

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

DOCKET NO. 981042-EM
FILED: DEC. 14, 1998

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RESPONSE OF THE UTILITIES COMMISSION, CITY OF NEW SMYRNA BEACH,
FLORIDA AND DUKE ENERGY NEW SMYRNA BEACH POWER COMPANY LTD.,
L.L.P. TO EX PARTE COMMUNICATION

The Utilities Commission, City of New Smyrna Beach, Florida ("UCNSB"), and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. ("Duke New Smyrna"), hereinafter referred to collectively as the "Joint Petitioners," pursuant to Section 350.042, Florida Statutes, hereby respectfully submit their response to the ex parte communication received by the Commissioners on December 2, 1998 and discussed at the outset of the hearings in the above-styled proceeding.

In summary, the Joint Petitioners believe that the subject ex parte letter does not express opposition to the New Smyrna Beach Power Project, but rather makes two points: (1) it observes that one of the issues raised in the instant case is similar to an issue raised in a previous declaratory statement docket¹ and (2) it offers

¹ In FPSC Docket No. 971446-EU, In Re: Petition of Duke Energy New Smyrna Beach Power Company Ltd. L.L.P for Declaratory Statement, Duke New Smyrna asked the Commission for a declaratory statement confirming its status as an "applicant" for a determination of need under Section 403.519, Florida Statutes. The Commission declined to render the requested declaratory

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the Commission the opportunity to suggest modifications to the statutes if the Commission determines that such changes would be in the public interest.

The substantive issue presented in this case is not the same as the issue posed in Docket No. 971446-EU. In that proceeding, Duke New Smyrna requested "the Commission's declaration that, in its own right and without the Utilities Commission's [i.e., the UCNSB's] participation as co-applicant, Duke New Smyrna may obtain a determination of need for the Power Plant pursuant to Section 403.519." FPSC Docket No. 971446-EU, Petition for Declaratory Statement at 5-6. In the instant docket, the question posed is whether the Commission should grant the determination of need for the New Smyrna Beach Power Project as requested by both the Utilities Commission, City of New Smyrna Beach, Florida, and Duke New Smyrna.

At a minimum, the presence of the Participation Agreement between the Utilities Commission, City of New Smyrna Beach, and Duke New Smyrna, which is described in the Joint Petitioners' filings and testimony, establishes that these entities are proper co-applicants within the scope of the Commission's Nassau decisions. Moreover, as explained in the Joint Petitioners' briefs in this proceeding, both the UCNSB and Duke New Smyrna are proper applicants, each in its own right.

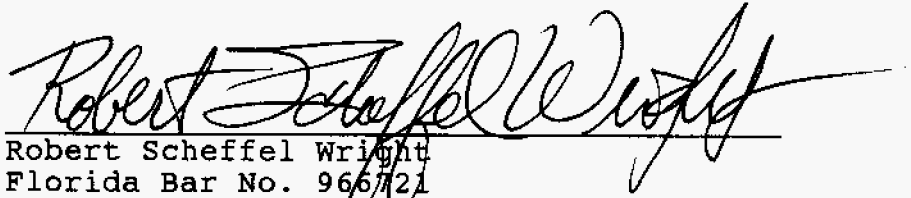
Relative to the second point of the ex parte communication,

statement because, the Commission reasoned, such a statement would be in the nature of a rule.

certainly the offer expressed therein is appreciated. However, the ex parte communication does not suggest that the Commission needs any revisions to its existing statutes, only that if such help is needed, consideration of the Commission's suggestions would be provided. The Joint Petitioners believe that the Commission has adequate authority to proceed with this need determination proceeding, to address all issues raised therein, and, if the Commission so determines on the merits, to grant the requested need determination. The Commission is the State's chief policy-making body for energy and other utility issues, and accordingly, it must interpret its statutes in light of the facts as they exist when arguably new issues are presented. The Commission has the responsibility, and the statutory charge, to interpret its existing statutes in the way that best serves the public interest. For the Commission to take the view that it lacks the authority to approve a determination of need for a power plant that it may determine is "needed" within the meaning of Section 403.519 would be unwise and unsound, and would not serve the interests of the State of Florida or of its electricity consumers.

The Utilities Commission, City of New Smyrna Beach, Florida and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. appreciate the opportunity to respond to the ex parte communication.

Respectfully submitted this 11th day of December, 1998.



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CERTIFICATE OF SERVICE
DOCKET NO. 981042-EM

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery (*) or by United States Mail, postage prepaid, on the following individuals this 11th day of December, 1998:

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