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September 15, 1998



Ms. Blanco Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
4750 Esplanade Way, Room 110
Tallahassee, Florida 32399

RE: Docket No. 981042-EM

Dear Ms. Bayo:

Enclosed for filing please find the original and fifteen (15) copies of Petitioner's Memorandum of Law in Opposition to Florida Power & Light Company's Motion to Dismiss.

Sincerely,

John T. LaVia, III



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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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| In Re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. | ) | DOCKET NO. 981042-EM |
| | ) | FILED: SEPT. 15, 1998 |

**PETITIONERS' MEMORANDUM OF LAW IN OPPOSITION TO FLORIDA POWER & LIGHT COMPANY'S MOTION TO DISMISS JOINT PETITION**

The Utilities Commission, City of New Smyrna Beach, Florida ("UCNSB" or "Utilities Commission") and Duke Energy New Smyrna Beach Power Company, Ltd., L.L.P. ("Duke New Smyrna"), collectively referred to herein as the "Petitioners", pursuant to Commission Rule 25-22.037(2)(b), Florida Administrative Code ("F.A.C."), hereby respectfully submit this memorandum of law in opposition to Florida Power & Light Company's Motion to Dismiss Joint Petition ("FPL's Motion to Dismiss")[1] and Florida Power & Light Company's Memorandum of Law Supporting Motion to Dismiss Joint Petition ("FPL's Memorandum of Law"). For the reasons stated herein, FPL's Motion to Dismiss is without merit and the Commission should deny it.

[1]On or about August 27, 1998, FPL filed a petition to intervene. Petitioners responded in opposition to the requested intervention on September 8, 1998. The issue of FPL's standing to intervene is pending. If the Commission denies FPL's intervention, its Motion to Dismiss will be moot.

## SUMMARY

Both the Utilities Commission and Duke New Smyrna are proper applicants for the Commission's determination of need under the plain language of the Florida Electrical Power Plant Siting Act. Moreover, both the UCNSB and Duke New Smyrna are "electric utilities" within the meaning of Section 366.02(2), Florida Statutes ("F.S."), and accordingly are subject to the jurisdiction that the Commission exercises with respect to such electric utilities. The New Smyrna Beach Power Project (the "Project") is also a joint electrical power supply project within the meaning of Chapter 361, Part II, F.S. (the Joint Power Act) and accordingly, Petitioners and a "joint operating agency," one of the specifically enumerated entities that satisfy the definition of "electric utility" and "applicant" under the Siting Act.

Public policy considerations mitigate strongly in favor of allowing the Petitioners to go forward to the need determination hearing on the merits of the Project. The Project serves the fundamental purposes of utility regulation, i.e., to promote a competitive result. Competition in the wholesale supply of electricity is, of course, beneficial to the customers of retail-serving utilities because it will lead to lower costs, enhanced efficiency, and an optimal allocation of society's scarce resources. These competitive benefits are particularly powerful here because the Project imposes no risks and no obligations on Florida electric customers.

The construction of Section 403.519, F.S., advocated by FPL, i.e., that Duke New Smyrna is excluded from access to the Commission's need determination process because it does not serve retail customers in Florida and does not have contracts to sell the Project's entire output to local retail-serving utilities in Florida, is inconsistent with the purposes of the Energy Policy Act of 1992 and with the orders of the Federal Energy Regulatory Commission. Moreover, the construction of Section 403.519, F.S., advanced by FPL would violate the Commerce Clause of the United States Constitution by discriminating against out-of-state power producers and their affiliates unless those entities enter into contracts with local, retail-serving utilities, as well as by impermissibly burdening interstate commerce.

The Joint Petition filed by the UCNSB and Duke New Smyrna satisfies all applicable pleading requirements of the Commission's rules pertaining to need determination applications. Finally, FPL's arguments on the merits of the Joint Petition are inappropriate for a motion to dismiss. At most, they raise issues of fact to be decided by the Commission, on the merits, following the evidentiary hearing in this proceeding.

Accordingly, FPL's motion to dismiss (even if FPL is granted intervention) must be denied.

## ARGUMENT

### I. BOTH DUKE NEW SMYRNA AND THE UTILITIES COMMISSION ARE PROPER APPLICANTS PURSUANT TO SECTION 403.519, FLORIDA STATUTES, FOR THE REQUESTED NEED DETERMINATION.

Under Section 403.519, Florida Statutes ("F.S."), "only an 'applicant' can request a determination of need" from the Commission. Nassau Power Corporation v. Deason, 641 So. 2d 396, 398 (Fla. 1994) (hereinafter "Nassau II"). In this instance, both Duke New Smyrna and the Utilities Commission, individually and in combination, fit squarely within the definition of "applicant" under Section 403.503(4),F.S., and thus are appropriate entities to petition the Commission for the requested need determination. Moreover, Duke New Smyrna is an "electric utility" within the meaning of Section 366.02(2), F.S., and accordingly is subject to the Commission's regulations applicable to such entities. FPL's arguments to the contrary, though numerous, are all based upon either the misapplication of the rules of statutory construction, a misstatement of legislative intent, or the flawed construction of prior Commission precedent, and are thus without merit.

**A. Duke New Smyrna is a Proper Applicant Under Section 403.519, F.S.**

Section 403.519, F.S., provides in pertinent part:

> On request by an applicant or on its own motion, the Commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act.

(Emphasis supplied.) Section 403.503,(4), F.S., defines an "applicant"[2] as:

[2]Section 403.522(4), F.S., (part of the Transmission Line Siting Act) contains an identical definition of the term "applicant."

> any electric utility which applies for certification pursuant to the provisions of this act.

(Emphasis supplied.) Section 403.503(13), F.S., in turn, defines an electric utility as:

> cities and towns, counties, public utility districts, regulated electric companies, electric cooperatives, and joint operating agencies, or combinations thereof, engaged in, or authorized to engage in, the business of generating, transmitting, or distributing electric energy.

(Emphasis supplied.) Thus, a "regulated electric company" is a proper "applicant" specifically authorized under the Siting Act to seek a determination of need from the Commission. Moreover, a "regulated electric company" may also combine with one of the other entities (such as a city) specifically enumerated in Section 403.503(13), F.S., as an applicant for a need determination. For the reasons set forth below, Duke New Smyrna is a "regulated electric company."

As alleged in the Joint Petition, Duke New Smyrna is a "public utility"[3] under the Federal Power Act, 16 U.S.C.S. § 824(b)(1)(1994). See Joint Petition at 4. Though irrelevant to Duke New Smyrna's status as a public utility under federal law, Duke New Smyrna is also an "exempt wholesale generator" ("EWG") pursuant to the Public Utility Holding Company Act of 1935, 15 U.S.C.S. § 79z-5a (1994 & Supp. 1997). The Federal Energy

[3]Section 366.02(1), F.S. provides that a "public utility" under Florida law "suppl[ies] electricity...to or for the public within" Florida. Because Duke New Smyrna is authorized to sell electricity only at wholesale, i.e., to other utilities, it is not a "public utility" under Section 366.02(1), F.S.

Regulatory Commission ("FERC") confirmed Duke New Smyrna's EWG status by its order dated June 9, 1998. Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., 83 FERC § 62,220 (June 9, 1998).

As a "public utility" selling power at wholesale in interstate commerce, Duke New Smyrna is clearly subject to the regulatory jurisdiction of FERC, including, but not limited to, the FERC's jurisdiction over rates pursuant to the Federal Power Act. In fact, as stated in the Joint Petition, the FERC has approved Duke New Smyrna's Rate Schedule No. 1 for sale of the Project's entire capacity and associated energy to other utilities under negotiated arrangements. See Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., 83 FERC § 61,316 (June 25, 1998). Thus, as a company that sells wholesale electric power subject to the regulatory jurisdiction of the FERC, Duke New Smyrna fits squarely within the plain meaning of the term "regulated electric company" under any reasonable construction of the term, and Duke New Smyrna is a proper applicant under Sections 403.503(13) and 403.519, F.S. See Carson v. Miller, 370 So. 2d 10 (Fla. 1979) (words of common usage should be construed in their plain and ordinary sense.)

In its Memorandum of Law, FPL argues that the Commission should reject Duke New Smyrna's position that it is a "regulated electric company" within the definition of an "electric utility" under the Siting Act. FPL's Memorandum of Law at 22. In support of its position FPL offers numerous grounds, each of which, as addressed below, is wholly without merit.

First, FPL argues that Nassau Power Corporation v. Beard, 601 So. 2d 1175 (Fla. 1992) (hereinafter Nassau I), Nassau II and the underlying Commission orders in those cases limit the Commission's authority to determine that Duke New Smyrna is a proper applicant under the Siting Act. FPL's Memorandum of Law at 22-23. FPL is wrong. The issue of how to construe the term "regulated electric company" was not addressed in either Nassau I, Nassau II, or the underlying Commission orders. In fact, no court has construed the term "regulated electric company." A QF is not a public utility under federal law and has no similar ability to invoke the term "regulated electric company" of Section 403.503(13), F.S.

Moreover, Nassau I, Nassau II and the underlying Commission orders represent the law of cogeneration, see F.P.S.C. Staff Memorandum, Dkt. No. 971446-EU (Dec. 2, 1997) at 6, or perhaps more generally, the law of non-utility generators seeking to bind a retail-serving utility to a long-term power contract. See Nassau II, 641 So. 2d at 397-98 (stating that the issue in that case "is whether a non-utility cogenerator such as Nassau is a proper applicant for a determination of need") (emphasis supplied). In both Nassau I and Nassau II the putative applicants for a need determination were attempting to require a utility to purchase, and ultimately charge its ratepayers for, the electrical power to be produced by the proposed projects.[4] That is simply not the case

[4]In the underlying orders that led to the Nassau decisions, the Commission emphasized the limited scope of its rulings. Thus, in Order No. 22341, the Commission said,

> to the extent that a proposed electric power

here. Nassau I and Nassau II are thus readily distinguishable. Further, Duke New Smyrna has alleged that it is both an "electric utility" pursuant to Section 403.503(13), F.S., and a "public utility" under the Federal Power Act. Thus, attempting to shoehorn Duke New Smyrna into the law of non-utility generators is patently absurd.[5]

More importantly, the fundamental factual distinction between this case and the cases that FPL invokes is that no utility other than the UCNSB is obligated to purchase power from the project. Duke New Smyrna has no regulated rate base and no captive customers. All economic risk associated with the Project is borne by Duke New Smyrna with absolutely no risk for other utilities or their ratepayers. By accepting all risk associated with the Project and not requiring a commitment to purchase by any utility,

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> plant constructed as a QF is selling its capacity to an electric utility pursuant to a standard offer or negotiated contract, that capacity is meeting the needs of the purchasing utility.

In Re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities, Docket No. 890004-EU, Order No. 22341, (Fla. Pub. Serv. Comm'n, Dec. 26, 1989). Also, in Order No. PSC-92-1210-EQ, which was reviewed by the Supreme Court in Nassau II, the Commission stressed: "It is our intent that this Order be narrowly construed and limited to proceedings wherein non-utility generators seek determinations of need based on a utility's need." In Re: Petition of Nassau Power Corporation to Determine Need for Electrical Power Plant (Okeechobee County Cogeneration Facility), 92 FPSC 10:643, 646, (emphasis supplied). By the Commission's own careful structure of the Order, the rationale does not apply to Duke New Smyrna.

[5]As discussed in Section I, B herein, Duke New Smyrna is also an "electric utility" as defined in Section 366.02(2).

Duke New Smyrna has rendered Nassau I, Nassau II, and the underlying Commission orders inapplicable.

Next, FPL contends that because EWGs did not exist in 1973 when Section 403.503(13), F.S., was adopted, the Legislature could not have intended to include them within the definition of "regulated electric company." FPL's Memorandum at 23. FPL's focus on Duke New Smyrna's EWG status and FPL's strained construction of Section 403.503(13), F.S., are both in error. While Duke New Smyrna readily agrees that it is an EWG, this fact is irrelevant to this analysis. The important fact is that Duke New Smyrna is a "public utility" under the Federal Power Act. The Federal Power Act, with its definition of public utility, was enacted in 1935, and was in place in 1973 when the Florida Legislature enacted the Siting Act. It is well settled that the Legislature is presumed to know the existing law when it enacts a statute. See Collins Investment Co. v. Metropolitan Dade County, 164 So. 2d 806 (Fla. 1964). Accordingly, the 1973 Florida Legislature is presumed to have been aware of "public utilities" under the Federal Power Act when it included the term "regulated electric company" in the Siting Act.

In addition, on its face Section 403.513(13), F.S., specifies that an "electric utility" includes any of a number of entities (including "regulated electric companies") that are "engaged in the business of generating, transmitting, or distributing electric energy." (Emphasis supplied.) By using the word "or" rather than "and", the Legislature established that even in 1973 an "electric

utility" under Section 403.503(13), F.S., could be engaged only in the generation of electric power. See Telophase Society v. State Board of Funeral Directors, 334 So. 2d 563 (Fla. 1976) (general rule is that the term "or" should be construed in the disjunctive).

An entity engaged solely in the generation and sale of electric energy, such as Duke New Smyrna, is necessarily a wholesale power producer, and wholesale power sales are (with limited exceptions not applicable here) transactions in interstate commerce. Entities making wholesale power sales in interstate commerce are (and were in 1973) public utilities subject to regulation under the Federal Power Act. As early as 1972, the year before the enactment of Section 403.503(13), F.S., the United States Supreme Court recognized in Federal Power Commission v. Florida Power & Light, 404 U.S. 453, 463 (1972), that the wholesale transmission and sale of electric power in interstate commerce was subject to regulation by the Federal Power Commission, the predecessor of the FERC. It is also well settled that the Legislature is presumed to be aware of the judicial construction of law on the subject concerning which a statute is enacted. See Collins, 164 So. 2d at 809. Thus, in 1973 the Legislature was fully aware of the fact that the wholesale sale of electric power in interstate commerce was subject to federal regulation, yet it did not limit or otherwise qualify the term "regulated electric company." In fact, the Legislature specifically provided that an entity that engaged solely in the generation of electric power for sale at wholesale (i.e., a wholesale public utility under the

Federal Power Act) was a proper applicant for a determination of need.

Lastly, and crucially, if the Legislature wanted to limit the term "regulated electric company" to exclude a federally "regulated electric company" such as an EWG, it could have done so at any time, including as recently as the 1996 legislative session when it amended Section 403.503, F.S. See Ch. 96-410, Laws of Fla. The Legislature did not do so, and its failure to limit the term "regulated electric company" expresses legislative approval of the existing language. Accord See P.S.C. Staff Memorandum, Dkt. No. 971446-EU (Dec. 2, 1997) at 6.

Next, FPL somewhat simplistically asserts that because the Siting Act is state law, "[t]here is no basis to conclude that when the Siting Act speaks about 'electric utilities' or 'regulated electric companies' it intends to address utilities or regulated electric companies under federal law." FPL's Memorandum of Law at 24. FPL's assertion is fundamentally flawed. It ignores the Supremacy Clause of the United States Constitution which provides that federal law is the "supreme Law of the Land," U.S. Const., art. VI. There is no rule of statutory construction that provides that a state legislature may not consider federal law in enacting state laws, or that state statutes are assumed to ignore federal law, or that a state regulatory agency such as the Commission must (or even may) wear blinders and ignore federal law.

FPL next contends that the "legislative history of the Siting Act suggests that the term 'electric utilities' should be read as

applying to state regulated electric utilities." (Emphasis supplied.) FPL's Memorandum of Law at 24. Once again, FPL's contention is wrong. First, FPL is essentially asking the Commission to insert the word "state" to qualify the term "regulated electric company" in Section 403.503(13), F.S. The Commission should not do so. It is a basic and long-standing principle of statutory construction that where a statute is clear and unambiguous, the tribunal construing it is not free to add words to steer it to a meaning and limitation which its plain meaning does not supply. See Armstrong v. City of Edgewater, 157 So. 2d 422, 425 (Fla. 1963). Moreover, "where there is doubt as to the legislative intent or where speculation is necessary, then the doubts should be resolved against the power of the courts to supply missing words." Id. Petitioners submit that the term "regulated electric company" is unambiguous and the plain meaning of the term should control. See Nicoll v. Baker, 668 So. 2d 989, 990-91 (Fla. 1996); Holly v. Auld, 450 So. 2d 217 (Fla. 1984). If the Commission has doubts as to the legislative intent, it should resolve these doubts against FPL's invitation to rewrite Section 403.503(13), F.S.

FPL also argues that Duke New Smyrna would not be subject to the statutory and rule requirements for filing ten year site plans. See Section 186.801, F.S. As discussed below, Duke New Smyrna is not only an electric utility under Section 403.503(13), F.S., it will also be an electric utility under Section 366.02(2), F.S., and accordingly will be subject to filing a ten year site plan.

FPL's next contention is that language in Section 366.05(8), F.S., a part of the Grid Bill[6], providing that Section 366.05, F.S., does not "supersede or control any provision of the Siting Act" "suggests" that "electric utilities" under the Siting Act must be state regulated. FPL's Memorandum of Law at 25. This contention is an illogical non sequitur. It simply does not follow that the language from Section 366.05(8), F.S., relied on by FPL suggests that the term "electric utilities" has the same meaning under the Grid Bill and the Siting Act. If anything, the provision of Section 366.05(8), F.S., that states it does not "supersede or control" the Siting Act expressly recognizes that there are provisions in the Siting Act that may differ and, if so, remain unaffected by Section 366.05(8), F.S. The definitions of "electric utility" and "applicant" are such provisions.

FPL next claims that the "common usage" of the term "electric utility" in Chapters 366 and 403, F.S., further reinforces a legislative intent that the term "electric utility" in the Siting Act refers to electric utilities subject to regulation under Chapter 366, F.S. FPL's Memorandum of Law at 25. In making this claim, once again FPL is in essence asking the Commission to rewrite the Siting Act. FPL would ignore the fact that the Siting Act contains a definition of electric utility that on its face differs from the definition of electric utility contained in

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[6]The provisions of Chapter 366, F.S., that are commonly referred to as the Grid Bill consist of Sections 366.04(2), 366.04(5), 366.05(7), and 366.05(8), F.S. See Ch. 74-96, Laws of Fla.

Section 366.02, F.S. The Commission must refuse to do so. It is a basic tenet of statutory construction that when a definition of a word or a phrase is provided in a statute, that meaning must be ascribed to the word or the phrase whenever it is repeated in the statute unless contrary intent clearly appears. Nicholson v. State, 600 So. 2d 1101,1103 (Fla.), cert. denied, 506 U.S. 1008 (1992). The Legislature clearly meant what it said when it included a distinct and separate definition for "electric utility" in the Siting Act, and for the purposes of determining an applicant under Section 403.519, F.S., the term "electric utility" includes "regulated electric companies" such as Duke New Smyrna. The Commission must honor this legislatively created distinction. Moreover, as discussed more fully in the next section herein, Duke New Smyrna is also an "electric company" as defined in Section 366.02(2), F.S.

In its final attempt to convince the Commission to stray from the plain meaning of the definition of "electric utility" in the Siting Act, FPL contends that the fact that prior to 1990, Section 403.519, F.S., contained the term "utility" in place of "applicant" is "further evidence" that the term "electric utility" under the Siting Act means "state regulated utilities." FPL's Memorandum of Law at 25-26. FPL has it backwards. Legislative intent is evident in the change the Legislature makes to a law, not in what the law formerly stated. FPL is focusing on language that the Legislature deemed inadequate to serve its purposes. In 1990, the Legislature

specifically amended[7] Section 403.519, F.S., replacing the term "utility" with the term "applicant". See Ch. 90-330, Laws of Fla. The elimination of the term "utility" from Section 403.519, F.S., reinforces the interpretation that the definitions in Chapter 366 and 403 are not identical. When the legislature amends a statute by omitting a word, it is fair to presume that the legislature intended the statute to have a different meaning than that accorded it prior to the amendment. Capella v. City of Gainesville, 377 So. 2d 658, 660, (Fla. 1979). The term "utility" no longer appears anywhere in Section 403.519, F.S., and thus to construe Section 403.519, F.S., based on what it used to say ignores the specific legislative action embodied in the 1990 amendments.

In summary, the rules of statutory construction lead inexorably to a single conclusion: a regulated electric company is an electric utility under the Siting Act and as such is a proper applicant for a determination of need under Section 403.519, F.S.

**B. Duke New Smyrna Is An "Electric Utility" and Is Subject to the Commission's Grid Bill Authority Under Chapter 366.02, F.S.**

Though not directly applicable to the analysis of Duke New Smyrna's status as an applicant under the Siting Act, FPL appears to suggest that Duke New Smyrna cannot be an "electric utility" (and therefore not an applicant) as that term is defined within the Siting Act because it is not an electric utility under the Commission's organic regulatory statute, Chapter 366, F.S. FPL

[7]FPL's use of the term "conformed" as opposed to "amended" is indicative of the weak ground on which its argument stands. Legislatures do not conform laws, they enact and amend them. See FPL's Memorandum at 26.

also relies heavily on its argument that the Commission should dismiss the UCNSB's and Duke New Smyrna's Petition because, FPL alleges, neither the New Smyrna Beach Power Project nor Duke New Smyrna will be subject to the Commission's authority under the Grid Bill. See FPL's Memorandum of Law at 54 (stating that the Commission does not exercise Grid Bill jurisdiction over Duke New Smyrna). Duke respectfully disagrees with both conclusions.

Duke New Smyrna is an "electric utility" under Section 366.02(2), Florida Statutes, by the plain language of the statute.[8] Section 366.02(2), F.S., defines "electric utility" to mean

> any municipal electric utility, investor-owned electric company, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state.

Duke New Smyrna is investor-owned, in that it is owned by its partners, Duke Energy Power Services Mulberry GP, Inc., which has a 1 percent ownership interest, and Duke Energy Global Asset Development, Inc., which has a 99 percent limited partnership interest. Second, when the New Smyrna Beach Power Project becomes operational, Duke New Smyrna will own, maintain, and operate an electric generation system within Florida. Thus, by a straightforward, "plain language" reading of the statutory

[8] Section 366.02(2) uses the present tense, perhaps giving rise to the technical argument that because Duke New Smyrna does not yet own a generation facility, it is not an electric utility. This distinction is not important here. FPL argues that the Commission will not have authority over the Project or over Duke New Smyrna, and what is important here is that the Commission will have the authority -- indeed, the regulatory authority -- over Duke New Smyrna as provided in Chapter 366, including that statute's Grid Bill provisions.

language, Duke New Smyrna satisfies each prong of the definition of "electric utility." Duke New Smyrna is also a "public utility" under the Federal Power Act, thereby making it also an "electric utility" under a reasonable generic application of that term.

The Commission's Grid Bill authority is found at Sections 366.04(2)&(5) and Sections 366.05(7)&(8), F.S. Relative to FPL's arguments, these provisions give the Commission "jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida . . . ." Fla. Stat. § 366.04(5) (1997). FPL's argument that Duke New Smyrna and the New Smyrna Beach Power Project would escape this jurisdiction is misplaced. In the first place, as discussed above, Duke New Smyrna is (or will be) an electric utility under Section 366.02(2), F.S., so FPL cannot argue that Duke New Smyrna would escape this authority because it is not an electric utility thereunder. Perhaps more importantly, the Commission's jurisdiction attaches to the "planning, development, and maintenance of a coordinated electric power grid," not to utilities; in fact, no form of the word utility even appears in this section.

**C. The Utilities Commission is a Proper Applicant Under Section 403.519, F.S.**

As previously noted, to be an "applicant" under Section 403.519, F.S., an entity must be an "electric utility" as defined in Section 403.503(13), F.S. The definition of "electric utility" set forth in Section 403.503(13), F.S., specifically includes

"cities and towns . . . engaged in or authorized to engage in, the business of generating, transmitting, or distributing electric energy." (Emphasis supplied.) The Utilities Commission is a subdivision of the City of New Smyrna Beach, Florida, created by a special act of the Florida Legislature. See Ch. 67-1754, Laws of Fla. As such, the Utilities Commission is a "city" within the definition of "electric utility" under Section 403.503(13), F.S., making it an authorized applicant under Section 403.519, F.S.

Moreover, the Utilities Commission is a municipal electric utility within the meaning of Section 366.02(2), F.S. As such, the Utilities Commission has "utility specific need" and is "obligated to serve customers" and fits squarely within even the overly narrow definition of "applicant" advanced by FPL. See FPL's Memorandum of Law at 16-17.

As set forth in the Joint Petition, the Utilities Commission and Duke New Smyrna have executed a Participation Agreement which grants the Utilities Commission an entitlement of 30 MW of the Project's output and sets forth the terms under which the Utilities Commission may obtain the energy to which it is contractually entitled.[9]

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[9]FPL questions whether the absence of a final power purchase contract for the 30 MW of capacity to which the UCNSB is entitled somehow affects the UCNSB's status as an "applicant" for the need determination. For at least two reasons, this issue is a red herring. First, the determination of the nature of the agreement between the UCNSB and Duke New Smyrna is a factual determination which is not subject to a motion to dismiss. See Lowery v. Lowery, 654 So. 2d 1218, 1219 (Fla. 2d DCA 1995). Second, and more importantly, the contractual arrangement between the UCNSB and Duke New Smyrna is binding on the parties and clearly entitles the UCNSB to 30 MW of capacity from the Project and the

FPL argues that the Utilities Commission is not a proper "applicant" for the 484 MW of capacity to which it is not entitled and that it does not need. FPL's argument is fatally flawed for several reasons. First, the Joint Petition contains sufficient allegations to establish that the Utilities Commission is an applicant under Section 403.519, F.S., for at least 30 MW of the Project's capacity. Whether the remaining capacity of the Project is entitled to a determination of need is a factual issue going to the merits of the need determination proceeding which cannot properly be decided by a motion to dismiss. See Lowery, 654 So. 2d at 1219. Second, and more importantly, nothing in Section 403.519, F.S., or in any Commission or Florida Supreme Court precedent requires that the entire output of a proposed project be used by the applicant or be contractually committed to a specific utility. In fact, on several occasions, the Commission has granted a need determination for a power plant to investor-owned and municipal utilities for power plants that represented excess non-committed capacity where considerations other than a particular utility's reliability criteria warranted the project. See, In Re: Petition

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energy associated with this capacity and specifies the key pricing terms for the power sold. In past need determination proceedings, the Commission has allowed applicants to proceed with commitments that were no more binding. See 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 Limited Partnership, Docket No. 920520-EQ (proposed contract with non-QF independent power producer was subject to PSC approval). In fact, in one case, the Commission allowed an applicant to proceed without any final contractual agreement whatsoever. In Re: Petition of Florida Crushed Stone Company for Determination of Need for a Coal-fired Cogeneration Electrical Power Plant, 83 FPSC 2:107 (Order No. 11611).

for Certification of Need for Orlando Utilities Commission, Curtis H. Stanton Energy Center Unit 1 and Related Facilities, Docket No. 810180-EU, Order No. 10320 (Fla. Pub. Serv. Comm'n, October 2, 1981); In Re: JEA/FPL's Application for Need for St. John's River Power Park Units 1 and 2, Docket No. 810045-EU, Order No. 10108 (Fla. Pub. Serv. Comm'n, June 26, 1981); In Re: Application for Certification of Tampa Electric Company's Proposed 417 Megawatt Net Coal-fired Big Bend Unit 4, Docket No. 800595-EU, Order No. 9749 (Fla. Pub. Serv. Comm'n, Jan. 16, 1981). Once again, the Utilities Commission and Duke New Smyrna request that the Commission grant them equal consideration.

**D. The Project is a Joint Electrical Power Supply Project Pursuant to Chapter 361, Part II, Florida Statutes and the Utilities Commission and Duke New Smyrna Constitute a "Joint Operating Agency."**

The definition of "electric utility" contained in Section 403.503(13), F.S., identifies a "joint operating agency" as one of the entities entitled to be an applicant for a determination of need under Section 403.519, F.S. Though the term "joint operating agency" is not defined in the Siting Act, the Petitioners assert that a reasonable construction of the term that harmonizes Chapter 361, Part II, F.S., (hereinafter the "Joint Power Act") and the Siting Act must include entities undertaking a "joint electric power supply project" pursuant to the Joint Power Act.[10] For the

[10]Petitioners are aware of no entities other than those undertaking a "joint electric power supply project" under the Joint Power Act, that could constitute a "joint operating agency." Thus, to construe the term "joint operating agency" as

reasons set forth below and as alleged in the Joint Petition (Joint Petition at 10), the Utilities Commission and Duke New Smyrna are a "joint operating agency" and thus are proper applicants for the need determination proceeding.

Section 361.12, F.S., provides in pertinent part that an "electric utility" is authorized to join with a "foreign public utility" for the purpose of "jointly financing, constructing, managing, operating, or owning any project or projects." Section 361.11(2), F.S., provides that for the purpose of the Joint Power Act an "electric utility" is:

> any municipality, authority, commission, or other public body, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electrical energy generation, transmission, or distribution system within the state on June 25, 1975.

(Emphasis supplied.) Section 361.11(4), F.S. provides that a "foreign public utility" is:

> any person, as defined in subsection (3), the principal location or principal place of business of which is not located within this state, which owns, maintains, or operates facilities for the generation, transmission, or distribution of electrical energy and which supplies electricity to retail or wholesale customers, or both, on a continuous, reliable, and dependable basis; or any affiliate or subsidiary of such person, the business of which is limited to the generation or transmission, or both, of electrical energy and activities reasonably incidental thereto.

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excluding "joint electrical power supply projects" would render the term without meaning. Such a construction is contrary to the basic tenet of statutory interpretation that a statute should be construed so as to give meaning to each of its provisions. See State v. Zimmerman, 370 So.2d 1179 (Fla. 4th DCA 1979).

(Emphasis supplied.) Lastly, Section 361.11(1), F.S., provides that a "project" is:

> a joint electric power supply project and any and all facilities, including all equipment, structures, machinery, and tangible and intangible property, real and personal, for the joint generation or transmission of electrical energy, or both, including any fuel supply or source useful for such a project.

The Utilities Commission is a commission which owned, maintained, and operated an electrical energy generation and distribution system in the state of Florida on June 25, 1975.[11] (See Ch. 67-1754, Laws of Fla.). Accordingly, the Utilities Commission fits squarely within the definition of "electric utility" contained in Section 361.11(2), F.S.

As stated in the Joint Petition, Duke New Smyrna is an affiliate of Duke Bridgeport Energy, L.L.C. Duke Bridgeport Energy, L.L.C. is the owner and operator of the Bridgeport Energy Project, a 520 MW gas-fired combined cycle power plant located and currently operating (in simple cycle mode) in Bridgeport, Connecticut and delivering power to wholesale customers. (Joint Petition at 6-7.) Accordingly, Duke New Smyrna is a "foreign public utility" because it is an affiliate of Duke Bridgeport Energy, L.L.C., a person (specifically defined to include corporations) the principal place of which is not located within the state of Florida, which currently owns, maintains and operates facilities for the generation of electrical energy and which

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[11]The Utilities Commission is also a "municipality" (see Ch. 67-1754, Laws of Fla.) and a "public body."

supplies electricity to wholesale customers on a continuous, reliable and dependable basis.

In summary, the Utilities Commission, an "electric utility" has exercised its authority under Section 361.12, F.S., to join with Duke New Smyrna, a "foreign public utility" for the purpose of jointly financing and acquiring a "project", namely the New Smyrna Beach Power Project. As such, the Utilities Commission and Duke New Smyrna are a "joint operating agency" and are thus proper applicants for a need determination pursuant to Section 403.519, F.S.

To counter Petitioners' allegations regarding their status as participants in operating a joint electric power supply project, FPL raises two arguments, neither of which has merit. First, FPL argues that the language contained in Section 361.16, F.S., which provides that the powers conferred by the Joint Power Act "shall not be construed as altering, repealing or limiting any of the provisions of any other law, general, local or special," somehow makes it "clear" that the Joint Power Act "does not alter or repeal existing law, including the law interpreting the Siting Act." FPL's Memorandum of Law at 30. While elsewhere Petitioners have demonstrated that the cases cited by FPL do not support its opposition to the Project, FPL's reliance on Section 361.16, F.S., for this proposition is absurd. Section 361.16, F.S., does not refer in any way to the <u>case law</u> interpreting the Siting Act. Rather, Section 361.16, F.S., makes it clear that the Joint Power Act is in addition and supplemental to existing <u>statutory</u> law.

Moreover, because Section 361.16, F.S., was adopted in 1975, (See Ch. 75-200, Laws of Florida) the only law that the Joint Power Act could be supplemental to must have been in existence at that time. None of the "law interpreting the Siting Act" on which the FPL relies was in existence at the time Section 361.16, F.S., was adopted and thus the Legislature could not have been referring to it. See Nassau I (decided in 1992) and Nassau II (decided in 1994).

Second, FPL argues that Duke New Smyrna is not a "foreign public utility" because it does not currently own, maintain or operate facilities. FPL's Memorandum of Law at 30. Once again, FPL's argument misses the mark. FPL seems to have conveniently ignored the portion of Section 361.11(4), F.S., that specifically provides that a "foreign electric utility" is "a person . . . or any affiliate or subsidiary of such person, the business of which is limited to the generation or transmission, or both, of electrical energy and activities reasonably included thereto." Consequently, as stated above, Duke New Smyrna is a "foreign electric utility" because its affiliate, Duke Bridgeport Energy, L.L.C., owns, maintains, and operates a facility outside the state of Florida that currently generates electrical energy. Moreover, the Joint Petition contains sufficient allegations that Duke New Smyrna or one of its affiliates currently owns, operates or maintains facilities. See Joint Petition at 6-7. Thus, whether those allegations are sufficient is a factual matter involving the merits of Petitioners' request for a need determination which

cannot be resolved by a motion to dismiss. See Lowery, 654 So. 2d at 1219.

In summary, the Joint Petition contains sufficient allegations to establish that the Utilities Commission and Duke New Smyrna have joined to form a joint electric power supply project under the Joint Power Act, and accordingly, the Utilities Commission and Duke New Smyrna are a "joint operating agency" within the definition of electric utility contained in Section 403.503(13), F.S., rendering them specifically authorized applicants under Section 403.519, F.S.

## II. PUBLIC POLICY CONSIDERATIONS AND THE COMMISSION'S STATUTES MITIGATE STRONGLY IN FAVOR OF ALLOWING THE PETITIONERS TO OBTAIN A DECISION ON THE MERITS OF THEIR REQUESTED NEED DETERMINATION.

Public policy considerations, including the fundamental purposes and goals of utility regulation, mitigate strongly in favor of interpreting Section 403.519, F.S., in a way that will allow the Petitioners to obtain a decision on the merits of their requested determination of need for the New Smyrna Beach Power Project. Moreover, the Commission's statutory mandates in Sections 366.01 and 366.81, F.S., also mitigate strongly in favor of allowing the Petitioners to obtain a final Commission decision on the merits of their requested need determination. This result -- rejecting FPL's motion to dismiss and allowing a decision on the merits -- is also specifically consistent with national energy policy.

The fundamental purpose of utility regulation is to promote a competitive economic result in markets that would otherwise be

characterized by a monopoly or monopolistic structure. The basic reason that we have utility regulation is that utilities have been thought to be "natural monopolies" where, due to long-run economies of scale and the high investment required to enter the business (which has historically created a barrier to such entry), competition could not function properly as it does in most other sectors of the economy. In this context, the fundamental purpose of regulation is to serve as a surrogate for competition where competition is not possible. However, as the Commission is aware, competition in the wholesale generation of electricity is both feasible and, from a policy perspective, desirable. Thus the regulator's purpose is best served by allowing the "real thing," i.e., competition in wholesale power supply, to work as it should. Allowing the Petitioners to go forward to a hearing on the merits of the proposed Project is consistent with this purpose.

Section 366.01, F.S., declares the Legislature's intent that Chapter 366 is to be liberally construed in the public interest. Promoting competition in any market for a lawful product is in the public interest because competition will lead to lower prices and greater efficiency than if the market is characterized by monopoly, and because competition will also lead to an optimal allocation of society's scarce resources. In their Petition, the UCNSB and Duke New Smyrna have specifically alleged that the proposed New Smyrna Beach Power Project will promote lower power costs and promote increased efficiency in Peninsular Florida. This public interest consideration is particularly applicable where the supplier seeking

access to the wholesale market, here Duke New Smyrna, offers a highly efficient, cost-effective power supply with no risk to Florida electric customers, with no strings attached to its proposal, and with no obligation to pay for, nor any prospect of being forced -- as captive electric ratepayers -- to pay for, the proposed Project.

Section 366.81, F.S., declares that the Florida Energy Efficiency and Conservation Act, of which Section 403.519, F.S., is a part, is "to be liberally construed in order to meet the complex problems of . . . increasing the overall efficiency and cost-effectiveness of electricity and natural gas production and use . . . and conserving expensive resources, particularly petroleum fuels." The Petitioners have alleged that the New Smyrna Beach Power Project will serve both these goals, by (1) increasing the overall efficiency and cost-effectiveness of electricity production, (2) increasing the overall efficiency and cost-effectiveness of natural gas use, and (3) conserving expensive resources, including petroleum fuels. An interpretation of Section 403.519, F.S., that permits the Commission to determine, on the merits of the case and as a matter of fact, whether the Project will meet these goals as the Petitioners have alleged is therefore consistent with the Commission's statutory mandate.

Finally, as developed more fully in Section IV below, allowing the Petitioners to obtain the Commission's decision on the merits is consistent with federal energy policy as reflected in the Energy Policy Act of 1992 and in FERC's Order 888.

## III. PROHIBITING DUKE NEW SMYRNA FROM APPLYING DIRECTLY FOR A DETERMINATION OF NEED WOULD VIOLATE THE DORMANT COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The Commerce Clause of the United States Constitution prohibits the Commission from interpreting Florida law to prevent Duke New Smyrna from applying directly for a determination of need. Under the interpretation of Section 403.519, F.S., proposed by FPL, Duke New Smyrna may construct and operate a merchant power plant in Florida only if it first contracts with an in-state utility, which (according to the opponents) is the only type of entity entitled to apply for a determination of need. According to this interpretation, it is impossible for any out-of-state entity to enter the wholesale market for electrical power in Florida without first obtaining the permission of a potential in-state competitor. This interpretation of Florida law would allow in-state utilities effectively to bar out-of-state companies from competing with them in the Florida market simply by refusing to apply for a determination of need on behalf of the out-of-state corporation. Or, conversely, the in-state utility can demand economic benefits to which it would not otherwise be entitled in exchange for presenting the out-of-state company's determination of need application. Both of these alternatives constitute clear favoritism toward local corporations, and are therefore inconsistent with the basic Commerce Clause principle that no state may use its regulatory authority to isolate its own corporations from interstate competition.

The dormant (or "negative") Commerce Clause is a body of doctrine derived from the Constitution's express grant of congressional power to "regulate Commerce . . . among the several states." U.S. Const. Art. I, Sec. 8. This doctrine imposes a judicially enforceable limit on the extent to which a state may regulate commerce coming into or leaving that state (including transactions that take place in interstate commerce). The dormant Commerce Clause limit on state regulatory authority is drawn directly from the Constitution, and therefore applies even in the absence of any federal statute preempting a particular state regulation. "[A]ny state regulation of interstate commerce is subject to scrutiny under the dormant Commerce Clause, unless such regulation has been preempted or expressly authorized by Congress." Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County, 48 F.3d 701, 710 (3rd Cir. 1995).

The dormant Commerce Clause creates a national economic marketplace in every commercial commodity, including electricity. See New England Power Co. v. New Hampshire, 455 U.S. 331 (1982)(striking down as violation of dormant Commerce Clause a New Hampshire Public Utilities Commission order banning export of locally produced hydroelectric power).[12] The principle governing

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[12]With rare exceptions, electric power transactions at wholesale are transactions in interstate commerce, subject to regulation by the Federal Energy Regulatory Commission. See Federal Power Comm'n v. Florida Power & Light Co., 404 U.S. 453, 463 (1972) (Federal Power Commission, the precursor of the FERC, held to have jurisdiction over the transmission of power, at wholesale, by utility over another utility's lines on the ground that the electrical energy thus transmitted "commingled" in interstate commerce); see also 16 U.S.C.S. §§ 824(a) & (b)(1)

dormant Commerce Clause cases is simple and virtually absolute: "This 'negative' aspect of the Commerce Clause prohibits economic protectionism--that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273-74 (1988). Any state statute or regulation that functions primarily to provide economic benefits to in-state corporations is therefore unconstitutional. "This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety." H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 535 (1949). In this case, Duke New Smyrna does not challenge the Florida health, safety, and environmental laws applicable to power generation facilities, and Duke New Smyrna intends to comply with these laws in every respect. But the interpretation of Section 403.519, F.S., that would prohibit Duke New Smyrna from even applying for a determination of need without first contracting with an in-state utility is related to neither health, safety nor the environment; it is pure economic protectionism, and therefore is prohibited by the dormant Commerce Clause.

State laws can conflict with dormant Commerce Clause mandates in two ways: by discriminating against out-of-state commerce, and by unreasonably burdening interstate commerce. The exclusionary

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(1994).

interpretation of Section 403.519, F.S., urged by FPL is unconstitutional under both categories of dormant Commerce Clause jurisprudence.

**A. To Prohibit Duke New Smyrna From Applying for a Determination of Need Unconstitutionally Would Discriminate Against Out of State Commerce.**

Requiring Duke New Smyrna to contract with an in-state utility before obtaining a determination of need would overtly discriminate against unaffiliated out-of-state companies seeking to enter the wholesale market for electrical energy in Florida. Overt discrimination of this sort against out-of-state competitors of in-state companies is virtually impossible to justify under the Commerce Clause. "[W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). Under the exclusionary interpretation of Section 403.519, F.S., urged by FPL, out-of-state companies who refuse to enter into binding contracts with in-state utilities would be totally barred from obtaining a determination of need, and therefore totally barred from doing business in Florida as a wholesale producer of electrical power. This interpretation of Section 403.519, F.S., fits precisely the Supreme Court's description of a clear dormant Commerce Clause violation. "The clearest example of [protectionist] legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." Philadelphia, 437 U.S. at 624.

The United States Supreme Court has held unconstitutional many examples of state regulations that have attempted to give local economic interests a competitive advantage by requiring anyone doing business in the state to channel part of their business to the local companies. See C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994)(striking down statute barring local waste recycler from shipping nonrecyclable waste to out-of-state processor); Oklahoma v. Wyoming, 502 U.S. 437 (1992)(striking down statute requiring utilities to buy designated percentage of local coal); South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984)(striking down statute requiring companies exporting timber from Alaska to process timber at local processing plants); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)(striking down statute requiring shippers to package cantaloupes in Arizona before being shipped out of state); Toomer v. Witsell, 334 U.S. 385 (1948)(striking down statute requiring shrimp fishermen to unload, pack, and stamp shrimp in South Carolina before shipping them out of state); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928)(striking down statute requiring shrimp to be hulled in Louisiana before being shipped out of state).

Although these cases extend over seven decades, and involve many different industries, the underlying theme is consistent: neither a state nor one of its agencies may discriminate against interstate commerce, regardless of whether the discrimination takes the form of a direct ban on out-of-state competitors, a statutory requirement that out-of-state businesses join with in-state

businesses before doing business within the state, or the selective application of otherwise legitimate certification requirements. This theme has been applied to cases analogous to the present one for many years. For example, denying Duke New Smyrna applicant status or requiring Duke to contract with a local utility to obtain a determination of need would be indistinguishable from an equally exclusionary certification requirement struck down over seventy years ago in Buck v. Kuykendall, 267 U.S. 307 (1925). In that case, the State of Washington required all common carriers using the state's highways over certain routes to obtain a certificate of public convenience and necessity. Id. at 313. Although the applicant had received a similar certificate from Oregon, and asserted his willingness to comply with all applicable Washington state regulations concerning common carriers, Washington denied the certificate on the ground that the route was already being adequately served. Id. In an opinion by Justice Brandeis, the Supreme Court struck down the certification requirement. The Court noted that the purpose of the requirement "is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines, not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons, while permitting it to others for the same purpose and in the same manner." Id. at 315-16.

The Supreme Court has recently reaffirmed Buck as an example of unlawful state discrimination against interstate commerce. See Carbone, 511 U.S. at 394; see also Medigen of Kentucky, Inc. v.

Public Service Comm'n of West Virginia, 985 F.2d 164, 167 (4th Cir. 1993)(striking down requirement that transporter of medical waste obtain a certificate of convenience and necessity, and noting that "West Virginia's goal of providing universal service at reasonable rates may well be a legitimate state purpose, but restricting market entry does not serve that purpose"). Moreover, excluding Duke New Smyrna from the determination of need process, as urged by FPL, would interfere with interstate commerce even more directly than the certification requirement struck down in Buck, because in this case Duke New Smyrna would be prohibited from even applying for a determination of need unless it contracts with a local utility. Thus, Duke New Smyrna would be entirely barred from the Florida market.

It is irrelevant for purposes of dormant Commerce Clause analysis that Duke could eventually enter the Florida market after it contracted with an in-state utility to obtain a determination of need. Any discriminatory state action that is intended or that has the effect of protecting local interests is sufficient to trigger the application of the Commerce Clause, even if that action merely imposes extra costs on an out-of-state entity. "The volume of commerce affected [by an exclusionary state regulation] measures only the extent of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce." Wyoming, 502 U.S. at 455. Thus, even a minor economic effect on the operation of Duke's facility would constitute a violation of the dormant Commerce Clause if that effect tends to

favor local economic interests. Such an effect is inevitable if Duke New Smyrna is forced to contract with a local utility to apply for a determination of need on Duke New Smyrna's behalf. The requirement that Duke New Smyrna enter a contract that might not be economically advantageous for Duke New Smyrna would itself constitute an impermissible impact on interstate commerce. At a minimum, local utilities are not likely to undertake the task of applying for a determination of need on behalf of Duke New Smyrna without demanding some compensation in return. Thus, Duke New Smyrna would be forced to compensate the local utility for its assistance, and this compensation would necessarily raise the cost of providing cheap power to the wholesale market. Local utilities who could themselves apply for a determination of need would therefore obtain an economic advantage over out-of-state competitors such as Duke New Smyrna in serving the market for wholesale electrical power. The United States Supreme Court has consistently held that the dormant Commerce Clause prohibits states from using their regulatory authority in this way to skew a particular economic market in favor of local interests.

The facially discriminatory nature of the proposed interpretation of Section 403.519, F.S., renders that interpretation constitutionally indefensible. As noted above, it is virtually impossible to justify discriminatory restrictions on interstate commerce. See Philadelphia, 437 U.S. at 624 (noting "a virtually per se rule of invalidity" for protectionist statutes). Such restrictions may not be justified under any circumstance if

the state cannot demonstrate that its legitimate local interests could not be protected through a nondiscriminatory alternative regulatory scheme. "Discrimination against interstate commerce in favor of local business or investment is per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." Carbone, 511 U.S. at 392. In this case, therefore, the only question is whether the legitimate interests represented by the determination of need process can be adequately served if Duke New Smyrna is permitted to apply directly to the Commission without first contracting with a local utility for the entire capacity of the Project.

The determination of need process serves three general legitimate state interests: ensuring electric system reliability and integrity; providing adequate electricity at a reasonable cost; and determining whether a proposed plant is the most cost effective available. See Fla. Stat. § 403.519. All three interests can easily be protected by a nondiscriminatory alternative: simply apply these parameters to the merits of Duke New Smyrna's application. Since the three legitimate state interests justifying the determination of need process can be satisfied without requiring a local utility to apply for a determination of need on behalf of Duke New Smyrna, the exclusionary interpretation of Section 403.519, F.S., cannot withstand the "rigorous scrutiny" the United States Supreme Court demands in its dormant Commerce Clause decisions.

Finally, the fact that Section 403.519, F.S., might hypothetically affect in-state wholesale utilities as well as out-of-state wholesale utilities such as Duke New Smyrna does not cure the unconstitutional discrimination inherent in the proposed interpretation. The Supreme Court has held repeatedly that a discriminatory statute "is no less discriminatory because in-state or in-town [companies] are also covered by the prohibition." Carbone, 511 U.S. at 391; see also Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 504 U.S. 353 (1992)(striking down Michigan landfill regulation, even though regulation disadvantaged some Michigan commerce as well as interstate commerce); Dean Milk Co. v. Madison, 340 U.S. 349 (1951)(striking down Madison, Wisconsin ordinance requiring local inspection of milk, even though ordinance affected milk imported from other parts of state, as well as milk from other states). It is also irrelevant that the regulation does not disadvantage some out-of-state companies, in the sense that some out-of-state companies may choose voluntarily to join with an in-state utility to seek a determination of need for a new merchant power plant. "[T]he mere fact that not all out-of-state competitors are disadvantaged by a state statute does not preclude a finding that the statute places a discriminatory burden on interstate commerce." Division of Alcoholic Beverages and Tobacco, et al v. McKesson Corp., 524 So.2d 1000, 1007 (Fla. 1988)(holding that protectionist excise tax violated dormant Commerce Clause, but refusing to force state to refund unconstitutionally collected tax), rev'd in part,

496 U.S. 18 (1990)(requiring state to refund unconstitutionally collected tax).

In sum, it is impossible under longstanding dormant Commerce Clause precedents to justify the requirement that Duke New Smyrna contract with a Florida utility before applying for a determination of need: The requirement overtly discriminates in favor of existing Florida utilities, it has no legitimate justification that cannot be satisfied by nondiscriminatory means, and it cannot be justified on the ground that other Florida independent power producers might also be affected by the requirement. The only possible conclusion, therefore, is that the exclusionary interpretation of Section 403.519, F.S., constitutes unconstitutional discrimination in violation of the dormant Commerce Clause, and Duke should be permitted to apply directly for a determination of need. The motions to dismiss should be denied.

**B. Prohibiting Duke New Smyrna From Applying for a Determination of Need Unconstitutionally Burdens Interstate Commerce.**

Because the requirement that Duke New Smyrna contract with a local utility before applying for a determination of need constitutes unconstitutional discrimination against interstate commerce, it is unnecessary to consider whether the requirement would unconstitutionally burden interstate commerce. See Carbone, 511 U.S. at 390 (holding that courts "need not resort to" burden category of dormant commerce clause analysis if statute is found to discriminate against interstate commerce). In this case, however, applying the burden category of dormant Commerce Clause analysis would produce the same result as the discrimination analysis:

i.e., that the proposed interpretation of Section 403.519, F.S., is unconstitutional.

This second category of dormant Commerce Clause analysis limits the extent to which states can indirectly burden interstate commerce, even if there is no evidence of local favoritism or discrimination against interstate commerce. The most frequently cited statement of the burden analysis is found in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. . . . And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

See also Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 579 (1986)("we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.").

In this case the proposed interpretation of Section 403.519, F.S., fails every aspect of the Pike burden test. Requiring Duke New Smyrna to contract with a local utility before applying for a determination of need is not evenhanded, the requirement's effect on interstate commerce is not incidental, the burden on commerce outweighs the putative local benefits, and the legitimate local interests represented by the determination of need process can be

protected through means that have a much lower impact on interstate activities.

The discussion in the previous section demonstrates why the proposed interpretation of Section 403.519, F.S., is not evenhanded in its treatment of in-state and out-of-state participants in the market for wholesale electrical power. Under FPL's proposed interpretation, the only way an out-of-state company can enter the market for wholesale electrical power is by entering into a contract with a local utility to obtain the necessary determination of need. This imposes a major burden on commerce because it imposes additional costs on out-of-state applicants, and forces them to give up a measure of control over the regulatory decisions that dictate how and when a new generation facility will be built.

The discussion in the previous section also disposes of the argument that legitimate local interests support the requirement that Duke New Smyrna enter into a contract with a local utility to obtain regulatory approval of its new facility. The only legitimate interests that can be asserted in favor of the determination of need process are: ensuring electric system reliability and integrity, providing adequate electricity at a reasonable cost, and determining whether a proposed plant is the most cost-effective available. See Fla. Stat. § 403.519. All three interests can be satisfied by dealing with Duke New Smyrna directly instead of through a local intermediary. There is, of course, a possible fourth interest to justify prohibiting Duke New Smyrna from applying for a determination of need directly, i.e., to

protect local economic interests from out-of-state competition in the wholesale market for electricity. This interest constitutes pure economic protectionism, however, and is therefore inconsistent on its face with the dormant Commerce Clause. Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 43-44 (1980).

Under the dormant Commerce Clause, the scope of the Commission's legitimate authority with regard to wholesale electrical generation facilities is necessarily more limited than its authority with regard to new generation facilities being proposed by utilities subject to retail rate regulation by the Commission. Thus, a decision to permit Duke New Smyrna to apply directly for a determination of need would not imply any constitutional limit to the Commission's existing authority to regulate local utilities. The Commission's greater authority with regard to local utilities is consistent with the dormant Commerce Clause because it is necessary to protect the ratepayers who will be forced to bear the cost and the risk of a local utility's power plants. These interests are not relevant to Duke New Smyrna's application, however, because Duke New Smyrna will assume the full cost and risk of the facility itself.

Permitting Duke New Smyrna to apply directly for a determination of need infringes on none of the state's legitimate regulatory interests. Conversely, requiring Duke New Smyrna to contract with a local utility to apply for a determination of need would directly burden interstate commerce in a manner that favors local economic interests and disadvantages competitors from outside

the state. The burden this requirement imposes on interstate commerce clearly exceeds the local benefits; therefore the exclusionary interpretation of Section 403.519, F.S., advanced by FPL is unconstitutional under the burden category of dormant Commerce Clause jurisprudence.

## IV. REQUIRING DUKE NEW SMYRNA TO OBTAIN A CONTRACT WITH STATE REGULATED ELECTRIC COMPANIES IN ORDER TO BUILD THE NEW SMYRNA POWER PROJECT IS INCONSISTENT WITH FEDERAL UTILITY LAW.

FPL is wrong when it argues that prior decisions requiring applicants to have contracts with purchasing utilities are applicable here. Even if one assumes for the sake of argument that the cases sited by FPL apply, and assumes further that the Legislature had the authority to adopt such a limitation under the Commerce Clause, interpreting Florida law as limiting applicants for a need determination to electric utilities regulated by the State is inconsistent with the goals and policies of federal law intended to promote competition in the United States electric utility industry. The Energy Policy Act of 1992, and FERC's Order 888, which require public utilities that own transmission facilities to provide access to those facilities to independent power generators on a non-discriminatory basis, are inconsistent with such a limiting construction of Section 403.519, F.S. The limiting construction would require that Duke New Smyrna contract to sell power to an in-state utility before it can construct and operate the Project, which would undermine a fundamental objective of Title VII of the Energy Policy Act and Order 888, i.e., to prevent vertically integrated public utilities (utilities that own

transmission, distribution and generation, and which thus have incentives to favor their own generation) from interfering with the development of a competitive wholesale power market.

**A. Requiring Duke New Smyrna to Contract With a State Regulated Utility In Order to Build Its Power Plant Conflicts with the Goal of the Energy Policy Act and Order 888 to Free the Wholesale Power Market from Undue Discrimination by Vertically Integrated Utilities.**

Federal preemption may be explicit, may result from a conflict between federal and state law, or may arise when the federal regulatory provisions evidence an intent by Congress to occupy the field within which the state regulates. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992). The interpretation of Section 403.519, F.S., advocated by FPL results in a circumstance in which the requirements of state law conflict with the goals of a federal statute or regulation. To run afoul of the Constitution, state law need not require conduct that would violate federal law; it is sufficient that state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm., 461 U.S. 190, 204 (1983) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). Requiring a wholesale power merchant to contract with a utility regulated by the State of Florida as a prerequisite to being allowed to build a power plant intended to supply power to the interstate wholesale market directly and substantially undermines the purposes of Title VII of the Energy Policy Act. That purpose is to prevent vertically integrated, regulated utilities from discouraging federally

regulated public utilities, such as Duke New Smyrna, from building wholesale generating facilities. See Energy Policy Act of 1992, Pub. Law. 102-486, 106 Stat. 2776, 2905-21 (1992).

The Energy Policy Act was written against a background of FERC's difficulty in unbundling generation of electricity and creating a competitive market for wholesale power. When Congress enacted the Federal Power Act, electricity was provided almost exclusively by vertically integrated state regulated utilities which owned generation, transmission and distribution facilities. Order 888, 61 Fed. Reg. 21,539, 21,543 (1992). Utilities sold a bundled service -- delivered electric energy -- to retail and wholesale customers. Id. Recent changes in technology, and the experience of utilities with buying power from independent qualifying facilities under the Public Utility Regulatory Policies Act of 1978 (PURPA), indicated that generation of electricity could be provided more economically by independent producers, operating in a competitive market, without forfeiting system reliability. Id. at 21,543-46. FERC, however, was limited in its ability to encourage development of independent wholesale generators by two major factors. First, FERC did not have clear authority to order vertically integrated utilities to transmit power for wholesale generators. Id. at 21,546. Thus, existing utilities could stymie the plans of wholesale public utilities by refusing to transmit power for them, which would isolate a generating facility and render it incapable of delivering its power. Second, the Public Utility Holding Company Act of 1935 (PUHCA) imposed severe

restrictions on the ability of independent developers to own power projects that were not qualifying facilities under PURPA, and prohibited utilities from owning such facilities outside of the geographic area in which they provide regulated service. Title VII of The Energy Policy Act was adopted to grant FERC authority to address both of these problems.

In amendments to Sections 211 & 212 of the Federal Power Act, Congress provided that FERC has the authority to order utilities to transmit power for other generators of electricity. See 16 U.S.C. §§ 824j, 824k (1998). The legislative history manifests that Congress's intent in so providing was to prevent utilities with monopoly power over power transmission from interfering with FERC's efforts to create a competitive market for wholesale power. The House Report on the Energy Policy Act stated:

> Absent clarification of FERC wheeling authority, it can be expected that some utilities will try to exercise their monopoly power to block IPP's and others' legitimate transmission requests. This would permit unlawful discrimination to thwart efficiency in the electricity industry, and would defeat the Commission's [FERC's] goal of encouraging low rates for consumers through greater competition.

H.R. Rep. No. 102-474(I) at 139-40 (1992), reprinted *in* 1992 U.S.C.C.A.N. 1954, 1962-63.

FERC's Order 888 also evidences a central concern with the ability of utilities to interfere with the development of a competitive wholesale power market. In the introduction and summary on the very first page of the 197 page Order, FERC stated

(primarily if not entirely to other utilities in Peninsular Florida), a market that has always been subject to federal rather than state regulatory jurisdiction. Hence, contrary to the assertions of FPL, there is no tradition of state regulation against which the dictates of the Energy Policy Act and Order 888 must be read.

**B. Requiring Duke New Smyrna to Enter into a Contract with a State Regulated Utility Undermines the Energy Policy Act's Goal of Facilitating Provision of Wholesale Power by Experienced, Competitive Power Producers.**

Requiring that wholesale power generators enter into a contract with a state-regulated utility before applying for a determination of need would also undermine the provisions of the Energy Policy Act that provide for wholesale public utilities, such as Duke New Smyrna, to be exempted from the requirements of PUHCA. Prior to the Energy Policy Act, PUHCA greatly restricted the structure of, and limited utility investment in, wholesale generators like Duke New Smyrna. PUHCA subjected any such producer that was affiliated with a utility to onerous regulation by the Securities Exchange Commission. See generally 15 U.S.C. §§79a - 79z-6 (1998). The legislative history of the Energy Policy Act demonstrates that Congress was especially concerned that PUHCA would discourage experienced power producers from building generating facilities. See H.R. Rep. No. 102-474(I) at 139 (1992), reprinted in 1992 U.S.C.C.A.N. 1954, 1962. Thus, in adopting section 711 of the Energy Policy Act, 15 U.S.C. §79z-5a (1998), Congress created a new entity relative to PUHCA, the exempt wholesale generator (EWG), specifically to allow companies like

that, in order for consumers to see the benefits from a competitive electricity market:

> we [FERC] must . . . ensure that all these [owners of transmission facilities] . . . cannot use monopoly power . . . to unduly discriminate against others [i.e. competing generators].

The reading of Section 403.519, F.S., advocated by the FPL would give FPL the precise power that Congress and FERC carefully worked to eliminate. Under that reading, if Florida's retail utilities do not agree to sign contracts for purchases of power from wholesale utility generators like Duke New Smyrna, these utilities retain the power to act as "gatekeepers" and prevent such wholesale utilities from building generating facilities at all. Transmission guaranteed by the Energy Policy Act is not worth anything if a wholesale utility cannot build a plant to generate power in the first place.

FPL incorrectly asserts that states have traditionally exercised complete authority over the need for power and electricity rates. See FPL's Memorandum of Law at 31. FPL quotes PG&E, 451 U.S. at 205, as the sole support for this proposition. FPL, however, conveniently omits language from the same paragraph of the PG&E opinion clearly recognizing "the broad authority of the Federal Power Commission [now the Federal Energy Regulatory Commission] over the need for and pricing of electrical power transmitted in interstate commerce [as an exception to the] economic aspects of electrical generation that [states] have ... regulated." 461 U.S. at 205-06. (Emphasis supplied.) Duke New Smyrna plans to supply power to the interstate wholesale market

Duke New Smyrna to use their expertise to develop and operate wholesale generating facilities. Construing Section 403.519, F.S., to allow existing utilities to veto the building of power plants by affiliates of out-of-state utilities would frustrate Congress's objective to allow experienced companies to build and operate wholesale generating facilities.

**C. Nassau II Does Not Contradict the Conclusion that Interpreting Section 403.519, F.S., to Require that Duke New Smyrna Contract with a State Regulated Utility is Inconsistent With Federal Policy.**

Finally, the Florida Supreme Court's decision in Nassau II does not undercut the conclusion that requiring Duke New Smyrna to enter into a contract for sale of power with a Florida electric utility is inconsistent with federal energy policy. In Nassau II, the court affirmed the Commission's interpretation that Section 403.519, F.S., required a PURPA qualifying facility (QF), proposing to bind a specific utility contractually as a precondition of going forward to enter into such a contract with a utility, before filing a (joint) application for a need determination. Federal preemption was not addressed by the Commission or the court. See generally 641 So. 2d 396; 92 FPSC 10:646. Even if it had been addressed, differences between the regulatory scheme established by PURPA and that established by the Energy Policy Act and Order 888 warrant different outcomes. PURPA requires state-regulated utilities to purchase power from QFs at avoided cost. 16 U.S.C. §824a-3 (1998). Thus, it envisions a sale of power to the utility and hence a contractual relationship between the QF and the utility. Unlike this case, in Nassau II, the QF attempted to require FPL to

contract with it as a means of showing need. The Commission implicitly recognized this difference when it specifically limited the interpretation in the Nassau Order to proceedings in which non-utility generators seek determinations of need based on a specific utility's need. See 92 FPSC at 10:646-47. The Commission's interpretation of Section 403.519, F.S., with respect to QFs thus merely dictated that a contract between the QF and the purchasing utility must be in place prior to the determination of need. If a contract requirement is imposed on wholesale power merchants for their plants to be considered for siting, the Commission would be creating an obligation that such merchants sell power to a particular utility in Florida, which is clearly inconsistent with the open, competitive wholesale market envisioned by Order 888.

To prohibit Duke New Smyrna's plant from siting consideration because Duke New Smyrna has not entered into a contract with a Florida utility is inconsistent with the purpose of the Energy Policy Act and Order 888, which are intended to prevent vertically integrated utilities from interfering with the creation of an open and competitive market for wholesale power. Allowing Duke New Smyrna to gain consideration in a siting proceeding does not threaten any of the interests Congress left for states to protect when it allowed states to retain authority to impose environmental and siting requirements on wholesale generating facilities. Thus, to interpret Section 403.519, F.S., to require an applicant for a need determination to contract with an in-state utility would clearly conflict with the objectives of Congress and FERC.

## V. THE JOINT PETITION MEETS THE PLEADING REQUIREMENTS OF SECTION 403.519, F.S., AND THE COMMISSION'S RULES.

The Joint Petition fully complies with all applicable pleading requirements set forth in Rule 25-22.081, F.A.C. and is more than sufficient to allow:

> the Commission to take into account the need for electric system reliability and integrity, the need for adequate reasonable cost electricity, and the need to determine the most cost effective alternative available....

See Rule 25-22.081, F.A.C. (repeating the necessary factors to be considered in a need determination proceeding set forth in Section 403.519, F.S.). FPL raises numerous alleged pleading deficiencies, each of which will be specifically addressed below. FPL's objections fall into three general categories: First, FPL claims that the allegations concerning the Utilities Commission are inadequate to meet the Commission's pleading requirements; second, FPL claims that because "Peninsular Florida" is not a utility, Petitioners cannot rely on it to satisfy the Commission's pleading requirements, and even if Petitioners could rely on Peninsular Florida, the allegations contained in the Joint Petition are otherwise inadequate; third, FPL asserts that because the Project is a merchant plant it cannot adequately allege need or identify the purchasing utility for the merchant component of the Project.

With regard to FPL's first claim, Petitioners submit that the allegations regarding the Utilities Commission, contained in the Joint Petition, fully comply with Rule 25-22.081, F.A.C. With regard to FPL's second claim, FPL simply misses the point --

Petitioners have not relied on, do not rely on, and need not rely on "Peninsular Florida" to meet the pleading requirements of Rule 25-22.081, F.A.C. Rather, the Joint Petition contains the information concerning Peninsular Florida because Peninsular Florida is the primary wholesale market in which the Project will operate and Petitioners believed that the information would be useful evidence to the Commission. Finally, with regard to FPL's third claim, FPL simply refuses to acknowledge that there can be different types of need. In doing so, FPL ignores the provision of Rule 25-22.081(3), F.A.C., that a need determination may be "sought on some basis in addition to or in lieu of capacity needs, such as oil backout ..." In sum, FPL has failed to identify any valid pleading deficiencies and its Motion to Dismiss should be denied.

**A. The Joint Petition Identifies the Primarily Affected Utilities in Compliance with Rule 25-22.081(1), F.A.C.**

Rule 25-22.081(1), F.A.C., requires that a petition for determination of need include: "[a] general description of the utility or utilities primarily affected." In this case, the Utilities Commission and Duke New Smyrna are the only utilities primarily affected and the Joint Petition includes all relevant allegations regarding both primarily affected utilities. The Joint Petition and supporting Exhibits specifically describe the Utilities Commission and Duke New Smyrna (see Joint Petition at 4-6), their load and electrical characteristics (see Joint Petition at 10-12, their generating capability (see Joint Petition at 10-11) and their interconnections (see Joint Petition at 8-9).

Contrary to FPL's assertions, nothing in Rule 25-22.081(1), F.A.C., requires that all capacity of a proposed power plant be allocated to a primarily affected utility, or that utilities that may purchase power from the Project in the future be identified. In this case, a utility such as FPL is not and cannot be a primarily affected utility or a purchasing utility until it elects, at its sole discretion, to enter into a power purchase agreement with Duke New Smyrna. If FPL had entered into such an agreement, Petitioners would have identified it in the Joint Petition. To date, FPL has not chosen to do so and thus is not primarily affected by this project and is not a purchasing utility.

**B. The Joint Petition Contains Allegations of Need in Compliance with 25-22.081(3), F.A.C.**

Rule 25-22.081(3), F.A.C., sets forth the issues concerning need for a proposed facility that should be included in a need determination petition. The Joint Petition contains all the required elements.

As stated above, the primarily affected utilities in this case are the Utilities Commission and Duke New Smyrna. The Joint Petition contains specific allegations addressing the Utilities Commission's need. See Joint Petition at 11; Joint Petition Exhibit at 43-52. The Joint Petition also contains all relevant allegations addressing the need in Peninsular Florida, the primary wholesale market in which Duke New Smyrna will operate.[13] See Joint

[13]The Joint Petition contains a minor scrivener's error. To wit, the reference to "Table 11" on page 12 of the Joint Petition and page 53 of the Joint Petition Exhibit is incorrect and should state "Tables 8 and 9."

Petition at 12, 17-18, 25, 28; Joint Petition Exhibit at 54-55. Duke New Smyrna's need allegations directly address the need of Duke New Smyrna as the wholesale power utility that it is. The Commission's rules require nothing more. See Rule 25-22.081(3), F.A.C., (recognizing needs other than traditional "capacity needs").

FPL argues that instead of directly alleging that the Project is needed, the Joint Petition "attempts to finesse" the need allegations. FPL's Memorandum of Law at 44. FPL's argument is meritless rhetoric. First, nothing in Rule 25-22.081(3), F.A.C., requires that the Joint Petition directly allege need--there simply are no magic words that must be included. Instead, Rule 25-22.081(3), F.A.C., merely requires "[a] statement of the specific conditions, contingencies or other factors which indicate a need...." (Emphasis supplied.) The Joint Petition includes such a statement. See Joint Petition at 10-11. Second, Petitioners' choice of the term "is consistent with" in the allegations of need contained in the Joint Petition is in no way novel in a need determination before the Commission. See Joint Petition at 12, 14, 23. In fact, in 1990, in FPL's 1990 Martin Expansion Project need determination proceeding, the Commission addressed the following issue:

> Issue 14: Are the type, size and timing of FPL's proposed Martin Units 3 and 4 reasonably consistent with the capacity needs of Peninsular Florida?

In re: Petition of Florida Power & Light Company for Determination of Need for Proposed Electrical Power Plant and Related Facilities

-- Martin Expansion Project, 90 FPSC Docket No. 890974-EI, Order No. 22691 at (Fla. Pub. Serv. Comm'n. March, 1990). (Emphasis supplied.) In its Prehearing Statement, rather than objecting to the use of the term "consistent with", FPL repeated Issue 14 verbatim and responded

> Yes . . . FPL's plan to add 1,312 of combined cycle capacity in the 1993 to 1995 time frame is consistent with the remaining Peninsular Florida need.

FPL's Prehearing Statement at 16-17 (Docket No. 890974-EI). (Emphasis supplied.) Clearly, FPL's use of the phrase "is consistent with" to describe how a proposed project affects need and addresses the "remaining" need of the rest of Peninsular Florida was appropriate for FPL in 1990 and is equally appropriate for Petitioners today.

**C. The Joint Petition Contains a Discussion of Viable Nongenerating Alternatives in Compliance with Rule 25-22.081(5), F.A.C.**

Rule 25-22.081(5), F.A.C., provides that a need determination petition should include "[a] discussion of viable nongenerating alternatives . . ." The Joint Petition contains a discussion regarding the Utilities Commission's nongenerating (i.e., conservation) alternatives. See Joint Petition at 22. The Joint Petition also contains a discussion of Duke New Smyrna's nongenerating alternatives. See Joint Petition at 23-24 (stating that as a federally regulated public utility Duke New Smyrna does not engage in end use conservation programs and is not required to have conservation goals pursuant to Section 366.82(2), F.S.). The allegations in the Joint Petition concerning conservation for both

the Utilities Commission and Duke New Smyrna constitute discussions of nongenerating alternatives and meet the pleading requirement of Rule 25-22.081(5), F.A.C.

**D. Rule 25-22.081(7), F.A.C., is not Applicable to the Project.**

Rule 25-22.081(7), F.A.C., provides in pertinent part:

> If the generation addition is the result of a purchased power agreement between an investor-owned utility and a non-utility generator ...

(Emphasis supplied.) Quite simply, Rule 25-22.081(7), F.A.C., does not apply in this case because the Project is not the result of a purchased power agreement between an investor-owned utility and a non-utility generator. Rather, the Project is the result of an agreement between Duke New Smyrna and the Utilities Commission, neither of which is a "non-utility generator." The Utilities Commission is an "electric utility" under Section 403.503(13), F.S., and Duke New Smyrna is an "electric utility under both Sections 366.02(3) and 403.503(13), F.S., and a "public utility" under the Federal Power Act. Thus, on its face, Rule 25-22.081(7), F.A.C., is not applicable to this need determination proceeding.

**E. The Joint Petition Alleges Utility-Specific Need.**

The Joint Petition includes a utility-specific allegation of need for the two primarily affected utilities in this case, at this time: Duke New Smyrna and the Utilities Commission. Contrary to FPL's assertions, nothing in Section 403.519, F.S., or Rule 25-22.081, F.A.C., requires more. Neither Section 403.519, F.S., nor Rule 25-22.081, F.A.C., require a need determination petition to identify all utilities that may be affected in the future, or to

link all of a project's capacity to a currently specifically identified utility.

## VI. FPL'S ARGUMENTS ON THE MERITS OF PETITIONERS' REQUEST FOR A NEED DETERMINATION ARE NOT APPROPRIATE IN A MOTION TO DISMISS.

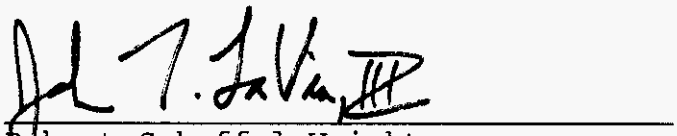
On numerous occasions in its Motion to Dismiss and its Memorandum of Law, FPL raises arguments that directly relate to the merits of Petitioners' request for a need determination. Specifically, FPL asserts that the Project is not needed, (FPL's Motion to Dismiss at 3; FPL's Memorandum of Law at 39-40), and that the Project will result in uneconomic duplication of facilities. FPL's Motion to Dismiss at 5; FPL's Memorandum of Law at 54-55. Whether the Project is needed and whether certification of the project will result in uneconomic duplication of facilities are among the core substantive issues to be decided by the Commission in this proceeding. As such, the ultimate resolution of these issues must be based on the Commission's consideration of all relevant factual matters, as well as matters of law. Clearly, resolution of these issues is not appropriate in the context of a motion to dismiss and the Commission should reject FPL's efforts to improperly utilize such a motion. See Lowery v. Lowery, 654 So. 2d 1218, 1219 (Fla. 1st DCA 1995) (a motion to dismiss cannot be used to determine issues of fact). Moreover, when considering FPL's Motion to Dismiss, the Commission must assume that all allegations in the Joint Petition are true and all reasonable inferences must be drawn in favor of Petitioners. See Abruzzo v. Haller, 603 So.

2d 1338 (Fla. 1st DCA 1992). The Commission should deny FPL's Motion to Dismiss.

**CONCLUSION**

The Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company, Ltd., L.L.P., are, individually and collectively, proper applicants for the Commission's determination of need for the New Smyrna Beach Power Project under all applicable law. For this reason, the Commission need never reach the federal law issues addressed herein. However, unlike FPL, which has attempted to stress the express differences within the Florida Statutes as well as the differences between state and federal law, the Petitioners have offered the Commission a unified, harmonized, interpretation. Both petitioners are applicants under the Siting Act and electric utilities under Section 366.02(2), F.S., and Duke New Smyrna is a public utility under the Federal Power Act. Allowing the petitioners to go forward to a hearing on the merits is consistent with the fundamental purpose of utility regulation, consistent with the goals of natural energy policy, and in harmony with the Commerce Clause of the United States Constitution. FPL's arguments are misplaced, unfounded and meritless and its Motion to Dismiss must be denied.

Respectfully submitted this 15th day of September, 1998.



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**CERTIFICATE OF SERVICE**
**DOCKET NO. 981042-EM**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery (*) or by United States Mail, postage prepaid, on the following individuals this 15th day of September, 1998:

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