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Subject: Docket Nos. 080501 / 070235 - PCS Phosphate's Post-Hearing Brief
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b. Docket No. 080501-EI, Petition for waiver of Rule 25-17.250(1) and (2)(a), F.A.C., which requires Progress Energy Florida to have a standard offer contract open until a request for proposal is issued for same avoided unit in standard offer contract, and for approval of standard offer contract

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e. Post-Hearing Brief of White Springs Agricultural Chemicals, Inc. d/b/s PCS Phosphate – White Springs

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for waiver of Rule 25-17.250(1) and (2)(a), F.A.C., which requires Progress Energy Florida to have a standard offer contract open until a request for proposal is issued for same avoided unit in standard offer contract, and for approval of standard offer contract.	DOCKET NO. 080501-EI
In re: Petition for approval of standard offer contract for purchase of firm capacity and energy from renewable energy producer or qualifying facility less than 100kW tariff, by Progress Energy Florida, Inc.	DOCKET NO. 070235-EQ
	Dated: May 18, 2009

POST-HEARING BRIEF OF
WHITE SPRINGS AGRICULTURAL CHEMICALS, INC.
d/b/a PCS PHOSPHATE – WHITE SPRINGS

Pursuant to the Order Establishing Procedure, Order No. PSC-09-0066-PCO-EI, issued January 30, 2009, White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate White Springs ("PCS Phosphate") hereby files its Post-Hearing Brief.

A. BASIC POSITION

Florida's energy strategy places a high priority on renewable energy production. This is reflected throughout applicable Florida statutes and regulatory requirements, and particularly in the objectives articulated in Rules 25-17.001(d) and 25-17.200, F.A.C. As part of this policy, the Commission requires each investor-owned electric utility to purchase capacity and energy from renewable resources either through bilateral contracts negotiated with individual renewable energy projects, or through a standard offer contract that a renewable provider can accept with little or no need for further negotiation of purchase price, terms and conditions.

The Commission's prior review of utility standard offer contracts has focused primarily on the energy and capacity pricing provisions based on designated avoided fossil-fueled units consistent with the requirements of Rule 25-17.250, F.A.C. However, other non-price terms, conditions and requirements may have a significant bearing on renewable energy production and development. For the most part, Rule 25-17.250, F.A.C. neither requires nor authorizes specific non-price terms and conditions, including many of the elements typically contained in a power supply agreement and which are contained in the standard offer contract filed for Commission approval. Absent a specific provision of a rule, all aspects of a standard offer contract must adhere to the basic objective of the Commission's renewable energy policy, which is stated as follows in Rule 25-17.200, F.A.C.:

> The purpose of these rules is to promote the development of renewable energy; protect the economic viability of Florida's existing renewable energy facilities; diversify the types of fuel used to generate electricity in Florida; lessen Florida's dependence on natural gas and fuel oil for the production of electricity; minimize the volatility of fuel costs; encourage investment within the state; improve environmental conditions; and, at the same time, minimize the costs of power supply to electric utilities and their customers.

In reviewing the standard offer contract Progress Energy Florida ("PEF" or "Progress") filed April 2, 2007, PCS Phosphate, which produces substantial amounts of renewable energy from waste heat, determined that the standard offer contained numerous provisions that were unnecessary, unreasonable, or served as a barrier to renewable energy production. This perspective is buttressed by the fact that no renewable energy supplier has accepted and executed a PEF standard offer proposal. PCS Phosphate's protests of the proposed approval of PEF's 2007 and 2008 standard offer

filings aims to modify the standard offer so that it might be better suited to accomplish its intended purpose.

The Commission's rules presume that a standard offer contract actually will serve the purpose suggested by the plain language of the term "standard offer", i.e., to facilitate renewable energy goals by establishing price, terms and conditions that a renewable energy producer can accept with little or no further negotiation. Progress maintains that the standard offer contract is simply the starting point for negotiations with a renewable energy supplier, and that a project developer is free to accept, reject or propose modifications to any standard offer contract term as a part of that negotiation. Taking further license with that viewpoint, PEF incorporates a variety of proposed terms and conditions that no reasonable renewable energy developer would (and, as noted, none have) accepted. As a result, the contract fails in its basic purpose (facilitating renewable energy development) because the standard offer actually creates new and unnecessary barriers to renewable development and production. In response to PCS Phosphate's protests, PEF has agreed to adopt certain changes to the standard offer. While some limited progress has been made as a result, the remaining matters in dispute are serious.[1]

Florida has a very limited number of clean and cost-effective generation supply options today, and continues to increase its reliance on natural gas for electric generation. Maximizing the production of renewable energy sources should be a Commission priority and, therefore, the Commission should scrutinize the PEF standard offer contract for RF/QFs carefully. Unreasonable terms and conditions that may impede development of,

[1] PEF has vaguely suggested at times that because no party other than PCS Phosphate has challenged its standard offer contract before, the contract must be acceptable. The utility, of course, is well aware that it bears the burden of demonstrating the reasonableness of each of the terms and conditions that it has proposed.

and production from, such alternative resources should be removed. Correcting these deficiencies now is especially important as Florida begins to enhance its use of domestic renewable resources.

As PCS Phosphate has detailed in its pleadings, and as summarized below, PEF's proposed standard offer contract contains provisions that are not consistent with either the Commission's regulations or the Florida statutory policies that govern renewable energy policy and give rise to those rules. Accordingly, PCS Phosphate requests that the Commission reject PEF's proposed standard offer contract as filed and mandate the changes to the contract described below.

PCS Phosphate has, throughout this proceeding, recognized that there may be a limited number of contract terms that may be technology-specific (i.e., testing requirements that may apply to a biomass project but may not be suitable for solar or wind). By the same token, wholesale power markets accommodate the varying performance characteristics of baseload coal and gas-fired combustion and combined-cycle turbines while reducing basic contracting terms to a standardized level. PCS Phosphate's recommendations in this docket have been designed to accomplish a comparable result for the renewable standard offer.

In particular, the Commission should require PEF to (i) revise its methodology for calculating capacity payments; (ii) include all costs associated with the avoided unit; and (iii) adopt non-price terms and conditions that are commercially reasonable and reflect standard industry practice. With respect to this last element, in Exhibit 8 (Exh. MJM-1 - Proposed Changes to PEF's Standard Offer Contract), PCS Phosphate has proposed specific revisions to the PEF standard offer contract that are fair and equitable while

accommodating the circumstances associated with a standard offer contract. PCS' proposed revisions generally are based on industry-standard agreements, or contracts in which PEF was a party. These changes are required for the standard offer contract to comply with and serve its intended function and the policies and purposes set forth at Section 366.91, Florida Statutes, and Rules 25-17.001 and 25-17.200, F.A.C.

Finally, each investor-owned electric utility in Florida is required to re-file its standard offer contract every April. Consequently, the Commission should direct PEF to incorporate all changes that it may order to the 2008 standard offer contract into all subsequent versions of PEF's standard offer contract unless PEF expressly proposes and justifies any departure in a future filing.

B. ISSUES AND POSITIONS

Issue 1: Is the standard offer contract filed by Progress Energy Florida on July 15, 2008, in compliance with Rules 25-17.200 through 25-17.310, Florida Administrative Code?

Summary of PCS Phosphate's Position: ** No. Progress' proposed Standard Offer Contract contains terms and conditions that violate both the express requirements of the Commission's regulations and the policy directives of Rule 25-17.200, F.A.C. and therefore does not comply with the relevant Commission regulations. **

Discussion: The Commission's regulations regarding standard offer contracts include clear policy goals as well as requirements for specific provisions of a standard offer contract. As noted above, Rule 25-17.200, F.A.C. makes explicit that the purpose of the standard offer contract is to further Florida's renewable energy goals. Thus, in order to be in compliance with the applicable provisions of the Florida Administrative Code, Progress' standard offer contract must both conform to any express requirements of the Commission's regulations and satisfy the overall directives set forth in Rule 25-17.200, F.A.C.

Although Progress has remedied some of the problems that PCS Phosphate has identified with the standard offer contract, the proposed contract, even with those corrections, does not comply with the Commission's rules because Progress continues to insist on terms that erect unnecessary and unreasonable barriers to renewable energy.

As Progress summarized in its rebuttal testimony, eight issues remain to be resolved:

(i) Determination of the appropriate performance characteristics of the avoided unit;

(ii) Grant of a Right of First Refusal to purchase Renewable Energy Credits ("RECs");

(iii) Use of interruptible power;

(iv) Number of capacity tests;

(v) Capacity testing period;

(vi) Permissible maintenance outage period;

(vii) Progress' retention of performance security; and

(viii) Symmetrical credit and collateral provisions.[2]

The deficiencies associated with each of these provisions of the PEF standard offer are explained in Issues 2 through 4 below. They apply with equal force to Issue 1, but are not repeated. PCS Phosphate has proposed revised contractual language for each of these contested issues. PCS Phosphate has not attempted to re-invent the wheel in these matters, but has, for the most part, drawn its suggested language changes directly from power purchase agreements in which Progress is the power supplier, or from standard industry contracts. As such, these provisions incorporate terms and conditions that either Progress, or the electric power industry generally, have already found acceptable. They

[2] Tr. at 10-13.

do not provide any particular or special benefit to waste heat energy sources such as PCS Phosphate. The revised contractual provisions aim to make the standard offer contract more symmetrical with respect to the obligations of each party. In doing so, the standard offer contract, as revised by PCS Phosphate, removes unnecessary barriers to the development of renewable generation and minimizes the need for potential renewable energy producers to expend negotiating capital just to achieve equitable terms and conditions. Until the Commission requires these revisions to the proffered contract, Progress remains out of compliance with Rules 25-17.200 through 25-17.310, F.A.C., and no reasonable entity is likely to execute the standard offer contract.

Issue 2: **Does the standard offer contract filed by Progress Energy Florida on July 15, 2008, contain terms and conditions that are not consistent with Rules 25-17.001 and 25-17.200 through 25-17.310, Florida Administrative Code?**

Summary of PCS Phosphate's Position: ** Yes. Progress' Standard Offer Contract is inconsistent with the Commission's regulations because it imposes incorrect performance requirements, fails to include all costs associated with the avoided unit, wrongly retains a renewable generator's performance security, and improperly burdens the ownership rights to Renewable Energy Credits.**

Discussion: Of the eight issues that remain in contention, three concern Progress' non-compliance with the Commission's regulations:

1. **Capacity Payment Calculation**

As explained in greater detail in the Issue 4 discussion, Progress has (i) imposed performance requirements which neither the avoided unit nor any other unit in Progress' generating fleet can satisfy and (ii) failed to include all of its appropriate cost components in its calculations.

2. **Return of a Renewable Generator's Performance Security**

Section 11.1 of the contract "requires the [performance] security be obtained

simultaneous with the execution of the Standard Offer Contract and maintained throughout the term of the contract." Tr. at 55. Progress' retention of the performance security violates Rule 25-17.0832, F.A.C., which requires "provisions to ensure repayment of payments to the extent that annual firm capacity and energy payments made to the qualifying facility in any year exceed the year's annual value of deferring the avoided unit . . ." Tr. at 105 (citing Rule 25-17.0832, F.A.C.).[3] The Commission's regulations go on to specify that such "[p]ayment or surety shall be refunded upon completion of the facility and demonstration that the facility can deliver the amount of capacity and energy specified in the contract . . . ." Rule 25-17.0832(4)(f)(1), F.A.C. (Emphasis added).

Progress seeks to explain its disregard of the Commission's regulations by claiming that "performance securities are needed . . . to help ensure that if a supplier can no longer meet its obligations under the contract, then the utility has funds available to cover a portion of the replacement cost of energy . . ." Tr. at 55. Progress witness Gammon goes on to state that "[w]ithout these provisions, the entire risk of default would be borne by PEF's customers, rather than by the party that is not meeting its obligations under a purchase power contract." *Id.*

Progress' insistence on retaining a renewable supplier's performance security constitutes an improper collateral attack on the Commission's rulemaking. The Commission should require PEF to revise its standard offer contact to accord with the Commission' determination that the proper time for the release of a renewable supplier's

[3] As PCS Phosphate witness acknowledged, "[s]eparately the renewable producer is also required to provide security to protect ratepayers in the event that the qualifying facility fails to deliver firm capacity and energy in the amount and time specified in the contract," Tr. at 105.

performance security is when that supplier has satisfactorily demonstrated the performance of its generating facility.

Even if the invalidity of Section 11.1 had not already been settled by the Commission's regulations, Progress' rationalizations would not support its refusal to release a supplier's performance security. First, it is not clear whether the analysis of risk made by Progress witness Gammon is within the scope of this docket, since comparisons of risk are not within, or directly related to, Rules 25-17.200 through 25-17.310, F.A.C.[4]

Moreover, Mr. Gammon has not accurately described the relative risks to consumers that are involved. Progress' ratepayers are protected from a renewable supplier's poor performance by the termination fee that may be assessed to a renewable supplier in default, as permitted by Rule 25-17.0832(4)(e)(10), F.A.C. Tr. at 123-24. This termination fee is separate from the performance security at issue in Section 11.1. *Id.* At the same time, Mr. Gammon's analysis ignores the risk that would be borne by all Progress ratepayers from a failure of Progress' avoided unit to perform. In that case, customers still bear all of the costs of replacement power, without any offset from a termination fee, and also continue to bear any construction and any repair costs, since all are recovered through the rates Progress charges.[5] If a renewable supplier fails to perform, Progress can terminate its payments and recover the termination fee, while the renewable supplier has no alternative source of recovering its fixed costs. Thus, because the renewable supplier bears much greater risk from a failure to perform than Progress, the renewable supplier has a greater incentive to ensure the continued efficient operation

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[4] *See, e.g.*, Staff Recommendation Memorandum, Docket No. 080193-EQ, at 8 (dated April 23, 2009).

[5] Absent a finding of imprudence, PEF's only risks relate to any incentives and/or penalties that may apply under the Commission's Generating Performance Incentive Factor rules.

of its generating facilities than does Progress, thereby lessening the overall risk to Progress' ratepayers.

3. Requiring a Right of First Refusal for the Purchase of Renewable Energy Credits or Attributes

This provision is contrary to the express terms of Rule 25-17.280, F.A.C., which provides that renewable energy credits shall remain the exclusive property of the renewable generating facility. Even as revised by Progress in the course of this proceeding, the proposed right of first refusal still constitutes an unfair and uncompensated-for encumbrance on the renewable energy producer's right to utilize its RECs. Tr. at 99-100. This alone directly violates the rule.

Moreover, the presence of such a right of first refusal provision likely would reduce the value and marketability of the RECs because "buyers or sellers in the market are going to be less likely . . . to submit bids or offers on those TRECs that they know are subject to a right of first refusal." Exh.11, Marz Deposition Tr. at 19. As PCS Phosphate witness Marz testified, the presence of a comparable right of first refusal reserved by gas pipelines has had a chilling effect on bids for such capacity. Tr. at 129. Consequently, PEF's proposed terms constitute an impermissible taking as well.

Progress' claim that a renewable supplier has the right to negotiate different terms[6] hardly excuses proposed terms that violate the requirements of the Commission's rules, and does not explain why a supplier should have to negotiate to secure a right granted in the Commission's regulations. Progress attempts to validate the provision by claiming that the supplier will receive the same compensation for its RECs, Tr. at 74, but ignores the impact that this restriction would have on the supplier's ability to market

[6] Tr. at 35.

those RECs. Tr. at 77.

Progress acknowledges that the right of first refusal restricts the right of a renewable supplier to market its RECs, and admits that Progress provides no compensation for imposing this burden on the renewable generator. Tr. at 77. In normal business transactions, a party may purchase an option to acquire something of value. In this instance, PEF simply grants itself an option without giving any compensation in return.

Next, PEF's provision that it can match a "bona fide offer" by a second party actually may create a market impairment for the RECs. Current practices among marketplace buyers and sellers do not allow time or opportunity for a renewable provider to obtain a consultation with the utility. Unless the renewable provider can extend offers and respond to buyers unimpeded, the provider's ownership rights are impaired.

Accordingly, the proposed right of first refusal to purchase RECs from the renewable provider should not be included in the standard offer contract. The standard offer contract should not provide any unique benefit or advantage to the utility as to notification or review of price, availability, or any other aspect of RECs, or any other renewable attributes. It certainly must not encumber the free exercise of a renewable energy supplier's otherwise established rights to hold, use or convey RECs. Neither should the standard offer contract convey a right to the utility without compensation to the renewable provider for that right. All arrangements between the renewable provider and any other party, with regard to any renewable attributes, should be the subject of negotiated contractual provisions as determined appropriate by the renewable energy provider alone.

Issue 3: **Do the non-price terms and conditions of the PEF's standard offer contract that are not specifically addressed by Florida Statutes or Commission regulations comply with the policies and purposes set forth in Section 366.91, Florida Statutes and Rules 25-17.001 and 25-17.200, Florida Administrative Code?**

Summary of PCS Phosphate's Position: ** No. The provisions concerning the use of interruptible power, the number of capacity tests, the capacity testing period, planned maintenance outage period and credit and collateral are not consistent with Florida's statutory and regulatory policies toward renewable energy because they are unwarranted, onerous and one-sided.**

Discussion: Five of the eight outstanding issues concern non-price terms and conditions that are not specifically addressed by either the Commission's regulations or Florida's statutes. As a result, the review of these provisions is guided by the purposes and policies established by the Florida Legislature and recognized by the Commission in its rules. In that context, proposed contractual provisions that are onerous, one-sided, commercially unreasonable and beyond the scope of the Commission's regulations must be removed. As explained below, each of these provisions fails to comply with the policies and purposes set forth at Section 366.91, Florida Statutes, and Rules 25-17.001 and 25-17.200, Florida Administrative Code.

1. **Use of Interruptible Power**

Section 6.3 of the standard offer contract prohibits a renewable supplier from utilizing interruptible standby service for its start-up requirements. This restriction contradicts the terms of the interruptible standby service rate schedule (SS-2) approved by the Commission which declares that facilities with on-site generation are eligible for interruptible standby service. Tr. at 111.

PEF offers no valid reason for denying renewable energy producers access to SS-2 service. Progress claims that this requirement is necessary to ensure that power is

always available to start a generating unit. Tr. at 65. Notably, however, the record is void of any NERC or FRCC reliability standard requiring each generator on Progress' system to receive firm service. Furthermore, despite it attempts to create the impression that no power would be available to an interruptible customer,[7] Progress has identified no tariff provisions that would prevent such a customer from drawing power to start its generating facility. Additionally, this contractual limitation serves only to increase the cost of standby service for a renewable energy producer. Exh. 6 (Marz Direct Testimony) at 32. Thus, based on the evidence in record, this requirement must be rejected as it deters the development of renewable energy and adversely impacts the viability of existing renewable facilities.

2. Number of Capacity Tests

In response to concerns raised by PCS Phosphate, Progress revised Section 7.4 of the contract to provide notice to a renewable generator of a Committed Capacity Test. PEF also reduced the number of such tests from six to two annually. In response, PCS Phosphate suggested that two conditions be placed on Progress' right to conduct a second capacity test: (i) that the second test be for good cause; and (ii) that the second test could not occur for a period of at least six months following the prior Committed Capacity Test. Tr. at 18. In PEF witness Gammon's Rebuttal Testimony, Progress indicated its willingness to accept the first condition, i.e., the good cause requirement, but objected to the second condition, i.e., the six-month interim period. Tr. at 136. Upon further consideration, PCS Phosphate agrees that additional limits on when Progress can request

[7] *See* Tr. at 65 and 119.

a second capacity test due to good cause are unnecessary and accepts the revised Section 7.4, as described by Mr. Gammon in his rebuttal testimony.

3. Capacity Testing Period

In Section 8.2, Progress mandates that every Committed Capacity Test be based on a test period of twenty-four hours. Progress alleges that this test period is necessary because "[t]he purchase of capacity and energy through the Standard Offer Contract is to avoid or defer the construction of an avoided unit and the purchased generation should be able to operate like the unit that is being avoided." Tr. at 137. This justification, however, is not supported by the Commission's regulations.

The only discussion of performance standards for qualifying facilities in the Commission's regulations occurs at Rule 25-17.0832(4)(e)(8), F.A.C., which states in full:

> The minimum performance standards for the delivery of firm capacity and energy by the qualifying facility during the utility's daily seasonal peak and off-peak periods. These performance standards shall approximate the anticipated peak and off-peak availability and capacity factor of the utility's avoided unit over the term of the contract;

This provision establishes that a renewable generator's performance will be based on how it compares with the avoided unit's capacity and availability factors. It does not establish any minimum testing period. Thus, when assessing the appropriate test period, the Commission must reference the policies and purposes of the Florida statutes and the applicable regulations. These objectives most decidedly are not designed to require a renewable energy supplier to function precisely as a natural gas-fired combined-cycle generator (indeed, the very point is to develop viable alternatives to gas-fired generation). Until the sun shines for twenty-four hours straight or the wind blows reliably and continuously for an entire day, it is unreasonable for Progress to contend that a test period

that is not feasible for many renewable providers can be reconciled with Florida's clearly articulated policies encouraging renewable energy development.

To rectify the unreasonableness of Progress' twenty-four hour test period, PCS Phosphate suggested that the standard offer contract be revised to allow Progress and the renewable supplier to agree to different test periods. Tr. at 101-02; Exh. 8, Section 8.2. As an example of where Progress has previously "recognized that capacity testing period[s] may need to be different depending on the facility,"[8] PCS Phosphate witness Marz presented an excerpt of Progress' power purchase agreement with Vandolah Power, L.L.C. This contractual excerpt serves as an example of how the incorporation of limited discretion to set testing periods can be, and has been, incorporated into a utility's power purchase agreements. Because allowing parties the flexibility to develop different testing periods is critical to recognizing the characteristics of certain renewable generators, PCS Phosphate's proposed addition to Section 8.2 should be accept by the Commission.

4. Permissible Maintenance Outage Period

In Section 10.2, Progress limits the number of scheduled maintenance days to 15 days per year. Progress claims that this standard is necessary because "[t]he scheduled maintenance in the Standard Offer Contract should be limited to the planned outage factor of the avoided unit." Tr. at 137-38. As with its proposed capacity testing period, Progress' suggested period is not justified by the Commission's regulations. As PCS Phosphate witness Marz explained, the provision is unnecessary and unduly restrictive because fifteen days per calendar year may not be sufficient to allow a renewable energy

[8] Tr. at 102.

producer to provide the maintenance essential to meeting the contractually obligated performance requirements. Tr. at 110. Further, there are no analogous restrictions on the numbers of days Progress can take its units out of service for maintenance. *Id.* To solve this additional example of Progress' disparate treatment of renewable generators, the Commission should, at a minimum, clarify that this provision is subject to negotiation; to best promote renewable generation, the Commission should increase the maximum number of maintenance days to thirty.

5. Symmetrical Credit and Collateral Provisions

The last area of the standard offer contract's provisions that conflict with Florida's policies promoting renewable generation involves the numerous one-sided non-price terms and conditions littered throughout the contract. A basic pitfall of any contract drafted solely by one party is the inherent tendency to avoid mutual exchange of rights and responsibilities among the parties. In particular, in addition to PCs Phosphate's suggested revisions already accepted by Progress, Tr. at 134-35, the credit and collateral requirements should be revised to be more symmetrical.

Progress has offered several reasons for its objections to PCS Phosphate's suggested revisions, including (i) the "mandatory" character of a Standard Offer Contract weighs against the inclusion of some reciprocal provisions, *see, e.g.*, Tr. at 138-39; (ii) Progress' regulation by the Commission is adequate protection for any contracting party, Tr. at 54; and (iii) symmetrical provisions increases the risks to Progress' ratepayers, Tr. at 13, 138-39. None of these justifications warrant Progress' one-sided treatment of potential renewable providers. First, Progress' suggestion that its regulatory obligation to provide a Standard Offer Contracts requires that it inflict prejudicial and disproportionate

terms demonstrates a failure to appreciate Florida's intention to promote renewable generation through Standard Offer Contracts. Rule 25-17.200, F.A.C. It is illogical for Progress to maintain that either the Legislature or the Commission would on one hand have sought to encourage renewable production through the implementation of the standard offer contract construct but on the other hand effectively discouraged such production through the burden of unfair terms.

Progress' second rationalization, that the "pervasive jurisdiction of the [Commission]" ensures Progress' performance under the contract, Tr. at 54, overstates the Commission's oversight role. Commission approval of a particular contract does not guarantee Progress' continued payment of its obligations; rather, the Commission is merely authorizing the recovery of the cost of Progress' purchase of the renewable producer's capacity and energy. Tr. at 104. In addition, in the event of a dispute regarding Progress' ability to fulfill its obligations, the standard offer contract does not provide the renewable generator the opportunity to turn to the Commission to resolve a contested issue. Instead, Section 20.09 mandates that any dispute that cannot be resolved by the parties' executives must be submitted to binding arbitration. Thus, contrary to Progress' assertion, the Commission is effectively barred from protecting the renewable power supplier's interests.

Finally, Progress' assertion that the use of symmetrical credit and collateral provisions increases the risks to its ratepayers is without merit. As mentioned before, the comparison of risks is not within the scope of the applicable Commission regulations.[9] Even if the assessment of relative risks were appropriate, Progress' ratepayers face little,

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[9] *See* n.4, *supra*.

if any, danger. Bilateral credit provisions are an industry standard for power purchase agreements. Tr. at 103. Indeed, Progress must have considered the risk of symmetrical provisions to be manageable before, as PCS Phosphate has proposed reciprocal creditworthiness provisions based on Progress' power supply agreement with the City of Mount Dora. Tr. at 106. In addition, Progress exaggerates the risk posed by the inclusion of symmetrical credit and collateral provisions. Any risk posed to ratepayers from symmetrical creditworthiness terms would pale when compared to the risk posed to customers by the triggering event of the creditworthiness provisions, that is, Progress' loss of its investment grade credit rating.

PCS Phosphate has recommended credit and collateral revisions that are consistent with industry and Progress' own practices, are fair to both parties and promote the development of renewable energy by removing unnecessary burdens to renewable suppliers. Thus, the Commission should adopt PCS Phosphate's changes. Exh. 8 at 31-32.

Issue 4: Does the standard offer contract's methodology for determining an RF/QF's capacity payments comply with the requirements of Rules 25-17.200 through 25-17.310, Florida Administrative Code?

Summary of PCS Phosphate's Position: ** No. The proposed performance standards do not properly differentiate between "availability factor" and "capacity factor," and do not distinguish between on-peak and off-peak performance. Also, Progress' calculation of the capacity payment fails to include all of the incremental costs of the avoided unit.**

Discussion: Section 4, Minimum Specifications and Milestones, of the standard offer contract establishes minimum performance standards for both on-peak and off-peak periods. The standard offer contract requires a renewable power supplier to maintain what Progress calls an "availability factor" of 89% for full capacity payments and sets a

minimum availability factor of 69%, below which a renewable generator will receive no capacity payment. Tr. at 95. Both of the performance standards and the minimum availability standards contradict the Commission's regulations regarding the performance required of a renewable generator.

Rule 25-17.0832(4)(e)(8), F.A.C. states that the Standard Offer Contract shall provide:

> The minimum performance standards for the delivery of firm capacity and energy by the qualifying facility during the utility's daily seasonal peak and off-peak periods. These performance standards shall approximate the anticipated peak and off-peak availability and capacity factor of the utility's avoided unit over the term of the contract.

As is explained below, "availability factor" and "capacity factor" are distinct measures of unit performance. PEF, however, uses these terms interchangeably in order to require a level of performance from a renewable energy provider that is virtually impossible to achieve, and far exceeds the expected performance of the Progress avoided unit. By requiring a renewable supplier to meet performance standards that are different from the anticipated performance of the avoided unit, Progress failed to properly apply this rule.[10] Specifically, Progress requires a renewable generator to maintain what it terms an "availability factor" that is equal to the avoided unit's expected capacity factor. Tr. at 95; *see also* Tr. at 12-13 (Progress witness Gammon referring to the standard offer contract's "capacity factor"). Moreover, Progress applies the same performance standard during both peak and off-peak periods. Standard Offer Contract, Section 4. Progress

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[10] Progress may also have acted counter to this regulation by utilizing performance criteria that are based on the avoided unit's expected performance at the start of its useful life instead of the unit's performance over the course of the contract. As an example, Progress requires a renewable generator to maintain a capacity factor of 89% to receive full payment, Tr. at 95, but historically Progress' combined cycle units only achieve a capacity factor of 46%. Tr. at 96.

should not be allowed to circumvent the Commission's regulations by creating its own definition of "availability factor" that differs from accepted industry practice.

As PCS Phosphate witness Marz explained, an "availability factor" defines a unit's availability to provide energy to the system (i.e., ready to run).[11] It is not a measure of actual energy production. In contrast, a "capacity factor" measures the actual production of a unit during a given time period relative to its potential maximum output.[12] Tr. at 96. Thus, a capacity factor addresses the actual unit usage, whereas an availability factor addresses a unit's potential to produce energy. *Id.* In everyday terms, a cycling unit, like a gas combined-cycle unit, should be available most of the time, but its actual production will be substantially less, depending on unit performance, unit dispatch and related factors.

When choosing its avoided unit (the Suwannee combined cycle plant) to add to its generation plans, Progress planned for where that unit likely would fall in its dispatch curve. PEF planned for the unit to cycle and would have known that the unit would not operate with the same characteristics of either a baseload or a purely peaking facility. The utility also expected that Suwannee would not require the capital costs of a baseload unit. Consequently, neither the fact that PEF maintains excess capacity to meet its reserve margin requirements nor that the capacity factor of combined cycle units is influenced by economic dispatch are reasons to allow PEF to equate availability and capacity factors for

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[11] Availability factor is calculated as the sum of the service hours plus reserve stand-by hours divided by period hours times 100 where "service hours" are those hours when the unit is synchronized with the transmission system, and "reserve stand-by hours" are those hours where the unit is available to generate but is not synchronized with the system. Tr. at 95-96.

[12] Capacity factor is calculated as the product of the energy generated during a defined period divided by the committed capacity times the period hours, expressed as a percentage. Tr. at 96.

the purpose of defining capacity payments to a renewable energy provider. If PEF sought to impose the capacity factor characteristics of a baseload facility, it should have a base load unit as its avoided unit, and calculate capacity payments based on the capital costs of such a unit. In short, Progress is not permitted under the applicable rule to impose operating characteristics on renewable generators that differ from the anticipated performance of its avoided unit.

By using the wrong formula for calculating an "availability factor," a renewable producer's unit must perform better than the avoided unit to qualify for any level of a capacity payment. As noted above, Progress requires a renewable unit to maintain a capacity factor of 89% for full capacity payment and 69% to receive any capacity payment. In sharp contrast, the estimated capacity factor for the avoided unit is 65.3% and the availability factor is 89% according to PEF's 2008 Ten Year Site Plan. Tr. at 96.

As further evidence of the unrealistic nature of Progress' performance standards, PCS Phosphate witness Marz examined the performance of Progress' existing combined cycle units.[13] PEF's existing combined cycle units, the Hines Energy Facility and the Tiger Bay Facility, only achieved a weighted average capacity factor of 41.6% in 2007. Tr. at 96 and Exh. 9 (Exh. MJM-2 - Capacity Factor of PEF's Combined Cycle Units). Thus, even if a renewable generator were to match the expected performance of Progress' avoided unit or its existing combined cycle units, it would receive no capacity payments because the renewable generator must maintain a minimum capacity factor of 69%.

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[13] Performance standards for standard offer contract purposes must be based on the expected performance of the avoided unit over the contract term. However, the historical performance of similar units operated by the utility provides a reliable means to verify the accuracy of Progress' estimate of the future operating characteristics of the avoided unit.

Progress contends that its evasion of the Commission's performance standards is justified because "the specified capacity factor ensures that PEF's customers are receiving equivalent capacity compared to the avoided unit." Tr. at 33. PEF supports this proposition by asserting that the expected capacity factor of its avoided units is reduced by economic dispatch and the excess capacity required to meet its reserve margin obligations. Because renewable units operating under a standard offer contract are not subject to economic dispatch, PEF claims to be justified in equating availability and capacity factors in the standard offer. This counter-intuitive argument fails on several levels.

First, Rule 25-17.0832(4)(e)(8), F.A.C. directly refers to both availability and capacity factors that are anticipated for the avoided unit. PEF cannot re-write the rule to negate the reference to expected capacity factor. Neither can PEF presume a capacity factor for a combined-cycle unit that approximates the expected performance of a baseload coal plant. PEF's performance definitions must be rejected absent a change in the rule.

Next, the rule requires performance standards to approximate the expected on- and off-peak performance of the avoided unit. In this case, the avoided unit is a gas-fired combined-cycle facility that is expected to operate more during on-peak periods than off-peak. The analysis of course would be different if the avoided unit were a baseload coal facility (as would the expected capacity payments to renewable resources). PEF's proposed performance standards require a renewable producer to operate like a baseload facility when the applicable performance comparison (and proposed capacity payments) are to a cycling unit. While PEF could not have it both ways in any event, the proposed

standard here violates the specific rule and serves to undermine the basic purpose of the Florida renewable energy policy. Greater incentives for renewable on-peak production could be justified and be within the context of the Commission's regulations, but Progress must at least apply the correct availability and capacity factors of the avoided unit to a renewable generator and apply the industry standard definitions to measure that performance.

In addition to mandating improper performance standards, Progress' proposed capacity payments fail to pay a renewable supplier full avoided costs. Section 366.91(3), F.S., requires contract provisions based upon the utility's full avoided costs, as defined in Section 366.051, F.S., which provides:

> A utility's "full avoided costs" are the incremental costs to the utility of the electric energy or capacity, or both, which, but for the purchase from cogenerators or small power producers, such utility would generate itself or purchase from another source.

In calculating the avoided costs associated with the avoided unit (Suwannee River Plant-Unit A), Progress did not include all of "the incremental costs to facility." Instead, Progress apparently utilized an inaccurate input into the formula specified in Rule 25-7.0832(6), F.A.C., for calculating the capacity payments. Specifically, Progress has not provided sufficient evidence to demonstrate that the costs for engineering and design of the Suwannee facility as well as any costs associated with the interconnection and transmission facilities associated with the Suwannee facility have been included in the avoided cost payment calculation. Tr. at 31 (stating only that the capacity payments are calculated from data in the Ten Year Site Plan); *see also*, Progress Standard Offer Contract, Schedule 2 to Rate Schedule COG-2, (failing to identify either total projected facility cost or cost components). The avoided cost capacity payments must be revised

to include these applicable costs. Progress' attempts to avoid these requirements through non-standard definitions, incorrect performance standards and incomplete cost inputs must be rejected.

Issue 5: **Should Docket 070235-EQ , Petition for approval of standard offer contract for purchase of firm capacity and energy from renewable energy producer or qualifying facility less than 100 kW tariff, by Progress Energy Florida, Inc., be closed?**

PCS Phosphate's Position: **Given the Commission's acceptance into the record of this proceeding of the Direct Testimony of Martin J. Marz, yes.**

Issue 6: **Should this docket be closed?**

PCS Phosphate's Position:: ** This docket should be closed following Commission review and acceptance of all standard offer contract revisions required by the Commission's order in this docket.**

Respectfully submitted the 18th day of May, 2009.

BRICKFIELD, BURCHETTE, RITTS & STONE, P.C.

s/ James W. Brew

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished by Electronic Mail and/or U.S. Mail this 18th day of May 2009, to the following:

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