IN THE SUPREME COURT OF FLORIDA

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

On Appeal From A Final Order Of The
Florida Public Service Commission

TAMPA ELECTRIC COMPANY,
FLORIDA POWER CORPORATION, and
FLORIDA POWER & LIGHT COMPANY,

Appellants,

v.

JOE A. GARCIA, et al., As Members Of The
Florida Public Service Commission;
DUKE ENERGY NEW SMYRNA BEACH
POWER COMPANY LTD., L.L.P.; and
UTILITIES COMMISSION OF THE CITY OF
NEW SMYRNA BEACH, FLORIDA,

Appellees.

ANSWER BRIEF OF APPELLEE DUKE ENERGY NEW SMYRNA BEACH POWER COMPANY LTD., L.L.P.

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ANSWER BRIEF OF DUKE

The Court has for review a final order (the "Order") [A 1][1] of the Florida Public Service Commission (the "PSC"), granting a Joint Petition for Determination of Need for an Electrical Power Plant (the "Petition") [A 2]. Appellees DUKE ENERGY NEW SMYRNA BEACH POWER COMPANY LTD., L.L.P. ("Duke"), and the Utilities Commission, City of New Smyrna Beach, Florida (the "City"), jointly submitted the Petition to the PSC pursuant to section 403.519, Florida Statutes. A determination of need is a prerequisite to complying with the Florida Electrical Power Plant Siting Act, sections 403.501-403.518, Florida Statutes (the "Siting Act").

Duke is a regulated wholesale electric power producer seeking to participate in the existing competitive wholesale electric power market in Florida pursuant to existing statutory authority. Duke seeks to do so by building a 514-megawatt, natural gas fired, combined cycle electric generating plant and associated facilities, to be located in Volusia County (the "Project"). Duke is subject to rate regulation by the Federal Energy Regulatory Commission ("FERC") as a "public utility" under the Federal Power

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[1] This brief is accompanied by a separate appendix containing a copy of the Order and other pertinent portions of the record, in particular a copy of the contract for Duke's provision of electric capacity and energy to the City (the "Participation Agreement"). [A 3.] References to the Appendix are designated by tab number and, where appropriate, specific page numbers, such as "A 2 at 3." References to the transcript, which retains its original pagination, are designated by volume and page number as "R Vol.-Pg."

Act, 16 U.S.C. § 824 (b)(1), and is certified by the FERC as an Exempt Wholesale Generator ("EWG"). [A 1 at 17-18.]

The City is a municipal electric utility that serves retail customers. [A 1 at 16.] The City has voluntarily entered into a power purchase contract with Duke requiring the City to assume significant obligations, among them to take or pay for 27 megawatts of the Project's energy.[2] [A 3.] Duke intends to sell the remaining power produced by the Project to other utilities in Florida's existing competitive wholesale power market. [A 5 at 18.]

The Order finds that Duke and the City, individually and jointly, are proper applicants for a determination of need; and that the Project is needed not only to provide reliable and cost-effective electricity to the City's retail customers, but also to ensure the reliability, integrity, and cost-effectiveness of Florida's electric system. [A 1 at 16-29, 39-45, 50-54.] Three investor-owned electric utilities that provide retail electric service directly to Florida consumers, and that would be competing with Duke for wholesale sales and purchases of electricity, have each independently appealed the Order: Tampa Electric Company ("TECO"), Florida Power Corporation ("FPC"), and Florida Power &

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[2] The City is entitled to 30 megawatts of the Project's capacity but required to "take or pay for" 27 megawatts. [A 3 at 2, 8.] In addition, the City will provide (1) the Project site and any additional land needed for the Project, (2) substation interconnection points, (3) water requirements for the Project, and (4) a portion of the up-front costs of securing regulatory approval for the Project. [A 3 at 40.]

Light Co. ("FPL") (collectively, "Appellants"). By order of the Court granting Duke's motion to file a single brief, this brief responds to all three Appellants' Initial Briefs. For the reasons set forth herein, the arguments contained in Appellants' Initial Briefs lack merit, and the PSC's Order should be affirmed.

JURISDICTION AND STANDARD OF REVIEW

Jurisdiction. The Florida Constitution confers upon this Court mandatory and exclusive direct appellate jurisdiction over the Order because it constitutes PSC action relating to rates or service of utilities providing electric service. See Art. V, sec. 3(b)(2), Fla. Const. ("The supreme court ... shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service."). Florida's statutes and Rules of Appellate Procedure further confirm the Court's jurisdiction over this case. See § 366.10, Fla. Stat. (1997);[3] § 350.128, Fla. Stat. (1997);[4] Fla. R. App. P.

[3] "As authorized by s. 3(b)(2), Art. V of the State Constitution, the Supreme Court shall review, upon petition, any action of the commission relating to rates or service of utilities providing electric or gas service."

[4] "As authorized by s. 3(b)(2), Art. V of the State Constitution, the Supreme Court shall, upon petition, review any action of the commission relating to rates or service of utilities providing electric, gas, or telephone service. The District Court of Appeal, First District, shall, upon petition, review any other action of the commission."

9.030(a)(1)(B)(ii);[5] Order, A 1 at 66-67 (notice of rights to judicial review).

Alone among the twelve parties to these proceedings, and contrary to the express assertions of jurisdiction by TECO and FPC, FPL argues that the Court lacks jurisdiction. FPL argues that the Court lacks jurisdiction because Duke is not a retail electric utility and the Order does not affect Duke's rates or service. [FPL In. Br. 22-23.] Putting aside for the moment Duke's status as an electric utility regulated under both federal and state law, FPL's argument overlooks that all three Appellants, and the City, are without dispute electric utilities, and that the Order affects their service as well as directly affects the City's rates. TECO and FPC have expressly conceded this point. [TECO In. Br. 4-6; FPC In. Br. 11-12.] In contrast, FPL neglects to acknowledge its own prior concession that an "affirmative determination of need as sought by Duke will determine the substantial interest of <u>every Peninsular Florida utility</u> and will adversely affect the ability of <u>every Peninsular Florida utility</u> to plan, certify, build and operate transmission and generation facilities necessary to meet its obligations to serve." [R 1-130 (FPL's Petition for Leave to Intervene at 9 (emphasis added)).] The Order, therefore, is

[5] "If provided by general law, the supreme court shall review ... action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service."

properly before the Court as PSC action relating to the rates and service of utilities providing electric service.

FPL further asserts that the Order exceeds PSC authority because it "commences the deregulation of power generation in Florida," and thus FPL attempts to place the Order in the catch-all category of miscellaneous PSC action reviewable only by the First District Court of Appeal. [FPL In. Br. 20-21.] To the contrary, however, the Order preserves Florida's regulatory framework for electric utilities, applies it to Duke and the City, and expressly provides that all future applicants under the Siting Act will continue to be subject to Florida's regulatory framework just as Duke and the City were and are. [A 1 at 44-45.] The Order is, therefore, subject to this Court's mandatory and exclusive appellate review.

Duke, the City, and the PSC previously filed lengthy responses in opposition to FPL's previous motion to dismiss these proceedings for lack of jurisdiction. Duke continues to rely on those arguments and authorities without repeating them all here. In summary, the Florida Constitution, Florida Statutes, Florida Rules of Appellate Procedure, and this Court's own precedents all reflect that this Court has jurisdiction over the Order. The constitutional provision of jurisdiction at Florida Constitution article V, section 3(b)(2), was intended to apply broadly to all matters involving the classes of electric, gas, and telephone service in Florida. See Arthur J. England, Jr., Eleanor Mitchell

Hunter, Richard C. Williams, Jr., Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 U. Fla. L. Rev. 147, 175-76 (1980) ("This [constitutional] phraseology was selected with the broad intent of covering all subjects of regulation relative to electric, gas and telephone utilities ... the terms 'rates' and 'service' should be viewed as all-encompassing as to these utilities.") (emphasis added); see also Gerald Kogan & Craig Waters, The Operation and Jurisdiction of the Florida Supreme Court, 18 Nova L. Rev. 1151, 1214 (1994) (describing the Court's jurisdiction over utility rates and service cases as "mandatory, exclusive"). The Order is well within the class of PSC action reviewable by this Court and only this Court.

Standard of Review. The Order enjoys a statutory presumption of correctness. § 403.519, Fla. Stat. (1997). One need only skim the Order and the briefs already filed, noting their complex web of state and federal statutes and regulations, public policy considerations, and vast array of acronyms, to understand why orders of the PSC "come to this Court 'clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers.'" Gulf Coast Elec. Coop. v. Johnson, 727 So. 2d 259, 262 (Fla. 1999) (emphasis added); see also Pan American World Airways, Inc. v. Florida Public Serv. Comm'n, 427 So. 2d 716, 717-18 (Fla. 1983) (describing "narrow scope of review": "We have only to determine whether the PSC's action comports with the essential requirements of law and is supported by

substantial competent evidence. The burden is upon appellants to overcome the presumption of correctness attached to orders of the PSC."). The PSC's "interpretation of a statute it is charged with enforcing is entitled to great deference"; PSC action will be affirmed absent a "departure from the essential requirements of law." Gulf Coast, 727 So. 2d at 262; see Pan Am, 427 So. 2d at 719.

The Court in Gulf Coast stated that "[c]onsidering the PSC's specialized knowledge and expertise in this area, this deferential standard of review is appropriate." Gulf Coast, 727 So. 2d at 262. Earlier, the Court noted that "because the PSC is the sole forum for determination of need under the Siting Act, its construction of section 403.519 is entitled to great weight and will not be overturned unless it is clearly unauthorized or erroneous." Nassau Power Corp. v. Deason, 641 So. 2d 396, 398 (Fla. 1994). The rule of deference reflects a "proper relationship between the courts and administrative agencies charged with particular regulatory duties." Hill Top Developers v. Holiday Pines Serv. Corp., 478 So. 2d 368, 370 (Fla. 2d DCA 1985), rev. denied, 488 So. 2d 68 (Fla. 1986), (describing the judge-made primary jurisdiction doctrine) (quoting United States v. Western P.R. Co., 352 U.S. 59 (1956)). Deference to administrative agencies helps "maintain uniformity at that level or to bring specialized expertise to bear upon the disputed issues." Hill Top, 478 So. 2d at 370. Agency decisions "infused by policy considerations," as is the Order under review, are peculiarly

within the province of the agency charged with interpreting and administering the pertinent statutes and regulations. See McDonald v. Department of Banking and Finance, 346 So. 2d 569, 578-79 (Fla. 1st DCA 1977).

In reviewing decisions of the PSC, the Court has clearly and consistently articulated its policy that it will not reweigh or reevaluate the evidence presented, but will examine the record only to determine whether competent, substantial evidence supports the PSC's findings and whether the decision comports with the essential requirements of law. See Bricker v. Deason, 655 So. 2d 1110, 1111 (Fla. 1995). This case proves the necessity and wisdom behind the longstanding rules of deference to PSC decisions, because it involves specialized agency expertise in a highly complex and intensively regulated area. The Order is well grounded in both law and public policy, and is supported by competent, substantial evidence. Therefore, the Order should be affirmed.

STATEMENT OF THE CASE AND FACTS

Duke objects to the failure of all three Appellants to include certain pertinent facts in their respective Statements of the Case and Facts. Duke objects to FPL's Statement in particular because it is argumentative and mostly irrelevant. Although Appellants adequately recite the procedural progress of the case before the PSC, they fail to describe accurately the nature of the Project, fail to present accurately Duke's status as a regulated electric company, and fail to acknowledge the nature and terms of the Participation Agreement between Duke and the City. These are undisputed facts upon which the PSC relied in determining that Duke and the City are proper applicants under the Siting Act.

During the hearings below, the PSC received testimony and evidence describing the nature of the Project. Michael C. Green, Duke's Vice President and General Manager, Florida and Southeast, testified that the Project will be a high efficiency generating facility using state of the art technology with proven reliability. [A 5, Green Direct Testimony at 572.] Duke must provide 30 megawatts of the Project's output to the City [A 3 at 2, 8], and will sell the remaining output on Florida's competitive wholesale power market. [Id.] The City is obligated to take or pay for 90% of the 30 megawatts, or 27 megawatts. [A 3 at 8.] Thus, the Project will provide clean and cost-effective power to the City and to other electric utilities that desire to purchase power from Duke to meet their customers' growing demands for electricity. [A 5.]

Importantly, Mr. Green testified that Duke, not Florida's ratepayers, will bear all of the capital investment and operating risks associated with the Project. [Id.]

The PSC also considered extensive testimony and evidence regarding Duke's status as a regulated electric utility. Duke is a "public utility" under the Federal Power Act, 16 U.S.C. § 824(b)(1) (1994). [A 1 at 17.] Duke is also an exempt wholesale generator ("EWG") pursuant to the Public Utility Holding Company Act of 1935 ("PUHCA"), 15 U.S.C. §79z-5a (1994 & Supp. 1997). [A 1 at 17.] The FERC confirmed Duke's EWG status by order dated June 9, 1998.[6] 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. See Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1983) (FERC has jurisdiction under the Federal Power Act to regulate wholesale electric power rates in interstate commerce). The FERC has approved Duke's Rate Schedule No. 1 for sale of the Project's entire capacity and associated energy to other utilities under negotiated arrangements.[7] Based on Duke's status as an EWG subject to FERC regulation as a public utility, and its status as an

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[6] See Duke New Smyrna Beach Power Company Ltd., L.L.P., 83 FERC § 62,220 (June 9, 1998) [A 4].

[7] See Duke New Smyrna Beach Power Company Ltd., L.L.P, 83 FERC § 61,316 (June 25, 1998) [A 4].

electric utility under section 366.02(2), Florida Statutes, the PSC found that Duke is a "regulated electric company," and thereby a proper "applicant" under section 403.519. [A 1 at 17.]

Further, the PSC considered extensive testimony and evidence regarding the Participation Agreement. The Participation Agreement provides that the City is entitled to 30 megawatts of the Project's capacity and "shall be obligated to take or pay for" 27 megawatt-hours of the associated energy from the Project. [A 3 at 2 (emphasis added).] The City is further obligated under the Participation Agreement to transfer "good and marketable title to the Site," and to "transfer to Duke additional property contiguous with the Site," at the City's sole expense and in a timely manner, if the Site "is not adequate for the Facility and its related facilities." [A 3 at 4.] The Participation Agreement also requires the City to construct "a wastewater treatment facility (which will include a storage reservoir of at least 2 million gallons for the reuse water) and complete the drilling and equipping of water wells" to supply all water required for the Project (in excess of that available from reuse water) for the life of the Project. [A 3 at 4-5 (emphasis added).] Also at its cost and for the life of the Project, the City is required to engineer, construct, and maintain connections from the Project to the Smyrna Substation, and to provide access to the FPC and FPL transmission grids. [A 3 at 5.] The City must share equally in the first $200,000 of costs related to obtaining permits and approval of the

Project. [A 3 at 6.] Based in part on these undisputed and unambiguous contractual obligations, the PSC found that a joint operating agency exists between Duke and the City, thus further qualifying both parties as "applicants" for a determination of need under section 403.519. [A 1 at 22-23.]

Appellants also neglect to advise the Court about the extensive testimony and other evidence presented to the PSC concerning the need for the electric power to be generated by the Project, the reliability and cost-effectiveness of the Project, and the technological efficiency and resulting lower environmental impacts of the Project. The record contains ample evidence that the City and Peninsular Florida need additional electric generating capacity to maintain system reliability and integrity, and that the Project can provide that capacity in a manner that promotes conservation and is cost-effective. [Tr. 3-393, 3-397-98; Exh. 16 to Vaden Direct Testimony; Tr. 4-581.]

The PSC heard testimony that the City needs energy and capacity to replace electricity it is currently purchasing under contracts scheduled to expire in the short term. That testimony demonstrated that Duke can supply these needs from the proposed Project at a far more cost-effective price than is otherwise available to the City from FPC or TECO. [Tr. 3-389, 3-392, 3-411, 3-497-98; A 1 at 40, 42.] The record shows that the total net present value of savings to the City is projected to be $39 million in comparison to the City's purchasing power from FPC and TECO.

[Tr. 3-395-96, 3-451-52] The PSC heard expert testimony that the price of electricity in a competitive market is subject to the law of supply and demand, and that prices for electricity, like any other commodity, tend to fall as supply increases. That testimony and other evidence adduced below shows that by making new electric power available for wholesale sales to the City and to other retail-serving utilities, and pricing those sales at competitive market-driven rates, Duke's entry into Florida will depress the price for wholesale electricity and create opportunities for lower cost retail electricity in Florida. [Tr. 5-727.] The record shows that the Project is cost-effective as compared to other proposed new generating capacity in the state. [Tr. 3-398.] The Project is also a cost-effective power supply resource to other Peninsular Florida utilities and their captive ratepayers because other utilities will buy power from the Project only when it is cost effective to do so. There is no requirement for other utilities to buy power from the Project. [Tr. 3-398, 4-589, 5-730; A 1 at 41-44.]

The PSC heard testimony that Peninsular Florida needs more than 8,000 megawatts over the next ten years just to maintain minimal reserve margins [Tr. 4-678], and that electric capacity supplied by the proposed Project is needed to augment existing reserve margins and prevent loss of firm load in Peninsular Florida. [Tr. 3-393, 3-504, 4-672, 6-778; A 1 at 41.] The PSC also heard testimony regarding the conservation aspects of the Project,

including evidence that the Project will produce electricity more efficiently and use natural gas more efficiently than other merchant power plants (i.e., electrical power plants without captive retail ratepayers) currently under construction in Florida. [Tr. 6-826, 3-396, 8-1152; A 1 at 49.]

Only with an awareness of these additional record facts, which Appellants failed to mention, may the Court fully understand the case and the competent, substantial evidence upon which the PSC relied in issuing the Order and establishing why the Order should be affirmed.

SUMMARY OF THE ARGUMENT

The PSC interpreted the regulatory statutes that it is charged with enforcing, and considered extensive evidence, before concluding that Duke and the City are proper applicants for a determination of need for the Project, and that they demonstrated such need. The Order complies with Florida law; is supported by competent, substantial evidence; and carries with it a statutory presumption of correctness that the Appellants have failed to overcome. The Court has jurisdiction pursuant to Florida Constitution Article V, section 3(b)(2), because the Order constitutes PSC action relating to rates and service of electric utilities.

A determination of need for an electrical power plant is required under section 403.519 before an applicant may obtain site certification for the facility under the Siting Act. In the exercise of its broad regulatory authority, the PSC may initiate a need determination proceeding sua sponte, and therefore its decision in this case to accept the Petition before it and determine need was a proper exercise of its authority. In addition, the PSC properly concluded that Duke and the City, individually and together, are proper applicants for a determination of need.

Although Appellants urge a narrow definition of "applicant" as that term is used in section 403.519, a broad interpretation is required in order to reflect the express

statutory language, to effectuate the purposes of the Siting Act, and to implement the PSC's broad regulatory authority in the public interest. The Siting Act defines "applicant" as "any electric utility which applies for certification." § 403.503(4), Fla. Stat. (1997). In turn, the Siting Act defines "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." Id. § 403.503(13). The Siting Act is not, as Appellants urge, limited to "retail" electric utilities, nor does it apply only to an electric utility that is subject to each and every aspect of PSC regulation. Rather, in order to secure the PSC's broad regulatory authority over the electric industry in Florida and to protect the public interest adequately, the Siting Act applies broadly to entities and combinations of entities engaged in the generation, transmission, or distribution of electricity.

After considering the law and the evidence, the PSC concluded that the City and Duke, individually and jointly, are proper "applicants" under section 403.519 for a variety of reasons. The City is a "cit[y] or town[]," and a municipal electric utility authorized and existing under Florida law, and therefore stands alone as an applicant, in addition to having joined with Duke to form a "joint operating agency." Duke is a "regulated electric

compan[y],” because Duke is a “public utility” regulated at the federal level by the FERC; and because Duke is an “electric utility” as defined under Florida law, subject to the PSC’s regulation under the Siting Act, the Grid Bill, the Ten Year Site Plan, and other statutes giving the PSC authority to regulate electric companies as necessary to ensure the reliability and efficiency of Florida’s electric power supply. The PSC properly declined Appellants’ invitation to govern this case by the holding in previous cogeneration cases involving Nassau Power Corporation -- cases completely distinguishable because they involved a non-utility cogenerator attempting to circumvent Florida’s cogeneration procedures to force a retail electric utility and its captive ratepayers to purchase and pay for cogenerated power even in the absence of a showing that the retail utility needed the power.

The joinder of Duke and the City in a “joint operating agency” under a Participation Agreement obligating Duke to provide to the City 30 megawatts of power from the Project, and obligating the City to take or pay for 27 megawatts of power in addition to providing substantial infrastructure and cost support for the Project, provides an independent basis for the PSC’s conclusion that Duke and the City are proper applicants for a determination of the Project’s need. The combination of Duke and the City is also significant because it is authorized by Florida’s Joint Power Act, chapter 361, Florida Statutes, which contemplates the joint development of a power supply project by a domestic entity and a

foreign public utility such as Duke. Appellants' attempts to bar Duke from doing business in Florida, by advancing an unsupportably narrow interpretation of the reach of need determination proceedings, are contrary to this statute and violate federal and state constitutional guarantees.

The Court should reject Appellants' arguments that the Siting Act may apply only to retail utilities and that the Order commences deregulation of Florida's electric industry. To the contrary, the Legislature made it clear that the PSC must have, and does have, broad authority to regulate this industry, and therefore the pertinent statutes must be interpreted broadly to effectuate this purpose and provide the public protections it was designed to afford. Duke seeks only to compete in Florida's wholesale power market, a market that according to uncontroverted evidence already exists and is supported by both state and federal law and policy. Duke has a constitutional and statutory right to enter the competitive wholesale power business in Florida if it can satisfy the pertinent regulations. Duke has complied with those threshold regulations by demonstrating a need for the Project.

Duke's allegations of need were legally sufficient, and competent, substantial evidence supports the PSC's determinations that the City needs the power it is obligated to take from the Project; that the remainder of the Project is necessary to make possible the low contract cost of the power to the City; and that power from the Project is necessary to ensure the reliability and

integrity of the State's power supply and reserve margins, and the availability of a cost-effective source of power to all Florida utilities. The PSC properly evaluated the need for the uncommitted capacity of the Project by analyzing Peninsular Florida's need, in view of Duke's authority and intent to sell the remaining power only at wholesale and at competitive market rates. A wholesale market by definition transcends local territorial boundaries, and so utility-specific need is not an appropriate consideration at this stage of the process. Instead, the PSC's regulatory authority will apply as each retail utility negotiates a contract with Duke to purchase power from the Project at wholesale, as they are entitled to do and currently do on a regular basis in the existing wholesale market in Florida. In addition, consideration of Peninsular Florida need was appropriate to preserve the PSC's regulatory authority to ensure a safe, reliable, and cost-effective power supply for all of Florida and to ensure adequate reserve margins.

Appellants have failed to overcome the statutory presumption that the Order is correct; have failed to demonstrate a departure from the essential requirements of law; and have failed to controvert the substantial, competent evidence supporting the Order. The Order is in accordance with both federal and state law and public policy, and should be affirmed.

ARGUMENT

After five days of hearing involving oral argument by the parties and the testimony of some thirteen witnesses, the PSC issued a long and detailed Order concluding that Duke and the City are proper applicants under the Siting Act, and that they satisfied all pertinent statutory criteria to demonstrate the need for the Project. [A 1 at 54.] Appellants' merits arguments fall into the two main topics of "applicant status" and "need," and will be addressed according to those topics.

The PSC's Order properly interprets and applies the Siting Act and other statutes and regulations within the PSC's province, and is supported by competent, substantial evidence. It arrives at this Court clothed with a presumption of correctness, and no Appellant has, or can, overcome that presumption by demonstrating a departure from the essential requirements of law or a lack of competent, substantial evidence. That Appellants may disagree with the PSC, or that they find evidence in the record supporting their own positions, or that they agree with a dissenter, are immaterial points entitled to no weight whatsoever. The PSC carefully considered the issues, the law, and the evidence, and reached a decision consistent with the law and public policy of Florida. That decision should be affirmed.

I. THE PSC'S DETERMINATION THAT DUKE IS A PROPER APPLICANT UNDER THE SITING ACT IS IN ACCORD WITH FLORIDA LAW AND PUBLIC POLICY, AND SHOULD BE AFFIRMED.

The PSC properly rejected the arguments that Appellants assert again here with respect to the principal issue on appeal: whether or not Duke is a proper "applicant" for a determination of need for the Project.[8] Analysis of this issue must begin with an understanding of the overall design for electric utility regulation in Florida, and in particular the purpose of the Siting Act. The purpose of the Siting Act is to ensure that construction of new electric generation in Florida is consistent with existing environmental and land use laws, and is in the public interest. In enacting the Siting Act, the Florida Legislature expressly stated its intent: "It is the intent to seek courses of action that will fully balance the increasing demands for electrical power plant location and operation with the broad interests of the public." §403.502, Fla. Stat. (1997). The Legislature specifically recognized that such action will be based on three premises:

> (1) To assure the citizens of Florida that operation safeguards are technically sufficient for their welfare and protection.
>
> (2) To effect a reasonable balance between the need for the facility and the environmental impact resulting from construction and operation of the facility, including air and water quality, fish and wildlife, and the water resources and other natural resources of the state.
>
> (3) To meet the need for electrical energy as established pursuant to s. 403.519.

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[8] The Order recites that "It is uncontroverted that the City is a proper applicant for a need determination." [A 1 at 16.]

§ 403.502, Fla. Stat. (1997).

A new power plant that will have a steam or solar cycle with 75 megawatts or more of electric generating capacity is subject to the permitting process under the Siting Act. See § 403.506, Fla. Stat. (1997). The permitting process involves the PSC's need determination pursuant to Section 403.519, and a land use hearing and a site certification hearing before the Siting Board. See § 403.508, Fla. Stat. (1997). A determination of need from the PSC under section 403.519 is a prerequisite to site certification under the Siting Act. See § 403.507(2)(a)2., Fla. Stat. (1997) ("The Public Service Commission shall prepare a report as to the present and future need for the electrical generating capacity to be supplied by the proposed electrical power plant."); § 403.519, Fla. Stat. (1997) ("The commission's determination of need for an electrical power plant shall create a presumption of public need and necessity and shall serve as the commission's report required by s. 403.507(2)(a)2."). The purpose of a PSC need determination is to ensure that Florida's citizens will not be harmed economically by the construction of new electrical generating capacity in the State. See In re: Petition of International Minerals and Chemicals Corporation for Determination of Need for Small Power Producing Electrical Power Plant, 86 F.P.S.C. 6:279 (June 17, 1986) ("The purpose of requiring the Commission's need determination of a generating facility is to

protect electric utility ratepayers from unnecessary expenditures.") The PSC has adhered to that purpose in this case.

Section 403.519 states, 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. ..." §403.519, Fla. Stat. (1997) (emphasis added). The Legislature has broadly and unambiguously defined those entities that may apply for site certification and a PSC need determination by including within the definition of "applicant" "any electric utility which applies for certification pursuant to the provisions of this act." § 403.503(4), Fla. Stat. (1997). The Siting Act, in turn, defines "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." §403.503(13), Fla. Stat. (1997).

These definitions create a two-prong test for determining whether an entity is a proper "applicant" under the Siting Act: (1) the entity must be one of the seven enumerated types of entities identified in the definition of "electric utility;" and (2) the entity must be engaged in, or authorized to engage in, one or more of the functions of generation, transmission or distribution of electric energy. After careful consideration of Duke's status under federal and state utility regulation, the Participation

Agreement between Duke and the City, and relevant case law, the PSC appropriately found that Duke satisfies this two-prong test because Duke (1) is a "regulated electric company" under both federal and state law and, with the City, is part of a "joint operating agency"; and (2) is authorized to generate electric energy. [A 1 at 17.] The PSC's Order should be affirmed.

A. Duke Is A Proper Applicant Because It Is A Regulated Electric Company.

The definition of "applicant" in section 403.503(4), when read in conjunction with the definition of "electric utility" in section 403.503(13), provides that "regulated electric companies" are proper applicants under the Siting Act if they are engaged in, or authorized to engage in, the generation, transmission or distribution of electric energy. See §403.503(4), (13), Fla. Stat. (1997) (emphasis added). The term "regulated electric companies" is not defined in the Siting Act. Thus, the PSC properly interpreted this phrase in accordance with its plain meaning in finding that Duke is a regulated electric company under both federal and state law. [A 1 at 17.] See Southeastern Fisheries Ass'n. Inc. v. Department of Natural Resources, 453 So. 2d 1351, 1353 (Fla. 1984) ("Where a statute does not specifically define words of common usage, such words must be given their plain and ordinary meaning."); see also Carson v. Miller, 370 So. 2d 10, 11 (Fla. 1979) ("unambiguous statutory language must be accorded its plain meaning").

1. Duke Is A Regulated Electric Company Under Federal Law.

In its Order, the PSC noted that Duke "is a public utility pursuant to the Federal Power Act, 16 U.S.C. Sec 824(b)(1) ... and an EWG pursuant to the Public Utility Holding Company Act of 1935, 15 U.S.C. Secs. 79z-5a ..." [A 1 at 17.] Thus, the PSC

appropriately recognized that as a public utility and an EWG, Duke is regulated by FERC. [A 1 at 17.]

Evidence below clearly demonstrated that because Duke is a "public utility" selling power at wholesale in interstate commerce, the FERC's regulatory jurisdiction over Duke includes regulation of Duke's wholesale rates. Duke has filed with FERC, and FERC has approved, Rate Schedule No. 1 for sale of the Project's entire capacity and associated energy at wholesale under negotiated arrangements. See Duke 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 rate jurisdiction of the FERC, Duke fits squarely within the phrase "regulated electric companies" in section 403.503(13). Accordingly, the PSC correctly decided that Duke satisfies the first prong of the two-prong test for determining what entities are proper "applicants" under the Siting Act.

2. Duke Is a Regulated Electric Company Under Florida Law.

Appellants argue that "regulated electric compan[y]" as used in section 403.503(13) really means "state regulated electric company." There is no legal basis, however, for this position. Nothing in section 403.503(13) qualifies the phrase "regulated electric company" based on whether such regulation occurs at the state or federal level. If the Legislature had intended to limit the phrase "regulated electric companies" to those electric

companies regulated by the PSC, it could have easily done so by adding the word "state." It did not.

To give credence to Appellants' strained interpretation, the Court would have to read "state" into the phrase "regulated electric compan[y]" in section 403.503(13). This simply is not permissible under Florida law. See Rebich v. Burdine's and Liberty Mut. Ins. Co., 417 So. 2d 284, 285 (Fla. 1st DCA 1982), rev. denied, 424 So. 2d 762 (Fla. 1982), ("courts in construing a statute may not insert words or phrases in that statute ... .") (citing Armstrong v. City of Edgewater, 157 So. 2d 422 (Fla. 1963)). In Armstrong, this Court stated:

> Courts are, of course, extremely reluctant to add words to a statute as enacted by the Legislature. They should be extremely cautious in doing so ... . The courts cannot and should not undertake to supply words purposely omitted. When there is doubt as to the legislative intent or where speculation is necessary, then the doubts should be resolved against the power of the courts to supply the missing words.

Armstrong, 157 So. 2d at 425. Nothing in the record evidences legislative intent to limit the phrase "regulated electric companies" in section 403.503(13) to "state regulated electric companies." As the PSC correctly did, the Court should refuse to amend section 403.503(13) to add the word "state." [A 1 at 18.]

Even assuming for the sake of argument that the Siting Act were limited to “state regulated electric companies,” Duke would still qualify as a proper applicant. In its Order, the PSC found that Duke is not only a regulated electric company under

federal law, but that Duke is also a regulated electric company under Florida law. [A 1 at 20.] Specifically, the PSC recognized that Duke is an "electric utility" pursuant to section 366.02(2), Florida Statutes, and that it is subject to the PSC's Grid Bill and ten-year site plan authority.[9] [A 1 at 19-20.] Duke is also subject to the PSC's jurisdiction under section 366.055, Florida Statutes, which provides the PSC authority over the "energy reserves of all utilities in the Florida energy grid . . . to insure that grid reliability is maintained." Section 366.02(2) defines an "electric utility" as "any municipal electric utility, investor-owned electric company, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission or distribution system in the state." § 366.02(2), Fla. Stat. (1997) (emphasis added). Like the definition of "electric utility" in section 403.503(13), the definition of "electric utility" in section 366.02(2) also contains two parts: (1) the entity must be either a municipal electric utility, an

[9] The PSC's Grid Bill authority is found in Sections 366.04(2) and (5) and Sections 366.05(7) and (8), Florida Statutes. These statutory 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. (1997). The PSC's ten-year site plan authority is found in Section 186.801(1), Florida Statutes, which provides, in pertinent part, that: "each electric utility shall submit to the Public Service Commission a 10-year site plan which shall estimate its power generating needs and the general location of its proposed power plant. § 186.801(1), Fla. Stat. (1997).

investor-owned electric company or a rural electric cooperative; and (2) the entity must own, maintain or operate an electric generation, transmission or distribution system.

It is undisputed that Duke is an electric company, and that it is owned by two investor partners, Duke Power Mulberry GP, Inc. and Duke Energy Global Asset Development, Inc. [A 1 at 20; A 5, final exhibit to Green Direct Testimony.] Thus, the PSC found that Duke satisfies the first part of the definition of "electric utility" in section 366.02(2) because it is an "investor-owned electric company." [A 1 at 20.]

In addressing the second part of the definition of "electric utility" in section 366.02(2), the PSC specifically notes that section 366.06(2), which uses the word "or," as opposed to "and," is worded in the disjunctive. [A 1 at 20.] See Sparkman v. McClure, 498 So. 2d 892, 895 (Fla. 1986) ("or" is disjunctive and indicates that alternatives were intended); see also Kirksey v. State, 433 So. 2d 1236, 1241 n.2 (Fla. 1st DCA 1983), rev. denied, 446 So. 2d 100 (Fla. 1984) (disjunctive indicates alternatives to be treated separately). Thus, the PSC concluded that to meet the second part of the definition of "electric utility," an entity has to own, maintain or operate a system performing at least one of three electricity functions -- generation, transmission or distribution. [A 1 at 20.] Accordingly, the PSC found that Duke satisfies the second part of the definition of "electric utility" in section 366.02(2) because the Project will be generating

electricity, thereby meeting the functional requirements of the definition. [A 1 at 20.]

Appellants contend that Duke cannot possibly be a "regulated electric company" under state law because Duke's counsel suggested in oral argument that some of the PSC's regulatory powers over "electric utilities" set forth in Chapter 366, Florida Statutes, may not apply to Duke due to federal preemption or practical considerations. This argument is wrong because nothing in the definition of "electric utility" in section 366.02(2) requires an entity to be subject to <u>all</u> of the PSC's regulatory powers in order to fall within the definition. Moreover, the PSC does not lack jurisdiction over an "electric utility" just because federal law or practical considerations render certain aspects of the PSC's total jurisdictional authority inapplicable. The PSC correctly found that Duke is a "regulated electric compan[y]" under Florida law, and its decision should be affirmed.

B. <u>Duke Is A Proper Applicant Because It And The City Are A Joint Operating Agency</u>.

In addition to finding that Duke was a proper applicant in its own right because it is a "regulated electric company," the PSC ruled that Duke and the City qualified as "applicants" for a determination of need for the additional reason that they are joint participants in an electric power supply project. As such, the PSC determined that Duke and the City constitute a "joint operating agency," which is one of the entities expressly entitled to apply

for a determination of need under section 403.519.[10] Although the phrase "joint operating agency" is not defined in the Siting Act, the PSC properly interpreted the phrase in accordance with its plain meaning and by reference to the provisions of the Joint Power Act, Chapter 361, Part II, Florida Statutes. The PSC's reference to the Joint Power Act was reasonable because it is the fundamental law in Florida governing the joint financing, construction, management, operation, and ownership of power supply projects by domestic and foreign utilities. The PSC's construction complies with the basic rule of statutory construction that a statute should be construed to give practical meaning to each of its terms. See State v. Zimmerman, 370 So. 2d 1179 (Fla. 4th DCA 1979). The PSC carefully evaluated the structure, ownership, and operation of the Project, and determined that it is a "joint electric power supply project" under the Joint Power Act. § 361.11(4), Fla. Stat. (1997). [A 1 at 22.] The PSC then concluded that Duke and the City are a "joint operating agency" entitled to apply for a determination of need. The PSC's interpretation of the statutes is within the PSC's authority; reasonble; not clearly erroneous;

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[10] The definition of "applicant" under the Siting Act, section 403.503(4), Florida Statutes (1997), is "any electric utility which applies for certification pursuant to the provisions of this act." An "electric utility," in turn, is "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)(emphasis added).

supported by competent, substantial evidence; and should be affirmed.

The PSC recognized that section 361.12, Florida Statutes, allows an "electric utility" to join with a "foreign public utility" for the purpose of "jointly financing, constructing, managing, operating, or owning any project or projects." § 361.12, Fla. Stat. (1997). The PSC determined, and no party disputed, that the City clearly fell within the definition of an "electric utility" under section 361.11(2), Florida Statutes.[11] The PSC determined that Duke is a "foreign public utility" under section 361.11(4), Florida Statutes,[12] through its affiliate, Duke Bridgeport Energy, L.L.C., which owns and operates the Bridgeport Energy Project, a 520 megawatt gas-fired, combined cycle power plant located and currently operating in Bridgeport, Connecticut and selling electricity at wholesale. [A 1 at 23.] Accordingly,

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[11] "'Electric utility' means any municipality, authority, commission, or other public body, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electrical energy generation, transmission, or distribution system within the state on June 25, 1975." § 361.11(2), Fla. Stat. (1997)(emphasis added).

[12] "'Foreign public utility' means any person, as defined in subsection (3) [including business entities], the principal location or principal place of business of which is not located within this state, which owns, maintains, or operates facilities for the generation, transmission, or distribution of electrical energy and which supplies electricity to retail or wholesale customers, or both, on a continuous, reliable, and dependable basis; or any affiliate or subsidiary of such person, the business of which is limited to the generation or transmission, or both, of electrical energy and activities reasonably incidental thereto." § 361.11(4), Fla. Stat. (1997)(emphasis added).

Duke is a "foreign public utility" because it is an affiliate of Duke Bridgeport Energy, L.L.C. -- a person the principal place of which is not located within the State of Florida, which currently owns, maintains and operates facilities for the generation of electrical energy and which supplies electricity to wholesale customers on a continuous, reliable and dependable basis.

Finally, the PSC found that the Project is a "project" under section 361.11(1), Florida Statutes (1997).[13] Thus, the PSC found that the City, an "electric utility," has exercised its authority under section 361.12, Florida Statutes (1997), to join with Duke, a "foreign public utility," to jointly finance and acquire a "project," constituting a "joint operating agency" entitled to apply for a determination of need. The PSC's interpretation of the pertinent statutory provisions is true to the language of the statutes and the spirit of the regulatory scheme as a whole, within the PSC's authority and not clearly erroneous; and supported by competent, substantial evidence; and should be affirmed.

Appellants argue that the Legislature could not have intended for the joint Duke/City Project to constitute a joint operating agency qualified for a determination of need because the

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[13] "'Project' means 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." § 361.11(1), Fla. Stat. (1997).

Siting Act pre-dated the Joint Power Act. But any such rule of statutory construction could lead to absurd results and impose upon the Florida Legislature impossible requirements of prescience. To avoid these results, Florida courts have long held that a grant of regulatory authority necessarily encompasses new and different members of the regulated class. See Taylor v. Roberts, 84 Fla. 654, 94 So. 874 (1922); State v. City of Jacksonville, 50 So. 2d 532, 536 (Fla. 1951). The PSC properly interpreted its regulatory authority as extending to a joint arrangement such as that between Duke and the City.

C. The Siting Act Is Not Limited To Retail Electric Utilities.

As previously described, the analysis of whether an entity is a proper "applicant" under the Siting Act requires a two-prong analysis. The second prong involves a determination of whether the entity is "engaged in, or authorized to engage in, the business of generating, transmitting, or distributing electric energy." § 403.503(13), Fla. Stat. (1997) (emphasis added). The PSC appropriately determined that to satisfy the second prong of the test, an entity has to be engaged in, or authorized to engage in, at least one of the three qualifying functions - generation, transmission or distribution. In reaching this conclusion, the PSC again correctly looked to the plain language of the statute and found that the word "or" was a "disjunctive article indicating an alternative." [A 1 at 17] (quoting TEDC/Shell City, Inc. v.

Robbins, 690 So. 2d 1323, 1325 n.4 (Fla. 3d DCA 1997)). Because Duke is authorized to engage in generation, the PSC found that Duke complies with the functional requirement of the definition of "applicant." [A 1 at 17.]

Appellants argue that the Siting Act is limited to retail distribution electric utilities, although no such limitation is expressed in the statute. This argument ignores the disjunctive article used in the definition of "electric utility" in section 403.503(13), and is also inconsistent with the purpose of the Siting Act. Under Appellants' narrow interpretation, the Siting Act would protect the public interest only when generating facilities that will sell electricity at retail are constructed. This is not what the statute says, nor is it what the Legislature could possibly have intended.

The Florida Legislature has delegated to the PSC under section 403.519 the important responsibility of regulating electrical power plant construction. The definitions of "applicant" and "electric utility" under the Siting Act are broadly worded to enable the PSC to effect the purpose of the need determination process and to ensure that the public will not be fiscally harmed by the construction of new generating capacity. See In re: IMC, 86 F.P.S.C. 6:279. Indeed, the PSC's authority over the need determination process is so broad that it is permitted to initiate such proceeding sua sponte if it so chooses. § 403.519, Fla. Stat. (1997) ("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 . . . . "). The PSC reasoned that it was entirely "logical" that the Legislature, by broadly defining "applicant" and "electric utility," intended to address the broader spectrum of power producers in order to fully effectuate the purposes of the Siting Act. [A 1 at 21.] Appellants' restrictive construction of the Siting Act and the associated need determination provisions would dangerously limit the role of the PSC in protecting the public interest under the Siting Act and section 403.519.

Although certification under the Siting Act is expressly made available to any "applicant," Appellants also ask the Court to restrict "applicant" status to "utilities" as defined in a separate statute, section 366.82, Florida Statutes, part of the Florida Energy Efficiency and Conservation Act ("FEECA"). Appellants impose far too restrictive an interpretation on the Siting Act. Appellants would have the Court ignore the definition of "electric utility" that the Legislature chose to use in the Siting Act while at the same time injecting into the Siting Act qualifiers from FEECA that the Legislature did not include in the Siting Act. Despite advancing these arguments, FPC and FPL both admit that "applicant" under the Siting Act is not synonymous with, and is broader than, "utility" under FEECA.[14]

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[14] FPC In. Br. at 42 ("The definition of 'utility' in FEECA was made more limited than the definition of 'applicant' in the

FEECA defines a "utility" to include only those entities that provide electricity or natural gas at retail to the public. See § 366.82(1), Fla. Stat. (1997). Although section 366.82 references section 403.519, the word "utility" is nowhere to be found in section 403.519. Instead, section 403.519 contains the word "applicant," expressly defined in section 403.503 as "any electric utility which applies for certification" pursuant to the Siting Act. § 405.503(4), Fla. Stat. (1997). Section 403.503(13), in turn, defines an "electric utility" as any of seven categories of entities or combinations of entities engaged in or authorized to engage in generating, transmitting, or distributing electric energy. Appellants' attempt to inject the FEECA definition of "utility" into the Siting Act not only contradicts the plain language of the Siting Act, but also violates established principles of statutory construction.

Appellants correctly note that section 403.519 at one time included the word "utility" rather than "applicant." In 1990, however, the Legislature amended section 403.519 by replacing the term "utility" with "applicant." See Ch. 90-331, § 24 at 2698, Laws of Fla. It is well established that "[w]hen the legislature amends a statute by omitting words, the general rule of construction is to presume that the legislature intended the

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Siting Act . . . ."); FPL In. Br. at 41 n.46 (acknowledging that certain small municipal electric utilities not subject to FEECA can obtain need determinations under the Siting Act because the latter uses “applicant” instead of “utility.”)

statute to have a different meaning than that accorded it before the amendment." Aetna Cas. & Sur. Co. v. Buck, 594 So. 2d 280, 283 (Fla. 1992) (citing Capella v. City of Gainesville, 377 So. 2d 658 (Fla. 1979)). Applying this rule, it is evident that the Legislature did not intend that the definition of "utility" in section 366.82 would apply to need determinations under section 403.519 after the effective date of the 1990 amendments. Nonetheless, Appellants in effect urged the PSC, and now urge this Court, to ignore the statutory amendment. The PSC correctly refused to do so, and this Court should affirm that decision.

In rejecting Appellants' argument that the definition of "utility" in FEECA should be applied to need determinations, the PSC aptly recognized that the argument "utterly disregards the law relative to entities required to file need determinations under the [Siting Act]" and PSC decisions correctly applying that law. [A 1 at 18.] Specifically, the PSC noted that small electric municipalities with sales of less than 2,000 gigawatt hours are not within the definition of "utility" in FEECA, see § 366.82, Fla. Stat. (1997), yet the PSC has recognized that such municipalities are proper applicants under section 403.519 and has determined need for their electric generating facilities.[15] Moreover, the PSC also

[15] See In re: Petition to determine need for Cane Island Power Park Unit 3 and related facility in Osceola County by Kissimmee Utility Authority and Florida Municipal Power Agency, 98 F.P.S.C. 10:56, Docket No. 980802-EM, Order No. PSC-98-1301-FOF-EM (Oct. 7, 1998); In re: Petition to determine need for proposed electrical power plant in St. Marks, Wakulla County, by City of

recognized that it previously granted a need determination for a non-retail electric company, Seminole Electric Cooperative, Incorporated ("Seminole"). See In re: Petition for determination of need for proposed electrical power plant to be located in Hardee and Polk Counties by Seminole Electric Cooperative, Incorporated, 94 F.P.S.C. 6:347, Docket No. 931212-EC, Order No. PSC-94-0761-FOF-EC (June 21, 1994). Seminole is the wholesale electricity generation and transmission supplier for eleven of Florida's retail rural electric cooperatives. Seminole does not engage in retail distribution, and thus, does not provide electricity at retail to the public. See id. The PSC has found that Seminole is, nevertheless, a proper "applicant" under the Siting Act and section 403.519.

The fact that the Project has a merchant plant component (i.e., a portion of the Project's power is not previously committed to any one purchaser) does not, as Appellants argue, take it out of Florida's existing regulatory framework or outside the PSC's regulatory jurisdiction. The Legislature is not required to foresee each and every future form of a regulated entity and

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Tallahassee, 97 F.P.S.C. 6:115, Docket No. 961512-EM, Order No. PSC-97-0659-FOF-EM (June 9, 1997). At the time that the PSC issued its Order, it noted that a petition for determination of need filed by the City of Lakeland -- also exempt from FEECA -- was pending before it. [A 1 at 19]. Since the issuance of the Order, that petition for need determination has been granted. See In re: Petition by City of Lakeland for determination of need for McIntosh Unit 5 and proposed conversion from simple to combined cycle, 99 F.P.S.C. 5:103, Docket No. 990023-EM, Order No. PSC-99-0931-FOF-EM (May 10, 1999).

expressly include it in a statute in order for it to be within the regulatory scope of the statute. Indeed, if that were the law, it would require only a little lawyerly creativity to change a project enough to take it completely out of regulatory reach. To avoid that kind of result, Florida courts have long held that a grant of regulatory authority necessarily encompasses new and different members of the regulated class. In Taylor v. Roberts, 84 Fla. 654, 94 So. 874 (1922), this Court applied that very principle to hold that municipal authority to regulate horse-drawn carriages necessarily encompassed the authority to regulate motor-driven automobiles, the latter constituting merely a "new and different kind" of regulated object:

> [Jacksonville city ordinance of 1887 provided] that the city council shall have power to pass ordinances 'to license, tax, and regulate hackney carriages, carts, omnibuses, wagons and drays,' the purpose of which was to vest in the city council the control over these vehicles in their use of the streets. Automobiles at that time were not in use, but the purpose of this provision was to vest in the city council full power to regulate all the then known classes of vehicles using the streets, and the subsequent use of the streets by a new and different kind of vehicle warrants the extension of this power to the control of the automobile by the city council. From the power to regulate all the known classes of vehicles at the time of the enactment of [the ordinance] . . . flows the implied power to regulate other classes of vehicles that come into general use in after years.

Taylor, 94 So. at 876. Some thirty years after applying this principle to the advent of motor-driven vehicles, this Court applied it again to the advent of television broadcasting in a regulatory climate created for radio broadcasting:

> [W]here the statute to be construed is couched in broad, general and comprehensive terms and is prospective in nature, it may be held to apply to new situations, cases, conditions, things, subjects, methods, persons or entities coming into existence since the enactment of the statute; provided they are in the same general class as those treated in the statute, can be reasonably said to come within the general purview, scope, purpose and policy of the statute, and there is nothing in the statute indicating an intention that they should not be brought within its terms.

State v. City of Jacksonville, 50 So.2d 532, 536 (Fla. 1951). These cases illustrate that where regulatory authority is created, and particularly where it is as broad as the authority granted to the PSC to regulate utilities in Florida, the regulatory authority properly extends to new members of the regulated class without regard to whether they are specifically mentioned in the original legislation. The merchant plant portion of the Project does not disqualify it from the need determination process, nor does it except it from PSC regulation under existing statutes. The PSC properly exercised its regulatory authority over the petition for the determination of need, and its decision should be affirmed.

A reasonable and correct interpretation of the Siting Act that takes into account federal law regarding EWGs regulated as "public utilities" under the Federal Power Act, as applied by the PSC below, protects the public interest with respect to new electrical generating facilities in the state. However, if the PSC were to narrowly construe the Siting Act to exclude EWGs regulated as "public utilities" under federal law, new electric generating facilities constructed by EWGs in Florida could fall outside of the

Siting Act and the PSC's general regulatory oversight. This would substantially diminish the PSC's role to protect the public interest with respect to power plants constructed in Florida. Notably, it could possibly lead to the unregulated proliferation of power plant construction against which FPL itself warns in its Initial Brief. The PSC's interpretation of the statutes it is charged with implementing was appropriate and should be affirmed.

D. The *Nassau* Decisions Do Not Apply.

Appellants attempt to buttress their restrictive and self-serving interpretation of "applicant" by relying on prior decisions of the PSC and this Court in Nassau Power Corp. v. Deason, 601 So. 2d 1175 (Fla. 1992)("Nassau I"); Nassau Power Corp. v. Beard, 641 So. 2d 396 (Fla. 1994)("Nassau II"); and the PSC order appealed in Nassau II - In Re: Petition of Nassau Power Corporation to determine need for electrical power plant (Okeechobee County Cogeneration Facility), Docket Nos. 920769-EQ, 920761-EQ, 920762-EQ, 920783-EQ, Order No. PSC-92-1210-FOF-EQ (Oct. 26, 1992)(the Nassau Order)(collectively, the "Nassau decisions"). Appellants' reliance on the Nassau decisions is misplaced.

The Nassau decisions are inapplicable for the simple reason that their facts and the law applied by the PSC and the Court are materially different from the facts and law of this case. The Nassau decisions involved non-utility cogenerators that were to

be Qualifying Facilities ("QFs"),[16] governed by a unique body of federal law known as the Public Utility Regulatory Policies Act, 16 U.S.C. §§ 2601-2645 ("PURPA"); and a corresponding Florida statute governing cogeneration, section 366.051. The Nassau decisions, therefore, do not control this case. See Lubell v. Roman Spa, Inc., 362 So. 2d 922, 922 (Fla. 1978) (error for case based on materially different facts to serve as precedent).

Under PURPA, QFs have the legal right to force retail-serving utilities to purchase their electricity output at prices not exceeding the purchasing utility's full avoided costs. Section 366.051 was enacted in accordance with PURPA and requires that a Florida electric utility shall purchase electricity offered by QFs whose cogeneration facilities are located in the utility's service areas. See § 366.051, Fla. Stat. (1997).[17] QFs sell their electricity output to purchasing utilities pursuant to long-term contracts. Upon approval by the PSC, the costs of these power purchase contracts incurred by the purchasing utility are passed on to the utility's captive ratepayers. The same is not true of

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[16] QFs are small power producers or cogenerators that meet the threshold efficiency, operating and ownership standards set forth by FERC pursuant to the Public Utility Regulatory Policies Act, 16 U.S.C. §§ 2601-645. See 18 C.F.R. §§ 292.201-.211 (1991).

[17] The PSC's implementation of section 366.051 is codified at Florida Administrative Code Rules 25-17.080 through 25-17.091. These rules provide that a utility can purchase QF energy and capacity either (1) by means of a "standard offer contract" that is part of the utility's tariff on file with the PSC, or (2) through a negotiated power purchase agreement. See Fla. Admin. Code R. 25-17.082, 25-17.0832.

merchant plants like the Duke Project that are not QFs and, thus, have no right to force a utility to purchase any of the plant output. The QFs in the Nassau decisions were seeking to unilaterally bind retail electric utilities and their captive ratepayers to the costs of long-term power purchase agreements under the authority of section 366.051, Florida Statutes.

Before 1990, the aggregate amount of cogenerated power that Florida utilities were required to purchase (i.e., the subscription limit) and the price to be paid for such cogenerated electricity (i.e., avoided costs) were calculated by the PSC on a state-wide, and not a utility-specific, basis. Similarly, prior to 1990, in evaluating the need for a cogeneration facility under the Siting Act, the PSC presumed the need for such facility provided that there was a need for the cogenerated power on a state-wide basis. See In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities, 89 F.P.S.C. 12:295, 319, Docket No. 890004-EU, Order No. 22341 (Dec. 26, 1989). This presumption, however, coupled with the requirement in section 366.051 that the electric utility in the area where the cogenerator is located "shall purchase all electricity offered for sale by such cogenerator," created a dilemma: an electric utility could be required to purchase cogenerated power that it did not need simply because a QF chose to locate its facility in the electric utility's service territory. To rectify this problem, the PSC changed its prior policy presuming

need for cogenerated electricity to require that "to the extent ... a QF is selling its capacity to an electric utility pursuant to [one of the two forms of QF contracts], that capacity ... must be evaluated from the purchasing utility's perspective in the need determination ... ." See id. The PSC clearly made this shift in policy in response to heavy-handed efforts by QF cogenerators to use PURPA mandates to force utilities and their ratepayers to purchase and pay for electricity that the purchasing utility did not need.

In Nassau I, Nassau Power Corporation ("Nassau") took issue with this shift in cogeneration policy that required QF capacity to be evaluated based on an individual utility's need. Nassau, however, failed to timely appeal Order No. 22341 in which the PSC announced its new policy of evaluating need for cogeneration capacity. Instead, Nassau appealed a later PSC order finding that Nassau's standard offer contract with FPL[18] fell within the PSC's subscription limit for cogenerated power based on a state-wide need, but that the standard offer contract would have to be evaluated based on FPL's specific need in the separate need determination proceedings for Nassau's proposed 435 megawatt

[18] A standard offer contract is an agreement between a utility and a "small" QF (less than 75 megawatts) for the purchase of firm energy and capacity. See Fla. Admin. Code R. 25-17.0832(3)(a). Each utility is required to submit to the PSC a standard offer contract to be included as part of the utility's tariff. See Fla. Admin. Code R. 25-17.0832(3). Standard offer contracts may be accepted by a small QF in lieu of a separately negotiated contract. See Fla. Admin. Code R. 25-17.0832(3)(c).

cogeneration facility. See In re: Planning Hearings on Load Forecasts Generation Expansion Plans and Cogeneration Pricing for Peninsular Florida's Electric Utilities, 90 F.P.S.C. 11:286, Docket No. 900004-EU, Order No. 23792 (Nov. 21, 1990) ("Contracts within the 'queue' must still be evaluated against individual utility need at a need determination proceeding.").[19]

The Court phrased the issue in Nassau I as follows: "At issue is the relationship, if any, between the requirements of the Siting Act and the requirements of the PSC's regulations governing small power producers and cogenerators." Nassau I, 601 So. 2d at 1176. The Court noted that "[u]nder the cogeneration regulations, Florida utilities are required to purchase cogenerated power based on the utilities' 'avoided costs' -- that is, the costs that the utilities would incur to produce the same amount of electricity if they did not instead purchase the cogenerated power from a qualifying facility." Nassau I, 601 So. 2d at 1177 (citations omitted). Thus, the Court recognized that "[p]resuming need under the Siting Act by way of the cogeneration regulations ... presented the awkward possibility that individual utilities would be required to purchase electricity that neither they nor their customers actually needed." Id. The Court upheld the PSC's policy not to

[19] Nassau I also involved Nassau's appeal of the PSC's order denying its Motion for Reconsideration. See In Re: Planning Hearings on Load Forecasts Generation Expansion Plans, and Cogeneration Prices for Florida's Electric Utilities, 91 F.P.S.C. 6:368, Docket No. 910004-EU, Order No. 24672 (June 17, 1991).

presume need for cogenerated power without a demonstration of specific need by the utility that will be purchasing the power, noting that the PSC's policy was firmly in place when Nassau signed its standard offer contract with FPL. See id. at 1179.

Nassau II reflects that Nassau, a QF under PURPA, filed simultaneously with the PSC a need determination petition and a contract approval petition. In its petitions, Nassau requested that the PSC determine need for a proposed cogeneration facility and contractually require FPL to purchase power generated from that facility even though FPL had already contracted to purchase the needed power from another entity.[20] The PSC and the Court recognized that Nassau sought to use the need determination proceeding, coupled with the cogeneration authority of PURPA and section 366.051, to force FPL and its ratepayers to pay for the cost of power that Nassau proposed to sell to FPL. The PSC dismissed Nassau's need determination application, finding that Nassau was not a proper "applicant" under the Siting Act because it was not an electric utility[21] and it did not have a contract with an electric utility. See Nassau II, 641 So. 2d at 398. The Court

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[20] The Nassau Order also addressed a petition for determination of need filed by Ark Energy, Inc. ("Ark") in which Ark requested that the PSC require FPL to enter into a contract with Ark. [A 1 at 27] (citing Ark's petition in Docket No. 920762-EQ). Ark, however, did not appeal the Nassau Order. Thus, Ark's petition for determination of need was not at issue in Nassau II.

[21] Unlike EWGs, QFs are not public utilities subject to FERC's rate regulation under the Federal Power Act. 18 C.F.R. § 292.601.

affirmed the PSC's dismissal. See Nassau II, 641 So. 2d at 399. As in Nassau I, the PSC ruling was clearly precipitated by aggressive attempts by QFs to use the need determination process for the anomalous purpose of requiring a utility to buy congenerated power that in fact it did not need.

Appellants urge this Court to apply the Nassau decisions to find that Duke is not one of the seven enumerated entities in section 403.503(13) that can be an "applicant" for a need determination under section 403.503(4). Appellants' arguments, however, overlook the profound factual and legal distinctions between the Nassau decisions and this case. Unlike the Nassau decisions, this case does not involve PURPA mandates and the relationship between the Siting Act and the PSC's regulations and policies governing cogeneration and small power production. Instead, this case involves an electric utility, subject to Florida's regulation and FERC rate regulation, that seeks to construct a generating facility to sell power in the competitive wholesale power market. Unlike the Nassau decisions, Duke is neither a QF nor a cogenerator, and has no legal right to require Florida utilities and their ratepayers to purchase and pay for power from the Project. Indeed, Duke is assuming all economic risks of the Project and is not requesting that other Florida utilities and their ratepayers bear any of those risks. Unlike the Nassau decisions, Duke has a power purchase agreement with the City. Try as they might, Appellants cannot avoid the reality that

Duke is neither a QF nor a cogenerator and is not using PURPA to force any Florida utility to purchase the power from the Project. Moreover, the Nassau decisions did not address the issue of how to construe "regulated electric company" or "joint operating agency" for purposes of determining who may apply under the Siting Act. These are material distinctions of fact and law that render the Nassau decisions inapposite.

Further, notwithstanding the clearly apparent factual distinctions between the Nassau decisions and this case, Appellants urge the Court to apply Nassau II and the Nassau Order to find that Duke is not an "applicant" under the Siting Act because it does not have a duty to serve customers. In Nassau II the Court noted that the PSC had reasoned below that Nassau could not have a need to be evaluated as an "applicant" under the Siting Act because it did not have a duty to serve any customers. Nassau II, 641 So. 2d at 398. Appellants take the "duty to serve" language out of context. The "duty to serve" language in Nassau II and the Nassau Order was a product of the unique facts presented there, which do not exist here. There, non-utility cogenerators were using the need determination process in tandem with a contract approval petition to force FPL to buy power from a proposed cogeneration facility, even though FPL had already entered into a contract to purchase the power that it needed from another source. Under Nassau II and the Nassau Order, the non-utility cogenerators would not have had a customer for their power unless the PSC were to force FPL to

purchase power from the non-utility cogenerators, the cost of which would be borne by FPL's ratepayers. Recognizing the unique facts presented to it, the PSC stated in the Nassau Order: "It is . . . 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." Nassau Order at 646-47.

Appellants neglect to mention the PSC's express limitation of the Nassau Order to its facts -- facts not presented here. Duke is not a non-utility cogenerator asking the PSC to require an electric utility to purchase its power on the basis of that utility's own need and pass the associated costs on to the utility's ratepayers. Duke is a utility -- a public utility under federal law and an electric utility under Florida law -- that seeks to construct an electrical generating facility to provide much needed power to the City, and on a state-wide basis in the existing competitive wholesale power market. Moreover, neither Florida's ratepayers nor the public in general will be required to bear any of the Project costs. Instead, Duke will assume all economic risk associated with the Project. Accordingly, this Court should not

apply Nassau II to require Duke to have a "duty to serve customers" in order to be a proper "applicant" under the Siting Act.

However, assuming for sake of argument that an "applicant" under the Siting Act must have a duty to serve customers, Duke nonetheless qualifies as a proper "applicant" under the Siting Act. Unlike Nassau and Ark, Duke currently has a duty to serve a customer -- the City. [See A 3.] In addition, Duke will have a duty to serve additional customers in the future when it negotiates agreements for the sale of power produced by the Project on Florida's competitive wholesale power market. Further, Florida's existing regulatory design also imposes on Duke a duty to serve customers as required by the PSC in order to maintain a coordinated electric grid in Florida that assures an adequate and reliable source of energy for operational and emergency purposes. See § 366.04(2),(5), Fla. Stat. (1997); § 366.055, Fla. Stat. (1997); § 366.05(7), (8), Fla. Stat. (Supp. 1998).

The PSC correctly concluded that "[t]his is a case of first impression arising on facts clearly distinguishable from the cogeneration precedent. As such, we are not overruling prior precedent with respect to need determination proceedings involving a QF." [A 1 at 28.] The Court, likewise, should refuse to apply the Nassau decisions in deciding this case. Instead, the Court should decide this case on its own facts and the relevant, applicable law, under which the Order should be affirmed.

E. The Order Reconfirms The PSC's Regulation Of Electric Utilities; It Does Not Commence Deregulation.

Contrary to Appellants' transparent "the sky is falling" scare tactics that the Order would deregulate the electric power industry in Florida, the Order clearly adheres to Florida's regulatory laws and public policy and does not deregulate. The Order does not authorize Duke to engage in the retail sale of electricity in Florida. [A 1 at 39.] The Order does not eliminate retail-service territory boundaries approved by the PSC. Likewise, the Order does not empower Duke to invade the franchise service areas of retail-serving utilities like Appellants to take away customers. [A 1 at 39.] The Order does not create a “right” to build merchant power plants in Florida. [A 1 at 44-45.] The Order is entirely consistent with Florida law prohibiting competition for retail customers among electric utilities.

The Order determines a need for the Project to generate electricity in the wholesale market, a market that without dispute is already competitive in Florida. The PSC heard extensive testimony confirming the existence of wholesale competition in Florida today, including the following from the former chairperson of the FERC:

> Indeed, there is already some wholesale competition in Florida among vertically integrated public utilities and municipal utilities, wholesale public utilities, and QFs ("Qualified Facilities" established pursuant to PURPA) that have extra capacity to sell as various times.

> . . . In summary, merchant plants can and do exist in current wholesale markets, completely independent of the existence or non-existence of retail competition.

[Tr. 7-972-74.]

FPC's own witness admitted that the wholesale electric market in Florida is competitive:

> Q. Does Florida Power Corporation plan for competition in the wholesale market?
>
> A. Yes. Yes. Florida Power does assume that competition exists in the wholesale market.

[Tr. 10-1325.]

This testimony clearly reflects that federal law specifically encourages competition in wholesale electric generation markets. The PSC was thoroughly apprised of the important implications of this body of federal law in legal briefs, testimony and other evidence presented below. [E.g., R 3-454, 5-804, R 10-1954, R 12-2315.] Suffice it to say here that the Energy Policy Act of 1992[22] and FERC's Order 888[23] are designed to specifically encourage the development of a competitive wholesale power market. This body of law requires public utilities that own

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[22] Public Law 102-486, 106 at 2776, 2905-21 (1992).

[23] 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).

transmission facilities to provide to other wholesale generators of electricity access to those facilities on a non-discriminatory basis. This requirement is designed to prevent vertically integrated public utilities (utilities that own generation, transmission and distribution assets, and that therefore have incentives to favor their own generation) from interfering with the development of a vigorous competitive wholesale power market. Under Appellants' restrictive view of section 403.519 and the Siting Act, only presently operating retail-serving utilities, or other generators that agree to enter into a contract with a retail-serving utility, would be capable of competing in the wholesale generation market in Florida. Under that narrow construction, if Florida's retail utilities do not agree to sign a contract for the purchase of power from wholesale utility generators like Duke, then those retail-serving utilities retain the power to act as gatekeepers and prevent such wholesale utilities from building generating facilities at all. That narrow construction creates the very interference with the development of a competitive wholesale power market that the Energy Policy Act and Order 888 were designed to prevent. If the Court adopted Appellants' arguments, it would construe section 403.519 to bar the development of a competitive wholesale energy market in Florida. This would contravene fundamental objectives of the Energy Policy Act and Order 888 and invite federal preemption, the very danger the Legislature has

sought to prevent in section 366.83.[24] The Legislature has given the PSC both the authority and the responsibility to regulate in the public interest. See Storey v. Mayo, 217 So. 2d 304, 307 (Fla. 1968), cert. denied, 395 U.S. 909 (1969). One of the PSC's important responsibilities is to evaluate the need for new electric power plants in Florida. Overwhelming evidence shows that Duke will build, at no cost to the public or to ratepayers, a highly efficient, environmentally clean electric generating facility that will sell low-cost power at extremely attractive rates to the City, and provide power at competitive wholesale rates to other retail-serving utilities in Florida. This evidence also shows that both the State and the City need this electric power to preserve system reliability and integrity, and to preserve already thin reserve margins.

Faced with these facts, the PSC would have acted against the public interest if it had barred the Project by embracing Appellants' strained and restrictive construction of the Siting Act and section 403.519. Appellants advance no legitimate reason why the public interest would be served by keeping the Project out of Florida, although of course Appellants stand to advance their private interests if they can block the Project and effectively re-monopolize the existing competitive wholesale electricity market in

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[24] Section 366.83 cautions that nothing in Section 366.80-366.83 or 403.519 shall "preempt federal law unless such preemption is expressly authorized by federal statute." § 366.83, Fla. Stat. (1997).

this State. The PSC, however, did not countenance Appellants' self-serving interpretations below, and the Court should not do so now.

II. THE PSC'S FINDING OF NEED IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE, IS CONSISTENT WITH GOVERNING LAW, AND SHOULD BE AFFIRMED.

Many of Appellants' arguments with respect to need arise from their position that Duke is not a proper applicant for a determination of need, and therefore have been addressed already in the previous section of this brief. Otherwise, Appellants argue that the PSC erred in determining need on a Peninsular Florida basis, that the evidence of need was insufficient, and that Duke's pleadings were technically deficient. The PSC reached and correctly rejected all of these arguments.

A. The PSC Properly Evaluated Need On A Peninsular Florida Basis.

The PSC properly rejected Appellants' arguments that it was required to assess the need for the Project's capacity in excess of that devoted to the City on a utility-specific basis rather than on a Peninsular Florida basis. In the first place, Appellants' attempts to interpret the Nassau decisions as requiring a utility-specific analysis in this case must fail for the reasons already explained above; i.e., in the Nassau decisions a cogenerator was attempting to force a sale of electricity to a utility under regulations that would require a pass-through to specifically identifiable captive retail ratepayers, which is not the case here. To the contrary, the very nature of the proposed

Project's excess capacity as a merchant plant establishes that no captive retail ratepayers will be at financial risk whatsoever. Instead, the PSC found that market forces will take their natural course to ensure lower prices to retail consumers, with any risk falling on Duke's owners.

In addition, the PSC's evaluation of need for the Project on a Peninsular Florida basis is consistent with the applicable statutory and regulatory provisions, prior PSC decisions, and the legislative history of the Siting Act. Section 403.519 does not require the PSC to examine a utility-specific need in all cases, nor does Florida Administrative Code Rule 25-22.081. In addition, the PSC recognized in its Order that it has not limited need determinations in the past to utility-specific need. [A 1 at 51.] See In re: Petition for Certification of Need for Orlando Utilities Commission, Curtis H. Stanton Energy Center Unit 1, and related Facilities., 81 F.P.S.C. 10:18, 20, Docket No. 810180-EU, Order No. 10320 (Oct. 2, 1981) ("the project will provide significant economic benefits for peninsular Florida ... .").

Contrary to Appellants' claims, the legislative history of the Siting Act also supports a broad interpretation of the concept of need, broader than the need of each individual utility.[25]

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[25] Although Duke believes it is necessary to respond to Appellants' assertions regarding the legislative history of the statutory provisions at issue, consideration of the legislative history is not appropriate because the Siting Act is clear and unambiguous. See Aetna Cas. & Sur. Co. v. Huntington Nat. Bank, 609 So. 2d 1315, 1317 (Fla. 1992) (it is a well-settled rule of

Legislative debate among Representative Spicola (the sponsor of the bill), Representative Andrews (the Chairman of the Subcommittee) and Mr. James Woodruff (a representative of TECO) focused on a broad consideration of need:

> 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 come--
>
> 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

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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).

> 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.

[R. 1783-85 (Fla. H.R. Comm. on Env. Pro., Subcomm. on Permits, tape recording of proceedings (March 27, 1973)(emphasis added).] Later, in the Subcommittee hearing, when asked again about whether there should be a geographical limitation on the area in which to determine need, one of the Subcommittee members stated: "The Southeastern United States is an area." [R 1814-15.] This legislative history indicates that the Florida Legislature considered "need" expansively, to include power generated in one area of Florida for consumption in other areas within the State. The concept of need in section 403.519 should not be restrictively interpreted to bar the PSC's consideration of an environmentally clean, highly efficient generating unit proposing to sell competitively priced electricity at wholesale with no risk to Florida's ratepayers.

Finally, Peninsular Florida need is also appropriate instead of utility-specific need because Duke seeks to enter

existing wholesale competition in Florida, not retail competition. The wholesale market for electricity in Florida is not tied to a particular geographic area or a particular set of captive retail ratepayers, and therefore it would make no sense to impose a utility-specific need requirement on this need determination. The PSC properly rejected this argument and found need on a Peninsular Florida basis.

B. The PSC's Findings Of Need Are Supported By Competent, Substantial Record Evidence.

The underlying policy of the PSC in deciding need determination petitions is "to protect electric utility ratepayers from unnecessary expenditures and ensure a safe reliable grid." [A 1 at 39.] The PSC considered all of the pertinent statutory criteria[26] and found that retail ratepayers will not be adversely affected by Duke's wholesale competition; and that the Project's uncommitted capacity is needed to make the City's portion cost-effective; and that the Project is needed for the sake of Peninsular Florida as a whole, to maintain the reliability and integrity that the PSC is required to ensure under the Grid Bill, and to maintain healthy wholesale competition, which will drive down retail prices. [A 1 at 40-49.] These findings of the PSC are

[26] Section 403.519, Florida Statutes (1997), requires the PSC to "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[; and] the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant..."

more than adequately supported by competent, substantial record evidence.

The record contains ample evidence that the City and Peninsular Florida need additional electric generating capacity to maintain system reliability and integrity, and that the Project can provide that capacity in a manner that promotes conservation and is cost-effective. [Tr. 3-393, 3-397-93; Exh. 16 to Vaden testimony; Tr. 4-581.] The evidence established that the City needs energy and capacity to replace electricity it is currently purchasing under contracts that will expire in the near term. Testimony shows that Duke can supply these needs from the proposed Project at a far more cost-effective price than is otherwise available to the City. [Tr. 3-389, 3-392, 3-411, 3-497-98; A 1 at 40, 42.] The record also shows that the total net present value of savings to the City is projected to be $39 million in comparison to the City's purchasing power from FPC and TECO. [Tr. 3-395-96, 3-451-52.] The PSC heard testimony that Peninsular Florida needs more than 8,000 megawatts over the next ten years just to maintain reserve margins that are already dangerously thin [Tr. 4-678], and that electric capacity generated by the proposed Project is needed to augment existing reserve margins and prevent loss of firm load in Peninsular Florida. [Tr. 3-393, 3-504, 4-672, 6-778; Exh. 7; A 1 at 41.] Testimony and other evidence adduced at the hearings below shows that by making new electric capacity available for wholesale sales to the City and to other retail-serving utilities, and pricing

those sales at competitive market-driven rates, Duke's entry into Florida will depress the price for wholesale electricity and create opportunities for lower cost retail electricity in Florida. [Tr. 5-727.] The record shows that the Project is cost-effective as compared to other proposed new generating capacity. [Tr. 3-398.] The Project is also a cost-effective power supply resource to other Peninsular Florida utilities and their captive ratepayers because other utilities will buy power from the Project only when it is cost-effective to do so. There is no requirement for other utilities to buy power from the Project. [Tr. 3-398, 4-589, 5-730; A 1 at 41-44.] The PSC also heard testimony regarding the conservation aspects of the Project, including evidence that the proposed Project is more efficient with respect to electricity production and natural gas use than other merchant power plants currently under construction in Florida. [Tr. 3-396, 6-826, 8-1152; A 1 at 49.]

In sum, the record reflects that the City and Peninsular Florida need additional electric generating capacity to maintain system reliability and integrity. The record also reflects that Duke can provide the needed capacity at a reasonable cost through a cost-effective and technically efficient Project with proven reliability and conservation qualities.

C. Duke's Pleadings Were Legally Sufficient.

Contrary to FPL's arguments that the Petition failed to satisfy the statutory pleading requirements, the PSC concluded that the Petition "alleges all of the required elements," that it "directly addresses the five criteria of Section 403.519," and that it "meets all applicable requirements of Rule 25-22.081, Florida Administrative Code." [A 1 at 15-16.] The record supports the PSC's determination. The Petition includes a description of both Duke and the City, including their load and electrical characteristics, their generating capability, and their interconnection; and further addresses the need of Peninsular Florida, the primary wholesale market in which Duke will operate. [A 2 at 4-7, 12, 17-18, 25, 28; R 1-87-90 (exhibits to Petition).] The Petition includes detailed load forecasts for the City; extensive information regarding the City's number of customers, peak demands and net energy load; and detailed information regarding the peak demands and reserve margins for Peninsular Florida. [A 2 at 12-14; R 1-87-90.] The Exhibits to the Petition discuss the critical operating conditions indicating the City's need for power generated by the Project, namely that the City relies extensively on purchased power and that all but one of its primary power purchase agreements are scheduled to expire between September 1999 and March 2000. [A 2 at 11; R 1-30.] The Exhibits to the Petition further describe forecasts of the load that Duke

expects to serve, and identifies the models upon which the load forecasts were based. [R 1-82-85, 1-90-94.]

In addition, the Petition and accompanying Exhibits set forth the real resource costs and benefits of the Project to the City and the specific benefits to Peninsular Florida in the form of enhanced reduced use of fuel oil and gas and reliability of the Florida electrical grid. [R 1-9-10, 12-14, 17-18, 87-91, 94-95.] Moreover, the Exhibits to the Petition describe the City's non-generating alternatives and discuss why it would be illogical to suggest that a wholesale power supplier, such as Duke, might have any non-generating alternative to producing power for sale. [R 1-23-24, 45.]

The record clearly supports the PSC's determination that the Petition satisfied the pleading requirements of Rule 25-22.081, and FPL has not demonstrated that the PSC departed from the essential requirements of law in making such determination. Accordingly, no pleadings issue exists to bar the Court's affirmance of the Order in all respects.

CONCLUSION

The PSC acted within its jurisdiction and authority by determining that Duke and the City are proper applicants under the Siting Act and that they demonstrated need for the Project. By operation of statute, the PSC's determination is presumed correct. The Order is not clearly erroneous or a departure from the

essential requirements of law, and is supported by competent, substantial evidence. Accordingly, the Order should be affirmed.

Respectfully submitted this 9th day of August, 1999.

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CERTIFICATE OF SERVICE AND OF FONT

I HEREBY CERTIFY that this brief is printed in 12 point Courier font, and that a true and accurate copy of the foregoing brief and the accompanying Appendix were furnished by United States mail to the following, this 9th day of August, 1999.

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