

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Joint Petition for Determination )  
of Need for an Electrical Power Plant in ) DOCKET NO. 981042-EM  
Volusia County by the Utilities )  
Commission, City of New Smyrna Beach, ) FILED: SEPT. 28, 1998  
Florida, and Duke Energy New Smyrna )  
Beach Power Company Ltd., L.L.P. )  
\_\_\_\_\_)

**DIRECT TESTIMONY**

OF

**MICHAEL C. GREEN, P.E.**

ON BEHALF OF

**THE UTILITIES COMMISSION, CITY OF  
NEW SMYRNA BEACH, FLORIDA**

AND

**DUKE ENERGY NEW SMYRNA BEACH  
POWER COMPANY LTD., LLP**

DOCUMENT NUMBER-DATE

10697 SEP 28 88

FPSC-RECORDS/REPORTING

IN RE: JOINT PETITION FOR DETERMINATION OF NEED  
BY THE UTILITIES COMMISSION, CITY OF NEW SMYRNA BEACH, FLORIDA  
AND DUKE ENERGY NEW SMYRNA BEACH POWER COMPANY,  
FPSC DOCKET NO. 981042-EM

DIRECT TESTIMONY OF MICHAEL C. GREEN, P.E.

1 Q: Please state your name and business address.

2 A: My name is Michael Charles Green, and my business address is  
3 Duke Energy Power Services, L.L.C., 615 Crescent Executive  
4 Court, Suite 100, Lake Mary, Florida 32746.

5

6 Q: By whom are you employed and in what position?

7 A: I am employed by Duke Energy Power Services, L.L.C. ("DEPS")  
8 as Vice President and General Manager, Florida and  
9 Southeast.

10

11 Q: Please describe your duties with Duke Energy Power Services.

12 A: My duties and responsibilities for DEPS include development  
13 and origination of power generation asset opportunities for  
14 DEPS in the Southeastern Region, including Florida.

15

16 QUALIFICATIONS AND EXPERIENCE

17 Q: Please summarize your educational background.

18 A: I hold a Bachelor of Science in Civil Engineering from the  
19 University of Tennessee.

20

21 Q: Please summarize your employment history and work  
22 experience.

**DIRECT TESTIMONY OF MICHAEL C. GREEN, P.E.**

1 A: I have 26 years of experience in the electric power  
2 industry, all with Duke. I began my career in 1972 in  
3 the Design Engineering Division of Duke Power Company,  
4 where I participated in, and eventually managed, the  
5 design of several Duke generation facilities, including  
6 nuclear, fossil, and hydroelectric facilities. On  
7 assignment to the Institute of Nuclear Power Operations  
8 (INPO), I spent two years, from 1983 to 1985, evaluating  
9 the construction of nuclear power plants. I was the  
10 United States representative on an International Atomic  
11 Energy Association (IAEA) evaluation team of the Alto  
12 Lazio nuclear facility in Italy in 1987.

13 I returned to become the general manager of Duke  
14 Power's Project Management Department, which managed several  
15 capital and operating projects aimed at improving the  
16 efficiency or other operating parameters of Duke Power's  
17 generating plants. I subsequently became General Manager of  
18 Duke Power's Strategic Planning Department. In that  
19 position, I was responsible for clarifying Duke's strategic  
20 direction for the future, which resulted in the merger with  
21 PanEnergy to form Duke Energy Corporation in 1997. At that  
22 time, I became Vice President in the Corporate Accounts  
23 Department, our company-wide marketing arm, coordinating the  
24 marketing efforts of several Duke business units. In June  
25 of this year, I accepted my current post as Vice President  
26 and General Manager, Florida and Southeast for Duke Energy

**DIRECT TESTIMONY OF MICHAEL C. GREEN, P.E.**

1 Power Services, L.L.C.

2

3 **Q: Have you previously testified before regulatory authorities**  
4 **or courts?**

5 A: Yes. I testified at the hearings of the Advisory Committee  
6 on Reactor Safety (ACRS) relating to Duke Power's Catawba  
7 Nuclear Generation Station in the late 1970s.

8

9 **Q: Are you a registered professional engineer?**

10 A: Yes. I am a registered professional engineer in the States  
11 of North Carolina and South Carolina.

12

13 **SUMMARY AND PURPOSE OF TESTIMONY**

14 **Q: What is the purpose of your testimony?**

15 A: I am testifying on behalf of the Utilities Commission, City  
16 of New Smyrna Beach, Florida ("UCNSB"), and Duke Energy New  
17 Smyrna Beach Power Company Ltd., LLP ("Duke New Smyrna"),  
18 the joint applicants for the Florida Public Service  
19 Commission's ("the Commission") determination of need for  
20 the New Smyrna Beach Project (or "the Project"). My  
21 testimony describes Duke Energy Power Services, L.L.C., Duke  
22 New Smyrna, and the relationships between DEPS, Duke New  
23 Smyrna, Duke Energy Corporation, and other Duke affiliates  
24 involved in developing the New Smyrna Beach Project. My  
25 testimony also describes the basic elements of the business  
26 relationship between the UCNSB and Duke New Smyrna, and

**DIRECT TESTIMONY OF MICHAEL C. GREEN, P.E.**

1 addresses Duke's assessment of the need for new merchant  
2 power plant capacity in Florida. Finally, my testimony  
3 addresses the projected capital cost of the Project.  
4

5 **Q: Please summarize your testimony.**

6 A: The Utilities Commission, City of New Smyrna Beach and Duke  
7 New Smyrna are petitioning the Commission to grant its  
8 determination of need for the New Smyrna Beach Power  
9 Project, a 500 MW (nominal) gas-fired combined cycle power  
10 plant to be located in New Smyrna Beach, Volusia County,  
11 Florida. The Project utilizes state-of-the-art technology,  
12 with proven reliability, high efficiency, and a very benign  
13 environmental profile. The Project will provide clean and  
14 cost-effective power to the UCNSB and a clean and cost-  
15 effective power supply option to other electric utilities to  
16 meet the growing demands of their retail customers in  
17 Florida. In contrast to rate-based facilities, Duke New  
18 Smyrna will bear all of the capital investment and operating  
19 risks associated with the Project, while the purchasing  
20 utilities and their ratepayers bear none. The UCNSB will  
21 receive 30 MW of the Project's output, and the remaining  
22 capacity will be sold on a "merchant" basis in Florida's  
23 wholesale power market.

DIRECT TESTIMONY OF MICHAEL C. GREEN, P.E.

1 Q: What are your responsibilities with respect to the New  
2 Smyrna Beach Power Project?

3 A: As DEPS's senior "on the ground" officer in Florida, my  
4 responsibilities with respect to the New Smyrna Beach  
5 Power Project include the general coordination of  
6 regulatory and business activities relating to the  
7 Project, as well as eventually coordinating the  
8 marketing efforts for capacity and energy sales from the  
9 Project.

10

11 Q: Are you sponsoring any exhibits to your testimony?

12 A: Yes. I am sponsoring the following exhibits.

13 MCG-1. Duke Energy New Smyrna Beach Power Company Ltd.,  
14 L.L.P., Ownership Structure.

15 MCG-2. Order of the Federal Energy Regulatory Commission  
16 ("FERC") approving Duke New Smyrna's market-based  
17 rate tariff.

18 MCG-3. Order of the FERC confirming Duke New Smyrna's  
19 status as an Exempt Wholesale Generator under the  
20 Public Utility Holding Company Act of 1935.

21 MCG-4. The Participation Agreement between the UCNSB and  
22 Duke New Smyrna.

23 MCG-5. New Smyrna Beach Power Project, Project Structure.

24 I am also sponsoring Figures 1 and 2 in the Exhibits  
25 filed on August 19, 1998 in support of our joint petition  
26 for determination of need for the Project, as well as the

DIRECT TESTIMONY OF MICHAEL C. GREEN, P.E.

1 text contained within Sections II.A, II.C, II.D, II.E, II.F,  
2 and III.F of those Exhibits.

3  
4 DUKE ENERGY CORPORATION, DUKE ENERGY POWER SERVICES,  
5 AND DUKE ENERGY NEW SMYRNA BEACH POWER COMPANY  
6

7 Q: Please describe Duke Energy Power Services, L.L.C. and its  
8 business.

9 A: Duke Energy Power Services, L.L.C. ("DEPS") is a limited  
10 liability corporation organized and existing under the laws  
11 of the State of Delaware. DEPS is a wholly-owned subsidiary  
12 of Duke Energy Global Asset Development, Inc., which is a  
13 wholly-owned subsidiary of Duke Energy Corporation ("Duke  
14 Energy").

15 DEPS is in the business of acquiring and developing  
16 "merchant" power plants, i.e., power plants that are  
17 operated to sell power to other utilities at wholesale at  
18 voluntarily negotiated rates, with DEPS taking all financial  
19 and operating risk associated with the plants. Merchant  
20 plants are not subject to the traditional regulatory  
21 treatment wherein the utility is assured the opportunity to  
22 recover prudently incurred costs, as well as the opportunity  
23 to earn a specified rate of return (currently ranging from  
24 10.75 percent to 13.0 percent in Florida and other  
25 jurisdictions) on its equity investment. No retail electric  
26 customers, and no utilities, are obligated to purchase the  
27 output of a merchant plant, nor to pay for the capital costs

**DIRECT TESTIMONY OF MICHAEL C. GREEN, P.E.**

1 of such a merchant plant if it should become uneconomic in  
2 the market.

3

4 **Q: What other power plants has DEPS acquired?**

5 A: Duke Energy Power Services has closed on the acquisition of  
6 three power plants in California, with total generating  
7 capacity of 2,645 MW. These power plants are now owned by  
8 three affiliated entities of DEPS. Duke Energy Morro Bay,  
9 L.L.C. owns and operates the Morro Bay Generating Station, a  
10 1,002 gas-fired unit. Duke Energy Moss Landing, L.L.C. owns  
11 and operates the Moss Landing Generating Station, a 1,478 MW  
12 gas-fired unit. Duke Energy Oakland, L.L.C. owns and  
13 operates the Oakland Generating Station, a 165 MW diesel-  
14 fueled unit. These plants are operated as merchant plants,  
15 selling power predominantly into the California wholesale  
16 market.

17

18 **Q: What other projects is DEPS currently developing?**

19 A: DEPS is presently developing the Bridgeport Energy Project,  
20 a 520 MW (nominal) natural gas fired combined cycle power  
21 plant that will, as an EWG and FERC-regulated public  
22 utility, provide wholesale power to the United Illuminating  
23 Company, based in New Haven, Connecticut, and to other  
24 wholesale customers in New England. The Bridgeport Project  
25 is presently under construction: Phase I of the Project, 350  
26 MW of combustion turbine capacity, is currently producing

**DIRECT TESTIMONY OF MICHAEL C. GREEN, P.E.**

1 power and is in commercial operation. The complete combined  
2 cycle plant, including an additional 170 MW of steam turbine  
3 generation, is expected to achieve commercial operation  
4 status in July 1999. Like the New Smyrna Beach Power  
5 Project, the Bridgeport Power Project will be operated by a  
6 Duke subsidiary, Duke Bridgeport Energy, L.L.C., which is  
7 also the majority (95.9 percent) owner of the Bridgeport  
8 Project.

9 In conjunction with Associated Electric Cooperative,  
10 Inc. ("AECI"), Duke is developing a 250 MW gas-fired  
11 combined cycle power plant in Southeast Missouri. This  
12 power plant is expected to achieve commercial operation in  
13 mid-1999. DEPS is pursuing additional development  
14 opportunities in the United States.

15

16 **Q: Does either DEPS or any of its merchant power plant**  
17 **affiliates sell electricity at retail in other**  
18 **jurisdictions?**

19 **A:** No. The only Duke Energy companies that provide retail  
20 electric service are Duke Power and Nantahala Power & Light  
21 Company, which serve approximately 2 million retail electric  
22 customers in North Carolina and South Carolina.

23

24 **Q: Please describe Duke Energy New Smyrna Beach Power Company**  
25 **Ltd., L.L.P. and its business.**

26 **A:** Duke New Smyrna is a Florida limited liability partnership

DIRECT TESTIMONY OF MICHAEL C. GREEN, P.E.

1 created in 1997. Duke New Smyrna's general partner is Duke  
2 Energy Power Services Mulberry GP, Inc., a Delaware  
3 corporation which has a 1 percent ownership interest, and  
4 the sole limited partner is Duke Energy Global Asset  
5 Development, Inc., which has a 99 percent ownership interest  
6 in Duke New Smyrna. The ownership structure of Duke New  
7 Smyrna is shown in Exhibit \_\_\_\_ (MCG-1).

8 Duke New Smyrna is a public utility under Section 201  
9 of the Federal Power Act. By its order issued on June 25,  
10 1998, the FERC approved Duke New Smyrna's Rate Schedule No.  
11 1, which permits Duke New Smyrna to enter into negotiated  
12 wholesale power sales agreements with willing purchasers.  
13 Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., 83  
14 FERC ¶61,316. Pursuant to a FERC order issued on June 9,  
15 1998, Duke New Smyrna is also an Exempt Wholesale Generator  
16 ("EWG"). Duke Energy New Smyrna Beach Power Company Ltd.,  
17 L.L.P., 83 FERC ¶62,220. Copies of these orders are  
18 included as Exhibits \_\_\_\_ (MCG-2) and \_\_\_\_ (MCG-3) to my  
19 testimony.

20 The primary purpose of Duke New Smyrna is to own and  
21 operate the New Smyrna Beach Power Project, i.e., the 500 MW  
22 (nominal) power plant that we are developing in New Smyrna  
23 Beach, Florida, to serve the power supply needs of the  
24 Utilities Commission, City of New Smyrna Beach and to  
25 provide reliable, competitively priced, environmentally  
26 clean, no-risk power in the Florida wholesale market.

DIRECT TESTIMONY OF MICHAEL C. GREEN, P.E.

1 Q: Please describe the regulatory status of Duke Energy New  
2 Smyrna Beach Power Company Ltd., L.L.P.

3 A: Because its business is selling wholesale power in  
4 interstate commerce, Duke New Smyrna is a "public utility"  
5 under the Federal Power Act and is subject to the regulatory  
6 jurisdiction of the Federal Energy Regulatory Commission.  
7 Duke New Smyrna has received the FERC's authorization to  
8 sell wholesale power at voluntarily negotiated, market-based  
9 rates. Duke New Smyrna has also been certified by the FERC  
10 as an Exempt Wholesale Generator ("EWG") pursuant to the  
11 Public Utility Holding Company Act of 1935 ("PUHCA"). This  
12 status enables Duke Energy Corporation to own its interest  
13 in Duke New Smyrna while remaining exempt from regulation  
14 (by the Securities Exchange Commission) as a holding company  
15 under PUHCA.

16

17 Q: Please describe Duke Energy Corporation and its business.

18 A: Duke Energy Corporation was formed in 1997 by the merger of  
19 Duke Power Company and PanEnergy Corporation. Measured by  
20 assets, Duke Energy Corporation is the seventh largest  
21 energy company in the world. Through Duke Power and  
22 Nantahala Power & Light Company, Duke Energy presently  
23 serves more than 2 million electric customers in North  
24 Carolina and South Carolina. Duke Power has more than  
25 18,000 MW of electrical generating capacity in the  
26 Carolinas. Approximately 12 percent of all natural gas

DIRECT TESTIMONY OF MICHAEL C. GREEN, P.E.

1 deliveries in the United States move through Duke Energy's  
2 pipeline system.

3 Duke Energy's subsidiaries and affiliates have  
4 operations on six continents. The main areas of operations  
5 are electric operations, energy transmission (electrical  
6 transmission as well as natural gas and liquids), and energy  
7 services. Duke Energy also has subsidiaries in real estate  
8 development, telecommunications, and water systems.

9 Duke Energy is financially strong and sound, with total  
10 assets exceeding \$24 billion and a bond rating of AA/AA+.

11

12 **Q: What experience do Duke Energy Corporation and other**  
13 **affiliates of DEPS and Duke New Smyrna have in operating**  
14 **electrical power plants?**

15 **A:** This section of my testimony addresses the power plant  
16 operations of Duke Power, Duke/Fluor Daniel, and American  
17 Ref-Fuel Company.

18 Duke Power. Duke Power, Duke Energy's vertically integrated  
19 electric utility that serves North and South Carolina, has  
20 been in the business of providing electric service from  
21 company-owned-and-operated power plants for more than 90  
22 years. At present, Duke Power owns and operates the  
23 following generating units:

24 1. 30 pulverized coal fired power plants, located at 8  
25 generating stations, with total generating capacity of  
26 7,699 MW;

DIRECT TESTIMONY OF MICHAEL C. GREEN, P.E.

- 1           2.    16 natural gas fired power plants, located at 1  
2                    generating station, with total generating capacity of  
3                    1,200 MW;
- 4           3.    23 oil fired power plants, located at 5 generating  
5                    stations, with total generating capacity of 589 MW;
- 6           4.    7 nuclear power plants, located at 3 generating  
7                    stations, with total generating capacity of 7,054 MW;  
8                    and
- 9           5.    79 hydroelectric power plants, located at 20 generating  
10                   stations, with total generating capacity of 2,694 MW.
- 11                   Duke Power's coal and nuclear units have consistently  
12                   ranked among the most efficient in the United States.

13                   Duke Engineering & Services, Inc., another Duke Energy  
14                   subsidiary, is the world's leading engineering and services  
15                   company, serving the nuclear, fossil and hydroelectric power  
16                   industry with complete plant life-cycle capabilities, from  
17                   design to operations to decommissioning.

18                   Duke/Fluor Daniel. The Duke/Fluor Daniel ("DFD") companies  
19                   combine the engineering, construction and operational  
20                   capabilities of Duke Energy and Fluor Daniel Inc. DFD is  
21                   currently constructing or operating facilities around the  
22                   globe.

23                   American Ref-Fuel Company. Duke Energy recently acquired a  
24                   50 percent interest in American Ref-Fuel Company, the third  
25                   largest waste-to-energy company in the U.S. At present,  
26                   American Ref-Fuel operates five waste-to-energy facilities

DIRECT TESTIMONY OF MICHAEL C. GREEN, P.E.

1 in New York, New Jersey, and New England.

2

3 **Q: Why is Duke Energy Power Services interested in building and**  
4 **operating the New Smyrna Beach Power Project in Florida?**

5 A: The Energy Policy Act of 1992 opened the nation's wholesale  
6 electric marketplace. DEPS strongly believes that Florida  
7 represents a sound business opportunity for wholesale power  
8 plants. With its growing population, growing electric  
9 demand, and peninsular geography, Florida needs additional  
10 generating capacity in the peninsula, and will benefit  
11 significantly from additional efficient and cost-effective  
12 gas-fired power. This need is particularly evidenced by the  
13 shortages and interruptions (of interruptible and load  
14 management customers) during this summer's hot spell. With  
15 Duke Energy's expertise and experience in constructing and  
16 operating highly efficient power plants, we are confident  
17 that we can compete effectively in the Florida wholesale  
18 market while providing reliable, cost-effective electric  
19 capacity and energy to Florida utilities for resale to their  
20 retail customers. We fully recognize that, as a merchant  
21 power plant, no utility nor any body of retail electric  
22 customers is obligated to buy the Project's output, and that  
23 Duke New Smyrna will bear all of the financial and operating  
24 risks associated with the construction and operation of New  
25 Smyrna Beach Power Project.

DIRECT TESTIMONY OF MICHAEL C. GREEN, P.E.

DUKE NEW SMYRNA AND THE UTILITIES COMMISSION,  
CITY OF NEW SMYRNA BEACH

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

Q: Please describe the business arrangement between the Utilities Commission, City of New Smyrna Beach and Duke Energy New Smyrna Beach Power Company.

A: The Utilities Commission, City of New Smyrna Beach, Florida, and Duke New Smyrna have entered into a Participation Agreement that sets forth the parties' duties and responsibilities in their business relationship. This Participation Agreement, including Amendment Number One, is included as Exhibit \_\_\_\_ (MCG-4) to my testimony. The key features of the Participation Agreement are as follows.

1. The UCNSB will furnish the site for the New Smyrna Beach Project to Duke New Smyrna.
2. The UCNSB will also furnish an interconnection point for the New Smyrna Beach Project to the 115 kV bus at the UCNSB's Smyrna Substation.
3. The UCNSB will provide reuse water from its adjacent wastewater treatment plant (currently under construction) and will provide other water supply sufficient for the process and make-up water requirements of the Project.
4. Duke New Smyrna has granted to the UCNSB an "entitlement" to 30 MW of the Project's capacity for the technical and economic life of the Project. Duke New Smyrna will provide the energy associated with the

**DIRECT TESTIMONY OF MICHAEL C. GREEN, P.E.**

1           entitlement capacity at agreed-upon pricing. When the  
2           final power purchase agreement is negotiated and  
3           executed, Duke New Smyrna will, consistent with FERC  
4           regulations, file that agreement with the FERC.  
5        5. Duke New Smyrna will design, engineer, construct,  
6           finance, own, and operate the Project, and will market  
7           all capacity, energy, and, subject to future FERC  
8           approval, ancillary services provided from the Project.  
9           Duke is also responsible for the provision of natural  
10          gas service to the Project.

11

12                           **OVERVIEW OF THE NEW SMYRNA BEACH PROJECT**

13       **Q: Please describe the New Smyrna Beach Project.**

14       **A:** The New Smyrna Beach Project is a 500 MW (nominal) natural  
15       gas fired power plant using advanced combustion turbine  
16       technology in combined cycle with a heat recovery steam  
17       generator and an electric steam turbine generator. The  
18       Project's rated summer capacity is 476 MW and its rated  
19       winter capacity is 548 MW. The Project will be constructed  
20       by Duke Fluor Daniel. The Project is scheduled to achieve  
21       commercial in-service status in October 2001, and is  
22       projected to have a technical and economic life in excess of  
23       30 years. Firm delivered gas supply will be provided for  
24       the Project's operations pursuant to a contract between  
25       Citrus Trading Corp. and DEPS having an initial term of 20  
26       years. Exhibit \_\_\_\_\_ (MCG-5) depicts the overall structure

**DIRECT TESTIMONY OF MICHAEL C. GREEN, P.E.**

1 of the New Smyrna Beach Power Project.

2 The Project will satisfy all applicable environmental  
3 permitting requirements. Gas-fired combined cycle  
4 technology is the most efficient and most environmentally  
5 benign electric generation technology currently available  
6 and feasible on a commercial basis. Indeed, we expect that  
7 the Project's operations will have a net beneficial effect  
8 on total emissions from power generation in Florida.

9 Detailed technical information regarding the New Smyrna  
10 Beach Power Project is presented in the testimony and  
11 exhibits of Mark Locascio, P.E. (power engineer), Kennie  
12 Sanford, P.E. (power engineer), Jeffrey Meling  
13 (environmental and permitting expert), Larry A. Wall (fuel  
14 supply), Dale Nesbitt, Ph.D. (project economics), and Michel  
15 Armand, P.E. (transmission issues).

16

17 **PROJECTED OPERATIONS OF THE NEW SMYRNA BEACH PROJECT**

18 **Q: Please give an overview of the projected operations of the**  
19 **New Smyrna Project.**

20 **A:** Dr. Nesbitt's analyses of the Florida bulk power supply  
21 market and of the Project's operating economics yield  
22 projections that the Project will operate between 7,000 and  
23 8,500 hours per year, with an availability factor of  
24 approximately 96 percent. In addition to supplying 30 MW of  
25 capacity and approximately 250,000 MWH per year of cost-  
26 effective energy to the UCNSB, we anticipate that the

**DIRECT TESTIMONY OF MICHAEL C. GREEN, P.E.**

1 Project will provide approximately 476 MW (summer) and 548  
2 MW (winter) of capacity, and between 3,700,000 MWH and  
3 4,200,000 MWH per year of cost-effective electrical energy,  
4 into the wholesale power market in Peninsular Florida.

5  
6 **Q: How likely is it that the Project will make sales to**  
7 **utilities outside Florida?**

8 **A:** It is unlikely that any significant amount of the Project's  
9 output would be sold outside Florida. This is a function of  
10 several factors, including relatively low generation costs  
11 in the SERC region as compared to those within Peninsular  
12 Florida, recent power shortages and projected tight reserves  
13 in peninsular Florida (when compared to the reserves within  
14 Florida), and limited transmission export capacity from  
15 Florida into the SERC region. Our analyses indicate that  
16 the market for the Project's is the wholesale power market  
17 within Florida, or within peninsular Florida, to be more  
18 precise. Of course, this is why we are seeking the  
19 Commission's determination of need that will enable us to  
20 build the New Smyrna Project in peninsular Florida, and why  
21 the transmission interconnection facilities are being  
22 designed to accommodate deliveries of power from the Project  
23 to utilities located south of the Project. Because the  
24 wholesale market in Peninsular Florida needs the capacity  
25 and energy of the Project, Duke New Smyrna -- being a  
26 wholesale provider -- needs the Project in order to

**DIRECT TESTIMONY OF MICHAEL C. GREEN, P.E.**

1 participate in that market and deliver the benefits that our  
2 projections say will result from that participation.

3 It is possible that, under certain short-term  
4 circumstances, Duke New Smyrna, like other Florida utilities  
5 with available power for sale, would make sales to utilities  
6 outside Florida. For example, if a strong cold front were  
7 to stall over South Georgia, resulting in mild weather for  
8 peninsular Florida coinciding with very cold weather in the  
9 rest of the Southeast, it is possible that the Project  
10 might, like other Florida utilities with available capacity,  
11 make some wholesale sales to utilities in, perhaps, Georgia  
12 or Alabama, assuming that there was adequate transmission  
13 capacity to accommodate such south-to-north transactions.

14 Overall, however, we expect that the vast majority of  
15 the Project's power sales will be made, at wholesale, to  
16 other utilities within Florida.

17  
18 **Q: Does Duke New Smyrna either plan to sell electricity at**  
19 **retail in Florida or anticipate making retail power sales in**  
20 **Florida?**

21 **A:** No. In the first place, by law, as an Exempt Wholesale  
22 Generator, Duke New Smyrna cannot sell electricity at  
23 retail. In addition, selling at retail is not a part of  
24 either DEPS's or Duke New Smyrna's development or marketing  
25 plans. As noted above, the only Duke Energy companies that  
26 sell power at retail are Duke Power and Nantahala Power &

**DIRECT TESTIMONY OF MICHAEL C. GREEN, P.E.**

1 Light, and none of DEPS's merchant plant affiliates sells at  
2 retail in any jurisdiction. Our primary areas of core  
3 expertise include building very efficient power plants and  
4 operating them very efficiently. This wholesale operation  
5 is our goal for the New Smyrna Beach Power Project.

6  
7 **PROJECT FINANCE, CAPITAL COST, AND VIABILITY**

8 **Q: Please give an overview of the financing plan for the New**  
9 **Smyrna Beach Power Project.**

10 **A:** The Project will be constructed and brought into commercial  
11 service solely with internal Duke New Smyrna funds.

12  
13 **Q: What is the projected capital cost of the New Smyrna Beach**  
14 **Power Project?**

15 **A:** The direct construction cost of the New Smyrna Beach Power  
16 Project is expected to be \$160 million, which equates to  
17 approximately \$311 per kW based on the Project's 514 MW  
18 capacity at ISO temperature and humidity conditions. This  
19 does not include the cost of downstream transmission  
20 upgrades that are planned to support power deliveries from  
21 the Project; the UCNSB has estimated the cost of those  
22 transmission additions to be approximately \$6.3 million.

23  
24 **Q: Please comment on the financial viability of the New Smyrna**  
25 **Beach Power Project.**

26 **A:** With Duke Energy's resources funding both the capital

**DIRECT TESTIMONY OF MICHAEL C. GREEN, P.E.**

1 investment and the operating costs of the Project, there can  
2 be no doubt as to its financial viability. With the  
3 Project's anticipated internal financing, DEPS and Duke New  
4 Smyrna will have very strong incentives to maintain and  
5 operate the Project as efficiently and economically as  
6 possible. In simple economic terms, we will expect to  
7 operate the Project whenever our potential incremental  
8 revenue exceeds our incremental production costs. As noted  
9 above, we expect to operate the Project between 7,000 and  
10 8,500 hours per year, with a very high availability factor.

11 Also, the gas-fired combined cycle technology that we  
12 have selected for the Project is the most efficient and the  
13 most economical currently available on a commercial basis.  
14 Indeed, it is the technology of choice throughout the U.S.  
15 electric industry today. Thus, we consider the Project to  
16 be entirely viable. The ultimate proof of this is that we  
17 are planning to invest approximately \$160 million of  
18 internal Duke New Smyrna funds in this Project.

19

20

**REQUESTED COMMISSION ACTION**

21 **Q: What action are UCNSB and Duke New Smyrna asking the**  
22 **Commission to take in this proceeding?**

23 **A: We are petitioning the Commission to issue its order**  
24 **granting an affirmative determination of need for the New**  
25 **Smyrna Beach Power Project. There is a need for additional**  
26 **generating capacity in Florida, and the Project is a viable,**

**DIRECT TESTIMONY OF MICHAEL C. GREEN, P.E.**

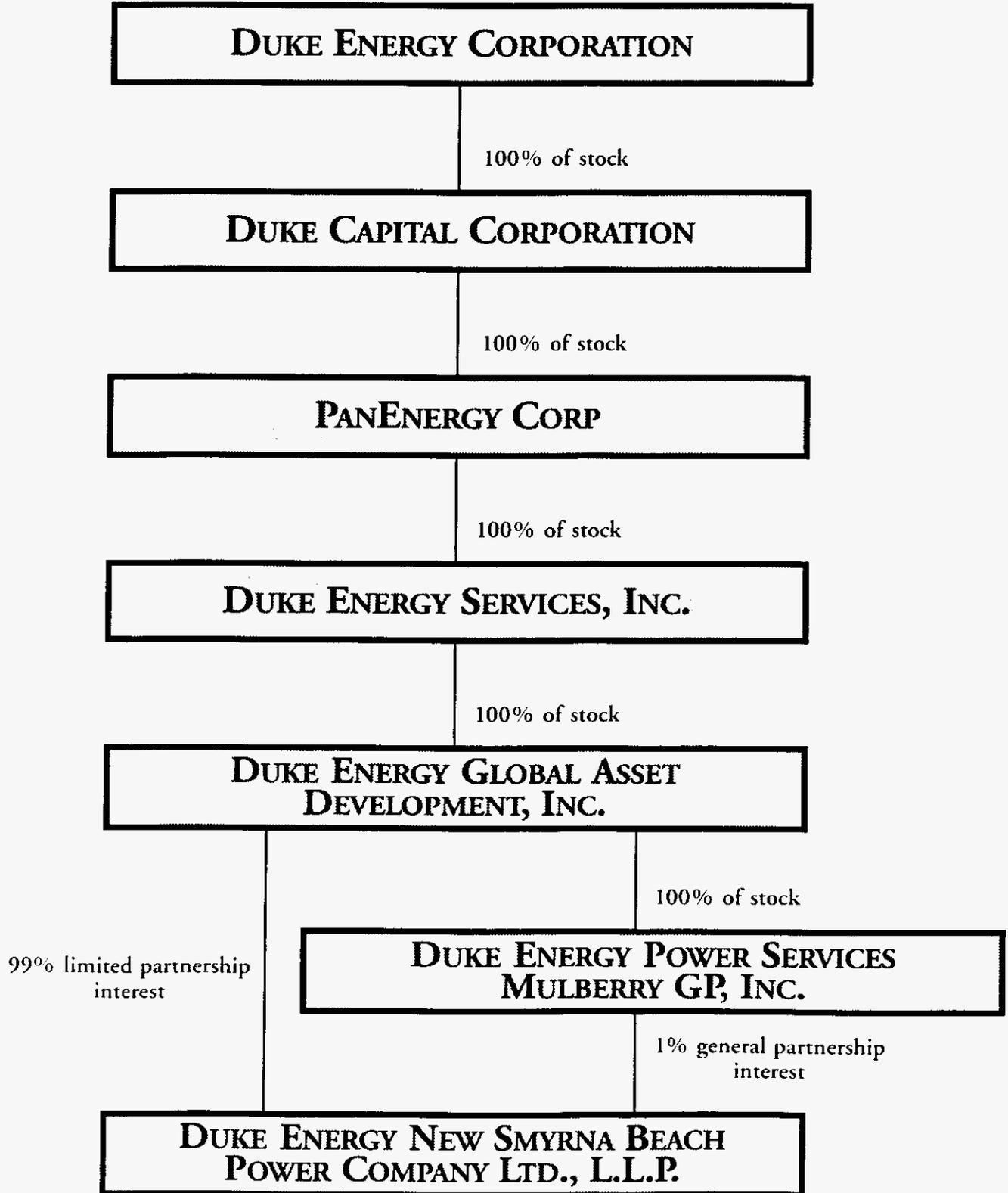
1 clean, reliable, highly available, highly efficient, and  
2 cost-effective power plant that will benefit the Utilities  
3 Commission, City of New Smyrna Beach, its retail electric  
4 customers, and other Peninsular Florida utilities and their  
5 customers, without any obligation to purchase the Project's  
6 output, without any obligation to pay for the Project's  
7 capital cost, and without any of the financial or operating  
8 risks associated with power plants.

9

10 **Q: Does this conclude your direct testimony?**

11 **A: Yes, it does.**

**DUKE ENERGY NEW SMYRNA BEACH  
POWER COMPANY LTD., L.L.P.**  
**OWNERSHIP STRUCTURE**



83 FERC ¶ 61,316

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

697363

Before Commissioners: James J. Hoecker, Chairman;  
Vicky A. Bailey, William L. Massey,  
Linda Breathitt, and Curt Hébert, Jr.

Duke Energy New Smyrna Beach ) Docket No. ER98-2624-000  
Power Company Ltd., L.L.P. )

ORDER ACCEPTING FOR FILING  
PROPOSED TARIFFS FOR MARKET-BASED POWER SALES  
AND REASSIGNMENT OF TRANSMISSION CAPACITY

(Issued June 25, 1998)

In this order, we accept for filing, without hearing or suspension, the tariffs filed by Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. (Duke New Smyrna), under which it proposes to sell power at wholesale at market-based rates and to reassign transmission capacity.

Background

On April 21, 1998, Duke New Smyrna, an indirect wholly-owned subsidiary of Duke Energy Corporation (Duke), filed an application requesting Commission authorization to sell electric capacity and energy at market-based rates. The power is to be produced from a generating facility for which construction has not commenced. Duke New Smyrna states that it has an agreement to sell 30 MW of the 500 MW output of the generating facility to the Utilities Commission of the City of New Smyrna Beach, Florida (New Smyrna Beach) and that Duke New Smyrna will file that agreement once it is finalized. Duke New Smyrna states that it may also enter into an agreement to provide ancillary services to New Smyrna Beach and that, if so, it will make a separate filing consistent with the Commission's then-existing requirements for ancillary services rates. Duke New Smyrna has also filed a tariff to reassign transmission capacity it has reserved for its own use on Duke's transmission system or on the transmission systems of other transmission providers.

Notice of Duke New Smyrna's filing was published in the Federal Register, 63 Fed. Reg. 23,774 (1998), with comments, protests and interventions due on or before May 11, 1998.

Timely motions to intervene were filed by: Sonat Marketing Company, LP (Sonat); New Smyrna Beach; Florida Power Corporation (Florida Power Corp); Florida Power & Light Company (FP&L); and Tampa Electric Company (TECO) (with protest). TECO argues that Duke New Smyrna's application is premature because construction

Docket No. ER98-2624-000

- 2 -

697364

plans are not finalized, and TECO contends that New Smyrna Beach should be treated as an affiliate because its business arrangements with Duke New Smyrna extend beyond the power sale.

On May 26, 1998, New Smyrna Beach filed an answer to TECO's protest. On that same date, Duke New Smyrna filed for leave to file an answer to TECO's protest, accompanied by its answer to the protest. Neither of these answers object to TECO's intervention.

### Discussion

#### Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (1997), the timely, unopposed motions to intervene of Sonat, New Smyrna Beach, Florida Power Corp, FP&L, and TECO serve to make them parties to this proceeding.

We will reject New Smyrna Beach's and Duke New Smyrna's answers to TECO as impermissible answers to a protest. 18 C.F.R. § 385.213(a)(2) (1997).

#### Market-Based Rates

The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. In order for an affiliate of a transmission-owning public utility to demonstrate the absence or mitigation of market power, the public utility must have on file with the Commission an open access transmission tariff for the provision of comparable services. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing. 1/

As we explain below, we find that Duke New Smyrna's market-based rate application meets these standards. Accordingly, we will accept the proposed market-based rates for filing, without modification, to become effective upon the commencement of service.

---

1/ E.g., Progress Power Marketing, Inc., 76 FERC ¶ 61,155 at 61,919 (1996), letter order approving settlement, 79 FERC ¶ 61,149 (1997); Northwest Power Marketing Company, L.L.C., 75 FERC ¶ 61,281 at 61,889 (1996); accord Heartland Energy Services, Inc., et al., 68 FERC ¶ 61,223 at 62,060-63 (1994) (Heartland).

Docket No. ER98-2624-000

- 3 -

697365

1. Generation Market Power

Duke New Smyrna will own a 500 MW generating facility to be constructed in New Smyrna Beach, Florida. In support of its market-based rate proposal, Duke New Smyrna relies on section 35.27(a) of the Commission's regulations, 18 C.F.R. § 35.27(a) (1997). Section 35.27(a) of the Commission's regulations reads, in pertinent part, as follows:

[A]ny public utility seeking authorization to engage in sales for resale of electric energy at market-based rates shall not be required to demonstrate any lack of market power in generation with respect to sales from capacity for which construction has commenced on or after July 9, 1996.

Duke New Smyrna has no existing generation and construction of the subject facility has not yet commenced. Under these circumstances, there is no need to consider the generation market power, if any, resulting from construction of the proposed facility. While we noted in Order No. 888 that we would not "ignore specific evidence presented by an intervenor that a seller requesting market-based rates for sales from new generation nevertheless possesses generation dominance," 2/ no such evidence is presented here.

In addition, Duke New Smyrna is affiliated with Duke, Nantahala Power and Light Company (Nantahala), and various power marketers and exempt wholesale generators. In Lykes-Duke/Louis Dreyfus, Ltd., 77 FERC ¶ 61,115 at 61,444 & n.3 (1996) (Lykes-Duke); see also Duke Power Company and PanEnergy Corporation, 79 FERC ¶ 61,236 at 62,037-38 (1997), the Commission determined that Duke and its affiliates lack generation dominance. Thus, Duke New Smyrna's affiliation with these companies does not create generation dominance concerns.

Accordingly, we find that Duke New Smyrna meets the Commission's generation market power standard for approval of market-based rates.

---

2/ Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (1996), FERC Stats. & Regs. ¶ 31,036 at 31,657 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998).

Docket No. ER98-2624-000

- 4 -

697366

2. Transmission Market Power

When an affiliate of a transmission-owning public utility seeks authorization to charge market-based rates, the Commission has required the public utility to have an open access transmission tariff on file before granting such authorization. 3/ Pursuant to Order No. 888, Duke filed an open access transmission tariff in Docket No. OA96-46-000. 4/ For this reason, we find that Duke New Smyrna meets the Commission's transmission market power standard for approval of market-based rates.

3. Other Barriers to Entry/Reciprocal Dealing

Our review of Duke New Smyrna's application satisfies us that there are no other barriers to entry or reciprocal dealing considerations of concern here.

4. Affiliate Abuse

Duke New Smyrna's rate schedule prohibits power sales to or power purchases from Duke and Nantahala absent a separate rate filing under section 205 of the Federal Power Act (FPA), 16 U.S.C. § 824d (1994). In addition, Duke New Smyrna has attached a code of conduct governing affiliate transactions. These commitments satisfy the Commission's requirements as to information sharing, the pricing of non-power goods and services, and separating business activities and operating personnel of the affiliates. With these safeguards, we are satisfied that there are no affiliate abuse considerations of concern here.

5. TECO's Argument That the Application Is Premature

TECO argues that Duke New Smyrna's filing is premature because the facility has not yet been constructed and its construction depends on whether Duke New Smyrna obtains the requisite siting authority. However, the Commission routinely grants requests for market-based rates for power producers whose generating facilities have yet to be constructed and, in fact, early Commission action often is critical to financing. 5/

---

3/ See Order No. 888, FERC Stats. & Regs. at 31,656-57; accord Southern Company Services, Inc., et al., 71 FERC ¶ 61,392 at 62,536 (1995); Heartland, 68 FERC at 62,059-60.

4/ The tariff covers Duke's and Nantahala's transmission facilities. See Lykes-Duke, 77 FERC at 61,444.

5/ See, e.g., Zond Development Corporation, 80 FERC ¶ 61,051 at 61,151-52, 61,154 (1997).

Docket No. ER98-2624-000

- 5 -

697367

6. TECO's Argument That the Commission Should Treat New Smyrna Beach as an Affiliate

TECO argues that the Commission should consider New Smyrna Beach to be an affiliate on the grounds that, if Duke New Smyrna provides ancillary services to New Smyrna Beach, it may be provided with preferential information about New Smyrna Beach's transmission system. We find that TECO's concerns are unfounded and speculative, particularly since New Smyrna Beach is not even the control area operator for its system. Moreover, any legitimate concerns about a possible future ancillary services arrangement are, at best, premature because no such agreement has yet been filed. We will review the merits of the agreement if and when it is filed.

Reassignment of Transmission Capacity

Duke New Smyrna states that, consistent with the conditions established by the Commission for reassignment of transmission capacity, <sup>6/</sup> it will reassign transmission capacity at a price not to exceed the highest of: (1) the original rate paid by Duke New Smyrna; (2) the applicable transmission provider's maximum rate on file at the time of the sale to the eligible customer; or (3) Duke New Smyrna's own opportunity costs, capped at the applicable transmission provider's cost of expansion at the time of the Duke New Smyrna sale to the eligible customer. The proposed tariff states that Duke New Smyrna will not recover opportunity costs without making a separate filing under section 205 of the FPA.

We find Duke New Smyrna's request to be consistent with our requirements applicable to the reassignment of transmission capacity. Accordingly, we accept Duke New Smyrna's proposal to reassign transmission capacity.

Reporting and Filing Requirements

Consistent with procedures we have adopted in other cases, Duke New Smyrna may file umbrella service agreements for short-term power sales (one year or less) within 30 days of the date of commencement of short-term service, to be followed by quarterly transaction summaries of specific sales. For long-term transactions (longer than one year), Duke New Smyrna must submit

---

<sup>6/</sup> See Order No. 888, FERC Stats. & Regs. at 31,694-97; Order No. 888-A, FERC Stats. & Regs. at 30,219-25; Commonwealth Edison Company, 78 FERC ¶ 61,312 at 62,335-36 (1997).

Docket No. ER98-2624-000

- 6 -

697368

the actual individual service agreement for each transaction within 30 days of the date of commencement of service. 7/

To ensure the clear identification of filings, and in order to facilitate the orderly maintenance of the Commission's files and public access to the documents, long-term transaction service agreements should not be filed together with short-term transaction summaries.

Additionally, we will direct Duke New Smyrna to inform the Commission promptly of any change in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing. These include, but are not limited to: (1) ownership of generation or transmission facilities or inputs to electric power production other than fuel supplies; or (2) affiliation with any entity not disclosed in the filing that owns generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area. 8/ Alternatively, Duke New Smyrna may elect to report such changes in conjunction with the updated market analysis it will be required to file every three years. 9/

#### Requests for Waivers and Authorizations

Duke New Smyrna requests waivers and authorizations similar to those granted to power marketers with market-based rate authorization: (1) waiver of the accounting and reporting requirements of Parts 41, 101, and 141 of the Commission's regulations; (2) abbreviated filings with respect to interlocking directorates under Part 45; (3) waiver of the filing requirements of Subparts B and C of Part 35, with the exception of sections 35.12(a), 35.13(b), 35.15, and 35.16; and (4) blanket authorization of securities issuances under Part 34. We will grant the requested waivers and authorizations consistent with those granted to other non-traditional entities selling at market-based rates.

---

7/ See, e.g., Southern Company Services, Inc., 75 FERC ¶ 61,130 at 61,444-45, clarified, 75 FERC ¶ 61,353 (1996); Plum Street Energy Marketing, Inc., et al., 76 FERC ¶ 61,319 at 62,556 (1996).

8/ See, e.g., Morgan Stanley Capital Group, 69 FERC ¶ 61,175 at 61,695 (1994), order on reh'g, 72 FERC ¶ 61,082 (1995); InterCoast Power Marketing Company, 68 FERC ¶ 61,248 at 62,134, clarified, 68 FERC ¶ 61,324 (1994).

9/ We reserve the right to require such an analysis at any time.

Docket No. ER98-2624-000

- 7 -

697369

The Commission orders:

(A) Duke New Smyrna's market-based power sales and transmission capacity reassignment tariffs are hereby accepted for filing, to become effective upon commencement of service.

(B) Duke New Smyrna is hereby directed to conform with the filing and reporting requirements specified in this order. The first quarterly report of transactions undertaken by Duke New Smyrna under its market-based power sales tariff will be due within 30 days of the end of the quarter in which service commences.

(C) Duke New Smyrna is hereby directed to file an updated market analysis within three years of the date of this order, and every three years thereafter.

(D) Duke New Smyrna is hereby directed to inform the Commission promptly of any change in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing. Alternatively, as discussed in the body of this order, Duke New Smyrna may elect to report any such changes every three years with the updated market analysis filed pursuant to Ordering Paragraph (C) above. Duke New Smyrna shall notify the Commission of which option it elects in its first quarterly report filed pursuant to Ordering Paragraph (B) above.

(E) Duke New Smyrna is hereby directed to inform the Commission of the date of commencement of service within 10 days of that date.

(F) Duke New Smyrna's request for waiver of Parts 41, 101, and 141 of the Commission's regulations is hereby granted.

(G) Within 30 days of the date of this order, any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by Duke New Smyrna should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.211 and 385.214 (1997).

(H) Absent a request to be heard within the period set forth in Ordering Paragraph (G) above, Duke New Smyrna is hereby authorized to issue securities and assume obligations or liabilities as guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate purposes of Duke New Smyrna, compatible with the public

Docket No. ER98-2624-000

- 8 -

697370

interest, and reasonably necessary or appropriate for such purposes.

(I) Until further order of this Commission, the full requirements of Part 45 of the Commission's regulations, except as noted below, are hereby waived with respect to any person now holding or who may hold an otherwise proscribed interlocking directorate involving Duke New Smyrna. Any such person instead shall file a sworn application providing the following information:

- (1) full name and business address; and
- (2) all jurisdictional interlocks, identifying the affected companies and the positions held by that person.

(J) The Commission reserves the right to modify this order to require a further showing that neither public nor private interests will be adversely affected by continued Commission approval of Duke New Smyrna's issuances of securities or assumptions of liabilities, or by the continued holding of any affected interlocks.

(K) Duke New Smyrna's requests for waiver of the provisions of Subparts B and C of Part 35 of the Commission's regulations, with the exception of sections 35.12(a), 35.13(b), 35.15, and 35.16, are hereby granted.

(L) Duke New Smyrna is hereby informed of the following rate schedule designations:

Duke Energy New Smyrna Power Company Ltd., L.L.P.  
Docket No. ER98-2624-000

<u>Designation</u>	<u>Description</u>
(1) FERC Electric Tariff, Original Volume No. 1 (Original Pages 1-2)	Market-Based Rates/ Code of Conduct
(2) FERC Electric Tariff, Original Volume No. 2 (Original Pages 1-3)	Reassignment of Transmission Rights

By the Commission.

( S E A L )

*David P. Boergers*  
David P. Boergers,  
Acting Secretary.

83 FERU 162.22 U

copy

FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, DC 20426

OFFICE OF THE GENERAL COUNSEL

June 9, 1998

Mr. Adam Wenner  
Vinson & Elkins L.L.P.  
The Willard Office Building  
1455 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

Re: Docket No. EG98-65-000

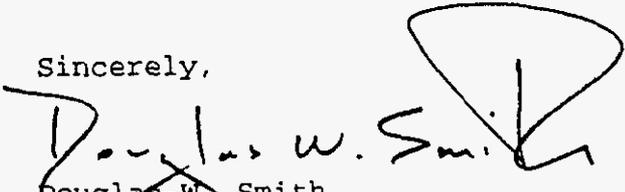
Dear Mr. Wenner:

On April 22, 1998, you filed an application for determination of exempt wholesale generator status on behalf of Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. pursuant to section 32 of the Public Utility Holding Company Act of 1935 (PUHCA). Notice of the application was published in the Federal Register, 63 Fed. Reg. 23,773 (1998), with interventions or comments due on or before May 15, 1998. Timely motions to intervene raising no arguments were filed by Sonat Marketing Company L.P., Florida Power Corporation, Tampa Electric Company, and Florida Power and Light Company.

Authority to act on this matter is delegated to the General Counsel. 18 C.F.R. 375.309(g). Based on the information set forth in the application, I find that Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. is an exempt wholesale generator as defined in section 32 of PUHCA.

A copy of this letter will be sent to the Securities and Exchange Commission.

Sincerely,

  
Douglas W. Smith  
General Counsel

## **PARTICIPATION AGREEMENT**

**Dated: February 17, 1998**

**by and between**

**Utilities Commission, City of New Smyrna Beach, Florida**

**and**

**Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.**

## TABLE OF CONTENTS

<b>1.0 ENTITLEMENT</b> .....	1
1.1 General.....	1
1.2 Availability .....	2
1.3 Associated Energy .....	2
1.4 Replacement Capacity and Energy .....	3
1.5 Provision For Modification of In Lieu Of Tax Agreement.....	3
1.6 Load Following Services .....	3
<b>2.0 FACILITY, SITE AND INFRASTRUCTURE</b> .....	4
2.1 Facility .....	4
2.2 Site .....	4
2.3 Make-up Water .....	4
2.4 Smyrna Substation .....	5
2.5 Gas Delivery System .....	5
<b>3.0 PERMITS AND APPROVALS</b> .....	6
3.1 General.....	6
3.2 Cost Sharing.....	6
3.3 Sale of Power .....	6
3.4 Facility and Gas Delivery System .....	6
<b>4.0 OPERATION AND MAINTENANCE</b> .....	7
4.1 General.....	7
4.2 Local Preference for Staffing.....	7
<b>5.0 TAXES</b> .....	7
5.1 General.....	7
5.2 Special Tax Agreement.....	7
<b>6.0 ADDITIONAL DEVELOPMENT RIGHTS</b> .....	8
6.1 General.....	8
<b>7.0 REPRESENTATIONS AND WARRANTIES</b> .....	9
7.1 Representations and Warranties of Duke.....	9
7.2 Representations and Warranties of UCNSB .....	10
<b>8.0 MISCELLANEOUS</b> .....	11
8.1 Notices .....	11
8.2 Exclusivity .....	11
8.3 Disclosure of Information .....	12
8.4 Assignment .....	12

8.5 Binding Effect; No Third Party Beneficiaries .....	12
8.6 Expenses .....	13
8.7 Indemnification .....	13
8.8 Further Assurances .....	13
8.9 Compliance with Laws .....	13
8.10 GOVERNING LAW .....	13
8.11 Dispute Resolution .....	14
8.12 Consequential Damages .....	14
8.13 Remedies .....	14
8.14 Waivers .....	14
8.15 Severability .....	14
8.16 No Partnership .....	15
8.17 Entire Agreement; Amendment .....	15
8.18 Headings; References .....	15
8.19 Counterparts .....	15
8.20 Limited Recourse Against UCNSB .....	15

**EXHIBITS**

Exhibit A	Description of the Site
Exhibit B	Tax Agreement

# PARTICIPATION AGREEMENT

This Participation Agreement ("Agreement"), dated as of February 17, 1998, is by and between the Utilities Commission, City of New Smyrna Beach, Florida, a commission ("UCNSB") of the City of New Smyrna Beach, Florida (the "City"), and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., a limited partnership organized and existing under the laws of the State of Florida ("Duke") (collectively, the "Parties").

WHEREAS, Duke and its affiliates are in the business of developing, owning and operating electric generation facilities throughout the United States;

WHEREAS, in order to meet the power requirements of UCNSB's existing and future customers in a manner that is in the best interest of such customers, and pursuant to a Letter of Intent dated May 21, 1997 (the "LOI") between UCNSB and PanEnergy Power Services, Inc. (now known as Duke Energy Power Services, LLC and an affiliate of Duke), such parties have conducted due diligence investigations regarding the feasibility and economic viability of developing an electric generation facility in New Smyrna Beach, Florida and have reached a definitive agreement for the Parties to proceed with the development of a combined-cycle electric generation facility with a capacity of approximately 240 megawatts or more (the "Facility"); and

WHEREAS, the Facility is to be located on a site presently owned by UCNSB of approximately 20 acres located northwest of the intersection of Interstate I-95 and State Road 44 in Volusia County, Florida and more particularly described on Exhibit A hereto (the "Site"), which Site is adjacent to UCNSB's 115 KV substation (the "Smyrna Substation");

NOW, THEREFORE, in consideration of the mutual agreements contained herein, UCNSB and Duke hereby agree as follows:

## 1.0 ENTITLEMENT

### 1.1 General

Duke shall provide to UCNSB an entitlement to 20 megawatts ("MW") of electric capacity (the "Entitlement") from the Facility measured at the ring bus of the Smyrna Substation. The Entitlement shall begin on the commercial operation date ("COD") of the Facility (which is expected to be about 33 months after the date hereof) and continue for the technical and economic life of the Facility (which technical and economic life shall be deemed to be the period during which the Facility, as it is initially constructed prior to the COD, is technically capable (excluding customary outages and force majeure outages) of producing electric energy at a cost that results in a reasonable profit and cash flow to the owner of the Facility when such energy is sold). The Entitlement shall be provided in consideration for UCNSB's contributions to Duke of the Site and certain infrastructure requirements as described in Section 2.0 and UCNSB's other

obligations under this Agreement. There shall be no other charge for the Entitlement.

1.2 Availability

The Entitlement shall be made available to UCNSB for all hours during which the Facility is available. If the Facility is unavailable because of either a scheduled or unscheduled outage, Duke shall have no responsibility to provide for replacement capacity to UCNSB. If the Facility is derated, UCNSB's Entitlement shall be derated proportionately.

1.3 Associated Energy

Beginning at the COD, Duke shall make available to UCNSB, at the ring bus of the Smyrna Substation, 20 megawatt hours ("MWH") of electric energy per hour associated with the Entitlement ("Associated Energy") and UCNSB shall be obligated to take or pay for 18 MWH/hour of Associated Energy for all hours in which the Facility is available. Such amount shall be prorated in conjunction with any derating of the Facility pursuant to Section 1.2. If the Facility is unavailable because of either a scheduled or unscheduled outage, Duke shall have no responsibility to provide for replacement energy. Associated Energy shall be priced at \$18.50 per MWH beginning on the COD. On each of the first nine anniversaries of the COD, the Associated Energy price shall be adjusted by multiplying the then existing price by a fraction, the numerator of which is the average of the Weekly Indexes (On-Peak) for the Price of Spot Electricity for the Florida/Georgia Border market as quoted in Power Markets Week published by The McGraw-Hill Companies for the 52 weeks immediately preceding such anniversary, and the denominator of which is the average of such Weekly Indexes for the 52 weeks immediately preceding the COD (in the case of the first anniversary) or the preceding anniversary (in the case of each subsequent anniversary) (or, if such Weekly Index ceases to be quoted, then the Parties shall agree on the publicly quoted index that is the most comparable to such Weekly Index as a substitute therefor); provided, however, that in no event shall the resulting price be greater or less than \$18.50 per MWH increased or decreased, respectively, by 3.5% per year (compounded) for each year after the COD (on a cumulative basis). From and after the tenth anniversary of the COD, the Associated Energy price shall be equal to the fair market value of similar quantities of firm wholesale electric energy (including capacity and transmission) delivered by an unrelated third party to another unrelated third party (without any other contractual relationships) at the Smyrna Substation; provided that UCNSB shall be entitled to an annual credit of \$1,000,000, one-twelfth of which shall be applied against each month's charges for Associated Energy (which credit shall not reduce any month's charges below zero and shall not be carried forward to future months), to reflect that the new pricing would not be on the same basis as the favorable pricing to UCNSB during the first ten years after the COD. Invoices for Associated Energy provided during a

month shall be delivered by Duke to UCNSB within 10 days after the end of such month and shall be due within 15 days after such delivery.

1.4 Replacement Capacity and Energy

If the Facility is available, but Duke chooses not to dispatch the Facility or the Facility commitments are below the minimum capacity of the Facility as established by Duke, then Duke shall arrange for replacement capacity and energy to be delivered to UCNSB at the ring bus of the Smyrna Substation. There shall be no charge for replacement capacity. Replacement energy shall be priced at the same price as Associated Energy from the Facility as provided in Section 1.3.

1.5 Provision For Modification of Tax Agreement

If at any time during the life of the Facility (which phrase life of the Facility, as used hereinafter, shall include the period of time from the date hereof through the decommissioning and dismantling of the Facility) the Tax Agreement defined in Section 5.2 is modified, is not renewed, or is otherwise affected such that the Facility or Duke incurs City Taxes (as defined in Section 5.2) in excess of \$500,000 with respect to the Site and the Facility (and, if applicable, the Additional Capacity as defined in Section 6.1) during any 12 month period beginning on the COD or any anniversary of the COD, Duke shall deliver to UCNSB an invoice or invoices for the amount of such excess and UCNSB shall pay to Duke the amount of such excess within 15 days after delivery of each such invoice.

1.6 Load Following Services

- (a) Duke shall furnish load following services to UCNSB that will allow UCNSB to schedule 20 MW for any hour, but take an amount of Associated Energy during the hour which is between 18 and 20 MWH (the "Load Following Services"). Duke shall not be obligated under this Agreement to provide to UCNSB any other ancillary services.
- (b) The capacity portion of the Load Following Services will be furnished as part of the 20 MW Entitlement. The energy associated with Load Following Services will be priced pursuant to Section 1.3.
- (c) Duke will provide the Load Following Services to UCNSB if the Facility is available. If the Facility is not available, Duke will have no responsibility to provide the Load Following Services. If Duke chooses not to dispatch the Facility or the Facility commitments are below the minimum capacity of the Facility as established by Duke, and if Duke does not arrange for the load following services from a third party, then UCNSB may arrange for the Load Following Services to be provided by another supplier under FERC Order 888 and Duke shall reimburse UCNSB within 15

days of being invoiced by UCNSB for the actual cost of such services minus the energy cost as provided in Section 1.3.

## 2.0 FACILITY, SITE AND INFRASTRUCTURE

### 2.1 Facility

Duke shall, at its cost, design, engineer, procure equipment for, construct, finance, own, operate, and market all capacity, energy and ancillary services provided from the Facility.

### 2.2 Site

UCNSB shall transfer good and marketable title to the Site (free and clear of all liens and encumbrances other than those set forth on Exhibit A hereto) to Duke prior to April 1, 1998. Prior to the commencement of construction of the Facility, Duke shall obtain a Phase I Site Assessment of the Site (to determine real or potential environmental liabilities) performed pursuant to ASTM E 1527-93 guidelines and deliver to UCNSB a copy of the results of such assessment. UCNSB shall indemnify and hold harmless Duke, its affiliates, and Duke's and its affiliates' respective directors, employees and representatives, from and against any and all claims, liabilities, losses and expenses (including costs of suit and attorneys' fees) attributable to the ownership or operation of the Site prior to such transfer or attributable to the condition of the Site at the time of such transfer, regardless of whether same are identified in such assessment. Subject to the foregoing, UCNSB shall not be responsible for, and Duke shall be responsible for, any costs of decommissioning and dismantling of the Facility at the end of its useful life. If, at any time prior to completion of the detailed engineering for the Facility, Duke reasonably determines (based on engineering and technical factors) that the Site is not adequate for the Facility and its related facilities, UCNSB will acquire, at UCNSB's cost and in a timely manner in order for Duke to meet its project schedule for the Facility, and transfer to Duke additional property contiguous with the Site on the same terms as the Site (as described in this Section).

### 2.3 Make-up Water

UCNSB will, at its cost, complete construction of a wastewater treatment facility (which will include a storage reservoir of at least 2 million gallons for the reuse water) and complete the drilling and equipping of water wells which, together with the reuse water from the water treatment facility, will be capable of supplying all water required by the Facility for the life of the Facility. Such water treatment facility and water wells will be located on land adjacent to the Site and will, contingent on UCNSB's receipt of necessary permits, be completed prior to the commencement of start-up testing of the Facility. From such water treatment facility and water wells, UCNSB will deliver to Duke at the power plant block on the Site all water required by the Facility for the life of the Facility. All of such water shall

be of a quality that meets the technical specifications, prior to demineralization, of the Facility. All of such water will be delivered through a minimum of a 12-inch main with a flow rate of at least 1500 gallons per minute. UCNSB shall charge Duke for all of such water at the lowest rate applicable to major users of reuse water in the area in which reuse water service is provided by UCNSB or by any successor provider (regardless of whether such reuse water is treated at such water treatment facility). Without limiting the foregoing, (a) rate increases will occur only to the extent necessary to meet operation and maintenance cost increases (cost base) associated with the processing of the reuse water, (b) since the Facility will be adjacent to the water treatment facility, capital costs and operation and maintenance costs associated with the transmission of the reuse water will not be included in any rate increases, and (c) Duke shall have the right, through appropriate proceedings, to contest any rate increases. If at any time such water from such water treatment facility and water wells is not sufficient (in terms of quantity or quality) to meet the requirements of the Facility, UCNSB shall deliver to Duke sufficient quantities of potable water as backup water at a price equal to the actual operating costs of pumping such potable water to the Facility (excluding any distribution system costs) and otherwise on the same terms as such water from such water treatment facility and water wells.

2.4 Smyrna Substation

UCNSB shall, at its cost, complete engineering and construction of a modification to the Smyrna Substation's ring bus, associated breakers, relays, instrumentation, etc., to accommodate a position in the ring bus for the Facility prior to the commencement of start-up testing of the Facility. UCNSB shall, at its cost, maintain the Smyrna Substation (including such modification) and provide Duke with access to the Florida Power Corp. and Florida Power & Light Co. transmission grids and with access to use the Smyrna Substation, in each case in a manner that will permit proper operation of the Facility for the life of the Facility.

2.5 Gas Delivery System

Duke shall, at its cost, cause natural gas pipeline service to be made available to the Site prior to the commencement of start-up testing of the Facility and shall also be responsible for any additional gas processing facilities that may be required downstream of the pipeline delivery meter and upstream of the Facility's combustion equipment.

### 3.0 PERMITS AND APPROVALS

#### 3.1 General

Each Party shall use reasonable efforts to obtain all permits and approvals required to perform its obligations under this Agreement and shall assist the other Party in obtaining its permits and approvals.

#### 3.2 Cost Sharing

Duke and UCNSB will share equally in the first \$200,000 of costs approved by Duke (which approval shall not be unreasonably withheld but must be obtained prior to incurring the costs) relating to obtaining and maintaining governmental permits and approvals for the Facility, including charges by Duke's affiliates but excluding Duke, Duke Energy Power Services, LLC and UCNSB staff expenses and excluding the fees and expenses of UCNSB's counsel. Any permitting costs so approved by Duke that are in excess of \$200,000 will be the sole responsibility of Duke.

#### 3.3 Sale of Power

The obligation of Duke to provide the Entitlement to UCNSB and to sell Associated Energy to UCNSB, and the obligation of UCNSB to purchase Associated Energy with the Entitlement from Duke, are subject to the receipt of the approval from the Federal Energy Regulatory Commission for the sale of power in a form acceptable to each of the Parties affected thereby in its sole discretion. Recognizing that Duke intends to qualify as an "exempt wholesale generator" under the Public Utility Holding Company Act of 1935, as amended, UCNSB agrees to resell, and not to use for any end use, all of the electric energy provided to it by Duke pursuant to this Agreement.

#### 3.4 Facility and Gas Delivery System

The obligations of Duke under Sections 2.1 and 2.5, including the obligation to construct the Facility and provide for natural gas deliveries to the Facility, are subject to (a) the receipt of all applicable governmental permits and approvals in a form acceptable to each of the Parties affected thereby in its sole discretion, (b) Duke obtaining a reasonably satisfactory agreement for the looping and extension of the existing natural gas pipeline lateral (i.e., the Sanford Lateral) running closest to the Site, (c) Duke obtaining, on or before March 7, 1998, the approval of the Policy Committee of Duke Energy Corporation to proceed with the transactions contemplated in this Agreement, and (d) no circumstance or event existing or having occurred that has had or could reasonably be expected to have a material adverse effect on the feasibility, prospects or business of the Facility. Duke shall give written notice to UCNSB if Duke determines not to complete the Facility as a result of any of the foregoing, in which event neither Party shall have any further obligations under this Agreement;

provided, however, that (i) each Party shall continue to be liable for any breaches hereof occurring prior to such notice, (ii) if at such time the Site has been conveyed to Duke, Duke shall reconvey to UCNSB all of Duke's right, title and interest to the Site, (iii) if such determination is made solely on the basis of the matters described in clause (d) of the immediately preceding sentence, then Duke shall also pay to UCNSB \$200,000, and (iv) if within 6 months thereafter UCNSB notifies Duke that UCNSB intends to complete the Facility with another party and requests Duke to transfer any governmental permits and approvals for the Facility and any applications therefor, and if such request is approved by Duke (which approval shall not be unreasonably withheld), Duke will, to the extent legally permissible, transfer to UCNSB any governmental permits and approvals that Duke has received in connection with the Facility and any applications for governmental permits or approvals in connection with the Facility that have not yet been obtained, in each case excluding any confidential or proprietary information of Duke.

#### 4.0 OPERATION AND MAINTENANCE

##### 4.1 General

Duke or its designee (which may, at Duke's option, be or include UCNSB) will be responsible for the Facility's operation and maintenance activities.

##### 4.2 Local Preference for Staffing

Subject to qualifying standards and to the extent commercially reasonable, Duke or its designee will give hiring preference to current UCNSB employees for staff positions at the Facility and will recruit for additional staffing needs from the New Smyrna Beach and Volusia County areas.

#### 5.0 TAXES

##### 5.1 General

Duke will be responsible for the payment of all taxes associated with the sale of capacity or energy from the Facility; provided that UCNSB shall pay (or reimburse Duke on a grossed-up basis for) all taxes (including, without limitation, gross receipts and similar taxes, but excluding (except in connection with a gross-up) federal and state income taxes) associated with the Entitlement or Associated Energy. Except as provided in the preceding sentence or Sections 1.5 or 5.2, Duke will also be responsible for all other federal, state, and local taxes that may be levied as a result of the construction, ownership, or operation of the Facility.

##### 5.2 Special Tax Agreement

Pursuant to the Tax Agreement dated February 17, 1998 by and between the City of New Smyrna Beach, Florida (the "City") and UCNSB (the "Tax Agreement"), the City has agreed to accept an annual payment of \$500,000 in lieu of any taxes, fees, user fees, license fees, assessments,

special assessments, or any other charges of any type or nature whatsoever, that the City (or any other special taxing district or instrumentality created by or on behalf of the City) is or may hereafter be in a position to levy, assess, charge, or otherwise impose, either directly or indirectly ("City Taxes", which term includes the payments under the Tax Agreement), regarding sales from, or ownership, construction, operation, decommissioning or dismantlement of, the Facility or the Site. A copy of the Tax Agreement is attached hereto as Exhibit B.

## **6.0 ADDITIONAL DEVELOPMENT RIGHTS**

### **6.1 General**

At any time and from time to time during the life of the Facility, UCNSB shall provide to Duke or its designee, in connection with the development of any additional power generating capacity above 240 MW at or near the Site (which may occur at the same time as the development of the Facility or at one or more subsequent times, and which may be part of the Facility or may be one or more additional facilities), the exclusive right to use the Smyrna Substation (and in such regard, at Duke's request, UCNSB shall provide to Duke, at UCNSB's cost to the extent applicable to the first 260 MW of additional power generating capacity and at Duke's cost to the extent in excess thereof, an additional position on the ring bus at the Smyrna Substation for such additional capacity) and then-currently available land, electric transmission, water treatment and delivery facilities, and other infrastructure at no additional cost. UCNSB shall not provide any such rights to any other parties during the life of the Facility. If, utilizing such rights, Duke develops any such additional power generating capacity above 240 MW that is not merely a modification of the Facility ("Additional Capacity"), then, effective as of the commencement of commercial operations of any Additional Capacity:

- (a) Duke shall provide to UCNSB an entitlement to an additional 10 MW of capacity from the Additional Capacity on substantially the same terms as the Entitlement, including a take or pay obligation for 90% of the electric energy from such additional entitlement; provided, however, that (i) if the capacity of such Additional Capacity is less than 240 MW, such additional entitlement shall be adjusted to a number of MW equal to the product (rounded up to the nearest whole MW) of 10 MW multiplied by a fraction, the numerator of which is the capacity of such Additional Capacity and the denominator of which is 240 MW, and (ii) if either the Facility or the Additional Capacity is derated, UCNSB's aggregate entitlement from such two sources shall be derated by multiplying the sum of the entitlements from such two sources by a fraction, the numerator of which is the aggregate availability of such two sources at the time and the

denominator of which is the aggregate capacity of such two sources;

- (b) the reference to \$500,000 in Section 1.5 shall be revised to be a dollar amount equal to the sum of (i) \$500,000 plus (ii) the product of \$250,000 multiplied by a fraction, the numerator of which is the capacity of such Additional Capacity and the denominator of which is 240 MW; provided, however, that with respect to any 12 month period beginning on the tenth or any subsequent anniversary of the COD, UCNSB shall not be obligated under Section 1.5 to pay Duke for any ad valorem taxes assessed on the Additional Capacity in excess of the amount described in clause (ii) of this Section 6.1(b), it being understood that, for purposes of allocating ad valorem taxes for this provision between the initial 240 MW of the Facility and the Additional Capacity, the Site and all real and personal property used or useful in connection with such initial 240 MW of the Facility shall be allocated to such 240 MW of the Facility and not to the Additional Capacity (for example, assuming the Additional Capacity is 240 MW, (A) if ad valorem taxes allocable to the Additional Capacity are \$250,000 and all other City Taxes allocable to the Additional Capacity are \$300,000, UCNSB shall pay to Duke \$300,000 with respect to City Taxes allocable to the Additional Capacity, and (B) if ad valorem taxes allocable to the Additional Capacity are \$300,000 and all other City Taxes allocable to the Additional Capacity are \$250,000, UCNSB shall pay to Duke \$250,000 with respect to City Taxes allocable to the Additional Capacity); and
- (c) UCNSB shall deliver to Duke all of the water required for such Additional Capacity on the same terms as the water described in Section 2.3 for the Facility, it being agreed that UCNSB shall incorporate into its 5 year capital improvements plan beginning in fiscal year 1998 the capital expenditures required to be in a position to deliver such water for the Additional Capacity.

## **7.0 REPRESENTATIONS AND WARRANTIES**

### **7.1 Representations and Warranties of Duke**

Duke hereby represents and warrants to UCNSB that:

- (a) Duke is a duly organized, validly existing Florida limited partnership and is in good standing under the laws of the State of Florida. It has all requisite partnership power and authority to enter into and to perform its obligations under this Agreement.
- (b) Its execution, delivery, and performance of this Agreement have been duly authorized, and do not and will not (i) violate any law,

rule, regulation, order, or decree applicable to it, (ii) violate its organizational documents, or (iii) contravene or constitute a default or breach under any instrument, indenture, agreement, or other obligation to which it is a party or by which it is bound.

- (c) This Agreement is a legal and binding obligation of Duke, enforceable against Duke in accordance with its terms, except to the extent enforceability is modified by bankruptcy, reorganization and other similar laws affecting the rights of creditors generally and by general principles of equity.
- (d) There is no litigation or administrative proceeding (excluding permit applications and similar matters) pending or, to the best of its knowledge, threatened involving Duke that, if adversely determined, could have a material adverse effect on the financial condition, prospects, or business of the Facility or Duke's ability to perform its obligations under this Agreement.

7.2 Representations and Warranties of UCNSB

UCNSB hereby represents and warrants to Duke that:

- (a) UCNSB is a duly organized, validly existing commission of the City and pursuant to Section 214 of Chapter 15 of the City's Charter UCNSB has been delegated the authority to manage, operate and control the City's utilities. Pursuant to the authority delegated to UCNSB by the City, UCNSB has all requisite power and authority to enter into and to perform its obligations under this Agreement.
- (b) UCNSB's execution, delivery, and performance of this Agreement have been duly authorized, and do not and will not (i) violate any law, rule, regulation, order, or decree applicable to it or the City, (ii) violate its organizational documents, or (iii) contravene or constitute a default or breach under any instrument, indenture, agreement, or other obligation to which it is a party or by which it is bound.
- (c) This Agreement is a legal and binding obligation of UCNSB, enforceable against UCNSB in accordance with its terms, except to the extent enforceability is modified by bankruptcy, reorganization and other similar laws affecting the rights of creditors generally and by general principles of equity.
- (d) There is no litigation or administrative proceeding (excluding permit applications and similar matters) pending or, to the best of its knowledge, threatened involving UCNSB that, if adversely determined, could have a material adverse effect on the financial

condition, prospects, or business of the Facility or UCNSB's ability to perform its obligations under this Agreement.

## 8.0 MISCELLANEOUS

### 8.1 Notices

All notices, requests or consents provided for or permitted to be given under this Agreement shall be in writing, shall be delivered to the recipient in person, by courier or mail, or by facsimile, telex or similar transmission, and shall be effective (a) upon receipt, if sent by personal delivery, mail or courier, or (b) upon the sender's receipt of electronic confirmation of transmission, if sent by facsimile, telex or similar transmissions during regular business hours on a business day (or, if not sent during regular business hours on a business day, on the next succeeding business day). All notices, requests and consents to be sent to a Party shall be sent to the following addresses or such other address as a Party may specify for its address by notice to the other Party:

If to UCNSB:

Utilities Commission, City of  
New Smyrna Beach, Florida  
Post Office Box 100  
200 Canal Street  
New Smyrna Beach, Florida 32170  
Telephone: 904-427-7100  
Facsimile: 904-423-7175  
Attention: Director of Utilities

If to Duke:

Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.  
400 South Tryon Street  
Suite 1800  
Charlotte, N.C. 28285  
Telephone: 704-382-5963  
Facsimile: 704-382-1452  
Attention: Mr. David Hauser

### 8.2 Exclusivity

From the date hereof until the COD, each Party shall use reasonable efforts to promote the business of the Facility and shall not solicit or engage in negotiations or discussions with any other party relating to the Facility or any other similar project within the area in which electric service is provided by UCNSB or any successor provider, if such

negotiations or discussions could reasonably be expected to have a material adverse effect on the business or prospects of the Facility.

8.3 Disclosure of Information

The Parties acknowledge that UCNSB is a publicly owned and operated utility and that UCNSB, its commissioners, employees and agents are subject to the provisions and requirements of Chapters 119 and 286, Florida Statutes, regarding the handling of public records and open meetings. Subject to such requirements, each Party shall maintain in confidence all information received from the other Party or its affiliates relating to the Facility; provided, however, that such Party may disclose such information (a) to its affiliates and its affiliates' respective directors, employees, and representatives (it being understood that they shall be informed by such Party of the confidential nature of such information and that such Party shall cause them to treat such information confidentially), (b) with the approval of Duke if such disclosure is reasonably necessary to develop, construct, finance or promote the business of the Facility, (c) if required to do so by applicable laws, rules, regulations, or orders (including any applicable securities exchange rules), (d) if such information was or becomes generally available to such Party on a non-confidential basis, provided that the source of such information was not known by such Party to be bound by a confidentiality obligation, or (e) if such information is generally available to the public.

8.4 Assignment

No assignment of any of the rights or obligations under this Agreement shall be made by either Party other than to an affiliate of such Party unless (a) it can be demonstrated to the reasonable satisfaction of the non-transferring Party that the financial creditworthiness of the transferee party is at least equal to or better than that of the transferring Party and (b) the non-transferring Party has consented in writing prior thereto, which consent shall not be unreasonably withheld; provided that it is understood that no assignment shall relieve the transferring Party of its obligations hereunder unless the non-transferring Party has consented in writing prior thereto, which consent shall be in such non-transferring Party's sole discretion. For purposes of this Agreement, an "affiliate" of a party shall be any other party controlling, controlled by, or under common control with such party. Without limiting the foregoing, if either Party transfers all or substantially all of its assets to another party, such Party shall cause such transferee party to assume all of such Party's obligations under this Agreement.

8.5 Binding Effect; No Third Party Beneficiaries

This Agreement shall be binding upon, and inure to the benefit of, the Parties and their respective successors and permitted assigns. Except to the extent Section 2.2 (relating to rights of certain parties to be indemnified) provides otherwise, this Agreement is solely for the benefit of the Parties and their respective successors and permitted assigns, and this Agreement shall not otherwise be deemed to confer upon or give to any other party any rights, claims or remedies.

8.6 Expenses

Except as otherwise provided herein, each Party agrees to bear any costs incurred by it in connection with this Agreement and the development of the Facility.

8.7 Indemnification

Each Party shall indemnify and hold harmless the other Party from and against all claims, liabilities, losses, and expenses (including costs of suit and attorneys' fees) that it may incur on account of any breach by the indemnifying Party of any of its representations, warranties or obligations under this Agreement.

8.8 Further Assurances

Each Party agrees to negotiate in good faith and to execute and deliver as soon as practicable after the date hereof a power purchase agreement more fully reflecting the matters described in Section 1.0 hereof. Each Party also agrees to execute such other documents and take such further actions as may be necessary or desirable to effectuate the provisions of this Agreement.

8.9 Compliance with Laws

Each Party shall comply with all laws, rules and regulations applicable to it, the Facility, or the infrastructure described in Section 2.0.

8.10 GOVERNING LAW

THIS AGREEMENT IS GOVERNED BY AND SHALL BE CONSTRUED IN ACCORDANCE WITH THE LAW OF THE STATE OF FLORIDA, EXCLUDING ANY CONFLICT-OF-LAWS RULE OR PRINCIPLE THAT MIGHT REFER THE GOVERNANCE OR THE CONSTRUCTION OF THIS AGREEMENT TO THE LAW OF ANOTHER JURISDICTION.

8.11 Dispute Resolution

In the event of any dispute between the Parties, the Parties shall first attempt to settle such dispute amicably if possible and, failing that, such dispute shall be submitted to the services of a professional mediation service (the cost of which shall be borne equally by the Parties) which shall attempt to mediate the dispute. If the Parties cannot agree upon a mediation service or if the dispute has not been resolved within 60 days after either Party requested mediation services, each Party shall be free to pursue any other means of resolution available to such Party.

8.12 Consequential Damages

Notwithstanding anything to the contrary contained herein, except for actual damages, neither Party shall be liable or have any responsibility to the other Party for any indirect, special, consequential, punitive or other delay-related or performance-related damages including, without limitation, lost earnings, production or profits. Such limitation on liability shall apply with respect to any claim or action, whether it is based in whole or in part on contract, negligence, strict liability, tort, statutory or any other theory of liability. The Parties specifically acknowledge that the benefits each Party contemplates deriving from the provisions of this Agreement reflect such allocation of risk and limitation on liability.

8.13 Remedies

Notwithstanding anything to the contrary contained herein, if UCNSB fails to pay any amounts aggregating over \$50,000 for more than 30 days after the due dates therefor, Duke shall have the right to cease providing energy to UCNSB until such failure is cured and, if such failure continues for more than 90 days after the due dates therefor, Duke shall have the right to terminate (upon notice to UCNSB) the Entitlement and all of Duke's obligations under Section 1.0. Subject to Section 8.12, the rights and remedies provided by this Agreement are cumulative and are in addition to any other rights and remedies a Party may have by law, statute or otherwise.

8.14 Waivers

Any waiver, express or implied, by a Party of any right under this Agreement shall be effective only if it is set forth in a written document executed by such Party and shall not constitute or be deemed to be a waiver of any other right, whether of a similar or dissimilar nature.

8.15 Severability

If any provision of this Agreement or the application thereof to any Party or circumstance shall be held invalid or unenforceable to any extent, the remainder of this Agreement and the application of such provision to the other Party or circumstances shall not be affected thereby and shall be enforced to the greatest extent permitted by law. In such event, the Parties agree that the provisions of this Agreement shall be modified and

reformed so as to effect the original intent of the Parties as closely as possible with respect to any such provision held invalid or unenforceable.

8.16 No Partnership

Nothing in this Agreement shall be construed (a) to create or constitute a partnership, agency or similar relationship, (b) to create any joint and several liability on the part of either of the Parties, or (c) to cause the Parties not to be separate legal entities.

8.17 Entire Agreement; Amendment

This Agreement and the Tax Agreement constitute the entire agreement among the Parties and their respective affiliates relating to the Facility and supersede all prior written or oral agreements among any such parties with respect to such matter (including, without limitation, the LOI). This Agreement may be amended or modified only by a written document executed by each of the Parties.

8.18 Headings; References

The headings of the Sections of this Agreement are included for convenience of reference only and shall not be used in construing or limiting the language of any particular Section. All references to a Party shall be deemed to include its successors and permitted assigns. Unless otherwise expressly provided, all references to "Sections" are to the Sections of this Agreement and all references to "Exhibits" are to the Exhibits attached hereto, each of which is made a part hereof for all purposes.

8.19 Counterparts

This Agreement may be executed in any number of counterparts with the same effect as if each Party had signed the same document. All counterparts shall be construed together and constitute the same instrument.

8.20 Limited Recourse Against UCNSB

The obligations of UCNSB under this Agreement shall not constitute general obligations of UCNSB or the City as "bonds" within the meaning of the Constitution of Florida, but shall be payable solely from, and shall be secured equally and ratably by a first lien on and pledge of, the Net Revenues from UCNSB's System on a parity with UCNSB's Series 1992 Certificates, Series 1993 Certificates, Series 1996 Certificates, and any Additional Parity Obligations without any preference, priority or distinction of any such certificate or obligation over any other thereof (with capitalized terms used in this Section but not otherwise defined in this Agreement having the meanings given to them in Resolution No. 28-78, adopted by UCNSB on June 30, 1978). UCNSB hereby grants to Duke such a first lien on and security interest in, and so pledges to Duke, such Net Revenues to secure the payment and performance of UCNSB's

obligations under this Agreement. UCNSB agrees to comply with all of its obligations set forth in such Resolution No. 28-78 as if such obligations were set forth herein.

IN WITNESS WHEREOF, each of the undersigned Parties has executed and delivered this Agreement as of the date first set forth above.

UTILITIES COMMISSION, CITY OF  
NEW SMYRNA BEACH, FLORIDA

Attest: *Debra Simmons*

By: *Ronald Vaden*  
Name: Ronald L. Vaden  
Title: Utilities Director

Approved as to form and correctness:

Counsel to UCNSB: *Hal Spence*  
Hal Spence, Esquire

DUKE ENERGY NEW SMYRNA BEACH  
POWER COMPANY LTD., L.L.P.

By: Duke Energy Power Services  
Mulberry GP, Inc.,  
its general partner

By: *James M. Donnell* *JK*  
Name: James M. Donnell  
Title: Senior Vice President

## EXHIBIT A

### Description of the Site

The Site shall be the West 1320 feet of the North 660 feet of the NE 1/4 of Section 21, Township 17 South, Range 33 East, containing 20 acres more or less, but excluding the land covered by the Smyrna Substation.

## EXHIBIT B

### TAX AGREEMENT

This Tax Agreement (this "Agreement"), dated as of February<sup>17</sup>, 1998, is by and between the Utilities Commission, City of New Smyrna Beach, Florida (the "Commission") and the City of New Smyrna Beach, Florida (the "City").

WHEREAS, the Commission, pursuant to Section 214 of the City's Charter, has been charged with the responsibility to manage, operate and control all of the City's utilities and, pursuant to Section 217 of the City's Charter, is authorized to furnish the electricity and power, among other utilities, to private individuals and corporations and in furtherance of said power, the Commission has the right to acquire, construct, maintain, extend, improve and develop electric production and distribution systems and to contract with public bodies, and private corporations, partnerships and individuals for such purposes; and

WHEREAS, the Commission has negotiated and expects to enter into a Participation Agreement (the "Participation Agreement") with Duke Energy New Smyrna Beach Power Company, a Delaware limited partnership ("Duke Energy LP", which term shall include its successors and assigns) for the purpose of developing a combined-cycle electric generating facility on an approximately 20 acre tract of land in Volusia County, Florida (the "Site") with a capacity of approximately 240 megawatts ("MW") or more and including its gas delivery and related infrastructure and any modifications to such facility or infrastructure (collectively, the "Facility"); and

WHEREAS, in consideration for the undertakings as set forth in the Participation Agreement, the Commission will be entitled to 20 MW of electric capacity from the Facility (the "Entitlement") and 20 MW hours of electric energy per hour associated with the Entitlement; and

WHEREAS, entering into the Participation Agreement and this Agreement will serve a public purpose of providing the Commission with an economical and long-term source of electric energy for the benefit of customers of the Commission and residents of the City; and

WHEREAS, as a condition of entering into the Participation Agreement, Duke Energy LP has requested that the Commission and the City enter into this Agreement to set forth the understanding of the parties hereto and Duke Energy LP related to the taxation and the exaction of any fees, charges or assessments by the City (or any other special taxing district or instrumentality created by or on behalf of the City) upon the Site, the improvements to be constructed which comprise the Facility and the electricity to be generated and sold by the owners of the Facility; and

NOW, THEREFORE, in consideration of the mutual agreements contained herein, the parties hereto agree as follows:

1. As provided in the Participation Agreement, Duke Energy LP, or its successors or assigns, has agreed to pay to the City \$500,000 payable in twelve equal monthly installments on the first day of each month commencing on the first day of the month following the commercial operation date ("COD") of the Facility and continuing until notice from Duke Energy LP that the Facility is no longer expected to be used for commercial operations. Such amount shall represent the total amount due to the City (or any other special taxing district or instrumentality created by or on behalf of the City) with respect to the Site, the Facility, the construction, ownership, operation, decommissioning and dismantlement of the Facility and the electricity generated, transmitted or sold therefrom. In consideration of such \$500,000 per year payments to the City by Duke Energy LP, the City covenants (i) to favorably consider any application to abate (or for exemption from) ad valorem property taxes, as provided by law, (ii) not to levy or impose a franchise fee applicable to the Facility or the electricity generated, transmitted or sold therefrom, (iii) to waive any payments to the city's general fund required pursuant to Section 218 of the City Charter, and (iv) not to directly or indirectly levy, assess, charge or impose (and to cause all other municipal entities not to directly or indirectly levy, assess, charge or impose) any taxes, fees, user fees, license fees, assessments, special assessments, or any other charges of any type or nature whatsoever that the City (or any other special taxing district or instrumentality created by or on behalf of the City) is or may hereafter be in a position to levy, assess, charge, or otherwise impose, either directly or indirectly, regarding the Site, the Facility, the construction, ownership, operation, decommissioning and dismantlement of the Facility, or the electricity generated, transmitted or sold therefrom.

2. In the event Duke Energy LP, or its successors or assigns, constructs additional power generating capacity above 240 MW at or near the Site utilizing the Commission's available facilities and infrastructure at no additional cost to Duke Energy LP (which additional power generating capacity is not merely a modification of the Facility) (the "Additional Capacity"), the amount due the City from Duke Energy LP shall be increased to an annual amount equal to the sum of (a) \$500,000 plus (b) the product of \$250,000 multiplied by a fraction, the numerator of which is the capacity of such Additional Capacity and the denominator of which is 240 MW, as provided in the Participation Agreement.

3. This Agreement does not relate to, and Duke Energy LP is responsible for, the payment of any and all taxes to be levied or fees, charges or assessment that may now or hereafter be imposed on Duke Energy LP or the Facility by any state or federal governmental unit or agency (other than the City or any other special taxing district or instrumentality created by or on behalf of the City).

4. The provisions of this Agreement relating to exemption from ad valorem tax shall terminate on the date which is 10 years from the COD if and to the extent required by Section 196.1995(6), Florida Statutes, unless renewed based on terms and provisions mutually agreed upon by the parties hereto.

5. This Agreement shall inure to the benefit of and shall be binding upon the City, the Commission, and their respective successors and assigns, and shall be governed by and construed

in accordance with the laws of the State of Florida. Duke Energy LP shall be a third party beneficiary of this Agreement.

6. In the event any provision of this Agreement shall be held invalid or unenforceable by any court of competent jurisdiction, the remainder of this Agreement shall not be affected thereby if such remainder would then continue to conform to the requirements of applicable law.

7. This Agreement represents the entire agreement between the parties. This Agreement may be supplemented, modified or amended only with the prior written consent of Duke Energy LP.

8. This Agreement may be simultaneously executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

IN WITNESS WHEREOF, the City has caused this Agreement to be executed by its Mayor and the seal of the City to be hereto affixed and attested by its City Clerk and the Utilities Commission, City of New Smyrna Beach, Florida has duly caused this Agreement to be executed by its Chairman and the seal of the Commission to be hereto affixed and attested by its Secretary Treasurer, all as of the date first above written.

(SEAL)

UTILITIES COMMISSION,  
CITY OF NEW SMYRNA, FLORIDA

By: Peter G. Malloy  
Chairman

ATTEST:

William Hegarty  
Secretary-Treasurer

CITY OF NEW SMYRNA BEACH, FLORIDA

(SEAL)

By: James J. Wenzel  
Mayor

ATTEST:

James J. Wenzel  
City Clerk

AMENDMENT NUMBER ONE  
TO PARTICIPATION AGREEMENT  
BY AND BETWEEN  
UTILITIES COMMISSION, CITY OF NEW SMYRNA BEACH, FLORIDA  
AND  
DUKE ENERGY NEW SMYRNA BEACH POWER COMPANY LTD., L.L.P.

This Amendment Number One to the Participation Agreement By and Between Utilities Commission, City of New Smyrna Beach, Florida and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. ("Amendment") is made and entered into March 11, 1998, by and between Utilities Commission, City of New Smyrna Beach, Florida ("UCNSB") and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. ("Duke"), collectively, the "Parties".

RECITALS

WHEREAS, UCNSB and Duke are Parties to the Participation Agreement to proceed with the development of a combined-cycle electric generation facility with a capacity of approximately 240 megawatts or more (the "Facility"), dated Feb. 17, 1998, ("Agreement").

WHEREAS, UCNSB and Duke desire to revise the Agreement;

NOW, THEREFORE, in consideration of the foregoing and of the mutual covenants contained herein, the Parties do hereby agree to amend the Agreement as follows:

1. Insert in Section 2.2, Site:

"and shall transfer back to UCNSB good and marketable title to the Site"

2. Delete in Section 3.4, Facility and Gas Delivery System:

"Policy Committee" and replace with:

"Board of Directors of Duke Energy Power Services, LLC, a subsidiary"

3. Add in Section 3.4, Facility and Gas Delivery System:

"(d) Duke obtaining, within 60 days after all necessary permits are obtained, approval for funding for construction of the project by the Duke Energy Corporation Board of Directors"

and update subsequent (d) to (e); and add "or (e)" to item (iii).

4. Add to Exhibit B, Tax Agreement, Paragraph 3:

"Ltd., L.L.P."

and replace "Delaware" with "Florida".

This Amendment Number One shall be come effective on March 11, 1998.

IN WITNESS WHEREOF, the Parties hereto have caused this Amendment Number One to the Agreement to be executed by their duly authorized officers as of the day and year first above stated.

ATTEST:

UTILITIES COMMISSION,  
CITY OF NEW SMYRNA BEACH, FLORIDA

By: *Helvia Simons*

By: *Ronald Vaden*  
Name: Ronald Vaden  
Title: Utilities Director

Approved as to form and correctness:

Counsel to UCNSB: *Attorneys*

DUKE ENERGY NEW SMYRNA BEACH  
POWER COMPANY LTD., L.L.P.

ATTEST:

By: Duke Energy Power Services  
Mulberry GP, Inc.  
its general partner

By: *Sandra Lee*

By: *James M. Donnell* *JK*  
Name: James M. Donnell  
Title: Senior Vice President

2.2 Site

UCNSB shall transfer good and marketable title to the Site (free and clear of all liens and encumbrances other than those set forth on Exhibit A hereto) to Duke prior to April 1, 1998. Prior to the commencement of construction of the Facility, Duke shall obtain a Phase I Site Assessment of the Site (to determine real or potential environmental liabilities) performed pursuant to ASTM E 1527-93 guidelines and deliver to UCNSB a copy of the results of such assessment. UCNSB shall indemnify and hold harmless Duke, its affiliates, and Duke's and its affiliates' respective directors, employees and representatives, from and against any and all claims, liabilities, losses and expenses (including costs of suit and attorneys' fees) attributable to the ownership or operation of the Site prior to such transfer or attributable to the condition of the Site at the time of such transfer, regardless of whether same are identified in such assessment. Subject to the foregoing, UCNSB shall not be responsible for, and Duke shall be responsible for, any costs of decommissioning and dismantling of the Facility and shall transfer back to UCNSB good and marketable title to the Site at the end of its useful life. If, at any time prior to completion of the detailed engineering for the Facility, Duke reasonably determines (based on engineering and technical factors) that the Site is not adequate for the Facility and its related facilities, UCNSB will acquire, at UCNSB's cost and in a timely manner in order for Duke to meet its project schedule for the Facility, and transfer to Duke additional property contiguous with the Site on the same terms as the Site (as described in this Section).

3.4 Facility and Gas Delivery System

The obligations of Duke under Sections 2.1 and 2.5, including the obligation to construct the Facility and provide for natural gas deliveries to the Facility, are subject to (a) the receipt of all applicable governmental permits and approvals in a form acceptable to each of the Parties affected thereby in its sole discretion, (b) Duke obtaining a reasonably satisfactory agreement for the looping and extension of the existing natural gas pipeline lateral (i.e., the Sanford Lateral) running closest to the Site, (c) Duke obtaining, on or before March 7, 1998, the approval of the Board of Directors of Duke Energy Power Services, LLC, a subsidiary of Duke Energy Corporation, to proceed with the transactions contemplated in this Agreement, (d) Duke obtaining, within 60 days after all necessary permits are obtained, approval for funding for construction of the project by the Duke Energy Corporation Board of Directors, and (e) no circumstance or event existing or having occurred that has had or could reasonably be expected to have a material adverse effect on the feasibility, prospects or business of the Facility. Duke shall give written notice to UCNSB if Duke determines not to complete the Facility as a result of any of the foregoing, in which event neither Party shall have any further obligations under this Agreement; provided, however, that (i) each Party shall continue to be liable for any breaches hereof occurring prior to such notice, (ii) if at such time the Site has been conveyed to Duke, Duke shall reconvey to UCNSB all of Duke's right, title and interest to the Site, (iii) if such determination is made solely on the basis of the matters described in clause (d) or (e) of the immediately preceding sentence, then Duke shall also pay to UCNSB \$200,000, and (iv) if within 6 months thereafter UCNSB notifies Duke that UCNSB intends to complete the Facility with another party and requests Duke to transfer any governmental permits and approvals for the Facility and any applications therefor, and if such request is approved by Duke (which approval shall not be unreasonably withheld), Duke will, to the extent legally permissible, transfer to UCNSB any governmental permits and approvals that Duke has received in connection with the Facility and any applications for governmental permits or approvals in connection with the Facility that have not yet been obtained, in each case excluding any confidential or proprietary information of Duke.

Figure 1

# NEW SMYRNA BEACH POWER PROJECT PROJECT STRUCTURE

