docket No. 160074-EQ – Petition for approval of new standard offer rate schedule for energy purchases from cogenerators and renewable facilities and for approval of standard offer contract for purchased of firm capacity and energy, by Florida Public Utilities Company.

Florida Public Utilities Company's Responses to Staff's Third Set of Data Requests

Florida Public Utilities Company's ("FPUC") responses to Staff's Third Data Requests are as follows:

1. Please provide a copy of the FERC Orders referenced in paragraph 7 of the Utility's petition.

   Company Response:

   Copies of the referenced FERC orders are appended to these responses.

2. Please provide a copy of JEA's and Gulf Power Company's standard offer contracts.

   Company Response:

   FPUC is not in possession of Gulf Power's standard offer contract. To the best FPUC's knowledge and understanding, Gulf Power's current standard offer contract can be accessed on the Florida Public Service Commission's ("FPSC") website at the following address:

   http://www.psc.state.fl.us/library/filings/16/01713-16/01713-16.pdf

   FPUC includes with these responses a copy of what it understands to be a JEA's standard offer current through May 2015, which was obtained from the FPSC. FPUC has no knowledge as to whether this tariff has been updated since that time.

3. Please provide a copy of the Utility's full requirements contracts with its wholesale providers (JEA and Gulf Power Company).

   Company Response:

   Copies of these contracts are appended to these responses.[1] A copy of the Company's Amendment No. 1 to its Generation Services Agreement with Gulf Power, which provides rates for 2018 and 2019 can be provided under separate

[1] The Company notes that, as noted on the document, the 2006 Generation Services Agreement with Gulf Power was previously treated as confidential as it related to the information on page 11. However, that information has since been disclosed in filings at FERC, as has been recognized in Docket No. 110041-EI. As such, the document no longer requires confidential treatment.

cover, along with a request for confidential classification, upon request or can otherwise be made available for inspection with confidential terms protected.

For Questions 4 through 6, please refer to the existing full requirements contracts with Gulf and JEA.

4. For Gulf and JEA, how is the capacity that FPUC is billed for determined?

Company Response:

JEA – The monthly capacity used is billing is the maximum demand for the month based upon the JEA metering equipment located at the transmission delivery point.

Gulf – The monthly capacity used is the based on the annual Capacity Purchase calculation which is completed based on the methodology shown in Appendix A of the full requirements contract. That amount for 2016 is currently set at 91 MW's.

a. Is there is a threshold below which reduction in load would not reduce contract payments?

Company Response:

JEA – No. Capacity payments to JEA are based on actual demand at the time of the monthly peak.

Gulf – Yes. Capacity payments to Gulf are based on a 91 MW minimum demand at the time of the monthly peak.

b. Would delivery of firm capacity by a third party provider to the interconnection between FPUC and the full requirements supplier reduce contract payments?

Company Response:

JEA – Yes. Since capacity payments to JEA are based on actual demand at the time of the monthly peak, it is our understanding that the capacity payment would be decreased by the firm capacity delivered to the interconnection point by the third party.

Gulf – No. Since capacity payments to Gulf are based on a 91 MW demand each month the firm capacity delivery to the interconnection point by a third party would not decrease the capacity payment.

5. For Gulf and JEA, please describe how a renewable provider wheeling firm capacity to the interconnection point between FPUC and the wholesale provider would be treated.

   a. Please provide an estimate of any reduction in payments based upon a 50 MW renewable facility providing firm capacity beginning January 1, 2017 at a capacity factor of 80% for 20 years. As part of this estimate, please complete the table below.

Full Requirements Supplier: [JEA / GPC]				
Year	Energy Payments	Capacity Payments	Other Payments (Specify)	Total Payments
	$(000)	$(000)	$(000)	$(000)
2017				
2018				
2019				
2020				
2021				
2022				
2023				
2024				
2025				
2026				
2027				
2028				
2029				
2030				
2031				
2032				
2033				
2034				
2035				
2036				
Total				
NPV (2017$)				

Company Response:

At the outset, FPUC notes that, due to the relatively low system demand for both the NE and NE Divisions, it is not possible to take delivery of 50 MW's at an 80% capacity factor. In order to ensure the answers are meaningful, the Company's responses to this question are based upon a 20 MW renewable facility providing firm capacity beginning January 1, 2017 at a capacity factor of 80% for 20 years.

Attached are spreadsheets ("3rd Data Request #5A – JEA" and "3rd Data Request #5A – Gulf") for each wholesale provider showing the impact of a third party providing capacity and energy at the wholesale provider's delivery point under the currently approved standard offer contract and the proposed standard offer contract. As can be seen, the increase in rates to FPU customers under the currently approved standard offer contract would be significant based on this delivery of capacity and energy. Using the methodology in the proposed standard offer contract there would be no increase to FPU customers.

The Company also notes the following in regard to this response:

JEA – The current contract with JEA expires December 31, 2017. FPU has begun the Purchase Power Solicitation process for a contract to begin January 1, 2018 but does not currently have information available for that time period. Responses will be based on the existing contract.

Gulf – The current contract with Gulf expires December 31, 2019. FPU has not yet begun the Purchase Power Solicitation process for a contract to begin January 1, 2020 and does not currently have information available for some of that time period. As such, responses are based on the existing contract.

b. Please compare the estimated reduction in payments to the estimated payments to a renewable provider under each full requirement supplier's standard offer contract. If the reduction in payments is less than the payments under the standard offer, please explain how ratepayers will be held harmless under the proposed tariff. If the reduction in payments is greater than the payments under the standard offer, please explain how the renewable provider will be paid FPUC's incremental cost of electric energy and capacity under the proposed tariff.

Company Response:

As shown in the examples above, FPU customers would be harmed significantly based on the currently approved standard offer contract. This results from the fact that FPU will be making a payment to the third party provider based on the wholesale providers contractual fuel cost while only being reimbursed by the wholesale provider based on the providers average hourly avoided cost. Since this reimbursement will be less than payment to the third party, FPU customers will see an overall increase in fuel cost recovery.

Under the proposed standard offer contract, the payments to the third party provider will match the wholesale provider's reimbursement to FPU which will result in no increase to FPU customers.

6. For JEA and Gulf, please describe how a renewable provider supplying electricity from within FPUC's service territory would be treated.

   a. Please provide an estimate of any reduction in payments based upon a 50 MW renewable facility providing firm capacity beginning January 1, 2017 at a capacity factor of 80% for 20 years. As part of this estimate, please complete the table below.

Full Requirements Supplier: [JEA / GPC]				
Year	Energy Payments	Capacity Payments	Other Payments (Specify)	Total Payments
	$(000)	$(000)	$(000)	$(000)
2017				
2018				
2019				
2020				
2021				
2022				
2023				
2024				
2025				
2026				
2027				
2028				
2029				
2030				
2031				
2032				
2033				
2034				
2035				
2036				
Total				
NPV (2017$)				

Company Response:

Consistent with FPUC's response to Data Request 5 above, the Company again notes that, due to the relatively low system demand for both the NE and NE Divisions, it is not possible to take delivery of 50 MW's at an 80% capacity factor. Thus, in order to ensure the answers are meaningful, responses will be based upon a 20 MW renewable facility providing firm

capacity beginning January 1, 2017 at a capacity factor of 80% for 20 years.

Attached is a spreadsheet ("3rd Data Request #6A – JEA" and "3rd Data Request – Gulf") for each wholesale provider showing the impact of a third party providing capacity and energy within the service territory under the proposed standard offer contract. As can be seen, the payments to these third party providers will be increased above those outside the service territory while avoiding any negative impact to FPU customers.

As the attached spreadsheets reflect, for third party providers located within the FPU service territory, payments to the wholesale providers are reduced above the level of reductions shown for those third party providers located outside of the service territory. These deliveries made within the service territory provide for an increased reduction based on the fact that these do not pass through the wholesale providers meter.

The in-service territory location provides for a reduction in transmission lines losses and full avoidance of the fuel, energy, environmental, transmission and capacity billing components in certain instances. Also, in service territory providers provide other less measurable benefits such as system stabilization, capacity redundancy and overall system reliability. The proposed standard offer contract will take into account these factors which will provide additional payments to third party provider within the service territory while avoiding cost increases to customers.

Also, the Company also notes the following in regard to this response:

JEA – The current contract with JEA expires December 31, 2017. FPU has begun the Purchase Power Solicitation process for a contract to begin January 1, 2018 but does not currently have information available for that time period. Responses will be based on the existing contract.

Gulf – The current contract with Gulf expires December 31, 2019. FPU has not yet begun the Purchase Power Solicitation process for a contract to begin January 1, 2020 and does not currently have information available for some of that time period. Responses will be based on the existing contract.

b. Please compare the estimated reduction in payments to the estimated payments to a renewable provider under each full requirement supplier's standard offer contract. If the reduction in payments is less than the payments under the standard offer, please explain how ratepayers will be held harmless under the proposed tariff. If the reduction in payments is greater than the payments under the standard offer, please explain how the renewable provider will be paid FPUC's incremental cost of electric energy and capacity under the proposed tariff.

Company Response:

Under the proposed standard offer contract for third party providers within the service territory, the payment would be based on the billing components that are avoided by having capacity and energy not passing through the wholesale provider's meter. In general this would include the Fuel Cost Component, Capacity Cost Component (NE Florida only) and avoided line losses. The overall reduction in the actual bill from the wholesale provider would be reduced by the Fuel Cost Component, Energy Cost Component (NE Florida Only), Environmental Cost Component, Capacity Cost Component (NE Florida Only) and avoided line losses.

This difference actually results in a benefit to both third party providers within the service territory and an overall reduction in purchased power cost which provides a benefit to FPU customers. Third party providers are reimbursed for energy and capacity (NE Florida only) at a cost above that of providers outside the service territory based on the benefits discussed above. Details for provided with the attachments provided in 6a.

The Transmission Billing Component has not been included in the detailed analysis provided. FPU is uncertain on exactly how this will be handled in the future and is therefore not included. However, should it be determined that this factor would be avoided in billing from the wholesale provide, it could provide additional benefits to third party providers and FPU customers.

Responses to Staff's 3rd Set of Data Requests

ATTACHMENT FOR DR 1#

Monday, February 25, 1980

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 292

[Docket No. RM79-55, Order No. 69]

Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission hereby adopts regulations that implement section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA). The rules require electric utilities to purchase electric power from and sell electric power to qualifying cogeneration and small power production facilities, and provide for the exemption of qualifying facilities from certain federal and State regulation. Implementation of these rules is reserved to State regulatory authorities and nonregulated electric utilities.

EFFECTIVE DATE: March 20, 1980.

FOR FURTHER INFORMATION CONTACT:
Ross Ain, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, 202-357-8446.
John O'Sullivan, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, 202-357-8477.
Adam Wenner, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, 202-357-8033.

Bernard Chew, Office of Electric Power Regulation, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, 202-376-9284.

SUPPLEMENTARY INFORMATION:

Issued February 19, 1980.

Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) requires the Federal Energy Regulatory Commission (Commission) to prescribe rules as the Commission determines necessary to encourage cogeneration and small power production, including rules requiring electric utilities to purchase electric power from and sell electric power to cogeneration and small power production facilities. Additionally, section 210 of PURPA authorizes the Commission to exempt qualifying facilities from certain Federal and State law and regulation.

Under section 201 of PURPA, cogeneration facilities and small power production facilities which meet certain standards and which are not owned by persons primarily engaged in the generation or sale of electric power can become qualifying facilities, and thus become eligible for the rates and exemptions set forth under section 210 of PURPA.

Cogeneration facilities simultaneously produce two forms of useful energy, such as electric power and steam. Cogeneration facilities use significantly less fuel to produce electricity and steam (or other forms of energy) than would be needed to produce the two separately. Thus, by using fuels more efficiently, cogeneration facilities can make a significant contribution to the Nation's effort to conserve its energy resources.

Small power production facilities use biomass, waste, or renewable resources, including wind, solar amd water, to produce electric power. Reliance on these sources of energy can reduce the need to consume traditional fossil fuels to generate electric power.

Prior to the enactment of PURPA, a cogenerator or small power producer seeking to establish interconnected operation with a utility faced three major obstacles. First, a utility was not generally required to purchase the electric output, at an appropriate rate. Secondly, some utilities charged discriminatorily high rates for back-up service to cogenerators and small power producers. Thirdly, a cogenerator or small power producer which provided electricity to a utility's grid ran the risk of being considered an electric utility and thus being subjected to State and Federal regulation as an electric utility.

Sections 201 and 210 of PURPA are designed to remove these obstacles. Each electric utility is required under section 210 to offer to purchase available electric energy from cogeneration and small power production facilities which obtain qualifying status under section 201 of PURPA. For such purchases, electric utilities are required to pay rates which are just and reasonable to the ratepayers of the utility, in the public interest, and which do not discriminate against cogenerators or small power producers. Section 210 also requires electric utilities to provide electric service to qualifying facilities at rates which are just and reasonable, in the public interest, and which do not discriminate against cogenerators and small power producers. Section 210(e) of PURPA provides that the Commission can exempt qualifying facilities from State regulation regarding utility rates and financial organization, from Federal regulation under the Federal Power Act (other than licensing under Part I), and from the Public Utility Holding Company Act.

I. Procedural History

On June 26, 1979, in Docket No. RM79-54,[1] the Commission issued proposed rules to determine which cogeneration and small power production facilities may become "qualifying" cogeneration or small power production facilities under section 201 PURPA. Such qualifying facilities are entitled to avail themselves of the rate and exemption provisions under section 210 of PURPA; and qualifying cogeneration facilities are eligible for exemption from incremental pricing under Title II of the Natural Gas Policy Act of 1978.[2] The Commission will soon issue a final rule in Docket No. RM79-54.

As part of the rulemaking process in this docket, the Commission issued a Staff Discussion Paper[3] on June 27, 1979, addressing issues arising under section 210 of PURPA.

Public hearings on RM79-54 and the Staff Discussion Paper (RM79-55) were held in San Francisco on July 23, 1979, Chicago on July 27, 1979, and Washington, D.C. on July 30, 1979. Written comments were also received.

On October 18, 1979, the Commission issued a Notice of Proposed Rulemaking under Section 210 of PURPA in Docket No. RM79-55.[4] On October 19, 1979, the Commission made available its preliminary Environmental Assessment (EA) of the proposed rules in Docket Nos. RM79-54 and RM79-55. In a Request for Further Comments,[5] the Commission requested further public comment on both proposed rules, and on the findings set forth in the preliminary EA. In order to obtain the data, views, and arguments of interested parties, the Commission Staff held public hearings in Seattle on November 19, 1979, in New York on November 28, 1979, in Denver on November 30, 1979, and in Washington, D.C. on December 4 and 5, 1979. The Commission also received written comment.

After consideration of the comments, the Commission Staff made available a final draft rule on January 29, 1980. State public utility commissioners were invited to comment on the draft at a public meeting held on February 5, 1980. Representatives of electric utilities were invited to comment at a public meeting held on February 8, 1980. The Commission Staff also made itself available to any other interested parties who wished to comment. All of the comments were considered in the formulation of this final rule.

In the Staff Discussion Paper and the Request for Further Comments, it was stated that any environmental effects attributable to this program would result from the combined effect of these two rulemaking proceedings. As noted previously, the Commission intends to issue final rules in Docket No. RM79-54 in the near future. At that time, the Commission will also make available its final Environmental Assessment.

II. Summary

These rules provide that electric utilities must purchase electric energy and capacity made available by qualifying cogenerators and small power producers at a rate reflecting the cost that the purchasing utility can avoid as a result of obtaining energy and capacity from these sources, rather than generating an equivalent amount of energy itself or purchasing the energy or capacity from other suppliers. To enable potential cogenerators and small power producers to be able to estimate these avoided costs, the rules require electric utilities to furnish data concerning present and future costs of energy and capacity on their systems.

These rules also provide that electric utilities must furnish electric energy to qualifying facilities on a nondiscriminatory basis, and at a rate that is just and reasonable and in the public interest; and that they must provide certain types of service which may be requested by qualifying facilities to supplement or back up those facilities' own generation.

[1] 44 FR 38873, July 3, 1979.

[2] 44 FR 65744, November 15, 1979.

[3] 44 FR 38883, July 3, 1979.

[4] 44 FR 61190, October 24, 1979.

[5] 44 FR 61977, October 29, 1979.

The rule exempts all qualifying cogeneration facilities and certain qualifying small power production facilities from certain provisions of the Federal Power Act, from all of the provisions of the Public Utility Holding Company Act of 1935 related to electric utilities, and from State laws regulating electric utility rates and financial organization.

The implementation of these rules is reserved to the State regulatory authorities and nonregulated electric utilities. Within one year of the issuance of the Commission's rules, each State regulatory authority or nonregulated utility must implement these rules. That implementation may be accomplished by the issuance of regulations, on a case-by-case basis, or by any other means reasonably designed to give effect to the Commission's rules.

III. Section-by-Section Analysis

Subpart A—General Provisions

§ 292.101 Definitions.

This section contains definitions applicable to this part of the Commission's rules. Paragraph (a) provides that terms defined in PURPA have the same meaning as they have in PURPA, unless further defined in this part of the Commission's regulations. The definitions in PURPA are found in section 3 of that Act.

Subparagraph (1) defines a qualifying facility as a cogeneration or small power production facility which is a qualifying facility under Subpart B of the Commission's regulations. Those regulations implement section 201 of PURPA, and are the subject of Docket No. RM79-54.

Subparagraph (2) defines "purchase" as the purchase of electric energy or capacity or both from a qualifying facility by an electric utility.

Subparagraph (3) defines "sale" as the sale of electric energy or capacity or both by an electric utility to a qualifying facility.

In the proposed rule, subparagraph (4) defined "system emergency" as a condition on a utility's system "which is likely to result in disruption of service to a significant number of customers or is likely to endanger life or property." In response to comments noting the difficulty in determining what constitutes a "significant number" of customers, the Commission has amended the definition to "a condition on an electric utility's system which is likely to result in imminent significant disruption of service to customers, or is imminently likely to endanger life or property." The emphasis is placed on the significance of the disruption of service, rather than on the number of customers affected.

Subparagraph (5) defines "rate" as any price, rate, charge, or classification made, demanded, observed or received with respect to the sale or purchase of electric energy or capacity, or any rule, regulation, or practice respecting any such rate, charge, or classification, and any contract pertaining to the sale or purchase of electric energy or capacity.

In the proposed rule, subparagraph (6) defined "avoided costs" as the costs to an electric utility of energy or capacity or both which, but for the purchase from a qualifying facility, the electric utility would generate or construct itself or purchase from another source. This definition is derived from the concept of "the incremental cost to the electric utility of alternative electric energy" set forth in section 210(d) of PURPA. It includes both the fixed and the running costs on an electric utility system which can be avoided by obtaining energy or capacity from qualifying facilities.

The costs which an electric utility can avoid by making such purchases generally can be classified as "energy" costs or "capacity" costs. Energy costs are the variable costs associated with the production of electric energy (kilowatt-hours). They represent the cost of fuel, and some operating and maintenance expenses. Capacity costs are the costs associated with providing the capability to deliver energy; they consist primarily of the capital costs of facilities.

If, by purchasing electric energy from a qualifying facility, a utility can reduce its energy costs or can avoid purchasing energy from another utility, the rate for a purchase from a qualifying facility is to be based on those energy costs which the utility can thereby avoid. If a qualifying facility offers energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to avoid the need to construct a generating unit, to build a smaller, less expensive plant, or to reduce firm power purchases from another utility, then the rates for such a purchase will be based on the avoided capacity and energy costs.

The Commission has added the term "incremental" to modify the costs which an electric utility would avoid as a result of making a purchase from a qualifying facility. Under the principles of economic dispatch, utilities generally turn on last and turn off first their generating units with the highest running cost. At any given time, an economically dispatched utility can avoid operating its highest-cost units as a result of making a purchase from a qualifying facility. The utility's avoided incremental costs (and not average system costs) should be used to calculate avoided costs. With regard to capacity, if a purchase from a qualifying facility permits the utility to avoid the addition of new capacity, then the avoided cost of the new capacity and not the average embedded system cost of capacity should be used.

Many comments noted that the definition of "avoided cost" in the proposed rule failed to link the capacity costs which a utility might avoid as a result of purchasing electric energy or capacity or both from a qualifying facility with the energy costs associated with the new capacity. If the Commission required electric utilities to base their rates for purchases from a qualifying facility on the high capital or capacity cost of a base load unit and, in addition, provided that the rate for the avoided energy should be based on the high energy cost associated with a peaking unit, the electric utilities' purchased power expenses would exceed the incremental cost of alternative electric energy, contrary to the limitation set forth in the last sentence of section 210(b).

One way of determining the avoided cost is to calculate the total (capacity and energy) costs that would be incurred by a utility to meet a specified demand in comparison to the cost that the utility would incur if it purchased energy or capacity or both from a qualifying facility to meet part of its demand, and supplied its remaining needs from its own facilities. The difference between these two figures would represent the utility's net avoided cost. In this case, the avoided costs are the excess of the total capacity and energy cost of the system developed in accordance with the utility's optimal capacity expansion plan,[8] *excluding* the qualifying facility, over the total capacity and energy cost of the system (before payment to the qualifying facility) developed in accordance with the utility's optimal capacity expansion plan *including* the qualifying facility.[9]

Subparagraph (7) defines "interconnection costs" as the reasonable costs of connection, switching, metering, transmission, distribution, safety provisions and

[8] An optimal capacity expansion plan is the schedule for the addition of new generating and transmission facilities which, based on an examination of capital, fuel, operating and maintenance costs, will meet a utility's projected load requirements at the lowest total cost.

[9] Throughout the rule and preamble, the phrase "energy or capacity" is used. This phrase is intended to include the capacity and energy costs associated with the capacity, if the purchase involves both energy or capacity.

administrative costs incurred by the electric utility directly related to the installation and maintenance of the physical facilities necessary to permit interconnected operations with a qualifying facility, to the extent such costs are in excess of the corresponding costs which the electric utility would have incurred if it had not engaged in interconnected operations, but instead generated an equivalent amount of energy itself or purchased an equivalent amount of electric energy or capacity from other sources. Interconnection costs do not include any costs included in the calculation of avoided costs.

The Commission has clarified this definition to include distribution and administrative costs associated with the interconnected operation, in response to comments indicating that the proposed rule was vague in these respects. This definition is designed to provide the State regulatory authorities and nonregulated electric utilities with the flexibility to ensure that all costs which are shown to be reasonably incurred by the electric utility as a result of interconnection with the qualifying facility will be considered as part of the obligation of the qualifying facility under § 292.306. These costs may include, but are not limited to, operating and maintenance expenses, the costs of installation of equipment elsewhere on the utility's system necessitated by the interconnection, and reasonable insurance expenses. However, the Commission does not expect that litigation expenses incurred by the utility involving this section will be considered a legitimate interconnection cost to be borne by the qualifying facility.

Certain interconnection costs may be incurred as a result of sales from a utility to a qualifying facility. The Commission notes that the Joint Explanatory Statement of the Committee of Conference (Conference Report) prohibits the use of "unreasonable rate structure impediments, such as unreasonable hook up charges or other discriminatory practices . . ." [8] This prohibition is reflected in § 292.306(a) of these rules, which provides that interconnection costs must be assessed on a nondiscriminatory basis with respect to other customers with similar load characteristics.

A qualifying facility which is already interconnected with an electric utility for purposes of sales may seek to establish interconnection for the purpose of utility purchases from the qualifying facility. In this case, the qualifying facility may have compensated the utility for its interconnection costs with respect to sales to the qualifying facility, either as part of the utility's demand or energy charges, or through a separate customer charge. If this is the case, the interconnection costs associated with the purchase include only those additional interconnection expenses incurred by the electric utility as a result of the purchase, and do not include any portion of the interconnection costs for which the qualifying facility has already paid through its retail rates.

One comment recommended that the definition be revised to cover "all identifiable costs, including but not limited to, the costs of interconnection . . . resulting from interconnected operation". The Commission rejects this suggestion in order to maintain consistency with its initial determination to separate the utility's avoided costs with regard to purchases from qualifying facilities, from the costs incurred as a result of interconnection with a qualifying facility. Accordingly, legitimate costs not recovered pursuant to this section can be netted out in the calculation of avoided costs.

This definition also incorporates the concept from the proposed rule, as clarified in an erratum notice,[9] that these costs are limited to the net increased interconnection costs imposed on an electric utility compared to those interconnection costs it would have incurred had it generated the energy itself or purchased an equivalent amount of energy or capacity from another source.

This section of the rule contains definitions of "supplementary power", "back-up power", "interruptible power", and "maintenance power" which did not appear in the proposed rule.

Subparagraph (8) defines "supplementary power" as electric energy or capacity, supplied by an electric utility, regularly used by a qualifying facility in addition to that which the facility generates itself.

Subparagraph (9) defines "back-up power" as electric energy or capacity supplied by an electric utility to replace energy ordinarily generated by a facility's own generation equipment during an unscheduled outage of the facility.

Subparagraph (10) defines "interruptible power" as electric energy or capacity supplied by an electric utility subject to interruption by the electric utility under specified conditions.

Subparagraph (11) defines "maintenance power" as electric energy or capacity supplied by an electric utility during scheduled outages of the qualifying facility.

Subpart C—Arrangements Between Electric Utilities and Qualifying Cogeneration and Small Power Production Facilities Under Section 210 of the Public Utility Regulatory Policies Act of 1978

§ 292.301 Scope.

Section 292.301(a) describes the scope of Subpart C of Part 292 of the Commission's rules. Subpart C applies to sales and purchases of electric energy or capacity between qualifying cogeneration or small power production facilities and electric utilities, and actions related to such sales and purchases. Section 292.301(b)(1) provides that this subpart does not preclude negotiated agreements between qualifying cogenerators or small power producers and electric utilities which differ from rates, or terms or conditions which would otherwise be required under the subpart. Paragraph (b)(2) states that this subpart does not affect the validity of any contract entered into between a qualifying facility and an electric utility for any purchase.[10]

Paragraph (b)(1) reflects the Commission's view that the rate provisions of section 210 of PURPA apply only if a qualifying cogenerator or small power production facility chooses to avail itself of that section. Agreements between an electric utility and a qualifying cogenerator or small power producer for purchases at rates different than rates required by these rules, or under terms or conditions different from those set forth in these rules, do not violate the Commission's rules under section 210 of PURPA. The Commission recognizes that the ability of a qualifying cogenerator or small power producer to negotiate with an electric utility is buttressed by the existence of the rights and protections of these rules.

Some comments stated that paragraph (b)(2) would unfairly penalize cogenerators and small power producers who, prior to the promulgation of these regulations, entered into binding contracts with electric utilities under less favorable terms than might be obtainable under these rules. The Commission interprets its mandate under section 210(a) to prescribe "such rules as it determines necessary to encourage cogeneration and small

[8] Conference Report on H.R. 4018, Public Utility Regulatory Policies Act of 1978, H. Rep. No. 1750, 95th Cong., 2d Sess. (1978).

[9] 44 FR 63114, November 2, 1979.

[10] The term "purchase" is defined in § 292.101(b)

power production * * *" to mean that the total costs to the utility and the rates to its other customers should not be greater than they would have been had the utility not made the purchase from the qualifying facility or qualifying facilities. That a cogeneration or small power production facility entered into a binding contractual arrangement with an electric utility indicates that it is likely that sufficient incentive existed, and that the further encouragement provided by these rules was not necessary. As a result, the Commission has not revised this provision.

§ 292.302 Availability of electric utility system cost data.

As the Commission observed in the Notice of Proposed Rulemaking, in order to be able to evaluate the financial feasibility of a cogeneration or small power production facility, an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility. This return will be determined in part by the price at which the qualifying facility can sell its electric output. Under § 292.304 of these rules, the rate at which a utility must purchase that output is based on the utility's avoided costs, taking into account the factors set forth in paragraph (e) of that section. Section 292.302 of these rules is intended by the Commission to assist those needing data from which avoided costs can be derived. It requires electric utilities to make available to cogenerators and small power producers data concerning the present and anticipated future costs of energy and capacity on the utility's system.

In the preamble to the proposed rule, the Commission stated that most electric utilities will have prepared data containing some of this information in compliance with the Commission's rules implementing section 133 of PURPA. Several commenters observed that the marginal cost data required to be provided pursuant to section 133 cannot be directly translated into a rate for purchases. The Commission has clarified paragraph (b) to emphasize that these data are not intended to represent a rate for purchases from qualifying facilities. Rather, these data are to be considered the first step in the determination of such a rate.

The Commission has also revised this section so that the rates for purchases can be more readily calculated from the data produced. The Commission has changed paragraph (b)(3) to provide that a utility shall submit the associated energy cost of each planned unit expressed in kilowatt-hours (kWh) along with the estimated capacity cost of planned capacity additions. This change is intended to ensure that the calculation of avoided costs includes the lower energy costs that might be associated with the new capacity. The Commission points out that the determination of a rate for purchases from a qualifying facility which enables a utility to defer or avoid the addition of a new unit must also reflect the hours of expected use of the deferred or avoided capacity addition.

The coverage under paragraph (a) of this section is the same as that provided pursuant to section 133 of PURPA and the Commission's rules implementing that section.[11] As noted in the Notice of Proposed Rulemaking, section 133 of PURPA applies to each electric utility whose total sales of electric energy for purposes other than resale exceeded 500 million kWh during any calendar year beginning after December 31, 1975, and before the immediately preceding calendar year.

Paragraph (b) provides that each regulated electric utility meeting the requirements of paragraph (a) must furnish to its State regulatory authority, and maintain for public inspection, data related to the costs of energy and capacity on the electric utility's system. Each nonregulated electric utility also must maintain such data for public inspection.

In response to comments received, the Commission has extended the date by which these data must be first provided to November 1, 1980, and changed the second date to May 31, 1982, to conform to the dates required by the Commission's regulations implementing section 133 of PURPA. The Commission has added paragraph (d) to allow a State regulatory authority or nonregulated utility to use a different approach than that provided in paragraph (b). As part of that substitute program, a State regulatory authority or nonregulated electric utility could provide that cost data be updated more frequently than every two years.

Subparagraph (1) of paragraph (b) requires each electric utility to provide the estimated avoided cost of energy on its system for various levels of purchases from qualifying facilities. The levels of purchases are to be stated in blocks of not more than 100 megawatts for systems with peak demand of 1000 megawatts or more, and in blocks equivalent to not more than ten percent of system peak demand for systems less than 1000 megawatts. This information is to be stated on a cents per kilowatt-hour basis, for daily and seasonal peak and off-peak periods, for the current calendar year and for each of the next five years.

Subparagraph (2) of paragraph (b) requires each electric utility to provide its schedule for the addition of capacity, planned purchases of firm energy and capacity, and planned capacity retirements for each of the next ten years.

Subparagraph (3) of paragraph (b) has been revised, as discussed previously, so that the costs of planned capacity additions include the associated energy costs.

The Commission received comment noting that some States have implemented or are planning to implement alternative methods by which electric utilities' system cost data would be made available. In order to prevent the preparation of duplicative data where the alternative method substantially deviates from the Commission approach, the Commission has added paragraph (d). This paragraph provides that any State regulatory authority or nonregulated electric utility may, after providing public notice in the area served by the utility and after opportunity for public comment, require data different than that which are otherwise required by this section if it determines that avoided costs can be derived from such data. Any State regulatory authority or nonregulated utility shall notify the Commission within 30 days of any determination to sustitute data requirements.

If a qualifying facility finds that the alternative requirements do not provide sufficient data from which avoided costs may be derived, the qualifying facility may seek court review of the matter as it can with regard to any other aspect of the State's implementation of this program.

A qualifying facility may wish to sell energy or capacity to an electric utility which is not subject to the reporting requirements of paragraph (b). In that event, paragraph (c) provides that, upon request of a qualifying facility, an electric utility not otherwise covered by paragraph (b) must provide data sufficient to enable the cogenerator or small power producer to estimate the utility's avoided costs. If such utility does not supply the requested data, the qualifying facility may apply to the State regulatory authority which has ratemaking authority over the utility or to this Commission for an order requiring that the information be supplied. The consideration of such applications should take into account the burden imposed on the small utilities.

[11] 44 FR 58687, October 11, 1979.

An electric utility which is legally obligated to obtain all of its requirements for electric energy and capacity from another utility may provide the data provided by its supplying utility and the rates at which it currently purchases such energy and capacity for any period during which this obligation will continue. The wholesale rates may require adjustment in order to reflect properly the avoided costs. This is discussed later in this preamble under § 292.303. In the case of small, non-generating utilities, the requirements of this section will be considered to have been satisfied if these cost data are readily available from the supplying utility.

Numerous comments mentioned that the proposed rule did not address the issue of validation of the data to be provided pursuant to this section. As a result, the Commission has added paragraph (e) which provides that any data submitted by an electric utility under this section shall be subject to review by its State regulatory authority. Paragraph (e)(2) places the burden of providing support for the data on the utility supplying the data.

§ 292.303 Electric utility obligations under this subpart.

Section 210(a) of PURPA provides that the Commission prescribe rules requiring electric utilities to offer to purchase electric energy from qualifying facilities. The Commission interprets this provision to impose on electric utilities an obligation to purchase all electric energy and capacity made available from qualifying facilities with which the electric utility is directly or indirectly interconnected, except during periods described in § 292.304(f) or during system emergencies.

A qualifying facility may seek to have a utility purchase more energy or capacity than the utility requires to meet its total system load. In such a case, while the utility is legally obligated to purchase any energy or capacity provided by a qualifying facility, the purchase rate should only include payment for energy or capacity which the utility can use to meet its total system load. These rules impose no requirement on the purchasing utility to deliver unusable energy or capacity to another utility for subsequent sale.

§ 292.303(a) Obligation to purchase from qualifying facilities.

§ 292.303(d) Transmission to other electric utilities. All-Requirement Contracts

Several commenters noted that the obligation to purchase from qualifying facilities under this section might conflict with contractual commitments into which they had entered requiring them to purchase all of their requirements from a wholesale supplier. One commenter noted that, with regard to all-requirements rural electric cooperatives, any impairment of the obligation to obtain all of a cooperative's requirements from a generation and transmission cooperative might affect the financing ability of the generation and transmission cooperative. The Commission observes that, in general, if it permitted such contractual provisions to override the obligation to purchase from qualifying facilities, these contractual devices might be used to hinder the development of cogeneration and small power production. The Commission believes that the mandate of PURPA to encourage cogeneration and small power production requires that obligations to purchase under this provision supersede contractual restrictions on a utility's ability to obtain energy or capacity from a qualifying facility.

The Commission has, however, provided an alternate means by which any electric utility can meet this obligation. Under paragraph (d), if the qualifying facility consents, an all-requirements utility which would otherwise be obligated to purchase energy or capacity from the qualifying facility would be permitted to transmit the energy or capacity to its supplying utility. In most instances, this transaction would actually take the form of the displacement of energy or capacity that would have been provided under the all-requirements obligation. In this case, the supplying utility is deemed to have made the purchase and, as a result the all-requirements obligation is not affected.

In addition, if compliance with the purchase obligation would impose a special hardship on an all-requirements customer, the Commission may consider waiving such purchase obligation pursuant to the procedures set forth in § 292.403.

Transmission to Other Facilities

There are several circumstances in which a qualifying facility might desire that the electric utility with which it is interconnected not be the purchaser of the qualifying facility's energy and capacity, but would prefer instead that an electric utility with which the purchasing utility is interconnected make such a purchase. If, for example, the purchasing utility is a non-generating utility, its avoided costs will be the price of bulk purchased power ordinarily based on the average embedded cost of capacity and average energy cost on its supplying utility's system. As a result, the rate to the qualifying facility would be based on those average costs. If, however, the qualifying facility's output were purchased by the supplying utility, its output ordinarily will replace the highest cost energy on the supplying utility's system at that time, and its capacity might enable the supplying utility to avoid the addition of new capacity. Thus, the avoided costs of the supplying utility may be higher than the avoided cost of the non-generating utility.

This would not appear to be the case if the qualifying facility offers to supply capacity and energy in a situation in which the supplying utility is in an excess capacity situation. Since the supplying utility has excess capacity, its avoided costs would include only energy costs. On the other hand, if the avoided cost were based on the wholesale rate to the all-requirements utility, the avoided cost would include the demand charge included in the wholesale rate, which would usually reflect an allocation of a portion of the fixed charges associated with excess capacity.

Use of the unadjusted wholesale rate fails to take into account the effect of reduced revenue to the supplying utility as a result of the substitute of the qualifying facility's output for energy previously supplied by the supplying utility. As the level of purchase by the all-requirements utility decreases, the supplying utility's fixed costs will have to be allocated over a smaller number of units of output. In effect, the loss in revenue to the supplying utility will cause the demand charges to the supplying utility's customers (including the all-requirements customers interconnected with the qualifying facility) to increase. Under the definition of "avoided costs" in this section, the purchasing utility must be in the same financial position it would have been had it not purchased the qualifying facility's output. As a result, rather than allocating its loss in revenue among all of its customers, in this situation the supplying utility should assign all of these losses to the all-requirements utility. That utility should, in turn, deduct these losses from its previously calculated avoided costs, and pay the qualifying facility accordingly.

Under these rules, certain small electric utilities are not required to provide system cost data, except upon request of a qualifying facility. If, with the consent of the qualifying facility, a small electric utility chooses to transmit energy from the qualifying facility to a second electric utility, the small utility

can avoid the otherwise applicable requirements that it provide the system cost data for the qualifying facility and that it purchase the energy itself. However, the ability to transmit a purchase to another utility is not limited to these smaller systems; it applies to any utility.

Accordingly, paragraph (d) provides that a utility which receives energy or capacity from a qualifying facility may, with the consent of the qualifying facility, transmit such energy to another electric utility. However, if the first facility does not agree to transmit the purchased energy or capacity, it retains the purchase obligation. In addition, if the qualifying facility does not consent to transmission to another utility, the first utility retains the purchase obligation. Any electric utility to which such energy or capacity is delivered must purchase this energy under the obligations set forth in these rules as if the purchase were made directly from the qualifying facility.

One commenter stated that this provision could result in energy being transmitted to a utility which has little or no information regarding the reliability of the qualifying facility. The Commission believes that, prior to these transactions occurring, it will be in the interest of the qualifying facility to inform any utility to which energy or capacity is delivered, of the nature of those deliveries, so that such energy or capacity can be usefully integrated into that utility's power supply.

Several other commenters believed that this provision went beyond the authority of section 210 of PURPA—namely, that the Commission cannot require the first utility to wheel the power nor the second utility to buy the power. First, the Commission notes that this transmission can only occur with the consent of the utility to which energy or capacity from the qualifying facility is made available. Thus, no utility is forced to wheel. Secondly, section 210 does not limit the obligation to purchase to any particular utility; rather, it is a generally applicable requirement.

Paragraph (d) provides that charges for transmission are not a part of the rate which an electric utility to which energy is transmitted is obligated to pay the qualifying facility. In the case of electric utilities not subject to the jurisdiction of this Commission, these charges should be determined under applicable State law or regulation which may permit agreement between the qualifying facility and any electric utility which transmits energy or capacity with the consent of the qualifying facility. For utilities subject to the Commission's jurisdiction under Part II of the Federal Power Act, these charges will be determined pursuant to Part II.

The electric utility to which the electric energy is transmitted has the obligation to purchase the energy at a rate which reflects the costs that it can avoid as a result of making such a purchase. In cases in which electricity actually travels across the transmitting utility's system, the amount of energy delivered will be less than that transmitted, due to line losses. When this occurs, the rate for purchase can reflect these losses. In other cases, the energy supplied by the qualifying facility will displace energy that would have been supplied by the purchasing utility to the transmitting utility. In those cases, a unit of energy supplied from the qualifying facility may replace a greater amount of energy from the purchasing utility. In that case, the rate for purchase should be increased to reflect the net gain. These provisions are also set forth in paragraph (d).

§ 292.303(b) Obligation to sell to qualifying facilities.

Paragraph (b) sets forth the statutory requirement of section 210(a) of PURPA that each electric utility offer to sell electric energy to qualifying facilities. The Commission observed in the Notice of Proposed Rulemaking that State law ordinarily sets out the obligation of an electric utility to provide service to customers located within its service area. In most instances, therefore, this rule will not impose additional obligations on electric utilities.

It is possible that a qualifying facility located outside the service area of an electric utility might require back-up, maintenance, or other types of power. The Commission believes that the instructions of section 210(a) of PURPA that it issue rules "as it determines necessary to encourage cogeneration and small power production * * *" mandate that it assure that such facilities are able to fulfill their needs for service.

However, the Commission also recognizes that State and local law limits the authority of some electric utilities to construct lines outside of their service area. Accordingly, the Commission requires electric utilities to serve any qualifying facility, and, subject to the restriction contained therein, to interconnect with any such facility as required in paragraph (c). However, an electric utility is only required to construct lines or other facilities to the extent authorized or required by State or local law. As a result, a qualifying facility outside the service area of a utility may be required to build its line into the service area of the utility.

§ 292.303(c) Obligation to interconnect

In the Notice of Proposed Rulemaking, the Commission used the interpretation set forth in the Staff Discussion Paper, that the obligation to interconnect with a qualifying facility is subsumed within the requirement of section 210(a) that electric utilities offer to sell electric energy to and purchase electric energy from qualifying facilities. The Commission observed that to hold otherwise would mean that Congress intended to require that qualifying facilities go through the complex procedures simply to gain interconnection, contrary to the mandate of section 210 of PURPA to encourage cogeneration and small power production.

During the comment period, this question was further explored, and it was suggested that the Commission has ample authority under the general mandate of section 210(a) of PURPA—namely, that it prescribe rules necessary to encourage cogeneration and small power production—to require interconnection.

While these interpretations received substantial support in the comments submitted, they were at the same time criticized on the theory that section 210(e)(3) of PURPA does not provide that a qualifying facility may be exempted from section 210 of the Federal Power Act (added by section 202 of PURPA and providing certain interconnection authority) and that this interconnection section specifically includes qualifying cogenerators and small power producers in its applicability. These commenters contended that since section 210 of the Federal Power Act deals explicitly with the subject of interconnections between qualifying facilities and electric utilities, no other section of that Act can be interpreted as also granting authority on that subject, as such an interpretation would render the express provision "surplusage".

With regard to these criticisms, the Commission observes that this argument might be tenable in the situation in which the section of the legislation which deals explicitly with the subject does not contain an express provision that it is *not* to be considered the exclusive authority on the subject. The Commission notes that section 212 of the Federal Power Act (as added by section 204 of PURPA) sets forth certain determinations that the Commission must make before it can issue an order under either section 210 or 211 of the Federal Power Act.

Section 212(e) states that no provision of section 210 of the Federal Power Act shall be treated "(1) as requiring any person to utilize the authority of such section 210 or 211 in lieu of any other authority of law, or (2) as limiting, impairing, or otherwise affecting any other authority of the Commission under any other provision of law." Thus, the Federal Power Act, as amended, expressly provides that the existence of authority under section 210 of the Federal Power Act to require interconnection is not to be interpreted as excluding any other interconnection authority available under any other law. The Commission emphasizes that the limitation is not restricted to the Federal Power Act, but rather extends to include other authority of law, such as the authority contained in the Public Utility Regulatory Policies Act of 1978, of which section 210 is a part. Clearly, the existence of this provision refutes the contention that section 210 of the Federal Power Act represents the exclusive method by which interconnection can be obtained. As a result, the comment that the direction contained in section 210(e)(3) of PURPA that no qualifying facility can be exempted from section 210 or 212 of the Federal Power Act is not persuasive.

The Commission finds that to require qualifying facilities to go through the complex procedures set forth in section 210 of the Federal Power Act to gain interconnection would, in most circumstances, significantly frustrate the achievement of the benefits of this program. The Commission does not feel that the legal interpretation set forth in the Staff Discussion Paper and the Notice of Proposed Rulemaking is the exclusive theory by which it may require interconnections under this program without resort to sections 210 and 212 of the Federal Power Act. The interpretation brought out during the comment period—that section 210(a) of PURPA provides a general mandate for the Commission to prescribe rules necessary to encourage cogeneration and small power production—provides, in the Commission's view, sufficient authority to require interconnection. The Commission believes that a basic purpose of section 210 of PURPA is to provide a market for the electricity generated by small power producers and cogenerators. The Commission believes that accomplishment of this purpose would be greatly hindered if it were to require qualifying facilities to utilize section 210 of the Federal Power Act as the exclusive means of obtaining interconnection. It therefore concludes that such a restrictive interpretation of the law is not supportable.

Paragraph (c)(1) thus provides that an electric utility must make any interconnections with a qualifying facility which may be necessary to permit purchases from or sales to the qualifying facility. A State regulatory authority or nonregulated electric utility must enforce this requirement as part of its implementation of the Commission's rules.

In addition, several commenters contended that, if the obligation to interconnect is required under section 210(a) PURPA, the limitation provided in section 212 of the Federal Power Act would not be available. That limitation provides that an electric utility which complies with an interconnection order under section 210 of the Federal Power Act would not be subject to the jurisdiction of the Federal Energy Regulatory Commission for any purposes other than those specified in the interconnection order.

After consideration of this concern, the Commission has added paragraph (c)(2) to provide that no electric utility is required to interconnect with any qualifying facility, if, solely by reason of purchases or sales over the interconnection, the electric utility would become subject to regulation as a public utility under Part II of the Federal Power Act. This exception is provided because the Commission notes that, in balance, the encouragement of cogeneration and small power production would not be furthered if, by virtue of interconnection with a qualifying facility, a previously nonjurisdictional utility were reluctantly to become subject to federal utility regulation.

§ 292.303(e) Parallel operation.

In the Notice of Proposed Rulemaking, the Commission provided that each electric utility must offer to operate in parallel with a qualifying facility, provided that the qualifying facility complies with standards established by the State regulatory authority or nonregulated electric utility with regard to the protection of system reliability pursuant to § 292.308. By operating in parallel, qualifying facilities are enabled to export automatically any electric energy which is not consumed by its own load. The comments submitted have not set forth any convincing reasons for changing the proposed rule. Paragraph (e) thus continues to require each electric utility to offer to operate in parallel with a qualifying facility.

§ 292.304 Rates for purchases.

Section 210(b) of PURPA provides that in requiring any electric utility to purchase electric energy from a qualifying facility, the Commission must ensure that the rates for the purchase be just and reasonable to the electric consumers of the purchasing utility, in the public interest, and nondiscriminatory to qualifying facilities, but that they not exceed the incremental costs of alternative electric energy (the costs of energy to the utility, which, but for the purchase, the utility would generate itself or purchase from another source).

Relation to State Programs

The Commission has become aware that several States have enacted legislation requiring electric utilities in that State to purchase the electrical output of facilities which may be qualifying facilities under the Commission's rules at rates which may differ from the rates required under the Commission's rules implementing section 210 of PURPA.

This Commission has set the rate for purchases at a level which it believes appropriate to encourage cogeneration and small power production, as required by section 210 of PURPA. While the rules prescribed under section 210 of PURPA are subject to the statutory parameters, the States are free, under their own authority, to enact laws or regulations providing for rates which would result in even greater encouragement of these technologies. However, State laws or regulations which would provide rates lower than the federal standards would fail to provide the requisite encouragement of these technologies, and must yield to federal law.

If a State program were to provide that electric utilities must purchase power from certain types of facilities, among which are included "qualifying facilities," at a rate higher than that provided by these rules, a qualifying facility might seek to obtain the benefits of that State program. In such a case, however, the higher rates would be based on State authority to establish such rates, and not on the Commission's rules.

A facility which provides energy or capacity to a utility under State authority may nevertheless seek to obtain exemption from the Federal Power Act, the Public Utility Holding Company Act, and State regulation of electric utilities as available under section 210(e) of PURPA. The Commission notes that the States lack the authority to exempt a facility from

the Federal Power Act or Public Utility Holding Company Act. The Commission finds no inconsistency in a facility's taking advantage of section 210 in order to obtain one of its benefits, while relying on other authority under which to buy from or sell to a utility.

§ 292.304(a) Rates for purchases.

Paragraph (a) sets forth the statutory requirement that rates for purchases be just and reasonable to the electric consumers of the electric utility and in the public interest, and not discriminate against qualifying cogeneration and small power production facilities.

In the proposed rule, the Commission stated that there is a rebuttable presumption that the rate for purchases is acceptable if it reflects the avoided cost resulting from a purchase on the basis of system cost data set forth pursuant to § 292.302 (b) or (c). Many of the comments received stated that this section was ambiguous.[12] The Commission has therefore provided that the rate for purchases meets the statutory requirements if it equals avoided costs, and has eliminated the reference to the "rebuttable presumption".

Some comments recommended that, as a matter of policy, this section be revised to provide that a State regulatory authority or nonregulated utility has discretion to establish the relationship between the avoided cost and the rate for purchases. Other commenters contended that the Commission should specify that the rate for purchase must equal the avoided cost resulting from such a purchase. In addition, several suggested that the Commission adopt a "split-the-savings" approach.

It is possible that developers of technologies which may be included as qualifying facilities may produce and make available power to electric facilities even though their cost of producing this power is greater than the utility's avoided costs. In most instances, however, purchases of energy or capacity from qualifying facilities will only occur when the cost to the qualifying cogenerator or small power producer of producing the energy or capacity is lower than the utility's avoided costs. Only if this is the case will payment by the utility of its avoided costs provide economic benefit for the cogenerator or small power producer.

When one electric utility can provide energy more cheaply than could another electric utility, the two utilities will often exchange power on a "split-the-savings" basis. In that type of transaction, the two utilities split the difference between the incremental costs incurred and the incremental costs that the purchasing utility would have incurred had it generated the power itself. Several commenters argued that rates for purchases from qualifying facilities should be based upon this same general principle. The effect of such a pricing mechanism would be to transfer to the utility's ratepayers a portion of the savings represented by the cost differential between the qualifying facility and the purchasing electric utility. Several utilities contend that by so allocating these savings, the Commission would provide an incentive for the electric utility to enter into purchase transactions with qualifying cogeneration and small power production facilities.

These commenters also noted that they had previously engaged in purchases from facilities which might become qualifying facilities under the Commission's rules, and they had paid prices for these purchases based on a "split-the-savings" methodology. These commenters observed that if the Commission's rules now require the payment of full avoided cost for these types of purchases, the purchased power expenses of the electric utility would increase.

Moreover, several utilities commented that, for the forseeable future, they are inextricably tied to the use of oil to produce electricity. They contepd that unless they are permitted to purchase energy and capacity from qualifying facilities at a rate somewhere between the qualifying facilities' costs and their own costs, they and their ratepayers will be subject to the continually increasing world price of oil.

Commenters opposing this allocation of savings to parties other than the qualifying facility noted that this section of PURPA is intended to encourage the development of cogeneration and small power production. They noted that in providing for this encouragement, the Commission may not set rates for purchases at a level which exceeds the incremental cost of alternative energy. Therefore, they observed that, under the full avoided cost standard, the utilities' customers are kept whole, and pay the same rates as they would have paid had the utility not purchased energy and capacity from the qualifying facility.

Although use of the full avoided cost standard will not produce any rate savings to the utility's customers, several commenters stated that these ratepayers and the nation as a whole will benefit from the decreased reliance of scarce fossil fuels, such as oil and gas, and the more efficient use of energy.

The Commission notes that, in most instances, if part of the savings from cogeneration and small power production were allocated among the utilities' ratepayers, any rate reductions will be insignificant for any individual customer. On the other hand, if these savings are allocated to the relatively small class of qualifying cogenerators and small power producers, they may provide a significant incentive for a higher growth rate of these technologies.

Another concern with the use of a split-the-savings rate for purchases is that it would require a determination of the costs of production of the qualifying facility. A major portion of this legislation is intended to exempt qualifying facilities from the cost-of-service regulation by which electric utilities traditionally have been regulated. The Conference Report noted that:

> It is not the intention of the Conferees that cogenerators and small power producers become subject . . . to the type of examination that is traditionally given to electric utility rate applications to determine what is the just and reasonable rate that they should receive for their electric power.[13]

Thus, section 210(e) of PURPA provides that the Commission shall exempt qualifying facilities from the Public Utility Holding Company Act, from the Federal Power Act and from State law and regulation respecting utility rates or financial organization, to the extent that the Commission determines that such exemption is necessary to encourage cogeneration or small power production.

Several commenters have contended that a determination of the qualifying facility's costs can be made without the detail required by cost-of-service regulation. However, the Commission believes that the basis for the determination of rates for purchases should be the utility's avoided costs and should not vary on the basis of the costs of the particular qualifying facility.

Several commenters recommended that rather than using a split-the-savings approach, the Commission should set rates for purchases at a fixed percentage of avoided costs. The Commission notes that, in most situations, a qualifying cogenerator or small power producer will only produce energy if its marginal cost of production is less than the price he receives for its output. If some fixed percentage is used, a qualifying facility

[12] The relationship between the utility system cost data and the rate for purchases is discussed under § 292.302 and § 292.304(b).

[13] Conference Report on H.R. 4018, Public Utility Regulatory Policies Act of 1978, H. Rep. No. 1750, 97, 95th Cong., 2d. Sess. (1978).

may cease to produce additional units of energy when its costs exceed the price to be paid by the utility. If this occurs, the utility will be forced to operate generating units which either are less efficient than those which would have been used by the qualifying facility, or which consume fossil fuel rather than the alternative fuel which would have been consumed by the qualifying facility had the price been set at full avoided costs.

§ 292.304(b) Relationship to avoided costs.

"New Capacity"

The proposed rule differentiated between "old" and "new" production in connection with simultaneous purchases and sales. The proposed rule required an electric utility to purchase at its avoided cost the total output of a facility, construction of which was commenced after the date of issuance of these rules, even if the utility simultaneously sells energy to the facility at its retail rate. The effect of this proposed rule was to separate the production aspect of a qualifying facility from its consumption function. Under this approach, the electrical output of a facility is viewed independently of its electrical needs. Thus, if a cogeneration facility produces five megawatts, and consumes three megawatts, it is treated the same as another qualifying facility that produces five megawatts, and that is located next to a factory that uses three megawatts.

The Commission continues to believe that permitting simultaneous purchase and sale is necessary and appropriate to encourage cogeneration and small power production. The limitation contained in the proposed rule was intended to prevent a cogenerator or small power producer, which had found it economical to produce power for its own consumption prior to the issuance of these rules, from receiving the economic rent that might result from the purchase of its entire output at a utility's full avoided cost after that date without new investment on the part of the qualifying facility.

The same reasoning applies to any facility which was in existence prior to the enactment of PURPA, whether or not it seeks to purchase and sell simultaneously. That construction of the facility was commenced prior to that date may indicate that appropriate economic returns were available without the further incentives provided by section 210.

The Commission is aware that in some instances, if a previously existing qualifying facility were not permitted to receive full avoided costs for its entire output, it would no longer have sufficient incentive to continue to produce electric power. The cost of production may have risen so as to render the previous rate insufficient to cover the costs of production, or permit an appropriate return.

Thus, with regard to facilities, construction of which commenced on or after the date of enactment of PURPA (November 9, 1978), the Commission has determined it appropriate to provide that rates for purchases shall equal full avoided costs. For facilities, construction of which commenced before the enactment of PURPA, the Commission will permit the State regulatory authorities and nonregulated electric utilities to establish rates for purchases at full avoided costs, or at a lower rate, if the State regulatory authority or nonregulated electric utility determines that the lower rate will provide sufficient encouragement of cogeneration and small power production. Thus, if a previously existing facility shows that it requires rates for purchases based on full avoided costs to remain viable, or to increase its output, the State regulatory authority or nonregulated electric utility is required to establish such rates. This distinction is intended to reflect the need for further incentives and the reasonable expectations of persons investing in cogeneration or small power production facilities prior to or subsequent to the enactment of this law.

Paragraph (b)(1) defines "new capacity" as any purchase of capacity from a qualifying facility, construction of which was commenced on or after November 9, 1978. Subparagraph (2) provides that for new capacity, utilities must pay a rate which equals their avoided cost.

A utility must therefore purchase all of the output from a qualifying facility. However, as explained above, for any portion of that output which is not "new capacity," the State regulatory authority or nonregulated electric utility, as provided in paragraph (b)(3), may provide for a lower rate, if it determines that the lower rate will provide sufficient incentive for cogeneration.

Paragraph (b)(4) requires electric utilities to pay full avoided costs for purchases from new capacity made available from a qualifying facility, regardless of whether the electric utility is simultaneously making sales to the qualifying facility.

§ 292.304(c) Standard rates for purchases.

The Notice of Proposed Rulemaking required electric utilities on request of a qualifying facility to establish a tariff or other method for establishing rates for purchase from qualifying facilities of 10 kw or less. Upon consideration of the comments received, the Commission has determined that the concept of requiring a standard rate for purchases should be retained. Several comments stated that this requirement could similarly be applied to facilities of up to 100 kw or less.

The Commission is aware that the supply characteristics of a particular facility may vary in value from the average rates set forth in the utility's standard rate required by this paragraph. If the Commission were to require individualized rates, however, the transaction costs associated with administration of the program would likely render the program uneconomic for this size of qualifying facility. As a result, the Commission will require that standardized tariffs be implemented for facilities of 100 kw or less.

In addition, some commenters pointed out that standard tariffs can be used on a technology specific basis, to reflect the supply characteristics of the particular technology. Some commenters also observed that the proposed rule did not require that standard rates for purchases from these small facilities be based on the purchasing utility's avoided cost. This omission might have permitted a utility to pay less than that rate for purchases.

The Commission has accordingly revised paragraph (c) to require each State regulatory authority or nonregulated electric utility to cause to be put into effect standard rates for purchases from qualifying facilities with a design capacity of 100 kilowatts or less. The revised rule requires that standard rates for purchases equal the purchasing utility's avoided cost pursuant to paragraphs (a), (b), and (e).

Several commenters noted that standard rates for purchases can also be usefully applied to larger facilities. The Commission believes that the establishment of standard rates for purchases can significantly encourage cogeneration and small power production, provided that these standard rates accurately reflect the costs that the utility can avoid as a result of such purchases. Accordingly, the Commission has added subparagraph (2) which permits, but does not require, State regulatory authorities and nonregulated electric utilities to put into effect a standard rate for purchases from qualifying facilities with a design capacity greater than 100 kilowatts. These rates must equal avoided cost pursuant to paragraphs (a), (b), and (e).

Many commenters at the Commission's public hearings and in written comments recommended that the Commission should require the establishment of "net energy billing" for small qualifying facilities. Under this billing method, the output from a qualifying facility reverses the electric meter used to measure sales from the electric utility to the qualifying facility. The Commission believes that this billing method may be an appropriate way of approximating avoided cost in some circumstances, but does not believe that this is the only practical or appropriate method to establish rates for small qualifying facilities. The Commission observes that net energy billing is likely to be appropriate when the retail rates are marginal cost-based, time-of-day rates. Accordingly, the Commission will leave to the State regulatory authorities and the nonregulated electric utilities the determination as to whether to institute net energy billing.

Paragraph (c)(3)(i) provides that standard rates for purchase should take into account the factors set forth in paragraph (e). These factors relate to the quality of power from the qualifying facility, and its ability to fit into the purchasing utility's generating mix.

Paragraph (e)(vi) is of particular significance for facilities of 100 kW or less. This paragraph provides that rates for purchase shall take into account "the individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system . . .". Several commenters presented persuasive evidence showing that an effective amount of capacity may be provided by dispersed small systems, even in the case where delivery of energy from any particular facility is stochastic. Similarly, qualifying facilities may be able to enter into operating agreements with each other by which they are able to increase the assured availability of capacity to the utility by coordinating scheduled maintenance and providing mutual back-up service. To the extent that this aggregate capacity value can be reasonably estimated, it must be reflected in standard rates for purchases.

Several commenters observed that the patterns of availability of particular energy sources can and should be reflected in standard rates. An example of this phenomenon is the availability of wind and photovoltaic energy on a summer peaking system. If it can be shown that system peak occurs when there is bright sun and no wind, rates for purchase could provide a higher capacity payment for photovoltaic cells than for wind energy conversion systems. For systems peaking on dark windy days, the reverse might be true. Subparagraph (3)(ii) thus provides that standard rates for purchases may differentiate among qualifying facilities on the basis of the supply characteristics of the particular technology.

§§ 292.304 (b)(5) and (d) Legally enforceable obligations.

Paragraphs (b)(5) and (d) are intended to reconcile the requirement that the rates for purchases equal the utilities' avoided cost with the need for qualifying facilities to be able to enter into contractual commitments based, by necessity, on estimates of future avoided costs. Some of the comments received regarding this section stated that, if the avoided cost of energy at the time it is supplied is less than the price provided in the contract or obligation, the purchasing utility would be required to pay a rate for purchases that would subsidize the qualifying facility at the expense of the utility's other ratepayers. The Commission recognizes this possibility, but is cognizant that in other cases, the required rate will turn out to be lower than the avoided cost at the time of purchase. The Commission does not believe that the reference in the statute to the incremental cost of alternative energy was intended to require a minute-by-minute evaluation of costs which would be checked against rates established in long term contracts between qualifying facilities and electric utilities.

Many commenters have stressed the need for certainty with regard to return on investment in new technologies. The Commission agrees with these latter arguments, and believes that, in the long run, "overestimations" and "underestimations" of avoided costs will balance out.

Paragraph (b)(5) addresses the situation in which a qualifying facility has entered into a contract with an electric utility, or where the qualifying facility has agreed to obligate itself to deliver at a future date energy and capacity to the electric utility. The import of this section is to ensure that a qualifying facility which has obtained the certainty of an arrangement is not deprived of the benefits of its commitment as a result of changed circumstances. This provision can also work to preserve the bargain entered into by the electric utility; should the actual avoided cost be higher than those contracted for, the electric utility is nevertheless entitled to retain the benefit of its contracted for, or otherwise legally enforceable, lower price for purchases from the qualifying facility. This subparagraph will thus ensure the certainty of rates for purchases from a qualifying facility which enters into a commitment to deliver energy or capacity to a utility.

Paragraph (d)(1) provides that a qualifying facility may provide energy or capacity on an "as available" basis, i.e., without legal obligation. The proposed rule provided that rates for such purchases should be based on "actual" avoided costs. Many comments noted that basing rates for purchases in such cases on the utility's "actual avoided costs" is misleading and could require retroactive ratemaking. In light of these comments, the Commission has revised the rule to provide that the rates for purchases are to be based on the purchasing utility's avoided costs estimated at the time of delivery.[14]

Paragraph (d)(2) permits a qualifying facility to enter into a contract or other legally enforceable obligation to provide energy or capacity over a specified term. Use of the term "legally enforceable obligation" is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility.

Many commenters noted the same problems for establishing rates for purchases under subparagraph (2) as in subparagraph (1). The Commission intends that rates for purchases be based, at the option of the qualifying facility, on either the avoided costs at the time of delivery or the avoided costs calculated at the time the obligation is incurred. This change enables a qualifying facility to establish a fixed contract price for its energy and capacity at the outset of its obligation or to receive the avoided costs determined at the time of delivery.

A facility which enters into a long term contract to provide energy or capacity to a utility may wish to receive a greater percentage of the total purchase price during the beginning of the obligation. For example, a level payment schedule from the utility to the qualifying facility may be used to match more closely the schedule of debt service of the facility. So long as the total payment over the duration of the contract term does not exceed the estimated avoided costs, nothing in these rules would prohibit a State regulatory authority or non-regulated electric utility from approving such an arrangement.

[14] In addition to the avoided costs of energy, these costs must include the prorated share of the aggregate capacity value of such facilities.

§ 292.304(c) Factors affecting rates for purchases.

Capacity Value

An issue basic to this paragraph is the question of recognition of the capacity value of qualifying facilities.

In the proposed rule, the Commission adopted the argument set forth in the Staff Discussion Paper that the proper interpretation of section 210(b) of PURPA requires that the rates for purchases include recognition of the capacity value provided by qualifying cogeneration and small power production facilities. The Commission noted that language used in section 210 of PURPA and the Conference Report as well as in the Federal Power Act supports this proposition.

In the proposed rule, the Commission cited the final paragraph of the Conference Report with regard to section 210 of PURPA:

> The conferees expect that the Commission, in judging whether the electric power supplied by the cogenerator or small power producer will replace future power which the utility would otherwise have to generate itself either through existing capacity or additions to capacity or purchase from other sources, will take into account the reliability of the power supplied by the cogenerator or small power producer by reason of any legally enforceable obligation of such cogenerator or small power producer to supply firm power to the utility.[15]

In addition to that citation, the Commission notes that the Conference Report states that:

> In interpreting the term "incremental costs of alternative energy", the conferees expect that the Commission and the States may look beyond the costs of alternative sources which are instantaneously available to the utility.[16]

Several commenters contended that, since section 210(a)(2) of PURPA provides that electric utilities must "purchase electric energy" from qualifying facilities, the rate for such purchases should not include payments for capacity. The Commission observes that the statutory language used in the Federal Power Act uses the term "electric energy" to describe the rates for sales for resale in interstate commerce. Demand or capacity payments are a traditional part of such rates. The term "electric energy" is used throughout the Act to refer both to electric energy and capacity. The Commission does not find any evidence that the term "electric energy" in section 210 of PURPA was intended to refer only to fuel and operating and maintenance expenses, instead of all of the costs associated with the provision of electric service.

In addition, the Commission notes that to interpret this phrase to include only energy would lead to the conclusion that the rates for sales *to* qualifying facilities could only include the energy component of the rate since section 210 also refers to "electric energy" with regard to such sales. It is the Commission's belief that this was not the intended result. This provides an additional reason to interpret the phrase "electric energy" to include both energy and capacity.

In implementing this statutory standard, it is helpful to review industry practice respecting sales between utilities. Sales of electric power are ordinarily classified as either firm sales, where the seller provides power at the customer's request, or non-firm power sales, where the seller and not the buyer makes the decision whether or not power is to be available. Rates for firm power purchases include payments for the cost of fuel and operating expenses, and also for the fixed costs associated with the construction of generating units needed to provide power at the purchaser's discretion. The degree of certainty of deliverability required to constitute "firm power" can ordinarily be obtained only if a utility has several generating units and adequate reserve capacity. The capacity payment, or demand charge, will reflect the cost of the utility's generating units.

In contrast, the ability to provide electric power at the selling utility's discretion imposes no requirement that the seller construct or reserve capacity. In order to provide power to customers at the seller's discretion, the selling utility need only charge for the cost of operating its generating units and administration. These costs, called "energy" costs, ordinarily are the ones associated with non-firm sales of power.

Purchases of power from qualifying facilities will fall somewhere on the continuum between these two types of electric service. Thus, for example, wind machines that furnish power only when wind velocity exceeds twelve miles per hour may be so uncertain in availability of output that they would only permit a utility to avoid generating an equivalent amount of energy. In that situation, the utility must continue to provide capacity that is available to meet the needs of its customers. Since there are no avoided capacity costs, rates for such sporadic purchases should thus be based on the utility system's avoided incremental cost of energy. On the other hand, testimony at the Commission's public hearings indicated that effective amounts of firm capacity exist for dispersed wind systems, even though each machine, considered separately, could not provide capacity value. The aggregate capacity value of such facilities must be considered in the calculation of rates for purchases, and the payment distributed to the class providing the capacity.

Some technologies, such as photovoltaic cells, although subject to some uncertainty in power output, have the general advantage of providing their maximum power coincident with the system peak when used on a summer peaking system. The value of such power is greater to the utility than power delivered during off-peak periods. Since the need for capacity is based, in part, on system peaks, the qualifying facility's coincidence with the system peak should be reflected in the allowance of some capacity value and an energy component that reflects the avoided energy costs at the time of the peak.

A facility burning municipal waste or biomass may be able to operate more predictably and reliably than solar or wind systems. It can schedule its outages during times when demand on the utility's system is low. If such a unit demonstrates a degree of reliability that would permit the utility to defer or avoid construction of a generating unit or the purchase of firm power from another utility, then the rate for such a purchase should be based on the avoidance of both energy and capacity costs.

In order to defer or cancel the construction of new generating units, a utility must obtain a commitment from a qualifying facility that provides contractual or other legally enforceable assurances that capacity from alternative sources will be available sufficiently ahead of the date on which the utility would otherwise have to commit itself to the construction or purchase of new capacity. If a qualifying facility provides such assurances, it is entitled to receive rates based on the capacity costs that the utility can avoid as a result of its obtaining capacity from the qualifying facility.

Other comments with regard to the requirement to include capacity payments in avoided costs generally track those set forth in the Staff Discussion Paper and the proposed rule. The thrust of these comments is that, in order to receive credit for capacity and to comply with the requirement that rates for purchases not exceed the incremental cost of alternative energy, capacity payments can only be required when the availability of capacity from a qualifying facility or facilities actually permits the purchasing utility to reduce

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[15] Conference Report on H.R. 4018, Public Utility Regulatory Policies Act of 1978, H. Rep. No. 1750, 95th Cong., 2d. Sess. (1978).

[16] *Id.*, pp. 98–9.

its need to provide capacity by deferring the construction of new plant or commitments to firm power purchase contracts. In the proposed rule, the Commission stated that if a qualifying facility offers energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to avoid the need to construct a generating plant, to enable it to build a smaller, less expensive plant, or to purchase less firm power from another utility than it would otherwise have purchased, then the rates for purchases from the qualifying facility must include the avoided capacity and energy costs. As indicated by the preceding discussion, the Commission continues to believe that these principles are valid and appropriate, and that they properly fulfill the mandate of the statute.

The Commission also continues to believe, as stated in the proposed rule, that this rulemaking represents an effort to evolve concepts in a newly developing area within certain statutory constraints. The Commission recognizes that the translation of the principle of avoided capacity costs from theory into practice is an extremely difficult exercise, and is one which, by definition, is based on estimation and forecasting of future occurrences. Accordingly, the Commission supports the recommendation made in the Staff Discussion Paper that it should leave to the States and nonregulated utilities "flexibility for experimentation and accommodation of special circumstances" with regard to implementation of rates for purchases. Therefore, to the extent that a method of calculating the value of capacity from qualifying facilities reasonably accounts for the utility's avoided costs, and does not fail to provide the required encouragement of cogeneration and small power production, it will be considered as satisfactorily implementing the Commission's rules.

§ 292.304(e) Factors affecting rates for purchases.

As noted previously, several commenters observed that the utility system cost data required under § 292.302 cannot be directly applied to rates for purchase. The Commission acknowledges this point and, as discussed previously, has provided that these data are to be used as a starting point for the calculation of an appropriate rate for purchases equal to the utility's avoided cost. Accordingly, the Commission has removed the reference to the utility system cost data from the definition of rates for purchases, and has inserted the reference to these data in paragraph (e), as one factor to be considered in calculating rates for purchases. Subparagraph (1) states that these data shall, to the extent practicable, be taken into account in the calculation of a rate for purchases.

Subparagraph (2) deals with the availability of capacity from a qualifying facility during system daily and seasonal peak periods. If a qualifying facility can provide energy to a utility during peak periods when the electric utility is running its most expensive generating units, this energy has a higher value to the utility than energy supplied during off-peak periods, during which only units with lower running costs are operating.

The preamble to the proposed rule provided that, to the extent that metering equipment is available, the State regulatory authority or nonregulated electric utility should take into account the time or season in which the purchase from the qualifying facility occurs. Several commenters interpreted this statement as implying that, by refusing to install metering equipment, an electric utility could avoid the obligation to consider the time at which purchases occur. This is not the intent of this provision. Clearly, the more precisely the time of purchase is recorded the more exact the calculation of the avoided costs, and thus the rate for purchases, can be. Rather than specifying that exact time-of-day or seasonal rates for purchases are required, however, the Commission believes that the selection of a methodology is best left to the State regulatory authorities and nonregulated electric utilities charged with the implementation of these provisions.

Clauses (i) through (v) concern various aspects of the reliability of a qualifying facility. When an electric utility provides power from its own generating units or from those of another electric utility, it normally controls the production of such power from a central location. The ability to so control power production enhances a utility's ability to respond to changes in demand, and thereby enhances the value of that power to the utility. A qualifying facility may be able to enter into an arrangement with the utility which gives the utility the advantage of dispatching the facility. By so doing, it increases its value to the utility. Conversely, if a utility cannot dispatch a qualifying facility, that facility may be of less value to the utility.

Clause (ii) refers to the expected or demonstrated reliability of a qualifying facility. A utility cannot avoid the construction or purchase of capacity if it is likely that the qualifying facility which would claim to replace such capacity may go out of service during the period when the utility needs its power to meet system demand. Based on the estimated or demonstrated reliability of a qualifying facility, the rate for purchases from a qualifying facility should be adjusted to reflect its value to the utility.

Clause (iii) refers to the length of time during which the qualifying facility has contractually or otherwise guaranteed that it will supply energy or capacity to the electric utility. A utility-owned generating unit normally will supply power for the life of the plant, or until it is replaced by more efficient capacity. In contrast, a cogeneration or small power production unit might cease to produce power as a result of changes in the industry or in the industrial processes utilized. Accordingly, the value of the service from the qualifying facility to the electric utility may be affected by the degree to which the qualifying facility ensures by contract or other legally enforceable obligation that it will continue to provide power. Included in this determination, among other factors, are the term of the commitment, the requirement for notice prior to termination of the commitment, and any penalty provisions for breach of the obligation.

In order to provide capacity value to an electric utility a qualifying facility need not necessarily agree to provide power for the life of the plant. A utility's generation expansion plans often include purchases of firm power from other utilities in years immediately preceding the addition of a major generation unit. If a qualifying facility contracts to deliver power, for example, for a one year period, it may enable the purchasing utility to avoid entering into a bulk power purchase arrangement with another utility. The rate for such a purchase should thus be based on the price at which such power is purchased, or can be expected to be purchased, based upon bona fide offers from another utility.

Clause (iv) addresses periods during which a qualifying facility is unable to provide power. Electric utilities schedule maintenance outages for their own generating units during periods when demand is low. If a qualifying facility can similarly schedule its maintenance outages during periods of low demand, or during periods in which a utility's own capacity will be adequate to handle existing demand, it will enable the utility to avoid the expenses associated with providing an equivalent amount of

capacity. These savings should be reflected in the rate for purchases

Clause (v) refers to a qualifying facility's ability and willingness to provide capacity and energy during system emergencies. Section 292.307 of these regulations concerns the provision of electric service during system emergencies. It provides that, to the extent that a qualifying facility is willing to forego its own use of energy during system emergencies and provide power to a utility's system, the rate for purchases from the qualifying facility should reflect the value of that service. Small power production and cogeneration facilities could provide significant back-up capability to electric systems during emergencies. One benefit of the encouragement of interconnected cogeneration and small power production may be to increase overall system reliability during such emergency conditions. Any such benefit should be reflected in the rate for purchases from such qualifying facilities.

Another related factor which affects the capacity value of a qualifying facility is its ability to separate its load from its generation during system emergencies. During such emergencies an electric utility may institute load shedding procedures which may, among other things, require that industrial customers or other large loads stop receiving power. As a result, to provide optimal benefit to a utility in an emergency situation, a qualifying facility might be required to continue operation as a generating plant, while simultaneously ceasing operation as a load on the utility's system. To the extent that a facility is unable to separate its load from its generation, its value to the purchasing utility decreases during system emergencies. To reflect such a possibility, clause (v) provides that the purchasing utility may consider the qualifying facility's ability to separate its load from its generation during system emergencies in determining the value of the qualifying facility to the electric utility.

Clause (vi) refers to the aggregate capability of capacity from qualifying facilities to displace planned utility capacity. In some instances, the small amounts of capacity provided from qualifying facilities taken individually might not enable a purchasing utility to defer or avoid scheduled capacity additions. The aggregate capability of such purchases may, however, be sufficient to permit the deferral or avoidance of a capacity addition. Moreover, while an individual qualifying facility may not provide the equivalent of firm power to the electric utility, the diversity of these facilities may collectively comprise the equivalent of capacity.

Clause (vii) refers to the fact that the lead time associated with the addition of capacity from qualifying facilities may be less than the lead time that would have been required if the purchasing utility had constructed its own generating unit. Such reduced lead time might produce savings in the utility's total power production costs, by permitting utilities to avoid the "lumpiness," and temporary excess capacity associated therewith, which normally occur when utilities bring on line large generating units. In addition, reduced lead time provides the utility with greater flexibility with which it can accommodate changes in forecasts of peak demand.

Subparagraph (3) concerns the relationship of energy or capacity from a qualifying facility to the purchasing electric utility's need for such energy or capacity. If an electric utility has sufficient capacity to meet its demand, and is not planning to add any new capacity to its system, then the availability of capacity from qualifying facilities will not immediately enable the utility to avoid any capacity costs. However, an electric utility system with excess capacity may nevertheless plan to add new, more efficient capacity to its system. If purchases from qualifying facilities enable a utility to defer or avoid these new planned capacity additions, the rate for such purchases should reflect the avoided costs of these additions. However, as noted by several commenters, the deferral or avoidance of such a unit will also prevent the substitution of the lower energy costs that would have accompanied the new capacity. As a result, the price for the purchase of energy and capacity should reflect these lower avoided energy costs that the utility would have incurred had the new capacity been added.

This is not to say that electric utilities which have excess capacity need not make purchases from qualifying facilities; qualifying facilities may obtain payment based on the avoided energy costs on a purchasing utility's system. Many utility systems with excess capacity have intermediate or peaking units which use high-cost fossil fuel. As a result, during peak hours, the energy costs on the systems are high, and thus the rate to a qualifying utility from which the electric utility purchases energy should similarly be high.

Subparagraph (4) addresses the costs or savings resulting from line losses. An appropriate rate for purchases from a qualifying facility should reflect the cost savings actually accruing to the electric utility. If energy produced from a qualifying facility undergoes line losses such that the delivered power is not equivalent to the power that would have been delivered from the source of power it replaces, then the qualifying facility should not be reimbursed for the difference in losses. If the load served by the qualifying facility is closer to the qualifying facility than it is to the utility, it is possible that there may be net savings resulting from reduced line losses. In such cases, the rates should be adjusted upwards.

§ 292.303(f) Periods during which purchase are not required.

The proposed rule provided that an electric utility will not be required to purchase energy and capacity from qualifying facilities during periods in which such purchases will result in net increased operating costs to the electric utility. This section was intended to deal with a certain condition which can occur during light loading periods. If a utility operating only base load units during these periods were forced to cut back output from the units in order to accommodate purchases from qualifying facilities, these base load units might not be able to increase their output level rapidly when the system demand later increased. As a result, the utility would be required to utilize less efficient, higher cost units with faster start-up to meet the demand that would have been supplied by the less expensive base load unit had it been permitted to operate at a constant output.

The result of such a transaction would be that rather than avoiding costs as a result of the purchase from a qualifying facility, the purchasing electric utility would incur greater costs than it would have had it not purchased energy or capacity from the qualifying facility. A strict application of the avoided cost principle set forth in this section would assess these additional costs as negative avoided costs which must be reimbursed by the qualifying facility. In order to avoid the anomalous result of forcing a qualifying utility to pay an electric utility for purchasing its output, the Commission proposed that an electric utility be required to identify periods during which this situation would occur, so that the qualifying facility could cease delivery of electricity during those periods.

Many of the comments received reflected a suspicion that electric utilities would abuse this paragraph to circumvent their obligation to purchase from qualifying facilities. In order to minimize that possibility, the Commission has revised this paragraph

to provide that any electric utility which seeks to cease purchasing from qualifying facilities must notify each affected qualifying facility prior to the occurrence of such a period, in time for the qualifying facility to cease delivery of energy or capacity to the electric utility. This notification can be accomplished in any reasonable manner determined by the State regulatory authority. Any claim by an electric utility that such a light loading period will occur or has occurred is subject to such verification by its State regulatory authority as the State authority determines necessary or appropriate either before or after its occurrence. Moreover, any electric utility which fails to provide adequate notice or which incorrectly identifies such a period will be required to reimburse the qualifying facility for energy or capacity supplied as if such a light loading period had not occurred.

The section has also been modified to clarify that such periods must be due to operational circumstances.

The Commission does not intend that this paragraph override contractual or other legally enforceable obligations incurred by the electric utility to purchase from a qualifying facility. In such arrangements, the established rate is based on the recognition that the value of the purchase will vary with the changes in the utility's operating costs. These variations ordinarily are taken into account, and the resulting rate represents the average value of the purchase over the duration of the obligation. The occurrence of such periods may similarly be taken into account in determining rates for purchases.

Tax Issues

The Conference Report states that:

> * * * the examination of the level of rates which should apply to the purchase by the utility of the cogenerator's or the small power producer's power should not be burdened by the same examination as are utility rate applications to determine what is the just and reasonable rate that they should receive for their electric power.[17]

The Commission notes that section 301(b)(2) of the Energy Tax Act of 1978 [18] makes certain energy property eligible for increased business investment tax credit. Some of this property is commonly used in cogeneration and small power production. However, section 301(b)(2)(B) excludes from such eligibility property "which is public utility property (within the meaning of section 46(f)(5) of the Internal Revenue Code of 1954)." [19] As a result, if the property of a qualifying facility which was otherwise eligible for the credit were to be classified as public utility property under section 46(f)(5) of the Internal Revenue Code, it would not be eligible for the increased investment tax credit.

The Commission notes that the Treasury Department's regulations provide that the definition of "public utility property" does not include property used in the business of the furnishing or sale of electric energy if the rates are not subject to regulation that fixes a rate of return on investment.[20] On this basis, the Commission believes that property of a qualifying facility that would otherwise be eligible for the energy tax credit would not be excluded from that eligibility under the public utility property exclusion.

First, this Commission is exempting property of qualifying facilities from regulation under Part II of the Federal Power Act, and from similar State and local laws and regulatory programs. Secondly, the Commission observes that the rates a qualifying facility will receive for sales of power to utilities are *not* based on a regulatory scheme which fixes a rate of return on investment of the qualifying facility.

As a result, the Commission believes that energy property of qualifying facilities should not be barred from eligibility for the tax credit by reason of the public utility property exclusion. The Commission wishes to express its opinion on this matter in an effort to further encourage cogeneration and small power production by means of this rulemaking process.

§ 292.305 Rates for sales.

Section 210(c) of PURPA provides that the rules requiring utilities to sell electric energy to qualifying facilities shall ensure that the rates for such sales are just and reasonable, in the public interest, and nondiscriminatory with respect to qualifying cogenerators or small power producers. This section contemplates formulation of rates on the basis of traditional ratemaking (*i.e.*, cost-of-service) concepts.

Paragraph (a) expresses the statutory requirement that such rates be just and reasonable and in the public interest. Paragraph (a) also provides that rates for sales from electric utilities to qualifying facilities not be discriminatory against such facilities in comparison to rates to other customers served by the electric utility.

A qualifying facility is entitled to purchase back-up or standby power at a nondiscriminatory rate which reflects the probability that the qualifying facility will or will not contribute to the need for and the use of utility capacity. Thus, where the utility must reserve capacity to provide service to a qualifying facility, the costs associated with that reservation are properly recoverable from the qualifying facility, if the utility would similarly assess these costs to non-generating customers.

In the proposed rule, paragraph (b) required electric utilities to provide energy and capacity and other services to any qualifying facility at a rate at least as favorable as would be provided to a customer who does not have his own generation. The comments received concerning this paragraph noted that this provision might be interpreted as requiring an electric utility to provide service to a qualifying facility at its most favorable rate, even if the qualifying facility would not be eligible for such a rate if it did not have its own generation. It is not the Commission's intention that, for example, an industrial cogenerator receive service at a rate applicable to residential customers; rather, such a customer should be charged at a rate applicable to a non-generating industrial customer unless the electric utility shows that a different rate is justified on the basis of sufficient load or other cost-related data. Accordingly, this section now provides that for qualifying facilities which do not simultaneously sell and purchase from the electric utility, the rate for sales shall be the rate that would be charged to the class to which the qualifying facility would be assigned if it did not have its own generation.

Subparagraph (2) provides that if, on the basis of accurate data and consistent system-wide costing principles, the utility demonstrates that the rate that would be charged to a comparable customer without its own generation is not appropriate, the utility may base its rates for sales upon those data and principles. The utility may only charge such rates on a nondiscriminatory basis, however, so that a cogenerator will not be singled out to lose any interclass or intraclass subsidies to which it might have been entitled had it not generated part of its electric energy needs itself.

In situations where a qualifying facility simultaneously sells its output to an electric utility and purchases its requirements from that electric utility, as a bookkeeping matter, the facility's

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[17] Conference Report on H.R. 4018, Public Utility Regulatory Policies Act of 1978, H. Rep. No. 1750, 95, 95th Cong., 2d Sess. (1978).

[18] Pub. L. No. 95-618, 26 U.S.C. §§ 48, 48, November 9, 1978.

[19] 26 U.S.C. § 48(e)(3)(b).

[20] Treasury Reg. § 146-3(g)(2), T.D. 7602 (March 23, 1979).

electrical output will not serve its own load, but rather will be supplied to the grid. As a result, the facility's electric load is likely to have the same characteristics as the load of other non-generating customers of the utility. If the utility does not provide data showing otherwise, the appropriate rate for sales to such a facility is the rate that would be charged to a comparable customer without its own generation.

Paragraph (b)(2) of the rule sets forth certain types of service which electric utilities are required to provide qualifying facilities upon request of the facility. These types of service are supplementary power, back-up power, interruptible power and maintenance power. In response to comments, these terms are defined in the text of the rules, as well as in this preamble.

Back-up or maintenance service provided by an electric utility replaces energy or capacity which a qualifying facility ordinarily supplies to itself. These rules authorize certain facilities to purchase and sell simultaneously. The amount of energy or capacity provided by an electric utility to meet the load of a facility which simultaneously purchases and sells will vary only in accordance with changes in the facility's load; interruptions in the facility's generation will be manifested as variations in purchases from the facility. In such a case, sales to the qualifying facility will not be back-up or maintenance service, but will be similar to the full-requirements service that would be provided if the facility were a non-generating customer.

Supplementary power is electric energy or capacity used by a facility in addition to that which it ordinarily generates on its own. Thus, a cogeneration facility with a capacity of ten megawatts might require five more megawatts from a utility on a continuing basis to meet its electric load of fifteen megawatts. The five megawatts supplied by the electric utility would normally be provided as supplementary power.

Back-up power is electric energy or capacity available to replace energy generated by a facility's own generation equipment during an unscheduled outage. In the example provided above, a cogeneration facility might contract with an electric utility for the utility to have available ten megawatts, should the cogenerator's units experience an outage.

Maintenance power is electric energy or capacity supplied during scheduled outages of the qualifying facility. By pre-arrangement, a utility can agree to provide such energy during periods when the utility's other load is low, thereby avoiding the imposition of large demands on the utility during peak periods.

Interruptible power is electric energy or capacity supplied to a qualifying facility subject to interruption by the electric utility under specified conditions. Many utilities have utilized interruptible service to avoid expensive investment in new capacity that would otherwise be necessary to assure adequate reserves at time of peak demand. Under this approach utilities assure the adequacy of reserves by arranging to reduce peak demand, rather than by adding capacity. Interruptible service is therefore normally provided at a lower rate than non-interruptible service.

During the Commission's public hearings on this rulemaking, one commenter stated that utilities which have excess capacity do not save any costs by providing interruptible service. The commenter contended that the Commission should not require a utility with excess capacity to offer interruptible service. If a utility is not adding capacity (whether by construction or purchase) to meet anticipated increases in peak demand, the rates charged for interruptible service might appropriately be the same as for non-interruptible services.

The Commission believes that these matters involving the provision of interruptible rates are best handled through the pricing mechanism. However, if as discussed above, interruptible customers provide no savings to the electric utility, the rate for interruptible service need not be lower than the rate for firm service. In such a case, the Commission would consider granting a waiver from this paragraph, under the provisions of § 292.403.

Some comments noted that certain electric utilities do not have any generating capacity, and to require the services listed in subparagraph (1) might place an undue burden on the electric utility. In light of these comments, the State regulatory authorities or the Commission, as the case may be, will allow a waiver of these requirements upon a finding after a showing by the utility to the State regulatory authority or Commission, as the case may be, that provision of these services will impair the utility's ability to render adequate service to its customers or place an undue burden on the electric utility. Notice must be given in the area served by the electric utility, opportunity for public comment must be provided, and an application must be submitted to the State regulatory authority with respect to any electric utility over which it has ratemaking authority or the Commission with respect to any nonregulated electric utility.

Paragraph (c)(1) provides that rates for sales of back-up or maintenance power shall not be based, without factual data, on the assumption that forced outages or other reductions in output by each qualifying facility on an electric utility's system will occur either simultaneously or during the system peak. Like other customers, qualifying facilities may well have intraclass diversity. In addition, because of the variations in size and load requirements among various types of qualifying facilities, such facilities may well have interclass diversity.

The effect of such diversity is that an electric utility supplying back-up or maintenance power to qualifying facilities will not have to plan for reserve capacity to serve such facilities on the assumption that every facility will use power at the same moment. The Commission believes that probabilistic analyses of the demand of qualifying facilities will show that a utility will probably not need to reserve capacity on a one-to-one basis to meet back-up requirements. Paragraph (c)(1) prohibits utilities from basing rates on the assumption that qualifying facilities will impose demands simultaneously and at system peak unless supported by factual data.

The rule provides that utilities may refute these assumptions on the basis of factual data. These data need not be in the form of empirical load data. It might be the case that within certain geographic areas, weather data and performance data would constitute a sufficient basis to refute the assumption relating to the coincidence of the demands imposed, for example, by windmills or photovoltaics, with respect to their need for back-up power.

Paragraph (c)(2) provides that rates for sales shall take into account the extent to which a qualifying facility can usefully coordinate periods of scheduled maintenance with an electric utility. If a qualifying facility stays on line when the utility will need its capacity, and schedules maintenance when the utility's other units are operative, the qualifying facility is more valuable to the utility, as it can reduce its capacity requirements.

§ 292.306 Interconnection costs.

Paragraph (a) states that each qualifying facility must reimburse any electric utility which purchases capacity or energy from the qualifying facility for any interconnection costs, on a nondiscriminatory basis with respect to other customers with similar load characteristics. The Commission finds

merit in those comments which suggested that the basis of comparison for nondiscriminatory practices in the proposed rule to "any other customer" was too broad, and that the correct reference for nondiscrimination is the practice of the utility in relation to customers in the same class who do not generate electricity. As noted previously, the interconnection costs of a facility which is already interconnected with the utility for purposes of sales are limited to any additional expenses incurred by the utility to permit purchases.

Several commenters expressed their concern that some protection should be provided to qualifying facilities from potential harassment by utilities in the form of requiring unnecessary safety equipment. As discussed above, the State regulatory authorities (with respect to electric utilities over which they have ratemaking authority) and nonregulated electric utilities have the responsibility and authority to ensure that the interconnection requirements are reasonable, and that associated costs are legitimately incurred.

For qualifying facilities with a design capacity of 100 kW or less, the Commission noted that interconnection costs could be assessed on a class basis, and the standard rates for purchases established for classes of facilities of this size pursuant to § 292.304(c)(1) might incorporate these costs. State regulatory authorities (with respect to electric utilities over which they have ratemaking authority) or nonregulated electric utilities may also determine interconnection costs for qualifying facilities with a design capacity of more than 100 kW on either a class average or individual basis.

Numerous comments raised the point that the proposed rule did not address the manner in which electric utilities would be reimbursed. Potential owners and developers of qualifying facilities recommended that the costs be amortized on a reasonable basis, because paying a large lump sum payment would be a considerable obstacle to the program. Electric utilities generally preferred payment up front, although several commenters indicated that amortization might be acceptable for credit-worthy facilities. The Commission believes that the manner of reimbursements (which may include amortization over a reasonable period of time) is best left to the State regulatory authorities and nonregulated utilities. In the determination of any standard rates for purchases established pursuant to § 292.304(c)(i), if the State approves some manner of amortization, it might consider assignment of uncollected interconnection costs to the class for which the rate is established.

§ 292.307 System emergencies.

Paragraph (a) provides that, except as provided under section 202(c) of the Federal Power Act, no qualifying facility shall be compelled to provide energy or capacity to the electric utility during an emergency beyond the extent provided by agreement between the qualifying facility and the utility.

The Commission finds that a qualifying facility should not be required to make available all of its generation to the utility during a system emergency. Such a requirement might interrupt industrial processes with resulting damage to equipment and manufactured goods. Many industries install their own generating equipment in order to ensure that even during a system emergency, their supply of power is not interrupted. To put in jeopardy the availability of power to a qualifying facility during a system emergency because of the facility's ability to provide power to the system during non-emergency periods would result in the discouragement of interconnected operation and a resultant discouragement of cogeneration and small power production. The Commission therefore provides that the qualifying facility's obligation to provide energy and capacity in emergencies be established through contract.

In order to receive full credit for capacity, a qualifying facility must offer energy and capacity during system emergencies to the same extent that it has agreed to provide energy and capacity during non-emergency situations. For example, a 30 megawatt cogenerator may require 20 megawatts for its own industrial purposes, and thus may contract to provide 10 megawatts of capacity to the purchasing utility. During an emergency, the cogenerator must provide the 10 megawatts contracted for to the utility; it need not disrupt its industrial processes by supplying its full capability of 30 megawatts. Of course, if it should so desire, a cogenerator could contractually agree to supply the full 30 megawatts during system emergencies. The availability of such additional backup capacity should increase utility system reliability, and should be accounted for in the utility's rates for purchases from the cogenerator.

Paragraph (b) provides that an electric utility may discontinue purchases from a qualifying facility during a system emergency if such purchases would contribute to the emergency. In addition, during system emergencies, a qualifying facility must be treated on a nondiscriminatory basis in any load shedding program—*i.e.*, on the same basis that other customers of a similar class with similar load characteristics are treated with regard to interruption of service.

Credit for capacity (as noted in § 292.304(e)(2)(v)) will also take into account the ability of the qualifying facility to separate its load and generation during system emergencies. However, the qualifying facility may well be eligible for some capacity credit even if it cannot separate its load and generation.

§ 292.308 Standards for operating reliability.

Section 210(a) of PURPA states that the rules requiring electric utilities to buy from and sell to qualifying facilities shall include provisions respecting minimum reliability of qualifying facilities (including reliability of such facilities during emergencies) and rules respecting reliability of electric utilities during emergencies. The Commission believes that the reliability of qualifying facilities can be accounted for through price; namely, the less reliable a qualifying facility might be, the less it should be entitled to receive for purchases from it by the utility.

As a result, the Commission has not included specific standards relating to the reliability in the sense of the ability of qualifying facilities to provide energy or capacity.

The Commission has determined that safety equipment exists which can ensure that qualifying facilities do not energize utility lines during utility outages. This section accordingly provides that each State regulatory authority or nonregulated electric utility may establish standards for interconnected operation between electric utilities and qualifying facilities. These standards may be recommended by any utility, any qualifying facility, or any other person. These standards must be accompanied by a statement showing the need for the standard on the basis of system safety and operating requirements.

Subpart D—Implementation

Summary of this Subpart

Rules in this subpart are intended to carry out the responsibility of the Commission to encourage cogeneration and small power production by clarifying the nature of the obligation to implement the Commission's rules under section 210.

These rules afford the State regulatory authorities and nonregulated electric utilities great latitude in determining the manner of implementation of the

Commission's rules, provided that the manner chosen is reasonably designed to implement the requirements of Subpart C. The Commission recognizes that many States and individual nonregulated electric utilities have ongoing programs to encourage small power production and cogeneration. The Commission also recognizes that economic and regulatory circumstances vary from State to State and utility to utility. It is within this context—in recognition of the work already begun and of the variety of local conditions—that the Commission promulgates its regulations requiring implementation of rules issued under section 210.

Because of the Commission's desire not to create unnecessary burdens at the State level, these rules provide a procedure whereby a State regulatory authority or nonregulated electric utility may apply to the Commission for a waiver if it can demonstrate that compliance with certain requirements of Subpart C is not necessary to encourage cogeneration or small power production and is not otherwise required under section 210.

Several commenters expressed their concern that State regulatory authorities would not be able adequately to implement the Commission's rules, and therefore, recommended that the Commission issue specific rules which the State regulatory authorities would adopt without change. The Commission does not find this proposal to be appropriate at this time, and believes that providing an opportunity for experimentation by the States is more conducive to development of these difficult rate principles.

Implementation

Section 210(f) of PURPA requires that within one year after the date that this Commission prescribes its rules under subsection (a), and within one year of the date any of these rules is revised, each State regulatory authority and each nonregulated electric utility, after notice and opportunity for hearing, must implement the rules or revisions thereof, as the case may be.

The obligation to implement section 210 rules is a continuing obligation which begins within one year after promulgation of such rules. The requirement to implement may be fulfilled either (1) through the enactment of laws or regulations at the State level, (2) by application on a case-by-case basis by the State regulatory authority, or nonregulated utility, of the rules adopted by the Commission, or (3) by any other action reasonably designed to implement the Commission's rules.

Review and Enforcement

Section 210(g) of PURPA provides one of the means of obtaining judicial review of a proceeding conducted by a State regulatory authority or nonregulated utility for purposes of implementing the Commission's rules under section 210. Under subsection (g), review may be obtained pursuant to procedures set forth in section 123 of PURPA. Section 123(c)(1) contains provisions concerning judicial review and enforcement of determinations made by State regulatory authorities and nonregulated utilities under Subtitle A, B, or C of Title I in the appropriate State court. These provisions also apply to review of any action taken to implement the rules under section 210. This means that persons can bring an action in State court to require the State regulatory authorities or nonregulated utilities to implement these regulations.

Section 123(c)(2) of PURPA provides that persons seeking review of any determination made by a Federal agency may bring an action in the appropriate Federal court. This distinction between Federal agencies and non-Federal agencies also applies to review of enforcement of the implementation of the rules under section 210.

Finally, the Commission believes that review and enforcement of implementation under section 210 of PURPA can consist not only of review and enforcement as to whether the State regulatory authority or nonregulated electric utility has conducted the initial implementation properly—namely, put into effect regulations implementing section 210 rules or procedures for that implementation, after notice and an opportunity for a hearing. It can also consist of review and enforcement of the application by a State regulatory authority or nonregulated electric utility, on a case-by-case basis, of its regulations or of any other provision it may have adopted to implement the Commission's rules under section 210.

Section 210(h)(2)(A) of PURPA states that the Commission may enforce the implementation of regulations under section 210(f). The Congress has provided not only for private causes of action in State courts to obtain judicial review and enforcement of the implementation of the Commission's rules under section 210, but also provided that the Commission may serve as a forum for review and enforcement of the implementation of this program.

§ 292.401 Implementation by state regulatory authorities and nonregulated electric utilities

Paragraph (a) of § 292.401 sets forth the obligation of each State regulatory authority to commence implementation of Subpart C within one year of the date these rules take effect. In complying with this paragraph the State regulatory authorities are required to provide for notice of and opportunity for public hearing. As described in the summary of this subpart, such implementation may consist of the adoption of the Commission's rules, an undertaking to resolve disputes between qualifying facilities and electric utilities arising under Subpart C, or any other action reasonably designed to implement Subpart C.

This section does not cover one provision of Subpart C which is not required to be implemented by the State regulatory authority or nonregulated electric utility. This provision is § 292.302 (Availability of electric utility system cost data), the implementation of which is subject to § 292.402, discussed below.

Subsection (b) sets forth the obligaton of each nonregulated electric utility to commence, after notice and opportunity for public hearing, implementation of Subpart C. The nonregulated electric utilities, being both the regulator and the utility subject to the regulation, may satisfy the obligation to commence implementation of Subpart C through issuance of regulations, an undertaking to comply with Subpart C, or any other action reasonably designed to implement that subpart.

Paragraph (c) sets forth a reporting requirement under which each State regulatory authority and nonregulated electric utility is to file with the Commission, not later than one year after these rules take effect, a report describing the manner in which it is proceeding to implement Subpart C.

Comments received regarding this section indicated a concern that the obligation of a State regulatory authority or nonregulated utility "to commence implementation * * * within one year * * *" did not provide any guidance as to when the process must be completed. The Commission notes that the intention of this section is that the State regulatory authorities and nonregulated utilities have one year in which to establish procedures and that at the end of that year each State must be prepared to entertain applications. The phrase "commence implementation" is intended by the Commission to connote that implementation of these rules is a

continuing process and that oversight will be ongoing.

§ 292.402 Implementation of reporting objectives.

The obligation to comply with § 292.302 is imposed directly on electric utilities. This is different from the rest of Subpart C where the obligation to act is imposed on the State regulatory authority or the nonregulated electric utility in its role as regulator. The Commission is exercising its authority under section 133 of PURPA and other laws within the Commission's authority to require this reporting.

Any electric utility which fails to comply with the requirements of § 292.302(b) is subject to the same penalties as it might receive as a result of a failure to comply with the requirements of the Commission's regulations issued under section 133 of PURPA. As stated earlier in this preamble, the data required by § 292.302 will form the basis from which the rates for purchases will be derived; § 292.302 is thus a critical element in this program. The Commission believes that, with regard to utilities subject to section 133 of PURPA, the Commission may exercise its authority under section 133 to require the data required by § 292.302(b) on the basis that the Commission finds such information necessary to allow determination of the costs associated with providing electric services. With regard to utilities not subject to section 133, if they fail to provide the data called for in § 292.302(c), the Commission may compel its production under the Federal Power Act and other statutes which provide the Commission with authority to require reporting of such data.

§ 292.403 Waivers.

Paragraph (a) provides for a procedure by which any State regulatory authority or nonregulated electric utility may apply for a waiver from the application of any of the requirements of Subpart C other than § 292.302. (Section 292.302(d) has been revised to permit a State regulatory authority or nonregulated utility to adopt a substitute method for the provision of system cost data without prior Commission approval.)

Paragraph (b) provides that the Commission will grant such a waiver only if the applicant can show that compliance with any of the requirements is not necessary to encourage cogeneration or small power production and is not otherwise required under section 210 of PURPA.

This section is included in recognition of the need for the Commission to afford flexibility to the States and nonregulated utilities to implement the Commission's rules under section 210.

Several comments suggested that the Commission set forth procedures for considering applications for waivers which would allow formal participation by qualifying facilities in a public hearing. The Commission notes that interested parties would be given an opportunity to be heard in any proceeding it conducts to determine whether or not a waiver should be granted.

Subpart F—Exemption of Qualifying Small Power Production and Cogeneration Facilities From Certain Federal and State Laws and Regulations

§ 292.601 Exemption of qualifying facilities from the Federal Power Act.

Section 210(e) of PURPA states that the Commission shall prescribe rules under which qualifying facilities are exempt, in part, from the Federal Power Act, from the Public Utility Holding Company Act of 1935, from the State laws and regulations respecting the rates, or respecting the financial or organization regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production. As noted in the Staff Discussion Paper, the Congress intended the Commission to make liberal use of its exemption authority in order to remove the disincentive of utility-type regulation. The Commission believes that broad exemption is appropriate.

Section 210(e)(2) of PURPA provides that the Commission is not authorized to exempt small power production facilities of 30 to 80 megawatt capacity from these laws. An exception is made for small power production facilities using biomass as a primary energy source. Such facilities between 30 and 80 megawatts may be exempted from the Public Utility Holding Company Act of 1935 and from State laws and regulations but may not be exempted from the Federal Power Act. The Commission will establish procedures for the determination of rates for these facilities in a separate proceeding.

Paragraph (a) sets forth those facilities which are eligible for exemption. Paragraph (b) provides that facilities described in paragraph (a) shall be exempted from all but certain specified sections of the Federal Power Act.

Section 210(e)(3)(C) of PURPA provides that no qualifying facility may be exempted from any license or permit requirement under Part I of the Federal Power Act. Accordingly, no qualifying facilities will be exempt from Part I of the Federal Power Act. The Commission recently issued simplified procedures for obtaining water power licenses for hydroelectric projects of 1.5 megawatts or less, and has issued proposed regulations to expedite licensing of existing facilities.[21]

The Commission believes cogeneration and small power production facilities could be the subject of an order under section 202(c) of the Federal Power Act requiring them to provide energy if the Economic Regulatory Administration determines that an emergency situation exists. Because application of this section is limited to emergency situations and is not affected by the fact that a facility attains qualifying status or engages in interchanges with an electric utility, the Commission notes that qualifying facilities will not be exempted from section 202(c) of the Act.

Furthermore, in response to comment, the Commission has revised this paragraph to provide that qualifying facilities are not exempt from sections 210, 211, and 212 of the Federal Power Act, as required by section 210(e)(3)(B) of PURPA.

Sections 203, 204, 205, 206, 208, 301, 302, and 304 of the Federal Power Act reflect traditional rate regulation or regulation of securities of public utilities. The Commission has determined that qualifying facilities shall be exempted from these sections of the Federal Power Act.

Section 305(c) of the Act imposes certain reporting requirements on interlocking directorates. The Commission believes that any person who otherwise is required to file a report regarding interlocking positions should not be exempted from such requirement because he or she is also a director or officer of a qualifying facility.

Finally, the enforcement provisions of Part III of the Federal Power Act will continue to apply with respect to the sections of the Federal Power Act from which qualifying facilities are not exempt.

§ 292.602 Exemption of qualifying facilities from the Public Utility Holding Company Act and certain State law and regulation.

Under section 210(e) of PURPA the Commission can exempt qualifying facilities from regulation under the

[21] *See* Order No. 11, Simplified Procedures for Certain Water Power Licenses, Docket No. RM79-9, issued September 5, 1978, and Application for License for Major Projects—Existing Dam, Docket No. RM79-36, 44 FR 24095 (April 21, 1979).

Public Utility Holding Company Act of 1935 and State laws and regulations concerning rates or financial organization. Only cogeneration facilities and small power production facilities of 30 megawatts or less may be exempted from both of these laws, with the exception that any qualifying small power production facility (*i.e.*, up to 80 megawatts) using biomass as a primary energy source can be exempted from these laws.

The Commission has determined that where a qualifying facility is subjected to more stringent regulation than other companies solely by reason of the fact that it is engaged in the production of electric energy, these more stringent requirements should be eased through exemption of qualifying facilities. By excluding any qualifying facility from the definition of an "electric utility company" under section 2(a)(3) of the Public Utility Holding Company Act of 1935, such facilities would be removed from Public Utility Holding Company Act regulation which is applied exclusively to electric utility companies. Moreover, by excluding qualifying facilities from this definition, parent companies of qualifying facilities would not be subject to additional regulation as a result of electric production by their subsidiaries. The Commission therefore believes that in order to encourage cogeneration and small power production it is necessary to exempt cogenerators and small power producers from all of the provisions of the Public Utility Holding Company Act of 1935 related to electric utilities.

Accordingly, paragraph (b) states that no qualifying facility shall be considered to be an "electric utility company", as defined in section 2(a)(3) of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79b(a)(3).

Section 210(e) of PURPA states that qualifying facilities which may be exempted from the Public Utility Holding Company Act may also be exempted from State laws and regulations respecting the rates or financial organization of electric utilities.

The Commission has decided to provide a broad exemption from State laws and regulations which would conflict with the State's implementation of the Commission's rules under section 210.

The Commission believes that such broad exemption is necessary to encourage cogeneration or small power production. Accordingly, subparagraph (c)(1) provides that any qualifying facility shall be exempt from State laws and regulations respecting rates of electric utilities, and from financial and organizational regulation of electric utilities. Several commenters noted that this section might be interpreted as exempting qualifying facilities from state laws or regulations implementing the Commission's rules, under section 210(f) of PURPA. In order to clarify that qualifying facilities are not to be exempt from these rules, the Commission has added subparagraph (c)(2) prohibiting any exemptions from State laws and regulations promulgated pursuant to Subpart C of these rules.

Some commenters indicated that § 292.301(b)(1) might be interpreted as prohibiting a State from reviewing contracts for purchases. These commenters stated that, as a part of a State's regulation of electric utilities, a State regulatory authority needs to be able to review contracts entered into by electric utilities it regulates.

These rules, and the exemptions being provided by these rules, are not intended to divest a State regulatory agency of its authority under State law to review contracts for purchases as part of its regulation of electric utilities. Such authority may continue to be exercised if consistent with the terms, policies and practices under sections 210 and 201 of PURPA and this Commission's implementing regulations. If the authority or its exercise is in conflict with these sections of PURPA or the Commission's regulations thereunder, the State must yield to the Federal requirements. The Commission does not believe it possible or advisable to attempt to establish more precise guidelines than these. Accordingly, States which have questions in this regard should seek an interpretive ruling from the Commission's General Counsel.

Subparagraph (c)(3) provides that, upon request of a State regulatory authority or nonregulated electric utility, the Commission may limit the applicability of the broad exemption from the State laws. This provision is intended to add flexibility to the exemption.

The Commission perceives that there may be instances in which a qualifying facility would wish to have an interpretation of whether or not it is subject to a particular State law in order to remove any uncertainty. Under subparagraph (c)(4), the Commission may determine whether a qualifying facility is exempt from a particular State law or regulation.

(Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2601, *et seq.*, Energy Supply and Environmental Coordination Act, 15 U.S.C. § 791 *et seq.*, Federal Power Act, as amended, 16 U.S.C. § 792 *et seq.*, Department of Energy Organization Act, 42 U.S.C. § 7101 *et seq.*, E.O. 12009, 42 Fed. Reg. 46267)

IV. Effective Date

The regulations promulgated in this order are effective March 20, 1980.

In consideration of the foregoing, the Commission amends Part 292 of Chapter I, Title 18, Code of Federal Regulations, as set forth below, effective March 20, 1980. By the Commission.

Kenneth F. Plumb,

Secretary.

(1) Subchapter K is amended in the table of contents and in the text of the regulation by deleting the title for Part 292 and substituting the following in lieu thereof:

Part 292—Regulations Under Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 With Regard to Small Power Production and Cogeneration.

(2) Subchapter K is further amended in the table of contents to Part 292 and in the text of the regulations by reserving Subpart B and by adding new Subparts A, C, D, and F to read as follows:

PART 292—REGULATIONS UNDER SECTIONS 201 AND 210 OF THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978 WITH REGARD TO SMALL POWER PRODUCTION AND COGENERATION.

Subpart A—General Provisions

Sec.

Subpart B—[Reserved]

Subpart C—Arrangements Between Electric Utilities and Qualifying Cogeneration and Small Power Production Facilities Under Section 210 of the Public Utility Regulatory Policies Act of 1978

Subpart D—Implementation

* * * * *

Subpart F—Exemption of Qualifying Small Power Production Facilities and Cogeneration Facilities From Certain Federal and State Laws and Regulations

Act and Certain State Law and Regulation.

Authority: This part issued under the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2601 *et seq.*, Energy Supply and Environmental Coordination Act, 15 U.S.C. § 791 *et seq.*, Federal Power Act, 16 U.S.C. § 792 *et seq.*, Department of Energy Organization Act, 42 U.S.C. § 7101 *et seq.*, E.O. 12009, 42 FR 46267.

Subpart A—General Provisions

§ 292.101 Definitions.

(a) *General rule.* Terms defined in the Public Utility Regulatory Policies Act of 1978 (PURPA) shall have the same meaning for purposes of this part as they have under PURPA, unless further defined in this part.

(b) *Definitions.* The following definitions apply for purposes of this part.

(1) "Qualifying facility" means a cogeneration facility or a small power production facility which is a qualifying facility under Subpart B of this part of the Commission's regulations.

(2) "Purchase" means the purchase of electric energy or capacity or both from a qualifying facility by an electric utility.

(3) "Sale" means the sale of electric energy or capacity or both by an electric utility to a qualifying facility.

(4) "System emergency" means a condition on a utility's system which is likely to result in imminent significant disruption of service to customers or is imminently likely to endanger life or property.

(5) "Rate" means any price, rate, charge, or classification made, demanded, observed or received with respect to the sale or purchase of electric energy or capacity, or any rule, regulation, or practice respecting any such rate, charge, or classification, and any contract pertaining to the sale or purchase of electric energy or capacity.

(6) "Avoided costs" means the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.

(7) "Interconnection costs" means the reasonable costs of connection, switching, metering, transmission, distribution, safety provisions and administrative costs incurred by the electric utility directly related to the installation and maintenance of the physical facilities necessary to permit interconnected operations with a qualifying facility, to the extent such costs are in excess of the corresponding costs which the electric utility would have incurred if it had not engaged in interconnected operations, but instead generated an equivalent amount of electric energy itself or purchased an equivalent amount of electric energy or capacity from other sources. Interconnection costs do not include any costs included in the calculation of avoided costs.

(8) "Supplementary power" means electric energy or capacity supplied by an electric utility, regularly used by a qualifying facility in addition to that which the facility generates itself.

(9) "Back-up power" means electric energy or capacity supplied by an electric utility to replace energy ordinarily generated by a facility's own generation equipment during an unscheduled outage of the facility.

(10) "Interruptible power" means electric energy or capacity supplied by an electric utility subject to interruption by the electric utility under specified conditions.

(11) "Maintenance power" means electric energy or capacity supplied by an electric utility during scheduled outages of the qualifying facility.

Subpart B—[Reserved]

Subpart C—Arrangements Between Electric Utilities and Qualifying Cogeneration and Small Power Production Facilities Under Section 210 of the Public Utility Regulatory Policies Act of 1978

§ 292.301 Scope.

(a) *Applicability.* This subpart applies to the regulation of sales and purchases between qualifying facilities and electric utilities.

(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 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.

§ 292.302 Availability of electric utility system cost data.

(a) *Applicability.* (1) Except as provided in paragraph (a)(2) of this section, paragraph (b) applies to each electric utility, in any calendar year, if the total sales of electric energy by such utility for purposes other than resale exceeded 500 million kilowatt-hours during any calendar year beginning after December 31, 1975, and before the immediately preceding calendar year.

(2) Each utility having total sales of electric energy for purposes other than resale of less than one billion kilowatt-hours during any calendar year beginning after December 31, 1975, and before the immediately preceding year, shall not be subject to the provisions of this section until May 31, 1982.

(b) *General rule.* To make available data from which avoided costs may be derived, not later than November 1, 1980, May 31, 1982, and not less often than every two years thereafter, each regulated electric utility described in paragraph (a) of this section shall provide to its State regulatory authority, and shall maintain for public inspection, and each nonregulated electric utility described in paragraph (a) of this section shall maintain for public inspection, the following data:

(1) The estimated avoided cost on the electric utility's system, solely with respect to the energy component, for various levels of purchases from qualifying facilities. Such levels of purchases shall be stated in blocks of not more than 100 megawatts for systems with peak demand of 1000 megawatts or more, and in blocks equivalent to not more than 10 percent of the system peak demand for systems of less than 1000 megawatts. The avoided costs shall be stated on a cents per kilowatt-hour basis, during daily and seasonal peak and off-peak periods, by year, for the current calendar year and each of the next 5 years;

(2) The electric utility's plan for the addition of capacity by amount and type, for purchases of firm energy and capacity, and for capacity retirements for each year during the succeeding 10 years; and

(3) The estimated capacity costs at completion of the planned capacity additions and planned capacity firm purchases, on the basis of dollars per kilowatt, and the associated energy costs of each unit, expressed in cents per kilowatt hour. These costs shall be expressed in terms of individual generating units and of individual planned firm purchases.

(c) *Special rule for small electric utilities.*

(1) Each electric utility (other than any electric utility to which paragraph (b) of this section applies) shall, upon request:

(i) Provide comparable data to that required under paragraph (b) of this section to enable qualifying facilities to estimate the electric utility's avoided costs for periods described in paragraph (b) of this section; or

(ii) With regard to an electric utility which is legally obligated to obtain all its requirements for electric energy and capacity from another electric utility, provide the data of its supplying utility

and the rates at which it currently purchases such energy and capacity.

(2) If any such electric utility fails to provide such information on request, the qualifying facility may apply to the State regulatory authority (which has ratemaking authority over the electric utility) or the Commission for an order requiring that the information be provided.

(d) *Substitution of alternative method.* (1) After public notice in the area served by the electric utility, and after opportunity for public comment, any State regulatory authority may require (with respect to any electric utility over which it has ratemaking authority), or any non-regulated electric utility may provide, data different than those which are otherwise required by this section if it determines that avoided costs can be derived from such data.

(2) Any State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated utility which requires such different data shall notify the Commission within 30 days of making such determination.

(e) *State Review.* (1) Any data submitted by an electric utility under this section shall be subject to review by the State regulatory authority which has ratemaking authority over such electric utility.

(2) In any such review, the electric utility has the burden of coming forward with justification for its data.

§ 292.303 Electric utility obligations under this subpart.

(a) *Obligation to purchase from qualifying facilities.* Each electric utility shall purchase, in accordance with § 292.304, any energy and capacity which is made available from a qualifying facility:

(1) Directly to the electric utility; or

(2) Indirectly to the electric utility in accordance with paragraph (d) of this section.

(b) *Obligation to sell to qualifying facilities.* Each electric utility shall sell to any qualifying facility, in accordance with § 292.305, any energy and capacity requested by the qualifying facility.

(c) *Obligation to interconnect.* (1) Subject to paragraph (c)(2) of this section, any electric utility shall make such interconnections with any qualifying facility as may be necessary to accomplish purchases or sales under this subpart. The obligation to pay for any interconnection costs shall be determined in accordance with § 292.306.

(2) No electric utility is required to interconnect with any qualifying facility if, solely by reason of purchases or sales over the interconnection, the electric utility would become subject to regulation as a public utility under Part II of the Federal Power Act.

(d) *Transmission to other electric utilities.* If a qualifying facility agrees, an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility may transmit the energy or capacity to any other electric utility. Any electric utility to which such energy or capacity is transmitted shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility. The rate for purchase by the electric utility to which such energy is transmitted shall be adjusted up or down to reflect line losses pursuant to § 292.304(e)(4) and shall not include any charges for transmission.

(e) *Parallel operation.* Each electric utility shall offer to operate in parallel with a qualifying facility, provided that the qualifying facility complies with any applicable standards established in accordance with § 292.308.

§ 292.304 Rates for purchases.

(a) *Rates for purchases.* (1) Rates for purchases shall:

(i) Be just and reasonable to the electric consumer of the electric utility and in the public interest; and

(ii) Not discriminate against qualifying cogeneration and small power production facilities.

(2) Nothing in this subpart requires any electric utility to pay more than the avoided costs for purchases.

(b) *Relationship to avoided costs.* (1) For purposes of this paragraph, "new capacity" means any purchase from capacity of a qualifying facility, construction of which was commenced on or after November 9, 1978.

(2) Subject to paragraph (b)(3) of this section, a rate for purchases satisfies the requirements of paragraph (a) of this section if the rate equals the avoided costs determined after consideration of the factors set forth in paragraph (e) of this section.

(3) A rate for purchases (other than from new capacity) may be less than the avoided cost if the State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or the nonregulated electric utility determines that a lower rate is consistent with paragraph (a) of this section, and is sufficient to encourage cogeneration and small power production.

(4) Rates for purchases from new capacity shall be in accordance with paragraph (b)(2) of this section, regardless of whether the electric utility making such purchases is simultaneously making sales to the qualifying facility.

(5) In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery.

(c) *Standard rates for purchases.* (1) There shall be put into effect (with respect to each electric utility) standard rates for purchases from qualifying facilities with a design capacity of 100 kilowatts or less.

(2) There may be put into effect standard rates for purchases from qualifying facilities with a design capacity of more than 100 kilowatts.

(3) The standard rates for purchases under this paragraph:

(i) Shall be consistent with paragraphs (a) and (e) of this section; and

(ii) May differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies.

(d) *Purchases "as available" or pursuant to a legally enforceable obligation.* Each qualifying facility shall have the option either:

(1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or

(2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:

(i) The avoided costs calculated at the time of delivery; or

(ii) The avoided costs calculated at the time the obligation is incurred.

(e) *Factors affecting rates for purchases.* In determining avoided costs, the following factors shall, to the extent practicable, be taken into account:

(1) The data provided pursuant to § 292.302(b), (c), or (d), including State review of any such data;

(2) The availability of capacity or energy from a qualifying facility during the system daily and seasonal peak periods, including:

(i) The ability of the utility to dispatch the qualifying facility;

(ii) The expected or demonstrated reliability of the qualifying facility;

(iii) The terms of any contract or other legally enforceable obligation, including the duration of the obligation, termination notice requirement and sanctions for non-compliance;

(iv) The extent to which scheduled outages of the qualifying facility can be usefully coordinated with scheduled outages of the utility's facilities;

(v) The usefulness of energy and capacity supplied from a qualifying facility during system emergencies, including its ability to separate its load from its generation;

(vi) The individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system; and

(vii) The smaller capacity increments and the shorter lead times available with additions of capacity from qualifying facilities; and

(3) The relationship of the availability of energy or capacity from the qualifying facility as derived in paragraph (e)(2) of this section, to the ability of the electric utility to avoid costs, including the deferral of capacity additions and the reduction of fossil fuel use; and

(4) The costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from a qualifying facility, if the purchasing electric utility generated an equivalent amount of energy itself or purchased an equivalent amount of electric energy or capacity.

(f) *Periods during which purchases not required.*

(1) Any electric utility which gives notice pursuant to paragraph (f)(2) of this section will not be required to purchase electric energy or capacity during any period during which, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself.

(2) Any electric utility seeking to invoke paragraph (f)(1) of this section must notify, in accordance with applicable State law or regulation, each affected qualifying facility in time for the qualifying facility to cease the delivery of energy or capacity to the electric utility.

(3) Any electric utility which fails to comply with the provisions of paragraph (f)(2) of this section will be required to pay the same rate for such purchase of energy or capacity as would be required had the period described in paragraph (f)(1) of this section not occurred.

(4) A claim by an electric utility that such a period has occurred or will occur is subject to such verification by its State regulatory authority as the State regulatory authority determines necessary or appropriate, either before or after the occurrence.

§ 292.305 Rates for sales.

(a) *General rules.* (1) Rates for sales:

(i) Shall be just and reasonable and in the public interest; and

(ii) Shall not discriminate against any qualifying facility in comparison to rates for sales to other customers served by the electric utility.

(2) Rates for sales which are based on accurate data and consistent systemwide costing principles shall not be considered to discriminate against any qualifying facility to the extent that such rates apply to the utility's other customers with similar load or other cost-related characteristics.

(b) *Additional Services to be Provided to Qualifying Facilities.* (1) Upon request of a qualifying facility, each electric utility shall provide:

(i) Supplementary power;

(ii) Back-up power;

(iii) Maintenance power; and

(iv) Interruptible power.

(2) The State regulatory authority (with respect to any electric utility over which it has ratemaking authority) and the Commission (with respect to any nonregulated electric utility) may waive any requirement of paragraph (b)(1) of this section if, after notice in the area served by the electric utility and after opportunity for public comment, the electric utility demonstrates and the State regulatory authority or the Commission, as the case may be, finds that compliance with such requirement will:

(i) Impair the electric utility's ability to render adequate service to its customers; or

(ii) Place an undue burden on the electric utility.

(c) *Rates for sales of back-up and maintenance power.* The rate for sales of back-up power or maintenance power:

(1) shall not be based upon an assumption (unless supported by factual data) that forced outages or other reductions in electric output by all qualifying facilities on an electric utility's system will occur simultaneously, or during the system peak, or both; and

(2) shall take into account the extent to which scheduled outages of the qualifying facilities can be usefully coordinated with scheduled outages of the utility's facilities.

§ 292.306 Interconnection costs.

(a) *Obligation to pay.* Each qualifying facility shall be obligated to pay any interconnection costs which the State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated electric utility may assess against the qualifying facility on a nondiscriminatory basis with respect to other customers with similar load characteristics.

(b) *Reimbursement of interconnection costs.* Each State regulatory authority (with respect to any electric utility over which it has ratemaking authority) and nonregulated utility shall determine the manner for payments of interconnection costs, which may include reimbursement over a reasonable period of time.

§ 292.307 System emergencies.

(a) *Qualifying facility obligation to provide power during system emergencies.* A qualifying facility shall be required to provide energy or capacity to an electric utility during a system emergency only to the extent:

(1) Provided by agreement between such qualifying facility and electric utility; or

(2) Ordered under section 202(c) of the Federal Power Act.

(b) *Discontinuance of purchases and sales during system emergencies.* During any system emergency, an electric utility may discontinue:

(1) Purchases from a qualifying facility if such purchases would contribute to such emergency; and

(2) Sales to a qualifying facility, provided that such discontinuance is on a nondiscriminatory basis.

§ 292.308 Standards for operating reliability.

Any State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated electric utility may establish reasonable standards to ensure system safety and reliability of interconnected operations. Such standards may be recommended by any electric utility, any qualifying facility, or any other person. If any State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated electric utility establishes such standards, it shall specify the need for such standards on the basis of system safety and reliability.

Subpart D—Implementation

§ 292.401 Implementation by State regulatory authorities and nonregulated electric utilities.

(a) *State regulatory authorities.* Not later than one year after these rules take effect, each State regulatory authority shall, after notice and an opportunity for public hearing, commence

implementation of Subpart C (other than § 292.302 thereof). Such implementation may consist of the issuance of regulations, an undertaking to resolve disputes between qualifying facilities and electric utilities arising under Subpart C, or any other action reasonably designed to implement such subpart (other than § 292.302 thereof).

(b) *Nonregulated electric utilities.* Not later than one year after these rules take effect, each nonregulated electric utility shall, after notice and an opportunity for public hearing, commence implementation of Subpart C (other than § 292.302 thereof). Such implementation may consist of the issuance of regulations, an undertaking to comply with Subpart C, or any other action reasonably designed to implement such subpart (other than § 292.302 thereof).

(c) *Reporting requirement.* Not later than one year after these rules take effect, each State regulatory authority and nonreguated electric utility shall file with the Commission a report describing the manner in which it will implement Subpart C (other than § 292.302 thereof).

§ 292.402 Implementation of certain reporting requirements.

Any electric utility which fails to comply with the requirements of § 292.302(b) shall be subject to the same penalties to which it may be subjected for failure to comply with the requirements of the Commission's regulations issued under section 133 of PURPA.

§ 292.403 Waivers.

(a) *State regulatory authority and nonregulated electric utility waivers.* Any State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated electric utility may, after public notice in the area served by the electric utility, apply for a waiver from the application of any of the requirements of Subpart C (other than § 292.302 thereof).

(b) *Commission action.* The Commission will grant such a wavier only if an applicant under paragraph (a) of this section demonstrates that compliance with any of the requirements of Subpart C is not necessary to encourage cogeneration and small power production and is not otherwise required under section 210 of PURPA.

Subpart F—Exemption of Qualifying Small Power Production Facilities and Cogeneration Facilities from Certain Federal and State Laws and Regulations

§ 292.601 Exemption to qualifying facilities from the Federal Power Act.

(a) *Applicability.* This section applies to:

(1) qualifying cogeneration facilities; and

(2) qualifying small power production facilities which have a power production capacity which does not exceed 30 megawatts.

(b) *General rule.* Any qualifying facility described in paragraph (a) shall be exempt from all sections of the Federal Power Act, except:

(1) Sections 1–30;

(2) Sections 202(c), 210, 211, and 212;

(3) Sections 305(c); and

(4) Any necessary enforcement provision of Part III with regard to the sections listed in paragraphs (b) (1), (2) and (3) of this section.

§ 292.602 Exemption to qualifying facilities from the Public Utility Holding Company Act and certain State law and regulation.

(a) *Applicability.* This section applies to any qualifying facility described in § 292.601(a), and to any qualifying small power production facility with a power production capacity over 30 megawatts if such facility produces electric energy solely by the use of biomass as a primary energy source.

(b) *Exemption from the Public Utility Holding Company Act of 1935.* A qualifying facility described in paragraph (a) shall not be considered to be an "electric utility company" as defined in section 2(a)(3) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79b(a)(3).

(c) *Exemption from certain State law and regulation.*

(1) Any qualifying facility shall be exempted (except as provided in paragraph (c)(2)) of this section from State law or regulation respecting:

(i) The rates of electric utilities; and

(ii) The financial and organizational regulation of electric utilities.

(2) A qualifying facility may not be exempted from State law and regulation implementing Subpart C.

(3) Upon request of a State regulatory authority or nonregulated electric utility, the Commission may consider a limitation on the exemptions specified in subparagraph (1).

(4) Upon request of any person, the Commission may determine whether a qualifying facility is exempt from a particular State law or regulation.

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18 CFR Part 292

[Docket No. RM79-55]

Rates and Exemptions for Qualifying Small Power Production and Cogeneration Facilities; Correction

April 3, 1980.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Erratum notice.

SUMMARY: This notice contains a correction of § 292.302 (a) and (b) of the Federal Energy Regulatory Commission's final regulations.

FOR FURTHER INFORMATION CONTACT: Deborah Gottheil, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426 (202) 357–8000.

SUPPLEMENTARY INFORMATION: In the Federal Energy Regulatory Commission's Final Regulations, issued February 19, 1980, entitled Regulations Under Section 210 of the Public Utility Regulatory Policies Act of 1978 (45 FR 12214, February 25, 1980), at 45 FR 12234, in § 292.302 (a) and (b), the reference to May 31, 1982 should be changed to June 30, 1982. This revision will accurately carry out the Commission's intent, as stated in the preamble to the rule, to "conform to the dates required by the Commission's regulations implementing section 133 of PURPA."

Kenneth F. Plumb,
Secretary.

[FR Doc. 80-10756 Filed 4-8-80; 8:45 am]
BILLING CODE 6450-85-M

48 FERC P 61101 (F.E.R.C.), 1989 WL 262068
**1 Commission Opinions, Orders and Notices

Carolina Power & Light Company

Docket No. ER89-460-000#
Order Accepting Rates for Filing Without Suspension or Hearing, Denying Motion to Reject or Dispose Summarily, Noting Interventions, and Dismissing Complaint
(Issued July 25, 1989)

*61386 Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon, Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

On May 24, 1989, as completed on May 26, 1989, Carolina Power & Light Company (Carolina) filed, pursuant to section 205 of the Federal Power Act (FPA), a proposed rider to its current Resale Services Schedules RS88-1B and RS88-2B. The proposed rider provides billing procedures for those instances where Carolina's full requirements customers purchase power from a qualifying facility (QF). [1] Carolina states that it was informed of a QF interconnecting with the system of Haywood Electric Membership Corporation (Haywood), a full requirements customer under Carolina's tariff. Carolina also states that its rate schedules on file with the Commission do not contain provisions accounting for such purchases. Carolina requests that the proposed rider become effective sixty days from the date of filing. [2]

Carolina states that the proposed rider would ensure that its rates with its full requirements customers are in accordance with section 292.303(d) of the Commission's regulations, [3] promulgated by the Commission's Order No. 69. [4] The proposed rider would apply whenever customers that purchase full requirements service from Carolina also purchase from QFs. The proposed rider computes the rate for full requirements service by applying Carolina's requirements rate to the combined loads which Carolina and the QF deliver to the customer, i.e., what the customer's load would have been absent the QF purchase. The proposed rider further computes a credit equal to Carolina's standard, state-approved avoided cost rate, the rate Carolina would have paid to the QF if Carolina had directly purchased the QF output.

Carolina submits the proposed rider as a rate schedule change other than a rate increase under section 35.13(a)(2)(ii) of the Commission's regulations. [5] Carolina states that the rider will not result in increased rates for, or revenues from, any of Carolina's customers. Rather, Carolina asserts that the rider sets forth terms and conditions for calculating metered demand and energy received by a Carolina full requirements customers from a QF.

Notice of Carolina's application was published in the *Federal Register*, with comments, *61387 protests or motions to intervene due on or before June 22, 1989. [6]

On June 22, 1989, the Cities of Bennettsville and Camden, South Carolina and French Broad Electric Membership Corporation (South Carolina Customers) jointly filed a motion to intervene, raising no substantive issues.

**2 On June 22, 1989, Haywood and North Carolina Electric Membership Corporation (NCEMC) (collectively, Haywood and NCEMC will be referred to as the Cooperatives) jointly filed a protest, motion to intervene, motion to reject or dispose summarily, request for five-month suspension and hearing, complaint and request for consolidation, expedited response and hearing. The Cooperatives dispute Carolina's claim that Carolina's rider is intended to offset reduced revenues that may result from a Carolina customer's purchase from a QF. Rather, the Cooperatives claim that

Carolina's proposed rider "is a response to the development of a 900 kW small hydroelectric qualifying facility" owned by the Lake Junaluska Assembly, a non-profit corporation associated with the Methodist Church (the Assembly). [7] NCEMC has contracted to purchase power from the Assembly's facility for delivery to Haywood via a line connecting the Assembly to Haywood's system. The Cooperatives allege that the proposed rider is intended to blunt NCEMC's purchase.

The Cooperatives claim that Carolina's rider is actually a rate increase which, they argue, restrains NCEMC from accessing the Assembly's output. The Cooperatives note that Carolina previously offered to purchase the Assembly's output, but offered an avoided cost payment that was deemed too low to render the project feasible. The Cooperatives argue that the rider imposes a rate increase penalty, rendering the purchase uneconomical. The Cooperatives maintain that the rider unduly benefits Carolina by increasing Carolina's revenues by $125,470. The Cooperatives also maintain that the rider is intended to prevent others from competing with Carolina for the purchase of QF capacity.

The Cooperatives contend that Order No. 69 is inapplicable to this proceeding. The Cooperatives claim that, contrary to Carolina's assertion, the Commission's regulations pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA) do not compel the filing of the rider. The Cooperatives interpret Order No. 69 as immunizing captive customers of generation systems with excess capacity (where the supplying utility's avoided costs are limited to its energy costs) from incurring unjustified rate increases as a result of other customers' purchases from QFs. [8] The Cooperatives argue that Order No. 69 does not apply in this proceeding since: (1) Carolina is not in an excess capacity situation; and (2) NCEMC, not Carolina or Haywood, is purchasing the facility's capacity. The Cooperatives maintain that the rider prevents NCEMC from competing with Carolina for the purchase of the facility's capacity.

The Cooperatives claim that Carolina filed the rider only because Carolina's sales would decrease due to NCEMC's capacity purchases of the facility's output. The Cooperatives stated that an examination of Carolina's relevant sales and cost data indicates Carolina will improperly charge Haywood for lost sales. The Cooperatives assert that the effects of the QF purchase on Carolina's rates and return on equity will be *de minimis*. Moreover, the Cooperatives assert that Carolina did not demonstrate that its estimated revenue loss would not be offset by increased sales, reduced costs, or both.

**3 The Cooperatives also claim that Carolina's rider includes irrelevant energy and demand credits. The Cooperatives maintain that these credits are based upon state-determined avoided costs for QF purchases, but that this proceeding does not concern such purchases. The Cooperatives deem the rider a wholesale rate increase to Haywood and dispute the relevance of state-approved, avoided costs.

In support of their motion to reject or summarily dispose of the filing, the Cooperatives state that: (1) the FPA does not permit rate increases that defeat PURPA transactions among nonparties; and (2) the filing does not comply with the Commission's regulations because Carolina did not characterize its filing ***61388** as a proposed rate increase. The Cooperatives alternatively request a five-month suspension of, and a hearing regarding, the proposed rider. The Cooperatives contend that Carolina's use of its state-approved, avoided cost rate is an inappropriate basis for a credit to a wholesale service which is subject to the Commission's exclusive jurisdiction. Further, the Cooperatives deem Carolina's proposed metering provision unjust and unreasonable insofar as it: (1) permits Carolina regular access to Haywood's facilities; (2) subjects Haywood to a metering charge; and (3) lacks a further provision, which the Cooperatives allege is customary, to protect Haywood from liability arising from meter installation.

In addition to the above motions, as part of their pleading, the Cooperatives included a complaint. The Cooperatives claim that the rider is meant to prevent NCEMC's negotiated purchase of QF capacity. The Cooperatives contend that Carolina's filing violates section 210(a) of PURPA [9] and section 292.303(a) of the Commission's regulations, [10] by defeating NCEMC's effort to comply with PURPA. [11] Accordingly, the Cooperatives request that the Commission

require Carolina to: (1) withdraw its filing; and (2) order Carolina to refrain from using the Commission as a forum to interfere with NCEMC's purchases of QF output.

On July 7, 1989, Carolina filed an answer to the Cooperatives' pleading. Carolina disputes the Cooperatives' claim that Order No. 69 is applicable in only limited situations, i.e., where the supplying utility has excess capacity or the distribution utility seeks exemption from its PURPA purchase obligations. Carolina contends that the discussion in Order No. 69 concerning excess capacity was meant to be illustrative, not limiting, [12] and that its rider fully conforms with the Commission's PURPA regulations.

Carolina disputes the Cooperatives' argument that the rider is inapplicable here because NCEMC, and not Haywood, will purchase the QF capacity. Carolina asserts that this argument is contradicted by the Cooperatives' claim that Haywood may freely receive the QF capacity because "full-requirements contracts cannot override PURPA purchase obligations." Carolina requests that the transaction be deemed either a QF purchase (in which case it argues that the Commission's PURPA regulations would apply with full force) *or* that NCEMC be deemed a "middleman" between Haywood and the Assembly (in which case it argues that PURPA could not be used to override Carolina's all-requirements contract with Haywood). Carolina observes that if the Cooperatives' rationale for avoiding restrictions in the all-requirements contract is Order No. 69, then the avoided-cost pricing limitations fully apply to Haywood. By contrast, if the rider is inapplicable because Haywood is not the purchaser from the QF, then Carolina contends that PURPA does not require Haywood to purchase that capacity.

**4 Carolina further disputes the Cooperatives' position that the rider represents a rate increase. Carolina contends that no revenue increase will occur, but that it proposes the rider to limit revenue reductions to a level consistent with the North Carolina Utilities Commission's avoided-cost determinations. [13] Carolina claims that the rider ensures that the amount of decreased revenue accurately reflects the costs avoided by Carolina when a full-requirements customer receives QF capacity. Whether Carolina provides credits based on its resale rates (as urged by the Cooperatives) or a North Carolina Commission-determined, avoided-cost rate (required under the rider), Carolina contends that its revenues will decrease.

Carolina observes that disapproval of the rider would force Carolina and its customers to absorb the demand costs, a result the Commission sought to prevent in Order No. 69. Carolina argues that permitting the relatively small revenue losses to occur (upon disapproval of the rider) would obscure Carolina's intention to provide a proper price signal to its full requirements customers, QF developers, or both. Carolina argues that since its rider is not a rate increase, the Commission should deny the Cooperatives' motion to reject and the Cooperatives' request for a five-month suspension and a hearing.

Finally, Carolina dismisses as both irrelevant and false the Cooperatives' assertions that the rider is Carolina's effort to improperly interfere in the transaction between NCEMC and the *61389 Assembly. Carolina states that it was prepared to pay the North Carolina Commission determined, avoided-cost rates to purchase directly from the Assembly, but that the offer was dismissed as uneconomical. Subsequently, Haywood approached Carolina in order to modify their contract to permit Haywood to purchase the QF capacity. Carolina maintains that when NCEMC became involved, intending to purchase the QF capacity for Haywood, Carolina informed NCEMC that it would reduce Haywood's rates equal to the costs Carolina avoided as a result of the QF capacity purchase. Carolina argues that its actions were not improper and that the Cooperatives offer no basis to support their request that the rider be withdrawn. Thus, Carolina asks that the Cooperatives' complaint be denied.

Discussion

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, [14] the timely, unopposed motions to intervene of the South Carolina Customers and the Cooperatives serve to make them parties to this proceeding.

This case presents four issues for us to consider: (1) whether Haywood, a full requirements customer of Carolina, will purchase the electricity directly from the QF, bringing Order No. 69 into play, or, instead, from NCEMC, in which case Order No. 69 may not apply; (2) whether Order No. 69 permits Carolina to implement the rider in circumstances where the utility does not have excess capacity; (3) whether Carolina properly documented the rider under applicable Commission regulations; and (4) whether Carolina engaged in other conduct, including refusing to accommodate Haywood's transmission connection to the QF and interfering with acquisition of the necessary rights-of-way. We will deal with each in turn.

**5 First, we find that NCEMC's claim that it is not a full requirements customer because it has generation is without merit. While NCEMC owns some generation, it is not uncommon for a customer that owns generation to contract for full requirements service for certain delivery points. The customer's ownership of generation is not dispositive of the character of service the utility provides. The Cooperatives also argue that Haywood is a customer of NCEMC, and not of Carolina. [15] However, Carolina provides the full requirements service to Haywood's delivery points, and Haywood's relationship with NCEMC does not change that fact.

Haywood next claims the transaction under review will not be a direct sale to it from a QF and therefore Order No. 69 does not apply. We reject that argument. In particular, Haywood states that it plans to purchase the power from NCEMC, and not from the QF. However the parties have structured the deal on paper, we find that NCEMC serves as a conduit for Haywood's purchase from the QF. *See* Cooperatives' Motion to Intervene *et al.* at 3, 4, 8. Thus we hold that Order No. 69 does come into play.

Second, in Order No. 69, we discussed the ramifications of a QF selling to a full requirements customer instead of selling to that customer's supplying utility. We recognized that only the full requirements supplier (here, Carolina) would be in a position to avoid constructing or running generation facilities. We were concerned that in cases where a full requirements supplier's wholesale rate exceeds its avoided costs, QFs may attempt to sell to the full requirements customer instead of the full requirements supplier, claiming the supplier's full requirements rate as the avoided cost. In such circumstances, it was determined that the full requirements rate should be adjusted so that the full requirements supplier will be in the same position as if it had purchased power directly from the QF. Order No. 69 states, in pertinent part, that:

> Use of the unadjusted wholesale rate fails to take into account the effect of reduced revenue to the supplying utility, as a result of the substitute of the [QF's] output for energy previously supplied by the supplying utility. As the level of the purchase by the all-requirements utility decreases, the supplying utility's fixed costs will have to be allocated over a smaller number of units of output. In effect, the loss in revenue to the supplying utility will cause the demand charges to the supplying utility's customers (including the all-requirements customers interconnected with the [QF]) to increase. Under the definition of 'avoided costs,' . . . the purchasing utility must be in the same financial position it would have been had it not purchased the [QF's] output. As a result, rather than allocating its loss in revenue among all of its customers, in this situation the supplying utility should assign all of these losses to the all-requirements utility. That utility should, in turn, deduct these losses from its previously calculated avoided costs, and pay the [QF] accordingly. [16]

**6 *61390 In *City of Longmont et al.*, 39 FERC P 61,301, at p. 61,974 (1987), we reaffirmed our intent in Order No. 69 to measure the avoided cost of a full requirements customer as the avoided cost of the full requirements supplier since it is the supplier that avoids generation when the full requirements customer purchases from a QF. Accordingly, we will accept Carolina's proposed rider for filing — to become effective on July 26, 1989 — inasmuch as we find it fully complies with Order No. 69.

Third, the Cooperatives seek rejection of the proposed rider, alleging that it constitutes a rate increase without the supporting cost data required under section 35.13 of the Commission's regulations. In *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235, 241-42 (D.C. Cir. 1980), the court held that the Commission has considerable discretion to decide whether a particular filing meets the agency's informational requirements. The court reasoned that those regulations serve to enable the Commission to proceed with an application and the Commission is the best judge of that. Using our judgment we find that Carolina has adequately supported its filing. While the rider may increase revenues, it would do so only in those instances where full requirements customers purchase QF capacity, and only to the extent of restoring Carolina to its prior position consistent with Order No. 69. We find that since the information provided by Carolina suffices in order for us to process the proposed rider, we will deny the Cooperatives' motion to reject.

Fourth, the Cooperatives complain that Carolina's course of conduct prior to the filing of the rider inhibited NCEMC's transaction with the Assembly. The Cooperatives request that the Commission use its enforcement powers to direct Carolina to refrain from interfering with NCEMC and the Assembly, and that Carolina withdraw the proposed rider. The Cooperatives raise three separate allegations of dilatory behavior.

The Cooperatives allege that Carolina filed the rider to specifically make NCEMC's transaction uneconomical. In adopting Order No. 69 we balanced that consideration against the harm of permitting all-requirements customers to purchase directly from QFs and the requirement that the utility and especially its captive customers not be worse off with the QF than without it. We concluded that a rider was appropriate and we see no reason to change our view here.

The Cooperatives allege that Carolina purposely stalled in modifying its transmission facilities to accommodate a transmission line interconnecting the facility with Haywood. As matters turned out, Carolina made the interconnection in four days. Affidavit of Herbert D. Patrick at 4. Thus we hold that Carolina did not delay in trying to accommodate Haywood.

**7 The Cooperatives allege that Carolina visited rights-of-way owners for the express purpose of persuading them to withhold permission for Haywood to construct a transmission line. The only evidence supporting this allegation is an affidavit alleging that Carolina employees had advised property owners of the QF's intent to request rights-of-way. The Cooperatives do not allege that Carolina's employees encouraged property owners to withhold their consent; in fact, consent was provided. There simply has not been any showing which would warrant our exercising any enforcement powers that we may have.

Finally, we find it unnecessary to establish a separate complaint proceeding, to be consolidated with the instant docket, for ultimate disposition of the issues. The facts and issues that would be presented in the complaint proceeding are identical to those already raised in this rate proceeding. Moreover, the relief sought under the complaint parallels that which is sought by the Cooperatives here. Accordingly, we will dismiss the complaint.

The Cooperatives alternatively request summary disposition of the proposed rider on the basis that Order No. 69 is inapplicable here. The Cooperatives' request, based upon three separate arguments, will also be denied.

First, the Cooperatives argue that Order No. 69 applies only when QF purchases measurably impact the utility and here there is no measurable impact. The Cooperatives' focus upon the impact on Carolina is irrelevant. No such limitation exists in Order No. 69.

Second, the Cooperatives argue that neither NCEMC nor Haywood are full requirements customers of Carolina, and so Order No. 69 is inapplicable. As we have found above, the Cooperatives are incorrect.

Third, the Cooperatives note that Carolina has no excess capacity and so Order No. 69 is inapplicable. We disagree. The excess capacity discussed in Order No. 69 was merely illustrative; [17] Order No. 69 contains no excess capacity restriction.

Consequently, Carolina need not have excess capacity to justify the treatment provided for in Order No. 69. Accordingly, *61391 we will deny the Cooperatives' request for summary rejection of Carolina's proposed rider.

Absent Commission rejection or summary disposition of Carolina's rider, the Cooperatives alternatively request a five-month suspension and investigation of the rider. However, the Cooperatives have not presented any arguments that warrant suspension or investigation. The Cooperatives aver that Carolina has not demonstrated that for purposes of billing under the rider, its avoided cost rate should be set at the state-approved level for direct QF purchases. However, Congress delegated to states and non-regulated electric utilities the responsibility of establishing avoided cost rates for QF purchases. Carolina's adoption of that rate to compute the rider is entirely consistent with our findings in Order No. 69 that the full requirements supplier be in the same position as if it had directly purchased from the QF.

**8 The Cooperatives further contest, as unjust and unreasonable, the metering provision of the proposed rider. We find that the Cooperatives' concerns over the metering provision are vague and fail to provide any basis for a hearing. We believe that it is consistent with Order No. 69 to allow Carolina to measure QF output to Haywood so that Carolina may compute bills under the rider and consequently we find it reasonable for Carolina to assess a metering charge. As to the unlimited liability of Haywood, the Cooperatives have not identified the provision they seek; thus, we find their assertions on this issue insufficient to embark upon an evidentiary hearing. Accordingly, we will deny the Cooperatives' request for suspension and a hearing.

The Commission orders:

(A) The Cooperatives' motion to reject or dispose summarily is hereby denied.

(B) The Cooperatives' requests for five-month suspension and a hearing are hereby denied.

(C) The Cooperatives' complaint is hereby dismissed.

(D) Carolina's rider to its full requirements tariff rate is hereby accepted for filing, without suspension, to become effective July 26, 1989. [18]

Federal Energy Regulatory Commission

Footnotes

1 *See* 18 C.F.R. §292.101(b)(1) (1988).

2 In its original May 24, 1989 filing, Carolina stated that July 24, 1989 is the requested effective date. However, on May 26, 1989, Carolina amended its original filing. Consequently, July 26, 1989 is the requested effective date.

3 18 C.F.R. §292.303(d) (1988).

4 Small Power Production and Cogeneration Facilities; Regulations Implementing section 210 of the Public Utility Regulatory Policies Act of 1978, Order No. 69, *FERC Statutes and Regulations, Regulations Preambles 1977-81* P 30,128, *FERC Statutes and Regulations, Regulations Preambles 1977-81* P 30,160 (1980), *aff'd, American Paper Inst . v. American Elec. Power Serv. Corp.*, 461 U.S. 402 (1983).

5 18 C.F.R. §35.13(a)(2)(ii) (1988).

6 54 Fed. Reg. 25,322 (1989).

7 Construction of the Assembly's project began in September 1987. A line-tie presently connects Haywood's distribution network with the project. The Cooperatives refer to the project as a qualifying small power production facility. Carolina assumes that the facility is a QF. For purposes of this proceeding, we will assume that the facility is a QF.

8 Order No. 69 notes that a QF may prefer selling its capacity to a generating utility like Carolina, rather than to a non-generating, full requirements customer of the generating utility because the full requirements supplier's avoided costs may be higher than the avoided cost of the non-generating utility. Order No. 69 further provides that:

This would not appear to be the case if the [QF] offers to supply capacity and energy in a situation in which the supplying utility is in an *excess capacity situation*. Since the supplying utility has excess capacity, its avoided costs would include only energy costs.

FERC Statutes and Regulations, Regulations Preambles 1977-81% i at p. 30,871 (emphasis added).

9 16 U.S.C. §824a-3(a) (1982).

10 18 C.F.R. §292.303(a) (1988).

11 The Cooperatives also maintain that Carolina: (1) deliberately delayed making modifications to its transmission facilities to accommodate a transmission line interconnecting the facility with Haywood; and (2) engaged in other improper practices by visiting rights-of-way owners in order to prevent the Assembly from obtaining permission to construct a transmission line.

12 *See Oglethorpe Power Corp.*, 32 FERC P 61,103, at p. 61,285 (1985).

13 Carolina represents that it has filed with the North Carolina Commission a rate schedule setting forth avoided-cost energy and capacity credits for Carolina's QF purchases. These rates form the basis for Carolina's proposed rider.

14 18 C.F.R. §385.214 (1988).

15 Carolina apparently does not recognize the assignment to NCEMC of Haywood's full requirements contract with Carolina.

16 *FERC Statutes and Regulations, Regulations Preambles 1977-81* at p. 30,871.

17 Reference to "excess capacity" was an illustration — it was not a limitation — recognizing that when a utility system experiences excess capacity, its avoided costs would equal only its avoided energy costs. In that circumstance, a QF with capacity for sale would be naturally biased toward that utility's requirements customer whose avoided costs would arguably be based upon the full requirements rate.

18 Carolina is hereby informed of the rate schedule designation: Original Sheet No. 25 under FPC Elective Tariff, First Revised Volume No. 1 (Resale Service Schedule — Rider No. 89)

48 FERC P 61101 (F.E.R.C.), 1989 WL 262068

End of Document

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Roger & Emma Wahl

v. Docket No. EL06-65-000

Allamakee-Clayton Electric Cooperative

NOTICE OF INTENT NOT TO ACT

(Issued June 15, 2006)

1. In this notice we decline to initiate an enforcement action pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA).[1] As a result Roger and Emma Wahl may bring an enforcement action directly in the appropriate court.

Background

2. Roger and Emma Wahl are homeowners in Lawler, Iowa. In 2002 and 2003 they installed a 7500 watt wind generator with photovoltaic solar panels at their residence. On April 24, 2006, the Wahls filed a complaint with the Commission seeking a ruling that Allamakee-Clayton Electric Cooperative (the Cooperative) is required by PURPA to purchase the output of the Wahls' generation facility pursuant to a net metering arrangement and that the Cooperative's avoided cost is the rate at which the Cooperative purchases full requirements electric power from its generation and transmission supplier, Dairyland Power Cooperative.

3. Notice of the Wahls' complaint was published in the *Federal Register*, 71 Fed. Reg. 25,833 (2006), with answers, interventions and protests due on or before May 17, 2006. The Cooperative filed a timely answer to the complaint.

4. The Cooperative argues that neither state nor federal law requires it to provide the Wahls a net metering arrangement. The Cooperative also argues that the issues raised by the Wahls' complaint are more properly issues for state court, not the Commission. The

[1] 16 U.S.C. § 824a-3 (2000).

Cooperative further argues that it, in its role as a nonregulated electric utility implementing PURPA, has properly determined its avoided costs. The Wahls filed an answer to the Cooperative's answer.

Discussion

Procedural Matters

5. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the Wahls' answer to the Cooperative's answer and will, therefore, reject it.

PURPA Claim

6. The Wahls' filing is fundamentally a challenge to the Cooperative's implementation of the Commission's PURPA regulations. Accordingly, we will treat the complaint as a petition for enforcement under section 210(h) of PURPA. Section 210(h)(2)(A) of PURPA provides that the Commission may undertake an enforcement action to require a "nonregulated electric utility" to implement the Commission's regulations under PURPA.

7. The Commission's enforcement authority under section 210(h)(2)(A) of PURPA, 16 U.S.C. § 824a-3(h)(2)(A) (2000) is discretionary. As the Commission pointed out in its 1983 Policy Statement, "the Commission is not required to undertake enforcement action."[2] If the Commission chooses not to undertake an enforcement action within 60 days of the filing of the petition, the petitioner may then bring an enforcement action directly against the utility in the appropriate court.[3]

8. The Wahls seek two determinations from the Commission: (1) that they are entitled to a net metering arrangement; and (2) that the Cooperative's avoided cost is the rate it pays its full requirements supplier. We decline to make determinations on either matter.

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[2] *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304 at 61,545 (1983) (Policy Statement).

[3] *Id.*

9. The Commission recently addressed the issue of net metering.[4] The Commission noted that Congress had amended section 111(d) of PURPA by its passage of the Energy Policy Act of 2005 (EPAct (2005)[5] and addressed net metering. In section 1251 of EPAct 2005, Congress revised PURPA to require state regulatory authorities and nonregulated utilities to consider adopting net metering. Section 1251 of EPAct 2005, which amended PURPA, provides that each state regulatory authority and each nonregulated utility shall consider "mak[ing] available upon request net metering service to any electric consumer that the electric utility serves" within two years of enactment of EPAct 2005 and shall complete consideration of this new standard within three years of enactment. The Commission in *Swecker* concluded that Congress had provided a specific process for states and nonregulated utilities to consider whether to make net metering available, and that the Commission should not intrude further -- that it was not appropriate for the Commission to go to court to require a nonregulated electric utility to provide net metering when Congress had enacted a specific provision of law that directed the nonregulated electric utility to consider whether or not to provide net metering on its own.[6] For those same reasons, we do not believe it appropriate to consider the Wahls' claim that they are entitled to a net metering arrangement.

10. Nor do we find any merit in the Wahls' contention that the Cooperative's avoided cost should be the price at which it purchases power from its supplier, rather than the supplier's avoided cost which the Cooperative is using as its avoided cost. The Cooperative's calculation of avoided cost is consistent with the Commission's regulations and precedent. In Order No. 69,[7] the Commission determined that the avoided cost of a full requirements customer is the avoided cost of the full requirements supplier because it is the supplier that avoids generation when the full requirements customer purchases from a QF. The Commission has consistently followed this rule.[8]

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[4] *Gregory Swecker*, 114 FERC ¶ 61,205, *reconsideration denied*, 115 FERC ¶ 61,084 (2006) (*Swecker*).

[5] Pub. L. 109-58, §1251, 119 Sta. 594, 962 (2005).

[6] 114 FERC ¶ 61,205 at P 28.

[7] *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978,* FERC Stats. & Regs. ¶ 30,128 at 30871, 45 Fed. Reg. 12,214 (1980).

[8] *See, e.g., City of Longmont*, 39 FERC ¶ 61,301 (1987); *Carolina Power & Light Co.*, 48 FERC ¶ 61,101 at 61,390 (1989); *North Little Rock Cogeneration, L.P. and Power Systems, Ltd. v. Entergy Services, Inc. and Arkansas Power & Light Company,* 72 FERC ¶ 61,263 at 62,172 (1995).

11. Notice is hereby given that the Commission declines to initiate an enforcement action under section 210(h)(2)(A) of PURPA.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

142 FERC ¶ 61,207
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

Gregory R. Swecker and Beverly F. Swecker

v. Docket No. EL11-39-002

Midland Power Cooperative and State of Iowa

ORDER DENYING REQUESTS FOR REHEARING AND RENEWING NOTICE OF INTENT NOT TO ACT

(Issued March 21, 2013)

1. In this order we deny rehearing of the Commission's December 15, 2011 order in this proceeding.[1] In the December 15 Order, the Commission found that the actions of Midland Power Cooperative (Midland), in disconnecting service to the qualifying facility (QF) owned by Gregory R. Swecker and Beverly F. Swecker (Sweckers), were inconsistent with Midland's obligations under the Public Utility Regulatory Policies Act of 1978 (PURPA)[2]. Nothing raised on rehearing warrants a change to that finding.

2. In the December 15 Order, the Commission also found that the underlying dispute concerning Midland's determination of its avoided costs for purchasing the output of the QF owned by the Sweckers was appropriate for resolution through a settlement process; the Commission stated that, if the parties were unable to report progress towards a settlement of the underlying dispute, the Commission would consider what steps to take next in this proceeding. In this order, in the absence of a settlement, we renew our earlier decision in this proceeding to give notice of our intent not to act.

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[1] *Gregory R. Swecker and Beverly F. Swecker v. Midland Power Cooperative and State of Iowa*, 137 FERC ¶ 61,200 (2011) (December 15 Order).

[2] 16 U.S.C. § 824a-3 (2006).

Background

History of Dispute

3. The history of the relationship between the Sweckers and Midland is long and contentious. We summarized that history in the December 15 Order, noting that more details of the relationship could be found in prior Commission orders. We re-summarize the facts and circumstances here for the convenience of the reader.

4. In 1998, Mr. Swecker, a retail customer of Midland, bought a 65kW wind generator for his farm; that generator is a small power production QF. Mr. Swecker and Midland have battled since then over various issues relating to the financial arrangements between Midland and the QF. The first dispute related to what the connection charge would be for his QF; Midland sought to charge Mr. Swecker its standard interconnection charge for QF service, while Swecker claimed to be entitled to be charged the lower residential/farm charge. In the course of this dispute Midland disconnected Mr. Swecker's electric service for nonpayment. In response, Mr. Swecker, in early 1999, in Docket No. EL99-41-000, filed his first petition asking the Commission to require Midland to provide service to his farm at the residential/farm rate and to award damages. The Commission declined to initiate an enforcement action against Midland.[3]

5. Mr. Swecker brought his dispute with Midland back to the Commission in October 2000, in Docket No. EL01-12-000. Mr. Swecker claimed that Midland had incorrectly calculated its avoided cost rate payable to QFs. Mr. Swecker alleged that Midland's actual avoided cost was much higher than the rate Midland offered to pay. Mr. Swecker requested the Commission to compel Midland to provide any and all data from which Midland's avoided costs might be derived. Mr. Swecker, while his petition was pending before this Commission, filed a request to pursue the matter in a judicial forum. Because both of the parties expressed a desire to pursue the matter in court, the Commission dismissed the petition to allow Mr. Swecker to file in an appropriate court.[4]

6. Mr. Swecker brought his dispute with Midland to the Commission again in 2003, in Docket No. EL03-53-000.[5] Mr. Swecker stated that he had brought the dispute back to

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[3] *Gregory Swecker v. Midland Power Cooperative*, 87 FERC ¶ 61,187 (1999).

[4] *Gregory Swecker v. Midland Power Cooperative*, 96 FERC ¶ 61,085 (2001).

[5] On June 3, 2003, Mr. Swecker amended his complaint by expressing opposition to what was then an anticipated request by Central Iowa Power Cooperative (CIPCO) for a waiver of certain regulations implementing PURPA. CIPCO's request was for a waiver for both itself and its members, including Midland. This separate, yet related, issue was addressed in Docket No. EL03-219-000, where the Commission denied CIPCO's request

(continued...)

the Commission because Midland had previously argued to this Commission that the case should be decided in a state forum and, when the dispute was in a state forum, argued that the dispute was preempted by PURPA and could not be decided by the state. Mr. Swecker stated that, because the state courts ruled that they lacked jurisdiction, he had returned to the Commission with his request that the Commission require Midland to fulfill its obligation to purchase power from his QF at Midland's avoided-cost rate and to sell him supplemental and backup power.

7. The Commission initially granted Mr. Swecker's 2003 petition for enforcement under section 210(h) of PURPA.[6] However, the Commission also encouraged the parties to attempt to settle the matter before the Commission filed its enforcement petition in Federal court.

8. Midland filed what it labeled a request for rehearing and vacatur of the 2003 Enforcement Petition Order. The National Rural Electric Cooperative Association (NRECA) also filed for rehearing. Subsequently, Mr. Swecker and Midland entered into a settlement agreement.[7] The Commission approved the 2004 Settlement Agreement, dismissed the requests for rehearing as moot, and declined to vacate the 2003 Enforcement Petition Order as requested by Midland in its request for rehearing.[8]

9. A few months later, however, Mr. Swecker once again filed a petition for enforcement under section 210(h) of PURPA. In the April 6, 2005 petition, in Docket No. EL05-92-000, Mr. Swecker requested that Midland purchase power from Mr. Swecker at the price at which Midland purchases power from CIPCO, Midland's power supplier; Mr. Swecker asserted this price constitutes Midland's avoided cost. Mr. Swecker also requested that the sale from his QF to Midland be billed with net data collected from a single meter (instead of from the two meters proposed by Midland) and stated that such net metering is appropriate because it is a simple way to determine the kilowatts that are available for sale from the QF. Mr. Swecker requested that the Commission undertake an enforcement proceeding to require Midland to provide Mr. Swecker net metering and to require Midland purchase power from Mr. Swecker at the price at which Midland purchases power from CIPCO.

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for waiver of the requirements of PURPA. *Central Iowa Power Cooperative*, 105 FERC ¶ 61,239 (2003), *reh'g denied*, 108 FERC ¶ 61,282 (2004).

[6] *Gregory Swecker v. Midland Power Cooperative,* 105 FERC ¶ 61,238 (2003) (2003 Enforcement Petition Order).

[7] We refer to the settlement agreement as the 2004 Settlement Agreement.

[8] *Gregory Swecker v. Midland Power Cooperative,* 108 FERC ¶ 61,268 (2004).

10. In an order in Docket No. EL05-92-000, the Commission granted Mr. Swecker's petition for enforcement. [9] The Commission found that, on the record before it, Midland should provide net metering The Commission also found that in the context of the Swecker/Midland dispute, where the price of excess power had already been agreed to, net metering is the most appropriate means to ensure that Midland complies with the mandates of PURPA. The Commission subsequently granted reconsideration of the 2005 Order.[10] The Commission found that, following the issuance of the 2005 Order, the Energy Policy Act of 2005 was enacted,[11] and that it was now clear that net metering was not required by PURPA.[12]

The Current Proceeding

11. The instant proceeding began on May 6, 2011, with the Sweckers' filing, in Docket No. EL11-39-000, a petition to enforce PURPA against Midland and the State of Iowa. The Sweckers claimed that Midland has refused to purchase the excess electric energy produced by the Swecker QF at Midland's full avoided cost. The Sweckers asked the Commission to declare that the full avoided cost rate is the rate that Midland pays its full-requirements supplier for energy and power. The Sweckers also asked the Commission for payment of energy and capacity that has been delivered to Midland from 2004 to April 1, 2011, at the rate the Sweckers claim is the proper avoided cost rate. Finally, the Sweckers asked that Midland be prohibited from disconnecting its QF until all violations and complaints have been resolved.

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[9] *Gregory Swecker*, 111 FERC ¶ 61,365, at P 45-46 (2005) (2005 Order).

[10] *Gregory Swecker*, 114 FERC ¶ 61,205, *order denying reconsideration,* 115 FERC ¶ 61,084 (2006) (2006 Order).

[11] Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1261 *et seq.*, 119 Stat. 594 (2005) (EPAct 2005).

[12] *Id.* In addition, on December 27, 2005, Mr. Swecker filed two petitions for enforcement pursuant to section 210(h) of PURPA. In Docket No. EL06-35-000, Mr. Swecker asked the Commission to initiate an enforcement proceeding against Grand Junction Municipal Utilities. Secondly, in Docket No. EL06-36-000, Mr. Swecker asked the Commission to initiate another enforcement proceeding against Midland. The Commission denied these two additional requests to enforce PURPA in the order granting reconsideration of the 2005 Order. *Id.*

12. In response to the May 6, 2011 filing of the Sweckers' petition to enforce PURPA, the Commission issued a notice of intent not to act.[13]

13. Shortly following issuance of the notice of intent not to act in this proceeding, Midland disconnected the Swecker QF. On October 27, 2011, the Sweckers filed a notice of that disconnection and a request for an expedited order for reconnection. On October 31, 2011, the Sweckers filed a second request for expedited order for reconnection.

December 15 Order

14. In the December 15 Order, the Commission found Midland's disconnection of the Sweckers' QF to be inconsistent with its obligations under PURPA.[14] The Commission reasoned[15] that, under section 210(a) of PURPA,[16] Midland has an obligation to purchase electric energy from QFs and to sell electric energy to QFs.[17]

15. The Commission explained that the available exemptions to the statutory purchase obligation are limited.[18] The first possible exemption is that a utility can be relieved of its QF purchase obligation under section 210(m) of PURPA, 16 U.S.C. § 824a-3(m) (2006).[19] The Commission concluded that this exemption is not at issue here, as Midland has not claimed relief under section 210(m) of PURPA, nor filed a petition seeking such relief pursuant to implementing sections 292.309 and 292.310 of the Commission's regulations.[20]

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[13] *Gregory R. Swecker and Beverly F. Swecker v. Midland Power Cooperative and State of Iowa,* 136 FERC ¶ 61,085, *reconsideration denied,* 137 FERC ¶ 61,035 (2011).

[14] December 15 Order, 137 FERC ¶ 61,200 at P 28.

[15] *Id.* PP 29-39.

[16] 16 U.S.C. § 824a-3(a) (2006).

[17] 18 C.F.R. § 292.303(a) (2012); 18 C.F.R. § 292.303(b) (2012); 18 C.F.R. § 292.303(c) (2012).

[18] December 15 Order, 137 FERC ¶ 61,200 at PP 32-37.

[19] Section 210(m) of PURPA is implemented through 18 C.F.R. §§ 292.309, 310 (2012).

[20] December 15 Order, 137 FERC ¶ 61,200 at P 32.

16. The Commission explained that a second possible exemption to the QF purchase obligation is contained in section 292.304(f)(1) of its regulations,[21] which provides, with certain limitations, that a utility is not required to purchase energy or capacity from a QF "during any period during which, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if id did not make such purchases, but instead generated an equivalent amount of energy itself."[22] The Commission stated[23] that in Order No. 69, which implemented section 292.304(f) of the Commission's regulations, the Commission stated that this section was intended to deal with a particular circumstances that can occur during light loading periods, in which a utility operating only base load units would be forced to cut back output from those units in order to accommodate the unscheduled QF energy purchases.[24] The Commission stated that such base load units might not be able to increase their output levels rapidly when the system demand later increased, resulting in the utility needing to rely upon less efficient, higher cost units.[25] Section 292.304(f) of the Commission's regulations, when read in the context of the explanation in Order No. 69, thus applies only to such low loading scenarios, and cannot be relied upon to curtail purchases of unscheduled QF energy for general economic reasons. [26]

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[21] 18 C.F.R. § 292.304(f)(1) (2012).

[22] *Id.* PP 33-35.

[23] *Id.* P 34.

[24] Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,870, 30,886 (1980).

[25] *Id.* at 30,886.

[26] The Commission further explained that many avoided-cost rates are calculated on an average or composite basis, and already reflect the variations in the value of the purchase in the lower overall rate. In such circumstances, the utility is already compensated, through the lower rate it generally pays for unscheduled QF energy, for any periods during which it purchases unscheduled QF energy even though that energy's value is lower than the true avoided cost. On the other hand, for avoided-cost rates that are determined in real-time, such avoided costs adjust to reflect the low (or zero or negative) value of the unscheduled QF energy, allowing the QF to make its own curtailment decisions. In neither case is the utility authorized to curtail the QF purchase unilaterally. December 15 Order, 137 FERC ¶ 61,200 at P 35.

17. The Commission thus concluded that section 292.304(f) of the Commission's regulations is inapplicable here.[27]

18. The Commission explained[28] that the third exemption from the obligation to purchase is contained in section 292.307(b) of the Commission's regulations,[29] which provides that a utility may, during a system emergency, discontinue purchases from a QF if such purchases would contribute to such emergency. Section 292.101(b)(4) of the Commission's regulations,[30] defines "system emergency" as "a condition on a utility's system which is likely to result in imminent significant disruption of service to customers or is imminently likely to endanger life or property." No claim has been made that a system emergency exists that justifies Midland's discontinuance of purchases from the Sweckers' QF.

19. The Commission concluded that because Midland, by disconnecting the Sweckers' QF from its system, has effectively ceased purchases from the Sweckers' QF, and that, because its justification for the disconnection and cessation of purchases does not fall within any of the exemptions to the purchase obligation, Midland's disconnection of the Sweckers' QF is inconsistent with its purchase obligation under PURPA and our regulations.[31]

20. The Commission then addressed Midland's obligation to sell to the Sweckers' QF.[32] The Commission stated that the obligation to sell to a QF is comprehensive under PURPA and the implementing regulations. The only exemption to the obligation to sell in PURPA is contained in section 210(m), which provides for an exemption from the obligation to sell but only upon a Commission finding of certain retail competition, or a Commission finding that the electric utility is not required by State law to sell electric energy in its territory.[33] The Commission stated that, in either case, however, cessation of sales to a QF requires an application to the Commission. The Commission noted that Midland had not applied for relief from the obligation to sell to the Sweckers' QF, and

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[27] *Id.* PP 33-35.

[28] *Id.* P 36.

[29] 18 C.F.R. § 292.307(b) (2012).

[30] 18 C.F.R. § 292.101(b)(4) (2012).

[31] December 15 Order, 137 FERC ¶ 61,200 at P 37.

[32] *Id.* PP 38-39.

[33] 16 U.S.C. § 824(a)-3(m)(5) (2006); 18 C.F.R. § 292.312 (2012).

the Commission concluded that Midland still has the obligation to sell capacity and energy to the Sweckers' QF and that the disconnection is inconsistent with that obligation.[34]

21. Finally, the Commission noted that Midland has implied that the Commission, by issuing a notice of intent not to act in this proceeding, [35] has found that Midland is correct on the merits. The Commission explained that Midland is incorrect, and that, in issuing the notice of intent not to act, the Commission was not ruling on the merits of the dispute between the Sweckers and Midland.[36] The Commission also stated that, rather than having the Commission address the merits, the parties might prefer to attempt to settle the avoided-cost issue. The Commission directed the Commission's Dispute Resolution Service to convene the parties to see if assisted negotiations might result in an agreement. The Commission stated that, if the parties were unable to reach an agreement, or make progress towards an agreement, the Commission would then decide what steps it will take next in this proceeding.[37]

Requests for Rehearing

22. On January 17, 2012, the Iowa Utilities Board, NRECA, and Midland each filed a request for rehearing of the December 15 Order (with substantial overlap between the arguments made). On January 12, 2012, the American Public Power Association filed a motion to intervene out of time stating that the Commission's December 15 Order decision concerning disconnection was erroneous.

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[34] December 15 Order, 137 FERC ¶ 61,200 at P 38. The Commission, however, noted that while there could be circumstances where failure to pay a bill would justify disconnection, where the electric utility is being accused of violating PURPA any such disconnection should not occur without first following the Commission's regulations for authorization to be relieved of the obligation to sell to the QF. *Id.* P 39. The Commission concluded that disconnection was not justified here, but must wait for the conclusion of the Sweckers' enforcement action under PURPA, including the conclusion of any petition for enforcement filed in Federal court. *Id.*

[35] *Id.* P 11 & n. 10 (citing *Gregory R. Swecker and Beverly F. Swecker v. Midland Power Cooperative and State of Iowa,* 136 FERC ¶ 61,085, *reconsideration denied,* 137 FERC ¶ 61,035 (2011)).

[36] *Id.* P 40.

[37] *Id.* PP 41-42.

23. On rehearing, the Iowa Utilities Board argues that the Commission, by ordering the Sweckers' electric service to be reconnected, has encroached into an area within the Iowa Utilities Board's jurisdiction. The Iowa Utilities Board argues that the avoided cost rate paid to the Sweckers has been the subject of prior litigation and should not be an issue in this proceeding. The Iowa Utilities Board states that Midland pays the required avoided cost rate to the Sweckers, which is the same rate that Midland pays to other QFs within its exclusive service territory; for Midland to pay a different rate, the Iowa Utilities Board argues, would violate the Iowa Utilities Board's nondiscriminatory standards. The Iowa Utilities Board also argues that the real dispute remaining in this case is not the avoided cost rate, but a dispute over bill payment, which it claims is within its exclusive jurisdiction. The Iowa Utilities Board concludes that the Sweckers should not be able to avoid disconnection of retail service for nonpayment of service by framing this as a PURPA dispute.[38]

24. NRECA argues that the Commission, in its December 15 Order, has attempted to amend its PURPA regulations to encompass disconnection of retail service for non-payment; NRECA claims that PURPA does not require utilities to seek prior approval to disconnect retail service, even to individual QFs, in non-payment situations.[39] NRECA argues that the Commission has no statutory jurisdiction over retail disconnection. NRECA argues that section 210(m) does not apply because (1) Midland was not seeking termination of the PURPA purchase obligation and (2) Midland was not seeking to terminate its PURPA sale obligation and continues to offer to sell to the Sweckers who, NRECA claims, have rejected Midland's offer to sell by their refusal to pay for this retail service. NRECA further argues that in its December 15 Order the Commission failed to acknowledge that the 2004 Settlement Agreement, which was approved by the Commission, provided Midland the right to disconnect for non-payment; the failure to acknowledge the 2004 Settlement Agreement encourages re-litigation of previously settled disputes, including re-litigation of the settled dispute concerning the proper calculation of avoided costs.

25. On rehearing, in addition to making many of the same arguments as NRECA in particular, Midland argues that Midland's avoided cost payments to the Sweckers are appropriate under PURPA. Midland points out that the rate Midland pays Swecker is

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[38] While the Iowa Utilities Board claims that the disconnection here was consistent with all state requirements for disconnection, this case involves not merely the disconnection of a retail customer but of a QF and therefore the relevant inquiry is consistency with PURPA and this Commission's requirements under PURPA as explained in greater detail below.

[39] As the discussion below makes plain, our action in the December 15 Order as well as in this order do not constitute a change in our regulations.

based on the avoided cost rate and terms included in the 2004 Settlement Agreement and approved by the Commission, escalated pursuant to the terms of an Iowa District Court proceeding. Midland points out that, as recently as May 27, 2011, the Iowa Utilities Board rejected the Sweckers' attempt to reopen the previously litigated avoided cost determination. Midland also claims that the rate sought by the Sweckers is based on the rate at which Midland purchases power from its all requirements wholesale supplier, which Midland points out is inconsistent with long Commission precedent. Midland seeks clarification that the avoided-cost rate it pays the Sweckers is consistent with the Commission's avoided cost principles. Finally, Midland argues that the Commission erred in imposing an obligation on Midland to seek Commission approval of its disconnection; disconnection for failure to pay a retail bill is a retail matter that properly should be considered by the Iowa Utilities Board.

26. The Commission's Dispute Resolution Service, the Sweckers, and Midland each also filed status reports stating that they had been unable to settle the avoided cost rate issues raised by the Sweckers' petition to enforce PURPA. The Sweckers subsequently filed pleadings urging the Commission to find that a properly calculated avoided-cost rate should be based on the rate that Midland pays to its wholesale suppliers; the Sweckers also ask that the Commission require Midland to provide information concerning the rate it pays its suppliers and to set the issue of what the appropriate avoided cost should be for investigation and hearing. Finally, the Sweckers filed a response to the requests for rehearing.

Discussion

Procedural Matters

27. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. American Public Power Association has not met this higher burden of justifying its late intervention. *See, e.g., Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250 at P 7 (2003). In light of our decision to deny American Public Power Association's late motion to intervene, we will dismiss American Public Power Association's request for rehearing. Because American Public Power Association is not a party to this proceeding, it lacks standing to seek rehearing of the December 15 Order. *See* 18 C.F.R. § 385.713(b) (2012).

28. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2012), prohibits an answer to a request for rehearing. Accordingly, we will reject the answer to the requests for rehearing.

Commission Determination

29. As discussed below, we deny NRECA and Midland's requests for rehearing. We also deny the Sweckers' renewed request that the Commission find that Midland's avoided cost must be based on the rate Midland pays its wholesale suppliers.[40]

30. The Iowa Utilities Board, NRECA and Midland argue that the Commission erred in finding that the disconnection should not have occurred without Midland's following the Commission's regulations for authorization to be relieved of the obligation to sell to the QF. They argue that disconnection of retail service is within the Iowa Utilities Board's jurisdiction, and not the Commission's. Nothing raised on rehearing convinces us that we erred in the December 15 Order in finding that Midland must seek Commission approval to disconnect the Sweckers.

31. As described in the December 15 Order,[41] under section 210(a) of PURPA,[42] Midland has an obligation to purchase electric energy from QFs and to sell electric energy to QFs. Nothing raised in the requests for rehearing convinces us that, by disconnecting the Sweckers, Midland has not in effect terminated, at least on a temporary basis, its obligation to buy from and sell to the Sweckers.[43] Nor are we convinced that a termination, even a temporary termination, may be accomplished other than by following this Commission's rules for termination.

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[40] As discussed below, Midland purchases from two wholesale suppliers, one serving part of Midland's service territory, and the other serving the remaining part of Midland's service territory. *See* note 58 *infra.*

[41] December 15 Order, 137 FERC ¶ 61,200 at PP 29-31.

[42] 16 U.S.C. § 824a-3(a) (2006).

[43] That is, we see little if any distinction in practice between disconnection and termination. While the former is claimed to be temporary, it can also be permanent in practice. And while the latter is claimed to be permanent, because our regulations allow for subsequently undoing a termination, *see* 18 C.F.R. § 292.313 (2012), it can also be temporary in practice. In short, cessation of service to a QF – whether called one or the other – is still cessation of service no matter how it is denominated.

32. Prior to the Commission's implementation of section 210(m) of PURPA,[44] which was added to PURPA by EPAct 2005, the Commission, as Midland points out, in practice left issues regarding disconnection of QFs for nonpayment of bills to state regulatory authorities or nonregulated utilities.[45] In implementing EPAct 2005, however, the Commission addressed, and provided specific regulations on, how an electric utility may terminate its obligations to purchase from and sell to QFs. [46]

33. The issue, moreover, is not so simple as the parties seeking rehearing suggest; it involves more than just a retail customer not paying its bills for retail service. While the Sweckers take retail service from Midland and such retail service is normally beyond our jurisdictional reach, that is not the end of the matter. The Sweckers also have a QF, and service to that QF pursuant to PURPA – interconnecting with and both buying from the QF and selling to the QF – can only be disconnected in very limited circumstances, as described in our earlier December 15 Order and here. PURPA does not allow service to a QF to be disconnected unilaterally by and at the sole discretion of the interconnected purchasing/selling electric utility (here, Midland), merely because that electric utility also

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[44] *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233 (2006), *order on reh'g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 (2007), *aff'd sub nom. American Forest and Paper Association v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008).

[45] *Gregory Swecker v. Midland Power Coop.,* 87 FERC ¶ 61,187, at 61,722 (1999). Midland also cites to the 2006 Order, *Gregory Swecker v. Midland Power Coop.,* 114 FERC ¶ 61,205 at P 6, *order denying reconsideration,* 115 FERC ¶ 61,084 (2006), as holding that disconnection was not a matter within its jurisdiction. Midland suggests that the 2006 Order's statement concerning jurisdiction was made after enactment of EPAct 2005 and thus binds the Commission. However, the language referenced by Midland is in the historical background section of that order reciting in summary fashion the prior history of the Swecker/Midland dispute (citing to *Gregory Swecker v. Midland Power Coop.*, 87 FERC at 61,722); it was not intended to be a holding on the then jurisdiction over disconnection. *Boston Edison Co.*, 101 FERC ¶ 61,068, at P 9 n.4 (2002); *Southern Co. Services, Inc.*, 57 FERC ¶ 61,284, at 61,929 (1991). Moreover, the 2006 Order was issued prior to the Commission's implementation of section 210(m) of PURPA in Order No. 688; the rules concerning termination of the obligations to purchase from and sell to QFs thus issued after the 2006 Order. The 2006 Order thus does not reflect the Commission's understanding of how EPAct 2005 affects an electric utility's right to disconnect a QF.

[46] And our affirmative grant of relief under PURPA section 210(m) does not relieve an electric utility of its obligation to interconnect with a QF – only the obligation to purchase from and sell to the QF.

happened to be selling retail service. When the two services are so intertwined physically that disconnection of one cannot be done without disconnection of the other, as is the case here,[47] the requirements of PURPA and our implementing regulations must prevail over the proposed unilateral action of the interconnected purchasing/selling utility. In the December 15 Order, the Commission thus held that disconnection, in the circumstances presented here, may not occur without following the Commission's regulations for authorization to be relieved of the obligation to sell to a QF.[48] The 2004 Settlement noted by NRECA includes a discussion of disconnection for failure to pay having to be consistent with applicable state law and Iowa Utilities Board regulations. Although this 2004 Settlement was approved by the Commission, Congress subsequently passed EPAct 2005 which clarified the Commission's jurisdiction over the mandatory purchase and sales obligations. Therefore, to allow the 2004 Settlement to control would be inconsistent with our obligations under PURPA, and the Commission's regulations.[49]

34. The Commission acknowledged that there may be circumstances where failure to pay a bill would justify disconnection.[50] The Commission further stated that in the case before us, however, where the Sweckers have indicated that they intend to pursue the matter in Federal court, the Commission did not believe disconnection was justified, but rather disconnection must wait for the conclusion of the Sweckers' enforcement action under PURPA, including the conclusion of any petition for enforcement filed in Federal court. Disconnection is not justified until the Sweckers have had a chance to fully litigate the payment dispute with Midland.

35. As we discuss below, the Commission reaffirms that it will exercise its discretion, and not itself initiate an enforcement proceeding in Federal court; while this action ends the dispute over avoided costs before the Commission, the Sweckers still have a statutory right themselves to take the dispute to court. Accordingly, upon conclusion of any Federal court proceeding brought by the Sweckers to enforce PURPA, the Commission will consider a petition to allow disconnection of the Sweckers from Midland for nonpayment.

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[47] *Cf.* Midland Rehearing at 2 (Midland's service to the Swecker's farm and residence "also provides back-up power to their QF").

[48] December 15 Order, 137 FERC ¶ 61,200 at P 39.

[49] 18 C.F.R. §§ 292.309-310, 292.312 (2012).

[50] *Id.* We see no inconsistency between requiring Midland to first follow the Commission's rules for terminating its obligation to sell to the Sweckers and the provision in the 2004 Settlement Agreement which permits disconnection for nonpayment of bills.

36. The remaining issue concerns the proper calculation of avoided costs and whether the Commission should go to court to enforce PURPA.[51] Midland, NRECA and the Iowa Utilities Board ask the Commission to declare that the avoided-cost rate currently being paid the Sweckers is consistent with PURPA. The Sweckers in turn ask that the Commission set up procedures to determine what rate Midland pays its wholesale supplier and to declare that Midland's avoided-cost rate should be based on what Midland pays its full-requirements wholesale supplier.[52] We find no merit in the Sweckers' contention that Midland's avoided cost must be the price at which Midland purchases power from its supplier, rather that supplier's avoided cost (which Midland states that it is using as its avoided cost). In Order No. 69,[53] the Commission determined that the avoided cost of a full requirements customer is the avoided cost of the full requirements customer's supplier because it is the supplier that avoids generation when the full requirements customer purchases from a QF. The Commission has consistently followed this approach.[54] Given that the rate the Sweckers seek is inconsistent with our precedent, we see no reason why we should initiate an enforcement proceeding on behalf of the Sweckers to establish an avoided-cost rate methodology inconsistent with our precedent. Moreover, the rate that Midland currently pays the Sweckers is the rate that

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[51] As noted above, the Commission has previously, in this proceeding, declined to initiate an enforcement proceeding in response to the Sweckers' petition. *See supra* note 11.

[52] Midland was formed by the consolidation of two rural electric distribution cooperatives, Green County Rural Electric Cooperative and Hardin County Rural Electric Cooperative. Midland purchases all power supplied to its service territory formerly served by Hardin County Rural Electric Cooperative from Corn Belt Power Cooperative; it purchases all power supplied to its service territory formerly served by Green County Electric Rural Electric Cooperative from CIPCO. Midland is located in Midland's service territory formerly served by Green County Electric Rural Electric Cooperative and Midland's avoided cost for that part of its service territory is based on CIPCO's avoided costs.

[53] *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978,* Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30871.

[54] *See, e.g., Roger & Emma Wahl v. Allamakee-Clayton Electric Cooperative,* 115 FERC ¶ 61,318, at P 10, *order denying reconsideration,* 116 FERC ¶ 61,134 (2006); *City of Longmont*, 39 FERC ¶ 61,301, at 61,974 (1987); *Carolina Power & Light Co.*, 48 FERC ¶ 61,101, at 61,390 (1989); *North Little Rock Cogeneration, L.P. and Power Systems, Ltd. v. Entergy Services, Inc. and Arkansas Power & Light Company,* 72 FERC ¶ 61,263, at 62,172 (1995).

the Sweckers agreed to in the 2004 Settlement Agreement —a settlement approved by the Commission.[55] Our regulations provide that nothing in the Commission's regulations limits the authority of any electric utility and QF to agree on their own to an avoided-cost rate, and nothing affects the validity of any contract entered into between an electric utility and a QF.[56] The Commission in implementing this regulation stated that the regulation recognizes that the fact that a QF entered into a contract with an electric utility at an agreed-to rate indicates that a higher rate would be unnecessary to encourage the development of the QF.[57] We therefore see no reason why we should go to court based on the Sweckers' petition to enforce PURPA.[58] We accordingly affirm our previous decision in this docket to not go to court to enforce PURPA based on the Sweckers' petition; the Sweckers thus may themselves go to court should they wish to do so.

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[55] *Gregory Swecker v. Midland Power Cooperative,* 108 FERC ¶ 61,268 (2004).

[56] 18 C.F.R. § 292.301(b) (2012).

[57] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,867-68. Midland makes inconsistent statements in the record as to whether the 2004 Settlement is binding. Our findings do not rest on whether the 2004 Settlement is binding, but on the fact that the 2004 Agreement is evidence that the parties agreed to a rate and that a higher rate thus would be unnecessary to encourage the development of the QF.

[58] The Commission has, more generally, emphasized that it considers stability and regulatory certainty an important concern. For the sake of stability and regulatory certainty, the Commission has indicated that a contract is not to be lightly revised. *See Rail Splitter Wind Farm, LLC v. Ameren Services Company and Midwest Independent Transmission System Operator, Inc.*, 142 FERC ¶ 61,047, at PP 31-32 (2013). Even if we assume that the Sweckers' decision to sign the 2004 Settlement Agreement required Midland to pay significantly less for the Sweckers' excess energy than it could have paid under a differently calculated avoided-cost rate, it appears that the difference between the 2004 Settlement Agreement's rate and what the Sweckers claim they were entitled to was insufficient to dissuade the Sweckers from executing the 2004 Settlement Agreement, and is equally insufficient now to persuade us to initiate our own enforcement proceeding.

The Commission orders:

The requests for rehearing are hereby denied, and we reaffirm our earlier notice of intent not to act, as discussed in the body of this order.

By the Commission. Commissioner Norris is concurring with a separate statement attached.
Commissioner Clark is dissenting in part with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Gregory R. Swecker and Beverly F. Swecker

v. Docket No. EL11-39-002

Midland Power Cooperative and State of Iowa

(Issued March 21, 2013)

NORRIS, Commissioner, *concurring*:

The Iowa Utilities Board (IUB) and Midland are correct that the issue of whether Midland can disconnect the Sweckers' retail service for nonpayment of their retail electricity bill is a matter that normally falls within state jurisdiction. However, with the Public Utilities Regulatory Policies Act, Congress placed the issue of whether Midland must purchase electric energy from QFs and sell electric energy to QFs squarely within FERC jurisdiction. Unfortunately, these two issues cannot currently be separated because there is only one existing interconnection to the Sweckers' farm and residence and the relevant QF. If Midland disconnects retail service to the Sweckers' farm and residence, then it also disconnects the QF and effectively terminates Midland's obligation to purchase from and sell to the QF.

This is an unfortunate set of circumstances that is compounded by the long and tortured history among the parties involved. If the IUB and Midland find a way to separate the jurisdictional questions here – such as building a second interconnection to the QF that would allow the QF to retain service despite the disconnection of retail service – I am open to other solutions that will respect state retail jurisdiction while fulfilling the Commission's responsibilities under federal law.

For these reasons, I respectfully concur.

John R. Norris, Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Gregory R. Swecker and Beverly F. Swecker Docket No. EL11-39-002

v.

Midland Power Cooperative and State of Iowa

(Issued March 21, 2013)

CLARK, Commissioner, *dissenting in part*:

Today's order addresses several requests for rehearing of a prior Commission decision[1] involving Midland Power Cooperative's (Midland) obligations under the Public Utility Regulatory Policies Act of 1978 (PURPA).[2] Petitioners generally raise two main issues: (1) whether Midland Power Cooperative's avoided cost payments to Gregory R. Swecker and Beverly F. Swecker are consistent with PURPA; and (2) whether it was appropriate for the Commission to order reconnection of the Sweckers' facilities following disconnection of its retail electric service. On the first issue, I agree with the finding in today's order that it would be inappropriate to initiate an enforcement proceeding on behalf of the Sweckers to establish a higher avoided cost payment for their qualifying facility (QF). Granting the Sweckers' request would result in a deviation from established Commission practice[3] and would be inconsistent with

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[1] *Gregory R. Swecker and Beverly F. Swecker v. Midland Power Cooperative and State of Iowa*, 137 FERC ¶ 61,200 (2011) (December 15 Order).

[2] 16 U.S.C. § 824a-3 (2006).

[3] *See Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978,* Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30871. *See also, e.g., Roger & Emma Wahl v. Allamakee-Clayton Electric Cooperative,* 115 FERC ¶ 61,318 at P 10, *order denying reconsideration,* 116 FERC ¶ 61,134 (2006); *City of Longmont,* 39 FERC ¶ 61,301 at 61,974 (1987); *Carolina Power & Light Co.*, 48 FERC ¶ 61,101 at 61,390 (1989); *North Little Rock Cogeneration, L.P. and Power Systems, Ltd. v. Entergy Services, Inc. and Arkansas Power & Light Company,* 72 FERC ¶ 61,263 at 62,172 (1995).

the settlement between the Sweckers and Midland,[4] which was approved by this Commission in 2004.[5] For these reasons, I support the order in part.

However, I cannot support the decision to uphold the Commission's prior order requiring reconnection of the Sweckers' QF. First, termination of the Sweckers' QF service arose consequentially from the disconnection of retail service, which was caused by the Sweckers' nonpayment for service provided by Midland. The Iowa Utilities Board has jurisdiction of the retail service and disconnection. The Board concludes that the Sweckers should not be able to avoid disconnection and payment for services by framing this as a PURPA dispute. I agree. While our PURPA regulations obligate electric utilities to provide QFs service, they do not give us jurisdiction over retail disconnection. Second, the 2004 Settlement Agreement signed by the Sweckers, and approved by the Commission, provides Midland with explicit authority to disconnect the Sweckers' facilities after sufficient notice and in accordance with applicable state law and Iowa Utilities Board regulations.[6] Accordingly, I would have deferred to the Iowa Utilities Board's jurisdiction over this matter instead of asserting Commission jurisdiction under PURPA.

For these reasons, I respectfully dissent in part from this order.

Tony Clark, Commissioner

[4] Docket No. EL03-53-000, Midland Power Cooperative Explanatory Statement in Support of Settlement and Request for Relief, Attachment 2 (Agreement for Electric Service to a Qualifying Facility and for Purchase of Surplus Demand and Energy from a Qualifying Facility) (2004 Settlement Agreement).

[5] *Gregory Swecker v. Midland Power Cooperative,* 108 FERC ¶ 61,268 (2004).

[6] *See* section 9 of the 2004 Settlement Agreement.

United States Court of Appeals
For the Eighth Circuit

No. 14-2186

Gregory R. Swecker; Beverly F. Swecker

Plaintiffs - Appellants

v.

Midland Power Cooperative; Central Iowa Power Cooperative

Defendants - Appellees

Appeal from United States District Court
for the Southern District of Iowa - Des Moines

Submitted: June 11, 2015
Filed: October 6, 2015

Before LOKEN, BYE, and KELLY, Circuit Judges.

LOKEN, Circuit Judge.

Beverly and Gregory Swecker own a farm in Iowa that has a wind generator and is a qualifying power production facility ("QF") certified by the Federal Energy Regulatory Commission ("FERC"). The Sweckers sell surplus electric energy to Midland Power Cooperative at a rate established by the Iowa Utilities Board ("IUB"), implementing FERC rules and regulations. See 16 U.S.C. § 824a-3(f). For more than a decade, the Sweckers and Midland have litigated rate disputes in state court, federal

court, and before FERC and the IUB.[1] In this round of their ongoing battle, the Sweckers appeal the district court's[2] dismissal of their suit against Midland and its primary supplier, Central Iowa Power Cooperative ("CIPCO"), seeking declaratory and injunctive relief requiring Midland "to purchase available energy from plaintiffs . . . at Midland's full avoided cost, rather than CIPCO's avoided cost." Reviewing the grant of a Rule 12(b)(6) motion to dismiss *de novo*, we affirm. See Briehl v. Gen. Motors Corp., 172 F.3d 623, 627 (8th Cir. 1999) (standard of review).

I. Factual and Regulatory Background

A. One purpose of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 ("PURPA"), was to "provid[e] for increased conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and equitable retail rates for electric consumers." 16 U.S.C. § 2601(1). "Section 210 of PURPA's Title II, 92 Stat. 3144, 16 U.S.C. § 824a-3, seeks to encourage the development of cogeneration and small power production facilities." FERC v. Mississippi, 456 U.S. 742, 750 (1982). To overcome the reluctance of traditional electric utilities to purchase power from nontraditional QFs, § 210 directs FERC to promulgate rules that require electric utilities to offer to purchase electric energy from small power production facilities. 16 U.S.C. § 824a-3(a)(2). FERC may initiate action in federal court to enforce these rules, and QFs

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[1]See Swecker v. Midland Power Coop., 142 FERC ¶ 61,207, 2013 WL 1182419 (Mar. 21, 2013) (Swecker); Swecker v. Midland Power Coop., 137 FERC ¶ 61,200, 2011 WL 6523727 (Dec. 15, 2011); Windway Techs., Inc. v. Midland Power Coop., 696 N.W.2d 303 (Iowa 2005); Office of Consumer Advocate v. Iowa Utils. Bd., 656 N.W.2d 101 (Iowa 2003); Windway Techs., Inc. v. Midland Power Coop., No. C00-3089MWB, 2001 WL 1248741 (N.D. Iowa Mar. 5, 2001).

[2]The Honorable James E. Gritzner, United States District Judge for the Southern District of Iowa.

such as the Sweckers may sue if FERC declines a request to act. 16 U.S.C. § 824a-3(h); Mississippi, 456 U.S. at 751.

PURPA provides that the rate at which electric utilities purchase a QF's power "shall be just and reasonable to the [customers] of the electric utility" and bars FERC from prescribing a rate that "exceeds the incremental cost to the electric utility of alternative electric energy." 16 U.S.C. § 824a-3(b). As the House committee report explained, "The provisions of [§ 210] are not intended to require the rate payers of a utility to subsidize cogenerators or small power producers." H.R. Rep. No. 95-1750, at 98 (1978), reprinted in 1978 U.S.C.C.A.N. 7797, 7832. The statute defines "incremental cost of alternative electric energy" as "the cost to the electric utility of the electric energy which, but for the purchase from [the] small power producer, such utility would generate or purchase from another source." § 824a-3(d). The FERC regulations adopted this definition in defining the term here at issue, "avoided costs."[3]

FERC enacted Rules 303 and 304 to implement § 210 of PURPA. See Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp., 461 U.S. 402, 406-07 (1983). Rule 303 provides that "[e]ach electric utility shall purchase, in accordance with [Rule 304], any energy and capacity which is made available from a qualifying facility: (1) Directly to the electric utility; or (2) Indirectly to the electric utility in accordance with paragraph (d) of this section." 18 C.F.R. § 292.303(a). Rule 304 reiterates the statutory mandates regarding rates and provides that a rate equaling avoided costs satisfies PURPA. §§ 292.304(a), (b)(2). Other regulations permit parties to agree upon a rate different than avoided costs. See 18 C.F.R. § 292.301(b)(1). It is undisputed that Midland is an "electric utility" under PURPA and thus subject to these obligations. See 16 U.S.C. § 2602(4).

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[3]"Avoided costs means the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(b)(6).

B. Midland is a retail electric distribution cooperative owned by its member customers. Midland is a member of and buys its power from CIPCO, a generation and transmission cooperative that supplies the wholesale power requirements of its thirteen rural electric and municipal electric cooperative members in the distribution territories they serve. Thus, CIPCO is considered to be Midland's "all-requirements supplier." Swecker v. Midland, 2011 WL 6523727, at *3. As a non-profit cooperative, Midland is a "nonregulated public utility" under Iowa and federal law, a misnomer, but one of jurisdictional significance. See 16 U.S.C. § 2602(9) & (18); Iowa Code § 476.1A.

One issue FERC needed to address in implementing § 210 of PURPA was the challenge posed by all-requirements contracts, namely, "that the obligation to purchase from qualifying facilities under this section might conflict with contractual commitments . . . requiring [utilities] to purchase all of their requirements from a wholesale supplier." Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, 45 Fed. Reg. 12,214, 12,219 (Feb. 25, 1980) ("Order No. 69"). More specifically, when setting the rate at which an all-requirements utility such as Midland must purchase from a QF such as the Sweckers, should the FERC-prescribed maximum rate be the avoided costs of Midland -- the rate at which it purchases from its all-requirements supplier, CITCO -- or CITCO's avoided costs, a lower rate?

In City of Longmont, 39 FERC ¶ 61,301, 1987 WL 117113, at *3 (June 16, 1987), FERC rejected the QF's argument that the avoided cost rate is the cost all-requirements customers pay their supplier because "the generation avoided by the [customers when they] purchase from QFs would be the energy and capacity cost avoided" by their all-requirements supplier. In Carolina Power & Light Co., 48 FERC ¶ 61,101, 1989 WL 262068, at *5-6 (July 25, 1989), applying City of Longmont, FERC explained why the supplying utility's avoided costs rate, not the rate charged by the supplying utility to an all-requirements customer, should apply:

> [I]n Order No. 69, we discussed the ramifications of a QF selling to a full requirements customer instead of selling to that customer's supplying utility. We recognized that only the full requirements supplier . . . would be in a position to avoid constructing or running generation facilities. We were concerned that in cases where a full requirements supplier's wholesale rate exceeds its avoided costs, QFs may attempt to sell to the full requirements customer instead of the full requirements supplier, claiming the supplier's full requirements rate as the avoided cost. In such circumstances, it was determined that the full requirements rate should be adjusted so that the full requirements supplier will be in the same position as if it had purchased power directly from the QF.

Another aspect of the all-requirements contract issue was addressed in Rule 303(d), which provides an alternate means by which an electric utility can meet its all-requirements obligation without hindering small power production:

> Under paragraph (d), if the qualifying facility consents, an all-requirements utility which would otherwise be obligated to purchase energy or capacity from the qualifying facility would be permitted to transmit the energy or capacity to its supplying utility. In most instances, this transaction would actually take the form of the displacement of energy or capacity that would have been provided under the all-requirements obligation. In this case, the supplying utility is deemed to have made the purchase and, as a result the all-requirements obligation is not affected.

Order No. 69, 45 Fed. Reg. at 12,219.

B. Relevant Procedural History

In this complex regulatory universe, federal district courts have exclusive jurisdiction over "implementation" claims, where the issue is whether a non-regulated utility such as Midland has improperly implemented the PURPA regulations. State

courts exercise jurisdiction over "as-applied" claims, for example, claims challenging the calculation of a specific avoided costs rate. See 16 U.S.C. §§ 824a-3(f), (g), 2633(a), (c).

After an Iowa state court set Midland's avoided costs at 2.5394 cents per kilowatt hour in 2002, the Sweckers and Midland entered into an Agreement for Electric Service to a Qualifying Facility that set the avoided cost rate at 2.5394 cents per kWh.[4] Litigation continued. The Sweckers argued before FERC that the Agreement inappropriately adopted a rate that was "based on false information provided by Midland." FERC determined that the "Agreement constitutes a reasonable resolution of this proceeding." Swecker v. Midland Power Coop., 108 FERC ¶ 61,268, 2004 WL 2106368, at *4-5 (Sept. 21, 2004). In Windway Techs., Inc. v. Midland Power Coop., 732 N.W.2d 887 (table), 2007 WL 752278, at *4-5 (Iowa App. Mar. 14, 2007), state courts rejected the Sweckers' attempt to relitigate Midland's avoided costs in pursuing a claim for damages. In 2011, the IUB declined the Sweckers' request to relitigate the rate issue and Midland's avoided costs. Swecker v. Midland Power Coop., No. FCU-2011-0008, 2011 WL 1589086, at *5 (I.U.B. Apr. 22, 2011).

Unsuccessful in these "as-applied" claims, the Sweckers sought federal relief, petitioning FERC to commence an enforcement action in federal court. FERC instead issued a Notice of Intent Not To Act, explaining that the Sweckers "ask that the Commission . . . declare that Midland's avoided-cost rate should be based on what Midland pays its full-requirements wholesale supplier," and rejecting this contention:

> In Order No. 69, the Commission determined that the avoided cost of a full requirements customer is the avoided cost of the full requirements

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[4]According to pleadings and attached exhibits, Midland pays CIPCO more for energy than it pays the Sweckers under this Agreement, with the rate it paid CIPCO between years 2001 and 2011 ranging from 4.98 cents to 6.37 cents per kWh.

> customer's supplier because it is the supplier that avoids generation when the full requirements customer purchases from a QF. The Commission has consistently followed this approach. Given that the rate the Sweckers seek is inconsistent with our precedent, we see no reason why we should initiate an enforcement proceeding on behalf of the Sweckers to establish an avoided-cost rate methodology inconsistent with our precedent. Moreover, the rate that Midland currently pays the Sweckers is the rate that the Sweckers agreed to in the 2004 Settlement Agreement -- a settlement approved by the Commission.

Swecker, 2013 WL 1182419, at *8 (citations omitted). This opinion reaffirmed the City of Longmont rule that FERC would "measure the avoided cost of a full requirements customer as the avoided cost of the full requirements supplier since it is the supplier that avoids generation when the full requirements customer purchases from a QF." Carolina Power, 1989 WL 262068, at *6.

The Sweckers then commenced this action, seeking an order "enforcing the implementation of PURPA and FERC's PURPA regulations and declaring Midland's full avoided cost rate for purchasing surplus energy from plaintiffs and all other non-consenting Qualifying Facilities is the same rate which Midland pays CIPCO." The district court granted Defendants' motion to dismiss, concluding that Plaintiffs failed to state a claim upon which relief can be granted because, in light of FERC precedent and FERC's consideration of the Sweckers' claim in deciding not to act, the "Complaint contains no factual basis for a determination Plaintiffs have a plausible claim for a departure from the established definition of 'avoided cost rate.'" The court denied the Sweckers' motion for a new trial or, in the alternative, an altered or amended order, noting that it had considered and rejected the Sweckers' contention that Midland cannot pay the Sweckers at CIPCO's avoided cost rate because the Sweckers never consented to that rate, as 18 C.F.R. § 292.303(d) requires. Rather, the court determined, § 292.303(d) is inapplicable because "Plaintiffs sold energy directly to Midland -- not indirectly to CIPCO through Midland."

III. Discussion

The Sweckers purport to raise three distinct issues on appeal, but their entire argument can be succinctly stated and analyzed: they contend that the plain language of 18 C.F.R. § 292.303(d) required Midland to obtain the Sweckers' consent as QF before CIPCO's avoided cost rate could apply to Midland's purchases, the district court erred in deferring to FERC's longstanding contrary interpretation of this regulation, and therefore their complaint stated a claim on which declaratory and injunctive relief from use of an unlawful avoided cost rate can be granted.

As we have explained, FERC adopted § 292.303(d) to provide an alternate means by which an all-requirements electric utility can meet its PURPA purchase obligations by "transmit[ting] the [QF's] energy or capacity to its supplying utility," in which case "the supplying utility is deemed to have made the purchase and, as a result the all-requirements obligation is not affected." Order No. 69, 45 Fed. Reg. at 12,219. The regulation provides:

> (d) *Transmission to other electric utilities.* If a qualifying facility agrees, an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility may transmit the energy or capacity to any other electric utility. Any electric utility to which such energy or capacity is transmitted shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility. The rate for purchase by the electric utility to which such energy is transmitted shall be adjusted up or down to reflect line losses pursuant to § 292.304(e)(3) and shall not include any charges for transmission.

The language describing a utility "which would *otherwise* be obligated to purchase energy" (emphasis added) plainly states that § 292.303(d) only enables an electric utility such as Midland to shed its purchase obligation with a QF's consent, in which case the all-requirements supplier (here, CIPCO) purchases the QF's energy

or capacity as if it was directly supplied.[5] However, that transfer of the purchase obligation never occurred in this case. The Sweckers never consented to supply CIPCO, directly or indirectly, and they alleged in their complaint and conceded on appeal that "Midland purchases surplus demand and energy from plaintiff." Thus, it is undisputed that Midland has upheld its PURPA obligation to purchase surplus energy the Sweckers made available. See 18 C.F.R. § 292.303(a); Order No. 69, 45 Fed. Reg. at 12,220 ("[i]f the qualifying facility does not consent to transmission to another utility, the first utility retains the purchase obligation").

The Sweckers argue that Order No. 69 prohibits using the supplying utility's avoided cost rate when the all-requirements customer purchases from the QF absent the QF's consent. FERC has consistently rejected this interpretation of § 292.303(d). Rather, in City of Longmont and Carolina Power, without reference to § 292.303(d), FERC adopted the rule that CIPCO's avoided costs are the maximum rate that may apply to Midland's mandatory purchases from the Sweckers to discourage QFs from withholding consent for direct energy transfers to all-requirements suppliers. This better serves the statutory purposes of "increased conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and equitable retail rates for electric consumers." 16 U.S.C. § 2601(1). The Sweckers' pleadings put this situation squarely within the paradigm described in Carolina Power -- the Sweckers are "attempt[ing] to sell to the full requirements customer [Midland] instead of the full requirements supplier [CIPCO], claiming the supplier's full requirements rate as the avoided cost." Carolina Power, 1989 WL 262068, at *5.

An agency's interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461

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[5]The procedural struggles between these parties illustrate why FERC chose to specify that the all-requirements customer retains the purchase obligation and may transfer the obligation only with the consent of the QF. See Central Iowa Power Coop., 105 FERC ¶ 61,239, 2003 WL 22725391, at *4 (Nov. 19, 2003).

(1997) (quotation omitted). Auer deference is particularly appropriate when "there is no indication that [the agency's] current view is a change from prior practice." Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1337 (2013). Here, FERC's interpretation of "avoided costs" when an all-requirements utility is required to purchase from a QF is not plainly erroneous; is consistent with the provisions of 18 C.F.R. §§ 292.101(b)(6), .303, and .304, read as a whole and in context; reasonably serves diverse statutory purposes when applying PURPA to a complex situation; and has been the agency's consistent practice since City of Longmont. FERC's interpretation is therefore controlling and forecloses the contrary interpretation of § 292.303(d) urged by the Sweckers on appeal. Applying this longstanding interpretation, the district court correctly concluded that the Sweckers' lack of consent to Midland transferring energy to CIPCO was "irrelevant since Plaintiffs never allege that Midland actually transferred Plaintiffs' energy to CIPCO."

IV. Conclusion

For the foregoing reasons, we agree with the district court that the Sweckers' complaint failed to state a claim for relief; we therefore affirm the Rule 12(b)(6) dismissal. As there were no errors of law in need of correction, the district court did not abuse its discretion in denying the Sweckers' Rule 59(e) motion. See Ellis v. City of Minneapolis, 518 F. App'x 502, 505 (8th Cir. 2013) (standard of review). Accordingly, the judgment of the district court is affirmed.

BYE, Circuit Judge, dissenting.

As the Court notes, an agency's interpretation of its own regulation is not controlling when it is "plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461 (1997) (quotation omitted). In this case, the Federal

Energy Regulatory Commission (FERC) adopted a rule in City of Longmont[6] and Carolina Power[7] without considering the consent provisions in the relevant regulation, 18 C.F.R. § 292.303(d), and without addressing the relevant and controlling provisions set forth in Order No. 69.[8] Because the rule adopted by FERC is inconsistent with both the controlling order and the controlling regulation, neither the district court nor our Court should defer to it. I therefore respectfully dissent from the decision to affirm the district court's dismissal of the Sweckers' complaint.

I

The Sweckers contend, and I agree, that § 292.303(d) gives a qualifying facility (QF) the discretion to choose whether to accept the avoided cost rate of a non-generating utility (Midland), or to bypass the non-generating utility and accept the avoided cost rate of the non-generating utility's supplier (CIPCO). I believe this is the only reasonable interpretation of the regulation when read in conjunction with Order No. 69.

In Order No. 69, FERC specifically addressed the situation where the utility obligated to purchase excess energy from a QF was not only a non-generating utility, but was also an all-requirements utility bound by contract to purchase all of its energy from the same supplying utility. In such a situation, there is necessarily tension between the utility's contractual obligations to its supplier, and the obligations imposed by federal law. This is exactly Midland's situation. Midland is both a non-generating utility and an all-requirements utility bound by contract to purchase all of

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[6]39 FERC ¶ 61,301, 1987 WL 117113 (June 16, 1987).

[7]48 FERC ¶ 61,101, 1989 WL 262068 (July 25, 1989).

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

its energy from CIPCO. But the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (PURPA), obligates Midland to purchase the excess energy generated by any QF in its coverage area, such as the Sweckers' windmill. Midland therefore cannot comply with both federal law and its contract. If it purchases all of its energy from CIPCO and refuses to purchase energy from QFs, it is violating federal law. On the other hand, if Midland complies with federal law by purchasing excess energy from a QF in its coverage area, it is violating its contract with CIPCO.

In Order No. 69, FERC adopted the consent requirement set forth in § 292.303(d) to address this issue. First, FERC indicated the obligations imposed by PURPA must take precedence over the contractual obligations the non-generating utility may have to its supplier. See 45 Fed. Reg. 12,214 at 12,219 (explaining that if the contractual obligations of an "all-requirements rural electric cooperative[]" were permitted "to override the obligation to purchase from qualifying facilities, these contractual devices might be used to hinder the development of cogeneration and small power production"). As a consequence, the Commission stated the "mandate of PURPA to encourage cogeneration and small power production requires that obligations to purchase under this provision supersede contractual restrictions on a utility's ability to obtain energy or capacity from a qualifying facility." Id.

FERC next noted that a non-generating utility always has the option of seeking a waiver "if compliance with the purchase obligation would impose a special hardship on an all-requirements customer." Id. Midland sought a waiver in this case, which if granted would have required CIPCO to purchase the excess energy generated by QFs in Midland's area. FERC, however, denied Midland's request for a waiver, and therefore Midland remains obligated to purchase energy from the Sweckers' windmill.

In the absence of a waiver, FERC offered another "out" to a non-generating all-requirements utility caught in this Catch 22 between its contractual obligations to its

supplier and its federal obligation to a QF under PURPA. That is where § 292.303(d) comes into play. As explained by FERC in Order No. 69, § 292.303(d) creates a situation where a QF can essentially bypass a non-generating utility middleman (such as Midland), and transmit its energy straight through to the supplying utility (such as CIPCO). This "out" permits the non-generating utility caught in the middle to satisfy its contractual obligations to its supplier, but also satisfies the requirements of PURPA by giving a QF an alternative purchaser of its excess energy.

The key, however, is that § 292.303(d) expressly requires the QF to consent to this alternative arrangement that relieves the non-generating utility from its federally-imposed purchase obligations. The regulation specifically states "[i]f a qualifying facility *agrees*, an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility [i.e., Midland] may transmit the energy or capacity to any other electric utility [i.e., Midland's supplier, CIPCO]." 18 C.F.R. § 292.303(d) (emphasis added). If such a transfer takes place, the regulation goes on to state that the "electric utility to which such energy or capacity is transmitted [i.e., CIPCO] shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility." Id.

There is no dispute that the Sweckers never consented to CIPCO purchasing their windmill's excess energy, and thus Midland still retains the obligation to purchase the Sweckers' excess energy pursuant to PURPA. Midland contends however, that irrespective of whether it retains the purchase obligation, or the purchase obligation has transferred to CIPCO, the avoided cost rate to use when paying the Sweckers is always CIPCO's avoided cost rate. In other words, the Sweckers must accept CIPCO's avoided cost rate if CIPCO becomes the purchaser, but the Sweckers must also accept CIPCO's avoided cost rate if Midland remains the purchaser.

Midland's position is inconsistent with Order No. 69 and § 292.303(d), and thus so is the Court's decision which adopts Midland's position. In Order No. 69, when explaining that the purchase obligation remains with the non-generating utility if a QF does not consent to the pass-through transmission to the supplying utility, FERC expressly gives examples where the QF may choose between the supplier's (i.e., CIPCO's) avoided cost rate or the non-generating utility's (i.e., Midland's) avoided cost rate. If, as Midland contends, the supplier's avoided cost rate is *always* applicable, there would have been no need for FERC to discuss situations where a QF might choose one over the other.

Order No. 69 expressly states: "There are several circumstances in which a qualifying facility might desire that the electric utility with which it is interconnected [i.e., Midland] not be the purchaser of the qualifying facility's energy and capacity, but would prefer instead that an electric utility with which the purchasing utility is interconnected [i.e., CIPCO] make such a purchase." 45 Fed Reg. 12,214 at 12,219. The Commission then sets forth an example where a non-generating utility's (Midland's) avoided cost rate may actually be *lower* than the supplying utility's (CIPCO's) avoided cost rate, such that it would be beneficial to the QF to consent to transmission directly to the supplier:

> If, for example, the purchasing utility is a non-generating utility, its avoided costs will be the price of bulk purchased power ordinarily based on the average embedded cost of capacity and average energy cost on its supplying utility's system.[9] As a result, the rate to the qualifying facility would be based on those average costs. If, however, the qualifying facility's output were purchased by the supplying utility, its output ordinarily will replace the highest cost energy on the supplying utility's system at that time, and its capacity might enable the supplying utility to avoid the addition of new capacity. Thus, *the avoided costs of the*

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[9]The amount of this cost (Midland's "price of bulked purchased power") is not clear in this record, but appears to be the correct amount to pay the Sweckers.

supplying utility may be higher than the avoided cost of the non-generating utility.

Id. (emphasis added).

The necessary and unavoidable implication of FERC's comparison between the supplying utility's avoided cost rate (CIPCO's), and the non-generating utility's avoided cost rate (Midland's), is that ***both*** avoided cost rates can apply. And it is equally clear from the detailed discussion set forth in Order No. 69 that the issue of which utilities' avoided cost rate applies is determined solely by the QF's consent. If Midland's position is correct, and an all-requirements non-generating utility was ***always*** entitled to use the supplying facility's avoided cost rate, there would have been no reason for FERC to have compared the two utilities' avoided cost rates in Order No. 69.

FERC goes on to state in Order No. 69 that "if the qualifying facility does not consent to transmission to another utility [CIPCO], the first utility [Midland] retains the purchase obligation." Id. at 12,220. When read in conjunction with the earlier comparison of the avoided costs rates of the non-generating utility and the supplying utility, the unavoidable conclusion is that the non-generating utility's (Midland's) avoided cost rate applies when the QF does not consent to the pass-through transmission to the supplier.

That is precisely the situation involved here. The Sweckers never consented to the transmission of their windmill's excess energy directly to CIPCO. As a consequence, Midland retains the purchase obligation. Therefore, it is Midland's avoided cost rate, not CIPCO's, which should be used when determining the amount to pay the Sweckers. The district court thus erred in dismissing the Sweckers' complaint.

As the Court itself notes, the rule FERC adopted in City of Longmont and Carolina Power was without reference to the consent provisions of § 292.303(d), or without addressing the relevant provisions set forth in Order No. 69 discussed herein. Thus, to the extent FERC has created a contrary rule whereby the supplying utility's avoided cost rate is always used when a non-generating utility has the initial purchase obligation, irrespective of whether or not a QF has consented to a pass-through transmission to a supplying utility, such a rule is not entitled to deference because it is plainly inconsistent with the controlling order and regulation.

II

I respectfully dissent.

Responses to Staff's 3rd Set of Data Requests

ATTACHMENT FOR DR 2#

RENEWABLE ENERGY STANDARD OFFER CONTRACT

Dated as of _____

Between

JEA

(Buyer)

and

Renewable Energy Qualified Facility

(REQF)

(Continued on Sheet No. 32.1)

(Continued from Sheet No. 32.0)

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RENEWABLE ENERGY STANDARD OFFER CONTRACT

THIS RENEWABLE ENERGY STANDARD OFFER CONTRACT (including all Appendices) hereinafter referred to as the "Contract", dated as of _____ ("Effective Date") is entered into between JEA, a body politic and corporate ("Buyer"), and _____ ("REQF"). Buyer and REQF are sometimes referred to herein individually as a "Party" and collectively as the "Parties".

WITNESSETH:

WHEREAS, the REQF desires to sell and Buyer desires to purchase electricity to be generated by the REQF consistent with Section 366.91, Florida Statutes, and

WHEREAS, the REQF has signed an interconnection agreement with the Buyer, or represents or warrants that it has entered into a valid and enforceable interconnection/transmission service ("Wheeling") agreement with the utility in whose service territory the Facility as defined below is to be located, pursuant to which the REQF assumes contractual responsibility to make any and all Wheeling-related arrangements (including control area services) between the REQF and the Wheeling utility, and all intermediate control areas and transmission owners, for delivery of the Facility's 's firm capacity and energy to Buyer; and

WHEREAS, the JEA Board has approved the form of this Standard Offer Contract for the Purchase of Firm Capacity and Energy from a Renewable Energy Qualifying Facility; and

WHEREAS, the REQF guarantees that the Facility is capable of delivering firm capacity and energy to BUYER for the term of this Contract in a manner consistent with the provisions of this Contract; and

WHEREAS, REQF will develop, construct, own and operate a renewable energy qualified facility located at _____ (the "Facility") with a maximum capacity of _____ KW; and

NOW, THEREFORE, in consideration of the mutual covenants and Contracts herein set forth, the Parties hereto agree as follows:

(Continued on Sheet No. 32.6)

(Continued from Sheet No. 32.5)

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions. As used in this Contract, the terms set forth below in this Section 1 shall have the respective meanings so set forth.

"Affected Party" has the meaning set forth in Section 19.1.

"Affiliate" means, when used with respect to any Person, any Person controlling, controlled by or under common control with such Person. For the purposes of this definition, the term "controlling" (and, with correlative meanings, the terms "controlled by" and "under common control with") shall mean (a) the possession of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities or by contract or agency or otherwise or (b) the power to exercise, directly or indirectly, more than fifty percent (50%) of the voting rights attributable to the shares of the controlled Person .

"Ancillary Services" means those services that are necessary to support the transmission of capacity and energy from resources to loads while maintaining reliable operation of the Interconnected Utility System in accordance with Good Utility Practice.

"Bankruptcy" means any case, action or proceeding under any bankruptcy, reorganization, debt arrangement, insolvency or receivership law or any dissolution or liquidation proceeding commenced by or against a Person and, if such case, action or proceeding is not commenced by such Person, such case or proceeding shall be consented to or acquiesced in by such Person or shall result in an order for relief.

"Bankruptcy Event" means with respect to a Party, an assignment by such Party for the benefit of creditors or the filing of a case in Bankruptcy or any proceeding under any other insolvency law under which such Party is debtor in bankruptcy.

"Business Day" means any day except a Saturday, Sunday, a Federal Reserve Bank holiday or NERC Holidays. A Business Day shall open at 8:00 a.m. and close at 5:00 p.m. local time for the relevant Party's principal place of business. The relevant Party, in each instance unless otherwise specified, shall be the Party from whom the notice, payment or delivery is being sent and by whom the notice or payment or delivery is to be received.

(Continued on Sheet No. 32.7)

(Continued from Sheet No. 32.6)

"Buyer Event of Default" has the meaning specified in Section 16.3.

"CCDD" means Contracted Capacity Delivery Date as defined in Section 6.5.1.

"Capacity Factor" means the total energy produced by the Facility during the period hours divided by the amount of energy the Facility would have produced if it had operated at maximum continuous rating during the Period Hours.

"Change in Law" means, after the Effective Date, the enactment, adoption, promulgation, modification or repeal or a material modification or change in the administrative or judicial application by any Governmental Agency of any applicable Requirement of Law.

"Confidential Information" has the meaning specified in Section 16.

"Contract Price" means the applicable price for Electric Energy stated in Section 10.

"Contract Year" means for each contract year, the period commencing on the CCDD (or anniversary thereof), and ending 365 days, 366 days in leap years, later through the expiration of the Term.

"Default Rate" means the one-month "LIBOR" as published from time to time in the "Money Rates" section of *The Wall Street Journal*, plus 4.5% (450 basis points) per annum.

"Dynamic Schedule" means a telemetered reading or value that is updated in real time and is used as a schedule in the Automatic Generation Control (AGC)/Area Control Error (ACE) equation and the integrated value of which is treated as a schedule for interchange accounting purposes.

"Dynamic Transfer" refers to methods by which the control response to loads or generation is assigned, on a real time basis, from the control area that is electrically connected to the control area that is not electrically connected. Dynamic Schedules and Pseudo Tie are two types of dynamic transfers.

(Continued on Sheet No. 32.8)

(Continued from Sheet No. 32.7)

"Effective Date" means the date of this Contract.

"Electric Energy" means electric energy output from the Facility delivered to Buyer at the Point of Delivery by REQF from and after the CCDD in accordance with the terms of this Contract.

"Emergency Condition" means an emergency condition or situation which (i) in the sole judgment of the REQF, Interconnected Utility, or Buyer presents an imminent physical threat of danger to life, or significant threat to health or property or (ii) in the sole judgment of the Interconnected Utility could cause a significant disruption on or significant damage to the Interconnected Utility's System (or any material portion thereof) or the transmission system of a third party (or any material portion thereof).

"Energy Rate" has the meaning set forth in Section 10.1.

"Environmental Attributes" means any and all credits, benefits, emission reductions, offsets, and allowances, howsoever entitled, resulting from the avoidance of the emission of any gas, chemical, or other substance to the air, soil, or water, which are deemed of value by Buyer. Environmental Attributes include but are not limited to: (1) any avoided emissions of pollutants to the air, soil or water such as (subject to the foregoing) sulfur oxides (SOx), nitrogen oxides (NOx), carbon monoxide (CO), and other pollutants; and (2) any avoided emissions of carbon dioxide (CO2), methane (CH4), and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change or other recognized environmental agency to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere. Environmental Attributes do not include Production Tax Credits or certain other financial incentives existing now or in the future associated with the construction or operation of the Facility.

(Continued on Sheet No. 32.9)

(Continued from Sheet No. 32.8)

"Environmental Impact" means any cost, damages, expense, liability, obligation or other responsibility arising from or under any Legal Requirement or occupational safety and health law, including those consisting of or relating to:

(a) any environmental, health or safety matter or condition (including on-site or off-site contamination, occupational safety and health and regulation of any chemical substance or product);

(b) any fine, penalty, judgment, award, settlement, legal or administrative proceeding, damages, loss, claim, demand or response, remedial or inspection cost or expense arising under any Legal Requirement or occupational safety and health law;

(c) financial responsibility under any Legal Requirement or occupational safety and health law for cleanup costs or corrective action, including any cleanup, removal, containment or other remediation or response actions ("Cleanup") required by any Legal Requirement or occupational safety and health law (whether or not such Cleanup has been required or requested by any Governmental Agency) and for any natural resource damages; or

(d) any other compliance, corrective or remedial required under any Legal Requirement or occupational safety and health law.

"Extension Term" has the meaning set forth in Section 3.1.

"Facility" means the [insert description of Facility]

"FERC" means the Federal Energy Regulatory Commission or its successor.

"Force Majeure Event" has the meaning set forth in Section 19.1.

"Force Majeure Period" means any period during which a Force Majeure Event affecting REQF occurs that precludes wholly or in part the capability of the Facility to deliver Electric Energy as required hereunder.

(Continued on Sheet No. 32.10)

(Continued from Sheet No. 32.9)

"Forced Outage" means an unplanned outage that requires either immediate removal of a unit from service, removal within six (6) hours or removal from service before the end of the next weekend as also defined by NERC.

"FRCC" means Florida Reliability Coordinating Council.

"Generation Interconnection Contract" means the generation interconnection Contract to be entered into separately between REQF and Buyer providing the construction and operation of the Interconnection Facilities at the Point Delivery.

"Good Utility Practice(s)" means any of the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather to be acceptable practices, methods, or acts generally accepted in the region.

"Government Agency" means any federal, state, local, territorial or municipal government, governmental department, commission, board, bureau, agency, instrumentality, judicial or administrative body (or any agency, instrumentality or political subdivision thereof), or any official of any such government agency, having jurisdiction over the Buyer, REQF, the Facility, or the Interconnected Utility.

"Governmental Approval" means any authorization, consent, ratification, waiver, registration, approval, license, ruling, permit, exemption, filing, variance, order, judgment, decree, publication, notice to, declarations of or with or regulation by or with, or issued, granted, or given by any Government Agency relating to the acquisition, ownership, occupation, construction, Commissioning, operation or maintenance of the Facility or to the execution, delivery or performance of this Contract..

(Continued on Sheet No. 32.11)

(Continued from Sheet No. 32.10)

"Governing Documents" means with respect to any particular entity: (a) if a corporation, the articles or certificate of incorporation and the bylaws; (b) if a general partnership, the partnership agreement and any statement of partnership; (c) if a limited partnership, the limited partnership agreement and the certificate of limited partnership; (d) if a limited liability company, the articles of organization and operating agreement; (e) if another type of person, any other charter or similar document adopted or filed in connection with the creation, formation or organization of the person; (f) as to any or all of the foregoing, as applicable, all equity holders' agreements, voting agreements, voting trust agreements, joint venture agreements, registration rights agreements or other agreements or documents relating to the organization, management or operation of any person or relating to the rights, duties and obligations of the equity holders of any person; and (g) any amendment or supplement to any of the foregoing.

"Green Tags" means (a) the Environmental Attributes associated with the energy generated from the Facility, together with (b) the Green Tag Reporting Rights associated with such energy and Environmental Attributes. One Green Tag represents the Environmental Attributes made available by the generation of 1 MWH from the facility.

"Hazardous Material" means any substance, material or waste which is or will foreseeably be regulated by any Governmental Agency, including any material, substance or waste which is defined as a "hazardous waste," "hazardous material," "hazardous substance," "extremely hazardous waste," "restricted hazardous waste," "contaminant," "toxic waste" or "toxic substance" under any provision of any Legal Requirement, and including petroleum, petroleum products, asbestos, presumed asbestos-containing material or asbestos-containing material, urea, formaldehyde and polychlorinated biphenyls.

"ISO" or "Independent System Operator" means any Person that becomes responsible as system operator for the Interconnected Utility System.

"Initial Term" has the meaning set forth in Section 3.1.

"Interconnection Facilities" means the interconnection facilities that will connect the Facility with the Interconnected Utility System, as more fully described in the Generation Interconnection Contract.

(Continued on Sheet No. 32.12)

(Continued from Sheet No. 32.11)

"Interconnected Utility" means Buyer or its successors and assigns; such assigns may include an ISO or any other entity operating a control area that includes the Interconnected Utility System.

"Interconnected Utility System" means the electric transmission and distribution system owned by Buyer, or their successors and assigns; such assigns may include assignment of operations to an ISO which shall then mean that Interconnected Utility System operated by such ISO.

"kW" means kilowatt.

"kWh" means kilowatt-hour.

"Knowledge" means that an individual will be deemed to have Knowledge of a particular fact or other matter if:

(a) that individual is actually aware of that fact or matter; or

(b) a prudent individual could be expected to discover or otherwise become aware of that fact or matter in the course of conducting a reasonably comprehensive investigation regarding the accuracy of any representation or warranty contained in this Contract.

A person (other than an individual) will be deemed to have Knowledge of a particular fact or other matter if any individual who is serving, or who has at any time served, as a director, officer, partner, executor or trustee of that person (or in any similar capacity) has, or at any time had, Knowledge of that fact or other matter (as set forth in (a) and (b) above), and any such individual (and any individual party to this Contract) will be deemed to have conducted a reasonably comprehensive investigation regarding the accuracy of the representations and warranties made herein by that person or individual.

"Legal Requirement" means any federal, state, local or municipal, law, ordinance, code, regulation, or statute.

(Continued on Sheet No. 32.13)

(Continued from Sheet No. 32.12)

"Lenders" means with respect to the REQF (a) any person or entity that, from time to time, has made loans to the REQF, its permitted successors or Permitted Assigns for the financing of the Facility or the marketing of the Electric Energy or which are secured by the Facility, (b) any holder of indebtedness of the REQF, (c) any person or entity acting on behalf of such holder(s) to which any holders' rights under financing documents have been transferred, any trustee or agent on behalf of any such holders, or (d) any Person who purchases the Facility in connection with a sale-leaseback or other lease arrangement in which the REQF is the lessee of the Facility pursuant to any form of lease arrangement.

"Liabilities" has the meaning set forth in Section 17.

"Licensed Professional Engineer" means a person acceptable to Buyer in its reasonable judgment who (a) is licensed to practice engineering in the state in which the Facility is located, in accordance with all Legal Requirements, (b) has training and experience in the engineering discipline(s) relevant to the matters with respect to which such person is called to provide a certification, evaluation, or opinion, (c) has no economic relationship, association or nexus with the REQF, (d) is not a representative of a consulting engineer, contractor, designer or other individual involved in the development of the Facility, or of a manufacturer or supplier of any equipment installed in the Facility, and (e) is licensed in an appropriate engineering discipline for the required certification being made. The engagement and payment of a Licensed Professional Engineer solely to provide the certifications, evaluations, and opinions required by this Contract shall not constitute a prohibited economic relationship, association or nexus with the REQF, so long as such engineer has no other economic relationship, association or nexus with the REQF.

"Maintenance Outage" means an outage that can be deferred beyond the end of the next weekend but requires that the unit be removed from service before the next planned outage as also defined by NERC.

"MW" means megawatt.

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"MWh" means megawatt-hour.

"Moody's" means Moody's Investors Service, or its successor.

"Maximum Continuous Rating" means the maximum capability of the Facility on a 24-hour basis, expressed in KW, when operated consistent with the manufacturer's recommended power factor and operating parameters, as set forth in Appendix A.

"NERC" means the North American Electric Reliability Council or its successor.

"NERC Holidays" means New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day, and other holidays observed by NERC.

"Net Output" means all energy produced by the Facility and delivered at the Point of Delivery.

"OEM" means the original equipment manufacturer.

"Permitted Assignee" means a Person having at least five (5) years experience in the operations and maintenance of electrical generation facilities similar to the Facility and having a level of creditworthiness equivalent to REQF and REQF Guarantors, which Person shall be reasonably acceptable to Buyer.

"Person" means any individual, firm, corporation, partnership, joint venture, limited liability company, association, joint stock company, trust, unincorporated organization, entity, or other enterprise, government or other political subdivision.

"Planned Outage, major" means an outage that is scheduled well in advance and is of a predetermined duration, lasts for more than a week and occurs only once or twice per year.

"Planned Outage, minor" means an outage that is scheduled well in advance and is of a predetermined duration, lasts for less than a week and occurs only once or twice per month.

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(Continued from Sheet No. 32.14)

"Point of Delivery" means, for Electric Energy delivered from the Facility, the point of which the Buyer takes receipt of the electric energy.

"Point of Interconnection" means, for Electric Energy, the point of REQF's electric connection to REQF's Interconnected Utility System. When REQF's facilities tie directly to Buyer then Point of Interconnection and Point of Delivery shall be the same.

"Production Tax Credits" means production tax credits under Section 45 of the Internal Revenue Code as in effect from time to time during the term of this Contract or any successor or other provision providing for a federal tax credit determined by reference to renewable electric energy produced from renewable resources and any correlative state tax credit determined by reference to renewable electric energy produced from renewable resources for which the Facility is eligible.

"Pseudo Tie" – means a telemetered reading or value that is updated in real time and is used as a tie flow in the AGC/ACE equation but for which no physical tie or energy metering actually exists. The integrated value is used as a metered MWh value for interchange accounting purposes.

"Reliability Council" means FRCC.

"Renewable Fuel" means, for the purposes of this Contract, hydrogen produced from sources other than fossil fuels, biomass as defined in Section 366.91 (2)(a), Florida Statutes, solar energy, geothermal energy, wind energy, ocean energy, hydroelectric power or waste heat from sulfuric acid manufacturing operations.

"Reporting Month" shall have the meaning given to that term in Section 9.6.

"Revenue Meter" means the meter which measures power flow into the main step up transformer at the Facility.

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(Continued from Sheet No. 32.15)

"REQF Event of Default" has the meaning specified in Section 15.1.

"Site" means the real property on which the Facility is located.

"Standard & Poor's" means Standard & Poor's Rating Services Group a division of McGraw-Hill, Inc. or its successor.

"Start-Up Testing" means the completion of required factory and start-up tests.

"Tax" means any income, gross receipts, license, payroll, employment, excise, severance, stamp, occupation, premium, property, environmental, windfall profit, customs, vehicle, airplane, boat, vessel or other title or registration, capital stock, franchise, employees' income withholding, foreign or domestic withholding, social security, unemployment, disability, real property, personal property, sales, use, transfer, value added, alternative, add-on minimum and other tax, fee, assessment, levy, tariff, charge or duty of any kind whatsoever and any interest, penalty, addition or additional amount thereon imposed, assessed or collected by or under the authority of any Government Agency or payable under any tax-sharing agreement or any other agreement.

"Term" has the meaning specified in Section 3.1.

"Test Energy" means Electric Energy output from the Facility delivered to Buyer from REQF during Start-Up Testing and before the CCDD in accordance with the terms of this Contract.

1.2 Interpretation. In this Contract, unless a clear contrary intention appears:

1.2.1 The singular number includes the plural number and vice versa;

1.2.2 Reference to any Person includes such Person's successors and assigns but, in the case of a Party, only if such successors and assigns are permitted by this Contract, and reference to a Person in a particular capacity excludes such Person in any other capacity or individually;

1.2.3 Reference to any gender includes each other gender;

(Continued on Sheet No. 32.17)

(Continued from Sheet No. 32.16)

1.2.4 Reference to any agreement (including this Contract), document, instrument or tariff means such agreement, contract, document, instrument or tariff as amended or modified and in effect from time to time in accordance with the terms thereof and, if applicable, the terms hereof;

1.2.5 Reference to any Legal Requirement means such Legal Requirement as amended, modified, codified or reenacted, in whole or in part, and in effect from time to time, including, if applicable, rules and regulations promulgated thereunder;

1.2.6 Reference to any Section or Appendix means such Section of this Contract or such Appendix to this Contract, as the case may be, and references in any Section or definition to any clause means such clause of such Section or definition;

1.2.7 "Hereunder", "hereof", "hereto" and words of similar import shall be deemed references to this Contract as a whole and not to any particular Section or other provision hereof or thereof;

1.2.8 "Including" (and with correlative meaning "include") means including without limiting the generality of any description preceding such term;

1.2.9 Relative to the determination of any period of time, "from" means "from and including", "to" means "to but excluding" and "through" means "through and including"; and

1.2.10 Reference to time shall always refer to prevailing Eastern Time, i.e., standard time or daylight time as applicable in Duval County, Florida.

1.3 Legal Representation of Parties. This Contract was negotiated by the Parties with the benefit of legal representation and any rule of construction or interpretation otherwise requiring this Contract to be construed or interpreted against any Party shall not apply to any construction or interpretation hereof or thereof.

1.4 Titles and Headings. Section and Appendix titles and headings in this Contract are inserted for convenience of reference only and are not intended to be a part of, or to affect the meaning or interpretation of, this Contract.

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(Continued from Sheet No. 32.17)

2. RENEWABLE ENERGY QUALIFYING FACILITY

2.1 Capacity, Power Factor and Location of Facility.

The REQF contemplates installing and operating a _____KVA _____generator located at _(hereinafter called the "Facility"). The generator is designed to produce a maximum of kilowatts (kW) of electric power at a 90% lagging to 90% leading power factor. The facility's location and generation capabilities are as described in the table below.

2.2 Technology and Generator Capabilities

TECHNOLOGY AND GENERATOR CAPABILITIES	
Location: Specific legal description (e.g., metes and bounds or other legal description with street address required)	City: County:
Generator Type (Induction or Synchronous)	
Type of Facility (Hydrogen produced from sources other than fossil fuels, biomass as defined in Section 366.91 (2)(a), Florida Statutes, solar energy, geothermal energy, wind energy, ocean energy, hydroelectric power or waste heat from sulfuric acid manufacturing operations)	
Technology	
Fuel Type and Source	
Generator Rating (KVA)	
Maximum Capability (kW)	
Minimum Load	
Peaking Capability	
Net Output (kW)	
Power Factor (%)	
Operating Voltage (kV)	
Peak Internal Load kW	

(a) The REQF's failure to complete the foregoing table in its entirety shall render this Contract null and void and of no further effect.

(b) The REQF represents and warrants that the sole source(s) of fuel or power used by the Facility, after the CCDD, to produce energy for sale to Buyer during the term of this Contract shall be such sources as are defined in and provided for pursuant to Sections 366.91(2)(a) and (b), Florida Statutes.

(Continued on Sheet No. 32.19)

(Continued from Sheet No. 32.18)

(c) The Parties agree and acknowledge that the REQF will not charge for and Buyer shall have no obligation to pay for any electrical energy produced by the Facility except from a fuel or power source as provided for in paragraph 2.2(b) above.

(d) The REQF shall annually, within thirty (30) days after the anniversary date of this Contract, deliver to Buyer at the address provided for in Section 24 a report certified by an officer of the REQF (i) stating the type and amount of each source of fuel or power used by the REQF to produce electrical energy during the twelve month period prior to the anniversary date (the "Contract Year"); and (ii) verifying that one hundred percent (100%) of all electrical energy sold by the REQF to Buyer during the Contract Year complies with Sections 2.2(b) and (c) of this contract.

(e) The REQF represents and warrants that the Facility meets the renewable energy requirements of Section 366.91, Florida Statutes, and that the REQF shall continue to meet the requirements of that Section throughout the term of this Contract. Buyer shall have the right at all times to inspect the Facility and to examine any books, records, or other documents of the REQF that Buyer deems necessary to verify that the Facility meets such requirements.

3. TERM AND SURVIVAL

3.1 Term. This Contract shall have a term (the "Term") commencing on the Effective Date and terminating ten years after the CCDD unless otherwise extended or terminated in accordance with the provisions of this Contract.

Notwithstanding the foregoing, if the CCDD of the Facility is not accomplished by the REQF before December 1, 2010 or such later date as may be permitted by Buyer pursuant to Section 6, Buyer's obligations under this Contract shall be rendered of no force and effect.

3.2 Survival. The provisions of Section 1 (Definitions and Interpretation), Sections 9.4 and 9.6 (Records), Section 11 (Limitation of Liability and Exclusive Remedies), Section 12 (Resolution of Disputes), Section 15 (Default, Termination and Remedies; Notice of Default), Section 17 (Indemnification), Section 16 (Confidentiality), Section 23 (Miscellaneous Provisions), and Section 25 (Entire Contract and Amendments) shall survive the termination of this Contract.

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(Continued from Sheet No. 32.19)

4. MINIMUM SPECIFICATIONS

4.1 Minimum Specifications. The following are minimum specifications pertaining to this Contract:

4.1.1. The avoided unit ("Avoided Unit") on which this Contract is based is an 82 MW simple-cycle combustion turbine unit.

4.1.2. The total Contracted Capacity needed to fully subscribe the Avoided Unit is 82 MW (the "Subscription Limit").

4.1.3 The maximum size of the REQF shall not be greater than 30 MW.

4.1.4. The date by which firm capacity and energy deliveries from the REQF to Buyer shall commence is December 1, 20__ (or such later date as may be permitted by Buyer pursuant to Section 6).

4.1.5. The period of time over which energy shall be delivered from the REQF to Buyer is the 10 year period beginning on the CCDD.

4.1.6. The following are the minimum performance standards for the delivery of firm capacity and energy by the REQF to qualify for full capacity payments under this Contract:

	All Hours
Annual Capacity Billing Factor	90%

* REQF Performance shall be as measured as described in the Compensation Section 10 and Appendix A.

5. SALE OF ELECTRICITY BY THE REQF

5.1 Sale of Electricity. Consistent with the terms of this Contract, the REQF shall sell to Buyer and Buyer shall purchase from the REQF all of the renewable electric power generated by the Facility. Buyer shall have the sole right to purchase all renewable energy and renewable capacity from the Facility. The purchase of electricity from the Buyer will be under a separate arrangement and will follow the Applicable JEA Electric Tariff.

(Continued on Sheet No. 32.21)

(Continued from Sheet No. 32.20)

5.2 Interruptible Standby Service. The REQF shall not rely on interruptible standby service for the start up requirements (initial or otherwise) of the Facility.

6. PROJECT IMPLEMENTATION AND ACHIEVEMENT OF CONTRACTED CAPACITY DELIVERY DATE

6.1 Development. REQF shall (a) use all commercially reasonable efforts to develop, engineer, procure, construct, and Commission the Facility, in accordance with all Legal Requirements and Good Utility Practice, and (b) apply for and obtain all Governmental Approvals and all renewals thereof as are required for REQF to perform its obligations under this Contract, including environmental permits.

6.2 Construction. REQF shall complete, or cause the completion of, the design, construction, installation, and Commissioning of the Facility in a manner consistent with Good Utility Practices.

6.3 Project Management. If requested by Buyer, the REQF shall submit to Buyer its integrated project schedule for Buyer's review within sixty calendar days within the Effective Date of this Contract and a start-up and test schedule for the Facility at least sixty calendar days prior to start-up and testing of the Facility. These schedules shall identify key licensing, permitting, construction and operating milestone dates and activities.

6.4 Status Report. If requested by Buyer, the REQF shall submit progress reports in a form satisfactory to Buyer every month until the CCDD and shall notify Buyer of any changes in such schedules within ten calendar days after such changes are determined. Buyer shall have the right to monitor the construction, start-up, and testing of the Facility, either on-site or off-site. Buyer's technical review and inspections of the Facility and resulting requests, if any, shall not be construed as endorsing the design thereof or as any warranty as to the safety, durability or reliability of the Facility.

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6.5 Contracted Capacity/Capacity Delivery Date.

6.5.1 The REQF commits to sell renewable capacity to Buyer, the amount of which shall be determined in accordance with this Section 6 (the "Contracted Capacity"). Subject to Section 6.5.3, the Contracted Capacity is set at ___ kW, with an expected CCDD of December 1, 20__.

6.5.2 Testing of the capacity of the Facility (each such test, a "Contracted Capacity Test") shall be performed in accordance with the procedures set forth in Section 6.6. The Demonstration Period for the first Contracted Capacity Test shall commence no earlier than December 1, 20__ and testing must be completed by 11:59 p.m., November 30, 20__. The first Contracted Capacity Test shall not be successfully completed unless the Facility demonstrates a Capacity of at least one hundred percent (100%) of the Contracted Capacity set forth in Section 6.5.1. Subject to Section 6.6 the REQF may schedule and perform up to three (3) Contracted Capacity Tests to satisfy the requirements of the Contract with respect to the first Contracted Capacity Test.

6.5.3 In addition to the first Contracted Capacity Test, Buyer shall have the right to require the REQF. by notice thereto, to validate the Contracted Capacity by means of a Contracted Capacity Test at any time, up to six (6) times per year, the results of which shall be provided to Buyer within seven (7) days of the conclusion of such test. On and after the date of such requested Contracted Capacity Test, and until the completion of a subsequent Contracted Capacity Test, the Contracted Capacity shall be set at the lower of the Capacity tested or the Contracted Capacity as set forth in Section 6.5.1.

6.5.4 Notwithstanding anything to the contrary herein, the Contracted Capacity may not exceed the amount set forth in Section 6.5.1 without the consent of Buyer, to be granted in Buyer's sole discretion.

6.5.5 The CCDD shall be defined as the first calendar day immediately following the date of the Facility's successful completion of the first Contracted Capacity Test.

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6.5.6 In no event shall Buyer make capacity payments to the REQF prior to December 1, 20__.

6.5.7 The REQF shall be entitled to receive capacity payments beginning on December 1, 20__ (or such later date permitted by Buyer pursuant to the following sentence). If the CCDD does not occur on or before December 1, 20__, Buyer shall immediately be entitled to draw down the Completion/Performance security in full, and in addition, Buyer may, but shall not be obligated to, allow the REQF up to an additional five (5) months to achieve the CCDD. If the REQF fails to achieve the CCDD either (1) by December 1, 20__ or (ii) by such later date as permitted by Buyer, Buyer shall have no obligation to make any capacity payments under this Contract and this Contract shall be rendered null and void and of no further effect.

6.6. Testing Procedures.

6.6.1 The Contracted Capacity Test must be completed successfully within a sixty-hour period (the "Demonstration Period"), which period, including the approximate start time of the Contracted Capacity Test, shall be selected and scheduled by the REQF by means of a written notice to Buyer delivered at least thirty (30) days prior to the start of such period. The provisions of the foregoing sentence shall not apply to any Contracted Capacity Test ordered by Buyer under any of the other provisions of this Contract. Buyer shall have the right to be present onsite to monitor any Contracted Capacity Test required or permitted under this Contract.

6.6.2 Contracted Capacity Test results shall be based on a test period of twenty-four (24) consecutive hours (the "Contracted Capacity Test Period") at the highest sustained net kW rating at which the Facility can operate without exceeding the design operating conditions, temperature, pressures, and other parameters defined by the applicable manufacturer(s) for steady state operations at the Facility. The Contracted Capacity Test shall be conducted utilizing as the sole fuel source renewable fuels or energy sources included in the definition in Section 366.91, Florida Statutes. The Contracted Capacity Test Period shall commence at the time designated by the REQF pursuant to Section 6.6.1 or at such time requested by Buyer pursuant to Section 6.5.3; provided, however, that the Contracted Capacity Test Period may commence earlier than such time in the event that Buyer is notified of, and consents to, such earlier time.

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6.6.3 Normal station service use of unit auxiliaries, including, without limitation, cooling towers, heat exchangers, and other equipment required by law, shall be in service during the Contracted Capacity Test Period. Normal deliveries of the contracted quantity and quality of cogenerated steam to the steam host, if any, shall be required during the Contracted Capacity Test Period.

6.6.4 The Capacity of the Facility (the "Capacity') shall be the average net capacity (generator output minus auxiliary) measured over the Contracted Capacity Test Period.

6.6.5 The Contracted Capacity Test shall be performed according to standard industry testing procedures for the appropriate technology of the REQF.

6.6.6 Except as otherwise provided herein, results of any Contracted Capacity Test shall be submitted to Buyer by the REQF within seven (7) days of the conclusion of the Contracted Capacity Test.

7. ELECTRIC ENERGY DELIVERY

7.1 Delivery of Electric Energy. Subject to the terms and conditions of this Contract, REQF shall sell, make available and deliver at the Point of Delivery and Buyer shall receive and purchase from REQF at the Point of Delivery, all Electric Energy tendered by REQF. All Electric Energy shall be measured by the Revenue Meter located at the Point of Interconnection.

7.2 Delivery of Test Energy. Subject to the terms and conditions of this Contract, REQF shall sell, make available and deliver at the Point of Delivery and Buyer shall receive and purchase from REQF at the Point of Delivery, all Test Energy tendered by REQF prior to the CCDD of the Facility.

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7.3 Point of Sale. Title and Risk of Loss. The point where sale of Electric Energy and associated Environmental Attributes will take place is at the Point of Delivery, free and clear of all liens, claims and encumbrances. Title to and risk of loss with respect to such Electric Energy and associated Environmental Attributes shall transfer from REQF to Buyer upon delivery of such Electric Energy at the Point of Delivery. Buyer shall be responsible for any transmission beyond the Point of Delivery. REQF shall be deemed to be in exclusive control of, and responsible for, any damage or injury caused by the Electric Energy up to and at the Point of Delivery. Buyer shall be deemed to be in exclusive control of, and responsible for, any damages or injury caused by, the Electric Energy from the Point of Delivery.

7.4 Dispatch and Control

7.4.1 Power supplied by the REQF hereunder shall be in the form of three-phase 60 Hertz alternating current, at a nominal operating voltage of ,000 volts (kV) and power factor dispatchable and controllable in the range of 90% lagging to 90% leading as measured at the interconnection point to maintain system operating parameters, as specified by Buyer.

7.4.2 The REQF shall operate the Facility with all system protective equipment in service whenever the Facility is connected to, or is operated in parallel with, Buyer's system, except for normal testing and repair in accordance with Good Utility Practices. The REQF shall provide adequate system protection and control devices to ensure safe and protected operation of all energized equipment during normal testing and repair. The REQF shall have qualified personnel test and calibrate all protective equipment at regular intervals in accordance with Good Utility Practices. A unit functional trip test shall be performed after each overhaul of the Facility's turbine, generator or boilers and the results shall be provided to Buyer prior to returning the equipment to service. The specifics of the unit functional trip test will be consistent with Good Utility Practices.

(Continued on Sheet No. 32.26)

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7.4.3 If the Facility is separated from the Buyer system for any reason, under no circumstances shall the REQF reconnect the Facility into Buyer's system without first obtaining Buyer's specific approval.

7.4.4 During the term of this Contract, the REQF shall employ qualified personnel for managing, operating and maintaining the Facility and for coordinating such with Buyer. The REQF shall ensure that operating personnel are on duty at all times, twenty-four hours a calendar day and seven calendar days a week. Additionally, during the term of this Contract, the REQF shall operate and maintain the Facility in such a manner as to ensure compliance with its obligations hereunder and in accordance with applicable law and prudent utility practices.

7.4.5 After providing notice to the REQF, Buyer shall not be required to accept or purchase energy from the REQF during any period in which, due to operational circumstances, acceptance or purchase of such energy would result in Buyer's incurring costs greater than those which it would incur if it did not make such purchases. An example of such an occurrence would be a period during which the load being served is such that the generating units on line are base load units operating at their minimum continuous ratings and the purchase of additional energy would require taking a base load unit off the line and replacing the remaining load served by that unit with peaking-type generation. Buyer shall give the REQF as much prior notice as practicable of its intent not to accept energy pursuant to this Section.

7.4.6 If the Facility has a contracted capacity of 25 MW or greater as defined by Section 6.5, Buyer may, at any time during the term hereof, by oral, written, or electronic notification to the REQF, request the REQF to deliver capacity and associated energy up to the full Contracted Capacity to meet Buyer's system requirements. The REQF shall comply with such request within ten (10) minutes of receiving such notification from Buyer. Any clock hour for which Buyer requests the delivery of such capacity and energy ("Scheduled Energy") shall be referred to herein as a "Dispatch Hour."

(Continued on Sheet No. 32.27)

(Continued from Sheet No. 32.26)

7.4.7 If the Facility has a Contracted Capacity as defined in Section 6.5 greater than or equal to 25 MW, the REQF shall operate the facility subject to dispatch and control rights of Buyer. Control of the Facility will either be by Seller's manual control under the direction of Buyer (whether orally or in writing) or by Automatic Generation Control by Buyer's system control center as determined by Buyer. Buyer may at times request that the real power output be equal to the Peaking Capability of the Facility but shall not require the real power output of the facility to be below the Facility's Minimum Load without decommitting the Facility. Buyer's exercise of its rights under this Section 7.4.7 shall not give rise to any liability on the part of Buyer, including any claim for breach of contract or for breach of any covenant of good faith and fair dealing.

7.5 Communications. The Parties will develop mutually acceptable procedures for communications between REQF's control room and Buyer's system operations center.

7.6 Remote SCADA Monitoring. REQF shall furnish data communication ports and associated cabinetry on its SCADA ("Supervisory Control and Data Acquisition") control system(s) such that Buyer may remotely monitor (read only) selected operating data. Buyer shall be responsible for all data communication equipment from the data communications port interface to the point of remote monitoring, including the cost of equipment purchase, installation, operations, maintenance and upkeep. REQF shall furnish or shall cause to be furnished in a timely fashion the necessary interface protocol requirements and specifications of its control system such that Buyer may specify its compatible equipment. REQF shall have the right and opportunity to review and approve the specification of the first interface and protective devices of the Buyer to assure that such devices are compatible with and shall not interfere with REQF's control system(s), and such approval shall not be unreasonably withheld. The data to be sampled, transmitted, and monitored shall include everything that is essential to Buyer's Dispatch of Buyer's own generating pool.

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7.7 Emergency Conditions. During an Emergency Condition, REQF may increase, reduce, curtail or interrupt electrical generation at the Facility in accordance with Good Utility Practices or take other appropriate action in accordance with the applicable provisions of the Generation Interconnection Contract which in the reasonable judgment of the Interconnected Utility may be necessary to operate, maintain and protect the Interconnected Utility System during an Emergency Condition or in the reasonable judgment of REQF may be necessary to operate, maintain and protect the Facility during an Emergency Condition.

7.8 Rights to Renewable Energy Green Attributes. The REQF hereby certifies that the Electric Energy being sold by the REQF to the Buyer is being generated from a Renewable Fuel source ("Green Electricity"). REQF agrees that the Buyer shall receive any and all Environmental Attributes of the Green Electricity being purchased pursuant to this Contract by purchase of the Electric Energy, including, but not limited to, any Green Tags, carbon dioxide credits, renewable energy credits or other similar rights or benefits attributable to Green Electricity. Buyer's receipt of Green Tags is limited to those above and beyond those required by the Facility to meet current or future environmental law, regulations or permit requirements of any jurisdictional governmental agency. REQF shall have the right to reclaim and use any Environmental Attributes or Green Tags it finds necessary exclusively for this Facility, in its sole judgment, for complying with any current or future change in environmental law, regulation or permit of any jurisdictional Government Agency.

8. METERING; BILLING; PAYMENT

8.1 Metering Electricity. All Electric Energy delivered by REQF to Buyer from the Facility under this Contract shall be metered by the Revenue Meters at the Point of Delivery at the REQF's System and the readings of such Revenue Meters shall be made in accordance with Good Utility Practice consistently applied. REQF and Buyer will maintain the Revenue Meters according to Good Utility Practice and all Legal Requirements.

The Buyer will provide the actual Revenue Meter which will be installed by the Buyer into the panel provided by the REQF, but owned, operated and maintained exclusively by the Buyer. The REQF is required to provide open access to the Revenue Meter and associated telemetry.

(Continued on Sheet No. 32.29)

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All recurring telecommunications service charges for the Revenue Meter shall be contracted for and provided by the Buyer, except that any physical facilities (including phone line installation charges) shall be the responsibility of the REQF.

8.1.1 Meter Testing. The Revenue Meters shall be tested by the Buyer at least once each year at Buyer's expense and at any other reasonable time upon request by either Party, at the requesting Party's expense. Buyer shall give REQF at least fourteen (14) days notice of any testing of the Revenue Meters, REQF shall have the right to be present during all testing and shall be furnished all testing results on a timely basis.

8.1.2 Inaccurate Meters. If testing of the Revenue Meters indicates that an inaccuracy of more than ±0.5% in measurement of Electric Energy has occurred, the affected Revenue Meter shall be re-calibrated promptly to register accurately within the Revenue Meter manufacturer stated tolerances. Each Party shall comply with any reasonable request of the other concerning the sealing of meters, the presence of a representative of the other Party when the seals are broken and the tests are made, and other matters affecting the accuracy of the measurement of Electric Energy. If either Party believes that there has been a meter failure or stoppage, it shall immediately notify the other Party.

8.1.3 Failed Meters. If, for any reason, any Revenue Meter is out of service or out of repair so that the amount of Electric Energy delivered cannot be ascertained or computed from the readings thereof, the Electric Energy delivered during the period of such outage shall be computed from the Backup Meter owned by the REQF and agreed upon by the Parties hereto upon the basis of the best data available, and any failure to agree shall be subject to resolution in accordance with Section 12.

8.2 Adjustment for Inaccurate Meters. If a Revenue Meter fails to register, or if the measurement made by a Revenue Meter is found upon testing to be inaccurate by more than ± 0.5% in measurement, an adjustment shall be made correcting all measurements by the inaccurate or defective Revenue Meter for both the amount of the inaccuracy and the period of inaccuracy, in the following manner:

(Continued on Sheet No. 32.30)

(Continued from Sheet No. 32.29)

8.2.1 As may be mutually agreed upon by the Parties in writing, or

8.2.2 In the event that the Parties cannot agree on the amount of the adjustment necessary to correct the measurements made by any inaccurate or defective Revenue Meter, the Parties shall use REQF's backup metering to determine the amount of such inaccuracy. REQF's backup metering shall be tested and maintained in accordance with the provisions of Section 8.1. In the event that REQF's backup metering also is found to be inaccurate by more than the allowable limits set forth in Section 8.2, the Parties shall mutually agree to estimate the amount of the necessary adjustment on the basis of deliveries of Electric Energy during periods of similar operating conditions when the Revenue Meter was registering accurately.

8.2.3 In the event that the Parties cannot agree on the actual period during which the Revenue Meter(s) made inaccurate measurements, the period during which the measurements are to be adjusted shall be the shorter of (a) the last one-half of the period from the last previous test of the Revenue Meter to the test that found the Revenue Meter to be defective or inaccurate, or (b) the one hundred eighty (180) days immediately preceding the test that found the Revenue Meter to be defective or inaccurate.

8.2.4 In the event that the Parties cannot agree to the adjustment per Section 8.2.1, 8.2.2 and 8.2.3, then the dispute will be resolved in accordance with Section 12 of this Contract.

8.2.5 To the extent that the adjustment period covers a period of deliveries for which payment has already been made by Buyer, REQF shall use the corrected measurements as determined in accordance with Sections 8.2.1, 8.2.2, or 8.2.3 hereof to re-compute the amount due for the period of inaccuracy and shall subtract the previous payments by Buyer for this period from such re-computed amount. If the difference is a positive number, the difference shall be paid by Buyer to REQF; if the difference is a negative number, that difference shall be either paid by REQF to Buyer directly or paid in the form of an offset to payments due REQF by Buyer hereunder at Buyer's sole option. Adjustment of such difference by the owing Party shall be made not later than thirty (30) days after the owing Party receives notice of the amount due, unless Buyer elects payment via an offset.

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8.3 Billing. Within ten (10) days after the last day of each month during the Term, REQF shall render a statement to Buyer for the amounts due in respect of such month under Section 7, which statement shall contain reasonable detail, in Buyer's reasonable opinion, showing the manner in which the applicable charges were determined.

8.4 Payments. The amount due to REQF as shown on any monthly statement rendered by REQF pursuant to Section 8.3 shall be paid by Buyer by electronic wire transfer to an account specified by REQF within thirty (30) days after the date such statement is received by Buyer. Any amount not paid by Buyer when due shall bear interest at the Default Rate from the date that the payment was due until the date payment by Buyer is made.

8.5 Offsets. Amounts due to Buyer as a result of Fuel Offsets as set out in Section 9.1.2 shall be offset against current and future payments due from Buyer with interest accrued daily at the Default Rate until fully offset or paid.

8.6 Billing Disputes. If either Party, in good faith, disputes any amounts due pursuant to an invoice rendered pursuant to this Contract, such Party shall notify the other Party of the specific basis for the dispute and, if the invoice shows an amount due, shall pay that portion of the statement that is undisputed, on or before the due date. Any such notice shall be provided within 12 months of the date of the invoice in which the error first occurred. If any amount disputed by such Party is determined to be due to the other Party, or if the Parties resolve the payment dispute, the amount due shall be paid within 30 days of such determination or resolution, along with interest accrued at the Default Rate from the date due until the date paid.

8.7 Examination of Records. Each Party (and its representative(s)) has the right, at its sole expense, upon reasonable notice and during normal working hours, to have an independent third party examine the records of the other Party to the extent reasonably necessary to verify the accuracy of any statement, charge or computation relating to the output of Electric Energy. If requested, a Party shall provide to the other Party statements evidencing the amounts of Electric Energy delivered at the Point of Delivery.

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9. OPERATION AND MAINTENANCE OF THE FACILITY

9.1 Standard of Operation

9.1.1 Operation and Maintenance. REQF shall manage, control, operate and maintain the Facility in a manner consistent with Good Utility Practice, in accordance with (a) the practices, methods, acts, guidelines, standards and criteria of FRCC, NERC, the ISO and any successors to the functions thereof; (b) the requirements of the Generation Interconnection Contract; and (c) all applicable Legal Requirements and (d) permits.

9.1.2 Fuel Arrangements. REQF shall obtain and maintain fuel supply and transportation arrangements in a manner consistent with Good Utility Practice and all legal requirements.

9.2 Permits and Licenses. REQF will obtain and maintain all certifications, permits, licenses and Governmental Approvals necessary to operate and maintain the Facility and to perform its obligations under this Contract during the Term and required pursuant to any and all Legal Requirements.

9.3 Scheduled Maintenance. Buyer understands that REQF shall shut down the Facility for maintenance as conditions require. The Parties shall mutually agree to an annual schedule of all scheduled maintenance that results in a curtailment of Buyer's Contracted Capacity. This schedule shall be established by the parties on or before October 5 of each year the Contract is in force for the next calendar year. REQF shall also notify Buyer immediately of any changes to the annual maintenance schedule. To the extent possible, Buyer and REQF shall coordinate maintenance outages to off-peak periods of the year.

9.3.1 Major Planned Outages – There shall be no Planned Outages during any portion of the months of December, January, February or June, July, August, or September.

9.3.2 Minor Planned Outages – REQF will notify Buyer when the Facility is down for preventative maintenance and the expected duration of the Outage.

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9.3.3 Maintenance Outages – Whenever REQF reasonably determines that it is necessary to schedule a Maintenance Outage, REQF shall notify Buyer of the proposed Maintenance Outage at least five (5) days before the outage begins. Upon such notice, the Parties shall plan the Maintenance Outage to mutually accommodate the reasonable requirements of REQF and the service obligations of Buyer; provided, however, that unless Buyer otherwise reasonably consents no Maintenance Outages may be scheduled between the hour ending 0700 through the hour ending 2200, Monday through Friday, during the months of December, January, February, June, July, August and September. Notice of a proposed Maintenance Outage shall include the expected start date of the Maintenance Outage, the amount of generation capability of the Facility that will not be available, and the expected completion date of the Maintenance Outage. REQF shall give Buyer notice of the Maintenance Outage as soon as the REQF determines that the Maintenance Outage is necessary. Buyer shall promptly respond to such notice and may request reasonable modifications in the schedule for the Maintenance Outage. REQF shall use all reasonable efforts to comply with any request to modify the schedule for a Maintenance Outage. REQF shall immediately notify Buyer of any subsequent change in the Maintenance Outage completion date. As soon as practicable, any notifications given orally shall be confirmed in writing. REQF shall take all reasonable measures and exercise its best efforts to minimize the frequency and duration of Maintenance Outages.

9.3.4 Forced Outages – REQF shall promptly provide to Buyer an oral report of any Forced Outage to the Facility. This report shall include the amount of the generation capability of the Facility that will not be available because of the Forced Outage and the expected return date of the generation capability. REQF shall promptly update the report as necessary to advise Buyer of changed circumstances.

9.3.5 Notice of Deratings and Outages – Without limiting the foregoing, REQF will inform Buyer of any major limitations, restrictions, deratings or outages known to REQF affecting the Facility for the following day and will promptly update REQF's notice to the extent of any material changes in this information, with "major" defined as affecting more than ten percent (10%) of the Nameplate Capability Rating of the Facility.

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9.3.6 Scheduling – Cooperation and Standards – To the extent that scheduling is required now or in the future, (a) REQF will reasonably cooperate with Buyer with respect to the scheduling of output and (b) each Party shall designate authorized representatives to communicate with regard to scheduling and related matters arising under this Contract. Each Party shall comply with the applicable standards and criteria of FERC, NERC, and or any regional or subregional reliability council.

9.4 Records. Each Party shall keep and maintain all records as may be necessary or useful in performing or verifying any calculations made pursuant to this Contract, or in verifying such Party's performance hereunder. All such records shall be retained by each Party for at least six (6) calendar years following the calendar year in which such records were created. Each Party shall make such records available to the other Party for inspection and copying at the other Party's expense, upon reasonable notice during such Party's regular business hours. Each Party shall have the right, upon thirty days written notice prior to the end of an applicable six (6) calendar year period to request copies of such records. Each Party shall provide such copies, at the other Party's expense, within thirty (30) days of receipt of such notice or shall make such records available to the other Party in accordance with the foregoing provisions of this Section 9.4.

9.5 Access Rights. Upon reasonable prior notice and subject to the safety rules and regulations of REQF, REQF shall provide Buyer and its authorized agents, employees and inspectors with reasonable access to the Facility: (a) for the purpose of reading or testing metering equipment, (b) as necessary to witness any required generation capability tests necessary to determine the amount of generation capability associated with the Facility, (c) in connection with the operation and maintenance of the Interconnection Facilities for the Facility, (d) to provide tours of the Facility to customers and other guests of Buyer (not more than 12 times per year), (e) for purposes of implementing Section 8.7 (Examination of Records), and (f) for other reasonable purposes at the reasonable request of Buyer.

9.6 Reports. REQF shall furnish to Buyer the following reports:

(a) In accordance with Section 6.4, REQF will provide a status report each month starting 30 days after the Effective Date.

(b) In accordance with Section 9.3, REQF will provide a maintenance schedule on or before October 5 of each year the Contract is in effect.

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(c) Within ten (10) working days after the end of each calendar month during the Term (a "Reporting Month") and after the CCDD, REQF shall provide to Buyer a report in electronic format which includes:1) the Facility's total net energy output (in MWH), 2) the number of hours of outages, amount of duration, amount of unavailability due to transmission or Buyer's constraints and other data necessary to calculate the Availability Factor, 3) total heat input of renewable and non-renewable fuel used, 4) summary of any other significant events related to the operation of Facility for the Reporting Month and 5) any change in the Facility or its operations which would reasonably be expected to negatively impact the Buyer's right to or use of the Environmental Attributes or Green Tags.

10. COMPENSATION

10.1 Energy Rate. Buyer agrees to pay the REQF for renewable energy produced by the Facility and delivered to Buyer in accordance with the rates and procedures contained in Appendix A, as it may be amended and approved from time to time by Buyer.

10.2 Capacity. Buyer agrees to pay the REQF for the renewable capacity described in Section 6.5 in accordance with the rates and procedures contained in Appendix A, as it may be amended and approved from time to time by the Buyer.

10.3 Rates Not Subject to Review. The rates for service specified herein (i.e., delivery of Electric Energy) shall remain in effect for the Term, and shall not be subject to change through application to the FERC pursuant to provisions of Section 205 et seq. of the Federal Power Act, absent Contract of the Parties.

10.4 Costs and Charges for Ownership and Operation. Without limiting the generality of any other provision of this Contract, REQF shall be solely responsible for paying when due: (a) all costs, fees and charges of owning and operating the Facility in compliance with all existing and future Legal Requirements and regulations and the terms and conditions of this Contract, and (b) all Taxes and charges (however characterized) now existing or hereinafter imposed on or with respect to the Facility, its operation, or on or with respect to emissions or other environmental impacts of the Facility.

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11. LIMITATION OF LIABILITY AND EXCLUSIVE REMEDIES

11.1 CONSEQUENTIAL DAMAGES. TO THE EXTENT ALLOWABLE BY APPLICABLE FLORIDA LAW, IN NO EVENT OR UNDER ANY CIRCUMSTANCES SHALL EITHER PARTY OR ITS AFFILIATES , OR THE DIRECTORS, OFFICERS, EMPLOYEES OR AGENTS OF SUCH PARTY OR AFFILIATES BE LIABLE TO THE OTHER PARTY.FOR ANY SPECIAL, INCIDENTAL, EXEMPLARY, INDIRECT, PUNITIVE OR CONSEQUENTIAL DAMAGES OR DAMAGES IN THE NATURE OF LOST PROFITS, WHETHER SUCH LOSS IS BASED ON CONTRACT, WARRANTY OR TORT. A PARTY'S LIABILITY UNDER THIS CONTRACT SHALL BE LIMITED TO DIRECT, ACTUAL DAMAGES.

12. RESOLUTION OF DISPUTES

12.1 Negotiations. The Parties shall attempt in good faith to resolve all disputes promptly by negotiation, as follows. Any Party may give the other Party written notice of any dispute not resolved in the normal course of business. If the matter has not been resolved within thirty (30) days, either Party may initiate litigation as provided hereinafter. If a Party intends to be accompanied at a meeting by an attorney, the other Party shall be given at least three (3) Business Days' notice of such intention and may also be accompanied by an attorney. Subject to Florida's Public Records Law, Chapter 119, Florida Statutes, and Florida Sunshine Law, Section 286.011, Florida Statutes, all negotiations pursuant to this clause shall be confidential.

12.2 Choice of Forum. Each of REQF and Buyer consents and agrees that any legal action or proceeding arising out of this Contract or the actions of the parties hereto leading up to the Contract shall be brought exclusively in the courts of competent jurisdiction located in Jacksonville, Duval County, Florida.

12.3 Costs. Each party shall bear its own fees and expenses, including attorney's fees, with respect to the litigation and any proceeding related thereto and the parties shall share equally the fees and expenses of the American Arbitration Association and the arbitrators.

(Continued on Sheet No. 32.37)

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12.4 Settlement Discussions. The Parties agree that no statements of position or offers of settlement made in the course of the negotiations described in this Section 12 will be offered into evidence for any purpose in any litigation between the Parties, nor will any such statements or offers of settlement be used in any manner against either Party in any such litigation. Further, no such statements or offers of settlement shall constitute an admission or waiver of rights by either Party in connection with any such litigation. At the request of either Party, any such statements and offers of settlement, and all copies thereof, shall be promptly returned to the Party providing the same.

12.5 Obligations to Pay Charges and Perform. If a dispute regarding this Contract arises on any matter which is not resolved as provided in Section 12.1 above, then, REQF shall continue to perform its obligations hereunder including its obligations to operate the Facility in a manner consistent with the applicable provisions of this Contract and Buyer shall continue to pay all charges and perform all other obligations required in accordance with the applicable provisions of this Contract.

13. ASSIGNMENT AND PROJECT FINANCING

13.1 Assignment. Except as set forth in this Section 13, neither Party may assign its rights or obligations under this Contract without the prior written consent of the other Party and such consent shall not be unreasonably withheld. Either Party may assign this Contract, with the consent of the other Party, to an Affiliate or the parent company of an Affiliate, but no such assignment shall release such assignor from any obligations hereunder whether arising before or after such assignment. REQF shall provide a copy of the Assignment Document to the Buyer as part of this Contract. Any other assignments shall not be approved without the written consent of the other Party.

13.2 Consent to Assignment to Lender. Notwithstanding the foregoing, either Party may, without the need for consent but upon notice to the other Party, transfer, sell, pledge, or encumber the accounts, revenues or proceeds hereof in connection with any financing or other financial arrangements necessary for REQF's operation of the Facility in each and every assignment of this Contract. The assignee shall (i) agree in writing to be bound by the terms and conditions hereof, (ii) possess the same or similar experience, and possess the same or better credit worthiness as the assignor. The assignor shall remain liable for its obligations hereunder.

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13.3 Assignments Not in Accordance Herewith. Any assignment of any interest in the Facility or in this Contract made without fulfilling the requirements of this Section 11 shall be null and void and shall constitute an Event of Default.

14. COMPLETION/PERFORMANCE SECURITY

14.1 As security for the achievement of the CCDD and satisfactory performance of its obligations hereunder, the REQF shall provide Buyer either: (a) an unconditional, irrevocable, direct-pay letter(s) of credit in effect through the completion of theTerm of the contract, issued by a financial institution(s) having an investment grade credit rating of at least AA- or its equivalent by at least two of the three nationally recognized credit reporting agencies of Fitch, Moody's and Standard and Poors, in form and substance acceptable to Buyer (including provisions (i) permitting partial and full draws and (ii) permitting Buyer to draw in full if such letter of credit is not renewed or replaced as required by the terms hereof at least ten (10) business days prior to its expiration date); (b) a bond issued by a financially sound company in form and substance acceptable to Buyer; or (c) a cash deposit(s) with Buyer. Such letter(s) of credit or cash deposit (a) shall be provided in the amount and by the date listed below:

$30.00 per kW (for the number of kW set forth in Section 6.5.1) within thirty (30) calendar days of the execution of this Contract by the Parties hereto.

14.2 The specific security instrument provided for purposes of this Contract is:

( ) unconditional, irrevocable, direct pay letter(s) of credit.
( ) Bond.
( ) cash deposit(s) with Buyer.

14.3 Buyer shall have the right to monitor the financial condition of the issuer(s) in the event any letter of credit is provided by the REQF. In the event the senior debt rating of any issuer(s) has deteriorated to a level below investment grade A, Buyer may require the REQF to replace the letter(s) of credit. The replacement letter(s) of credit must be issued by a financial institution(s) with an investment grade credit rating, and meet the requirements of Section 14.1, within thirty (30) calendar days following written notification to the REQF of the requirement to replace. Failure by the REQF to comply with the requirements of this Section 14.3 shall be grounds for Buyer to draw in full on the existing letter of credit and to exercise any other remedies it may have hereunder.

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14.4 If an Event of Default under Section 15.1 occurs, Buyer shall be entitled immediately to receive, draw upon, or retain, as the case maybe, one-hundred percent (100%) of the then-applicable Completion/Performance Security.

14.5 If an Event of Default has not occurred and the REQF fails to achieve the CCDD on or before December 1, 20__ (irrespective of any extension that may be granted by Buyer under Section 6.5), Buyer shall be entitled immediately to receive, draw upon, or retain, as the case may be, one-hundred (100%) of the Completion/Performance Security. The Parties acknowledge that the injury that Buyer will suffer as a result of delayed availability of Contracted Capacity and energy is difficult to ascertain and that Buyer may accept such sums as liquidated damages or resort to any other remedies which may be available to it under law or in equity. If the Capacity Delivery Date occurs on or before December 1, 20__, then the REQF shall be entitled to reduce the amount of the Completion/Performance Security to an amount equal to $15.00 per kW (for the number of kW set forth in Section 6.5.1).

14.6 In the event that Buyer requires the REQF to perform one or more Contracted Capacity Test(s) at any time on or before the first anniversary of the CCDD pursuant to Section 6.6 and, in connection with any such Contracted Capacity Test(s), the REQF fails to demonstrate a Capacity of at least one-hundred percent (100%) of the Contracted Capacity set forth in Section 6.5, Buyer shall be entitled immediately to receive, draw upon, or retain, as the case may be, one-hundred percent (100%) of the then-remaining amount of the Completion/Performance Security. In the event That Buyer does not require the REQF to perform a Contracted Capacity Test or if the REQF successfully demonstrates (in connection with all such Contracted Capacity Tests required by Buyer pursuant to Section 6.6) a Capacity of at least one-hundred percent (100%) of the Contracted Capacity set forth in Section 6.5, in either case, on or before the first anniversary of the CCDD, then the REQF shall be entitled to a refund of or Buyer shall return, as applicable, any remaining amount of the Completion/Performance Security within thirty (30) days of the first anniversary of the CCDD.

15. DEFAULT, TERMINATION AND REMEDIES; NOTICE OF DEFAULT

15.1 REQF Event of Default. The following shall constitute Events of Default of REQF ("REQF Events of Default") upon their occurrence unless cured as indicated below:

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(Continued from Sheet No. 32.39)

(a) REQF's dissolution or liquidation or other Bankruptcy Event which occurs with respect to REQF and REQF files a petition in connection with a Bankruptcy Event and such petition is not withdrawn or dismissed within 60 days after such filing.

(b) REQF's failure to cure any commercial or financing Contracts or other written instrument to which REQF is a party that is material to REQF's ability to perform its responsibilities under this Contract within the time allows for a cure under such Contract or instrument.

(c) REQF's failure to make any payment when due under this Contract other than billing disputes covered under Section 8.6, if any, if the failure is not cured within 10 days after the Buyer gives the REQF notice of the default.

(d) Any omission of material fact or a representation made by REQF under Section 20.1 shall be false or misleading in any material respect, or REQF has otherwise breached any representation or warranty made by REQF pursuant to this Contract and such breach, omission or representation is not cured within 30 days after the Buyer gives REQF notice of the default.

(e) REQF's sale of Green Tags, or Environmental Attributes from the Facility to a Party other than Buyer in breach of this Contract and if REQF does not permanently cease such sale and compensate Buyer for the damages arising from the breach within 10 days after Buyer gives REQF notice of the default.

(f) REQF's assignment of this Contract or any of REQF's rights under the Contract not in compliance with the provisions of Section 13 and not cured within 90 days.

(g) REQF otherwise fails to perform any material obligation imposed upon the REQF by this Contract if the failure is not cured within 30 days after the Buyer gives the REQF notice of the default, *provided however*, that upon written notice from the REQF, this 30 day period shall be extended by an additional 60 days if (i) the failure cannot reasonably be cured within the 30 day period despite diligent efforts, (ii) the default is capable of being cured within the additional 60 day period and (c) the REQF commences the cure within the original 30 day period and is at all times thereafter diligently and continuously proceeding to cure the failure; *provided further*, that any material violation or breach of any Legal Requirement shall be deemed a non-curable event.

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(h) The REQF fails to meet the fuel requirements specified in Section 2 of this Contract;

(i) The REQF changes or modifies the Facility from that provided in Section 2 with respect to its type, location, technology or fuel source, without prior written approval from Buyer;

(j) After the Contract Capacity Delivery Date, the Facility fails for twelve consecutive months to maintain an Annual Capacity Billing Factor, as described in Appendix A, of at least 90%;

(k) The REQF fails to comply with any of the provisions of Section 14 hereof;

(l) The REQF fails to give proper assurance of adequate performance as specified under this Contract within 30 days after Buyer., with reasonable grounds for insecurity, has requested in writing such assurance;

(m) The REQF materially fails to perform as specified under this Contract, including, but not limited to, the REQF's obligations under Sections 7, 8,9, 14, 17, 18,19, 20.1 and 23.

(n) The REQF fails to achieve licensing, certification, and all federal, state and local governmental environmental and licensing approvals required to initiate construction of the Facility by no later than June 1, 20__;

(o) The occurrence of an event of default by the REQF under the Interconnection Agreement;

(p) The REQF fails to satisfy its obligations, if a Facility has a CCDD over 25 MW, under Section 7.4.6 more than two (2) times in any calendar year;

(q) The REQF breaches any material provision of this Contract not specifically mentioned in this Section 15; or

(r) If at any time after the CCDD, the REQF reduces the Contracted Capacity due to an event of Force Majeure and fails to repair the Facility and reset the Contracted Capacity to the level set forth in Section 6.1 (as such level may be reduced by Section 6.3) within twelve (12) months following the occurrence of such event of Force Majeure.

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15.2 Buyer's Rights in the Event of Default.

15.2.1 Upon the occurrence of any of the Events of Default in Section 15.1, Buyer may, at its option:

(a) terminate this Contract, without penalty or further obligation, except as set forth in Section 15.2.2, by written notice to the REQF, and offset against any payment(s) due from Buyer to the REQF, any monies otherwise due from the REQF to Buyer;

(b) enforce the provisions of the Termination Security requirement pursuant to Section 15 hereof, or

(c) exercise any other remedy(ies) which may be available to Buyer at law or in equity.

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

15.3 Buyer Event of Default. The following shall constitute Events of Default of Buyer ("Buyer Events of Default") upon their occurrence unless cured as indicated below:

(a) Buyer's dissolution or liquidation or other Bankruptcy Event which occurs with respect to Buyer and Buyer files a petition in connection with a Bankruptcy Event and such petition is not withdrawn or dismissed within 60 days after such filing.

(b) Buyer's failure to make any payment when due under this Contract, if any, if the failure is not cured within 10 days after the REQF gives the Buyer notice of the default.

(c) Buyer's assignment of this Contract or any of Buyer's rights under the Contract not in compliance with the provisions of Section 13 and not cured within 90 days.

(Continued on Sheet No. 32.43)

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(d) Any omission of material fact or a representation made by Buyer under Section 20.2 shall be false or misleading in any material respect, or Buyer has otherwise breached any representation or warranty made by Buyer pursuant to this Contract and such breach, omission or representation is not cured within 30 days after the REQF gives Buyer notice of the default.

(e) Buyer otherwise fails to perform any material obligation imposed upon the Buyer by this Contract if the failure is not cured within 30 days after the REQF gives the Buyer notice of the default, *provided however*, that upon written notice from the Buyer, this 30 day period shall be extended by an additional 60 days if (i) the failure cannot reasonably be cured within the 30 day period despite diligent efforts, (ii) the default is capable of being cured within the additional 60 day period and (c) the Buyer commences the cure within the original 30 day period and is at all times thereafter diligently and continuously proceeding to cure the failure; *provided further*, that any material violation or breach of any Legal Requirement shall be deemed a non-curable event.

15.4 Remedies.

15.4.1 Upon the occurrence and during the continuance of a Buyer Event of Default or a REQF Event of Default, the non-defaulting Party may at its discretion suspend performance hereunder or terminate this Contract by delivering notice of termination to the defaulting Party.

15.4.2 If a Buyer Event of Default under Section 15.3 has occurred and is continuing, REQF shall have the right to sell Electric Energy from the Facility on a daily basis to third parties during the continuance of such Buyer Event of Default. REQF is responsible for all transmission and ancillary services or other services needed to effect such sales.

15.4.3 Upon termination, the non-defaulting Party may pursue any and all legal or equitable remedies provide by law, equity or this Contract. The rights contemplated by this Section are cumulative such that the exercise of one or more rights shall not constitute a waiver of any other rights.

15.4.4 If this Contract is terminated because of REQF's default, REQF may not require Buyer to purchase the Electric Energy from the Facility before the date of which the term would have ended had this Contract remained in effect. REQF hereby waives its rights to require Buyer to do so.

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16. CONFIDENTIALITY

To the extent allowed by law and subject to the restrictions and provisions of Chapter 119, Florida Statutes, each Party agrees that it will treat in confidence all documents, materials and other information marked "Confidential" or "Proprietary" by the disclosing Party ("*Confidential Information*") which it shall have obtained during the course of the negotiations leading to, and its performance of, this Contract (whether obtained before or after the date of this Contract). Confidential Information shall not be communicated to any third party (other than, in the case of REQF, to its Affiliates, to its counsel, accountants, financial or tax advisors, or insurance consultants, to prospective partners and other investors in REQF and their counsel, accountants, or financial or tax advisors, or in connection with its financing or REQFinancing; and in the case of Buyer, to its Affiliates, or to its counsel, accountants, financial advisors, tax advisors or insurance consultants). As used herein, the term "Confidential Information" shall not include any information which (i) is or becomes available to a Party from a source other than the other Party, (ii) is or becomes available to the public other than as a result of disclosure by the receiving Party or its agents or (iii) is required to be disclosed in the opinion for a Party's legal counsel under applicable law or judicial, administrative or regulatory process, but only to the extent it must be disclosed. The timing and content of any press releases associated with this Contract shall be agreed to by the Parties prior to any public disclosure or distribution.

Notwithstanding any provision herein to the contrary, the parties acknowledge and agree that Buyer is subject to Chapter 119, Florida Statutes, and related statutes known as the "Public Records Laws" and that this Contract shall be a public record as defined therein. Any specific information that REQF deems to be confidential must be clearly identified as such by REQF. To the extent consistent with Florida Law, Buyer shall maintain the confidentiality of all such information marked by REQF as confidential. If a request is made to view such Confidential Information, the Buyer will immediately notify REQF of such request and the date that such records relating to the Confidential Information will be released to the requester unless REQF obtains a court order enjoining such disclosure. If REQF fails to obtain that court order enjoining disclosure, Buyer will release the requested information on the date specified. Such release of any Confidential Information shall be deemed to be made with REQF's consent and will not be deemed to be a violation of law or this Contract.

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(Continued from Sheet No. 32.44)

17. INDEMNIFICATION

To the extent allowed by law and subject to the provisions and limitations of Section 768.28, Florida Statutes, each Party shall indemnify and hold harmless the other Party, and its officers, directors, governing body, agents representatives, and employees from and against any and all claims, demands, actions, losses, liabilities, expenses (including reasonable legal fees and expenses), suits and proceedings of any nature whatsoever (a) arising directly or indirectly out of any of the indemnifying Party's operations, work or services performed in connection with this Contract including, but not limited to, for personal injury, death or property damage to each other's property or facilities or personal injury, death or property damage to third parties (collectively "Liabilities") caused by the negligent act or omission of the indemnifying Party or (b) arising out of the failure of any of the indemnifying Party to keep, observe or perform any of its obligations under this Contract or in any other document or instrument delivered by the Parties pursuant to this Contract except to the extent such injury or damage is attributable solely or in part to the negligence or willful misconduct of, or breach of this Contract by, the Party seeking indemnification hereunder, in which event the prior obligations as set forth herein shall be comparatively reduced to the extent that the claim is caused in part by the negligent act or omission or breach of the Parties.

Notwithstanding any provision in the Contract to the contrary, nothing shall be construed in any manner as either altering, expanding or waiving Buyer's sovereign immunity beyond the legislative waiver found in section 768.28 Florida Statutes, nor shall it be construed to impose any liability on Buyer for which it would not otherwise, by law, be responsible.

18. INSURANCE

18.1 Required Coverages. The REQF shall procure or cause to be procured and shall maintain, at its sole expense, throughout the entire term of this Contract, a policy or policies of: (a) workers' compensation insurance; (b) employer's liability insurance; (c) automobile liability insurance; (d) all-risk property damage (REQF's property, plant and equipment); and (e) general liability insurance issued by an insurer or insurers licensed to do business in Florida and reasonably acceptable to Buyer on a standard "Insurance Services Office" commercial general liability form (such policy or policies, collectively, the "REQF Insurance"). A certificate or certificates of insurance shall be delivered to Buyer, at JEA: Attention: Procurement Services, Customer Case Center, 6th Floor, 21 West Church Street, Jacksonville, FL 32202-3139, at least fifteen (15) calendar days prior to the start of any interconnection work. At a minimum, the REQF Insurance shall contain (a) an endorsement providing coverage, including products liability/completed operations coverage for

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the term of this Contract, and (b) a broad form contractual liability endorsement covering liabilities (i) which might arise under, or in the performance or nonperformance of, this Contract and the Interconnection Agreement, or (ii) caused by operation of the Facility of any of the REQF's equipment or by the REQF's failure to maintain the Facility or the REQF's equipment in satisfactory and safe operating condition. Effective at last fifteen (15) calendar days prior to the synchronization of the Facility with Buyer's system, the REQF Insurance shall be amended to include coverage for interruption or curtailment of power supply in accordance with industry standards. Without limiting the foregoing, the REQF Insurance must be reasonably acceptable to Buyer. Any premium assessment or deductible shall be for the account of the REQF and not Buyer.

18.2 Minimum General Liability Insurance. The REQF Insurance shall have a minimum limit of one million ($1,000,000) per occurrence, combined single limit, for bodily injury (including death) or property damage.

18.3 Unavailability. In the event that such insurance become totally unavailable or procurement thereof becomes commercially impracticable, such unavailability shall not constitute an Event of Default under this Contract, but Buyer and the REQF shall enter into negotiations to develop substitute protection which the parties in their reasonable judgment deem adequate.

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

18.5 Cancellation or Material Alteration. The REQF Insurance shall provide that it may not be cancelled or materially altered without at least thirty (30) calendar days' written notice to Buyer. The REQF shall provide Buyer with a copy of any material communication or notice related to the REQF Insurance within ten (10) business days of the REQF's receipt or issuance thereof.

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18.6 Named Insureds. The REQF shall be designated as the named insured and Buyer shall be designated as an additional insured under the REQF Insurance. The REQF Insurance shall be endorsed to be primary to any coverage maintained by Buyer.

19. FORCE MAJEURE

19.1 Definition. For the purposes of this Contract, "Force Majeure Event" means an event, condition or circumstance that is not reasonably foreseeable, is beyond the reasonable control of and is not caused by the negligence of lack of due diligence of the Party affected (the "Affected Party") or its contractors or suppliers, which, despite all reasonable efforts of the Affected Party to prevent it or mitigate its effects, prevents the performance by such Affected Party of its obligations hereunder. Subject to the foregoing, "Force Majeure Event" as to either Party, shall include, but are not limited to:

19.1.1 blockades, embargoes, sabotage, epidemics, explosions and fire (in either case to the extent not attributable to the fault or the negligence of the Affected Party);

19.1.2 lightning, flood, earthquake, landslide, tornado, hurricanes, unusually severe storms, or other natural calamity or act of God;

19.1.3 strike or other labor dispute other than any labor dispute or strike by REQF's employees or the employees of any contractor or subcontractor employed at or performing work with respect to the Facility;

19.1.4 war, insurrection, civil disturbance, sabotage or riot;

19.1.5 actions or inactions of civil or military authority (including courts, Governmental Agencies or administrative agencies;

19.1.6 failure to obtain Governmental Approvals as a result of a change in any Legal Requirement;

19.1.7 changes in law materially adversely affecting operation of the Facility;

19.1.8 lack of fuel caused by a Force Majeure Event;

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19.1.9 the failure of performance by any third party having an Contract with REQF, including, without limitation, any vendor, supplier, or customer of REQF that is excused by reason of Force Majeure (or comparable term), as defined in REQF's Contract with such third party but only if such event would also constitute Force Majeure as defined in this Contract; and

19.2 Equipment breakdown or inability to use equipment caused by its design, construction, operation, maintenance or inability to meet regulatory standards, or otherwise caused by an event originating in the Facility, shall not be considered an event of Force Majeure, unless the REQF can conclusively demonstrate, to the reasonable satisfaction of Buyer, that the event was not reasonably foreseeable, was beyond the REQF's reasonable control and was not caused by the negligence or lack of due diligence of the REQF or its contractors or suppliers.

19.3 Obligations Under Force Majeure.

19.3.1 If either Party is rendered unable, wholly or in part, to perform some or all of its obligations under this Contract (other than obligations to pay money) as a direct result of a Force Majeure event, despite all reasonable efforts of such Party to prevent or mitigate its effects, then, during the continuance of such inability, the obligation of such Party to perform the obligations so affected shall be suspended, except as provided in this Section 19. If REQF is the Affected Party, the CCDD shall be extended day for day for the duration of the effects of a Force Majeure Event.

19.3.2 In the event of any delay or nonperformance resulting from an event of Force Majeure, the Party claiming Force Majeure shall notify the other Party in writing within five (5) business days of the occurrence of the event of Force Majeure, of the nature, cause, date of commencement thereof and the anticipated extent of such delay, and shall indicate whether any deadlines or date(s), imposed hereunder may be affected thereby. The suspension of performance shall be of no greater scope and of no greater duration than the cure for the Force Majeure requires. A Party claiming Force Majeure shall notify the other Party of the cessation of the event of Force Majeure or of the conclusion of the affected Party's cure for the event of Force Majeure, in either case within two (2) business days thereof. Upon the conclusion of the Force Majeure Event, the Party relying on such Force Majeure Event shall, with all reasonable dispatch, take all steps reasonably necessary to resume the obligation(s) previously suspended.

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19.3.3 The Party claiming Force Majeure shall use its best efforts to cure the cause(s) preventing its performance of this Contract; provided, however, the settlement of strikes, lockouts and other labor disputes shall be entirely within the discretion of the affected Party, and such Party shall not be required to settle such strikes, lockouts or other labor disputes by acceding to demands which such Party deems to be unfavorable.

19.4 If the REQF suffers an occurrence of an event of Force Majeure that reduces the generating capability of the Facility below the Contracted Capacity, the REQF may, upon notice to Buyer, temporarily adjust the Contracted Capacity as provided below. Such adjustment shall be effective the first calendar day immediately following Buyer's receipt of the notice or such later date as may be specified by the REQF. Furthermore, such adjustment shall be the minimum amount necessitated by the event of Force Majeure.

19.5 If the Facility is rendered completely inoperative as a result of Force Majeure, the REQF shall temporarily set the Contracted Capacity equal to 0 KW until such time as the Facility can partially or fully operate at the Contracted Capacity that existed prior to the Force Majeure. If the Contracted Capacity is 0 KW, Buyer shall have no obligation to make capacity payments hereunder.

19.6 If at anytime during the occurrence of an event of Force Majeure or during its cure, the Facility can partially or fully operate, then the REQF shall temporarily set the Contracted Capacity at the maximum capability that the Facility can reasonably be expected to operate.

19.7 Upon the cessation of the event of Force Majeure or the conclusion of the cure for the event of Force Majeure, the Contracted Capacity shall be restored to the Contracted Capacity that existed immediately prior to the Force Majeure. Notwithstanding any other provision of this contract, upon such cessation or cure, Buyer shall have the right to require a Contracted Capacity Test to demonstrate the Facility's compliance with the requirements of this Section. Any Contracted Capacity Test required by Buyer under this Section shall be additional to any Contracted Capacity test under Section 6.5.

19.8 During the occurrence of an event of Force Majeure and a reduction in Contracted Capacity under this Section, all Monthly Capacity Payments shall reflect pro rata, the reduction in Contracted Capacity.

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

19.10 Notwithstanding the foregoing, a Party shall not be excused under this Section 19, (i) for any non-performance of its obligations under this Contract having a greater scope or longer period than is justified by the Force Majeure Event, (ii) for the performance of obligations that arose prior to the Force Majeure Event, or (iii) to the extent absent the Force Majeure Event the Affected Party would nonetheless have been unable to perform its obligations under this Contract.

19.11 No Economic Force Majeure. Force Majeure Events do not include changes in market conditions.

19.12 Extended Force Majeure Event After the CCDD.

19.13 If an Affected Party reasonably believes that a Force Majeure Event that is preventing it from performing its obligations hereunder could result in a suspension of such performance for a period of one (1) month or longer, the Affected Party shall submit a plan acceptable to the other Party to overcome the Force Majeure Event. Such plan shall be submitted within thirty (30) Business Days of the start of the Force Majeure Event. The plan shall set forth a course of repairs, improvements, changes to operations or other actions which could reasonably be expected to permit the Affected Party to resume performance its obligations under this Contract within a reasonable time frame projected in the plan. While such a plan is in effect, the Affected Party shall provide weekly status reports to the other Party notifying the other Party of the steps which have been taken to remedy the Force Majeure Event and the expected remaining duration of the Party's inability to perform its obligations. If the Force Majeure Event has not been overcome within five (5) months from its inception, the Parties shall meet to reassess the amount of time that is likely to pass before the Affected Party can reasonably be expected to resume performance under this Contract, and the Affected Party shall have thirty (30) days to establish a revised plan acceptable to the Non-Affected Party to overcome the Force Majeure Event within twelve (12) months of its beginning. If at the end of such thirty (30) days one or both of the

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Parties reasonably concludes that the Force Majeure Event cannot be reasonably be expected to be overcome within twelve months of the beginning of the Force Majeure Event, the Non-Affected Party may terminate this Contract with five (5) days notice to the Affected Party. Upon termination of this Contract as provided in this Section 19.4, the Parties shall have no further liability or obligation to each other except for any obligation arising prior to the date of such termination and those that survive termination as listed in Section 3.2. In addition to the foregoing, the Non-Affected Party not prevented from performing its obligations due to the Force Majeure Event may terminate this Contract upon ten (10) Days prior written notice if (a) the Affected Party fails to provide a Force Majeure remedy plan as provided for in this Section 19.4, (b) the Affected Party fails to carry out the Force Majeure remedy plans in a method reasonably designed to cause that Party to be able to perform it obligations hereunder within twelve (12) months of the Force Majeure Event occurring, or (c) within five (5) Business Days after a request, the REQF fails to provide a weekly status report to the other Party.

19.14 No obligation of either Party that arose before the Force Majeure Event causing the suspension of performance or that arise after the cessation of the Force Majeure Event shall be excused by the Force Majeure Event. The suspension of performance shall be of no greater scope and of no longer duration than is required by the Force Majeure Event.

20. REPRESENTATIONS AND WARRANTIES

20.1 Representations and Warranties of REQF. REQF hereby makes the following representations and warranties to Buyer that as of the Effective Date:

20.1.1 REQF is a [insert] (corporation, partnership, or other, as applicable) duly organized, validly existing and in good standing under the laws of the State of [insert] and has the full corporate and legal power and authority to own (or hold under lease) and use its properties, to carry on its business as now being conducted and to enter into this Contract and, subject to the receipt of applicable Governmental Approvals and other regulatory approvals, carry out the transactions contemplated hereby and perform and carry out all covenants and obligations on its part to be performed under and pursuant to this Contract.

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20.1.2 This Contract constitutes the legal, valid and binding obligation of REQF, enforceable in accordance with its terms. Upon the execution and delivery by REQF of this Contract and each other Contract to be executed or delivered by any or all of REQF and Shareholders at the Closing (collectively, the "REQF's Closing Documents), each of REQF's Closing Documents will constitute the legal, valid and binding obligation of each enforceable in accordance with its terms. REQF has the absolute and unrestricted right, power and authority to execute and deliver this Contract and the REQF's Closing Documents to which it is a party and to perform its obligations under this Contract and the REQF's Closing Documents, and such action has been duly authorized by all necessary action by REQF's shareholders and board of directors and any other applicable committees of the board.

20.1.3 Neither the execution and delivery of this Contract nor the consummation or performance of any of the terms and conditions of this Contract will, directly or indirectly (with or without notice or lapse of time):

(a) Breach (a) any provision of any of the Governing Documents of REQF or (b) any resolution adopted by the board of directors or the shareholders of REQF;

(b) Breach or give any Governmental Agency or other person the right to challenge any of the contemplated transactions pursuant to this Contract or to exercise any remedy or obtain any relief under any Legal Requirement or any order to which REQF may be subject;

(c) Contravene, conflict with or result in a violation or breach of any of the terms or requirements of, or give any Governmental Agency the right to revoke, withdraw, suspend, cancel, terminate or modify, any Government Approval that is held by REQF or that otherwise relates to the Facility or to the business of REQF;

(d) Cause Buyer to become subject to, or to become liable for the payment of, any Tax;

(e) Breach any provision of, or give any person the right to declare a default or exercise any remedy under, or to accelerate the maturity or performance of, or payment under, or to cancel, terminate or modify, any contract to which REQF is a party that is material to and would permanently prevent REQF from performing its responsibilities under this Contract;

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REQF is not required to give any notice to or obtain any consent from any person in connection with the execution and delivery of this Contract or the consummation or performance of any of the terms and conditions as contemplated herein. REQF has obtained all permits, licenses, Governmental Approvals and consents of Governmental Agencies required for the lawful performance of its obligations hereunder.

20.1.4 This Contract constitutes the legal, valid and binding obligation of REQF enforceable in accordance with its terms, except as such enforceability may be limited by Bankruptcy, insolvency, reorganization or similar laws relating to or affecting the enforcement of creditors' rights generally or by general equitable principles, regardless of whether such enforceability is considered in a proceeding in equity or at law.

20.1.5 There is no pending, or to the Knowledge of REQF, threatened action or proceeding affecting REQF before any Governmental Agency which purports to affect the legality, validity or enforceability of this Contract. REQF has knowledge of all laws and business practices that must be followed in performing its obligations under this Contract. REQF is in compliance with all Legal Requirements and Governmental Approvals as more fully stated below, except to the extent that failure to comply therewith would not, in the aggregate, have a material adverse effect on REQF or Buyer.

20.1.5(A) Legal Requirements.

(a) REQF is, and at all times since _____, 20__ has been, in full compliance with each Legal Requirement that is or was applicable to it or to the conduct or operation of its business or the ownership or use of the Facility;

(b) No event has occurred or circumstance exists that (with or without notice or lapse of time): (i) may constitute or result in a violation by REQF of, or a failure on the part of REQF to comply with, any Legal Requirement; or (ii) may give rise to any obligation on the part of REQF to undertake, or to bear all or any portion of the cost of, any remedial action of any nature; and

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(c) REQF has not received, at any time since _____, 20__ , any notice or other communication (whether oral or written) from any Governmental Agency or any other person regarding (i) any actual, alleged, possible or potential violation of, or failure to comply with, any Legal Requirement; or (ii) any actual, alleged, possible or potential obligation on the part of REQF to undertake, or to bear all or any portion of the cost of, any remedial action of any nature;

20.1.5(B) Governmental Approvals.

(a) REQF is, and at all times since _____, 20__ has been, in full compliance with each Governmental Approval that is or was applicable to it or to the conduct or operation of its business or the ownership or use of the Facility;

(b) Except as expressly contemplated herein, neither the execution and delivery by the REQF of this Contract, nor the consummation by the REQF of any of the transactions contemplated thereby, requires the consent or approval of, the giving of notice to, the registration with, the recording or filing or any document with, or the taking of any other action in respect of Governmental Authority, except in respect of permits (i) which have already been obtained and are in full force and effect or (ii) are not yet required (and with respect to which the REQF has no reason to believe that the same will not be readily obtainable in the ordinary course of business upon due application therefore);

(c) No event has occurred or circumstance exists that may (with or without notice or lapse of time): (i) constitute or result directly or indirectly in a violation of or a failure to comply with any term or requirement of any Governmental Approval or (ii) result directly or indirectly in the revocation, withdrawal, suspension, cancellation or termination of, or any modification to, any applicable Governmental Approval;

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(d) REQF has not received, at any time since _____, 20__ any notice or other communication (whether oral or written) from any Governmental Agency or any other person regarding: (i) any actual, alleged, possible or potential violation of or failure to comply with any term or requirement of any Governmental Approval or (ii) any actual, proposed, possible or potential revocation, withdrawal, suspension, cancellation, termination of or modification to any Governmental Approval; and

(e) All applications required to have been filed for the renewal of the Governmental Approvals have been duly filed on a timely basis with the appropriate Governmental Agencies, and all other filings required to have been made with respect to such Governmental Approvals have been duly made on a timely basis with the appropriate Governmental Agencies.

20.1.6 There is no pending or, to REQF's Knowledge, threatened action, suit, investigation or proceeding at law or in equity (a) by or against REQF or that otherwise relates to or may affect the business of, or the Facility owned or used by REQF; of (b) that challenges, or that may have the effect of preventing, delaying, making illegal or otherwise interfering with, any of the transactions contemplated herein. To the Knowledge of REQF: (a) there has been no violation or default with respect to any law which could adversely affect or impair the transactions contemplated herein; (b) no event has occurred or circumstance exists that is reasonably likely to give rise to or serve as a basis for the commencement of any such proceeding; and, (c) there are no proceedings that could have a material adverse effect on the business, operations, assets, condition or prospects of REQF or upon the Facility.

20.1.7 There are no claims, liabilities, investigations, litigation, administrative hearings, whether pending, or, to the Knowledge of the REQF, threatened, or judgments or orders relating to any Hazardous Material (collectively called "Environmental Claims") asserted or threatened against the REQF or relating to the Facility. The REQF has not caused or permitted any Hazardous Material to be used, generated, reclaimed, transported, released, treated, stored or disposed of in a manner which could form the basis of an Environmental Claim against the REQF or potentially the Buyer.

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

20.1.9 REQF is not now insolvent and will not be rendered insolvent by any of the transactions contemplated herein. As used in this section, "insolvent" means that the sum of the debts and other probable liabilities of REQF exceeds the present fair saleable value of REQF's assets.

20.1.10 REQF has paid, or made provision for the payment of, all Taxes that have or may have become due for all periods covered by the Tax Returns or otherwise, or pursuant to any assessment received by REQF, except such Taxes, if any, that are being contested in good faith and as to which adequate reserves (determined in accordance with Generally Accepted Accounting Principals).

20.1.11 The REQF represents and warrants that the Facility meets the renewable energy requirements of Section 366.91, Florida Statutes, and that the REQF shall continue to meet the requirements of that Section throughout the term of this Contract. Buyer shall have the right at all times to inspect the Facility and to examine any books, records, or other documents of the REQF that Buyer deems necessary to verify that the Facility meets such requirements.

20.2 Representations and Warranties of Buyer. Buyer hereby makes the following representations and warranties to REQF:

20.2.1 Buyer is a body politic and corporate duly organized, validly existing and in good standing under the laws of the State of Florida. Buyer is qualified to do business in the State of Florida and has the legal power and authority to own its properties, to carry on its business as now being conducted and to enter into this Contract and carry out the transactions contemplated hereby and perform and carry out all covenants and obligations on its part to be performed under and pursuant to this Contract.

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20.2.2 The execution, delivery and performance by Buyer of this Contract has been duly authorized by all necessary corporate action in accordance with Buyer's policies and procedures, and does not and will not require any consent or approval other than that which has been obtained.

20.2.3 The execution and delivery of this Contract, the consummation of the transactions contemplated hereby and the fulfillment of and compliance with the provisions of this Contract do not and will not conflict with or constitute a breach of or a default under, any of the terms, conditions or provisions of any Legal Requirements, or its Sections of incorporation or bylaws, or any deed of trust, mortgage, loan Contract, other evidence of indebtedness or any other Contract or instrument to which either Buyer is a party or by which it or any of its property is bound, or result in a breach of or a default under any of the foregoing.

20.2.4 This Contract constitutes the legal, valid and binding obligation of Buyer enforceable in accordance with its terms, except as such enforceability may be limited by Bankruptcy, insolvency, reorganization or similar laws relating to or affecting the enforcement of creditors' rights generally or by general equitable principles, regardless of whether such enforceability is considered in a proceeding in equity or at law.

20.2.5 There is no pending, or to the Knowledge of buyer, threatened action or proceeding affecting it before any Governmental Agency which purports to affect the legality, validity or enforceability of this Contract.

21. INTERCONNECTION

21.1 Facilities. REQF shall own, operate, maintain and control during the Term at its sole cost and expense all Interconnection Facilities located on the Facility Site up to, but not including, the Point of Interconnection. REQF shall pay all costs associated with interconnecting the Facility to the Interconnected Utility System.

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22. TAXES

22.1 Applicable Taxes. Subject to the provisions of Section 10.3, each Party shall be responsible for the payment of all Taxes imposed on its own income or net worth. Except as provided in this Section 22, REQF shall be responsible for the payment of all present or future federal, state, municipal or other lawful Taxes applicable by reason of the operation of the Facility or assessable on REQF's property or operations including taxes on (a) the purchase by REQF or delivery of fuel to the Facility, and (b) production of electricity. To the extent required by applicable law, Buyer shall pay any sales, use, excise, and any other similar Taxes, if any, imposed or levied by a governmental agency on the sale or use of or payments for the Electric Energy sold and delivered under this Contract arising at or after the Point of Delivery.

Subject to the provisions and limitations of Section 768.28, Florida Statutes, Buyer shall indemnify, defend, and hold REQF harmless from any liability for all such Taxes for which Buyer is responsible. REQF shall indemnify, defend, and hold Buyer harmless from any liability from all such Taxes for which REQF is responsible. Buyer shall reimburse REQF promptly on demand for the amount of any such Tax that is Buyer's responsibility hereunder that REQF remits, plus any penalties and interest incurred and remitted, except such penalties as result from REQF's conduct. REQF shall reimburse Buyer promptly on demand for the amount of any such tax that is REQF's responsibility hereunder that Buyer remits, plus any penalties, interest incurred and remitted, except penalties as result from Buyer's conduct.

22.2 Contested Taxes. Neither Party shall be required to pay any such Tax, assessment, charge, levy, account payable or claim if the validity, applicability or amount thereof is being contested in good faith by appropriate actions or proceedings (including posting security as may be required) which will prevent the forfeiture or sale of any property utilized under this Contract or any material interference with the use thereof.

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22.3 Other Costs and Charges. REQF and Buyer will pay and discharge all lawful assessments and governmental charges or levies imposed upon it or in respect to all or any part of its property or business, all trade accounts payable in accordance with usual and customary business terms, and all claims for work, labor, or materials which, if unpaid might become a lien or charge upon any of its property. REQF shall be responsible for all costs or charges imposed in connection with the delivery of the Electric Energy at the Point of Delivery, including but not limited to transmission costs and charges. Without limiting the generality of the foregoing or any other provision in this Contract, REQF shall be solely responsible for paying when due (a) all costs of owning and operating the Facility in compliance with existing and future Legal Requirements and the terms and conditions of this Contract, and (b) all Taxes and charges, however characterized, or now existing or hereinafter imposed on or with respect to the Facility, and its Operation.

23. MISCELLANEOUS PROVISIONS

23.1 Non-Waiver. The failure of either Party to insist in any one or more instances upon strict performance of any provisions of this Contract, or to take advantage of any of its rights hereunder, shall not be construed as a waiver of any such provisions or the relinquishment of any such right or any other right hereunder, which shall remain in full force and effect.

23.2 Relationship of Parties. This Contract shall not be interpreted or construed to create an association, joint venture, or partnership between the Parties or to impose any partnership obligation or liability upon either Party. Neither Party shall have any right, power or authority to enter into any Contract or undertaking for, or to act on behalf of, or to act as or be an agent or representative of, or to otherwise bind, the other Party.

23.3 Successors and Assigns. This Contract shall inure to the benefit of and be binding upon the successors and Permitted Assigns of the Parties.

23.4 Governing Laws. This Contract shall be construed in accordance with and governed by the laws of the State of Florida without regard to its conflicts of laws provisions.

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23.5 Counterparts. This Contract may be executed in more than one counterpart, each of which may be signed by fewer than all Parties, but all of which constitute the same Contract.

23.6 Third Party Beneficiaries. This Contract is intended solely for the benefit of the Parties hereto. Nothing in this Contract shall be construed to create a duty to or standard of care with reference to, or any liability to, any Person not a Party to this Contract.

23.7 Venue. Any legal action pertaining to this Contract should be originated in Duval County, Florida and shall be interpreted and enforced in accordance with the laws of the State of Florida.

23.8 Several Obligations. Nothing contained in this Contract shall be construed to create an association, trust, partnership or joint venture or to impore a trust, partnership or fiduciary duty, obligation, or liability on or between the Parties. If REQF includes two or more parties, each such party shall be jointly and severally liable for REQF's obligations under this Contract.

23.9 Partial Invalidity. The Parties do not intend to violate any laws governing the subject matter in this Contract. If any of the terms of this Contract are finally held or determined to be invalid, illegal or void as being contrary to any applicable law or public policy, all other terms of the Contract shall remain in effect. The Parties shall use best efforts to amend this Contract to reform or replace any terms determined to be invalid, illegal or void, such that the amended terms (a) comply with and are enforceable under applicable law, (b) give effect to the intent of the Parties in entering into this Contract and (c) preserve the balance of the equities contemplated by this Contract in all material respects.

23.10 Media. Any media announcement, publication etc using referring to Buyer is required to have Buyer's review and approval prior to publishing.

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

(Continued on Sheet No. 32.61)

(Continued from Sheet No. 32.60)

23.12 Disclaimer. In executing this Contract, JEA does not, nor should it be construed, to extend its credit or financial support for the benefit of any third parties lending money to or having other transactions with the REQF or any assignee of this Contract.

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

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

23.15 Set-Off. JEA may at any time, but shall be under no obligation to, set off any and all sums due from the REQF against sums due to the REQF hereunder.

24. NOTICES

Unless otherwise provided in this Contract, any notice, consent or other communication required to be made under this Contract shall be in writing and shall be delivered to the address set forth below or such other address or persons as the receiving Party may from time to time designate by written notice:

If to Buyer, to:
Contractual:

Buyer
JEA
21 W. Church Street T-12
Jacksonville, FL 32202

If to REQF, to:

_____

All notices shall be effective when received.

(Continued on Sheet No. 32.62)

(Continued from Sheet No. 32.61)

25. ENTIRE CONTRACT AND AMENDMENTS.

This Contract supersedes all previous representations, understandings, negotiations and Contracts either written or oral between the Parties hereto or their representatives with respect to the subject matter hereof and constitutes the entire Contract of the Parties with respect to the subject matter hereof. No amendments or changes to this Contract shall be binding unless made in writing and duly executed by both Parties.

IN WITNESS WHEREOF, the Parties hereto have executed this Contract as of the date set forth at the beginning of this Contract.

BUYER: JEA

By: _____

Name: _____

Title: _____

REQF: By: _____

Form Approved by:

_____
Assistant General Counsel

(Continued on Sheet No. 32.63)

(Continued from Sheet No. 32.62)

APPENDIX A

TO THE STANDARD OFFER CONTRACT STANDARD RATE FOR PURCHASE OF FIRM CAPACITY AND ENERGY FROM A RENEWABLE ENERGY QUALIFYING FACILITY

I. RATES FOR PURCHASES BY THE BUYER

Firm Renewable Capacity and Renewable Energy are purchased at a unit cost; in dollars per kilowatt per month and cents per kilowatt-hour, respectively, based on the value of deferring additional capacity required by the Buyer. For the purpose of this Rate, an Avoided Unit has been designated by the Buyer. The Buyer's Avoided Unit has been identified as a 82 MW simple-cycle combustion turbine unit with an in-service date of December 1, 2010.

A. Firm Renewable Capacity Rates

The avoided capacity costs, in dollars per kilowatt per month, associated with renewable capacity sold to a utility by a REQF pursuant to the Buyer's Standard Offer Contract shall be defined as the year-by-year value of deferral of the Buyer's Avoided Unit with an in-service date of December 1, 2010. The year-by-year value of deferral is calculated as the levelized debt service over a 20 year period including operation and maintenance costs for a simple-cycle combustion turbine. Capacity payments will be adjusted annually for inflation at an escalation of 2%.

EXAMPLE MONTHLY RENEWABLE CAPACITY PAYMENT IN $/kW/MONTH 2010 COMBUSTION TURBINE AVOIDED UNIT (82 MW) STANDARD OFFER CONTRACT AVOIDED CAPACITY PAYMENTS ($/kW/MONTH)

Contract Year From	To	Normal Payment Starting 12/01/2010
12/1/2010	11/30/2011	3.90
12/1/2011	11/30/2012	4.00
12/1/2012	11/30/2013	4.10
12/1/2013	11/30/2014	4.20
12/1/2014	11/30/2015	4.30
12/1/2015	11/30/2016	4.41

(Continued on Sheet No. 32.64)

(Continued from Sheet No. 32.63)

Performance Criteria

Payments for Firm Renewable Capacity are conditioned on the REQF's ability to maintain the following performance criteria:

1. Capacity Delivery Date

The Capacity Delivery Date shall be no later than the projected in-service date of the Buyer's Avoided Unit (i.e., December 1, 2010).

2. Availability and Capacity Factor

The Renewable Facility's availability and capacity factor are used in the determination of firm renewable capacity payments through a performance based calculation as detailed below. Renewable Monthly Capacity Payments (MCP) for each Monthly Billing Period shall be computed according to the following:

(a) Annual Capacity Billing Factor (ACBF) – This factor is calculated using the 12-month rolling average of the Monthly Capacity Factor. This 12-month rolling average shall be defined as the sum of the 12 consecutive Monthly Capacity Factors preceding the date of the calculation, divided by 12. During the first 12 consecutive Billing Periods, commencing with the first Monthly Billing Period in which Capacity payments are to be made, the calculation of the ACBF shall be performed as follows: (a) during the first Monthly Billing Period, the ACBF shall be equal to the Monthly Capacity Factor (b) thereafter, the calculation of the ACBF shall be computed by dividing the sum of the Monthly Capacity factors during the first year's Monthly Billing Periods in which Capacity payments are to be made by the number of Monthly Billing Periods which have elapsed. This calculation shall be performed at the end of each Monthly Billing Period until enough Monthly Billing Periods have elapsed to calculate a true 12-month rolling average ACBF.

(b) Monthly Capacity Factor (MCF) – The total Scheduled Renewable Energy received during the Monthly Billing Period for which the calculation is made, divided by the total Scheduled Renewable Energy requested during the Monthly Billing Period. During Monthly Billing Period where the number of Dispatch Hours equals zero (0), MCF shall equal 1.0. Dispatch hours are as defined in Section 7.4.6 of the Standard Offer Contract.

(Continued on Sheet No. 32.65)

(Continued from Sheet No. 32.64)

(c) Monthly Billing Period- The period beginning on the first calendar day of each calendar month, except that the initial Monthly Billing Period shall consist of the period beginning 12:01 am on the CCDD and ending with the last calendar date of such month.

(d) In the event that the ACBF at the end of the current Monthly Billing Period is less than 0.9 (90%), then no Monthly Capacity Payment shall be due.

(e) In the event that the ACBF >= 0.9, then the Capacity Payments ($) is calculated as the Capacity Payment (above in $/KW/month) times the Committed Renewable Capacity specified in Section 6.5 in KW.

B. Renewable Energy Rates

The energy rate, in cents per kilowatt-hour (¢/kWh), shall be based on the BUYER's actual hourly avoided energy costs which are calculated by JEA. BUYER's projected avoided energy costs are calculated based on BUYER's forecast of fuel prices, system characteristics, and system operations. BUYER's actual avoided energy costs are determined by evaluating the marginal cost of BUYER's generation for each historical hour of the billing period and multiplying this cost times the energy produced and delivered to BUYER during the same hour by the REQF. All purchases of renewable energy shall be adjusted for losses from the point of metering to the point of interconnection.

Estimated As-Available Energy Cost

For informational purposes only, the estimated incremental avoided energy costs for the next four semi-annual periods are as follows.

Applicable Period (Fiscal Year)	On-Peak ¢/KWH	Off-Peak ¢/KWH	Average ¢/KWH
2013	4.49	3.79	3.97
2014	4.79	3.83	4.07
2015	5.06	4.06	4.32
2016	5.42	4.23	4.54
2017	5.41	4.35	4.62

For the purpose of this Schedule, the on-peak hours shall be those hours occurring April 1 through October 31 Mondays through Fridays, from 12 noon to 9:00 p.m. excluding Memorial Day, Independence Day and Labor Day; and November 1 through March 31 Mondays through Fridays from 6:00 a.m. to 10:00 a.m. and 6:00 p.m. to 10:00 p.m. prevailing Eastern time excluding Thanksgiving Day, Christmas Day, and New Year's Day. BUYER shall have the right to change such On-Peak Hours by providing the REQF a minimum of thirty calendar days' advance written notice.

(Continued on Sheet No. 32.66)

(Continued from Sheet No. 32.65)

II. CHARGES TO RENEWABLE ENERGY FACILITY

The REQF shall be responsible for all applicable charges as currently approved or as they may be approved by the Buyer's Governing Board, including, but not limited to:

A. Customer Charges

REQF, as a customer of Buyer and as a Facility who receives energy from Buyer, will be applicable for all charges in the Applicable JEA Electric Tariff.

B. Interconnection Charge for Non-Variable Utility Expenses

The REQF shall bear the cost required for interconnection, including the metering. The REQF shall have the option of (i) payment in fall for the interconnection costs including the time value of money during the construction of the interconnection facilities and providing a surety bond, letter of credit or comparable assurance of payment acceptable to the Buyer adequate to cover the interconnection cost estimates, (ii) payment of monthly invoices from the Buyer for actual costs progressively incurred by the Buyer in installing the interconnection facilities, or (iii) upon a showing of credit worthiness, making equal monthly installment payments over a period no longer than thirty-six (36) months toward the full cost of interconnection. In the latter case, the Buyer shall assess interest at the rate then prevailing for thirty (30) day highest grade commercial paper, such rate to be specified by the Buyer thirty (30) days prior to the date of each installment payment by the REQF.

C. Interconnection Charge for Variable Utility Expenses

The REQF shall be billed monthly for the variable utility actual expenses associated with the operation and maintenance of the interconnection facilities. These include (a) the Buyer's inspections of the interconnection facilities and (b) maintenance of any equipment beyond that which would be required to provide normal electric service to the REQF if no sales to the Buyer were involved.

III. TERMS OF SERVICE

(1) It shall be the REQF's responsibility to inform the Buyer of any change in its electric generation capability.

(2) Any electric service delivered by the Buyer shall be metered separately and billed under the applicable retail rate schedule(s), whose terms and conditions shall pertain.

(3) The Buyer shall specify the point of interconnection and voltage level.

(4) The REQF must enter into an interconnection agreement with the Buyer which will, among other things, specify safety and reliability standards for the interconnection to the Buyer's system.

(5) Service under this rate schedule is subject to the rules and regulations of the Buyer.

(Continued on Sheet No. 32.67)

(Continued from Sheet No. 32.66)

SPECIAL PROVISIONS

Special contracts deviating from the above standard rates are allowable provided the Buyer agrees to them.

APPENDIX B

TO THE STANDARD OFFER CONTRACT DETAILED PROJECT INFORMATION

Each eligible Renewable Contract received by JEA will be evaluated to determine if the underlying REQF project is financially and technically viable. The REQF shall to the extent available, provide JEA with a detailed project proposal which addresses the information requested below.

I. FACILITY DESCRIPTION

- Project Name
- Project Location
  - Street Address
  - Site Plot Plan
  - Legal Description of Site
- Generating Technology
- Facility Classification (include types from statute)
- Primary Renewable Fuel
- Alternate Renewable Fuel (if applicable)
- Committed Capacity
- Expected In-Service Date
- Steam Host (for cogeneration facilities)
  - Street Address
  - Legal Description of Steam Host
  - Host's annual steam requirements (lbs/yr)
- Contact Person
  - Individual's Name and Title
  - Company Name
  - Address
  - Telephone Number
  - Telecopy Number

(Continued on Sheet No. 32.68)

(Continued from Sheet No. 32.67)

II. PROJECT PARTICIPANTS

- Indicate the entities responsible for the following project management activities and provide a detailed description of the experience and capabilities of the entities:
  - Project Development
  - Siting and Licensing the Facility
  - Designing the Facility
  - Constructing the Facility
  - Securing the Renewable Fuel Supply
  - Operating the Facility
  - Provide details on all electrical generation facilities which are currently under construction or operational which were developed by the REF.
  - Describe the financing structure for the projects identified above, including the type of financing used, the permanent financing term, the major lenders, and the percentage of equity invested at financial closing.

III. RENEWABLE FUEL SUPPLY

- Describe all fuels to be used to generate electricity at the Facility. Indicate the specific physical and chemical characteristics of each fuel type (e.g., Btu content, sulfur content, ash content, etc.). Identify special considerations regarding renewable fuel supply origin, source and handling, storage and processing requirements.

- Provide annual renewable fuel requirements (ARFR) necessary to support the requirements pursuant to Section 366.91, Florida Statutes, and the planned levels of generation and list the assumptions used to determine these quantities.

- Provide a summary of the status of the fuel supply arrangements in place to meet the ARFR in each year of the proposed operating life of the Facility. Use the categories below to describe the current arrangement for securing the AFR.

Category		Description of Renewable Fuel Supply Arrangement
Developed	=	renewable fuel is from a fully developed
owned	=	source owned by one or more of the project participants
contract	=	fully executed firm renewable fuel contract exists between the developer(s) arid renewable fuel supplier(s)
LOI	=	a letter of intent for the renewable fuel supply exists between developer(s) and renewable fuel supplier(s)
REF	=	renewable energy facility will burn biomass, waste, or another renewable resource
spot	=	renewable fuel supply will be purchased on the spot market
none	=	no firm renewable fuel supply arrangement currently in place
other	=	renewable fuel supply arrangement which does not fit any of the above categories (please describe)

(Continued on Sheet No. 32.69)

(Continued from Sheet No. 32.68)

- Indicate the percentage of the Facility's ARFR which is covered by the above renewable fuel supply arrangement(s) for each proposed operating year. The percent of ARFR covered for each operating year must total 100%. For renewable fuel supply arrangements identified as owned, contract, or letter of intent, provide documentation to support this category and explain the fuel price mechanism of the arrangement. In addition, indicate whether or not the fuel price includes delivery and, if so, to what location.

- Describe fuel transportation networks available for delivering all primary and secondary fuel to the Facility site. Indicate the mode, route and distance of each segment of the journey, from fuel source to the Renewable Energy Facility site. Discuss the current status and pertinent factors impacting future availability of the transportation network.

- Provide annual renewable fuel transportation requirements (ARFTR) necessary to support planned levels of generation and list the assumptions used to determine these quantities.

- Provide a summary of the status of the renewable fuel transportation arrangements in place to meet the ARFTR in each year of the proposed operating life of the Renewable Energy Facility. Use the categories below to describe the current arrangement for securing the ARFTR.

  owned = renewable fuel transport via a fully developed system owned by one or more of the project participants
  contract = fully executed firm renewable transportation contract exists between the developer(s) and renewable fuel transporter(s)
  LOI = a letter of intent for renewable fuel transport exists between developer(s) and renewable fuel transporter(s)
  Spot = renewable fuel transportation will be purchased on the spot market
  none = no firm renewable fuel transportation arrangement currently in place
  other = renewable fuel transportation arrangement which does not fit any of the above categories (please describe)

- Indicate the percentage of the Facility's ARFR which is covered by the above renewable fuel supply arrangement(s) for each proposed operating year. The percent of ARFR covered for each operating year must total 100%. For renewable fuel supply arrangements identified as owned, contract, or LOI, provide documentation to support this category and explain the transportation price mechanism of the arrangement.

- Provide the maximum, minimum, and average renewable fuel inventory levels to be maintained for primary and secondary fuels at the Facility site. List the assumptions used in determining the inventory levels.

(Continued on Sheet No. 32.70)

(Continued from Sheet No. 32.69)

IV. PLANT DISPATCHABILITY/CONTROLLABILITY

- Provide the following operating characteristics and a detailed explanation supporting the performance capabilities indicated.
  - Ramp Rate (MW/minute)
  - Peak Capability (% above Committed Capacity)
  - Minimum power level (% of Committed Capacity)
  - Facility Turnaround Time, Hot to Hot (hours)
  - Start-up Time from Cold Shutdown (hours)
  - Unit Cycling (# cycles/yr)
  - MW and MVAR Control (AGC, Manual, Other (please explain))

V. SITING AND LICENSING

- Provide a licensing/permitting milestone schedule which lists all permits, licenses and variances required to site the Facility. The milestone schedule shall also identify, key milestone dates for baseline monitoring, application preparation, agency review, certification and licensing/siting board approval, and agency permit issuance.

- Provide a licensing/permitting plan that addresses the issues of air emissions, water use, wastewater discharge, wetlands, endangered species, protected properties, solid waste, surrounding land use, zoning for the Facility, associated linear facilities, and support of and opposition to the Facility.

- List the emission/effluent discharge limits the Facility will meet, and describe in detail the pollution control equipment to be used to meet these limits.

VI. FACILITY DEVELOPMENT AND PERFORMANCE

- Submit a detailed engineering, procurement, construction, startup and commercial operation schedule. The schedule shall include milestones for site acquisition, engineering phases, selection of the major equipment vendors, architect engineer, EPC contractor, and Facility operator, steam host integration, and delivery of major equipment. A discussion of the current status of each milestone should also be included where applicable.

- Attach a diagram of the power block arrangement. Provide a list of the major equipment vendors and the name and model number of the major equipment to be installed.

- Provide a detailed description of the proposed environmental control technology for the Facility and describe the capabilities of the proposed technology.

(Continued on Sheet No. 32.71)

(Continued from Sheet No. 32.70)

- Attach preliminary flow diagrams for the steam system, water system, and renewable fuel system, and a main electrical one line diagram for the Facility.

- State the expected heat rate (HHV) at 75 degrees Fahrenheit for loads of 100%, 75%, and 50% and minimum load. In addition, attach a preliminary heat balance for the Facility.

- [NOTE: add any requirements related to demonstrating that the facility meets the requirements under the statute]

VII. FINANCIAL

- Provide JEA with assurances that the proposed REF project is financially viable by attaching a detailed pro-forma cash flow analysis. The pro-forma must include, at a minimum, the following assumptions for each year of the project.

  - Annual Project Revenues
    - Capacity Payments ($ and $/kW/Mo)
    - Variable O&M ($ and $/MWh)
    - Energy ($ and $/MWh)
    - Steam Revenues ($ and %/lb.)
    - Tipping Fees ($ and $/ton)
    - Interest Income
    - Other Revenues
    - Variable O&M Escalation (%/yr)
    - Energy Escalation (%/yr)
    - Steam Escalation (%/yr)
    - Tipping Fee Escalation (%/yr)
  - Annual Project Expenses
    - Fixed O&M ($ and $/kW/Mo)
    - Variable O&M ($ and $/MWh)
    - Energy ($ and $/MWh)
    - Property Taxes ($)
    - Insurance($)
    - Emission Compliance ($ and $/MWh)
    - Depreciation ($ and %/yr)
    - Other Expenses($)
    - Fixed O&M Escalation (%/yr)
    - Variable O&M Escalation (%/yr)
    - Energy Escalation (%/yr)

(Continued on Sheet No. 32.72)

(Continued from Sheet No. 32.71)

- Other Project Information
  - Installed Cost of the Renewable Energy Facility ($ and $/kW)
  - Committed Renewable Capacity (kW)
  - Average Heat Rate - HHV (MBTU/kWh)
  - Federal Income Tax Rate (%)
  - Facility Capacity Factor (%)
  - Renewable Energy Sold to JEA (MWhs)
- Permanent Financing
  - Permanent Financing Term (yrs)
  - Project Capital Structure (percentage of long-term debt, subordinated debt, tax exempt debt, and equity)
  - Financing Costs (cost of long-term debt, subordinated debt, tax exempt debt, and equity)
  - Annual Interest Expense
  - Annual Debt Service ($)
  - Amortization Schedule (beginning balance, interest expense, principal reduction, ending balance)

- Provide details of the financing plan for the project and indicate whether the project will be non-recourse project financed. If it will not be project financed please explain the alternative financing arrangement.

- Submit financial statements for the last two years on the principals of the project, and provide an illustration of the project ownership structure.

Responses to Staff's 3rd Set of Data Requests

ATTACHMENT FOR DR 3#

AMENDED AND RESTATED

ELECTRIC SERVICE CONTRACT

THIS AMENDED AND RESTATED ELECTRIC SERVICE CONTRACT, entered into as of ~~October 28,~~ November 26 2008 between JEA, a body politic and corporate existing under the laws of the State of Florida, hereinafter called the Authority or JEA, and the FLORIDA PUBLIC UTILITIES COMPANY, a Florida Corporation hereinafter called the Company. Individually, Authority or Company may be referred to as "Party" and collectively, the Authority and Company may be referred to as "Parties".

RECITALS

WHEREAS, JEA (formerly Jacksonville Electric Authority) and Company entered into the original Electric Service Agreement on January 29, 1996 (hereinafter "1996 Agreement"); and

WHEREAS, the 1996 Agreement was amended by the Parties by that certain amendment dated February 7, 2000 (the "2000 Amendment"); and

WHEREAS, the Parties entered into a subsequent amendment dated September 25, 2006 (the "2006 Amendment"); and

WHEREAS, the Parties believe that it is in their best interests to Amend and Restate the 1996 Agreement to incorporate the 2000 and 2006 Amendments, and provide certain new amendments.

IN CONSIDERATION OF THE PREMISES AS SET FORTH HEREIN, and the mutual covenants and agreements hereinafter contained, the parties agree as follows:

Section 1. Scope of Contract

Subject to the terms and conditions hereinafter set forth, the Authority shall sell and deliver to the Company and the Company shall purchase and receive from the Authority its full requirements for electric energy required by the Company herein described except that which may be generated by the Company in cases of emergency with its owned generation or which may be received from a co-generator or small power producer which the

Company is legally obligated to accept under the rules of any agency having such jurisdiction. The Company shall not purchase electric energy elsewhere without the written consent of the Authority unless the Authority fails to furnish energy.

Section 2. Term and Termination of Contract

(a) The Term shall commence at hour ending 0100 hours, January 1, 2008, and end at hour ending 2400 hours, on December 31, 2017 ("Ten Year Term"). The parties may, by mutual agreement at least thirty (30) months prior to the expiration of the Ten Year Term, extend the Ten Year Term for a period that may be mutually agreed upon by the parties.

(b) If the Florida Public Service Commission (FPSC) rejects or fails to approve in a timely manner any part of Company's request to adjust its fuel related costs based on the rates and prices that Company has agreed to pay Authority pursuant to this Agreement, the parties shall, in good faith, negotiate such amendments as may be appropriate to address the FPSC's concerns. Company shall, in its discretion, take such actions to appeal any FPSC determination, and Authority shall, in its discretion, assist in such efforts.

(c) If the FPSC rejects or fails to approve in a timely manner any part of any such request by Company to adjust its fuel related costs due to a rate adjustment under this Agreement, and the Parties negotiate but are unable to agree to changes to this Agreement to address FPSC concerns, then at Company's option, Company may terminate this Agreement by providing written notice to Authority at least one year before Company's proposed date of termination of this Agreement (the "notice period"). The rates as determined under this Agreement as appropriate will apply during the notice period.

Section 3. Rates

The following rates shall apply during the Ten Year Term:

(a) For the billing period commencing 1/1/2008 through 12/31/2008:

i. The Demand Charge shall be $7.00/kW-month

ii. The Fuel Rate Shall be the Retail Tariff Fuel Rate, as set by the Authority from time to time.

iii. The Other Energy Rate shall be $0.003/kWh.

(b) For the billing period commencing 1/1/2009 through 12/31/2017:

i. The Fuel Rate shall be the Retail Tariff Fuel Rate, as set by the Authority from time to time.

ii. Rates shall be set by the JEA Board of Directors in public meetings. Notice of such meetings will be given Company at least 30 days prior to such meetings. Rates shall be set to recover the fully allocated costs of serving Company based upon the Cost of Service Principles as defined in Section 3(f).

(c) During the term of this Agreement, Authority may retain reasonably credentialed and experienced electricity cost of service and rates consultants to assist Authority in preparing cost of service models, studies and reports. These studies shall follow the principles set forth in Section 3(f). Authority will bear the costs of such consultants.

(d) Authority may update its cost of service study, where such study follows the principles set forth in Section 3(f), and adjust Company rates no more frequently than every two years, unless Authority adjusts its retail base rates sooner, in which event Authority may adjust Company rates at the time of the retail base rate adjustment. All invoice charges and billings by Authority to Company for services rendered, cannot be changed retroactively as a result of changes in rates resulting from Authority's cost of service study.

(e) Except as may be expressly stated in this Agreement, the parties agree that nothing herein shall be construed as a waiver of any rights of Company or Authority. Further, the parties agree that nothing herein shall be construed as the Company or Authority's consent or submission to the jurisdiction, or the scope of current jurisdiction, of any regulatory authority that does not, independently of this Agreement, have jurisdiction over the Company or Authority.

(f) Cost of Service Principles:

i. Purpose of COS Methodology. The Cost of Service (COS) Methodology determines the allocated share of Authority's Electric Revenue Requirements attributable to Company for the services provided by Authority to Company.

ii. Authority's Revenue Requirements are determined on a cash needs basis at the direction of the Authority's Board and currently include debt service expense and coverage amounts, reserve funds, operating and maintenance expenses including fuel and non-fuel purchased power, capital outlay, taxes and levies including contributions to the City of Jacksonville, an allocated share of general overhead expenses, and expenses related to general plant and related facilities.

iii. Comparability. Authority shall apply the COS Methodology in a manner that is not unduly discriminatory to Company, such that the total allocated cost of service for the Company shall be no greater than that implied for any other wholesale customer similarly situated as Company. The level of total charges paid by Company shall not be significantly greater than the allocated cost of service level implied by the COS Methodology.

iv. The COS Methodology shall allocate the Authority's non-fuel Revenue Requirements to the Company on bases that reflect the peak electric demands and electric energy provided by the Authority to wholesale and retail customers.

v. Price Terms including non-fuel energy charges and demand charges, shall not deviate significantly from that implied by the demand and energy related costs attributable to Company, which result from the COS Methodology.

(g) Termination of Transmission Service:

On January 1, 2008, Authority will no longer provide transmission service under the terms of this Agreement. Rather on or before January 1, 2008, Company must apply to and obtain Network Transmission Service from Authority, as defined by the procedures of the Authority's Open Access Transmission Tariff (OATT).

(h) JEA Resources:

Authority will continue to supply Company capacity and energy requirements from the system generation resources of Authority which may be augmented by additional system generation resources in the future. No particular generation resource of the Authority is specifically committed to supplying the generation services provided under this Amendment. Company has no right to any particular resource of the Authority.

(i) Ancillary Services:

Authority hereby agrees to supply, as part of the generation services herein, services identified as Schedules 3 (Regulation Reserves), 4 (Energy Imbalance), 5 (Spinning Reserves), and 6 (Supplemental Reserves) in the OATT in order to facilitate self-supply of these services by Company. Provision of these services is included in the rates for generation service in this Section 3. Authority shall not charge for Reactive Supply and Voltage Control under this agreement, as the costs for such services shall be charged under the OATT.

Section 4. Payments

Payments for the service rendered hereunder to the service location shall be made monthly on submission of a bill containing a statement of meter readings at the beginning of the billing period, end of the billing period, meter constants, energy consumption and demand, and such other pertinent data as shall be required. Payments shall be made by wire transfer to: Wachovia Bank, N.A., Jacksonville, FL, ABA No [redacted], Account No. [redacted], within ten (10) days of the date thereof or by the 20th calendar day of that month, whichever is later. Late payments shall accrue interest on a daily basis at JEA's then current late charge rate pursuant to JEA's Policies and Procedures. In the unlikely event that payments cannot be made by wire transfer due to storms or other similar events, payments shall be made by check, in legally available funds, within the same time frames set forth above, to JEA, 21 W. Church St., Jacksonville, FL 32202, Attention: Payment Processing CC-3.

Section 5. Company and Authority Facilities

(a) The Company shall, at its own risk and expense, furnish, install and maintain all necessary apparatus for utilizing the energy to be supplied hereunder, such as transformers, switchboards, circuit breakers, safety devices, wiring, etc., and said installation shall be of such character as will not introduce disturbances on the Authority's lines, and the apparatus shall be selected and used so as to secure the highest practicable power factor.

(b) The Authority shall have the right of general supervision over all apparatus connected to its circuits, and the manner of operation of such apparatus in the interest of the proper operation of the Authority system as a whole and the continuity of service to all its customers. The Authority reserves the right to review the operation and interconnection scheme of any generating customer of the Company which may engage in parallel operation with the Company's electrical system. The Authority may refuse to make connections, or to commence or to continue to give service unless the installation and apparatus and operation of the preceding shall meet with its approval, and approval of any municipal or other agents having lawful jurisdiction. The Company agrees to abide by any reasonable regulations which may be established by the Authority for the operation of the apparatus connected by the Company to the Authority's lines.

(c) The Company shall provide, when needed, a suitable place or building for properly housing the meters and other service equipment of the Authority, all in accordance with plans and specifications furnished by the Authority.

(d) The Authority shall provide, install and maintain the necessary watt-hour meter and its accessories of a standard manufacture for the measurement of demand and energy consumed under this Contract.

Section 6. Service Location

The electric energy to be furnished by the Authority under this contract shall be delivered to the Company from the Nassau

Substation which is located in Section 43, Township 2 North, Range 27 East, Nassau County, Florida.

Section 7. Service Specifications

(a) The Authority shall furnish electric service of the following characteristics at the point of delivery:

Phase	3
Wire	3
Cycles	60
Voltage	138,000
Current	Alternating
Metering Voltage	138,000
KVA Capacity	150,000 KVA

(b) The Company shall use reasonable diligence to take and use electric energy hereunder from each of the phases in such a manner that the total energy shall be divided equally between the three phases.

(c) Company will maintain an electrical power factor at the point of interconnection of 90% or greater. Should the power factor fall below 90% within a billing period, Company will be billed in accordance with the rate and measurement methodology of Authority's Retail Rates Tariff sheet 5.1.

Section 8. Measurement of Energy

All electric energy furnished by the Authority hereunder shall be measured at the service location specified in Section 6 of this contract by suitable meter of standard manufacture, to be furnished, installed, maintained, calibrated and read by the Authority at its expense. In the event any meter(s) fails to register, or registers incorrectly the electric energy furnished therethrough during any month, the Authority shall determine the length of the period in such month during which such meter (s) failed to register or registered incorrectly, and the quantity

of electric energy delivered during such period utilizing the Company's check metering located at the Company's Stepdown Substation (adjusted for losses), and an appropriate adjustment based thereon shall be made in the Company's bill solely for such month; provided that in no event shall an adjustment be made for any month unless such meter shall have been tested by the Authority of its own volition or at the written request of the Company within thirty (30) days from and after the date upon which the bill for such month shall have been rendered. Any meter which registers not more than ±0.5% slow or fast shall be deemed correct. No device or connection shall be maintained by the Company at the service location which will prevent any meter from registering correctly the energy used or to be used.

Section 9. Meter Test

The Authority, at its expense, shall periodically inspect and test the meter(s) installed by it at intervals not exceeding one (1) year. At the written request of the Company, the Authority shall make additional tests of any or all of such meters in the presence of representatives of the Company. The cost of such additional tests shall be borne by the Company if the percentage of error is found to be not more than ±0.5% slow or fast.

Section 10. Change in Load

Whenever possible, reasonable notice shall be given by the Company to the Authority respecting any material changes proposed in the connected load or in the characteristics of such load at the service location.

Section 11. Continuity of Service and Consumption

(a) The Authority shall not be liable to the Company hereunder, nor shall the Company be liable to the Authority hereunder by reason of failure of the Authority to deliver or the Company to receive electrical energy as the result of fire, strike, riot, explosion, flood, accident, breakdown, acts of God, or the public enemy, prohibition by governmental authority

or court decree, or other acts beyond the control of the party affected; it being the intention of each party to relieve the other of the obligation to supply electric energy or to receive and pay for electric energy when as a result of any of the above mentioned causes either party may be unable to deliver or use in whole or in part the electric energy contracted to be delivered or received. Both parties shall be prompt and diligent in using their best efforts to remove and overcome the cause or causes of said interruption, but nothing herein contained shall be construed as permitting the Authority to refuse to deliver or the Company to refuse to receive electric energy after the cause of interruption has been removed.

(b) The Authority does not guarantee that the supply of electric energy hereunder shall be free from interruption occasioned by any of the causes mentioned in the foregoing paragraph and it is agreed that such interruption shall not constitute a breach of this Contract on the part of the Authority and the Authority shall not be liable to the Company for damages resulting there from. In the event of such interruption of service, the Authority will restore the service as soon as it can reasonably do so and will at all times exert the greatest efforts toward the end of supplying as nearly constant service as is reasonable and practicable. In case of impaired or defective service, the Company shall immediately give notice to the nearest office of the Authority by telephone, confirming such notice in writing as soon thereafter as practicable.

Section 12. Access to Service Location

The Company hereby grants to the Authority the right, at all reasonable times, by its duly authorized agents and employees, to enter the premises of the Company for the purpose of inspecting and repairing or removing the property of the Authority, of reading meters, or of performing any work incidental to the supplying of all services hereby contracted for.

Section 13. Liability for Accidents

The electric energy supplied under this Contract is supplied upon the express condition that after it passes the meter equipment of the Authority, it becomes the property of the Company. The Company shall indemnify and save harmless and defend the Authority for loss, damage or injury (including death) to any person or property whatsoever resulting directly or indirectly from the use or misuse or presence of said electric energy on the Company's premises after it passes the point of delivery to the Company, except where such loss, damage or injury shall be shown to have been occasioned by the sole negligence of the Authority, its agents, servants or employees. In the event of joint negligence on the part of the company and the Authority, any loss or damages shall be apportioned in accordance with the Uniform Contribution Among Tortfeasors Act (Section 768.31, Florida Statutes) as it exists on the effective date of this Contract.

Section 14. Default

If the Company defaults in the performance of any obligations under this Contract, the Authority will provide the Company with 30 days written notice to cure such default. If the Company fails to cure such default, the Authority may suspend service, such suspension not to interfere with the enforcement by the Authority of any other legal right or remedy, and at its option the Authority may cancel this contract in the event of any such default. No delay by the Authority in enforcing any of its rights hereunder shall be deemed a waiver of such rights, nor shall a waiver by the Authority of one of the Company's defaults be deemed a waiver of any other or subsequent default.

No dispute with reference to the amount due for electric service hereunder shall excuse the Company from paying when due the amount stated by the Authority to be due, but any amount which the Company may have so paid that is deficient or in excess of the amount actually found upon investigation to be due shall be promptly paid by the Company or the Authority with interest at the same rate indicated in Section 4, above.

Should the uncured default lie in the failure of the Company to make prompt payments of the bills in accordance with Section 4, above, then the Authority shall have the right immediately to discontinue service and this Contract shall, at the election of the Authority, be wholly at an end and the parties shall thereby be severally released from all obligations hereunder, save the rights of action then already accrued.

Section 15. Assignment

(a) Subject to the provisions in the next sentence, this Agreement shall be binding upon Company and Authority and their respective successors and assigns; provided, however, that neither Party may assign this Agreement or any rights or obligations hereunder without first obtaining the prior written consent of the other Party (which consent shall not be unreasonably withheld or delayed), the consent of any lenders, if required, and any necessary governmental or regulatory authorization, if required. No assignment shall be acceptable unless the assignee shall meet the standards of Creditworthiness, as defined herein to be a rating of Baa 1 by Moody's Investor Services, or BBB+ for Standard & Poor's (S&P) or Fitch, or, in Authority's sole discretion, meet the standards set forth in Section 19 of this Agreement. In addition, the assignee shall provide an agreement to be bound by and abide by all the terms and conditions contained in this Agreement.

(b) If the assignee shall fail to maintain the Creditworthiness standards as set forth herein, the assignee shall be required to provide Authority with notice, and provide, within five (5) business days of such notice, an irrevocable letter of credit in accordance with the requirements set forth in Section 19 of this Agreement.

Section 16. Notices

Any notice contemplated by this Contract shall be made in writing and shall be delivered in person or by deposit in the U.S. mail, first class mail, certified receipt requested, to JEA, 21 West Church Street, Jacksonville, Florida 32202, ATTENTION: CEO/Managing Director in the case of the Authority; and to FLORIDA PUBLIC UTILITIES COMPANY, Post Office Box 3395, West Palm Beach, Florida 33402-3395, ATTENTION: President as to the Company. The designation of the person to be notified or

the address of such person may be changed at any time by similar notice.

Section 17. Successors and Assigns

This Agreement shall inure to the benefit of and be binding upon any respective successors and assigns of the Parties.

Section 18. Sole Agreement

This Amended and Restated Electric Service Contract embodies the entire Agreement and understanding between the parties hereto, and incorporates all the previous amendments to the 1996 Agreement as set forth in the Recitals stated herein, and there are no other prior agreements or understandings, oral or written with reference to the subject matter thereof that are not merged herein and superseded hereby.

Section 19. Credit

(a) At all times during the term of this contract, Company shall maintain an acceptable standard of creditworthiness which shall be the more stringent (as to each measure) of a level equivalent to (i) that defined by Company's current commercial bank lenders at the time or (ii) (A) Total Liabilities to Tangible Net Worth less than 3.75 and (B) Fixed Charge Coverage Ratio greater than 1.50 (as both of such ratios are defined in Attachment A hereto). An example of Company's current standard of creditworthiness, as defined by its current bank lender, is shown in Attachment A.

(b) Should Company not satisfy the standards of creditworthiness defined above, Company shall notify Authority of the failure to meet either of these standards as soon as Company is aware of such failure and in no case later than when Company notifies Company's commercial bank lender(s). Company shall provide within five (5) days of such notice, the irrevocable letter of credit substantially in the form of Attachment B from either (i) a commercial bank rated no lower

than Aa3/AA- by Moody's Investors Service or Standard & Poor's or (ii) a commercial bank acceptable to Authority in its sole discretion, with a term of one (1) year in the amount of the highest one month's amount due Authority for service hereunder prior to such date or $3,000,000.00, whichever is greater. In addition, Company shall require that any Commercial lender(s) shall agree to forebear from pursuing any and all remedies for default for a minimum period of 30 days following notice of such failure.

(c) Company shall not be obligated to renew such letter of credit if, during its one (1) year term or extensions thereof, Company cures the substandard condition of creditworthiness. If such letter of credit is required by the terms hereof to be renewed and Authority does not receive written evidence from the letter of credit bank by the date which is 10 days prior to the expiration date of such letter of credit of such renewal for an additional one-year period (or a new letter of credit from another bank meeting the requirements established in this Section), Authority may draw the full amount available under such letter of credit and retain such amount as a permanent deposit for amounts due hereunder. If at any time the deposit is reduced from an amount less than the full amount of such letter of credit or if such letter of credit is drawn upon and the full amount of the draw is not reinstated within five (5) days of such draw, Authority may elect to terminate its obligation hereunder to supply energy to Company.

(d) Company provides bank lenders certification reports of credit standards quarterly, and Company shall furnish the same certification reports to Authority.

Section 20. Reps and Warrants

The parties hereby represent and warrant to each other this Amended and Restated Electric Service Contract has been duly and validly executed and delivered by such party and constitutes such party's legal, valid and binding obligation, enforceable against it in accordance with its terms. The Authority further represents and warrants that as of the date hereof, Company is not in default of any provisions of the 1996 Agreement, as amended by the 2000 Amendment, and the 2006 Amendment.

Signature Page Follows

IN WITNESS WHEREOF, JEA, and FLORIDA PUBLIC UTILITIES COMPANY, a Florida corporation, have caused this Contract to be executed and attested by their duly authorized officer on the day and date first above written.

ATTEST:

Cathy Barnwell (SEAL)

JEA

By: _____
CEO/Managing Director

Form Approved:

_____
Assistant General Counsel

ATTEST

_____
Signature
George M. Bachman
Secretary-Treasurer

FLORIDA PUBLIC UTILITIES CO.

By: _____ (SEAL)
Signature
John T. English
CEO

RBRandyDebracombinedUpdatesfpuservice contract2.doc-2008

ATTACHMENT A

MAINTENANCE OF $20 M LINE OF CREDIT FROM BANK OF AMERICA

Compliance Ratios for Line of Credit Are As Follows:

i) **Total Liabilities to Tangible Net Worth Ratio.**
Maintain as at the end of each fiscal year a ratio of Total Liabilities (excluding the non-current portion of Subordinated Liabilities) to Tangible Net Worth not exceeding 4:1.

"Tangible Net Worth" means the value of the Company's total assets (excluding intangibles such as goodwill and patents) less Total Liabilities.

"Subordinated Liabilities" means liabilities subordinated to the Company's obligations to the Lender in a manner acceptable to the Lender in its sole discretion.

ii) **Fixed Charge Coverage Ratio:**
Maintain a Fixed Charge Coverage Ratio of at least 1.25:1.00.

"Fixed Charge Coverage Ratio" means the ratio of (i) net income after income taxes, plus depreciation and amortization, plus interest expense, plus rent/lease expense, plus/minus the change in the value of any Interest Rate Protection Agreement to (ii) current maturities of long term debt and Capital Lease obligations, plus interest expense, plus rent/lease expense.

ATTACHMENT B

(Bank Letterhead)

[Date]

JEA
21 W. Church Street
Jacksonville, FL 32202

RE: IRREVOCABLE LETTER OF CREDIT NO. _____ U.S. $ _____

To the [ ] Department:

We hereby issue our irrevocable, unconditional Letter of Credit No. _____ in favor of JEA for the account of JEA (the "Account Party").

We undertake to honor from time to time your draft or drafts on us at sight in an amount or amounts not exceeding, in the aggregate U.S. $_____.

Drafts drawn hereunder must be marked "Drawn under Letter of Credit No. _____, dated _____, 2006" accompanied by your certification as follows:

Under Section [19] of the Amended and Restated Agreement dated ____, 2008 between JEA and the Florida Public Utilities, Inc. (FPU), JEA is entitled to the amount of such draw in satisfaction of certain past due amounts from FPU as defined under the current agreement.

OR

Under Section [19] of the Amended and Restated Agreement dated ____, 2008 between JEA and the Florida Public Utilities, Inc., JEA is entitled to draw the full amount available to be drawn hereunder because JEA has not received written notice from you within 10 days prior to the scheduled expiration that the term of such Letter of Credit has not been extended by an additional year.

We agree that we shall have no duty or right to inquire as to the basis upon which JEA has determined to present to us any draft under this Letter of Credit and shall honor such draft upon presentation in accordance with the terms hereof. Partial drawings are permitted.

This Letter of Credit is valid until _____, provided; however, that this Letter of Credit will be automatically extended without amendment for one (1) year from the present or any future expiry date hereof unless sixty (60) days prior to such expiry date we notify you by overnight courier or certified mail that we elect not to extend this Letter of Credit beyond the then current expiration date.

This Letter of Credit contains all the terms and conditions of this credit which shall not be altered except by reduction in amount due to corresponding payments in like amount in compliance with the above terms. We hereby waive any defense based on any allegation of fraud.

This letter of Credit is subject to the International Standby Practices, International Chamber of Commerce Publication No. 590 (the "ISP98") and the laws of the State of Florida to the extent not inconsistent therewith.

This Letter of Credit is transferable and assignable in its entirety. There are no other conditions to this Letter of Credit.

Very truly yours,

[Bank]

EXECUTION COPY CONFIDENTIAL

AGREEMENT FOR GENERATION SERVICES

BETWEEN

GULF POWER COMPANY

AND

FLORIDA PUBLIC UTILITIES COMPANY

Dated as of December 28, 2006

TABLE OF CONTENTS

AGREEMENT FOR GENERATION SERVICES BETWEEN GULF POWER COMPANY AND FLORIDA PUBLIC UTILITIES COMPANY

This Agreement for Generation Services ("Agreement") is entered into and effective as of the 28th day of December 2006 ("Effective Date"), by and between **GULF POWER COMPANY** (acting through its agent, Southern Company Services, Inc., a corporation organized and existing under the laws of the State of Alabama ("SCS")), a corporation organized and existing under the laws of the State of Florida ("Gulf Power") and **FLORIDA PUBLIC UTILITIES COMPANY**, a corporation organized and existing under the laws of the State of Florida ("FPUC"). Gulf Power and FPUC are individually referred to as a "Party" and collectively referred to as the "Parties."

W I T N E S S E T H:

WHEREAS, Gulf Power is engaged in, among other things, the sale of electric power at wholesale for resale and has received authorization from FERC to provide such service at market-based rates in accordance with the Southern Operating Companies' FERC Electric Tariff, Second Revised Volume No. 4, Market-Based Rate Tariff;

WHEREAS, FPUC supplies the native load electric requirements of its electric system headquartered in Marianna, Florida ("Northwest Division"); and

WHEREAS, subject to the terms and conditions of this Agreement, the Parties desire for Gulf Power to supply the native load electric requirements of the Northwest Division through FPUC's purchase of capacity and associated energy pursuant to this Agreement.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants herein set forth, and other good and valuable consideration, the receipt, sufficiency and adequacy

of which are hereby acknowledged, each Party intending to be legally bound, hereby agrees as follows:

ARTICLE 1

DEFINITIONS & INTERPRETATION

1.1 Definitions. In addition to the initially capitalized terms and phrases defined in the preamble of this Agreement, the following capitalized terms used herein and not otherwise defined, whether singular or plural, shall have the following respective meanings:

"**AAA**" shall have the meaning set forth in Section 16.2.2.

"**Acceptable Rating**" shall mean, with respect to a Person, such Person has: (A) (i) an issuer rating (and senior unsecured rating if also available) of at or above Baa3 (or future equivalent) by Moody's, or (ii) an issuer credit rating (and senior unsecured rating if also available) of at or above BBB- (or future equivalent) by S&P; or (B) the Required Ratios but does not have an issuer credit rating or senior unsecured rating by S&P and does not have an issuer rating or senior unsecured rating by Moody's.

"**Adjusted Hourly Demand**" shall mean, for a given Hour, the sum of: (a) the Northwest Hourly Demand; plus (b) the amount of any demand satisfied by generation connected to the Northwest Division System (including distributed generation); plus (c) contract interruptible or curtailable load on such electric system curtailed at Gulf Power's request and any firm load reductions occurring as a result of system emergencies; plus (d) transmission and other losses from the Delivery Point(s) that would be associated with the foregoing (b) and (c) as if such demand and loads (whether or not curtailed, interrupted or reduced) were served by Gulf Power under this Agreement (such transmission losses on the Transmission System to be determined pursuant to the then-current transmission tariff (or other applicable arrangement governing

transmission on the Transmission System) applicable to transmission service on the Transmission System, as amended from time to time), all expressed in megawatt-hours per hour (MWH/H). In determining the total Northwest Hourly Demand for any Hour, the demand measurements at all applicable Meter Point(s) shall be cumulated simultaneously.

"**Affiliate**" shall mean, with respect to any Person, any other Person directly or indirectly controlling or controlled by or under direct or indirect common control with such specified Person. For purposes of this definition, "control" means the power to direct the management and policies of such Person, directly or indirectly, whether through the ownership of voting securities, by contract or otherwise. The terms "controlling" and "controlled" have meanings correlative to the foregoing.

"**After-Tax Basis**" means, with respect to a specified amount owing or to be paid to any Person, such amount ("Base Amount") supplemented by a further payment ("Additional Payment") to that Person so that the sum of the Base Amount plus the Additional Payment shall, after deduction of the amount of all Federal, state and local income taxes required to be paid by such Person in respect of the receipt or accrual of the Base Amount and the Additional Payment (taking into account the net present value of any reduction in such income taxes resulting from tax benefits realized by the recipient as a result of the payment or the event giving rise to the payment), be equal to the amount required to be received. Such calculations shall be made on the basis of the highest generally applicable Federal, state and local income tax rates applicable to the Person for whom the calculation is being made for all relevant periods, and shall take into account the deductibility of state and local income taxes for Federal income tax purposes.

"**Agreement**" shall mean this Agreement for Generation Services as set forth in the preamble above.

"**Applicable Year**" shall have the meaning set forth in Appendix C.

"**Approval Deadline**" shall have the meaning set forth in Section 9.4.

"**Arbitration Expenses**" shall have the meaning set forth in Section 16.5.

"**Assignment Conditions**" shall have the meaning set forth in Section 17.1.2.

"**Banking Day**" shall mean any Day other than a Saturday, Sunday or any Day on which the Federal Reserve Bank of New York is closed.

"**Benefited Party**" shall have the meaning set forth in Section 5.3.

"**CAIR**" shall mean the final rule issued by the Environmental Protection Agency on March 10, 2005 entitled "Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone," often referred to as the Clean Air Interstate Rule, including any rules, regulations or other actions of any Governmental Authority(ies) to comply with or implement such rule.

"**Calculation Year**" shall have the meaning set forth in Appendix A.

"**CAMR**" shall mean the final rule issued by the Environmental Protection Agency on March 15, 2005 entitled "Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units," often referred to as the Clean Air Mercury Rule, including any rules, regulations or other actions of any Governmental Authority(ies) to comply with or implement such rule.

"**Capacity Purchase**" shall have the meaning set forth in Appendix A.

"**Cash Security**" shall mean cash security, free and clear of any adverse lien or interest, pursuant to a pledge agreement in form and substance reasonably acceptable to the Party(ies) to which such security is being provided.

"**Change in Law**" means the adoption, enactment, promulgation or issuance of, a change in, or a new or changed interpretation by a Governmental Authority of, any Law or any standards

or criteria contained in a permit, license or other approval of a Governmental Authority after June 21, 2005.

"**Change in Law Notice**" shall have the meaning set forth in Section 9.1.2.

"**Confidential Information**" shall have the meaning set forth in Section 15.1.

"**Continuation Period**" shall have the meaning set forth in Section 9.5.2.

"**Current Year**" shall have the meaning set forth in Appendix C.

"**Day**" shall mean a calendar day; provided, however, for purposes of this Agreement, a Day shall begin and end at the applicable Operating Time.

"**Decreased Costs**" means the amount of any reduction in Gulf Power's costs and/or expenses (fixed and variable) that result from complying with or recognizing a Change(s) in Law and which: (i) is associated with any of Gulf Power's generating and power supply resources; (ii) is associated with capacity and energy provided under this Agreement; or (iii) is realized by Gulf Power in performing its obligations under this Agreement; provided, however, with respect to any Decreased Costs under the foregoing (i), any benefit or credit that FPUC is entitled to receive as a result of such Decreased Costs shall be limited to a proportionate share based on the amount of capacity provided under this Agreement and FPUC's actual load served under this Agreement. In no event shall Decreased Costs be reflected in a separate Change in Law Component pursuant to Section 9.1.3 if such Decreased Costs are also reflected in the Gulf Energy Rate pursuant to the formula in Appendix C.

"**Defaulting Party**" shall have the meaning set forth in Section 12.1.

"**Delivered Energy**" shall mean, for a given Hour, all energy (expressed in megawatt-Hours (MWH)) delivered by Gulf Power to FPUC under this Agreement at the Delivery Point(s), which energy shall be measured at the Meter Point(s) and shall be increased for transmission and

other losses from the Delivery Point(s) to the Meter Point(s), where such transmission losses on the Transmission System are to be determined pursuant to the then-current OATT (or other arrangement governing transmission on the Transmission System) applicable to transmission service on the Transmission System, as amended from time to time.

"**Delivery Point(s)**" shall mean (as applicable): (i) the high voltage side of the generator step-up transformer(s) at each of the generating units and plants from which capacity and energy are provided under this Agreement, if such units and/or plants are connected to the Transmission System; and/or or (ii) the interface(s) between the Transmission System and the system(s) to which the generating units and plants from which capacity and energy are provided under this Agreement are connected, if such units and/or plants are not connected to the Transmission System.

"**Disallowance Order**" shall have the meaning set forth in Section 9.5.1.

"**Dispute Response**" shall have the meaning set forth in Section 16.1.1.

"**Disputing Party**" shall have the meaning set forth in Section 16.1.1.

"**Due Date**" shall have the meaning set forth in Section 6.1.3.

"**Effective Date**" shall have the meaning set forth in the preamble of this Agreement.

"**Eligible Collateral**" shall mean an Eligible Letter of Credit, an Eligible Guaranty, or Cash Security.

"**Eligible Guaranty**" shall mean a continuing parent guaranty in form and substance reasonably acceptable to the receiving Party issued by an entity who has and maintains an Acceptable Rating.

"**Eligible Letter of Credit**" shall mean a letter of credit in form and substance reasonably acceptable to the receiving Party issued by a major U.S. commercial bank with assets of at least

$25 billion and a senior unsecured rating of at least A2 (or future equivalent) by Moody's or at least A (or future equivalent) by S&P.

"**Event of Default**" shall have the meaning set forth in Section 12.1.

"**Federal Power Act**" means the Federal Power Act, 16 U.S.C.A. §§ 791a-828c, as the same may hereafter be amended from time to time.

"**FERC**" shall mean the Federal Energy Regulatory Commission or any Governmental Authority succeeding to the powers and functions thereof under the Federal Power Act.

"**Force Majeure Event**" shall have the meaning set forth in Section 11.1.1.

"**Forecasted Northwest Annual Peak Demand**" shall mean the quantity determined pursuant to Appendix A of this Agreement.

"**FPSC**" shall mean the Florida Public Service Commission, or any Governmental Authority succeeding to the powers and functions thereof.

"**FPSC Approval**" shall have the meaning set forth in Section 9.4.1.

"**FPUC Information**" shall have the meaning set forth in Section 17.16.

"**FPUC Liquidated Damages**" shall have the meaning set forth in Section 12.3.3.

"**FPUC Termination Date**" shall have the meaning set forth in Section 12.3.2.

"**FPUC**" shall have the meaning set forth in the first paragraph of this Agreement.

"**Funds From Operations Interest Coverage Ratio**" shall mean, with respect to a Party, the sum of such Party's Net Income from Continuing Operations plus Depreciation and Amortization plus Deferred Income Taxes plus gross interest expense incurred before subtracting capitalized interest and interest income divided by such Party's gross interest expense incurred before subtracting capitalized interest and interest income. All items included in the calculation

of the Funds From Operations Interest Coverage Ratio shall be prepared and calculated in accordance with GAAP.

"**GAAP**" means generally accepted accounting principles in the United States applied on a consistent basis.

"**Governmental Authority**" means any federal, state, local, territorial or municipal government and any department, commission, board, court, bureau, agency, instrumentality, judicial or administrative body thereof.

"**Growth Rate**" shall have the meaning set forth in Appendix A.

"**Guarantor**" shall mean, with respect to a Party, an entity that guarantees such Party's obligations under this Agreement, including through an Eligible Guaranty.

"**Gulf Energy Rate**" shall have the meaning set forth in Appendix C.

"**Gulf Liquidated Damages**" shall have the meaning set forth in Section 12.4.3.

"**Gulf Power**" shall have the meaning set forth in the preamble of this Agreement.

"**Gulf Termination Date**" shall have the meaning set forth in Section 12.4.2.

"**Harmed Party**" shall have the meaning set forth in Section 5.3.

"**Hour**" shall mean one (1) of the clock-hours of a Day.

"**Hourly**" shall have a meaning correlative to that of Hour.

"**Impacted Party**" shall have the meaning set forth in Section 9.3.1.

"**Impasse Notice**" shall have the meaning set forth in Section 16.1.2.

"**Increased Costs**" means the additional costs and expenses (fixed and variable) incurred by Gulf Power that result from complying with or recognizing a Change(s) in Law and which: (i) are associated with any of Gulf Power's generating and power supply resources; (ii) are associated with capacity and energy provided under this Agreement; or (iii) are incurred by Gulf

Power in performing its obligations under this Agreement; provided, however, with respect to any Increased Costs under the foregoing (i), FPUC's responsibility for such costs shall be limited to a proportionate share based on the amount of capacity provided under this Agreement and FPUC's actual load served under this Agreement. Examples of Increased Costs shall include costs and expenses resulting from: (i) compliance with environmental Laws changing existing emissions limits (e.g., NOx) or establishing limits for currently uncontrolled substances (e.g., CO2 and mercury); (ii) the imposition of or increases in taxes (such as taxes on power and gas sales) except for income taxes; and (iii) compliance with health and safety Laws. For purposes of calculating the Increased Costs associated with capitalized additions or modifications or other capital expenditures (determined in accordance with GAAP), the Parties will at that time jointly establish an appropriate annual fixed charge rate for application to the original capital cost (less depreciation) of such additions, modifications, or other capital expenditures. Such fixed charge rate shall be consistent with the methodology and approach used by the FPSC to determine the weighted average cost of capital (otherwise known as the overall rate of return) for the purpose of establishing prices for retail electricity service provided by Gulf Power. This calculation will represent the total cost associated with the identified addition, modifications, or other capital expenditures including and recognizing the key factors such as depreciation, useful life, carrying costs, and any other cost or expense item directly related to capital investments. Any costs and/or expenses not otherwise reflected in a fixed charge rate calculation shall be treated as Increased Costs as incurred; provided, however, that in no event shall Increased Costs be reflected in a separate Change in Law Component pursuant to Section 9.1.3 if such Increased Costs are also reflected in the Gulf Energy Rate pursuant to the formula in Appendix C.

"**Incremental Benefit**" shall have the meaning set forth in Section 5.3.

"**Incremental Burden**" shall have the meaning set forth in Section 5.3.

"**Indemnified Party**" shall have the meaning set forth in Section 10.1.4.

"**Indemnifying Party**" shall have the meaning set forth in Section 10.1.4.

"**Interest Rate**" shall mean the rate per annum equal to the lesser of: (i) the highest interest rate allowed by Law; or (ii) (a) for the first 14 Days of a given consecutive period of time during which interest shall accrue under this Agreement at the Interest Rate, the prime rate as stated in the *Wall Street Journal* on the date payment is due; and (b) for the remainder of such consecutive period of time after such 14 Day period has expired, two percent (2%) plus the prime rate as stated in the *Wall Street Journal* on the date payment is due.

"**Law**" means any act; statute; law; requirement; ordinance; order; ruling or rule; regulation; standards and/or criteria contained in any permit, license or other approval; legislative or administrative action; or a decree, judgment or order of any Governmental Authority imposed, whether in effect now or at any time in the future.

"**Meter Point(s)**" shall mean the points of interconnection between the Northwest Division System and the Transmission System.

"**Month**" shall mean a calendar month.

"**Monthly**" shall have a meaning correlative to that of Month.

"**Monthly Capacity Payment**" shall have the meaning set forth in Section 4.1.

"**Monthly Capacity Rate**" shall mean, for each Month during the Service Term, the applicable rate per kilowatt Month ($/kW-Mo.) for the Year in which such Month occurs, determined pursuant to the following table:

Year	Capacity Rate ($/kW-Mo.)
2008	$7.80
2009	$8.35
2010	$8.45
2011	$8.70
2012	$9.00
2013	$9.50
2014	$10.05
2015	$10.55
2016	$11.15
2017	$11.70

"**Monthly Energy Payment**" shall have the meaning set forth in Section 4.2.

"**Moody's**" shall mean Moody's Investors Service or its successor, provided that, if Moody's ceases to exist or publish ratings, Moody's shall mean a nationally recognized rating agency mutually agreed upon by the Parties, which agreement will not be unreasonably withheld or delayed.

"**Negotiation Period**" shall have the meaning set forth in Section 16.1.2.

"**NERC**" shall mean the North American Electric Reliability Council, including the regional reliability organization(s) to which the Southern Operating Companies belong, and any successor organization(s).

"**Non-Defaulting Party**" shall have the meaning set forth in Section 12.1.

"**Northwest Annual Peak Demand**" shall mean the amount of the Adjusted Hourly Demand for the Northwest Division for the one Hour period during the Peak Season in which the Northwest Division experiences the highest Adjusted Hourly Demand.

"**Northwest Division**" shall have the meaning set forth in the preamble of this Agreement.

"**Northwest Division System**" shall mean the integrated transmission and/or distribution system of the Northwest Division, as such system may be modified or expanded from time-to-time, as well as any successor transmission and/or distribution system(s).

"**Northwest Hourly Demand**" shall mean, for a given Hour, the sum of: (i) the integrated Hourly energy requirements for the Northwest Division expressed in kilowatt-Hours per Hour (kWH/H), as measured conjunctively at the Meter Point(s), plus: (ii) transmission and other losses from the Delivery Point(s) to the Meter Point(s) that would be associated with such demand (such transmission losses on the Transmission System to be determined pursuant to the then-current OATT (or other arrangement governing transmission on the Transmission System) applicable to transmission service for the Transmission System, as amended from time to time).

"**Notice of Dispute**" shall have the meaning set forth in Section 16.1.1.

"**OATT**" shall mean the Open Access Transmission Tariff governing transmission service on the Transmission System, as such tariff is filed at FERC and as such tariff may be revised or amended from time to time.

"**Operating Time**" shall mean the time standard used to dispatch, schedule and control generation in the Southern Control Area (currently, central prevailing time).

"**Original Amount**" shall have the meaning set forth in Section 9.3.1.

"**Party-Appointed Arbitrators**" shall have the meaning set forth in Section 16.2.1.

"**Peak Season**" shall mean the period of time comprising the Months of May through September.

"**Person**" means any individual, corporation, limited liability corporation, partnership, joint venture, trust, unincorporated organization, Governmental Authority, municipal, city or other entity.

"**Previous Season**" shall have the meaning set forth in Appendix A.

"**Previous Year**" shall have the meaning set forth in Appendix C.

"**Proposed Resolutions**" shall have the meaning set forth in Section 16.3.

"**Prudent Utility Practices**" shall mean, at a particular time, any of the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry prior to such time, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired results at a reasonable cost consistent with good business practices, reliability, safety and expedition. Prudent Utility Practices is not intended to be limited to the optimum practice, method or act to the exclusion of all others, but rather to be a spectrum of possible practices, methods or acts, having due regard for, among other things, manufacturers' warranties and the requirements of Governmental Authorities of competent jurisdiction and the requirements of this Agreement.

"**Required FPUC Collateral Amount**" shall be equal to the aggregate Monthly Capacity Payments as calculated in Appendix B hereto that are reasonably expected to become due under this Agreement (as reasonably calculated by Gulf Power (assuming no Event of Default has occurred or will occur hereunder and no termination or modification of this Agreement will occur)) during the 12 Months immediately following the date the Required FPUC Collateral Amount is determined by Gulf Power from time to time; provided, however, before the commencement of the Service Term, the Required FPUC Collateral Amount shall be the aggregate Monthly Capacity Payments as calculated in Appendix B hereto that are reasonably expected to become due under this Agreement (as reasonably calculated by Gulf Power (assuming no Event of Default has occurred or will occur hereunder and no termination or

modification of this Agreement will occur)) for the first 12 Months of the Service Term; provided, further, upon the expiration of the Service Term and until all amounts under this Agreement that will be due to be paid by FPUC are indefeasibly paid (including all true-up amounts after the expiration of the Service Term under Appendix C), the Required FPUC Collateral Amount shall be equal to the Monthly Capacity Payment for the final Month of the Service Term (regardless of whether such capacity payment has been paid).

"**Required Gulf Collateral Amount**" shall be equal to the aggregate Monthly Capacity Payments as calculated in Appendix B hereto that are reasonably expected to become due under this Agreement (as reasonably calculated by Gulf Power (assuming no Event of Default has occurred or will occur hereunder and no termination or modification of this Agreement will occur)) during the 12 Months immediately following the date the Required Gulf Collateral Amount is determined by Gulf Power from time to time; provided, however, before the commencement of the Service Term, the Required Gulf Collateral Amount shall be the aggregate Monthly Capacity Payments as calculated in Appendix B hereto that are reasonably expected to become due under this Agreement (as reasonably calculated by Gulf Power (assuming no Event of Default has occurred or will occur hereunder and no termination or modification of this Agreement will occur)) for the first 12 Months of the Service Term.

"**Required Ratios**" means a Funds From Operations Interest Coverage Ratio of at least 2.0 and a Total Debt to Total Capital Ratio not to exceed .65, as tested quarterly as of the end of each quarter averaged over the 6 consecutive quarters then ending.

"**Reserve Requirement**" means fifteen percent (15%).

"**RTO**" shall have the meaning set forth in Section 5.3.

"**S&P**" means Standard & Poor's, a division of The McGraw-Hill Companies, Inc., or its successor, provided that, if S&P ceases to exist or publish ratings, S&P shall mean a nationally recognized rating agency mutually agreed upon by the Parties, which agreement will not be unreasonably withheld or delayed.

"**SCGen**" shall have the meaning set forth in Section 17.16.

"**SCS**" shall have the meaning set forth in the preamble of this Agreement.

"**SEC**" shall have the meaning set forth in Section 15.2.3.

"**Service Term**" shall have the meaning set forth in Section 2.1.

"**Southern Company**" shall mean The Southern Company, a Delaware corporation.

"**Southern Control Area**" shall mean the electric service area encompassed by tie lines, including, the pseudo tie lines (as defined in NERC's "Terms Used in the Policies"), between the Southern Operating Companies and other utilities.

"**Southern Operating Companies**" shall mean, collectively, the electric utility operating company Affiliates of Southern Company engaged in common dispatch and control of generating resources within the Southern Control Area, which, as of the Effective Date, include Alabama Power Company, Georgia Power Company, Gulf Power, Mississippi Power Company, and Southern Power Company.

"**Tariff**" shall mean Southern Operating Companies' FERC Electric Tariff, Second Revised Volume No. 4, Market-Based Rate Tariff, as superseded or amended from time to time.

"**Term**" shall mean the period of time commencing on the Effective Date and ending December 31, 2017 as set forth in Article 2.

"**Third Arbitrator**" shall have the meaning set forth in Section 16.2.1.

"**Total Debt to Total Capital Ratio**" shall mean, with respect to a Party, such Party's Long Term Debt plus Current Maturities plus Commercial Paper plus Other Short Term Borrowings divided by such Party's Long Term Debt plus Current Maturities plus Commercial Paper plus Other Short Term Borrowings plus Shareholder's Equity (Including Preferred) plus Minority Interest. All items included in the calculation of the Total Debt to Total Capital Ratio shall be prepared and calculated in accordance with GAAP.

"**Transmission Force Majeure Event**" means the occurrence of a circumstance where: (i) a Force Majeure Event causes physical damage to transmission facilities; (ii) FPUC has procured firm transmission service or network integration transmission service under the OATT with respect to the energy to be supplied by Gulf Power under this Agreement; and (iii) as a result of such physical damage to transmission facilities, FPUC is unable to utilize such procured firm and/or network integration transmission service to deliver such energy from the Delivery Point(s) to the Meter Point(s). Unless the circumstances in (i) through (iii) above exist, a curtailment or interruption of transmission service shall not constitute a Transmission Force Majeure Event.

"**Transmission Risk**" means the ramifications (performance, economic or otherwise) resulting from the unavailability of transmission service, including inadequacy, interruption or curtailment of transmission service.

"**Transmission System**" shall mean the integrated transmission systems of the electric utility operating companies of Southern Company, as such systems may be modified or expanded from time-to-time, as well as any successor transmission system(s).

"**Year**" shall mean a calendar year.

1.2 Interpretation. In this Agreement, unless the context otherwise requires, the singular shall include the plural and any pronoun shall include the corresponding masculine, feminine and neuter forms. The words "hereof," "herein," "hereto" and "hereunder" and words of similar import when used in this Agreement shall, unless otherwise expressly specified, refer to this Agreement as a whole and not to any particular provision of this Agreement. Whenever the terms "include" or "including" are used herein in connection with a listing of items included within a prior reference, such listing shall be interpreted to be illustrative only, and shall not be interpreted as a limitation on or exclusive listing of the items included within the prior reference. Any reference in this Agreement to "Section," "Article" or "Appendix" shall be references to this Agreement unless otherwise stated, and all such Appendices shall be incorporated in this Agreement by reference. Unless specified otherwise, a reference to a given agreement or instrument, and all schedules, exhibits, appendices and attachments thereto, shall be a reference to that agreement or instrument as modified, amended, supplemented and restated, and in effect from time to time (subject to Section 17.19).

1.3 Construction. Both Parties acknowledge that each was actively involved in the negotiation and drafting of this Agreement and that no Law or rule of construction shall be raised or used in which the provisions of this Agreement shall be construed in favor of or against either Party because one is deemed to be the author thereof.

ARTICLE 2

TERM OF THE AGREEMENT

2.1 Term. This Agreement shall begin on the Effective Date and shall remain in effect for a term ending at the end of the Day on December 31, 2017 ("Term"), unless this Agreement is terminated earlier in accordance with its terms. The Service Term under this

Agreement shall commence at the beginning of the Day (Operating Time) on January 1, 2008 and shall continue until the expiration or termination of this Agreement in accordance with its terms.

2.2 Survival. All provisions of this Agreement that expressly or by implication come into or continue in force and effect following the expiration or termination of this Agreement shall remain in effect and be enforceable following such expiration or termination.

ARTICLE 3

SALE OF ELECTRIC CAPACITY AND ENERGY

3.1 Sale and Supply of Capacity. During the Service Term, subject to the terms of this Agreement, Gulf Power shall supply and sell to FPUC, and FPUC shall receive and purchase from Gulf Power, an amount of capacity equal to the Capacity Purchase as determined in accordance with the methodology provided in Appendix A.

3.2 Sale and Delivery of Energy. During the Service Term, subject to the terms of this Agreement, Gulf Power shall sell and deliver to FPUC, and FPUC shall receive and purchase from Gulf Power, a supply of energy necessary to supply the Northwest Hourly Demand. Gulf Power shall deliver such energy to, and FPUC shall receive such energy at, the Delivery Point(s).

3.3 Supply Sources for Energy. FPUC acknowledges and agrees that Gulf Power, or its agent(s), shall have the sole authority, which Gulf Power or its agent(s) may exercise in their sole discretion, to manage, control, operate and maintain the electricity resources used to supply energy to FPUC under this Agreement. Gulf Power may serve FPUC with energy from any resource(s) available to it. Gulf Power shall use the same method of dispatching resources to provide energy to FPUC under this Agreement as it uses for all of its territorial customers and shall make no adverse distinction against FPUC in designating resources to provide energy to FPUC hereunder. In addition, Gulf Power will assist FPUC in identifying resources associated

with this Agreement as may be required in connection with FPUC's obtaining network integration transmission service under the OATT.

3.4 Exclusive Supply. FPUC shall not purchase electric energy or capacity to meet the Northwest Division's load requirements from any party other than Gulf Power without the prior written consent of Gulf Power except to the extent that: (i) Gulf Power fails to furnish energy or capacity to FPUC in accordance with the terms of this Agreement; (ii) FPUC is required to purchase energy and/or capacity from third party generating facilities directly connected to the Northwest Division System pursuant to the Public Utility Regulatory Policies Act of 1978 (including regulations issued thereunder); and/or (iii) another Law requires FPUC to meet some portion of its load requirements by purchasing a required amount of energy (MWh) and/or capacity (MW) from third party generators. Provided, however, in the event that (ii) or (iii) of the foregoing sentence is applicable, FPUC shall provide Gulf Power with prompt notice of the applicable requirement to purchase capacity and/or energy from third party generating facilities. If such notice is provided, the Parties shall promptly commence good faith negotiations to agree upon feasible actions, if any, to be taken by either or both Parties that would facilitate the means by which FPUC can satisfy and/or comply with such requirement while simultaneously leaving this Agreement in full force and effect as originally executed. In the event that the Parties cannot agree upon such actions, FPUC and Gulf Power shall negotiate an appropriate amendment to this Agreement to reduce the amount of capacity and/or energy (as applicable) purchased under this Agreement, but only to the extent necessary for FPUC to comply with the specific requirement to purchase capacity and/or energy from the applicable third parties; provided, however, the recognition of such requirement in any such amendment and the reduction of the amount of capacity and/or energy purchased shall not adversely distinguish

against Gulf Power or this Agreement as compared to FPUC's other power suppliers and/or other power supply arrangements, unless such adverse distinction is required by Prudent Utility Practices because of transmission considerations. Any such amendment shall, to the maximum extent practicable, allow each Party to continue to recognize the economic bargain originally contemplated by this Agreement as of the Effective Date. In addition, any such amendment shall define the use and control of any third party generating facilities, including reliability provisions, such that Gulf Power can continue to meet its obligations under Section 7.2.

ARTICLE 4

PAYMENTS

4.1 Monthly Capacity Payment. FPUC shall pay Gulf Power, or Gulf Power's designated agent, a Monthly Capacity Payment for each Month of the Service Term, as calculated pursuant to the methodology in Appendix B.

4.2 Monthly Energy Payment. FPUC shall pay Gulf Power, or Gulf Power's designated agent, a Monthly Energy Payment for each Month of the Service Term, as calculated pursuant to the methodology in Appendix D.

4.3 Other Payments. In addition to the payments specified in this Article 4, each of FPUC and Gulf Power shall pay all amounts for which it is responsible pursuant to the other provisions of this Agreement.

ARTICLE 5

TRANSMISSION

5.1 Transmission Arrangements.

5.1.1 FPUC shall be responsible for all costs associated with and for making all necessary transmission arrangements (including any required ancillary services) for the

delivery of all Delivered Energy from and beyond the Delivery Point(s). Such transmission arrangements (including the procurement of ancillary services) shall be made by FPUC pursuant to the provisions of the OATT. Gulf Power shall be responsible for all costs associated with and for making all necessary transmission arrangements (including any required ancillary services) for the delivery of all Delivered Energy prior to the Delivery Point(s). In the event that a Party is assessed costs that are the responsibility of the other Party pursuant to this Section 5.1.1, the responsible Party shall promptly reimburse the assessed Party for such costs actually incurred.

5.1.2 Gulf Power shall, at no additional cost to Gulf Power, provide such administrative assistance to FPUC as it may reasonably request consistent with applicable Law in connection with FPUC's application for network integration transmission service under the OATT for Delivered Energy purchased hereunder; provided, however, that FPUC acknowledges that it is solely responsible for requesting and contracting for such service (including the negotiation of all terms and conditions of the pertinent transmission agreements).

5.2 Transmission Risk. Notwithstanding any other provision of this Agreement, any and all Transmission Risk associated with energy to be scheduled and/or delivered at and beyond the Delivery Point(s) in connection with this Agreement, whether before or after the Meter Point(s), shall be expressly borne by FPUC. In no event shall Gulf Power or any of Gulf Power's Affiliates be responsible or have any liability to FPUC whatsoever under this Agreement in connection with, and in no event shall the Monthly Capacity Payment (subject to Section 11.1.3.2) be reduced as a result of, the unavailability, inadequacy, interruption or curtailment of transmission service (whether before or after the Meter Point(s)) for any energy to be delivered

hereunder.

5.3 Formation of RTO. In the event that a Regional Transmission Organization(s) or similar organization ("RTO") is formed and the formation and/or implementation of such RTO results in: (i) a quantifiable monetary benefit for a Party with regard to its performance under this Agreement ("Benefited Party") that is greater than the monetary benefit to such Party contemplated on the Effective Date (the amount by which such monetary benefit is increased being referred to as the "Incremental Benefit"); and (ii) a quantifiable monetary harm for the other Party with regard to its performance under this Agreement ("Harmed Party") that results in a monetary burden to such Party that is greater than the monetary burden to such Party contemplated on the Effective Date (the amount by which such monetary burden is increased being referred to as the "Incremental Burden"), the Parties shall negotiate to reach mutual agreement regarding an amendment(s) to this Agreement establishing a method whereby the Benefited Party would share with the Harmed Party an amount of the Incremental Benefit equal to the lesser of: (i) the Incremental Benefit; or (ii) the Incremental Burden. In no event shall such amendment(s) require the Benefited Party to bear more of a monetary burden or receive less of a monetary benefit than as originally contemplated in this Agreement for such Party on the Effective Date.

ARTICLE 6

BILLING AND PAYMENT

6.1 Billing and Payment.

6.1.1 As promptly as practicable after the end of each Month during the Service Term, but no later than the tenth (10th) Day of the following Month, Gulf Power or its agent shall send FPUC an invoice stating the Monthly Capacity Payment, the Monthly

Energy Payment and any other amounts for which FPUC is responsible under this Agreement.

6.1.2 In addition to the payments set forth in Section 6.1.1, the Monthly invoice shall include the following adjustments: (a) billing corrections, including charges or credits, identified by either of the Parties subsequent to the last Monthly invoice, which shall not be subject to interest; (b) any billing corrections, including charges or credits, that the Parties have mutually agreed upon or otherwise resolved in accordance with Section 6.2 subsequent to the last Monthly invoice, which shall be subject to interest in accordance with Section 6.2; and (c) any overdue amounts, which shall be subject to interest in accordance with Section 6.2. Any corrections made by Gulf Power pursuant to subpart (a) of the foregoing sentence to a charge set forth on a particular Monthly invoice shall be made by Gulf Power no later than 365 Days after the issuance of such invoice. Notwithstanding the foregoing, the adjustments contemplated by this Section 6.1.2 shall not include true-ups made pursuant to the calculation of the Gulf Energy Rate under Appendix C.

6.1.3 Each Monthly payment shall be due and payable on or before the tenth (10^{th}) Day after FPUC's receipt of each Monthly invoice or if such Day is not a Banking Day, the next Banking Day ("Due Date"). FPUC shall make payment to Gulf Power or its designated agent in accordance with such invoices on or before the Due Date in immediately available funds through wire transfer of funds or other means acceptable to Gulf Power. If FPUC does not make a payment on or before the Due Date, then interest shall be added to the overdue payment, from the date such overdue payment was due until

such overdue payment together with interest is paid, which interest shall be compounded Monthly at the Interest Rate.

6.2 Billing Disputes and Final Accounting.

6.2.1 If, after receiving a Monthly invoice (or any other statement or bill), FPUC reasonably questions or contests the amount or propriety of any payment or amount claimed by Gulf Power to be due pursuant to this Agreement, FPUC shall provide Gulf Power with written notice of such disputed invoice amount. Notwithstanding the notice of a disputed invoice amount, FPUC shall make payments in full in accordance with such disputed invoice and adjustments with interest shall subsequently be made, if appropriate, as set forth below.

6.2.2 FPUC shall have 12 Months after the receipt of any Monthly invoice (or any other statement or bill) to question or contest the amount or propriety of any charge or credit on such invoice or statement. In the event that FPUC questions or contests any such charge or credit, Gulf Power shall promptly review the questioned charge or credit and shall notify FPUC of any error in the determination of amounts reflected on such disputed invoice and the amount of any adjusted payment that either Party is required to make as a result of such re-determination. The Party required to make such payment shall make payment to the other Party in immediately available funds by the later of: (i) 10 Days after receipt by FPUC of any such notice of re-determination from Gulf Power as to the adjusted amount; or (ii) the Due Date for the next Monthly invoice. Payments made by a Party under this Section 6.2.2 shall include interest at the Interest Rate from the date the original payment was due until the date such payment together with interest at the Interest Rate is made.

6.3 Availability of Records. Until the end of 12 Months after the receipt of any Monthly invoice, each Party will make available to the other Party and each Party may audit, such books and records of the other Party (or other relevant information to which such Party has access) as are reasonably necessary for such Party to calculate and determine the accuracy of amounts shown on such invoice and thereby to verify the appropriateness of the invoiced amounts. Upon written request and reasonable notice, each Party will make available to the other Party copies of or access to such books and records during normal business Hours, at such requesting Party's sole expense for purposes of conducting such an audit. In the event either Party determines that an invoice was not accurate or appropriate, it shall notify the other Party in writing of the discrepancy and of the necessary correction. The Party receiving such notice shall make such payments or take such other actions as are necessary to correct the discrepancy by the later of: (i) 10 Days following receipt of such notice; or (ii) the Due Date for the next Monthly invoice.

ARTICLE 7

CHARACTER OF SERVICE

7.1 Service Rendered. This Agreement is intended as a service agreement pursuant to the Tariff. Gulf Power shall provide and FPUC shall pay for services under this Agreement pursuant to the terms and conditions of the Tariff and of this Agreement. To the extent the terms and conditions of the Tariff are inconsistent with those set forth in this Agreement, the provisions of this Agreement shall control.

7.2 Constancy of Supply.

7.2.1 Gulf Power shall supply energy to meet the load requirements of the Northwest Division in a manner that is as firm as, and otherwise comparable with, the

manner in which the Southern Operating Companies meet their firm retail native load requirements, without any adverse distinction; provided, however, notwithstanding any other provision of this Agreement, Gulf Power does not guarantee or warrant that Gulf Power will supply a constant or uninterrupted supply of energy under this Agreement; provided, further, that Gulf Power shall use commercially reasonable best efforts, consistent with Prudent Utility Practices and the provisions of this Agreement, to provide the services contemplated herein in an uninterrupted fashion.

7.2.2 Subject to Section 7.2.1, to the extent practicable and consistent with Prudent Utility Practices, Gulf Power shall raise or lower the output of the generating resources used to provide energy hereunder as necessary to follow the moment-by-moment changes in the sum of the total load requirements of the Northwest Division. Gulf Power shall also provide FPUC with on-line and quick-start generation reserves consistent with the amount of capacity purchased under this Agreement.

7.2.3 Notwithstanding any other provision of this Agreement, in the event that Gulf Power, or one of its respective agents, determines in its sole discretion that it is necessary or appropriate for Gulf Power to shed, interrupt, or curtail firm territorial requirements load (including for reason that adequate resources are not available), and Gulf Power does shed, interrupt or curtail such loads, then FPUC's similar firm loads or interruptible/curtailable loads at the Northwest Division shall share in such interruption, curtailment or load shedding on a load-ratio basis and without adverse distinction. FPUC may restore service to such shed, interrupted or curtailed loads consistent with the restoration of service to Gulf Power's similar firm or interruptible/curtailable loads. For actions taken pursuant to this Section 7.2.3, neither Gulf Power, nor its Affiliates shall be

in breach of this Agreement by reason of, and shall have no liability whatsoever to FPUC for, any failure to make capacity available hereunder, or for any failure to deliver or any interruption in the delivery of energy hereunder or for any deficiency in the quality of service hereunder.

7.3 Character of Transactions. The sale of capacity by Gulf Power under this Agreement shall not constitute either: (i) a sale, lease, transfer or conveyance of an ownership interest or contractual right in or to any specific generation facility or resources; or (ii) a dedication of ownership or an entitlement to the capacity or output of any specific generation facility or resource.

ARTICLE 8

METERING

8.1 Metering.

8.1.1 The amount of energy transferred under this Agreement shall be determined by meters selected by Gulf Power or other methods as Gulf Power and FPUC jointly deem necessary. FPUC shall be responsible for and shall pay, under this Agreement, all costs of purchasing, installing, owning, reading, testing, inspecting, operating and maintaining the meters used in connection with service to FPUC under this Agreement (including meters owned by Gulf Power) to the extent that such costs are not otherwise assigned to or payable by another party under FPUC's network operating agreement under the OATT. Such costs shall be paid by FPUC in addition to the Monthly Capacity Payment and the Monthly Energy Payment. The Parties shall cause meters to be read Monthly at times mutually agreed upon. Metering records shall be available at all times to authorized agents and employees of the Parties for the purposes of this Agreement.

8.1.2 Each meter used in determining the demand for or amount of electric energy supplied hereunder will be tested, calibrated, repaired and corrected at the times and in a manner consistent with the provisions of FPUC's network operating agreement under the OATT governing the meters that measure the delivery of energy to the Northwest Division load.

8.1.3 The results of all such tests and calibrations shall be open to examination by FPUC and a report of every test shall be furnished to FPUC as soon as reasonably practical. Any meters tested and found to be not more than 2% above or below normal shall be considered, solely for purposes of this Agreement, to be correct and accurate insofar as correction of billing is concerned. If as a result of any test, any meter is found to register in excess of 2% either above or below normal, then, solely for purposes of this Agreement, the readings of such meter previously taken for billing purposes shall be corrected according to the percentage of inaccuracy so found, but no such correction shall extend beyond 90 days previous to the day on which the inaccuracy is discovered by such test.

8.1.4 For any period that a meter is found to have failed to register, then solely for purposes of this Agreement, it shall be assumed that the demand established, or electric energy delivered, as the case may be, during said period is the same as that for a period of like operation to be agreed upon by Gulf Power and FPUC during which such meter was in service and operating.

8.1.5 The provisions of this Article 8 shall apply only with respect to metering under this Agreement and shall have no application with respect to FPUC's network operating agreement under the OATT.

ARTICLE 9

CHANGE IN LAW; ENVIRONMENTAL PROVISIONS; REGULATORY

9.1 Change in Law.

9.1.1 Notwithstanding any other provision of this Agreement, but subject to Sections 9.1.2, 9.1.3 and 9.1.4 (including provision of the applicable Change in Law Notice): (i) FPUC shall pay Increased Costs (on an After-Tax Basis) through the Change in Law Component each Month pursuant to Section 9.1.3; and (ii) FPUC shall receive the benefit of Decreased Costs through the Change in Law Component each Month pursuant to Section 9.1.3.

9.1.2 At any time, Gulf Power may notify FPUC, or FPUC may notify Gulf Power, that a Change in Law will result or has resulted in: (i) Increased Costs that are FPUC's responsibility under this Agreement; or (ii) Decreased Costs for which FPUC is entitled to receive a credit under this Agreement ("Change in Law Notice"). The Change in Law Notice shall include: (x) the applicable Change in Law that has caused or will cause the Increased Costs or Decreased Costs; and (y) as applicable, the resulting Increased Costs that are FPUC's responsibility hereunder or the resulting Decreased Costs for which FPUC is entitled to receive a credit (or a projection of such costs if actual costs cannot reasonably be known). Such notice shall also include reasonable documentation of the applicable Change in Law and resulting Increased Costs or Decreased Costs. Within 90 Days after a Party receives a Change in Law Notice applicable to it, such Party shall: (a) make a good faith determination of whether the Increased Costs or Decreased Costs (as applicable) result from a Change in Law as specified in this Agreement; (b) make a good faith determination of whether the Increased

Costs or Decreased Costs (as applicable) are determined in accordance with this Agreement; and (c) send the Party providing the Change in Law Notice written notice of its determination. In the event that a Party receiving a Change in Law Notice applicable to it does not send written notice of its determination within such time period, such Party shall be deemed to have concurred that the specified Increased Costs or Decreased Costs result from a Change in Law. If such Party does not concur, the Parties shall commence discussions in an effort to address and resolve the basis for the disagreement. If the Parties are unable to resolve their disagreement within 120 Days after the Change in Law Notice was received, the Parties shall submit the issue to binding arbitration under the procedures set forth in Article 16.

9.1.3 If a Party has provided a Change in Law Notice, Gulf Power shall initiate a Change in Law Component (or modify an existing Change in Law Component) as a separate and distinctly observable component of the Monthly invoices sent to FPUC hereunder that shall reflect Increased Costs that are FPUC's responsibility or Decreased Costs for which FPUC is entitled to a credit (whether such costs are for future or prior periods); provided, however, if there is a disagreement with respect to whether a Change in Law has occurred or the amount of Increased Costs or Decreased Costs, the Change in Law Component shall reflect the position of Gulf Power with respect to Increased Costs and the position of FPUC with respect to Decreased Costs and then be resolved under the provisions of Article 16, Dispute Resolution, of this Agreement; provided, further, that to the extent any disagreement with regard to Increased Costs or Decreased Costs is resolved in a Party's favor, then a payment shall be made to the applicable Party(ies) if required in order to refund or pay any overcharges or undercharges with appropriate interest, where

the amount of interest is to be calculated in accordance with the Interest Rate. As applicable, FPUC shall pay or receive a credit for the amount of the Change in Law Component, as adjusted from time to time, with each Monthly invoice. In the event that the Change in Law Component is based on an estimate of Increased Costs or Decreased Costs, there shall be included a true-up amount in a subsequent Monthly invoice (either a credit or an additional charge, as appropriate) to reflect actual Increased Costs or Decreased Costs once they are known. Any portion of a Change in Law Component that is for the recovery of Increased Costs or Decreased Costs incurred in prior periods shall include interest on such amounts at the Interest Rate.

9.1.4 Notwithstanding anything to the contrary in this Section 9.1 above, to the extent that Gulf Power includes Increased Costs and/or Decreased Costs in the calculation of the Gulf Energy Rate, (i) Sections 9.1.1, 9.1.2 and 9.1.3 shall not apply with respect to such costs or the Change(s) in Law associated with such costs, and (ii) FPUC shall pay or receive the benefit of (as applicable) such increases or decreases in costs through the Gulf Energy Rate and the Monthly Energy Payment as calculated by Gulf Power.

9.2 Clean Air Interstate Rule and Clean Air Mercury Rule. The Parties acknowledge that CAIR and/or CAMR impose obligations that will increase Gulf Power's costs of providing capacity and energy under this Agreement. Therefore, FPUC agrees to reimburse Gulf Power for an appropriate pro rata share (i.e., a proportionate share based on the amount of capacity provided under this Agreement and FPUC's actual load served under this Agreement) of all costs and expenses incurred by Gulf Power that result from complying with or recognizing CAIR and CAMR with respect to Gulf Power's generating and other power supply resources, including costs and expenses associated with obtaining emissions allowances, variable and fixed operation

and maintenance costs, and costs and expenses associated with making capital additions to or installing environmental controls at such resources. Except to the extent that Gulf Power includes FPUC's pro rata share of such costs and expenses in the Gulf Energy Rate, such pro rata share of such costs and expenses shall be calculated in the same manner as Increased Costs and shall be invoiced by Gulf Power and paid by FPUC through the Change in Law Component. In addition, Gulf Power shall provide FPUC an appropriate pro rata share of the benefit of all allowances (if any) allocated by any Governmental Agency under CAIR and CAMR to Gulf Power's generating resources, and allowances purchased by Gulf Power and its agent(s) for Gulf Power's generating resources to comply with CAIR and CAMR, provided that FPUC shall not receive such benefit after the expiration of the Service Term.

9.3 Federal Energy Regulatory Commission.

9.3.1 The Parties anticipate that this Agreement is not required to be filed and accepted by FERC because it is a market-based contract. Therefore, this Agreement shall not be contingent on FERC acceptance. Having freely negotiated and agreed upon the economic bargain among them as set forth hereunder, the Parties waive all rights under Sections 205 and 206 of the Federal Power Act to effect a change in the Agreement. Moreover, it is the Parties' mutual intent that FERC be precluded, to the fullest extent permitted by law, from altering this Agreement in any way. Notwithstanding the foregoing, if at any time FERC takes some action that adversely alters an amount(s) to be paid to a Party under this Agreement (the Party adversely affected by such action altering an amount(s) to be paid being referred to as the "Impacted Party") as contemplated on the Effective Date (such amount(s) as contemplated on the Effective Date being referred to as the "Original Amount"), Impacted Party shall be deemed to have retained rights under

Section 205 and/or Section 206 (as applicable) to file for changes in the Agreement, but only to the extent required to modify this Agreement to more closely or entirely reflect the Original Amount. Moreover, in the event that FERC takes some action that adversely alters the Original Amount, Impacted Party may take any or all of the actions set forth under Section 9.3.1.1 and 9.3.1.2 in its sole and absolute discretion.

9.3.1.1 Impacted Party may exercise its Section 205 or Section 206 rights (as applicable) provided under Section 9.3.1 if at any time it reasonably determines in its sole discretion that it may be able to have this Agreement modified so that it more closely or entirely reflects the Original Amount. Before exercising such rights, Impacted Party shall negotiate with the other Party in an effort to reach mutual agreement regarding amendments to this Agreement so that it will more closely or entirely reflect the Original Amount. Impacted Party shall file any resulting amendments for acceptance by FERC (if required by FERC), and the other Party shall not oppose such filing(s). If the Parties are unable to agree upon such amendment(s), Impacted Party shall be entitled to make unilateral filing(s) at FERC under Section 205 or 206 (as applicable) to seek modification of this Agreement in order to more closely or entirely reflect the Original Amount. In this latter event, the other Party shall not oppose Impacted Party's right to restore the Original Amount (provided that the other Party shall retain the right to challenge the amount of and/or the methodology for calculating the Original Amount and/or the means by which the filing Party proposes to restore the Original Amount). Any amendment(s) or filing(s) contemplated hereunder shall restore the Original Amount (or any allowed portion thereof) for the remainder of the Term and shall provide reimbursement to Impacted Party for any amounts that it overpaid or was underpaid (relative to the Original Amount) in

prior periods (with interest) as a result of the alteration of the Original Amount. Such amendment(s) or filing(s) by Impacted Party shall not require the other Party to bear more of an economic burden than originally contemplated in this Agreement on the Effective Date. Nothing in this Agreement is intended to or shall restrict the number of times that Impacted Party may exercise the above-described Section 205 and/or Section 206 rights during the Term or within any specific time frame.

9.3.1.2 If FERC takes some action that adversely alters the Original Amount and Impacted Party is Gulf Power, then Gulf Power shall be entitled to provide notice to FPUC that it is terminating this Agreement on a date that is no earlier than 365 Days after such notice is provided. If: (i) FERC takes some action that adversely alters the Original Amount and Impacted Party is FPUC; (ii) FPUC has actively made reasonable efforts through negotiations with Gulf Power and has supported filings made at FERC by either Party to modify this Agreement so that it reflects the Original Amount; and (iii) FERC does not allow this Agreement to reflect the Original Amount within 120 Days after the first of such filings, then FPUC shall be entitled to provide notice to Gulf Power that it is terminating this Agreement on a date that is no earlier than 245 Days after such notice is provided. If Impacted Party provides a notice to terminate the Agreement under this Section, this Agreement shall terminate on the date specified in the applicable notice. Upon any such termination, no Party shall have any further liability or obligation under this Agreement to any other Party, except for any liabilities and obligations accruing prior to such termination.

9.4 Initial Approval of the Florida Public Service Commission.

9.4.1 No later than 45 Days after the Effective Date, FPUC shall make a filing with the FPSC seeking approval by the FPSC for FPUC to recover from its Northwest Division customers all payments required to be made to Gulf Power under this Agreement without material modification or condition with respect to such Agreement ("FPSC Approval"). After making such filing, FPUC shall utilize diligent efforts to obtain the FPSC Approval by no later than July 1, 2007 ("Approval Deadline"). FPUC shall promptly notify Gulf Power when it receives a ruling from the FPSC regarding the requested FPSC Approval. FPUC shall keep Gulf Power reasonably informed as to the progress of its efforts to obtain the FPSC Approval.

9.4.2 If the FPSC Approval is not received by the Approval Deadline or if the FPSC issues an order denying FPUC's request for the FPSC Approval ("FPSC Denial") prior to the Approval Deadline, FPUC shall be entitled to provide notice to Gulf Power that it desires to immediately terminate this Agreement, provided that such notice must be provided within 10 Days after the first to occur of the Approval Deadline or the date of the FPSC Denial. If FPUC does not provide such notice within such time period, then this Agreement shall continue in full force and effect for the remainder of the Term. If FPUC provides such notice within such time period, then this Agreement shall immediately terminate and no Party shall have any further obligation or liability to the other Party under this Agreement.

9.5 Subsequent Action of the Florida Public Service Commission.

9.5.1 After the Approval Deadline, if the FPSC issues an order with respect to this Agreement that prohibits FPUC from recovering from its Northwest Division

customers a material portion of the payments required to be made to Gulf Power under this Agreement, including payments resulting from Increased Costs (each such order being referred to as a "Disallowance Order"), then FPUC shall be entitled to provide notice to Gulf Power that it desires to terminate this Agreement, provided that such notice must be provided to Gulf Power within 60 Days after the issuance of the Disallowance Order. If FPUC does not provide such notice within such time period, then FPUC shall be deemed to have waived its right to provide such notice with respect to the Disallowance Order giving rise to such right. If FPUC provides such notice within such time period, then Gulf Power shall respond to FPUC within 60 Days after receiving such notice that Gulf Power either: (i) accepts such termination; or (ii) does not accept such termination.

9.5.2 Notwithstanding the issuance of a Disallowance Order, this Agreement shall continue in full force and effect as originally executed on the Effective Date (including all payment provisions) for the next 365 Days of the Service Term after such Disallowance Order ("Continuation Period"). If Gulf Power elects to accept termination in its notice under Section 9.5.1 with respect to a Disallowance Order, upon the expiration of the Continuation Period, this Agreement shall immediately terminate and neither Party shall have any further liability or obligation to the other hereunder (except for liabilities and obligations accruing prior to termination). If Gulf Power elects to not accept termination in its notice under Section 9.5.1 with respect to a Disallowance Order, effective upon the expiration of the Continuation Period, this Agreement shall be deemed amended (but only until such time that the FPSC allows FPUC to recover the previously disallowed amount) such that with respect to capacity and energy provided under this

Agreement after the Continuation Period, FPUC will only be required to pay those amounts which such Disallowance Order allows FPUC to recover from its Northwest Division customers.

ARTICLE 10

INDEMNIFICATION; TITLE; COSTS AND EXPENSES

10.1 Indemnification. The following provisions shall apply with respect to energy deemed delivered hereunder to FPUC:

10.1.1 Gulf Power shall defend, indemnify and save FPUC and its respective officers, directors, agents, employees and Affiliates harmless, on an After-Tax Basis, from and against any and all claims, liabilities, actions, demands, judgments, losses, costs, expenses (including reasonable attorney's fees) arising out of, resulting from, or in any way connected with the generation, transmission, or delivery of such energy and associated capacity prior to the Delivery Point(s) (whether or not the same is caused or arises out of joint, concurrent or contributory negligence of FPUC), except to the extent the same is caused by willful misconduct of an officer, director, subcontractor, agent or employee of FPUC.

10.1.2 FPUC shall defend, indemnify and save Gulf Power, its officers, directors, agents, employees and Affiliates harmless, on an After-Tax Basis, from and against any and all claims, liabilities, actions, demands, judgments, losses, costs, expenses (including reasonable attorney's fees) arising out of, resulting from, or in any way connected with the generation, transmission, or use of such energy and associated capacity at and after the Delivery Point(s) (whether or not the same is caused or arises out of joint, concurrent or contributory negligence of Gulf Power), except, in each case, to the

extent the same is caused by willful misconduct of an officer, director, subcontractor, agent or employee of Gulf Power (as applicable).

10.1.3 The rights, obligations and protections afforded by this Section 10.1 shall survive the termination, expiration or cancellation of this Agreement, and shall apply to the fullest extent permitted by law.

10.1.4 A Party that becomes entitled to indemnification under this Agreement ("Indemnified Party") shall promptly notify the Party required to indemnify such Indemnified Party ("Indemnifying Party") of any claim or proceeding in respect of which it is to be indemnified. Such notice shall be given as soon as reasonably practicable after the Indemnified Party becomes aware of such claim or proceeding. Failure to give such notice shall not excuse an indemnification obligation except to the extent failure to provide notice adversely affects the Indemnifying Party's interests. The Indemnifying Party shall assume the defense thereof with counsel designated by the Indemnifying Party; provided, however, that if the defendants in any such action include both the Indemnified Party and the Indemnifying Party and the Indemnified Party reasonably concludes that there may be legal defenses available to it that are different from or additional to, or inconsistent with, those available to the Indemnifying Party, the Indemnified Party shall have the right to select and be represented by separate counsel. The Indemnified Party shall be responsible for the expenses associated with such separate counsel, unless a liability insurer will pay the expenses of such separate counsel. If the Indemnifying Party fails to assume the defense of a claim, the indemnification of which is required under this Agreement, the Indemnified Party may, at the expense of the Indemnifying Party, contest, settle, or pay such claim; provided, however, that settlement

or full payment of any such claim may be made only with the Indemnifying Party's consent or, absent such consent, written opinion of the Indemnified Party's counsel that such claim is meritorious or warrants settlement.

10.2 Fees, Charges and Taxes. Except as otherwise provided hereunder, all fees, charges and taxes associated with energy delivered hereunder at and after the Delivery Point(s) shall be the sole responsibility of FPUC. Except as otherwise provided hereunder (e.g., those provisions that require FPUC to reimburse Gulf Power for certain fees, charges and taxes, such as Increased Costs), all fees, charges and taxes associated with such energy prior to the Delivery Point(s) shall be the sole responsibility of Gulf Power.

10.3 Title. Title to energy delivered hereunder shall pass from Gulf Power to FPUC at the Delivery Point(s), and FPUC shall be deemed to be in exclusive possession and control of such energy at and after such point(s).

ARTICLE 11

FORCE MAJEURE

11.1 Force Majeure Event.

11.1.1 For the purposes of this Agreement, a "Force Majeure Event" as to a Party means any occurrence, nonoccurrence or set of circumstances, whether or not foreseeable, that is beyond the reasonable control of such Party and is not caused by such Party's negligence or lack of due diligence, including any strike, stoppage in labor, failure of contractors or suppliers of materials or services, flood, ice, earthquake, storm or eruption; fire; explosion; invasion, riot, war, commotion or insurrection; sabotage, terrorism or vandalism; military or usurped power; or act of God or of a public enemy. The term Force Majeure Event shall not include: (i) a change or circumstance in market

conditions that affects the value of this Agreement for either Party; (ii) difficulty or inability to make payments for any reason; (iii) FPUC's inability to use or a lack of need for the capacity and energy purchased hereunder except to the extent such lack of need arises as a result of one or more Transmission Force Majeure Events; or (iv) FPUC's inability, to any extent, to recover in its customer rates the amounts to be paid under this Agreement for any reason, including due to action or inaction of any Governmental Authority.

11.1.2 Subject to Sections 11.1.3, 11.2 and 11.3 below, either Party shall be excused from performance (other than payment obligations) and shall not be construed to be in breach or default in respect of any obligation hereunder for so long as the affected Party is rendered unable to perform such obligation due to a Force Majeure Event.

11.1.3 Subject to the limits set forth in Sections 11.1.3.1 and 11.1.3.2, during the suspension of performance due to or resulting from a Force Majeure Event, FPUC shall not be relieved from the obligation to make and be responsible for Monthly Capacity Payments and Monthly Energy Payments.

11.1.3.1 In the event that Gulf Power suspends performance under this Agreement for a period greater than 90 consecutive Days due to a Force Majeure Event directly affecting Gulf Power's generation resources prior to the Delivery Point(s), the Monthly Capacity Payment(s) applicable to capacity provided after such 90 Day period shall be reduced on a pro rata basis to reflect the amount of energy Gulf Power does not provide after such 90 Day period as a result of such event.

11.1.3.2 In the event that a Transmission Force Majeure Event occurs for a period greater than 90 consecutive Days, the Monthly Capacity Payment(s)

applicable to capacity provided after such 90 Day period shall be reduced on a pro rata basis to reflect the amount of energy that FPUC is unable to receive after such 90 Day period as a result of such event.

11.2 Notice and Remedy of Force Majeure Events. Following the occurrence of a Force Majeure Event, the affected Party shall:

11.2.1 give the other Party notice thereof, followed by written notice if the first notice is not written, as promptly as practicable after such Party becomes aware of such Force Majeure Event, describing the particulars of such Force Majeure Event;

11.2.2 use its reasonable best efforts consistent with Prudent Utility Practice to remedy its inability to perform as soon as practicable; provided, however, that this Section shall not require the settlement of any strike, walkout, lockout or other labor dispute on terms which in the sole judgment of the Party involved in the dispute, are contrary to its interest; provided further, that the settlement of strikes, lockouts or other labor disputes shall be entirely within the discretion of the Party having the difficulty; and

11.2.3 provide the other Party with written notice when it is able to resume performance of its obligations under this Agreement.

11.3 Suspension of Performance. The suspension of performance due to a Force Majeure Event shall be of no greater scope and of no longer duration than is required by such Force Majeure Event. No Force Majeure Event shall extend this Agreement beyond its stated Term.

ARTICLE 12

EVENTS OF DEFAULT AND TERMINATION

12.1 Events of Default. "Event of Default" shall mean the occurrence of any of the following events with respect to a Party (the "Defaulting Party," and the Party not in default being a "Non-Defaulting Party"):

12.1.1 the failure by the Defaulting Party to make, when due, payment of any amount required under this Agreement if such failure is not remedied within 5 Banking Days after written notice of such failure is given to the Defaulting Party by the Non-Defaulting Party;

12.1.2 any representation or warranty of the Defaulting Party pursuant to this Agreement shall prove to have been false or misleading in any material respect when made or deemed made and have been known by the Defaulting Party to have been so at the time made or deemed made unless (a) the fact, circumstances or condition that is the subject of such representation or warranty is made true within 30 Days after notice thereof has been given to the Defaulting Party and (b) such cure removes any adverse effect on the Non-Defaulting Party of such fact, circumstance or condition being otherwise than as first represented;

12.1.3 the Defaulting Party or its Guarantor:

(a) makes a general assignment or arrangement for the benefit of its creditors;

(b) (i) files a petition or otherwise commences, authorizes, or acquiesces in the commencement of a proceeding or case under any bankruptcy or similar law for the protection of creditors or (ii) has such petition filed or

proceeding commenced against it and, in the case of a petition filed or proceeding commenced against it, such petition or proceeding results in a judgment of insolvency or bankruptcy or the entry of any order for relief or the making of an order for the winding-up or liquidation of such entity, or is not dismissed, discharged, stayed or restrained within 5 Banking Days of the filing or commencement thereof;

(c) otherwise becomes bankrupt or insolvent;

(d) fails or is unable or admits in writing its inability generally to pay its debts as they become due;

(e) is dissolved (other than pursuant to a consolidation, acquisition, amalgamation or merger);

(f) has a resolution passed for its winding-up, official management or liquidation (other than pursuant to a consolidation, acquisition, amalgamation or merger);

(g) seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for all or substantially all of its assets;

(h) has a secured party take possession of all or substantially all of its assets, or has a distress, execution, attachment, sequestration or other legal process levied, enforced or sued on or against all or substantially all of its assets and subject secured party maintains possession, or any such process is not dismissed, discharged, stayed or restrained, in each case within 30 Days thereafter;

(i) causes or is subject to any event with respect to it which, under the applicable laws of any jurisdiction, has an analogous effect to any of the events specified in Section 12.1.3 clauses (a) through (h) (inclusive);

(j) takes any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the foregoing acts; or

(k) merges with any other party and the surviving entity does not assume the Defaulting Party's or its Guarantor's obligations with respect to this Agreement;

12.1.4 the material failure by the Defaulting Party to perform or observe any material obligation or covenant set forth in this Agreement (other than obligations which are otherwise specifically covered in this Section 12.1 as a separate Event of Default), and such failure is not cured within 60 Days after written notice of such default is given to the Defaulting Party;

12.1.5 the Defaulting Party or its Guarantor defaults on obligations under one or more agreements or instruments in respect of debt and such default continues after the applicable grace period, if any, specified in such agreement or instrument if the principal amount of such obligations equal or exceed ten million dollars ($10,000,000.00), and such default results in such debt becoming, or becoming capable at such time of being declared, due and payable prior to its stated maturity, whether or not such debt is in fact declared due and payable;

12.1.6 the failure by a Party to maintain the Eligible Collateral as required under Article 13, unless such failure is cured within 3 Banking Days after such Party receives notice of such failure.

12.2 Notification of Default. In the event a Party becomes aware of any event or circumstance that constitutes an Event of Default, such Party shall promptly notify the other Party.

12.3 Event of Default by Gulf Power.

12.3.1 Upon and after the occurrence of an Event of Default by Gulf Power, so long as such Event of Default is continuing, FPUC shall be entitled to suspend the performance of its obligations to Gulf Power under this Agreement, except for the obligations to pay for energy and capacity provided by Gulf Power prior to termination of this Agreement. In addition to such suspension, if an Event of Default by Gulf Power has occurred and is continuing, FPUC shall have the right by notice to Gulf Power to take one or more of the following actions in its sole discretion: (i) terminate this Agreement; (ii) pursue an action for equitable relief by recourse to a court of competent jurisdiction, but only to the extent necessary to effect a cure of such Event of Default; or (iii) if the Event of Default is for the failure to pay an amount of money pursuant to this Agreement, pursue an action for damages equal to (but no greater than) the amount of money not paid pursuant to the procedure set forth in Article 16. Provided, however, notwithstanding anything to the contrary in this Agreement, FPUC shall not be entitled to take or maintain more than one of the actions in (i) through (iii) of the foregoing sentence at the same time with respect to the same Event of Default, and in no event shall FPUC be entitled to receive both FPUC Liquidated Damages and a remedy under (ii) or (iii) of the foregoing sentence as a result of the same Event of Default.

12.3.2 If FPUC elects option (i) in a notice under Section 12.3.1, FPUC shall designate a Banking Day in such notice that is no more than 120 Days from the date of

such notice (such designated date being referred to as the "FPUC Termination Date"). On the FPUC Termination Date, (i) Gulf Power shall pay to FPUC the FPUC Liquidated Damages; and (ii) this Agreement shall terminate and no Party shall have any further liability or obligation to the other Party under this Agreement, except for any obligations and liabilities occurring prior to termination and Gulf Power's obligation to pay the amounts under this Section 12.3.

12.3.3 As used herein, "FPUC Liquidated Damages" means the aggregate sum of what the Monthly Capacity Payments would have been under this Agreement (assuming no Event of Default had occurred and no termination or modification of this Agreement), as reasonably determined by FPUC, for the lesser of: (i) (A) if the FPUC Termination Date occurs after the commencement of the Service Term, the 24 Months following the Month in which the FPUC Termination Date occurs, or (B) if the FPUC Termination Date occurs prior to the Service Term, the first 24 Months of the Service Term; or (ii) the Months remaining in the Service Term.

12.4 Event of Default by FPUC.

12.4.1 Upon and after the occurrence of an Event of Default by FPUC, so long as such Event of Default is continuing, Gulf Power shall be entitled to suspend the performance of its obligations to FPUC under this Agreement; provided, however, that Gulf Power shall provide FPUC with at least 5 Days prior written notice before suspending the provision of capacity and energy due to an Event of Default, which notice may be provided with (and such 5 Day notice period may run concurrent with the notice period in) any notice provided under Sections 12.1.1, 12.1.2, 12.1.4 or 12.1.6. In addition to such suspension, if an Event of Default by FPUC has occurred and is continuing, Gulf

Power shall have the right by notice to FPUC to take one or more of the following actions in its sole discretion: (i) terminate this Agreement; (ii) pursue an action for equitable relief by recourse to a court of competent jurisdiction, but only to the extent necessary to effect a cure of such Event of Default; or (iii) if the Event of Default is for the failure to pay an amount of money pursuant to this Agreement, pursue an action for damages equal to (but no greater than) the amount of money not paid pursuant to the procedure set forth in Article 16. Provided, however, notwithstanding anything to the contrary in this Agreement, Gulf Power shall not be entitled to take or maintain more than one of the actions in (i) through (iii) of the foregoing sentence at the same time with respect to the same Event of Default, and in no event shall Gulf Power be entitled to receive both Gulf Liquidated Damages and a remedy under (ii) or (iii) of the foregoing sentence as a result of the same Event of Default.

12.4.2 If Gulf Power elects option (i) in a notice under Section 12.4.1, Gulf Power shall designate a Banking Day in such notice that is no more than 120 Days from the date of such notice (such designated date being referred to as the "Gulf Termination Date"). On the Gulf Termination Date, (i) FPUC shall pay to Gulf Power the Gulf Liquidated Damages; and (ii) this Agreement shall terminate and no Party shall have any further liability or obligation to the other Party under this Agreement, except for any obligations and liabilities accruing prior to termination and FPUC's obligation to pay the amounts under this Section 12.4.

12.4.3 As used herein, "Gulf Liquidated Damages" means the aggregate sum of what the Monthly Capacity Payments would have been under this Agreement (assuming no Event of Default had occurred and no termination or modification of this Agreement),

as reasonably determined by Gulf Power, for the lesser of: (i) (A) if the Gulf Termination Date occurs after the commencement of the Service Term, the 24 Months following the Month in which the Gulf Termination Date occurs, or (B) if the Gulf Termination Date occurs prior to the Service Term, the first 24 Months of the Service Term; or (ii) the Months remaining in the Service Term.

12.5 Exclusive Remedy. The exercise by a Party of its rights under Section 12.3 or 12.4 (as applicable) shall be the sole and exclusive remedy (whether arising in contract, tort or otherwise) of such Party for an Event of Default by or attributable to the Defaulting Party. The Parties acknowledge and agree that in the event of an Event of Default, all or a portion of the amount of damages arising therefrom are not susceptible to an accurate determination. The Parties further acknowledge and agree that the liquidated damages set forth above are not intended as a penalty and represent a fair and reasonable approximation of all or a portion of the damages a Non-Defaulting Party may incur in each particular case.

ARTICLE 13

CREDITWORTHINESS AND SECURITY

13.1 FPUC's Provision of Eligible Collateral. If and for so long as FPUC does not have an Acceptable Rating and FPUC has or will have remaining payment obligations under this Agreement, then FPUC shall provide to and maintain in favor of Gulf Power Eligible Collateral that unconditionally secures all of FPUC's obligations to Gulf Power under this Agreement, in an amount not less than the Required FPUC Collateral Amount. Such Eligible Collateral shall be provided to Gulf Power within 10 Days after FPUC's receipt of notice from Gulf Power (or its agent) of the requirement to provide Eligible Collateral pursuant to the provisions of this Section. So long as no Event of Default by or attributable to FPUC shall have occurred and be

continuing, Gulf Power shall cooperate with FPUC, at FPUC's request and expense, to release and return to FPUC Eligible Collateral theretofore provided by FPUC to and then held by Gulf Power if and to the extent FPUC contemporaneously provides to Gulf Power replacement or substitute Eligible Collateral in equal or greater amount that satisfies the requirements of this Section. If, at any time, the Required FPUC Collateral Amount shall be more than the amount of the Eligible Collateral provided by FPUC to and then held by Gulf Power, FPUC shall, within 10 Days of Gulf Power's request, have additional Eligible Collateral in the amount of such difference provided to Gulf Power unless FPUC is no longer required to maintain such Eligible Collateral under the terms hereof. So long as no Event of Default by or attributable to FPUC shall have occurred and be continuing hereunder, if, on the first Banking Day of any Year, the Required FPUC Collateral Amount shall be less than the amount of the Eligible Collateral theretofore provided by FPUC to and then held by Gulf Power, Gulf Power shall cooperate with FPUC, at FPUC's request and expense, to have such Eligible Collateral then held by Gulf Power reduced by the amount of such difference, subject to FPUC's obligation to thereafter provide Eligible Collateral to Gulf Power in order to comply with the provisions of this Section. In addition, at such time that FPUC has an Acceptable Rating and so long as no Event of Default by or attributable to FPUC shall have occurred and be continuing hereunder, FPUC may request and Gulf Power shall cooperate with FPUC, at FPUC's expense, to have the Eligible Collateral theretofore provided by FPUC and then held by Gulf Power released and returned to FPUC, subject to FPUC's obligation to thereafter provide Eligible Collateral to Gulf Power in order to comply with the provisions of this Section. Notwithstanding anything to the contrary contained or implied above, the Required FPUC Collateral Amount shall be and remain reduced by the

dollar amount of any payment received by Gulf Power in connection with its realizing upon Eligible Collateral theretofore provided by FPUC to Gulf Power pursuant to this Section.

13.2 Gulf Power's Provision of Eligible Collateral. If and for so long as Gulf Power does not have an Acceptable Rating and Gulf Power has or will have remaining payment obligations under this Agreement, then Gulf Power shall provide to and maintain in favor of FPUC Eligible Collateral that unconditionally secures all of Gulf Power's obligations to FPUC under this Agreement, in an amount not less than the Required Gulf Collateral Amount. Such Eligible Collateral shall be provided to FPUC within 10 Days after Gulf Power's receipt of notice from FPUC of the requirement to provide Eligible Collateral pursuant to the provisions of this Section. So long as no Event of Default by or attributable to Gulf Power shall have occurred and be continuing, FPUC shall cooperate with Gulf Power, at Gulf Power's request and expense, to release and return to Gulf Power Eligible Collateral theretofore provided by Gulf Power to and then held by FPUC if and to the extent Gulf Power contemporaneously provides to FPUC replacement or substitute Eligible Collateral in equal or greater amount that satisfies the requirements of this Section. If, at any time, the Required Gulf Collateral Amount shall be more than the amount of the Eligible Collateral provided by Gulf Power to and then held by FPUC, Gulf Power shall, within 10 Days of FPUC's request, have additional Eligible Collateral in the amount of such difference provided to FPUC unless Gulf Power is no longer required to maintain such Eligible Collateral under the terms hereof. So long as no Event of Default by or attributable to Gulf Power shall have occurred and be continuing hereunder, if, on the first Banking Day of any Year, the Required Gulf Collateral Amount shall be less than the amount of the Eligible Collateral theretofore provided by Gulf Power to and then held by FPUC, FPUC shall cooperate with Gulf Power, at Gulf Power's request and expense, to have such Eligible Collateral then held

by FPUC reduced by the amount of such difference, subject to Gulf Power's obligation to thereafter provide Eligible Collateral to FPUC in order to comply with the provisions of this Section. In addition, at such time that Gulf Power has an Acceptable Rating and so long as no Event of Default by or attributable to Gulf Power shall have occurred and be continuing hereunder, Gulf Power may request and FPUC shall cooperate with Gulf Power, at Gulf Power's expense, to have the Eligible Collateral theretofore provided by Gulf Power and then held by FPUC released and returned to Gulf Power, subject to Gulf Power's obligation to thereafter provide Eligible Collateral to FPUC in order to comply with the provisions of this Section. Notwithstanding anything to the contrary contained or implied above, the Required Gulf Collateral Amount shall be and remain reduced by the dollar amount of any payment received by FPUC in connection with its realizing upon Eligible Collateral theretofore provided by Gulf Power to FPUC pursuant to this Section.

13.3 Compliance Certificate. A Party who does not have any of: (i) an issuer credit rating or senior unsecured rating by S&P; or (ii) an issuer rating or senior unsecured rating by Moody's shall furnish or cause to be furnished to the other Party quarterly within 45 Days of the end of each quarter a completed certificate of the chief financial officer of such Party, substantially in the form of Appendix E hereto.

ARTICLE 14

REPRESENTATIONS AND WARRANTIES

14.1 Execution. Each Party represents and warrants to the other Party as of the Effective Date that: (i) it has all the necessary corporate and legal power and authority and has been duly authorized by all necessary corporate action to enable it to lawfully execute, deliver and perform under this Agreement; and (ii) it is a valid legal entity duly organized and validly

existing in good standing under the laws of the state of its formation and is, to the extent required, qualified to do business in the state where it is organized.

14.2 Binding Obligations. Each Party represents and warrants to the other Party that as of the Effective Date this Agreement is the valid and binding obligation of such Party, enforceable against such Party in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, fraudulent conveyance, moratorium or other similar laws affecting enforcement generally, and by equitable principles regardless of whether such principles are considered in a proceeding at law or in equity.

14.3 Execution and Consummation. Each Party represents and warrants to the other Party that as of the Effective Date the execution and delivery of this Agreement, the consummation of the transactions contemplated hereby and the fulfillment of and compliance with the provisions of this Agreement do not and will not conflict with any of the terms, conditions or provisions of its organizational documents or any law applicable to it or result in a breach or default under any evidence of its indebtedness or any other agreement or instrument to which it is a party or by which it or any of its property is bound which has a reasonable likelihood of materially and adversely affecting the consummation of the transactions contemplated hereby or the performance by the Party of any of its obligations under this Agreement.

14.4 Actions and Proceedings. Each Party represents and warrants to the other that as of the Effective Date there is no pending or, to the knowledge of such Party, threatened action or proceeding affecting such Party before any Governmental Authority that has a reasonable likelihood of materially adversely affecting or reasonably threatening the ability of such Party to perform its obligations under this Agreement or the validity or enforceability of this Agreement

against it and that there are no bankruptcy proceedings pending or being contemplated by it or, to its knowledge, threatened against it.

14.5 Absence of Certain Events. Each Party represents and warrants to the other Party that as of the Effective Date no Event of Default attributable to it has occurred and is continuing and no such event or circumstance would occur as a result of its entering into or performing its obligations under this Agreement.

ARTICLE 15

CONFIDENTIALITY

15.1 Confidential Information. "Confidential Information" shall mean business or technical information of a Party rightfully in the possession of such Party, which information derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by Persons who can obtain economic value from its disclosure and use, and which information is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Confidential Information consists of information designated as confidential and furnished by a Party to another Party in discussions leading up to execution of this Agreement (including in Gulf Power's proposals to FPUC) and during the Term of this Agreement, and the detailed terms and pricing information contained in this Agreement.

15.2 Disclosure of Confidential Information.

15.2.1 Each Party agrees that during the Term of this Agreement and for a period of 5 Years from the date of termination of this Agreement it will not, without the written consent of the other Party or as otherwise provided herein, disclose Confidential Information of another Party to any other party; provided, however, each Party shall be

entitled to disclose Confidential Information to its (or its Affiliates') agents, employees, officers, directors, representatives, contractors, advisors, lenders, accountants, rating agencies, underwriters, consultants and advisors who need to know such information in connection with the performance of their duties or services for such Party or Affiliates or in connection with the analysis, issuance or rating of any debt or equity securities or financial activities of such Party or Affiliates; provided, further, that such parties shall be bound by an obligation to maintain the confidentiality of such Confidential Information and such Party shall be responsible for any use or disclosure by such parties of any Confidential Information inconsistent with this Article 15.

15.2.2 To the extent Gulf Power is required to provide Confidential Information in this Agreement to FERC, Gulf Power shall seek confidential treatment of such Confidential Information from FERC, and FPUC will provide reasonable cooperation in connection with such request. Notwithstanding the foregoing, the Parties acknowledge that certain Confidential Information may need to be disclosed in filings with FERC which may become publicly available. In the event this Agreement becomes publicly available, Gulf Power will promptly notify FPUC once Gulf Power learns of this fact; provided, however, that regardless of whether such notification is provided, the provisions of this Article 15 shall no longer apply to this Agreement if this Agreement becomes publicly available as a result of filings with FERC or otherwise.

15.2.3 Each Party may file this Agreement and Confidential Information with the Securities and Exchange Commission ("SEC") as may be necessary under Laws in connection with such Party's application to the SEC for such orders and approvals as may be required for financing and/or the issuance and sale of interests in or debt issued or to

be issued by such Party and/or its Affiliates. Such Party shall request confidential treatment of this Agreement and Confidential Information in connection with such filing; however, the Parties acknowledge that such request may be denied in whole or in part, and accordingly, that confidential treatment may not be afforded by the SEC to such information. In addition, each Party may disclose Confidential Information as required by the SEC pursuant to the Securities and Exchange Act of 1934, as amended, and any rule or regulation promulgated thereunder. In the event any Confidential Information will need to be disclosed in connection with a filing under this Section 15.2.3, the Parties shall consult and cooperate with each other prior to such disclosure, including, without limitation, in determining the extent to which confidential treatment will be sought for such terms, conditions and provisions.

15.2.4 The Parties agree to seek confidential treatment of this Agreement and other Confidential Information from the FPSC to the maximum extent possible pursuant to Chapter 366.093, Florida Statutes, and Rule 25-22.006 of the Florida Administrative Code. In the event any Confidential Information will need to be disclosed in connection with any application for the FPSC approval of this Agreement or the rates to be charged hereunder, FPUC shall consult and cooperate with Gulf Power prior to such disclosure, including, without limitation, in determining the extent to which confidential treatment will be sought for such terms, conditions and provisions.

15.2.5 Nothing in this Section 15.2 shall prohibit or otherwise limit the use or disclosure of Confidential Information if such Confidential Information: (a) was previously known to the disclosing or using Party unrelated to this Agreement without an obligation of confidentiality; (b) was developed by or for the disclosing or using Party

unrelated to this Agreement using nonconfidential information; (c) was acquired by the disclosing or using Party from a third party which is not, to the disclosing or using Party's knowledge, under an obligation of confidence with respect to such information; (d) is or becomes publicly available other than through a manner inconsistent with this Section 15.2; or (e) is provided or made available for inspection by any Party under public records or public disclosure laws but only to the extent required to be so provided or made available.

15.2.6 Notwithstanding anything in this Article 15 to the contrary, if a Party is required by applicable Law or in the course of administrative or judicial proceedings or investigations, to disclose to third parties, Confidential Information of the other Party or this Agreement, such required Party may make disclosure of such information; provided, however, that all reasonable steps are taken by such Party to assure continued confidential treatment by the relevant administrative, regulatory or judicial agencies or other recipient and provided further that as soon as such Party learns of the disclosure request or requirement or otherwise intends to disclose any such Confidential Information pursuant hereto and prior to making disclosure, such Party, to the extent permitted by law, notifies the other Party of the requirement, request or intention and the terms thereof and such other Party may challenge the disclosure requirement, request or intention or seek a protective order or other appropriate remedy. The required Party, at the expense of the Party whose Confidential Information would be disclosed, shall attempt to minimize the disclosure of such Confidential Information consistent with applicable law and attempt to obtain proprietary or confidential treatment of such Confidential Information by the Person to whom such Confidential Information will be disclosed (and if practicable,

reasonably prior to any such disclosure). If, in the absence of a protective order or other appropriate remedy, the required Party is nonetheless, in the written opinion of counsel, legally compelled to disclose such Confidential Information or otherwise may become subject to contempt or other censure or penalty, the required Party may, in such instance but not otherwise, without liability hereunder, disclose that portion of such Confidential Information which and to whom such counsel advises the required Party is legally required to be disclosed (but none other).

15.3 Remedies. A breach of the confidentiality obligations of Section 15.2 by any Person with whom the receiving Party has shared Confidential Information of the disclosing Party shall be deemed a breach of this Article by the receiving Party. The Parties shall be entitled to all remedies available at law or in equity to enforce, or seek relief in connection with, this confidentiality obligation; provided that all monetary damages shall be limited to actual direct damages and a breach of the confidentiality obligations of Section 15.2, notwithstanding anything to the contrary in this Agreement, shall not give rise to a right to suspend or terminate this Agreement or result in an Event of Default hereunder.

ARTICLE 16

DISPUTE RESOLUTION

16.1 Dispute Resolution Generally.

16.1.1 Except as allowed otherwise in Section 12.3.1(ii) or 12.4.1(ii), in the event any dispute arises out of or in connection with this Agreement or its performance (including the existence, validity and interpretation of this Agreement), a Party (the "Disputing Party") shall provide the other Party (the "Responding Party") with a written notice of the particular dispute for each issue in dispute, a proposed means for resolving

each such issue, and support for such position (the "Notice of Dispute"). Within 30 Days after receiving the Notice of Dispute, the Responding Party shall provide the Disputing Party with a written notice of each additional issue (if any) with respect to the dispute raised by the Notice of Dispute, a proposed means for resolving every issue in dispute, and support for such position (the "Dispute Response").

16.1.2 Within 15 Days after the submission of the Dispute Response, the administrative representatives of each Party shall meet to discuss the matter and attempt in good faith to reach a negotiated resolution of the dispute. If the administrative representatives do not resolve the dispute by unanimous agreement within 30 Days after receipt of the Dispute Response, or such other time period as the Parties may agree in writing to allow for discussions (the "Negotiation Period"), the dispute shall be submitted to a senior executive of each of the Parties for resolution. If the dispute is not resolved after 60 Days from the submission to such senior executives, then either Party may provide written notice to the other Party declaring an impasse (the "Impasse Notice") and initiating binding arbitration in accordance with the further provisions of this Article 16.

16.2 Initiation of Arbitration; Selection of Arbitrators.

16.2.1 Arbitration will be deemed to be initiated when an Impasse Notice is given by the delivering Party to the receiving Party in accordance with the notice provisions of Section 17.11. The Party initiating arbitration shall nominate 1 arbitrator at the same time it initiates arbitration. The other Party shall nominate 1 arbitrator within 20 Days of receiving the Impasse Notice. Each of the 2 arbitrators appointed by the Parties (the "Party-Appointed Arbitrators") shall not be and shall not have been previously an employee or agent of or consultant or counsel to either Party and will not have a direct or

indirect interest in either Party or the subject matter of the arbitration. The Party-Appointed Arbitrators shall appoint a third, neutral arbitrator (the "Third Arbitrator") within 10 Days after the last Party-Appointed Arbitrator is appointed. The Third Arbitrator shall be competent and experienced in matters involving the electric energy business in the United States, with at least 5 years of electric industry experience, and shall be impartial and independent of either Party and the Party-Appointed Arbitrators.

16.2.2 If the Party-Appointed Arbitrators are unable to agree on the Third Arbitrator within 60 Days from initiation of arbitration, then the Third Arbitrator shall be selected by the American Arbitration Association (the "AAA") with due regard given to the selection criteria above and input from the Parties and the Party-Appointed Arbitrators. The Parties shall undertake to request the AAA to complete selection of the Third Arbitrator no later than 90 Days from initiation of arbitration. Costs charged by the AAA for this service shall be borne by the Parties in accordance with Section 16.5.

16.2.3 In the event the AAA should fail to select the Third Arbitrator within 90 Days from initiation of arbitration, then either Party may petition a court of competent jurisdiction in Florida to select the Third Arbitrator. Due regard shall be given to the selection criteria above and input from the Parties and the Party-Appointed Arbitrators.

16.2.4 If prior to the conclusion of the arbitration a Party-Appointed Arbitrator or the Third Arbitrator becomes incapacitated or otherwise unable to serve, then a replacement arbitrator shall be appointed in the manner described above and applicable to the original arbitrator being replaced.

16.3 Discovery, Hearing. Discovery and other pre-hearing procedures shall be conducted as agreed to by the Parties, or if they cannot agree, as determined by a majority of the

Party-Appointed Arbitrators and the Third Arbitrator; provided, however, all pre-hearing discovery shall be completed within 180 Days following selection of the Third Arbitrator. Within 15 Days after completion of such pre-hearing discovery, the Parties shall submit to each other by overnight delivery, the Party-Appointed Arbitrators and the Third Arbitrator a separate precise statement for each issue in dispute, that party's proposed means of resolving each issue in dispute, and the factual or legal support for such proposal (the "Proposed Resolutions"). No later than 30 Days after all pre-hearing discovery has been completed, a hearing shall be conducted at which the Parties shall each present such evidence and witnesses as they may choose. Arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the AAA, as amended and supplemented, except where specifically modified by this Agreement.

16.4 Decision. The Party-Appointed Arbitrators and the Third Arbitrator shall consider the terms and conditions of this Agreement and all relevant evidence and testimony, and shall render their decision within 90 Days following conclusion of the hearing; provided, however, the Party-Appointed Arbitrators and the Third Arbitrator are expressly and specifically limited to selecting one (1) of the Proposed Resolutions for each issue in dispute provided by the Parties; provided, further, the Party-Appointed Arbitrators and the Third Arbitrator shall not have the authority to effect any other resolution of the issues in dispute. The decision rendered by a majority of the Party-Appointed Arbitrators and the Third Arbitrator, made in writing, shall be final and binding upon the Parties. Any such decision may be filed in a court of competent jurisdiction and may be enforced by the Parties as a final judgment in such court. The Party-Appointed Arbitrators and the Third Arbitrator shall have no authority to award special, exemplary, or consequential damages.

16.5 Expenses of Arbitration. Each Party shall bear the compensation and expenses of its respective Party-Appointed Arbitrator, own counsel, witnesses, consultants and employees. All other expenses of arbitration (the "Arbitration Expenses") shall be borne by the Parties equally. Notwithstanding the foregoing provisions of this Section 16.5, any costs incurred by the Parties in seeking judicial enforcement of any decision rendered in writing by a majority of the Party-Appointed Arbitrators and the Third Arbitrator, shall be chargeable to and borne exclusively by the Party against whom such court order is obtained.

16.6 Confidentiality. All disputes resolved pursuant to this Article 16 shall be subject to the confidentiality provisions set forth in Article 15.

ARTICLE 17

MISCELLANEOUS PROVISIONS

17.1 Assignment.

17.1.1 Neither Party may directly (by way of merger, consolidation or otherwise) assign this Agreement or its rights and obligations hereunder in whole, in part or collaterally without the written consent of the other Party (which consent shall not be unreasonably withheld, conditioned or delayed); provided that, notwithstanding the foregoing, either Party may assign this Agreement and its rights and obligations hereunder directly (by way of merger, consolidation or otherwise) without the consent of the other Party to any Person or entity who: (i) has the legal power and authority to perform and satisfy the obligations of such assigning Party under this Agreement; and (ii) has an Acceptable Rating or provides the credit support required by Article 13 of this Agreement. The assigning Party will notify the other Party in writing prior to any assignment with respect to which consent is not required hereunder. No assignment by a

Party of this Agreement or its rights or obligations hereunder shall relieve the assigning Party of liability for its obligations under this Agreement without the written release of the other Party. Such release shall not be withheld if the Assignment Conditions (defined below) are satisfied.

17.1.2 The non-assigning Party's obligation to recognize or perform for any Person or entity claiming rights in this Agreement by outright assignment, by way of merger or consolidation or as the result of the realization or foreclosure upon a collateral assignment permitted by this Agreement (an "Assignee"), shall be subject to such Assignee: (i) establishing that it (a) has the legal power and authority to perform and satisfy the obligations of its assigning Party under this Agreement and (b) has an Acceptable Rating or has provided the credit support required by Article 13 of this Agreement; (ii) having cured all existing Events of Default attributable to the assigning Party under this Agreement; and (iii) having executed and delivered to the non-assigning Party and being in compliance with an assignment and assumption agreement whereby the Assignee assumes and agrees to satisfy all conditions and pay and perform all obligations in favor of the non-assigning Party then existing and/or thereafter arising under this Agreement (the "Assignment Conditions").

17.1.3 Notwithstanding anything to the contrary contained or implied in this Section 17.1, either Party may (without the other Party's consent) assign, transfer, mortgage and/or pledge this Agreement and any and all of its rights hereunder as security for any obligation secured in whole or part by any indenture, mortgage, security interest or other lien on any or all of its generating facilities.

17.2 Agents of the Parties.

17.2.1 Gulf Power hereby designates SCS as its agent for purposes of the implementation and administration of this Agreement. Gulf Power may designate a new agent from time to time under this Agreement by giving FPUC written notice in which event SCS's role, as agent, shall cease and the newly-designated agent shall be substituted for the sole purpose of serving and acting as agent for Gulf Power hereunder.

17.2.2 Wherever this Agreement requires a Party to provide information, schedules, notice or the like to, or to take direction from, another Party or its agent, the Party required to take such action shall provide such information, schedules, notice or the like to, or take direction from, whichever of such other Party, its agent or both that such other Party may direct from time to time. Each Party shall be accountable for the acts or omissions of its agents. In the event a Party's agent does not perform in accordance with this Agreement, such Party shall be in breach of this Agreement.

17.3 No Partnership. The Parties do not intend for this Agreement to, and this Agreement shall not, create any joint venture, partnership, association taxable as a corporation, or other entity for the conduct of any business for profit.

17.4 Successors and Assigns. This Agreement shall inure to the benefit of and be binding upon any respective successors and assigns of the Parties.

17.5 No Third Party Benefit. Nothing in this Agreement shall be construed to create any duty, obligation or liability of Gulf Power or FPUC to any Person not a Party to this Agreement.

17.6 No Consequential Damages. NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, BUT SUBJECT TO ANY OBLIGATION FOR A

PARTY TO PAY LIQUIDATED DAMAGES UNDER SECTION 12.3.2 OR 12.4.2, THE SOLE AND EXCLUSIVE REMEDY FOR ANY LIABILITY UNDER THIS AGREEMENT SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES. SUBJECT TO ANY OBLIGATION FOR A PARTY TO PAY LIQUIDATED DAMAGES UNDER SECTION 12.3.2 OR 12.4.2, NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR ANY SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES UNDER, ARISING OUT OF, DUE TO OR IN CONNECTION WITH ITS PERFORMANCE OR NONPERFORMANCE OF THIS AGREEMENT OR ANY OF ITS OBLIGATIONS HEREIN, WHETHER BASED ON CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, WARRANTY OR OTHERWISE. TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, THAT OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT, AND THAT THE LIQUIDATED DAMAGES CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS.

17.7 No Affiliate Liability. NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, NO AFFILIATE OF ANY PARTY (INCLUDING ANY AFFILIATE OF EITHER PARTY ACTING AS SUCH PARTY'S AGENT WHERE SUCH PARTY'S AGENT IS GIVEN CERTAIN AUTHORITIES HEREUNDER) SHALL HAVE ANY LIABILITY WHATSOEVER FOR SUCH PARTY'S PERFORMANCE, NONPERFORMANCE OR DELAY IN PERFORMANCE UNDER THIS AGREEMENT UNLESS SUCH AFFILIATE HAS BEEN ASSIGNED THIS AGREEMENT IN ACCORDANCE WITH SECTION 17.1.

17.8 Disclaimer of Warranty. EXCEPT AS EXPRESSLY PROVIDED OTHERWISE IN THIS AGREEMENT, THERE ARE NO WARRANTIES UNDER THIS AGREEMENT, AND EACH PARTY HEREBY DISCLAIMS ANY AND ALL EXPRESS, IMPLIED OR STATUTORY WARRANTIES RELATING TO THE SUBJECT MATTER OF THIS AGREEMENT, INCLUDING ANY AND ALL WARRANTIES AS TO MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AVAILABILITY, ACCURACY, QUALITY, QUANTITY OR OTHERWISE.

17.9 Time of Essence; No Waiver.

17.9.1 Time is of the essence of this Agreement.

17.9.2 No Party's failure to enforce, at any time, any provision of this Agreement or to require at any time performance by another Party of any provision of this Agreement, shall in any way be construed as a waiver of any such provision, nor prevent such Party from enforcing each and every other provision of this Agreement at such time or at any time thereafter, nor in any way affect the validity of this Agreement or any part hereof, or the right of either Party thereafter to enforce each and every such provision. No waiver of all or any part of this Agreement shall be valid unless it is reduced to a writing, expressly stating that the Parties agree to such waiver, and is duly executed by the Parties.

17.10 Amendments. Except as otherwise provided in this Agreement, this Agreement may be amended only by a written instrument, duly executed by each of the Parties, which has received all acceptances or approvals of Governmental Authorities with competent jurisdiction necessary for the effectiveness thereof.

17.11 Notice. Any notice, request, consent or other communication permitted or required by this Agreement shall be in writing and shall be deemed given on the Day hand-

delivered to the officer of the receiving Party identified below, or the Day received by the receiving Party below if other means are selected by the Party providing notice, which Day of receipt must be established by appropriate evidence that can be authenticated by the receiving Party (e.g., certified mail, prepaid, return receipt requested, with the United States Postal Service).

If given to Gulf Power, it shall be addressed to:

Vice President, Southern Wholesale Energy
Southern Company Services, Inc.
600 18th Street North
Birmingham, AL 35203

Facsimile: (205) 257-2163

With a copy to:

Vice President, Chief Financial Officer and Comptroller
Gulf Power Company
1 Energy Place
Pensacola, FL 32520

Facsimile: (850) 444-6744

and if given to FPUC, it shall be addressed to:

President and CEO
Florida Public Utilities Company
401 S. Dixie Highway
West Palm Beach, FL 33401

Facsimile: (561) 833-8562

unless Gulf Power or FPUC shall have designated a different officer or address for itself by appropriate notice to the other.

17.12 Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

17.13 Articles and Sections Headings. The descriptive headings of the various Articles and Sections of this Agreement have been inserted for convenience of reference only and shall in no way modify or restrict any of the terms or provisions hereof.

17.14 Public Announcement. The Parties agree that no public or other announcement concerning the detailed terms and conditions or pricing provisions hereof shall be made except after mutual consultation and consent; provided, however, that consent will not be required if either Party determines that disclosure is required by a Governmental Authority.

17.15 Governing Law. The Agreement shall be governed by and construed in accordance with the laws of the State of Florida.

17.16 Information Exchange. The implementation and administration of this Agreement may require FPUC to provide certain information relating to FPUC's historical and projected loads, and any other necessary information as determined by the Parties ("FPUC Information"). Such FPUC Information may be provided to Southern Company Generation ("SCGen"), a division of SCS as agent for Gulf Power. SCGen includes "energy affiliates" of the Southern Operating Companies as defined by FERC's Standards of Conduct regulations. FPUC understands that SCGen will only use FPUC Information for the limited purpose of implementing and administering this Agreement, and for no other purpose, and that such information will not be used or disseminated in any manner contrary to the confidentiality provisions in Article 15 of this Agreement or in violation of FERC's Standards of Conduct.

FPUC acknowledges that FPUC Information has not been and is not being provided to SCGen in exchange for any preferential treatment, either operational or rate-related, by Gulf Power.

17.17 Severability. In the event any provision of this Agreement is declared invalid or unenforceable by a final, non-appealable order of any Governmental Authority, the Parties shall promptly renegotiate to restore this Agreement as near as possible to its original intent and effect.

17.18 Further Assurances. If either Party reasonably determines or is reasonably advised that any further instruments or any other things are necessary or desirable to carry out the terms of this Agreement, the other Party shall execute and deliver all such instruments and assurances and do all things reasonably necessary and proper to carry out the terms of this Agreement.

17.19 Entire Agreement. This Agreement and the Appendices attached hereto constitute the entire agreement between the Parties as of the time of execution relating to the subject matter contemplated by this Agreement and supersedes all prior agreements, whether oral or written.

17.20 Survival of Obligations. Upon the expiration or termination of the Parties' sale, purchase and delivery obligations under this Agreement, any monies, penalties or other charges due and owing Gulf Power or subsequently becoming due and owing (including the Monthly Energy Payment and Monthly Capacity Payment for the last Month of the Service Term and the true-up amounts calculated under Appendix C) shall be paid in accordance with the terms of this Agreement, any corrections or adjustments to payments previously made shall be determined, and any refunds due FPUC made, as soon as practicable. To the extent necessary to enforce or resolve matters or claims hereunder, the provisions of Articles 4, 6, 9, 10, 12, 13, 16 and Sections 2.2, 17.6, 17.7 and 17.8, including the rights and obligations of the Parties therein provided, shall survive the termination or expiration of this Agreement and the performance by the Parties of their obligations hereunder.

17.21 Changes in Agreement. Except for any changes and/or a termination of this Agreement pursuant to Section 9.3.1, absent the agreement of the Parties to the proposed change, the standard of review for changes to this contract proposed by a Party, a non-Party or FERC acting sua sponte shall be the "public interest" standard of review set forth in United Gas Pipeline Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956) (the "Mobile-Sierra" doctrine).

[The next page is the signature page.]

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed and delivered by their respective duly authorized representatives as of the date first above written.

GULF POWER COMPANY
By its Agent
Southern Company Services, Inc.

By:_____
Name:
Title:

FLORIDA PUBLIC UTILITIES COMPANY

By:_____
Name:
Title:

Responses to Staff's 3rd Set of Data Requests

ATTACHMENT FOR DR 5#

Docket #160074-EQ
Response for Staff's Third Data Request
Question 5A

Currently Approved Standard Offer Contract (provider located outside FPU Service Territory)

Firm Capacity Amount (MW)	20
Capacity Factor	80%
Resulting Energy (MWH)	140,160

JEA Full Requirements Supplier

Capacity Cost ($/KW)	$14.31	
Energy Cost ($/KWH)	$0.01100	
Environmental Cost ($/KWH)	$0.00062	
Fuel Cost ($/KWH)	$0.04360	
Transmission Cost ($/KW)	$1.51	
JEA Avoided Cost ($MWH)	$0.04000	Estimate

NOTE: The FPU Payment to JEA and the FPU Payment to the Third Party Supplier are the same under the existing standard offer contract.

NOTE: The reimbursement from JEA to FPU for the capacity and energy from the Third Party Provider would be at the JEA average hourly avoided cost which has been estimated based on previous information from JEA.

Payment to Third Party based on current SOC				
Year	Annual Energy Payments $(000)	Annual Capacity Payments $(000)	Annual Other Payments $(000)	Annual Total Payments $(000)
2017	$6,111	$3,434	$0	$9,545
2018	$6,111	$3,434	$0	$9,545
2019	$6,111	$3,434	$0	$9,545
2020	$6,111	$3,434	$0	$9,545
2021	$6,111	$3,434	$0	$9,545
2022	$6,111	$3,434	$0	$9,545
2023	$6,111	$3,434	$0	$9,545
2024	$6,111	$3,434	$0	$9,545
2025	$6,111	$3,434	$0	$9,545
2026	$6,111	$3,434	$0	$9,545
2027	$6,111	$3,434	$0	$9,545
2028	$6,111	$3,434	$0	$9,545
2029	$6,111	$3,434	$0	$9,545
2030	$6,111	$3,434	$0	$9,545
2031	$6,111	$3,434	$0	$9,545
2032	$6,111	$3,434	$0	$9,545
2033	$6,111	$3,434	$0	$9,545
2034	$6,111	$3,434	$0	$9,545
2035	$6,111	$3,434	$0	$9,545
2036	$6,111	$3,434	$0	$9,545
Total	$122,220	$68,688	$0	$190,908
NPV (2017$)	$99,923	$56,157	$0	$156,081
Rate	2%			

JEA Credit to FPU for Third Party Capacity & Energy				
Year	Annual Energy Payments $(000)	Annual Capacity Payments $(000)	Annual Other Payments $(000)	Annual Total Payments $(000)
2017	$5,606	$3,434	$0	$9,041
2018	$5,606	$3,434	$0	$9,041
2019	$5,606	$3,434	$0	$9,041
2020	$5,606	$3,434	$0	$9,041
2021	$5,606	$3,434	$0	$9,041
2022	$5,606	$3,434	$0	$9,041
2023	$5,606	$3,434	$0	$9,041
2024	$5,606	$3,434	$0	$9,041
2025	$5,606	$3,434	$0	$9,041
2026	$5,606	$3,434	$0	$9,041
2027	$5,606	$3,434	$0	$9,041
2028	$5,606	$3,434	$0	$9,041
2029	$5,606	$3,434	$0	$9,041
2030	$5,606	$3,434	$0	$9,041
2031	$5,606	$3,434	$0	$9,041
2032	$5,606	$3,434	$0	$9,041
2033	$5,606	$3,434	$0	$9,041
2034	$5,606	$3,434	$0	$9,041
2035	$5,606	$3,434	$0	$9,041
2036	$5,606	$3,434	$0	$9,041
Total	$112,128	$68,688	$0	$180,816
NPV (2017$)	$91,673	$56,157	$0	$147,830

Additional Capacity & Energy Payment ($000)
$505
$505
$505
$505
$505
$505
$505
$505
$505
$505
$505
$505
$505
$505
$505
$505
$505
$505
$505
$505
$10,092
$8,251

Proposed Standard Offer Contract (provider located outside FPU Service Territory)

Firm Capacity Amount (MW)	20
Capacity Factor	80%
Resulting Energy (MWH)	140,160

JEA Full Requirements Supplier

Capacity Cost ($/KW)	$14.31	
Energy Cost ($/KWH)	$0.01100	
Environmental Cost ($/KWH)	$0.00062	
Fuel Cost ($/KWH)	$0.04360	
Transmission Cost ($/KW)	$1.51	
JEA Avoided Cost ($MWH)	$0.04000	Estimate

NOTE: The FPU Payment to JEA and the FPU Payment to the Third Party Supplier are different under the proposed standard offer contract.

NOTE: The reimbursement from JEA to FPU for the capacity and energy from the Third Party Provider would be at the JEA average hourly avoided cost which has been estimated based on previous information from JEA. This amount would match the FPU Payment to the Third Party Supplier.

Payment to Third Party based on proposed SOC				
Year	Annual Energy Payments $(000)	Annual Capacity Payments $(000)	Annual Other Payments $(000)	Annual Total Payments $(000)
2017	$5,606	$3,434	$0	$9,041
2018	$5,606	$3,434	$0	$9,041
2019	$5,606	$3,434	$0	$9,041
2020	$5,606	$3,434	$0	$9,041
2021	$5,606	$3,434	$0	$9,041
2022	$5,606	$3,434	$0	$9,041
2023	$5,606	$3,434	$0	$9,041
2024	$5,606	$3,434	$0	$9,041
2025	$5,606	$3,434	$0	$9,041
2026	$5,606	$3,434	$0	$9,041
2027	$5,606	$3,434	$0	$9,041
2028	$5,606	$3,434	$0	$9,041
2029	$5,606	$3,434	$0	$9,041
2030	$5,606	$3,434	$0	$9,041
2031	$5,606	$3,434	$0	$9,041
2032	$5,606	$3,434	$0	$9,041
2033	$5,606	$3,434	$0	$9,041
2034	$5,606	$3,434	$0	$9,041
2035	$5,606	$3,434	$0	$9,041
2036	$5,606	$3,434	$0	$9,041
Total	$112,128	$68,688	$0	$180,816
NPV (2017$)	$91,673	$56,157	$0	$147,830
Rate	2%			

JEA Credit to FPU for Third Party Capacity & Energy				
Year	Annual Energy Payments $(000)	Annual Capacity Payments $(000)	Annual Other Payments $(000)	Annual Total Payments $(000)
2017	$5,606	$3,434	$0	$9,041
2018	$5,606	$3,434	$0	$9,041
2019	$5,606	$3,434	$0	$9,041
2020	$5,606	$3,434	$0	$9,041
2021	$5,606	$3,434	$0	$9,041
2022	$5,606	$3,434	$0	$9,041
2023	$5,606	$3,434	$0	$9,041
2024	$5,606	$3,434	$0	$9,041
2025	$5,606	$3,434	$0	$9,041
2026	$5,606	$3,434	$0	$9,041
2027	$5,606	$3,434	$0	$9,041
2028	$5,606	$3,434	$0	$9,041
2029	$5,606	$3,434	$0	$9,041
2030	$5,606	$3,434	$0	$9,041
2031	$5,606	$3,434	$0	$9,041
2032	$5,606	$3,434	$0	$9,041
2033	$5,606	$3,434	$0	$9,041
2034	$5,606	$3,434	$0	$9,041
2035	$5,606	$3,434	$0	$9,041
2036	$5,606	$3,434	$0	$9,041
Total	$112,128	$68,688	$0	$180,816
NPV (2017$)	$91,673	$56,157	$0	$147,830

Additional Capacity & Energy Payment ($000)
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0

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Question 5A

Currently Approved Standard Offer Contract (provider located outside FPU Service Territory)

Firm Capacity Amount (MW)	20
Capacity Factor	80%
Resulting Energy (MWH)	140,160

Gulf Full Requirements Supplier

Capacity Cost ($/KW)	$0.00	
Energy Cost ($/KWH)	$0.00000	
Environmental Cost ($/KWH)	$0.01834	
Fuel Cost ($/KWH)	$0.03964	
Transmission Cost ($/KW)	$2.94	
Gulf Avoided Cost ($MWH)	$0.03100	Estimate

NOTE: The FPU Payment to Gulf and the FPU Payment to the Third Party Supplier are the same under the existing standard offer contract.

NOTE: The reimbursement from Gulf to FPU for the energy from the Third Party Provider would be at the Gulf average hourly avoided cost which has been estimated based on previous information from Gulf

NOTE: There is no capacity impact since the payment for capacity from FPU to Gulf is a fixed monthly payment and is not related to metered Demand.

Payment to Third Party based on current SOC				
Year	Annual Energy Payments $(000)	Annual Capacity Payments $(000)	Annual Other Payments $(000)	Annual Total Payments $(000)
2017	$5,556	$0	$0	$5,556
2018	$5,556	$0	$0	$5,556
2019	$5,556	$0	$0	$5,556
2020	$5,556	$0	$0	$5,556
2021	$5,556	$0	$0	$5,556
2022	$5,556	$0	$0	$5,556
2023	$5,556	$0	$0	$5,556
2024	$5,556	$0	$0	$5,556
2025	$5,556	$0	$0	$5,556
2026	$5,556	$0	$0	$5,556
2027	$5,556	$0	$0	$5,556
2028	$5,556	$0	$0	$5,556
2029	$5,556	$0	$0	$5,556
2030	$5,556	$0	$0	$5,556
2031	$5,556	$0	$0	$5,556
2032	$5,556	$0	$0	$5,556
2033	$5,556	$0	$0	$5,556
2034	$5,556	$0	$0	$5,556
2035	$5,556	$0	$0	$5,556
2036	$5,556	$0	$0	$5,556
Total	$111,119	$0	$0	$111,119
NPV (2017$)	$90,848	$0	$0	$90,848
Rate	2%			

Gulf Credit to FPU for Third Party Capacity & Energy					Additional Capacity & Energy Payment ($000)
Year	Annual Energy Payments $(000)	Annual Capacity Payments $(000)	Annual Other Payments $(000)	Annual Total Payments $(000)	
2017	$4,345	$0	$0	$4,345	$1,211
2018	$4,345	$0	$0	$4,345	$1,211
2019	$4,345	$0	$0	$4,345	$1,211
2020	$4,345	$0	$0	$4,345	$1,211
2021	$4,345	$0	$0	$4,345	$1,211
2022	$4,345	$0	$0	$4,345	$1,211
2023	$4,345	$0	$0	$4,345	$1,211
2024	$4,345	$0	$0	$4,345	$1,211
2025	$4,345	$0	$0	$4,345	$1,211
2026	$4,345	$0	$0	$4,345	$1,211
2027	$4,345	$0	$0	$4,345	$1,211
2028	$4,345	$0	$0	$4,345	$1,211
2029	$4,345	$0	$0	$4,345	$1,211
2030	$4,345	$0	$0	$4,345	$1,211
2031	$4,345	$0	$0	$4,345	$1,211
2032	$4,345	$0	$0	$4,345	$1,211
2033	$4,345	$0	$0	$4,345	$1,211
2034	$4,345	$0	$0	$4,345	$1,211
2035	$4,345	$0	$0	$4,345	$1,211
2036	$4,345	$0	$0	$4,345	$1,211
Total	$86,899	$0	$0	$86,899	$24,220
NPV (2017$)	$71,046	$0	$0	$71,046	$19,801

Proposed Standard Offer Contract (provider located outside FPU Service Territory)

Firm Capacity Amount (MW)	20
Capacity Factor	80%
Resulting Energy (MWH)	140,160

Gulf Full Requirements Supplier

Capacity Cost ($/KW)	$0.00	
Energy Cost ($/KWH)	$0.00000	
Environmental Cost ($/KWH)	$0.01834	
Fuel Cost ($/KWH)	$0.03964	
Transmission Cost ($/KW)	$2.94	
Gulf Avoided Cost ($MWH)	$0.03100	Estimate

NOTE: The FPU Payment to Gulf and the FPU Payment to the Third Party Supplier are different under the proposed standard offer contract.

NOTE: The reimbursement from Gulf to FPU for the energy from the Third Party Provider would be at the Gulf average hourly avoided cost which has been estimated based on previous information from Gulf. This amount would match the FPU payment to the Third Party Supplier.

NOTE: There is no capacity impact since the payment for capacity from FPU to Gulf is a fixed monthly payment and is not related to metered Demand.

Payment to Third Party based on proposed SOC				
Year	Annual Energy Payments $(000)	Annual Capacity Payments $(000)	Annual Other Payments $(000)	Annual Total Payments $(000)
2017	$4,345	$0	$0	$4,345
2018	$4,345	$0	$0	$4,345
2019	$4,345	$0	$0	$4,345
2020	$4,345	$0	$0	$4,345
2021	$4,345	$0	$0	$4,345
2022	$4,345	$0	$0	$4,345
2023	$4,345	$0	$0	$4,345
2024	$4,345	$0	$0	$4,345
2025	$4,345	$0	$0	$4,345
2026	$4,345	$0	$0	$4,345
2027	$4,345	$0	$0	$4,345
2028	$4,345	$0	$0	$4,345
2029	$4,345	$0	$0	$4,345
2030	$4,345	$0	$0	$4,345
2031	$4,345	$0	$0	$4,345
2032	$4,345	$0	$0	$4,345
2033	$4,345	$0	$0	$4,345
2034	$4,345	$0	$0	$4,345
2035	$4,345	$0	$0	$4,345
2036	$4,345	$0	$0	$4,345
Total	$86,899	$0	$0	$86,899
NPV (2017$)	$71,046	$0	$0	$71,046
Rate	2%			

Gulf Credit to FPU for Third Party Capacity & Energy				
Year	Annual Energy Payments $(000)	Annual Capacity Payments $(000)	Annual Other Payments $(000)	Annual Total Payments $(000)
2017	$4,345	$0	$0	$4,345
2018	$4,345	$0	$0	$4,345
2019	$4,345	$0	$0	$4,345
2020	$4,345	$0	$0	$4,345
2021	$4,345	$0	$0	$4,345
2022	$4,345	$0	$0	$4,345
2023	$4,345	$0	$0	$4,345
2024	$4,345	$0	$0	$4,345
2025	$4,345	$0	$0	$4,345
2026	$4,345	$0	$0	$4,345
2027	$4,345	$0	$0	$4,345
2028	$4,345	$0	$0	$4,345
2029	$4,345	$0	$0	$4,345
2030	$4,345	$0	$0	$4,345
2031	$4,345	$0	$0	$4,345
2032	$4,345	$0	$0	$4,345
2033	$4,345	$0	$0	$4,345
2034	$4,345	$0	$0	$4,345
2035	$4,345	$0	$0	$4,345
2036	$4,345	$0	$0	$4,345
Total	$86,899	$0	$0	$86,899
NPV (2017$)	$71,046	$0	$0	$71,046

Additional Capacity & Energy Payment ($000)
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0
$0

Responses to Staff's 3rd Set of Data Requests

ATTACHMENT FOR DR 6#

Docket #160074-EQ
Response for Staff's Third Data Request
Question 6A

Firm Capacity Amount (MW)	20
Capacity Factor	80%
Resulting Energy (MWH)	140,160

JEA Full Requirements Supplier

Capacity Cost ($/KW)	$14.31	
Energy Cost ($/KWH)	$0.01100	
Environmental Cost ($/KWH)	$0.00062	
Fuel Cost ($/KWH)	$0.04360	
Transmission Cost ($/KW)	$1.51	
Avoided Transmission Losses	1.5%	
JEA Avoided Cost ($MWH)	$0.04000	Estimate

Note: Provider is located inside the FPU Service Territory

NOTE: The FPU Payment to the Third Party provider would be based on the full reduction in fuel cost, capacity and line losses based on the proposed standard offer contract.

NOTE: The reduction in the JEA billing to FPU would include the capacity, energy, environmental, fuel and line loss components due to the fact that the energy and capacity are not metered by JEA at the interconnection point.

FPU Payment to Third Party based on proposed SOC				
Year	Annual Energy Payments $(000)	Annual Capacity Payments $(000)	Annual Other Payments $(000)	Annual Total Payments $(000)
2017	$6,204	$3,487	$0	$9,691
2018	$6,204	$3,487	$0	$9,691
2019	$6,204	$3,487	$0	$9,691
2020	$6,204	$3,487	$0	$9,691
2021	$6,204	$3,487	$0	$9,691
2022	$6,204	$3,487	$0	$9,691
2023	$6,204	$3,487	$0	$9,691
2024	$6,204	$3,487	$0	$9,691
2025	$6,204	$3,487	$0	$9,691
2026	$6,204	$3,487	$0	$9,691
2027	$6,204	$3,487	$0	$9,691
2028	$6,204	$3,487	$0	$9,691
2029	$6,204	$3,487	$0	$9,691
2030	$6,204	$3,487	$0	$9,691
2031	$6,204	$3,487	$0	$9,691
2032	$6,204	$3,487	$0	$9,691
2033	$6,204	$3,487	$0	$9,691
2034	$6,204	$3,487	$0	$9,691
2035	$6,204	$3,487	$0	$9,691
2036	$6,204	$3,487	$0	$9,691
Total	$124,081	$69,734	$0	$193,815
NPV (2017$)	$101,445	$57,013	$0	$158,457
Rate	2%			

Reduction in JEA billing to FPU due to Third Party Capacity & Energy					Savings from Capacity & Energy Payment ($000)
Year	Annual Energy Payments $(000)	Annual Capacity Payments $(000)	Annual Other Payments $(000)	Annual Total Payments $(000)	
2017	$7,857	$3,487	$0	$11,344	$1,653
2018	$7,857	$3,487	$0	$11,344	$1,653
2019	$7,857	$3,487	$0	$11,344	$1,653
2020	$7,857	$3,487	$0	$11,344	$1,653
2021	$7,857	$3,487	$0	$11,344	$1,653
2022	$7,857	$3,487	$0	$11,344	$1,653
2023	$7,857	$3,487	$0	$11,344	$1,653
2024	$7,857	$3,487	$0	$11,344	$1,653
2025	$7,857	$3,487	$0	$11,344	$1,653
2026	$7,857	$3,487	$0	$11,344	$1,653
2027	$7,857	$3,487	$0	$11,344	$1,653
2028	$7,857	$3,487	$0	$11,344	$1,653
2029	$7,857	$3,487	$0	$11,344	$1,653
2030	$7,857	$3,487	$0	$11,344	$1,653
2031	$7,857	$3,487	$0	$11,344	$1,653
2032	$7,857	$3,487	$0	$11,344	$1,653
2033	$7,857	$3,487	$0	$11,344	$1,653
2034	$7,857	$3,487	$0	$11,344	$1,653
2035	$7,857	$3,487	$0	$11,344	$1,653
2036	$7,857	$3,487	$0	$11,344	$1,653
Total	$157,150	$69,734	$0	$226,884	$33,069
NPV (2017$)	$128,481	$57,013	$0	$185,494	$27,036

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Firm Capacity Amount (MW)	20
Capacity Factor	80%
Resulting Energy (MWH)	140,160

Gulf Full Requirement Supplier

Capacity Cost ($/KW)	$0.00	
Energy Cost ($/KWH)	$0.00000	
Environmental Cost ($/KWH)	$0.01834	
Fuel Cost ($/KWH)	$0.03964	
Transmission Cost ($/KW)	$2.94	
Avoided Transmission Losses	1.5%	
Gulf Avoided Cost ($MWH)	$0.03500	Estimate

Note: Provider is located inside the FPU Service Territory

NOTE: The FPU Payment to the Third Party provider would be based on the full reduction in fuel cost and line losses based on the proposed standard offer contract.

NOTE: The reduction in the Gulf billing to FPU would include the environmental, fuel and line loss components due to the fact that the energy and capacity are not metered by Gulf at the interconnection point.

NOTE: There is no capacity impact since the payment for capacity to FPU from Gulf is a fixed monthly payment and is not related to metered Demand.

FPU Payment to Third Party based on proposed SOC				
Year	Annual Energy Payments $(000)	Annual Capacity Payments $(000)	Annual Other Payments $(000)	Annual Total Payments $(000)
2017	$5,641	$0	$0	$5,641
2018	$5,641	$0	$0	$5,641
2019	$5,641	$0	$0	$5,641
2020	$5,641	$0	$0	$5,641
2021	$5,641	$0	$0	$5,641
2022	$5,641	$0	$0	$5,641
2023	$5,641	$0	$0	$5,641
2024	$5,641	$0	$0	$5,641
2025	$5,641	$0	$0	$5,641
2026	$5,641	$0	$0	$5,641
2027	$5,641	$0	$0	$5,641
2028	$5,641	$0	$0	$5,641
2029	$5,641	$0	$0	$5,641
2030	$5,641	$0	$0	$5,641
2031	$5,641	$0	$0	$5,641
2032	$5,641	$0	$0	$5,641
2033	$5,641	$0	$0	$5,641
2034	$5,641	$0	$0	$5,641
2035	$5,641	$0	$0	$5,641
2036	$5,641	$0	$0	$5,641
Total	$112,811	$0	$0	$112,811
NPV (2017$)	$92,231	$0	$0	$92,231
Rate	2%			

Reduction in Gulf billing to FPU due to Third Party Capacity & Energy				
Year	Annual Energy Payments $(000)	Annual Capacity Payments $(000)	Annual Other Payments $(000)	Annual Total Payments $(000)
2017	$8,250	$0	$0	$8,250
2018	$8,250	$0	$0	$8,250
2019	$8,250	$0	$0	$8,250
2020	$8,250	$0	$0	$8,250
2021	$8,250	$0	$0	$8,250
2022	$8,250	$0	$0	$8,250
2023	$8,250	$0	$0	$8,250
2024	$8,250	$0	$0	$8,250
2025	$8,250	$0	$0	$8,250
2026	$8,250	$0	$0	$8,250
2027	$8,250	$0	$0	$8,250
2028	$8,250	$0	$0	$8,250
2029	$8,250	$0	$0	$8,250
2030	$8,250	$0	$0	$8,250
2031	$8,250	$0	$0	$8,250
2032	$8,250	$0	$0	$8,250
2033	$8,250	$0	$0	$8,250
2034	$8,250	$0	$0	$8,250
2035	$8,250	$0	$0	$8,250
2036	$8,250	$0	$0	$8,250
Total	$165,005	$0	$0	$165,005
NPV (2017$)	$134,903	$0	$0	$134,903

Savings from Capacity & Energy Payment ($000)
$2,610
$2,610
$2,610
$2,610
$2,610
$2,610
$2,610
$2,610
$2,610
$2,610
$2,610
$2,610
$2,610
$2,610
$2,610
$2,610
$2,610
$2,610
$2,610
$2,610
$2,610
$52,194
$42,672