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September 21, 1998

Ms. Blanca Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
4750 Esplanade Way, Room 110
Tallahassee, Florida 32399

RE: Docket No. 981042-EM

Dear Ms. Bayo:

Enclosed for filing please find the original and fifteen (15) copies of Petitioners' Memorandum of Law In Opposition to Florida Power Corporation's Motion to Dismiss Proceeding.

Sincerely,

John T. LaVia, III

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.	)	DOCKET NO. 981042-EM
	)	FILED: SEPT. 21, 1998

PETITIONERS' MEMORANDUM OF LAW IN OPPOSITION TO FLORIDA POWER CORPORATION'S MOTION TO DISMISS PROCEEDING

The Utilities Commission, City of New Smyrna Beach, Florida ("UCNSB" or "Utilities Commission") and Duke Energy New Smyrna Beach Power Company, Ltd., L.L.P. ("Duke New Smyrna"), collectively referred to herein as the "Petitioners", pursuant to Commission Rule 25-22.037(2)(b), Florida Administrative Code ("F.A.C."), hereby respectfully submit this memorandum of law in opposition to Florida Power Corporation's Motion to Dismiss Proceeding ("FPC's Motion to Dismiss").[1] For the reasons stated herein, FPC's Motion to Dismiss is without merit and the Commission should deny it.

SUMMARY

Both the Utilities Commission and Duke New Smyrna are proper applicants for the Commission's determination of need under the plain language of the Florida Electrical Power Plant Siting Act (the "Siting Act"). Moreover, both the UCNSB and Duke New Smyrna

[1]On or about September 8, 1998, FPC also filed a Petition to Intervene. Petitioners are filing a response in opposition to the requested intervention concurrently with the filing of this memorandum of law. Thus, the issue of FPC's standing to intervene is pending. If the Commission denies FPC's intervention, its Motion to Dismiss will be moot.

are "electric utilities" within the meaning of Section 366.02(2), Florida Statutes ("F.S."), and accordingly are subject to the jurisdiction that the Commission exercises with respect to such electric utilities. The New Smyrna Beach Power Project (the "Project") is also a joint electrical power supply project within the meaning of Chapter 361, Part II, F.S. (the Joint Power Act) and accordingly, Petitioners are a "joint operating agency," one of the specifically enumerated entities that satisfy the definition of "electric utility" and "applicant" under the Siting Act.

Contrary to FPC's protestations, Petitioners are neither asking the Commission to rewrite Section 403.519, F.S., and the Siting Act, nor urging the Commission to repudiate any of its prior orders. Rather, Petitioners, as "applicants" under Section 403.519, F.S., are seeking a determination of need from the Commission expressly within the Commission's existing statutory and regulatory framework. By filing the Joint Petition, Petitioners readily agree that the Commission is the "gatekeeper" to the site certification process under the Siting Act. The Joint Petition represents a request for the Commission's determination of need that is wholly consistent with the plain meaning of the Siting Act, Section 403.519, F.S., and Commission precedent in past need determination proceedings.

Public policy considerations mitigate strongly in favor of allowing the Petitioners to go forward to the need determination hearing on the merits of the Project. The Project serves the fundamental purposes of utility regulation, i.e., to promote a

competitive result. Competition in the wholesale supply of electricity is, of course, beneficial to the customers of retail-serving utilities like FPC because it will lead to lower costs, enhanced efficiency, and an optimal allocation of society's scarce resources. These competitive benefits are particularly powerful here because the Project imposes no risks and no obligations on Florida electric customers.

The construction of Section 403.519, F.S., advocated by FPC, i.e., that Duke New Smyrna is excluded from access to the Commission's need determination process because it does not serve retail customers in Florida and does not have contracts to sell the Project's entire output to local retail-serving utilities in Florida, is preempted as a matter of federal law because it conflicts with the purposes of the Energy Policy Act of 1992 and with the orders of the Federal Energy Regulatory Commission. Moreover, the construction of Section 403.519, F.S., advanced by FPC would violate the Commerce Clause of the United States Constitution by discriminating against out-of-state power producers and their affiliates unless those entities enter into contracts with local, retail-serving utilities, as well as by impermissibly burdening interstate commerce.

Accordingly, (if FPC is granted intervention), FPC's motion to dismiss must be denied.

ARGUMENT

I. BOTH DUKE NEW SMYRNA AND THE UTILITIES COMMISSION ARE PROPER APPLICANTS PURSUANT TO SECTION 403.519, FLORIDA STATUTES, FOR THE REQUESTED NEED DETERMINATION.

Under Section 403.519, Florida Statutes ("F.S."), "only an 'applicant' can request a determination of need" from the Commission. Nassau Power Corporation v. Deason, 641 So. 2d 396, 398 (Fla. 1994) (hereinafter "Nassau II"). In this instance, both Duke New Smyrna and the Utilities Commission, individually and in combination, fit squarely within the definition of "applicant" under Section 403.503(4),F.S., and thus are appropriate entities to petition the Commission for the requested need determination. Moreover, Duke New Smyrna is an "electric utility" within the meaning of Section 366.02(2), F.S., and accordingly is subject to the Commission's regulations applicable to such entities. FPC's arguments to the contrary, though numerous, are all based upon either the misapplication of the rules of statutory construction, a misstatement of legislative intent, or the flawed construction of prior Commission precedent, and are without merit.

A. Duke New Smyrna is a Proper Applicant Under Section 403.519, Florida Statutes.

Section 403.519, F.S., provides in pertinent part:

> On request by an applicant or on its own motion, the Commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act.

(Emphasis supplied.) Section 403.503,(4), F.S., defines an "applicant"[2] as:

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[2]Section 403.522(4), F.S., (part of the Transmission Line Siting Act) contains an identical definition of the term "applicant."

> any electric utility which applies for certification pursuant to the provisions of this act.

(Emphasis supplied.) Section 403.503(13), F.S., in turn, defines an electric utility as:

> cities and towns, counties, public utility districts, regulated electric companies, electric cooperatives, and joint operating agencies, or combinations thereof, engaged in, or authorized to engage in, the business of generating, transmitting, or distributing electric energy.

(Emphasis supplied.) Thus, a "regulated electric company" is a proper "applicant" specifically authorized under the Siting Act to seek a determination of need from the Commission. Moreover, a "regulated electric company" may also combine with one of the other entities (such as a city) specifically enumerated in Section 403.503(13), F.S., as an applicant for a need determination. For the reasons set forth below, Duke New Smyrna is a "regulated electric company."

As alleged in the Joint Petition, Duke New Smyrna is a "public utility"[3] under the Federal Power Act, 16 U.S.C.S. § 824(b)(1)(1994). See Joint Petition at 4. Though irrelevant to Duke New Smyrna's status as a public utility under federal law, Duke New Smyrna is also an "exempt wholesale generator" ("EWG") pursuant to the Public Utility Holding Company Act of 1935, 15 U.S.C.S. § 79z-5a (1994 & Supp. 1997). The Federal Energy

[3]Section 366.02(1), F.S., provides that a "public utility" under Florida law "suppl[ies] electricity...to or for the public within" Florida. Because Duke New Smyrna is authorized to sell electricity only at wholesale, i.e., to other utilities, it is not a "public utility" under Section 366.02(1), F.S.

Regulatory Commission ("FERC") confirmed Duke New Smyrna's EWG status by its order dated June 9, 1998. Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., 83 FERC § 62,220 (June 9, 1998).

As a "public utility" selling power at wholesale in interstate commerce, Duke New Smyrna is clearly subject to the regulatory jurisdiction of FERC, including, but not limited to, the FERC's jurisdiction over rates pursuant to the Federal Power Act. In fact, as stated in the Joint Petition, the FERC has approved Duke New Smyrna's Rate Schedule No. 1 for sale of the Project's entire capacity and associated energy to other utilities under negotiated arrangements. See Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., 83 FERC § 61,316 (June 25, 1998). Thus, as a company that sells wholesale electric power subject to the regulatory jurisdiction of the FERC, Duke New Smyrna fits squarely within the plain meaning of the term "regulated electric company" in the Siting Act, and Duke New Smyrna is a proper applicant under Sections 403.503(4), 403.503(13) and 403.519, F.S. See Carson v. Miller, 370 So. 2d 10 (Fla. 1979) (words of common usage should be construed in their plain and ordinary sense.)

On its face Section 403.503(13), F.S., specifies that an "electric utility" includes any of a number of entities (including "regulated electric companies") that are "engaged in, or authorized to engage in, the business of generating, transmitting, or distributing electric energy." (Emphasis supplied.) The Legislature enacted the Siting Act (including Section 403.503(13), F.S.) in 1973. See Ch. 73-33, Laws of Fla. (as originally

codified, the definition of "electric utility" now located in Section 403.503(13), F.S., was located in Section 403.502(4), F.S.) By using the word "or" rather than "and", the Legislature established that even in 1973 an "electric utility" under Section 403.503(13), F.S., could be engaged only in the generation of electric power. See Telophase Society v. State Board of Funeral Directors, 334 So. 2d 563 (Fla. 1976) (general rule is that the term "or" should be construed in the disjunctive).

An entity engaged solely in the generation and sale (but not the distribution) of electric energy, such as Duke New Smyrna, is necessarily a wholesale power producer, and wholesale power sales are (with limited exceptions not applicable here) transactions in interstate commerce. Entities making wholesale power sales in interstate commerce are (and were in 1973) public utilities subject to regulation under the Federal Power Act. As early as 1972, the year before the enactment of Section 403.503(13), F.S., the United States Supreme Court recognized in Federal Power Commission v. Florida Power & Light, 404 U.S. 453, 463 (1972), that the wholesale transmission and sale of electric power in interstate commerce was subject to regulation by the Federal Power Commission, the predecessor of the FERC. It is also well settled that the Legislature is presumed to be aware of the judicial construction of law on the subject concerning which a statute is enacted. See Collins Investment Co. v. Metropolitan Dade Co., 164 So. 2d 806, 809 (Fla. 1964). Thus, in 1973, the Florida Legislature was fully aware of the fact that the wholesale sale of electric power in

interstate commerce was subject to federal regulation, yet it did not limit or otherwise qualify the term "regulated electric company." In fact, the Legislature specifically provided that an entity that engaged solely in the generation of electric power for sale at wholesale (i.e., a wholesale public utility under the Federal Power Act), such as Duke New Smyrna, was a proper applicant for a determination of need.

In its Motion to Dismiss, FPC argues that only "retail utilities regulated by this Commission may seek a determination of need under Section 403.519 and commence a proceeding under the Siting Act." FPC's Motion to Dismiss at 6 (emphasis in original). In support of its position, FPC offers a number of arguments, each of which, as addressed below, is wholly without merit.

First, FPC makes the following statutory interpretation argument: FPC claims that because an "applicant" under Section 403.503(4), F.S., means an "electric utility," (emphasis supplied by FPC) and Section 366.82(1), F.S., defines a "utility" as an entity that "provides electricity . . . at retail to the public", only a retail utility may seek a determination of need. FPC's Motion to Dismiss at 5-6. In essence, FPC is advocating that the Commission first look to Section 403.503, F.S., for the definition of "applicant," to find that it means "electric utility," but then inexplicably, to forsake the specific definition of "electric utility" contained in the same definitional section of Section 403.503, F.S., and refer instead to the definition of "utility" in Section 366.82, F.S.--a definition in a different chapter of the

statute of a term that does not even appear in Section 403.519, F.S. Petitioners agree with the FPC, that the Commission must look to Section 403.503(4), F.S., for the definition of "applicant." However, the remainder of FPC's attempt at "statutory construction" is utter nonsense.

In making this contorted statutory "interpretation" argument, FPC ignores the fact that in 1990, the Legislature amended Section 403.519, F.S., by replacing the term "utility" with the term "applicant." See Ch. 90-330, Laws of Fla. Thus, the term "utility" no longer appears anywhere in Section 403.519, F.S.[4] and FPC's invitation to construe Section 403.519, F.S., based on what it once said requires the Commission to ignore the specific legislative action embodied in the 1990 amendments. Legislative intent is evident in the change the legislature makes to a statute, not in what the statute formerly stated. When the legislature amends a statute by omitting a word, it is fair to presume that the legislature intended the statute to have a different meaning than that accorded to it prior to the amendment. Capella v. City of Gainesville, 377 So. 2d 658, 660 (Fla. 1979). The definition of "utility" in Section 366.82(1), F.S., is no longer relevant to

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[4]Sections 366.80-366.85 and 403.519, F.S., referred to as the "Florida Energy Efficiency and Construction Act," were enacted in 1980. See Ch. 80-65, Laws of Fla. Though the Legislature elected to delete the term "utility" from Section 403.519, F.S., Sections 366.80-366.85, F.S., still retain numerous references to the term "utility" and thus FPC cannot argue that Section 366.82(1), F.S., has been rendered meaningless. See, e.g., Fla. Stat. §§ 366.81, 366.82(3), 366.82(4), 366.82(5), 366.82(7), 366.83, and 366.85 (each of which uses the term "utility").

Section 403.519, F.S., because the word "utility" no longer appears in that section.

Moreover, in arguing that the term "applicant" means "utility", and not "electric utility", FPC also ignores the fact that Section 403.503(13), F.S., specifically includes a definition for the term "electric utility." It is a basic tenet of statutory construction that when a definition of a word or phrase is provided in a statute, that meaning must be ascribed to the word or phrase whenever it is repeated in the statute unless contrary intent clearly appears. Nicholson v. State, 600 So. 2d 1101, 1103 (Fla.), cert. denied, 506 U.S. 1008 (1992). The Legislature clearly meant what it said when it included a distinct and separate definition for "electric utility" in Section 403.503, F.S., and for purposes of determining who is an "applicant" under Section 403.519, F.S., the term "electric utility" includes "regulated electric companies" such as Duke New Smyrna. The Commission must honor this legislatively created distinction between "utility" and "electric utility" and reject FPC's strained construction of these statutes.

On several occasions in its statutory interpretation argument, FPC attempts to limit the definition of "applicant" to "state-regulated" or "retail" utilities.[5] See, e.g., FPC's Motion to Dismiss at 2, ¶ 3 and 4, ¶ 7 (using the term "state-regulated"); FPC's Motion to Dismiss at 6, ¶ 12 (using the term "retail"). Neither the phrase "state-regulated" nor the term "retail" appears

[5]As explained above, FPC's references to "utility" rather than "electric utility" are not supported by the applicable definitions in Section 403.503, F.S.

in Section 403.503(4), 403.503(13) or Section 403.519, F.S., and the Commission should not give credence to FPC's attempted sleight-of-hand insertion of these words in its arguments.[6] It is a basic and longstanding principle of statutory construction that where a statute is clear and unambiguous, the tribunal construing it is not free to add words to steer it to a meaning and limitation which its plain meaning does not supply. See Armstrong v. City of Edgewater, 157 So. 2d 422, 425 (Fla. 1963). In essence, FPC is inviting the Commission to rewrite Sections 403.503(4), 403.503(13) and 403.519, F.S., by adding the terms "state-regulated" and "retail" to modify the term "electric utility." The Legislature did not use either term in its enactments, and the Commission should decline FPC's invitation.

If the Legislature wanted to limit the definition of "applicant" contained in Section 403.503(4), F.S., or the definition of "electric utility" contained in Section 403.503(13), F.S., to "state-regulated" or "retail" entities, it could have done so at any time, including as recently as the 1996 legislative session when it amended Section 403.503, F.S. See Ch. 96-410, Laws of Fla. The Legislature did not do so, and its failure to limit the terms "applicant" or "electric utility" to "state-regulated" or "retail" entities expresses legislative approval of the existing

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[6]Even if Section 403.519, F.S., were limited to "state" regulated electric utilities, as discussed in the next section herein, Duke New Smyrna is an "electric utility" under Section 366.02(2), F.S., and is accordingly subject to the Commission's Grid Bill jurisdiction and thus state regulated.

language. Accord see F.P.S.C. Staff Memorandum, Dkt. No. 971446-EU (Dec. 2, 1997) at 6.

FPC next argues that Nassau Power Corporation v. Beard, 601 So. 2d 1175 (Fla. 1992) (hereinafter Nassau I)[7], Nassau II and the underlying Commission orders in those cases somehow limit the Commission's authority to determine that Duke New Smyrna is a proper applicant under the Siting Act. FPC's Motion to Dismiss at 7-11. FPC is wrong. The real issue in this case, i.e., how to construe the term "regulated electric company", was not addressed in either Nassau I, Nassau II, or the underlying Commission orders. In fact, no court has construed the term "regulated electric company", and as explained above, Petitioners submit that the plain meaning of the term controls.

Moreover, Nassau I, Nassau II and the underlying Commission orders represent the law of cogeneration, see F.P.S.C. Staff Memorandum, Dkt. No. 971446-EU (Dec. 2, 1997) at 6, or perhaps more generally, the law of non-utility generators seeking to bind a retail-serving utility to a long-term power contract as a condition of going forward with their project. See Nassau II, 641 So. 2d at 397-98, 399 (stating that the issue in that case "is whether a non-utility cogenerator such as Nassau is a proper applicant for a determination of need" and also stating that a "non-utility

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[7]It is noteworthy that in its description of Nassau I, FPC twice mischaracterizes dicta as the holding of the case. See FPC's Motion to Dismiss at 8, ¶ 15; 9 ¶ 18. The actual holding of Nassau I was that Nassau Power Corporation, the appellant in that case, challenged the wrong order. See Nassau I, 601 So. 2d at 1178-79.

generator will be able to obtain a need determination for a proposed project only after a power sales agreement has been entered into with a utility") (emphasis supplied). In both Nassau I and Nassau II the putative applicants for a need determination were attempting to require a utility to purchase, and ultimately charge its ratepayers for, the electrical power to be produced by the proposed projects.[8] That is simply not the case here. Nassau I and Nassau II are thus readily distinguishable. Further, Duke New Smyrna has alleged that it is both an "electric utility"[9]

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[8]In the underlying orders that led to Nassau I and Nassau II, the Commission emphasized the limited scope of its rulings. Thus, in Order No. 22341, the Commission said,

> to the extent that a proposed electric power plant constructed as a QF is selling its capacity to an electric utility pursuant to a standard offer or negotiated contract, that capacity is meeting the needs of the purchasing utility.

In Re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities, Docket No. 890004-EU, Order No. 22341, (Fla. Pub. Serv. Comm'n, Dec. 26, 1989) (emphasis supplied). Also, in Order No. PSC-92-1210-EQ, which was reviewed by the Supreme Court in Nassau II, the Commission stressed: "It is our intent that this Order be narrowly construed and limited to proceedings wherein non-utility generators seek determinations of need based on a utility's need." In Re: Petition of Nassau Power Corporation to Determine Need for Electrical Power Plant (Okeechobee County Cogeneration Facility), 92 FPSC 10:643, 646, (emphasis supplied). By the Commission's own careful structure of its Order, the rationale does not apply to Duke New Smyrna.

[9]It is noteworthy that in Nassau II, in language quoted by the FPC in its Motion to Dismiss, the Court described the underlying Commission order as follows:

> The Commission dismissed the petition [for need determination], reasoning that only electric utilities, or entities with whom electric utilities have executed a power

pursuant to Section 403.503(13), F.S., and a "public utility" under the Federal Power Act. As an "electric utility"[10] under state law and a "public utility" under federal law, Duke New Smyrna is clearly not a non-utility generator, and attempting to shoehorn Duke New Smyrna into the law of non-utility generators is patently absurd.

Nor do the FPC-cited orders from the Seminole and Cypress Energy Partners proceedings support FPC's contentions. FPC cites Order No. 19468, Docket No. 880309-EC (In re: Petition of Seminole Electric Cooperative, Inc. to Determine Need for Electrical Power Plant) as standing for the proposition that the Commission "cannot use 'generic' need determination for any utility." FPC's Motion to Dismiss at 14. FPC's shorthand is misleading. In the Seminole case, the Commission told the applicant it would not issue a determination of need in the absence of a definitive proposal for a specific unit. It was Seminole's vague and general description of a project and the fact that the results of its RFP were not in that led to the statement quoted by FPC. The order is inapplicable here, because Duke New Smyrna has identified a specific state-of-

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> purchase contract are proper applicants for a need determination proceeding under the Siting Act.

Nassau II, 641 So. 2d at 398 (quoted by FPC in its Motion to Dismiss at 10). Duke New Smyrna is an electric utility and thus a proper applicant under both Nassau II and the Commission's underlying order.

[10]As discussed in the next section herein, Duke New Smyrna is also an "electric utility" as defined in Section 366.02(2), F.S.

the art unit with the degree of specificity required by the Commission's rules and is eager to support its proposal at hearing.

The Commission rendered Order No. PSC-92-1355-FOF-eq in Docket No. 920520-EQ, In re: Joint Petition to Determine Need for Electric Power Plant to be Located in Okeechobee County by Florida Power and Light Co. and Cypress Energy Partners, Ltd., in the context of efforts by Nassau Power Corporation and ARK/CSW to convince the Commission to consolidate the joint application of FPL and Cypress Energy Partners with the separate applications they had filed in conjunction with the power purchase contracts they proposed to impose on Florida Power & Light Company. The Commission refused to consolidate the dockets, reasoning that in a case filed by a utility proposing to fill a specific need, the role of the Commission was to vote the applicant's proposal up or down. The cited order has no application here for two reasons. First, in this case, the Commission is not being asked to choose among competing alternatives. Secondly, as pointed out above, Duke New Smyrna is a public utility under federal law, as well as an "electric utility" under state law, and the "law of non-utility generators" has no application to it in any event.

The fundamental factual distinction between this case and the cases that FPC invokes is that no utility other than the UCNSB is obligated to purchase power from the project. Duke New Smyrna has no regulated rate base and no captive customers. All economic risk associated with the Project is borne by Duke New Smyrna with absolutely no risk imposed on other utilities or their ratepayers.

By accepting all risk associated with the Project and not requiring a commitment to purchase by any utility, Duke New Smyrna has rendered Nassau I, Nassau II, and the underlying Commission orders inapplicable.

FPC also argues that Duke New Smyrna would not be subject to the statutory and rule requirements for filing ten-year site plans. See Section 186.801, F.S. As discussed below, Duke New Smyrna is not only an electric utility under Section 403.503(13), F.S., it will also be an electric utility under Section 366.02(2), F.S., and accordingly will be subject to filing a ten-year site plan.

In summary, the rules of statutory construction lead inexorably and consistently to a single conclusion: a regulated electric company, such as Duke New Smyrna, is an electric utility under the Siting Act and as such is a proper applicant for a determination of need under Section 403.519, F.S.

B. Duke New Smyrna Is An "Electric Utility" and Is Subject to the Commission's Grid Bill Authority Under Chapter 366.02, Florida Statutes, and the Commission's Ten-Year Site Plan Requirements Under Section 186.801, Florida Statutes.

FPC argues that Duke New Smyrna is not a proper applicant because it is neither subject to the Commission's Grid Bill authority nor required to comply with the Commission's ten-year site plan requirements. Thus, FPC concludes, allowing Duke New Smyrna to be an "applicant" is inconsistent with the overall regulatory scheme in Florida. See FPC's Motion to Dismiss at 11-12. Duke New Smyrna respectfully disagrees with FPC's analysis and its conclusion.

Duke New Smyrna is an "electric utility" under Section 366.02(2), F.S., by the plain language of the statute.[11] Section 366.02(2), F.S., defines "electric utility" to mean

> any municipal electric utility, investor-owned electric company, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state.

Duke New Smyrna is investor-owned, in that it is owned by its partners, Duke Energy Power Services Mulberry GP, Inc., which has a 1 percent ownership interest, and Duke Energy Global Asset Development, Inc., which has a 99 percent limited partnership interest. In addition, when the New Smyrna Beach Power Project becomes operational, Duke New Smyrna will own, maintain, and operate an electric generation system within Florida. Thus, by a straightforward, "plain language" reading of the statutory language, Duke New Smyrna satisfies each element of the definition of "electric utility." Duke New Smyrna is also a "public utility" under the Federal Power Act, thereby making it also an "electric utility" under a reasonable generic application of that term.

Section 186.801(1), F.S., provides in pertinent part that,

> each <u>electric utility</u> shall submit to the Public Service Commission a 10-year site plan which shall estimate its power generating

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[11] Section 366.02(2) uses the present tense, perhaps giving rise to the technical argument that because Duke New Smyrna does not yet own a generation facility, it is not an electric utility. This distinction is not important here. FPC argues that the Commission will not have authority over the Project or over Duke New Smyrna, and what is important here is that the Commission will have the authority -- indeed, the <u>regulatory</u> authority -- over Duke New Smyrna as provided in Chapter 366, including that statute's Grid Bill provisions.

> needs and the general location of its proposed power plant.

Thus, the Commission's ten-year site plan requirement applies to "electric utilities",[12] and, as an electric utility under both Sections 403.503(13), and 366.02(3), F.S., Duke New Smyrna intends to fully comply with them.[13]

The Commission's Grid Bill authority is found at Sections 366.04(2)&(5) and Sections 366.05(7)&(8), F.S. Relative to FPC's arguments, these provisions give the Commission "jurisdiction over

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[12]FPC yet again attempts to amend a statute sub silentio, this time, by claiming that only "retail" utilities must file ten-year site plans. See FPC's Motion to Dismiss at 10. The word "retail" does not appear in Section 186.801, F.S., and the Commission should reject FPC's attempt to rewrite the statute.

[13]FPC cites comments made by "a representative of Duke New Smyrna at a Staff workshop held on November 7, 1977 [sic--the workshop was actually held on November 7, 1997]" to the effect that it would be "impractical" for Duke New Smyrna to comply with the ten year site plan requirements. See FPC's Motion to Dismiss at 14. The actual comments, by Duke New Smyrna's representative, Schef Wright were as follows:

> Tom, you asked the question would it be useful for merchant plants to file a ten-year site plan. I think our answer to that is it's not really practical for us to make a ten-year projection, and I think we might have some competitive concerns about revealing our sites. But, you follow it up by saying your real concern was about potential transmission impacts . . . .

FPSC, transcript of Merchant Plant Workshop at 90 (November 7, 1997) (emphasis supplied). Clearly, when viewed in context, Mr. Wright's remarks were qualified, off-the-cuff responses to a general concern raised by Commission staff. Duke New Smyrna is in no way bound by these comments, and in fact, in reaction to Staff's questions and further review of Section 366.02(2) and Section 186.801, F.S., Duke New Smyrna determined that it is required to comply with the Commission's ten-year site plan requirements.

the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida . . . ." Fla. Stat. § 366.04(5) (1997). FPC's argument that Duke New Smyrna and the New Smyrna Beach Power Project would escape this jurisdiction is misplaced. In the first place, as discussed above, Duke New Smyrna is (or will be) an electric utility under Section 366.02(2), F.S., so FPC cannot argue that Duke New Smyrna would escape this authority because it is not an electric utility thereunder. Perhaps more importantly, the Commission's jurisdiction attaches to the "planning, development, and maintenance of a coordinated electric power grid," not to utilities; in fact, no form of the word utility even appears in this section.

In sum, Duke New Smyrna is or will be subject to the Commission's Grid Bill authority and will be required to comply with the Commission's ten-year site plan requirements. Thus, FPC's conclusion that the Project is inconsistent with the overall regulatory scheme and would introduce a "wild card" to the site plan process is unfounded and meritless.

C. The Utilities Commission is a Proper Applicant Under Section 403.519, F.S.

As previously noted, to be an "applicant" under Section 403.519, F.S., an entity must be an "electric utility" as defined in Section 403.503(13), F.S. The definition of "electric utility" set forth in Section 403.503(13), F.S., specifically includes "cities and towns . . . engaged in or authorized to engage in, the

business of generating, transmitting, or distributing electric energy." (Emphasis supplied.) The Utilities Commission is a subdivision of the City of New Smyrna Beach, Florida, created by a special act of the Florida Legislature. See Ch. 67-1754, Laws of Fla. As such, the Utilities Commission is a "city" within the definition of "electric utility" under Section 403.503(13), F.S., making it an authorized applicant under Section 403.519, F.S.

Moreover, the Utilities Commission is a municipal electric utility within the meaning of Section 366.02(2), F.S. As such, the Utilities Commission has "utility specific need" and is "obligated to serve customers" and fits squarely within even the overly narrow definition of "applicant" advanced by FPC. See FPC's Motion to Dismiss at 9.

As set forth in the Joint Petition, the Utilities Commission and Duke New Smyrna have executed a Participation Agreement which grants the Utilities Commission an entitlement of 30 MW of the Project's output and sets forth the terms under which the Utilities Commission may obtain the energy to which it is contractually entitled.[14]

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[14]FPC questions whether the absence of a final power purchase contract for the 30 MW of capacity to which the UCNSB is entitled somehow affects the UCNSB's status as an "applicant" for the need determination. For at least two reasons, this issue is a red herring. First, the determination of the nature of the agreement between the UCNSB and Duke New Smyrna is a factual determination which is not subject to a motion to dismiss. See Lowery v. Lowery, 654 So. 2d 1218, 1219 (Fla. 2d DCA 1995). Second, and more importantly, the contractual arrangement between the UCNSB and Duke New Smyrna is binding on the parties and clearly entitles the UCNSB to 30 MW of capacity from the Project and the energy associated with this capacity and specifies the key pricing terms for the power sold. In past need determination

FPC argues that the Utilities Commission is not a proper "applicant" for the 484 MW of capacity to which it is not entitled and that it allegedly does not need. See FPC's Motion to Dismiss at 6-7. FPC's argument is fatally flawed for several reasons. First, the Joint Petition contains sufficient allegations to establish that the Utilities Commission is an applicant under Section 403.519, F.S., for at least 30 MW of the Project's capacity. Whether the remaining capacity of the Project is entitled to a determination of need is a factual issue going to the merits of the need determination proceeding which cannot properly be decided by a motion to dismiss. See Lowery, 654 So. 2d at 1219. Second, and more importantly, nothing in Section 403.519, F.S., or in any Commission or Florida Supreme Court precedent requires that the entire output of a proposed project be used by the applicant or be contractually committed to a specific utility. In fact, on several occasions, the Commission has granted a need determination for a power plant to investor-owned and municipal utilities for power plants that represented capacity beyond that required to maintain the applicant's reliability criteria where other considerations in those instances, reducing Florida's reliance on

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proceedings, the Commission has allowed applicants to proceed with commitments that were no more binding. See In Re: Joint Petition to Determine Need for Electric Power Plant to be Located in Okeechobee County by Florida Power & Light Company and Cypress Energy Partners Limited Partnership, Docket No. 920520-EQ (proposed contract with non-QF independent power producer was subject to PSC approval). In fact, in one case, the Commission allowed an applicant to proceed without any final contractual agreement whatsoever. In Re: Petition of Florida Crushed Stone Company for Determination of Need for a Coal-fired Cogeneration Electrical Power Plant, 83 FPSC 2:107 (Order No. 11611).

oil and increasing Broker sales, warranted the project. See, In Re: Petition for Certification of Need for Orlando Utilities Commission, Curtis H. Stanton Energy Center Unit 1 and Related Facilities, FPSC Docket No. 810180-EU, Order No. 10320 (Fla. Pub. Serv. Comm'n, October 2, 1981); In Re: JEA/FPC's Application for Need for St. John's River Power Park Units 1 and 2, FPSC Docket No. 810045-EU, Order No. 10108 (Fla. Pub. Serv. Comm'n, June 26, 1981); In Re: Application for Certification of Tampa Electric Company's Proposed 417 Megawatt Net Coal-fired Big Bend Unit 4, FPSC Docket No. 800595-EU, Order No. 9749 (Fla. Pub. Serv. Comm'n, Jan. 16, 1981). The Utilities Commission and Duke New Smyrna simply request that the Commission grant them the same opportunity to proceed on a basis other than a specific utility's reliability criteria that it has given other applicants numerous times.

D. The Project is a Joint Electrical Power Supply Project Pursuant to Chapter 361, Part II, Florida Statutes and the Utilities Commission and Duke New Smyrna Constitute a "Joint Operating Agency."

The definition of "electric utility" contained in Section 403.503(13), F.S., identifies a "joint operating agency" as one of the entities entitled to be an applicant for a determination of need under Section 403.519, F.S. Though the term "joint operating agency" is not defined in the Siting Act, the Petitioners assert that a reasonable construction of the term that harmonizes Chapter 361, Part II, F.S., (hereinafter the "Joint Power Act") and the Siting Act must include entities undertaking a "joint electric

power supply project" pursuant to the Joint Power Act.[15] For the reasons set forth below and as alleged in the Joint Petition (Joint Petition at 10), the Utilities Commission and Duke New Smyrna are a "joint operating agency" and thus are proper applicants for the need determination proceeding.

Section 361.12, F.S., provides in pertinent part that an "electric utility" is authorized to join with a "foreign public utility" for the purpose of "jointly financing, constructing, managing, operating, or owning any project or projects." Section 361.11(2), F.S., provides that for the purpose of the Joint Power Act an "electric utility" is:

> any municipality, authority, commission, or other public body, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electrical energy generation, transmission, or distribution system within the state on June 25, 1975.

(Emphasis supplied.) Section 361.11(4), F.S. provides that a "foreign public utility" is:

> any person, as defined in subsection (3), the principal location or principal place of business of which is not located within this state, which owns, maintains, or operates facilities for the generation, transmission, or distribution of electrical energy and which supplies electricity to retail or wholesale

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[15]Petitioners are aware of no entities other than those undertaking a "joint electric power supply project" under the Joint Power Act, that could constitute a "joint operating agency." Thus, to construe the term "joint operating agency" as excluding "joint electrical power supply projects" would render the term without meaning. Such a construction is contrary to the basic tenet of statutory interpretation that a statute should be construed so as to give meaning to each of its provisions. See State v. Zimmerman, 370 So.2d 1179 (Fla. 4th DCA 1979).

> customers, or both, on a continuous, reliable, and dependable basis; or any affiliate or subsidiary of such person, the business of which is limited to the generation or transmission, or both, of electrical energy and activities reasonably incidental thereto.

(Emphasis supplied.) Lastly, Section 361.11(1), F.S., provides that a "project" is:

> a joint electric power supply project and any and all facilities, including all equipment, structures, machinery, and tangible and intangible property, real and personal, for the joint generation or transmission of electrical energy, or both, including any fuel supply or source useful for such a project.

The Utilities Commission is a commission which owned, maintained, and operated an electrical energy generation and distribution system in the state of Florida on June 25, 1975.[16] (See Ch. 67-1754, Laws of Fla.). Accordingly, the Utilities Commission fits squarely within the definition of "electric utility" contained in Section 361.11(2), F.S.

As stated in the Joint Petition, Duke New Smyrna is an affiliate of Duke Bridgeport Energy, L.L.C. Duke Bridgeport Energy, L.L.C. is the owner and operator of the Bridgeport Energy Project, a 520 MW gas-fired combined cycle power plant located and currently operating (in simple cycle mode) in Bridgeport, Connecticut and delivering power to wholesale customers. (Joint Petition at 6-7.) Accordingly, Duke New Smyrna is a "foreign public utility" because it is an affiliate of Duke Bridgeport Energy, L.L.C., a person (specifically defined to include

[16]The Utilities Commission is also a "municipality" (see Ch. 67-1754, Laws of Fla.) and a "public body."

corporations) the principal place of which is not located within the state of Florida, which currently owns, maintains and operates facilities for the generation of electrical energy and which supplies electricity to wholesale customers on a continuous, reliable and dependable basis.

In summary, the Utilities Commission, an "electric utility," has exercised its authority under Section 361.12, F.S., to join with Duke New Smyrna, a "foreign public utility," for the purpose of jointly financing and acquiring a "project," namely the New Smyrna Beach Power Project. As such, the Utilities Commission and Duke New Smyrna are a "joint operating agency" and are thus proper applicants for a need determination pursuant to Section 403.519, F.S.

In summary, the Joint Petition contains sufficient allegations to establish that the Utilities Commission and Duke New Smyrna have joined to form a joint electric power supply project under the Joint Power Act, and accordingly, the Utilities Commission and Duke New Smyrna are a "joint operating agency" within the definition of electric utility contained in Section 403.503(13), F.S., rendering them specifically authorized applicants under Section 403.519, F.S. FPC does not address Petitioners' allegations that the Project is a joint electrical power supply project pursuant to the Joint Power Act and FPC's silence must be viewed as acquiescence to Petitioners' allegations.

II. PETITIONERS HAVE MADE THEIR REQUEST FOR A NEED DETERMINATION SQUARELY WITHIN THE COMMISSION'S EXISTING STATUTORY FRAMEWORK.

In this proceeding, Duke New Smyrna and the Utilities Commission have petitioned the Commission requesting that the Commission make a determination of need for the Project. In doing so, Petitioners have explained why they are proper "applicants" under the Commission's controlling statute, Section 403.519, F.S. Petitioners have thus recognized the Commission's important and exclusive role as the gatekeeper to the site certification process under the Siting Act. See Fla. Stat. § 403.508(3) (providing that a determination of need by the Commission "shall be a condition precedent" to the conduct of a certification hearing). The Petitioners' request that the Commission exercise the exclusive role carved out for it by the Legislature and open the gate for the consideration of their Project clearly falls within the Commission's existing regulatory framework and is consistent with Commission's precedent in past need determination cases.

Contrary to FPC's assertions, the Commission need not rewrite its statutes or rules to consider the Joint Petition. See FPC's Motion to Dismiss at 17. The term "applicant" is in Section 403.519, F.S. The terms "electric utility", "regulated electric company" and "joint operating agency" are in Section 403.503, F.S., and the Commission need only construe these terms within their plain meaning to consider the Joint Petition. See Nicoll v. Baker, 668 So. 2d 989, 990-91 (Fla. 1996) (the plain meaning of a term should control). Rather, by inserting the terms "state-regulated" and "retail" in its own attempts to qualify the definitions in Sections 403.503, F.S., it is FPC itself that is advocating a

revision of the Commission's statute. No matter how many times FPC repeats its "state-regulated" mantra, the terms "state-regulated" and "retail" do not appear in the operative statutes.

FPC pays lip service to the Commission's role as "gatekeeper for the siting process." FPC's Motion to Dismiss at 4. However, FPC shows its true colors when, in describing its view of the ten-year site plan requirements, it states that "it would be untenable to require such utilities to plan for need and to meet electric power needs, while at the same time taking out of their hands the prerogative of proposing when and to what extent new generating capacity will be initiated." FPC's Motion to Dismiss at 13-14 (emphasis in original). Thus, in FPC's view of the world, it is FPC's (and presumably other Florida retail-serving utilities') sole prerogative to be the gatekeepers to the siting process. Once again, FPC has it backwards--the Legislature specifically granted the Commission -- not FPC and not other retail-serving utilities -- the exclusive authority to determine need. See Fla. Stat. § 403.508(3). The Commission should reject FPC's attempts to anoint itself as the gatekeeper to the siting process and consider Petitioners' request on its merits.

FPC also argues that the Commission must repudiate its prior interpretations of Section 403.519, F.S., and the Siting Act to afford Duke New Smyrna the relief it seeks. FPC's Motion to Dismiss at 16. This is untrue. It is simply more baseless rhetoric by FPC. FPC has not cited any Commission precedent interpreting the terms "regulated electric company" because no such

precedent exists. Thus, the Petitioners are not requesting a repudiation of Commission precedent in the Joint Petition; rather, they are requesting that the Commission make a determination of need within the existing statutory framework.

Lastly, and most cynically, FPC attempts to equate Petitioners' request for a determination of need in this proceeding with industry restructuring and deregulation. See FPC's Motion to Dismiss at 17-18 (quoting from Duke Energy Corporation's Electric Industry Restructuring Plan relating to retail restructuring filed with the South Carolina PSC.) FPC's attempts to equate the New Smyrna Beach Power Project with retail "restructuring" could not be further from the mark.[17] While Duke Power has recommended to the South Carolina PSC, in its consideration of retail restructuring, that "fundamental changes to the industry should be taken in an orderly and responsible manner," Duke has never advocated a go-slow approach to the development of a robustly competitive wholesale power market, including merchant power plants, in its home state service areas or anywhere else. This is because the further development of a competitive wholesale power market, including merchant plants, is not a change to the industry at all. The Project will operate, under current law, exclusively in the

[17]FPC's citation to Duke Energy Corporation's ("DEC") Electric Industry Restructuring Plan for the State of South Carolina is taken wholly out of context. DEC's comments were made in the specific context of a state undertaking retail deregulation. Florida is not undertaking retail industry restructuring or retail deregulation, and the Joint Petitioners are proposing the Project to operate in the current wholesale market under current law.

wholesale power market (the same wholesale power market in which FPC and other Florida utilities also participate). Indeed, as Petitioners alleged in the Joint Petition, Duke New Smyrna is prohibited by federal law (the Public Utility Holding Act of 1935) from making any retail sale of electricity from the Project, and may only sell electricity to wholesale purchasers, i.e., to other utilities. See Joint Petition at 5. The Joint Petition does not request that the Commission undertake any form of industry restructuring and the Commission need not restructure anything to make a determination on the merits of Petitioners' request.

Moreover, Duke Power Company (Duke New Smyrna's affiliate that serves retail and wholesale customers in North Carolina and South Carolina) has clearly recognized the right of merchant plant developers and operators to participate in the wholesale market in its traditional home service areas in North Carolina and South Carolina. Duke Power has embraced merchant plants, supported them before the North Carolina Utilities Commission, and entered into a power purchase agreement with the Rockingham Energy Project, a 600 MW-class combined cycle merchant facility located in Duke Power's North Carolina service area.

In summary, despite FPC's attempted invocation of the spectre of industry restructuring, the fundamental issue at this point of this proceeding is whether Duke New Smyrna and the Utilities Commission are, individually, or in combination, proper applicants for a determination of need under Section 403.519, F.S. The allegations in the Joint Petition unequivocally demonstrate that

both Duke New Smyrna and the Utilities Commission are proper "applicants". The Commission should consider the Joint Petition on its merits.

III. PUBLIC POLICY CONSIDERATIONS AND THE COMMISSION'S STATUTES MITIGATE STRONGLY IN FAVOR OF ALLOWING THE PETITIONERS TO OBTAIN A DECISION ON THE MERITS OF THEIR REQUESTED NEED DETERMINATION.

Public policy considerations, including the fundamental purposes and goals of utility regulation, mitigate strongly in favor of interpreting Section 403.519, F.S., in a way that will allow the Petitioners to obtain a decision on the merits of their requested determination of need for the New Smyrna Beach Power Project. Moreover, the Commission's statutory mandates in Sections 366.01 and 366.81, F.S., also mitigate strongly in favor of allowing the Petitioners to obtain a final Commission decision on the merits of their requested need determination. This result -- rejecting FPC's Motion to Dismiss and allowing a decision on the merits -- is also specifically consistent with national energy policy.

The fundamental purpose of utility regulation is to promote a competitive economic result in markets that would otherwise be characterized by a monopoly or monopolistic structure. The basic reason that we have utility regulation is that utilities have been thought to be "natural monopolies" where, due to long-run economies of scale and the high investment required to enter the business (which has historically created a barrier to such entry), competition could not function properly as it does in most other

sectors of the economy. In this context, the fundamental purpose of regulation is to serve as a surrogate for competition where competition is not possible. However, as the Commission is aware, competition in the wholesale generation of electricity is both feasible and, from a policy perspective, desirable. Thus the regulator's purpose is best served by allowing the "real thing," i.e., competition in wholesale power supply, to work as it should. Allowing the Petitioners to go forward to a hearing on the merits of the proposed Project is consistent with this purpose.

Section 366.01, F.S., declares the Legislature's intent that Chapter 366 is to be liberally construed in the public interest. Promoting competition in any market for a lawful product is in the public interest because competition will lead to lower prices and greater efficiency than if the market is characterized by monopoly, and because competition will also lead to an optimal allocation of society's scarce resources. In their Petition, the UCNSB and Duke New Smyrna have specifically alleged that the proposed New Smyrna Beach Power Project will promote lower power costs and promote increased efficiency in Peninsular Florida. This public interest consideration is particularly applicable where the supplier seeking access to the wholesale market, here Duke New Smyrna, offers a highly efficient, cost-effective power supply with no risk to Florida electric customers, with no strings attached to its proposal, and with no obligation to pay for, nor any prospect of being forced -- as captive electric ratepayers -- to pay for, the proposed Project.

Section 366.81, F.S., declares that the Florida Energy Efficiency and Conservation Act, of which Section 403.519, F.S., is a part, is "to be liberally construed in order to meet the complex problems of . . . increasing the overall efficiency and cost-effectiveness of electricity and natural gas production and use . . . and conserving expensive resources, particularly petroleum fuels." The Petitioners have alleged that the New Smyrna Beach Power Project will serve both these goals, by (1) increasing the overall efficiency and cost-effectiveness of electricity production, (2) increasing the overall efficiency and cost-effectiveness of natural gas use, and (3) conserving expensive resources, including petroleum fuels. An interpretation of Section 403.519, F.S., that permits the Commission to determine, on the merits of the case and as a matter of fact, whether the Project will meet these goals as the Petitioners have alleged is therefore consistent with the Commission's statutory mandate.

Finally, as developed more fully in Section V below, allowing the Petitioners to obtain the Commission's decision on the merits is consistent with federal energy policy as reflected in the Energy Policy Act of 1992 and in FERC's Order 888.

IV. PROHIBITING DUKE NEW SMYRNA FROM APPLYING DIRECTLY FOR A DETERMINATION OF NEED WOULD VIOLATE THE DORMANT COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The Commerce Clause of the United States Constitution prohibits the Commission from interpreting Florida law to prevent Duke New Smyrna from applying directly for a determination of need. Under the interpretation of Section 403.519, F.S., proposed by FPC,

Duke New Smyrna may construct and operate a merchant power plant in Florida only if it first contracts with an in-state utility, which (according to FPC) is the only type of entity entitled to apply for a determination of need. According to this interpretation, it is impossible for any out-of-state entity to enter the wholesale market for electrical power in Florida without first obtaining the permission of a potential in-state competitor. This interpretation of Florida law would allow in-state utilities effectively to bar out-of-state companies from competing with them in the Florida market simply by refusing to apply for a determination of need on behalf of the out-of-state corporation. Or, conversely, the in-state utility can demand economic benefits to which it would not otherwise be entitled in exchange for presenting the out-of-state company's determination of need application. Both of these alternatives constitute clear favoritism toward local corporations, and are therefore inconsistent with the basic Commerce Clause principle that no state may use its regulatory authority to isolate its own corporations from interstate competition.

However, the Petitioners have provided the Commission a concise roadmap of how to avoid running afoul of the Commerce Clause. The Commission should simply adopt the plain meaning of the definitions of "applicant", "electric utility" and "regulated electric company", and consider the Joint Petition on its merits. It is well settled that when a statute may be reasonably construed in more than one manner, a court (or in this case the Commission)

is obliged to adopt the constitutional construction. See Vildibill v. Johnson, 492 So. 2d 1047 (Fla. 1986).

The dormant (or "negative") Commerce Clause is a body of doctrine derived from the Constitution's express grant of congressional power to "regulate Commerce . . . among the several states." U.S. Const. Art. I, Sec. 8. This doctrine imposes a judicially enforceable limit on the extent to which a state may regulate commerce coming into or leaving that state (including transactions that take place in interstate commerce). The dormant Commerce Clause limit on state regulatory authority is drawn directly from the Constitution, and therefore applies even in the absence of any federal statute preempting a particular state regulation. "[A]ny state regulation of interstate commerce is subject to scrutiny under the dormant Commerce Clause, unless such regulation has been preempted or expressly authorized by Congress." Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County, 48 F.3d 701, 710 (3rd Cir. 1995).

The dormant Commerce Clause creates a national economic marketplace in every commercial commodity, including electricity. See New England Power Co. v. New Hampshire, 455 U.S. 331 (1982)(striking down as violation of dormant Commerce Clause a New Hampshire Public Utilities Commission order banning export of locally produced hydroelectric power).[18] The principle governing

[18]With rare exceptions, electric power transactions at wholesale are transactions in interstate commerce, subject to regulation by the Federal Energy Regulatory Commission. See Federal Power Comm'n v. Florida Power & Light Co., 404 U.S. 453, 463 (1972) (Federal Power Commission, the precursor of the FERC,

dormant Commerce Clause cases is simple and virtually absolute: "This 'negative' aspect of the Commerce Clause prohibits economic protectionism--that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273-74 (1988). Any state statute or regulation that functions primarily to provide economic benefits to in-state corporations is therefore unconstitutional. "This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety." H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 535 (1949). In this case, Duke New Smyrna does not challenge the Florida health, safety, and environmental laws applicable to power generation facilities, and Duke New Smyrna intends to comply with these laws in every respect. But the interpretation of Section 403.519, F.S., that would prohibit Duke New Smyrna from even applying for a determination of need without first contracting with an in-state utility is related to neither health, safety nor the environment; it is pure economic protectionism, and therefore is prohibited by the dormant Commerce Clause.

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held to have jurisdiction over the transmission of power, at wholesale, by utility over another utility's lines on the ground that the electrical energy thus transmitted "commingled" in interstate commerce); see also 16 U.S.C.S. §§ 824(a) & (b)(1) (1994).

State laws can conflict with dormant Commerce Clause mandates in two ways: by discriminating against out-of-state commerce, and by unreasonably burdening interstate commerce. The exclusionary interpretation of Section 403.519, F.S., urged by FPC is unconstitutional under both categories of dormant Commerce Clause jurisprudence.

A. To Prohibit Duke New Smyrna From Applying for a Determination of Need Unconstitutionally Would Discriminate Against Out of State Commerce.

Requiring Duke New Smyrna to contract with an in-state utility before obtaining a determination of need would overtly discriminate against unaffiliated out-of-state companies seeking to enter the wholesale market for electrical energy in Florida. Overt discrimination of this sort against out-of-state competitors of in-state companies is virtually impossible to justify under the Commerce Clause. "[W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). Under the exclusionary interpretation of Section 403.519, F.S., urged by FPC, out-of-state companies who refuse to enter into binding contracts with in-state utilities would be totally barred from obtaining a determination of need, and therefore totally barred from doing business in Florida as a wholesale producer of electrical power. This interpretation of Section 403.519, F.S., fits precisely the Supreme Court's description of a clear dormant Commerce Clause violation. "The clearest example of [protectionist] legislation is a law that

overtly blocks the flow of interstate commerce at a State's borders." Philadelphia, 437 U.S. at 624.

The United States Supreme Court has held unconstitutional many examples of state regulations that have attempted to give local economic interests a competitive advantage by requiring anyone doing business in the state to channel part of their business to the local companies. See C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994)(striking down statute barring local waste recycler from shipping nonrecyclable waste to out-of-state processor); Oklahoma v. Wyoming, 502 U.S. 437 (1992)(striking down statute requiring utilities to buy designated percentage of local coal); South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984)(striking down statute requiring companies exporting timber from Alaska to process timber at local processing plants); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)(striking down statute requiring shippers to package cantaloupes in Arizona before being shipped out of state); Toomer v. Witsell, 334 U.S. 385 (1948)(striking down statute requiring shrimp fishermen to unload, pack, and stamp shrimp in South Carolina before shipping them out of state); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928)(striking down statute requiring shrimp to be hulled in Louisiana before being shipped out of state).

Although these cases extend over seven decades, and involve many different industries, the underlying theme is consistent: neither a state nor one of its agencies may discriminate against interstate commerce, regardless of whether the discrimination takes

the form of a direct ban on out-of-state competitors, a statutory requirement that out-of-state businesses join with in-state businesses before doing business within the state, or the selective application of otherwise legitimate certification requirements. This theme has been applied to cases analogous to the present one for many years. For example, denying Duke New Smyrna applicant status or requiring Duke to contract with a local utility to obtain a determination of need would be indistinguishable from an equally exclusionary certification requirement struck down over seventy years ago in Buck v. Kuykendall, 267 U.S. 307 (1925). In that case, the State of Washington required all common carriers using the state's highways over certain routes to obtain a certificate of public convenience and necessity. Id. at 313. Although the applicant had received a similar certificate from Oregon, and asserted his willingness to comply with all applicable Washington state regulations concerning common carriers, Washington denied the certificate on the ground that the route was already being adequately served. Id. In an opinion by Justice Brandeis, the Supreme Court struck down the certification requirement. The Court noted that the purpose of the requirement "is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines, not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons, while permitting it to others for the same purpose and in the same manner." Id. at 315-16.

The Supreme Court has recently reaffirmed Buck as an example of unlawful state discrimination against interstate commerce. See Carbone, 511 U.S. at 394; see also Medigen of Kentucky, Inc. v. Public Service Comm'n of West Virginia, 985 F.2d 164, 167 (4th Cir. 1993)(striking down requirement that transporter of medical waste obtain a certificate of convenience and necessity, and noting that "West Virginia's goal of providing universal service at reasonable rates may well be a legitimate state purpose, but restricting market entry does not serve that purpose"). Moreover, excluding Duke New Smyrna from the determination of need process, as urged by FPC, would interfere with interstate commerce even more directly than the certification requirement struck down in Buck, because in this case Duke New Smyrna would be prohibited from even applying for a determination of need unless it contracts with a local utility. Thus, Duke New Smyrna would be entirely barred from the Florida market.

It is irrelevant for purposes of dormant Commerce Clause analysis that Duke could eventually enter the Florida market after it contracted with an in-state utility to obtain a determination of need. Any discriminatory state action that is intended or that has the effect of protecting local interests is sufficient to trigger the application of the Commerce Clause, even if that action merely imposes extra costs on an out-of-state entity. "The volume of commerce affected [by an exclusionary state regulation] measures only the extent of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate

commerce." Wyoming, 502 U.S. at 455. Thus, even a minor economic effect on the operation of Duke's facility would constitute a violation of the dormant Commerce Clause if that effect tends to favor local economic interests. Such an effect is inevitable if Duke New Smyrna is forced to contract with a local utility to apply for a determination of need on Duke New Smyrna's behalf. The requirement that Duke New Smyrna enter a contract that might not be economically advantageous for Duke New Smyrna would itself constitute an impermissible impact on interstate commerce. At a minimum, local utilities are not likely to undertake the task of applying for a determination of need on behalf of Duke New Smyrna without demanding some compensation in return. Thus, Duke New Smyrna would be forced to compensate the local utility for its assistance, and this compensation would necessarily raise the cost of providing cheap power to the wholesale market. Local utilities who could themselves apply for a determination of need would therefore obtain an economic advantage over out-of-state competitors such as Duke New Smyrna in serving the market for wholesale electrical power. The United States Supreme Court has consistently held that the dormant Commerce Clause prohibits states from using their regulatory authority in this way to skew a particular economic market in favor of local interests.

The facially discriminatory nature of the proposed interpretation of Section 403.519, F.S., renders that interpretation constitutionally indefensible. As noted above, it is virtually impossible to justify discriminatory restrictions on

interstate commerce. See Philadelphia, 437 U.S. at 624 (noting "a virtually per se rule of invalidity" for protectionist statutes). Such restrictions may not be justified under any circumstance if the state cannot demonstrate that its legitimate local interests could not be protected through a nondiscriminatory alternative regulatory scheme. "Discrimination against interstate commerce in favor of local business or investment is per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." Carbone, 511 U.S. at 392. In this case, therefore, the only question is whether the legitimate interests represented by the determination of need process can be adequately served if Duke New Smyrna is permitted to apply directly to the Commission without first contracting with a local utility for the entire capacity of the Project.

The determination of need process serves three general legitimate state interests: ensuring electric system reliability and integrity; providing adequate electricity at a reasonable cost; and determining whether a proposed plant is the most cost effective available. See Fla. Stat. § 403.519. All three interests can easily be protected by a nondiscriminatory alternative: simply apply these parameters to the merits of Duke New Smyrna's application. Since the three legitimate state interests justifying the determination of need process can be satisfied without requiring a local utility to apply for a determination of need on behalf of Duke New Smyrna, the exclusionary interpretation of

Section 403.519, F.S., cannot withstand the "rigorous scrutiny" the United States Supreme Court demands in its dormant Commerce Clause decisions.

Finally, the fact that Section 403.519, F.S., might hypothetically affect in-state wholesale utilities as well as out-of-state wholesale utilities such as Duke New Smyrna does not cure the unconstitutional discrimination inherent in the proposed interpretation. The Supreme Court has held repeatedly that a discriminatory statute "is no less discriminatory because in-state or in-town [companies] are also covered by the prohibition." Carbone, 511 U.S. at 391; see also Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 504 U.S. 353 (1992)(striking down Michigan landfill regulation, even though regulation disadvantaged some Michigan commerce as well as interstate commerce); Dean Milk Co. v. Madison, 340 U.S. 349 (1951)(striking down Madison, Wisconsin ordinance requiring local inspection of milk, even though ordinance affected milk imported from other parts of state, as well as milk from other states). It is also irrelevant that the regulation does not disadvantage some out-of-state companies, in the sense that some out-of-state companies may choose voluntarily to join with an in-state utility to seek a determination of need for a new merchant power plant. "[T]he mere fact that not all out-of-state competitors are disadvantaged by a state statute does not preclude a finding that the statute places a discriminatory burden on interstate commerce." Division of Alcoholic Beverages and Tobacco, et al v. McKesson

Corp., 524 So.2d 1000, 1007 (Fla. 1988)(holding that protectionist excise tax violated dormant Commerce Clause, but refusing to force state to refund unconstitutionally collected tax), rev'd in part, 496 U.S. 18 (1990)(requiring state to refund unconstitutionally collected tax).

In sum, it is impossible under longstanding dormant Commerce Clause precedents to justify the requirement that Duke New Smyrna contract with a Florida utility before applying for a determination of need: The requirement overtly discriminates in favor of existing Florida utilities, it has no legitimate justification that cannot be satisfied by nondiscriminatory means, and it cannot be justified on the ground that other Florida independent power producers might also be affected by the requirement. The only possible conclusion, therefore, is that the exclusionary interpretation of Section 403.519, F.S., constitutes unconstitutional discrimination in violation of the dormant Commerce Clause, and Duke should be permitted to apply directly for a determination of need. FPC's Motion to Dismiss should be denied.

B. Prohibiting Duke New Smyrna From Applying for a Determination of Need Unconstitutionally Burdens Interstate Commerce.

Because the requirement that Duke New Smyrna contract with a local utility before applying for a determination of need constitutes unconstitutional discrimination against interstate commerce, it is unnecessary to consider whether the requirement would unconstitutionally burden interstate commerce. See Carbone, 511 U.S. at 390 (holding that courts "need not resort to" burden category of dormant commerce clause analysis if statute is found to

discriminate against interstate commerce). In this case, however, applying the burden category of dormant Commerce Clause analysis would produce the same result as the discrimination analysis: i.e., that the proposed interpretation of Section 403.519, F.S., is unconstitutional.

This second category of dormant Commerce Clause analysis limits the extent to which states can indirectly burden interstate commerce, even if there is no evidence of local favoritism or discrimination against interstate commerce. The most frequently cited statement of the burden analysis is found in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. . . . And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

See also Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 579 (1986)("we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.").

In this case the proposed interpretation of Section 403.519, F.S., fails every aspect of the Pike burden test. Requiring Duke New Smyrna to contract with a local utility before applying for a determination of need is not evenhanded, the requirement's effect on interstate commerce is not incidental, the burden on commerce

outweighs the putative local benefits, and the legitimate local interests represented by the determination of need process can be protected through means that have a much lower impact on interstate activities.

The discussion in the previous section demonstrates why the proposed interpretation of Section 403.519, F.S., is not evenhanded in its treatment of in-state and out-of-state participants in the market for wholesale electrical power. Under FPC's proposed interpretation, the only way an out-of-state company can enter the market for wholesale electrical power is by entering into a contract with a local utility to obtain the necessary determination of need. This imposes a major burden on commerce because it imposes additional costs on out-of-state applicants, and forces them to give up a measure of control over the regulatory decisions that dictate how and when a new generation facility will be built.

The discussion in the previous section also disposes of the argument that legitimate local interests support the requirement that Duke New Smyrna enter into a contract with a local utility to obtain regulatory approval of its new facility. The only legitimate interests that can be asserted in favor of the determination of need process are: ensuring electric system reliability and integrity, providing adequate electricity at a reasonable cost, and determining whether a proposed plant is the most cost-effective available. See Fla. Stat. § 403.519. All three interests can be satisfied by dealing with Duke New Smyrna directly instead of through a local intermediary. There is, of

course, a possible fourth interest to justify prohibiting Duke New Smyrna from applying for a determination of need directly, i.e., to protect local economic interests from out-of-state competition in the wholesale market for electricity. This interest constitutes pure economic protectionism, however, and is therefore inconsistent on its face with the dormant Commerce Clause. Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 43-44 (1980).

Under the dormant Commerce Clause, the scope of the Commission's legitimate authority with regard to wholesale electrical generation facilities is necessarily more limited than its authority with regard to new generation facilities being proposed by utilities subject to retail rate regulation by the Commission. Thus, a decision to permit Duke New Smyrna to apply directly for a determination of need would not imply any constitutional limit to the Commission's existing authority to regulate local utilities. The Commission's greater authority with regard to local utilities is consistent with the dormant Commerce Clause because it is necessary to protect the ratepayers who will be forced to bear the cost and the risk of a local utility's power plants. These interests are not relevant to Duke New Smyrna's application, however, because Duke New Smyrna will assume the full cost and risk of the facility itself.

Permitting Duke New Smyrna to apply directly for a determination of need infringes on none of the state's legitimate regulatory interests. Conversely, requiring Duke New Smyrna to contract with a local utility to apply for a determination of need

would directly burden interstate commerce in a manner that favors local economic interests and disadvantages competitors from outside the state. The burden this requirement imposes on interstate commerce clearly exceeds the local benefits; therefore the exclusionary interpretation of Section 403.519, F.S., advanced by FPC is unconstitutional under the burden category of dormant Commerce Clause jurisprudence.

V. FEDERAL LAW PREEMPTS THE STATE FROM REQUIRING DUKE NEW SMYRNA TO OBTAIN A CONTRACT WITH STATE REGULATED ELECTRIC COMPANIES IN ORDER TO BUILD THE NEW SMYRNA BEACH POWER PROJECT.

FPC is wrong when it argues that prior decisions requiring certain applicants to have contracts with purchasing utilities are applicable here. Even if one assumes, for the sake of argument, that the cases sited by FPC apply, and assumes further that the Legislature had the authority to adopt such a limitation under the Commerce Clause, interpreting Florida law as limiting applicants for a need determination to electric utilities regulated by the State is inconsistent with the goals and policies of federal law intended to promote competition in the United States electric utility industry. The Energy Policy Act of 1992, and FERC's Order 888, which require public utilities that own transmission facilities to provide access to those facilities to independent power generators on a non-discriminatory basis, preempt such a limiting construction of Section 403.519, F.S. The limiting construction would require that Duke New Smyrna contract to sell power to an in-state utility before it can construct and operate the Project, which would undermine a fundamental objective of Title

VII of the Energy Policy Act and Order 888, i.e., to prevent vertically integrated public utilities (utilities that own generation, transmission, and distribution, and which thus have incentives to favor their own generation) from interfering with the development of a competitive wholesale power market.

The doctrine of federal preemption derives from the affirmative grant of powers to Congress and the Supremacy Clause of the United States Constitution. See Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); Independent Energy Producers Ass'n, Inc. v. Cal. Pub. Util. Comm., 36 F.3d 848, 853 (9th Cir. 1993). As long as Congress acts within its constitutional powers, its statutes take precedence over any state law that conflicts with them. See Gibbons v. Ogden, 22 U.S. (9 Wheat) 1,210 (1824). By the same reasoning, state laws must also yield to duly promulgated federal regulations with which they conflict. See Louisiana Pub. Serv. Comm. v. FCC, 476 U.S. 355, 369 (1986); Hillsborough County, Fla. v. Automated Med Labs, 471 U.S. 707, 713 (1985); Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153-54 (1982). State law need not require conduct that would violate federal law; it is sufficient that state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Pacific Gas & Electric Company v. State Energy Resources Conservation & Dev. Comm'n., 461 U.S. 190, 204 (1983) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1991)).

A. Requiring Duke New Smyrna to Contract With a State Regulated Utility In Order to Build Its Power Plant Conflicts with the Goal of the Energy Policy Act and Order 888 to Free the

Wholesale Power Market from Undue Discrimination by Vertically Integrated Utilities.

Federal preemption may be explicit, may result from a conflict between federal and state law, or may arise when the federal regulatory provisions evidence an intent by Congress to occupy the field within which the state regulates. Cipollone, 505 U.S. at 516. The interpretation of Section 403.519, F.S., advocated by FPC would result in a circumstance in which the requirements of state law would conflict with the goals and purposes of a federal statute or regulation. To run afoul of the Constitution, state law need not require conduct that would violate federal law; it is sufficient that state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." PG&E, 461 U.S. at 204 (quoting Hines, 312 U.S. at 67). Requiring a wholesale power merchant to contract with a utility regulated by the State of Florida as a prerequisite to being allowed to build a power plant intended to supply power to the interstate wholesale market directly and substantially undermines the purposes of Title VII of the Energy Policy Act. That purpose is to prevent vertically integrated, regulated utilities from discouraging federally regulated public utilities, such as Duke New Smyrna, from building wholesale generating facilities. See Energy Policy Act of 1992, Pub. Law. 102-486, 106 Stat. 2776, 2905-21 (1992).

The Energy Policy Act was written against a background of FERC's difficulty in unbundling generation of electricity and creating a competitive market for wholesale power. When Congress

enacted the Federal Power Act, electricity was provided almost exclusively by vertically integrated state regulated utilities which owned generation, transmission and distribution facilities. Order 888, 61 Fed. Reg. 21,539, 21,543 (1992). Utilities sold a bundled service -- delivered electric energy -- to retail and wholesale customers. Id. Recent changes in technology, and the experience of utilities with buying power from independent qualifying facilities under the Public Utility Regulatory Policies Act of 1978 (PURPA), indicated that generation of electricity could be provided more economically by independent producers, operating in a competitive market, without forfeiting system reliability. Id. at 21,543-46. FERC, however, was limited in its ability to encourage development of independent wholesale generators by two major factors. First, FERC did not have clear authority to order vertically integrated utilities to transmit power for wholesale generators. Id. at 21,546. Thus, existing utilities could stymie the plans of wholesale public utilities by refusing to transmit power for them, which would isolate a generating facility and render it incapable of delivering its power. Second, the Public Utility Holding Company Act of 1935 (PUHCA) imposed severe restrictions on the ability of independent developers to own power projects that were not qualifying facilities under PURPA, and prohibited utilities from owning such facilities outside of the geographic area in which they provide regulated service. Title VII of The Energy Policy Act was adopted to grant FERC authority to address both of these problems.

In amendments to Sections 211 & 212 of the Federal Power Act, Congress provided that FERC has the authority to order utilities to transmit power for other generators of electricity. See 16 U.S.C. §§ 824j, 824k (1998). The legislative history manifests that Congress's intent in so providing was to prevent utilities with monopoly power over power transmission from interfering with FERC's efforts to create a competitive market for wholesale power. The House Report on the Energy Policy Act stated:

> Absent clarification of FERC wheeling authority, it can be expected that some utilities will try to exercise their monopoly power to block IPP's and others' legitimate transmission requests. This would permit unlawful discrimination to thwart efficiency in the electricity industry, and would defeat the Commission's [FERC's] goal of encouraging low rates for consumers through greater competition.

H.R. Rep. No. 102-474(I) at 139-40 (1992), reprinted *in* 1992 U.S.C.C.A.N. 1954, 1962-63.

FERC's Order 888 also evidences a central concern with the ability of utilities to interfere with the development of a competitive wholesale power market. In the introduction and summary on the very first page of the 197 page Order, FERC stated that, in order for consumers to see the benefits from a competitive electricity market:

> we [FERC] must . . . ensure that all these [owners of transmission facilities] . . . cannot use monopoly power . . . to unduly discriminate against others [i.e. competing generators].

The reading of Section 403.519, F.S., advocated by the FPC would give FPC the precise power that Congress and FERC carefully worked

to eliminate. Under that reading, if Florida's retail utilities do not agree to sign contracts for purchases of power from wholesale utility generators like Duke New Smyrna, these utilities retain the power to act as "gatekeepers" and prevent such wholesale utilities from building generating facilities at all. Transmission guaranteed by the Energy Policy Act is not worth anything if a wholesale utility cannot build a plant to generate power in the first place.

B. Requiring Duke New Smyrna to Enter into a Contract with a State Regulated Utility Undermines the Energy Policy Act's Goal of Facilitating Provision of Wholesale Power by Experienced, Competitive Power Producers.

Requiring that wholesale power generators enter into a contract with a state-regulated utility before applying for a determination of need would also undermine the provisions of the Energy Policy Act that provide for wholesale public utilities, such as *Duke New Smyrna*, to be exempted from the requirements of PUHCA. Prior to the Energy Policy Act, PUHCA greatly restricted the structure of, and limited utility investment in, wholesale generators like Duke New Smyrna. PUHCA subjected any such producer that was affiliated with a utility to onerous regulation by the Securities Exchange Commission. See generally 15 U.S.C. §§79a - 79z-6 (1998). The legislative history of the Energy Policy Act demonstrates that Congress was especially concerned that PUHCA would discourage experienced power producers from building generating facilities. See H.R. Rep. No. 102-474(I) at 139 (1992), reprinted in 1992 U.S.C.C.A.N. 1954, 1962. Thus, in adopting section 711 of the Energy Policy Act, 15 U.S.C. §79z-5a (1998),

Congress created a new entity relative to PUHCA, the exempt wholesale generator (EWG), specifically to allow companies like Duke New Smyrna to use their expertise to develop and operate wholesale generating facilities. Construing Section 403.519, F.S., to allow existing utilities to veto the building of power plants by affiliates of out-of-state utilities would directly interfere with Congress' objective to allow experienced companies to build and operate wholesale generating facilities.

Congressional intent that states not be allowed to burden the building of EWG facilities dispositively preempts the states from imposing such burdens. See Cal. Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987) (stating that the Court's role in preemption cases is to ascertain the intent of Congress). When Congress passed the Energy Policy Act, it fully recognized that the Act would affect the criteria that states historically considered in approving a state regulated utility's construction of power generation facilities. The Act explicitly allows the states to retain jurisdiction to guard against environmental harm that building a plant might entail, and to determine siting issues raised by an application to build such a plant. At a minimum, harmonizing the Energy Policy Act with Section 403.519, F.S., requires the Commission to deny FPC's Motion to Dismiss and grant the Petitioners a hearing on the merits of the Project; this application or construction would allow the Commission to make its decision under its statutes, on the merits, while respecting the

Congress's and the FERC's purpose of promoting wholesale competition.

C. Nassau II Does Not Contradict the Conclusion that Interpreting Section 403.519, F.S., to Require that Duke New Smyrna Contract with a State Regulated Utility is Preempted by Federal Law.

Finally, the Florida Supreme Court's decision in Nassau II does not undercut the conclusion that requiring Duke New Smyrna to enter into a contract for sale of power with a Florida electric utility would conflict with federal law. In Nassau II, the court affirmed the Commission's interpretation that Section 403.519, F.S., required a PURPA qualifying facility (QF), that proposed to bind a specific utility contractually as a precondition of going forward with its project, to enter into such a contract with a utility before filing a (joint) application for a need determination. Federal preemption was not addressed by the Commission or the court. See generally 641 So. 2d 396; 92 FPSC 10:646.

Even if it had been addressed, differences between the regulatory scheme established by PURPA and that established by the Energy Policy Act and Order 888 warrant different outcomes. PURPA requires state-regulated utilities to purchase power from QFs at avoided cost. 16 U.S.C. §824a-3 (1998). Thus, it envisions a sale of power to the utility and hence a contractual relationship between the QF and the utility. Unlike this case, in Nassau II, the QF attempted to require FPL to contract with it as a means of showing need. The Commission implicitly recognized this difference when it specifically limited the interpretation in the Nassau Order

to proceedings in which non-utility generators seek determinations of need based on a specific utility's need. See 92 FPSC at 10:646-47. The Commission's interpretation of Section 403.519, F.S., with respect to QFs thus merely dictated that a contract between the QF and the purchasing utility must be in place prior to the determination of need for the QF's facility. If a contract requirement is imposed on wholesale power merchants for their plants to be considered for siting, the Commission would be creating an obligation that such merchants sell power to a particular utility in Florida, which is clearly inconsistent with the open, competitive wholesale market envisioned by Order 888.

To prohibit Duke New Smyrna's plant from siting consideration because Duke New Smyrna has not entered into a contract with a Florida utility would undermine the structure and purposes of the Energy Policy Act and Order 888, which are intended to prevent vertically integrated utilities from interfering with the creation of an open and competitive market for wholesale power. Allowing Duke New Smyrna to gain consideration in a siting proceeding does not threaten any of the interests Congress left for states to protect when it allowed states to retain authority to impose environmental and siting requirements on wholesale generating facilities. Thus, to interpret Section 403.519, F.S., to require an applicant for a need determination to contract with an in-state utility would clearly conflict with the objectives of Congress and FERC and therefore is preempted.

CONCLUSION

The Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company, Ltd., L.L.P., are, individually and collectively, proper applicants for the Commission's determination of need for the New Smyrna Beach Power Project under all applicable law. For this reason, the Commission need never reach the federal law issues addressed herein. However, unlike FPC, which has strained to stress the express differences within the Florida Statutes as well as the differences between state and federal law, the Petitioners have offered the Commission a unified, harmonized, interpretation. Both petitioners are applicants under the Siting Act and electric utilities under Section 366.02(2), F.S., and Duke New Smyrna is a public utility under the Federal Power Act. Allowing the petitioners to go forward to a hearing on the merits is consistent with the applicable statutes consistent with the fundamental purpose of utility regulation, consistent with the goals of national energy policy, and in harmony with the Commerce Clause of the United States Constitution, the Energy Policy Act of 1992, and applicable FERC orders. The Commission should note well that the Petitioners are asking for consideration of their proposed Project on the merits, pursuant to the Commission's statutes and rules interpreted harmoniously with themselves and with directly applicable federal law. Contrary to FPC's suggestions, both the Petitioners and the Project fit squarely within the statutory framework of the Siting

Act and Chapter 366, F.S. FPC's arguments are misplaced, unfounded and meritless and its Motion to Dismiss must be denied.

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CERTIFICATE OF SERVICE
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I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery (*) or by United States Mail, postage prepaid, on the following individuals this 21st day of September, 1998:

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