

FLORIDA PUBLIC SERVICE COMMISSION
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MEMORANDUM

December 2, 1997

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FPSC - Records/Reporting

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF APPEALS (BELLAK) *RCB DES*
DIVISION OF ELECTRIC & GAS (HAFF) *ms* *JT*

RE: DOCKET NO. 971446-EU - PETITION FOR DECLARATORY STATEMENT
BY DUKE ENERGY NEW SMYRNA BEACH POWER COMPANY, L.L.P.
CONCERNING ELIGIBILITY TO OBTAIN DETERMINATION OF NEED
PURSUANT TO SECTION 403.519, F.S., RULES 25-22.080 AND
.081, F.A.C., AND PERTINENT PROVISIONS OF THE FLORIDA
ELECTRICAL POWER PLANT SITING ACT

AGENDA: 12/16/97 - REGULAR AGENDA - PETITIONER AND PETITIONER FOR
INTERVENTION MAY PARTICIPATE AT COMMISSION'S DISCRETION.

CRITICAL DATES: FEBRUARY 2, 1998 - (DECISION DUE TO MEET 90-
DAY REQUIREMENT IN SECTION 120.565, FLA.
STAT.)

SPECIAL INSTRUCTIONS: S:\PSC\APP\WP\R971446.RCM

CASE BACKGROUND

On November 4, 1997, Duke New Smyrna Beach Power company, L.L.P. (Duke New Smyrna) filed a petition for declaratory statement. The petition asks the Commission to issue an order stating that Duke New Smyrna is entitled to apply for a determination of need for its proposed power plant pursuant to Sections 403.519 and 403.503(4) and (13) of the Florida Electrical Power Plant Siting Act and Commission Rules 25-22.080-.081, Florida Administrative Code.

On December 1, 1997, Florida Corporation (FPC) filed a Motion to Dismiss Proceeding, Answer to Petition for Declaratory Statement, and Petition to Intervene and Request for Administrative Hearing.

The power plant Duke New Smyrna plans to develop is a natural gas fired, combined cycle electrical generating unit near New Smyrna Beach, in Volusia County, Florida. The plant is envisioned, but not definitely configured, at between 240 MW and 500 MW of net

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generating capacity and planned to come on line as early as the summer of 2000.

Pursuant to a participation agreement being negotiated between Duke New Smyrna and the Utilities Commission of New Smyrna Beach (New Smyrna Commission), the New Smyrna Commission will be entitled to 20 MW to 30 MW of the plant's output. The remainder of the output will be marketed in the open wholesale market. Duke New Smyrna will take all investment, capital, and market risk associated with building and operating the plant.

Duke New Smyrna will be certified as an Exempt Wholesale Generator (EWG) pursuant to the Public Utility Holding Company Act, 15 U.S.C.S. §79Z-5a (1994 & Supp. 1997), and will file a tariff and application materials with FERC to sell the plant's output at market-based rates. Market-based rates have been approved for other facilities by the FERC, as in Cataula Generating Company, L.P., FERC ¶61,261 (1997). Unlike the owner of a QF (Qualifying Facility), Duke New Smyrna could not compel any utility to purchase its power.

DISCUSSION OF ISSUES

ISSUE 1: Should FPC's Motion to Dismiss Proceeding be granted?

RECOMMENDATION: No. FPC's Motion to Dismiss Proceeding should be denied.

STAFF ANALYSIS: FPC cites a number of cases holding that, when the result is an agency statement of general applicability interpreting law or policy, declaratory statement proceedings are inappropriate. Significantly, the Court, in such cases as Regal Kitchens, Inc., v. Florida Dep't of Revenue, 641 So. 2d 158 (1st DCA 1994), and Mental Health District Bd v. Florida Dep't of Health and Rehabilitative Services, 425 So. 2d 160 (1st DCA 1983), cited by FPC, upheld that part of the declaratory statement which related solely to the facts and circumstances of the petitioners, while reversing as to those parts that were generally applicable statements of policy. In this case, the Commission may apply the relevant statutes to the particular facts and circumstances of the petitioner while, at the same time, avoiding the kinds of broad policy pronouncements which have been held to be improper.

ISSUE 2: Should FPC's Petition to Intervene be granted?

RECOMMENDATION: No. FPC's Petition to Intervene should be denied.

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STAFF ANALYSIS: FPC cited Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (2nd DCA 1981), as the source of the test for standing to intervene. According to that test, a petitioner must show that (1) it will suffer injury in fact of sufficient immediacy to warrant a hearing, and (2) that the injury is of a type or nature that the proceeding is designed to protect.¹

In claiming to meet both parts of this test, FPC claims, inter alia, that it has an interest in meeting its statutory duties of furnishing adequate and reliable electric service at reasonable cost, maintaining the reliability of the grid and taking a measured and effective approach to the development and maintenance of generating capacity in this state. FPC seeks to intervene to "avoid impairment" to this well-considered and orderly development of generating capacity.

As a basis for its concerns, FPC cites many provisions within both Chapters 366 and 403, as well as the Florida Supreme Court's decisions in Nassau Power Corp. v. Beard, 601 So. 2d 1175 (Fla. 1992) ("Nassau I") and Nassau Power Corp. v. Deason, 641 So. 2d 396 (Fla. 1994) ("Nassau II").

FPC notes, for example, that the Nassau decisions confer a significant measure of control upon FPC over the creation of new generation capacity that the relief sought by IMCA and Duke would impair. For its part, Tampa Electric lists a number of instances relevant to its concerns that its ability to plan for and provide cost effective service would be negatively impacted by IMCA and Duke's project.

Staff, however, believes that these concerns do not meet the Agrico test because they confuse the request for a declaration that IMCA and Duke can be applicants for a need determination with the actual determination as to whether such a plant is, or is not, needed. Staff believes that while some or all of Tampa Electric and FPC's concerns may meet the tests of (1) immediacy of the claimed injury and (2) the type of injury the proceeding is intended to protect against when such a need determination application is actually acted upon, the present petition is preliminary to the stage at which FPC's actual standing would arise.

¹ It is assumed that the Court means injury of a type the proceeding is designed to protect against.

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Moreover, staff believes it is somewhat circular to argue that the Nassau cases create circumstances which Duke's petition will impair to FPC's injury if the Nassau cases concern the law applicable to cogenerators and this petition does not concern the law of cogeneration.

ISSUE 3: Should Duke New Smyrna be permitted to address the Commission and should FPC be permitted to participate?

RECOMMENDATION: Yes. Duke New Smyrna and FPC should be permitted to participate in order to inform the Commission as to these complex issues.

STAFF ANALYSIS: In Monsanto, briefing was permitted to inform the Commission as to the issues therein even though formal intervention was denied. In this case, FPC's Answer could serve that function and its participation would be of assistance in view of the complexity of the issues involved in this docket.

ISSUE 4: Should the Commission issue the requested declaratory statement?

RECOMMENDATION: Yes. The Commission should issue a declaratory statement to the effect that Duke New Smyrna may seek a determination of need for its proposed power plant pursuant to provisions of the Florida Electrical Power Plant Siting Act (Siting Act) and Commission rules.

STAFF ANALYSIS: Under the Siting Act, an "applicant" is defined at Section 403.503(4) as

any electric utility which applies for certification pursuant to the provisions of this act. [e.s.]

Section 403.519, in turn, provides that "[o]n request by an applicant or its own motion, the Commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act." [e.s.]

Section 403.503(13) defines "electric utility" as

cities and towns, counties, public utility districts, regulated electric companies, . . . engaged in, or

authorized to engage in, the business of generating, transmitting, or distributing electric energy.² [e.s.]

The essence of petitioner's claim to be a proper applicant which is entitled to a determination by the Commission of the need for petitioner's proposed power plant is that Duke New Smyrna will be "a regulated electric company" subject to the FERC's regulatory authority and oversight of it as an Exempt Wholesale Generator. This claim requires the consideration, inter alia, of whether the term "regulated electric companies" in Section 403.503(13) includes the federal FERC regulations at issue or is limited to state regulated electric companies, and, indeed, whether such EWG regulation is regulation at all in the sense intended in Section 403.503(13).

Examining the latter point first, there is a certain irony involved in considering such EWG regulation to be regulation for Section 403.503(13) purposes. Since it is essentially deregulatory in nature, it is "light-handed" regulation, rather than traditional rate of return regulation. As illustrated in Cataula Generating Company, L.P., the Federal Energy regulatory Commission

allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. [e.s.]

While the processes by which the FERC makes this determination and the reporting requirements by which oversight of the seller's status is maintained differ from the means and goals of "traditional" regulation, staff believes that when Duke New Smyrna becomes subject to FERC's oversight as an EWG, it may then properly be described as a "regulated" electric company.³

² Because the definitions in both Section 403.503 and Section 366.02 are expressly in reference to the respective act and chapter in which they appear there is no requirement that they be construed in pari materia.

³ Thus, apprehension that issuing this declaratory statement will result in "uneconomic duplication" not only jumps the gun by equating "applicant" status with an actual determination of need, but also mixes regulatory metaphors. As cogeneration illustrates, different regulatory schemes based on contrasting rationales can co-exist. The Commission can oversee their separate evolutions and make policies appropriate to each as may be required by the state's

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Further the short answer as to whether the term "regulated electric companies" encompasses the federal regulation at issue or is limited to state regulated electric companies is that the Legislature could have easily secured the latter limitation as a result of adding the word "state". It not only has not done so, but has not done so in the most recent amendments to these provisions in 1996. Staff believes, therefore, that in the absence of such an amendment, the Commission can, in its discretion, interpret the term "regulated electric companies" to include Duke New Smyrna under the facts and circumstances presented. The benefit of having done so will be that the need -- or lack of need -- for Duke New Smyrna's proposed project may then be determined on its merits rather than having any such determination foreclosed a priori. Staff believes that such a case-by-case determination has more potential benefit for the state than foreclosure of that determination based on a more restricted reading of Section 403.503(13).

While staff is aware that in prior Commission orders affirmed by the Florida Supreme Court in Nassau Power Corp. v. Beard, 601 So. 2d 1175 (Fla. 1992), and Nassau Power Corp. v. Deason, 641 So. 2d 396 (Fla. 1994), the Commission restricted cogenerator applicants under the Siting Act to those who had obtained agreements with co-applicant utilities, that development in the law of cogeneration is clearly inapplicable to this case, which does not involve cogeneration. Indeed, where Duke New Smyrna plainly stated, at p. 7 of its petition,

...unlike the owner of a Qualifying Facility (QF), Duke New Smyrna would have no legal right to compel any utility to purchase its power[,] [e.s.]

it would be illogical to apply to Duke New Smyrna holdings intended to address concerns only relevant to cogenerators which do have such a legal right to compel utilities to purchase their power. This is especially so where the Commission's orders were expressly limited to that context.⁴ Indeed, staff views the deeper, underlying premise of the Nassau cases as consistent with its recommendations as to Duke New Smyrna here. In effect, the Nassau cases represented an adjustment to the procedural requirements on cogenerators to reflect concerns about the regulation of

changing needs.

⁴ That context was specifically described as "non-utility generators [which] seek a determination of need based on a utility's need. 92 FPSC 10:646.

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cogeneration which developed as a result of the Commission's experience with that category of provider. Staff's recommendations concerning Duke New Smyrna likewise reflect its view that a rigid imposition of procedural requirements applicable to so-called "non-utility" generators would be inappropriate where, with the filing and consideration of the merits in full of Duke New Smyrna's petition, that category is no longer limited to cogenerators and other non-utility generators which seek a determination of need based on a utility's need.⁵

ISSUE 5: Should this docket be closed?

RECOMMENDATION: Yes. This docket should be closed.

STAFF ANALYSIS: Upon the issuance of the Commission's final order in this matter, this docket may be closed.

RCB

⁵ Section 120.565 requires that the Commission apply the law to petitioner's facts and circumstances, not the law found applicable in the past to others in different facts and circumstances.