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STATE & FEDERAL ENERGY REGULATORY LAW
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October 1, 2018

VIA ELECTRONIC FILING

Ms. Carlotta S. Stauffer
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

RE: Docket No. 20180169-EQ -- Petition for Declaratory Statement by Duke Energy Florida, LLC, Regarding PURPA Solar Qualifying Facility Power Purchase Agreements

Dear Ms. Stauffer:

On behalf of Vote Solar, attached please find Vote Solar's Motion for Leave to File Amicus Curiae Memorandum. Attached to the Motion is Vote Solar's Amicus Curiae Memorandum.

If you have any questions regarding this transmittal and attachments, or require anything further in this regard, please contact me at (772) 225-5400

Sincerely,

/s/ Rich Zambo

Richard A. Zambo, P.A.
Attorney for Vote Solar

RAZ/bms

Attachment

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Declaratory Statement by Duke Energy Florida, LLC, Regarding PURPA Solar Qualifying Facility Power Purchase Agreements	Docket No. 20180169-EQ Filed: October 1, 2018

VOTE SOLAR'S MOTION FOR LEAVE TO FILE AMICUS CURIAE MEMORANDUM

Vote Solar moves the Florida Public Service Commission ("Commission") for leave to appear and participate as Amicus Curiae and to file the attached memorandum addressing Duke Energy Florida, LLC's (Duke) Petition for Declaratory Statement filed in the above-referenced docket on September 7, 2018 (Petition). As grounds therefore, Vote Solar says:

1. Vote Solar is a registered 501(c)3 nonprofit grassroots advocacy and public policy organization whose purpose is to help bring solar energy into the mainstream across the U.S. Vote Solar therefore has a substantial interest in the preservation and enforcement of Florida and Federal law applicable to non-utility owned solar energy facilities (QFs) that provide and guarantee various rights, protections and opportunities for QFs and that are the basis for Duke's Petition. Such rights and guarantees include, but are not limited to, a QFs right to sell, and the corresponding utility obligation to purchase, the QF produced electricity at no more or no less than the utility's full avoided cost.

2. Vote Solar participates in energy policy related proceedings across the country in support of pro-solar state and Federal policies and programs. In the process, Vote Solar has gained valuable and broad expertise that it's pleased to share with the Commission. Vote Solar's support and advocacy of solar energy combines its extensive technical and policy expertise along with coalition building through fact-based case analyses; the ultimate purpose being to advocate for regulatory and legislative policies conducive to increasing solar use and growth in the mainstream.

3. The following are reasons why Vote Solar feels it could lend valuable insights, analyses and expertise to the Commission as it considers the very significant, numerous and diverse issues raised by Duke in its Petition.

- **Technical Expertise:** Energy policy is a complex and dynamic arena in which Vote Solar is well versed and experience. Our technical experts help regulators and other policymakers understand policy options, make the case for strong program and regulatory design, and implement the programs that are going to most effectively support diverse and sustainable solar growth.
- **Public Engagement**: As the Commission has recognized in the past, the public supports the growth in solar energy. However, Vote Solar has learned that the policy and regulatory processes deciding the future of solar - including the instant docket - are remarkably inaccessible to the general public. Vote Solar strives to provide the public with a strong voice in the many critical policy decisions through the press, social media and grassroots mobilization.
- **Coalition Building**: Vote Solar aims to transform one of this country's most powerful industries in states nationwide. We multiply the impact of our extensive expertise, skills and resources by collaborating with local and national partners wherever possible. From our position as an independent solar advocacy group, Vote Solar plays an important role in bringing diverse interests together toward the common goal of solar growth – all solar growth whether ***Duke-owned*** or ***non-Duke-owned***.

The following concerns are further addressed in attached Amicus Curiae Memorandum:

4. Without disregarding the importance of PURPA and the FERC rules in determining the disposition of the Petition, it's critically necessary to recognize that the Florida Legislature, as set forth in Section 366.91(3), Florida Statutes, clearly established a minimum term of ten years for standard offer contracts between public utilities and QFs to encourage the development of renewable and QF generation. The Commission recently confirmed the Legislative intent in its recent order approving Duke's 2018 standard offer contract.[1] Importantly, this statutory declaration of a ten year minimum contract raises the question of whether the Commission is even authorized to grant Duke's Petition in the affirmative.

[1] In its June 19, 2018 order in Docket No. 20180073-EQ, (Order No. PSC-2018-0314-PAA-EQ) the Commission stated in pertinent part that: "The standard offer contract may also serve as a starting point for negotiation of contract terms by providing payment information to an RF/QF operator, when one or both parties desire particular contract terms other than those established in the standard offer."

5. Duke, like other Florida utilities, is required to act in a manner that is prudent and in the best interest of its rate payers[2]. Duke's Petition, would have an extreme chilling effect on the ***non-Duke owned*** solar industry thereby depriving Duke and its rate payers of a potentially less costly alternative to ***Duke-owned*** solar. Duke failed to issue market place RFPs to attract **non-Duke-owned** solar developers or operators who may have been able to equivalent but more cost-effective solar capacity at lower cost to Duke and its rate payers.

6. If granted, Duke's Petition would severely undermine and chill enforcement of the regulatory provisions set forth in Chapter 366, Florida Statutes and in associated Federal law under PURPA and the FERC's ongoing implementing regulations. Three of Florida's investor-owned electric utilities' (IOU) have commenced, with Commission approval, the addition of some 2500 megawatts of solar facilities in Florida. Duke alone is poised to add some 700 megawatts of solar facilities by 2021 under the SoBRA agreement, and according to its ten-year site plan several hundred more megawatts by 2027. Duke has recognized the unquestionable, substantial benefits of solar energy, even though there is no demonstrated need for such facilities to meet load. If granted, Duke's Petition would put ***non-Duke-owned*** solar in a position where it would be virtually impossible to acquire financing at reasonable terms.

7 In Vote Solar's view, the Commission should consider Duke's simultaneously pending petition seeking approval of its first SoBRA, in Docket No 20180133-EI, as an indispensable "companion" to Duke's Petition in this case. Both cases deal with exactly the same solar energy subject matter but tellingly, Duke is taking totally opposite and conflicting positions on the alleged risks and dangers of solar facilities to its rate payers.

8. Under Federal law, Duke's proposed ***Duke-owned*** solar facilities are avoidable, and as such the cost of those units should establish the "avoided cost" payable for ***non-Duke-owned*** solar. Duke's behavior is unreasonable at best and discriminatory at worst, it is totally at odds with Florida law as well as Federal PURPA law and FERC rules. In this regard, Duke admits very early in its Petition that Federal law prohibits utilities and state commissions from

[2] 366.06, Florida Statutes: Rates; procedure for fixing and changing.— (1) The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and prudently invested by the public utility company in such property used and useful in serving the public … (ES)

discriminating against QF[3], yet Duke seeks Commission assistance in allowing it to do just that. It may be of interest to the Commission that Duke has been pursuing a similar path in other states, most recently in North Carolina where its proposal for ***non-Duke-owned*** solar was soundly rejected.

9. Unless Duke is also willing to accept cost recovery for ***Duke-owned*** solar in maximum increments of two years[4], after which it could seek Commission approval for additional two year terms but in amounts to be determined, Duke's proposal will provide an undue competitive advantage to ***Duke-owned*** solar over ***non-Duke-owned*** solar by proposing two year contracts with great uncertainty beyond the two years. It is therefore by definition discriminatory and in direct contravention of the clear Federal mandate that utilities may "…not discriminate against cogenerators or small power producers [QFs]" regardless of whether such contracts are negotiated or a Commission approved standard offer.

10. Though not exhaustive, Vote Solar has the following concerns regarding Duke's Petition for Declaratory Statement:

(a) Duke asks the Commission to challenge well settle Florida and Federal law;
(b) Duke offers the Commission erroneous interpretations of applicable Florida and Federal law, especially PURPA and FERC rules;
(b) Duke identifies alleged risks of ***non-Duke-owned*** solar QF due to a downward trend in solar panel prices, yet ignores those same risks ***in Duke-owned*** SoBRA solar;
(c) Duke's Petition is overly vague and fails to articulate the indispensable elements necessary to sustain a petition for Declaratory Statement;
(d) Duke improperly attempts to circumvent rule 25-17.0834, F.A.C. that prescribes the procedures and sanctions for resolving disputes between QFs and Utilities;
(e) Duke ignores prohibitions under applicable laws against discrimination against ***non-Duke-owned*** solar QFs, by unlawfully favoring ***Duke-owned*** solar;

[3] Duke Petition at Page 3: As explained in Order No. 69, "[e]ach electric utility is required under section 210 [of PURPA] to offer to purchase available electric energy from cogeneration and small power production facilities which obtain qualifying status . . . [and] to pay rates which are just and reasonable to the ratepayers of the utility, in the public interest, and which do not discriminate against cogenerators or small power producers. (ES)

[4] As Duke's Petition proposes for ***non-Duke-owned*** solar QFs

(f) Duke takes the completely opposite position on alleged solar risks in this proceeding, compared to its position in its SoBRA proceedings where such risks are ignored;

(g) Duke seeks to gain Commission approval of its anti-competitive actions;

(h) Duke seeks Commission assistance in crippling the market for ***non-Duke-owned*** solar QFs, knowing that two year solar QF contracts will not be financeable; and,

(i) Duke ignores the fact that the Commission is not able to act in the affirmative on its Petition because doing so would contravene the law.

11. The Commission has determined on previous occasions that "It is within the Commission's jurisdiction to allow amicus curiae participation in Commission proceedings."[5] Vote Solar's request to participate as Amici Curiae in this proceeding is pursuant to and consistent with the Commission's prior determination regarding such participation as set forth in the referenced precedent and as cited in footnote 5, below.

12. Vote Solar requests that it be allowed to file in this Docket, the attached Amicus Curiae Memorandum that addresses, among other things, the issues identified above and other matters arising therefrom:

13. Vote Solar has contacted counsel for Duke and represents that in reply Duke advised that it takes no position on Vote Solar's motion to participate as Amicus Curiae, but reserves all rights to file a substantive response, if necessary, to any filing.

14. Copies of all notices, pleadings and other documents with respect to this Motion should be furnished to:

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[5] In re: Petition for declaratory statement regarding co-ownership of electrical cogeneration facilities in Hendry County by Southeast Renewable Fuels, LLC, Order No. PSC-13-0509-PCO-EQ, issued October 28, 2013, in Docket No. 130235-EQ at 1.

WHEREFORE, Vote Solar respectfully requests that the Commission accept for filing and consider the arguments and concerns expressed in the attached Amicus Curiae Memorandum when arriving at its conclusions regarding and its ultimate disposition of the petition filed in this proceeding.

Respectfully submitted on this 1st day of October, 2018.

/s/ ***Rich Zambo***

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Declaratory Statement by Duke Energy Florida, LLC, Regarding PURPA Solar Qualifying Facility Power Purchase Agreements	Docket No. 20180169-EQ Filed: October 1 , 2018

VOTE SOLAR'S AMICUS CURIAE MEMORANDUM

1. INTRODUCTION

Vote Solar has this day also its Motion for Leave to File Amicus Curiae Memorandum addressing issues raised and arguments made in the above captioned Petition for Declaratory (Petition) for consideration by the Commission in its deliberations. Vote Solar hopes that this Amicus Curiae Memorandum assist the Commission in disposing of Duke's Petition.

Florida and Federal law defining the rights and protections afforded PURPA Solar Qualifying Facilities (QFs), and those affecting Commission authority in such matters, are extensive and straightforward. If granted, Duke's Petition which is contrary to and at odds with well-settled law, would contravene important key legal requirements and mandates. For example, though Duke is familiar with the Federal PURPA and FERC prohibitions against discriminating against QFs (see Duke's reference to same on page 3 of the Petition) it chose to ignore those prohibitions and seeks Commission approval of contract terms that will undoubtedly be discriminatory to ***Duke-owned*** solar QFs.

Moreover, contrary to the clear threshold requirements specific to a declaratory statement, Duke fails to identify any particular "controversy" or "questions or doubts as to how the statutes, rules or orders may apply to "petitioner's particular circumstance." as required by Rule 28-105.001, F.A.C. Any controversy, questions or doubts that may be extrapolated from the flawed Petition are creations of Duke. The "controversy" is born out of Duke's disagreement with and

refusal to accept current law which Duke mistakenly seeks to change by its Petition. Expressing dissatisfaction with the purpose and intent of applicable law is an inappropriate use of a declaratory statement, especially when there are other avenues of relief available. The Petition's lack of specificity also raises many issues of concern that Vote Solar addresses further herein.

The Florida Legislature and the Commission have over the years acted in thoughtful and deliberate ways to comply with the PURPA, FERC rules and the Florida Legislature's intent of encouraging renewable energy resources – including solar QFs - in the State. In furtherance of that intent, some years ago the Commission adopted Rule 25-17.0834, F.A.C. intended specifically for the "Settlement of Disputes" between utilities and QFs. Applying to the Commission for relief under that rule is the appropriate starting point for Duke to settle any "alleged" disputes with a QF. Importantly, that rule grants the Commission the ability, if it finds Duke failed to negotiate in good faith, to: (i) Order Duke to sign a contract at full avoided cost; and, (ii) impose an appropriate penalty on Duke. By filing a declaratory statement to voice dissatisfaction with the law, and failing to provide details of its circumstances, Duke thus avoids the risk of the Commission finding that it failed to negotiate in good faith under the Rule.

What Duke truly seeks in its Petition is a change in well-settled law, something that can only be accomplished by an act of the Legislature, Congress or FERC. Florida law providing for a minimum ten year contract length-of-term is clear, as are the contract and non-discrimination provisions of Federal law. Granting Duke's Petition would be inconsistent with the determinations of the Florida Legislature in Chapter 366.91(3), F.S., and Congress under PURPA and FERC rules, thereby raising the very important question of whether Duke is asking that the Commission take action that would challenge Florida and Federal law on Duke's behalf.

For these and other reasons discussed in more detail herein because Duke's Petition is fatally flawed in substance and procedure, it must be dismissed or denied by the Commission.

II. ARGUMENT & DISCUSSION

ISSUES ARISING OUT OF FLORIDA LAW
DUKE'S PETITION CONFLICTS WITH FLORIDA LAW, IS IMPRUDENT, IS DISCRIMINATORY AND ASKS THE COMMISSION TO CHALLENGE SETTLED LAW

1. **The Florida Legislature:** Without discounting the importance of PURPA and the FERC rules (which the Petition seeks to contravene), it's necessary to recognize the key fundamental fact that Florida's Legislature, in Section 366.91(3), Florida Statutes, established a minimum term of ten years for standard offer contracts between public utilities and QFs. In spite of this clear mandate, Duke proposes a maximum term of two years with possible renegotiation at two year intervals. In its Petition, which focuses on negotiated contracts, Duke would mislead the Commission into believing that the prescribed ten year minimum term is immaterial for negotiated contracts and applies only to standard offers. Duke errs in this regard by failing to mention that standard offers were intended by the Commission to provide a starting point from which negotiations could take place. In fact, the Commission's June 19, 2018 order approving Duke's 2018 standard offer in Docket No. 20180073-EQ, confirms this.[1] The standard offer concept was adopted by the Commission specifically in an effort to encourage QF and renewable generation in Florida, an objective and aspiration that has been affirmed by the Legislature in a number of instances.[2]

[1] See Order Page 2: The standard offer contract may also serve as a starting point for negotiation of contract terms by providing payment information to an RF/QF operator, when one or both parties desire particular contract terms other than those established in the standard offer. (ES)

[2] For example: Section 366.92, F.S - Florida renewable energy policy. (1) It is the intent of the Legislature to promote the development of renewable energy; protect the economic viability of Florida's existing renewable energy facilities; diversify the types of fuel used to generate electricity in Florida; lessen Florida's dependence on natural gas and fuel oil for the production of electricity; minimize the volatility of fuel costs; encourage investment within the state; improve environmental conditions; and, at the same time, minimize the costs of power supply to electric utilities and their customers. (ES)

2. **Duke requests a Challenge to Florida law**: The Legislature clearly requires Duke to offer a minimum contract term of ten years to Florida QFs. Duke's proposal to ignore that requirement raises the question of whether Duke is improperly and knowingly asking the Commission to grant a request that would have the Commission challenge the Legislature's authority and energy policy on Duke's behalf. The Commission should proceed with caution in considering the Petition which unnecessarily puts the Commission in an awkward position of potentially challenging Florida and Federal law. Interestingly, Congress enacted PURPA to, among other things, to overcome traditional electric utilities' reluctance to purchase power from nontraditional electric generating facilities such as QFs.[3] Now, four decades after PURPAs was enacted by Congress, Duke maintains its "reluctance" to purchase power from QFs.

3. **Two year term incompatible with avoided cost:** There is an important hidden and sinister consequence to solar QFs that would result directly from limiting solar QF contracts to a two year term as Duke proposes. By omission, Duke misleads the Commission in its argument for a two year term. Specifically, avoided cost capacity payments under Commission's rules adopted in the early 1980s, are based on what is known as the "Value of Deferral"[4] (VOD). The VOD is defined by a complex and complicated mathematical formula that is not included here but which can be found in the referenced rule.[5] For purposes of this case, an absolutely critical

[3] In enacting PURPA, Congress sought to overcome traditional electric utilities' reluctance to purchase power from nontraditional electric generation facilities and to reduce the financial burden of state and federal regulation on nontraditional facilities. FERC v. Mississippi, 456 U.S. 742, 750-51 (1982). To overcome the first impediment to developing nontraditional sources of power, section 210(a) of PURPA, 16 U.S.C. § 824a-3(a), requires the FERC to prescribe "such rules as it determines necessary to encourage cogeneration and small power production," including rules requiring traditional utilities to purchase electricity from QFs. FERC v. Mississippi, 456 U.S. 742, 750 (1982). State regulatory authorities will then implement these rules. 16 U.S.C. § 824a-3(f). (ES)

[4] 25-17.0832, F.A.C. - Firm Capacity and Energy Contracts. (See section (6) of the rule).

[5] Though explanation of the complicated VOD formula is beyond the mathematical capability of the author, Staff is well versed in its complexities and its use. Issues related to the VOD are presented in Docket No. 20180152-EQ, In Re: Petition for approval to terminate qualifying facility power purchase agreement with Ridge Generating Station, L.P., by Duke Energy Florida, LLC., now pending before the Commission which may further elucidate VOD issues.

feature of the VOD formula is that a QF entering into a contract for capacity would only be paid the "full avoided cost" if the QF contracted for and performed in accordance with contract terms for a term equal to the useful life of the "avoided unit" on which the VOD calculation is based.

VOD was adopted by the Commission in the early 1980s when the QF industry was in its infancy and there were some justifiable concerns about the viability and reliability of the new resource. An important feature of the VOD is that payments start out very low[6] but escalate each year at a continually increasing throughout the contract term. The VOD pricing method appealed to, and was adopted by, the Commission primarily because the annually increasing payments provided a continually growing economic incentive for the QF to stay the course of the contract and perform for a time period that would be the useful life of the "avoided unit". By doing so, at the end of the contract term, the QF would have received "full avoided cost". By definition therefore, a VOD based contract over a term of less than the useful life of the avoided unit cannot and would not pay full avoided cost.

Duke's current avoided unit is a combustion turbine with a useful life in the range of 25 years.[7] Unless Duke is willing to pay the solar QF the entire avoided cost over two years, contracts limited to Duke's two year maximum would pay the QF only a very small fraction of actual avoided cost. Moreover, the VOD payments in those first two years under Duke's proposal, would be the lowest in the calculated VOD payment stream. This result is inconsistent with the Commission rules as well as *Section 366.051, F.S.* which directs the Commission that: "In fixing rates for power purchased by public utilities from cogenerators or small power

[6] Compare this to a utility revenue requirements streams that start at the highest level and trends lower at a gradual rate as a particular asset is depreciated.

[7] See Duke's 2018 Standard Offer Contract in FPSC's June 19, 2018 Order No. PSC-2018-0314-PAA-EQ, Docket No. 20180073-EQ. Duke's avoided unit is a combustion turbine with a typical useful life of some 25 years. Accordingly, a solar QF contract must be for no less than 25 years if a QF is to receive full avoided costs as required by law.

producers, the commission shall authorize a rate equal to the purchasing utility's full avoided costs." (ES)

As noted, the Commission is currently dealing with the VOD methodology, though in a different context, in another Duke case that's currently pending in *Docket No. 20180152-EQ, Re: Duke Energy Florida, LLC's, Petition for approval to terminate qualifying facility power purchase agreement with Ridge Generating Station, L.P.*

4. **Duke's actions not prudent:** Duke, like all Florida investor-owned utilities, is required to act prudently and in the best interests of its rate payers when investing revenues derived from rate-payers.[8] Duke's Petition, would severely impede the ***non-Duke owned*** solar QF industry in Florida by making such solar facilities non-financeable, thereby preventing the industry from helping Duke restrain or reduce its charges to its rate payers. Duke's Petition, if granted, would deprive its rate payers of potentially less costly alternatives to ***Duke-owned*** solar. Duke has failed to assess the marketplace via RFPs, or otherwise attempt to attract ***non-Duke-owned*** solar QF developers who may have been willing to provide less costly and more cost-effective ***non-Duke-owned*** solar. Additionally, Duke's proposal to require unreasonably short contract terms and prices that are just a fraction of avoided cost, would add more serious impediments to ***non-Duke-owned*** solar QFs. The Commission should consider whether or not Duke acted prudently by ignoring and actively seeking to impede competition from potentially lower cost ***non-Duke-own*** solar in favor of ***Duke-owned*** solar. If Duke could have acquired equivalent solar capacity at a lower cost, but ignored or otherwise failed to do so, its investment in ***Duke-owned*** solar may

[8] 366.06, F.S. Rates; procedure for fixing and changing.— (1) The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and prudently invested by the public utility company in such property used and useful in serving the public … (ES)

very well be an imprudent investment and a breach of the "regulatory compact" with its rate payers, as discussed in sections 8 and 9, below.

5. **Improper avenue of relief:** As noted in the introduction, Rule 25-17.0834, F.A.C. was specifically adopted by the Commission to provide an expeditious and readily available means of resolving disputes between utilities and QFs.[9] Clearly, applying to the Commission for relief under that rule was appropriate for Duke at the time it filed its Petition to settle the "so-called disputes" alleged in the Petition.[10] It is noteworthy that proceeding under that rule would have given the Commission the ability, if it finds the utility failed to negotiate in good faith, to (i) Order Duke to sign a contract at full avoided cost; and, (ii) impose an appropriate penalty on the utility. By wrongly attempting to use a declaratory statement, Duke thus improperly avoids the risks of having been found to have failed to negotiate in good faith under the Rule, thus circumventing Commission authority and intent.

6. **Declaratory statement threshold**: Duke has chosen a declaratory statement as the means by which to pursue its requested relief, but fails to meet the minimum elements of Rule 28-105.001, F.A.C.[11] Duke fails to identify the requisite controversy or questions or doubts as to

[9] 25-17.0834, F.A.C. - Settlement of Disputes in Contract Negotiations. (1) Public utilities shall negotiate in good faith for the purchase of capacity and energy from qualifying facilities and interconnection with qualifying facilities. In the event that a utility and a qualifying facility cannot agree on the rates, terms, and other conditions for the purchase of capacity and energy, either party may apply to the Commission for relief. Qualifying facilities may petition the Commission to order a utility to sign a contract for the purchase of capacity and energy which does not exceed a utility's full avoided costs as defined in Section 366.051, F.S., should the Commission find that the utility failed to negotiate in good faith. … (3) If the Commission finds that a utility has failed to negotiate or deal in good faith with qualifying facilities, or has explicitly dealt in bad faith with qualifying facilities, it shall impose an appropriate penalty on the utility (ES)

[10] As referenced previously, Duke fails to articulate any particular controversy, questions or doubts. Rather, Duke seeks to change or circumvent well-settle law on its obligation to purchase from solar QFs at avoided cost.

[11] 28-105.001, F.A.C. - Purpose and Use of Declaratory Statement. 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.

how the statutes, rules, or orders may apply to the it's particular circumstances, and that are to be resolved by the Commission. Because the applicable statutes, rules and orders are clear, and Duke indentifies no specific controversy or any particular questions or doubts, Duke attempts to have the Commission grant, through a declaratory statement, relief that can only be granted through the Florida Legislature, Congress or the FERC. Any controversy, questions or doubts that can be extrapolated from Duke's Petition are of its own making. Rather than accepting and complying with Florida law that clearly establishes a minimum contract term of ten years, Duke asks the the Commision to accept its disagreement with the law as meeting the rule's requisite threshold for controversy, questions or doubts. Duke's Petition, by failing to fully describe its "particular circumstances", asks the Commission to challenge the law, and places the Commission at risk of substantially lowering the declaratory statement threshold for by precedential effect.

7. **Improperly impacts rights of others**: Duke's Petition, if granted, will likely be used as "authority" that Dukee is legally entitled to offer only two year negotiated contracts to ***non-Duke-owned*** solar, despite the law to the contrary. The Rule is very specific in that: "A declaratory statement is not the appropriate means <u>for determining the conduct of another person</u>." The declaratory statement may not be used to determine the conduct or determine the rights of the as-yet unidentified ***non-Duke-owned*** solar QF or QFs. Because any controversy, question or doubt that may exist in this case are nothing more than Duke's refusal to accept and comply with the clear pronouncments of Section 366.91(03), F.S., Duke's Petition fails substantively and procedurally to meet the threshold for declaratory statements. Duke may avail itself of the other available and more appropriate means of resolving its concerns, including: (i) a petition to the Commission under Rule 25-17.0834, F.A.C., (specifically intended for resolution of disputes between utilities and QFs); and, more appropriately in view of the several Federal

laws that Duke challenges, (ii) by petitioning FERC for a Declaratory Order[12]; or; (iii) by a request to FERC for an enforcement action under Section 210(h)(2) of PURPA.

8. **Discouragement of investment in Florida**: Florida Statutes, especially at 366.91 and 366.92 encourage, among other things, renewable energy investment within the state. Duke's proposed two year maximum contract term will render many, if not all, ***non-Duke-owed*** solar facilities non-financeable. In glaring contrast, ***Duke-owned*** solar facilities are financed involuntarily by its rate payers through the SoBRA. Duke is therefore allowed, through the SoBRA for example, to recover of all costs incurred, plus a return on investment to a maximum of $1,650.00/kW(ac), over a "contract term"[13] equal to the depreciable or useful life of the solar facility which is typically in the range of 20-30 years. Duke is essentially guaranteed financing for ***Duke-owned*** solar by its ratepayers who have no choice in the matter - a luxury not available to ***non-Duke-owned*** solar QFs.

More egregiously, Duke seeks to impose a two year maximum contract term for ***non-Duke-owne***d solar QFs, as compared to Duke's 20-30 years contract terms, which will make financing either unavailable or available only under the most unreasonable conditions so as to render ***non-Duke-owned*** solar economically unfeasible. The inability of ***non-Duke-owned*** solar to obtain financing discourages rather than encourages solar QFs and would therefore contravene the express Legislative intent to "promote the development of renewable energy" and to "encourage investment within the state", among other things[14].

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[12] 18 C.F.R. 385.207

[13] Clearly a "contract" with Duke's rate payers as part of the "regulatory compact". It may be a unilateral contract, but a contract nonetheless. This demonstrates the magnitude of Duke's discrimination. See note 15, below.

[14] See for example; 366.91 Renewable energy. (1 The Legislature finds that it is in the public interest to promote the development of renewable energy resources in this state. Renewable energy resources have the potential to help diversify fuel types to meet Florida's growing dependency on natural gas for electric production, minimize the volatility of fuel costs, encourage investment within the state, improve environmental conditions, and make Florida a leader in new and innovative technologies. See also 366. (ES)

9. **SoBRA vs. Two Year QF Term:** Underscoring the unreasonable and discriminatory nature of Duke's Petition, one must compare the ***Duke-owned*** solar "contract term" under the regulatory compact,[15] and Duke's resulting guaranteed revenues that are rate payer financed under the SoBRA, to the maximum two year term and unknown prices as proposed by Duke for ***non-Duke-owned*** solar. The SoBRA "contract" virtually guarantees that Duke, after each ***Duke-owned*** solar facility is added to its "base rates", will recover all costs incurred up to a maximum of $1650.00/kWh(ac), plus a return on investment over the useful or depreciable life "contract term" of the ***Duke-owned*** solar which is typically in the range of 20 - 30 years.

In contrast, ***non-Duke-owned*** solar under Duke's proposal, would be limited to a maximum term of two years with the possibility that Duke would allow an additional two year extension but at an unknown price. Duke is certainly aware that price uncertainty, linked to an extremely short contract term, will be problematic to potential lenders or financial institutions, thereby preventing potential ***non-Duke-owned*** solar QFs from fairly participating in what PURPA and FERC intend to be a competitive wholesale market.

Most importantly, there's a troubling inconsistency in Duke's claimed justification for the two year limit on ***non-Duke-owned*** solar and its SoBRA petition.[16] Duke alleges that it's concerned that, because solar panel prices are in a downward trend, Duke may find that it "over-paid" in the future (in hindsight) if it entered a long-term contract today. Duke views this as an unacceptable risk to its rate payers, but omits mentioning that this risk also exists with any capital expenditure made by Duke, including the substantial ***Duke-owned*** solar expenditures that are subject to the SoBRA petition. In spite of the alleged risks, Duke shows no intention of

[15] At the heart of [utility] economic regulation is the "regulatory compact," an implied contract balancing rights and obligations of a utility and its ratepayers. (ES) *Florida Senate Committee on Communications, Energy, and Public Utilities re: Senate Bill 465 (March 27, 2017)*

[16] FPSC Docket No. 20180149 In re: Petition for limited proceeding to approve first solar base rate adjustment (SoBRA), By Duke Energy Florida, LLC.

delaying or cancelling any ***Duke-owned*** solar, although the downward panel price trends would also result in Duke's rate payers over-paying in the future.

The Commission should consider Docket No. 20180149 (Duke's first SoBRA) as an indispensable "companion" to Duke's Petition because they both deal with solar facilities and the inherent risks in solar panel downward price trends, and are on nearly identical CASR schedules. That would help illuminate the fact that Duke takes totally opposite and conflicting positions on the alleged risks and dangers of solar facilities in its SoBRA petition as compared to the Petition in this case in order to justify discriminatory treatment of solar QFs.

ISSUES ARISING OUT OF FEDERAL LAW
DUKE'S PETITION CONTRAVENES PURPA, IS ANTI-COMPETITIVE AND ASKS THE COMMISSION TO CHALLENGE SETTLED LAW

10. **Duke's Petition contravenes Federal law**: One fundamental purpose of Federal QF law, as reflected in PURPA and FERC implementing regulation, is to eliminate discrimination against QFs. Duke is fully aware of this prohibition as evidenced by it reference to the appropriate language of FERC Order 69, implementing PURPA.[17] That prohibition is codified in FERC rule at 18 CFR §292.304 - Rates for purchases, which provides at §292.304(a)(1)(ii) that rates for purchases from QFs shall not discriminate against QFs. 18 CFR §292.304(b)(5), in a provision critical to the Commission in disposing of the Petition as it relate to Duke's concern over prices estimated at the time it contracts with a solar QF, specifies that: "In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, "the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery." This

[17] Duke Petition at Page 3: "As explained in Order No. 69, "[e]ach electric utility is required under section 210 [of PURPA] to offer to purchase available electric energy from cogeneration and small power production facilities which obtain qualifying status . . . [and] to pay rates which are just and reasonable to the ratepayers of the utility, in the public interest, and which do not discriminate against cogenerators or small power producers." (ES)

rule cuts to the heart of Duke's argument of the alleged risks due to downward price trends in solar panels. FERC's rule is entirely logical in that it recognizes the reality that when a utility invests in any capacity, the price of that same capacity is also likely to increase or decrease with the passage of time. This is a risk inherent in all utility capacity investments, especially ***Duke-owned*** solar, and is an area where Duke must be cautious and prudent in the investment of rate payer-provided financing/revenues.

Duke's Petition fails to comply with Federal law in at least the following two ways: (i) by discriminating against QFs and (ii) by depriving the QF of payments over "the specific term" of the contract based on rates that are estimated at the time the contract is entered into. Importantly, FERC has recently held that "a legally enforceable obligation should be long enough to allow QFs reasonable opportunities to attract capital from potential investors."[18] Duke's Petition falls well short of and would breach this well settled Federal law under PURPA.

11. **Duke's Petition is anti-competitive:** PURPA is the only federal law that requires wholesale electric supply competition in all states, even those that have not restructured their retail electric markets. PURPA accomplishes this through its mandatory purchase obligation and by tying the rates for purchase to a utility's avoided cost.[19] In states like Florida that are regulated at the retail level, electric utilities are granted limited monopolies for purposes of serving the retail electric market. PURPA, created a competitive wholesale electric market allowing QFs and other non-utilities to participate in the wholesale supply business. Duke's Petition, if granted, would essentially extend its Florida monopoly into the wholesale arena.

[18] Given this "need for certainty with regard to return on investment," coupled with Congress' directive that the Commission [FERC] "encourage" QFs, "a legally enforceable obligation should be long enough to allow QFs reasonable opportunities to attract capital from potential investors." *Windham Solar LLC & Allco Fin. Ltd., 157 FERC ¶ 61, 134 (Nov. 22, 2016) at page 5 (ES)*

[19] "Avoided cost" means the incremental cost to an electric utility of electric energy or capacity or both which but for the purchase from the qualifying facility or qualifying facilities such utility would generate itself or purchase from another source. (ES) *18 C.F.R. § 292.101(b)(6). See also 45 Fed. Reg. 38, (ES) 12234 (Feb. 25, 1980).*

Because Duke is allowed to recover costs and earn a return on investment on property that's used and useful in serving its rate payers, there's a financial incentive for Duke to increase investment and to impede QF competition.

Duke seeks to compete with ***non-Duke-owned*** solar by using its own rules and a heavily tilted playing field favoring Duke. By virtue of the SoBRAs, Duke will enjoy a guaranteed full cost recovery plus a profit over the 20-30 year useful life "contract term" of ***Duke-owned*** solar. Limiting ***non-Duke-owned*** solar QFs to contracts to two years renders them essentially non-financeable and would be crippling to the industry. Moreover, by virtue of the Value of Deferral avoided cost pricing [20] discussed previously, ***non-Duke-owned*** QFs would receive only a very small fraction of avoided cost over a two year period. Duke, contrary to Congress' intent when adopting PURPA, is attempting to re-monopolize the supply market by eliminating competition from all ***non-Duke-owned*** QFs.[21]

12. **PURPA applies to the Commission:** By enacting PURPA, Congress sought to overcome traditional electric utilities' reluctance to purchase power from nontraditional electric generation facilities and to reduce the financial burden of state and federal regulation on such nontraditional facilities. *FERC v. Mississippi, 456 U.S. 742, 750-51, 102 S.Ct. 2126, 2132-33, 72 L.Ed.2d 532 (1982).* Congress directed FERC in PURPA Section 210 (a) "…not later than 1 year after the date of enactment of this Act, the Commission [FERC] shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration

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[20] By virtue of the mathematics behind the value of deferral avoided cost methodology as described in paragraph 8, above, (which has outlived it useful purpose), Duke's proposal to limit a solar QF to two year term contracts would mean that the QF is only paid a very small fraction of full avoided cost – i.e. the very low levels of the first two years, hardly sufficient to attract necessary financing of for the **non-Duke-owned** solar QF.

[21] Anticompetitive practices refer to a wide range of business practices in which a firm or group of firms may engage in order to restrict inter-firm competition to maintain or increase their relative market position and profits without necessarily providing goods and services at a lower cost or of higher quality. (ES) Organisation for Economic Co-operation and Development (OECD)

and small power production, … which rules require electric utilities to offer to (1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities and (2) purchase electric energy from such facilities." (ES)

Further, Section 210(f) of PURPA provides that – "(1) Beginning on or before the date one year after any rule is prescribed by the Commission [FERC] under subsection (a) or revised under such subsection, each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority." (ES) Duke asks the Commission to ignore or violate direct Federal mandates to the states (and the Commission) by allowing it to reprise the "…traditional electric utilities' reluctance to purchase power from nontraditional electric generation facilities…"[22] which PURPA was intended to put to an end.

13. **Duke asks the Commission to ignore Federal law:** In matters relating to QFs, the Commission is directed by Congress to implement and abide by the FERC regulations, which for purposes of this proceeding, include: (i) prohibiting discrimination against QFs; (ii) enforcing the right of QFs to sell electric capacity and/or energy to utilities at avoided cost pursuant to a legally enforceable obligation/contract over a specific term; (iii) guaranteeing QFs the option to select projected avoided cost payments determined on the day the contract is signed or on the day deliveries begin; and, (iv) requiring the term of such contract to be long enough to allow QFs reasonable opportunities to attract capital from potential investors.

FERC recently found that "[S]tate regulatory authorities cannot preclude a QF - even an intermittent QF - from obtaining a legally enforceable obligation with a forecasted avoided cost rate." *Windham Solar LLC and Allco Finance Limited*, 157 F.E.R.C. P61,134, at ¶ 6 (2016). Furthermore in its Order No. 69, the Commission [FERC] stated that the "[u]se of the term

[22] FERC v. Mississippi, 456 U.S. 742, 750-51, 102 S.Ct. 2126, 2132-33, 72 L.Ed.2d 532 (1982).

'legally enforceable obligation' is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility." The Commission [FERC] explained in JD Wind 1, LLC [23] that the establishment of a legally enforceable obligation turns on the QF's commitment, and not the utility's actions: "[A] QF has the option to commit itself to sell all or part of its electric output to an electric utility . . . Accordingly, a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations." (ES)

14. **Dukes avoided capacity costs are legally flawed:** Duke's Petition indicates that its avoided unit for "avoided cost" purposes is a combustion gas turbine-generator scheduled to go into service in 2027[24] - i.e. the next generating unit that Duke plans to construct. Nevertheless Duke intends, pursuant to SoBRA and its 2018 ten-year site plan, to purchase, install and generate from multiple ***Duke-owned*** solar facilities with a total capacity of 1,150 megawatts much of which is scheduled to be placed into service well before 2027 and which certainly appears "avoidable". Notably each proposed ***Duke-owned*** solar facility is 74.9 megawatts; falling just below the threshold of 75 megawatts at which Duke would be required to use a competitive solicitation (RFP) process to seek out ***non-Duke-owned*** solar. Even though Duke may be in marginal compliance with the Commission's avoided cost and bidding rules,[25] the Commission should question whether Duke is acting prudently by investing heavily in ***Duke-owned*** solar, while ignoring potentially much lower cost ***non-Duke-owned*** solar.

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[23] JD Wind 1, LLC, 129 FERC ¶ 61,148, at P 25 (2009), reh'g denied, 130 FERC ¶ 61,127 (2010)

[24] Order PSC-2018-0314-PAA-EQ, Docket No. 20180073-EQ, Duke's alleged avoided unit is a combustion turbine with an in-service date many years later than Duke's proposed SoBRA solar facilities

[25] FPSC avoided cost and bidding rules were adopted several decades ago. The utility and QFs industries have both changed substantially over that time. It may be time for the Commission to revisit the subject. Too much is now improperly exempted from avoided unit designation: e.g. - nuclear and any facilities of less than 75 megawatts.

The avoided cost assumptions made by Duke fly in the face of the clear, unassailable definition provided by PURPA and FERC's rule. Under Federal law, "'Avoided cost' means the incremental cost to an electric utility of electric energy or capacity or both which but for the purchase from the qualifying facility or qualifying facilities such utility would generate itself or purchase from another source." (ES) *Federal Register I Vol. 45. No. 38 I Monday. February 25. 1980 I Rules and Regulation, 12234, 18 C.F.R. § 292.101(b)(6).* Because Duke certainly intends to "generate" electric energy and capacity or both "itself" via its ***Duke-owned*** solar, compliance with Federal law requires Duke to use its proposed ***Duke-owned*** solar facilities as avoided units for purposes of calculating its true avoided cost.

15. **Similar Duke activities in other states:** Florida is one of a number of states in which Duke has sought to gain approval of very short-term and much less than avoided cost contracts. Recently, Duke's efforts for approval of a two year maximum contract for QFs were rejected [26] by the North Carolina Utilities Commission (NCUC). The NCUC found, based on evidence on the record, that*:* "Based upon the foregoing and the entire record herein, the Commission finds that Duke's proposal to adjust avoided energy rates every two years should not be adopted in this case. … Therefore, the Commission will require Duke to file revised avoided cost rate schedules, power purchase agreements, and terms and conditions, reflective of this conclusion, as part of the compliance filing required by this order."

Vote Solar understands that Duke's proposed short-term contracts for QF have also been rejected in Indiana and one or more other states.

[26] North Carolina Utilities Commission, DOCKET NO. E-100, SUB 148. In Re: Biennial Determination of Avoided Cost Rates for Electric Utility Purchases from Qualifying Facilities – October 11, 2017. ORDER ESTABLISHING STANDARD RATES AND CONTRACT TERMS FOR QUALIFYING FACILITIES

III. SUMMARY & CONCLUSION

DUKE'S PETITION IS FATALLY FLAWED, IS IN CONFLICT WITH SETTLED LAW, AND SEEKS COMMISSION ASSISTANCE IN BREACHING FLORIDA & FEDERAL LAW

For the many reasons identified, discussed and argued herein, Vote Solar urges the Commission to summarily DISMISS or very least, DENY Duke's Petition as being fatally flawed. The legal, procedural, substantive and factual shortcomings of the Petition can lead to no other conclusion or action by the Commission. Vote Solar is extremely concerned regarding the issues listed below. Though not exhaustive, they highlight numerous shortfalls.

(a) Duke asks the Commission to challenge well settle Florida and Federal laws;

(b) Duke offers the Commission an erroneous interpretation of applicable Florida and Federal law especially PURPA and FERC rules;

(b) Duke identifies alleged risks/dangers of ***non-Duke-owned*** solar QF facilities due to a downward trend in solar panel prices but ignores the same risks in SoBRA facilities;

(c) Duke's Petition is overly vague and fails to articulate the indispensable elements necessary to sustain a petition for Declaratory Statement;

(d) Duke improperly attempts to circumvent rule 25-17.0834, F.A.C. prescribing the procedures and sanctions for resolving disputes between QFs and Utilities;

(e) Duke ignores prohibitions under applicable laws against discriminatory practices against ***non-Duke-owned*** solar QFs by favoring ***Duke-owned*** solar;

(f) Duke takes totally opposite positions on alleged solar QF risks in this proceeding compared to its position in its SoBRA proceedings where such risks are ignored;

(g) Duke attempts to enlist Commission assistance in it anti-competitive behavior that is designed to restrict and restrain ***non-Duke-owned*** solar QFs;

(h) Duke seeks Commission assistance in destroying the market for ***non-Duke-owned*** solar QFs, knowing that two year solar QF contracts will not be financeable; and,

(i) Duke ignores the fact that the Commission is not able to act in the affirmative on its Petition because doing so would contravene the law.

WHEREFORE, Vote Solar urges the Commission to dismiss or summarily deny Duke's petitions for the reasons presented in this Amicus Memorandum. Taking action on the Petition could result in unnecessary litigation and in the meantime potentially halt development and the associated investment by non-Duke-owned solar QFs in Florida.

Respectfully submitted on this 1st day of October, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on this 1st day of October, 2018, to the following:

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