IN THE SUPREME COURT
STATE OF FLORIDA

TAMPA ELECTRIC COMPANY, Appellant, vs. FLORIDA PUBLIC SERVICE COMMISSION, Agency/Appellee.	)	CASE NO. 95,444

ANSWER BRIEF OF APPELLEE
FLORIDA PUBLIC SERVICE COMMISSION

ROBERT D. VANDIVER
General Counsel
Florida Bar No. 344052

RICHARD C. BELLAK
Associate General Counsel
Florida Bar No. 341851

FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
850-413-6092

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellee, Florida Public Service Commission is referred to as the Commission. Appellee, Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. is referred to as Duke, Duke New Smyrna or Duke EWG. The Utilities Commission, City of New Smyrna Beach, Florida is referred to as the City. Appellant, Tampa Electric Company is referred to as Tampa Electric.

References to the transcript of the hearing are designated Tr.___. References to the Record are designated R._____. References to the oral argument on January 28, 1999 are designated O.A. Tr._____.

Acronyms:

Epact - Energy Policy Act of 1992 (Public Law 102-486, 106 Sdat. 2776, 2905-21 (1992))

EWG - Exempt Wholesale Generator

FEECA - Florida Energy Efficiency and Conservation Act

FERC - Federal Energy Regulatory Commission

FRCC - Florida Reliability Coordinating Council

MW - Megawatt

MWH - Megawatt Hours

PPSA - Florida Electrical Power Plant Siting Act

PURPA - Public Utility Regulatory Policies Act of 1978 16 U.S.C. §§ 2601-2645

QF - Qualifying Facility

STATEMENT OF THE CASE AND FACTS

Appellee Florida Public Service Commission (Commission) rejects appellant Tampa Electric Company's (Tampa Electric) Statement of the Case and of the Facts, Initial Brief, p. 10-12, as incomplete and misleading. Though some of the sentences therein are accurate, the context is insufficient to relate those facts in a meaningful way to this case.

With two exceptions, the Commission also rejects Tampa Electric's preliminary conclusions and arguments found at p. 2, ¶2 through p. 10 of the Initial Brief. The Commission agrees with Tampa Electric's conclusion at p. 3 of the Initial Brief that the Court has jurisdiction over this case. Likewise, as noted at p. 7 of the Initial Brief, the opinion in Gulf Coast Electric Cooperative v. Johnson, 727 So. 2d 259 (Fla. 1999), articulates the standard of review of Commission orders. However, the remainder of Tampa Electric's preliminary arguments and conclusions are erroneous and will be responded to as argument.

The Commission's Statement of the Case and Facts is as follows:

In the challenged Order, the Commission granted a determination of need to joint petitioners Utilities Commission, City of New Smyrna Beach, Florida (City) and Duke Energy New Smyrna Beach Power Company, Ltd., L.L.P. (Duke). App. 1. In so doing, the Commission found that, on the basis of the extensive record and

applying the facts therein to the statutory criteria in Section 403.519, Florida Statutes, petitioners had demonstrated that their project was needed. App. 1, p. 35-54.

The Commission heard testimony from the Director of the City's Utilities Commission as to the City's need for the project. The City owns and operates power plants with a total capacity of 18.8 MW. (Tr. 389) However, the City's capacity needs are for 92 MW currently and expected to grow to 97 MW by 2003. (Tr. 392)

The City's current contracts with wholesale power suppliers Florida Power Corporation (FPC) and Tampa Electric are due to expire at the end of 1999. (Tr. 411) Because of the increasing need of those utilities to serve their own retail customers and/or the cost of their wholesale power, the City will either be unable to renew those contracts or uninterested in doing so. (Tr. 497-8) Under the City's Participation Agreement with Duke, the City has an entitlement to the energy associated with 30 MW of the Project's capacity for the technical and economic life of the project, at an agreed price substantially below the rates otherwise available to the City. The City calculates the net present value of the resulting savings at $39 million in comparison to obtaining its wholesale power from Tampa Electric or FPC. (Tr. 387; 396; 451-2)

The City also noted that reuse water from its new wastewater treatment plant would be used by the project, which will be fueled by domestically produced natural gas rather than imported fuel.

(Tr. 399; 404-5) Moreover, the immediate proximity of the project, with its remaining energy available for sale at wholesale on a merchant plant basis, will increase the City's reliability as well as that of Peninsular Florida. (Tr. 393-4; 397-8) The City, in sum, jointly petitioned for this need determination on the basis that the project is,

> a viable, clean, highly efficient, and cost-effective power project that will benefit the Utilities Commission of New Smyrna Beach, its retail electric customers, and other Peninsula Florida utilities and their retail customers, without any obligation to purchase the Project's output, without any obligation to pay for the Project's capital cost, and without financial, operating, or business risk to them.

(Tr. 401)

The Commission also heard testimony from the General Manager of the Florida Municipal Power Agency (FMPA) as to the need of its All Requirements Project (ARP) for an additional 80-100 MW of power and the prospective role of the Duke/City project in meeting that need. (Tr. 534-5; 540-1) The witness specifically expressed his support for a vigorous wholesale market, noting that,

> anything that puts a limitation on the potential suppliers to our wholesale power needs is not in the best interest of FMPA.

(Tr. 537)

A question from Commissioner Deason and the answer made in response demonstrate the timely importance of that point:

> Commissioner Deason: Mr. L'Engle, you indicated that the [Peninsular Florida] <u>reserve margins have declined</u> from what they historically had been, and I think you

> indicated that a reason ... is that there is the concern over the possibility of competition even at the retail level; is that correct?
>
> Witness L'Engle: I think that is one of the driving forces.
>
> Commissioner Deason: O.K. And with that threat, utilities are trying to reduce costs, and obviously the higher [the] reserve margin, the higher [the] overall cost; is that also correct?
>
> Witness L'Engle: Yes, sir. [e.s.]

(Tr. 559)

Testimony by the General Manager for Florida and Southeast of Duke's development affiliate expanded on that point:

> With its growing population, growing electric demand and peninsular geography, Florida needs additional generating capacity in the peninsula, and will benefit significantly from additional efficient cost-effective gas-fired power. This need is particularly evidenced by the shortages and interruptions (of interruptible and load management customers) during this summer's hot spell. [e.s.]

(Tr. 581)

> In addition to supplying 30 MW of capacity and approximately 250,000 MWH per year of cost-effective energy to the [City], we anticipate that the Project will provide approximately 476 MW (summer) and 548 MW (winter) of capacity, and between 3,700,000 MWH and 4,200,000 MWH per year of cost-effective electric energy, into the wholesale power market in Peninsular Florida.

(Tr. 584-5)

The testimony presented also addressed the nature of the wholesale electric market in Florida:

> Q. And you're aware, aren't you, that as we sit here today, that there is some competition in the wholesale market in the State of Florida?

A. A wholesale market exists today in Florida.

Q. And that some of that wholesale market is made up of the state's investor-owned utilities who are selling their excess capacity; isn't that correct?

A. That is correct.

. . .

Q. And isn't it your belief that if you had more players and more competition in the wholesale market that that would drive the price downward?

A. Absolutely. More players in a wholesale market will have a downward pressure on pricing. [e.s.]

(Tr. 596-7)

The Commission also heard testimony from the President of Altos Management Partners, Inc., a consulting firm whose services include short and long run models of North American gas, North American electricity, world and North American oil markets, a World Gas Trade program, a Western European gas program, a Southern Cone of South America Gas Model, a Southeast Australia Gas Model, an Electric Asset Operational Model, an asset valuation model, and a risk management and probabilistic analysis model. (Tr. 694) The consultant testified that there was a need for the project's 500 MW of electric generation capacity and energy in the Peninsular Florida market, that the need was immediate, that the natural gas combined cycle technology of the City/Duke project was the most cost effective option to provide it, that prices in the Florida market would be reduced by virtue of City/Duke's entry and that the energy would be sold in state. (Tr. 697)

The consultant noted that his model predicted

> few places in North America where the need for new gas [combined-cycle] generation is more acute and more immediate than in Peninsular Florida. Florida is growing and Florida electricity is expensive. New capacity such as the [City/Duke] project is needed to meet inevitable growth in the State, ameliorate the current and future market price, and provide economic benefits via reduced market prices to the State of Florida.

(Tr. 706; 713-714; 729-30).

The Commission also heard the testimony of a former Chairman of the Federal Energy Regulatory Commission [FERC] address the policy issues which this case presented. That testimony characterized the "merchant plant" aspect of the Project as consistent with,

> economic efficiency, with federal energy policy, and with the fundamental purposes of utility regulation, as well as with the current structure of the electric utility industry in the United States.
>
> . . .
>
> For the past twenty years, the vast majority of new generation in this country has been provided by non-traditional competitive sources. Indeed, passage of the Public Utility Regulatory Policies Act in 1978 effectively declared that <u>electric generation was no longer a natural monopoly</u>.
>
> . . .
>
> Pursuant to the Energy Policy Act of 1992, <u>competition in wholesale generation is one of the express goals of national energy policy, and it is thus effectively the law of the land</u>. [e.s.]

(Tr. 967; 971)

The witness noted that no special accommodations were required to allow FERC-regulated public utilities operating as merchant plants to operate in Florida. Wholesale competition in power supply markets can exist with or without retail competition and is, therefore, unrelated to the issues of deregulation, restructuring or retail competition:

> 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 at 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. 972-4)

The witness indicated that, at least since the passage of PURPA in 1978, Congress and the FERC have favored competition in the supply of bulk electricity. That objective was furthered by the Energy Policy Act of 1992, which created a new regulatory category of suppliers, "Exempt Wholesale Generators" (EWG). In Order No. 888, FERC also implemented Congress' policy of assuring access of all wholesale suppliers to transmission facilities.[1] In short, federal policy has, for the past 20 years, favored and encouraged competition in the wholesale generation and supply of electricity in the United States. Moreover, limiting or

[1] Both transmission and distribution retain the characteristics of natural monopolies. (Tr. 882-3)

restricting the participation of merchant plants in the Florida wholesale market, e.g., by requiring merchant plant developers to enter into contracts with existing retail utilities as a condition of building a power plant in Florida, would be inconsistent with and contrary to federal energy policy, as would excluding merchant plants completely. (Tr. 974-6)

The witness also characterized the argument that the "obligation to serve" retail customers vests control over access to the wholesale market in existing retail - serving utilities as a red herring:

> Utilities gave up this argument when they started buying and selling power between and among themselves: it makes no difference whether the seller of power is another utility that serves at retail and wholesale or a utility that sells at wholesale only. Consider, for example, the Tennessee Valley Authority, the Bonneville Power Administration, the Southeast Power Administration, generation and transmission cooperatives, wholesale joint power projects, and other entities that provide bulk power to retail-serving utilities in the present wholesale power markets. FERC-regulated public utilities operating merchant plants are fundamentally and functionally no different than these other, existing entities that provide bulk wholesale power to retail-serving utilities.

(Tr. 985)

> . . . the purchasing utility still has the obligation to serve. Not necessarily the obligation to generate. [e.s.]

(Tr. 998)

Finally, in support of the case demonstrating the ability of the project to meet the statutory need requirements of Section

403.519, witnesses were presented who spoke to reliability issues (Tr. 1097-8; 1111-14), the technological efficiency of the project and the resulting lower environmental impacts. (Tr. 1056-7) Petitioners' environmental expert described, beside the appropriateness of the plant from the standpoint of environmental licensing, environmental benefits that would result. First, most of the water to support the operation of the project will come from the city's adjacent wastewater treatment plant. That will not only reduce the amount of other water -- including ground water -- needed, but also reduce, if not eliminate, discharges of treated effluent that would otherwise come from the wastewater treatment plant. Moreover, the impact of the plant on air quality in the area will not only be very minimal, but to the extent the generation from this plant will displace some operation of dirtier less efficient plants, the air quality in the region and the state will be improved because of the project. (Tr. 1138-9)

STANDARD OF REVIEW

Commission orders come to this Court clothed with the statutory assumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made. Moreover, an agency's interpretation of a statute it is charged with enforcing is entitled to great deference. The party challenging an order of

the Commission bears the burden of overcoming those presumptions by showing a departure from the essential requirements of law. Gulf Coast Electric Cooperative v. Johnson, 727 So. 2d 259 (Fla. 1999).

This Court, in reviewing a Commission order will not reweigh or re-evaluate the evidence presented to the Commission, but should only examine the record to determine whether the order complained of complies with essential requirements of law and whether the agency had available competent, substantial evidence to support its findings. Bricker v. Deason, 655 So. 2d 1110, 1111 (Fla. 1995).

Response to Tampa Electric's Preliminary Arguments (Initial Brief, p. 2, ¶2 through p. 10).

As noted previously, the Commission agrees with appellant's assertion at p. 3 of the Initial Brief that the Court has jurisdiction and the standard of review cited at p. 7 of the Initial Brief, found in Gulf Coast Electric Cooperative v. Johnson, supra. The remaining preliminary arguments are, however, incorrect and should be rejected.

The orders and cases cited at p. 2-3 of the Initial Brief are not key or even relevant precedents to this case because the facts are inapposite. They embody Commission policy concerning need applications by QFs ["Qualified Facilities"] seeking need determinations based on requiring specific utilities to purchase their power.[2] Those orders announcing the policy concerning PURPA

[2] QFs, unlike EWGs, have the ability to require utilities to purchase their power pursuant to PURPA [Public Utility

QFs were issued either prior to the passage of the Energy Policy Act of 1992, or contemporaneously therewith, and never even considered, let alone encompassed, the different facts applicable to Exempt Wholesale Generators [EWG], a new regulatory category created by the 1992 Act. EWGs such as the City/Duke applicant in this case cannot require anyone to purchase their power, thus distinguishing this case from those relied on by appellant.

> Commissioner Clark: Tell me why those [Ark & Nassau] cases are inapposite....
>
> [City/Duke's attorney]: We are not trying to force any utility to buy the output of this project. We have no legal right, as QFs do, to force any entity to buy the output of this project. [e.s.]

(Tr. 112)

As noted similarly in the Commission's Order, the Ark and Nassau orders and opinions dealt with the "specter of a retail utility being required to purchase unneeded electricity". In this case, however, City/Duke "is not seeking to require retail utilities to purchase the proposed plant's merchant output". [e.s.] App. 1, p. 27-8. Though appellants would like to fashion a Procrustean bed from Ark and Nassau so they can then announce that the City/Duke project "doesn't fit", there is no basis on which to do so. As stated in the January 28, 1999 oral argument before the Commission,

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Regulatory Policies Act of 1978]. See, Section 366.051, Florida Statutes.

> The whole point is...there is not authority to tie this Commission's hands when it comes to deciding this [EWG-Siting Act] issue before you today. You write on a clean slate, because merchant plants are different from small generators who are seeking to impose a contract on a retail generator because of the effects of it on the ratepayer. [e.s.]

(O.A. Tr. 28) [R. 2155]

. . .

> What I would say to you is ... that the law of stare decisis or precedent is based on the actual issue decided; and hence, I reassert to you that you are, in fact, writing on a clean slate, and there's nothing in either of those Nassau decisions that ties your hands in any way.

(O.A. Tr. 76-7) [R. 2203-4]

Tampa Electric also seeks to leave the impression, on p. 2 of the Initial Brief, that the granting of a need determination in this case will "injure Tampa Electric's ability" to plan various aspects of meeting its service obligations and the needs of its customers. Though Tampa Electric presented no witness to support that claim, co-appellant Florida Power Corporation (FPC) did. However, cross-examination effectively vitiated that claim when considered along with the testimony already cited above, which indicated that retail-serving utilities would not be adversely affected in their planning. Under the standard of review, those facts cannot be reweighed:

> [I]t makes no difference whether the seller of power is another utility that serves at retail and wholesale or a utility that sells at wholesale only .... FERC-regulated public utilities operating merchant plants are fundamentally and functionally no different than these

> [five listed examples of] other, existing entities that provide bulk wholesale power to retail-serving utilities. [e.s.]

(Tr. 985)

The admissions of the FPC witness confirm that:

> Commissioner Garcia: ... but if there was a plant, 500 megawatts, that would have been available in Florida, on the market, would it have been bad for you--and when I say "you", your company, or your ratepayers, or the state reliability in some way?
>
> [FPC witness]: ...I think I was willing to concede that a generation resource in that kind of situation could be beneficial .... they would be a wholesale market participant, and we would most likely work with them like we would anybody else. [e.s.]

(Tr. 1352)

Moreover, FPC's witness admitted that the wholesale market in Florida was 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. [e.s.]

(Tr. 1325)

Again, that admission vitiates Tampa Electric's further claim that "uneconomic duplication" could result from City/Duke's entry into the Florida wholesale market. "Uneconomic duplication" results from duplication in "natural monopoly" markets, not in markets conceded to be "competitive". Competition in markets that are competitive, i.e., which are not "natural monopoly" markets, is

in fact, “duplication” which is “economic” and the Commission’s Order reflects that:

> ...the Project will be economic for other Florida retail customers [as well as for the City’s ratepayers] because Duke New Smyrna will operate the plant as a merchant plant. Merchant plants increase wholesale competition thereby in theory lowering wholesale electric prices from what they otherwise may be. [e.s.]

App. 1, p. 47.

That result, by definition, is economic, not uneconomic.

Finally as to appellant’s preliminary arguments, Tampa Electric notes on p. 10 of the Initial Brief that Section 120.68(7)(e)3, Florida Statutes, requires remand to the agency for further proceedings if an agency’s exercise of discretion is found by the reviewing court to be,

> 3. Inconsistent with the officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency... [e.s.]

Here, of course, the Commission has formulated its initial policy and practice with respect to Siting Act review of EWGs under the provisions of Section 403.519, and, therewith, its initial regulatory response to initiatives in the Energy Policy Act of 1992. There is, therefore, no official agency policy or prior agency practice on point to create any inconsistency. However, even assuming arguendo any inconsistency, the Commission believes that its 55 page Order, supported by a voluminous record, a hearing transcript of nearly 1700 pages and many hours of oral argument,

constitutes whatever explanation of deviation that Section 120.68(7)(e)3 may be deemed to require.

SUMMARY OF ARGUMENT

Tampa Electric Company's argument is, for all intents and purposes, limited to a single point. Tampa Electric asserts, incorrectly, that the Nassau holdings concerning cogeneration somehow preclude the Commission's initial regulatory siting action concerning what is, effectively, a mirror opposite of the facts of cogeneration, an Exempt Wholesale Generator (EWG). Tampa Electric's argument is meritless.

In McCaw Communications of Florida v. Clark, this Court stated that:

> the actions of administrative agencies are usually concerned with deciding issues according to a public interest that often changes with shifting circumstances and passage of time.

The Court warned against a too doctrinaire analogy between courts and administrative agencies and against

> inadvertently precluding agency-initiated action concerning the subject matter dealt with in an earlier order.

In this case, the subject matter, an EWG, was not even the subject matter of the Nassau orders. EWGs only came into existence after or contemporaneously with those orders. The first EWG applicant post-dated those orders by 6 years. Yet appellant would create a Procrustean bed from Nassau and attempt to force holdings only relevant to cogeneration on this entirely different set of facts, without regard to those different facts. That is not the law of Florida. McCaw Communications, supra.

The Nassau cases solved the problem of how to channel cogenerated power to a utility actually needing the power. The problem had its roots in Section 366.051, which permits a cogenerator to force a utility in the area where the cogenerator is located to purchase all of the cogenerator's output.

In this case, EWGs cannot force any utility to purchase their power. There is no specific "purchasing utility" at issue in an EWG need determination from the perspective of which to assess the need for an EWG. There is no equivalent of Section 366.051 for EWGs.

The attempt to extend the holdings in the inapposite Nassau decisions to this case is a ploy to preclude Florida's ratepayers from benefitting from EWGs. The "requirement" of demonstrating "utility-specific" need can never be met by an EWG. Moreover, there is no regulatory purpose whatsoever in imposing such a "requirement". In Nassau, the valid purpose was to channel the cogenerated power to a utility needing the power. Here, there is no need to channel an EWG's power toward or away from any utility.

Tampa Electric's further argument that Duke EWG cannot be a "regulated" electric company because the Commission will not impose a rate structure pursuant to Section 366.04(2)(b) on Duke fails completely. The Commission does not do so on Tampa Electric's wholesale sales either and for the same reason: both Tampa Electric's wholesale sales and Duke's wholesale sales are subject

to Federal Energy Regulatory Commission (FERC) tariffs. Therefore, it is unnecessary for the Commission to impose a rate structure. That does not mean that either Tampa Electric or Duke is not "regulated" pursuant to Section 366.02(2), Florida Statutes. See, Section 366.11, Florida Statutes.

Finally, Tampa Electric's argument that the definition of "utility" in Section 366.82(1) restricts Section 403.519 applicants to "retail utilities" is incorrect. First, the word "utility" does not appear in Section 403.519. The Commission processed the application under the current statute, not the statute prior to its amendment. Second, Section 366.83 forecloses the use of either 366.82(1) or 403.519 to preempt federal law. The entire purpose of Tampa Electric's arguments is to utilize strained constructions of those statutes in an attempt to preempt the EWG provisions of the Energy Policy Act of 1992. Tampa Electric's attempt to do so facially and fatally conflicts with the Legislative command in Section 366.83.

ARGUMENT

I. THE COMMISSION DID NOT ERR IN FINDING THAT DUKE IS A PROPER APPLICANT FOR A NEED DETERMINATION UNDER SECTION 403.519, FLORIDA STATUTES.

Tampa Electric's first point is that the City/Duke plant must be certified under the Siting Act. As stated in the Commission's Order at App. 1, p. 54, the entire plant was certified:

> The Joint Petitioners have shown [pursuant to Section 403.519, Florida Statutes and Rule 25-22.081, Florida

> Administrative Code] that there is a reliability need for 30 MW of the proposed plant's capacity for the City and an economic need for the remaining 484 MW. Even if Duke New Smyrna had come in for a need determination on its own without the City, we believe that it is a proper applicant and could have shown an economic need for the proposed plant. Accordingly, granting the determination of need requested by the joint petitioners[3] is consistent with the public interest and the best interests of electric customers in Florida. [e.s.]

See, Section 366.01; Gulf Coast Elec. Coop. v. Johnson, 727 So. 2d 259, 264 (Fla. 1999) (the public interest is the ultimate measuring stick to guide the PSC in its decisions).

Next, Tampa Electric claims that "Duke is not a proper applicant", not based on the applicable statutes themselves, but on Tampa Electric's misreading of cases which are not on point, i.e., Ark and Nassau. Section 403.503(4), Florida Statutes, defines an "applicant" as an "electric utility". Section 403.503(13), in turn, defines an "electric utility" as, inter alia, "regulated electric companies". Duke is a public utility pursuant to the Federal Power Act, 16 U.S.C. Sec. 824(b)(1) and an Exempt Wholesale Generator (EWG) pursuant to the Public Utility Holding Company Act of 1935, 15 U.S.C. Secs. 79Z-5A. Duke New Smyrna has a FERC approved tariff, which, while a pro-competitive type of regulation, is, in fact, "regulation". (Tr. 577-8)

Moreover, Duke New Smyrna is in the business of generating and, to some extent, transmitting electricity. Therefore, the

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[3] See, Chapter 361, Florida Statutes as to joint electric supply projects.

Commission did not err in concluding that Duke New Smyrna, which is both "regulated" and an "electric company", meets the statutory definition of an "applicant" based on the plain meaning thereof.

Tampa Electric says, however, that there are more requirements than appear in the statutes. Supposedly, these additional requirements appear in Ark and Nassau. Tampa Electric is mistaken as to every assertion it makes as to that claim.

Order No. PSC-92-1210-FOF-EQ, referred to as "Ark and Nassau" by Tampa Electric, is explicitly

> limited to proceedings wherein non-utility generators seek determinations of need based on a utility's need.

Order 1210, p. 4 (92 FPSC 10:646) (App. 4). Therefore, Order 1210 is doubly off-point. Duke New Smyrna is an electric utility, not a non-utility generator, such as the entities in Order 1210. Moreover, and crucially, Duke New Smyrna is not seeking "a determination of need based on a utility's need", as were both entities described in Order 1210. Indeed, Duke New Smyrna describes, in effect, the mirror opposite of those facts. As an EWG, it cannot require any utility to purchase its power:

> The Project will necessarily be cost-effective to wholesale purchasers and their retail customers, because the costs of the Project will not be included in rate base, and because no utility nor any electric customer will be obligated to purchase the projects' output. Wholesale purchasers will buy the project's output only if it is cost-effective when compared to other alternatives.

R. 28.

In Order 1210, the Commission noted that the Order should be narrowly construed because the Commission did not want to decide "in the abstract" questions related to self-service generators which had "not been presented". 92 FPSC 10:647. Obviously, this 1992 Order cannot now be properly made into a Procrustean bed to decide "in the abstract" the proper regulatory treatment of EWGs when this petition by the first EWG to apply for a need determination had "not been presented" until 1998.

Moreover, as Order 1210 predicted, such argument as Tampa Electric indulges "in the abstract" about Ark and Nassau is not well-grounded in fact or law. As noted in Order 23792 (App. 3), the Commission took the position that

> to the extent a proposed electric power plant constructed as a QF [with the ability to legally force retail-serving utilities to buy its power] is selling its capacity to an electric utility pursuant to a standard offer or negotiated contract, that capacity is meeting the needs of the purchasing utility. As such, that capacity must be evaluated from the purchasing utility's perspective in the need determination proceeding.... [e.s.]

90 FPSC 11:289.

In this case, however, Duke, as an EWG, is to no extent whatsoever constructed as a QF and cannot force any one to purchase its power. There is no contract at issue, nor is need sought on the basis of meeting the needs of any purchasing utility, as to the merchant portion of the plant. Therefore, that capacity should not be evaluated from any purchasing utility's perspective. Tampa Electric's assumption is incorrect that holdings based on

inapposite facts and inapplicable reasoning create binding and rigid precedent for an entirely different case, i.e., this one. Lubell v. Roman Spa, Inc., 362 So. 2d 922 (Fla. 1978).

This Court's holdings in the area of administrative finality demonstrate how totally wrong Tampa Electric's approach is here. As stated in McCaw Communications of Florida v. Clark, 679 So. 2d 1177 (Fla. 1996),

> ... the actions of administrative agencies are usually concerned with deciding issues according to a public interest that often changes with shifting circumstances and passage of time. Such considerations should warn us against a too doctrinaire analogy between courts and administrative agencies and also against inadvertently precluding agency-initiated action concerning the subject matter dealt with in an earlier order.

679 So. 2d at 1179.

Here, the "shifting circumstances and passage of time" have brought before the Commission facts concerning tight margin reserves in Peninsular Florida, a reluctance on the part of incumbent utilities to build (as opposed to "plan") more plant so as to relieve those tight margin reserves, the fact of large numbers of "interruptible" customers leaving one utility's conservation program during last summer's hot spell, and the specter of Florida's imminent vulnerability to outages, price-spikes, unnecessarily expensive electricity and other undesirable phenomena as a result of the confluence of shrinking reserves and increasing demand. (R. 12-13; Tr. 556-7; 559; 581; 706; 712-14; 729-30; 1352; 1480).

At the same time, the Commission has been presented with a new and fortuitous federal pro-competitive initiative in wholesale electric energy markets in the form of an initial EWG applicant for need determination. The Commission has been implementing federal pro-competitive initiatives in the wholesale markets of Florida in its role as co-regulator of that market with the Federal Energy Regulatory Commission since 1980. Section 366.051; Rule Chapter 25-17, Part III. In contrast to the Public Utility Regulatory Policies Act of 1978 [PURPA], an intrusive, mandatory and confrontational federal program, the EWG initiative created by the Energy Policy Act of 1992 is far more benign. No specific accommodation is needed beyond Florida's ordinary review of this application on the merits. No statutory, regulatory or policy change is needed. There is certainly no basis to invoke analyses which were geared to the unique problems posed by QFs:

> One of the problems inherent in the selection of a statewide rather than an individual utility avoided unit[4] is that of misallocation of cogenerated power. That is, the potential for uneconomic duplication of capacity unless cogenerated power can be channeled to the utility which actually has the need for the power. [e.s.]

Order No. 22341; 89 FPSC 12:313.

[4] Under PURPA, a QF's rates were capped at the cost the purchasing utility "avoided" by purchasing the QF's power instead of building additional plant.

No wonder, then, that the Commission overruled its previous decisions which had held that as long as QF need determination cases, inter alia,

> fell within the current MW subscription limit ... the need for ... the QF power has already been proven. [e.s.]

No wonder, too, as to the solution:

> [C]apacity must be evaluated from the purchasing utility's perspective in the need determination proceeding . . .

89 FPSC 12:319.

In this case, by contrast, there is no "avoided unit" at issue, let alone a statewide avoided unit. There is no "subscription limit" on which to base any presumption of need.

There is no potential for "uneconomic duplication" since Duke, as an EWG, cannot require anyone to purchase its wholesale power. Its market presence is economic; i.e., price lowering. No "channeling" by the Commission toward or away from any "purchasing utility" is needed. The cases relied on by appellant are therefore wholly and completely off point. Even if they were deemed in any way relevant, the Commission's Order constitutes a sufficient "explanation" of deviation for Section 120.68(7)(e)3 purposes.

What is at issue is petitioners' offer to increase Peninsular Florida's generation by more than 500 MW, without requiring the cost thereof to be put in rate base, without requiring anyone to purchase the power and to do so based on gas combined-cycle technology which is both very efficient and environmentally

beneficial to the extent that some operation of older, dirtier and less efficient plant is displaced. Though appellant derides one witness's "manna from heaven" characterization, the Commission majority clearly saw this federal initiative as timely, based on the facts of record.

Tampa Electric's Procrustean bed approach is meritless. Absolutely no thought is given to either the public interest or to the shifting circumstances or passage of time which delineate the public interest in this case. Instead, Tampa Electric tries to prove the unprovable by referring to the definition of "utility" in Section 366.82(1), i.e., an entity which provides:

> electricity . . . at retail to the public.

However, Section 403.519 was amended so that the word "utility" does not appear. Moreover, appellant's claim that the FEECA definition of "utility" in Section 366.82(1) governs Siting Act need determinations would exempt many municipalities and small electric cooperatives that are exempt from FEECA but not exempt from Siting Act requirements. See, App. 1, p. 17-18. Tampa Electric's analysis is not consistent with those requirements and is simply incorrect.

Indeed, Tampa Electric's arguments are also demonstrably incorrect based on the savings clause found at Section 366.83:

> ...nor shall ss. 366.80-366.86 and 403.519 preempt federal law unless such preemption is expressly authorized by federal statute.

Tampa Electric's arguments attempt to utilize strained constructions of these listed statutes for the very purpose of preempting the federal initiative regarding EWGs in the Energy Policy Act of 1992 from reaching Florida's wholesale markets. This is not consistent with the public interest, nor the liberal construction of the statutes required by the Legislature in Section 366.01. It is not even an interpretation that makes sense, since City/Duke's application is being processed with respect to the current statutes, not the wording therein prior to amendment. Beyond that, the Legislature has, by the savings clause, directed that these statutes not be used to preempt federal law. The federal government left to the states the task of siting, not the decision on whether to preempt the Energy Policy Act of 1992. The Florida legislature is explicitly in accord, and Tampa Electric's attempt to preempt federal law by its mis-construction of the listed statutes must be rejected as a matter of law pursuant to Section 366.83. That section defeats the arguments in the dissent cited at p. 26 of the Initial Brief, as well, for the same reason.

Tampa Electric's further circumlocutions and ratiocinations as to its "Procrustean bed" position are no improvement because, in those arguments, cases are viewed by appellants as "controlling precedent" which are, in fact, inapposite. For example, appellant points out that Ark and Nassau were found not to be "regulated electric companies". Their status, of course, is not at issue in

this case, but they are in any event, distinguishable. Their rates were not tariffed, as are Duke New Smyrna's and the EWG must meet certain continuing regulatory parameters to be initially so tariffed and to remain so tariffed. In contrast, QF rates refer only to the purchasing utility's "avoided cost", so in that sense, the QF is literally not a "regulated electric company", but an entity meeting certain legal parameters which functions within the regulated cost structure of the purchasing utility.

Tampa Electric also claims that the requirements of the Joint Power Act, Section 361.10, Florida Statutes, et. seq., are not met by this project. However, Section 361.11(1), Florida Statutes, defines "project" as

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

In claiming that all financing, acquiring, constructing, managing, operating or owning of the project will be performed solely by Duke, appellant apparently neglects the City's role in the project. The record demonstrates that the City will supply the land (real property), reuse water from its treatment plant (a useful source, structures and machinery), interconnection with the grid (facilities) and tax forgiveness (intangible property). (Tr. 386-7; 406-7) The record, therefore, supports the Commission's

determination that the definition of Joint Electrical Power Supply Project is applicable to the City/Duke project.

Tampa Electric further argues that Duke can only be an "electric utility" as defined in Section 366.02(2), Florida Statutes, if it is subject to all of the Commission's Section 366.04 powers. Since, according to appellant, Duke claimed that it was not subject to Sections 366.04(2)(b), (c), or (e), concerning the prescribing of rate structures, conservation requirements and territorial dispute resolutions, respectively, Duke cannot be an "electric utility".

However, this argument exalts form over substance. Section 366.04 confers on the Commission the power over utilities to prescribe uniform systems and classifications of accounts, rate structures and the resolution of territorial disputes without specifying the manner in which that power is to be exercised in any given instance. For example, as to Duke, it would not be logical for the Commission to grant a need determination in support of the siting of this project based on the benefits to Florida of Duke's FERC tariff allowing the EWG to negotiate power sales at market-based rates, if the Commission did not concur that the FERC tariff imposed the appropriate rate structure for Duke. Similarly, the Commission's Order impliedly concurs with FERC that Duke's accounting to that agency in order to establish a lack of market power on an ongoing basis appropriately exercises Florida's power

to impose such requirements as well. Moreover, since the record establishes that Duke's duplication of existing facilities is economic, not uneconomic, and that Duke lacks any ability to force any utility to purchase its wholesale power, a petition alleging a territorial dispute would be resolved by designating the entire state as the appropriate territory for Duke's sales at wholesale in Florida. Further, siting Duke's plant was found to confer an environmental benefit to the extent some operation of older less efficient, dirtier plant was replaced. That is a form of conservation.

Examples of the flexibility with which the Commission exercises its powers over Section 366.02(2) electric utilities would include the fact that the Commission does not impose any rate structure on Seminole Electric Cooperative's wholesale rates (which are not subject to FERC's wholesale rate regulation), or on the FERC-regulated wholesale rates of electric public utilities (which are also "electric utilities" pursuant to Section 366.02(2)). In other words, Tampa Electric itself illustrates the fact that the Commission's decision not to exercise its power under 366.04 to impose a rate structure on Tampa Electric's own FERC-regulated wholesale rates because it is unnecessary to do so does not mean that Tampa Electric is not an electric utility pursuant to Section 366.02(2). Appellant's argument fails as to Duke as well for the same reason. See, Section 366.11.

In Gulf Coast Electric Cooperative v. Johnson, supra, the appellant argued that the Commission's approval of other territorial agreements establishing territorial boundaries required that the Commission also establish territorial boundaries in that case. The Commission's position was:

> not that it is never appropriate to establish a territorial boundary to resolve a territorial dispute - just that it is not in the public interest in this case.

The Court affirmed the Commission's order, noting that the public interest is the ultimate measuring stick to guide the PSC in its decisions. 727 So. 2d at 264. In this case, the claim that Duke is an electric utility pursuant to Section 366.02(2) is not defeated by the Commission's position that no rate structure beyond the FERC tariff need be imposed.

For its final point in this section, Tampa Electric recommences its flogging of the Ark and Nassau dead horse. Now Appellant states,

> Nowhere in the Ark and Nassau decision is there any suggestion that the Commission's statutory interpretation applied only to QFs, as suggested in the Order. [e.s.]

The short answer is that the explicit point as to QFs is made everywhere in Order 22341 (App. 2), where the Commission developed the policy underlying the decision in Ark and Nassau. Ark and Nassau carries out the policy in Order 22341 by being explicitly

> limited to proceedings wherein non-utility generators seek determinations of need based on a utility's need. [e.s.]

> Order 22341 establishes that as the definition of a QF:
>
> ...we take the position that to the extent that a proposed electric power plant constructed as a QF is selling its capacity to an electric utility pursuant to a standard offer or negotiated contract [the two forms of cogeneration contracts described in Rule Chapter 25-17, Part III], that capacity is meeting the needs of the purchasing utility. As such, that capacity must be evaluated from the purchasing utility's perspective in the need determination proceeding.... [e.s.]

89 FPSC 12:319.

The Ark and Nassau order made it clear that both Ark and Nassau fit the "cogenerator" mold of seeking to have the Commission force the utility to purchase their power pursuant to Section 366.051:

> [N]either Ark nor Nassau has a contract to approve. Rather, these parties hope the Commission will order FPL to execute a contract. [e.s.]

92 FPSC 10:646.

Therefore, Tampa Electric's claim that "independent power producers lack the authority to require utilities providing retail service to purchase their output" is irrelevant. All of the reasoning in Orders 22341 and 23792 which led to the decision in Ark and Nassau is directed toward dealing with the circumstances of QFs. Since the Commission found as a factual matter that both Ark and Nassau hoped the Commission would force FPL to purchase their power, i.e., "execute a contract", the reasoning applicable to QFs was applied to Ark as well. Again, all of that reasoning previously quoted speaks explicitly to the circumstances of cogenerators:

> One of the problems ... is that of misallocation of cogenerated power. [e.s.]

89 FPSC 12:313.

> [The Commission overruled its previous holdings that as long as QF need determination cases] fell within the current MW subscription limit...the need for...the QF power has already been proven. [e.s.]

Id. at 12:319.

Therefore, the attempt by appellant to create a mantra out of "the obligation to serve retail customers" while ignoring the context that posited a choice between a cogenerator (or Ark, which was seeking to be treated like one), and the specific utility required to purchase the power, renders the mantra itself meaningless. As noted in Order 22341, the Commission was looking for a way that

> cogenerated power can be channeled to the utility which actually has the need for the power. [e.s.]

The search was motivated by the desire to avoid the misallocation of cogenerated power. The solution was to take the position that

> to the extent . . . a QF is selling its capacity to an electric utility pursuant to [one of the two forms of cogeneration contracts], that capacity ... must be evaluated from the purchasing utility's perspective in the need determination proceeding. . . .

Therefore, the Ark and Nassau order sets out the law of cogeneration. None of the policy analysis or factual and legal underpinnings thereof, such as "avoided units", "subscription limits", "channeling" the cogenerated power to "the utility which actually has the need for the power", "forcing the utility to execute contracts", "non-utility generators", etc., etc., has

anything at all to do with the siting of Duke, EWG, a regulated (i.e., tariffed) electric company, or its Joint Electric Power Plant Project with the City. The facts and law of the one are inapposite to the facts and law of the other. The attempt to finesse the difference seeks the very kind of decision "in the abstract" which the Commission in Ark and Nassau said should be avoided. 92 FPSC 10:647.

Because of the unique aspects of implementing PURPA, the Commission had to recede in its technical analysis from an initial "statewide" formulation of need pursuant to Section 403.519 in the specific context of cogeneration. That does not mean that the underlying purpose of the statute is other than to speak to the power plant needs of Florida, and its citizens/ratepayers generally. The Commission agrees with the specific holdings of the Ark/Nassau orders and opinions in that specific context; i.e., where the choice is between a PURPA QF relying on that status to have its power purchased, and a "purchasing utility", "need" is to be analyzed from the perspective of the "purchasing utility".

The Commission does not agree, however, with an abstract formulation which disregards all of that context in favor of a bald syllogism to the effect that the "need" described in Section 403.519 purely and simply is the "need" of three large, incumbent utility companies, i.e., co-appellants here. Nothing in Section 403.519 suggests that the Florida Legislature drafted, or intended

to draft, a statute which could be correctly interpreted to mean that what Tampa Electric and its two co-appellants "need" is what defines the "need" of the State of Florida. Nothing in the Commission's Ark/Nassau orders or this Court's opinions affirming them suggests that bald hypothesis or, in the Commission's opinion, should be interpreted that way.

> The record amply supports the Commission's conclusion that
>
> > granting the determination of need requested by the joint petitioners is consistent with the public interest and the best interests of electric customers in Florida. [e.s.]

App. 1, p. 54.

This Court stated in Gulf Coast, supra, that

> the public interest is the ultimate measuring stick to guide the PSC in its decisions. [e.s.]

Appellant's attempt to substitute a different measuring stick, "the interest of companies with an obligation to serve", should be rejected.

II. THE COMMISSION FOUND NEED ON A PENINSULAR FLORIDA BASIS, DID NOT ERR IN SO FINDING, DID NOT PRESUME SUCH NEED AND WAS NOT REQUIRED TO ADHERE TO THE INAPPOSITE LAW OF COGENERATION.

In this section, Tampa Electric continues to argue "in the abstract" without regard to the facts or regulatory context in which the Ark and Nassau order was explicitly limited:

> 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 do not believe [that a question that has not been presented to date] should be decided in the abstract. [e.s.]

92 FPSC 10:646-7.

When applied the way Tampa Electric applies the conclusions in the Nassau decisions, the conclusions make no sense. For example, Order 23792 states:

> [T]o the extent a proposed electric power plant constructed as a QF is selling its capacity to an electric utility pursuant to a standard offer or negotiated contract, that capacity is meeting the needs of the purchasing utility. As such, that capacity must be evaluated from the purchasing utility's perspective in the need determination proceeding. . . .

90 FPSC 11:289 (App. 3).

That is the rationale presented by the Commission and affirmed by the Court. The points of complete irrelevance and inapplicability to this case are clearly manifest and multiple. First, the basic premise, "a proposed power plant constructed as a QF" is completely absent and, therefore, inapplicable. There is no "proposed power plant constructed as a QF" in this case. Second, there is no QF plant "selling its capacity to an electric utility pursuant to a standard offer or negotiated contract". EWGs are not eligible for either the standard offer or negotiated QF contracts described. Rule 25-17.0832(2) and (4). Third, there is no specific utility to which the EWG will sell its merchant power identified as the basis or premise of its application. Therefore, its merchant capacity is not claimed as meeting the needs of a

specific purchasing utility. Therefore, the merchant capacity need not -- indeed, cannot -- be evaluated from "the purchasing utility's perspective in the need determination proceeding". There is no "purchasing utility" at issue in these facts.

Thus, Tampa Electric's point that "the Order makes no attempt to analyze any need for the uncommitted megawatts generated by Duke's proposed plant on a unit or utility specific basis" is a complete non-sequitur. There is no "unit or utility" involved which has been or can be "specified" and no need to do so since the requirement is premised on there being "a proposed electric power plant constructed as a QF". Clearly, appellant's arguments are not based on Florida law, but are simply misstatements of the law.

The further argument presented is of a piece with the foregoing. Certainly, in an analysis of siting cogeneration plants, i.e., non-utility generators, "utility and unit specific criteria" are appropriate for all of the reasons previously stated. However, Duke is an electric utility, and the need for Duke's plant is not "assumed", as Tampa Electric states. It would not have required a lengthy order or 1700 pages of testimony to assume the result in this case. Since there is no "purchasing utility" at issue with respect to the Siting Act review of the merchant capacity of Duke, Tampa Electric's argument that the Commission erred in not considering need from the perspective of a non-

existent specific purchasing utility is meritless and should be rejected.

Tampa Electric then cites the Court's approval of the Commission's analysis of need for cogenerated power as stated above:

> In Order No. 22341, the Commission clearly adopted the position that the four criteria in Section 403.519 are 'utility and unit specific' and that need for the purpose of the Siting Act is the need of the entity ultimately consuming the power.

601 So. 2d 1179.

That, of course, correctly states the Commission's position with respect to a proposed power plant constructed as a QF selling its capacity to an electric utility pursuant to a standard offer or negotiated QF contract. The Court's conclusion logically follows therefrom:

> The PSC's interpretation is consistent with the overall directive of Section 403.519, which requires, in particular that the Commission determine the cost effectiveness of a proposed power plant. This requirement would be rendered virtually meaningless if the PSC were required to calculate need on a statewide basis without considering which localities would actually need more electricity in the future.

Nassau Power Corporation v. Beard, 601 So. 2d 1175 (Fla. 1992). The reason that conclusion logically follows from the relevant facts of cogeneration is demonstrated in the previous citations of Commission orders in this brief, orders which Tampa Electric never mentions. For example,

> One of the problems inherent in the selection of a statewide avoided unit[5] is that of misallocation of cogenerated power...unless cogenerated power can be channeled to the utility which actually has the need for the power. [e.s.]

Order No. 22341; 89 FPSC 12:313.

To solve the problem, the Commission

> overrule[d] those previous decisions in which the Commission held that in qualifying facility (QF) [i.e., cogeneration] need determination cases as long as the negotiated contract price was less than that of the standard offer and fell within the current MW subscription limit both the need for and the cost-effectiveness of the QF power has already been proven. [e.s.]

89 FPSC 12:319.

The reason the Commission overruled its prior presumption of need and cost-effectiveness in cogeneration cases was that otherwise, a cogenerator could choose a location and thereby select which utility had to purchase its power pursuant to PURPA and Section 366.051. Then, if the statewide avoided unit subscription limit had not been reached, the cogenerator could rely on that presumption of cost-effectiveness and need to have the Commission require that utility to execute a contract with the QF at some negotiated price below that of the "standard offer". See, Section 366.051; Rule 25-17.0832(2); 25-17.0832(4). This was the case whether that utility needed the power or not. Section 366.051 provides, in pertinent part,

---

[5] n. 4, supra.

> The electric utility in whose service area a cogenerator or small power producer is located shall purchase ... all electricity offered for sale by such cogenerator or small power producer; [e.s.]

Thus, the Court's conclusion in Nassau Power Corp. v. Beard, supra, that the requirement in Section 403.519 of determining cost-effectiveness

> would be rendered virtually meaningless if the PSC were required to calculate need on a statewide basis without considering which localities would actually need more electricity in the future [e.s.]

makes sense as to cogeneration. The statewide avoided unit together with the presumption of need for QF power made it impossible to channel cogenerated power to a utility which actually needed the power. In effect, the cogenerator's decision as to where it chose to locate was dispositive, making it impossible for the Commission either to discharge its responsibility to oversee the grid pursuant to Section 366.04(5) or to evaluate cost-effectiveness for Section 403.519 siting act purposes. The Court therefore agreed that the Commission should not be required to calculate need on a statewide basis, even if the subscription limit for the statewide avoided unit had not been reached.

How much, if any, of these holdings are relevant to this case? None. Even the wording is irrelevant. In this case, there is no megawatt subscription limit; there is no statewide avoided unit. Therefore, the Commission is not "calculating need" against the totals in an avoided unit or a megawatt subscription limit. It is

not “calculating” need at all, nor is there a “statewide avoided unit” which “requires” the Commission to “calculate” need on a “statewide” basis. None of these holdings should be, or even can be, turned into a Procrustean bed into which the different facts of this case are distorted to fit. Such futile exercises are contrary to Florida law. McCaw Communications, supra.

Here, the Commission had evidence of shrinking margin reserves and a reluctance on the part of incumbent utilities to build new plant.

> Commissioner Deason: . . . you indicated that the [Peninsular Florida] reserve margins have declined [because of] concern over the possibility of competition even at the retail level; is that correct?
>
> [FMPA] Witness: I think that is one of the driving forces.
>
> Commissioner Deason: OK. And with that threat, utilities are trying to reduce costs and obviously, the higher [the] reserve margin the higher [the] overall cost, is that also correct?
>
> [FMPA] Witness: Yes, sir.

(Tr. 559)

As noted by Commissioner Garcia at the hearing,

> We’re seeing that we’re running on very tight margins. We’re not even sure that 15% [margin reserves] is what we should be looking at. We have possibilities of having shortfall in the near future ... because people are preparing for that future [of retail competition]. People are worried about the future because they haven’t built plants; the municipals haven’t, you [incumbent utilities] haven’t and we’re running tight. [e.s.]

(Tr. 1480)

The Commission painstakingly evaluated the need for the City/Duke project based on the record and utilizing the statute provided for such evaluations in the interest of the public of the State of Florida. The cases relied on by Tampa Electric are irrelevant to the facts of this case. Appellant's reliance on irrelevance together with its vanishingly slim statement of the facts are indicative of the tenuous and formalistic nature of this appeal.

III. NEITHER THE COMMISSION'S FINDING THAT DUKE IS A PROPER APPLICANT UNDER THE SITING ACT NOR ITS ANALYSIS AND CONCLUSIONS REGARDING THE NEED CRITERIA IN SECTION 403.519 ARE ERRONEOUS.

After again raising the baseless assertions that the Commission assumed the need for this project and that Nassau is applicable (i.e., that the Commission should have evaluated need from the perspective of a non-existent specific purchasing utility), Tampa Electric's final section of argument consists of suggestions as to how the Court might reweigh the evidence, contrary to the standard of review.

As noted previously, Duke is within the Commission's jurisdiction (to the same extent as Tampa Electric's own wholesale activities) as an electric utility pursuant to Section 366.02(2). Moreover, there was ample evidence of record that the environmental impacts of the project were slight and that there were environmental benefits to be derived from the siting of this plant. There was also ample evidence that there was a need for the additional wholesale capacity and energy in Peninsular Florida and

that the need was immediate. The added reliability was found to inure to both the City and Peninsular Florida. It was also determined on the basis of the evidence that the presence of the additional merchant capacity was economically needed to reduce the price of wholesale power to the benefit of all Florida ratepayers.

Tampa Electric's final conclusion that

> the Commission abdicates this responsibility [to Florida ratepayers] to "the market" with the hope that economic benefits will accrue

not only asks the Court to reweigh the evidence, but also to misunderstand entirely the Commission's decision. For 20 years, federal regulation of wholesale markets has fostered competition in the country generally and in Florida specifically. Regulation may be anti-competitive, but it may also be pro-competitive. The Commission, in its role as regulator, may -- and in this case has -- carefully evaluated the role that an EWG could play in benefitting the ratepayers of Florida. Just as Tampa Electric's wholesale activities are subject to some regulation, yet are not subject to the natural monopoly-based rate-setting regulation in 366.05(1), Duke's exclusively wholesale activities will be subject to the same level of regulation; i.e., a mix of FERC tariffing and Florida Commission oversight. Since the Commission has not abdicated its responsibility to Florida's ratepayers by permitting Tampa Electric's participation in the concededly competitive wholesale markets in Florida, the Commission will not be abdicating

its responsibility by allowing Duke to participate in these markets on the same basis.

Duke is willing to build this plant at a point in time when it is needed and under provisions that the Commission found to be consistent with and beneficial to the public interest. At the same time, incumbents appear to be less interested in doing so. The Commission did not err in granting the need determination in this case.

CONCLUSION

The Commission's Order is supported by competent substantial evidence and has not been demonstrated to be erroneous.

WHEREFORE, the Florida Public Service Commission respectfully requests that the Commission's Order be affirmed.

Respectfully submitted,

ROBERT D. VANDIVER
General Counsel
Florida Bar No. 344052

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RICHARD C. BELLAK
Associate General Counsel
Florida Bar No. 341851

FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
850-413-6092

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 9th day of August, 1999 to the following:

Harry W. Long, Jr.
TECO Energy, Inc.
P. O. Box 111
Tampa, FL 33601

Lee L. Willis
James D. Beasley
Ausley & McMullen
227 S. Calhoun Street
Tallahassee, FL 32301

Attys for Tampa Electric Company

D. Bruce May
Susan L. Kelsey
Holland & Knight, LLP
P. O. Drawer 810
Tallahassee, FL 32302

Daniel S. Pearson
P. O. Box 015441
Miami, FL 33131

Brent C. Bailey, General Counsel
Duke Energy Power Services, LLC
P. O. Box 1642
Houston, TX 77251-1642
Attys for Duke Energy New Smyrna Beach Power Company, Ltd., LLP

Robert S. Lilien
Duke Energy Power Services, LLC
442 Church Street, PB05B
Charlotte, N.C. 23242

James A. McGee
P. O. Box 14042
St. Petersburg, FL 33733

Gary L. Sasso
Carlton Fields Ward Emmanuel
Smith and Cutler, P.A.
P. O. Box 2861
St. Petersburg, FL 33731
Attys for Florida Power Corporation

Gail Kamaras
1114 Thomasville Rd.
Suite E
Tallahassee, FL 32303
Atty for Legal Environmental Assistance Foundation, Inc.

Terry L. Krammer
PAC Director
3944 Florida Boulevard
Palm Beach Gardens, FL 33410
Atty for System Council U-4

Alvin B. Davis
Thomas R. Julin

Charles A. Guyton
Matthew M. Childs

Edward M. Mullins
Sandra K. Wolkov
Steel Hector & Davis LLP
200 South Biscayne Blvd.
40th Floor
Miami, FL 33131-2398
Attys for Florida Power & Light Company

Steel Hector & Davis, LLP
215 South Monroe Street
Suite 601
Tallahassee, FL 32301

Jon C. Moyle, Jr.
Robert J. Sniffen
Moyle, Flanigan, Katz, Kolins,
Raymond & Sheehan
210 South Monroe Street
Tallahassee, FL 32301
Attys for PG&E Generating Company

Donald F. Santa, Jr.,
LC&E Energy Corporation
220 West Main Street
Louisville, KY 40232

Robert S. Wright
John T. LaVia
Alan C. Sundberg
Landers & Parsons, P.A.
310 West College Avenue
Tallahassee, FL 32301
Attys for Utilities Commission,
City of New Smyrna Beach, Florida

William B. Willingham
Michelle Hersel
P. O. Box 590
Tallahassee, FL 32302
Attys for Florida Electric
Cooperatives Assoc., Inc.

_____
RICHARD C. BELLAK

I HEREBY CERTIFY that the font type used in this brief is Courier New 12 Point.

_____
RICHARD C. BELLAK

SUPPLEMENTAL APPENDIX

APPENDIX 1: Order No. PSC-99-0535-FOF-EM

APPENDIX 2: Order No. 22341

APPENDIX 3: Order No. 23792

APPENDIX 4: Order No. PSC-92-1210-FOF-EQ