

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: February 16, 2018

TO: Office of Commission Clerk (Stauffer)

FROM: Office of the General Counsel (Harper) *pett S.M.C.*
Office of Industry Development and Market Analysis (Crawford) *BC CA*

RE: Docket No. 20170273-EQ – Petition by Sunrun Inc. for declaratory statement concerning leasing of solar equipment.

AGENDA: 03/01/18 – Regular Agenda – Parties May Participate at the Commission’s Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Clark

CRITICAL DATES: 03/29/18 (Final Order must be issued by this date pursuant to Section 120.565(3), Florida Statutes)

SPECIAL INSTRUCTIONS: None

Case Background

On December 29, 2017, Petitioner, Sunrun Inc. (Sunrun) filed a petition for a declaratory statement (Petition). Sunrun asks the Commission to declare that based on the facts presented by Sunrun:

- (1) Sunrun’s residential solar equipment lease does not constitute a sale of electricity;
- (2) Offering its solar equipment lease to customers in Florida will not cause Sunrun to be deemed a public utility under Florida law; and
- (3) The residential solar equipment lease described in its petition will not subject Sunrun or Sunrun’s customer-lessees to regulation by the Commission.

Docket No. 20170273-EQ

Date: February 16, 2018

Pursuant to Rule 28-105.0024, Florida Administrative Code (F.A.C.), a Notice of Declaratory Statement was published in the January 4, 2018, edition of the Florida Administrative Register, informing interested persons of the Petition. There were no requests to intervene filed. However, on February 5, 2018, Gulf Power Company (Gulf Power) and Florida Public Utilities Company (FPUC) filed a motion to participate as amici curiae along with a memorandum of law setting forth a number of issues for consideration by the Commission. The motion was granted by Order No. PSC-2018-0080-PCO-EQ. Sunrun filed a response to the memorandum of law, providing additional information about its Petition. On February 14, 2018, Florida Electric Cooperatives Association, Inc., (FECA) filed a letter in support of Gulf Power and FPUC's motion and memorandum of law.

This recommendation addresses Sunrun's Petition for Declaratory Statement. Pursuant to Section 120.565(3), Florida Statutes (F.S.), a final order must be issued within 90 days, which is March 29, 2018. The Commission has jurisdiction pursuant to Section 120.565, F.S., and Chapter 366, F.S.

Discussion of Issues

Issue 1: Should the Commission grant Sunrun's Petition for Declaratory Statement?

Recommendation: Yes. Based on the facts presented by Sunrun, the Commission should grant Sunrun's Petition and declare: (1) Sunrun's residential solar equipment lease does not constitute a sale of electricity; (2) offering its solar equipment lease to customers in Florida will not cause Sunrun to be deemed a public utility under Florida law; and (3) the residential solar equipment lease described in its Petition will not subject Sunrun or Sunrun's customer-lessees to regulation by the Commission. The Commission should also state that its declaration is limited to the facts described in Sunrun's Petition and would not apply to different, alternative facts. (Harper, Crawford)

Staff Analysis: Staff recommends the Commission grant Sunrun's Petition for Declaratory Statement based on the facts presented by Sunrun. Below is a more detailed explanation of staff's recommendation.

Law Governing Petitions for Declaratory Statements

Declaratory statements are governed by Section 120.565, F.S., and the Uniform Rules of Procedure in Chapter 28-105, F.A.C. Section 120.565, F.S., states, in pertinent part:

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

Rule 28-105.001, F.A.C., Purpose and Use of Declaratory Statement, provides:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

Rule 28-105.002(5), F.A.C., requires a petition for declaratory statement to include a description of how the statutory provisions or orders on which a declaratory statement is sought may substantially affect the petitioner in the petitioner's particular set of circumstances. A party seeking a declaratory statement must not only show that it is in doubt as to the existence or nonexistence of some right or status, but also that there is a bona fide, actual, present, and practical need for the declaration. *State Department of Environmental Protection v. Garcia*, 99 So. 2d 539, 544-45 (Fla. 3d DCA 2011). A declaratory statement procedure is intended to enable

members of the public to definitively resolve ambiguities of law arising in the planning of their future affairs and to enable the public to secure definitive binding advice as to the applicability of agency-enforced law to a particular set of facts. *Department of Business and Professional Regulation, Div. of Pari-Mutuel Wagering v. Investment Corp. of Palm Beach*, 747 So. 2d 374, 382 (Fla. 1999).

Sunrun's Petition for Declaratory Statement

Sunrun's particular circumstances and facts

The Petition states that Sunrun has offices in Tampa, Florida, and is the nation's largest dedicated residential solar storage and energy services company with over 160,000 customers currently in 22 states and the District of Columbia. In Florida, Sunrun offers only its "cash solar product," which customers must purchase and pay for in full, upfront.¹

Sunrun plans to offer leasing as an option in Florida for potential customer-lessees who prefer not to or cannot purchase and pay upfront for residential solar systems. Sunrun states that the Florida residential solar equipment lease will consist of a 20-year lease of solar panels with an option to include batteries. According to Sunrun, the residential solar equipment lease will include the following:

- Lease payments will be fixed for a 20-year lease term. The payment amounts will be based on a negotiated rate of return and will be independent of electric generation, production rates, or any other operational variable of the leased equipment.
- Sunrun will hold legal title to the leased equipment and receive the tax credits and depreciation benefits associated with the investment.
- Sunrun will have no control over the use of the equipment other than as the beneficiary of covenants requiring the customer-lessee to maintain the equipment in good repair.
- At the lease expiration, the customer-lessee will be able to purchase the solar equipment at fair market value, renew the lease on an annual basis, or require removal of the equipment.
- Sunrun will provide customary workmanship warranties to protect the customer-lessees' home from damage during the installation process. The customer-lessees will be responsible for the costs for ongoing system maintenance through their monthly lease payment. Equipment warranties and maintenance services will be triggered by damage to or malfunction of the system, or its components, and will not be dependent upon electrical generation or system production rates.
- The customer-lessee will be responsible for the cost of non-warranty maintenance, repair and replacement.

¹Based upon staff's review of information on Sunrun's website, it currently offers potential customers in Florida two options to purchase and own a solar energy system. Customers may either pay upfront the cost of the system, including installation, or customers may finance the cost of the system, including installation, and make monthly payments. See <https://www.sunrun.com/solar-by-state/fl>.

- Once the system is installed and interconnected, the operational burden and risk of maintaining the equipment and assuring adequate solar exposure conditions will be borne by the customer-lessee.
- The customer-lessee will be responsible for the costs of applicable property taxes and insurance.
- Lease terms and conditions will be compliant with applicable IRS and accounting standards.

Amici Curiae Gulf Power and FPUC raise issues that they believe the Commission should consider when evaluating Sunrun's Petition. Their issues all relate to the single fact that Sunrun did not file a lease agreement for the Commission's review. For example, they state that the lease would provide information as to energy performance guarantees for the solar systems, whether the lessee is entitled to compensation via separate bill credits or refunds in the event that performance guarantees are not met, and information as to the nature of the obligations retained by the lessor as compared to the lessee. Gulf Power and FPUC assert that without Sunrun's proposed leasing agreement, there is ambiguity as to whether the lease program is compliant with Florida law and suggest that the Commission's Order on Declaratory Statement address such compliance issues. Amici Curiae also provide marketing materials from Sunrun's activities in other jurisdictions.²

In its response to Gulf Power and FPUC's memorandum of law, Sunrun states that its Petition clearly outlines how the lease payments will not be linked to electricity production. Sunrun points to the places in the Petition where it addresses the lease components as to guarantees, warranties, and obligations of the lessor and lessees. Sunrun reiterates that its Petition provides that the customer-lessee's payments will be fixed in amount throughout the lease term and without regard to the level of electricity production or output of lease equipment.

Also in response, Sunrun states that the Petition is consistent with Rule 26-6.065(2), F.A.C., and Order 17009, issued December 22, 1986, in Docket No. 860725-EU, *In re: Petition of Monsanto Company for a declaratory statement concerning the lease financing of a cogeneration facility (Monsanto)*, as Sunrun's customer-lessees will be solely responsible for all costs and expenses associated with the maintenance, repair, replacement and operation of the leased equipment, and the lease payments will not be dependent on electric generation.

Sunrun concludes that providing a lease agreement is not required because it is seeking the affirmative declaration from the Commission in good faith before investing any further time, effort, and expense with this proposed project. Moreover, it states that the relevant statutes and rules do not require it to provide contractual documentation before the agency may issue a declaratory statement. Sunrun notes its activities in other jurisdictions are irrelevant to its Petition in Florida.

²As mentioned in the case background, FECA filed a letter of support for Gulf Power and FPUC's motion and memorandum of law.

Statutes, Rules, and Commission Orders Applicable to Sunrun's Facts

The statute to be applied to this Petition is Section 366.02(1), F.S., which states, in pertinent part, that the Commission's jurisdiction extends to public utilities defined as:

Every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas...to or for the public within the state.

The rule that applies to this Petition is Rule 25-6.065, F.A.C., which provides, in pertinent part:

The term "customer-owned renewable generation" does not preclude the customer of record from contracting for the purchase, lease, operation, or maintenance of an on-site renewable generation system with a third-party under terms and conditions that do not include the retail purchase of electricity from the third party.

The Commission order applicable to Sunrun's Petition is Order 17009, issued December 22, 1986, in Docket No. 860725-EU, *In re: Petition of Monsanto Company for a declaratory statement concerning the lease financing of a cogeneration facility*. In *Monsanto*, the Commission declared that the Monsanto Company's on-site lease financing of its cogeneration facility did not result in a retail sale of electricity, did not cause the lessor to be deemed a public utility, and did not subject either the company or its lessor to regulation by the Commission.

Declaratory Statement Requested

Sunrun asks the Commission to declare that based on the facts presented by Sunrun:

- (1) Sunrun's residential solar equipment lease does not constitute a sale of electricity;
- (2) Offering its solar equipment lease to customers in Florida will not cause Sunrun to be deemed a public utility under Florida law; and
- (3) The residential solar equipment lease described in its petition will not subject Sunrun or Sunrun's customer-lessees to regulation by the Commission.

In its Petition, Sunrun states that the declaratory statement procedure can assist Sunrun with planning its future conduct and will help avoid costly administrative litigation by selecting the proper course of action in advance. Sunrun will only offer and market the residential solar equipment lease program in Florida if the Commission grants, in the affirmative, its request for a declaratory statement, which contains specific facts as required by Section 120.565(3) F.S. For this reason, Sunrun is a substantially affected person and has standing to bring its Petition.

Staff's Analysis of Sunrun's Petition for Declaratory Statement

Sunrun's Petition asks the Commission whether Sunrun's proposed leasing program triggers the Commission's jurisdiction under Section 366.02(1), F.S. The Commission has issued previous orders on petitions for declaratory statement that have addressed the concept of what constitutes a public utility in terms of leasing cogenerators or the use of energy created by cogenerators.

These orders stand for the general proposition that where a customer pays a flat fee to an energy generation equipment supplier for personal use and that fee is not based on electric production, there is no jurisdictional sale of electricity. The *Monsanto* declaratory statement is on point in this instance.

In *Monsanto*, the company asked the Commission for a declaratory statement to recognize that the company's use of lease-financing for equipment to increase the company's own on-site generation would not render the company subject to the Commission's jurisdiction. In its petition, the company stated that it would replace older, less efficient natural gas boilers with a combustion turbine capable of using either oil or natural gas as a fuel, and would finance this project by leasing the necessary equipment. The company stated that it would pay a fixed amount for the lease, an amount that was not tied to energy production. The lease would run for a minimum of five years, after which the company could elect to renew it, purchase the equipment, or pay for the removal of the equipment. The company stated that it would pay for the fuel and would be responsible for any operation and maintenance costs for the equipment. The Commission answered the declaratory statement in the affirmative and held that Monsanto's plan would not trigger the Commission's jurisdiction because the company's lease financing of its cogeneration facility did not result in a retail sale of electricity, did not cause the company's lessor to be deemed a public utility, and did not subject either the company or its lessor to regulation by the Commission.

Like *Monsanto*, Sunrun's fixed lease payments are independent of electric generation and production. Sunrun's residential solar equipment lease program will allow individual customers to generate their electricity for personal use. According to Sunrun's facts, the customer will be the end-user and will not engage in the retail sale of electricity.

Additionally, Sunrun's lease does not run afoul of Order No. 18302, issued in October 16, 1987, in Docket No. 8700446-EU, *In re: Petition by PW Ventures Inc., for a Declaratory Statement in Palm Beach County (PW Ventures)*. The Commission's holding in *PW Ventures* established that private companies cannot use cogenerators to engage in unregulated retail sales to avoid Commission jurisdiction.

In the *PW Ventures* order, the Commission denied PW Ventures Inc.'s Petition for Declaratory Statement for Commission approval to construct, own, and operate a cogeneration project, because the facts presented in the petition constituted a retail sale of electricity to another independent private company. In its order, the Commission explicitly held that this decision was consistent with its prior order in *Monsanto*. In *PW Ventures, Inc. v. Nichols*, 533 So. 2d. 281, 284 (1988), the Florida Supreme Court affirmed the Commission's order and opined that while limiting the sale of electric service was in the public interest, there was no prohibition on self-generation.

The facts in Sunrun's Petition are consistent with Order No. 23729, issued in November 7, 1990, in Docket No. 900699-EQ, *In re: Petition of Seminole Fertilizer Corporation for a declaratory statement concerning the financing of a cogeneration facility (Seminole)*. In *Seminole*, the Commission reiterated its holding in *Monsanto* and held that there was no retail sale of

electricity triggering the Commission's jurisdiction when a private company expanded its cogeneration equipment to lease the energy equipment to its subsidiary.

Moreover, the facts set forth in Sunrun's Petition are also consistent with Rule 25-6.065, F.A.C., which addresses interconnection and net metering of customer-owned renewable generation. Rule 25-6.065(2)(a), F.A.C., specifically states that "[t]he term 'customer-owned renewable generation' does not preclude the customer of record from contracting for the purchase, lease, operation, or maintenance of an on-site renewable generation system with a third-party under terms and conditions that do not include the retail purchase of electricity from the third person." Gulf Power and FPUC point to Order No. PSC-13-0652-DS-EQ, issued Dec. 11, 2013, in Docket No. 130235-EQ, *In re: Petition for declaratory statement regarding co-ownership of electrical co-generation facilities in Hendry County by Southwest Renewable Fuels, LLC*, at p. 6 (*Southeast*), for the proposition that Sunrun must provide a lease agreement for the Commission's review. Staff disagrees.

In *Southeast*, the Commission denied the declaratory statement petition because the companies failed to provide the business arrangement contract documentation. The Commission determined that the business arrangement between Southeast Renewable Fuels, Inc., and its Confidential Partner would give rise to the possibility of a retail transaction between unrelated entities, which could fall within the definition of a public utility and invoke the Commission's regulatory jurisdiction. However, Sunrun's facts are different from the *Southeast* set of facts. The leasing agreement described in Sunrun's Petition outlines the relevant factors to show self-generation, which is more consistent with *Monsanto* than with *Southeast*. Sunrun's Petition can be distinguished from *Southeast* because there is no issue of two unrelated entities joining together to generate electricity for joint use and for compensation. Sunrun's Petition states that lessees would be leasing solar panels for the purposes of generating electricity for their own personal use, which is in contrast to the complex business arrangement outlined in *Southeast*.

Staff believes that Sunrun's Petition contains the necessary facts to support its request for a declaratory statement, and that production of a lease agreement is unnecessary for the requested relief. The Petition describes the proposed lease agreement obligations for the lessor and lessee with respect to both warranty and repairs.³ While Gulf Power and FPUC speculate about facts that may be included in the lease agreement that are contrary to those presented in the Petition, it is well settled that declaratory statements are inherently limited to the facts upon which they are based.⁴ When the Commission issues the declaratory statement, it will be controlling only as to the facts relied upon and not as to other, different or additional facts. If Sunrun attempted to go outside the clear bounds of its Petition as suggested by Gulf Power or FPUC by, for example, providing energy performance guarantees and other obligations in the lease that were not presented in their declaratory statement set of facts, then the Commission's declaratory statement would not apply to these alternate set of facts.

³See Sunrun Petition at 2, 3, 7 and 14.

⁴Rule 28-105.003, F.A.C. (agency may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts). See also Order No. 23729, issued November 7, 1990, in Docket No. 900699-EQ, *In re: Petition of Seminole Fertilizer Corporation for a declaratory statement concerning the financing of a cogeneration facility*.

Conclusion

For the reasons set forth above, staff recommends that the Commission grant Sunrun's Petition for Declaratory Statement and declare that based on the facts presented by Sunrun: (1) Sunrun's residential solar equipment lease does not constitute a sale of electricity; (2) offering its solar equipment lease to customers in Florida will not cause Sunrun to be deemed a public utility under Florida law; and (3) the residential solar equipment lease described in its petition will not subject Sunrun or Sunrun's customer-lessees to regulation by the Commission. The Commission should also state that its declaration is limited to the facts described in Sunrun's Petition and would not apply to different, alternative facts.

Issue 2: Should this docket be closed?

Recommendation: Yes, if the Commission votes to either grant or deny the Petition for Declaratory Statement, the docket should be closed.

Staff Analysis: Whether the Commission grants or denies Sunrun's Petition, a final order will be issued. Upon issuance of the final order, the docket should be closed.