

IN THE SUPREME COURT OF FLORIDA

TAMPA ELECTRIC COMPANY)
)
 Appellant,)
)
 vs.) Case No. 95,444
)
 JOE GARCIA, etc., et al.)
)
 Appellees.)
)
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 FLORIDA POWER CORPORATION)
)
 Appellant,)
)
 vs.) Case No. 95,445
)
 JOE GARCIA, etc., et al.)
)
 Appellees.)
)
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 FLORIDA POWER & LIGHT COMPANY)
)
 Appellant,)
)
 vs.) Case No. 95,446
)
 JOE GARCIA, etc., et al.)
)
 Appellees.)
)
 _____)

Answer Brief of PG&E Generating
(f/k/a U. S. Generating Company)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

CERTIFICATE OF FONT SIZE iv

PRELIMINARY STATEMENT v

STATEMENT OF THE CASE AND OF THE FACTS 1

STANDARD OF REVIEW 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

CONCLUSION 7

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
Power Plant Siting Act, §§403.501-403.518, <u>Florida Statutes</u> (1997)	4
Joint Power Act, §§361.10-361.18, <u>Florida Statutes</u> (1997)	4
Florida Energy Efficiency and Conservation Act, §§366.80-366.85 and §403.519, <u>Florida Statutes</u> (1997)	4
Rule 25-22.082, <u>Florida Administrative Code</u>	5
Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992)	5
Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21, 540, FERC Stat. & Regs. Jan. 1991-June 1996, Regs. Preambles ¶131,036 (1996), <u>order on reh'g</u> , Order No. 888-A, 62 Fed. Reg. 12,274, III FERC Stats. & Regs., Regs. Preambles ¶131,048 (1997), <u>order on reh'g</u> , Order No. 888-B, 81 FERC ¶61,248 (1997), <u>order on reh'g</u> , Order No. 888-C, 82 FERC ¶61,046 (1998)	5

CERTIFICATE OF FONT SIZE

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PRELIMINARY STATEMENT

On June 1, 1999, U. S. Generating Company changed its name to PG&E Generating. A Notice of Name Change was filed with the Court on June 23, 1999. For purposes of this Brief, the Company will refer to itself as "PG&E Generating".

STATEMENT OF THE CASE AND OF THE FACTS

PG&E Generating adopts, and hereby incorporates by reference, the procedural history and statement of the facts set forth by Appellee, Duke Energy Power Company Ltd., L.L.P. and by Appellee, the Utilities Commission of the City of New Smyrna Beach, Florida (collectively, "Duke/New Smyrna;" singularly, "Duke" and "New Smyrna").

STANDARD OF REVIEW

PG&E Generating hereby adopts and incorporates by reference the positions set forth by Duke and New Smyrna.

SUMMARY OF ARGUMENT

This proceeding is not about an effort by the PSC to deregulate the entire electric utility industry in the State of Florida, and the PSC's decision does not deregulate the entire electric utility industry in the State of Florida. This proceeding is only about whether the PSC properly adjudicated one need application to build one power plant. In that case, based on the extensive record before it, the PSC correctly applied the Power Plant Siting Act when it granted the application. Its decision should be affirmed in all respects.

ARGUMENT

The Public Service Commission's Decision Should be Affirmed

The Appellants in the instant case have attacked the decision of the Public Service Commission ("PSC" or "Commission") to grant the need petition of Duke/New Smyrna to construct a 514 megawatt natural gas fired combined cycle power plant by contending that the PSC's decision was a wild departure from the grant of power given to the Commission by the Florida Legislature. In characterizing the PSC's decision as a "wild goose chase," the Appellants have selectively cited various portions of the Power Plant Siting Act, §§403.501-403.518, Fla. Stat. (1997), the Joint Power Act, §§361.10-361.18, Fla. Stat. (1997), the Florida Energy Efficiency and Conservation Act, §§366.80-366.85 and §403.519, Fla. Stat. (1997), while apparently ignoring the legislative declarations contained in those same statutes which clearly authorize the Commission's decision in this case.

Peppered throughout the initial briefs filed by Appellants are assertions and insinuations that the PSC's order amounts to "deregulation" of the electric utility industry. Appellants' characterization of the order as tantamount to "deregulation" is wholly unfounded and a rabbit trail that should not be traveled. Indeed, the PSC's final order in this case clearly reveals that it has made no attempt to "deregulate" electric utilities, but simply

decided the merits of a need petition filed by Duke/New Smyrna as a regulated applicant for a particular power plant project.

While certain policy considerations may underlie the Commission's decision, such considerations - which the Commission is entitled to weigh - are consistent with Federal and State policy that call for an open, competitive wholesale market for electricity. For example, the PSC has in place a competitive bid rule that requires investor-owned utilities to solicit competitive bids for new power plant developments. See, Rule 25-22.082, Florida Administrative Code. How could the PSC on the one hand require such competitive bids, while on the other hand conclude that the construction of such plants in Florida is not permitted? At the Federal level, both Congress and the Federal Energy Regulatory Commission ("FERC") have embraced open competition in the wholesale electric market. Congress plainly recognized the benefits of competition in the wholesale electric market when it passed the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992). FERC has also acted to encourage wholesale competition within the electric industry.¹

¹ See, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21, 540, FERC Stat. & Regs. Jan. 1991-June 1996, Regs. Preambles ¶31,036 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274, III FERC Stats. & Regs., Regs. Preambles ¶31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶61,046 (1998).

The PSC's consideration of the Duke/New Smyrna need determination petition, following several days of hearing the case from scores of witnesses and receiving into evidence numerous exhibits, is compelling evidence, in and of itself, of the regulatory nature of the proceeding. The PSC's decision, which comports with State and Federal policy of encouraging competition in the wholesale electricity market, is squarely within the PSC's existing regulatory framework and should not be disturbed.

CONCLUSION

The attempts by Appellants to characterize the action taken by the Commission as "deregulation" is misguided and should be rejected by this Court. The PSC simply adjudicated a need application submitted by Duke/New Smyrna, a regulatory function that the Legislature directed the PSC to perform. The Commission's decision merely follows the path of ensuring a robust, competitive wholesale electric power market and is not tantamount to deregulation. The PSC's order in this case was entirely consistent with relevant statutory enactments and was within the PSC's power and jurisdiction.

For the foregoing reasons, the final order of the PSC should be affirmed in all respects.

Respectfully submitted,

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