



Dianne M. Triplett
Deputy General Counsel

October 15, 2018

VIA ELECTRONIC FILING

Ms. Carlotta Stauffer, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: *Duke Energy Florida, LLC's Petition for Declaratory Statement regarding PURPA solar qualifying facility power purchase agreements*; Docket No. 20180169-EQ

Dear Ms. Stauffer:

Enclosed for filing in the above-referenced Docket on behalf of Duke Energy Florida, LLC ("DEF") is DEF's Reply to Southern Alliance for Clean Energy's Response in Opposition to DEF's Request for Declaratory Statement.

Thank you for your assistance in this matter. Please feel free to call me at (727) 820-4692 should you have any questions concerning this filing.

Sincerely,

/s/ Dianne M. Triplett

Dianne M. Triplett

DMT/cm
Enclosure

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Declaratory Statement
by Duke Energy Florida, LLC, Regarding
PURPA Solar Qualifying Facility Power
Purchase Agreements

Docket No. 20180169-EQ

Filed: October 15, 2018

**DUKE ENERGY FLORIDA, LLC’S REPLY TO SOUTHERN
ALLIANCE FOR CLEAN ENERGY’S RESPONSE IN OPPOSITION TO
DUKE ENERGY FLORIDA’S REQUEST FOR DECLARATORY STATEMENT**

Duke Energy Florida, LLC (“DEF” or “the Company”), pursuant to Rules 28-105.003 and 28-105.0027(1), F.A.C., hereby replies to Southern Alliance for Clean Energy’s (“SACE”) Response in Opposition (“Response”) filed on October 8, 2018, with the Florida Public Service Commission (“Commission”) in the above-referenced docket regarding DEF’s Petition for Declaratory Statement (“Petition”).

In its Response, SACE raises the issue of whether a declaratory statement is the proper procedural mechanism for deciding the question raised by DEF in its Petition. As discussed in greater detail below, Florida law requires the Commission to issue a statement in response to the Petition. SACE also makes two other arguments regarding the practices of Duke Energy Renewables (“DER”) and DEF’s overall integrated resource planning (“IRP”) process. As set forth below, both these arguments are wholly irrelevant to the sole issue before the Commission in this declaratory statement. Finally, SACE makes other arguments that have been raised by other parties/interested persons in their filings in this docket. Accordingly, and for efficiency, DEF will not repeat its responses to those arguments here; rather, it incorporates by reference its previous responses.

The Commission is required to issue the declaratory statement.

1. Rule 28-105.001, F.A.C., provides that a declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules or orders over which an agency has authority.

2. In its Petition, DEF seeks a declaration that Order PSC-2011-0439-PAA-EQ and Rule 25-17.250, F.A.C., are aligned when DEF, on behalf of its customers, fixes one hundred percent of the QF payment rate for PURPA solar QF PPAs for no more than two years at a time.

3. SACE argues that the Commission should refuse to issue a statement in response to DEF's Petition because such a statement would "apply to all QFs wishing to negotiate a PPA with DEF" and to "other similarly situated investor-owned utilities" and would, thus, SACE contends, constitute a rule. *See Response at pp. 4 and 8.*

4. An agency statement is a rule if "its effect requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law." *See Jenkins v. State of Florida*, 855 So.2d 1219, 1225 (Fla. 1st DCA 2003).

5. The only effect of the Commission's statement will be to explain how an existing Commission rule and order will be applied to the particular set of facts set forth in DEF's Petition, which is not itself a rule. *Envntl. Trust v. State, Dept. of Env'tl. Protection*, 714 So.2d 493 (Fla. 1st DCA 1998) ("An agency statement explaining how an existing rule of general applicability will be applied in a particular set of facts is not itself a rule. If that were true, the agency would be forced to adopt a rule for every possible variation on a theme, and private entities could continuously attack the government for its failure to have a rule that precisely addresses the facts at issue. Instead, these matters are left for the adjudication process under section 120.57, Florida Statutes.").

6. The fact that the Commission’s statement may also resolve questions concerning the applicability of Order PSC-2011-0439-PAA-EQ and Rule 25-17.250, F.A.C., to negotiations between other investor-owned utilities and QFs does not prevent the Commission from issuing the statement. *See Inv. Corp. of Palm Beach v. Div. of Pari–Mutuel Wagering, Dept. of Bus. & Prof’l. Regulation*, 714 So.2d 589, 594 n. 7 (Fla. 3d DCA 1998) (Cope, J. dissenting), *quashed Investment Corp.*, 747 So.2d 374 (Fla.1999) (“A declaratory statement is not transformed into a rule merely because it addresses a matter of interest to more than one person. . . . the reasoning employed by the agency in support of a declaratory statement may offer useful guidance to others who are likely to interact with the agency in similar circumstances.”); *see also Chiles v. Dept. of State, Div. of Elections*, 711 So.2d 151, 154 (Fla. 1st DCA 1998) (“While the issue [raised in a petition for declaratory statement] must apply in the petitioner’s particular set of circumstances, there is no longer a requirement that the issue apply only to the petitioner.”).

7. As recently noted by the First District Court of Appeal in *Society for Clinical and Medical Hair Removal, Inc. v. Department of Health*, 183 So.3d 1138 (Fla. 1st DCA 2015), the Florida Supreme Court’s decision in *Investment Corp.* “stands for the proposition that an agency has an obligation to issue a declaratory statement explaining how a statute or rule applies in the petitioner’s particular circumstances even if the explanation would have a broader application than to the petitioner.”

8. Contrary to SACE’s argument, the Commission may not decline to respond to DEF’s Petition simply because the Commission’s statement would apply to others in the industry. *ExxonMobil Oil Corp. v. State, Dept. of Agriculture & Consumer Services*, 50 So.3d 755 (Fla. 1st DCA 2010). In *ExxonMobil*, the court held that the Department of Agriculture could not refuse to issue a declaratory statement as to whether an oil company’s reliance on a

regional gasoline price index in setting prices satisfied an exemption of price increases based on the fact that the answer could affect several other similarly situated oil companies. The court remarked that statements as to one member of a unique industry having very limited participants would almost invariably be of interest to others in the very limited group. *Id.* at 758.

9. The cases upon which SACE relies for its position that the Commission may not issue a statement applying to a class of persons are either based upon the more-restrictive pre-1996 version of section 120.565, Florida Statutes (*Florida Optometric Assoc. v. Wingo, Tampa Elec. Co. v. Florida Dept. of Community Affairs, Regal Kitchens, Inc. v. Florida Dept. of Revenue*) or actually support issuance of the statement by the Commission as indicated above (*ExxonMobil Oil Corp. v. State, Dept. of Agriculture & Consumer Services; Chiles v. Dept. of State, Div. of Elections, Div. of Pari-Mutuel Wagering; Dept. of Bus. & Prof'l. Regulation v. Inv. Corp. of Palm Beach*).

10. SACE relies primarily on *Lennar Homes, Inc. v. Department of Business & Professional Regulation*, 888 So.2d 50 (Fla. 1st DCA 2004) for its argument that a statement responding to DEF's Petition would constitute a broad agency policy. *Lennar Homes* is distinguishable from the facts here. The agency in *Lennar Homes* not only announced a "broad agency policy" that prohibited the use of arbitration provisions in all condominium purchase and sale contracts statewide, but it went further and purported to invalidate the petitioner's contract. *See id.* at 54–55 ("In the case before us, the [agency] went beyond applying the condominium statutes to [petitioner]'s contract and ruled that the contract language requiring arbitration was void against public policy. We know of no statute which confers authority on the [agency] to declare a party's contract void."). Here, the declaratory statement sought by DEF would only

address the narrow question framed by the Petition, which is limited in scope to the applicability of a Commission rule and order to a particular set of facts.

11. As indicated above, the Commission’s response to the narrow question posed by DEF’s Petition need not involve rulemaking. Even assuming, however, that the Commission determines that the statement sought by DEF would constitute a rule, the Commission must, nevertheless, issue the statement and then initiate the rulemaking process. *See Society for Clinical and Medical Hair Removal, Inc.*, 183 So. 3d at 1144 (“an agency has an obligation to issue a declaratory statement explaining how a statute or rule applies in the petitioner’s particular circumstances even if the explanation would have a broader application than to the petitioner. But, if the statement has such a broad and general application that it meets the definition of a rule, the agency must also simultaneously initiate the rulemaking process to adopt the statement as a rule.”).

The business and financing practices of a Duke Energy affiliate are irrelevant to how this Commission should treat solar QF PPA obligations in Florida.

12. SACE argues that Duke Energy Renewables (DER) enters into long term contracts, therefore QFs in Florida should be allowed to do the same. *See Response at p. 13.* SACE also inaccurately implies DER’s PPAs are the “same type” of PPAs that solar QFs in peninsular Florida are demanding from DEF under PURPA. *See id.* While it is irrelevant to this proceeding how a non-regulated Duke Energy affiliate either assists other utilities across the U.S. to meet their long-term state renewable policy initiatives, or helps large companies, municipalities, or cooperatives meet their long-term clean energy goals in some open electric markets, the analogy is misplaced. DEF’s Petition is referencing Florida solar QFs that underpin

their negotiations or QF PPA provisions with FERC's minimal requirements under PURPA¹ (e.g., the solar QF under PURPA has no obligation to contribute to fuel diversity, fuel price stability or energy security (*see* Rule 25-17.240(2), F.A.C.) and the forced-put of PURPA energy on a utility customer is of the QF's choosing² (*see* Rules 25-17.230(5) and 25-17.0889, F.A.C.)) at a QF payment rate that is no less than avoided cost. Furthermore, on behalf of its customers, DEF will be expected to purchase all solar QF PURPA energy from all similarly situated solar QFs at the same QF payment rate, terms, and other conditions ensuring the PURPA rights of each QF are preserved. Of course any company (DER included), if given the opportunity, would prefer to have a fixed stream of revenue for as long as possible. But that is not what PURPA requires; nor is that the issue in this proceeding. The issue here is, under Florida rules, to protect DEF customers from paying no more and no less than full avoided cost, whether offering a 100 percent fixed price for a two year period under a solar QF PPA apportions an equivalent amount of risk to its customers when compared to the risk the Commission approved in its QF Standard Offer Contract with a variable QF payment rate. Additionally, DEF is concerned SACE lacks the understanding of the reliability needs of the bulk electric system in Florida to compare the wholesale renewable sales by DER that generally occur in other NERC Regional Reliability Organizations across well-interconnected electric markets to the potential Florida solar QF generation in the FRCC region alone. As stated in DEF's Petition, Florida is unique from all other states in that it is a peninsula with limited power import/export capabilities. The result is that DEF, as a Balancing Authority, must be vigilant in monitoring the addition of unplanned generating resources to ensure that its Balancing Area can reliably accommodate the additional

¹ *See DEF's Petition* at 11-14; *See Duke Energy Florida, LLC's Response to Vote Solar's Amicus Curiae Memorandum*, Docket No. 20180169-EQ (Oct. 8, 2018), at 4, and 8-9.

² *See Duke Energy Florida, LLC's Response to SEIA's Petition to Intervene and Response in Opposition to Petition for Declaratory Statement*, Docket No. 20180169-EQ (Oct. 9, 2018), at 2.

generation. DEF's Petition is meant to provide necessary guidance to prudently plan, integrate, and fairly advance cost-effective solar generation, which includes the influx of potentially viable solar QF generation in its Balancing Area, while also ensuring DEF customers are held harmless even as solar pricing continues to decline and QF avoided energy payment rates are changing.³ See Rule 25-17.0825(2)(a), F.A.C.

SACE's argument to revamp Florida's planning process is wholly irrelevant to this declaratory statement proceeding.

13. DEF, in compliance with Commission rules and statutes, has engaged in a rigorous planning process for years. SACE appears to believe that, because DEF's Petition involves solar, this is an appropriate forum in which it can bring forth arguments about how the Commission's entire planning process should be completely revamped and changed. While DEF completely disagrees with SACE's allegations regarding DEF's planning processes, DEF does not believe that a point by point rebuttal of each of SACE's arguments would be helpful to this proceeding. DEF has set forth a limited issue about which it is uncertain and has asked the Commission for a declaration with respect to that issue. Arguments about whether a planning system, which works quite well and has for years, should be "fixed" or changed, is wholly irrelevant to this proceeding and should be disregarded by the Commission in its consideration of DEF's requested declaratory statement.

Respectfully submitted,

/s/ Dianne M. Triplett
DIANNE M. TRIPLETT
299 First Avenue North
St. Petersburg, FL 33701
T: 727.820.4692; F: 727.820.5519
E: Dianne.Triplett@Duke-Energy.com

³ See *Duke Energy Florida, LLC's Response to Ecoplexus, Inc.'s Response in Opposition to Petition for Declaratory Statement*, Docket No. 20180169-EQ (Oct. 1, 2018), at 8-9.

MATTHEW R. BERNIER
106 East College Avenue, Suite 800
Tallahassee, FL 32301
T: 850.521.1428; F: 727.820.5519
E: Matthew.Bernier@Duke-Energy.com

Attorneys for Duke Energy Florida, LLC

CERTIFICATE OF SERVICE
(Dkt. No. 20180169-EQ)

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following by electronic mail this 15th day of October, 2018, to all parties of record as indicated below.

/s/ Dianne M. Triplett
Attorney

<p>Rosanne Gervasi Office of General Counsel Florida Public Service Commission 2540 Shumard Oak Blvd. Tallahassee, FL 32399-0850 rgervasi@psc.state.fl.us</p> <p>J. R. Kelly / C. Rehwinkel Office of Public Counsel c/o The Florida Legislature 111 West Madison St., Rm. 812 Tallahassee, FL 32399 kelly.jr@leg.state.fl.us rehwinkel.charles@leg.state.fl.us</p> <p>Robert Scheffel Wright / John T. LaVia, III (Ecoplexus) 1300 Thomaswood Dr. Tallahassee, FL 32308 jlavia@gbwlegal.com schef@gbwlegal.com</p> <p>Paul Esformes (Ecoplexus, Inc.) 807 East Main St., Ste. 6-050 Durham, NC 27701 pesformes@ecoplexus.com</p> <p>Robert Fallon (Ecoplexus) Engleman Fallon, PLLC 1717 K St., N.W., Ste. 900 Washington, DC 20006 rfallon@efenergylaw.com</p> <p>Marsha E. Rule (Vote Solar / SEIA) 119 South Monroe St., Ste. 202 Tallahassee, FL 32301 marsha@rutledge-ecenia.com</p>	<p>Rich Zambo (Vote Solar / SEIA) Rich Zambo, P.A. 2336 S.E. Ocean Blvd., No. 309 Stuart, FL 34966 richzambo@aol.com</p> <p>George Cavros, Esq. (SACE) 120 E. Oakland Park Blvd., Ste. 105 Fort Lauderdale, FL 33334 george@cavros-law.com</p> <p>Heather Curlee (SEIA) Wilson Sonsini Goodrich & Rosati, P.C. 701 Fifth Ave., Ste. 5100 Seattle, WA 98104 hcurlee@wsgr.com</p> <p>Dylan Casey (Hardee Dydo Solar) P.O. Box 59225 Birmingham, AL 35259 dcasey@beaufortrosemary.com</p> <p>Lindsay Latre (esaSolar) 108 Commerce St., Ste. 105 Lake Mary, FL 32746 Llatre@esa-solar.com</p> <p>Daniel Ros / Justin Vandenbroeck (Renergetica) 108 Commerce St., Ste. 105 Lake Mary, FL 32746 daniel.ros@renergetica.com justin@renergetica.cloud</p>
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