BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Sunrun Inc. for Declaratory Statement Concerning Leasing of Solar Equipment _____/	Docket No. 20170273-EQ Filed: February 9, 2018

RESPONSE TO JOINT MOTION FOR LEAVE TO FILE AMICI CURIAE MEMORANDUM
BY SUNRUN INC.

Pursuant to Rules 28-106.204 and 28-105.0027, Florida Administrative Code, Sunrun Inc. ("Sunrun") hereby withdraws its objection and responds to the February 5, 2018 Joint Motion of Gulf Power Company and Florida Public Utilities Company for Leave to file Amici Curiae Memorandum.

Response to Joint Motion and Memorandum

This is not a case of first impression. The Commission has already determined that an equipment lease is not a sale of electricity. *In re: Petition of Monsanto Company for a Declaratory Statement Concerning the Lease Financing of a Cogeneration Facility*, Order No. 17009, Docket No. 860725 (Dec. 22, 1986) ("*Monsanto*"). The facts as stated in Sunrun's Petition are consistent with those in *Monsanto* and the declarations sought by Sunrun are the same. Just as importantly, Rule 25-6.065, Florida Administrative Code, which codifies key elements underpinning the Monsanto decision, further supports Sunrun's request.

The Joint Movants claim that Sunrun's Petition lacks sufficient facts, and imply that the Sunrun must supply a copy of its equipment lease before the

Commission can consider Sunrun's Petition. Not so. Sunrun's Petition is a straightforward request that closely follows Commission precedent on equipment leasing and includes the same amount of material information included in controlling law and precedential declaratory petition proceedings. Joint Movants hypothesize facts inconsistent with and contrary to the facts stated in Sunrun's Petition, erroneously implying alternative terms that are dependent on operational variables such as electric generation or production rates.[1] The Commission should disregard such "straw man" arguments.

1. Lease Payments Are Not Linked to Electricity Production

As clearly set forth in its Petition, Sunrun proposes to lease solar equipment to Florida residential customers, which equipment will provide the owner of a single residence with the means to potentially self-generate enough solar electricity for that residence. The lease will be for a fixed and stated term of years, and the customer-lessee's payments will be fixed in amount throughout the lease term, without regard to the level of electricity production or output of leased equipment. Sunrun's Petition clearly explains that "[l]ease payments will be fixed throughout the term of the 20-year lease. These payments, based on a negotiated rate of return on Sunrun's investment, will be independent of electric generation, production rates, or any other operational variable of the leased equipment." (Emphasis added.)[2]

[1] "For example, it would be important to understand whether the proposed lease contains energy performance guarantees for the solar systems and whether the lessee is entitled to compensation, via separate bill credits, refunds or otherwise, in the event that performance guarantees are not met." Joint Memorandum at 3.

[2] Sunrun Petition at ¶7; *see also* ¶14.

2. The Lease Will Not Unlawfully Shift Maintenance Obligations from Customer-Lessees to Sunrun

Pursuant to Rule 25-6.065(2)(a), Florida Administrative Code, customers may contract with third parties to operate and maintain their leased renewable solar generating systems:

> (a) "Customer-owned renewable generation" means an electric generating system located on a customer's premises that is primarily intended to offset part or all of the customer's electricity requirements with renewable energy. The term "customer-owned renewable generation" does not preclude the customer of record from contracting for the purchase, lease, operation, or maintenance of an on-site renewable generation system with a third-party under terms and conditions that do not include the retail purchase of electricity from the third party. (Emphasis added).

As permitted by Rule 26-6.065(2)(a) and clearly stated in its Petition, Sunrun will provide customary workmanship warranties to protect the customer-lessee's home from damage during the installation process. The equipment warranties and maintenance services are triggered by damage to or malfunction of the system or its components, and are not dependent upon electric generation produced. The customer-lessee will be responsible for the cost of non-warranty maintenance, repair and replacement.

Small (*e.g.,* 10kW) residential solar systems of the type Sunrun proposes to lease to residential customers have little to no ongoing equipment operational requirements other than routine inspections, monitoring solar exposure, and repairs as necessary. Operating and maintaining such residential solar equipment is simple and

straightforward. Just as any other type of equipment lease, Sunrun will maintain or repair a malfunctioning system as part of a paid maintenance plan, which in this case would be wrapped into the monthly fixed lease payments, but will not in any way be tied to or indexed to the amount of electricity produced. Like the petitioner in *Monsanto,* Sunrun's customer-lessees will be "solely responsible for all costs and expenses associated with the maintenance, repair, replacement and operation of the leased equipment…" Sunrun's lease does not shift any burden from the customer-lessee onto the lessor in a way that is at odds with *Monsanto* or Rule 25-6.065, or that could be deemed a retail sale of electricity.

3. Sunrun Provided Facts Sufficient to Support its Petition

Joint Movants mistakenly opine that the Commission should examine Sunrun's proposed lease before granting the requested declaratory statements. This argument is not only incorrect, but mistakes both the purpose and effect of a declaratory statement. As explained in Sunrun's Petition, the purpose of a declaratory statement is to assist in planning future conduct and "avoid costly administrative litigation by selecting the proper course of action in advance."[3] Thus, "a party should seek a declaratory statement from the agency 'in advance' of selecting and taking a course of action."[4] Sunrun is not presently marketing a lease product in Florida and has not yet created its proposed Florida lease. Rather, acting

[3] *Chiles v. Dep't of State, Div. of Elections,* 711 So.2d 151, 154 (Fla. 1st DCA 1988); *Adventist Health System/Sunbelt, Inc. v. Agency for Health Care Admin.*, 955 So.2d 1173, 1176 (Fla. 1st DCA 2007).

[4] *Adventist Health System/Sunbelt, Inc. v. Agency for Health Care Admin.*, 955 So.2d 1173, 1176 (Fla. 1st DCA 2007) (quoting *Novick v. Dep't of Health, Bd. of Med.*, 816 So.2d 1237, 1240 (Fla. 5th DCA 2002)).

in good faith and consistent with Section 120.565, Florida Statutes, Sunrun is seeking an affirmative declaration from the Commission before undertaking the time, effort and expense of developing such lease. Neither Section 120.565 nor Rule 28-105.002 suggest that a petitioner must provide contractual documentation of its proposed course of action before an agency may issue a declaratory statement, nor has the Commission required such documentation in cases that present far more complicated facts.[5]

As set forth in Section 120.565, an agency's declaratory statement applies only to the particular circumstances presented by the petitioner. As this Commission explained in *Seminole Fertilizer*, declaratory statements are based on and limited to the facts presented in the Petition:

> [A] Declaratory Statement is based solely upon information provided by Petitioner. Any alternation or modification of that information or failure to realize arrangements as described in the petition may substantially affect the conclusions reached in this Declaratory Statement as stated herein. Moreover, our conclusion is limited to the facts presented by Petitioner.[6]

Sunrun's Petition details the essential terms of the proposed lease upon which it seeks the Commission's declaration and is sufficient to support the declarations sought.

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[5] *See, e.g., Monsanto* and *In re: Petition of Seminole Fertilizer Corporation for a Declaratory Statement Concerning the Financing of a Cogeneration Facility,* Order No. 23729 (November 7, 1990).

[6] *In re: Petition of Seminole Fertilizer Corporation for a Declaratory Statement Concerning the Financing of a Cogeneration Facility,* Order No. 23729 (November 7, 1990).

4. Sunrun's Activities in Other Jurisdictions Are Irrelevant to its Petition

As clearly stated in its Petition, Sunrun currently sells or leases residential solar systems in 22 states. Importantly, however, none of Sunrun's current marketing materials – online or otherwise – apply to the proposed Florida-specific solar equipment lease, which is not yet available. Marketing materials that target states other than Florida, and any future adjustments to marketing materials that may reflect a Florida lease product, are irrelevant to Sunrun's Petition in this this proceeding.

WHEREFORE, Sunrun respectfully requests the Commission to grant its Petition for Declaratory Statement and issue the declarations requested therein.

Respectfully submitted this 9th day of February, 2018.

BY: ***/s/ Marsha E. Rule***

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following by electronic mail on February 9, 2017:

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