IN THE SUPREME COURT OF FLORIDA

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| Tampa Electric Company, Florida Power Corporation, Florida Power & Light Co., and Florida Wildlife Federation,<br><br>Appellants,<br><br>vs.<br><br>Joe a. Garcia, Julia L. Johnson, Susan Clark, J. Terry Deason, and E. Leon Jacobs, Jr., as members of the Florida Public Service Commission, Duke Energy Power Company Ltd., L.L.P. and the Utilities Commission of the City of New Smyrna Beach, Florida,<br><br>Appellees. | ) | Case Nos. 95,444, 95,445, 95,446, 95,447 |

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On Appeal from an Order of the
Florida Public Service Commission

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# Initial Brief of Florida Power & Light Co.

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## EXPLANATION OF RECORD REFERENCES

The record in this case consists of 14 volumes of pleadings that will be referenced by the notation "(R[Volume #]-[Page #])," 13 volumes of transcripts that will be referenced by the notation "(T[Volume #] at [Page #])," and exhibits 1-34 and 36-43 that will be referenced by the notation "(Ex.[Exhibit #]-[Page #])." Prior to submission of this brief, FPL filed a motion to transfer this case to the First District Court of Appeal that included an appendix of materials that might not be easily accessible to the Court. References to that appendix are made in this brief by the notation "(App. Ex. __ at __)."

## INTRODUCTION

Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. ("Duke"), is a privately-owned, for-profit company that would like to build a large power plant in Volusia County, Florida, so that it can sell electrical power wholesale at free market prices unregulated by the Florida Public Service Commission ("PSC"). Duke cannot build such a plant, however, because the Florida Legislature has not authorized free-market plants to apply for the certification statutorily required to construct a power plant in Florida. In fact, the Legislature has rejected a proposal for such deregulation.

The Legislature *has* authorized monopoly utilities such as appellant Florida Power & Light Co. ("FPL") and entities committed to supply such utilities to apply for certification for *their* new power plants. And, this Court has direct appellate jurisdiction over orders granting or denying such applications because such orders are of statewide significance and they have a direct financial impact on Florida retail customers. That legislative authorization and this Court's constitutional jurisdiction may not be invoked by free-market companies such as Duke to evade the Legislature's decision that only monopoly utilities are allowed to build power plants. This Court therefore should transfer these appeals to the First District Court of Appeal and that Court should vacate the PSC's order for lack of jurisdiction.[1]

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1. Prior to submission of this brief, FPL moved to transfer this case to the First District because Fla. Const. art. V, sec. 3(b)(2) provides this Court with jurisdiction only over orders relating to rates or services of utilities providing electric service.

## STATEMENT OF THE CASE & FACTS

The following statement summarizes the case and the disposition in the PSC.

### Allegations of the Petition

Duke commenced this litigation on August 19, 1998, by filing a petition with the PSC for a determination pursuant to section 403.519, Fla Stat. (1997), of "need" for a 514-megawatt ("MW") electrical power plant to be built in Volusia County, Florida.[2] (R1-1). Duke alleged that it is a subsidiary of Duke Energy Global Asset Development, a Nevada corporation, which itself is a subsidiary of Duke Energy Corporation, a North Carolina corporation.[3] (R1-1-Ex.D-¶ 6). Duke noted that it "may only sell power to wholesale purchasers, i.e., to other utilities." (R1-1-Ex.D-¶ 5).

The petition made no effort to conceal that Duke is a privately owned company that would like to build a "merchant" power plant in Volusia County at an estimated

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2. Earlier in the same year, the PSC had refused to provide Duke with a declaratory statement that companies such as it could apply for a determination of need because it concluded that declaration of general policy would be better left to the Legislature. In re: Petition for Declaratory Statement by Duke Energy etc., Dkt. No. 971446-EU, Order No. PSC-98-0078-FOF-EU (Jan. 13, 1998).

3. Duke also alleged that it is public utility under the Federal Power Act, 16 U.S.C. § 824(b)(1)(1994) (R1-¶ 4), and an exempt wholesale generator ("EWG") under the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79z-5a (1994 & Supp. 1997) (R1-¶ 5).

cost of $160-million, with the hope that after the plant is built it will be able to exploit short-term power demands to make unspecified and unregulated profits by selling power at wholesale to unspecified retail utilities inside and outside of Florida.

Duke asked the PSC to consider the petition as having been brought not only by Duke but also by the Utilities Commission of the City of New Smyrna Beach, Florida ("the City"). Duke claimed the City had "an entitlement to 30 MW of the Project's capacity." (R1-1-Ex.D-¶ 3). But the City has no obligation to purchase *any* power at all. Duke simply has given the City an option to purchase six percent of the planned output of the 514-MW plant at sweetheart rates -- a small price to pay to gain entry into Florida's power generation market. The "balance" of power remaining after the City decided whether to exercise its option (94 percent of the plant's capacity) would be offered on the wholesale power market to unidentified customers. (R1-1-Ex.D).

FPL, Florida Power Corp. ("FPC"), Tampa Electric Company ("TECO"), and others petitioned to intervene, alleging that their substantial interests would be affected by disposition of the petition. (R1-122, 173, RV3-412 & RV6-1091).

Duke opposed their intervention arguing the utilities "cannot demonstrate any adverse effect (other than perhaps a speculative, purely competitive economic effect on [their] ability to make wholesale sales to other utilities)." (R2- 219, 220-23). The

PSC granted FPL, FPC, and TECO leave to intervene. (R4-613).

**Intervenors Move to Dismiss the Petition**

FPL and FPC moved to dismiss Duke's petition, asserting that the statutory scheme pursuant to which the petition had been submitted had been enacted solely for the purpose of allowing monopoly utilities serving retail customers to obtain new power plant certification. (R2-198, 250).

In its prehearing statement, the PSC staff identified that a threshold legal issue was whether the PSC had "the statutory authority to render a determination of need under Section 403.519, Florida Statutes, for a project that consists in whole or in part of a merchant plant (i.e., a plant that does not have . . . an agreement in place for the sale of firm capacity and energy to a utility for resale to retail customers in Florida)." (R4-779, 784).

**Argument on the Motion to Dismiss**

On December 2, 1998, the PSC heard arguments on dismissal. (V1-1-143). FPC put the question as follows: "Whether the legislation involved here essentially empowers the Commission to permit Duke to attain a determination of need for a merchant plant. The fundamental question is one of statutory construction." (V1-21).

During the hearing, Commissioner Deason recognized that "need" determinations have no appropriate role in a free market enterprise to build a new

power plant. He observed that he did not "know of any agency in the state that the shopping mall developer has to go to" to get a determination of need. Deason contrasted that with "monopolistic regulated utilities" where "there was a question exactly how much at risk the investors' funds were being placed." (V1-71). Deason noted that "that was one of the reasons in the Power Plant Siting Act that there was a determination of need and cost-effectiveness because it ultimately was going to end up in the rate base that ratepayers were going to have to pay a return on." (V1-71). This underscored FPL's point that section 403.519 cannot be interpreted as authorizing a merchant plant operator to apply for a need determination because it would not be committed to the regulated monopoly market.

Commissioner Deason also noted that the PSC would not know the rates that Duke would charge for most of the power that it generated. (V1-91). Counsel for Duke responded that the PSC could "fairly infer and conclude" that Duke's rates would be cost-effective by the mere fact that Duke sells in the wholesale market and that "they will only buy from us when it's cost-effective for them to do so." (V1-92).

When asked how many plants are "needed," counsel for Duke responded, "the more the merrier." (V1-117). Commissioner Clark rhetorically asked: "[W]hy should you come get a need [determination] from us? The market will determine how much is appropriate. . . . Then perhaps it makes no sense for you to go through a need

[determination]. It strikes me that there may be a problem with the current law. The law isn't the way perhaps it should be, given what's developing in the industry, but we're nonetheless constrained by what's in the law." (V1-121). Commissioner Garcia added: "This proceeding, you're saying, I guess, sort of it's superfluous. I mean, it's the law, and we have to do this. This is unnecessary, because our job is strictly that: protecting the ratepayers?" (V1-125).

Counsel for Duke did not dispute that it made no sense to require his client to go through a need determination, but nevertheless urged the PSC to interpret the law as requiring such a meaningless exercise because otherwise his client could not obtain a certification. (V1-121-27). "The problem is," he explained, "the way the statute is written out, we still have that r[o]le to play, and we don't argue that -- we do not argue that you don't have that r[o]le to play. We're here within that context asking you for that determination of need. If you were willing to give us the summary order that I just described, we could go home real soon." (V2-182).

Counsel for Duke argued further that the PSC should be anxious to see companies come into Florida to build numerous merchant plants that potentially would be more efficient than existing plants. He postulated that a series of merchant plant need determination cases could result in construction of another 10,000 megawatts of plants being built. "[I]s that too much?," he asked, "no ma'am; that's

not too much. That's a scenario that you all should want to see occur." (V1-139; see also V3-425).

Commissioner Clark explained, however, that such a scenario would leave Florida's retail utilities with useless, expensive power plants in which they had been guaranteed a regulatory opportunity to earn a return. (V1-140-41). Counsel for Duke urged the commissioners to ignore "stranded" investments as not being before them. (V1-141). Commissioner Clark responded that to address stranded investments after the merchant plants were built would be "putting the cart before the horse." (V1-141).

Nevertheless, the PSC unanimously voted to defer ruling on the motion to dismiss until after it considered evidence presented by the parties. (V2-328-29).

**Duke's Evidence of "Need"**

Lacking a firm contract that requires it to provide power to any retail utility in Florida, Duke instead presented a parade of witnesses who testified that minimal City resources would be used for the plant;[4] that construction would be paid for by Duke

4. Duke's first witness Ronald L. Vaden, director of the Utilities Commission for the City of New Smyrna Beach (V3-377), testified that the City and Duke had agreed that the City would furnish a 30-acre site and a connection to FPL and FPC transmission lines. (V3-403-04). Michel P. Armand described the transmission facility that would interconnect the project to the Florida transmission grid. (V8-1101). Larry Wall, of Duke Energy Power Services, described the physical and contractual arrangements for supplying natural gas to the project. (V8-1115).

and thus would not be charged to ratepayers and therefore there would be "absolutely no risk to the ratepayers" (V3-406); that construction would create jobs and a source of municipal revenue (V3-407-08); that the plant probably would lower consumers' electric bills (V3-411-12); that Duke's business judgment in investing in the plant was sound given the likelihood that Duke would profit from the plant[5]; that the plant would increase the reliability and integrity of the City's electric system (V3-412); and that operation of the plant would be efficient and minimize environmental impact.[6]

Duke's witnesses did not, however, offer evidence regarding the City's alternatives to constructing a 514-MW power plant. (V3-450-52). They admitted that the PSC could not determine the actual prices that the City would pay Duke for power.[7] They testified that the City had made only minimal conservation efforts to reduce demand. (V3-390-91). They could not show how construction of the plant

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5. Management consultant Dale Nesbitt referred to the plant as "manna from heaven": "The time has come . . . to . . . let the market bring the capacity in a limited, gauged, rationed, metered kind of way." (V7-945).

6. Although section 403.519 does not direct the PSC to consider the environmental consequences of building a power plant (which is assigned to the Department of Environmental Protection in section 403.504) Duke called an environmental engineer to testify that the proposed site was "well-suited" environmentally. (V8-1138-40).

7. Commissioner Deason questioned whether prices set by Duke for all customers would be reasonable "when the state is in a capacity emergency and they're the only source there with any capacity?" (V3-420).

meaningfully would increase the reliability of either the City's, (V4-538 & 562-64), or the state's electric service.[8] They further made it clear that the 484 MWs produced beyond that available to the City could not be relied upon by any utility at any price.[9] When asked to explain how they had come to the conclusion that the plant would be a financial success, Duke's witnesses admitted that they had assumed that power generation would be deregulated,[10] did not produce their underlying data,[11] admitted reliance on outdated information,[12] admitted making questionable assumptions about

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8. Duke introduced exhibits showing that in August, 1998, the Florida Reliability Coordinating Council ("FRCC"), had concluded that a 15 percent reserve margin is reasonable (Ex.4-16-19) and that even without the proposed Duke plant reserve margins would be in excess of 17 percent through summer 2007. (Ex.7-RLV-7-1 & 7).

9. Michael Green, vice president of Duke Power Services, developer of the plant, testified the City had no right to count on more than 30 MWs from the plant. (V4-635-36). He could not say what the City's price would be for power above 30 MWs, nor could he say what prices Duke would charge wholesale. (V4-636-37). Green acknowledged Duke intended some short-term sales outside Florida. (V4-586).

10. Nesbitt's conclusions were premised upon complex computer simulations designed to show how markets would operate in the absence of regulation. He conceded that these markets do not now exist and that they were intended to reflect the "coming merchant world" (V6-785-92), "within the next decade" *after* statutory and regulatory market controls had been lifted. (V6-788).

11. Nesbitt relied on one computer model that he had not even disclosed in his direct testimony. (Ex.43-V1-81) (V6-812-15).

12. Nesbitt thought he had used the 1997 NERC data for net energy for load (Ex.43-V1-45), but later admitted he had used 1996 data (Ex.43-64 & V6-800). Since

deregulation (V6-799, 803-04), and referred to untested and unrecognized computer models.[13]

Martha Hesse, a Duke witness who had served as chairman of the Federal Energy Regulatory Commission during the mid-1980s and who is now president of Hesse Gas Company, attempted to persuade the PSC that construction of the proposed plant would be "consistent" with the objectives of the federal Energy Policy Act of 1992. She also admitted, however, that the Energy Policy Act expressly leaves the question of power plant siting entirely up to the states. (V7-1007-08, 1020-24).

**The Intervenors' Evidence of Lack of "Need"**

The intervenors offered witnesses who testified that the proposed plant was unnecessary because each utility already has built power plants that are adequate to supply the retail customers in their respective territories. Michael Rib, director of resource planning at FPC, explained that state law requires utilities to provide for the needs of all of their customers by such actions as the submission of a 10-year site plan that estimates generating needs. (V9-1169 & V10-1404). He further testified that state law requires FPC to develop plans and programs to conserve energy (V9-1169-

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the NERC forecast only went through 2005, he extrapolated. (V6-800).

13. Nesbitt admitted his computer models had not been presented to, reviewed by, or relied upon by a regulatory agency. (V6-807). Nesbitt also could not use them to analyze present "need." (V2-116) (Ex.18-DMN-Ex.43).

70) and to provide a 15 percent reserve margin to ensure that capacity will exist throughout periods of unusually high demand. (V9-1173). He noted that the PSC can require retail utilities to increase their generating capacity if customer needs are not being met. (V9-1195). He concluded that the builder of a merchant plant has no "need," as that term is used in the statutory scheme, because it has no obligation to serve retail customers and because retail customer needs are being met by those utilities permitted to serve them. (V9-1168).

He further testified that if "need" were to be determined by the PSC without reference to the needs of the retail customers of a specific utility, then all Florida retail utilities would have to alter their approach to planning because those utilities do not rely on the availability of power that is not committed via ownership or long-term contracts, and they have built plants and contracted for power without assuming that merchant plants could supply power. (V9-1173 & V10-1277 & 1334-36). A ruling allowing merchant plants would displace existing plants necessary to meet customer needs, leaving them as unrecoverable "stranded costs." (V10-1257-58, 1266).

Commissioner Deason argued that investments in inefficient plants should be stranded whether merchant plants are allowed or not. He explained that the FPC had "the responsibility to look at [its] higher cost units" and ask the PSC to retire them.

(V10-1267). Rib responded that utilities already take this into account in planning to meet the needs of customers. (V10-1266). What utilities do not consider is that merchant plants that are not statutorily "needed" would be built. (V10-1267 & 1369).

Rib anticipated that allowing merchant plants to be built before revising the regulatory structure would result in facilities duplicative of those that retail utilities had planned to build. (V10-1392-93). Asked how Florida could change from a regulated to a free market system, Rib referred the PSC to the "enormous effort" that had been made in other states to develop comprehensive legislation. (V10-1363).

FPC next called Vincent M. Dolan, its director of Corporate and Regulatory Strategy. (V11-1423). He testified that merchant plants had not previously been sited in Florida and that Duke was calling upon the PSC "to change the way we now operate." (V11-1441). He noted that "there are no clear guidelines on how merchant plants fit into the existing framework in this state, and how this decision might impact the existing policies and rules" of the PSC. (V11-1442).

He acknowledged that a number of states were addressing the issue of merchant plants, but that federal law had not dictated these changes. "Whether and how to site merchant plants within Florida is within the state's prerogative." (V11-1442). He urged the PSC not to "lightly abandon" the "traditional regulatory framework" "at the invitation of an enterprising developer who has no mandate to

protect the public interest of the citizens of this state." (V11-1442).

The Legislature, Dolan testified, plainly has not authorized such a sweeping change. He pointed to correspondence from Senator James Scott, chairman of the Regulated Industries Committee of the Florida Senate to then-PSC Chairman Julia Johnson, observing that when the predecessor to section 403.519 was enacted during the 1970s, "no one contemplated the possibility that might some day apply to electric companies that do not serve retail customers in Florida" and that he believed that "a policy decision of this magnitude should not be made without a full and complete hearing by the legislature." (V11-1443).

Dolan then testified that before merchant power plants are built in Florida the Legislature should decide how the PSC could meet its obligation to ensure adequate generation capacity; how the PSC should deal with a merchant plant that changes its plans to build capacity after a need determination is made; how to determine the appropriate amount of need; whether to allow construction of merchant plants that render existing plants redundant; how merchant plants would impact the electric industry, consumers and the environment; and how many merchant plants should be built. (V11-1444-46).

Dolan testified that opening markets to competition does not ensure rationality. Merchant plants in New England have filed applications for capacity in excess of

peak demands. (V11-1452). He concluded that businesses and marketers and developers do not always "behave rationally against an economic model." (V11-1452).

Commissioner Garcia asked Dolan why the PSC should care about the building of excessive capacity as long as the PSC continued to guarantee the profits of existing retail utilities. (V11-1453-54). "For all I care," Garcia reasoned, "a merchant plant company could go bankrupt ten times over." (V11-1454). Dolan explained he should care because "[w]e're not talking about strip malls or McDonalds . . . These plants require major commitments of resources: Land, water, fuel, transmission, interconnections." (V11-1454). Dolan reminded Garcia that any decision to alter a legislative scheme upon which individuals had relied to invest in retail utilities would raise constitutional and practical issues. (V11-1458-59). In other states that have authorized merchant plants, the legislatures had addressed such issues before proceeding with deregulation, he noted. (V11-1459). New Jersey, for example, has provided municipalities with a five-year grace period before losing the tax base of a an existing power plant. (V11-1477-78).

FPL called William D. Steinmeier (V11-1506), chairman of the Missouri PSC from 1984 to 1992 and past president of the National Association of Regulatory Utility Commissioners. (V11-1507). He testified that it would be inconsistent with

Florida policy requiring a utility-specific showing of need for the PSC to consider Duke's petition. Granting the petition would disrupt FPL's ability to plan for and meet system needs, preclude investors from recovering investments, produce duplication of facilities, and adversely affect ratepayers. (V11-1507-08, 11523 & V12-1544).

Steinmeier testified that "the argument that the 'merchant' plant is being built at Duke's total risk and that so-called 'captive customers' would be held harmless is faulty." (V11-1526). Ratepayers ultimately could be held responsible for the cost of existing power plants "that become underutilized because of 'merchant' plants." (V11-1527). He pointed out that if investors lost the value of existing plants, the cost of capital to retail utilities ultimately would impact consumers. (V11-1527).

Steinmeier also questioned whether the PSC could perform its statutory duty of maintaining grid reliability if it allowed merchant plants to take over power generation without any obligation to serve any retail customers. (V11-1528). And, he testified, interpreting the regulatory scheme as requiring Florida's retail utilities to make a utility-specific showing of need, but exempting merchant plants from such a requirement, would discriminate against retail utilities. (V12-1546-47).

Finally, Steinmeier explained that when FPL makes an off-system sale of power to a municipal utility, the gain on that sale is returned to FPL's customers

through a Fuel Adjustment Clause of the Capacity Clause. (V11-1529). Any sales made by a plant built by Duke, however, would return such gains to Duke's shareholders. (V11-1529). Therefore, Florida ratepayers would lose the benefit of gains otherwise flowing through such capacity clauses. (V11-1529-30).

**The PSC Majority**

A three-member PSC majority denied the intervenors' motions to dismiss, holding that Duke could be considered a proper "applicant" under section 403.519 because that term is defined to include an "electric utility" and Duke could be regarded as such. (R14-2665). The majority then proceeded to conduct a lengthy, abstract semantic analysis of the various Florida statutes that comprise Florida's scheme for regulating electric utilities. (R14-2658-67). The analysis was divorced from consideration of the purpose of the statutes: to regulate monopoly utilities.

The PSC observed that under the statutes, an "applicant" is defined as an "electric utility" and an "electric utility" is defined to include a "regulated electric company" and a "joint operating agency." The majority reasoned that because Duke's interstate sales are "regulated" by the federal government, Duke fairly could be regarded as a "regulated electric company." (R14-2674) (citing 16 U.S.C. § 824(b)(1)). The PSC majority also noted that Duke had agreed to submit to some PSC regulation and therefore Duke could be regarded as a "regulated electric

company" under Florida law. (R14-2677). The PSC majority alternatively held that Duke and the City could be regarded as a "joint operating agency" under chapter 361, Florida Statutes. (R14-2679-80).

The PSC majority noted that Rule 25-22.081, Fla. Admin. Code, requires a petitioner to identify the specific utility or utilities primarily affected by the proposed plant, to identify the utility specific conditions or contingencies for the plant, to identify viable nongenerating alternatives, and to provide an economic impact statement (R14-2681), but held that Duke need not meet all of these requirements because no utility would be obligated to purchase power from it. (R14-2681-82).

The PSC majority also rejected the intervenors' arguments that the PSC's own prior decision in In re: Petition of Nassau Power Corp. to Determine Need for Electrical Power Plant (Okeechobee County Cogeneration Facility), 92 F.P.S.C. 10:643 (1992) (hereinafter "Ark and Nassau"), aff'd sub. nom Nassau Power Corp. v. Deason, 641 So. 2d 396 (1994) (hereinafter "Nassau II"), required dismissal of the petition because it held that an applicant must have retail customers or a firm contract with an entity authorized to sell to retail customers. (R14-2683-84). That decision, and the Supreme Court's affirmance of it, did not apply, the PSC majority held, because that case involved entities known as "cogenerators" that by federal and state law could require retail utilities to purchase their output and therefore would create

risk to ratepayers. (R14-2685). The PSC ignored the intervenors' arguments that the Ark and Nassau decision applied to all non-utility generators including those that could not require the purchase of its power and that, in any event, this distinction was meaningless because the PSC had no proper role to play in determining need for a plant that would not be an asset of a monopoly utility by ownership or firm contract.

Having determined that Duke and the City were proper applicants, the PSC then proceeded to examine the statutory need criteria. (R14-2695-96). The PSC eschewed utility-specific analysis for most of the plant. Instead, the PSC examined the criteria with respect to the City's alleged need for 30 MWs of capacity and then speculated about whether future intended purchasers might purchase in a competitive environment. With respect to the latter, the PSC recognized that no utility had an obligation to purchase from Duke, but assumed utilities would do so "if it [were] economic to do so." (R14-2696). The PSC further assumed that "those retail customers . . . would realize economic benefits." (R14-2696).

**The PSC Dissenters**

Commissioner Clark dissented. (R14-2713). She noted that in 1980 the Legislature had directed the PSC to evaluate any application for a need determination in light of the possibility that increased efficiency and conservation measures might reduce or eliminate the claimed need. As part of this responsibility, she reasoned, the

PSC must evaluate the specific conservation measures that the applicant has taken, but a merchant plant owner, unlike a utility, would not have made any such efforts because it had no obligation to provide service to any set of consumers. (R14-2714) (citing 1980 Fla. Laws § 5, Ch. 80-65). To Commissioner Clark, this meant that the Legislature did not intend section 403.519 to be available to merchant plant owners.

Clark also noted that the Legislature had defined the term "applicant" under section 403.519 to mean "utility" and that section 366.82(1), Fla. Stat., had defined that term to mean "'[a]ny person or entity of whatever form which provides electricity or natural gas at retail to the public.'" (R14-2715) (quoting Ch. 80-65, § 5, Fla. Laws) (emphasis in Order). This also confirmed for Commissioner Clark that the Legislature had not intended section 403.519 to be available to companies like Duke which are prohibited by law from providing retail electric service.

Clark further noted that the PSC previously had held in its Ark and Nassau decision that the term "applicant," as used in section 403.519, encompasses only entities that may be obligated to serve customers. (R14-2716-17) (citing Order No. PSC-92-1210-FOF-EQ).

Clark also rejected the majority's contention that Duke's regulation by the federal government would bring it within the definition of an "electric utility" merely because section 403.503(13) defines the term "electric utilities" to include "regulated

electric companies." Clark noted the federal government had not authorized companies such as Duke until 1992 -- years after the Legislature had included "regulated electric companies" within its definition of "electric utilities." (R14-2718).

Clark concluded that "the current regulatory scheme does not contemplate the siting of merchant plants." (R14-2720). "Our task in this case was to decide what the law is, not what it ought to be." (R14-2720).

Commissioner Jacobs also dissented. He pointed out that the PSC's reliance on free market considerations to justify the need for a 514-MW plant marked a drastic departure from how the PSC historically has determined whether a plant is the most cost-effective alternative available. (R14-2722). In the past, he observed, the PSC had required an extensive analysis of alternatives to increasing capacity, but here the PSC had relied upon speculation that the wholesale market and contract terms always would favor buyers. (R14-65-2723). Jacobs disagreed with this departure from time-honored and statutorily-required analysis. (R14-2723).

## SUMMARY OF THE ARGUMENT

**Point I: Lack of Supreme Court & PSC Jurisdiction.** The Florida Constitution and the Florida Legislature have created a mechanism to regulate those entities that are authorized to sell electricity to consumers in Florida and those entities

that are committed to supplying them. Each of those entities participates in a monopoly. Because these companies face no competition, the Legislature requires the PSC to regulate the prices that the entities participating in the scheme charge and the services that they provide. And, because PSC orders rendered pursuant to this grant of authority have a direct and statewide economic impact on all Floridians, the Legislature also has authorized this Court to exercise *direct* appellate review of those orders. The order before the Court in these appeals is not such an order. Instead, it is an order that commences the deregulation of power generation in Florida by determining, for the first time, that a "merchant" power plant -- that is, a plant that is not committed to serve a monopoly market -- is "needed." The order should be reversed because the PSC had no authority to enter such an order. But, that reversal properly should come from the First District Court of Appeal because this Court's direct appellate jurisdiction extends only to PSC orders imposing regulation upon those supplying the monopoly market -- not to orders purporting to open that market to competition.

**Point II: Failure of Pleadings & Proof.** The PSC plainly should have dismissed the petition because it did not meet express statutory and regulatory pleading requirements. Moreover, the evidence in support of the petition did not meet the standards which this Court and the PSC have set to determine"need" for a power

plant. Neither of these conclusions is surprising given that both the statutes and regulations at issue were not designed to allow a finding that any merchant plant is ever "needed."

## STANDARD OF REVIEW

Point I addresses this Court's jurisdiction and the PSC's jurisdiction. Both issues are pure questions of law subject to de novo review. United Tel. Co. v. Public Serv. Comm'n, 496 So. 2d 116 (Fla. 1986).

Point II.A. seeks reversal of the PSC's conclusion that Duke made allegations entitling it to a determination of need. The standard of review is whether the PSC departed from the essential requirements of law. Gulf Coast Elec. Coop., Inc. v. Johnson, No. 92,479, 1999 WL 74016 (Fla. Feb. 18, 1999). Point II.B. seeks reversal because Duke failed to offer sufficient evidence of need. The standard of review is whether the decision is supported by substantial, competent evidence. Id.

## ARGUMENT

### I.

### Florida's Scheme for Regulating Monopoly Utilities Does Not Allow Free Market Power Plants

Duke has no proper place in Florida's judicial or statutory scheme for regulating monopoly utilities. This Court's jurisdiction over PSC orders relating to rates and services of utilities providing electric service exists for the specific purpose

of regulating the monopoly retail utility market. The PSC's jurisdiction to determine need also exists solely for the purpose of regulating the monopoly utilities.

### A. This Court's Direct Appellate Jurisdiction Does Not Extend to Orders that Do Not Regulate Monopolies

The sole jurisdictional basis for appealing the order at issue directly to this Court is article V, section 3(b)(2) of the Florida Constitution, which states that this Court has jurisdiction over "action of statewide agencies relating to rates or services of utilities providing electric, gas, or telephone service."[14] The challenged order is *not* such an action because it does not relate directly to rates or services of utilities providing electric, gas, or telephone service. Duke is not a utility providing services as defined by the Florida Constitution. The order does not set, establish or affect the rates Duke may charge for wholesale sales of electricity. Duke's sales are not subject to PSC determination at all. The Federal Energy Regulatory Commission, not the PSC, has jurisdiction over Duke's sales. (R1-4).

The order does not regulate Duke's provision of service. Duke has no service obligation. An examination of jurisdiction is required[15] and casts a bright light on

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14. See also §§ 350.128 & 366.10, Fla. Stat.(1997); Fla. R. App. P. 9.030(a)(1)(B)(ii).

15. "[A] tribunal always has jurisdiction to determine its own jurisdiction." Sun Ins. Co. v. Boyd, 105 So. 2d 574, 575 (Fla. 1958); see also Polk County v. Sofka, 702 So. 2d 1243 (Fla. 1997) ("'Courts are bound to take notice of the limits of their

the impropriety of not only these appeals, but also of Duke's PSC filing.

Article V, section 3(b)(2) "was conceived through an alliance between the supreme court and representatives of the electric, gas, and telephone utilities in the state" and first became a part of the Florida Constitution in 1980. Arthur J. England, Jr., Eleanor M. Hunter, Richard C. Williams, Jr., Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 Fla. L. Rev. 147, 175-76 (1980). Through its adoption "it was decided that the statewide significance of PSC decisions in electric, telephone and gas cases, and their financial impact on the citizens of the State of Florida, warranted leaving the review of those Commission decisions with the court." Id. (footnotes omitted). Article V, section 3(b)(2) was "intended to cut down substantially the number of cases that would come to the court from the PSC [to] . . . five to ten such cases each year." Id. (footnotes omitted).

If the Court accepts jurisdiction and finds that the PSC had jurisdiction to consider the matter at issue, this Court's caseload will increase dramatically and in a manner that the framers of article V, section 3(b)(2) could not have intended or envisioned. FPL anticipates that companies will seek need determinations for

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authority and if want of jurisdiction appears at any stage of the proceedings, original or appellate, the court should notice the defect and enter an appropriate order'").

merchant plants in many Florida cities in the near future.[16] This anticipation is based not only on press reports, but also the experience of those states that *have* adopted deregulation. In those states, merchant plant activity literally has exploded.[17] "As of late October, developers had announced plans to build 109 plants in the United States to generate 56,368 MWs."[18] This is in addition to approximately 13,349 MWs that are now operational, 6,558 MWs that are under construction, and 8,178-8,328 MWs that are under development.[19] California alone has faced at least 20 applications from builders of merchant power plants.[20] Duke's counsel hypothesized a similar immediate flow of applications here. (V1-139) (referring to possible construction of plants that could produce an additional 10,000 MWs).

The framers of article V, section 3(b)(2) never could have dreamed that this

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16. See, e.g., The McGraw-Hill Cos., Panda Says it Will Proceed with Plans for a 1,000-MW Merchant Unit in Florida, Electric Util. Week 15 (June 7, 1999) (App. Ex. G).

17. Christopher Seiple, Merchant Plant Activity Set to Explode, 135 No. 8 Pub. Util. Fort. 14 (1997) (App. Ex. J);see also, Charles W. Thurston, Merchant Power: Promise or Reality, 137 No. 1 Pub. Util. Fort. 15, 15 (1999) (App. Ex. H); Stephen H. Watts, Merchant Power Scoreboard, http://www.mwbb.com/services/energy-mp.htm (updated May 25, 1999) (App. Ex. I)

18. Thurston, supra note 17 at 15-16.

19. Watts, supra note 17.

20. Cal. Energy Comm'n, Energy Facilities Siting/Licensing Process, http://www.energy.ca.gov/maps/siting_cases.html (visited June 15, 1999) (App. Ex. K).

Court would have direct supervision over such extensive administrative action because (1) at the time of its adoption, companies such as Duke, a wholesale electricity generator that does not sell electricity to the public and that is not subject to PSC rate regulation did not -- and could not -- exist,[21] and (2) the action is not the sort of direct economic regulation of monopolies that required this Court's direct and immediate supervision. The PSC itself justified its ruling below on the finding that its decision would *not* have a financial impact on the citizens of the State of Florida. (App. Ex. A at 39, 43-45, 47). The order pertains to the speculative plans of a single company to build a power plant that would have no obligation to serve any Florida citizens and no contracts to provide service to utilities serving Florida citizens. If such a plant fails, Florida citizens will have no direct obligation to pay for it. If such a plant succeeds, Florida citizens will continue to buy their electricity from the retail utilities whose rates are regulated by the PSC in orders that are reviewable by this Court. This order therefore is not the type of order that is within the limited direct appellate jurisdiction that the 1980 amendments to the Florida Constitution preserved in this Court for review of administrative action.

**B. A State Statute to Regulate Monopolies Does**

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21. Federal law imposed many hurdles to the existence of companies such as Duke until 1992 and important obstacles to their being able to operate profitably until 1996. See Point I.B.1.b. infra.

**Not Provide an Avenue to Force Markets Open**

If the Court concludes that it does have jurisdiction, it next must decide whether the PSC had jurisdiction to consider Duke's petition.

### 1. Existing Legislation is Designed to Regulate Monopolies -- Not to Deregulate Power Generation

The purpose of the statute at issue -- section 403.519, Florida Statutes (1997) -- was originally and still is today to provide a tool by which the PSC may regulate monopoly utilities. Federal law has evolved recently so that states may amend such tools and create new tools that could be used in a deregulated competitive environment. Florida, however, has not amended section 403.519 and has not enacted other legislation needed for deregulation.

#### a. Section 403.519 is an Integral Part of a State Mechanism to Regulate Monopolies

Before 1951, electric and gas utilities had been regulated by local governments and this had resulted in different rates in different localities for the same service.[22] To solve this problem, the Legislature vested regulatory jurisdiction in the Florida Railroad and Public Utilities Commission, predecessor to the PSC. Ch. 26545, at 123, Laws of Fla. (1951). This Act gave the PSC "exclusive and plenary" authority over

22. Richard C. Bellak & Martha Carter Brown, Drawing the Lines: Statewide Territorial Boundaries for Public Utilities in Florida, 19 Fla. St. U. L. Rev. 407, 409 (1991).

these utilities, including the power to approve agreements between utilities that divided territory to prevent duplication of electric facilities and that recognized monopolies within each territory.[23] In 1965, this Court held that the PSC power over price, production, and quality of service provided an adequate substitute for free market competition that would ensure that utilities did not abuse their monopoly status.[24] This Court observed that "often a regulated or measurably controlled monopoly is in the public interest, and that an area of public utility operations competition alone has long since ceased to be a potent or even a reasonably efficient regulatory factor."[25] Thus, the PSC's role is to regulate where competition is absent.

The PSC's authority over utilities did not originally include, however, authority to approve the siting of new power plants. That power had been left to local government entities that engaged in "notoriously lengthy and expensive

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23. Bellak & Brown, supra note 22 at 409-11. The capital-intensive nature of the industry, the need to achieve economies of scale, the need to use public rights-of-way, the diseconomies of multiple, redundant, and competing lines and facilities led to the general conclusion that utilities were natural monopolies. See generally City Gas Co. v. Peoples Gas Sys., 182 So. 2d 429 (1965)

24. City Gas Co., 182 So. 2d at 436 (affirming that PSC's regulatory power over price, production, and quality of service provides an adequate substitute for free market competition); see also Peoples Gas Sys., Inc. v. Mason, 187 So. 2d 335 (Fla. 1966).

25. Storey v. Mayo, 217 So. 2d 304, 307 (Fla. 1968) (explaining the basis of the City Gas decisions).

proceedings."[26] By 1973, local government constraints on the construction of new power plants had become a serious problem because "the 1973 oil embargo was tightening and a rapid conversion to non-petroleum based fuels was a national priority."[27] To address this problem, the Legislature enacted the Florida Power Plant Siting Act, ch. 73-33, Laws of Fla. ("the Siting Act"), to preempt local government actions and to consolidate the approval of most state agencies into a single license.[28] The Siting Act therefore became an important part of the general statutory scheme for regulating monopoly utilities.

A critical component of the Siting Act was section 403.507(1)(b), Florida Stat. (1973),[29] which imposed upon the PSC an obligation to prepare a report and recommendation concerning the "need" for any proposed new power plant. Such a regulatory determination of need for any proposed new plant was necessary because a Florida retail utility, as a monopoly, would not face competition and would be entitled by law to a reasonable rate of return upon its rate base. See § 366.041, Fla.

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26. Lisa O. O'Neill, Florida Electrical Power Plant Siting Act: Perpetuating Power Industry Supremacy in the Certification Process, 36 Fla. L. Rev. 817, 819 (1984).

27. Id.

28. Id..

29. Recodified as § 403.507(2)(a)1., Fla. Stat. (1997), by Ch. 94-356, § 385, Laws of Fla.

Stat. (1997). The construction of a new plant created the possibility that the cost of the plant would be included in the rate base. See § 366.06(1), Fla. Stat. (1997). Thus, the examination of need by the PSC -- prior to plant construction -- acted as a regulatory check on the incentive that a monopoly utility might have to construct facilities merely for the purpose of seeking its inclusion in its rate base and increasing its profits. Such a regulatory determination of need would be unnecessary, of course, for any entity operating in a competitive market because it would be unable to seek a government-required return on its investment. If a free market plant proved to be unneeded, its owners necessarily would face a loss.

In 1980, the PSC's obligation to make a recommendation regarding need became an obligation to determine need when the Legislature passed the Florida Energy Efficiency & Conservation Act ("FEECA"), Ch. 80-65, §5, Laws of Fla., a law intended to reduce energy consumption throughout the state. FEECA created section 366.86, Fla. Stat., which was recodified through a revisers bill as section 403.519, Fla. Stat. (1980 Supp.),[30] to focus the PSC's need determination on electric system reliability and integrity, adequacy of reasonable cost electricity, and the

30. Fla. Stat. Table of Section Changes (1980 Supp.).

availability of cost effective alternatives.[31] This complimentary need provision, like the original need provision, also sought to impose a regulatory check on the incentive to build a plant merely for the purpose of deriving a government-allowed return without complete regard for consumer needs. And, as was true of the original need provision, the new provision would be unnecessary to check a free market entity's incentive to build a new plant because such a company would have no regulatory means to extract a return from its investment.[32]

Neither the 1973 nor the 1980 need provisions conceivably could have been intended to accommodate power generators such as Duke because no such entities existed when the acts were passed. Indeed, state law, as discussed above, made retail competition impossible through approval of territorial agreements, and federal law, as discussed below, made wholesale competition in the power generation industry impossible as well.

**b. Federal Law Prevented Out-of-State Companies from Competing with In-State Monopolies Until 1996**

In 1935 Congress had passed the Public Utilities Company Holding Act

31. § 366.81, Fla. Stat.(1980 Supp.) (recodified as § 403.502, Fla. Stat. (1997) (describing the legislative intent)).

32. § 403.507(2)(a)2., Fla. Stat. (1997) and § 403.519, Fla. Stat. (1997), were linked together by Ch. 94-356, § 385, Laws of Florida.

("PUHCA") (codified as 15 U.S.C.A. § 79 et seq. (West 1994)), to break up large utility holding companies by making it difficult for them to have multi-state interests in electric or gas utility companies.[33] Although this legislation ended the predominance of monopoly utilities that had spanned the country, it did not prevent utilities from maintaining generation and transmission monopolies at the state and local level and this required state legislatures to impose regulation on these utilities.[34]

Congress also enacted the Federal Power Act ("FPA") (codified as 16 U.S.C.A. §§ 791-828 (West Supp. 1997)) in 1935 to take control of interstate sales of power between utilities in different states as well as all wholesale sales.[35] This legislation allowed utilities across the country "to function as if they were part of an integrated

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33. Dickstein Shapiro Morin & Oshinsky, Electric Utility Restructuring in New York, http://www.dsmo.com/press/elecu02.htm (visited June 26, 1999); see generally American Power & Light Co. v. SEC, 329 U.S. 90, 98-104 (1945).

34. Scott B. Finlinson, The Pains of Extinction: Stranded Costs in the Deregulation of the Utah Elec. Indus., 1998 Utah L. Rev. 173 (1998) (App. Ex. L); Bellak & Brown, supra note 22 (describing regulation imposed through approval of territorial agreements) (App. Ex. M).

35. The FPA could extend only to the wholesale aspect of the electric industry, see 16 U.S.C. § 824(b)(1) (1994), because Congress only has the right to "regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3. Transactions between utilities for the sale or transmission of electricity across state lines falls within this power and the power also allows the federal government to reach wholesale sales and transmission transactions regardless of whether they cross state lines, because they affect interstate commerce. See generally Florida Power Corp. v. Florida Pub. Serv. Comm'n, 404 U.S. 453, 462 (1972).

system, even though each element was designed and built to serve the separate interests of the local utility owning the facility."[36] So, although some wholesale activity took place after 1935 at both the intrastate and interstate levels, it was largely an effort to smooth unanticipated demands or surpluses rather than an effort to compete. The FPA vests regulatory authority over wholesale sales in the Federal Energy Regulatory Commission ("FERC") and, significantly for this case, states that FERC "shall have no jurisdiction [except in instances not applicable here] over facilities used for the generation of electricity . . . ." FERC has recognized that this provision withholds from its control plant siting, licensing and construction. Monogohela Power Co., Dkt. No. ER87-330-001, 40 F.E.R.C. ¶ 61,256 (Sept. 17, 1987).

In 1978, Congress introduced some competition in the power generation market through PURPA, codified as 16 U.S.C.A. § 2601-45 (1997), which encouraged power production through small and technologically progressive power producers to reduce dependency on increasingly expensive foreign oil and environmental harm.[37] Any nonutility generator in compliance with PURPA was deemed a qualifying facility

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36. Dickstein Shapiro Morin & Oshinsky, supra note 33.

37. Richard L. Fanyo, State Jurisdiction and Retail Wheeling, 1997 Mineral L. Series 4-1; see also § 366.051, Fla. Stat.(1997) (implementing PURPA).

("QF"),[38] and, to encourage the construction of such facilities, PURPA required utilities to purchase their power at a price not exceeding the utilities' cost to construct or purchase a comparable amount of electric generating capacity. § 366.051, Fla. Stat. (1997).

Congress then enacted the Energy Policy Act of 1992 ("EPACT"), 106 Stat. 2776 (1992) (codified in relevant part as 16 U.S.C.A. §§ 796(22)-(25), 824(j)-(l) (West 1994)), which exempted a class of companies from PUHCA's regulatory requirements (the companies are referred to as exempt wholesale generators or EWGs) and required utilities to provide transmission services. Still, EPACT did little to increase competition in the power generation industry because utilities could charge higher prices for the use of their transmission facilities than the costs that they incurred and thereby make sales by non-utility generators noneconomical.

FERC changed this on April 24, 1996, through adoption of Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21540 (1996), [Regs. Preambles Jan. 1991-June 1996] F.E.R.C. Stat. & Regs. ¶ 31,036, clarified, 76 F.E.R.C. ¶61,009

38. A QF cannot be owned primarily by traditional utilities. They are owned by independent power producers. See 16 U.S.C.A. § 2601 et seq.

& 76 F.E.R.C. ¶61,347 (1996) (hereinafter "Order No. 888"). That order provided a means by which a power generator could distribute its power over utility transmission lines at non-discriminatory prices. After adoption of Order No. 888, an exempt wholesale generator economically could build a power plant and sell its power.

### c. Federal Law Expressly Allows States to Control In-State Power Plant Siting

But, neither Order No. 888, EPACT, PURPA, PUHCA, nor the FPA impose any limitation on states' power to control the siting of power plants. In fact EPACT expressly allowed each state to decide for itself whether power plants could be built within its borders, stating:

> Nothing in this title or in any amendment made by this title shall be construed as affecting or intending to affect, or in any way to interfere with, the authority of any State or local government relating to environmental protection or the siting of facilities.

P.L. 102-486 § 731, Title VII, Sub. C, 1992 U.S.C.C.A.N. (106 Stat.) 2776, 2921 (Oct. 24, 1992), note to 15 U.S.C.A. § 79 (West 1994) (emphasis added). FERC also expressly recognized that EPACT imposed a significant limitation on its authority to deregulate the electric power generation industry through its express reservation of

power plant siting decisions to the states.[39] Order 888 at 433 n. 533 (recognizing that its provisions cannot interfere with state siting authority).

Thus, state statutes like section 403.519, enacted well before the federal government took action to make competition in the wholesale power generation industry possible, were left unaffected by the evolution of federal law.[40] They continue to stand as narrow authorizations allowing those state agencies charged with regulating monopoly utilities to determine whether power plants owned by or committed to serving those utilities are "needed." This Court has expressly interpreted this statute in that fashion, Point I.B.2. infra, and that interpretation is consistent not only with the purpose of the statute, but with its language. Point I.B.3. infra. As importantly, the Florida Legislature expressly has considered

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39. The federal government's express reservation of plant siting power to the states negates Duke's claim that state authority to control power plant siting had been preempted or violates the Commerce Clause. See Northeast Cent. Pipeline Corp. v. Commission of Kan., 109 S. Ct. 1262 (1988) (reservation to the states of power over gas production rates indicated Congressional intent that state regulation violate Commerce Clause); see also Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 205 (1983) (states have authority over need for facilities to be licensed and rate making).

40. Duke is very familiar with this through its parent's participation in Utilities Commission v. Empire Power Co., 435 S.E. 2d 553 (N.C. App. 1993), a case which held that the North Carolina statutes enacted to regulate monopoly utilities could not be interpreted as authorizing the construction of merchant power plants in North Carolina.

comprehensive legislation to allow merchant plants in Florida and to deregulate the electric industry entirely, but to date it has rejected such proposals. Point I.B.4. infra. And, perhaps even more importantly, enactment of comprehensive legislation plainly would be essential to any orderly transition from the current scheme of regulation to the free market system envisioned by the PSC. Point I.B.5. infra.

It may now be frustrating to companies like Duke that they still are unable to compete in states such as Florida given the removal of some long-standing federal barriers to competition. But, unless the Legislature decides that it is desirable for merchant power plants to be built here, that simply cannot happen.[41]

### 2. This Court Has Held that a Power Plant Only Can be "Needed" Under Section 403.519 if it is Committed to a Specific Monopoly Utility

This Court already has held that section 403.519 does not allow the deregulation of power generation in Florida, by its rulings (1) that a petitioner under section 403.519 must show that the power that it proposes to produce is in fact

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41. There is by no means universal agreement that construction of merchant plants is desirable. See, e.g., Wallace Roberts, Power Play, The American Prospect (Jan-Feb. 1999), http://epn.org/prospect/42/ 42roberts.html (visited June 8, 1999) (App. Ex. S) ("deregulation will do little for environmental goals"); John Cronin, Power Plant Overload, N.Y. Times, May 20, 1999, at Week in Review Op-Ed (" Plants will go out of business, but not before leaving their ugly mark on land, air and water") (App. Ex. T). This Court historically has regarded "competition alone" as an insufficient means of regulation given that naturally high barriers to entry often prevent meaningful competition, in any event. See Storey, 217 So. 2d at 307.

needed by a specific utility that is authorized to serve retail consumers, Nassau Power Corp. v. Beard, 601 So. 2d 1175 (Fla. 1992) ("Nassau I"); and (2) that the PSC properly dismissed a petition under section 403.519 submitted by an entity that neither was authorized to serve consumers directly nor contractually committed to sell its power to such an entity. Nassau II, 641 So. 2d 396.

These rulings establish that section 403.519 cannot be used to deregulate power generation in Florida because they prevent the siting of any power plant in Florida unless the plant is committed on a long-term contractual basis to an entity with a monopoly within a specific geographic area.[42] This requirement prevents a merchant plant from selling much, if any, of its power at market prices. Instead, the plant would be required to sell its power at contractual prices that monopoly entities would be willing to pay and those prices, in turn, would be strictly a function of the prices that the PSC, as a monopoly regulator, would set for electricity sold to consumers.

For a number of years, the PSC had resisted concluding that such an

42. The unavailability of a need determination is fatal to any proposed plant. § 403.506, Fla. Stat.(1997) provides that "[n]o construction of any new electrical power plant" (with steam capacity of more than 75 MWs) may be built in Florida without certification, and § 403.508(3), Fla. Stat. (1997) makes an affirmative determination of need by the PSC a condition precedent to such certification.

interpretation of section 403.519 is required.[43] In 1989, however, the PSC overruled its prior interpretations of section 403.519 and held that every entity seeking a need determination must show that a specific retail utility needs any power it proposes to produce.[44] This was a sound interpretation of section 403.519 given that it had been enacted as a means of imposing regulation on the construction of new plants by monopoly utilities. The ruling effectively allowed the PSC to regulate those companies that wished to supply power to the monopoly utilities in the same manner

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43. E.g., In Re: Petition of Fla. Crushed Stone Co. for Determination of Need for a Coal-Fired Cogeneration Elec. Power Plant, 83 F.P.S.C. 2:107 (Order No. 11611); In Re: Petition by Broward County for Determination of Need for a Solid Waste-Fired Elect. Power Plant, 86 F.P.S.C. 2:287 (Order No. 15723). With respect to qualified facilities, the PSC considered need on a statewide rather than utility specific basis. In Re: Petition of Pasco County for Determination of Need for a Solid Waste-Fired Cogeneration Power Plant, 87 F.P.S.C. 6:281 (Order No. 17752). But, this resulted in power plants being built in geographic areas where they were not needed by the utilities obligated to purchase their power. Nassau I, 601 So. 2d 1175.

44. In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Fla.'s Elec. Utils., 89 F.P.S.C. 12:294, 319 (Order No. 22341) (overruling prior orders and establishing that the statutory criteria for evaluating need must be applied in a utility and unit specific basis). After this ruling in 1989, the PSC consistently adhered to the decision, excepting only municipal solid waste facilities, because of their specific statutory encouragement. See, e.g., Ark and Nassau, 92 F.P.S.C. 10:643, 645 ("a contracting utility is an indispensable party to a need determination proceeding"); In re: Petition for Determination of Need for Elec. Power Plant (Amelia Island Facility) by Nassau Power Corp., 92 F.P.S.C. 2:814 (Order No. 25808) (petitioner unable to demonstrate need for project on the basis of improving FPL's reliability because location prevented that); In Re: Petition of Fla. Power & Light Co. to Determine Need for Elec. Power Plant - Martin Expansion Project, 90 F.P.S.C. 6:268, 284-86 (Order No. 23080).

that it regulated those utilities. This Court affirmed this interpretation of section 403.519 in Nassau I and Nassau II.

Duke and the PSC majority attempted to distinguish the Nassau decisions on the basis that they arose from the efforts of a company seeking to build a QF, rather than an EWG. (R14-2710). That is no basis to distinguish the Nassau cases at all. Whether a petitioner is seeking to build a QF or any other type of power plant, if the plant is not committed on a long-term basis to serve a specific utility within the PSC's jurisdiction, the PSC has no meaningful role to play in determining whether the plant is needed. The reason that the Legislature has directed the PSC to make a determination of need in the first instance is to ensure that monopolies are not engaging in construction of plants merely so that they can seek a regulatory return on their investment. If a proposed plant will not become a capital asset of any monopoly utility (by ownership or firm contract), there is no threat that any monopoly utility will be able to include the plant in its rate base and that means that the PSC has no reason to determine whether the plant is needed or not.

Instead of concluding that a plant is "needed" because its costs never could be regulatorily passed along to ratepayers, the PSC should have recognized that section 403.519 is simply not a mechanism that is available to an entity seeking to build a merchant plant. Finding a merchant plant is needed achieves only one end: the

commencement of the deregulation of power generation in Florida and that is entirely inconsistent with the purpose, language and history of section 403.519; the Florida Legislature's rejection of deregulation legislation; and the lack of existing statutory mechanisms to administer deregulation.[45]

### 3. The Statutory Language Does Not Authorize Deregulation.

With both the purpose and this Court's prior interpretations of section 403.519 in mind, the meaning of the language of the statute becomes clear. The statute allows any "applicant" to apply for a need determination and defines the term "applicant" as an "electric utility." § 403.503(4), Fla. Stat. (1997). "Electric utility" is defined 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." § 403.503(13), Fla. Stat. (1997).

This delineation of entities plainly refers only to Florida's monopoly utilities (or those obligated to provide power to them) because those were the entities that required regulation because of their monopoly status, and those were the only entities

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45. Because the PSC's ruling in the instant case retreats from its previous interpretation of § 403.519, Fla. Stat. (1997), it is not entitled to deference. § 120.68(7)(e)3., Fla. Stat. (1997); see also Florida Cities Water Co. v. Florida Pub. Serv. Comm'n, 384 So. 2d 1280 (Fla. 1980).

that existed at that time to build power plants. As discussed, companies like Duke did not exist until 19 years after passage of section 403.519.

Any doubt regarding the conclusion that section 403.519 is intended to apply solely to monopoly utilities selling at retail is dispelled by section 366.82(1), Fla. Stat. (1997), which was enacted as a part of FEECA in 1980. It explicitly provides: "For purposes of [section] 403.519, 'utility' means any person or entity of whatever form which provides electricity . . . *at retail to the public*." (emphasis added). The PSC refused to apply this definition, resorting to statutory construction arguments that would do as much violence to the statutes as they would prevent.[46] (R14-2675-76).

All statutory construction arguments advanced by Duke similarly were divorced from any analysis of the history or purpose of section 403.519. For example, Duke argued that because it had granted an option to the City to purchase *six percent* of the proposed plant's capacity, its petition could be regarded as a

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46. For example, the PSC reasoned that using the definition of "utility" found in section 366.82(1) to interpret section 403.519 would prevent certain small municipalities from obtaining need determinations because a 1989 amendment, ch. 89-292, Laws of Florida, omits them from the definition of "utility" in section 366.82(1) (and thereby excludes them from certain planning and reporting obligations). The Legislature averted this problem in 1990 by changing "utility" to"applicant" in section 403.519. Ch. 90-331, Laws of Florida. But there is no evidence that by solving that problem, the Legislature intended to open section 403.519 to entities like Duke.

submission by a municipality or as the submission of a joint operating agency. This utterly ignored the established precedents that it is the commitment of the proposed capacity to monopoly utilities that provides standing to seek a need determination -- not the addition of a City's name to a petition as a potential purchaser of a tiny portion of the output from a proposed plant that will neither be owned by or committed to supply to the City.[47]

Yet, the argument provided a veneer of legitimacy to allow Duke's application to be considered. Having breached the dike, Duke then flooded the PSC with policy arguments in favor of allowing merchant plants to built.

**4. <u>The Florida Legislature Has Rejected Deregulation</u>.**

The conclusion that section 403.519 cannot be invoked to commence the deregulation of power generation in Florida is bolstered by the fact that the Florida

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47. Duke's argument that it could be treated with the City as a "joint operating agency" which section 403.503(13) includes within the definition of an "electric utility" which may be an "applicant" under section 403.519 is similarly flawed. In addition, the term "joint operating agencies" only could be interpreted as referring to combinations of governmental entities because the Siting Act was enacted a year before the Constitution was amended to allow private entities to enter into such arrangements, Fla. Const. art. VII, § 10(d), and nine years before joint power projects between government agencies and out-of-state entities were allowed. Ch. 82-52, Laws of Florida. In any event, the allegations of the petition showed that the plant would not meet the requirements for a joint power project, <u>compare</u> § 361.12, Fla. Stat. (1997) <u>with</u> (R1-4-¶¶ 4 & 31), and it never alleged there was a joint operating agency.

Legislature has rejected such a proposal.[48] Florida Senate Bill 1888, 15th Leg., in March, 1998 (App. Ex. N), died in Committee, "reflecting both the strong opposition from utilities and lack of consumer interest." In April, 1999, the Legislature adjourned "with no major electric industry restructuring effort or even a study considered."[49] The Department of Energy's conclusion: "Florida has not done much to restructure its electric power industry."[50]

**5. New Legislation is a Prerequisite to Deregulation.**

The need for informed legislation to achieve deregulation -- rather than sweeping administrative action under ill-fitting statutes designed to regulate monopoly utilities -- exists in large measure because deregulation threatens to create

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48. U.S. Dep't of Energy, Status of State Elec. Indus. Restructuring Activity as of June 1, 1999 - Florida, http://www.eia.doe.gov/cneaf/electricity/chg_str/ tab5rev. html#FL (visited June 11, 1999) (App. Ex. O) (hereinafter "Status of Restructuring").

49. U.S. Dep't of Energy, U.S. Energy Information Administration Electric Page - State Electricity Profiles, http://www.eia.doe.gov/cneaf/electricity/ st_profiles/ florida/fl.html (visited June 14, 1999) (App. Ex. P).

50. Id. The Legislature's consideration of Senate Bill 1888 indicates that the Legislature does not believe that the existing legislative scheme allows deregulation, and, moreover, its failure to pass the bill indicates that the Legislature does not support deregulation. 49 Fla. Jur. 2d Statutes § 161 (1984) ("Amendments made, or proposed and defeated, may throw light on the construction of the act finally passed") (citing Mayo v. American Agric. Chemical Co., 133 So. 885 (Fla. 1931)). In addition, Sen. Scott's Dec. 12, 1997, letter to the PSC confirms that the Siting Act itself was not intended to be available to Duke. (PSC Tr. Ex. 36) (App. Ex. Q).

stranded costs for existing utilities. Stranded costs are the investments made by utilities under a prior regulatory regime that cannot be recovered once the regulation is lifted.[51] The utilities incur these costs with the legislative assurance that state regulatory commissions are likely to allow recovery of the costs by increasing or maintaining electric rates.[52] Full deregulation of the electric generation industry would leave stranded costs *of $300 billion* nationwide.[53] States pursuing deregulation must and have factored in stranded costs.[54] In addition, many other statutory reforms are essential to assure reliability and integrity in a deregulated market.

Even a cursory review of deregulation statutes from other states reveals the numerous issues that must be addressed in conjunction with deregulation of any

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51. See Willam B. Tye & Frank C. Graves, The Economics of Negative Barriers to Entry: How To Recover Stranded Costs and Achieve Competition on Equal Terms in the Electric Utility Industry, 37 Nat. Resources J. 175, 179 (1997).

52. See Finlinson, supra note 34, at 207.

53. Roberts, supra note 41. To require public utility shareholders to bear this burden might constitute an unconstitutional taking of property. Herbert Hovenkamp, The Takings Clause and Improvident Regulatory Bargains, 108 Yale L. J. 801 (1999) (App. Ex. U).

54. See, e.g., Cal. Pub. Util. Code §§ 330(d) & 345 (West 1997-1998) (requiring all utility customers to pay a "competitive transition charge" and establishing a special class of bonds to finance and buy out utilities' stranded costs); see Finlinson, supra note 34, at 202 n.184 (reporting survey of state legislation); Status of Restructuring supra note 48 (App. Ex. O) (same).

type.[55] Florida, by contrast, has done nothing legislatively to commence deregulation, to deal with stranded costs, or to deal with any other deregulation issue.[56]

55. See, e.g., Me. Rev. Stat. Ann. tit 35, § 3204(1) (West 1997); Mass. Gen. Laws ch. 164, §§ 1A, 1G (1998) & Mass. Regs. Code tit. 220, § 11.03; 66 Pa. Cons. Stat. §§ 2801 et seq. (1998); Wis. Stat. § 196.491(1)(w), (3) (1998).

56. The PSC's jurisdiction is limited, of course, to that which the Legislature has given it. Therefore it cannot forge ahead with these matters on its own.

## II.

## Duke Failed to Make Required Allegations of Need or to Offer Sufficient Evidence of Need

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. Duke simply forced the "square-peg" of its merchant plant into the "round-hole" of section 403.519 monopoly regulation.

### A. Duke Failed to Make Required Allegations.

Rule 25-22.081(1), Fla. Admin. Code, requires the petitioner to include, "[a] general description of the utility or utilities primarily affected, including the load and electrical characteristics, generating capability, and interconnections." The petition alleged only that the City and Duke were the "primarily affected utilities." But, the City had expressed only an interest in six percent of the power to be generated, and Duke, the power generator, hardly could be considered an affected utility. The "primarily affected utilities" plainly would be those that would purchase 94 percent of the plant's output but they were not identified by the petition. (R14-2681). Duke claimed that it had complied with Rule 25-22.081(1) by identifying "Peninsular Florida" as the primarily affected utilities. "Peninsular Florida" is a geographic area and it is obvious that few of the 59 utilities therein would be affected by a plant in New Smyrna Beach.

Rule 25-22.081(3), Fla. Admin. Code, requires a petition to state the specific conditions, contingencies or 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. The petition made no such statement. Rule 25-22.081(3) also requires a petition to present detailed load forecasts and to identify models used to formulate such forecasts. The petition did not contain this information either.

Rule 25-22.081(3) further requires a petition to provide "detailed analysis and supporting documentation of the costs and benefits" if the determination is sought on some basis in addition to or in lieu of capacity needs. The petition provided some information regarding the six percent of the power that Duke hopes to sell to the City, but failed to provide information regarding the remaining 94 percent of the capacity.

Rule 25-22.082 , Fla. Admin. Code, requires each investor-owned electric utility to evaluate alternatives to its proposed plant by issuing a request for proposal (RFP). The PSC found Duke to be an "investor-owned utility" (R14-2674), but Duke did not allege that it had issued an RFP.

Finally, Rule 25-22.081(5), Fla. Admin. Code, requires a description of nongenerating alternatives. No such allegations appeared.

### B. The PSC's Determination of Need is Clearly Erroneous

Faced with a petition that failed to make the required allegations, the PSC majority nevertheless forged on to consider the "evidence."

The PSC began by noting that 30 MWs would increase the reliability and integrity of the City's electric service (R14-2697), explaining that "the participation agreement is a legally binding agreement" between Duke and the City. (R14-2697). The PSC overlooked that the City would *not* be entitled to any power from Duke if Duke chose not to build the plant, chose not to dispatch power from the plant, or chose to shut down the plant. (V3-443-47). The PSC also ignored that the City could "not rely on the non-firm market to supply a firm need" (V4-538) and that a merchant plant's capacity "would not count towards being anybody's reserve margin unless it is firmly committed by contract." (V4-562-64). See also Rule 25-6.035(2), Fla. Admin. Code (non-firm commitments cannot be used for reserve margins).

With respect to the 484 MWs not earmarked for the City, the PSC even more cavalierly concluded that this power was needed for reliability and integrity. The PSC found this "capacity should be considered for hourly and short term operating reserves" (R14-2698) and to support this conclusion noted that one witness had testified that the availability of merchant power could have averted the loss of firm load during one Christmas freeze a decade ago. (R14-2698). That approach to reliability and integrity, of course, would justify the construction of any power plant

that might be available in a time of extreme demand. Unwilling to go quite that far, the PSC tried to tie its justification of the 484 MWs of output back to the 30 MWs need claimed by the City based on economies of scale. (R14-2699). Using that logic, a 2,000-MW super plant also could be found to be needed for the reliability of the City's supposed 30 MW need. Significantly, the PSC majority acknowledged that the plant is not needed to meet the acceptable reserve margins for Peninsular Florida. (R14-2698).[57]

With respect to the need for adequate electricity at a reasonable cost factor, the PSC initially quantified the economic benefit of the 30 MWs of the plant to the City at $39 million. (R14-2699). But, the PSC did not quantify the economic benefit of the vast majority of the proposed plant's output.

The PSC determined that Duke's "plant *may* lower wholesale electric prices," (R14-2701) (emphasis added), but not that the plant *would* lower wholesale prices. The PSC defensively commented that its ruling should not be interpreted to mean that *every* merchant plant would be approved, irrespective of the lack of proof of demonstrated savings to consumers (R14-2701), but it provided no indication of how

57. Several witnesses took issue with the FRCC's 15 percent reserve margin. For example, Vaden testified that the reserve margin was too low given extreme weather (V3-423), but he acknowledged that the City itself uses a 15 percent reserve. (V3-434). Green also volunteered that the 15 percent reserve margin criteria was too low, but admitted he was not an expert on that issue. (V4-624-25).

it could deny any future petition other than if it proposed a plant that would be technically incompatible with the Florida grid. (R14-2702).

In assessing whether Duke's plant would be the most cost-effective measure available, the PSC ignored the fact that the City had done no analysis of the cost of building its own plant in five years (V3-450-51), had issued no capacity purchase request for proposal (V3-451), and had not solicited other developers to see if they could beat Duke's price. (V3- 451-52). Instead, the PSC simply assumed Duke's plant would be most cost effective alternative for the City.

FPL does not, however, question that the City is getting a good deal from Duke. If the plant is in fact built, it appears that the City will be rewarded for supporting Duke's application by getting substantially sub-market rates. That Duke has given the City a loss-leader on 30 MWs of power should have been a red flag to the PSC that the remaining 484 MWs will not go so cheaply. Indeed, it should be anticipated that the rates charged for this power will fully exploit the exigencies of every spike in demand. But, the PSC simply observed: "Merchant plants increase wholesale competition thereby in theory lowering wholesale electric prices from what they otherwise may be." (R14-2704). That is no analysis at all of whether the proposed plant would be the most cost-effective alternative.

Regarding the City's consideration of conservation alternatives, the evidence

was that the City had offered load management and energy audits, (V3-390-91) and that green pricing with a photovoltaic unit had been planned but was not available. (V3-391). The City offered no other proof of conservation potential on its system. (V3-390-91). Nevertheless, the PSC said that the City had done all that was required. For the remaining 94 percent of the plant's output, the PSC simply held that merchant plants have "limited" conservation obligations and said those obligations had been met. (R14-2706). This again demonstrates the need analysis does not fit merchant plants.

The PSC concluded its analysis with the observation that it had a long history of finding need from economic need rather than immediate capacity requirements. (R14-2706). The PSC had not previously, however, ever found need, as it did here, on the basis that the market had determined need for it.

## CONCLUSION

The appeals should be transferred to the First District Court of Appeal or the PSC's order should be reversed.

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