

IN THE SUPREME COURT OF FLORIDA

TAMPA ELECTRIC CO., FLORIDA )  
POWER CORP., and FLORIDA POWER & )  
LIGHT CO., )

Appellants, )

vs. )

Case Nos. 95,444, 95,445  
and 95,446

JOE GARCIA, as Chairman of the )  
FLORIDA PUBLIC SERVICE COMMISSION; )  
UTILITIES COMMISSION, CITY OF NEW )  
SMYRNA BEACH, FLORIDA; and DUKE )  
ENERGY NEW SMYRNA BEACH POWER )  
COMPANY LTD., L.L.P., et al., )

Appellees. )

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ANSWER BRIEF OF APPELLEE UTILITIES COMMISSION,  
CITY OF NEW SMYRNA BEACH, FLORIDA

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**CERTIFICATE AS TO TYPE SIZE**

It is hereby certified that this brief was prepared with 12-point Courier font, a non-proportional font.

**PRELIMINARY STATEMENT**

Although three appeals of the same order are before the Court, there is one record from the proceedings of the Florida Public Service Commission ("PSC") below. Citations to the record on appeal are in the form R(volume)-(page no.). Citations to the transcript of the hearings below are in the form T(volume)-(page no.). Citations to the exhibits in the case below are in the form Ex (no.) at (page no.). All references to the Florida Statutes are to the 1997 edition, unless noted otherwise.

The following abbreviations and terms are used herein.

**UCNSB** - the Utilities Commission, City of New Smyrna Beach, Florida

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

**Project** - the New Smyrna Beach Power Project, the proposed 514 MW gas-fired electrical power plant for which the PSC determined need in the proceeding below.

**Participation Agreement** - a binding contract between the UCNSB and Duke, setting forth the rights and obligations of the UCNSB and Duke with respect to the Project.

**PSC** - the Florida Public Service Commission.

**Order** - the PSC's order on appeal, Order No. PSC-99-0535-FOF-EM, Order Granting Determination of Need (for the Project).

**PPSA** - the Florida Electrical Power Plant Siting Act, Sections 403.501-.518, Florida Statutes (1997).

**FEECA** - the Florida Energy Efficiency and Conservation Act, comprising Sections 366.80-.85 & 403.519, Florida Statutes.

**FERC** - the Federal Energy Regulatory Commission.

**Federal Power Act** - a federal law, codified at a 16 U.S.C.S. §

791(a) et seq., that, inter alia, provides for federal regulation of wholesale electricity sales and transmission in interstate commerce.

**PUHCA** - the Public Utility Holding Company Act of 1935.

**Energy Policy Act or EPAct** - an act of the U.S. Congress, Public Law 102-486, that amended both the Federal Power Act and the Public Utility Holding Company Act of 1935.

**IOU** - an investor-owned public utility, usually a vertically integrated utility that engages in the generation, transmission, and distribution of electricity; as used herein, "the IOUs" refers to Appellants FPL, FPC, and TECO.

**FPC** - Florida Power Corporation, an IOU that opposes the Project.

**FPL** - Florida Power & Light Company, an IOU that opposes the Project.

**TECO** - Tampa Electric Company, an IOU that opposes the Project.

**QF** - a qualifying facility as defined in the rules of the FERC, 18 CFR § 292.101 et seq. There are two types of QFs, "qualifying cogeneration facilities" and "qualifying small power production facilities." (The latter is not relevant to this case.) Pursuant to PURPA, QFs have the legal right to force utilities to buy their electric power output at the utility's avoided cost.

**Qualifying Cogeneration Facility** - a QF that produces electricity and useful thermal energy by the sequential use of energy produced from a combustion process. To be a qualifying cogeneration facility, a cogenerator must satisfy specified efficiency and ownership criteria in the FERC's rules.

**Cogenerator** - A power producer that produces electricity and useful thermal energy by the sequential use of energy produced from a combustion process.

**Merchant Plant** - an electrical power plant that is not in the rate base of a regulated utility and for which captive retail electric ratepayers are not subject to being forced to pay through regulated rates.

**Non-Utility Generator** - a term frequently used loosely to refer to an electricity supplier other than a vertically integrated utility that provides electric service at retail.

**Independent Power Producer** - an electricity supplier that is not related to the utility or utilities to which it sells power, usually used to refer to a QF or another supplier.

**Exempt Wholesale Generator or "EWG"** - a public utility under the Federal Power Act that sells electricity at wholesale in interstate commerce but which, pursuant to certification by the FERC, satisfies criteria exempting both the specific utility and any parent or affiliate company from regulation by the Securities Exchange Commission pursuant to PUHCA.

**PURPA** - the Public Utility Regulatory Policies Act of 1978, P.L. 95-617, codified as part of the Federal Power Act.

#### JURISDICTION OF THE COURT

The Florida Supreme Court has jurisdiction over this appeal pursuant to article V, section 3(b)(2) of the Florida Constitution and Section 350.128(1), Florida Statutes ("F.S."). The UCNSB adopts the jurisdictional arguments made in its joint response (with Duke) in opposition to FPL's motion to transfer these appeals to the First District Court of Appeals.

#### STATEMENT OF THE CASE AND FACTS

The IOUs' statements of the case and facts are frequently incomplete, incorrect, misleading, irrelevant, and argumentative. Consequently, the UCNSB rejects the IOUs' statements and substitutes the following.

The key issues presented by these appeals are: (1) whether the PSC erred in concluding that both the UCNSB and Duke are proper applicants for the PSC's determination of need for the Project, and that their Joint Petition for Determination of Need for the Project was proper; and (2) whether the PSC erred in granting its affirmative determination of need for the Project. To fully comprehend these issues, it is necessary to understand the statutory and regulatory framework governing the UCNSB's (and Duke's) application and the Project.

## The Statutory Framework

The case below was a proceeding to determine the need for the New Smyrna Beach Power Project pursuant to Section 403.519 and the PPSA. Most new power plants<sup>1</sup> must be approved under the PPSA before construction may begin. § 403.506(1), Fla. Stat. The permitting process for PPSA-jurisdictional plants includes the PSC's need determination pursuant to Section 403.519, a land use hearing, and a site certification hearing. § 403.508(1)-(3), Fla. Stat. Obtaining the PSC's affirmative determination of need is a prerequisite to holding the site certification hearing. § 403.508(3), Fla. Stat. Following the site certification hearing, an administrative law judge issues a recommended order to the Governor and Cabinet, sitting as the Siting Board, for final disposition. § 403.509(1)-(2), Fla. Stat. The PSC's determination of need is one of the important factors that the Siting Board considers when balancing the need for a proposed power plant and the environmental impacts resulting from its construction and operation. § 403.502, Fla. Stat.

An entity must have standing as a proper "applicant" for the PSC's determination of need and for site certification by the Siting Board. Section 403.519 provides as follows.

**403.519 Exclusive forum for determination of need.**

-- On request by an applicant or on its own motion, the commission shall begin a proceeding to determine the

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<sup>1</sup> Any new steam or solar electric generating facility that will have 75 MW or more of electric generating capacity must be permitted under the PPSA. Power plants that do not have at least 75 MW may, at the applicant's option, seek certification under the PPSA or may pursue individual permits from the respective permitting agencies.

need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act. . . . In making its determination, the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant.

An "applicant" is defined as "any electric utility which applies for certification pursuant to the provisions of [the PPSA]." § 403.503(4), Fla. Stat. In turn, "electric utility" is defined in Section 403.503(13), F.S., as follows:

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

Thus, any of the enumerated entities, or any combination, may seek certification of a proposed power plant, and may seek the PSC's determination of need as part of that process.<sup>2</sup>

The Project proposed by the UCNSB and Duke must be approved under the PPSA. Thus, the purpose of the PSC's proceeding below was to determine whether the Project is needed, based on the statutory criteria.

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<sup>2</sup> Contrary to the IOUs' assertions, there is no reference to "monopoly utilities" or to "retail utilities" in any part of the PPSA. Indeed, the word "utility" does not even appear in Section 403.519. It is clear that the generation and sale of electricity at wholesale is not a monopoly industry, because most utilities buy and sell power from a variety of utilities and other entities, including QFs.

### The Regulatory Framework

Applicants under the PPSA include "regulated electric companies." § 403.503(13), Fla. Stat. Understanding what entities are and are not subject to regulation, and by what regulatory bodies, is thus critical to understanding why the PSC correctly found that Duke is a proper applicant.

Utilities providing electric service may be subject to the jurisdiction of the FERC and of the state regulatory authority, e.g., the PSC, in each state in which they operate. For example, FPL, FPC, and TECO are subject to FERC regulation, under the Federal Power Act, of their wholesale power sales and transmission service, and to PSC regulation, under Chapter 366, F.S., of their retail rates and service. Generally, any company that sells or transmits electricity at wholesale in interstate commerce is a "public utility" as defined in the Federal Power Act,<sup>3</sup> and subject to the jurisdiction of the FERC. Generally, any company that sells electricity at retail is subject to state regulatory authority with respect to such sales. See §§ 366.02(1), 366.04(1), 366.041(1), & 366.06(1), Fla. Stat. Utilities providing only wholesale service may also be subject to the jurisdiction of state regulatory authorities to the extent authorized by state law and to the extent that such regulation is

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<sup>3</sup> 16 U.S.C.S. § 824(b)(1) (1994). See Federal Power Comm'n v. Florida Power & Light Co., 404 U.S. 453, 463 (1972) (wholesale transmission and sale of electric power in interstate commerce held subject to regulation by the Federal Power Commission, the predecessor of the FERC).



not preempted by federal law.<sup>4</sup> The FERC regulates rates for sales of electricity at wholesale in interstate commerce; state regulation of such sales is preempted by the Federal Power Act. See 16 U.S.C.S. § 824a (1994). Utilities that are subject to the FERC's jurisdiction must have a FERC-approved tariff for the sale of their services. Id. at § 824d. FERC may set the rates for such sales via conventional regulation of rate base and prudent expenditures, or it may authorize the utility to charge market-based rates.

In Florida, any entity, other than a municipal electric utility system or a cooperative utility system, that supplies electricity to or for the public, is a "public utility." § 366.02(1), Fla. Stat. PSC orders that have interpreted the key "to or for the public" language of this statute have focused on whether the entity engaged in the retail sale of electricity. In Re: Petition of PW Ventures for Declaratory Statement in Palm Beach County, 87 FPSC 10:247, aff'd sub nom. PW Ventures v. Nichols, 533 So. 2d 281 (1988); In Re: Petition of Seminole Fertilizer Corp. for a Declaratory Statement Concerning the Financing of a Cogeneration Facility, 90 FPSC 11:126.

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<sup>4</sup> See In Re: Doswell Limited Partnership, (Case No. PUE890068) (Va. Corp. Comm'n, Feb. 13, 1990) (wholesale utility subject to state regulation to the extent not preempted); Arkansas Electric Coop. Corp. v. Arkansas Public Service Comm'n, 461 U.S. 375 (1983) (wholesale electric cooperative that was specifically exempted from FERC regulation was subject to state regulation, by the Arkansas PSC, where authorized by state law); see also In the Matter of the Petition of AES Greenfield, (Case No. 41361) (Ind. Util. Reg. Comm'n, March 11, 1999) (merchant plant held a "public utility" within the meaning of Indiana statutes, but Indiana Utility Regulatory Commission declined to exercise such jurisdiction).

Retail-serving public utilities in Florida generally have an exclusive right to serve customers in their service areas. See § 366.04(2)(d)&(e), Fla. Stat. These customers are thus "captive" retail customers of these utilities. See A1 at 27-28, 47. These utilities are entitled to charge rates that allow them to cover all reasonable and prudently incurred expenses, including a reasonable return on investment. § 366.041(1), Fla. Stat. ("no public utility shall be denied a reasonable rate of return upon its rate base"); §§ 366.06(1)&(2), Fla. Stat. Thus, when a public utility buys and owns a power plant, it is entitled to recover all costs of owning and operating the power plant, including depreciation and a reasonable return on its investment, subject to the PSC's determination that the investment was prudent when made.

The PSC's electric regulation statute, Chapter 366, also recognizes another type of electricity provider, an "electric utility," defined in Section 366.02(2) as follows:

"Electric utility" means any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state.

The PSC regulates "electric utilities" for the following purposes: for retail utilities, to prescribe a rate structure, to approve territorial agreements, and to resolve territorial disputes; and for all utilities (i.e., both wholesale and retail), to require the filing of reports and other data, and to require electric power conservation and reliability within the grid, for operational and emergency purposes. § 366.04(2)(c)&(f),

Fla. Stat. The PSC also has: jurisdiction over a coordinated power supply grid (§ 366.04(5), Fla. Stat.); jurisdiction over safety standards for transmission and distribution facilities (§ 366.04(6), Fla. Stat.); and the authority to assure the availability of energy reserves to ensure that grid reliability and integrity are maintained. § 366.055, Fla. Stat.

In supplying service to their customers, retail-serving utilities may generate power from their own power plants or they may contract for power from other suppliers.<sup>5</sup> Such other suppliers include other vertically-integrated utilities, e.g., FPL, FPC, and TECO, wholesale-only utilities, power marketers, and QFs.<sup>6</sup> With the exception of certain power purchases from QFs under PURPA, all wholesale purchases are voluntary by the purchasing utility; no non-QF power supplier can require a utility to buy its power. Retail-serving utilities may buy power from any wholesale power suppliers that they choose, and they may recover the costs of such purchases subject to a prudence review

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<sup>5</sup> In Florida, approximately 21 retail-serving utilities have generation facilities and approximately 34 retail-serving utilities do not. Fla. Pub. Serv. Comm'n, Statistics of the Florida Electric Utility Industry, 1997 at 5 (1998). The UCNSB has a small amount of generation capacity (18.8 MW) but buys most of its power from other suppliers at wholesale. T3-389.

<sup>6</sup> Other terms, such as "non-utility generator" and "independent power producer," are sometimes applied to QFs and wholesale public utilities. While QFs are not public utilities under the Federal Power Act, all other entities that sell electricity at wholesale in interstate commerce are. Thus, it is at least somewhat of a misnomer to refer to such entities as "non-utility" generators; this term probably came to be applied to such entities because they are not traditional vertically-integrated utilities (i.e., utilities that own and operate generation, transmission, and distribution facilities).

by the PSC. See § 366.06(1), Fla. Stat.

QFs, however, have the legal right under PURPA to require retail-serving utilities to buy their output (both capacity and energy) at prices not exceeding the purchasing utility's full avoided cost.<sup>7</sup> In Florida, most QFs sell their capacity and energy to purchasing utilities pursuant to long-term contracts. The PSC reviews these contracts for approval of cost recovery on the front end. Fla. Admin. Code R. 25-17.0832(3)-(4). Thus, captive retail customers can be forced to pay the capital and operating costs associated with their retail-serving utilities' power plants and forced to pay the costs associated with long-term contracts between utilities and QFs. The same is not true of the costs of merchant power plants. See A1 at 27, 47.

#### Procedural History

The UCNSB and Duke filed their Joint Petition on August 19, 1998. R1-1. FPL and FPC moved to dismiss the Joint Petition, R2-250 and R2-198, and the UCNSB and Duke filed memoranda in opposition to both motions. R2-323 and R3-454. Pursuant to notice, the hearings below were convened on December 2, 1998. The first day consisted of oral argument on the motions to dismiss filed by FPL and FPC. T1-19 to T2-318. The PSC took the motions under advisement and proceeded with evidentiary hearings on the merits of the Joint Petition on December 3, 4, 11, and 18,

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<sup>7</sup> The term "full avoided costs" means "the incremental costs to the utility of the electric energy or capacity, or both, which, but for the purchase from cogenerators or small power producers, such utility would generate itself or purchase from another source." § 366.051, Fla. Stat.

1998. The UCNSB and Duke introduced into evidence the testimony and exhibits of 10 witnesses, FPC called two witnesses, and FPL called one witness. In all, forty-two exhibits were admitted into evidence in the proceeding. The PSC heard an additional two-hour oral argument on the motions to dismiss on January 28, 1999. R11-2128-2227.

On March 4, 1999, the PSC voted to deny FPL's and FPC's motions to dismiss and voted to grant the determination of need for the Project. The PSC's Order reflects that four members of the Commission<sup>8</sup> agreed that the joint application filed by the UCNSB and Duke was proper and appropriate for action by the PSC. The Order further reflects that a majority of the PSC voted to grant the requested determination of need following consideration of the criteria in Section 403.519: the need for system reliability and integrity, A1 at 39-42, the need for adequate electricity at a reasonable cost, A1 at 42-45, whether the Project is the most cost-effective alternative available, A1 at 45-48, conservation measures available to the applicants, A1 at 48-49, and other matters within the PSC's jurisdiction, A1 at 49-54.

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<sup>8</sup> This includes the three Commissioners, Terry Deason, Joe Garcia, and Julia Johnson, who supported the majority decision, plus Commissioner Leon Jacobs, who wrote in his partial concurrence "I agree with the majority that in the instant docket Duke New Smyrna is a proper applicant . . . because of the relationship of the parties to the partnership." A1 at 64. Commissioner Jacobs also wrote that he "would not render a decision relative to Duke's standing as an applicant individually, nor would [he] make a decision on standing by bifurcating the application into the electricity required for the City of New Smyrna and the additional capacity of the plant (which has been dubbed 'merchant capacity')." Id.

## Facts

The UCNSB is a municipal electric utility authorized and existing under Florida law. See Ch. 67-1754, Laws of Fla. As a municipal utility, and as distinguished from the IOUs, the UCNSB is not subject to direct rate regulation by the PSC, but is subject to the PSC's regulation relating to rate structure, territorial disputes and agreements, and certain of the PSC's planning and coordination functions. The UCNSB offers conservation programs, including a load management program that enables the UCNSB to reduce its peak demand by approximately ten percent. T3-390-91, 394-95. The UCNSB also plans to install a solar photovoltaic demonstration project of approximately 150 kilowatts capacity and to implement a "green pricing" program, pursuant to which customers may elect to make certain payments in support of renewable resources, including solar energy. T3-391.

Duke is a "public utility" under the Federal Power Act, and is subject to the regulatory authority of the FERC. T4-577, 16 U.S.C.S. § 824(b)(1) (1994).<sup>9</sup> The FERC has approved Duke's

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<sup>9</sup> Though irrelevant to the PSC's decision and to the legal analysis applicable here, Duke is also an Exempt Wholesale Generator ("EWG") for purposes of PUHCA. Exh 17, Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., 83 FERC ¶ 62,220 (June 9, 1998); 15 U.S.C.S. § 79z-5a (1994 & Supp. 1997). This exemption makes it possible for Duke's parent corporation to have interests in both Duke and in power generators in other states without becoming subject to regulation by the Securities Exchange Commission pursuant to PUHCA. Duke's status as an EWG is irrelevant because it is Duke's status as a public utility under the Federal Power Act and as an "electric utility" under Chapter 366 that make it a "regulated electric company" and therefore a proper applicant under the PPSA and Section 403.519. An entity, like Duke, that operated a power plant in Florida for the purpose of making wholesale sales of electricity in interstate commerce, would be a "public utility" under the Federal Power Act and an

tariff for wholesale power sales at market-based rates. Ex 17, Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., 83 FERC ¶ 61,316 (June 25, 1998).<sup>10</sup> Duke is also an "electric utility" under Chapter 366, subject to the PSC's regulatory jurisdiction to the extent that such jurisdiction is not preempted by the Federal Power Act and to the extent applicable to the types of activities in which Duke engages. See A1 at 19-20. Specifically, Duke is subject to the PSC's Grid Bill authority.<sup>11</sup> Id.

The electrical power plant for which the UCNSB and Duke sought and obtained the PSC's determination of need is the New Smyrna Beach Power Project, a state-of-the-art 514 MW natural gas fired power plant. R1-7-8, T8-1046. The Project will be highly efficient at converting primary energy (in the form of natural gas) into electricity. The Project will use approximately 6,832 British thermal units ("Btu") of primary energy to produce one kilowatt-hour of electricity, far more efficient than most existing oil- and gas-fired units in Florida today. T5-713-14.

The UCNSB and Duke entered into the Participation Agreement, which describes their respective rights and responsibilities in developing the Project. Ex 7, RLV-1. Under the Participation

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"electric utility" under Florida law regardless whether it and its affiliates were exempt from PUHCA regulation.

<sup>10</sup> Market-based rate authority is neither novel nor unusual. In fact, both FPC and FPL have FERC-approved tariffs authorizing them to charge market-based rates outside Peninsular Florida, as do various affiliates of those companies. See, e.g., In Re: Florida Power & Light Co., 81 FERC ¶ 61,107 (October 29, 1997); In Re: Florida Power Corp., 79 FERC ¶ 61,385 (June 26, 1997).

<sup>11</sup> §§ 366.04(2)&(5) and 366.05(7)&(8), Fla. Stat.

Agreement, the UCNSB will: (1) furnish the site for the Project; (2) furnish an interconnection point for the Project to the UCNSB's Smyrna Substation; (3) provide reuse water from the UCNSB's adjacent wastewater treatment plant and other water supply necessary to meet the water requirements for the Project; (4) treat the wastewater produced by the Project; and (5) design, engineer, and construct modifications to the Smyrna Substation to accommodate the Project. T3-386-87.<sup>12</sup> For its part, Duke will design, engineer, construct, finance, own, and operate the Project, and will market all capacity, energy, and potentially other electric services from the Project. T3-387-88.

Under the Participation Agreement, the UCNSB has an entitlement to 30 megawatts ("MW") of the Project's capacity and the right to purchase the associated energy output<sup>13</sup> at specified rates.<sup>14</sup> Contrary to the IOUs' mischaracterization of the Participation Agreement, it is not an "option:" Duke is obligated

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<sup>12</sup> The UCNSB strongly disagrees with the IOUs' efforts to characterize the benefits that it will receive under the Participation Agreement as a "loss leader." The UCNSB has given good and substantial value for those benefits, including a long-term commitment to provide reuse water from the UCNSB's wastewater treatment plant at favorable rates to Duke. Moreover, there is no evidence whatsoever that Duke will experience a "loss" in any way when providing the entitlement capacity to the UCNSB or selling energy to the UCNSB at the contract prices.

<sup>13</sup> The UCNSB has the right to purchase 30 megawatt-hours ("MWH") per hour of the Project's output. Electric "capacity" is measured in megawatts and kilowatts, and reflects the instantaneous output or usage rate for electricity. Electric energy is measured in megawatt-hours or kilowatt-hours, which reflect electricity actually used over a period of time.

<sup>14</sup> The UCNSB's purchase price of energy from the Project starts at \$18.50 per MWH in 2001 and escalates according to a contractually specified price index factor. Ex 7, RLV-1 at 2, 8.



to provide 30 MWH per hour of the Project's energy output to the UCNSB, and the UCNSB is contractually obligated to "take or pay" for 27 MWH per hour of that output, when the Project is operating. Ex 7, RLV-1 at 2, 8. The "Project will provide needed electric generating capacity that will help enable the UCNSB system to maintain adequate and reliable service" to its customers. T3-393. The UCNSB's system "reliability will be greatly enhanced" by the proximity of the Project to the UCNSB's service area. T3-393. The UCNSB's power purchases from the Project will enable the UCNSB to save more than \$3 million per year for the first ten years of the Project's operations, and approximately \$39 million in net present value terms, over the Participation Agreement's twenty year term. T3-396.

Duke will sell the balance of the Project's output at wholesale. T4-584-85. Duke will not sell any of the power at retail. T4-586-87. Duke will sell the additional power produced by the Project to other utilities for resale to those utilities' retail customers. Power produced by the Project, like power produced by any other wholesale supplier, will ultimately be used and consumed by retail customers, i.e., the general public. Therefore, the Project will naturally serve a public purpose. While it is possible that Duke may make some sales to other utilities outside Florida, the vast majority, if not all, of the Project's output will be sold to retail-serving utilities in Peninsular Florida. T4-585-86<sup>15</sup>

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<sup>15</sup> FPL's statement that Duke "intends" to sell power outside Florida is simply a misrepresentation of Mr. Green's testimony,

No utility or captive body of retail customers can be forced to buy any of the Project's output. T3-398-99. Other retail-serving utilities may, however, elect to buy power from the Project when it is cost-effective to do so. T3-398 The Project will provide benefits to the ratepayers of other Peninsular Florida utilities because the Project will provide increased reliability and lower electricity costs for them. T3-397-99.

Unlike QFs, Duke will have no legal right to force any utility to purchase its output. T4-581. Unlike the conventional regulatory treatment of rate-based plants owned by retail-serving utilities, Duke will bear all of the capital, investment, and operating risk associated with the Project, and will not have the ability to force any captive retail electric customers to bear any of those costs. T4-581; A1 at 24, 43, 47.

The PSC concluded that the Project will provide operational benefits to Peninsular Florida, A1 at 41, enhance operational reserves, A1 at 41, reduce prices to Peninsular Florida retail ratepayers, A1 at 44, and reduce wholesale market power of other generating utilities in Florida, T5-727. The Project will displace more costly and less efficient sources of generation, T5-713-14, to promote the more efficient use of natural gas, and

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at T4-586, which reads as follows:

It is possible that under certain short-term circumstances, Duke New Smyrna, like other Florida utilities with available power for sale, would make sales to utilities outside Florida . . . .

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

the more efficient production of electricity, T5-727-28, Ex 18, DMN-7, and to provide environmental benefits in the form of reduced pollution from power generation. T3-399-400, T5-728.

#### STANDARD OF REVIEW

Despite the IOUs' attempts to confuse the issue, the standard of review in this case is clear. In Gulf Coast Elec. Co-op., Inc. v. Johnson, 727 So. 2d 259, 262 (Fla. 1999), the Court stated that the standard of review applicable to appeals from PSC orders is "circumscribed by certain well-established principles." The Court explained that under this circumscribed scope of review, PSC orders "come to this Court 'clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, and that they are just and such as ought to have been made.'" Id. (emphasis supplied) (quoting Ameristeel Corp. v. Clark, 691 So. 2d 473, 477 (Fla. 1997) (citations omitted); see also Legal Environmental Assistance Foundation, Inc. v. Clark, 668 So. 2d 982, 987 (Fla. 1996); United Tel. Co. v. Public Serv. Comm'n, 496 So. 2d 116, 118 (Fla. 1986).

The Gulf Coast Court further explained that "'an agency's interpretation of a statute it is charged with enforcing is entitled to great deference.'" 727 So. 2d at 262 (quoting Ameristeel, 691 So. 2d at 477). Thus, a party challenging a PSC order "'bears the burden of overcoming [these] presumptions by showing a departure from the essential requirements of law.'" Gulf Coast, 727 So. 2d at 262 (quoting Ameristeel, 691 So. 2d at 477). The Court "'will approve the Commission's findings and

conclusions if they are based on competent substantial evidence and if they are not clearly erroneous.'" Gulf Coast, 727 So. 2d at 262 (quoting Ameristeel, 691 So. 2d at 477); see also Fort Pierce Utils. Auth. v. Beard, 626 So. 2d 1356, 1357 (Fla. 1993); § 120.68(10), Fla. Stat.

In Gulf Coast, the Court noted that it applies this "deferential standard of review" when reviewing PSC orders because of the PSC's "specialized knowledge and expertise." 727 So. 2d at 262. In Nassau Power Corp. v. Deason, 641 So. 2d 396, 398 (Fla. 1994) ("Nassau II"), the Court explained that this deferential standard of review is particularly appropriate when the Court is reviewing a PSC order determining need under Section 403.519, F.S. The Nassau II Court stated that "because the PSC is the sole forum for determination of need under the PPSA, its construction of Section 403.519 is entitled to great weight and will not be overturned unless it is clearly unauthorized or erroneous." Id.

TECO argues that the Court should not defer to the PSC in this case because the PSC has allegedly "departed without justification"<sup>16</sup> from its prior interpretation of a statute or rule that it is charged with administering. TECO's Brief at 10. TECO's argument is unfounded. First, the Order does not deviate from prior PSC interpretations of statutes or rules. As

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<sup>16</sup>Section 120.68(7)(e)3., F.S., provides that a court shall remand a case to an agency or set aside agency action, when it finds that the agency's exercise of discretion was "[i]nconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency . . . ." (emphasis supplied.)

explained more fully in section I.B. herein, the Order is wholly consistent with both the PSC's and this Court's prior interpretations of the PPSA and Section 403.519. Second, the PSC's 55-page Order explains in detail the justification for its decision. Accordingly, the PSC has complied with Section 120.68(7)(e)3., and TECO's argument must be rejected.

#### SUMMARY OF ARGUMENT

The issues presented by these appeals are (1) whether the PSC erred in denying FPL's and FPC's motions to dismiss and (2) whether the PSC erred in granting the requested determination of need for the Project. Resolution of the first issue turns on the PSC's construction of the statutes under which it operates, and the standard of review is whether the PSC's interpretation of those statutes was clearly erroneous or unauthorized by law. Resolution of the second issue depends on whether there is competent substantial evidence of record to support the PSC's decision to grant its determination of need for the Project.

Notwithstanding the IOUs' protestations to the contrary, the PSC carefully and directly analyzed the issues before it, concluded that the UCNSB and Duke presented a proper application for the PSC's determination of need, and correctly denied the IOUs' motions to dismiss. The PSC's decision was neither clearly erroneous nor unauthorized. The PSC also evaluated the Project by properly applying the statutory criteria in Section 403.519 and concluded, based on competent substantial evidence of record, that the determination of need should be granted. Accordingly, the Court should affirm the PSC's Order.

ARGUMENT

As demonstrated below, each and every one of the IOUs' arguments is without merit, and the Court should affirm the PSC's Order in all respects.

**I. THE COMMISSION CORRECTLY FOUND THAT BOTH THE UCNSB AND DUKE ARE PROPER APPLICANTS FOR A DETERMINATION OF NEED FOR THE PROJECT.**

Under Section 403.519, "only an 'applicant' can request a determination of need" from the Commission. Nassau II, 641 So. 2d at 398. In this instance, both Duke and the UCNSB, individually and in combination, fit squarely within the plain meaning of "applicant" under Section 403.503(4), F.S., and thus are appropriate entities to petition the Commission for the requested need determination. Moreover, both the UCNSB and Duke are "electric utilities" within the meaning of Section 366.02(2), F.S., and accordingly are subject to the Commission's regulations applicable to such entities. The IOUs' arguments to the contrary, though numerous, ignore and rewrite the plain language of the statute and are based upon the misapplication of other rules of statutory construction, misstatements of legislative intent, or misinterpretation of prior PSC orders.

**A. The UCNSB and Duke Are, Individually and Collectively, Proper Applicants Under Section 403.519.**

Section 403.519 provides in pertinent part:

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

(emphasis supplied.) Section 403.503,(4), F.S., defines an

"applicant"<sup>17</sup> as:

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

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

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

(emphasis supplied.) Thus, both a "city" and a "regulated electric company" are "applicants" specifically authorized under the PPSA and may seek a determination of need from the PSC. Moreover, the statute specifically authorizes "combinations" of any of the enumerated entities to apply for a need determination.

The UCNSB is a subdivision of the City of New Smyrna Beach, Florida, created by a special act of the Florida Legislature. See Ch. 67-1754, Laws of Fla. As such, the UCNSB is a "city" within the definition of "electric utility" under Section 403.503(13), F.S., and thus is an authorized applicant under Section 403.519.

The UCNSB and Duke have executed a Participation Agreement which grants the UCNSB an entitlement to 30 MW of the Project's output and sets forth the terms under which the UCNSB will buy the energy to which it is contractually entitled.<sup>18</sup> The IOUs do

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<sup>17</sup>Section 403.522(4), F.S., (part of the Transmission Line Siting Act) contains an identical definition of the term "applicant."

<sup>18</sup> The IOUs' assertions that the Participation Agreement merely gives the UCNSB an "option" to purchase power from the

not seriously dispute this fact, but argue that the UCNSB is not a proper "applicant" for the 484 MW of capacity to which it is not entitled and allegedly does not need. See TECO's Brief at 24; FPC's Brief at 26. This argument is fatally flawed for several reasons. First, nothing in Section 403.519, nor in any PSC or Florida Supreme Court precedent, requires that the entire output of a proposed project be used by the applicant or be contractually committed to a specific utility.<sup>19</sup> In fact, on several occasions, the PSC has granted need determinations to retail-serving utilities for proposed power plants that would provide excess non-committed capacity where considerations other than a particular utility's reliability criteria warranted the project.<sup>20</sup> The UCNSB and Duke have simply followed these precedents.

Duke is a proper applicant under the PPSA because it is a "regulated electric company." First, Duke is regulated by the FERC as a "public utility" under the Federal Power Act, 16

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Project are unfounded. As to the UCNSB's purchase rights and obligations, the Participation Agreement specifically provides that the UCNSB shall "take or pay" for 27 MWH per hour of energy from the Project. This is no "option" -- it is a binding obligation.

<sup>19</sup> Contrary to FPC's assertion, at page 26 of its Brief, there is nothing either in Section 403.519 or the PSC's or this Court's Nassau decisions that limits standing "to the extent of" capacity under contract to another utility.

<sup>20</sup> See In Re: Petition for Certification of Need for Orlando Utilities Commission, Curtis H. Stanton Energy Center Unit 1 and Related Facilities, 81 FPSC 10:18; In Re: JEA/FPL's Application for Need for St. John's River Power Park Units 1 and 2, 81 FPSC 6:220; In Re: Application for Certification of Tampa Electric Company's Proposed 417 Megawatt Net Coal-fired Big Bend Unit 4, 81 FPSC 1:64.



U.S.C.S. § 824(b)(1)(1994). See R1-4. As a "public utility" selling power at wholesale in interstate commerce, Duke is subject to the regulatory jurisdiction of FERC, including, but not limited to, the FERC's jurisdiction over rates pursuant to the Federal Power Act. Indeed, the FERC has already approved Duke's Rate Schedule No. 1 for sale of the Project's entire capacity and associated energy to other utilities under negotiated arrangements. Ex 17, MCG-2, Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., 83 FERC § 61,316 (June 25, 1998). Thus, as a company that sells wholesale electric power subject to the regulatory jurisdiction of the FERC, Duke fits squarely within the plain meaning of the term "regulated electric company" under any reasonable construction of the term, and therefore, Duke is a proper applicant under Sections 403.503(13) and 403.519, F.S. See Carson v. Miller, 370 So. 2d 10 (Fla. 1979) (words of common usage should be construed in their plain and ordinary sense.)

Second, Duke is a "regulated electric company" because it is an "electric utility" subject to the PSC's regulatory authority and jurisdiction under the plain language of Chapter 366. Section 366.02(2), F.S., defines "electric utility" to mean

any municipal electric utility, investor-owned electric company, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state.

Duke is investor-owned, in that it is owned by its partners, Duke Energy Power Services Mulberry GP, Inc. and Duke Energy Global Asset Development, Inc. T 4-577, Ex 17, MCG-1. When the

Project becomes operational, Duke will own, maintain, and operate an electric generation system within Florida.<sup>21</sup> Thus, by a straightforward, "plain language" reading of the statutory language, Duke is an "electric utility."<sup>22</sup>

As an electric utility under Chapter 366, Duke is subject to the PSC's Grid Bill authority, which is found at Sections 366.04(2)&(5) and 366.05(7)&(8), F.S. These provisions give the PSC "jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida . . . ." § 366.04(5), Fla. Stat. Duke is also subject to the PSC's jurisdiction under Section 366.055, F.S., which gives the PSC authority over the "[e]nergy reserves of all utilities in the Florida energy grid . . . to ensure that grid reliability and integrity are maintained."

**B. The PSC Correctly Distinguished Both Its Own Earlier Nassau Decisions and This Court's Decisions Upholding Them.**

The PSC's Order clearly explained the distinctions between the instant case and the earlier Nassau decisions, but the IOUs have nonetheless hung their legal arguments on these two earlier

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<sup>21</sup> Section 366.02(2) uses the present tense, perhaps giving rise to the technical argument that because Duke New Smyrna does not yet own a generation facility, it is not an electric utility. This argument is meritless. The PSC will have regulatory authority over Duke under Chapter 366. It is not difficult to imagine the incredulity with which the PSC would greet this verb-tense argument if raised by Duke in an effort to avoid or forestall the PSC's authority.

<sup>22</sup> Contrary to the IOU's assertions, Duke did not "agree" or "consent" to partial PSC jurisdiction. That is simply not how the law works: an entity either is subject to PSC jurisdiction or it is not.

decisions of the PSC and this Court's decisions affirming them.<sup>23</sup> Nothing in any of these decisions, however, precluded the PSC from approving the UCNSB's and Duke's petition for the Project, nor does anything therein bind this Court from affirming the PSC's decision. As the PSC recognized, this is case of first impression: accordingly, the PSC wrote, and this Court now writes, on a clean slate.

To understand the real meaning and import of these cases, the Court must consider the context, indeed the regulatory fabric, in which those cases arose. Nassau I arose out of proceedings in which a QF, Nassau Power Corp. ("Nassau"), had an executed power purchase agreement with FPL; the PSC-approved payments due under this contract were based on a "statewide avoided unit" that was identified in hearings before the PSC. In an order that "prioritized" several competing QFs' proffered contracts based on this statewide avoided unit, the PSC established Nassau's place at the head of the queue but held that Nassau's project was still, in the need determination, subject to evaluation against FPL's utility-specific needs and avoided costs. 90 FPSC 11:286. The PSC cited to a previous order in which the PSC had stated that "to the extent that a proposed electric power plant constructed as a QF is selling its capacity

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<sup>23</sup> In Re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Pricing for Peninsular Florida's Electric Utilities, 90 FPSC 11:286 ("Order No. 23792"), aff'd sub nom. Nassau Power Corp. v. Beard, 601 So. 2d 1179 (Fla. 1992) ("Nassau I"); In Re: Petition of Nassau Power Corp. to Determine Need for Electrical Power Plant (Okeechobee County Cogeneration Facility), 92 FPSC 10:643 ("ARK & Nassau"), aff'd sub nom. Nassau Power Corp. v. Deason, 641 So. 2d 396 (Fla. 1994) ("Nassau II").

to an electric utility pursuant to a standard offer or negotiated contract, that capacity is meeting the needs of the purchasing utility." In Re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Pricing for Peninsular Florida's Electric Utilities, 89 FPSC 12:295, 319 ("Order No. 22341") (emphasis supplied). On appeal, this Court recognized that Nassau had executed its contract "with full knowledge of the PSC's policy determination in Order No. 22341." Nassau I at 1177. This Court's precise holding was that Nassau had appealed the wrong order, i.e., Order No. 23792, and could not challenge the PSC's prior determination in Order No. 22341 that was the gravamen of Nassau's complaint. Id. at 1178-79.

Nassau II arose out of proceedings in which FPL had filed a joint petition for determination of need with a non-QF entity, Cypress Energy Partners ("Cypress"). ARK & Nassau, 92 FPSC at 10:643. Nassau, again as a QF, sought a determination of need and sought to have the PSC issue an order requiring FPL to execute a contract by which Nassau would provide the identical power as Cypress but at more favorable prices to FPL. A 3-to-2 majority of the PSC dismissed Nassau's petition, holding that Nassau was not a proper applicant without a signed contract with the utility whose need it proposed to serve.<sup>24</sup> 92 FPSC at 10:647.

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<sup>24</sup> The only issue presented to this Court on appeal was "whether a non-utility cogenerator such as Nassau is a proper applicant for a determination of need." Nassau II, 641 So. 2d at 397-98 (emphasis supplied). In the PSC proceedings, another entity, ARK Energy ("ARK"), which was not a QF, also sought a need determination and a PSC order requiring FPL to execute a power purchase contract similar to that offered by Nassau. See TECO's Appendix at 12. ARK was thus acting like a QF, seeking,

The PSC carefully limited the scope of its ruling, stating that:

It is also our intent that this Order be narrowly construed and limited to proceedings wherein non-utility generators seek determinations of need based on a utility's need. We explicitly reserve for the future the question of whether a self-service generator (which has its own need to serve) may be an applicant for a need determination without a utility co-applicant. To date this circumstance has not been presented to us and we do not believe the question should be decided in the abstract.

ARK & Nassau, 92 FPSC 10:643, 646-47 (emphasis supplied).

Thus, by the PSC's own careful structure and analysis within its Order, the rationale for denying Nassau (and ARK) applicant status does not apply to Duke. The PSC explicitly reserved ruling on the self-service generator issue because it was raised below; a merchant utility's status was not raised below and, accordingly, the PSC's ARK & Nassau decision did not address the issue and cannot be precedent concerning this subject.

Ignoring the PSC's express limitation, the IOUs now argue that the earlier Nassau decisions prohibit the PSC from finding that Duke is a proper applicant in the instant case. FPC's Brief at 21-27. This argument is misplaced because the instant case is factually different from the Nassau cases, and thus the Nassau cases are therefore of no precedential value here. In both Nassau I and Nassau II, the putative applicants for a need determination were attempting to serve a specific utility's need and to require the utility to purchase, and ultimately charge its

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as a QF may, to bind FPL's customers to a long-term contract pegged against FPL's avoided cost. ARK did not appeal the PSC's decision and thus was not a party to the Nassau II appeal in this Court. Thus, the issue of ARK's applicant status was neither presented to, nor decided by, this Court.

ratepayers for, the electrical power to be produced by the proposed projects. That is simply not the case here.

The PSC carefully explained the factual differences between the two cases, "the differences are captive ratepayers and the specter of a retail utility being required to purchase unneeded electricity." A1 at 27. The PSC also explained that its decision in the instant case was consistent with its policy to protect ratepayers and promote the public interest. A1 at 54.

The interpretation of the term "regulated electric company" was not addressed in Nassau I, Nassau II, or the underlying PSC orders. No court has construed the term "regulated electric company." Parenthetically, a QF is not a public utility under federal law and thus is not a "regulated electric company" under Section 403.503(13).

Moreover, Nassau I, Nassau II and the underlying PSC orders state the law applicable to cogeneration, or perhaps more generally, the law of non-utility generators seeking to bind a retail-serving utility to a long-term power contract. See Nassau II, 641 So. 2d at 397-98 (stating that the issue in that case "is whether a non-utility cogenerator such as Nassau is a proper applicant for a determination of need") (emphasis supplied). Duke is both an "electric utility" under Chapter 366, F.S., and a "public utility" under the Federal Power Act. Thus, the law governing non-utility generators is not applicable to the Project, Duke, or the UCNSB.

Finally, the IOUs attempt to make much of the PSC's statements in its ARK & Nassau order that only entities that are

obligated to serve customers may qualify as applicants under Section 403.519. FPC's Brief at 22, TECO's Brief at 20; ARK & Nassau, 92 FPSC at 10:645. In the first place, Section 403.519 has no such restriction, nor does it, as urged by FPC, restrict applicants to retail-serving utilities. See FPC's Brief at 22. More significantly, the only entity that has an express statutory obligation to serve retail customers is a "public utility" under Section 366.02(1). See § 366.03, Fla. Stat. ("Each public utility shall furnish to each person applying therefor reasonably sufficient, adequate, and efficient service upon terms as required by the commission.") Thus, municipal and cooperative utilities do not have a statutory obligation to serve retail customers, yet they are included, along with "regulated electric companies," in the group of entities that are authorized under the PPSA and Section 403.519 to seek need determinations and site certifications. Moreover, wholesale public utilities may have a contractual obligation to serve wholesale customers, just as Duke has a contractual obligation to serve the UCNSB. Finally, under Section 366.055, F.S., wholesale utilities, like Duke, may indeed be required (i.e., statutorily obligated) by the PSC to make their energy reserves available for service in Florida.

**C. The Project is a Joint Electrical Power Supply Project Pursuant to Chapter 361, Part II, F.S., and the UCNSB and Duke Constitute a "Joint Operating Agency."**

FPC challenges the PSC's finding that the UCNSB and Duke comprise a "joint operating agency" and that the application for the Project is therefore proper under the PPSA. FPC's Brief at 31-33. This argument is refuted by the plain language of the

statute. The definition of "electric utility" contained in Section 403.503(13) identifies a "joint operating agency" as one of the entities entitled to be an applicant for a determination of need under Section 403.519. Though the term "joint operating agency" is not defined in the PPSA, a reasonable construction of the term that harmonizes Chapter 361, Part II, F.S. (the "Joint Power Act") and the PPSA must include entities undertaking a "joint electric power supply project" pursuant to the Joint Power Act.<sup>25</sup> The Project is a "joint electrical power supply project" and the UCNSB and Duke, as a "joint operating agency," are thus proper applicants for the requested determination of need.

Section 361.11(1), F.S., provides that a "project" is:

a joint electric power supply project and any and all facilities, including all equipment, structures, machinery, and tangible and intangible property, real and personal, for the joint generation or transmission of electrical energy, or both, including any fuel supply or source useful for such a project.

Section 361.12, F.S., provides in pertinent part that an "electric utility" is authorized to join with a "foreign public

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<sup>25</sup> The UCNSB is aware of no entities other than those undertaking a "joint electric power supply project" under the Joint Power Act, that could constitute a "joint operating agency." Thus, to construe the term "joint operating agency" as excluding "joint electrical power supply projects" would render the term without meaning. Such a construction is contrary to the basic tenet of statutory interpretation that a statute should be construed so as to give meaning to each of its provisions. See State v. Zimmerman, 370 So.2d 1179 (Fla. 4th DCA 1979). Moreover, it is irrational to suggest that the Legislature would have created a legal entity, here a "joint electrical power supply project," without providing the legal ability for such entities to be permitted. Finally, the proper construction of the term "joint operating agency" was not addressed in either Nassau I, Nassau II, or the underlying Commission orders. Indeed, no court has construed the term "joint operating agency."



utility" for the purpose of "jointly financing, constructing, managing, operating, or owning any project or projects." The UCNSB is an electric utility within the meaning of the Joint Power Act that owned, maintained, and operated an electrical energy generation and distribution system in the state of Florida on June 25, 1975.<sup>26</sup> T3-385; see § 361.11(2), Fla. Stat., and Ch. 67-1754, Laws of Fla. Section 361.11(4), F.S. provides that a "foreign public utility" includes any person whose principal place of business is outside Florida "or any affiliate or subsidiary of such person, the business of which is limited to the generation or transmission, or both, of electrical energy." Duke is a "foreign public utility" within the meaning of the Joint Power Act because its affiliate, Duke Bridgeport Energy, L.L.C., is the owner and operator of the Bridgeport Energy Project, a 520 MW gas-fired combined cycle power plant located and currently operating in Bridgeport, Connecticut and delivering power to wholesale customers. T4-575-76.

The record contains competent substantial evidence to support the PSC's finding that the UCNSB and Duke have joined to form a joint electric power supply project under the Joint Power Act. T3-386-87, T4-582-83 (UCNSB will acquire and provide the Project site, reuse water, and interconnection facilities; Duke will construct and operate the power plant). Accordingly, the PSC's decision that the UCNSB and Duke are a "joint operating agency" and thus proper applicants under Section 403.503(13),

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<sup>26</sup> The Utilities Commission is also a "municipality" (see Ch. 67-1754, Laws of Fla.) and a "public body."

must be affirmed.

**II. THE IOUs' LEGISLATIVE HISTORY ARGUMENTS ARE MISPLACED.**

The IOUs argue that the legislative history of the PPSA and the Florida Energy Efficiency and Conservation Act ("FEECA") (Sections 366.80-.85, and 403.519, F.S.) should be interpreted to exclude Duke from the definition of "applicant", as used in Section 403.519. See, e.g., FPC's Brief at 39-46. This argument is wholly without foundation and ignores both the rules of statutory construction and the actual legislative history of the PPSA.<sup>27</sup>

As a threshold issue, it is a well-settled rule of statutory construction that where the language of a statute is clear and unambiguous, the statute must be given its plain and ordinary meaning, and no further review of legislative history is necessary. Aetna Cas. & Sur. Co. v. Huntington Nat. Bank, 609 So. 2d 1315, 1317 (Fla. 1992); Holly v. Auld, 450 So. 2d 217 (Fla. 1984). As previously discussed herein, Duke fits squarely within the definition of the term "regulated electric companies" and is therefore an applicant under the PPSA and Section 403.519. The plain meaning of these defined terms provides clear and unambiguous guidance to the Court and, therefore, further review of the history of Section 403.519 is unnecessary and improper.

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<sup>27</sup> Moreover, FPC's argument (Brief at 40, 48) that the purpose of the PPSA is to prevent a proliferation of power plants is unsupported by the statute, the purpose of which is to "effect a reasonable balance between the need for the facility and the environmental impact. . . of the facility. . . ." § 403.502, Fla. Stat.

However, even assuming, arguendo, that Section 403.519 is ambiguous, the legislative history also supports the Order. The Legislature amended Section 403.519 in 1990 by removing the term "utility" and replacing it with the term "applicant". See Ch. 90-330, Laws of Fla. Thus, the term "utility" no longer appears anywhere in Section 403.519. The IOUs' legislative history arguments ignore the Legislature's action in 1990 and attempt to construe Section 403.519 as if the term "utility" still appeared in that provision.

The IOUs assert that the 1990 amendments to Section 403.519 were merely "housekeeping amendments" and, presumably, should be ignored by the Court.<sup>28</sup> See, e.g., FPC's Brief at 43. The IOUs are mistaken. Chapter 90-330, Laws of Florida, was not a "Revisor's Bill." Rather, it was a substantive act that "became the vehicle to which several environmental bills were amended." See Fla. H.R. Comm. on Environ. Protection, Subcomm. on Permits, CS/HB 3065 (1990) Staff Analysis 1 (June 2, 1990), (hereinafter the "Staff Analysis for CS/HB 3065"). T3-364, Ex 1 at tab 3. It is a well-settled rule of statutory construction that when the Legislature amends a statute, a court construing that amendment should assume that the Legislature intended the amendment to serve a useful purpose and otherwise have meaning. See Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362, 364 (Fla.

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<sup>28</sup>FPC claims that the 1990 amendment to Section 403.519, F.S., was intended to fix a "minor discrepancy" in Section 403.519, F.S., whereby certain municipal utilities were excluded from the definition of "applicant." FPC offers no authority for this speculative interpretation of the 1990 amendment.

1977).

The IOUs argue that the Staff Analysis for CS/HB 3065 demonstrates legislative intent that the term "applicant" be limited to utilities with ratepayers. See, e.g., FPC's Brief at 44.<sup>29</sup> The IOUs base their argument on the fact that the economic impact statement contained in the Staff Analysis for CS/HB 3065 states that "[f]or utilities, additional costs could be transferred to the ratepayer." Staff Analysis for CS/HB 3065 at 15. However, the IOUs' argument fails to put the above-quoted language in context. The relevant paragraph of the Staff Analysis for CS/HB 3065 states, in full:

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

(Emphasis supplied.) By using the term "could," the Staff Analysis for CS/HB 3065 leaves open the possibility that not all additional costs arising under Chapter 90-330 would necessarily be transferred to a utility's ratepayers. As compared to a traditional, vertically-integrated utility that can pass on increased costs to its captive ratepayers, Duke has no such captive ratepayers to whom it can transfer application fees, so an increase in application fees is simply an increased cost to Duke of doing business in Florida.

The IOUs also assert that because Section 403.519 was

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<sup>29</sup> It appears that the IOUs, when making their argument regarding the legislative intent purportedly embodied in the Staff Analysis for CS/HB 3065, no longer consider the 1990 amendments to Section 403.519, F.S., to be "housekeeping amendments."

enacted as part of FEECA, the Commission should look to the definition of "utility" contained in Section 366.82(1) of FEECA to limit the term "applicant." See FPC's Brief at 42-44. Once again, the IOUs miss the point: the term "utility" does not appear in Section 403.519. The Legislature has specifically stated that an "applicant" can seek a determination of need under Section 403.519. Duke is such an applicant and the Court should reject the IOUs' unfounded invitation to ignore this clear directive.

Lastly, the legislative history of the PPSA supports a broad interpretation of the concept of need. See FPC's Brief at 39-40. The Legislature enacted the PPSA in 1973 when it passed House Bill 149. See Ch. 73-33, Laws of Florida. House Bill 149 was debated in several committees; however, the only relevant substantive debate on the bill occurred on March 27, 1973, at a meeting of the House Environmental Protection Committee, Subcommittee on Permits. See R9-1769-1821 (Fla. H.R. Comm. on Env. Pro., Subcomm. on Permits, tape recording of proceedings (March 27, 1973)).

In the March 27, 1973 subcommittee hearing, the legislators discussed the concept of need. Representative Spicola (the sponsor of House Bill 149), Representative Andrews (the chairman of the subcommittee), and Mr. James Woodruff (a representative of Tampa Electric Company) engaged in the following colloquy:

REP. SPICOLA: I think we ought to have a need in the area.

MR. WOODRUFF: Well let me--let me switch the situation to the peninsula of Florida that doesn't

involve the Southern Covenant, [sic] but they involve Tampa Electric Company and the City of Maitland, and other investor-owned utilities and companies-- . . . Part of our building plan is to inter-space where one year we will build a plant and the next year maybe Florida Power Corporation will build a plant. Florida Power is here . . . In some intermediate--the City of Lakeland may build a plant. But these are three systems on the west coast of Florida that are inter-tied. And what it means is that each company doesn't have to have a particular amount of steady reserve over and an over-investment of capital, we can call one another, and where the City of Lakeland or Tampa Electric Company may not be able to justify the particular need in our area, that's just in the area served, we can justify it in the areas served by Florida Power Corporation, Lakeland, and . . . on an interim building schedule. Just a part of overall planning.

CHAIR: I know, I know what you're talking about, Cliff, involved in building, but what you do is you build a plant that's big enough to meet your future needs. If you've got some excess capacity which you sell off to somebody that needs some--

MR. WOODRUFF: Yes, that's correct.

CHAIR: But you anticipate that within about ten years your needs are going to outstrip this capacity, and so the other people you've been selling to are going to build in the interim, and they'll have excess capacity that they'll sell back to you. Well, that's just simply need in the area, it's just at what point in time.

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

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

R9-1783-85 (emphasis supplied). Later, in the subcommittee hearing, when asked again about whether there should be a

geographical limitation on the area in which need would be determined, one of the legislators stated "[t]he Southeastern United States is an area." R9-1814-15. As this legislative history demonstrates, in 1973, when the Legislature adopted the PPSA, the Legislature considered "need" to include power generated in one area of Florida for consumption in other areas within the state. Clearly, the Legislature that enacted the PPSA had an expansive view of the concept of "need."

**III. THE RESTRICTIVE INTERPRETATION OF SECTION 403.519 ADVOCATED BY THE IOUs WOULD VIOLATE THE UNITED STATES CONSTITUTION.**

The UCNSB and Duke argued below that the Commerce Clause of the United States Constitution prohibits an interpretation of Section 403.519, that would prevent UCNSB's co-applicant, Duke, from applying directly for a determination of need in this case. In the Order, the PSC considered<sup>30</sup> the Commerce Clause issue but determined that there is "insufficient evidence in the record to fully adjudicate [the issue]." A1 at 30. Contrary to the Order, sufficient record evidence exists for this Court to determine the Commerce Clause issue. (However, like the PSC below, the Court need not reach this issue to affirm the PSC's Order.)

Under the interpretation of Section 403.519 proposed by the IOUs in their arguments below, the UCNSB's co-applicant, Duke,

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<sup>30</sup> While the PSC lacks the jurisdiction to invalidate a statute on constitutional grounds, the PSC may properly consider constitutional issues in interpreting the statutes with which it is charged with enforcing. Communications Workers of America, Local 3170 v. City of Gainesville, 697 So. 2d 167, 170 (1st DCA 1997) ("The notion that the constitution stops at the boundary of an administrative agency does not bear scrutiny.").

may construct and operate a merchant power plant in Florida only if it first contracts with an in-state retail-serving utility, which (according to the IOUs) is the only type of entity entitled to apply for a determination of need. According to this interpretation, it is impossible for any out-of-state entity to enter the wholesale market for electrical power in Florida without first obtaining the permission of a potential in-state competitor. This interpretation of Florida law would allow in-state utilities to bar out-of-state companies from competing with them in the Florida market simply by refusing to apply for a determination of need on behalf of the out-of-state corporation. Or, conversely, the in-state utility can demand economic benefits in exchange for co-sponsoring the out-of-state company's determination of need application. Both of these alternatives constitute clear favoritism toward local corporations, and are therefore inconsistent with the basic Commerce Clause principle that no state may use its regulatory authority to isolate its own corporations from interstate competition.

The dormant (or "negative") Commerce Clause is a body of doctrine derived from the Constitution's express grant of congressional power to "regulate Commerce . . . among the several states." Art. I, § 8, U.S. Const. This doctrine imposes a judicially enforceable limit on the extent to which a state may regulate transactions in interstate commerce.

The dormant Commerce Clause creates a national economic marketplace in every commercial commodity, including electricity. See New England Power Co. v. New Hampshire, 455 U.S. 331 (1982)



(striking down as violation of dormant Commerce Clause a New Hampshire Public Utilities Commission order banning export of locally produced hydroelectric power). The principle governing dormant Commerce Clause cases is simple and virtually absolute: "This 'negative' aspect of the Commerce Clause prohibits economic protectionism -- that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273-74 (1988). Any state statute or regulation that functions primarily to provide economic benefits to in-state corporations is therefore unconstitutional. In this case, the interpretation of Section 403.519 that would categorically prohibit UCNSB's co-applicant, Duke, from even applying for a determination of need without first contracting with an in-state utility is pure economic protectionism, and therefore is prohibited by the dormant Commerce Clause.

State laws can conflict with the Commerce Clause in two ways: by discriminating against out-of-state commerce, and by unreasonably burdening interstate commerce. The exclusionary interpretation of Section 403.519 urged by the IOUs is unconstitutional under both categories of jurisprudence.

**A. To Prohibit the UCNSB's Co-Applicant, Duke, From Applying for a Determination of Need Would Unconstitutionally Discriminate Against Out-of-State Commerce.**

Requiring the UCNSB's co-applicant, Duke, to contract with an in-state utility before obtaining a determination of need would overtly discriminate against out-of-state companies seeking to enter the wholesale market for electrical energy in Florida.

Overt discrimination of this sort against out-of-state competitors of in-state companies is virtually impossible to justify under the Commerce Clause. "[W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). Under the exclusionary interpretation of Section 403.519 urged by the IOUs, out-of-state companies who refuse to enter into binding contracts with in-state utilities would be totally barred from obtaining a determination of need, and therefore totally barred from doing business in Florida as a wholesale producer of electrical power. This interpretation of Section 403.519 fits precisely the Supreme Court's description of a clear dormant Commerce Clause violation.

The Supreme Court has held unconstitutional many state regulations that have attempted to give local economic interests a competitive advantage by requiring anyone doing business in the state to channel part of their business to the local companies.<sup>31</sup> The underlying theme is consistent: neither a state nor its agencies may discriminate against interstate commerce, regardless of whether the discrimination takes the form of a direct ban on out-of-state competitors, a statutory requirement that out-of-state businesses join with in-state businesses before doing business within the state, or the selective application of

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<sup>31</sup> See C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994); Oklahoma v. Wyoming, 502 U.S. 437 (1992); South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Toomer v. Witsell, 334 U.S. 385 (1948); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928); Buck v. Kuykendall, 267 U.S. 307 (1925).

otherwise legitimate certification requirements.

It is irrelevant for purposes of dormant Commerce Clause analysis that Duke could eventually enter the Florida market after it contracted with an in-state utility to obtain a determination of need. Any discriminatory state action that is intended or that has the effect of protecting local interests is sufficient to trigger the application of the Commerce Clause, even if that action merely imposes extra costs on an out-of-state entity. See Wyoming, 502 U.S. at 455.

The facially discriminatory nature of the IOUs' proposed interpretation of Section 403.519, F.S., renders that interpretation constitutionally indefensible. As noted above, it is virtually impossible to justify discriminatory restrictions on interstate commerce. See Philadelphia, 437 U.S. at 624. Such restrictions may not be justified under any circumstances if the state cannot demonstrate that its legitimate local interests could not be protected through a nondiscriminatory alternative regulatory scheme. See Carbone, 511 U.S. at 392. In this case, therefore, the only question is whether the legitimate interests represented by the need determination process can be adequately served if Duke is permitted to apply directly for a need determination without first contracting with a local utility for the entire capacity of the Project.

The need determination process serves three general legitimate state interests: ensuring electric system reliability and integrity; providing adequate electricity at a reasonable cost; and determining whether a proposed plant is the most cost

effective available. See § 403.519, Fla. Stat. All three interests are easily protected by the nondiscriminatory alternative adopted by the PSC: simply applying these criteria to the merits of the Joint Applicant's application. Since the three legitimate state interests justifying the determination of need process can be satisfied without requiring a local utility to apply for a determination of need on behalf of Duke, the IOUs' exclusionary interpretation of Section 403.519 cannot withstand the "rigorous scrutiny" the Supreme Court demands in its dormant Commerce Clause decisions.

**B. Prohibiting Duke From Applying for a Determination of Need Unconstitutionally Burdens Interstate Commerce.**

Because the requirement that Duke contract with a local utility before applying for a determination of need constitutes unconstitutional discrimination against interstate commerce, it is unnecessary to consider whether the requirement would unconstitutionally burden interstate commerce. See Carbone, 511 U.S. at 390 (holding that courts "need not resort to" burden analysis if statute is found to discriminate against interstate commerce). In this case, however, applying the burden category of dormant Commerce Clause analysis would produce the same result as the discrimination analysis: i.e., that the IOUs' interpretation of Section 403.519 is unconstitutional.

This second category of dormant Commerce Clause analysis limits the extent to which states can indirectly burden interstate commerce, even if there is no evidence of local favoritism or discrimination against interstate commerce. In

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), the Supreme Court stated:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. . . . And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

In this case, the IOUs' proposed interpretation of Section 403.519 fails every aspect of the Pike burden test.

The discussion in the previous section demonstrates why the proposed interpretation of Section 403.519 is not evenhanded in its treatment of participants in the market for wholesale electrical power. Under the IOUs' proposed interpretation, the only way any company can enter the market for wholesale electrical power is by entering into a contract with a local utility to obtain the necessary determination of need. This imposes a major burden on commerce because it imposes additional costs on applicants who seek to participate in the interstate wholesale power market, and forces them to give up a measure of control over the regulatory decisions that dictate how and when a new generation facility will be built.

The discussion in the previous section also disposes of the argument that legitimate local interests support the requirement that Duke enter into a contract with a local utility to obtain regulatory approval of its new facility. The only legitimate interests that can be asserted in favor of the determination of

need process are: ensuring electric system reliability and integrity, providing adequate electricity at a reasonable cost, and determining whether a proposed plant is the most cost-effective available. See § 403.519, Fla. Stat. All three interests can be satisfied by dealing with Duke directly instead of through a local intermediary. There is, of course, a possible fourth interest to justify prohibiting Duke from applying for a determination of need directly, i.e., to protect local economic interests from out-of-state competition in the wholesale market for electricity. This interest constitutes pure economic protectionism, however, and is therefore inconsistent on its face with the dormant Commerce Clause. Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 43-44 (1980).

Permitting the UCNSB's co-applicant, Duke, to apply directly for a determination of need infringes on none of the state's legitimate regulatory interests. Conversely, requiring Duke to contract with a local utility to apply for a determination of need would directly burden interstate commerce in a manner that favors local economic interests and disadvantages competitors from outside the state, as well as disadvantaging the would-be customers, such as the UCNSB, of the competitors. The burden this requirement imposes on interstate commerce clearly exceeds the local benefits; therefore the exclusionary interpretation of Section 403.519 advanced by the IOUs before the PSC, is unconstitutional under the burden category of dormant Commerce Clause jurisprudence.

The IOUs did not address Commerce Clause issues in their

initial briefs before the Court. However, in their arguments before the PSC, the IOUs cited three cases in opposition to the the UCNSB's and Duke's Commerce Clause arguments. See T2-278-79, 281-82). One of those cases, Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Corp., 461 U.S. 190 (1983), involved preemption, not dormant Commerce Clause issues, and is therefore wholly irrelevant to determining the constitutional limits on the application of Florida law. The second case, Arkansas Electrical Cooperative Corp. v. Arkansas Public Service Comm'n, 461 U.S. 375 (1983), is also irrelevant to the present case because in that case the United States Supreme Court itself noted that "the most serious concern identified in [Pike v. Bruce Church]-economic protectionism-is not implicated here." Id. at 394. In contrast to that case, which involved the regulation of rates among utilities "all of whom are located within the state," id. at 394, this case involves an attempt to give existing local market participants the authority to dictate whether and on what terms other competitors can enter the Florida wholesale power market. This is the essence of economic protectionism.

The IOUs also misconstrue the third case, General Motors Corp. v. Tracy, 117 S. Ct. 811 (1997). The IOUs cite Tracy to support their argument that the exclusion of Duke from the wholesale market for electricity "is a fair discrimination that does not violate the dormant commerce clause." T2-281. Tracy does not support this claim. Tracy involved a very different kind of state action than is at issue here: a state statute that

imposed a sale and use tax on all natural gas purchases, but exempted from the tax so-called "local distribution companies" ("LDCs"). These LDCs were heavily regulated local gas companies whose sales of natural gas were "bundled" with legally-mandated consumer services and protections (such as the requirement to sell natural gas to all purchasers within each company's service area). See id., at 816, 823. Although the tax exemption provided some financial advantages to these companies, it did not affect the ability of sellers of "unbundled" natural gas to enter the separate market for sales to large purchasers of natural gas "who were able to buy gas on the open market and were willing to take it free of state-created obligations to the buyer." Id. at 821.

Nothing in the Supreme Court's opinion in Tracy suggests that the Commerce Clause would permit the state to authorize the local "bundled" gas sellers to bar other companies from entering the market for "unbundled" gas sales. As the Supreme Court explained in a more recent decision, in Tracy "the Court premised its holding that the statute at issue was not facially discriminatory on the view that sellers of 'bundled' and 'unbundled' natural gas were principally competing in different markets." Camps Newfoundland/Owatonna, Inc. v. Town of Harrison, Maine, 117 S. Ct. 1590, 1602 n.16 (1997). The Supreme Court explained in Tracy that states may impose different (and sometimes more favorable) regulations on entities serving different markets because eliminating such regulations "would not serve the dormant Commerce Clause's fundamental objective of



preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." Tracy, 117 S. Ct. at 824. In contrast to Tracy, in this case the IOUs seek total control over the market for wholesale electricity. The IOUs are thus seeking to dominate the very market in which Duke is attempting to compete. This is precisely the sort of "preferential advantage" that the Court has consistently held violates the dormant Commerce Clause.

**IV. FEDERAL LAW PREEMPTS THE STATE FROM REQUIRING THE UCNSB'S CO-APPLICANT, DUKE, TO OBTAIN A CONTRACT WITH RETAIL ELECTRIC UTILITIES IN ORDER TO APPLY FOR A DETERMINATION OF NEED.**

The Energy Policy Act of 1992 preempts any application of state law that would allow vertically integrated utilities to prevent competition in the wholesale electric power market. Yet, it is precisely such an interpretation that the IOUs urged on the PSC and the PSC properly rejected in the Order.

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

from non-retail utility generators in the wholesale market. The House Report states:

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

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

In argument below, the IOUs explicitly conceded that under their proposed interpretation of state law, retail utilities in Florida have the power to keep others out of the wholesale market. T2-291-92. First, the IOUs contended that no significant power plant can be sited in Florida without first contracting to sell firm power to retail utilities. T2-266. Second, the IOUs suggested that the PSC does not have the power to order them to enter into any such contracts. T2-285-86. Hence, the IOUs see state law as giving the vertically integrated utilities the power to keep others out of the wholesale market, power that Congress explicitly aimed to eliminate in the Energy Policy Act.

The IOUs attempt to avoid the ineluctable conclusion that federal law prohibits states from allowing vertically integrated utilities to play gatekeeper to the wholesale generation market by contending that Congress only prevented vertically integrated utilities from using their monopoly power over transmission but not their monopoly power over distribution to bar access to that market. This contention implicitly attributes to Congress a lack

of rationality and is wrong as a matter of law. Congress would have no reason to go to great pains to structure the Energy Policy Act to eliminate vertically integrated utilities' abilities to use power over their transmission grids to block entry into the wholesale market while allowing the same utilities to block entry by utilizing a perverse reading of state laws governing the need for power plants. Whether the existing retail utilities block access by refusing transmission or by refusing to enter into contracts that they claim are prerequisites for building a power plant, the result is the same; the integrated utilities are shielded from the very competition in the wholesale power market that Congress intended to foster.

The IOUs nonetheless claimed that this illogical outcome is warranted because the Federal Power Act of 1935 granted states and not the federal government power to regulate power generation. T2-275. This claim flies in the face of Supreme Court precedents, which make clear that the line Congress drew was between the wholesale and retail markets. See Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354, 378-79 (1988); Nantahala Power & Light v. Thornburg, 476 U.S. 953, 966 (1986); Federal Power Comm'n v. So. Cal. Edison, Co., 376 U.S. 205, 215-16 (1964). The history behind this provision shows that Congress only recognized states' power to regulate generation insofar as it affects the environment or burdens retail customers, and does not give the states the authority to regulate the economics of plants engaged in purely wholesale operations. See Arkansas Electrical Cooperative, 461 U.S. at 378-79 (noting that in

enacting the Federal Power Act, "Congress undertook to establish federal regulation over most of the wholesale transactions of electric and gas utilities engaged in interstate commerce").

In the Federal Power Act, Congress gave neither the states nor the Federal Power Commission (now the FERC) the authority to license privately-owned generation facilities built solely for the purpose of supplying wholesale power. In the Energy Policy Act, however, Congress unambiguously expressed its intent that rather than relying on state or federal regulation of the economics of wholesale power, it preferred to rely on a competitive market free from the influence of the monopoly power of vertically integrated utilities.

In their argument below, the IOUs relied on Monongahela Power Company, 40 FERC ¶61,256 (1987) for the proposition that the Federal Power Act preserved the states' authority "over the capacity planning, determination of power needs, plant siting, licensing, construction, and the operations of coal-fired plants." T2-276. But the facts of that case clarify that this proposition applies only with respect to environmental issues and economic issues directly affecting retail customers. The issue in Monongahela was whether FERC had to prepare an Environmental Impact Statement ("EIS") when it set wholesale rates for a plant owned by a state-regulated retail utility. FERC concluded that it did not have to prepare an EIS because regulatory authority over the environmental effects of building and operating fossil fuel fired power plants lay with the states. The UCNSB does not take issue with this holding as far as it goes. The Energy

Policy Act explicitly reserves to states continued jurisdiction to regulate the environmental impacts of merchant plants, and it is because of this continuing jurisdiction that the UCNSB and Duke are seeking certification under the PPSA. See 15 U.S.C. §79 (1998). The UCNSB does take issue, however, with the IOUs' attempts to stretch this holding to assert that states have jurisdiction over purely wholesale aspects of the generation market. An isolated quotation from a FERC decision disavowing FERC jurisdiction over environmental effects stemming from a plant in a retail utility's rate base is a thin reed on which to hang state authority to frustrate the will of Congress with respect to the wholesale generation market.

Moreover, the IOUs' assertion that the need determination is part of the environmental siting assessment of the Project, and therefore not preempted, is misplaced. See T2-276-78, 308-10. The determination of need is not part of the environmental assessment: it is a precondition to the UCNSB and Duke being able to present evidence about the environmental impact of its project to the Siting Board. See § 403.508(3), Fla. Stat.

**V. CONTRARY TO FPL'S THEORY, THIS CASE REPRESENTS REGULATION OF WHOLESALE POWER PRODUCERS, NOT DEREGULATION OF THE ELECTRIC INDUSTRY.**

A substantial portion of FPL's Brief (pages 26-44) consists of FPL's unfounded argument that allowing merchant plants achieves only one end, "the commencement of the deregulation of power generation in Florida," which, FPL asserts, is not allowed under existing state law. FPL's Brief at 39. FPL's arguments range from its selective exposition of the Nassau cases,

discussed above, to state and federal legislative history,<sup>32</sup> also discussed above, sounding and resounding the theme that the PPSA and Section 403.519 only apply to "monopoly utilities." FPL's Brief at 26, 28, 29, 35, 38, 40.<sup>33</sup> Contrary to FPL's assertions, the PSC's Order is a proper exercise of its regulatory authority within the existing statutory and regulatory framework. Moreover, the PSC expressly recognized its regulatory authority over the UCNSB and Duke under existing statutes.

While the UCNSB agrees that the existing statutes and rules apply to monopoly electricity providers, such as FPL and the other IOUs, neither the statutes nor the rules suggest that they are exclusively designed for that purpose. For example, neither Section 403.519 nor any section of the PPSA refers to "monopoly" utilities or to "retail" utilities. FPL's argument that "a regulatory determination of need would be unnecessary . . . for any entity operating in a competitive market because it would be unable to seek a government-required rate of return on its

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<sup>32</sup> Though irrelevant to the analysis of the UCNSB's and Duke's status as applicants under the PPSA and Section 403.519, FPL is mistaken when it asserts that "[f]ederal law prevented out-of-state companies from competing with in-state monopolies until 1996." FPL's Brief at 31. There was never any federal statutory prohibition of competition at any level; indeed, this suggestion is ludicrous. However, there were market impediments, generally erected by the unwillingness of companies like FPL to deal fairly with competitive power suppliers, to competition that federal laws, e.g., PURPA and the Energy Policy Act, and rules, e.g., FERC's Order 888, were enacted and promulgated to overcome.

<sup>33</sup> FPC essentially makes the same argument throughout its Brief, arguing that the PSC only has the authority "to regulate retail utilities in this State," FPC's Brief at 15, and that only retail utilities can apply for a determination of need pursuant to the PPSA. See FPC's Brief at 16, 19, 26, 39-40, 42.

investment," FPL's Brief at 29-30, ignores the PSC's extensive jurisdiction over Florida's power supply grid, its clear mandate to regulate in the public interest under Chapter 366, and the Legislature's articulated purpose of the PPSA, namely to balance the need for new power plants against their environmental and other effects. All of these purposes indicate that PSC review of need applications is entirely appropriate within the existing statutory framework, even when the proposed plant will not be in the rate base of any utility with captive retail customers.

FPL suggests that the PSC's action below represents deregulation of the generation sector of the electric industry in Florida. The illogic of this suggestion is readily apparent from what actually occurred below: the UCNSB and Duke applied to the PSC, as the regulatory authority with jurisdiction over their petition, for regulatory relief pursuant to the applicable statutes and rules. See, R1-1, 29. The PSC reviewed the UCNSB's and Duke's application pursuant to its governing statutes and rules and granted the requested relief. A1 at 38-53, 55.

The Order confirms that the PSC simply exercised its regulatory authority over the UCNSB and Duke in evaluating the Joint Petition and in determining need for the Project. Among other things, the PSC expressly recognized that both the UCNSB and Duke are "electric utilities" subject to the Commission's regulatory authority pursuant to the Grid Bill and other statutes. A1 at 16-17, 19-20. The PSC also considered and applied the criteria of Section 403.519 to the proposed Project, A1 at 38-53. Finally, the PSC made it quite clear that the PSC

viewed its action as an exercise of its regulatory authority, not as deregulation, and that such regulation would be applied to any future merchant plant proposals. Specifically, the Order states:

Merchant plant applicants do not have a right to build merchant plants in Florida. Each applicant must demonstrate that its project conveys a benefit to Florida ratepayers, given the existence of the prior power plant additions. We recognize that there may be certain applications in the future, which may fail to demonstrate an economic need, despite the fact that the retail ratepayers are not at risk. This demonstration may involve the inability of the applicant to demonstrate that it [satisfies specific regulatory criteria].

A1 at 44-45. This is PSC regulation of utilities providing electric service, not deregulation. Moreover, it is not "abdication to the market" as suggested by the IOUs. The Court should reject FPL's misleading arguments and affirm the Order.

**VI. THE COMMISSION CORRECTLY CONCLUDED THAT THE UCNSB AND DUKE PROPERLY PLED ALL REQUIRED ELEMENTS FOR A DETERMINATION OF NEED.**

FPL asserts that "Duke's petition did not make the allegations required for a determination of 'need' and did not offer evidence sufficient to justify a determination of need." FPL's Brief at 45. FPL misquotes Rule 25-22.081(3)<sup>34</sup> and then

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<sup>34</sup> The subject rule, Fla. Admin. Code R. 25-22.081(3), provides in its entirety that the petition shall contain:

(3) A statement of the specific conditions, contingencies or other factors which indicate a need for the proposed electrical power plant including the general time within which the generating units will be needed. Documentation shall include historical and forecasted summer and winter peaks, number of customers, net energy for load, and load factors with a discussion of the more critical operating conditions. Load forecasts shall identify the model or models on which they were based and shall include sufficient detail to permit analysis of the model or models. If a



criticizes the Joint Petition and Exhibits. FPL's Brief at 45-46. FPL alleges numerous pleading deficiencies, each of which is addressed specifically below. In summary, the Joint Petition fully complies with all applicable pleading requirements set forth in Rule 25-22.081, F.A.C., and is more than sufficient to allow "the Commission to take into account the need for electric system reliability and integrity, the need for adequate, reasonable cost electricity, and the need to determine the most cost effective alternative available . . . ." A1 at 15, 51; see also Fla. Admin. Code R. 25-22.081.

FPL asserts that the Joint Petition did not identify the utility or utilities primarily affected by the Project. FPL's Brief at 45. FPL is incorrect. Rule 25-22.081(1), F.A.C., requires that a petition for determination of need include: "[a] general description of the utility or utilities primarily affected." In this case, the UCNSB and Duke are the only utilities primarily affected and the Joint Petition included all relevant allegations regarding both. The Joint Petition and Exhibits specifically describe the UCNSB and Duke, R1-4-6, 42-47, their load and electrical characteristics, R1-77-86, 90-91, their generating capability, R1-37-38, 85, 61-62, 69, and their interconnections, R1-38, 63. The Joint Petition also specifically addressed the need in Peninsular Florida, the primary wholesale market in which Duke will operate. R1-12, 17-

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determination is sought on some basis in addition to or in lieu of capacity needs, such as oil backout, then detailed analysis and supporting documentation of the costs and benefits is required.

18, 25, 28, 87-90. While the Petition did not specifically allege that Duke needs the Project, it is an obvious inference that a wholesale power utility, like Duke, needs power plants to produce and sell electricity.<sup>35</sup>

Contrary to FPL's assertions, nothing in Rule 25-22.081(1), F.A.C., requires that all capacity of a proposed power plant be allocated to a primarily affected utility, or that utilities that may purchase power from the Project in the future be identified. Utilities such as FPL are not and cannot be primarily affected utilities until they elect, at their sole discretion, to enter into a power purchase agreement with Duke. FPL chose not to do so and thus is not primarily affected by the Project.

FPL further asserts that the UCNSB and Duke identified "Peninsular Florida" as the "primarily affected utilities." FPL's Brief at 45. FPL is incorrect once again: the Joint Petitioners identified and described the UCNSB (an electric utility under Chapter 366) and Duke (a "public utility" under the Federal Power Act and an "electric utility" under Chapter 366) as the "primarily affected utilities." R1-4-7, 10-15, 44-46, 77-92. Contrary to FPL's assertions, the Joint Petition contains the information concerning Peninsular Florida because Peninsular Florida is the primary wholesale market in which the Project will operate, and because the presentation of such information is

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<sup>35</sup> The standard for disposing of motions to dismiss is whether, with all allegations in the petition assumed true, and with all reasonable inferences drawn from the petition in favor of the petitioner, the petition states a cause of action. Simon v. Tampa Electric Co., 202 So. 2d 209, 211 (Fla. 2d DCA 1967).

consistent with longstanding PSC practice and clearly within the jurisdiction of the PSC in carrying out its duties under Section 403.519. Moreover, allegations that the Project is consistent with the needs of Peninsular Florida are in no way novel in a need determination before the PSC. In fact, in a 1990 FPL need determination proceeding, the PSC addressed the following issue:

Issue 14: Are the type, size and timing of FPL's proposed Martin Units 3 and 4 reasonably consistent with the capacity needs of Peninsular Florida?

In re: Petition of Florida Power & Light Company for Determination of Need for Proposed Electrical Power Plant and Related Facilities -- Martin Expansion Project, 90 FPSC 3:234.

(emphasis supplied). In its Prehearing Statement, rather than objecting to the use of the term "consistent with", FPL repeated Issue 14 verbatim and responded

Yes . . . FPL's plan to add 1,312 of combined cycle capacity in the 1993 to 1995 time frame is consistent with the remaining Peninsular Florida need.

FPL's Prehearing Statement at 16-17 (Docket No. 890974-EI) (emphasis supplied). See R2-375-76. Clearly, the PSC's analysis of whether a proposed project "is consistent with" Peninsular Florida's needs was appropriate for FPL in 1990 and is equally appropriate for the UCNSB and Duke today.

FPL asserts that the Petition and Exhibits did not "state the specific conditions, contingencies, and other factors that indicate the number of customers, net energy for load, load factors, and critical operating conditions of the utility purchasing the proposed power output." FPL also asserts that the Petition and Exhibits failed to present detailed load forecasts

and to identify the models used to prepare those forecasts. FPL's Brief at 46. FPL is again mistaken: the Joint Petition and Exhibits included extremely detailed load forecasts for the UCNSB, R1-77-85; detailed information regarding the number of customers, peak demands, and net energy for load of the UCNSB, R1-7, 10-11, 44-45, 77-84; (load factor is readily calculated from peak demands and net energy for load); and detailed information regarding the peak demands and reserve margins (a key indicator of need) for Peninsular Florida, R1-12-14, 87-90. The Exhibits also discussed the critical operating conditions indicating the UCNSB's need for the Project, namely that the UCNSB relies extensively on purchased power and that all but one of its main power purchase agreements are scheduled to expire between September 1999 and March 2000, R1-11; described forecasts of the load that Duke expects to serve, R1-90-91; and identified the models upon which the load forecasts were based. R1-82-85, 93-94.

FPL also criticizes the Joint Petition and Exhibits for allegedly failing to provide "detailed analysis and supporting documentation of the costs and benefits" of the Project considered on a basis other than capacity needs. FPL's Brief at 46. Contrary to FPL's criticism, the Joint Petition and Exhibits set forth the real resource costs, see R1-50, and benefits to the UCNSB -- more than \$39 million (net present value) over the first twenty years of the Participation Agreement's life, R1-14, 17-18 -- as well as the specific benefits to Peninsular Florida in the form of enhanced efficiency of electricity generation and primary

fuel savings, i.e., reduced use of fuel oil and gas. R1-9-10, 91, 94-95. The pleadings also describe the Project's expected contributions to Peninsular Florida reliability. R1-12-13, 87-90.

FPL also asserts that the UCNSB and Duke failed to provide a description of non-generating alternatives as required by Rule 25-22.081(5), F.A.C. FPL's Brief at 46. FPL is once again mistaken. The Exhibits describe the UCNSB's non-generating alternatives, i.e., conservation programs. R1-45. The Joint Petition also contains a discussion of Duke's non-generating alternatives. See R1-23-24 (stating that as a federally regulated public utility Duke does not engage in end use conservation programs and is not required to have conservation goals pursuant to Section 366.82(2), F.S.).<sup>36</sup> It is illogical to suggest that a wholesale power supplier might have any non-generating alternative to producing power for sale. The allegations in the Joint Petition meet the pleading requirement of Rule 25-22.081(5), F.A.C.

Rule 25-22.082, F.A.C., relates to requests for proposals, not to the contents of need petitions. The record reflects that Duke/Fluor Daniel, the engineering, procurement, and construction contractor for the Project, "considered proposals from four vendors, including General Electric, Siemens, Westinghouse, and ASEA Brown-Boveri" for the electrical generators for the Project.

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<sup>36</sup> While Duke New Smyrna does not engage directly in end-use energy conservation programs, the record contains both allegations and competent substantial evidence that the proposed Project is consistent with the goals and purposes of FEECA. R1-17, 23-24, 28-29; T5-727-28 (reduced primary fuel use for power generation).

T8-1051-52. The PSC correctly recognized the function of Rule 25-22.082 with respect to merchant utilities, stating that, within the framework of Rule 25-22.082, Duke could offer the Project's capacity and energy to potential purchasing utilities, thereby presenting another generation supply alternative for existing retail utilities, "without putting Florida ratepayers at risk for the costs of the facility as is done for the costs for rate based power plants." A1 at 41, 45.

**VII. THE COMMISSION PROPERLY GRANTED THE REQUESTED DETERMINATION OF NEED FOR THE PROJECT FOLLOWING CORRECT APPLICATION OF THE STATUTORY CRITERIA.**

The IOUs accuse the PSC of erroneously granting its affirmative determination of need for the Project. FPC's Brief at 35. TECO's Brief at 37-38. FPL's Brief at 46-50. The IOUs also accuse the PSC of "assuming" and "presuming" various elements of the need determination. TECO's Brief at 36, FPL's Brief at 49. Significantly, however, the IOUs do not argue that there is a lack of competent substantial evidence of record to support the PSC's decision to grant the determination of need for the Project. This is, of course, the correct standard of review. § 120.68(7)(b), Fla. Stat.

The issue before the Court is whether competent substantial record evidence supports the PSC's granting of the requested determination of need. The PSC is required to "take into account" the following criteria in making its determination of need under Section 403.519: "the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-

effective alternative available." The PSC is also to "expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant." None of these criteria is superior to any other, nor is any a sine qua non to the PSC's determining whether a particular plant is needed; each is simply to be "take[n] into account."

Applying the appellate standard of review readily demonstrates the correctness of the PSC's decision. Extensive record evidence supports the PSC's findings and conclusions with respect to each of these criteria. For example, Mr. Vaden and Mr. L'Engle testified to the Project's contributions to meeting the need for system reliability and integrity. T3-393-94, 397-98, T4-562 ("the more capacity in the state, . . . the more reliable the state would be"). The record also contains evidence that the Project will contribute to meeting the need for adequate electricity at a reasonable cost. T3-396, 398-99, T5-704-14. Mr. Vaden, the UCNSB's Utilities Director, testified that the Project is the most cost-effective alternative available to the UCNSB, T3-395-96, and Dr. Nesbitt testified that the project is the most cost effective power supply alternative for Peninsular Florida. T5-714-16. The record also showed that the Project has favorable capital costs, availability, and efficiency compared to other proposed units in Florida. T3-398-99, Ex 7, RLV-8. Witness Vaden described the UCNSB's conservation programs, T3-390-91, and Witness Nesbitt testified that the Project contributes directly

and significantly to the increased efficiency and cost-effectiveness of electricity production and natural gas use. T5-714-15, 727-28. Moreover, to the extent that the Project displaces oil-fired generation, it will contribute to the express statutory goal of conserving expensive resources, especially petroleum fuels. See T5-727-28; see §§ 366.81 & 366.82(2), Fla. Stat. Finally, with respect to other matters within the PSC's jurisdiction, the record shows that the Project's operation will lower wholesale prices, thereby reducing retail electricity prices to customers, T5-721, 723-28, reduce ratepayer risk, T5-721, T7-984, and promote the public interest. T7-983-84.

FPC asserts that the entire Project is not needed to provide the expected benefits to the UCNSB and its retail customers. FPC's Brief at 35. FPC simply disagrees with the PSC's weighing of the evidence in reaching its factual finding to the contrary. FPC has offered no record evidence to support its claim, while ignoring the express evidence of record supporting the PSC's finding. T3-393-96.

TECO asserts that the PSC's analysis and conclusions regarding the need criteria are "necessarily illogical and erroneous given the Commission's erroneous predicate that Duke is a proper applicant under the Siting Act." TECO's Brief at 35. This argument ignores the UCNSB, whose "applicant" status the IOUs do not contest. See, e.g., TECO's Brief at 16. Perhaps more significantly, TECO's own words demonstrate the circularity of its reasoning: logically, if the PSC's predicate is correct, i.e., if Duke is in fact a proper applicant, then TECO's



assertion is false. The Court should reject this circular, self-serving argument. TECO also accuses the PSC of glossing over or bending the need criteria to fit the case before it. TECO's Brief at 35. However, the record contains ample competent substantial evidence of record supporting the PSC's findings with respect to each of the statutory criteria.

TECO also criticizes the PSC's conclusion that "the entire project will provide net benefits to Florida ratepayers generally, just because the project may allow the [UCNSB] to buy 30 MW at a lower price [than] it could elsewhere." TECO's Brief at 37. This misstates the PSC's analysis: independent record evidence supports the PSC's conclusion that the project will benefit the ratepayers of Florida. T7-980-81, T5-721-28, T3-397-400. TECO's assertion that the PSC's analysis turns on the assumption of investment risk by Duke, TECO's Brief at 38, also mischaracterizes the PSC's analysis and ignores record evidence. The economic benefits to Florida ratepayers are enhanced operating reliability, A1 at 41, T3-398-99, T4-562, and lower power supply costs resulting in lower retail electricity prices, with the added benefit of reduced ratepayer risk. T5-721, T7-980, 984. With regard to the possibility of lost revenues possibly affecting one utility's ratepayers due to displaced wholesale sales, TECO's Brief at 38, TECO presented no evidence to support any such hypothesis. Moreover, there is no evidence to support the contention that the Project's net effects on Florida ratepayers will be negative. Finally, TECO's assertions regarding potential out-of-state sales are simply IOU scare

tactics that ignore the testimony of both Mr. Green and Dr. Nesbitt that the vast majority -- in excess of 99 percent -- of the Project's output will be sold in Peninsular Florida. T4-586-87, T5-720-21, Ex 18, DMN-13. There is no evidence of record to indicate that any significant amount of the Project's output will be sold outside Peninsular Florida.

FPL argues that the PSC "overlooked" and "ignored" various evidence. See, e.g., FPL's Brief at 47 (alleging that: PSC "overlooked" that the UCNSB would not be entitled to any power from the Project if Duke didn't build it; PSC "ignored" that a merchant plant's capacity would not count towards being anybody's reserve margin unless committed by contract; PSC "cavalierly concluded that [the Project's] power was needed for reliability and integrity.") These examples and FPL's other assertions are either irrelevant (e.g., FPL's assertion that the UCNSB wouldn't be entitled to any power from an unbuilt plant) or simply attempts to re-weigh the evidence. The record contains ample evidence to support the PSC's finding that the presence of the Project will enhance electric system reliability in Peninsular Florida,<sup>37</sup> T3-397-98, T4-562, and ample evidence to support the

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<sup>37</sup> FPL's assertion that "the PSC majority acknowledged that the plant is not needed to meet the acceptable reserve margins for Peninsular Florida" is a blatant misrepresentation of what the PSC actually stated in its Order. In the cited material, the PSC actually stated that "[t]he utility intervenors [i.e., FPL, FPC, and TECO] argued that because Peninsular Florida reserve margins are forecasted to be at or above the FRCC's threshold, the Project is not needed for peninsular reliability." A1 at 40-41. FPL's baseless effort to elevate its argument into a PSC statement is bootstrapping and misrepresentation of the worst sort, and the Court should reject it.

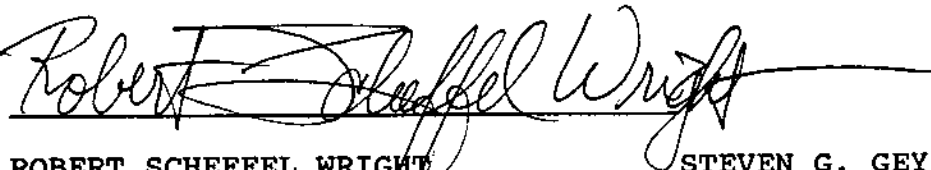
PSC's conclusion that the Project represents the most cost-effective power supply alternative for the UCNSB. T3-395-96, Ex 7, RLV-6.

CONCLUSION

The Florida Public Service Commission properly denied FPL'S and FPC'S motions to dismiss and granted its affirmative determination of need for the New Smyrna Beach Power Project in accord with all applicable statutory criteria. Accordingly, the Florida Public Service Commission's Order No. PSC-99-0535-FOF-EM should be affirmed in all respects.

Respectfully submitted this 9th day of August, 1999.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail to the following this 9<sup>th</sup> day of August, 1999.

  
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