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September 8, 1998

Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
4750 Esplanade Way, Room 110
Tallahassee, FL 32399

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RE: DOCKET NO. 981042-EM

Dear Ms. Bayó:

Enclosed for filing please find the original and fifteen (15) copies of Florida Power & Light Company's Motion to Dismiss Joint Petition.

Very truly yours,



Charles A. Guyton

ACK _____
AFA 2 CAG:ml
APP _____ Enclosure
CAF _____ cc: All Parties of Record

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São Paulo Rio de Janeiro
RECORDS & REPORTING

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint Petition for Determination)
of Need for an Electrical Power Plant)
in Volusia County by the Utilities) DOCKET NO. 981042-EM
Commission, City of New Smyrna Beach,) FILED: SEPTEMBER 8, 1998
Florida, and Duke Energy New Smyrna)
Beach Power Company Ltd., L.L.P.)
_____)

FLORIDA POWER & LIGHT COMPANY'S
MOTION TO DISMISS JOINT PETITION

Pursuant to Florida Administrative Code Rule 28-106.204, Florida Power & Light Company ("FPL") files this motion to dismiss the Joint Petition For Determination Of Need For An Electrical Power Plant ("Joint Petition") filed with the Florida Public Service Commission ("Commission") on August 19, 1998. The Joint Petition should be dismissed for the following reasons, which are more fully developed in the attached supporting memoranda:

The Joint Petition should be dismissed because neither Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. ("Duke") nor the Utilities Commission, New Smyrna Beach are proper applicants as to the proposed project's "merchant plant" capacity. The Utilities Commission, New Smyrna Beach is not an applicant as to the proposed project's "merchant plant" capacity, 484 out of 514 MW; it is a co-applicant only as to 30 MW. Duke is not a proper applicant or co-applicant as to any of its proposed capacity. Duke is not an

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"applicant" or "utility" within the meaning of the Siting Act. It lacks the requisite obligation to serve and the corresponding need for power. Duke also has no commitment to serve (contract) and seeks a need determination without making such a commitment. Under the Commission's and the Supreme Court's interpretation of the Siting Act, Duke is not a proper co-applicant because it has no contract in place for the sale of power to any purchasing utility, including the Utilities Commission, New Smyrna Beach. Absent a contract for its capacity, Duke is not a proper co-applicant and neither Duke nor the Utilities Commission, New Smyrna Beach is a proper applicant as to the entire proposed facility. Therefore, the Joint Petition must be dismissed.

The Joint Petition fails to meet the mandatory pleading requirements for a determination of need petition in Florida Administrative Code Rules 25-22.081, and its failure to comply with this rule masks other deficiencies with the Joint Petition. Compliance with these mandatory pleading requirements is essential for the Commission to be able to discharge its responsibilities under these rules, The Florida Electrical Power Plant Siting Act ("Siting Act") Sections 403.501 - 403.518, Florida Statutes, and Section 403.519, Florida Statutes.

The Joint Petition fails to plead that the "merchant plant" capacity of the proposed power plant, 484 MW out of 514 MW, is needed to meet any of the statutory criteria of Section 403.519,

Florida Statutes under which the Commission must determine need. This failure to allege facts sufficient to meet any of the mandatory criteria under Section 403.519, Florida Statutes is fatal. Moreover, Tables 8 and 9 in the Joint Petition Exhibit actually show that the Project is not needed to meet Peninsular Florida reserve margins. The Joint Petition fails to allege need and should be dismissed.

The Joint Petition fails to identify and plead the need of the purchasing utility for the proposed "merchant plant" capacity of the project. The Commission's rules, the plain language of the Section 403.519, and prior Commission and Supreme Court of Florida decisions interpreting the Siting Act all require that an entity such as Duke, which has no obligation to serve and aspires to sell capacity and energy to a utility, must identify the purchasing utility and demonstrate need by showing that it has a contract with the purchasing utility and that the contractual purchase will satisfy the statutory need criteria. Duke completely fails to follow the law in this regard. Instead, Duke advances an argument that its project "is consistent with" "Peninsular Florida's" need for capacity without ever acknowledging that "Peninsular Florida" is not a utility or even a legal entity but merely a planning construct. Duke's approach frustrates the necessary utility specific inquiry in a need determination. Without identifying the purchasing utility, explaining the terms under which its power will

be sold, and addressing how the proposed "merchant plant" capacity satisfies the mandatory statutory criteria regarding the need for a power plant, Duke has failed to state a cause of action and may not proceed. If allowed to proceed with such deficiencies, Duke would be held to a lesser burden than utilities and other non-utility generators; they would have their pleading deficiencies rewarded.

The Joint Petition should be dismissed because the underlying theory of the Joint Petition, that the market rather than the Commission should determine the need for power plants, is inconsistent with the purpose and intent of the Siting Act. Under the Siting Act a determination of need is a condition precedent to environmental certification of a power plant. The Legislature established criteria for the Commission to determine need which only make sense when viewed from the perspective of the utility having a need for power arising from an obligation to provide service. The Legislature chose the Commission as the exclusive determiner of need and the Siting Board as the entity to weigh need against environmental damage. It did not choose the marketplace to make these essential determinations, yet that is what the Joint Petitioners seek. They seek to build first and then have the market determine whether the plant was needed. This approach is inconsistent with the Siting Act and would frustrate its intended operation. It would invite the proliferation of power plants and

their certain environmental impact with no assurance the plants would meet their purported need.

Finally, the Joint Petition should be dismissed because it seeks a determination of need for a power plant which represents an uneconomic duplication of facilities. The Commission has extensive authority and responsibility to avoid and redress the uneconomic duplication of facilities in Florida. The FRCC study upon which the Joint Petition extensively relies shows that all the capacity needs for Peninsular Florida through 2007-2008 have been met by utility plans already in place. This power plant is premised solely upon meeting an unspecified part of the same need. The Commission has a responsibility to protect against such an uneconomic duplication of facilities; it should dismiss the Joint Petition which clearly proposes duplicative resources.

DATED this 8th day of September, 1998.

Respectfully submitted,

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Attorneys for Florida Power
& Light Company

By: Charles A. Guyton
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**CERTIFICATE OF SERVICE
DOCKET NO. 981042-EM**

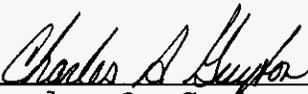
I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Motion to Dismiss Joint Petition has been furnished by Hand Delivery (*), or U.S. Mail this 8th day of September, 1998, to the following:

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By: 
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