

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Declaratory Statement by Duke Energy New Smyrna Beach Power Company, L.L.P. Concerning Eligibility to Obtain Determination of Need Pursuant to Section 403.519, F.S., Rules 25-22.080 and .081, F.A.C., and Pertinent Provisions of the Florida Electrical Power Plant Siting Act.

DOCKET NO. 971446-EU
ORDER NO. PSC-98-0078-FOF-EU
ISSUED: January 13, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
DIANE K. KIESLING
JOE GARCIA

ORDER DENYING PETITION FOR DECLARATORY STATEMENT

BY THE COMMISSION:

BACKGROUND

On November 4, 1997, Duke New Smyrna Beach Power Company, L.L.P. (Duke New Smyrna) filed a petition for declaratory statement. The petition asks us to issue an order stating that Duke New Smyrna is entitled to apply for a determination of need for its proposed power plant pursuant to Sections 403.519 and 403.503(4) and (13) of the Florida Electrical Power Plant Siting Act and Rules 25-22.080-.081, Florida Administrative Code.

On December 2, 1997, Florida Power Corporation (FPC) filed a Motion to Dismiss Proceeding, Answer to Petition for Declaratory Statement, and Petition to Intervene and Request for Administrative Hearing.

DOCUMENT NUMBER-DATE

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Pleadings filed after December 1, 1997 included the following:

Florida Power & Light Company's (FPL) Motion for Leave to Participate Amicus Curiae; FPL's Notice of Supplemental Authority; Duke New Smyrna's Motion to Dismiss FPC's Petition to Intervene and to Deny FPC's Request for Administrative Hearing; Duke New Smyrna's Consolidated Motion to Strike FPC's Answer and FPC's Motion to Dismiss; FPL's Petition for Leave to Intervene; Enron Capital & Trade Resources Corp.'s Motion for Leave to File Amicus Curiae Memorandum of Law and Request to Address the Commission; Duke New Smyrna's Motion to Dismiss FPL's Petition for Leave to Intervene.

The power plant Duke New Smyrna plans to develop is a natural gas fired, combined cycle electrical generating unit near New Smyrna Beach, in Volusia County, Florida. The plant is envisioned, but not definitely configured, at between 240 MW and 500 MW of net generating capacity and planned to come on line as early as the summer of 2000.

Pursuant to a participation agreement being negotiated between Duke New Smyrna and the Utilities Commission of New Smyrna Beach (New Smyrna Commission), the New Smyrna Commission will be entitled to 20 MW to 30 MW of the plant's output. The remainder of the output will be marketed in the open wholesale market. Duke New Smyrna will take all investment, capital, and market risk associated with building and operating the plant.

Duke New Smyrna will be certified as an Exempt Wholesale Generator (EWG) pursuant to the Public Utility Holding Company Act, 15 U.S.C.S. §79Z-5a (1994 & Supp. 1997), and will file a tariff and application materials with FERC to sell the plant's output at market-based rates. Market-based rates have been approved for other facilities by the FERC, as in Cataula Generating Company, L.P., FERC ¶61,261 (1997). Unlike the owner of a QF (Qualifying Facility), Duke New Smyrna could not compel any utility to purchase its power.

DISCUSSION

FPC cites a number of cases holding that, when the result is an agency statement of general applicability interpreting law or policy, declaratory statement proceedings are inappropriate. Regal Kitchens, Inc., v. Florida Dep't of Revenue, 641 So. 2d 158 (1st

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DCA 1994), and Mental Health District Bd v. Florida Dep't of Health and Rehabilitative Services, 425 So. 2d 160 (1st DCA 1983). We agree with FPC that a statement to the effect that Exempt Wholesale Generators are proper applicants under the Siting Act would be a statement of general applicability interpreting law and policy. Such a statement would not merely affect petitioner in petitioner's set of circumstances only, but would carry implications for the electric power industry statewide.

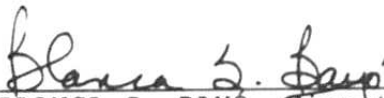
On this basis, we decline to issue the requested Declaratory Statement, noting that petitioner can file a request for rulemaking. Staff was also directed to discuss with the Chairman appropriate proceedings to review law and policy as to merchant plants being applicants for certificates of need.

In view of the above, it is

ORDERED by the Florida Public Service Commission that the Petition for Declaratory Statement of Duke-New Smyrna Beach Power Company L.L.P. is denied. It is further

ORDERED that this docket be closed.

By Order of the Florida Public Service Commission this 13th day of January, 1998.



BLANCA S. BAYO, Director
Division of Records and Reporting

Commissioner Garcia dissented.

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as

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well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.