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 8, 2018

SOUTHERN ALLIANCE FOR CLEAN ENERGY'S RESPONSE IN OPPOSTION TO DUKE ENERGY FLORIDA'S REQUEST FOR DECLARATORY STATEMENT

Southern Alliance for Clean Energy ("SACE"), by and through its undersigned attorney, hereby files its Response in Opposition to Duke Energy Florida, LLC's ("DEF") Request for Declaratory Statement.

I. INTRODUCTION

On September 7, 2018, DEF filed a *Petition for Declaratory Statement regarding PURPA solar qualifying facility power purchase agreements* with the Florida Public Service Commission ("Commission"). The petition asks the Commission to issue the statement that: " A negotiated term of two (2) years is an appropriate contract length for a 100 percent levelized or fixed price in a PURPA solar QF power purchase agreement."[1] A request for a declaratory statement allows a substantially affected person to get an agency opinion of an applicable statute or rule as it relates to the petitioners particular set of circumstances.[2] SACE has filed a motion to intervene as a party[3] in this docket and files this Response in Opposition to inform and assist the Commission in disposing of DEF's petition.

[1] Duke Energy Florida, *Duke Energy Florida, LLC Petition for declaratory statement regarding PURPA solar qualifying facility power purchase agreements*, Docket No. 20180169-EQ September 7, 2018, p. 2.
[2] §120.575(1), Fla. Stat.
[3] Southern Alliance for Clean Energy, *Amended Motion to Intervene*, Docket No. 2018169, October 1, 2018.

The Public Utility and Regulatory Policies Act ("PURPA") was enacted in 1978 with a goal of encouraging increased energy independence in the United States by requiring, in part, states to establish the prices retail utilities must pay for power from third-party-owned renewable energy projects, known as qualifying facilities ("QF") – thus giving small renewable energy developers a market for their power.[4] The price is set at the utility's full avoided cost.[5] PURPA plays a critical role in advancing cost effective utility-scale solar development.[6] While the Federal Energy Regulatory Commission ("FERC") determines QF status, state utility commissions, such as this Commission, have jurisdiction over the terms of QF contracts, power purchase agreements ("PPAs"), including how utilities calculate the avoided cost rate at which QFs are paid for purchased power.

DEF's requested declaratory statement, if granted by the Commission, would violate both federal PURPA laws and regulations, and state law. The solar parties have submitted legal memoranda in this docket extensively identifying the violations of federal and state law that would flow from DEF's request.[7] SACE generally supports the legal arguments of the solar parties, and specifically supports arguments that a 2-year fixed price term would be so short a length that, it would cripple a QFs ability to attract capital from potential investors; and that the appropriate

[4] 16 U.S.C. § 796(17)(A). Pursuant to PURPA, two types of facilities are eligible for QF status: small power production and cogeneration facilities. A small power production facility is a generating facility with capacity of 80 MW or less whose primary energy source is renewable energy, such as hydroelectric, wind, solar, biomass, waste or geothermal resources.

[5] 16 U.S.C. § 824a-3(d) & § Section 366.051, Fla. Stat. (Avoided cost is defined in PURPA as "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.").

[6] Southern Alliance for Clean Energy, *SACE Comments to the Florida Public Service Commission: Solar Energy in Florida,* June 23, 2015, pp. 8-20 at: http://www.psc.state.fl.us/Files/PDF/Utilities/Electricgas/SolarEnergy//Southern%20Alliance%20for%20Clean%20Energy.pdf

[7] Solar Energy Industries Association, Response in Opposition, October 2, 2018; Ecoplexus, Inc., Response in Opposition, October 2, 2018; Vote Solar's Amicus Curiae Memorandum, October 1, 2018.

energy capacity rate and other attributes should be based on all planned utility generation units, including DEF self-build solar projects.

In addition to the substantive flaws, DEF's request for declaratory statement is procedurally flawed because DEF asks for policy of general applicability which can only be provided through rulemaking, DEF's petition ignores existing Commission rules regarding negotiation in good faith, and DEF seeks to impose its own interpretation of the "circumstances" as an end run around the Commission's dispute resolution process.

II. SUMMARY OF ARGUMENT

DEF's request for declaratory statement must be denied by this Commission because it is procedurally flawed and would substantively violate federal and state law. The first procedural flaw is that while DEF's request is styled as a declaratory statement request, it is in substance a request for an agency policy statement of general applicability and must utilize state rulemaking procedure under Section 120.54, F.S.

Secondly, DEF's request would lead this Commission to ignore its current rules that provide that PPA terms, including contract length and price terms for capacity and energy, between QF owners and utilities must be "negotiated" and done so in "good faith"[8] DEF's use of a declaratory statement to cement a contract price term and length before a negotiation has been initiated violates the concept of an arms-length transaction, with no preconditions, in fair a contract negotiation.

[8] R. 25-17.0834, F.A.C. ("Public utilities shall negotiate in good faith for the purchase of capacity and energy from qualifying facilities …."); *See also* Order No PSC-2018-0314-PAA-EQ ("The standard offer contract may also serve as a starting point for 'negotiation' of contract terms….").

Lastly, DEF's request for declaratory statement is at its essence a contract negotiation dispute. Commission Rule 25-17.0834, F.A.C. contemplates that disputes of the type must be resolved through the Commission's fact-finding dispute resolution process.

Beyond the procedural flaws, DEF's request, if granted, will violate PURPA and Florida statutes intended to implement it. Rather than restate the solar parties' arguments, SACE's Response will focus on the procedural flaws of DEF's petition, and why a resolution of the dispute implicated in DEF's request can only be resolved through significant fact finding by the Commission.

III. ARGUMENT

A. The Petition Should Be Denied Because the Requested Statement Would Announce a Broad Agency Policy Statement, Akin to a Rule

DEF's request should be denied because a Commission statement on the issues raised in DEF's petition would be a broad policy statement that can only be provided through rulemaking. The facts and questions are instead generally applicable to a class of QFs and other similarly situated investor-owned utilities ("IOUs"). DEF's request, if granted, will set forth a new interpretation of law, and would constitute a rule.

Pursuant to Section 120.565(1), Florida Statutes, "[a]ny 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."

In turn, Rule 28-105.001, F.A.C., provides that:

> [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.

An agency may not utilize a declaratory statement to adopt a broad policy or interpretation, or to repudiate an agency rule, either of which would require, instead, that the agency use the rulemaking procedures set forth in Ch. 120. *Exxon Mobil Oil Corp. v. State, Dep't of Agriculture & Consumer Servs*., 50 So. 3d 755, 757 (Fla. 1st DCA 2010) *Florida Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering v. Investment Corp. of Palm Beach,* 747 So. 2d 374, 375 (Fla. 1999); *Chiles v. Department of State, Division of Elections*, 711 So. 2d 151, 155 (Fla. 1st DCA 1998); *Florida Optometric Association; Agency for Health Care Administration v. Wingo,* 697 So.2d 1231 (Fla. 1st DCA 1997); *Tampa Elec. Co. v. Florida Dep't. of Community Affairs,* 654 So.2d 998 (Fla. 1st DCA 1995); *Regal Kitchens, Inc. v. Florida Dep't of Revenue,* 641 So.2d 158 (Fla. 1st DCA 1994); *Tampa Electric Company v. Florida Department of Community Affairs,* 654 So. 2d 998, 999 (Fla. 1st DCA 1995) (holding that a declaratory statement which sets forth "broad agency policy ... that appl[ies] to an entire class of persons" is impermissibly broad.).

A declaratory statement may not be issued that establishes a broad agency policy or provides statutory or rule interpretations that apply to an entire class of persons. If an agency is presented with a petition for a declaratory statement requiring a response that amounts to a rule, the agency should decline to issue the statement and initiate rulemaking. *Investment Corp.,* 747 So. 2d at 375.

DEF asks the Commission to state that "[a] negotiated term of two (2) years is an appropriate contract length for a 100 percent levelized or fixed price in a PURPA solar QF power purchase agreement." This is asking for a rule.

An agency "rule" is:

> each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. §120.52 (16), Fla. Stat.

Chiles held that a declaratory statement may "not be employed in place of a rule to require compliance with general agency policy"[9] and that "[i] f an agency is presented with a petition for a declaratory statement requiring a response that amounts to a rule, the agency should decline to issue the statement and initiate rulemaking." 711 So. 2d at 155. (emphasis added); *Accord*, *Florida Optometric Ass'n v. Department of Professional Regulation, Bd. of Opticianry*, 567 So. 2d 928, 937 (Fla. 1st D.C.A. 1990).

In *Lennar Homes, Inc. v. Department of Business & Professional Regulation,* 888 So.2d 50 (Fla. 1st DCA 2004), the First District held that DPR "was without authority to interpret and declare void Lennar's contractual arbitration provision in a declaratory statement proceeding under section 120.565 and to announce a general policy of far-reaching applicability against arbitration provisions in a declaratory statement proceeding." 888 So2d. at 51. Lennar had filed a petition for declaratory statement asking the agency whether the statutes prohibited a mandatory and binding arbitration provisions in purchase agreements between purchasers and condominium developers. The agency issued a statement declaring that such arbitrations provisions are prohibited by the statute and was void as against public policy. *Id.*

On appeal, the Court ruled that the authority of the Division to issue declaratory statements is limited by section 120.565 to a determination "as to the applicability of a statutory provision ...

[9] *Citing Regal Kitchens Inc. v. Fla. Dep't. of Revenue*, 641 So.2d 158 (Fla. 1st DCA 1994) and *Tampa Electric Co. v. Fla. Dep't. of Community Affairs*, 654 So2d. (Fla. 1st DCA 1995)

to the petitioner's particular set of circumstances." *Id.* The Court found that, the agency's declaratory statement "not only determined the applicability of several … statutes to Lennar's particular purchase contract, it announced a broad agency policy that prohibited the use of arbitration provisions in condominium purchase and sale agreements." *Id.* The agency, wrote the Court, "cannot use the declaratory statement proceeding as a vehicle to announce a broad policy against arbitration." Id. (citing *Tampa Electric Company v. Florida Department of Community Affairs,* 654 So. 2d 998, 999 (Fla. 1st DCA 1995); *Accord Florida Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering v. Investment Corp. of Palm Beach,* 747 So. 2d 374, 375 (Fla.1999).

In this instance, the requested statement would announce a broad agency policy, a reinterpretation of rules that is not readily apparent from a literal reading of the Commission's rules. As discussed more fully below, Commission rules require that the utility negotiate with QFs in good faith. DEF asks, in effect to replace that requirement with a truncated non-negotiated process where price and terms are non-negotiable.

In addition to reinterpreting or even revising Commission rules, this new broad policy statement would apply to a class of persons. The intent behind and effect of DEF's request is found in DEF's petition where it states the requested declaratory statement is needed to "implement standards to ensure that the economic and regulatory circumstances specific to Florida are appropriately addressed."[10] This statement indicates that DEF would apply the declaratory statement broadly as a standard to all solar QFs. Throughout its brief, DEF discusses QFs as if

[10] Duke Energy Florida, *Duke Energy Florida, LLC Petition for declaratory statement regarding PURPA solar qualifying facility power purchase agreements*, Docket No. 20180169-EQ September 7, 2018, p. 9.; *See also* Ecoplexus, Inc. argument in its Response in Opposition, pp. 12-13; and SEIA Response in Opposition, at 5.

they are a class in the context of alleged future economic and reliability challenges.[11] The intent behind, and the effect of, DEF's request would therefore apply to all QFs wishing to negotiate a PPA with DEF. This is a broad agency statement to an entire class of persons.

Moreover, another class of person to whom the statement would apply are the state's IOUs. DEF has not pled circumstances that are particular to DEF that are not also particular to the class of IOUs. In its petition, DEF states that evolving economic, system operations, and regulatory circumstances have primarily forced the need for the statement. Yet, other IOUs face these same evolving economic, regulatory, and operational circumstances. In its petition, DEF advocates for interpretation of rules to which it is subject to, more fully described below. Yet, the state's other IOUs are subject to the same Commission rules regarding solar QF PPAs. All IOUs are presumably solicited by QF developers as is DEF. Other IOUs presumably are dealing with solar QF developers consistent with current commission rules – that require utilities to negotiate in good faith for the purchase of capacity and energy from qualifying facilities.[12] DEF aims to change that standard. Therefore, the statement if granted would effectively be a rule change for another class of persons, all state's IOUs, and not limited to DEF's alleged "particular" circumstances. Hence, DEF's request, if granted, would constitute a rule, i.e., a statement of general applicability that implements, interprets, or prescribes law or policy. As such the Commission should deny the petition.

B. The Petition Should Be Denied Because is Contrary to Commission Precedent and Violates Commission Rules

1. Commission rule require that PPAs be negotiated in good faith

[11] *Id.* at 4, 6, 9, 10, 11, 12, 17, 18 – 21.
[12] *See* argument below.

DEF's request for declaratory judgment would, if granted by this Commission, provide DEF with the authority to set the contract term and price in a PPA negotiation before the parties even "sit at the table" to begin negotiation. DEF's request represents not only an inappropriate request for a broad agency policy, discussed above, but would establish a contract condition that would provide DEF the upper hand in PPA negotiations with solar QFs. If granted, the parties would not have equal bargaining power. DEF could force QF's to accept 2-year fixed price terms, which will cripple a QF's ability to attract capital from potential investors; which in turn would force it to accept a lower variable As-Available energy only rate, or force it out of the Florida market altogether. This violates the concept of an arms-length transaction implicit in the term "negotiation," where both sides are presumed to have equal bargaining power.[13]

DEF's request for authority to set the contract term and price also violates Commission rules. For instance, R. 25-17.0834, F.A.C. states in pertinent part that "[p]ublic utilities shall negotiate in good faith for the purchase of capacity and energy from qualifying facilities and interconnection with qualifying facilities." (emphasis added).[14] For As-Available energy contracts, R. R. 25-17.0825(1)(b), F.A.C. states that "[t]hose qualifying facilities wishing to negotiate a contract for the sale of firm capacity and energy with terms different from those in a utility's standard offer contract may do so pursuant to subsection 25-17.0832(2), F.A.C.") (emphasis added). Rule 25-17.0832(2) states that the utilities are to negotiate in good faith for the purchase of power from QFs. It is hard to reconcile the requirement for good faith negotiation with

[13] Black's Law Dictionary ("Parties are said to deal "at arm's length" when each stands upon the strict letter of his rights, and conducts the business in a formal manner, without trusting to the other's fairness or integrity, and without being subject to the other's control or overmastering influence."), at: https://thelawdictionary.org/at-arms-length/

[14] R. 25-17.0825(1)(b), FAC ("Those qualifying facilities wishing to negotiate a contract for the sale of firm capacity and energy with terms different from those in a utility's standard offer contract may do so pursuant to subsection 25-17.0832(2), F.A.C.") (emphasis added).

DEF's request for unequal bargaining power that will allow it to largely dictate negotiations. DEF should not be allowed to use the Section 120.575, F.S. declaratory statement process to give it unfair bargaining power in negotiations over solar QF PPAs. DEF's request, therefore, must be denied.

2. Commission rule requires that contract disputes be addressed through a dispute resolution process that require presentation of all facts

It is clearly evident from the facts presented by DEF in its request for declaratory statement, and subsequent response by Ecoplexus, Inc. ("Ecoplexus") that at its heart, DEF's petition is about a contract negotiation dispute between DEF and Ecoplexus and, likely, one or more additional developers of solar QFs. While a request for a declaratory statement provides that it applies to the petitioner's "particular set of circumstances,"[15] it appears that the circumstances themselves cannot be agreed upon by the parties.

The circumstances in dispute between DEF and Ecoplexus include the appropriate avoided capacity rate criteria and the price of power Ecoplexus can and has committed offer DEF. DEF states that it has concerns with QF contracts over the long-term risk of overpayments exceeding avoided cost,[16] while Ecoplexus, an established solar provider, states in its motion for intervention that it has "committed to sell DEF solar power, including all capacity, energy and other attributes . . . at costs less than DEF's proposed cost for such power."[17] Ecoplexus appropriately argues that avoided cost rate criteria for solar QF should be all avoidable generation units – including DEF's self-build solar generation. Yet, DEF states the criteria is its planned 226 MW natural gas-fueled

[15] §120.575(1), Fla. Stat.
[16] Duke Energy Florida, *Duke Energy Florida, LLC Petition for declaratory statement regarding PURPA solar qualifying facility power purchase agreements*, Docket No. 20180169-EQ September 7, 2018, p. 18.
[17] Ecoplexus, Inc., *Motion to Intervene of Ecoplexus, Inc.,* Docket No. 20180169-EQ September 24, 2018, p.2.

combustion turbine facility.[18] These inconsistent interpretations by DEF and Ecoplexus appear to be at odds, or at least, suggest that DEF may not have provided all the particular circumstances necessary for the Commission to render a well-informed statement.

This is surely the reasons that the Commission established a dispute resolution process where factual and legal disputes can be resolved.[19]

> 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. (emphais added)
> Rule 25-17.0834(1), F.A.C.

The Commission's dispute resolution rule allows either party to apply for Commission relief regarding any disagreement on rates, terms, and other conditions in a proposed PPA in a way that allows both parties the ability to provide a factual record on which the Commission may make an informed decision. The declaratory statement is premised on the particular set of facts as outlined by DEF in its petition. The Commission will not determine disputed issues in this case – even though such disputed facts, and law, exist. Therefore, DEF's request for declaratory statement is more appropriate for the Commission's dispute resolution process, and must be denied.

IV. RESOLUTION OF ISSUES IMPLICATED IN DEF's REQEST REQUIRES SIGNIFICANT FACT FINDING

DEF's petition highlights certain inescapable considerations: 1) DEF has not demonstrated an understanding of the solar market; 2) DEF's integrated resource planning ("IRP") process isn't

[18] Duke Energy Florida, *Duke Energy Florida, LLC Petition for declaratory statement regarding PURPA solar qualifying facility power purchase agreements*, Docket No. 20180169-EQ September 7, 2018, p. 4.
[19] *See also* Vote Solar Amicus Curiae Brief at 2.

studying solar energy resources properly; and 3) the issues implicated in DEF's petition depend on factual findings that are likely to change over time.

A. DEF has not demonstrated an understanding of the solar market

DEF in 2015 filed comments[20] with this Commission stating the following in reference to solar power, including utility scale solar.

> New policies and programs that would be most effective at promoting more solar energy systems will need additional subsidies to incent solar installations beyond current levels and solar adoption rates. (emphasis added)

Yet in its petition, DEF states that "[b]y Q2-2016, there were almost 1,600 MW of solar projects in all of DEF's interconnection queues …."[21] Clearly, DEF did not understand the solar market just 3 years ago, stating that solar "subsidies" would be needed to incent solar development. But without these so-called subsidies, solar was already so cost effective that just one year later, DEF had 1,600 MW of solar projects in its PPA queue.

DEF has clearly changed its perspective since 2015: DEF believed solar was so cost-effective in 2017 that its rate settlement agreement provided for a Solar Base Rate Adjustment ("SOBRA") mechanism for rate recovery of up to 700 MW of cost-effective solar. Based on DEF's previous statement on solar power needing subsidies, to the adoption of the SOBRA, to the issues implicated in this docket, DEF clearly did not foresee or adequately study solar as a resource in its IRP.

In this docket, it advocates for 2 year fixed price contract for solar QF PPAs. This proposal does not adequately consider the QF solar PPA's ability to provide power and cost lower than such

[20] DEF, Enhancing the Development of Solar Technologies in Florida, June 2015 Flortidhttp://www.psc.state.fl.us/Files/PDF/Utilities/Electricgas/SolarEnergy//Duke%20Energy%20Florida.pdf

[21] Duke Energy Florida, *Duke Energy Florida, LLC Petition for declaratory statement regarding PURPA solar qualifying facility power purchase agreements*, Docket No. 20180169-EQ September 7, 2018, p. 6.

power from DEF's self-build solar projects.[22] DEF's petition seeks the Commission's authority to shut out lower-cost solar options, as a 2 year contract would not provide a reasonable opportunity for QFs to attract capital from potential investors.[23] DEF states that FERC does not require that a PURPA contract be financeable.[24] Yet, Duke Energy Renewables, an independent power producer affiliated with Duke Energy, would never sign a 2-year PPA with a utility.

The business practices of Duke Energy Renewables have been confirmed by Duke Energy's executive vice president Lloyd M. Yates, during a North Carolina Utilities Commission hearing on a determination of avoided cost rates for electric utility purchases from QFs. On cross-examination, Witness Yates confirmed that Duke Energy Renewables, enters into long-term contracts with terms of 20 years. [25] He stated that these facilities rely on long-term contracts in order to establish "long-term revenue streams." [26] Witness Yates also indicated that Duke Energy Renewables borrows project development capital from the Duke holding company rather than from financial institutions and that Duke Energy Renewables does not provide project sponsor equity because that equity is provided at the holding company level.[27] DEF should allow QFs the same type of long-term contracts and long-term revenue streams that Duke Energy Renewables requires for its own projects.

DEF's obligation to offer reasonable contract terms do not necessarily mean that contracts will be entered into. But its past statements and actions indicate that its interest in supporting solar

[22] *See* Ecoplexus Response in Opposition at 2.
[23] *See* Vote Solar Amicus Curiae Brief at 9.
[24] DEF's Response to SACE's motion to intervene at 3.
[25] North Carolina Utilities Commission, *In the Matter of: Biennial Determination of Avoided Cost Rates for Electric Utility Purchases from Qualifying Facilities – 2016*; Docket No. E-100, SUB 148, Hearing Transcript, at Tr. Vol. II, p.48, ln 8-15.; *See also* Post Hearing Brief of Southern Alliance for Clean Energy, Docket No. E-100, SUB 148.
[26] *Id*. at Tr. Vol. II, p. 44, ln 8-10.
[27] *Id.* at Tr. Vol. II, p. 40, ln 1-15.

is constrained to either offering subsidies or controlling solar development through self-build projects. It has shown no evidence of a good-faith effort to consider other development pathways that thrive in other states. In order to be fully informed in its oversight responsibilities, the Commission needs to develop a record regarding what are the necessary elements of contract terms and what terms are merely desirable or advantageous from the utility or solar developer perspective.

B. DEF is still not studying solar energy resources properly

Florida's current planning requirements for solar development are not serving DEF, the Commission, or QFs well. The process includes fundamentally three steps under the Commission's purview: 1) the Ten-Year Site Plan ("TYSP")[28]; 2) the Request for Proposal ("RFP") process[29]; and 3) the Site Certification process.[30] As discussed below, solar power projects under 75 MW are effectively exempt from these steps, except for a requirement to revise the TYSP to include those projects. For any planned generating unit 75 MW or greater, the utility initiates regulatory oversight when the unit is identified as the utility's next planned generating unit in a TYSP revision. Until that point, any discussion of a planned generating unit is merely informational and does not appear to have any regulatory significance. Identification of the next planned generating unit is important for a number of reasons, including the practice of basing the avoided capacity rate in standard offer contracts on the next unit (and not, for example, on the opportunity to defer subsequent units or change the type of the next unit). Even more important is that Commission rules identify this unit as the benchmark for the alternative scenario analysis.

The only requirement for a Florida utility to consider alternatives to the next planned

[28] §186.801, Fla. Stat.
[29] R. 25-22.082, F.A.C.
[30] §403.501, Fla. Stat., et. seq.

generating unit is the Commission's rule requiring a RFP process for projects 75 MW or greater.[31] According to that rule, "The use of a RFP process is an appropriate means to ensure that a public utility's selection of a proposed generation addition is the most cost-effective alternative available."[32] The Commission's rules do not provide for any public review of the alternative scenario analysis.

Yet DEF, along with Tampa Electric and FPL, are all pursing development of multiple solar projects sized at just under the 75 MW threshold. Cumulatively, these projects would represent the "next planned generating unit" but by the artifice of sizing them below 75 MW, the utilities undercut the intent of the Commission's rules. DEF, for instance, has sized its Hamilton solar facility at 74.9 MW. As a result, the avoided capacity rate in standard offer contracts is not based on the cost of the SOBRA solar projects. Neither is the RFP process triggered. This gap in the rules is the source of significant point of contention between DEF and Ecoplexus. DEF cites to its most recently approved standard offer contract in identifying a 226 MW turbine as it next planed generating unit.[33] Yet, Ecoplexus cites to the Commission rule 25-17.0832(2) for support that the utilities are to negotiate with the QF for <u>all</u> planned utility generating units.[34]

Florida's utilities do undertake a more comprehensive analysis of resource needs beyond that in the RFP, utilizing what is *presumed* to be a thorough IRP analysis including consideration of resource alternatives through a computer model optimization process. However, this process is

[31] R. 25-22.082, F.A.C. The use of the "next planned generating unit" as the sole benchmark for "price and non-price attributes" in the RFP rule is itself problematic. By focusing on a unit, rather than the utility's needs and opportunities to reduce power costs to customers, the rule effectively excludes any requirement for the utility to consider alternative configurations of technology that might be more cost-effective in the long-term.

[33] Duke Energy Florida, *Duke Energy Florida, LLC Petition for declaratory statement regarding PURPA solar qualifying facility power purchase agreements*, Docket No. 20180169-EQ September 7, 2018, p. 4.
[34] Ecoplexus, Inc.'s Response in Opposition, at 18

not available to the public for review during either the TYSP or the RFP process. It is only when the results of the RFP process are made known,[35] and a request for a need determination is made, that the utility's assumptions and methods for considering alternatives can be evaluated by interested parties and the PSC.

This review is ill timed. By the time that a utility files a request for a need determination, the utility has likely waited until what it views as the last possible moment for building the power plant. At this point, the utility has constrained its options due to schedule and potentially missed opportunities.

More relevant to the current issue is that there is no opportunity to review the IRP analysis, upon which DEF relies when determining the avoided cost of capacity. Since Florida's utilities currently base their avoided cost of capacity on their unreviewable determination of the next planned generation unit over 75 MW in capacity, there is no point of entry for interested parties to contest that determination or to point out that the cumulative impact of multiple solar projects sized under 75 MW could be more cost-effectively procured from some other source, or using some other method. In order to be fully informed in its oversight responsibilities, the Commission needs to develop a record regarding how the avoided cost of capacity was determined and whether it is an appropriate benchmark in contract negotiations.

Furthermore, conducting a more extensive review of DEF's IRP could include a risk-adjusted determination of the avoided cost of energy as a basis for establishing a levelized value. Together with a resource-specific avoided cost of capacity, such an evidentiary record would more

[35] A utility's IRP analysis may also be obtained during the goal setting proceeding under the Florida Energy Efficiency and Conservation Act (FEECA), which occurs every five years. However, utility-scale solar generation is not within the scope of that proceeding.

effectively support the terms and prices in a standard offer or negotiated PURPA QF contract.

The lack of such a process means that Florida customers are likely shouldering unnecessary costs from a less than optimal resource planning process. Yet, in spite of the regulatory gaps cited above, DEF insists on arguing that this process works[36] even though it is now in front of this Commission asking for a declaratory statement on issues which stem from its failure to adequately study and plan solar resources.

Additionally, DEF hasn't adapted its planning process to cost-effectively identify the ideal quantity of new solar generation – the 700 MW of solar generation target in its SOBRA provision may not even be great enough to achieve an optimal amount of cost-effective generation. DEF states that the following in its response to SACE motion to intervene on page 2.

> The 700 MW of DEF-owned solar included in the 2017 Settlement Agreement cannot be avoided or deferred under PURPA, PURPA was never intended to replace other renewables, and is separate and apart from the issue presented in this docket.

It's quite telling that DEF considers two distinct types of solar resources as it makes resource planning decisions – QF solar and DEF self-build solar. While there is no significant operational difference between the two, it appears that the QF solar can provide the same power more cost-effectively. These are the types of resource planning mistakes that a robust IRP process can avoid. Unfortunately, the current state resource planning process is, in practice, entirely disconnected from the issues raised in this proceeding and leaves the QFs and this Commission uninformed on critical facts.

C. The issues implicated in DEF's petition are based on factual findings that are likely to change over time

[36] DEF's Response to SACE's motion to intervene, October 5, 2018, p. 3.

As discussed above, contract negotiation disputes such as the one that exists between DEF and Ecoplexus (and presumably other solar developers) are provided for in the Commission's rules, and the parties should bring relevant and particular circumstances before the Commission for dispute resolution pursuant to Rule 25-17.0834(1), F.A.C. Such disputes will require the Commission to develop a record regarding the current status of the factors affecting the ability of QFs to enter into contracts that are consistent with legal requirements and financial market practices, and also regarding the appropriate avoided cost of generation capacity and risk-adjusted avoided cost of energy (including all production costs) appropriate to the particular circumstances of the contract negotiation dispute.

SACE also recognizes that it is not clear that the Commission would wish to engage in such extensive reliance on its dispute resolution process. The Commission will be asked to resolve disputes every time when QF and utility interests don't align, not only on the facts, but on the law. A more durable solution is called for, which the Commission properly initiated in 2015 in requesting comments on solar energy policy in Florida, but has not pursued.

V. CONCLUSION AND REQUESTED RELEIF

Wherefore, SACE hereby respectfully requests that the Commission deny DEF's petition requesting a declaratory statement as the petition is procedurally flawed and, if granted, would violate federal and state laws.

RESPECTFULLY SUBMITTED this 8th day of October, 2018

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy and correct copy of the foregoing was served on this 8th day of October, 2018 via electronic mail on:

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