IN THE SUPREME COURT OF FLORIDA

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

On Appeal from an Order of the
Florida Public Service Commission

Reply Brief of Florida Power & Light Co.

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INTRODUCTION

If the order of the Florida Public Service Commission ("PSC") is affirmed, the PSC will be faced with dozens of petitions from companies that would like to build new power plants in Florida. Each petition would advance the same argument presented by Duke Energy New Smyrna Beach Power Co., Ltd. ("Duke") here: Need must be found to exist where private investors are willing to gamble that a proposed plant will be profitable. Each need determination would be reviewable by direct appeal to this Court. Each appeal would bring this Court the same argument: Defer to the speculation of investors. The Constitution, statutes, and regulations now in place neither require nor permit such an absurd process.

STATEMENT OF THE CASE AND FACTS

With varying degrees of invective, the appellees attack FPL's statement of the case and the facts. The anticipated vitriol aside, none of the four appellees contests that FPL accurately recited that Duke is a privately-owned company that would like to build a merchant plant to exploit short-term power demands to make unregulated profits by selling power at wholesale to unspecified retail utilities inside and outside of Florida. (FPL Initial Brief at 2-3).

The PSC attempts to defend Duke's potential profits as "regulated" because they are "authorized by a FERC (Federal Energy Regulatory Commission) tariff." (PSC at 8). But that FERC tariff expressly authorizes Duke to engage in "market-based power sales." In re Duke Energy New Smyrna Beach Power Co. Ltd., 83 FERC ¶61,316

(June 25, 1998) (Ex. A). Thus, Duke's supposedly regulated rates would regulated only by a regulator that has authorized Duke to charge market rates.[1]

The appellees do not dispute that FPL and FPC moved to dismiss Duke's petition for a determination of need on the ground that the existing statutory scheme had been enacted solely for the purpose of allowing monopoly utilities serving retail customers to obtain new power plant certification (FPL Initial Brief at 4) and that PSC commissioners remarked during the hearing on this motion that need determinations by state regulatory bodies have no appropriate role in a free market enterprise to build a new power plant. (FPL Initial Brief at 4-7).

The appellees' briefs offer a Chamber of Commerce presentation to demonstrate that merchant plants may be desirable as a matter of public policy. They neglect to refute that the statutory and regulatory criteria relating to need were not met. For example, the PSC labors to point out that witnesses testified that construction of the plant would provide additional generation capacity (PSC at 2-3), but not that the plant would be needed to meet existing reserve margins. The PSC makes no effort to refute FPL's contention that Duke's own evidence demonstrated that through the year 2007, reserve margins will be at least 13 percent *greater* than necessary to meet the limits

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1. See 16 U.S.C. § 824d (requiring public utilities engaged in the interstate sale and transmission of electric power to file their rates and charges with the FERC for review); 16 U.S.C. § 824d(a) (authorizing FERC to review rates, but only to determine whether they are "just and reasonable").

determined to be reasonable by the Florida Reliability Coordinating Council -- even without the proposed Duke plant. (FPL at 8 n.8 & 11). Nor do appellees refute that any power produced by Duke's proposed plant could not be relied upon to meet reserve margins because Duke's plant would have no obligation to sell. (FPL at 9 n.9).

The PSC also points to the testimony of Martha Hesse, a former chair of the FERC, regarding federal initiatives to increase competition in the wholesale market for power. (PSC at 5). Hesse's prefiled direct testimony did assert, as the PSC contends, that "[e]xcluding merchant power plants from participating in the Florida wholesale market, or, for that matter, in any other wholesale market, would be inconsistent with and contrary to federal energy policy." (V7-976). But, the PSC completely ignores Hesse's essential live testimony that the Energy Policy Act of 1992 expressly leaves the question of power plant siting entirely up to the states. (FPL at 10) (citing V7-10007-08, 1020-24). When pressed as to where the Energy Policy Act provides that a state may not require a merchant plant to have a contract with a purchasing utility, Hesse candidly acknowledged, "It's silent." (V8-1020).

None of the appellees has rebutted the evidence that retail utilities are meeting the needs of Florida consumers and that the PSC could order retail utilities to provide additional capacity if reserves were deemed inadequate. (FPL at 10). Nor have they rebutted the testimony that merchant plants could duplicate and displace existing plants and produce millions of dollars in "stranded costs." (FPL at 11).

The appellees are also silent regarding the elaborate statutory mechanisms described in the testimony before the PSC that would be essential to make a transition from a regulated retail utility economy to a free-market retail utility economy. (FPL at 12-14). Appellees point the Court to no testimony explaining how the numerous problems created by an order opening Florida to merchant plants could be met by the existing constitutional, statutory, and regulatory framework.

STANDARD OF REVIEW

The appellees urge the Court to defer to the PSC with respect to all issues presented for review. (PSC at 7; City at 17; Duke at 6; PG&E at 2). But, "deference [to the PSC] . . . cannot be accorded when the commission exceeds its authority." United Tel. Co. v. Public Serv. Comm'n, 496 So. 2d 116, 118 (Fla. 1986). "If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested." Radio Tel. Communications, Inc. v. Southeastern Tel. Co., 170 So. 2d 577, 582 (Fla. 1965). *A fortiori*, any question regarding this Court's jurisdiction is a pure question of law that cannot be subverted by state agency action. Review of the jurisdictional questions presented by FPL in Point I of its argument therefore must be *de novo*.

Regarding Point II.A. of FPL's brief, the parties agree that the PSC's order must be reversed if the PSC departed from the essential requirements of law in concluding that Duke had alleged need without alleging any commitment to sell power to a Florida

retail utility. (PSC at 7; City at 17; Duke at 6; PG&E at 2). The parties also agree that the PSC's finding that Duke established need must be reversed if it is not supported by substantial, competent evidence. (Id.).

ARGUMENT

I.

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

The appellees have failed to define any place, let alone a proper place, for Duke's plant in Florida's judicial or statutory scheme for regulating monopoly utilities.

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

One of the most significant aspects of this case is the impact that it will have on this Court's jurisdiction under article V, section 3(b)(2) of the Florida Constitution. An order affirming the PSC decision below will open the PSC to a flood of merchant plant petitions from the many companies that are anxious to compete in Florida in the power generation business. An order affirming the decision below also will open this Court to a flood of mandatory direct appeals from the orders on those petitions.

Just days after FPL filed its initial brief in this case, Duke Energy Corporation, an affiliate of appellee Duke, announced on July 9, 1999, that it plans to build a $1.3 billion natural gas pipeline from Mobile Bay through the Florida panhandle and down through the Florida peninsula. The pipeline will be capable of powering plants than

can produce 10,000 megawatts of electricity -- the equivalent of the output of 20 power plants like the one that is the subject of this litigation. (Ex. B).

Shortly after Duke Energy's announcement, PG&E Generating announced its intention to build a 500-MW merchant plant near Okeechobee, Florida. See The McGraw-Hill Cos., PG&E Generating Plans Merchant Plant in Florida; to Come on Line in 2003, Electric Util. Week 18 (July 26, 1999) (Ex. C). Next, Panda Energy International announced plans to build a *second* 1,000-MW merchant plant in the Midway-Fort Pierce area. The McGraw-Hill Cos., Panda Plans $300-Million, 1000-MW Low-Emissions Plant in Florida, Electric Util. Week 15 (Aug. 23, 1999) (Ex. D). Then, IPS/Avon Park announced plans to construct a 680-MW merchant plant in Hardee County with a start-up date of sometime before July 2002. See The McGraw-Hill Cos., IPS/Avon Park Plans 680-MW Florida Plant; Partnering Talks Now Underway, Electric Util. Week 16 (Sept. 20, 1999) (Ex. E).

Anxious not to fall behind these competitors and not content to wait for this Court's ruling in this case, PG&E Energy actually filed a petition for determination of need for a 550-MW plant with the PSC on September 24, 1999. (Ex. F). Significantly, unlike Duke, PG&E asserted no pretext of committing any of the output of its proposed merchant plant to a monopoly retail utility. It simply alleged in its petition that free market forces had dictated a need for a plant with no commitment to sell to retail utilities. (Ex. F at 16-23).

Considering that these large commitments are being made even *before* this Court has had an opportunity to begin its review of the PSC order, it cannot be doubted that an order affirming the PSC decision will inspire a stampede of applications for power plant need determinations.[2] Article V, section 3(b)(2) of the Florida Constitution was not adopted to require this Court to preside over such a free market gold rush. See Arthur J. England, Jr., Eleanor M. Hunter, Richard C. Williams, Jr., Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 Fla. L. Rev. 147, 175 (1980) (footnotes omitted) [hereinafter, "Jurisdictional Reform"] ("The framers intended to cut down substantially the number of cases that would come to the court from the PSC, and it is estimated the court will now receive approximately five to ten such cases each year").

The appellee plant developers are silent regarding this argument. The PSC, for its part, attempts to trivialize the argument as a "scare tactic," (PSC at 14), but does not and cannot deny that this will happen. Instead, the PSC argues that this Court

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2. This is what has happened in other states that have opened themselves to merchant plant construction. Since FPL filed its initial brief demonstrating that developers had announced plans to build 109 plants in the United States to generate more than 56,000 MWs of electricity (FPL at 24), even more plans to build merchant plants have been announced. The McGraw-Hill Cos., Connectiv Plans 500-MW Del. Plant to Sell 'Load-Following' Supplies, Elec. Util. Week 16 (Sept. 20, 1999); The McGraw-Hill Cos., Cinergy Mulls 135-MW Merchant Plant in Indiana, To Be On-Line by June, 2000, Elec. Util. Week 16 (Sept. 20, 1999); The McGraw-Hill Cos., Panda Plans 1,000-MW Merchant Plant in Eastern Pa., On-Line in Mid-2002, Elec. Util. Week 19 (July 26, 1999).

previously has exercised jurisdiction over appeals from PSC orders which, like the order at issue, have not imposed *direct* regulation upon the rates and services of monopoly retail utilities providing electric service. The PSC contends that this Court has jurisdiction over any statewide agency action that has any *indirect* impact on the rates that monopoly utilities are authorized by the PSC to charge. (PSC at 12).

The PSC is correct that neither article V, section 3(b)(2), nor sections 350.128 or 366.10, Florida Statutes (the statutes implementing article V, section 3(b)(2)), contain the words "direct" or "directly." But that cannot mean that this Court must exercise mandatory direct appellate jurisdiction over *every* statewide agency action that has an indirect effect on utilities providing electric service. Decisions regarding roads, taxes, pollution controls, and wages all impact indirectly the rates and services of utilities providing electric service. But it cannot seriously be argued that such decisions fall within this Court's direct mandatory jurisdiction. It also cannot seriously be argued that the magnitude of the impact of any given regulatory decision can trigger this Court's direct appellate jurisdiction. Where would such a line be drawn? At $1 million or $10 million or $100 million or $1 billion.[3] There is no logical line to be

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3. The order under review may well have a great indirect impact on monopoly retail utilities. It is estimated that if full competition were implemented in North Carolina, investor-owned utilities, municipal utilities, and electric cooperatives would face about $5.1 billion in net stranded costs, including $840 million in Duke Power investments. The McGraw-Hill Cos., North Carolina's Total Stranded Cost Estimated at $5.1 Billion Through 2020, Electric Util. W. at 15 (Sept. 13, 1999).

drawn by amount. More is required than an indirect impact.[4]

The proper method for determining whether a decision must be directly reviewed by this Court is to evaluate whether the decision acts in the place of free market forces that otherwise determine electric utility rates and service. If the regulation does serve this function by, for example, setting rates or deciding geographic service boundaries, then the decision is properly the type which can and should be reviewed by this Court through a mandatory and direct appeal. See City Gas Co. v. Peoples Gas Sys., 182 So. 2d 429 (Fla. 1965); Peoples Gas Sys., Inc. v. Mason, 187 So. 2d 335 (Fla. 1966). On the other hand, when the PSC decision is *not* a substitute for the lack of competition, this Court has no direct jurisdiction. See Jurisdictional Reform, 32 Fla. L. Rev. at 174.

The order at issue does not provide a substitute for free-market forces. It does the opposite. It abdicates to market forces the decision as to whether the power plant

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4. See PW Ventures, Inc. v. Nichols, 533 So. 2d 281 (Fla. 1988) (reviewing PSC order holding that corporation fell within PSC's jurisdiction under transaction wherein corporation agreed to provide retail power for industrial complex); Florida Power & Light Co. v. Nichols, 516 So. 2d 260 (Fla. 1987) (reviewing PSC order regulating terms and conditions for utilities transmission of cogenerating electricity); Floridians United for Safe Energy, Inc. v. Public Serv. Comm'n, 475 So. 2d 241 (Fla. 1985) (reviewing PSC order granting utility rate increase); Citizens of the State of Fla. v. Public Serv. Comm'n, 448 So. 2d 1024 (Fla. 1984) (reviewing PSC approval of FPL's computation of its recovery factor); Pan Am. World Airways, Inc. v. Florida Pub. Serv. Comm'n, 427 So. 2d 716 (Fla. 1983) (reviewing PSC order holding that a company was a new FPL customer after merger).

at issue is "needed." The order requires no showing that specific retail customers' demands are not being met, that the demands cannot be reduced, or that the demands cannot be met by more economic means than construction of a new plant. The order simply blesses the entrepreneurial ambition of Duke's investors.

Although that decision is clearly wrong, it is not subject to direct review by this Court because it is not a substitute for market forces. The error should be corrected by the First District Court of Appeal through FPL's direct appeal to that court.[5]

The PSC's citation to Panda-Kathleen, L.P. v. Clark, 701 So. 2d 322 (Fla. 1997), actually supports FPL's jurisdictional argument. In that case, Florida Power Corporation ("FPC"), a monopoly retail utility, petitioned the PSC for a declaration that it could not be required to purchase power from a Panda-Kathleen "qualified facility" ("QF") for a period of 30 years, as had been set forth in a standard contract, because the economic life of the plant was just 20 years. The PSC granted the petition. That decision had a direct impact on the rates and services of a monopoly retail utility -- it freed FPC from an obligation to purchase power from a Panda-Kathleen plant for a 10-year period -- and therefore that decision was reviewable by this Court because it constituted direct economic regulation of a monopoly retail utility. Nothing in

5. That appeal has been stayed pending this proceeding. This Court denied FPL's motion to transfer the appeal to the First District, but without prejudice to the jurisdictional arguments raised therein being presented in the briefs here.

Panda-Kathleen supports the PSC's overreaching suggestion that this Court may review any decision that involves a wholesaler of electric power.

The PSC also cannot argue that either it or this Court has jurisdiction because FPL and other monopoly utilities themselves engage in wholesale sales and themselves obtain PSC need determinations for their plants. (PSC at 13). The PSC and this Court have jurisdiction to determine the need for plants committed by ownership or contract to provide power to Florida's monopoly retail utilities.[6] The PSC and this Court also arguably have jurisdiction to determine the need for power plants that could require monopoly retail utilities to purchase their output by law.[7] See Nassau Power Corp. v.

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6. Duke's grant of an option to the City to purchase 6 percent of the power produced by the proposed plant does not create the type of commitment required to invoke the PSC's jurisdiction. It is no commitment at all. The option simply creates the *possibility* that the City *might* exercise the option if the plant were built. While the option remains unexercised, the PSC has no assurance that *any* of the power produced would be committed to a specific monopoly retail utility. Moreover, even a contract to sell a small percentage of a plant's output to a monopoly retail utility cannot warrant a PSC need determination. That device would allow any applicant to circumvent the requirement that plants must be committed to serve a monopoly retail utility.

7. This Court held that it had jurisdiction in the Nassau cases. Had jurisdiction been questioned, however, it is far from clear that this Court would have reached that result because it is not clear that an order disposing of a need petition by a qualified facility that has no contract to provide service is an action relating to the rates or services of a utility providing electric service. Such an order arguably has only an indirect impact on utilities providing electric service because they are required by law to purchase power from cogenerators. Because the order disposing of Duke's petition had an even more attenuated impact on utilities providing electric service, this Court's assertion of jurisdiction in those cases is as no impediment to a conclusion that this Court may not entertain this direct appeal, even assuming that the Court expressly considered and decided the jurisdictional issue present in the Nassau cases.

Beard, 601 So. 2d 1175 (Fla. 1992) ("Nassau I"), and Nassau Power Corp. v. Deason, 641 So. 2d 396 (1994) ("Nassau II"). But, there is no authority that this Court or the PSC have jurisdiction to determine need for a plant that is not committed to monopoly retail utilities by either ownership or contract *and* that would have no statutory right to require such utilities to buy from it, as is the case with Duke's proposed plant.

B. A State Statute to Regulate Monopolies Does Not Provide an Avenue to Force Markets Open

FPC puts it well when it observes that the appellees are attempting to fit a square peg in a round hole through their arguments that section 403.519 allows the PSC to determine that the proposed free market plant is needed.

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

FPL argued in its initial brief that existing legislation provides a framework for regulating a monopoly market and that it would be absurd to conclude that that framework could be used to deregulate the power generation market, even if the language of the statutes could be read as authorizing a need determination for the Duke plant. It is this Court's "primary duty to give effect to the legislative intent; and if a literal interpretation leads to an unreasonable result, plainly at variance with the purpose of the legislation as a whole, [the Court] must examine the matter further." Radio Tel. Communications, Inc., 170 So. 2d at 580. Nothing in any of the appellees' briefs refutes this point.

The PSC acknowledges the purpose of the existing statutory scheme when it observes that "*competition is replaced* by natural monopoly regulation." (PSC at 17). The PSC also agrees that federal law prevented out-of-state companies from competing with in-state monopolies until 1996 (PSC at 18), but then argues that the recent change in federal law should be interpreted as requiring Florida to abandon its decision to regulate power generation as a monopoly.[8] (PSC at 21). In advancing this argument, the PSC completely ignores two critical points. First, none of the applicable federal laws or regulatory orders imposes *any* limitation on the states' power to control the siting of power plants. Second, and more importantly, it also ignores that the federal Energy Policy Act expressly allows each state to decide for itself whether power plants can be built within its borders. (FPL at 34). The arguments that section 403.519, as interpreted by FPL and as previously interpreted by the PSC and by this Court, is an improper attempt to "preempt" federal law is plainly incorrect.[9]

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8. The PSC lacks standing to make this argument. See Department for Revenue v. Markham, 396 So. 2d 1120, 1121 (Fla. 1981); Barr v. Watts, 70 So. 2d 347, 350 (Fla. 1953); State ex rel. Atlantic Coast Line Ry. v. State Bd. of Equalizers, 94 So. 681 (1922); Turner v. Hillsborough County Aviation Auth., 24 Fla. L. W. D2034 (Fla. 2d DCA Sept. 3, 1999); but see Fuchs v. Robbins, 24 Fla. L. W. D1529, 1533 n.1 (Fla. 3d DCA June 30, 1999), rev. granted, Fla. Sup. Ct. Case No. 96,182.

9. In determining whether the Atomic Energy Act preempted state law, the Supreme Court held in Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983), that "states retain their traditional responsibility in the field of regulating electrical utilities for *determining questions of need*, reliability, cost and other related state concerns. Id. at 204 (emphasis added); see also Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (rejecting argument

The City, for its part, has used a large portion of its brief to argue that section 403.519 would violate the dormant Commerce Clause of the United States Constitution if the statute were not interpreted to allow merchant power plants. (City at 39-47). Duke, of course, has advanced neither any constitutional argument of its own nor the constitutional argument advanced by the City.[10] The City's ephemeral standing to raise the constitutional issue is premised on its unexercised option to buy a fraction of the proposed plant's output.

If the Court nevertheless were to address the City's constitutional issue, it should hold that section 403.519 does not violate the Commerce Clause. The City mischaracterizes FPL's argument as contending that an out-of-state utility is prohibited by section 403.519 from operating a merchant plant. (City at 38). That is not FPL's argument. The argument is that Florida does not have a regulatory scheme that authorizes determinations of need for merchant plants regardless of whether the owner

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that coal severance tax was unconstitutional because it substantially frustrated national energy policy).

10. Duke pulls up short of asking this Court to declare section 403.519 unconstitutional if it finds that the act does not allow a finding of need for merchant plants. (Duke at 38). Instead, Duke makes the ironic argument that if the statute were so interpreted then it "could possibly lead to the unregulated proliferation of power plant construction." (Duke at 38). That, of course, is plainly incorrect because § 403.506(1), Fla. Stat. (1997), provides, "No construction of any new electrical power plant . . . may be undertaken after October 1, 1973, without first obtaining certification in the manner herein provided" and § 403.508(3), Fla. Stat., makes a certificate of need a "condition precedent" to the certification.

is an in-state or out-of-state utility. In-state utilities do not have any more statutory authority to seek a determination of need to construct and operate a merchant plant than do out-of-state utilities such as Duke. Thus, the City's first Commerce Clause theory -- that section 403.519 overtly discriminates against out-of-state utilities because it requires any power plant built to be part of the regulatory system -- is a sham. If Duke wishes to open and operate a power plant within the existing regulatory framework, it can seek a certificate of need for such a plant. There is no discrimination against Duke simply because it cannot obtain that which is not available to anyone.

Despite the City's suggestion to the contrary (City at 41), no evidence exists in the record that section 403.519 was enacted to discriminate against out-of-state utilities. Section 403.519 was, as the City puts it, enacted to serve "legitimate state interests" such as ensuring electricity system reliability and integrity, providing adequate electricity at a reasonable cost, and permitting plants that are the most cost effective. (City 41-42) (citing section 403.519). Section 403.519 is a regulatory examination of the "need" for a new plant. That examination is dictated by the Florida Legislature's decision to regulate utilities as monopolies rather than to allow them to compete freely. The need determination also ensures that the expenditures by public utilities are actually needed for system reliability, so that customers do not wind up paying for unneeded facilities. The purpose of section 403.519 is not economic protection.

Undaunted, the City argues that if section 403.519 does not overtly discriminate against it, the statute nevertheless should be held to violate the dormant Commerce Clause because the statute unduly burdens interstate commerce. But, dormant Commerce Clause concerns are overridden where, as here, Congress has expressly authorized state regulation of interstate commerce. Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders, 48 F.3d 701, 710 (3d Cir. 1995). In section 731 of the Energy Policy Act, Congress expressly reserved siting and environmental licensing of power plants other than hydroelectric facilities to the states. (FPL at 34). Accordingly, the operation of state laws such as section 403.519 regulating power plant siting cannot be said to be a violation of the dormant Commerce Clause.[11]

Furthermore, as the City admits, where, as here, the statute at issue regulates evenhandedly to effectuate a legitimate local interest and has only incidental effects on interstate commerce, the statute will be upheld unless the burden on commerce clearly exceeds the local benefits. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); see also General Motors Corp. v. Tracy, 117 S. Ct. 811, 828 (1997) (Commerce Clause was never intended to prevent the states from legislating to protect public

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11. See, e.g., Northeast Central Pipeline Corp. v. Commission of Kan., 109 S. Ct. 1262 (1988); Prudential Ins. Co. v. Benjamin, 66 S. Ct. 1142 (1946); Gallagher v. Motors Ins. Corp., 605 So. 2d 62, 66 (Fla. 1992).

welfare).Section 403.519's requirement that a nonutility applicant must have a contract with a monopoly retail utility passes the test set forth in Pike: All applicants must demonstrate need, and all applicants that have no need of their own must demonstrate need by producing a contract with an entity that has an obligation to serve and a corresponding need.

And, these requirements effectuate a legitimate local public interest. As set forth in section 403.502, Florida Statutes, the selection of power plant sites has a "significant impact upon the welfare of the population, the location and growth of industry, and the use of natural resources of the state." Requiring a determination of need for every plant that will be entitled to seek a legislated rate of return from ratepayers establishes "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" as intended by Section 403.502(2), Florida Statutes. Environmental protection and resource conservation are areas of legitimate local concern. Minnesota v. Lover Leaf Creamery Co., 449 U.S. 456 (1981).

Lacking a valid constitutional argument, Duke turns to statutory construction. It contends that FPL's reading of section 403.519 would preclude small electric municipal utilities with sales of less than 2,000 gigawatt hours from obtaining need determinations because a 1989 amendment, ch. 89-292, Laws of Florida, omits such

small municipalities from the definition of "utility" in section 366.82(1), Florida Statutes, that is used by FPL to interpret the definition of applicant. (Duke at 35). Duke ignores FPL's point that small municipal utilities were removed from the definition of "utility" merely to relieve them from onerous reporting requirements. (FPL at 41 n.46). In order to preserve the ability of small municipalities to apply for need determinations under section 403.519, the Legislature then had to use a word other than "utilities" to define those entities that would be entitled to need determinations. The Legislature chose to substitute the word "applicant" for "utility" in section 403.519. Ch. 90-331, Laws of Florida. There is no evidence that this housekeeping change to preserve the right of small municipalities to apply for need determinations was intended to open section 403.519 to entities like Duke.

Another statutory construction argument advanced by Duke is that the PSC previously has granted a need determination for a non-retail electric company, Seminole Electric Cooperative Inc. ("Seminole"). (Duke at 36). But, there is a critical distinction between plants such as Seminole's that are being built to serve the rural electric cooperative market and those such as Duke's that are being built to serve the general wholesale market. Those who decide to build power plants to serve rural areas do so, not because there is a market demand for such plants, but rather, because there is governmental assistance available to make economic operation of such plants

feasible.[12] Government funding acts as a substitute for market demand. It therefore is necessary to evaluate the "need" for the plant.[13] Duke cannot rely on the PSC's acceptance of this role as providing any basis for the PSC to exercise jurisdiction over its petition.

Nor can Duke, as Duke contends, be treated with the City as a "joint operating agency,"§ 403.503(13), Fla. Stat., which is defined as an "applicant" under section 403.519.[14] First, the petition never alleged there was a joint operating agency. Duke and the City now argue that they qualify as a "joint operating agenc[y]" because they qualify as an "electric power supply project" -- under a different statute -- the Joint Power Act. But, the term "joint operating agencies" only could be interpreted as referring to combinations of governmental entities. The Siting Act was enacted a year

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12. The Rural Electrification Act of 1936 ("the REA"), 7 U.S.C. § 901 *et seq.*, was enacted to ensure that rural America would have low cost electricity service notwithstanding that it lacked a population large enough to create the market demand necessary to attract commercial electric service. See United States v. Cajun Elec. Power Coop., Inc. (In re Cajun Elec. Power Coop, Inc.), 109 F.3d 248, 252 (5th Cir. 1997). The REA makes loans to rural electric systems at lower than market interest rates. Id. Cooperatives such as Seminole qualify for loans to build power plants through their dedication to serve persons in rural areas. Id. See also 7 U.S.C. § 903.

13. This takes place at the federal level, when a determination is made that funds will be loaned for the building of the plant. 7 C.F.R. Part 1703 et seq. Federal law also provides that "no loan shall be made unless the consent of the State authority having jurisdiction in the premises is first obtained," 7 U.S.C. § 903, providing a proper role for the PSC in determining need.

14. Section 403.519 includes "joint operating agency" within the definition of an "electric utility."

before the Constitution was amended to allow private entities to enter into such arrangements, Fla. Const. art. VII, § 10(d), and nine years before joint power projects between government agencies and out-of-state entities were allowed. Ch. 82-52, Laws of Florida.

Second, the allegations of the petition showed that the proposed plant does not qualify as a "joint electric power supply project" in any case. Compare § 361.12, Fla. Stat. (1997) with (R1-4-¶¶ 4 & 31). Pursuant to section 361.12, Florida Statutes, an "electric utility" may join with a "foreign public utility" for the purpose of "*jointly* financing, acquiring, constructing, managing, operating, or owning any project." § 361.12, Fla. Stat. (1997) (emphasis added). Appellees fail to allege any *joint* action between Duke and the City to finance, acquire, construct, manage, operate, or own the proposed plant. Indeed, the City concedes that "Duke will design, engineer, construct, finance, own and operate the Project." (City at 14). There is no "joint" action under the statute.

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

FPL's initial brief pointed out that this Court already has held that section 403.519 does not allow the deregulation of power generation in Florida by its rulings (1) that a petitioner under section 403.519 must show that the power that it proposes to produce is in fact needed by a specific utility that is authorized to serve retail

consumers, Nassau I, 601 So. 2d 1175; and (2) that the PSC properly dismissed a petition under section 403.519 submitted by an entity that neither was authorized to serve consumers directly nor contractually committed to sell its power to such an entity. Nassau II, 641 So. 2d 396. (FPL at 37).

Appellees point out that the Nassau decisions involved a QF which could force sales to retail utilities and they argue that this is a basis for not applying the holding of the decisions here. (PSC at 24-27, Duke at 39-48, City at 24-29). But the fact that a QF can force sales to retail utilities and that Duke's plant cannot force sales to retail utilities is no basis not to apply the Nassau holding here. The Nassau cases dictate that a plant must be committed to serve a specific retail utility in order for the PSC to have any role in determining its need. Where a plant, such as that proposed by Duke, has *neither* the right to force sales to a retail utility *nor* a contract to sell power to a retail utility, the holding of the Nassau decisions applies with even greater force because such a plant is being built outside of the monopoly system over which the Legislature has given PSC jurisdiction.

3. The Statutory Language Does Not Authorize Deregulation

FPL argued in its initial brief that there is no language in section 403.519 that supports the idea that it was enacted by the Legislature to authorize the PSC to commence the deregulation of power generation in Florida. None of the appellees refutes this point. Instead, they engage in various semantic arguments in an attempt

to show that the words could be construed in the fashion that they would like. But, all of the semantic arguments require the Court to blind itself to the fact that the appellees are asking the Court to find in the words that which is not there: an instruction to the PSC that it should no longer treat power generation as a monopoly in Florida.

The PSC concedes that "the statutes do in fact indicate that the Commission's regulation embodies the natural monopoly principle" and that "[r]ead together, such statutes clearly articulate and affirmatively express a state policy which is anti-competitive; i.e., *competition is replaced* by natural monopoly regulation." (PSC at 17-18).[15] The PSC does not, of course, mean that state policy or statutes are *anti*-competitive. Rather, it means that state policy and statutes reflect a legislative decision that the public would be better served by regulation of utilities providing electric service rather than by free competition that could produce duplicative and expensive facilities, wide price fluctuations, and unreliable service. Storey v. Mayo, 217 So. 2d 304, 307 (Fla. 1968) (in "public utility operations competition alone has long since ceased to be a . . . a reasonably efficient regulatory factor").

The PSC argues that the statutes imposing regulation upon monopoly utilities

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15. Indeed, the PSC concedes that statutes governing the supply of electricity to the public "characteristically do replace competition with anti-competitive regulation." (Id.). In support, the PSC cites section 366.05(1) which indicates the Commission's duty "to regulate for the purpose of fixing rates and charges for services rendered." (Id.).

nonetheless can be read as authorizing the PSC to commence deregulation by finding that a merchant plant is needed because the PSC does engage in the regulation of some competitive activities. But to make this argument, the PSC relies on its flawed federal deregulation preemption argument -- not statutory language.[16]

The appellees' arguments regarding the application of regulatory schemes to changing technologies are similarly unavailing. "To so interpret the statute and the legislative intent would . . . be . . . 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." Radio Tel. Communications, Inc., 170 So. 2d at 581 (land mobile radio service not a "telephone company" subject to regulation).

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16. For example, the PSC states that in section 366.051, the PSC has "over two decades, implemented PURPA." But, as explained in FPL's initial brief at 34, federal deregulation of the power industry specifically reserves the siting of power plants to the states. The PSC also cites the provisions of section 366.11 that exempt from regulation wholesale sales of power generated by plants committed to serve Florida retail customers as demonstrating that the PSC has legislative authority to find a need for power plants that make wholesale sales. As previously discussed, the exemption of wholesale sales of power from plants committed to serve Florida retail customers cannot be logically interpreted as a legislative authorization for the PSC to find that a need exists for power plants not committed to serve any retail customers.

4. The Florida Legislature has Rejected Deregulation

Appellees also fail to address the overriding fact that the Florida Legislature has rejected the deregulation of power generation in Florida. This is clearly evidenced by the death of Florida Senate Bill 1888, indicating that the Legislature does not believe that the existing legislative scheme allows deregulation and that the Legislature does not support deregulation.[17] Appellees make no attempt to deny that "Florida has not done much to restructure its electric power industry."[18]

The Florida House Utilities and Communications committee is conducting an interim project called "Electric Restructuring in Other States and Existing Electric Supply in Florida." The project, expected to be completed by mid-November, 2000, will discuss the restructuring in other states, pending state and federal legislation pertaining to electric deregulation, and the existing electric supply in Florida.

5. New Legislation is a Prerequisite to Deregulation

Not one of the appellees makes any attempt to address FPL's argument that deregulation cannot be accomplished in an orderly fashion without comprehensive

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17. U.S. Dep't of Energy, Status of State Elec. Indus. Restructuring Activity as of June 1, 1999 - Florida, http://www.eia.doe.gov/cneaf/electricity/chg_str/ tab5rev. html#FL (visited June 11, 1999); see 49 Fla. Jur. 2d Statutes § 161 (1984) ("Amendments made, or proposed and defeated, may throw light on the construction of the act finally passed").

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

legislation akin to that which has been adopted by states like California. Ad hoc deregulation in the manner urged here by the PSC will create a duplicative set of free-market power plants that will stand side-by-side with those plants committed to serve retail customers. The consequences of that will be severe, as was pointed out in testimony before the PSC. Merchant plants might succeed in displacing existing plants, causing millions of dollars in losses to existing regulated utilities. Ratepayers or taxpayers could be held responsible for those losses. Planning by existing utilities could become impossible. Grid reliability could be undermined. Rates could fluctuate wildly. (V11-1507-47). Indeed, appellees ignore that full deregulation of the electric generation industry could leave stranded costs *of $300 billion* nationwide, necessitating elaborate legislation. (FPL at 44).

II.

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

Duke's petition fails to make allegations required for a determination of need. Not surprisingly, the evidence Duke submitted also falls far short of that which is required by statute and regulation.

A. Duke Failed to Make Required Allegations

FPL initial brief pointed out that Duke had not pled facts required by five provisions of the Florida Administrative Rules 25-22.081(1) & (3), 25-22.081(3), 25-

22.082, and 25-22.081(5). All of the appellees' responses to this amount to nothing more than a contention that the pleading requirements should not be deemed applicable when a petition is asking to build a merchant plant. It is enough, the appellees essentially argue, for Duke and the City to have told the PSC in their complaint that they would like to build a power plant in New Smyrna Beach, that the plant will sell power at market prices, and that if that turns out to be an economic failure, then it is the responsibility of Duke's shareholders and not any Florida retail ratepayers. This attack on statutorily required pleadings makes the unavailability of the statutory scheme to merchant plants quite obvious.

For example, in response to FPL's argument that Duke did not identify the utilities "primarily affected" by the proposed merchant plant, the PSC argues that Duke could not do so because the plant to be built is a wholesale plant. (PSC at 31-34). That presupposes that merchant plants are contemplated by Rule 25-22.081(1). To state that the City is the primarily affected utility is ludicrous given that the vast majority of the proposed plant's output is intended to be sold elsewhere.

The PSC's arguments with respect to Rule 25-22.081(3) and Rule 25-22.081(5) similarly reveal its intention to legislate rather than regulate. The PSC admits that "[i]nformation specific to a purchasing utility cannot be alleged" for a merchant plant. (PSC at 34). But that means that the petition should fail, not that the information-specific requirement should be ignored. Nassau I, 601 So. 2d at 1178 n.9.

Duke completely fails to comply with Rules 25-22.081(4) and 25-22.082. The latter requires that "each investor-owned electric utility shall evaluate supply-side alternatives to its next planned generating unit by issuing a Request for Proposals (RFP)." The former requires investor-owned utilities to plead the results of the RFP. The PSC found Duke to be an "investor-owned utility" (R14-2674-76), and thus Duke was required by law, to issue an RFP, but the PSC waived the requirement.

Duke ignores this point altogether. (Duke Brief 58-59). The City jams the square peg into the round hole by arguing that the PSC recognized that Duke complied with the general "framework" of Rule 25-22.082 by stating the merchant plant itself was a sufficient alternative. (City at 60). The PSC simply states that these rules "appear more relevant" to an entity in the regulated system. (PSC at 35). That is FPL's point: the rules do not apply to merchant plants, and, because Duke could not meet their requirements, the petition should have been dismissed.

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

The same contempt for the existing statutory scheme can be seen in the appellees' responses to FPL's arguments that the evidence was not sufficient to allow a determination of need. The appellees essentially respond to this argument by stating that no evidence is required to determine need when a proposed plant will not become a part of the rate base of a monopoly retail utility.

Initially, the City and the PSC accuse FPL of asking the Court to reweigh the

evidence. (PSC at 36-38, City at 60-64). But FPL's arguments are based upon the fact that *no* evidence supports the PSC's findings.

For example, *no* evidence supports the PSC's findings that a 514 MW plant is needed for system reliability and integrity when only 30 MW are earmarked for the City and the plant is not needed for current reserve margins.[19] *No* evidence supports the PSC's findings that the 514 MW was needed for any specific utility other than 30 MW for the City. The PSC's "findings" on these points are based upon the assumption -- *i.e., not* evidence -- that the merchant plant's capacity would be purchased by retail utilities because that power would be cheaper. But, that finding could be used to support the building of any merchant plant, and thus the PSC had no role to play in determining the merchant plant was needed. Since the PSC must play a role in a need determination, section 403.519 does not apply to merchant plants. The PSC concludes its brief by accusing FPL of being against free enterprise. (PSC at 42). FPL is not against free enterprise. FPL's point is that the Florida Legislature has delegated to the PSC the function of determining whether electric power plants are actually needed. The PSC simply cannot delegate that responsibility to the free market.

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19. The City and the PSC take FPL to task for stating that the PSC acknowledged that the plant is not needed for acceptable reserve margins. (City at 64 n.37; PSC at 39). They are splitting hairs. While it is true that the PSC did note that current reserve margins were being re-examined (R14-2697-98), the PSC did not find that the merchant plant was needed for *current* reserve margins. The PSC also did not make a utility-specific determination that the merchant plant was needed.

Conclusion

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

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