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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement regarding PURPA solar qualifying facility power purchase agreements, by Duke Energy Florida, LLC.	DOCKET NO. 20180169-EQ FILED: OCTOBER 2, 2018

RESPONSE OF ECOPLEXUS, INC., IN OPPOSITION TO PETITION FOR DECLARATORY STATEMENT

Ecoplexus, Inc. ("Ecoplexus"), pursuant to the Notice of Declaratory Statement published in the Florida Administrative Register on September 11, 2018, and Rule 28-106.204, Florida Administrative Code (F.A.C.), and subject to its Motion to Intervene filed herein on September 24, 2018, hereby files this response in opposition ("Response in Opposition") to the "Petition for Declaratory Statement Regarding PURPA Solar Qualifying Facility Power Purchase Agreements" (the "Petition") filed herein by Duke Energy Florida, LLC ("DEF") on September 7, 2018. In the Petition, DEF asks the Commission to 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.

In summary, DEF seeks to avoid its obligations under Florida and federal law to purchase cost-effective solar power offered by Qualifying Facilities ("QFs") in order to maximize shareholder returns to the detriment of its customers. As an

example of DEF's putting its earnings and shareholders ahead of its customers' best interests, since July 2017, Ecoplexus, an established developer and operator of solar-powered Qualifying Facilities ("QF"), has expressly and specifically offered and committed to sell to DEF solar power - including all energy, capacity, and associated attributes, including ancillary services and environmental attributes - to be produced by QFs that Ecoplexus is developing in DEF's service area, at pricing that will result in lower costs to DEF's customers (on a Cumulative Present Value Revenue Requirements, or "CPVRR" basis), than the costs that DEF would incur to build, own, and operate solar generating facilities of virtually identical capacity and technology capabilities. DEF's Petition seeks the Commission's authority to shut out higher-value, lower-cost solar options, including Ecoplexus' projects and cost-effective offers, which further betrays DEF's obligation to serve its customers at lowest cost. Moreover, DEF's Petition is procedurally flawed in that it effectively asks the Commission to adopt a new rule and improperly seeks an advisory opinion.

To protect DEF's customers and to comply with Florida and federal law, and for other reasons explained below, the Commission should deny DEF's Petition.

In further support of its positions, this Response in Opposition sets forth the legal background applicable to the issues raised by DEF's Petition, relevant factual background, and argument and discussion on the issues raised.

LEGAL BACKGROUND

The rights and obligations of utilities (DEF here) and Qualifying Facilities (e.g., Ecoplexus) with respect to generating, delivering, and purchasing electric power are governed by both federal and state law. The framework of those relationships is prescribed by the Public Utility Regulatory Policies Act of 1978 ("PURPA"), Public Law No. 95-617 tit. II § 210, 92 Stat. 3117, 3144 (codified as amended at 16 U.S.C. § 824a-3), which is administered by the U.S. Federal Energy Regulatory Commission ("FERC"). FERC has adopted rules implementing PURPA, 18 CFR Part 292, commonly referred to as the "PURPA Rules," which Florida and the other states are required to implement and enforce in the regulatory framework established by the Congress through PURPA. 16 U.S.C. § 824a-3(f) (also commonly cited and referred to as Section 210f of the Federal Power Act); Portland General Elec. Co. v. FERC, 854 F.3d 692, 695 (D.C. Cir. 2017) (noting that "Subsection (f) [of Section 210] . . . requires state public-utility commissions to implement FERC's rules at the local level.")

Both federal law and Florida law give a QF the right to compete with a utility for building new generation. To that end, a QF has the right to enter into a long-term obligation - either a power purchase agreement ("PPA") or a non-contractual, legally enforceable obligation – with a utility at rates that are no greater than the incremental costs of alternative electric energy, i.e., the utility's avoided costs. The

QF also has the express right to be paid rates that are fixed or defined (though not necessarily levelized) at the time the purchase obligation is incurred. A utility's avoided cost is defined as "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." 16 U.S.C. § 824a-3(d); see also 18 CFR § 292.101(b)(6) (defining "avoided costs" as "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.") Naturally, Florida law tracks these requirements almost verbatim. Additional detail regarding applicable Florida and federal law is provided in the relevant sections below.

FACTUAL BACKGROUND

Ecoplexus is an established developer, owner, and operator of solar-powered electrical generating facilities in the United States and other countries. Ecoplexus presently has more than 50 projects operating or under construction in five U.S. states and Japan with total capacity of approximately 365 megawatts, alternating current ("MW-AC"). Ecoplexus also has contracted to provide approximately 438 MW-AC of additional solar capacity and energy from additional projects, for a total of 803 MW-AC. Ecoplexus' solar facilities in the U.S. are Qualifying Small Power Production Facilities.

DEF is a public utility, as defined in Section 366.02(1), Florida Statutes,[1] subject to the plenary regulatory jurisdiction of the Commission. DEF presently serves approximately 1.8 million customers in its service area in Florida. Duke Energy Florida, LLC Ten-Year Site Plan, 2018-2027, dated April 2018 ("DEF 2018 TYSP" or "2018 TYSP") at 2-10, Schedule 2.3.1. DEF proposes to own and operate solar facilities and to recover the costs of those facilities through base rates, presumably for the facilities' 30-year lives (as shown in DEF's 2018 TYSP). In its 2017 Second Amended and Restated Settlement Agreement ("2017 Settlement"), filed by DEF in Docket No. 20170183-EI on August 29, 2017, DEF announced its intent to procure up to 700 MW of solar power through a Solar Base Rate Adjustment ("SOBRA") mechanism. In re: Application for limited proceeding to approve 2017 second revised and restated settlement agreement, including certain rate adjustments, by Duke Energy Florida, LLC, FPSC Docket No. 20170183-EI, DEF's Settlement Petition at 24 (FPSC Document No. 07346-2017, Aug. 29, 2017). According to its 2018 TYSP, between now and 2027, DEF plans to construct (or acquire), own, and operate 16 new solar generating units with total capacity of approximately 1,148 MW-AC, and with in-service dates projected to be between March 2019 and December 2027. DEF 2018 TYSP at 3-11 through 3-25, 3-29. As part of its planned solar facilities, DEF recently filed its first petition for approval to

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[1] All references to the Florida Statutes are to the 2018 edition.

recover the costs of two planned, DEF-owned solar facilities through its base rates. In re: Petition for a Limited Proceeding to Approve First Solar Base Rate Adjustment, by Duke Energy Florida, LLC, PSC Docket No. 20180149-EI (petition filed on July 31, 2018) (the "DEF SOBRA Docket").

While declaratory statements are limited to the facts presented by a petitioner, in this instance, DEF has omitted significant facts from its Petition, and these omissions would render the requested statement meaningless relative to the real issue at hand, which is this:

> Whether DEF is obligated by the Commission's rules and relevant orders, and by PURPA and the PURPA Rules, to negotiate with QFs that offer solar power to DEF for the purchase of solar power based on such QFs' enabling DEF to cost-effectively avoid the cost of constructing DEF-owned solar generating facilities.

It appears that DEF intends to use the requested declaratory statement, if the Commission were to issue it, to avoid purchasing power from solar QFs through PPAs that would provide the same amounts of solar power[2] that DEF plans to generate from its self-built units, at costs to customers less than DEF's costs for its proposed or planned DEF-owned facilities.

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[2] The term "solar power" is used herein to mean solar energy, capacity, and all associated attributes, including ancillary services capabilities and environmental attributes such as Renewable Energy Credits that are produced by a QF's solar electric generating facilities.

Beginning in July 2017, Ecoplexus offered to sell, and expressly committed to sell, all of the capacity, energy, and attributes (including Renewable Energy Credits and ancillary services capabilities) produced by five of its solar QFs to DEF. Each of these five solar projects is certified with the FERC as a Qualifying Facility. For all practical purposes, Ecoplexus' solar QFs have the same capacity, energy, and other productive characteristics and attributes, including renewable attributes such as Renewable Energy Credits ("RECs") and ancillary services capabilities, all of which Ecoplexus has expressly offered to DEF, as the solar facilities that DEF proposes to own, whether self-built or purchased from others and then added to DEF's rate base as it proposes. Moreover, Ecoplexus has expressly offered to match the operations, performance, availability, curtailment characteristics of Ecoplexus' solar QFs to those of DEF-owned-and-operated facilities.

DEF failed to tell the Commission in its Petition that Ecoplexus specifically and expressly offered and committed to provide the same amounts of solar power that DEF wants to obtain from its DEF-owned solar units for the same term in years as the life of DEF's planned solar units, at less than the costs to DEF's customers of DEF's self-owned solar facilities.

The descriptions of the pricing to be offered to QFs per DEF's two-year PPA proposal in DEF's Petition, referring to a "four-year avoided cost forecast" and an "updated offer with new pricing," assuming negotiations on the basis of a standard

offer contract based on a fossil-fueled avoided generating unit and "updated fuel forecasts," and referring to "long term variable risk," have the hallmarks of energy-only payments based on DEF's projected as-available energy costs. See DEF's Petition at 10. From these descriptions, it thus appears clear that DEF wants the Commission to authorize DEF to base its payments to solar QFs on the basis of avoided energy costs only, rather than on the full revenue requirements of solar generating facilities in DEF's generation plans.

SUMMARY OF ARGUMENT

The declaratory statement requested by DEF's Petition should be denied because it is procedurally flawed and because it would violate both Florida and federal law, including Florida Statutes, applicable Commission Rules and orders, and PURPA and the PURPA Rules, by allowing DEF to avoid its obligations to purchase QF power at its full avoided – and fully avoidable – cost. DEF's Petition is procedurally improper under the declaratory statement provisions of Florida's Administrative Procedure Act because it would establish a broad statement of agency policy – i.e., a rule – and because it is based on hypothetical allegations rather than particular facts.

DEF's "parade of horribles," notably its arguments that it would have to buy too much solar power and that the fixed-price risk of long-term power purchases from solar developers would disadvantage DEF's customers, are misplaced,

fallacious, and misleading. DEF's "too much solar" or "over-subscription" argument is readily refuted by the PSC's own Rule 25-17.260, F.A.C., which provides an express remedy in the event that a utility believes that additional offers would result in increased customer costs, by directly applicable FERC orders, and by simple logic, namely the obvious fact that where there are no solar facilities to be avoided, there are no avoided costs associated with such facilities. DEF's "fixed-price risk" argument is readily seen to be disingenuous and fallacious when payments to solar QFs are compared to the fixed costs that DEF plans to recover from its customers through base rates pursuant to DEF's SOBRA proposals: the costs of solar facilities are almost entirely fixed capital-related costs, which DEF would recover from its customers through base rates regardless of the facilities' production. DEF's argument is that it should not have to pay fixed or defined costs to solar QFs, even when those QFs have offered fixed or defined costs less than the effectively fixed and defined base rate costs that DEF wants to charge its customers for its SOBRA projects. The Commission must reject this ploy and DEF's requested declaratory statement.

From the description of DEF's two-year fixed-energy-price PPA proposal in its Petition, it appears clear that DEF intends to base its proposed pricing on its as-available energy price forecasts and not on the costs of DEF's planned solar facilities. If DEF were allowed to use the requested statement to avoid its obligation

to purchase solar power from QFs at or below its avoided costs for such facilities, any such use would be contrary to several provisions of Florida Statutes, including DEF's obligation to serve at fair, just, and reasonable rates – which would be breached by DEF over-paying for solar power that it claims it needs – and Florida's pro-renewable energy policy set forth in Florida Statutes.

ARGUMENT

I. DEF'S PETITION FOR DECLARATORY STATEMENT IS PROCEDURALLY FLAWED AND SHOULD BE DENIED.

In the Petition, DEF requests that the Commission issue the following declaratory statement:

> 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.

Petition at 2, 22. Section 120.565, Florida Statutes, provides in pertinent part:

> (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.
>
> (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

The Commission should deny DEF's requested declaratory statement because it fails to comply with Section 120.565, Florida Statutes because (1) it improperly

announces a broad agency policy of general applicability, rather than "as it applies to the petitioner's particular set of circumstances;" and (2), because the Petition is based on merely hypothetical factual allegations instead of a present, ascertained state of facts, and thus would result in issuance of an improper advisory opinion. To be clear, DEF is improperly seeking a declaratory statement from the Commission that, if issued, will establish a contract term applicable to all future (though unidentified) power purchase agreements with all solar QF providers. This is clearly an improper attempt to amend Chapter 25-17, F.A.C., and the Commission should reject it.

A. The Petition Should be Denied Because the Requested Declaratory Statement Would Announce a Broad Agency Policy and is Equivalent to a Rule.

It is well-settled in Florida that a declaratory statement may not be employed in place of a rule to require compliance with general agency policy. See Lennar Homes, Inc. v. Dep't of Bus. & Prof. Reg., 888 So. 2d 50, 53 (Fla. 1st DCA 2004) (quoting Chiles v. Dep't of State, Division of Elections, 711 So. 2d 151, 154 (Fla. 1st DCA 1998)); see also ExxonMobil Oil Corp. v. State, Dep't of Agric. & Consumer Servs., 50 So. 3d 755, 758 n.1 (Fla. 1st DCA 2010) (recognizing that in Lennar Homes, the court found that "a declaratory statement may not go so far as to announce 'broad agency policy' which is akin to a rule."). "If an agency is presented with a petition for a declaratory statement requiring a response that amounts to a

rule, the agency should decline to issue the statement and initiate rulemaking." Lennar Homes, 888 So. 2d at 53 (quoting Chiles, 711 So. 2d at 154).

DEF's Petition requests that the Commission issue a statement of agency policy that would be applicable to all "power purchase agreements" between DEF[3] and a "solar QF." That DEF is requesting the Commission to issue the equivalent of a rule is confirmed in DEF's Petition, wherein DEF states:

> Under PURPA's cooperative federalism framework, FERC does not mandate or prescribe a minimum PPA term. The Florida Commission must therefore implement standards to ensure that the economic and regulatory circumstances specific to Florida are appropriately addressed.

Petition at 9 (footnote omitted) (emphasis supplied). The appropriate mechanism for implementing "standards" applicable to all negotiated power purchase agreements between DEF and solar QFs is through rulemaking.[4] See § 120.54(1)(a), Fla. Stat. ("Rulemaking is not a matter of agency discretion.") In fact, the requested

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[3] Ecoplexus notes that the broad statement of agency policy requested by DEF would be equally applicable to other investor owned utilities in Florida.

[4] As a statement of general applicability that would act as a standard for all power purchase agreements between DEF and solar QFs, the only appropriate mechanism for the Commission to implement this new standard would be through rulemaking; however, for the reasons discussed below such rulemaking is not required in this instance because any rule attempting to require the contract terms described in DEF's declaratory statement would be inconsistent with Chapter 25-17, F.A.C., and would violate Chapter 366, Florida Statutes, PURPA, the PURPA Rules, and existing precedent of both the Commission and FERC.

declaratory statement is so broad that DEF felt compelled to devote an entire section of the Petition to explaining that the declaratory statement should apply to all "solar QF PPAs that are mandatory purchases by the Company on behalf of DEF customers under PURPA, as implemented by the FPSC rules." Petition at 21. The Commission should reject DEF's improper attempt to accomplish rulemaking through this declaratory statement proceeding and deny DEF's Petition.

B. The Petition Should be Denied Because it is Based on Hypothetical Factual Allegations, and if Issued Would Represent an Improper Advisory Opinion.

A party seeking a declaratory statement must show that there is an "actual present and practical need" for the requested declaratory statement, and that the declaration addresses a "present controversy." Sutton v. Dep't of Envtl. Protection, 654 So. 2d 1047, 1048 (Fla. 5th DCA 1995); In Re: Request for Declaratory Statement by Tampa Electric Company Regarding Territorial Dispute with City of Bartow in Polk County, Docket No. 031017-EU, Order No. PSC-04-0063-FOF-EU (Jan. 22, 2004) 2004 WL 239416 (hereinafter "In Re: TECO Territorial Dispute"). A declaratory statement should not be issued if it "amounts to an advisory opinion at the instance of parties who show merely the possibility of legal injury on the basis of a hypothetical 'state of facts which have not arisen' and are only 'contingent, uncertain [and] rest in the future.'" In Re: TECO Territorial Dispute at 4 (citing Santa Rosa County v. Administration Comm'n, 661 So. 2d 1190, 1192-93 (Fla.

1995) (quoting Williams v. Howard, 329 So. 2d 277, 283 (Fla. 1976)); see also In re: Petition for Declaratory Statement with Respect to Use of Decommissioning Trust Dollars for Spent Fuel and Other Non-Radiological Decommissioning Costs for Crystal River 3 Nuclear Plant, Docket No. 20130207-EI, Order No. PSC-13-0452-FOF-EI (Oct. 9, 2013) 2013 WL 5594469 (denying in part DEF's request for declaratory statement because it raised a "merely hypothetical situation").

Here, DEF is asking the Commission to issue a declaratory statement concerning a non-existent power purchase agreement.[5] DEF's request for a declaratory statement is based entirely on a hypothetical state of facts which have not arisen and are contingent and uncertain, and which may never arise.[6] Instead, DEF's Petition focuses on a contract term unilaterally created by DEF, to be imposed on solar QFs, which DEF wants the Commission to bless in the abstract. The Commission should reject DEF's invitation to issue an unauthorized advisory opinion.

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[5] In In re: Declaratory Statement Concerning Lease of Solar Equipment, Docket No. 20170273-EQ, Order No. PSC-2018-0251-DS-EQ (May 17, 2018) 2018 WL 2316552, the Commission delayed issuing a declaratory statement concerning a solar equipment lease until the petitioner actually provided a copy of the lease.

[6] As further evidence of the contingent nature of DEF's claimed injury, DEF refers to "probable future scenarios." Petition at 10.

II. DEF'S REQUESTED DECLARATORY STATEMENT WOULD VIOLATE FLORIDA LAW BY ALLOWING DEF TO AVOID ITS OBLIGATIONS TO PURCHASE SOLAR QF POWER AT DEF'S FULL AVOIDED COST AND TO NEGOTIATE IN GOOD FAITH FOR THE PURCHASE OF COST-EFFECTIVE QF POWER.

Both Florida and federal law require that DEF must purchase solar energy, capacity, and associated attributes from QFs at costs that are no greater than DEF's avoided costs – i.e., the costs that DEF would otherwise incur to produce or obtain the same power from its own facilities. DEF's requested declaratory statement is an attempt to avoid its obligations under Florida Statutes and the Commission's rules to pay QFs up to DEF's full avoided cost for all generating facilities shown in DEF's generation plans. In fact, it appears clear that DEF would use the requested declaratory statement, if it were issued, to avoid purchasing solar power from QFs at less than DEF's fully avoidable, "avoided costs" of its planned SOBRA facilities. Accordingly, the Commission should deny DEF's Petition.

A. Florida Law Regarding Cogeneration and Small Power Production

In implementing PURPA, the Florida Legislature expressly recognized the benefits to the public of electricity produced by cogeneration and small power production and imposed on Florida utilities, as a matter of state law, the same obligation to purchase as imposed by PURPA:

> Electricity produced by cogeneration and small power production is of benefit to the public when included as part of the total energy supply of the entire electric grid of the state or consumed by a cogenerator or small power producer. The electric utility in whose service area a

> cogenerator or small power producer is located shall purchase, in accordance with applicable law, all electricity offered for sale by such cogenerator or small power producer; or the cogenerator or small power producer may sell such electricity to any other electric utility in the state. The commission shall establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers and may set rates at which a public utility must purchase power or energy from a cogenerator or small power producer. In fixing rates for power purchased by public utilities from cogenerators or small power producers, the commission shall authorize a rate equal to the purchasing utility's full avoided costs. A utility's "full avoided costs" are the incremental costs to the utility of the electric energy or capacity, or both, which, but for the purchase from cogenerators or small power producers, such utility would generate itself or purchase from another source.

§ 366.051, Fla. Stat. (emphasis supplied).

The Commission implemented PURPA first by adopting, in 1981, Commission rules 25-17.080 through 25-17.0889, F.A.C. In 2007, the Commission further adopted Rules 25-17.200 through 25-17.310, F.A.C., to "promote the development of renewable energy" and to "minimize the costs of power supply to electric utilities and their customers." The Florida Legislature has also enacted legislation that encourages cogeneration, renewable energy, the overall cost-effectiveness of electricity production, and reduction in the use of natural gas as an electric generating fuel in Florida. §§ 366.051, 366.82, 366.91, and 366.92, Fla. Stat.

The key Commission rules applicable to DEF's obligation to purchase from QFs are Rules 25-17.0832(2) and 25-17.0834(1), F.A.C. These rule sections are reproduced here in their entirety.

25-17.0832 Firm Capacity and Energy Contracts.

* * *

(2) Negotiated Contracts. Utilities and qualifying facilities are encouraged to negotiate contracts for the purchase of firm capacity and energy to avoid or defer the construction of all planned utility generating units which are not subject to the requirements of Rule 25-22.082, F.A.C. If a utility is required to issue a Request for Proposals (RFP) pursuant to Rule 25-22.082, F.A.C., negotiations with qualifying facilities shall be governed by the utility's RFP process. Negotiated contracts will be considered prudent for cost recovery purposes if it is demonstrated by the utility that the purchase of firm capacity and energy from the qualifying facility pursuant to the rates, terms, and other conditions of the contract can reasonably be expected to contribute towards the deferral or avoidance of additional capacity construction or other capacity-related costs by the purchasing utility at a cost to the utility's ratepayers which does not exceed full avoided costs, giving consideration to the characteristics of the capacity and energy to be delivered by the qualifying facility under the contract. Negotiated contracts shall not be counted towards the subscription limit of the avoided unit in a standard offer contract, thus preserving the standard offer for small qualifying facilities as described in subsection (4).

* * *

25-17.0834 Settlement of Disputes in Contract Negotiations.

(1) Public utilities shall negotiate in good faith for the purchase of capacity and energy from qualifying facilities and interconnection with qualifying facilities. In the event that a utility and a qualifying facility cannot agree on the rates, terms, and other conditions for the purchase of capacity and energy, either party may apply to the Commission for relief. Qualifying facilities may petition the Commission to order a utility to sign a contract for the purchase of capacity and energy which does not exceed a utility's full avoided costs as defined in Section 366.051, F.S., should the Commission find that the utility failed to negotiate in good faith.

(Emphasis supplied.)

The Commission's rules contemplate that utilities will fulfill their responsibility – pursuant to PURPA and pursuant to Section 366.051, Florida Statutes – to obtain cost-effective power from QFs by negotiating in good faith for the purchase of QF capacity and energy "at a cost to the utility's ratepayers which does not exceed full avoided costs, giving consideration to the characteristics of the capacity and energy to be delivered by the qualifying facility under the contract." Rule 25-17.0832(2), F.A.C. The Commission's rules expressly state that utilities are to negotiate in good faith for the purchase of power from QFs "to avoid or defer the construction of ***all planned utility generating units*** which are not subject to the requirements of Rule 25-22.082, F.A.C." Id. (Emphasis supplied.) This requirement was further explained by the Commission in its Order No. 25668, which addressed several issues in the implementation of its Cogeneration Rules, where the Commission stated the following:

> Under Section 366.051, Florida Statutes, our cogeneration rules, . . . and PURPA, a utility is generally required to purchase all electricity offered for sale by a QF which could avoid or defer a planned utility unit. Rule 25-17.0834, Florida Administrative Code, requires that public utilities shall negotiate in good faith for the purchase of capacity and energy from qualifying facilities. From this authority it follows that generally a utility is required to negotiate for the purchase of firm capacity and energy from QFs based on ***any unit*** identified in the utility's generation expansion plan.

In re: Implementation of Rules 25-17.080 through 25-17.091, F.A.C., Regarding Cogeneration and Small Power Production, PSC Docket No. 910603-EQ, Order No. 25668 at 4 (Fla. Pub. Serv. Comm'n, Feb. 3, 1992) (emphasis supplied).

B. DEF's Solar QF Payment Proposal Would Violate Florida Law.

As explained above, Florida law requires DEF to purchase all energy and capacity offered by a solar QF at its full avoided costs. The Commission's rules and orders implementing those rules require DEF to negotiate in good faith for, and to purchase, QF power based on any generating unit in DEF's plan. Rules 25-17.0832(2) & 25-17.0834, F.A.C.; Order No. 25668 at 4. DEF's proposal would allow DEF to refuse to purchase, and to refuse to negotiate for the purchase of, solar QF power at its full avoided costs, rather allowing DEF to limit its payments to two-years-ahead as-available energy costs.

DEF proposes to own and operate solar facilities and to recover the costs of those facilities through base rates. In its 2017 Second Amended and Restated Settlement Agreement ("2017 Settlement"), filed by DEF in Docket No. 20170183-EI on August 29, 2017, DEF announced its intent to procure up to 700 MW of solar power through a SOBRA mechanism, i.e., through its base rates. In re: Application for limited proceeding to approve 2017 second revised and restated settlement agreement, including certain rate adjustments, by Duke Energy Florida, LLC, FPSC Docket No. 20170183-EI, DEF's Petition at 24 (FPSC Document No. 07346-2017,

Aug. 29, 2017). Further, according to its 2018 TYSP, between now and 2027, DEF plans to construct, own, and operate 16 new solar generating units with total capacity of approximately 1,148 MW-AC, and with in-service dates projected to be between March 2019 and December 2027. DEF 2018 TYSP at 3-11 through 3-25, 3-29. More recently, on July 31, 2018, DEF filed its petition for approval to recover through its base rates the costs of its first two SOBRA projects, with total capacity of 149.8 MW.

DEF's SOBRA proposals and the rest of its planned solar units are fully avoidable based on their cost structure and regulatory approval status. DEF's SOBRA proposals, and the rest of its planned solar units, would have essentially a fixed cost structure, i.e., capital construction costs, return on equity and debt, depreciation, property taxes, and small amounts of fixed operating and maintenance costs, none of which would vary with the energy output of DEF's solar facilities. There are no fuel costs or costs that vary with the energy output of solar facilities; the price of the energy input to solar generating facilities – i.e., sunshine – is zero. From a regulatory perspective, none of DEF's planned solar facilities have been approved by the Commission.

DEF's proposed two-year, energy-only PPA scheme plainly violates Florida law (and also federal law) that requires DEF to purchase solar energy, capacity, and associated attributes offered by Ecoplexus and other solar QFs at DEF's full avoided

costs. All of the costs to be incurred by DEF for its solar facilities, including the projects that are the subject of its pending SOBRA filing, are fully avoidable, and solar QFs are entitled to be paid DEF's full avoided costs. DEF's Petition is an obvious attempt to end-run its purchase obligations under Section 366.051, Florida Statutes, and Commission Rules 25-17.0832(2) and 25-17.0834, F.A.C.

The descriptions of the pricing to be offered to QFs per DEF's two-year PPA proposal in DEF's Petition, referring to a "four-year avoided cost forecast" and an "updated offer with new pricing," which assume negotiations on the basis of a standard offer contract based on a fossil-fueled avoided generating unit and "updated fuel forecasts," and refer to "long term variable risk," have the hallmarks of energy-only payments based on DEF's projected as-available energy costs. See Petition at 10. From these descriptions, it appears clear that DEF wants the Commission to authorize DEF to base its payments to solar QFs on the basis of avoided energy costs only. Florida law requires payment of full avoided cost, based on the same definition of avoided cost as federal law, i.e., the cost that the utility can avoid by purchasing QF power. §366.051, Fla. Stat. Florida law thus requires DEF to make payments to QFs who will provide the same capacity and energy as DEF would obtain from self-built solar facilities. DEF's solar costs – the revenue requirements of rate-based

facilities – will not change materially once incurred;[7] solar facilities have no energy-related costs (i.e., costs related to the energy output of the solar facilities), and DEF's solar costs are for all practical purposes "fixed" (defined by initial capital investment plus capital additions, depreciated over time) for the life of the projects – capital costs, including return on equity, debt, and depreciation, and property taxes, and fixed O&M costs that do not vary with the level of a solar facility's output. Solar QFs are entitled to be, and should be, paid on the same basis, for and over the same time period that DEF would commit its customers to paying for DEF's SOBRA units.

DEF's proposed two-year energy-only PPAs would violate Florida law by paying far less than DEF's "full avoided costs," i.e., "the incremental costs to the utility [DEF] of the electric energy or capacity, or both, which, but for the purchase from cogenerators or small power producers, such utility [DEF] would generate itself or purchase from another source," i.e., the costs of DEF's planned solar units, which at this time– since they have not yet been incurred or approved – are all incremental costs.

From DEF's Petition, it appears that DEF's intention is to use the requested declaratory statement, if it were issued, to avoid even negotiating with solar QFs that

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[7] It is possible that DEF's ROE or long-term debt cost could change, and that it could add to the investment in its solar facilities, but there are no energy-related costs to change.

offer and commit to provide solar power – including capacity, energy, and all other attributes that a DEF-owned solar facility would have – to DEF at pricing that produces CPVRRs below the fully avoidable costs of DEF's planned solar units. The Commission should accordingly deny DEF's Petition.

III. DEF'S TWO-YEAR PPA PROPOSAL WOULD VIOLATE PURPA, THE PURPA RULES, AND APPLICABLE FERC ORDERS.

A. Federal Law Regarding Cogeneration and Small Power Production

The key provisions of PURPA and the PURPA Rules relevant to DEF's Petition and requested approval of its two-year PPA proposal are the PURPA requirements that QFs have the right to sell power to a utility in competition with the utility's own self-built or self-owned generating units. To that end, PURPA and the PURPA Rules give a QF the right to enter into a long-term obligation (either a contract or a legally enforceable obligation) with a utility at rates that, at the QF's option, may be fixed at the time the obligation is incurred and that do not exceed the utility's avoided costs, defined as "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." 16 U.S.C. § 824a-3(d); see also 18 CFR § 292.101(b)(6) (defining "avoided costs" as "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.") As discussed elsewhere herein, Florida statutory

law reinforces this requirement in multiple provisions that promote renewable energy, and further with its overarching requirement that Florida public utilities are to provide safe and reliable service to their customers in the most cost-effective way possible.

The PURPA Rules provide specific options to QFs for selling their power to utilities, including the option to have the utility's avoided costs determined at the time the QF's obligation to sell power to the utility and the utility's obligation to purchase such power is incurred. 18 CFR § 292.304(d)(2); JD Wind 1, LLC, 129 FERC ¶ 61148 (F.E.R.C.), 2009 WL 3954726 at 1, 6-7 ("JD Wind"); New York State Electric & Gas, 71 FERC ¶ 61,027 (1995) ("The regulations [FERC PURPA regulations] specifically allow rates for the purchase of QF energy or capacity pursuant to a contract over a specified term to be based on avoided costs calculated, at the option of the QF, at the time of delivery *or* at the time the obligation is incurred") (emphasis in original).

Moreover, it is clear that PURPA contemplates that rates paid to QFs can be greater than or less than the utility's avoided costs at any point in time: PURPA Rule 18 CFR 292.304(b)(5) states:

> 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.

FERC allows a QF to "establish a fixed contract price for its energy and capacity at the outset of its obligation" so that an investor could estimate with "reasonable certainty, the expected return on a potential investment before construction of a facility. See JD Wind, 130 FERC ¶ 61.127 at P 23 (2010) (citing Order No. 69, Small Power Production and Cogeneration Facilities, Regulations Implementing Section 210 of the Public Utilities Regulatory Policies Act of 1978, Final Rule, 45 FR 12214, 12218, "[I]n 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.")

PURPA and FERC's PURPA Rules further prevent utilities from limiting the length of PPAs in a manner that would make the project impracticable or incapable of obtaining appropriate financing. See, e.g., Windham Solar LLC, 157 FERC ¶ 61,134 at P 8 (2016) (noting that FERC's PURPA regulations (18 C.F.R. Section 292.304(d)(2)), do not specify a particular number of years for PPAs or other legally enforceable obligations but do require that given the "need for certainty with regard to return on investment," coupled with Congress' directive that the Commission "encourage" QFs, a PPA or other legally enforceable obligation should be long enough to allow QFs reasonable opportunities to attract capital from potential investors.)

While states have the "responsibility in the first instance to determine an avoided-cost rate consistent with the Commission's PURPA regulations," Pioneer Wind Park I, LLC, 145 FERC ¶ 61,215 at P 41 (2013), FERC has stated that "[i]f 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 or to build a smaller, less expensive plant or to reduce firm power purchased from another utility, then the rate for such a purchase will be based on the avoided capacity and energy costs." Order No. 69, Small Power Production and Cogeneration Facilities, Regulations Implementing Section 210 of the Public Utilities Regulatory Policies Act of 1978, Final Rule, 45 FR 12214, 12216; see also California Public Utilities Commission, 133 FERC ¶ 61,059 at P 26 (2010) ("The question, then, is what costs the electric utility is avoiding. ... [I]n determining the avoided cost rate, just as a state may take into account the cost of the next marginal unit of generation, so as well the state may take into account obligations imposed by the state that, for example, utilities purchase energy from particular sources of energy or for a long duration.")

B. DEF's Proposal Will Violate PURPA and the PURPA Rules.

DEF asserts, at pages 6-7 of its Petition, that its two-year PPA proposal would "comply[] with PURPA and Commission rules." For the same reasons that DEF's two-year proposal would violate Florida law, it would violate PURPA. It would

enable DEF to avoid paying QFs its full avoided – and fully avoidable – costs for planned solar facilities. It would discriminate against QFs in favor of DEF-owned units. Moreover, it would violate FERC's PURPA requirements that PPA rates should be fixed (i.e., stated definitely, though not necessarily levelized) for a term long enough to provide QFs a reasonable opportunity to attract financing. See, e.g., Windham Solar LLC, 157 FERC ¶ 61,134 at P 8 (2016).

PURPA requires payment of full avoided costs to QFs who enable a utility to avoid capacity and energy costs. In this case, the only costs to be avoided are DEF's capacity costs for DEF-owned solar facilities, because there are no energy-related costs for solar facilities. The price of the solar fuel – Florida sunshine – is zero. DEF's proposal would pay solar QFs on the basis of two-years-ahead projected as-available energy costs, whereas DEF's true avoided – and avoidable – costs are the full capital and related fixed revenue requirements (e.g., property taxes) of its planned solar facilities. DEF's proposal violates PURPA and should be denied accordingly.

FERC has rejected a utility pricing proposal virtually identical to DEF's two-year PPA proposal. In Hydrodynamics, Inc., 146 F.E.R.C. ¶ 61193 (2014 WL 1097409) at P 34-35, FERC held that a utility's (NorthWestern Corporation) attempts to limit (with the Montana Public Service Commission's approval) QF payments to either (a) long-term agreements with "only variable, market based rates"

or (b) "a fixed-price, short-term, energy-only agreement of up to 18 months," violated PURPA. FERC explained that the utility's proposed limitation would prevent the QFs in that case from "obtain[ing] forecasted avoided cost rates, which is inconsistent with the Commission's regulations, which entitle a QF with a legally enforceable obligation to rates that, at the QF's option, are forecasted avoided cost rates." Id. at P 34 (citing to 18 CFR § 292.304(d)(2)). The similarity between the 18-month fixed-price proposal rejected by FERC in Hydrodynamics to DEF's two-year fixed-price proposal here cannot be ignored. DEF's proposal violates PURPA and should be denied accordingly.

Moreover, it appears that DEF is attempting to argue that PPAs with fixed or defined pricing, which may be greater than or less than the utility's avoided costs at any point in time, are not consistent with PURPA or with the utility's full-avoided-cost purchase obligations under PURPA and the PURPA Rules. See DEF's Petition at 15-16. If DEF is suggesting this, it is woefully mistaken. FERC has in fact stated just the opposite:

> West Penn directly challenges our long-standing rule, as set forth in section 292.304 of our PURPA regulations, that rates for a long-term QF contract based on avoided costs calculated as of the time the legal obligation to sell power was incurred continue to comply with statutory and regulatory requirements—including the requirement that QF rates be just and reasonable—even if the rates differ from avoided costs at the time the power is delivered.

West Penn Power Co., 71 FERC P 61,153 at 61,495.

C. DEF's Proposal Will Violate FERC Orders Regarding the Need for Financing Certainty for QFs.

While DEF is correct that FERC does not require a particular number of years for QF PPAs, PURPA and the PURPA Rules, as applied by FERC do require that the utility must pay its full avoided costs, and that the QF has the explicit option (per 18 CFR §292.304(d)(2)((ii)) to have its pricing set based on the utility's avoided costs at the time the PPA or other legally enforceable obligation is incurred. Fixed, or defined, pricing for a QF that enables a utility to avoid adding a thirty-year solar asset to its rate base is particularly appropriate for solar facilities because they have no energy-related costs. FERC also requires that PPAs should be long enough to allow QFs reasonable opportunities to attract capital from potential investors. In Windham Solar LLC, 157 FERC 61134 (F.E.R.C.), 2016 WL 6921612 at *3, FERC explained:

> Finally, the Commission has long held that its regulations pertaining to legally enforceable obligations "are intended to reconcile the requirement that the rates for purchases equal to the utilities' avoided cost with the need for qualifying facilities to be able to enter into contractual commitments, by necessity, on estimates of future avoided costs" and has explicitly agreed with previous commenters that "stressed the need for certainty with regard to return on investment in new technologies." Given this "need for certainty with regard to return on investment," coupled with Congress' directive that the Commission "encourage" QFs, a legally enforceable obligation should be long enough to allow QFs reasonable opportunities to attract capital from potential investors.

(footnotes omitted). A two-year PPA is not sufficient for any QF, at least not any utility-scale QF, to obtain financing.

D. DEF's Proposal Will Unlawfully Discriminate Against Solar QFs.

Finally, PURPA and the PURPA regulations require utilities to pay rates that are just and reasonable to utility customers and that do not discriminate against cogenerators or small power producers. Order No. 69, Small Power Production and Cogeneration Facilities, Regulations Implementing Section 210 of the Public Utilities Regulatory Policies Act of 1978, Final Rule, 45 FR 12214, 12215. DEF's proposal would allow it to pay solar QFs, who have offered to meet DEF's solar power requirements (as set forth in its Ten Year Site Plan) for the life of DEF's planned solar units at pricing no greater than DEF's costs for DEF-owned solar units, on the basis of a series of two-years-ahead as-available energy costs, while DEF would lock up the full fixed capital revenue requirements for the life of its DEF-owned solar facilities. DEF's revenue requirements on a dollars per MWH basis for its proposed SOBRA facilities would be multiples of DEF's as-available energy costs and rates. It is difficult to imagine a more discriminatory, anti-QF proposal. DEF's proposed two-year PPA would discriminate against QFs in violation of PURPA, and by enabling it to avoid buying power from QFs at costs less than DEF's costs for its proposed DEF-owned facilities, it would directly harm DEF's customers. The Commission should deny DEF's requested statement.

IV. DEF'S PETITION IS BASED ON INCOMPLETE FACTS AND THUS OBSCURES THE REAL ISSUE POSED BY THE OFFERS THAT DEF RECEIVED FROM ECOPLEXUS AND APPARENTLY FROM OTHER QFS.

DEF's requested declaratory statement is a spurious proposal that DEF wants to use to chill QF development while it adds into its rate base DEF-owned solar facilities at costs to its ratepayers that are greater than necessary to obtain exactly the same amounts of solar power, with the same attributes. As discussed below, the "problems" upon which DEF bases much of its argument – of hypothesized over-subscription and the non-existent risk that underlying avoided costs might change relative to solar QF PPA payments – are inapplicable to the facts at hand. DEF also bases its request on incomplete and misrepresented facts, notably where it tells the Commission that some QFs want very long term PPAs with fixed prices, while failing to tell the Commission that solar QFs have expressly offered to provide solar power, including capacity, energy, and all associated attributes, including ancillary services capabilities and environmental attributes, that would enable DEF to avoid building solar facilities. By omitting these critical facts, DEF has attempted to portray its requested declaratory statement as addressing problems that do not exist while avoiding the real issue at hand, which is this:

> Whether DEF is obligated by the Commission's rules and relevant orders, and by PURPA and the PURPA Rules, to negotiate with QFs that offer solar power to DEF for the purchase of solar power based on such QFs' enabling DEF to cost-effectively avoid the cost of constructing DEF-owned solar generating facilities.

DEF's Petition makes clear that DEF plans to offer energy-only payments based on DEF's projected as-available energy costs for the first 2 years, with a renewal option for future payments also based on DEF's projected as-available costs. (Even if DEF intended to offer the full revenue requirement of its planned solar facilities, which appears not to be true, recalculated every two years, such pricing would not pay QFs DEF's full avoided costs of a DEF-owned solar unit, and such payments would not enable any QF to develop its units.) It is apparent that DEF intends to use the requested declaratory statement to avoid its obligation to purchase of solar power from QFs based on any generating unit in DEF's plan, as required by Rule 25-17.0832(2), F.A.C., as explicated by Commission Order No. 25668 at 4, as well as its Florida and PURPA obligation to purchase solar power from QFs at its full avoided cost. DEF should at least have framed the real issue correctly.

V. DEF'S ALLEGATIONS THAT ITS TWO-YEAR PPA PROPOSAL WILL AVOID PROBLEMS FOR ITS RATEPAYERS ARE ERRONEOUS AND MISLEADING.

DEF alleges that its two-year energy-only PPA proposal will protect its customers from having to pay for unreasonable amounts of solar power and from fixed-cost risks such as it experienced with its PPA with US EcoGen. These are specious and fallacious attempts to distract the Commission from DEF's designs to impose higher costs – indeed, higher fixed costs – on its ratepayers with the same

risks that it alleges would accompany purchases from QFs. DEF's argument that it will have to purchase unreasonably high amounts – 3,000 to 6,000 MW – of solar power from QFs is refuted by the Commission's rules, FERC decisions, and simple logic. DEF's other argument – that PPAs with QFs would expose customers to fixed-cost risks – is specious, fallacious, and misleading when compared to the fixed costs, and corresponding fixed-cost risks, that DEF wants to impose on its customers through its current and future SOBRA proposals.

A. DEF's Over-Subscription Argument is Misplaced.

DEF asserts to the Commission that it would have to pay the same amount to all QFs offering solar power, Petition at 11, and that it could thus be exposed to having to pay for between 3,000 MW and 6,000 MW of solar power. This assertion is refuted by simple logic, by the Commission's rules, and by FERC decisions.

Simple Logic. Simple logic dictates that where there are no solar facilities to be avoided, there are no avoided costs associated with such facilities. The requirements of PURPA and Florida law are straightforward: public utilities like DEF must purchase power from QFs at the full avoided costs, defined as "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." Where DEF plans to add DEF-owned solar facilities to its rate base, the full costs of such facilities are fully

avoidable and thus are, in fact, DEF's "avoided costs." However, simple logic indicates that if, at a given point in time, DEF were not planning to build more solar capacity, then it would have no avoidable or avoided costs associated with additional solar capacity. On the known facts, DEF's 2018 Ten Year Site Plan shows that DEF plans to add 1,148.5 MW of solar capacity from 2019 through 2027; simple logic indicates that DEF does not have any avoidable or avoided solar costs after 2027. In the context of Rule 25-17.0832(2), F.A.C. and Commission Order No. 25668, there are no further "planned utility [solar] generating units" "identified in [DEF's] generation expansion plan" against which a QF could demand to negotiate avoided-cost-based payments.

Commission Rules Regarding Subscription Limits. The Commission's rules recognize the logical validity of subscription limits and provide an express and ready remedy for the "problem" alleged by DEF. The Commission's standard offer contract rules expressly recognize that subscription limits are appropriate for QF contracts. See 25-17.0832(4), F.A.C. (recognizing subscription limits and specifically authorizing utilities not to accept standard offer contracts where such acceptance would exceed the applicable subscription limit). While Rule 25-17.260, F.A.C., Subscription Limits, provides that "There shall be no preset subscription limits for the purchase of capacity and energy from renewable generating facilities," the very next sentence of that Rule addresses the potential problem that DEF claims

to want to address with its two-year PPA proposal: the same Rule expressly provides that, "To the extent that the purchase of capacity and energy from a renewable generating facility is not needed for reliability or will increase costs to the general body of ratepayers above full avoided cost, the utility shall petition the Commission for relief." Thus, the Commission has recognized the potential issue of over-subscription and provided a clear and readily available remedy to address this issue, if it were to occur.

FERC Recognizes that the PURPA Obligation to Purchase "Does Not Require a Utility to Pay for Capacity that It Does Not Need." Further, FERC has recognized the logically obvious point that where there are no capacity costs to be avoided, no avoided-cost-based capacity payments are required. In City of Ketchikan, Alaska, FERC granted a limited waiver of the PURPA Rules to allow four non-regulated (municipal or similar) utilities to decline "to purchase and pay for capacity that [was] not needed." FERC stated the following:

> In implementing section 210 of PURPA, the Commission made clear that an avoided cost rate need not include capacity costs (as distinct from energy costs) where a QF does not "permit the purchasing 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." Order No. 69, FERC Stats. & Regs., Regs. Preambles 1977-1981 ¶ 30,128 at 30,865. The Commission commented:
>
> 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.
>
> Order No. 69, FERC Stats. & Regs., Regs. Preambles 1977-1981 ¶ 30,128 at 30,870 (emphasis added [in original FERC order]). Accordingly, an avoided cost rate need not include capacity unless the QF purchase will permit the purchasing utility to avoid building or buying future capacity. Thus, while utilities may have an obligation under PURPA to purchase from a QF, that obligation does not require a utility to pay for capacity that it does not need. [fn. omitted]

City of Ketchikan, Alaska, 94 FERC P 61293 (F.E.R.C.), 2001 WL 275023 at *6 (emphasis supplied).

DEF's over-subscription argument is specious and fallacious – DEF does not have to purchase QF power where that power does not enable DEF to avoid costs that it would otherwise incur. Here, in the near term, DEF plans to acquire 149.8 MW of solar facilities from two projects, and thereafter to charge its customers effectively fixed base rate charges for those facilities for their lives. Ecoplexus has offered to provide the same amount of solar power (up to 224.5 MW) at pricing that is unequivocally less than DEF's proposed solar costs. Further, according to its 2018 Ten Year Site Plan, DEF plans to build or acquire roughly another 1,000 MW of solar power between now and 2027; the costs of those solar facilities are also fully avoidable. Beyond that, however, DEF would be able to ask the Commission for relief from purchasing more solar capacity and energy than it plans to build, generate itself, or purchase from another source.

B. DEF's Fixed-Cost Price Risk Argument is Erroneous Because DEF Itself Would Impose the Same Risks on Its Ratepayers at Higher Costs than Offered by Ecoplexus.

DEF asserts that its two-year PPA proposal will protect its customers from the risks of fixed-price contracts. This argument is fallacious and disingenuous because, for all practical purposes, the costs of solar facilities are all fixed costs, especially once they would be rolled into DEF's rate base, and there are no energy-related costs that could shift so as to reduce avoided costs once the plant was built. In short, in its SOBRA proposals, DEF is effectively signing a PPA with itself – and committing its ratepayers to purchase all of the capacity, energy, and other attributes of its proposed SOBRA projects, based on DEF's assumptions and projected fuel costs, energy costs, and other factors, with all of the risks associated with and attendant upon those assumptions and projections.

Moreover, as set forth above, PURPA contemplates that the utility and the QF will enter an obligation (i) at a rate equal to the utility's avoided costs, (ii) fixed at the time the obligation is incurred[8] and (iii) for a term sufficient to finance the QF project. FERC's regulations "reconcile the requirement that the rates for purchases

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[8] New York State Electric and Gas Corporation, 71 FERC ¶ 61,027 (1995) (The regulations specifically allow rates for the purchase of QF energy or capacity pursuant to a contract over a specified term to be based on avoided costs calculated, at the option of the QF, at the time of delivery *or* at the time the obligation is incurred.)

equal the utilities' avoided cost with the need for [QFs] to be able to enter into contractual commitments based, by necessity, on estimates of future avoided costs."[9] As such, FERC has long contemplated that long-term fixed avoided-cost-based QF rates could deviate over time from the utility's avoided-cost rates at the time the obligation is incurred. Therefore, DEF is wrong if and to the extent it argues that a QF obligation must be limited to two years to ensure that the avoided costs paid to a QF never exceed DEF's avoided costs.

DEF points to its experience with a PPA, in the US EcoGen case, wherein the Commission approved a PPA with fixed energy payment rates, as support for its proposal to fix payments to solar QFs for two years at a time. Petition at 5 (citing In re: Petition for Approval of Negotiated Power Purchase Agreement with U.S. EcoGen Polk, LLC by Progress Energy Florida, Inc., Order No. PSC-2011-0439-PAA-EQ (F.P.S.C., Oct. 3, 2011) ("US EcoGen")). While it is true that the US EcoGen order identified and expressed concern with the risks of fixed energy payments in that specific PPA with a biomass-fueled QF, that case is entirely inapposite and incapable of replication here, because the risk in US EcoGen was the risk that the fuel costs associated with DEF's avoided unit – i.e., the avoided unit upon which payments to US EcoGen (the QF itself) were based – might change causing DEF's avoided energy costs to change while the fixed energy payments

[9] Id.

approved for the US EcoGen PPA would not change, thereby potentially resulting in the US EcoGen PPA becoming non-cost-effective.

The Commission's discussion of the risks in the US EcoGen order makes clear that the risks of concern were those of fixed energy payments relative to the projected avoided unit fuel costs upon which those payments were based.

> In its Petition, PEF provided a cost-effectiveness analysis based on the 2010 Standard Offer, compared to the negotiated contract's fixed capacity and energy rates.
>
> * * *
>
> By fixing energy payment rates, the rates are not allowed to float with changes to the avoided unit's fuel costs. This allocates all the risk of fuel price fluctuations from EcoGen to PEF's ratepayers. For example, if fuel costs do not escalate as quickly as projected in the contract, it may result in a NPV loss. Conversely, if fuel costs escalate faster, customers would see an increased benefit. Regardless, PEF would remain obligated to pay the contracted rate and may seek to recover the costs from the ratepayers through the fuel cost recovery clause, subject to our review.
>
> Given the fixed nature of the contract's payments, and the contract's reliance upon lower fuel payments to be cost-effective, additional scenarios were requested from PEF to provide an updated analysis.

US EcoGen at 3-4 (emphasis supplied); see also In re: Petition for Approval to Terminate Qualifying Facility Power Purchase Agreement with Florida Power Development, LLC, by Duke Energy Florida, LLC, Docket No. 20170274-EQ, Order No. 2018-0240-PAA-EQ (F.P.S.C., May 8, 2018) ("Florida Power Development"). In Florida Power Development, DEF sought and obtained approval

to terminate a PPA with a biomass-fueled QF and with fixed energy payments. As in US EcoGen, the Commission noted that the risks of fixed energy payments, where cost-effectiveness depended on those payments being less than DEF's fuel costs, were imposed on customers:

> Since that time, DEF's avoided costs have decreased, and now payments under the PPA exceed DEF's current avoided costs. The PPA is at a fixed contractual energy rate; therefore, any changes in fuel prices are borne by customers.

Florida Biomass Development at 2 (emphasis supplied).

This scenario – changing fuel costs resulting in impaired cost-effectiveness to customers – is plainly incapable of replication with solar QF PPAs as compared to the avoidable costs of DEF's self-built or DEF-owned solar facilities. There are obviously no fuel costs associated with any DEF-built or DEF-owned solar facility, and therefore no risk of a change in avoided fuel costs affecting the cost-effectiveness of a solar PPA based on avoiding a DEF solar facility. The price of sunlight is zero. DEF's attempt to rely on US EcoGen as a basis for its requested declaratory statement is fallacious and misleading. DEF has confused the risks of energy payments pegged to fuel costs for fossil-fueled avoided units under standard offer contracts with the fixed energy payments that a solar QF would receive for avoiding a planned DEF-owned solar facility for the life of such facility. DEF's argument is misplaced, and its Petition should accordingly be denied.

In fact, whatever the cost risks associated with solar generating facilities may be, DEF would impose the same risks on its customers with its rate-based SOBRA projects, except that DEF would do so at higher costs than necessary. While the costs – and thus the avoidable and avoided costs – of solar generating facilities may continue to decline in the future, once DEF puts a solar asset into its rate base, the costs thereof are effectively fixed for the life of the asset, because there are no energy-related costs, fuel costs or otherwise, to change, which was the risk identified in US EcoGen, and seen again in Florida Biomass Development. Similarly, and correspondingly, PPA payments to a solar QF should, and presumably would, be based on the long-term fixed costs that the QF enables the utility to avoid.

It is true that DEF's cost of equity, debt, or property taxes might decline, but it is equally true that those fixed costs might increase. It is also true that PPAs provide additional risk avoidance benefits to customers that are not present with utility-owned facilities. Specifically, for a DEF-owned unit, DEF would recover its revenue requirements regardless whether the unit met performance or output expectations, whereas a QF being paid on the basis of dollars per MWH would only get paid for power that it delivers. Additionally, DEF would have the opportunity to put additional capital costs into its rate base over time, and to recover the costs of any losses (e.g., storm damage costs) from its customers, whereas QFs with PPAs would not have that opportunity at all – once PPA rates are set, they are set.

VI. DEF'S REQUESTED DECLARATORY STATEMENT WOULD VIOLATE FLORIDA'S RENEWABLE ENERGY POLICY AND ENABLE DEF TO VIOLATE ITS OBLIGATION TO SERVE ITS RATEPAYERS AT THE LOWEST POSSIBLE COST.

DEF's requested declaratory statement would violate Florida renewable energy policy and enable DEF to violate its duty to provide safe and reliable service to its ratepayers at the lowest possible cost. Accordingly, it should be denied.

A. DEF's Requested Declaratory Statement Would Violate Florida Renewable Energy Policy.

The Florida Legislature has addressed renewable energy, including electricity produced from solar energy, in multiple sections of the Florida Statutes. In Section 366.91, Florida Statutes, the Legislature made the following specific findings:

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

Renewable energy specifically includes electrical energy produced using solar energy. § 366.91(2)(d), Fla. Stat.

The Legislature went on to further articulate the State's renewable energy policy in Section 366.92, Florida Statutes, where it stated the following:

> **366.92 Florida renewable energy policy.—**

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

DEF's requested declaratory statement would allow it to install its planned DEF-owned solar facilities at greater cost to customers than offered by solar QFs. It would thus violate the intent of Florida's pro-renewable energy policy, which includes the express policy statement that a utility's procurement of renewable is to "minimize the costs of power supply to electric utilities and their customers." § 366.92, Fla. Stat.

B. DEF's Requested Declaratory Statement Would Enable DEF to Breach Its Obligation to Serve Customers at the Lowest Possible Cost.

DEF is a public utility as that term is defined in Section 366.02(1), Florida Statutes. As such, it is subject to the plenary jurisdiction of the Commission under Chapter 366, Florida Statutes. Chapter 366 requires public utilities to provide safe, adequate, efficient, and sufficient service at fair, just, and reasonable rates. §§ 366.03, 366.04(6), 366.06 & 366.07, Fla. Stat. These provisions are generally accepted as meaning that Florida public utilities have a duty to provide safe, adequate, and reliable service at the lowest cost to their customers. For example, in the 2009 general rate case of Progress Energy Florida, DEF's predecessor company,

Progress Florida's president and CEO, Vincent M. Dolan, agreed that "Progress Energy Florida has a duty to provide service, safe, adequate, reliable service to its customers at the lowest possible cost." In re: Petition for Increase in Rates by Progress Energy Florida, Inc., Docket No. 20090079-EI, Hearing Transcript at 257.

DEF's proposed two-year PPA proposal would shut out solar QF development because its low prices based on as-available energy costs only and its short two-year term would render virtually all solar projects impracticable. It would thereby enable DEF to build (or buy) – and put into its rate base – its over-priced solar units, which is obviously DEF's intention. It would therefore also violate DEF's statutory obligation to serve – pursuant to the above-cited sections of Chapter 366 – at the lowest possible cost – by over-charging its customers for solar power that it plans to obtain from DEF-owned facilities when lower-cost solar power is available from solar QFs.

In some circumstances, if a utility fails to fulfill this responsibility, it is subject to have excess costs disallowed as imprudent. With respect to the ability to purchase cost-effective power from QFs, however, the utility must – in accordance with Florida Statutes, the Commission's rules, PURPA, and the PURPA Rules – fulfill its lowest-cost-service responsibility by purchasing power from QFs who offer power that is cost-effective, i.e., available to the utility at or below its avoided cost of comparable generating facilities and energy production.

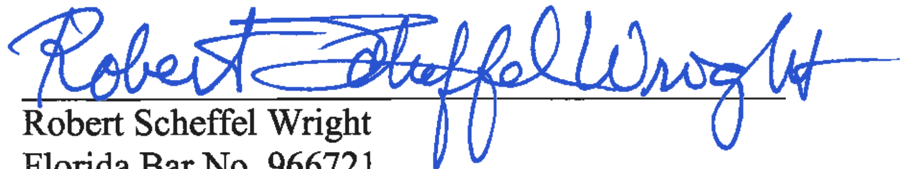
CONCLUSION AND RELIEF REQUESTED

DEF's Petition is procedurally flawed and should be denied for those reasons. Moreover, the declaratory statement requested by DEF would violate Florida and federal law by allowing DEF to avoid its state-law and PURPA obligations to purchase QF power at no more than its avoided costs. Further, and worse, allowing DEF to get away with this ploy will allow DEF to breach its obligation to serve its customers at the lowest possible cost, as well as to violate Florida renewable energy policy, which includes the Legislature's explicit directive that renewable energy should be employed in order to "minimize the costs of power supply to electric utilities and their customers."

Accordingly, the Petition should be denied.

WHEREFORE, Ecoplexus respectfully requests the Commission to enter its order DENYING DEF's Petition for Declaratory Statement.

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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