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RECORDS AND REPORTING

September 8, 1998

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

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

Dear Ms. Bayo:

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

1. Florida Power Corporation's Petition to Intervene; 09722-98
2. Florida Power Corporation's Motion to Dismiss Proceeding; and 09723-98
3. Florida Power Corporation's Request for Oral Argument. 09724-98

Also enclosed are additional copies of the above documents for acknowledgement of filing. We request you acknowledge receipt and filing of the above by stamping these additional copies and returning them to me in the self-addressed, stamped enveloped provided for your convenience.

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If you or your Staff have any questions regarding this filing, please contact me at (813) 821-7000.

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FPSB BUREAU OF RECORDS

Very truly yours,

Gary L. Sasso  
Gary L. Sasso by F. Hawks

Enclosures  
cc: Counsel of Record  
GLS:jlc

S#108059.1

CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A.

ORLANDO PENSACOLA TALLAHASSEE WEST PALM BEACH ST. PETERSBURG MIAMI

PTI Brad

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: August 19, 1998

FLORIDA POWER CORPORATION'S PETITION TO INTERVENE

I. Introduction

1. Florida Power Corporation ("FPC") petitions the Commission for leave to intervene as a full party respondent in this proceeding, pursuant to Fla. Admin. Code Rule 25-22.039. Petitioners Utilities Commission, City of New Smyrna Beach, Florida ("New Smyrna") and Duke Energy New Smyrna Beach Power Company, L.L.P. ("Duke") seek relief from the Commission -- namely, authority to build a "merchant plant" -- that would profoundly restructure this State's statutorily-mandated approach to planning and siting generating capacity. In turn, this would impinge directly upon FPC's substantial interests in meeting its obligations (1) to evaluate, plan for, and provide adequate and reliable electric service and (2) to maintain the integrity of the grid. Further, based upon the preliminary information provided, it appears that the proposed project will directly affect and impair FPC's transmission system.

2. This is Duke's second attempt to gain Commission approval to build a merchant plant in this State. The first time, Duke sought a declaratory statement that Exempt Wholesale

Generators ("EWGs") may apply for a determination of need to build a merchant plant under Section 403.519, Fla. Stat., and Commission Rules 25-22.080-.081, Florida Administrative Code, as the necessary precondition to obtaining approval of the project under the Florida Electrical Power Plant Siting Act ("Siting Act"), absent a contract with a utility that would purchase the power generated by the EWG.

3. As the Commission quite properly recognized, the relief sought by Duke would require issuance of a declaratory statement by the Commission that would not merely affect Duke in its particular set of circumstances, "but would carry implications for the electric power industry statewide." 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, Dkt. No. 971446-EU, Order No. PSC-98-0078-FOF-EU (Jan. 13, 1998). In essence, Duke's request amounted to a broadside assault on this State's current regulatory approach to planning and siting generating capacity and thus presented a host of significant policy issues that the Commission and the Legislature would have to address in a forum that permitted broad participation by affected persons, including public utilities like FPC. Accordingly, the Commission denied Duke's request for declaratory relief.

4. Attempting to short-circuit this process, Duke filed the instant petition for permission to build essentially the same plant ostensibly as a co-applicant with a state-regulated utility, namely, New Smyrna. Duke bases its current petition on the fact that it has entered into a participation agreement with New Smyrna contemplating that New Smyrna may obtain an "entitlement" to 30 MW of capacity and associated power from the proposed Duke facility. The Joint Petition discloses, however, that a "final power purchase agreement" has not yet been "negotiated and executed" by the parties. Exhibits to Joint Petition, at 16, ¶ 5.

5. At best, the proposed agreement amounts to the tail wagging the dog, inasmuch as it will account for only 30 MW out of the 514 MW that the proposed plant would generate. As Duke admits in its petition:

[E]xcept for the 30 MW of entitlement capacity provided to the UCNSB [New Smyrna], the Project will be a "merchant" plant. A merchant plant differs from a traditional "rate based" plant, in that the costs of a rate based plant are recovered through the rates charged to the utility's captive customers.

Joint Petition, ¶ 21 (emphasis added). So the basic question remains whether Section 403.519 and the Siting Act may be used to site a merchant plant that proposes to generate power that no state-regulated utility has contracted to purchase and that no state-regulated utility claims, for the most part, to need in order to meet its state-mandated obligations to serve its retail customers. The answer under existing law is still "no."

6. In view of the gravity of this issue, and the obvious impact it has on FPC's role under the regulatory structure of this State, the Commission permitted FPC to participate in Duke's declaratory judgment proceeding. In the course of that proceeding, the Commission Staff and Duke itself acknowledged in written submissions to the Commission that the concerns raised by FPC in its petition to intervene in that docket would be implicated even more directly in an actual need proceeding.<sup>1/</sup> It follows that FPC's petition to intervene in this case should be granted.

## II. Intervenor Information

7. The name and address of the affected agency are:

Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

8. The name and address of the petitioner are:

Florida Power Corporation  
P.O. Box 14042  
3201 - 34th Street, South  
St. Petersburg, Florida 33733-4042

9. All pleadings, motions, orders, and other documents directed to the petitioner are to be served on:

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<sup>1/</sup> See, e.g., PSC Staff Memorandum, Dkt. No. 971446-EU (Dec. 2, 1997) at p. 3 (acknowledging FPC's concerns may meet test for standing to intervene in need determination proceeding); Duke Energy New Smyrna Beach Power Company, L.L.P.'s Motion to Dismiss Florida Power Corporation's Petition to Intervene and to Deny Request for Administrative Hearing, Docket No. 971446-EU, Filed Dec. 8, 1997, at pages 4-7 (discussing generally why FPC's asserted injuries would be more appropriately addressed in need determination proceeding rather than declaratory statement proceeding).

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### III. Substantial Interests Affected

10. Under the current statutory framework in Florida, the Commission is charged with the responsibility of ensuring that adequate electric power will be available for the people of this State at a reasonable cost. The Commission is equipped and directed to carry out this mandate by means of regulatory authority over various utilities, including public utilities like FPC, which are subject to the jurisdiction and regulation of the Commission under Chapter 366, Fla. Stat. To this end, the Commission has authority to oversee planning by such utilities and then to enforce commitments, if necessary, to build and

maintain adequate generating capacity. E.g., Sections 366.03, 366.04(2), 366.05(7), 366.05(8), 366.80-.85, Fla. Stat.

11. Section 403.519 and the Siting Act do not exist apart from this statutory framework. To the contrary, they are an integral piece of it. In particular, Section 403.519 provides the means by which the Commission monitors, reviews, and authorizes undertakings by state-regulated utilities to site power plants in this State. With a full appreciation of these tenets, the Commission and the Florida Supreme Court have held -- subject to a limited qualification discussed below -- that only a state-regulated utility may obtain a determination of need under the statute, based on its own need for generating capacity to serve its retail customers. Nassau Power Corp. v. Beard, 601 So. 2d 1175 (Fla. 1992) ("Nassau I") and Nassau Power Corp. v. Deason, 641 So. 2d 396 (Fla. 1994) ("Nassau II").

12. In Nassau I, for example, the Commission and the Court explicitly recognized 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). Again, in Nassau II, the Commission and the Court held that "a need determination proceeding is designed to examine the need resulting from an electric utility's duty to serve customers." 641 So. 2d at 398 (emphasis added).

13. The utility-specific criteria discussed in these cases and set forth in the statute reflect the statutory obligations of

both the Commission and the state-regulated utilities, such as FPC, to ensure electric system reliability and integrity, to provide adequate electricity at a reasonable cost, to consider whether a proposed facility is the most cost-effective alternative available for supplying electricity, and to take into account whether conservation measures are reasonably available to mitigate the need for the plant.

14. In the Nassau decisions, the Commission and the Supreme Court recognized a limited qualification to their rulings, namely, that a state-regulated utility may undertake to discharge its obligations to provide adequate generating capacity by entering into a power sales agreement with an Independent Power Producers ("IPP") to build and operate a power plant that would meet the state-regulated utility's need. In this connection, the Commission and Court determined that an IPP under a power purchase contract with the utility to meet the needs of the utility may participate in a need proceeding as a co-applicant with the utility. But the Commission and the Court made plain that this did not suspend the fundamental statutory restriction that "a need determination proceeding is designed to examine the need resulting from an electric utility's duty to serve customers." Nassau II, 641 So. 2d at 398 (emphasis added).

15. In effect, through the Joint Petition, Duke is presuming to meet the needs of FPC and other utilities in "Peninsular Florida" without a power sales agreement, whether those utilities want Duke to do so, or not. Of course, this is



improper under the Nassau decisions. Be that as it may, Duke's showing of need for its merchant power plant rests on its estimation of the need for power by various retail utilities throughout the State, necessarily including FPC. As the Commission and the Court recognized in the Nassau decisions, the utilities whose needs are at issue are indispensable parties to the need proceeding where those needs are evaluated. This is no less true because Duke has improperly attempted to bypass the prerequisite of having power sales agreements in place with the affected utilities for the capacity and energy associated with its proposed project before petitioning the Commission.

16. Indeed, in light of the controlling authority that we have discussed, Duke's petition in this docket must be seen as nothing less than an attempt on Duke's part to persuade the Commission to alter fundamentally the regulatory framework in this State. As we discuss more fully in FPC's Motion to Dismiss (filed contemporaneously herewith), this Commission does not have the authority under existing law to oblige Duke's request. Even if the Commission were at liberty to do so, as the Commission recognized when it declined to examine what was essentially the same issue in a declaratory statement proceeding, Duke's attempt to site a merchant plant will have a profound impact upon the role of public utilities like FPC under the current regulatory regime. Indeed, as discussed supra at 2, the Commission recognized that the relief requested by Duke "would carry implications for the electric power industry statewide."

17. Allowing Duke to construct its proposed generating facility to sell power wholesale on a competitive basis would have a serious, imminent, and deleterious impact on FPC's ability to discharge its statutory obligations under Section 403.519, the Siting Act, and associated legislation.

a. To begin with, it is clear that while Duke seeks the perceived economic opportunity of constructing a merchant power plant in Central Florida, Duke does not seek to assume FPC's statutory obligation to serve the customers of this region. Nor could it, since it may not lawfully serve retail consumers of electricity. Although Duke has entered into a participation agreement with New Smyrna -- an entity that does directly serve retail customers -- the agreement contemplates only that Duke may provide 30 MW of a proposed 514 MW facility to New Smyrna. Duke admittedly intends to sell the remainder at wholesale on a competitive price basis.

b. Given Duke's intent, the Commission must consider the impact of Duke's proposal on the Commission's responsibility to ensure adequate and reliable electric service in this region and the integrity of the grid. FPC likewise must evaluate and respond to the impact of this proposal on its ability to meet its obligations to provide both adequate generation and transmission facilities to serve its ratepayers at a reasonable cost.

c. In this connection, the Commission expressly recognized in its decision in Nassau II that construing Section 403.519 and the Siting Act to limit applicant status to electric

utilities that have a duty to serve customers and to IPPs under contract with them "simply recognizes the utility's planning and evaluation process." In Re: Petition of Nassau Power Corporation, Order No. PSC-92-1210-FOF-EQ (Pub. Serv. Comm. Oct. 26, 1992), at 5. To amplify this point, each state-regulated electric utility is required by statute to prepare and file with the Commission a ten-year site plan, "estimat[ing] its power-generating needs and the general location of its proposed plant sites." Section 186.801, Fla. Stat. Significantly, the ten-year site plan requirement was enacted initially as part of the Siting Act, and was codified separately only in order to collect comprehensive planning requirements in one location in the Florida Statutes. Section 403.505, Fla. Stat. (1973); 1973 Florida Laws Chapter 73-33, Section 1; 1976 Florida Laws Chapter 76-76, Section 2; Staff Analysis for Committee Substitute for Senate Bill No. 659, Senate Committee on Natural Resources and Conservation, p. 1 (Apr. 19, 1976).

d. The planning process under this statutory scheme necessarily includes determinations by the utilities of whether or when they will build new generating capacity or purchase power from others during the planning period. The site-plan process is part of an orderly procedure for assessing need for additional generating capacity and fulfilling the objectives of Section 403.519, the Siting Act, and related legislation of ensuring system integrity and adequate and reliable electric energy in this State, and thus it is an important means by which the state-

regulated electric utilities discharge their statutory obligation to provide the public with adequate and reliable electric service.

e. In the same vein, Section 366.05, Fla. Stat., provides that if the Commission determines that inadequacies exist with respect to the energy grids developed by the state-regulated electric utilities, the Commission shall have the power, "after a finding that mutual benefits will accrue to the electric utilities involved, to require installation or repair of necessary facilities, including generating plants . . . with the costs to be distributed in proportion to the benefits received . . ." This provision goes on to direct that the "electric utilities involved in any action taken . . . pursuant to this subsection shall have full power and authority . . . to jointly plan, finance, build, operate, or lease generating . . . facilities," *id.*, using, if applicable, the provisions of Section 403.519 and the Siting Act (which were not altered by this provision). There is no dispute that this provision applies only to state-regulated electric utilities.

f. The Legislature has thus made clear that it is the Commission and the state-regulated electric utilities, which include public utilities like FPC, that have the obligation to assure the electric power needs of the state will be met as part of a broad and comprehensive regulatory scheme, providing for reciprocal benefits and burdens. In point of fact, retail utilities are required by law to make adequate investments in

generating capacity, with appropriate assurances for the recovery of costs and a return on those investments. At the same time, the Commission discharges its statutory duties through the powers that it exercises over state-regulated utilities.

g. The decisions in Nassau I & II directly support and further this regulatory scheme and the concomitant planning process by confirming that the prerogative of initiating proceedings to determine the need for siting new power plants is vested where the statutory responsibility for planning and assuring adequate service resides -- namely, with the electric utilities regulated by the Commission and with the Commission itself.

18. Opening up Section 403.519 and the Siting Act to speculative merchant plant developers would not only wrest from the state-regulated electric utilities meaningful control over the site-planning process that they are statutorily required to pursue, but would impede the ability of the utilities even to monitor what those developers are planning.

a. At a Staff workshop held on November 7, 1997, Duke's representative rejected the prospect that merchant plant developers could submit ten-year site plans like those prepared by electric utilities, suggesting that it would be impractical and would compromise competitively sensitive information. Yet, the state-regulated electric utilities, including the public utilities, would be expected to forecast load and to plan

strategies to serve that load without the benefit of this information.

b. Compounding the problem, neither the Commission nor state-regulated utilities will have assurance that, even if built, merchant plants like the proposed project will be available to provide energy to utilities in the State of Florida when it is needed most. It is revealing that in its petition Duke makes no commitment to sell any amount of power (apart from providing a 30 MW "entitlement" to New Smyrna) in the State of Florida, speculating merely that it may make the "vast majority of its wholesale sales . . . to other utilities in Peninsular Florida." Joint Petition, ¶ 5. The fact is, when push comes to shove, Duke will sell to the highest bidder -- whether inside or outside the State -- or perhaps not at all, depending upon its own unregulated-business priorities. This would introduce a wild card into the Commission's and FPC's planning processes.

19. Further, based on the limited information set forth in the Joint Petition, it appears that the proposed project will place additional demands on the transmission system maintained by FPC in the area that would serve the project. Thus, the Joint Petition acknowledges:

The project will be electrically interconnected to the Peninsular Florida bulk transmission grid at the existing Smyrna Substation owned by the UCNSB [New Smyrna]. The Smyrna Substation is a 115kV substation that is electrically connected to the transmission systems of both Florida Power & Light Company and Florida Power Corporation.

Joint Petition, ¶ 11. It appears that FPC would be required significantly to modify or augment its transmission system in order to transmit the output of this new generating plant.

20. Further, the Nassau decisions confer upon FPC a significant measure of control over the determination of whether, when, and where to create new generating capacity, based on considerations that include the integrity of FPC's transmission system. Duke is seeking in this proceeding relief that would impair this control. For this reason, too, FPC's interest in this proceeding is direct and immediate.

21. Finally, the Commission is expressly directed by statute to avoid "further uneconomic duplication of generation, transmission, and distribution facilities" in this State. Section 366.04(5), Fla. Stat. The relief that Duke seeks in this proceeding directly threatens to impinge upon this mandate and, by the same token, to visit upon FPC and other state-regulated utilities and the environment of the State of Florida the consequences of the construction of redundant generating facilities. If merchant plant developers, like Duke, are permitted unilaterally to launch new generation projects without power sales agreements tailored to meet the needs of particular utilities or their customers, the risk that they will unnecessarily duplicate existing generation facilities is palpable.

#### IV. FPC's Standing to Intervene

22. In order to establish standing to intervene in any proceeding, it is settled that a petitioner must show that (1) it will suffer injury in fact of sufficient immediacy to warrant a hearing, and (2) that the injury is of a type or nature that the proceeding is designed to protect. E.g., Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), review denied, 415 So. 2d 1359 (Fla. 1982). In applying the Agrico test, the Commission "must not lose sight of the reason for requiring a party to have standing in order to participate in a judicial or administrative proceeding": "[T]o ensure that a party has a substantial interest in the outcome" so that "he will adequately represent the interest he asserts" in a proceeding in which that interest is not "totally unrelated to the issues which are to be resolved in the administrative proceeding." Gregory v. Indian River County, 610 So. 2d 547, 554 (Fla. 1st DCA 1992).

23. As we have discussed, FPC's interest in ensuring that it will be able to continue to meet its statutory duties of furnishing at a reasonable cost adequate and reliable electric service in its territory and ensuring that the integrity of the grid is maintained will be directly and deleteriously affected by any ruling that puts control over the siting process into the hands of developers that have contracts with utilities to sell only an insignificant percentage of the total output from the developers' facilities and that have no statutory obligation to



serve retail consumers. Further, petitioners' proposal potentially threatens to impair FPC's ability to plan for, and ensure, the reliability of FPC's transmission system and to impose upon FPC and its ratepayers the consequences of uneconomic duplication of generating facilities.

24. More specifically, in Nassau I & II, the Commission and the Florida Supreme Court made clear that it was the business of the regulated utilities in this State to plan for and meet the need that Section 403.519 and the Siting Act were enacted to address. The ruling that Duke and New Smyrna seek in this need determination proceeding directly impinges upon these interests. Therefore, because the issues to be resolved in this proceeding will affect FPC's statutory duties and responsibilities, FPC has a sufficient interest in the outcome of the proceeding to give FPC standing to intervene. See Osceola County v. St. Johns River Water Mgmt. Dist., 486 So. 2d 616, 617 (Fla. 5th DCA 1986) (County with statutory duties and responsibilities with respect to planning for water management and conservation has a sufficient interest in state activities that affect those duties and responsibilities to provide the County standing to challenge Water District's consideration of consumptive use permit), aff'd, 504 So. 2d 385 (Fla. 1987); Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400, 403, n.4 (Fla. 1996) (school boards allegedly prevented from carrying out their statutory duties have standing to seek declaratory relief that

adequate education is fundamental right under the Florida Constitution). Thus, the first condition of Agrico is met.

25. Further, as we have discussed, Duke has placed in issue -- and presumes to meet -- the needs of various retail utilities throughout Peninsular Florida, including FPC, albeit without power sales agreements in place. Under the Nassau decisions, FPC is not only entitled to intervene in such a proceeding, but it is an indispensable party to the proceeding.

26. In addition, the project will likely require access to FPC transmission facilities. Based on the minimal information set forth in the petition, it appears that the project will place additional demands upon those facilities, necessitating that FPC augment its facilities. Further, a determination by the Commission that would confer upon merchant plant developers the ability to initiate such projects would impair the ability of utilities like FPC to plan and manage their generation and transmission systems so as to ensure adequate and reliable service. In these respects, too, FPC will suffer injury in fact if petitioners are given the relief they seek.

27. Finally, as described, opening up the siting process directly to merchant plant developers would pose a palpable threat of the uneconomic duplication of facilities, to the detriment of FPC and its ratepayers.

28. At the same time, it is evident that the interests that FPC seeks to defend are within the zone of interests that will be addressed by this proceeding. This proceeding will profoundly

affect the role that state-regulated utilities play under Section 403.519 and the Siting Act. The Nassau decisions make clear that it is the responsibility of the state-regulated electric utilities, through their own efforts or through parties with whom they have power sales agreements, to take a measured and effective approach to the development and maintenance of generating capacity in this State. For that matter, the ten-year site plan requirement was enacted as part and parcel of the same legislation creating the Siting Act. See p. 10, supra. The Joint Petition filed by Duke and New Smyrna calls upon the Commission to alter this regulatory approach, and thus to alter the role that state-regulated utilities now play in managing the initiation of new generating capacity in this State.

29. Moreover, as discussed, FPC seeks to intervene in this proceeding to protect its role in controlling the orderly implementation of projects that affect the reliability of its transmission system. Section 403.519 explicitly evidences concern for "electric system reliability and integrity." A ruling that would take from state-regulated utilities, and give to merchant plant developers, the ability to initiate new projects to develop generating capacity would diminish FPC's ability to meet these statutory concerns.

30. Finally, we have shown that affording access indiscriminately to merchant plant developers may well lead to the uneconomic duplication of generating facilities with attendant problems for FPC. The whole point of Section 403.519,

the Siting Act, the related planning legislation, and the Nassau decisions was to ensure that the development of generating capacity in this State would proceed in a well-considered and orderly fashion. FPC seeks to intervene to avoid impairment to these very interests. Thus, the second requirement of Agrico is met.

31. Sensitive to these concerns, this Commission permitted FPC to participate in the declaratory judgment proceeding that Duke initiated as part of its effort to obtain permission to build a merchant plant in this State. See 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, Dkt. No. 971446-EU, Order No. PSC-98-0078-FOF-EU (Jan. 13, 1998). As noted above, in the course of that proceeding, the Commission Staff and Duke stated in written submissions filed with the Commission that FPC's stated concerns would be implicated even more directly in an actual need proceeding. See, e.g., PSC Staff Memorandum, Dkt. No. 971446-EU (Dec. 2, 1997) at p. 3 ("Staff believes that while some or all of . . . FPC's concerns may meet the tests [for standing to intervene] when such a need determination application is actually acted upon, the present petition [for a declaratory statement] is preliminary to the stage at which FPC's actual standing would arise"); Duke Energy New Smyrna Beach Power Company, L.L.P.'s

Motion to Dismiss Florida Power Corporation's Petition to Intervene and to Deny Request for Administrative Hearing, Docket No. 971446-EU, Filed Dec. 8, 1997, at page 4 ("All of FPC's purported injuries to its substantial interests are linked to the construction of a potential future merchant power plant . . . ."). It follows that FPC's petition to intervene as a party respondent in this docket should be granted.

32. Indeed, the Commission has routinely allowed entities to intervene in need determination proceedings precisely because the substantial interests of those entities will be affected by the proceedings. See, e.g., In re: Joint Petition to Determine Need for Electric Power Plant to be Located in Okeechobee County by Florida Power & Light Company and Cypress Energy Partners, Ltd. Partnership, 1992 Fla. PUC LEXIS 1631; 92 FPSC 11: 363; Dkt. No. 920520-EQ; Order No. PSC-92-1355-FOF-EQ (Nov. 23, 1992) (recognizing there is a limited need by utilities for additional capacity and energy and that "it is incumbent upon competing alternatives to come forward at a need determination" proceeding); In re: Petition to Determine Need for Proposed Electrical Power Plant in St. Marks, Wakulla County, by City of Tallahassee, 1997 Fla. PUC LEXIS 679; 97 FPSC 6: 115; Dkt. No. 961512-EM; Order No. PSC-97-0659-FOF-EM (June 9, 1997) (granting the Legal Environmental Assistance Foundation, Enpower, Inc., and LS Power LLC leave to intervene in need determination proceeding); In re: Petition of Ark Energy, Inc. and CSW Development-I, Inc. for Determination of Need for Electric Power

Plant to be Located in Okeechobee County, FL, 1993 Fla. PUC LEXIS 124; Dkt. No. 920807-GP; Order No. PSC-93-0141-PCO-GP (Jan. 27, 1993) (granting FP&L's petition to intervene in need determination proceeding); In re: Joint Petition to Determine Need for Electric Power Plant to be Located in Okeechobee County by Florida Power & Light Co. and Cypress Energy Partners, Ltd., 1992 Fla. PUC LEXIS 1146; 92 FPSC 8:376; Dkt. No. 920520-EQ; Order No. PSC-92-0830-PCO-EQ (Aug. 18, 1992) (granting Nassau Power Corporation's petition to intervene in need determination proceeding); In re: Petition for Determination of Need for a Proposed Electrical Power Plant and Related Facilities in Polk County by Tampa Electric Company, 1992 Fla. PUC LEXIS 568; 92 FPSC 3: 19; Dkt. No. 910883-EI; Order No. PSC-92-0002-FOF-EI (March 2, 1992) (granting Floridians for Responsible Utility Growth leave to intervene in need determination proceeding); In re: Petition of Florida Power Corporation for Determination of Need for Proposed Electrical Power and Related Facilities, 1991 Fla. PUC LEXIS 1863; 91 FPSC 10:290 (Oct. 15, 1991) (granting Florida Industrial Cogeneration Association, Floridians for Responsible Utility Growth and Panda Energy Corporation leave to intervene in need determination proceeding).

V. Disputed Issues of Material Fact

33. FPC submits that the Joint Petition is facially deficient as a matter of law and that it can and should be dismissed summarily. Assuming, however, that the Commission would have proper occasion to consider and determine factual

issues, the Joint Petition and Exhibits present numerous disputed issues of material fact. These include, but are not limited to:

- a. Whether Duke and New Smyrna have established a power sales agreement sufficient to satisfy the requirements of the Nassau decisions, even as to that part of the Joint Petition directed to New Smyrna's needs.
- b. Whether the terms of any agreement between Duke and New Smyrna are sufficient to ensure that each and every one of the need criteria of Section 403.519 are satisfied, even as to that part of the Joint Petition directed to New Smyrna's needs.
- c. Whether the terms of any agreement between Duke and New Smyrna are sufficient to enable the Commission and other utilities to have sufficient assurance for purposes of planning, implementation, and operation of their systems that the needs of even New Smyrna will be adequately met.
- d. Whether and to what extent the power produced by Duke's merchant plant will be sold in Florida or outside the State.
- e. Whether Duke will have a commitment to market power in this State in the areas where it may be needed most when it is needed most.
- e. Whether and to what extent the Commission and retail utilities in this State will have any assurance of how, when, where, and on what terms Duke will market power in this State.
- f. Whether the terms of sale for power sold from the project will be advantageous to ultimate consumers in this State, in relation to regulated sales on the interchange by other utilities.
- g. Whether the project has a contract in place for a firm supply of gas to operate the project as projected in the Joint Petition and Exhibits.
- h. Whether the project will divert natural gas from other power producers in the State.
- i. Whether the transmission grid in the State will be adversely affected by the project.

- j. Whether FPC's transmission facilities will be adversely affected by the project.
- k. Whether and to what extent FPC would need to modify its transmission facilities in order to accommodate the project.
- l. Whether and to what extent the project will divert transmission resources that FPC and other utilities need to serve their customers.
- m. Whether the engineering characteristics of the project are accurately stated in the Joint Petition and Exhibits and will be achievable.
- n. Whether and to what extent the project will impact the environment.
- o. Whether the project is needed.
- p. Whether petitioners' estimations of need are accurate, well-founded, and reasonable.
- q. Whether and to what extent ratepayers of retail utilities will bear the costs of the project under future sales arrangements.
- r. Whether the project would result in the non-economic duplication of facilities.
- s. Whether the petition complies with the Commission's rules.
- t. Whether petitioners have complied with the Commission's rules.

VI. Ultimate Facts Alleged

34. Duke has no obligation to serve retail customers under the statutory framework in this State, and thus has no standing to seek a determination of need by the Commission. Duke and New Smyrna have not entered into a power sales agreement even as to New Smyrna's projected needs; thus, neither is in a position at this time to seek approval of any project regarding even the limited amount of power that New Smyrna will require.



35. The Commission does not have the statutory authority under existing law to consider the Joint Petition on its merits. To do so would be tantamount to engaging in unauthorized industry restructuring that would be detrimental to the ability of the Commission and state-regulated utilities, including FPC, to discharge their various responsibilities under existing regulatory requirements.

37. This proceeding profoundly affects FPC substantial interests in the respects described in this petition, and FPC should be granted leave to intervene for the reasons given in this petition.

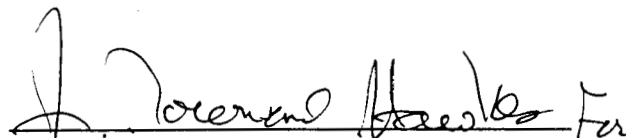
36. Petitioners have not shown, and cannot show, that the project will meet the requirements of Section 403.519, and the implementing rules of the Commission.

WHEREFORE, FPC respectfully petitions for leave to intervene and participate as a full party to this proceeding.

DATED this 8<sup>th</sup> day of September 1998.

Respectfully submitted,

FLORIDA POWER CORPORATION

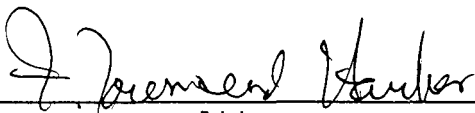


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to: Robert Scheffel Wright, Esq., Landers and Parson, P.A., Post Office Box 271, Tallahassee, FL 32302 as counsel for Duke Energy New Smyrna Beach Power Company, L.L.P.; and, Robert S. Lilien, Esq., Duke Energy Power Services, LLC, 422 Church Street, PB05B, Charlotte, NC 28242 this 8<sup>th</sup> day of February, 1998.

  
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Attorney