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

SOLAR ENERGY INDUSTRIES ASSOCIATION'S RESPONSE IN OPPOSITION TO DUKE ENERGY FLORIDA, LLC'S PETITION FOR DECLARATORY STATMENT

INTRODUCTION

The Solar Energy Industries Association ("SEIA"), pursuant to the Notice of Declaratory Statement published in the Florida Administrative Register on September 11, 2018 and Rule 28-106.303 of the Florida Administrative Code (F.A.C.) responds in opposition to Duke Energy Florida, LLC's ("DEF") Petition for Declaratory Statement Regarding PURPA Solar Qualifying Facility Power Purchase Agreements ("DEF Petition").[1] The DEF Petition seeks relief from this Commission that is inconsistent with both (i) Florida law and (i) the Public Utility Regulatory Policies Act of 1978 ("PURPA") and the implementing regulations promulgated thereunder by the Federal Energy Regulatory Commission ("FERC"). Accordingly, for the reasons explained below, SEIA respectfully requests that the Commission summarily deny DEF's requested declaration.

Background

Reliably and efficiently supplying consumers with the amounts of electricity they want, when they want it, requires a diverse generation mix. SEIA encourages this Commission to maintain an

[1] SEIA has separately petitioned this Commission to intervene. As explained therein, 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).

"all of the above" approach and ensure that a qualifying facility ("Qualifying Facility" or "QF") can obtain a contract from a utility of a term that is sufficient to support financing. As discussed below, the relief requested in the DEF Petition a two (2) year term is inconsistent with Florida law and insufficient for QFs to access capital. DEF's request is inconsistent with both state and federal law as it denies a QF's legally enforceable obligation that purchases be made for a term that is "long enough to allow QFs reasonable opportunities to attract capital from potential investors."[2] Granting the request in the DEF Petition will eliminate the ability of QFs within the service territory of DEF to obtain financing in the capital markets, inconsistent with PURPA.

A. PURPA's Purpose is to Encourage Independent Power Producers

In May 1983, the Supreme Court unanimously upheld PURPA's provisions and FERC's determination that the "the nation as a whole would benefit from the decreased reliance on scarce fossil fuels and the more efficient use of energy."[3] The legislative history of PURPA makes clear that PURPA was intended to increase competition from QFs by reducing both fuel price risk and the cost of power.[4] As the Supreme Court has explained, the "basic purpose of section 210 of PURPA is to provide a market for the electricity generated by small power producers and cogenerators [QFs]"[5]

[2] *See Windham Solar*, 157 FERC ¶ 61,134, P 8 (2016).
[3] *Am. Paper Inst. v. Am. Elec. Power Serv. Corp*., 461 U.S. 402, 407 (1983) (quoting 45 Fed. Reg. 12222 (1980)).
[4] *See, e.g.,* Public Utility Regulatory Policies Act, Joint Explanatory Statement of the Committee of Conference at 98, Report No. 95-1750 (Oct. 10, 1978) (explaining that "the conferees use the phrase 'not to discriminate against [QFs]' because they were concerned that the electric utility's obligations to purchase and sell under this provision might be circumvented by the charging of unjust and non-cost based rates for power solely to discourage cogeneration or small power production.").
[5] *Id.*

as "utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities."[6]

SEIA's members that are developing solar projects in the state, including QFs within DEF's territory, are supporting the important statutory goals of resource and supplier diversity, while contributing to the overall resilience of the state's electric system.[7] A diverse generation mix enables the flexibility to respond to dynamic fuel prices by substituting lower-cost resources for more expensive resources. SEIA encourages this Commission to maintain an "all of the above" approach by ensuring that the PURPA program provides a level field as was intended to encourage the economic decisions that move the power sector toward the most cost-effective generation mix which integrates solar generation with other baseload, cycling, and peaking technologies. At a time in which the established industry is changing rapidly, SEIA strongly encourages this Commission to maintain its PURPA program and dismiss the DEF Petition, or in the alternative, deny the requested declaration as being contrary to, or inconsistent with PURPA.

1. *Florida Statute Requires a Minimum of a 10 Year Term*

Florida statute, which established requirements relating to the purchase of capacity and energy by public utilities renewable energy producers, explicitly states that "each public utility must continuously offer a purchase contract to producers of renewable energy" and requires that "[e]ach contract must provide a contract term of at least 10 years."[8] The Commission adopted Rules 25-

[6] *FERC v. Mississippi*, 456 U.S. at 750.
[7] *See, e.g., Why North Carolina's Solar Power Projects are a Bright Spot Amid Florence Damage*, CHARLOTTE BUSINESS JOURNAL (Sept. 2018) (reporting that, for all the concerns about the resiliency of solar power projects, they appear to have fared as well or better than traditional power plants during Florence).
[8] Section 366.91(3), Fla.Stat.

17.200 through 17.310, F.A.C. to implement Section 366.91, Florida Statutes. Section 25-17.200 of the Florida Administrative Code is consistent with federal law, recognizing that the purpose of the PURPA program is to

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

While the Commission retained flexibility on payment options to "allow renewable energy providers the option to select the payment option that best fits its financing requirements, and provides a basis from which negotiated contracts can be developed" in order to "promote renewable energy generation"[9] the underlying statute and the Commission's interpretation of such statute was not intended to foreclose financing options for QF developers. DEF has failed to offer an explanation as to how its request is consistent with the clear state law and regulations setting forth the rules for purchases from QFs.

DEF's request for a two year term is inconsistent with Section 366.91(3), Florida Statutes as well as Rule 25-17.200, F.A.C. Granting the request in the DEF Petition will eliminate the ability of QFs within the service territory of DEF to obtain financing in the capital markets, thereby discouraging investment within the state. While the Commission retained flexibility on payment options to "allow renewable energy providers the option to select the payment option that best fits its financing requirements, and provides a basis from which negotiated contracts can be developed" in

[9] Florida Public Service Commission, *Review of the 2016 Ten-Year Site Plans of Florida's Electric Utilities*, (Nov. 2016) http://www.psc.state.fl.us/Files/PDF/Utilities/Electricgas/TenYearSitePlans/2016/Review.pdf at 36.

order to "promote renewable energy generation"[10] the underlying statute and the Commission's interpretation of such statute was not intended to foreclose financing options for QF developers. Granting DEF's request to limit QF contracts to two, or even four, years of avoided cost rates will discourage investment in the state. While states are free, under their own authority, to enact laws or regulations providing for rates which would result in even greater encouragement of QFs, rates that are lower than the federal standards "would fail to provide the requisite encouragement of these technologies and must yield to federal law."[11]

2. *DEF Request is Outside the Scope of Rule 25-105.001*

Rule 28-105.001, F.A.C. is not designed to allow a utility to obtain a policy statement of general applicability, but to resolve a controversy or answer questions or doubt concerning the "applicability of statutory provisions, rules, or orders over which the agency has authority."[12] Implicit in this purpose is the idea that there is a potential dispute or lack of clarity about the meaning of the statute or rule in question. DEF has not identified the statute, rule, or order that presents confusion and that requires clarification through a declaratory statement. On the contrary, DEF is asking this Commission to approve a new policy of general applicability, without going through rulemaking and without regard to the fact that the outcome sought by DEF is inconsistent with a clear and unambiguous legislative mandate.

SEIA encourages the Commission to limit the procedural avenues by which a utility can seek to change the rules that govern QF contracting and deny the DEF Petition, which seeks relief that

[10] Florida Public Service Commission, *Review of the 2016 Ten-Year Site Plans of Florida's Electric Utilities*, (Nov. 2016) http://www.psc.state.fl.us/Files/PDF/Utilities/Electricgas/TenYearSitePlans/2016/Review.pdf at 36.
[11] Order No. 69, 45 Fed. Reg. 12,214 at 12,221 (1980) ("Order No. 69").
[12] Rule 28-105.001, F.A.C.

can only be granted through the Florida Legislature, Congress or FERC. SEIA encourages the Commission to dismiss the DEF Petition for failure to comply with Rule 28-105.001, F.A.C.[13] Defending their PURPA rights against these practices is a major challenge for small independent developers that, unlike utilities, do not recover the cost of such legal efforts from the ratepayers. SEIA is unaware of a controversy that existed prior to the submission of the DEF Petition, and notes that the DEF Petition itself has created the controversy. The DEF Petition seeks relief that can only be granted through the Florida Legislature, Congress or FERC, and SEIA encourages the Commission to dismiss the DEF Petition as outside the scope of Rule 28-105.001, F.A.C.[14]

B. A Financeable Contract is the Cornerstone of PURPA

At the most basic level, third-party financing requires that an independent developer enter into a sales arrangement from the output of its plant that includes (1) a known price for the sale of the product (energy, capacity, and other services) and (2) a financeable term, similar to a utility depreciation or amortization schedule. As Duke explained to FERC in pre-filed testimony, providing fixed prices over a term "permits an assessment of the economic viability of such projects at the front end."[15] 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 . . . ."[16] Just as regulated utilities require certainty as to cost recovery to finance power plant construction, QFs

[13] 28-105.001, F.A.C. (stating that "A declaratory statement is not the appropriate means for determining the conduct of another person.").
[14] *Id.* (stating that "A declaratory statement is not the appropriate means for determining the conduct of another person.").
[15] *See* Comments of Duke Energy Corporation to the Federal Energy Regulatory Commission's Technical Conference Concerning Implementation Issues Under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), Docket No. AD16-16 (June 7, 2016).
[16] *Id.*

cannot obtain equity or debt financing without certainty that funds invested in or loaned for QF construction will be recovered through PPA revenues.

1. *PURPA Requires DEF to Forecast Rates for a Financeable Term*

As explained in Order No. 69, the legally enforceable obligation set forth in 18 C.F.R. § 292.304(d)(2) was established by regulation in order 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."[17] FERC recognized that translation to 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."[18] SEIA acknowledges the challenges inherent in computing an avoided cost. DEF, however, is well-suited to propose a methodology that best approximates the expected value of energy and capacity on its systems over the next 10-20 years, as regulated utilities routinely make such projections when seeking approval to construct new generating facilities. Long term projections of cost-savings are often used to justify new construction when a "need" to serve load cannot be shown.

Federal law provides the QF the right to offer energy or capacity pursuant to a legally enforceable obligation over a specified term. Federal law vests the QF with the right, prior to beginning the specified term, to elect to sell the output to the purchasing utility at either "the avoided costs calculated at the time of delivery; or the avoided costs calculated at the time the obligation is

[17] Order No. 69 at 12,226.
[18] *Id.*

incurred."[19] This federal structure "enables a qualifying facility to establish a fixed contract price for its energy and capacity at the outset of its obligation."[20] The request in the DEF Petition attempts to subvert the QF's federally guaranteed right to obtain a fixed price contract for a financeable term and should be rejected as an inconsistent implementation of PURPA.[21] Small renewable projects incorporating solar photovoltaics require significant initial capital outlays upfront (often in the millions to tens of millions of dollars) that are financed and repaid over time, but have low variable operation and maintenance costs and lack the fuel cost component of a traditional thermal generator. It is SEIA's position that the proper vehicle to address DEF's concerns on avoided cost calculations is through revisions to such calculations by the Florida Legislature or Congress—not through draconian cuts that are contrary to current law and that eliminate the ability of a QF to secure a financeable contract.

Federal law mandates that administratively determined avoided costs include "both the fixed and running costs on an electric utility system which can be avoided by obtaining energy and capacity from qualifying facilities."[22] As the federal courts have recognized, "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 . . . ."[23] This is consistent with FERC's position that, "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

[19] 18 CFR 292.304(d)(2).
[20] Order No. 69 at 12,224.
[21] *See, e.g.,* DEF Petition at 6; *id.* at 12-13.
[22] Order No. 69 at 12,261.
[23] *Greenwood v. N.H. PUC*, 2007 U.S. Dist. LEXIS 52524 at 9-10 (D.N.H. 2007)).

construction of a facility."[24] SEIA strongly encourages this Commission to deny the relief requested in the DEF Petition as an improper implementation of PURPA.

2. *Two Year Term is an Inconsistent Application of PURPA*

In response to what DEF sees as a risk to its ratepayer of the downward price trend in the incremental cost to serve, DEF has requested that this Commission institute short-term contracts—described as "a two-year initial solar QF PPA term that may include a four year avoided cost forecast."[25] For DEF to assert that the risk of long-term contracting and long-term planning is unique to PURPA contracts is disingenuous at best. It is well-accepted that "[a] utility-owned generating unit normally will supply power for the life of the plant, or until it is replaced by more efficient capacity."[26] In hindsight a utility with captive customers may find that it "overpaid" for its construction or acquisition of a generating plant at some point in the future if price trends continue their downward progress, but this phenomenon is applicable to any utility constructed resource—regardless of the technology type.

Granting DEF's request to limit QF contracts to two, or even four, years of avoided cost rates would be an inconsistent implementation of the federal mandate. While FERC allows the states "flexibility for experimentation and accommodation of special circumstance," FERC has been clear that forecasted rates must "not fail to provide the required encouragement."[27] States are free, under their own authority, to enact laws or regulations providing for rates which would result in even greater encouragement of QFs, but rates that are lower than the federal standards "would fail to

[24] Order No. 69 at 12,219.
[25] DEF Petition at 10.
[26] Order No. 69 at 12,226.
[27] *Id.*

provide the requisite encouragement of these technologies and must yield to federal law."[28] Granting the request in the DEF Petition will eliminate the ability of QFs within the service territory of DEF to obtain financing in the capital markets, inconsistent with PURPA.

Long-term, fixed-price contracts are essential to enable a QF to obtain viable project financing arrangements, which in turn allow the project to compete. This concept is captured by state law and Section 366.91, Florida Statutes, reflect the prevailing industry view that long-term contracts are "an important tool to achieve and maintain a strong power infrastructure, particularly for new entrants into the generation sector and especially for many renewable energy developers."[29] Long term contracting risks are not unique to PURPA contracts, but generally represent a balance undertaken in exchange "provide price stability, hedge risk, and support financing for new investments."[30]

As explained in the PURPA Compliance Manual, contracts with QFs "may be negotiated or renegotiated at any time, although, in the past, it has typically been negotiated by utilities and QFs as the QF is gathering the assurances necessary to finance its project."[31] As FERC explained in rejecting a proposal in Connecticut that would limit the ability of a QF to obtain a fixed price contract, "regardless of whether a QF can provide firm output, that QF has the option to sell its output pursuant to a legally enforceable obligation with a forecasted avoided cost rate."[32] FERC went on to explain, that given the need for certainty with regards to return on investment, coupled

[28] *Id.* at 12,221. *Compare* DEF Petition at 14-15.
[29] Notice of Proposed Rulemaking, *Wholesale Competition in Regions with Organized Markets*, (June 22, 2007) Docket Nos. RM07-19-000, AD07-7-000 at P 83.
[30] *Id.* at P 88.
[31] *See* PURPA Title II Compliance Manual (March 2014) at 16, *available at* https://pubs.naruc.org/pub/B5B60741-CD40-7598-06EC-F63DF7BB12DC.
[32] Windham Solar at P 4.

with Congress' directive that FERC "encourage" QFs, a legally enforceable obligation should *be long enough* to allow QFs reasonable opportunities to attract capital from potential investors.[33] It is mathematically impossible to repay a project's entire costs over a two-year term at an avoided cost rate. SEIA strongly encourages this Commission to deny the relief requested in the DEF Petition as a contravention of the letter and intent of Florida law and as an improper application of PURPA.

C. Competition Drives Innovation

When properly designed, a PURPA program drives innovation by identifying a needed commodity or service and allowing market participants to compete on an even playing field to provide the commodity or service. Over the past decade, SEIA's member companies have developed cutting edge technologies that aid the efficient and reliable delivery of electric power to consumers across the country, and PURPA should be credited with these innovations. For example, intense competition amongst solar companies drove inverter manufacturers to innovate, driving down the cost to install and unlocking the potential for increased power controls. The advanced inverters that have emerged now have multiple ports that allow an operator to manage the flow not just between solar panels and the grid, but also between solar panels and an on-site battery, or between solar panels and an electric vehicle charging station, or between an on-site battery and the grid itself. Advanced inverters allow solar installations to provide active power control and voltage regulation through reactive power regulation. DEF should be incentivized to work with QF developers to be sure that these capabilities are recognized and used to provide grid services. Now that renewable technologies are emerging as cost-competitive alternatives to traditional generation sources, this statutory commitment is more important than ever to ensure that the goals and

[33] *Id.* at P 4-5 (emphasis added).

requirements of PURPA are met and QFs throughout the country do not suffer discriminatory treatment by utilities that would prefer to not engage with QFs as PURPA requires.

WHEREFORE, for the reasons set forth above, SEIA respectfully asks the Commission to DISMISS the Petition for Declaratory Statement filed in this docket by DEF, or in the alternative, to DENY the substantive declaratory statements requested as being contrary to, or inconsistent with PURPA.

RESPECTFULLY SUBMITTED this 2nd day of October, 2018.

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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 2nd day of October, 2018.

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