STATE OF FLORIDA

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Public Service Commission

April 7, 2010

VIA ELECTRONIC FILING

Ms. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: Docket No. EL10-43-000

Dear Ms. Bose:

Forwarded herewith are comments of the Florida Public Service Commission regarding Florida Power & Light Company's Petition for Declaratory Order in the above-captioned proceeding.

Sincerely,

/ s /

Cynthia B. Miller
Senior Attorney

CBM:tf

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Florida Power & Light Company	)	Docket No. EL10-43-000

COMMENTS OF THE FLORIDA PUBLIC SERVICE COMMISSION IN SUPPORT OF FLORIDA POWER & LIGHT COMPANY'S PETITION FOR DECLARATORY ORDER

Pursuant to Rule 385.214 of the Federal Energy Regulatory Commission (Commission) rules, the Florida Public Service Commission (FPSC) filed a timely Notice of Intervention on March 19, 2010, in this proceeding. The FPSC hereby submits these comments requesting that the Commission clarify the scope of its jurisdiction over interconnection agreements between a public utility and a qualifying facility (QF) under the provisions of the Public Utility Regulatory Policy Act of 1978 (PURPA). In particular, the FPSC seeks clarification of the 2007 Niagara Mohawk Power Corp. d/b/a/ National Grid[1] case. Thus, these comments are filed in support of the Florida Power & Light petition regarding this policy issue.

Specifically, the FPSC takes exception to a finding in Niagara whereby the Commission stated "where a QF may sell any of its output to a third-party," the Commission has jurisdiction over the interconnection agreement (emphasis added).[2] This statement implies that, regardless of whether actual sales to another utility occur, the very potential for making such sales would result in Commission regulation of the interconnection. If this interpretation remains in effect, it may render the FPSC's current rules governing interconnection between the utility and QF moot, which would have a negative effect on the FPSC's efforts to encourage the development of renewable energy resources in Florida.

[1] 121 FERC ¶ 61,183 (2007)
[2] 121 FERC ¶ 61,183 at page 13.

Congress enacted PURPA to encourage conservation of energy and the efficient use of energy resources by promoting the development of cogeneration and small power producers in the private sector. To accomplish this, PURPA established three basic tenants requiring electric utilities to (1) interconnect with; (2) purchase from; and (3) make sales to qualifying cogenerators and small power producers (QFs). The capacity and energy purchased from QFs then became part of the electric utility's overall supply needed to serve retail electric customer demand. To facilitate the implementation of this new national energy policy, Congress empowered states with regulatory agencies, such as the FPSC, to regulate the purchase power contracts between state regulated public utilities and QFs, including interconnection.

Since its inception, Florida has embraced the provisions of PURPA. The Florida Legislature has adopted statutes requiring the FPSC to adopt rules that enhance the provisions of PURPA to encourage the development of cogeneration and renewable small power production in Florida. In 1981, the Florida Legislature enacted §366.05(9), Florida Statutes, (F.S.) authorizing the FPSC to establish guidelines for the purchase and sale of capacity and energy from any cogenerator or small power producer. In 1989, the statutes were broadened with the enactment of §366.051, F.S., which declares that: "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 grid of the state or consumed by a cogenerator or small power producer." The statute goes on to state that "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." (emphasis added) The statute requires that utility payments to QFs for the purchase of capacity and energy shall be at a rate equal to the

purchasing utility's full avoided cost. In essence, this long-standing act of the Florida Legislature extended the PURPA "obligation to purchase" to all public utilities in the state regardless of the location of the cogenerator or small power producer with payments equal to the purchasing utility's avoided cost.

In implementing the Florida Statutes, the FPSC has been careful to harmonize the requirements of both federal and state law. Pursuant to Rule 25-17.087, Florida Administrative Code (F.A.C.), each utility is required to interconnect with any QF within its service area. The interconnection standards established by this rule are consistent with FERC requirements. As mentioned above, once interconnected, the QF may elect to make sales either to its native utility or to a third party utility. Where sales to a third party utility are requested, Rule 25-17.0889, F.A.C., requires each electric utility in Florida to provide transmission service to wheel as-available energy or firm energy and capacity from the QF to the purchasing utility. The rates, terms, and conditions for such transmission services are those approved by the FERC.

In addition to the above, the Florida Legislature has enacted and the FPSC has implemented through rulemaking, numerous other provisions to encourage the development of renewable energy generating resources within Florida. In 2006, the Florida Legislature enacted §366.91, F.S., which requires investor-owned utilities to continuously offer purchase contracts (standard offer contracts) to producers of renewable energy. Pending legislation, first initiated in 2008 and continuing in the 2010 Legislative Session, may establish additional requirements for Florida's electric utilities to include a certain percentage of renewable energy as part of their overall energy supply.

In Niagara, the Commission stated that "where a QF may sell any of its output to a third-party," the Commission has jurisdiction over the interconnection agreement.[3] (emphasis added) This statement implies that, regardless of whether actual sales to a third-party occur, the very potential for making such sales would result in the Commission regulation of the interconnection. Since Florida has opened the statewide grid to non-utility renewable energy suppliers, it follows that each qualified cogenerator and small power producer has the potential to make sales to an electric utility other than the native utility to which it must interconnect. If this interpretation stands, it may render the FPSC's current rules governing interconnection moot. Qualifying facilities would be forced to seek and adjudicate interconnection agreements from the Commission; while the rates, terms, and conditions of purchased power contracts would remain under state purview. Such bifurcation would do little to facilitate the FPSC's and the Commission's efforts to encourage the development of renewable energy resources in Florida.

Further, the FPSC believes that the Commission may have violated the Federal Administrative Procedure Act (APA) when it changed policies, previously adopted by rulemaking, in the Niagara case. "Rule" is defined in the APA as the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.[4] A "rulemaking" is an agency process for formulating, amending, or repealing a rule.[5] The section on rulemaking in the APA requires that the agency provide a notice of proposed rulemaking and that interested persons be given an opportunity to participate in the rulemaking through submission of written data, views or arguments.[6] This ensures due process. These generic notice and comment requirements were not followed in the

[3] 121 FERC ¶ 61,183 at page 13.
[4] 5 U.S.C. Sec. 551 (4)
[5] 5 U.S.C. Sec. 551 (5)
[6] 5 U.S.C. Sec. 553

Niagara case. Interested persons could not discern that such a policy shift was occurring in that utility-specific case.

Conclusion

For the foregoing reasons, the FPSC respectfully requests that the Commission clarify the language in the Niagara case to no longer imply that jurisdiction shifts to the Commission when a QF "may" sell to the non-host utility in the future. In the alternative, the FPSC requests that the Commission open a full "notice and comment" rulemaking so that interested persons, such as state commissions, are able to participate in the proceeding.

Respectfully submitted,

/ s /

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Certificate of Service

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Tallahassee, FL this 7th day of April, 2010.

/ s /
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