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VIA FEDERAL EXPRESS

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 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 Florida Power Corporation's Notice of Filing the affidavit of William Woodward Webb.

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

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

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Very truly yours,

Gary L. Sasso
gls

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cc: Counsel of Record
GLS:jlc

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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. 9801042-EM FILED DECEMBER 2, 1998

FLORIDA POWER CORPORATION'S NOTICE OF FILING
ORIGINAL AFFIDAVIT OF WILLIAM WOODWARD WEBB

Florida Power Corporation ("FPC") hereby gives notice of filing the original Affidavit of William Woodward Webb (without exhibit) filed in support of its Motion to Dismiss the Joint Petition for a Determination of Need For An Electrical Power Plant filed by the Utilities Commission, City of New Smyrna Beach, Florida and Duke Energy New Smyrna Beach Power Company, L.L.P. FPC previously filed a facsimile copy of Mr. Webb's affidavit with the Commission on December 1, 1998.

Dated this 2nd day of December, 1998.

Respectfully submitted,

FLORIDA POWER CORPORATION

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CERTIFICATE OF SERVICE

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

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Attorney

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. 9801042-EM FILED DECEMBER 1, 1998

AFFIDAVIT OF WILLIAM WOODWARD WEBB

STATE OF NORTH CAROLINA

COUNTY OF WAKE

Before me, the undersigned authority, personally appeared William Woodward Webb who, being duly sworn, deposes and says:

1. I am an attorney with the law firm of Broughton, Wilkins, Webb and Sugg, P.A. in Raleigh, North Carolina.

2. I represented Empire Power Company in the North Carolina Court of Appeals in the case of *State of North Carolina v. Empire Power Company,* in Case No. 921OUC724.

3. I make this affidavit based on my personal knowledge.

4. The attached brief is a true and correct copy of the Brief of Appellee Duke Power Company served on me as counsel for Empire Power Company and, as indicated on the cover page of the brief, filed with the North Carolina Court of Appeals in that action.

5. This concludes my affidavit.

WILLIAM WOODWARD WEBB

SWORN TO AND SUBSCRIBED before me this 1st day of December 1998, by

Tammie C. Foxes

Notary Public, State of North Carol

(AFFIX NOTARY SEAL)

Tammie C. [redacted]

(Print, type or stamp name of Notary Public)

Personally known ✓ OR produced identification _____.

Type of identification produced:

NO. 9210UC724

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA ex rel. Utilities Commission, Public Staff North Carolina Utilities Commission, and Carolina Power and Light Company and Duke Power Company as Intervenors, Appellees v. Empire Power Company, Applicant for Certificate of Public Convenience and Necessity, Appellant	No. 9210UC724 From Wake County Public Utilities Commission Docket No. SP-91

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BRIEF OF APPELLEE DUKE POWER COMPANY

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NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA ex rel. Utilities Commission, Public Staff North Carolina Utilities Commission, and Carolina Power and Light Company and Duke Power Company as Intervenors, Appellees	)	No. 9210UC724
v.	)	From Wake County Public Utilities Commission Docket No. SP-91
Empire Power Company, Applicant for Certificate of Public Convenience and Necessity, Appellant	)	

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BRIEF OF APPELLEE DUKE POWER COMPANY

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STATEMENT OF THE FACTS

Empire is an independent power producer ("IPP"). IPPs supply power on a contract basis to public utilities and others for resale. IPPs are relatively new entrants into the power generation business. Empire is not a public utility and as such is precluded by statute from "producing, generating, transmitting, delivering, or furnishing electricity,...to or for the public for compensation..." Otherwise, Empire would be operating illegally as an uncertificated public utility. G.S. §§ 62-3(23)(A) and 62-110. Empire can only sell electricity to entities which are either licensed public utilities or which are exempted from the definition of public utility, such as municipalities.

On October 31, 1991, Empire instituted the action from which it now appeals by submitting an application for a certificate of public convenience and necessity to construct a 600 MW electric generating facility in Rockingham County, North Carolina. (R. p. 1A). In its application, Empire sought to establish a "public need" for its proposed generating facility. Empire alleged five bases for the "public need." These five reasons were largely based upon prior Commission decisions, including the Commission's determinations in the certification of Duke's Lincoln Combustion Turbine facility proceeding concerning the need for Lincoln itself (but not the need for other facilities) Docket No. E-7, Sub 461 (App. pp. 1 to 24) and alleged "problems" with Duke's Lincoln facility. Empire failed to make any allegation that any entity had committed to purchase electricity from Empire or was even interested in purchasing electricity from Empire. 1/

Pursuant to G.S. § 62-82(a), Empire published notice of its application on November 22 and 29 and on December 6 and 13, 1991. (R. p. 76). On December 20, 1991, CP&L filed its complaint and petition to intervene in the proceeding and on December 23, 1991, Duke filed its complaint and petition to intervene. (R. pp. 66, 70).

On January 17, 1992, CP&L filed a motion to dismiss. (R. p. 100). The basis of the motion to dismiss was that Empire had not alleged a public need for its facility because it had not shown a buyer for its electricity. On January 22, 1992, the Commission ordered oral argument on CP&L's motion. (R. p. 105). Oral argument was held on February 5, 1992.

1/ Because certain of these proceedings are referenced by the Commission's Order in this case, Duke requests that the Court take judicial notice of the Commission's Orders pursuant to G.S. § 8C-1, Rule 201. These Orders are appended to this Brief.

The Commission issued its order on April 23, 1992. (R. p. 228). The Commission recognized that Empire was the first IPP to apply for a certificate. Therefore, the Commission had no specific rules or precedent to deal with Empire's application, but had to apply the statutory criteria contained in G.S. § 62-110.1 and the cases decided thereunder to the facts of this case. (R. P. 234). The Commission found that in order to show a public need, Empire must allege a contract or written commitment from the utility to which it proposes to sell electricity since it had indicated that it would sell electricity to Duke or CP&L. If Empire had indicated any other appropriate entity as a purchaser, Empire would have been required to furnish similar evidence. Otherwise, the Commission noted that it would have no basis to know the nature of the facility it was being asked to certify or whether there was a need for that facility. (R. p. 233).

The Commission noted that its rules provided detailed requirements for a utility to meet in order to certificate a generating facility. The Commission also noted that electric utilities are required by federal law to purchase electricity from "qualifying facilities." 16 U.S.C.A. § 824a-3. 2/ Therefore, the Commission found that federal law established a "public need" for qualified facilities. Even with respect to qualifying facilities, however, the Commission noted that it had rules which applied to certification of such facilities, which included the requirement that the applicant provide to the Commission its general plan for the sale of electricity. Empire, however, is not a "qualified facility" under federal law and cannot rely upon this federal determination of public need. (R. p. 232).

2/ "Qualifying facilities" are cogeneration facilities and other small power producers that meet certain requirements of federal law. See 16 U.S.C.A. § 796(17)(18).

The Commission also noted that Empire could not rely upon the load forecast of public utilities in this State to establish a "public need" for its facility in part because the utilities in this State had already taken steps to meet that need. For example, Duke intended to meet its need through the certificated Lincoln Combustion Turbine Station, and CP&L had received a certificate for a peaking facility in South Carolina. Unless Empire could show a commitment to purchase electricity from its facility, Empire could not show a public need as required by statute. (R. pp. 230, 232-33). Imposition of this requirement would not unfairly prejudice IPPs. The Commission stated that it would continue to exercise its complaint jurisdiction under G.S. § 62-72 to ensure that utilities acted in good faith with IPPs. The Commission noted that Empire had in fact brought a complaint proceeding against Duke and received an evidentiary hearing. This complaint was subsequently dismissed based on the Commission's determination that Duke had acted reasonably. Docket No. E-7, Sub 492 (App. pp. 25 - 51). Furthermore, the Commission stated that if an IPP believes that it has a more cost effective source of generation than proposed by a public utility it can intervene in the public utility's certification case. Empire had in fact attempted to intervene in Duke's Lincoln certification and its petition was dismissed only because it was untimely filed (after the close of the hearing). Finally, the Commission noted that IPPs can participate in the Commission's least cost integrated resource planning proceedings and that Empire had in fact done so. (R. p. 233-34).

Finally, the Commission found that the application of this requirement to Empire did not unfairly prejudice Empire. The Commission stated that its dismissal of Empire's application was without prejudice to Empire's right to file a new application as soon as it could comply with the filing requirement. (R. p. 234).

ARGUMENT

I. THE COMMISSION PROPERLY EXERCISED ITS JURISDICTION OVER EMPIRE WITHIN THE AUTHORITY GIVEN IT BY THE GENERAL ASSEMBLY.

EMPIRE ASSIGNMENT OF ERROR NOS. 1-7, 9, 11, 12

A. The Commission Properly Exercised its Authority Over Empire Pursuant to G.S. §§ 62-82 and 110.1 and in Conjunction With the Other Powers Given to the Commission by Article 62.

The Commission, in its Order dismissing Empire's application, referred to its powers under G.S. §§ 62-31 and 60. These sections give the Commission the power to establish policies such as minimum filing standards rules and certain adjudicative authority. Empire contends that the Commission's use of these powers was inappropriate because Empire claims that in a certificate case, the Commission exercises only the powers specifically provided by G.S. § 62-82. (Appellant's Brief at 10-14). Empire assumes that the Commission utilized G.S. §§ 62-31 and 60 in order to deviate from the process specifically prescribed by G.S. §§ 62-82 and 110.1. This is not so. As Duke will demonstrate in Section II herein, the Commission complied in all respects with the specific provisions of G.S. §§ 62-82 and 110.1.

The Commission, in deciding Empire's application, did not rely on G.S. §§ 62-31 and 60 to deviate from the statutorily prescribed process for deciding certificate cases, but relied on these statutes only to implement that process. Empire appears to contend that in a certificate case the Commission can look only to G.S. §§ 62-82 and 110.1 in isolation with no reference to powers granted to it by other statutory provisions. G.S. §§ 62-82 and 110.1, however, do not state this; they are not self-contained but exist only within the entire matrix of Chapter 62. For example, G.S. § 62-110.1 requires that the Commission determine whether the public convenience and necessity <u>requires</u> the construction of a proposed generating facility. The Commission can only make this determination by looking to the policies expressed by other parts of

Chapter 62 including (1) the assurance of a reliable and adequate supply of electricity, (2) the provision of economical service and (3) the encouragement of the least-cost mix of generation and demand reduction alternatives. See, e.g., G.S. §§ 62-2(3), 3(a), (4) and (4a).

Chapter 62 establishes an orderly process for the planning of future generation which the Commission must consider in deciding a certificate case. First, G.S. § 62-110.1(c) requires the Commission to develop and keep current an analysis of the long-range needs for expansion of future generating facilities in this State and to provide that analysis to the Governor and the General Assembly annually. G.S. § 62-2(3a) provides that the planning for additional resources to meet future growth should be made on a "least cost" basis so that only generating resources and demand-reduction resources, including conservation, which will lead to the lowest possible consumer bills are utilized. Finally, G.S. § 62-110.1(a) requires Commission approval prior to beginning construction of a generating resource so that the Commission can determine whether the proposed resource is the least-cost option prior to the time significant funds are expended.

Pursuant to these statutes, the Commission in 1988 implemented rules requiring "Least Cost Integrated Resource Planning" in North Carolina. Rules R8-56 to 61. (App. pp. 52-65). These rules require utilities to develop and update integrated resource plans and file these plans with the Commission. 3/ The rules require periodic public hearings to be held on these plans. Rule R8-56(f). Utilities and other persons (including Empire) can participate in these proceedings.

3/ The plans are referred to as "integrated" because they combine generation alternatives and demand reduction alternatives such as conservation.

In furtherance of these and other legislative policies, the Legislature has granted to the Commission the authority to implement the Legislature's policy (G.S. § 62-31) and to make judicial determinations (G.S. § 62-60). These are the powers that the Commission utilized in the present proceeding and are powers that the Commission has traditionally utilized in certificate proceedings. 4/ The fact that these powers are not specifically referred to in G.S. §§ 62-82 and 110.1 does not mean that they do not exist in certificate proceedings because the Commission has these powers in all proceedings by the terms of G.S. §§ 62-31 and 60 themselves.

If, as Empire contends, the only procedures and powers applicable to certification cases are those specifically stated in G.S. §§ 62-82 and 110.1, then the Commission would be deprived of many necessary powers and the parties of many procedural protections. For example, the Commission would have no ability to compel testimony or production of documents or issue subpoenas (G.S. §§ 62-61 and 62) because these powers are not expressly granted by G.S. § 62-82. Similarly, there would be no prohibition against ex parte communications or requirement that hearings be public (G.S. §§ 62-70 and 71) because these protections are not specifically provided by G.S. § 62-82. The logical import of Empire's argument would deprive the Commission and the parties of the ability to implement the Legislature's policy. 5/

4/ For example, the Commission utilized its powers under G.S. § 62-31 to adopt rules applicable to certificate proceedings as early as 1973. See Former Rule R8-42.

5/ Before the Commission, Empire, in fact, argued that other provisions in Chapter 62 applied in certification proceedings. Empire argued that G.S. §§ 62-73 and 74 concerning complaints and the Commission's rules concerning complaints rendered Duke's and CP&L's complaints defective, even though none of the provisions Empire relied upon were contained in G.S. §§ 62-82 or 110.1. (R. pp. 144-48).

In the present proceeding it is clear that the Commission reasonably utilized its powers granted by G.S. §§ 62-31 and 60 in furtherance of the legislative policy underlying G.S. §§ 62-82 and 110.1. First, the Commission found that an independent power producer such as Empire must present evidence of a contract for the sale of power prior to obtaining a certificate. This is a threshold requirement. Unless Empire can establish that there exists a market for its power, Empire cannot make a showing that the public convenience and necessity requires the construction of its generating station. In short, Empire cannot even make a prima facie showing that the public convenience and necessity requires construction of its plant unless it can show that someone will buy its power. Furthermore, unless Empire can show where its power will be sold, the Commission has no basis for finding that the construction of the plant is in accordance with the least-cost planning process.

This does not, as Empire suggests, give the utilities the ability to ignore least-cost alternatives by not including them in the utilities' planning process. As the Commission noted, if an independent power producer believes it has been unreasonably treated by a utility, the independent power producer can (1) participate in the least-cost planning proceedings, (2) bring a complaint proceeding against the utility or (3) intervene in any proceeding of the utility to certificate a generating facility. (R. pp. 233-34).

In fact, Empire has already utilized all of these options. It is currently participating in the least-cost planning proceedings. Empire has also brought a complaint against Duke and was afforded a full evidentiary hearing after which the Commission found that Duke had treated Empire fairly. Empire also attempted to intervene in Duke's certification proceeding for its most recent generation facility and was refused intervention only because Empire's petition to

intervene was filed untimely (after the evidentiary hearing was over). (R. pp. 233-34).

The Commission, having set a reasonable standard in furtherance of the General Assembly's policy, properly dismissed Empire's application pursuant to the authority granted by G.S. § 62-60. This provision gives the Commission the powers of a judicial body which would include the power to dismiss a proceeding or to grant summary judgment. Because Empire, by its admission, failed to meet the minimum criteria required by the Commission to obtain a certificate, any further hearing by the Commission would have been futile and a waste of time and resources. Under these circumstances, a dismissal of the proceedings was appropriate under G.S. § 62-60.

B. The Commission's Requirement That Empire Show Where Electricity From its Plant Will be Used Comports in All Respects With The North Carolina Constitution.

Empire contends that the Commission's requirement that it demonstrate that a market for the use of its power exists by showing a contractual arrangement for the sale of such power is unconstitutional because it constitutes a delegation of the General Assembly's legislative powers and is a violation of the police power. (Appellant's Brief at 16-23). Neither of these contentions has any merit.

The leading North Carolina case concerning delegation of legislative powers is Adams v. Department of Natural and Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978). In Adams the Supreme Court addressed the Legislature's delegation to the Coastal Resources Commission of the authority to develop and adopt guidelines for development of the coastal areas of North Carolina. In Adams the Supreme Court set the following standard for such delegation:

> In the search for adequate guiding standards the primary sources of legislative guidance are declarations by the General Assembly of the legislative goals and policies which an agency is to apply when exercising its delegated powers. We have noted

> that such declarations need be only "as specific as the circumstances permit." (citations omitted) When there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide guidance to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances. 295 N.C. 698.

In Adams the Supreme Court found that adequate standards had been provided because the General Assembly set forth certain goals for the Coastal Resources Commission to achieve. Adams has been relied upon in a number of cases determining the constitutionality of the General Assembly's delegation of authority to administrative bodies. See, e.g., In re Guess, 327 N.C. 46, 54, 393 S.E.2d 833 (1990) (upholding constitutionality of statute authorizing the Board of Medical Examiners to revoke medical licenses for a departure of the "standards of acceptable and prevailing medical practice."); In re Broad and Gales Creek Community Association, 300 N.C. 267, 274, 266 S.E.2d 645 (1980) (upholding the authority of the Marine Fisheries Commission to deny a dredge and fill permit if there will be a "significant adverse effect on the value and enjoyment of the property of any riparian owners . . . ." The court stated that "it is precisely this need to deal with individual factual circumstances, as in the case of applications for permits to dredge and fill in the state's estuarine resources, which makes the task impossible for the legislature to manage alone. The legislature has properly set forth adequate standards here to allow the agency, with its accumulation of expertise in this subject area, to apply the standards to the varying factual circumstances."); Farlow v. Board of Chiropractic Examiners, 76 N.C. App. 202, 213, 332 S.E.2d 696 (1985) (upholding authority of Board of Chiropractic Examiners to revoke license for "unethical conduct." The court stated that "[t]here is a need for expertise in administering the chiropractic profession. We believe the proscription of

'unethical conduct' is a sufficiently definite standard so that the Board may set policies within it without exercising a legislative function.").

In the present case the General Assembly has set forth a specific standard for the Commission -- whether or not the public convenience and necessity requires the construction of the proposed generating facility. This standard has been in existence in this State since the adoption of G.S. § 62-110.1 in 1965 and has been in existence with respect to the grant of a utility franchise pursuant to G.S. § 62-110 since 1931. This standard alone is sufficient legislative guidance under the cases cited above, and is much more specific than other delegations which have been approved such as a proscription against "unethical conduct." Furthermore, the standard is accompanied by specific policies for the Commission to consider in taking action. In G.S. § 62-2 the Legislature has established ten specific policies for the Commission to consider in taking actions under Chapter 62. These policies are very similar to the policies relied upon by the Supreme Court in Adams, supra.

As in Adams, the General Assembly in 1965 could not have anticipated all of the facts and circumstances which could arise in the future which would necessitate a certificate of public convenience and necessity, and therefore all the General Assembly could do was establish a standard. For example, in 1965 IPPs such as Empire did not exist -- all generating resources were provided by utilities themselves. Furthermore, as in Adams, the decision as to whether to permit construction of an electric generation facility is a matter which requires great knowledge and technical expertise and depends on individual factual circumstances. This decision can significantly affect the planning process required by Chapter 62 and the least-cost plans of the utilities which the Commission regulates. Under these circumstances the General Assembly cannot be expected to set specific criteria for the grant of a certificate to all

potential applicants. Therefore, the delegation to the Commission of such responsibility is clearly within the holding of the Supreme Court in Adams.

Empire's next constitutional challenge is based upon an alleged violation of the police powers of the State. Essentially, Empire's argument is that the public should have no interest in what Empire does with its own funds. Empire relies upon three cases, none of which support its position.

The primary case relied upon by Empire is State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1940). That case involved the establishment of a State Dry Cleaners Commission which had the authority to license dry cleaners in this State. A majority of the members of the Commission were individuals involved in the dry cleaning business. The Supreme Court first noted that statutes such as this which regulated trade by members of the industry who had an interest in excluding others from entry into the trade were suspect on their face. Id. at 752. The Supreme Court next distinguished between industries requiring scientific or technical knowledge and skill and those which are "ordinary trades and occupations, harmless in themselves, in many of which men have engaged immemorially as a matter of common right, . . ." Id. at 756. The Supreme Court found that the dry cleaning business fit in the latter category and therefore strictly reviewed the statutes. The Supreme Court found the act unconstitutional because it failed to disclose "a justifiable relation to a reasonably necessary public purpose" and because it attempted "to exclude from an ordinary harmless occupation, upon insufficient grounds, those who are entitled under the constitutional guarantees to engage in it, . . ." Id. at 761, 765.

The facts in Harris and the facts of this case could not be more divergent. The legislative policy of assuring a reliable, least-cost source of electricity has been firmly established by the General Assembly. Empire's proposed facility

would have a significant impact upon this legislative policy. Empire proposes to provide through its facility approximately one-fifth of the new peaking capacity needed in this State during the next decade. (R. p. 2). Empire proposes to flow energy from this facility into the Duke transmission system which would have significant impacts on the Duke system and other utilities in North Carolina with which Duke's facilities are interconnected. (R. p. 40). Clearly, Empire does not intend to engage in the type of "ordinary" occupation referred to by Harris, but rather into an occupation which has a fundamental effect upon the economy of North Carolina.

The remaining two cases cited by Empire are similarly inapt. In In re Aston Park Hospital, Inc., 282 N.C. 542, 193 S.E.2d 729 (1973), the Supreme Court overturned a statute which required a certificate of public convenience and necessity before beginning construction of a hospital. The Supreme Court found that the General Assembly had not established a reasonable relationship between the regulation of private facilities for medical care with the public need. Significantly, Empire fails to note that the Supreme Court distinguished the public utility industry from the medical industry. The Supreme Court stated as follows:

> In the public utility businesses competition, deemed unnecessary, is curtailed by the requirement that one desiring to engage in such business procure from the Utilities Commission a certificate of public convenience and necessity. G.S. 62-110. However, in those fields the State has undertaken to protect the public from the customary consequences of monopoly by making the rates and services of the certificate holder subject to regulation and control by the Utilities Commission. G.S. 62-32, G.S. 62-42, G.S. 62-130. No comparable power to regulate hospital rates and services has been given to the Medical Care Commission.

Id. at 550. Therefore, Aston Park is expressly inapplicable to regulated monopolies such as the public utility industry. Indeed, one of the purposes of Chapter 62 is to "promote the inherent advantages of regulated public

utilities." G.S. § 62-2(2). Furthermore, Empire fails to note that the defect identified by the Supreme Court in Aston Park was not the regulation itself of private business but the fact that the General Assembly had not made explicit findings describing the relation between the purposes behind the certificate law and its effect on individual rights. After Aston Park a new certificate law was enacted describing that relationship and therefore the constitutional "infirmity" was cured. See HCA Crossroads Residential Centers v. North Carolina Department of Human Resources, 327 N.C. 573, 584, 398 S.E.2d 466 (1990) (Whichard, J., dissenting on other grounds). In the present case the Legislature has clearly described the policies underlying the regulation at issue.

Even if Aston Park applied to the present proceeding, there is clearly a substantial public purpose involved in the licensing of power generation facilities. As Duke has discussed above, the General Assembly has established a policy of long-term planning to meet future electric needs in North Carolina upon a least-cost basis. The ability of entities to begin construction of large generating facilities in this State at their own whim would have an obvious effect on the ability of utilities to plan on a least-cost basis, and to include demand reduction planning, including conservation, in these efforts as required by G.S. § 62-2(3a). If Empire were allowed to begin building a 600 MW generating facility with no Commission scrutiny, the utilities would have no basis to determine whether to include this generating facility in their least-cost plans. This could lead to expensive duplication of facilities. Furthermore, the only facilities available for the transmission of that power are the transmission facilities of the public utilities in this State. Indeed, Empire is prohibited from engaging in such transmission because this is a public utility function. G.S. §§62-3(23)(A) and 110. If, as Empire states in its application, it intends

to flow such power into the Duke transmission system, this would significantly impact Duke and other utilities in North Carolina to which Duke's systems are interconnected.

Finally, Empire's facility could have a significant effect on future reliability. If a generating facility is incorporated in a utility's least-cost plan, there must be some assurance that the owner of the facility is financially and technically capable of building the facility it proposes. In fact, in other proceedings before the Commission, Empire has admitted that it has no significant assets and has never even had occasion to prepare basic financial statements. (App. pp. 30-32). Yet it proposes here to build a facility that it admits will cost $200 to $240 million and would be responsible for one-fifth of the new resources needed to meet future load growth in North Carolina for the next ten years. (R. pp. 2, 45). If utilities incorporated Empire's facility in their least-cost plans and Empire were unable to finance and reliably operate such facility there would be a significant shortfall of power in this State. In short, the public has a significant interest in the regulation of any proposed generating facility in this State because the facility can have a substantial effect on the availability and price of electricity in the future.

The remaining case relied upon by Empire is also fully supportive of Duke's position. That case, A-S-P Associates v. Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979), involved Raleigh's regulation of construction of historic districts. The Supreme Court found that it was within the police power of Raleigh to regulate the aesthetic appearance of buildings in a historic district. In that case the Supreme Court stated that the police power "is as extensive as may be required for the protection of the public health, safety, morals and general welfare." Id. at 213. The General Assembly has found that

the provision of adequate, reliable and low cost electric service is firmly tied to the general welfare of this State, and no reasonable person would argue to the contrary. G.S. §62-2. Therefore, regulation of the provision of electric generating services is firmly tied to the public welfare and within the police power of the State.

II. EMPIRE IS NOT ENTITLED TO A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY UNDER N.C.G.S. § 62-82(a) AS A MATTER OF LAW.

EMPIRE ASSIGNMENT OF ERROR NOS. 1-10

A. The North Carolina Utilities Commission Commenced a Hearing Within the Time Frame Established by N.C.G.S. § 62-82(a).

G.S. § 62-82(a) provides that whenever an application for a certificate of public convenience and necessity is filed with the Commission, the Commission shall require the applicant to publish notice. The statute further provides,

> [T]hereafter the Commission upon complaint shall, or upon its own initiative may, upon reasonable notice, enter upon a hearing to determine whether such certificate shall be awarded. Any such hearing must be commenced by the Commission not later than three months after the filing of such application... If the Commission or panel does not, upon its own initiative, order a hearing and does not receive a complaint within 10 days after the last day of publication of the notice, the Commission or panel shall enter an order awarding the certificate.

Empire contends that G.S. § 62-82(a) requires the Commission to order a hearing within 10 days after the last day of publication of the notice or issue an order awarding the certificate and to begin holding a "full-fledged evidentiary hearing" on the certificate application within three months of the filing of the application. (Appellant's Brief at 28, 39-40). However, Empire's interpretation of the statute is erroneous and is contrary to the rules of statutory construction. G.S. § 62-82(a) does not require the Commission to order a hearing within a 10 day limit and only provides that the Commission must commence a hearing within three months of the filing of the application.

The cardinal rule of statutory construction is that legislative intent controls. State ex rel. Utilities Commission v. Public Staff, 309 N.C. 195, 210, 306 S.E.2d 435 (1983), appeal after remand, 320 N.C. 1, 358 S.E.2d 35 (1987); In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981). In ascertaining the intent of the legislature, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish. Public Staff, 309 N.C. at 210. A court is also required to consider the consequences that will flow from the construction of a statute one way or another. Id.; Campbell v. Church, 298 N.C. 476, 259 S.E.2d 558 (1970).

Empire's assertion that the Commission must order a hearing within 10 days of the last day of publication under G.S. § 62-82 is incorrect and irrelevant to the facts of this case. Empire contends that the phrase "within 10 days after the last day of publication of the notice" in G.S. § 62-82(a) qualifies the phrase "[i]f the Commission or panel does not, upon its own initiative, order a hearing" as well as the later phrase "and does not receive a complaint." Ironically, one of the cases on which Empire relies heavily, HCA Crossroads, supra, contradicts Empire's statutory construction. As the Supreme Court in HCA Crossroads noted, according to the doctrine of the last antecedent, "relative and qualifying words, phrases, and clauses ordinarily are to be applied to the word or phrase immediately preceding and, unless the context indicates a contrary intent, are not to be construed as extending to or including others more remote." Id. at 578, citing 82 C.J.S., Statutes § 334 (1953) and 73 Am. Jur.2d Statutes § 230 (1974). Pursuant to the doctrine of the last antecedent, the 10-day time limit only qualifies the Commission's receipt of a complaint, the phrase immediately preceding it, and not the more remote phrase concerning the ordering of a hearing.

Even if there were a requirement that, absent a complaint, the Commission must order a hearing within 10 days of the last day of publication of the notice, Empire would still not be entitled to an order awarding the certificate. The sentence has two requirements that must be met before the Commission shall enter an order awarding the certificate: (1) the Commission does not order a hearing, and (2) the Commission does not receive a complaint within 10 days after the last day of publication. The last day of Empire's publication of notice was December 13, 1991. (R. p. 76). Both CP&L and Duke filed Complaints and Petitions to Intervene within 10 days after the last day of publication. (R. pp. 66, 70). Because the Commission did receive timely complaints, the Commission was not required to enter an order awarding the certificate.

Empire is also incorrect in its assertion that G.S. § 62-82 requires the Commission to begin holding a "full-fledged evidentiary hearing" within three months of the filing of its application. Those are not the words contained in G.S. § 62-82. The Legislature chose the words "commence" and "hearing" to describe the action required by the Commission. Black's Law Dictionary, 6th Edition (1990), defines "commence" as "to initiate by performing the first act" or "to institute or start." Black's states that the word "hearing," while it may refer to an evidentiary proceeding, is "frequently used in a broader and more popular significance to describe whatever takes place before magistrates clothed with judicial functions and sitting without jury at any stage of the proceedings subsequent to its inception..., and to hearings before administrative agencies as conducted by a hearing examiner or Administrative Law Judge." Black's also defines "administrative hearing" as "an oral proceeding before an administrative agency consisting of argument or trial or both."

"Hearing" is used throughout Chapter 62 of the General Statutes and the Commission's Rules and Regulations but is not defined. Rule R1-21 of the Commission's Rule and Regulations addresses the conduct of "hearings" before the Commission and distinguishes "formal hearings" from other hearings. The rule clearly contemplates different types of hearings before the Commission.

While North Carolina cases apparently have not defined "hearing," other courts have interpreted "hearing," as follows: (1) "[p]retrial conference is a 'hearing' within rule that motion may not be made orally except at 'trial or hearing.'" Coggan v. Coggan, 213 So.2d 902, 903, Fla. Ct. App. (1968); (2) "[t]he word 'hearing' is generally understood as meaning a judicial examination of the issues between the parties, whether of law or of fact." Mathews v. Weiss, 15 Ill.App.2d 530, 146 N.E.2d 809, 810 (1958); and (3) "The word 'hearing' includes oral argument." Wisconsin Tel. Co. v. Public Service Commission, 287 N.W. 122, 232 Wis. 274.

A basic tenet of administrative law is that a statutory reference to a hearing does not necessarily require a trial-like proceeding. See United States v. Florida East Coast Railway, 410 U.S. 224, 239-40 (1973). "One must approach administrative law with an unrestricted notion of the term 'hearing.' A hearing in administrative law need not be a trial-like, adverserial proceeding..." Charles H. Koch, Administrative Law and Practice, §1.23, p. 42 (1985). In the administrative context, "[a] hearing is any oral proceeding before a tribunal." Kenneth Culp Davis, Administrative Law Text, § 7.01, p. 157 (1972). The method of trial is appropriate for resolving issues of fact, and the method of oral argument, not trial, is the appropriate process for resolving non-factual issues of law, policy, and discretion. Id. at 158. In this case, where there was no dispute as to the facts, there was only the question of what Empire must show

to establish a "public need," as required by statute. A trial-like, or "full-fledged evidentiary hearing," was not required.

It is clear that "hearing" may be defined differently depending on the context in which it is used and the legislative intent behind the requirement of a "hearing." As discussed more fully in Section IIB of this Brief, the Legislature's intent in G.S. § 62-82 in providing for the commencement of a hearing within three months was to provide for the orderly processing of certificate applications. The Legislature did not prescribe what type of hearing was appropriate in each case. That was left to the Commission to determine based on the facts of each case. Here, where the Commission's initial hearing determined that Empire had failed to even allege a public need for the facility, Empire received an appropriate hearing. Any further hearing would have been futile.

Given that "commence" means to "initiate by performing the first act" or to "institute or start" and "hearing" includes oral argument, the Commission "commenced a hearing" as required by G.S. § 62-82 within three months of Empire's filing of its certificate application. Empire filed its application on October 31, 1991. (R.p. 1A). The Commission entered an Order on January 22, 1992, scheduling oral argument on CP&L's Motion to Dismiss (R.p. 105), thereby commencing the hearing before the expiration of the three-month period.

B. The Time Provisions of N.C.G.S. § 62-82(a) are Directory not Mandatory, and Therefore, are not Jurisdictional.

Even if the Commission had not commenced a hearing within three months of the filing of Empire's application, the Commission was still not required to issue Empire a certificate as a matter of law. Empire maintains that the time provisions of G.S. § 62-82(a) are mandatory and jurisdictional, that the Commission violated the statutory time provisions, and that the Commission's

"violation" of G.S. § 62-82(a) caused it to lose jurisdiction thereby rendering the Commission's Order of April 23, 1992, void, and leaving the Commission jurisdiction only to award a certificate to Empire. Empire's argument violates the legislative intent behind G.S. § 62-82(a) and the other statutes relevant to the certification process.

Whether the time provisions of G.S. § 62-82(a) are jurisdictional in nature depends largely upon the legislative intent behind the statute. North Carolina Art Society v. Bridges, 235 N.C. 125, 130, 69 S.E.2d 1, 5 (1952). If the provisions are mandatory, they are jurisdictional. If merely directory, they are not jurisdictional.

The legislative intent of G.S. § 62-82(a) must be ascertained in light of the entire statutory framework of the certification process. G.S. § 62-110.1 is the controlling statute concerning construction of generating facilities. Paramount among the requirements of G.S. § 62-110.1 is the requirement that the Commission determine that "public convenience and necessity requires or will require, such construction." G.S. § 62-110.1 also establishes that the Commission is responsible for keeping abreast of the need for the expansion of generating facilities in North Carolina and sets forth a number of factors which the Commission must consider when determining whether to issue a certificate for a particular facility.

The North Carolina Court of Appeals addressed the legislative intent of G.S. § 62-110.1 in State ex rel. Utilities Commission v. High Rock Lake, 37 N.C.App. 138, 245 S.E.2d 787 (1978). The Court noted "that public convenience and necessity is based on an 'element of public need for the proposed service.'" Id. at 140.

Given that the intent of G.S. § 62-110.1 is to provide for the public need for electricity without wasteful duplication or overexpansion of generating

facilities, the purpose of G.S. § 62-82 can only be to provide an orderly procedure for handling certificate applications. If the time provisions in G.S. § 62-82(a) were mandatory, the Commission could be required to issue a certificate without fully determining that the proposed facility is needed. The statute, however, specifies when the provisions are mandatory and only requires that a certificate be issued if (1) the Commission does not order a hearing at all and (2) if there is no complaint filed within 10 days of the last publication. Here the Commission did order a hearing and received complaints within the 10-day period. If the Court should find that the Commission failed to commence the hearing within three months, the statute does not state what consequences, if any, flow from this failure. Empire would interpret the legislative silence in a manner that effectively negates the purpose of the statute. If this had been the legislature's intent, however, it would have said so. The fact that the legislature specified that the Commission must issue a certificate under certain circumstances, but did not do so if the Commission failed to commence a hearing within three months, shows that this was not the legislature's intent. Thus the time frame of G.S. § 62-82(a) should be construed as directory only.

Statutory provisions as to the precise time an action is to be taken generally are not regarded as mandatory where a time is fixed simply for the purpose of establishing an orderly procedure, and the doing of a thing within a certain time is stated without any negative words restraining the doing of it afterward. 73 Am Jur 2d, Statutes, Sec. 18. G.S. § 62-82(a) does not prohibit a hearing more than three months after the filing of an application, nor does it require the completion of the hearing within any time period. The cases in which statutory provisions as to time are regarded as mandatory tend

to be where the rights of the parties or the public interest would be injuriously affected by failure to act within the time allowed. Id.

Empire contends that its rights have been injuriously affected by the Commission's failure to act within the time allowed and that G.S. § 62-82(a) must be strictly construed as a mandatory provision. Empire cites In re Trulove, 54 N.C.App. 218, 282 S.E.2d 544 (1981) disc. rev. denied, 304 N.C. 727, 288 S.E.2d 808 (1982), as authority that the word "shall" as used in statutes is mandatory not directory. (Appellant's Brief at 25) However, Trulove is an interpretation of a different statute [G.S. § 89C-22(b)] and states only that "shall" is generally mandatory. Further, Trulove states that mandatory requirements are to be followed especially when the proceeding is penal in nature. Id. at 221.

Trulove involved the suspension of an engineer's license by the state licensing board. Similarly, other cases on which Empire relies for its argument that G.S. § 62-82(a) is mandatory and requires strict construction concern the suspension or revocation of a professional license by a state licensing board. Snow v. Board of Architecture, 273 N.C. 559, 160 S.E.2d 719 (1968), (suspension of architect's certificate of admission); and Parrish v. North Carolina Real Estate Licensing Board, 41 N.C.App 102, 254 S.E.2d 268 (1979) (revocation of broker's license). Another case cited by Empire, Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970) is a contract case in which strict construction was held to be necessary because the statute was in derogation of the right to engage in a lawful occupation and carried criminal penalties. These cases have no relevance to the facts of this case not only because they involve different statutes but also because, unlike this case, the statutes are penal in nature.

The only case which Empire cites which bears even slight resemblance to the facts of this case is HCA Crossroads, 327 N.C. 573,398 S.E.2d 466 (1990), in

which the time limits of G.S. § 131E-185 were held to be mandatory, and having acted outside the statutory time limits, the Department of Human Resources was deemed to have issued a certificate of need for the health facility. Empire's reliance on HCA Crossroads is misplaced for several reasons. First and most obvious, HCA Crossroads is inapplicable because it addressed a different statute (G.S. § 131E-185) which contains different language.

Second, G.S. § 131E-185 specifically prescribes "time limits" (emphasis added). This statute is part of the very detailed and elaborate statutory framework under which the Department of Human Resources issues certificates. Article 9 of Chapter 131E establishes specific administrative review procedures, rules for enforcement, and sanctions. In contrast G.S. § 62-82(a) is far less detailed, and nowhere is the phrase "time limit" ever used. Unlike Article 9, which sets an overall time limit for the period beginning with the filing of an application for a certificate to an administrative decision, G.S. § 62-82 sets no such overall time frame. In fact, G.S. § 62-82 creates an indefinite process. Although it describes the time in which the Commission must commence a hearing, it does not state when the hearing must conclude. Under G.S. § 62-82 the Commission is allowed to commence a hearing and continue the hearing to a later time(s) as needed until the Commission has sufficient evidence on which to base a decision.

Third, the Court in HCA Crossroads relied heavily on the doctrine of the last antecedent to reach its conclusion that the time limits of G.S. § 131-E-185 are mandatory. Application of this doctrine resulted in the Human Resources Commission having the authority to reject an application only "within the review period" and thereafter having the authority only to approve an application. There is no similar construction applicable to G.S. § 62-82.

Empire's argument would also deny complainants' of their statutory right. Empire argues at great length that it has an absolute right to a "full-fledged evidentiary hearing" within three months of the filing of its application. However, G.S. § 62-82 also grants a right to a hearing to anyone who files a timely complaint with the Commission. This right is just as absolute as the applicant's; hence the requirement that the filing of a complaint automatically triggers a hearing to determine whether such certificate shall be awarded. If the Commission were required to issue an order awarding a certificate to Empire because it did not hold a "full-fledged evidentiary-hearing" within three months, it would prejudice Duke's and CP&L's absolute rights to a hearing under G.S. § 62-82. The licensing cases cited by Empire and HCA Crossroads involved only an individual applicant and an administrative board. This case involves not only the applicant, Empire, and an administrative agency, but two complainants as well who have rights under the relevant statute.

A practical application of Empire's interpretation of G.S. § 62-82(a) illustrates the flaw in Empire's argument that the statute's time provisions are mandatory. Although Empire filed its application on October 31, 1991, it twice filed revisions to the information included in its application which included information on price, interconnection plans, and air permits. The second revision was filed as late as January 31, 1992. (R.p. 77, 109). This information is essential information which the Commission must consider before deciding to grant or deny any certificate.

If the time provisions of G.S. § 62-82(a) were mandatory as Empire contends, the Commission would not only have been required to issue a certificate to Empire independent of proven need but also on the basis of incomplete information. If a certificate is to be issued any time a hearing is not commenced within the three-month period, then Empire could file a certificate

application, file essential information as late as one day prior to the end of the three-month period, and then claim that it is entitled to a certificate because the time expired. Clearly this result cannot be the Legislature's intent.

Furthermore, if Empire's assertion that the time provisions of G.S. § 62-82 are mandatory were correct, the Commission would be required to issue a certificate if it failed to comply with any of the other time provisions of the statute. For example, G.S. §62-82 requires the Commission to furnish a transcript of the evidence and testimony "by the end of the second business day after the taking of each day of testimony." Under Empire's interpretation, if the Commission did not furnish a transcript within this time period, it would be required to enter an order awarding the applicant a certificate. Again, this cannot be the Legislature's intent.

Because the primary intent of G.S. §§ 62-82 and 62-110.1 is to prevent the wasteful duplication or over-expansion of generating facilities, the time provisions of G.S. § 62-82(a) cannot be jurisdictional. In order to effectuate the purposes of the certificate law, the time provisions must be considered directory only. Thus, the Commission had jurisdiction to enter its Order on Motion to Dismiss dated April 23, 1992, even if the court should find that the Commission failed to comply with the three months provision.

III. THE COMMISSION DID HAVE THE AUTHORITY, JURISDICTION AND JUSTIFICATION TO DISMISS EMPIRE'S CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY APPLICATION WHEN IT ISSUED ITS APRIL 23, 1992 ORDER ON MOTION TO DISMISS.

EMPIRE ASSIGNMENT OF ERROR NOS. 1-12

A. G.S. § 62-82 Does Not Require That a "Full-Fledged Evidentiary Hearing" be Held on a Certificate for Public Convenience and Necessity Application Before Issuance of an Order Which Does Not Award the Certificate of Public Convenience and Necessity.

The Commission in this proceeding issued an order granting CP&L's Motion to Dismiss on April 23, 1992. (R. p. 228). The granting of the Motion to

Dismiss by the Commission followed numerous filings and oral argument by the parties before the Commission. Empire contends that neither G.S. § 62-82 nor § 62-110.1 make any provision for the dismissal of certificate applications. (Appellant's Brief at 42-43).

G.S. § 62-60 describes the authority of the Commission to conduct hearings as follows: "For the purpose of conducting hearings . . . , the Commission shall be deemed to exercise functions judicial in nature and shall have all the powers and jurisdiction of a court of general jurisdiction. . . . The Commission shall render its decision upon questions of law and fact in the same manner as a court of record." Commission Rule R1-7(a) provides that motions may be addressed to the Commission for various purposes including "for such other relief as may be appropriate." CP&L filed a Motion to Dismiss for failure to state a claim for which relief can be granted, which is a motion which any court of general jurisdiction, and therefore the Commission, can grant. It is not necessary that G.S. § 62-82 or § 62-110.1 contain a provision for dismissal.

Empire contends that without a full-fledged evidentiary hearing, there is no basis, authority or justification for dismissing a certificate application. (Appellant's Brief at 43). The motion to dismiss was properly granted because Empire failed to establish the need for the Rolling Hills facility in its application. As discussed in Section IIB, G.S. § 62-110.1 requires a showing of public convenience and necessity. Chapter 62 is very specific as to the activities of the Commission in responding to the long range needs for expansion of facilities for the generation of electricity. Empire's application stated that it had an outstanding proposal to sell long-term wholesale peaking capacity and energy to Duke for delivery beginning as early as 1994 (which Duke had refused). Additionally, Empire's application and supporting papers asserted that the need for the Rolling Hills facility could be found across the State

as well as within the Duke service territory. It was established, however, that there was no agreement between Duke and Empire for the purchase of electricity. Empire also identified no other committed buyer for the electricity generated by the Rolling Hills facility. (R. p. 230).

Empire stated in its certificate application that one reason the Rolling Hills facility is needed is because the North Carolina electric utilities require approximately 3000 MW of additional peaking capacity by year 2000 (referencing LCIRP Docket No. E-100, Sub 58) and that Duke will need 1165 MW of peaking capacity by 1997 (referencing Lincoln Docket No. E-7, Sub 461). (R. p. 2). Empire failed, however, to establish how its capacity would fit into the integrated resource planning process or into any specific utilities' future resource plans. Indeed the Commission in 1990 granted Duke a certificate to build the 1,165 MW Lincoln facility to meet its needs.

As discussed in Section IIB of this Brief, the High Rock Lake case concluded that G.S. § 62-110.1 requires that a public need for a proposed generating facility must be established before a certificate is issued and that the Commission is required to regulate the expansion policy for electric utility plants in North Carolina. Empire cannot simply cite a utility's load forecast or least cost integrated resource plan in order to show public need for its certificate application. Empire must show how its facility will meet that need. Unless Empire can show a contract or commitment to purchase its generation, then it cannot meet this threshold criteria.

Empire contends that it was erroneous for the Commission to decide material facts before evidence is offered. Empire cites State ex rel. Utilities Commission v. Town of Pineville, 13 N.C.App. 663, 187 S.E.2d 473 (1972). (Appellant's Brief at 44) The Pineville case involved a hearing before the Commission in which the Commission proceeded to find facts without ever having

heard from additional witnesses that wanted to testify. The Pineville case involved disputed factual questions. Here there were no relevant facts which were in dispute. Empire admitted that it had no buyer for its power, and therefore it could not show that its facility was needed.

B. The Commission did Have the Authority to Dismiss Empire's Application and the Dismissal was Appropriate.

Empire contends that it is an issue of fact as to whether the public convenience and necessity required the construction of Empire's facility. (Appellant's Brief at 45) Empire further contends that one purpose of the hearing would be to determine whether the facility was needed such that Empire could negotiate with the utilities to agree upon the prices and terms necessary to foster a transaction. (Appellant's Brief at 46). In High Rock Lake, supra, 37 N.C.App. 138, 245 S.E.2d 787 (1978), the court held that public convenience and necessity as set forth in G.S. § 62-110.1 is based on an element of public need for the proposed service and that the purpose of the statute was to "prevent costly overbuilding." 37 N.C.App. at 140. It is a matter of law that Empire was required to show an element of public need for its facility.

Empire contends that the phrase "public convenience and necessity" means the public at large, not a limited number of utilities. (Appellant's Brief at 46). The public at large receives its electricity from utilities certificated under G.S. § 62-110. Empire, which has not received a certificate as a public utility under G.S. § 62-110, cannot serve the "public at large." Unless it can show that a utility (or an entity exempt from the definition of public utility) is willing to buy its power, it cannot show a public need.

Empire also contends that the Commission improperly rejected Empire's assertion that the public required Empire's power on the basis of environmental limitations on Duke's Lincoln Combustion Turbine Station. In its Order the Commission stated that "the allegation that Duke's Lincoln capacity is limited

by its air permit has been addressed by the Commission's Order dated February 28, 1991 in Docket No. E-7, Sub 461." (Appellant's Brief at 47). The Commission in E-7, Sub 461 relied on North Carolina environmental agencies that issued the air permit for the Lincoln facility. The High Rock case, supra, indicated that "[e]nvironmental concerns are generally left to other regulatory agencies, except as they affect the cost and efficiency of the proposed generating facility." 37 N.C.App. at 141. Therefore, it is appropriate and legally correct for the Commission to rely on North Carolina environmental regulatory agencies for their expertise. Empire contends, however, that it was not a party to that proceeding because it was denied intervention in Docket No. E-7, Sub 461. Empire was denied intervention in E-7, Sub 461 only because it requested intervention subsequent to the completion of the hearing. Therefore, it is inappropriate for Empire to complain of its own delay in filing for intervention and to attempt here to attack collaterally the Commission's prior determination.

Empire contends that when the Commission relies upon judicial notice of material facts not appearing in evidence, it shall be stated with particularity. It alleges that the Commission did not do so which constitutes an error of law. Empire cites Humble Oil & Refining Co. v. Board of Alderman, 284 N.C. 458, 202 S.E.2d 129 (1974). (Appellant's Brief at 48). This cite is apparently utilized for the proposition that the procedural rules of an administrative agency are binding upon the agency which enacts them as well as upon the public. There is no indication here, however, that the Commission has not followed its own rules. As discussed above, the Commission cited the prior Order which it relied upon and stated the basis for its reliance.

Empire also contends that it was error for the Commission to reject Empire's application because it referenced the long range plans adopted by the

Commission. (Appellant's Brief at 48). The Commission only stated in its Order dismissing Empire's application that this was an inappropriate method to establish the public need for Empire's facility. The Commission did not dismiss Empire's application for a certificate because it referenced a Least Cost Integrated Resource Plan.

C. The Commission Did Not Exceed its Authority by Requiring a Non-utility to Present a Purchase Commitment From an Electric Utility in Order to Qualify for a Full-Fledged Evidentiary Hearing on its Certificate Application.

Empire contends that although G.S. § 110.1 contains no requirement that an applicant present a purchase commitment, the Commission ordered such a requirement and that such a requirement is in excess of the Commission's authority. (Appellant's Brief at 49-50). The General Assembly used the term "public convenience and necessity" to define the standard to be applied by the Commission to proposed facilities. High Rock, supra at 140. The General Assembly left it to the Commission to apply this standard to the facts of each application.

In 1965, when G.S. § 62-110.1 was enacted, most generating facilities were built by public utilities to serve their own customers. Public utilities could show a need for generating facilities by showing that their customers' needs for electricity required additional generating facilities. Since 1965, other entities have entered the power generating business, including qualifying facilities (QFs) under federal law. 16 U.S.C.A. § 796 (17)(18). QFs are required to obtain certificates under G.S. § 62-110.1. Under federal law, utilities must purchase excess electricity generated by QFs. 16 U.S.C.A. § 824a-3. Commission Rule R1-37 requires an application for a QF to include the applicant's general plan for sale of the electricity to be generated, including the utility to which the applicant plans to sell the electricity, any provisions for wheeling of the electricity, and arrangements for firm, non-firm

or emergency generation, among other details. This rule was promulgated after the concept of QFs was developed.

Empire does not meet the definition of a QF; rather, it is an IPP. No law requires a utility to buy generation from an IPP; rather, utilities buy power from IPPs only if it is cost-justified and needed. The Commission's finding that an IPP must allege a definite public need for its proposed facility is merely a stating of the obvious existing requirement in North Carolina. Further, the Commission stated that when the IPP proposes to sell its electricity to a North Carolina utility it must allege a contract or a written commitment from the utility agreeing to purchase the electricity in order to establish a public need. If the IPP proposes to sell to someone else, it must provide similar details.

Empire contends that the requirement of a contract or commitment to purchase the electricity establishes a monopoly of the electric utilities over the wholesale power market in North Carolina. (Appellant's Brief at 50). This is not so. As the Commission stated in its order dismissing the Empire certificate, IPPs have the complaint procedure under G.S. § 62-73 to ensure that the utilities act in good faith with the IPPs. (R. pp. 233-34). Empire in fact has filed a complaint against Duke and consequently was aware of its rights. Further, an IPP can participate in the integrated resource planning proceedings before the Commission, and Empire has been allowed to intervene in the upcoming integrated resource planning proceeding.

Empire contends that the Commission requirement establishes a new class in violation of both its statutory authority and the Equal Protection clause of the Constitution of the United States and that the requirement deprives all entities such as Empire of their constitutional rights to due process. (Appellant's Brief at 51). G.S. § 62-31 provides that "[t]he Commission shall

have and exercise full power and authority to administer and enforce the provisions of this Chapter and to make and enforce reasonable and necessary rules and regulations to that end." The Commission has the authority to establish minimum filing requirements for certificate applications. Clearly the Commission properly differentiated between utilities and IPPs. Utilities, in certificating a facility, can show a need for the facility by demonstrating that their own customers require the electricity. The utility has a preexisting duty to sell to these customers. This is not so with an IPP. IPPs have no right or duty to sell to anyone. They can only sell electricity if they can find a utility or other entity to buy it. If there is no buyer, there can be no public need. Empire cites In re Denial of Request by Humana Hospital Corp., 78 N.C.App. 637, 338 S.E.2d 139, 143 (1986), and Humble Oil and Refining Company, supra, (Appellant's Brief at 52) for the general proposition that Empire is entitled to a fair review of its application under the appropriate plans, standards, and criteria and that requiring a written sales agreement in order to qualify for either a certificate or a hearing is inappropriate. It has been established in this section that the Commission has the authority to establish rules pursuant to its delegated authority, and the High Rock Lake case, supra, establishes the standard of public need for the facility. Empire did not satisfy this burden. Empire is not prejudiced by the Commission applying this standard to it since it did not have a buyer at the time of the Commission's Order and still does not have a buyer. Empire can file a new application when it satisfies the minimum filing requirements of establishing need for the facility.

Empire cites Keiger v. Board of Adjustment, 281 N.C. 715, 720, 190 S.E.2d 175, 179 (1972), in which the Petitioner met every ordinance standard and site requirement for a mobile home park. (Appellant's Brief at 54).

Notwithstanding, the Board denied the permit. A subsequent rezoning ordinance was passed which precluded petitioners from receiving the permit. In the present case, however, Empire did not meet the requirement of showing a public need for its facility as required by statute. Empire also cites State ex rel. Utilities Commission v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978), for the statement that the Commission's rulemaking is not res judicata. (Appellant's Brief at 54). That case specifically states that rulemaking is an exercise of the delegated legislative authority of the Commission. That is what the Commission has done in this case to carry out the legislative policy of controlling the construction of electric generating facilities.

D. The Commission's Decision is Not Void.

Empire contends that the Commission has no authority to establish a rule that a certificate applicant must present a commitment from an electric utility, that the Commission had no authority to apply retroactively this requirement to Empire and that there existed an issue of material fact. Therefore Empire contends the order issued by the Commission was without authority and is void. (Appellant's Brief at 54-55). The Commission order indicated that Empire must allege a definite public need for its proposed facility, and if its statement of need states that it proposes to sell its electricity to a North Carolina utility, it must allege a commitment or contract. The Commission is entitled to know what type of facility it is being asked to certify at the time of the application as well as whether it is compatible with the policy of the State of North Carolina. There was no retroactive application of this requirement to prove need for the facility as it was already in existence. It is clear that the Commission can legally dismiss an application for a certificate and that there was a basis for such dismissal because no public need was established.

CONCLUSION

On the basis of the foregoing arguments, Duke respectfully submits that the Order of the Commission in this proceeding is lawful with respect to the issues discussed herein and respectfully requests that the Commission's Order be affirmed in such respects.

This the 12th day of October, 1992.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the Brief of Appellee Duke Power Company was duly served upon counsel and the parties listed below by depositing a copy of same in the United States mail, first-class postage prepaid as follows:

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CONTENTS OF APPENDIX

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-7, SUB 461

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application of Duke Power Company for a Certificate of Public Convenience and Necessity Pursuant to G.S. § 62-110.1 Authorizing Construction of the Lincoln Combustion Turbine Station in Lincoln County, North Carolina	)))))	ORDER GRANTING CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

HEARD IN: Courtroom #2, Lincoln County Courthouse, Lincolnton, North Carolina, on September 27 and 28, 1990, and in Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina 27602, on November 20 and 21, 1990

BEFORE: Chairman William W. Redman, Jr., Presiding, and Commissioners Ruth E. Cook, Julius A. Wright, Robert O. Wells, Charles H. Hughes, and Laurence A. Cobb

APPEARANCES:

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BY THE COMMISSION: This proceeding was instituted on February 2, 1990, by Duke Power Company (Duke) filing information required under Commission Rule R8-61(b) pertaining to the proposed Lincoln Combustion Turbine Station. This filing was followed on July 27, 1990, by the filing of an application for a certificate of public convenience and necessity under N.C.G.S 62-110.1 to construct the Lincoln Combustion Turbine Station on a site in Lincoln County, North Carolina.

In the application for a certificate of public convenience and necessity, Duke proposes to construct sixteen simple cycle combustion turbine units capable of generating 1,165 MW. The site is located two miles west of Lowesville on an approximately 711-acre site. The units are designed to burn natural gas and fuel oil. Two five-million gallon tanks will provide long-term storage for the oil used to fuel the turbines. There will be a natural gas pipeline connection to the facility. The site will also include a 9½-acre storage pond with 125 acre-feet of useable capacity. The project's generation output will tie into Duke's transmission grid by a fold-in with the existing McGuire Longview Tie 230 KV line. Construction of the project is scheduled to begin in October 1991.

On July 31, 1990, a Notice of Intervention was filed by the Attorney General on behalf of the using and consuming public.

On August 1, 1990, Duke filed the testimony of Donald H. Denton, Jr., stating that the proposed construction conformed to Duke's most recent Least-Cost Integrated Resource Plan (LCIRP) approved by this Commission's Order dated May 17, 1990, and stating that since the construction of turbines was already included in its LCIRP, Duke did not need to file an update.

By Order of the Commission dated August 8, 1990, notice of the application was required to be published in a daily newspaper of general circulation in Lincoln County; and the Commission, on its own motion, set public hearings on the application to commence on September 27 and 28, 1990, at the Lincoln County Courthouse, Lincolnton, North Carolina, and in the Commission Hearing Room, Raleigh, North Carolina, on November 20 and 21, 1990. The Order stated that Duke would file testimony supporting its application on September 7, 1990, and would file additional testimony detailing its demand-side management evaluations and results by October 15, 1990. The Order provided the opportunity for intervention by interested parties.

On September 7, 1990, Duke filed the testimony and exhibits of Donald H. Denton, Jr. and Richard B. Priory.

On September 21, 1990, Duke provided proof of publication from the Lincoln Times-News and the Charlotte Observer indicating that notice of the application had been published in accordance with the Commission's Order.

On September 24, 1990, Petition for Leave to Intervene was filed on behalf of George Clark, Barbara Clark, Walter Clark, Allison Clark, Donald Fisher, Mary Fisher, Margaret Morrison Guillett, Boyd McLean, Jimmie C. Dellinger, Aaron Broach, and Christine Broach (hereinafter referred to as the Intervenors). Filed along with the petition to intervene was a Motion for Postponement of Hearings. The Commission issued an Order on September 26, 1990, denying the Motion for Postponement of Hearings insofar as it sought to postpone the hearings in Lincolnton on September 27 and 28, 1990. The Commission, however, provided an opportunity for the parties to respond to Intervenors' motion for postponement of the Raleigh hearing and for an additional hearing in Lincolnton. The Commission allowed the intervention of Intervenors at the public hearing in Lincolnton on September 27, 1990. A number of public witnesses testified in Lincolnton on September 27 and 28.

On October 2, 1990, the Attorney General filed a Motion Joining Intervenors' Motion for Continuance of the Raleigh hearing.

On October 4, 1990, a Petition to Intervene was filed by Carolina Utility Customers Association, Inc. An Order allowing intervention was issued by the Commission on October 8, 1990.

On October 5, 1990, Duke filed its Response to the motion for postponement of hearings and to the request for additional opportunity to comment in Lincolnton.

On October 10, 1990, a prehearing conference was held in Raleigh before a Hearing Examiner. The parties were represented, and an Order was issued on October 17, 1990, describing procedures to be followed by the parties at the Raleigh hearing.

On October 17, 1990, the Commission also issued its Order Denying Motion for Postponement of Hearing. The Order reaffirmed the intervention of the Intervenors. The Commission recognized that public notice had already been given and that postponement of the hearing in Raleigh would result in confusion to the public and a waste of resources. The Commission also recognized that G.S. 62-82 provides for the Commission to commence hearing applications promptly and to make its decisions with reasonable dispatch. Finally, the Commission denied the alternative request for an additional public hearing in Lincolnton in that the Commission had already held two public hearings in Lincolnton and numerous witnesses had testified.

Meanwhile, on October 15, 1990, Duke filed the testimony of Donald H. Denton, Jr., regarding demand-site evaluations.

Pursuant to the Commission's August 8, 1990 Order, all parties other than Duke were required to file testimony by November 5, 1990. On October 29, 1990, Intervenors filed a motion for additional time in which to prefile expert testimony, requesting an extension of seven days. Duke opposed this request in a response filed October 31, 1990. On October 31, 1990, the Public Staff requested that it be granted a two-day extension to prefile its testimony. On November 2, 1990, the Commission issued Orders granting Intervenors an extension of time to and including November 13, 1990, to prefile testimony, and granting the Public Staff an extension of time to and including November 7, 1990, to prefile its testimony.

On November 7, 1990, the Public Staff filed the testimony of Dennis J. Nightingale and Danny P. Evans.

On November 13, 1990, Intervenors requested one additional day to file the testimony of Dr. Douglas Crawford-Brown. This request was subsequently granted by Commission Order of November 21, 1990. On November 13, 1990, Intervenors filed the testimony of Dr. Robert B. Williams. On November 14, 1990, the testimony of Dr. Douglas Crawford-Brown was filed.

The public hearing was held in Raleigh on November 20 and 21, 1990. At the conclusion of the hearing, the Commission directed the parties to file proposed orders on or before January 25, 1991.

During the course of the hearing, Intervenors made an offer of proof concerning certain confidential information. The Commission ordered that the offer of proof be submitted in a sealed envelope, and this was done by Commission Order of March 19, 1991. The Commission did not review this information in reaching its decision.

On November 19, 1990, the Attorney General filed a Notice arguing that the cost of the proposed plant is currently unknown and urging the Commission to delay a decision herein until a reasonable showing can be made as to the cost of compliance with air and water quality regulations. Duke filed a Response on November 30, 1990, and the Attorney General then filed a Request to Reply on December 12, 1990. These filings have been considered and are ruled on hereinafter.

Proposed orders and briefs were filed as ordered on January 25, 1991.

On February 1, 1991, Empire Power Company filed a Petition to Intervene in this docket. On February 8, 1991, the Attorney General filed a Position to the effect that he does not object to Empire's intervention. Duke filed a Response opposing intervention on February 12, 1991. Empire then filed a Request to Reply on February 15, 1991. The Commission issued its Order Denying Petition to Intervene on February 20, 1991.

The Public Staff filed a Motion for Reconsideration or Clarification on February 22, 1991, asking the Commission to either reconsider denial of intervention for Empire or "clarify in what docket a continuing review of the feasibility of the Lincoln County CT plant will occur." The Attorney General joined the Public Staff's Motion on March 4, 1991. By its March 4 filing, the

Attorney General also requested leave to file a late-filed exhibit, a February 27, 1991 letter from the Air Quality Section of the North Carolina Department of Environment, Health, and Natural Resources, Division of Environmental Management (DEM) regarding pending air permit applications for the proposed Lincoln County plant and existing Duke plants. Empire also moved for reconsideration on March 4, 1991. Duke filed Responses to the Public Staff, the Attorney General, and Empire on March 5 and 8, 1991. Duke opposed the late-filed exhibit offered by the Attorney General. Finally, Empire filed a Request to Reply on March 8, 1991. All of these filings have been considered by the Commission and are ruled on hereinafter.

Based on the foregoing, the verified application, the testimony and exhibits received into evidence at the hearing, and the entire record in this proceeding, the Commission now makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Duke Power Company is a corporation organized and existing under the laws of the State of North Carolina, and is a public utility operating in North and South Carolina where it is engaged in the business of generating, transmitting, distributing and selling electric power.

2. Duke Power Company has properly made application to this Commission for a Certificate of Public Convenience and Necessity as required prior to commencement of construction of new generating capacity and related facilities at its proposed Lincoln Combustion Turbine Station; all required notices have been given and the necessary parties were present or had the opportunity to be present at the public hearings, including members of the public who desired to appear; hearings were held on September 27 and 28, 1990, in Lincolnton, North Carolina, and on November 20 and 21, 1990, in Raleigh, North Carolina; and Duke, the Public Staff, Attorney General, Intervenors George Clark, et al., CUCA, and members of the public presented their views concerning the subject application.

3. Based on the evidence of future need for electric power in the Duke service area, and the Commission's own independent analysis of future requirements for electric service to North Carolina, made under G.S. § 62-110.1 and 62-2(3a), and considering the interchange, pooling and purchase of power, use of demand-side options, including conservation, load management and efficiency programs, and other methods for providing appropriate, reliable, efficient and economical electric service, public convenience and necessity requires that Duke construct an additional 1,165 mW of electric capacity for operation beginning as early as 1994.

4. The use of simple cycle combustion turbines for the 1,165 mW capacity addition, based on Duke's Least-Cost Integrated Resource Plan as it relates to cost and efficiency, is appropriate.

5. Construction of the Lincoln Combustion Turbine Station is consistent with the Commission's plan for expansion of electric generating capacity in North Carolina which includes, among other documents, the Commission's Order Adopting Least Cost Integrated Resource Plans dated May 17, 1990.

6. Duke utilized a reasonable process to select the site for the Lincoln Combustion Turbine Station.

7. The proposed site for the Lincoln Combustion Turbine Station is appropriate.

8. The Commission finds the estimated construction costs of the Lincoln Combustion Turbine Station of $480,523,000 to $517,560,000 to be reasonable, recognizing that the actual cost will be dependent upon compliance with environmental regulations, the construction schedule, and other factors.

9. The Commission finds that a certificate of public convenience and necessity for the Lincoln Combustion Turbine Station should be issued, subject to reporting and opportunities for further review as herein provided.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1 AND 2

The evidence for these findings of fact is contained in the verified application, the Commission's files and records regarding this proceeding, the Commission Orders scheduling hearings, and the testimony of witnesses. These findings of fact are essentially informational, procedural and jurisdictional in nature.

The Commission conducted public hearings in Lincolnton, North Carolina, on September 27, 1990, during the hours of 7 p.m. to 10:15 p.m., and on September 28, 1990, during the hours of 9 a.m. to 11:15 a.m. to hear from members of the general public. Lincolnton is 12 miles from the proposed Lincoln Combustion Turbine Station project site. There were 16 witnesses on September 27 and nine witnesses on September 28. Some of the witnesses were in favor of the project and some opposed the project. Those in favor of the project recognized that there was a need for capacity, that the plant would contribute to the economy, and that Duke was a good corporate citizen. Those opposed to the project cited the project's effect on air quality, traffic, and the character of the area.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 3, 4, AND 5

The evidence pertaining to these findings of fact is set forth in Duke's Application, Rule R8-61 filing, and the testimony of Duke witness Denton, Public Staff witnesses Dennis J. Nightingale and Danny P. Evans, and Intervenors' witness Dr. Robert B. Williams.

NEED FOR ADDITIONAL CAPACITY

Witness Denton presented testimony to support the application for the certificate to construct electric generation facilities and to address Duke's least cost integrated resource planning. He testified that Duke had filed its Least Cost Integrated Resource Plan (LCIRP) on April 6, 1989, and its Short-term Action Plan on April 26, 1990. The Commission Order Adopting Least Cost

Integrated Resource Plans dated May 17, 1990, approved the LCIRP presented by Duke, concluding that the plan should provide adequate and reasonable reserve capacity during 1990-2003.

Witness Denton also testified that Duke's least cost planning process tended to show that Duke's near term capacity addition needs are best met by peaking capacity, and that the best option to meet the peaking resource requirement is combustion turbines. Duke's LCIRP includes as capacity additions over 2,100 mW of new combustion turbine capacity during 1994-99. He stated that construction of the 1,165 mW Lincoln Combustion Turbine Station is an integral part of Duke's LCIRP and is consistent with the Commission's plan for expansion of electric generating capacity reflected in the Commission's May 17, 1990 Order.

Witness Denton further testified that growth in the service area continues to add peak electric demand to the Duke system. From 1974 to 1989, the Duke system peak demand grew at an average annual rate of 3.5%. The most recent forecast projected the 1990 system summer peak to be 14,452 mW and an average annual peak growth rate of 2.4% for the years 1990-2004. He testified that in order to meet customer demand, Duke is bringing on line the four-unit Bad Creek Pumped Storage Hydroelectric project, is refurbishing units in its Plant Modernization Program, and is relying on load reductions expected from Duke's demand-side management program.

Witness Denton testified that Duke's reserve margin will be below 20% in the years 1990 through 1993. He stated that this margin should be adequate in the near term given that there is surplus capacity in the Southeast which will be available on the spot market during that period. He also stated that a reserve margin below 20% is unacceptable in the long term. He contended that the capacity from the Lincoln Combustion Turbine Station is necessary to maintain the minimum planning reserve margin in 1994 and beyond.

Witness Denton also discussed Duke's efforts to purchase capacity from other sources. He stated that Duke is presently finalizing an agreement on a purchase of 200 mW, but that this would not affect the schedule for the Lincoln Combustion Turbine Station. He indicated that the approval of the Lincoln Combustion Turbine Station will help in future negotiations to purchase capacity from other sources by providing an approved alternative to such purchases.

Witness Denton discussed Duke's demand-side resources contained in the most recent Short-Term Action Plan filed in April 1990. The demand-side programs incorporate load reductions associated with existing programs as well as new programs. The existing programs consist of interruptible type programs that are designed to be activated during capacity shortage situations. The interruptible programs target residential water heaters and air conditioners, industrial processes, and customer owned standby generators. In addition, there are conservation programs which include lighting, insulation, heating, ventilation, and air conditioning systems. The new programs include the promotion of Residential High Efficiency Heat Pumps, Commercial Air Conditioning Load Control, and Standby Generators with backfeed capability. These programs are currently implemented in pilot project studies to validate program design assumptions and customer acceptance.

Witness Denton testified that the most recent demand-side evaluations included 54 options consisting of existing and new programs, addressing all customer and market sectors, for initial analysis. Following the economic tests and the risk-assessment test contained in its LCIRP process, 23 of the options were selected for inclusion in the LCIRP. In addition, six options are or will become pilot programs. He concluded that the cumulative impact of the 23 demand-side options results in an equivalent combustion turbine capacity of 945 mW in 1995 and 1,607 mW by the year 2004 as compared with the 1990 Short-Term Action Plan which reported 714 mW in 1995 and 879 mW by 2004. Even with this peak load reduction, the analysis shows the need for all 16 Lincoln combustion turbines in the 1994 to 1996 period and shows that reserves during this period will rise only slightly above the 20% minimum planning reserve margin.

Witness Evans presented the Public Staff's most recent independent peak load forecast for Duke, which projects the system summer peak to grow from 14,143 mW in 1990 to 19,729 mW in 2005, an average annual growth rate of 2.2%. He testified that the forecast used by Duke in this proceeding is based on essentially the same methodology as that used by the Public Staff. He expressed some concern about the way Duke models the electricity price effect, and he therefore viewed Duke's forecast with caution.

Witness Nightingale addressed Duke's most recent demand-side management (DSM) evaluations, the need for the Lincoln Combustion Turbines based upon both Duke's and the Public Staff's current peak load forecasts considering the Commission's minimum 20% reserve margin for planning purposes, and the Public Staff's position on Duke's request for a certificate of public convenience and necessity.

Witness Nightingale stated that Duke should be commended for the effort put forth to complete its new DSM evaluations in time for inclusion in this proceeding. He indicated that the increase in cumulative DSM capacity compared to the DSM capacity contained in Duke's April 1990 Short-Term Action Plan is significant. Witness Nightingale also pointed out that the Public Staff was extremely pleased with Duke's leadership in the area of DSM. While North Carolina has embraced load management and similar concepts for years, least cost integrated resource planning is now resulting in a broad range of new conservation and DSM programs. Many of the DSM programs adopted by Duke are new to most customers in this State.

Nevertheless, witness Nightingale expressed reservations about Duke's strategic sales programs. He pointed out that 11 of the 23 demand-side programs were strategic sales programs designed to increase the use of electricity during periods of low cost. He recommended that a study of the appropriate level of strategic sales programs be performed by Duke in its next DSM evaluation and that the study should address the potential problems of strategic sales programs, such as creating sales during peak loading periods.

Witness Nightingale also recommended that Duke's next DSM evaluation should look more to demand reduction programs and conservation programs geared to postpone or negate future capacity additions, and specifically the combustion turbine additions projected for 1997 and 1999 and the coal fired capacity additions projected for the years 2000 and 2001. He indicated that Duke had

committed to increase its research and development efforts regarding demand reduction and conservation programs.

In reviewing Duke's application, witness Nightingale commented on the lack of nonutility generator (NUG) generation shown for the future. He testified that the Public Staff believes Duke should adopt a nonutility generation goal of 500 mW of NUG capacity additions by the year 2000. On cross-examination, he noted that any new NUG capacity would have to be cost justified on the Duke system and that it is not appropriate to show NUG capacity in reserve margin calculations until Duke has contracts in hand for nonutility generation.

In response to witness Nightingale, witness Denton testified that Duke does not have any objections to establishing a goal of aggressively pursuing nonutility generation. He stated that studies have been performed to evaluate the opportunities for installing cost-effective nonutility generation and that the studies found there is not significant generation available which is cost-effective on Duke's system.

Witness Nightingale testified that the 20% planning margin is a minimum and that the optimal reserve margin may be higher. He testified that his review of the need for the Lincoln combustion turbines, based upon both Duke's and the Public Staff's current peak load forecasts and the Commission's minimum reserve margin, indicated that all of the Lincoln capacity will be needed by the summer of 1997. He indicated that the difference in the Duke and the Public Staff forecasts primarily influences how many units are added in each year between 1994 and 1997. Based upon the information known today and Duke's commitment to strive to offset future generation additions by intensifying its DSM and nonutility generation efforts, the Public Staff recommended the issuance of a certificate of public convenience and necessity for the Lincoln combustion turbines.

Intervenor witness Dr. Williams testified that he examined Duke's and the Public Staff's 1989 and 1990 long-term forecasts of peak demand for electricity. The forecasts by Duke and the Public Staff predict an increase in the peak in every year during the forecast period. The 1990 Duke forecast, however, predicts higher peaks than do the others. Witness Williams concluded that Duke's 1990 forecast is not the most accurate predictor of Duke's peak demand in the forecast period. He raised three concerns. First, he was concerned that Duke's forecasting techniques over-emphasize an abnormal year such as the high peak that occurred in 1989. Second, he believed that Duke's economic variables did not adequately recognize current economic conditions and noted that the actual temperature adjusted peak demand for 1990 was below both the Public Staff's and Duke's forecasted peaks. Third, he was concerned about Duke's use of three separate variables reflecting the real price of electricity and Duke's forecast that the real price of electricity would decline during the forecast period.

In response to witness Williams' first concern, witness Denton testified that the January 1990 Duke forecast reflected an unanticipated growth in the industrial base and the earlier opening of schools in North Carolina. He stated that one of every three years, the peak system demand will occur after the schools open. He noted that the 1989 peak occurred in late August. Duke used 1988, not 1989, as the base year for the 1990 forecast because of the unusual growth in 1989.

In response to witness Williams' second concern, witness Denton testified that the 1990 temperature adjusted peak was 14,058 mW as compared to the 1990 Duke forecasted peak of 14,452 mW. He testified further that a deviation from the forecast in any one year is not unusual and not necessarily an indication that the forecast is incorrect. He stated that a forecast is based on averages and that the forecast is a 15-year forecast of average economic conditions under probable weather conditions.

In response to witness Williams' third concern about Duke's use of three separate variables on the real price of electricity, witness Denton testified that two of these three variables were zeroed out of the forecast which had the result of reducing the 1994 peak forecast by approximately 500 mW. He also testified that the real price of electricity has declined since 1987.

Witness Williams testified that Duke had not included nonutility generating capacity in its Lincoln combustion turbine evaluation. He testified that Duke is currently exploring purchases for the 1990's of 500 mW of peaking-type service available for purchase from 1993 to 1997 and 80-250 mW which may be available for purchase from 1995 to 1999. He noted that these resources were not included in Duke's plans for capacity additions. He concluded that if the additional nonutility generation and purchase power opportunities are added into the Public Staff's evaluation of the need for the Lincoln Combustion Turbines, reasonable reserve margins are predicted without addition of the Lincoln Combustion Turbines. On cross-examination, he acknowledged that NUG capacity should not be included as available if it was not firm capacity.

The Commission concludes that the need for near term peaking capacity is a part of Duke's Least-Cost Integrated Resource Plan as approved in 1990. The proposed 1,165 mW Lincoln Combustion Turbine Station is intended to fill the need for near term peaking capacity.

Among the fears expressed by some parties to the preceding was the view that Duke's real price of electricity may increase over the next few years rather than decrease or remain stable as projected by Duke. Such fears are based at least partially on Duke's ability to obtain annual rate increases through the fuel adjustment mechanism and the experience modification factor (EMF) procedure permitted by G.S. § 62-133.2, and on the potential for general rate increases in response to the impending commercial operation of the Bad Creek pumped storage station and perhaps other generating stations. If such real price of electricity does increase, the price elasticity impact of such increase may lower the rate of growth of Duke's peak loads.

Furthermore, the uncertainties surrounding the American economy at the present time preclude any easy assumption that the current economic downturn will be short lived. There are fears among some of the parties that Duke's load forecast does not adequately account for the possibility of a significant economic downturn in the near future. These fears are heightened for some by the fact that Duke's actual 1990 summer peak was significantly below the level projected in Duke's 1990 forecast, and that an abnormally high peak in 1989 may have unduly influenced the forecast.

Duke indicated that it had little reason to believe that acceptable purchased power or NUG generation would be available at reasonable prices. However, both witness Nightingale and Dr. Williams contended that Duke could obtain a greater amount of purchased power or NUG generation than was reflected in its 1990 forecast. The projected availability of purchased power or NUG generation hinges primarily on the level of certainty that such capacity will be firm capacity.

After analyzing all of the evidence, the Commission concludes that the Lincoln Combustion Turbine Station will be needed to provide generating capacity for Duke's North Carolina retail ratepayers at least by the late 1990's and very possibly as early as 1994. In view of the uncertainties surrounding the forecasted rate of load growth and the level of contribution to Duke's system from purchased power and NUG generation, the Commission anticipates that the commercial operation date of each individual combustion turbine unit contemplated for installation at the Lincoln Combustion Turbine Station will be timed in such a manner as to maintain Duke's system reserve margins as close as reasonably possible to the 20% minimum standard adopted by the Commission. However, the timing of each individual CT unit must also be consistent with cost effectiveness and other considerations contained in Duke's approved least cost integrated resource plan.

DUKE AGREEMENT RE: DSM AND NUG

The Public Staff pointed out to the Commission that it had reached an agreement with Duke shortly before the hearing in this proceeding. The Public Staff agreed not to contest the Certificate of Public Convenience and Necessity for the Lincoln Combustion Turbine Station and Duke agreed to strengthen its efforts in the demand side management (DSM) and NUG generation areas.

The Public Staff analyzed Duke's efforts to meet its needs with DSM and NUG generation and was greatly satisfied with Duke's DSM efforts. The Public Staff was especially pleased with Duke's leadership in the DSM area. It cited the increases in cumulative DSM capacity over those shown in Duke's 1990 short-term action plan, and increased spending proposed by Duke for DSM programs. Many of Duke's DSM programs are new to customers in this state.

The Public Staff and Duke reached agreement on two DSM policies: first, that Duke will move toward more balanced spending between load management and conservation programs; and second, that Duke will move toward a reduction in the number of "strategic sales" programs and related spending.

Duke acknowledged that more of its new spending on DSM programs is on load management than on conservation programs. Duke agreed to concentrate more of its research on cost effective conservation programs. It also agreed with the Public Staff that future DSM programs should aim towards forestalling construction of future generating plants.

The Public Staff was troubled by the number of "strategic sales" programs and the amount of spending on them. Duke assured the Public Staff that, as future generating plants draw closer, its least cost integrated resource planning (LCIRP) process will reject an increasing number of the strategic sales programs.

The Public Staff advised that it was satisfied that Duke's LCIRP process will work as Duke has indicated. However, it indicated that if future LCIRP filings did not show reductions in the strategic sales programs, it reserves the right to request a review of the process.

The Public Staff is not as satisfied with Duke's efforts to encourage NUGs. To assure NUGs that Duke is serious about its interest in NUG development, the Public Staff recommended that Duke adopt a reasonable goal, such as 500 mW of NUG additions by the year 2000. The Public Staff pointed out that Duke has already achieved over 122 mW of its original goal of 127 mW of NUGs by the year 2001. It contends that since Duke has set specific megawatt goals in the past, it should be able to set such goals for future additions.

Duke did not agree to set a specific megawatt goal for NUG additions, but agreed to strengthen its NUG program. It has designated a central contact person to handle NUG inquiries, and it has set a goal of aggressively pursuing NUGs as a part of its LCIRP.

The Commission is of the opinion that the agreement between the Public Staff and Duke regarding DSM and NUG programs should be adopted herein. Duke's expansion of DSM programs and spending reflect a strong commitment to making its LCIRP work.

The Commission is further of the opinion that this proceeding is not the appropriate forum for setting a specific megawatt goal for NUG additions. Although NUG additions were discussed herein and were a consideration in the determinations made herein, further discussion is needed before a specific megawatt goal is established for NUG additions. New NUG additions will be closely monitored in future LCIRP filings and particularly in future generic hearings on the LCIRP process. Discussion of specific megawatt goals for NUG additions would be more appropriate within such LCIRP process.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 6

The evidence for this finding is found in the testimony of Duke witness Priory and the Intervenor's witness Crawford-Brown.

Witness Priory's Exhibit RBP-1 shows that Duke conducted a comprehensive siting study to identify potential locations for a combustion turbine facility on the Duke system. The study evaluated various site-specific costs and environmental impacts to arrive at an appropriate site. The methodology used was a screening approach starting with the Duke service area. Coarse screening criteria were developed to determine exclusion areas and preferred areas. The coarse screening criteria are listed below:

Proximity to load center

- Primary location in northeast part of the service area;
- Secondary location in the central to southwest part of the service area.

Water Availability

- Adequate water storage and source of recharge water;
- Location near large streams, rivers, and reservoirs preferred.

Permitting

- No existing air or water quality constraints.

Land Ownership

- Use of Duke Power properties where possible.

Pipeline

- Location within 15 miles of natural gas pipeline if possible.

Transmission System -

- Proximity to 500, 230, or 110 KV lines.

Railroad

- Proximity to carrier lines.

Population

- Density exclusion limit of 400 persons per square mile.

PSD Class I Area

- A 10-kilometer buffer zone for all Prevention of Significant Deterioration (PSD) Class I areas.

Land Use

- Land use was reviewed to locate acceptable and unacceptable sites near lakes in Duke's service area.

Ten potential siting zones were identified from the coarse screening criteria. Within these zones, 53 preliminary sites were identified.

Twenty-seven of the 53 sites were studied in detail. Fine screening criteria were applied to the sites for development of site-specific costs and evaluation of environmental concerns. The fine screening criteria are listed below:

COST CONSIDERATIONS

Construction Costs

- Earthwork
- Railroad
- Gas Pipeline
- Buildings
- Switchyard
- Tanks
- Water Supply
- Engineering
- Support

Transmission Line Costs

- Construction
- Reliability

Land Acquisition Costs

ENVIRONMENTAL CONSIDERATIONS

Air Quality

- National Ambient Air Quality Standards (NAAQS)
- Existing Air Quality

Additional Considerations

- Endangered species
- Aquatic recreation
- Terrestrial recreation
- Water shortage area
- Water quality

After application of the fine screening criteria, six sites in North Carolina (including the Lincoln County site) and one site in South Carolina were selected for detailed evaluation. Two North Carolina sites were located in Rowan County and one each was located in Davidson, Rockingham and Stokes Counties. The South Carolina site was located in York County. These other sites were rejected based on site-specific costs and/or environmental impacts.

An area in Lincoln County was identified as the best site area. Witness Priory testified that the site is well suited when considering environmental aspects, costs, and fuel and transmission access. The specific site ultimately purchased was included in the Lincoln County area identified in the siting study.

Although the site was not the first property within the Lincoln County area pursued by Duke, the site embodies all the characteristics which made the area attractive. Witness Priory stated that Duke's siting methodology focused on areas instead of specific parcels of property because it is difficult to identify property lines and willing sellers during the siting process. He testified that of the seven final sites, the Lincoln County site was chosen primarily because of cost. The incremental cost to develop the Lincoln County site was $7.183 million; the incremental cost of the York County site, which was also seriously considered, was $22.023 million.

Witness Priory acknowledged that Duke had expressed a preference for a site near large bodies of water in its coarse screening criteria because Duke was considering a number of technologies at that time, but that this criterion was not important with respect to simple cycle combustion turbines.

Witness Crawford-Brown testified on behalf of the Intervenors. He testified that Duke excluded areas with existing air quality problems in its siting process. Among the areas excluded were Mecklenburg County, because of carbon monoxide and ozone problems, and Gaston County, because of particulate problems. Duke also excluded areas within ten miles of its Allen, Marshall and Cliffside generating plants because of concern with sulfur dioxide emissions at those plants as estimated by Duke Power in a modeling study. Duke did not, however, exclude an area around its Riverbend plant, which is only six miles from the Lincoln Combustion Turbine site. Witness Crawford-Brown concluded that Duke's decision not to exclude a 10-mile area surrounding the Riverbend plant was not justifiable. Such an exclusion would eliminate the proposed Lincoln County site from consideration. In addition, he predicted that prevailing wind directions will transport emissions from the Marshall and Allen plants toward the Lincoln Combustion Turbine Station site and that if the exclusions areas around those plants were adjusted to reflect transport patterns and prevailing winds, the exclusion area around the Marshall plant would exclude the Lincoln Combustion Turbine Station site.

In response to cross-examination, Dr. Crawford-Brown testified that he was not qualified to talk about economic factors resulting from the Clean Air Act, and he acknowledged that "the manner in which the Clean Air Act will be administered in North Carolina is not established." He also testified that the Clean Air Act will be a "consideration for the entire range of facilities which Duke Power operates," and that Duke could "leave the LCTS entirely as it is and simply reduce emissions from some other facility." He concluded that "there is a good possibility that the Clear Air Act would have no impact whatsoever on LCTS" and would not predict the probability of any action resulting from the Clear Air Act.

With respect to these matters, Duke witness Priory testified that the three exclusion areas around Marshall, Allen, and Cliffside were chosen because the existing emissions in those areas were close to national ambient air quality standards based on Duke's modeling results in 1980. An analysis was performed to see how close a new source could be located to the existing plants without affecting air quality at the existing plants. It was determined that combustion turbine emissions outside a ten-mile radius from the new source would not cause a significant impact on the air quality in the vicinity of the existing plants.

The location of the site was not known at the time Duke established the coarse screening criteria, and a ten-mile circular exclusion area was determined to be sufficient. The exclusion area was used to assure that the new source would not cause the existing plants to exceed the national ambient air quality standard. With respect to Duke's failure to draw an exclusion area around Riverbend, witness Priory testified that a 1980 study, Exhibit DCB-2, was used to draw the exclusion areas. The study shows maximum concentrations of sulfur dioxide for each plant based on 3-hour averages and 24-hour averages. Exhibit DCB-2 shows maximum 3-hour concentrations of sulfur dioxide at Marshall as 1134 micrograms per cubic meter, Allen as 1301 micrograms per cubic meter, Cliffside as 1542 micrograms per cubic meter, and Riverbend as 1022 micrograms per cubic meter. The National Ambient Air Quality Standard for the maximum 3-hour concentration of sulfur dioxide is 1300 micrograms per cubic meter. Based on this data, witness Priory stated that Duke elected to exclude areas around Marshall, Allen, and Cliffside. The Riverbend maximum 3-hour concentration was lower than those at Marshall, Allen, and Cliffisde. The Riverbend maximum 24-hour concentration was higher than at Marshall. However, Priory testified that Duke was not concerned with 24-hour concentrations in siting the Lincoln Combustion Turbine Stations because the Lincoln Combustion Turbine Station will be a peaking station and is not expected to run for long periods of time.

The Commission has held that a complainant challenging the siting of an electric transmission line must show that the utility's site selection was arbitrary and unreasonable in order to prevail. Gwynn Valley, Inc. v. Duke Power Company 78 Report of NCUC Orders and Decisions 186 (1988); Kirkman v. Duke Power Company, 64 Report of NCUC Orders and Decisions 89 (1974). These were complaint cases, and the burden of proof was on the Complainant. The present docket is a certificate proceeding pursuant to G. S. 62-110.1 and the burden of proof is on the utility. G.S. 62-110.1 provides that a utility must obtain a certificate that public convenience and necessity requires, or will require, construction of a new generating facility. The statute sets forth no specific requirements as to the siting process of new generating facilities. The purpose of the statute is to prevent costly overbuilding of generating facilities, and environmental concerns are generally left to other regulatory agencies. State ex rel. Utilities Commission v. High Rock Lake Association, 37 N.C. App. 138, 245 S.E.2d 787, cert. denied, 295 N.C. 646, 248 S.E.2d 257 (1978). Though "not at the heart of the regulatory process" under G.S. 62-110.1, the Commission recognizes that environmental concerns are relevant to the extent they affect the cost and efficiency of a proposed generating facility. Id. The Commission also recognizes its responsibility under the State Enviromental Policy Act and specifically under G.S. 62-2(5) "to encourage and provide harmony between public utilities, their users and the environment." The Commission has considered all of the siting and enviromental concerns raised by the evidence. The Commission concludes that Duke has the burden of proof to show that its siting process was reasonable and that the site proposed for the new generating facility is an appropriate one.

Based on the evidence presented, the Commission concludes that Duke has conducted a thorough and reasonable siting process. Duke applied coarse screening criteria to determine exclusion areas where it would be difficult to place a plant and preferred areas which would tend to lower the cost of the plant. Duke then applied fine screening criteria to determine site-specific

costs and environmental concerns. Duke selected the Lincoln County site based on the siting criteria which include costs considerations.

Intervenors' witness Crawford-Brown raised several concerns with the siting process. First, he contended that Duke should have drawn an exclusion area around Duke's Riverbend plant which would have eliminated the Lincoln County site. The primary basis for this contention is the fact that Riverbend's 24-hour sulphur dioxide concentrations are above those at Duke's Marshall plant around which Duke drew an exclusion area. Duke's evidence tended to show that it was not concerned with the 24-hour concentrations because the Lincoln County facility will be a peaking station and will not run for long periods of time. Witness Priory stated that the exclusion areas were based upon three-hour concentrations, and the Commission notes that the Riverbend three-hour emissions are below those at Marshall. Witness Crawford-Brown also contended that Duke's circular exclusion area around Marshall should have been drawn to reflect the prevailing wind directions to insure that emissions from the Marshall station would not affect the combustion turbine site. However, witness Priory testified that the purpose of the exclusion area was not to protect the combustion turbine site but to protect air quality levels at Duke's existing plant sites. The Commission concludes that Duke's exclusion areas were drawn in a reasonable manner.

Witness Crawford-Brown's other major concern with the siting process was the effect of the new Clean Air Act. The Commission notes that this Act became law well after the site selection process was completed. Furthermore, the witness stated that it will be a long time before the implications of the Act can be assessed and that the Act may have no impact whatsoever on the Lincoln County site. The Commission is concerned with the effect of air quality regulations on the site, as discussed later in this Order. Subject to that discussion, the Commission finds from the evidence that Duke's site selection process was reasonable.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7

The evidence for this finding of fact is found in the testimony of Duke witness Priory, Intervenors' witness Crawford-Brown, and the public witnesses.

Turning to the appropriateness of the site chosen, the evidence tends to show that the project site is located in Lincoln County on State Road (SR) 1511, approximately two miles west of Lowesville. The site is adjacent to a large, active commercial quarry. Other communities surrounding the project include Lincolnton (12 miles west), Gastonia (14 miles southwest), Charlotte (18 miles southeast), and Davidson (11 miles northeast). Lake Norman and the Catawba River are three miles east of the project. The project site borders or includes portions of Anderson Creek and Killian Creek. Forney Creek is nearby. The project site consists of approximately 711 acres. Approximately 50% of the site is agricultural fields planted with pine seedlings; and the reminder is second-growth hardwoods, pines or mixed pine/hardwood stands. Access to the project site is by SR 1511, which connects N.C. Highways 16 and 73. This road will provide access for all work force and material deliveries during construction as well as for plant staff, material deliveries, and fuel oil shipments during operation.

Witness Priory testified that comprehensive studies were performed to evaluate the existing environmental conditions and the environmental impacts of construction and operation of the Lincoln Combustion Turbine Station. Studies included measurements of the chemical and physical characteristics of Killian, Forney and Anderson Creeks. Aquatic macroinvertebrates and fish were sampled and identified from the creeks. The samples were typical of Piedmont streams impacted by agricultural and moderate residential development. Terrestrial flora and fauna were also surveyed. No rare or endangered plant or animal species or habitat for such species was found to occur on the site. The existing air quality was evaluated based on information from ambient air monitoring performed by the State Division of Environmental Management. Witness Priory concluded that the existing ambient air quality at the project site is well below National Ambient Air Quality Standards.

Witness Priory stated that the environmental effects of site construction will be minimal. With respect to water quality of streams bordering the site, some temporary effects due to sediment from erosion during grading activities are expected. These effects will be minimized by the Sedimentation and Erosion Control Plan, which will include an undisturbed vegetation buffer between the construction site and the streams. Impacts of siltation on aquatic macroinvertebrates and fish will be minimized by erosion control measures. Terrestrial impact will consist of the permanent clearing of approximately 100 acres of mixed hardwoods, pines, shrub, and pasture land. The effect on wildlife on the site will be the loss of some upland game habitat. Effect on wildlife outside the 100 acre area of immediate construction will be minimal and temporary. Air quality impacts during construction should be minimal and will be in accordance with permits issued by appropriate state agencies.

Witness Priory testified that the environmental impact of project operation is also expected to be minimal. Water quality in Killian Creek will be affected in two ways: stream flow will be reduced due to the withdrawal of water for project use and stream chemistry will be affected due to project wastewater discharges. Stream flow reduction will be minimized by use of a water storage pond and by limiting withdrawals to periods of ample stream flow. Wastewater discharges to Killian Creek will meet the requirements of the National Pollutant Discharge Elimination System (NPDES) permit. He further testified that effects of operation on aquatic macroinvertebrates and fish will be minimized by the use of the water storage pond and by the low withdrawal velocities at the Killian Creek intake structure. Projected sound contours during operation of the plant were developed from manufacturer's specifications to estimate sound levels at various distances from the plant. It is expected that the sound will not adversely impact the surrounding community. Witness Priory also testified that detailed evaluations of the air quality impacts had been performed in support of the air quality Prevention of Significant Deterioration (PDS) permit and that modeled concentrations are well below ambient air quality standards. He testified that emissions will meet the requirements of the permit and will have minimal impact on existing air quality.

Witness Crawford-Brown questioned the reliability of sulfur dioxide measurements obtained at the Iron Station monitor as a basis for estimating the sulfur dioxide ambient level at the Lincoln Combustion Turbine Station site. He testified that a monitor closer to the Lincoln Combustion Turbine Station might

show a larger effect from emissions at Duke's existing plant and might cause standards to be exceeded. Witness Crawford-Brown also testified about concerns with air quality under expected changes required by the new Clean Air Act. The Lincoln County site is in a panhandle of land surrounded on three sides by areas of concern with air quality. Witness Crawford-Brown testified that the new Clean Air Act may result in new monitoring in the Charlotte area which may place that area in the "serious" air quality category. Such a category would require reduction in sulfur dioxide emissions and may result in closer scrutiny of new sulfur dioxide and nitrogen oxide emissions in the surrounding area. He conceded that reductions might be accomplished through the anticipated system of allotments, and on cross examination he conceded that the manner in which the Clean Air Act will be administered in North Carolina has not been established yet.

Duke witness Priory explained that the purpose of using data from the Iron Station monitor in the modeling was to capture the ambient air quality absent any sources. All existing sources were then modeled in the analysis. This results in emissions from Marshall, Allen, and Riverbend being modeled into the study. In fact, to the extent that emissions from Marshall, Allen, and Riverbend are already included in the ambient air quality at Iron Station, there is some double counting of these emissions.

Various public witnesses also testified concerning the site. The proposed site is now in a quiet, rural area. Construction and operation of the proposed plant will cause a substantial increase in noise and traffic. Witnesses expressed particular concern about traffic since fuel oil will be delivered by tanker truck on a narrow, two-lane, winding rural road. The same road carries school buses for the three nearby public schools. Various witnesses testified to the deterioration of the quality of life in the area and to the loss of other, more desirable development in the area.

The Commission concludes that Duke has carried its burden of proof as to the appropriateness of the site of this facility. Duke has located a site which is less than a mile from a gas transmission line, has an adequate existing transmission line, and has an adequate water supply. Duke did not displace any homeowners in obtaining this site, and the site has substantial acreage so as to provide a large buffer area separating the plant from adjacent property owners. The Commission is mindful of the concerns addressed by the Intervenors and by the public witnesses. The traffic concerns expressed were largely premised on the facility's running 24 hours a day with no oil in the storage tanks, a scenario which is highly unlikely. The Commission is also cognizant of the public witnesses' testimony on the history of the site, which once included the home where Stonewall Jackson was married. This home was torn down prior to Duke's purchase of the property, and Duke has conducted comprehensive studies of the site to ensure that there are no significant historical or archaeological sites. The Commission also notes that the site is adjacent to an active quarry. Construction and operation of the facility will undoubtedly have some effects on the surrounding area; however, this is inevitable wherever the facility is located. Primarily, concerns as to water and air quality are the responsibility of other agencies, and the Commission will condition the certificate granted herein upon Duke's compliance with applicable environmental permits. The effect that compliance with environmental permits will have on the cost of locating the

facility at this specific site is considered hereinafter. Subject to that discussion, the Commission concludes that the proposed site of the Lincoln Combustion Turbine Station is appropriate.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

The evidence for this finding is contained in the testimony of Duke's witnesses Priory and Denton, Public Staff witness Nightingale and Intervenors' witness Crawford-Brown.

Witness Priory testified concerning the cost of the Lincoln Combustion Turbine Station. He testified that the Lincoln facility will include 16 General Electric simple cycle combustion turbine units, each rated at 72.8 mW, and auxiliary equipment. Total plant capacity will be 1,165 mW. The facility will tie into an existing 230 KV transmission line on the plant site. The facility will also include two 5-million gallon fuel oil storage tanks, administrative and maintenance support buildings, and a water storage pond. The units will be fueled by either natural gas or fuel oil. A natural gas pipeline is located less than one mile from the station. The project cost estimate is dependent on the schedule for bringing the units in service. Duke Exhibit RBP-1 indicated plans to install from four to twelve units in 1994, with the remainder in 1995 and 1996, and in-service cost from $480.523,000 to $517,560,000. The estimate includes all required labor, materials, equipment, contingency, and engineering and supervision costs, as well as overhead costs and legal expenses. In discussing the current project schedule, Mr. Priory identified a construction start date of October, 1991, with the first six units in service by summer of 1994. The remaining ten units are scheduled to be in service by summer of 1995. He indicated that the current schedule is based on the capacity requirements outlined in Mr. Donald H. Denton's testimony. Witness Denton stated that Duke plans to build the plant in the most cost efficient manner to meet the needs of the system, taking into account all of the parameters that impact construction. Other evidence tended to show that two-thirds of the estimated costs are under contract and one-third is not.

The primary concerns raised with respect to the cost of the facility are those concerning the air and water permitting costs. By filing dated November 19, 1990, the Attorney General urges the Commission to delay its decision in this case until such time as a reasonable showing of the costs and conditions of compliance with air and water quality environmental regulations could be made.

N.C.G.S. 62-110.1 requires an applicant to file "an estimate of construction costs in such detail as the Commission may require." The Commission must approve the cost estimate. Rule R8-61(b)(9) requires an applicant to provide the following:

> A statement of estimated cost information, including plans and related transmission capital costs . . . ; all operating expenses by categories, including fuel costs and total generating cost per net KWH at plant; and information concerning capacity factor, heat rate, and plant service life.

Cost estimates, not actual cost figures, are required by the statute and the regulation and Duke has provided the cost information required. Duke witness Priory testified that the cost estimate is reasonable. The Commission recognizes that any cost estimate may change over time for a variety of reasons, including the permitting and licensing process.

The siting and construction of a generating facility involves numerous permits and licenses as shown on pages 8-1 to 8-3 of Duke's Rule R8-61(b) filing. The permitting and licensing process is time consuming and costly. Duke has spent approximately $8,775,000 on the Lincoln Combustion Turbine Station site and plans to spend an additional $16,141,000 prior to the start of construction in October 1991. The ultimate cost of compliance with environmental permits at this site is not known and cannot be known at the present time. In this case uncertainty is greater than usual because of the recent passage of new legislation on air quality. The February 27, 1991, letter from DEM which the Attorney General has asked to submit as an exhibit does not either resolve Duke's pending air permit applications or quantify new costs resulting from the Clean Air Act. We deny the Attorney General's motion to submit the letter as evidence.

The Commission concludes that it cannot withhold a decision indefinitely, as requested by the Attorney General, since G.S. 62-82 directs the Commission to decide certificate applications within a certain time frame. Based on the estimate and the testimony now available, the Commission finds that Duke's cost estimate is reasonable. However, we recognize that the actual cost is dependent upon future regulatory developments, the actual construction schedule and other factors. The Commission will therefore direct further reporting and opportunity for reevaluation as hereinafter provided.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

This finding, which is really a conclusion of law, is based upon the preceding findings and discussions of evidence.

Duke asks the Commission to issue a certificate of public convenience and necessity. Duke recognizes that it must construct and operate the facility in strict accordance with all applicable laws and regulations, including permits to be obtained from the Division of Environmental Management and the Division of Water Resources dealing with air and water quality. Duke also recognizes that it must provide progress reports as required by G.S. 62-110.1(f), as well as the various filings required by the Commission rules on least cost integrated resource planning.

The Public Staff asks the Commission to go further. In addition to incorporating the Public Staff's agreement with Duke on DSM and NUG issues, which has already been discussed, the Public Staff wants the Commission to require Duke to address specifically, and separately from other plants, the proposed schedule and continuing need for the Lincoln Combustion Turbine Station in connection with future least cost integrated resource planning filings. The Public Staff also wants a status report addressing the status of engineering, outstanding permits, changes in costs, and the reasons for any changes in costs. The Public Staff sees these filings as a means of providing an opportunity to reevaluate this proposed facility based on future changes in need or costs. It maintained that

future reevaluations of the project in LCIRP filings are advisable because Duke can cancel or postpone some of the planned units as conditions require.

As noted above, the Attorney General asks the Commission to continue this proceeding until more evidence is available on the cost of complying with environmental regulations. CUCA asks the Commission to issue a certificate "on a tentative basis" and to revisit the need for the facility annually. Finally, Intervenors urge the Commission to deny a certificate, arguing that Duke has failed to carry its burden of proof.

Previously in this Order, the Commission has found and concluded that there is a need for the generation represented by this facility, that the facility is consistent with Duke's current least cost integrated resource plan, that the proposed site is appropriate, and that the present cost estimate is reasonable. The Commission concludes that a certificate of public convenience and necessity should be issued. However, as noted above, the Commission recognizes the uncertainties in the load forecasts and the time of commercial operation for the individual units of the Lincoln Combustion Turbine Station. Further, the Commission notes that the pollution control technology for the facility and the cost of complying with environmental regulations cannot be known at this time. We are not dealing with the usual uncertainties of construction. The recent passage of new clean air legislation, the full effects of which will not be known for some time, makes the situation unique. The Commission concludes that it is best to proceed by issuing a certificate based on the present evidence and within the time frame required by G.S. § 62-82, but to require the special reports, in addition to those otherwise required by statute, as suggested by the Public Staff.

More specifically, the Commission is of the opinion that Duke should file periodic status reports for the Lincoln Combustion Turbine station showing: (1) the status of necessary State and Federal permits; (2) the status of engineering and construction; (3) explanations for any significant changes in costs or cost estimates; and (4) explanations for any significant changes in forecasts or need for the project. The status reports should be filed annually as a part of the annual short-term action plans filed pursuant to Commission Rule R8-59, and they should be subject to updates under essentially the same circumstances as updates to the short-term action plans. For example, Commission Rule R8-60 requires that an update to the short-term action plan be filed within 30 days after any significant change in the load forecast. Such an update should also be filed within 30 days after any significant change in costs or cost estimates. The Lincoln Combustion Turbine station should be discussed separately from the other combustion turbines in Duke's short-term action plans.

The current docket number for filing short-term action plans is Docket No. E-100, Sub 58. If future generic LCIRP proceedings are held in a different docket rather than E-100, Sub 58, subsequent short-term action plans will be filed in that different docket rather than in E-100, Sub 58.

The Commission also concludes that Duke should file a status report approximately six months in the future describing the status of necessary permits from state agencies, including the Division of Environmental Management (DEM), and also describing the cost impact and other impacts of the Federal Clean Air

Act on the Lincoln Combustion Turbine Station to the extent that such impacts can be more clearly determined at that time. In this context, such impacts should also include other generating plants affected by measures taken to add the Lincoln Combustion Turbine Station to the Duke system.

Finally, the Commission must turn to the recent motions dealing with the proposed intervention of Empire Power Company. The Commission issued an Order on February 20, 1991, denying Empire's Petition to Intervene. That Order was based on the Petition having been filed too late. The Commission has been asked to reconsider, and we have done so. We reaffirm the denial of intervention in this docket. As noted above, the procedure for certificate applications is specified by G.S. § 62-82. The Commission does note, however, that Empire has also petitioned to intervene in Docket No. E-100, Sub 58, and a separate order has been issued in that docket.

IT IS, THEREFORE, ORDERED as follows:

1. That a Certificate of Public Convenience and Necessity is hereby granted to Duke Power Company for the construction of the Lincoln Combustion Turbine Station, having an output of 1,165 megawatts, to be located on a site near Lowesville in Lincoln County, North Carolina, as applied for in this proceeding subject to the conditions hereinafter set forth.

2. The plant will be constructed and operated in strict accordance with all applicable laws and regulations, including permits issued by the North Carolina Department of Environment, Health and Natural Resources, and with the current requirements imposed by the Division of Water Resources as set forth in AG-Duke Exhibit No. 4 with such changes as Duke and the Division of Water Resources may agree to hereafter.

3. That Duke Power Company shall file status reports with the Commission at least annually containing the following information about the Lincoln Combustion Turbine Station project:

(a) the status of necessary State and Federal permits;
(b) the status of engineering and construction;
(c) explanations for any significant changes in costs or cost estimates; and
(d) explanations for any significant changes in forecasts or need for the project.

4. That Duke Power Company shall file the status reports required herein as part of its annual short-term action plans submitted pursuant to NCUC Rule R8-59. Such reports and plans shall be filed in Docket No. E-100, Sub 58, until such time as the Commission opens a new generic docket on least cost integrated resource planning.

5. That Duke Power Company shall file updates to the status reports required herein within 30 days after any significant change in the cost estimates or forecasted need for the project, and that said updates shall be filed as updates to the current short-term action plans.

6. That the status reports required herein shall discuss the LCT project separately from the other combustion turbines in Duke's short-term action plans.

7. That Duke Power Company shall file a supplemental report with the Commission approximately six months after the date of this Order describing the status of necessary permits from state agencies, including the Division of Environmental Management, and also decribing the cost impact and other impacts of the federal Clean Air Act on the Lincoln project. The supplemental report shall also describe said impacts on other generating plants resulting from measures being taken to add the Lincoln project to the Duke system.

8. That the agreement between Duke Power Company and the Public Staff regarding DSM and NUG programs as discussed herein is hereby approved and adopted.

ISSUED BY ORDER OF THE COMMISSION.

This the 26th day of March 1991.

NORTH CAROLINA UTILITIES COMMISSION

(SEAL)

Geneva S. Thigpen, Acting Chief Clerk

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-7, SUB 492

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Empire Power Company, Complainant	)	ORDER DENYING COMPLAINT
v.	)	
Duke Power Company, Respondent	)	

HEARD: Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on December 11, 1991

BEFORE: Commissioner Allyson K. Duncan, Presiding, Chairman William W. Redman, Commissioner Sarah Lindsay Tate, Commissioner Julius A. Wright, Commissioner Robert O. Wells, and Commissioner Laurence A. Cobb

APPEARANCES:

For Empire Power Company:

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For Duke Power Company:

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Robert W. Kaylor, Patterson, Dilthey, Clay, Cranfill, Sumner and Hartzog, Post Office Box 310, Raleigh, North Carolina 27603

For the Using and Consuming Public:

Gisele L. Rankin, Staff Attorney, Public Staff--North Carolina Utilities Commission, Post Office Box 29520, Raleigh, North Carolina 27626-0520

BY THE COMMISSION: On April 4, 1991, Empire Power Company (Empire) filed a formal complaint with the North Carolina Utilities Commission against Duke Power Company (Duke) alleging that Duke failed to comply with Commission Rules R8-56(a) and R8-58(e) and with the Commission Order Granting Certificate of Public Convenience and Necessity for Duke's Lincoln Combustion Turbine Station (Lincoln) in Docket No. E-7, Sub 461. On May 13, 1991, Duke filed its answer and

a motion to dismiss. On June 11, 1991, Empire filed its response and requested an evidentiary hearing. On June 17, 1991, the Attorney General served notice of intervention. On June 20, 1991, the Public Staff filed a statement of position. On June 25, 1991, the Attorney General filed a motion for a hearing. The Commission, by Order dated June 28, 1991, ordered that oral argument be scheduled for July 11, 1991, for the purpose of considering Duke's motion to dismiss. The oral argument was held as scheduled.

By Order of the Commission dated August 28, 1991, the Commission denied Duke's motion to dismiss and scheduled the matter for hearing on October 23, 1991, on the issues set forth in the Order. The Order required that the hearing be limited to consideration of two issues: (1) whether Empire made to Duke a proposal of reasonably available purchased power that would have a significant impact on Duke's least cost integrated resource plan and whether such proposal was complete, detailed, and sufficient for assessment, and (2) whether Duke arbitrarily denied Empire's proposal without making a detailed assessment of it using reasonable methods and assumptions or, if such assessment was made, whether Duke made it available to Empire.

Extensive discovery was conducted by the parties. In response to Duke's motion that prefiling of testimony be required and Empire's motion that the hearing be rescheduled, the Commission issued an Order on September 17, 1991, requiring prefiled testimony and rescheduling the hearing for December 11, 1991. Empire filed its direct testimony by letter dated November 19, 1991, and its rebuttal testimony on December 6, 1991. Duke filed its testimony by letter dated November 27, 1991. Subpoenas were requested by Empire, and various motions were filed with regard to the request. At the public hearing, Empire withdrew its motions concerning the subpoenas.

On December 9, 1991, Duke filed its motion to strike certain portions of the testimony of Empire witness Steven L. Greenberg. Empire filed a motion to strike testimony of Duke witness W. F. Reinke and T. C. McMeekin on December 11, 1991. The motion concerning witness Greenberg's testimony was addressed during the hearing, and a portion of witness Greenberg's testimony was struck. The outstanding motion to strike testimony of witness Reinke and witness McMeekin is denied. All other motions not dealt with at the hearing are deemed denied.

Upon call of the case for hearing, both Empire and Duke were present and represented by counsel. Empire presented the testimony of Steven L. Greenberg, Vice President of Empire Power Company, in support of its complaint. Duke presented the testimony of W. F. Reinke, Vice President of System Planning and Operating, Duke Power Company and T. C. McMeekin, Vice President, McGuire Nuclear Site, Duke Power Company. Witness McMeekin was Vice President, Design Engineering during the time of the Empire proposal which is the subject of the complaint. Design Engineering and System Planning and Operating were responsible for review of the Empire proposal.

Based upon careful consideration of the testimony and exhibits presented at the hearing, the entire record in this matter, and the issues set forth by the Commission, the Commission now makes the following:

FINDINGS OF FACT

1. Empire Power Company is a non-utility power company or independent power producer (IPP) that was created in October 1990 to take over the new business and project development functions of Empire Energy Management Systems, Inc. Empire is a project developer.

2. Duke Power Company is a public utility operating in North and South Carolina where it is engaged in the business of generating, transmitting, distributing and selling electric power.

3. In July 1990, Empire proposed to sell electric power to Duke from a combustion turbine generating facility to be built in Person County. Empire subsequently updated and modified its proposal numerous times between August 1990 and January 1991 and again in June 1991 and in November 1991. The site was changed to Rockingham County in December 1990. Other changes included site size, facility size, combustion turbine capability and manufacturer, heat rate, fuel cost, staffing, water supply, operating and maintenance costs, and others.

4. Empire's sole experience in power plant development is a 10-megawatt cogeneration facility at MacDill Air Force Base in Florida that is still under construction. Empire has never generated any electric power anywhere.

5. Empire had a Memorandum of Understanding with Westinghouse for the design, engineering, procurement, and construction of its project. However, the Memorandum of Understanding was subject to termination and was structured so that neither party was bound to liability.

6. Empire proposed Westinghouse W501D5 combustion turbines. There are only two such turbines in operation in peaking application in the United States.

7. Empire does not have an income statement or balance sheet. It has few assets. It has participation offers, but it has no firm agreements for financing or equity participation.

8. Empire's proposal lacked site-specific, balance-of-plant information, i.e., information concerning those portions of the plant not supplied pursuant to a typical combustion turbine manufacturer's contract.

9. When Empire subsequently applied to the Commission for a certificate of public convenience and necessity, much of the technical plant information submitted was identical to information submitted by Duke in its application for a certificate of public convenience and necessity for its Lincoln project.

10. Even though the proposal was not complete, Duke was able to make several assessments of Empire's initial proposal and its supplemental proposal by using Duke's own experience and information from other industry sources. Duke conducted two technical assessments and three economic assessments of Empire's proposal during the period of August 1990 through January 1991. Duke spent significant time and resources in these assessments and Duke discussed its overall concerns and conclusions with Empire in September and November 1990 and in January and June 1991.

11. Duke made certain modifications to Empire's proposal in order to either correct errors or put it on a comparable basis with Duke's supply-side alternative, the Lincoln County Project. Duke made certain assumptions because the proposal was incomplete. Duke's modifications and assumptions were reasonable.

12. Duke conducted a technical assessment of Empire's original proposal in August and September 1990. This evaluation identified 13 areas of concern, including (among others identified in the discussion of evidence) the output rating and the startup time of the turbines proposed, the reliability of the water source proposed, the maintenance and inspection intervals proposed, the inadequate staffing proposed, inconsistencies in the construction schedule proposed, and Empire's lack of experience. Duke concluded from this evaluation that it could not prudently rely upon Empire for peaking power in the time frame proposed.

13. Duke conducted an economic assessment of Empire's original proposal in September 1990. This assessment showed that the proposal offered no cost advantage to Duke.

14. Empire made a supplemental proposal in October 1990 and Duke performed additional assessments of it in November 1990. The supplemental proposal satisfactorily addressed some, but not all, of Duke's concerns. Duke continued to have concerns about the turbines' startup time, maintenance and inspections, noise, and Empire's lack of experience. Duke again concluded that it was not prudent to rely upon Empire and that the proposal offered no cost advantage.

15. Empire presented Duke a Life Cycle Cost Analysis in January 1991 in which it claimed that its project offered Duke a $100 million savings. Duke performed its own economic analysis using Empire's methodology and again concluded that there was no cost advantage in Empire's proposal.

16. Other issues raised during this proceeding relating to the interpretation of Commission Rule R8-58(e) and to the appropriate evaluation process by which utilities should assess future purchased power proposals may be raised in the pending least cost integrated resource planning docket, Docket No. E-100, Sub 64.

EVIDENCE AND CONCLUSIONS IN SUPPORT OF FINDINGS OF FACT NOS. 1-7

These findings concern the issue of whether Empire made a proposal of reasonably available purchased power.

Empire witness Greenberg contends that from July 1990 to January 1991, Empire made a bona fide power sales proposal to Duke. He testified that on July 24, 1990, Empire telephoned Duke and sent a facsimile letter describing its power sales proposal for dispatchable, long-term peaking capacity, beginning as early as 1994. On July 31, 1990, Empire presented Duke with a written proposal. In its proposal, Empire had identified several sites which would support the proposed facility, had entered into a Memorandum of Understanding for engineering, equipment procurement and construction services with an experienced, turn-key supplier of such facilities (Westinghouse), and had identified various

methods of financing the facility it proposed. Empire's original offer to Duke was for up to three 100-MW increments of peaking power from a site in Person County, North Carolina called the Rolling Hills project.

Witness Greenberg stated that the Rolling Hills project was conceived at the beginning of 1990 when Empire prepared to respond to a competitive solicitation for peaking power being conducted by a North Carolina municipal utility system. Empire decided not to submit a bid to the municipals and instead made a proposal to Duke for the Rolling Hills project.

Witness Reinke testified that on July 24, 1990, Empire telephoned to ask Duke if it might be interested in an offer from Empire to sell Duke up to 1,000 MW of simple cycle combustion turbine capacity in 100-MW increments from a facility to be located in Person County. No price information or other details were discussed in the phone conversation. On July 31, 1990, Empire provided its original proposal including prices for up to 300 MW in Person County following up on its July 24, 1990, oral offer. Witness Reinke further testified that on numerous occasions between August 1990 and January 1991, Empire updated and modified its proposal. In fact, Empire modified its proposal in June 1991, after Empire had filed its complaint against Duke. Changes included site location, site size, facility size, combustion turbine capability and manufacturer, heat rate, fuel cost, staffing, water supply, and operating and maintenance cost, among others. Empire changed two major aspects (capacity and site size) of its project as late as November 1991. Witness McMeekin testified that Empire's numerous changes contributed to Duke's belief that Empire was not very knowledgeable about generating facilities. Duke's preliminary assessments of Empire's proposal were on the basis of Empire's 300-MW offer at the Person County site.

Duke witnesses Reinke and McMeekin testified that Duke had serious concerns about Empire's lack of experience in the development, design, construction, ownership and operation of large generating plants, Empire's uncertain financial resources, and what Duke considered to be significant technical problems associated with Empire's proposal. These concerns led Duke to conclude that it could not prudently rely on Empire for reliable, cost-effective peaking power in the 1994 time frame. Therefore, Duke did not consider Empire's project to be reasonably available.

Witness McMeekin testified that one of Duke's major concerns was Empire's lack of experience. Empire's sole experience in power plant development consisted of a 10-MW cogeneration facility at MacDill Air Force Base in Florida. That $15 million facility was still under construction and has not generated power to date. Witness McMeekin indicated that Empire's lack of experience was obvious from the proposal in that the proposal demonstrated little knowledge of combustion turbine licensing, siting, design, construction and operation. He further testified that the principals of Empire had limited experience. He said that Duke had concerns about the reliability and deliverability of a product by a team with no experience in the generating facility business.

Empire witness Greenberg pointed out that Empire was trying to sell Duke capacity, not equipment, and that Duke should have considered the experience of Westinghouse. Witness Greenberg testified as to Westinghouse's experience in the

turn-key design, fabrication and construction of peaking combustion turbine plants and to Empire's reasons for selecting Westinghouse turbines for its proposal.

Witness Greenberg testified that Empire's role as project developer is to coordinate the resources of those entities which specialize in specific aspects of a power project, such as siting, permitting, licensing, procurement, construction, financing, fuel supply, and operation and maintenance. Witness Greenberg said, "You could almost describe [Empire] as a shell corporation. . ." He testified that Empire had entered into negotiations with a subsidiary of Baltimore Gas and Electric, a company with substantial experience in the independent power industry, for participation in the Rolling Hills project and had discussed participation in its project with Westinghouse and Commercial Union Energy. He stated that Empire had almost a dozen major developers, utility subsidiaries and contractors who expressed their desire to participate in the Rolling Hills project. Duke witness McMeekin pointed out that while Empire brings up the possibility that Westinghouse and other experienced and financially strong companies might participate in the Rolling Hills project, no firm commitments from these companies have been forthcoming. Further, no information regarding potential equity investors had been presented to Duke.

Witness McMeekin testified that all utilities must deal with the fact that signing a purchased power contract with an IPP or QF does not assure that the power will be available when needed. He pointed out that Virginia Power signed up nearly 30 projects as a result of its December 1986 and March 1988 solicitations. The majority of the accepted proposals were by QFs. Of those, seven have been terminated and others are struggling. To avoid this problem, witness McMeekin said utilities must carefully screen potential suppliers and rely only on those that have a high probability of success. For this reason, purchased power solicitations ask for financial information as well as technical information. Potential suppliers must demonstrate through their proposals that they are financially and technically capable of delivering the project as proposed. Duke witness McMeekin testified that Empire did not demonstrate its financial or technical capability.

In response to Empire's assertions regarding Westinghouse's experience and the claimed advantage of Westinghouse W501D5 combustion turbines (CTs), Duke witness McMeekin testified regarding industry experience with General Electric (GE) and Westinghouse CTs in peaking applications and pointed out that field experience with Westinghouse W501D5 CTs in peaking applications is limited. When considering the need for CTs on the Duke system, Duke determined that high reliability was paramount given the expected use of the CTs in peaking applications. Duke concentrated on filling this need with field-proven equipment. Witness McMeekin stated that there were approximately 15 W501D5s installed in the United States with two of these in peaking applications. There were nearly 100 GE 7001EA CTs installed in the United States with over half of these in peaking applications. Duke selected GE turbines for its Lincoln project, partly on the basis of this concern.

Empire witness Greenberg testified that Empire offered various guarantees, such as completion, output quantity, output availability, startup availability, and heat rate. These included guarantees of Westinghouse, insurance policies,

completion bonds, cash, marketable securities and letters of credit. He testified to Empire's willingness to provide bonds, deposits, guarantees, other forms of security, and a right of first refusal on the plant to Duke so as to provide Duke with the utmost protection for its customers and the utmost confidence in Empire's ability to deliver on its proposal. Empire's contention was that its guarantees on the project made it "reasonably available." However, witness Greenberg admitted on cross-examination that its guarantees do not protect against not having power available.

Duke witnesses Reinke and McMeekin addressed Duke's concern about Empire's guarantees. Duke had grave doubts about any guarantees from an inexperienced developer like Empire, and Duke questioned what recourse Duke would have in the event that such guarantees were not met. Witness McMeekin testified that even if Empire could provide guarantees, Duke must be concerned about its risks if Empire cannot successfully complete the project. No amount of penalties could account for the impact to Duke's customers of not having the generation in place when needed to meet customer demand. Witness Reinke noted that Empire's statement that it will guarantee the project means nothing at this time because Empire apparently has no assets. He said that Empire was simply asking Duke to trust its ability to obtain such guarantees from other sources.

Witness Greenberg contended that Empire's proposal was one of reasonably available power because Westinghouse, an experienced builder of CT projects, had signed a Memorandum of Understanding (MOU) with Empire to provide turn-key design, engineering, equipment procurement, construction and probably operation of Empire's Rolling Hills project. Empire's position was that Duke should not rely on Empire, but on Westinghouse. However, the Memorandum of Understanding states that if Westinghouse's revised price under their agreement makes the transaction uneconomic for Empire, then the Memorandum Of Understanding may be terminated, and further that neither Empire nor Westinghouse shall be liable to the other for any damages arising out of termination of the letter. Under cross-examination, witness Greenberg described MOUs as documents that are structured so that they can be signed quickly, sometimes overnight, to demonstrate the interest of two parties to do a project. They are not reviewed by counsel, and they are structured so that neither party is bound to a multi-hundred million dollar liability.

Duke witness Reinke testified that financial strength was an important consideration in assessing the ability of an independent power producer (IPP) to successfully execute the contractual obligations of any project. Requisite financial strength is required by lenders prior to providing project financing. Financial strength is also important during the operational phase of any project in case of deficient cash flow projections. The ability of the owners to back a project with adequate financial resources is essential in assuring a reliable, dependable project.

In response to Duke's request for financial information, Empire stated that it was a privately held company and therefore does not have an annual report or SEC Form 10-K. Empire also indicated to Duke that it had not needed to assemble a certified or uncertified income statement or balance sheet and thus none was available. If one were available, it would primarily reflect the expenses incurred in developing the Rolling Hills project as a net loss on the income

statement and as a capitalized asset on the balance sheet. Empire further stated that it had received "bona-fide" proposals from equity investors but that Empire could not provide them because they were confidential.

Witness Greenberg testified that Empire has not had any difficulty financing the project to date. He stated that Empire's proposal indicated that financing was to be provided by Sanwa Business Credit Corporation, a wholly-owned subsidiary of Sanwa Bank of Japan. He testified that since making its proposal, Empire had also had participation offers from electric utilities, subsidiaries of an equipment manufacturer, and an insurance company, each of which confirmed the viability of Empire's project based on their detailed review of Empire's proposal and on their experience in having developed and financed similar large independent power projects. However, he acknowledged that no firm agreements for financing or equity participation had been reached with any partners, financiers, or subcontractors.

Duke witness McMeekin testified that problems with Empire's proposed schedule for its project contributed to Duke's conclusion that Empire's proposal was not one of "reasonably available purchased power." The Siting section of Empire's proposal stated that construction of the plant should take approximately one and one-half years. The Schedules section, however, only showed a one-year construction duration on both schedule charts, and the construction period ended six months prior to the last equipment delivery. Also, the earliest CT procurement and fabrication activities shown on the schedule charts would not result in equipment delivery supporting the construction schedule.

Witness Reinke testified that an IPP project like Empire's does not offer flexibility equivalent to a utility-built project like Lincoln. Duke could accelerate or slow down the construction of Lincoln to bring any number of units on line as needed. Duke has negotiated supply contracts with its vendors that allow Duke the flexibility to change the schedule so that Duke can place the units in service when they will be needed and when they will be least cost. This flexibility also supports Duke's efforts in demand-side management (DSM) in that DSM program impacts are less exact than supply-side options. Duke evaluates its resource needs each year as a part of its normal planning cycle and utilizes the least cost resources that provide an adequate and dependable electric supply. If planned supply-side resources are provided by purchased power contracts which require capacity payments beginning on a specific date, provided the capacity is available, flexibility would be limited by the contract and may only be achievable at a substantially increased cost.

The Commission concludes that Empire did submit to Duke a written power sales proposal for dispatchable peaking combustion turbine capacity on July 31, 1990. This proposal was updated and modified by Empire on several occasions between July 1990 and June 1991. The Commission also concludes that Duke made a preliminary examination of Empire's proposal and, based on its preliminary examination, Duke had legitimate concerns regarding Empire's lack of experience, the limited experience in peaking service of the CT units proposed by Empire, Empire's uncertain financial resources, and problems with Empire's proposed construction schedules. These concerns led Duke to conclude that Empire's proposal would present an unacceptable risk to Duke's customers and was, therefore, not a reasonably available purchased power option.

It is important that utilities screen potential suppliers for financial and technical capability and rely on those that have a high probability of success. Duke's conclusions that it could not safely rely on Empire for peaking power and therefore that Empire's proposal did not constitute a reasonably available purchased power resource were appropriate.

EVIDENCE AND CONCLUSIONS IN SUPPORT OF FINDINGS OF FACT NOS. 8-9

These findings concern the issue of whether Empire's proposal was complete, detailed, and sufficient.

Witness Greenberg contended in his direct testimony that Empire's proposal included virtually all of the elements that are commonly required by utility-sponsored peaking power solicitations, citing excerpts from the 1989 Virginia Electric and Power Company solicitation. He then listed solicitation information requirements which Empire provided to Duke. In his rebuttal testimony, witness Greenberg provided an itemized listing of balance-of-plant technical information in Empire's application for a Certificate of Public Convenience and Necessity. He cross-referenced this information to locations in Empire's proposal to Duke, which was included in Empire Exhibit SLG-1. Under rebuttal cross-examination, witness Greenberg contended that the bulk of the balance-of-plant information sought by Duke was contained within Tabs (I) through (N) of Empire's proposal. He denied Duke's statement that Tabs (I) through (N) contained turbine, not balance-of-plant, information.

Witness Greenberg indicated in direct testimony that Empire did not provide Duke all its data and that much of the equipment-specific information was not provided because Empire was selling Duke capacity, not equipment. He stated that more information was available, but Empire expected to provide that later in response to specific questions.

Witness Greenberg also testified that a number of updates to the proposal were provided to Duke as a result of Empire's continued development of the project, further review of its proposal and ongoing discussions with Westinghouse. The updates included transmission price estimates to move the power into Duke's territory, updated power output guarantees, and updated pricing proposals based on these other updates. Witness Greenberg noted several changes and options regarding the responsibility and costs of facility operating and maintenance (O&M). In response to Duke's September 1990 comments on O&M, Empire increased its prices, added contingencies, and confirmed costs and prices with Westinghouse. Empire also provided Duke the option of performing O&M itself or through its preferred contractor.

In regard to sites, witness Greenberg testified that after the supplemental proposal was submitted, Empire continued to pursue additional sites in Duke's territory, primarily in Rockingham County. Rockingham County was selected due to its classification as an attainment area, its location in the northeast part of Duke's service territory, and its location on the Transco pipeline. He also stated that Empire did not tell Duke about the site until December 1990, when it provided the Rockingham County Site Proposal to Duke along with additional heat rate information on the Westinghouse equipment. Witness Greenberg claimed this would enable Duke to re-analyze the economics of Empire's project by relying on

the heat rates provided by Empire and by eliminating the fixed cost of transmission from the Person County site.

Witness McMeekin testified that Empire's original proposal was not complete, detailed and sufficient for Duke to perform a detailed assessment thereof. However, based upon Duke's knowledge of combustion turbines, Duke performed technical and economic evaluations of the proposal in order to determine whether Empire's proposal could conceivably benefit Duke's customers. The assessment of the proposal was difficult because Empire provided numerous changes to the proposal during the time Duke was making its assessments.

Witness Reinke testified that Empire provided a supplement to its proposal dated October 9, 1990, revising certain aspects of its proposal. The revision primarily addressed several, but not all, of Duke's major areas of concern. Witness Reinke indicated that Empire continued to correspond with Duke. On December 28, 1990, January 2, 1991, and January 7, 1991, Empire identified an additional site for the Empire project and provided further information on sites and heat rate. Empire met with Duke on January 9, 1991, and provided Duke with its Life Cycle Cost Analysis of the Empire project.

Witness McMeekin disagreed with Empire's statement that these changes were a sign of flexibility. He stated that Empire's numerous changes contributed to Duke's belief that Empire was not very knowledgeable about generating facilities. For example, Empire adjusted its pricing only once due to siting changes. Empire increased the capacity charge to reflect the cost of using a pumping station for one of the Alamance County sites but proposed different site locations and sizes without changes in price.

Witness McMeekin indicated that one of the shortcomings of the various Empire proposals was the lack of balance-of-plant information, i.e., information concerning all portions of the plant not supplied pursuant to the typical turbine manufacturer's contract. Duke contended that Empire provided a standard package of information on the turbine package from Westinghouse, which is typically provided to potential customers, but did not provide sufficient site-specific balance of plant information. Witness McMeekin stated that necessary technical information for adequate balance-of-plant assessment would have included the following:

1. Conceptual mechanical and electrical system descriptions to include electrical one line diagrams, process flow diagrams, etc;

2. Conceptual identification and description of components and structures included in the facility; and

3. Site plan and other drawings defining the basis of the offer.

Witness McMeekin provided excerpts from 1989 Florida Power and Light Company and Virginia Electric & Power Company proposals to demonstrate that other utilities have required this level of technical detail.

Witness McMeekin described the balance-of-plant information and the level of detail included in Empire's proposal, including updates and revisions, to

support his contention that inadequate information was provided. As an example to further demonstrate that balance-of-plant information was lacking, the body of the Technical Information section of the original proposal was shown in McMeekin Exhibit 3. No balance-of-plant data was included. None was included in this section of the supplemental proposal either. Other sections provided detailed information on the turbine and supporting auxiliary equipment. No such sections existed for the balance of plant. The balance-of-plant information which was provided was very general with little or no detail.

Witness McMeekin provided an example of the importance of balance-of-plant information for the plant. He noted that Empire had allocated $1.75 million for interconnection in the Financing section of its proposal. Yet using the estimate range and unit cost figures submitted by Empire in its proposal for the switchyard and transmission line and using the actual length of transmission line required to the Eno Tie at the Person County site, the cost for the switchyard and transmission line could have been as high as $12.3 million. Thus, the Empire interconnect allocation could have been understated by as much as $10.55 million. which would have increased Empire's $122 million capital cost by 8.6%. Similar interconnect cost discrepancies existed at the Rockingham County site where Duke estimated interconnect cost at approximately $6 million. These interconnect cost estimates did not include the cost of upgrading the existing transmission system.

Witness McMeekin described other errors associated with Empire's interconnect cost. The Financing section of Empire's original proposal contained a constant $1.5 million interconnect cost for a one-, two-, or three-unit facility. In the supplementary proposal, the constant interconnect cost increased to $1.75 million; however, much of the cost associated with interconnect is unit-related so that the cost should increase with the number of units. He testified that this was a costly error and served to demonstrate Empire's lack of understanding regarding the elements involved and their interrelationship with the plant.

Witness McMeekin noted that Empire attempted to divert attention away from its lack of adequate information by stating that detailed and "working scale model information" was not available. Such type of modeling is not part of industry practice and was clearly neither required nor appropriate. On the other hand, balance-of-plant information, including layout drawings and descriptions of plant systems and equipment, has been and continues to be provided as standard practice in bid solicitations of utilities.

Witness McMeekin stated that there was recent evidence indicating that Empire realized that its balance-of-plant information submitted to Duke was deficient. In its October 31, 1991, application to the Commission for a Certificate of Public Convenience and Necessity for the Rolling Hills facility in Rockingham County, Empire included the kind of balance-of-plant information that Duke considered necessary for an adequate technical assessment. This information was essentially not included in Empire's proposal to Duke. Witness McMeekin noted, however, that much of the technical plant information submitted to the Commission by Empire in its Rolling Hills certificate application was a verbatim duplication of the information submitted by Duke in its Lincoln certificate application.

During cross-examination of witness Greenberg, a comparison the Lincoln and Rolling Hills certificate applications was discussed. Greenberg acknowledged that Empire had copied portions of Duke's Lincoln application verbatim. Under its Waste Water Treatment System description, Duke stated that Lincoln's treated waste water was to be released directly into Killian Creek. In copying the Lincoln application for the corresponding section of the Rolling Hills application, Empire omitted this statement and no means of discharge was identified. Upon cross-examination, witness Greenberg could not explain Empire's method of treated waste water discharge.

Empire contends that it did not include much of the equipment-specific information in its proposal because it is proposing to sell Duke capacity, not a plant. The Commission notes that Empire is proposing to sell capacity from a single power plant with no alternative generating resources to provide replacement power. Empire's proposal is not the same as a capacity purchase from a generating system which can provide capacity from multiple sources. If Empire's single power plant is unreliable or more costly than projected, Empire has no replacement power options. Complete information on the equipment comprising the plant should be part of a proposal in order for Duke to determine the expected reliability of the plant to meet customers' load requirements.

The Commission concludes that the record shows that Empire essentially provided a standard Westinghouse combustion turbine proposal to Duke without significant site-specific information including necessary balance-of-plant information. The technical scope of information and level of detail did not meet the requirements established by other utilities in their purchased power solicitations. The balance-of-plant information furnished was incomplete, and the limited information provided was very general with little or no detail. Empire did provide balance-of-plant information with its subsequent application to the Commission for a Certificate of Public Convenience and Necessity for Rolling Hills, but Empire acknowledged it copied that information from an earlier Duke application. Further, as previously discussed, there were numerous changes in Empire's proposal. Empire submitted several changes and options to Duke with regard to output, heat rate, interconnect cost, site, and pricing. All of these issues should have been confirmed and incorporated prior to submittal to Duke.

The Commission concludes that Empire's proposal was not complete, detailed and sufficient. The Commission has previously concluded that the proposal was not one of reasonably available purchased power. The first issue identified by the Commission--whether Empire made a proposal of reasonably available purchased power that was complete, detailed and sufficient to perform an assessment--is therefore answered no. Based on Duke's preliminary evaluation of the proposal, no full assessment was required. Nonetheless, Duke did perform assessments of the proposal, and the Commission has considered them.

EVIDENCE AND CONCLUSIONS IN SUPPORT OF FINDINGS OF FACT NOS. 10-15

These findings concern the issue of whether Duke made a detailed assessment of Empire's proposal using reasonable methods and assumptions.

Witness Greenberg testified that as a result of Empire's Request for Production of Documents, Empire learned that Duke did conduct a detailed

assessment of Empire's proposal, as shown by Exhibit SLG-3. Witness Greenberg acknowledged that he reviewed Duke's technical assessments and that Duke conducted economic comparisons between Empire's proposal and Duke's least cost supply-side option (Duke's Lincoln County project) on three occasions. Each time, Duke examined Empire's proposal as proposed and as modified by Duke. Witness Greenberg discounted Duke's modifications to Empire's proposal, other than heat rate and fuel cost. He agreed that it was appropriate to assume equal fuel costs and equal heat rates and to exclude initial fuel costs. In general, Empire alleges that Duke used unreasonable methods and assumptions in its assessments of the Empire proposal. Further, Empire claims that Duke's notes and memoranda demonstrate that Duke acted in bad faith.

Witness Greenberg specifically addressed Duke's concerns and modifications. For example, he did not agree with Duke's modification to Empire's O&M costs. He stated that for maintenance and variable O&M, Empire complied with Westinghouse specifications, recommendations, and proposals. He also testified that the actual O&M costs would be passed through to Duke.

In response to Duke's concern with the CTs' startup time, witness Greenberg testified that the emergency startup time of 10 minutes for spinning reserve purposes was confirmed by Westinghouse on September 25, 1990. He also stated that the spinning reserve classification was inappropriate and unnecessary.

Witness Greenberg defended the proposed one-person staff by noting that staffing of peaking plants is usually done according to utility preference. He stated that, intuitively, a facility that is capable of remote start and only runs about 100 hours per year, usually during peak periods, does not need to be staffed by more than one person 8,760 hours per year.

Witness Greenberg also responded to Duke's concern about the proposed maintenance program by explaining that the timing of maintenance intervals depends on the mode of equipment operation which would be dictated by Duke. He indicated that Empire's costs were based on manufacturer's recommendations and are consistent with industry practice.

Empire's witness Greenberg noted that there may be additional cost factors related to the impact of environmental permit restrictions when both Rolling Hills and Duke's least cost supply-side alternative receive final air permits. Witness Greenberg argued that the cost of environmental permit restrictions would further accentuate the economic advantage of Empire's proposal.

Witness Greenberg testified that Duke mistakenly used annual variable cost data and added it to a monthly fixed cost in Duke's September and November economic analyses. He also testified that Duke improperly calculated Empire's fixed O&M cost at three times its actual value in the November analysis.

During cross-examination, witness Greenberg stated that the $75,000 tax figure submitted by Empire was not for the entire facility but only for a portion of the facility. He stated that the rest of the taxes were taken care of in other parts of the pricing and spreadsheets. Witness Greenberg also testified that he did not know what the tax would be on a $122 million facility. Witness Greenberg agreed that the tax rate times $122 million would be a ballpark

estimate of taxes and that this would be annual property tax of about $750,000 per year.

Witness Greenberg claimed that transmission losses would likely be less at the Empire location than at Duke's Lincoln location, effectively increasing the cost advantage of Empire's proposal.

Witness Greenberg testified that the purchase of capacity from Empire at a different site and on a different model of equipment would actually increase Duke's reliability. He also stated that the location of the project in the northeast portion of Duke's service territory was beneficial.

Witness Greenberg testified to Empire's belief that Duke acted in bad faith and alleged that Duke's notes and memoranda, contained in Exhibit SLG-3, clearly showed bad faith and unreasonableness in Duke's actions. Empire offered specific Duke documents to ddmonstrate bad faith. One document presented as Empire Cross-Examination Exhibit Number 3 was a list of options for dealing with the proposal which was discussed at an internal Duke meeting. The document listed various "pros and cons" of the options.

Finally, witness Greenberg contended that Duke's assessments were unreasonable because Duke failed to request additional information. Empire expressed its intention to cooperate with Duke in providing all of the information requested by Duke as quickly as possible.

Witness Reinke and witness McMeekin testified that Duke made detailed assessments of Empire's initial proposal and updated the assessments twice to incorporate updated or modified information submitted by Empire. Duke used reasonable methods and assumptions in making all assessments, based on Duke's experience in the power generation business and information from other industry sources.

Witness Reinke testified that Duke acted in good faith in its dealings with Empire. The fact that Duke did not enter into a contract with Empire does not demonstrate bad faith. Witness Reinke stated that Empire has taken selected documents out of context to try to establish bad faith. Witness Reinke and witness McMeekin both testified during cross-examination that Empire Cross-Examination Exhibit Number 3, Duke's discussion of options, was the range or spectrum of thoughts or potential consequences that Duke saw as a result of evaluating the Empire proposal. Discussion of the options is not an example of bad faith.

Witness Reinke also noted that Duke spent significant time and resources examining Empire's proposal. Duke conducted two technical assessments and three economic assessments of Empire's proposal. This was done even though Empire had no significant experience and apparently no net worth. Witness Reinke was of the opinion that under the circumstances Duke did more than could be expected.

Witness McMeekin described the assessments which Duke conducted. In order to determine if the offer was in the best interests of Duke's customers, Duke performed an assessment which included consideration of many criteria, including cost, benefits, risks, uncertainties, and reliability. Duke performed technical

evaluations and economic analyses on the Empire proposal and supplemental information during the period from August 1990 through January 1991. Duke determined that there were significant technical problems associated with Empire's proposal and that Empire lacked experience in the development and construction of generating plants. These technical problems and Empire's lack of experience raised significant concerns with respect to the reliability of Empire's proposal. Additionally, the economic analyses of Empire's proposal demonstrated that Empire offered no cost advantage. Therefore, Duke concluded that it could not prudently rely on Empire for reliable cost effective peaking power.

Duke's Technical Assessment of Empire's Original Proposal

Witness McMeekin described the technical assessment made on Empire's original proposal and air permit application in August 1990. He indicated that the scope of Duke's technical evaluation was necessarily limited to the information provided by Empire which was incomplete in many respects. Duke identified the following areas of concern:

1. Questionable rating of the Westinghouse turbines;

2. Higher capital cost than Lincoln;

3. Startup time on the Westinghouse turbines which did not meet spinning reserve requirements for the Duke system;

4. Reliability of on-site wells as a water source without thorough study and testing;

5. No air quality modeling or Best Available Control Technology analysis;

6. Empire's proposed air permit application which was based on unlimited hours of operation without selective catalytic reduction, use of 0.3% sulfur oil, and emission parameters based on natural gas, rather than fuel oil;

7. Potential delays associated with late initiation of licensing process by Empire;

8. Unrealistic fuel plan demonstrating a lack of understanding of natural gas availability;

9. Maintenance/inspection intervals based on manufacturer's recommendations which were not consistent with Duke's survey of industry practice;

10. Unacceptable staffing by one operator with no mention of maintenance staffing or philosophy;

11. Noise level guarantees which were potential licensing issues;

12. Inconsistencies and problems within the construction schedule; and

13. Empire's lack of experience.

Witness McMeekin testified that Duke had concerns with the output rating of the proposed Westinghouse CTs. Comparisons between the proposal Westinghouse made to Duke in 1988 and those submitted by Empire show substantial differences. While Empire stated that the unit is capable of 100 MW at 95 degrees F on natural gas, Westinghouse proposed to Duke the same model machine as capable of a noticeably lower output at 97 degrees F. Duke modified the output for purposes of its economic analysis.

Witness McMeekin responded to witness Greenberg's testimony that sufficient data was provided for Duke to confirm Empire's output, thus making the output modification used by Duke in its economic analysis inappropriate. Empire stated that the increase in capacity above that proposed by Westinghouse to Duke in 1988 was due to use of a higher water injection-to-fuel ratio used by Westinghouse to achieve lower NOx emissions. Witness McMeekin testified that Empire failed to provide Duke with either the proposed NOx emission level or the water injection-to-fuel ratio in its initial proposal. Also, the water injection-to-fuel ratio correction curve provided by Empire was the same as previously provided to Duke by Westinghouse in 1988 and terminated at a maximum water injection-to-fuel ratio less than the value used by Empire. Thus, the parameters required to identify the basis of the increase in output were not provided to Duke. Also, the technical information supplied by Empire implied that a higher water injection-to-fuel ratio was not used. Duke maintained that it was justified in making the output modification under those circumstances.

Witness McMeekin testified that there were implications from an increase in output on the W501D5 turbine above the output provided by Westinghouse to Duke in 1988. At the outset of determining the need for CTs on the Duke system, Duke determined that high reliability was paramount given the expected service. As such, Duke concentrated on filling this need with field-proven equipment. Duke suspected that Empire's assertion that the increase in output resulted from a higher water injection rate did not represent the total scope of change. Duke learned that the firing temperature on the W501D5 had been increased twice in recent years. Higher firing temperatures could have a significant bearing on material performance from the standpoint of material failure and could also lead to more frequent maintenance inspections. Thus, both reliability and cost consideration issues were raised by Empire's proposed use of W501D5 turbines at higher outputs, especially for peaking service. Duke noted that turbine vendor warranties are for a limited time and that the owner assumes the financial risk if a turbine modification results in problems following expiration of the warranty.

Witness McMeekin compared the cost/kw of the Empire proposal with the Lincoln plant in its technical evaluation. Duke made comparisons of the capital cost including interest during construction between the Lincoln and Empire projects. On an equal basis the comparisons showed that Lincoln had a 4% lower capital cost per kw than the Empire project. This comparison was based on the capital costs proposed by Empire which Duke claims have been understated.

Witness McMeekin also testified that Duke had concerns with the proposed startup time for the turbines planned by Empire. Empire's original proposal

included a startup time of 30 minutes which does not meet spinning reserve requirements for a 10-minute startup. Duke decided in 1988 that the specifications for the Lincoln combustion turbine equipment would hnclude a 10-minute startup to meet spinning reserve requirements and that decision has not changed. Witness Reinke discussed the requirements for spinning reserve. "Spinning reserve" is excess generating capacity which must be available to respond to the load fluctuations that naturally occur on a power system. There is a continuous effort to match fluctuations in system load with system generation in order to maintain a balance. The system must also be able to make up quickly for the loss of a generating unit forced out of service. Spinning reserve requirements are from the North American Electric Reliability Council Operating Guide and from contractual obligations. He further stated that a 10-minute startup requirement provides significant economies associated with being able to use combustion turbine units to provide spinning reserve.

Witness McMeekin testified that Duke had concerns with Empire's proposed water source. The Empire proposal stated that water for plant operations would be from on-site wells. Duke's concern was the reliability of on-site wells as a water source without thorough study and testing. Without a geotechnical evaluation and on-site testing, the provision of such a large volume of water from wells would be risky in both the long and short term. Also, there was no discussion regarding storage of any untreated water in the proposal.

In regard to air quality, witness McMeekin testified that the original proposal by Empire did not include sufficient detail to assess Empire's ability to license the project. The proposal did not include a discussion of any modeling to evaluate compliance with air quality standards.

Witness McMeekin testified that Empire's proposed air permit application which was subsequently submitted to Duke on September 6, 1990, was based on unlimited hours of operation without selective catalytic reduction, use of 0.3% sulfur oil and emissions parameters based on natural gas. Witness McMeekin testified that these were not reasonable criteria. Although witness Greenberg testified that Empire was aware of the need to utilize both natural gas and fuel oil as a fuel source for the turbine, the preliminary air permit application gave no indication of this. Further, witness Greenberg testified that the preliminary air permit application provided to Duke on September 12, 1990, was based on 100% oil. Duke did not receive a preliminary air permit application on September 12. Duke noted that Empire stated in a September 12, 1990 letter its intention to file the application that day, but to date Empire apparently has not formally filed an application for a Prevention of Significant Deterioration (PSD) permit. These positions by Empire further served to demonstrate its lack of understanding regarding combustion turbine licensing requirements.

Witness McMeekin testified that Duke also had concerns with Empire's original proposal related to fuel source. He testified that the fuel plan submitted by Empire demonstrated a lack of understanding of natural gas availability. The proposal stated that there would be sufficient pipeline capacity under normal operating conditions to supply the turbines with natural gas. Empire's fuel plan ignored the fact that natural gas would not be available during extreme winter conditions to accommodate Duke's needs for peaking power.

Also, Empire's cash flow for the project was based on the use of natural gas as the sole fuel, which is unrealistic.

Witness McMeekin testified that Duke had concerns during the original technical evaluation with regard to Empire's proposed operation and maintenance. He stated that the proposed maintenance and inspection intervals were considered inadequate. Duke's opinion was based on its own experience and industry information on in-service CT units. Empire made no mention of maintenance staffing or philosophy other than the maintenance intervals.

Duke also had concerns with Empire's proposal to have only one on-site operator. While it is possible for one person to operate the units, one person cannot adequately keep the plant operational over an extended time. Witness McMeekin noted that the staffing issue had not been resolved. Although Empire proposed a staff of five in its October proposal, witness Greenberg's testimony defended the original proposal as consistent with industry practice. In McMeekin Exhibit 5 Duke showed that staffing at representative combustion turbine facilities, which were referenced by witness Greenberg, was no less than two people per plant and averaged more than one person per unit. McMeekin testified that Empire does not appear to understand that no relationship exists between remote start and staffing levels, and that this staffing issue demonstrates the inexperience of Empire and the problems of relying on turbine vendor recommendations.

Witness McMeekin testified that the schedule contained in the proposal had several problems. The Siting section and the Schedule section of the proposal showed different construction durations. Also, the schedule had activity conflicts such that construction would not have been supported.

Witness McMeekin testified that one of Duke's major concerns during the technical review was Empire's lack of experience. This lack of experience was obvious from the proposal. Empire's proposal demonstrated little knowledge of combustion turbine licensing, siting, design, construction, and operation. Empire's inexperience was confirmed through information provided at Duke's request on Empire's experience to date. The whole of its power plant development experience consists of a 10-MW cogeneration facility which is still under construction. By its own admission, Empire had no other experience and has never produced any power anywhere.

Witness McMeekin testified that the conclusion of the technical evaluation was that Empire's proposal had significant technical deficiencies and that its capital cost was higher than the Lincoln project. Based on this evaluation, Duke determined that there was a substantial risk that Empire lacked the capability to execute its proposal given its low level of understanding and the large number of issues which had not been addressed. Duke concluded that it could not prudently rely on Empire for peaking power in the time frame proposed by Empire. Witness McMeekin stated that Duke did not seek additional technical information in order to refine its analysis. Empire failed the initial assessment, and therefore no further assessment was necessary.

Duke's Economic Assessment of Empire's Original Proposal

In regard to Duke's economic assessment of the original proposal, witness McMeekin testified that Duke analyzed the proposal at capacity factors of 1% and 5% (because the original proposal utilized an unrealistic 20% capacity factor) for one combustion turbine and three combustion turbines. The original assessment was completed in September 1990. The analysis considered capital costs, fixed and variable operating and maintenance (O&M) costs, transmission costs, and fuel costs. In addition to evaluating the Empire project as originally proposed, Duke made certain modifications to the information provided by Empire. These modifications included a reduction in summer capacity, adjustment of heat rate to reflect comparable conditions, and changes to the O&M costs (including fuel cost).

Witness McMeekin testified that Duke modified the output to be consistent with the proprietary information presented to Duke by Westinghouse in 1988. Duke later learned that Westinghouse had increased its rating; however, without in-service experience Duke was concerned that this increased output might affect reliability and maintenance. Thus, witness McMeekin testified that the modified output value was appropriate.

Witness McMeekin testified that Duke modified the heat rate to reflect a higher heating value of fuel instead of the lower heating value. The Empire heat rate was based on 95 degrees F while Duke's was 97 degrees F. The heat rates provided by Empire were not cycling-adjusted so the effect of short-term run duration was not considered. CTs are used for short-term runs, and the heat rate needs to reflect frequent cycling. Duke replaced Empire's proposed heat rate with a cycling-adjusted heat rate based on higher heating value.

Witness McMeekin also described the modification to Empire's proposed O&M costs. Witness McMeekin noted that Empire did not originally offer to guarantee its O&M and fuel costs. Empire proposed to pass through all of these costs. Therefore, Duke needed to assess the true costs of O&M and fuel. Empire's proposed O&M costs were based on vendor recommendations. Duke modified the O&M costs based on industry practice. Duke's opinion, based on in-house experience and industry information, was that vendor recommendations are frequently overly optimistic.

Witness McMeekin testified that Duke's economic assessment showed that the Empire proposal offered no cost advantage. However, he indicated that Duke's economic assessment was not the primary reason Duke did not accept Empire's offer. The conclusions drawn from the technical assessment of the proposal and Empire's modifications led Duke to conclude that Empire had very little experience in the power generating business. Duke concluded that Empire's proposal was not a viable alternative based on the technical assessment, Empire's lack of experience, and the economic assessment.

Duke's Assessments of Empire's Supplemental Proposal

Witness McMeekin testified that Empire provided a supplemental proposal in October 1990 and Duke updated its original assessments. Witness McMeekin testified that although Empire addressed some of the issues that had been

identified, Duke still had significant concerns about the proposal. The Person County water source and staffing were addressed satisfactorily. All other issues remained a concern. Empire's lack of experience remained a major concern.

Empire reduced its Person County site size in the supplemental proposal from 200 to 56 acres due to sale of the remaining property. Empire claimed this would not cause a noise problem, giving as an example a 500-MW facility located on 50 acres. Witness McMeekin testified that the referenced facility was enclosed, which would result in lower sound levels at the property boundary but at a much higher cost for construction and operation. Duke still had concerns regarding noise based on the supplemental proposal. Duke felt that it was very likely that the 59 dBA noise level guaranteed by Empire at the facility perimeter would result in unfavorable community reaction. Duke did not consider this satisfactory.

Witness McMeekin testified that Empire's supplemental proposal of October 1990 addressed, in part, Duke's concern with Empire's fuel source. Empire provided information that natural gas would be available in the summer months. However, there was no mention of the need to depend on fuel oil for non-summer operation and no adjustment of the proposed operational costs to reflect the use of fuel oil.

Witness McMeekin testified that Empire's proposed startup time was changed in the supplemental proposal. Empire included a table in its supplemental proposal which listed the cold start as 29.5 minutes and the emergency start as 19.5 minutes for the Westinghouse 501D5. The revised startup time still did not meet the 10-minute spinning reserve requirement. Empire also included a letter from Westinghouse which stated that the turbines could be started "in approximately 10 minutes" but with the note that frequency of recommended inspections and maintenance would be significantly impacted. The impact of each 19.5-minute start was shown as the equivalent of 400 operating hours, i.e., equivalent to almost one year's operation, which would have a significant impact on cost of maintenance. Witness McMeekin testified that the impact of an approximate 10-minute start was not included; however, the implication relative to the 19.5-minute start was that it would indeed be most severe.

The supplemental proposal did not change the basic conclusion that it was not prudent for Duke to rely on Empire for peaking power in the time frame included in its proposal. Witness McMeekin stated that the review of the supplemental proposal continued to show no cost advantage in purchasing electricity from Empire as compared to Duke's proposed Lincoln project.

Duke's Assessment of Empire's Life Cycle Cost Analysis

Witness McMeekin also testified that Duke reviewed Empire's Life Cycle Cost Analysis presented to Duke in January 1991 in which Empire claimed a savings of $100 million. He stated that Duke performed its own economic analysis using Empire's methodology. Duke modified several parameters to correct errors in Empire's analysis and to place the analysis on a comparable basis. Witness Reinke testified that the results of this analysis were communicated to Empire in a meeting on January 21, 1991. This evaluation concluded that the Empire project was not a viable, least cost alternative to Duke's Lincoln project.

Witness McMeekin described the modifications Duke made to the Life Cycle Cost Analysis. Witness McMeekin testified that Duke modified the summer capacity, discount rate, capital costs, facility life, variable O&M, and heat rate. He noted that Empire based its comparison on the cost parameters provided by Duke to the Commission in the Lincoln certificate proceeding pursuant to Rule R8-61(b) and that these costs were an anticipated upper bound and were not on the same basis as the Empire proposal. Witness McMeekin stated that the Rolling Hills capacity and the Lincoln capacity were adjusted to be comparable to account for operation and temperature differences. Witness McMeekin testified that Duke used a discount rate of 9.77% for both projects. He also noted that the capital cost used by Empire for Duke was not comparable in that it contained the costs for initial filling of the fuel oil tanks. Furthermore, Empire's interconnect costs appeared to be substantially underestimated and the cost of upgrading Duke's transmission system to accommodate the additional load was totally omitted. He noted that the facility life basis for Duke as stated in Rule R8-61(b) information was 20 years versus the 25-year life incorrectly stated by Empire.

Witness McMeekin described Duke's concern with variable O&M costs applied to Duke and Empire in the Life Cycle Cost Analysis submitted by Empire. Empire's analysis utilized the variable O&M costs for Duke as shown in Duke's R8-61(b) filing which were based on industry practice while Empire's projected O&M costs were based on vendor recommendations. The variable O&M estimate presented in the Rule R8-61(b) filing was not based on vendor recommendations and cannot be used for comparison with estimates based on vendor recommendations. Duke's opinion, based on in-house experience and industry information, was that vendor recommendations are frequently overly optimistic. Therefore, Duke equalized variable O&M for both Empire and Lincoln at the R8-61(b) filing level. Witness Greenberg agreed in his testimony that Westinghouse's and GE's recommended variable O&M were roughly comparable.

Witness McMeekin testified that Duke had a concern with heat rates used by Empire in its Life Cycle Cost Analysis. The heat rates used by Empire for Duke and Empire units were neither cycling adjusted nor at the same temperature.

In regard to Duke's assessment of Empire's January 1991 Life Cycle Cost Analysis, witness McMeekin concluded that the analysis continued to show that there was no cost advantage to purchasing electricity from Empire.

Other Issues Pertaining to Duke's Assessments of Empire's Proposal

Witness McMeekin acknowleged that Duke made certain errors in its September and November analyses. He said that Duke treated an annual cost component as a monthly component in the September and November analyses. In the November analysis, Duke interpreted the fixed O&M costs identified by Empire in the October supplement as per-unit cost. The information provided by Empire was unclear. In the original proposal, fixed O&M was provided on a per-unit basis. The October supplement did not specify that the O&M cost was on a total plant basis and not a per-unit basis. The January analysis did not contain the referenced errors but showed no cost advantage to the Empire project. Witness McMeekin also testified that if these errors in the September and November assessments were corrected, the conclusion would not change. The error in the

September analysis favored Empire while the errors in the November analysis favored Duke. Adjustments for these errors showed the same relative results; when placed on a comparable basis, the Empire project offered no cost advantage.

Witness McMeekin testified that Empire's claimed savings of $100 million was the result of Empire's assumptions relating to O&M costs and fuel. Even using numbers agreed upon by Duke and Empire, the capital cost of Lincoln is lower than Empire's. Witness McMeekin noted that in its July and October proposals, the capital cost was the only cost that Empire was not going to pass through to Duke. Witness McMeekin noted that witness Greenberg admitted that the fuel costs of the two facilities should be equal. Witness Greenberg also admitted that the manufacturer's recommended maintenance and variable O&M for the proposed machines at the two facilities are roughly equal. Therefore, by Empire's own admission, one would expect that the projected fuel and O&M cost of the two facilities would be roughly equal. Witness McMeekin testified that Empire manipulated these numbers to produce a $100 million "savings," none of which it proposed to guarantee.

Witness Reinke stated that Empire is an inexperienced company proposing essentially the same type of project as Duke's Lincoln project. Regardless of who builds and owns the capacity, the operating requirements to meet the anticipated peaking demands of Duke's customers are the same. Since Duke's economic analysis showed that substantial cost savings from Empire's proposal did not exist, purchasing capacity from Empire instead of building capacity offered no advantage to Duke's customers to offset the additional risks and reliability concerns associated with purchasing power from an inexperienced developer.

Witness McMeekin explained the significance of location for a CT project. Duke conducted an extensive study of potential combustion turbine sites, including the northeast portion of Duke's service territory. The Lincoln site was selected as a result of this siting study. Witness Reinke did not agree with Empire's contention that its project would provide Duke with needed diversity. Duke has 163 generating units in 39 locations in its service area. With this degree of existing diversity, it is much more important that the focus be on equipment reliability rather than location.

With regard to transmission losses, witness Reinke testified that losses are inherent in the transfer of power. Kilowatt-hour losses for peaking facilities are considerably less than for base-load facilities. Witness Reinke stated that Empire's project would have little effect on system losses. Mr. Reinke stated that locating a generating facility in the northeast portion of Duke's territory would tend to reduce flows on the interconnection with Carolina Power & Light Company (CP&L) in the Durham area; however, it is not a necessary requirement that flow on this interconnection be reduced. The interconnection with CP&L in Durham has sufficient capacity to accommodate a wide range of contingencies on both systems.

Empire claimed in its complaint that Duke refused "to hold additional discussions with Empire, a NUG that was shown to Duke to be cost justified" and claimed that therefore "Duke has violated its agreement with the Public Staff to increase its non-utility generation efforts (an agreement embodied in the Commission's March 26, 1991 Order in Docket No. E-7, Sub 461)." Witness McMeekin

and witness Reinke testified that Duke reviewed and evaluated Empire's analysis using reasonable methods and assumptions, and concluded that there was no cost advantage. The facts that Duke continued a dialogue with Empire about its project, held discussions with Empire, and made several assessments of Empire's project show that Duke acted in accordance with its agreement with the Public Staff. Additionally, Duke expressed an interest in continuing discussions with Empire regarding capacity needs beyond Lincoln.

Commission Conclusions

The Commission concludes that Duke made detailed assessments of Empire's proposal and that Duke used reasonable methods and assumptions in its assessments.

In its technical assessments, Duke identified numerous shortcomings, only a few of which Empire satisfactorily addressed. Duke questioned Empire's output rating of the Westinghouse turbines. While Duke acknowledged that it later learned that the units were capable of the higher output, Duke continued to question the impact of the higher output on reliability and O&M costs. Duke was concerned that the start-up time for the Westinghouse turbines proposed by Empire did not meet Duke's spinning reserve requirements. Duke appropriately included this requirement for its supply-side option. Duke also expressed concerns about the reliability of on-site wells as a water source. Empire attempted to reassure Duke; however, Empire has not drilled any test wells and provided no proof that adequate water was available on the site. Duke noted that Empire had not obtained or applied for an air permit. Empire stated that it was in the process of completing the application and that there was adequate time. In a September 1990 letter to Duke, Empire stated its intention to file the air permit application immediately, but it has not been filed to date. Duke questioned the maintenance and inspection intervals that Empire proposed. Empire proposed the manufacturer's recommendations and Duke disagreed based on its knowledge and industry feedback. Duke also questioned Empire's staffing level in the original proposal. Empire subsequently modified its staffing level; however, Empire provided testimony to support its original staffing level. Duke identified noise as a potential issue, based on its experience in licensing other generating facilities. One of Duke's major concerns was Empire's lack of experience. Empire noted its willingness to guarantee all aspects of the project, contending that inexperience was a moot point. However, no amount of guarantee can produce the capacity that Duke will need if the developer cannot complete the project on time. Experience is an appropriate and reasonable consideration, and Empire's lack of experience was a major factor in Duke's decision.

Duke performed three economic assessments of Empire's proposal. In each assessment, Duke compared Empire's Rolling Hills project with Duke's Lincoln project, after modifying certain aspects of the Rolling Hills project to place it on a comparable basis. Empire disagreed with Duke's modifications. In its September and November economic assessments, Duke modified Empire's proposed output, heat rate, and O&M costs. Duke witness McMeekin stated that the output adjustment was appropriate for units in peaking service. Both parties agreed that the heat rates should be the same, and it has been admitted that both Westinghouse's and General Electric's O&M recommendations are comparable. Duke's modifications were appropriate to ensure a fair and reasonable comparison of the

projects. The conclusion of Duke's economic analyses was that there was no cost advantage to Empire's project. Duke acknowledged errors in its September and November economic analyses but noted that corrected analyses yielded the same relative results and conclusions. Duke later reviewed a Life Cycle Cost Analysis provided by Empire in which Empire claimed a $100 million savings for Duke's customers. Duke made certain modifications to the analysis and concluded once again that there was no cost advantage to Empire's project. Duke's modifications were made to ensure that cost comparisons were on a consistent basis, and Empire failed to demonstrate during the proceeding that these modifications were inappropriate. The Commission also recognizes that significant transmission system upgrade costs were not included in the comparison. The Commission concludes that the $100 million savings that Empire claimed does not exist.

The record shows that Duke went to great lengths to analyze Empire's proposal and that Duke discussed the results of the analyses with Empire. Empire continued to make changes to its proposal, which Duke in turn analyzed. Duke's assessments showed significant deficiencies in the proposaland no cost advantage. The Commission concludes that Duke used reasonable methods and assumptions and did not arbitrarily deny the proposal. Any assumptions Duke was required to make were the result of the proposal being incomplete and, in any event, were reasonable assumptions. Duke's modifications were reasonable. Having reviewed the record in its entirety, the Commission finds no evidence of bad faith by Duke.

EVIDENCE AND CONCLUSIONS IN SUPPORT OF FINDING OF FACT NO. 16

Rule R8-58(e) requires each electric utility to "assess on an ongoing basis the potential benefits of reasonably available purchased power resources" and to "discuss its overall assessment of its purchased power resources, including . . . independent power producers . . . , and provide details of the methods and assumptions used in the assessment of those purchased power resources having a significant impact on its least cost integrated resource plan."

Witness Greenberg testified that Duke violated Rule R8-58(e) by not providing its assessments of Empire's proposal to the Commission. He also testified that Duke did not provide its assessments to Empire until after the complaint was filed and discovery was conducted. However, he stated that in September 1990 a Duke representative told him the general areas in which Empire's proposal was deficient.

Witness Reinke testified that Duke discussed its overall assessment of purchased power resources, including Empire's proposal, in its 1991 short-term action plan filed with the Commission. It is Duke's position that since all of its assessments showed that Empire's proposal had no significant impact on the least cost plan, Rule R8-58(e) did not require a discussion of the details of the methods and assumptions used in the assessments. Witness Reinke testified that Duke did not provide a detailed assessment of Empire's proposal to either Empire or the Commission; however, Duke discussed its concerns with Empire on September 18, 1990, on November 20, 1990, on January 9, 1991, on January 21, 1991, on January 31, 1991, and again on June 27, 1991.

The Public Staff, in its post-hearing brief, argued that Duke's interpretation of Rule R8-58(e)--"[i]f we assess it and reject it, then it has no significant impact and therefore the details of the assessment need not be reported"--is wrong. The Public Staff argued that the purpose of the reporting requirement is to give the Commission an opportunity to review the assessments and that the "significant impact language clearly is meant as a limit on the number of projects the assessment of which has to be reported in detail." The Public Staff argued that Empire's proposal had a potential significant impact on Duke's least cost plan and that Duke violated Rule R8-58(e) by failing to provide details of its assessments in its least cost filings. The Public Staff asked the Commission to clarify the terms "reasonably available" and "significant impact" and to require Duke to establish an evaluation process by which it can analyze future proposals for purchased power resources.

The Commission concludes that our previous findings and discussions adequately resolve the two issues which were identified as the focus of the present complaint proceeding. The issues raised by the Public Staff, dealing with interpretation of Rule R8-58(e) and with the appropriate evaluation process by which utilities should assess future purchased power proposals, are more appropriately raised in the context of the Commission's pending least cost integrated resource planning docket, Docket No. E-100, Sub 64.

IT IS, THEREFORE, ORDERED that the complaint of Empire Power Company filed against Duke Power Company on April 4, 1992, should be, and the same hereby is, denied.

ISSUED BY ORDER OF THE COMMISSION.

This the 22nd day of May, 1992.

NORTH CAROLINA UTILITIES COMMISSION

(SEAL)

Geneva S. Thigpen, Chief Clerk

Commissioner Duncan concurs by separate opinion.

Commissioner Duncan, concurring.

While I agree with the majority's ultimate decision in this case, I am not entirely comfortable with the route it takes to reach that point. I therefore write separate to express those concerns.

As the majority opinion points out, the Commission's consideration in this hearing was limited to two issues: (1) whether Empire made a proposal to Duke of reasonably available purchased power that would have a significant impact on Duke's least cost integrated resource plan, and whether such proposal was complete, detailed and sufficient for Duke to perform a detailed assessment thereof and (2) whether Duke arbitrarily denied the proposal without making any detailed assessment thereof using reasonable methods or assumptions, or, if such assessment was made, whether Duke has refused to provide the assessment.

I do not believe the Commission's conclusion that Empire's proposal was not complete, detailed and sufficient for assessment is either justified by the record or necessary to the result. It is undisputed that Duke had no standards in place by which to evaluate the sufficiency of independent power producer (IPP) proposals, and, apparently, no formal procurement procedures for handling proposals with respect to purchased power. There was, therefore, no objective criteria either to guide Empire in putting together its submission or to serve as a standard for determining completeness. Empire could reasonably have thought, as do I, that indicating its willingness to supply whatever remaining material was necessary was the appropriate way to handle the ambiguity created by Duke's own absence of such procedures. Instead, the majority chooses to interpret Empire's offer to work within Duke's standardless framework as a sign of weakness rather than flexibility, and conspicuously declines to comment on Duke's failure to even attempt to obtain the information that it now says was necessary.

Not only do I think this conclusion arguably wrong, it seems to me clearly unnecessary. The fact remains that Duke did manage to perform not one but five assessments without the information that it claims, after the fact, was so critical, and without making any effort to obtain that information from Empire. In fact, the record reflects that Empire did not even learn of Duke's assessments until Duke responded to a request for production of documents during discovery. I would therefore have concluded that it was unnecessary to reach this issue, because Duke was entitled to prevail on the second. I think it is supportable from the record that Duke did not deny the proposal arbitrarily, because it had legitimate concerns about reliability and Empire's lack of experience.

Having agreed with the result, however, I do want to make it clear that I am not convinced that Duke acted in the good faith with which the majority wishes to credit it. I am particularly concerned about three things, two of which also concerned the Public Staff: (1) Duke's failure either to discuss Empire's proposal with the Commission or its deficiencies with Empire; (2) a pattern of conduct, including a written memorandum, indicating Duke's intent to discourage proposals by IPP's; and (3) the timing of Duke's communications with Empire

(with the final rejection of Empire coming, as the Public Staff points out, within days after the proposed orders in Duke's Lincoln certificate docket were filed) which strongly suggests that Duke merely wished to string Empire along until it could no longer intervene in the Lincoln certificate docket.

I hope that Duke understands that although perhaps justified here by the legitimacy of the concerns regarding Empire's inexperience, this is a course of conduct which I, at least, would not like to see repeated.

Allyson K Duncan

001562

DOCKET NO. E-100, SUB 54

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Investigation and Rulemaking Proceeding to Consider Least Cost Integrated Resource Planning	)))	ORDER ADOPTING RULES

BY THE COMMISSION: By Order issued March 25, 1987, the Commission instituted a general investigation and rulemaking proceeding to consider the adoption of a new approach to electric utility planning which is intended to identify those electric resource options which can be obtained for the total least cost to the ratepayers consistent with adequate, reliable service. Carolina Power & Light Company, Duke Power Company, Virginia Electric and Power Company, d/b/a North Carolina Power, Nantahala Power and Light Company, the Public Staff, and the Attorney General were made parties to the proceeding and were requested to file comments. Carolina Utility Customers Association, Inc. (CUCA), and the North Carolina Industrial Energy Consumers (NCIEC) were allowed to intervene in the proceeding.

By Order issued March 16, 1988, the Commission proposed rules which define an overall framework within which the least cost integrated resource planning process will take place and requested comments on the proposed rules from all interested parties. The Commission recognized in the Order that it could address each issue in the proceeding more effectively by refocusing the rulemaking proceeding on a relatively few issues at a time, and that such an approach would initially require the adoption of rules establishing the basic framework for a least cost integrated resource planning program, followed by rules developing the details necessary to flesh out the overall program.

The March 16, 1988, Order also requested comments on three specific issues in addition to comments on the proposed rules themselves; the three issues being: (1) the primary considerations which must be addressed by each least cost integrated resource planning study and the relative weight which should be given to each of the considerations in ranking each resource option in the study; (2) the consideration of appropriate rewards to utilities for efficiency and conservation which decrease utility bills; and (3) the next issue or issues which need to be developed in greater detail as part of a systematic evolution of the proposed rules.

Comments were filed by Carolina Power & Light Company, Duke Power Company, North Carolina Power, the Public Staff, the Attorney General, Paul Markowitz of the Energy Conservation Coalition, and Martha Drake. Additional reply comments were filed by CP&L and Duke Power Company.

Based on the comments filed in this proceeding, the Commission is of the opinion that the rules proposed in the Order of March 16, 1988, should be adopted with relatively minor revisions. The rules specify that demand-side resource planning and supply-side resource planning are to be integrated into a single planning process; and that alternative resource options must be studied and compared in such depth that a balanced, realistic evaluation of the options

can be made. The rules adopted herein also integrate Article 8 of the Commission's existing electric service rules (NCUC Rules R8-42 and R8-43 for Electric Energy Supply Planning) into the least cost integrated resource planning rules.

The Commission is also of the opinion that other issues commented on by the parties to the proceeding should be addressed by separate Order as appropriate. Such issues as a working definition of least cost integrated resource planning, appropriate rewards to utilities for efficiency and conservation, and competitive bidding systems for new capacity need further work and discussion.

In a companion Order issued this same day in Docket No. E-100, Sub 58, the Commission has scheduled hearings to consider, analyze, and investigate the least cost integrated resource plans which will be developed and filed in that docket by CP&L, Duke, North Carolina Power, and Nantahala. These plans will be prepared in conformity with all applicable state laws and the rules adopted and implemented by this Order. All interested parties, including the Public Staff and Attorney General, will be encouraged to participate in those hearings. The Commission has also scheduled six night hearings across the State of North Carolina for the convenience of those members of the general public who may wish to appear and testify. In addition, the Commission has indicated an intent to initiate, as an important part of those proceedings, a comprehensive investigation into the scope and effectiveness of the demand-side programs and resource options which our electric utilities currently have in place in North Carolina and which they may plan to initiate in the near future. In particular, CP&L, Duke, North Carolina Power, and Nantahala have been directed as part of their plans and testimony to provide a detailed description and assessment of the effectiveness of their energy conservation and load management programs. Furthermore, the Commission has also requested the Public Staff to conduct a comprehensive investigation into the scope and effectiveness of the integrated resource plans to be filed by the electric utilities, with particular emphasis being given to the subject of conservation and load management as a resource option.

In addition to the actions today taken in Docket No. E-100, Sub 58, the Commission concludes that it is also appropriate to request the Public Staff to coordinate efforts with CP&L, Duke, North Carolina Power, and Nantahala to jointly develop and propose an assortment of demand-side pilot demonstration projects for implementation and trial in North Carolina. The Commission believes that pilot projects can and will form an extremely important part of the process which is designed to implement a comprehensive program of least cost planning in this State.

IT IS, THEREFORE, ORDERED as follows:

1. That the rules attached hereto as Appendix A entitled "Least Cost Integrated Resource Planning" are hereby adopted effective on and after the date of this Order.

2. That Article 8 of the Commission's Rules for Electric Light and Power, consisting of NCUC Rules R8-42 and R8-43, is hereby rescinded effective on and after the date of this Order.

3. That the Public Staff is hereby requested to coordinate efforts with CP&L, Duke, North Carolina Power, and Nantahala to jointly develop and propose for the Commission's consideration an assortment of demand-side pilot demonstration projects for implementation and trial in North Carolina. The Public Staff is hereby requested to report back to the Commission regarding the status of this matter as soon as possible.

ISSUED BY ORDER OF THE COMMISSION.

This the 8th day of December 1988.

NORTH CAROLINA UTILITIES COMMISSION

Sandra J. Webster, Chief Clerk

(SEAL)

APPENDIX A

CHAPTER 8

ELECTRIC LIGHT AND POWER

ARTICLE 11

LEAST COST INTEGRATED RESOURCE PLANNING

Rule R8-56. General.

(a) Purpose. The purpose of least cost integrated resource planning is to ensure that each regulated electric utility operating in North Carolina is developing reliable projections of the long range demands for electricity in its service area and a combination of reliable resource options for meeting the anticipated demands in a cost effective manner. These rules are intended to be consistent with the applicable provisions of the North Carolina General Statutes, but are not intended to restrict or prohibit demonstration projects, pilot programs or other experimental ventures.

(b) Applicability. These rules are applicable to Carolina Power & Light Company, Duke Power Company, Nantahala Power and Light Company, and Virginia Electric and Power Company, d/b/a North Carolina Power.

(c) Integrated Resource Plan. Each utility shall develop and keep current a least cost integrated resource plan consisting of at least the following components:

(1) A load forecast;

(2) An integrated resource plan; and

(3) A short-term action plan.

(d) Data. Each utility shall provide such information and data as the Commission requests and deems necessary for proper evaluation of the integrated resource plans prepared by the utility.

(e) Filing. Each utility shall file its least cost integrated resource plan and supporting testimony with the Commission at the times designated by the Commission. The utilities should anticipate filing such plans approximately every two (2) or three (3) years. The Public Staff or any other intervenor may file a least cost integrated resource plan of its own, or it may prepare an evaluation of the least cost integrated resource plans filed by the utilities, or both. Any least cost integrated resource plans, evaluations, and supporting testimony prepared by the Public Staff or other intervenors shall be filed at the times designated by the Commission. A reasonable amount of time will be given for the Public Staff and other intervenors to evaluate the least cost integrated resource plans filed by the utilities prior to filing their own least cost integrated resource plans and evaluations. The intervenors should anticipate filing their own least

cost integrated resource plans and evaluations approximately four (4) months after receipt of the integrated resource plans filed by the utilities.

(f) Review. The Commission is required by G.S. 62-110.1(c) to consult with the utilities in North Carolina and with other state and federal agencies having relevant information in analyzing the long range needs for expansion of electric generating facilities in North Carolina. The Public Staff is required by G.S. 62-15(d) to assist the Commission in analyzing the long range needs for expansion of electric generating facilities pursuant to G.S. 62-110.1. Public hearings to consider the least cost integrated resource plans filed by the utilities and the least cost integrated resource plans and evaluations filed by the Public Staff and other intervenors shall be scheduled at the time and place designated by the Commission. The utilities and intervenors should anticipate public hearings being scheduled a minimum of 45 days after the filing of testimony and exhibits by the intervenors.

Rule R8-57. Load Forecasts.

The load forecasts filed by each utility as part of its least cost integrated resource plan shall include, at a minimum, the following:

(a) A description of the methods and assumptions used by the utility to prepare its forecast including a description of the models and variables used in the models;

(b) A tabulation of the utility's forecasts for at least a 15-year period, including peak loads for the summer and winter seasons of each year, annual energy forecasts, and the projected effects of non-price induced conservation and load management on the forecasted annual energy and peak loads for each year; and

(c) Highest, lowest, and most probable forecast scenarios based on the methods and assumptions used by the utility in preparing its forecasts; or, any other technique which addresses forecast uncertainty to at least a comparable degree.

Rule R8-58. Integrated Resource Plan.

Each utility shall evaluate each resource option without regard to geographical location which is reasonably available to it in meaningful quantities, including both demand-side and supply-side options, in order to determine an integrated resource plan which offers a combination of reliable resource options for meeting the anticipated demands on its system in a cost effective manner. The assumptions in the evaluation shall be fully documented, and the cost benefits of all resource options in the evaluation shall be quantified to the extent possible.

(a) Evaluation of Resource Options. Evaluation of resource options shall include at least the following considerations:

(1) Determine the present value of future revenue requirements where appropriate for in evaluating the resource options;

(2) Evaluate both demand-side and supply-side resource options using the best and most reasonable procedures available, including, but not limited to, such resource options as conservation, load management, relighting, insulation, cogeneration and small power production;

(3) Analyze the sensitivity of major assumptions used in the evaluation of resource options, including:

A. Assessment of risk in accordance with an assumption's potential impact on the least cost plan;

B. Assessment of reliability; and

C. Assessment of other uncertainties, including forecast uncertainty.

(b) Generating Facilities. Each utility shall provide data for the electric generating facilities (including planned additions and retirements, but excluding cogeneration and small power production) in its integrated resource plan. Data should be detailed enough to facilitate a comparative analysis of capacity alternatives and shall include all planning assumptions.

(1) Existing Generation. The utility shall provide a 15-year projection of the following:

A. Projected fuel use by type of generation. Data shall be annual data;

B. Projected unit characteristics by type of generation, such as availability factors, capacity factors, heat rates, outage rates or other relevant data. Data shall be annual data;

C. Projected retirements of existing units, including a discussion of the reasons for the retirements; and

D. Other projected changes to existing generating units which are expected to increase or decrease capability by at least 10% or 10 megawatts, whichever is less, plus a discussion of any life extension programs currently being planned or implemented.

(2) Planned Generation Additions. The utility shall provide a 15-year projection of the following:

A. Projected fuel use by type of generation. Data shall be annual data;

B. Projected unit characteristics by type of generation, such as availability factors, capacity factors, heat rates, outage rates or other relevant data. Data shall be annual data; and

C. Summaries of all studies supporting the new generation additions included in the least cost plan.

(c) Alternative Energy Resources. Each utility shall assess on an ongoing basis the potential benefits of reasonably available alternative energy resource options, including the benefits of lower fuel costs and improved efficiency of its generating facilities. Alternative energy resources shall include, but not be limited to, hydro, wind, geothermal, solar thermal, solar photovoltaic, municipal solid waste, biomass and other alternative energy resources. The utility shall discuss its overall assessment of alternative energy resources and it shall provide details of the methods and assumptions used in the assessment of those alternative energy resources having a significant impact on its least cost integrated resource plan. The utility shall also provide general information on the methods and assumptions used in the assessment of the reasonably available alternative energy resources considered under this paragraph but not adopted for its least cost integrated resource plan.

(d) Conservation and Load Management. Each utility shall assess on an ongoing basis the potential benefits of conservation and load management techniques, including the benefits of lower fuel costs and improved efficiency of the overall system. The utility shall discuss its overall assessment of conservation and load management techniques, and it shall provide details of the methods and assumptions used in the assessment of those conservation and load management techniques having a significant impact on its least cost integrated resource plan. The assessments shall include costs, benefits, risks, uncertainties, reliability, and customer acceptance where appropriate. The utility shall also provide general information on the methods and assumptions used in the assessment of those conservation and load management techniques considered under this plan but not adopted for its least cost integrated resource plan.

(e) Purchased Power. Each utility shall assess on an ongoing basis the potential benefits of reasonably available purchased power resources. The assessments shall include costs, benefits, risks, uncertainties, and reliability where appropriate. The utility shall discuss its overall assessment of its purchased power resources, including but not limited to

purchases from cogenerators, small power producers, independent power producers and other utilities, and provide details of the methods and assumptions used in the assessment of of those purchased power resources having a significant impact on its least cost integrated resource plan.

(f) Transmission/Distribution Facilities. Each utility shall assess on an ongoing basis the potential benefits of improvements to the transmission/distribution facilities. The utility shall discuss its overall assessment of transmission/distribution facilities improvements, and it shall provide details of the methods and assumptions used in the assessment of those facility improvements having a significant impact on its least cost integrated resource plan.

Rule RB-59. Short-Term Action Plan.

Each utility shall prepare an annual short-term action plan which discusses those specific actions currently being taken by the utility to implement its least cost integrated resource plan. The utility's short-term action plan shall contain a summary of the resource options or programs contained in its current least cost integrated resource plan and for which specific actions must be taken by the utility within the next two to three years. For each resource option or program, the summary shall include:

(a) The objective of the resource option or program;

(b) Criteria for measuring progress toward the objective;

(c) The implementation schedule for the program over the next two to three years; and

(d) Actual progress toward the objective to date.

Rule R8-60. Annual Report of Updates to Least Cost Integrated Resource Plans.

Every electrical public utility shall furnish the Commission with an annual report containing a fifteen-year forecast of loads and generating capability. An updated report shall be filed within thirty (30) days after any significant revision of the forecast, and there shall be at least one report filed annually. The report shall describe all generating facilities and known transmission facilities with operating voltage of 200 KV or more which, in the judgment of the utility, will be required to supply system demands during the forecast period. The report shall cover the 15-year period next succeeding the date of said reports and shall include the following:

(a) A tabulation of summer and winter peak loads, annual energy forecast, generating capability, and reserve margins for each year;

(b) A list of the existing plants in service with capacity, location, and any technological innovations to be backfitted to improve environment quality to the extent known;

(c) A list of generating units under construction or planned at plant locations for which property has been acquired, for which certificates have been received, or for which applications have been filed with location, capacity, plant type, and proposed date of operation included;

(d) A list of proposed generating units at locations not known with general location, capacity, plant type, and date of operation included to the extent known;

(e) A list of units to be retired from service with location, capacity and expected date of retirement from the system;

(f) A list of units which are being considered for life extension, refurbishment or upgrading. The reporting utility shall also provide the expected (or actual) date removed from service, general location, capacity rating upon return to service, expected return to service date, and a general description of work to be performed;

(g) A list of transmission lines and other associated facilities (200 KV or over) which are under construction or proposed including the capacity and voltage levels, location, and schedules for completion and operation;

(h) A list of any generation and associated transmission facilities under construction which have delays of over six months in the previously reported in-service dates and the major causes of such delays. Upon request from the Commission Staff, the reporting utility shall supply a statement of the economic impact of such delays;

(i) A list of future probable sites giving general location and description, major advantages, and whether the site is wholly owned, partially owned or not owned by the utility; and

(j) The current short-term action plan.

Rule R8-61. Preliminary Plans and Certificates of Public Convenience and Necessity for Construction of Electric Generation and Related Transmission Facilities in North Carolina.

(a) No commitments and contracts made for the purchase of a steam supply system, turbine, generator or other major component of the generation system shall be noncancelable until such time as the certificate of public convenience and necessity has been issued.

(b) Information to be filed 120 days or more before the filing of the application for a certificate of public convenience and necessity for generating facilities with capacity of 300 MW or more shall include the following:

(1) Available site information (including maps and description), preliminary estimates of initial and ultimate development, justification for the adoption of the site selected, and general information describing the other locations considered;

(2) As appropriate, preliminary information concerning geological, aesthetic, ecological, meteorological, seismic, water supply, population and general load center data to the extent known;

(3) A statement of the need for the facility including information on loads and generating capability;

(4) A description of investigations completed, in progress, or proposed involving the subject site;

(5) A statement of existing or proposed plans known to applicant of federal, state, local governmental and private entities for other developments at or adjacent to the proposed site;

(6) A statement of existing or proposed environmental evaluation program to meet the applicable air and water quality standards;

(7) A brief general description of practicable transmission line routes emanating from the site;

(8) A list of all agencies from which approvals will be sought covering various aspects of any generation facility constructed on the site and the title and nature of such approvals;

(9) A statement of estimated cost information, including plans and related transmission capital cost (initial core costs for nuclear units); all operating expenses by categories, including fuel costs and total generating cost per net kWh at plant; and information concerning capacity factor, heat rate, and plant service life. Furnish comparative cost including

related transmission cost of other final alternatives considered; and

(10) A schedule showing the anticipated beginning dates for construction, testing, and commercial operation of the generating facility.

(c) Procedures for obtaining the certificate of public convenience and necessity shall be as stated in the General Statutes.

(d) In filing an application for a certificate of public convenience and necessity pursuant to G.S. 62-110.1(a) in order to construct a generating facility, a utility shall include the following:

(1) The most recent least cost integrated resource plan of the utility plus any proposals by the utility to update said plan;

(2) Testimony specifically indicating the extent to which the proposed construction conforms to the utility's most recent least cost integrated resource plan; and

(3) Testimony supporting any utility proposals to update its most recent resource integration plan.