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: JANUARY 19, 1999

JOINT PETITIONERS' POST-HEARING STATEMENT OF ISSUES AND POSITIONS AND POST-HEARING BRIEF

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"), collectively referred to herein as the "Joint Petitioners," pursuant to the Order Establishing Procedure for this docket, as amended, and Commission Rule 25-22.038(2), Florida Administrative Code ("F.A.C."), hereby file their Post-Hearing Statement of Issues and Positions and Post-Hearing Brief, both of which are contained within this pleading. The Joint Petitioners' Post-Hearing Statement of Issues and Positions lists the issues identified in the Prehearing Order and provides the Joint Petitioners' positions thereon. The Post-Hearing Brief is divided into three main parts: Legal Issues, Fact Issues, and Policy Issues, respectively.

Citations to the official hearing transcript are in the form "Witness, TR abc", where the witness whose testimony is cited is identified and page "abc" identifies the page(s) of the transcript cited. Similarly, citations to exhibits are in the form "EXH def at ghi", where "def" represents the number of the exhibit as identified in the record and "ghi" identifies the page number(s) referenced. The electrical power plant for which the Joint Petitioners seek the Commission's determination of need, i.e., the New Smyrna Beach Power Project, is referred to herein as "the Project." Those intervenors opposing the Project, that filed motions to dismiss the Joint Petition, presented oral argument on the motions to dismiss and introduced testimony in this

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proceeding, i.e., Florida Power & Light Company ("FPL") and Florida Power Corporation ("FPC"), are, where appropriate, referred to collectively as "the Opponents."

JOINT PETITIONERS' POST-HEARING STATEMENT OF ISSUES AND POSITIONS

The Joint Petitioners herein address the issues identified for this case in the order and format listed in the prehearing order.

NEED FOR ELECTRIC SYSTEM RELIABILITY AND INTEGRITY

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

DUKE/UCNSB: *Yes. Available data, as well as recent experience, indicate that capacity in Peninsular Florida is tight. Whatever the level of reliability, the Project will improve it by adding quantity and redundancy at no risk to ratepayers.*

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

DUKE/UCNSB: *Yes.*

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

DUKE/UCNSB: *Yes.*

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

DUKE/UCNSB: *Yes. Duke New Smyrna needs the project to fulfill its obligations to the UCNSB and to participate in the Florida wholesale market. Moreover, the issue properly before the Commission is whether the Commission should grant the requested need determination for the Project, considering the criteria in Section 403.519.*

ISSUE 5: Can or should the capacity of the proposed project be properly included when calculating short-term operating and long-term planning reserve margins of an individual Florida utility or the State as a whole?

DUKE/UCNSB: *Yes.*

ISSUE 6: What transmission improvements and other facilities are required in conjunction with the construction of the proposed facility, and were their costs adequately considered?

DUKE/UCNSB: *Planned transmission improvements include approximately 25 miles of 115 kV transmission line connecting the Smyrna Substation to the Cassadaga and Lake Helen substations. Other facilities include a 42-mile gas lateral and approximately 500 feet of water transmission pipe. The costs of these improvements have been adequately considered.*

NEED FOR ADEQUATE ELECTRICITY AT A REASONABLE COST

ISSUE 7: Is there a need for the proposed power plant, taking into account the need for adequate electricity at a reasonable cost, as this criterion is used in Section 403.519?

DUKE/UCNSB: *Yes. Florida has many old, inefficient plants that are expensive to operate. Ratepayers need lower costing electricity. The Project will provide it by displacing generation from the inefficient units at no risk to the ratepayers.*

MOST COST-EFFECTIVE ALTERNATIVE AVAILABLE

ISSUE 8: Is the proposed power plant the most cost-effective alternative available, as this criterion is used in Section 403.519?

DUKE/UCNSB: *Yes.*

ISSUE 9: Has Duke New Smyrna provided adequate assurances regarding available primary and secondary fuel to serve the proposed power plant on a long- and short-term basis?

DUKE/UCNSB: *Yes.*

ISSUE 10: What impact, if any, will the proposed power plant have on natural gas supply or transportation resources on State regulated power producers?

DUKE/UCNSB: *The Project's construction and operation will not adversely affect gas supply or transportation resources. When the Project is operating, it will displace less efficient electric generating facilities, resulting in more efficient use of both electricity generation and gas transportation resources in Florida.*

ISSUE 11: Will the proposed project result in the uneconomic duplication of transmission and generation facilities?

ISSUE 17: As to the project's merchant capacity, is either Duke New Smyrna or UCNSB an "applicant" or "electric utility" within the meaning of the Siting Act and Section 403.519, Florida Statutes?

DUKE/UCNSB: *Yes. Both Duke New Smyrna and the UCNSB are "applicants" and "electric utilities" within the meaning of the Siting Act and Section 403.519, Florida Statutes.*

ISSUE 18: If the Commission were to grant an affirmative determination of need to Duke New Smyrna as herein requested, when the utilities in peninsular Florida had plans in place to meet reliability criteria, would the Commission be meeting its responsibility to avoid uneconomic duplication of facilities?

DUKE/UCNSB: *Yes. The Commission would be fulfilling its statutory responsibilities by assuring adequate electricity at reasonable cost and by providing for enhanced system reliability without economic risk to Florida electric customers, and by assuring to Florida customers the additional benefits of a robust competitive wholesale power supply market.*

ISSUE 19: Does the Joint Petition meet the pleading requirements of Rule 25-22.081, Florida Administrative Code?

DUKE/UCNSB: *Yes.*

ISSUE 20: Does the Joint Petition state a cause of action by not alleging that the proposed power plant meets the statutory need criteria and instead alleging that the proposed power plant is "consistent with" Peninsular Florida's need for power?

DUKE/UCNSB: *Yes, the Joint Petition states a cause of action.*

ISSUE 21: If the Commission were to permit Duke New Smyrna to demonstrate need on a "Peninsular Florida" basis and not require Duke New Smyrna to have a contract with purchasing utilities for its merchant plant capacity, would the more demanding requirements on QFs, other non-utility generators and electric utilities afford Duke New Smyrna a special status?

DUKE/UCNSB: *No.*

POLICY ISSUES

ISSUE 22: If Duke New Smyrna premises its determination of need upon Peninsular Florida without contracts from individual purchasing utilities, how would the Commission's affirmative determination of need affect subsequent determinations of need by utilities petitioning to meet their own need?

DUKE/UCNSB: *Basically, not at all. Regardless of the grounds for the Commission's decision to grant the requested determination of need, subsequent need determination petitions would be evaluated on the same statutory criteria that are applicable to the petition for determination of need for the New Smyrna Beach Power Project.*

ISSUE 23: Will granting a determination of need as herein requested relieve electric utilities of the obligation to plan for and meet the need for reasonably sufficient, adequate and efficient service?

DUKE/UCNSB: *No. Retail-serving electric utilities will have the same obligation to provide retail service if the Project is built as if the Project is not built. All utilities in Peninsular Florida will have the opportunity to buy power from the Project, and presumably will do so when it is cost-effective.*

ISSUE 24: Will granting a determination of need as herein requested create a risk that past and future investments made to provide service may not be recovered and thereby increase the overall cost of providing electric service and/or future service reliability?

DUKE/UCNSB: *No. Neither the Commission's granting the requested determination of need, nor the Project's construction and operation, will create a risk of non-recovery of past or future investments. The Project will result in lower overall costs of providing electric service and of maintaining reliable electric service in Florida.*

ISSUE 25: If Duke New Smyrna premises its determination of need upon Peninsular Florida without contracts from individual purchasing utilities, how would the Commission's affirmative determination of need affect subsequent determinations of need by QFs and other non-utility generators petitioning to meet utility specific needs?

DUKE/UCNSB: *Basically, not at all. See DUKE/UCNSB's position on Issue 22 above.*

ISSUE 26: If the Commission abandons its interpretation that the statutory need criteria are "utility and unit specific," how will the Commission ensure the maintenance of grid reliability and avoid uneconomic duplication of facilities in need determination proceedings?

DUKE/UCNSB: *Granting the requested need determination would not represent such an "abandonment." The Commission has only applied the statutory criteria on a utility-specific basis where the petitioning entity attempted to bind utility ratepayers through long-term commitments. The Commission will fulfill its Grid Bill responsibilities as it does now.*

ISSUE 27: Will granting a determination of need as herein requested result in electric utilities being authorized to similarly establish need for additional generating capacity by reference to potential additional capacity needs which the electric utility has no statutory or contractual obligation to serve?

DUKE/UCNSB: *No. The Commission's granting the requested determination of need will not have this result, because utilities already have the opportunity to establish need for electrical power plants in this way, based on the criteria in Section 403.519.*

ISSUE 28: What effect, if any, would granting a determination of need as herein requested have on the level of reasonably achievable cost-effective conservation measures in Florida?

DUKE/UCNSB: *None. The level of reasonably achievable cost-effective conservation measures in Florida depends on the relative costs and effectiveness of supply-side (generation) and demand-side (conservation) alternatives, not on what entity is proposing them. No evidence has been introduced with respect to this issue.*

ISSUE 29: Would granting the determination of need requested by the joint petitioners be consistent with the public interest and the best interests of electric customers in Florida?

DUKE/UCNSB: *Yes.*

ISSUE 30: Would granting the determination of need requested by the joint petitioners be consistent with the State's need for, and promote, a robust competitive wholesale power supply market?

DUKE/UCNSB: *Yes.*

ISSUE 31: Would granting the determination of need requested by the joint petitioners be consistent with state and federal energy policy?

DUKE/UCNSB: *Yes.*

FINAL ISSUES

ISSUE 32: Based on the resolution of the foregoing issues, should the petition of the UCNSB and Duke New Smyrna for determination of need for the New Smyrna Beach Power Project be granted?

DUKE/UCNSB: *Yes.*

ISSUE 33: Should this docket be closed?

DUKE/UCNSB: *Yes. When the Commission's order granting the requested determination of need for the New Smyrna Beach Power Project has become final and no longer subject to appeal, this docket should be closed.*

JOINT PETITIONERS' POST-HEARING BRIEF

SUMMARY

The Commission should grant the requested determination of need because the Project will improve electric system reliability, lower the cost of electricity to Florida's ratepayers, and be a cost-effective power supply resource for the UCNSB and its retail customers, as well as for other Peninsular Florida utilities and their customers. Granting the requested determination of need for the Project will also promote other goals within the Commission's jurisdiction and public interest responsibility, including enhanced wholesale competition, lower electric costs for wholesale and retail customers, reduced market power of existing utilities with large generation market shares, enhanced efficiency in electricity production and natural gas use, improved environmental quality, and mitigation of risk borne by ratepayers.

The Commission should deny the Opponents' motions to dismiss because the Joint Petition states a cause of action upon which relief may be granted, soundly and properly invokes the Commission's jurisdiction, and establishes the standing of the Joint Petitioners to seek and obtain the Commission's affirmative determination of need for the Project. Moreover, the Commission should grant the requested determination of need with the confidence that its order doing so will be affirmed by the Florida Supreme Court in the event that one or more of the Opponents appeals that order.

PART ONE: LEGAL ISSUES

This section of the Joint Petitioners' Post-Hearing Brief addresses Issues 14 through 21, which include the threshold issues posed by the Opponents' motions to dismiss (Issues 14, 15, 17,

19, and 20) as well as ancillary legal issues raised by the Opponents.

I. THE OPPONENTS' MOTIONS TO DISMISS AND APPLICABLE STANDARDS OF REVIEW.

The general standard of review for a motion to dismiss under Rule 1.140, Florida Rules of Civil Procedure, is whether, taking all allegations contained in the petition as well as all reasonable inferences arising from those allegations as true, the petition states a claim upon which relief may be granted. If so, then a motion to dismiss must be denied. See Simon v. Tampa Electric Company, 202 So. 2d 209, 211 (Fla. 2d DCA 1967).[1] In the instant case, this standard necessarily encompasses consideration of whether the Commission has the authority and jurisdiction to grant the requested relief, and whether the Joint Petition satisfies the standing requirements applicable to petitions for a determination of need.

The first issue above goes to the sufficiency of pleadings. The standard of review is whether the non-movants' -- here, the Joint Petitioners' -- pleadings state a claim upon which the Commission may grant the requested relief. See Simon, 202 So. 2d at 211. The second issue goes to the Commission's statutory authority; the standard of review is whether the Commission has the statutory authority to apply its statutes in a manner that would permit it to grant the requested relief. At the appellate level, review of the Commission's decision would address the Commission's interpretation of its organic statutes. If the Commission's construction of its statutes is not "clearly erroneous," the Commission's construction and decisions based thereon will be upheld. Nassau Power Corp. v. Deason, 641 So. 2d 396, 398 (Fla. 1994) ("Nassau II") (citing P.W. Ventures, Inc. v. Nichols, 533 So. 2d 281, 283 (Fla. 1988)).

The third issue--standing--also directly implicates the Commission's interpretation of its

[1]A motion to dismiss tests the legal sufficiency of a pleading and is not intended to determine issues of ultimate fact. McWhirter, Reeves, McGlothlin, Davidson, Rief & Bakas, P.A. v. Weiss, 704 So. 2d 214, 215 (Fla. 2d DCA 1998).

own statutes, particularly the definition of "applicant" under Section 403.519, Florida Statutes ("F.S."), and whether the UCNSB and Duke New Smyrna are proper applicants for the Commission's determination of need for the Project. As to the standing requirement, if there is any single ground upon which the Commission may grant standing for the Joint Petitioners, then the motions to dismiss must be denied. In this case, the Commission may grant standing on the basis that both the UCNSB and Duke New Smyrna are, individually or collectively, proper applicants within the meaning of Sections 403.503(4) and (13), F.S., or on the basis that the contract between the UCNSB and Duke New Smyrna is sufficient (within the framework of prior Commission decisions) to establish standing for the Joint Petitioners to seek a determination of need for the Project. The Commission also may grant standing on the basis that the UCNSB's and Duke New Smyrna's joint involvement in the construction and operation of the Project brings the Project within the meaning of "joint operating agency" under Section 403.503(13), F.S. If any one of those grounds for standing is met, then the Opponents' motions to dismiss must be denied.[2] On appeal, the Commission's determination to grant the Joint Petitioners' standing would be upheld because the decision will be subject to review under the same "not clearly erroneous" standard that is applicable to the Commission's determination of jurisdiction to grant the requested relief. See Nassau II, 641 So. 2d at 398.

II. THE JOINT PETITION STATES A CAUSE OF ACTION UPON WHICH RELIEF MAY BE GRANTED.

The Commission should deny the Opponents' motions to dismiss because the Joint Petition fully complies with all applicable pleading requirements set forth in Rule 25-22.081, F.A.C., and

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[2]Under the Florida Electrical Power Plant Siting Act (Sections 403.501-.518, F.S., hereinafter the "Siting Act"), an applicant need be only one type of authorized applicant to proceed. Indeed, most individual applicants are only one type of applicant (e.g., a city, town, cooperative, or regulated electric company). An entity entitled to proceed on any one ground does not need to establish standing on any other basis.

is more than sufficient to allow:

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

See Rule 25-22.081, F.A.C. FPL's motion to dismiss alleges three general categories of pleading deficiencies: (1) the allegations concerning the UCNSB are inadequate to meet the Commission's pleading requirements; (2) Joint Petitioners cannot rely on Peninsular Florida to satisfy the Commission's pleading requirements because "Peninsular Florida" is not a utility,[3] and even if Joint Petitioners could do so, the allegations contained in the Joint Petition are otherwise inadequate; (3) the Joint Petitioners cannot adequately allege need or identify the purchasing utility for the merchant component of the Project.

As explained more fully in the Joint Petitioners' Memorandum of Law in Opposition to FPL's Motion to Dismiss,[4] FPL's allegations are erroneous because:

1. The Joint Petition identifies the primarily affected utilities, the UCNSB and Duke New Smyrna, in compliance with Rule 25-22.081(1), F.A.C. Nothing in this Rule requires that all capacity of a proposed power plant be allocated to a retail-serving utility, or that the utilities that may purchase power in the future be identified. Neither FPL nor FPC is a primarily affected utility because neither has a contract to purchase power from the Project.

2. The Joint Petition adequately alleges need in compliance with Rule 25-22.081(3), F.A.C.

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[3]This argument turns the Commission's charge to promote the public interest on its head. The Opponents' argument implies that the Commission cannot consider Peninsular Florida or statewide needs, which of course the Commission must do. See Section 366.04(5), F.S. (granting the Commission jurisdiction over planning, development and maintenance of a coordinated electric power supply grid throughout the State).

[4]On September 15, 1998, in response to FPL's motion to dismiss the Joint Petition, the Joint Petitioners filed their Memorandum of Law in Opposition to FPL's Motion to Dismiss Joint Petition and on September 21, 1998, in response to FPC's motion to dismiss the Joint Petition, the Joint Petitioners filed their Memorandum of Law in Opposition to FPC's Motion to Dismiss Joint Petition (hereinafter collectively referred to as "Joint Petitioners' Memoranda of Law in Opposition to Motions to Dismiss").

The Petition specifically alleges the UCNSB's need and contains all relevant allegations addressing the need in Peninsular Florida, the primary wholesale market in which the Project will operate. FPL's assertion that the Joint Petition does not adequately allege need is spurious. Nothing in the Rules requires any "magic words" alleging need; rather, the Rules merely require "[a] statement of the specific conditions, contingencies or other factors which indicate a need . . . ." (Emphasis supplied.) The Joint Petition includes such statements. See Joint Petition at 10-11.

3. The Joint Petition contains a discussion of viable nongenerating alternatives in compliance with Rule 25-22.081(5), F.A.C. See Joint Petition at 22-24 (discussing the UCNSB's nongenerating alternatives and the fact that, as a federally regulated wholesale public utility, Duke New Smyrna does not engage in end use conservation programs and is not required in the Joint Petition to have conservation goals pursuant to Section 366.82(2), F.S.). These allegations constitute discussions of nongenerating alternatives sufficient to meet the pleading requirement of Rule 25-22.081(5), F.A.C.

4. The Joint Petition includes a utility-specific allegation of need for the two primarily affected utilities in this case, Duke New Smyrna and the UCNSB. Nothing in Section 403.519, F.S., or Rule 25-22.081, F.A.C., requires more.

III. THE COMMISSION HAS THE AUTHORITY TO GRANT THE REQUESTED DETERMINATION OF NEED AND TO CONFIRM THAT THE JOINT PETITIONERS ARE, INDIVIDUALLY AND COLLECTIVELY, PROPER APPLICANTS FOR THE COMMISSION'S DETERMINATION OF NEED FOR THE PROJECT.

The Commission has the authority to grant the requested determination of need for the Project pursuant to Section 403.519, F.S., and the Commission's Rules 25-22.080-.081, F.A.C. Both the UCNSB and Duke New Smyrna are, individually and collectively, "applicants" within the meaning of Sections 403.503(4) and (13), F.S. This conclusion and result are not barred by earlier decisions of the Commission or the Florida Supreme Court. Indeed, the Commission will be upheld on appeal if the Commission rules that the UCNSB and Duke New Smyrna are both applicants within the meaning of Section 403.519, F.S.

A. The Commission Has the Authority To Grant the Requested Determination of Need and to Determine "Applicant" Status.

The Commission has the jurisdiction and authority to grant the requested determination of need for the Project. Under Section 403.519, F.S., the Commission is required to conduct, upon petition by an "applicant" or on its own motion, a proceeding to determine the need for an

electrical power plant subject to the Siting Act. Under Section 403.507(2)(a)2, F.S., the Commission is required to prepare a report to the Department of Environmental Protection regarding the need for the plant. The jurisdiction of the Siting Act is over power plants and applicants. See Section 403.506, F.S. The Commission's relevant jurisdiction arises under the Siting Act and Section 403.519, F.S. When the Legislature established the Commission's responsibility under these two statutes, the Legislature obviously intended the Commission to exercise its authority to carry out its responsibilities under those statutes, and to construe terms within those statutes when necessary to carry out those responsibilities. See Ameristeel Corp. v. Clark, 691 So. 2d 473, 477 (Fla. 1997) (stating that "an agency's interpretation of a statute that it is charged with enforcing is entitled to great deference.") (Emphasis supplied.)

B. Both the UCNSB and Duke New Smyrna Are Proper Applicants Under Section 403.519.

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

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

(Emphasis supplied.) Section 403.503(4), F.S., defines an "applicant"[5] as:

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

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

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

(Emphasis supplied.) Thus, a "regulated electric company" is a proper "applicant" under the Siting Act. Moreover, a "regulated electric company" also may combine with a city as an

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

applicant for a need determination. For the reasons set forth below, Duke New Smyrna is a "regulated electric company."

Duke New Smyrna will sell power at wholesale in interstate commerce and, thus, is a "public utility"[6] under the Federal Power Act, 16 U.S.C.S. § 824(b)(1)(1994).[7] See Joint Petition at 4. As such, Duke New Smyrna is clearly subject to the regulatory jurisdiction of the Federal Energy Regulatory Commission ("FERC"), including but not limited to the FERC's jurisdiction over rates pursuant to the Federal Power Act. As stated in the Joint Petition, the FERC has approved Duke New Smyrna's Rate Schedule No. 1 for sale of the Project's entire capacity and associated energy to other utilities under negotiated arrangements. Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., 83 FERC § 61,316 (June 25, 1998). EXH 17. Thus, as a company that sells wholesale electric power subject to the regulatory jurisdiction of the FERC,[8] Duke New Smyrna fits squarely within the plain meaning of the term "regulated electric company" under any reasonable construction of the term, and Duke New Smyrna is a proper applicant under Sections 403.503(13) and 403.519, F.S. See Carson v. Miller, 370 So. 2d 10 (Fla. 1979) (words of common usage should be construed in their plain and ordinary sense.)

The Opponents contend that the Legislature could not have intended to include EWGs within the definition of "regulated electric company" because EWGs, such as Duke New Smyrna,

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

[7]Though irrelevant to Duke New Smyrna's status as a public utility under federal law, Duke New Smyrna is also an "exempt wholesale generator" ("EWG") pursuant to the Public Utility Holding Company Act of 1935 ("PUHCA"), 15 U.S.C.S. § 79z-5a (1994 & Supp. 1997).

[8]As discussed in Section III. D. of this brief, Duke New Smyrna is subject to the Commission's Grid Bill jurisdiction and thus is also state-regulated.

did not exist in 1973 when Section 403.503(13), F.S., was adopted. The Opponents' focus on Duke New Smyrna's EWG status is in error. Duke New Smyrna's status as an EWG is irrelevant to this analysis. The important fact is that Duke New Smyrna is a "public utility" under the Federal Power Act. The Federal Power Act, with its definition of public utility, was enacted in 1935 and was in place in 1973 when the Florida Legislature enacted the Siting Act. It is well-settled that the Legislature is presumed to know the existing law when the Legislature enacts a statute. See Collins Investment Co. v. Metropolitan Dade County, 164 So. 2d 806 (Fla. 1964). Accordingly, the 1973 Florida Legislature is presumed to have been aware of the definition of "public utility" under the Federal Power Act when the Legislature included the term "regulated electric company" in the Siting Act.

The Legislature has repeatedly amended the Siting Act, but the Legislature has never evidenced any intent whatsoever to restrict the construction of the term "regulated electric company" to utilities whose retail service is regulated by the Commission. To the contrary, the Legislature has chosen -- and stuck with -- language that expressly and specifically includes wholesale-only utilities, like Duke New Smyrna, within the scope of the term. The plain language of Section 403.503(13), F.S., specifies that an "electric utility" includes any one of a number of entities (including "regulated electric companies") that are "engaged in the business of generating, transmitting, or distributing electric energy." (Emphasis supplied.) By using the word "or" rather than "and", the Legislature established that even in 1973 an "electric utility" under Section 403.503(13), F.S., could be engaged only in the generation of electric power. See Telophase Society v. State Board of Funeral Directors, 334 So. 2d 563 (Fla. 1976) (general rule is that the term "or" should be construed in the disjunctive).

An entity engaged solely in the generation and sale of electric energy, such as Duke New Smyrna, is necessarily a wholesale power producer, and wholesale power sales are (with limited

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

As previously noted, to be an "applicant" under Section 403.519, F.S., an entity must be an "electric utility" as defined in Section 403.503(13), F.S. The definition of "electric utility" set forth in Section 403.503(13), F.S., specifically includes "cities and towns . . . engaged in or authorized to engage in, the business of generating, transmitting, or distributing electric energy." (Emphasis supplied.) The UCNSB is a subdivision of the City of New Smyrna Beach, Florida, that was created by a special act of the Florida Legislature. See Ch. 67-1754, Laws of Fla. As such, the UCNSB is a "city" as that term is used within the definition of "electric utility" under Section 403.503(13), F.S., and thus the UCNSB is an authorized applicant under Section 403.519, F.S. In fact, during the hearing on the motions to dismiss, FPC's counsel conceded that the UCNSB is an applicant. TR 28.

C. The Participation Agreement is a Binding Contract Sufficient To Satisfy All Requirements of Prior Commission Orders.

As set forth in the Joint Petition, the UCNSB and Duke New Smyrna have executed a Participation Agreement that grants the UCNSB an entitlement of 30 MW of the Project's output and sets forth the terms under which the UCNSB may obtain the energy to which it is contractually entitled. Vaden, TR 386; Green, TR 582; EXH 7. However, the Opponents argue that the UCNSB is not a proper "applicant" for the 484 MW of capacity from the Project for which it is not contractually entitled. The Opponents' argument is fatally flawed for several reasons. First, the Joint Petition contains sufficient allegations to establish that the UCNSB is an applicant under Section 403.519, F.S., for at least 30 MW of the Project's capacity. Whether the remaining capacity of the Project is entitled to a determination of need is a factual issue which goes to the merits of the need determination proceeding and thus cannot properly be decided on a motion to dismiss. See Lowery v. Lowery, 654 So. 2d 1218, 1219 (Fla. 2d DCA 1995). Second, and more importantly, nothing in Section 403.519, F.S., or in any Commission or Florida Supreme Court precedent requires that the entire output of a proposed project be used by the applicant or be contractually committed to a specific utility. The Commission's earlier decisions only require a contract where the specific purchasing utility's need is at issue, and where the applicant proposes to require the utility's ratepayers to bear the risk of its project. See Nassau II, 641 So. 2d at 398-99. Neither Nassau II, nor Section 403.519, F.S., nor any other statute or rule requires a contract for all of the output of any power plant, regardless what entity, or what type of entity, proposes to build it.

D. Both Duke New Smyrna and the UCNSB Are "Electric Utilities" Under Section 366.02(2), F.S.

As explained in detail in the Joint Petitioners' Memoranda of Law in Opposition to the Motions to Dismiss, both the UCNSB and Duke New Smyrna are "electric utilities" under Section

366.02(2), F.S., by the plain language of the statute. The UCNSB is a municipal electric utility, and Duke New Smyrna is, or will be,[9] an investor-owned electric company that owns, maintains, and operates an electric generation system within the state. The Opponents' argument that one power plant does not constitute a "system" is spurious and would irrationally deprive the Commission of jurisdiction over such power plants. For example, if an existing power plant in Florida was sold to an EWG that then operated the plant as a merchant facility, the Opponents' rationale would leave the Commission without authority or jurisdiction to fulfill its Grid Bill[10] responsibilities with respect to such plant. This is obviously irrational and not a result contemplated by either the Grid Bill, the Commission, or sound public policy. Even FPC's witness (Mr. Rib) agreed that a purchased merchant plant could exist within the current regulatory framework. Rib, TR 1276. There is no jurisdictional difference deriving from a power plant's origins that determines whether its owners or operators are "electric utilities" or whether their power plants are subject to the Commission's authority. The Project will be subject to the Commission's authority, as will Duke New Smyrna, as an electric utility under Section 366.02(2), F.S.

This result is particularly important because it defeats the Opponents' argument that Duke New Smyrna will not be subject to Commission jurisdiction. More importantly, it defeats the

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[9]Section 366.02(2) uses the present tense, perhaps giving rise to the technical argument that because Duke New Smyrna does not yet own a generation facility, it is not an electrical utility. This distinction is not relevant to this case. The Opponents erroneously argue that the Commission will not have authority over the Project or over Duke New Smyrna; however, the Commission will have the regulatory authority over Duke New Smyrna provided in Chapter 366, including that Chapter's Grid Bill provisions, both because Duke New Smyrna will be an electric utility and because the Commission's Grid Bill authority attaches to Florida's electric power supply system.

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

Opponents' argument that Duke New Smyrna may not be an applicant under the Siting Act or Section 403.519, F.S., because, the Opponents assert, those statutes only contemplate state-regulated entities as applicants. As explained above, Duke New Smyrna is state-regulated. This result forces the Opponents to argue that only state-regulated utilities that serve at retail may be applicants. This argument would deprive both Seminole Electric Cooperative and the Florida Municipal Power Agency of applicant status, which obviously is an absurd result. The Commission must reject the Opponents' arguments.

E. The Commission's Granting the Requested Determination of Need for the Project Is Neither Barred Nor Controlled by the Commission's Earlier **Nassau** Decisions.

The Nassau cases, oft-cited by the Opponents, are simply inapplicable here because they address different facts in very different contexts. In fact, as set forth in the Joint Petitioners' Memoranda of Law in Opposition to the Motions to Dismiss, the statutory interpretation issue in this proceeding -- i.e., how to construe the terms "regulated electric company" and "joint operating agency" -- is a case of first impression.[11]

Nassau Power Corporation v. Deason, 601 So. 2d 1179 (Fla. 1992) (hereinafter "Nassau I"), addressed, in pertinent part, whether a "qualifying facility" ("QF") under the Federal Power Act (see 16 U.S.C.S. § 796) with a contract based on statewide need (as embodied in a "statewide avoided unit"), but whose project was intended to serve the need of a specific utility, could obtain a determination of need. The Commission found that a QF with a contract had standing to pursue a need determination for its proposed plant, but the contract did not relieve the QF from showing that the purchasing utility required the capacity. The Florida Supreme Court, in upholding the

[11]It is well-settled that the doctrine of stare decisis does not apply to a question or issue not raised in a former case. See State ex rel. Christian v. Austin, 302 So. 2d 811, 818 (Fla. 1st DCA 1974) (citing City of Miami Beach v. Traina, 73 So. 2d 860, 861 (Fla. 1954)).

Commission, held that the QF had appealed the wrong order and denied relief. Nassau I, 601 So. 2d at 1178-79. In a footnote, the Court rejected the QF's argument that the prior Commission practice (of assuming need for a cogenerator) could be relied upon to force the Commission not to apply the need determination criteria with respect to a utility that had a contract with the QF. Id. at 1178-79, n. 9.

It is important to note that the underlying order, In Re: Hearings on Local Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities, Docket No. 890004-EU, Order No. 22341 (FPSC Dec. 26, 1989) (hereinafter "Order No. 22341") i.e., the order which the Florida Supreme Court held that the QF in Nassau I should have appealed, also addressed utility-specific need in the specific context of setting the prices and determining the terms and conditions of standard offer contracts for the sale of capacity and energy by QFs to utilities. Order No. 22341 was entered in a Commission proceeding whose primary purpose was to establish the pricing, terms, and conditions for cogeneration contracts to be imposed on ratepayers.[12] Order No. 22341 did not involve and is not applicable to need determinations for power plants, like the instant case, where there are no captive ratepayers being forced to pay for the plants.

Nassau II also addressed need and standing in the context of a QF that sought Commission approval of a contract, not signed by a retail-serving utility, by which the QF hoped to require the subject utility to pay for the QF's power plant via a long-term capacity and energy contract. The Commission expressly and specifically limited the scope of the order underlying Nassau II:

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[12]Order No. 22341 required utilities subject to the Commission's cogeneration rules to submit tariffs in compliance with those rules within ten days following rendition of Order No. 22341, and to submit standard offer contracts in compliance with those rules consistent with Order No. 22341. (Order No. 22341 also addressed the requirements applicable to Florida Public Utilities Company, a non-generating investor-owned utility.)

> It is also our intent that this Order be narrowly construed and limited to proceedings wherein non-utility generators seek determinations of need based on a utility's need.

In Re: Petition of Nassau Power Corporation to Determine Need for Electrical Power Plant, 92 FPSC 10:643, 646 (Order No. PSC-92-1210-EQ). The Florida Supreme Court upheld the Commission, stating that "because we cannot say that the Commission's construction of Section 403.519 is clearly unauthorized or erroneous, we affirm this order under review." Nassau II, 641 So. 2d at 399.

Nassau II simply does not apply to the facts present in this case. Nothing in Nassau II indicates any intent by either the Commission or the Court to restrict wholesale competition or prevent the construction of power plants that could provide needed capacity and energy to Florida's electric customers in cases where, as here, there is no risk or obligation upon those customers (other than to pay for energy that their retail utilities actually purchase for resale to them). By its very terms, Nassau II is limited in scope to the Commission's underlying decision, i.e., Nassau was not a proper applicant to serve FPL's need where it did not have a contract with FPL.

The standard of review applicable to the Commission's decision in the instant case is the same deferential "not clearly unauthorized or erroneous" standard applied in Nassau II. Hence, if the Commission grants the requested need determination for the Project and its order is appealed, the Court will apply that same deferential standard and affirm the Commission. See Nassau II, 641 So. 2d at 399.

F. The Joint Petitioners Have Standing To Seek the Requested Determination of Need Because the Project is a Joint Electric Power Supply Project Under Sections 361.11-.12, F.S.

As explained more fully in the Joint Petitioners' Memoranda of Law in Opposition to the

Motions to Dismiss, the Project is a joint power supply project under Sections 361.11-.12, F.S. A reasonable construction of the term "joint operating agency," as that term is used in the Siting Act's definitions of "electric utility" and "applicant", would include such joint power supply projects. Regardless of whether those terms are synonymous, or even inclusive, it would be irrational and contrary to the legislative intent underlying the Joint Power Act, to apply a narrow interpretation of Section 403.519, F.S., or the Siting Act, to prevent the realization of a project that clearly fits within the specific definitions of a joint electric power supply project, as contemplated and authorized by the Legislature.

G. The Legislative History of the Power Plant Siting Act Supports the Joint Petitioners' Interpretation of the Term "Applicant."

The Opponents argue that the legislative history of the Siting Act and the Florida Energy Efficiency and Conservation Act ("FEECA") (Sections 366.80-.85, and 403.519, F.S.) should be interpreted to exclude Duke New Smyrna from the definition of "applicant", as used in Section 403.519, F.S. See TR 21-43. The Opponents' argument is wholly without foundation and flies in the face of both the rules of statutory construction and the actual legislative history of the Siting Act.

As a threshold issue, it is a well-settled rule of statutory construction that where the language of a statute is clear and unambiguous, the statute must be given its plain and ordinary meaning, and no further review of legislative history is necessary. Aetna Casualty & Surety Co. v. Huntington National Bank, 609 So. 2d 1315, 1317 (Fla. 1992); Holly v. Auld, 450 So. 2d 217 (Fla. 1984). As previously discussed herein, the term "applicant" as used in Section 403.519, F.S., is defined in Section 403.503(4), F.S., to mean an "electric utility." The term "electric utility" is defined in Section 403.503(13), F.S., to include "regulated electric companies" and "joint operating agencies." The relevant definitions include wholesale-only electric companies

such as Duke New Smyrna. The plain meaning of these defined terms provides clear and unambiguous guidance to the Commission and, therefore, further review of the legislative history of Section 403.519, F.S., is unnecessary and improper.

In a recent order, the Commission addressed the issue of whether it is appropriate to consider the legislative history of a statute to determine the meaning of terms specifically defined in a statute or rule. In In Re: Florida Power & Light Company, 1998 WL274594, Docket No. 980294-EI, Order No. PSC-98-0603-FOF-EI (April 28, 1998), the Commission stated:

> In determining the meaning of a phrase, the reader must first refer to the statute to see if the legislature specifically defined the phrase . . . If the phrase is specifically defined in either statute or rule, then such term is not ambiguous. Courts may resort to legislative history, administrative construction of a statute, and rules of statutory construction only to determine the legislative intent of an ambiguous statute.

(Citations omitted.) In Florida Power & Light Company, the Commission concluded that there was "no need to resort to any of the rules of statutory construction" because the phrases at issue in that case were defined by rule. Id. In the instant case, the Commission should follow its own precedent and reject the Opponents' unnecessary and dubious analysis of legislative history. Under the plain meaning of the relevant definitions, Duke New Smyrna is an "applicant."

Even if one were to assume that the definition of an "applicant" is ambiguous, and that it was thus necessary to look to legislative history to resolve that ambiguity, the history of the Siting Act evinces no legislative intent to limit the term "applicant" in the manner advocated by the Opponents.

As explained in the Joint Petitioners' Memoranda of Law in Opposition to the Motions to Dismiss, the Legislature amended Section 403.519, F.S., in 1990 by removing the term "utility" and replacing it with the term "applicant". See Ch. 90-330, Laws of Fla. Thus, the term "utility" no longer appears anywhere in Section 403.519, F.S. The Opponents' arguments

concerning legislative history are all attempts to convince the Commission to ignore the Legislature's action in 1990 and to construe Section 403.519, F.S., as if the term "utility" still appeared in that provision.

The Opponents asserted during the oral argument on the motions to dismiss that the 1990 amendments to Section 403.519, F.S., were merely "housekeeping amendments" and, presumably, should be ignored by the Commission. TR 39. The Opponents are wrong. Chapter 90-330, Laws of Florida, was not a "Revisor's Bill." Rather, it was a substantive enactment that "became the vehicle to which several environmental bills were amended." See Fla. H.R. Comm. on Environ. Protection, Subcomm. on Permits, CS/HB 3065 (1990) Staff Analysis 1 (June 2, 1990), (hereinafter the "Staff Analysis for CS/HB 3065").[13] It is a well-settled rule of statutory construction that when the Legislature amends a statute, a tribunal construing that amendment should assume that the Legislature intended the amendment to serve a useful purpose and otherwise have meaning. See Carlile v. Game & Fresh Water Fish Commission, 354 So. 2d 362, 364 (Fla. 1977).

Next, at the oral argument, the Opponents argued that the Staff Analysis for CS/HB 3065 demonstrates a clear legislative intent that the term "applicant" be limited to utilities with ratepayers. TR 41-42.[14] The Opponents base their argument solely on the fact that the economic impact statement contained in the Staff Analysis for CS/HB 3065 states, under the heading "Direct Private Costs", that "[f]or utilities, additional costs could be transferred to the ratepayer." Staff Analysis for CS/HB 3065 at 15. However, the Opponents argument fails to put the above-

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[13]Pursuant to a request by FPC, the Commission has taken judicial notice of the Staff Analysis for CS/HB 3065.

[14]It appears that the Opponents, when making their argument regarding the legislative intent purportedly embodied in the Staff Analysis for CS/HB 3065, no longer consider the 1990 amendments to Section 403.519, F.S., to be "housekeeping amendments."

quoted language in context. The relevant paragraph of the economic impact statement contained in the Staff Analysis for CS/HB 3065 states, in full:

> Application fees will be increased. For private industry, this will result in increased cost of doing business. For utilities, additional costs could be transferred to the ratepayer.

(Emphasis supplied.) By using the term "could", the Staff Analysis for CS/HB 3065 leaves open the possibility that not all additional costs arising under Chapter 90-330 must necessarily be transferred to a utility's ratepayers. More importantly, the Staff Analysis for CS/HB 3065 recognizes that the increased application fees will result in increased costs of doing business for other private entities. For example, Duke New Smyrna has no ratepayers to whom it can transfer application fees, so an increase in application fees is simply an increased cost to Duke New Smyrna of doing business in Florida.

The Opponents noted at the oral argument that the 1973 bill which became the Siting Act states in its summary that the act provides "that the regulation of electric utilities is preempted by the state." TR 30-31 (referencing Ch. 73-33, Laws of Fla.)[15] From this fact, the Opponents argue that the Legislature must have intended the term "regulated electric company", as used in the definition of "electric utility", to mean state-regulated electric company. TR 30-31.

Once again, the Opponents are wrong. The summary for Chapter 73-33, Laws of Florida, references state preemption because Section 403.510(1), F.S., provides that the Siting Act supersedes all inconsistent local or state regulations. Accordingly, Section 403.510(2), F.S., provides for the state's preemption of power plant siting. In 1973, the Legislature had not yet enacted legislation resolving the issue of whether local governments should be allowed to regulate power plant siting. The state preemption of local government regulation of power plant siting

[15]Pursuant to a request by FPC, the Commission has taken judicial notice of Chapter 73-33, Laws of Florida.

contained in Chapter 73-33, Laws of Florida, does not affect any concurrent federal regulation of electric utilities. As discussed above and in Joint Petitioners' Memoranda of Law in Opposition to the Motions to Dismiss, the Opponents are trying to rewrite Sections 403.503(4), 403.503(13) and 403.519, F.S., by adding the phrase "state regulated"[16] (as well as the phrase "that serves retail customers") to modify the term "electric utility." No legitimate basis for the Opponents' argument exists. The Legislature could have added the phrase "state-regulated" to the Siting Act if the Legislature had intended to do so.

Lastly, during the oral argument on the motions to dismiss, the Opponents asserted that because Section 403.519, F.S., was enacted as part of FEECA, the Commission should look to the definition of "utility" contained in Section 366.82(1), F.S., of FEECA to limit the term "applicant." TR 35-38. Once again, the Opponents miss the point. First, the Opponents' argument is based on a mischaracterization of the Joint Petitioners' position on the applicability of FEECA. Counsel for FPC asserted at the oral argument that "Duke concedes that the Florida Energy Efficiency and Conservation Act, FEECA, does not apply to wholesale generators such as itself." TR 34-35. The Joint Petitioners have made no such concession. Rather, the Joint Petitioners have simply stated that the conservation goals provisions of FEECA do not apply to a federally-regulated public utility that sells power exclusively at wholesale. See Joint Petition at 23-24. Clearly, the Joint Petitioners believe that Section 403.519, F.S., (a part of FEECA) applies to them. Second, and most importantly, the Opponents' reliance on the definition of "utility" in Section 366.82(1), F.S., ignores the irrefutable fact that the term "utility" does not appear in Section 403.519, F.S. The Legislature has carefully and specifically stated that an "applicant" can seek a determination of need under Section 403.519, F.S. Duke New Smyrna is

[16]Even this argument fails because Duke New Smyrna is an electric utility under Section 366.02(2), F.S., subject to the Commission regulations applicable to such utilities.

such an applicant and the Commission should reject the Opponents' unfounded invitation to ignore this clear legislative directive.

IV. THE COMMISSION'S DETERMINATION OF NEED FOR THE PROJECT IS CONSISTENT WITH EARLIER COMMISSION DECISIONS DETERMINING NEED FOR ELECTRICAL POWER PLANTS ON BASES OTHER THAN STRICT, NARROW RELIABILITY CONSIDERATIONS.

The Opponents of the Project have argued that the Commission cannot award an affirmative determination of need unless the Joint Petitioners demonstrate that a specific utility requires the capacity of the Project to maintain adequate reliability. This argument flies in the face of the plain language of Section 403.519, F.S., which enumerates multiple specific criteria that the Commission is to apply. Correctly read, i.e., giving effect to all of the statute's words, the statute prohibits the Commission from considering only the impact on reliability. The argument is also contradicted by precedent. The Commission has frequently recognized that economic considerations and other matters play as important a part in its analysis of need as reliability criteria. In prior cases the Commission has concluded that proposed power plants were needed to lower costs and achieve other benefits even though the capacity of the power plants was not required to maintain reliability criteria for several years beyond the power plants in-service dates.

A. The Several Statutory Criteria.

By law, the Commission is not tethered to the single criterion of reliability. Section 403.519, F.S., directs the Commission to

> take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The Commission shall also expressly consider . . . other matters within its jurisdiction which it deems relevant.

If the Commission considered only reliability, it would not be carrying out its statutory

responsibility to consider other factors.

B. Applications of the Statutory Criteria.

The broad indices of the statute have not lain dormant. Over time, the Commission has used and applied the several dimensions of need contemplated -- indeed required -- as factors to be considered by Section 403.519, F.S. For example, when QF Florida Crushed Stone ("FCS") applied for a determination of need, the Commission issued the requested determination, based primarily on the improved fuel efficiency inherent in the cogeneration process, not on considerations of reliability. In re: Petition of Florida Crushed Stone Company for Determination of Need for a Coal-Fired Cogeneration Electrical Power Plant, Docket No. 820460, Order No. 11611, (Feb. 14, 1983) (hereinafter "Order No. 11611").[17] The Commission concluded that fuel efficiency is "within its jurisdiction" and "relevant" to the issue of need within the meaning of Section 403.519, F.S. Id.

FPL has opposed the Project based upon a narrow and restrictive definition of "need." Yet, when FPL and Jacksonville Electric Authority ("JEA") requested the Commission to issue a determination of need for two 625 MW coal-fired units at the St. Johns River Power Park, (Docket No. 810045-EU), FPL presented a far more liberal view of "need." The Commission embraced FPL's expansive view of the concept of need and in its order, the Commission stated:

> We construe the "need for power" issue to encompass several aspects of need. In our evaluation of the need for SJRPP Units 1 and 2, we have considered the principal areas of the electrical need for additional capacity to ensure an adequate supply of bulk electrical power and energy to electric consumers and the economic need of providing this bulk power and energy at the lowest possible cost. In addition, the socio-economic need of reducing the

[17]Moreover, as suggested by the Joint Petitioners in the instant case, in Order No. 11611, the Commission acknowledged that, while the effect was not quantified in that case, adding a generating unit necessarily improves reliability. Order No. 11611 at 3. Also parallel to the FCS case, the Project will contribute to greatly increased fuel efficiency.

> consumption of imported oil into the State of Florida has been considered.

In re: JEA/FPL's Application of Need for St. John's River Power Park Units 1 and 2 and Related Facilities, FPSC Docket No. 810045-EU, Order No. 10108 at 2 (June 26, 1981)(hereinafter "Order No. 10108") (emphasis supplied).

FPL and JEA proposed in-service dates of December 1985 and May 1987 for the two 625 MW coal-fired units. Following the hearing, the Commission concluded that Peninsular Florida did not require the capacity of the units for reliability purposes prior to 1991, that JEA did not require the capacity prior to 1991, and that FPL did not need the capacity to maintain reliability criteria until 1989. The Commission stated,

> Thus, the salient issue in the determination of the need for SJRPP Units 1 and 2 with in-service dates of December 1985 and May 1987, respectively, is whether the construction of these units in the time frames proposed represent the lowest cost alternative to avoid the continued use of expensive oil-fired generation in peninsular Florida and in the areas served by JEA and FPL.

Order No. 10108, at 2. The Commission granted the determination of need based on the economic viability of the proposal (i.e., the project's lower cost of electricity) and the socio-economic benefits associated with reducing Florida's dependence on oil. Id. at 6.

Similarly, when the Orlando Utilities Commission ("OUC") applied for a determination of need for its Stanton Unit No. 1, the Commission gave the considerations of "economic need" and the socio-economic benefits of reducing oil consumption equal billing with the criterion of reliability:

> . . . the primary areas of analysis . . . should include Florida's electrical need for additional capacity to ensure an adequate supply of bulk electrical power and energy to electric consumers, as well as the economic need of providing this bulk power and energy at the lowest possible cost. Another aspect of the need issue is the socio-economic need of reducing the State's consumption of imported oil.

In re: Petition for Certification of Need for Orlando Utilities Commission, Curtis H. Stanton Energy Center Unit 1 and Related Facilities, 81 FPSC 10:18, 19 (Order No. 10320) (hereinafter "Stanton I"). The Commission should also note well its express consideration of "Florida's electrical need for additional capacity" and the "need for reducing the State's consumption of imported oil."

As was the case with the St. Johns River Power Park, the Commission proceeded to analyze each aspect of need from the perspective of Peninsular Florida as a whole, as well as individual service areas. As in the St. Johns River Power Park case, the Commission concluded that the capacity of OUC's Stanton No. 1 unit, which had a proposed in-service date of November 1986, was not needed to maintain Peninsular Florida's reliability criteria "in the 1980s." OUC's need for capacity to maintain reliability criteria also was not the basis for awarding an affirmative determination of need. Instead, the Commission issued the determination of need based on findings related to the energy savings and the displacement of oil that the unit would make possible. One source of such energy savings, which the Commission identified as a reason to issue the determination of need, was an increase in activity on the Energy Broker. Stanton I, at 20-22.

The Commission's proceeding on Tampa Electric Company's ("TECO") request for a determination of need for its Big Bend 4 unit is another example of a case in which the Commission approached the subject of need from economic as well as reliability perspectives. It also provides another example in which the Commission surveyed the subject of need from the perspective of Peninsular Florida, as well as the individual utility.

While the Commission decided that TECO individually required the capacity of Big Bend 4 to maintain reliability, the Commission placed greater emphasis on TECO's economic justifications, in the form of net savings and oil reductions:

> Construction of Big Bend 4 is warranted as economically cost-effective based on the cost differential in coal and oil . . . .
>
> * * *
>
> The cost-beneficial economics of constructing Big Bend 4 have been completely and substantially demonstrated by Tampa Electric Company in this proceeding and the "need" for the said power generation should be certified.

In Re: Application for Certification of Tampa Electric Company's Proposed 417 Megawatt Net Coal-Fired Big Bend Unit 4, 81 FPSC 1:64, 66-67 (Order No. 9749).

Thus, in prior cases, FPL and other companies have justified the construction of new units and the Commission has granted determinations of need based on economic analyses like the one that Duke New Smyrna has submitted in this case. In those cases, however, the utilities did not propose to absorb the investment risk associated with their economic projections.

During the oral argument on the motions to dismiss, Commissioner Deason asked Opponents' counsel whether, under the law, an applicant may justify the need for a unit based on considerations other than reliability. Counsel for FPL acknowledged that such economic justifications had been accepted by the Commission in the past (referencing the cases cited by Duke New Smyrna, which have been more fully described above), and could be accepted by the Commission again. TR 313. Counsel for FPL then argued that only "purchasing utilities" could avail themselves of such considerations. However, FPL's argument is simply an erroneous and contrived corollary to FPL's likewise mistaken contention that only utilities that serve retail customers (or entities holding contracts with them) may file an application for a determination of need.

Counsel for FPC also recognized that determinations of need have been granted for reasons other than reliability concerns, including "statewide economic benefits," but similarly contended that the Commission "receded" from that position in Nassau I when the Commission said that need is utility specific. TR 271.

Thus, the Opponents do not dispute the statutory right of an applicant to prove -- and the statutory authority for the Commission to find -- "need" on a basis other than reliability criteria, as has occurred in prior Commission cases. Based on their distorted readings of the Nassau decisions, however, the Opponents argue simply that this ability -- like everything else about the Siting Act -- must be reserved for utilities that serve retail customers. As described above, that argument also fails for want of statutory support: the Siting Act says "regulated electric companies" not "electric companies that are regulated by the Commission and serve retail customers."

C. The Legislative History of the Siting Act Supports a Broad, Inclusive Interpretation of "Need."

The Opponents argue that need can only be utility-specific need and that no entity other than a utility with retail customers can need generating capacity. See, e.g., TR 271. In making this blanket assertion, the Opponents again ignore the legislative history of the Siting Act.

As previously discussed, the Legislature enacted the Siting Act in 1973 when it passed House Bill 149. See Ch. 73-33, Laws of Florida. House Bill 149 was debated in several committees; however, the only relevant substantive debate on the bill occurred on March 27, 1973, at a meeting of the House Environmental Protection Committee, Subcommittee on Permits. Pursuant to a request by Joint Petitioners, the Commission has taken judicial notice of the certified tape recordings of the March 27, 1973 subcommittee meeting and authorized Joint Petitioners to file the certified transcripts of those tapes. TR 1678. See Fla. H.R. Comm. on Env. Pro., Subcomm. on Permits, tape recording of proceedings (March 27, 1973) (hereinafter "March 27, 1973 Transcript").

In the March 27, 1973 subcommittee hearing, the Legislature spent considerable time debating the concept of need. For example, Representative Spicola (the sponsor of House Bill

149), Representative Andrews (the chairman of the subcommittee), and Mr. James Woodruff (a representative of Tampa Electric Company) engaged in the following colloquy:

> MR. WOODRUFF: . . . Mr. Allen's question and . . . have been conferring back here concerning the need for electricity, and I think really what he was aiming at . . . would be, is not the need that he was questioning, but the need in the area. Of course Gulf Power is part of the Southern Covenant, [sic] and of course, all of the electric generating facilities within the state are inter-tied, as you know.
>
> REP. SPICOLA: Well, that's one of our points, Mr. Woodruff, is we're not going to let Georgia build their plants down here and pollute us and send the power up to Georgia.
>
> MR. WOODRUFF: Well--
>
> REP. SPICOLA: I think we ought to have a need in the area.
>
> MR. WOODRUFF: Well let me--let me switch the situation to the peninsula of Florida that doesn't involve the Southern Covenant, [sic] but they involve Tampa Electric Company and the City of Maitland, and other investor-owned utilities and companies--. . . Part of our building plan is to inter-space where one year we will build a plant and the next year maybe Florida Power Corporation will build a plant. Florida Power is here . . . In some intermediate--the City of Lakeland may build a plant. But these are three systems on the west coast of Florida that are inter-tied. And what it means is that each company doesn't have to have a particular amount of steady reserve over and an over-investment of capital, we can call one another, and where the City of Lakeland or Tampa Electric Company may not be able to justify the particular need in our area, that's just in the area served, we can justify it in the areas served by Florida Power Corporation, Lakeland, and . . . on an interim building schedule. Just a part of overall planning.
>
> CHAIR: I know, I know what you're talking about, Cliff, involved in building, but what you do is you build a plant that's big enough to meet your future needs. If you've got some excess capacity which you sell off to somebody that needs some--
>
> MR. WOODRUFF: Yes, that's correct.
>
> CHAIR: But you anticipate that within about ten years your needs are going to outstrip this capacity, and so the other people you've been selling to are going to build in the interim, and they'll have excess capacity that they'll sell back to you. Well, that's just simply need in the area, it's just at what point in time.

MR. WOODRUFF: Okay, if you feel that's broad enough to cover the entire area, as opposed to one particular company and service area--

CHAIR: This thing is so broad that I don't see how in the world even Gulf Power could say, look, we want to build this capacity plant, we're going to serve some part of Georgia, because I think sooner or later, Florida and Georgia are going to have to be concerned about their mutual welfare and we're not going to say you can't build one. That's going to be an area, and there's going to be a need in the area. I don't see how in the world this limits anybody to anything.

March 27, 1973 Transcript, Part I at 14-16 (emphasis supplied). Later, in the subcommittee hearing, when asked again about whether there should be a geographical limitation on the area in which to determine need, one of the subcommittee members stated "[t]he Southeastern United States is an area." March 27, 1973 Transcript, Part II at 5-6. As the above-cited legislative history demonstrates, in 1973, the Legislature considered "need" to include power generated in Florida for consumption in Georgia. Clearly, the Legislature that enacted the Siting Act had a fairly expansive view of the concept of "need." The Joint Petitioners wholeheartedly agree with Representative Andrews -- the concept of need in Section 403.519, F.S., does not "limit anybody to anything."

V. BOTH THE U.S. CONSTITUTION AND THE ENERGY POLICY ACT OF 1992 PRECLUDE THE RESTRICTIVE INTERPRETATION OF SECTION 403.519 ADVANCED BY THE OPPONENTS.

While the Commission cannot decide constitutional issues, it not only can, but should, consider federal statutory and constitutional limitations upon its decisions and the interpretations of its own laws. See Smith v. Willis, 415 So. 2d 1331, 1336 (Fla. 1st DCA 1982). Where there are two possible interpretations of a statute, but one is consistent with the Constitution while the other is not, the Commission must construe the statute in such a manner as to support its constitutionality. See Corn v. State, 332 So. 2d 4 (Fla. 1976). Here, both the Commerce Clause of the United States Constitution and the Energy Policy Act of 1992 are inconsistent with, and therefore preclude, the interpretation of Section 403.519, F.S., advanced by the Opponents, while

the interpretation advanced by the Joint Petitioners is consistent with both. Accordingly, the Commission must reject the Opponents' restrictive interpretation of Section 403.519, F.S., in favor of the interpretation offered by the Joint Petitioners. Joint Petitioners are not arguing that the Commission is preempted from doing its job -- i.e., from deciding the merits of the requested determination of need in accord with the Commission's statutes and rules. Rather, the Commission is preempted from adopting an interpretation of statutes in a way that conflicts with the Constitution and with the express goals of Congress.

A. Prohibiting Duke New Smyrna From Applying for a Determination of Need Would Violate the Commerce Clause of the United States Constitution.

The Joint Petitioners' Memoranda of Law in Opposition to the Motions to Dismiss describe the abundant Commerce Clause jurisprudence that prohibits the State from requiring Duke New Smyrna to enter into a binding contract with an existing retail utility before obtaining a determination of need. The Opponents have not seriously challenged the merits of this constitutional doctrine, choosing instead to try to divert the Commission's attention from the important constitutional flaws in the Opponents' interpretation of Florida law. Contrary to the contentions of the Opponents, the dormant Commerce Clause doctrine is not being raised as a "scare tactic", see TR 262, in an attempt to have the Commission improperly perform a judicial function by deciding the constitutionality of a statute or of its own acts. See TR 306-07. The Commission must consider the federal constitutional and statutory background in the course of interpreting the Commission's authority under state law. The Opponents themselves argue that the "fundamental question" in this case is "one of statutory authority." TR 21. The Opponents' problem, however, is that the Commission is applying the relevant Florida statutes for the first time to an application to build a merchant power plant. The Joint Petitioners raise the preemption and constitutional issues to inform the Commission of the federal constraints on the application

of Florida law in this context--constraints which must be taken into account by the Commission in determining its statutory authority over determination of need applications for power plants intended to serve the competitive wholesale market for electricity.

It is a longstanding rule of statutory construction "that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." Hooper v. California, 155 U.S. 648, 647 (1895). The Florida Supreme Court has applied this rule in emphasizing that "if fairly possible a statute should be construed to avoid not only an unconstitutional interpretation, but also one which even casts grave doubts upon the statute's validity." State ex rel. Shevin v. Metz Construction Co., 285 So.2d 598, 600 (Fla. 1973). The Joint Petitioners raise the federal statutory and constitutional law doctrines because this body of law precludes the Commission from adopting the protectionist interpretation of Florida law advanced by the Opponents. The Joint Petitioners also emphasize that these federal law problems can be avoided entirely by interpreting Florida law to permit the Joint Petitioners to apply directly for a determination of need. While the Commission does not have the authority to rule on the constitutionality of state statutes, the Commission has an absolute obligation to consider the entire legal framework when interpreting its statutory authority.

Although the Commerce Clause and federal statutory law are the backdrop for the Commission's interpretation of Florida law, Florida law itself does not embody the exclusionary effects and protectionist principles advanced by the Opponents. Federal law does not prevent the Commission from carrying out its responsibilities because, under an appropriate interpretation of Florida law, as set forth in Section III. B. above, Duke New Smyrna is permitted to file a determination of need petition independently, without first contracting with a Florida utility. The federal issues will arise only if the Opponents prevail on their very restrictive--and unsupportable--interpretation of Florida law.

The Opponents have made little serious effort to refute the many cases cited in the Joint Petitioners' Memoranda of Law in Opposition to the Motions to Dismiss--all of which indicate that the Opponents' interpretation of Florida law is unconstitutional. The constitutional flaw in the Opponents' case is evident in the way the Opponents themselves characterized Florida law at the hearing on the motions to dismiss. At that hearing, Commissioner Clark asked "a bottom line question" that summarized the Opponents' position: "It's your view that there will be no wholesale competition in Florida provided by entities other than utilities who provide retail service or entities which have firm contracts with those retail providers from plants built in Florida." TR 49. Counsel for FPC confirmed that this was the Opponents' position: "Plants built in Florida, that is correct." TR 49.

As this exchange indicates, the Opponents argue that Duke New Smyrna (or any other outside company) cannot even ask permission to enter the market for wholesale energy in Florida unless Duke New Smyrna first contracts with one of a very small group of companies that the Opponents contend have been given an absolute monopoly on access to this market. Under the Opponents' theory, Florida law would prohibit any other company from anywhere in the country (or in any other country) from applying to do business here unless the applicant first entices one of Florida's favored companies to join its application. It is very clear from more than seventy years of United States Supreme Court precedents that this interpretation of Florida law would violate the federal constitution. The central principle embodied in these cases is neither subtle nor ambiguous: "where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); see also Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992) ("When a state statute clearly discriminates against interstate commerce, it will be struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism."). In their briefs

and arguments, the Opponents have failed to identify even a single interest unrelated to economic protectionism that requires this Commission to prohibit the Joint Petitioners from even applying for a determination of need; therefore, the Opponents' interpretation is unconstitutional.

The Joint Petitioners' Memoranda of Law in Opposition to the Motions to Dismiss provide the details of dormant Commerce Clause limitations on state action restricting entry into new economic markets within a state. As noted therein, dormant Commerce Clause limits are drawn directly from the United States Constitution and are therefore binding on all states even in the absence of other federal legislation or regulations. Thus, this aspect of the Commerce Clause restricts state action even if Congress had not adopted (in the Energy Policy Act of 1992) a clear policy favoring competition in the wholesale power market.

The Joint Petitioners' Memoranda of Law in Opposition to the Motions to Dismiss describe the two different categories of dormant Commerce Clause limitations. One category prohibits discrimination against interstate commerce, and the other prohibits unreasonable burdens on interstate commerce. These categories are merely two different manifestations of the single unifying principle that states are prohibited from enacting laws that distort the national market for any economic goods, including electrical power, that has the effect of favoring certain companies and disfavoring others. See Lewis v. B.T. Investment Managers, Inc., 447 U.S. 27, 42 (1980) (holding unconstitutional Florida banking regulation statute because it "discriminate[d] among affected business entities according to the extent of their contacts with the local economy"). Regardless whether the state's action is labeled "discrimination" or "burden," the state action is unconstitutional if it attempts to carve out one part of the state economy from the national market and grant exclusive access to that market to a small group of favored participants. That is precisely what the Opponents argue Florida law requires in this case.

The Opponents' interpretation of Florida law violates not only the general principle of free

trade embodied in the dormant Commerce Clause, but also the specific details of both the discrimination and burden-on-commerce analyses. The Opponents' interpretation of state law violates the rules regarding discrimination against commerce because the Opponents' interpretation would give a favored group of local economic interests (i.e., themselves) an absolute veto over any other company that seeks to apply for a determination of need to enter the wholesale market for energy in Florida. Using state regulatory processes to provide a small handful of companies an absolute competitive advantage amounts to simple economic protectionism, to which "'a virtually per se rule of invalidity' has been applied." Wyoming, 502 U.S. at 454-55 (quoting Philadelphia, 437 U.S. at 624).

The Opponents' interpretation of Florida law is equally unconstitutional under a burden-on-commerce analysis. As noted in the Joint Petitioners' Memoranda of Law in Opposition to the Motions to Dismiss, the dormant Commerce Clause burden analysis is essentially a balancing test, under which the courts assess whether the legitimate state interest in regulating commerce is outweighed by the burden on commerce. In cases such as Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), the United States Supreme Court has identified several factors that go into the balancing assessment. These factors include: Is the statute evenhanded? Is its effect on interstate commerce substantial? Is there another less burdensome way for the state to enforce the state's legitimate (i.e., nonprotectionist) interests? These factors lead to the ultimate issue: Does the burden on interstate commerce outweigh the local interest?

In this case, the Opponents' exclusionary interpretation of Florida law would fail every single aspect of the burden analysis. First, the Opponents' interpretation of Florida law is not evenhanded, because the Opponents' companies are given favored treatment (i.e., absolute veto power over potential competitors) in the determination of need process regarding the wholesale power market. Second, the burden on interstate commerce imposed by the Opponents'

interpretation is substantial, because it completely forecloses entry into the market for wholesale energy in Florida in the absence of a contractual affiliation with a local company. Third, the local interests that are not protectionist in nature (i.e., the state's legitimate interests in preserving the environment, protecting retail ratepayers, and ensuring the reliability of the power grid) can all be enforced without mandating that outside companies must contract with a local firm before applying to do business in the Florida wholesale power market. Therefore, the burden on commerce imposed by the Opponents' interpretation of Florida law would far outweigh the local interest in barring the Joint Petitioners from applying directly for a determination of need. Like the regulation found unconstitutional in Buck v. Kuykendall, the Opponents' interpretation is unconstitutional because "[i]ts effect upon [interstate] commerce is not merely to burden, but to obstruct it." Buck v. Kuykendall, 267 U.S. 307, 316 (1925).

Given the overwhelming weight of dormant Commerce Clause jurisprudence, it is impossible to avoid the conclusion that adoption of the Opponents' restrictive and protectionist interpretation of Florida law would violate the United States Constitution. The Opponents implicitly concede this when they fail to muster any serious effort to refute the abundant case law cited in the Joint Petitioners' Memoranda of Law in Opposition to the Motions to Dismiss. Instead of refuting Joint Petitioners' legal arguments, the Opponents have chosen simply to disparage the Commerce Clause claim as a "scare tactic," see TR 262, while simultaneously arguing that the Commission is not competent to consider the federal legal background when interpreting state law. See TR 306-07.

During an entire day-long hearing on the motion to dismiss, the Opponents cited only three cases in opposition to Joint Petitioners' Commerce Clause arguments. See TR 278-79, 281-82. One of those cases, Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Corp., 461 U.S. 190 (1983), involved preemption, not dormant Commerce Clause

issues, and is therefore wholly irrelevant to determining the constitutional limits on the application of Florida law. The second case, Arkansas Electrical Cooperative Corp. v. Arkansas Public Service Comm'n, 461 U.S. 375 (1983), is also irrelevant to the present case because in that case the United States Supreme Court itself noted that "the most serious concern identified in [Pike v.] Bruce Church--economic protectionism--is not implicated here." Arkansas Electrical Cooperative, 461 U.S. at 394. In contrast to that case, which involved the regulation of rates among utilities "all of whom are located within the state," id. at 394, this case involves an attempt to give existing local market participants the authority to dictate whether and on what terms other competitors can enter the wholesale power market. This is the essence of economic protectionism.

The Opponents also misconstrue the third case, General Motors Corp. v. Tracy, 117 S. Ct. 811 (1997). The Opponents cite Tracy to support their argument that the exclusion of the Joint Petitioners from the wholesale market for electricity "is a fair discrimination that does not violate the dormant commerce clause." TR 281. Tracy does not support this claim. Tracy involved a very different kind of state action than is at issue here. Tracy involved a state statute that imposed a 5 percent sale and use tax on all natural gas purchases, but exempted from the tax so-called "local distribution companies" ("LDCs"). These LDCs were heavily regulated local gas companies whose sales of natural gas were "bundled" with legally-mandated consumer services and protections (such as the requirement to sell natural gas to all purchasers within each company's service area). See id., at 816, 823. Although the tax exemption provided some financial advantages to these companies, it did not affect the ability of sellers of "unbundled" natural gas to enter the separate market for sales to large purchasers of natural gas "who were able to buy gas on the open market and were willing to take it free of state-created obligations to the buyer." Id. at 821.

Nothing in the Supreme Court's opinion in Tracy suggests that the Commerce Clause would permit the state to authorize the local "bundled" gas sellers to bar other companies from entering the market for "unbundled" gas sales. As the Supreme Court explained in a more recent decision, in Tracy "the Court premised its holding that the statute at issue was not facially discriminatory on the view that sellers of 'bundled' and 'unbundled' natural gas were principally competing in different markets." Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine, 117 S.Ct. 1590, 1602 n.16 (1997). The Supreme Court explained in Tracy that states may impose different (and sometimes more favorable) regulations on entities serving different markets because eliminating such regulations "would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." Tracy, 117 S.Ct. at 824. In contrast to Tracy, in this case the Opponents seek total control over the market for wholesale electricity. The Opponents are thus seeking to dominate the very market in which the Joint Petitioners have chosen to compete. This is precisely the sort of "preferential advantage" that the Court has consistently held violates the dormant Commerce Clause.

One possible reason for the Opponents' weak response to Joint Petitioners' dormant Commerce Clause arguments is that the Opponents seem to confuse the dormant Commerce Clause issue with the issue of federal statutory interpretation and preemption. The Opponents argue that the federal energy statutes grant the states total authority to regulate electrical generation. TR 275. They seem to believe that if the Commission accepts this interpretation of federal law, this also determines the constitutionality of protectionist regulations involving companies generating electricity for sale in the wholesale market. The Opponents' assumptions are flawed in two fundamental ways. First, as the following section of this brief explains, the Opponents' interpretation of federal energy policy ignores the clear Congressional preference for

open competition in the wholesale energy market, and the equally strong Congressional opposition to state's interfering with the competitive wholesale market. Second, even if the Opponents were correct that Congress did not specifically renounce state interference with competition in the wholesale market for energy, this does not in any way diminish the independent limitations imposed on the states by the constitutional provisions governing interstate commerce.

It is true that the Commerce Clause grants Congress the power to authorize states to regulate interstate commerce in situations where such regulations would otherwise violate the dormant Commerce Clause. But in light of longstanding constitutional policy favoring unfettered interstate commerce, the Supreme Court has imposed rigid rules that "Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve such a violation of the Commerce Clause." Wyoming, 502 U.S. at 458; see also Maine v. Taylor, 477 U.S. 131, 139 (1986). The Opponents cannot find in the Federal Power Act--much less the Energy Policy Act--the necessary unambiguous statement of congressional intent to permit state interference with interstate commerce in the wholesale energy market. Indeed, in recent years the Supreme Court has on two separate occasions specifically rejected the claim that Section 201(b) of the Federal Power Act (16 U.S.C. Sec. 824(b)(1)), which reserves to the states the power to regulate retail electrical rates, immunizes states from dormant Commerce Clause scrutiny. See Wyoming, 502 U.S. at 455-56; New England Power Co. v. New Hampshire, 455 U.S. 331, 341 (1982). As recently as 1992 the Court noted that "we have already examined [Section 201 (b) of the Federal Power Act] . . . and found nothing in the statute or the legislative history 'evinc[ing] a congressional intent 'to alter the limits of state power otherwise imposed by the Commerce Clause.'" Wyoming, 502 U.S. at 458; (quoting New England Power Co., 455 U.S. at 341).

These recent Supreme Court decisions are directly relevant to this case. In short, the dormant Commerce Clause prevents Florida (and every other state) from regulating the market

for electrical power in a protectionist manner, and nothing in any federal statute overrides this critical constitutional protection of the open wholesale market for electricity. The dormant Commerce Clause does not prevent the Commission from protecting legitimate local interests that are not protectionist in nature, but the economic protectionism inherent in the Opponents' interpretation of Florida law cannot withstand even cursory constitutional scrutiny.

B. Federal Law Preempts the State From Requiring Duke New Smyrna to Obtain a Contract With Retail Electric Utilities in Order to Apply for a Determination of Need.

The Energy Policy Act of 1992 preempts any application of state law that would allow vertically integrated utilities to prevent competition in the wholesale electric power market. Yet, it is precisely such an interpretation that the Opponents urge on the Commission.

Preemption law is clear; state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is preempted. Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm., 461 U.S. 190, 204 (1983). As the Joint Petitioners emphasized in their Memoranda of Law in Opposition to the Motions to Dismiss, a major objective of the Energy Policy Act was to prevent vertically integrated utilities from preventing the development of a robust competitive wholesale power market. The provisions in that Act authorizing FERC to order transmission wheeling were passed to address Congress's concern that vertically integrated utilities would use their power over transmission and retail markets to block competition from non-retail utility generators in the wholesale market. The House Report states:

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

H.R. Rep. No. 102-474(I) at 139-40 (1992); reprinted in 1992 U.S.C.C.A.N. 1954, 2962-63.

At oral argument on the Opponents' motions to dismiss, the Opponents explicitly conceded that under their proposed interpretation of state law, retail utilities in Florida have the power to keep others out of the wholesale market. TR 291-92. The Opponents contend first that no significant power plant can be sited in Florida without first contracting to sell firm power to retail utilities. TR 266. Second, the Opponents suggest that this Commission does not have the power to order them to enter into any such contracts. TR 285-86. Hence, the Opponents see state law as giving the vertically integrated utilities the power to keep others out of the wholesale market, power that the Energy Policy Act explicitly aimed to eliminate.

The Opponents attempt to escape the ineluctable conclusion that federal law prohibits states from allowing vertically integrated utilities to play gatekeeper to the wholesale generation market by contending that Congress only prevented vertically integrated utilities from using their monopoly power over transmission but not their monopoly power over distribution to bar access to that market. This contention implicitly attributes to Congress a lack of rationality and is wrong as a matter of law. Congress would have no reason to go to great pains to structure the Energy Policy Act to eliminate vertically integrated utilities' abilities to use power over their transmission grids to block entry into the wholesale market while allowing the same utilities to block entry by utilizing a perverse reading of state laws governing the need for power plants. Whether the existing retail utilities block access by refusing transmission or by refusing to enter into contracts that they claim are prerequisites for building a power plant, the result is the same; the integrated utilities are shielded from the very competition in the wholesale power market that Congress meant to foster.

The Opponents claim nonetheless that this illogical outcome is warranted because the Federal Power Act of 1935 granted states and not the federal government power to regulate power generation. TR 275. This claim flies in the face of Supreme Court precedents, which make clear

that the line Congress drew was between the wholesale and retail markets. See Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354, 378-79 (1988); Nantahala Power & Light v. Thornburg, 476 U.S. 953, 966 (1986); Florida Power Commission v. So. Cal. Edison, 376 U.S. 205, 215-16 (1964). The history behind this provision shows that Congress only recognized states' power to regulate generation insofar as it affects the environment or burdens retail customers, and does not give the states the authority to regulate the economics of plants engaged in purely wholesale operations. The Federal Power Act was adopted in response to the Supreme Court's declaration, in Public Utilities Commission of Rhode Island v. Attleboro Steam and Electric Co., 273 U.S. 83 (1927), that the Commerce Clause prohibited states from regulating wholesale rates for power. This created a regulatory gap because interstate sales of electricity remained unregulated. Congress could have responded by allowing states to regulate the wholesale rates of power plants in their jurisdictions, but instead it chose to grant that power to the Federal Power Commission, the predecessor of the FERC. Compare Group Life and Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 217-20 & n. 18 (1979) (explaining that by passing the McCarran-Ferguson Act, Congress gave the states the authority to regulate insurance free from constraints imposed by the dormant Commerce Clause and federal statutes regulating business generally), with Arkansas Electrical Cooperative, 461 U.S. at 378-79 (1983) (noting that in enacting the Federal Power Act, "Congress undertook to establish federal regulation over most of the wholesale transactions of electric and gas utilities engaged in interstate commerce"). Hence, the history of the Federal Power Act demonstrates that Congress affirmatively chose not to grant states the authority to intervene in matters that affect only the wholesale market.

In the Federal Power Act, Congress gave neither the states nor the Federal Power Commission (now the FERC) the authority to license privately-owned generation facilities built solely for the purpose of supplying wholesale power. In the Energy Policy Act, however,

Congress unambiguously expressed its intent that rather than relying on state or federal regulation of the economics of wholesale power, it preferred to rely on a competitive market free from the influence of the monopoly power of vertically integrated utilities.

In their argument, the Opponents rely on Monongahela Power Company, 40 FERC ¶61,256 (1987) for the proposition that the Federal Power Act preserved the states' authority "over the capacity planning, determination of power needs, plant siting, licensing, construction, and the operations of coal-fired plants." TR 276. But the facts of that case clarify that this proposition applies only with respect to environmental issues and economic issues directly affecting retail customers. The issue in Monongahela was whether FERC had to prepare an Environmental Impact Statement ("EIS") when it issued a wholesale rate order to a plant owned by, and in the rate base of, a state-regulated retail utility. FERC concluded that it did not have to prepare an EIS because regulatory authority over the environmental effects of building and operating fossil fuel fired power plants lay with the states. The Joint Petitioners do not take issue with this holding as far as it goes. The Energy Policy Act explicitly reserves to states continued jurisdiction to regulate the environmental impacts of merchant plants, and it is because of this continuing jurisdiction that the Joint Petitioners are seeking certification under the Siting Act. See 15 U.S.C. §79 (1998). The Joint Petitioners take issue, however, with the Opponents' attempts to stretch this holding to assert that states have jurisdiction over purely wholesale aspects of the generation market. An isolated quotation from a FERC decision disavowing FERC jurisdiction over environmental effects stemming from a plant in a retail utility's rate base is a thin reed on which to hang state authority to frustrate the will of Congress with respect to the wholesale generation market.

The Opponents attempt to shore up their vulnerable position regarding the limits the Energy Policy Act places on allowable interpretations of Section 403.519, F.S., by asserting that

the need determination included in that section is part of the environmental assessment of the Project, which the Energy Policy Act explicitly left within states' authority. The Opponents contend that one cannot assess environmental impact without balancing it against need, and that is the reason for placing the need determination in the environmental statutes. See TR 276-78, 308-10. But the structure of the Siting Act itself belies the Opponents' contention.

The determination of need is not part of the balancing of environmental impact; it is a precondition on Duke New Smyrna being able to present evidence about the environmental impact of its project to the Siting Board. See Fla. Stat. § 403.508(3) (stating that a determination of need by the Commission pursuant to Section 403.519, F.S., "shall be a condition precedent to the conduct of the certification hearing.") A simple hypothetical will illustrate why the need determination cannot be considered part of the environmental assessment. Suppose that all parties agreed that there was no need for a merchant plant, or for that matter, any power plant under the criteria by which the Commission has determined need for generation plants proposed for inclusion in rate base by a retail utility. But suppose as well that all agree that if the proposed plant were built and operated, then it would replace other generation units that currently belch forth smoke and pollute rivers. The overall environmental impact of such a plant might be positive and might justify the plant being built. But by the Opponents' arguments, the Siting Board would never get to consider these environmental benefits because the Opponents would read Section 403.519, F.S., to preclude the Commission from issuing the determination of need that would allow the proponent of the plant to proceed to the hearing before the Siting Board. This is patently inconsistent with the fundamental purposes of the Siting Act and clearly demonstrates that the determination of need cannot be part of the environmental regulatory authority that the Energy Policy Act left to the states.

Instead, the determination of need protects against (i) retail ratepayers bearing the cost of

unnecessary plants being put in the rate base, (ii) vertically integrated monopolies building plants that will increase their power to exploit their monopolies over transmission and retail distribution of power, and (iii) the construction of plants that will threaten the integrity and reliability of the power grid in Florida. The last of these goals is relevant to the Commission's review of the Project, while the first two are not. But none of them justifies categorically undermining the congressionally encouraged and envisioned development of a robust competitive wholesale power market by reading Section 403.519, F.S., to allow the vertically integrated utilities to keep merchant plants out of Florida.

VI. GRANTING THE REQUESTED DETERMINATION OF NEED WOULD NOT CONFER SPECIAL STATUS ON DUKE NEW SMYRNA RELATIVE TO QUALIFYING FACILITIES.

Issue 21 asks whether allowing Duke New Smyrna to demonstrate need for the Project based on Peninsular Florida needs, while not requiring Duke New Smyrna to have a contract to sell the Project's merchant capacity to a retail-serving utility, would afford special status to Duke New Smyrna as compared to QFs and other non-utility generators.

This issue is irrelevant because QFs and FERC-regulated public utilities are different under both federal and state law. QFs already enjoy special status with respect to having the legal ability to force retail-serving utilities to purchase their output, a legal right that neither Duke New Smyrna nor any other non-QF merchant utility would have. QF's also have other rights to obtain certain services from utilities that neither Duke New Smyrna nor any other merchant utility would have. Dolan, TR 1628.

Moreover, it is not at all clear that the suggested special status (i.e., that a FERC-regulated merchant utility without contracts for all of its capacity could get a need determination where a QF without a contract could not) would even exist at all. The Commission has only ruled that a QF seeking to serve a specific utility's identified need, and to bind that utility's ratepayers to

pay for the plant pursuant to a long-term contract, lacks standing to pursue its need determination without a contract. See Nassau II, 641 So. 2d at 398-99. Faced with a reprise of its Florida Crushed Stone decision, (i.e., a QF seeking a need determination without a contract and without seeking to bind any utility's ratepayers to such a contract), it seems likely that the Commission would follow its earlier precedent and allow such a QF to proceed. See Order No. 11611.

VII. GRANTING THE REQUESTED DETERMINATION OF NEED WOULD NOT VIOLATE THE COMMISSION'S CHARGE TO AVOID UNECONOMIC DUPLICATION OF FACILITIES.

Issue 18 asks whether, if the Commission granted the requested need determination for the Project when (by assumption) other utilities in Peninsular Florida had plans in place to meet reliability criteria, the Commission would be meeting its responsibility to avoid uneconomic duplication of facilities. As to the legal aspects of this issue, the Commission should note that there are several criteria to be considered in determining need for a proposed power plant, including the need for system reliability and integrity, the need for adequate electricity at a reasonable cost, whether the proposed power plant is the most cost-effective alternative available, and available conservation measures. See Fla. Stat. §403.519; Steinmeier, TR 1549.

If the Commission determines, pursuant to those criteria, that a proposed plant is the most cost-effective alternative, or that the proposed plant is needed to provide adequate electricity at a reasonable cost, or both, it will have effectively also determined that such proposed plant is not uneconomically duplicative. In this case, the determination is easy. Whether uneconomic duplication exists must be measured from the perspective of ratepayers. Here, Duke New Smyrna is accepting all investment risk, and ratepayers will not pay for the output unless it is economic. In such a situation, there is no "uneconomic duplication."

PART TWO: FACT ISSUES

The Commission should grant the requested determination of need for the New Smyrna Beach Power Project because the Project will:

1. improve system reliability and integrity for both the UCNSB and for Peninsular Florida,

2. provide adequate electricity at reasonable cost, both to the UCNSB and to other Peninsular Florida utilities, and

3. be the most cost-effective alternative available to the UCNSB and to other Peninsular Florida utilities to serve their retail customers.

Moreover, there are no conservation measures available to the UCNSB to mitigate the need for the Project and, indeed, the Project itself will promote the goals and purposes of FEECA. Finally, other matters within the Commission's jurisdiction, including (a) mitigating the risk to captive electric ratepayers, (b) providing additional economic benefits to captive electric ratepayers by reducing market power in the generation of electricity, (c) enhancing efficiency in the production of electricity and in the use of natural gas, (d) reducing consumption of expensive primary fuels, particularly petroleum fuels, and (e) enhancing environmental quality (which is, at a minimum, consistent with the Commission's charge to protect and promote the public interest under Section 366.01, F.S.), also support granting the determination of need for the Project.

I. THE JOINT PETITIONERS HAVE PROVIDED SUFFICIENT INFORMATION TO ENABLE THE COMMISSION TO ASSESS THE NEED FOR THE PROJECT.

The Joint Petitioners have provided extensive information regarding the Project. Mr. Michael C. Green, P.E., Vice President and General Manager for Duke Energy Power Services, LLC ("DEPS"), described Duke New Smyrna, the Project, the roles of Duke New Smyrna, DEPS (the Project developer), Duke/Fluor Daniel (the anticipated engineering, procurement, and construction contractor and the anticipated operations and management contractor for the Project), and Duke New Smyrna's responsibilities under the Participation Agreement. Green, TR 582-83,

EXH 17. Mr. Ronald L. Vaden, Utilities Director for the UCNSB, described the UCNSB, its customer base and power supply needs, the UCNSB's contributions to the Project, and the UCNSB's responsibilities and rights under the Participation Agreement. Vaden, TR 386-88, EXH 7. Dr. Dale Nesbitt described, extensively, the need for the Project and the wholesale market in which it will operate. See, e.g., Nesbitt, TR 704-14, EXHs 18-19. Mr. Michel Armand, P.E., described the additional transmission facilities that the Joint Petitioners believe are satisfactory to accommodate delivery of the Project's output to other utilities in Florida. Armand, TR 1092, EXH 24. (The actual additions to transmission facilities will depend on Duke New Smyrna's application for transmission service from FPL and FPC, and possible proceedings with respect to such applications before the FERC.) Mr. Mark Locascio, P.E., described the mechanical systems and other technical aspects and specifications of the Project. Locascio, TR 1049-51, EXH 23. The testimony of Mr. Kennie Sanford, P.E., was entered into the record by stipulation of the parties without appearance or cross-examination. TR 1028. Mr. Sanford's testimony describes the electrical one-line diagram and electrical systems of the Project. Sanford, TR 1032-36; EXH 22. Mr. Larry A. Wall, Vice President, Southeast Region for DEPS, described the fuel supply arrangements for the Project. Wall, TR 1110-11; EXH 25. Mr. Jeffrey L. Meling, P.E., described the environmental characteristics and anticipated impacts of the Project, as well as the Project's permitting schedule and the likelihood of the Project obtaining all required environmental permits. Meling, TR 1130-36; EXH 26.

The Joint Petitioners have provided appropriate assurances that the Project has adequate fuel supply arrangements. Mr. Wall described the gas supply contract between DEPS and the Project's fuel supplier, Citrus Trading Corp., and testified that the Project has a guaranteed firm delivered supply of natural gas to the Project. Wall, TR 1111. Mr. Wall also testified that it would be imprudent and uneconomical to install on-site backup fuel because of the remoteness of

which the Commission recently granted a determination of need. L'Engle, TR 544.

Just to maintain razor-thin reserve margins, Peninsular Florida needs more than 8,000 MW over the next ten years. Green, TR 678; EXH 3. In some years, the reserves are projected to dip below 15 percent. EXH 7. The Project will operate primarily in the Florida market, and Duke New Smyrna anticipates that the vast majority of its wholesale power sales will be made to retail-serving utilities in Florida. Green, TR 672; Nesbitt, TR 778. Although the Opponents suggested that Duke New Smyrna would sell the Project's output outside of Florida, the Opponents produced no evidence whatsoever that the Project would sell any amount of its output outside Florida; the best that the Opponents could do was to get Mr. Green to state that under some circumstances, Duke New Smyrna might behave rationally and sell power outside Florida if there were a sound business reason for doing so. Green, TR 626-28. Even then, Mr. Green testified without contradiction that Duke New Smyrna is committed to Florida and to being a contributor to the State's goal of meeting its future electrical supply needs. Green, TR 672. It follows that under virtually all reasonably expected circumstances and scenarios, the Project's output will be made available to serve Florida customers. Thus, even though individual utilities may not be able to count the Project's capacity toward their reserve margins unless and until they execute a capacity contract with Duke New Smyrna, the Commission may, quite realistically, consider the additional reliability that the Project will provide in evaluating Peninsular Florida's reliability. In the simplest terms, the capacity of the Project will increase the percentage reserve margin for Peninsular Florida, considered on an aggregate basis, by about 1.2 percent, e.g., beginning in 2001/2002 where winter reserves will increase from 17.3 percent to 18.7 with load management. EXH 7. The Commission has previously recognized that uncommitted capacity will improve reliability in Florida. In Florida Crushed Stone, the Commission recognized that, while the reliability contribution was not necessarily quantifiable, the addition of a power plant would

improve reliability in Florida. FCS, Order No. 11611 at 3.

With respect to the need for system reliability and integrity, the Opponents' response appears to be that they, and the other retail-serving utilities in Florida "have it covered," i.e., that they have in place plans for sufficient capacity. See Rib, TR 1182-83. However, it is clear that these reserve margins are razor-thin and thus the Commission should reject this argument. Mr. L'Engle testified that they are thin, and that he would be uncomfortable if the State went any lower. L'Engle, TR 557. It is fair to say that additional capacity is something you do not know you need until you need it, and then you are really glad to have it. Mr. Vaden observed, correctly, that the Peninsular Florida utilities thought that they "had it covered" in December of 1989, but of course, they did not. Vaden, TR 416, 423, 511. Mr. Green correctly observed that the State experienced very tight supply conditions this past summer, (Vaden, TR 483; Green, 628) with the interruptions of residential load management customers so severe that more than 50,000 discontinued or reduced their participation in FPC's program. EXH 42.

Indeed, it would be ironic for FPC to assert, or for the Commission to agree, that reserve margins hovering around 15 percent were adequate. In 1984, when FPC brought its Crystal River 5 coal-fired power plant ("CR5") into service, it placed 662 MW of less efficient oil-fired and gas-fired steam capacity into extended cold storage. When the Florida Industrial Power Users Group intervened in FPC's rate case to challenge the inclusion of the full amount of CR5 in rate base, contending that FPC's reserves were excessive, the Commission found that "FPC's projected reserve margin for the 1984/85 winter peak of 27.7% is not especially high considering it occurs immediately after the placement of the large unit in service." In Re: Petition of Florida Power Corporation for Authority to Increase its Rates and Charges, 84 FPSC 10:112, 118 (Order No. 13771). The Joint Petitioners respectfully assert that if a reserve margin of 27.7%, nearly two times currently projected winter peak reserves, can be found to be "not especially high" when a

utility wants its ratepayers to pay for a new unit, reserves hovering at razor-thin lows cannot be said to "have the situation covered" when that argument is advanced to prevent a power plant from being constructed without ratepayer obligation or risk.

III. NEED FOR ADEQUATE ELECTRICITY AT A REASONABLE COST.

Both the UCNSB and Peninsular Florida need additional electricity at a reasonable cost, and the New Smyrna Beach Power Project will meet that need, at least in part.[18]

Like other commodities, the price of electricity in the competitive wholesale market is subject to the laws of supply and demand. A fundamental tenet of economic theory is that prices fall as supply increases. Nesbitt, TR 724, 726, 762, 763. Dr. Nesbitt explained why practical considerations assure that this economic truth applies to the effect of the Project: "Merchant producers do not have the luxury of being able to impose their costs on downstream customers, and their entry therefore necessarily depresses market prices." Nesbitt, TR 727. This assures that a portion of the cost advantage that the new, efficient unit will have over older units will be passed through to customers. This also illustrates that with a merchant plant such as the Project, there is no possibility of uneconomic duplication. Utilities will purchase from Duke New Smyrna in the wholesale market only if it is to the economic advantage of their customers to do so. If they do not, the investment is not borne by ratepayers. Ratepayers bear zero financial and operating risk. Nesbitt, TR 721.

Of course, the Project will have this effect only if it is viable over time. To gauge whether the project can compete successfully in the Florida market, Dr. Nesbitt used data concerning the production costs of existing units, projected demands of Florida customers, the

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[18]Indeed, Peninsular Florida needs more efficient, low-cost electricity, like that produced by the Project, than the Project's 514 MW. Nesbitt, TR 704. Thus, it is also fair to say that the Project will contribute to meeting Florida's total need for adequate electricity at reasonable cost.

representative cost structure of the Duke New Smyrna project, and sophisticated modeling techniques to simulate the operation of the Project in the Florida wholesale market. The modeling simulations serve to apply and quantify the concepts of supply and demand noted above. The demand is represented by the total requirements of consumers of electricity over time. The supply consists of all of the generating resources available to serve those requirements. Nesbitt, TR 880. Each individual generating resource has an associated production cost. To the extent possible, utilities employ their cheapest generating units first, and commit others as needed in the ascending order of the hierarchy of production costs. Nesbitt, 746, 922-29. The objective at any point in time is to serve the instantaneous demand of consumers with the least cost mix of available units. By simulating the manner in which units would be dispatched from the "supply stack" of available units to serve Floridians' projected demand over time, Dr. Nesbitt ascertained the "market clearing prices" -- that is, the price points at which there was no unserved load (or, in the terms of economic theory, the point at which the supply curve intersects the demand curve) -- over time. Nesbitt, TR 881. The thrust of Dr. Nesbitt's analysis was to determine the hours during which, based on its own costs of generation, the Project could compete with these "market clearing prices". Nesbitt, TR 711,725. Based on the construction cost, heat rate, and fuel prices associated with the Project, Dr. Nesbitt modeled the extent to which Duke New Smyrna would operate in the Florida market when inserted in the "supply stack" that serves customers in Florida. Dr. Nesbitt's analysis showed that the cost differential between existing inefficient, expensive plants and the highly efficient Duke New Smyrna unit would enable Duke New Smyrna to operate immediately at a capacity factor of 83% -- a level typical of an "intermediate" load unit -- and to advance quickly to capacity factors in the range of 94%, or levels characteristic of the utilities' cheapest base-loaded units. Nesbitt, TR 719. Said differently, the Project will operate at full capacity to lower prices of wholesale electricity 93% of the time during much of its life. The

Opponents introduced absolutely no modeling analyses, nor any other analyses, to contradict Dr. Nesbitt's conclusions.

In view of Florida's large inventory of old, inefficient generating units, that the Project will be competitive so much of the time should not be surprising. Exhibit 19, which contains the "Florida Supply Stack" prepared by Dr. Nesbitt, shows some 20,000 MW of existing capacity that is more expensive to operate than the Project will be. Nesbitt, TR 933. In fact, Dr. Nesbitt's modeling indicates that some 5400 MW of new combined cycle capacity is needed immediately to displace the existing fleet of inefficient, expensive generating units in Florida's inventory and to thereby lower costs of electricity to Florida's ratepayers. Nesbitt, TR 768-69. Further, the Project will be viable even if others build new units. This is because the Project will be competing -- not with other new units -- but with the old, inefficient units that sit at the top of the supply stack. Nesbitt, TR 751.

During cross-examination, Opponents' counsel pointed out that Dr. Nesbitt has described his models as appropriate to the simulation of a fully deregulated environment. Counsel for FPL emphasized that Dr. Nesbitt employed certain assumptions and values in his simulations that differ from actual or "real world" values. However, with each such "criticism," the Opponents succeeded only in reinforcing Dr. Nesbitt's conclusions, by illustrating that he arrived at them through deliberately conservative means.

First, Dr. Nesbitt pointed out that the existing wholesale market has characteristics of a competitive market that make his choice of modeling tools appropriate for this case. Specifically, Dr. Nesbitt testified that utilities operate their units on the principle of "economic dispatch" (i.e., in the order of ascending costs). Nesbitt, TR 746-47, 924-25. In addition, as a result of federal initiatives the wholesale market is characterized by ease of access to transmission service -- another assumption that Dr. Nesbitt built into his model. Nesbitt, TR 922-23.

With respect to the choice of assumptions, Dr. Nesbitt explained that, since his objective was to measure the viability (and therefore the wisdom) of a potential $160 million capital investment, he intentionally used conservative parameters for the purpose. Nesbitt, TR 926. Dr. Nesbitt consciously set the bar high, by requiring the Project to perform in an environment of assumed aggressive competition. Nesbitt, TR 926. To illustrate, Dr. Nesbitt's decision to instruct the model to "build" and simulate all new capacity that the model indicated to be economic, rather than to include in the simulation only the lesser amount of new capacity in the utilities' generation expansion plans, was not a mistake or a flaw; it was the deliberate construction of a rigorous litmus test. Nesbitt, TR 927. Similarly, when Dr. Nesbitt assumed that all purchased power contracts would be priced at market rather than at the terms provided for in the contracts, he deliberately fashioned an environment for the simulations in which it would be relatively more difficult for a new entrant to compete successfully. Nesbitt, TR 929. Substituting the lesser quantity of planned construction and/or using actual contract prices for purchased power in the analyses would only make the project appear more viable.

The same relationship is true of the conservatively low fuel prices Dr. Nesbitt employed (Nesbitt, TR 929-30), and of his assumption that Duke New Smyrna would make only energy sales. Nesbitt, TR 945. Like the others, each of these conservative assumptions had the effect of understating the extent to which the Project would compete successfully and of understating the amount of needed capacity quantified by the model. Nesbitt, TR 931. Had any or all of these assumptions been modified to reflect the less aggressive degree of competition that presently prevails in the "real world," the Project would have appeared more viable. Nesbitt, TR 931.

The Opponents of the Project attempted to resist the evidence that the Project is needed by offering "what ifs" that have no basis in reality. For instance, counsel for FPC based many of his questions on the premise that, after Duke New Smyrna had expended some $160 million

to build a plant near them, the Florida utilities would not be able to prevail on Duke New Smyrna to enter into a contract with them! To the contrary, the evidence in the proceeding is clear that Duke New Smyrna will pursue arrangements of every kind available in the market. Green, TR 672. Further, Dr. Nesbitt testified that contracts having capacity charges are a more lucrative way of operating than depending on energy sales alone. Nesbitt, TR 945. To place any credence in the Opponents' argument, the Commission would have to believe that Duke New Smyrna is leaving money on the table.

Another fallacy favored by the Opponents during the hearing was the notion that power from the Project would be unavailable to Floridians because Duke New Smyrna intends to transmit it out of state. The evidence disproves this contention. Mr. Green testified without contradiction that Duke New Smyrna is committed to Florida and to contributing to the State's meeting its future electrical supply needs. Green, TR 672. In addition to the evidence of Duke New Smyrna's planning and commitment, practical economic reasons assure the power will be sold in Florida. First, Duke New Smyrna is locating the unit in Florida precisely because the Florida market is extremely attractive. Vaden, TR 507; Green, TR 581. Florida has a large inventory of old, inefficient units. In fact, the raw costs of production -- with which the Project must compete -- are much higher in Florida than in the Southeastern Electric Reliability Council. Nesbitt, TR 720-21. Further, unlike other regions, Florida experiences summer and winter peaks, a fact much to the advantage of merchant capacity. Nesbitt, TR 709-10. In addition, Dr. Nesbitt's modeling simulations reveal that the Southern Company, to whom Duke New Smyrna would likely market its power if sold out of state, has strong inter-ties with midwestern utilities that burn cheaper coal. Nesbitt, TR 916-17. Duke New Smyrna would not be a likely candidate for sales to the Southern Company even if that were its plan, for the simple reason that the Southern Company has access to cheaper power. The notion that Duke New Smyrna's power will

be exported to any meaningful degree is simply a red herring.

Opponents also tried to raise the bogeyman of "stranded investment." It's another red herring. First, it is necessary to distinguish between displacement and retirement. Dr. Nesbitt's modeling indicates that the old units will be used less if the Project is approved, but will continue to be needed in peak periods. Nesbitt, TR 750-51, 914. The Project will relieve ratepayers of costs associated with old units, not increase them, because the Project will enable the utilities to avoid the high maintenance and preservation costs associated with old, inefficient units. Nesbitt, TR 936. At the same time, the Project will lower the price of electricity to ratepayers, mitigate the rate base risk that ratepayers would otherwise bear, and create opportunities to expand the economy and GDP. Nesbitt, TR 727, 748, 867.

IV. THE PROJECT IS THE MOST COST-EFFECTIVE ALTERNATIVE TO ENHANCE SYSTEM RELIABILITY AND INTEGRITY AND TO PROVIDE ADEQUATE ELECTRICITY AT REASONABLE COST.

The Project is the most cost-effective alternative available to provide the entitlement capacity and energy to the UCNSB, and the most cost-effective alternative available to provide additional power supplies to the Peninsular Florida wholesale market for the benefit of Florida's electric ratepayers. Nesbitt, TR 715-17.

Pursuant to the Participation Agreement, the Project is expected to save the UCNSB and its customers approximately $3 million per year (out of an estimated total annual cost to UCNSB of $12 million per year) for the first ten years of the Agreement, and approximately $39 million (net present value) over the initial 20-year term of the Agreement. Vaden, TR 396; EXH 7, SCH RLV-6. These savings are estimated based on a comparison of the UCNSB's power supply costs including the Project as compared to UCNSB either continuing to purchase its requirements from TECO and FPC or installing a smaller self-built generating unit. Vaden, TR 394-96; EXH 7.

The Project is also cost-effective as compared to other proposed new generating capacity

in Florida. Vaden, TR 398; EXH 7. Perhaps more significantly, the Project will necessarily be a cost-effective power supply resource to other Peninsular Florida utilities and their retail customers. Vaden, 397-98; Nesbitt, TR 714-15. This is because no utility, and no utility's retail customers, are required to buy the Project's output. Vaden, TR 398; Green, TR 589; Nesbitt, TR 730. Accordingly, other utilities will buy power from the Project only when it is cost-effective to them in comparison to other power supply options, e.g., self-generation or other purchases. Vaden, TR 389; Nesbitt, TR 730. When confronted by Commissioner Deason's suggestion that the Commission and the State might be missing an opportunity to obtain, for Florida electric customers, a cost-effective alternative that would provide cost-effective generation, Mr. Dolan admitted that FPC does not "think that merchant plants are a bad thing for Florida." Rather, he reiterated his concerns regarding the process. Dolan, TR 1456. Mr. Dolan also acknowledged his concern regarding a possible missed opportunity. Dolan, TR 1485; see also Dolan, TR 1635 (where Mr. Dolan acknowledged, in response to a question from Commissioner Garcia, that if there were another efficient competitor in the Florida power market, FPC's ratepayers could save some more money).

V. CONSERVATION MEASURES

The Project is consistent with the purposes and goals of FEECA, of which Section 403.519, F.S., is a part. Section 366.81, F.S., declares that FEECA is "to be liberally construed in order to meet the complex problems of . . . increasing the overall efficiency and cost-effectiveness of electricity and natural gas production and use . . . and conserving expensive resources, particularly petroleum fuels." The Project will serve both these goals, by (1) increasing the overall efficiency and cost-effectiveness of electricity production, Nesbitt, TR 826, EXH 16; Vaden, TR 396; EXH 7; (2) increasing the overall efficiency and cost-effectiveness of natural gas use, Meling, TR 1152; Nesbitt, TR 728; and (3) conserving expensive resources,

including petroleum fuels. Nesbitt, TR 728; EXH 16.[19]

The amount of fuel consumed to generate a unit of electricity is a direct function of the conversion efficiency, or heat rate, of the generating unit. The state-of-the-art Project will have a heat rate of only 6,832 Btus/kWH. Sanford, TR 1032. Relative to the units it will displace, some of which have heat rates higher than 10,000 Btus/kWH, the Project will have a significant advantage in the efficiency with which it converts fuel into electricity. This means that as the Project operates, far less fuel will have to be burned to supply the same amount of electricity. Meling, TR 1152.

These savings are quantified in Dr. Nesbitt's Exhibit 18, Schedule DMN-7. If one assumes that the Project displaces oil units 100% of the time, the fuel savings would total 70,000,000 barrels of oil during only the first ten years of operation. EXH 16, Table 10. Clearly, by conserving fossil fuels, the Project will perform a valuable and needed conservation function.

Other than the conservation measures inherent in the highly efficient Project, there are no additional energy conservation effects and benefits beyond those already being implemented or planned by the UCNSB that could cost-effectively mitigate the need for the Project. Vaden, TR 390, 492. Moreover, there is no record evidence that there are any such cost-effective conservation measures available to any utility in Peninsular Florida to mitigate the need for the

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[19]The Project should not be expected to affect the level of cost-effective conservation. As noted by Dr. Nesbitt, the Project competes with additional power supply resources at the margin, i.e., with the highest cost resource, not with "infra-marginal" resources, such as other new power plants utilizing similar gas-fired combined cycle technology. Nesbitt, TR 845. It follows directly that energy conservation measures also compete, at least for energy savings, with the least efficient, highest-cost marginal units in the supply stack; also, where the "all-in" cost of a new resource is less than the true incremental operating cost of such marginal units, energy conservation measures compete against the inefficient marginal units rather than against the efficient new resource.

Project (or for other gas-fired combined cycle capacity like it). Indeed, the Florida Reliability Coordinating Council's data (EXH 3) show that, even after all planned conservation measures are implemented, there is a need for more than 8,000 MW of additional generating capacity in Florida.

VI. OTHER MATTERS WITHIN THE COMMISSION'S JURISDICTION

The Project will provide additional tangible benefits to Florida and to the State's electric customers in several ways. Consistent with the Commission's charge to protect ratepayers, the Project will (1) limit market power and reduce electricity costs by increasing competition in the wholesale supply of electricity in Peninsular Florida, (2) allocate the capital and investment risk associated with new generating capacity to Duke New Smyrna, rather than to captive ratepayers, (3) consistent with the goals of FEECA, enhance the efficiency of the State's electricity supply system, as well as the efficiency of primary fuel use in Florida, and (4) consistent with the Commission's charge to protect and promote the public interest, improve environmental quality by reducing the total amount of pollution created by electrical generation.

Market Power. Presently, the Peninsular Florida power market is dominated by three large investor-owned utilities. With such market concentration comes market power, and with market power comes the opportunity to maintain prices higher than a truly competitive market would achieve. Nesbitt, TR 720. Small entrants, like Duke New Smyrna with the 514 MW Project, have no market power, (Nesbitt, TR 771) but will have the effect of diluting the concentration that would otherwise exist and of causing market prices to be lower than they would be without such entrants' participation. Nesbitt, TR 723-24. Indeed, the participation and encouragement of merchant power plants is consistent with the fundamental purposes of state utility regulation. Hesse, TR 984. The proposed Project presents the Commission with the opportunity to begin creating a "merchant fringe" to insulate ratepayers from market power and

the price fly-ups that such concentrated power can cause. Nesbitt, TR 723-24. On a related point, the Project will provide market discipline for wholesale power costs in Florida. Nesbitt, TR 945.

Favorable Risk Allocation. Unlike traditional utility-built and rate-based power plants, Duke New Smyrna will bear the entire capital, investment, and operating risk associated with the Project. Green, TR 581. Duke New Smyrna has no opportunity to force any ratepayers to pay the Project's capital cost, nor to pay a reasonable rate of return on its investment, nor to pay for expensive repairs. This will insulate captive electric ratepayers from such risks, whereas the ratepayers would be burdened by them, under traditional scenarios, if the same amount of power were supplied by utility-built, rate-based plants. Green, TR 593, 667; Nesbitt, TR 762; Hesse, TR 969; Vaden, TR 399.

Enhanced Energy Efficiency. Since the Project is a state-of-the-art combined cycle power plant, it will tend to operate much of the time, or stated differently, it will dispatch early in the State's supply stack. Nesbitt, TR 719, 933-34; EXH 19. Thus, the Project's operation will displace generation from older, less efficient units. Accordingly, it will save primary fuel. Dr. Nesbitt's Exhibit 18, Schedule DMN-7, shows that even if the Project only displaced less efficient gas-fired generation, it would save approximately 159,841,174 Mcf of natural gas over the 2002-2012 time period. Nesbitt, TR 728. Moreover, because the Project will use gas more efficiently, it will also utilize gas transportation capacity more efficiently. Meling, TR 1152. Both the improvements in electricity production efficiency and the savings of gas and oil resulting from the Project's operation are consistent with the Commission's charge under FEECA.

Enhanced Environmental Quality. The Project will displace generation from older, dirtier units. Meling, TR 1139, 1144; Nesbitt, TR 728. Since pollution arises from the combustion of fuel, the Project's markedly greater generation efficiency will assure that the Project will benefit

environmental quality in Florida. The Project will also provide environmental benefits because it will utilize reuse water from the UCNSB new wastewater treatment facility. Vaden, TR 387; EXH 16 at 20. While such benefits may be difficult to quantify, they are real and of real benefit to the citizens of the State. Indeed, Intervenor LEAF supports the Project. See LEAF's Post-Hearing Statement, at 1 (stating, "the proposed power plant is a cleaner, more efficient alternative than most existing generation" and that "LEAF support[s] the project to the extent that it increases the use of cleaner renewable energy resources in Florida and provides more environmental benefits than existing supply resources.") Other environmental groups also support the Project. See, e.g., Letter from Kathy Marsh, Conservation Chair, Volusia-Flagler Sierra Club to the Commissioners (Nov. 17, 1998) (on file with the Commission); Letter from Lee Bidgood, Jr., Conservation Chair, Southeast Volusia Audubon Society, Inc. to the Commissioners (Nov. 6, 1998) (on file with the Commission).

PART THREE: POLICY ISSUES

This section of the Joint Petitioners' Brief addresses the policy issues identified in the Prehearing Order. In summary, granting the requested determination of need for the Project is consistent with the public interest and with the best interests of Florida and its electric customer-citizens, consistent with both Florida and federal energy policy, and consistent with the need of the State and its electric customer-citizens for a robust competitive wholesale power supply market. All the Opponents have been able to muster in opposition to the Project is a "parade of hypothetical horribles," i.e., hypothetically possible effects that might result if the Project and numerous others like it were to be constructed in Florida. The Opponents have been unable to point to even one jurisdiction where even one example of their alleged hypothetical effects has even been alleged to occur, and the testimony offered by the Opponents is generally based on un-informed or under-informed opinion. See Rib, TR 1200; Dolan, TR 1499-1501. Even FPL's

witness, William Steinmeier, the former President of the National Association of Regulatory Utility Commissioners ("NARUC"), agrees that wholesale competition is the national energy policy of the United States today. Steinmeier, TR 1576.

I. GRANTING THE DETERMINATION OF NEED FOR THE PROJECT IS CONSISTENT WITH THE PUBLIC INTEREST AND WITH THE BEST INTERESTS OF FLORIDA'S ELECTRIC CUSTOMERS.

Granting the requested need determination for the Project is consistent with the interests of Florida's citizens and electric customers. The Commission is charged broadly to promote the public interest, see Section 366.01, F.S., and to liberally construe Section 403.519, F.S. in order to address the goals of FEECA, including enhancing the efficiency of electricity production and conserving expensive energy resources. Indeed, it can fairly be said that protecting and promoting the public interest, and the best interests of Florida citizens and electric customers, is the polestar by which the Commission is guided.

The Project will promote the public interest and the best interests of Florida electric customers, in several ways:

1. The Project will provide needed capacity (Vaden, TR 411, EXH 7; Nesbitt, TR 696, EXH 18) and needed lower cost electricity (Nesbitt, TR 705-06) at no risk to Florida electric customers. Nesbitt, TR 721; Hesse, TR 978, 980-81; Green, TR 581; Vaden, TR 399.
2. The Project's operation and presence in the wholesale market will reduce wholesale power costs and thus retail customers' rates and will also reduce market power, thus holding down end-use customers' electricity costs. Nesbitt, TR 723-24, 727; Hesse, TR 980.
3. The Project will improve the overall efficiency of electricity production and natural gas use and will also conserve expensive energy resources, including petroleum

fuels, both specific goals of FEECA. Nesbitt, TR 728, 1152; EXH 16.

4. The Project will improve Florida's overall environmental quality by reducing the amounts of pollution created by electricity generation. Meling, TR 1139, EXH 26; Nesbitt, TR 728; Hesse, TR 980-81.

Perhaps most important of all, and most consistent with the public interest, the Project will provide the above benefits without financial or operating risk to ratepayers. No captive utility ratepayers are subject to being required to pay for the capital investment of the Project. Nesbitt, TR 721; Green, TR 399; Hesse, TR 978, 980-81. Utility customers will only pay for the electricity generated by the Project that they actually use, and that will be only when the Project offers a better deal than alternative resources. Nesbitt, TR 730; Green TR 656; Hesse, TR 980. Even FPC's witness, Mr. Rib, admitted that FPC would potentially buy power form the Project, if it were built, TR 1319-20, and that FPC "would benefit if there were more people offering power out there." Rib, TR 1226-27. The Project offers economic energy, efficiency, reliability, and environmental benefits, at no customer risk. In short, it is truly the power supply equivalent of "manna from Heaven." TR 748, 886, 901.

II. GRANTING THE DETERMINATION OF NEED FOR THE PROJECT IS CONSISTENT WITH BOTH FLORIDA AND FEDERAL ENERGY POLICY.

Federal energy policy, as articulated by the United States Congress, through the Public Utility Regulatory Policy Act and the Energy Policy Act of 1992, and by the FERC through Order 888 and other orders, is to promote competition in the wholesale provision of electricity. As Martha O. Hesse, former chair of FERC, testified:

> In the Energy Policy Act, Congress also acted to assure access of all wholesale power suppliers to transmission facilities, for the purpose of promoting more robust and free competition in power supply. FERC implemented this policy directive by its Order No. 888, and continues to extend and refine these policies by imposing pro-competition requirements at every opportunity.

> In summary, it is clear that for the past 20 years, federal energy policy has favored and encouraged competition in the wholesale generation and supply of electricity in the United States.

Hesse, TR 975. Indeed, the legislative history manifests that Congress's intent was to prevent utilities with market power over transmission from interfering with FERC's efforts to create a competitive market for wholesale power. 1992 U.S.C.C.A.N. 1954, 1962-63. Even FPL's witness, William Steinmeier the former president of NARUC, readily agreed that "the policy of the federal government is to promote and encourage competition in the electric power industry, particularly wholesale competition." Steinmeier, TR 1576.

The Project is also consistent with the fundamental purposes of state utility regulation, which Ms. Hesse summarized as follows:

> The basic purposes of utility regulation are to protect the public interest and to promote an economically efficient, competitive result in the allocation of resources to electricity production and to prevent the exercise of monopoly power. Stated differently, utility regulation is intended to serve as a surrogate for competition. . . . [Another] purpose of utility regulation is to attempt to come as close as possible, in a constrained or structurally imperfect market, to the outcome that would be achieved in a competitive market.

Hesse, TR 983-84. Moreover, as discussed above, the Project is also specifically consistent with the goals of FEECA, including increased efficiency of electricity production and conservation of expensive primarily fuels. Thus, the Project is also consistent with Florida's general and specific energy policy.

The best that the Opponents have to offer in response is Mr. Steinmeier's testimony that, as a matter of state policy, new power plants should only be built under the Siting Act when necessary to satisfy reliability criteria. See Steinmeier, TR 1538-39. This is not only contradicted by the plain language of Section 403.519, F.S., which requires the Commission to consider all of the enumerated factors, it is also contradicted by the fundamental purpose of the

Siting Act, which is to balance the need for electricity against its potentially adverse environmental consequences. See Section 403.502, F.S. Where a new power plant, like the Project, will actually reduce the adverse effects of electricity generation (and the opponents here have adduced no evidence to contradict the Joint Petitioners' testimony and evidence in this regard), it makes no sense whatsoever to prohibit such a plant's construction, and operation because it is not, or may not be, strictly needed for reliability purposes. Even Mr. Steinmeier admitted that the Commission could make the determination to site a power plant that would provide benefits including improved reliability, enhanced environmental quality and reduced power costs. Steinmeier, TR 1575-76.[20] Mr. Steinmeier further stated that,"[a]ll of the criteria have to be considered, certainly." Steinmeier, TR 1549.

III. GRANTING THE DETERMINATION OF NEED FOR THE PROJECT IS CONSISTENT WITH THE GOAL OF A ROBUST COMPETITIVE WHOLESALE POWER SUPPLY MARKET.

Florida needs robust competition in its wholesale power market to promote efficiency, limit market power, and reduce electricity costs to ratepayers. See Nesbitt, TR 706, 723-24, 728; Hesse, TR 975-78; see also Rib, TR 1329. The more wholesale competitors there are, the better. L'Engle, TR 537, 552. Granting the requested determination of need for the Project will support this goal and help ensure the benefits that robust competition will provide. Even the Opponents do not argue that robust wholesale competition is bad in any way.

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[20]Although Mr. Steinmeier first contended that there should be a contract, when asked why the Commission's hands should be tied by such a restraint, he responded that the Commission "would make that determination based upon the record and argument in this case." Steinmeier, TR 1576.

IV. THE OPPONENTS' PARADE OF HYPOTHETICAL HORRIBLES COMPRISES NO MORE THAN BASELESS, CONTRIVED SCARE TACTICS.

The Opponents allege that a number of bad things might occur if the Commission grants the requested determination of need for the Project. Mr. Rib asserts that allowing the Project to be constructed could create uncertainty in the utilities' planning processes. Rib, TR 1257. Mr. Dolan, after reading through his testimony, identified several concerns, e.g., an alleged change in the regulatory framework, possible lack of a standard by which to evaluate merchant plants in need determination proceedings, possible uneconomic duplication of facilities, and possible future stranded cost effects. Dolan, TR 1613-17. Mr. Steinmeier testified that merchant plants complicate the planning process and that a positive determination of need could have various adverse effects on existing utilities. Steinmeier, TR 1557, 1578.

Mr. Rib's assertion is baseless. FPC regularly plans its operations with respect to the availability of other uncommitted capacity. See Rib, TR 1206-08. Exhibit 30 is a diagram that illustrates how FPC includes the potential availability of uncommitted capacity from other utilities in its reliability analyses using its TIGER program, FPC's "primary tool for evaluating loss of load probability." Rib, TR 1207. Indeed, FPC calculates its "unassisted loss of load probability" criterion, one of its three reliability criteria, by including consideration of potential purchases from uncommitted resources. Rib, TR 1207-08.

Mr. Dolan asserts that the Joint Petition asks the Commission to "change the ground rules" and "amount to a major reworking of the current prevailing regulatory understanding and approach" for power plant permitting in Florida. Dolan, TR 1613-14. This is no more than argument, based on Mr. Dolan's company's position that merchant plants are not allowed to proceed under the Siting Act. Mr. Dolan fails to explain how, if at all, the Project would cause problems for the Commission or the State. Mr. Dolan then asserts that the Commission would

have a problem with future merchant plant permitting proceedings, in terms of deciding what standard to apply. Dolan, TR 1614. However, Mr. Dolan subsequently agreed that the Commission could, as a matter of policy, "apply the criteria in Section 403.519, F.S., as the standard against which it would judge" need determination petitions for merchant projects. Dolan, TR 1618-19. Mr. Dolan also alleges concern regarding a possible uneconomic duplication of facilities. Dolan, TR 1615. Of course, the Commission can reasonably be expected to consider that issue in the normal course of determining whether a proposed plant is the most cost-effective alternative available under the current statutory criteria; however, as previously stated, because the Project involves no risk to Florida's ratepayers there can be no uneconomic duplication. Mr. Dolan also mentions "a concern . . . at some point in the future [regarding] the subsequent impact on stranded costs." Dolan, TR 1615. This is speculation with no predicate.

Mr. Dolan also mentions his belief that the Commission would have limited jurisdiction over the wholesale activity of the merchant plant. Dolan, TR 1616. The Joint Petitioners would submit (1) that the Commission would have the same jurisdiction over the wholesale activity of the Project as it has over the wholesale activity of power plants owned by Florida's investor-owned utilities and (2) that the more important jurisdictional issue for the Commission is its jurisdiction under the Grid Bill, to which the Joint Petitioners agree Duke New Smyrna and the Project will be subject. Finally, Mr. Dolan refers back to issues listed in his testimony that he asserts need to be addressed if merchant plants are to be allowed to proceed in Florida. Dolan, TR 1616. While it may be appropriate to address those issues at some point, raising them as flags does not warrant foreclosing beneficial opportunities for Florida and its electric customers. The Joint Petitioners submit that the important issues implicated by their application are those identified in Section 403.519, F.S., and the other substantive Commission statutes applicable to planning, reliability, the public interest, ratepayer protection, and energy efficiency.

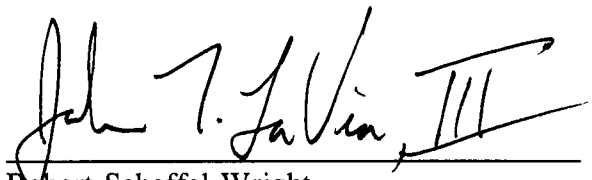
Mr. Steinmeier identified several potential adverse effects on existing utilities if the Commission granted the requested determination of need for the Project, including that it: "could affect utilities' ability to meet their service obligations, could affect subsequent need determination proceedings, could affect the ability to plan, could affect recoverability of past and future investments, could lead to uneconomic duplication of facilities, and could adversely affect the customers of Florida utilities." Steinmeier, TR 1578-79. These are mere hypothetical effects. Mr. Steinmeier admitted that he has made no study of merchant power plants. Steinmeier, TR 1560. More significantly, when asked under cross-examination, Mr. Steinmeier admitted that he was not "aware of any case before any public utilities commission in the United States in which it was even alleged that the construction and operation of a merchant plant" would have any of the above-referenced suggested hypothetical effects. Steinmeier, TR 1579.

This admission by Mr. Steinmeier, the former president of NARUC, underscores the true nature of the Opponents' criticisms of the Project: the criticisms are no more than a contrived "parade of hypothetical horribles" that have no basis in reality. The Commission should recognize them as such, reject them, and grant the requested determination of need for the Project.

CONCLUSION

The Commission should deny the Opponents' motions to dismiss and grant the Joint Petitioners' requested determination of need for the Project. The Joint Petitioners have adequately stated, in their Joint Petition, a claim upon which the Commission may grant the requested determination of need, and the Joint Petitioners have more than adequately explained exactly how and why the Commission's decision granting them standing as "applicants" is consistent with the applicable statutes and prior Commission orders, as well as how and why the Commission's order granting them standing will be upheld on any appeal taken by the Opponents to the Florida Supreme Court.

More importantly, the Commission should grant the requested determination of need for the Project because it will provide real, tangible, and meaningful benefits to Florida and to electric customers throughout the Peninsula. The Project will contribute to the critical need for system reliability and integrity, as evidenced by the tight supply conditions that existed in Florida this past June and by the extensive outages imposed on load management and interruptible customers during those conditions. The Project will provide additional electricity at necessarily lower, cost-effective prices. Finally, the Project will provide many additional benefits to Florida and its electric customers, including limiting market power, allocating the capital and investment risk associated with the Project to Duke New Smyrna rather than to captive ratepayers, expanding GDP, enhancing energy efficiency and enhancing environmental quality. As Dr. Nesbitt stated, from the perspective of the State of Florida, the project is truly "manna from Heaven." Nesbitt, TR 748, 886, 901.



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CERTIFICATE OF SERVICE
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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 19th day of January, 1999.

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