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: September 8, 1998

FLORIDA POWER CORPORATION'S MOTION TO DISMISS PROCEEDING

Florida Power Corporation ("FPC") moves the Commission to dismiss the Joint Petition for a Determination of Need For An Electrical Power Plant filed by the Utilities Commission, City of New Smyrna Beach, Florida ("New Smyrna") and Duke Energy New Smyrna Beach Power Company, L.L.P. ("Duke") on the ground that, as a matter of law, the Commission does not have the authority to grant petitioners' request. In support of this motion, FPC states as follows:

INTRODUCTION

1. In their Joint Petition, Duke and New Smyrna seek a determination of need from the Commission under Section 403.519, Fla. Stat., and Commission Rules 25-22.080-.081, as the necessary precondition for obtaining authorization under the Florida Electrical Power Plant Siting Act ("the Siting Act") to build a 514 MW electrical power plant. Duke proposes to operate the plant basically as a "merchant plant," committing only a small portion of the capacity of the plant to New Smyrna's needs. As Duke and New Smyrna admit in the Joint Petition:

> [E]xcept for the 30 MW of entitlement capacity provided to the UCNSB [New Smyrna], the Project will be a "merchant" plant. A merchant plant differs from a traditional "rate based" plant, in that the costs of a rate based plant are recovered through the rates charged to the utility's captive customers.

Joint Petition, ¶ 21 (emphasis added).

2. In fact, Duke and New Smyrna have no contract between them for the purchase by New Smyrna of even the 30 MW "entitlement" mentioned in the Joint Petition. The exhibits to the Joint Petition disclose that a "final power purchase agreement" has not been "negotiated and executed" between the two petitioners. Exhibits to Joint Petition, at 16, ¶ 5.

3. The Joint Petition thus raises the fundamental question whether Section 403.519 and the Siting Act may be used to site a merchant plant that proposes to generate power that no state-regulated utility has contracted to purchase and that, for the most part, no state-regulated utility claims to need in order to meet its state-mandated obligations to serve its retail customers. The answer to this question is unequivocally "no."

4. As we show herein, the Commission does not have statutory authority to grant the relief requested. Although the Commission would be able to entertain a petition to determine the need for a plant designed to meet the limited requirements identified by New Smyrna, the Joint Petition is not based upon a purchase power contract between Duke and New Smyrna to meet even that need. In fact, petitioners' showing is predicated on Duke's willingness to construct a 514 MW plant that will operate

basically on a merchant plant basis, not a plant tailored to New Smyrna's needs.

5. Indeed, the Joint Petition states that New Smyrna has considered and rejected building a plant commensurate with its needs -- "with capacities in the range of 20 to 50 MW" -- and expects to achieve cost savings from the proposed project (in comparison to purchasing power from Florida Power or Tampa Electric Company) only because of the considerable size of the projected unit. Exhibits to Joint Petition, at 62-63. It follows that the Commission must dismiss the Joint Petition in its entirety.[1/]

ARGUMENT

6. Under the existing statutory and regulatory framework, the Commission and the utilities it regulates have responsibility for ensuring that there is adequate and reliable electric service in the State at a reasonable cost. The Commission carries out its obligations by exercising regulatory authority over various utilities, including public utilities like FPC. To this end, the Commission has authority to oversee planning by such utilities and then to enforce commitments, if necessary, to build and

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[1/] If New Smyrna wished to build a plant to serve its own need for 30 MW -- either directly or by means of a contract with an Independent Power Producer ("IPP") -- it would not require a determination of need from this Commission to do since the Siting Act does not even apply to plants of that size. See Section 403.506, Fla. Stat. ("the provisions of [the Siting Act] shall not apply to any electrical power plant or steam generating plant of less than 75 MW in capacity").

maintain adequate generating capacity. E.g., Sections 366.03, 366.04(2), 366.05(7), 366.05(8), 366.80-.85, Fla. Stat.

7. Section 403.519 and the Siting Act are an integral part of this statutory framework. In particular, Section 403.519 provides the means by which the Commission monitors, reviews, and authorizes undertakings by state-regulated utilities to site electrical power plants in this State. In fact, the Florida Legislature has made clear that no new electrical power plants (with steam capacity of over 75 MW) may be built in this State outside this regulatory framework.

8. In this connection, Section 403.506 of the Siting Act provides in pertinent part:

> No construction of any new electrical power plant or expansion in steam generating capacity of any existing electrical power plant may be undertaken after October 1, 1973, without first obtaining certification in the manner herein provided. (emphasis added).

Further, Section 403.508 of the Siting Act makes this Commission the gatekeeper for the siting process. That section provides in relevant part:

> [A]n affirmative determination of need by the Public Service Commission pursuant to § 403.519 shall be a condition precedent to the conduct of the certification hearing. (emphasis added).

9. Attempting to comply with these requirements, petitioners in this docket have asked the Commission to "enter its order GRANTING [their] petition for an affirmative determination of need for the proposed New Smyrna Beach Power Project, as described [in the Joint Petition]." Joint Petition, at 29. The problem is, the "New Smyrna Beach Power Project"

described in the Joint Petition is not the kind of project that may be approved under Section 403.519. This is clear under the plain language of the applicable legislative provisions, the legislative history of the those provisions, and the authoritative decisions of the Commission and the Florida Supreme Court construing those provisions.

10. To begin with, as indicated above, Duke and New Smyrna seek a determination of need under Section 403.519. That section provides in pertinent part:

> On request by an applicant . . . the commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act. . . . In making its determination, the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant . . . which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant.

11. The Siting Act defines "applicant" as "any electric utility which applies for certification." Section 403.503(4), Fla. Stat. (emphasis added). In turn, Section 366.82(1), Fla. Stat., provides that "For the purposes of §§ 366-80-366.85 and [§]403.519, "utility" means any person or entity of whatever form which provides electricity or natural gas at retail to the public . . . ." (emphasis added).[2/]

[2/] Section 403.519 was enacted in 1980 as part of the Florida Energy Efficiency and Conservation Act ("FEECA"), Sections 366.80-366.85, Fla. Stat., and thus is part of the (continued...)

12. Together, these provisions make clear that only retail utilities regulated by this Commission may seek a determination of need under Section 403.519 and commence a proceeding under the Siting Act. It is apparent, therefore, that Duke has no standing to ask this Commission to determine that its plant is needed.

13. In an effort to circumvent this restriction, Duke claims that it has entered into a so-called participation agreement with New Smyrna -- providing New Smyrna with an "entitlement" to use 30 MW of capacity of Duke's proposed power plant. The Joint Petition discloses, however, that a purchase power contract has not been negotiated or executed. Based upon petitioners' intent to enter into a limited and ill-defined purchase power agreement, Duke relies upon New Smyrna's status as an "applicant" to seek approval not for a power plant conceived to meet New Smyrna's needs, but for a project that will operate in the main as a wholesale merchant power plant. Much like a

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[2/](...continued)
comprehensive regulation in this State applicable to retail utilities. Pub. Laws of Fla., Ch. 80-65, § 5 (codified originally at Section 366.86[1]). Under FEECA, each retail utility in this State is statutorily required to "develop a plan for increasing energy efficiency and conservation within its service territory," in accordance with the rules of this Commission. Section 366.81, Fla. Stat.; see Section 366.82(3) (directing the Commission to "require each utility to develop a plan to meet the overall goals [set by the Commission for conservation] within its service area").

In the Joint Petition Duke acknowledges that, as a wholesale utility, it "does not engage directly in the implementation of end-use energy conservation programs" and it "is not required to have conservation goals pursuant to [FEECA]." Joint Petition, ¶ 35 (emphasis added). This is further confirmation that Section 403.519 was not intended to be used for siting projects developed by entities like Duke.

Trojan horse, Duke relies upon a prospective, minimal commitment to a state-regulated utility (at a level of need normally exempt from the Siting Act) to get its wholesale power plant project past the gate that would ordinarily be closed to enterprising developers. Neither the law nor common sense permit this result.

14. Both this Commission and the Florida Supreme Court have conclusively determined that a need proceeding under the Section 403.519 must be limited to determining the need of a retail utility for capacity that it will require in order to serve its customers. See Nassau Power Corp. v. Beard, 601 So. 2d 1175 (Fla. 1992) ("Nassau I"), and Nassau Power Corp. v. Deason, 641 So. 2d 396 (Fla. 1994) ("Nassau II") (collectively, the Nassau decisions"). In the face of these decisions, Duke seeks to justify its merchant plant project not on the basis of a defined need of any retail utility to serve its particular customers, but on speculation that it will be able to sell its power on a statewide basis (or market it outside the State) on a competitive basis. In short, Duke calls upon this Commission to engage in fundamental restructuring of the statutory framework for assessing, planning, and providing for the need for electric power in this State.

15. In the Nassau decisions, the Commission and the Court recognized -- subject to a limited qualification discussed below -- that only a state-regulated, retail utility may obtain a determination of need under the statute, based on its own need for generating capacity to serve its retail customers. In Nassau

I, for example, the Commission and the Court explicitly recognized that "the four criteria [for assessing need] in section 403.519 are 'utility and unit specific' and that the need for the purposes of the Siting Act is the need of the entity ultimately consuming the power." 601 So. 2d at 1178 n.9 (emphasis added). Accordingly, the Commission and the Court held that the Section 403.519 "require[s] the PSC to determine need on a utility-specific basis." Id. (emphasis added).

16. The Court reasoned that this interpretation of the statute was "consistent with the overall directive of section 403.519, which requires, in particular, that the Commission determine the cost-effectiveness of a proposed power plant. This requirement would be rendered virtually meaningless if the PSC were required to calculate need on a statewide basis without considering which localities actually need more electricity in the future." Id. (emphasis added). Proving the Court's point, Duke asserts in the Joint Petition that "[e]ven if the Project were not the most cost-effective alternative for Duke New Smyrna per se, such concern is generally irrelevant to the Commission's consideration of this Petition (except as it might relate to the Project's financial viability) because Duke New Smyrna will only be able to sell its wholesale power to other utilities if and when utility purchasers determine that such purchases are cost-effective relative to those utilities' alternative power supply options, e.g., self-generation or other purchases." Joint Petition, ¶ 29 (emphasis in original).

17. In other words, having substituted its own regulatory model for the one adopted by the Florida Legislature, Duke is quick to announce that the statutory standards contained in Section 403.519 are thereby irrelevant. In this State, however, it is still the Florida Legislature that makes law, not Duke or New Smyrna. And the law that we must currently follow forecloses this Commission from accepting Duke's invitation to engage in industry restructuring.[3/]

18. Indeed, in rejecting the argument that the Commission should be able to evaluate need on a statewide basis because it had done so in the past, the Court in Nassau I held that this prior practice "cannot be used now to force the PSC to abrogate its statutory responsibilities under the Siting Act." Id. at 1178 (emphasis added). The Court thus made clear that interpreting Section 403.519 to limit a determination of need to a "utility and unit specific" inquiry, with particular reference to the needs of electric utilities that serve the retail public, was not simply a matter of regulatory discretion, but was

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[3/] In the same vein, Duke seeks to circumvent other requirements applicable to any retail-utility petitioner in a proceeding such as this, making all the more clear that neither the Legislature nor the Commission ever contemplated that a need proceeding would be used to evaluate a merchant plant.

For example, retail utilities must develop plans to meet the Commission's energy conservation goals, including a demand-side management plan, and the compliance or noncompliance therewith by the utility is a consideration under Section 403.519 in determining the need for the proposed power plant. Section 366.82(3), (4), Fla. Stat.; Public Service Commission Rule 25-17.001-.002. Duke is not in a position to comply with these procedures and has not purported to do so. See also n. 1, supra.

compelled by the plain language of the statute and the internal logic of its provisions.

19. The Commission and the Florida Supreme Court confirmed this statutory interpretation in Nassau II. In that case, the Court upheld the Commission's decision rejecting an application for a determination of need submitted by an electric cogenerator -- Nassau Power Corporation ("Nassau") -- that proposed to sell power to Florida Power & Light, but did not have a contract to do so. The Commission and Court held that Nassau was not a proper "applicant" under the Siting Act, "reasoning that only electric utilities, or entities with whom such utilities have executed a power purchase contract are proper applicants for a need determination under the Siting Act." 641 So.2d at 398 (emphasis added).

20. In upholding the Commission's ruling, the Court held that "[t]he Commission's construction of the term 'applicant' as used in section 403.519 is consistent with the plain language of the pertinent provisions of the Act and this Court's 1992 decision in Nassau Power Corp. v. Beard." Id. (emphasis added). The Court emphasized that, in reaching its conclusion, "[t]he Commission reasoned that a need determination proceeding is designed to examine the need resulting from an electric utility's duty to serve customers. Non-utility generators, such as Nassau, have no similar need because they are not required to serve customers." Id. (emphasis added).

21. Therefore, the Court held that an electric utility with a duty to serve customers is an indispensable party in any need proceeding and that the scope of that proceeding would be limited to determining the needs of that utility. Specifically, the Court stated:

> [A] non-utility generator will be able to obtain a need determination for a proposed project only after a power sales agreement has been entered into with a utility. The non-utility generator will be considered a joint applicant with the utility with which it has contracted. This interpretation of the statutory scheme will satisfy the requirement that an applicant be an "electric utility," while allowing non-utility generators with a contract with an electric utility to bring the contract before the Commission for approval.

Id. at 399 (emphasis added). The Court could not have made any clearer that an IPP -- like Duke -- has standing to participate in a need proceeding only because of and to the extent of any power purchase contract that it may have with a state-regulated retail utility to develop a project to meet the needs of that utility. By the same token, a state-regulated utility may not allow its status to be used to enable the IPP to gain a Commission determination of need for a power plant with capacity that is not committed by a power purchase contract to serve the needs of that utility.

22. This result is consistent with the overall regulatory scheme in Florida. It would be inappropriate to interpret Section 403.519 and the Siting Act in a vacuum, and the Commission and the Court in the Nassau decisions were careful not to do so. Thus, in Nassau II, the Commission expressly held that its construction of Section 403.519 and the Siting Act to limit a

need proceeding to a determination of the need of an electric utility with a duty to serve retail customers "simply recognizes the utility's planning and evaluation process." In Re: Petition of Nassau Power Corporation, Order No. PSC-92-1210-FOF-EQ (PSC Oct. 26, 1992), at 5.

23. The Commission was referring to the fact that each retail utility in this State is required by statute to prepare and file with the Commission a ten-year site plan, "estimat[ing] its power-generating needs and the general location of its proposed plant sites." Section 186.801, Fla. Stat. This statutory planning obligation was enacted as part of the same legislation creating the Siting Act, and was codified separately in order to collect planning legislation in one location in the Florida Statutes. Section 403.505, Fla. Stat. (1973); 1973 Florida Laws Chapter 73-33, Section 1; 1976 Florida Laws Chapter 76-76, Section 2; Staff Analysis for Committee Substitute for Senate Bill No. 659, Senate Committee on Natural Resources and Conservation, p. 1 (Apr. 19, 1976).

24. The ten-year site-planning process necessarily includes determinations by the retail utilities in this State of whether and when they will build new generating capacity or purchase power from others during the planning period, and it contemplates review by the Commission of those determinations.

25. Thus, Section 366.05(7), Fla. Stat., provides that "[t]he commission shall have the power to require reports from all electric utilities to assure the development of adequate and

reliable energy grids." Section 366.05(8) provides that if the Commission determines that inadequacies exist with respect to the energy grids developed by electric utilities, the Commission shall have the power, "after a finding that mutual benefits will accrue to the electric utilities involved, to require installation or repair of necessary facilities, including generating plants . . . with the costs to be distributed in proportion to the benefits received . . . ." This provision further states that the "electric utilities involved in any action taken . . . pursuant to this subsection shall have full power and authority . . . to jointly plan, finance, build, operate, or lease generating facilities," id. (using, if applicable, the provisions of Section 403.519 and the Siting Act, which are not altered by this provision).

26. The site-plan process, then, is part of an orderly procedure for assessing need and fulfilling the statutory objectives of Chapter 366, Section 403.519, and the Siting Act of ensuring system integrity and adequate and reliable electric energy in this State. The Commission's decisions in Nassau I and II directly support and further this regulatory scheme and concomitant planning process by confirming that the prerogative of siting new power plants will be vested where the statutory responsibility for planning and serving resides -- with state-regulated retail electric utilities. Indeed, it would be untenable to require such utilities to plan for need and to meet electric power needs, while at the same time taking out of their

hands the prerogative of proposing when and to what extent new generating capacity will be initiated. See also In Re: Joint Petition to Determine Need for Electric Power Plant to be Located in Okeechobee County by Florida Power & Light Co. and Cypress Energy Partners, Ltd., Docket No. 920520-EQ, Order No. PSC-92-1355-FOF-EQ, 92 FPSC11: 363, at 3-4 ("the statutory exclusion of non-utilities as applicants recognizes the utility's planning and evaluation process and envisions either approval or denial of the utility's selection of its generation alternatives") (emphasis added); In Re: Petition of Seminole Electric Cooperative, Inc. to Determine Need for Electrical Power Plant, Docket No. 880309-EC, Order No. 19468, 88-6 FPSC 185, at 14 (the Commission "cannot use 'generic' need determination for any utility").

27. Opening up Section 403.519 and the Siting Act to speculative merchant plant developers would, as the Commission concluded in Nassau II, "greatly detract from the reliability of the process." Order No. PSC-92-1210-FOF-EQ, at 5. It would introduce a wild card into the site-plan process. Wholesale merchant plant developers are not subject to Commission regulation and have neither any obligation to serve, nor any obligation to advise the Commission or anyone else what their future plans for service are. In fact, at a Staff workshop held on November 7, 1977, Duke's representative stated that it would be impractical for Duke or other merchant plant developers to prepare and submit a ten-year site plan, and that doing so might compromise competitive interests. Yet, FPC and other state-

regulated electric utilities would be left to discharge their planning and service obligations without any assurance of what, if any resources, will be available in this State through merchant plant wholesalers.

28. While Duke seeks the perceived economic opportunity of constructing a merchant plant, Duke does not seek to assume FPC's statutory obligation to serve the customers of this region. Nor could it, since it may not lawfully serve retail consumers of electricity. Although Duke proposes to enter into a purchase power agreement with New Smyrna -- an entity that does directly serve retail customers -- even if executed, that agreement would ostensibly obligate Duke, in some ill-defined manner, to provide only 30 MW out of 514 MW to New Smyrna. Duke admittedly intends to sell the remaining 484 MW at wholesale on a competitive price basis.

29. Because merchant plants have no obligation to serve, however, neither the Commission nor state-regulated utilities could rely upon the operation of merchant plants to satisfy the statutory obligations to plan for and assure adequate and reliable electric power in this State, and to maintain the integrity of the electric system. Merchant plant developers would be free to abandon merchant plant projects after approval by this Commission or to sell power either outside the area where a pressing need exists, or outside the State altogether. It is revealing that in the Joint Petition Duke makes no commitment to sell any amount of power (outside the 30 MW dedicated to New

Smyrna) in the State of Florida, speculating merely that it may make the "vast majority of its wholesale sales . . . to other utilities in Peninsular Florida." Joint Petition, ¶ 5. The fact is, when push comes to shove, Duke will sell to the highest bidder -- whether inside or outside the State -- or perhaps not at all, depending upon its own unregulated business priorities.

30. In sum, the existing legislative framework for assessing, planning for, and meeting the needs for electric power in this State does not contemplate or authorize the review or approval of merchant plant projects like Duke's. If Duke wishes to change the law, it must make its case in the Legislature, not before this Commission. The Commission simply does not have the power to grant Duke the relief it requests.

31. In this connection, the Florida Supreme Court has now authoritatively interpreted Section 403.519 and the Siting Act in the Nassau decisions, reaching conclusions not only consistent with the well-reasoned Commission decisions in those cases but compelled by the "plain language" of the legislation itself. It is too late in the day for the Commission to repudiate that interpretation in order to afford Duke the relief it seeks. To do so would exceed the Commission's authority. E.g., Haas v. Department of Business & Professional Regulation, 699 So.2d 863 (Fla. 5th DCA 1997) ("commission went beyond its statutory authority" in imposing indefinite suspension of real estate license where statute provided for a suspension up to a maximum of ten years); Alacare Home Health Services, Inc. v. Sullivan,

891 F.2d 850, 856 (11th Cir. 1990) ("[n]otwithstanding our normal deference to the responsible agency's interpretation of a statute, we conclude that the Secretary exceeded the statutory scope of authority and therefore that the regulation allowing for a good cause waiver of the 180 day filing deadline is invalid").

CONCLUSION

32. It is ironic that in addressing the subject of regulatory restructuring in a state where it provides retail service -- South Carolina (see Joint Petition, ¶ 6) -- Duke's parent corporation, Duke Energy Corporation, urged the Public Service Commission of South Carolina to proceed with caution, deliberation, and with a well-considered plan in mind in order to avoid deleterious effects on the State's electric consumers:

> Duke recommends that fundamental changes to the industry should be taken in an orderly and responsible manner. South Carolina is in the enviable position of having electric utility suppliers which offer service at rates at or below the national average. This status should afford the State sufficient time to review the deregulation efforts in other states and to adopt the successful elements from other states' restructuring initiatives. The myriad technological and administrative issues surrounding retail competition must be resolved for successful implementation of any restructuring effort. A poorly managed transition could have a deleterious effect on South Carolina's electric consumers. Duke hopes to work with the Commission and the other stakeholders to create a viable competitive electric industry.

Electric Industry Restructuring Plan of Duke Energy Corporation d/b/a Duke Power, at 4, Before the Public Service Commission of South Carolina (June 30, 1997) (emphasis added). With the shoe now on the other foot, Duke shamelessly urges this Commission to restructure the regulatory framework in this State willy-nilly,

on an ad hoc basis -- in the teeth of controlling statutory restrictions and authoritative interpretations of this State's highest court -- to serve Duke's own profitmaking interests. Duke asks for the benefit of being able to site an electric power plant in Florida, free of the state regulatory duties designed to protect ratepayers. For the reasons we have given, the Commission should decline this invitation.

WHEREFORE, FPC respectfully requests that the Commission grant its motion to dismiss the Joint Petition.

DATED this 3rd day of September 1998.

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 U.S. Mail to: Robert Scheffel Wright, Esq., Landers and Parson, P.A., Post Office Box 271, Tallahassee, FL 32302 as counsel for Duke Energy New Smyrna Beach Power Company, L.L.P.; and, Robert S. Lilien, Esq., Duke Energy Power Services, LLC, 422 Church Street, PB05B, Charlotte, NC 28242 this 8th day of September, 1998.

F. Dressend Hunter
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