

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Florida Power & Light  
Company's Sunshine Energy Program.

DOCKET NO. 070626-EI  
ORDER NO. PSC-08-0600-PAA-EI  
ISSUED: September 16, 2008

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman  
LISA POLAK EDGAR  
KATRINA J. McMURRIAN  
NANCY ARGENZIANO  
NATHAN A. SKOP

NOTICE OF PROPOSED AGENCY ACTION  
ORDER TERMINATING PROGRAM AND CANCELLING TARIFF

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code (F.A.C.).

BACKGROUND

The Commission first encouraged FPL to consider green pricing options in June 1995.<sup>1</sup> At the time, green pricing was a relatively new concept. In general, green pricing programs allow interested customers to voluntarily contribute towards renewable generating resources, which are often higher in cost than fossil-fuel based generation. In response to our encouragement, FPL requested, and we approved, a two-year Green Pricing Research and Development Project to test customer response to a green pricing initiative.<sup>2</sup> Customer contributions received as a result of the program were used to construct a 10 kW photovoltaic system at FPL's Martin generating site.

In August 1997, as a part of the demand-side management goal setting proceeding, we approved a stipulation between FPL and the Legal Environmental Assistance Foundation.<sup>3</sup> Under the stipulation, FPL agreed to "[i]nvestigate and, if feasible, implement a Green Energy Program under which FPL would purchase energy generated from new renewable resources."

<sup>1</sup> See Order No. PSC-95-0691-FOF-EG, issued June 9, 1995, in Docket No. 941170-EG, In Re: Approval of demand-side management plan of Florida Power and Light Company.

<sup>2</sup> See Order No. PSC-97-0528-FOF-EG, issued May 7, 1997, in Docket No. 960624-EG, In Re: Petition for approval of Green Pricing Research and Development Project by Florida Power and Light Company.

<sup>3</sup> See Order No. PSC-99-1412-S-EG, issued August 6, 1997, in Docket No. 971004-EG, In Re: Adoption of numeric conservation goals by Florida Power and Light Company.

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We subsequently approved a three-year green energy research program as a part of FPL's demand-side management plan.<sup>4</sup> Under this program, FPL performed additional research on customer preferences regarding renewable energy and the potential for developing a green pricing program. FPL used this customer preference information to design a three-year pilot green pricing program.

We approved FPL's voluntary pilot green pricing program on December 22, 2003.<sup>5</sup> FPL's pilot green pricing program was available only to residential customers and was based primarily on tradable renewable energy credits (TRECs). TRECs are financial instruments used to promote renewable generation by providing an additional revenue source to renewable generators. TRECs are essentially formed by separating the environmental attributes from the actual energy produced by renewable generating resources. Residential customers who chose to participate were charged \$9.75 per month. In return, FPL made two commitments: (1) to purchase the TRECs associated with 1,000 kWh of renewable energy for each \$9.75 contribution, and (2) to develop or purchase 150 kW of solar capacity within Florida for every 10,000 participating customers. In our order, we allowed FPL to recover reasonable and prudent project administrative costs through its Energy Conservation Cost Recovery (ECCR) clause up to \$1.5 million if project administrative costs exceeded revenues received. We also ordered FPL to provide marketing materials to our staff, for approval, prior to distribution to customers. Finally, we required FPL to file detailed semi-annual progress reports and to provide us with a schedule for expanding the program to include commercial customers.

On August 29, 2006, FPL filed a petition to convert its pilot green pricing program to a permanent program under its demand-side management plan and to expand the program to include commercial customers. We approved FPL's permanent green pricing program, the Sunshine Energy Program, and the associated tariff in November 2006.<sup>6</sup> Unlike the pilot program, our order did not require FPL to file semi-annual progress reports for the permanent program. Instead, FPL committed to record revenues and expenses, and provide status reports as part of its ECCR clause filings.

In 2007, our staff opened a docket to review FPL's Sunshine Energy Program. On September 27, 2007, our staff filed a recommendation that certain modifications should be made to the Sunshine Energy Program. Many of our staff's concerns involved FPL's contract with Green Mountain Energy Company (Green Mountain). On October 4, 2007, FPL requested that the recommendation be deferred in order for FPL to address the issues raised in staff's recommendation.

In an effort to fully evaluate the Sunshine Energy Program, our staff also initiated an audit for the purpose of identifying, to the extent possible, how these voluntary contributions

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<sup>4</sup> See Order No. PSC-00-0915-PAA-EG, issued May 8, 2000, in Docket No. 991788-EG, In Re: Approval of demand-side management plan of Florida Power and Light Company.

<sup>5</sup> See Order No. PSC-03-1442-TRF-EI, in Docket No. 030752-EI, In Re: Petition for approval of green power pricing research project as part of Demand-Side Management Plan by Florida Power and Light Company.

<sup>6</sup> See Order No. PSC-06-0924-TRF-EI, issued November 6, 2006, in Docket No. 060577-EI, In Re: Petition to convert green power pricing research project to permanent program and to extend program to commercial customers, by Florida Power and Light Company.

were being used and whether there is a clear and transparent accounting for these monies. This audit was completed on May 30, 2008. On June 16, 2008, FPL filed a response to our staff's audit of the Sunshine Energy Program.

Over the eight month period following our deferral of consideration of staff's September 2007 recommendation, FPL provided verbal updates to our staff on the status of its efforts to renegotiate its contract with Green Mountain. On June 5, 2008, FPL filed a petition to modify the Sunshine Energy Program. The petition included a proposed revised tariff sheet no. 8.841.

This order addresses our concerns regarding FPL's implementation of its existing Sunshine Energy Program, as well as FPL's petition to modify the program and the associated tariff. We have jurisdiction over this matter under Sections 366.04, 366.05, 366.06, 366.80, 366.81, and 366.82, Florida Statutes (F.S.).

### REVIEW OF THE SUNSHINE ENERGY PROGRAM

The following describes the Sunshine Energy Program, the results of our staff's audit, and staff's concerns regarding implementation of the program.

#### FPL's Existing Sunshine Energy Program

FPL contracted with Green Mountain to fulfill its obligations to residential participants in the program. Under the existing contract, Green Mountain is responsible for:

- developing marketing plans and materials,
- marketing the program to residential customers,
- providing customer sign-up and account services,
- purchasing tradable renewable energy credits (TRECs) for these customers, and
- developing 150 kW of solar capacity for each 10,000 participating residential customers.

FPL's contract with Green Mountain is basically a turn-key agreement in which Green Mountain is responsible for meeting all of FPL's commitments for use of residential participants' contributions. In exchange, Green Mountain receives the vast majority of each participant's monthly \$9.75 contribution as a flat fee; FPL receives a small portion of each contribution to cover internal administrative expenses and any associated taxes.

FPL has a separate contract with Sterling Planet to meet its commitments with respect to commercial participants. Sterling Planet is responsible for purchasing all TRECs for participating commercial customers. Under the existing Sunshine Energy Program, FPL does not count commercial participants toward its solar development obligation.

*Program Participation, Revenues and Expenses*

Table 1 below displays the data FPL provided on program enrollments, revenues, and expenses, from the beginning of the pilot program in 2004, through May 31, 2008.

<b>Table 1</b>						
	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>Total</b>
<b>Cumulative Participants</b>	10,674	23,066	28,742	37,184	38,929	
<b>Revenues</b>	\$514,642	\$2,258,751	\$2,928,225	\$3,900,993	\$1,833,288	\$11,435,899
<b>Expenses</b>	\$476,590	\$2,101,449	\$2,819,106	\$3,915,094	\$1,579,228	\$10,891,467
<b>Net Revenues</b>	\$38,052	\$157,302	\$109,119	\$(14,101)	\$254,060	\$544,432

Revenues for the program are obtained from the \$9.75 per month contributed by participating customers. Total program revenues through May 31, 2008, were \$11,435,899, with total expenses of \$10,891,467. As of May 31, 2008, total program revenues (including pilot years) exceeded total expenses by \$544,432. Program expenses during this time period included FPL's payments to its third party contractors Green Mountain and Sterling Planet, FPL's internal administrative expenses, and gross receipts taxes.

*TREC Purchases*

As discussed above, Green Mountain and Sterling Planet purchase TRECs associated with 1,000 kWh of renewable energy for each \$9.75 customer contribution. These TRECs can be purchased from in-state or out-of-state renewable facilities. FPL provided the data in Table 2 regarding annual in-state and out-of-state TREC purchases from the start of the pilot program in 2004, through June 20, 2008.

<b>Table 2</b>					
	<b>In-State TRECs</b>	<b>% of Total</b>	<b>Out-of- State TRECs</b>	<b>% of Total</b>	<b>Total</b>
<b>2004</b>	20,531	40.0%	30,797	60.0%	51,328
<b>2005</b>	106,885	47.6%	117,709	52.4%	224,594
<b>2006</b>	136,257	45.0%	166,535	55.0%	302,792
<b>2007</b>	97,017	26.0%	276,730	74.0%	373,747
<b>Jan-June 2008</b>	50,000	100.0%	0	0.0%	50,000

*Solar Capacity Commitment*

We requested that FPL provide an update on its progress to meet its commitment to develop 150 kW of solar capacity within Florida for every 10,000 participating residential customers. On June 16, 2008, FPL reported that 513 kW of solar projects have been completed or are in progress as a result of the Sunshine Energy Program. FPL is counting the following projects toward its solar commitment.<sup>7</sup>

- 8 kW of solar installed in cooperation with SunSmart Schools – 2 kW at 4 schools;
- 2 kW of solar installed at the Miami Science Museum;
- 54 kW of rooftop solar installed on homes at The Quarry residential subdivision in Naples, Florida;
- 250 kW solar array at Rothenbach Park in Sarasota;
- 75 kW Publix Supermarkets project – 50 kW complete, 25 kW in progress; and

<sup>7</sup> Note: the 10 kW photovoltaic system FPL installed at its Martin generating site as a result of an earlier pilot program is not counted toward FPL's solar commitment in its Sunshine Energy Program.

- 124 kW of solar photovoltaic systems under the Sun Funds Program.<sup>8</sup>

These projects have been financed in various ways, including contributions to capital costs, long-term agreements to purchase TRECs, and leveraging state solar rebates and tax incentives. FPL believes that leveraging Sunshine Energy funds with other sources provides an opportunity to increase the solar projects developed as a result of the program at a reduced cost. To support its view on leveraging, FPL referred to the 124 kW of customer-owned solar photovoltaic systems listed above which received rebates through the Sun Funds Program. The Department of Environmental Protection's Energy Office currently administers a state program which offers a rebate of \$4 per watt for solar photovoltaic systems. The Sun Funds Program offers an additional rebate of \$1.50 per watt to FPL customers that install solar photovoltaic systems and are approved to receive the state's \$4 per watt rebate. The Sun Funds rebates were initially limited to a total of \$150,000.

### Audit Results

Our staff began requesting information as a part of its normal ongoing review process for an existing utility program; however, they determined that further scrutiny was warranted for two reasons. First, available data suggested that Green Mountain was behind schedule on solar project development. In addition, there appeared to be excess revenues that could have been used to provide greater benefits to program participants through additional renewable project development.

These initial concerns prompted our staff to conduct further discovery and an audit to more fully understand how the program's revenues were being used and whether the use of these revenues was in accordance with our order, as well as in the best interest of the program's participants. This audit was completed on May 30, 2008. FPL has requested that portions of the results of the audit be held confidential. One concern, however, is the audit's finding that the vast majority of the program's revenues have been spent on marketing and administrative costs. Table 3 below displays the total revenues and cost breakdown by categories from 2004 through 2007, as determined by our staff's audit.

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<sup>8</sup> The Sun Funds Program is a solar rebate program that Green Mountain initiated on FPL's behalf under the Sunshine Energy Program in late 2007. Staff's audit shows that 100 kW of solar photovoltaic systems are to receive funding through the Sun Funds rebate program.

		<b>% of Costs to Total Costs</b>	<b>% of Costs to Payments to Green Mountain</b>	<b>% of Costs to FPL Revenues</b>
<b>Revenues</b>	\$9,578,895			\$9,578,895
<b>Payments to Green Mountain</b>	\$8,614,950		\$8,614,950	
<b>Project Costs Paid</b>	\$431,504	4.99%	5.01%	4.50%
<b>TREC Costs</b>	\$1,803,620	20.87%	20.94%	18.83%
<b>Marketing and Other Costs</b>	\$6,408,070	74.14%	74.38%	66.90%
<b>Total</b>	\$8,643,194	100.0%	100.33%	90.23%

On June 16, 2008, FPL filed a response to the staff audit. FPL takes issue with the audit report's finding on marketing expenses associated with the program. FPL states that the audit mischaracterized "direct costs and general and administrative costs" as marketing costs. FPL provided its own breakdown of program expenditures, as shown on the attached document prepared by FPL. FPL lists the following cost breakdown for the existing program:

- 7 percent – FPL program management
- 68 percent – marketing and administration
- 24 percent – TRECs and renewable projects

Concerns Regarding FPL's Implementation of the Existing Program

Several concerns have been identified with the Sunshine Energy Program; however, it is appropriate to note that the program has been successful on certain levels. The program stimulated customer awareness and support for renewable energy. Participation in the program, with 38,929 participants as of May 31, 2008, has demonstrated that there is strong interest among FPL's customers in renewable energy development. In addition, the program has provided funds

<sup>9</sup> The audit did not address the portion of customer contributions directed to FPL's administrative costs. Also, the data provided does not include Green Mountain's estimated \$1 million for its corporate overhead in support of the program through 2007.

for the development of the renewable projects discussed above, as well as an additional revenue stream for renewable generators (both in-state and out-of-state) through the purchase of TRECs.

But, upon a more thorough review of the program's effectiveness and in light of recent legislative policies concerning renewable energy, there are concerns with the continuation of the program. The Florida Legislature has recently shown a clear preference for in-state renewable projects. Section 366.92, F.S., expresses the Legislature's intent to promote the development of renewable energy, 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, and encourage investment within the state. Also, HB 7135, enacted during the 2008 regular session, requires the Commission to develop a renewable portfolio standard. While the bill includes a renewable energy credit trading system, the bill restricts utilities to meet their obligations with in-state renewable generation. HB 7135 also authorizes this Commission to allow utilities to recover costs for 110 megawatts of solar projects developed within Florida. In light of these shifts in policy, as well as questions raised about administrative, marketing, and other costs, we believe that other, better options are available to promote renewable generation, such that the Sunshine Energy Program is no longer the best means by which the State's renewable energy policies can be achieved.

#### Conclusion

As discussed above, the Sunshine Energy Program does not currently serve the interest of the program's participants and does not align with current state renewable energy policies. Therefore, the Sunshine Energy Program shall be terminated effective July 29, 2008. The existing tariff shall be cancelled, and FPL shall escrow all voluntary contributions collected as of July 29, 2008, and beyond. The escrow account shall be established between FPL and an independent financial institution pursuant to a written escrow agreement. This Commission shall be a party to the written escrow agreement and a signatory to the escrow account. The written escrow agreement shall state the following: that the account is established at the direction of this Commission for the purpose set forth above; that no withdrawals of funds shall occur without the prior approval of this Commission through the Commission Clerk; that the account shall be interest bearing; that information concerning that escrow account shall be available from the institution to this Commission or its representative at all times. Pursuant to Rule 25-6.109(6), F.A.C., the utility shall provide a report by the 10th of each month indicating the monthly and total amount of money subject to refund as of the preceding month as well as the status of the escrow account. Within 30 days from the date of this Order, FPL shall submit a revised tariff sheet to remove the program from its tariff. In addition, FPL shall provide notice of termination of the program to the participants.

With respect to the money spent on the Sunshine Energy Program, we direct staff to continue with an audit of Green Mountain's books pertaining to the program, with the understanding that the information will be available to this Commission in the future. Green Mountain has agreed to provide us with the information that we need to better understand the program and has agreed to cooperate with staff, to the extent that it can, to provide the information that this Commission is seeking. If there are any unresolved issues that arise from

the termination of the Sunshine Energy Program, those issues will be considered in the Energy Conservation Cost Recovery Clause (ECCR) proceeding.

TARIFF CANCELLATION

Pursuant to Section 366.06(3), F.S., we may withhold consent to the operation of all or any portion of a new rate schedule, delivering to the utility making the request a reason or written statement of a good cause for doing so within 60 days. On June 5, 2008, FPL filed a petition, along with a revised tariff sheet, to modify the Sunshine Energy Program. Based on our decision to terminate the program and cancel the current tariff, we find that the revised tariff shall be denied.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Power & Light Company's Sunshine Energy Program shall be terminated, effective July 29, 2008, for the reasons set forth herein. It is further

ORDERED that Florida Power & Light Company shall escrow all voluntary contributions collected as of July 29, 2008, and beyond, as set forth herein. FPL shall also provide a report by the 10th of each month indicating the monthly and total amount of money subject to refund as of the preceding month and the status of the escrow account. It is further

ORDERED that Florida Power & Light Company shall submit a revised tariff sheet to remove the program from its tariff within 30 days from the date of this Order. It is further

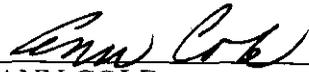
ORDERED that Florida Power & Light Company shall provide notice of termination of the Sunshine Energy Program to the participants. It is further

ORDERED that the revised tariff sheet, filed on June 5, 2008, to modify the Sunshine Energy Program is hereby denied. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this docket shall remain open pending resolution of our staff's audit.

By ORDER of the Florida Public Service Commission this 16th day of September, 2008.

  
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ANN COLE  
Commission Clerk

( S E A L )

KEF

CONCURRENCE BY: COMMISSIONER MCMURRIAN and COMMISSIONER SKOP

COMMISSION MCMURRIAN, concurring with opinion as follows:

I concur with the Commission's decision to terminate the Sunshine Energy program at this time. Between 2004 and 2008, a multitude of generous FPL customers voluntarily contributed at least \$9.75 per month. This enabled the program to spur awareness of and investment in renewable energy. The need for the program, however, has diminished greatly due to the progressive policies advanced by the Florida Legislature and Governor Crist. Presently, the Commission is devoting its resources to implementation of these initiatives to advance renewables in Florida.

It is most likely the case that the Sunshine Energy program could have performed better and delivered greater benefits. It is definitely the case that the perfect information that only comes with the passage of time was not available at the program's inception.

As discussed during our deliberation of this matter, the Commission has remaining issues to sort through with respect to this now terminated program. Of course, it is important to reserve judgment on these related issues until the staff audit is complete and we have more information. However, I believe FPL has complied with the relevant tariff. This was confirmed by our staff during the Agenda conference.

Unfortunately, the Sunshine Energy program appears to have lost credibility with the public. This, coupled with the fact that recent policy changes have provided the state with other alternatives for advancing renewable energy, supports termination of the Sunshine Energy program at this time.

COMMISSIONER SKOP, concurring specially with comment:

It suffices to say that no reasonable person would have contributed to the Sunshine Energy® program had they known that approximately 76.4% of the contributions would be spent on marketing and administrative expenses instead of renewable energy.<sup>10</sup> In reaching this conclusion, it is important to recognize that FPL was paid an administrative fee to manage the Sunshine Energy® program.<sup>11</sup> Therefore, FPL was best positioned to know that the vast majority of the contributions that it collected from the voluntary ratepayers during the 4 ½ year period that the program was in effect were not being spent on renewable energy. Accordingly, FPL had a fiduciary duty to disclose this material fact to the customers that were solicited to participate in the program, to the program participants, and to this Commission. It is clear to me that FPL failed to make this disclosure. Furthermore, one need only look as far as the Frequently Asked Questions section of the FPL Sunshine Energy® webpage to appreciate how consumers could have been misled with respect to how their contributions would be spent under the program.<sup>12</sup> Based upon the above, I firmly believe that FPL should be held accountable for failing to fully disclose material facts associated with the utilization of funds associated with this program and that refunds are warranted.<sup>13</sup>

Notwithstanding the aforementioned, an essential part of managing the Sunshine Energy® program was the FPL obligation to manage the performance of Green Mountain Energy under the contract.<sup>14</sup> In this regard, Green Mountain Energy clearly failed to perform its obligations under the contract as follows:

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<sup>10</sup> Audit Finding No. 2, Florida Power and Light Company Sunshine Energy Program Audit (for the 12 months ended December 31, 2007), dated May 29, 2007 (concluding that 23.6% of the total Sunshine Energy® program revenues during the period of 2004-2007 were spent on TREC(s) and solar projects). Accordingly, this directly implies that 76.4% (100% - 23.6%) of the total revenue during this period was spent on marketing and administrative costs for the Sunshine Energy® program.

<sup>11</sup> FPL retained an administrative fee in the amount of \$0.65 from each monthly \$9.75 contribution to manage the Sunshine Energy program.

<sup>12</sup> Excerpt from Frequently Asked Questions section of the FPL Sunshine Energy® webpage:

Q: "What does the additional cost pay for?"

A: "The charge goes toward the purchase of renewable resources for the program and **nominal** administrative costs to operate the program." (**Emphasis Added**).

<sup>13</sup> The issue of refunds will be addressed within the ECCR docket. As stated during the bench discussion, I believe that FPL should be ordered to pay a Contribution in Aid of Construction (CIAC) in the amount of six million dollars (\$6,000,000) toward the construction of the FPL solar projects (110 MW) that were recently approved by this Commission. I believe that this remedy would provide a "win-win" situation for all parties in resolution of this matter recognizing the potential difficulty of refunding the voluntary contributions that were collected over a multi-year period.

<sup>14</sup> Trademark License and Services Agreement, by and between Florida Power & Light Company and Green Mountain Energy Company, dated 30 July, 2003. It is interesting to note that Florida Power & Light Company represented to Green Mountain Energy Company that it owned the federally registered Sunshine Energy® trademark at the time it entered the contract (see Section 1.21 and Schedule II of the contract). United States

Section 13.1

Green Mountain Energy failed to enroll 25,000 new customers per year (on a year to year basis). Green Mountain Energy alleges that it spent millions of dollars on marketing, yet enrollment from program inception to termination over a period of 4 ½ years totaled less than 39,000 customers. This number represents less than 1% of the overall FPL customer base which reflects upon the overall effectiveness and management oversight of the Green Mountain Energy marketing effort.

Section 18.1

Green Mountain Energy failed to perform its contractual obligation under Section 18.1 of the contract. Section 18.1 sets forth the General Commitment of Green Mountain Energy with respect to the construction of the solar resource projects.<sup>15</sup> The record clearly establishes that Green Mountain Energy did not meet this requirement in accordance with the provisions of the contract. Total installed solar capacity to date during the years of 2005 and 2006 was zero.<sup>16</sup> Additionally, the net metered, residential PV solar installations that Green Mountain Energy and FPL are claiming credit for under the Solar Capacity Commitment do not meet the requirement of provision 18.1(i) of the contract which requires FPL to purchase “all energy generated”, NOT “net energy delivered” (from each solar resource project) under a Power Purchase Agreement (PPA).<sup>17</sup> As an illustrative example, the Rothenbach Park solar array clearly meets this requirement as reflected within the PPA for the project; while the net metered installations claimed for the Quarry subdivision and Sun Funds projects do not.<sup>18</sup> Furthermore, Green Mountain

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Trademark and Patent Office (USPTO) records, however, clearly indicate that Florida Power & Light Company did not own the Sunshine Energy® trademark as of the date of the contract. In fact, the Sunshine Energy® trademark was owned by FPL Energy Services, Inc. (an unregulated subsidiary of FPL Group, Inc., and an affiliate of Florida Power & Light Company) and was not legally conveyed to Florida Power & Light Company until April 5, 2004 (as recorded by the USPTO on May 10, 2004).

<sup>15</sup> Green Mountain Energy committed to supplying FPL with 150 kW of solar capacity in Florida for every 10,000 Customers enrolled in the program within one year after meeting each Customer enrollment threshold.

<sup>16</sup> Notwithstanding this fact, FPL sought approval from this Commission to make the Green Pricing Program permanent during the fourth quarter of 2006. The FPL petition failed to disclose that Green Mountain Energy was not meeting its solar construction obligation, and that no solar capacity had been installed to date. The FPL petition also did not disclose amendments to the underlying contract. Review of the transcript also indicates that FPL did not disclose these material facts during the Agenda conference discussion. Despite the fact that Green Mountain Energy was not meeting its solar construction obligation, and that no solar capacity had been installed to date, FPL continued to allow the solicitation of consumers during this period.

<sup>17</sup> Transcript (page 96, lines 18-23) from Item 11 of Agenda Conference; July 1, 2008.

<sup>18</sup> In these instances, voluntary contributions were being used for private residences which may not have even been enrolled in the Sunshine Energy® program. Additionally, the Sun Funds rebates were never approved by this Commission, and were offered only after this Commission began its formal review of the Sunshine Energy® program in 2007. Despite the spin and rhetoric, this appears to be an attempt by Green Mountain Energy to meet its long overdue solar capacity obligations as quickly and cheaply as possible, but does not meet the requirements of provision 18.1(i) of the contract. Accordingly, by failing to manage the performance of Green Mountain Energy in

Energy had the sole obligation for meeting the Solar Capacity Commitment under the contract. FPL, however, is counting the Miami Science Museum solar array (2 kW), an array developed and paid for by FPL, toward meeting the solar obligation of Green Mountain Energy under the contract. In this regard, it is uncertain why FPL seems to be performing an obligation of Green Mountain Energy under the contract.<sup>19</sup> Such actions would not be necessary if FPL properly managed the performance of Green Mountain Energy under the contract.

Section 18.2

Green Mountain Energy failed to perform its contractual obligation under Section 18.2 of the contract. Section 18.2 sets forth the Initial Commitment of Green Mountain Energy with respect to the construction of the solar resource projects.<sup>20</sup> Through its own admission, the record clearly establishes that Green Mountain Energy did not meet this requirement in accordance with the provision of the contract.<sup>21</sup>

Based upon the above, it is evident that Green Mountain Energy failed to fully perform its contractual obligations, and that FPL failed to manage the performance of Green Mountain Energy in accordance with the provisions of the contract.

Finally, in an attempt to divert attention away from the undisputed fact that the vast majority of contributions to the Sunshine Energy® program were not being spent on renewable energy, FPL focuses upon NREL rankings, the Tariff, and TREC(s) purchases as the basis for asserting why the Sunshine Energy® program was successful. Such arguments are not persuasive and should be rejected for the following reasons:

Discussion of NREL Rankings

FPL and Green Mountain Energy both cite NREL rankings as a basis for asserting why the Sunshine Energy® program was successful. The mere fact that a green program can achieve a top 5 status by spending only 23.6% of the total funds collected on renewable

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accordance with provision 18.1(i) of the contract, FPL is effectively allowing Green Mountain Energy to meet each new incremental solar capacity commitment at a mere fraction of the cost (150 kW = for a one-time total cost of only \$225,000 - less the value of the retained TRECs) that Green Mountain Energy alleges to incur for a compliant project (i.e., the \$22,000/month obligation that Green Mountain Energy claims to incur for the Rothenbach Park project through 2015).

<sup>19</sup> FPL has also recently committed to provide FAU with funding in the amount of \$34,000 towards the completion of a 34 kW solar photovoltaic facility. To the extent that FPL is not attempting to count this project toward meeting the solar capacity obligation of Green Mountain Energy under the contract, I wholeheartedly support, encourage, and commend FPL's on-going efforts to support renewable energy projects in partnership with Florida's public schools and State universities.

<sup>20</sup> Green Mountain Energy committed to FPL that it would cause a solar project with a minimum capacity of 50 kW to be built in Florida within one year after the program start date.

<sup>21</sup> Transcript (page 85, lines 18-20) from Item 11 of Agenda Conference; July 1, 2008.

energy leaves much to be said about the inherent value and overall quality of such rankings.<sup>22</sup> It further stands to reason that the expected benefit to the environment is not maximized when the vast majority of contributions to such programs are spent on marketing and administrative costs. Based upon the above, I would respectfully suggest that the NREL rankings provide a false sense of authenticity to such programs which may not directly translate into value for consumers.

#### Discussion of Tariff

The FPL assertion that it should be relieved from regulatory accountability merely because it technically met the requirements of the Green Power Pricing Tariff is equally misguided and should be rejected. First, FPL wrote the Tariff that was filed for approval. Second, FPL knew, or should have known, that the Tariff was defective to the extent that the Tariff did not incorporate the solar capacity requirement that FPL openly represented as an inducement to the consumers that were solicited to participate in the Sunshine Energy® program and to this Commission.<sup>23</sup> Third, technically meeting the requirements of a defective Tariff is not dispositive to the controlling questions of whether FPL made full disclosure of material facts regarding the Sunshine Energy® program, and whether FPL was prudent in the management of the Sunshine Energy® program.

#### Discussion of TREC(s)

FPL further cites the cumulative number of TREC(s) purchased as an additional basis for asserting why the Sunshine Energy® program was successful. In the instant case, the record clearly reflects that only 18.83% of the total funds collected were spent on TREC purchases.<sup>24</sup> It further stands to reason that the expected benefit to the environment is not maximized when the vast majority of contributions to the Sunshine Energy® program were spent on marketing and administrative costs. Additionally, if carbon reduction was truly a goal of the program, then it is quite evident that a far greater number of TREC(s) could have actually been purchased under the program. Therefore, the FPL argument, while colorable, lacks substantial merit upon further review and scrutiny.

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<sup>22</sup> Audit Finding No. 2, Florida Power and Light Company Sunshine Energy Program Audit (for the 12 months ended December 31, 2007), dated May 29, 2007 (concluding that 23.6% of the total Sunshine Energy® program revenues during the period of 2004-2007 were spent on TREC(s) and solar projects). Accordingly, this directly implies that 76.4% (100% - 23.6%) of the total revenue during this period was spent on marketing and administrative costs for the Sunshine Energy® program.

<sup>23</sup> FPL never sought to correct the defective tariff by seeking to amend it; yet FPL is apparently content to argue behind the same Tariff using it as a shield.

<sup>24</sup> Audit Finding No. 2, Florida Power and Light Company Sunshine Energy Program Audit (for the 12 months ended December 31, 2007), dated May 29, 2007 (concluding that 18.83% of the total Sunshine Energy® program revenues during the period of 2004-2007 were spent on TREC purchases).

Finally, although the question of whether the Sunshine Energy® program purchased the required number of TREC(s) under the contract was never at issue in this proceeding, I remain concerned by the fact that Green Mountain Energy significantly decreased its purchase of Florida generated TREC(s) for the Sunshine Energy® program, on a year-to-year basis from 2006 to 2007. While substantially decreasing its purchase of Florida generated TREC(s) in 2007, Green Mountain Energy conveniently purchased 74,658 TREC(s) from the FPL Energy Horse Hollow wind project in Texas via a third party transaction. At that time, Green Mountain Energy could have chosen to purchase the same number of TREC(s) originating from a non-FPL affiliated source, but did not do so. Accordingly, the Green Mountain Energy preference appears to favor an unregulated subsidiary of FPL Group.

In summary, no reasonable person would have contributed to the Sunshine Energy® program had they known that approximately 76.4% of the contributions would be spent on marketing and administrative expenses instead of renewable energy.<sup>25</sup> As the program manager, FPL was best positioned to know that the vast majority of the contributions that it collected from the voluntary ratepayers during the 4 ½ year period that the program was in effect were not being spent on renewable energy. Accordingly, FPL had a fiduciary duty to disclose this material fact to the customers that were solicited to participate in the program, to the program participants, and to this Commission. It is clear to me that FPL failed to make this disclosure. Furthermore, an essential part of managing the Sunshine Energy® program was the FPL obligation to manage the performance of Green Mountain Energy under the contract. As discussed above, it is clearly evident that Green Mountain Energy failed to fully perform its contractual obligations, and that FPL failed to manage the performance of Green Mountain Energy in accordance with the provisions of the contract. Based upon the above, I firmly believe that FPL should be held accountable for the lack of disclosure and management oversight problems associated with the Sunshine Energy® program and that refunds are warranted.<sup>26</sup>

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<sup>25</sup> Audit Finding No. 2, Florida Power and Light Company Sunshine Energy Program Audit (for the 12 months ended December 31, 2007), dated May 29, 2007 (concluding that 23.6% of the total Sunshine Energy® program revenues during the period of 2004-2007 were spent on TREC(s) and solar projects). Accordingly, this directly implies that 76.4% (100% - 23.6%) of the total revenue during this period was spent on marketing and administrative costs for the Sunshine Energy® program.

<sup>26</sup> The issue of refunds will be addressed within the ECCR docket. As stated during the bench discussion, I believe that FPL should be ordered to pay a Contribution in Aid of Construction (CIAC) in the amount of six million dollars (\$6,000,000) toward the construction of the FPL solar projects (110 MW) that were recently approved by this Commission. I believe that this remedy would provide a “win-win” situation for all parties in resolution of this matter recognizing the potential difficulty of refunding the voluntary contributions that were collected over a multi-year period.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on October 7, 2008.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.