

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  
ORDER NO. PSC-98-1595-PHO-EM  
ISSUED: December 1, 1998

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code, a Prehearing Conference was held on Thursday, November 5, 1998, in Tallahassee, Florida, before Commissioner Joe Garcia, as Prehearing Officer.

APPEARANCES:

ROBERT SCHEFFEL WRIGHT, ESQUIRE, and JOHN T. LaVIA, III, ESQUIRE, Landers & Parsons, P.A., 310 West College Avenue, Tallahassee, Florida 32301  
On behalf of Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. (DUKE/UCNSC).

JAMES A. MCGEE, ESQUIRE, Post Office Box 14042, St. Petersburg, Florida 33733; and GARY L. SASSO, ESQUIRE, Carlton Fields Ward Emmanuel Smith & Cutler, P.A., Post Office Box 2861, St. Petersburg, Florida 33731  
On behalf of Florida Power Corporation (FPC).

JAMES D. BEASLEY, ESQUIRE, Ausley & McMullen, Post Office Box 391, Tallahassee, Florida 32302  
On behalf of Tampa Electric Company (TECO).

MICHELLE HERSHEL, ESQUIRE, Post Office Box 590, Tallahassee, Florida 32302  
On behalf of Florida Electric Cooperatives Association, Inc. (FECA).

GAIL KAMARAS, ESQUIRE, 1114 Thomasville Road, Suite E, Tallahassee, Florida 32303  
On behalf of Legal Environmental Assistance Foundation, Inc. (LEAF).

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Tallahassee, Florida 32301  
On behalf of Florida Power & Light Company (FPL).

TERRY L. KAMMER, PAC DIRECTOR, 3944 Florida Boulevard, Palm  
Beach Gardens, Florida 33410  
On behalf of System Council U-4, (IBEW).

ROBERT J. SNIFFEN, ESQUIRE, Moyle, Flanigan, Katz, Kolins,  
Raymond & Sheehan, 210 South Monroe Street, Tallahassee,  
Florida 32301  
On behalf of U.S. Generating Company.

LESLIE J. PAUGH, ESQUIRE, and GRACE A. JAYE, ESQUIRE, Florida  
Public Service Commission, 2540 Shumard Oak Boulevard,  
Tallahassee, Florida 32399-0850  
On behalf of the Commission Staff.

#### PREHEARING ORDER

##### I. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, Florida Administrative Code, this Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

##### II. CASE BACKGROUND

On August 19, 1998, the Petitioners, the Utilities Commission, City of New Smyrna Beach, Florida (UCNSB), and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. (Duke), filed a Joint Petition for Determination of Need for an Electrical Power Plant. By Order No. PSC-98-1305-PCO-EM, issued October 8, 1998, Florida Power & Light Company (FPL), Florida Power Corporation (FPC), Tampa Electric Company (TECO), Florida Electric Cooperatives Association (FECA), and the Legal Environmental Assistance Foundation (LEAF) were granted intervention. System Council U-4, IBEW, petitioned for leave to intervene on October 7, 1998. On November 3, 1998, U.S. Generating Company petitioned to intervene. U.S. Generating Company's Petition for Intervention was granted by Order No. PSC-98-1510-PCO-EM, issued November 13, 1998. On November 13, 1998, Florida Wildlife Federation petitioned to intervene. On November

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16, 1998, Save the Manatee Club petitioned to intervene. On November 20, 1998, Florida State Building and Construction Trades petitioned to intervene. On November 23, 1998, Louisville Gas & Electric filed a Request for Certification of Counsel, a Motion for Leave to File Amicus Curiae Memorandum of Law, and an Amicus Curiae Memorandum of Law. This matter is currently set for an administrative hearing on December 2 - 4, 1998.

### III. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time periods set forth in Section 366.093(2), Florida Statutes.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 366.093, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

- 1) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 366.093, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.

- 2) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.
- 3) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- 4) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.
- 5) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of Records and Reporting's confidential files.

#### IV. POST-HEARING PROCEDURES

Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, Florida Administrative Code, a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 60 pages, and shall be filed at the same time.

V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties has been prefiled. All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

VI. ORDER OF WITNESSES

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
<u>Direct</u>		
Ronald L. Vaden	DUKE/UCNSB	2, 3, 5, 7, 8, 11, 12, 13, 22, 25, 26, 28, 29, 30, 32
Michael C. Green, P.E.	DUKE/UCNSB	1, 2, 3, 4, 5, 6, 16, 32
John C. "Claude" L'Engle	DUKE/UCNSB	1, 3, 12, 29, 30, 32

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
Dale M. Nesbitt, Ph.D.	DUKE/UCNSB	1, 3, 5, 7, 8, 10, 11, 18, 24, 29, 30, 32
Martha O. Hesse	DUKE/UCNSB	3, 27, 29, 30, 31, 32
Mark Locascio, P.E.	DUKE/UCNSB	3, 32
Kennie Sanford, P.E.	DUKE/UCNSB	3, 32
Michel P. Armand, P.E.	DUKE/UCNSB	3, 6, 32
Larry A. Wall	DUKE/UCNSB	3, 9, 32
Jeffrey L. Meling, P.E.	DUKE/UCNSB	3, 32
Michael D. Rib	FPC	1-5, 7, 8, 10, 11, 13, 22, 25-26, 32
Vincent M. Dolan	FPC	1, 7, 8, 10, 11, 13, 22-27, 28-32
William D. Steinmeier	FPL	1, 2, 3, 4, 7, 8, 11, 13, 22, 24, 26, 27

VII. BASIC POSITIONS

DUKE/  
UCNSB:

The Commission should issue its order granting the determination of need sought by the Joint Petitioners for the New Smyrna Beach Power Project ("the Project"). The Project is a state-of-the-art, natural gas fired combined cycle power plant that will contribute meaningfully to the needs of the UCNSB and of electric customers in Peninsular Florida for system reliability and integrity and for adequate electricity at a reasonable cost. The Project is the most cost-effective alternative available for the UCNSB, for Duke New Smyrna, and for Florida electric customers, because no utilities (other than the UCNSB) are required to buy power from the Project, and because no Florida electric customers are subject to being required to pay for the Project's capital or operating costs. Duke New Smyrna is assuming all business and operating risk associated with the Project, thereby providing this cost-effective power supply

resource to retail-serving utilities in Peninsular Florida, for resale to their customers, at no risk either to those utilities nor to their customers. Delaying the construction and operation of the Project would adversely affect the reliability of the Peninsular Florida bulk power supply system, would adversely affect the availability of adequate electricity at a reasonable cost, and would adversely affect the environment of Florida.

**FECA:** Duke New Smyrna's petition cannot be approved by the Florida Public Service Commission because it does not satisfy the fundamental requirements that are set forth in Section 403.519, F.S., and Rule 25-22.081, F.A.C. Moreover, Duke New Smyrna has not identified a retail need for the majority of the capacity and energy from the proposed plant. Until such time that Duke identifies an end-use "need" for its proposed plant, it must be presumed that the need at issue already is being addressed by FECA's members and the other utilities that sell electricity at retail in Florida, and that there is no "need" for the proposed plant.

**FPC:** Under existing law, a merchant plant may not obtain a determination of need under Section 403.519, Fla. Stat. The need provision was enacted as part of the Florida Energy Efficiency and Conservation Act ("FEECA"), Section 366.80-366.85, Fla. Stat., Section 336, and is part of a comprehensive statutory and regulatory framework in this State applicable to utilities that have a statutory duty to serve retail customers. In this connection, Section 366.82(1) of FEECA provides that "For the purposes of...[§]403.519, 'utility' means any person or entity of whatever form which provides electricity...at retail to the public...." (Emphasis added). In contrast to utilities like FPC, merchant plants do not have a statutory obligation to serve retail customers in Florida. Accordingly, they may not obtain a determination of need under Section 403.519.

The Florida Supreme Court has so held. In Nassau Power Corp. v. Beard, 601 So. 2d 1175 (Fla. 1992) ("Nassau I"), the Court held that "the four criteria [for assessing need] in Section 403.519 are 'utility and unit specific' and that the need for the purposes of the Siting Act is

the need of the entity ultimately consuming the power." 601 So. 2d at 1178 n.9 (emphasis added). To the same effect, in Nassau Power Corp. v. Deason, 641 So. 2d 369 (Fla. 1994) ("Nassau II"), the Court held that "a need determination proceeding is designed to examine the need resulting from an electric utility's duty to serve customers. Non-utility generators...have no similar need because they are not required to serve customers." Id. at 398 (emphasis added). The Court held that "only electric utilities [that have a statutory obligation to serve customers], or entities with whom such utilities have executed a power purchase contract are proper applicants for a need determination." Id.

Limiting need proceedings to retail utilities (and to independent power producers that have executed a power purchase agreement with them) is thus compelled by express statutory language and the Supreme Court's decisions in the Nassau cases. Further, it simply makes no sense to speak of "need" in the context of a merchant plant. Merchant plant developers have no "need" for generating capacity because, by definition, they have no obligation to serve customers. They need only profits, and Section 403.519 does not exist to provide economic opportunities for enterprising developers. Only retail utilities have the right and responsibility to serve the consumers of electric power in this State. As the Supreme Court recognized, it follows that only retail utilities may be said to have a "need" for generating capacity required to supply power to such consumers.

For planning purposes, retail utilities are not permitted to rely upon merchant plant capacity that is not committed to serve the needs of the respective utilities. Thus, even retail utilities do not "need" merchant plants. Retail utilities cannot "need" something they cannot count on.

In this case, although the Utilities Commission, City of New Smyrna Beach ("UCNSB") is a petitioner, UCNSB claims to need only 30 MW of the 510 MW power plant that Duke Energy New Smyrna Beach Power company Ltd., L.L.P. ("Duke") proposes to build. Even as those 30 MW, the petitioners have not adduced an executed power purchase agreement. Thus, the proposed plant is in whole or



substantial part a merchant plant. That being the case, petitioners cannot meet, and have not met, the statutory requirements for obtaining a determination of need under Section 403.519.

For these reasons, and for the reasons developed more fully in FPC's motion to dismiss and prefiled testimony, the Joint Petition must be denied. The petitioners' plea to change the law in this State should be directed to the Florida Legislature, where the issues raised by the Joint Petition may be appropriately addressed.

**FPL:**

The need determination of Duke New Smyrna/UCNSB should be denied. The Joint Petition should be dismissed without this matter proceeding to trial. The underlying theory of the petitioners' case, that the market rather than the Commission should determine need, is inconsistent with Section 403.519, Florida Statutes. Neither Duke New Smyrna nor the UCNSB is a proper applicant as to the plant's merchant capacity, which comprises over 94% of the Project. The Joint Petition fails to satisfy the utility specific criteria of Section 403.519; instead, it inappropriately attempts to rely on Peninsular Florida need. The petitioners fail to allege that their plant is needed to meet Peninsular Florida need or the most cost effective alternative to meet such need; instead, they merely allege that their plant is "consistent with" such need and is "a cost-effective alternative." The Petition actually shows that reliability criteria for Peninsular Florida would be achieved without the proposed plant. The proposed plant would result in uneconomic duplication of facilities. The Petition also fails to meet the Commission's minimum pleading requirements.

The petitioners' evidence fails to prove need. No attempt is made to prove that any individual utility needs the proposed merchant capacity. Duke New Smyrna fails to provide crucial information necessary to apply the statutory need criteria, including the entities to whom it will sell, the price of the sales, and other terms and conditions that affect cost-effectiveness and reliability. Instead of showing need premised upon reliability, Duke New Smyrna attempts to prove "need" based upon economics, but this effort falls short as well.

The Commission should dismiss or deny this proceeding consistent with its prior decisions and the Supreme Court's Nassau decisions.

**LEAF:** Based on the commitment of UCNSB to implement a solar generation program of 150 kW, including customer green pricing, LEAF is conditionally supporting the project, subject to verification at hearing of environmental benefits set forth in the petition, exhibits, and testimony of Petitioners.

**TECO:** Duke Energy New Smyrna Beach Power Ltd. LLP ("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 meaning of Section 403.503(13) of the Florida Statutes. Only "Electric Utilities" qualify as Applicants under the Siting Act.

The fact that Duke is joined in its application by the Utilities Commission of the City of New Smyrna Beach ("New Smyrna") does nothing to remedy Duke's ineligibility. New Smyrna has no contract to purchase any of the capacity of the proposed plant and does not qualify as a co-applicant. Duke proposes a 484 MW (476 MW summer and 548 MW winter) plant to be built on a purely speculative basis. New Smyrna's co-application does nothing to support the applicant status on Duke with regard to the proposed generation in which New Smyrna has no interest.

The relief sought in this case would injure Tampa Electric's ability to plan, certify, build and operate transmission generation facilities necessary to meet its service obligation and the needs of its customers. 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 need of the 59 Florida utilities comprising "Peninsular Florida" to attempt to 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. The relief sought in this case would also introduce tremendous uncertainty in the

planning process for Tampa Electric and other Florida utilities, adversely affecting their ability to plan their generation and transmission facilities to reliably meet the future demand for electric service by the residents of this state. The proposed project has not been shown to be needed 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 the Utilities Commission, New Smyrna Beach to mitigate the alleged need for the project. Based upon the foregoing, the petition in this proceeding should either be dismissed or denied.

**IBEW:** Duke's petition should not be approved because Duke does not meet the basic requirements of section 403.519. Furthermore Duke has not shown a need for the majority of the capacity of the proposed plant nor do they have a firm contract to sell any of the proposed capacity.

**USGEN:** USGEN believes that the introduction of merchant plants into the State of Florida will enhance the State's competitive wholesale market for electricity, is in the best interest of the citizens of Florida, and should be authorized by the Commission.

**STAFF:** Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

VIII. ISSUES AND POSITIONS

**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?

**POSITIONS**

**DUKE/**

**UCNSB:** Yes. The proposed Project will contribute to the reliability of Florida customers' electric service without requiring them to assume responsibility for the investment risk of the Project.

**FECA:** No.

**FPC:** No. Neither the Commission nor regulated utilities may rely upon the uncommitted capacity of a merchant plant for reliability purposes. A merchant plant may sell its electric power when it wants and where it wants -- whether in Florida or outside the State -- governed solely by its own economic self-interest. (Rib, Dolan)

**FPL:** No. The statutory need criterion in Section 403.519, Florida Statutes requiring the Commission to consider "the need for electric system reliability and integrity" is a utility specific criterion. Duke New Smyrna proposes to build a 514 MW power plant. Duke New Smyrna has alleged and attempted to prove a utility specific need for only 30 MW of the proposed plant (less than 6%). As to the merchant plant capacity of the proposed unit, more than 94% of the unit, Duke has not even attempted to demonstrate a utility specific need.

Duke New Smyrna's attempt to justify its proposed plant's merchant capacity based upon Peninsular Florida's alleged need for electric system reliability and integrity is legally and factually deficient. Peninsular Florida is not a utility with customers and an obligation to serve; consequently, there is no obligation to serve Peninsular Florida. Since the need determined in a need determination proceeding arises from an obligation to serve customers, an attempt to premise a showing of need solely upon Peninsular Florida is legally deficient.

Factually, the Joint Petitioner's case demonstrates that Peninsular Florida meets a reserve margin criteria at or in excess of 15% well beyond the proposed plant's October 2001 projected in service date. Duke's attempted demonstration of need for the proposed power plant through Dr. Nesbitt does not really rest upon considerations or measurements of reliability but of economics.

**LEAF:** Conditional yes.

**TECO:** No.

**IBEW:** No- The unregulated plant with no contracts or obligation to serve can sell its capacity to whatever entity it chooses regardless of need or location, inside or outside the state based only on the bottom line profit selling the capacity will bring.

**USGEN:** No position.

**STAFF:** No position at this time pending the evidence adduced at hearing.

**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?

**POSITIONS**

**DUKE/**

**UCNSB:** Yes.

**FECA:** No position.

**FPC:** Duke has a participation agreement in place with UCNSB, not an executed power purchase agreement. The participation agreement is qualified in a number of respects and does not provide assurance that even UCNSB's needs for generating capacity will be met. Further, UCNSB is able to justify the proposed project as a cost-effective alternative only because the plant would have a capacity many times greater than 30 MW in capacity. It is untenable to contend that a utility that needs 30 MW

for reliability purposes may seek to satisfy that need by seeking certification of a 510 MW plant, with uncommitted capacity of 480 MW. (Rib)

**FPL:** Duke New Smyrna does not have a final purchased power agreement in place with the UCNSB, and such an agreement is a prerequisite for Duke New Smyrna to be a proper coapplicant with the UCNSB as to 30 MW of its proposed power plant.

The Participation Agreement entered into between Duke New Smyrna and the UCNSB does not meet the UCNSB's needs for electric system reliability and integrity.

**LEAF:** No position.

**TECO:** No.

**IBEW:** IBEW has no position.

**USGEN:** No position.

**STAFF:** No position at this time pending evidence adduced at hearing.

**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?

**POSITIONS**

**DUKE/**

**UCNSB:** Yes.

**FECA:** The Commission has sufficient information to deny the petition for need, but the Commission cannot approve the Petition based upon the information that Duke has submitted.

**FPC:** Petitioners are incapable of adducing such information. (Rib)

**FPL:** No. The Joint Petition filed by the petitioners failed to provide all the information required by Commission

Rule 25-22.081, Florida Administrative Code. The information required by the rule is information the Commission has previously stated is necessary for it to assess the need for a proposed power plant when applying the need criteria of Section 403.519, Florida Statutes. More importantly, Duke New Smyrna has not identified the utilities to which it will sell the merchant portion of its power plant, the price or prices at which its merchant output will be sold, or the other terms and conditions of sale which would affect the Commission's determination of whether the proposed plant is needed under the utility specific need criteria of Section 403.519. Duke also fails to provide detail necessary to investigate the limited information which it has provided the Commission.

**LEAF:** No position.

**TECO:** No.

**IBEW:** No the petitioners have shown no need nor do they have firm contracts with other Florida utilities for the capacity.

**USGEN:** No position.

**STAFF:** No position at this time pending evidence adduced at hearing. This issue is duplicative and can be addressed in Issue 1.

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

**POSITIONS**

**DUKE/**

**UCNSB:**

To the extent that this issue is relevant, yes. The issue that is properly before the Commission is whether the Commission should grant the requested need determination for the Project, taking into account the criteria in Section 403.519. There is a need for the Project in Florida considering those criteria.

**FECA:** No.

**FPC:** No. Duke has no "need" for any generating capacity because it has no obligation to serve customers. (Rib)

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

**LEAF:** No position.

**TECO:** Tampa Electric supports the inclusion of this issue. If it is included, Tampa Electric's position on this issue is no.

**IBEW:** IBEW has no position.

**USGEN:** No position.

**STAFF:** No position at this time pending evidence adduced at hearing. This issue is duplicative and can be addressed in Issue 1.

**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?

**POSITIONS**

**DUKE/**

**UCNSB:** Yes. The capacity of the New Smyrna Beach Power Project can and should be included in calculating the reserve margin of Peninsular Florida, which is also known as the Florida Reliability Coordinating Council region. The capacity of the New Smyrna Beach Power Project can and should be included when calculating the reserve margin of the Utilities Commission, City of New Smyrna Beach, Florida. The capacity of the New Smyrna Beach Power Project can and should be included in calculating the



reserve margin of any other Peninsular Florida utility, including associations such as Seminole Electric Cooperative or the Florida Municipal Power Agency, once such utility has signed a contract for the purchase of firm capacity and energy from the Project.

**FECA:** The capacity of the proposed project can not and should not be included in the calculation of the reserve margin of an individual Florida utility or the State as a whole until such time that the plant's output is contractually obligated to be delivered to a utility that serves retail customers in Florida.

**FPC:** No. In the absence of an executed power purchase agreement, whether, when, or where the capacity of the proposed project would be available would be completely speculative. (Rib)

**FPL:** No. Absent a final purchased power contract committing the output of the proposed project to individual Florida utilities, the capacity of the proposed project is not properly included when calculating the reserve margin of an individual Florida utility or the State as a whole. Such a reliance on an uncommitted resource would not be prudent. Absent final purchased power contracts committing the proposed project's capacity to individual Florida utilities, Duke New Smyrna would be free to provide its capacity to utilities outside of Florida, leaving Florida utilities and the state without any reliability benefits and with possible reliability detriments by committing transmission resources.

**LEAF:** No position.

**TECO:** No. The capacity is not committed to serve the customers of any individual Florida utility or the state as a whole.

**IBEW:** No - the capacity of the proposed plant should not be included in the reserve margin as there are no firm contracts for this capacity. Duke New Smyrna will be free to sell the capacity outside of Florida to the highest bidder if the economics justify the transaction.

**USGEN:** No position.

**STAFF:** No position at this time pending evidence adduced at hearing. This issue is duplicative and can be addressed in Issue 1.

**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?

**POSITIONS**

**DUKE/**

**UCNSB:** The transmission improvements that are planned to accommodate power deliveries from the New Smyrna Beach Power Project include approximately 25 miles of additional 115 kV transmission line connecting the Smyrna Substation to the Cassadaga Substation and the Lake Helen Substation. Other facilities that are required for the operation of the Project include the proposed 42-mile gas lateral connecting the Project to FGT's main gas transmission pipeline and approximately 500 feet of water transmission pipe connecting the Project to the adjacent wastewater treatment plant of the UCNSB. The costs of these improvements have been adequately considered in the Project.

**FECA:** No position.

**FPC:** No position.

**FPL:** Without knowing the entities to whom Duke New Smyrna will sell the output of its proposed plant, this question may not be answered.

**LEAF:** No position.

**TECO:** Petitioners have not sustained their burden of proof on these issues.

**IBEW:** IBEW has no position.

**USGEN:** No position.

**STAFF:** No position at this time pending the evidence adduced at hearing.

**NEED FOR ADEQUATE ELECTRICITY AT A REASONABLE COST**

**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?

**POSITIONS**

**DUKE/**

**UCNSB:** Yes. The proposed project will help meet the need for adequate electricity at a reasonable cost without requiring any utility or utility customer to bear the risk of the Project. As a result, customers can only win as a result of the granting of the determination of need.

**FECA:** No.

**FPC:** No. As the Court held in the Nassau decisions, the need criteria of Section 403.519 are utility specific and concern the need of the entity consuming the power -- namely utilities with an obligation to serve customers in Florida. Neither the Commission nor utilities like FPC that must plan for adequate generating capacity may appropriately rely upon uncommitted capacity of a merchant plant to provide "adequate" electricity at a reasonable cost. (Rib, Dolan)

**FPL:** No. The statutory need criterion in Section 403.519, Florida Statutes requiring the Commission to consider "the need for adequate electricity at a reasonable cost" is a utility specific criterion. Duke New Smyrna proposes to build a 514 MW power plant. Duke New Smyrna has alleged and attempted to prove a utility specific need for only 30 MW of the proposed plant (less than 6%). As to the merchant plant capacity of the proposed unit, more than 94% of the unit, Duke has not even attempted to demonstrate a utility specific need.

Duke New Smyrna's attempt to justify its proposed plant's merchant capacity based upon Peninsular Florida's alleged need for adequate electricity at a reasonable cost is

deficient. Peninsular Florida is not a utility with customers and an obligation to serve; consequently, there is no obligation to serve Peninsular Florida. Since the need determined in a need determination proceeding arises from an obligation to serve customers, an attempt to premise a showing of need solely upon Peninsular Florida is legally deficient. Factually, the Joint Petitioner's case fails to demonstrate that the proposed plant will meet a need for adequate electricity at a reasonable cost.

**LEAF:** Conditional yes.

**TECO:** No. The Petition does not allege facts sufficient to support a determination of need.

**IBEW:** No - The petition does not show enough factual data to show a determination of need.

**USGEN:** No position.

**STAFF:** No position at this time pending the evidence adduced at hearing.

**MOST COST EFFECTIVE ALTERNATIVE AVAILABLE**

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

**POSITIONS**

**DUKE/**

**UCNSB:** Yes.

**FECA:** No. Duke New Smyrna has not provided prices for sales of capacity and energy from the proposed plant.

**FPC:** No. Again, as the Court held in the Nassau cases, the statutory criteria are utility specific and apply to retail utilities with an obligation to serve customers. As regards this particular criterion, it makes no sense to speak of cost-effective alternatives without

understanding that the statute speaks of alternative means that a retail utility has available to it for discharging its statutory obligation to serve its customers. (Rib, Dolan)

**FPL:** No. The statutory need criterion in Section 403.519, Florida Statutes requiring the Commission to consider "whether the proposed power plant is the most cost-effective alternative available" is a utility specific criterion. Duke New Smyrna has not demonstrated that its proposed merchant capacity is the most cost-effective alternative available to any individual Florida utility. Duke New Smyrna has also failed to demonstrate that its merchant capacity is the most cost-effective alternative available to Peninsular Florida, even though such a showing would not satisfy the utility specific criterion of Section 430.519, Florida Statutes. Until FPL has the opportunity to complete discovery, FPL cannot take a position as to whether the proposed power plant may be the most cost-effective alternative to the UCNSB; it appears that the UCNSB's analysis may have omitted relevant costs and that the UCNSB did not attempt to solicit alternative proposals.

**LEAF:** Conditional yes.

**TECO:** No. Duke New Smyrna has not and cannot show that the proposed power plant is the most cost-effective alternative available as that term is used in Section 403.519, Fla. Stat.

**IBEW:** IBEW has no position.

**USGEN:** No position.

**STAFF:** No position at this time pending the evidence adduced at hearing.

**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?

**POSITIONS**

**DUKE/**

**UCNSB:** Yes.

**FECA:** No position.

**FPC:** No position.

**FPL:** No.

**LEAF:** No position.

**TECO:** No.

**IBEW:** IBEW has no position.

**USGEN:** No position.

**STAFF:** No position at this time pending the evidence adduced at hearing.

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

**POSITIONS**

**DUKE/**

**UCNSB:** The Joint Petitioners do not agree that this issue is appropriate for this power plant need determination proceeding. Without waiving their objection, the Joint Petitioners take the position that the Project's construction and operation will not adversely affect gas supply or transportation resources. When the Project is operating, it will displace less efficient generation, resulting in more efficient use of both generation and gas transportation (transmission) resources in Florida.

**FECA:** No position.

- FPC:** It will divert these resources from utilities that have an obligation to serve customers in this State.
- FPL:** It will restrict the natural gas supply and transportation that would otherwise be available.
- LEAF:** No position.
- TECO:** Tampa Electric supports the inclusion of this issue. The proposed power plant would divert natural gas supply and transportation resources from utilities having an obligation to serve customers in this state.
- IBEW:** It could divert natural gas from utilities that have an obligation to serve Florida's electric consumers.
- USGEN:** No position.
- STAFF:** No position at this time pending evidence adduced at hearing. This issue is duplicative and can be addressed in Issue 8.
- ISSUE 11:** Will the proposed project result in the uneconomic duplication of transmission and generation facilities?

**POSITIONS**

**DUKE/**

**UCNSB:** No. This question must be gauged from the perspective of costs imposed on customers. Because Duke New Smyrna is bearing all risk, and utilities will purchase only if the transaction is economic, by definition the project cannot result in the uneconomic duplication of facilities.

**FECA:** No position.

**FPC:** Yes. Petitioners do not sincerely seek to justify this plant on the grounds that the retail utilities' existing or planned power plants cannot produce sufficient capacity to furnish adequate power to their customers. Rather, petitioners candidly acknowledge that the proposed project is intended to displace existing plants that still have a useful life. This amounts to economic waste.

**FPL:** Yes. Peninsular Florida utilities already have plans in place to construct generation facilities which are necessary to ensure their system reliability and achieve their reliability criteria. This is evidenced in part by Duke New Smyrna's filing which shows that Peninsular Florida's reserve margin will be in excess of 15% from the summer of 1998 through the summer of 2007 without the Project. Consequently, the proposed plant is not needed for reliability purposes. If the proposed plant were nonetheless built, it would be an unnecessary and uneconomic duplication of generation facilities.

**LEAF:** No position.

**TECO:** Tampa Electric supports the inclusion of this issue. The proposed power plant would divert natural gas supply and transportation resources from utilities having an obligation to serve customers in this state.

**IBEW:** Yes - Utilities existing and planned power plants are capable of meeting the capacity needs of Florida's energy consumers.

**USGEN:** No.

**STAFF:** No position at this time pending evidence adduced at hearing. This issue is duplicative and can be addressed in Issue 8.

**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?

**POSITIONS**

**DUKE/**  
**UCNSB:** No.

**FECA:** No position.

**FPC:** No position.



**FPL:** Perhaps. This matter is open pending discovery.

**LEAF:** No position.

**TECO:** No position.

**IBEW:** IBEW has no position.

**USGEN:** No position.

**STAFF:** No position at this time pending evidence adduced at hearing. This issue is duplicative and can be addressed in Issue 8.

#### CONSERVATION MEASURES

**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?

#### POSITIONS

**DUKE/UCNSB:** There are no additional conservation measures reasonably available to the Joint Petitioners that would mitigate the need for the proposed power plant.

**FECA:** No position.

**FPC:** Petitioners have not engaged in efforts to take such measures; nor may a merchant plant satisfy this criterion. A merchant plant has no "need" for the plant (but only for profits). So it makes no sense to talk about mitigating that need. (Rib, Dolan)

**FPL:** There may well be conservation measures available that would mitigate the need for the proposed plant. It appears that the UCNSB has not sufficiently investigated its conservation potential, and without knowing the individual utilities to which Duke New Smyrna will sell its output, it cannot be determined whether there are conservation measures available which would mitigate those utilities' "need" for the output of the proposed plant.

**LEAF:** No.

**TECO:** The petitioners have not sustained their burden of demonstrating that no conservation measures are available to mitigate the need for the proposed power plant.

**IBEW:** IBEW has no position.

**USGEN:** No position.

**STAFF:** No position at this time pending the evidence adduced at hearing.

#### LEGAL ISSUES

**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)?

#### POSITIONS

**DUKE/**

**UCNSB:** Yes. Past decisions requiring agreements were limited to circumstances in which the applicant tried to obligate a utility and its customers as a condition precedent. By contrast, Duke New Smyrna proposes to enhance reliability and economics while absorbing all investment risk.

**FECA:** No. The Commission cannot render a determination of need unless there is an identified retail need that is sufficient to justify the proposed plant.

**FPC:** No, it does not. The express terms of Sections 366.82(1) and 403.519, Fla. Stat., and the decisions of the Supreme Court in the Nassau cases make clear that the Legislature simply has not authorized determinations of need for merchant plants in this State. Whether this might be a good idea or bad, the Legislature has not permitted it. Under existing law, only retail utilities with an

obligation to serve customers (or independent power produces with an executed power purchase agreement) may seek a determination of need under Section 403.519, Florida Statutes.

**FPL:** No.

**LEAF:** Yes, the Commission has authority to render a determination.

**TECO:** No.

**IBEW:** No. The Commission cannot render a determination of need unless it is shown that there is need for the proposed capacity.

**USGEN:** Yes.

**STAFF:** No position at this time pending the review and analysis of the arguments of the parties.

**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?

**POSITIONS**

**DUKE/**

**UCNSB:** Yes.

**FECA:** Yes.

**FPC:** The Commission must follow the directives of the statute and the Florida Supreme Court restricting its jurisdiction in the present case. The Commission does not have the power to deviate from these directives.

**FPL:** Yes. Seldom is a legal issue the Commission is called upon to address more clearly settled than this issue.

The Commission, on its own initiative, has previously dismissed petitions for a determination of need because it found that the petitioners were "not proper applicants

for a need determination proceeding under Section 403.519, Florida Statutes." Order No. PSC-92-1210-FOF-EQ. One of the two projects whose need petitions were dismissed was an independent power producer, Pahoee Power Partners II Project; the other project, owned by Nassau Power Corporation, was a cogenerator. Both were characterized by the Commission as non-utility generators. The Commission found that the need to be determined in a need determination proceeding was the need "resulting from a duty to serve customers" and that non-utility generators had "no such need since they are not required to serve customers." The Commission found that this interpretation of the Siting Act was in accord with and upheld in Nassau Power Corporation v. Beard, 601 So. 2d 1175.

The Commission's dismissal of these entities as improper applicants under Section 403.519, Florida Statutes was appealed to the Supreme Court of Florida in Nassau Power Corporation v. Deason, 641 So.2d 396 (Fla. 1994), where the Court framed the issue as follows: "[a]t issue here is whether a non-utility generator, such as Nassau, is a proper applicant for a determination of need under Section 403.519, Florida Statutes (1991)." The Court found that the Commission's construction of the term "applicant" as used in Section 403.519, Florida Statutes, was consistent with the plain language of the Siting Act and "the Court's 1992 decision in Nassau Power Corp. v. Beard." The Commission's dismissal of the need determination on the ground that the petitioner was not a proper applicant was affirmed.

**LEAF:** No position.

**TECO:** Yes. This issue has been decided by the Commission in the affirmative. The Commission dismissed need petitions filed by Ark Energy, Inc. and Nassau Power Corporation because they weren't proper applicants under Section 403.519, Florida Statutes. These decisions were affirmed by the Supreme Court of Florida.

**IBEW:** IBEW has no position.

**USGEN:** Yes.

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**STAFF:** No position at this time pending the review and analysis of the arguments of the parties. The parties have not, to date, addressed the issues relative to Section 403.519, Florida Statutes.

**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?

**POSITIONS**

**DUKE/**

**UCNSB:** Not at this time, nor is such an obligation a necessary prerequisite for the Commission's granting the determination of need for the Project requested by the Joint Petitioners. Once utilities avail themselves of the capacity and energy of the project through contractual arrangements because it is economic, Duke New Smyrna's obligations will be no different from any other wholesale supplier.

**FECA:** No.

**FPC:** Clearly not.

**FPL:** No.

**LEAF:** No position.

**TECO:** Tampa Electric supports the inclusion of this issue and responds to it in the negative.

**IBEW:** No.

**USGEN:** No position.

**STAFF:** No.

**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?

**POSITIONS**

**DUKE/  
UCNSB:**

This issue is duplicative of Issue 14 and others. Both Duke New Smyrna and the UCNSB are "applicants" and an "electric utilities" within the meaning of the Siting Act and Section 403.519, Florida Statutes.

**FECA:**

FECA supports the inclusion of this issue in this docket. Duke New Smyrna is not a proper "applicant" or an "electric utility" within the meaning of the Siting Act and Section 403.159, F.S. UCNSB is a proper applicant, but it does not have a need that justifies the proposed plant.

**FPC:**

Neither Duke New Smyrna nor UCNSB may file and prosecute an application under Section 403.519, Florida Statutes, or the Siting Act for a merchant plant. The statutory provisions do not accommodate merchant plants either in intent or according to their terms. Section 366.85, Fla. Stat., specifies that "For the purpose of ...[§] 403.519, 'utility' means any person or entity of whatever form which provides electricity...at retail to the public..." (Emphasis added). A merchant plant does not provide electricity to retail customers. The Florida Supreme Court in the Nassau decisions likewise made clear that Section 403.519, Florida Statutes, and the Siting Act are limited to resolving applications by utilities that have an obligation to serve retail customers, thus excluding merchant plants.

**FPL:**

No. In Order No. PSC-92-1210-FOF-EQ, the Commission found another independent power producer like Duke New Smyrna not to be an "applicant" or an "electric utility" within the meaning of Section 403.519, Florida Statutes, and the Siting Act. That decision, which was affirmed in Nassau Power Corp. v. Deason, is dispositive in this case as to Duke New Smyrna.

As to the UCNSB, the UCNSB does not profess to be an applicant as to Duke New Smyrna's merchant capacity. The only capacity that the UCNSB states that it needs from the Duke New Smyrna project is 30 MW of capacity allegedly committed to it under the Participation Agreement. The UCNSB is not an applicant as to Duke New Smyrna's merchant capacity.

**LEAF:** No position.

**TECO:** The petitioners have not sustained their burden of demonstrating that no conservation measures are available to mitigate the need for the proposed power plant.

**IBEW:** IBEW has no position.

**USGEN:** Yes.

**STAFF:** This issue can be addressed in Issue 14.

**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?

**POSITIONS**

**DUKE/**

**UCNSB:** The Joint Petitioners object to this issue as stated because it is argumentative and duplicative of other issues. Without waiving this objection, the Joint Petitioners take the following position:

Yes. The Commission would be meeting its responsibilities under Section 403.519, Florida Statutes, and the Grid Bill by assuring adequate electricity at a reasonable cost and by providing for enhancement of electric system reliability in Florida without economic risk to Florida electric customers, as well as by assuring the other benefits to Florida electric customers that would flow from a robust competitive wholesale power market.

**FECA:** No.

**FPC:** No. The Commission would be encouraging an uneconomic duplication of facilities.

**FPL:** No.

**LEAF:** No position.

**TECO:** Tampa Electric supports the inclusion of this issue and responds to it in the negative.

**IBEW:** No.

**USGEN:** Yes.

**STAFF:** No position pending review of parties' briefs.

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

**POSITIONS**

**DUKE/**  
**UCNSB:** Yes.

**FECA:** No.

**FPC:** It does not and cannot because the proposed project is a merchant plant.

**FPL:** No. As set forth fully in FPL's motion to dismiss, the Joint Petition fails to meet the requirements of Rule 25-22.081, Florida Administrative Code in several important respects.

**LEAF:** No position.

**TECO:** Tampa Electric supports the inclusion of this issue and responds to it in the negative.

**IBEW:** IBEW has no position.

**USGEN:** No position.



**STAFF:** No position pending review of the parties' briefs.

**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?

**POSITIONS**

**DUKE/**

**UCNSB:** Yes, the Joint Petition states a cause of action.

**FECA:** No.

**FPC:** It does not state a claim for relief that the Commission has power to grant for the reasons we have given.

**FPL:** The Joint Petition fails to state a cause of action not only because it fails to allege an individual utility's need for the merchant capacity of the proposed plant, but also because it fails to allege as to Peninsular Florida that the plant is needed for "electric system reliability and integrity" and "adequate electricity at a reasonable cost" and because it fails to allege that it is "the most cost-effective alternative." Allegations that the plant is "consistent with" need or that it is "a cost-effective alternative" fail to state a cause of action. Duke's testimony and exhibits suffer from similar deficiencies.

**LEAF:** No position.

**TECO:** Tampa Electric supports the inclusion of this issue and responds to it in the negative.

**IBEW:** No.

**USGEN:** Yes.

**STAFF:** No position pending review of the parties' briefs.

**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?

**POSITIONS**

**DUKE/**

**UCNSB:** No. A contract is not required because, unlike prior applicants, the Joint Petitioners are not attempting to impose costs or risks on any utility or utility customer.

**FECA:** No.

**FPC:** Yes.

**FPL:** Yes. Individual utilities demonstrating a need under the Siting Act are required to show that the plant is needed to meet their service obligations to their customers. QFs and other non-utility generators also have to be able to show that their capacity is needed by a utility and have a contract with the utility which has an obligation to serve and a need for their power. If Duke New Smyrna were allowed to proceed without its own obligation to serve or a contract with an entity which had an obligation to serve, it would be given a special status without any compelling justification.

**LEAF:** No position.

**TECO:** Tampa Electric supports the inclusion of this issue and responds to it in the affirmative.

**IBEW:** Yes. Utilities must show and demonstrate a need for proposed capacity to serve their customers.

**USGEN:** No position.

**STAFF:** No position pending review of the parties' briefs.

**POLICY ISSUES**

**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?

**POSITIONS**

**DUKE/**

**UCNSB:** Basically, not at all, except the utilities will have another resource to evaluate. Regardless of the grounds for the Commission's decision to grant the requested determination of need, it would not affect subsequent petitions for determination of need by retail-serving utilities seeking to build power plants to meet the needs of their retail customers. Such petitions for determination of need would be evaluated on the same statutory criteria that are applicable to the petition for determination of need for the New Smyrna Beach Power Project.

**FECA:** FECA supports the inclusion of this issue in this docket. Approval of the Duke New Smyrna project, based upon a wholesale statewide need, would adversely impact the ability of Florida's electric cooperatives to plan for and provide capacity and energy for the present and future needs of their consumer-owners.

**FPC:** It would create havoc in future need proceedings since neither the Commission nor retail utilities would know whether or to what extent they were able or obligated to take into account merchant plants in planning future generation. (Rib, Dolan)

**FPL:** Peninsular Florida utilities would have to confront Commission findings that Duke New Smyrna's plant was needed to meet Peninsular Florida's need and that it was the most cost-effective alternative available, even though this case does not appear likely to yield a serious comparison of the Duke New Smyrna plant to other planned alternatives. It may reasonably be anticipated

that Duke New Smyrna may argue that such findings regarding its plant preclude an affirmative determination of need until their plant is under contract. If it has no impact, then there was no need for the Duke New Smyrna plant in the first place (Steinmeier)

**LEAF:** No position.

**TECO:** Tampa Electric supports inclusion of this issue. Such a result would expose Commission regulated utilities to significant risks and uncertainties and adversely affect the ability to plan for future demand, thereby jeopardizing reliable electric service to utility customers in Florida.

**IBEW:** It would have an adverse affect on planning for future needs, thus creating uncertainty in the industry, and possible problems supplying reliable service to Florida's electric consumers.

**USGEN:** No position.

**STAFF:** No position at this time pending evidence adduced at hearing.

**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?

**POSITIONS**

**DUKE/**

**UCNSB:** The Joint Petitioners believe that this issue is irrelevant, but state their position as follows:

No. Like the numerous retail-serving electric utilities in Florida that presently do not own their own generation but rather buy all of their power supplies at wholesale, retail-serving electric utilities will have the same obligation to provide retail service if the Project is built as if the Project is not built. While the obligation remains the same, the Project will provide an additional resource with which to fulfill that

obligation. All utilities in Peninsular Florida will have the opportunity to buy power from the Project, and presumably will do so when it is cost-effective.

**FECA:** FECA supports the inclusion of this issue in this docket. Whether or not this project is approved will have no impact on Florida's electric cooperatives' obligation to plan for and meet their present or future needs.

**FPC:** Due to this issue and other policy issues like it, the present proceeding is not the time or place to make a change in existing law. (Dolan)

**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. (Steinmeier)

**LEAF:** No.

**TECO:** Tampa Electric supports inclusion of this issue and responds to it in the negative.

**IBEW:** Stipulated.

**USGEN:** No position.

**STAFF:** No position at this time pending evidence adduced at hearing.

**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?

**POSITIONS**

**DUKE/**

**UCNSB:** The Joint Petitioners believe that this issue is irrelevant, but state their position as follows:

No. Neither the Commission's granting the requested determination of need, nor the Project's construction and

operation will create a risk of non-recovery of past or future investments. Nor will such actions increase the cost of providing electric service or the cost of maintaining reliable service. In fact, the Project will result in lower overall costs of providing electric service and of maintaining reliable electric service in Florida.

- FECA:** Yes.
- FPC:** Yes. The risk is inherent in the uneconomic duplication of facilities that will attend siting new plants designed to displace viable existing ones. (Dolan)
- FPL:** Yes. Since Duke cannot show a reliability need for its plant, it argues that there is an economic need to displace generation from oil fired units or gas fired units with a higher heat rate. 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.
- LEAF:** No. This issue is inappropriate, especially as to alleged non-recovery of investments not yet made.
- TECO:** Tampa Electric supports inclusion of this issue and responds to it in the affirmative.
- IBEW:** IBEW has no position.
- USGEN:** No position.
- STAFF:** No position at this time pending evidence adduced at hearing.

**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?

**POSITIONS**

**DUKE/**

**UCNSB:** Basically, not at all. See DUKE/UCNSB's position on Issue 22 above.

**FECA:** No position.

**FPC:** Again, it would create havoc in future need proceedings since no one involved would know whether or to what extent reliance could be placed upon a merchant plant to meet the specific needs of retail utilities. (Rib, Dolan)

**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.

**LEAF:** No position.

**TECO:** Tampa Electric supports the inclusion of this issue and responds by saying that such determination of need would confuse and adversely affect subsequent need determination proceedings, to the detriment of electric utility customers statewide.

**IBEW:** IBEW has no position.

**USGEN:** No position.

**STAFF:** No position at this time pending evidence adduced at hearing.

**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?

**POSITIONS**

**DUKE/**

**UCNSB:**

The Joint Petitioners object to the form of the question. The Commission has only applied the statutory criteria on a utility-specific basis in cases where the petitioning entity (utility or supplier) was attempting to bind the utility's ratepayers to pay for the proposed power plants either through rates or through long-term contracts.

Because the Project (and any similar power plants) will be subject to the Commission's Grid Bill authority as part of the State's electric power supply system the Commission will fulfill its Grid Bill responsibilities as it does now, with one (or perhaps more) additional wholesale power suppliers in the State.

**FECA:**

No position.

**FPC:**

It could not adequately do so. (Rib, Dolan)

**FPL:**

It would frustrate the Commission's ability to protect against uneconomic duplication of facilities and it would make assurance of grid reliability more difficult. (Steinmeier)

**LEAF:**

No position.

**TECO:**

Tampa Electric supports the inclusion of this issue and responds by saying that the Commission's ability to accomplish these statutory duties would be adversely affected by such an abandonment.

**IBEW:**

IBEW has no position.

**USGEN:**

No position.



**STAFF:** No position at this time pending evidence adduced at hearing.

**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?

**POSITIONS**

**DUKE/**

**UCNSB:** No, granting the requested determination of need will not have this result, because utilities already have the opportunity to establish need for electrical power plants in this way, based on the criteria in Section 403.519.

**FECA:** No position.

**FPC:** This policy issue and others like it make clear that the Commission should not attempt to change existing law in the context of this proceeding. (Dolan)

**FPL:** An affirmative determination should not be granted. However, if Duke New Smyrna 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 a basis other than an individual utility's need. (Steinmeier)

**LEAF:** No position.

**TECO:** Yes.

**IBEW:** IBEW has no position.

**USGEN:** No position.

**STAFF:** No position at this time pending evidence adduced at hearing.

**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?

**POSITIONS**

**DUKE/**

**UCNSB:** None. The level of reasonably achievable cost-effective conservation measures is a function of the efficacy of such measures, the cost of such measures, and the cost and efficacy of supply-side alternatives at any point in time. The Joint Petitioners note that no evidence has been introduced with respect to this issue.

**FECA:** No position.

**FPC:** Merchant plants have no incentive to achieve conservation and every incentive to maximize energy consumption. Thus, granting the joint petition will have a deleterious effect on conservation measures. (Dolan)

**FPL:** It would further reduce the cost estimate of combined cycle technology, reducing the avoided cost of generation, making it more difficult to justify conservation measures.

**LEAF:** None.

**TECO:** The effect would be negative.

**IBEW:** IBEW has no position.

**USGEN:** No position.

**STAFF:** No position at this time pending evidence adduced at hearing.

**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?

**POSITIONS**

**DUKE/**

**UCNSB:** Yes. The Project will enhance electric system reliability, provide adequate electricity at a reasonable cost without economic risk to ratepayers, and improve the overall environmental profile of electricity generation in Florida.

**FECA:** No.

**FPC:** No. It would violate the law of Florida and thus subvert the public interest. The Legislature has established a framework for determining the need for generating capacity that has worked successfully for decades. This has served and will continue to serve the best interests of the public. It would not serve the public interest to depart from existing law, without legislative authorization and a full airing of the issues in an appropriate forum. This is exactly what petitioners are urging the Commission to do. (Dolan)

**FPL:** This policy issue is inappropriate. Unlike the preceding policy issues, it does not address specific matters within the Commission's jurisdiction. The Commission is not charged under either the Siting Act or Chapter 366, Florida Statutes, to generally protect the "public interest." Without a contract with individual utilities for its merchant capacity, Duke New Smyrna cannot demonstrate any impact on Florida electric utility customers.

**LEAF:** Conditional yes.

**TECO:** Tampa Electric opposes inclusion of this issue as worded. If it is included, Tampa Electric's position is no.

**IBEW:** IBEW has no position.

**USGEN:** Yes.

**STAFF:** No position at this time pending evidence adduced at hearing.

**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?

**POSITIONS**

**DUKE/**

**UCNSB:** Yes.

**FECA:** No position.

**FPC:** This issue inappropriately assumes that there is an unmet need for wholesale competition in this State. This is not a proper inquiry in a statutory need proceeding under Section 403.519, Florida Statutes, which is limited to considering the utility specific need of retail utilities for capacity to serve their customers. (Dolan)

**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.

**LEAF:** Conditional yes.

**TECO:** Tampa Electric opposes inclusion of this issue as worded. If it is included, Tampa Electric's position is that Petitioners have not met their burden of demonstrating the affirmative.

**IBEW:** IBEW has no position.

**USGEN:** Yes.

**STAFF:** No position at this time pending evidence adduced at hearing.

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

**POSITIONS**

**DUKE/**

**UCNSB:** Yes.

**FECA:** No.

**FPC:** No. It would flatly violate state law and do nothing to advance an area of regulation that federal law leaves expressly to the states. (Dolan)

**FPL:** This is an inappropriate issue. Questions of federal energy policy are beyond the jurisdiction of the Commission. Granting the determination of need would be inconsistent with well established state policy, which has long been that a non-utility generator such as Duke New Smyrna must have a contract with a utility to justify a need for its proposed power plant.

**LEAF:** Conditional yes.

**TECO:** Tampa Electric opposes inclusion of this issue. If it is included, Tampa Electric's position is no. State policy should govern and, accordingly, no convincing demonstration can be made as to Federal policy.

**IBEW:** IBEW has no position.

**USGEN:** Yes.

**STAFF:** No position at this time pending evidence adduced at hearing.

**FINAL ISSUES**

**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?

**POSITIONS**

**DUKE/**

**UCNSB:** Yes.

**FECA:** No.

**FPC:** No. (Rib, Dolan)

**FPL:** No.

**LEAF:** No position.

**TECO:** No.

**IBEW:** No.

**USGEN:** Yes.

**STAFF:** No position at this time pending evidence adduced at hearing.

**ISSUE 33:** Should this docket be closed?

**POSITIONS**

**DUKE/**

**UCNSB:** Yes. When the Commission's order granting the requested determination of need for the New Smyrna Beach Power Project has become final and no longer subject to appeal, this docket should be closed.

**FECA:** Yes.

**FPC:** Yes, after denying the Joint Petition.

**FPL:** Yes.

**LEAF:** Yes.  
**TECO:** Yes.  
**IBEW:** Yes.  
**USGEN:** Yes, after the Commission grants Duke's Petition.  
**STAFF:** Yes.

IX. EXHIBIT LIST

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
			<u>Direct</u>
Vaden	DUKE/UCNSB	_____ (RLV-1)	The Participation Agreement between the UCNSB and Duke New Smyrna, including Amendment Number One to the Participation Agreement.
		_____ (RLV-2)	Historical and projected customers of the UCNSB.
		_____ (RLV-3)	Historical and projected summer and winter peak demands of the UCNSB system.
		_____ (RLV-4)	Historical and projected energy requirements of the UCNSB system.
		_____ (RLV-5)	The UCNSB's power supply resources.
		_____ (RLV-6)	Cost-effectiveness tables.

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
		<u>                    </u> (RLV-7)	Summer and winter reserve margins for Peninsular Florida with and without the Project's seasonal capacity.
		<u>                    </u> (RLV-8)	Comparison of capital costs, heat rates, and availability factors for proposed generating units for Peninsular Florida.
		<u>                    </u> (RLV- )	Tables 4, 5, 6, 7, 8, 9, 11, 12, 13, and 14 and Figures 16, 17, and 18 in the Exhibits filed in support of the Joint Petition on August 19, 1998, as well as the text contained in Section II.B, II.F., IV.A, V.A, and VI of those Exhibits.
Green	DUKE/UCNSB	<u>                    </u> (MCG-1)	Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. Ownership Structure.
		<u>                    </u> (MCG-2)	Order of the Federal Energy Regulatory Commission ("FERC") approving Duke New Smyrna's market-based rate tariff.





<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
		_____ (DMN-5)	Florida Capacity per NERC.
		_____ (DMN-6)	Southern Capacity per NERC
		_____ (DMN-7)	New Smyrna Beach Power Project, Projected Operations and Fuel Savings
		_____ (DMN-8)	Florida - 1998 Baseload (40%)
		_____ (DMN-9)	Florida Dispatch - 1998 High Load Factor Intermediate (25%)
		_____ (DMN-10)	Florida Dispatch - Low Load Factor Intermediate (15%)
		_____ (DMN-11)	Florida Dispatch - 1998 High Load Factor Peak (15%)
		_____ (DMN-12)	Florida Dispatch - 1998 SuperPeak (5%)
		_____ (DMN-13)	Comparative Electricity Production Costs, SERC and FRCC, 1995 - 1998
		_____ (DMN-14)	Benefits of Duke New Smyrna Beach Power Project (Graphic)
		_____ (DMN-15)	<u>Achieving Competitive Advantage Through Quantative Electric Asset Valuation Using the Altos North American Regional Electricity Model</u>

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
		_____ (DMN-16)	<u>Overview of the North American Regional Gas (NARG) Model</u>
		_____ (DMN- )	Table 10 and Part I of Table 15 contained in the Exhibits submitted on August 19, 1998.
Locascio	DUKE/UCNSB	_____ (ML-1)	Current resume of Mark Locascio
		_____ (ML-2)	New Smyrna Beach Power Project, Project Profile
		_____ (ML-3)	New Smyrna Beach Power Project Site Plan
		_____ (ML-4)	New Smyrna Beach Power Project, Proposed Plot Plan.
		_____ (ML-5)	CAD Renderings of the power plant and site layout
		_____ (ML-6)	Estimated Plant Performance and Emissions
		_____ (ML-7)	New Smyrna Beach Power Project; Process Flow Diagram
		_____ (ML-8)	Summary of the Design Basis for the Project
		_____ (ML-9)	Generation Alternatives considered for the Project

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
		_____ (ML-10)	Preliminary Water Balances for the Project.
		_____ (ML-11)	EPC Schedule for the Project
		_____ (ML- )	Tables 1, 2, and 15, and Figures 4, 5, 6, 7, 9, 10, 11, and 14 in Exhibits filed on August 19, 1998, and the text that accompanies those exhibits
Sanford	DUKE/UCNSB	_____ (KS-1)	Resume of Kennie Sanford, Jr., P.E.
		_____ (KS-2)	Electrical One-Line Diagram of the New Smyrna Beach Power Project

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
		<u>                    </u> (KS-3)	New Smyrna Beach Power Project, Electrical Facilities Description, which includes an electrical system overview of the Project, descriptions of the major electrical components of the Project, description of the Project's startup and standby power supplies, listing of applicable electrical design considerations (codes and standards), and description of systems controls for the Project
Armand	DUKE/UCNSB	<u>                    </u> (MPA-1)	Qualifications of Michel P. Armand, P.E.
		<u>                    </u> (MPA-2)	Summary of Transmission Project Experience, Resource Management International, Inc.
		<u>                    </u> (MPA-3)	Transmission Interconnection Map for the New Smyrna Beach Power Project (Figure 12 in the Exhibits filed on August 19, 1998)

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
		<u>                    </u> (MPA-4)	New Smyrna Beach Power Project, Results of Power Flow Studies - 2001
		<u>                    </u> (MPA-5)	New Smyrna Beach Power Project, Results of Power Flow Studies - 2004
Wall	DUKE/UCNSB	<u>                    </u> (LAW-1)	The Transaction Agreement between Duke Energy Power Services, L.L.C. and Citrus Trading Corp.
Meling	DUKE/UCNSB	<u>                    </u> (JLM-1)	P r e l i m i n a r y Evaluation of Site Features and Potential Impacts.
Dolan	FPC	<u>                    </u> (VMD-1)	Letter from James A. Scott, Chairman, Regulated Industries Committee, The Florida Senate to Julia Johnson, Chairman, Public Service Commission dated December 12, 1997
		<u>                    </u> (VMD-2)	Letter from Julia Johnson, Chairman, Public Service Commission to the Hon. Jim Scott, Chairman, Senate Regulated Industries Commission, The Florida Senate dated December 19, 1997

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

X. PROPOSED STIPULATIONS

There are no proposed stipulations.

XI. PENDING MOTIONS

1. UCNSB/DNSB Motion to Strike Portions of Prefiled Direct Testimony of Florida Power & Light Company's Witness, William B. Steinmeier, filed November 4, 1998. FPL Response to UCNSB and Duke's Motion to Strike Portions of Prefiled Direct Testimony of William D. Steinmeier, filed November 16, 1998.
2. UCNSB/DNSB Motion to Strike Portions of Prefiled Direct Testimony of Florida Power Corporation's Witness, Vincent M. Dolan, filed November 4, 1998. FPC Memorandum in Opposition to Petitioners' Motions to Strike Portions of Prefiled Testimony of Vincent M. Dolan and Michael D. Rib, filed November 16, 1998.
3. UCNSB/DNSB Motion to Strike Portions of Prefiled Direct Testimony of Florida Power Corporation's Witness, Michael D. Rib, filed November 4, 1998.
4. FPL Motion to Dismiss Joint Petition, filed September 8, 1998.
5. FPC Motion to Dismiss Proceeding, filed September 8, 1998.
6. FPL Motion for Protective Order filed by Florida Power & Light Company, November 10, 1998. UCNSB/DNSB Response to Motions for Protective Order Filed by FPL, FPL Group, and FPL Energy, Inc., filed November 13, 1998.
7. FPL Motion for Protective Order filed by FPL Group, November 10, 1998. UCNSB/DNSB Response to Motions for Protective Order Filed by FPL, FPL Group, and FPL Energy, Inc., filed November 13, 1998.
8. FPL Motion for Protective Order filed by FPL Energy, Inc., November 10, 1998. UCNSB/DNSB Response to Motions for Protective Order Filed by FPL, FPL Group, and FPL Energy, Inc., filed November 13, 1998.

9. Florida Wildlife Federation Petition to Intervene filed November 13, 1998.
10. TECO Motion for Protective Order, filed November 13, 1998.
11. Save the Manatee Club Petition to Intervene filed November 16, 1998.
12. Florida State Building & Construction Trades Council's Petition to Intervene, filed November 20, 1998.
13. Louisville Gas & Electric Energy Corporation's Motion for Leave to File an Amicus Curiae Memorandum of Law and to Address the Commission Regarding Issues Posed by Motions to Dismiss Joint Petition by UCNSB and Duke, Amicus Curiae Memorandum of Law, and Request for Certification of Counsel, filed November 23, 1998.

XII. RULINGS

1. System Council U-4, IBEW's petition for Leave to Intervene, filed October 7, 1998, was **GRANTED** at the Prehearing Conference, November 5, 1998.
2. UCNSB's Motion for Alternate Expedited Discovery Schedule contained in it's Response in Opposition to FPL's Motion to Expedite Discovery and Motion for Alternate Expedited Discovery Schedule, filed October 19, 1998, was **GRANTED** at the Prehearing Conference, November 5, 1998.
3. FPL and FPC's requests for oral argument on the pending Motions to Dismiss were **GRANTED** at the Prehearing Conference. Two hours at the beginning of the hearing are set aside for the parties to argue their positions on the pending Motions to Dismiss filed by FPL and FPC. The time is to be divided one-half hour each for FPL and FPC, with one hour for UCNSB to respond to both utilities' arguments.

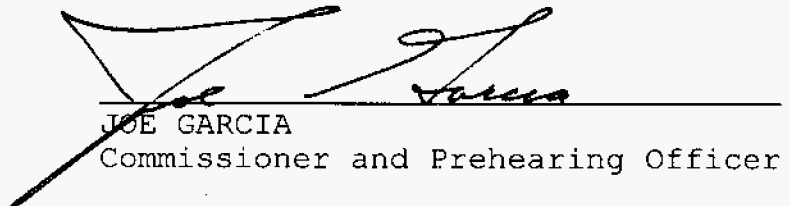


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It is therefore

ORDERED by Commissioner Joe Garcia, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner Joe Garcia, as Prehearing Officer, this 1st day of December, 1998.

  
\_\_\_\_\_  
JOE GARCIA  
Commissioner and Prehearing Officer

( S E A L )

LJP/GAJ

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 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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric  
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gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

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