IN THE SUPREME COURT
STATE OF FLORIDA

TAMPA ELECTRIC COMPANY, CASE NO. 95,444

Appellant,

vs.

FLORIDA PUBLIC SERVICE COMMISSION,

Agency/Appellee.

_____/

On Appeal From a Final Order of the
Florida Public Service Commission of March 22, 1999

REPLY BRIEF OF APPELLANT TAMPA ELECTRIC COMPANY

HARRY W.LONG, JR.
Appearing Pro Hac Vice
TECO Energy, Inc.
Post Office Box 111
Tampa, FL 33601
(813) 228-4111

and

LEE L. WILLIS FBN 0135074
JAMES D. BEASLEY FBN 0178751
Ausley & McMullen
P. O. Box 391
227 S. Calhoun Street (32301)
Tallahassee, Florida 32302
(850) 224-9115

Attorneys for Appellant
TAMPA ELECTRIC COMPANY

This brief is prepared using 12 point Courier New, a font that is not proportionately spaced.

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SUMMARY OF REBUTTAL

The Appellees have failed in their answer briefs to meaningfully confront the key elements that define the Commission's legal error in the proceeding below.[1] The Appellees have cruelly tortured, when necessary, and ignored, when convenient, the plain meaning of the controlling statutes and precedents in an effort to support positions that clearly are not sustainable under Florida law. In so doing, it is the Appellees who have made the Procrustean bed[2] in this proceeding. Now, having found that bed to be exceedingly lumpy, they must, nonetheless, lie in it.

The legal issues in this proceeding are quite simple and straightforward, once the multitude of evidentiary red herrings are safely netted and removed from consideration. For instance, the Commission goes to great lengths at Page 14 of its answer brief to justify its departure from clearly applicable precedent by asserting that its previous Siting Act rulings did not involve Exempt Wholesale Generators ("EWGs"). On the basis of this observation, the Commission asserts that it is entitled to work from a clean precedential slate in this proceeding and concludes

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[1] The Preface and Key Cases Sections of Tampa Electric's Initial Brief in this proceeding are hereby incorporated by reference in the Reply Brief.

[2] Procrustes was a mythical Greek giant who stretched or shortened captives to make them fit his bed (for reasons unknown). A Procrustean Bed, as referred to in the Commission' answer brief, is an arbitrary standard to which precise conformity is forced.

that EWGs have special standing under the Siting Act in light of the federal energy policy articulated in the Energy Policy Act of 1992. However, the Commission has attempted to make a distinction where no meaningful difference exists. EWGs and independent power producers ("IPPs") are identical for all purposes relevant to this proceeding[3]. Both are subject to Federal Energy Regulatory Commission ("FERC") regulation. Both can generate and sell power at wholesale. Neither can force investor owner utilities ("IOUs") to purchase their power and neither is eligible to become an applicant under the Siting Act unless the output of their proposed plant is committed to a public utility that serves retail customers.

This illusory distinction between IPPs and EWGs is only one of many red herrings on which Appellees have relied in their answer briefs. Contrary to their assertions, this case is not about whether the City is eligible to be an applicant, within the meaning of the Siting Act, for a project principally intended to serve its own needs; nor is it about whether the City has a legitimate need for 30 MWs of capacity to serve its load. This case is not about whether Duke can force Florida investor owned utilities to buy the output of its proposed plant. Instead, the issue is whether an independent power producer, such as Duke, which has no public

[3] The principal significance of the EWG designation is in the context of the Public Utility Holding Company Act. Creation or acquisition of an EWG by a holding company that would otherwise be exempt from the requirements of the Act does not affect the holding company's exemption.

utility obligation to serve retail customers in Florida and which is not subject to the jurisdiction of the Commission, can nonetheless lawfully construct a power plant in Florida which is not exempt under the Siting Act. Tampa Electric respectfully submits that the answer, based on clear precedent and on the record before this Court, is an emphatic "no".

The Appellees' rejection of the additional standards of review articulated in the cases set forth at Pages 2-3 of Tampa Electric's initial brief on the ground that those cases deal with different facts and different subject matter would negate the use of <u>any</u> standard or precedent, if taken literally.

* When read in a logical manner, the relevant provisions of the Florida Statutes conclusively establish that an applicant under the Siting Act must be an electric utility that, by definition, has an obligation to serve at retail.

* Since the record makes clear that City will neither construct, own, operate nor finance any portion of Duke's proposed project, the garden variety power purchase and sale relationship between Duke and the City is not, by definition, a sustainable basis for Appellees' assertions that Duke and the City have formed a joint operating agency, within the meaning of Section 403.519.

* The clear and unambiguous language of Sections 366.02 and 366.04 conclusively establish that Duke is not an electric utility, subject to the Commission's jurisdiction.

* Duke and City's preemption assertions to the contrary notwithstanding, the Energy Policy Act specifically states that nothing in the Act is intended to affect or interfere with the authority of any state or local government related to environmental protection or the siting of facilities.

* The Appellees' assertion that the Nassau cases are irrelevant because they deal with different subject matter than the Order under review in this proceeding is demonstrably incorrect and, if taken at face value, illogical.

* The standard of eligibility explicitly established for both QFs and non-utility generators by the Commission in the Ark and Nassau decision and affirmed by this Court in Nassau II is directly applicable to this proceeding and conclusively eliminates Duke as a proper applicant under the Siting Act.

* The Commission concluded that the order under appeal in this proceeding does not overrule, limit or alter the Nassau decisions[4]. Therefore, its attempt to now justify

[4] Order at Page 30

overruling the same Nassau decisions that it expressly refrained from changing on the grounds of "shifting circumstances and passage of time" is perplexing and unsupportable.

Appellees Attempt to Artificially Limit the Standard of Review to be Applied in this Proceeding is Flawed.

At Page 11 of its answer brief, the Commission contends that the orders and cases cited by Tampa Electric in its initial brief at Pages 2-3 that further describe the standard of review to be applied in this proceeding "are not key or even relevant precedents to this case because the facts are inapposite." The Commission proceeds to support its assertion by discussing the subject matter differences between this case and the standard of review cases cited by Tampa Electric. However, the Commission's assertions miss the point.

A standard is nothing more than a set of principles or rules which yield a consistent result when applied to a specific issue which arises under different sets of facts. In this proceeding, the threshold question is what standard of review should this Court apply to Commission decisions. Precisely the same threshold question is presented in the cases cited by Tampa Electric. It makes no difference whether the standard is applied to a Commission decision concerning qualifying facilities ("QFs") under the Public Utility Regulatory Policies Act of 1978 ("PURPA") or a decision interpreting the Siting Act. The standard applies equally with

regard to both sets of subject matter. Admittedly, if the same standard is applied to different sets of facts, one might well expect different results or conclusions. However, that expected outcome has nothing to do with whether or not a single standard should be applied in the first place when a common question is presented. If one were to accept the Commission's assertion at face value, then the Gulf Coast Electric Cooperative v. Johnson case[5], which all parties agree is germane, would also be inapposite since the subject matter of that case differs from the subject matter of this proceeding.

The standards of review cited by Tampa Electric are especially germane to this proceeding. Where, as Tampa Electric contends here, an agency's construction amounts to an unreasonable interpretation, or is clearly erroneous, it cannot stand. Deference by the court to an agency's interpretation of its enabling statute is appropriate only if the statute is ambiguous. Otherwise, the court and the agency must give effect to the unambiguously expressed intent of the Legislature. As discussed later herein, the Commission, in the proceeding below, has stretched for a statutory interpretation that is inconsistent with the plain meaning of the relevant statute. As noted in Tampa Electric's initial brief, this Court has not hesitated to overturn erroneous Commission interpretations of its statutory authority.

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[5] Gulf Coast electric Cooperative v. Johnson, 727 So.2d 259 (Fla. 1999)

In the Teleprompter Corporation case[6], the Commission sought to reverse its earlier conclusion that it had no power to regulate "pole attachment" agreements. In quashing the Commission's new order asserting its authority to regulate "pole attachment" agreements, this Court concluded that:

> Since that decision [declaring lack of jurisdiction] there has been no relevant change in the Commission's statutory grant of jurisdiction. Therefore, the reasoning in that [original] decision is still relevant[7]

In this case there has been no change in the Commission's statutory grant of jurisdiction which would justify a complete reversal of its earlier interpretation of the eligibility requirements for applicant status under the Siting Act.

In summary, although generally clothed with a presumption of validity, a Commission decision must be overturned upon a showing that such decision departs from the essential requirements of law. This is particularly true in a situation where the Commission departs without justification from its own prior interpretation of a statute or rule that it is charged with administering or departs from controlling judicial precedent, as is the case in this proceeding.

The Relevant Provisions of the Florida Statutes Conclusively Establish that an Applicant Under the Siting Act must be an Electric Utility that, by Definition, has an Obligation to Serve at Retail.

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[6] Teleprompter Corporation v. Hawkins, 384 So.2d 648 (Fla. 1980)

[7] Id. at 384 So.2d 649

The Appellees assert that an "applicant", within the meaning of Florida Statutes Section 403.519, need not have a utility obligation to serve the public at retail. Essentially, the Appellees would have this Court ignore the fact that a "utility" is defined under Section 366.82(1) as "any person or entity of whatever form that provides electricity or natural gas at retail to the public..."[8] and that this definition is made directly applicable to Section 403.519. In defense of their assertion, Appellees point out the obvious fact that the word "utility" does not appear in the current version of Section 403.519. On the strength of this observation, the Appellees conclude that the explicit statement of applicability to Section 403.519 set forth in Section 366.82(1) is inapposite and, therefore, meaningless. An approach to legislative interpretation which simply ignores statutory language that is inconvenient to the conclusion that one wishes to reach is suspect.

The unadorned fact is that an applicant is defined as an "electric utility" under Section 403.503(4), Florida Statutes. Therefore, the terms "applicant" and "electric utility" can and should be used interchangeably for purposes of determining who is eligible under Section 403.519 to apply for need certification

[8] Section 366.82(1) specifically excludes from the definition of a "Utility", in relevant part, "any municipality or instrumentality thereof and any cooperative organized under the Rural Electric Cooperative Law providing electricity at retail to the public whose annual sales as of July 1, 1993, to end-use customers is less than 2,000 gigawatt hours."

under the Siting Act. If one simply substitutes the term "electric utility" for "applicant" in Section 403.519, the direct nexus to the definition contained in Section 366.82(1) is inescapably established. Under this approach all of the pertinent statutory provisions are given meaning and effect.

Appellees argue against the existence of this nexus between Sections 403.519 and 366.82(1) on two grounds. First, they argue that Section 366.83 explicitly provides that Sections 403.519 and 366.82(1) shall not be interpreted in a manner that preempts federal law, in particular, the Energy Policy Act. Second, they argue that the definitions in Sections 366.02(2), 403.503(4) and 366.82(1) are not co-extensive, leading to the conclusion, albeit erroneous, that the provisions of Section 366.82(1) cannot be applied reasonably to Section 403.519 of the Siting Act.

These arguments cannot withstand scrutiny. First, Appellees' concern over Section 366.83 is misplaced. Section 366.83 reads, in relevant part, as follows:

> Nothing in ss. 366.80-366.86 and 403.519 preempt federal law <u>unless such preemption is expressly authorized by federal statute</u>. (emphasis added)

Appellees assert that this language prevents application of Section 366.82(1) to Section 403.519 in a manner that purports to preempt federal law. However, the Appellees have ignored the explicit statement in Section 731 of the Energy Policy Act that establishes that:

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

Federal statutory policy expressly leaves to state and local government the jobs of environmental protection and siting of facilities, without federal interference. Therefore, Section 366.83 creates no bar to the application of Section 366.82(1) to Section 403.519.

Appellees assert[9] that Section 366.82(1) cannot be applicable to Section 403.519, despite the explicit statutory statement to the contrary, because Section 403.519 has not been interpreted, to date, to deny applicant status to municipal electric utilities or rural electric cooperatives whose annual sales as of July 1, 1993, to end-use customers are less than 2,000 gigawatt hours. Appellees point out that such municipal electric utilities and rural electric cooperatives are excluded from the definition of "Utility" under Section 366.82(1). As far as Tampa Electric is aware, there has been no test case on this question of law. It may well be the case that Sections 403.519, 366.02(2), 403.503(4) and 366.82(1), when read in conjunction, exclude certain municipals and cooperatives as applicants under the Siting Act. Tampa Electric expresses no opinion on this point. However, this issue has not been raised by

[9] See Commission?s answer brief, p.25;Duke answer brief, pp.35-36

any of the parties and is totally irrelevant to the matters at issue in this proceeding. At best, Appellees point out an irrelevant question of law that, perhaps, will be decided in some future proceeding rather that an ambiguity in the controlling statute that supports their assertions.

The Record Evidence in This Proceeding Establishes that Duke and City Have Not Formed A Joint Operating Agency within the Meaning of Section 403.

The Appellees persist in their assertion that Duke and the City have formed a Joint Operating Agency, within the meaning of Section 403.503(4), entitling them to Applicant status under Section 403.519. Their persistence on this point is perplexing in light of the uncontradicted evidence to the contrary. As noted it Tampa Electric's initial brief, the Joint Power Act, Section 361.10, Florida Statutes, et. seq., contemplates joint involvement. The Act empowers electric utilities, or other entities whose membership consists only of electric utilities, to join with other entities:

> For the purpose or purposes of jointly financing, acquiring, constructing, managing, operating or owning any project or projects. (emphasis added) Section 361.12, Florida Statutes

The City argues at Pages 20-30 of its answer brief that it knows of no statutory definition of "Joint Operating Agency". Instead, based on its assertion that City and Duke are engaged in a joint

electrical power supply project, the City urges this Court to look for guidance in Section 361.11(1) where a "Project" is defined as:

> 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 to such project. (emphasis added)

Even using the City's statutory citation, joint operation is an essential element. However, there is nothing "joint" about Duke and City's involvement with the proposed project. Admissions in both the Duke and City answer briefs serve to confirm this conclusion.

Under Section 2.1 the Participation Agreement between Duke and City, it is clear that "Duke shall, at its own cost, design, engineer, procure equipment for, construct, finance, own, operate, and market all capacity, energy and ancillary services provided from the Facility" (Hearing Exhibit No. 7, document RLV-1, at p.4; A-1). The Participation Agreement admits of no "joint" participation by the City. Instead, the Duke/City arrangement is nothing more than a garden variety, firm power sale. The City's donation of the site for the proposed plant is nothing more than an advance payment in-kind for capacity. The City will supply water to the project for a fee. In short, there is no joint entity that will own and operate the proposed plant nor does the City have any ownership interest in the proposed facility. Therefore, there can be no Joint Operating Agency within the meaning of Section

403.503(4). The Appellees have simply reiterated facts from the record that underscore this conclusion.

The Clear and Unambiguous Language of Sections 366.02 and 366.04 Conclusively Establish that Duke is not an Electric Utility, Subject to the Commission's Jurisdiction.

Appellees persist in their assertion that Duke is an "electric utility" within the meaning of Section 366.02, thereby rendering it a "regulated electric company" within the meaning of Section 403.503(13). However, none of the Appellees have confronted the statutory language that belies their conclusion. Section 366.04, Florida Statutes, in defining the jurisdiction of the Commission, states that the Commission shall have power over electric utilities for a number of purposes including (a) prescribing uniform systems and classifications of accounts; (b) prescribing a rate structure for all electric utilities; and (c) approving territorial agreements and resolving territorial disputes. The statute does not say that the Commission will have power over some electric utilities; nor does it say that the Commission will have some of the enumerated powers over electric utilities. Section 366.04 clearly establishes that the Commission shall have all of the enumerated powers over all electric utilities. All of the parties are in agreement that the Commission is preempted from exercising certain of the enumerated powers with regard to Duke. Therefore, Duke cannot be an electric utility within the meaning of Section 366.02(2).

The Appellees suggest that the Commission is free to regulate Duke's wholesale business at the proposed plant to the extent not explicitly preempted by federal law. The Commission simply cannot expand its jurisdiction unilaterally beyond the scope clearly articulated by the Legislature because it believes that such expanded jurisdiction would be in the public interest; nor can Duke and the City confer such expanded jurisdiction by agreeing to be subject only to selected Commission powers. As the City pointed out at Page 6 of its answer brief, utilities providing wholesale service may also be subject to the jurisdiction of state regulatory authorities to the extent authorized by state law. The City cites several cases in footnote 4, at Page 7 of its brief in an effort to suggest that state regulation of a wholesale generator is authorized under Florida law. What the City fails to highlight is that the cited cases involve states that have statutory provisions explicitly authorizing state regulatory authorities to exercise some jurisdiction over wholesale utilities with regard to the siting of power plants. The Commission has no such jurisdiction under Florida law and the Appellees, understandably, have not been able to find a single explicit statutory provision to the contrary.

The Appellees' View of Federal Preemption is Nothing More Than a "Heads-I-Win-Tails-You-Lose" Proposition.

When reduced to its essence, Appellees contention is that the Commission is preempted from issuing a ruling adverse to Duke in this proceeding, but has full authority, under the same set of

state laws, to grant Duke the relief that it has requested. This reasoning is suspect, to say the least. It is an uncontested fact in this proceeding, that the federal government has left to the states the power to site facilities and manage environmental protection. As noted above, the Energy Policy Act explicitly forbids federal interference with these state activities. Where, then, is the federal statutory language that would preempt a Commission decision denying Duke applicant status under the Siting Act? The short answer is that no such statutory provision exists. Certainly no such federal law has been cited by the Appellees.

Recognizing the weakness of their preemption argument, the Appellees attempt to characterize an adverse Commission decision as a form of economic discrimination, the only purpose of which would be to give Florida utilities an unfair economic advantage over out-of-state utilities[10]. Such an adverse ruling, they argue, would trigger the "dormant Commerce Clause" and lead, inexorably, to preemption.

The problem with this contrived analysis is that a denial of the relief sought by Duke in this proceeding would have nothing to do with creating an unfair economic advantage for Florida utilities and everything to do with protecting Florida's environment, a matter which, as noted above, the federal government has left to the states.

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[10] Duke Brief, Page 49

Amazingly, the City asserts at Page 51 of its brief that the determination of need is not a part of the environmental analysis required under the Siting Act and, therefore is preempted. However, this preemption occurs only if the need determination is adverse to Duke. The City compounds this error by insisting that the need hearing is, instead, merely a precondition to the City and Duke being able to present evidence about the environmental impact of its project to the Siting Board. While colorful, these assertions are not grounded in fact or reason.

The stated purpose of the Siting Act is, in relevant part:

> To effectuate 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. Section 403.502(2)

Contrary to the City's assertions, the need review does not and could not meaningfully exist in isolation from the statutory process of balancing perceived need against environmental consequences. The Siting Act, of which the need certification is an integral part, is explicitly a state environmental protection statute. Denial of the relief requested by Duke would be nothing more than an acknowledgement that Duke's lack of any specific, cognizable need would prevent the Commission from discharging its statutory obligation to identify a specific need for the facility that would permit the balancing mandated under the Siting Act. An

adverse decision would be a matter of environmental protection rather than economic protectionism.

In any event, the Dukes of the world would not be excluded from the Florida market. Duke would be free to construct an exempt plant in Florida. In addition, Duke and other interested parties would have the opportunity to bid on the construction of non-exempt plants that would be dedicated to supplying specifically identified retail utility needs.

The Appellees' Assertion, that the Nassau Cases are Inapplicable Because the Facts Presented in those Cases is Different from the Facts Presented in the Proceeding Below, is Demonstrably Incorrect and, if Taken at Face Value, Illogical.

Appellees have made the same mistake in evaluating the relevance of the Nassau cases to this proceeding that they made with regard to the standard of review cases discussed above. The Nassau cases posed the threshold question of who is eligible to be an applicant, within the meaning of Section 403.519. The Commission articulated and this Court confirmed that the proper standard to be applied in answering the threshold question was that an eligible applicant had to have a public utility obligation to provide retail service to the public. With this standard firmly in mind, the Commission proceeded to answer the threshold question by applying the above-mentioned standard to the facts of the cases before it.

If the threshold question in this case differed materially from the threshold question in the Nassau cases, then the

Appellees' rejection of the Nassau cases as controlling precedents might be understandable. However, the threshold questions presented are identical. Even if one accepts Appellees' erroneous assertion that the facts, subject matter and ultimate questions raised in this proceeding differ materially from those presented in the Nassau cases, one cannot reasonably arrive at the conclusion that a different standard should be applied in each case where a common threshold question is presented. The only reason for having a standard is to be able to use it to achieve a principled and consistent result when applied to differing fact patterns. The Appellees have missed the point entirely.

The Standard of Eligibility Explicitly Established for Both QFs and IPPs by the Commission in the Ark and Nassau Decision and Affirmed by this Court in Nassau II is Directly Applicable to this Proceeding and Conclusively Eliminates Duke as a Proper Applicant under the Siting Act.

The Commission argues, at Page 31 of its answer brief that "all of the reasoning in Orders 22341 and 23792 that led to the decision in Ark and Nassau is directed toward dealing with the circumstances of QFs." The Commission further asserts that the Ark and Nassau order is inapposite because it was explicitly limited to proceedings wherein non-utility generators seek determinations of need based on a utility's need. Both assertions are demonstrably incorrect.

It is beyond dispute that the Commission, in establishing a standard for eligibility under the Siting Act in the Nassau cases,

specifically and intentionally addressed the eligibility of non-utility generators, including IPPs, as well as QFs. In the Ark and Nassau decision, after observing that it is a utility's need for power to serve its customers that must be evaluated in a need determination proceeding, the Commission said:

> . . . a non-utility generator has no such need because it is not required to serve customers. The utility, not the cogenerator or independent power producer, is the proper applicant. (emphasis added)

It is also beyond dispute that the Commission's interpretation of the Siting Act in Ark and Nassau was independently reviewed and independently affirmed in Nassau II, where this Court said:

> The Commission dismissed the petition, reasoning that only electric utilities, or entities with whom such utilities have executed a power purchase contract are proper applicants for a need determination proceeding under the Siting Act.
>
> * * *
>
> The Commission's construction of the term "applicant" as used in Section 403.519 is consistent with the plain language of the pertinent provisions of the Act and this Court's 1992 decision in Nassau Power Corp. v. Beard.
>
> * * *
>
> The Commission reasoned that a need determination proceeding is designed to examine the need resulting from an electric utility's duty to serve [retail] customers. Non-utility generators, such as Nassau, have no similar need because they are not required [by law] to serve customers. Nassau II at 398.

The above-mentioned excerpts leave nothing to the imagination. It is impossible to reasonably conclude that the Nassau decisions were intended to apply only to QFs, as the Appellees assert.

The Appellees' second contention that the Ark and Nassau order is inapposite because it was explicitly limited to proceedings wherein non-utility generators seek determinations of need based on a utility's need leads to the opposite conclusion. As the Commission admitted at Page 17 of its answer brief, the "requirement" of demonstrating utility specific need can never be met by an EWG or an IPP for that matter. Therefore, since EWGs, as non-utility generators, have no needs of their own, any need identified for an EWG must, by definition, be derived from and based upon the individual needs of Florida's retail electric utilities. Even under the Commission's standard, the Ark and Nassau decision would be directly applicable to the case below.

The Appellees have Offered no Credible Justification for Reversal of the Commission's or this Court's Nassau Decisions.

As Tampa Electric pointed out in its initial brief, the Commission unambiguously stated its intention not to overturn or modify the Nassau cases. However the Appellees use a significant portion of their answer briefs attempting to explain why the Commission is justified in overturning the Nassau cases with regard to the question of eligibility criteria for applicant status under the Siting Act. In an effort to justify an act which it

specifically disavowed in the Order, the Commission places significant but undue reliance on McCaw Communications of Florida v. Clark, 679 So.2d 1177 (Fla. 1996) which purportedly suggests that the Commission must have the flexibility to modify its decisions on issues according to a public interest that often changes with shifting circumstances and passage of time. However, the Commission has misperceived the import of the McCaw case.

In McCaw the Court reviewed a Commission decision changing the manner in which the Commission had previously set interconnection rates charged by local exchange telephone companies to mobile service providers. There was no question in McCaw that the Commission had jurisdiction to set these rates. Instead, the only claim was that the Commission order in question was unsupported by adequate evidence and violated the doctrine of administrative finality.

The Court held that there was adequate evidentiary support for the Commission's order and that the order did not violate the doctrine of administrative finality. McCaw does not stand for the proposition that the Commission can adjust or evolve its own jurisdiction over time. Instead, the McCaw decision stands for the proposition that the Commission, in its exercise of unquestioned rate setting authority, may take into account different influences over time to set rates in a different manner. For example in the 1970s the Commission did away with declining block rates for electric service on the ground that they promote energy usage

rather than conservation. There was no question that the Commission had jurisdiction to do this given the Commission's authority to set reasonable rates for investor owned electric utilities.

The key point is the Legislature has never conferred upon the Commission any general authority to regulate public utilities. As the Court pointed out in Radio Telecommunications, Inc. v. Southeastern Telephone Company, 177 So.2d 577 (Fla. 1964), rehearing denied 1965:

> Throughout our history, each time a public service of the state is made subject to the regulatory power of the Commission, the Legislature has enacted a comprehensive plan of regulation and control and then conferred upon the Commission the authority to administer such plan.

Radio Telecommunications involved a dispute between a radio service company that wanted to remain interconnected with the local telephone company so that its customers could use both the radio facilities and the land line facilities. The radio service provider filed a complaint with the Public Service Commission asking for a determination that it could continue to receive telephone service from the local telephone company. The Commission concluded that the radio service provider was operating as a telephone company without a certificate and authorized the local telephone company to discontinue service to it.

In reviewing the Commission order, the Court observed that when the Florida Legislature enacted comprehensive telephone

regulation in 1913 it "could not have envisioned " much less have intended to regulate and control " the radio communication services with which we are here concerned."

As to the telephone company's argument that the statutes had been readopted biannually from 1943 to 1963, evidencing possible legislative intent to include radio communication services, the Court stated:

> To so interpret the statute and the legislative intent would, in our opinion, be judicial legislating of the kind frequently condemned " that is, interpreting an existing statute or constitutional provision to encompass a situation obviously not within the purview of the legislative branch of the government or the people at the time of its enactment or adoption " as well as directly opposed to the policy of this state in its regulation of public utilities.

Finally, the Court in Radio Telecommunications stated its belief that if and when the Florida Legislature decides to enter a field reserved to it in the Federal Communications Act it would do so in no uncertain terms and in language appropriate to and by regulation suitable for the new type of communication service.

As observed in Commissioner Clark's dissent in the order on appeal, at page 61 (R. 2718), the Commission has previously attempted to rely on federal acts to broaden its authority, and this court overturned that decision. In Florida Power & Light Company v. Florida Public Service Commission, 5 FALR 227-J (4483), 471 So.2d 526 (Fla. 1985), the Court reversed a Commission decision adopting rules on the utilities' purchase of power from

cogenerators and small power producers. The Commission had adopted rules based on the Public Utility Regulatory Policy Act of 1978 which gave states the task of implementing policy by setting the price to be paid by utilities for cogenerated power. The Court found the Commission lacked state statutory authority to implement the directives of PURPA. The opinion noted the fact that the Legislature subsequently provided the authority for rules in this area, but the subsequent enactment did not "breathe new life into the already adopted rules." 5 FALR at 227-J, 471 So.2d 526-536 (Fla. 1985). Upon request of the Court, the opinion was withdrawn from the bound volume of the Southern Reporter and the case was voluntarily dismissed in 1985, although the rationale and persuasive effect of the decision remains.

In the instant case the Commission, likewise, clearly errs in attempting to "grow" its own jurisdiction beyond the boundaries laid out by the Legislature.

CONCLUSION

Prior decisions of this Court and the Commission leave no doubt that Duke is ineligible to be an applicant under the Siting Act, as a matter of law. Duke has no public utility obligation to serve retail electric customers in Florida. The Commission would have no jurisdiction over Duke with regard to the proposed project. With regard to all of the above, there have been no subsequent changes in Florida or Federal law which support a different result.

The sheer volume of information collected by the Commission and the policy justifications advanced for its conclusions in the proceeding below cannot serve to confer jurisdiction on the Commission where none exists.

Based on the foregoing, the Commission's Order on appeal should be reversed and remanded for entry of an order finding as a matter of law that neither Duke nor the City is a proper applicant for a determination of need under Section 403.519, Florida Statutes, with respect to the 484 MW uncommitted portion of Duke's proposed power plant.

DATED this 4th day of October 1999.

Respectfully submitted,

HARRY W. LONG, JR.
TECO Energy Inc.
Post Office Box 111
Tampa, FL 33601

_____

LEE L. WILLIS
JAMES D. BEASLEY
Ausley & McMullen
Post Office Box 391
Tallahassee, FL 32302

ATTORNEYS FOR APPELLANT,
TAMPA ELECTRIC COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by U. S. Mail to Robert Scheffel Wright, John T. LaVia, III and Alan C. Sundberg, Landers & Parsons, P.A., 310 West College Avenue, Tallahassee, Florida 32301, counsel for Utilities Commission, City of New Smyrna Beach, Florida; D. Bruce May, Susan L. Kelsey, P. O. Drawer 810 Tallahassee, FL 32302, Daniel S. Pearson, P.O. Box 015441 Miami, FL 33131 and Brent C. Bailey, General Counsel, Duke Energy Power Services, LLC, P.O. Box 1642, Houston, TX 77251-1642, counsel for Duke Energy New Smyrna Beach Power Company, Ltd., L.L.P.; Robert S. Lilien, Duke Energy Power Services, LLC 442 Church Street, PB05B, Charlotte, NC 23242; James A. McGee, Post Office Box 14042, St. Petersburg, Florida 33733 and Gary L. Sasso, Carlton Fields Ward Emmanuel Smith & Cutler, P.A., Post Office Box 2861, St. Petersburg, Florida 33731, counsel for Florida Power Corporation; William B. Willingham and Michelle Hershel, Post Office Box 590, Tallahassee, Florida 32302, counsel for Florida Electric Cooperatives Association Inc.; Gail Kamaras, 1114 Thomasville Road, Suite E, Tallahassee, Florida 32303, counsel for Legal Environmental Assistance Foundation, Inc.; Alvin B. Davis, Thomas R. Julin, Edward M. Mullins and Sandra K. Wolkov, Steel Hector & Davis LLP, 200 South Biscayne Blvd. 40th Floor, Miami, FL 33131-2398 and Charles A. Guyton and Matthew M. Childs, Steel Hector & Davis, LLP, 215 South Monroe Street, Suite 601, Tallahassee, Florida 32301, counsel for Florida Power & Light

Company; Terry L. Kammer, PAC Director, 3944 Florida Boulevard, Palm Beach Gardens, Florida 33410, counsel for System Council U-4; Jon C. Moyle, Jr. and Robert J. Sniffen, Moyle, Flanigan, Katz, Kolins, Raymond & Sheehan, 210 South Monroe Street, Tallahassee, Florida 32301, counsel for PG&E Generating Company; Donald F. Santa, Jr., LC&E Energy Corporation, 220 West Main Street, Louisville, KY 40232; Grace A. Jaye, Robert D. Vandiver, General Counsel, and Richard C. Bellak, Associate General Counsel, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850 counsel for the Commission Staff, this _____ day of October, 1999.

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ATTORNEY

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