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ORIGINAL



January 19, 1999

HAND DELIVERED

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

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.
FPSC Docket No. 981042-EU

Dear Ms. Bayo:

Enclosed for filing in the above docket are the original and fifteen (15) copies of each of the following:

1. Tampa Electric Company's Post-Hearing Brief. [redacted] 99

2. Tampa Electric Company's Post-Hearing Statement of Issues and Positions. 00667-99

Also enclosed is a diskette containing the above documents originally typed in Microsoft Word 97 format which have been saved in Rich Text format for use with WordPerfect.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning same to this writer.

Thank you for your assistance in connection with this matter.

Sincerely,

RECEIVED & FILED
FPSC-BUREAU OF RECORDS

James D. Beasley

JDB/pp
Enclosures

cc: All parties of record (w/encls.)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION ORIGINAL

| | | |
|---|---|---|
| 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-EU<br>FILED: January 19, 1999 |

**TAMPA ELECTRIC COMPANY'S**
**POST-HEARING BRIEF**

Tampa Electric Company ("Tampa Electric" or "the company"), pursuant to the schedule announced at the conclusion of the hearing in this matter, submits this its Post-Hearing Brief on the key issues underlying this proceeding:

**Background**

This proceeding was commenced by the filing of a joint petition by the Utilities Commission, New Smyrna Beach, Florida ("New Smyrna") and Duke Energy New Smyrna Beach Power Company, Ltd., LLP ("Duke"), asking the Commission to authorize the construction of a "merchant plant." In their joint petition Duke and New Smyrna seek a determination of need under Section 403.519, Florida Statutes, and Commission Rules 25-22.080-081 to build a 514 MW electrical power plant. The joint petition acknowledges that except for 30 MW of capacity purportedly allocated to New Smyrna the project will be a "merchant" plant.

The joint petition goes on to state that even Duke and New Smyrna do not have a final purchased power agreement for the 30 MW supposedly earmarked for New Smyrna. Thus, the issue before the Commission is whether Section 403.519, Florida Statutes, and the Power Plant

Siting Act may be used to site a merchant plant under circumstances when no state regulated utility has contracted to purchase the output and where only 30 MW of the total 514 MW are even claimed to be needed by any state regulated electric utility.

Two of the intervenors in this proceeding, Florida Power & Light Company (FP&L) and Florida Power Corporation (FPC), filed motions to dismiss the joint petitions. Those motions to dismiss have been taken under advisement by the Commission. Tampa Electric supports the reasoning set forth in the motions to dismiss filed by FP&L and FPC and urges that the joint petition either be dismissed or denied. Granting a determination of need for the proposed merchant plant would clearly contravene existing Florida law as interpreted by this Commission and by the Supreme Court of Florida.

## ARGUMENT

### I.

### GRANTING A NEED DETERMINATION FOR THE PROPOSE PROJECT WOULD BE INCONSISTENT WITH FLORIDA LAW.

Duke does not qualify as an applicant under the Florida Power Plant Siting Act ("Siting Act"), Section 403.501 - 403.518 and Section 403.519, Florida Statutes. Specifically, Duke does not qualify as an "Electric Utility" within the meeting of Section 403.503(13) of the Florida Statutes. Only "Electric Utilities" qualify as Applicants under the Siting Act.

The term "Electric Utility" under Section 403.503(13) means:

> . . .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.

What each of these entities has in common, and what Duke lacks, is the obligation to serve retail customers. In its order dismissing petitions in the Ark and Nassau cases[1] the Commission found that Ark and Nassau did not qualify as applicants because they did not fit the above definition. In so doing the Commission observed:

> Significantly, each of the entities listed under the statutory definition may be obligated to serve customers. It is this need, resulting from a duty to serve customers, which the need determination proceeding is designed to examine. Non-utility generators such as Nassau and Ark have no such needs since they are not required to serve customers. The Supreme Court recently upheld this interpretation of the Siting Act. Dismissal of these need determination petitions is in accord with that decision. See Nassau Power Corporation v. Beard, 601 So.2d 1175 (Fla. 1992).
>
> Order No. 92-1210, at page 3.

The same holds true in the instant case. Duke does not qualify as an applicant under the Siting Act.

The fact that Duke is joined in its application by New Smyrna does nothing to remedy Duke's ineligibility. New Smyrna has no firm contract to purchase any of the capacity of the proposed plant and does not qualify as a co-applicant. Duke proposes that its merchant plant be built on a purely speculative basis. New Smyrna's co-application does nothing to support the applicant status of Duke with regard to the proposed generation in which New Smyrna has no interest. Duke has no obligation to provide service and cannot justify the need for its project based upon its own need or on the need of New Smyrna. Duke is improperly relying upon the generic need of the 59 Florida utilities compromising "Peninsular Florida" in an attempt to

[1] Order No. PSC-92-1210-FOF-EQ issued October 26, 1992 in Dockets Nos. 920769-EQ, 920761-EQ, and 920762-EQ.

demonstrate the need for its project but would have no obligation to use the capacity of the project for the citizens of Florida if its request were granted.

Both the Commission and the Supreme Court of Florida have clearly held that need proceedings under Section 403.519, Florida Statutes, must be limited to determining the need of a Florida retail electric utility for capacity that it will require in order to serve its customers. Nassau Power Corp. v. Beard, 601 So.2d 1175 (Fla. 1992); Nassau Power Corp. v. Deason, 641 So.2d 396 (Fla. 1994). Rather than attempting to justify its proposed merchant plant project on the basis of the need of any retail electric utility to serve its customers needs, Duke simply urges the Commission to speculate that the output of the plant will be needed. To do this the Commission would have to ignore or redefine the longstanding statutory framework for assessing planning and providing for the need for electric power in this state.

Section 403.519, Florida Statutes, sets forth four specific criteria for assessing need. Both the Commission and the Court have held that these criteria are "utility and unit specific" and that need for purposes of the Siting Act is the need of the entity ultimately consuming the power. Nassau Power Corp. v. Beard, 601 So.2d at 1178, n.9. The Commission and the Court have held that Section 403.519 requires the Commission to determine need on a utility specific basis. Duke, on the other hand, would have the Commission ignore the statutory criteria set forth in Section 403.519 and simply presume the existence of some unidentified statewide need. A similar argument was rejected by the Court in Nassau Power Corp. v. Beard. There the Court stated that the Commission's prior evaluation of need on a statewide basis "cannot be used now to force the PSC to abrogate its statutory responsibilities under the Siting Act." Id. at 1178. The Court made it very clear that adherence to a utility and unit specific analysis was not a matter of regulatory discretion, but was compelled by the plain language of the statute.

In the second Nassau decisions the Commission and the Court held that Nassau was not a proper "applicant" under the Siting Act, because Nassau was not a Florida electric utility or an entity with whom such utilities have executed a power purchase contract.

Here only 30 MW out of a total of 514 MW are alleged to be earmarked for New Smyrna and even that tiny segment of plant capacity lacks the conclusive support of an executed power purchase contract. Granting the requested determination of need for the uncommitted merchant plant capacity proposed by Duke would be clearly inconsistent with Section 403.519 as previously interpreted and applied by this Commission and the Supreme Court of this state.

## II.

## DUKE'S CONSTITUTIONAL ARGUMENTS ARE INAPPROPRIATE AND ERRONEOUS.

Duke spends considerable time urging the Commission to reject the established law and precedent in this state on the ground that adherence to that law and precedent is somehow preempted or otherwise precluded by federal constitutional considerations. Duke's efforts to have this Commission address and decide constitutional issues are inappropriate. The Commission is an administrative agency created by statute. Deciding the constitutionality of an action is a function of the judiciary, not an administrative agency. Administrative agencies lack jurisdiction to consider the constitutionality of their own actions. Hayes v. State, Department of Business Regulation, Division on Parimutuel Wagering, 418 So.2d 331 (Fla. 3d DCA 1982). Constitutional challenges to the actions of administrative agencies are for the courts alone to determine and are not for administrative resolution. Adams Packing Association v. Florida Department of Citrus, 352 So.2d 569 (Fla. 2d DCA 1977); Metro Dade County v. Department of

Commerce, 365 So.2d 432, 435 (Fla. 3d DCA 1978). Duke's preemption and commerce clause arguments are founded on constitutional provisions contained in the supremacy and commerce clauses of the U. S. Constitution. For the Commission to decide Duke's erroneous constitutional arguments would require the Commission to usurp the function of the judiciary.

**Duke's Preemption Argument is Erroneous**

Even beyond the fact that Duke is erroneously asking the Commission to address the constitutionality of its own prior actions, there can be no doubt that the Commission's and the Supreme Court's interpretations of Section 403.519 are consistent with federal law. The Energy Policy Act, a congressional exercise of commerce clause powers, specifically leaves to the states the authority to make siting and environmental licensing decisions. The act did not change the Commission's authority over environmental protection or the siting of power plants. Section 731 of the Energy Policy Act states:

> Nothing in this title or in any amendment made by this title shall be construed as affecting or tending to affect, or in any way to interfere with the authority of any State or local government relating to environmental protection or siting of facilities.

The Federal Energy Regulatory Commission's Order 888 similarly makes it clear that FERC did not intend to affect matters otherwise left to the states by Congress. That is specifically stated in Order 888. Duke's preemption argument is directly contravened by the express provisions of the Energy Policy Act and FERC Order No. 888.

**Duke's Dormant Commerce Clause Argument, Likewise, is Erroneous**

As stated earlier, the Energy Policy Act, a congressional exercise of Commerce Clause power, leaves to the Commission the authority to exercise siting and environmental licensing decisions. The dormant Commerce Clause Doctrine is designed to guard against economic protectionism. Nowhere in the Commission's interpretation of Section 403.519 in the Nassau decisions, or in the Supreme Court's approvals of those interpretations, is there any suggestion that the Legislature devised the Siting Act to effect protectionism. The Commission's requirement that power plants proposed by independent power producers (IPPs) be committed by contract to regulated utilities serving retail customers has no hint of economic protectionism. The Commission has applied this standard and the Supreme Court has confirmed the appropriateness of it because it is necessary to make a valid need determination. Otherwise there would be no way for the Commission to carry out its responsibility under the Siting Act. Without knowing to whom and under what terms and conditions an IPP will sell its output, the Commission cannot even begin to address the statutory criteria in Section 403.519.

The Supreme Court of the United States has recognized regulatory exceptions to the dormant Commerce Clause. In General Motors Corporation v. Tracy, 519 U.S. 278, 117 S.Ct. 811 (1996) the Court considered and rejected a dormant Commerce Clause challenge to the exemption of local gas distribution companies from sales and use taxes on sellers of natural gas. In so doing, the Court noted the common sense of its traditional recognition of the need to accommodate state health and safety regulation in applying dormant Commerce Clause principles. Section 403.519, as interpreted by this Commission and by the Supreme Court, is just such a regulation.

Duke's dormant Commerce Clause argument was likely selected out of desperation as opposed to reason, given the clear legal requirement in this state that IPP sponsored power plants be contractually committed to regulated electric utilities having an obligation to serve retail customers. Duke's argument should be rejected.

## III.

## DUKE'S INVITATION FOR THE COMMISSION TO USURP THE ROLE OF THE LEGISLATURE SHOULD BE REJECTED.

Recognizing that the traditional regulatory framework in Florida does not contemplate or condone determinations of need for uncommitted merchant plants, Duke is forced to ask the Commission to administratively restructure the controlling statutes to facilitate the end Duke seeks to obtain. It would clearly be inappropriate for the Commission to attempt to revise the regulatory framework that has functioned so well, and for so many years, for the benefit of electric utility customers in Florida.

Under the plain meaning of existing statutes and recent clear articulations by this Commission and the Supreme Court of Florida, Tampa Electric believes the Commission lacks authority to determine the need for merchant plants. In the absence of such authority, any debate on the desirability of introducing merchant plants in this state necessarily must take place in the Legislature. Such a view was recently shared by Senator James Scott, Chairman of the Regulated Industries Committee of the Florida Senate, in a letter to Commissioner Johnson on the occasion of Duke's prior request for the Commission to decide Duke had standing to file a need petition. Senator Scott wrote:

> When the Florida Electrical Power Plant Siting Act was enacted during the 1970's no one contemplated the possibility that [it] might some day apply to electric utilities who do not serve retail customers in Florida.
>
> Without judging the merits of the specific petition before the Commission, I believe that a policy decision of this magnitude should not be made without a full and complete hearing by the Legislature. (Tr. 1443, lines 13-22) (emphasis supplied)

Duke is once again seeking a policy decision of the same magnitude as that addressed in Senator Scott's letter, and nothing in the law has changed in the interim. Whether any policy change of this magnitude should be made is for the Florida Legislature to decide.

## IV.

## DUKE AND NEW SMYRNA HAVE FAILED TO DEMONSTRATE THE NEED UNDER THE CRITERIA CONTAINED IN SECTION 403.519.

Even putting aside for a moment the legal impediments to a determination of need for a merchant plant, Duke and New Smyrna have failed to present evidence adequate to satisfy the four specific need criteria contained in Section 403.519. By failing to describe the terms and conditions under which the merchant output of the plant will be sold, or even to whom it will be sold, Duke and New Smyrna have precluded the Commission from meaningfully evaluating the four statutory need criteria.

Rather than presenting evidence on utility specific, and unit specific need, Duke and New Smyrna essentially are asking the Commission to presume that the need criteria are met. The Commission should not engage in any type of presumption that the proposed power plant is needed or will be cost-effective. As the Supreme Court said in Nassau v. Beard, it would be an

abrogation of the Commission's statutory responsibilities to presume need or to presume the satisfaction any of the criteria under the determination of need statute. It is the law of the state of Florida under Nassau v. Beard that determinations of need must be made on a utility specific and unit specific basis. Duke and New Smyrna have not done this and, thus, have failed to carry their burden of proof.

Duke and New Smyrna's own witness, Mr. John C. L'Engle, General Manager of the Florida Municipal Power Agency ("FMPA"), testified that Duke has not offered FMPA a specific price to sell power from the proposed unit. (Tr. 547, lines 21-24). Mr. L'Engle conceded that given the absence of a contract and even a specific price at which Duke might sell power from the plant, it would not be prudent for FMPA to rely upon the proposed plant for meeting its forecasted load at this time. (Tr. 547, line 25 – Tr. 548, line 4)

Mr. L'Engle testified that before FMPA can rely on the proposed plant to meet all or a part of its capacity needs FMPA would need to know the terms and conditions of the arrangement. (Tr. 548, lines 4-8). He testified that FMPA would need to know the prices as well as the other terms that affect the reliability of the supply from the unit. (Tr. 548, lines 9-12). Mr. L'Engle testified that he would not even be able to assess the cost-effectiveness of any purchase until he knows the price. (Tr. 548, lines 13-16) He further testified that Duke's proposed merchant plant could not be counted toward any utility's reserve margin unless it is firmly committed by contract. (Tr. 562)

If Duke's own witness cannot rely upon or evaluate the cost-effectiveness of the proposed power plant project, it should go without saying that the Commission is powerless to do so as well. Duke's "more is better" approach cannot and should not be allowed to serve as a substitute for evidence of utility specific and unit specific need.

The proposed project has not been shown to meet a need for electric system reliability and integrity nor for adequate electricity at a reasonable cost.

The proposed project has not been shown to be the most cost-effective alternative available. It has not been shown that there are no conservation measures reasonably available to New Smyrna or any other unidentified electric utility in Florida to mitigate the alleged need for the project.

## V.

## THE SITING ACT AND CONSIDERATIONS OTHER THAN RELIABILITY.

Toward the conclusion of the hearing Commissioner Deason indicated a desire to address the issue of whether the Siting Act allows considerations of factors other than reliability in assessing the need for new generating plant. This Commission on occasion has considered and approved utility applications for the need for units that are somewhat larger than needed to meet the applicant utility's needs in the immediate future. The Commission rationale has been to allow the utility to grow into a larger unit and thereby gain the economies associated with that larger unit. However, this approach has been used in a measured and deliberate way, and then only after a demonstration that the applicant utility will need the certified capacity to meets its customers' needs by a reasonable date certain.

For example, in the Commission's order[2] granting a determination of need for the City of Tallahassee to construct a 250 MW combined cycle unit (Purdom Unit 8), the Commission found that the City would need 88 MW beginning in the year 2000, with that need increasing to 187

[2] Order No. PSC-97-0659-FOF-EM, issued June 9, 1997 in Docket No. 961512-EM.

MW in the year 2005. The entire 250 MW would be needed by the year 2007. The Commission approved the entire 250 MW only after determining that constructing the unit in several stages over that time frame would be significantly more costly than constructing it in one stage.

The point here is that the Commission in the Tallahassee case and others like it adhered to the criteria of Section 403.519 and required that utility and unit specific need be demonstrated rather than simply presuming need and writing a blank check, as Duke would have the Commission do here.

## VI.

## WHAT WOULD THE PROPOSED PROJECT HURT?

Throughout this proceeding witnesses were asked a common question as to how the utilities and their customers could be harmed by allowing this project to go forward. Duke's "more is better" and "show us why not" approach, if adopted by this Commission, would do harm to regulated electric utilities by the simple fact that it would violate the very regulatory framework under which electric utilities are regulated in this state. Allowing the construction of uncommitted merchant plant despite the continuing and unchanged plain language of the Siting Act and FEECA would bring about confusion and adversely impact the regulated utilities' ability to plan for orderly, reliable and cost-effective generation additions.

Duke's own witness, Mr. Claude L'Engle of FMPA, testified that it would not be prudent for his agency to attempt to rely on Duke to meet forecasted load in the absence of a contractual commitment and a specific price. (Tr. 547)

Even though regulated electric utilities would be unable to rely on uncommitted merchant plant capacity, they would not know whether or the extent to which this Commission might nevertheless later expect them to rely on such resources or fault them for not having relied on them. Uneconomic duplications would be one likely outcome and capacity shortfalls could very well be another.

Counsel for Duke agreed with Commissioner Clark during the hearing that to the extent sales made from the proposed plant displace sales that investor-owned utilities, like Tampa Electric, might have made at wholesale, and those sales are supported by investment that the Commission has allowed in their retail rate base the retail customers will be worse off because they would not get the benefit of those revenues. (Tr. 188, line 17 – Tr. 189, line 25). As Commissioner Garcia pointed out, Tampa Electric has the most to lose in the way of displaced off-system sales, given the amount of sales the company makes in comparison to its size. (Tr. 1636)

All of these considerations strongly suggest that the state's traditional and highly effective regulatory model -- and the benefits it has bestowed on utility ratepayers in this state -- should not be jeopardized through regulatory experimentation with merchant plants, even if it were permissible under existing law.

## CONCLUSION

Tampa Electric respectfully urges the Commission either to dismiss or deny Duke and New Smyrna's Joint Petition.

DATED this 19th day of January, 1999.

Respectfully submitted,

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ATTORNEYS FOR TAMPA ELECTRIC COMPANY

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Post-Hearing Brief, filed on behalf of Tampa Electric Company, has been furnished by hand delivery (*) or U. S. Mail on this 19th day of January 1999 to the following:

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