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

VIA HAND DELIVERY

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

Dear Ms. Bayo:

Enclosed for filing in the above docket on behalf of Florida Power Corporation are the original and fifteen (15) copies of Florida Power Corporation's Unopposed Motion for Leave to File Post-Hearing Statement of Issues and Positions Out of Time and the Post-Hearing Statement of Issues and Positions by Florida Power Corporation.

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

If you or your Staff have any questions regarding this filing, please contact me at (813)

ACK 821-7000.

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Enclosures

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cc: Council of Record

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Very truly yours,

Gary L. Sasso  
Gary L. Sasso (with)

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ORIGINAL

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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

DOCKET NO. 981042-EM

FILED: January 26, 1999

**POST-HEARING STATEMENT OF ISSUES AND POSITIONS BY  
FLORIDA POWER CORPORATION**

**ISSUE 1:** Is there a need for the proposed power plant, taking into account the need for electric system reliability and integrity, as this criterion is used in Section 403.519?

**FPC:** \*No. Neither the Commission nor regulated utilities may rely upon the uncommitted capacity of a merchant plant for reliability purposes.\*

**ISSUE 2:** Does Duke New Smyrna have an agreement in place with the UCNSB, and, if so, do its terms meet the UCNSB's needs in accordance with the statute?

**FPC:** \*Duke has a participation agreement in place with UCNSB, not an executed power purchase agreement. The agreement is conditional and does not provide assurance that even UCNSB's needs for generating capacity will be met.\*

**ISSUE 3:** Does the Commission have sufficient information to assess the need for the proposed power plant under the criteria set forth in Section 403.519, Fla. Statutes?

**FPC:** \*No. Petitioners have not adduced sufficient information to show a utility specific need for the plant, nor even to show UCNSB's need for the plant.\*

**ISSUE 4:** Does Duke New Smyrna have a need by 2001 for the 484 MW of capacity (476 MW summer and 548 MW winter less 30 MW) represented by the proposed facility?

**FPC:** \*No. Duke has no "need" for any generating capacity because it has no obligation to serve customers.\*

**ISSUE 5:** Can or should the capacity of the proposed project be properly included when calculating short term operating and long term planning reserve margins of an individual Florida utility or the State as a whole?

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FLORIDA PUBLIC SERVICE COMMISSION

- FPC: \*No. Absent an executed power purchase agreement, whether, when, or where the capacity of the proposed project would be available would be speculative.\*
- ISSUE 6: What transmission improvements and other facilities are required in conjunction with the construction of the proposed facility, and were there costs adequately considered?
- FPC: \*Without knowing the entities to whom Duke would sell the output of its proposed plant, this question cannot be answered.\*
- ISSUE 7: Is there a need for the proposed power plant, taking into account the need for adequate electricity at a reasonable cost, as this criterion is used in Section 403.519?
- FPC: \*No. No utility may appropriately rely upon uncommitted capacity of a merchant plant to provide “adequate” electricity at a reasonable cost.\*
- ISSUE 8: Is the proposed power plant the most cost-effective alternative available, as this criterion is used in Section 403.519?
- FPC: \*No. Petitioners have failed to show that this criterion is satisfied on a utility-specific basis or on a Peninsular-Florida basis.\*
- ISSUE 9: Has Duke New Smyrna provided adequate assurances regarding available primary and secondary fuel to serve the proposed power plant on a long- and short-term basis?
- FPC: \*No.\*
- ISSUE 10: What impact, if any, will the proposed power plant have on natural gas supply or transportation resources on State regulated power producers?
- FPC: \*It will divert these resources from utilities that have an obligation to serve.\*
- ISSUE 11: Will the proposed project result in the uneconomic duplication of transmission and generation facilities?
- FPC: \*Yes. The project would simply duplicate other existing or planned facilities.\*
- ISSUE 12: Is the identified need for power of the Utilities Commission, New Smyrna Beach (“UCNSB”) which is set forth in the Joint Petition met by the power plant proposed by Florida Municipal Power Association in Docket No. 980802-EM?
- FPC: \*It may be.\*
- ISSUE 13: Are there any conservation measures taken by or reasonably available to the petitioners which might mitigate the need for the proposed power plant?

FPC: \*Petitioners have not engaged in efforts to take such measures; nor may a merchant plant do so. Such measures may be available to Florida retail utilities.\*

ISSUE 14: Does the Florida Public Service Commission have the statutory authority to render a determination of need under Section 403.519, Florida Statutes, for a project that consists in whole or in part of a merchant plant(i.e., a plant that does not have as to the merchant component of the project, an agreement in place for the sale of firm capacity and energy to a utility for resale to retail customers in Florida)?

FPC: \*No, it does not, under the express terms of Sections 366.82(1) and 403.519, Fla. Stat., and the decisions of the Supreme Court in the Nassau.\*

ISSUE 15: Does the Public Service Commission have jurisdiction under the Power Plant Siting Act, Sections 403.501 - 403.518, and Section 403.519, Florida Statutes, to determine “applicant” status?

FPC: \*Yes, but the Commission must follow the directives of the statute and the Florida Supreme Court restricting its jurisdiction in the present case.\*

ISSUE 16: As to its project’s merchant capacity, does Duke New Smyrna have a statutory or other legally enforceable obligation to meet the need of any electric utility in Peninsular Florida for additional generating capacity?

FPC: \*Clearly not.\*

ISSUE 17: As to the project’s merchant capacity, is either Duke New Smyrna or UCNSB an “applicant” or “electric utility” within the meaning of the Siting Act and Section 403.519, Florida Statutes?

FPC: \*No. The Florida Supreme Court in the Nassau decisions made clear that Section 403.519 and the Siting Act are limited to resolving applications by utilities that have an obligation to serve retail customers, thus excluding merchant plants.\*

ISSUE 18: If the Commission were to grant an affirmative determination of need to Duke New Smyrna as herein requested, when the utilities in peninsular Florida had plans in place to meet reliability criteria, would the Commission be meeting its responsibility to avoid uneconomic duplication of facilities?

FPC: \*No. This would encourage an uneconomic duplication of facilities.\*

ISSUE 19: Does the Joint Petition meet the pleading requirements of Rule 25-22.081, Florida Administrative Code?

FPC: \*It does not and cannot because the proposed project is a merchant plant.\*

ISSUE 20: Does the Joint Petition state a cause of action by not alleging that the proposed power plant meets the statutory need criteria and instead alleging that the proposed power plant is “consistent with” Peninsular Florida’s need for power?

FPC: \*Under the Nassau decisions, it does not.\*

ISSUE 21: If the Commission were to permit Duke New Smyrna to demonstrate need on a “Peninsular Florida” basis and not require Duke New Smyrna to have a contract with purchasing utilities for its merchant plant capacity, would the more demanding requirements on QFs, other non-utility generators and electric utilities afford Duke New Smyrna a special status?

FPC: \*Yes.\*

ISSUE 22: If Duke New Smyrna premises its determination of need upon Peninsular Florida without contracts from individual purchasing utilities, how would the Commission’s affirmative determination of need affect subsequent determinations of need by utilities petitioning to meet their own need?

FPC: \*It would create havoc in future need proceedings since retail utilities would not know whether or to what extent they were able or obligated to take into account merchant plants in planning future generation.\*

ISSUE 23: Will granting a determination of need as herein requested relieve electric utilities of the obligation to plan for and meet the need for reasonably sufficient, adequate and efficient service?

FPC: \*Although the obligations of utilities would remain unchanged, the impact of such a determination on a utility’s obligation to serve would be unclear.\*

ISSUE 24: Will granting a determination of need as herein requested create a risk that past and future investments made to provide service may not be recovered and thereby increase the overall cost of providing electric service and/or future service reliability?

FPC: \*Yes. This risk is inherent in siting new plants designed to displace viable existing ones and to supplant plans by utilities to meet their future needs.\*

ISSUE 25: If Duke New Smyrna premises its determination of need upon Peninsular Florida without contracts from individual purchasing utilities, how would the Commission’s affirmative determination of need affect subsequent determinations of need by QFs and other non-utility generators petitioning to meet utility specific needs?

FPC: \*It would create havoc in future need proceedings by making unclear whether or to what extent reliance could be placed upon merchants to meet the need of retail utilities. Also, QFs would be relatively disadvantaged under the Nassau rule.\*

ISSUE 26: If the Commission abandons its interpretation that the statutory need criteria are “utility and unit specific,” how will the Commission ensure the maintenance of grid reliability and avoid uneconomic duplication of facilities in need determination proceedings?

FPC: \*It could not adequately do so.\*

ISSUE 27: Will granting a determination of need as herein requested result in electric utilities being authorized to similarly establish need for additional generating capacity by reference to potential additional capacity needs which the electric utility has no statutory or contractual obligation to serve?

FPC: \*The implications of such a decision are unclear and potentially far-reaching. The Commission should not attempt to change existing law in the context of this proceeding.\*

ISSUE 28: What effect, if any, would granting a determination of need as herein requested have on the level of reasonably achievable cost-effective conservation measures in Florida?

FPC: \*It would undermine that objective by opening the way for the siting of merchant plants that are not accountable under FEECA, including Section 403.519.\*

ISSUE 29: Would granting the determination of need requested by the joint petitioners be consistent with the public interest and the best interests of electric customers in Florida?

FPC: \*No. It would violate the law of Florida and thus subvert the public interest.\*

ISSUE 30: Would granting the determination of need requested by the joint petitioners be consistent with the State’s need for a robust competitive wholesale power supply market?

FPC: \*This issue inappropriately assumes that there is an unmet need for wholesale competition in this State. The record is to the contrary. Further, this is not a proper inquiry in a statutory need proceeding.\*

ISSUE 31: Would granting the determination of need requested by the joint petitioners be consistent with state and federal energy policy?

FPC: \*No. It would flatly violate state law and do nothing to advance an area of regulation that federal law leaves expressly to the states.\*

ISSUE 32: Based on the resolution of the foregoing issues, should the petition of the UCNSB and Duke New Smyrna for determination of need for the New Smyrna Beach Power Project be granted?

FPC: \*No.\*

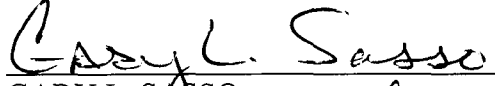
ISSUE 33: Should this docket be closed?

FPC: \*Yes, after dismissing or denying the Joint Petition.\*

Respectfully submitted,

FLORIDA POWER CORPORATION

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by facsimile as indicated and U.S. Mail to all counsel of record as follows this 20 day of January, 1999:

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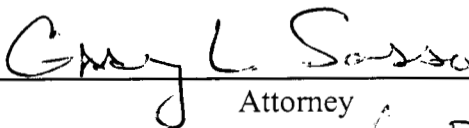
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Attorney (D.H.)

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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

FILED: January 26, 1999

**FLORIDA POWER CORPORATION'S UNOPPOSED MOTION  
FOR LEAVE TO FILE POST-HEARING STATEMENT OF ISSUES  
AND POSITIONS OUT OF TIME**

Florida Power Corporation ("FPC") moves the Commission for leave to file its Post-Hearing Statement of Issues and Positions five (5) business days out of time. Because the Post-Hearing Statement together with FPC's post-hearing brief would exceed the 75-page limit set by the Chairman after the hearing, FPC consents to withdraw the final three pages of its post-hearing brief in order to substitute its post-hearing statement of issues and positions. In support of this Motion, FPC states as follows:

1. At the conclusion of the hearing in this matter, the parties discussed dates for filing post-hearing briefs with the Commission, and established the date for doing so as January 19, 1999. In compliance with this deadline, FPC filed its post-hearing brief addressing in detail the basic issues raised in this case.

2. Although filing the post-hearing brief on a timely basis, below-signed counsel overlooked the further obligation to file along with the brief a post-hearing statement of issues and positions in this proceeding, having focused on discussions among the parties and before the Commission about post-hearing briefs rather than post-hearing statements, as such. This was due to oversight by counsel, compounded by the departure from counsel's law office in January

of the attorney who had been monitoring compliance with the Commission's procedural requirements. This omission was recognized when counsel received the post-hearing filings by other parties, which included post-hearing statements of issues and positions. Accordingly, FPC seeks leave to file its post-hearing statement of issues and positions five (5) business days out of time.

3. FPC's counsel has contacted counsel for all parties in this case who filed pre-hearing statements and post-hearing submissions, and is authorized to represent that all parties have consented to this motion, including: Schef Wright, as counsel for Duke Energy New Smyrna Beach Power Company, L.L.P. and Utilities Commission, City of New Smyrna Beach, Florida; Jon Moyle, as counsel for US Generating Company; Charles Guyton, as counsel for Florida Power & Light; James D. Beasley, counsel for TECO; and William B. Willingham, as counsel for Florida Electric Cooperatives Association, Inc.; and Gail Kamaras, as counsel for LEAF.

4. Filing the post-hearing statement only five (5) business days out of time should not prejudice any party to this proceeding or cause delay in the proceedings. FPC's post-hearing statement substantially conforms to FPC's pre-hearing statement, but has been made shorter to comply with the Commission's limitation on the number of words per issue. Accordingly, all parties were given notice of FPC's positions in this matter through FPC's pre-hearing statement. Further, FPC timely discussed FPC's positions on the key issues in great detail in FPC's post-hearing brief. Although the brief does not address these issues specifically by issue number, the application of the discussion in the brief to the basic issues in this proceeding is clear from the headings in the brief and the substance of the argument.

5. Rule 1.090 of the Florida Rules of Civil Procedure governs motions for enlargement of time after the expiration of the time for filing a submission (in the absence of such a rule by the Commission). Rule 25-22.035, Fla. Admin. Code. Rule 1.090(b) provides in pertinent part that, “When an act is required or allowed to be done at or within a specified time . . . for cause shown the court at any time in its discretion . . . upon motion made . . . after the expiration of the specified period, may permit the act to be done when failure to act was the result of excusable neglect . . . .” In the circumstances described, FPC’s failure to file a timely post-hearing statement of issues and positions was due to the excusable neglect of below-signed counsel, and not due to any disrespect or disregard for this Commission’s rules by FPC or counsel, nor the result of a conscious choice to waive any positions vigorously and repeatedly asserted throughout these proceedings.

6. Leave to cure a default in a procedural obligation should be “liberally” granted in such circumstances to avoid any inadvertent waiver of a party’s positions “so that controversies may be determined on their merits.” See, e.g., Brandt v. Dolman, 421 So. 2d 689 (Fla. 4<sup>th</sup> DCA 1982) (setting aside a default on grounds of “excusable neglect” where counsel “neglected to file a pleading” on the party’s behalf); Travelers Insurance Co. v. Bryson, 341 So. 2d 1013 (Fla. 4<sup>th</sup> DCA 1977) (default set aside on ground of “excusable neglect” where counsel failed to calendar a hearing date and thus failed to attend the hearing). Further, FPC acted diligently upon learning of the oversight. Brandt, 421 So. 2d at 690 (noting that “the movant must exercise due diligence upon learning of the default” and holding that “[a]ction taken within twelve days as in the instant case clearly meets the criteria of due diligence”).

7. Because FPC prepared its post-hearing brief without taking into account the obligation to include a post-hearing statement of issues and positions, FPC’s brief was 72 pages

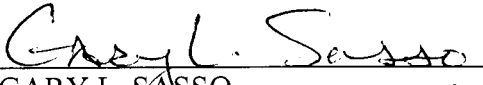
in length, well within the 75-page limit on post-hearing briefs, but not including the post-hearing statement of issues and positions. Because of the number of issues, FPC was unable to prepare a statement of three pages or less so that the brief and post-hearing statement together would not exceed 75 pages. Accordingly, FPC consents to withdraw the final three pages of its post-hearing brief in order to substitute its post-hearing statement of issues and positions.

Wherefore, FPC respectfully requests that the Commission grant FPC leave to file its post-hearing statement of issues and positions five (5) business days out of time.

Respectfully submitted,

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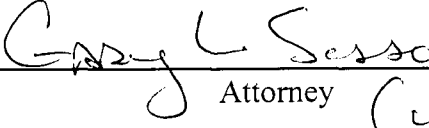
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