IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION, Appellant, vs. JOE A. GARCIA, etc., et al. Appellees.	)	Case No. 95,445

Reply Brief of Florida Power Corporation

JAMES A. McGEE
Senior Counsel
JEFF FROESCHLE
Senior Counsel
FLORIDA POWER CORPORATION
P.O. Box 14042
St. Petersburg, Florida 33733
Telephone: (727) 820-5184
Facsimile: (727) 820-5519

GARY L. SASSO
Florida Bar No. 622575
SYLVIA H. WALBOLT
Florida Bar No. 033604
JOSEPH H. LANG, JR.
Florida Bar No. 059404
CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER
Post Office Box 2861
St. Petersburg, FL 33731
Telephone: (727) 821-7000
Telecopier: (727) 822-3768

Attorneys for Florida Power Corporation

TABLE OF CONTENTS

CERTIFICATE OF FONT SIZE

This brief was prepared using 14 point Times New Roman type.

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

ARGUMENT

After volumes of briefing, one inescapable fact remains: By proclaiming that a "merchant" plant satisfies the statutory standard of "need," the Florida Public Service Commission ("PSC") has forced a square peg into a round hole. Put in legal terms, the PSC has exceeded its statutory authority.

Acknowledging, as it must, that the Florida Legislature never heard of "merchant" plants when it enacted the Siting Act in 1973 and the need provision in FEECA in 1980, the PSC resorts to the exhortation that it must be given unfettered discretion to "decide[] issues according to a public interest which changes with shifting circumstances and passage of time," PSC Brief, at 19 (*quoting McCaw Communications of Florida v. Clark*, 629 So. 2d 1175, 1179 (Fla. 1992)). But whatever may be said about the authority of the PSC to exercise discretion in determining matters *within its statutory authority*,[1] the PSC has *no* discretion to regulate *outside* its prescribed authority. In approving a "merchant" plant, that is exactly what the PSC has done.

---

[1]This Court's decision in *McCaw* involved the setting of rates by the PSC, which naturally will change over time, not a re-interpretation of the agency's enabling statutes without any intervening amendment. Further, the Florida Legislature has acted repeatedly in recent years to circumscribe agency policymaking authority, amending the Florida Administrative Procedure Act (APA) in 1996 to make clear that agencies must develop policy through rulemaking based on clear statutory authority, see ch. 96-159, Laws of Fla., and then amending the statute again in 1999 to emphasize that the statutory authority for rules must be explicit, see ch. 99-379, Laws of Fla. After the 1996 amendment to the APA, the PSC was foreclosed from adopting policy that was only "reasonably related" to delegated statutory

In analogous circumstances, the Michigan Supreme Court very recently struck down the well-meaning but *ultra vires* action of the Michigan Public Service Commission directing electric utilities to implement ostensibly pro-competitive measures in that state. *Consumers Power Co. v. Michigan Public Service Comm'n*, 596 N.W.2d 126, 1999 WL 462507 (Mich. June 29, 1999) (holding that the "PSC exceeded its authority in ordering the electric utilities to transmit electricity produced and sold by other suppliers to customers in the service area of the utility"). The Florida PSC's action here warrants the same response.

In its brief, Duke contends that the PSC's approval of a "merchant" plant under existing legislation is analogous to an agency's permissible regulation of automobiles under an ordinance providing authority to regulate "carriages, carts, omnibuses, wagons, and drays," the purpose of which was to vest authority over all "known classes of vehicles using the streets," Duke Brief, at 37, (*quoting Taylor v. Roberts*, 84 Fla. 654, 94 So. 874, 876 (1922)). This argument mischaracterizes what the PSC has done in this case.

FPC does not quarrel with the proposition that the PSC has authority under the Siting Act and FEECA to authorize construction of electric power plants using progressively advanced *technology* (*e.g.*, coal, oil, gas, solar). But what is involved in this case is not changing *technology* but the adulteration of the whole concept of *need*, the very basis of the legislative policy judgment that undergirds the Siting Act and FEECA.

---

authority. *Compare General Telephone Co. of Florida v. Florida Public Service Commission*, 446 So. 2d 1063 (Fla. 1984), *with* § 120.52(8), Fla. Stat. (1997).

As FPC explained in its Initial Brief, the Siting Act and FEECA are an integral part of a regulatory regime in Florida built on the unchallenged concept that retail Florida utilities are given an *exclusive* franchise to sell power to the citizens of this State. Because *only* such utilities may serve the citizens of this State, *only* such utilities may be said to *need* power resources to meet their service obligations. This is the fundament underlying Florida's statutory scheme. Further, it is *exactly* how this Court construed the Siting Act and the need provision of FEECA in the *Nassau* decisions.

Despite the thousands of words the appellees have used to *characterize* the *Nassau* decisions, no amount of characterization can change what this Court actually *said* in its decisions, namely, that "a need proceeding" under section 493.519 "is designed to examine the need resulting from an electric utility's duty to serve customers," and that "[n]on-utility generators" like Duke "have no similar need because they are not required to serve customers." *Nassau Power Corp. v. Deason*, 641 So. 2d 396, 398 (Fla. 1994) (*Nassau II*). This simple, irrefutable statement is true as a matter of logic and law, and this is why admitting a "merchant" plant into this statutory framework amounts to inserting a square peg into a round hole.

Why has the PSC taken this step? In its brief, the PSC asserts that "shifting circumstances" brought before the PSC "facts concerning tight reserve margins in Peninsular Florida, reluctance on the part of incumbent utilities to build (as opposed to 'plan') more plant[s] 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." PSC Brief, at 17-18. "At the same time," the PSC says, "the Commission has been presented *with a new and fortuitous federal pro-competitive initiative in wholesale electric markets in the form of an initial EWG applicant for need determination*." PSC Brief, at 18.[2]

This is an extraordinary statement. Under Florida law, the PSC is given both the responsibility and the means to assure that the State will have adequate and reliable energy resources by regulating the *existing state utilities*. In fact, the Florida Statutes specifically provide:

> If the commission determines that there is probable cause to believe that inadequacies exist with respect to the energy grids developed by the *electric utility industry*, it shall have the power, after proceedings provided by law, and after a finding that mutual benefits will accrue to the *electric utilities* involved, to require installation or repair of necessary facilities, *including generating plants* . . ., with the costs to be distributed in proportion to the benefits received . . . .

§ 366.05(8), Fla. Stat. (1997).

What the PSC is arguing, in essence, is that it is concerned that it has lost control over the entities it has traditionally regulated (which is neither true nor supported by the record in this case), and it has "fortuitously" been presented with – and eagerly embraced – an apparently enticing solution from *outside* the framework of the existing state system. (In fact, in the proceedings below, Duke promoted its project as "manna" from Heaven.) But regulatory agencies in this State do not have the license to scuttle the approach that the Florida Legislature has

[2] All emphasis is supplied unless otherwise noted.

mapped out for them in favor of a new alternative that has superficial appeal. As Commissioner Clark pointed out in dissent, *whatever the apparent benefits* of "merchant" plants, it is the job of the legislature, not the PSC, to evaluate these ostensible benefits and to determine that the time is right to embark on a new regulatory approach to building electric power plants in Florida.[3]

The appellees invoke the specter that enforcing existing law, as articulated in the *Nassau* decisions, would somehow give retail utilities, like FPC, a strangle-hold on the development of adequate power resources in Florida. In this connection, the PSC suggests that, if a power plant developer must demonstrate that it has firm contracts in place with Florida retail utilities to meet the need of those utilities as a condition to building a new plant in this State, Florida utilities can exercise their leverage to suppress the development of new generating resources.

---

[3] Appellees attempt to distinguish the *Nassau* cases by characterizing this case as one of "first impression." This is a euphemistic way of saying that the PSC's decision in this case is unprecedented. Despite the fact that the PSC and this Court *previously* made clear that a need proceeding under section 403.519 is designed to examine the need of a retail utility, the PSC in this case *for the first time* approved a petition that neither demonstrated (1) that particular retail utilities *needed* the proposed plant; nor (2) that the plant developer was committed to *meet that need* through firm contracts. Appellees assert that the PSC has previously approved need applications that did not demonstrate the need of particular retail utilities (see cases cited at pages 35-36 and 52-53 of Duke's brief), but appellees are wrong. In the Orlando Utilities Commission case, the application was filed on behalf of a retail utility at a time when Florida utilities were overly dependent on foreign oil. (The same is true of the other proceedings cited in footnote 20 of the Answer Brief filed by the Utilities Commission, City of New Smyrna Beach). In the case involving Seminole Electric Cooperative, Inc., the application was filed on behalf of a generating and transmission supplier for eleven "member" rural cooperatives. In other words, the generator had a commitment to serve the needs of eleven retail utilities.

This argument amounts to a quarrel with the existing legislative framework, which assigns *exclusive* retail franchises to Florida retail utilities. It is on account of this exclusive retail franchise that anyone wishing to sell electric power for consumption in Florida must transact business with a Florida utility. The *Nassau* decisions merely implement this statutory scheme. If the PSC wishes to change this framework, it should recommend an amendment to the Florida Legislature. It should not undertake improperly to subvert the law.

In any event, the PSC's argument is fundamentally flawed. The PSC concedes in its brief that, if the Duke plant is built and operated as a "merchant" plant, "[t]here is no danger that any utility will be *forced* to purchase power from Duke that it does not need." PSC Brief, at 28. This confirms that the PSC is willing to trust retail utilities to make appropriate, pro-competitive decisions to purchase power from the Duke plant *after* the proposed plant is built. But this puts the cart before the horse. What *Nassau* requires is that *before* Duke or other developers go forward and construct an electric power plant in Florida, with attendant impacts on the environment (including infrastructure, such as gas pipelines and transmission lines), a proper applicant must *first* demonstrate that particular retail utilities actually *need* the power from the plant, and that the developer of the plant is actually committed to *meet that need*, as evidenced by firm power purchase agreements with retail utilities accounting for the output of the plant. There is no more reason to presume (and no basis in the record to conclude) that a Florida utility *that truly has a need for more capacity* will improperly decline to negotiate contracts to satisfy that need *before* a plant is built

than there is to presume that a utility will refrain from purchasing power *after* the plant is built (*if* the power is needed).

In refusing to follow the *Nassau* decisions, the PSC has permitted Duke to build a 540 MW power plant in this State based literally on *speculation* that retail utilities somewhere in the State (or outside Florida) will purchase its output *after* the plant is built. Yet Duke made no showing that any Florida utility – other than the Utilities Commission, New Smyrna Beach (the City), which has contracted for less than 6 percent of the plant's output – will actually *need* the output of the plant, or that the output will be available if when a particular Florida utility may actually need it. To the contrary, Duke admitted before the PSC that "*Duke New Smyrna has not identified in either its Joint Petition and Exhibits or its direct testimony and exhibits any individual Florida utilities, other than the Utilities Commission, New Smyrna Beach, which have a need for the output of the Project.*" [R6-1140]. Duke has purposely chosen to build a "merchant" plant that would be unencumbered by firm commitments, rather than try to negotiate firm contracts with Florida utilities, and has thus created a situation where no Florida utility (other than the City, to a meager extent) can *count on* the Duke plant to meet a true *need* when and if a need arises.

If the Florida Legislature wished to permit enterprising developers to build "spec" plants in Florida based on their willingness to assume the economic risk of those investments, the legislature knew how to say so. But the legislature did not say so. Rather, it chose a different approach – an approach that was built around its judgment (1) to impose an *exclusive* retail franchise and obligation to serve upon retail utilities in Florida; and then (2) to tailor the construction of electric

power plants in this State to the *need* of those retail utilities. The virtue of this approach is that it has limited the proliferation of power plants in a State with changing demographics and a highly sensitive environment to the number that is actually *needed* to serve the State's population in a reliable manner.

Statutory Construction

It should come as no surprise, then, that in order to reach its contrary approach, the PSC has had to twist and distort the existing statutory language and intent.

To begin with, the PSC asserts that Duke is a "regulated electric company" within the meaning of the Siting Act and is therefore a proper "applicant." In FPC's Initial Brief, we explained that the Florida Legislature meant by this term to refer to electric utilities that are regulated by the PSC. This is confirmed by the context of the Siting Act – enacted, as it was, as part of the fabric of state regulation over Florida utilities – and the legislature's own statement of its intent in enacting the Siting Act, namely, that the legislature intended to confirm "that the regulation of electric utilities is preempted by the *state*." Ch. 73-33, Laws of Fla.

In its brief, the PSC insists that the term "regulated electric company" must include *federally* regulated entities because Florida may not preempt federal regulation. PSC Brief, at 30. Of course, it is true that Florida may not preempt *federal* regulation (and no one contends that the Florida Legislature has attempted to do so) but that unremarkable point does not prove that in using the term "regulated electric company" the legislature meant to *refer* to *federal* regulation. To the contrary, if the legislature meant to confirm its intent to preempt Florida

local law by enacting the Siting Act, the legislature must have meant to refer to the exercise of comprehensive Florida *state* regulation. It follows that a "regulated electric company" must be a utility regulated under Florida law by the PSC.

In fact, arguing that the term "regulated electric company" includes federally regulated power producers proves too much because the Qualifying Facilities (cogenerators) at issue in the *Nassau* cases were federally regulated power companies. In fact, in order to obtain and maintain its status as a "Qualifying Facility," a cogenerator must satisfy federal regulatory requirements under the Public Utility Regulatory Policies Act of 1978 (PURPA). Thus, if the PSC were correct in its argument in *this* case, it would have been wrong in rejecting the applications of the cogenerators in the *Nassau* cases. But the PSC was not wrong in the *Nassau* cases, and this Court said so.

Appellees argue, nonetheless, that Duke *will be* a state regulated Florida "electric utility" *if* its application is approved in this case. Of course, merely to state this proposition is to demonstrate that it is circular. Appellees do not contend and cannot contend that, *at the time it filed its application,* Duke was a state regulated Florida electric utility. What appellees are arguing is that Duke will become state-regulated if the PSC says it is. But this bootstrap argument is not a legitimate exercise in statutory construction.

The fact is, no matter what appellees claim, Duke will *not* become a Florida "electric utility" under a proper reading of the Florida Statutes before or *after* its application might be approved. As FPC pointed out in its Initial Brief, under section 366.04(2), the PSC "shall have power over *electric utilities* for the following purposes: (a) to prescribe uniform systems and classifications of

accounts; (b) to prescribe a rate structure *for all electric utilities*; (c) to require electric power conservation . . . . (d) to approve territorial agreements . . . ." With regard to these requirements, counsel for Duke and the City made the following critical concessions before the PSC: "I don't think you could prescribe a rate structure for us for our wholesale sales. We don't serve at retail so that's irrelevant. We're not subject to the conservation requirements. And because we have no retail service area, we would not be subject to territorial disputes." [T1-94]. In other words, Duke is a square peg (an independent power producer) trying to get into a round hole (reserved for Florida electric utilities).

Before this Court, the City has attempted to rewrite the coverage of the Florida Statutes (section 366.04(2), in particular) to accommodate its case. Specifically, the City re-characterizes what the statute says to pick and choose what *manner* of regulation *should* apply to "merchant" plants, to wit: "The PSC regulates 'electric utilities' for the following purposes: *for retail utilities*, to prescribe a rate structure, to approve territorial agreements, and to resolve territorial disputes; and *for all utilities* (*i.e.*, both wholesale and retail), to require the filing of reports and other data, and to require electric power conservation and reliability within the grid, for operational and emergency purposes." City Brief, at 8 (underlining in original). It is evident that appellees are pleased to insert the modifier "retail" before "utilities" when it suits their purposes, but they insist on ignoring it when it proves inconvenient.

The fact is, the PSC's enabling statutes do not divvy up authority over retail and wholesale utilities in the manner that the City describes. Rather, the Florida statutes make clear throughout that *all the utilities that the PSC regulates are retail*

utilities. To repeat, section 366.02(4) expressly provides, *inter alia*, that the PSC "shall have power . . . to prescribe a rate structure *for all electric utilities*." What this means is, if an entity is in fact an "electric utility" under Florida law, then the PSC *shall* have the power to prescribe its rate structure (among other matters). Since Duke concedes that this power does *not* apply to it, then surely it follows that Duke is not an "electric utility" regulated by the PSC under its enabling laws.[4]

The PSC's argument on appeal is even more imaginative and equally unconvincing. Specifically, in its brief the PSC contends that, *while FERC may actually* regulate Duke, *the Florida PSC* "impliedly" concurred with FERC when, for example, FERC approved Duke's tariff and accepted its accounting to that agency. PSC Brief, at 31. In the same vein, the PSC argues that because the proposed plant was found to offer an environmental benefit, "[t]hat is a *form* of conservation." *Id.* In this manner, the PSC asserts that it has exercised regulatory power over Duke in each of the areas expressly applicable under section 366.04(2) to "all electric utilities" (namely, prescribing uniform systems and classifications of accounts, prescribing rate structure, requiring electric conservation, and approving territorial agreements). Despite the PSC's herculean efforts to make it so, however, what it describes is *not* state regulation over "merchant" plants. It is

[4] Duke argues that the PSC has granted need determinations in the past to Seminole Electric Cooperative, Inc., which is "the wholesale electricity generation and transmission supplier for eleven of Florida's retail rural electric cooperatives." Duke's Brief, at 36. Seminole is a dedicated supplier, however, to specifically identified retail cooperatives, and the PSC repeatedly referenced such "member cooperatives" in its Order. Thus, Seminole was constructing facilities to meet the utility-specific need of particular retail utilities in Florida. By insisting upon entering the State as a "merchant" plant, Duke expressly eschewed any showing that it was committed to serving the identified needs of particular retail utilities.

"pretend" regulation. In truth and fact, what the PSC describes is an attempt to force a square peg into a round hole.

Appellees offer an alternative statutory argument that is just as ill-conceived: that the City and Duke are a "joint operating agenc[y]," within the meaning of the Siting Act. As FPC demonstrated more fully in its Initial Brief, this alternative argument should be rejected for at least four reasons.

First, appellees seek to interpret the term "joint operating agenc[y]" in the Siting Act by arguing that Duke and the City satisfy the *different* term "joint electric power supply project" under a *different* statute (the Joint Power Act), enacted two years after the Siting Act became law. Although appellees insist that they cannot conceive of what the term "joint operating agency" might mean without referring to the Joint Power Act, obviously the Florida Legislature had *something* in mind other than the definition in the Joint Power Act since *that* statute was not even enacted until two years later. The term used in the Siting Act, "joint operating agenc[y]," plainly refers to joint inter-governmental (*i.e.*, "agency") power projects, not to entrepreneurial "merchant" plant developments, with questionable public accountability. In fact, the PSC and this Court squarely considered and decided (in the *Nassau* cases) that the term "joint operating agenc[y]," like each of the other terms used in the Siting Act, identifies entities that may be *obligated to serve customers*, like retail utilities or municipalities.

Second, the kind of "joint electric power supply project" described by Duke and the City (involving a private developer and municipal authority) was not even *legal* at the time the Siting Act was enacted (indeed, it was not authorized until

1982) and so could not have been what the Florida Legislature intended by the term "joint operating agency[y]" in 1973. *See* FPC Initial Brief, at 32.

Third, the proposed project will not, in any event, be a "joint electric power supply project" within the meaning of the Joint Power Act since a *joint* power project under that statute is one where the project participants are "*jointly* financing, acquiring, constructing, managing, operating, or owning" the project. § 361.12, Fla. Stat. (1997). The City concedes in its brief that "*Duke* will design, engineer, construct, finance, own, and operate the Project, and will market all capacity, energy, and potentially other electric services from the Project." The City Brief, at 14. In other words, this is Duke's show. Duke is merely using the City to gain a foothold in this State.

Fourth, whatever they call this project, appellees still have not established that the project will satisfy the *need* of any Florida utility, beyond the negligible capacity subscribed by the City. Indeed, it is in essence a "merchant" plant that is being built on "spec." Attaining "applicant" status does not excuse the applicant from demonstrating that a proposed plant is *needed* on a utility-specific basis. Even a retail utility, like FPC, must meet this burden in order to obtain PSC approval to construct a new plant. In this case, however, the PSC excused Duke from making a utility-specific showing of *need*, simply because Duke was willing to accept the *economic* risks associated with its investment. But FEECA and the Siting Act were enacted to protect more than *economic* interests. Rather, they were enacted to protect the State's fragile environment against deterioriation from the expansion of power plants and associated facilities, absent a showing that the retail utilities in this State actually *needed* new generating resources and that

construction of new plants could not be avoided through *conservation* measures taken by retail Florida utilities. (*See* pages 14-18, *infra*).

Accordingly, the PSC impermissibly construed the Siting Act in straining to take advantage of what PSC counsel concedes to be a "fortuitous" circumstance (an application by a "merchant" plant) falling outside the existing regulatory framework.

Finally, appellees selectively quote from the legislative history of the Siting Act to argue somehow that the Florida Legislature intended to adopt an "expansive" view of need. *E.g.*, Duke Brief, at 36-37. Contrary to what appellees contend, the legislative history of the Siting Act actually confirms that the PSC has misconstrued the statute in this case.

To begin with, the Siting Act, as originally enacted, included the ten-year site plan law. *See* Ch. 73-33, § 1, Laws of Fla. That law required "each electric utility" to submit "a ten-year site plan which shall estimate *its* power generating needs and the general location of proposed power plant sites." *Id.* As this Court recognized in *Nassau II,* only a retail utility can have "its" own power generating needs because only a retail utility is obligated to sell power to the public.

Further, the legislative history of the Siting Act makes clear that the legislature intended the law to act as a constraint on the proliferation of power plants in Florida, limiting construction to only those plants that a retail utility could demonstrate it needed within its ten-year planning horizon. During a discussion of the law, the Chair of the Subcommittee on Permits of the House Environmental Protection Committee, Representative Andrews, explained to a utility representative:

> [W]e just don't want you going out and building any power plants *you* don't need. . . . [W]e should balance the considerations of the need for additional power with the ecological considerations[.] So what we want them to [do] is to make a determinination that *there is in fact a need that has to be served*, and then they balance the ecological considerations with that need. If we've got a need that's ten years from now, we may have some trouble, and that's a different balance than if we've got one that says to me we've got a need, because if we don't have it we're going to black out next summer . . . .

[R9-1765-1821 (at pp. 10-11 of transcript)].

During these same discussions, a representative of Florida Power & Light explained how retail utilities plan for future needs and how they might be expected to obtain certification to build a plant under the new law:

> [I]f you can't prove your need and the reason for building the power plant, it's a difficult thing to sell any agency. I think we do that now. . . . And I think that if we look into the future and we look in planning, and we look at our ten-year proposal, and we look at the size of the plants that we're building, and I think we can get a proper balance between need, ecology, and growth of the state. I think that's really what we're after.

[R9-1765-1821 (at pp. 11-12 of transcript)].

As enacted, the Siting Act directed the state planning division to review the site plans submitted by the various utilities required to file plans under the act and to consider the need for electrical power "in the area to be served." *See* Ch. 73-33, § 1, Laws of Fla. Although this provision does not itself prescribe the scope or procedure for need determinations under the later-enacted need provision of FEECA (section 403.519), the legislative history of this provision confirms that members of the legislative subcommittee that developed the Siting Act envisioned that retail utilities would make use of the Siting Act to develop power plants to meet their present and future needs, in a manner that avoided the unnecessary duplication and spread of generating plants in Florida.

During discussions on the subject, a representative of TECO, Mr. Woodruff, provided examples of the utilities that were expected to use the law, namely, "Tampa Electric Company," "City of Lakeland," and "Florida Power Corporation," all electric utilities that may be obligated to serve customers in Florida, exactly as this Court stated in *Nassau II*. Woodruff asserted that retail utilities should be able to "inter-space" plant construction,

> where one year we build a plant and next year maybe Florida Power Corporation will build a plant. . . . In some intermediate [period], the City of Lakeland may build a plant. . . . And what it means is that each company doesn't have to have a particular amount of steady reserve over . . . investment of capital, we can call on one another and where the City of Lakeland or Tampa Electric Company may not be able to justify the particular need in our area, that's just in the area served, we can justify it in the areas served by Florida Power Corporation, Lakeland and [TECO] on an interim building schedule. Just a part of overall planning.

[R9-1765-1821 (at p. 15 of transcript)].[5] The point was, retail utilities should be permitted to stagger construction of their power plants to avoid an uneconomic duplication or proliferation of resources, relying upon each other when necessary to avoid the premature construction of new capacity.[6]

---

[5] Two transcripts of this subcommittee meeting were presented during the proceedings below. One clearly identified TECO in the above passage and the other did not. FPC chooses to identify TECO in its excerpt.

[6] Appellees contend that Florida utilities like FPC engage in wholesale sales from time to time, and that this somehow justifies the PSC's decision to approve a "merchant" plant. As the legislative history (discussed above) explains, however, Florida utilities like FPC engage in wholesale sales *incidental* to their primary retail service obligations, sharing reserves among each other in order to forestall the redundant construction of generating plants and in order to optimize the use of their facilities for the benefit of their retail ratepayers. This is a far cry from siting a "merchant" plant, which operates on "spec."

Rep. Spicola agreed, restating the point this way: "[W]hat you do is *you* build a plant big enough to meet *your* future needs. If you've got some excess capacity which you sell off to somebody that needs some. . . . But you anticipate that *within about ten years your needs* are going to outstrip this capacity, and so the other people you have been selling to are going to build in the interim, and they'll have excess capacity that they'll sell back to you. Well, that's just simply need in the area, it's just at what point in time." [R9-1765-1821 (at pp. 15-16 of transcript)].

This discussion confirms that, because of its statutory obligation to serve, a utility like FPC plans for *its* present and future needs and, as may be appropriate, seeks authorization to build a new plant that it can grow into over the ten-year planning horizon. In the meantime, the utility will incidentally have excess power to sell to other retail utilities, thus assisting their resource planning and optimizing the use of that facility for FPC's retail ratepayers. The system was conceived as an integrated whole, and it makes no provision for "merchant" plant developers to site plants based on perceived economic opportunity as distinguished from actual, identified present and future needs of the applicant utility.

By the same token, the legislative history makes clear that a retail utility like the City may not serve as the sole, legitimate sponsor of a plant that is *more than 14 times larger than what the utility needs now or will ever need over its ten-year planning horizon*. The Siting Act, coupled with the ten-year site plan law, contemplates that a utility will build a plant that will meet its *utility-specific needs* within its ten-year planning period. Consistent with this intent, section 403.519

requires that the applicant demonstrate "the need for an electrical power *plant*," not some minuscule portion of it.

Thus, neither the language of FEECA and the Siting Act nor the legislative history of these laws supports the PSC's decision and order in this case.

Constitutional Issues

As a last resort, the City contends (and PSC counsel implies)[7] that, if this Court enforces the *Nassau* decisions in this case, then it must proceed to declare the Siting Act unconstitutional. The City argues that (1) Federal law would preempt FEECA and the Siting Act if they were construed in accordance with *Nassau*, and (2) the "dormant" Commerce Clause precludes such a construction. The City is wrong on both counts.

At the outset, it should be obvious that the Federal Constitution applies in North Carolina, just as it does in Florida. Yet, as FPC discussed in its Initial Brief, Duke's parent utility persuaded the Public Service Commission of North Carolina that a power plant developer should be denied a certificate of public necessity to construct a merchant power plant in North Carolina because the developer was not able to "present evidence of a contract for the sale of power prior to obtaining a

[7]Because the PSC ruled in Duke's favor, it had no occasion to reach Duke's constitutional arguments and would be constrained from doing so in any event because it is an administrative agency, not a court. In its decision, the PSC suggested that it would like to see a fuller record before deciding Duke's constitutional challenges, meaning, in essence, that Duke failed to meet its burden of proving that application of the *Nassau* decisions to this case would be unconstitutional. On this appeal, however, PSC counsel repeatedly implies that FPC's construction of the Siting Act would preempt federal law. As we now demonstrate, this contention is based on a micharacterization of federal law.

certificate." *See* FPC Initial Brief, at 49-50 (*quoting* Duke Energy's Brief on Appeal). Having obtained this result, Duke's parent utility persuaded the North Carolina Court of Appeals to affirm. *Id.* As we now show, enforcing the *Nassau* rule is no less constitutional in Florida than it is in North Carolina.

Turning first to the issue of federal preemption, the City contends that the Energy Policy Act of 1992 and FERC Order 888 preempt Florida from requiring Duke to obtain a contract with state-regulated electric companies in order to build the proposed project. Yet "there is a long-standing presumption against federal preemption of the exercise of the power of the states," and a party asserting preemption must establish "that Congress has clearly and unmistakably manifested its intent to supersede state law." *Hernandez v. Coopervision, Inc.*, 661 So. 2d 33, 34-35 (Fla. 2d DCA 1995); *see, e.g., Hillsborough County v. Automated Med. Laboratories, Inc.*, 471 U.S. 707, 714 (1985). The United States Supreme Court has explained, "As we have frequently indicated, '[p]re-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or the Congress has unmistakenly so ordained.'" *Commonwealth Edison Co. v. Montana*, 101 S. Ct. 2946, 2962 (1981)(collecting cases).

The City does not, and cannot, say that either the Energy Policy Act or FERC Order 888 expressly precludes the states from regulating the construction of new power plants in the way that Florida has, or in any other way for that matter. This is for good reason. Section 731 of the Energy Policy Act preserves state and local authority over the siting of facilities and environmental protection, as follows:

> Nothing in this title or any amendment made by this title shall be construed as affecting or intending to affect, *or in any way to interfere with*, the authority of any state or local government relating to environmental protection or the siting of facilities.

15 U.S.C. § 79, Historical and Statutory Notes.

Indeed, Duke's own policy witness, Martha Hesse, a former Chairman of FERC, conceded at the hearing that this proceeding was exactly the kind of proceeding left by federal law to the states, and she refused to opine that federal law foreclosed the application of the *Nassau* decisions to this case, saying instead that federal law was *silent* on such matters. [T7-1006, T8-1020-25].

The fact is, the Energy Policy Act and FERC Order 888 did not mandate wholesale competition in all ways at all times, as the City (and PSC counsel) would have this Court believe. Rather, in enacting the Energy Policy Act, Congress purposely focused its work on *transmission* access, specifically leaving to the states their historic role of determining whether and in what circumstances new *generation* facilities might be needed.

Sensitive to the long-standing division of federal and state authority over issues of transmission and generation, the United States Supreme Court rejected a far more compelling federal preemption challenge than the City's in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983). The Court's reasoning in *Pacific Gas* applies *a fortiori* to this case.

In that case, the Court held that states were free to impose a *moratorium* on the construction of nuclear power plants on economic grounds, despite federal legislation – the Atomic Energy Act – that explicitly promoted nuclear energy. The Court stated, "There is little doubt that a primary purpose of the Atomic

Energy Act was, and continues to be, the promotion of nuclear power." *Id.* at 221. The Court nonetheless held that "the states have been allowed to *retain authority over the need for electrical generating facilities* sufficient to permit a state so inclined to *halt the construction of new nuclear plants by refusing on economic grounds to issue certificates of public convenience in individual proceedings*." *Id.* at 216. Further, the Court recognized that, since the states were "certainly free to make these decisions on a case-by-case basis, *a state is not foreclosed from reaching the same decision through a legislative judgment, applicable to all cases*." *Id.* at 315. The Court observed, "it *should be up to Congress* to determine whether a state has misused the authority left in its hands." *Id.* at 216.

Here, too, in the final analysis, amorphous arguments about a general federal policy of promoting wholesale competition must give way to the paramount and long-recognized interests of the State in ensuring the orderly development of power plants within its jurisdiction and its enforcement of comprehensive regulatory schemes designed to assure adequate and reliable electric service for its citizens. When and if Congress sees fit to regulate in this area itself, Congress will make the judgment to do so.

The City next contends that this Court is precluded by the Commerce Clause from conditioning the development of power plants by independent power producers on a demonstration that such plants are needed, as evidenced by contracts with retail utilities. The Commerce Clause, of course, does not expressly prohibit anything. Rather, it is an affirmative grant of lawmaking authority to Congress to "regulate Commerce . . . among the several States." U.S. Const. Art. I, § 8, cl. 3. Thus, when Congress elects to confer upon the states the prerogative

of regulating in a particular area, the Commerce Clause itself does not act to inhibit such state regulation. *E.g.*, *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980). This is exactly what Congress has done here.

Congress has plainly preserved to the states their traditional role of regulating the need for generating facilities and the terms upon which facilities may be sited. As discussed above, section 731 of the Energy Policy Act specifically preserves state authority over the siting of facilities and the protection of the environment. Further, the United States Supreme Court explicitly recognized in *Pacific Gas* that the "*[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States.*" 461 U.S. at 205; *see also id.* at 191 (referring to the states' "traditional authority over economic questions such as the need for additional generating capacity, the type of generating facilities to be licensed, land use, and ratemaking"); *id.* at 194 (referring to "the exercise of historic state authority over the generation and sale of electricity"). *See also Monongahela Power Company*, Docket No. ER87-330-001, 40 FERC ¶ 61,256 (Sept. 17, 1987) ("jurisdiction over the *capacity planning, determination of power needs, plant siting, licensing, construction*, and the operations of [power] plants ha[s] been deliberately withheld from [FERC's] control or responsibility" and "preserved [to] the States[]"). Accordingly, this is not a situation where Congress has – through inattention – omitted to regulate issues that should be off-limits to states under same "dormant" aspect of the Commerce Clause.

Even if Congress may be thought to have overlooked this area of regulation, however, and thus even if the "dormant" Commerce Clause may be thought to

apply in this case, Florida law in this area would survive constitutional scrutiny. The City contends, basically, that Florida law places regulated retail utilities in a favored position, making the need of those utilities determinative in a need proceeding. The United States Supreme Court recently rejected a similar challenge under the Commerce Clause in *General Motors Corporation v. Tracy*, 519 U.S. 278, 117 S. Ct. 811 (1997).

The Court in that case upheld a tax by the State of Ohio that applied to unbundled power marketing sales by an interstate gas distributor, but that exempted competitive sales by in-state regulated utilities. The Court began by tracing the history of regulation in the gas and electric industries, observing that state regulation emerged in the early part of this century after "then-recent experiments with free market competition in the manufactured gas and electricity industries had dramatically underscored the need for comprehensive regulation." 117 S. Ct. at 819.

In sustaining Ohio's differential tax treatment of state utilities and interstate power marketers, the Court pointed out:

> Conceptually, of course, any notion of discrimination assumes a comparison of *substantially similar entities*. Although this central assumption has more often than not itself remained dormant in this Court's opinions on state discrimination subject to review under the dormant Commerce Clause, when the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes.

Id. at 824. In that case, the Court recognized that regulated utilities provide "bundled" services that benefit smaller consumers. "While this captive market is not geographically distinguished from the area served by the independent marketers, it is defined economically as comprising consumers who are captive to

the need for bundled benefits." *Id.* at 825. Although regulated utilities competed directly with power marketers for larger, non-captive customers, the Court held that Ohio was justified in treating them differently, "*giv[ing] greater weight to the captive market and the local utilities' singular role in serving it.*" *Id.* at 826.

The Court noted there, as in *Pacific Gas*, that "should intervention by the National Government be necessary, *Congress has both the resources and the power to strike the balance between the needs of the competitive and captive markets.*" *Id.* Accordingly, the Court rejected the challenge of the power marketers to Ohio's regulatory approach. *See also Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 377, 395 (1983) ("the regulation of utilities is one of the most important functions traditionally associated with the police power of the States").

As in *Tracy*, the retail utilities in this State are assigned a critical role in need proceedings not out of some purpose to favor their economic interests, but because they alone sell power to, and are statutorily obligated to serve, the ultimate consumers in this State. *No one challenges the constitutionality of this exclusive retail franchise,* and it is on *account of that retail franchise* that any wholesale provider *must* deal with the retail utilities in Florida. This is not economic protectionism, but a rational, incontestably proper means to regulate the provision of the vital service of electric power in a way that balances the need for a reliable power supply with the State's interests in protecting its environment.

In support of Duke's position, the City has relied heavily on the Supreme Court's earlier decision in *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) invalidating under the Commerce Clause New Hampshire's directive

that the owner of an *existing* hydroelectric plant that participated in the regional New England Power Pool alter its historic pattern of interstate *billing* in order to provide the economic benefits of its interstate power sales to New Hampshire. The utility had historically made most of its sales in Massachusetts and Rhode Island, selling only 6 percent of its output in New Hampshire.

The *New England Power* case did not involve the states' traditional regulatory control over the development of, and need for, *new* generating facilities within a state. The case did not involve any local interest at all, except for sheer economics. *See id.* at 336, 339. Although the Court explicitly recognized that "Congress may use its powers under the Commerce Clause to '[confer] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy," *id.* at 340, the Court held that, with regard to the special area of hydroelectric energy, Congress explicitly preserved only those state laws *then* in existence at the time the Federal Power Act was adopted, *id.* at 341.

Unlike the situation in *New England Power*, what is at issue here is the State's exercise of its traditional power to regulate whether and in what circumstances *new* power plants may be built in this State. If the Court enforces the *Nassau* rule to order rejection of the joint petition, it will not be to serve some perceived economic interest, but to effectuate the important legislative determination that new power plants should not be constructed in Florida unless they are demonstrably needed.

CONCLUSION

For the foregoing reasons, and the reasons given in our Initial Brief, the Court should reverse the decision and order below and remand the case for dismissal of the joint petition.

Respectfully submitted,

FLORIDA POWER CORPORATION

JAMES A. McGEE
Senior Counsel
JEFF FROESCHLE
Senior Counsel
FLORIDA POWER
CORPORATION
P.O. Box 14042
St. Petersburg, Florida 33733
Telephone: (727) 820-5184
Facsimile: (727) 820-5519

GARY L. SASSO
Florida Bar No. 622575
SYLVIA H. WALBOLT
Florida Bar No. 033604
JOSEPH H. LANG, JR.
Florida Bar No. 059404
CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER
Post Office Box 2861
St. Petersburg, Florida 33731
Telephone: (727) 821-7000
Facsimile: (727) 822-3768

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished via U.S. Mail to all counsel of record this 1st day of October, 1999, as follows:

Robert Scheffel Wright
Alan C. Sundberg
John T. LaVia
Landers & Parson, P.A.
310 West College Avenue
Tallahassee, FL 32301
Phone: (850) 681-0311
Fax: (850) 224-5595
Attorneys for Duke Energy New Smyrna Beach Power Company, L.L.P. and New Smyrna Beach Utilities Commission

D. Bruce May
Susan L. Kelsey
Holland & Knight, LLP
P.O. Drawer 810
Tallahassee, FL 32302
Phone: (850) 224-7000
Fax: (850) 224-8832

Daniel S. Pearson
701 Brickell Ave., Ste. 3000 (33131)
Post Office Box 015441
Miami, FL 33101
Phone: (305) 374-8500
Fax: (305) 789-7799

Alvin B. Davis
Thomas R. Julin
Edward M. Mullins
Sandra K. Wolkov
Steel Hector & Davis LLP
200 South Biscayne Blvd., 40th Floor
Miami, FL 33131-2398
Phone: (305) 577-2835
Fax: (305) 577-7001
- and -
Matthew M. Childs
Charles A. Guyton
Steel Hector & Davis, LLP
215 South Monroe Street, Suite 601
Tallahassee, FL 32301-1804
Phone: (850) 222-2300
Fax: (850) 222-8410
Attorneys for Florida Power & Light Company

Brent C. Bailey
General Counsel
Duke Energy Power Services, LLC
Post Office Box 1642
Houston, Texas 77251-1642
Phone: (713) 627-5307
Fax: (713) 627-5550

Robert S. Lilien
Duke Energy Power Services, LLC
422 Church Street, PB05B
Charlotte, NC 23242

Lee L. Willis
James D. Beasley
Ausley & McMullen
Post Office Box 391
Tallahassee, FL 32302
Phone: (850) 224-9115
Fax: (850) 222-7560

- and –
Harry W. Long, Jr.
TECO Energy, Inc.
Post Office Box 111
Tampa, FL 33601
Phone: (813) 228-4111
Attorneys for Tampa Electric Company

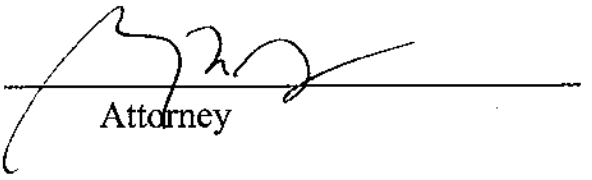
William B. Willingham
Michelle Hershel
Post Office Box 590
Tallahassee, FL 32302
Phone: (850) 877-6166
Fax: (850) 656-5485
Attorney for Florida Electric Cooperatives Association, Inc.

Gail Kamaras
Legal Environmental Assistance Foundation, Inc.
1114 Thomasville Road, Suite E
Tallahassee, FL 32303
Phone: (850) 681-2591
Fax: (850) 505-5505
Attorney for LEAF

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

Jon C. Moyle, Jr.
Robert J. Sniffen
Moyle, Flanagan, Katz, Kolins, Raymond & Sheehan
210 South Monroe Street
Tallahassee, FL 32301
Attorneys for PG&E Generating Company
(f/k/a US Generating Company)
Phone: (850) 681-3828
Fax: (850) 681-8788

Richard C. Bellack, Assistant General Counsel
Robert D. VanDiver, General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Gunter Building
Tallahassee, FL 32399-0850
Attorneys for the PSC Staff
Phone: (850) 413-6092



Attorney