ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Determination of Need for an Electrical Power Plant in Okeechobee County by Okeechobee Generating Company, L.L.C.	DOCKET NO. 991462-EU FILED: JANUARY 18, 2000

OKEECHOBEE GENERATING COMPANY'S SECOND MOTION FOR PROTECTIVE ORDER

Okeechobee Generating Company, L.L.C. ("OGC"), pursuant to Rules 25-22.006(6), 28-106.204, and 28-106.206, Florida Administrative Code ("F.A.C."), and Rule 1.280(c), Florida Rules of Civil Procedure ("FRCP"), hereby moves the Florida Public Service Commission ("Commission") for a protective order prohibiting discovery by Florida Power & Light Company ("FPL") and Florida Power Corporation ("FPC") of certain confidential, proprietary business information and trade secrets of PG&E Generating. In support of this motion, OGC says:

Background

1. On October 19, 1999, FPC propounded on OGC its First Set of Interrogatories and its First Request for Production of Documents. On November 2, 1999, FPL propounded on OGC its First Set of Interrogatories (Nos. 1-61), Second Set of Interrogatories (Nos. 62-71), First Request for Production of Documents (Nos. 1-36) and Second Request for Production of Documents (Nos. 37-60) (FPL's and FPC's various discovery requests are collectively referred to herein as "Intervenors' Discovery Requests"). OGC timely objected to certain of Intervenors' Discovery Requests on

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the grounds that the requests called for the production of documents containing confidential, proprietary business information.

2. Numerous of the Intervenors' Discovery Requests ask OGC or OGC's affiliate, PG&E Generating Company, L.L.C. ("PG&E Generating")[1], to divulge confidential proprietary business information or trade secrets. For example, FPL's request to produce No. 43 states:

> Please provide all technical and financial analyses related to the construction of an electric generation plant in Florida, that were performed by or on behalf of OGC or its affiliates prior to the decision to petition the Florida Public Service Commission to issue a determination of need for the Okeechobee Generating Project.

FPC's request to produce No. 24 asks OGC to produce:

> All documents reflecting, mentioning, constituting, or relating to OGC's business plan.

OGC responded to these and similar of Intervenors' Discovery Requests by stating that OGC has no such documents. FPL and FPC have inquired in correspondence whether PG&E Generating (as opposed to OGC) has any documents or information responsive to this and similar requests. See letter from Charles Guyton to Robert Scheffel Wright (December 10, 1999) (attached hereto as Exhibit A).

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[1]OGC is an indirect affiliate of PG&E Generating. PG&E Generating is not an applicant for the requested determination of need and is not a party to this proceeding.

3. PG&E Generating has identified two documents that would be responsive to this and other of the Intervenors' Discovery Requests: i) the PG&E Generating Project Pro Forma for the Okeechobee Generating Project ("PG&E Generating's Pro Forma")[2] and ii) a memorandum dated August 18, 1999, from Doug Egan to PG&E Generating's Department Heads (the "August 18, 1999 Memorandum").

4. PG&E Generating's Pro Forma is a composite document maintained by PG&E Generating in both a hard copy and Excel spreadsheet format. The document contains highly confidential, proprietary business information including PG&E Generating's forward price curves for energy and capacity, natural gas transportation costs, costs of capital, rates of return, net revenue projections, and other highly sensitive privileged information. Moreover, PG&E Generating's Pro Forma contains economic information and assumptions that go to the very core of how PG&E Generating makes business decisions concerning a wide array of issues, including, but not limited to, risk management and investment decision-making.

5. The August 18, 1999 Memorandum contains confidential, proprietary business information concerning PG&E Generating's development plans outside of Florida.

6. PG&E Generating respectfully moves the Commission for a protective order regarding any disclosure of PG&E Generating's Pro

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[2]OGC does not have possession or control of this document.

Forma and the August 18, 1999 Memorandum on the basis that a) disclosure of PG&E Generating's Pro Forma and the August 18, 1999 Memorandum will require OGC to reveal confidential information regarding PG&E Generating's internal financial projections and development plans to its competitors, thereby causing significant and irreparable harm to the economic interests of OGC and PG&E Generating and b) disclosure of PG&E Generating's Pro Forma and the August 18, 1999 Memorandum is not reasonably necessary to FPL and FPC.

Argument

7. OGC's basis for this protective order is very similar to the basis advanced by FPL in its Motion for Protective Order filed with the Commission on December 6, 1999; and, accordingly, OGC relies on many of the same cases as cited by FPL.

8. Section 90.506, Florida Statutes ("F.S."), creates a privilege for confidential business information. Section 90.506, F.S., provides:

> A person has a privilege to refuse to disclose, and to prevent other persons from disclosing, a trade secret owned by that person if the allowance of the privilege will not conceal fraud or otherwise work injustice. When the court directs disclosure, it shall take the protective measures that the interests of the holder of the privilege, the interests of the parties, and the furtherance of justice require. The privilege may be claimed by the person or the person's agent or employee.

Section 90.506, F.S., is implemented by Rule 1.280(c)(7), FRCP,

which authorizes a tribunal to order "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way."[3]

9. Section 366.093(2), F.S., similarly authorizes the Commission to issue appropriate protective orders. Section 366.093(2), F.S., is implemented by Commission Rule 25-22.006(6), F.A.C. Rule 25-22.006(6)(a), F.A.C., provides:

> In any formal proceeding before the Commission, any utility or other person may request a protective order protecting proprietary confidential business information from discovery. Upon a showing by a utility or other person and a finding by the Commission that the material is entitled to protection, the Commission shall enter a protective order limiting discovery in the manner provided for in Rule 1.280, Florida Rules of Civil Procedure. The protective order shall specify how the confidential information is to be handled during the course of the proceeding and prescribe measures for protecting the information from disclosure outside the proceeding.

10. Rule 1.280(c)(7), FRCP, authorizes a party seeking to prevent disclosure of confidential trade secret information to move for a protective order. See Eastern Cement Co. v. Dep't of Envtl. Reg., 512 So. 2d 264 (Fla. 1st DCA 1987). Once the moving party demonstrates that the material at issue is in fact a

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[3]The parties are in agreement that Rule 1.280, FRCP, controls discovery issues in this proceeding under the Commission's rules and the Uniform Rules of Administrative Procedure. Rules 25-22.006(6), 28-106.206 and 28-106.213(4), F.A.C.

confidential trade secret, the burden shifts to the opposing party to show a "reasonable necessity for the information." Id. at 266; see also Scientific Games, Inc. v. Dittler Bros., Inc., 586 So. 2d 1128, 1131 (Fla. 1st DCA 1991); Goodyear Tire and Rubber Co. v. Cooey, 359 So. 2d 1200 (Fla. 1st DCA 1978). If there is no such "reasonable necessity" the confidential information will not be subject to discovery. Eastern Cement, 512 So. 2d at 266.

11. The information requested by FPL and FPC is precisely the type of information the provisions of Sections 90.506 and 366.093, F.S., and Rule 1.280(c)(7), FRCP, were designed to protect. See Inrecon v. Village Homes at Countrywalk, 644 So. 2d 103 (Fla. 3d DCA 1994) (confidential information about business operations is a protected trade secret). Affiliates of both FPL and FPC directly compete with PG&E Generating in wholesale generation markets in other geographic regions of the United States, including, but not limited to, New England, California and Texas. Just as FPL asserted in its Motion for Protective Order filed on December 6, 1999, disclosure of such information to FPL and FPC would cause significant economic and business injury to PG&E Generating. In essence, Intervenors' Discovery Requests seek disclosure of crucial components of PG&E Generating's cost and pricing information for the Okeechobee Generating Project and for other of PG&E Generating's projects throughout the nation to PG&E Generating's business competitors. Providing FPL and FPC with

such information would allow FPL and FPC and their affiliates to gain a significant competitive advantage over OGC and PG&E Generating with regard to pricing and with regard to market strategy, not only in Florida, but also in other areas of the country where the companies are in direct competition. Requiring OGC to disclose PG&E Generating's Pro Forma and the August 18, 1999 Memorandum would also cause OGC to reveal OGC's and PG&E's confidential economic assumptions to companies that are obviously in a position to capitalize on such knowledge.

12. The confidential, proprietary business information contained in PG&E Generating's Pro Forma and the August 18, 1999 Memorandum is not relevant to the central issues in this proceeding, i.e., whether there is a need for the Okeechobee Generating Project in Florida.[4] Thus, the only plausible explanation for FPL's and FPC's insistent attempts to obtain the confidential, proprietary business information embodied in PG&E Generating's Pro Forma is presumably to use that information to question the financial viability of the Project. This is not a valid basis for requiring OGC to disclose this confidential information. FPL and FPC have no reasonable need for the highly

[4]This is especially true given that the Okeechobee Generating Project is a merchant plant, and as such, will not put any Florida ratepayers at risk. See In Re: Joint Petition for Determination of Need for an Electric 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., 99 FPSC 3:401.

confidential information contained in PG&E Generating's Pro Forma for this purpose (or any other). OGC has provided the Commission with extensive information concerning the viability of the Project, including all input and output data supporting the allegations regarding the Project's financial viability contained in OGC's Petition for Determination of Need. (The data include the forward price curves, fuel cost projections, and the like, on which OGC relies in this case.) Moreover, both FPL and FPC surely have access to energy pricing information (such as from Megawatt Daily and Gas Daily, as well as other sources) and most probably have (or can develop) their own information regarding forward price curves, fuel costs, and the like.[5] Finally, both FPC and FPL can make informed estimates regarding cost of capital. Thus, if either FPL's or FPC's purpose is to challenge the financial viability of the Project, OGC's and PG&E Generating's confidential information is not necessary to FPL and FPC because they have extensive information available to them and the ability to attempt to bring that information to bear in this proceeding. Therefore,

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[5]Just as neither FPL nor FPC is entitled to obtain this confidential, competitively sensitive information from OGC and PG&E Generating, OGC would agree that it is not entitled to the corresponding information from FPL or FPC. However, if OGC and PG&E Generating are required to disclose this confidential energy pricing information, FPL and FPC and their wholesale affiliates should similarly be required to disclose their confidential energy pricing information. Without disclosure of such information, OGC would be unable to test the credibility of any challenge that either FPL or FPC might make to the economic viability of the Project.

since FPL and FPC have no reasonable need for OGC's and PG&E Generating's confidential information, OGC believes that FPL's and FPC's only purpose in seeking disclosure of PG&E Generating's Pro Forma is to gain a competitive advantage over OGC and PG&E Generating.[6] Obtaining information to gain a competitive advantage does not rise to the level of "reasonable necessity" required by Rule 1.280(c)(7), FRCP. In Federal Deposit Ins. Corp. v. Balkany, 564 So. 2d 580, 581 (Fla. 3d DCA 1990) (quoting Hollywood Beach Hotel & Golf Club, Inc. v. Gilliland, 740 Fla 24, 191 So. 2d (1939)), the court stated:

> The rule that allows a party to request production of its opponents' records "is in no sense designed to afford a litigant an avenue to pry into his adversary's business or go on a fishing expedition to uncover business methods, confidential relations, or other facts pertaining to the business."

The rule set forth in Balkany is equally applicable here.

13. Rule 25-22.006(6)(a), F.A.C., specifically provides that "a party may request a protective order protecting proprietary confidential business information from discovery." (Emphasis supplied.) Rule 25-22.006(6)(a), F.A.C., authorizes the Commission to completely protect such information from discovery.

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[6]OGC believes that FPC and FPL both well know that the Project will be financially viable and that is why they are challenging the Project before the Commission and in the press. See e.g., Paul Evanson, 'Energy Deal Will Harm Us,' Miami Herald, Sept. 7, 1999; Leslie Hillman, FPL Foes Find Way into State, Ft. Lauderdale Sun-Sentinel, Sept. 22, 1999, (attached hereto as Composite Exhibit B).

In this instance, a protective order limiting the use of PG&E Generating's Pro Forma and the August 18, 1999 Memorandum to litigation purposes in this case will not adequately protect the interests of OGC and PG&E Generating. Disclosure of any of the highly sensitive financial assumptions in PG&E Generating's Pro Forma or disclosure of PG&E Generating's future development plans contained in the August 18, 1999 Memorandum to any of FPL's or FPC's employees or agents (including FPL's and FPC's counsel) would necessarily cause significant and irreparable economic injury to OGC and PG&E Generating because once such information is released, FPC and FPL will be able to determine OGC's and PG&E Generating's pricing strategies and future development plans. Accordingly, the Commission should issue a protective order protecting PG&E Generating's Pro Forma from disclosure in this proceeding.

14. OGC has conferred with counsel for the parties to this proceeding and is authorized to represent that FPL and FPC object to this motion, LEAF has no objection to this motion, counsel for Commission Staff takes no position on this motion, and OGC was unable to reach counsel for TECO.

WHEREFORE, OGC respectfully requests that the Commission issue a permanent protective order absolutely protecting PG&E Generating's Pro Forma from disclosure in this proceeding.

Respectfully submitted this 18th day of January, 2000.

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Attorneys for Okeechobee Generating
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CERTIFICATE OF SERVICE
DOCKET NO. 991462-EU

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery (*), fascimile (**), or by United States Mail, postage prepaid, on the following individuals this 18th day of January, 2000.

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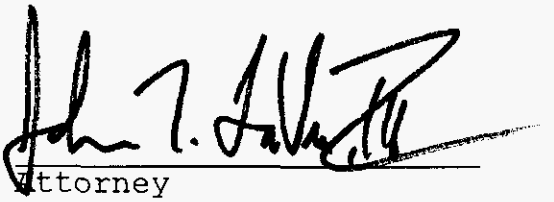

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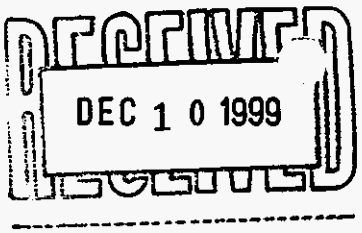
STEEL HECTOR & DAVIS



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December 10, 1999

Charles A. Guyton
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Via Hand Delivery

Mr. Robert Scheffel Wright
Mr. John T. LaVia, III
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310 West College Avenue
Tallahassee, FL 32301

Re: Outstanding Discovery Matters

Dear Scheff and Jay:

At our meeting Tuesday we spent considerable time going through OGC's discovery responses and addressing how FPL felt they were less than complete. We worked through all the interrogatories but only part of the requests for production. I agreed to get back to you about the remaining requests for production. That is the purpose of this letter.

We had worked through request 19 on FPL's first request, so I will begin with request 20 and address each of the remaining requests about which we have concerns.

21. Are there no OGC or PG&E projections responsive. If there are, what terms and conditions are proposed for review?

24. What is the status of the effort to secure a nondisclosure arrangement with ABB? We are interested in terms and conditions for such an agreement.

25. Are there PG&E or other affiliates documents responsive? If so, under what terms and conditions may FPL review them?

26. What is the status of the effort to secure a nondisclosure arrangement with ABB? We are interested in terms and conditions for such an agreement.

27. Is there nothing more than the response to request for production 9?

30-33. We expect to respond to you Monday regarding your proposed "terms" for review of Altos documents.

36. It appears there are other documents responsive to this request in the possession of OGC's parent or other affiliates that should be produced. Please identify any PG&E or other documents withheld on confidentiality grounds and state the terms and conditions proposed for FPL's access to them.

EXHIBIT A

Second Request for Production

37. The entire file identified is not responsive. Which subfiles are responsive?

38. Which subfiles are responsive?

40. As we understand your supplemental response, you have identified all specific documents relied upon. If not, please identify any remaining documents.

43. It appears there are other documents responsive to this request in the possession of OGC's parent or other affiliates that should be produced. Please identify any PG&E or other documents withheld on confidentiality grounds and state the terms and conditions proposed for FPL's access to them.

44. It appears there are other documents responsive to this request that are in the possession of OGC's parent or other affiliate and should be produced.

45. Was there no reliance on PG&E or other affiliates' documents?

46. Are all the documents identified in your supplemental response documents Mr. Vaden relied upon to conclude that it was unlikely OGC or other merchant plants will export outside of Florida?

47. Are the all the documents identified in your supplemental response documents Mr. Kordecki relied upon to conclude that it was unlikely OGC or other merchant plants will export outside of Florida?

49-50. Neither of the documents provided show the UCNSB's resources available to serve load beyond 2002. Such information appears to be necessary to answer the response. Is there nothing else responsive?

52. In regard to the second paragraph of the response, which specific responsive documents are being withheld? As to the ABB documents, what is the status of securing a nondisclosure agreement? As to "Internal Project Performance," please identify all responsive documents and whether each is an OGC document or a PG&E document. Additionally, please specify the terms and conditions proposed for FPL's access.

53. What is the status of securing an ABB nondisclosure agreement?

56. What is the status of securing a nondisclosure agreement with Gulfstream regarding the confidential documents identified in this response. Do we need to secure an order compelling disclosure to facilitate securing such an agreement, or can OGC and Gulfstream reach an agreement short of that?

58. What is the status of securing an ABB nondisclosure agreement?

59. Are these the only responsive documents?

Third Request for Production

65. What terms and conditions are proposed for FPL's review?

Gentlemen, I believe that, along with the concerns voiced Tuesday, this letter addresses most of FPL's concerns regarding outstanding discovery. While it appears that there will be matters for the Prehearing Officer to address, we are hopeful that we can work through a number of these concerns. We look forward to your response.

Sincerely

Charles A. Guyton

cc: Jon Moyle
TAL_1998/32984-1

Sun-Sentinel, Wednesday, September 22, 1999

UTILITIES

FPL foes find way into state

Rivals are sidestepping regulators

By LESLIE HILLMAN
BUSINESS WRITER

Like it or not, Florida utilities are going to have greater competition in electric production.

Florida Power & Light and other utilities have fought hard to prevent out-of-state power companies like North Carolina's **Duke Energy** from coming into the state. Duke's regulatory petition last year to build a 514-megawatt plant in New Smyrna Beach was appealed all the way to the Florida Supreme Court.

But even if the court strikes down Duke's plant, out-of-state companies are still finding ways to sidestep regulators and enter Florida through other means.

They are buying plants and refurbishing them to boost electric output and building plants that don't need regulator approval. Over the next several years such merchant plants — or those for wholesale production — will add thousands of megawatts of electricity to the state's current capacity of about 40,000 megawatts.

"They're getting around us," said Joe Garcia, chairman of the Florida Public Service Commission. "I can't say a thing about it."

Not that he minds much. Independent of the rest of the commission, Garcia has become an active proponent of companies developing the wholesale market for electricity in Florida.

FPL is taking issue with Garcia, setting up a battle between two powerful forces in the Florida electric industry — one that most Florida officials probably would prefer to avoid.

"This merchant power plant issue has got everyone very nervous," said Karen Skinner of the Florida Depart-

■ COMPETITION continues on 2D

COMPOSITE EXHIBIT "B"

FPL foes finding way into state

COMPETITION

CONTINUED FROM PAGE 1D

ment of Environmental Protection's plant siting coordination office.

FPL says the plants will take up new land, hog precious water resources, pollute the air, and may not even serve Florida customers.

"There isn't any need for increased capacity," said FPL President Paul Evanson.

But Florida environmentalists back the newcomers because the gas-fired plants they are proposing are cleaner to run than older plants that run on coal or oil.

"There's going to be some level of environmental benefit to the state," said Gail Kamaras, energy program director at the Legal Environmental Assistance Foundation in Tallahassee.

There is no shortage of comers.

Carolina Power & Light recently agreed to buy **Florida Progress**, Florida's second-largest electric generator, for $8 billion. Constellation Power, a unit of **Constellation Energy Group**, is building a gas-powered plant of about 850 megawatts in Brevard County.

Because the plant has no steam generation, it did not require PSC approval. A company must go to regulators if the proposed plant will generate more than 75 megawatts of electricity using steam.

Reliant Energy of Texas recently agreed to buy a 619-megawatt plant from the Orlando Utilities Commission for $205 million that will not require PSC approval.

"We would like to see a vibrant competitive wholesale market for electricity in Florida," said Doug Divine, senior vice president for generation development at Reliant's wholesale energy group.

Divine and others who support wholesale competition say it will lead to lower rates for consumers.

With wholesale competition, consumers still won't have a choice in electricity provider. But the new and refurbished plants run by out-of-state utilities typically are much cheaper than Florida's stable of older, less-efficient plants. That should allow Florida's utilities to buy cheaper electricity and pass the savings on to customers.

"A competitive wholesale market means better prices and more choices for all of Florida's consumers," Garcia said.

Out-of-state companies also say their presence will force Florida utilities to become more efficient, which also could lower rates.

FPL has already taken action to boost efficiency, spending about $1 billion through 2003 to rework and more than double the capacity at its Sanford and Fort Myers plants.

"If we did have a totally competitive model, those would be very efficient, competitive plants," Evanson said.

Meanwhile, FPL is investing billions to buy or build merchant plants in other states. That's because those states allow for competition, Evanson says.

"It's up to the [Florida] Legislature to change it," he said. "If they do, fine — we'll change."

Whether state legislators will act anytime soon is unclear. In the meantime, the back door into Florida will remain wide open.

Leslie Hillman can be reached at lhillman@sun-sentinel.com or (954) 356-4664.

THE HERALD, TUESDAY, SEPTEMBER 7, 1999

'Energy deal will harm us'

Paul Evanson is president of Florida Power & Light Co.

Some out-of-state companies want fundamental change in Florida's electric system without allowing our elected state representatives to vote on the matter.

Changing a system that works well makes no sense. In Florida Power & Light's territory, for example:

■ Residential customers enjoy some of the lowest electric rates and recently received a 6 percent rate decrease.

■ FPL is one of the cleanest utilities in the nation.

■ Customers' needs for adequate power are being met.

PAUL J. EVANSON

The central issue involves building "merchant" power plants whose output is not dedicated to Florida consumers. It started in New Smyrna Beach, where 40 megawatts of power is needed — enough to serve 10,000 homes. Duke Energy, a North Carolina company, agreed to sell power to the small town at below-cost prices. In return, Duke would construct a 500-megawatt plant — 10 times the size needed.

Unlike FPL and Florida's other regulated utilities, Duke would not be obligated to sell its excess power within Florida at reasonable rates, regulated by the Florida Public Service Commission. Even during emergencies, Duke would not be subject to anti-price-gouging regulations.

Instead, it could sell to the highest bidder anytime, anywhere — yet the pollution from this large facility would remain in Florida. This is exactly what Florida's Power Plant Siting Act of 1973 was enacted to prevent: unnecessary power plants damaging Florida's environment.

This "sweetheart deal" primarily benefits Duke shareholders and gives New Smyrna Beach an unfair economic-development advantage, while penalizing other communities and companies that play by the rules.

There is no need for merchant plants in Florida. FPL is meeting its customers' energy needs today and is increasing its output by 20 percent in the future. Using clean, natural gas to upgrade and expand existing power plants, we also will decrease overall emissions and avoid the need to build on new land, in sharp contrast to Duke's plans.

So what is likely to happen if Duke is allowed to go ahead with its plan?

■ Out-of-state companies could turn Florida into a leading electricity exporter, draining our state's precious resources and unnecessarily polluting our environment. Several other companies already have proposed building more than 8,000 megawatts (almost half of FPL's entire capacity) with much of that power potentially being sent out-of-state. Every unnecessary megawatt means more of Florida's natural resources consumed. Duke, in fact, could use more than 400-million gallons of ground water per year in a region where residential use already is restricted, wells are being damaged and the water table is falling.

■ FPL customers could lose millions of dollars annually. A proliferation of merchant plants could wipe out savings that we pass on to our customers from the sale of our excess power. During the last year, FPL customers have saved more than $100 million from those sales.

Earlier this year, the PSC approved construction of the Duke plant. We, among others, contend that Florida laws do not permit merchant plants, and the commission overstepped its authority. We are appealing that decision in court.

Allowing merchant plants is not a bad practice for every state. In fact, some state legislatures have enacted laws to allow merchant plants, primarily because their constituents suffered from high electric rates and supply shortages. FPL affiliates build merchant plants in some states, but only in those where laws permit such activity.

The Florida legislature, known for its concerns over environmental protection, has not determined that the risk of allowing a proliferation of new plants is good public policy — nor that there is reason to change a system that already is providing low-cost, reliable service. In fact, residents served by FPL pay 42 percent less per kilowatt-hour than those residents in California where merchant plants are allowed.

Let's not short-circuit a system that works by allowing this back-door approach to policy-making. Floridians deserve better.