

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 070677-EQ

In the Matter of:

PETITION FOR APPROVAL OF NEGOTIATED
RENEWABLE ENERGY CONTRACT WITH MANATEE
GREEN POWER, LLC, BY FLORIDA POWER &
LIGHT COMPANY.



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PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 11

BEFORE: CHAIRMAN MATTHEW M. CARTER, II
COMMISSIONER LISA POLAK EDGAR
COMMISSIONER KATRINA J. McMURRIAN
COMMISSIONER NANCY ARGENZIANO
COMMISSIONER NATHAN A. SKOP

DATE: Tuesday, January 29, 2008

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: LINDA BOLES, RPR, CRR
JANE FAUROT, RPR
Official FPSC Reporters
(850) 413-6734 and 413-6732

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FPSC-COMMISSION CLERK

1 PARTICIPATING:

2 BRYAN S. ANDERSON, representing Florida Power &
3 Light Company.

4 MICHAEL COOKE, GENERAL COUNSEL, JEAN HARTMAN,
5 ESQUIRE, and TOM BALLINGER, representing the Florida Public
6 Service Commission Staff.

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P R O C E E D I N G S

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2 CHAIRMAN CARTER: We are now, Commissioners, moving
3 to Item Number 11. Give staff a moment to get set up here, but
4 we're moving to Item Number 11.

5 (Pause.)

6 Staff, you are recognized to present the issue.

7 MS. HARTMAN: On the agenda is Docket 070677-EQ
8 regarding a petition for approval of negotiated renewable
9 energy contract with Manatee Green Power, LLC, and Florida
10 Power & Light.

11 There are three issues in the docket today for your
12 consideration. Issue 1 is approval of the requested recovery
13 for capacity and energy payments under the contract. Staff
14 recommends approval of these payments for recovery.

15 Issue 2 is approval through the fuel clause for
16 recovery for payments made under the contract for Green
17 Attributes associated with the purchase of this energy. Staff
18 recommends denial.

19 Issue 3 is closure of the docket, and staff
20 recommends closure if no timely protest to the proposed agency
21 action is filed within 21 days.

22 CHAIRMAN CARTER: Okay. Remember to push the button.
23 I believe we have the parties here wishing to speak. You're
24 recognized.

25 MR. ANDERSON: Good morning, Chairman Carter. My

1 name is Bryan Anderson. I'm an attorney for Florida
2 Power & Light Company. I'm accompanied here today by
3 Tom Hartman, who is the Director for Business Management for
4 the regulatory assessment planning part of our company which
5 works on contracts like this.

6 We've all worked together a lot over the last year or
7 so on how best to increase the amount of new renewable
8 generation we have here in Florida, and what we have before us
9 today is an important step which has consequences for this
10 particular contract but also with respect to future development
11 of considerable amounts of renewable generation in Florida. We
12 are grateful with staff's concurrence with our view in Issue 1
13 that this contract complies with the avoided cost standards.

14 The point we wish to visit with you about here today
15 is Issue 2, which involves the treatment of the purchase of
16 renewable attributes. You'll note we don't say renewable
17 energy credits and things like that because that's not really
18 defined in Florida law yet. We mean renewable attributes in
19 the broadest sense, which for this would involve the purchase
20 of anything that might be defined under federal law, state law,
21 including CO2 mitigation, all those different things.

22 The core point that we would like to leave with today
23 is the idea that in order to move forward and to encourage the
24 development of renewable generation, which we all want to do,
25 we need to provide for -- the right regulatory treatment in

1 this case involves permitting the purchase of renewable energy
2 credits and cost recovery for those renewable energy credits.
3 You know, what we have before you here no doubt complies with
4 PURPA, PSC, express intent of the Legislature to promote
5 renewable energy.

6 The, one of the core ideas I'd like to touch on
7 though is that it's been suggested in a staff recommendation
8 that this contract would result in customers paying more than
9 avoided cost. And to be very clear, I've had passed down to
10 you some important FERC decisions on this point.

11 The Federal Energy Regulatory Commission, which is
12 the source of all our guidance here in the states as to what
13 constitutes avoided cost, very clearly delineates what goes
14 into consideration of avoided cost. And a good example is in
15 the ELO3-133-000 order in front of you at Pages 5 and 6.
16 Paragraph 21 talks about the things that go into the mix:
17 Utility system cost data, availability of capacity or energy,
18 relationship of the availability of energy. The point that
19 FERC makes, and this is Paragraph 22 at Page 6, they say,
20 "Significantly, what factor is not mentioned in the
21 Commission's regulations is the environmental attributes of the
22 QF selling to the utility." And then the last sentence of that
23 same paragraph, "The avoided cost rates, in short, are not
24 intended to compensate the QF for more than capacity and
25 energy."

1 So the way to think about this in our view for this
2 contract and as we look forward to other contracts is that
3 there are analytically two transactions occurring in the same
4 contract. One is for the capacity and energy not to exceed
5 avoided costs. We're all in agreement here today that standard
6 is met. The separate and distinct element is the purchase of
7 renewable energy credits or the renewable attributes. And the
8 question there is the classic utility question, which is is
9 this a reasonable thing to do? Are the costs reasonable? And
10 we submit to you that it is appropriate and timely for the
11 State of Florida to recognize these types of costs to encourage
12 utilities to purchase renewable attributes.

13 Think about the generation cases we've worked with
14 recently where we always factor in now CO2 costs. CO2 cost
15 regulations are on the horizon. They're not here yet but
16 they're part of our daily planning. The suggestion in the
17 staff recommendation is that it's too speculative to permit
18 these purchases because there's no renewable portfolio standard
19 yet in Florida. We suggest that over the 15-year horizon of
20 this contract it's a reasonable thing to be purchasing
21 renewable attributes in anticipation that the state will move
22 in that direction. And, in addition, please take into
23 consideration that even if the state does not do that, there is
24 no likelihood of harm to customers through this purchase. The
25 reason for this particular contract is we negotiated a good

1 price for these renewable attributes. They're already in the
2 money. The market price is trending up a little bit. So, you
3 know, worst case, if we never, ever needed these, they could,
4 they could be sold up. It's also a fairly small amount over
5 the 15-year term of the contract. It's about \$800,000 over the
6 term.

7 But please think this through in relation to the
8 145 megawatts of new renewable capacity which was bid into our
9 renewable RFP. The only way under existing Florida law that we
10 see to come to you to seek approval of those contracts is with
11 capacity and energy costs not exceeding avoided cost complying
12 with the FERC regulation of the state rules, and then whatever
13 pricing is necessary in relation to the renewable attributes
14 that is negotiated in order to permit those facilities to be
15 constructed and brought forward. And because those costs, of
16 course, are not included in our rates in any way, that cost
17 recovery in our view needs to be recognized.

18 So we ask the Commission today to please approve our
19 petition as drafted and as requested, to permit the approval of
20 renewable attributes, which staff agrees is a good idea, but to
21 permit the cost recovery through the appropriate capacity or
22 energy clause.

23 That's the end of our remarks. I'm happy to answer
24 any questions. We also have your own rule handed out to you
25 which we all worked on together, which expressly recognizes

1 that renewable energy credits, tax credits are the property of
2 the renewable generating facility. And in our negotiations we
3 as utilities are not permitted to use our payments at full
4 avoided cost, again, recognizing the idea that this is
5 separate, distinct and additional. That's the end of our
6 remarks. Thank you.

7 CHAIRMAN CARTER: Thank you very kindly.

8 Commissioners, comments, questions?

9 Commissioner Skop, you're recognized.

10 Oh, I'm sorry. Commissioner McMurrin, you're
11 recognized.

12 COMMISSIONER McMURRIAN: Thank you. Were we going to
13 hear from staff first or --

14 MR. BALLINGER: If you'd like, we can.

15 COMMISSIONER McMURRIAN: Chairman, if that's --

16 CHAIRMAN CARTER: That's an excellent idea. That's
17 an excellent idea.

18 COMMISSIONER McMURRIAN: Thank you.

19 CHAIRMAN CARTER: Let's hear from staff. You're
20 recognized.

21 MR. BALLINGER: Tom Ballinger with Commission staff.
22 First of all, I believe I agree with Mr. Anderson that these
23 Green Attributes are separate and apart from avoided cost and
24 that's why staff showed it as two separate issues in the
25 recommendation. We do treat them differently. However, I also

1 agree with Mr. Anderson that they're undefined at this time,
2 even acknowledge they're not a TREC. They are a Green
3 Attribute of something yet to be defined in the future, if and
4 when.

5 So with that lack of clarity of what they are, staff
6 looked to them as another energy payment, and that's why we
7 came up with the phrase "above avoided cost." It's basically
8 an adder to the energy payment at this time because it's
9 undefined of what else it could be.

10 Treating them as separate as we did, staff is again
11 acknowledging that there is no market yet for Green Attributes
12 or RECs in Florida. And we think that to approve FPL's
13 recovery mechanism would be prejudging any discussion you may
14 have in the future about RPS, of whether to include Green
15 Attributes as part of an RPS structure or whether not to
16 include them. They may not be necessary. So it is kind of a
17 premature acknowledgment, if you will, or recovery of RECs.

18 Staff's recommendation was trying to incentivize the
19 utility that if they are a good thing and they are needed to
20 promote renewable generation, we would allow the utility to
21 earn a profit on the RECs if they are sold either in state or
22 out of state, whatever the case may be in the future. They are
23 in a much better position to judge the Green Attribute market
24 and can track it than the Commission may be or the ratepayers.
25 We don't think it's appropriate right now to burden the

1 ratepayers with that risk. And that's kind of the, the
2 summary, if you will, of our recommendation.

3 CHAIRMAN CARTER: Thank you, Mr. Ballinger.
4 Commissioners. Commissioner McMurrian.

5 COMMISSIONER McMURRIAN: Thank you. And this may be
6 a little awkward because I don't have all this planned out.
7 I'm trying to react to a few things that Mr. Anderson said and
8 a few things that Mr. Ballinger said, and perhaps I'll throw it
9 out and see who's, who's best to answer it.

10 I guess, Mr. Anderson, with respect to what
11 Mr. Ballinger said about the attributes being undefined, is
12 there any way to give more certainty to what we're exactly
13 dealing with here with respect to Green Attributes?

14 MR. ANDERSON: There is considerable certainty in
15 terms of how it is described within the terms of the contract
16 before us today. The most significant point is that it is
17 defined in such a way as to be the broadest bushel basket in
18 which to capture any renewable attribute that could be used
19 essentially at any time. But it is correct that Florida is
20 not, you know, formally defined a TREC market or a TREC trading
21 mechanism. I think the best analogy remains, for example, how
22 we think about CO2. It's in our planning, it's in our costing
23 all the time. It's prudent and reasonable to include this type
24 of purchase at this time, particularly if we were to try to
25 incent and develop new renewables.

1 COMMISSIONER McMURRIAN: Chairman, a follow-up with
2 Mr. Ballinger.

3 I mean, even if there were a way to define that
4 better, and I think, as Mr. Anderson said, without having that
5 kind of a market in Florida at this time it would be hard to
6 define it and I think they're trying to keep it broad, but even
7 if there was a way to narrow it down, would that really resolve
8 the concerns we have before us anyway? It's really just one of
9 them; right?

10 MR. BALLINGER: Correct. It's why we used the phrase
11 "above avoided cost" because I didn't know what else to call
12 it. So I look at it as an additional energy payment since it
13 is undefined. In my view even if it was defined we would still
14 have the problem of there's not a market in Florida yet. The
15 only market we have for any RECs of some sort is voluntary
16 markets, which is why we refer to the order at the bottom of a
17 declaratory statement where the Commission said that if you
18 want to pay above avoided costs, an adder, if you will, to
19 renewable energy, you can do so through voluntary contributions
20 from ratepayers and not violate PURPA, but you may not obligate
21 ratepayers to a payment above avoided cost. Staff sees this as
22 an obligation to ratepayers paying above avoided costs because
23 it's an undefined term. It's basically another energy
24 component.

25 COMMISSIONER McMURRIAN: Chairman, I'm sorry. Thank

1 you.

2 So, Mr. Ballinger, you said that you agreed with him
3 that they're separate. You think that it has to be factored in
4 to the calculation for avoided costs though. You think that
5 these Green Attributes have to be calculated in as a part of
6 that in order to determine whether it meets avoided cost
7 standard or not.

8 MR. BALLINGER: I think at this juncture it does
9 because it's undefined. So in my mind it's another energy
10 payment. We did treat it separately though recognizing that
11 there is a voluntary market out there for Green Attributes or
12 TRECs in other states and things of this nature. And, quite
13 frankly, we didn't want to jeopardize the validity of this
14 contract. By looking at it and including it totally of avoided
15 cost, then it would be well above avoided cost and the
16 Commission would be forced to deny it. I think that's why
17 staff came up with the recommendation it did to say we
18 recognize these as separate entities, they're undefined, we
19 don't think it's appropriate for ratepayers to have this risk.
20 Therefore, we're recommending that the utility retain ownership
21 of these attributes and sell them where they may.

22 COMMISSIONER McMURRIAN: Mr. Chairman, I do have
23 another for Mr. Anderson.

24 To the, to the point that Mr. Ballinger makes about
25 the risk to the ratepayers and some of the discussion that we

1 had earlier with you, and you were saying that even if the
2 market doesn't materialize and you can sell them and you think
3 you'll be able to get at least the 325 per megawatt hour back,
4 but what happens if you can't sell them back at 325? Is, is
5 the company willing to take on that sort of risk if we were to
6 somehow include these for cost recovery at this point? Is the
7 company willing to say if it never materializes, and I'm not
8 sure what point that would be, I'm not sure how far down the
9 road we would be looking, but if that did materialize, is the
10 company willing at that point to basically say we would be
11 willing to take on the difference between 325 and perhaps you
12 can only sell them for 310, for instance?

13 MR. ANDERSON: We'd suggest that would not be
14 appropriate under utility regulation. We're purchasing
15 something in good faith. We're seeking a prudence
16 determination concerning its purchase. And if that purchase is
17 prudent and reasonable, and we believe it is, then those costs
18 should be recovered and that's not a risk of the type our
19 company should bear.

20 May I make one brief comment though also? With
21 respect to Mr. Ballinger's point about trying to define these
22 costs, these renewable costs as part of avoided cost, I'd just
23 like to caution the Commission and all of us here today, I
24 think that would be inviting a very serious legal error. And
25 the reason is, is that Section 292.304 of 18 C.F.R. is the

1 source of our definitions of what constitutes avoided cost and
2 that's carried through, of course, in Florida regulations.
3 Those are set forth, for example, in the order denying
4 rehearing that's before you there.

5 ELO3-133-001 at Page 5, Paragraph 14, lists those
6 items, the types of items that are expressly included in
7 determining avoided cost. Avoided cost isn't what a utility
8 makes it up to be, it isn't things that we can all decide
9 should be lumped in there. It's a very specific formula. And,
10 in fact, it was this formula which is exclusive of, does not
11 include in any way renewable attributes which was the basis of
12 the FERC's decision that we were talking about earlier that
13 renewable attributes are separate and apart. They're not part
14 of the avoided cost computation. And the significance of that
15 is it would be incorrect to conclude that approving cost
16 recovery would result in payment of higher than avoided costs.
17 The simple reason being these are by definition not part of the
18 avoided cost computation. This is a separate and distinct
19 purchase of a renewable attribute which is actually defined at
20 length in our contract at Paragraph D1 which I won't read to
21 you now. But I just wanted to leave that point.

22 CHAIRMAN CARTER: Commissioner McMurrian.

23 COMMISSIONER McMURRIAN: Well, I did, I did hope that
24 we would get some response to that from our legal staff. And
25 also I had another question for, for the technical staff, if

1 it's okay.

2 CHAIRMAN CARTER: You're recognized. You're
3 recognized.

4 COMMISSIONER McMURRIAN: Essentially is there some
5 way -- if we were to move forward with the staff recommendation
6 as is, is there some way for FPL to possibly get recovery for
7 these Green Attributes later? If everything does materialize,
8 is there a way to in a sense go back and look at that down the
9 road and say this, you know, this has materialized and now it
10 seems to make sense and this would be a good thing for the
11 ratepayer?

12 MR. COOKE: Commissioners, I don't, I can't think of
13 a reason why if the market does materialize, if these issues
14 become much more crystal clear as to what these attributes are
15 and how they're defined, I can't think of a reason why this
16 Commission probably on petition by FPL or on its own couldn't
17 revisit this question in the future.

18 COMMISSIONER McMURRIAN: And also, Chairman, the
19 point about legal, we would be committing legal error
20 essentially if we were to do --

21 MS. HARTMAN: My reading of the FERC opinions is that
22 the opinions only speak to who owns the TRECs. And my
23 understanding is that they decide, well, states can determine
24 ownership. I don't, I don't have a broader reading of that.

25 COMMISSIONER McMURRIAN: Thank you. Mr. Chairman, I

1 just wanted to say, as you can see, I'm sort of struggling
2 here. I don't -- this is not one where I read it and I had a
3 clear answer in my mind. And we, staff and I had a long
4 discussion yesterday about this. I see the points that
5 Mr. Anderson is raising. I am concerned and I think we've had
6 some of these related discussions before about there's so much
7 uncertainty about what's going to happen and I know that's
8 staff's point.

9 But I also feel like that this -- I don't want to
10 miss an opportunity to essentially get these Green Attributes
11 at a good price that might ultimately materialize very
12 favorably for the ratepayer and I don't want to miss that
13 opportunity and in a sense send a message that we don't want to
14 encourage utilities to purchase these Green Attributes when
15 they can this way. So I guess I'm just struggling here and I
16 just wanted to voice that. Thank you.

17 CHAIRMAN CARTER: Okay. Commissioners, we'll
18 recognize Commissioner Edgar, then Commissioner Skop.
19 Commissioner Edgar, you're recognized.

20 COMMISSIONER EDGAR: Thank you, Mr. Chairman.

21 Going back to some of the discussion a few minutes
22 ago, if I might. Just a general question to Mr. Anderson. Is
23 the existing and future potential market for Green Attributes
24 the same market as for TRECs or is it somewhat different?

25 MR. ANDERSON: It's somewhat different. Just think

1 this through with me for a moment, is in Florida we haven't
2 defined attributes of a TREC. Therefore, for purposes of this
3 contract, we define things much broader as to any renewable
4 attribute of any description. It could be a carbon credit, it
5 could be this or that. So the significance is, is that if this
6 state establishes TRECs, the TREC component of this would be
7 conveyed to FPL for the benefits of its customers under it. In
8 addition, if under some federal arrangement or federal scheme
9 there were CO2 credits of some type applicable to this, we
10 would own those also.

11 So this, this -- by -- we very specifically thought
12 about how to do this in the best way for our customers. I
13 think it's Green E -- or there's already a voluntary market in
14 Florida for Green E Attributes. That's -- when we talk about
15 this being kind of in the money already, that's what we're
16 referring to. And I think the voluntary price for those is now
17 about \$3.60 a megawatt hour. This contract price is about
18 \$3.25. So the significant point is even in this market in
19 Florida where we haven't even defined the attribute, where they
20 haven't even become scarce because they're being acquired by an
21 RPS, that narrow sliver of the voluntary right is already in
22 excess of value of what we'd be paying here. So that's one of
23 the reasons we think this would be a good deal on behalf of our
24 customers.

25 And at the same time, to Commissioner McMurrian's

1 point, as we look forward to other contracts like this, we
2 would, like you, like to see lots of additional renewable
3 generation. Please recall under these contracts we earn
4 nothing. It's a pure flow through to customers. Customers --
5 and we all get the environmental benefits, but the costs we
6 earn nothing on. So all we would get if we were to take these
7 ourselves for this or any other contract would be some
8 undefined risk, which that's not how utilities provide service.
9 We try to focus on what do our customers need, buy it, provide
10 it and recover those costs in a way. We're not, we're not set
11 up and we're not in the business of holding portfolios of
12 things for possible future use for this contract or other
13 contracts.

14 COMMISSIONER EDGAR: May I follow up, Mr. Chairman?

15 CHAIRMAN CARTER: You're recognized.

16 COMMISSIONER EDGAR: Thank you.

17 But, Mr. Anderson, earlier in your opening overview
18 comments you pointed out that the amount that we are talking
19 about is approximately \$800,000 over 15 years, and I think in
20 your comments you made the point that that would be a very
21 small amount of money to the customers. But yet I feel like
22 I'm also hearing you say that FPL is strongly opposed to the
23 accounting treatment recommended by staff because it would be
24 too risky for the utility to take on, and those two statements
25 are, are not in complete concert in my mind. Could you

1 elaborate?

2 MR. ANDERSON: It goes to the basic nature of a
3 utility company, which we don't take positions in underlying
4 assets as a trading company. We buy things to use to serve our
5 customers, and then what we try to do is ensure that we recover
6 those costs and only the costs. So the significant point is
7 that while we think this is a, a good and reasonable
8 transaction on behalf of our customers, we're literally not in
9 the business of taking positions like this on our own account
10 and we would not likely choose to do that.

11 It's also a significant point -- I recognize the
12 \$800,000 over 15 years. But think about this for all other
13 utilities in the state, for the 145 megawatts coming down the
14 pike. What we're trying to do is ensure that interests are
15 aligned correctly. We want renewables to be developed. This
16 project will be five new megawatts and that's good. But you
17 can see the chilling effect that it has for utilities if, if
18 we're not, if we're put in the position of essentially having
19 to take market risks on something we don't earn money on anyway
20 and not recover those costs. So it's just, it's just not
21 consistent with, with, with how utilities do business and how
22 our company would wish to proceed.

23 CHAIRMAN EDGAR: Just a brief comment. Thank you,
24 Mr. Chairman. A brief comment.

25 And thank you, Mr. Anderson, for your comments. I do

1 hear you and much of what you're saying resonates with me, but
2 yet I have some discomfort that I am still grappling with.

3 I agree with what Commissioner McMurrian said and
4 what Mr. Anderson said, that, you know, we are as a state and
5 certainly as one Commissioner and probably as a Commission
6 trying to put in place policies and actions to encourage the
7 additional use of renewable energy in a manner that is deemed
8 to be reliable and cost-effective. But -- so I don't want my
9 statement to be construed as being opposed to that because I
10 agree with that. But yet I just don't feel like I have enough
11 clarity at this point to be able to recommend recovery through
12 the fuel clause. And that to me is an additional step that if
13 as a Commission we are going to recommend cost recovery through
14 the fuel clause, I would like to have more, more of a real feel
15 about what it is that we are doing. So that's kind of what I'm
16 grappling with. And I know there are other questions, so thank
17 you, Mr. Chairman.

18 CHAIRMAN CARTER: Thank you, Commissioner.

19 Commissioner Skop, you're recognized, sir.

20 COMMISSIONER SKOP: Thank you, Mr. Chairman.

21 I have just a few observations with respect to the
22 contract first and foremost. I wanted to commend FPL for
23 adequately protecting its customers under the existing
24 agreement specifically with respect to Section I, the
25 completion performance security and the drawdown ability in

1 case the vendor does not perform, as well as Section M, FPL's
2 right in the event of default to terminate with no termination
3 fee, unlike some contracts that have substantial termination
4 fees.

5 With respect to Issue 2, which I think is the crux of
6 the matter before us, I think there was a statement made that,
7 some statements that have been made that I'd like to flesh out
8 a little bit with a question to staff.

9 I do agree that the Green Attributes have not yet
10 been defined and they may encompass a lot of things of
11 substantial value to utilities in terms of market potential and
12 meeting their needs on a forward-going basis. But I also note
13 that there does appear to be a TREC in terms of an in-state
14 TREC purchase mechanism already in place under an existing, one
15 or more existing voluntary programs within the state. So with
16 respect to that, I'd like to direct a question to Mr. Ballinger
17 with respect to Footnote 7 on Page 8 of the staff
18 recommendation. And if you could kind of speak to that a
19 little bit in relation to the ruling under that order as well
20 as the, the program that's mentioned.

21 MR. BALLINGER: Okay. That was a declaratory
22 statement back in 2002 that FPL asked, and it was seeking from
23 the Commission that if it had a voluntary program to collect
24 money from customers, a Green Energy Program where customers
25 voluntarily contributed, say, an extra \$5 a month in their bill

1 to go purchase renewable energy, would that violate PURPA if
2 those additional payments went to a renewable generator? And
3 the Commission's decision in that declaratory order was, no,
4 they would not as long as they're voluntary; that if people
5 wish to contribute to such causes, they may do that. The
6 difference would come is if ratepayers were obligated to pay
7 these premiums, if you will, for renewable energy. That could
8 be a violation of PURPA. And that was the crux of that
9 decision in that declaratory statement.

10 COMMISSIONER SKOP: Okay. And as a follow-up, Mr.
11 Chair. With respect to the program mentioned in Footnote 7,
12 that program is currently the subject of a separate docketed
13 matter; is that correct?

14 MR. BALLINGER: I believe so. I believe the Green
15 Energy Program that was being discussed by FPL transformed into
16 the current Sunshine Energy Program.

17 COMMISSIONER SKOP: And that program purchases both
18 in-state and out-of-state RECs; is that correct?

19 MR. BALLINGER: Correct.

20 COMMISSIONER SKOP: Okay. Fellow Commissioners,
21 again, I think, I think my position on this is, is there may be
22 a substantial market in the future. And I fully respect
23 Commissioner McMurrian's concerns and also the argument that
24 Mr. Anderson has projected; however, we're not exactly there
25 yet, as I think Commissioner Edgar has properly recognized.

1 I do fully support staff's recommendation on Issue 2,
2 notwithstanding that there is also a separate and distinct
3 basis over and above staff's recommendation that deals with a
4 separate docketed matter that would substantiate why this
5 request in its near term should not be approved because there's
6 already in effect an existing mechanism that could purchase
7 some, if not all, of the RECs and attributes in question. But,
8 again, I am generally in support of staff's recommendation and
9 if we wish to move forward in the absence of different
10 questions -- if not, I'm prepared to make a motion.

11 CHAIRMAN CARTER: Before we do that and before I
12 recognize Commissioner McMurrin for a subsequent question,
13 Commissioner Argenziano, do you have any questions in reference
14 to this issue, Issue 11? We're particularly talking about
15 Issue Number 2 in that case.

16 COMMISSIONER ARGENZIANO: No, Mr. Chairman. I think
17 my questions have been answered and my colleagues have asked
18 very pertinent questions.

19 CHAIRMAN CARTER: Thank you. I know you're not
20 feeling well, but I sure appreciate you, you know, fighting the
21 good fight and being with us here.

22 COMMISSIONER ARGENZIANO: Absolutely.

23 CHAIRMAN CARTER: Commissioner McMurrin, you're
24 recognized.

25 COMMISSIONER McMURRIAN: Thank you.

1 MR. ANDERSON: Mr. Chairman, I'm sorry, but before
2 you --

3 CHAIRMAN CARTER: Yes, sir. Yes, sir.

4 MR. ANDERSON: May I have one last side remark,
5 please?

6 CHAIRMAN CARTER: You seem real excited about it, so
7 let's go ahead on.

8 MR. ANDERSON: I appreciate it. And we've all worked
9 on these renewable issues. We're really trying to make this
10 work. We feel this is a way. We would like though for the
11 Commission to consider this, is that if you disagree with our
12 position, we ask that you grant your staff the administrative
13 authority to approve the contract without the purchase of Green
14 Attributes should we be able to renegotiate the contract under
15 otherwise similar terms. That would let us, you know, pay the
16 avoided cost exactly as stated. We would not buy the renewable
17 attributes at all. And, you know, Seimens has expressed the
18 concern they'd like to get their project going, and that would
19 save the time of renegotiating a contract in its entirety and
20 resubmitting and restarting all the clocks. But we would ask
21 that the Commission do that and we would then X out, if we
22 can -- we'd have to negotiate this, any purchase of renewable
23 attributes.

24 CHAIRMAN CARTER: Let me do this before --
25 Commissioner McMurrian, I know I told you I was going to

1 recognize you. Let me, let me recognize Mr. Cooke for just one
2 moment here and kind of bring us around here.

3 MR. COOKE: I'm generally in favor of that. I think
4 that we could do that administratively if it's very clear what
5 it is that you are directing us to do. I think that there are
6 provisions in the contract that would be specifically
7 eliminated if that were the case. So there would be no
8 delegation to us as staff to make a substantive decision. But
9 in the alternative, if you approve it here in this forum to
10 tell us that you agree that if the payments under that contract
11 are negotiated out, that we could implement that
12 administratively. I'm a little uncertain because we have to
13 look at the contract and we would not want to get into making
14 substantive decisions. Just a question of whether we could do
15 it administratively or not.

16 CHAIRMAN CARTER: Interesting. We'll just take that
17 kind of under advisement for right now. But right now I want
18 to go to Commissioner McMurrin, who's been very patient.
19 You're recognized.

20 COMMISSIONER McMURRIAN: Thank you, Chairman. And
21 actually my question, and I wanted to pose it to Mr. Anderson
22 and to staff, in a way it was along those lines. And I've been
23 trying to think about if there's some way for us to address
24 this issue without necessarily addressing Issue 2. And I guess
25 my concern is, is that this issue is bigger than this one

1 contract and this one issue before us. And I just wanted to
2 throw out there is there some way -- and perhaps Mr. Anderson
3 is saying that they would go back and talk to, talk to the
4 other party about perhaps, you know, sort of taking this out of
5 the contract and maybe that's definitely one way to do it.

6 I guess my question was is there some way for the
7 Commission to sort of take up this issue about Green Attributes
8 and recovery through a clause and that sort of thing on a more
9 generic basis, even if we, even if we do need to go forward
10 with this issue that's before us today? Because obviously the
11 company has petitioned for it in this manner and I think we
12 might have to make a decision on that. But would there be some
13 way for us to take that issue up more broadly, because I do
14 think it's bigger than what we have before us? And I'd like to
15 hear from Mr. Anderson and from staff. I'm not sure what order
16 is best, so.

17 CHAIRMAN CARTER: Mr. Anderson.

18 MR. ANDERSON: Thank you, Commissioner McMurrin.
19 I'm sorry for interrupting you earlier. I just wanted to make
20 sure that the point was in before the vote occurred.

21 Our thinking is kind of piece by piece here. We have
22 this particular contract that we've worked to negotiate that
23 potentially could be online this year, which is good. Our
24 thought all along has been that a broader form solution will
25 most likely be needed in relation to costs for recovery of

1 renewable attributes and this and that, you know, in a
2 rulemaking or, or in the context of RPS or all the things we've
3 talked about elsewhere.

4 Our thought very specifically for this contract was
5 to try not to have to decide that, perhaps be very clear that
6 in approving this the Commission is thinking of those things
7 down the road. But the specific thing we thought would work
8 for this particular contract would be the fuel clause recovery
9 we talked about in which case it would be incorporated in the
10 schedules beginning 2009 as a line item for your review and the
11 like. And by the time that actually occurs -- let's think this
12 through. This facility comes on late 2008, let's say. Let's
13 say we begin making payments in 2009. There's already a
14 considerable time buffer there in terms of when as a mechanical
15 matter we start recovering costs.

16 And for the issue generally, as you've said, I
17 suggest we'll have a lot more information down the road as to
18 how this Commission wishes to proceed in relation to recovery
19 of such costs generally if there's a special new rule, a
20 special new clause. I can't prejudge that with you. I agree
21 it's a, it's a large issue down the road. What we're trying to
22 do here with this contract is move the ball forward in one
23 small incremental way.

24 CHAIRMAN CARTER: Mr. Ballinger.

25 MR. BALLINGER: Yes. I would suggest that this

1 should not be discussed in a vacuum of just cost recovery.
2 This, I think this is a bigger part of an RPS development if
3 and when you do that and it should be taken in that context in
4 total. I'm not sure if there's additional workshops scheduled
5 to look at RPS and things of that nature. But I would suggest
6 that's where it should be discussed and not just a separate
7 thing about cost recovery. I would caution you that I think to
8 approve cost recovery before you develop an RPS would tie your
9 hands when you go to develop an RPS because here you've already
10 committed ratepayer funds to Green Attributes of some sort to
11 apply to RPS. You may be faced with a decision that you don't
12 need Green Attributes to make your RPS, yet you've already
13 spent some money. So I think it's going to hamper your
14 judgment or could hamper your judgment in the future, and I
15 would suggest that you discuss this in the total context of RPS
16 development.

17 COMMISSIONER ARGENZIANO: Mr. Chair?

18 CHAIRMAN CARTER: Yes, ma'am. You're recognized,
19 Commissioner Argenziano.

20 COMMISSIONER ARGENZIANO: I couldn't agree more with
21 Mr. Ballinger. I think at this time it's purely speculative.
22 The company is not willing to take the risk with their
23 shareholders, I guess. I approve of what the company is trying
24 to do, but I can't see putting that on the consumer at this
25 time. We don't even know where the, where the Legislature is

1 going to turn out on this yet and I think it would be very
2 dangerous.

3 CHAIRMAN CARTER: Okay. Let me do this,
4 Commissioners. Let me just take about five minutes. The clock
5 on the wall says 11:30. We'll get back in here at eleven -- is
6 it 10:30? Oh. Maybe I shouldn't quit my day job. I was about
7 to say, Mr. Anderson, welcome to the matrix. (Laughter.) But
8 how about we come back at about 11:00 -- 10:35. All right?
9 Does that work for everybody? Commissioner Argenziano, can you
10 hold on for a second? We're going to take about a
11 five-minute -- 10:35.

12 COMMISSIONER ARGENZIANO: Yes, Mr. Chair.

13 CHAIRMAN CARTER: We're on recess.

14 (Recess.)

15 CHAIRMAN CARTER: If everyone will get in their
16 places and all, we'll kind of bring ourselves back around here.
17 And I think just as we took a break Commissioner McMurrian had
18 some questions; I think Commissioner Skop has some questions.

19 Commissioner Edgar, did you have any additional
20 questions?

21 COMMISSIONER EDGAR: Thank you, Mr. Chairman.

22 I would like to be just a touch clearer on the,
23 perhaps -- my words, not yours -- alternative suggestion that
24 Mr. Anderson gave to us shortly before the break. And you read
25 us some suggested language about giving some administrative

1 approval authority to staff.

2 Could you go over that again?

3 MR. ANDERSON: Of course.

4 COMMISSIONER EDGAR: Thank you.

5 MR. ANDERSON: We would ask that if the Commission
6 disagrees with our position on Issue 2, we would request that
7 the Commission grant its staff the administrative authority to
8 approve the contract without the purchase of green attributes,
9 should the company be able to renegotiate the contract under
10 otherwise similar terms.

11 COMMISSIONER EDGAR: Mr. Chairman, may I follow up?

12 CHAIRMAN CARTER: You're recognized.

13 COMMISSIONER EDGAR: Thank you.

14 Mr. Anderson, am I correct that if that were to be
15 the way we go, just for discussion purposes at this point, if
16 that is the way that the Commission ultimately went, then that
17 would not impact Issue 1 as it is laid out currently?

18 MR. ANDERSON: Just thinking this through, if the
19 staff recommendation as a whole is adopted, then it would be
20 FPL's choice to reject the contract in its entirety under the
21 reg-out clause in the contract. So what this fall-back
22 position that we have just talked about does, is it gives us
23 the ability to try to preserve the purchase at the
24 not-to-exceed-avoided-cost price, if we can negotiate that, and
25 remove the green attributes. And that's not something we have

1 talked to the proposed seller about, but that would be
2 something we would do, but we can't speak to what the result
3 would be. Our strong preference, of course, is approval as
4 proposed.

5 COMMISSIONER EDGAR: Thank you. And I understand and
6 I appreciate that position. But I also think that, therefore,
7 the answer to my question is yes.

8 MR. ANDERSON: Yes.

9 COMMISSIONER EDGAR: And is there a timing? I mean,
10 is that part of the reason that you would be looking for us to
11 handle that in the next steps, if we went that direction
12 administratively through staff rather than bring it back before
13 the Commission, is that there are some timing constraints?

14 MR. ANDERSON: Yes, that is correct. There are
15 timing constraints.

16 COMMISSIONER EDGAR: All right. Thank you very much.

17 CHAIRMAN CARTER: Thank you.

18 Commissioner Skop, you're recognized.

19 COMMISSIONER SKOP: Thank you, Mr. Chairman.

20 Just a quick question or comment. I do, under the
21 circumstances, tend to fully agree with Mr. Ballinger and
22 Commissioner Argenziano's position on this matter. Certainly
23 if, under the existing contract, there were an option or a
24 right of refusal with respect to the attributes, certainly I
25 think that that would be something of value in the future.

1 But, again, as Mr. Ballinger has appropriately, I think,
2 pointed out, we are not in a RPS situation yet, and so it's
3 somewhat analogous to putting the cart ahead of the horse.

4 But, again, I am somewhat open to supporting
5 administrative review. My concern is just what the disposition
6 would be. But, again, I think I could support staff and trust
7 their judgment that they would move forward as long as, as Mr.
8 Cooke has pointed out, there is not a substantive change that
9 would need to come before the Commission. But, like I said, I
10 just wanted to opine on that. And with that, I'm willing to
11 move forward with what the Commission decides.

12 CHAIRMAN CARTER: Commissioners, do we need to hear
13 from Mr. Ballinger, or do you have further questions, or
14 discussions? I'm looking at Mr. Cooke right now before we --

15 COMMISSIONER ARGENZIANO: Mr. Chair?

16 CHAIRMAN CARTER: You're recognized, Commissioner
17 Argenziano.

18 COMMISSIONER ARGENZIANO: If I could, I would like to
19 hear -- I'd like to ask Mr. Ballinger, basically, to repeat his
20 statements before. I need to hear them one more time to fully
21 understand why he is opposed to the Issue 2 proposal.

22 MR. BALLINGER: I'll do my best, Commissioner.

23 COMMISSIONER ARGENZIANO: Thank you.

24 MR. BALLINGER: I kind of did it on the fly the first
25 time, so let's see if I can get it right the second time.

1 I think, basically, we summed it up is that is a bit
2 premature. That we do not have an RPS in place, I think to --
3 as Mr. Anderson pointed out, FPL is not in the business of
4 holding on to portfolios for possible future use, nor does
5 staff think that ratepayers should be held on to portfolios for
6 possible future use. I don't think they should bear that risk,
7 especially when they are not in the position to understand the
8 markets as well as the utility is.

9 Staff's recommendation has given the utility the
10 opportunity to earn a return, if you will, on these attributes
11 if they sell them in the open market and, at the same time,
12 encourage renewable generation. I hope that sums up, again,
13 what we said earlier. If not, I will try again.

14 COMMISSIONER ARGENZIANO: Yes, Mr. Ballinger, that's
15 what I thought you said. And I guess I still feel the same
16 way, Mr. Chair. Thank you.

17 CHAIRMAN CARTER: Thank you, Commissioner Argenziano.
18 Commissioners? Commissioner Skop.

19 CHAIRMAN CARTER: Commissioner Skop.

20 COMMISSIONER SKOP: Thank you, Mr. Chairman.

21 Just one quick follow up to staff. Mr. Ballinger,
22 you would agree, would you not, that there is, notwithstanding
23 the fact that this may be premature in light of not having the
24 RPS in place, but should the need arise to purchase attributes
25 from this project, which does have a substantial benefit to the

1 state, I clearly recognize that, but you would agree, would you
2 not, there is an existing mechanism under an existing voluntary
3 program to accomplish that?

4 MR. BALLINGER: Yes. And even if the existing
5 program could not facilitate it, I think FPL is free to come up
6 with a new voluntary program for in-state RECs to address it.

7 COMMISSIONER SKOP: Don't give me a coronary.

8 MR. BALLINGER: No. I understand. But, I'm not
9 certain that the existing program could cover it. There might
10 be some problem, there may not be; but that does not prevent
11 the utility from developing a voluntary program to cover these
12 things.

13 COMMISSIONER SKOP: Thank you.

14 CHAIRMAN CARTER: Thank you.

15 Commissioner Edgar.

16 COMMISSIONER EDGAR: Mr. Chairman, if the timing is
17 correct, let me put this out, if I may. I think that I would
18 make a motion in support of the staff recommendation on Issue
19 1 and Issue 3, and on Issue 2 to adopt the language that was
20 suggested by Mr. Anderson such that we would give staff
21 administrative authority to approve the contract without the
22 green attributes portion.

23 COMMISSIONER SKOP: I'd be willing to second that.

24 CHAIRMAN CARTER: Thank you, Commissioners.

25 It has been moved and seconded. Any questions on

1 where we're going? I'm glad that staff was taking notes on
2 that.

3 Commissioner McMurrian, you're recognized.

4 COMMISSIONER McMURRIAN: It is not a question, it's
5 just a comment. I wanted to say I appreciate you all giving me
6 the latitude to ask some questions to think some of this
7 through. I am in agreement with the motion.

8 I'm just trying to, again, perhaps add some more
9 certainty to this whole process. It seems like we are just not
10 going to be able to get it at this time point, but I think that
11 as long as we continue to look at these types of issues and
12 make sure that we are thinking outside the box, to use that
13 over-used phrase, then I'm comfortable with the staff rec, and
14 the motion, actually the motion as Commissioner Edgar made.

15 CHAIRMAN CARTER: As we bring this in for a landing,
16 I think it just shows that we are willing and able to look at
17 opportunities for companies to step up and do innovative things
18 to assist in this process where we are headed, but also we want
19 to be cognizant of the ratepayers.

20 So, with that, Commissioners, all those in favor of
21 the motion let it be known by the sign of aye.

22 (Unanimous affirmative vote.)

23 CHAIRMAN CARTER: All those opposed?

24 The motion passes.

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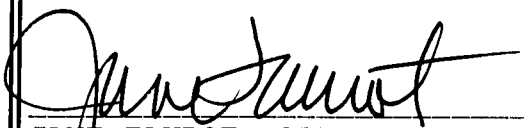
CERTIFICATE OF REPORTERS

WE, JANE FAUROT, RPR, and LINDA BOLES, RPR, CRR, Official Commission Reporters, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

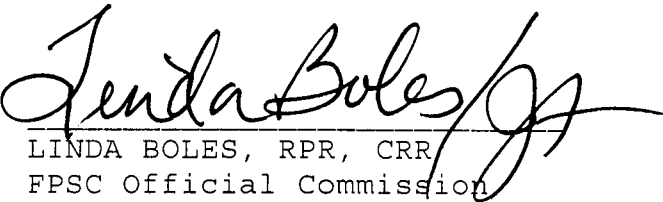
IT IS FURTHER CERTIFIED that we stenographically reported the said proceedings; that the same has been transcribed under our direct supervision; and that this transcript constitutes a true transcription of our notes of said proceedings.

WE FURTHER CERTIFY that we are not a relative, employee, attorney or counsel of any of the parties, nor are we a relative or employee of any of the parties' attorneys or counsel connected with the action, nor are we financially interested in the action.

DATED THIS 5th DAY OF February, 2008.



JANE FAUROT, RPR
FPSC Official Commission
Reporter
(850) 413-6732



LINDA BOLES, RPR, CRR
FPSC Official Commission
Reporter
(850) 413-6734

070677-EQ

item 11 Handout

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

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

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

Docket No. EL03-133-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued October 1, 2003)

1. On June 13, 2003, American Ref-Fuel Company, Covanta Energy Group, Montenay Power Corporation, and Wheelabrator Technologies Inc. (Petitioners) filed a petition for declaratory order in which they seek an interpretation of the Commission's regulations implementing Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-3 (2000). See 18 C.F.R. Part 292 (2003).
2. Petitioners, through direct and indirect subsidiaries, own and operate waste-to-energy power plants across the United States that are certified as qualifying facilities (QFs). Petitioners seek Commission interpretation of its avoided cost rules under PURPA. Specifically, Petitioners seek an order declaring that avoided cost contracts entered into pursuant to PURPA, absent express provisions to the contrary, do not inherently convey to the purchasing utility any renewable energy credits or similar tradeable certificates (RECs). They contend that the power purchase price that the utility pays under such a contract compensates a QF only for the energy and capacity produced by that facility and not for any environmental attributes associated with the facility.
3. As discussed below, we grant Petitioners' petition for a declaratory order, to the extent that they ask the Commission to declare that contracts for the sale of QF capacity and energy entered into pursuant to PURPA do not convey RECs to the purchasing utility (absent express provision in a contract to the contrary). While a state may decide that a sale of power at wholesale automatically transfers ownership of the state-created RECs, that requirement must find its authority in state law, not PURPA.

Background

4. RECs have been created in recent years by State programs typically designed to promote increased reliance on renewable energy resources. These State programs typically are premised on promoting policy goals such as improved air and water quality, reduction of greenhouse gas emissions, broader fuel diversity, enhanced energy security, and hedging against the price volatility of fossil fuels.
5. According to Petitioners, to date such programs have been adopted in 13 States. They require retail sellers of electricity to include in their resource portfolios a certain amount of electricity from renewable energy resources. This obligation can be satisfied by owning renewable energy facilities, by purchasing power from such facilities, or by purchasing tradable certificates, such as RECs, that correspond to a certain amount of renewable energy generated by a third party. Two states have implemented REC trading programs. Some ISOs are also developing markets for REC trading.
6. The development of these programs and trading markets for RECs has given rise to disputes between QFs and their purchasing utilities. These disputes have focused on the underlying PURPA purchase obligation; that is, whether the existence of a long-term contract entered into pursuant to a PURPA purchase obligation determines ownership of the RECs, though the long-term contract may be silent.
7. Petitioners argue that, absent express provisions to the contrary, contracts entered into pursuant to PURPA do not inherently convey RECs to the utility that purchases the QF's power at avoided cost. They argue that, under this Commission's regulations, avoided cost does not reflect or compensate for environmental externalities associated with QF generation. They also argue that, under Commission precedent, environmental attributes of generation are treated as unbundled from the sale of power. Finally, Petitioners argue that utility arguments in support of a finding that the RECs do convey to the utilities as part of the avoided cost sale depend upon a revisitation of the avoided cost determination made at the time of the purchase obligation. Petitioners argue that such a revisitation of the avoided cost determination should not be allowed.
8. Notice of Petitioners' filing was published in the Federal Register, 68 Fed. Reg. 38,321 (2003), with comments, protests, and interventions due on or before July 7, 2003.
9. Timely motions to intervene and comments in support of the Petitioners were filed by Minnesota Methane LLC; Miami-Dade County Department of Solid Waste Management; USA Biomass Power Producers Alliance; Independent Energy Producers of New Jersey; Independent Power Producers of New York, Inc.; County of Olmsted, Minnesota; Solid Waste Association of North America; Decker Energy International, Inc.; Sithe Energies, Inc.; Azure Mountain Power Company, Tannery Island Power Company; Hydro Power, Inc.; and Energy Enterprises, Inc.

10. These parties request the Commission to grant the Petitioners' petition for declaratory order. They primarily argue that, under existing rules, the avoided cost paid by the purchasing utility compensates the QF for the capacity and the energy generated; and that the sale of RECs, in contrast, compensates the QF for the facility's environmental attributes and rewards the risks associated with the investment in and the design and operation of a renewable energy resource plant. They argue that QF developers face risks in designing and constructing a plant that will be a viable long-term investment -- meeting rigorous environmental standards that include generating technologies that meet environmental and reliability standards and Commission policy. Therefore, RECs need to remain an incentive for QF developers. They largely agree that allowing QFs to trade the RECs associated with a renewable facility will facilitate the development of liquid and efficient markets for RECs, which will in turn create incentives for the development and use of renewable energy resources for the generation of power.

11. Timely motions to intervene, comments and protests in opposition were filed by purchasing utilities, including: Public Service Electric and Gas Company; PacifiCorp; Southern California Edison Company and Pacific Gas & Electric Company; Edison Electric Institute; Xcel Energy Services Inc.; Jersey Central Power & Light Company; Metropolitan Edison Company and Pennsylvania Electric Company (collectively, the FirstEnergy Companies); Ridgewood Renewable Power, LLC.; Central Maine Power Company; Northeast Utilities Service Company, on behalf of Connecticut Light and Power Company, Western Massachusetts Electric Company, Public Service Company of New Hampshire, and the United Illuminating Company; and Bangor Hydro-Electric Company.

12. The parties that oppose the petition for declaratory order request that the Commission either: (1) find that PURPA contracts, unless stated to the contrary, include the transfer of RECs; (2) decline to issue an order; or (3) defer the Petitioners' petition for declaratory order to the states. They largely contend that QFs are fairly compensated. They further argue that PURPA contracts that require a utility to purchase a QF's entire output are bundled contracts and include renewable attributes, which are not separable from the capacity and energy. Some argue that granting the Petitioners request would increase the returns to the QFs at the expense of utilities, other retail suppliers and their customers, and ultimately would discourage REC trading programs.

13. Central Maine Power Company (Central Maine) argues that the Petitioners' request is a matter of private contract interpretation and not suited for generic decision-making by the Commission. Central Maine believes that the grant of the declaratory order would directly affect its rights under each Power Purchase Agreement with a QF, by improperly determining Central Maine's contractual rights to tradable certificates.

14. The following state commissions filed notices of intervention, comments or protests: Maine Public Utilities Commission (Maine Commission), New Hampshire Public Utilities Commission (New Hampshire Commission), New York State Public Service Commission (New York Commission), and California Public Utilities Commission (California Commission). The state commissions generally argue that the implementation and interpretation of QF contract issues should be left to the states. They also argue the Petitioners' request interferes with state initiatives and request the Commission to deny the relief requested, as a matter of policy. The Maine Commission argues that RECs are an element of PURPA contracts and should be viewed as part of a bundled product transferred to the purchaser with the capacity and energy. They request the Commission determine that Maine utilities own the renewable attributes of power sold to them through QF contracts entered into prior to the date of electric restructuring in Maine. The New Hampshire Commission argues that the Petitioners' argument that PURPA contracts compensate QFs only for capacity and energy, not for any environmental attributes, is a fallacy.

15. Motions to intervene with no position were filed by New York State Electric & Gas Corporation; New England Power Pool; Rochester Gas and Electric Corporation; Constellation Power Source, Inc. and Constellation Power, Inc.; California Energy Commission; and CHI Energy, Inc.

16. Untimely motions to intervene in support of the petition were filed by Northeast Maryland Waste Disposal Authority; Craven County Wood Energy; Electric Power Supply Association; California Biomass Energy Alliance, LLC.; City of Alexandria, Virginia; Florida Partnership for Affordable Competitive Energy; and Arlington County, Virginia, Department of Environmental Services. An untimely motion to intervene in opposition to the petition was filed by Atlantic City Electric Company. Untimely motions to intervene with no position were filed by Pennsylvania Public Utility Commission; and PPL EnergyPlus, LLC and PPL Electric Utilities Corporation.

Discussion

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the notices of intervention and the timely, unopposed motions to intervene serve to make those who filed them parties to this proceeding. Furthermore, given their interest and the absence of undue prejudice or delay, we find good cause to grant the untimely motions to intervene.

18. We will grant Petitioners' request for declaratory order, to the extent that the petition asks that the Commission declare that the Commission's avoided cost regulations did not contemplate the existence of RECs and that the avoided cost rates for capacity and energy sold under contracts entered into pursuant to PURPA do not convey the RECs, in the absence of an express contractual provision.

19. Section 210(a) of PURPA requires the Commission to prescribe rules imposing on electric utilities the obligation to offer to purchase electric energy from QFs. Under Section 210(b) of PURPA, such purchases must be at rates that are: (1) just and reasonable to electric consumers and in the public interest; (2) not discriminatory against QFs; and (3) not in excess of the incremental cost to the electric utility of alternative electric energy. Section 210(d) of PURPA, in turn, defines “incremental cost of alternative electric energy” as “the cost to the electric utility of the electric energy which, but for the purchase from [the QF] such utility would generate or purchase from another source.”¹

20. The Commission implemented the purchase obligation set forth in PURPA in Section 292.303 of its regulations, 18 C.F.R. § 292.303(a) (2003), which provides:

Each electric utility shall purchase, in accordance with § 292.304, any energy and capacity which is made available from a qualifying facility

Section 292.304, in turn, requires that rates for purchases shall: (1) be just and reasonable to the electric customer of the electric utility and in the public interest; and (2) not discriminate against qualifying cogeneration and small power production facilities. 18 C.F.R. § 292.304(a)(1) (2003). The regulation further provides that nothing in the regulation requires any electric utility to pay more than the avoided costs for purchases. 18 C.F.R. § 292.304(a)(2) (2003).² “Avoided costs” is defined as “the incremental costs 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.” 18 C.F.R. § 292.101(b)(6) (2003).

21. Section 292.304 sets forth what factors are to be considered in determining avoided costs. See 18 C.F.R. § 292.304(e) (2003). The factors to be considered include:

- (1) the utility’s system cost data;
- (2) the availability of capacity or energy from a QF during the system daily and season peak periods;
- (3) the relationship of the availability of energy or capacity from the QF to the ability of the electric utility to avoid costs; and

¹ See, e.g., Connecticut Light and Power Company, 70 FERC ¶ 61,012 at 61,023, 61,028, reconsideration denied, 71 FERC ¶ 61,035 at 61,151 (1995), appeal dismissed, 117 F. 3d 1485 (D.C. Cir. 1997).

² See, e.g., id., 70 FERC at 61,023-24, 61,028-030, and 71 FERC at 61,151-53.

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

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

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

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

The Commission orders:

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

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

(S E A L)

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Docket No. EL03-133-000

(Issued October 1, 2003)

BROWNELL, Commissioner, dissenting:

1. The logic of this order escapes me. The order states, and I agree, that RECs are creations of the States, and that PURPA does not address the ownership of RECs. Given that, the logical conclusion ought to be that whether a particular contract conveys RECs is purely a matter of the particular state law creating the RECs. This order, however, grants the petition with the blanket declaration that PURPA avoided-cost contracts do not convey RECs to the purchasing utility unless they include an express provision doing so. I would have dismissed the petition and left the issue of ownership of RECs to be resolved in the appropriate state fora.

Nora Mead Brownell
Commissioner

070677-EQ
Item 11 Handout

107 FERC ¶ 61,016
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

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

Docket No. EL03-133-001

ORDER DENYING REHEARING

(Issued April 15, 2004)

1. In this order, we deny rehearing of the Commission's October 1, 2003 Order in this proceeding, American Ref-Fuel Company, et al., 105 FERC ¶ 61,004 (2003) (October 1 Order). In the October 1 Order, the Commission interpreted the Commission's regulations implementing section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-3 (2000), see 18 C.F.R. Part 292 (2003), by declaring that contracts for the sale of qualifying facility (QF) capacity and energy entered into pursuant to PURPA do not convey renewable energy credits or similar tradeable certificates (RECs) to the purchasing utility (absent express provision in a contract to the contrary). The Commission further declared that while a State may decide that a sale of power at wholesale automatically transfers ownership of the State-created RECs, that requirement must find its authority in State law, not PURPA.

Background

2. RECs were created in recent years by State programs typically designed to promote increased reliance on renewable energy resources. These State programs typically are premised on promoting policy goals such as improved air and water quality, reduction of greenhouse gas emissions, broader fuel diversity, enhanced energy security, and hedging against the price volatility of fossil fuels.

3. According to the petition, such programs had been adopted in 13 states as of the date of the petition. The programs require retail sellers of electricity to include in their resource portfolios a certain amount of electricity from renewable energy resources. This

obligation can be satisfied by owning renewable energy facilities, by purchasing power from such facilities, or by purchasing tradeable certificates, such as RECs, that correspond to a certain amount of renewable energy generated by a third party. Two States have implemented REC trading programs. Some Independent System Operators and Regional Transmission Organizations are also developing markets for REC trading.

4. The development of these programs and trading markets for RECs has given rise to disputes between QFs and their purchasing utilities. These disputes have focused on the underlying PURPA purchase obligation; that is, whether the existence of a long-term contract entered into pursuant to a PURPA purchase obligation determines ownership of the RECs, though the long-term contract may be silent.

October 1 Order

5. On June 13, 2003, American Ref-Fuel Company, Covanta Energy Group, Montenay Power Corporation, and Wheelabrator Technologies Inc. (Petitioners) filed a petition for declaratory order seeking an interpretation of the Commission's avoided costs rules under PURPA. Specifically, Petitioners sought an order declaring that avoided cost contracts entered into pursuant to PURPA, absent express provisions to the contrary, do not inherently convey to the purchasing utility any RECs. They argued that the power purchase price that the utility pays under such a contract compensates a QF only for the energy and capacity produced by that facility and not for any environmental attributes associated with the facility.

6. In the October 1 Order the Commission granted the petition for declaratory order:

to the extent that the petition asks that the Commission declare that the Commission's avoided cost regulations did not contemplate the existence of RECs and that the avoided cost rates for capacity and energy sold under contracts entered into pursuant to PURPA do not convey the RECs, in the absence of an express contractual provision.^[1]

¹ October 1 Order at P 18, 24; accord id. at P 3. Our reference to an "express contractual provision" here and elsewhere in the October 1 Order seems to have been misunderstood. We did not mean to suggest that the parties to a PURPA contract, by contract, could undo the requirements of State law in this regard. All we intended by this language was to indicate that a PURPA contract did not inherently convey any RECs, and correspondingly that, assuming State law did not provide to the contrary, the QF by contract could separately convey the RECs.

The Commission continued that, while a State may decide that a sale of power at wholesale automatically transfers ownership of the State-created RECs, that requirement must find its authority in State law.²

Requests for Rehearing

7. Timely requests for rehearing were filed by the Maine Public Utilities Commission (Maine Commission); the Edison Electric Institute; Southern California Edison Company and Pacific Gas and Electric Company, jointly; Jersey Central Power & Light Company, Metropolitan Edison Company and Pennsylvania Electric Company (collectively, the FirstEnergy Companies); Public Service Electric and Gas Company (PSE&G); Northeast Utilities Service Company on behalf of Connecticut Light and Power Company, Western Massachusetts Electric Company, and Public Service Company of New Hampshire (collectively the NU Operating Companies) and United Illuminating Company; and Xcel Energy Services, Inc. All urge that the Commission should have either dismissed the petition for declaratory order, or, if it did not dismiss the petition, the Commission should have ruled that PURPA contracts are bundled total output contracts that include the renewable attributes and thus RECs convey with the electricity sold under the contracts.

8. Petitioners filed an answer to the requests for rehearing.

Discussion

9. Rule 713(d) of the Commission's Rules of Practice and Procedure provides that the Commission will not permit answer to requests for rehearing. 18 C.F.R. § 385.713 (d) (2003). We will accordingly reject Petitioners' answer to the requests for rehearing.

10. Nothing raised on rehearing warrants changing our decision in the October 1 Order and, accordingly, we will deny rehearing.

11. The entities seeking rehearing, other than the Maine Commission, are (or represent) utilities that purchase electricity from QFs. They argue the Commission should have dismissed the petition and left the issue of whether a contract conveys RECs to the appropriate State court.³ Alternatively, just as they argued in response to the

² *Id.* at P 24.

³ While those seeking rehearing argue that, once the Commission acknowledged that RECs are creatures of the States and exist outside the confines of PURPA, *see id.* at P 23-24, dismissal of the petition was the only action the Commission could take in this case, we do not agree. In this regard we note that those seeking rehearing also argue on
(continued...)

original petition, all seek a ruling that avoided cost rates paid under PURPA pay not just for capacity and energy from a QF, but also any associated RECs. All oppose having this Commission rule that contracts for the sale of QF capacity and energy entered into pursuant to PURPA convey only the capacity and energy, and do not convey RECs, to the purchasing utility (absent express provision in the contracts to the contrary).

12. We disagree. As we stated in the October 1 Order, “States, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold or traded; it is not an issue controlled by PURPA.”⁴ However, PURPA does determine the rate which electric utilities must offer to purchase electric energy from QFs.

13. As we explained in the October 1 Order,⁵ section 210(a) of PURPA requires the Commission to prescribe rules imposing on electric utilities the obligation to offer to purchase electric energy from QFs.⁶ The Commission implemented the purchase obligation in PURPA in section 292.303 of its regulations, 18 C.F.R. § 292.303 (2003), which provides:

Each electric utility shall purchase, in accordance with § 292.304, any energy and capacity which is made available from a qualifying facility

Section 292.304, in turn, requires that rates for purchases shall: (1) be just and reasonable to the electric customer of the electric utility and in the public interest; and (2) not discriminate against qualifying cogeneration and small power production facilities. 18 C.F.R. § 292.304(a)(1) (2003). The regulation further provides that nothing

rehearing, as they did in response to the petition, that RECs automatically convey under PURPA avoided cost contracts to the power-purchasing utilities. They ask that the Commission affirmatively rule that, under PURPA, RECs are conveyed to the purchasing utilities. They, in essence, argue that the Commission may properly address the substance of the petition, as long as the Commission rules in their favor. They implicitly acknowledge that the Commission can properly rule on the substance of the petition, rather than dismiss it. Their quarrel is thus with how the Commission ruled on the substance of the petition.

⁴ *Id.* at P 23. Indeed, insofar as RECs are State-created, different States can treat RECs differently.

⁵ *Id.* at P 19-21.

⁶ In PURPA the QFs are referred to as qualifying small power production facilities and as qualifying cogeneration facilities.

in the regulation requires any electric utility to pay more than the avoided costs for purchases. 18 C.F.R. § 292.304(a)(2) (2003). “Avoided costs” is defined as “the incremental costs 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.” 18 C.F.R. § 292.101(b)(6) (2003).

14. Section 292.304 sets forth what factors are to be considered in determining avoided costs. See 18 C.F.R. § 292.304(e) (2003). The factors to be considered include:

- (1) the utility’s system cost data;
- (2) the availability of capacity or energy from a QF during the system daily and season peak periods;
- (3) the relationship of the availability of energy or capacity from the QF to the ability of the electric utility to avoid costs; and
- (4) the costs or saving resulting from variations in line losses from those that would have existed in the absence of purchases from the QF.

15. As the Commission stated in its October 1 Order,⁷ the factor that is not mentioned in the Commission’s regulations is the environmental attributes of the QF selling to the utility. This is because, under PURPA and our implementing regulations, avoided costs were intended to put the utility in the same position when purchasing QF capacity and energy as if the utility either had generated the energy itself or purchased the energy from another source. In this regard, the avoided cost that a utility pays a QF does not depend on the type of QF, i.e., whether it is a fossil-fuel-fired cogeneration facility or a renewable-energy-fired small power production facility. As those seeking rehearing recognize, only renewable energy small power production facilities have renewable attributes, yet the energy from a cogeneration facility is priced the same as the energy from a small power production facility. Both are priced based on a purchasing utility’s avoided costs. The Commission thus reasonably concluded that avoided cost rates are not intended to compensate the QF for more than capacity and energy.⁸

⁷ Id. at P 22.

⁸ Id.

16. If avoided cost rates are not intended to compensate a QF for more than capacity and energy, it follows that other attributes associated with the facilities are separate from, and may be sold separately from, the capacity and energy.⁹ Indeed, states in creating RECs that are unbundled and tradeable have recognized this. The very fact that RECs may be unbundled and may be traded under State law indicates that the environmental attributes do not inherently convey pursuant to an avoided cost contract to the purchasing utility.

17. In sum, therefore, we will deny rehearing of our October 1 Order.

The Commission orders:

The requests for rehearing are hereby denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁹ In this regard, we note that cogeneration facilities, to receive QF status, are required to produce both electricity and useful thermal output. See 16 U.S.C. §§ 796 (18)(A)(i)-(ii), (B) (2000); 18 C.F.R. §§ 292.202(c), 292.205 (2003). The thermal output that is a pre-requisite to a cogeneration facility's achieving QF status is saleable separately from the capacity and energy of the cogeneration facility. See, e.g., *Liquid Carbonics Industries Corp. v. FERC*, 29 F.3d 697, 700 (D.C. Cir. 1994) (purchase of thermal output by unaffiliated thermal host establishes arm's-length market for thermal output); see also *Brazos Electric Power Cooperative, Inc. v. FERC*, 205 F.3d 235, 237-38 (5th Cir. 2000); *Kamine/Besicorp Allegany L.P.*, 63 FERC ¶ 61,320 at 63,157-59 (1993); *Arroyo Energy Limited Partnership*, 62 FERC ¶ 61,257 at 62,722-23, reh'g denied, 63 FERC ¶ 61,198 at 62,545-46 (1993); *Electrodyne Corp.*, 32 FERC ¶ 61,102 at 61,277-79 (1985).

If the thermal output of a cogeneration QF is separately saleable, the renewable attributes of a small power production QF are similarly separate.

UNITED STATES OF AMERICA
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Covanta Energy Group,
Montenay Power Corporation, and
Wheelabrator Technologies Inc.

Docket No. EL03-133-001

(Issued April 15, 2004)

Nora Mead BROWNELL, Commissioner *dissenting*:

1. As I stated in my prior dissent, I believe that once the Commission acknowledged that RECs are creations of the States, the only logical course was to dismiss the petition and leave the issue of ownership of RECs to be resolved in the appropriate state fora. Therefore, I would have granted rehearing.

Nora Mead Brownell