

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: April 6, 2018

TO: Office of Commission Clerk (Stauffer)

FROM: Office of the General Counsel (Harper) *AGH S.M.C.*
Office of Industry Development and Market Analysis (Crawford) *BC CH*

RE: Docket No. 20170273-EQ – Petition by Sunrun Inc. for declaratory statement concerning leasing of solar equipment.

AGENDA: 04/20/18 – Regular Agenda – Parties May Participate at the Commission’s Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Clark

CRITICAL DATES: Statutory Deadline Waived

SPECIAL INSTRUCTIONS: None

Case Background

On December 29, 2017, Petitioner, Sunrun Inc. (Sunrun), filed a petition for a declaratory statement (Petition). Sunrun asks the Commission to declare that based on the facts presented by Sunrun:

- (1) Sunrun’s residential solar equipment lease does not constitute a sale of electricity;
- (2) Offering its solar equipment lease to customers in Florida will not cause Sunrun to be deemed a public utility under Florida law; and
- (3) The residential solar equipment lease described in its petition will not subject Sunrun or Sunrun’s customer-lessees to regulation by the Commission.

Docket No. 20170273-EQ

Date: April 6, 2018

Pursuant to Rule 28-105.0024, Florida Administrative Code (F.A.C.), a Notice of Declaratory Statement was published in the January 4, 2018, edition of the Florida Administrative Register, informing interested persons of the Petition.

There were no requests to intervene filed. However, on February 5, 2018, Gulf Power Company (Gulf Power) and Florida Public Utilities Company (FPUC) filed a motion to participate as amici curiae along with a memorandum of law that set forth issues for the Commission's consideration. One issue that amici curiae raised was that Sunrun did not file a copy of the lease agreement with its Petition for Declaratory Statement. Gulf and FPUC's motion was granted by Order No. PSC-2018-0080-PCO-EQ. Sunrun filed a response to the memorandum of law, providing additional information about its Petition. On February 14, 2018, Florida Electric Cooperatives Association, Inc., (FECA) filed a letter in support of Gulf Power and FPUC's motion and memorandum of law.

The Commission considered the petition at the March 1, 2018 Agenda Conference. Pursuant to Section 120.565(3), Florida Statutes (F.S.), there is a 90-day deadline for an agency to issue a final order on a petition for declaration statement. Sunrun waived this deadline at the March 1, 2018, Agenda Conference. At the Agenda Conference, the Commission deferred its consideration of Sunrun's Petition so that Sunrun could develop a draft solar lease agreement to present to the Commission. This would be for the limited purpose of the Commission evaluating the relevant facts contained in the provisions of the lease that relate to the facts in its Petition. On March 20, 2018, Sunrun filed a draft solar lease agreement to support the facts in its Petition.

This recommendation addresses Sunrun's Petition for Declaratory Statement. The Commission has jurisdiction pursuant to Section 120.565, F.S., and Chapter 366, F.S.

Discussion of Issues

Issue 1: Should the Commission grant Sunrun's Petition for Declaratory Statement?

Recommendation: Yes. Based on the facts presented by Sunrun, the Commission should grant Sunrun's Petition and declare: (1) Sunrun's residential solar equipment lease as described in Sunrun's Petition does not constitute a sale of electricity; (2) offering its solar equipment lease to customers in Florida as described in Sunrun's Petition will not cause Sunrun to be deemed a public utility under Florida law; and (3) the residential solar equipment lease as described in Sunrun's Petition will not subject Sunrun or Sunrun's customer-lessees to regulation by the Commission. The Commission should also state that its declaration is limited to the facts described in Sunrun's Petition and would not apply to different, alternative facts. (Harper, Crawford)

Staff Analysis: Sunrun's Petition asks the Commission to declare whether Sunrun's solar leasing program as described in Sunrun's Petition will make Sunrun or its lease customers a public utility subject to the Commission's jurisdiction under Section 366.02(1), F.S. Although Sunrun provided a copy of a draft solar equipment lease for the Commission's consideration when addressing Sunrun's question, the Commission would not have the authority to approve Sunrun's draft lease.

Sunrun's Petition and its draft solar equipment lease provide that the lease payments are fixed and are therefore independent of electric production. This is consistent with Rule 25-6.065, F.A.C., which allows customers to lease an on-site renewable generation system from a third-party without triggering the Commission's jurisdiction. Staff recommends the Commission grant Sunrun's Petition for Declaratory Statement. Below is a more detailed explanation of Staff's recommendation.

Law Governing Petitions for Declaratory Statements

A declaratory statement procedure is intended to enable members of the public to definitively resolve ambiguities of law arising in the planning of their future affairs and to enable the public to secure definitive binding advice as to the applicability of agency-enforced law to a particular set of facts. *Department of Business and Professional Regulation, Div. of Pari-Mutuel Wagering v. Investment Corp. of Palm Beach*, 747 So. 2d 374, 382 (Fla. 1999). Declaratory statements are governed by Section 120.565, F.S., and the Uniform Rules of Procedure in Chapter 28-105, F.A.C. Section 120.565, F.S., states, in pertinent part:

- (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.
- (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances.

Rule 28-105.001, F.A.C., Purpose and Use of Declaratory Statement, provides:

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 the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

If a petitioner requesting a declaratory statement meets the filing requirements provided by Rule 28-105.002, F.A.C., an agency must issue the declaratory statement.¹ Rule 28-105.002, F.A.C., requires a petition for declaratory statement to include the following information:

- (1) The caption shall read: Petition for Declaratory Statement Before (Name of Agency).
- (2) The name, address, any e-mail address, telephone number, and any facsimile number of the petitioner.
- (3) The name, address, any e-mail address, telephone number, and any facsimile number of the petitioner's attorney or qualified representative if any.
- (4) The statutory provision(s), agency rule(s), or agency order(s) on which the declaratory statement is sought.
- (5) A description of how the statutes, rules, or orders may substantially affect the petitioner in the petitioner's particular set of circumstances.
- (6) The signature of the petitioner or of the petitioner's attorney or qualified representative.
- (7) The date.

Rule 28-105.003, F.A.C., provides the requirements for how agencies must dispose of declaratory statements. The rule states that an agency may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts.

Sunrun's Petition for Declaratory Statement

Sunrun's particular circumstances and facts

The Petition states that Sunrun has offices in Tampa, Florida, and is the nation's largest dedicated residential solar storage and energy services company with over 160,000 customers currently in 22 states and the District of Columbia. In Florida, Sunrun offers only its "cash solar product," which customers must purchase and pay for in full, upfront.²

¹An 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. *Soc'y for Clinical & Med. Hair Removal, Inc. v. Dep't of Health*, 183 So. 3d 1138, 1144 (Fla. 1st DCA 2015).

²Based upon staff's review of information on Sunrun's website, it currently offers potential customers in Florida two options to purchase and own a solar energy system. Customers may either pay upfront the cost of the system, including installation, or customers may finance the cost of the system, including installation, and make monthly payments. See <https://www.sunrun.com/solar-by-state/fl>. Additionally, Sunrun states that the solar products it offers are different for each state and that it provides a website specifically for Florida. See <https://www.sunrun.com/solar-by-state/fl>.

Sunrun plans to offer leasing as an option in Florida for potential customer-lessees who prefer not to or cannot purchase and pay upfront for residential solar systems. Sunrun states that the Florida residential solar equipment lease will consist of a 20-year lease of solar panels with an option to include batteries. According to Sunrun, the proposed leasing program payment amounts will be based on a negotiated rate of return and will be independent of electric generation, production rates, or any other operational variable of the leased equipment.

Amici Curiae Gulf Power and FPUC raise issues in the memorandum of law that questioned the facts outlined in Sunrun's Petition. Specifically, they pointed out that Sunrun did not file a lease agreement with its Petition, so it is unclear whether the lease agreement would match the facts set forth in Sunrun's Petition. In response to the Commission's concerns expressed at the March 1, 2018 Agenda Conference, Sunrun filed a draft solar equipment lease. The draft lease includes the following provisions:

- Lease payments will be fixed for a 20-year lease term. The payment amounts will be based on a negotiated rate of return and will be independent of electric generation, production rates, or any other operational variable of the leased equipment.
- Sunrun will hold legal title to the leased equipment and receive the tax credits and depreciation benefits associated with the investment.
- Sunrun will have no control over the use of the equipment other than as the beneficiary of covenants requiring the customer-lessee to maintain the equipment in good repair.
- At the lease expiration, the customer-lessee will be able to purchase the solar equipment at fair market value, renew the lease on an annual basis, or require removal of the equipment.
- Sunrun will provide customary workmanship warranties to protect the customer-lessees' home from damage during the installation process. The customer-lessees will be responsible for the costs of ongoing system maintenance through their monthly lease payment. Equipment warranties and maintenance services will be triggered by damage to or malfunction of the system, or its components, and will not be dependent upon electrical generation or system production rates.
- The customer-lessee will be responsible for the cost of non-warranty maintenance, repair, and replacement.
- Once the system is installed and interconnected, the operational burden and risk of maintaining the equipment and assuring adequate solar exposure conditions will be borne by the customer-lessee.
- The customer-lessee will be responsible for the costs of applicable property taxes and insurance.
- Lease terms and conditions will be compliant with applicable IRS and accounting standards.

Statutes, Rules, and Commission Orders Applicable to Sunrun's Facts

The statute to be applied is Section 366.02(1), F.S., which states, in pertinent part, that the Commission's jurisdiction extends to public utilities defined as:

Every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas...to or for the public within the state.

The rule that applies is Rule 25-6.065, F.A.C., which provides, in pertinent part:

The term ‘customer-owned renewable generation’ does not preclude the customer of record from contracting for the purchase, lease, operation, or maintenance of an on-site renewable generation system with a third-party under terms and conditions that do not include the retail purchase of electricity from the third party.

Rule 25-6.065, F.A.C., allows customers to contract to lease an on-site renewable generation system with a third-party. The rule allows leases for solar equipment that include a maintenance agreement so long as the lease payments do not depend on electric generation.

The Commission order applicable to Sunrun’s Petition is Order 17009, issued December 22, 1986, in Docket No. 860725-EU, *In re: Petition of Monsanto Company for a declaratory statement concerning the lease financing of a cogeneration facility*. In *Monsanto*, the Commission declared that the Monsanto Company’s on-site lease financing of its cogeneration facility did not result in a retail sale of electricity, did not cause the lessor to be deemed a public utility, and did not subject either the company or its lessor to regulation by the Commission.

Staff’s Analysis of Sunrun’s Petition for Declaratory Statement

Sunrun’s Petition asks the Commission whether Sunrun’s proposed solar leasing program triggers the Commission’s jurisdiction under Section 366.02(1), F.S. In its Petition, Sunrun states that the declaratory statement procedure can assist Sunrun with planning its future conduct and will help avoid costly administrative litigation by selecting the proper course of action in advance. Because Sunrun seeks to offer and market the residential solar equipment lease program in Florida only if the Commission grants, in the affirmative, its request for a declaratory statement, Sunrun is a substantially affected person and has standing to bring its Petition.

According to the declaratory statement rules, the Commission’s analysis of Sunrun’s Petition is limited to the facts presented in the Petition, and the Commission may answer the question without taking any position with regard to the validity of the facts.³ Because the Commission’s analysis in this case is limited solely to the jurisdiction question raised by Sunrun’s Petition, staff has analyzed the facts presented under Section 366.02(1), F.S, prior Commission orders, and Rule 25-6.065, F.A.C., to determine if Sunrun’s proposed program constitutes a sale of electricity.

Staff reviewed the draft solar lease for the sole purpose of confirming that it reflected the facts stated in Sunrun’s Petition. Because the Commission’s analysis is limited solely to the jurisdiction question raised by the Petition, other provisions in the draft lease, such as those

³See Rule 28-105.003, F.A.C.

provisions that relate to Sunrun's compliance with the Florida Consumer Protection Law, were not part of staff's analysis.⁴

Also, Gulf Power and FPUC provided marketing materials from Sunrun's activities in other jurisdictions in their memorandum of law. In response, Sunrun provided Florida-specific marketing materials while noting its activities in other jurisdictions are irrelevant to its Petition in Florida. Because staff's review of Sunrun's draft solar lease was limited to confirming that the draft solar lease supported the facts presented in the Petition, staff did not consider Sunrun's marketing materials for other states.

Rule 25-6.065, F.A.C., Interconnection and Net Metering of Customer-Owned Renewable Generation

Sunrun filed a draft solar equipment lease to illustrate how its leasing model would operate in Florida. Sunrun's draft solar lease shows that the lease customers must utilize their utility's service and interconnection and net metering provisions. This is consistent with Rule 25-6.065, F.A.C., which provides, in pertinent part:

The term 'customer-owned renewable generation' does not preclude the customer of record from contracting for the purchase, lease, operation, or maintenance of an on-site renewable generation system with a third-party under terms and conditions that do not include the retail purchase of electricity from the third party.

In 2002, the Commission adopted Rule 25-6.065, F.A.C., "to promote the development of small customer-owned renewable generation, particularly solar and wind energy systems."⁵ Rule 25-6.065, F.A.C., allows customers to lease solar equipment from a third party. The rule allows for a maintenance agreement to be included in the lease so long as the lease payments do not depend on electric generation. According to Sunrun's facts, the customer will be the end-user, and the lease payments do not depend on electric generation. Therefore, staff believes the lease program model as described in Sunrun's Petition is consistent with Rule 25-6.065, F.A.C.

Sunrun's Petition is Consistent with the Monsanto Order

The Commission has issued previous orders on petitions for declaratory statement that have addressed the concept of what constitutes a public utility in terms of leasing cogenerators or the use of energy created by cogenerators. These orders stand for the general proposition that where a customer pays a flat fee to an energy generation equipment supplier for personal use and that fee is not based on electric production, there is no jurisdictional sale of electricity.⁶

⁴In *Deltona Corp. v. Mayo*, 342 So. 2d 510 (Fla. 1977), the Florida Supreme Court held that consumer protection was outside the bounds of the Commission's jurisdiction: "If Deltona engaged in an unfair business practice or committed fraud, however, it may be a concern of other state agencies or the basis for private law suits (on which we express no opinion), but it is not a matter of statutory concern to the Public Service Commission."

⁵In 2005, the Florida legislature echoed the Commission's intent to promote customer-owned renewable generation when it enacted Section 366.91, F.S., to require public utilities to develop a standardized interconnection agreement and net metering programs for customer-owned renewable generation.

⁶For example, in Order No. 18302, issued in October 16, 1987, in Docket No. 8700446-EU, *In re: Petition by PW Ventures Inc., for a Declaratory Statement in Palm Beach County (PW Ventures)*, the facts presented in the petition constituted a retail sale of electricity to another independent private company. The Commission's holding

Although the *Monsanto* declaratory statement considered cogenerators rather than a solar customer-owned system, the order reflects the facts which are most similar to the facts presented in Sunrun's Petition because it involved leasing equipment for self-generation. In *Monsanto*, the company asked the Commission for a declaratory statement to recognize that the company's use of lease-financing for equipment to increase the company's own on-site generation would not render the company subject to the Commission's jurisdiction. In its petition, the company stated that it would pay a fixed amount for the lease, an amount that was not tied to energy production. The lease would run for a minimum of five years, after which the company could elect to renew it, purchase the equipment, or pay for the removal of the equipment. The Commission answered the declaratory statement in the affirmative and held that Monsanto's plan would not trigger the Commission's jurisdiction because the company was "leasing equipment which produces electricity rather than buying electricity that the equipment generates."⁷ The Commission stated: "(M)ost importantly, just as in the lease of an automobile, the lease payments would be fixed through the term of the lease."⁸

In *Monsanto*, the company was responsible for maintenance of the cogenerators. Amici curiae state in their memorandum of law that "[i]f the proposed leasing arrangement places repair, replacement and/or maintenance obligations on the lessor rather than the lessee, such an agreement would appear to be odds with the Commission's holding in *Monsanto*." Amici curiae do not state how the assignment of maintenance obligations would conflict with *Monsanto* or how that would result in a sale of electricity and appears to be irrelevant. In *Monsanto*, the Commission considered maintenance because of the operational nature of cogenerators. Cogenerators can be turned off and on and ramped up and down, and, as a result, maintenance activities and costs can vary. Therefore, the lessee in *Monsanto* assumed the responsibility of maintaining the leased equipment to avoid having the lease payments go up and down due to maintenance activity. The holding in *Monsanto* is based on the fixed nature of the lease payments rather than who has the obligation for maintenance.

Like *Monsanto*, Sunrun's lease payments are fixed and, therefore, independent of electric production. Sunrun's proposed residential solar equipment lease program will allow individual customers to generate electricity for personal use. Unlike the fact in *Monsanto* that the lessee assumed responsibility for maintaining the leased equipment because maintenance activities could cause the lease payments to vary, Sunrun's maintenance arrangement allows the company to maintain the solar panels without affecting the lease payments. Sunrun will monitor the output of the solar panels for the purpose of maintenance, and if faulty panels are detected and repaired or replaced, the customer's monthly lease payment would remain fixed regardless of the output and maintenance activity. Therefore, the lease payments would not vary based on generation, and the lease arrangement would not be considered a sale of electricity.

established that private companies cannot engage in unregulated retail sales to avoid Commission jurisdiction. The Florida Supreme Court affirmed the Commission's order and opined that while limiting the sale of electric service was in the public interest, there was no prohibition on self-generation. *PW Ventures, Inc. v. Nichols*, 533 So. 2d. 281, 284 (1988).

⁷ *Monsanto* at 6.

⁸ *Monsanto* at 7.

After the *Monsanto* order, the Commission promulgated Rule 25-6.065, F.A.C., “to promote the development of small customer-owned renewable generation, particularly solar and wind energy systems.” Rule 25-6.065, F.A.C., allows customers to lease solar equipment from a third party and allows for a maintenance agreement so long as the lease payments do not depend on electric generation. Thus, the Sunrun Petition is consistent with both *Monsanto* and the Commission’s current Rule 25-6.065, F.A.C.

Sunrun’s Draft Solar Equipment Lease is Consistent with Sunrun’s Petition

Staff believes that Sunrun’s Petition contains the necessary facts to support its request for a declaratory statement. The Petition describes the proposed model in a manner sufficient for the Commission to answer the question of jurisdiction.

Staff reviewed Sunrun’s draft solar lease for the limited purpose of further understanding the facts in the Sunrun Petition. Specifically, staff’s analysis was limited to the facts related solely to the Commission’s jurisdiction. Accordingly, staff reviewed the draft solar lease’s terms and obligations for the lessor and lessee with respect to lease payments and maintenance and warranties.

Staff believes that Sunrun’s draft solar lease payment structure is consistent with the facts in its Petition. Because the draft solar lease provides that the lease payments are fixed payments, it does not constitute a retail sale of electricity.

In addition, Sunrun’s draft solar lease is consistent with the maintenance and warranties structure outlined in its Petition. Sunrun’s draft solar lease offers customers a maintenance agreement that is independent of electric production. While Sunrun states it will give customers an estimate on the solar panels’ output for the purpose of sizing the system to fit the customers’ home, it makes no other representation, warranty or guarantee of any kind regarding the system’s output or performance.⁹ Because the lease payments are fixed regardless of the repairs and maintenance that may be required with the panels, Sunrun’s draft solar lease terms appear to be independent of electric generation.¹⁰

Sunrun states that the proposed leasing program’s maintenance package allows Sunrun to monitor the system remotely to collect information on the panels to notify Sunrun of any defects with the panels, such as damage or malfunction of the panel due to moisture intrusion.¹¹ Sunrun states that it will monitor and collect data from the panels in order for Sunrun to proactively address any problems that may arise due to system defects, which is necessary for Sunrun to meet the consumer protection requirements in the law and Sunrun’s contractual obligations with its customers. Sunrun states while it will be remotely measuring the energy produced by the solar system, Sunrun will not operate the system or manipulate the systems’ output. Rather, the

⁹ See Draft solar lease page 6, Section D “System Performance.”

¹⁰ See Draft solar lease page 4, Section C titled “Our Warranties” Also, the draft solar lease includes terms related to estimated electric generation for the sole purpose of sizing the solar system for the size of the home. Draft Solar Lease pages 5-6, Section D “System Performance.”

¹¹ See Sunrun’s Notice of Filing pages 5-6, paragraph 11, and Draft solar lease page 5, paragraph 3, in the section titled “Contacting Sunrun to Fix Solar System” and page 7, paragraph 2, in the section titled “Solar System Production and Energy Consumption Monitoring Data.”

monitoring of the system is simply to collect information to ensure the equipment is operating properly and to provide Sunrun with information to enhance its service. Staff believes that the fact that Sunrun proposes to monitor and collect data while maintaining the solar system does not conflict with the facts outlined in Sunrun's Petition. Moreover, staff believes that the fact that Sunrun is offering customers a maintenance plan as part of its fixed lease payment plan is consistent with Rule 25-6.065, F.A.C., which does not preclude the customer "from contracting for the purchase, lease, operation, or *maintenance* of an on-site renewable generation system." (Emphasis added.)

Staff believes that Sunrun's Petition contains the necessary facts to support its request for a declaratory statement. Sunrun's proposed solar leasing program will not allow for customer payments or charges based on electric production because the monthly lease payments are fixed. Staff believes Sunrun's proposed solar leasing program as outlined in its Petition is consistent with Rule 25-6.065, F.A.C. If Sunrun goes outside the clear bounds of its Petition, then the Commission's declaratory statement would not apply to an alternate set of facts. It is well settled that declaratory statements are inherently limited to the facts upon which they are based.¹² The declaratory statement will be controlling only as to the facts in Sunrun's Petition and not as to other, different or additional facts.

Conclusion

For the reasons set forth above, staff recommends that the Commission grant Sunrun's Petition for Declaratory Statement and declare: (1) Sunrun's residential solar equipment lease as described in Sunrun's Petition does not constitute a sale of electricity; (2) offering its solar equipment lease to customers in Florida as described in Sunrun's Petition will not cause Sunrun to be deemed a public utility under Florida law; and (3) the residential solar equipment lease as described in Sunrun's Petition will not subject Sunrun or Sunrun's customer-lessees to regulation by the Commission. The Commission should also state that its declaration is limited to the facts described in Sunrun's Petition and would not apply to different, alternative facts.

¹²Rule 28-105.003, F.A.C. (agency may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts). See also Order No. 23729, issued November 7, 1990, in Docket No. 900699-EQ, *In re: Petition of Seminole Fertilizer Corporation for a declaratory statement concerning the financing of a cogeneration facility*. (The Commission stated its conclusion was limited to the facts presented by the Petitioner.)

Issue 2: Should this docket be closed?

Recommendation: Yes, if the Commission votes to either grant or deny the Petition for Declaratory Statement, the docket should be closed.

Staff Analysis: Whether the Commission grants or denies Sunrun's Petition, a final order will be issued. Upon issuance of the final order, the docket should be closed.