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January 19, 1999

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By Hand Delivery

Blanca S. Bayó, Director
Records and Reporting
Florida Public Service Commission
4075 Esplanade Way, Room 110
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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

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company ("FPL") in Docket No. 981042-EM are the original and fifteen (15) copies of: (1) Florida Power & Light Company's Posthearing Statement of Issues and Positions, (2) Florida Power & Light Company's Memorandum on Legal Issues, (3) Florida Power & Light Company's Memorandum On Fact And Policy Issues and (4) a Certificate of Service for items (1) - (3).

FPL has divided its memorandum to facilitate the oral argument scheduled for January 28, 1999. FPL's Memorandum on Legal Issues addresses FPL's pending motion to dismiss and supplements its earlier supporting memorandum.

Also enclosed is a diskette containing a copy of Florida Power & Light Company's Posthearing Statement. The diskette is a 3.5 inch high density diskette using Word Perfect 6.1 for Windows.

If you or your Staff have any questions regarding this filing, please contact me.

Very truly yours,

Charles A. Guyton
Charles A. Guyton

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Legal Issues Memorandum
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Posthearing Statement
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Posthearing Statement of Issues and Positions, Florida Power & Light Company's Memorandum on Legal Issues, and Florida Power & Light Company's Memorandum On Fact And Policy Issues in Docket No. 981042-EM were served by Hand Delivery (when indicated with an *) or mailed this 19th day of January, 1999 to the following:

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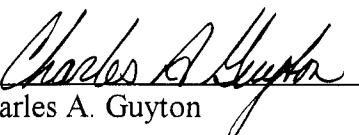
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By: 
Charles A. Guyton

ORIGINAL

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: January 19, 1999

FLORIDA POWER & LIGHT COMPANY'S
POSTHEARING STATEMENT OF ISSUES AND POSITIONS

Florida Power & Light Company ("FPL") hereby files its Posthearing Statement of Issues and Positions in Docket No. 981042-EM.

BASIC POSITION: The Joint Petition should be dismissed or denied. It is inconsistent with the Siting Act. As to merchant capacity, DNS lacks a statutory or contractual obligation to serve, and utility specific need criteria are ignored. "Peninsular Florida's" need is inadequately pled, unproven and legally deficient. The Project is unnecessarily duplicative.

ISSUE 1: Is there a need for the proposed power plant, taking into account the need for electric system reliability and integrity, as this criterion is used in Section 403.519?

FPL: No. This need criterion is utility specific; no attempt has been made to show a utility specific need for 470 MW, 94% of the plant's capacity. The attempt to justify the plant's merchant capacity based upon "peninsular Florida's" alleged need for electric system reliability and integrity is legally and factually deficient.

ISSUE 2: Does Duke New Smyrna have an agreement in place with the UCNSB, and, if so, do its terms meet the UCNSB's needs in accordance with the statute?

FPL: DNS does not have a final purchased power agreement in place with the UCNSB. The Participation Agreement between DNS and UCNSB does not meet the UCNSB's needs for electric system reliability and integrity.

ISSUE 3: Does the Commission have sufficient information to assess the need for the proposed power plant under the criteria set forth in Section 403.519, Fla. Statutes?

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FPL: No. The information necessary to show a utility specific need for DNS' merchant capacity was not introduced. Not all information necessary to show UCNSB need was introduced. Due to self-imposed confidentiality concerns, insufficient information was submitted to prove economic viability, adequate gas supply, and unit operating parameters.

ISSUE 4: Does Duke New Smyrna have a need by 2001 for the 484 MW of [merchant] capacity (476 MW summer and 548 MW winter less 30 MW) represented by the proposed facility?

FPL: No. DNS does not have customers for its merchant plant capacity, and DNS does not have a statutory or contractual obligation to serve from its merchant capacity. Since need arises from an obligation to serve, Duke does not have a need for its 484 MW of merchant capacity.

ISSUE 5: Can or should the capacity of the proposed project be properly included when calculating short term operating and long term planning reserve margins of an individual Florida utility or the State as a whole?

FPL: No. Absent contracts committing the output of the project to individual Florida utilities, it would be imprudent to count the Project's capacity in individual Florida utilities' or Florida's reserve margins. (L'Engle, Vaden) DNS could commit its capacity outside Florida, providing Florida no reliability benefits and possible reliability detriments.

ISSUE 6: What transmission improvements and other facilities are required in conjunction with the construction of the proposed facility, and were their costs adequately considered?

FPL: Without knowing the entities to whom DNS would sell the output of its proposed plant, this question cannot not be answered. None of the downstream transmission improvements the petitioners identify as required are permitted or are part of this application.

ISSUE 7: Is there a need for the proposed power plant, taking into account the need for adequate electricity at a reasonable cost, as this criterion is used in Section 403.519?

FPL: No. This need criterion is utility specific; no utility specific need for 470 MW, 94% of the plant's capacity, has been shown. The attempt to justify the plant's merchant capacity based upon "peninsular Florida's" alleged need for adequate electricity at a reasonable cost is legally and factually deficient.

ISSUE 8: Is the proposed power plant the most cost-effective alternative available, as this criterion is used in Section 403.519?

FPL: No. No attempt has been made to show the plant's merchant capacity is the most cost-effective alternative for a specific utility. UCNSB failed to show the capacity is its most cost-effective alternative. The petitioners failed to show the plant is peninsular Florida utilities' most cost-effective alternative.

ISSUE 9: Has Duke New Smyrna provided adequate assurances regarding available primary and secondary fuel to serve the proposed power plant on a long- and short-term basis?

FPL: No. No gas transportation contract was provided. No evidence was provided showing the volume of gas in the fuel supply contract or that the volume will be sufficient to meet anticipated operations. There is no secondary fuel.

ISSUE 10: What impact, if any, will the proposed power plant have on natural gas supply or transportation resources on State regulated power producers?

FPL: The proposed plant would restrict the natural gas supply and transportation that would otherwise be available to utilities with an obligation to provide service.

ISSUE 11: Will the proposed project result in the uneconomic duplication of transmission and generation facilities?

FPL: Yes. Petitioners' evidence shows that peninsular Florida's utilities' collective reserve margin without the Project will be in excess of 17% from the scheduled in-service date of the proposed plant through the summer of 2007. The proposed plant is an unnecessary and uneconomic duplication of generation facilities.

ISSUE 12: Is the identified need for power of the Utilities Commission, New Smyrna Beach ("UCNSB") which is set forth in the Joint Petition met by the power plant proposed by Florida Municipal Power Association in Docket No. 980802-EM?

FPL: Perhaps. There is no prohibition of either the FMPPA or the Utilities Commission of Kissimmee providing the UCNSB with 30 MW of capacity from the Cane Island unit.

ISSUE 13: Are there any conservation measures taken by or reasonably available to the petitioners which might mitigate the need for the proposed power plant?

FPL: Probably. The UCNSB has not proven it has sufficiently investigated its conservation potential; without knowing the other purchasing utilities, it cannot be determined whether there are conservation measures available that would mitigate those utilities' "need" for the output of the proposed plant.

ISSUE 14: Does the Florida Public Service Commission have the statutory authority to render a determination of need under Section 403.519, Florida Statutes, for a project that consists in whole or in part of a merchant plant (i.e., a plant that does not have as to the merchant component of the project, an agreement in place for the sale of firm capacity and energy to a utility for resale to retail customers in Florida)?

FPL: No. The need determination criteria are utility specific; need is the need of the purchasing utility; the Commission may not presume need. *Nassau v. Beard*. Need arises from an obligation to serve; absent a statutory or contractual obligation to serve, a merchant plant is not a proper need applicant. *Nassau v. Deason*.

ISSUE 15: Does the Public Service Commission have jurisdiction under the Power Plant Siting Act, Sections 403.501 - 403.518, and Section 403.519, Florida Statutes, to determine "applicant" status?

FPL: Yes. The Commission has dismissed need petitions because the petitioners were "not proper applicants for a need determination proceeding under Section 403.519, Florida Statutes." *Ark and Nassau*. The Commission's dismissal of these improper applicants under the Siting Act was affirmed by the Supreme Court of Florida. *Nassau v. Deason*.

ISSUE 16: As to its project's merchant capacity, does Duke New Smyrna have a statutory or other legally enforceable obligation to meet the need of any electric utility in Peninsular Florida for additional generating capacity?

FPL: No. DNS has no statutory service obligation; it has economic choice of where to sell its output. DNS has no contract to sell its merchant capacity. Because DNS has no statutory or legally enforceable (contractual) obligation to serve, DNS has no "need" as to its merchant capacity. *Nassau v. Deason*.

ISSUE 17: As to the project's merchant capacity, is either Duke New Smyrna or UCNSB an "applicant" or "electric utility" within the meaning of the Siting Act and Section 403.519, Florida Statutes?

FPL: No. In Order No. PSC-92-1210-FOF-EQ an IPP like DNS was found not to be an “applicant” or an “electric utility” under Section 403.519 and the Siting Act. That determination was affirmed in *Nassau. v. Deason*, which controls as to DNS. UCNSB has not alleged need for the merchant capacity.

ISSUE 18: If the Commission were to grant an affirmative determination of need to Duke New Smyrna as herein requested, when the utilities in Peninsular Florida had plans in place to meet reliability criteria, would the Commission be meeting its responsibility to avoid uneconomic duplication of facilities?

FPL: No. Petitioners’ evidence shows that peninsular Florida utilities have plans in place to meet their reliability criteria without DNS. Permitting Duke to build a unit to meet the same need would be uneconomic duplication of facilities, inconsistent with the Commission’s responsibility under the Grid Bill and the Siting Act.

ISSUE 19: Does the Joint Petition meet the pleading requirements of Rule 25-22.081, Florida Administrative Code?

FPL: No. Rule 25-22.081 was adopted as the minimum information necessary in a need petition for the Commission to discharge its responsibilities under Section 403.519. The Joint Petition fails to meet the requirements of Rule 25-22.081 in several important respects, as set forth in FPL's Legal Memorandum.

ISSUE 20: Does the Joint Petition state a cause of action by not alleging that the proposed power plant meets the statutory need criteria and instead alleging that the proposed power plant is “consistent with” Peninsular Florida’s need for power?

FPL: No. It doesn’t allege that “peninsular Florida” needs the plant for “electric system reliability and integrity” and “adequate electricity at a reasonable cost” and it is “the most cost-effective alternative.” Allegations that the plant is “consistent with” need or is “a cost-effective alternative” fail to state a cause of action.

ISSUE 21: If the Commission were to permit Duke New Smyrna to demonstrate need on a “Peninsular Florida” basis and not require Duke New Smyrna to have a contract with purchasing utilities for its merchant plant capacity, would the more demanding requirements on QFs, other non-utility generators and electric utilities afford Duke New Smyrna a special status?

FPL: Utilities must show their plant is needed to meet service obligations. Nonutility generators must contract with a utility to show their plant is needed to meet service obligations. If DNS were permitted without a statutory or contractual obligation to serve, it would enjoy a special status without any rational reason.

ISSUE 22: If Duke New Smyrna premises its determination of need upon Peninsular Florida without contracts from individual purchasing utilities, how would the Commission's affirmative determination of need affect subsequent determinations of need by utilities petitioning to meet their own need?

FPL: It should have no effect, and the Commission should so hold. Absent such a holding, peninsular Florida utilities, which retain the obligation to serve, could be disadvantaged by this case's decision, facing arguments by DNS that the Commission's determination precludes the utilities from pursuing alternative supply options.

ISSUE 23: Will granting a determination of need as herein requested relieve electric utilities of the obligation to plan for and meet the need for reasonably sufficient, adequate and efficient service?

FPL: No. Granting this determination of need would not relieve utilities of their obligation to plan and meet need. It would, however, create additional uncertainty, making planning more difficult. It could also make securing determinations of need for alternatives preferred by utilities more difficult to secure.

ISSUE 24: Will granting a determination of need as herein requested create a risk that past and future investments made to provide service may not be recovered and thereby increase the overall cost of providing electric service and/or future service reliability?

FPL: Yes. Since DNS cannot show a reliability need for its plant, it argues that there is an "economic need" to displace generation from existing units. Such displacement would have the potential of stranding investment in existing generation facilities, increasing the risk faced by utilities and their overall cost of capital.

ISSUE 25: If Duke New Smyrna premises its determination of need upon Peninsular Florida without contracts from individual purchasing utilities, how would the Commission's affirmative determination of need affect subsequent determinations of need by QFs and other non-utility generators petitioning to meet utility specific needs?

FPL: It would put them at a disadvantage, as they are required to have contracts for their output with a utility. Such a disadvantage would contravene the legislative mandate to encourage cogeneration.

ISSUE 26: If the Commission abandons its interpretation that the statutory need criteria are "utility and unit specific," how will the Commission ensure the maintenance of grid reliability and avoid uneconomic duplication of facilities in need determination proceedings?

FPL: The Commission may not abandon the Supreme Court's interpretation that the statutory need criteria are utility specific. Such an attempt would frustrate the Commission's ability and responsibility to apply the Siting Act, avoid unnecessary facility duplication and assure grid reliability.

ISSUE 27: Will granting a determination of need as herein requested result in electric utilities being authorized to similarly establish need for additional generating capacity by reference to potential additional capacity needs which the electric utility has no statutory or contractual obligation to serve?

FPL: An affirmative determination should not be granted. However, if DNS is permitted to justify need based upon a basis other than an individual utility's need, then utilities should be permitted to justify need upon the same basis.

ISSUE 28: What effect, if any, would granting a determination of need as herein requested have on the level of reasonably achievable cost-effective conservation measures in Florida?

FPL: If need can be premised upon statewide "economic need" without consideration of utility specific need and individual utilities' conservation potential, the resulting proliferation of power plants will diminish and may ultimately eliminate conservation as a system resource. This would frustrate FEECA and the Siting Act.

ISSUE 29: Would granting the determination of need requested by the joint petitioners be consistent with the public interest and the best interests of electric customers in Florida?

FPL: The Commission is not charged to generally protect the "public interest," but granting the request would frustrate rational application of the Siting Act and invite a proliferation of unneeded, duplicative power plants. Without a contract for its merchant capacity, DNS cannot demonstrate any impact on Florida electric utility customers.

ISSUE 30: Would granting the determination of need requested by the joint petitioners be consistent with the State's need for a robust competitive wholesale power supply market?

FPL: This issue is inappropriate. It has a factual premise that assumes Duke's theory of the case. More importantly, the wholesale market in Florida is a matter beyond the Commission's jurisdiction. The evidence in the case shows there already is a robust wholesale market in Florida.

ISSUE 31: Would granting the determination of need requested by the joint petitioners be consistent with state and federal energy policy?

FPL: Granting the petition would be inconsistent with state energy policy that the Siting Act calls for utility specific determinations of need premised upon statutory or contractual obligations to serve. Federal energy policy is outside the Commission's jurisdiction, but allows the Commission to apply state energy policy in siting proceedings.

ISSUE 32: Based on the resolution of the foregoing issues, should the petition of the UCNSB and Duke New Smyrna for determination of need for the New Smyrna Beach Power Project be granted?

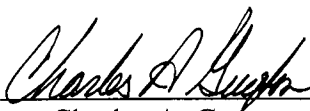
FPL: No.

ISSUE 33: Should this docket be closed?

FPL: Yes.

Respectfully submitted,
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