

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of renewable energy tariff and standard offer contract, by Florida Power & Light Company. | DOCKET NO. 080193-EQ
FILED: February 26, 2009

**WHEELABRATOR TECHNOLOGIES, INC.'S
POST-HEARING STATEMENT OF ISSUES AND POSITIONS
AND POST-HEARING BRIEF**

Wheelabrator Technologies, Inc. (Wheelabrator), by and through its undersigned counsel, pursuant to Order No. PSC-09-0031-PHO-EQ, files this Post-Hearing Statement of Issues and Positions and Post-Hearing Brief.

Basic Position

While some facts may be in dispute in this docket, the most critical fact is agreed upon by Wheelabrator and Florida Power & Light (FPL). Since the Legislature's enactment of the requirement that FPL make a standard offer continuously available to renewable generators, *not a single generator has signed such a contract with FPL and not a single megawatt has been sold to FPL pursuant to such a contract.* This fact illustrates, better than any other, that the document FPL seeks to have this Commission approve not only does not conform to the requirements of the statute but has been a woeful failure in encouraging renewable resources in the state.

As the Commission considers the matters at issue in this docket, it must step back and bear in mind the law which must guide its decision here. As this Commission is well aware, the development of renewable energy in Florida and the lessening of Florida's dependence on natural gas is an important state goal that has been articulated clearly by the Florida Legislature and the Governor. The overarching principle which must guide the Commission in its review of FPL's standard offer contract is the Legislature's direction in enacting the statutes related to renewable energy development in this state.

Section 366.91(1), Florida Statutes, states:

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

To that end, section 366.91(3) requires FPL to have a standard offer contract continuously available. This requirement is not idle verbiage – every enactment of the Legislature is intended to have meaning – but is a requirement intended to make a meaningful contract for the purchase of renewable energy available for renewable generators.¹ In addition, section 366.92(1), Florida Statutes, states:

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.

Despite these clear legislative mandates, many of the terms and conditions in FPL's standard offer contract are unreasonable and unworkable for renewable facilities. While FPL claimed over and over again at hearing that the standard offer contract it proffered was a "one size fits all" contract, the "one size" FPL tenders does not fit all – *it fits no one*. It is a document totally unsuited for the task that the Legislature has assigned to it and it meets neither the letter nor the spirit of the law. In addition, the FPL standard offer contract would hold renewable generators to standards above those to which FPL's own units are subject.

¹ "[A] statute should be construed and applied so as to give effect to the evident legislative intent..." *Arthur Young & Co. v. Mariner Corp.*, 630 So.2d 1199, 1202 (Fla. 4th DCA 1994).

FPL does not deny that it has signed up *no* renewable generation under its standard offer contract. Its answer seems to be a shrug of the shoulders and an “invitation” to negotiate. However, this falls far short of what the statutes require. FPL must have in place a viable standard offer contract that generators can sign, not an unreasonable contract that gathers dust on a shelf.

In order for FPL’s standard offer contract to be reasonable and to comply with the Legislature’s mandates, FPL should be required to make the following revisions to the contract:

- Given that energy payments are based on avoided costs, provisions 8.4.6 and 8.4.8 should be revised to compensate renewable developers when FPL constrains their energy production. Without compensation for foregone sales, renewable producers do not receive full avoided cost.
- The basis for renewable facilities receiving capacity payments should be revised to better recognize the capacity value that they offer. The capacity factor or Annual Capacity Billing Factor required to achieve full capacity payments should be set at 89% and the minimum capacity factor to receive any capacity payment should be set at 69%.
- The Committed Capacity Test in FPL’s contract should be revised to take into account the intermittent operating profiles of renewable projects. A four-hour test period for biomass facilities should be adopted.
- The maintenance provisions in FPL’s standard offer contract should be revised so that FPL does not have the unilateral right to dictate a renewable generator’s maintenance schedule.
- The trip test provisions of the standard offer contract should be eliminated.
- The provisions in FPL’s standard offer contract providing FPL with a right of first refusal for Tradable Renewable Energy Certificates (TREC)s should be eliminated to avoid any adverse impact on their market value and to comport with the Commission rule.

These simple revisions will help to make FPL’s standard offer contract one that is more appropriate to encourage the development of renewable facilities in the state as required by Florida Statutes.

ISSUES AND POSITIONS

ISSUE 1: Does FPL's standard offer contract encourage the development of renewable energy pursuant to Sections 366.91 and 366.92, F.S.?

POSITION: *No, FPL's contract discourages the development of renewable resources. In 2005, the Florida Legislature enacted legislation stating that "it is in the public interest to promote the development of renewable resources in this state" noting the many benefits of renewable resources. The Legislature went on to require that each public utility *must* continuously offer a contract to purchase renewable energy. This legislation makes it clear that renewable energy is a valuable resource which should be encouraged.*

ISSUE 2: Does FPL's standard offer contract protect the economic viability of existing renewable facilities pursuant to Section 366.92, F.S.?

POSITION: *No. Not only does the Legislature require FPL to encourage the development of new renewable facilities, it also requires that the economic viability of existing facilities be protected. Wheelabrator has several renewable facilities already built in Florida, but the standard offer contract that FPL offers presents a barrier to such facilities rather than a viable commercial arrangement. No existing renewable facility has signed a standard offer contract with FPL.*

DISCUSSION:

Wheelabrator

Wheelabrator is a wholly-owned subsidiary of Waste Management Inc. Wheelabrator operates 16 waste-to-energy plants across the United States and built the first commercially successful waste-to-energy plant in the United States. In Florida, Wheelabrator owns and operates two waste-to-energy facilities in Broward County and built and operates the City of Tampa's waste-to-energy facility. Wheelabrator also owns and operates a waste wood/tires/landfill gas-to-energy facility in Auburndale. Renewable energy facilities operated by Wheelabrator in Florida have a generating capacity of more than 200 megawatts. (Tr. 82-83). Thus, Wheelabrator's facilities, which utilize known, proven technology, are the very type of facilities with which FPL should be eager to contract.

Wheelabrator currently has two contracts with FPL (Tr. 36). As Ms. Dubin admitted, Wheelabrator is a well-known, well-established, reliable provider of renewable energy. (Tr. 36). Despite this fact, FPL does not have available a reasonable standard offer contract that a provider, such as Wheelabrator, can execute.

Renewable Energy Legislation

In spite of the clear legislative direction of sections 366.91 and 366.92, Florida Statutes, (quoted above), as well as the Governor's Executive Order No. 07-127, encouraging utilities to procure 20% of their electricity from renewable resources (Exhibit No. 13),² FPL's standard offer contract is a barrier to the development of renewable energy in this state. It frustrates the Legislature's attempts to bring the benefits of renewable energy to Florida.³

This is plainly illustrated by the fact that, as FPL witness Dubin admitted (Tr.43, 58), not a single megawatt of renewable energy has been signed up under the FPL standard offer contract. This is the case despite the fact that FPL admits that the standard offer contract must be a viable, executable contract that it would expect renewable facilities to sign, (Tr. 44), and that FPL testified that it believes this contract will encourage the development of renewable energy on a going forward basis. (Tr. 59). While FPL may pay lip service to its aspiration to meet the goals of the renewable energy legislation, its actions belie that claim. Clearly, its standard offer contract does not encourage the development of renewable energy as the statute requires.

Mr. Dalton testified that the FPL standard offer contract has been a failure. (Tr. 122). Because the FPL standard offer contract is not designed to encourage renewable energy, a major

² Subsequent to the issuance of this Executive Order, the Governor issued a letter reiterating his goals and praising "[e]ntrepreneurs [who] . . . make up Florida's green tech industry. Together, they will increase our use of renewable and alternative energy and strengthen our economic future, while also protecting our natural environment and reducing our dependence on foreign oil." (A Special Message from Governor Crist, Nov. 19, 2008). (Tr. 91).

³ Not only is renewable energy critical to Florida, but it is a national concern as well. As the federal Department of Energy (DOE) has stated, it has a number of priorities critical to the development of renewable resources. These include: reducing or ending dependence on foreign oil, increasing the viability and deployment of renewable energy technologies, and increasing the reliability and efficiency of electric generation, delivery and use. (Tr. 89).

vehicle for the promotion and achievement of renewable energy goals is not being utilized. That is, the state, as well as FPL's customers, cannot realize the full benefits that renewable energy has to offer. (Tr. 97).

Rather than encouraging renewable facilities, such a contract will *reduce* the amount of renewable energy developed in Florida and frustrate the goals the Legislature and Governor are attempting to achieve. (Tr. 95). Mr. Dalton summarized the problems with FPL's standard offer contract as follows:

- FPL's standard offer contract is a barrier to the development of renewable energy resources in Florida and does not encourage the development of these resources in the State, contrary to the direction of the Florida Legislature.
- FPL's standard offer contract frustrates the realization of the multi-faceted benefits renewable energy offers as the Florida Legislature outlined in section 366.92, Florida Statutes.
- By revising several provisions in the standard offer contract to balance the risks to renewable energy facilities developers, a workable standard offer contract can be crafted.
- The lopsided risk allocation in FPL's standard offer contract is a barrier to the development of renewable energy facilities that results in FPL using its own facilities to meet customers' requirements.
- Under FPL's standard offer contract, renewable energy facilities offer FPL customers lower risks than FPL-built facilities. Therefore, implementing Wheelabrator's recommendations will not require FPL customers to bear more risks than they bear when served from FPL's own facilities.

(Tr. 87).

The specific changes to FPL's standard offer contract, described in the discussion of the issues below, will encourage renewable development in the state and more appropriately balance the risk between the parties. As noted above, for the standard offer contract to have any utility, it

must be a document that developers are willing to sign. (Tr. 97). The changes Wheelabrator has set forth in this case will go a long way toward meeting that goal.

Purpose of a Standard Offer Contract

As Mr. Dalton testified, a standard offer contract is a contract between a buyer and seller which specifies not only the price that will be paid for the power, but all other terms and conditions of the contract. (Tr. 92). Such contracts have been in use since the early 1980s to achieve regulatory policy objectives.

Mr. Dalton summarized the advantages of a standard offer contract in procuring renewable power as follows:

- They can provide greater certainty regarding pricing and the terms under which the electric utility is willing to purchase power from the renewable energy developer, which reduces project development risks and costs. The pricing certainty they offer also facilitates financing;
- They greatly lower administrative costs to the developer by providing a much simpler process for the potential developer than a request for proposals (RFPs) or a negotiated process;
- They give the renewable energy developer greater certainty by setting out clear prerequisites which, if met, will lead to a contract, reducing the risk of non-selection that developers face in an RFP or engagement in protracted negotiations; and
- They can therefore open the possibility of renewable development to a broader range of potential participants.

(Tr. 93).

As Ms. Dubin admitted, one of the purposes of a standard offer is to have a contract available that requires no negotiation with the utility. (Tr. 39). As Ms. Dubin also testified, negotiations can be time-consuming and require substantial resources to be committed by both parties. (Tr. 39-40). Further, even after the parties devote time and resources to negotiations, there is no guarantee that the parties will ultimately reach an agreement. (Tr. 40). This is no

doubt the reason that the Legislature requires a standard offer contract to be *continuously* available.

However, it appears that FPL actually views the standard offer contract as a “base from which project owners and developers may, if they choose, seek to negotiate with FPL....” (Tr. 72, 168, 182). This is not the purpose of a standard offer contract – it is not a template for negotiations, but is required to be a viable, executable contract.⁴

It is also important to recognize that, despite FPL’s continual attempts to suggest that what Wheelabrator really should do is negotiate with FPL, negotiation is not a substitute for and does not obviate the legal requirement for a standard offer contract.⁵ (Tr. 72).

The lack of any market response to FPL’s standard offer contract is a clear indication that changes are needed to implement the Legislature’s goals. (Tr. 123).

Risk to Customers

A major theme of FPL’s presentation in this case is that it has only included the provisions to which Wheelabrator objects so as to protect its customers. However, the changes Wheelabrator recommends will not require FPL customers to bear more risk. To the contrary, if a reasonable standard offer contract is not put in place and renewable facilities are allocated too much risk, renewable facilities will not be built and FPL’s customers will bear the risk of FPL-built generation facilities. (Tr. 111). Thus, the appropriate analysis for the Commission is to compare the risks customers bear if FPL contracts with a renewable provider versus the risks customers bear if FPL builds its own generation facilities. (Tr. 111).

⁴ Ms. Dubin admitted that the Legislature has not expressed a preference for a negotiated contract over a standard offer contract. (Tr. 199).

⁵ It is interesting to note that while FPL admits that it must have a standard offer continuously available at all times, Ms. Dubin also testified that there was a point in 2006 when FPL did not have such a contract available. (Tr. 40-43). Because FPL withdrew its standard offer at that time (Exhibit No. 14), it does not appear that FPL was in compliance with the statute.

As currently drafted, the FPL standard offer contract provides FPL customers with lower risk than an FPL-constructed plant. For example, when FPL constructs a plant, customers bear all project development costs and risks.⁶ In contrast, the renewable developer bears its own development risk. If the cost of a renewable project is higher than anticipated, the developer must absorb those costs; the renewable generator cannot pass the additional cost through to ratepayers. (Tr. 112). In addition, standard offer contracts contain numerous provisions intended to protect ratepayers,⁷ including requirements for performance and security deposits. (Tr. 112).⁸

Similarly, FPL customers bear more construction risk from FPL facilities than from renewable facilities. Again, if prices escalate (such as for commodities), the renewable facility must absorb those costs because it is bound by its contract. FPL, on the other hand (assuming no mismanagement) can pass the higher costs through to ratepayers. (Tr. 113).

In addition, prior to commercial operation of the avoided unit, the revenues renewable producers receive can vary with fuel costs. This is a large risk to which FPL is not exposed. FPL passes through changes in fuel prices directly to its customers. (Tr. 113).

Further, FPL customers bear virtually all the market risk associated with an FPL generating unit. If, for example, FPL builds a combined cycle gas turbine (CCGT), expecting a lower heat rate to offset higher capital costs but market conditions change later, FPL will still recover from ratepayers for the unit. (Tr. 114). FPL's cost recovery is not at risk based on the CCGT's capacity factor as is the renewable generator's. (Tr. 114). Renewable providers have no such guarantees.

⁶ See, *i.e.*, Docket No. 070432-EI, where customers are required to absorb development costs for a cancelled FPL project.

⁷ Wheelabrator has not contested any of these provisions.

⁸ See, *i.e.*, Order No. PSC-06-0743-PAA-EQ at 2-3, which sets out the numerous protections afforded ratepayers in the standard offer contract.

In addition, customers bear less risk associated with a renewable facility's operations than with FPL facility operations. Changes in the operating costs (e.g., heat rate degradation) or availabilities of renewable generators do not affect FPL's cost recovery, unless there is a catastrophic failure at a generating unit and FPL has been deemed to be imprudent. (Tr. 113-114).

The bottom line is that renewable facilities bear too much risk, at least at the rates offered in the FPL standard offer contract. Therefore, there has been no meaningful renewable energy development in FPL's service territory. Revising several terms in the standard offer contract as Wheelabrator has suggested so that it represents a more balanced allocation of risk that will allow renewable facilities to be financed does not require FPL customers to bear more risk than they would have if FPL provided similar supplies. (Tr. 115).

ISSUE 3: Is the requirement in FPL's standard offer contract that renewable generators must achieve availability of 97% to receive full capacity payments reasonable and consistent with Sections 366.91 and 366.92, F.S., Rule 25-17.0832, F.A.C. and Rules 25-17.200 through 25-17.310, F.A.C.?

POSITION: *No. The standard that must guide the Commission in this docket are the statutory provisions set out in Issues 1 and 2 above. Standard offer contracts must encourage the development of renewable generation and protect the viability of existing renewable facilities. The requirement that a renewable facility achieve a capacity factor of 97% fails to meet that standard. The capacity factor to receive full capacity payments should be set at 89%.*

ISSUE 5: Is the requirement in FPL's standard offer contract that renewable generators have an Annual Capacity Billing Factor of at least 80% to receive capacity payments reasonable and consistent with Sections 366.91 and 366.92, F.S., Rule 25-17.0832, F.A.C. and Rules 25-17.200 through 25-17.310, F.A.C. ?

POSITION: *No. This requirement ignores the fact that renewable facilities provide capacity value at much lower capacity factors than FPL requires. Section 366.91 provides that capacity payments are not required if the renewable generator is "unlikely to provide any capacity value." Capacity values below those FPL recognizes provide benefits and the renewable generator should be compensated on that basis. A renewable generator should be required to meet a minimum capacity factor of 69% to receive capacity payments.*

DISCUSSION:

FPL's standard offer contract requires renewable facilities to have an availability factor of 97% or more to receive the full Base Capacity Payment and greater than 80% to receive any capacity payment at all. (Tr. 103; Exhibit 16, Appendix B). These requirements are unreasonable and should be modified.

As Mr. Dalton testified, few (if any) renewable facilities are likely to achieve a 97% capacity factor and many will have trouble achieving greater than 80% -- the level required to receive any capacity payment. This is probably a large part of the reason that no renewable generators have signed the standard offer contract. (Tr. 100). Obviously, including requirements that the target market cannot meet not only does not encourage renewable energy, but affirmatively discourages it.

As discussed earlier, Wheelabrator currently has two standard offer contracts with FPL. (Exhibit No. 15). These contracts, which FPL admits have served it and its ratepayers well, (Tr. 48), and have provided value to FPL customers (Exhibit No. 12 at 13), contain a capacity factor of 70%. This standard is in stark contrast to the 97% capacity factor contained in the standard offer contract which is the subject of this docket. (Tr. 51; Exhibit 16).

The high capacity threshold in the FPL standard offer contract is compounded by the provision in section 8.4.6 of the contract (discussed below), which gives FPL an open-ended right not to purchase from the renewable provider. When FPL interrupts a renewable generator pursuant to section 8.4.6, its capacity factor is reduced, making it even more difficult for the renewable generator to meet the exceedingly high 97% required for the full capacity payment. (Tr. 123). In essence, this curtailment provision makes the capacity factor even higher than 97%. (Tr. 58, 123).

The 80% Annual Capacity Billing Factor (ACBF) required to receive *any* capacity payment is also unreasonable. This requirement fails to recognize, and is inconsistent with, section 366.91, Florida Statutes. Section 366.91(3), Florida Statutes, provides, in part:

Capacity payments are not required if . . . the producer is unlikely to provide *any* capacity value to the utility or the electric grid during the contract term.⁹

This section indicates that renewable providers can provide capacity value even at lower capacity factors than the contract requires for capacity payments. (Tr. 103). Thus, the statute recognizes that capacity payments are not required if the facility does not provide *any* capacity value to the utility or the grid. Capacity factors below what FPL seeks to require *do* provide capacity benefits. (Tr. 106). Biomass projects, like Wheelabrator's, clearly have capacity value even when they have an ACBF less than 80%. (Tr. 103).

For example, a renewable energy facility that operates during all on-peak hours, and as such has a capacity factor of less than 50%, still has significant capacity value. While it may not have the same capacity value as a CCGT, given that a portion of its capacity value is really the value of the energy that it produces, it still provides capacity value to FPL and should be compensated for such value. (Tr. 106).

As support for requirement that renewable generators must meet an 80% capacity factor in order to receive *any* capacity payment, FPL relies on Order No. 24989. This order was entered in 1991, some 18 years ago. It clearly predated sections 366.91 and 366.92, Florida Statutes, and any discussion or consideration of the value of renewable energy. (Tr. 60). The order, as Ms. Dubin admitted, does not even touch upon renewable generation or the benefits it brings to the state. (Tr. 60).

⁹ Emphasis added.

Despite the fact that both FPL and Progress Energy Florida (Progress) propose combined cycle gas turbines, using the same technology as their avoided units, FPL's requirement for a renewable generator to receive any capacity payments is much higher than Progress'. Progress allows full capacity payments at an on-peak capacity factor of 89%, and provides capacity payments to a minimum capacity factor of 69%. (Progress Energy Florida, Standard Offer Contract, section 4, p. 9.415). (Tr. 104).

The capacity factor (or ACBF) in the FPL standard offer contract required to achieve full capacity payments should be modified so that it conforms to the 89% which Progress requires in its standard offer contract for a combined cycle unit. The minimum capacity factor to receive any capacity payment should be 69%. These availability factors are generally consistent with the EAF targets for combined cycle gas turbines that FPL uses in its GPIF filings.¹⁰ (Tr. 107).

ISSUE 4: Is the requirement that the Equivalent Availability Factor ("EAF") be based on the expected EAF of FPL's next planned generating unit reasonable and consistent with Sections 366.91 and 366.92, F.S., Rule 25-17.0832, F.A.C. and Rules 25-17.200 through 25-17.310, F.A.C.?

POSITION: *The overarching principles that must guide the Commission in this docket are the statutory provisions set out in Issues 1 and 2 above – that is that standard offer contracts must encourage the development of renewable generation and protect the viability of existing renewable facilities. A renewable facility is unlikely to be able to meet the standards FPL seeks to impose on it and FPL's own units do not meet such a standard.*

The Equivalent Availability Factor (EAF)¹¹ of FPL's next planned generating unit used in FPL's standard offer contract is too high. The evidence demonstrated that FPL's CGGTs rarely achieve the EAF expected of renewable facilities. (Tr. 125). The EAF should be adjusted to the more reasonable level of 89%.

¹⁰ See Issue 4.

¹¹ EAFs are a commonly used measure of generating unit availability that considers partial unit deratings as well as planned and forced outages. (Tr. 105).

Exhibit No. 4 presents the equivalent availability factors (EAFs) for FPL's CCGTs that are covered by the Generating Performance Incentive Factor (GPIF), as reported in its April 2008 filing. This exhibit, which relies on FPL's own information, indicates that the reported EAFs of FPL's CCGTs, which range from 89.5% (forecast) to 90.9% (actual), are well below what FPL requires renewable energy providers to satisfy to receive full capacity payments. Thus, FPL seeks to hold renewable facilities to standards its own fleet does not meet. (Tr. 105, 128).

FPL seeks to hold renewable generators to an "expected" EAF for a Mitsubishi G-class combined cycle unit. FPL admits that none of these units are currently on its system. (Tr. 189). FPL admits that the characteristics of these units are what it *hopes* will be achieved. (Tr. 190). FPL admits that the operating characteristics are nothing more than projections. (Tr. 190). FPL admits that if these projected units do not meet their "expected" performance levels, there is *no* penalty to FPL. (Tr. 190). In contrast, if a renewable facility does not meet the "expected" characteristics of the FPL unit, it does not get paid. (Tr. 190).

FPL attempts to counter Wheelabrator's position by stating that its Mitsubishi G CCGTs are "expected" to have higher availability factors. FPL states that Wheelabrator is wrong to compare the requirements of the standard offer contract to the units in FPL's GPIF filing rather than to the "expected" performance of units that are not even built. FPL criticizes this approach because it is based on actual unit performance not "expected"¹² performance. (Tr. 172). However, actual unit performance is a much better indicator of what will actually occur in the future than projections of expected performance of units not even online.

That this is the case is clearly illustrated by a comparison of projections FPL made in its Ten Year Site Plan and the actual performance of some of its units. For example, in its 2002 Ten

¹² The "expected" performance of the G units is 96.8%. (Tr. 173).

Year Site Plan, FPL projected the EAF of its Sanford Unit 5 to be 96%. (Exhibit No. 20). As Ms. Dubin admitted, actual operation of the unit showed the EAF to be only 91.5% (Tr. 195; Exhibit No. 2) – a substantial difference. If “expected” rather than actual performance is the guide, renewable facilities will be held to higher standards than FPL’s own facilities. (Tr. 195-196).

Another example shows that FPL experiences significant performance risks as to its own generating units. FPL’s 2007 Form 10-K indicates that “[s]ince June 2006, FPL has experienced different types of compressor blade failures in three combustion turbine compressors (CTCs) at two of its fossil generating plants, resulting in significant damage to the combustion turbines.” The Form 10-K also notes that FPL “has 32 of this type of CTCs in its generating fleet, which were all made by the same manufacturer.” (Tr. 105). Again, actual performance is a better guide than expectations.

While FPL attempts to use some of the combined cycles it now has on line¹³ to suggest that the “expected” performance of the Mitsubishi G unit is reasonable, these units do not provide a relevant comparison. The units FPL has selected went into service in 2005 and 2007. Because they are combined cycle gas turbines, they require a long maintenance outage at about 40,000 operating hours or approximately five years.¹⁴ These units have not yet reached that point and thus are not the appropriate benchmark to use to gauge the performance of FPL combined cycle units over their useful life. (Tr. 129).

Last, the EAF factor that FPL uses does not consider maintenance outages. A maintenance outage occurs when a unit goes out of service when it would not otherwise be dispatched. Because FPL’s cost recovery is not affected by when a particular unit runs, it is not

¹³ FPL uses Turkey Point Unit 5, Martin Unit 8 and Manatee Unit 3 for its comparison. (Tr. 173).

¹⁴ Ms. Dubin admitted that the units have not yet had their first extended maintenance outage. (Tr. 192).

affected by such outages. However, in contrast, a renewable facility is paid *only* when it runs. Thus, because the maintenance outages are not considered in the EAF, a renewable facility is unduly penalized. (Tr. 129-130).

ISSUE 6: Are provisions 8.4.6 and 8.4.8 of FPL's standard offer contract that permit FPL to reduce output or not accept energy from renewable generators reasonable and consistent with Sections 366.91 and 366.92, F.S., Rule 25-17.0832, F.A.C. and Rules 25-17.200 through 25-17.310, F.A.C. ?

POSITION: *No. As to section 8.4.6, this provision is too broad and should be carefully crafted so as not to provide FPL with the open-ended ability to refuse to purchase from renewable facilities. Further, to the extent that such provisions remain in the contract, renewable facilities should be compensated during periods of curtailment based on lost energy margins.*

Section 8.4.6

Section 8.4.6¹⁵ gives FPL an open-ended right not to purchase from a renewable facility. Such a provision is very broad and could be used to significantly constrain a renewable generator's operations. (Tr. 98). The provision could be interpreted to allow FPL to refuse to purchase energy from a renewable facility when its sales price is higher than the variable cost of FPL's marginal unit; thus, this provision should be redrafted to provide greater clarity. (Tr. 99).

Wheelabrator suggests that the following revision be made to the first sentence in section 8.4.6 (Exhibit No. 16, p. 9.036). FPL should be directed to replace the text after "FPL shall not be required to accept or purchase energy from the QS" with the following language:

during any period in which, due to operational circumstances, acceptance or purchase of such energy would result in excessive costs to FPL, such as would occur if a baseload unit were required to be taken off line and its energy replaced partly with the energy purchased from the REF and partly with energy from FPL's peak facilities or other such generation facilities that have variable costs which are markedly higher than those of the facility whose energy was replaced.

¹⁵ It should be noted that the order FPL relies on to support this provision, Order No. 12634 (Tr. 165), was entered in 1983 (Exhibit No. 6) and relates to amendment of the cogeneration rules. It has nothing to do with renewable facilities which are the subject of this docket. (Tr. 155).

(Tr. 99).

However, even the change suggested above does not totally alleviate the problems with this provision. FPL's unqualified right not to purchase still presents a potential barrier to the financing of renewable facilities. (Tr. 100). As Mr. Dalton testified, energy revenues are critical to the financial viability of renewable providers because they have low marginal operating costs and high fixed costs. Thus, they produce margins when they run.¹⁶

As discussed earlier, the FPL contract provides that the full capacity payments are received only when the very high capacity factor of 97% is achieved (Tr. 100), and that 97% is pushed even higher when a renewable facility is backed down. (Tr. 58, 123). Because few, if any renewable facilities, can achieve a 97% capacity factor, requiring renewable facilities to recover a significant part of their costs based on as-available energy rates, while giving FPL an unlimited right to interrupt the renewable generator, is simply unreasonable. (Tr. 101). Thus, renewable providers that are constrained under this provision should be compensated based on the lost energy margins (i.e., the contract energy price less variable operating costs) that they forgo. This is equitable and necessary to provide renewable facilities with the revenue certainty required to finance their projects. Further, because a renewable generator's cost recovery is often based in large part on energy payments, such a provision may prevent the generator from recovering full avoided cost. This creates a major contract risk which is a barrier to financing. (Tr. 123).

As Commissioner Argenziano discussed with Mr. Dalton, one way to mitigate the problem with FPL's curtailment resulting in a capacity factor above 97% would be not to include such curtailments in the capacity factor calculation. (Tr. 147). However, this does not address

¹⁶ This is especially true under FPL's standard offer contract because its unreasonable terms may result in the renewable provider receiving no capacity payments at all. (Tr. 100).

the problem of a renewable facility that does not receive the payments on the margin it would have received had it not been curtailed. (Tr. 148).

FPL attempted to dismiss this argument by contending that the Wheelabrator Broward North Unit had a 97% capacity factor on a 12-month rolling basis. However, this makes Wheelabrator's point.

The actual nominal capacity of the Broward North Unit is 64 megawatts, while the contract capacity is 54 megawatts. This difference between the nominal capacity, which the unit can achieve in some hours, and its contract capacity provides a significant margin of error that lets the unit achieve higher capacity factors. (Tr. 130). If a renewable facility must hold back one-sixth of its capacity in order to achieve an artificially high annual capacity billing factor target, that is a clear indication that the target is too high and creates a barrier for renewable facilities. (Tr. 131). In essence, Wheelabrator is not paid anything for the 10 megawatts it holds in reserve in an attempt to meet this factor. (Tr. 131).

Section 8.4.8

Section 8.4.8 gives FPL the right to dispatch down the renewable generator up to 18 times per year.¹⁷ Again, this provision prevents the renewable generator from receiving full avoided cost and gives FPL the arbitrary right to curtail. (Tr. 101, 124). This arbitrary right¹⁸ should be subject to an economic test and FPL should compensate renewable generators during curtailment periods based on lost energy margins. (Tr. 101).

When renewable providers are curtailed under either of these provisions, they should receive a payment based on the difference between the otherwise applicable energy payment and

¹⁷ At hearing, Ms. Dubin listed a number of specific circumstances during which curtailment would be exercised. (Tr. 57). However, she admitted that none of those circumstances are listed in the standard offer contract. (Tr. 58).

¹⁸ Whether or not a renewable generator has actually been curtailed is irrelevant. The provision gives FPL the open-ended right to do so when it chooses and that impacts a renewable facility's ability to recover its capital cost and service its debt. (Tr. 137, 138, 154).

their marginal operating costs. This will ensure that the standard offer payment reflects the full avoided cost of the next planned generation unit, (Tr. 124), and make renewable generators whole. (Tr. 136).

Finally, these provisions also implicate the requirement that renewable facilities receive full avoided cost. The pricing in the FPL standard offer contract is based on its avoided cost, including FPL's cost of capital. Because FPL's cost of capital reflects its business risk¹⁹ and not the risk of renewable facilities, the avoided cost payments understate the value of renewable generation. (Tr. 116). That is, this unilateral ability to interrupt acts as a constraint on the renewable facility's ability to earn full avoided cost. (Tr. 127).

ISSUE 7: Is the requirement in FPL's standard offer contract that committed capacity testing procedures be based on a test period of 24 hours reasonable and consistent with Sections 366.91 and 366.92, F.S., Rule 25-17.0832, F.A.C. and Rules 25-17.200 through 25-17.310, F.A.C.?

POSITION: *No. This provision discourages the development of renewable generation because such a requirement fails to recognize that a renewable facility has inherently variable output due to its fuel source. Therefore, the Committed Capacity Test should be based on a short- duration test period that recognizes the intermittent nature of renewable facilities, such as a four-hour test period.*

DISCUSSION:

The committed capacity test (Exhibit No. 16, p. 9.034) is "based on a test period of twenty-four (24) consecutive hours (the "Committed Capacity Test Period") at the highest sustained net kW rating at which the Facility can operate without exceeding the design operating conditions..." This requirement for a committed capacity test of 24 hours is overly stringent. A four-hour test is more than sufficient to evaluate the capability of a generating unit. (Tr. 124). The Committed Capacity Test should be based on a shorter-duration test period. Test procedures

¹⁹ See Issues 1 and 2 for a discussion of the relative risk differences to ratepayers between power from renewable facilities versus power from FPL-owned generation.

should recognize the intermittent nature of renewable generating facilities, such that rated capacity levels are sustained for shorter periods. (Tr. 102).

Further, this presents yet another example of an instance where renewable generators are held to a higher standard than FPL. FPL's own units do not have to meet a committed capacity test. (Tr. 124). While Ms. Dubin testified that the Mitsubishi G units would go through a capacity test, there is no financial penalty to FPL if the units fail such a test. (Tr. 197-198). If the renewable facility does not pass the committed capacity test, it will not receive full capacity payments. (Tr. 198). Thus, again, FPL attempts to hold renewable facilities to standards higher than its own units.

ISSUE 8: Are the maintenance requirements in FPL's standard offer contract reasonable and consistent with Sections 366.91 and 366.92, F.S., Rule 25-17.0832, F.A.C. and Rules 25-17.200 through 25-17.310, F.A.C.?

POSITION: *No. The maintenance requirements in FPL's standard offer contract fail to take into account the nature of renewable generation. FPL should not be given the unilateral ability to dictate maintenance schedules. A renewable facility should be required to inform FPL before October 1st of each year of the duration and magnitude of planned outages. The renewable generator should be required to promptly update this schedule when changes are necessary and use best efforts to coordinate its scheduled outages with FPL.*

DISCUSSION:

Section 8.2 of FPL's standard offer contract provides, in part:

The QS [Qualified Seller] shall schedule maintenance outages *only during periods approved by FPL*, such approval not unreasonably withheld. [sic]

(Exhibit No. 16, p. 9.035, emphasis supplied). Thus, FPL has the unilateral right to dictate the maintenance schedule of the renewable generator; that is, the standard offer contract allows FPL to reject the renewable facility's maintenance schedule. (Tr. 62, 67).

Such a provision is unreasonable. It is particularly so given the fact that in the current standard offer contracts between FPL and Wheelabrator, the maintenance provision provides for cooperative scheduling between the parties.²⁰ The current provision in the parties' contracts states, in part:

5. Electricity Production Schedule

During the term of this Agreement, QF agrees to:

- (a) Provide FPL prior to October 1 of each calendar year an estimate of the amount of electricity to be generated by the Facility and delivered to the Company for each month of the following calendar year, including the time, duration and magnitude of any planned outages or reductions in capacity;
- (b) Promptly update the yearly generation schedule and maintenance schedule as and when any changes may be determined necessary;
- (c) Coordinate its scheduled Facility outages with FPL.

(Exhibit No. 15, p. 5). Thus, this current provision provides that the parties will work together to cooperatively schedule maintenance. (Tr. 61). This provision, which has been in effect between the parties for a number of years, has worked well between the parties. Ms. Dubin admitted that the parties have been able to work together cooperatively to schedule maintenance to the satisfaction of both parties. (Tr. 61).

The renewable generator must retain the ability to set and maintain an outage schedule according to the requirements of the equipment and its solid waste customer base. The current FPL standard offer contract does not allow this.

²⁰ Again, Ms. Dubin gave a lengthy explanation at hearing of the circumstances regarding maintenance scheduling. None of those circumstances appear in the contract. (Tr. 62).

ISSUE 9: Are the trip test requirements in FPL's standard offer contract reasonable and consistent with Sections 366.91 and 366.92, F.S., Rule 25-17.0832, F.A.C. and Rules 25-17.200 through 25-17.310, F.A.C.?

POSITION: *No, the trip test requirements in FPL's standard offer contract discourage renewable generation and are unnecessary.*

DISCUSSION:

Section 8.4.2 of the standard offer contract requires, in part:

A unit functional trip test shall be performed after each overhaul of the Facility's turbine, generator or boilers and the results shall be provided to FPL prior to returning the equipment to service.

(Exhibit No. 16 at p. 9.035). As Ms. Dubin, explained this is essentially a test of the turbine. (Tr. 68). Again, this is an example of another unnecessary and burdensome provision which FPL has attempted to insert into the standard offer contract.

Ms. Dubin testified that the current standard offer contracts between FPL and Wheelabrator have no provisions regarding a trip test. She further testified that the fact that such provisions were not included in the current contracts has not created any problems between the parties. (Tr. 68).

But again, FPL does not hold its units to the same trip test requirements to which it seeks to hold renewable generators. If a renewable generator does not pass the trip test, it would be in contract default. (Tr. 69). This would subject it to numerous default actions and it would not receive payments under the contract. In contrast, while Ms. Dubin testified that a trip test would be run on the FPL units, if the units failed such a test, FPL would face no penalty. (Tr. 69). This lopsided treatment is the antitheses of the requirement that renewable generation be encouraged.

ISSUE 10: Is the requirement in FPL's standard offer contract giving it a right of first refusal as to tradable renewable energy credits (TREC)s reasonable and consistent with Sections 366.91 and 366.92, F.S., Rule 25-17.0832, F.A.C. and Rules 25-17.200 through 25-17.310, F.A.C.?

POSITION: *No, this provision is in direct conflict with rule 25-17.280, Florida Administrative Code. FPL's attempt to encumber the tradable renewable energy credit with a 30-day right of first refusal should be rejected. It adversely affects the value of the TREC and will make it more difficult for a renewable provider to receive full market value for the TREC.*

DISCUSSION:

FPL's standard offer contract provides that if a renewable generator wants to sell its TREC in the market place, it *first* must come to FPL with a bona fide offer from another purchaser to buy the TREC – that is, someone else must have already agreed to purchase the TREC. After receipt of an offer from another purchaser, the renewable generator must give FPL 30 days to decide if it wants the TREC. (Exhibit No. 16, p. 9.044).²¹ Ms. Dubin admitted that no analysis was done of the TREC market to determine what the usual trading time is for TREC.s. (Tr. 71).

The Commission's rule on tradable renewable energy credits provides:

Tradable renewable energy credits and tax credits shall remain the exclusive property of the renewable generating facility. A utility shall not reduce its payment of full avoided costs *or place any other conditions* upon such government incentives in a negotiated or standard offer contract, unless agreed to by the renewable generating facility.

Rule 25-17.280, Florida Administrative Code (emphasis supplied). Thus, this rule plainly states that no conditions shall be placed upon the TREC. However, a right of first refusal is clearly a condition on the TREC and it will affect the value of the renewable generator's TREC. It is an option for which no compensation has been paid. (Tr. 140).

As Mr. Dalton testified, the right of first refusal will adversely affect the value of TREC.s

²¹ While FPL contends that the Commission has already approved such a provision (Tr. 175), it was not the subject of an evidentiary hearing where the Commission could explore the issues with such a provision. (Tr. 70).

for several reasons. First, a right of first refusal is likely to make it more difficult for a renewable generator to receive full market value for its TRECs. Request for proposal (RFP) processes where TRECs are often purchased and sold typically do not provide for a seller to withdraw its offer if another party like FPL exercises its right to purchase the commodity. (Tr. 109).

Second, many RFP processes do not provide sufficient time for a 30-day right of first refusal like that contained in FPL's standard offer contract. Mr. Dalton is familiar with the TREC market in the northeast, where it is more developed than in Florida. He testified that where there are functioning renewable portfolio standards, the time between when an offer is made and a party has to act on that offer is much less than thirty days. In some cases, it is as little as five to eight days. (Tr. 156). Ms. Dubin admitted that if, for example, a renewable generator had the opportunity to sell a TREC within 10 days, the generator might not be able to consummate that transaction given FPL's claim on the TREC for thirty days. (Tr. 71). This scenario was aptly illustrated at hearing.

Exhibit No. 21 shows a TREC bid process Evolution Markets conducted. Exhibit No. 21 (page 2) shows that participating bidders were required to submit bids by 1:45 p.m. on February 13, 2008. Bidders were then given the opportunity to improve on the best bid until 2:00 p.m. All bids were required to be binding until 5 p.m. the following day. As Ms. Dubin agreed, in this situation, the bidding was open for *less than 48 hours*. (Tr. 205). It would have been impossible for FPL's right of first refusal to not compromise the renewable generator's ability to participate in this bid opportunity.²²

Exhibit No. 22 illustrates a TREC auction PECO conducted. In that situation, bids opened on February 3rd and bidders were notified of the award on February 11th. That is, there

²² Ms. Dubin's comment that the renewable generator should "inform FPL and work out whatever solution might work for it" (Tr. 205), is no solution at all, and certainly imposes no obligation on FPL.

were eight days between the bid and the award. Ms. Dubin admitted that it would be difficult for a renewable generator to participate in this auction under the terms of the right of first refusal in the standard offer contract. (Tr. 208).

Third, as the market in Florida for TRECs develops under the forthcoming RPS, it is likely that the term for parties to conclude the purchase and sale of TRECs will be compressed. This is common in competitive markets as illustrated above. Therefore, the right of first refusal will reduce the market for the TRECs the renewable community generates. (Tr. 109).

Last, under a bilateral sale, a purchaser is less likely to be interested in pursuing a TREC purchase if a third party is able to match its offer and purchase the TRECs. (Tr. 109). This is particularly the case when the right can be exercised by a party like FPL, who has the best available information regarding what a TREC is worth. As Mr. Dalton testified, a prospective purchaser is going to be very concerned about entering into negotiations for a TREC where FPL has the right of first refusal. (Tr. 141). Thus, the market for TRECs will be narrowed which will in turn will have an adverse impact on the TRECs' value. (Tr. 141).

Finally, it is interesting that FPL refers to the right of first refusal as a "valuable right." (Tr. 175). While Wheelabrator agrees with the characterization, it is apparently a right which FPL wishes to secure for free.

ISSUE 11: Should the standard offer contract filed by Florida Power & Light Company be approved?

POSITION: *No. FPL's standard offer contract should not be approved. Rather, the Commission should require FPL to make the changes outlined above and in the testimony of Mr. Dalton and submit the contract for approval.*

DISCUSSION:

The discussion in the prior issues reviews in detail the problems with FPL's standard offer contract and why the contract fails to implement the legislative intent that new renewable generation be encouraged and that existing renewable generation be protected. The Commission should require FPL to implement Wheelabrator's proposed changes to the standard offer contract as listed below.

- The standard offer contract should be revised to eliminate FPL's open-ended right to not purchase power from the REF under certain operating conditions and compensate renewable providers when they are required to back down their facilities. (sections 8.4.6, 8.4.8).
- The Committed Capacity Test specified in the standard offer contract should be changed from twenty-four hours to four hours. (section 6.2)
- To receive full capacity payments renewable facilities should be required to achieve a realistic capacity factor of 89%; to receive partial capacity payments, renewable facilities should be required to achieve a capacity factor of 69%. (section 3 and Appendix B).
- The Trip Test provision should be eliminated. (section 8.4.2).
- The Maintenance provision should be eliminated. (section 8.2) and require the parties to work cooperatively to schedule maintenance.
- The right of first refusal regarding TRECs should be eliminated. (section 17.6.2).

These simple changes will result in a much more reasonable standard offer contract to fulfill the Legislature's goals.

ISSUE 12: Should this docket be closed?

POSITION: *The docket should be closed after FPL has revised its standard offer contract in the manner Wheelabrator has outlined and the Commission has approved it.*

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Prehearing Statement was served via Electronic Mail and First Class United States Mail this 26th day of February, 2009, to the following:

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