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November 30, 1998

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

VIA FEDERAL EXPRESS

Re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Beach, Florida and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.
DOCKET NO. 981042-EM

Duplexing

Dear Ms. Bayo:

Enclosed for filing in the above docket on behalf of the Florida Power Corporation are the original and fifteen (15) copies of the Florida Power Corporation's Request For Judicial Notice And Florida Power Corporation's Notice Of Filing.

We request you acknowledge receipt and filing of the above by stamping the additional copy enclosed.

If you or your Staff have any questions regarding this filing, please contact me at (727) 821-7000.

Very truly yours,

Gary L. Sasso

Enclosures
cc: Counsel of Record
GLS:pjs

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ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.

DOCKET NO. 981042-EM

FILED: December 1, 1998

/

FLORIDA POWER CORPORATION'S REQUEST FOR JUDICIAL NOTICE

Pursuant to Florida Statutes §§ 90.201(1), 90.202(2), (5), and (6), and 90.203, Florida Power Corporation ("FPC"), requests that the Commission take judicial notice of the items attached to its contemporaneously filed notice of filing, consisting of the following:

1. Laws of Florida, Chapter 73-33;

2. Senate Staff Analysis and Economic Impact Statement; CS for SB 1052, including attachments, for Laws of Florida, Chapter 80-65;

3. House of Representatives, Committee on Environmental Regulation, Final Staff Analysis & Economic Impact Statement, dated June 2, 1990, including attachments; CS/HB 3065 for Laws of Florida, Chapter 90-33;

4. Brief of Appellee Duke Power Company, filed in State of North Caroline ex rel. Utilities Commission, et al. vs. Empire Power Company, Case No. 9210UC724, in the North Carolina Court of Appeals;

5. In Re Empire Power Company, 132 P.U.R.4th 444 (N.C. U.C. April 23, 1992);

6. State of North Carolina ex rel. Utilities Commission v. Empire Power Co., 435 S.E.2d 553 (N.C. Ct. App. 1993).

STP#501716.01

Each of the foregoing items is a matter of public record and FPC believes that the Commission has full authority and ability to consider each item in this proceeding without a request for judicial notice. In an abundance of caution, however, FPC is filing this request for judicial notice since each of the foregoing items is also a matter of which the Commission either must or shall, upon request by any party, take judicial notice.

For example, the Commission must take judicial notice of item 1 above, as a public statutory law of the Florida Legislature. Florida Statutes § 90.201(1). The Commission also must, upon request, take judicial notice of the Legislative histories of the public statutory laws of the Florida Legislature (items 2 and 3) which constitute "[o]fficial actions of the legislative" department of Florida. Florida Statutes § 90.202(5).

In addition, the brief filed by Duke Power Company in State of North Caroline ex rel. Utilities Commission, et al. vs. Empire Power Company, Case No. 921OUC724, before the North Carolina Court of Appeals (item 4) constitutes a "[r]ecord[] of . . . any court of record in the United States." Florida Statutes § 90.202(6). Indeed, the brief bears the "filed" stamp of the North Carolina Court of Appeals on its cover. Under Florida Statutes § 90.203, this Commission, upon request, must take judicial notice of the brief. Similarly, the published decisions

of the North Carolina Utilities Commission (item 5) and the North Carolina Court of Appeals (item 6) constitute "[d]ecisional . . . law of every other state, territory, and jurisdiction of the United States." Florida Statutes § 90.202(2). Florida Statutes § 90.203 provides that the Commission shall take judicial notice of these items upon FPC's request.

WHEREFORE, FPC requests that the Commission take judicial notice of each of the foregoing items.

DATED this 30th day of November, 1998.

Respectfully submitted,

FLORIDA POWER CORPORATION

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Facsimile: (813) 866-4931

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by Express Mail, priority overnight delivery, to:

Robert Scheffel Wright, Esq.
John T. LaVia, III, Esq.
Landers and Parson, P.A.
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Suite 202
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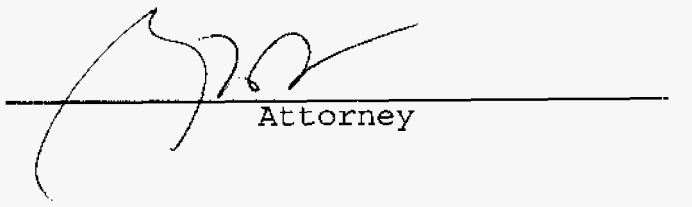
J. Roger Howe, Esq.
Office of Public counsel
111 West Madison Avenue
Room 812
Tallahassee, FL 32399-1400

this 30th day of November, 1998.



Attorney

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.

DOCKET NO. 981042-EM

FILED: December 1, 1998

/

FLORIDA POWER CORPORATION'S NOTICE OF FILING

Florida Power Corporation hereby gives notice of filing the following items in support of its Motion to Dismiss the Joint Petition for a Determination of Need For An Electrical Power Plant filed by the Utilities Commission, City of New Smyrna Beach, Florida and Duke Energy New Smyrna Beach Power Company, L.L.P.:

1. Laws of Florida, Chapter 73-33;

2. Senate Staff Analysis and Economic Impact Statement; CS for SB 1052, including attachments, for Laws of Florida, Chapter 80-65;

3. House of Representatives, Committee on Environmental Regulation, Final Staff Analysis & Economic Impact Statement, dated June 2, 1990, including attachments; CS/HB 3065 for Laws of Florida, Chapter 90-33;

4. Brief of Appellee Duke Power Company, filed in State of North Caroline ex rel. Utilities Commission, et al. vs. Empire Power Company, Case No. 9210UC724, in the North Carolina Court of Appeals;

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6. State of North Carolina ex rel. Utilities Commission v. Empire Power Co., 435 S.E.2d 553 (N.C. Ct. App. 1993).

DATED this 30th day of November, 1998.

Respectfully submitted,

FLORIDA POWER CORPORATION

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JEFF FROESCHLE
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Tallahassee, FL 32399-1400

this 30th day of November, 1998.

Attorney

CHAPTER 73-32

Senate Bill No. 539

AN ACT relating to Florida beef; repealing sections 534.43, 534.44, 534.45, and 534.46, Florida Statutes, requiring packers, retailers, and restaurants selling beef raised, produced, and slaughtered in Florida to mark, stamp, or describe same as "produced in Florida" or "Florida beef"; providing effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Sections 534.43, 534.44, 534.45 and 534.46, Florida Statutes, are repealed.

Section 2. This act shall be effective immediately upon becoming a law.

Approved by the Governor May 11, 1973.

Filed in Office Secretary of State May 14, 1973.

CHAPTER 73-33

Committee Substitute for House Bill No. 149

AN ACT relating to electrical power plant siting; creating the Florida electrical power plant siting act; creating sections 403.501-403.516, Florida Statutes; providing legislative intent; providing definitions; establishing powers of the department of pollution control and the division of state planning; providing that this act shall apply to all steam electrical generating plants and associated transmission lines; providing procedures for certification; providing for an application fee; requiring the filing of a ten-year site plan by electric utilities; providing for studies and public hearings; providing that applications shall be acted upon within twelve months of application; providing that the regulation of electric utilities is preempted by the state; providing that certification by the pollution control board is final state approval for the utility; providing for revocation of certification; providing for judicial review; providing for enforcement and penalties; providing for severability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Sections 403.501-403.516 are created and shall be known and cited as the Florida Electrical Power Plant Siting Act.

403.501 Legislative intent.—The legislature finds that the present and predicted growth in electric power demands in the state of Florida requires the development of a procedure for the selection and utilization of sites for electrical generating facilities and the identification of a state position with respect to each proposed site. The legislature recognizes that the selection of sites and the routing of associated transmission lines will have a significant impact upon the welfare of the population, the location and growth of industry and the use of the natural resources of the state.

The legislature finds that the efficiency of the permit application and review process at both the state and local level would be improved with the implementation of a process whereby a permit application would be centrally coordinated and all permit decisions could be reviewed based on the standards and recommendations of the deciding agencies. It is the policy of the state of Florida that, while recognizing the pressing need for increased power gencration facilities, the state shall ensure through available and reasonable methods, that the location and operation of electrical power plants will produce minimal adverse effects on human health, the environment, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life. It is the intent to seek courses of action that will fully balance the increasing demands for electrical power plant location and operation with the broad interests of the public. Such action will be based on these premises:

(1) To assure the citizens of Florida that operation safeguards are technically sufficient for their welfare and protection.

(2) To effect a reasonable balance between the need for the facility and the environmental impact resulting from construction and operation of the facility, including air and water quality, fish and wildlife, and the water resources and the other natural resources of the state.

(3) To provide abundant low-cost electrical energy.

403.502 Definitions.—

(1) "Applicant" means any electric utility which makes application for a site location certification pursuant to the provisions of this act.

(2) "Application" means any request for approval of a particular site or sites filed in accordance with the procedures established prusuant to this act.

(3) "Person" means an individual, partnership, joint venture, private or public corporation, association, firm, public service company, political subdivision, municipal corporation, government agency, public utility district or any other entity, public or private, however organized.

(4) "Electric utility" means cities and towns, counties, public utility districts, regulated electric companies, electric cooperatives and joint operating agencies, or combinations thereof, engaged in or authorized to engage in the business of generating, transmitting or distributing electric energy.

(5) "Site" means any proposed location wherein a power plant, or power plant alteration or addition resulting in an increase in generating capacity, will be located, including offshore sites within state jurisdiction.

(6) "Certification" means the written order of the board approving an application in whole or with such modification as the board may deem appropriate, which order shall constitute a binding agreement between the applicant and the state requiring compliance with the provisions of the order as conditions to be met prior to or concurrent with the construction or operation of any electrical power plant coming under this act.

(7) "Electrical power plant" means for the purpose of certification, any steam or solar electrical generating facility using any process or fuel, including nuclear materials, and shall include those directly associated transmission lines required to connect the electrical power plant to an existing transmission network.

(8) "Department" means the department of pollution control.

(9) "Board" means the Florida pollution control board.

(10) "Division" means the division of state planning of the department of administration.

(11) "State comprehensive plan" means that plan prepared in accordance with the provisions of part I of chapter 23, Florida Statutes.

403.503 Department of Pollution Control; powers enumerated.—The department of pollution control shall have the following powers in relation to this act:

(1) To adopt, promulgate or amend reasonable rules to carry out the provisions of this act, including rules setting forth environmental precautions to be followed in relation to the location and operation of electrical power plants.

(2) To prescribe the form, content, and necessary supporting documentation for site certification;

(3) To receive applications for final site locations and to investigate the sufficiency thereof;

(4) To make, and contract for, when applicable, studies of electrical power plant sites proposed by the applicant;

(5) To conduct hearings on the proposed location of the electric power plant sites;

(6) To require an application fee not to exceed $25,000; such fee to be paid upon each application for certification.

(7) To prepare written reports which shall include:

(a) A statement indicating whether the application is in compliance with the department's rules;

(b) The report from the public service commission setting forth the need for electricity in the area to be served as required by Section 403.507, F.S.

(c) The environmental effects of the construction and operation of the electrical power plant, and

(d) A recommendation as to the disposition of the application.

(8) To give adequate public notice and to directly notify all concerned state or local agencies, and report any comments received from said agencies to the board and the applicant.

(9) To prescribe the means for monitoring the effects arising from the construction and the operation of electrical power plants to assure continued compliance with terms of certification.

403.505 Ten-year site plans.—

(1) Beginning January 1, 1974, each electric utility shall submit to the division of state planning a ten-year site plan which shall estimate its power generating needs and the general location of proposed power plant sites. The ten year plan shall be reviewed and submitted not less frequently than every two years. Upon receipt of the plan it shall be the duty of the division to make a preliminary study of each plan within twelve months and to classify each proposed plan as "suitable" or "unsuitable". The division may suggest alternate plans. All findings of the division shall be made available to the department for its consideration at any subsequent certification proceedings. It is recognized that ten-year site plans submitted by an electric utility are tentative information only and are subject to change at any time at the discretion of the utility. In its preliminary study of each site, the division shall consider:

(a) The need, including the need as determined by the Florida public service commission, for electrical power in the area to be served.

(b) The anticipated environmental impact of an electrical power plant on the area.

(c) Possible alternative to the proposed plan.

(d) The views of appropriate local, state and federal agencies.

(e) Conformance with the state comprehensive plan.

(2) To enable it to carry out its duties under this section, the division may, after hearing, establish a study fee which shall not exceed $1,000 for each proposed plan studied.

(3) Prior to October 1, 1973, the division shall adopt rules governing the method of submitting, processing and studying the ten-year plans as required by this section.

403.506 Applicability and certification.—

(1) Provisions of this chapter shall apply to any electrical power plant as defined herein. No construction of any new electrical power plant or expansion in steam generating capacity of any existing electrical power plant may be undertaken after October 1, 1973, without first obtaining certification in the manner as herein provided, except that this act shall not apply to any such electrical power plant presently operating, or under construction, or which has, upon the effective date of this act, applied for a permit or certification under requirements in force prior to the effective date of this act.

(2) Applications for certification shall be upon forms prescribed by the department and shall be supported by such pertinent information and technical studies as the department may require.

403.507 Detailed studies to be conducted.—

(1) It shall be the duty of the department to notify the division of state planning and the public service commission within ten days of receipt of an application for site certification. The division shall review and update the studies made under provisions of section 403.505 and shall present its recommendation to the department within three months of receipt of notification. The public service commission shall prepare a report and recommendation as to the present and future needs for electrical generating capacity in the area to be served by the proposed site and shall submit its findings to the department within three months of receipt of notification. The applicant, at its cost, shall furnish such information, studies and data as the department, division or public service commission may direct.

(2) It shall be the duty of the department to conduct, or contract for, a study of the proposed power generating facility, including but not limited to the following site criteria:

(a) Cooling system requirements;

(b) Proximity to load centers;

(c) Proximity to navigable water and other transportation systems;

(d) Soil and foundation conditions;

(e) Availability of water;

(f) Land use;

(g) Accessibility to transmission, and

(h) Environmental impact.

(3) All reasonable expenses associated with the studies required by paragraphs (1) and (2) of this section shall be paid from the application fee required by section 403.503(6).

408.508 Public hearings.—

(1) The department shall conduct an initial public hearing in the county of the proposed site within sixty days of receipt of an application for site certification; provided that the place of such public hearing shall be as close as possible to the proposed site.

(2) The department must determine at the initial public hearing whether or not the proposed site is consistent and in compliance with existing land use plans and zoning ordinances. If it is determined that the proposed site does conform with existing land use plans and zoning ordinances in effect as of the date of the application, the responsible zoning authority, or planning authority shall not thereafter change such land use plans or zoning ordinances so as to affect the proposed site. If it is determined that the proposed site does not conform, it shall be the responsibility of the applicant to make the necessary application for rezoning. Should the application for rezoning be denied the applicant may appeal this decision to the department which may, if it determines after notice and hearing that it is in the public interest to authorize a non-

conforming use of the land as a site for an electrical power plant, authorize a variance to the existing land use plans and zoning ordinances. No further action may be taken by the department until the proposed site conforms to existing land use plans or zoning ordinances. The initial hearing may consider any other matter appropriate to consideration of the site.

(3) At least one additional public hearing shall be held by the department in the exercise of its functions under this chapter, prior to acting upon the application.

(4)(a) The parties to a certification hearing shall include:

1. The applicant.

2. The public service commission and the division of state planning, each county and municipal government and any other state agency which may have an interest in the proposed site that have filed with the department, not less than ten days prior to the date set for hearing, a notice of intent to be a party.

3. Any domestic nonprofit corporation or association formed in whole or in part to promote conservation or natural beauty, to protect the environment, personal health or other biological values; to preserve historical sites; to promote consumer interests; to represent commercial or industrial groups; or to promote orderly development of the area in which the site is located, that has filed with the department, not less than ten days prior to the date set for hearing, a notice of intent to be a party.

4. Such other persons as the department or hearing officer may at any time deem appropriate.

(b) Any person may present written or oral testimony relative to the need for, or the effects of, the proposed electrical power plant.

403.509 Recommendations to pollution control board.—

(1) The department shall consider all evidence presented at the hearings as well as information gathered in any studies, and shall report to the board its recommendations for the disposition of an application for certification no later than twelve months after receipt of such an application, or such later time as is mutually agreed by the department and the applicant.

(2) Within sixty days of receipt of the department's report the board shall act upon the application by written order approving in whole, or with such modification as the board may deem appropriate, or denying the issuance of a certificate and stating the reasons for issuance or denial. If the certificate is denied or approved with modifications, the board shall set forth in writing the action the applicant would have to take to secure the board's approval of the application.

(3) The issuance or denial of the certification by the board shall be the final administrative action required as to that application.

403.510 Superseded laws, regulations and certification power.—

(1) If any provision of this act is in conflict with any other provision, limitation or restriction which is now in effect under any law or ordinance of this state or any political subdivision or municipality, or any rule or regulation promulgated thereunder, this act shall govern and control and such other law, ordinance, rule or regulation promulgated thereunder shall be deemed superseded for the purposes of this act.

(2) The state hereby preempts the regulation and certification of electrical power plant sites and electrical power plants as defined in this act.

403.511 Effect of certification.—

(1) Subject to the conditions set forth therein, any certification agreement signed by the chairman of the pollution control board shall bind the state or any of its departments, agencies, divisions, bureaus, commissions, districts or boards as to the approval of the site and the construction and operation of the proposed electrical power plant and major transmission lines.

(2) The certification agreement shall authorize the electric utility named therein and to construct and operate the proposed electrical power plant subject only to the conditions set forth in such certification.

(3) The issuance of a site certification shall be in lieu of any permit, certificate or similar document required by any other department, agency, division, bureau, commission, district or board of this state, or any local agency, including but not limited to those documents, permits or certificates which may be required under chapters 253, 380, 387, 381, 378, 870, 373, 298 and 161, Florida Statutes, but shall not affect in any way the rate-making powers of the public service commission under chapter 366, Florida Statutes; nor, shall this act in any way affect the right of any local government to charge appropriate fees or require that construction be in compliance with local building codes, standards, and regulations.

403.512 Revocation or suspension of certification.—Any certification may be revoked or suspended:

(1) For any material false statement in the application or in the supplemental or additional statements of fact or studies required of the applicant when a true answer would have warranted the board's refusal to recommend a certification in the first instance; or

(2) For failure to comply with the terms or conditions of the original certification; or

(3) For violation of the provisions of this chapter, or regulations or orders issued hereunder.

403.513 Review.—

(1) The approval or rejection of an application for certification by the pollution control board shall be subject to judicial review.

(2) Any rules and regulations adopted pursuant to this act shall be subject to judicial review.

403.514 Enforcement of compliance.—Violations of this act shall be enforced as provided in sections 403.121, 403.131, 403.141, and 403.161, Florida Statutes.

403.515 Availability of information.—The department shall make available for public inspection and copying during regular office hours at the expense of any person requesting copies, any information filed or submitted pursuant to this act.

403.516 Severability.—If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provisions to other persons or circumstances, is not affected.

Section 2. In the event the Legislature reorganizes the agencies dealing with environmental programs into a single agency the powers and the duties of the board set forth in this act shall be transferred to said agency.

Section 3. This act shall take effect July 1, 1973.

Approved by the Governor May 15, 1973.

Filed in Office Secretary of State May 16, 1973.

CHAPTER 73-34

House Bill No. 1059

AN ACT relating to the legislative office buildings; amending §272.16, Florida Statutes, to provide that certain portions of those buildings are under the control of their respective houses; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 272.16, Florida Statutes, is amended to read:

272.16 Parking areas within capitol center area.—

(1) The division of building construction and maintenance of the department of general services may assign parking areas within the capitol center area, not to exceed sixty percent of said areas, to state officers and employees employed in Tallahassee; provided, however, that parking areas must be provided for members of the legislature during session of the legislature, regular and extraordinary. Not more than fifteen percent of said parking areas may be set aside for the use of persons temporarily visiting or attending to business in the capitol center area, and which persons reside beyond the territorial limits of the city of Tallahassee. Any remaining portion of the parking areas not assigned as aforesaid may be limited in period of time for use. *Provided, however, that the department of general services shall have no power to assign parking spaces in the legislative office buildings, nor shall those spaces be included under the provisions of this act, except as provided in §272.18(2).*


2

...IMATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

8U-65

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Fernandez	1. N.R.	Fav. C/S
2.		2. W&M	
3.		3.	

SUBJECT:

Electrical transmission lines siting

BILL NO. AND SPONSOR:

CS for SB 1052 by Senator Vogt

I. SUMMARY:

A. Present Situation:

Under current law, transmission lines with a capacity of 230 or more kilovolts and which cross a county line fall under the DRI review process. Section 22F-2.03(2), Florida Administrative Code. The DRI process was designed to deal with relatively compact and contiguous developments, such as residential housing developments or shopping centers which have regional impact extending across several jurisdictions of local government. Transmission lines have regional impact, but the DRI process does not work well for single purpose corridors which may extend 200 miles yet be only 100 yards wide. In addition, the permitting process may become complicated if individual permits are required from DER, DNR, Water Management Districts, and other state or local agencies.

B. Effect of Proposed Changes:

The Transmission Line Siting Act creates a new one-stop review and permitting process for transmission lines which are larger than 230 kilovolts and which cross county lines. The Act is patterned after the Florida Power Plant Siting Act.

The Act provides that upon filing an application and application fee with the Department of Environmental Regulation (DER), it will coordinate the permitting process. The entire permitting process is designed to take no longer than seven (7) months from application to approval by the Governor and Cabinet sitting as the Siting Board.

Within 60 days of the filing of an application, the Department of Natural Resources, the Water Management District with jurisdiction, the Department of Community Affairs and the Game and Fresh Water Fish Commission prepare reports which are filed with the DER. Contemporaneously, the Public Service Commission makes a determination of need for the line. The PSC's determination of need is binding on all parties to certification proceeding. Upon receipt of the determination of need and the various agency reports, but no later than three (3) months after a complete application is filed, the DER prepares a written analysis of the application and makes its recommendations as to the disposition of the application and any proposed conditions of certification which it believes should be imposed. Within four (4) months of the application's being filed, a certification hearing is held on the application and written analysis before a DOAH hearing officer. Based on this certification hearing, the hearing officer files findings of fact, conclusions of law and a recommended order with the Governor and Cabinet who are the ultimate deciding authority.

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

Analyst:		Bill No. And Sponsor:
Staff Director:	Fernandez	
Subject:	Electrical transmission lines siting	CS for SB 1052 by Senator Vogt

Local governments in whose jurisdiction the proposed line is to be located are automatically parties to the proceeding, as are all of the reporting agencies. In addition, conservation and environmental groups as well as civic groups may become parties simply by filing a Notice of Intent to become a party 15 days prior to the certification hearing. The statute provides broad public notice and procedural safeguards.

Certification constitutes the sole license of the state, any any local or regional governmental agency as to the location and maintenance of the transmission line corridor and the construction of the transmission line. The Act supersedes a wide variety of existing state regulatory proceedings, including the Development of Regional Impact (Chapter 380) procedures. The Act requires the DER and PSC to adopt procedural rules to implement it on or before October 31, 1980. The Act is applicable to all transmission lines which are built after December 31, 1980, except for those transmission lines specified in Section 403.524 of the proposed Act.

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

The proposed siting procedure is expected to substantially reduce the delays experienced in the existing permitting process. Therefore, it is anticipated that the proposed bill could result in cost savings to industry of millions of dollars.

B. Government:

Since the state agencies will be conducting procedures not presently required by law, it is anticipated that more staff time will be required and that processing applications will be more expensive. However, the application fee may offset some of these costs.

III. COMMENTS:

According to DER and industry spokesmen, the proposed Act has been reviewed and approved by various groups and agencies, including the PSC (the Commissioners and staff), DER, the Governor's office, the State Energy Office, the Department of Community Affairs, the Association of County Commissioners, the Regional Planning Councils Association, the Game and Fresh Water Fish Commission, the Florida Electric Power Coordinating Group representing utility companies, and representatives of environmental interests.

IV. AMENDMENTS:

CS/CS/HB 786, creating the Florida Energy Efficiency and Conservation Act, was amended onto the bill.

DATE: May 2, 1990

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Fernandez	N.R.	
2.		W&M	
3.			

SUBJECT: Electrical transmission lines siting

BILL NO. AND SPONSOR: SB 1052 by Senator Vogt

I. SUMMARY:

A. Present Situation:

Under current law, transmission lines with a capacity of 230 or more kilovolts and which cross a county line fall under the DRI review process. Section 22F-2.03(2), Florida Administrative Code. The DRI process was designed to deal with relatively compact and contiguous developments, such as residential housing developments or shopping centers which have regional impact extending across several jurisdictions of local government. Transmission lines have regional impact, but the DRI process does not work well for single purpose corridors which may extend 200 miles yet be only 100 yards wide. In addition, the permitting process may become complicated if individual permits are required from DER, DNR, Water Management Districts, and other state or local agencies.

B. Effect of Proposed Changes:

The Transmission Line Siting Act creates a new one-stop review and permitting process for transmission lines which are larger than 230 kilovolts and which cross county lines. The Act is patterned after the Florida Power Plant Siting Act.

The Act provides that upon filing an application and application fee with the Department of Environmental Regulation (DER), it will coordinate the permitting process. The entire permitting process is designed to take no longer than seven (7) months from application to approval by the Governor and Cabinet sitting as the Siting Board.

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SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

Analyst:		Bill No. And Sponsor:
Staff Director:	Fernandez	
Subject:	Electrical transmission lines siting	CS for SB 1052 by Senator Vogt

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A. Public:

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B. Government:

Since the state agencies will be conducting procedures not presently required by law, it is anticipated that more staff time will be required and that processing applications will be more expensive. However, the application fee may offset some of these costs.

III. COMMENTS:

According to DER and industry spokesmen, the proposed Act has been reviewed and approved by various groups and agencies, including the PSC (the Commissioners and staff), DER, the Governor's office, the State Energy Office, the Department of Community Affairs, the Association of County Commissioners, the Regional Planning Councils Association, the Game and Fresh Water Fish Commission, the Florida Electric Power Coordinating Group representing utility companies, and representatives of environmental interests.

It should be noted that SB 908 includes "Electrical Transmission Lines" within the definition of "Development of Regional Impact," while this bill creates an exclusive permitting procedure for electrical transmission lines. If both bills receive favorable action, the reference in SB 908 to "Electrical Transmission Lines" should be deleted in order to avoid creating a conflict in the law.

IV. AMENDMENTS: None

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

Analyst:		Bill No. And Sponsor:
Staff Director:	Fernandez	
Subject:	Electrical transmission lines siting	SB 1052 by Senator Vogt

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IV. AMENDMENTS: None

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.		Fernandez	N.R.	Fav. C/S
2.			W&M	
3.				

SUBJECT: Electrical transmission lines siting

BILL NO. AND SPONSOR: CS for SB 1052 by Senator Vogt

I. SUMMARY:

A. Present Situation:

Under current law, transmission lines with a capacity of 230 or more kilovolts and which cross a county line fall under the DRI review process. Section 22F-2.03(2), Florida Administrative Code. The DRI process was designed to deal with relatively compact and contiguous developments, such as residential housing developments or shopping centers which have regional impact extending across several jurisdictions of local government. Transmission lines have regional impact, but the DRI process does not work well for single purpose corridors which may extend 200 miles yet be only 100 yards wide. In addition, the permitting process may become complicated if individual permits are required from DER, DNR, Water Management Districts, and other state or local agencies.

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State of Florida

Joseph P. Cresse
Commissioner

FLETCHER BUILDING
101 EAST GAINES STREET
TALLAHASSEE 32301
(904) 488-2986

Public Service Commission

January 19, 1981

Honorable Bob Graham
Governor of Florida
The Capitol
Tallahassee, Florida 32301

Dear Governor Graham:

There are several misconceptions in the letter to you from the Florida Home Builders Association dated December 29, 1980 concerning the Commission's concept of Service Availability Charges and Kilowatt Demand Credits. The purpose of this letter is to set forth the conceptual basis of our approach and to respond to the six specific points which the Association raised.

We start from the fact that each house imposes a demand on the electric system. The demand imposed can vary quite widely, depending on how energy efficient the house is. Of particular importance are air conditioning, heating and water heating. The new Model Energy Code permits the use of electric resistance elements for heating and water heating. Put simply, these devices are building in a long term disaster for Florida citizens as costs continue to rise. It is a fact that new generating capacity today costs over five times the embedded cost of all existing capacity of the state's largest utility. When the impact of rising fuel prices is added, the implications are staggering. I believe these problems were recognized by you and the 1980 Legislature when the Florida Energy Efficiency and Conservation Act (CS/SB 1052) was passed.

The fundamental problem is that the house buyer does not often make the decision about how to balance original cost and operating costs. Rather, the builder makes the decision about what equipment to install. Since the builder does not pay the monthly utility bills, he is primarily concerned with original cost and feels great pressure to install central air conditioning with strip heat and an electric resistance water heater. These units have the lowest original cost which enables

the builder to price the house lower and enlarge the pool of potential buyers. This problem is compounded by the fact that very few lenders recognize that the lower utility bills of an efficient house should be taken into account when qualifying buyers. Actually, the relative advantage of an efficient house should increase over time, which would also increase the lender's security.

The Commission is trying to match the payment of costs with the cause of costs. Otherwise, we send the wrong price signals. The great problem with subsidies, for whatever purposes, is that they send the wrong signal because subsidies make the apparent cost less than the true cost. The Commission is committed to the proposition that we should do those things which are cost effective. If it is not cost effective, we should not do it. In other words, the characterization of the charges as a "penalty" is wrong. It is, in effect, a recognition of the cost involved when new houses waste energy and force utilities to build expensive generating capacity that otherwise would not be necessary. The question is: Who will pay the cost? Will it be the customer who creates the additional demand on the system by using inefficient appliances or will the cost be paid by all of the customers of the system?

This is the basic issue which the Commission has decided to determine; no decisions have yet been made to have a fee or what the level of a fee should be if there is one. I believe, of course, that if most Floridians were given a choice, they would elect to pay a little more now for a better home if they would more than recover that cost through lower utility bills.

Briefly, I would like to respond to each of the six points in the letter:

1. Asserts that this concept would discriminate against "agricultural, governmental, industrial, existing buildings or mobile homes" and is therefore in violation of legislative intent.

Since the inefficient house imposes costs on every ratepayer, it may be discrimination against all other ratepayers unless the inefficient house pays the costs it causes. Although the Commission was given specific authority for experimental rates in the Florida Energy Efficiency and Conservation Act, there is precedent which indicates the proposed charge falls within the established ratemaking authority. For example, those with electric resistance space heaters in 1950 paid a higher rate because of the extra costs they imposed. A copy of this tariff is attached.

2. Asserts the Commission's concept directly repudiates the Model Energy Code.

It seems to me that this concept complements the code rather than repudiates it. The Commission is specifically concerned with the efficiency of air conditioning, heating, and water heating. However, the code permits installation of inefficient air conditioning, strip heat and resistance water heating. As I have said, the continued widespread use of these units will severely damage Florida's economy. For example, attached is a sample calculation prepared by your Energy Office which shows how inefficient a 2,400 square foot house can be in the Tallahassee area and still achieve a 97.7 point total under the code. This sample house could have an air conditioner with an EER of 6, electric strip heating and electric hot water.

3. Asserts that we will ignore existing housing.

In fact, existing housing is much tougher to deal with on a cost effective basis. Therefore, we have approved programs to subsidize retrofits as an incentive. We will closely monitor this program to determine what improvements are achieved.

4. Asserts that there is no assurance that the guidelines will achieve any savings over the code.

It is obvious that requiring more efficient energy usage through installation of heat pumps and waste heat recovery units rather than strip heating will save energy. The tests which we have seen, and simple logic, indicate that this is a fact.

5. Asserts that there would be a "$1,500 penalty" and works through a spurious calculation to get additional mortgage costs.

As indicated earlier, we have not established the amount of any Service Availability Charge or fee. To the best of my knowledge there has been no talk of a $1,500 penalty. Our emphasis is not on collecting a fee but on making it cost effective for all concerned to build and buy energy efficient homes. Therefore, the rational economic person will take the least cost path by improving energy efficiency rather than paying the cost of the additional generating capacity and the state as a whole will benefit.

6. Advocates subsidies for construction of new residential housing.

It should be recognized that the cost of any subsidy would be paid by all of the customers of the system. Our approach is to allocate the cost to the person who causes that cost and, at the same time, to make it cost beneficial for that person to practice conservation through improved efficiency rather than paying for unneccessary generating capacity.

In closing, let me point out the critical differences between this concept and an impact fee. An impact fee is intended to provide funds to meet all or part of the costs of growth and to establish a revenue stream. This concept is intended to do neither. It should not establish a revenue stream because the least cost path is to build a better house. This concept should put Florida in a better position for healthy growth in the future because our utility bills will be less. Put simply, it is cheaper to be efficient.

I am copying those who were sent a copy of Mr. Hope's letter to you in order to clarify where we are at this juncture. We are still at a very early stage. The staff is developing the concept. They have held one workshop. The staff has not proposed a rule to the Commission. Obviously, the Commission has not yet voted to propose a rule, much less on the final rule. We do intend to move ahead with this matter as quickly as reasonably possible, because of the magnitude of the problem.

Thank you for your consideration. Please let me know if you have any questions.

Sincerely,

Joe Cresse

Joseph P. Cresse
Chairman

JPC/pr

cc: Commissioners
David Swafford
Bill Talbott

Attachments

STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN COMMITTEE SUBSTITUTE FOR SENATE BILL 1052

1. Exempts from this act and s. 380.06, F.S., any transmission line on which construction has commenced by October 1, 1981 and which is designed to operate at 500 kilovolts or more for the purpose of transferring electrical power from one state to another.

2. Provides that any license, easement, or other interest in state lands shall be issued by the appropriate agency as a ministerial act. However, for lands where title is vested in the BTIITF, appropriate Board approval is required.

Committee on Natural Resources & Conservation

Chairman or Staff Director

CI4(4-74) (File 2 copies with Committee Substitutes)

Rec. from R. Le Topping
ltr to dtd

PROPOSED TRANSMISSION LINE SITING ACT

The Transmission Line Siting Act creates a new one-stop review and permitting process for transmission lines which are larger than 230 kilovolts and which cross county lines. The Act is patterned after the Florida Power Plant Siting Act.

The Act provides that upon filing an application and application fee with the Department of Environmental Regulation (DER), it will coordinate the permitting process. The entire permitting process is designed to take no longer than seven (7) months from application to approval by the Governor and Cabinet sitting as the Siting Board.

Within 60 days of the filing of an application, the Department of Natural Resources, the Water Management District with jurisdiction, the Department of Community Affairs and the Game and Freshwater Fish Commission prepare reports which are filed with the DER. Contemporaneously, the Public Service Commission makes a determination of need for the line. The PSC's determination of need is binding on all parties to the certification proceeding. (See Section 3 of the Act.) Upon receipt of the determination of need and the various agency reports, but no later than three (3) months after a complete application is filed, the DEP prepares a written analysis of the application and

makes its recommendations as to the disposition of the application and any proposed conditions of certification which it believes should be imposed. Within four (4) months of the application's being filed, a certification hearing is held on the application and written analysis before a DOAH hearing officer. Based on this certification hearing, the hearing officer files findings of fact, conclusions of law and a recommended order with the Governor and Cabinet who are the ultimate deciding authority.

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3

STORAGE NAME: H3065z.er
DATE: June ~~2, 1990~~

90-331 **AS PASSED BY THE LEGISLATURE**

HOUSE OF REPRESENTATIVES
COMMITTEE ON ENVIRONMENTAL REGULATION
FINAL STAFF ANALYSIS & ECONOMIC IMPACT STATEMENT

BILL #: CS/HB 3065

RELATING TO: Environmental Regulation

SPONSOR(S): Committee on Environmental Regulation & Representatives Huenink and Smith

EFFECTIVE DATE: July 1, 1990

DATE BECAME LAW:

CHAPTER #: , Laws of Florida

COMPANION BILL(S): SB 1906 by Senator McPherson

OTHER COMMITTEES OF REFERENCE: (1) Finance & Taxation

(2) Appropriations

****

I. SUMMARY:

CS/HB 3065 became the vehicle to which several environmental bills were amended. Each issue is described below in Sections A. and B. of the analysis. The fiscal impacts of each are also described separately in the Fiscal Analysis section of this staff analysis.

A. PRESENT SITUATION:

Electrical Power Plant and Transmission Line Siting:

Part II of Chapter 403, F. S., contains the Florida Electrical Power Plant Siting Act (PPSA) and the Transmission Line Siting Act (TLSA). Enacted in 1973, the PPSA provides a centralized permitting process for steam or solar electrical generating plants of more than 75 megawatts (MW). Certification under the PPSA provides a lifetime permit for the electrical power plant. Since 1973, 21 power plants representing 12,000 MW have been certified under the act, and almost 7,300 MW have been constructed.

The TLSA provides for a similar permitting process for electrical transmission lines of 230 kilovolts (KV) or greater. Since the TLSA was enacted in 1980, over 700 miles of transmission lines have been certified.

Hazardous Waste Education:

Currently within the State of Florida approximately 1.2 million tons of hazardous waste are generated annually. This waste stream is divided into large quantity generators, medium and

small quantity generators, and households. It is estimated that approximately fifty percent of the state's total hazardous waste originates within the small quantity generators and households.

Presently, hazardous waste generated by households is exempt from federal and state statutes controlling its disposal. This means that 120,000 tons annually of household hazardous waste is being unwittingly disposed of in landfills, over the fence, down the drain, or some other indiscriminate place.

On the other hand, the Department of Environmental Regulation (department) manages the Waste Elimination and Reduction Assistance Program (WRAP) that works with various small quantity generators, as well as other industry, to reduce and recycle hazardous waste at the source.

The department is currently training retired engineers to assist in the WRAP program. This new program is known as the REWRAP program. The RE stands for retired engineers. Presently, the department has trained sixteen retired engineers and seventeen on-site technical advisory visits have been completed.

Air Pollution Control:

Existing law in section 320.03(6), F. S., provides for a nonrefundable fee of 50 cents to be charged on every vehicle license registration sold, transferred, or replaced in Florida. These fees are deposited into the Air Pollution Control Trust Fund of the Department of Environmental Regulation (DER) for use in funding the state's air quality program. Fees collected in counties with DER approved local air pollution control programs are returned to each county for deposit into a local air pollution control trust fund. The local funds are used for air pollution control programs relating to control of emissions from mobile sources and toxic and odor emissions, air quality monitoring, and facility inspections pursuant to chapter 403, F. S., or any similar local ordinance.

In 1985, the Environmental Protection Agency delegated its asbestos inspection and removal program to the DER. No funding or staff were provided. The DER has operated the program since that time with one full-time position.

Public Water Systems:

The Department of Environmental Regulation (DER) accepted primacy from the Environmental Protection Agency (EPA) to implement the Federal Safe Drinking Water Act (PL 93-523) administered through the Public Water System Supervision program. Florida's public water systems currently have the poorest compliance rates in the eight state EPA Region IV grouping; achieving only 86% compliance for the EPA's bacteriological standards and 58% compliance for monitoring and reporting. The DER has established a four year goal to achieve a 95% compliance rate for bacteriological standards and monitoring and reporting by public and private water systems.

According to the DER, the Florida Drinking Water Program is funded by General Revenue, a federal grant, and permit fees. The DER requires a permit for the construction or modification of any public drinking water treatment system. Permits are also required for expansions of water distribution systems. Drinking water treatment systems are not required to obtain operation permits. The DER has delegated the permitting of water distribution systems to 10 Department of Health and Rehabilitative Services (DHRS) approved county public health units. An additional county fee may be assessed for the water distribution system permits issued by the delegated county health units in counties with specific ordinances.

Presently, section 381.261, F. S., allows the DHRS general supervision and control over all private water systems, public water systems, and individual sewage disposal systems, not under the DER; and over those aspects of the public water supply program under its authority pursuant to ss. 403.862-864, F. S.

B. EFFECT OF PROPOSED CHANGES:

Electrical Power Plant and Transmission Line Siting:

This legislation, for the most part, conforms the definitions, timing, and procedural provisions of the PPSA and the TLSA. Similar duties are created for applicants under each act, the Department of Environmental Regulation (department), and the various agencies involved. A common group of mandatory parties is created under both acts. That group includes the Department of Natural Resources, the Game and Fresh Water Fish Commission, the Regional Planning Councils, and local governments. These parties are required to submit written reports on matters within their jurisdictions. It will be the responsibility of the applicant to distribute copies of applications to each agency involved and to provide multiple newspaper notices.

A process for determination of completeness and sufficiency of information provided in applications is set forth in the act. If an application is found to be incomplete or insufficient, time schedules are stopped until the needed information is provided. Rather than issuing a preliminary report as now required, each agency will provide a statement of issues listing and explaining those issues of major concern within its jurisdiction.

The land use hearing now included under the PPSA is retained. As mandatory parties, local governments will have a more significant role in proceedings and will be reimbursed from the certification fee for any reports they provide.

Issues to be raised before the Siting Board will be limited to those raised in the certification hearing conducted by the Hearing Officer or contained in the recommended order. Also, all participants in any proceeding before the Siting Board will be

bound by the ex parte rules contained in Chapter 120, Florida Statutes.

Under both Acts, application fees will be substantially increased. This is the first increase in over a decade. Also, applicants will pay the cost of newspaper notices and costs associated with conducting the proceedings, including the costs of transcripts. Such costs are currently paid from certification fees. Agencies may be reimbursed for report preparation and for travel and per diem to attend proceedings. Remaining funds will be used by the department to monitor the certified plant/transmission line.

Under the TLSA, there will be a limit of one opportunity for corridors other than that proposed by the applicant to be proposed. The Public Service Commission (PSC), under both Acts, will be required to provide newspaper notice of the PSC's proceedings to determine the need for either the proposed power plant or the proposed transmission line.

The Department of Environmental Regulation is authorized three additional positions to carry out the provisions of these Acts. An appropriation of $126,371 is appropriated from the Operating Trust Fund to the department to fund those positions.

Hazardous Waste Education:

This act creates the Hazardous Waste Information Grant Program to be developed and implemented by the Department of Environmental Regulation (DER). The program's purpose is to enable local governments to operate hazardous waste information programs locally to inform citizens about proper management and disposal of hazardous waste. Counties will be able to apply for grants of no more than $25,000 to operate their local programs. The DER will receive $250,000 from the Water Quality Assurance Trust Fund to implement the grant program.

Air Pollution Control:

This act amends section 320.03(6), F. S., to increase the nonrefundable license fee for air pollution control programs from 50 cents to $1 per license. For counties with approved air pollution control programs, 50 cents from each $1 fee collected in the county will be returned to that county for its local air pollution control programs. Beginning in FY 1992-93, counties will receive 75 cents from each $1 fee collected in the county.

The act also authorizes the DER to charge an inspection and notification fee for asbestos removal projects. The fee cannot exceed $50 for a residential dwelling, $300 for a small business (as defined in s. 288.703(1), F. S.), or $1,000 for any other project. The fees will be deposited into the asbestos program account in the Air Pollution Control Trust Fund for use by the DER in administering the asbestos program. The DER may contract with local governments to conduct asbestos removal within local

jurisdictions. Schools, both public and private, are exempt from the fees.

Public Water Systems:

The act requires the Department of Health and Rehabilitative Services (DHRS) to require persons operating or constructing drinking water systems to obtain approval from the DHRS, and suppliers of water must submit samples to a DHRS-certified laboratory for analysis. The DER is authorized to assess certain noncompliance fees against suppliers of water for certain recordkeeping and monitoring violations. Such fees will be deposited into the Water Quality Assurance Trust Fund or the appropriate public health unit trust fund. Fees from the examination and certification of water and wastewater treatment facility operators will also be deposited into the Water Quality Assurance Trust Fund.

After January 2, 1991, no county public health may be designated and approved by the DER unless such public health unit can carry out all functions of the drinking water program. Criteria for approval are provided. Fees received from suppliers of water in counties with approved public health units will be deposited in the appropriate public health unit trust fund.

An appropriation of 18 positions and $1 million from the Water Quality Assurance Trust Fund is given to the DER to carry out the provisions of the Florida Safe Drinking Water Act. The DHRS receives from the Water Quality Assurance Trust Fund $100,000 to establish 2 positions, and an additional $400,000 to assist in carrying out the responsibilities of the DHRS regarding this act. The DER also receives $75,000 from the Water Quality Assurance Trust Fund to contract with a vocational school or community college to develop water and wastewater operator examinations and curriculum for water and wastewater operator training.

C. SECTION-BY-SECTION ANALYSIS:

Sections 1 through 21 refer to the Power Plant Siting Act

Section 1. - Section 403.501 - Corrects citations in the short title.

Section 2. - Section 403.502 - Clarifies legislative intent.

Section 3. - Section 403.503 - Amends definitions section to add or change definitions to make both the PPSA and TLSA consistent. A new emphasis on planning is reflected by the definitions.

Section 4. - Section 403.504 - Revises and updates the departments authority and duties. Language relating to fees is deleted from this section and included in a later section (403.518, F.S.). Text relating to "written analysis" is also deleted and included in a later section (403.507, F.S.).

Section 5. - Section 403.506 - Changes the term "chapter" to "act" and corrects citations.

Section 6. - Section 403.5064 - Creates a new section providing for the applicant to assume responsibility for providing notice and distributing copies of applications to all affected agencies and parties. Currently, the state bears this responsibility.

Section 7. - Section 403.5065 - Language relating to completeness is deleted from this section and included in a later section (s. 403.5066, F. S.).

Section 8. - Section 403.5066 - Creates a new section which describes and clarifies the process for determining the completeness of an application.

Section 9. - Section 403.5067 - Creates a new section which describes and clarifies the process for determining the sufficiency of an application. This is to assure that agencies receive enough information in a timely manner to evaluate an application. Inadequate time limits for dealing with insufficient applications would be resolved.

Section 10. - Section 403.507 - Adds the Department of Natural Resources, Game and Fresh Water Fish Commission, regional planning councils and local governments as agencies which must review an application. Allows local governments and the Department of Community Affairs to assess compliance with local comprehensive plans. Requires agencies to file a preliminary statement of issues prior to filing their reports. Also, requires agencies to declare a position on any needed variances, exceptions, or exemptions. Clarifies the contents of agency reports and describes an order of presentation at hearings.

Section 11. - Section 403.508 - Includes agencies and parties entitled to participate in the certification proceeding to make PPSA consistent with TLSA and comprehensive planning process. Requires hearing officer to file a report with the Siting Board if the recommended order is not timely issued. Describes an order of presentation at hearings.

Section 12. - Section 403.509 - Clarifies powers, duties, and proceedings of the Siting Board.

Section 13. - Section 403.5095 - Allows parties to object to alteration of time limits by hearing officer.

Section 14. - Section 403.510 - Clarifies specifically that rules, regulations, and laws are superseded by the act.

Section 15. - Section 403.511 - Conforms effect of certification to TLSA. Provides that failure of notification regarding the need for variances, exceptions, or exemptions from nonprocedural standards or regulations of an agency will be treated as a waiver from such standards or regulations.

Section 16. - Section 403.5115 - Creates a section listing notices to be published, which notices are to be published and paid for by the applicant, and which by the department. Specifies that the applicant shall pay for the cost of transcripts and conduct of the hearing.

Section 17. - Section 403.5111 is renumbered as section 403.5116.

Section 18. - Section 403.512 - Changes the term "chapter" to "act".

Section 19. - Section 403.513 - Changes the term "part" to "act".

Section 20. - Section 403.514 - Changes the term "part" to "act".

Section 21. - Section 403.516 - Revises the procedures for modifying conditions of certifications. Changes are designed to reduce the number of modifications brought to the board for approval.

Section 22. - Section 403.517 - Deletes language regarding supplemental application fees. Text is included later in section 403.518.

Section 23. - Section 403.518 - Creates a new section including all fees in one section. Increases the application fee and describes how much is reserved for the department's administrative and technical expenses. Clarifies reimbursement procedures for other agencies' expenses.

Section 24. - Section 403.519 - Requires the PSC to publish notice of "need" hearings in newspaper. Clarifies that a need order is final agency action.

Sections 25 through 46 refer to the Transmission Line Siting Act

Section 25. - Section 403.52 - Corrects citations in the short title.

Section 26. - Section 403.521 - Clarifies legislative intent and changes term "part" to "act".

Section 27. - Section 403.522 - Updates definitions to be consistent and compatible with PPSA and current agency practice.

Section 28. - Section 403.523 - Updates text describing the departments authority and duties. Deletes specific fee text which is included later under section 403.5365. Deletes text regarding compilation of agency reports (included later in section 403.526).

Section 29. - Section 403.524 - Clarifies which transmission lines are exempt from the TLSA.

Section 30. - Section 403.525 - Deletes reference to determining the completeness and sufficiency of an application and transfers

description of those processes to later sections (ss. 403.5252 and 403.5253).

Section 31. - Section 403.5251 - Creates a new section that requires the applicant to distribute copies of applications and amendments to agencies and parties. Requires department to provide a list of affected agencies and a schedule of key dates.

Section 32. - Section 403.5252 - Creates a new section that describes detailed procedures for determining the completeness of an application.

Section 33. - Section 403.5253 - Creates a new section that describes detailed procedures for determining the sufficiency of an application to assure that agencies receive adequate information in a timely manner for evaluation of an application. Resolves inadequate time limits in instances of insufficient applications.

Section 34. - Section 403.526 - Requires the applicant to distribute copies of applications and amendments to agencies and parties. Requires the department to prepare a written analysis of the applications and clarifies contents of agency reports. Limits the applicability of changes to local ordinances after the filing of a local government's report with the department.

Section 35. - Section 403.527 - Changes responsibility for publication of notices in newspapers from the department to the applicant. Requires the department to provide lists of agencies entitled to copies of applications and a recommended schedule for processing and requires applicant to distribute applications. Text describing the alternate corridor process is deleted and included later under section 403.5271. An order of presentation for hearings is described.

Section 36. - Section 403.5271 - Creates a new section describing the alternate corridor process, allowing more time for review of alternatives, filing supplemental reports, and establishing time frames for review of alternates.

Section 37. - Section 403.5275 - Removes text describing fees for amendments to applications. Language is included later in section 403.5365.

Section 38. - Section 403.529 - Limits parties to Siting Board proceedings to those who appeared, offered testimony, or were parties of record in the certification proceeding conducted by the hearing officer. Makes criteria for certifying TLSA projects consistent with proposed PPSA criteria.

Section 39. - Section 403.531 - Clarifies language stating that failure of notification about the need for variances or exemptions will be treated as a waiver from nonprocedural standards or regulations. This language also applies to exemptions or other relief. Changes to local comprehensive plans

imposed by the board under Chapter 163 biennial change restrictions are exempt.

Section 40. - Section 403.5312 - Corrects citations.

Section 41. - Section 403.5315 - Clarifies procedures for modifying certifications after issuance.

Section 42. - Section 403.533 - Changes term "part" to "act".

Section 43. - Section 403.536 - Specifically identifies that rules, regulations, or ordinances, in addition to laws, are superseded by the Act.

Section 44. - Section 403.5365 - Creates a new section codifying all fees in one section, increasing the application fee, and describing how much of the fee goes to the department for administrative and technical expenses. Reimbursement procedures for other agencies' expenses are clarified.

Section 45. - Section 403.537 - Describes size of advertisements the Public Service Commission must publish in newspapers. Corrects citations.

Section 46. - Section 403.539 - Corrects citations.

Section 47. - Section 258.397 - Biscayne Bay Aquatic Preserve.

Section 48. - Section 258.45 - Corrects citations.

Section 49. - Section 288.503 - Industrial Siting Act definitions text.

Section 50. - Section 366.04(6) - Public Service Commission jurisdiction text.

Section 51. - Section 366.05(8) - Public Service Commission powers text.

Section 52. - Section 380.06 - Provides certain sports facility exemptions to developments of regional impact process.

Section 53. - Section 380.23(3)(c) - Coastal Zone Management Federal Consistency review text.

Section 54. - Section 403.061(30) - Department of Environmental Regulation powers and duties relating to electric and magnetic fields.

Section 55. - Section 403.7045(3)(c) - Application of solid and hazardous waste regulation text.

Section 56. - Appropriates $126,371 from the Operating Trust Fund. Application processing fees would be deposited into this fund and would be the revenue source.

Section 57. - Provides that provisions of the act shall not apply to any application for certification that has been determined to be complete prior to the date of the act.

Section 58. - Section 320.03 - Provides for an increase of 50 cents in the nonrefundable air pollution control $1 fee assessed on vehicle license registrations sold in Florida; provides that counties with DER approved air pollution control programs can receive a portion of the fees collected in that county.

Section 59. - Authorizes the DER to charge an inspection and notification fee for asbestos removal projects, and provides maximum amounts for the fees.

Section 60. - Section 403.7227 - Directs the DER to implement a Hazardous Waste Information Grant Program for local governments; provides a cap of $25,000 per grant; provides a repeal date of October 1, 1992 for the section.

Section 61. - Provides an appropriation of $250,000 from the Water Quality Assurance Trust Fund to the DER for the Hazardous Waste Grant Program.

Section 62. - Section 403.7083 - Requires certain biological waste incinerator facilities to meet certain minimum air quality standards by July 1, 1991; provides criteria.

Section 63. - Section 403.716 - Requires landfill operators to complete an approved DER training course or be qualified as an interim operator pursuant to DER rules.

Section 64. - Section 403.7222 - Clarifies intent relating to existing Class I industrial injection wells.

Section 65. - Section 403.724 - Requires the owner or operator of a hazardous waste facility to prove financial responsibility in the form of cash, establishment of a trust fund, surety bonds, a letter of credit, a financial test, or a corporate guarantee.

Section 66. - Section 403.721 - Clarifies the DER's rulemaking responsibility regarding hazardous waste and hazardous constituents from solid waste management units.

Section 67. - Section 403.703 - Modifies the definition of "land disposal" for hazardous waste to include placement in a concrete vault or bunker intended for disposal purposes.

Sections 68. - 76. - Sections 381.261, 381.2615, 403.854, 403.860, 376.307, 403.862 - Clarify the duties of the DER and the DHRS relating to the Florida Safe Drinking Water Act; provide for collection and deposit of fees and penalties; provide appropriations to the DER and the DHRS to carry out the Act.

Section 77. - Provides an effective date of July 1, 1990, or upon becoming a law, whichever occurs later.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

	FY 90-91	FY 91-92

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

Electrical Power Plant and Transmission Line Siting

1. Non-recurring or First Year Start-Up Effects:

EXPENDITURES:		
Department of Environmental Regulation		
Operating Trust Fund		
Operating Capital Outlay	$ 8,002	$ -0-
TOTAL	$ 8,002	$ -0-

2. Recurring or Annualized Continuation Effects:

EXPENDITURES:		
Department of Environmental Regulation		
Operating Trust Fund		
Salary & Benefits (3 FTE)	$ 99,019	$ 103,969
Expenses	19,350	20,317
TOTAL	$118,369	$ 124,286

3. Long Run Effects Other Than Normal Growth:

(See Fiscal Comments)

4. Appropriations Consequences:

EXPENDITURES:		
Department of Environmental Regulation		
Operating Trust Fund	$ 126,371	$ 124,286
REVENUES:		
Department of Environmental Regulation		
Operating Trust Fund	$ 600,000	$ 600,000

Air Pollution Control — FY 90-91 — FY 91-92

1. Non-recurring or First Year Start-up Effects:

None

2. Recurring or Annualized Continuation Effects:

REVENUES:
Department of Environmental Regulation
Air Pollution Control Trust Fund — $ 7.2 m — $ 7.6 m

Note: Approximately $600,000 of the estimated revenue is from the asbestos fee, the balance is from the tag surcharge. Estimated revenue for FY 92-93 is $7.8 million.

3. Long Run Effects Other Than Normal Growth:

None

4. Appropriations Consequences:

(see fiscal comments)

Hazardous Waste Education — FY 90-91

1. Non-recurring or First Year Start-up Effects:

EXPENDITURES:
Department of Environmental Regulation
Water Quality Assurance Trust Fund — $250,000

2. Recurring or Annualized Continuation Effects:

Indeterminate

3. Long Run Effects Other Than Normal Growth:

Indeterminate

4. Appropriations Consequences:

EXPENDITURES:
Department of Environmental Regulation
Water Quality Assurance Trust Fund — $250,000

Public Water Systems — FY 90-91 — FY 91-92

1. Non-recurring or First Year Start-Up Effects:

Dept. of Health & Rehabilitative Services
$136,642

Department of Environmental Regulation
$125,000

2. Recurring or Annualized Continuation Effects:

EXPENDITURES:
Dept. of Health and Rehabilitative Services
Water Quality Assurance Trust Fund $500,000

Department of Environmental Regulation
Water Quality Assurance Trust Fund $1,000,000

REVENUES:

Dept. of Health and Rehabilitative Services
Water Quality Assurance Trust Fund $500,000

Department of Environmental Regulation
Water Quality Assurance Trust Fund $1,000,000

3. Long Run Effects Other Than Normal Growth:

None

4. Appropriations Consequences:

Dept. of Health and Rehabilitative Services
Water Quality Assurance Trust Fund $500,000

Department of Environmental Regulation
Water Quality Assurance Trust Fund $1,000,000

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

Electrical Power Plant and Transmission Line Siting

1. Non-recurring or First Year Start-Up Effects:

Local governments will be required to file reports under the PPSA (already required under the TLSA). Local governments in the jurisdiction where a project would be located will incur the cost of staff training and establishing accounting procedures for reimbursements.

2. Recurring or Annualized Continuation Effects:

Local governments in the jurisdiction of a proposed project may incur additional costs from required participation in PPSA proceedings. Pro-rata application fee disbursements may not cover all agency expenses.

3. Long Run Effects Other Than Normal Growth:

The proposed revisions are procedural and should not create effects above and beyond those which would otherwise occur.

Air Pollution Control

1. Non-recurring or First Year Start-up Effects:

None

2. Recurring or Annualized Continuation Effects:

Local governments with approved air pollution control will continue to receive the 50 cents collected for each license sold, transferred, or replaced within the county. Fees received by the department for inspection and notification for asbestos removal projects could also benefit local governments as the department could contract with them to conduct asbestos removal within local jurisdictions.

3. Long Run Effects Other Than Normal Growth:

A portion of the funds generated by the increase will be used to enhance and expand air monitoring networks in rapidly-growing medium-sized cities, and an air toxic monitoring network will be established in each city with a population over 200,000.

Hazardous Waste Education

1. Non-recurring or First Year Start-up Effects:

Cities and counties will be eligible to receive grants of up to $25,000 for hazardous waste information programs.

2. Recurring or Annualized Continuation Effects:

Indeterminate

3. Long Run Effects Other Than Normal Growth:

Indeterminate

Public Water Systems

1. Non-recurring or First Year Start-up Effects:

According to the DER, this act will only impact DER-approved county health units. Only local governments owning public water systems will be affected. Such governments will be subject to appropriate non-compliance fees.

2. Recurring or Annualized Continuation Effects:

Minimal

3. Long Run Effects Other Than Normal Growth:

Minimal

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Electrical Power Plant and Transmission Line Siting

1. Direct Private Sector Costs:

Application fees will be increased. For private industry, this will result in increased costs of doing business. For utilities, additional costs could be transferred to the rate payer.

2. Direct Private Sector Benefits:

Due to more expedient processing, applicants and other segments of the private section will benefit from the additional manpower granted to the department.

3. Effects on Competition, Private Enterprise, and Employment Markets:

None

Air Pollution Control

1. Direct Private Sector Costs:

The private sector will pay an additional 50 cents in nonrefundable fees for each vehicle license registration sold, transferred, or replaced within Florida. Those homes or businesses undergoing asbestos removal will be subject to inspection and notification fees, the level of which is to be established by department rules, but not exceeding the statutory caps provided in this act.

2. Direct Private Sector Benefits:

Increased air pollution monitoring and control could result in cleaner air for all citizens.

3. Effects on Competition, Private Enterprise, and Employment Markets:

Indeterminate

Hazardous Waste Education

1. Direct Private Sector Costs:

Those biological incineration facilities permitted between June 1, 1989 and August 31, 1989, will be required to install equipment necessary to meet emission standards by July 1, 1991, instead of July 1, 1992.

2. Direct Private Sector Benefits:

The private sector will benefit by receiving grant money from the state, through cities and counties, to aid in informing and educating citizens as to the proper disposal of hazardous wastes, especially those generated in households. Citizens and the environment will benefit from proper disposal of such waste, rather than it being disposed of indiscriminately.

3. Effects on Competition, Private Enterprise, and Employment Markets:

This act requires only those biological waste incineration facilities permitted between June 1, 1989, and August 21, 1989, to meet the more stringent standards by July 1, 1991. It is possible that a one year advantage will be afforded those facilities which were permitted prior to July 1, 1989, and are grandfathered in under the DER rule, as these facilities will continue to be under the existing rule deadline of July 1, 1992.

Public Water Systems

1. Direct Private Sector Costs:

Privately owned water systems will be subject to the DER non-compliance fees if they do not maintain compliance with the adopted monitoring and reporting requirements.

2. Direct Private Sector Benefits:

Both agencies commented on the peace-of-mind benefit that will result from the public's knowledge that more was being done to ensure compliance with health and safety standards.

3. Effects on Competition, Private Enterprise, and Employment Markets:

Forcing compliance will ensure that those systems currently failing to comply with monitoring and reporting requirements will no longer be saved such expenses. The DHRS reports that its laboratory will charge substantially less than the

average cost for water system analyses. Therefore, the state laboratory will be used more extensively until the disparity between state and private laboratories' costs is lessened.

D. FISCAL COMMENTS:

Electrical Power Plant and Transmission Line Siting

This proposed legislation will increase fees to supplement application processing under the PPSA and TLSA. According to the department, however, such increases will not cover all agency expenses related to the processing of applications. For example, estimates of the cost to government for processing and performing the licensing analysis on one mid-size power plant will be about $165,000, whereas the proposed fee cap is $150,000. The estimated cost for licensing analysis for a transmission line will be about $117,000.

For the Department of Environmental Regulation, non-recurring expenses will be:

- cost of establishing and hiring for three new positions, plus furniture and equipment needed for those positions;
- workload costs of rearranging trust fund accounts handling application fees (would now use the Operating Trust Fund instead of the Industrial Siting Trust Fund);
- workload involved in revising rules to reflect statutory changes.

Non-recurring expenses for other agencies include publication of required reports (for those agencies not previously required to file reports), the cost of establishing an accounting procedure for reimbursements, and staff training in procedures related to these acts.

For the Department of Environmental Regulation:

- costs of 3 new positions
- administration of revised programs; a savings to the department would occur as the applicant assumes the costs of distributing applications, preparing and placing newspaper notices, and arranging for hearing rooms and transcripts.

For other agencies:

- The Public Service Commission may incur additional costs for newspaper notices required under the PPSA and for larger notices than previously required under the TLSA.
- Costs may be incurred related to required participation in PPSA proceedings. Even though fee amounts are raised, all agency expenses may not be covered through the pro-rata

disbursements. Such agency participation is already required under the TLSA.

The proposed revisions to these acts are largely procedural and should result in cost savings due to more streamlined operations.

The cost of administering the program are shifted. Applicant fees will cover more of the costs that previously came from general revenue or local agency budgets.

Air Pollution Control

According to the DER, the existing shortfall of $1.4 million will be eliminated. General Revenue funds of $0.8 million will not be needed to supplement the program. Certain items in the DER's fiscal year 1990-91 budget request, including replacement of Operating Capital Outlay for continuation of current air monitoring programs and contractual support for ozone and mercury studies, can be funded.

A multi-year expansion of the state's air monitoring network can be funded. According the DER, this expansion will allow the state to improve compliance and monitoring activities to complement federal Clean Air Act initiatives.

Presently, 8 counties receive funding from license fees for their DER approved pollution control programs. Recent emphasis by the federal government on removing asbestos from schools and other public buildings has significantly increased the scope of the asbestos inspection and removal program and, according to the DER, has resulted in the need for seven additional fulltime positions.

III. LONG RANGE CONSEQUENCES:

This act should result in more efficient processing of certification applications for power plants and transmission lines. The costs to the state for governmental review of applications should be reduced somewhat. Improved air quality to safeguard human health should also result from adoption of this act. With regard to hazardous waste, the long range consequences of successful implementation of this act should be positive and should afford greater protection to our groundwater supply. With regard to the public drinking water section of this act, the DER comments that field presence and aggressive enforcement capabilities encouraged by the proposed bill will help to meet its four year goal to reduce the total number of violations reported to EPA by 30 per cent. The DER believes the act will greatly enhance its enforcement capabilities to make non-compliance more costly than compliance.

IV. COMMENTS:

Electrical Power Plant and Transmission Line Siting

The DER is supportive of this act as it provides needed assistance to the existing staff of 2 persons who handle PPS and TLS applications.

Hazardous Waste Education:

Congress has mandated through Section 104(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, that states take remedial action to provide assurances, prior to the EPA funding such actions, to have the availability of hazardous waste treatment or disposal facilities which have adequate capacity to manage the hazardous waste expected to be generated within the next twenty years.

Florida is attempting to respond to this federal mandate through the passage of the Water Quality Assurance Act of 1983 and the Solid Waste Management Act of 1988. These landmark environmental acts established the Amnesty Days Program, the Emergency Response Program, set up local and regional hazardous waste collection and storage facilities, required that a Statewide Multipurpose Hazardous Waste Facility be sited, established a Waste Elimination and Reduction Assistance Program, and created a used oil recycling and collection program.

Additionally, the Department of Environmental Regulation has generated and submitted a Capacity Assurance Plan to the Environmental Protection Agency outlining the state's hazardous waste remedial actions until the year 2009. The submission of this plan is critical to the state's ability to remain eligible for federal Superfund cleanup money.

With all of this progress, Florida remains isolated from the land filling capability of hazardous waste with Alabama due to its inaction in the establishment of a Multipurpose Hazardous Waste Treatment Facility. The construction of a Multipurpose Hazardous Waste Treatment Facility may be four years away due to numerous administrative challenges, and citizens continue to unwittingly dispose of some 120,000 tons of potentially hazardous waste annually into landfills, down the drain or on the ground thus posing a threat to the state's precious drinking water.

Public Drinking Water:

The act is accepted by both the DER and the DHRS as an effective tool in the effort to improve the water supply. The DER also reports that it plans to "devote more efforts to the drinking water program, coordinate better with the DHRS, concentrate more heavily on drinking water compliance, establish new sources of revenue, train DER and DHRS staff, focus on public education, and offer technical support to small public systems."

V. SIGNATURES:

COMMITTEE ON ENVIRONMENTAL REGULATION:

Prepared by:	Staff Director:
Susan D. Reese	Richard H. Wilhelm

COMMITTEE ON APPROPRIATIONS:

Prepared by:	Staff Director:
Leo Charles Lachat	Dr. James A. Zingale

FINAL ANALYSIS PREPARED BY COMMITTEE ON ENVIRONMENTAL REGULATION:

Prepared by:	Staff Director:
Susan D. Reese	Richard H. Wilhelm

REVISED: _____ BILL NO. CS/SB 1906

DATE: May 24, 1990 Page 1

90-331

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

	ANALYST	STAFF DIRECTOR		REFERENCE	ACTION
1.	Branning	Voigt	1.	NRC	Fav/CS
2.			2.	CA	Withdrawn
3.			3.	FTC	Withdrawn
4.	Akins	Smith	4.	AP	

SUBJECT:

Electrical Power Plant and Transmission Line Siting

BILL NO. AND SPONSOR:

CS/SB 1906 by Natural Resources and Senator McPherson

I. SUMMARY:

A. Present Situation:

In 1973, the Legislature created the Florida Electrical Power Plant Siting Act. This act, ss. 403.501-403.519, F.S., provides a centralized permitting process for electrical power plants. The act applies to all electrical power plants except any electrical power plant or steam generating plant of less than 75 megawatts. Since 1973, 21 electric power plants representing 12,000 megawatts have been certified under this act, and plants generating almost 7,300 megawatts have been constructed.

In 1980, the Legislature created the Transmission Line Siting Act. This act, ss. 403.52-403.539, F.S., provides for a centralized and coordinated permitting process for the location of transmission line corridors and the construction and maintenance of transmission lines. The act generally applies to any transmission line, except a transmission line certified pursuant to the Electric Power Plant Siting Act. Certain exceptions are provided in s. 403.524, F.S. Since 1980, over 700 miles of transmission lines have been certified.

B. Effect of Proposed Changes:

This bill would update the procedures and provisions of both the Electric Power Plant Siting Act and the Transmission Line Siting Act. The bill further attempts to conform the definitions and procedural provisions contained in both acts.

Sections 1-24 of the bill pertain to the Electrical Power Plant Siting Act.

Section 1. Section 403.501, F.S., is amended to correct citations in the short title.

Section 2. Section 403.502, F.S., is amended to provide that the location and operation of electrical power plants must not unduly conflict with the goals established by the applicable local comprehensive plans.

Section 3. Section 403.503, F.S., is amended to place an emphasis on planning and to provide some consistency with the Transmission Line Siting Act. Certain terms are redefined and the following terms are added and defined: completeness, corridor, local government, nonprocedural requirements of agencies, preliminary statement of requirements of agencies, preliminary statement of issues, Public Service Commission, regional planning council, right-of-way, sufficiency, and water management district.

Section 4. Section 403.504, F.S., relating to the Department of Environmental Regulation's powers and duties is amended. Certain specific fee language is deleted from this section as fees are addressed later in the bill. The department would conduct certain studies and prepare a written analysis as required in s. 403.507, F.S. Specific report language is deleted from this section.

Section 5. Section 403.506, F.S., is amended to correct certain references (changes "chapter" to "part" and "permit" to "license").Excludes certain substations from this act.

Section 6. Section 403.5064, F.S., is created to provide that the applicant would assume the responsibility for providing certain notices and distributing copies of applications to all affected parties. Currently, the department has this responsibility.

Section 7. Section 403.5065, F.S., is amended to provide for the appointment of a hearing officer.

Section 8. Section 403.5066, F.S., is created to require the department to file a statement within a certain time with the Division of Administrative Hearings (DOAH) and the applicant regarding the completeness of the application. In the event an application is declared incomplete, the applicant must respond by eigher agreeing with the statement, agreeing to amend the application, or contesting the statement. If the applicant contests the statement, provisions are made for a hearing.

Section 9. Section 403.5067, F.S., is created to require the department to file a statement regarding the sufficiency of the application to DOAH with 45 days after distribution of a complete application. The department must base its statement upon consultation with the affected agencies. If the application is deemed insufficient and is contested by the applicant, provisions are made for a hearing.

Section 10. The Department of Community Affairs, the Public Service Commission, the affected water management district, the affected local governments, the Department of Natural Resources, the Game and Fresh Water Fish Commission, and the affected regional planning council are required to report and comment on the application within 150 days.

The department is required to conduct and complete certain studies no later than 210 days after the complete application is filed with the department. The department must prepare a written analysis to be filed with the designated hearing officer no later than 240 days after the complete application is filed with the department, but no later than 60 days prior to the certification hearing.

Section 11. Section 403.508, F.S., is amended to provide that a certification hearing must be held by the designated hearing officer no later than 300 days after the complete application is filed with the department. The hearing officer must submit a recommended order no later than 60 days after the filing of the hearing transcript. If the hearing officer fails to issue such order within the 60 days, he must submit a report to the Siting Board to advise of the delay.

The Department of Natural Resources, the Game and Fresh Water Fish Commission, and the affected regional planning council are added as parties to the proceeding. The order of presentation by the parties at the certification hearing is specified.

Section 12. Section 403.509, F.S., is amended to limit the issues that may be raised in area hearing before the Siting Board.

Section 13. Section 403.5095, F.S., is amended to provide that the time limits may be altered under certain conditions.

Section 14. Certain technical amendments are made to s. 403.510, F.S.

Section 15. Section 403.511, F.S., is amended to provide that the certification may include certain conditions which constitute variances, exemptions, exceptions from certain nonprocedural standards or regulations. Provides for notification to the applicant of certain nonprocedural requirements by each party. Failure of such notification by an agency will be treated as a waiver from nonprocedural standards. No variance, exemption, or exception can be granted from any rule or statute regarding the protection of endangered or threatened species, aquatic preserves, Outstanding National Resource Waters, Outstanding Florida Waters, or for the disposal of hazardous waste except upon a finding by the Siting Board that such a variance, exception, or exemption is in the public interest.

The certification is in lieu of any license, permit, or certificate required pursuant to chapters 125, 161, 163, 166, 168, 253, 298, 370, 373, 376, 380, 381, 387, 403, 404, F.S., the Florida Transportation Code, or 33 U.S.C. s. 1341.

Section 16. Section 403.5115, F.S., is created to provide that certain notices are required to be published by the applicant and the department.

Section 17. Section 403.5111, F.S., is renumbered as s. 403.5116, F.S.

Sections 18, 19, and 20. Certain technical amendments are made to ss. 403.512, 403.513, and 403.514, F.S.

Section 21. Section 403.516, F.S., allows the department to modify the terms and conditions of the certification under certain circumstances. The applicant is also allowed to petition for modification of the certification.

Section 22. Section 403.517, F.S., is amended to provide that the department adopt rules relating to resolution of disputes as to the completeness and sufficiency of supplemental applications.

Final disposition of a supplemental application by the Siting Board must be made within 215 days of filing for such applications.

Section 23. Section 403.518, F.S., is created to establish certain fees which are to be deposited into the Operating Trust Fund.

(1) Notice-of-intent fee -- $2,500.

(2) Application fee -- not to exceed $150,000.

(3) Certification modification fee -- not to exceed $15,000.

(4) Supplemental application fee -- not to exceed $50,000.

Section 24. Section 403.519, F.S., is amended to require the Public Service Commission to publish certain notices regarding a proceeding to determine the need for a power plant.

Sections 19-45 pertain to the Transmission Line Siting Act.

Section 25. Section 403.52, F.S., is amended to correct citations in the short title.

Section 26. Section 403.521, F.S., is amended to provide that the location of transmission line corridors and the construction and maintenance of transmission lines cannot unduly conflict with the goals established by the local comprehensive plan.

Section 27. Section 403.522, F.S., relating to definitions, is amended to include a specific definition for the following terms: electric utility, license, nonprocedural requirements of agencies, person, preliminary statement of issues.

Section 28. Section 403.523, F.S., relating to the Department of Environmental Regulation's powers and duties is amended. Certain specific fee language is deleted from this section as fees are addressed later in the bill. The department would prepare a written analysis as required by s. 403.526, F.S. Specific report language is deleted from this section.

Section 29. Section 403.524, F.S., is amended to provide that the provisions of the Transmission Line Siting Act do not apply to transmission lines which are less than 15 miles in length or do not cross a county line.

Section 30. Section 403.525, F.S., is amended to require the appointment of a hearing officer.

Section 31. Section 403.5251, F.S., is created to provide for distribution of the application and preparation of a schedule of certain dates.

Section 32. Section 403.5252, F.S., is created to require the department to file a statement within a certain time with DOAH and the applicant regarding the completeness ofthe applicant. In the event an application is declared incomplete, the applicant must respond by by either agreeing with the statement, agreeing to amend the application, or contesting the statement. If the applicant contests the statement, provisions are made for a hearing.

Section 33. Section 403.5253, F.S., is created to require the department to file a statement regarding the sufficiency of the application to DOAH within 30 days after distribution of a complete application. The department must base its statement upon consultation with the affected agencies. If the application is deemed in sufficient and is contested by the applicant, provisions are made for a hearing.

Section 34. Section 403.526, F.S., is amended to require the the Department of Natural Resources, each affected water management district, the Department of Community Affairs, the Game and Fresh Water Fish Commission, affected local governments, and affected regional planning councils are required to submit a preliminary statement of issues to the department and the applicant within 60 days after receipt of the complete application. Statements of issues are to be submitted by each agency to the department no later than 90 days after receipt of a copy of the complete application.

Section 35. Section 403.527, F.S., is amended to require the applicant, rather than the department, to publish certain notices. The department is still required to publish certain notices in the Florida Administrative Weekly.

The hearing officer must conduct a certification hearing no later than 185 days after receipt of a complete application. Also, a recommended order is due no later than 60 days after the hearing transcripts are filed with DOAH.

Certain language relating to alternate corridors is deleted.

Parties to the proceeding are specified. Also, the order of presentation at the certification hearing is specified.

Section 36. Section 403.5271, F.S., is created to provide for alternate corridors.

Section 37. Section 403.5275, F.S., is amended to delete language relating to fees for amendments to the application.

Section 38. Section 403.529, F.S., is amended to limit the issues that may be raised before the Siting Board.

In determining whether certification should be approved, the board must consider certain criteria including land development regulations.

Section 39. Section 403.531, F.S., is amended to provide that each party must notify the applicant of certain nonprocedural requirements.

The certification is in lieu of any license, permit, or certificate required pursuant to chapters 125, 161, 166, 186, 253, 258, 298, 370, 373, 376, 380, 381, 387, 403, 404, F.S., the Florida Transportation Code, or 33 U.S.C.. s. 1341.

Section 40. Certain technical amendments are made to s. 403.533, F.S.

Section 41. Section 403.5315, F.S., is amended to provide that the applicant or the department may petition the department or DOAH for a modification of certification under certain conditions.

Section 42. Certain technical amendments are made to s. 403.533, F.S.

Section 43. Section 403.536, F.S., is amended to specify that certain rules and ordinances are superceded by this act.

Section 44. Section 403.5365, F.S., is created to establish certain fees which are to be deposited into the Operating Trust Fund.

(1) Application fee -- $1,000 for each mile of the proposed transmission line corridor, plus an amount not to exceed $50,000 based on the load-carrying capability and configuration of the transmission line.

(2) Amendment fee -- if a corridor alignment change is proposed, the minimum fee is $2,000 and $750 per mile.

(3) Certification modification fee --

(a) if no alignment change is proposed -- $4,000;

(b) if an alignment change is proposed -- $1,000 for each mile plus an amount not to exceed $10,000 based on the length of the corridor realignment.

Section 45. Section 403.537, F.S., is amended to require the Public Service Commission to publish a notice regarding determination of need.

Sections 46, 47, 48, 49, 50, 51, 52, 53, and 54 Certain technical amendments relating to references are made to ss. 403.539, 258.397, 258.45, 288.503, 366.04, 366.05, 380.23, 403.061, and 403.7045, F.S.

Section 55. The Department of Environmental Regulation is appropriated $126,371 from the Operating Trust Fund to implement the provisions of the Electrical Power Plant Siting

Act and the Transmission Line Siting Act. The department is also authorized three additional positions.

Section 56. This bill does not affect any application for certification of an electrical power plant or a transmission line that has been completed prior to the effective date of this act.

Section 57. Effective date.

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

The fees charged to the applicant under both the Electrical Power Plant Siting Act and the Transmission Line Siting Act are increased by this bill. The fees will vary with each power plant application and transmission line application. It is assumed that the average for each power plant application will be approximately $150,000 and the average for one 60-mile transmission line will be $110,000. Such costs, however, are generally passed on to the ratepayer.

Also, much of the burden regarding notices is shifted from the department to the applicant.

B. Government:

The department currently has 2.5 current positions assigned to Power Plant/Transmissiom Line Siting. This bill provides for an appropriation of $126,371 and three new positions to the Department of Environmental Regulation from the Operating Trust Fund. The three new positions would include a senior attorney, an engineer III, and a secretary.

The department has estimated the following total costs, including new positions to administer the Electrical Power Plant Siting Act and the Transmission Line Siting Act:

FY 1990-91 -- $235,371

FY 1991-92 -- $239,086

FY 1992-93 -- $250,866

It is anticipated that the costs associated with administering this act will be funded by the fees collected from the applicants.

Local governments, regional planning councils, water management districts, and other state agencies are required to review and comment on the applications filed with the department. The amount of costs incurred regarding such review would depend on the project and the degree to which such entities become involved. However, much of their costs could be reimbursed by the department from the fees collected.

III. COMMENTS:

None.

IV. AMENDMENTS:

None.

4

NO. 9210UC724

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA ex rel. Utilities Commission, Public Staff North Carolina Utilities Commission, and Carolina Power and Light Company and Duke Power Company as Intervenors,	)	No. 9210UC724
Appellees	)	From Wake County Public Utilities Commission Docket No. SP-91
v.	)	
Empire Power Company, Applicant for Certificate of Public Convenience and Necessity,	)	
Appellant	)	

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BRIEF OF APPELLEE DUKE POWER COMPANY

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NO. 9210UC724

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Empire Power Company, Applicant for Certificate of Public Convenience and Necessity, Appellant	)	

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BRIEF OF APPELLEE DUKE POWER COMPANY

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STATEMENT OF THE FACTS

Empire is an independent power producer ("IPP"). IPPs supply power on a contract basis to public utilities and others for resale. IPPs are relatively new entrants into the power generation business. Empire is not a public utility and as such is precluded by statute from "producing, generating, transmitting, delivering, or furnishing electricity,...to or for the public for compensation..." Otherwise, Empire would be operating illegally as an uncertificated public utility. G.S. §§ 62-3(23)(A) and 62-110. Empire can only sell electricity to entities which are either licensed public utilities or which are exempted from the definition of public utility, such as municipalities.

On October 31, 1991, Empire instituted the action from which it now appeals by submitting an application for a certificate of public convenience and necessity to construct a 600 MW electric generating facility in Rockingham County, North Carolina. (R. p. 1A). In its application, Empire sought to establish a "public need" for its proposed generating facility. Empire alleged five bases for the "public need." These five reasons were largely based upon prior Commission decisions, including the Commission's determinations in the certification of Duke's Lincoln Combustion Turbine facility proceeding concerning the need for Lincoln itself (but not the need for other facilities) Docket No. E-7, Sub 461 (App. pp. 1 to 24) and alleged "problems" with Duke's Lincoln facility. Empire failed to make any allegation that any entity had committed to purchase electricity from Empire or was even interested in purchasing electricity from Empire. 1/

Pursuant to G.S. § 62-82(a), Empire published notice of its application on November 22 and 29 and on December 6 and 13, 1991. (R. p. 76). On December 20, 1991, CP&L filed its complaint and petition to intervene in the proceeding and on December 23, 1991, Duke filed its complaint and petition to intervene. (R. pp. 66, 70).

On January 17, 1992, CP&L filed a motion to dismiss. (R. p. 100). The basis of the motion to dismiss was that Empire had not alleged a public need for its facility because it had not shown a buyer for its electricity. On January 22, 1992, the Commission ordered oral argument on CP&L's motion. (R. p. 105). Oral argument was held on February 5, 1992.

1/ Because certain of these proceedings are referenced by the Commission's Order in this case, Duke requests that the Court take judicial notice of the Commission's Orders pursuant to G.S. § 8C-1, Rule 201. These Orders are appended to this Brief.

The Commission issued its order on April 23, 1992. (R. p. 228). The Commission recognized that Empire was the first IPP to apply for a certificate. Therefore, the Commission had no specific rules or precedent to deal with Empire's application, but had to apply the statutory criteria contained in G.S. § 62-110.1 and the cases decided thereunder to the facts of this case. (R. P. 234). The Commission found that in order to show a public need, Empire must allege a contract or written commitment from the utility to which it proposes to sell electricity since it had indicated that it would sell electricity to Duke or CP&L. If Empire had indicated any other appropriate entity as a purchaser, Empire would have been required to furnish similar evidence. Otherwise, the Commission noted that it would have no basis to know the nature of the facility it was being asked to certify or whether there was a need for that facility. (R. p. 233).

The Commission noted that its rules provided detailed requirements for a utility to meet in order to certificate a generating facility. The Commission also noted that electric utilities are required by federal law to purchase electricity from "qualifying facilities." 16 U.S.C.A. § 824a-3. 2/ Therefore, the Commission found that federal law established a "public need" for qualified facilities. Even with respect to qualifying facilities, however, the Commission noted that it had rules which applied to certification of such facilities, which included the requirement that the applicant provide to the Commission its general plan for the sale of electricity. Empire, however, is not a "qualified facility" under federal law and cannot rely upon this federal determination of public need. (R. p. 232).

2/ "Qualifying facilities" are cogeneration facilities and other small power producers that meet certain requirements of federal law. See 16 U.S.C.A. § 796(17)(18).

The Commission also noted that Empire could not rely upon the load forecast of public utilities in this State to establish a "public need" for its facility in part because the utilities in this State had already taken steps to meet that need. For example, Duke intended to meet its need through the certificated Lincoln Combustion Turbine Station, and CP&L had received a certificate for a peaking facility in South Carolina. Unless Empire could show a commitment to purchase electricity from its facility, Empire could not show a public need as required by statute. (R. pp. 230, 232-33). Imposition of this requirement would not unfairly prejudice IPPs. The Commission stated that it would continue to exercise its complaint jurisdiction under G.S. § 62-72 to ensure that utilities acted in good faith with IPPs. The Commission noted that Empire had in fact brought a complaint proceeding against Duke and received an evidentiary hearing. This complaint was subsequently dismissed based on the Commission's determination that Duke had acted reasonably. Docket No. E-7, Sub 492 (App. pp. 25 - 51). Furthermore, the Commission stated that if an IPP believes that it has a more cost effective source of generation than proposed by a public utility it can intervene in the public utility's certification case. Empire had in fact attempted to intervene in Duke's Lincoln certification and its petition was dismissed only because it was untimely filed (after the close of the hearing). Finally, the Commission noted that IPPs can participate in the Commission's least cost integrated resource planning proceedings and that Empire had in fact done so. (R. p. 233-34).

Finally, the Commission found that the application of this requirement to Empire did not unfairly prejudice Empire. The Commission stated that its dismissal of Empire's application was without prejudice to Empire's right to file a new application as soon as it could comply with the filing requirement. (R. p. 234).

ARGUMENT

I. THE COMMISSION PROPERLY EXERCISED ITS JURISDICTION OVER EMPIRE WITHIN THE AUTHORITY GIVEN IT BY THE GENERAL ASSEMBLY.

EMPIRE ASSIGNMENT OF ERROR NOS. 1-7, 9, 11, 12

A. The Commission Properly Exercised its Authority Over Empire Pursuant to G.S. §§ 62-82 and 110.1 and in Conjunction With the Other Powers Given to the Commission by Article 62.

The Commission, in its Order dismissing Empire's application, referred to its powers under G.S. §§ 62-31 and 60. These sections give the Commission the power to establish policies such as minimum filing standards rules and certain adjudicative authority. Empire contends that the Commission's use of these powers was inappropriate because Empire claims that in a certificate case, the Commission exercises only the powers specifically provided by G.S. § 62-82. (Appellant's Brief at 10-14). Empire assumes that the Commission utilized G.S. §§ 62-31 and 60 in order to deviate from the process specifically prescribed by G.S. §§ 62-82 and 110.1. This is not so. As Duke will demonstrate in Section II herein, the Commission complied in all respects with the specific provisions of G.S. §§ 62-82 and 110.1.

The Commission, in deciding Empire's application, did not rely on G.S. §§ 62-31 and 60 to deviate from the statutorily prescribed process for deciding certificate cases, but relied on these statutes only to implement that process. Empire appears to contend that in a certificate case the Commission can look only to G.S. §§ 62-82 and 110.1 in isolation with no reference to powers granted to it by other statutory provisions. G.S. §§ 62-82 and 110.1, however, do not state this; they are not self-contained but exist only within the entire matrix of Chapter 62. For example, G.S. § 62-110.1 requires that the Commission determine whether the public convenience and necessity <u>requires</u> the construction of a proposed generating facility. The Commission can only make this determination by looking to the policies expressed by other parts of

Chapter 62 including (1) the assurance of a reliable and adequate supply of electricity, (2) the provision of economical service and (3) the encouragement of the least-cost mix of generation and demand reduction alternatives. See, e.g., G.S. §§ 62-2(3), 3(a), (4) and (4a).

Chapter 62 establishes an orderly process for the planning of future generation which the Commission must consider in deciding a certificate case. First, G.S. § 62-110.1(c) requires the Commission to develop and keep current an analysis of the long-range needs for expansion of future generating facilities in this State and to provide that analysis to the Governor and the General Assembly annually. G.S. § 62-2(3a) provides that the planning for additional resources to meet future growth should be made on a "least cost" basis so that only generating resources and demand-reduction resources, including conservation, which will lead to the lowest possible consumer bills are utilized. Finally, G.S. § 62-110.1(a) requires Commission approval prior to beginning construction of a generating resource so that the Commission can determine whether the proposed resource is the least-cost option prior to the time significant funds are expended.

Pursuant to these statutes, the Commission in 1988 implemented rules requiring "Least Cost Integrated Resource Planning" in North Carolina. Rules R8-56 to 61. (App. pp. 52-65). These rules require utilities to develop and update integrated resource plans and file these plans with the Commission. 3/ The rules require periodic public hearings to be held on these plans. Rule R8-56(f). Utilities and other persons (including Empire) can participate in these proceedings.

3/ The plans are referred to as "integrated" because they combine generation alternatives and demand reduction alternatives such as conservation.

In furtherance of these and other legislative policies, the Legislature has granted to the Commission the authority to implement the Legislature's policy (G.S. § 62-31) and to make judicial determinations (G.S. § 62-60). These are the powers that the Commission utilized in the present proceeding and are powers that the Commission has traditionally utilized in certificate proceedings. 4/ The fact that these powers are not specifically referred to in G.S. §§ 62-82 and 110.1 does not mean that they do not exist in certificate proceedings because the Commission has these powers in all proceedings by the terms of G.S. §§ 62-31 and 60 themselves.

If, as Empire contends, the only procedures and powers applicable to certification cases are those specifically stated in G.S. §§ 62-82 and 110.1, then the Commission would be deprived of many necessary powers and the parties of many procedural protections. For example, the Commission would have no ability to compel testimony or production of documents or issue subpoenas (G.S. §§ 62-61 and 62) because these powers are not expressly granted by G.S. § 62-82. Similarly, there would be no prohibition against ex parte communications or requirement that hearings be public (G.S. §§ 62-70 and 71) because these protections are not specifically provided by G.S. § 62-82. The logical import of Empire's argument would deprive the Commission and the parties of the ability to implement the Legislature's policy. 5/

4/ For example, the Commission utilized its powers under G.S. § 62-31 to adopt rules applicable to certificate proceedings as early as 1973. See Former Rule R8-42.

5/ Before the Commission, Empire, in fact, argued that other provisions in Chapter 62 applied in certification proceedings. Empire argued that G.S. §§ 62-73 and 74 concerning complaints and the Commission's rules concerning complaints rendered Duke's and CP&L's complaints defective, even though none of the provisions Empire relied upon were contained in G.S. §§ 62-82 or 110.1. (R. pp. 144-48).

In the present proceeding it is clear that the Commission reasonably utilized its powers granted by G.S. §§ 62-31 and 60 in furtherance of the legislative policy underlying G.S. §§ 62-82 and 110.1. First, the Commission found that an independent power producer such as Empire must present evidence of a contract for the sale of power prior to obtaining a certificate. This is a threshold requirement. Unless Empire can establish that there exists a market for its power, Empire cannot make a showing that the public convenience and necessity requires the construction of its generating station. In short, Empire cannot even make a prima facie showing that the public convenience and necessity requires construction of its plant unless it can show that someone will buy its power. Furthermore, unless Empire can show where its power will be sold, the Commission has no basis for finding that the construction of the plant is in accordance with the least-cost planning process.

This does not, as Empire suggests, give the utilities the ability to ignore least-cost alternatives by not including them in the utilities' planning process. As the Commission noted, if an independent power producer believes it has been unreasonably treated by a utility, the independent power producer can (1) participate in the least-cost planning proceedings, (2) bring a complaint proceeding against the utility or (3) intervene in any proceeding of the utility to certificate a generating facility. (R. pp. 233-34).

In fact, Empire has already utilized all of these options. It is currently participating in the least-cost planning proceedings. Empire has also brought a complaint against Duke and was afforded a full evidentiary hearing after which the Commission found that Duke had treated Empire fairly. Empire also attempted to intervene in Duke's certification proceeding for its most recent generation facility and was refused intervention only because Empire's petition to

intervene was filed untimely (after the evidentiary hearing was over). (R. pp. 233-34).

The Commission, having set a reasonable standard in furtherance of the General Assembly's policy, properly dismissed Empire's application pursuant to the authority granted by G.S. § 62-60. This provision gives the Commission the powers of a judicial body which would include the power to dismiss a proceeding or to grant summary judgment. Because Empire, by its admission, failed to meet the minimum criteria required by the Commission to obtain a certificate, any further hearing by the Commission would have been futile and a waste of time and resources. Under these circumstances, a dismissal of the proceedings was appropriate under G.S. § 62-60.

B. The Commission's Requirement That Empire Show Where Electricity From its Plant Will be Used Comports in All Respects With The North Carolina Constitution.

Empire contends that the Commission's requirement that it demonstrate that a market for the use of its power exists by showing a contractual arrangement for the sale of such power is unconstitutional because it constitutes a delegation of the General Assembly's legislative powers and is a violation of the police power. (Appellant's Brief at 16-23). Neither of these contentions has any merit.

The leading North Carolina case concerning delegation of legislative powers is Adams v. Department of Natural and Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978). In Adams the Supreme Court addressed the Legislature's delegation to the Coastal Resources Commission of the authority to develop and adopt guidelines for development of the coastal areas of North Carolina. In Adams the Supreme Court set the following standard for such delegation:

> In the search for adequate guiding standards the primary sources of legislative guidance are declarations by the General Assembly of the legislative goals and policies which an agency is to apply when exercising its delegated powers. We have noted

> that such declarations need be only "as specific as the circumstances permit." (citations omitted) When there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide guidance to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances. 295 N.C. 698.

In Adams the Supreme Court found that adequate standards had been provided because the General Assembly set forth certain goals for the Coastal Resources Commission to achieve. Adams has been relied upon in a number of cases determining the constitutionality of the General Assembly's delegation of authority to administrative bodies. See, e.g., In re Guess, 327 N.C. 46, 54, 393 S.E.2d 833 (1990) (upholding constitutionality of statute authorizing the Board of Medical Examiners to revoke medical licenses for a departure of the "standards of acceptable and prevailing medical practice."); In re Broad and Gales Creek Community Association, 300 N.C. 267, 274, 266 S.E.2d 645 (1980) (upholding the authority of the Marine Fisheries Commission to deny a dredge and fill permit if there will be a "significant adverse effect on the value and enjoyment of the property of any riparian owners . . . ." The court stated that "it is precisely this need to deal with individual factual circumstances, as in the case of applications for permits to dredge and fill in the state's estuarine resources, which makes the task impossible for the legislature to manage alone. The legislature has properly set forth adequate standards here to allow the agency, with its accumulation of expertise in this subject area, to apply the standards to the varying factual circumstances."); Farlow v. Board of Chiropractic Examiners, 76 N.C. App. 202, 213, 332 S.E.2d 696 (1985) (upholding authority of Board of Chiropractic Examiners to revoke license for "unethical conduct." The court stated that "[t]here is a need for expertise in administering the chiropractic profession. We believe the proscription of

'unethical conduct' is a sufficiently definite standard so that the Board may set policies within it without exercising a legislative function.").

In the present case the General Assembly has set forth a specific standard for the Commission -- whether or not the public convenience and necessity requires the construction of the proposed generating facility. This standard has been in existence in this State since the adoption of G.S. § 62-110.1 in 1965 and has been in existence with respect to the grant of a utility franchise pursuant to G.S. § 62-110 since 1931. This standard alone is sufficient legislative guidance under the cases cited above, and is much more specific than other delegations which have been approved such as a proscription against "unethical conduct." Furthermore, the standard is accompanied by specific policies for the Commission to consider in taking action. In G.S. § 62-2 the Legislature has established ten specific policies for the Commission to consider in taking actions under Chapter 62. These policies are very similar to the policies relied upon by the Supreme Court in Adams, supra.

As in Adams, the General Assembly in 1965 could not have anticipated all of the facts and circumstances which could arise in the future which would necessitate a certificate of public convenience and necessity, and therefore all the General Assembly could do was establish a standard. For example, in 1965 IPPs such as Empire did not exist -- all generating resources were provided by utilities themselves. Furthermore, as in Adams, the decision as to whether to permit construction of an electric generation facility is a matter which requires great knowledge and technical expertise and depends on individual factual circumstances. This decision can significantly affect the planning process required by Chapter 62 and the least-cost plans of the utilities which the Commission regulates. Under these circumstances the General Assembly cannot be expected to set specific criteria for the grant of a certificate to all

potential applicants. Therefore, the delegation to the Commission of such responsibility is clearly within the holding of the Supreme Court in Adams.

Empire's next constitutional challenge is based upon an alleged violation of the police powers of the State. Essentially, Empire's argument is that the public should have no interest in what Empire does with its own funds. Empire relies upon three cases, none of which support its position.

The primary case relied upon by Empire is State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1940). That case involved the establishment of a State Dry Cleaners Commission which had the authority to license dry cleaners in this State. A majority of the members of the Commission were individuals involved in the dry cleaning business. The Supreme Court first noted that statutes such as this which regulated trade by members of the industry who had an interest in excluding others from entry into the trade were suspect on their face. Id. at 752. The Supreme Court next distinguished between industries requiring scientific or technical knowledge and skill and those which are "ordinary trades and occupations, harmless in themselves, in many of which men have engaged immemorially as a matter of common right, . . ." Id. at 756. The Supreme Court found that the dry cleaning business fit in the latter category and therefore strictly reviewed the statutes. The Supreme Court found the act unconstitutional because it failed to disclose "a justifiable relation to a reasonably necessary public purpose" and because it attempted "to exclude from an ordinary harmless occupation, upon insufficient grounds, those who are entitled under the constitutional guarantees to engage in it, . . ." Id. at 761, 765.

The facts in Harris and the facts of this case could not be more divergent. The legislative policy of assuring a reliable, least-cost source of electricity has been firmly established by the General Assembly. Empire's proposed facility

a significant impact upon this legislative policy. Empire proposes ide through its facility approximately one-fifth of the new peaking .ity needed in this State during the next decade. (R. p. 2). Empire oposes to flow energy from this facility into the Duke transmission system which would have significant impacts on the Duke system and other utilities in North Carolina with which Duke's facilities are interconnected. (R. p. 40). Clearly, Empire does not intend to engage in the type of "ordinary" occupation referred to by Harris, but rather into an occupation which has a fundamental effect upon the economy of North Carolina.

The remaining two cases cited by Empire are similarly inapt. In In re Aston Park Hospital, Inc., 282 N.C. 542, 193 S.E.2d 729 (1973), the Supreme Court overturned a statute which required a certificate of public convenience and necessity before beginning construction of a hospital. The Supreme Court found that the General Assembly had not established a reasonable relationship between the regulation of private facilities for medical care with the public need. Significantly, Empire fails to note that the Supreme Court distinguished the public utility industry from the medical industry. The Supreme Court stated as follows:

> In the public utility businesses competition, deemed unnecessary, is curtailed by the requirement that one desiring to engage in such business procure from the Utilities Commission a certificate of public convenience and necessity. G.S. 62-110. However, in those fields the State has undertaken to protect the public from the customary consequences of monopoly by making the rates and services of the certificate holder subject to regulation and control by the Utilities Commission. G.S. 62-32, G.S. 62-42, G.S. 62-130. No comparable power to regulate hospital rates and services has been given to the Medical Care Commission.

Id. at 550. Therefore, Aston Park is expressly inapplicable to regulated monopolies such as the public utility industry. Indeed, one of the purposes of Chapter 62 is to "promote the inherent advantages of regulated public

utilities." G.S. § 62-2(2). Furthermore, Empire fails to note that the defect identified by the Supreme Court in Aston Park was not the regulation itself of private business but the fact that the General Assembly had not made explicit findings describing the relation between the purposes behind the certificate law and its effect on individual rights. After Aston Park a new certificate law was enacted describing that relationship and therefore the constitutional "infirmity" was cured. See HCA Crossroads Residential Centers v. North Carolina Department of Human Resources, 327 N.C. 573, 584, 398 S.E.2d 466 (1990) (Whichard, J., dissenting on other grounds). In the present case the Legislature has clearly described the policies underlying the regulation at issue.

Even if Aston Park applied to the present proceeding, there is clearly a substantial public purpose involved in the licensing of power generation facilities. As Duke has discussed above, the General Assembly has established a policy of long-term planning to meet future electric needs in North Carolina upon a least-cost basis. The ability of entities to begin construction of large generating facilities in this State at their own whim would have an obvious effect on the ability of utilities to plan on a least-cost basis, and to include demand reduction planning, including conservation, in these efforts as required by G.S. § 62-2(3a). If Empire were allowed to begin building a 600 MW generating facility with no Commission scrutiny, the utilities would have no basis to determine whether to include this generating facility in their least-cost plans. This could lead to expensive duplication of facilities. Furthermore, the only facilities available for the transmission of that power are the transmission facilities of the public utilities in this State. Indeed, Empire is prohibited from engaging in such transmission because this is a public utility function. G.S. §§62-3(23)(A) and 110. If, as Empire states in its application, it intends

to flow such power into the Duke transmission system, this would significantly impact Duke and other utilities in North Carolina to which Duke's systems are interconnected.

Finally, Empire's facility could have a significant effect on future reliability. If a generating facility is incorporated in a utility's least-cost plan, there must be some assurance that the owner of the facility is financially and technically capable of building the facility it proposes. In fact, in other proceedings before the Commission, Empire has admitted that it has no significant assets and has never even had occasion to prepare basic financial statements. (App. pp. 30-32). Yet it proposes here to build a facility that it admits will cost $200 to $240 million and would be responsible for one-fifth of the new resources needed to meet future load growth in North Carolina for the next ten years. (R. pp. 2, 45). If utilities incorporated Empire's facility in their least-cost plans and Empire were unable to finance and reliably operate such facility there would be a significant shortfall of power in this State. In short, the public has a significant interest in the regulation of any proposed generating facility in this State because the facility can have a substantial effect on the availability and price of electricity in the future.

The remaining case relied upon by Empire is also fully supportive of Duke's position. That case, A-S-P Associates v. Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979), involved Raleigh's regulation of construction of historic districts. The Supreme Court found that it was within the police power of Raleigh to regulate the aesthetic appearance of buildings in a historic district. In that case the Supreme Court stated that the police power "is as extensive as may be required for the protection of the public health, safety, morals and general welfare." Id. at 213. The General Assembly has found that

the provision of adequate, reliable and low cost electric service is firmly tied to the general welfare of this State, and no reasonable person would argue to the contrary. G.S. §62-2. Therefore, regulation of the provision of electric generating services is firmly tied to the public welfare and within the police power of the State.

II. EMPIRE IS NOT ENTITLED TO A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY UNDER N.C.G.S. § 62-82(a) AS A MATTER OF LAW.

EMPIRE ASSIGNMENT OF ERROR NOS. 1-10

A. The North Carolina Utilities Commission Commenced a Hearing Within the Time Frame Established by N.C.G.S. § 62-82(a).

G.S. § 62-82(a) provides that whenever an application for a certificate of public convenience and necessity is filed with the Commission, the Commission shall require the applicant to publish notice. The statute further provides,

> [T]hereafter the Commission upon complaint shall, or upon its own initiative may, upon reasonable notice, enter upon a hearing to determine whether such certificate shall be awarded. Any such hearing must be commenced by the Commission not later than three months after the filing of such application... If the Commission or panel does not, upon its own initiative, order a hearing and does not receive a complaint within 10 days after the last day of publication of the notice, the Commission or panel shall enter an order awarding the certificate.

Empire contends that G.S. § 62-82(a) requires the Commission to order a hearing within 10 days after the last day of publication of the notice or issue an order awarding the certificate and to begin holding a "full-fledged evidentiary hearing" on the certificate application within three months of the filing of the application. (Appellant's Brief at 28, 39-40). However, Empire's interpretation of the statute is erroneous and is contrary to the rules of statutory construction. G.S. § 62-82(a) does not require the Commission to order a hearing within a 10 day limit and only provides that the Commission must commence a hearing within three months of the filing of the application.

The cardinal rule of statutory construction is that legislative intent controls. State ex rel. Utilities Commission v. Public Staff, 309 N.C. 195, 210, 306 S.E.2d 435 (1983), appeal after remand, 320 N.C. 1, 358 S.E.2d 35 (1987); In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981). In ascertaining the intent of the legislature, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish. Public Staff, 309 N.C. at 210. A court is also required to consider the consequences that will flow from the construction of a statute one way or another. Id.; Campbell v. Church, 298 N.C. 476, 259 S.E.2d 558 (1970).

Empire's assertion that the Commission must order a hearing within 10 days of the last day of publication under G.S. § 62-82 is incorrect and irrelevant to the facts of this case. Empire contends that the phrase "within 10 days after the last day of publication of the notice" in G.S. § 62-82(a) qualifies the phrase "[i]f the Commission or panel does not, upon its own initiative, order a hearing" as well as the later phrase "and does not receive a complaint." Ironically, one of the cases on which Empire relies heavily, HCA Crossroads, supra, contradicts Empire's statutory construction. As the Supreme Court in HCA Crossroads noted, according to the doctrine of the last antecedent, "relative and qualifying words, phrases, and clauses ordinarily are to be applied to the word or phrase immediately preceding and, unless the context indicates a contrary intent, are not to be construed as extending to or including others more remote." Id. at 578, citing 82 C.J.S., Statutes § 334 (1953) and 73 Am. Jur.2d Statutes § 230 (1974). Pursuant to the doctrine of the last antecedent, the 10-day time limit only qualifies the Commission's receipt of a complaint, the phrase immediately preceding it, and not the more remote phrase concerning the ordering of a hearing.

Even if there were a requirement that, absent a complaint, the Commission must order a hearing within 10 days of the last day of publication of the notice, Empire would still not be entitled to an order awarding the certificate. The sentence has two requirements that must be met before the Commission shall enter an order awarding the certificate: (1) the Commission does not order a hearing, and (2) the Commission does not receive a complaint within 10 days after the last day of publication. The last day of Empire's publication of notice was December 13, 1991. (R. p. 76). Both CP&L and Duke filed Complaints and Petitions to Intervene within 10 days after the last day of publication. (R. pp. 66, 70). Because the Commission did receive timely complaints, the Commission was not required to enter an order awarding the certificate.

Empire is also incorrect in its assertion that G.S. § 62-82 requires the Commission to begin holding a "full-fledged evidentiary hearing" within three months of the filing of its application. Those are not the words contained in G.S. § 62-82. The Legislature chose the words "commence" and "hearing" to describe the action required by the Commission. Black's Law Dictionary, 6th Edition (1990), defines "commence" as "to initiate by performing the first act" or "to institute or start." Black's states that the word "hearing," while it may refer to an evidentiary proceeding, is "frequently used in a broader and more popular significance to describe whatever takes place before magistrates clothed with judicial functions and sitting without jury at any stage of the proceedings subsequent to its inception..., and to hearings before administrative agencies as conducted by a hearing examiner or Administrative Law Judge." Black's also defines "administrative hearing" as "an oral proceeding before an administrative agency consisting of argument or trial or both."

"Hearing" is used throughout Chapter 62 of the General Statutes and the Commission's Rules and Regulations but is not defined. Rule R1-21 of the Commission's Rule and Regulations addresses the conduct of "hearings" before the Commission and distinguishes "formal hearings" from other hearings. The rule clearly contemplates different types of hearings before the Commission.

While North Carolina cases apparently have not defined "hearing," other courts have interpreted "hearing," as follows: (1) "[p]retrial conference is a 'hearing' within rule that motion may not be made orally except at 'trial or hearing.'" Coggan v. Coggan, 213 So.2d 902, 903, Fla. Ct. App. (1968); (2) "[t]he word 'hearing' is generally understood as meaning a judicial examination of the issues between the parties, whether of law or of fact." Mathews v. Weiss, 15 Ill.App.2d 530, 146 N.E.2d 809, 810 (1958); and (3) "The word 'hearing' includes oral argument." Wisconsin Tel. Co. v. Public Service Commission, 287 N.W. 122, 232 Wis. 274.

A basic tenet of administrative law is that a statutory reference to a hearing does not necessarily require a trial-like proceeding. See United States v. Florida East Coast Railway, 410 U.S. 224, 239-40 (1973). "One must approach administrative law with an unrestricted notion of the term 'hearing.' A hearing in administrative law need not be a trial-like, adverserial proceeding..." Charles H. Koch, Administrative Law and Practice, §1.23, p. 42 (1985). In the administrative context, "[a] hearing is any oral proceeding before a tribunal." Kenneth Culp Davis, Administrative Law Text, § 7.01, p. 157 (1972). The method of trial is appropriate for resolving issues of fact, and the method of oral argument, not trial, is the appropriate process for resolving non-factual issues of law, policy, and discretion. Id. at 158. In this case, where there was no dispute as to the facts, there was only the question of what Empire must show

to establish a "public need," as required by statute. A trial-like, or "full-fledged evidentiary hearing," was not required.

It is clear that "hearing" may be defined differently depending on the context in which it is used and the legislative intent behind the requirement of a "hearing." As discussed more fully in Section IIB of this Brief, the Legislature's intent in G.S. § 62-82 in providing for the commencement of a hearing within three months was to provide for the orderly processing of certificate applications. The Legislature did not prescribe what type of hearing was appropriate in each case. That was left to the Commission to determine based on the facts of each case. Here, where the Commission's initial hearing determined that Empire had failed to even allege a public need for the facility, Empire received an appropriate hearing. Any further hearing would have been futile.

Given that "commence" means to "initiate by performing the first act" or to "institute or start" and "hearing" includes oral argument, the Commission "commenced a hearing" as required by G.S. § 62-82 within three months of Empire's filing of its certificate application. Empire filed its application on October 31, 1991. (R.p. 1A). The Commission entered an Order on January 22, 1992, scheduling oral argument on CP&L's Motion to Dismiss (R.p. 105), thereby commencing the hearing before the expiration of the three-month period.

B. The Time Provisions of N.C.G.S. § 62-82(a) are Directory not Mandatory, and Therefore, are not Jurisdictional.

Even if the Commission had not commenced a hearing within three months of the filing of Empire's application, the Commission was still not required to issue Empire a certificate as a matter of law. Empire maintains that the time provisions of G.S. § 62-82(a) are mandatory and jurisdictional, that the Commission violated the statutory time provisions, and that the Commission's

"violation" of G.S. § 62-82(a) caused it to lose jurisdiction thereby rendering the Commission's Order of April 23, 1992, void, and leaving the Commission jurisdiction only to award a certificate to Empire. Empire's argument violates the legislative intent behind G.S. § 62-82(a) and the other statutes relevant to the certification process.

Whether the time provisions of G.S. § 62-82(a) are jurisdictional in nature depends largely upon the legislative intent behind the statute. North Carolina Art Society v. Bridges, 235 N.C. 125, 130, 69 S.E.2d 1, 5 (1952). If the provisions are mandatory, they are jurisdictional. If merely directory, they are not jurisdictional.

The legislative intent of G.S. § 62-82(a) must be ascertained in light of the entire statutory framework of the certification process. G.S. § 62-110.1 is the controlling statute concerning construction of generating facilities. Paramount among the requirements of G.S. § 62-110.1 is the requirement that the Commission determine that "public convenience and necessity requires or will require, such construction." G.S. § 62-110.1 also establishes that the Commission is responsible for keeping abreast of the need for the expansion of generating facilities in North Carolina and sets forth a number of factors which the Commission must consider when determining whether to issue a certificate for a particular facility.

The North Carolina Court of Appeals addressed the legislative intent of G.S. § 62-110.1 in State ex rel. Utilities Commission v. High Rock Lake, 37 N.C.App. 138, 245 S.E.2d 787 (1978). The Court noted "that public convenience and necessity is based on an 'element of public need for the proposed service.'" Id. at 140.

Given that the intent of G.S. § 62-110.1 is to provide for the public need for electricity without wasteful duplication or overexpansion of generating

facilities, the purpose of G.S. § 62-82 can only be to provide an orderly procedure for handling certificate applications. If the time provisions in G.S. § 62-82(a) were mandatory, the Commission could be required to issue a certificate without fully determining that the proposed facility is needed. The statute, however, specifies when the provisions are mandatory and only requires that a certificate be issued if (1) the Commission does not order a hearing at all and (2) if there is no complaint filed within 10 days of the last publication. Here the Commission did order a hearing and received complaints within the 10-day period. If the Court should find that the Commission failed to commence the hearing within three months, the statute does not state what consequences, if any, flow from this failure. Empire would interpret the legislative silence in a manner that effectively negates the purpose of the statute. If this had been the legislature's intent, however, it would have said so. The fact that the legislature specified that the Commission must issue a certificate under certain circumstances, but did not do so if the Commission failed to commence a hearing within three months, shows that this was not the legislature's intent. Thus the time frame of G.S. § 62-82(a) should be construed as directory only.

Statutory provisions as to the precise time an action is to be taken generally are not regarded as mandatory where a time is fixed simply for the purpose of establishing an orderly procedure, and the doing of a thing within a certain time is stated without any negative words restraining the doing of it afterward. 73 Am Jur 2d, Statutes, Sec. 18. G.S. § 62-82(a) does not prohibit a hearing more than three months after the filing of an application, nor does it require the completion of the hearing within any time period. The cases in which statutory provisions as to time are regarded as mandatory tend

to be where the rights of the parties or the public interest would be injuriously affected by failure to act within the time allowed. Id.

Empire contends that its rights have been injuriously affected by the Commission's failure to act within the time allowed and that G.S. § 62-82(a) must be strictly construed as a mandatory provision. Empire cites In re Trulove, 54 N.C.App. 218, 282 S.E.2d 544 (1981) disc. rev. denied, 304 N.C. 727, 288 S.E.2d 808 (1982), as authority that the word "shall" as used in statutes is mandatory not directory. (Appellant's Brief at 25) However, Trulove is an interpretation of a different statute [G.S. § 89C-22(b)] and states only that "shall" is generally mandatory. Further, Trulove states that mandatory requirements are to be followed especially when the proceeding is penal in nature. Id. at 221.

Trulove involved the suspension of an engineer's license by the state licensing board. Similarly, other cases on which Empire relies for its argument that G.S. § 62-82(a) is mandatory and requires strict construction concern the suspension or revocation of a professional license by a state licensing board. Snow v. Board of Architecture, 273 N.C. 559, 160 S.E.2d 719 (1968), (suspension of architect's certificate of admission); and Parrish v. North Carolina Real Estate Licensing Board, 41 N.C.App 102, 254 S.E.2d 268 (1979) (revocation of broker's license). Another case cited by Empire, Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970) is a contract case in which strict construction was held to be necessary because the statute was in derogation of the right to engage in a lawful occupation and carried criminal penalties. These cases have no relevance to the facts of this case not only because they involve different statutes but also because, unlike this case, the statutes are penal in nature.

The only case which Empire cites which bears even slight resemblance to the facts of this case is HCA Crossroads, 327 N.C. 573,398 S.E.2d 466 (1990),

which the time limits of G.S. § 131E-185 were held to be mandatory, and having acted outside the statutory time limits, the Department of Human Resources was deemed to have issued a certificate of need for the health facility. Empire's reliance on HCA Crossroads is misplaced for several reasons. First and most obvious, HCA Crossroads is inapplicable because it addressed a different statute (G.S. § 131E-185) which contains different language.

Second, G.S. § 131E-185 specifically prescribes "time limits" (emphasis added). This statute is part of the very detailed and elaborate statutory framework under which the Department of Human Resources issues certificates. Article 9 of Chapter 131E establishes specific administrative review procedures, rules for enforcement, and sanctions. In contrast G.S. § 62-82(a) is far less detailed, and nowhere is the phrase "time limit" ever used. Unlike Article 9, which sets an overall time limit for the period beginning with the filing of an application for a certificate to an administrative decision, G.S. § 62-82 sets no such overall time frame. In fact, G.S. § 62-82 creates an indefinite process. Although it describes the time in which the Commission must commence a hearing, it does not state when the hearing must conclude. Under G.S. § 62-82 the Commission is allowed to commence a hearing and continue the hearing to a later time(s) as needed until the Commission has sufficient evidence on which to base a decision.

Third, the Court in HCA Crossroads relied heavily on the doctrine of the last antecedent to reach its conclusion that the time limits of G.S. § 131-E-185 are mandatory. Application of this doctrine resulted in the Human Resources Commission having the authority to reject an application only "within the review period" and thereafter having the authority only to approve an application. There is no similar construction applicable to G.S. § 62-82.

Empire's argument would also deny complainants' of their statutory right. Empire argues at great length that it has an absolute right to a "full-fledged evidentiary hearing" within three months of the filing of its application. However, G.S. § 62-82 also grants a right to a hearing to anyone who files a timely complaint with the Commission. This right is just as absolute as the applicant's; hence the requirement that the filing of a complaint automatically triggers a hearing to determine whether such certificate shall be awarded. If the Commission were required to issue an order awarding a certificate to Empire because it did not hold a "full-fledged evidentiary hearing" within three months, it would prejudice Duke's and CP&L's absolute rights to a hearing under G.S. § 62-82. The licensing cases cited by Empire and HCA Crossroads involved only an individual applicant and an administrative board. This case involves not only the applicant, Empire, and an administrative agency, but two complainants as well who have rights under the relevant statute.

A practical application of Empire's interpretation of G.S. § 62-82(a) illustrates the flaw in Empire's argument that the statute's time provisions are mandatory. Although Empire filed its application on October 31, 1991, it twice filed revisions to the information included in its application which included information on price, interconnection plans, and air permits. The second revision was filed as late as January 31, 1992. (R.p. 77, 109). This information is essential information which the Commission must consider before deciding to grant or deny any certificate.

If the time provisions of G.S. § 62-82(a) were mandatory as Empire contends, the Commission would not only have been required to issue a certificate to Empire independent of proven need but also on the basis of incomplete information. If a certificate is to be issued any time a hearing is not commenced within the three-month period, then Empire could file a certificate

application, file essential information as late as one day prior to the end of the three-month period, and then claim that it is entitled to a certificate because the time expired. Clearly this result cannot be the Legislature's intent.

Furthermore, if Empire's assertion that the time provisions of G.S. § 62-82 are mandatory were correct, the Commission would be required to issue a certificate if it failed to comply with any of the other time provisions of the statute. For example, G.S. §62-82 requires the Commission to furnish a transcript of the evidence and testimony "by the end of the second business day after the taking of each day of testimony." Under Empire's interpretation, if the Commission did not furnish a transcript within this time period, it would be required to enter an order awarding the applicant a certificate. Again, this cannot be the Legislature's intent.

Because the primary intent of G.S. §§ 62-82 and 62-110.1 is to prevent the wasteful duplication or over-expansion of generating facilities, the time provisions of G.S. § 62-82(a) cannot be jurisdictional. In order to effectuate the purposes of the certificate law, the time provisions must be considered directory only. Thus, the Commission had jurisdiction to enter its Order on Motion to Dismiss dated April 23, 1992, even if the court should find that the Commission failed to comply with the three months provision.

III. THE COMMISSION DID HAVE THE AUTHORITY, JURISDICTION AND JUSTIFICATION TO DISMISS EMPIRE'S CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY APPLICATION WHEN IT ISSUED ITS APRIL 23, 1992 ORDER ON MOTION TO DISMISS.

EMPIRE ASSIGNMENT OF ERROR NOS. 1-12

A. G.S. § 62-82 Does Not Require That a "Full-Fledged Evidentiary Hearing" be Held on a Certificate for Public Convenience and Necessity Application Before Issuance of an Order Which Does Not Award the Certificate of Public Convenience and Necessity.

The Commission in this proceeding issued an order granting CP&L's Motion to Dismiss on April 23, 1992. (R. p. 228). The granting of the Motion to

Dismiss by the Commission followed numerous filings and oral argument by the parties before the Commission. Empire contends that neither G.S. § 62-82 nor § 62-110.1 make any provision for the dismissal of certificate applications. (Appellant's Brief at 42-43).

G.S. § 62-60 describes the authority of the Commission to conduct hearings as follows: "For the purpose of conducting hearings . . . , the Commission shall be deemed to exercise functions judicial in nature and shall have all the powers and jurisdiction of a court of general jurisdiction. . . . The Commission shall render its decision upon questions of law and fact in the same manner as a court of record." Commission Rule R1-7(a) provides that motions may be addressed to the Commission for various purposes including "for such other relief as may be appropriate." CP&L filed a Motion to Dismiss for failure to state a claim for which relief can be granted, which is a motion which any court of general jurisdiction, and therefore the Commission, can grant. It is not necessary that G.S. § 62-82 or § 62-110.1 contain a provision for dismissal.

Empire contends that without a full-fledged evidentiary hearing, there is no basis, authority or justification for dismissing a certificate application. (Appellant's Brief at 43). The motion to dismiss was properly granted because Empire failed to establish the need for the Rolling Hills facility in its application. As discussed in Section IIB, G.S. § 62-110.1 requires a showing of public convenience and necessity. Chapter 62 is very specific as to the activities of the Commission in responding to the long range needs for expansion of facilities for the generation of electricity. Empire's application stated that it had an outstanding proposal to sell long-term wholesale peaking capacity and energy to Duke for delivery beginning as early as 1994 (which Duke had refused). Additionally, Empire's application and supporting papers asserted that the need for the Rolling Hills facility could be found across the State

as well as within the Duke service territory. It was established, however, that there was no agreement between Duke and Empire for the purchase of electricity. Empire also identified no other committed buyer for the electricity generated by the Rolling Hills facility. (R. p. 230).

Empire stated in its certificate application that one reason the Rolling Hills facility is needed is because the North Carolina electric utilities require approximately 3000 MW of additional peaking capacity by year 2000 (referencing LCIRP Docket No. E-100, Sub 58) and that Duke will need 1165 MW of peaking capacity by 1997 (referencing Lincoln Docket No. E-7, Sub 461). (R. p. 2). Empire failed, however, to establish how its capacity would fit into the integrated resource planning process or into any specific utilities' future resource plans. Indeed the Commission in 1990 granted Duke a certificate to build the 1,165 MW Lincoln facility to meet its needs.

As discussed in Section IIB of this Brief, the High Rock Lake case concluded that G.S. § 62-110.1 requires that a public need for a proposed generating facility must be established before a certificate is issued and that the Commission is required to regulate the expansion policy for electric utility plants in North Carolina. Empire cannot simply cite a utility's load forecast or least cost integrated resource plan in order to show public need for its certificate application. Empire must show how its facility will meet that need. Unless Empire can show a contract or commitment to purchase its generation, then it cannot meet this threshold criteria.

Empire contends that it was erroneous for the Commission to decide material facts before evidence is offered. Empire cites State ex rel. Utilities Commission v. Town of Pineville, 13 N.C.App. 663, 187 S.E.2d 473 (1972). (Appellant's Brief at 44) The Pineville case involved a hearing before the Commission in which the Commission proceeded to find facts without ever having

heard from additional witnesses that wanted to testify. The Pineville case involved disputed factual questions. Here there were no relevant facts which were in dispute. Empire admitted that it had no buyer for its power, and therefore it could not show that its facility was needed.

B. The Commission did Have the Authority to Dismiss Empire's Application and the Dismissal was Appropriate.

Empire contends that it is an issue of fact as to whether the public convenience and necessity required the construction of Empire's facility. (Appellant's Brief at 45) Empire further contends that one purpose of the hearing would be to determine whether the facility was needed such that Empire could negotiate with the utilities to agree upon the prices and terms necessary to foster a transaction. (Appellant's Brief at 46). In High Rock Lake, supra, 37 N.C.App. 138, 245 S.E.2d 787 (1978), the court held that public convenience and necessity as set forth in G.S. § 62-110.1 is based on an element of public need for the proposed service and that the purpose of the statute was to "prevent costly overbuilding." 37 N.C.App. at 140. It is a matter of law that Empire was required to show an element of public need for its facility.

Empire contends that the phrase "public convenience and necessity" means the public at large, not a limited number of utilities. (Appellant's Brief at 46). The public at large receives its electricity from utilities certificated under G.S. § 62-110. Empire, which has not received a certificate as a public utility under G.S. § 62-110, cannot serve the "public at large." Unless it can show that a utility (or an entity exempt from the definition of public utility) is willing to buy its power, it cannot show a public need.

Empire also contends that the Commission improperly rejected Empire's assertion that the public required Empire's power on the basis of environmental limitations on Duke's Lincoln Combustion Turbine Station. In its Order the Commission stated that "the allegation that Duke's Lincoln capacity is limited

by its air permit has been addressed by the Commission's Order dated February 28, 1991 in Docket No. E-7, Sub 461." (Appellant's Brief at 47). The Commission in E-7, Sub 461 relied on North Carolina environmental agencies that issued the air permit for the Lincoln facility. The High Rock case, supra, indicated that "[e]nvironmental concerns are generally left to other regulatory agencies, except as they affect the cost and efficiency of the proposed generating facility." 37 N.C.App. at 141. Therefore, it is appropriate and legally correct for the Commission to rely on North Carolina environmental regulatory agencies for their expertise. Empire contends, however, that it was not a party to that proceeding because it was denied intervention in Docket No. E-7, Sub 461. Empire was denied intervention in E-7, Sub 461 only because it requested intervention subsequent to the completion of the hearing. Therefore, it is inappropriate for Empire to complain of its own delay in filing for intervention and to attempt here to attack collaterally the Commission's prior determination.

Empire contends that when the Commission relies upon judicial notice of material facts not appearing in evidence, it shall be stated with particularity. It alleges that the Commission did not do so which constitutes an error of law. Empire cites Humble Oil & Refining Co. v. Board of Alderman, 284 N.C. 458, 202 S.E.2d 129 (1974). (Appellant's Brief at 48). This cite is apparently utilized for the proposition that the procedural rules of an administrative agency are binding upon the agency which enacts them as well as upon the public. There is no indication here, however, that the Commission has not followed its own rules. As discussed above, the Commission cited the prior Order which it relied upon and stated the basis for its reliance.

Empire also contends that it was error for the Commission to reject Empire's application because it referenced the long range plans adopted by the

Commission. (Appellant's Brief at 48). The Commission only stated in its Order dismissing Empire's application that this was an inappropriate method to establish the public need for Empire's facility. The Commission did not dismiss Empire's application for a certificate because it referenced a Least Cost Integrated Resource Plan.

C. The Commission Did Not Exceed its Authority by Requiring a Non-utility to Present a Purchase Commitment From an Electric Utility in Order to Qualify for a Full-Fledged Evidentiary Hearing on its Certificate Application.

Empire contends that although G.S. § 110.1 contains no requirement that an applicant present a purchase commitment, the Commission ordered such a requirement and that such a requirement is in excess of the Commission's authority. (Appellant's Brief at 49-50). The General Assembly used the term "public convenience and necessity" to define the standard to be applied by the Commission to proposed facilities. High Rock, supra at 140. The General Assembly left it to the Commission to apply this standard to the facts of each application.

In 1965, when G.S. § 62-110.1 was enacted, most generating facilities were built by public utilities to serve their own customers. Public utilities could show a need for generating facilities by showing that their customers' needs for electricity required additional generating facilities. Since 1965, other entities have entered the power generating business, including qualifying facilities (QFs) under federal law. 16 U.S.C.A. § 796 (17)(18). QFs are required to obtain certificates under G.S. § 62-110.1. Under federal law, utilities must purchase excess electricity generated by QFs. 16 U.S.C.A. § 824a-3. Commission Rule R1-37 requires an application for a QF to include the applicant's general plan for sale of the electricity to be generated, including the utility to which the applicant plans to sell the electricity, any provisions for wheeling of the electricity, and arrangements for firm, non-firm

or emergency generation, among other details. This rule was promulgated after the concept of QFs was developed.

Empire does not meet the definition of a QF; rather, it is an IPP. No law requires a utility to buy generation from an IPP; rather, utilities buy power from IPPs only if it is cost-justified and needed. The Commission's finding that an IPP must allege a definite public need for its proposed facility is merely a stating of the obvious existing requirement in North Carolina. Further, the Commission stated that when the IPP proposes to sell its electricity to a North Carolina utility it must allege a contract or a written commitment from the utility agreeing to purchase the electricity in order to establish a public need. If the IPP proposes to sell to someone else, it must provide similar details.

Empire contends that the requirement of a contract or commitment to purchase the electricity establishes a monopoly of the electric utilities over the wholesale power market in North Carolina. (Appellant's Brief at 50). This is not so. As the Commission stated in its order dismissing the Empire certificate, IPPs have the complaint procedure under G.S. § 62-73 to ensure that the utilities act in good faith with the IPPs. (R. pp. 233-34). Empire in fact has filed a complaint against Duke and consequently was aware of its rights. Further, an IPP can participate in the integrated resource planning proceedings before the Commission, and Empire has been allowed to intervene in the upcoming integrated resource planning proceeding.

Empire contends that the Commission requirement establishes a new class in violation of both its statutory authority and the Equal Protection clause of the Constitution of the United States and that the requirement deprives all entities such as Empire of their constitutional rights to due process. (Appellant's Brief at 51). G.S. § 62-31 provides that "[t]he Commission shall

have and exercise full power and authority to administer and enforce the provisions of this Chapter and to make and enforce reasonable and necessary rules and regulations to that end." The Commission has the authority to establish minimum filing requirements for certificate applications. Clearly the Commission properly differentiated between utilities and IPPs. Utilities, in certificating a facility, can show a need for the facility by demonstrating that their own customers require the electricity. The utility has a preexisting duty to sell to these customers. This is not so with an IPP. IPPs have no right or duty to sell to anyone. They can only sell electricity if they can find a utility or other entity to buy it. If there is no buyer, there can be no public need. Empire cites In re Denial of Request by Humana Hospital Corp., 78 N.C.App. 637, 338 S.E.2d 139, 143 (1986), and Humble Oil and Refining Company, supra, (Appellant's Brief at 52) for the general proposition that Empire is entitled to a fair review of its application under the appropriate plans, standards, and criteria and that requiring a written sales agreement in order to qualify for either a certificate or a hearing is inappropriate. It has been established in this section that the Commission has the authority to establish rules pursuant to its delegated authority, and the High Rock Lake case, supra, establishes the standard of public need for the facility. Empire did not satisfy this burden. Empire is not prejudiced by the Commission applying this standard to it since it did not have a buyer at the time of the Commission's Order and still does not have a buyer. Empire can file a new application when it satisfies the minimum filing requirements of establishing need for the facility.

Empire cites Keiger v. Board of Adjustment, 281 N.C. 715, 720, 190 S.E.2d 175, 179 (1972), in which the Petitioner met every ordinance standard and site requirement for a mobile home park. (Appellant's Brief at 54).

Notwithstanding, the Board denied the permit. A subsequent rezoning ordinance was passed which precluded petitioners from receiving the permit. In the present case, however, Empire did not meet the requirement of showing a public need for its facility as required by statute. Empire also cites State ex rel. Utilities Commission v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978), for the statement that the Commission's rulemaking is not res judicata. (Appellant's Brief at 54). That case specifically states that rulemaking is an exercise of the delegated legislative authority of the Commission. That is what the Commission has done in this case to carry out the legislative policy of controlling the construction of electric generating facilities.

D. The Commission's Decision is Not Void.

Empire contends that the Commission has no authority to establish a rule that a certificate applicant must present a commitment from an electric utility, that the Commission had no authority to apply retroactively this requirement to Empire and that there existed an issue of material fact. Therefore Empire contends the order issued by the Commission was without authority and is void. (Appellant's Brief at 54-55). The Commission order indicated that Empire must allege a definite public need for its proposed facility, and if its statement of need states that it proposes to sell its electricity to a North Carolina utility, it must allege a commitment or contract. The Commission is entitled to know what type of facility it is being asked to certify at the time of the application as well as whether it is compatible with the policy of the State of North Carolina. There was no retroactive application of this requirement to prove need for the facility as it was already in existence. It is clear that the Commission can legally dismiss an application for a certificate and that there was a basis for such dismissal because no public need was established.

CONCLUSION

On the basis of the foregoing arguments, Duke respectfully submits that the Order of the Commission in this proceeding is lawful with respect to the issues discussed herein and respectfully requests that the Commission's Order be affirmed in such respects.

This the 12th day of October, 1992.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the Brief of Appellee Duke Power Company was duly served upon counsel and the parties listed below by depositing a copy of same in the United States mail, first-class postage prepaid as follows:

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CONTENTS OF APPENDIX

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-7, SUB 461

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application of Duke Power Company for a Certificate of Public Convenience and Necessity Pursuant to G.S. § 62-110.1 Authorizing Construction of the Lincoln Combustion Turbine Station in Lincoln County, North Carolina	)))))	ORDER GRANTING CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

HEARD IN: Courtroom #2, Lincoln County Courthouse, Lincolnton, North Carolina, on September 27 and 28, 1990, and in Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina 27602, on November 20 and 21, 1990

BEFORE: Chairman William W. Redman, Jr., Presiding, and Commissioners Ruth E. Cook, Julius A. Wright, Robert O. Wells, Charles H. Hughes, and Laurence A. Cobb

APPEARANCES:

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BY THE COMMISSION: This proceeding was instituted on February 2, 1990, by Duke Power Company (Duke) filing information required under Commission Rule R8-61(b) pertaining to the proposed Lincoln Combustion Turbine Station. This filing was followed on July 27, 1990, by the filing of an application for a certificate of public convenience and necessity under N.C.G.S 62-110.1 to construct the Lincoln Combustion Turbine Station on a site in Lincoln County, North Carolina.

In the application for a certificate of public convenience and necessity, Duke proposes to construct sixteen simple cycle combustion turbine units capable of generating 1,165 MW. The site is located two miles west of Lowesville on an approximately 711-acre site. The units are designed to burn natural gas and fuel oil. Two five-million gallon tanks will provide long-term storage for the oil used to fuel the turbines. There will be a natural gas pipeline connection to the facility. The site will also include a 9½-acre storage pond with 125 acre-feet of useable capacity. The project's generation output will tie into Duke's transmission grid by a fold-in with the existing McGuire Longview Tie 230 KV line. Construction of the project is scheduled to begin in October 1991.

On July 31, 1990, a Notice of Intervention was filed by the Attorney General on behalf of the using and consuming public.

On August 1, 1990, Duke filed the testimony of Donald H. Denton, Jr., stating that the proposed construction conformed to Duke's most recent Least-Cost Integrated Resource Plan (LCIRP) approved by this Commission's Order dated May 17, 1990, and stating that since the construction of turbines was already included in its LCIRP, Duke did not need to file an update.

By Order of the Commission dated August 8, 1990, notice of the application was required to be published in a daily newspaper of general circulation in Lincoln County; and the Commission, on its own motion, set public hearings on the application to commence on September 27 and 28, 1990, at the Lincoln County Courthouse, Lincolnton, North Carolina, and in the Commission Hearing Room, Raleigh, North Carolina, on November 20 and 21, 1990. The Order stated that Duke would file testimony supporting its application on September 7, 1990, and would file additional testimony detailing its demand-side management evaluations and results by October 15, 1990. The Order provided the opportunity for intervention by interested parties.

On September 7, 1990, Duke filed the testimony and exhibits of Donald H. Denton, Jr. and Richard B. Priory.

On September 21, 1990, Duke provided proof of publication from the Lincoln Times-News and the Charlotte Observer indicating that notice of the application had been published in accordance with the Commission's Order.

On September 24, 1990, Petition for Leave to Intervene was filed on behalf of George Clark, Barbara Clark, Walter Clark, Allison Clark, Donald Fisher, Mary Fisher, Margaret Morrison Guillett, Boyd McLean, Jimmie C. Dellinger, Aaron Broach, and Christine Broach (hereinafter referred to as the Intervenors). Filed along with the petition to intervene was a Motion for Postponement of Hearings. The Commission issued an Order on September 26, 1990, denying the Motion for Postponement of Hearings insofar as it sought to postpone the hearings in Lincolnton on September 27 and 28, 1990. The Commission, however, provided an opportunity for the parties to respond to Intervenors' motion for postponement of the Raleigh hearing and for an additional hearing in Lincolnton. The Commission allowed the intervention of Intervenors at the public hearing in Lincolnton on September 27, 1990. A number of public witnesses testified in Lincolnton on September 27 and 28.

On October 2, 1990, the Attorney General filed a Motion Joining Intervenors' Motion for Continuance of the Raleigh hearing.

On October 4, 1990, a Petition to Intervene was filed by Carolina Utility Customers Association, Inc. An Order allowing intervention was issued by the Commission on October 8, 1990.

On October 5, 1990, Duke filed its Response to the motion for postponement of hearings and to the request for additional opportunity to comment in Lincolnton.

On October 10, 1990, a prehearing conference was held in Raleigh before a Hearing Examiner. The parties were represented, and an Order was issued on October 17, 1990, describing procedures to be followed by the parties at the Raleigh hearing.

On October 17, 1990, the Commission also issued its Order Denying Motion for Postponement of Hearing. The Order reaffirmed the intervention of the Intervenors. The Commission recognized that public notice had already been given and that postponement of the hearing in Raleigh would result in confusion to the public and a waste of resources. The Commission also recognized that G.S. 62-82 provides for the Commission to commence hearing applications promptly and to make its decisions with reasonable dispatch. Finally, the Commission denied the alternative request for an additional public hearing in Lincolnton in that the Commission had already held two public hearings in Lincolnton and numerous witnesses had testified.

Meanwhile, on October 15, 1990, Duke filed the testimony of Donald H. Denton, Jr., regarding demand-site evaluations.

Pursuant to the Commission's August 8, 1990 Order, all parties other than Duke were required to file testimony by November 5, 1990. On October 29, 1990, Intervenors filed a motion for additional time in which to prefile expert testimony, requesting an extension of seven days. Duke opposed this request in a response filed October 31, 1990. On October 31, 1990, the Public Staff requested that it be granted a two-day extension to prefile its testimony. On November 2, 1990, the Commission issued Orders granting Intervenors an extension of time to and including November 13, 1990, to prefile testimony, and granting the Public Staff an extension of time to and including November 7, 1990, to prefile its testimony.

On November 7, 1990, the Public Staff filed the testimony of Dennis J. Nightingale and Danny P. Evans.

On November 13, 1990, Intervenors requested one additional day to file the testimony of Dr. Douglas Crawford-Brown. This request was subsequently granted by Commission Order of November 21, 1990. On November 13, 1990, Intervenors filed the testimony of Dr. Robert B. Williams. On November 14, 1990, the testimony of Dr. Douglas Crawford-Brown was filed.

The public hearing was held in Raleigh on November 20 and 21, 1990. At the conclusion of the hearing, the Commission directed the parties to file proposed orders on or before January 25, 1991.

During the course of the hearing, Intervenors made an offer of proof concerning certain confidential information. The Commission ordered that the offer of proof be submitted in a sealed envelope, and this was done by Commission Order of March 19, 1991. The Commission did not review this information in reaching its decision.

On November 19, 1990, the Attorney General filed a Notice arguing that the cost of the proposed plant is currently unknown and urging the Commission to delay a decision herein until a reasonable showing can be made as to the cost of compliance with air and water quality regulations. Duke filed a Response on November 30, 1990, and the Attorney General then filed a Request to Reply on December 12, 1990. These filings have been considered and are ruled on hereinafter.

Proposed orders and briefs were filed as ordered on January 25, 1991.

On February 1, 1991, Empire Power Company filed a Petition to Intervene in this docket. On February 8, 1991, the Attorney General filed a Position to the effect that he does not object to Empire's intervention. Duke filed a Response opposing intervention on February 12, 1991. Empire then filed a Request to Reply on February 15, 1991. The Commission issued its Order Denying Petition to Intervene on February 20, 1991.

The Public Staff filed a Motion for Reconsideration or Clarification on February 22, 1991, asking the Commission to either reconsider denial of intervention for Empire or "clarify in what docket a continuing review of the feasibility of the Lincoln County CT plant will occur." The Attorney General joined the Public Staff's Motion on March 4, 1991. By its March 4 filing, the

Attorney General also requested leave to file a late-filed exhibit, a February 27, 1991 letter from the Air Quality Section of the North Carolina Department of Environment, Health, and Natural Resources, Division of Environmental Management (DEM) regarding pending air permit applications for the proposed Lincoln County plant and existing Duke plants. Empire also moved for reconsideration on March 4, 1991. Duke filed Responses to the Public Staff, the Attorney General, and Empire on March 5 and 8, 1991. Duke opposed the late-filed exhibit offered by the Attorney General. Finally, Empire filed a Request to Reply on March 8, 1991. All of these filings have been considered by the Commission and are ruled on hereinafter.

Based on the foregoing, the verified application, the testimony and exhibits received into evidence at the hearing, and the entire record in this proceeding, the Commission now makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Duke Power Company is a corporation organized and existing under the laws of the State of North Carolina, and is a public utility operating in North and South Carolina where it is engaged in the business of generating, transmitting, distributing and selling electric power.

2. Duke Power Company has properly made application to this Commission for a Certificate of Public Convenience and Necessity as required prior to commencement of construction of new generating capacity and related facilities at its proposed Lincoln Combustion Turbine Station; all required notices have been given and the necessary parties were present or had the opportunity to be present at the public hearings, including members of the public who desired to appear; hearings were held on September 27 and 28, 1990, in Lincolnton, North Carolina, and on November 20 and 21, 1990, in Raleigh, North Carolina; and Duke, the Public Staff, Attorney General, Intervenors George Clark, et al., CUCA, and members of the public presented their views concerning the subject application.

3. Based on the evidence of future need for electric power in the Duke service area, and the Commission's own independent analysis of future requirements for electric service to North Carolina, made under G.S. § 62-110.1 and 62-2(3a), and considering the interchange, pooling and purchase of power, use of demand-side options, including conservation, load management and efficiency programs, and other methods for providing appropriate, reliable, efficient and economical electric service, public convenience and necessity requires that Duke construct an additional 1,165 mW of electric capacity for operation beginning as early as 1994.

4. The use of simple cycle combustion turbines for the 1,165 mW capacity addition, based on Duke's Least-Cost Integrated Resource Plan as it relates to cost and efficiency, is appropriate.

5. Construction of the Lincoln Combustion Turbine Station is consistent with the Commission's plan for expansion of electric generating capacity in North Carolina which includes, among other documents, the Commission's Order Adopting Least Cost Integrated Resource Plans dated May 17, 1990.

6. Duke utilized a reasonable process to select the site for the Lincoln Combustion Turbine Station.

7. The proposed site for the Lincoln Combustion Turbine Station is appropriate.

8. The Commission finds the estimated construction costs of the Lincoln Combustion Turbine Station of $480,523,000 to $517,560,000 to be reasonable, recognizing that the actual cost will be dependent upon compliance with environmental regulations, the construction schedule, and other factors.

9. The Commission finds that a certificate of public convenience and necessity for the Lincoln Combustion Turbine Station should be issued, subject to reporting and opportunities for further review as herein provided.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1 AND 2

The evidence for these findings of fact is contained in the verified application, the Commission's files and records regarding this proceeding, the Commission Orders scheduling hearings, and the testimony of witnesses. These findings of fact are essentially informational, procedural and jurisdictional in nature.

The Commission conducted public hearings in Lincolnton, North Carolina, on September 27, 1990, during the hours of 7 p.m. to 10:15 p.m., and on September 28, 1990, during the hours of 9 a.m. to 11:15 a.m. to hear from members of the general public. Lincolnton is 12 miles from the proposed Lincoln Combustion Turbine Station project site. There were 16 witnesses on September 27 and nine witnesses on September 28. Some of the witnesses were in favor of the project and some opposed the project. Those in favor of the project recognized that there was a need for capacity, that the plant would contribute to the economy, and that Duke was a good corporate citizen. Those opposed to the project cited the project's effect on air quality, traffic, and the character of the area.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 3, 4, AND 5

The evidence pertaining to these findings of fact is set forth in Duke's Application, Rule R8-61 filing, and the testimony of Duke witness Denton, Public Staff witnesses Dennis J. Nightingale and Danny P. Evans, and Intervenors' witness Dr. Robert B. Williams.

NEED FOR ADDITIONAL CAPACITY

Witness Denton presented testimony to support the application for the certificate to construct electric generation facilities and to address Duke's least cost integrated resource planning. He testified that Duke had filed its Least Cost Integrated Resource Plan (LCIRP) on April 6, 1989, and its Short-term Action Plan on April 26, 1990. The Commission Order Adopting Least Cost

Integrated Resource Plans dated May 17, 1990, approved the LCIRP presented by Duke, concluding that the plan should provide adequate and reasonable reserve capacity during 1990-2003.

Witness Denton also testified that Duke's least cost planning process tended to show that Duke's near term capacity addition needs are best met by peaking capacity, and that the best option to meet the peaking resource requirement is combustion turbines. Duke's LCIRP includes as capacity additions over 2,100 mW of new combustion turbine capacity during 1994-99. He stated that construction of the 1,165 mW Lincoln Combustion Turbine Station is an integral part of Duke's LCIRP and is consistent with the Commission's plan for expansion of electric generating capacity reflected in the Commission's May 17, 1990 Order.

Witness Denton further testified that growth in the service area continues to add peak electric demand to the Duke system. From 1974 to 1989, the Duke system peak demand grew at an average annual rate of 3.5%. The most recent forecast projected the 1990 system summer peak to be 14,452 mW and an average annual peak growth rate of 2.4% for the years 1990-2004. He testified that in order to meet customer demand, Duke is bringing on line the four-unit Bad Creek Pumped Storage Hydroelectric project, is refurbishing units in its Plant Modernization Program, and is relying on load reductions expected from Duke's demand-side management program.

Witness Denton testified that Duke's reserve margin will be below 20% in the years 1990 through 1993. He stated that this margin should be adequate in the near term given that there is surplus capacity in the Southeast which will be available on the spot market during that period. He also stated that a reserve margin below 20% is unacceptable in the long term. He contended that the capacity from the Lincoln Combustion Turbine Station is necessary to maintain the minimum planning reserve margin in 1994 and beyond.

Witness Denton also discussed Duke's efforts to purchase capacity from other sources. He stated that Duke is presently finalizing an agreement on a purchase of 200 mW, but that this would not affect the schedule for the Lincoln Combustion Turbine Station. He indicated that the approval of the Lincoln Combustion Turbine Station will help in future negotiations to purchase capacity from other sources by providing an approved alternative to such purchases.

Witness Denton discussed Duke's demand-side resources contained in the most recent Short-Term Action Plan filed in April 1990. The demand-side programs incorporate load reductions associated with existing programs as well as new programs. The existing programs consist of interruptible type programs that are designed to be activated during capacity shortage situations. The interruptible programs target residential water heaters and air conditioners, industrial processes, and customer owned standby generators. In addition, there are conservation programs which include lighting, insulation, heating, ventilation, and air conditioning systems. The new programs include the promotion of Residential High Efficiency Heat Pumps, Commercial Air Conditioning Load Control, and Standby Generators with backfeed capability. These programs are currently implemented in pilot project studies to validate program design assumptions and customer acceptance.

Witness Denton testified that the most recent demand-side evaluations included 54 options consisting of existing and new programs, addressing all customer and market sectors, for initial analysis. Following the economic tests and the risk-assessment test contained in its LCIRP process, 23 of the options were selected for inclusion in the LCIRP. In addition, six options are or will become pilot programs. He concluded that the cumulative impact of the 23 demand-side options results in an equivalent combustion turbine capacity of 945 mW in 1995 and 1,607 mW by the year 2004 as compared with the 1990 Short-Term Action Plan which reported 714 mW in 1995 and 879 mW by 2004. Even with this peak load reduction, the analysis shows the need for all 16 Lincoln combustion turbines in the 1994 to 1996 period and shows that reserves during this period will rise only slightly above the 20% minimum planning reserve margin.

Witness Evans presented the Public Staff's most recent independent peak load forecast for Duke, which projects the system summer peak to grow from 14,143 mW in 1990 to 19,729 mW in 2005, an average annual growth rate of 2.2%. He testified that the forecast used by Duke in this proceeding is based on essentially the same methodology as that used by the Public Staff. He expressed some concern about the way Duke models the electricity price effect, and he therefore viewed Duke's forecast with caution.

Witness Nightingale addressed Duke's most recent demand-side management (DSM) evaluations, the need for the Lincoln Combustion Turbines based upon both Duke's and the Public Staff's current peak load forecasts considering the Commission's minimum 20% reserve margin for planning purposes, and the Public Staff's position on Duke's request for a certificate of public convenience and necessity.

Witness Nightingale stated that Duke should be commended for the effort put forth to complete its new DSM evaluations in time for inclusion in this proceeding. He indicated that the increase in cumulative DSM capacity compared to the DSM capacity contained in Duke's April 1990 Short-Term Action Plan is significant. Witness Nightingale also pointed out that the Public Staff was extremely pleased with Duke's leadership in the area of DSM. While North Carolina has embraced load management and similar concepts for years, least cost integrated resource planning is now resulting in a broad range of new conservation and DSM programs. Many of the DSM programs adopted by Duke are new to most customers in this State.

Nevertheless, witness Nightingale expressed reservations about Duke's strategic sales programs. He pointed out that 11 of the 23 demand-side programs were strategic sales programs designed to increase the use of electricity during periods of low cost. He recommended that a study of the appropriate level of strategic sales programs be performed by Duke in its next DSM evaluation and that the study should address the potential problems of strategic sales programs, such as creating sales during peak loading periods.

Witness Nightingale also recommended that Duke's next DSM evaluation should look more to demand reduction programs and conservation programs geared to postpone or negate future capacity additions, and specifically the combustion turbine additions projected for 1997 and 1999 and the coal fired capacity additions projected for the years 2000 and 2001. He indicated that Duke had

committed to increase its research and development efforts regarding demand reduction and conservation programs.

In reviewing Duke's application, witness Nightingale commented on the lack of nonutility generator (NUG) generation shown for the future. He testified that the Public Staff believes Duke should adopt a nonutility generation goal of 500 mW of NUG capacity additions by the year 2000. On cross-examination, he noted that any new NUG capacity would have to be cost justified on the Duke system and that it is not appropriate to show NUG capacity in reserve margin calculations until Duke has contracts in hand for nonutility generation.

In response to witness Nightingale, witness Denton testified that Duke does not have any objections to establishing a goal of aggressively pursuing nonutility generation. He stated that studies have been performed to evaluate the opportunities for installing cost-effective nonutility generation and that the studies found there is not significant generation available which is cost-effective on Duke's system.

Witness Nightingale testified that the 20% planning margin is a minimum and that the optimal reserve margin may be higher. He testified that his review of the need for the Lincoln combustion turbines, based upon both Duke's and the Public Staff's current peak load forecasts and the Commission's minimum reserve margin, indicated that all of the Lincoln capacity will be needed by the summer of 1997. He indicated that the difference in the Duke and the Public Staff forecasts primarily influences how many units are added in each year between 1994 and 1997. Based upon the information known today and Duke's commitment to strive to offset future generation additions by intensifying its DSM and nonutility generation efforts, the Public Staff recommended the issuance of a certificate of public convenience and necessity for the Lincoln combustion turbines.

Intervenor witness Dr. Williams testified that he examined Duke's and the Public Staff's 1989 and 1990 long-term forecasts of peak demand for electricity. The forecasts by Duke and the Public Staff predict an increase in the peak in every year during the forecast period. The 1990 Duke forecast, however, predicts higher peaks than do the others. Witness Williams concluded that Duke's 1990 forecast is not the most accurate predictor of Duke's peak demand in the forecast period. He raised three concerns. First, he was concerned that Duke's forecasting techniques over-emphasize an abnormal year such as the high peak that occurred in 1989. Second, he believed that Duke's economic variables did not adequately recognize current economic conditions and noted that the actual temperature adjusted peak demand for 1990 was below both the Public Staff's and Duke's forecasted peaks. Third, he was concerned about Duke's use of three separate variables reflecting the real price of electricity and Duke's forecast that the real price of electricity would decline during the forecast period.

In response to witness Williams' first concern, witness Denton testified that the January 1990 Duke forecast reflected an unanticipated growth in the industrial base and the earlier opening of schools in North Carolina. He stated that one of every three years, the peak system demand will occur after the schools open. He noted that the 1989 peak occurred in late August. Duke used 1988, not 1989, as the base year for the 1990 forecast because of the unusual growth in 1989.

In response to witness Williams' second concern, witness Denton testified that the 1990 temperature adjusted peak was 14,058 mW as compared to the 1990 Duke forecasted peak of 14,452 mW. He testified further that a deviation from the forecast in any one year is not unusual and not necessarily an indication that the forecast is incorrect. He stated that a forecast is based on averages and that the forecast is a 15-year forecast of average economic conditions under probable weather conditions.

In response to witness Williams' third concern about Duke's use of three separate variables on the real price of electricity, witness Denton testified that two of these three variables were zeroed out of the forecast which had the result of reducing the 1994 peak forecast by approximately 500 mW. He also testified that the real price of electricity has declined since 1987.

Witness Williams testified that Duke had not included nonutility generating capacity in its Lincoln combustion turbine evaluation. He testified that Duke is currently exploring purchases for the 1990's of 500 mW of peaking-type service available for purchase from 1993 to 1997 and 80-250 mW which may be available for purchase from 1995 to 1999. He noted that these resources were not included in Duke's plans for capacity additions. He concluded that if the additional nonutility generation and purchase power opportunities are added into the Public Staff's evaluation of the need for the Lincoln Combustion Turbines, reasonable reserve margins are predicted without addition of the Lincoln Combustion Turbines. On cross-examination, he acknowledged that NUG capacity should not be included as available if it was not firm capacity.

The Commission concludes that the need for near term peaking capacity is a part of Duke's Least-Cost Integrated Resource Plan as approved in 1990. The proposed 1,165 mW Lincoln Combustion Turbine Station is intended to fill the need for near term peaking capacity.

Among the fears expressed by some parties to the preceding was the view that Duke's real price of electricity may increase over the next few years rather than decrease or remain stable as projected by Duke. Such fears are based at least partially on Duke's ability to obtain annual rate increases through the fuel adjustment mechanism and the experience modification factor (EMF) procedure permitted by G.S. § 62-133.2, and on the potential for general rate increases in response to the impending commercial operation of the Bad Creek pumped storage station and perhaps other generating stations. If such real price of electricity does increase, the price elasticity impact of such increase may lower the rate of growth of Duke's peak loads.

Furthermore, the uncertainties surrounding the American economy at the present time preclude any easy assumption that the current economic downturn will be short lived. There are fears among some of the parties that Duke's load forecast does not adequately account for the possibility of a significant economic downturn in the near future. These fears are heightened for some by the fact that Duke's actual 1990 summer peak was significantly below the level projected in Duke's 1990 forecast, and that an abnormally high peak in 1989 may have unduly influenced the forecast.

Duke indicated that it had little reason to believe that acceptable purchased power or NUG generation would be available at reasonable prices. However, both witness Nightingale and Dr. Williams contended that Duke could obtain a greater amount of purchased power or NUG generation than was reflected in its 1990 forecast. The projected availability of purchased power or NUG generation hinges primarily on the level of certainty that such capacity will be firm capacity.

After analyzing all of the evidence, the Commission concludes that the Lincoln Combustion Turbine Station will be needed to provide generating capacity for Duke's North Carolina retail ratepayers at least by the late 1990's and very possibly as early as 1994. In view of the uncertainties surrounding the forecasted rate of load growth and the level of contribution to Duke's system from purchased power and NUG generation, the Commission anticipates that the commercial operation date of each individual combustion turbine unit contemplated for installation at the Lincoln Combustion Turbine Station will be timed in such a manner as to maintain Duke's system reserve margins as close as reasonably possible to the 20% minimum standard adopted by the Commission. However, the timing of each individual CT unit must also be consistent with cost effectiveness and other considerations contained in Duke's approved least cost integrated resource plan.

DUKE AGREEMENT RE: DSM AND NUG

The Public Staff pointed out to the Commission that it had reached an agreement with Duke shortly before the hearing in this proceeding. The Public Staff agreed not to contest the Certificate of Public Convenience and Necessity for the Lincoln Combustion Turbine Station and Duke agreed to strengthen its efforts in the demand side management (DSM) and NUG generation areas.

The Public Staff analyzed Duke's efforts to meet its needs with DSM and NUG generation and was greatly satisfied with Duke's DSM efforts. The Public Staff was especially pleased with Duke's leadership in the DSM area. It cited the increases in cumulative DSM capacity over those shown in Duke's 1990 short-term action plan, and increased spending proposed by Duke for DSM programs. Many of Duke's DSM programs are new to customers in this state.

The Public Staff and Duke reached agreement on two DSM policies: first, that Duke will move toward more balanced spending between load management and conservation programs; and second, that Duke will move toward a reduction in the number of "strategic sales" programs and related spending.

Duke acknowledged that more of its new spending on DSM programs is on load management than on conservation programs. Duke agreed to concentrate more of its research on cost effective conservation programs. It also agreed with the Public Staff that future DSM programs should aim towards forestalling construction of future generating plants.

The Public Staff was troubled by the number of "strategic sales" programs and the amount of spending on them. Duke assured the Public Staff that, as future generating plants draw closer, its least cost integrated resource planning (LCIRP) process will reject an increasing number of the strategic sales programs.

The Public Staff advised that it was satisfied that Duke's LCIRP process will work as Duke has indicated. However, it indicated that if future LCIRP filings did not show reductions in the strategic sales programs, it reserves the right to request a review of the process.

The Public Staff is not as satisfied with Duke's efforts to encourage NUGs. To assure NUGs that Duke is serious about its interest in NUG development, the Public Staff recommended that Duke adopt a reasonable goal, such as 500 mW of NUG additions by the year 2000. The Public Staff pointed out that Duke has already achieved over 122 mW of its original goal of 127 mW of NUGs by the year 2001. It contends that since Duke has set specific megawatt goals in the past, it should be able to set such goals for future additions.

Duke did not agree to set a specific megawatt goal for NUG additions, but agreed to strengthen its NUG program. It has designated a central contact person to handle NUG inquiries, and it has set a goal of aggressively pursuing NUGs as a part of its LCIRP.

The Commission is of the opinion that the agreement between the Public Staff and Duke regarding DSM and NUG programs should be adopted herein. Duke's expansion of DSM programs and spending reflect a strong commitment to making its LCIRP work.

The Commission is further of the opinion that this proceeding is not the appropriate forum for setting a specific megawatt goal for NUG additions. Although NUG additions were discussed herein and were a consideration in the determinations made herein, further discussion is needed before a specific megawatt goal is established for NUG additions. New NUG additions will be closely monitored in future LCIRP filings and particularly in future generic hearings on the LCIRP process. Discussion of specific megawatt goals for NUG additions would be more appropriate within such LCIRP process.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 6

The evidence for this finding is found in the testimony of Duke witness Priory and the Intervenor's witness Crawford-Brown.

Witness Priory's Exhibit RBP-1 shows that Duke conducted a comprehensive siting study to identify potential locations for a combustion turbine facility on the Duke system. The study evaluated various site-specific costs and environmental impacts to arrive at an appropriate site. The methodology used was a screening approach starting with the Duke service area. Coarse screening criteria were developed to determine exclusion areas and preferred areas. The coarse screening criteria are listed below:

Proximity to load center

- Primary location in northeast part of the service area;
- Secondary location in the central to southwest part of the service area.

Water Availability

- Adequate water storage and source of recharge water;
- Location near large streams, rivers, and reservoirs preferred.

Permitting

- No existing air or water quality constraints.

Land Ownership

- Use of Duke Power properties where possible.

Pipeline

- Location within 15 miles of natural gas pipeline if possible.

Transmission System

- Proximity to 500, 230, or 110 KV lines.

Railroad

- Proximity to carrier lines.

Population

- Density exclusion limit of 400 persons per square mile.

PSD Class I Area

- A 10-kilometer buffer zone for all Prevention of Significant Deterioration (PSD) Class I areas.

Land Use

- Land use was reviewed to locate acceptable and unacceptable sites near lakes in Duke's service area.

Ten potential siting zones were identified from the coarse screening criteria. Within these zones, 53 preliminary sites were identified.

Twenty-seven of the 53 sites were studied in detail. Fine screening criteria were applied to the sites for development of site-specific costs and evaluation of environmental concerns. The fine screening criteria are listed below:

COST CONSIDERATIONS

Construction Costs

- Earthwork
- Railroad
- Gas Pipeline
- Buildings
- Switchyard
- Tanks
- Water Supply
- Engineering
- Support

Transmission Line Costs

- Construction
- Reliability

Land Acquisition Costs

ENVIRONMENTAL CONSIDERATIONS

Air Quality

- National Ambient Air Quality Standards (NAAQS)
- Existing Air Quality

Additional Considerations

- Endangered species
- Aquatic recreation
- Terrestrial recreation
- Water shortage area
- Water quality

After application of the fine screening criteria, six sites in North Carolina (including the Lincoln County site) and one site in South Carolina were selected for detailed evaluation. Two North Carolina sites were located in Rowan County and one each was located in Davidson, Rockingham and Stokes Counties. The South Carolina site was located in York County. These other sites were rejected based on site-specific costs and/or environmental impacts.

An area in Lincoln County was identified as the best site area. Witness Priory testified that the site is well suited when considering environmental aspects, costs, and fuel and transmission access. The specific site ultimately purchased was included in the Lincoln County area identified in the siting study.

Although the site was not the first property within the Lincoln County area pursued by Duke, the site embodies all the characteristics which made the area attractive. Witness Priory stated that Duke's siting methodology focused on areas instead of specific parcels of property because it is difficult to identify property lines and willing sellers during the siting process. He testified that of the seven final sites, the Lincoln County site was chosen primarily because of cost. The incremental cost to develop the Lincoln County site was $7.183 million; the incremental cost of the York County site, which was also seriously considered, was $22.023 million.

Witness Priory acknowledged that Duke had expressed a preference for a site near large bodies of water in its coarse screening criteria because Duke was considering a number of technologies at that time, but that this criterion was not important with respect to simple cycle combustion turbines.

Witness Crawford-Brown testified on behalf of the Intervenors. He testified that Duke excluded areas with existing air quality problems in its siting process. Among the areas excluded were Mecklenburg County, because of carbon monoxide and ozone problems, and Gaston County, because of particulate problems. Duke also excluded areas within ten miles of its Allen, Marshall and Cliffside generating plants because of concern with sulfur dioxide emissions at those plants as estimated by Duke Power in a modeling study. Duke did not, however, exclude an area around its Riverbend plant, which is only six miles from the Lincoln Combustion Turbine site. Witness Crawford-Brown concluded that Duke's decision not to exclude a 10-mile area surrounding the Riverbend plant was not justifiable. Such an exclusion would eliminate the proposed Lincoln County site from consideration. In addition, he predicted that prevailing wind directions will transport emissions from the Marshall and Allen plants toward the Lincoln Combustion Turbine Station site and that if the exclusions areas around those plants were adjusted to reflect transport patterns and prevailing winds, the exclusion area around the Marshall plant would exclude the Lincoln Combustion Turbine Station site.

In response to cross-examination, Dr. Crawford-Brown testified that he was not qualified to talk about economic factors resulting from the Clean Air Act, and he acknowledged that "the manner in which the Clean Air Act will be administered in North Carolina is not established." He also testified that the Clean Air Act will be a "consideration for the entire range of facilities which Duke Power operates," and that Duke could "leave the LCTS entirely as it is and simply reduce emissions from some other facility." He concluded that "there is a good possibility that the Clear Air Act would have no impact whatsoever on LCTS" and would not predict the probability of any action resulting from the Clear Air Act.

With respect to these matters, Duke witness Priory testified that the three exclusion areas around Marshall, Allen, and Cliffside were chosen because the existing emissions in those areas were close to national ambient air quality standards based on Duke's modeling results in 1980. An analysis was performed to see how close a new source could be located to the existing plants without affecting air quality at the existing plants. It was determined that combustion turbine emissions outside a ten-mile radius from the new source would not cause a significant impact on the air quality in the vicinity of the existing plants.

The location of the site was not known at the time Duke established the coarse screening criteria, and a ten-mile circular exclusion area was determined to be sufficient. The exclusion area was used to assure that the new source would not cause the existing plants to exceed the national ambient air quality standard. With respect to Duke's failure to draw an exclusion area around Riverbend, witness Priory testified that a 1980 study, Exhibit DCB-2, was used to draw the exclusion areas. The study shows maximum concentrations of sulfur dioxide for each plant based on 3-hour averages and 24-hour averages. Exhibit DCB-2 shows maximum 3-hour concentrations of sulfur dioxide at Marshall as 1134 micrograms per cubic meter, Allen as 1301 micrograms per cubic meter, Cliffside as 1542 micrograms per cubic meter, and Riverbend as 1022 micrograms per cubic meter. The National Ambient Air Quality Standard for the maximum 3-hour concentration of sulfur dioxide is 1300 micrograms per cubic meter. Based on this data, witness Priory stated that Duke elected to exclude areas around Marshall, Allen, and Cliffside. The Riverbend maximum 3-hour concentration was lower than those at Marshall, Allen, and Cliffisde. The Riverbend maximum 24-hour concentration was higher than at Marshall. However, Priory testified that Duke was not concerned with 24-hour concentrations in siting the Lincoln Combustion Turbine Stations because the Lincoln Combustion Turbine Station will be a peaking station and is not expected to run for long periods of time.

The Commission has held that a complainant challenging the siting of an electric transmission line must show that the utility's site selection was arbitrary and unreasonable in order to prevail. Gwynn Valley, Inc. v. Duke Power Company 78 Report of NCUC Orders and Decisions 186 (1988); Kirkman v. Duke Power Company, 64 Report of NCUC Orders and Decisions 89 (1974). These were complaint cases, and the burden of proof was on the Complainant. The present docket is a certificate proceeding pursuant to G. S. 62-110.1 and the burden of proof is on the utility. G.S. 62-110.1 provides that a utility must obtain a certificate that public convenience and necessity requires, or will require, construction of a new generating facility. The statute sets forth no specific requirements as to the siting process of new generating facilities. The purpose of the statute is to prevent costly overbuilding of generating facilities, and environmental concerns are generally left to other regulatory agencies. State ex rel. Utilities Commission v. High Rock Lake Association, 37 N.C. App. 138, 245 S.E.2d 787, cert. denied, 295 N.C. 646, 248 S.E.2d 257 (1978). Though "not at the heart of the regulatory process" under G.S. 62-110.1, the Commission recognizes that environmental concerns are relevant to the extent they affect the cost and efficiency of a proposed generating facility. Id. The Commission also recognizes its responsibility under the State Enviromental Policy Act and specifically under G.S. 62-2(5) "to encourage and provide harmony between public utilities, their users and the environment." The Commission has considered all of the siting and enviromental concerns raised by the evidence. The Commission concludes that Duke has the burden of proof to show that its siting process was reasonable and that the site proposed for the new generating facility is an appropriate one.

Based on the evidence presented, the Commission concludes that Duke has conducted a thorough and reasonable siting process. Duke applied coarse screening criteria to determine exclusion areas where it would be difficult to place a plant and preferred areas which would tend to lower the cost of the plant. Duke then applied fine screening criteria to determine site-specific

costs and environmental concerns. Duke selected the Lincoln County site based on the siting criteria which include costs considerations.

Intervenors' witness Crawford-Brown raised several concerns with the siting process. First, he contended that Duke should have drawn an exclusion area around Duke's Riverbend plant which would have eliminated the Lincoln County site. The primary basis for this contention is the fact that Riverbend's 24-hour sulphur dioxide concentrations are above those at Duke's Marshall plant around which Duke drew an exclusion area. Duke's evidence tended to show that it was not concerned with the 24-hour concentrations because the Lincoln County facility will be a peaking station and will not run for long periods of time. Witness Priory stated that the exclusion areas were based upon three-hour concentrations, and the Commission notes that the Riverbend three-hour emissions are below those at Marshall. Witness Crawford-Brown also contended that Duke's circular exclusion area around Marshall should have been drawn to reflect the prevailing wind directions to insure that emissions from the Marshall station would not affect the combustion turbine site. However, witness Priory testified that the purpose of the exclusion area was not to protect the combustion turbine site but to protect air quality levels at Duke's existing plant sites. The Commission concludes that Duke's exclusion areas were drawn in a reasonable manner.

Witness Crawford-Brown's other major concern with the siting process was the effect of the new Clean Air Act. The Commission notes that this Act became law well after the site selection process was completed. Furthermore, the witness stated that it will be a long time before the implications of the Act can be assessed and that the Act may have no impact whatsoever on the Lincoln County site. The Commission is concerned with the effect of air quality regulations on the site, as discussed later in this Order. Subject to that discussion, the Commission finds from the evidence that Duke's site selection process was reasonable.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7

The evidence for this finding of fact is found in the testimony of Duke witness Priory, Intervenors' witness Crawford-Brown, and the public witnesses.

Turning to the appropriateness of the site chosen, the evidence tends to show that the project site is located in Lincoln County on State Road (SR) 1511, approximately two miles west of Lowesville. The site is adjacent to a large, active commercial quarry. Other communities surrounding the project include Lincolnton (12 miles west), Gastonia (14 miles southwest), Charlotte (18 miles southeast), and Davidson (11 miles northeast). Lake Norman and the Catawba River are three miles east of the project. The project site borders or includes portions of Anderson Creek and Killian Creek. Forney Creek is nearby. The project site consists of approximately 711 acres. Approximately 50% of the site is agricultural fields planted with pine seedlings; and the reminder is second-growth hardwoods, pines or mixed pine/hardwood stands. Access to the project site is by SR 1511, which connects N.C. Highways 16 and 73. This road will provide access for all work force and material deliveries during construction as well as for plant staff, material deliveries, and fuel oil shipments during operation.

Witness Priory testified that comprehensive studies were performed to evaluate the existing environmental conditions and the environmental impacts of construction and operation of the Lincoln Combustion Turbine Station. Studies included measurements of the chemical and physical characteristics of Killian, Forney and Anderson Creeks. Aquatic macroinvertebrates and fish were sampled and identified from the creeks. The samples were typical of Piedmont streams impacted by agricultural and moderate residential development. Terrestrial flora and fauna were also surveyed. No rare or endangered plant or animal species or habitat for such species was found to occur on the site. The existing air quality was evaluated based on information from ambient air monitoring performed by the State Division of Environmental Management. Witness Priory concluded that the existing ambient air quality at the project site is well below National Ambient Air Quality Standards.

Witness Priory stated that the environmental effects of site construction will be minimal. With respect to water quality of streams bordering the site, some temporary effects due to sediment from erosion during grading activities are expected. These effects will be minimized by the Sedimentation and Erosion Control Plan, which will include an undisturbed vegetation buffer between the construction site and the streams. Impacts of siltation on aquatic macroinvertebrates and fish will be minimized by erosion control measures. Terrestrial impact will consist of the permanent clearing of approximately 100 acres of mixed hardwoods, pines, shrub, and pasture land. The effect on wildlife on the site will be the loss of some upland game habitat. Effect on wildlife outside the 100 acre area of immediate construction will be minimal and temporary. Air quality impacts during construction should be minimal and will be in accordance with permits issued by appropriate state agencies.

Witness Priory testified that the environmental impact of project operation is also expected to be minimal. Water quality in Killian Creek will be affected in two ways: stream flow will be reduced due to the withdrawal of water for project use and stream chemistry will be affected due to project wastewater discharges. Stream flow reduction will be minimized by use of a water storage pond and by limiting withdrawals to periods of ample stream flow. Wastewater discharges to Killian Creek will meet the requirements of the National Pollutant Discharge Elimination System (NPDES) permit. He further testified that effects of operation on aquatic macroinvertebrates and fish will be minimized by the use of the water storage pond and by the low withdrawal velocities at the Killian Creek intake structure. Projected sound contours during operation of the plant were developed from manufacturer's specifications to estimate sound levels at various distances from the plant. It is expected that the sound will not adversely impact the surrounding community. Witness Priory also testified that detailed evaluations of the air quality impacts had been performed in support of the air quality Prevention of Significant Deterioration (PDS) permit and that modeled concentrations are well below ambient air quality standards. He testified that emissions will meet the requirements of the permit and will have minimal impact on existing air quality.

Witness Crawford-Brown questioned the reliability of sulfur dioxide measurements obtained at the Iron Station monitor as a basis for estimating the sulfur dioxide ambient level at the Lincoln Combustion Turbine Station site. He testified that a monitor closer to the Lincoln Combustion Turbine Station might

show a larger effect from emissions at Duke's existing plant and might cause standards to be exceeded. Witness Crawford-Brown also testified about concerns with air quality under expected changes required by the new Clean Air Act. The Lincoln County site is in a panhandle of land surrounded on three sides by areas of concern with air quality. Witness Crawford-Brown testified that the new Clean Air Act may result in new monitoring in the Charlotte area which may place that area in the "serious" air quality category. Such a category would require reduction in sulfur dioxide emissions and may result in closer scrutiny of new sulfur dioxide and nitrogen oxide emissions in the surrounding area. He conceded that reductions might be accomplished through the anticipated system of allotments, and on cross examination he conceded that the manner in which the Clean Air Act will be administered in North Carolina has not been established yet.

Duke witness Priory explained that the purpose of using data from the Iron Station monitor in the modeling was to capture the ambient air quality absent any sources. All existing sources were then modeled in the analysis. This results in emissions from Marshall, Allen, and Riverbend being modeled into the study. In fact, to the extent that emissions from Marshall, Allen, and Riverbend are already included in the ambient air quality at Iron Station, there is some double counting of these emissions.

Various public witnesses also testified concerning the site. The proposed site is now in a quiet, rural area. Construction and operation of the proposed plant will cause a substantial increase in noise and traffic. Witnesses expressed particular concern about traffic since fuel oil will be delivered by tanker truck on a narrow, two-lane, winding rural road. The same road carries school buses for the three nearby public schools. Various witnesses testified to the deterioration of the quality of life in the area and to the loss of other, more desirable development in the area.

The Commission concludes that Duke has carried its burden of proof as to the appropriateness of the site of this facility. Duke has located a site which is less than a mile from a gas transmission line, has an adequate existing transmission line, and has an adequate water supply. Duke did not displace any homeowners in obtaining this site, and the site has substantial acreage so as to provide a large buffer area separating the plant from adjacent property owners. The Commission is mindful of the concerns addressed by the Intervenors and by the public witnesses. The traffic concerns expressed were largely premised on the facility's running 24 hours a day with no oil in the storage tanks, a scenario which is highly unlikely. The Commission is also cognizant of the public witnesses' testimony on the history of the site, which once included the home where Stonewall Jackson was married. This home was torn down prior to Duke's purchase of the property, and Duke has conducted comprehensive studies of the site to ensure that there are no significant historical or archaeological sites. The Commission also notes that the site is adjacent to an active quarry. Construction and operation of the facility will undoubtedly have some effects on the surrounding area; however, this is inevitable wherever the facility is located. Primarily, concerns as to water and air quality are the responsibility of other agencies, and the Commission will condition the certificate granted herein upon Duke's compliance with applicable environmental permits. The effect that compliance with environmental permits will have on the cost of locating the

facility at this specific site is considered hereinafter. Subject to that discussion, the Commission concludes that the proposed site of the Lincoln Combustion Turbine Station is appropriate.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

The evidence for this finding is contained in the testimony of Duke's witnesses Priory and Denton, Public Staff witness Nightingale and Intervenors' witness Crawford-Brown.

Witness Priory testified concerning the cost of the Lincoln Combustion Turbine Station. He testified that the Lincoln facility will include 16 General Electric simple cycle combustion turbine units, each rated at 72.8 mW, and auxiliary equipment. Total plant capacity will be 1,165 mW. The facility will tie into an existing 230 KV transmission line on the plant site. The facility will also include two 5-million gallon fuel oil storage tanks, administrative and maintenance support buildings, and a water storage pond. The units will be fueled by either natural gas or fuel oil. A natural gas pipeline is located less than one mile from the station. The project cost estimate is dependent on the schedule for bringing the units in service. Duke Exhibit RBP-1 indicated plans to install from four to twelve units in 1994, with the remainder in 1995 and 1996, and in-service cost from $480.523,000 to $517,560,000. The estimate includes all required labor, materials, equipment, contingency, and engineering and supervision costs, as well as overhead costs and legal expenses. In discussing the current project schedule, Mr. Priory identified a construction start date of October, 1991, with the first six units in service by summer of 1994. The remaining ten units are scheduled to be in service by summer of 1995. He indicated that the current schedule is based on the capacity requirements outlined in Mr. Donald H. Denton's testimony. Witness Denton stated that Duke plans to build the plant in the most cost efficient manner to meet the needs of the system, taking into account all of the parameters that impact construction. Other evidence tended to show that two-thirds of the estimated costs are under contract and one-third is not.

The primary concerns raised with respect to the cost of the facility are those concerning the air and water permitting costs. By filing dated November 19, 1990, the Attorney General urges the Commission to delay its decision in this case until such time as a reasonable showing of the costs and conditions of compliance with air and water quality environmental regulations could be made.

N.C.G.S. 62-110.1 requires an applicant to file "an estimate of construction costs in such detail as the Commission may require." The Commission must approve the cost estimate. Rule R8-61(b)(9) requires an applicant to provide the following:

> A statement of estimated cost information, including plans and related transmission capital costs . . . ; all operating expenses by categories, including fuel costs and total generating cost per net KWH at plant; and information concerning capacity factor, heat rate, and plant service life.

Cost estimates, not actual cost figures, are required by the statute and the regulation and Duke has provided the cost information required. Duke witness Priory testified that the cost estimate is reasonable. The Commission recognizes that any cost estimate may change over time for a variety of reasons, including the permitting and licensing process.

The siting and construction of a generating facility involves numerous permits and licenses as shown on pages 8-1 to 8-3 of Duke's Rule R8-61(b) filing. The permitting and licensing process is time consuming and costly. Duke has spent approximately $8,775,000 on the Lincoln Combustion Turbine Station site and plans to spend an additional $16,141,000 prior to the start of construction in October 1991. The ultimate cost of compliance with environmental permits at this site is not known and cannot be known at the present time. In this case uncertainty is greater than usual because of the recent passage of new legislation on air quality. The February 27, 1991, letter from DEM which the Attorney General has asked to submit as an exhibit does not either resolve Duke's pending air permit applications or quantify new costs resulting from the Clean Air Act. We deny the Attorney General's motion to submit the letter as evidence.

The Commission concludes that it cannot withhold a decision indefinitely, as requested by the Attorney General, since G.S. 62-82 directs the Commission to decide certificate applications within a certain time frame. Based on the estimate and the testimony now available, the Commission finds that Duke's cost estimate is reasonable. However, we recognize that the actual cost is dependent upon future regulatory developments, the actual construction schedule and other factors. The Commission will therefore direct further reporting and opportunity for reevaluation as hereinafter provided.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

This finding, which is really a conclusion of law, is based upon the preceding findings and discussions of evidence.

Duke asks the Commission to issue a certificate of public convenience and necessity. Duke recognizes that it must construct and operate the facility in strict accordance with all applicable laws and regulations, including permits to be obtained from the Division of Environmental Management and the Division of Water Resources dealing with air and water quality. Duke also recognizes that it must provide progress reports as required by G.S. 62-110.1(f), as well as the various filings required by the Commission rules on least cost integrated resource planning.

The Public Staff asks the Commission to go further. In addition to incorporating the Public Staff's agreement with Duke on DSM and NUG issues, which has already been discussed, the Public Staff wants the Commission to require Duke to address specifically, and separately from other plants, the proposed schedule and continuing need for the Lincoln Combustion Turbine Station in connection with future least cost integrated resource planning filings. The Public Staff also wants a status report addressing the status of engineering, outstanding permits, changes in costs, and the reasons for any changes in costs. The Public Staff sees these filings as a means of providing an opportunity to reevaluate this proposed facility based on future changes in need or costs. It maintained that

future reevaluations of the project in LCIRP filings are advisable because Duke can cancel or postpone some of the planned units as conditions require.

As noted above, the Attorney General asks the Commission to continue this proceeding until more evidence is available on the cost of complying with environmental regulations. CUCA asks the Commission to issue a certificate "on a tentative basis" and to revisit the need for the facility annually. Finally, Intervenors urge the Commission to deny a certificate, arguing that Duke has failed to carry its burden of proof.

Previously in this Order, the Commission has found and concluded that there is a need for the generation represented by this facility, that the facility is consistent with Duke's current least cost integrated resource plan, that the proposed site is appropriate, and that the present cost estimate is reasonable. The Commission concludes that a certificate of public convenience and necessity should be issued. However, as noted above, the Commission recognizes the uncertainties in the load forecasts and the time of commercial operation for the individual units of the Lincoln Combustion Turbine Station. Further, the Commission notes that the pollution control technology for the facility and the cost of complying with environmental regulations cannot be known at this time. We are not dealing with the usual uncertainties of construction. The recent passage of new clean air legislation, the full effects of which will not be known for some time, makes the situation unique. The Commission concludes that it is best to proceed by issuing a certificate based on the present evidence and within the time frame required by G.S. § 62-82, but to require the special reports, in addition to those otherwise required by statute, as suggested by the Public Staff.

More specifically, the Commission is of the opinion that Duke should file periodic status reports for the Lincoln Combustion Turbine station showing: (1) the status of necessary State and Federal permits; (2) the status of engineering and construction; (3) explanations for any significant changes in costs or cost estimates; and (4) explanations for any significant changes in forecasts or need for the project. The status reports should be filed annually as a part of the annual short-term action plans filed pursuant to Commission Rule R8-59, and they should be subject to updates under essentially the same circumstances as updates to the short-term action plans. For example, Commission Rule R8-60 requires that an update to the short-term action plan be filed within 30 days after any significant change in the load forecast. Such an update should also be filed within 30 days after any significant change in costs or cost estimates. The Lincoln Combustion Turbine station should be discussed separately from the other combustion turbines in Duke's short-term action plans.

The current docket number for filing short-term action plans is Docket No. E-100, Sub 58. If future generic LCIRP proceedings are held in a different docket rather than E-100, Sub 58, subsequent short-term action plans will be filed in that different docket rather than in E-100, Sub 58.

The Commission also concludes that Duke should file a status report approximately six months in the future describing the status of necessary permits from state agencies, including the Division of Environmental Management (DEM), and also describing the cost impact and other impacts of the Federal Clean Air

Act on the Lincoln Combustion Turbine Station to the extent that such impacts can be more clearly determined at that time. In this context, such impacts should also include other generating plants affected by measures taken to add the Lincoln Combustion Turbine Station to the Duke system.

Finally, the Commission must turn to the recent motions dealing with the proposed intervention of Empire Power Company. The Commission issued an Order on February 20, 1991, denying Empire's Petition to Intervene. That Order was based on the Petition having been filed too late. The Commission has been asked to reconsider, and we have done so. We reaffirm the denial of intervention in this docket. As noted above, the procedure for certificate applications is specified by G.S. § 62-82. The Commission does note, however, that Empire has also petitioned to intervene in Docket No. E-100, Sub 58, and a separate order has been issued in that docket.

IT IS, THEREFORE, ORDERED as follows:

1. That a Certificate of Public Convenience and Necessity is hereby granted to Duke Power Company for the construction of the Lincoln Combustion Turbine Station, having an output of 1,165 megawatts, to be located on a site near Lowesville in Lincoln County, North Carolina, as applied for in this proceeding subject to the conditions hereinafter set forth.

2. The plant will be constructed and operated in strict accordance with all applicable laws and regulations, including permits issued by the North Carolina Department of Environment, Health and Natural Resources, and with the current requirements imposed by the Division of Water Resources as set forth in AG-Duke Exhibit No. 4 with such changes as Duke and the Division of Water Resources may agree to hereafter.

3. That Duke Power Company shall file status reports with the Commission at least annually containing the following information about the Lincoln Combustion Turbine Station project:

(a) the status of necessary State and Federal permits;
(b) the status of engineering and construction;
(c) explanations for any significant changes in costs or cost estimates; and
(d) explanations for any significant changes in forecasts or need for the project.

4. That Duke Power Company shall file the status reports required herein as part of its annual short-term action plans submitted pursuant to NCUC Rule R8-59. Such reports and plans shall be filed in Docket No. E-100, Sub 58, until such time as the Commission opens a new generic docket on least cost integrated resource planning.

5. That Duke Power Company shall file updates to the status reports required herein within 30 days after any significant change in the cost estimates or forecasted need for the project, and that said updates shall be filed as updates to the current short-term action plans.

6. That the status reports required herein shall discuss the LCT project separately from the other combustion turbines in Duke's short-term action plans.

7. That Duke Power Company shall file a supplemental report with the Commission approximately six months after the date of this Order describing the status of necessary permits from state agencies, including the Division of Environmental Management, and also decribing the cost impact and other impacts of the federal Clean Air Act on the Lincoln project. The supplemental report shall also describe said impacts on other generating plants resulting from measures being taken to add the Lincoln project to the Duke system.

8. That the agreement between Duke Power Company and the Public Staff regarding DSM and NUG programs as discussed herein is hereby approved and adopted.

ISSUED BY ORDER OF THE COMMISSION.

This the 26th day of March 1991.

NORTH CAROLINA UTILITIES COMMISSION

(SEAL)

Geneva S. Thigpen, Acting Chief Clerk

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-7, SUB 492

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Empire Power Company, Complainant	)	ORDER DENYING COMPLAINT
v.	)	
Duke Power Company, Respondent	)	

HEARD: Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on December 11, 1991

BEFORE: Commissioner Allyson K. Duncan, Presiding, Chairman William W. Redman, Commissioner Sarah Lindsay Tate, Commissioner Julius A. Wright, Commissioner Robert O. Wells, and Commissioner Laurence A. Cobb

APPEARANCES:

For Empire Power Company:

William Woodward Webb, Broughton, Wilkins & Webb, P.A., P. O. Box 2387, Raleigh, North Carolina 27602

For Duke Power Company:

William Larry Porter, Associate General Counsel and Karol P. Mack Senior Attorney, Duke Power Company, 422 South Church Street, Charlotte, North Carolina 28242-0001

Robert W. Kaylor, Patterson, Dilthey, Clay, Cranfill, Sumner and Hartzog, Post Office Box 310, Raleigh, North Carolina 27603

For the Using and Consuming Public:

Gisele L. Rankin, Staff Attorney, Public Staff--North Carolina Utilities Commission, Post Office Box 29520, Raleigh, North Carolina 27626-0520

BY THE COMMISSION: On April 4, 1991, Empire Power Company (Empire) filed a formal complaint with the North Carolina Utilities Commission against Duke Power Company (Duke) alleging that Duke failed to comply with Commission Rules R8-56(a) and R8-58(e) and with the Commission Order Granting Certificate of Public Convenience and Necessity for Duke's Lincoln Combustion Turbine Station (Lincoln) in Docket No. E-7, Sub 461. On May 13, 1991, Duke filed its answer and

a motion to dismiss. On June 11, 1991, Empire filed its response and requested an evidentiary hearing. On June 17, 1991, the Attorney General served notice of intervention. On June 20, 1991, the Public Staff filed a statement of position. On June 25, 1991, the Attorney General filed a motion for a hearing. The Commission, by Order dated June 28, 1991, ordered that oral argument be scheduled for July 11, 1991, for the purpose of considering Duke's motion to dismiss. The oral argument was held as scheduled.

By Order of the Commission dated August 28, 1991, the Commission denied Duke's motion to dismiss and scheduled the matter for hearing on October 23, 1991, on the issues set forth in the Order. The Order required that the hearing be limited to consideration of two issues: (1) whether Empire made to Duke a proposal of reasonably available purchased power that would have a significant impact on Duke's least cost integrated resource plan and whether such proposal was complete, detailed, and sufficient for assessment, and (2) whether Duke arbitrarily denied Empire's proposal without making a detailed assessment of it using reasonable methods and assumptions or, if such assessment was made, whether Duke made it available to Empire.

Extensive discovery was conducted by the parties. In response to Duke's motion that prefiling of testimony be required and Empire's motion that the hearing be rescheduled, the Commission issued an Order on September 17, 1991, requiring prefiled testimony and rescheduling the hearing for December 11, 1991. Empire filed its direct testimony by letter dated November 19, 1991, and its rebuttal testimony on December 6, 1991. Duke filed its testimony by letter dated November 27, 1991. Subpoenas were requested by Empire, and various motions were filed with regard to the request. At the public hearing, Empire withdrew its motions concerning the subpoenas.

On December 9, 1991, Duke filed its motion to strike certain portions of the testimony of Empire witness Steven L. Greenberg. Empire filed a motion to strike testimony of Duke witness W. F. Reinke and T. C. McMeekin on December 11, 1991. The motion concerning witness Greenberg's testimony was addressed during the hearing, and a portion of witness Greenberg's testimony was struck. The outstanding motion to strike testimony of witness Reinke and witness McMeekin is denied. All other motions not dealt with at the hearing are deemed denied.

Upon call of the case for hearing, both Empire and Duke were present and represented by counsel. Empire presented the testimony of Steven L. Greenberg, Vice President of Empire Power Company, in support of its complaint. Duke presented the testimony of W. F. Reinke, Vice President of System Planning and Operating, Duke Power Company and T. C. McMeekin, Vice President, McGuire Nuclear Site, Duke Power Company. Witness McMeekin was Vice President, Design Engineering during the time of the Empire proposal which is the subject of the complaint. Design Engineering and System Planning and Operating were responsible for review of the Empire proposal.

Based upon careful consideration of the testimony and exhibits presented at the hearing, the entire record in this matter, and the issues set forth by the Commission, the Commission now makes the following:

FINDINGS OF FACT

1. Empire Power Company is a non-utility power company or independent power producer (IPP) that was created in October 1990 to take over the new business and project development functions of Empire Energy Management Systems, Inc. Empire is a project developer.

2. Duke Power Company is a public utility operating in North and South Carolina where it is engaged in the business of generating, transmitting, distributing and selling electric power.

3. In July 1990, Empire proposed to sell electric power to Duke from a combustion turbine generating facility to be built in Person County. Empire subsequently updated and modified its proposal numerous times between August 1990 and January 1991 and again in June 1991 and in November 1991. The site was changed to Rockingham County in December 1990. Other changes included site size, facility size, combustion turbine capability and manufacturer, heat rate, fuel cost, staffing, water supply, operating and maintenance costs, and others.

4. Empire's sole experience in power plant development is a 10-megawatt cogeneration facility at MacDill Air Force Base in Florida that is still under construction. Empire has never generated any electric power anywhere.

5. Empire had a Memorandum of Understanding with Westinghouse for the design, engineering, procurement, and construction of its project. However, the Memorandum of Understanding was subject to termination and was structured so that neither party was bound to liability.

6. Empire proposed Westinghouse W501D5 combustion turbines. There are only two such turbines in operation in peaking application in the United States.

7. Empire does not have an income statement or balance sheet. It has few assets. It has participation offers, but it has no firm agreements for financing or equity participation.

8. Empire's proposal lacked site-specific, balance-of-plant information, i.e., information concerning those portions of the plant not supplied pursuant to a typical combustion turbine manufacturer's contract.

9. When Empire subsequently applied to the Commission for a certificate of public convenience and necessity, much of the technical plant information submitted was identical to information submitted by Duke in its application for a certificate of public convenience and necessity for its Lincoln project.

10. Even though the proposal was not complete, Duke was able to make several assessments of Empire's initial proposal and its supplemental proposal by using Duke's own experience and information from other industry sources. Duke conducted two technical assessments and three economic assessments of Empire's proposal during the period of August 1990 through January 1991. Duke spent significant time and resources in these assessments and Duke discussed its overall concerns and conclusions with Empire in September and November 1990 and in January and June 1991.

11. Duke made certain modifications to Empire's proposal in order to either correct errors or put it on a comparable basis with Duke's supply-side alternative, the Lincoln County Project. Duke made certain assumptions because the proposal was incomplete. Duke's modifications and assumptions were reasonable.

12. Duke conducted a technical assessment of Empire's original proposal in August and September 1990. This evaluation identified 13 areas of concern, including (among others identified in the discussion of evidence) the output rating and the startup time of the turbines proposed, the reliability of the water source proposed, the maintenance and inspection intervals proposed, the inadequate staffing proposed, inconsistencies in the construction schedule proposed, and Empire's lack of experience. Duke concluded from this evaluation that it could not prudently rely upon Empire for peaking power in the time frame proposed.

13. Duke conducted an economic assessment of Empire's original proposal in September 1990. This assessment showed that the proposal offered no cost advantage to Duke.

14. Empire made a supplemental proposal in October 1990 and Duke performed additional assessments of it in November 1990. The supplemental proposal satisfactorily addressed some, but not all, of Duke's concerns. Duke continued to have concerns about the turbines' startup time, maintenance and inspections, noise, and Empire's lack of experience. Duke again concluded that it was not prudent to rely upon Empire and that the proposal offered no cost advantage.

15. Empire presented Duke a Life Cycle Cost Analysis in January 1991 in which it claimed that its project offered Duke a $100 million savings. Duke performed its own economic analysis using Empire's methodology and again concluded that there was no cost advantage in Empire's proposal.

16. Other issues raised during this proceeding relating to the interpretation of Commission Rule R8-58(e) and to the appropriate evaluation process by which utilities should assess future purchased power proposals may be raised in the pending least cost integrated resource planning docket, Docket No. E-100, Sub 64.

EVIDENCE AND CONCLUSIONS IN SUPPORT OF FINDINGS OF FACT NOS. 1-7

These findings concern the issue of whether Empire made a proposal of reasonably available purchased power.

Empire witness Greenberg contends that from July 1990 to January 1991, Empire made a bona fide power sales proposal to Duke. He testified that on July 24, 1990, Empire telephoned Duke and sent a facsimile letter describing its power sales proposal for dispatchable, long-term peaking capacity, beginning as early as 1994. On July 31, 1990, Empire presented Duke with a written proposal. In its proposal, Empire had identified several sites which would support the proposed facility, had entered into a Memorandum of Understanding for engineering, equipment procurement and construction services with an experienced, turn-key supplier of such facilities (Westinghouse), and had identified various

methods of financing the facility it proposed. Empire's original offer to Duke was for up to three 100-MW increments of peaking power from a site in Person County, North Carolina called the Rolling Hills project.

Witness Greenberg stated that the Rolling Hills project was conceived at the beginning of 1990 when Empire prepared to respond to a competitive solicitation for peaking power being conducted by a North Carolina municipal utility system. Empire decided not to submit a bid to the municipals and instead made a proposal to Duke for the Rolling Hills project.

Witness Reinke testified that on July 24, 1990, Empire telephoned to ask Duke if it might be interested in an offer from Empire to sell Duke up to 1,000 MW of simple cycle combustion turbine capacity in 100-MW increments from a facility to be located in Person County. No price information or other details were discussed in the phone conversation. On July 31, 1990, Empire provided its original proposal including prices for up to 300 MW in Person County following up on its July 24, 1990, oral offer. Witness Reinke further testified that on numerous occasions between August 1990 and January 1991, Empire updated and modified its proposal. In fact, Empire modified its proposal in June 1991, after Empire had filed its complaint against Duke. Changes included site location, site size, facility size, combustion turbine capability and manufacturer, heat rate, fuel cost, staffing, water supply, and operating and maintenance cost, among others. Empire changed two major aspects (capacity and site size) of its project as late as November 1991. Witness McMeekin testified that Empire's numerous changes contributed to Duke's belief that Empire was not very knowledgeable about generating facilities. Duke's preliminary assessments of Empire's proposal were on the basis of Empire's 300-MW offer at the Person County site.

Duke witnesses Reinke and McMeekin testified that Duke had serious concerns about Empire's lack of experience in the development, design, construction, ownership and operation of large generating plants, Empire's uncertain financial resources, and what Duke considered to be significant technical problems associated with Empire's proposal. These concerns led Duke to conclude that it could not prudently rely on Empire for reliable, cost-effective peaking power in the 1994 time frame. Therefore, Duke did not consider Empire's project to be reasonably available.

Witness McMeekin testified that one of Duke's major concerns was Empire's lack of experience. Empire's sole experience in power plant development consisted of a 10-MW cogeneration facility at MacDill Air Force Base in Florida. That $15 million facility was still under construction and has not generated power to date. Witness McMeekin indicated that Empire's lack of experience was obvious from the proposal in that the proposal demonstrated little knowledge of combustion turbine licensing, siting, design, construction and operation. He further testified that the principals of Empire had limited experience. He said that Duke had concerns about the reliability and deliverability of a product by a team with no experience in the generating facility business.

Empire witness Greenberg pointed out that Empire was trying to sell Duke capacity, not equipment, and that Duke should have considered the experience of Westinghouse. Witness Greenberg testified as to Westinghouse's experience in the

turn-key design, fabrication and construction of peaking combustion turbine plants and to Empire's reasons for selecting Westinghouse turbines for its proposal.

Witness Greenberg testified that Empire's role as project developer is to coordinate the resources of those entities which specialize in specific aspects of a power project, such as siting, permitting, licensing, procurement, construction, financing, fuel supply, and operation and maintenance. Witness Greenberg said, "You could almost describe [Empire] as a shell corporation. . ." He testified that Empire had entered into negotiations with a subsidiary of Baltimore Gas and Electric, a company with substantial experience in the independent power industry, for participation in the Rolling Hills project and had discussed participation in its project with Westinghouse and Commercial Union Energy. He stated that Empire had almost a dozen major developers, utility subsidiaries and contractors who expressed their desire to participate in the Rolling Hills project. Duke witness McMeekin pointed out that while Empire brings up the possibility that Westinghouse and other experienced and financially strong companies might participate in the Rolling Hills project, no firm commitments from these companies have been forthcoming. Further, no information regarding potential equity investors had been presented to Duke.

Witness McMeekin testified that all utilities must deal with the fact that signing a purchased power contract with an IPP or QF does not assure that the power will be available when needed. He pointed out that Virginia Power signed up nearly 30 projects as a result of its December 1986 and March 1988 solicitations. The majority of the accepted proposals were by QFs. Of those, seven have been terminated and others are struggling. To avoid this problem, witness McMeekin said utilities must carefully screen potential suppliers and rely only on those that have a high probability of success. For this reason, purchased power solicitations ask for financial information as well as technical information. Potential suppliers must demonstrate through their proposals that they are financially and technically capable of delivering the project as proposed. Duke witness McMeekin testified that Empire did not demonstrate its financial or technical capability.

In response to Empire's assertions regarding Westinghouse's experience and the claimed advantage of Westinghouse W501D5 combustion turbines (CTs), Duke witness McMeekin testified regarding industry experience with General Electric (GE) and Westinghouse CTs in peaking applications and pointed out that field experience with Westinghouse W501D5 CTs in peaking applications is limited. When considering the need for CTs on the Duke system, Duke determined that high reliability was paramount given the expected use of the CTs in peaking applications. Duke concentrated on filling this need with field-proven equipment. Witness McMeekin stated that there were approximately 15 W501D5s installed in the United States with two of these in peaking applications. There were nearly 100 GE 7001EA CTs installed in the United States with over half of these in peaking applications. Duke selected GE turbines for its Lincoln project, partly on the basis of this concern.

Empire witness Greenberg testified that Empire offered various guarantees, such as completion, output quantity, output availability, startup availability, and heat rate. These included guarantees of Westinghouse, insurance policies,

completion bonds, cash, marketable securities and letters of credit. He testified to Empire's willingness to provide bonds, deposits, guarantees, other forms of security, and a right of first refusal on the plant to Duke so as to provide Duke with the utmost protection for its customers and the utmost confidence in Empire's ability to deliver on its proposal. Empire's contention was that its guarantees on the project made it "reasonably available." However, witness Greenberg admitted on cross-examination that its guarantees do not protect against not having power available.

Duke witnesses Reinke and McMeekin addressed Duke's concern about Empire's guarantees. Duke had grave doubts about any guarantees from an inexperienced developer like Empire, and Duke questioned what recourse Duke would have in the event that such guarantees were not met. Witness McMeekin testified that even if Empire could provide guarantees, Duke must be concerned about its risks if Empire cannot successfully complete the project. No amount of penalties could account for the impact to Duke's customers of not having the generation in place when needed to meet customer demand. Witness Reinke noted that Empire's statement that it will guarantee the project means nothing at this time because Empire apparently has no assets. He said that Empire was simply asking Duke to trust its ability to obtain such guarantees from other sources.

Witness Greenberg contended that Empire's proposal was one of reasonably available power because Westinghouse, an experienced builder of CT projects, had signed a Memorandum of Understanding (MOU) with Empire to provide turn-key design, engineering, equipment procurement, construction and probably operation of Empire's Rolling Hills project. Empire's position was that Duke should not rely on Empire, but on Westinghouse. However, the Memorandum of Understanding states that if Westinghouse's revised price under their agreement makes the transaction uneconomic for Empire, then the Memorandum Of Understanding may be terminated, and further that neither Empire nor Westinghouse shall be liable to the other for any damages arising out of termination of the letter. Under cross-examination, witness Greenberg described MOUs as documents that are structured so that they can be signed quickly, sometimes overnight, to demonstrate the interest of two parties to do a project. They are not reviewed by counsel, and they are structured so that neither party is bound to a multi-hundred million dollar liability.

Duke witness Reinke testified that financial strength was an important consideration in assessing the ability of an independent power producer (IPP) to successfully execute the contractual obligations of any project. Requisite financial strength is required by lenders prior to providing project financing. Financial strength is also important during the operational phase of any project in case of deficient cash flow projections. The ability of the owners to back a project with adequate financial resources is essential in assuring a reliable, dependable project.

In response to Duke's request for financial information, Empire stated that it was a privately held company and therefore does not have an annual report or SEC Form 10-K. Empire also indicated to Duke that it had not needed to assemble a certified or uncertified income statement or balance sheet and thus none was available. If one were available, it would primarily reflect the expenses incurred in developing the Rolling Hills project as a net loss on the income

statement and as a capitalized asset on the balance sheet. Empire further stated that it had received "bona-fide" proposals from equity investors but that Empire could not provide them because they were confidential.

Witness Greenberg testified that Empire has not had any difficulty financing the project to date. He stated that Empire's proposal indicated that financing was to be provided by Sanwa Business Credit Corporation, a wholly-owned subsidiary of Sanwa Bank of Japan. He testified that since making its proposal, Empire had also had participation offers from electric utilities, subsidiaries of an equipment manufacturer, and an insurance company, each of which confirmed the viability of Empire's project based on their detailed review of Empire's proposal and on their experience in having developed and financed similar large independent power projects. However, he acknowledged that no firm agreements for financing or equity participation had been reached with any partners, financiers, or subcontractors.

Duke witness McMeekin testified that problems with Empire's proposed schedule for its project contributed to Duke's conclusion that Empire's proposal was not one of "reasonably available purchased power." The Siting section of Empire's proposal stated that construction of the plant should take approximately one and one-half years. The Schedules section, however, only showed a one-year construction duration on both schedule charts, and the construction period ended six months prior to the last equipment delivery. Also, the earliest CT procurement and fabrication activities shown on the schedule charts would not result in equipment delivery supporting the construction schedule.

Witness Reinke testified that an IPP project like Empire's does not offer flexibility equivalent to a utility-built project like Lincoln. Duke could accelerate or slow down the construction of Lincoln to bring any number of units on line as needed. Duke has negotiated supply contracts with its vendors that allow Duke the flexibility to change the schedule so that Duke can place the units in service when they will be needed and when they will be least cost. This flexibility also supports Duke's efforts in demand-side management (DSM) in that DSM program impacts are less exact than supply-side options. Duke evaluates its resource needs each year as a part of its normal planning cycle and utilizes the least cost resources that provide an adequate and dependable electric supply. If planned supply-side resources are provided by purchased power contracts which require capacity payments beginning on a specific date, provided the capacity is available, flexibility would be limited by the contract and may only be achievable at a substantially increased cost.

The Commission concludes that Empire did submit to Duke a written power sales proposal for dispatchable peaking combustion turbine capacity on July 31, 1990. This proposal was updated and modified by Empire on several occasions between July 1990 and June 1991. The Commission also concludes that Duke made a preliminary examination of Empire's proposal and, based on its preliminary examination, Duke had legitimate concerns regarding Empire's lack of experience, the limited experience in peaking service of the CT units proposed by Empire, Empire's uncertain financial resources, and problems with Empire's proposed construction schedules. These concerns led Duke to conclude that Empire's proposal would present an unacceptable risk to Duke's customers and was, therefore, not a reasonably available purchased power option.

It is important that utilities screen potential suppliers for financial and technical capability and rely on those that have a high probability of success. Duke's conclusions that it could not safely rely on Empire for peaking power and therefore that Empire's proposal did not constitute a reasonably available purchased power resource were appropriate.

EVIDENCE AND CONCLUSIONS IN SUPPORT OF FINDINGS OF FACT NOS. 8-9

These findings concern the issue of whether Empire's proposal was complete, detailed, and sufficient.

Witness Greenberg contended in his direct testimony that Empire's proposal included virtually all of the elements that are commonly required by utility-sponsored peaking power solicitations, citing excerpts from the 1989 Virginia Electric and Power Company solicitation. He then listed solicitation information requirements which Empire provided to Duke. In his rebuttal testimony, witness Greenberg provided an itemized listing of balance-of-plant technical information in Empire's application for a Certificate of Public Convenience and Necessity. He cross-referenced this information to locations in Empire's proposal to Duke, which was included in Empire Exhibit SLG-1. Under rebuttal cross-examination, witness Greenberg contended that the bulk of the balance-of-plant information sought by Duke was contained within Tabs (I) through (N) of Empire's proposal. He denied Duke's statement that Tabs (I) through (N) contained turbine, not balance-of-plant, information.

Witness Greenberg indicated in direct testimony that Empire did not provide Duke all its data and that much of the equipment-specific information was not provided because Empire was selling Duke capacity, not equipment. He stated that more information was available, but Empire expected to provide that later in response to specific questions.

Witness Greenberg also testified that a number of updates to the proposal were provided to Duke as a result of Empire's continued development of the project, further review of its proposal and ongoing discussions with Westinghouse. The updates included transmission price estimates to move the power into Duke's territory, updated power output guarantees, and updated pricing proposals based on these other updates. Witness Greenberg noted several changes and options regarding the responsibility and costs of facility operating and maintenance (O&M). In response to Duke's September 1990 comments on O&M, Empire increased its prices, added contingencies, and confirmed costs and prices with Westinghouse. Empire also provided Duke the option of performing O&M itself or through its preferred contractor.

In regard to sites, witness Greenberg testified that after the supplemental proposal was submitted, Empire continued to pursue additional sites in Duke's territory, primarily in Rockingham County. Rockingham County was selected due to its classification as an attainment area, its location in the northeast part of Duke's service territory, and its location on the Transco pipeline. He also stated that Empire did not tell Duke about the site until December 1990, when it provided the Rockingham County Site Proposal to Duke along with additional heat rate information on the Westinghouse equipment. Witness Greenberg claimed this would enable Duke to re-analyze the economics of Empire's project by relying on

the heat rates provided by Empire and by eliminating the fixed cost of transmission from the Person County site.

Witness McMeekin testified that Empire's original proposal was not complete, detailed and sufficient for Duke to perform a detailed assessment thereof. However, based upon Duke's knowledge of combustion turbines, Duke performed technical and economic evaluations of the proposal in order to determine whether Empire's proposal could conceivably benefit Duke's customers. The assessment of the proposal was difficult because Empire provided numerous changes to the proposal during the time Duke was making its assessments.

Witness Reinke testified that Empire provided a supplement to its proposal dated October 9, 1990, revising certain aspects of its proposal. The revision primarily addressed several, but not all, of Duke's major areas of concern. Witness Reinke indicated that Empire continued to correspond with Duke. On December 28, 1990, January 2, 1991, and January 7, 1991, Empire identified an additional site for the Empire project and provided further information on sites and heat rate. Empire met with Duke on January 9, 1991, and provided Duke with its Life Cycle Cost Analysis of the Empire project.

Witness McMeekin disagreed with Empire's statement that these changes were a sign of flexibility. He stated that Empire's numerous changes contributed to Duke's belief that Empire was not very knowledgeable about generating facilities. For example, Empire adjusted its pricing only once due to siting changes. Empire increased the capacity charge to reflect the cost of using a pumping station for one of the Alamance County sites but proposed different site locations and sizes without changes in price.

Witness McMeekin indicated that one of the shortcomings of the various Empire proposals was the lack of balance-of-plant information, i.e., information concerning all portions of the plant not supplied pursuant to the typical turbine manufacturer's contract. Duke contended that Empire provided a standard package of information on the turbine package from Westinghouse, which is typically provided to potential customers, but did not provide sufficient site-specific balance of plant information. Witness McMeekin stated that necessary technical information for adequate balance-of-plant assessment would have included the following:

1. Conceptual mechanical and electrical system descriptions to include electrical one line diagrams, process flow diagrams, etc;

2. Conceptual identification and description of components and structures included in the facility; and

3. Site plan and other drawings defining the basis of the offer.

Witness McMeekin provided excerpts from 1989 Florida Power and Light Company and Virginia Electric & Power Company proposals to demonstrate that other utilities have required this level of technical detail.

Witness McMeekin described the balance-of-plant information and the level of detail included in Empire's proposal, including updates and revisions, to

support his contention that inadequate information was provided. As an example to further demonstrate that balance-of-plant information was lacking, the body of the Technical Information section of the original proposal was shown in McMeekin Exhibit 3. No balance-of-plant data was included. None was included in this section of the supplemental proposal either. Other sections provided detailed information on the turbine and supporting auxiliary equipment. No such sections existed for the balance of plant. The balance-of-plant information which was provided was very general with little or no detail.

Witness McMeekin provided an example of the importance of balance-of-plant information for the plant. He noted that Empire had allocated $1.75 million for interconnection in the Financing section of its proposal. Yet using the estimate range and unit cost figures submitted by Empire in its proposal for the switchyard and transmission line and using the actual length of transmission line required to the Eno Tie at the Person County site, the cost for the switchyard and transmission line could have been as high as $12.3 million. Thus, the Empire interconnect allocation could have been understated by as much as $10.55 million. which would have increased Empire's $122 million capital cost by 8.6%. Similar interconnect cost discrepancies existed at the Rockingham County site where Duke estimated interconnect cost at approximately $6 million. These interconnect cost estimates did not include the cost of upgrading the existing transmission system.

Witness McMeekin described other errors associated with Empire's interconnect cost. The Financing section of Empire's original proposal contained a constant $1.5 million interconnect cost for a one-, two-, or three-unit facility. In the supplementary proposal, the constant interconnect cost increased to $1.75 million; however, much of the cost associated with interconnect is unit-related so that the cost should increase with the number of units. He testified that this was a costly error and served to demonstrate Empire's lack of understanding regarding the elements involved and their interrelationship with the plant.

Witness McMeekin noted that Empire attempted to divert attention away from its lack of adequate information by stating that detailed and "working scale model information" was not available. Such type of modeling is not part of industry practice and was clearly neither required nor appropriate. On the other hand, balance-of-plant information, including layout drawings and descriptions of plant systems and equipment, has been and continues to be provided as standard practice in bid solicitations of utilities.

Witness McMeekin stated that there was recent evidence indicating that Empire realized that its balance-of-plant information submitted to Duke was deficient. In its October 31, 1991, application to the Commission for a Certificate of Public Convenience and Necessity for the Rolling Hills facility in Rockingham County, Empire included the kind of balance-of-plant information that Duke considered necessary for an adequate technical assessment. This information was essentially not included in Empire's proposal to Duke. Witness McMeekin noted, however, that much of the technical plant information submitted to the Commission by Empire in its Rolling Hills certificate application was a verbatim duplication of the information submitted by Duke in its Lincoln certificate application.

During cross-examination of witness Greenberg, a comparison the Lincoln and Rolling Hills certificate applications was discussed. Greenberg acknowledged that Empire had copied portions of Duke's Lincoln application verbatim. Under its Waste Water Treatment System description, Duke stated that Lincoln's treated waste water was to be released directly into Killian Creek. In copying the Lincoln application for the corresponding section of the Rolling Hills application, Empire omitted this statement and no means of discharge was identified. Upon cross-examination, witness Greenberg could not explain Empire's method of treated waste water discharge.

Empire contends that it did not include much of the equipment-specific information in its proposal because it is proposing to sell Duke capacity, not a plant. The Commission notes that Empire is proposing to sell capacity from a single power plant with no alternative generating resources to provide replacement power. Empire's proposal is not the same as a capacity purchase from a generating system which can provide capacity from multiple sources. If Empire's single power plant is unreliable or more costly than projected, Empire has no replacement power options. Complete information on the equipment comprising the plant should be part of a proposal in order for Duke to determine the expected reliability of the plant to meet customers' load requirements.

The Commission concludes that the record shows that Empire essentially provided a standard Westinghouse combustion turbine proposal to Duke without significant site-specific information including necessary balance-of-plant information. The technical scope of information and level of detail did not meet the requirements established by other utilities in their purchased power solicitations. The balance-of-plant information furnished was incomplete, and the limited information provided was very general with little or no detail. Empire did provide balance-of-plant information with its subsequent application to the Commission for a Certificate of Public Convenience and Necessity for Rolling Hills, but Empire acknowledged it copied that information from an earlier Duke application. Further, as previously discussed, there were numerous changes in Empire's proposal. Empire submitted several changes and options to Duke with regard to output, heat rate, interconnect cost, site, and pricing. All of these issues should have been confirmed and incorporated prior to submittal to Duke.

The Commission concludes that Empire's proposal was not complete, detailed and sufficient. The Commission has previously concluded that the proposal was not one of reasonably available purchased power. The first issue identified by the Commission--whether Empire made a proposal of reasonably available purchased power that was complete, detailed and sufficient to perform an assessment--is therefore answered no. Based on Duke's preliminary evaluation of the proposal, no full assessment was required. Nonetheless, Duke did perform assessments of the proposal, and the Commission has considered them.

EVIDENCE AND CONCLUSIONS IN SUPPORT OF FINDINGS OF FACT NOS. 10-15

These findings concern the issue of whether Duke made a detailed assessment of Empire's proposal using reasonable methods and assumptions.

Witness Greenberg testified that as a result of Empire's Request for Production of Documents, Empire learned that Duke did conduct a detailed

assessment of Empire's proposal, as shown by Exhibit SLG-3. Witness Greenberg acknowledged that he reviewed Duke's technical assessments and that Duke conducted economic comparisons between Empire's proposal and Duke's least cost supply-side option (Duke's Lincoln County project) on three occasions. Each time, Duke examined Empire's proposal as proposed and as modified by Duke. Witness Greenberg discounted Duke's modifications to Empire's proposal, other than heat rate and fuel cost. He agreed that it was appropriate to assume equal fuel costs and equal heat rates and to exclude initial fuel costs. In general, Empire alleges that Duke used unreasonable methods and assumptions in its assessments of the Empire proposal. Further, Empire claims that Duke's notes and memoranda demonstrate that Duke acted in bad faith.

Witness Greenberg specifically addressed Duke's concerns and modifications. For example, he did not agree with Duke's modification to Empire's O&M costs. He stated that for maintenance and variable O&M, Empire complied with Westinghouse specifications, recommendations, and proposals. He also testified that the actual O&M costs would be passed through to Duke.

In response to Duke's concern with the CTs' startup time, witness Greenberg testified that the emergency startup time of 10 minutes for spinning reserve purposes was confirmed by Westinghouse on September 25, 1990. He also stated that the spinning reserve classification was inappropriate and unnecessary.

Witness Greenberg defended the proposed one-person staff by noting that staffing of peaking plants is usually done according to utility preference. He stated that, intuitively, a facility that is capable of remote start and only runs about 100 hours per year, usually during peak periods, does not need to be staffed by more than one person 8,760 hours per year.

Witness Greenberg also responded to Duke's concern about the proposed maintenance program by explaining that the timing of maintenance intervals depends on the mode of equipment operation which would be dictated by Duke. He indicated that Empire's costs were based on manufacturer's recommendations and are consistent with industry practice.

Empire's witness Greenberg noted that there may be additional cost factors related to the impact of environmental permit restrictions when both Rolling Hills and Duke's least cost supply-side alternative receive final air permits. Witness Greenberg argued that the cost of environmental permit restrictions would further accentuate the economic advantage of Empire's proposal.

Witness Greenberg testified that Duke mistakenly used annual variable cost data and added it to a monthly fixed cost in Duke's September and November economic analyses. He also testified that Duke improperly calculated Empire's fixed O&M cost at three times its actual value in the November analysis.

During cross-examination, witness Greenberg stated that the $75,000 tax figure submitted by Empire was not for the entire facility but only for a portion of the facility. He stated that the rest of the taxes were taken care of in other parts of the pricing and spreadsheets. Witness Greenberg also testified that he did not know what the tax would be on a $122 million facility. Witness Greenberg agreed that the tax rate times $122 million would be a ballpark

estimate of taxes and that this would be annual property tax of about $750,000 per year.

Witness Greenberg claimed that transmission losses would likely be less at the Empire location than at Duke's Lincoln location, effectively increasing the cost advantage of Empire's proposal.

Witness Greenberg testified that the purchase of capacity from Empire at a different site and on a different model of equipment would actually increase Duke's reliability. He also stated that the location of the project in the northeast portion of Duke's service territory was beneficial.

Witness Greenberg testified to Empire's belief that Duke acted in bad faith and alleged that Duke's notes and memoranda, contained in Exhibit SLG-3, clearly showed bad faith and unreasonableness in Duke's actions. Empire offered specific Duke documents to ddmonstrate bad faith. One document presented as Empire Cross-Examination Exhibit Number 3 was a list of options for dealing with the proposal which was discussed at an internal Duke meeting. The document listed various "pros and cons" of the options.

Finally, witness Greenberg contended that Duke's assessments were unreasonable because Duke failed to request additional information. Empire expressed its intention to cooperate with Duke in providing all of the information requested by Duke as quickly as possible.

Witness Reinke and witness McMeekin testified that Duke made detailed assessments of Empire's initial proposal and updated the assessments twice to incorporate updated or modified information submitted by Empire. Duke used reasonable methods and assumptions in making all assessments, based on Duke's experience in the power generation business and information from other industry sources.

Witness Reinke testified that Duke acted in good faith in its dealings with Empire. The fact that Duke did not enter into a contract with Empire does not demonstrate bad faith. Witness Reinke stated that Empire has taken selected documents out of context to try to establish bad faith. Witness Reinke and witness McMeekin both testified during cross-examination that Empire Cross-Examination Exhibit Number 3, Duke's discussion of options, was the range or spectrum of thoughts or potential consequences that Duke saw as a result of evaluating the Empire proposal. Discussion of the options is not an example of bad faith.

Witness Reinke also noted that Duke spent significant time and resources examining Empire's proposal. Duke conducted two technical assessments and three economic assessments of Empire's proposal. This was done even though Empire had no significant experience and apparently no net worth. Witness Reinke was of the opinion that under the circumstances Duke did more than could be expected.

Witness McMeekin described the assessments which Duke conducted. In order to determine if the offer was in the best interests of Duke's customers, Duke performed an assessment which included consideration of many criteria, including cost, benefits, risks, uncertainties, and reliability. Duke performed technical

evaluations and economic analyses on the Empire proposal and supplemental information during the period from August 1990 through January 1991. Duke determined that there were significant technical problems associated with Empire's proposal and that Empire lacked experience in the development and construction of generating plants. These technical problems and Empire's lack of experience raised significant concerns with respect to the reliability of Empire's proposal. Additionally, the economic analyses of Empire's proposal demonstrated that Empire offered no cost advantage. Therefore, Duke concluded that it could not prudently rely on Empire for reliable cost effective peaking power.

Duke's Technical Assessment of Empire's Original Proposal

Witness McMeekin described the technical assessment made on Empire's original proposal and air permit application in August 1990. He indicated that the scope of Duke's technical evaluation was necessarily limited to the information provided by Empire which was incomplete in many respects. Duke identified the following areas of concern:

1. Questionable rating of the Westinghouse turbines;

2. Higher capital cost than Lincoln;

3. Startup time on the Westinghouse turbines which did not meet spinning reserve requirements for the Duke system;

4. Reliability of on-site wells as a water source without thorough study and testing;

5. No air quality modeling or Best Available Control Technology analysis;

6. Empire's proposed air permit application which was based on unlimited hours of operation without selective catalytic reduction, use of 0.3% sulfur oil, and emission parameters based on natural gas, rather than fuel oil;

7. Potential delays associated with late initiation of licensing process by Empire;

8. Unrealistic fuel plan demonstrating a lack of understanding of natural gas availability;

9. Maintenance/inspection intervals based on manufacturer's recommendations which were not consistent with Duke's survey of industry practice;

10. Unacceptable staffing by one operator with no mention of maintenance staffing or philosophy;

11. Noise level guarantees which were potential licensing issues;

12. Inconsistencies and problems within the construction schedule; and

13. Empire's lack of experience.

Witness McMeekin testified that Duke had concerns with the output rating of the proposed Westinghouse CTs. Comparisons between the proposal Westinghouse made to Duke in 1988 and those submitted by Empire show substantial differences. While Empire stated that the unit is capable of 100 MW at 95 degrees F on natural gas, Westinghouse proposed to Duke the same model machine as capable of a noticeably lower output at 97 degrees F. Duke modified the output for purposes of its economic analysis.

Witness McMeekin responded to witness Greenberg's testimony that sufficient data was provided for Duke to confirm Empire's output, thus making the output modification used by Duke in its economic analysis inappropriate. Empire stated that the increase in capacity above that proposed by Westinghouse to Duke in 1988 was due to use of a higher water injection-to-fuel ratio used by Westinghouse to achieve lower NOx emissions. Witness McMeekin testified that Empire failed to provide Duke with either the proposed NOx emission level or the water injection-to-fuel ratio in its initial proposal. Also, the water injection-to-fuel ratio correction curve provided by Empire was the same as previously provided to Duke by Westinghouse in 1988 and terminated at a maximum water injection-to-fuel ratio less than the value used by Empire. Thus, the parameters required to identify the basis of the increase in output were not provided to Duke. Also, the technical information supplied by Empire implied that a higher water injection-to-fuel ratio was not used. Duke maintained that it was justified in making the output modification under those circumstances.

Witness McMeekin testified that there were implications from an increase in output on the W501D5 turbine above the output provided by Westinghouse to Duke in 1988. At the outset of determining the need for CTs on the Duke system, Duke determined that high reliability was paramount given the expected service. As such, Duke concentrated on filling this need with field-proven equipment. Duke suspected that Empire's assertion that the increase in output resulted from a higher water injection rate did not represent the total scope of change. Duke learned that the firing temperature on the W501D5 had been increased twice in recent years. Higher firing temperatures could have a significant bearing on material performance from the standpoint of material failure and could also lead to more frequent maintenance inspections. Thus, both reliability and cost consideration issues were raised by Empire's proposed use of W501D5 turbines at higher outputs, especially for peaking service. Duke noted that turbine vendor warranties are for a limited time and that the owner assumes the financial risk if a turbine modification results in problems following expiration of the warranty.

Witness McMeekin compared the cost/kw of the Empire proposal with the Lincoln plant in its technical evaluation. Duke made comparisons of the capital cost including interest during construction between the Lincoln and Empire projects. On an equal basis the comparisons showed that Lincoln had a 4% lower capital cost per kw than the Empire project. This comparison was based on the capital costs proposed by Empire which Duke claims have been understated.

Witness McMeekin also testified that Duke had concerns with the proposed startup time for the turbines planned by Empire. Empire's original proposal

included a startup time of 30 minutes which does not meet spinning reserve requirements for a 10-minute startup. Duke decided in 1988 that the specifications for the Lincoln combustion turbine equipment would hnclude a 10-minute startup to meet spinning reserve requirements and that decision has not changed. Witness Reinke discussed the requirements for spinning reserve. "Spinning reserve" is excess generating capacity which must be available to respond to the load fluctuations that naturally occur on a power system. There is a continuous effort to match fluctuations in system load with system generation in order to maintain a balance. The system must also be able to make up quickly for the loss of a generating unit forced out of service. Spinning reserve requirements are from the North American Electric Reliability Council Operating Guide and from contractual obligations. He further stated that a 10-minute startup requirement provides significant economies associated with being able to use combustion turbine units to provide spinning reserve.

Witness McMeekin testified that Duke had concerns with Empire's proposed water source. The Empire proposal stated that water for plant operations would be from on-site wells. Duke's concern was the reliability of on-site wells as a water source without thorough study and testing. Without a geotechnical evaluation and on-site testing, the provision of such a large volume of water from wells would be risky in both the long and short term. Also, there was no discussion regarding storage of any untreated water in the proposal.

In regard to air quality, witness McMeekin testified that the original proposal by Empire did not include sufficient detail to assess Empire's ability to license the project. The proposal did not include a discussion of any modeling to evaluate compliance with air quality standards.

Witness McMeekin testified that Empire's proposed air permit application which was subsequently submitted to Duke on September 6, 1990, was based on unlimited hours of operation without selective catalytic reduction, use of 0.3% sulfur oil and emissions parameters based on natural gas. Witness McMeekin testified that these were not reasonable criteria. Although witness Greenberg testified that Empire was aware of the need to utilize both natural gas and fuel oil as a fuel source for the turbine, the preliminary air permit application gave no indication of this. Further, witness Greenberg testified that the preliminary air permit application provided to Duke on September 12, 1990, was based on 100% oil. Duke did not receive a preliminary air permit application on September 12. Duke noted that Empire stated in a September 12, 1990 letter its intention to file the application that day, but to date Empire apparently has not formally filed an application for a Prevention of Significant Deterioration (PSD) permit. These positions by Empire further served to demonstrate its lack of understanding regarding combustion turbine licensing requirements.

Witness McMeekin testified that Duke also had concerns with Empire's original proposal related to fuel source. He testified that the fuel plan submitted by Empire demonstrated a lack of understanding of natural gas availability. The proposal stated that there would be sufficient pipeline capacity under normal operating conditions to supply the turbines with natural gas. Empire's fuel plan ignored the fact that natural gas would not be available during extreme winter conditions to accommodate Duke's needs for peaking power.

Also, Empire's cash flow for the project was based on the use of natural gas as the sole fuel, which is unrealistic.

Witness McMeekin testified that Duke had concerns during the original technical evaluation with regard to Empire's proposed operation and maintenance. He stated that the proposed maintenance and inspection intervals were considered inadequate. Duke's opinion was based on its own experience and industry information on in-service CT units. Empire made no mention of maintenance staffing or philosophy other than the maintenance intervals.

Duke also had concerns with Empire's proposal to have only one on-site operator. While it is possible for one person to operate the units, one person cannot adequately keep the plant operational over an extended time. Witness McMeekin noted that the staffing issue had not been resolved. Although Empire proposed a staff of five in its October proposal, witness Greenberg's testimony defended the original proposal as consistent with industry practice. In McMeekin Exhibit 5 Duke showed that staffing at representative combustion turbine facilities, which were referenced by witness Greenberg, was no less than two people per plant and averaged more than one person per unit. McMeekin testified that Empire does not appear to understand that no relationship exists between remote start and staffing levels, and that this staffing issue demonstrates the inexperience of Empire and the problems of relying on turbine vendor recommendations.

Witness McMeekin testified that the schedule contained in the proposal had several problems. The Siting section and the Schedule section of the proposal showed different construction durations. Also, the schedule had activity conflicts such that construction would not have been supported.

Witness McMeekin testified that one of Duke's major concerns during the technical review was Empire's lack of experience. This lack of experience was obvious from the proposal. Empire's proposal demonstrated little knowledge of combustion turbine licensing, siting, design, construction, and operation. Empire's inexperience was confirmed through information provided at Duke's request on Empire's experience to date. The whole of its power plant development experience consists of a 10-MW cogeneration facility which is still under construction. By its own admission, Empire had no other experience and has never produced any power anywhere.

Witness McMeekin testified that the conclusion of the technical evaluation was that Empire's proposal had significant technical deficiencies and that its capital cost was higher than the Lincoln project. Based on this evaluation, Duke determined that there was a substantial risk that Empire lacked the capability to execute its proposal given its low level of understanding and the large number of issues which had not been addressed. Duke concluded that it could not prudently rely on Empire for peaking power in the time frame proposed by Empire. Witness McMeekin stated that Duke did not seek additional technical information in order to refine its analysis. Empire failed the initial assessment, and therefore no further assessment was necessary.

Duke's Economic Assessment of Empire's Original Proposal

In regard to Duke's economic assessment of the original proposal, witness McMeekin testified that Duke analyzed the proposal at capacity factors of 1% and 5% (because the original proposal utilized an unrealistic 20% capacity factor) for one combustion turbine and three combustion turbines. The original assessment was completed in September 1990. The analysis considered capital costs, fixed and variable operating and maintenance (O&M) costs, transmission costs, and fuel costs. In addition to evaluating the Empire project as originally proposed, Duke made certain modifications to the information provided by Empire. These modifications included a reduction in summer capacity, adjustment of heat rate to reflect comparable conditions, and changes to the O&M costs (including fuel cost).

Witness McMeekin testified that Duke modified the output to be consistent with the proprietary information presented to Duke by Westinghouse in 1988. Duke later learned that Westinghouse had increased its rating; however, without in-service experience Duke was concerned that this increased output might affect reliability and maintenance. Thus, witness McMeekin testified that the modified output value was appropriate.

Witness McMeekin testified that Duke modified the heat rate to reflect a higher heating value of fuel instead of the lower heating value. The Empire heat rate was based on 95 degrees F while Duke's was 97 degrees F. The heat rates provided by Empire were not cycling-adjusted so the effect of short-term run duration was not considered. CTs are used for short-term runs, and the heat rate needs to reflect frequent cycling. Duke replaced Empire's proposed heat rate with a cycling-adjusted heat rate based on higher heating value.

Witness McMeekin also described the modification to Empire's proposed O&M costs. Witness McMeekin noted that Empire did not originally offer to guarantee its O&M and fuel costs. Empire proposed to pass through all of these costs. Therefore, Duke needed to assess the true costs of O&M and fuel. Empire's proposed O&M costs were based on vendor recommendations. Duke modified the O&M costs based on industry practice. Duke's opinion, based on in-house experience and industry information, was that vendor recommendations are frequently overly optimistic.

Witness McMeekin testified that Duke's economic assessment showed that the Empire proposal offered no cost advantage. However, he indicated that Duke's economic assessment was not the primary reason Duke did not accept Empire's offer. The conclusions drawn from the technical assessment of the proposal and Empire's modifications led Duke to conclude that Empire had very little experience in the power generating business. Duke concluded that Empire's proposal was not a viable alternative based on the technical assessment, Empire's lack of experience, and the economic assessment.

Duke's Assessments of Empire's Supplemental Proposal

Witness McMeekin testified that Empire provided a supplemental proposal in October 1990 and Duke updated its original assessments. Witness McMeekin testified that although Empire addressed some of the issues that had been

identified, Duke still had significant concerns about the proposal. The Person County water source and staffing were addressed satisfactorily. All other issues remained a concern. Empire's lack of experience remained a major concern.

Empire reduced its Person County site size in the supplemental proposal from 200 to 56 acres due to sale of the remaining property. Empire claimed this would not cause a noise problem, giving as an example a 500-MW facility located on 50 acres. Witness McMeekin testified that the referenced facility was enclosed, which would result in lower sound levels at the property boundary but at a much higher cost for construction and operation. Duke still had concerns regarding noise based on the supplemental proposal. Duke felt that it was very likely that the 59 dBA noise level guaranteed by Empire at the facility perimeter would result in unfavorable community reaction. Duke did not consider this satisfactory.

Witness McMeekin testified that Empire's supplemental proposal of October 1990 addressed, in part, Duke's concern with Empire's fuel source. Empire provided information that natural gas would be available in the summer months. However, there was no mention of the need to depend on fuel oil for non-summer operation and no adjustment of the proposed operational costs to reflect the use of fuel oil.

Witness McMeekin testified that Empire's proposed startup time was changed in the supplemental proposal. Empire included a table in its supplemental proposal which listed the cold start as 29.5 minutes and the emergency start as 19.5 minutes for the Westinghouse 501D5. The revised startup time still did not meet the 10-minute spinning reserve requirement. Empire also included a letter from Westinghouse which stated that the turbines could be started "in approximately 10 minutes" but with the note that frequency of recommended inspections and maintenance would be significantly impacted. The impact of each 19.5-minute start was shown as the equivalent of 400 operating hours, i.e., equivalent to almost one year's operation, which would have a significant impact on cost of maintenance. Witness McMeekin testified that the impact of an approximate 10-minute start was not included; however, the implication relative to the 19.5-minute start was that it would indeed be most severe.

The supplemental proposal did not change the basic conclusion that it was not prudent for Duke to rely on Empire for peaking power in the time frame included in its proposal. Witness McMeekin stated that the review of the supplemental proposal continued to show no cost advantage in purchasing electricity from Empire as compared to Duke's proposed Lincoln project.

Duke's Assessment of Empire's Life Cycle Cost Analysis

Witness McMeekin also testified that Duke reviewed Empire's Life Cycle Cost Analysis presented to Duke in January 1991 in which Empire claimed a savings of $100 million. He stated that Duke performed its own economic analysis using Empire's methodology. Duke modified several parameters to correct errors in Empire's analysis and to place the analysis on a comparable basis. Witness Reinke testified that the results of this analysis were communicated to Empire in a meeting on January 21, 1991. This evaluation concluded that the Empire project was not a viable, least cost alternative to Duke's Lincoln project.

Witness McMeekin described the modifications Duke made to the Life Cycle Cost Analysis. Witness McMeekin testified that Duke modified the summer capacity, discount rate, capital costs, facility life, variable O&M, and heat rate. He noted that Empire based its comparison on the cost parameters provided by Duke to the Commission in the Lincoln certificate proceeding pursuant to Rule R8-61(b) and that these costs were an anticipated upper bound and were not on the same basis as the Empire proposal. Witness McMeekin stated that the Rolling Hills capacity and the Lincoln capacity were adjusted to be comparable to account for operation and temperature differences. Witness McMeekin testified that Duke used a discount rate of 9.77% for both projects. He also noted that the capital cost used by Empire for Duke was not comparable in that it contained the costs for initial filling of the fuel oil tanks. Furthermore, Empire's interconnect costs appeared to be substantially underestimated and the cost of upgrading Duke's transmission system to accommodate the additional load was totally omitted. He noted that the facility life basis for Duke as stated in Rule R8-61(b) information was 20 years versus the 25-year life incorrectly stated by Empire.

Witness McMeekin described Duke's concern with variable O&M costs applied to Duke and Empire in the Life Cycle Cost Analysis submitted by Empire. Empire's analysis utilized the variable O&M costs for Duke as shown in Duke's R8-61(b) filing which were based on industry practice while Empire's projected O&M costs were based on vendor recommendations. The variable O&M estimate presented in the Rule R8-61(b) filing was not based on vendor recommendations and cannot be used for comparison with estimates based on vendor recommendations. Duke's opinion, based on in-house experience and industry information, was that vendor recommendations are frequently overly optimistic. Therefore, Duke equalized variable O&M for both Empire and Lincoln at the R8-61(b) filing level. Witness Greenberg agreed in his testimony that Westinghouse's and GE's recommended variable O&M were roughly comparable.

Witness McMeekin testified that Duke had a concern with heat rates used by Empire in its Life Cycle Cost Analysis. The heat rates used by Empire for Duke and Empire units were neither cycling adjusted nor at the same temperature.

In regard to Duke's assessment of Empire's January 1991 Life Cycle Cost Analysis, witness McMeekin concluded that the analysis continued to show that there was no cost advantage to purchasing electricity from Empire.

Other Issues Pertaining to Duke's Assessments of Empire's Proposal

Witness McMeekin acknowleged that Duke made certain errors in its September and November analyses. He said that Duke treated an annual cost component as a monthly component in the September and November analyses. In the November analysis, Duke interpreted the fixed O&M costs identified by Empire in the October supplement as per-unit cost. The information provided by Empire was unclear. In the original proposal, fixed O&M was provided on a per-unit basis. The October supplement did not specify that the O&M cost was on a total plant basis and not a per-unit basis. The January analysis did not contain the referenced errors but showed no cost advantage to the Empire project. Witness McMeekin also testified that if these errors in the September and November assessments were corrected, the conclusion would not change. The error in the

September analysis favored Empire while the errors in the November analysis favored Duke. Adjustments for these errors showed the same relative results; when placed on a comparable basis, the Empire project offered no cost advantage.

Witness McMeekin testified that Empire's claimed savings of $100 million was the result of Empire's assumptions relating to O&M costs and fuel. Even using numbers agreed upon by Duke and Empire, the capital cost of Lincoln is lower than Empire's. Witness McMeekin noted that in its July and October proposals, the capital cost was the only cost that Empire was not going to pass through to Duke. Witness McMeekin noted that witness Greenberg admitted that the fuel costs of the two facilities should be equal. Witness Greenberg also admitted that the manufacturer's recommended maintenance and variable O&M for the proposed machines at the two facilities are roughly equal. Therefore, by Empire's own admission, one would expect that the projected fuel and O&M cost of the two facilities would be roughly equal. Witness McMeekin testified that Empire manipulated these numbers to produce a $100 million "savings," none of which it proposed to guarantee.

Witness Reinke stated that Empire is an inexperienced company proposing essentially the same type of project as Duke's Lincoln project. Regardless of who builds and owns the capacity, the operating requirements to meet the anticipated peaking demands of Duke's customers are the same. Since Duke's economic analysis showed that substantial cost savings from Empire's proposal did not exist, purchasing capacity from Empire instead of building capacity offered no advantage to Duke's customers to offset the additional risks and reliability concerns associated with purchasing power from an inexperienced developer.

Witness McMeekin explained the significance of location for a CT project. Duke conducted an extensive study of potential combustion turbine sites, including the northeast portion of Duke's service territory. The Lincoln site was selected as a result of this siting study. Witness Reinke did not agree with Empire's contention that its project would provide Duke with needed diversity. Duke has 163 generating units in 39 locations in its service area. With this degree of existing diversity, it is much more important that the focus be on equipment reliability rather than location.

With regard to transmission losses, witness Reinke testified that losses are inherent in the transfer of power. Kilowatt-hour losses for peaking facilities are considerably less than for base-load facilities. Witness Reinke stated that Empire's project would have little effect on system losses. Mr. Reinke stated that locating a generating facility in the northeast portion of Duke's territory would tend to reduce flows on the interconnection with Carolina Power & Light Company (CP&L) in the Durham area; however, it is not a necessary requirement that flow on this interconnection be reduced. The interconnection with CP&L in Durham has sufficient capacity to accommodate a wide range of contingencies on both systems.

Empire claimed in its complaint that Duke refused "to hold additional discussions with Empire, a NUG that was shown to Duke to be cost justified" and claimed that therefore "Duke has violated its agreement with the Public Staff to increase its non-utility generation efforts (an agreement embodied in the Commission's March 26, 1991 Order in Docket No. E-7, Sub 461)." Witness McMeekin

and witness Reinke testified that Duke reviewed and evaluated Empire's analysis using reasonable methods and assumptions, and concluded that there was no cost advantage. The facts that Duke continued a dialogue with Empire about its project, held discussions with Empire, and made several assessments of Empire's project show that Duke acted in accordance with its agreement with the Public Staff. Additionally, Duke expressed an interest in continuing discussions with Empire regarding capacity needs beyond Lincoln.

Commission Conclusions

The Commission concludes that Duke made detailed assessments of Empire's proposal and that Duke used reasonable methods and assumptions in its assessments.

In its technical assessments, Duke identified numerous shortcomings, only a few of which Empire satisfactorily addressed. Duke questioned Empire's output rating of the Westinghouse turbines. While Duke acknowledged that it later learned that the units were capable of the higher output, Duke continued to question the impact of the higher output on reliability and O&M costs. Duke was concerned that the start-up time for the Westinghouse turbines proposed by Empire did not meet Duke's spinning reserve requirements. Duke appropriately included this requirement for its supply-side option. Duke also expressed concerns about the reliability of on-site wells as a water source. Empire attempted to reassure Duke; however, Empire has not drilled any test wells and provided no proof that adequate water was available on the site. Duke noted that Empire had not obtained or applied for an air permit. Empire stated that it was in the process of completing the application and that there was adequate time. In a September 1990 letter to Duke, Empire stated its intention to file the air permit application immediately, but it has not been filed to date. Duke questioned the maintenance and inspection intervals that Empire proposed. Empire proposed the manufacturer's recommendations and Duke disagreed based on its knowledge and industry feedback. Duke also questioned Empire's staffing level in the original proposal. Empire subsequently modified its staffing level; however, Empire provided testimony to support its original staffing level. Duke identified noise as a potential issue, based on its experience in licensing other generating facilities. One of Duke's major concerns was Empire's lack of experience. Empire noted its willingness to guarantee all aspects of the project, contending that inexperience was a moot point. However, no amount of guarantee can produce the capacity that Duke will need if the developer cannot complete the project on time. Experience is an appropriate and reasonable consideration, and Empire's lack of experience was a major factor in Duke's decision.

Duke performed three economic assessments of Empire's proposal. In each assessment, Duke compared Empire's Rolling Hills project with Duke's Lincoln project, after modifying certain aspects of the Rolling Hills project to place it on a comparable basis. Empire disagreed with Duke's modifications. In its September and November economic assessments, Duke modified Empire's proposed output, heat rate, and O&M costs. Duke witness McMeekin stated that the output adjustment was appropriate for units in peaking service. Both parties agreed that the heat rates should be the same, and it has been admitted that both Westinghouse's and General Electric's O&M recommendations are comparable. Duke's modifications were appropriate to ensure a fair and reasonable comparison of the

projects. The conclusion of Duke's economic analyses was that there was no cost advantage to Empire's project. Duke acknowledged errors in its September and November economic analyses but noted that corrected analyses yielded the same relative results and conclusions. Duke later reviewed a Life Cycle Cost Analysis provided by Empire in which Empire claimed a $100 million savings for Duke's customers. Duke made certain modifications to the analysis and concluded once again that there was no cost advantage to Empire's project. Duke's modifications were made to ensure that cost comparisons were on a consistent basis, and Empire failed to demonstrate during the proceeding that these modifications were inappropriate. The Commission also recognizes that significant transmission system upgrade costs were not included in the comparison. The Commission concludes that the $100 million savings that Empire claimed does not exist.

The record shows that Duke went to great lengths to analyze Empire's proposal and that Duke discussed the results of the analyses with Empire. Empire continued to make changes to its proposal, which Duke in turn analyzed. Duke's assessments showed significant deficiencies in the proposaland no cost advantage. The Commission concludes that Duke used reasonable methods and assumptions and did not arbitrarily deny the proposal. Any assumptions Duke was required to make were the result of the proposal being incomplete and, in any event, were reasonable assumptions. Duke's modifications were reasonable. Having reviewed the record in its entirety, the Commission finds no evidence of bad faith by Duke.

EVIDENCE AND CONCLUSIONS IN SUPPORT OF FINDING OF FACT NO. 16

Rule R8-58(e) requires each electric utility to "assess on an ongoing basis the potential benefits of reasonably available purchased power resources" and to "discuss its overall assessment of its purchased power resources, including . . . independent power producers . . . , and provide details of the methods and assumptions used in the assessment of those purchased power resources having a significant impact on its least cost integrated resource plan."

Witness Greenberg testified that Duke violated Rule R8-58(e) by not providing its assessments of Empire's proposal to the Commission. He also testified that Duke did not provide its assessments to Empire until after the complaint was filed and discovery was conducted. However, he stated that in September 1990 a Duke representative told him the general areas in which Empire's proposal was deficient.

Witness Reinke testified that Duke discussed its overall assessment of purchased power resources, including Empire's proposal, in its 1991 short-term action plan filed with the Commission. It is Duke's position that since all of its assessments showed that Empire's proposal had no significant impact on the least cost plan, Rule R8-58(e) did not require a discussion of the details of the methods and assumptions used in the assessments. Witness Reinke testified that Duke did not provide a detailed assessment of Empire's proposal to either Empire or the Commission; however, Duke discussed its concerns with Empire on September 18, 1990, on November 20, 1990, on January 9, 1991, on January 21, 1991, on January 31, 1991, and again on June 27, 1991.

The Public Staff, in its post-hearing brief, argued that Duke's interpretation of Rule R8-58(e)--"[i]f we assess it and reject it, then it has no significant impact and therefore the details of the assessment need not be reported"--is wrong. The Public Staff argued that the purpose of the reporting requirement is to give the Commission an opportunity to review the assessments and that the "significant impact language clearly is meant as a limit on the number of projects the assessment of which has to be reported in detail." The Public Staff argued that Empire's proposal had a potential significant impact on Duke's least cost plan and that Duke violated Rule R8-58(e) by failing to provide details of its assessments in its least cost filings. The Public Staff asked the Commission to clarify the terms "reasonably available" and "significant impact" and to require Duke to establish an evaluation process by which it can analyze future proposals for purchased power resources.

The Commission concludes that our previous findings and discussions adequately resolve the two issues which were identified as the focus of the present complaint proceeding. The issues raised by the Public Staff, dealing with interpretation of Rule R8-58(e) and with the appropriate evaluation process by which utilities should assess future purchased power proposals, are more appropriately raised in the context of the Commission's pending least cost integrated resource planning docket, Docket No. E-100, Sub 64.

IT IS, THEREFORE, ORDERED that the complaint of Empire Power Company filed against Duke Power Company on April 4, 1992, should be, and the same hereby is, denied.

ISSUED BY ORDER OF THE COMMISSION.

This the 22nd day of May, 1992.

NORTH CAROLINA UTILITIES COMMISSION

(SEAL)

Geneva S. Thigpen, Chief Clerk

Commissioner Duncan concurs by separate opinion.

Commissioner Duncan, concurring.

While I agree with the majority's ultimate decision in this case, I am not entirely comfortable with the route it takes to reach that point. I therefore write separate to express those concerns.

As the majority opinion points out, the Commission's consideration in this hearing was limited to two issues: (1) whether Empire made a proposal to Duke of reasonably available purchased power that would have a significant impact on Duke's least cost integrated resource plan, and whether such proposal was complete, detailed and sufficient for Duke to perform a detailed assessment thereof and (2) whether Duke arbitrarily denied the proposal without making any detailed assessment thereof using reasonable methods or assumptions, or, if such assessment was made, whether Duke has refused to provide the assessment.

I do not believe the Commission's conclusion that Empire's proposal was not complete, detailed and sufficient for assessment is either justified by the record or necessary to the result. It is undisputed that Duke had no standards in place by which to evaluate the sufficiency of independent power producer (IPP) proposals, and, apparently, no formal procurement procedures for handling proposals with respect to purchased power. There was, therefore, no objective criteria either to guide Empire in putting together its submission or to serve as a standard for determining completeness. Empire could reasonably have thought, as do I, that indicating its willingness to supply whatever remaining material was necessary was the appropriate way to handle the ambiguity created by Duke's own absence of such procedures. Instead, the majority chooses to interpret Empire's offer to work within Duke's standardless framework as a sign of weakness rather than flexibility, and conspicuously declines to comment on Duke's failure to even attempt to obtain the information that it now says was necessary.

Not only do I think this conclusion arguably wrong, it seems to me clearly unnecessary. The fact remains that Duke did manage to perform not one but <u>five</u> assessments without the information that it claims, after the fact, was so critical, and without making any effort to obtain that information from Empire. In fact, the record reflects that Empire did not even learn of Duke's assessments until Duke responded to a request for production of documents during discovery. I would therefore have concluded that it was unnecessary to reach this issue, because Duke was entitled to prevail on the second. I think it is supportable from the record that Duke did not deny the proposal arbitrarily, because it had legitimate concerns about reliability and Empire's lack of experience.

Having agreed with the result, however, I do want to make it clear that I am not convinced that Duke acted in the good faith with which the majority wishes to credit it. I am particularly concerned about three things, two of which also concerned the Public Staff: (1) Duke's failure either to discuss Empire's proposal with the Commission or its deficiencies with Empire; (2) a pattern of conduct, including a written memorandum, indicating Duke's intent to discourage proposals by IPP's; and (3) the timing of Duke's communications with Empire

(with the final rejection of Empire coming, as the Public Staff points out, within days after the proposed orders in Duke's Lincoln certificate docket were filed) which strongly suggests that Duke merely wished to string Empire along until it could no longer intervene in the Lincoln certificate docket.

I hope that Duke understands that although perhaps justified here by the legitimacy of the concerns regarding Empire's inexperience, this is a course of conduct which I, at least, would not like to see repeated.

Allyson K Duncan

DOCKET NO. E-100, SUB 54

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Investigation and Rulemaking Proceeding to Consider Least Cost Integrated Resource Planning	)))	ORDER ADOPTING RULES

BY THE COMMISSION: By Order issued March 25, 1987, the Commission instituted a general investigation and rulemaking proceeding to consider the adoption of a new approach to electric utility planning which is intended to identify those electric resource options which can be obtained for the total least cost to the ratepayers consistent with adequate, reliable service. Carolina Power & Light Company, Duke Power Company, Virginia Electric and Power Company, d/b/a North Carolina Power, Nantahala Power and Light Company, the Public Staff, and the Attorney General were made parties to the proceeding and were requested to file comments. Carolina Utility Customers Association, Inc. (CUCA), and the North Carolina Industrial Energy Consumers (NCIEC) were allowed to intervene in the proceeding.

By Order issued March 16, 1988, the Commission proposed rules which define an overall framework within which the least cost integrated resource planning process will take place and requested comments on the proposed rules from all interested parties. The Commission recognized in the Order that it could address each issue in the proceeding more effectively by refocusing the rulemaking proceeding on a relatively few issues at a time, and that such an approach would initially require the adoption of rules establishing the basic framework for a least cost integrated resource planning program, followed by rules developing the details necessary to flesh out the overall program.

The March 16, 1988, Order also requested comments on three specific issues in addition to comments on the proposed rules themselves; the three issues being: (1) the primary considerations which must be addressed by each least cost integrated resource planning study and the relative weight which should be given to each of the considerations in ranking each resource option in the study; (2) the consideration of appropriate rewards to utilities for efficiency and conservation which decrease utility bills; and (3) the next issue or issues which need to be developed in greater detail as part of a systematic evolution of the proposed rules.

Comments were filed by Carolina Power & Light Company, Duke Power Company, North Carolina Power, the Public Staff, the Attorney General, Paul Markowitz of the Energy Conservation Coalition, and Martha Drake. Additional reply comments were filed by CP&L and Duke Power Company.

Based on the comments filed in this proceeding, the Commission is of the opinion that the rules proposed in the Order of March 16, 1988, should be adopted with relatively minor revisions. The rules specify that demand-side resource planning and supply-side resource planning are to be integrated into a single planning process; and that alternative resource options must be studied and compared in such depth that a balanced, realistic evaluation of the options

can be made. The rules adopted herein also integrate Article 8 of the Commission's existing electric service rules (NCUC Rules R8-42 and R8-43 for Electric Energy Supply Planning) into the least cost integrated resource planning rules.

The Commission is also of the opinion that other issues commented on by the parties to the proceeding should be addressed by separate Order as appropriate. Such issues as a working definition of least cost integrated resource planning, appropriate rewards to utilities for efficiency and conservation, and competitive bidding systems for new capacity need further work and discussion.

In a companion Order issued this same day in Docket No. E-100, Sub 58, the Commission has scheduled hearings to consider, analyze, and investigate the least cost integrated resource plans which will be developed and filed in that docket by CP&L, Duke, North Carolina Power, and Nantahala. These plans will be prepared in conformity with all applicable state laws and the rules adopted and implemented by this Order. All interested parties, including the Public Staff and Attorney General, will be encouraged to participate in those hearings. The Commission has also scheduled six night hearings across the State of North Carolina for the convenience of those members of the general public who may wish to appear and testify. In addition, the Commission has indicated an intent to initiate, as an important part of those proceedings, a comprehensive investigation into the scope and effectiveness of the demand-side programs and resource options which our electric utilities currently have in place in North Carolina and which they may plan to initiate in the near future. In particular, CP&L, Duke, North Carolina Power, and Nantahala have been directed as part of their plans and testimony to provide a detailed description and assessment of the effectiveness of their energy conservation and load management programs. Furthermore, the Commission has also requested the Public Staff to conduct a comprehensive investigation into the scope and effectiveness of the integrated resource plans to be filed by the electric utilities, with particular emphasis being given to the subject of conservation and load management as a resource option.

In addition to the actions today taken in Docket No. E-100, Sub 58, the Commission concludes that it is also appropriate to request the Public Staff to coordinate efforts with CP&L, Duke, North Carolina Power, and Nantahala to jointly develop and propose an assortment of demand-side pilot demonstration projects for implementation and trial in North Carolina. The Commission believes that pilot projects can and will form an extremely important part of the process which is designed to implement a comprehensive program of least cost planning in this State.

IT IS, THEREFORE, ORDERED as follows:

1. That the rules attached hereto as Appendix A entitled "Least Cost Integrated Resource Planning" are hereby adopted effective on and after the date of this Order.

2. That Article 8 of the Commission's Rules for Electric Light and Power, consisting of NCUC Rules R8-42 and R8-43, is hereby rescinded effective on and after the date of this Order.

3. That the Public Staff is hereby requested to coordinate efforts with CP&L, Duke, North Carolina Power, and Nantahala to jointly develop and propose for the Commission's consideration an assortment of demand-side pilot demonstration projects for implementation and trial in North Carolina. The Public Staff is hereby requested to report back to the Commission regarding the status of this matter as soon as possible.

ISSUED BY ORDER OF THE COMMISSION.

This the 8th day of December 1988.

NORTH CAROLINA UTILITIES COMMISSION

Sandra J. Webster, Chief Clerk

(SEAL)

APPENDIX A

CHAPTER 8

ELECTRIC LIGHT AND POWER

ARTICLE 11

LEAST COST INTEGRATED RESOURCE PLANNING

Rule R8-56. General.

(a) Purpose. The purpose of least cost integrated resource planning is to ensure that each regulated electric utility operating in North Carolina is developing reliable projections of the long range demands for electricity in its service area and a combination of reliable resource options for meeting the anticipated demands in a cost effective manner. These rules are intended to be consistent with the applicable provisions of the North Carolina General Statutes, but are not intended to restrict or prohibit demonstration projects, pilot programs or other experimental ventures.

(b) Applicability. These rules are applicable to Carolina Power & Light Company, Duke Power Company, Nantahala Power and Light Company, and Virginia Electric and Power Company, d/b/a North Carolina Power.

(c) Integrated Resource Plan. Each utility shall develop and keep current a least cost integrated resource plan consisting of at least the following components:

(1) A load forecast;

(2) An integrated resource plan; and

(3) A short-term action plan.

(d) Data. Each utility shall provide such information and data as the Commission requests and deems necessary for proper evaluation of the integrated resource plans prepared by the utility.

(e) Filing. Each utility shall file its least cost integrated resource plan and supporting testimony with the Commission at the times designated by the Commission. The utilities should anticipate filing such plans approximately every two (2) or three (3) years. The Public Staff or any other intervenor may file a least cost integrated resource plan of its own, or it may prepare an evaluation of the least cost integrated resource plans filed by the utilities, or both. Any least cost integrated resource plans, evaluations, and supporting testimony prepared by the Public Staff or other intervenors shall be filed at the times designated by the Commission. A reasonable amount of time will be given for the Public Staff and other intervenors to evaluate the least cost integrated resource plans filed by the utilities prior to filing their own least cost integrated resource plans and evaluations. The intervenors should anticipate filing their own least

cost integrated resource plans and evaluations approximately four (4) months after receipt of the integrated resource plans filed by the utilities.

(f) Review. The Commission is required by G.S. 62-110.1(c) to consult with the utilities in North Carolina and with other state and federal agencies having relevant information in analyzing the long range needs for expansion of electric generating facilities in North Carolina. The Public Staff is required by G.S. 62-15(d) to assist the Commission in analyzing the long range needs for expansion of electric generating facilities pursuant to G.S. 62-110.1. Public hearings to consider the least cost integrated resource plans filed by the utilities and the least cost integrated resource plans and evaluations filed by the Public Staff and other intervenors shall be scheduled at the time and place designated by the Commission. The utilities and intervenors should anticipate public hearings being scheduled a minimum of 45 days after the filing of testimony and exhibits by the intervenors.

Rule R8-57. Load Forecasts.

The load forecasts filed by each utility as part of its least cost integrated resource plan shall include, at a minimum, the following:

(a) A description of the methods and assumptions used by the utility to prepare its forecast including a description of the models and variables used in the models;

(b) A tabulation of the utility's forecasts for at least a 15-year period, including peak loads for the summer and winter seasons of each year, annual energy forecasts, and the projected effects of non-price induced conservation and load management on the forecasted annual energy and peak loads for each year; and

(c) Highest, lowest, and most probable forecast scenarios based on the methods and assumptions used by the utility in preparing its forecasts; or, any other technique which addresses forecast uncertainty to at least a comparable degree.

Rule R8-58. Integrated Resource Plan.

Each utility shall evaluate each resource option without regard to geographical location which is reasonably available to it in meaningful quantities, including both demand-side and supply-side options, in order to determine an integrated resource plan which offers a combination of reliable resource options for meeting the anticipated demands on its system in a cost effective manner. The assumptions in the evaluation shall be fully documented, and the cost benefits of all resource options in the evaluation shall be quantified to the extent possible.

(a) Evaluation of Resource Options. Evaluation of resource options shall include at least the following considerations:

(1) Determine the present value of future revenue requirements where appropriate for in evaluating the resource options;

(2) Evaluate both demand-side and supply-side resource options using the best and most reasonable procedures available, including, but not limited to, such resource options as conservation, load management, relighting, insulation, cogeneration and small power production;

(3) Analyze the sensitivity of major assumptions used in the evaluation of resource options, including:

A. Assessment of risk in accordance with an assumption's potential impact on the least cost plan;

B. Assessment of reliability; and

C. Assessment of other uncertainties, including forecast uncertainty.

(b) Generating Facilities. Each utility shall provide data for the electric generating facilities (including planned additions and retirements, but excluding cogeneration and small power production) in its integrated resource plan. Data should be detailed enough to facilitate a comparative analysis of capacity alternatives and shall include all planning assumptions.

(1) Existing Generation. The utility shall provide a 15-year projection of the following:

A. Projected fuel use by type of generation. Data shall be annual data;

B. Projected unit characteristics by type of generation, such as availability factors, capacity factors, heat rates, outage rates or other relevant data. Data shall be annual data;

C. Projected retirements of existing units, including a discussion of the reasons for the retirements; and

D. Other projected changes to existing generating units which are expected to increase or decrease capability by at least 10% or 10 megawatts, whichever is less, plus a discussion of any life extension programs currently being planned or implemented.

(2) Planned Generation Additions. The utility shall provide a 15-year projection of the following:

A. Projected fuel use by type of generation. Data shall be annual data;

B. Projected unit characteristics by type of generation, such as availability factors, capacity factors, heat rates, outage rates or other relevant data. Data shall be annual data; and

C. Summaries of all studies supporting the new generation additions included in the least cost plan.

(c) Alternative Energy Resources. Each utility shall assess on an ongoing basis the potential benefits of reasonably available alternative energy resource options, including the benefits of lower fuel costs and improved efficiency of its generating facilities. Alternative energy resources shall include, but not be limited to, hydro, wind, geothermal, solar thermal, solar photovoltaic, municipal solid waste, biomass and other alternative energy resources. The utility shall discuss its overall assessment of alternative energy resources and it shall provide details of the methods and assumptions used in the assessment of those alternative energy resources having a significant impact on its least cost integrated resource plan. The utility shall also provide general information on the methods and assumptions used in the assessment of the reasonably available alternative energy resources considered under this paragraph but not adopted for its least cost integrated resource plan.

(d) Conservation and Load Management. Each utility shall assess on an ongoing basis the potential benefits of conservation and load management techniques, including the benefits of lower fuel costs and improved efficiency of the overall system. The utility shall discuss its overall assessment of conservation and load management techniques, and it shall provide details of the methods and assumptions used in the assessment of those conservation and load management techniques having a significant impact on its least cost integrated resource plan. The assessments shall include costs, benefits, risks, uncertainties, reliability, and customer acceptance where appropriate. The utility shall also provide general information on the methods and assumptions used in the assessment of those conservation and load management techniques considered under this plan but not adopted for its least cost integrated resource plan.

(e) Purchased Power. Each utility shall assess on an ongoing basis the potential benefits of reasonably available purchased power resources. The assessments shall include costs, benefits, risks, uncertainties, and reliability where appropriate. The utility shall discuss its overall assessment of its purchased power resources, including but not limited to

purchases from cogenerators, small power producers, independent power producers and other utilities, and provide details of the methods and assumptions used in the assessment of of those purchased power resources having a significant impact on its least cost integrated resource plan.

(f) Transmission/Distribution Facilities. Each utility shall assess on an ongoing basis the potential benefits of improvements to the transmission/distribution facilities. The utility shall discuss its overall assessment of transmission/distribution facilities improvements, and it shall provide details of the methods and assumptions used in the assessment of those facility improvements having a significant impact on its least cost integrated resource plan.

Rule R8-59. Short-Term Action Plan.

Each utility shall prepare an annual short-term action plan which discusses those specific actions currently being taken by the utility to implement its least cost integrated resource plan. The utility's short-term action plan shall contain a summary of the resource options or programs contained in its current least cost integrated resource plan and for which specific actions must be taken by the utility within the next two to three years. For each resource option or program, the summary shall include:

(a) The objective of the resource option or program;

(b) Criteria for measuring progress toward the objective;

(c) The implementation schedule for the program over the next two to three years; and

(d) Actual progress toward the objective to date.

Rule R8-60. Annual Report of Updates to Least Cost Integrated Resource Plans.

Every electrical public utility shall furnish the Commission with an annual report containing a fifteen-year forecast of loads and generating capability. An updated report shall be filed within thirty (30) days after any significant revision of the forecast, and there shall be at least one report filed annually. The report shall describe all generating facilities and known transmission facilities with operating voltage of 200 KV or more which, in the judgment of the utility, will be required to supply system demands during the forecast period. The report shall cover the 15-year period next succeeding the date of said reports and shall include the following:

(a) A tabulation of summer and winter peak loads, annual energy forecast, generating capability, and reserve margins for each year;

(b) A list of the existing plants in service with capacity, location, and any technological innovations to be backfitted to improve environment quality to the extent known;

(c) A list of generating units under construction or planned at plant locations for which property has been acquired, for which certificates have been received, or for which applications have been filed with location, capacity, plant type, and proposed date of operation included;

(d) A list of proposed generating units at locations not known with general location, capacity, plant type, and date of operation included to the extent known;

(e) A list of units to be retired from service with location, capacity and expected date of retirement from the system;

(f) A list of units which are being considered for life extension, refurbishment or upgrading. The reporting utility shall also provide the expected (or actual) date removed from service, general location, capacity rating upon return to service, expected return to service date, and a general description of work to be performed;

(g) A list of transmission lines and other associated facilities (200 KV or over) which are under construction or proposed including the capacity and voltage levels, location, and schedules for completion and operation;

(h) A list of any generation and associated transmission facilities under construction which have delays of over six months in the previously reported in-service dates and the major causes of such delays. Upon request from the Commission Staff, the reporting utility shall supply a statement of the economic impact of such delays;

(i) A list of future probable sites giving general location and description, major advantages, and whether the site is wholly owned, partially owned or not owned by the utility; and

(j) The current short-term action plan.

Rule R8-61. Preliminary Plans and Certificates of Public Convenience and Necessity for Construction of Electric Generation and Related Transmission Facilities in North Carolina.

(a) No commitments and contracts made for the purchase of a steam supply system, turbine, generator or other major component of the generation system shall be noncancelable until such time as the certificate of public convenience and necessity has been issued.

(b) Information to be filed 120 days or more before the filing of the application for a certificate of public convenience and necessity for generating facilities with capacity of 300 MW or more shall include the following:

(1) Available site information (including maps and description), preliminary estimates of initial and ultimate development, justification for the adoption of the site selected, and general information describing the other locations considered;

(2) As appropriate, preliminary information concerning geological, aesthetic, ecological, meteorological, seismic, water supply, population and general load center data to the extent known;

(3) A statement of the need for the facility including information on loads and generating capability;

(4) A description of investigations completed, in progress, or proposed involving the subject site;

(5) A statement of existing or proposed plans known to applicant of federal, state, local governmental and private entities for other developments at or adjacent to the proposed site;

(6) A statement of existing or proposed environmental evaluation program to meet the applicable air and water quality standards;

(7) A brief general description of practicable transmission line routes emanating from the site;

(8) A list of all agencies from which approvals will be sought covering various aspects of any generation facility constructed on the site and the title and nature of such approvals;

(9) A statement of estimated cost information, including plans and related transmission capital cost (initial core costs for nuclear units); all operating expenses by categories, including fuel costs and total generating cost per net kWh at plant; and information concerning capacity factor, heat rate, and plant service life. Furnish comparative cost including

related transmission cost of other final alternatives considered; and

(10) A schedule showing the anticipated beginning dates for construction, testing, and commercial operation of the generating facility.

(c) Procedures for obtaining the certificate of public convenience and necessity shall be as stated in the General Statutes.

(d) In filing an application for a certificate of public convenience and necessity pursuant to G.S. 62-110.1(a) in order to construct a generating facility, a utility shall include the following:

(1) The most recent least cost integrated resource plan of the utility plus any proposals by the utility to update said plan;

(2) Testimony specifically indicating the extent to which the proposed construction conforms to the utility's most recent least cost integrated resource plan; and

(3) Testimony supporting any utility proposals to update its most recent resource integration plan.


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1992 WL 486370 (N.C.U.C.)
(Publication page references are not available for this document.)

Re **Empire Power** Company
Docket No. SP-91
North Carolina Utilities Commission
April 23, 1992

ORDER dismissing, as deficient on its face, an application for a certificate of public convenience and necessity to construct an independent power production facility.

Commission rules that a certificate application by an independent power producer (IPP) must, at a minimum, allege a definite public need for the proposed facility. Moreover, if the IPP proposes to sell its electricity to an in-state utility, the application must allege a contract or written commitment from the utility agreeing to purchase the electricity.

Commission concludes that it is appropriate to require IPPs to establish public need for their facilities because, unlike qualifying cogeneration and small power production facilities, the need for IPPs is not established by federal law.
P.U.R. Headnote and Classification

1.
COMMISSIONS
s11
NC.U.C. 1992
Jurisdiction and powers -- Summary judgment -- Motions to dismiss.
Re Empire Power Company
132 P.U.R.4th 444, 1992 WL 486370 (N.C.U.C.)
P.U.R. Headnote and Classification

2.
ELECTRICITY
s3
NC.U.C. 1992
Generating plants -- Independent power producers -- Certification -- Filing requirements -- Demonstration of public need.
Re Empire Power Company
132 P.U.R.4th 444, 1992 WL 486370 (N.C.U.C.)
P.U.R. Headnote and Classification

3.
CERTIFICATES
s48
NC.U.C. 1992
Particular organizations -- Independent power producers.
Re Empire Power Company
132 P.U.R.4th 444, 1992 WL 486370 (N.C.U.C.)
P.U.R. Headnote and Classification

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4.
CERTIFICATES
s102
NC.U.C. 1992
Electric -- Construction -- Generating plant -- Independent power producer.
Re Empire Power Company
132 P.U.R.4th 444, 1992 WL 486370 (N.C.U.C.)
P.U.R. Headnote and Classification

5.
CERTIFICATES
s163
NC.U.C. 1992
Applications -- Filing requirements -- Independent power producers -- Generating plant -- Construction -- Demonstration of public need.
Re Empire Power Company
132 P.U.R.4th 444, 1992 WL 486370 (N.C.U.C.)
P.U.R. Headnote and Classification

6.
PUBLIC UTILITIES
s73
NC.U.C. 1992
Electric -- Independent power producers -- Certification requirements.
Re Empire Power Company
132 P.U.R.4th 444, 1992 WL 486370 (N.C.U.C.)
P.U.R. Headnote and Classification

7.
COGENERATION
s6
NC.U.C. 1992
Public Utilities Regulatory Policies Act -- Electric generation -- Public need -- Inapplicability to independent power producers.
Re Empire Power Company
132 P.U.R.4th 444, 1992 WL 486370 (N.C.U.C.)

BY THE COMMISSION:

On October 31, 1991, Empire Power Company (Empire) filed an Application pursuant to G. S. 62-110.1(a) seeking a certificate of public convenience and necessity authorizing construction of a 600 megawatt combustion turbine electric generating facility in Rockingham County, North Carolina. The facility is referred to as Rolling Hills. The Application was accompanied by information "in the format prescribed by Rule R8-61(b)." Empire subsequently filed revisions to this information on January 8 and January 31, 1992.

The Application was considered at the Commission Conference of November 12, 1991. On November 19, 1991, the Commission issued its Order Requiring Publication of Notice, which provided for notice of the Application to be published, mailed to the utility or utilities to which Empire plans to sell

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electricity, and delivered to the Clearinghouse Coordinator for distribution to interested State agencies.

On November 22, 1991, Empire filed a Certificate of Service of Notice on three utilities: Duke Power Company (Duke), Carolina Power & Light Company (CP&L), and North Carolina Power. By subsequent filing of January 8, 1992, Empire asserts that it does not seek to sell to North Carolina Power and does not consider North Carolina Power's capacity requirements as a basis for public need for Rolling Hills.

On December 20, 1991, CP&L filed a Complaint and Petition to Intervene. On December 23, 1991, Duke filed a Petition to Intervene and Complaint. Empire filed Responses on January 8, 1992. The Commission subsequently issued Orders allowing the interventions of CP&L and Duke on January 14, 1992.

On January 17, 1992, CP&L filed a Motion to Dismiss Empire Power Company's Application for a Certificate of Public Convenience and Necessity. The Commission scheduled an oral argument on the Motion by Order of January 22, 1992. Empire filed a Response to CP&L's Motion to Dismiss on January 31, 1992.

On January 28, 1992, Duke filed a Motion to Participate in Oral Argument asserting that Duke "generally adopts CP&L's Motion to Dismiss . . ."

On February 4, 1992, Empire filed a Motion for Summary Judgment arguing that it should be granted a certificate without any hearing or further proceedings.

The oral argument was held as scheduled on February 5, 1992. Arguments were presented on both the Motion to Dismiss and the Motion for Summary Judgment. At the close of oral argument, the Commission allowed time for further written arguments to be presented on both Motions.

Various responses and arguments were filed by the parties on February 21, 24 and 26, 1992. The Commission has carefully considered all of the arguments, oral and written, presented herein. The Commission will first consider the Motion to Dismiss Empire's Application.

[1] Empire argues that the Commission does not have the authority to dismiss its application because G.S. 62-82, which prescribes the procedure for handling certificate applications, does not provide for dismissal. (The Commission notes that G.S. 62-82 does not provide for summary judgment either, but Empire nonetheless filed a motion for summary judgment, citing Rule 56 of the Rules of Civil Procedures.) G.S. 62-60 grants the Commission "all the powers and jurisdiction of a court of general jurisdiction as to all subjects over which the Commission has or may hereafter be given jurisdiction by law." The statute goes on to provide that the Commission may render its decisions "upon questions of law and of fact in the same manner as a court of record." Commission Rule R1-7(a) provides that motions may be addressed to the Commission for various purposes including "for such other relief as may be appropriate." The motion herein is equivalent to a motion to dismiss for failure to state a claim for which relief can be granted, which any court can grant. The Commission, as a body with all the powers and jurisdiction of a court of general jurisdiction in this case, unquestionably has the power to grant or deny a motion to dismiss an application as deficient on its face. Because the Commission so clearly has such authority, specific mention of it in G.S. 62-82 would have been redundant.

[2] [3] [4] [5] [6] [7] CP&L and Duke move to dismiss Empire's Application as deficient on its face because the Application does not sufficiently allege a need for the Rolling Hills facility and because the information required by Commission Rule R8-61(b) was not prefiled before the Application. The Commission

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concludes that the Application should be dismissed on the first ground.

The Commission notes its authority to administer G.S. 62-110.1(a), the statute under which Empire filed its Application. G.S. 62-31 provides, "The Commission shall have and exercise full power and authority to administer and enforce the provisions of this Chapter and to make and enforce reasonable and necessary rules and regulations to that end." Thus, the Commission has authority to establish reasonable minimum filing requirements for certificate applications under G.S. 62-110.1(a). Pursuant to this authority, the Commission concludes that an independent power producer such as Empire must allege a definite public need for its proposed facility and that when, as in this case, the independent power producer proposes to sell its electricity to a North Carolina utility, it must allege a contract or written commitment from the utility agreeing to purchase the electricity. For the reasons stated hereinafter, the Commission concludes that this is a reasonable minimum filing requirement. Otherwise, the Commission will not know either the true nature of the facility it is being asked to certify or whether there is a need for the facility.

Empire has failed to meet this filing requirement. Empire's Application alleges "an outstanding proposal to sell long-term wholesale peaking capacity and energy to Duke . . . for delivery beginning as early as 1994." However, Empire does not have a contract or commitment with either Duke or CP&L. It is clear from their filings and argument that neither Duke nor CP&L is interested in buying electricity from Rolling Hills. They have other plans to meet their capacity needs in the time frame proposed by Empire. Empire's Application attempts to allege need in other ways. It alleges: (1) the Commission ruled in Docket No. E-100, Sub 58 (the 1989-90 least cost integrated resource planning investigation) that North Carolina electric utilities require approximately 3,000 megawatts of additional peaking capacity before the year 2000, and the Commission ruled in Docket No. E-7, Sub 461 (a certification proceeding filed by Duke for its Lincoln County Combustion Turbine Station) that Duke requires at least 1165 megawatts of peaking capacity by 1997; (2) the northeast part of Duke's service territory, which includes the proposed site of Rolling Hills, is the "primary location" to add peaking capacity to Duke's system; (3) Rolling Hills will be built at Empire's own risk; (4) Empire's "guaranteed cost of peaking capacity and energy" is below Duke's avoided cost of peaking capacity and energy; and (5) the draft air permit issued for Duke's Lincoln County Combustion Turbine Station limits Duke's proposed generating capacity at that facility. Empire's Application also cites the Commission's "load forecasts" adopted pursuant to G.S. 62-110.1(c). The Commission finds these allegations to be insufficient to support the Application. Some of the allegations repeat charges that Empire has already made against Duke in a pending complaint proceeding, Docket No. E-7, Sub 492. [FN1] The allegation that Duke's Lincoln capacity is limited by its air permit has been addressed by the Commission's Order on Motion to Issue Show Cause Order and Motion for Update and Reevaluation dated February 28, 1991, in Docket No. E-7, Sub 461. At best, Empire's Application simply cites the general load forecasts of Duke and CP&L and alleges a proposal, which has been rejected, to sell to Duke. The Commission needs more in order to implement G.S. 62-110.1 and G.S. 62-2(3a).

G.S. 62-110.1(a) provides

> . . . no public utility or other person shall begin the construction of any steam, water, and other facility for the generation of electricity to be

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directly or indirectly used for the furnishing of public utility service, even though the facility be for furnishing the service already being rendered, without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction.

The statute applies not only to public utilities, but also to "other person[s]." The purpose of the statute is to prevent the overbuilding of electric generating capacity. The Court of Appeals has stated the following:

This regulatory statute was enacted in 1965 to help curb overexpansion of generating facilities beyond the needs of the service area. To this end, the General Assembly used the term "public convenience and necessity" to define the standard to be applied by the Utilities Commission to proposed facilities. In reviewing the Commission's application of the standard in other regulatory actions, the Court has held that public convenience and necessity is based on an "element of public need for the proposed service." State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 270, 148 S.E.2d 100, 110 (1966); see also State ex rel. Utilities Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E. 2d 731 (1973), cert. den., 284 N.C. 623, 201 S.E.2d 693 (1974); State ex rel. Utilities Commission v. Queen City Coach Co., 4 N.C. App. 116, 166 S.E. 2d 441 (1969). Moreover in 1975, an "act to establish an expansion policy for electric utility plants in North Carolina, to promote greater efficiency in the use of all existing plants, and to reduce electricity costs by requiring greater conservation of electricity" was enacted by the General Assembly, 1975 Sess. Laws Ch. 780. This act, codified as G.S. 62- 110.1(c)-(f), directs the Utilities Commission to consider the present and future needs for power in the area, the extent, size, mix and location of the utility's plants, arrangements for pooling or purchasing power, and the construction costs of the project before granting a certificate of public convenience and necessity for a new facility. From these statutes and the case law, it is clear that the purpose of requiring a certificate of public convenience and necessity before a generating facility can be built is to prevent costly overbuilding. Environmental concerns were generally left to other regulatory agencies, except as they affect the cost and efficiency of the proposed generating facility.

State ex rel. Utilities Commission v. High Rock Lake, 37 N.C. App, 138, 140-141, 246 S.E. 2nd 787, cert. denied, 295 N.C. 646, 248 S.E. 2nd 257 (1978). [FN2] In another context, the Supreme Court has held that in order to show public convenience and necessity, the applicant must demonstrate a "definite public need" for the facility in question. State ex rel. Utilities Commission v. Two-Way Radio Services, Inc., 272 N.C. 591, 158 S.E. 2nd 855 (1968); State ex rel. Utilities Commission v. Carolina Tel. and Tel. Company, 267 N.C. 257, 148 S.E. 2nd 100 (1966). More recently, in 1987, the General Assembly enacted G.S. 62-2(3a) to require "least cost" planning and to encourage "use of the entire spectrum of demand-side options . . . as additional sources of energy supply and/or energy demand reductions."

What must an applicant allege and prove in order to show a definite public need for a proposed electric generating facility? The Commission has previously addressed the filing requirements for a public utility and a "qualifying facility," but these requirements are not appropriate for an independent power producer (IPP).

If the applicant is a public utility, Commission Rules R8-56 through R8-61 control. These rules require least cost integrated resource planning by our

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State's electric utilities and provide for detailed long-range load forecasts, analyses of current generating capability, evaluation of demand-side and supply-side resource options, and other data. Rule R8-61(d) provides that in filing an application for a certificate pursuant to G. S. 62-110.1(a), a utility shall include its most recent least cost integrated resource plan, any proposed updates to the plan, and testimony specifically indicating how the proposed facility conforms to the plan. The Commission must consider load forecasts "in acting upon any petition by any utility for construction." G.S. 62-110.1(c) (emphasis added). An IPP cannot simply cite a utility's load forecast or least cost integrated resource plan in order to show public need for its own certificate application. This is essentially what Empire has attempted. The Commission has previously ruled that a finding that a utility's least cost integrated resource plan is reasonable is not intended as a substitute for certification under G.S. 62-110.1(a), and the Court of Appeals upheld this view. State ex rel. Utilities Commission v. N.C. Electric Membership Corporation, 105 N.C. App. 136, 141, --S.E.2d-- (1992). In a certificate proceeding, an IPP must allege more than some general need; it must allege a definite need for its own proposed facility.

When the applicant for a certificate under G.S. 62-110.1(a) proposes a "qualifying facility" under federal law, Commission Rule R1-37 controls the filing requirements. Qualifying facilities include "small power producers" which employ renewable resources and "cogenerators" which use heat or steam that would otherwise be wasted in industrial processes to generate electricity. 16 USCA s 796 (17) (18). Rule R1-37 requires an application for a qualifying facility to include

The applicant's general plan for sale of the electricity to be generated, including the utility to which the applicant plans to sell the electricity, any provisions for wheeling of the electricity, arrangements for firm, non-firm or emergency generation, the service life of the project, and the projected annual sales in kilowatt hours.

Commission Rules R1-37(b)(1)(x). It is appropriate to require more from an IPP than from a qualifying facility. This is because federal law has essentially established the "public need" for qualifying facilities by requiring all electric utilities to purchase electricity from such facilities. 16 USCA s 824a-3(a). This law was enacted in 1978 as part of the National Energy Act to encourage the efficient use of energy resources. There is no comparable law for IPPs.

Since IPPs cannot simply rely upon the load forecasts of the utilities and since no law establishes "public need" for them, the Commission concludes that it is reasonable to require that an IPP proposing to sell its electricity to a North Carolina utility must first obtain and allege as part of its certificate application either a contract or a written commitment from the utility. [FN3] Our decision is reasonable in order to carry out the purposes of G.S. 62-110.1 and G.S. 62-2(3a). G.S. 62-110.1 is intended to effect the orderly and coordinated expansion of electric generating capacity. G.S. 62-2(3a) is intended to stress demand-side management by electric utilities. These purposes would be defeated were we to certify Empire's facility without knowing how or whether it fits into the overall scheme of energy planning. For example, Empire's Application cites Duke's and CP&L's needs for additional peaking capacity, but the utilities are planning to meet those needs in other ways. Duke has a

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certificate for the Lincoln County Combustion Turbine Station issued by this Commission in a proceeding in which Empire chose not to intervene. [FN4] CP&L has a certificate for a peaking facility in South Carolina. Requiring a contract or commitment before certification will insure that the purposes of G.S. 62-110.1 and G.S. 62(3a) -- to coordinate the building of electric generating capacity, to prevent overbuilding, and to use demand-side options -- are met. Further, without a contract or commitment, the Commission cannot know what type of facility it is certifying. Empire now proposes to sell its electricity to a North Carolina utility. However, if the Commission were to issue a certificate and no such agreement were ever reached, Empire would no doubt begin looking for other customers. Selling to a non-utility would raise completely different issues. It might even raise the issue of Empire trying to become a public utility itself although located within Duke's service territory. The Commission is entitled to know what type of facility it is being asked to certify at the time of the application.

Empire argues that the Commission would be deferring its authority to the utilities if it requires an IPP to obtain a contract or commitment before certification. This is not true at all. The Commission will exercise its complaint jurisdiction to ensure that utilities are acting in good faith with IPPs. Empire clearly knows this since Empire itself filed a complaint against Duke charging that Duke arbitrarily refused to consider purchasing electricity from Rolling Hills. The Commission, rather than dismissing the complaint as urged by Duke, scheduled an evidentiary hearing and gave Empire a full opportunity to present evidence as to Duke's actions. See the Order Denying Motion to Dismiss and Scheduling Evidentiary Hearing dated August 28, 1991, in Docket No. E-7 Sub 492. That complaint proceeding is pending before the Commission. In addition to filing a complaint, an IPP that believes it has a better alternative can intervene when a utility files a certificate application of its own. Empire could have participated when Duke obtained a certificate for its Lincoln County facility if it had acted timely. Finally, an IPP can participate in the Commission's least cost integrated resource planning investigations. Empire has already intervened in the current investigation, Docket No. E-100, Sub 64. Utility management is entitled, in the first instance, to decide how it proposes to meet its capacity needs, but the Commission retains oversight by way of complaint jurisdiction, least cost integrated resource planning investigations, and certification proceedings. Thus, an IPP has several options available to it, and the Commission is in no way delegating its authority to the utilities by the decision made today.

The Commission recognizes that before today, it had no rule or order in place specifying the requirements for a certificate application by an IPP. IPPs are a relatively new entrant in the field of electric generation. Empire is the first IPP to file an application for a certificate in North Carolina. The present docket is the first docket in which the Commission has dealt with this subject. It was not until CP&L's Motion to Dismiss that the Commission had occasion to examine the law and to determine public policy with respect to certificate applications by IPPs. Nonetheless, the Commission finds it appropriate to apply the requirement announced today to Empire's Application. To do otherwise would allow the reasons and policies upon which our decision is based to be defeated in this case. Empire is not unduly prejudiced since it does not have a buyer at this time. Our decision is of course without prejudice to Empire's right to file

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(Publication page references are not available for this document.)

a new application as soon as it can comply with our filing requirement.

Our decision to dismiss Empire's Application renders Empire's Motion for Summary Judgment moot. The Motion for Summary Judgment was of course predicated upon a valid application. Since we have concluded that the Application must be dismissed, it would be inappropriate to consider summary judgment.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss filed in this proceeding by CP&L on January 27, 1992, should be, and the same hereby is, allowed.

ISSUED BY ORDER OF THE COMMISSION.

This the 23rd day of April 1992.

FOOTNOTES

FN1 At oral argument Duke characterized Empire's Application as "simply another collateral attack on Lincoln."

FN2 The idea was broached at oral argument that fostering competition in electric generation might in and of itself constitute "public need." Suffice it to say that is not the policy decreed by G.S. 62-110.1(c)-(f), and the Commission must interpret "public convenience and necessity" in light of the policy enacted by the General Assembly.

FN3 This is not a unique requirement. When an applicant seeks a permit to operate as a contract motor carrier, Commission Rules require a written contract with one or more shippers or passengers having a need for a specific type of service not otherwise available. Commission Rule R2-15(b).

FN4 Empire petitioned to intervene over two months after the hearing was completed, and the Commission denied intervention as untimely.

EDITOR'S APPENDIX

PUR Citations in Text

[N.C.Sup.Ct.] North Carolina ex rel. Utilities Commission v. Carolina Teleph. & Teleg. Co., 267 N.C. 257, 64 PUR3d 243, 148 S.E.2d 100 (1966).

[N.C.Sup.Ct.] North Carolina ex rel. Utilities Commission v. Two Way Radio Service, 272 N.C. 591, 72 PUR3d 222, 158 S.E.2d 855 (1968).

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6

STATE of North Carolina ex rel. UTILITIES COMMISSION, Public Staff North Carolina Utilities Commission, and Carolina Power and Light Company and Duke Power Company as Intervenors
v.
EMPIRE POWER COMPANY, Applicant for Certificate of Public Convenience and Necessity.

No. 9210UC724.

Court of Appeals of North Carolina.

Oct. 19, 1993.

The Utilities Commission dismissed petition for certificate of public convenience and necessity, submitted by independent power producer. Appeal was taken. The Court of Appeals, McCrodden, J., held that: (1) Commission's authority with respect to certificates was not restricted to section of statute specifically dealing with approval of such certificates; (2) provision requiring that hearing be commenced within three months of filing of application was directory rather than mandatory, and did not compel issuance of certificate after period had expired; and (3) there were no material issues of fact requiring Commission to hold hearing.

Affirmed.

[1] PUBLIC UTILITIES ⇐ 147
317Ak147
State Utilities Commission is creature of legislature and exercises only that authority conferred on it by statute.

[2] ELECTRICITY ⇐ 8.4
145k8.4
Although state Utilities Commission may not deviate from specific statutory provisions governing approval of certificates of public convenience and necessity for construction of electricity generating facilities, Commission may rely upon other statutory provisions to interpret and implement process. G.S. §§ 62-82, 62-110.1.

[3] CONSTITUTIONAL LAW ⇐ 77
92k77
Utilities Commission's establishment of minimum filing requirements, in connection with application for certificate of public convenience and necessity to construct electricity generating facility, was not unconstitutional exercise of legislative powers by administrative board; commission was held to legislative standard, consisting of requirement that public convenience and necessity support construction of facility, and by ten specific policies regarding electric power generation, set forth in statute. G.S. §§ 62-2, 62-110.1.

[3] ELECTRICITY ⇐ 8.4
145k8.4
Utilities Commission's establishment of minimum filing requirements, in connection with application for certificate of public convenience and necessity to construct electricity generating facility, was not unconstitutional exercise of legislative powers by administrative board; commission was held to legislative standard, consisting of requirement that public convenience and necessity support construction of facility, and by ten specific policies regarding electric power generation, set forth in statute. G.S. §§ 62-2, 62-110.1.

[4] CONSTITUTIONAL LAW ⇐ 81
92k81
Utilities Commission action, in rejecting petition for certificate of convenience and necessity, was not an unconstitutional exercise of police power of state interfering with ability of petitioner to engage in lawful business, on its own land, with private funds; energy generation business was traditionally one subject to public regulation, in order to ensure reliable and economic power supply and avoidance of costly overbuilding.

[4] ELECTRICITY ⇐ 8.4
145k8.4
Utilities Commission action, in rejecting petition for certificate of convenience and

necessity, was not an unconstitutional exercise of police power of state interfering with ability of petitioner to engage in lawful business, on its own land, with private funds; energy generation business was traditionally one subject to public regulation, in order to ensure reliable and economic power supply and avoidance of costly overbuilding.

[5] ELECTRICITY ⇐ 8.4
145k8.4
Utilities Commission had not exceeded jurisdictional time limit, so as to be required to issue a certificate of convenience and necessity for the construction of electricity generating facility, even though it had not ordered hearing within ten days of last day of publication of notice of filing of petition; under statute imposing requirement automatic issuance of certificate would be defeated by Commission's receipt of a complaint within ten days of date of publication of notice, and such complaint was received. G.S. § 62- 82(a).

[6] ELECTRICITY ⇐ 8.4
145k8.4
Utilities Commission did not comply with requirement that it was to "commence" hearing on petition for certificate of convenience and necessity to construct electric generating facility within three months of filing of application, by scheduling within period oral argument on an opponent's motion to dismiss, to be held outside period. G.S. § 62-82(a).
See publication Words and Phrases for other judicial constructions and definitions.

[7] STATUTES ⇐ 227
361k227
Statutory time periods during which action is required to be taken are generally considered to be directory rather than mandatory, unless legislature expresses a consequence for failure to comply within time period.

[8] PUBLIC UTILITIES ⇐ 167
317Ak167
Statute providing that Utilities Commission must commence hearing on petition for certificate of public convenience and necessity, within three months after filing of application, was directory rather than mandatory, and did not compel issuance of certificate following noncompliance with time period; in same statute legislature had specified that Commission was required to issue certificate in event hearing was not ordered or complaint received with respect to petition within ten days of last publication of notice of application, and absence of corresponding mandatory language in connection with three months provision indicated it was directory. G.S. § 62-82(a).

[9] PUBLIC UTILITIES ⇐ 167
317Ak167
Utilities Commission was not required to hold hearing, prior to dismissal of an application for certificate of public convenience and necessity. G.S. §§ 62-82, 62-110.1.

[10] ELECTRICITY ⇐ 8.4
145k8.4
Independent power producer was not entitled to certificate of public convenience and necessity to construct electrical power generation facility, on grounds that it had established need for proposed facility and application; producer had cited proposal to sell long-term wholesale peaking capacity and energy to utility, which utility had already refused, and producer had relied upon outdated information covering power needs across entire state, as well as local area. G.S. § 62-110.1.

[11] ELECTRICITY ⇐ 8.4
145k8.4
Utilities Commission could dismiss petition for certificate of public convenience and necessity, thus taking action essentially equivalent to summary judgment, when there was no genuine issue as to material fact; petition had been based upon needs of utilities in area to purchase energy from provider, and utilities had denied such needs. G.S. § 62-110.1; Rules Civ.Proc., Rule 56(a), G.S. § 1A-1.
**554 *268 Petitioner Empire Power Company (Empire) is an independent power producer (IPP). IPP's, relatively new entrants into the power generation business, supply

power on a contract basis to public utilities and others for resale.

On 31 October 1991, Empire, pursuant to N.C.Gen.Stat. § 62-110.1(a) (1989), submitted an application for a certificate of public convenience and necessity (CPCN), to construct a 600 megawatt combustion turbine electric generating facility, to be called Rolling Hills, in Rockingham County. On 19 November 1991, pursuant to N.C.Gen.Stat. § 62-82(a) (1989), the North Carolina Utilities Commission (the Commission) issued an order requiring petitioner to publish four weeks of public notice in Rockingham County. The order also required petitioner to serve a copy of its application and the public notice on each of the utilities to which it planned to sell electricity. On 22 November 1991, petitioner filed a verification that on 21 November 1991, it had served copies of the application and public notice on Carolina Power & Light (CP & L), *269 Duke Power Company (Duke), and North Carolina Power. In a subsequent filing on 8 January 1992, petitioner asserted that it did not seek to sell to North Carolina Power. On 22 and 29 November and 6 and 13 December 1991, petitioner published its public notice, and on 30 December 1991, filed an affidavit of publication with the Commission. CP & L and Duke filed complaints and petitions to intervene in the proceeding on 20 and 23 December 1991, respectively. CP & L filed a motion to dismiss on 17 January 1992, followed by petitioner's motion for summary judgment, **555 filed 4 February 1992. On 5 February 1992, the Commission heard arguments on both the motion to dismiss and the motion for summary judgment. The Commission entered an order 23 April 1992, dismissing petitioner's application, and finding that the decision rendered petitioner's motion for summary judgment moot. From this order, petitioner appeals.

Broughton, Wilkins, Webb & Jernigan, P.A. by William Woodward Webb and Sara M. Biggers, Raleigh, for petitioner-appellant.

Robert P. Gruber, Executive Director, by Gisele L. Rankin, Staff Atty., Raleigh, for respondent-appellee, Public Staff--North Carolina Utilities Com'n.

Len S. Anthony and Hunton & Williams by Frank A. Schiller, Raleigh, for respondent-appellee, Carolina Power and Light Co.

Steve C. Griffith, Jr., William Larry Porter, Karol P. Mack, and Kennedy, Covington, Lobdell & Hickman by Myles E. Standish, Charlotte, for respondent- appellee, Duke Power Co.

McCRODDEN, Judge.

Petitioner's appeal, consisting of twelve assignments of error, requires our determination of three issues: (I) whether the Commission's dismissal of the petition for a CPCN exceeded the constitutional and legislative limits of the Commission's authority and jurisdiction over petitioner's application; (II) whether, once the Commission failed to order a hearing within ten days of publication, as required by N.C.G.S. § 62-82(a), the law required it to issue a CPCN to petitioner; and (III) whether the Commission had the authority, jurisdiction, and justification to dismiss petitioner's application. Within each of these general issues, petitioner presented additional questions which we will address in the order in which petitioner raised them.

*270 We initially note that N.C.Gen.Stat. § 62-94(b) (1989) governs our review of the Commission's decision. That statute provides that an appellate court may reverse or modify a decision of the Commission if the decision prejudices substantial rights of petitioner, because the Commission's findings, inferences, conclusions, or decisions are:
(1) In violation of constitutional provisions, or

(2) In excess of statutory authority or jurisdiction of the Commission, or
(3) Made upon unlawful proceedings, or
(4) Affected by other errors of law, or
(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
(6) Arbitrary or capricious.
N.C.G.S. § 62-94(b). This Court will uphold a

decision of the Commission unless we find error based on one of the enumerated grounds of section 62- 94(b). State ex rel. Utilities Comm. v. Southern Bell, 88 N.C.App. 153, 177, 363 S.E.2d 73, 87 (1987). The issues raised by petitioner relate to subsections (1) and (2), i.e., whether the Commission's action violated constitutional provisions or was in excess of its statutory authority or jurisdiction.

I.

[1] We first determine the scope of the Commission's authority and jurisdiction pursuant to Chapter 62. Petitioner contends that the Commission's authority and jurisdiction in determining certification cases for IPP's are limited to that expressly granted in N.C.G.S. §§ 62-82 and 110.1 (the CPCN sections). We agree with petitioner that the Utilities Commission is a creature of the legislature and exercises only that authority conferred upon it by statute, Utilities Com. v. Motor Lines, 240 N.C. 166, 168, 81 S.E.2d 404, 406 (1954), but we do not agree with petitioner's narrow interpretation of the statute.

In its 23 April 1992 order, the Commission allowed CP & L's motion to dismiss on the ground that petitioner failed to show, as it must under section 62- 110.1, that public convenience and necessity required construction of the Rolling Hills facility. Petitioner contends that the Commission's dismissal of its application and *271 its establishment of minimum filing requirements constituted **556 an impermissible deviation from the process specifically provided in sections 62-82 and 110.1, and any deviation from these sections is beyond the Commission's authority and jurisdiction.

Section 62-110.1 concerns the Commission's role in receiving and acting upon CPCN applications, and states that "no public utility or other person shall begin the construction of any ... facility for the generation of electricity to be directly or indirectly used for the furnishing of public utility service ... without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction." N.C.G.S. § 62-110.1(a) (emphasis added). Section 62-82 concerns the special procedure to be followed when reviewing a CPCN application. Specifically, section 62-82(a) provides that when a CPCN application is filed:

> [T]he Commission shall require the applicant to publish a notice thereof once a week for four successive weeks in a daily newspaper of general circulation in the county where such facility is proposed to be constructed and thereafter the Commission upon complaint shall, or upon its own initiative may, upon reasonable notice, enter upon a hearing to determine whether such certificate shall be awarded. Any such hearing must be commenced by the Commission not later than three months after the filing of such application.... If the Commission or panel does not, upon its own initiative, order a hearing and does not receive a complaint within 10 days after the last day of publication of the notice, the Commission or panel shall enter an order awarding the certificate.

N.C.G.S. § 62-82(a).

[2] Petitioner maintains that the CPCN sections provide a sufficiently complete set of instructions, so that the Commission would not need to refer to other more general laws contained in Chapter 62. Petitioner cites State ex rel. Utilities Comm. v. Edmisten, 291 N.C. 451, 232 S.E.2d 184 (1977), in support of its argument that the general powers of the Commission, granted pursuant to the various sections of Chapter 62, cannot be inferred into statutes which are more specific in their application, i.e., N.C.G.S. §§ 62- 82 and 62-110.1. In Edmisten, the Supreme Court found that the language of N.C.Gen.Stat. § 62-134(e) was clear and unambiguous, and thus the Commission could not employ a more general statute, *272 N.C.Gen.Stat. § 62-3(24), to alter the meaning and thus nullify section 62-134(e). We find the instant case distinguishable from Edmisten since we determine, as illustrated in part II of this opinion, that sections 62-110.1 and 62-82 do not provide the Commission with complete

instructions for the process of awarding and denying certificates to applicants. Therefore, the Commission may turn to the more general sections of Chapter 62, specifically, N.C.Gen.Stat. § 62-31 (1989) and N.C.Gen.Stat. § 62-60 (1989), for guidance in interpreting the process not addressed in sections 62-82 and 62-110.1. In so doing, however, the Commission may not, and we find it did not, deviate from the process which is stated clearly and unambiguously in sections 62-82 and 62-110.1: the Commission required petitioner to publish notice once a week for four weeks; the notice was last published on 13 December 1991, and the Commission received two complaints within ten days following the last day of publication of petitioner's notice.

Within Chapter 62, sections 62-31 and 62-60 confer rule-making and judicial powers upon the Commission. However, petitioner argues that the CPCN sections narrowly circumscribe the Commission's jurisdiction over it since it is not a "public utility," and therefore the Commission should be limited to only those procedures specifically stated in sections 62-82 and 62- 110.1. Since neither section 62-82 nor section 62-110.1 specifically provides for the dismissal of CPCN applications or the establishment of minimum filing criteria, petitioner maintains that the Commission should be prevented from employing those procedures. Assuming arguendo that petitioner is not a public utility, we nevertheless determine that the Commission's exercise of its judicial powers in ruling upon CPCNs for non-utilities is not limited exclusively **557 to sections 62-82 and 62-110.1. Nothing in section 62-82(a) suggests that the North Carolina legislature intended to limit the Commission's exercise of its section 62-31 and section 62-60 powers in such a way as to exclude CPCN applications.

Furthermore, we have already determined that, although the Commission may not deviate from the provisions expressly stated in sections 62-82 and 62- 110.1, the Commission may rely upon other sections in Chapter 62 to interpret and implement the process. Any other interpretation of the statute would leave the Commission without procedure in instances in which the General Assembly did not anticipate all of the facts and circumstances arising in the Commission's review of an application. Because the CPCN sections *273 do not contain complete instructions, they cannot be the sole source of the Commission's authority and jurisdiction over applications for certificates. For example, sections 62-82 and 62-110.1 contain no provisions concerning the Commission's authority to hear dispositive motions, motions on evidentiary matters, or motions related to discovery. We conclude that the Commission may resort to other parts of Chapter 62 for the processing of applications. This allows it to effectuate the purpose of the Chapter, which is to promote the policy of the State as set forth in N.C.Gen.Stat. § 62-2 (1989). Utilities Comm. v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

[3] Relying on these same assignments of error, petitioner also argues that the Commission's order dismissing petitioner's application was unconstitutional because it constituted an improper exercise of legislative powers. We agree with petitioner that the General Assembly cannot delegate to an administrative board the power to legislate. Farlow v. Bd. of Chiropractic Examiners, 76 N.C.App. 202, 211, 332 S.E.2d 696, 702, disc. review denied, 314 N.C. 664, 336 S.E.2d 621 (1985). We do not agree, however, that the Commission's establishment of minimum filing requirements constituted an unconstitutional exercise of legislative powers. In Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R., 295 N.C. 683, 249 S.E.2d 402 (1978), an instructive case for us, the Supreme Court addressed the legislature's delegation of authority to develop and adopt guidelines for the coastal areas of North Carolina to the Coastal Resources Commission. The Court stated:

In the search for adequate guiding standards the primary sources of legislative guidance are declarations by the General Assembly of the legislative goals and policies which an agency is to apply when exercising its delegated powers. We have noted that such declarations need be only "as specific as the

circumstances permit." When there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances.
Id. at 698, 249 S.E.2d at 411 (citation omitted).

*274 With regard to electric generating facilities, the General Assembly set forth a specific standard for the Commission, i.e., whether public convenience and necessity requires the construction of the proposed facility. We read this standard in pari materia with N.C.G.S. § 62-2 which contains ten specific policies, among which are promoting the inherent advantages of regulated public utilities and adequate, reliable, and economic utility service, including the entire spectrum of demand side option as resources necessary to meet future growth, and fostering continued service of public utilities on a well-planned and coordinated basis. We believe that the standard of public convenience and necessity and the policies of the State are sufficient to guide the Commission in deciding a CPCN case and that the legislature's delegation of this authority is not unconstitutional.

**558 [4] Petitioner next contends that the Commission's deviation from the process prescribed by sections 62-82 and 62-110.1 constituted an unconstitutional exercise of the police power of the State, and thus the Commission should not be able to prevent petitioner from engaging in lawful business, on its own land, with private funds. The cases cited by petitioner are distinguishable from the instant case, and we therefore find this argument meritless. State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1940), cited by petitioner, involved the licensing of individuals in the dry cleaning business. The Supreme Court distinguished between industries requiring scientific or technical knowledge and skill and those which are "ordinary trades and occupations, harmless in themselves, in many of which men have engaged immemorially as a matter of common right...." Id. at 756, 6 S.E.2d at 861. The Court found that the dry cleaning business fit in the latter category, and thus strictly reviewed the statute. The Court stated that an exercise of police power may be valid if the proposed restriction has a reasonable relation to the evil it purports to remedy. Id. at 759-60, 6 S.E.2d at 863.

The facts in the instant case show that petitioner does not intend to engage in the type of "ordinary trade or occupation" referred to in Harris, such as the Court considered the dry cleaning business to be in 1940. Because the supply and sale of electricity to other utilities is not an ordinary trade or occupation, we will not strictly construe the statute. We find that the licensing of IPPs has a reasonable relation to the creation of a reliable and economical power supply and the avoidance of the costly overbuilding *275 of generation resources. See State ex rel. Utilities Comm. v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

Petitioner also cites In re Hospital, 282 N.C. 542, 193 S.E.2d 729 (1973), in which the Supreme Court overturned N.C.Gen.Stat. § 90-291, which required a certificate of public convenience and necessity before beginning construction of a hospital, finding that the General Assembly had not established a reasonable relationship between the regulation of private facilities for medical care and the public health. After that opinion, however, the legislature repealed the statute on which the case was based and enacted N.C.Gen.Stat. §§ 131E-175 to -190 (1992), which requires certificates of need in the development of new institutional health services and which rendered moot the holding of In re Hospital. Moreover, even if the case were not moot, the Supreme Court distinguished the public utility business from the medical industry, stating:
In the public utility businesses competition, deemed unnecessary, is curtailed by the requirement that one desiring to engage in such business procure from the Utilities

Commission a certificate of public convenience and necessity. However, in those fields the State has undertaken to protect the public from the customary consequences of monopoly by making the rates and services of the certificate holder subject to regulation and control by the Utilities Commission. No comparable power to regulate hospital rates and services has been given to the Medical Care Commission. Id. at 550, 193 S.E.2d at 734-35 (citations omitted). Indeed, one of the purposes of Chapter 62 is to "promote the inherent advantages of regulated public utilities." N.C.G.S. § 62-2(2). Although we need not reach the question of whether petitioner is a public utility, we find that the statute indicates that there is a substantial public purpose in the licensing of power generating facilities such as that proposed by petitioner.

Finally, we summarily dismiss petitioner's argument that, if the Commission may find authority from sections other than 62-82 and 62-110.1, the entire CPCN process would be fraught with uncertainty. We find section 62-82, when read in conjunction with other provisions of Chapter 62, sufficiently clear to avoid the confusion suggested by petitioner.

*276 II.

[5] In petitioner's next assignment of error, it contends that section 62-82 presents **559 a jurisdictional time limit, during which the Commission must order a hearing in order to maintain jurisdiction over the CPCN process. We do not agree with petitioner's analysis of section 62-82 that, if the Commission does not order a hearing, it must award a certificate within ten days of the last day of the publication of the notice. Section 62-82(a) provides, "[i]f the Commission or panel does not, upon its own initiative, order a hearing and does not receive a complaint within 10 days after the last day of publication of the notice, the Commission or panel shall enter an order awarding the certificate." (Emphasis added). We find it unnecessary to determine whether the phrase within ten days of the last day of the publication applies only to the period of time within which the Commission must receive a complaint, as suggested by the doctrine of the last antecedent, HCA Crossroads Residential Ctrs. v. N.C. Dept. of Human Res., 327 N.C. 573, 578, 398 S.E.2d 466, 469 (1990), because it is clear that the Commission's receipt of Duke's and CP & L's complaints to petitioner's application defeated the automatic issuance of the certificate.

[6] Petitioner also argues that the Commission failed to commence a hearing within three months after the filing of the CPCN application, and therefore, the Commission is without jurisdiction to act in any manner other than to award a certificate to petitioner. We agree that the Commission failed to commence a hearing within the three-month period, as required by section 62-82(a). Section 62-82(a) requires that "[the] hearing must be commenced by the Commission not later than three months after filing of such application. " (Emphasis added). Since petitioner filed its application on 31 October 1991, the three-month time period for commencing a hearing began to run from this date. On 22 January 1992, the Commission scheduled oral argument on CP & L's motion to dismiss for 5 February 1992.

Black's Law Dictionary defines the word "commence" as "to initiate by performing the first act" or "to institute or start." Black's Law Dictionary, 6th Edition 268 (1990). We find unpersuasive the Commission's argument that the order of 22 January 1992, scheduling oral argument to be held on 5 February 1992 which is outside the three-month time period, constituted a commencement of the hearing. If we were to find that the mere scheduling of a hearing *277 constituted a commencement, the Commission could schedule a hearing in the indefinite future, which is clearly not the intent of the statute. The General Assembly intended that the determination whether to award a CPCN certificate be an expedient procedure; section 62-82 provides that the procedure for "rendering decisions" during the hearing of a CPCN application shall take precedence over all other matters on the Commission's calendar, except for rate cases conducted pursuant to N.C.Gen.Stat. § 62-81 (1989).

[7] Since the Commission failed to commence a hearing within three months, petitioner maintains the Commission was left with jurisdiction only to grant a certificate to petitioner. We disagree. Whether the time provisions of section 62-82(a) are jurisdictional in nature depends upon whether the legislature intended the language to be mandatory or directory. Art Society v. Bridges, 235 N.C. 125, 130, 69 S.E.2d 1, 5 (1952). Many courts have observed that statutory time periods are generally considered to be directory rather than mandatory unless the legislature expresses a consequence for failure to comply within the time period. See Meliezer v. Resolution Trust Co., 952 F.2d 879, 883 (5th Cir.1992); Thomas v. Barry, 729 F.2d 1469, 1470 n. 5 (D.C.Cir.1984). If the provisions are mandatory, they are jurisdictional; if directory, they are not.

[8] Section 62-82 clearly specifies that one provision is mandatory, and that is the one that requires that a certificate be issued if the Commission does not order a hearing at all and there is no complaint filed within ten days of the last date of publication. However, the statute is silent as to the consequences, if any, which would result from the Commission's failure to commence a hearing within the three-month time period. When the General Assembly, **560 in the same statute, expressly provides for the automatic issuance of a certificate under different circumstances (the Commission does not order a hearing and no complaint is filed), the only logical conclusion is that the General Assembly only intended for an automatic issuance to occur in that specific situation. Cf. Campbell v. Church, 298 N.C. 476, 482, 259 S.E.2d 558, 563 (1979) (an exchange of real property between a redevelopment commission and a church must comply with the advertisement and bid requirements of N.C.Gen.Stat. § 160A-514(d), since the statute contained certain instances, of which an exchange was not included, where advertisement and bids are not required).

*278 Petitioner relies upon HCA Crossroads, which held that an agency's failure to act on a certificate of need within the time period provided by N.C.Gen.Stat. § 131E-185 divested the agency of jurisdiction to take any action other than issuing the certificate. HCA Crossroads is inapplicable to the case at hand because the Court addressed a statute (N.C.G.S. § 131E-185) which contains specific language stating that the "Department shall issue ... a certificate of need with or without conditions or reject the application within the review period. " HCA Crossroads, 327 N.C. at 577, 398 S.E.2d at 469 (emphasis added); N.C.G.S. § 131E-185(b). The absence of any such explicit language in section 62-82(a) distinguishes this case from HCA Crossroads.

The Commission's automatic issuance of a certificate, when complaints and motions to intervene have been filed in the matter and a sufficient showing of public need has not been made, would be contrary to the purpose of section 62-110.1(a). The primary purpose of the statute is to provide for the orderly expansion of the State's electric generating capacity in order to create the most reliable and economical power supply possible and to avoid the costly overbuilding of generation resources. Eddleman, 320 N.C. at 362, 358 S.E.2d at 351. In order to give effect to this purpose, we find the language in section 62-82 to be directory and, thus, not jurisdictional.

III.

[9] We likewise reject petitioner's final set of arguments further questioning the authority, jurisdiction, and justification of the Commission's action. The first of these arguments is that section 62-82(a) requires the Commission to hold a hearing before it can dismiss a CPCN application. Petitioner bases its interpretation upon its earlier argument that the Commission's powers over CPCN applications are limited to those enumerated in sections 62-82 and 62-110.1. As previously stated, however, where section 62-82 is silent, the Commission may refer to the judicial powers of Chapter 62 to supplement its procedure for awarding or denying certificates. Section 62-60 describes the Commission's authority as that of a court of general jurisdiction in which it "shall render its

decision upon questions of law and fact in the same manner of a court of record." The Commission's dismissal of the application was, therefore, a proper exercise of its authority. We also note that, although petitioner initially opposed CP & L's motion to dismiss on the basis *279 that section 62-80 did not authorize it, it later filed a motion for summary judgment, arguably abandoning its position concerning the authority of the Commission.

[10] We also do not agree with petitioner's argument that the Commission erred in dismissing its application because, according to petitioner, it had established the need for its proposed facility in its application. Before awarding a certificate, the Commission must comply with section 62-110.1 which requires a showing of public convenience and necessity by the applicant. Subsection (d) mandates the Commission's consideration of the "applicant's arrangement with other electric utilities for interchange of power, pooling of plant, purchase of power and other methods for providing reliable, efficient and economical electric service." Petitioner's application stated that it had an outstanding proposal to sell long-term wholesale peaking capacity and energy to Duke for delivery beginning as early as 1994. Duke, however, had **561 refused this proposal. Additionally, the application, citing dated testimony from previous Commission hearings, generally asserted that there was a need for its proposed facility across the state as well as within the Duke service territory. We find that this forecast of evidence on the issue of need was inadequate and that the Commission's dismissal was proper.

[11] Petitioner argues that the Commission's dismissal of its application was similar to granting summary judgment and was in error, because the issue of public convenience and necessity was a genuine issue of material fact. Although the determination of public convenience and necessity is essentially a factual inquiry, summary judgment is appropriate when there is no genuine issue as to any material fact. N.C.Gen.Stat. § 1A-1, Rule 56(a) (1990). The Commission based its order dismissing petitioner's application upon the following facts: petitioner is an IPP and, as such, proposed to construct a 600 megawatt electric generating facility in Rockingham County; it based public need for this facility upon the allegation that Duke and/or CP & L needed such a facility; neither Duke, CP & L, nor any other public utility, however, had committed to purchase the output of petitioner's proposed facility; and in fact both Duke and CP & L objected to petitioner's application. Petitioner failed to raise any genuine dispute concerning these facts.

The Utilities Commission is required to regulate the expansion of electric utility plants in North Carolina and, before issuing a *280 CPCN, must establish a public need for a proposed generating facility. In re Duke Power Co., 37 N.C.App. 138, 245 S.E.2d 787, disc. review denied, 295 N.C. 646, 248 S.E.2d 257 (1978). Petitioner failed to raise a genuine issue of material fact that public need required construction of the Rolling Hills facility, and the Commission's dismissal of its application was appropriate. The Commission's decision was without prejudice to petitioner's right to file another application at some future date.

In finding that there was no genuine issue of material fact as to the public need for the Rolling Hills facility, we have no need, and we decline, to address petitioner's question of whether the Commission appropriately linked the need for petitioner's power to a requirement, first stated in the Commission's order, that petitioner have a contract to sell such power.

For the foregoing reasons, we affirm the Commission's dismissal of petitioner's application for a certificate of public convenience and necessity.

Affirmed.

WELLS and JOHN, JJ., concur.

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KEYCITE

CITATION: **State ex rel. Utilities Com'n v. Empire Power Co., 112 N.C.App. 265, 435 S.E.2d 553, Util. L. Rep. P 26,349 (N.C.App., Oct 19, 1993) (NO. 9210OUC724)**

History of the Case
Direct History

1 Re Empire Power Company, 1992 WL 486370, 132 P.U.R.4th 444 (N.C.U.C. Apr 23, 1992) (NO. SP-91)
Order Affirmed by
=> 2 **State ex rel. Utilities Com'n v. Empire Power Co.,** 112 N.C.App. 265, 435 S.E.2d 553, Util. L. Rep. P 26,349 (N.C.App. Oct 19, 1993) (NO. 9210OUC724)
Review Denied by
3 State ex rel. Utilities Com'n v. Empire Power Co., 335 N.C. 564, 441 S.E.2d 125 (N.C. Jan 27, 1994) (NO. 473P93)