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December 23, 2008

-VIA HAND DELIVERY -

Ms. Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Florida Power & Light Company's Petition for Approval of Renewable Energy Tariff and Standard Offer contract -Docket No. 080193-EQ

Dear Ms. Cole:

I am enclosing for filing in the above-referenced docket an original and fifteen (15) copies of Florida Power & Light Company's prefiled rebuttal testimony of Korel M. Dubin.

If there are any questions regarding this transmittal, please contact me at 561-304-5253.

Sincerely,

Bryan S. Anderson

Enclosures
cc: Counsel for parties of record (w/encl.)

COM ___
ECR 1
GCL 1
OPC ___
RCP ___
SSC ___
SGA 1
ADM ___
CLK 6

CERTIFICATE OF SERVICE
Docket No. 080193-EQ

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery (*) or U.S. mail on December 23, 2008 to the following:

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By _____
Bryan S. Anderson, Esq.
Authorized House Counsel No. 219511

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 080193-EQ
FLORIDA POWER & LIGHT COMPANY

IN RE: FLORIDA POWER & LIGHT COMPANY'S PETITION FOR APPROVAL OF A RENEWABLE ENERGY TARIFF AND STANDARD OFFER CONTRACT

REBUTTAL TESTIMONY & EXHIBITS OF:

KOREL M. DUBIN

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

FLORIDA POWER & LIGHT COMPANY

REBUTTAL TESTIMONY OF KOREL M. DUBIN

DOCKET NO. 080193-EQ

December 23, 2008

Q. Please state your name and business address.

A. My name is Korel M. Dubin and my business address is 9250 West Flagler Street, Miami, Florida 33174.

Q. By whom are you employed and what is your position?

A. I am employed by Florida Power & Light Company ("FPL" or "the Company") as Senior Manager of Purchased Power in the Resource Assessment and Planning Department.

Q. Have you previously filed testimony in this docket?

A. Yes, I have.

Q. Are you sponsoring an exhibit in this case ?

A. Yes, it consists of the following documents:

KMD-1 – Dalton Deposition Transcript

KMD-2 - Excerpts from Commission Order No. 12634

KMD-3 – Excerpt from Commission Order No. 13247

KMD-4 – Excerpt from Commission Order No. 24989

KMD-5 – Excerpt from Commission Order No. PSC-07-0492-TRF-EQ

KMD-6 – Excerpt from FERC Order issued October 1, 2003, Docket No. EL03-133-000

KMD- 7 – Excerpt from Ontario Power Authority Standard Offer Program Rules

Q. What is the purpose of your rebuttal testimony?

A. The purpose of my testimony is to respond to the testimony of the Wheelabrator Technologies Inc. ("Wheelabrator") witness John C. Dalton, which opposes FPL's Standard Offer Contract approved by the Florida Public Service Commission ("Commission") Order No. PSC-08-0544-TRF-EQ.

Q. Please provide an overview of the points in your rebuttal testimony.

A. My rebuttal testimony explains how FPL's Standard Offer Contract complies with Florida statutes, regulations and regulatory policy concerning Standard Offer Contracts, focusing on the several specific considerations raised in Mr. Dalton's testimony. A key theme that emerged from my review of Mr. Dalton's testimony is that Wheelabrator's suggestions for changes to FPL's Standard Offer Contract are contrary to well-established regulatory and statutory direction of the Commission and the Florida Legislature.

The Commission's policy for Standard Offer Contracts generally, and FPL's Standard Offer Contract specifically, are premised on ensuring that customers do not pay more for capacity and energy under a Standard Offer Contract than would be paid if capacity and energy were to be provided by FPL's Next Planned Generating Unit, which in

this case would be a Mitsubishi "G" class natural gas fired combined cycle unit. As such, the provisions of FPL's Standard Offer Contract are framed in terms of the economics and operating characteristics of such a unit, consistent with long-standing Commission requirements.

While Mr. Dalton suggests that some of the economic and operating specifications in the Standard Offer Contract are not consistent with particular renewable generating units, these criticisms miss the point of the contract, which is not to be based on the characteristics of any particular renewable technology. Rather, economic and operating accommodations for specific renewable energy technologies is best accomplished through negotiation – something FPL always stands ready to do.

As such, Mr. Dalton's opposition to FPL's Standard Offer Contract is fundamentally misplaced, since Wheelabrator's position much more opposes the Commission Rules and Florida Statutes governing Standard Offer Contracts, which are not the proper subject of a protest matter like this case. Moreover, Mr. Dalton's and Wheelabrator's positions are much more like those that have been raised and rejected in prior Standard Offer Contract rulemakings. This can be seen in the fact that Mr. Dalton's five recommendations contained in his testimony to modify FPL's Standard Offer Contract are inconsistent with Commission Rules and would remove some of

the protections for FPL's customers that these Rules provide. And last my rebuttal testimony addresses some inconsistencies in the underlying support for Wheelabrator's testimony.

Q. Please summarize your testimony.

A. FPL supports development of renewable energy in Florida, and continues to work hard to purchase that which has been made available to it pursuant to negotiated contracts consistent with the Commission's preference for that approach. FPL notes that negotiated contracts permit accomodation of the specific attributes of individual types and sizes of renewable generating resources in a way that cannot be as readily done with the Standard Offer Contract which, by its nature, is required to be applicable to all types and sizes of renewable generating resources.

For all of the reasons provided in my direct and rebuttal testimony, FPL requests that the Commission find that FPL's Standard Offer Contract complies with Florida Statutes, the Commission's regulations and is reasonable, and deny Wheelabrator's request that the Commission order changes to the contract that are not consistent with Florida law or the Commission's regulations, and are not reasonably protective of FPL's customers.

Q. Mr. Dalton's testimony provides five recommendations to modify FPL's Standard Offer Contract. Who will be affected if Wheelabrator's recommendations are adopted?

A. Initially, it appears there are three groups impacted by Wheelabrator's proposed changes to FPL's Standard Offer Contract: (1) Wheelabrator, which I assume feels it may profit or otherwise benefit if its proposed changes are adopted, (2) FPL's customers, who stand to pay more money and receive less assurance of reliability for Standard Offer Contract purchased power if Wheelabrator's proposed changes are adopted, and (3) FPL, which is concerned that (i) its Standard Offer Contract comply with applicable laws, regulation and Commission policy; (ii) customers do not pay more than is required for purchased power; and (iii) reliability of service under Standard Offer Contracts is not unreasonably compromised.

The interests of FPL and its customers are closely aligned. So, really there are only two competing interests here: (1) Wheelabrator, which wishes utility customers to pay more and accept less reliability for power sold under Standard Offer Contracts; and (2) FPL's customers, who reasonably expect the Commission Rules, Florida Statutes and FPL's corresponding Standard Offer Contract to protect their interest in not paying greater than avoided cost for reliable purchased power.

Q. Please comment on Wheelabrator's first recommendation on page 38, lines 11 through 13 of Mr. Dalton's testimony that states "[g]iven that energy payments are based on avoided costs, provisions 8.4.6 and 8.4.8 be revised to compensate REF

developers when they are constrained off or down by FPL."

A. To begin with, it is important to recognize that these two contract provisions Mr. Dalton complains of are expressly provided for under applicable Commission rules and past regulatory decisions. Accordingly, Mr. Dalton's suggestions are contrary to law and should not be accepted. In addition, it is important to remember the concept that the Standard Offer Contract is modeled upon what customers would receive from a Next Planned Generating Unit. FPL would itself reduce output or curtail production from its next planned generating unit if necessary for reliability reasons, or due to availability of generation from a more cost-effective generating unit (or purchased power). These contract provisions are thus consistent with the underlying philosophy of the Standard Offer Contract, which is to protect customers by providing for Standard Offer Contract service consistent with economic and operating characteristics of FPL's next planned generating unit.

Q. You mentioned that Mr. Dalton's positions concerning Sections 8.4.6 and 8.4.8 are not consistent with the Commission's regulations. Please explain that in more detail.

A. This is best shown by putting the provisions of FPL's Standard Offer Contract in juxtaposition with the Commission's requirements for Standard Offer Contracts.

Provision 8.4.6

Section 8.4.6 of FPL's Standard Offer Contract states that "FPL shall not be required to accept or purchase energy from the QS during any period in which, due to operational circumstances, acceptance or purchase of such energy would result in FPL's incurring costs greater than those which it would incur if it did not make such purchases."

This contract provision is taken almost verbatim from Commission Rule 25-17.086 that states "[w]here purchases from a qualifying facility will impair the utility's ability to give adequate service to the rest of its customers or, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, or otherwise place an undue burden on the utility, the utility shall be relieved of its obligation under Rule 25-17.082, F.A.C., to purchase electricity from a qualifying facility." This striking similarity can also be seen on page 11 of Mr. Dalton's Deposition Transcript (See KMD-1).

Furthermore in Order No. 12634 (page 23) in Docket No. 820406-EU (See KMD-2) the Commission provided some clarification to Rule 25-17.086 "to make clear that a utility is not required to purchase from QF when to do so would result in costs greater than those which the utility would incur if it did not make such purchases." Wheelabrator ignores the fact that the Commission included this provision to protect customers by ensuring that customers do not pay more when the

utility purchases from a Qualifying Facility ("QF") than if the utility did not make the purchase. Wheelabrator states that FPL's Standard Offer Contract provision 8.4.6 is "problematic" when it appears that Wheelabrator's criticism is really of the Rule and Florida Statutes that govern FPL's and other utilities' Standard Offer Contract provisions. This can also be seen from Mr. Dalton's deposition on pages 12 through 13 of the transcript (See KMD-1).

Provision 8.4.8

Under section 8.4.8 of the Standard Offer Contract FPL has the right for a renewable facility that is less than 75 MW to require the renewable facility to reduce output to a level below the Committed Capacity. Wheelabrator fails to recognize that FPL's Standard Offer Contract provision 8.4.8 complies with Commission Order No. 13247 (Page 13) in Docket No. 830377-EU (See KMD-3), where the Commission found that the "QF must agree to reduce generation or take other appropriate action as requested by the purchasing utility for safety reasons or to preserve system integrity." Again, Wheelabrator states that FPL's Standard Offer Contract provision 8.4.8 is "problematic" when it appears that Wheelabrator's criticism, as with provision 8.4.6, is really with the Commission Rule and Florida Statutes that are the basis for FPL's Standard Offer Contract provisions. This can also be seen from Mr. Dalton's deposition on page 13 and 14 of the transcript (See KMD-1).

Q. Please comment on Wheelabrator's second recommendation on page 38, lines 14 through 16 of Mr. Dalton's testimony that states "[t]he Committed Capacity Test in section 3 should be revised to better consider intermittent operating profiles of REFs. I recommend a four-hour test for period biomass facilities." (Note – I believe Wheelabrator meant section 6.)

A. Under section 6.2 of the Standard Offer Contract FPL requires the REF to base the committed Capacity Test on a test period of 24 hours. This provision is consistent with the committed Capacity Testing requirements that are characteristic of FPL's next Planned Generating Unit, which is a modern combined cycle base load unit capable of operating reliably 24 hours per day, 7 days per week. The amount of money paid to a facility owner under a Standard Offer Contract is designed to purchase capacity and energy delivered on a reliability basis comparable to such a unit, consistent with the Commission's basic approach for Standard Offer Contracts.

In contrast, Mr. Dalton's suggestion would have FPL and the Commission abandon this touchstone of reliability in favor of a considerably lesser standard of reliability which is not consistent with that provided by the next planned generating unit. In short customers get less and should pay less, all other things being equal, from a facility that is not as reliable as the Next Planned Generating Unit.

It is important to note that the Standard Offer Contract has to be open to all potential counterparties and generation types, and contract provisions like this Capacity Test provision are needed to help ensure reliable service to FPL's customers. The specific recommendation that Wheelabrator makes is more suited to a negotiated contract, not the Standard Offer Contract.

This is supported by the Commission statement in Order No. 12634 (page 7) in Docket No. 820406-EU (See KMD-2) that states "[a]t the outset, we wish to state that it is our preference that QFs and utilities negotiate individually tailored contracts. The rules we have adopted are intended to both encourage negotiated contracts and provide a fall back remedy in the event a contract cannot be negotiated."

Consistent with the Commission's ruling, FPL views its Standard Offer Contract as providing a reasonable base from which project owners and developers may, if they choose, seek to negotiate with FPL agreements more closely tailored to the needs of facilities with different fuel types, sizes and operating characteristics, among other unique features, something FPL is always willing to do. Specifically, if a facility cannot satisfy the reliability requirements and characteristics of the Next Planned Generating Unit, this is something to handle in a negotiation context – the solution is not to incorrectly reduce the reliability characteristics of the Next Planned Generating Unit

provided for in the Standard Offer Contract.

Q. Is the possibility of such negotiations merely theoretical?

A. Not at all. Consistent with the Commission's policy direction, FPL has negotiated contracts and continues to negotiate purchased power contracts. Notably, FPL has for more than twenty years purchased hundreds of millions of dollars of firm capacity and energy from Wheelabrator's existing facilities. Those contracts were initially signed as Standard Offer Contracts with amendments that were successfully negotiated. Indeed, Wheelabrator and FPL are currently engaged in contract negotiations to replace the 1987 Broward South (50.6 MW of firm capacity and energy) and 1987 Broward North (45 MW of firm capacity and energy) contracts that are scheduled to terminate on August 1, 2009 and December 31, 2010, respectively. FPL initiated contract discussions with Wheelabrator per a letter dated April 14, 2008. Since that time, FPL has held a conference call with Wheelabrator on June 26, 2008 and an in-person meeting on October 29, 2008. Currently, FPL is in the process of responding to a proposed term sheet from Wheelabrator.

Q. Is it appropriate for specific items that Wheelabrator may wish to negotiate individually with FPL to be included in changes to the Standard Offer Contract?

A. FPL is happy to discuss any specific terms in the context of individual negotiations that take into account the specific operating characteristics and economics of Wheelabrator's Florida renewable

energy facilities. However, it is not appropriate and is in fact contrary to the Standard Offer Contract approach adopted in Florida to include such generator-specific revisions in a utility's Standard Offer Contract. Again, that is because the Standard Offer Contracts starts from the perspective of describing the economics and operating characteristics of the Next Planned Generating Unit in order to ensure that customers pay no more than avoided costs for service comparable to that of the Next Planned Generating Unit. Any deviations that Wheelabrator or any renewable energy provider wishes to have from the Standard Offer Contract can and should be discussed on an individual negotiated contract basis, where all the pluses and minuses of a prospective supplier's facility can be considered in relation to the characteristics of FPL's next planned generating unit.

Q. Please comment on Wheelabrator's third recommendation on page 38, lines 17 through 21 of Mr. Dalton's testimony that states "[t]he basis for REFs receiving capacity payments should be revised to better recognize value that they offer. I propose that the capacity factor or Annual Capacity Billing Factor required to achieve full capacity payments be set at 89% and that the minimum capacity factor to receive any capacity payment be set at 69%."

A. This is again an effort to change the basis of FPL's Standard Offer Contract from the operating characteristics of the "G" type combined

cycle unit which comprises FPL's Next Planned Generating Unit. Mr. Dalton's suggestion is not founded at all in any reference to the characteristics of the Next Planned Generating Unit.

Under Appendix B of the Standard Offer Contract FPL requires that the REF meet an Annual Capacity Billing Factor ("ACBF") equal to or greater than 97% to receive 100% of the capacity payment and a minimum of 80% to receive any type of payment. In Order No. 12634 (pages 15 and 16) in Docket No. 820406-EU (See KMD-2) the Commission stated that "risk associated with the purchase of QF capacity should be explicitly recognized in the rate of payment so as to reduce the risk to the ratepayers." FPL's 2014 Combined Cycle ("CC") avoided unit has a projected annual Equivalent Availability of 97 % as shown on page 93 Schedule 9 of FPL's 2008 Ten Year site Plan. In other words if necessary the generating capacity of FPL's CC avoided unit is available to contribute to FPL's system reliability 97 % of the hours in a year. By FPL setting its minimum performance requirement to a 97% Equivalent Availability factor ("EAF") in order for the QF to receive full capacity payments, FPL is ensuring that its customers receive the same level of reliability that they would otherwise receive from the CC avoided unit.

The Commission specifically evaluated and approved FPL's pay-for-performance sliding scale methodology in calculating capacity

payments as a contract provision that is beneficial to customers in Order No. 24989 (page 17) in Docket No. 910004-EU (See KMD-4). In that Order, the Commission found that this methodology broadens the range of performance in which the QF can be paid for performance while also encouraging the QF to provide capacity during FPL's peak periods. The Commission, in its findings encourages the QF to provide capacity during peak periods and to provide the customers with the same level of reliability that they would receive from the avoided unit.

Q. Mr. Dalton states that "FPL seeks to hold other facilities to standards its own fleet does not meet." Is this true?

A. No. In support of this statement, Mr. Dalton incorrectly compares the Standard Offer Contract EAF to those contained in FPL's Generating Performance Incentive Factor ("GPIF") filing which requires three years worth of operating history for GPIF generating units, not the expected EAF of the Next Planned Generating Unit. Therefore, the EAF comparisons that Mr. Dalton makes are not appropriate. It is also important to note, Wheelabrator's protesting petition challenges FPL's maintenance and trip test procedures. These procedures are consistent with manufacturers' recommendations and FPL's operating and maintenance practices.

Q. Please explain how FPL calculates the EAF in the Standard Offer Contract.

A. The EAF of 97% calculated in the Standard Offer Contract is

modeled after the Next Planned Generating Unit performance used in the recently approved Petition to determine need for West County Energy Center Unit 3. The unit is a 3-on-1 combined cycle unit which utilizes Mitsubishi Power Systems "G" technology advanced combustion turbines. The EAF of 96.8% is a project average value which consists of an average planned outage factor ("POF") of 2.1% and an average forced outage factor ("FOF") of 1.1%. The EAF does not include allowance for maintenance outages ("MOF") since maintenance outages are outages that would only be performed as system conditions permit.

Q. Has FPL's own fleet of existing combined cycle units similar to the Next Planned Generating Unit performed at these levels?

A. Yes, contrary to Mr. Dalton's assertions, FPL's most recent Greenfield units at Turkey Point Unit 5, Martin Unit 8 and Manatee Unit 3 have an average to date EAF, without MOF, of 98.6%, 91.3% and 97.6% respectively. The lower Martin Unit 8 EAF is due to a fuel gas heater outage which occurred shortly after placing the unit into commercial operation. Overall, taking into account the entire fleet of "F" technology combined cycle plants, which includes repowered facilities, the average EAF exceeds 94%. This supports the reasonableness of FPL's 96.8% value for the "G" technology Next Planned Generating Unit.

Q. What is the basis for Mr. Dalton suggesting that FPL's Annual Capacity Billing Factor required to achieve full capacity

payments be set at 89% and that the minimum capacity factor to receive any capacity payment be set at 69%?

A. Mr. Dalton's point again seems to reflect a misunderstanding of the fundamental basis of FPL's Standard Offer Contract. FPL is required to base its Standard Offer Contract provisions on its own projections of the operating characteristics of its own Next Planned Generating Unit. There is no provision in Florida law, regulations or Commission decisions supporting use of the characteristics of another utility's Next Planned Generating Unit, or of a "state-wide" Next Planned Generating Unit. Mr. Dalton's suggestion seems to have arbitrarily taken his proposed Annual Capacity Billing Factors from Progress Energy's Standard Offer Contract. In doing this he has erred even further, because if one reviews Progress Energy's Tariff Sheet 9.442, Appendix A, one will see that Progress Energy requires an Annual Capacity Billing Factor of 91% to receive 100% of the payments, not the 89% as Wheelabrator's testimony claims. While Mr. Dalton has incorrectly characterized Progress Energy's Annual Capacity Billing Factor, even if he had stated this figure correctly his proposal is still in violation of the requirement that FPL's Standard Offer Contract be based on its own Next Planned Generating Unit, not that of another utility.

Q. Please comment on Wheelabrator's fourth recommendation on page 39, lines 1 through 3 of Mr. Dalton's testimony that states "[t]he provisions in the SOC (e.g., right of first refusal) for

Tradable Renewable Energy Certificates (TRECs) should be eliminated to avoid any adverse impact on their market and comport with the Commission rule."

A. While Mr. Dalton proposes to eliminate the TREC right of first refusal, this is a valuable right protecting FPL's customers that has been expressly considered and approved by the Commission. Under section 17.6.2 of the Standard Offer Contract FPL has a right of first refusal with respect to any and all bona fide offers to purchase any RECs received by the REF and FPL agrees to exercise that option within 30 days of receiving notification by the REF of a bona fide offer. In Order No. PSC-07-0492-TRF-EQ (page 5) in Docket No. 070234-EQ (See KMD-5), the Commission notes that a right of first refusal "will insure that Florida's ratepayers enjoy all of the attributes associated with renewable generation without imposing a financial penalty to the owner of the renewable generation facility." FPL's 30 day provision for the right of first refusal permits FPL a reasonable period of time to conduct due diligence and assess the value of bona fide offers for TRECs, and respond to the seller. This period and time provision permits FPL to ensure that it protects its customers interests by only exercising the right of first refusal if it is in the best interests of FPL customers, based upon assessment of then-existing TREC market conditions. Finally, if this provision does not meet the requirements of an individual seller of capacity and energy, it is like other provisions subject to potential negotiation within the context of

an individual contract.

Q. Please comment on Wheelabrator's fifth recommendation on page 39, lines 4 through 7 of Mr. Dalton's testimony that states "[f]inally, I recommend that the Commission consider changes to the methodology it employs to establish avoided cost for renewable energy facilities to recognize that the appropriate avoided generation resource for these projects is another renewable energy resource, not a fossil fuel-fired generating resource."

A. Throughout Mr. Dalton's testimony, Wheelabrator continues to insist that the Standard Offer Contract characteristics (pricing, capacity tests, EAF etc.) should be based on the characteristics of the renewable generator. This, however, is totally inconsistent with Commission Rules, Florida Statutes, and Federal laws which *require* FPL and other utilities to base Standard Offer Contracts on avoided cost based on the Next Planned Generating Unit. Avoided cost is the value of the energy and capacity based upon the unit avoided by the utility. In other words, avoided cost is independent of the type or characteristics of the QF, depending only upon the unit avoided by the utility. The Federal Energy Regulatory Commission ("FERC") has specifically expressed this in its Order Granting Petition for Declaratory Order in Docket No. EL03-133-000 that was actually requested by Wheelabrator.

On June 13, 2003, American REF-Fuel Company, Covanta Energy Group, Montenay Power Corporation, and Wheelabrator filed a petition for a declaratory order in which they were seeking the FERC's interpretation of implementing the Public Utility Regulatory Act ("PURPA") of 1978. Specifically, they were seeking an order declaring that avoided cost contracts entered into pursuant to PURPA do not inherently convey to the purchasing utility any renewable energy credits or RECs, contending that the power purchase price that the utility pays under such a contract compensates a QF only for the energy and capacity produced by that facility. In the FERC Order issued October 1, 2003 (See KMD-6), FERC clarified what is and is not included in avoided cost. In Paragraph 22, FERC states that "avoided costs were intended to put the utility into the same position when purchasing QF capacity and energy as if the utility generated the energy itself or purchased energy from another source. In this regard, the avoided cost that a utility pays a QF does not depend on the type of QF, i.e., whether it is a fossil-fuel-cogeneration facility or a renewable-energy small power production facility. The avoided cost rates, in short, are not intended to compensate the QF for more than capacity and energy." (Emphasis added.)

Q. Mr. Dalton's testimony on page 35, lines 4 through 5, states that "[m]y point is that FPL's SOC requires REF owners to bear too much risk given the rates and terms offered." Please comment on this statement.

A. Wheelabrator fails to recognize that the Standard Offer Contract is premised on the characteristics of FPL's Next Planned Generating Unit, as is required by law. The Standard Offer Contract is not the result of the give and take of commercial negotiations between an unrestricted buyer and seller, but is in actuality a unilateral "put" right of a renewable generator. This means that if the renewable generator signs the contract, the utility is obligated to purchase on behalf of its customers capacity and energy precisely as prescribed in the contract. As such, it is necessary that the contract as a whole and in specific contract provisions be constituted in such a way as to protect and limit the risk for the *customers* of the utility in a contract that may be entered into by project developers and owners that have facilities with a broad range of sizes, fuel types, types of generation, geographical location, and performance characteristics. Furthermore, Wheelabrator fails to acknowledge that the Standard Offer Contract also provides contract provisions that benefit the REF such as being able to tailor their capacity payment stream, i.e., Early Capacity Payments, Levelized Capacity Payments, Early Levelized Capacity, or the Flexible Payment Option to meet its specific needs.

Q. Mr. Dalton's testimony on page 15, lines 1 through 7, states that "REFs such as Wheelabrator, which has proven its ability to provide reliable cost-effective renewable power and has facilities in the ground in Florida, are unlikely to sign FPL's SOC. There are a number of other utilities in Florida with whom

Wheelabrator could contract for the sale of the output of its existing projects and where Wheelabrator might be more likely to develop new projects. As such, the terms and conditions in FPL's SOC could prevent FPL customers from realizing the benefits of existing and new projects." Please comment on these statements.

A. Mr. Dalton appears to be unfamiliar with the fact that FPL has successfully contracted for and purchased for years about 300 MW of renewable energy some of which is pursuant to negotiated contracts, as is consistent with the Commission's policy direction favoring negotiated contracts described earlier in my rebuttal testimony. Given the availability and encouragement of negotiated contracts to best fit the needs of individual sellers of renewable energy, it would be surprising if the business and regulatory flexibility of negotiated contracts was not preferred to simply signing the Standard Offer Contract. Moreover, Mr. Dalton's comment suggests that he has not read the other Florida Investor Owned Utilities' ("IOUs") Standard Offer Contracts. If he had, he would see that the other IOUs, who because they are subject to the same Commission Rules and Florida Statutes as FPL, have many of the same terms and conditions as FPL. Moreover, these are the same terms and conditions that Wheelabrator is protesting. For example all the IOUs' Standard Offer Contracts have contract provisions that allow the utilities to not accept or reduce the generation from a REF. All of the IOUs have a

provision for the Right of First Refusal for RECs. And Progress Energy's provision for a Committed Capacity Test is based on a test period of twenty-four (24) hours, exactly like FPL's. So Mr. Dalton's statements appear to be unfounded and again seem to point to the fact that Wheelabrator's opposition to FPL's Standard Offer Contract is really opposition to the Commission Rules and Florida Statutes that are the basis for all Florida IOUs' Standard Offer Contracts.

Q. Is Mr. Dalton's testimony inconsistent with Wheelabrator's responses to FPL's First Set of Interrogatories?

A. Yes, it is. In response to Interrogatory No 3, Wheelabrator states: "Further, information regarding proceedings outside the state of Florida is not relevant to the subject matter of this docket, is not reasonably calculated to lead to the discovery of admissible evidence, and is overbroad." In response to Interrogatory No 6, Wheelabrator states: "Further, information regarding negotiations outside the state of Florida is not relevant to the subject matter of this docket, is not reasonably calculated to lead to the discovery of admissible evidence, and is overbroad." In response to Interrogatory No 7, Wheelabrator states: "Further, information regarding contracts outside the state of Florida is not relevant to the subject matter of this docket, is not reasonably calculated to lead to the discovery of admissible evidence, and is overbroad." And, in response to Interrogatories Nos. 8 and 9, Wheelabrator states: "Further, information regarding facilities outside the state of Florida is not

relevant to the subject matter of this docket, is not reasonably calculated to lead to the discovery of admissible evidence, and is overbroad." It is clear from Wheelabrator's interrogatory responses that they assert that proceedings, negotiations, contracts and facilities outside the state of Florida are irrelevant, yet the underlying support for Wheelabrator's testimony is a Standard Offer Contract program in Ontario and a capacity value calculation from New York. Information outside the State of Florida is either irrelevant or not. It cannot be both ways.

Q. In Mr. Dalton's testimony, when referring to his "extensive experience in the design and evaluation of SOCs" he only references the Ontario Power Authority ("OPA") Standard Offer Program. Is the OPA Standard Offer Program comparable to Standard Offer Contracts in Florida?

A. No. The OPA program that Mr. Dalton' says he is experienced with is not subject to U.S. jurisdiction, or Florida jurisdiction concerning Standard Offer Contracts. As such, it does not have the basic characteristics of FPL's Standard Offer Contracts that I have described in my testimony. The OPA program in my view is more of an example of a feed-in tariff which is not analogous to the Standard Offer Contract that FPL is mandated to continuously offer in Florida. For example, one fundamental difference is that the OPA program provides a very large premium for certain renewables while the Standard Offer Contract under Florida law and regulation is required

to be priced at avoided cost, without any premium for any particular technology. I will distinguish between the purpose of (i) a Standard Offer Contract and (ii) a feed-in tariff.

Standard Offer Contracts

According to Rule 25-17.200, F.A.C., the "purpose of [the Standard Offer Contract] rules 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." Furthermore, as stated in my direct testimony, FPL's focus in preparing, submitting and administering its Standard Offer Contract is to make available a fair and reasonable agreement providing an avenue for FPL to make purchases from such facilities, for the benefit and in a manner protective of FPL's customers. FPL also views its Standard Offer Contract as providing a reasonable base from which project owners and developers may, if they choose, seek to negotiate with FPL agreements more closely tailored to the needs of facilities with different fuel types, sizes and operating characteristics, among other unique features.

Feed-in Tariffs

"Feed-in tariffs have become a term of art to refer to the style of incentives adopted (most notably) by Germany to increase the adoption of renewable energy resources. Under the German feed-in tariff legislation, renewable energy technologies are guaranteed interconnection with the electricity grid, and are paid a premium rate that is designed to generate a reasonable profit for investors over a 20-year term. The rates are differentiated by technology such that each renewable resource type (e.g. solar, wind, biomass, etc.) can profitably be developed. This approach stands in contrast to the Public Utilities Regulatory Act (PURPA) in the US, under which long-term contracts are based on the avoided cost of conventional fuels." Feed-in Tariffs and Renewable Energy in the USA – a Policy Update, Wilson Rickerson, Florian Bennhold, and James Bradbury (May 2008), at page 2. Following this logic, a feed-in tariff represents a *mandatory premium rate* purchase requirement of certain renewables through fixed-rate long-term contracts to electric utilities. The OPA Standard Offer Program is representative of such a feed-in tariff as (i) certain eligible facilities are guaranteed interconnection with the electricity grid, (ii) certain eligible facilities are paid a premium rate (i.e., 42.0 cents per kWh for photo-voltaic energy) over a 20-year contract term, and (iii) the rates are differentiated by technology type.

Aside from the fact that the OPA Standard Offer Program concerns a feed-in tariff rather than a Standard Offer Contract, the OPA Standard Offer Program is not within the jurisdiction of the United States, much less Florida.

Q. Would facilities like Wheelabrator's in Broward County be eligible for the OPA Standard Offer Program?

A. No. As shown on page 30 of OPA's Standard Offer Program Rules (See KMD-7), Municipal Solid Waste facilities are specifically excluded from the definition of "Renewable Biomass." The same OPA program that Mr. Dalton's touts as an example of a program that encourages broad participation would exclude his own client.

Q. On page 13 lines 15 through 18 of Mr. Dalton's direct testimony he states "[f]urthermore by basing the SOC energy payment options on the costs of the avoided fossil-fueled generating unit, FPL prevents its customers from realizing the volatility of fuel cost, which is one of the renewable energy benefits the Florida Legislature cites." Do you agree?

A. No. In fact, Mr. Dalton acknowledges in his direct testimony on page 13 lines 5 through 7 that FPL pursuant to Commission Rule 25-17.250 identifies its next avoidable fossil fueled generating unit as the avoided cost benchmark for purposes of its Standard Offer Contract.

Q. On page 14 lines 11 through 14 of Mr. Dalton's direct testimony he states that "FPL's SOC does not encourage the development

of renewable energy resources in the State. The best indication of this is the fact that not a single renewable energy resource developer has executed FPL's SOC since January 2006 when it was first put in place. Do you agree?

A. No, what Mr. Dalton fails to recognize in his testimony is that FPL's petitions to the FPSC for approval of its Standard Offer Contracts and Tariff schedules have been protested by interveners since 2006 making it difficult for any potential renewable generator to avail themselves of FPL's Standard Offer Contract. As a case in point, subsequent to FPL's filing of its Standard Offer Contract on April 3, 2006 the Florida Industrial Cogeneration Association ("FICA") petitioned the FPSC on June 26, 2006 for a formal hearing and for leave to intervene in the IOUs' Standard Offer Contract Dockets protesting Commission Order No. 06-0486-TRF-EQ. This Order had approved the IOUs' Standard Offer Contracts. On September 21, 2006 the Commission recommended that due to FICA's protest of Order No. 06-0486-TRF-EQ the Standard Offer Contracts were not in effect. Mr. Dalton was unaware of this protest as can be seen from Mr. Dalton's deposition transcript page 26 (See KMD-7). In the following year, on April 2, 2007, FPL petitioned the Commission for approval of its new Standard Offer Contract and Tariff schedules. On July 2, 2007 FICA filed an amended petition and for leave to intervene in their protest of Order No. 07-0492-TRF-EQ which had preliminarily approved FPL's Standard Offer Contract. And then this

year, on April 1, 2008 FPL petitioned the FPSC for approval of its newest Standard Offer Contract and Tariff Schedules. On August 19, 2008 the Commission issued Order No. 08-0544-TRF-EQ approving FPL's Standard Offer Contract and twenty-one days later, on September 9, 2008, Wheelabrator petitioned the Commission for a formal hearing and protested the approval, providing little time for a renewable generator to avail themselves of the Standard Offer Contract.

In addition, Mr. Dalton's testimony fails to mention that for 2008, through November, FPL has purchased 1,145,999 MWH of renewable energy under firm capacity contracts, with firm generating capacity of 157.6 MW. Additionally through November 2008, FPL purchased approximately 341,039 MWH of renewable energy from As-Available producers, with generating capacity of 126.05 MW. FPL is always interested in adding to these purchases of renewable energy upon terms and conditions beneficial to its customers and in compliance with applicable laws and regulations.

Q. Does this conclude your testimony?

A. Yes, it does.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Docket No: 080193-EQ

Served December 10, 2008

IN RE: Florida Power & Light Company's
Petition for Approval of Renewable
Energy Tariff and Standard Offer Contract
_____/

DEPOSITION OF JOHN C. DALTON
(via telephone)

WEDNESDAY, DECEMBER 17, 2008
2:11 p.m. - 3:23 p.m.

700 UNIVERSE BOULEVARD
JUNO BEACH, FLORIDA
- - -

Reported By:
Eleanor M. Evensen, RPR
Notary Public, State of Florida
West Palm Beach Office #61866

APPEARANCES:

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ALSO PRESENT:

Kory Dubin, FPL Senior Manager Purchase Power (via telephone)
Sabrina Spradley, FPL

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I N D E X

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E X H I B I T S

P R O C E E D I N G S

- - -

Deposition taken before ELEANOR M. EVENSEN, Registered Professional Reporter, in the above cause.

- - -

Thereupon,

JOHN C. DALTON

having been first duly sworn or affirmed by Notary Public Janelle L. Korba, was examined and testified as follows:

THE WITNESS: I do.

(Dalton Group Composite Exhibit No. 1 was marked for identification)

DIRECT EXAMINATION

BY MR. ANDERSON:

Q. Good afternoon, Mr. Dalton, how are you?

A. Thank you, I'm doing well.

Q. My name is Bryan Anderson. I'm an attorney for Florida Power and Light Company, and I'll be asking you some questions this afternoon with respect to the testimony you filed in the Standard Offer Contract Case in docket 0801913-EQ down in Florida.

You're familiar with your testimony, of course, right?

A. Yes, I am.

Q. Okay. This afternoon I'll ask you to answer the questions out loud with words. As you know this is a telephonic deposition and we need to all take special pains to speak clearly.

Does that make sense to you?

A. It does.

Q. If my questions are unclear or you wish them restated, please let me know. Otherwise I'll assume you understood my question. Okay?

A. Understood.

Q. All right. Let me ask at the outset, Mr. Dalton, are you familiar with the Florida Public Service Commission's rules applicable to qualified facilities?

A. Generally. I've focused more in terms of the rules that apply to Standard Offer Contract.

Q. And that's my next question, are you also familiar with the rules that are applicable to the Standard Offer Contract with renewables and things, right?

A. Yes, I am.

Q. Have you reviewed prior commission orders which were involved in the development of the Standard Offer Contracts and things over there?

MS. KAUFMAN: Do you have something specific, Bryan you are referring to?

BY MR. ANDERSON:

Q. Did you understand my question, Mr. Dalton?

A. Yes. I'm trying to think in terms of what specifically I have reviewed. I mean I've seen the rules. I might have, at some point, reviewed any decision that was issued with the rules. But, I'm not clear in terms of, you know, all the decisions I might have seen.

Q. Other than this Standard Offer Contract proceeding have you participated in any other Florida Public Service Commission proceeding?

A. No, I have not.

Q. Have you participated, for example, in the pending Renewable Portfolio Standard Rule-Making workshops or proceedings?

A. I have not participated in that proceeding.

Q. Do you consider yourself an expert in Florida Renewable Energy Policy?

A. I would say I reviewed what I thought was the relevant Florida Statute and reviewed various executive orders issued by the Governor.

Q. Are you an expert in the technological capability of various forms of renewable energy in

Florida?

A. I am an expert in terms of the general capabilities of renewable energy. I realize that in Florida there are some, you know, specific circumstances based on kind of resource availability which I don't have, I wouldn't necessarily consider myself an expert on.

I think in probably the area where it's going to have the most significant impact would be with respect to intermittent resources such as wind and solar.

Q. Do you consider yourself competent here today to testify from the perspective of wind or solar energy developers in your criticisms of the Standard Offer Contract?

A. Yes, I do.

Q. And what were you retained to do in this particular case?

A. I was retained by Wheelabrator to comment on the Standard Offer of Contract, which was filed by Florida Power and Light.

Q. I'd like to walk you through a number of the points that you have raised in your prefiled direct testimony and ask you some questions about them, okay?

A. Certainly.

Q. Is it fair to say that one of the things that, concerns you have raised is the idea that FPL is entitled to not make purchases under the Standard Offer Contract when doing so would cause FPL to incur costs greater than it would otherwise incur?

MS. KAUFMAN: Can you refer him to a specific page, Bryan, when you're talking about his testimony?

MR. ANDERSON: I just asked the question and I was going to see if he could answer the question.

THE WITNESS: Could you repeat it please?

BY MR. ANDERSON:

Q. Do you have any quarrel with FPL's contract provisions stating that the company need not make purchases when doing so would cause FPL to incur costs greater than it would incur otherwise?

MS. KAUFMAN: I'm going to object. If you want to refer him to a specific contract that he can take a look at and answer more specifically.

MR. ANDERSON: Vicki, we just don't need to do this. There is no requirement that I point him to any document. He either understands the question or not.

If he does not quarrel with those provisions

he can say so and we can move on.

THE WITNESS: I guess there are two provisions identified --

MS. KAUFMAN: My only point, Bryan, is if you are talking about specific provisions in the contract, I just want to be sure that the record is clear, when you say "those provisions" I think it's vague.

BY MR. ANDERSON:

Q. Mr. Dalton, can you answer the question?

A. Yes. There were two provisions identified in my testimony which I was concerned with, which I believe you might be referring to, and these would be sections 8.4.6 and 8.4.8.

Q. Specifically looking at -- do you have our tariff sheet in front of you, original sheet number 9.036 which contains 8.4.6 and 8.4.8? It's labeled: Exhibit A1, the first page of the Dalton Group Exhibit 1 that I provided you; do you have that?

A. That's sheet number 9.0.36?

Q. Yes, sir, that's right. And just to be clear, we are talking about the first sentence of 8.4.6; is that right?

A. I see that.

Q. And the second point you raised is the first

sentence of 8.4.8; is that right?

A. That's correct.

Q. Okay. I'm going to read to you that first sentence 8.4.6. It states: "After providing notice to the QS, FPL shall not be required to accept or purchase energy from the QS during any period in which, due to operational circumstances, acceptance of purchase of such energy would result in FPL's incurring costs greater than those which it would incur if did not make such purchases."

Did I read that accurately?

A. It appears you did.

Q. I'd like you to look at page A2 of Dalton Group Exhibit 1; do you have that?

A. I'm not sure in terms of the reference you're making.

Q. I sent you a packet of documents.

A. Okay.

Q. You have that in front of you?

A. Yes, I do.

Q. And the first page is Exhibit A1; is that right? We just looked at that together.

A. Yes.

Q. Now turn the page. You see where it says Exhibit A2?

A. Yes.

Q. Okay. And you see behind that sheet labeled A2: Commission Rule 25-17.086, Periods during which purchase are not required. Do you have that?

A. I see it.

Q. Okay. Now, I would like you to read the first sentence of that rule to yourself. Just let me know when you are done.

A. Okay, read it.

Q. Do you agree that language you just read in Commission Rule 25-17.086 is almost identical to the language in FPL's tariff, which was paragraph 8.4.6, that first sentence I read to you?

A. I would say that it's similar.

Q. Could you explain any differences?

A. It appears that the Rule 25-17.086 reference is given to impairing the ability, the utility's ability to give adequate service to the rest of the customers. And that reference isn't made in section 8.4.6.

Q. So that's additional language which probably could be included in the agreement, but is not, right?

A. That is additional language.

Q. Okay. Let's please look back at the tariff sheet we looked at before, which was Exhibit A1,

original sheet number 9.036; do you have that?

A. Yes, I do.

Q. Now we'll look at section 8.4.8 again, and make sure you have that in front of you?

A. I have it in front of me.

Q. Good, thanks.

I'm sorry, I misreferenced you. I still want you to look at 8.4.6 higher on the page; do you see that?

Just higher on the same page 8.4.6 is what I'm directing you to again; you see that?

A. I see that.

Q. Okay. I'd like you now to please look at Exhibit A3 in the package of materials I sent to you, and flip to the second page in Exhibit A3, which in the top right corner says: Order number 12634, and docket number 820406-EU, page 23; do you have that?

A. Yes, I do.

Q. And I'm just going to read to you the paragraph there, first full paragraph. Is it correct that the commission in this order at page 23 stated: "We have retained the provisions of the original rule excusing a utility from its obligation to purchase under certain circumstances, and have added to it to make clear the utility is not required to purchase

from a QF when to do so would result in costs greater than those which the utility would incur if it did not make such purchases." Is that right?

A. When you say: "Is that right?"

Q. Have I correctly read that portion of the Commission's order?

A. That's correct.

Q. Okay. Now we're ready to look back on the tariff sheet number 9.036, section 8.4.8. It states: If the facility has a committed capacity of less than 75 megawatts, FPL may require during certain periods by oral, written, or electronic notification that the QS cause the facility to reduce output to a level below the committed capacity, but not lower than the facility's minimum load;" is that right?

A. That's correct.

Q. Please look now at Exhibit A4 in the Dalton Group Exhibit.

Do you have that? I'd like you to look at the second page behind the label A4 where it says order number 12347, docket number 830377-EU, page 13; do you see that?

A. You want me to go to the second page?

Q. Yes, sir, where it says page 13 in the upper right-hand corner?

A. Yes, I have that in front of me.

Q. I'm going to draw your attention to the second full paragraph. Just check and make sure I'm reading this correctly: "We do find, however, that the following additional performance criteria are reasonable and should be adopted, colon" -- and skip down to number 3 there -- "the QF must agree to reduce generation or take other appropriate action as requested by the purchasing utility for safety reasons or to preserve system integrity." Have I read that correctly?

A. That's correct.

Q. Please turn to Exhibit B1 in the Dalton Group Exhibit 1. It's one page, labeled Original Sheet number 9.032 from the Standard Offer Contracts; do you have that?

A. That was Exhibit B1?

Q. Yes, sir, that's right. It's labeled up in the right-hand corner: Original Sheet Number 9.032. Do you have that?

A. I have that.

Q. And this is from the Standard Offer Contract also that you reviewed, right?

A. Just confirming that.

Q. Thanks.

A. Yes, that appears to be from the Standard Offer Contract.

Q. Thanks. Please look down under number 3, Minimum Specifications. And then we see several subparagraphs 1 through 5 on this particular page. Do you see those paragraphs?

A. This is under Minimum Specifications?

Q. Yes, sir.

A. Yes, I see those.

Q. Drawing your attention to paragraph 5 it states: "The following are the minimum performance standards for the delivery of firm capacity and energy by the QS to qualify for full capacity payments under this contract. Says availability on peak 97 percent, all hours 97 percent." Is that right?

A. That's right.

Q. This is one of the provisions that you comment on in your testimony; is that right?

A. That's correct.

Q. Please look at Exhibit B2 in Dalton Group Exhibit 1. And turn to the second page. Please let me know when you are there.

A. I'm on the second page.

Q. Thank you. This Exhibit B2, you will agree, is the Commission Rule 25-17.0832, Firm Capacity

Energy Contracts; I presume this is something you reviewed; is that right?

A. Yes, I did.

Q. Looking at that second page, middle of the page, there is a subparagraph E; are you there?

A. E, Minimum Specifications?

Q. Yes, sir. It goes on to state, and I quote, "Each Standard Offer Contract shall, at minimum, specify," and there is a colon, right?

A. That's correct.

Q. And I'd like to draw your attention down to the eighth thing to be provided, which states: (8) The minimum performance standards for the delivery of the firm capacity and energy by the qualifying facility during the utility's daily seasonal peak and off-peak periods. These performance standards shall approximate the anticipated peak and off-peak availability and capacity factor of the utility's avoided unit over the terms of contract." Right?

A. That's correct.

Q. So that's the standard to be applied in stating what the minimum performance standard is, right?

A. That's right.

Q. In your work on this case, you have learned,

I'm sure, that the standard offer contract is based on FPL's next plan generating units; is that right?

A. That's correct.

Q. And the type of unit which is used for the purposes of this contract, do you agree, is a three-on-one combined cycle unit?

A. That's my understanding.

Q. Utilizing Mitsubishi Power Systems G-Technology Advanced combustion turbines?

A. I knew it's a G class unit, I didn't know it's a Mitsubishi.

Q. Are you familiar with the term "equivalent availability factor"?

A. Yes, I am.

Q. Are you aware those are F-Technology units -- I'm sorry, I skipped over a point.

Are you familiar with FPL's operations of its most recent greenfield units at Turkey Point unit five, Martin unit eight, and Manatee unit three?

A. I'm generally familiar.

Q. Those are F-series units; are you aware of that?

A. I wasn't aware in terms of whether they were G-class or an F-class.

Q. Are you aware that each of the three-units I

mentioned, Turkey Point unit five, Martin unit eight, Manatee unit three, have an average to date equivalent availability factor of 98.6 percent, 91.3 percent, and 97.6 percent respectively?

A. I wasn't aware of that.

Q. You were not aware of that; is that right?

A. I was not aware of that.

MR. ANDERSON: Off the record for a moment.

(Break in the proceedings)

MR. ANDERSON: Back on the record.

BY MR. ANDERSON:

Q. I believe it's your view, isn't it, that other utilities in Florida are available with whom Wheelabrator can contract for the sale of the output of its existing projects?

A. That's correct.

Q. Do you agree that the Standard Offer Contracts of all the other investor-owned utilities in Florida are subject to the same rules we have been talking about?

A. They are subject to the same rules, obviously it's up to the individual utility to draft the specific provisions within the contract.

Q. Have you prepared any detailed written analysis or comparison of the terms and conditions of

the various Florida utilities contracts?

A. Is your question have I compared an analysis comparing the terms offered by different utilities? Obviously I've focused on -- I have focused on FPL's Standard Offer Contract.

Q. What I asked is have you prepared a detailed written analysis of any differences between the various Florida utilities Standard Offer Contracts?

A. No, I have not.

Q. Is it your view that regulatory proceedings outside of the State of Florida are not relevant to the subject matter of this docket?

A. Yes, I would say that's a very broad question, and I would think that regulatory proceedings that have a direct bearing in terms of, you know, avoided costs, that would have a bearing on this docket.

Q. Did you help prepare or did you review Wheelabrator's responses to FPL's first set of interrogatories numbers 1 through 15 in this proceeding?

A. Yes, I helped prepare some of those responses.

Q. Are you aware that in its response Wheelabrator stated information regarding proceedings

outside the State of Florida is not relevant to the subject matter of this docket, is not reasonably calculated to lead to the discovery of admissible evidence, and is overbroad, and that was in response to FPL interrogatory number three?

Did you review or approve the language I just read?

A. I was not involved in terms of drafting that response.

Q. And you agree no witness, other than you, has submitted any testimony on behalf of Wheelabrator, right?

A. That's correct.

Q. Do you agree or contend that information regarding negotiations of Standard Offer Contracts outside the State of Florida is not relevant to the subject matter of this docket, is not reasonably calculated to lead to discovery of admissible evidence, and is overbroad?

MS. KAUFMAN: I'm going to object because you are asking for a legal opinion there, Mr. Anderson.

MR. ANDERSON: I'll ask another question.

BY MR. ANDERSON:

Q. Mr. Dalton, do you rely upon your knowledge

or background regarding negotiations in any state other than Florida in providing your testimony here today?

MS. KAUFMAN: I'll object, that's overbroad. In regard to what? Any of his testimony?

BY MR. ANDERSON:

Q. Please respond to the question.

A. Can you repeat the question?

Q. Let me try again.

Have you helped anybody ever with a contract negotiation for a Standard Offer Contract?

A. I have helped draft Standard Offer Contracts.

Q. How about have you helped the people negotiate renewable energy contracts?

A. Yes, I have.

Q. Do you rely on your background and experience negotiating those contracts in offering your opinions here today?

A. Yes, I do.

Q. That's what puzzles me, because the responses that you reviewed and approved say that negotiations outside the State of Florida are not relevant to the subject matter of this docket; do you agree with that?

MS. KAUFMAN: I'll object. That's not what Mr. Dalton testified.

MR. ANDERSON: He can answer the question.

MS. KAUFMAN: I just want you to appropriately characterize what he said, Bryan.

THE WITNESS: As I said earlier, I did not approve this response. I didn't draft the response.

BY MR. ANDERSON:

Q. Is your position that contracts outside the State of Florida are not relevant to the subject matter of this docket?

MS. KAUFMAN: Again, I object, you are asking for a legal conclusion.

MR. ANDERSON: I'll ask a different question.

BY MR. ANDERSON:

Q. Did you rely upon any information considering past experience with contracts outside the State of Florida in offering your testimony we are talking about today?

A. Yes, I did.

Q. Did you review or approve the stated requested response that states -- this is number seven -- that information regarding contracts outside the State of Florida is not relevant to the subject matter of this docket?

A. I didn't draft that response.

Q. You refer in your testimony to the Standard Offer Contract Program in Ontario; is that right?

A. That's correct.

Q. And a capacity value calculation from New York?

A. Correct.

Q. Can you explain why it's Wheelabrator's position why you refer and rely on those things while the things which we have just talked about state that other states are not relevant?

MS. KAUFMAN: Again, I'm going to object, you are asking him for a legal conclusion, and he is not -- that's not within the bounds of his testimony.

MR. ANDERSON: Let's take two steps back, Vicki. I'm entitled to ask the witness what the basis of his opinion is.

MS. KAUFMAN: I agree.

MR. ANDERSON: And your client provided interrogatory responses that none of this is relevant and none of this needs to be provided, and your witness contradicts you.

So, I'm very troubled by that, and that's why I'm asking these questions and I'm entitled to an answer.

MS. KAUFMAN: I don't agree with your characterization of my client's position, but we don't need to argue about that on the record. And I agree you are entitled to ask Mr. Dalton the basis for his opinion.

What I disagree with is you asking him to give you his legal view as to whether objections are appropriate or what is relevant and what's not relevant.

MR. ANDERSON: Vicki, I'll stop asking these questions if you will agree that his testimony concerning other states or other contracts should be stricken.

MS. KAUFMAN: Then I'm not going to agree to that, Bryan, but I'd be happy to talk to you offline.

MR. ANDERSON: All right.

BY MR. ANDERSON:

Q. Mr. Dalton, could you tell us what your understanding is of a feed-in tariff?

A. I guess I would distinguish a feed-in tariff from a Standard Offer Contract in that a feed-in tariff typically is based on costs, whereas Standard Offer Contracts are more typically based on values.

Q. Would you agree that feed-in tariffs usually

involve paying a premium rate for renewable energy? A view over the economic value of the generation?

A. That's a very open-ended statement in terms of premium rate. One needs to step back and say what is the specific rate for the feed-in tariff.

Q. Let's be specific then. You are familiar with the Ontario Power Authority Renewable Energy Standard Offer Program Contract?

A. Yes, I am.

Q. Is that a feed-in tariff type of program?

A. No, it's not.

Q. Could you look at your direct testimony please, page 14? Do you have that in front of you?

A. I have it in front of me.

Q. Could you please look at lines 11 through 14 where you state: FPL SOC does not encourage development of the renewable energy resources in the state. The best indication of this is the fact that not a single renewable energy resource developer has executed FPL's SOC since January 2006, when it was first put in place. Is that accurate, what I read?

A. That's what the testimony says.

Q. And that's your view in this case, right?

A. That's right.

Q. Are you aware FPL's Standard Offer Contract

and tariff schedule have been protested by intervenors since 2006?

A. I know that Wheelabrator protested, I believe, the 2007 Standard Offer Contract filing.

Q. Are you aware that in the prior year, 2006, that after FPL filed its Standard Offer Contract on April 3, 2006, the Florida Industrial Co-Generation Association petitioned the FPSC for a hearing on the Standard Offer Contract?

A. I'm not aware of that.

Q. Are you aware that Florida Public Service Commission on September 21, 2006, recommended that, or found that due to the protest that the Standard Offer Contracts were not in effect?

A. I was not aware of that.

Q. And, as you said for this year's Standard Offer Contract it's your client, Wheelabrator, that has filed the petition, right, protesting the Standard Offer Contract?

A. That's correct.

MR. ANDERSON: Off the record.

(Discussion held off the record.)

MR. ANDERSON: Mr. Dalton, FPL does not have anymore questions for you. We really thank you very much for your time today.

Do any other parties have questions?

MS. HARTMAN: This is Jean Hartman, I have a couple of questions.

CROSS EXAMINATION (John C. Dalton)

BY MS. HARTMAN:

Q. Mr. Dalton, my name is Jean Hartman and I'm the commission attorney assigned to this docket, and I appreciate your time this afternoon.

A. Good afternoon.

Q. Afternoon. If at any point during my questions you don't -- you need a break or if you need some clarification regarding any of the terms I use, could you please let me know, otherwise I'll assume you understand everything I'm saying.

A. I'll do that.

Q. If I could please refer you to Rule 25-17.0324 E8?

That is in the packet Mr. Anderson distributed, Vicki.

MS. KAUFMAN: I'm not sure if it's in the packet.

MR. ANDERSON: May I assist? That was group Exhibit B2, page 2.

MS. KAUFMAN: Thank you.

MS. HARTMAN: Thank you.

BY MS. HARTMAN:

Q. I'm referring to the section: These performance standards shall approximate the anticipated peak and off-peak availability and capacity factor of the utility's avoided unit over the term of the contract.

A. I see that.

Q. Okay. If a renewable energy facility operating under contract cannot maintain the committed capacity output for more than four hours due to intermittent nature of the facility, how can that performance of the contracted generator be said to approximate a generator capable of operating at a full rating for as long as several consecutive days if it is needed?

A. I guess the point of distinction that I would make here, and I would -- what I would do is step back and look at the objectives of the Standard Offer Contract rules based on the direction provided by the legislature. In there the legislative found it was in the public interest to promote the development of renewable energy resources in the state.

So, with that as kind of a guiding overriding principle, I would think that it is appropriate to better reflect and consider the performance

characteristics of renewable energy resources.

I think that where we have been to date we found there is a subjective to promote renewable energy in Florida, and the market response I think has not been what everyone would like, and as a result people are looking at other policies.

So, what I've suggested is that it is appropriate to give consideration to a broader portfolio of renewable energy resources, and reflect that while maybe biomass energy resources have a hard time sustaining output for 24-hour periods for capacity test, that it is more appropriate to consider a shorter 4-hour window for the performance of that test, and to recognize that by being more permissive in allowing a shorter capacity test period you are more likely to be encouraging the development of renewables.

And that while one unit output might be reduced slightly in a specific hour, through a portfolio of resources you might get another unit that is performing more than its rated capacity or the average over that 4-hour period.

Q. Thank you. How would the inherently variable generations for which you propose a shorter averaging period of 4 hours fit into a utility's operation which

would be based on a continuous 24-hour basis?

A. I'm not sure if I follow the question. I think that what I've suggested is that what we are talking about here is what is the appropriate basis for determining capacity payment, and that's been kind of the focus on my comments.

There is another issue in terms of the variability of output and what that means for energy payments, but is your focus in terms of the capacity value of the resource?

Q. Well, how do you get those two together then, capacity and payment?

MS. KAUFMAN: I'm going to ask Ms. Hartman if you can maybe clarify the question? But Mr. Dalton, if you understand you can answer it.

THE WITNESS: Would the court reporter read the question back to me?

(A portion of the record was read by the reporter.)

MS. HARTMAN: I think you want to go back to the first question I asked or, I'm sorry, the question right before that.

THE WITNESS: That's correct, that would help.

BY MS. HARTMAN:

Q. Let me just state it again. How would you

propose a shorter averaging period of 4 hours, how would you propose that fit into a utility's operation which may be based on a continuous 24-hour performance?

A. I think that the focus here is on what is the capacity value and what is the appropriate payment for capacity values. And I think that the issue is when is the utility likely to experience peak loads and what is going to be the availability of generations during this peak load period.

So, typically peak loads are experienced over relatively narrow windows of time. So, you know, you wouldn't expect peak loads to be sustained, for example, for a 24-hour period. My thought is that using a 4-hour capacity test doesn't necessarily have to adversely affect the reliability of the system by resulting in payment for capacity that, in effect, isn't there.

I think that the second element of this is the capacity test and then there's the payment for capacity. And what I propose essentially insures that a very similar approach is employed by FPL. I've just used availability provisions that were more inline with what other utilities have offered, and more inline with the actual historical operating

performance of FPL's combined cycle gas turbine fleet, as reported in the GPIF filing.

Q. Thank you. Did you help prepare or review Wheelabrator's response to staff interrogatory number one?

A. Let me get that in front of me.

Q. Okay.

A. Yes, I did.

Q. Thank you. Is it correct then that in response to staff interrogatory number one to Wheelabrator, or that Wheelabrator proposed an availability requirement of 89 percent for biomass generation?

A. Yes. What we proposed was that if you achieve a capacity factor of 89 percent or greater, then you would be eligible for the full capacity payment.

Q. In response to Part B of that interrogatory Wheelabrator refers to the Progress Standard Offer Contract, and states that the proposed availability target is consistent with that used by Progress.

Could you please explain the reasoning for Wheelabrator's suggestion that the requirement included in the Progress Energy Contract is appropriate for Wheelabrator's Standard Offer Contract

to supply capacity and energy for FPL?

A. I guess what I was trying to do is looking at the 97 percent capacity factor requirement in the FPL contract, based on many different contracts I've reviewed never seen such a high capacity factor or availability factor requirement to receive a full capacity payment.

So, I went to look at what other utilities offered. And both FPL and Progress Energy have the same avoided unit. They're both combined cycle gas turbine units. And I just noted that Progress Energy only required an 89 percent capacity factor to receive a full capacity payment.

The second thing that caused me to believe that was an appropriate target was the receipt of full capacity payment, was that consistent with the equivalent availability factors that are represented in the GPIF filing for FPL for the various combined cycle gas turbine unit.

Q. I wanted to talk to you a little bit about the similarities and differences between the Progress avoided unit and the FPL avoided unit.

Do you know if they have the same capacity rating?

A. I don't know if they have the same capacity

rating. I would expect that probably the most important unit is the determinant of what is going to be the underlying availability of the technologies is the technology itself, and the fact they're a combined cycle gas turbine is probably, to my mind, the most relevant.

Q. And I think you answered the question earlier but let me ask, do you know if they have the same manufacturer?

A. I don't know if they have the same manufacturer.

Q. Do you know if there are any differences in burners, oxygen flow, or other elements of combustion technology?

A. I don't know.

Q. Okay. Do you know if there are differences in fuel supply? And by that I mean do you know if there are -- they have different contracts for transportation or chemical content?

A. I'm not aware of that. These would be avoided units and, obviously for the FPL unit, it is going to be in service in -- I believe scheduled to be in service in 2014. So, I suspect that those contractual arrangements are currently in place.

Q. Regarding the nature and use of the Standard

Offer Contract, Mr. Dalton, you provided several suggestions for change and said in your view should be made to FPL's Standard Offer Contract; is that correct?

A. That's correct.

Q. Could you explain, in general, the reasons that underlie the suggestions you have made?

A. Certainly. I think that the starting point is recognizing what is the underlying objective here. And that's to promote the development of renewable energy resources in the state.

And, obviously, what has driven that objective is the recognition of the broad-based benefits that renewable energy resources offer.

And based on my review of the Standard Offer Contract and my experience with Standard Offer Contracts and power contracts in general, I came to the opinion that there were a number of contract provisions prior generation developers, renewable energy project facility developers bear considerable risk causing them to be reluctant to enter into the Standard Offer Contract.

And these are specifically outlined in my testimony. And I can go through each one of those different provisions, if you would like.

Q. No, thank you.

Would your suggested changes -- well, let me back up.

Would your suggested changes -- sorry, I need to go off record for a second. Hold on please.

(Break in the proceedings.)

MS. HARTMAN: Sorry. Back on.

BY MS. HARTMAN:

Q. Would your suggested changes have a similar impact for renewable generations if Wheelabrator had a different technology or didn't use waste to energy generations?

I'm sorry, I need to go offline for a second.

(Break in the proceedings)

MS. HARTMAN: I'm sorry, back on the line.

BY MS. HARTMAN:

Q. Mr. Dalton, would your suggested changes have similar impact for renewable generations using other technologies, such as solar or wind?

A. I would say that if you look at my proposed changes, and there is four fundamental changes that are proposed to the Standard Offer Contract, there's only one which might be viewed as not being as understanding of the specific circumstances of solar or wind, and that would be the provisions pertaining

to the annual capacity billing factor.

And the issue there was in establishing its capacity value FPL has used a combined cycle unit, and a combined cycle that capital costs which are used to establish the capacity value for a combined cycle unit.

One element of those costs really isn't strictly a pure form of capacity. So, if one were to have standard such as employed in New England or in New York where capacity value is established based on your availability during narrow periods which reflect when peak demand conditions are experienced, if one were to have such a framework in place, the appropriate capacity payment would need to be lower and some of the value associated with capacity in the current capacity payment would need to be allocated to energy payments.

And I viewed this such financial engineering for the purposes of this testimony is beyond the appropriate scope. And so what I offered was changes for this provision which would cover, you know, many of the existing renewable energy facilities in Florida.

And it is my understanding that biomass facilities represent about two-thirds of the renewable

capacity in Florida, so I thought it was appropriate to offer a recommendation that would recognize their likely operating profile. And which, in turn, was consistent with provisions that progress energy used, and as well consistent with the operating performance of some of FPL's combined-cycle gas turbine units.

But the other three provisions that I have suggested should be revised. Those would be changes I think that would enable the development of a broad range of renewable technologies in Florida. And if the commission were to determine that those were appropriate changes, I think it would have a favorable affect in terms of promoting the legislature's objectives of promoting the development of renewable energy sources in Florida.

MS. HARTMAN: Thank you, I have no other questions.

MS. KAUFMAN: Back on the notary thing, I have done this three times to Miss Janelle and each time it has bounced back.

THE WITNESS: If you send it to me I guess I've got it, I'll make sure it gets sent.

MS. KAUFMAN: Very good. And I guess we should go back on the record to state that Mr. Dalton does not waive reading and signing.

MR. ANDERSON: Could you state your address, Mr. Dalton, so we have that for the record?

THE WITNESS: 706 West Street, Carlisle, Massachusetts. Carlisle is spelled C-A-R-L-I-S-L-E. And the ZIP code is 01741.

MR. ANDERSON: And I have nothing further. We're off the record.

(Discussion held off the record.)

MS. KAUFMAN: What is your turnaround, Ms. Court Reporter?

COURT REPORTER: Turnaround is requested by Mr. Anderson e-mail by Friday.

(Discussion held off the record.)

MS. KAUFMAN: Why don't I talk to Bryan then, I don't need it expedited.

(Witness excused.)

(Deposition was concluded.)

C E R T I F I C A T E

THE STATE OF FLORIDA

COUNTY OF PALM BEACH

I hereby certify that I have read the foregoing deposition by me given, and that the statements contained herein are true and correct to the best of my knowledge and belief, with the exception of any corrections or notations made on the errata sheet, if one was executed.

Dated this ___ day of _____, 2008.

_____

JOHN C. DALTON

#61866

ERRATA SHEET

IN RE: FPL PETITION FOR APPROV. CR: ELEANOR EVENSEN

DEPOSITION OF: JOHN C. DALTON

TAKEN: 12/17/2008 # 61866

Do Not Write On Transcript - Enter Changes Here

CHANGE	LINE	CHANGE	REASON

Please forward the original signed errata sheet to this office so that copies may be distributed to all parties.

Under penalty of perjury, I declare that I have read my deposition and that it is true and correct subject to any changes in form or substance entered here.

Date: _____ SIGNATURE OF DEPONENT: _____

REPORTER'S CERTIFICATE

STATE OF FLORIDA
COUNTY OF PALM BEACH

I, ELEANOR M. EVENSEN, Registered Professional Reporter and Notary Public in and for the State of Florida at Large, do hereby certify that I was authorized to and did report said deposition in stenotype; and that the foregoing pages are a true and correct transcription of my shorthand notes of said deposition.

I further certify that said deposition was taken at the time and place hereinabove set forth and that the taking of said deposition was commenced and completed as hereinabove set out.

I further certify that I am not an attorney or counsel of any of the parties, nor am I a relative or employee of any attorney or counsel of party connected with the action, nor am I financially interested in the action.

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.

DATED this 18th day of December, 2008.

_____
ELEANOR M. EVENSEN
61866

DECEMBER 18, 2008

Mr. John Dalton # 61866
706 West Street
Carlisle, Massachusetts
01741

RE: Florida Power & Light Company's Petition for Approval of Renewable Energy Tariff and Standard Offer Contract.

Please take notice that on December 17, 2008, you gave your deposition in the above-referred matter. At that time, you did not waive signature. It is now necessary that you sign your deposition.

Please call our office at the below-listed number to schedule an appointment between the hours of 9:00 a.m. and 4:30 p.m. Monday through Friday at the Esquire office located nearest you.

If you do not read and sign the deposition within a reasonable time (i.e., thirty (30) days unless otherwise directed), the original, which has already been forwarded to the ordering attorney, may be filed with the Clerk of the Court. If you wish to waive your signature, sign your name in the blank at the bottom of this page and return it to us at 515 North Flagler Drive, P-200, West Palm Beach, Florida, 33401.

Very truly yours,

Eleanor M. Evensen
Esquire Deposition Services

I do hereby waive my signature:

_ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _
(Witness Name)

cc: Via transcript (Bryan Anderson, Esquire)
(Vicki Kaufman, Esquire)
(Jean Hartman, Esquire)
File copy

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Amendment of Rules 25-17.80 through 25-17.89 relation to cogeneration.	) DOCKET NO. 820406-EU) ORDER NO. 12634) ISSUED: 10-27-83

The following Commissioners participated in the disposition of this matter:

JOSEPH P. CRESSE
JOHN R. MARKS, III
KATIE NICHOLS

FINAL ORDER

BY THE COMMISSION:

Background

In 1978 the Public Utility Regulatory Policies Act (PURPA) was enacted as part of a group of measures known as the National Energy Act. Certain provisions of PURPA established a federal policy encouraging cogeneration and small power production and required the Federal Energy Regulatory Commission and state regulatory commissions to implement that policy through the exercise of their regulatory authority over electric utilities. In March 1980, FERC issued its regulations. Tracking PURPA, the federal regulations established an obligation on the part of electric utilities to buy electricity from and sell electricity to cogenerators and small power producers who met certain fuel efficiency standards, hereinafter referred to as Qualifying Facilities (QFs). These transactions were to be conducted at rates which were just, reasonable, in the public interest, and non-discriminatory to QFs. FERC concluded that if rates for the purchase of electricity from QFs by utilities were set at full avoided cost for both energy and capacity, the rates would meet the criteria just mentioned and cogeneration and small power production would be encouraged to the maximum extent possible. FERC required state regulatory commissions to implement its regulations within one year. Thus, in April 1981, the Florida Public Service Commission adopted Rule 25-17.80 through Rule 25-27.89, Florida Administrative Code[1]. These rules, inter alia, required investor-owned electric utilities in Florida to buy energy at a rate which reflected the full decremental fuel cost avoided by the utility by the purchase of energy from QFs. A capacity credit was apparently required if a QF's operation was sufficiently reliable to anticipate that its capacity contribution would result in the avoidance of additional capacity construction by an electric utility. The level of any capacity payment was to be negotiated according to six criteria relating to the size and operational characteristics of the QF. Several controversies arose in connection with the implementation of the original rules. Hearings were held on each utility's tariff and a protracted dispute between Florida Power and Light Company and Resources Recovery, Dade County, Inc., was brought to us for resolution. In the course of resolving these questions, in Dockets Nos. 810296-EU and 820114-EU, we made several further

[1]In Florida Power & Light Co., Inc. v FPSC, (Case No. 60,671, March 17, 1983), the Florida Supreme Court ruled that the rules were invalid because the Commission lacked statutory authority to adopt them. The appeal is still pending. The issue it presents has been laid to rest with the passage of Section 366.05(9), Florida Statutes, which specifically empowers the Commission to set rates for cogenerators and small power producers.

The hearings on the proposed rules were held on May 16, 18 and 19, 1983. Due to the complexity of the issues, the interest aroused by them, and the number of witnesses involved, the Commission conducted the hearing in a manner similar to that required by Section 120.57, Florida Statutes. In addition to their prefiled testimony, several witnesses filed rebuttal testimony setting forth their evaluation of the positions taken by other parties. Sworn testimony was received from the following witnesses: R. Trapp for the Commission Staff, B. Payne for the Commission Staff, J. Cundelan for ITT, R. Graf for Nichols, A. Herman for Nichols, M. W. Howell for Gulf, J. Oerting for Gulf, L. Brook for Dade County, A. Wenner for Dade County, H. Parmesano for Dade County, D. Mestas for TECO, S. Nixon for FPC, J. Seelke for FP&L, R. Denis for FP&L, F. Seidman for IMC, et al, G. R. Araknecht for IMC, et al, H. Cook for IMC, et al, E. Loyless for IMC, et al, R. Spann for RRD, B. Capehart, K. Wiley for PCG, J. Haskins for Gulf, and The Mayor of Boca Raton. All parties had the opportunity to cross examine all of the witnesses who testified.

Broward and Palm Beach Counties intervened after the hearings were completed.

At the conclusion of the hearing, the Commission outlined an alternative to the proposals it had received from the parties. The Commission requested all parties to critique this proposal, in addition to the others presented at the hearing, in the post-hearing comment period.

Staff circulated its proposed final rule, and the Commission alternative, and all parties had ten days thereafter to submit written comments. At its regularly scheduled agenda conference on July 5, 1983, the Commission tentatively approved a final rule. Oral arguments were held on the tentatively approved rule on July 12, 1983. At the conclusion of oral arguments, the Commission requested all parties to submit additional written comments by July 26, 1983. At our regularly scheduled agenda conference on August 2, 1983, we approved the final rules which were filed with the Secretary of State on August 15, 1983.

The Rules

We now turn to a discussion of the issues raised by each rule and our resolution of them. At the outset, we wish to state that it is our preference that QFs and utilities negotiate individually tailored contracts. The rules we have adopted are intended to both encourage negotiated contracts and provide a fall back remedy in the event a contract cannot be negotiated.

Rule 25-17.80 Definitions and Qualifying Criteria

This rule establishes the criteria a cogenerator or small power producer must meet to obtain Qualifying Facility status. We have continued our adoption of the FERC criteria. The criteria establish minimum fuel efficiency standards and prohibit an investor-owned utility from having a controlling equity interest in a QF. To help those unfamiliar with the criteria, a brief description of the fuel efficiency standards and the ownership test have been added to the rule. We have made a substantive addition to the rule by including a provision which allows a cogenerator or small power producer who cannot meet the FERC criteria to petition the Commission for Qualifying Facility status for the purpose of receiving energy and capacity payments pursuant to these rules. [Rule 25-17.80(1)]. As indicated in the rule, such a petition would be judged by whether the cogenerator or

unit one year. We adopt the testimony of Mr. Trapp on this point. We agree with Mr. Trapp that there must be a link between the price paid for QF capacity and the value of other supply side alternatives available to a utility to meet its service obligation. It is this linkage that ensures that cogeneration and small power production will remain a cost effective conservation measure.

As originally proposed, the rule would have required a very strict link between the price paid for QF capacity and the value of deferral. The rule as originally proposed:

1) Required a utility to contract for the purchase of QF capacity if the latter would result in the avoidance or deferral of construction of the utility's next planned unit;

2) Required a QF to sign a contract no later than the commitment date of the utility's avoided unit;

3) Required a QF to begin delivery of firm capacity no later than the in-service date of the utility's avoided unit;

4) Required a QF to maintain a 70% capacity factor;

5) Conditioned the obligation to make capacity payments on total QF capacity contractually committed to a utility being equal to the capacity of the utility's avoided unit;

6) Conditioned the rate of payment for QF capacity on the amount of capacity, the capacity factor, the ability to dispatch, the ability to coordinate outages, availability during peak, and technological similarities of the QF and the utility.

In essence, the rule as originally proposed created a subscription period for QF capacity. For example, if a utility's next planned unit was 425 MW, capacity payments would be offered to the first 425 MW of QF capacity to sign a contract. However, no capacity payment would be made unless 425 MW of QF capacity had been contractually committed by the date on which the utility would otherwise have committed to the construction of the avoided unit. Then, the rate of payment was to be negotiated based on further distinctions among QFs; in any event, the rate of payment could not exceed 80% of the theoretical value of deferral.

Upon further reflection, however, we decided that requiring such a strict MW-for-MW link between QF capacity and a utility's next planned unit would not sufficiently encourage cogeneration and small power production, as it shrouds capacity payments in too much uncertainty. We have, therefore, dropped the requirement of an MW-for-MW link from the final rule. We emphasize that by doing so, we have increased the risk assumed by the ratepayers. The final rule is a gamble that by offering to buy capacity on the terms and conditions specified in the rule, sufficient capacity will materialize to permit actual avoidance or deferral of additional generating capacity by Florida utilities.

We remain steadfast in our belief that the risk associated with the purchase of QF capacity should be explicitly recognized in the rate of payment so as to reduce the risk to the

ratepayers. Specifically, there is the risk that an insufficient amount of capacity will be available when it is needed to permit the actual avoidance or deferral of additional generating capacity by the utility who has purchased the QF capacity. There is also the risk that after utilities are obligated to purchase QF capacity, it will not be needed during the time it will be available because a utility's generation expansion plan has been deferred for reasons unrelated to cogeneration, e.g., declining load forecasts due to slower growth or improved conservation or the availability of a less expensive source of supply. Moreover, because our rule requires that a QF commit itself for only ten years, while generating capacity owned by a utility is expected to provide service for at least thirty years, there is a risk that there will be an insufficient amount of QF capacity at the end of the initial contract period. We have accounted for these risks by including a generic risk factor in the calculation of the value of deferral, the basis for capacity payments. The theoretical value of an annual deferral is reduced by 20%.

Many of the QFs who intervened in this proceeding contended that inclusion of a generic risk factor in the value of deferral calculations constituted payment of less than full avoided cost and therefore is not permitted by the FERC regulations. What this argument overlooks is that the FERC regulations encompass an if-then test: if QF capacity avoids capacity related expenditures by a utility, then the QF must be compensated at full avoided cost. Further, the FERC Regulations permit a state regulatory commission to link the value or quality of QF capacity to varying payment levels. This rule simply says that QF capacity provided at a certain level of reliability for a certain length of time with certain risks associated with it is generically worth 80% of the theoretical value of deferral. Stated another way, we believe that the law permits the kind of trade-off we have settled on: payment of 80% of the theoretical value of deferral as much as seven years before the in-service date of the avoided unit without the certainty that any costs will actually be avoided or deferred. Note that a QF has an opportunity to obtain 100% of the theoretical value of deferral in a separtely negotiated contract. Obviously one would expect a QF to make contractual commitments that exceed the eligibility requirements for the standard offer in exchange for capacity payments that exceed those specified in the standard offer.

The value of deferral is, in essence, a calculation of the value of deferring the revenue requirements of a new generating plant by one year. Essentially, it compares the difference in annual revenue requirements if the revenue requirements stream begins in year X as compared to beginning in year X+1.

To calculate the value of deferral, the plant to be deferred must be identified, and the anticipated in-service date, as well as the plant's projected costs, must be ascertained. Thus, the rule provides for an annual implementation hearing. At this hearing, we will determine the next planned, needed, generating plant in the state, its anticipated in-service date, and its projected costs. Based on these findings, the capacity payment for QF capacity sold pursuant to a utility's standard offer will be determined. Thereafter, we will annually review our findings with respect to the statewide avoided unit, its timing and cost.

To give QFs as much choice as the situation permits, the rule allows a QF to select one of two payment options tied to the value of deferral. Regardless of the option selected, the statewide avoided unit and its anticipated in-service date current at the time a QF accepts a utility's standard offer, is fixed for the

25-17.84, a utility has the same obligation to provide adequate service to its customers who are QFs as it does to all customers. Firm service to a QF should not be qualitatively different than firm service to any other customers.

We have retained the provisions of the original rule excusing a utility from its obligation to purchase under certain circumstances, and have added to it to make clear that a utility is not required to purchase from a QF when to do so would result in costs greater than those which the utility would incur if it did not make such purchases. We believe this is most likely to happen during a utility's off-peak periods where it may be cycling its base load units and QF purchases would force it to shut down the units altogether.

Rule 25-17.87 Interconnection and Standards

We have substantially expanded this rule to establish general safety and interconnection standards that will apply in the absence of a determination by a utility that either less stringent or more stringent standards are necessary in a particular case. Several QFs expressed concern that a utility vested with this discretion would impose costly, unnecessary interconnection requirements on a QF. We expect utilities to act reasonably in this regard and impose only those requirements reasonably necessary to maintain system integrity and safety. In the event a QF believes it is being unfairly treated, it may petition the Commission for relief. [Rule 25-17.87(3)].

It is, therefore,

ORDERED by the Florida Public Service Commission, that all electric utility companies subject to the provisions of Rules 25-17.80 through 25-17.87, Florida Administrative Code, shall submit a tariff in compliance with these rules, by December 12, 1983, for consideration in Docket No. 830377-EU. It is further

ORDERED that all electric utility companies subject to the provisions of Rules 25-17.80 through 25-17.87, Florida Administrative Code, shall submit details of the methodology to be used to calculate avoided energy costs as set forth in Rule 25-17.825, Florida Administrative Code, by December 12, 1983, for consideration in Docket No. 830377-EU. It is further

ORDERED that notice, as required by 18 CFR Section 292.403(a), be given that the Florida Public Service Commission will seek a waiver of 18 CFR Section 292.304(h)(4), which permits a Qualifying Facility to engage in sales on a simultaneous purchase and sale basis. It is further

ORDERED that this docket be closed.

By ORDER of the Florida Public Service Commission, this 27th day of October, 1983.

Steve Tribble
COMMISSION CLERK

(S E A L)

RED

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Proceedings to Implement Cogeneration Rules

DOCKET NO. 830377-EU
ORDER NO. 13247
ISSUED: 5-1-84

The following Commissioners participated in the disposition of this matter:

JOSEPH P. CRESSE
JOHN R. MARKS, III
KATIE NICHOLS

FINAL ORDER

BY THE COMMISSION:

On September 2, 1983 the Commission substantially revised Rule 25-17.80 through Rule 25-17.89, F.A.C. hereinafter referred to as the cogeneration rules. The revisions codified refinements of the Commission's cogeneration policy developed in Docket Nos. 810296-EU, 820114-EU, and 820165-EU; developed a methodology for determining the cost effectiveness of utility payments for the purchase of firm capacity and energy from cogenerators and small power producers; and established a statewide standard offer for the purchase of firm capacity and energy from cogenerators and small power producers (hereinafter referred to as Qualifying Facilities or QFs).

This docket was opened by the Commission's own motion pursuant to Rule 25-17.83(4) on August 16, 1983 to determine the statewide avoided unit for the purpose of determining the need for, timing, and pricing of firm capacity and energy purchases from QFs. Also, certain other aspects of implementation of the revised rules were addressed in this proceeding.

Several parties formally intervened in these proceedings. They were: Florida Power Corporation; Florida Power & Light Company; Florida Public Utilities Company; Gulf Power Company; Tampa Electric Company; Farmland Industries, Inc.; Florida Crushed Stone Company; International Minerals and Chemical Corporation; U.S. Sugar Corporation; W. R. Grace & Company; Resources Recovery, Dade County; Metropolitan Dade County; Conserv, Inc.; Broward County; U.S. Steel Corporation; Royster Company; Dothan Oil Mill Company; and St. Regis Paper Company.

On January 6, 1984, a prehearing conference was held. With the above listed intervenors in attendance, the parties agreed to a prehearing memorandum which established 45 substantive issues and 1 legal issue to be addressed at the hearing.

Public hearings were held on January 18 and 19, 1984 and on February 14 and 23, 1984. Sworn testimony was received from 11 witnesses on behalf of the intervenors listed above as well as testimony by the Commission staff.

In-Service Date of Statewide Avoided Unit

Rule 25-17.83(4) requires the Commission to designate a statewide avoided unit for the purpose of determining the need for, timing, and pricing of firm capacity and energy purchases from QFs. This approach to pricing QF capacity and energy reflects the Commission's long standing policy that the need for additional capacity by Florida utilities should be determined from a statewide perspective rather than simply focusing on the isolated needs of the individual Florida utility systems. This policy is derived from Section 366.04(3), Florida Statutes, which states:

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rolling average basis, QFs should also be required to maintain a 70 percent capacity factor during on peak hours on a 12 month rolling average basis. Since approximately 75 percent of the hours in the year, 6570 hours out of a total of 8760, are considered to be off peak hours, the utilities fear that a QF could generate all its required energy during off peak hours and hence make no contribution to the deferral of additional capacity construction.

While we are somewhat sympathetic to this concern, we are unconvinced that an absolute 70 percent on peak capacity factor is necessary. We note that during cross examination none of the utility witnesses were able to produce a specific study showing that they would be unable to defer additional capacity construction unless they received an average of 70 percent of their contracted cogeneration capacity during on peak hours. Accordingly, we decline to adopt this additional requirement at this time but will continue to monitor the performance of QFs with respect to our goal of deferring additional capacity construction in Florida.

We do find, however, that the following additional performance criteria are reasonable and should be adopted:

(1) The QF must agree to provide monthly generation estimates by October 1 for the next calendar year; and

(2) The QF must agree to promptly update the yearly generation schedule when any changes are determined necessary; and

(3) The QF must agree to reduce generation or take other appropriate action as requested by the purchasing utility for safety reasons or to preserve system integrity; and

(4) The QF must agree to coordinate scheduled outages with the purchasing utility; and

(5) The QF must agree to comply with the purchasing utility's reasonable requests regarding daily or hourly communications.

In addition to the above performance criteria, we find that capacity payments to a QF should not commence until the QF has attained commercial in-service status. This additional requirement is necessary to protect ratepayers from the risk associated with speculative construction by QFs over which this Commission has no control. The commercial in-service date of a QF will be defined as the first day of the month following the successful completion of the QF maintaining an hourly kilowatt output, as metered at the point of interconnection, equal to or greater than the QF's contractually committed capacity for a 24 hour period. We fully expect each QF to coordinate the selection of and operation of its facility during this test period with the purchasing utility to insure that the performance of the QF during this 24 hour period is reflective of the anticipated day to day operation of the QF.

We further find that during the first twelve months during which these performance criteria are imposed, the QF's capacity factor should be calculated by dividing the sum of the kilowatt hours sold by the QF to the purchasing utility for the number of months since the performance criteria became applicable by the product of the number of hours in the months which have transpired times the maximum committed capacity of the QF. This calculation should be performed each month until enough months have transpired to calculate a true 12 month rolling average capacity factor.

37 of 38 DOCUMENTS

In Re: Planning Hearings on Load Forecasts Generation Expansion Plans, and Cogeneration Prices for Florida's Electric Utilities

DOCKET NO. 910004-EU; ORDER NO. 24989

Florida Public Service Commission

1991 Fla. PUC LEXIS 1386

91 FPSC 8:560

August 29, 1991

[*1]

The following Commissioners participated in the disposition of this matter: THOMAS M. BEARD, Chairman; J. TERRY DEASON; BETTY EASLEY; MICHAEL McK. WILSON

OPINION: FINAL ORDER

BY THE COMMISSION:

As a result of the revision of the cogeneration rules (Docket No. 891049-EU), we initiated a proceeding to approve new standard offer contracts. Pursuant to Order No. 23625, each utility was required to file by October 30, 1990, its most recent ten-year generation expansion plan, a standard interconnection agreement, and one or more standard offer contracts designed to avoid the construction of capacity identified in its plan.

A hearing was conducted in this docket on May 20, 22, and 23, 1991. Pursuant to Order No. 24142, the scope of this hearing was limited to those issues necessary to approve firm capacity and energy tariffs, standard offer contracts, as-available energy tariffs, and standard interconnection agreements.

FPC'S FORECASTS, ASSUMPTIONS, AND GENERATION ALTERNATIVES

1. FPC'S RELIABILITY CRITERIA
2. FPC'S LOAD FORECAST
3. FPC'S CONSERVATION FORECAST
4. FPC'S FUEL FORECAST
5. FPC'S UNIT PERFORMANCE FORECAST
6. FPC'S PURCHASED POWER FORECAST
7. FPC'S STRATEGIC [*2] CONCERNS
8. FPC'S AVOIDED UNIT GENERATING TECHNOLOGIES
9. FPC'S SUPPLY SIDE ALTERNATIVES
10. FPC'S APPROPRIATE GENERATION EXPANSION PLAN

1. FPC'S RELIABILITY CRITERIA

Florida Power Corporation (FPC) utilizes a dual criteria, consisting of a 0.1 Loss of Load Probability (LOLP) and a 10% winter reserve margin. These two reliability criteria have been used by FPC for some time and they are indicators of different system, requirements. A reserve margin is an indicator of the systems ability to serve the system-wide seasonal peak demand. The percentage of reserve, usually expressed as a percentage of peak demand, is maintained in order to allow for variations in load and unit availability. The actual percentage planned is a judgement based on the utility's size and its interconnections to neighboring utilities. A LOLP criteria is an indicator of the system's ability to meet daily peak demands. This method considers the forced and planned outage rates of the utility's units, as well as the probability of emergency assistance, if needed.

While these two criteria are adequate, they can only be as good as the assumptions that go into the planning process. For example, the LOLP [*3] calculation is very sensitive to assistance from other utilities. Both criteria are also sensitive to errors in load forecasts. These two areas seem to be the major cause of FPC's near term

for inclusion in its standard offer tariff that would allow for a credit to the QF if a benefit occurs to FPL as a result of the purchase of firm capacity and energy from the QF.

8. FPL'S STANDARD OFFER TAX PROVISION

FPL originally proposed language in its tariff which made the QF liable for any taxes or impositions for which FPL would not have been liable if it had produced the energy and constructed the facility itself. Several intervenors criticized this language as being too vague. We agree that this language can and should be modified to be more favorable to the QFs while maintaining revenue neutrality for FPL's ratepayers. FPL has agreed to modify the language in section 12.12 to specify which taxes the QF will be responsible for paying, by substituting the language it has provided in Exhibit 26.

Exhibit 26 contains tariff language which specifies that, "In the event that FPL becomes liable for additional taxes, including interest and/or penalties arising from the Internal Revenue Service's determination . . . that FPL's early, levelized or early levelized capacity payments to the QF are not [*60] fully deductible when paid (additional tax liability), FPL may bill QF monthly for the costs, including carrying charges, interest and/or penalties, associated with the fact that all or a portion of these early, levelized capacity payments are not currently deductible for federal and state income tax purposes . . . These costs would be calculated so as to place FPL in the same economic position as it would have been in if the entire early, levelized or early levelized capacity payments had been deductible in the period in which the payments were made. . . ." We approve the language in Exhibit 26.

FICA argued that the Commission should require utilities to seek an IRS ruling prior to assessing any possible tax effects on QFs. We expect that FPL will take reasonable and prudent steps to identify, clarify, and minimize the effects of such taxes. We will not, however, require FPL to seek an IRS ruling in all cases.

9. FPL'S CAPACITY BENEFITS FOR EARLY DELIVERY

FPL's standard offer contract should and does recognize that a QF must deliver firm capacity and energy as a condition of receiving early capacity payments. Section 9 need not specify this condition because Section 4.1 (via [*61] COG-2 tariff sheet 10.201) and Section 11 specify that capacity payments will not commence until the contract in-service date.

10. FPL'S PERFORMANCE REQUIREMENTS (STIPULATED)

All parties to this docket have stipulated to FPL's position or have agreed not to object to the stipulation on this issue. Based upon our Staff's analysis, we will accept the stipulation of the parties that the operating performance requirements in FPL's standard offer contract reasonably reflect the performance of FPL's avoided unit.

11. FPL'S SLIDING SCALE CAPACITY PAYMENTS

Appendix C to FPL's standard offer contract provides the computation of the monthly capacity payment made to cogenerators. FPL proposes an adjustment which exponentially reduces the QF's capacity payment in a month when the twelve-month rolling average of the on-peak capacity factor is below the avoided unit minimum. This adjustment broadens the range of performance in which the QF can be paid for performance while encouraging the QF to provide capacity during FPL's peak periods.

FPL's adjustment to capacity payments is reasonable. Therefore, we approve the capacity payment adjustment proposed in Appendix C of FPL's standard [*62] offer contract for calculating monthly capacity payments to the QF.

12. FPL'S MAINTENANCE SCHEDULING

The QF and the utility should work together to ensure that the QF's maintenance schedule is acceptable to both parties. However, FPL must have the ultimate ability to reject a QF's maintenance schedule to prevent planned outages when FPL needs the capacity.

The language in sections 6.1 and 6.2 of FPL's standard offer provides a mechanism for the QF and the utility to develop a mutually acceptable maintenance schedule. These sections allow the QF to perform its maintenance when it wishes, if possible. If the QF requests a maintenance schedule that would lessen FPL's reliability, FPL will advise the QF of an acceptable time period which is close to the one it requested. This approach is reasonable.

13. FPL'S VIABILITY DOCUMENTS

FPL's original tariff requires: a) articles of incorporation or partnership agreement and recent annual report; b) description of the QF's experience; c) letters of intent on financing, fuel, and architect; d) evidence of property options or ownership; e) prospectus for securities or bond offerings; f) contract with municipality; g) description of facility; [*63] h) technical and environmental data; and i) feasibility studies. FPL stated that it needs these documents to determine whether it is prudent and reasonable to rely on a particular QF. (TR 1592)

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition for approval of renewable energy tariff standard offer contract, by Florida Power & Light Company.	DOCKET NO. 070234-EQ ORDER NO. PSC-07-0492-TRF-EQ ISSUED: June 11, 2007

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
MATTHEW M. CARTER II
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

ORDER APPROVING STANDARD OFFER CONTRACT AND ASSOCIATED TARIFFS FILED BY FLORIDA POWER & LIGHT COMPANY

BY THE COMMISSION:

In its 2005 session, the Florida Legislature enacted Section 366.91, Florida Statutes, regarding renewable energy which states:

> 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.

Section 366.91(3), Florida Statutes, enumerates requirements to promote the development of renewable energy resources. In summary:

a) By January 1, 2006, each investor-owned electric utility (IOU) and municipal utility subject to the Florida Energy Efficiency and Conservation Act (FEECA) of 1980 must continuously offer to purchase capacity and energy from specific types of renewable resources;
b) the contract shall be based on the utility's full avoided costs, as defined in Section 366.051, Florida Statutes;
c) each contract must provide a term of at least ten years; and
d) the Commission shall establish requirements relating to the purchase of capacity and energy by public utilities from renewable energy producers and may adopt rules to administer this section.

On March 8, 2007, proposed amendments to Part III, Rule 25-17.0832, Florida Administrative Code, and Part IV, Chapter 25-17, Florida Administrative Code (Rules 25-

Future Carbon Regulations

Rule 25-17.270, Florida Administrative Code, specifically requires standard offer contracts to allow either party to reopen a contract if avoided unit costs change as a result of new environmental and other regulatory requirements, such as carbon emission standards, enacted during the term of the contract. FPL's Standard Offer Contract is in compliance with this requirement. (See Section No. 17.6.3)

Tradable Renewable Energy Credits (TRECs)

Rule 25-17.280, Florida Administrative Code, requires that TRECs shall remain the exclusive property of the renewable generator. A utility shall not place any conditions upon such incentives in a standard offer contract, unless agreed to by the renewable generating facility.

FPL acknowledged that TRECs are the property of the renewable generator, and also has included a right of first refusal with specific timelines for responding. Such a condition will insure that Florida's ratepayers enjoy all of the attributes associated with renewable generation without imposing a financial penalty to the owner of the renewable generation facility. (See Section 17.6.2)

Imputed Debt Equivalent Adjustments (Equity Adjustments)

Pursuant to Rule 25–17.290, Florida Administrative Code, "an investor-owned utility shall not impose any imputed debt equivalent adjustments (equity adjustments) to reduce the avoided costs paid to a renewable generating facility unless the utility has demonstrated the need for the adjustment and obtained the prior approval of the Commission." FPL's original Petition filed May 2, 2007, with accompanying tariff sheets, requested approval to include an equity adjustment in the calculation of capacity payments to be made under its Standard Offer Contract. However, on May 17, 2007, FPL filed its Second Amended Petition withdrawing its request that the Commission approve an imputed debt equivalent adjustment in its standard offer contract.

Conclusion

Based on the above, we find that FPL's Standard Offer Contract and associated tariffs are in compliance with Rules 25-17.200 through 25-17.310, Florida Administrative Code, and are therefore approved, effective May 22, 2007. If a protest is filed within 21 days of the issuance of this Order, the tariffs shall remain in effect pending resolution of the protest. Potential signatories to the standard offer contract should be aware that FPL's tariffs and standard offer contract may be subject to a request for hearing, and if a hearing is held, may subsequently be revised. If no timely protest is filed, this docket shall be closed upon the issuance of a Consummating Order.

Based on the foregoing, it is

105 FERC ¶ 61,004
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

American Ref-Fuel Company,
Covanta Energy Group,
Montenay Power Corporation, and
Wheelabrator Technologies Inc.

Docket No. EL03-133-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued October 1, 2003)

1. On June 13, 2003, American Ref-Fuel Company, Covanta Energy Group, Montenay Power Corporation, and Wheelabrator Technologies Inc. (Petitioners) filed a petition for declaratory order in which they seek an interpretation of the Commission's regulations implementing Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-3 (2000). See 18 C.F.R. Part 292 (2003).

2. Petitioners, through direct and indirect subsidiaries, own and operate waste-to-energy power plants across the United States that are certified as qualifying facilities (QFs). Petitioners seek Commission interpretation of its avoided cost rules under PURPA. Specifically, Petitioners seek an order declaring that avoided cost contracts entered into pursuant to PURPA, absent express provisions to the contrary, do not inherently convey to the purchasing utility any renewable energy credits or similar tradeable certificates (RECs). They contend that the power purchase price that the utility pays under such a contract compensates a QF only for the energy and capacity produced by that facility and not for any environmental attributes associated with the facility.

3. As discussed below, we grant Petitioners' petition for a declaratory order, to the extent that they ask the Commission to declare that contracts for the sale of QF capacity and energy entered into pursuant to PURPA do not convey RECs to the purchasing utility (absent express provision in a contract to the contrary). While a state may decide that a sale of power at wholesale automatically transfers ownership of the state-created RECs, that requirement must find its authority in state law, not PURPA.

(4) the costs or saving resulting from variations in line losses from those that would have existed in the absence of purchases from the QF.

22. Significantly, what factor is not mentioned in the Commission's regulations is the environmental attributes of the QF selling to the utility. This is because avoided costs were intended to put the utility into the same position when purchasing QF capacity and energy as if the utility generated the energy itself or purchased the energy from another source. In this regard, the avoided cost that a utility pays a QF does not depend on the type of QF, i.e., whether it is a fossil-fuel-cogeneration facility or a renewable-energy small power production facility. The avoided cost rates, in short, are not intended to compensate the QF for more than capacity and energy.

23. As noted above, RECs are relatively recent creations of the States. Seven States have adopted Renewable Portfolio Standards that use unbundled RECs. What is relevant here is that the RECs are created by the States. They exist outside the confines of PURPA. PURPA thus does not address the ownership of RECs. And the contracts for sales of QF capacity and energy, entered into pursuant to PURPA, likewise do not control the ownership of the RECs (absent an express provision in the contract). States, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold or traded; it is not an issue controlled by PURPA.

24. We thus grant Petitioners' petition for a declaratory order, to the extent that they ask the Commission to declare that contracts for the sale of QF capacity and energy entered into pursuant to PURPA do not convey RECs to the purchasing utility (absent an express provision in a contract to the contrary). While a state may decide that a sale of power at wholesale automatically transfers ownership of the state-created RECs, that requirement must find its authority in state law, not PURPA.

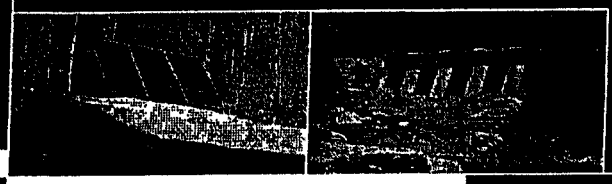
The Commission orders:

The Commission hereby grants Petitioners' petition for declaratory order, as discussed in the body of this order.

By the Commission. Commissioner Brownell dissenting with a separate statement attached.

(SEAL)

Magalie R. Salas,
Secretary.



ONTARIO POWER AUTHORITY

Standard Offer Program
Renewable Energy
Final Program Rules

OPA
Ontario Power Authority™

(73) **"Renewable Biomass"** means organic matter that is derived from a plant and available on a renewable basis, including, without limitation, organic matter derived from dedicated energy crops, dedicated trees, agricultural food and feed crops and waste organic material from harvesting or processing agricultural products, forestry products (including spent pulping liquor) and sewage including manure, provided that:

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(a) such organic matter is not Municipal Solid Waste;

(b) such organic matter is not peat or a peat derivative;

(c) such organic matter shall not contain any treated by-products of manufacturing processes, including, without limitation, chipwood, plywood, painted or varnished wood, pressure treated lumber, or wood contaminated with plastics or metals;

(d) such organic matter shall not include hazardous waste or liquid industrial waste, nor contain any materials that can adversely affect anaerobic processes or cause liquids or solids produced through anaerobic processes to become hazardous waste; and

(e) supplementary non-renewable fuels used for start up, combustion, stabilization and low combustion zone temperatures shall be no more than 10.00% of the total fuel heat input in any calendar year for Electricity generation units with a Gross Nameplate Capacity of 500 kW or less and 5.00% of the total fuel heat input in any calendar year for Electricity generation units with a Gross Nameplate Capacity of greater than 500 kW;

(74) **"Renewable Generation Facility"** means a facility that generates Electricity that is delivered through an LDC-owned meter or other meter as provided by the Distribution System Code to a Distribution System or Load Customer from any one of the following sources: wind, Thermal Electric Solar, PV, Renewable Biomass, Bio-gas, Bio-fuel, landfill gas, or water;

(75) **"Retail Settlement Code"** means the code established and approved by the OEB, governing the determination of financial settlement costs for electricity retailers, consumers, generators and distributors, as amended from time to time;

(76) **"RPPI"** means the Renewable Power Production Incentive established and administered by the Government of Canada;

(77) **"Sales Taxes"** means GST and PST and excludes all other *ad valorem*, property, occupation, severance, production, transmission, utility, gross production, gross receipts, sales, use and excise taxes, taxes based on profits, net income or net worth and other taxes, governmental charges, licenses, permits and assessments;

(78) **"Secured Lender"** means a chargee, mortgagee, assignee, sublessee, grantee or similar counterparty under a Secured Lender's Security Agreement;

(79) **"Secured Lender's Security Agreement"** means an agreement or instrument, including a deed of trust or similar instrument securing bonds or debentures, containing a charge, mortgage, pledge, security interest, assignment, sublease or similar right with respect to all or any part of a Generator's right, title and interest in or to its Contract Facility and the relevant Contract or any benefit or advantage of any of the foregoing, granted by the Generator as security for any indebtedness, liability or obligation of the Generator, together with any amendment, change, supplement, restatement, extension, renewal or modification thereof;

(80) **"Settlement Period"** means the monthly or other periodic billing cycle for a relevant LDC;

(81) **"Site-Specific Losses"** means Electricity losses due to line resistance, the operation of transformers and switches, and other associated losses which may occur as a result of the difference between the location of a Contract Facility's meter and the assigned Connection Point. Loss factors for Site-Specific Losses shall be applied in accordance with the Retail Settlement Code and other applicable regulatory instruments;