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RECORDS AND REPORTING

November 2, 1998

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

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

Dear Ms. Bayo:

Enclosed for filing in the above docket on behalf of Florida Power Corporation are the original and fifteen (15) copies of the Prehearing Statement of Florida Power Corporation.

We request you acknowledge receipt and filing of the above by stamping the additional copy enclosed.

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

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

Very truly yours,

Gary L. Sasso

- ACK Enclosures
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FPSC-RECORDS/REPORTING

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Joint Petition for)
Determination of Need for an)
Electrical Power Plant in Volusia)
County by the Utilities Commission,)
City of New Smyrna Beach, Florida,)
and Duke Energy New Smyrna Beach)
Power Company Ltd., L.L.P.)
_____)

DOCKET NO. 981042-EM

FILED: November 2, 1998

PREHEARING STATEMENT OF
FLORIDA POWER CORPORATION

Florida Power Corporation ("FPC") pursuant to Rule 25-22.038, Florida Administrative Code, hereby submits its Prehearing Statement in this matter, and states as follows:

A. APPEARANCES

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On behalf of Florida Power Corporation

B. WITNESSES

<u>Witness</u>	<u>Subject Matter</u>	<u>Issue</u>
Michael D. Rib	Petitioners' failure to show need, regulatory framework for planning and determining need	Issues 1-6, 8, 9, 12, 15, 17, 30, 33-34, 41
Vincent M. Dolan	Policy issues concerning merchant plants	Issues 1, 6, 8, 9, 12, 15, 17, 30-35, 37-41

C. EXHIBITS

<u>Exhibit Number</u>	<u>Witness</u>	<u>Description</u>
<u>VMD-1</u>	Dolan	Letter from James A. Scott, Chairman, Regulated Industries Committee, The Florida Senate to Julia Johnson, Chairman, Public Service Commission dated December 12, 1997
<u>VDM-2</u>	Dolan	Letter from Julia L. Johnson, Chairman, Public Service Commission to The Hon. Jim Scott, Chairman, Senate Regulated Industries Commission, The Florida Senate dated December 19, 1997

D. STATEMENT OF BASIC POSITION

Under existing law, a merchant plant may not obtain a determination of need under Section 403.519, Fla. Stat. The need provision was enacted as part of the Florida Energy Efficiency and Conservation Act ("FEECA"), Sections 366.80-366.85, Fla. Stat., Section 366, and is part of a comprehensive statutory and regulatory framework in this State applicable to utilities that have a statutory duty to serve retail customers. In this connection, Section 366.82(1) of FEECA provides that "For the purposes of . . . [§]403.519, 'utility' means any person or entity of whatever form which provides electricity . . . at retail to the public" (Emphasis added). In contrast to utilities like FPC, merchant plants do not have a statutory obligation to serve retail customers in Florida. Accordingly, they may not obtain a determination of need under Section 403.519.

The Florida Supreme Court has so held. In Nassau Power Corp. v. Beard, 601 So. 2d 1175 (Fla. 1992) ("Nassau I"), the Court held that "the four criteria [for assessing need] in Section 403.519 are 'utility and unit specific' and that the need for the purposes of the Siting Act is the need of the entity ultimately consuming the power." 601 So. 2d at 1178 n.9 (emphasis added). To the same effect, in Nassau Power Corp. v. Deason, 641 So. 2d 396 (Fla. 1994) ("Nassau II"), the Court held that "a need determination proceeding is designed to examine the need resulting from an electric utility's duty to serve customers. Non-utility generators . . . have no similar need because they are not required to serve customers." Id. at 398 (emphasis added). The Court held that "only electric utilities [that have a statutory obligation to serve customers], or entities with whom such utilities have executed a power purchase contract are proper applicants for a need determination." Id.

Limiting need proceedings to retail utilities (and to independent power producers that have executed a power purchase agreement with them) is thus compelled by express statutory language and the Supreme Court's decisions in the Nassau cases. Further, it simply makes no sense to speak of "need" in the context of a merchant plant. Merchant plant developers have no "need" for generating capacity because, by definition, they have no obligation to serve customers. They need only profits, and Section 403.519 does not exist

to provide economic opportunities for enterprising developers. Only retail utilities have the right and responsibility to serve the consumers of electric power in this State. As the Supreme Court recognized, it follows that only retail utilities may be said to have a "need" for generating capacity required to supply power to such consumers.

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

In this case, although the Utilities Commission, City of New Smyrna Beach ("UCNSB") is a petitioner, UCNSB claims to need only 30 MW of the 510 MW power plant that Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. ("Duke") proposes to build. Even as to those 30 MW, the petitioners have not adduced an executed power purchase agreement. Thus, the proposed plant is in whole or substantial part a merchant plant. That being the case, petitioners cannot meet, and have not met, the statutory requirements for obtaining a determination of need under Section 403.519.

For these reasons, and for the reasons developed more fully in FPC's motion to dismiss and prefiled testimony, the Joint Petition must be denied. The petitioners' plea to

change the law in this State should be directed to the Florida Legislature, where the issues raised by the Joint Petition may be appropriately addressed.

E. STATEMENT OF POSITION ON SPECIFIC ISSUES

NEED FOR ELECTRIC SYSTEM RELIABILITY AND INTEGRITY

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

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

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

FPC: Duke has a participation agreement in place with UCNSB, not an executed power purchase agreement. The participation agreement is qualified in a number of respects and does not provide assurance that even UCNSB's needs for generating capacity will be met. Further, UCNSB is able to justify the proposed project as a cost-effective alternative only because the plant would have a capacity many times greater than 30 MW in capacity. It is untenable to contend that a utility that needs 30 MW for reliability purposes may seek to satisfy that need by seeking certification of a 510 MW plant, with uncommitted capacity of 480 MW. (Rib)

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

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

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

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

ISSUE 5: Can or should the capacity of the proposed project be properly included when calculating the reserve margin of an individual Florida utility or the State as a whole?

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

ISSUE 6: What impact will the proposed project have on the reliability of generation and transmission systems within Florida?

FPC: Absent an agreement in place for the sale of firm capacity and energy to a utility for resale to retail customers in Florida, the proposed project may not be counted on to improve reliability. It may compromise such reliability. (Rib, Dolan)

ISSUE 7: What transmission improvements and other facilities are required in conjunction with the construction of the proposed facility, and were their costs adequately considered?

FPC: No position at this time.

NEED FOR ADEQUATE ELECTRICITY AT A REASONABLE COST

ISSUE 8: Is there a need for the proposed power plant, taking into account the need for adequate electricity at a reasonable cost, as this criterion is used in Section 403.519?

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

MOST COST EFFECTIVE ALTERNATIVE AVAILABLE

ISSUE 9: Is the proposed power plant the most cost-effective alternative available, as this criterion is used in Section 403.519?

FPC: No. Again, as the Court held in the Nassau cases, the statutory criteria are utility specific and apply to retail utilities with an obligation to serve customers. As regards this particular criterion, it makes no sense to speak of cost-effective alternatives without understanding that the statute speaks of alternative means that a retail utility has available to it for discharging its statutory obligation to serve its customers. (Rib, Dolan)

ISSUE 10: Has Duke New Smyrna provided adequate assurances regarding available primary and secondary fuel to serve the proposed power plant on a long- and short-term basis?

FPC: No position at this time.

ISSUE 11: What impact, if any, will the proposed power plant have on natural gas supply or transportation resources on State regulated power producers?

FPC: It will divert these resources from utilities that have an obligation to serve consumers in this State.

ISSUE 12: Will the proposed project result in the uneconomic duplication of transmission and generation facilities?

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

ISSUE 13: Have the UCNSB and Duke New Smyrna provided sufficient information on the site, design, and engineering characteristics of the New Smyrna Beach Power Project to evaluate the proposed Project?

FPC: No position at this time.

ISSUE 14: Have the costs of environmental compliance associated with the New Smyrna Beach Power Project been adequately considered by the UCNSB and Duke New Smyrna?

FPC: No position at this time.

ISSUE 15: What are the terms and conditions pursuant to which the electric utilities having the need will purchase the capacity and energy of the proposed power plant?

FPC: This is unknowable at this time. Because no executed purchase power agreements exist, the project is not "needed" within the meaning of Section 403.519. (Rib, Dolan)

ISSUE 16: Is the identified need for power of the Utilities Commission, New Smyrna Beach ("UCNSB") which is set forth in the Joint Petition met by the power plant proposed by Florida Municipal Power Association in Docket No. 980802EM?

FPC: No position at this time.

CONSERVATION MEASURES

ISSUE 17: Are there any conservation measures taken by or reasonably available to the petitioners which might mitigate the need for the proposed power plant?

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

LEGAL ISSUES

ISSUE 18: Does the Florida Public Service Commission have the statutory authority to render a determination of need under Section 403.519, Florida Statutes, for a project that consists in whole or in part of a merchant plant (i.e., a plant that does not have as to the merchant component of the project, an agreement in place for the sale of firm capacity and energy to a utility for resale to retail customers in Florida)?

FPC: No, it does not. The express terms of Sections 366.82(1) and 403.519, Fla. Stat., and the decisions of the Supreme Court in the Nassau cases make clear that the Legislature simply has not authorized determinations of need for merchant plants in this State. Whether this might be a good idea or bad, the Legislature has not permitted it. Under existing law, only retail utilities with an obligation to serve customers (or independent power producers with an executed power purchase agreement) may seek a determination of need under Section 403.519.

ISSUE 19: Does the Public Service Commission have jurisdiction under the Power Plant Siting Act, Sections 403.501 - 403.518, and Section 403.519, Florida Statutes, to determine "applicant" status?

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

ISSUE 20: As to its project's merchant capacity, does Duke New Smyrna have a statutory or other legally enforceable obligation to meet the need of any electric utility in Peninsular Florida for additional generating capacity?

FPC: Clearly not.

ISSUE 21: Absent a statutory or contractual obligation to serve, can Duke New Smyrna have a need within the meaning of Section 403.519, Florida Statutes and the Siting Act?

FPC: No. Section 403.519 sets forth the statutory procedure to determine whether a retail utility has a need for generating capacity to meet its obligation to serve its customers. Absent an obligation to serve retail customers in this State, it cannot be said that Duke New Smyrna "needs" generating capacity. Duke New Smyrna needs only profits, but Section 403.519 does not exist to afford economic opportunities to enterprising developers.

ISSUE 22: As to the project's merchant capacity, is either Duke New Smyrna or UCNSB an "applicant" or "electric utility" within the meaning of the Siting Act and Section 403.519, Florida Statutes?

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

ISSUE 23: Under the Siting Act and Section 403.519, Florida Statutes, may the Commission issue a generic determination of need?

FPC: No. The statutory terms and the Nassau decisions make clear that need must be assessed on a utility-specific basis.

ISSUE 24: If the Commission were to accept the presumption the joint petitioners ask the Commission to make, that "the Project will necessarily be a cost-effective power supply option for the utilities to which Duke New Smyrna sells its merchant power," would the Commission be abrogating its responsibilities under the Siting Act?

FPC: Yes. The Court in Nassau I specifically stated that if the Commission attempted to evaluate need on a statewide basis -- instead of on a utility-specific basis -- the Commission would "abrogate its statutory responsibilities under the Siting Act." 601 So. 2d at 1178. In the same vein, the Court held that the statutory requirement "that the Commission determine the cost-effectiveness of a proposed power plant . . . would be rendered virtually meaningless if the PSC were required to calculate need on a statewide basis" Id.

ISSUE 25: If the Commission were to grant an affirmative determination of need to Duke New Smyrna as herein requested, when the utilities in peninsular Florida had plans in place to meet reliability criteria, would the Commission be meeting its responsibility to avoid uneconomic duplication of facilities?

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

ISSUE 26: Does the Joint Petition meet the pleading requirements of Rule 25-22.081, Florida Administrative Code?

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

ISSUE 27: Does the Joint Petition state a cause of action by not alleging that the proposed power plant meets the statutory need criteria and instead alleging that the proposed power plant is "consistent with" Peninsular Florida's need for power?

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

ISSUE 28: Is "Peninsular Florida" a legal entity with an obligation to serve?

FPC: No.

ISSUE 29: If the Commission were to permit Duke New Smyrna to demonstrate need on a "Peninsular Florida" basis and not require Duke New Smyrna to have a contract with purchasing utilities for its merchant plant capacity, would the more demanding requirements on QFS, other non-utility generators and electric utilities afford Duke New Smyrna a special status?

FPC: Yes.

POLICY ISSUES

ISSUE 30: If Duke New Smyrna premises its determination of need upon Peninsular Florida without contracts from individual purchasing utilities, how would the Commission's affirmative determination of need affect subsequent determinations of need by utilities petitioning to meet their own need?

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

ISSUE 31: Will granting a determination of need as herein requested relieve electric utilities of the obligation to plan for and meet the need for reasonably sufficient, adequate and efficient service?

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

ISSUE 32: Will granting a determination of need as herein requested create a risk that past and future investments made to provide service may not be recovered and thereby increase the overall cost of providing electric service and/or future service reliability?

FPC: Yes. This risk is inherent in the uneconomic duplication of facilities that will attend siting new plants designed to displace viable existing ones. (Dolan)

ISSUE 33: If Duke New Smyrna premises its determination of need upon Peninsular Florida without contracts from individual purchasing utilities, how would the Commission's affirmative determination of need affect subsequent determinations of need by QFs and other non-utility generators petitioning to meet utility specific needs?

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

ISSUE 34: If the Commission abandons its interpretation that the statutory need criteria are "utility and unit specific," how will the Commission ensure the maintenance of grid reliability and avoid uneconomic duplication of facilities in need determination proceedings?

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

ISSUE 35: Will granting a determination of need as herein requested result in electric utilities being authorized to similarly establish need for additional generating capacity by reference to potential additional capacity needs which the electric utility has no statutory or contractual obligation to serve?

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

ISSUE 36: If Duke New Smyrna were allowed to proceed as an applicant, would the Commission "end up devoting inordinate time and resources to need cases," "wast[e] time in need determinations proceedings for projects that may never reach fruition," and "devote excessive resources to micromanagement of utilities', power purchases?"

FPC: Yes. The Commission recognized this danger in adopting the approach affirmed by the Florida Supreme Court in the Nassau decisions.

ISSUE 37: What effect, if any, would granting a determination of need as herein requested have on the level of reasonably achievable cost-effective conservation measures in Florida?

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

ISSUE 38: Would granting the determination of need requested by the joint petitioners be consistent with the public interest and the best interests of electric customers in Florida?

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

ISSUE 39: Would granting the determination of need requested by the joint petitioners be consistent with the State's need for a robust competitive wholesale power supply market?

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

ISSUE 40: Would granting the determination of need requested by the joint petitioners be consistent with state and federal energy policy?

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

FINAL ISSUES

ISSUE 41: Based on the resolution of the foregoing issues, should the petition of the UCNSB and Duke New Smyrna for determination of need for the New Smyrna Beach Power Project be granted?

FPC: No. (Rib, Dolan)

ISSUE 42: Should this docket be closed?

FPC: Yes, after denying the Joint Petition.

F. STIPULATED ISSUES

None at this time.

G. PENDING MOTIONS

Florida Power Corporation's Motion to Dismiss Proceeding


Florida Power & Light Company's Motion to Dismiss Joint
Petition

Florida Power & Light Company's Motion to Expedite Discovery

Respectfully submitted,

FLORIDA POWER CORPORATION

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to counsel of records as follows:

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this 2nd day of November, 1998.



Attorney