

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Duke Energy Florida, LLC's Petition for  
Declaratory Statement Regarding PURPA Solar  
Qualifying Facility Power Purchase Agreements

Docket No. 20180169-EQ

Filed: October 2, 2018

**PETITION TO INTERVENE BY  
SOLAR ENERGY INDUSTRIES ASSOCIATION**

Pursuant to Chapters 120 and 366, Florida Statutes (F.S.), and Rule 28-105.0027, Florida Administrative Code (F.A.C.), the Solar Energy Industries Association ("SEIA"), through the undersigned counsel, hereby moves to intervene in the above captioned docket. Consistent with the requirements of the applicable rules and in support of this petition, SEIA states:

1. Agency Affected:

The name and address of the Agency affected by this petition is as follows:

Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

2. Name and Address:

The address of SEIA is as follows:

Solar Energy Industries Association  
600 14<sup>th</sup> Street, N.W., Suite 400  
Washington, D.C. 20005  
(202) 682-0556

3. SEIAs' Representatives:

The names and address of counsel for SEIA authorized to receive all notices, pleadings, and other communications in this docket:

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4. Receipt of Notice: SEIA received notice of the Florida Public Service Commission's ("Commission") action through publication of such notice in the Florida Administrative Register Vol. 44/No. 177 on September 11, 2018.

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<sup>1</sup> Ms. Curlee has been designated as a "Qualified Representative" in accordance with 28-106.106, F.A.C.

### Statement of Substantial Interest

5. Solar power is the fastest growing source of energy, worldwide, and SEIA is the national trade association of the U.S. solar energy industry which now employs more than 250,000 Americans. SEIA works with its member companies to build jobs and diversity, champion the use of cost-competitive solar in America, remove market barriers and educate the public on the benefits of solar energy. SEIA's members include dozens of stakeholders of the solar energy industry that have headquarters or locations in Florida, among them installers, manufacturers, contractors, developers, financiers and service providers. SEIA's member companies are actively working to develop qualifying cogeneration and small power production facilities ("Qualifying Facilities" or "QFs") throughout the state of Florida in accordance with the applicable state and federal regulations implementing the Public Utility Regulatory Policies Act of 1978 ("PURPA").

6. The issues presented in this proceeding are directly related to SEIA's defense of its members' rights to obtain a financeable power purchase agreement from a purchasing utility, consistent with the federal law. On June 29, 2016, the staff of the Federal Energy Regulatory Commission ("FERC") conducted a technical conference to discuss implementation issues related to PURPA.<sup>2</sup> SEIA provided live and pre-filed testimony, explaining that "PURPA's fundamental purpose of ensuring that independent generation owners can compete with incumbent utilities – which are natural monopolies that may not have an incentive to lower costs and benefit consumers –

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<sup>2</sup> See, e.g., Supplemental Notice of Technical Conference, Docket No. AD16-16 (June 27, 2016); Notice Inviting Post- Technical Conference Comments re Implementation Issues under the Public Utility Regulatory Policies Act of 1978, Docket No. AD16-16 (Sept 6, 2016).

remains as necessary today as it was in 1978.”<sup>3</sup> On September 6, 2016, FERC staff invited comments on two matters: (1) the “one mile rule; and (2) minimum standards for PURPA-purchase contracts.”<sup>4</sup> SEIA submitted post-technical conference comments on November 7, 2016 in which SEIA requested, among other things, that FERC take action to ensure that QFs “are offered a fixed price, long-term contract based on the utility’s true avoided cost.”<sup>5</sup>

7. On September 6, 2017 SEIA provided live and pre-filed testimony to the United States House of Representatives Committee on Energy and Commerce, Subcommittee on Energy at the “*Powering America: Reevaluating PURPA’s Objectives and its Effects on Today’s Consumers*” hearing.<sup>6</sup> As SEIA testified, QFs are facing a return of the same tactics as they experienced more than forty years ago when Congress passed PURPA to ensure that independent generators remain could compete with monopoly utilities.<sup>7</sup> As SEIA explained, the “anticompetitive practices are largely directed at preventing solar generators from obtaining a fixed-price, long-term contract with the incumbent utility, even when such contracts are proposed based on the price a utility would pay for the incremental cost of electric energy or capacity that, but for the purchase from the qualifying facility (QF), such utility would generate itself or purchase from another source (“avoided cost”).”<sup>8</sup>

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<sup>3</sup> FERC. *Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Docket No. AD16-16-000 (June 29, 2016) (testimony of Todd Glass on behalf of the Solar Energy Industries Association).

<sup>4</sup> Notice Inviting Post-Technical Conference Comments, Docket No. AD16-16-000 (Sept. 6, 2016).

<sup>5</sup> SEIA, Post-Technical Conference Comments and Request for a Policy Statement on PURPA Implementation, Docket No. AD16-16-000 (November 7, 2016).

<sup>6</sup> *Powering America: Reevaluating PURPA’s Objectives and its Effects on Today’s Consumers: Before the Subcomm. on Energy Of the H. Comm. on Energy and Com, 115<sup>th</sup> Cong.* (Sept. 6, 2017).

<sup>7</sup> *Id.* at 4-5.

<sup>8</sup> *Id.* at 5.

8. On September 7, 2018, Duke Energy Florida, LLC (“DEF”) requested that this Commission issue a declaratory statement that “[a] negotiated term of two (2) years is an appropriate contract length for a 100 percent levelized or fixed price in a PURPA solar QF power purchase agreement.”<sup>9</sup> As explained further in SEIA’s accompanying Response in Opposition, such a request is inconsistent with the federal rights granted to QFs by PURPA.

9. SEIA meets the three-prong associational standing test established by the Florida Supreme Court in *Florida Home Builders v. Department of Labor and Employment Security*, 412 So.2d 351 (Fla. 1982) which is based on the basic standing principles in *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). Under this test, an association has standing when: (1) the association demonstrates that the Commission’s decision in a docket may substantially affect a substantial number of its members; (2) the subject matter of the proceeding is within the association’s general scope of interest and activity; and (3) the relief requested is of a type appropriate for the association to receive on behalf of its members. The subject matter of this proceeding is within SEIA’s general scope of interest and particular legal expertise and activity and the relief requested is of the type appropriate for SEIA to receive on behalf of its members.

10. Additionally, SEIA meets the two-prong standing test of *Agrico Chemical Company v. Department of Environmental Regulation*.<sup>10</sup> The test requires (1) an injury in fact, and (2) substantial injury of a type or nature that the proceeding is designed to protect. As a trade association, SEIA has standing to participate in this proceeding, even though it is acting solely as the representative of its

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<sup>9</sup> See Petition for Declaratory Statement from Duke Energy Florida, LLC, Docket No. 10180169-EQ (Sept. 7, 2018).

<sup>10</sup> 406 So. 2d 478 (Fla. 2d DCA 1981).

members.<sup>11</sup> SEIA recognizes that although many issues are raised in this proceeding, SEIA will limit its participation in this proceeding to issues germane to PURPA implementation at both the Florida and Federal levels.

11. The substantial majority of SEIA's members in the Southeast are doing business within the State, including within the service area of DEF. If this Commission were to grant DEF's request, SEIA's members would be foreclosed from competing on an equal basis to provide electricity to DEF's customers at a rate equal to the utility's incremental cost to serve. A substantial number of SEIA's QF members are actively developing, or attempting to develop, QF projects within Florida. Ecoplexus, Inc., an active SEIA member, has submitted an intervention that explains the difficulty in doing business with DEF and its attempts to exercise its federally-mandated right to sell. Additional SEIA members, some who fear competitive disadvantage in disclosing early and mid-stage development, currently have active QF projects under development within DEF's territory. SEIA's member companies are also actively developing QF projects within the service territories of other investor-owned utilities regulated by this Commission, including Florida Power & Light Company, Tampa Electric Company and Gulf Power Company, and are concerned about a competitive disadvantage if such early and mid-stage development opportunities were disclosed. Rule 25-17.0832(3), F.A.C. applies equally to all utilities within the state and the substantial majority of SEIA's members will be impacted by the precedent of this Commission's finding with regard to contract term. A substantial number of SEIA's member companies are concerned that a finding from this Commission will be used to support similar requests for shortened contract terms

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<sup>11</sup> See *Florida Home Builders*, 412 So. 2d at 353.

in other service territories both within the state and throughout the country.<sup>12</sup> If this Commission approves DEF's request, SEIA members that are currently doing business in the state will almost certainly find that their QF projects are no longer financially feasible, as they would be unable to attract financing at reasonable terms and conditions. SEIA's Florida members would have no choice but to immediately cease their QF activities and those SEIA members that are considering doing business in the state will find opportunities elsewhere.<sup>13</sup>

12. As noted above and explained further in the accompanying Response in Opposition, erroneously finding that a two year contract term is compliant with PURPA and Congressional intent will bring real and immediate economic harm to SEIA's members and while denying consumers access to competitively-priced generation. PURPA, and its scheme of cooperative federalism, is designed with the express purpose of preventing such harms. As Duke Corporation, on behalf of its operating utilities including DEF, explained to FERC during the 2016 technical conference: "Congress thought it important to encourage investment in small power producing projects ... and one way to do so was to set firm rates to be paid for power generated by the [QF] over the life of typical financing arrangement. Doing so permits an assessment of the economic viability of such

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<sup>12</sup> SEIA's members are currently opposing Duke's request in South Carolina to shorten the contract term to two years and successfully opposed Duke's request in North Carolina to shorten the contract term to five years. As explained in the Response in Opposition, in these situations, QF developers are faced with the untenable choice of either abandoning a project or using their limited equity to fund litigation (which may or may not be successful) against the incumbent utilities which have a deep bench of experienced professionals and the authority to recover all such legal and expert expenses. *Compare* Answer in Opposition by Wasatch Wind Intermountain, LLC to Xcel Energy Services Inc.'s Request for Rehearing at 3, Docket No. EL11-51, et al. (Apr. 25, 2012) (explaining, in the context of a PURPA contract with a vertically-integrated utility that "this docket is a poster child of the havoc a determined opponent can create, even under the current rules, regardless of the legal merits or the underlying claim, and at very low cost to itself.").

<sup>13</sup> As explained more fully in the accompanying Response in Opposition, the Commission's interpretation of its law applies state-wide and the precedential impact reaches far beyond the limited DEF service territory.

projects at the front end.”<sup>14</sup> As Duke acknowledged, this is consistent with the purchasing utility’s “obligation to assure QFs that their contracts will be respected so they may be financed . . .”<sup>15</sup> If the Commission grants DEF’s petition for its declaratory statement that a negotiated term of two (2) years is an appropriate contract length for a 100 percent levelized or fixed price in a PURPA solar QF PPA, it would immediately prevent SEIA’s member companies from developing solar projects with DEF’s territory and will have a chilling effect on QF development within the service territories of other investor-owned utilities in Florida.

13. SEIA has conferred with counsel for DEF on the substance of its petition, in accordance with 28-106.303, F.A.C. and represents that DEF has stated that it “takes no position on SEIA’s petition to intervene at this time, but reserves the right to file any response, including an opposition, upon receipt of the full petition.”

14. WHEREFORE, SEIA respectfully requests that the Commission enter an order granting its petition to intervene in the above captioned docket.

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<sup>14</sup> Duke Energy Corporation, Post-Technical Conference Comments of Duke Energy Corporation Concerning Reassessment and Implementation of Public Utility Regulatory Policies Act of 1978, Docket No. AD16-16-000 (November 7, 2016) (quoting *Greenwood v. N.H. PUC*, 2007 U.S. Dist. LEXIS 52524 at 9-10 (D.N.H. 2007)).

<sup>15</sup> *Id.*



RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of October, 2018,

/s/ Heather Curlee

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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 delivery, on this 2<sup>nd</sup> day of October, 2018.

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