

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Duke Energy New Smyrna Beach Power Company, L.L.P. for Declaratory Statement Concerning Eligibility To Obtain Determination of Need Pursuant to Section 403.519, Florida Statutes

DOCKET NO. 971446 -EI FILED: November 4, 1997

PETITION FOR DECLARATORY STATEMENT

Duke Energy New Smyrna Beach Power Company, L.L.P. ("Duke New Smyrna" or "Duke"), pursuant to Section 120.565, Florida Statutes, and Commission Rule 25-22.020, Florida Administrative Code, hereby respectfully requests the Commission's declaration that, on the facts set forth below, Duke New Smyrna is entitled to apply for a determination of need for an electrical power plant pursuant to Section 403.519, Florida Statutes, Commission Rules 25-22.080-.081, Florida Administrative Code, and pertinent provisions of the Florida Electrical Power Plant Siting Act ("the Siting Act"). In the alternative, Duke New Smyrna respectfully

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requests the Commission to declare that no determination of need is required for its proposed merchant power plant project. Duke New Smyrna has a real and immediate need for the Commission's declaration because it will determine how Duke New Smyrna proceeds with its planned project. In support of its petition, Duke New Smyrna states as follows.

In summary, Duke plans to develop a natural gas fired, combined cycle electrical generating unit near New Smyrna Beach, in Volusia County. Duke New Smyrna will be certified as an

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DOCUMENT NUMBER-DATE
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Exempt Wholesale Generator pursuant to the Public Utility Holding Company Act of 1935, and Duke will operate this power plant as a "merchant plant" pursuant to tariffs filed with, and subject to the regulatory jurisdiction of, the United States Federal Energy Regulatory Commission. Because Duke will be subject to the FERC's regulatory jurisdiction as a "public utility" under the Federal Power Act, it will be a "regulated electric company" within the meaning of Section 403.503(13), Florida Statutes, and will thus be a proper applicant for a determination of need pursuant to Sections 403.503(4) and 403.519, Florida Statutes. Duke Energy New Smyrna Beach Power Company, L.L.P. respectfully asks the Commission to confirm this conclusion in an order granting the requested declaratory statement.

PROCEDURAL BACKGROUND

1. The name and address of the Petitioner is:

Duke Energy New Smyrna Beach Power Company, L.L.P.
400 South Tryon Street, Suite 1800
Charlotte, North Carolina 28285 .

2. All pleadings, motions, orders, and other documents directed to the Petitioner are to be served on the following.

Robert Scheffel Wright, Esq.
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and

Robert S. Lilien, Esq.
Duke Energy Power Services, LLC
422 Church Street, PB05B
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DECLARATORY STATEMENTS SOUGHT

3. Based upon the facts described below, Duke New Smyrna respectfully requests the Commission's declaration that:

A. Duke New Smyrna Beach Power Company, L.L.P., as a FERC-regulated public utility under the Federal Power Act and as an Exempt Wholesale Generator selling power at wholesale in interstate commerce from merchant plant capacity, is entitled to apply for a determination of need for the proposed power plant.

In the alternative, Duke New Smyrna seeks the Commission's declaration that:

B. No determination of need is required for Duke New Smyrna's proposed power plant.

STATUTES AND ORDERS INVOLVED

4. Duke New Smyrna seeks the Commission's declaratory statement regarding its eligibility to pursue the Commission's need determination processes. The requested declaratory statement involves the following statutes and orders.

a. Section 403.519, Florida Statutes, which establishes the determination of need process that the Commission administers with respect to the siting of electrical power plants under the Siting Act.

b. Section 403.503(4)&(13), Florida Statutes, which define, for purposes of the Siting Act, the terms "applicant" and "electric utility," respectively.

c. Commission Rules 25-22.080-.081, Florida Administrative Code, which implement Section 403.519 and govern the Commission's need determination processes.

d. In Re: Petition of Florida Crushed Stone Company for Determination of Need for a Coal-Fired Cogeneration Electrical Power Plant, Order No. 11611 (Fla. Pub. Serv. Comm'n, Feb. 14, 1983) & In Re: Florida Crushed Stone Company Power Plant Site Certification Application, Case No. PA 82-17 (before the Governor and Cabinet sitting as the Siting Board, March 12, 1984).

e. In Re: Petition for Determination of Need for Electrical Power Plant (Amelia Island Cogeneration Facility) by Nassau Power Corporation, 92 FPSC 2:814.

f. In Re: JEA/FPL's Application of Need for St. John's River Power Park Units 1 and 2 and Related Facilities, Docket No. 810045-EU (Fla. Pub. Serv. Comm'n, June 26, 1981), Order No. 10108.

g. In Re: Petition of Orlando Utilities Commission for Determination of Need for Stanton Unit 1, Docket No. 810180-EU (Fla. Pub. Serv. Comm'n, Oct. 2, 1981), Order No. 10320.

h. In Re: Application for Certification of Tampa Electric Company's Proposed 417 Megawatt Net Coal-Fired Big Bend Unit No. 4, Docket No. 800595-EU (Fla. Pub. Serv. Comm'n, Jan. 16, 1981), Order No. 9749.

i. In Re: Petition of Nassau Power Corporation to Determine Need for Electrical Power Plant (Okeechobee County Cogeneration Facility) and In Re: Petition of ARK Energy Inc. and CSW Development-I, Inc. for Determination of Need for Electric Power Plant To Be Located in Okeechobee County, Florida, 92 FPSC 10:643 (Fla. Pub. Serv. Comm'n, Oct. 26, 1992), Order No. PSC-92-1210-FOF-EQ ("Nassau Power" & "ARK/CSW").

j. In Re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities, 89 FPSC 12:294 (hereafter the "Planning Hearings Order").

5. While the requested declaratory statement does not necessarily require the Commission to construe federal law, the following sections of the United States Code are also relevant to the analysis of Duke New Smyrna's status as a "regulated electric company," and thus as an "applicant" within the meaning of the Power Plant Siting Act.

a. Title 16, Section 824 of the United States Code, part of the Federal Power Act, which addresses the regulation by the United States Federal Energy Regulatory Commission ("FERC") of the sale and transmission of electric energy at wholesale in interstate commerce.

b. Title 16, Section 824d, of the United States Code, which provides for the FERC's regulation of wholesale electric rates.

c. Title 15, Section 79z-5a of the United States Code, which defines Exempt Wholesale Generators ("EWGs") and provides for the exemption of EWGs from the provisions of the Public Utility Holding Company Act of 1935.

FACTS

6. Duke Energy New Smyrna Beach Power Company, L.L.P. plans to develop a natural gas fired, combined cycle electrical generating unit ("the Power Plant" or "the Plant") near New Smyrna Beach, in Volusia County, Florida. While Duke New Smyrna is evaluating various options that would affect the ultimate size and configuration of the Plant, at this time, Duke envisions that the Plant will have between 240 MW and 500 MW of net generating capacity, and that the Plant will come on-line as early as the summer of 2000. With its advanced technology design, the Power Plant will be as efficient as any currently available generating technology, and its heat rate efficiency will compare favorably to the heat rates of all existing power plants in Florida.

7. Duke is developing the Project to be a "merchant plant," that is, a power plant that will sell electric capacity and energy in the open wholesale market. Pursuant to a participation agreement currently being negotiated by Duke New Smyrna and the Utilities Commission of New Smyrna Beach ("the Utilities Commission"), the Utilities Commission will be entitled to approximately 20 MW to 30 MW of the Plant's output, which it will then sell at retail pursuant to its tariffs. Duke New Smyrna here seeks the Commission's declaration that, in its own right and without the Utilities Commission's participation as co-applicant, Duke New Smyrna may obtain a determination of need for

the Power Plant pursuant to Section 403.519.

8. Other than the New Smyrna Beach Utilities Commission's entitlement capacity, Duke New Smyrna will market the Plant's output as "merchant plant" capacity and energy in the open wholesale market. Such power sales may be for short or long periods, at market-based rates, under terms to be negotiated between Duke New Smyrna and wholesale purchasers at various times in the future. In order to make any such sales, Duke New Smyrna will have to sell its power at prices that potential wholesale purchasers deem advantageous for themselves and for their customers. Duke will take all investment, capital, and market risk associated with building and operating the Plant.

9. As a seller of wholesale electric capacity and energy in interstate commerce¹, Duke New Smyrna will, for purposes of federal law, be a "public utility" subject to the regulatory jurisdiction of the FERC under the Federal Power Act. 16 U.S.C.S. § 824(e)&(b)(1) (1994). Accordingly, Duke New Smyrna will file with the FERC a tariff and requisite application materials for the sale of the Power Plant's output at market-based rates. Duke New Smyrna will be certified as an Exempt Wholesale Generator pursuant to the Public Utility Holding Company Act. 15 U.S.C.S. § 79z-5a (1994 & Supp. 1997). Several other such facilities have

¹ See, e.g., Federal Power Commission v. Florida Power & Light Co., 404 U.S. 453, 463, (1971). In this case, the U.S. Supreme Court upheld the FPC's jurisdiction over the transmission of power, at wholesale, by Florida Power & Light ("FPL") over Florida Power Corporation's lines on the ground that the electrical energy thus transmitted "commingled" in interstate commerce.

obtained FERC's approval for market-based rates. See, e.g., Cataula Generating Company, L.P., 79 FERC ¶61,261 (1997).

10. Duke New Smyrna, as an exclusively wholesale supplier of power in interstate commerce, will not be subject to the Commission's rate regulation authority, but Duke will, of course, be subject to the rate regulation jurisdiction of the FERC.

11. None of Duke New Smyrna's generation or transmission assets will be included in any Commission-regulated utility's rate base, and accordingly, Florida electric ratepayers will not be required to pay for Duke's assets as a consequence of the certification and construction of the Power Plant. Moreover, Florida electric ratepayers will not be required to bear any capital risk or rate base risk associated with the Power Plant. As an EWG, unlike the owner of a Qualifying Facility ("QF"), Duke New Smyrna would have no legal right to compel any utility to purchase its power. All of its transactions are expected to be at negotiated wholesale rates.

DISCUSSION

12. The permitting of certain power plants in Florida is subject to the processes established in the Florida Electrical Power Plant Siting Act, Sections 403.501 through 403.518, Florida Statutes, and in Section 403.519, Florida Statutes,² which governs the "determination of need" for such power plants. In summary, power plants proposed by certain entities "engaged in,

² Section 403.519 is part of the Florida Energy Efficiency and Conservation Act, commonly referred to as "FEECA."

or authorized to engage in, the business of generating, transmitting, or distributing" electricity that have a steam or solar energy cycle of 75 megawatts ("MW") or more must follow the permitting procedures pursuant to the Siting Act, while those using other technologies and those with steam or solar energy cycles less than 75 MW may, but are not required to, pursue permitting under the Siting Act. Fla. Stat. § 403.503(12) (1995 & Supp. 1996). The rules by which the Commission fulfills its responsibilities under Section 403.519 are codified at Rules 25-22.080-.081, Florida Administrative Code.

13. Section 403.503(4), Florida Statutes, defines an "applicant" as "any electric utility which applies for certification pursuant to the provisions of" the Siting Act. In turn, Section 403.503(13) defines the term "electric utility" as "cities and towns, counties, public utility districts, regulated electric companies, electric cooperatives, and joint operating agencies, or combinations thereof, engaged in, or authorized to engage in, the business of generating, transmitting, or distributing electric energy." The Commission has determined that the definition of "applicant" applies to entities that seek to pursue the determination of need process under Section 403.519.³

14. As an EWG selling power at wholesale in interstate

³ Section 403.519 provides that "[o]n request by an applicant or on 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."

commerce, Duke New Smyrna will be a "public utility" pursuant to Section 201 of the Federal Power Act. 16 U.S.C.S. §824(e) (1994). Consequently, it will be subject to the regulatory jurisdiction of the FERC, including the FERC's jurisdiction over rates, pursuant to the Federal Power Act. 16 U.S.C.S. § 824d (1994). Accordingly, Duke New Smyrna will have to obtain FERC approval of its tariff, which it anticipates will authorize market-based rates, and it will be subject to all other applicable regulatory requirements of the FERC. Since Duke New Smyrna will sell only at wholesale, however, it will not be a "public utility" within the meaning of Section 366.02(1), Florida Statutes, because it will not be "supplying electricity . . . to or for the public within" Florida.

15. Because Duke New Smyrna will be regulated by the FERC, and because it will be engaged in the business of generating electricity for resale, the EWG will be a "regulated electric company" within the meaning of Section 403.503(13), Florida Statutes, under any reasonable construction of that term. Accordingly, Duke New Smyrna is a proper applicant under Sections 403.503(13) and 403.519.⁴ There is no distinction between federally regulated and state-regulated electric companies either specified in the Siting Act or otherwise applicable. Purely wholesale supply projects, e.g., interstate gas pipelines,

⁴ Power plants of "traditional" retail utilities that are subject to Siting Act requirements are frequently employed by those utilities in the wholesale market. An EWG is simply an additional species of "regulated electric company" engaged in the same wholesale market.

typically are or may be subject to state environmental and siting requirements. There is thus nothing unusual about a wholesale electric supply project pursuing its permits through a state's comprehensive site certification process.

16. The Commission should note that the definition of "electric utility" under Section 403.503(13) uses the disjunctive. That is, it encompasses any "regulated electric company" engaged in, or authorized to engage in, the generation, transmission, or distribution of electricity. Clearly, then, a "regulated electric company" that is engaged only in the generation of electricity is a proper applicant under the Siting Act and Section 403.519. Equally clearly, the regulation of companies engaged only in the business of generating electricity for sale at wholesale in interstate commerce is reserved to the FERC under the Federal Power Act. 16 U.S.C.S. §824(a)&(b) (1994); see also Federal Power Commission v. Florida Power & Light Co., 404 U.S. 453, 463 (1971) (Federal regulatory jurisdiction attaches to wholesale electric power transactions where electric energy commingles in transmission facilities that are interconnected with facilities over which there are power flows between states.)

17. Section 403.519 does not require that the applicant be a "public utility" subject to the ratemaking and regulatory jurisdiction of this Commission, nor even an "electric utility" subject to the Commission's limited jurisdiction under Chapter 366. Rather, it simply requires that an applicant be one of several types of entities, including "regulated electric

companies." Moreover, the Legislature could have tied the definition of "applicant" to the definitions of "public utility" and "electric utility," or simply to the definition of "electric utility," in Section 366.02. That it did not do so is compelling evidence that the scope of the term "regulated electric companies" must be construed more broadly than the narrower definitions contained in Section 366.02.

18. Both the Commission and the Governor and Cabinet, sitting as the Power Plant Siting Board (the "Siting Board"), have previously allowed entities other than traditional utility systems selling at retail to pursue the need determination and site certification processes. In fact, both the Commission and the Siting Board have approved the construction of a power plant that was, at the time of its permitting, a "merchant" power plant. See In Re: Petition of Florida Crushed Stone Company for Determination of Need for a Coal-Fired Cogeneration Electrical Power Plant, Order No. 11611 (Fla. Pub. Serv. Comm'n, Feb. 14, 1983) & In Re: Florida Crushed Stone Company Power Plant Site Certification Application, Case No. PA 82-17 (before the Governor and Cabinet sitting as the Siting Board, March 12, 1984).

19. Specifically, at the time Florida Crushed Stone ("FCS") applied for a determination of need, it held no power sales contract with a purchasing utility. Instead, FCS planned to serve its own needs and to attempt to market the surplus in the wholesale market. In a real sense, even though Florida Crushed Stone's project was a QF, it was a "merchant plant" at the time FCS sought a determination of need. In that case, the Siting

Board specifically dismissed a challenge to FCS's standing as an applicant, reasoning as follows:

Using the ordinary meaning of the words in this definition, this Board concludes that FCS constitutes an electric utility for the purposes of the Power Plant Siting Act because, upon approval of this certification and construction of the proposed cogeneration facility, FCS will be in the business of generating electricity.

Florida Crushed Stone, (Siting Board), slip op. at 2. In other words, the Governor and Cabinet recognized that Florida Crushed Stone's merchant power plant, even though exempt from state and federal ratemaking regulation as a QF, would render FCS an electric utility within the meaning of the Siting Act. Here, it is even more clear that Duke New Smyrna, as a federally regulated public utility under the Federal Power Act, satisfies the statutory definition of an applicant.

20. Following the FCS application, additional QFs pursued need determinations before the Commission. However, they differed from the FCS situation in one critical respect. Subsequent applicants either held a power purchase contract with a purchasing utility or, alternatively, sought to require a particular utility to enter a contract for the purchase of the output of their planned facilities. In the Planning Hearings Order, the Commission stated that it would require a QF holding a contract with a utility to demonstrate that its project was needed by and cost-effective for the purchasing utility in order to qualify for a determination of need. In Re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices

for Peninsular Florida's Electric Utilities, 89 FPSC 12:294. And, in Nassau Power & ARK/CSW, the Commission dismissed the petitions of Nassau Power Corporation and ARK/CSW for determinations of need, and their companion petitions for approval of power sales contracts with FPL, on the grounds that they proposed, but did not hold, contracts with FPL, the utility whose need for capacity they sought to satisfy.

21. Viewed in context, neither the Planning Hearings Order nor the Commission's decision in Nassau Power & ARK/CSW conflicts with the Florida Crushed Stone decision. Nor does either of these orders preclude the Commission from accepting and processing need determinations for additional merchant plants. In Florida Crushed Stone, the Commission recognized the legal ability of a merchant plant to proceed under the need determination statute, as did the Siting Board in its companion order, where the applicant did not propose to serve a specific utility's identified need.

22. In the Planning Hearings Order, the Commission clarified that the determinations underlying a power purchase contract approved on the basis of the Commission's proxy "statewide avoided unit," which was the avoided cost standard then in effect, would not necessarily pass muster for need determination and Siting Act purposes when the QF was called upon to show that the contract was needed by the specific contracting utility. In that Order, the Commission observed that certain criteria of Section 403.519 are "specific" to the purchasing utility. This statement, however, was directed to the processing

of need determination petitions by QFs holding contracts with particular utilities, at a time when those contracts were derived from, and based on, the Commission's designated "statewide avoided unit." Before 1990, when the Commission revised its cogeneration rules to base measurements of need and avoided cost on the individual purchasing utility's needs, the Commission addressed the potential mismatch created by the use of a generic proxy for the approval of QF contracts, on the one hand, and the possibly different costs of the purchasing utility, on the other. The Commission decided that:

to the extent that a proposed electric power plant constructed as a QF is selling its capacity to an electric utility pursuant to a standard offer or negotiated contract, that capacity is meeting the needs of the purchasing utility.

Planning Hearings Order, 89 FPSC 12:319.

23. The Planning Hearings Order supports the proposition that an applicant for a determination of need that proposes to impose the costs and risks of its project on a particular utility's ratepayers must demonstrate that its contract would be advantageous to those ratepayers even if it had been approved by the Commission on a different basis, e.g., by the Commission's statewide avoided unit determination. However, that order did not in any way address need determination petitions for merchant plants, where by definition the applicant bears all of the investment, capital, and market risk associated with building its plant.

24. In Nassau Power and ARK/CSW, the Commission was addressing need determination petitions filed by entities that sought prior assurance -- via contracts with a utility approved by the Commission for cost recovery -- that a particular utility's ratepayers would be responsible for paying for their proposed units, as a condition of going forward.

25. Other decisions establish that, where a contract with a specific utility is not the basis for satisfying need, the Commission can and does apply the statutory criteria in a manner that is not "utility specific." For instance, in Florida Crushed Stone, the Commission recognized that FCS's proposed unit would confer general reliability benefits, even though FCS did not hold a power purchase contract at the time. Florida Crushed Stone, Order No. 11611 at 3. And, in the application of the Orlando Utilities Commission ("OUC") for a determination of need for its Stanton Unit 1, the Commission took into account the positive benefits the proposed unit would have on ratepayers' costs through its impact on the Energy Broker. The Commission found that the unit would enable OUC to produce more coal-fueled and nuclear-fueled energy than its system would require at times of minimum load, thereby enabling it to market such excess energy as economy energy on a peninsula-wide basis. In Re: Petition of Orlando Utilities Commission for Determination of Need for Stanton Unit 1, Docket No. 810180-EU (Fla. Pub. Serv. Comm'n, Oct. 2, 1981), Order No. 10320 at 3-4. The Commission has thus established that, where a contract with a particular purchasing utility is not the basis for a determination of need, an

applicant can satisfy the statutory criteria relating to reliability and cost by reference to the impact of a proposed plant on peninsular Florida or on the State as a whole.

26. This is true of other dimensions of "need" as well. For instance, the Commission approved Florida Crushed Stone's application based primarily on the general need for and benefits to be derived from the fuel efficiency associated with cogeneration.⁵ Also, pursuant to the criteria of Section 403.519, "traditional utilities," i. e., vertically integrated utilities having generation, transmission, and distribution facilities that both generate electric power and sell it at retail, have proffered -- and the Commission has accepted -- additional justifications for determinations of need that are neither limited to the petitioning utility nor related to the reliability of the petitioning utility's system. For example, in Docket No. 810045-EU, FPL and the Jacksonville Electric Authority ("JEA") proposed the St. John's River Power Park project, two coal-fired units having projected in-service dates of 1985 and 1987. The Commission determined that the capacity of the proposed units would not be required for reliability purposes until at least 1991. However, the Commission granted the petitioners' determination of need, stating as follows:

We construe the "need for power" to encompass several aspects of need . . . [including] the socio-economic need of reducing the

⁵ In this regard, Duke New Smyrna expects to show that the efficiency of Duke's proposed Power Plant will be far more efficient than Florida Crushed Stone's project, even including FCS's cogeneration application of waste heat for process drying.

consumption of imported oil in the State of Florida.

In Re: JEA/FPL's Application of Need for St. John's River Power Park Units 1 and 2 and Related Facilities, Docket No. 810045-EU (Fla. Pub. Serv. Comm'n, June 26, 1981), Order No. 10108 at 2.

27. Similarly, in the OUC docket cited above, OUC proposed an in-service date of November 1986 for its Stanton 1 coal-fired unit. In Order No. 10320, the Commission concluded that the capacity of the proposed unit would not be needed for reliability purposes "during the 1980's." Order No. 10320 at 3. However, the Commission also examined "another aspect of the need issue . . . the socio-economic need of reducing the State's consumption of imported oil." The Commission reasoned that OUC's project . . . will provide significant economic benefits for peninsular Florida in terms of supplying an alternative to oil-fired capacity generation." The Commission concluded that the unit would help enable electric utilities to meet and surpass the Commission's goal of reducing statewide oil consumption.

28. Again, in the proceeding on Tampa Electric Company's ("TECO") petition for determination of need for its Big Bend 4 generating unit, the Commission recognized the socio-economic benefits of reducing Florida's consumption of imported oil as a basis for granting a determination of need. In Re: Application for Certification of Tampa Electric Company's Proposed 417 Megawatt Net Coal-Fired Big Bend Unit No. 4, Docket No. 800595-EU

(Fla. Pub. Serv. Comm'n, Jan. 16, 1981), Order No. 9749 at 4.⁶

29. Duke New Smyrna, the proposed EWG merchant power supplier, does not propose to require the ratepayers of any utility to guarantee the cost and bear the risk of the proposed Power Plant through a contract prior to certification. It follows that, in gauging the ability of the proposed plant to satisfy the statutory criteria, the Commission is not confined or restricted to an analysis of a specific utility's reliability or the need for adequate electricity at a reasonable cost for a specific utility's ratepayers. In keeping with its precedents, the Commission may consider statewide, or peninsula-wide, need, cost-effectiveness, and other factors relating to a proposed power plant.

30. Moreover, just as FPL, JEA, OUC, and TECO persuaded the Commission that "aspects of need" other than their respective, utility-specific reliability criteria and cost-effectiveness determinations supported their petitions, Duke New Smyrna may support its petition by relying on "aspects of need" that, while not based on a contract with a specific purchasing utility, nonetheless invoke relevant matters within the Commission's jurisdiction. Without asking the Commission to prejudge the "need" issue,⁷ Duke new Smyrna believes it is appropriate to

⁶ In this respect, Duke New Smyrna expects to demonstrate that the proposed Power Plant will similarly reduce the use of imported oil in Florida by economically displacing oil-fired generation, at no risk to electric consumers.

⁷ The scope and specification of issues relating to the criteria set forth in Section 403.519 would naturally be determined on a case-specific basis. Duke New Smyrna would

point out that there are many "aspects of need" within the Commission's jurisdiction that are neither utility-specific nor dependent on a contract with a specific purchasing utility, but which a merchant plant developer can demonstrate its project satisfies in a need determination proceeding. By way of illustration only, other aspects of need that a merchant plant of the type planned by Duke New Smyrna can satisfy may include general reliability benefits,⁸ environmental benefits, energy efficiency and conservation benefits, and other socio-economic benefits, including both reduction of oil imports and downward competitive pressure on wholesale prices, and thereby on retail

suggest that, because the merchant plant poses no economic risk to utility customers, and because its presence can only enhance reliability, the evaluation of merchant plant proposals may be less rigorous than for a traditional retail utility's need determination, which dovetails directly with the utility's request for authority to recover the costs of its project from its ratepayers. An approach to evaluating a "merchant plant" proposal in a determination of need case that takes into account the willingness of the applicant to insulate ratepayers from rate base and investment risk would encourage the further development of, and maximize the benefits from, this unique segment of the wholesale power market.

⁸ With respect to reliability, merchant plant capacity like that planned by Duke New Smyrna can provide a source of capacity that will enhance reliability in peninsular Florida. Peninsular Florida is, based on the existing retail utilities' own data, entering a period of tight capacity. According to the 1997 Ten-Year Plan, State of Florida, prepared by the Florida Reliability Coordinating Council, the reserve margin for peninsular Florida will, without the installation of additional generating capacity, fall to 11 percent in the winter of 2001-2002 and to 9 percent in the winter of 2003-2004, even with the exercise of load management and interruptible resources. Without exercising load management and interruption rights, the reserve margin for peninsular Florida will fall to 4 percent in the winter of 1999-2000, just over two years from now, and to 1 percent in the winter of 2001-2002. Without exercising load management and interruptible resources, peninsular Florida's reserve margin is projected to become negative in the winter of 2003-2004.

prices paid by consumers.⁹

31. The Commission's order dismissing the need determination and companion contract approval petitions of Nassau Power and ARK/CSW does not alter this conclusion. As compared to Duke New Smyrna's proposed merchant project, the issue in the Nassau Power and ARK/CSW dockets was whether Nassau Power or ARK/CSW could obtain a determination of need for power plants that they might build to serve a specific retail utility's identified need. The Commission's decision in Nassau Power and ARK/CSW came about as follows. In 1992, FPL signed a proposed contract with Cypress Energy Partners ("CEP"). CEP and FPL then filed a petition for determination of need, based on FPL's projection that it would require a total of 800 to 900 MW of additional capacity during 1998 and 1999 to meet its reliability criteria. In Re: Joint Petition to Determine Need For Electric Power Plant to be Located in Okeechobee County, Florida by Florida Power & Light Company and Cypress Energy Partners, L.P., 92 FPSC 11:363 ("Cypress Energy"). Nassau Power Corporation and ARK/CSW intervened in the Cypress Energy need determination case with proposals to serve FPL's identified need. Nassau Power & ARK/CSW, 92 FPSC 10:643. Nassau and ARK/CSW also offered competing contracts and filed independent applications for

⁹ The success of the merchant plant will depend on the EWG's ability to offer attractive prices. Accordingly, Duke New Smyrna's merchant plant can be expected to benefit consumers by providing competitively-priced, low-cost power through the Florida Energy Broker System and through other non-Broker sales, and by otherwise stimulating competitive pricing in the wholesale market.

determinations of need. Significantly, in their applications, Nassau and ARK/CSW offered and proposed to meet the same FPL need for capacity that underlay the CEP contract and petition. The Commission dismissed Nassau's and ARK/CSW's petitions, reasoning that, because Nassau and ARK/CSW had no "obligation to serve customers" and only offered to enter contracts, Nassau and ARK/CSW were not proper applicants under the Siting Act. The Commission said it would require that the purchasing utility be both an "indispensable party" and a joint applicant with the QF holding a contract with the utility. Cypress Energy, 92 FPSC 11:363 at 365-66. This order, too, was affirmed by the Supreme Court of Florida. Nassau Power Corp. v. Deason, 641 So. 2d 396 (Fla. 1994).

32. Neither the Commission's order nor the Court's decision affirming that order can, however, be construed to deny an EWG merchant plant access to the permitting processes of the Siting Act. Again, context is critical. As explained above, the situation addressed by the Commission, and by the Court on judicial review, involved an attempt by non-utility power producers to require customers of a particular utility to become contractually responsible for the costs of the unit that the non-utility producers proposed to build to satisfy a specific utility's need for capacity and energy. In its order dismissing those attempts, the Commission explicitly stated:

It is also our intent that this order be narrowly construed and limited to proceedings wherein non-utility generators seek a determination of need based on a utility's need.

Nassau Power & ARK/CSW, 92 FPSC 10:646 (emphasis supplied). By the Commission's own carefully selected language, the order dismissing Nassau's and ARK/CSW's petitions does not constitute precedent for rejecting a petition for determination of need for a true "merchant plant," because the merchant plant developer's application would not be premised on meeting a particular utility's need through a decision and order of the Commission. Moreover, allowing merchant plant developers to pursue need determinations under Section 403.519 would not have the effect of requiring any utility's customers to pay for the merchant plant.

33. Alternatively, Duke New Smyrna respectfully asks the Commission to enter an order declaring that no need determination is necessary for its planned merchant plant project. Within the context of Section 403.519, the Commission could determine that no need determination is necessary simply because there is no economic risk to ratepayers associated with the planned Power Plant, and because the proposed Plant can only enhance reliability within the State. The absence of economic risk obviates concerns regarding cost-effectiveness, and the reliability enhancement benefits are particularly significant in view of impending capacity constraints in peninsular Florida. The Commission should not and cannot require Duke New Smyrna to use the need determination process and at the same time prohibit Duke from pursuing that process. This would be offensive to the Energy Policy Act of 1992, which encourages competition in the wholesale generation of electricity, as well as to the Interstate Commerce and Equal Protection clauses of the United States

Constitution. Thus, the Commission should either grant the requested declaratory statement confirming Duke New Smyrna's status as a legitimate "applicant" or declare that no determination of need for the proposed Power Plant is required.

CONCLUSION

34. Duke New Smyrna is a proper "applicant" for purposes of pursuing a determination of need proceeding under Section 403.519, Florida Statutes, because, as an EWG, Duke New Smyrna will be a "public utility" subject to FERC regulation under the Federal Power Act, and therefore also a "regulated electric company" within the meaning of Sections 403.503(13) and 403.519, Florida Statutes. Moreover, policy considerations mitigate strongly in favor of allowing such a "merchant plant" applicant to proceed under Section 403.519 and the Siting Act. Duke New Smyrna's proposed Plant will provide needed capacity and associated reliability benefits at no risk to ratepayers, because the applicant will take all of the economic risk associated with the investment at the same time it introduces needed competition and lower prices into the wholesale market.

35. Duke New Smyrna has a real and immediate need for the requested declaration, and accordingly, Duke requests expedited treatment of this petition.

WHEREFORE, Duke New Smyrna Beach Power Company, L.L.P. respectfully requests the Commission to enter its order declaring that, on the facts presented, it is a proper "applicant" as that term is defined in Section 403.503(13), Florida Statutes, and is therefore entitled to submit a petition for determination of need pursuant to Section 403.519. In the alternative, Duke New Smyrna respectfully requests the Commission to enter its order declaring that no determination of need is required for its proposed merchant power plant project.

Respectfully submitted this 4th day of November, 1997.



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