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Florida and North Carolina Move Toward Joining National Trend Requiring Renewable Energy Generation

Florida's utility regulators are entertaining input from stakeholders to develop a Renewable Portfolio Standard ("RPS") that will require utilities to purchase 20 percent of their power from solar, wind and other renewable generating sources by the year 2020. Governor Charlie Crist directed the Florida Public Service Commission ("PSC") to adopt rules imposing the RPS standard as part of a July 13 executive order aimed at reducing Florida's contribution to greenhouse gas emissions. The Governor's directive puts Florida in position to become the first state in the Southeast to enact an RPS mandate, which in other states has been credited with unleashing tens of millions of dollars in investment in renewable energy research and deployment. North Carolina, however, may soon seize that distinction; a bill calling for utilities to generate at least 12.5 percent of all electricity sold at retail by 2017 is pending in the state House with the 2007 legislative session nearing its end.

Governor Crist's executive order directed the PSC to begin the rulemaking process by September 1, 2007, to impose an RPS. At least 24 states – none in the Southeast – have enacted a renewable energy mandate by law, regulation or public referendum. Congress is considering a nationwide RPS as part of comprehensive energy legislation promoted by leading Democrats, including Sen. Jeff Bingaman, D-N.M., chairman of the key Senate Energy and Natural Resources Committee.

The PSC convened a workshop July 26 to hear from utilities, independent power producers and experts from academia and advocacy groups about how the renewable mandate should be structured. Among the issues the PSC is confronting are:

- Which technologies will qualify as "renewable" for purposes of satisfying the 20 percent quota? Investor-owned utilities are pressing the Commission to include nuclear power, on the grounds that nuclear energy produces no harmful carbon emissions. Developers of landfill waste-to-energy plants likewise want the PSC to classify their technology as renewable.
- Which retail electric suppliers will be covered by the RPS mandate? State RPS quotas commonly exempt small suppliers, such as rural electric membership cooperatives, below a certain size. Current Florida PSC rules require only large investor-owned utilities to report annually to the Commission on the companies' progress toward diversifying their fuel mix to include renewables.
- Whether to impose intermediate, escalating benchmarks between now and 2020, as is common among RPS states.
- Whether utilities may satisfy some or all of the mandate by purchasing "green credits" from generators outside Florida in lieu of building or buying renewable generating capacity themselves, or by paying "alternative compliance payments" to the state. Other RPS states, including New Jersey and Massachusetts, have imposed substantial fees of up to \$55 for every megawatt-hour that a utility falls short of reaching its RPS target.

Additionally, state regulators must decide whether independent power producers selling the output from renewable energy facilities are entitled to receive extra compensation for the non-price values associated

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with their energy, including fuel diversity, and reduced environmental and public health impacts. The federal Public Utility Regulatory Policies Act (“PURPA”) requires utilities to accept energy from qualifying renewable energy producers at the utilities’ “avoided cost” rate, but leaves some discretion for state utility commissions to determine which factors will go into calculating avoided cost. Several IPP witnesses testifying at the July 26 PSC workshop made the point that “avoided cost” payment rates offered to renewable generators historically have been below-market, and the risk of underpayment increases when utilities are allowed to lock in long-term contracts based on fuel cost assumptions that frequently turn out to be understated.

Florida utilities now generate no more than 2 percent of customer demand from renewable sources, with most coming from waste-to-energy plants at municipal landfills, so the Governor’s mandate will require a substantial building campaign over the next 13 years. This will provide significant opportunities for independent power producers, although siting new generation facilities will also pose substantial challenges. Experts at the PSC workshop agreed that the most promising and commercially realistic resource for Florida is biomass. Florida has 10 million acres of farmland and 15 million acres of timberland, and produces an estimated 93.5 million dry tons of potential biomass fuel each year. There is less consensus whether wind power or solar energy can economically fulfill more than a token amount of a 20 percent RPS mandate, although the Governor’s executive order instructs the PSC to place particular emphasis on those technologies.

In addition to requiring the PSC to enact a renewable energy quota, Governor Crist’s executive order also:

- Directs the state Department of Environmental Protection to enact rules capping utility greenhouse gas emissions at levels no greater than the year 2000, with the cap ratcheting down in later years;
- Requires the PSC to adopt rules allowing small distributed generators of 1 MW or less (such as residential solar-cell generators) to offset their power consumption through “net metering,” under which meters would run backward when generation outstripped consumption; and
- Directs the PSC to impose national engineering standards under which renewable generators may interconnect with Florida’s power grid.

The PSC workshop coincided with Governor Crist’s announcement that St. Petersburg-based Progress Energy has signed a 20-year Purchase Power Agreement for the output of a 75 MW biomass gasification plant to be built in rural Liberty County by Atlanta-based Biomass Gas & Electric, LLP (“BG&E”). Attorneys from Sutherland Asbill & Brennan LLP assisted in negotiating and drafting the agreement for BG&E, the third and largest such contract that the privately held developer has signed this year.



If you are interested in assistance with financing and regulatory approvals to develop renewable energy projects, or advice on the impact of evolving standards in interconnection and net metering, please contact the following attorneys with Sutherland's Energy, Environmental and Energy Litigation teams:

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