

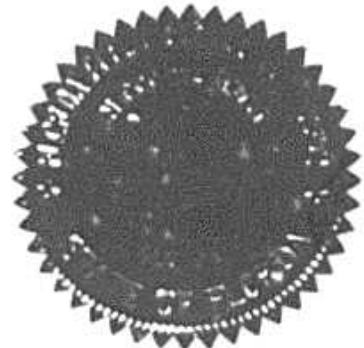
BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of : DOCKET NO. 971337-EU

Petition of Duke Energy, L.P., :
and IMC-Agrico Company for a :
declaratory statement concerning :
eligibility to obtain :
determination of need pursuant :
To Section 403.519, F.S. :

In the Matter of : 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, :
Power Plant Siting Act. :



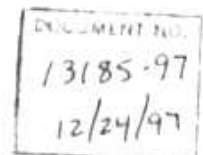
PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 5 and 6

BEFORE: CHAIRMAN JULIA L. JOHNSON
COMMISSIONER J. TERRY DEASON
COMMISSIONER SUSAN F. CLARK
COMMISSIONER DIANE K. KIESLING
COMMISSIONER JOE GARCIA

DATE: Tuesday, December 16, 1997

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

REPORTED BY: ROWENA NASH
Official Commission Reporter
(904) 413-6736



1 **PARTICIPATING:**

2 **MARY A. BANE**, FPSC Deputy Executive
3 Director/Technical.

4 **RICHARD BELLAK**, FPSC Division of Appeals.

5 **JOSEPH A. McGLOTHLIN**, Representing
6 IMC-Agrico Company.

7 **ROBERT SCHEFFEL WRIGHT**, Representing Duke
8 Energy New Smyrna Beach Power Company, L.L.P.

9 **GARY SASSO**, Representing Florida Power
10 Corporation.

11 **CHARLES A. GUYTON**, Representing Florida
12 Power & Light Company.

13 **LEE L. WILLIS**, Representing Tampa Electric
14 Company.

15 **BILL L. BRYANT, JR.**, Representing Enron
16 Capital and Trade Corporation.

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P R O C E E D I N G S

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2 **CHAIRMAN JOHNSON:** If everyone could settle
3 down, we're going to go back on the record and begin
4 Item 5. I think we are prepared for Item 5.

5 Staff.

6 **MR. BELLAK:** Commissioners, Item 5 concerns
7 the petition of Duke Mulberry Energy and IMC-Agrico
8 Company for a declaratory statement concerning their
9 ability to be applicants pursuant to the Power Plant
10 Siting Act. And the Commission -- the Staff
11 considered various pleadings that have come in since.

12 The recommendation has been filed, and so as
13 a preliminary matter, I wanted to mention them to you,
14 that the Staff is taking the position that the motions
15 to strike and motions to dismiss should be denied,
16 because even though the Staff recommends that
17 intervention not be permitted in this docket and -- in
18 this item and in the following item, which is kind of
19 a parallel item to this, still those pleadings that
20 have been filed can be used as briefing for the
21 purposes of informing the Commission. So, therefore,
22 we recommend that those motions to strike and motion
23 to dismiss be denied.

24 In general, the Staff is recommending that
25 there not be intervention in this item based on the

1 fact that the standing of those who seek to intervene
2 will more properly be present under the Agrico test.
3 If and when an actual application for determination of
4 need is filed by an applicant, at that time it's felt
5 that the would-be intervenors here would have standing
6 to participate in that process.

7 So this, then, they cannot show under the
8 Agrico test sufficient immediacy of any injury for
9 them to meet the test for intervention at this point.
10 However, we do recommend that they be permitted to
11 address the Commission. And to the list of those
12 permitted to address the Commission, if the Commission
13 so finds, should be added Mr. Bryant who filed the
14 petition of Enron to participate as amicus after the
15 Staff recommendation was filed.

16 Beyond that, the Staff recommends that the
17 petition for declaratory statement be granted, and if
18 the Commission is willing to listen to the
19 participants, then the staff will respond at that time
20 to any comments that are made.

21 **COMMISSIONER DEASON:** Well, I have one quick
22 question for Staff, first of all. You've indicated
23 that those that seek intervention don't meet the test
24 and that there's no immediacy of harm, and that would,
25 if there is an application filed by the applicant

1 then, they perhaps could make that showing and could
2 intervene. When during this process do they have an
3 opportunity to litigate or address the questions of
4 whether the applicant is truly an applicant under the
5 statutes and the various decisions by the Commission?

6 MR. BELLAK: Well, that goes back to the
7 nature of a declaratory statement. What's happened in
8 these petitions -- and this is with full recognition
9 that declaratory statement procedures have an element
10 of artificiality about them -- but these petitioners
11 only are seeking to know if under these facts and
12 circumstances, and based on current law, they are
13 proper applicants. And, in fact, there are parts of
14 their petition which could be read more broadly than
15 that, where they say tell us that we, as a merchant
16 plant, can be an applicant, and those have been
17 totally -- those parts of the petition have been
18 ignored in the recommendation. There's no
19 recommendation that the Commission grant any kind of
20 statement that is that broad, because that would be
21 the kind of declaratory statement that would be
22 improper under the cases.

23 But instead, the recommendation is simply to
24 address whether they, in the particular facts and
25 circumstances that they allege under the current

1 status of the law are, in fact, applicants.

2 COMMISSIONER CLARK: Mr. Bellak --

3 COMMISSIONER DEASON: Well, I guess my
4 question is even if it's just a question of law, is
5 today when we are going to get the argument as to
6 whether, under the law, they do meet the definition of
7 an applicant?

8 MR. BELLAK: Well, there's -- under the
9 declaratory statement, they normally would not have an
10 opportunity to address you on that. The reason that
11 we are recommending participation is because of the
12 complexity and importance of the issue. But it
13 doesn't change their status from an intervention
14 standpoint.

15 COMMISSIONER CLARK: Commissioner Deason,
16 maybe I can help this process a little bit. I was
17 struck by the fact that these two declaratory
18 statements ask the same thing. Don't they? If we are
19 an EWG under the Federal Power Act, are we entitled to
20 be an applicant. There's no particular set of
21 circumstances that are unique. It is going to be a
22 statement of general applicability, and for that
23 reason it should be done through rulemaking.

24 And in my view, it is entirely inappropriate
25 to issue these declaratory statements. And that if

1 the companies want to come in and ask that we adopt a
2 rule that says, "If you are a regulated utility under
3 the Federal Power Act, you are entitled to be an
4 applicant," then we get everybody in and we make the
5 decision. And it affords them the opportunity that if
6 we're wrong, they can take it over to DOAH and get it
7 declared invalid. That's my view.

8 **COMMISSIONER DEASON:** What's wrong with that
9 view?

10 **MR. BELLAK:** Well, I think they still have a
11 right to find out if -- I think they do not have a
12 right to find out if any EWG is an applicant, although
13 they could certainly derive that implication from how
14 we handle their petition.

15 **COMMISSIONER CLARK:** But I guess, Richard --

16 **MR. BELLAK:** But that's the problem with the
17 declaratory statement.

18 **COMMISSIONER CLARK:** Richard, what I'm
19 saying is even between the two, they don't suggest any
20 unique circumstances. All they are saying is we
21 qualify as the regulated utility because we are
22 regulated by FERC under the Federal Power Act. To me,
23 all they are asking for is a general statement of
24 applicability, and that being under the definition of
25 regulated utility, are EWGs entitled to be applicants.

1 And to me, that's rulemaking.

2 **MR. BELLAK:** Well, if they did ask that and
3 we responded to it, it would be an improper
4 declaratory statement. But keep in mind the Monsanto
5 motto. Monsanto wanted to know if under the facts and
6 circumstances lease financing would cause a retail
7 sale. It's easy to broaden that out and say that
8 that's an improper petition for a declaratory
9 statement. Because anyone who wants to engage in
10 lease financing will now have a rule that says you can
11 do a lease financing arrangement, and you will not be
12 regulated by the Florida Public Service Commission.

13 But that's not what they asked, and that's
14 no what we granted. So it comes down to a formality,
15 and it's artificial. It comes down to the formalism,
16 whether you're looking at the Monsanto case or the
17 Seminole case. There's nothing particularly unique
18 about Monsanto. All Monsanto says was we want a lease
19 finance in order to do self-generation.

20 **COMMISSIONER CLARK:** Yes. But, Richard,
21 they said here's the deal, we want a structure, it's
22 between these two parties, here's how it's going
23 forward. And the question was asked is it
24 self-generation. Here what they're saying is if we
25 are an EWG under the Federal Power Act, are we also a

1 regulated --

2 MR. BELLAK: Electric company.

3 COMMISSIONER CLARK: Yeah.

4 -- such that we are entitled to be an
5 applicant. To me, there's nothing unique about what
6 they've asked for, therefore, they are not entitled to
7 a declaratory statement, but they are entitled to find
8 out. And they are entitled to find out through a
9 request for rulemaking.

10 MR. BELLAK: Right. Well, I'm not sure that
11 I perceive the difference, but I understand what your
12 saying.

13 COMMISSIONER CLARK: Well, there is a
14 difference in how you have to fight --

15 MR. BELLAK: In other words the
16 declaratory --

17 COMMISSIONER CLARK: If there is a
18 difference in standing to intervene.

19 MR. BELLAK: Correct. Well, the declaratory
20 statement petition statute, as I understand it, does
21 not say anything about unique circumstances. All it
22 says is, "Any substantially effected person may seek a
23 declaratory statement regarding an agency's opinion as
24 to the applicability of a statutory petition, or of
25 any rule or orders of the agency as it applies to a

1 petitioner's particular set of circumstances."

2 **COMMISSIONER CLARK:** Well, I guess
3 "particular" is in there, and it also seems to me if
4 it isn't unique, then it's general. And if it's a
5 statement of general applicability, then it ought to
6 be a rule.

7 **MR. BELLAK:** Well, the Staff is not
8 recommending that you issue any statement of general
9 applicability. All the Staff is recommending is that
10 you consider for a grant a statement as to the -- how
11 these statutes apply to this petitioner's particular
12 set of circumstances.

13 **COMMISSIONER CLARK:** But I guess what I'm
14 saying is their circumstances aren't particular, they
15 are general.

16 **MR. BELLAK:** Well, as far as the legal
17 analysis of any -- I hate to use the word
18 "particular," but as far as the legal analysis of any
19 petitioner, the legal analysis may include aspects
20 that are generic. The EWG is generic. The lease
21 financing arrangement in Monsanto is generic. But all
22 the statement declares is the application of the law
23 to the particular set of circumstances of the
24 petitioner. But I certainly could see where you would
25 have a different view of that.

1 **COMMISSIONER CLARK:** Well, I guess it gets
2 down to the fact that there aren't always bright
3 lines. And it just seems to me that in this case it
4 is, in fact, more appropriate for rulemaking. And I
5 think it is inappropriate to go the declaratory
6 statement route in these two instances.

7 **COMMISSIONER KIESLING:** Well, let me ask one
8 other thing, I mean, I concur with you that it is
9 inappropriate for a declaratory statement, but why
10 can't they also resolve this question by filing an
11 application for a determination of need, hear whatever
12 motions we get --

13 **COMMISSIONER CLARK:** Right.

14 **COMMISSIONER KIESLING:** -- and if we decide
15 that -- or if this Commission decides that, you know,
16 they are not an applicant, then you dismiss their
17 petition. If they are an applicant, then it goes
18 forward that way. I mean, that's another avenue.

19 **COMMISSIONER DEASON:** Didn't we follow that
20 procedure a few years back, and it was denied? Isn't
21 that one of these cases that has been cited before?

22 **COMMISSIONER CLARK:** Yes, Commissioner.

23 **COMMISSIONER KIESLING:** Okay.

24 **COMMISSIONER CLARK:** I don't know why they
25 didn't want to answer that.

1 **COMMISSIONER DEASON:** It seems like I
2 vaguely recall that case.

3 **COMMISSIONER KIESLING:** Well, I think it's
4 the case that one of the parties handed out.

5 **COMMISSIONER CLARK:** Is that what this is?

6 **COMMISSIONER KIESLING:** Well, I don't know
7 what that is. This is what I've got. It was the Ark
8 Energy --

9 **CHAIRMAN JOHNSON:** Any other questions,
10 Commissioners? Should we proceed then with --

11 **COMMISSIONER CLARK:** I don't think it is,
12 because --

13 **CHAIRMAN JOHNSON:** Do you want to address
14 this, Susan?

15 **COMMISSIONER CLARK:** No, that's fine.

16 No. I guess the reason I sort of made that
17 statement to begin with was to perhaps shorten this,
18 but you may want to hear from parties.

19 **COMMISSIONER DEASON:** Well, my concern is
20 similar to the concern in the previous item, is that I
21 think this is a very significant issue. I want to
22 hear from everyone, get input, try to make an
23 informed, reasoned decision. I'm not comfortable that
24 a declaratory statement is the way to do that.

25 What I'm hearing my Staff tell me is that,

1 well, we are willing to declare they're applicants,
2 and then when they file an application, then people's
3 substantial interest are affected and they can
4 intervene. But we've already jumped the hurdle.
5 We've already declared them an applicant, and they
6 haven't had an opportunity to tell us whether they
7 legitimately are or are not an applicant. And that
8 concerns me. And I want to have that input.

9 **COMMISSIONER CLARK:** And I guess I would
10 like to have it settled once and for all in the sense
11 that we go to rulemaking. And it's not a continuation
12 of motions in individual proceedings. I don't see
13 what's going to be different. And I know the
14 legislature is interested in this, in terms of they're
15 interested in the policy implications of it, when you
16 do policy through rulemaking.

17 **COMMISSIONER DEASON:** Perhaps we can -- I
18 mean, I would appreciate some input. But perhaps we
19 can limit the discussion to just where we are
20 procedurally and not get in, perhaps, into all of the
21 nitty-gritty of whether they are or are not an
22 applicant at this point. Just to discuss whether this
23 is the appropriate vehicle and who has a right to
24 participate and how they participate. And maybe if we
25 limit it to that, we can at least get over that

1 hurdle, and we will know whether we need to devote
2 more time today --

3 CHAIRMAN JOHNSON: I would agree.

4 COMMISSIONER DEASON: -- to some of the more
5 substantive issues.

6 COMMISSIONER CLARK: That sounds good.

7 CHAIRMAN JOHNSON: That's how we'll -- oh,
8 I'm sorry, Commissioner Kiesling.

9 COMMISSIONER KIESLING: Are we going to hear
10 argument once on Item 5 and once again on Item 6, or
11 are we rolling them in together?

12 COMMISSIONER DEASON: Well, they are so
13 similar --

14 COMMISSIONER KIESLING: I think we should
15 roll them in together.

16 CHAIRMAN JOHNSON: Roll them in.

17 COMMISSIONER KIESLING: Roll them in as one
18 to be --

19 CHAIRMAN JOHNSON: Where should we start?

20 We are going to take argument from the
21 parties. Do we start -- where should we start,
22 Mr. Bellak? Should we start --

23 MR. McGLATHLIN: Chairman Johnson, if
24 there's going to be a discussion on the pending
25 petitions to intervene, I think the petitioners should

1 go first, and we should be allowed to respond. If
2 there's going to be discussion beyond that point as to
3 the -- whether IMC and Duke Mulberry are entitled to
4 go through the declaratory statement, then I think we
5 should go first.

6 **COMMISSIONER DEASON:** Personally, I would
7 rather address the second question, whether this, the
8 declaratory statement, is the appropriate vehicle that
9 we need to proceed. So whoever is seeking declaratory
10 statement, I think probably needs to go first, and
11 let's address that question.

12 **MR. MCGLOTHLIN:** I'm Joe McGlothlin. I'm
13 here on behalf of IMCA, and I'll share the time with
14 Schef Wright who's representing Duke Mulberry.

15 **CHAIRMAN JOHNSON:** Hold on one second. Did
16 you want to limit the time?

17 **COMMISSIONER DEASON:** That's to you're
18 discretion.

19 **CHAIRMAN JOHNSON:** Yeah, we're going to
20 limit the time. Each side, or each party, let's try
21 to do it in five minutes. You may get a lot of
22 questions, but --

23 **MR. MCGLOTHLIN:** Am I to share five minutes,
24 or --

25 **CHAIRMAN JOHNSON:** No, five minutes. Speak.

1 **MR. McGLOTHLIN:** All right. If I could just
2 try to respond to the questions and the comments that
3 have been put forth so far. Commissioner Clark, the
4 reason why the declaratory statement is appropriate is
5 that, even though as you and Mr. Bellak discussed, the
6 EWG aspect of the proceeding is not unique. The
7 particular proposal is a particular plant to be built
8 by a particular development and a particular business
9 structure by two particular entities.

10 **COMMISSIONER CLARK:** But how does that
11 affect their status as an applicant?

12 **MR. McGLOTHLIN:** As an applicant?

13 **COMMISSIONER CLARK:** Right.

14 **MR. McGLOTHLIN:** It means that we can
15 describe a specific fact situation and ask the
16 Commission to apply the law to it. And the
17 declaratory statement statute and your rule
18 contemplates exactly that.

19 And there was some discussion in the prior
20 item, docket, about the fact that once that's done
21 there is some precedential effect in that one would
22 expect that if somebody else has the identical
23 situation and you have the same law applied to it, you
24 can expect some similar results. But that doesn't
25 detract from the fact that as entities who come to you

1 with a particular fact proposal and ask you how the
2 law applies to them, we are entitled to a statement if
3 we can satisfy the other aspects of the statute and
4 the rule.

5 Now, in this case, we have -- I think it's
6 worth noting and without getting too far into the
7 merits of it, that we have identified some aspects of
8 our proposal that are different than things that
9 you've seen before. And at some point along the way
10 that the first QF who applied for a determination of
11 need was the first of its kind. But, as I recall, the
12 Commission didn't say, woops, that has never been done
13 before, we need a rule; instead you acted on what was
14 pending before you.

15 Now, someone pointed out that it's available
16 to us to go ahead and file the complete application.
17 I don't deny that's the case, but think about what's
18 involved in an application for determination of need.
19 It's a time consuming process. It requires a lot of
20 resources. And I think it is legitimate for us to put
21 to you the legal question of whether under our
22 situation we are entitled, under the law, to be an
23 applicant.

24 We've also pointed out in our petition
25 that -- we've put it to you in the alternative. We've

1 asked you to rule that we are entitled to ask for a
2 determination of need, but, alternatively, if you
3 think that's not the case, then the alternative should
4 be that no determination of need is required for our
5 project, because we want to avoid the catch 22 that
6 the utilities want to put us in. And there are some
7 constitutional implications of that that Enron has
8 addressed in a amicus brief. And I will leave the
9 particulars to them.

10 But by and large, we fall within the ambit
11 of the statutes. We have a specific fact situation.
12 We want that. We ask the Commission to apply the law
13 to it and take into account, first of all, that unlike
14 things you've seen before, this project would impose
15 no capital investment, no operation risk on the
16 ratepayers. It is not contingent upon the prior
17 agreement by contract or order of any ratepayers to be
18 responsible for the cost. And it's going to be in the
19 form of an exempt wholesale generator, which under the
20 federal law is a public utility, and so qualifies as a
21 regulated electric company within the meaning of the
22 statute.

23 **COMMISSIONER CLARK:** I guess that's where
24 you lose me. It seems to me the essence of what you
25 are asking is if we are a regulated entity under the

1 Federal Power Act, are we entitled to be an applicant.
2 And that's really the only facts that need to be
3 alleged or that you are alleging that qualifies you to
4 come under this. And to me, you are asking for a
5 statement of general applicability.

6 **MR. McGLOTHLIN:** There's more than that.
7 There's the factual aspect of it which is that we are
8 contemplating the possibility of a power plant that
9 exceeds 75 megawatts in terms of steam capacity. So
10 there's more than just the EWG component on it. And
11 so the EWG is certainly part and parcel of it, but the
12 fact that we are asking the Commission to interpret
13 the definition of "applicant" and "electric utility,"
14 within the meaning of the Power Plant Siting Act,
15 doesn't detract from the fact that we are legitimately
16 asking for a declaratory statement. That's no
17 different from any other situation in which a
18 petitioner asks the Commission to apply the law to the
19 facts.

20 **CHAIRMAN JOHNSON:** Would you say that again?
21 I didn't hear you.

22 **MR. McGLOTHLIN:** This is no different from
23 any other situation of which a petitioner asks the
24 Commission to apply law to the specific facts
25 presented and issue a declaratory statement. The EWG

1 component is one factual aspect of the totality to
2 which we ask you to apply the definition of
3 "applicant" and "electric utility," as within the
4 meaning of the Power Plant Siting Act.

5 CHAIRMAN JOHNSON: Okay. Mr. -- you are
6 finished?

7 MR. McGLOTHLIN: Yes, ma'am.

8 CHAIRMAN JOHNSON: Mr. Wright.

9 MR. WRIGHT: Thank you, Madam Chairman.
10 Robert Scheffel Wright, law firm of Landers and
11 Parsons, appearing on behalf of Duke Mulberry Energy,
12 L.P. and Duke Energy New Smyrna Beach Power Company,
13 L.L.P. Since we are taking both dockets together
14 here, Mr. Ron Vaden, who is the Director of the New
15 Smyrna Beach Utility's Commission, has some
16 correspondence for you that supports the granting of
17 the request of declaratory statement that's he's going
18 to pass out at this time. This will be filed later
19 today in the correspondence section of the docket.

20 COMMISSIONER KIESLING: Mr. Wright, why
21 don't you go on with your argument while he's doing
22 that.

23 MR. WRIGHT: Thank you, Commissioner
24 Kiesling, I'd be delighted to. Regarding the
25 procedural questions, issues that have been raised,

1 we're asking you for a determination of our rights and
2 status with respect to the laws that you administer.
3 We have proposed particular plants at particular sites
4 under particular structures. In the IMCA case, our
5 project involves a self-generation joint venture. In
6 the Duke New Smyrna case, it involves an agreement to
7 provide both power pursuant to a participation
8 agreement to the Utility's Commission of New Smyrna
9 Beach.

10 We believe that we are entitled to a
11 declaration as to the applicability of your laws to
12 our facts. We have not asked you for a rule, your
13 order won't be a rule. As Mr. Bellak explained, your
14 order won't say "Every EWG is an applicant under the
15 act." Your order would say, if granted as recommended
16 by the Staff, that Duke Mulberry is a proper applicant
17 and Duke New Smyrna is a proper applicant based on the
18 facts that they allege.

19 Now, you could also do rulemaking if you
20 want, but I certainly think that our asking for
21 declaratory statements as to the applicability of
22 facts, to our applicability of the law, to our
23 particular facts, and granting those statements is
24 well within incipient policy -- the scope of incipient
25 policy development under MacDonald. And I think it's

1 well within your authority to grant the request of
2 declaratory statement. And if you feel the need to go
3 on to rulemaking, you could go on to rulemaking.

4 Regarding the prospect of our filing
5 petitions for our determination of need and then go
6 through a process where others might be allowed to
7 file motions to dismiss, and so on, we could do that.
8 Frankly, the cost of doing that is not insignificant.
9 The cost of preparing the petition/application
10 materials, the testimony, etcetera, is not
11 insignificant, and it is to avoid that cost that we
12 have come to you -- well, part of it, because we are
13 already working on the permitting, frankly, for both
14 of these.

15 But part of the reason for coming to you for
16 a declaratory statement is to avoid incurring that
17 cost if when we get there, you know, a few months down
18 the road, you are going to shut us out on the grounds
19 that we're not proper applicants. And the question I
20 would say is -- well, what I would say is it doesn't
21 make sense when you've got the issue before you
22 today -- we believe and Staff agrees -- properly
23 framed is a petition for declaratory statement.
24 You've got probably every interested party in the
25 state present, ready to argue it. Why make us go

1 through the hoops of filing an application and having
2 a whole bunch of hearings on motions to dismiss, in
3 which the pleadings are going to look almost identical
4 to what you've got before you now when you can address
5 the issue today through what we, I believe, is a
6 properly framed petition for declaratory statement?

7 You know we strongly support the Staff's
8 recommendations, both procedurally and substantively.
9 We think the analysis as to why we are proper
10 applicants is straightforward. We will be regulated
11 electric companies under the Act. We will be engaged
12 in the generation of electricity. If you put those
13 two things together, you are an applicant under the
14 Act. We'll be a public utility under the Federal
15 Power Act.

16 **COMMISSIONER CLARK:** Mr. Wright, can I ask
17 you, could we possibly grant one and not the other?
18 Say, yes, under one, you are entitled to apply; and on
19 the other, you're not. What particular fact in each
20 case would allow us to make that distinction?

21 **MR. WRIGHT:** Well, of course, I think the
22 law as it applies would require that both be granted.
23 I think you could say hypothetically, since the New
24 Smyrna Beach Utility's Commission is involved in the
25 one and they're a retail utility, that's sort of like

1 what we've seen before, and we can grant that.

2 Since the other involves self-generation,
3 that's still up for grabs. Based on the previous
4 discussion of Item 4, we are not so sure about that,
5 maybe we need to consider that later. Now, I wouldn't
6 agree with that, I think you ought to grant both of
7 them, but --

8 **COMMISSIONER CLARK:** But am I mistaken that
9 they both basically ask for authority to be an
10 applicant on exactly the same grounds.

11 **MR. WRIGHT:** As to the Duke entities, yes,
12 ma'am. But that doesn't make the statement that we've
13 asked you to give a rule.

14 **COMMISSIONER CLARK:** Okay.

15 **CHAIRMAN JOHNSON:** Let me ask the question
16 in a different way. If the petitions solely allege
17 that we are an EWG regulated under the Federal Power
18 Act are we an applicant, what if that had been the
19 question. Is that appropriate for a deck statement?

20 **MR. WRIGHT:** Yes.

21 **CHAIRMAN JOHNSON:** Okay. Well, that's what
22 I thought you were saying. That's, to me, the crux of
23 your argument, is that question. That narrowly
24 defined, even though it would have general
25 applicability, you're still saying that that is

1 appropriate for a deck action.

2 **MR. WRIGHT:** It's appropriate for a deck
3 action because it applies to us only. We have not
4 asked you for a rule. We have not asked you for a
5 statement of general applicability. Your declaratory
6 statement, if you would grant it, would have the
7 normal language that declaratory statements always
8 have.

9 Everyone should be aware here that the
10 declaratory statement herein granted applies to this
11 petitioner and his facts and circumstances only,
12 period. And any variance from that may result in a
13 different outcome. And Mr. Bellak addressed this very
14 well in his recommendation with respect to Issue 1
15 where he cites to Regal Kitchens and the Mental Health
16 District Board versus Florida Department of HRS.

17 **CHAIRMAN JOHNSON:** Where are you reading
18 from?

19 **MR. WRIGHT:** Staff recommendation at 2,
20 Staff analysis under Issue 1. The review in courts in
21 these cases upheld -- and these were cases,
22 apparently, where the orders granted by the agencies
23 involved said, "Yeah, you have this status under the
24 law and so does everybody else." And what the court's
25 went on to say was the statement is okay and not

1 overturned, to the extent that it applies to the
2 petitioners only. To the extent that it purports to
3 be broader than that, it's that part of it, is carved
4 away and that part of it is overruled.

5 It's my understanding that folks who
6 practice in the tax area cite Regal Kitchens as
7 precedent, notwithstanding the fact that it's
8 expressly limited to the court, and in parallel
9 limited by the court, to Regal Kitchen. And in
10 parallel to the situation here, it was a deck
11 statement as to the applicability of some tax rules or
12 tax statutes to one entity that went too far.

13 The part that went too far was excised. The
14 part that applied to Regal Kitchen only was allowed to
15 stand. And that's what we've suggesting to you, it's
16 what Mr. Bellak's suggesting to you. You can grant
17 the statement. He's actually crafted his
18 recommendation, you know, in my opinion, extremely
19 tightly to make it clear that all you're doing is
20 granting -- all the Staff are recommending that you do
21 is grant a deck statement based on our facts only and
22 applicable to us only. There's no rule inherent
23 there.

24 **CHAIRMAN JOHNSON:** How can something as
25 broadly as I just phrased it be applicable to you

1 only?

2 **MR. WRIGHT:** Well, maybe I misunderstood
3 you, Chairman Johnson. If what you asked is I'm an
4 EWG, may I be an applicant, then I think that would
5 probably be a rule. But that's different from saying
6 I'm Duke Mulberry Energy, L.P., and this is the plant
7 I propose to build, and this is the structure and this
8 is da-ta-da, am I an applicant.

9 **CHAIRMAN JOHNSON:** Okay. Well, maybe you
10 misunderstood me when I first asked the question.

11 **MR. WRIGHT:** I apologize.

12 **CHAIRMAN JOHNSON:** And I interrupted you.

13 **MR. WRIGHT:** Well, I'm afraid I've gone over
14 my five minutes. I did want to address a couple of
15 the substantive points because I thought this was the
16 only opportunity we were going to have to present
17 argument.

18 **CHAIRMAN JOHNSON:** You may have an
19 opportunity to present argument on the substantive
20 points later, but I think this is limited to just the
21 procedural.

22 **MR. WRIGHT:** Thank you.

23 **MR. SASSO:** Hi, I'm Gary Sasso with Carlton
24 Fields, representing Florida Power Corporation. We
25 respectfully disagree with the Staff's position on

1 this issue and would urge that this is quite
2 definitely not the type of proceeding that may be
3 disposed of through a declaratory proceeding vehicle.

4 Let me begin briefly by talking about the
5 law because I think there may be some confusion here.
6 Mr. Bellak suggested that there is really no basis to
7 conclude that a declaratory statement can never be
8 issued, that the prescription by the case law is
9 simply that it be tailored to the particular
10 circumstances involved.

11 We have cited in our motion to dismiss the
12 petitions, the Tampa Electric Company versus the
13 Florida Department of Community Affairs case. And let
14 me just read some salient portions of that decision.

15 Citing Regal Kitchens, the First District in
16 that case said, "An administrative agency may not use
17 a declaratory statement as a vehicle for the adoption
18 of a broad agency policy or to provide statutory or
19 rule interpretations that apply to an entire class of
20 persons." That, of course, is what is going on here.

21 The court went on to say, "When an agency is
22 called upon to issue a declaratory statement in
23 response to a question which is not limited to
24 specific facts and a specific petitioner and which
25 would require a response of such a general and

1 consistent nature as to meet the definition of a rule,
2 the agency should either decline to issue this
3 statement or comply with the provisions of Section
4 120.54 governing rulemaking."

5 This case calls upon the Commission and the
6 courts to basically inquire what's really going on
7 here. Is this case being used as a vehicle for the
8 adoption of a broad policy, and is it being used as an
9 attempt to obtain a ruling that applies to an entire
10 class of persons?

11 In the Regal Kitchens' decision, the court
12 did talk about the idea of limiting a declaratory
13 statement, but made clear that a declaratory statement
14 may be affirmed in part to the extent that it is
15 proper, if the improper parts are severable.

16 We would submit to you that in the
17 circumstances of this situation, it would be
18 impossible to sever the policy issues from the
19 particular circumstances of these petitioners because
20 as already has been identified, there are only two.

21 The petitions in the New Smyrna case and in
22 the Duke Mulberry case ask for relief on the ground
23 that the plants will exceed 75 megawatts, which is the
24 threshold, of course, for the Power Plant Siting Act,
25 and that the plants will qualify for EWG status.

1 That's it. That is the ground on which the
2 petitioners in both cases seek relief.

3 In the request to address the Commission,
4 Duke and IMC describe their own petition as follows,
5 "duke Mulberry and IMCA submit that their petition
6 presents a case of first impression that raises
7 significant issues with respect to the statutory basis
8 for and policy implications of granting competitive
9 wholesale power producers, such as Duke Mulberry as an
10 exempt wholesale generator, access to the Commission's
11 need determination process pursuant to Section
12 403.519." That, in a nutshell, is what both of these
13 petitions are all about.

14 Now, as both Mr. Bellak has said and as
15 Mr. Wright has said, even with the intention of
16 narrowly limiting a recommendation in this case, Staff
17 has attempted to craft a recommendation that does not
18 transgress on the notion that a declaratory statement
19 should not exceed the particular circumstances of the
20 petitioners. But I would point to the Staff's own
21 recommendation to indicate that despite that intention
22 and those best efforts, they did not succeed in doing
23 so.

24 The Staff makes a recommendation to grant
25 the petitions, and then says, "Staff believes that

1 such a case-by-case determination has more potential
2 benefit for the state than foreclosure of that
3 determination based on a more restrictive reading of
4 Section 403.503(13)."

5 What Staff has essentially done here is used
6 this recommendation to make policy. And if we were
7 granted the opportunity to address the Commission in
8 appropriate circumstances, we would demonstrate that
9 that policy decision has already been made by the
10 legislature, which is essentially already determined;
11 who ought to be an applicant and who shouldn't be an
12 applicant and who has foreclosed EWGs from
13 participating.

14 The recommendation goes on to say, "Staff's
15 recommendations concerning Duke Mulberry likewise
16 reflect its view that a rigid imposition of procedural
17 requirements applicable to so-called nonutility
18 generators would be inappropriate where with the
19 filing and consideration of the merits in full of Duke
20 Mulberry and IMCA's petition, that category is no
21 longer limited to cogenerators and other nonutility
22 generators which seek a determination of need based on
23 a utility's need."

24 So Staff's own recommendation is making
25 categorical determinations of who's in and who's out,

1 receding from Florida Supreme Court precedent and this
2 Commission's own prior precedent. And if that's not
3 policy, it's hard to determine what is.

4 We are not in a gray area here. As
5 Commissioner Clark pointed out, there may be
6 situations where there may be room for debate about
7 whether a particular petition presents an appropriate
8 occasion for declaratory statement. This is not such
9 a petition. The vehicle is created for a situation,
10 perhaps where a regulated entity wants to clarify its
11 obligations before proceeding at its peril. Here Duke
12 and IMC are not even regulated entities. They could
13 have filed a need petition and attempted to get
14 applicant status. It would have been evident from the
15 get go that they wouldn't even be able to fill out the
16 form necessary to initiate that proceeding.

17 So instead of doing that, they chose to come
18 to this Commission and present a very broad and
19 abstract proposition; can an entity that is an EWG and
20 building a plant in excess of 75-megawatts basically
21 break into this closed regulatory and legislative
22 scheme that heretofore has been limited to utilities
23 and independent power producers in a contract with the
24 utility. And we would submit that that is plainly an
25 effort to call upon this Commission to make a policy

1 through a proceeding that is designed to cut out of
2 the loop the utilities that have the most direct
3 standing and stake in a current regulatory regime.

4 **CHAIRMAN JOHNSON:** Mr. Sasso, you need to
5 wrap up.

6 **MR. SASSO:** Thank you.

7 **CHAIRMAN JOHNSON:** Mr. Guyton.

8 **MR. GUYTON:** Commissioners, my name is
9 Charles Guyton. I'm with the law firm of Steel,
10 Hector and Davis, and I represent Florida Power &
11 Light in this proceeding. I think Mr. Sasso has
12 adequately addressed the law. This is a very clear
13 legal issue for your resolve, and I think he's hit the
14 nail squarely on the head. I want to bring --

15 **CHAIRMAN JOHNSON:** You're going to have to
16 speak closer.

17 **MR. GUYTON:** I want to bring three factors
18 to your attention which I think clearly demonstrate
19 that you are being asked to give a declaratory
20 statement as to a matter of general applicability, or
21 in the alternative, a matter of general statement of
22 policy.

23 First, is look at the Duke/IMCA petition
24 itself. Buried in the middle of it is the following
25 sentence, "The issue posed by this petition is simply

1 whether a merchant plant developer may pursue the
2 permitting for its project using the processes of a
3 siting act in Section 403.519." They want a
4 declaratory statement as to an entire class of
5 entities, merchant plant developers.

6 Second thing, it's a subtle, but I think yet
7 another good example. We are arguing two declaratory
8 statement proceedings before you right now, Items 5
9 and 6. We've rolled them together because the issues
10 are virtually identical. This is a matter of general
11 applicability, as you recognize, in structuring the
12 agenda and the argument.

13 And three, if you look at the Staff
14 recommendations before you, all you have to do is
15 substitute one party for the other, otherwise they are
16 identical. This is a matter of general applicability,
17 a declaratory statement should not be issued. Thank
18 you.

19 **CHAIRMAN JOHNSON:** Mr. Willis.

20 **MR. WILLIS:** I'm Lee Willis representing
21 Tampa Electric Company. Commissioners, it's very
22 important for the Commission to be cautious in setting
23 policies which could have a dramatic effect on the
24 power supply of this state. The requested declaratory
25 statement that's before you would fundamentally change

1 Commission-stated policy adopted in generic
2 proceedings and set forth in numerous orders of this
3 Commission and has been affirmed in two cases of the
4 supreme court: in Nasau Power versus Beard and Nasau
5 Power Company versus Deason.

6 Declaratory statements are simply not the
7 appropriate type of proceeding to establish or to
8 change policy. The decision sought by a petitioner in
9 this docket will be used as a matter of general
10 applicability. They have cleverly styled this as a
11 petition for declaratory statement, but that's really
12 wrong. The relief they seek is a major change in
13 policy and the rejection of prior Commission policy
14 and Supreme Court precedence. And declaratory
15 statements are not the appropriate types of
16 proceedings for those kinds of actions. Now, the only
17 reason that they decided this was to try to avoid
18 input and participation by those that are directly
19 affected by it.

20 Now, as you said at the outset of this,
21 there is nothing unique in this petition. It's not
22 limited to the particular circumstances of the
23 applicant, and you can't avoid making a statement of
24 general applicability in this case so, therefore, it
25 should be dismissed.

1 **CHAIRMAN JOHNSON:** Thank you, Mr. Willis.
2 Staff?

3 **MR. BELLAK:** Yeah, I'd like to respond to
4 that. It seems that as you listen I'm reminded of the
5 Opticians case. In the Opticians case, the claim was
6 made that the statement was improper because it asked
7 for a statement that as an optician one could do the
8 following with respect to certain prescription drugs,
9 as an optician. Substitute for that as a merchant
10 plant one could do the following, perhaps be an
11 applicant. Those kinds of petitions for declaratory
12 statement are too broad. Not because, as the
13 commenders think, you can take subject matter and look
14 at it and weigh it in your hand, judge its importance,
15 look at the shape or the outline, think about what
16 other people are going to conclude about it, and
17 decide that's just not declaratory statement material.
18 And that's the argument you've just heard. That's all
19 you've heard. They have no case that says that.

20 And what's wrong with that is that means you
21 shouldn't have issued the Monsanto opinion because
22 that has abstract legal reasoning in it which could be
23 applied generically. You shouldn't have entered the
24 PW Venture's opinion because that has abstract legal
25 reasoning in it. And you shouldn't actually do

1 anything in terms of a declaratory statement.

2 What the cases say is don't issue a
3 statement that says as an optometrist, you can do the
4 following, because that sets policy for the entire
5 profession of optometry. What you should do, you
6 could take the same subject matter and issue a proper
7 declaratory statement which would say Mr. so-and-so,
8 in his particular facts and circumstances, here's how
9 the law applies to him.

10 Now, others may draw a conclusion from it --
11 and I think there's an artificial conclusion being
12 driven because there are two petitions for declaratory
13 statement. Suppose there were only one, would that
14 look not like a declaratory statement? I submit to
15 you that it would look exactly like a declaratory
16 statement, and all you've heard are the arguments for
17 why there are never second and third petitions along
18 the same subject matter. Because the first petition
19 answers it for a lot of other people, but that does
20 not make it an incorrect or improper petition.

21 **COMMISSIONER CLARK:** Mr. Bellak, is issuing
22 a declaratory statement within our discretion to do or
23 not?

24 **MR. BELLAK:** I think it is not within your
25 discretion to fail to respond to the petition, but I

1 think that you would have certainly within your
2 discretion to either grant or deny. But I think your
3 denial would have to be for reasons that could be
4 sustained on appeal.

5 Now, I think that the Opticians case
6 demonstrates the difference between setting policy for
7 all of the opticians in the state and the difference
8 between applying the facts and law to one optician
9 from which petition for declaratory statement others
10 may draw conclusions. And I think that once you issue
11 a statement, you can then go on to rulemaking or you
12 can then seek to have the law changed. Or the
13 legislature could then do what they want to do, but I
14 don't think you have discretion to say this is too
15 important, this is too weighty, this has too many
16 policy implications, because all of the implications
17 that they choose to draw, that's their choice. That
18 can't be the standard.

19 COMMISSIONER CLARK: Madam Chairman, you
20 know, I guess at some point I would be willing to
21 listen to more arguments on this, but I am mindful of
22 the fact that we are only on five and six and time is
23 marching on. And it's my view that we should deny the
24 declaratory statements in both these cases. I
25 believe -- there's nothing black and white. If

1 everything were black and white, all the lawyers would
2 be out of business.

3 It was one of my surprises upon getting out
4 of law school that people didn't come into your office
5 and say, well, this is a tort action and that you had
6 to actually figure out where it fits. And in this
7 case, I don't think it fits a declaratory statement.
8 I think what it more appropriately fits is a
9 rulemaking.

10 But I would say it is perhaps broader than
11 that. Because I think as a Commission, we need to
12 explore what the law says and perhaps what it should
13 say if it doesn't allow for merchant plants. And let
14 me just outline my concerns. We don't have
15 jurisdiction over wholesale competition, FERC does.
16 And my reading of FERC Order 888 is that there will be
17 wholesale competition. And the indication we have
18 gotten with respect to the ten-year site plans is
19 there's an anticipation on the part of regulated
20 retail entities that will be a competitive market.

21 And as Mr. Dennis indicated yesterday, we
22 have got to build in Florida if we're going to have a
23 competitive market, because there is a limited ability
24 to import from Georgia. So we need to determine how
25 do we facilitate that.

1 And if the law says the only people that can
2 apply under Chapter 403, or whatever it is, is a
3 regulated retail utility, does that mean that other
4 merchant plants can go under the local? In other
5 words, they can go through all the local siting and
6 get a certificate that way.

7 And then the question becomes is that how we
8 want to set public policy? Or should all those plants
9 over 75 megawatts at least get some review by this
10 Commission that they are needed to serve load or
11 they're needed to make the competitive market so that
12 we don't have a lot of excess capacity? But maybe
13 that would be a good idea because it would drive down
14 the price.

15 But it seems to me that we need to address
16 this. And we need to address not only what the law
17 says, but what should it say. And it concerns me that
18 our ten-year site plans indicate that they are going
19 to be purchasing power and that there will perhaps be
20 merchant plants, but Florida doesn't allow merchant
21 plants because you can't be an applicant and perhaps
22 you can't go locally.

23 And if we do that, will FERC preempt us and
24 say that your local laws are invading our jurisdiction
25 with respect to wholesale, and how do we reconcile

1 that. If we win the battle, we risk losing the war,
2 and FERC will take over everything. And I think we
3 need to think about that.

4 **CHAIRMAN JOHNSON:** We have one last speaker.
5 I'm sorry, Mr. Bryant.

6 **MR. BRYANT:** Bill Bryant. Yes, Madam
7 Chairman, thank you. Bill Bryant with the local law
8 firm of Katz Kutter Haigler representing Enron Capital
9 and Trade Corporation. We filed a memo of law as
10 amicus. It goes to precisely the last point, and I
11 realize the time is an issue, so I will jump over some
12 of my comments to say, the point that we're making in
13 our memo is that the one impermissible outcome is for
14 the Public Service Commission to say you cannot
15 compete.

16 I think the issue that you have to face is
17 to what extent do these petitioners have access to the
18 Siting Act. The Siting Act has certain benefits. If
19 they don't have access to the Siting Act, can you then
20 say you cannot build. Because without being -- and
21 that, I believe, is the position that the utilities
22 are urging.

23 And the position I believe the utilities are
24 urging is that they are the gatekeepers of competition
25 and that unless they have a plant specific need, then

1 you cannot build as a generator. I think that that
2 runs directly into conflict preemption problems, and
3 that decision is subject to attack on those grounds.
4 The real issue that the PSC is facing is to what
5 extent are you going to permit potential applicants,
6 situated like these petitioners, go through the
7 process of applying for a certificate of need.

8 Enron believes that, as a general matter, I
9 mean, you can do either one. You have broad
10 discretion. You can say don't darken our doorstep,
11 don't come here, you don't need a certificate of need,
12 go build. Because the merchant plant, or whoever is
13 doing the constructing, is taking all of the risk.
14 There is no ratepayer risk. That person has to go to
15 every single state agency that has regulatory
16 authority, whether it's the DCA for land use, or DEP
17 for environmental concerns, all the local concerns,
18 they have to run every gauntlet. The issue that you
19 have to face is to what extent are you going to permit
20 them to go through the Siting Act.

21 It would seem to me and to Enron beneficial
22 for everyone who's going to build generating capacity
23 to go through the Siting Act. For this reason, they
24 should be in front of you. They should be telling you
25 what their plans are. You should have, and your Staff

1 should have, formally presented, even if it's 100%
2 their risk and they may never sell the first kilowatt
3 hour of electricity because they screwed up and priced
4 it wrong. Or they couldn't build it as efficiently as
5 they wanted to. Or somebody else comes along with a
6 more efficient form of fuel and consequently they're
7 out of business. That's their risk.

8 But it seems to me, that those are things
9 that you should know about formally.

10 **CHAIRMAN JOHNSON:** But, Mr. Bryant, I
11 apologize for cutting you off, and I would agree with
12 you on the statements that you've made. But the
13 question before us is the proper forum. Do we
14 address -- and how do we get to those issues. It's my
15 understanding that the applicants filed -- or the
16 individuals filed to determine whether or not they
17 were applicants and which process they would -- to the
18 extent that they are applicants. And they'd have that
19 comprehensive process. To the extent that they are
20 not, then they might have to go through the local
21 government process.

22 So my question for you goes to the process
23 by which we determine whether or not they are
24 applicants, this process or the rulemaking process?

25 **MR. BRYANT:** And I appreciate that, and I

1 think there's a subsidiary question that may, in fact,
2 overwhelm that, which is whether or not they can go
3 through the Siting Act. Is it the position of the
4 Public Service Commission that only those that go
5 through the Siting Act can build electric generating
6 facilities no matter what? Now, what's the proper
7 forum for that?

8 I think that I agree with Staff, I agree
9 with Mr. Bellak. Everything you do is being listened
10 to by someone. This is a recorded proceeding. They
11 are going to take guidance. Based upon what you do,
12 whether or not you intend it that way. So reaching
13 that decision -- all I am suggesting is I think it's
14 appropriate for the Commission to decide you can go
15 locally if you want to, but then reserve if you're
16 going to decide on who can be an applicant under the
17 Siting Act, reserve that for some more expansion
18 discussion. One last comment, if I may.

19 CHAIRMAN JOHNSON: Quickly.

20 MR. BRYANT: Senator Scott's letter, which I
21 don't have copies of, I'm sorry, the expression of
22 legislative interest and the actions of the Public
23 Service Commission, simply one point to that. He says
24 when the Florida Electric Power Plant Siting Act was
25 enacted during the 1970s, no one contemplated the

1 possibility that might some day apply to electric
2 companies that do not directly serve retail customers
3 in Florida. Of course, he's exactly correct, which is
4 why the legislature gives a body, such as this, broad
5 discretion, to deal with circumstances that could not
6 have been foreseen at the time that their Staff wrote
7 the law which ultimately passed.

8 So you have the broad discretion to deal
9 with all these issues, and we would urge you to do so
10 simply because those people who are looking to invest
11 in Florida are trying to figure out if Florida is an
12 environment where they, in fact, can invest. And we
13 all have an interest in a quick outcome there.

14 **CHAIRMAN JOHNSON:** Thank you. Any other
15 questions, Commissioners?

16 **COMMISSIONER DEASON:** Yes. Mr. Bryant, what
17 say do we have whether an entity can go before a local
18 authority to get a site certified?

19 **MR. BRYANT:** None if you decide you don't.
20 We are here asking -- we have one question, can we
21 come before you and ask and for determination of need
22 or not? And if not, then is it the case that no
23 determination of need is necessary, you go take your
24 chances at the local level. What these petitioners
25 are asking is, can they come before you and ask, not

1 will you give them a determination of need.

2 **CHAIRMAN JOHNSON:** Commissioner Clark, you
3 made some statements and one was regarding the need
4 for us to look at what the law says and what the law
5 should say. But are you suggesting that the rule
6 making forum would be a more appropriate forum to have
7 that kind of discussion?

8 **COMMISSIONER CLARK:** I don't know if we
9 should do it through rulemaking or a generic
10 proceeding. But I do recall that in telephones, prior
11 to having the authority to allow pay telephones to
12 compete, we held a hearing to see if it was in the
13 public interest to do that.

14 And I guess what I am suggesting is that at
15 this point we need to explore what the law is with
16 respect to merchant plants and what it ought to be.
17 And my reason for making that statement is we are
18 blessed today with having so many people who are
19 desirous of being players in that market here. And I
20 think you need to be talking to each other.

21 I think probably the best outcomes are those
22 where all the participants can agree to them. And I
23 was just laying out for you my thoughts on you may be
24 absolutely correct that the law didn't contemplate
25 this. But given the fact that FERC has jurisdiction

1 over wholesale sales and given the fact that they have
2 stepped to require competition, what changes do we
3 need to make to facilitate that that still protects
4 the interests of the people of the state of Florida.
5 Because if we don't, do we run the risk of FERC
6 stepping in and saying you no longer have authority to
7 determine if and when power plants will be built and
8 that they will preempt it. Senator Murkowski has
9 suggested that they preempt transmission line siting.
10 And it will be presented to the Federal Government
11 that Florida is --

12 Depending on how you approach this issue, it
13 may be presented that Florida is opposed to wholesale
14 competition, and I have concerns about that. And it
15 is becoming more acute based on the fact that you all
16 are telling us we need power.

17 **COMMISSIONER DEASON:** Well, let me say that
18 I think that you've hit upon an issue that needs to be
19 considered, this needs to be a policy issue. It seems
20 to me declaratory statements are not conducive to
21 discussing policy issues.

22 It seems to me -- and this is not an attempt
23 on anyone's part, but it appears that declaratory
24 statements seem to be kind of exclusive instead of
25 inclusive of everyone's participation. And it seems

1 to me that the law was written a long time ago, and we
2 still have an obligation to interpret the law. But it
3 may be that that law needs to be changed, it needs to
4 be removing the ambiguities, I don't know. And
5 perhaps there needs to be some policy considerations
6 of the legislature in this process as well. But what
7 doesn't mean that we shirk our responsibilities here
8 either.

9 It seems to me that -- well, I guess, I
10 don't know if a declaratory statement is the
11 appropriate vehicle or not. I have concerns about it.
12 I want to get to a resolution of the issue and have it
13 to be inclusive for everyone and try to make -- even
14 address policy considerations if we need to. To go
15 beyond just a mere interpretation because it is, maybe
16 we may find ourselves recommending changes to the law
17 to the legislature or at least providing input to that
18 process if it evolves to that. And we need to be
19 informed on what type of input, if asked, that we give
20 to the legislature on this. Because it is a very
21 serious question, very serious. And I think it does
22 have implications for the long-term energies applied
23 for this state.

24 And so, whatever the process is, I don't
25 want to feel like I'm too overly constrained in

1 looking at this very critical issue. That's what my
2 concern is. So maybe you attorneys can help me out
3 and tell me what I need to do.

4 **COMMISSIONER CLARK:** I guess, Madam
5 Chairman, I would move that we deny the request for
6 declaratory statements in both of these dockets. But
7 then I would move that we go, I guess at this point,
8 to a generic proceeding. I suppose we could go to
9 rulemaking on the narrow issue and get that addressed.
10 And then once having that addressed, open a generic
11 proceeding as to -- assuming we conclude they can't
12 apply.

13 **CHAIRMAN JOHNSON:** They can or can't?

14 **COMMISSIONER CLARK:** Cannot. -- should we
15 go to a generic proceeding as to whether they should.

16 I guess to answer you, Commissioner Deason,
17 I think it's appropriate to deny the requests because
18 I don't think that they're appropriate for a
19 declaratory statement. But I can't give you a
20 definitive answer on how to approach it, but I would
21 say that I feel there's a need to approach it, to
22 answer it quickly.

23 **COMMISSIONER DEASON:** Well, let me say that
24 I agree with that. Because I think that there are
25 plans out there, evaluations have been made, and I

1 would anticipate that perhaps they are time sensitive,
2 most economic decisions are. And I would anticipate
3 that these probably are, too. And I would hate that
4 our process -- by the fact that I believe that we
5 should be cautious and deliberative, but I would hate
6 that process taking so long as to basically void what
7 otherwise would be a good economic decision on
8 someone's part to do business in the state of Florida.

9 **COMMISSIONER KIESLING:** And let me just add
10 that if that's the case, they can always file an
11 application.

12 **COMMISSIONER CLARK:** I agree with that. But
13 I think that Mr. McGlothlin and Mr. Wright have
14 brought up an excellent point. That's a lot of money
15 to spend to answer that question.

16 **COMMISSIONER KIESLING:** I agree.

17 **COMMISSIONER CLARK:** And we ought to answer
18 the question.

19 **COMMISSIONER KIESLING:** I'm not disagreeing
20 with that. But that is another mechanism by which
21 they can get that question answered. That's my only
22 point.

23 **COMMISSIONER GARCIA:** My question is where
24 does it leave the company with the issue that it
25 brought before us today?

1 **COMMISSIONER CLARK:** One of the things they
2 can do is file a request for rulemaking, that we adopt
3 a rule that says the term, "regulated entity" -- is
4 that what it is in the -- includes entities regulated
5 by the Federal Government. Because that's what I
6 understand your requirement to be.

7 And then we can answer that issue, and it's
8 available for parties who are on the opposite side to
9 challenge our rulemaking. And it's also available for
10 the legislature to step in and make their
11 determination. One advantage I think it does have is
12 that we will have a full discussion and that the
13 policy implications, regardless of what we decide, are
14 very clear for the legislature, and they don't have
15 to, in effect, do the fact finding.

16 **CHAIRMAN JOHNSON:** And that's a suggestion
17 of them petitioning us for rulemaking.

18 **COMMISSIONER CLARK:** They could do that, but
19 I guess what I -- at this point let's get through what
20 we need to. I would recommend we deny the petitions,
21 that we instruct our Staff to come back to us. It may
22 be not the next agenda, but the next agenda, as to
23 what should the policy be with respect to merchant
24 plants being able to apply for a certificate of need.

25 **CHAIRMAN JOHNSON:** Now, the last part just

1 threw me off, Susan. You said for the Staff to come
2 back with a recommendation of what the policy --

3 COMMISSIONER CLARK: Well, they could talk
4 to you, actually, about opening up a docket.

5 CHAIRMAN JOHNSON: Okay.

6 COMMISSIONER CLARK: And I suppose they
7 don't need to come back to the agenda. But I'd
8 certainly like information about what they are
9 planning. And the applicants can come back with a
10 request for rulemaking. Isn't that still available
11 under the APA, or have they changed that? And we have
12 to respond to that request within a certain period of
13 time.

14 CHAIRMAN JOHNSON: Yeah. My only concern
15 and the reason I ask the question is that I'd like to
16 see this issue addressed as quickly as possible. And
17 even if we needed to do something on our own motion,
18 like opening the generic docket, because this is an
19 issue that is not just facts specific to the
20 individuals that are here today; but there are other
21 merchant plants and other industry groups that are
22 looking at our state and they need the direction, too.

23 So I'm just looking for the appropriate
24 forum to address it. I wouldn't even want to
25 necessarily wait on them to petition for rulemaking.

1 We may want to open something generic so that we can
2 have the deliberations and the debates and get the
3 information that we would need.

4 **COMMISSIONER CLARK:** Well, I guess my motion
5 is this, that we deny the request for declaratory
6 statement for both Item 5 and Item 6, and that we
7 direct Staff to come to you, Madam Chairman, and
8 recommend an appropriate proceeding for us to follow
9 to review the policy on the law and the policy with
10 respect to merchant plants being applicants for a
11 certificate of need. And that's sort of generally
12 what I would do.

13 And having said that, recognize that it is
14 always open to the two applicants in this case to file
15 a request for rulemaking. That's my motion.

16 **CHAIRMAN JOHNSON:** There's a motion. Is
17 there a second?

18 There's a question?

19 **COMMISSIONER KIESLING:** I'm happy to second,
20 but I just looked up 403.519. And what this means, I
21 don't know, but it says, "On request by an applicant
22 or on its own motion, the Commission shall begin a
23 proceeding to determine the need for" --

24 So it does seem to me that we can open
25 something generic.

1 **COMMISSIONER CLARK:** I guess I view that as
2 a determination of need and we would do that -- maybe
3 we are going to need to do that if we are concerned
4 about where the power is coming from. But I don't see
5 that as giving us authority. Well, I don't know that
6 we need to use that.

7 **COMMISSIONER KIESLING:** Well, I guess I'm
8 thinking, let's figure out what it's in there for. If
9 we never can begin a proceeding on need without an
10 application, then why are the words "on its own
11 motion" in there? It seems to me that it can be
12 interpreted that on "its own motion" may mean that
13 there's a way for people to get the question before us
14 without having to file a full-blown application.

15 **COMMISSIONER DEASON:** Well, I always
16 interpreted that to mean back in the more traditional
17 full -- utilities that we fully regulated, that if we
18 felt there was a capacity shortfall, we could order
19 them to build a power plant. But we would have to go
20 through and make a determination that there was a need
21 for the plant before we could order them to build a
22 plant. That's what I thought that was for.

23 **COMMISSIONER KIESLING:** And I don't know. I
24 am willing to second that motion.

25 **CHAIRMAN JOHNSON:** Joe, did you have a

1 question?

2 **COMMISSIONER GARCIA:** Yeah. Well,
3 Mr. Wright seemed to be wanting to say something.

4 **MR. WRIGHT:** Madam Chairwoman, with your
5 permission, I just wanted to respond to Commissioner
6 Kiesling's question and the colloquy between her and
7 Commissioner Deason.

8 **CHAIRMAN JOHNSON:** If you could, briefly.

9 **MR. WRIGHT:** Very briefly, thank you. I
10 don't think there's anything in 403.519 that
11 constrains the Commission to do any particular
12 scenario as to how it might begin a need determination
13 proceeding. And I would just submit to you that it
14 would be well within your authority.

15 Given to live power plant proposals where
16 we've got the sites under -- nearly under control, and
17 live projects that we have come to you with, and so
18 on, for you to begin need determination proceedings
19 sua sponte with respect to these two power plants
20 themselves. I just wanted to though that out in
21 response to Commissioner Kiesling's remarks. Thank
22 you.

23 **CHAIRMAN JOHNSON:** Thank you. And I can
24 tell you, and really for the benefit of the
25 Commissioners, if Staff were to present that to me, I

1 would make sure that the full Commission had an
2 opportunity to review and make a determination as to
3 whether that's how we want to proceed.

4 There is a motion and a second. Any further
5 discussion or questions? Seeing none, all those in
6 favor signify by saying aye.

7 **COMMISSIONER DEASON:** Aye.

8 **COMMISSIONER CLARK:** Aye.

9 **CHAIRMAN JOHNSON:** Aye.

10 **COMMISSIONER KIESLING:** Aye.

11 **CHAIRMAN JOHNSON:** Those opposed?

12 **COMMISSIONER GARCIA:** Nay.

13 **CHAIRMAN JOHNSON:** Show it approved on a 4
14 to 1 vote. Was that Issue -- whose motion? Was it
15 your motion? Was it Issue 5 and 6? In toto.

16 **MR. BELLAK:** Thank you.

17 **CHAIRMAN JOHNSON:** Thank you.

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1 STATE OF FLORIDA)
2 COUNTY OF LEON)

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3 I, ROWENA NASH Official Commission Reporter,

4 DO HEREBY CERTIFY that the Agenda Conference
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