

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of

DOCKET NO. 981042-EM

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.



VOLUME 2

Pages 144 through 354

PROCEEDINGS:

HEARING

BEFORE:

CHAIRMAN JULIA L. JOHNSON
COMMISSIONER J. TERRY DEASON
COMMISSIONER SUSAN F. CLARK
COMMISSIONER JOE GARCIA
COMMISSIONER E. LEON JACOBS, JR.

DATE:

Wednesday, December 2, 1998

TIME:

Commenced at 9:30 a.m.
Adjourned at 6:45 p.m.

PLACE:

Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY:

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APPEARANCES:

(As heretofore noted.)

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I N D E X

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P R O C E E D I N G S

(Hearing reconvened at 2:00 p.m.)

(Transcript follows in sequence from
Volume 1.)

CHAIRMAN JOHNSON: Mr. Wright, I understand that there's a need to perhaps go out of order with your witnesses, with your individuals that are going to -- the presentations.

MR. WRIGHT: Yes, Madam Chairman. Professor Seidenfeld has to teach a class shortly, and if it's acceptable to the Commission, we would propose that he present his section of the argument which addresses federal preemption, next and then go back to the conclusion of my comments on the state law issues.

CHAIRMAN JOHNSON: Okay.

MR. SEIDENFELD: Thank you, Commissioners.
The interpretation of Section 403.519 advocated by the opponents to Duke New Smyrna's project is not only incorrect, it is also preempted by federal law. This is relevant to you, because if you believe that the statute is subject to two different interpretations, and one of those is preempted by federal law, then your discretion is limited and you cannot adopt that interpretation.

And I would submit that the interpretation

1 advocated, as I said, by the opponents is preempted.
2 It's preempted because the interpretation would
3 conflict with and undermine the full implementation of
4 the objectives of the Energy Policy Act of 1992 and
5 FERC's Order 888.

6 As Commissioner Deason stated earlier in
7 questioning, we are in a new era, and the federal law
8 that reflects this new area is the Energy Policy Act
9 and FERC's Order 888. It is precisely with these laws
10 that the interpretation advocated by opponents is in
11 conflict.

12 One of the major objectives of the Energy
13 Policy Act, if not the overriding objective, was to
14 prevent vertically integrated utilities from using
15 their preferred position as coordinated generators,
16 transmitters, and distributors of power to stymie
17 development of a robust, competitive, wholesale market
18 for power.

19 When Congress adopted the act, FERC had
20 already been trying through individual market based
21 rate orders to encourage the development of a
22 competitive wholesale market, but it was faced with
23 vertically integrated utilities who were not being
24 very cooperative, because by their control over
25 transmission they could stop the generator, these

1 plants, generation plants, from being able to deliver
2 the power to their ultimate buyers.

3 And the vertically integrated utilities, of
4 course, have an incentive to do that, because if the
5 wholesale generators cannot deliver the power, then
6 there's no competition in the generation market, and
7 the utilities get to earn a return on the generation
8 that they provide.

9 It was precisely for this reason that
10 Congress in the Energy Policy Act gave FERC the
11 authority to order wheeling of wholesale power. As
12 the Congress recognized in the committee report from
13 the House, it said that absent clarification of FERC
14 wheeling authority, it can be expected that some
15 utilities will try to exercise their monopoly power to
16 block IPPs and other legitimate transmission requests.

17 This would permit unlawful discrimination to
18 thwart efficiency in the electricity industry and
19 would defeat of the Commission's -- that is, FERC's --
20 goal of encouraging low rates for consumers through
21 greater competition. That's House Report
22 No. 102-474I.

23 Now, although the act explicitly addresses
24 barriers to the development of wholesale -- of the
25 competitive wholesale market by -- that vertically

1 integrated utilities can erect over their control over
2 transmission, the reason for this is because that is
3 the power that such utilities had utilized, and I
4 don't think that Congress was aware of, nor am I aware
5 of, other states that had adopted this notion that the
6 vertically integrated utilities could force generators
7 into a position where they had to enter contracts or
8 they could not build their power plants.

9 But, nonetheless, whether -- wholesale
10 generators cannot compete because they have no way to
11 transmit power to buyers, or whether they cannot
12 compete because they can't build their plants in the
13 first place, the effect is the same.

14 Essentially, the interpretation advocated by
15 the opponents would give the utilities a veto power
16 over the wholesale generators, the exempt wholesale
17 generators, coming in and fulfilling the need that
18 Congress sought and saw, and that FERC saw of creating
19 a robust, wholesale competitive power market.

20 So by requiring Duke New Smyrna to enter
21 into a contract with a state-regulated retail utility,
22 the Commission would restore the power exercised by
23 traditionally vertical -- vertically integrated
24 utilities to prevent the development of a fully
25 competitive, wholesale generation market; a power that

1 the Energy Policy Act meant to take away from these
2 utilities.

3 The goals of Order 888, which actually was
4 premised on --

5 COMMISSIONER DEASON: Excuse me. Is the
6 signing of long-term contracts, does that prevent
7 wholesale competition?

8 MR. SEIDENFELD: The signing of long-term
9 contracts -- well, that would not prevent competition
10 if it's done voluntarily.

11 The idea is to leave it to the market to
12 decide what is the best mechanism for the generation
13 and delivery of power. So if a merchant plant were to
14 sign long-term contracts because it felt that was the
15 best it could do, and that was the best in the sense
16 of reducing or allocating the risk of these -- of
17 unknown events in the future, that would certainly be
18 consistent with the act.

19 COMMISSIONER DEASON: So a requirement, if
20 you follow argument that's been presented here today
21 that it takes a long-term contract before an applicant
22 has status to get a need determination, you're saying
23 that interpretation is preempted by federal law?

24 MR. SEIDENFELD: Well, the problem is not
25 whether entering a contract is inconsistent with

1 federal law; the problem is giving utilities the
2 decision of the power to decide not to enter contracts
3 is what's contrary to the policies of the Energy
4 Policy Act and the goals of the Energy Policy Act,
5 because --

6 COMMISSIONER DEASON: Well, how did their
7 decision not to enter into contracts -- I thought
8 this -- this Commission has a bidding rule, does it
9 not?

10 MR. SEIDENFELD: I'm not sure what that
11 means. I'm not familiar with the Commission's bidding
12 rule. I was just talking about the interpretation of
13 the Act.

14 But as I understand it, the utilities would
15 be able to delay, if not entirely stop, plants from
16 being built by refusing to sign contracts that would
17 be reasonable and thereby put the wholesale generators
18 at a great disadvantage, if not stop them totally, by
19 simply refusing to sign these contracts or delaying
20 the signing of the contract and making the Commission
21 order them to do so, if the Commission has that power.

22 COMMISSIONER DEASON: If there is truly the
23 need for capacity, the utility has an obligation to
24 either build that capacity themselves or to purchase
25 that from another entity; is that correct?

1 **MR. SEIDENFELD:** Well, yes, that is correct;
2 but, of course, that obligation existed when utilities
3 were refusing to transmit power and wheel power as
4 well. And if the situation was such that -- and
5 Congress recognized this, that the utilities are not
6 going to go voluntarily into this competitive market;
7 not all of them anyway. Some of them would perhaps
8 relish it, but others wouldn't. And any barrier to
9 entry that gives the utility the power to essentially
10 bias that market or veto entrance into that market
11 would be inconsistent with the act and the goals of
12 the act.

13 **COMMISSIONER DEASON:** You're saying that the
14 argument presented here today by Florida Power & Light
15 and Florida Power Corporation, that that
16 interpretation of the law is a barrier to entry and is
17 preempted by federal law?

18 **MR. SEIDENFELD:** Yes, that's exactly what
19 I'm saying. It's a barrier to entry; not only a
20 barrier to entry, but it's a barrier to entry that is
21 put in the hands of the very utility that will be
22 competing with the wholesale generator. That's the
23 problem.

24 And not only did Congress want there to be a
25 competitive market -- that is the general goal -- but

1 they made it very clear -- in fact, virtually half of
2 the Energy Policy Act relates to -- the part on
3 electricity -- relates to taking away the power of
4 utilities to stop the development of the wholesale
5 market by refusing to wheel.

6 They did not address these aspects of
7 refusals to enter contracts or delaying things by
8 entering contracts because, to tell you the truth, I
9 don't think that they were aware of or saw this. This
10 is a pretty unique situation to Florida with the
11 reading of the statute that the opponents advocate.

12 COMMISSIONER DEASON: It takes some pretty
13 unique reading of the federal law to say that the
14 utilities' interpretation is a barrier to competition,
15 does it --

16 MR. SEIDENFELD: Excuse me?

17 COMMISSIONER DEASON: You just told me that
18 the federal law didn't even contemplate the
19 requirement to have contracts as a barrier to
20 competition. So you're having some pretty ingenious
21 interpretation of federal law to say that the
22 utilities' interpretation of state law is a barrier to
23 competition; is that not --

24 MR. SEIDENFELD: No, no. I don't think that
25 you have to say that there was, if you will, a

1 specific requirement or envisioning of a certain
2 mechanism by which the states would regulate that
3 has -- that involves preempting. Preemption occurs
4 whenever the states regulate in such a way that it
5 impedes substantially the affectation of the goals of
6 Congress and of the agencies that have regulated
7 pursuant to the congressional statutes.

8 And in this case, both FERC's Order 888 and
9 the act itself, I think, are pretty clear that they do
10 not want the traditional vertically integrated
11 utilities from weighing in and preventing the
12 formation of a wholesale -- of a robust wholesale
13 competitive market.

14 In addition, there is also another goal of
15 the act in FERC's Order 888, and that is to attract
16 companies into the generation market that would have
17 experience, expertise, and be able to effectuate the
18 policy of creating a competitive, bulk wholesale
19 market by encouraging utilities in another state or
20 utilities in an area outside of their franchise area
21 to build power plants.

22 Prior to the act, in order to do so,
23 affiliates of utilities were required to do one of two
24 things. They could be -- subject themselves to the
25 Public Utilities Holding Company Act, which has very,

1 very obtrusive regulation under the Securities &
2 Exchange -- by the Securities & Exchange Commission,
3 and, virtually, as far as I know, there are no --
4 anymore any PUHCA regulated utilities; or they could
5 form these what are called PUHCA pretzels -- and the
6 name almost gives away the story there -- these
7 contorted affiliations and subsidiaries where no one
8 could own more than 10% of the utility, which would
9 divide or separate management from ownership; which
10 may take away the fear of cross-subsidizations and
11 abuses of power by some of these utilities, but also
12 was a very inefficient way to run a corporate entity.

13 And so to avoid these -- the sort of dilemma
14 of either forming a PUHCA pretzel or subjecting one's
15 self to SEC regulation, Congress expressly provided
16 that FERC could issue exemptions for utilities to come
17 in, and affiliates of utilities to come in, and build
18 wholesale generators. That's the exempt wholesale
19 generators, or EWGs. And, in fact, Duke New Smyrna is
20 an EWG.

21 If a barrier, such as having to enter a
22 long-term contract, is put in the way of these
23 entities entering the market, that, too, would
24 undermine the policies of the Energy Policy Act and of
25 the FERC's Order 888.

1 **COMMISSIONER DEASON:** Well, can state
2 Florida law be read to be a barrier to competition
3 because even it has a requirement that there be a need
4 before a power plant is built?

5 **MR. SEIDENFELD:** That's an interesting
6 question, but not one that is, I think, necessarily
7 before us here; but let me say why I think it's not
8 before the Commission, and then go on and, if you
9 want, I'll answer the question.

10 But in this case Duke New Smyrna is not
11 claiming that there doesn't need to be a need
12 determination. They are claiming that they will make
13 a showing that there is need within the parameters of
14 the statute.

15 **COMMISSIONER DEASON:** Well, what about this
16 scenario: If we allow them applicant status; we go
17 through the merits of the proceeding; we determine
18 that there is a need, and the need is 500 megawatts
19 and no more, and then the next EWG comes in and wants
20 to build a power plant, and we say, sorry, we allowed
21 this EWG to do it in the name of promoting
22 competition, but there's no longer any need, so sorry
23 you can't compete, is that a barrier to competition?

24 **MR. SEIDENFELD:** It's not that it's a
25 barrier to competition. The question is whether it

1 would be a barrier that is sufficiently foreseen by
2 the act and -- I shouldn't say foreseen -- but
3 sufficiently impedes the goals of the act.

4 I think that the answer may be yes, that the
5 need determination would be of a different kind, and
6 FERC in Order 888 talks about this. I think that when
7 you talk about a need determination, you would really
8 be talking about the issues of reliability, market
9 dominance, the relation to the market, and the
10 transmission grade, and things of that nature such
11 that you don't want a utility being able to have some
12 sort of market power that disturbs the competitive
13 market.

14 The need determination, you're right, would
15 be essentially made by having a competitive market.
16 If there is need, that will attract wholesale
17 generators into the market. If there is not,
18 presumably the wholesale generators will not enter the
19 market, and the market will take care of the
20 traditional notion of need.

21 But there still is a notion to make sure
22 that the market is operating correctly, that --

23 COMMISSIONER GARCIA: What if we asked FPC
24 to build generation, and that precluded your client
25 from coming into the state because we have too much

1 generation?

2 MR. SEIDENFELD: Well, I --

3 COMMISSIONER GARCIA: Would that be a
4 barrier to competition because this Commission had a
5 very aggressive policy in building a new generation?

6 MR. SEIDENFELD: That, I think, the answer
7 is clearly no; because what the statute envisions is
8 anyone can build power; whether you order a utility to
9 do it or a wholesale generator can do it, they should
10 come in. And if they're willing to take the risks or
11 if you, as a Commission, say the ratepayers -- we want
12 our utilities to build a power -- and let the
13 ratepayers take the risk, which you can do -- that is
14 not an impediment to competition. That increases
15 competition.

16 The point of Duke New Smyrna's position here
17 is that every additional power plant increases
18 competition unless there is some sort of reliability
19 problem or some sort of market dominance type problem,
20 and, therefore, that would be -- not only would it not
21 interfere with it, it would be very consistent with
22 the goals of what the Energy Policy Act had in mind.

23 COMMISSIONER JACOBS: Am I to understand you
24 to say, then, that the goals of the Siting Act having
25 to do with the environmental issues, the centralized

1 permitting, all those operate outside of the purview
2 of the federal law, and we can exercise that
3 jurisdiction without any limitation?

4 **MR. SEIDENFELD:** You can, and there's a
5 reason for that, and that is because the statute, the
6 Energy Policy Act, explicitly envisioned that there
7 might be some encroachment on what state regulators
8 had traditionally done with respect to retail
9 utilities.

10 And in doing so, they explicitly stated that
11 nothing in this act shall interfere with the authority
12 of states to oversee the environmental issues and the
13 siting of plants.

14 They did not say anything about need. They
15 did not say anything about barriers to entry and the
16 states, when they -- that barriered entry might be
17 protective of, for instance, stranded costs or
18 anything like that; that they simply said that if that
19 would impede with the goals of the act, then that
20 would be precluded.

21 **COMMISSIONER DEASON:** Well, what about the
22 argument the first step of environmental protection is
23 the requirement that this Commission determine that
24 there is a need so that the environment is not
25 degraded by the construction of an unneeded power

1 plant?

2 **MR. SEIDENFELD:** Well, again, I think there,
3 as we've mentioned, there is some balancing to be
4 done, but I don't think that you can simply say that
5 because there's no need, that one doesn't get to
6 present the environmental evidence.

7 Remember, we're just here on a motion to
8 dismiss, that Duke doesn't even get to present its
9 evidence. If there's balancing to be done, certainly
10 Duke has to have the opportunity to present its
11 evidence as to what it considers the need and what
12 effect it will have on the market.

13 **COMMISSIONER DEASON:** No. My question goes
14 to --

15 **MR. SEIDENFELD:** Environmental degradation.

16 **COMMISSIONER DEASON:** -- the fact that we're
17 not preempted because this is part of the
18 environmental regulation in the state of Florida. It
19 just happens that the first step of that is
20 administered by this agency, that we have to determine
21 need before the second step is even reached in the
22 environmental regulation of the construction of power
23 plants in the state of Florida.

24 **MR. SEIDENFELD:** Well, I guess if one were
25 to interpret the Florida statute that way, then you

1 would be saying that if --

2 COMMISSIONER DEASON: That's exactly the way
3 Mr. Guyton interprets it if --

4 MR. SEIDENFELD: Right.

5 COMMISSIONER DEASON: -- if I'm
6 understanding him correctly. He's shaking his head in
7 the affirmative.

8 MR. SEIDENFELD: Okay. You would be saying
9 that need is a matter of an environmental issue. If
10 we determine that there is no need for the plant, then
11 we don't even have to get to the environmental issues,
12 because it will degrade the environment and,
13 therefore, we don't have to consider it, and we can
14 dismiss you.

15 Now, one of the -- again we're getting off
16 the question of this is a motion to dismiss. I think
17 if you let Duke present the evidence --

18 COMMISSIONER DEASON: Well, what you're
19 saying is, is that we're preempted by federal law, so
20 much of what -- if not all of what is being argued
21 over here is not relevant, and that you should not be
22 dismissed. And what I'm wanting to understand is, is
23 that if we do make the assumption that this is part of
24 environmental regulation within the state of Florida,
25 are we preempted by Energy Policy Act?

1 **MR. SEIDENFELD:** Well, I would say that
2 you're preempted by the Energy Policy Act to a great
3 extent, or that you're limited as to what you can
4 consider need. Because it's not only the Energy
5 Policy Act; it actually goes back to the Federal Power
6 Act of 1935, I believe, where the jurisdictional split
7 between the state commissions and the federal
8 commissions was based on what is retail versus what is
9 wholesale.

10 Now, it has been true that traditionally it
11 has been vertically integrated utilities that have
12 been proposing and building power plants, and that
13 would have a direct impact on the rate base. But
14 where that is not true, FERC has had -- it's FERC's
15 jurisdiction to determine need and FERC's jurisdiction
16 to determine questions of allocation and cost.

17 In fact --

18 **COMMISSIONER DEASON:** Let me ask you this:
19 The federal government's reluctance to site a nuclear
20 waste disposal sight, is that a barrier to competition
21 in the nuclear industry and preempted by the Energy
22 Policy Act?

23 **MR. SEIDENFELD:** Can you repeat the
24 question, because I didn't --

25 **COMMISSIONER DEASON:** It's an absurd

1 question, but --

2 MR. SEIDENFELD: Well, that's okay. I
3 didn't hear it.

4 COMMISSIONER DEASON: The fact that the
5 federal government itself has been reluctant to
6 site -- or to certify sites for disposal of nuclear
7 waste, is that a barrier to competition for nuclear
8 energy and, therefore, is preempted by the Energy
9 Policy Act?

10 MR. SEIDENFELD: Well, this is a very
11 interesting question. It came up before the Energy
12 Policy Act in an actual case, PG&E versus the
13 California State Energy Resource Conservation &
14 Development Commission. And there the -- California
15 had issued a moratorium on nuclear power plants until
16 such time as the waste disposal problem and the spent
17 fuel disposal problem had been taken care of.

18 And the court was very careful. The court
19 said that was not preempted by the nuclear -- the
20 Atomic Energy Act, but in doing so it had said that's
21 because the issue here was an issue of the effect on
22 the costs to ratepayers. That is what the states are
23 authorized to look into.

24 And here there would be -- the argument was
25 that this could add to the cost of the plant

1 ultimately because of the spent fuel not being
2 disposed of there'd have to be storage.

3 And it was only for that reason that the
4 Supreme Court held that it was not preempted. But it
5 made it very clear in that it actually stated that
6 after saying that states had traditionally regulated
7 issues of economic matters with respect to power
8 plants, it said that the broad authority of the
9 Federal Power Commission, now the Federal Energy
10 Regulatory Commission, over the need for and pricing
11 of electrical power transmitted in interstate commerce
12 is an exception to the economic aspects of electrical
13 generation that states have regulated.

14 And I would -- I don't know if the case came
15 up under the Energy Policy Act, but I would say that a
16 state could not assert without some tie to the notion
17 that there would be ratepayers who would have to pay
18 more, they could not assert, that such a moratorium
19 would be consistent if FERC had come out and said that
20 we want these sorts of power plants to be built
21 because there's a need for them.

22 Thank you.

23 **CHAIRMAN JOHNSON:** Mr. Wright?

24 **MR. WRIGHT:** Thank you, Madam Chairman.

25 Before moving on, I wanted to respond to a question or

1 comment made by Commissioner Garcia.

2 You asked, I think, whether it was -- about
3 the interplay between FERC policy and market power and
4 who might build a power plant. I think you were
5 asking a hypothetical about whether Florida Power
6 Corporation could build a -- effectively a merchant
7 plant totally outside rate base.

8 And the answer is yes. It is FERC's policy
9 that all new generation should be at market based
10 rates where there is no market power. If Florida
11 Power Corporation can establish that there's no risk
12 to ratepayers and no market power, FERC will give them
13 authority to build a power plant and -- or not to
14 build a power plant -- sorry -- it will give them
15 market base rate authority to charge that.

16 The problem is, typically where there's a
17 large utility that owns a sizable percentage of
18 generation, they may run into market power constraints
19 as vis-a-vis obtaining market based rate authority
20 from FERC.

21 **COMMISSIONER DEASON:** Mr. Wright, how do you
22 define the absence of market power? Or do you not
23 define it?

24 **MR. WRIGHT:** The absence of market power?

25 **COMMISSIONER DEASON:** Yes.

1 **MR. WRIGHT:** Somewhat technically, but
2 conceptually, the absence of -- there is no market
3 power where the seller, in this instance, cannot
4 influence market price. If one has a sizable enough
5 percentage of the asset or the resource being sold in
6 a market, that withholding it could affect the market
7 price, then one has market power.

8 **COMMISSIONER DEASON:** Well, if there's no
9 market --

10 **MR. WRIGHT:** (Inaudible overlap.)

11 **COMMISSIONER DEASON:** -- does the finding of
12 no market power assume that there's free entry of
13 competitors?

14 **MR. WRIGHT:** I think Mr. Santa may be in a
15 better position to answer that than I.

16 **MR. SANTA:** Commissioner Deason, when the
17 FERC looks at applications by utilities for market
18 based rate authority, it applies a four-part test.

19 The first part of the test is whether or not
20 the applicant has the ability to exercise market
21 power; that is, do they have the ability to withhold
22 supply and drive up price.

23 The second thing the Commission looks at is
24 whether or not they have the ability to exercise
25 market power in transmission by withholding access to

1 transmission. And the Commission has found that for
2 utilities and affiliates of utilities that own
3 transmission, Order 888, open access tariff, mitigates
4 the transmission market power.

5 The Commission also looks at whether or not
6 the applicant has the ability to erect other barriers
7 to entry. This could include, for example, if it were
8 a combination utility and it also controlled the
9 natural gas system in that area. Do they have the
10 ability to withhold or frustrate the ability of
11 competitors to get gas supply is an instance that has
12 come up.

13 And then the fourth thing the Commission
14 looks at is whether there is any evidence of affiliate
15 abuse or ability to engage in reciprocal dealing. And
16 typically the Commission imposes fairly stringent
17 affiliate rules, both with respect to the ability to
18 manipulate the transmission system and also in terms
19 of the sharing of information and cross dealing
20 between the utility merchant and the unregulated
21 affiliate.

22 **COMMISSIONER DEASON:** Well, let me ask you
23 this: If we determine that Duke has applicant status
24 and shows that there's a need for the capacity, and
25 that's all the capacity that's needed, and anyone else

1 that tries to come into the state and build capacity
2 under the status quo, that there's not a need, so
3 there's no more new competitors, then does Duke by
4 definition then have the benefits of both in the sense
5 that they're not subject to a long-term contract?
6 They can charge whatever they want, but they don't
7 have to worry about new competitors coming in, so they
8 have protection on one side and no restraint on the
9 other, and does that not equal market power?

10 MR. SANTA: I'm not sure whether this was to
11 Mr. Wright or to myself.

12 COMMISSIONER DEASON: Either.

13 MR. SANTA: Let me take a shot at it. First
14 of all, the Commission in -- the Commission being the
15 FERC -- making a finding that the applicant lacks
16 market power, I think, satisfies that question.

17 COMMISSIONER DEASON: It may satisfy it for
18 FERC, but it doesn't necessarily satisfy what is
19 within our jurisdiction.

20 MR. SANTA: Well, I would argue to the
21 extent that they are making wholesale sales that are
22 subject to the FERC's jurisdiction, that is a federal
23 matter.

24 But let me answer the second part of your
25 question, which was the one of -- that you're raising,

1 which is can Duke New Smyrna somehow be the last one
2 that gets in the door and then the door slams shut,
3 and do they somehow have an advantaged position due to
4 that.

5 One thing I would point out is that, as you
6 know, the Power Plant Siting Act and the terms of
7 facilities that must come under the Power Plant Siting
8 Act, in fact, does not cover all generators; that if
9 you were below a certain megawatt threshold or if you
10 do not have a steam generator as part of your system,
11 you don't come under the Power Plant Siting Act.

12 Therefore, to the extent that one
13 economically could enter the market by building a
14 plant that was smaller in scale or a simple combustion
15 turbine and not a combined cycle unit, they could
16 freely enter the market even if the Commission had
17 made a determination in the context of Duke or whoever
18 the last one in the door was, that in fact that was
19 the last increment of power that was needed.

20 So I think that your concerns about somehow
21 this applicant being the last one that gets in the
22 door and then they somehow gain an advantaged
23 position, that I think there are ways that the market
24 would respond to that.

25 **COMMISSIONER DEASON:** Well, if we determine

1 that there's a need for the 500 megawatts, that means
2 that there's going to be times in the year when
3 there's not going to be any other power available
4 except for that 500 megawatts, or else if we never
5 reach a situation where that's the only power
6 available, it's not needed.

7 And when that is the situation, that is the
8 only power available and there are no long-term
9 contracts, what's to prevent Duke from withholding,
10 under your definition of market power, withholding
11 supply to drive up price and then sell at an
12 exorbitant price because there's no long-term
13 contract; they're the ones that met the need, and the
14 need was capped; utilities couldn't build their own or
15 contract with someone else, because there was no
16 longer any need? What's to prevent Duke from
17 exercising that type of market power?

18 MR. SANTA: Commissioner Deason, I think
19 what would prevent Duke from exercising that kind of
20 market power is that while the FERC under the Federal
21 Power Act regulates wholesale sales, it is in fact
22 this Commission that regulates the wholesale purchases
23 that are made by utilities. And before a utility
24 could make a wholesale purchase from Duke, that would
25 have to be approved by this Commission.

1 **COMMISSIONER DEASON:** So are you saying this
2 Commission is going to tell the utility to turn the
3 lights out because Duke's price is too high? Have a
4 black-out, a brown-out, turn people's electricity off
5 because Duke's price is too high?

6 Do you foresee that in reality?

7 **MR. SANTA:** I don't foresee that, sir, but
8 I've got to say I would say that at that point in time
9 if the utility, in fact, was in that dire a situation,
10 I'd have some serious questions about the prudence of
11 that utility for letting itself get itself there. And
12 you would have the ability, if they've been imprudent
13 in their --

14 **COMMISSIONER GARCIA:** But isn't a prudency
15 review at the back end? A prudency review is in after
16 the brown-out. A prudency review comes at the back
17 end. And if Duke is selling power at a \$1,000 or
18 whatever, our prudency is on the back end.

19 And if FPC, which bought Duke's power, which
20 you believe was priced too high, first of all, I doubt
21 that the price would stay too high, because the market
22 would immediately probably have Mr. Santa's client
23 coming in here and saying, we're going to build a
24 generation unit.

25 But clearly if there was that need, and that

1 was the only power, we would have to justify FPC's
2 purchase.

3 **COMMISSIONER DEASON:** Your question was that
4 we'd allow somebody else to come in and build, but if
5 we have a strict interpretation of need and the amount
6 of megawatts that the capacity was already there with
7 adequate reserve margins, there is no more need, so
8 there's nobody else coming into the market.

9 **MR. SANTA:** Except for the fact that they
10 could come in with facilities that were not subject to
11 the Power Plant Siting --

12 **COMMISSIONER DEASON:** And I understand that
13 technicality, but you're talking about facilities of a
14 small size, which is not the most economic for
15 production or you're talking about non-steam units,
16 which are very special clients.

17 **MR. SANTA:** Well, I -- for example, to give
18 you a hypothetical as to when it might be economical
19 to do that is that if, in fact, your concern is what
20 happens during a superpeak period when the prices do
21 get very high, in those situations somebody can
22 construct a small sized combustion turbine and
23 economically justify that facility as a peaker.

24 The other thing I think that the -- I'm
25 sorry -- I just lost my train of thought.

1 **COMMISSIONER CLARK:** Let me ask a question,
2 since you've lost your train of thought.

3 I understand -- what was the gentlemen's
4 name that just left?

5 **MR. SANTA:** Professor Seidenfeld.

6 **COMMISSIONER CLARK:** I understand his
7 argument to be that if we read the statute as FPL and
8 FPC wants us to read it, and that is, it will have the
9 effect that wholesale competition from power plants in
10 Florida can only come from utilities providing retail
11 service or entities from whom -- with whom they have
12 firm contracts, if we take that view, then we are
13 going to run afoul of the Energy Policy Act; and the
14 reason we will run afoul of it is because we will have
15 the effect of prohibiting that wholesale competition
16 to develop just the same as if they prohibited -- they
17 did not open their transmission systems. It would
18 have the same impact.

19 **MR. SANTA:** Yes, Commissioner Clark. I
20 think you've restated the professor's argument
21 accurately.

22 **COMMISSIONER CLARK:** And as I understand it
23 further, that the sort of piece they carved out for us
24 saying that this doesn't affect your siting
25 jurisdiction doesn't affect your jurisdiction to say

1 yes or no to retail wheeling can't be used as a way of
2 avoiding that preemption.

3 MR. SANTA: That that cannot be used as a
4 way of avoiding that preemption.

5 COMMISSIONER GARCIA: Could you ask the
6 question again, because I didn't understand it.

7 COMMISSIONER CLARK: What I understand
8 Mr. Guyton and Mr. Sasso to, in effect, say is that
9 our Power Plant Siting Act has the effect of limiting
10 wholesale competition in Florida from plants sited in
11 Florida to plants that are either built by known
12 utilities providing retail service or to plants
13 with -- of entities with which they have firm
14 contracts.

15 MR. SANTA: Correct.

16 COMMISSIONER CLARK: Cogenerators.

17 MR. SANTA: Yes.

18 COMMISSIONER CLARK: And I take it your
19 argument is that if we read the Power Plant Siting Act
20 in that way, then we would be preempted by the Energy
21 Policy Act?

22 MR. SANTA: That is correct. I think it is
23 a situation where the argument is that the
24 interpretation of the law that is advocated by the
25 utilities puts the utilities themselves in the

1 gatekeeper role in that they are the ones who under
2 their interpretation either are going to be building
3 the generation or must have contracts with the
4 builders of that generation, and that in putting the
5 utilities in the gatekeeper role, you in essence would
6 be recreating the regime that controlled prior to the
7 Energy Policy Act within which utilities could
8 frustrate entry of competitive generators by denying
9 access to transmission.

10 **COMMISSIONER CLARK:** And you're also saying
11 that the part of the act that said you can't read this
12 as invading our jurisdiction over siting or over the
13 decision to allow retail competition or not, you can't
14 read that section to have that resolved because it
15 undermines the whole policy with respect to wholesale
16 competition. That's your view?

17 **MR. SANTA:** I would argue that the state
18 still has a legitimate role to play with respect to
19 the siting of generation and that what we are talking
20 about here today is a motion to dismiss, in other
21 words, to keep Duke New Smyrna from ever even getting
22 into the door to be able to argue the merits of its
23 case.

24 And I think that within the context of if
25 Duke New Smyrna -- if the motion to dismiss is denied

1 and Duke New Smyrna has the opportunity to argue its
2 case on the merits, this Commission retains the
3 ability to fulfill the purposes of the Power Plant
4 Siting Act and to protect the environment to protect
5 ratepayers within the state of Florida.

6 COMMISSIONER CLARK: But if we decide to
7 read it that wholesale competition can only come from
8 those two entities, then we do run afoul of --

9 MR. SANTA: I believe you do; yes,
10 Commissioner.

11 COMMISSIONER CLARK: Okay.

12 MR. WRIGHT: Madam Chair, I'm going to try
13 to resume to wrap up our state law arguments.

14 CHAIRMAN JOHNSON: Okay.

15 MR. WRIGHT: We do make the point in our
16 brief, which was not challenged in the oral argument
17 at any rate, by either of the opponents that the
18 proposed project is a joint power supply project
19 pursuant to Part 2 of Chapter 361.

20 The analysis is fairly simple. The statute
21 says that municipalities may enter into joint power
22 supply projects with various entities, including
23 foreign public utilities. And if you read the
24 definition, you will see that that includes an entity
25 like Duke New Smyrna that is an affiliate of an entity

1 that provides wholesale power in another state.

2 We have at least four such affiliates, three
3 in California and one in Connecticut; Duke Bridgeport
4 Energy, L.L.C. This is all laid out in our brief.
5 The point that we would make is the language "joint
6 power supply project" is not exactly the same as a
7 joint operating agency, although considered in light
8 of each other, it makes some sense that they might be
9 considered to be the same.

10 But perhaps more importantly, we would
11 submit to you that not -- that even considering or
12 notwithstanding the fact that the Legislature enacted
13 the joint power supply project statutes after the
14 Siting Act, they definitely created the possibility of
15 there being projects just like this one between
16 various entities and municipal utilities in Florida.

17 And it is just unreasonable and unthinkable
18 to think that the Legislature would have created the
19 opportunity for such projects to go forward under
20 Chapter 361 of Florida Statutes and not contemplated
21 the possibility that they could be permitted pursuant
22 to the Siting Act.

23 That's silly. That would say that the
24 Legislature created these, but they can't be
25 permitted.

1 **COMMISSIONER DEASON:** Are you saying, then,
2 that the Florida Legislature envisioned a 500-megawatt
3 plant being built to meet a 30-megawatt need?

4 **MR. WRIGHT:** I don't know what they
5 envisioned, Commissioner Deason. They envisioned
6 joint power supply projects, and we fit the
7 definition. The New Smyrna Beach power project fits
8 the definition. It is a joint project of the
9 Utilities Commission, City of New Smyrna Beach and
10 Duke New Smyrna.

11 **COMMISSIONER JACOBS:** But doesn't it carry
12 your argument a bit farther, it doesn't sound
13 reasonable as well that the Legislature would have
14 intended that we have unknown capacity that can enter
15 into the market under unknown conditions as well?

16 I mean, by your argument anybody can come
17 in -- so long as they need 10 megawatts they can come
18 in and ask for a 1,000-megawatt plant, and it gets
19 into the market.

20 **MR. WRIGHT:** I think that's true. I think
21 that at a minimum, they would be -- in this
22 scenario --

23 **COMMISSIONER GARCIA:** They don't get into
24 the market, they --

25 **MR. WRIGHT:** -- assuming --

1 **COMMISSIONER GARCIA:** -- get in the door.

2 **MR. WRIGHT:** -- they would at a minimum be
3 allowed to get in the door and be entitled to a
4 decision on the merits from this Commission as to the
5 need determination and, we believe, from the Power
6 Plant Siting Board as to the merits of the power plant
7 overall balancing, as it is their charge to do, the
8 environmental consequences of its construction and
9 operation with the need for that power.

10 **COMMISSIONER JACOBS:** So then I guess I
11 would harken back to Commissioner Deason's, then;
12 wouldn't we then have an obligation under the
13 authority that you do exceed to us under the Siting
14 Plan Act to say, well, there is some reasonable point
15 where we may not need all of the capacity as a plant,
16 and then we begin to balance the environmental
17 consideration and all those things to limit that
18 1,000-megawatt plant.

19 Do you agree to that?

20 **MR. WRIGHT:** No, sir. I think it's the job
21 of the Department of Environmental Protection and
22 Power Plant Siting Board to make the balance. That's
23 what Florida 3.502 says. It's their job to balance
24 the need for the plant and the environmental
25 consequences of building it.

1 And as to the need, we seem to be talking
2 about need defined in a very restrictive sense as
3 minimum capacity needed to meet certain minimum
4 liability criteria.

5 And the Commission has on at least three
6 occasions that I'm aware of certified -- or determined
7 the need for power plants that were needed solely for
8 economic and oil backup purposes where the
9 Commission -- at least two occasions where the
10 Commission said in its order that there's no need for
11 this capacity over a relevant time for us. It's clear
12 that it's not needed, but we find that it serves other
13 purposes. And I think you can consider need in any
14 number of contexts within your statute.

15 **COMMISSIONER CLARK:** Are you saying the
16 decision on the need for the plant versus the impact
17 on the environment is a decision for DEP to make and
18 the Power Plant Siting Board?

19 **MR. WRIGHT:** Yes, ma'am.

20 **COMMISSIONER CLARK:** So, in effect, they
21 will control how much of a wholesale market we'll
22 have?

23 **MR. WRIGHT:** Well, that poses a good
24 question. I believe they have the authority -- and
25 they have recently exercised it -- they have the

1 authority to deny a license or a power plant based on
2 the balancing that they perform.

3 COMMISSIONER GARCIA: Which they've done.

4 MR. WRIGHT: Which they have done. So if --
5 and I think it is that balancing -- help me out if you
6 think differently -- I think it is that balancing that
7 is clearly reserved to the states by the express
8 provisions of the Energy Policy Act.

9 COMMISSIONER CLARK: So why do we determine
10 need for merchant plants at all? Why shouldn't we say
11 "This is a merchant plant. You decide if it's worth
12 making the environment worse --

13 MR. WRIGHT: Well, Commissioner --

14 COMMISSIONER CLARK: -- to have this plant?"

15 MR. WRIGHT: Well, Commissioner Clark, I
16 don't disagree that that would be a reasonable
17 position for you to take at -- certainly up to some
18 point. You know, we had a discussion about how much
19 is too much earlier, and, you know, I think that the
20 whole -- a whole lot of new capacity could be built in
21 this state on a merchant basis with great benefits,
22 both through reliability and economics.

23 And if you wanted to just give us a cursory
24 order that said -- based on the fact that this is a
25 merchant plant that poses no risk to ratepayers and it

1 appears that sales will remain at cost-effective rates
2 and it will contribute to reliability and contribute
3 to the need for adequate electricity at a reasonable
4 cost within the state, so ordered, we could take that
5 to Mr. Owen over at the DEP and go forward.

6 The problem is, the way the statute is
7 written out, we still have that rule to play, and we
8 don't argue that -- we do not argue that you don't
9 have that rule to play. We're here within that
10 context asking you for that determination of need. If
11 you were willing to give us the summary order that I
12 just described, we could go home real soon.

13 **COMMISSIONER DEASON:** Mr. Wright, are you
14 indicating that this Commission has the discretion and
15 authority to make a determination of need beyond just
16 strict reliability concerns, that there are economic
17 considerations?

18 **MR. WRIGHT:** Absolutely, Commissioner
19 Deason. You've done it in the past, and you can do it
20 now.

21 **COMMISSIONER DEASON:** Would one of those
22 considerations be that an EWG comes in and we
23 determine that we have sufficient reserve margins, but
24 that the market for electricity in the state would be
25 enhanced by more competition so there's a need for

1 this plant?

2 **MR. WRIGHT:** I think you could do that, yes,
3 sir. I think you could do it either on those terms or
4 you could do it on the basis that the sales from the
5 project would be cost-effective.

6 I believe that you could do it on the basis
7 of that because the state needs additional competition
8 in the wholesale power supply within the state, that
9 the particular proposed power plant that would be
10 before you in such a proceeding would contribute to
11 the state's need for adequate electricity at a
12 reasonable cost; I think you could do it on any of
13 those bases, yes, sir.

14 **COMMISSIONER DEASON:** I'm not going to
15 interrupt Mr. Wright again, but I'm going to ask at
16 some point that same question to Mr. Guyton and
17 Mr. Sasso. I'd like a response to it.

18 **MR. WRIGHT:** In fact, Mr. Sasso suggested
19 that one power plant might not constitute a system. I
20 think that that's a stretch and an argument that would
21 purport to deprive you of jurisdiction that you would
22 really like to have.

23 For example, I think everybody in this room
24 probably knows that there are power plants presently
25 on the block, so to speak, that may be sold off to

1 others, existing power plants in this state, that may
2 be sold off to others and operated as merchant plants.

3 This could happen. It could happen soon.

4 If that happens, would those plans be -- fall within
5 the definition of an electric utility under 366.02
6 sub (2)? I submit to you they would. The other side,
7 the opponents of this, want to argue that they
8 wouldn't.

9 Similarly, I think you know that there's
10 been recently filed some permit applications for a
11 large peaking facility to be located in Brevard
12 County, 850 megawatts of combustion turbine capacity.
13 You have no jurisdiction over that. I don't think so.
14 I think that when that plant is built -- and quite
15 frankly I think arguments about the tense are not
16 appropriate -- I think when that plant is built it
17 will be a generation system owned by an investor-owned
18 public utility under the Federal Power Act in Florida,
19 and you can extend your planning and Grid Bill
20 authority to that entity.

21 **COMMISSIONER JACOBS:** That's an interesting
22 assessment, because I've been asked some questions
23 about that recently.

24 If we follow your logic, doesn't that bring
25 them -- don't we get an earlier bite of that apple? I

1 mean, it sounds like -- and I'm stepping a bit out of
2 my expertise on that particular project, and I don't
3 want to deal too much with it, but it sounds like we
4 could at least begin to assert some jurisdiction over
5 that, can't we, under your argument?

6 **MR. WRIGHT:** As to requiring, I think -- as
7 to requiring planning reports, yes, sir, I do. I
8 don't even -- it's not subject to the Siting Act, so
9 you don't have that kind of a bite at it, but at this
10 point I think you could require planning reports from
11 it.

12 Also, as we've discussed and has been
13 discussed earlier, combustion turbines can be built
14 today without going through the Siting Act. The
15 interpretation advocated by the opponents here would
16 essentially constrain new competition to those built
17 by them, those built by those whom they have selected
18 in a gatekeeper contracting role for inefficient power
19 plants. I'd submit to you that that's a result you
20 guys don't want to encourage.

21 **COMMISSIONER DEASON:** I'm sorry. I didn't
22 follow that. If combustion turbines are not subject
23 to the requirements of the Siting Act, how do you get
24 that interpretation?

25 **MR. WRIGHT:** That that would be what could

1 be built outside the existing retail serving utilities
2 and those who contract with them. So you'd have a
3 constrained entry of efficient plants, and anybody
4 else who wanted to compete would be constrained who --
5 if they weren't able to get a contract, or even if
6 they were willing to take the risk, as Duke New Smyrna
7 is, if you applied the opponents' arguments, they'd be
8 constrained to building something inefficient, which
9 they clearly can do under state law as it exists
10 today. They're clearly outside the scope of the
11 Siting Act, clearly outside of Section 403.519.

12 Mr. Sasso made some remarks about Duke
13 Energy's retail utility, Duke Power, having opposed
14 the permit application for some combustion turbines.
15 I want to tell you it is my understanding that Empire
16 Power Company, the entity involved there, intended to
17 force Duke to buy all the output of those plants at
18 Duke's avoided cost and that they filed their
19 application after Duke itself -- Duke Power, that is,
20 itself -- had filed its applications to build a
21 similar amount of peaking capacity.

22 More importantly, that was all before the
23 Energy Policy Act. Since the Energy Policy Act, Duke
24 Power has supported the construction of merchant
25 plants in North Carolina, including the Rockingham

1 Energy Project. We will file with you, subject to
2 request for official notice, a copy of the papers
3 filed on the -- with the North Carolina Utilities
4 Commission on behalf of that project.

5 That project indicates that it's to be a
6 750-megawatt summer capacity facility of which
7 600 megawatts is committed to Duke Power by contract
8 for three years. Duke has some options that may take
9 it up to eight years. That's it. After that, that
10 plant is a complete merchant project, and Duke has
11 supported that before the staff of the North Carolina
12 Utilities Commission. And by the way --

13 **COMMISSIONER DEASON:** But there is a
14 contract, though.

15 **MR. WRIGHT:** There's a contract for three
16 years for part of the output of the plant larger than
17 the part here. But on the other hand, the term of the
18 contract in the North Carolina Rockingham Plant
19 instance is a fraction of the projected term of the
20 contract that we have, that Duke New Smyrna has, with
21 the Utilities Commission in New Smyrna Beach. And
22 when you see the papers, you'll learn that a Florida
23 utilities -- utility at this point of action proposed
24 this project and may still participate as an investor
25 therein.

1 I wanted to respond to some commentary
2 regarding stranded costs. Stranded costs only exist
3 in the case where you get to retail restructuring. In
4 this world today, Duke New Smyrna may exist, or the
5 New Smyrna Beach power project may exist as a merchant
6 power plant and sell power at wholesale. But the fact
7 is that under regulation today, where we sit today,
8 the retail serving utilities of Florida will still
9 sell all of the retail kilowatt hours in Florida. We
10 can't serve at retail without becoming fully subject
11 to rate regulatory authority and also losing our EWG
12 status.

13 The point is that stranded cost is an issue
14 related to retail restructuring, not to the
15 introduction of a wholesale merchant power plant into
16 Florida's wholesale power market.

17 **COMMISSIONER CLARK:** Mr. Wright, you
18 disagree, though, that to the extent that sales you
19 make from your plant displace sales, say, that Tampa
20 Electric Company might have made at wholesale, and
21 those sales are supported by investment that we've
22 allowed in their retail rate base, that those
23 customers will be worse off because they won't get the
24 benefit of those revenues, and as I understand it,
25 that may be through a clause, so it is a dollar for

1 dollar detriment.

2 MR. WRIGHT: Madam Chairman, that might be
3 the case, that might not be the case. It depends on
4 the jurisdictional separation as between the FERC
5 jurisdictional rate base and the FPSC jurisdictional
6 rate base.

7 COMMISSIONER CLARK: Mr. Wright, assume --

8 MR. WRIGHT: If it's something --

9 COMMISSIONER CLARK: -- it's in our
10 jurisdiction, because we have, in fact, had them come
11 to us and say, we need to make a year long contract.
12 We can't do it on the broker system because we won't
13 have the ability to sell it. You need to approve this
14 now, and let us keep it in the retail rate base and
15 just have the benefit of that rather than putting it
16 into the wholesale jurisdiction.

17 So I think that can happen, and I want you
18 to assume --

19 MR. WRIGHT: All right.

20 COMMISSIONER CLARK: -- if it is in the
21 retail rate base --

22 MR. WRIGHT: I agree with you --

23 COMMISSIONER CLARK: -- they will be worse
24 off.

25 MR. WRIGHT: -- that that can happen.

1 However, I will make the same point I made earlier,
2 and that is that if we are to make a sale at all, it
3 is because the utilities purchasing from us in lieu
4 of, in your example, Tampa Electric Company, find our
5 proposed power sale more cost-effective to them,
6 meaning greater benefits to their ratepayers, and I
7 would assume -- I don't think I'd assume, I think I
8 would conclude, in fact, that the net overall effect
9 would be a net benefit to Florida ratepayers.

10 **COMMISSIONER CLARK:** You're assuming that
11 the benefit to the purchasing power company would be
12 great than the detriment to the company who --

13 **MR. WRIGHT:** Yes, ma'am.

14 **COMMISSIONER CLARK:** -- forgoes the sale?

15 **MR. WRIGHT:** And the attendant benefit to
16 the state of the efficiency gain, i.e., raw fuel
17 savings that would derive from using a more efficient
18 generation resource.

19 **COMMISSIONER CLARK:** So we're just shifting
20 who pays the cost.

21 **MR. WRIGHT:** Well, two things. You're
22 shifting -- you may be shifting part of some cost.
23 You may be shifting some part of that cost, but you're
24 also getting benefits. And I point out to you the
25 same thing can happen to Tampa Electric Company

1 following your example as -- if anybody else makes
2 that wholesale sale, whether it's FPC or FPL or any
3 other utility in Florida, or Georgia Power Company,
4 for that matter. To the extent they can use
5 transmission to get the power down here, the same
6 thing happens.

7 The point we'd make is that shutting out a
8 would-be competitor will for sure deprive those
9 customers of the utilities who might otherwise have
10 purchased our power from the benefits they could get,
11 and since there pretty much has to be a cost savings,
12 an overall cost savings, for us to be able to
13 generate, you're costing the state some real economic
14 benefits.

15 Finally, the arguments that the IOUs put
16 forth are based on efforts at narrow statutory
17 construction on what somebody might or might not have
18 thought 25 years ago when the Siting Act was enacted
19 and on dicta from cases that are at least some
20 little -- and based on facts that are not the same as
21 the case here.

22 In meaningful ways they are asking you to
23 use old regulation, the regulation of yesterday, for
24 the regulation of today and tomorrow. The
25 interpretations of the statutes that they advocate

1 would tie your hands. They want to tell you you can't
2 even consider this project, even if it's the greatest
3 thing since sliced bread.

4 Mr. Sasso himself used the expression.
5 "Bind your hands." That's wrong. It's wrong as a
6 matter of law. It's wrong as a matter of policy. It
7 doesn't make good sense in any way.

8 We are offering you and advocating to you
9 interpretations for what you need in today's rule --
10 in today's world. You have the authority under your
11 existing statutes as they exist today to hold that we
12 are appropriate applicants, both the Utilities
13 Commission of New Smyrna and Duke New Smyrna, to
14 consider our case on the merits.

15 This would be good for Florida, it would be
16 good for the ratepayers of Florida utilities, and
17 although they might not want to admit it, it would be
18 good for Florida's utilities themselves. They would
19 have more options and more opportunities and would be
20 to avoid costs and save money for their ratepayers.

21 Thank you. Mr. Santa will be next.

22 **MR. SANTA:** Thank you, Madam Chairman, and
23 members of the Commission. A good part of what I was
24 going to cover in my presentation has been covered
25 either by Professor Seidenfeld or also in some of the

1 extemporaneous discussion that we had a few minutes
2 ago. So I will try to abbreviate my presentation, and
3 then also at the end of that, I'd like to address some
4 of the points that have come up in discussion and try
5 to add some clarification.

6 LG&E agrees with the applicants that this
7 question can be settled on the basis of the face of
8 the statute; that is, that the applicants satisfy the
9 statutory criteria for proceeding to a merits
10 determination under the Power Plant Siting Act.

11 Still, should the Commission find it
12 necessary to proceed with its inquiry, LG&E submits
13 that the interpretation of the Siting Act advocated by
14 the utilities contravenes federal energy policy as
15 it's been expressed by Congress in Title VII of the
16 Energy Policy Act and by the Federal Energy Regulatory
17 Commission through its implementation of both the
18 letter and the spirit of the act through its
19 pro-competitive open access policies.

20 Simply stated, federal energy policy
21 promotes competition in wholesale power markets. The
22 project proposed by Duke New Smyrna and the Utilities
23 Commission has been authorized by the FERC pursuant to
24 authorities and policies implementing Congress'
25 direction promoting wholesale competition.

1 As has been stated, the project is in EWG
2 under PUHCA. It's also a public utility under the
3 Federal Power Act that's been authorized by FERC to
4 sell power in wholesale markets at market based rates.

5 Under the utilities' interpretation of the
6 Power Plant Siting Act, the project, as it is
7 currently configured, could not be sited. In fact
8 FPL's counsel conceded that much this morning. He
9 stated that because it falls within the criteria of
10 projects that come under the Power Plant Siting Act,
11 it cannot take the alternative path and seek
12 authorizations at the state level.

13 If it cannot be sited, it cannot be built.
14 If it cannot be built, it cannot generate electricity
15 to be sold at wholesale in interstate commerce. And
16 if it cannot sell electricity at wholesale, the
17 federal policy of promoting competition in wholesale
18 markets will be frustrated. It is as simple as that.

19 When we enacted EPACT, the Congress
20 recognized that the bulk power market had the
21 potential to be competitive. This had been
22 demonstrated over the preceding decade based on the
23 experience under PURPA and also the experience of
24 other industries that had been deregulated by the
25 Congress; trucking, airlines, natural gas and others,

1 where it was demonstrated that if a market has the
2 potential to be competitive, market forces produce
3 greater economic efficiency and lower consumer prices
4 than does regulation.

5 Congress also realized that the real
6 barriers to greater competition in electric power
7 generation were, in fact, legal and regulatory
8 barriers. In particular, these barriers were the
9 Public Utility Holding Company Act's restrictions on
10 utility ownership of power plants outside their
11 franchise service territories and the FERC's lack of
12 clear authority to compel access to utility
13 transmission.

14 Title VII of EPACT addressed both of these
15 issues. The Congress amended PUHCA to create the
16 exempt wholesale classification, and EWG status was
17 intended to facilitate market entry by new wholesale
18 generators. Congress also amended the Federal Power
19 Act to grant FERC the express authority to compel
20 transmission access for wholesale power transactions.

21 These amendments, while filling only a few
22 pages of a bill that spanned hundreds of pages,
23 represented a watershed event in federal energy
24 policy. In the statement that accompanied the signing
25 of EPACT, then President Bush characterized Title VII

1 as quote, "a landmark furthering competition in the
2 way electricity is generated and sold, thus lowering
3 prices while ensuring adequate supplies," closed
4 quote.

5 As Professor Seidenfeld noted, the
6 legislative history of EPACT and the preambles to
7 FERC's orders implementing the congressional policy in
8 EPACT speak clearly to the need to promote wholesale
9 competition by removing barriers to market entry. I
10 will not repeat the quotes that Professor Seidenfeld
11 quoted in his presentation, but nonetheless, it is
12 very clear, and I think the Commission has been
13 unambiguous and the Congress has been unambiguous
14 about the federal policy of promoting wholesale
15 competition in interstate commerce.

16 The Power Plant Siting Act clearly is a
17 state statute, and on its face does not conflict with
18 federal law. The problem, however, is that under the
19 interpretation advocated by the utilities in their
20 motion to dismiss, the Siting Act in operation would
21 contravene federal energy policy. That is the network
22 effect of the utility's interpretation would be to
23 reestablish an existing, vertically integrated,
24 franchised utilities as the gatekeepers to wholesale
25 competition in the Florida market. In other words, it

1 would turn back the clock to the regime that prevailed
2 prior to EPACT and FERC Order 888.

3 In particular, under the utilities'
4 interpretation, a new entrant, such as Duke New
5 Smyrna, would need to contract with an in-state retail
6 utility before it could be eligible to petition for
7 determination of need under the Power Plant Siting
8 Act.

9 This would viciate (sic) what Congress
10 sought to achieve in the Energy Policy Act. That is,
11 neither EWG status nor transmission access would be
12 worth much if one is physically barred from entering
13 the market. Such an interpretation of a state siting
14 law would frustrate wholesale competition, and
15 therefore contravene federal energy policy in any
16 state in the union.

17 Still, due to its unique geography, the
18 effect would be particularly acute here in Florida.
19 As you well know, Florida is a peninsula. Therefore,
20 physical access to the state's electric power market
21 is limited by geography, and these limits are further
22 compounded by the transmission constraints between
23 Peninsular Florida and the systems to the north.

24 Thus, unlike other regions, of the country,
25 out-of-state suppliers have easy access to in-state

1 power markets, those wanting to compete head to head
2 with Florida's incumbent utilities in the state's bulk
3 power market find it imperative to construct
4 generating facilities within the state's border.

5 In sum, the adverse effects of the
6 anticompetitive interpretation of the Siting Act
7 advocated by the utilities would be greatly magnified
8 due to the state of Florida's unique geography.

9 Also, let me reinforce the point that the
10 pro-competitive interpretation of the Siting Act
11 advocated by the applicants and by LG&E does not
12 frustrate this Commission's ability to pursue the
13 legitimate ends for which the Siting Act was intended.

14 **COMMISSIONER CLARK:** Mr. Santa, let me ask
15 you a question on that point. If we determine there
16 was a need, say, for the reason that it would appear
17 to promote robust wholesale competition, but then the
18 Siting Board said, well, that may be true, but we
19 don't want it in Florida, then are they preempted also
20 from doing that?

21 **MR. SANTA:** Commissioner Clark, I don't know
22 the answer. I tend to think that under preemption
23 analysis -- and I wish Professor Seidenfeld was here
24 to answer the question -- but, nonetheless, my
25 understanding of it is that there are balancing tests

1 that are applied, that there is recognition of
2 legitimate state interests to be protected, and that
3 the courts engage in a balancing test of the effect on
4 interstate commerce versus the protection of those
5 legitimate state interests and whether the manner that
6 the state has chosen to advance those interests is the
7 least obtrusive possible on interstate commerce.

8 COMMISSIONER CLARK: Well, it strikes me
9 that whether we make -- the only things that's changed
10 is that we don't make the decision, they do.

11 MR. SANTA: Well, I would presume they would
12 make the decision based on environmental grounds, and
13 that they would engage in a balancing of what was the
14 effect on the environment of constructing this
15 facility, what would be the benefits to the
16 environment by virtue of the fact that it might be
17 displacing more environmentally damaging generation,
18 and that they would balance those concerns under both
19 state law and also under federal environmental
20 statutes; although I would say that the interesting
21 thing is that if that were the grounds on which the
22 board denied, the Siting Board denied, Duke New
23 Smyrna, it probably could not deny Duke New Smyrna on
24 those grounds and then turn around and site a utility
25 sponsored plant that had the same kind of effect on

1 the environment.

2 **COMMISSIONER CLARK:** Could they say that
3 we're only going to find -- allow the environment to
4 be disturbed to meet a margin of reserve of 15% for
5 each utility; we think that's the right balance
6 between building new power plants and assuring the
7 health, safety and welfare --

8 **MR. SANTA:** I think that is an argument that
9 if it were pushed to litigation, would have to be
10 evaluated under the commerce clause as to whether or
11 not that was the least obtrusive way to protect the
12 state's legitimate interests versus the fact that it
13 would be placing a burden on interstate commerce in
14 that wholesale sales of electricity, even if they are
15 by power plants located in the state of Florida
16 selling to markets in Florida, nonetheless are
17 interstate commerce.

18 **COMMISSIONER CLARK:** So I guess what you're
19 indicating, then, is that the notion of us -- of them
20 being able to reject a plant for environmental reasons
21 is not absolute, that the federal law would preempt
22 them with respect to at least allowing some wholesale
23 competition?

24 **MR. SANTA:** Well, I think it would be a
25 question of had -- in applying the environmental laws,

1 have the -- did the Siting Board take an approach that
2 imposed a greater burden on interstate commerce than
3 was necessary. But I think if they had legitimate
4 grounds for conditioning the plant or rejecting it on
5 environmental grounds and applied those in an
6 even-handed manner rather than a manner which burdened
7 interstate commerce versus in-state utilities, that
8 they might have legitimate grounds for doing so.

9 COMMISSIONER CLARK: They couldn't simply
10 say that we don't think there's any reason to site
11 power plants in Florida to serve more than 20% of the
12 existing need? They couldn't just make that the
13 standard?

14 MR. SANTA: Let me defer to the professor
15 here, who is our --

16 MR. GEY: Yes. Let me take over here,
17 because I think actually the questions you're asking
18 are -- relate not to preemption in the sense that
19 Professor Seidenfeld was discussing, which involved
20 preemption under the federal statutes, but rather the
21 commerce laws directly, which is also preemption, but
22 it's preemption directly under the Constitution.

23 And the answer to your question is, it's not
24 absolutely certain, but -- whether they would be
25 allowed to make the decision that you suggest, but

1 it's certainly limited by the commerce clause. There
2 are a number of commerce clause decisions from the
3 U.S. Supreme Court in the last 20 years involving
4 precisely the sort of environmental decisions that you
5 suggest in which the Supreme Court has decided that
6 states may not limit various kinds of economic
7 activity to protect local environmental interests.

8 These cases do not -- most of them do not
9 arise in the energy context; they arise, for example,
10 with regard to waste dumps and toxic waste disposal
11 and things of that sort. But even with regard to
12 interests like that, which are fairly high order
13 environmental concerns, the Supreme Court has said
14 that a state may not essentially pinch itself off from
15 the rest of the country by saying keep your garbage to
16 yourself, we don't want it here.

17 So the precise numbers are in issue, and it
18 would be a balancing test, in effect, because it would
19 be a question of whether the burden on commerce
20 outweighs the local interest involved; and those cases
21 are never sure things, but it would certainly be
22 questionable under the Constitution.

23 **COMMISSIONER JACOBS:** Can I ask you to give
24 me your impressions of this hypothetical and how it
25 will play out in your preemption analysis?

1 Let's move away from the environmental
2 restriction we might impose. Let's say we really want
3 to look at the overall market impact and reliability
4 of the grid, and we would want to impose a requirement
5 that -- actually impose a superprocedure in this need
6 determination that some number of retail utilities
7 would have to demonstrate that on the in-service date
8 of your plant, your capacity would represent a cost
9 efficient purchase for them.

10 **COMMISSIONER GARCIA:** Would you repeat the
11 question?

12 **COMMISSIONER JACOBS:** On the in-service date
13 we would essentially require that as a condition of
14 permitting your plant, that some number -- you have
15 one with 30, but we would want some number of other
16 utilities to come in and demonstrate that on the
17 in-service date of your plant your product would
18 represent a cost efficient -- cost-effective purchase
19 for them, and -- I don't know. It may not need to be
20 the whole 500. It may need to be 450 or 400, but we
21 would set some kind of a requirement of that.

22 They don't have to have a contract, and I
23 don't even know that we'd say they have to contract on
24 the in-service date, but they would have to
25 demonstrate that on that in-service date your output

1 would be cost-effective.

2 **MR. SANTA:** Mr. Jacobs, I think the
3 hypothetical you pose, it kind of starts to sound like
4 you can't get there from here; because how, if you
5 certify a plant today with a condition that must be
6 fulfilled at some point in the future, why would Duke
7 New Smyrna make the investment, and what would be the
8 penalty to Duke New Smyrna if they hadn't met the
9 condition? Because if you're saying on the date that
10 it goes into service it's got to have something --

11 **COMMISSIONER JACOBS:** No, no. What I'm
12 saying is those utilities have to, those retail
13 utilities have to demonstrate that it would be
14 cost-effective for them to purchase -- and that's the
15 essence of your argument. Your argument is --

16 **COMMISSIONER GARCIA:** But don't they have
17 to --

18 **COMMISSIONER JACOBS:** -- is it not? Is it
19 not your argument --

20 **COMMISSIONER GARCIA:** -- come in for
21 recovery of this Commission?

22 **COMMISSIONER JACOBS:** I'm sorry.

23 **COMMISSIONER GARCIA:** If Mr. Sasso's FPC
24 buys its power at a rate that's not cost-effective,
25 we're not going to allow recovery.

1 **COMMISSIONER JACOBS:** I understand that, and
2 that cost recovery issue would --

3 **COMMISSIONER GARCIA:** I mean, doesn't that
4 go back to the argument you're sort of trying to make
5 the -- Commissioner Deason's argument in the inverse.
6 If somebody wants to build a Gayfers or whatever --

7 **COMMISSIONER JACOBS:** Yeah.

8 **COMMISSIONER GARCIA:** -- you're going to
9 say, well, if you want to build another one, you've
10 got to sell just as cheap as --

11 **COMMISSIONER JACOBS:** No, no. I'm not
12 asking them to have to contract with somebody on the
13 in-service date. What I'm asking them to demonstrate
14 that if somebody were --if there was a need that
15 exists on the in-service date, there are people out
16 there for whom their product would be a cost-effective
17 purchase. If they choose to purchase or not is up to
18 them. When we certify --

19 **COMMISSIONER GARCIA:** If it isn't a
20 cost-effective -- if it isn't cost-effective, we're
21 not going to allow recovery in terms of what our
22 interest is to protect ratepayers.

23 **COMMISSIONER JACOBS:** I don't dispute that
24 at all. It would be a cost -- the retail utility
25 would still have to undergo a prudence test as to the

1 purchase, but at this point in time, we're trying to
2 make an assessment as to whether or not we want to
3 allow this capacity and whether or not there's reason
4 to believe that it will have -- it will be received in
5 the marketplace as a need determination, that the cost
6 recovery issue will come later; and I guarantee you
7 that if it proves to be cost-effective, you'll get it.

8 But what I'm saying here is, what you're
9 saying is that -- if I understood your preemption
10 argument, it was that if we try and make utilities
11 have a contract, if we try and make merchant plants
12 have the contracts before they enter the market, we're
13 bordering into preemption territory. And what I'm
14 saying is, okay, I don't want them to have to have a
15 contract, but I want them to have some demonstration
16 that when they come into the marketplace they will be
17 a cost-effective producer.

18 MR. WRIGHT: Madam Chairman, may I respond
19 to Commissioner Jacobs?

20 CHAIRMAN JOHNSON: Yes.

21 MR. WRIGHT: Commissioner Jacobs, this
22 definitely goes beyond the scope of this motion to
23 dismiss, but I want to try to respond now in hopes
24 that things that will be clearer.

25 We feel that our -- that the evidence we

1 have already filed and the testimony you will hear and
2 exhibits you will receive will demonstrate to you --
3 you know, in our view we allege that it will
4 demonstrate to you unequivocally that this power plant
5 will be a cost-effective addition to all the
6 generation supply system of Peninsular Florida and
7 that it will not only provide cost-effective power by
8 the normal operation of rational decision makers in
9 the market, but that it will also reduce costs to
10 ratepayers because of the downward competitive
11 pressure it will impose on wholesale market power
12 costs.

13 And that's really evidence that has yet to
14 come in because we're still here on this motion to
15 dismiss. But your question was, can you consider that
16 today. And the answer is, if we get to the hearing on
17 the merits, the evidence will be presented to you,
18 sir.

19 **COMMISSIONER JACOBS:** I understand your
20 argument. Mine has to do with how do we -- if we're
21 bordering on preemption, how do we serve the interests
22 that have already been stated in state law? And
23 already we've heard arguments from our Supreme Court
24 as to what our concerns and interests should be as we
25 consider this application, which would be that there

1 be some nexus of need to the capacity that we permit
2 or that we site.

3 And what I'm saying is, what if we make that
4 nexus -- and this is interesting because, if I
5 understood the argument before, one of the prongs in
6 the Florida cases is that the petitioning entity was
7 the one who wanted to promote the contract.

8 What I'm saying here is that we don't want
9 that entity to promote the contract, but we certainly
10 want them to have a say in whether or not they would
11 buy that capacity, and we should be able to consider
12 that.

13 Now, whether they buy it, whether we offer
14 them cost recovery of it, that's separate and apart
15 from that issue.

16 **COMMISSIONER GARCIA:** Well, why? My
17 question is why would they -- first of all, why would
18 I care?

19 If Duke comes to Florida and decides to
20 build a power plant and it's not going to affect --
21 I'm not saying that's the answer -- but it's not going
22 to affect the ratepayers of the state of Florida, and
23 they spend \$150, \$200 million in our state and they go
24 bust, how does that affect the ratepayers in a
25 negative way?

1 **COMMISSIONER JACOBS:** Because if they can't
2 make that showing, then why would we permit that
3 plant? If they can't find enough people out there who
4 would say they'd buy --

5 **COMMISSIONER GARCIA:** I get calls on a
6 constant basis wanting this state to give them money
7 to relocate their facilities right here. Some of them
8 I think are good ideas, some of them not so good. I
9 try to direct them in the right direction, but I
10 certainly don't stop anyone who wants to invest money
11 in our state.

12 They may be building a giant block of cement
13 that has no good use, but that's a giant block of
14 cement in our state that's investment in our state.
15 And the truth is, as long as my ratepayers aren't
16 exposed, why do I want them to guarantee me that
17 they're going to build something that's going to be,
18 at least, cost alternative for someone? If it isn't,
19 they're up the creek.

20 **COMMISSIONER CLARK:** Well, I think one of
21 the concerns that comes in is that if you allow them
22 to build it for purposes of protecting the
23 environment, you believe that there should be some
24 limit on how much can be built --

25 **COMMISSIONER GARCIA:** Well, see,

1 Commissioner --

2 COMMISSIONER CLARK: Wait a minute. Let me
3 finish.

4 If they don't have the obligation to
5 actually to sell that power in Florida, there's a
6 possibility that it could be sold elsewhere, and then
7 you have reliability problems in Florida. I say a
8 possibility. I know the export capabilities are slim,
9 but, nonetheless, they have been made, and power had
10 been exported at some good prices. And I think --

11 COMMISSIONER GARCIA: And you're right --

12 COMMISSIONER CLARK: -- that's the danger
13 of --

14 COMMISSIONER GARCIA: That's an outside.
15 You're absolutely right, and maybe Florida as -- you
16 know, I've seen that bogeyman trotted out of the
17 closet on many occasions, and Florida should not
18 become the power plant of the rest of the state. I
19 think our transmission --

20 COMMISSIONER CLARK: I've heard that, too.

21 COMMISSIONER GARCIA: -- our transmission
22 capabilities don't allow that. But on the other side,
23 you know, the question is -- that you're asking is --
24 and I haven't addressed it when we've been talking,
25 but how much is too much?

1 I don't particularly like strip malls, but I
2 don't really have to get -- I don't have to engage the
3 City Commission to say enough is enough. There comes
4 a point where enough, the market decides.

5 Now, there are cities who decide and say
6 enough is enough; we will not zone any more strip
7 malls, and they put a moratorium for a bunch of
8 environmental reasons. They have to have some public
9 policy reason.

10 And I think the same is true here, but we
11 don't have that. I mean, we don't have that in this
12 case. We may decide that in Florida 15% margin
13 reserve is enough; the companies have met it; go home,
14 Mr. Wright. But I don't think that's the issue at
15 hand. In other words, is his power going to be the
16 most efficient one? The market is going to decide
17 that.

18 **COMMISSIONER JACOBS:** If I can go back for a
19 minute. You kind of took me to the lawyers' detour.
20 You kind of said, we don't have the situation;
21 therefore, the question is irrelevant.

22 Let's assume the hypothetical is, and would
23 that deal -- how would that play into your preemption
24 argument if we were to impose such a requirement?

25 Do you want me to restate it again, what the

1 requirement would be? (No response)

2 The requirement would be that we would
3 impose a process in this need determination whereby we
4 would allow intervention of however number of retail
5 utilities, and they would demonstrate that their
6 purchases on your in-service date would be
7 cost-effective; not that they would make those
8 purchases, but that they would be cost-effective.

9 MR. WRIGHT: If the question is, would doing
10 that run afoul of federal preemption pursuant to the
11 Energy Policy Act, I think the answer is yes. It
12 would still leave the utilities in the driver's seat.

13 It would still -- see, it's complicated
14 because of the timing involved, Commissioner Jacobs.
15 We're here on the motion to dismiss and to whether we
16 can even go forward on the merits.

17 And if your question is, what about this
18 nexus, you know, the nexus makes a lot of sense when
19 captive ratepayers are involved. It makes sense that
20 there be a nexus between a contract and the retail
21 serving utility where the retail utility's ratepayers
22 are to be on the hook.

23 The nexus involved in -- or the nexus is --
24 that may be involved -- where there's a merchant plant
25 such as is proposed here or where a significant of

1 merchant capacity is proposed as part of a power plant
2 here is different. The nexus is to general -- maybe
3 we submit to general need for economic power, to
4 general need for additional reliability, and so on,
5 without reference to a specific retail utility's body
6 of ratepayers.

7 What I would say is you don't have to get
8 there at this point, in any event. I would agree with
9 Commissioner Garcia that once the plant is built,
10 either we'll sell at cost-effective rates -- and,
11 again, I think you have to assume that utilities are
12 going to behave rationally and that they'll buy from
13 us when they think it's a good deal, and they won't
14 buy from us when they don't think it's a good deal;
15 and you'll have an opportunity for prudence review.

16 But to shut us out categorically at this
17 point, or even to impose that kind of condition on us,
18 I think, would at a minimum run afoul of the commerce
19 clause and probably be preempted, although the
20 preemption argument that's here today, Commissioner,
21 is really the question as to whether categorically
22 excluding entities such as Duke New Smyrna, federally
23 regulated public utilities, from this permitting
24 process is a permissible construction of the statute.

25 **CHAIRMAN JOHNSON:** Could you -- while he --

1 oh, I thought you were still --

2 COMMISSIONER JACOBS: No. I'm done.

3 CHAIRMAN JOHNSON: Could you go over,
4 Mr. Wright, again what is the nexus for a merchant
5 plant? Because you added a qualifying "may be," and I
6 want to understand what you think the nexus might be.

7 MR. WRIGHT: I'm not sure there is. You can
8 look at it in different ways. And Professor Gey, I
9 think, will address part of this in discussing the
10 commerce clause issue momentarily.

11 You could look at it and have looked at it
12 in the past on the criteria set forth in the statute
13 with respect to Peninsular Florida. You have looked
14 at the economic need for power plants. You could look
15 at this merchant plant, and we offered evidence that
16 this power plant will enhance reliability in the
17 Peninsula. We've offered evidence that this power
18 plant will contribute substantially to providing lower
19 cost, cost-effective electricity at a reasonable cost
20 in the Peninsula.

21 However, there may not even be an nexus.
22 There may not need to be a nexus. I think, you know,
23 ultimately there may be a question of just our ability
24 to participate in the wholesale power supply market,
25 and that really gets to the commerce clause that

1 Professor Gey needs to address.

2 MR. GEY: In view of the time, let me make
3 some just very, very quick comments, because these
4 issues have come especially in the last hour's
5 discussion, and let me just give you some systematic
6 framework for understanding the commerce clause
7 issues.

8 And, again, the commerce clause issues arise
9 primary in regard to the motion to dismiss, because
10 the motion to dismiss essentially is predicated on the
11 notion that Duke New Smyrna cannot even play the game;
12 they can't even get into the game without first
13 contracting with a local utility. And, in fact,
14 Commissioner Clark, your summary of the opponents'
15 position pretty much frames the issue.

16 Your summary, which I think is correct, is
17 that there will be no wholesale power plants except
18 those operated by retail utilities and entities that
19 have a firm contract with retail utilities.

20 Now, the problem from the commerce clause
21 perspective is that by doing -- by establishing a
22 system of that sort you've essentially given a small
23 handful of companies an absolute veto on who can
24 participate in the wholesale power market. And the
25 problem with that is, it amounts to economic

1 protectionism, which violates a range of commerce
2 clause decisions stretching back 70 years, and some
3 even longer than that.

4 **COMMISSIONER DEASON:** Let me interrupt you
5 just a second. Is that true, given our regulatory
6 authority over the utilities, that if there is an
7 entity that can construct a power plant in a
8 cost-effective manner, provides a contract to a retail
9 utility which is cost-effective, and that contract is
10 not accepted by the utility when they have a justified
11 need and they do something that is not cost-effective,
12 in effect our regulation is going to either not allow
13 that to happen, or else they're going to be penalized
14 in the rates they're allowed to recover and their
15 costs are going to be higher, and we're going to allow
16 on recovery of what the cost-effective rates would
17 have been?

18 **MR. GEY:** Well, the reason this is
19 complicated is because you have very different powers
20 with regard to the retail section of the industry and
21 the wholesale segment of the industry; and this dates
22 back all the way to the Federal Power Act in 1935.
23 And one of the idiosyncrasies of the commerce laws --
24 and in fact the area of law that I'm talking about is
25 the so-called dormant commerce law -- dormant commerce

1 laws in a sense that it operates independently of any
2 federal statute or federal regulation.

3 **CHAIRMAN JOHNSON:** You need to slow down.

4 **MR. GEY:** That's what my students say.

5 The dormant commerce clause is an
6 independent constitutional restriction on what the
7 states can do by way of regulating economic activity.

8 Under the dormant commerce clause the only
9 real way to get around, for example, rules against
10 discrimination against interstate commerce is by
11 having a federal statute or a federal regulation
12 permitting states to discriminate; and there's even a
13 phrase in the commerce clause literature that
14 describes this. The phrase is that the part cannot
15 discriminate against the whole, but the whole can
16 permit parts to discriminate against the whole, the
17 theory being the federal government can always
18 allocate --

19 **CHAIRMAN JOHNSON:** You need to slow down.

20 **MR. GEY:** Okay.

21 The federal government can always permit
22 local entities to discriminate if it's in the interest
23 of some larger federal concern. And what's happened
24 in this industry is that the federal government in the
25 Federal Power Act starting in 1935 and the subsequent

1 statutes has decided to permit states to regulate in
2 ways that in the absence of the federal regulation
3 would probably violate the constitution with regard to
4 the retail segment of the industry.

5 And so the reason this is complicated is
6 because you have to -- we have to figure out exactly
7 what it is that the statute permits states to do, and
8 that's the preemption issue and what it is that the
9 constitution limits states from doing; and that's the
10 commerce clause issue.

11 So with regard to your question and also,
12 Commissioner Clark, your question about the
13 environmental regulations, the answer is, the first
14 thing you do is look at the federal statutes to see
15 what the federal statutes permit states to do or
16 prohibit them from doing. And our position is that
17 the federal statutes encourage merchant plants and
18 independent market and wholesale energy sales.

19 And then if the federal statutes do not
20 resolve the issue, you look to the federal policy
21 under the commerce clause. And the commerce clause
22 essentially is an almost absolute rule prohibiting
23 economic protection.

24 So the answer to your question is, to the
25 extent that the federal statutes prohibit regulating

1 the wholesale power market, you can't do it. And to
2 the extent that the federal statutes don't speak to
3 the subject and the regulation would amount to
4 economic protectionist legislation, the answer is, you
5 can't do it under that authority either.

6 **CHAIRMAN JOHNSON:** Is your position, then --
7 to be clear, is your position that under the dormant
8 section of the commerce --

9 **MR. GEY:** Dormant commerce clause.

10 **CHAIRMAN JOHNSON:** -- dormant commerce
11 clause that we don't even have the authority to go
12 through a need --

13 **MR. GEY:** No.

14 **CHAIRMAN JOHNSON:** -- analysis?

15 **MR. GEY:** No.

16 **CHAIRMAN JOHNSON:** How is it limited then?

17 **MR. GEY:** It's limited in the sense that
18 you -- that the states are allowed to pursue
19 legitimate local concerns. And those concerns include
20 ensuring adequate electricity a reasonable cost.
21 Those concerns include environmental regulations that
22 are peculiar to the state. All the legitimate local
23 interests come into play and are permissible.

24 What the state cannot do is implement those
25 regulations in a way that favors one group of economic

1 actors and disfavors another group of economic actors.
2 And, again, keep in mind that these issues are being
3 discussed primarily with regard to the motion to
4 dismiss. And under the motion to dismiss, the claim
5 is Duke cannot even make the claim that it had -- that
6 there's a need within Florida for its merchant power
7 plants. And so once you get past that issue --

8 COMMISSIONER DEASON: Let me interrupt. But
9 the requirement to have a contract with a retail
10 utility, that is prohibited by the dormant commerce
11 clause? Or is that --

12 MR. GEY: I think the answer is yes.

13 CHAIRMAN JOHNSON: Are you going to explain
14 why?

15 MR. GEY: The answer is yes, because that
16 requirement again gives a favored set of economic
17 actors -- in this case retail utilities in Florida --

18 CHAIRMAN JOHNSON: Why is it favored for us
19 to say you have to have a contract? That's what I'm
20 not understanding. Because I understood your --

21 MR. GEY: Because it gives --

22 CHAIRMAN JOHNSON: -- analysis, but I'm --

23 MR. GEY: Right.

24 CHAIRMAN JOHNSON: -- not understanding --

25 MR. GEY: -- one group of economic actors

1 the ability to foreclose another group of economic
2 actors, even from participating in a particular
3 market; in this case, the market for wholesale energy.
4 And the reason it does that is because if the retail
5 utilities simply refuse to enter into contracts with
6 market entrants such as Duke New Smyrna, in effect
7 market entrants such as Duke New Smyrna would be
8 foreclosed entirely from the Florida market.

9 If they didn't have a contract under that
10 interpretation, they could not even file a petition
11 for determination of need. And, again, this is --
12 this amounts to pure economic protection, which the
13 court has prohibited over and over.

14 **CHAIRMAN JOHNSON:** Well, the IOU, they can't
15 just -- in the face of a need, they can't just refuse,
16 and there's a process that we have in place here.

17 **MR. GEY:** It's a process, though, that
18 circumvents the marketplace in a way that again gives
19 economic entities within the state the ability to
20 dictate market realities to actors outside the state
21 who may disagree.

22 In other words, you could have a scenario,
23 or you may have a scenario in this case, in fact,
24 where the market participants in the state already,
25 the retail utilities, disagree with Duke New Smyrna

1 about the economic viability of this new plant.

2 And in the situation like that, again the
3 commerce clause seems to say -- well, not just seems
4 to say, actually does say in the context of decisions
5 interpreting the clause, that the state may not give
6 the local economic actors the ability to make those
7 decisions or other market entrants who want to simply
8 take the risk and market their product.

9 COMMISSIONER CLARK: I have a question for
10 you then. Are the anti-trust laws developed under the
11 commerce clause?

12 MR. GEY: Yes. All economic regulations at
13 the federal level come under the commerce --

14 COMMISSIONER CLARK: Well, if there is a
15 state action immunity under antitrust that basically
16 says that you can have geographic division of
17 territory, you can have a system of regulation that
18 totally displaces commercial or market activity, I
19 don't understand why the dormant commerce clause
20 didn't undermine that defense.

21 MR. GEY: The reason is because that's a
22 statute passed by Congress under its commerce clause
23 authority. The dormant commerce clause is a
24 constitutional limitation, inherent intrinsic
25 constitutional limitation on what states may do, state

1 and local --

2 COMMISSIONER CLARK: But is --

3 MR. GEY: But Congress can essentially
4 override dormant commerce clause rules.

5 COMMISSIONER CLARK: Right. But I didn't
6 think --

7 MR. GEY: (Inaudible simultaneous comments.)

8 COMMISSIONER CLARK: -- the antitrust laws
9 had something called state action immunity. That was
10 something that the courts came up with. And why would
11 the courts come up with it if you still had that
12 dormant commerce clause?

13 MR. GEY: The -- well, you mean under the
14 antitrust statutes?

15 COMMISSIONER CLARK: Right. There is --

16 MR. GEY: (Inaudible simultaneous comments.)

17 COMMISSIONER CLARK: -- as I understand it,
18 the notion of state action immunity is not part of the
19 federal antitrust laws. It was developed by the
20 courts, and they essentially --

21 MR. GEY: Well, if --

22 COMMISSIONER CLARK: -- said where the state
23 has a system --

24 MR. GEY: Right.

25 COMMISSIONER CLARK: -- to displace

1 competition and displace it with regulation --

2 MR. GEY: At retail. Not at wholesale, at
3 retail. Under the -- you mean -- you're talking about
4 the Federal Power Act, right?

5 COMMISSIONER CLARK: Right. Let me just --
6 the distinction you're making back to me is that
7 because we're trying to influence the wholesale in
8 this --

9 MR. GEY: Precisely.

10 COMMISSIONER CLARK: -- instance, then the
11 dormant commerce clause --

12 MR. GEY: Right. The Federal Power Act does
13 give the states -- again, does give the states
14 authority over retail electrical generation and sales
15 that is different than the power states have under
16 their commerce clause authority with regard to
17 wholesale activity.

18 And, again, Congress could go back and write
19 a statute, an extension of a Federal Power Act that
20 gives the states the authority to do exactly the same
21 thing with regard to wholesale, because congress under
22 its active commerce clause authority can write a
23 statute giving states whatever power it wants, so long
24 as it doesn't violate other constitutional provisions,
25 like the 14th Amendments; but Congress hasn't done

1 that.

2 Congress has carved out essentially an
3 exception to the antidiscrimination rules that are
4 built into to the commerce clause with regard to
5 retail electrical generation, not with regard to
6 wholesale.

7 And that's the issue. At what point does
8 the congressional authority given to the local public
9 service commissions with regard to retail implicitly
10 provide power to the PSC to govern wholesale
11 activities? And our argument is that given what the
12 federal government has said in other statutes,
13 combined with the general limitations on state power
14 under the dormant commerce clause, that power does not
15 extend to denying Duke New Smyrna the ability even to
16 file a determination of need position in this case.

17 **CHAIRMAN JOHNSON:** Under your analysis of
18 the dormant commerce clause, if we were to approve the
19 Duke New Smyrna petition and then SONAT or some other
20 company were to come before us --

21 **MR. GEY:** Right.

22 **CHAIRMAN JOHNSON:** -- and we were to
23 determine that there was sufficient margin reserve and
24 we that we didn't need another merchant plant, would
25 that hold up, or is that some violation, too, of the

1 dormant commerce clause? I mean, do we have that kind
2 of authority under your analysis?

3 MR. GEY: The answer is I don't know. I
4 don't know because the factors that would enter into
5 that decision are different than the factors the court
6 has looked at in other cases. But I should tell you
7 there are cases, again a lot of them involving
8 environmental issues, where the states have a lot of
9 power or the courts imply that the states have a lot
10 of power, where the states try to preserve scarce
11 resources and the court has struck down statutes
12 intended to preserve those scarce resources on
13 commerce clause grounds.

14 And this is kind of the same sort of thing,
15 because what you're trying to do is preserve local
16 resources in the sense of preserve the sanctity of --
17 not the sanctity, but the -- (pause) --

18 COMMISSIONER DEASON: The quality?

19 MR. GEY: I'm sorry?

20 COMMISSIONER DEASON: The quality?

21 MR. GEY: Well, the quality, the integrity
22 of the system as a whole, I mean. And, again, you
23 would end up having to --

24 COMMISSIONER GARCIA: (Inaudible
25 simultaneous comments away from microphone) -- two,

1 for example, don't allow foreign coal to come into the
2 state, or the local coal is preferred to the
3 outside --

4 MR. GEY: Which is actually a Supreme Court
5 case, but the Supreme Court struck that down --

6 COMMISSIONER GARCIA: Right. Right.

7 MR. GEY: It's the same sort of scenario.
8 And, again, it would be complicated both because the
9 factors involved are different than the court has
10 considered so far, and also because you have the
11 statutory issues, as well, come into play.

12 And so it would require an analysis of the
13 meaning of the statute combined with the meaning of
14 the dormant commerce clause, and the answer, bottom
15 line, is that I don't know what the answer would be,
16 but it would certainly be problematic and subject to
17 review by the courts.

18 CHAIRMAN JOHNSON: But the issue that we're
19 dealing with today, a merchant plant coming into the
20 state and wanting to go through this process, nothing
21 similar has occurred in other states?

22 MR. GEY: So far as I know, nothing has, at
23 least in -- that has been litigated, nothing has come
24 up. There have been other Supreme Court decisions
25 dealing with electrical generation. The Wyoming v.

1 Oklahoma case is one. The New England power case is
2 another. The New England Legislature passed -- New
3 Hampshire Legislature passed a statute prohibiting the
4 export of electricity, and it was deemed a violation
5 of the commerce clause. But nothing of this --
6 nothing of this sort, though, that I'm aware of.

7 **CHAIRMAN JOHNSON:** Because your position,
8 again to be clear, is that if we determine that the
9 definition -- or the statutory provisions are as
10 Mr. Guyton and Mr. Sasso articulated, that that is an
11 unconstitutional provision in our statutes that --

12 **MR. GEY:** That's right. But, again, it's a
13 very limited claim, because all we're claiming is that
14 it is unconstitutional to prevent Duke even from
15 presenting its case to the Commission. That's the
16 claim, not that the Commission doesn't have authority
17 to do the determination of need; not that the
18 environmental and safety and health and economic
19 issues should come into --

20 **COMMISSIONER GARCIA:** You believe that we
21 could meet and we could hear Mr. Wright's case or
22 Duke's case and then say there's no need?

23 **MR. GEY:** You could do that, and, again, the
24 next question would be, would that be a violation of
25 the commerce clause. And the answer to that would be,

1 it depends; it depends on whether that action is in
2 essence a sham or economic protections.

3 COMMISSIONER GARCIA: Right.

4 MR. GEY: And if it is, then it is --

5 COMMISSIONER GARCIA: Then it fails.

6 MR. GEY: -- (Inaudible simultaneous

7 comments.) -- but if it's a legitimate --

8 COMMISSIONER GARCIA: But if it isn't --

9 MR. GEY: If it's a legitimate decision, and
10 if that decision affects not just external actors like
11 Duke New Smyrna, but also internal actors that are
12 already preferred active in the system, if both actors
13 are disadvantaged in the same way, the answer is it's
14 not the commerce clause problem. It might be a
15 problem under the statutes --

16 COMMISSIONER GARCIA: Right.

17 CHAIRMAN JOHNSON: -- but it's not a
18 commerce clause problem.

19 COMMISSIONER GARCIA: But a decision that
20 the statute in terms of defining applicant means that
21 in order for Duke to come in, they have to have
22 show -- New Smyrna would have needed the whole 500
23 megawatts for us to say that that is required, or that
24 a contract is required, that that's too much of a
25 threshold and that that would tip the balance?

1 **MR. GEY:** That's right. That's exactly
2 right.

3 **CHAIRMAN JOHNSON:** Even though they can come
4 if they -- perhaps could come in if they had the
5 contract, you're saying that's too high a barrier to
6 put forth?

7 **MR. GEY:** That's right; because it -- you've
8 heard the term "barriers to entry" in the context of
9 the statutes. Well, this is the constitutional
10 barrier to entry. It gives again --

11 **COMMISSIONER GARCIA:** There are cases along
12 those lines that you force people to purchase certain
13 things if they come through the state or things of
14 that nature. I remember --

15 **MR. GEY:** -- (Inaudible simultaneous
16 comments.) -- there are a number of cases like that --

17 **COMMISSIONER GARCIA:** (Inaudible
18 simultaneous comments.) -- awhile ago --

19 **MR. GEY:** -- and there are cases we cited in
20 our brief, cases stretching back to the '20s which
21 states were issuing certificates of need in other
22 economic industries, and said, we've already issued
23 enough --

24 **COMMISSIONER GARCIA:** The same way that we
25 could not prevent -- say, Duke Power decided to go

1 over to Georgia and build a bunch of power plants on
2 the border and started selling them into the state.
3 We couldn't stop that.

4 MR. GEY: That's right. That's right. And,
5 again, and that -- the Supreme Court has spoken on
6 that less than a decade ago --

7 COMMISSIONER GARCIA: Right.

8 MR. GEY: -- and spoken very clearly, too;
9 no holes in the decision.

10 COMMISSIONER DEASON: Explain something to
11 me. And maybe this is a good analogy, maybe it's not.
12 Liquor sales is a regulated activity in the state of
13 Florida, I assume all states; and as far as I know,
14 you have to have a license before you can establish
15 a --

16 MR. GEY: Separate amendment; 21st
17 Amendment.

18 COMMISSIONER DEASON: That's a separate one.
19 All --

20 MR. GEY: That's right.

21 COMMISSIONER DEASON: -- that has nothing to
22 do with commerce.

23 MR. GEY: No.

24 COMMISSIONER DEASON: Give me --

25 MR. GEY: It's essentially --

1 **COMMISSIONER DEASON:** -- one where the state
2 requires some license or activity that doesn't violate
3 this dormant commerce clause.

4 **MR. GEY:** Well, the states have been given
5 the authority to regulate, obviously, many
6 professions, including my own. And that's -- it's not
7 a problem, again, because there are legitimate local
8 interests having to do with the oversight of
9 professions who are providing sensitive services to a
10 local population where you need local control. You
11 need a fairly direct hand over those people to keep
12 them legitimate.

13 But, again, there are limits. There's a
14 case, for example, involving attorneys, attorney
15 registration.

16 **COMMISSIONER DEASON:** But does the state of
17 Florida have a need determination for the number of
18 lawyers?

19 **MR. GEY:** Oh, I hope not.

20 **COMMISSIONER DEASON:** Should we? (Laughter)

21 **MR. GEY:** Should there be?

22 **COMMISSIONER DEASON:** Yeah.

23 **MR. GEY:** Oh, no. We need more lawyers. We
24 need lots of lawyers.

25 **COMMISSIONER DEASON:** It's kind of funny,

1 but seriously, we're talking about a need
2 determination for the amount of generating capacity
3 that Florida needs which is a constraint upon the
4 market.

5 MR. GEY: Right. And I'll give you an
6 example that's actually come up, again in the
7 northeast; Wal-Mart. Could a city or a state say, we
8 have too many Wal-Marts? And the answer is no. And,
9 in fact, many cities in the northeast have tried to do
10 this because they're not quaint enough. And the
11 answer is the courts have struck them down, every
12 single one. The answer is no.

13 COMMISSIONER DEASON: Well, an extreme
14 interpretation of your argument is, is that the whole
15 Power Plant Siting Act is a violation of the --

16 MR. GEY: No, no.

17 COMMISSIONER DEASON: -- dormant commerce --

18 MR. GEY: Because of federal statutes that
19 have given the states the authority to do certain
20 things with regard to retail electricity, that's the
21 key. The Federal Power Act is the key, because that
22 gets you out at the retail level. That gets you out
23 of these commerce clause --

24 COMMISSIONER GARCIA: There's a series of
25 reasons under our rules that allow us to prevent it.

1 Let's say that Duke and FPC and FPL all wanted to
2 build a series of power plants in the same area of the
3 state which affected reliability. Then we could say,
4 no, there's not a need for a power plant there, I
5 guess --

6 **MR. GEY:** Right. That's the key. But in
7 the absence of those statutes, you're right; it would
8 be problematic.

9 **COMMISSIONER DEASON:** So you're saying as
10 far as retail, the provision of retail service, we can
11 put whatever constraints we want on saying no power
12 plants by the entities we regulate on a retail level,
13 but we've got to allow exempt wholesale generators to
14 come in and build whatever they want. Is that what --

15 **MR. GEY:** Well, I don't want to put myself
16 over as an expert on the Federal Power Act, because
17 I'm not sure -- built into the structure of their act
18 there may be limitations on your authority. But to
19 the extent that the act permits you to do this, the
20 answer is yes. There would not be -- put it this
21 way --

22 **COMMISSIONER GARCIA:** I think Mr. Santa
23 could probably answer that question better.

24 **MR. SANTA:** The Federal Power Act does not
25 go specifically to the issue of siting generating

1 facilities. The Federal Power Act regulates wholesale
2 sales and interstate commerce and interstate
3 transmission.

4 **COMMISSIONER CLARK:** But I think
5 Commissioner Deason is right, though. What your
6 argument basically says with respect to the dormant
7 commerce clause is, we can control what our retail
8 utilities do in terms of siting -- building power
9 plants, but we can't control what a merchant plant
10 would do without running afoul of the dormant --

11 **MR. GEY:** Of the dormant commerce clause.
12 But that's not really quite right, because you can do
13 precisely the same things in terms of restrictions on
14 environmental impact and so forth. You can do exactly
15 the same thing to wholesale power companies that you
16 do with regard to similar activities by the local --

17 **COMMISSIONER CLARK:** But we cannot condition
18 that on a need for retail service import.

19 **MR. GEY:** You can condition it -- well, see,
20 again, I don't want to make it that absolute, because
21 there is a legitimate interest in the state, given the
22 fact that there are just physical limits on
23 transmission capacity and so forth.

24 There would be a legitimate need at some
25 point for the state to step in and restrict at a level

1 that we're not even close to the production of more
2 power plants possibly. But, again, I hate to
3 condition everything, but the question at that point
4 would be, well, could Florida condition the building
5 of extra power plants for fear that some of the power
6 would be shipped out of state? Answer: No. See the
7 New Hampshire power case.

8 So, again, I can't answer your question
9 absolutely, but it's -- there's a question mark, a
10 question mark created by the Supreme Court. And again
11 I --

12 COMMISSIONER CLARK: Let me just ask you --

13 MR. GEY: -- can't tell you how strong --

14 COMMISSIONER CLARK: -- we could not deny a
15 siting of a power plant --

16 MR. GEY: I'm sorry. You could --

17 COMMISSIONER CLARK: We could not deny the
18 siting of a power plant based on the idea that it was
19 not necessary to serve retail customers in Florida.

20 MR. GEY: I think the New Hampshire power
21 case pretty much answers that question no, you could
22 not deny someone the ability to build a power plant
23 even if they came to you and said we're shipping all
24 the power out of state.

25 COMMISSIONER CLARK: But we could deny it if

1 Florida Power Corporation came and said, that's what
2 we want to do.

3 MR. GEY: Yes, because of the statutory
4 structure at the federal level which gives you
5 authority to protect the ratepayers who would end up
6 footing the bill.

7 COMMISSIONER DEASON: Why are we even here
8 today, then? Under the dormant commerce clause, why
9 don't you just go build your power plant, and don't
10 even ask us?

11 MR. GEY: Well, again, we recognize that
12 there are legitimate concerns that are built in to
13 the --

14 COMMISSIONER DEASON: You're saying for
15 purposes of this limited motion to dismiss, we want to
16 be able to give our case.

17 MR. GEY: Precisely. That's it.

18 COMMISSIONER DEASON: Okay. And then you're
19 saying, but if we don't demonstrate our case to you,
20 you're preempted anyway because --

21 MR. GEY: No, no, not all. What we're
22 saying is, we want to present our case, because even
23 if we can get to the determination of need process, we
24 think that the rules are the same with regard to
25 everybody in that process, and so we would

1 obviously --

2 COMMISSIONER GARCIA: (Inaudible
3 simultaneous comments away from microphone.)

4 MR. GEY: Precisely. That's the only issue.
5 It's not that we want to abandon the rules; we just
6 want to play the game.

7 COMMISSIONER GARCIA: So your argument would
8 go more directly to Mr. Guyton's argument, which was
9 you're not an applicant --

10 MR. GEY: Right.

11 COMMISSIONER GARCIA: Mr. Guyton says you're
12 not an applicant so we shouldn't even be here.

13 MR. GEY: Right.

14 COMMISSIONER GARCIA: Your argument goes to
15 the fact, well, of course I'm an applicant if you
16 plainly read the language of the statute, or at least
17 that's --

18 MR. GEY: Exactly.

19 COMMISSIONER GARCIA: -- what Schef is
20 telling us, that you're allowed to at least make your
21 case, and when you make your case, you should stand on
22 the same ground as FPL or FPC would stand when they
23 said to us, well, here's what the need is in
24 Peninsular Florida, and this is what we hope to meet.

25 COMMISSIONER DEASON: But you don't want to

1 be in the same place about regulated utilities,
2 because when they come before this Commission and they
3 demonstrate a need, that capacity is built, becomes
4 part of their rate base, their ratepayers have first
5 claim to it, and it is sold to those ratepayers on a
6 cost of service basis.

7 And it doesn't depend what the demand is or
8 what the supply is at any given time. Their customers
9 have first call on that, and it is for them, and it is
10 at a stated price; i.e., it is as if it were under a
11 contract basis.

12 And that's what we're saying to you. Before
13 you have applicant status, you need a contract with a
14 regulated utility. To me that is the equality of it.
15 And if you want -- having a contract puts you in the
16 same place and treats you the same as if you were a
17 regulated utility.

18 **MR. GEY:** But the difference, though, is
19 that Duke New Smyrna is taking the risk here, not the
20 ratepayers.

21 **MR. WRIGHT:** We are not asking to be put in
22 the same place. We are asking for the opportunity to
23 take the risk. We are not asking for the guaranteed
24 opportunity to earn a specified rate of return. We're
25 not asking --

1 **COMMISSIONER DEASON:** You want a
2 determination of need, which is a limitation on the
3 amount of capacity that can be built in this state.
4 And once you get your power plant built, nobody else
5 can come in unless they demonstrate the same thing.
6 So there's a limitation on the amount of power that
7 can be built in the state; therefore, there is a
8 limitation on the supply. Therefore, since you have
9 no contractual obligations, you have the ability to
10 control what price you sell at, and you can take
11 advantage when there is a low capacity situation.

12 **MR. WRIGHT:** Respectfully, Commissioner
13 Deason, I don't agree.

14 **COMMISSIONER DEASON:** Tell me where I'm
15 wrong.

16 **MR. WRIGHT:** I don't agree that there is any
17 meaningful limit at this point in time. You know,
18 this is a fact issue, but I aver to you that there's
19 an opportunity to construct well over 10,000 megawatts
20 of new capacity that would be cost-effective and
21 environmentally beneficial, vis-a-vis the existing
22 supply stack in this state. Even then, I think you
23 could go a lot higher than that. It's just not there.

24 We are not saying, we want our 500 megawatts
25 and then pull up the ladder, Mack, I got mine. We are

1 not here saying, we want our 500 megawatts and then we
2 want you to slam the door on --

3 **COMMISSIONER DEASON:** I'm not saying you
4 want that, but the basis of your argument is, is that
5 there is a need determination --

6 **MR. WRIGHT:** Yes.

7 **COMMISSIONER DEASON:** -- which means at some
8 point somewhere, and we haven't defined it yet, but at
9 some point someone is going to come in and we're going
10 to say there's no longer any need, go away.

11 **MR. WRIGHT:** At some point you might do
12 that. I submit to you, Commissioner Deason, that that
13 point is way out in the future. You can address that
14 on a case-by-case basis.

15 I think when you look at what have been
16 called by your staff razor thin reserve margins in
17 this state, you will reach the same conclusion that we
18 have, and that is that you're not anywhere near that
19 point today, nor are you likely, unless the people of
20 the state of Florida get real lucky, nor are you
21 likely to be anywhere near that point anytime in the
22 foreseeable future.

23 **COMMISSIONER DEASON:** Well, I guess my
24 bottom line point is, I don't see where it is an undue
25 hardship or a barrier to competition, given the

1 regulated scenario that we have in this state, for you
2 to simply have a contract in hand when you come
3 forward to show that there's a need for your
4 particular power plant with a --

5 MR. WRIGHT: Because it would --

6 COMMISSIONER DEASON: -- guaranteed price --

7 COMMISSIONER GARCIA: That's like asking for
8 a license before you participate. That's like saying,
9 If you want to do business in Florida, you need these
10 criteria and in an issue where we know there could
11 be competition.

12 Someone is saying, we're willing to come to
13 Florida and build a strip mall. You want them to say,
14 before you build a strip mall, you need to have --
15 show me a list of customers or you can't build the
16 strip mall.

17 CHAIRMAN JOHNSON: We do that with strip
18 malls, through the --

19 COMMISSIONER GARCIA: But we do that on a
20 zoning basis. We do it to make sure that the
21 infrastructure can bear it, but we don't do it because
22 you need to show the customer. You need to show that
23 the infrastructure can bear it.

24 COMMISSIONER CLARK: Well, let me just point
25 out that while Schef and his clients are willing to

1 say that we can show a need, I think what the argument
2 with respect to the dormant commerce clause is that we
3 can't even condition it on a need in the state. That
4 would run afoul of the fact of the dormant commerce
5 clause and the fact that wholesale competition is
6 within the FERC jurisdiction.

7 I thought that's what you said.

8 MR. GEY: Well, again, I don't want to make
9 any absolute statements about the reach of the
10 commerce clause in an area where --

11 COMMISSIONER CLARK: You just said the main
12 case, or the New Hampshire --

13 MR. GEY: No, I mean --

14 COMMISSIONER CLARK: -- wouldn't let us --

15 MR. GEY: Yeah. In that situation you were
16 talking -- I thought we were talking about a plant,
17 though, that was built in anticipation of selling the
18 power out of state. That's the New Hampshire case.
19 That's the New England Power case.

20 COMMISSIONER GARCIA: It was the inverse.

21 MR. GEY: Yeah, it was the reverse of --

22 COMMISSIONER CLARK: And they could not
23 prevent that from being sited in New Hampshire, so --

24 MR. GEY: Well, it --

25 COMMISSIONER CLARK: -- so I think

1 Commissioner Deason is right. If you just, you know,
2 just tell us you're going to sell it out of state. If
3 you can sell it in state, great, but, you know, we
4 can't stop you.

5 MR. GEY: No intention of doing that.
6 That's --

7 MR. WRIGHT: That's not our case as we have
8 alleged it, Commissioner Clark. We expect to sell 99%
9 plus percent of the output of this power plant to
10 other utilities in Peninsular Florida.

11 You know, could we have come here under the
12 semi-outlandish hypothetical you proposed and say,
13 look, we want to build a power plant here and sell
14 power to Georgia or Alabama or Tennessee, we probably
15 could have.

16 That's not why we're here. That's not the
17 way Duke Energy or its affiliates do business.

18 CHAIRMAN JOHNSON: Mr. Wright, then how do
19 we deal with the general issue of need?

20 I know you state we look at need from the
21 standpoint of Peninsular Florida, but what happens --
22 or how do we evaluate -- assume we allow -- we say
23 Duke is an applicant; you come in, you get permitted
24 for the 500 megawatts. When we do our general needs
25 assessment, how can we as a Commission rely upon that

1 500 megawatts if you decide, no, it's not available?
2 How do we factor that into our analysis?

3 MR. WRIGHT: Based on whatever facts exist
4 at the time. As of today there's a transmission
5 export limitation in the state of 1900 megawatts.
6 Hypothetically you could get three and a half of these
7 power plants built, and hypothetically under some
8 circumstances that are not likely to occur all at the
9 same time, they could export their capacity.

10 Realistically, you could look at the power
11 plant on a statewide basis, make some reasonable
12 probabilistic assumption on how much of that will be
13 available at a time of need to serve, and apply that
14 in your evaluation of the presence of this power plant
15 and its contributions to meeting the need.

16 We think the power plant is going to be
17 available to serve in Florida virtually all the time
18 anyway, and of course if we move forward through the
19 development process, we expect to be negotiating
20 contracts of varying terms. Some may be hourly, some
21 may be yearly, some may be five years, some may be
22 quarterly, some may be seasonally.

23 We expect to be negotiating contracts with
24 other utilities in Florida, and once they're
25 committed, then you know it's here. The problem is,

1 if you shut us out today, they'll never have the
2 opportunity to enter those contracts.

3 **CHAIRMAN JOHNSON:** But if we allow you in
4 today, and -- the IOU, and we say, therefore, that
5 we're relying upon that for our needs, then the IOU is
6 kind of shut out from building a plant.

7 **MR. WRIGHT:** I do not agree. I think that
8 they can justify need on exactly the same criteria in
9 the statute. It comes to the question, Chairman
10 Johnson --

11 **COMMISSIONER GARCIA:** (Inaudible
12 simultaneous comments away from microphone.) The
13 Chairman has a very good point. We make a
14 determination, and what's the need for?

15 **MR. WRIGHT:** The need is for this power
16 plant.

17 **COMMISSIONER GARCIA:** (Inaudible comments
18 away from microphone.) We make a determination --
19 Commissioner Johnson makes a very good point. Here we
20 go, we have this hearing. Lo and behold we determine,
21 yes, 500 megawatts, we can use an extra 500 megawatts.
22 Next week Mr. Sasso is up here for his company, FPC,
23 and says, we need 1,000.

24 I know where Mr. Sasso's power is going.
25 You know, he -- the ratepayers are going to pay for it

1 because they get the first dibs on the power that
2 they -- we know where that's going, but, Schef, we
3 don't know where your power is going, but we know we
4 approved 500 megawatts, and it's committed to nothing
5 and no one in the state of Florida.

6 MR. WRIGHT: Well, 30 megawatts of it, as of
7 today --

8 COMMISSIONER GARCIA: All right --
9 (Inaudible simultaneous comments away from
10 microphone.) -- 470 that are left out there --

11 MR. WRIGHT: And --

12 COMMISSIONER GARCIA: -- sort of --

13 MR. WRIGHT: -- that's true; you don't know
14 exactly who it's going to as of this point in time.
15 We aver to you in our analyses; if we get to the
16 hearing on the merits, will show that virtually all
17 the output at this plant is going to be sold in
18 Florida, because that's where the market is, that's
19 where the economic --

20 COMMISSIONER GARCIA: (Inaudible
21 simultaneous comments away from microphone.)

22 MR. WRIGHT: -- benefit of making these
23 sales is, and that is information that can inform your
24 decision.

25 The question as to --

1 **COMMISSIONER GARCIA:** Regardless how you
2 answer this, I want to make it clear. I think this
3 goes to the merits. I think this is -- and we have
4 been talking about the merits for quite a while. It's
5 not a question of dismissal and --

6 **MR. WRIGHT:** Yes, we have.

7 **COMMISSIONER GARCIA:** -- I have engaged --
8 (Inaudible comments away from microphone.) -- more so
9 than my colleagues.

10 We're talking about the merits and -- go
11 ahead Schef, I'm sorry.

12 **MR. WRIGHT:** That's okay. The point is, you
13 make the comment that FPC, or -- and I -- you may be
14 shut out. I don't agree with that. They're not shut
15 out.

16 The question really goes back to how much is
17 too much? Where might you draw the line? I'll give
18 you one example where you might draw the line. You
19 might draw the line if I came in and said I wanted to
20 build a Chernoble type nuclear unit. You might say
21 no, you know, we don't think that's reliable, kind of
22 had some problems, and we are not going to grant a
23 determination of need for that power plant.

24 I think there are instances where you could
25 draw the line, but as to how much of a good thing is

1 too much, you know, again I submit to you you can do
2 that on a case-by-case basis, and, again, with the
3 reserve margins where they are, yet you're not there,
4 you're not likely to be there next year, or frankly
5 you're probably not likely to be there in the next
6 seven years.

7 And if you do get to the point where you're
8 having to ask yourself the question, do we really now
9 have too much of -- especially if it's merchant
10 capacity where the ratepayers aren't on the -- they're
11 state of the art power plants, they're being operated
12 efficiently, and we have every reason to operate them
13 as such, and they're enhancing reliability. And, you
14 know, hypothetically if we give them more than 2,000,
15 you know the excess above 1,900 is staying in the
16 state, because there isn't transmission capacity to
17 take it out, and you know it's going to be sold at
18 competitive rates, assuming rational economic
19 behavior.

20 Some day, yes, you might get to the point of
21 asking, well, are we to the point yet where we have
22 too much. And I submit to you that that's a question
23 that I think you can answer at each need determination
24 proceeding as we go forward over the next five, 10, 15
25 years, but I don't agree in any way that an IOU or

1 another merchant developer is shut out by granting our
2 need determination today.

3 My believe is -- and this is something you
4 all can openly decide -- but I'll tell you, my belief
5 is that you're not likely to ever -- you're not likely
6 within the next 10 years to get to the point of saying
7 we've got too much of this kind of capacity.

8 **CHAIRMAN JOHNSON:** Would we ever get to the
9 point where -- what was the -- what did you say?
10 The -- sending electricity out of the state, what did
11 you say --

12 **MR. WRIGHT:** Transmission export capacity?

13 **CHAIRMAN JOHNSON:** Yes. And what did you
14 say the capacity was?

15 **MR. WRIGHT:** 1,900 megawatts.

16 **CHAIRMAN JOHNSON:** To the extent that Duke
17 wanted to build four plants and were to reach that
18 capacity, you're right; a fifth provider probability
19 wouldn't want to come into the state, and that kind of
20 then goes to --

21 **MR. WRIGHT:** They might not to want come
22 into the state for the purpose of exporting power, but
23 Duke doesn't want to come into the state for the
24 purpose of exporting power, Madam Chairman.

25 **CHAIRMAN JOHNSON:** Yeah, but one of the

1 things that under that kind of analysis what the
2 Commission would then do -- what I'm concerned about
3 is an issue that Commissioner Deason raised earlier,
4 and that is that it goes to the opposite of the market
5 power analysis that you all had to show at FERC.

6 But if you get to the point where if you
7 have the plants, and a fourth provider may not want --
8 or a fifth provider may not want to come into the
9 state, then our utilities would then be forced to deal
10 with you, and you aren't tied to any contract. And
11 how do we determine pricing?

12 MR. WRIGHT: They could negotiate contracts
13 with us. They could come to you and build -- and seek
14 authority to build their own. You can build CTs in a
15 short period of time, Madam Chairman.

16 And it's true, it is hypothetically true,
17 that a mer -- an entity with uncommitted capacity --
18 and there are at least a couple hundred megawatts, if
19 not more than that, of uncommitted capacity in the
20 state today -- it is possible that for a short period
21 of time an entity with uncommitted capacity might be
22 able to extract a very, very high price, but if there
23 were any foreseeability of that type of behavior and
24 that type of market condition continuing, somebody
25 could put CTs on the ground in less than 12 months.

1 And there's built-in protection in the
2 ability of the IOUs and the municipal utilities and
3 cooperatives, or the G&T cooperatives, at any rate,
4 and their members through their G&T cooperatives to
5 add capacity if they feel that that is the best thing
6 for them to do economically for their ratepayers. And
7 presumably that is what they will do.

8 If we offer them a better deal, we would
9 presume they would buy from us because it's a better
10 deal for them and their ratepayers. If we don't offer
11 them a better deal, and if, you know, if we were to
12 try to charge \$7,000 a megawatt hour and gouge people,
13 they could say, you know, we're not dealing with you
14 guys. We're going to build our own, and in short
15 order.

16 **CHAIRMAN JOHNSON:** Thank you.

17 **MR. SANTA:** Madam Chairman, can I make a
18 couple of concluding comments to wrap up a couple of
19 points that have been raised?

20 **CHAIRMAN JOHNSON:** Briefly, and then we have
21 to take a break.

22 **MR. SANTA:** Okay. Thank you very much.
23 This morning there was a discussion about how to
24 distinguish the cases that were in the Florida
25 Power & Light Company handout, and I wanted to address

1 a couple points going there.

2 First of all, with respect to the cases
3 where the applicants were qualifying facilities under
4 the Federal Power Act, for example the Nassau cases, I
5 point out to the extent that Duke's application and
6 saying it is a qualified applicant turns on the fact
7 that it is a public utility under the Federal Power
8 Act, that those QFs do not apply, because a qualifying
9 facility under PURPA is not a public utility under the
10 Federal Power Act.

11 Also with respect to the --

12 **CHAIRMAN JOHNSON:** I'm sorry. Could you say
13 that again? I missed the first part of it.

14 **MR. SANTA:** Certainly.

15 Legally a qualifying facility under PURPA, a
16 QF, a cogenerator, is not a public utility under the
17 Federal Power Act.

18 **CHAIRMAN JOHNSON:** And that is what ARK was.

19 **MR. SANTA:** Right; and I was just about to
20 get to ARK and distinguish ARK as well.

21 Next, turning to the ARK case, and the
22 counsel for Florida Power & Light made the point that
23 ARK was not a QF, but they were an independent power
24 producer. I quite frankly had not heard of the ARK
25 case before this morning.

1 However, what struck me in looking at that
2 case is that there is no evidence from the order
3 itself that either the applicants in ARK ever raised
4 the issue that they were a public utility under the
5 Federal Power Act, nor is there any evidence that the
6 Commission ever ruled on that point. So I would view
7 that as an issue of first impression and do not
8 believe that ARK should control.

9 The third point I'd make with respect to
10 distinguishing the cases is that based on my quick
11 look at it, all of the Commission orders that were
12 being dealt with in the cases cited by Florida
13 Power & Light were issued by this Commission prior to
14 enactment of the Energy Policy Act.

15 Consequently, the Commission did not have to
16 deal at that point in time with the issues that have
17 been raised today about the interaction between
18 federal energy policy regarding wholesale competition
19 and how the Siting Act operates.

20 **COMMISSIONER CLARK:** Mr. Santa, let me ask
21 you a question on that point. Are you saying that
22 regardless of what our interpretation was of the state
23 law prior to the EPACT, you must now -- let's assume
24 the interpretation was you can only have wholesale
25 competition from power plants in Florida that are

1 owned by utilities or entities who have firm
2 contracts, based on the fact that you have to show a
3 need at retail to serve that.

4 Even if that's what we found, and that's how
5 we interpreted the contract, we can now not -- we can
6 now not interpret the statute that way because we
7 would run afoul of the federal law.

8 MR. SANTA: That is correct. I would argue
9 that that is an intervening event that has raised an
10 issue that was not raised at that point in time and
11 that should affect your interpretation of the Siting
12 Act.

13 COMMISSIONER CLARK: Well, it strikes me
14 that having made that interpretation and being upheld
15 by the courts, that maybe it's not within our ability
16 to change our mind based on the intervening act, but
17 we've got to go back to the Legislature and say, you
18 need to change this. We cannot --

19 MR. SANTA: Well, let me -- sorry.

20 COMMISSIONER CLARK: It cannot be
21 interpreted the way we have, and it needs to be
22 changed.

23 MR. SANTA: Well, two points. One of them
24 being that I think because ARK, at least as I read it,
25 never got to the issue of whether someone was a public

1 utility under the Federal Power Act that qualified
2 them as an applicant, that issue has not been
3 addressed by this Commission.

4 Second of all, I would argue that under the
5 preemption analysis, if the Commission has got two
6 interpretations of the act, and one of them would run
7 afoul of being preempted and the other one wouldn't,
8 that this Commission should opt for the one that is
9 not preempted.

10 COMMISSIONER CLARK: Here's my concern --

11 MR. SANTA: But the final point -- let me
12 just make this point, and it draws back to, I think,
13 an analogous experience with the FERC when it issued
14 Order 888.

15 Notwithstanding all of the discussion about
16 EPACT, the statutory basis for the Commission doing
17 Order 888 was Section 206 of the Federal Power Act,
18 which has remained substantially unchanged since it
19 was enacted in 1935.

20 When the Commission was considering the
21 proposed rule that led to Order 888, there was
22 extensive argument by commenters that, in fact,
23 Section 206 of the Power Act, which was not authorized
24 to mandate open access, and they even cited some
25 instances where --

1 **COMMISSIONER DEASON:** We may have made that
2 argument ourselves. I don't know that.

3 **COMMISSIONER CLARK:** And it's not settled.

4 **MR. SANTA:** It is pending, but I think that
5 in terms of the issues that are being challenged, that
6 is not one of them that's getting a lot of attention.

7 But, anyway, let me finish, because the
8 point I'm making is more one of reasoning by analogy.
9 And it is this: That if a regulatory body is going to
10 feel as if it's feet are in concrete based on what
11 specifically was contemplated and was in people's
12 minds at the time that the Legislature enacted the
13 statute, you really are tying your hands.

14 And I tend to think that based on experience
15 that reasonable interpretations of a statute that
16 recognize changes that have occurred in the regulated
17 industries during the intervening period, that really
18 the Commission needs to grant itself that flexibility;
19 and, therefore, if based on the face of the statute
20 and based on changes that have occurred both in the
21 federal law and in the industry in the intervening
22 period, the Commission should take account of those.

23 **COMMISSIONER CLARK:** Well, I don't
24 necessarily disagree with you, but I also think what
25 you're asking us to do has implications beyond just

1 siting a power plant, that there are implications as
2 to stranded investment at some future date.

3 I realize, Schef, that this is not this
4 particular case, but, you know, pretty soon you make
5 decisions and you find yourself someplace where had
6 you considered them earlier, you might not have made
7 those decisions; and for that reason I think we've got
8 to sort of look at those eventualities, those eventual
9 results that might occur.

10 And it seems to me that there are a number
11 of issues with respect to the environment that it may
12 be appropriate to go to the policy makers in this
13 state and say, you know, things have changed. We have
14 interpreted our power plant siting to do this. We
15 don't think we can interpret it that way anymore, but
16 here are the implications of allowing this kind of
17 siting of the power plants to develop. And maybe it's
18 reasonable for us to look at other aspects of our
19 regulation in conjunction with opening -- or with the
20 siting of more merchant plants.

21 **MR. SANTA:** I mean, should the Commission
22 choose to go that route, I mean, it's free to do that.

23 But let me just make one final point, and
24 that is that earlier you had raised the point,
25 Commissioner Clark, that should the Commission choose

1 to deny this partly on the basis that it would
2 displace off-system sales that were currently being
3 made by Florida's investor-owned utilities, I've got
4 to tell you if that were the basis for the
5 Commission's action, I really think that would
6 certainly run afoul of federal energy policy promoting
7 wholesale competition in the market, because that
8 would in essence be saying that the notion here is not
9 to promote competition or protect competition, but it
10 is to protect competitors.

11 That clearly is not what the Congress and
12 the FERC have sought to promote. And I think if that
13 were the articulated basis, it would run afoul of
14 federal energy policy and probably the constitutional
15 arguments that have been advanced.

16 **COMMISSIONER CLARK:** I'm just making the
17 observation. I think it's interesting that you
18 suggest we should look at the Peninsula as a whole and
19 the need for the power as a whole, but when we would
20 determine whether or not it is cost-effective, we
21 would only look at who might purchase power and not
22 the impact it might have on the retail customers of
23 the entity from which power might not be purchasing --

24 **MR. SANTA:** I mean, this goes to the merits,
25 which is not what I came here for. But, you know I

1 think some of it goes to the issue that to the extent
2 that the applicants can demonstrate that due to low
3 reserve margins and growing demand within the state,
4 and viewing the state or viewing the Peninsula or part
5 of the state as a whole, there is a clear need over
6 the foreseeable future for significant additions of
7 capacity.

8 That notion of viewing this as a zero sum
9 gain situation where if a new entrant comes in, it
10 automatically means that it displaces existing sales
11 may not well be the case. It is not a static pie, and
12 I don't think it should be viewed as that.

13 But, again, that goes more to the merits,
14 which I think is part of the argument that is being
15 made by Duke and also the interest of LG&E here today,
16 and that is that applicants ought to have the
17 opportunity to present their case on the merits and
18 have it judged there, rather than being in a situation
19 where the incumbent utilities effectively are the
20 gatekeepers as to whether you can even present your
21 case.

22 **CHAIRMAN JOHNSON:** Thank you. We're going
23 to take a 15-minute break.

24 (Brief recess.)

25 - - - - -

1 **CHAIRMAN JOHNSON:** We're going to go back on
2 the record. Mr. Sasso?

3 **MR. SASSO:** What we've heard here today is
4 essentially an argument for the wholesale
5 restructuring --

6 **CHAIRMAN JOHNSON:** Is your mike on?

7 **MR. SASSO:** I think so. Yes. I'm sorry.
8 Can you hear better?

9 What we've heard today is basically an
10 argument for the wholesale restructuring of the
11 legislative framework in this state that applies to
12 the planning for need and the siting of new -- of
13 power plant facilities to meet that need.

14 We've heard talk about a new world, about
15 the obligation of this Commission to deal with that
16 new world, and we've even heard the extraordinary
17 argument that in dealing with these issues, this
18 Commission should basically not concern itself with
19 what was in the minds of the people who enacted the
20 Power Plant Siting Act in 403.519 when they enacted
21 it.

22 Of course it is fundamental that it is the
23 intention of the Legislature that enacted the law that
24 controls, and this Commission simply does not have the
25 authority as a creature of that legislation to usurp

1 what is essentially a legislative role and decide that
2 in view of changing circumstances, or a new world or
3 whatever, even an intervening federal law, that a
4 different approach is appropriate or even a good idea.

5 COMMISSIONER DEASON: What about the
6 argument that the federal law preempts us; we don't
7 have a choice?

8 MR. SASSO: Yeah. I do intend to deal with
9 that, Commissioner Deason.

10 In fact, I think basically what we've heard
11 today is a twofold approach. There's a carrot. This
12 is such a great plan, and it's going to be so
13 cost-effective that you should let us in, you should
14 throw your arms around us and embrace us. But of
15 course, if it's such a great plan and it's needed so
16 much because of razor thin reserve margins, they
17 shouldn't have any difficulty at all in lining up
18 contracts before they come to this Commission, and
19 they haven't done so.

20 And we've heard, well, if you don't accept
21 the fact that this is just irresistible, then we'll
22 use the stick; you have no choice. You have to let us
23 in because of preemption or the dormant commerce
24 clause. And with all respect, that's a scare tactic
25 that has no merit, which I propose to discuss.

1 Now, Commissioner Deason asked, well, can't
2 we take this case and basically decide that there is a
3 need to provide some statewide economic benefit in the
4 form of these merchant plants and discharge our
5 obligation. And we would say emphatically no, that is
6 not the current legislative or regulatory framework
7 that this Commission operates under.

8 **COMMISSIONER DEASON:** You cannot find need
9 based on economic reasons?

10 **MR. SASSO:** No, your Honor -- I'm sorry.
11 No, Commissioner Deason. It's a habit.

12 **COMMISSIONER GARCIA:** He likes your Honor
13 better. (Laughter)

14 **COMMISSIONER DEASON:** To quote a previous
15 Commissioner, "a simple lordship will do." (Laughter)

16 **MR. SASSO:** Very well, your lordship.

17 The statute is quite clear on this, and the
18 Nassau decisions are quite clear on this. It's
19 evident when one looks at the statute in the
20 development of them, as I've explained earlier this
21 morning, that these laws are tailored to a
22 determination of need by particular retail utilities,
23 and these utilities have an obligation to mitigate
24 their need for a new plant before seeking authority to
25 buy one -- or to build one.

1 Both the Power Plant Siting Act and the
2 Florida Energy and Efficiency and Conservation Act
3 have as their purpose the effort on the part of the
4 Legislature to deal with growth and demand. The Power
5 Plant Siting Act says "The Legislature finds that the
6 present and the predicted growth in electric power
7 demands in the state require the development of a
8 procedure for the selection and utilization of sites,"
9 et cetera.

10 FEECA says, "The Legislature finds and
11 declares that it is critical to utilize the most
12 efficient, cost-effective energy conservation systems
13 in order to protect the health, prosperity, general
14 welfare, reduction in -- and control of growth rates
15 of electric consumption and of weather sensitive peak
16 demand are of particular importance."

17 Recall that 403.519 was enacted as part of
18 FEECA, and what the Legislature directed there is
19 retail electric utilities, first you work with your
20 customers to reduce demand, and only if you can't do
21 that, only if you can't show us that you've mitigated
22 the need for adding capacity to your systems to meet
23 the demand due to growth in the state, et cetera, in
24 your service territory, then you come in and ask for
25 an incremental impact essentially in the form of a new

1 plant.

2 And 403.519 is quite specific in saying that
3 the Commission shall consider reliability, and this
4 Commission has pointed that out, that this is not
5 something that can be dispensed with as part of the
6 need determination. In fact, it is critical as a
7 prerequisite to the construction of new capacity that
8 it be shown to be needed to deal with load and demand
9 requirements on a reliability basis.

10 **COMMISSIONER DEASON:** Let me be clear.
11 You're saying that obviously need -- the reliability
12 is something the Commission has an obligation to
13 review.

14 If we look at a situation and we determine
15 that reliability is adequate, reserves are adequate,
16 there's ample capacity, but there is a proposed
17 facility whose economics are so compelling that we
18 determine need based upon the compelling economics,
19 that is not within our authority?

20 **MR. SASSO:** I don't believe that is within
21 your authority.

22 We skipped over an important step, and that
23 is, again, as we've demonstrated at some length this
24 morning, and as Mr. Guyton demonstrated, the need
25 determination must be utility-specific.

1 Under the whole of these statutes the
2 utilities are directed, the retail utilities are
3 directed, each utility is directed to identify its
4 need within its service area to mitigate its need
5 within that service territory and then to put forth a
6 proposal to satisfy its need.

7 And so the fundamental requirement is that
8 the focal point for the determination of any need is
9 that a retail utility has to come before you, either
10 in its own behalf or as a coapplicant in which then
11 it's seeking to satisfy its need through an IPP to
12 demonstrate that it has a need for that facility.

13 That's the fundamental ingredient that's
14 missing here today. There is no retail utility
15 telling this Commission that this IPP, which is
16 frankly here seeking market economic opportunities,
17 frankly not seeking to meet the need of the retail
18 utilities in this state, frankly unwilling to commit
19 to be there when push comes to shove for those retail
20 utilities in the state, that ingredient is missing
21 from this case, and that is why --

22 **COMMISSIONER GARCIA:** Why do we need that
23 commitment? (Inaudible comments away from
24 microphone.)

25 **MR. SASSO:** Because that is what need means.

1 A plant is not needed unless one can rely on it when
2 capacity is required. And, in fact, it's important to
3 understand that --

4 **COMMISSIONER GARCIA:** (Inaudible comments
5 away from microphone.) It's kind of weird to think
6 they're going to build a plant and not going to
7 sell -- obviously there's a need every day and it's
8 sold on a market near Florida and -- (inaudible) --

9 **MR. SASSO:** Well, they're hoping to sell
10 energy, and in fact they may sell energy. But as the
11 questions today have pointed out, the point of this
12 proceeding is to determine whether this power is
13 needed.

14 And a retail utility is not permitted to
15 take into account the existence of a merchant plant in
16 determining whether its reserve margins are met
17 because these are nonfirm purchases. It may not be
18 there when it's needed.

19 And if this Commission somehow finds that
20 this plant goes to meet some statewide need, which is
21 directly contrary to the legislative mandate and to
22 the Nassau decision by the Florida Supreme Court, if
23 it were to do that, and then by virtue of that
24 decision have to confront the fact that there is some
25 finite limit in this state for the addition of new

1 capacity, then when a utility comes along and actually
2 can demonstrate that it has a need in its service
3 territory to add capacity, we're going to be
4 confronted with exactly the dilemma that Commissioner
5 Deason's questions have pointed out.

6 COMMISSIONER GARCIA: Isn't that dilemma,
7 though, a long way away?

8 MR. SASSO: Perhaps not. Perhaps not,
9 but --

10 COMMISSIONER GARCIA: How much generation
11 are you planning to add in the next few years -- is
12 your company planning to add --

13 MR. SASSO: Well, I can't give you an exact
14 number of what we're planning to add in the next ten
15 years.

16 I can tell you that the retail utilities in
17 this state are planning to add capacity in the next 10
18 years during the time horizon that this plant is
19 coming on line, but they're adding it in a way that
20 they know it will be there when they need it.

21 They're adding it to their own systems or
22 they propose to purchase it under firm contracts, but
23 when their consumers need power, it will be there.
24 They don't have to bet on whether this plant will be
25 one of those three and a half that is able to export

1 its capacity out of this jurisdiction when severe
2 weather conditions permit that as a marketing
3 opportunity.

4 And the point of it is that we could debate
5 here today whether merchant plants make sense, whether
6 we should shift to a marketing driven approach to the
7 determination of need, which has frankly been
8 advocated by our adversaries.

9 In fact, it's even been suggested that a
10 market driven approach to need is federally compelled.
11 We could debate all of that, but we would respectfully
12 suggest that that is not an appropriate set of issues
13 for this Commission, that these are fundamentally
14 legislative policy making issues.

15 And it's important to understand, also, the
16 significance of this need determination in the context
17 of all of these statutes. There's been some
18 discussion today about the balancing of need with
19 environmental impact and the role of this Commission
20 versus the role of the DER, and there's been some
21 suggestion made that, well, just let this plant in as
22 needed, and the DER will worry about environmental
23 impacts.

24 That is not the way the legislation is set
25 up. The legislation is set up basically to avoid,

1 unless necessary, the incremental impact of the
2 construction of new power plants in this state.

3 This Commission is the first line of defense
4 against that incremental impact, and this Commission
5 is directed to determine whether it's really necessary
6 for the state to incur any incremental impact. Now,
7 once this Commission decides that not just that it's a
8 need idea or it might be beneficial to the people in
9 this state, but once this Commission decides that it's
10 necessary, then the case goes over to DER, and their
11 need is conclusively presumed. No one can debate the
12 issue of need once it's over there.

13 Now, under the Power Plant Siting Act, need
14 is balanced against environmental impacts, but now the
15 case goes over there with a thumb on the scale on the
16 need side. DER is prevented from examining the need
17 saying, well, how badly is this really needed; do we
18 really have to go through this; do we really have to
19 accept the encroachment of a new merchant plant, a new
20 fleet of merchant plants in our state; do we really
21 have to build this thing next door to somebody who
22 doesn't want it there?

23 They can't reexamine those issues because
24 it's conclusively presumed that the need is
25 established by virtue of this Commission's decision.

1 So this Commission does play a very important role in
2 the siting process, and it would be an abdication of
3 responsibility not to enforce an existing law on need
4 to discharge that rule.

5 Now, Mr. Wright has suggested that there
6 have been occasions in the past when this Commission
7 has looked at statewide economic benefits, et cetera,
8 but those decisions have been cited in their papers,
9 and they're all pre-Nassau decisions. This Commission
10 receded from those decision in Nassau, and the Florida
11 Supreme Court sustained those decisions.

12 Now, the Florida Supreme Court in doing
13 so -- just as a point of clarification, and Mr. Guyton
14 can develop this more fully -- didn't simply say,
15 you're not wrong.

16 The Florida Supreme Court said that the
17 construction reached by this Commission was compelled
18 by the plain language of the statute; said there is
19 only one sense in which there can there can be need
20 under the statute; only retail utilities can provide
21 power to the consumers in this state. No one else can
22 provide power to them; therefore, no one else can need
23 generating capacity to discharge that duty.

24 A merchant plant isn't selling directly to
25 the public. They're not pumping energy into the

1 ground in Peninsular Florida. They're purporting to
2 sell to retail utilities to meet their need, and so
3 that's the focal point for a need determination
4 proceeding; is there a retail utility that itself
5 needs this power to discharge its duty to serve.

6 It's an entirely rational scheme. And this
7 Commission's decision and the Florida Supreme Court's
8 decision grow out of the legislative pattern that I
9 discussed this morning where there's a pervasive
10 discussion in reference to planning and siting by
11 retail utilities of their own individual needs.

12 Now, let me address the preemption issue.
13 Basically we've heard today, I think, that federal law
14 in essence requires that this Commission change its
15 whole method of dealing with need.

16 We've heard, frankly, that what's really
17 appropriate is a need type of decision making that is
18 market driven, that looks at market access issues,
19 market competition issues, ensures that the market is
20 functioning appropriately and resources are being
21 allocated appropriately. That's basically what's
22 being advocated.

23 Now, at the threshold it's important to
24 understand that this Commission, again as a creature
25 of legislation, this Commission would not exist if it

1 weren't for the existing state regulatory framework.
2 And this Commission is not empowered to go back and
3 tinker with its own enabling organic legislation.
4 That is a role for the Legislature.

5 And if for any reason, by virtue of
6 intervening federal law or what have you, there is a
7 need to revisit state law that may have been enacted
8 before those intervening developments, only the
9 legislature in the state elected by the people of the
10 state has that type of law making authority.

11 **COMMISSIONER CLARK:** Mr. Sasso, I seem to
12 recall that there's a requirement that if one
13 interpretation of a law would make it
14 unconstitutional, that you have an obligation to
15 interpret it in such a way that it is not
16 unconstitutional.

17 **MR. SASSO:** Well, I've got two responses to
18 that. One, as I'm about to demonstrate, I don't even
19 think that there is a serious issue here of the
20 unconstitutionality of this legislation.

21 **COMMISSIONER CLARK:** Okay.

22 **MR. SASSO:** But beyond that, that is really
23 the function of the courts. This statute means today
24 what it meant the last time this Commission construed
25 it and the Florida Supreme Court construed it. It

1 hasn't changed.

2 In fact, as I've demonstrated this morning,
3 there has been a consistent pattern throughout the
4 development of these laws from 1973 through 1980,
5 1990. It's been consistent. And if one were going to
6 attempt to reach the result that the petitioners want,
7 it would involve not only maybe embracing a fair
8 construction reduction, but really embracing one
9 that's not permitted by the legislation.

10 But is there a serious preemption issue? We
11 don't believe that there is. Mr. Seidenfeld --

12 **COMMISSIONER DEASON:** Excuse me. You say
13 there's not a preemption because we shouldn't worry
14 about it because it's not our responsibility, because
15 it's the Legislature's responsibility, or there's flat
16 no preemption concerns?

17 **MR. SASSO:** Both. I've got basically two
18 points. One is that if there is a preemption problem,
19 it's a problem that the Florida Supreme Court needs to
20 consider or the Legislature.

21 But the second point I want to make is to
22 attempt to allay the Commission's concerns about
23 preemption because I don't believe that there is a
24 serious preemption issue here, which I'll explain now.

25 Mr. Seidenfeld argues this morning

1 essentially that Congress attempted to create a regime
2 of wholesale competition through the Energy Policy Act
3 of 1992, and he's forced to concede that they did so
4 by regulating transmission issues; they did not
5 regulate generation issues.

6 But he said, oh, that was really kind of an
7 oversight because they thought that would do the job,
8 and they didn't go far enough; but their purpose was
9 clearly to reach all of these issues, and so this
10 Commission is obliged to kind of anticipate where the
11 federal Congress was going and make sure that we all
12 get there.

13 Well, this wasn't simply an accident or an
14 oversight on Congress's part to leave generation
15 alone. In fact, under the Federal Power Act, Congress
16 provided that the Federal Energy Regulatory
17 Commission -- this is under Section 201 in the Federal
18 Power Act -- quote, "shall have no jurisdiction over
19 facilities used for the generation of electricity."

20 Now, this wasn't just a matter limited to
21 retail issues, as somebody over here said. In fact, I
22 think Mr. Santa frankly conceded when he was asked
23 about this that the Federal Power Act deals with
24 wholesale sales. And it's in that context that
25 Congress said "We're leaving generation to the state."

1 FERC said, in view of that, quote,
2 "jurisdiction over the capacity planning,
3 determination of power needs, plant siting, licensing,
4 construction, and operations of power plants has been
5 deliberately withheld from our control or
6 responsibility when Congress specifically preserved
7 the state's authority over such matters in Section
8 201(b) of the FPA," in the Monongahela Power Company
9 case.

10 So this is not at all limited to retail
11 generation issues.

12 **COMMISSIONER CLARK:** I'm sorry. That was
13 the Energy Power Act that you were reading from?

14 **MR. SASSO:** The Federal Power Act.

15 **COMMISSIONER CLARK:** Did the Energy Power
16 Act change that?

17 **MR. SASSO:** No, it did not. For one thing
18 the Federal Power Act is still on the books. Second,
19 the FERC decision that I mentioned is still good law;
20 and, third, the Energy Power Act in Section 731
21 specifically preserved the state's authority over
22 environmental protection and the siting of facilities,
23 which encompasses the determination of need planning
24 construction of new facilities.

25 And even if you had to find a link to

1 retail, the whole point of our discussion today is to
2 establish that again it is only the retail utilities
3 in the state that can serve people in this state, and
4 that is why a need determination focuses on whether
5 their needs are met, whether they have a need for
6 additional capacity.

7 **COMMISSIONER CLARK:** Let me back you up a
8 minute. You're saying that the Federal Power Act, the
9 one enacted in 1935, has not changed with respect to
10 our jurisdiction as you described it with respect to
11 capacity siting?

12 **MR. SASSO:** That's correct.

13 **COMMISSIONER CLARK:** That the fact that all
14 the EPACT addressed was environmental issues with
15 respect to siting doesn't narrow what they've left to
16 us?

17 **MR. SASSO:** No, it doesn't. Again, EPACT
18 specifically preserves siting issues, which is a very
19 broad category of issues, and there's no indication
20 that EPACT was intended to reach generation.

21 And, in fact, we sort of got things reversed
22 when we're talking about preemption here. The law on
23 preemption is that the states have authority to act in
24 the area of their traditional police powers unless
25 Congress has manifested a clear intent to divest the

1 states of that authority.

2 And the argument that we're hearing here
3 today is a conception that Congress has not, against
4 intent to divest the states of authority, but that one
5 can kind of infer or read between the lines that if
6 they'd really thought about it, they might get around
7 to speaking to these generation and siting issues
8 which have traditionally and historically been
9 committed to the states.

10 **COMMISSIONER CLARK:** Mr. Sasso, are you
11 going to comment on the -- is it the New Hampshire or
12 Maine case that said the state couldn't prevent siting
13 of a plant to serve need in another state?

14 **MR. SASSO:** I'm not familiar with that
15 particular case. As I heard the description of it and
16 discussion of it, it sounded like it may have
17 concerned the sales of wholesale power; but I'd be
18 happy to take a look at that and comment on it.

19 I am aware of other authorities that make
20 clear that this is an area that is committed to the
21 state's authority, and -- including a very recent
22 United States Supreme Court decision which addresses
23 some of these dormant commerce clause issues which I'd
24 like to discuss.

25 In a long line of cases, the United States

1 Supreme Court has made clear -- and I'll quote now
2 from the Arkansas Electric case from 1983. Quote:
3 "The regulation of utilities is one of the most
4 important of the functions traditionally associated
5 with the police power of the states."

6 Pacific Gas & Electric Company case said
7 need for new power facilities, their economic
8 feasibility and rates and services are areas that have
9 been characteristically governed by the states.

10 This is the background against which
11 Congress acted when it developed EPACT. Even the
12 Nuclear Regulatory Commission has said that states
13 retain the right, even in the face of the issuance of
14 a NRC construction permit, to preclude construction on
15 such bases as lack of need for additional generating
16 capacity or the environmental unacceptability of the
17 proposed facility or site.

18 We've heard argument that really all that's
19 required to satisfy these concerns is that the
20 Commission treat this IPP similarly with other
21 in-state entities. Well, that is exactly what we're
22 asking this Commission to do.

23 Nassau made clear and the statutes in this
24 jurisdiction made clear that all IPPs, whether they're
25 Florida companies or North Carolina companies or

1 wherever they come from, they can build capacity only
2 if they do so to meet the need of a retail utility.

3 Retail utilities are subject to the plenary
4 powers of this Commission; are not similarly situated
5 with IPPs. It really is as simple as that.

6 And they say they want a hearing on the
7 merits, which we respectfully suggest they've gotten
8 today in the sense that really matters fundamentally;
9 does this Commission have an organic authority to
10 grant the petition that they have filed with this
11 Commission. They're received a very full hearing on
12 the merits of that issues.

13 The hearing on the merits they want is an
14 opportunity to argue for restructuring. But they say,
15 really all we want you to do is let us in, and we want
16 you to judge us by the same rules that apply to
17 everybody else. They say that on the one hand, but on
18 the other hand they're saying, we don't want to meet
19 the rules that apply to everybody else.

20 The rules that apply to everybody else are
21 quite clearly articulated in the Nassau decisions;
22 namely, if you want to come into this state and
23 construct your plant as an IPP, you've got to line up
24 your contracts first; you've got to demonstrate
25 there's a need.

1 That's an even-handed rule that applies to
2 intrastate companies, interstate companies, you name
3 it; and the only discrimination that's made is a fair
4 discrimination between those entities that are subject
5 to plenary regulation and those that are not.

6 And the United States Supreme Court has
7 recognized that that is a fair discrimination that
8 does not violate the dormant commerce clause. In the
9 case of General Motors v. Tracy, which was decided in
10 February of last year, the court addressed these
11 issues in the context of the gas industry.

12 And it's interesting, because they talk
13 about the history of regulation, which is kind of easy
14 to forget as we're dealing with the new world. But
15 the court there traced the fact that until the 1920s
16 there had been rampant competition in the electric
17 industry and the gas industry, and the court pointed
18 out, quoting now, "The states then recent experiments
19 with free market competition in the manufactured gas
20 and electricity industries had dramatically
21 underscored the need for comprehensive regulation."

22 It went on to point out that many
23 municipalities at that time honored the tenets of
24 laissez-faire to the point of permitting multiple gas
25 franchises to serve a single area in relying on

1 competition to protect the public interest.

2 The results were both predictable and
3 disastrous, including an initial period of wasteful
4 competition.

5 The court says that the public suffered
6 through essentially the same evolution in the electric
7 industry. What they were reviewing in this case was a
8 tax by Ohio that was placed on wholesale sales by gas
9 power marketers, but which exempted wholesale sales by
10 regulated utilities.

11 And the court said, that's fine; that is not
12 an impermissible discrimination between two similarly
13 situated actors because retail utilities are regulated
14 utilities that have two kinds of sales; retail sales
15 and wholesale sales; are fundamentally different from
16 only power marketers that sell at wholesale.

17 They are subject to a comprehensive scheme
18 of regulation with all kinds of pluses and minuses for
19 them and for their ratepayers and for the public
20 interest, and they're simply not similarly situated,
21 and the state can treat them differently.

22 And that's fundamentally the situation we
23 have here. They can and should be treated by the same
24 set of rules, and it's our contention, and we believe
25 this is abundantly clear from the pleadings and the

1 arguments today, that judgment, the judgment that they
2 are not attempting to be judged by the same set of
3 rules, could be made as a matter of law, based on the
4 pleadings and the concessions they have made today.

5 **COMMISSIONER DEASON:** Mr. Sasso, what about
6 the argument that -- the requirement to have a
7 contract -- basically gives them to sign a contract
8 and they never have opportunity to enter the market?

9 **MR. SASSO:** Well, we are not unregulated
10 entities. The retail utilities are not unregulated
11 entities. The way the legislative framework works is
12 the Legislature sets up the Commission. The
13 Commission regulates this industry, but it regulates
14 the industry through its plenary authority over retail
15 utilities.

16 Only retail utilities have access to the
17 retail market. It's a total monopoly, the complete
18 exclusion of out-of-state competitors. And so the
19 issue is when and under what circumstances do those
20 retail utilities, which have an exclusive prerogative
21 to serve the customers, when and under what
22 circumstances do they need capacity to do so?

23 That is the only issue here that needs to be
24 determined. And that is the issue that the courts and
25 this Commission has frequently recognized to be the

1 controlling issue. And it's pursuant to this
2 Commission's regulation over those issues and the
3 legislation that controls those issues that this
4 so-called veto power exists.

5 It's not a veto power. It's just a form of
6 access, a form of regulation. It's a limitation on a
7 market that right now is a hybrid market in many
8 respects. But no one would contend seriously that the
9 Energy Policy Act resulted in the wholesale scuttling
10 of the existing regulatory regime. That's just not
11 the fact.

12 And there are some limitations imposed on
13 access. There are clear limitations imposed on the
14 ability to build new plants that have an impact in a
15 state, but those are appropriate and left to the
16 states to regulate.

17 **COMMISSIONER DEASON:** You're saying you do
18 not have a veto power?

19 **MR. SASSO:** We do not have a veto power.
20 Again, as has been demonstrated today in the
21 discussion, utilities have to have a bona fide need
22 before they can think of adding capacity. First they
23 have to attempt to mitigate it.

24 And then if they have a need, they either
25 proceed to offer that out for bid or demonstrate to

1 this Commission, a regulatory body, that certain
2 standards have been met to dispense with that
3 requirement, but that is subject to this Commission's
4 oversight.

5 That is a regulatory issue. It is not a
6 market maneuver by the retail utilities in this
7 jurisdiction.

8 COMMISSIONER DEASON: Would Duke have
9 standing to bring a case before this Commission to
10 allege and demonstrate that the Florida Power
11 Corporation as an individual utility has a need and
12 that they are prepared to provide -- fill that need in
13 a cost-effective manner and here's the contract?

14 MR. SASSO: That's the Nassau case.

15 COMMISSIONER DEASON: And they do not?

16 MR. SASSO: I don't believe they do. The
17 utility has a statutory obligation to determine
18 whether it has a need. This Commission has --

19 COMMISSIONER GARCIA: (Inaudible
20 simultaneous comments away from microphone.)

21 MR. SASSO: Pardon me?

22 COMMISSIONER GARCIA: Duke Power can't build
23 in Florida, and we can't have merchant plants in
24 Florida basically is what you're telling us?

25 MR. SASSO: A merchant plant cannot be

1 constructed in Florida today unless it falls within
2 the exemption, if it's below a certain size.

3 Duke can come into Florida and sell power in
4 the state if it's simply -- it's essentially puts its
5 money where its mouth is and says to the utilities,
6 enter into contracts with us; we've got a great plant
7 that's going to be a boon to you; it's going to be the
8 best, most cost-effective alternative to you to meet
9 your needs; and then comes to the Commission with that
10 utility --

11 **COMMISSIONER GARCIA:** But if the utility
12 doesn't want to, it doesn't -- Duke doesn't get to
13 play.

14 **MR. SASSO:** Duke doesn't get to play on its
15 own, on its own terms whenever it wants to, as some of
16 your questions pointed out, to maybe jump the gun and
17 beat out utilities that are planning to build reliable
18 power to meet their needs under the conventional
19 system. They don't get to do that.

20 **COMMISSIONER CLARK:** But what we would get
21 to do is when you come in with your need with a plan
22 different than what they're suggesting, they can
23 intervene and say, no, it's not the most
24 cost-effective; ours is, and you should choose ours.

25 **MR. SASSO:** That's right. This is --

1 **COMMISSIONER GARCIA:** Do they get to do
2 that? I mean, you're coming to us, if I'm not
3 mistaken --

4 **COMMISSIONER CLARK:** Didn't we do that one
5 time?

6 **COMMISSIONER GARCIA:** I'm sorry?

7 **COMMISSIONER CLARK:** Terry, didn't we do
8 that one time; Cypress? What happened in Cypress?

9 **COMMISSIONER DEASON:** I'm sorry. I didn't
10 hear the question. I got distracted.

11 **COMMISSIONER CLARK:** Didn't FP&L come in one
12 time with an entity and want a certificate of need,
13 and we denied it?

14 **COMMISSIONER DEASON:** Yes. Florida
15 Power & Light came in, and it was the Cypress project.
16 There was a contract there and we determined that it
17 was not the most cost-effective alternative. I'm not
18 sure if whether we said -- I think we said there was a
19 need, but it was not the most cost-effective.

20 **MR. GUYTON:** Not only that, but at the same
21 time that the ARK and Nassau cases were decided and
22 they were dismissed as to ARK and Nassau, they were
23 allowed to intervene and participate in the Cypress
24 need determination case and challenge that finding.

25 So, yes, Commissioner Clark, that's exactly

1 what has happened in the past.

2 **COMMISSIONER CLARK:** And when the Commission
3 said that there was a need, but this wasn't the most
4 cost-effective way to meet it, then what happened?
5 How was it met?

6 **MR. GUYTON:** Commissioner, I quite frankly
7 don't recall. That was back in 1992, and I don't
8 recall what -- as I recall, there was a change in the
9 company's need from the time the determination was
10 made in Cypress that it didn't feel like it needed to
11 go ahead with the Cypress -- since it could no longer
12 go ahead with the Cypress plan, but I don't recall --

13 **COMMISSIONER DEASON:** I think there were a
14 series of steps, measures that were taken; perhaps
15 repowering some changes in transmission, capacitors or
16 something which increased -- I'm not exactly sure
17 if --

18 **MR. GUYTON:** That may very well be. I just
19 simply don't recall.

20 **COMMISSIONER GARCIA:** Mr. Sasso, tell me
21 where Mr. Wright's point of entry is?

22 You come in to us and you ask us that -- you
23 come in for a waiver. In a few months, you say, look,
24 I want a waiver; I don't want to have to put this to
25 bid; I'm going to build a plant; I'm not going to

1 build it into rate base; I'm going to assume the risk.
2 And you come to us and ask us for a determination of
3 that need.

4 Can Mr. Wright join that case and say, no,
5 he can't build that plant because I can do it for
6 less?

7 **MR. SASSO:** As I understand it, he can
8 attempt to participate in our need case.

9 **COMMISSIONER CLARK:** Wait a minute. Attempt
10 to. (Laughter) I heard that.

11 **COMMISSIONER GARCIA:** He can show up to make
12 sure you don't get it. He just doesn't get it.

13 **COMMISSIONER CLARK:** Are you going to take
14 the position that he is not a person whose substantial
15 interests are affected and that he has no standing to
16 intervene in your case? (No response.)

17 **COMMISSIONER DEASON:** I believe in the
18 Cypress case -- while they're discussing that -- I
19 believe in the Cypress case there was participation
20 and that the parties were allowed to present evidence
21 that demonstrate that the proposal was not the most
22 cost-effective, but they were not allowed to
23 demonstrate that their contract would be the most
24 cost-effective.

25 **COMMISSIONER GARCIA:** Exactly. So it isn't

1 even a point of entry. Mr. Wright gets to show up at
2 your hearing, if we let him in, and gets to say -- he
3 gets to spend his money to prove your plan isn't the
4 most effective and efficient for Florida ratepayers.

5 **COMMISSIONER DEASON:** And if my
6 characterization was wrong, please somebody correct
7 me.

8 **MR. WRIGHT:** Commissioners, that is exactly
9 what happened in the Nassau, Cypress cases. Nassau
10 Power and the ARK CSW development partnership were
11 allowed to participate and put on evidence as to the
12 cost-effectiveness or noncost-effectiveness of the
13 contract that FPL proposed to enter into with the
14 Cypress coal-fired power plant.

15 They were not permit to obtain a decision on
16 the merits of their proposals. That was issues again
17 that was decided by a three to two vote by the
18 Commission at the time dismissing their petitions for
19 determination of need which were predicated on FPL's
20 need, which you did find in the order.

21 **MR. SASSO:** I think that the answer to this
22 is, the process works as follows: The normal chain of
23 events is the utility would issue an RFP, and that is
24 their point of entry; and if the RFP is denied to them
25 or if the deal is denied to them, then they can

1 challenge that in the need proceeding.

2 If the utility seeks a bid waiver, then that
3 is within the judgment of the Commission either a
4 permissible course or not a permissible course, but
5 that would be the exception to that point of entry.

6 **COMMISSIONER GARCIA:** Do you understand what
7 you're saying, Mr. Sasso, is that you can't do it in
8 Florida; you can't spent your money in Florida; you
9 can't do business in Florida; there's no way into
10 Florida unless you come through me.

11 **MR. SASSO:** No, I'm not -- I'm sorry.

12 **COMMISSIONER GARCIA:** What are you saying,
13 Mr. Sasso, today? Unless you have a contract, you
14 cannot build power in Florida?

15 **MR. SASSO:** Not through Florida Power
16 Corporation. There are a number of utilities in the
17 state of Florida.

18 If any of them needs power and they present
19 an attractive proposal, and they can demonstrate that
20 they should be awarded the opportunity to do that,
21 then they can come into the state, and that is --

22 **COMMISSIONER GARCIA:** How? Only if you let
23 them in. Only if you and your brethren, the companies
24 of the state, let them in. But outside of that, we're
25 not in a position to force them.

1 **MR. SASSO:** There is no absolute right of
2 entry; that's correct. There's no absolute right of
3 entry. It is a conditional, qualified opportunity for
4 entry, but that is a creature of --

5 **COMMISSIONER GARCIA:** So if Duke built this
6 plant in Thomasville, Georgia, and the Commission
7 there approved it and they spent their money there and
8 they could ship in as much as they could get through
9 the transmission lines, that would be fine.

10 The people of Thomasville, Georgia would be
11 served, that they got this huge investment, high
12 paying jobs; they got a generation station there in
13 their city, but they may not like the environmental
14 consequences, but that's their problem. But we get
15 their -- but they sell their electricity into the
16 state. You wouldn't be able to stop that, and they'd
17 be able to sell on our market.

18 **MR. SASSO:** Well, you're basically
19 questioning the wisdom of the legislative judgment.
20 The Legislature decides --

21 **COMMISSIONER GARCIA:** I think that -- I
22 think you're taking the law and seeing it as something
23 that we're trapped within, and I don't think that's
24 what we're looking at. I mean, I think you can
25 plainly read this law either way. And I think there's

1 enough in this law to read that we have some
2 determination here.

3 And what worries me is that we're creating a
4 barrier. We're saying, no, you can't spend your money
5 in Florida. No, you can't take a risk in Florida,
6 because this business belongs wholly and completely,
7 even though on a federal level there are laws that say
8 the transmission of energy -- of electricity is
9 competitive, or has to be allowed to be -- and yet not
10 in Florida.

11 MR. SASSO: Well, there are a couple points
12 that I would like to make.

13 First, I think you're correct, Commissioner,
14 to the extent that you're suggesting that we are
15 suggesting that this Commission is constrained by
16 existing law. We believe that quite sincerely.

17 We do not believe the Commission has
18 latitude, given the language of this law in the
19 Florida Supreme Court's pronouncements, to basically
20 allow Duke to accomplish what it seeks to accomplish.

21 We believe that the legislation is quite
22 clear in being limited to retail utilities in focusing
23 the planning for new capacity, the siting of new
24 capacity, and the participation in a need proceeding
25 to retail utilities.

1 Now, if that may have some consequences that
2 may be debatable in terms of the new world and whether
3 that is good or bad or indifferent, we would
4 respectfully suggest that that has to be taken up with
5 the Legislature.

6 There is no absolute right of entry into the
7 state at the wholesale level; that is correct. There
8 is regulatory oversight of participation at the
9 wholesale level and certainly at the retail level.
10 That happens to be the current state of the law.

11 Duke would basically have this Commission
12 change all of the rules, and that's what it will take
13 to allow Duke to participate in the need proceeding in
14 the way that they want to participate and to obtain a
15 favorable ruling.

16 We're not talking here about working within
17 the framework of existing legislation; we're talking
18 about fundamentally scuttling that, no longer
19 requiring that need be based a utility-specific basis.

20 Looking at need as a market issue, is there
21 a market opportunity here to build a plant? Shouldn't
22 Duke be like a shopping mall? Shouldn't we allow the
23 market to determine whether there's room for X number
24 of plants? Shouldn't we allow --

25 **COMMISSIONER GARCIA:** Tell me how that

1 affects your rights in a negative way.

2 MR. SASSO: Well, it's simply a matter of
3 law. It affects us in a negative way in that it
4 violates the law under which we are regulated --

5 MR. SANTA: And we are operating --

6 COMMISSIONER GARCIA: So you're -- where is
7 the risk to you? My question is simple. If I let
8 Schef do this, if I let Duke Power come into
9 Florida -- let's forget about ratepayers.

10 I think we can explore that forever and
11 we'll have different outcomes, but I feel pretty safe
12 that the -- that they're not going to be heard, at
13 least at this early stage of this penetration. So
14 tell me how your shareholders are going to be hurt by
15 us letting Duke Power in.

16 MR. SASSO: Well, I'm not here really to be
17 speaking on behalf of the interests of the
18 shareholders as such. I'm here discussing the
19 legislative scheme, which does not permit that result.

20 To permit that result does impair our
21 ability to discharge our duties under the current
22 legislative scheme. Currently --

23 COMMISSIONER GARCIA: How --

24 MR. SASSO: -- Florida Power Corporation
25 has a duty to serve its customers, has a duty to

1 ensure adequate and reliable energy to its customers.
2 It cannot rely on nonfirm power resources to meet that
3 duty.

4 It is difficult to anticipate where this
5 will stop or what the trimmings on the tree will be,
6 but if this Commission decides somehow that this
7 merchant plant is needed, there's only one need that
8 we know about, and that is the need of the retail
9 utilities to meet the demand of their customers.

10 That means this Commission will have decided
11 somehow that this plant will absorb a certain part of
12 that capacity. That means that Florida Power --

13 COMMISSIONER GARCIA: And if, Mr. Sasso, you
14 cannot enter into an agreement with Mr. Wright; we let
15 Mr. Wright in, and Mr. Wright builds his power plant,
16 spends his money in our state, hires people; the
17 people in New Smyrna get their 30 megawatts, and we've
18 got a brand spanking new generation unit in our state;
19 and then your need comes up.

20 You have a need, and you go to Mr. Wright
21 and you say -- no, you don't go to Mr. Wright, you
22 come to us, and you say, we're going to build a plant;
23 we have a 500-megawatt need and we're going to build a
24 plant.

25 And Mr. Wright might show up here and say,

1 well, that's not the least cost alternative, and he
2 opposed your plan. If he's got a better deal, why
3 wouldn't you contract with Mr. Wright? It's built.
4 It's done. Your ratepayers aren't at a risk. What's
5 the negative here? Because that's what I fail to see.

6 I mean, you've made an eloquent argument,
7 and you want to keep us in a box here, but there are
8 so many positives on one side of the ledger here that
9 you just won't address, and I tend to think, well,
10 maybe there's a property right somewhere that, you
11 know, as a utility, you know, I've sort of got a leash
12 on you. You can't make too much money. You can't
13 lose too much on the other side, as long as you play
14 by the rules, but the game is pretty much controlled.

15 Now, if I let Schef in, I don't think I'm
16 affecting you.

17 **MR. SASSO:** Well, two points. To begin
18 with, if the benefit is to get a brand spanking new
19 plant with jobs and money for the state, that is
20 really 180 degrees away from the purpose of the --

21 **COMMISSIONER GARCIA:** I'm --

22 **MR. SASSO:** -- Power Plant Siting Act and
23 FEECA, which are designed to limit economic
24 opportunity for the protection of the environment and
25 for the protection of the public welfare. Those laws

1 are not designed to encourage economic opportunities
2 and to invite entrepreneurs into Florida.

3 COMMISSIONER CLARK: Yes, but they're --

4 COMMISSIONER GARCIA: But they're done to
5 protect ratepayers also. The whole point was --

6 MR. SASSO: That's correct.

7 COMMISSIONER GARCIA: -- not to allow you
8 with an interest to build generation, to build 20 new
9 generation plants in Florida just because you can get
10 them into rate base.

11 The whole point is we control the process,
12 because we control you. You have to play by a certain
13 series of rules.

14 By allowing Duke Power into the state, I
15 don't see how you are affected any negative way. I
16 certainly don't see how the ratepayers are affected.
17 So now I turn to the last person that can be affected,
18 you, in this case. How are you negatively impacted?

19 You're right, you do have an obligation to
20 serve. You must meet that, and you are guaranteed a
21 rate of return under our scenario under our rules. So
22 if you turn -- if you come back to us in six months
23 and say, you know, Duke's selling power at
24 unreasonable rates. I'm not going to buy power from
25 Duke. It's cheaper for us to build.

1 I can foreseeably see you getting that into
2 rate base. If his price does not meet what the price
3 should be, I see you getting that plant into your rate
4 base.

5 MR. SASSO: Well, it's sort of an
6 interesting proposition, because Duke has made a
7 studied point of saying they are not seeking to
8 justify this plant on the basis that they will stand
9 ready to enter into a long-term contract with a
10 utility, such as Florida Power Corporation, to meet
11 its need.

12 They are seeking to justify this plant on a
13 merchant plant basis. For all we know, they will
14 build this plant and not enter into long-term
15 contracts for its capacity. They will build this
16 plant and market in an opportunistic way inside or
17 outside the state. They may not even build this
18 plant.

19 COMMISSIONER GARCIA: Mr. Sasso, how does
20 that hurt us?

21 MR. SASSO: It hurts us because how are we
22 supposed to plan our capacity now? They want --

23 COMMISSIONER GARCIA: Well --

24 MR. SASSO: -- to put a plant in service in
25 the year 2000, or maybe they begin work and it turns

1 out its going to go in the year 2001. Are we now
2 obliged to say there is going to be a facility however
3 many miles away from us that will be there, that will
4 be available to us when we need it at that same time,
5 and we'll bank on that, even though we have no firm
6 contracts?

7 **COMMISSIONER GARCIA:** Well, if you have no
8 firm contracts -- if you have no firm contracts, you
9 have an obligation to serve, so you have to come to
10 this Commission and meet that obligation.

11 You can't rely Duke Power, and I'm not
12 asking you to rely on Duke Power. What I am asking
13 you, if you have an obligation to serve, and you can't
14 get a long-term contract out of them that is good for
15 your ratepayers, then you're going to build it
16 yourself or you're going to put an RFP out and you're
17 going to find someone to build it for you.

18 **MR. SASSO:** Exactly. I can't -- you know, I
19 can't rely on them. They won't give me a long-term
20 contract, so I build my own plant myself, and we've
21 got uneconomic duplication of facilities. We've got
22 two --

23 **COMMISSIONER GARCIA:** What are you worried
24 about? You've got it into rate base. We're going to
25 take care of you -- if you've got a plant that is

1 protected under the regulation of this state, you're
2 protected. Your shareholders are protected and the
3 ratepayers are on the hook for it because you found
4 the least cost alternative. And Mr. Schef -- I mean,
5 Mr. Wright cannot -- he's stuck with his power plant
6 because you didn't buy his power.

7 MR. SASSO: Of course where that leads is
8 the retail utilities continue to do their planning and
9 building of their own capacity. They don't rely on
10 Duke or similar merchant plants.

11 COMMISSIONER GARCIA: Right.

12 MR. SASSO: Those plants coexist, and we
13 have redundant plants that aren't there to meet a
14 need.

15 COMMISSIONER GARCIA: Let me tell you
16 something. Trust me. The market is not going to
17 build redundant power plants. You're not going to be
18 able to show up in New York and say, yeah, we're here
19 to collect some more money because we like seeing
20 power plants pop up in Florida.

21 Clearly if his fails, that's the last one,
22 at least until someone else gets brave.

23 MR. SASSO: With all respect, it would be
24 our position that these are fundamentally legislative
25 issues. Right now there is a legislative framework in

1 place that requires a showing of need to add new
2 capacity to this state.

3 Basically, as I understand the argument, we
4 ought to allow a certain element to put plants in this
5 state without a precondition or a showing of need
6 because they might be there and they might provide
7 some benefit, even though the retail utilities can't
8 rely on them and will still have to build their own
9 plants.

10 That is not our understanding of the current
11 law, and if we are to go there, we would respectfully
12 submit that the Legislature has to take us there.

13 **CHAIRMAN JOHNSON:** Mr. Guyton?

14 **MR. GUYTON:** Commissioners, your lordship --
15 did I get that right? (Laughter)

16 **COMMISSIONER DEASON:** Yes.

17 **MR. GUYTON:** We've been here a long time.
18 I'm not going to try to drag this out. I think there
19 are several simple points to make. There are three or
20 four points in rebuttal that I want to make, and then
21 I want to remind you of your responsibilities under
22 state law.

23 I agree with what Mr. Sasso has had to say
24 in terms of his analysis. I'm not going to repeat it.
25 I want to add some supplemental points.

1 First, I want you to recall back sometime in
2 the late morning, early afternoon you asked a question
3 to counsel for Duke New Smyrna that says "How are you
4 going to measure the cost-effectiveness of this
5 plant?" And the response from Mr. Wright was "I think
6 you can fairly infer or conclude that this will be
7 cost-effective if it is bought."

8 Commissioners, he is asking you to engage in
9 a presumption as to one of the essential need criteria
10 under 405.519; "Infer that it's going to be
11 cost-effective."

12 The Supreme Court in Nassau v. Beard said it
13 was an abrogation of your statutory responsibilities
14 to presume need or presume that any of the criteria
15 were met; instead, you had to go through an actual
16 determination.

17 Two, he suggests that we're trying to add
18 language to the statutes saying that these are
19 utility-specific criteria. We're not adding anything
20 to the statute. You have held that those criteria are
21 utility-specific on a number of occasions. We've
22 discussed two today. But more importantly, the
23 Supreme Court of Florida has said in Nassau Power v.
24 Beard they are utility-specific. They can't get
25 around that. That is the law of the state of Florida.

1 Three: They say both of those decisions are
2 totally irrelevant because all the language that we
3 rely upon is dicta. My, what an expansive view of the
4 term, dicta. The question in both the underlying
5 decision and the decision in Nassau Power v. Beard was
6 whether the criteria are utility-specific.

7 I want to take you back to Footnote 9. This
8 is the holding of the case. "We reject Nassau's
9 alternative argument that the Siting Act does not
10 require the PSC to determine need on a
11 utility-specific basis." Commissioners, that's not
12 dicta; that's the holding of the Supreme Court in
13 Nassau v. Beard.

14 The second proposition is "Were Nassau and
15 ARK proper applicants under the Power Plant Siting
16 Act?" That was the basis for your dismissal in the
17 ARK and Nassau case. And here's what the Supreme
18 Court said. It was the holding in the case, not
19 dicta.

20 "The Commission's construction of the term
21 'applicant,' as used in Section 403.519, is consistent
22 with the plain language of the pertinent provisions of
23 the act and this court's 1992 decision in
24 Nassau Power v. Beard.

25 Mr. Wright suggested to you in the last 10

1 to 15 need determinations before this Commission
2 you've considered whether the need for the power plant
3 was consistent with Peninsular Florida need.

4 He's absolutely right. That was one of the
5 issues that you considered, but not one of those cases
6 did you decide to approve that need determination
7 solely on Peninsular Florida need.

8 In each and every case you looked at
9 individual utility need, as you're required to, under
10 the Supreme Court precedent I've just cited; and you
11 found that it was needed by a specific utility, and
12 then you went on to find that it was also consistent
13 with Peninsular Florida need.

14 He suggested that one of the reasons they
15 can get around -- or one of the ways they could get
16 around the ARK and Nassau decisions is that they're a
17 joint power project, except we didn't say anything
18 about that in oral argument.

19 Well, Mr. Sasso did early this morning, and
20 I agree. But I want to take you through
21 Section 361.11, because it defines what a joint
22 electric power supply project is within the meaning of
23 section -- within Chapter 361.

24 And it says it is any and all facilities
25 including all equipment, structures, machinery and

1 tangible and intangible property, real and personal,
2 for the joint generation or transmission of electrical
3 energy or both, including any fuel supply or source
4 useful for such project.

5 There is no allegation in the joint
6 petition, and that's what's at issue here, that there
7 will be joint generation or joint transmission. Duke
8 New Smyrna will own the generating facility. The
9 Utilities Commission will own the transmission
10 facilities. There is no joint ownership in either one
11 of those facilities. This is not within the clear
12 definition of a joint power -- joint electric power
13 supply project, such a project.

14 Now, we spent a lot of the afternoon having
15 raised the question of constitutional issues before
16 this Commission. I'm surprised, given some of the law
17 professors here, that we've overlooked a very
18 fundamental issue that should have been brought to
19 your attention.

20 This agency is an administrative agency. It
21 may not exercise judicial functions. Under Article 2,
22 Section 3 of the state constitution, there is a
23 separation of powers.

24 Deciding the constitutionality of an action
25 is a judicial function. It is not an administrative

1 function, and because of that constitutional
2 provision, there is a long line of cases in Florida to
3 the effect that an administrative agency may not pass
4 on the constitutionality of its own acts, which is
5 exactly what you're being asked to do the under both
6 the preemption and the commerce clause arguments,
7 preemption being an argument under the supremacy
8 clause of the U.S. Constitution and commerce clause
9 being a constitutional clause as well.

10 There's also a line of case law, same line,
11 that says constitutional challenges to administrative
12 agencies are for the courts and not -- are for the
13 courts alone to determine and are not for
14 administrative resolution. I cite Metropolitan Dade
15 County v. Department of Commerce, 365 So.2d 432-435,
16 Florida 3rd DCA (1978), for the proposition that you
17 can't pass on the constitutionality of your own acts;
18 one of the cases, Hayes v. State Department of
19 Business Regulation, 418 So.2d 331.

20 Commissioners, I think the short answer to
21 every constitutional argument that's been raised here
22 is that with all due respect, you can't pass on them.
23 You can't consider them. They are beyond your
24 purview.

25 What you have to do under the separation of

1 powers doctrine is that you have to pass on what you
2 can pass on, and that's the Siting Act; and it's very
3 clear what your responsibilities are in the Siting
4 Act. That is a very well developed body of law.

5 Now, I do want to go briefly to the
6 preemption and the commerce clause arguments, because
7 they've been argued so extensively this afternoon, but
8 I will be brief.

9 I think it's clear under the Energy Policy
10 Act -- and this hasn't been read to you in the course
11 of the entire conversation this afternoon, and I think
12 it's unfortunate, but it has been acknowledged
13 somewhat reluctantly by Duke that when Congress passed
14 the Energy Policy Act, they reserved siting and
15 environmental licensing to the states. And it's
16 consistent with the Federal Power Act provision that
17 Mr. Sasso read to you earlier in the Monagaha
18 decision, and they said that's not going to change.

19 I want to read you that provision out of the
20 Energy Policy Act, because I think it is clearly
21 dispositive of the preemption issue. This is
22 Section 731 of the Energy Policy Act of 1992:
23 "Nothing in this title or in any amendment made by
24 this title shall be construed as affecting or
25 intending to affect, or in any way to interfere with

1 the authority of any state or local government
2 relating to environmental protection or siting of
3 facilities." That's what the Congress said in the
4 Energy Policy Act.

5 You have and continue to have the authority
6 that you had before for the siting of facilities, and
7 in Florida that means there's got to be a
8 determination of need. And in Florida, the case law
9 that was existing at that time, it had to be a
10 utility-specific determination of need.

11 Now, this has been implemented by, as has
12 been pointed out, by the Federal Energy Regulatory
13 commission in Order 888. They have a similar passage
14 there. They say, and I want to quote briefly from it:
15 "In response to several of the commenters, we further
16 clarify that the Commission's jurisdiction over the
17 rates, terms and conditions of unbundled retail
18 transmission is no broader than our authority over
19 transmission used for wholesale transactions and will
20 not affect matters otherwise left to the states by
21 Congress."

22 And then they have a footnote. It's
23 Footnote 543: "Among other things, Congress has left
24 to the states authority to regulate generation and
25 transmission siting. See FPA (Federal Power Act)

1 Sections 201(b), 211(d)(1), and Section 731 of the
2 Energy Policy Act."

3 I think it is clear that there's not a
4 preemption argument here. They have reserved that
5 power to you. More importantly, the Energy Policy Act
6 was a part of Congress's exercise of its commerce
7 clause powers, and it has given to you and retained to
8 you the authority to exercise siting and environmental
9 licensing decisions. So there's not a dormant
10 commerce clause issue here. They've said, go ahead,
11 exercise that; it's entirely consistent with the
12 commerce clause.

13 Finally, you recall the dormant commerce
14 clause are designed to protect against economic
15 protectionism. Well, think back. Why did the
16 requirement of such a contract arise in this state?
17 You weren't trying to protect any utility in the state
18 at that time? The Supreme Court wasn't trying to
19 protect any utility in the state.

20 Why did it arise? Because if you're going
21 to determine need, you need to know who has the need.
22 If you're going to determine cost-effectiveness, you
23 need to know whether it's cost-effective to a specific
24 entity.

25 The requirement of a contract didn't arise

1 due to economic protectionism. It arose because of a
2 fundamental problem that you had with the Siting Act
3 with entities of this type.

4 Unless you know who they were going to sell
5 to and the terms and conditions under which it was
6 sold, there was no ability for you to discharge your
7 state responsibility under the Siting Act, and that is
8 to determine whether there was a need for the power
9 plant.

10 Commissioners, you are seldom asked to
11 decide a legal issue where the precedent is so clear.
12 I would ask you respectfully to disregard this room
13 full of lawyers and witnesses that are poised to try
14 this case. This matter should be decided on the law.

15 This petition is fundamentally inconsistent
16 with the law of the state of Florida. The
17 constitutional issues that have been raised before you
18 are not appropriately before you.

19 If there is a question of federal law, that
20 is up to the courts to decide, not for this Commission
21 to decide; and it is certainly beyond the prerogative
22 of this Commission to undertake a fundamental
23 rewriting of the Siting Act in this proceeding that is
24 a prerogative solely to the Legislature.

25 This joint petition should be dismissed.

1 Thank you.

2 COMMISSIONER DEASON: I have a question for
3 Mr. Guyton, and it was a question I asked earlier and
4 I indicated I was going to ask later.

5 And the question is this, Mr. Guyton. I
6 think Mr. Sasso has already given his answer to this
7 question. Can we, the Florida Commission, make a
8 determination of need beyond reliability concerns;
9 i.e., can we do it for purposes to gain economic
10 advantages or promote an economic unit or to enhance
11 competition?

12 MR. GUYTON: Not generally. I think you
13 have to follow the criteria that's set out by the
14 Legislature.

15 Could you make a determination that you
16 don't need it for reliability but it's perhaps the
17 most cost-effective alternative? You could, for a
18 specific utility. That's what the Nassau v. Beard
19 case says. It's got to be utility-specific.

20 You could for a purchasing utility. That's
21 what Nassau v. Deason says. You cannot do it on a
22 general assessment of economic need in the state.
23 That goes beyond clearly the holding in both of those
24 decisions.

25 COMMISSIONER DEASON: So you're saying we

1 can do it as long as it's done on a utility-specific
2 basis?

3 MR. GUYTON: I want to make sure that you
4 understand what I'm saying is that, can you do it on a
5 basis other than solely reliability? Yes, you can do
6 it on, quote, "cost-effectiveness," and economic need
7 there that's shown that it's the most cost-effective
8 alternative.

9 Would you necessarily have to show that
10 there was a need for reliability? Not necessarily.
11 You've done that in the past in several need orders,
12 as Mr. Wright has pointed out. But you're not going
13 to be able to abandon the criteria completely, and you
14 can't take a look at it from a Peninsular Florida or
15 statewide basis.

16 You have to look from the perspective of an
17 individual utility. And for an entity like this, you
18 have to look at it from the perspective of a
19 purchasing utility. That's what the two Nassau cases
20 tell us.

21 CHAIRMAN JOHNSON: Any other questions,
22 Commissioners?

23 MR. WRIGHT: May I have about three minutes,
24 please?

25 CHAIRMAN JOHNSON: Briefly.

1 **MR. WRIGHT:** Thank you.

2 Mr. Sasso suggested in his remarks that what
3 we're talking about is wholesale restructuring and
4 that we want to change all the rules. That's not
5 true. We're here within the rules.

6 There is a wholesale market. There's a
7 wholesale market today. This power plant will exist
8 within the existing framework and the statutes. Just
9 because somebody might not have thought of something
10 in 1973 does not mean that the statute cannot and
11 should not be interpreted to address a situation as it
12 arises.

13 The First Amendment was written in 1789, and
14 it has been applied to address a whole lot of things
15 including, for example, television. Again, I submit
16 to you the plain language of the statute authorizes
17 this.

18 Mr. Sasso engaged yet again in selective
19 reading of the purposes of the Florida Energy
20 Efficiency and Conservation Act. He talked about
21 energy conservation measures by retail serving
22 utilities, but he failed to mention to you the
23 specific goals of the Energy efficiency and
24 Conservation Act to conserve expensive resources,
25 particularly petroleum fuels, and to increase the

1 overall efficiency of electricity and natural gas
2 production and use. We have alleged that our project
3 will serve both of those goals.

4 As to reliability, reliability is one of
5 four criteria in the -- four express criteria in the
6 statute. You certainly must consider all four. None
7 is superior to the other.

8 Mr. Sasso made a remark that is just
9 patently untrue. He said that Duke has made a studied
10 point of saying that they would not, in Duke, enter
11 into a long-term power sales contract. That is just
12 false. Our witnesses have said in depositions that we
13 would consider any and all potential deals that we
14 might be able to make with any utility in Florida.

15 As to the argument that our presence might
16 impair their ability to serve, I don't think that's
17 true at all. Our presence, the presence of the New
18 Smyrna Beach power project would provide an additional
19 option.

20 Florida Power Corporation and other
21 utilities in Florida already today rely on other
22 utilities on uncommitted, unsited, uncontracted
23 capacity in Georgia and in Florida.

24 Florida Power Corporation, the last time it
25 conducted an RFP process -- following on some remarks

1 made by Commissioner Garcia, regarding the benefit of
2 an available plant -- the last time Florida Power
3 Corporation conducted an RFP process it gave extra
4 weight to the Dade County resource recovery facility
5 in its evaluation. Why? Because it was already built
6 and operating.

7 As to Mr. Guyton's comments regarding
8 constitution -- the Commission's considerations or
9 agencies' consideration of constitutional issues, he
10 is correct that may not pass on those constitutional
11 issues.

12 He is not correct that you may not consider
13 them. You are clearly allowed to consider them to
14 avoid an unconstitutional result.

15 Finally, as regards preemption, the Energy
16 Policy Act does not preempt you from doing your job,
17 nor does it preempt the Power Plant Siting Board from
18 doing its job. It reserves to you your ability to do
19 your job.

20 However, conflict preemption applies where
21 an interpretation of a statute would conflict directly
22 with the express purpose of Congress, or with federal
23 rules for that matter, in -- as expressed either in
24 the statute or contemporaneously with the statute.

25 And if you look at the legislative history

1 which we have cited in our papers of the Energy Policy
2 Act, you will see that it says the bill's electricity
3 provisions will promote additional competition in
4 wholesale electricity power market in order to improve
5 the efficiency of the electric utility industry and
6 secure the lowest possible cost for consumers.

7 It also talks about preventing the ability
8 of incumbent transmission owning utilities to thwart
9 efficiency and defeat the committee's goal -- that's
10 the congressional committee's goal -- of encouraging
11 low rates for consumers through greater competition,
12 and goes on to talk about one or more additional goals
13 being served by this Title VII of the act, including
14 the promotion of wholesale competition.

15 That is congressional intent. That is the
16 purpose of the Energy Policy Act. An interpretation
17 of a state law that categorically excludes competitors
18 from the wholesale power market is preempted. You're
19 still allowed to do your job. Doing your job is not
20 preempted, and what we're asking you to do is, please,
21 do your job. Give us a hearing on the merits.

22 Hopefully we get through this hurdle, get
23 above -- past this hurdle, and we go on to the Siting
24 Board where they, exercising their authority in
25 harmony with the federal law, will do their job, too.

1 Thank you.

2 **CHAIRMAN JOHNSON:** Thank you.

3 Commissioners, any questions?

4 **COMMISSIONER GARCIA:** I was going to make a
5 suggestion even before Staff makes its rec. I'm of
6 the opinion that we should hear this. We have the
7 parties here. We should hear this, and we should
8 reserve judgment until after we've heard it, and if we
9 still want to vote to dismiss this, we can hear it --
10 when we've heard the specifics, and we can vote it out
11 on Friday if some of you still want to dismiss it; but
12 I think it's a good opportunity for this Commission to
13 hear the arguments.

14 I think if they're valid on all -- I mean,
15 they both have very strong points, and I don't know if
16 I'm convinced or not, and I think it merits being
17 heard.

18 **CHAIRMAN JOHNSON:** So then you would suggest
19 that we defer ruling on the motion until --

20 **COMMISSIONER GARCIA:** Until we finish the
21 hearing, and then if someone wants to make the motion
22 then, we can rule on it then.

23 **CHAIRMAN JOHNSON:** Any other comments, or do
24 you want to hear from Staff?

25 **MS. FAUGH:** Commissioners, you've heard just

1 about eight hours of very eloquent and very well
2 reasoned arguments from counsel.

3 It's very difficult to come behind that, but
4 I am going to ask you to take a deep breath and
5 completely change your focus from everything that you
6 have heard today.

7 We are here on motions to dismiss. A motion
8 to dismiss raises a question of law whether the
9 petition alleges sufficient facts to state a cause of
10 action.

11 The test for motions to dismiss was
12 enunciated in Barnes v. Dawkins, 624 So.2d 349,
13 Florida 1st DCA (1993). That test is whether with all
14 of the allegations in the petition assumed to be true,
15 the petition states a cause of action upon which
16 relief may be granted.

17 The tribunal must consider only the
18 petition. All reasonable inferences drawn from the
19 petition must be made in favor of the petitioner. I
20 submit to you that the arguments on the merits, while
21 excellent, are just that; arguments on the merits.

22 Procedurally, my opinion is that the
23 petition meets the test for going forward as to having
24 made all of the allegations. The allegations are
25 sufficient to allege all of the elements of this cause

1 of action, which is Section 403.519.

2 The elements are the five criteria that the
3 Commission look at in making a need determination.
4 All five criteria have been adequately discussed in
5 the petition to withstand the motion to dismiss, so
6 Staff's recommendation is that the motions be denied.

7 Staff's recommendation bears no relation to
8 a recommendation on the merits. I believe that is a
9 decision for the Commissioners to make.

10 **CHAIRMAN JOHNSON:** Questions, Commissioners?

11 (No response.)

12 And to that point, then, counsel, you're
13 suggesting, then, the issue of whether or not they are
14 proper applicants before the Commission is an issue on
15 the merits?

16 **MS. PAUGH:** That's correct.

17 **CHAIRMAN JOHNSON:** So that that's
18 something -- and in some way you're -- it's consistent
19 with what Commissioner Garcia is saying.

20 I mean, at the end of this would we
21 entertain a motion to dismiss, or how would we handle
22 it?

23 **MS. PAUGH:** You have several options. You
24 may grant or deny the motion to dismiss at this time.
25 You may grant or deny it in the middle of the

1 proceeding. Your may grant or deny it at the end of
2 the proceeding.

3 If you deny it at any point, the only effect
4 is that the proceeding goes forward, and then these
5 question of laws -- and they are excellent questions
6 of law and, yes, they must be answered -- will then be
7 proven up or not proven up in the proceedings, and you
8 will make your decision based on the evidence that you
9 have before you.

10 **CHAIRMAN JOHNSON:** Okay. Because I want it
11 to be clear that if we grant the motion to dismiss, we
12 are not saying therefore they are applicants as we go
13 through this process.

14 **MS. PAUGH:** That is not Staff's position. I
15 am not saying they are a proper applicant or not a
16 proper applicant. I'm saying strictly as a matter of
17 procedural law in the state of the Florida, the
18 petition withstands a motion to dismiss.

19 **CHAIRMAN JOHNSON:** Thank you. Questions,
20 Commissioners?

21 **COMMISSIONER CLARK:** I guess I'm confused by
22 that, because it seems to me like a fundamental
23 question is, does this person have a right to bring an
24 action, and the question being raised, is this person
25 an applicant under the statute; does this person have

1 a right to bring an action.

2 That would seem to me to be fundamental of a
3 motion to dismiss. You know, I'm not indicating that
4 I'm prepared at this time to grant the motion to
5 dismiss. I'm just not sure.

6 I think we can reserve judgment and say,
7 yeah, we've heard everything; we don't think you're a
8 proper person to bring the action.

9 COMMISSIONER GARCIA: I think it's a central
10 issue to what we're going to be looking at anyway.
11 But I think Ms. Paugh makes a very good point that the
12 truth is that looking at everything in its most
13 positive light, for -- is it the applicant in this
14 case? Or the --

15 MS. PAUGH: The petitioner is what the case
16 law states.

17 COMMISSIONER GARCIA: You know, I don't --
18 I'm not convinced, and that should be the determining
19 factor. I'm not saying that they are an applicant or
20 not. I'm just not convinced.

21 COMMISSIONER CLARK: The determining factor
22 is if you're convinced, Joe Garcia?

23 COMMISSIONER GARCIA: Well, no, no. If
24 we're convinced -- if they've met the standards. And
25 what I'm saying is that there's a question. And we've

1 been working on this eight hours, and --

2 **COMMISSIONER DEASON:** Well, let me ask this
3 question. In all due respect to Staff's
4 recommendation, you've finally honed it. What I hear
5 you say saying is if we get an application in, an
6 applicant says I'm an applicant, a verified applicant
7 under the law, we have to accept that, and then going
8 to hearing to find out if, in fact, he is an
9 applicant, an appropriate applicant under the law.

10 **COMMISSIONER JACOBS:** I would go to the
11 court case. I think it makes it fairly clear in
12 Nassau 2, the very end of the decision. I think it
13 speaks clearly to this.

14 It says "The nonutility generator will be
15 considered a joint applicant with the utility with
16 which it has contracted." If the parties plead that
17 there is such a contract, we in the consideration of a
18 motion to dismiss take that as true, and it resolves
19 the issue of whether or not they're an electric
20 utility and a proper applicant. Now --

21 **COMMISSIONER GARCIA:** Are you saying that
22 the 30 megawatts is enough --

23 **COMMISSIONER JACOBS:** No, that's a question
24 of fact that we deal with in the hearing --

25 **COMMISSIONER GARCIA:** You're saying that

1 they --

2 COMMISSIONER JACOBS: -- that could
3 indeed --

4 COMMISSIONER GARCIA: -- meet the
5 standard -- they're an applicant because under Nassau
6 they meet the standard.

7 COMMISSIONER JACOBS: For purposes of
8 dealing with a motion to dismiss, if they allege this,
9 we take it as true.

10 COMMISSIONER DEASON: They've stated -- I
11 mean, they've been very forthright and indicated
12 there's no secret that the capacity is 500. They have
13 a contract and we can interpret those -- accept those
14 facts. I don't see where we have to go to a hearing.
15 I mean, everyone agrees that those are the facts. We
16 don't have to go to hearing to determine if those
17 facts are true.

18 COMMISSIONER JACOBS: As a matter of whether
19 or not we proceed to hearing, I think that it is
20 relevant. I think it is absolutely the -- I see it as
21 a turning point.

22 I see it that if they approach this -- and,
23 in fact, the last sentence here I think is even more
24 clear. "This interpretation of the statutory scheme
25 will satisfy the requirement that an applicant can be

1 an electric utility," and this is key "while allowing
2 nonutility generators with a contract within an
3 electric utility to bring the contract before the
4 Commission for approval."

5 They get to bring it. We get to decide
6 whether or not to approve it. If we say they don't
7 even get to bring it, in my opinion we've just
8 overturned this decision.

9 CHAIRMAN JOHNSON: Well, maybe it's easier
10 to the extent that we want to hear the case, perhaps
11 that may not be the rationale that the Commissioners
12 would like to adopt in deciding whether or not to
13 dismiss the case.

14 Commissioner Garcia has suggested that maybe
15 we go -- that he'd like for us to go ahead and hear
16 from the witnesses and then make up our minds on the
17 merits of the cases presented. I'm inclined to want
18 to do that for the simple reason I just haven't made
19 up my mind yet.

20 COMMISSIONER CLARK: You want to take it
21 under advisement.

22 CHAIRMAN JOHNSON: Exactly. I came in, you
23 know, and after having read the materials and for the
24 benefit of the people who have been presenting, if we
25 go forward leaning more towards the arguments put

1 forth by Duke; but I thought that the argument put
2 forth today by Mr. Sasso and Mr. Guyton were quite
3 compelling, and I do at a minimum need to take this
4 under further advisement and look at some of the
5 issues and look into that dominant commerce clause
6 argument that I've not --

7 **COMMISSIONER GARCIA:** Dormant clause.

8 **CHAIRMAN JOHNSON:** Dormant.

9 **UNIDENTIFIED SPEAKER:** (Inaudible comment
10 away from microphone.) (Laughter)

11 **CHAIRMAN JOHNSON:** So at a minimum, I'd like
12 for us to have some more time, and it would probably
13 be a useful event to go through the process.

14 **COMMISSIONER CLARK:** Let me just -- you
15 know, and it also seems that it won't be time that is
16 not well spent in the sense that from Senator Lee,
17 he's indicated that "If the Commission believes
18 broadening the definition of utilities who may apply
19 under the power Siting Act is necessary and desirable,
20 I would welcome your recommendations for amending the
21 law."

22 So it will -- you know, it will accomplish
23 the purpose of getting more information on that, maybe
24 highlighting areas that we need more information on,
25 notwithstanding that our ultimate conclusion may be

1 that they're not under current law a proper applicant.

2 COMMISSIONER GARCIA: Well, Commissioners,
3 again I only point out the wisdom of the hearing
4 officer not to have this discussed yesterday at Agenda
5 because we would still be at Agenda yesterday, today.
6 But that being the case, I guess --

7 COMMISSIONER JACOBS: I want to know who the
8 hearing officer was.

9 COMMISSIONER GARCIA: Bright guy.
10 (Laughter) But maybe the point is can the Chairman
11 decide to take it under advisement or do we need to
12 vote on this?

13 CHAIRMAN JOHNSON: I mean, I think we should
14 hear the rest -- we can hear what's been presented. I
15 mean, I think that would be beneficial --

16 COMMISSIONER GARCIA: I'm asking if you need
17 a motion or can you decide this on your own? That's
18 all I'm asking, because I think we --

19 COMMISSIONER DEASON: Well, just a question.
20 To take it under advisement, do we need a motion?

21 COMMISSIONER GARCIA: Well, no; just not to
22 rule on this now. Reserve judgment is basically what
23 we're doing; reserve the ruling on dismissal until
24 we've heard all the evidence at least.

25 CHAIRMAN JOHNSON: I don't know procedurally

1 if we can do that, but that's what I would like to
2 have done.

3 COMMISSIONER CLARK: Unless somebody makes a
4 motion to approve -- grant the motion --

5 COMMISSIONER DEASON: Well, let me state my
6 preference. My preference -- I mean, we've been here
7 all day. We've devoted a lot of time and effort to
8 express everybody's minds.

9 My preference would be to go ahead and deal
10 with it right now, but if there's a desire on one or
11 more Commissioner's part to take this under
12 advisement, I'd certainly respect that and would not
13 object to doing that; but I can tell you what my
14 preference is, but that's just selfish motivation.

15 COMMISSIONER CLARK: No, it's not selfish.
16 It's just that you've heard and you're ready.

17 CHAIRMAN JOHNSON: He's heard enough. Is
18 there then a motion that we take it under advisement
19 and we hear the rest of the proceeding before we rule
20 on the particular motion?

21 COMMISSIONER GARCIA: So moved.

22 CHAIRMAN JOHNSON: Is there a second?

23 COMMISSIONER CLARK: I second it. I mean --
24 I'll second it.

25 CHAIRMAN JOHNSON: All those in favor

1 signify by saying aye.

2 COMMISSIONER GARCIA: Aye.

3 COMMISSIONER JACOBS: Aye.

4 COMMISSIONER CLARK: Aye.

5 CHAIRMAN JOHNSON: Aye.

6 COMMISSIONER DEASON: I'm going to say aye,
7 but it's not my first choice.

8 CHAIRMAN JOHNSON: Then we'll do that, and
9 we'll proceed tomorrow at what time?

10 (Discussion off the record.)

11 MR. WRIGHT: Madam Chairman --

12 CHAIRMAN JOHNSON: We're going to reconvene
13 tomorrow at 9:30.

14 MR. WRIGHT: May I on the record have one
15 minute for a procedural matter?

16 CHAIRMAN JOHNSON: Yes.

17 MR. WRIGHT: We have, as you probably know,
18 10 witnesses' prefiled testimony. By correspondence
19 addressed to all parties we asked whether two of our
20 witnesses whose testimony appears to be relatively
21 noncontroversial might be excused with their
22 testimonies and exhibits entered into the record as
23 though read and received into evidence accordingly.

24 One of those witnesses -- everybody we've
25 heard from, Mr. Kenny Sanford, Jr., professional

1 engineer, who is an electrical engineer, sponsored
2 some testimony regarding the case, all parties who
3 responded to our correspondence indicated that it
4 would be okay with them if Mr. Sanford did not have to
5 come to Tallahassee, that it would be okay for his
6 testimony to be entered into the testimony as though
7 read and his exhibits received into evidence
8 accordingly.

9 He is on standby to fly here if somebody has
10 changed their mind or somebody who didn't respond to
11 our correspondence feels otherwise, but I'd like to
12 ask or have you ask the parties on the record right
13 now if that's okay; and if it's okay, then we can have
14 a stipulation. We'll enter it into the record at the
15 appropriate time, but he won't have to come here.

16 Thank you.

17 **CHAIRMAN JOHNSON:** Okay. Any objections to
18 the stipulation of Mr. Sanford's exhibits and
19 testimony? (No response.)

20 Let the record reflect that there were none,
21 and tomorrow we'll take care of that in the proper
22 course.

23 **MR. WRIGHT:** Thank you very much.

24 **CHAIRMAN JOHNSON:** Anything else? I know we
25 have some procedural issues to entertain. Perhaps we

1 should just take those up in the -- we'll go ahead and
2 handle those now. I think we can do that.

3 Staff has done a real good analysis -- and I
4 believe all of the Commissioners actually have a copy
5 of Staff's analysis of the motion to strike. We'll
6 wrap that up now, so we won't have as much to do
7 tomorrow.

8 MS. PAUGH: I'll defer to Ms. Jaye to
9 address the motions to strike. This is motions to
10 strike portions of testimony of Witnesses Steinmeier,
11 Dolan and Rib.

12 MR. LaVIA: Madam Chair, we're the moving
13 party. My name is Jay LaVia on behalf of joint
14 petitioners. I'll keep this as brief as possible.

15 Basically it's joint petitioners' position
16 that legal argument and legal opinion is not the
17 proper subject for direct testimony in an evidentiary
18 proceeding. In that vein, we have moved to strike
19 only those portions of the prefiled testimony that
20 constitute legal argument.

21 This is not a novel idea. It's a well
22 settled legal tenet that legal opinion is not an
23 appropriate subject for expert testimony in an
24 evidentiary testimony such as this need determination
25 proceeding.

1 For example, to cite Professor Erhart, (sic)
2 who had addressed the issue, he has stated that the
3 evidence code, the portion of the evidence code
4 allowing expert witnesses, was not intended to permit
5 a witness to testify to legal conclusion or to express
6 an opinion upon questions of substantive law.

7 He cites numerous cases. I won't go into
8 them. Siebert v. Bayport was one at 573 So.2d 888, in
9 which the court or lower tribunal allowed expert
10 testimony on interpreting the provisions of
11 Chapter 553, and the appellate court reversed
12 declaring that it was reversible error to allow such
13 testimony. There are other cases. I'll skip over
14 them.

15 The Commission has followed that precedent
16 in an order cited in our papers in our motion to
17 strike; Southern States Docket No. 930880.
18 Commissioner Johnson, acting as prehearing officer,
19 granted a motion to strike certain testimony.

20 And I'm going to read a short excerpt from
21 that: "It has not been Commission practice to allow
22 expert testimony on legal issues. I concur the most
23 appropriate place for legal discussion is in a
24 posthearing filing such as a brief where all the
25 parties have equal opportunity to present case law and

1 argument in support of their position on the issue.
2 Cross-examination of a witness on legal opinion is not
3 contemplated by Section 120.57, which provides for a
4 fact finding proceeding. Legal argument is more
5 appropriately reserved for argument of counsel in a
6 party's brief."

7 "The parties must remember that although
8 this proceeding is an investigation into the
9 appropriate rate structure for Southern States, it is
10 also an evidentiary hearing as contemplated by
11 Section 120.57, Florida Statutes."

12 "For this reason, the portion of the
13 witness' testimony that addresses the Commission's
14 authority to consider conservation when setting rates
15 is not appropriately raised in the testimony. In the
16 pertinent portion of the witness' testimony, the only
17 expertise he employs is his legal opinion regarding
18 the appropriate interpretation of certain statutes.
19 The parties may incorporate such interpretation in
20 their briefs."

21 The rationale in Southern States makes good
22 sense. It is illogical to require the joint
23 petitioners to cross-examine Mr. Steinmeier and
24 Mr. Rib and Mr. Dolan, the three witnesses for whom
25 we've filed motions to strike on their legal opinions.

1 For example, I'll pull one out for now. I'm
2 prepared to go line by line through each one.

3 Mr. Steinmeier testified as to what the
4 Florida Supreme Court ruled in Nassau 1 and Nassau 2,
5 the cases we've discussed for seven or so hours today.
6 It's pure legal opinion.

7 However, joint petitioners tried to explore
8 the basis for this opinion during Mr. Steinmeier's
9 testimony on November 17th, and we asked
10 Mr. Steinmeier if he knew the difference between the
11 holding of a case and dicta to start exploring the
12 basis for our legal opinion.

13 FPL's attorney objected to our question
14 stating that it called for a legal conclusion. We
15 emphatically agree; it calls for a legal conclusion.

16 We're not attempting to silence FPL. There
17 have been 100 pages of material briefing this and
18 eight hours of oral argument. The opponents, FPL and
19 FPC, seem to argue that Ms. Hesse, one of joint
20 petitioner's witnesses, is allegedly offering legal
21 opinion. We disagree.

22 They have not moved to strike any of
23 Ms. Hesse's opinion, but we specifically and carefully
24 characterized Ms. Hesse's testimony as policy, and
25 it's appropriate for this Commission to hear testimony

1 on policy.

2 It's possible that Mr. Steinmeier and
3 Mr. Rib and Mr. Dolan could have couched their
4 testimony in terms of policy. They chose not to do
5 so, and as clear legal opinion it should be stricken.

6 We have specifically identified in our
7 motions the excerpts that we need -- that we have
8 called into question. I'm prepared to address them
9 item by item, and there's probably about 30 of them.
10 I will do whatever the Commission prefers.

11 Thank you.

12 **CHAIRMAN JOHNSON:** Thank you. Sir?

13 **MR. BUTLER:** Good afternoon, Commissioners.
14 John Butler on behalf of Florida Power & Light.

15 Let me, first of all, just read quickly the
16 purpose of Mr. Steinmeier's testimony from his
17 prepared testimony.

18 "The purpose of my testimony is to provide
19 my perspective based upon my experience as a state
20 regulator and my knowledge of the utility industry on
21 the joint petition in this case."

22 "I will address the joint petition from the
23 perspective of state regulatory policy and
24 particularly what I read to be Florida's regulatory
25 policy. I will discuss how the joint petition is

1 inconsistent with Florida policy in that it does not
2 provided sufficient information for this Commission to
3 make the findings required of it by the Power Plant
4 Siting Act."

5 "I will also address how granting a
6 determination of need for this project raises serious
7 concerns for FPL in carrying out its obligations to
8 serve its customers."

9 Clearly the purpose of his testimony is to
10 provide his perspectives as a former state utility
11 commissioner and chairman of this Commission on
12 regulatory policy. It's not strictly or even
13 primarily legal opinion. Although he is a lawyer,
14 that's not the purpose for which his testimony was
15 offered.

16 In the interests of time, I won't take up
17 your time in doing so, but there are numerous
18 instances where the testimony that he has offered
19 which the petitioners have moved to strike claiming
20 that it is legal opinion clearly is otherwise, and
21 I'll just give you one example.

22 This is on Page 13 of his testimony where
23 after the discussion of the Commission's orders and
24 the Supreme Court's decisions regarding those orders
25 goes on to say, Mr. Steinmeier does: "It is not just

1 cases that I rely upon to draw my conclusions. As I
2 pointed out earlier, I believe that these
3 interpretations of the Power Plant Siting Act would be
4 correct even if those decisions has not been entered.
5 The need determination criteria are utility-specific.
6 Utilities are the only entities with an obligation to
7 serve, and the need examined in the need determination
8 is the need of the utility with such an obligation to
9 serve," et cetera; clearly commenting as a policy
10 witness on what the Commission's policy should be
11 regardless of what the cases do or don't hold.

12 There's reference to the Southern States
13 Utilities order by this Commission as one of the
14 principal grounds for the motions to strike. I'd like
15 to comment on that briefly.

16 First of all, you know, the first basis
17 stated in that order was that the issue addressed by
18 the testimony in question wasn't relevant to the
19 matters at hand in that docket.

20 I'll read a sentence from the order. "Since
21 the issue addressing the Commission's authority to
22 approve a uniform rate structure has already been
23 addressed in Docket No. 920199-WS and is being
24 addressed in the pending appeal, it is not relevant to
25 this proceeding. Therefore, the portions of

1 Mr. Mann's testimony related to that issue are,
2 likewise, not relevant."

3 Now, clearly the issue of how the Power
4 Plant Siting Act is to be applied is not only
5 relevant, but central to this proceeding and is easily
6 distinguished from the first rationale used in the
7 Southern States Utilities decision.

8 Secondly, as I think has been quoted here
9 previously, there was a concern expressed that the
10 testimony offered by Mr. Mann was legal opinion, but
11 it says -- I think this was what was specifically
12 quoted earlier.

13 In the pertinent portions of Mr. Mann's
14 testimony, the only expertise he employs is his legal
15 opinion regarding the appropriate interpretation of
16 certain statutes.

17 That's not what Mr. Steinmeier is doing. If
18 there is any legal analysis at all, it is purely
19 incidental to the primary purpose of his testimony,
20 which is to provide you his perspectives as a policy
21 witness and as somebody who has substantial experience
22 in utility policy making.

23 Finally, I'd like to bring to your attention
24 the fact that the Florida APA specifically recognizes
25 the need in instances where you are developing policy,

1 as you appear to be here, to consider matters of --
2 consider testimony that supports those policies.

3 And I'm quoting to you from
4 Section 120.57(1)(e), and 1(e)(2) provides that an
5 agency must demonstrate that an unadopted rule is --
6 and it goes through several things -- but subsection
7 (f), that section says "is supported by competent and
8 substantial evidence". In other words, it
9 specifically envisions your taking evidence on the
10 subject of the policy expressed in an unadopted rule.

11 **CHAIRMAN JOHNSON:** Where are you reading
12 from? I'm sorry. What was the cite?

13 **MR. BUTLER:** This is 120.57(1), paren (3),
14 paren (2), paren (f), way down the subsection list.

15 Finally I would like to note that one of the
16 cases that was cited in the Southern States Utilities
17 order, T.J.R. Holding Company --

18 **CHAIRMAN JOHNSON:** I'm sorry to interrupt
19 you again, but could you go back to that point?
20 Because I know in your written filing you had cited to
21 Chapter 120, but you didn't provide the rationale that
22 you just provided, or it wasn't as clearly stated.

23 Explain to me again how you believe those
24 provisions, what those provisions say and how we
25 should interpret those as we make a decision on the

1 ruling.

2 MR. BUTLER: Okay.

3 CHAIRMAN JOHNSON: You said the first one
4 was 120.57(1)(e)(2)(f)?

5 MR. BUTLER: Yeah, (e)(2)(f). You'll note
6 in the written response that we filed there's a
7 reference in Paragraph 10 to 120.57, paren (1),
8 paren (e). I'm just focusing you in more precisely on
9 the subsection involved.

10 And basically the point is that (1)(e)(2)
11 provides a list, A through G, of things that the
12 agency is to demonstrate with respect to an incipient
13 rule, a nonrule policy, you know, unadopted rule, as
14 the term is used here.

15 The first is that it is within the powers,
16 functions and duties delegated by the Legislature.
17 (b) is "does not enlarge, modify, or contravene the
18 specific provisions of law implemented, et cetera,
19 down to, and (f) "is supported by competent and
20 substantial evidence."

21 Now, competent and substantial evidence
22 supporting an unadopted rule is going to be evidence
23 about the policy that that rule would embody, and that
24 is specifically what policy testimony of the sort that
25 Mr. Steinmeier is offering would provide.

1 I think that the provisions in Section
2 120.57(1)(e) not only recognize that you can, but in
3 fact that you need that sort of testimony to support a
4 policy that you are evolving.

5 CHAIRMAN JOHNSON: And it's your position,
6 then, that our decision in this case is incipient
7 nonrule policy?

8 MR. BUTLER: I think that it very well may
9 be, yes.

10 CHAIRMAN JOHNSON: Okay.

11 MR. BUTLER: Finally, as I was starting to
12 refer to the Southern States Utilities order
13 references a case as one of the two bases for the
14 position that testimony expressing legal opinion
15 should not be permitted. And that is T.J.R. Holding
16 Company v. Alachua County, 617 So.2d 798.

17 I would note that in this case the court
18 expressly recognized the possibility that expert
19 testimony could be useful for the purpose of providing
20 the court, or in this case the agency, with an
21 understanding of the meaning of statutory language
22 involving words of art or scientific and technical
23 terms.

24 Now, in that case the court concluded that
25 the phrase for which the testimony had been offered,

1 which is "affects the use of land," wasn't
2 sufficiently obscure or scientific or technical to
3 require an expert on elaboration and explanation, and
4 so declined to require the court below to rely on the
5 expert opinions that had been offered on that term.

6 But I think that the Power Plant Siting Act
7 is replete with terms of art and specialized terms,
8 the sort that the testimony of Mr. Steinmeier is
9 calculated to provide you elucidation on.

10 Finally, let me just say that I think
11 fundamentally the distinction between testimony that
12 is legal opinion and testimony that is policy opinion
13 is the difference between testimony on what you can or
14 may do and testimony on what you should do.

15 You've had a lot of argument today on what
16 you can or may do, and presumably you're going forward
17 with at least the possibility that you feel that you
18 can or may entertain the petition that is before you
19 from Duke New Smyrna.

20 If that is the case, then you are moving to
21 the secondary question of whether you should entertain
22 that petition, should grant it. That is the purpose
23 of Mr. Steinmeier's testimony. It is to provide you
24 policy perspective. It is not legal opinion, and it
25 should be allowed in its entirety.

1 Thank you.

2 CHAIRMAN JOHNSON: Any questions

3 Commissioners? Staff?

4 MS. JAYE: Thank you, Chairman and
5 Commissioners. I would defer to Mr. Sasso. I believe
6 that he had some responses to --

7 CHAIRMAN JOHNSON: Oh, I'm sorry, Mr. Sasso.

8 MR. SASSO: (Inaudible comments.)

9 COMMISSIONER GARCIA: Mr. Sasso, you're not
10 on.

11 MR. SASSO: Sorry. I get confused with
12 lights on and lights off.

13 We would start with the proposition that
14 this is a regulatory proceeding before a regulatory
15 agency applying applicable regulations, and the issues
16 that have been identified for hearing in this case so
17 reflect.

18 For example, Issue 1 is whether there's a
19 need for this plant on the basis of reliability
20 criterion as that criterion is used in Section
21 403.519. We would submit that at a minimum, the
22 issues set for hearing include mixed issues of law,
23 fact, law and policy.

24 Florida Power Corporation, of course, is a
25 regulated utility. Mr. Rib, one of the witnesses

1 whose testimony is challenged, is a resource planner
2 for Florida Power Corporation. He doesn't do his job
3 in a vacuum.

4 What he addresses in his testimony is how he
5 does his job under the existing regulatory framework,
6 and in that connection he refers to the function that
7 he plays under the 10-year Site Plan law, the function
8 that he plays in assessing need on a utility-specific
9 basis for purposes of determining whether Florida
10 Power Corporation needs new capacity, how FEECA
11 imposes certain obligations on Florida Power
12 Corporation.

13 And he testifies not to legal opinions.
14 Mr. Rib is not an attorney. He testifies to his
15 understanding of how all of these matters interface in
16 doing his job, how they relate to his doing his job as
17 a planner. He cannot discuss those issues
18 intelligibly without some reference to the current
19 legislative and regulatory framework.

20 I mean, Duke's motion is sort of an
21 interesting proposition, because Duke proposes to
22 prove through this proceeding, as we've discussed all
23 day, that need exists on some basis that has never
24 been entertained before. We would submit it's really
25 not need. And they seek to address issues divorced

1 from the existing legislative and regulatory
2 framework, yet they would like our witnesses to
3 participate on the same terms and not make reference
4 to existing regulatory and legislative framework when
5 they talk about how they actually do their job in this
6 state.

7 As I've mentioned, Mr. Rib is not giving a
8 legal opinion. He talks about his understanding of
9 need assessment as a resource planner and addresses
10 certain policy and factual issues in that regard.

11 The same with Mr. Dolan. He also works for
12 Florida Power Corporation. He's also not an attorney.
13 He works with strategic planning issues and regulatory
14 policy issues for the company.

15 And he begins his testimony by saying "I'm
16 not going to discuss the statutory issues, the legal
17 issues. I defer to legal counsel on that." What he
18 does do is says that merchant plants are not being
19 sited now in Florida, and if we are to start siting
20 merchant plants in Florida, that is going to present
21 some very serious policy issues." And he identifies
22 those policy issues.

23 And, again, both witness from time to time
24 refer to the status quo as an anchor point to some of
25 the issues they address in their testimony, but this

1 is not a case as the Southern States case was where an
2 attorney basically was sworn to provide the type of
3 argument that we made today before the Commission
4 under oath on issues that were deemed to be irrelevant
5 for the factual determination of the case. In fact,
6 one of the issues in Southern States was on appeal.
7 Those are fundamentally different situations.

8 I would point out, also, that Duke's
9 witnesses Ms. Hesse and Mr. Green testified at length
10 about what PURPA does and what it means and what its
11 effect is, what FERC Order 888 is and what it means
12 and what its effect is, what the Energy Policy Act of
13 1992 is and what it means and what its effect is, what
14 the purposes are of state regulation.

15 And, yes, we have not moved to strike their
16 testimony. We don't think it makes any difference.
17 If we had moved to strike their testimony, they would
18 say, "There. See, they acknowledge that these are not
19 proper matters to discuss."

20 But the fact is, as we've seen today, at a
21 minimum, everybody would have to acknowledge that
22 there are -- that this case bumps up against, at a
23 minimum bumps up against, the legislative and
24 regulatory framework; and we cannot ignore that, and
25 we cannot expect the witnesses to ignore that.

1 **MR. GUYTON:** May I add a couple -- just a
2 couple examples of what we view as the offending
3 portions of the testimony to put it in context? I'm
4 prepared to go to each one, but it will just take a
5 minute.

6 **CHAIRMAN JOHNSON:** No. You may have the
7 opportunity to do that later, but I want to hear from
8 Staff first.

9 **MR. GUYTON:** Okay. Thank you.

10 **MS. JAYE:** Commissioners, it is Staff's
11 belief after having gone line by line through the
12 question testimony that this testimony does constitute
13 legal argument that is not proper. It should be
14 stricken.

15 In order to bolster Staff's recommendation a
16 little here, since people have been pulling out orders
17 and cases and all, I have made copies of a lot of the
18 case law regarding the appropriateness of legal
19 argument in testimony, whether it may be received by
20 courts and relied upon by courts in making their
21 decisions. I have copies of the cases. If anyone
22 wishes a copy, the stack is here and, Commissioners,
23 if you would like, I can have someone bring the cases
24 up to you.

25 **CHAIRMAN JOHNSON:** While she's doing that,

1 Mr. Sasso raised the point that a lot of the testimony
2 is a mixture of law and policy.

3 MS. JAYE: Yes, it --

4 COMMISSIONER GARCIA: Madam Chairman, I got
5 that feeling, also, working through Mr. Steinmeier's
6 testimony that -- I don't know if it's as much a legal
7 analysis as it is an analysis of the situation and
8 factors that go into decision making.

9 So I think Mr. Sasso raises a good point
10 about that they're mixed issues. I would add to that
11 that I think the Chairman is fully competent to make
12 this decision.

13 MS. JAYE: Might I add that in Order
14 No. PSC-941520-PCO-WS issued December 9th, 1994 in
15 Docket No. 930945-WS, we had a witness attempt to file
16 testimony before the Commission which was indeed held
17 to be a legal opinion, even though it was quite
18 properly a question to be addressed by the Commission;
19 and the Commission itself did say that the legal
20 issues should be addressed in party briefs at the
21 conclusion of the hearing. And this was not an
22 attorney.

23 Again, there's been some question, well,
24 this particular witness may be an attorney and, you
25 know, how can he divorce his legal opinion from

1 discussion of the facts.

2 In this case we have the fiscal and finance
3 manager of the Polk County Utilities Division who came
4 bearing testimony concerning whether specific SSU
5 utilities whose operation and service distribution are
6 contained within a single county that has not elected
7 to be subject to the Commission's jurisdiction, but
8 which may receive administrative direction and
9 operational support from outside the county are to be
10 considered part of a system as contemplated by the
11 statute.

12 Ms. Zwack brought testimony bearing on that
13 very issue before the Commission, and the Commission
14 held in this order for this reason the existence of
15 franchise agreements and legal arguments about alleged
16 conflict of these agreements with Commission
17 jurisdiction should not be precluded, but rather
18 reserved for the posthearing briefs.

19 The Commission goes on in this paragraph,
20 and this is at Page 180 of the order as reported, and
21 says: "Therefore Ms. Zwack's testimony at -- and it
22 lists the pages and line numbers -- is stricken."

23 **CHAIRMAN JOHNSON:** Mr. Grace, I agree with
24 you, and I don't think the parties are arguing that
25 expert -- that you should not or cannot have expert

1 testimony on questions of law.

2 The gentleman -- what's your name?

3 **MR. BUTLER:** John Butler.

4 **CHAIRMAN JOHNSON:** Mr. Butler applied --
5 because my question was going to be, well, how do you
6 know the difference? I mean, when is it a legal
7 opinion and when is it a policy opinion? And he
8 applied the "can do, should do" test to kind of make a
9 distinction that with respect to the witnesses,
10 oftentimes they weren't testifying as to what the law
11 allows, they were testifying as to what the Commission
12 should do, and that that, in fact, as it's couched
13 really should be treated as policy opinion.

14 I'm not taking this issue lightly. I
15 understand that expert testimony on questions of law
16 can be reversible error, so I think we need to be very
17 careful. And you've done a very thorough analysis
18 here.

19 But my question still remains going through
20 this, and I know that the gentleman here is going to
21 show me some examples when it's clearly law -- but I
22 submit that the others will show me when it's a
23 mixture, as Mr. Butler cited to the motion to strike
24 Page 13, Line 1 through 15, I believe, as testimony of
25 Mr. Steinmeier's that was, in his opinion, policy

1 opinion and not going to the law, but it's more of a
2 "should do".

3 When you did your analysis, and I do have
4 your analysis here Ms. Grace, did you consider whether
5 or not they were policy opinions that went to what the
6 Commission should do versus legal opinions?

7 MS. JAYE: Despite the presentation of the
8 opinion as being policy and the disclaimer at the
9 beginning of the deposition -- I'm sorry -- of
10 prefilled testimony, I found that the tone of the
11 answers, some of the questions that were asked and the
12 tone of the answers to those questions where they were
13 challenged did indeed present a legal opinion.

14 I might add, too, that as the court held in
15 Lindsey v. Allstate Insurance Company -- which was
16 passed out to you, Commissioners, it's 561 So.2d 427,
17 Florida 3rd DCA (1990) -- at Page 428 the court found
18 no abuse of discretion as shown by the trial court in
19 excluding testimony of an expert as to how the statute
20 should be interpreted. It is improper for a trial
21 court to rely on expert testimony to determine the
22 meaning of terms in a legislative enactment.

23 So whether or not it might be helpful or it
24 might be really nice to have someone outside come in
25 and help you understand what is meant in the statute

1 in 403, Chapter 403, and in the definition sections as
2 to, you know, the utility, electric utility, et
3 cetera, that is not properly before you. That
4 testimony should be stricken. That is a decision that
5 you need to make on your own unaided.

6 **CHAIRMAN JOHNSON:** I'll tell you what I'll
7 do. I'm going to take the cases that you've given me
8 home tonight and go back through, and I have your
9 analysis. Do the parties have your analysis also? Is
10 this filed, your analysis?

11 **MS. JAYE:** It has not been filed; no,
12 Commissioner. It was not --

13 **CHAIRMAN JOHNSON:** That's fine.

14 **MS. JAYE:** It was an internal planning
15 document.

16 **CHAIRMAN JOHNSON:** That's fine. Actually
17 what I'll do, because I do have the filing, the motion
18 to strike, and I also have the responses, and I have
19 the benefit of your work, I'm going to take that home
20 tonight and go back through this, and I'll make a
21 ruling on all the motions in the morning.

22 **MS. JAYE:** Thank you, Commissioners.

23 **COMMISSIONER GARCIA:** Madam Chairman, should
24 we maybe ask the parties to see if they can work
25 something out, or is that an impossibility on some of

1 this?

2 I mean, clearly it would probably help the
3 Chairman to some degree if you all would be able to
4 come to an agreement that there are some mixed
5 questions of law and fact and there are some that are
6 just of law, and it would certainly move this along
7 tomorrow morning.

8 **CHAIRMAN JOHNSON:** That would be helpful.

9 And, in fact, I can see Mr. Sasso coming in tomorrow
10 with his list lined up, you know, saying, well, we
11 have some motions to strike, too, with respect to some
12 issues that you may believe are policy issues that
13 might decide are legal issues based upon the arguments
14 that you presented today.

15 So it would be helpful if you all could go
16 through and understand the seriousness of this,
17 because we don't want the legal -- opinions on legal
18 issues of law in the testimony, but -- could you
19 respond to --

20 **MR. LaVIA:** Of course joint petitioners are
21 willing to sit down with Florida Power & Light and
22 Florida Power Corporation and review the testimony
23 where a witness testifies that --

24 **COMMISSIONER GARCIA:** I don't think you need
25 to make the point now.

1 **CHAIRMAN JOHNSON:** You're trying to help me
2 on my homework, aren't you?

3 **MR. LaVIA:** After all we're heard from the
4 professors, I'm preempting where a witness says this
5 is not preempted. It doesn't say "should," it says
6 it's not preempted.

7 **CHAIRMAN JOHNSON:** Maybe I'll apply the
8 "should do, can do --

9 **MR. LaVIA:** I'm perfectly willing to be
10 subject to the "should do, can" test.

11 **CHAIRMAN JOHNSON:** Okay. I'll work on that
12 tonight.

13 **MR. LaVIA:** Thank you.

14 **CHAIRMAN JOHNSON:** Anything else? (No
15 response.)

16 Seeing none we're adjourned until 9:30 in
17 the morning.

18 (Thereupon, the hearing adjourned
19 at 6:45 p.m.)

20 (Transcript follows in sequence in Volume
21 3.)

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