

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Joint Petition for Determination )  
of Need for an Electrical Power Plant in ) DOCKET NO. 981042-EM  
Volusia County by the Utilities )  
Commission, City of New Smyrna Beach, ) FILED: SEPT. 8, 1998  
Florida, and Duke Energy New Smyrna )  
Beach Power Company Ltd., L.L.P. )

PETITIONERS' RESPONSE IN OPPOSITION AND MOTION TO DENY FLORIDA  
POWER & LIGHT COMPANY'S PETITION FOR LEAVE TO INTERVENE AND  
ACCOMPANYING MEMORANDUM OF LAW

The Utilities Commission, City of New Smyrna Beach, Florida ("UCNSB" or "Utilities Commission") and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. ("Duke New Smyrna"), collectively referred to as "the Petitioners" herein, pursuant to Commission Rule 25-22.037(2)(b), hereby respectfully submit this response in opposition and motion to deny the petition for leave to intervene filed herein by Florida Power & Light Company on August 27, 1998 ("FPL's Petition"), together with the Petitioners' accompanying memorandum of law.

SUMMARY

ACK \_\_\_\_\_ This is a proceeding to determine the need for the New Smyrna  
AFA 2 Beach Power Project. The purpose of this proceeding is to  
APP \_\_\_\_\_ determine whether the proposed Project is consistent with the needs  
CAF \_\_\_\_\_ of Florida electric customers for reliable electric power supplies  
CMU \_\_\_\_\_ at a reasonable cost, and to assure that the proposed power plant  
CTR \_\_\_\_\_ is the most cost-effective alternative available to provide a  
EAG Butrell  
LEG 2 needed power supply resource. Accordingly, the interests that this  
LIN 5 proceeding is designed to protect are the interests of electric  
OPC \_\_\_\_\_  
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customers in having adequate and reliable power supplies and in not being saddled, as captive electric ratepayers, with the cost responsibility for uneconomic power supply resources.

FPL has petitioned to intervene in this proceeding. To establish standing to intervene, FPL must demonstrate (1) that it will suffer injury in fact which is of sufficient immediacy to entitle it to a section 120.57 hearing, and (2) that its injury is of the type or nature against which this proceeding is designed to protect. Ameristeel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997) (citing Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981)). FPL has alleged that its interests will be affected by the Commission's action in this docket, including its planning, construction, and operation of transmission and generation facilities, and its "continuing ability to make capacity and energy sales to other utilities." FPL's Petition at 5. FPL has also asserted that, because it is the dominant utility in Peninsular Florida, its substantial interests will be "determined" by the Commission's action herein.

As demonstrated below, FPL's claims regarding adverse effects on its interests are nothing more than speculative, conclusory allegations that FPL has not explained, and which, indeed, FPL cannot explain in a way sufficient to establish standing herein. FPL has not demonstrated, and cannot demonstrate, standing to participate in this need determination proceeding in accordance with applicable principles of Florida law because FPL cannot demonstrate any adverse effect (other than perhaps a speculative, purely competitive economic effect on FPL's ability to make

wholesale sales to other utilities). The interests that FPL has alleged -- effects on its ability to plan, build, and operate transmission and generation facilities, and effects on its ability to make sales to other wholesale purchasers -- are speculative, remote, and outside the zone of interests to be protected in this proceeding to determine the need for the New Smyrna Beach Power Project. Moreover, FPL's assertions that as the dominant generation and distribution utility in Peninsular Florida, its interests will be "determined" in this proceeding are nothing more than conclusory allegations that will not withstand analysis.

Accordingly, FPL's petition to intervene must be denied.

#### **RELIEF REQUESTED**

WHEREFORE, based on the foregoing, the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. respectfully move the Commission to DENY the petition for leave to intervene in this proceeding filed by Florida Power & Light Company.<sup>1</sup>

#### **MEMORANDUM OF LAW**

This is a proceeding to determine the need for the New Smyrna Beach Power Project. The purpose of this proceeding is to

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<sup>1</sup> In accord with In Re: Application for Amendment of Certificate No. 427-W to Add Territory in Marion County by Windstream Utilities Company, 97 FPSC 4:556, the Petitioners are responding to FPL's petition as a motion, and therefore are requesting denial thereof. Also, since FPL is not yet a party, but rather only a movant, the Petitioners are moving to deny the motion rather than to dismiss FPL. If FPL is granted intervention, the Petitioners reserve their rights to move to dismiss FPL at any time during these proceedings.

determine whether the proposed Project is consistent with the needs of Florida electric customers for reliable electric power supplies at a reasonable cost and to assure that the Project is the most cost-effective alternative available to provide needed power. See Floridians for Responsible Utility Growth v. Beard, 621 So. 2d 410, 412 (Fla. 1993); In Re: Petition to Determine Need for Proposed Capital Expansion Project of the Dade County Resources Recovery Facility, an Existing Solid Waste Facility, by Metropolitan Dade County, FPSC Docket No. 930196-EQ, Order No. PSC-93-1715-FOF-EQ at 2 (Fla. Pub. Serv. Comm'n, Nov. 30, 1993). The proceeding also serves to evaluate the need for the Project against which the Governor and Cabinet, sitting as the Siting Board, must balance the environmental impact resulting from the Project's construction and operation in making the ultimate decision whether to grant or deny site certification for the Project.

FPL has petitioned to intervene in this proceeding.<sup>2</sup> To demonstrate or establish standing to intervene, FPL must demonstrate (1) that it will suffer injury in fact which is of sufficient immediacy to entitle it to a section 120.57 hearing, and (2) that its injury is of the type or nature against which this proceeding is designed to protect. Ameristeel, 691 So. 2d at 477 (citing Agrico, 406 So. 2d at 482).

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<sup>2</sup> Though styled a petition for leave to intervene, FPL devotes substantial portions of its purported statements of substantial interest to allegations concerning the merits of the UCNSB's and Duke New Smyrna's petition which are not relevant to FPL's interests and therefore inappropriate to a petition to intervene. See, e.g., FPL's Petition at 7 (stating that Duke New Smyrna cannot demonstrate need).

The Petitioners now move the Commission to deny FPL's petition to intervene, stating that it is clear on the face of FPL's petition that FPL has not and cannot meet its burden as a matter of law.

#### **SUMMARY OF APPLICABLE LAW**

To establish standing to intervene, FPL must demonstrate (1) that it will suffer injury in fact which is of sufficient immediacy to entitle it to a Section 120.57 hearing, and (2) that its injury is of the type or nature against which this proceeding is designed to protect. Ameristeel, 691 So. 2d at 477 (citing Agrico, 406 So. 2d at 482). These requirements are commonly known as the two prongs of the "Agrico test" for standing. The first prong of the Agrico test focuses on the degree of injury, and the second prong focuses on the nature of the injury. Ameristeel, 691 So. 2d at 477 (citing Agrico, 406 So. 2d at 482).

To satisfy the first prong of the Agrico test, FPL must demonstrate that this proceeding will result in an injury to FPL which is immediate, not remote. The alleged injury cannot be based merely on speculation or conjecture. See Ameristeel, 691 So. 2d at 478; Ward v. Board of Trustees of the Internal Improvement Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995); International Jai-Alai Players Ass'n v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1226 (Fla. 3d DCA 1990); Village Park Mobile Home Ass'n v. Department of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987).

To satisfy the second prong of the Agrico test, FPL must

demonstrate that its alleged injuries are of the type and nature against which this need determination proceeding is designed to protect. Stated differently, FPL's alleged injuries must fall within the "zone of interest" to be protected by this need determination proceeding and the statute and rules that establish the purpose and framework for this proceeding. See North Ridge General Hospital, Inc. v. NME Hospitals, Inc., 478 So. 2d 1138, 1139 (Fla. 1st DCA 1985). Moreover, as a general rule, alleged economic injury alone is not sufficient to form the basis for standing unless the proceeding and underlying statutory framework are specifically designed to address competitive economic injury. Id.

#### **SUMMARY OF ARGUMENT**

This is a proceeding to determine the need for the New Smyrna Beach Power Project. The purpose of this proceeding is to determine whether the proposed Project is consistent with the needs of Florida electric customers for reliable electric power supplies at a reasonable cost and to assure that the proposed power plant is the most cost-effective alternative available to provide needed power. Accordingly, the interests that this proceeding is designed to protect are the interests of electric customers in having adequate and reliable power supplies and in not being saddled, as captive electric ratepayers, with the cost responsibility for uneconomic power supply resources.<sup>3</sup> The proceeding also serves to

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<sup>3</sup> As explained in the Petitioners' initial filing and below, no Florida electric customers are subject to being forced to pay for the costs associated with the New Smyrna Beach Power Project.

evaluate the need for the proposed Project against which the Governor and Cabinet, sitting as the Siting Board, must balance the environmental impact resulting from the Project's construction and operation in making the ultimate decision whether to grant or deny site certification for the Project.

FPL has alleged that its interests will be affected by the Commission's action in this docket, including its planning, construction, and operation of transmission and generation facilities, and its "continuing ability to make capacity and energy sales to other utilities." FPL's Petition at 5. FPL has also asserted that, because it is the dominant utility in Peninsular Florida, its substantial interests will be determined by the Commission's action herein. See FPL's Petition at 5-6 (alleging that its interests are "subject to determination in this proceeding") and 7-8 (reciting statistics demonstrating FPL's dominant position in Peninsular Florida).

As demonstrated below, FPL's claims regarding adverse effects on its interests are nothing more than speculative, conclusory allegations that FPL has not explained, and which, indeed, FPL cannot explain in a way sufficient to establish standing herein. Moreover, the interests that FPL asserts are outside the zone of interests that this need determination proceeding is designed to protect. Other than the allegation that its ability to make wholesale sales may be affected by the operation of the New Smyrna Beach Power Project (clearly a competitive economic interest not cognizable in this proceeding), FPL has offered no explanation as to how, if at all, any of FPL's alleged effects will be adverse.

For example, while claiming that its ability to plan its generation and transmission system will be "dramatically affected" by the Commission's action herein, FPL doesn't explain how the effects will be adverse, or how such effects would be any different than FPL's reliance on future unspecified firm capacity purchases from unidentified parties in its own 1997 Ten Year Site Plan and associated planning processes. Nor has FPL explained how the appropriate proceedings before the Federal Energy Regulatory Commission ("FERC"), the regulatory authority with plenary jurisdiction over the rates, terms, and conditions for transmission service provided by FPL, would be inadequate to protect its interests with respect to its transmission system.

With or without the Project in operation, and with or without the Commission having determined the need for the Project, FPL can:

1. plan its generation and transmission system as it already does;
2. obtain permits for, build, and operate transmission facilities, and charge compensatory rates for wholesale transmission service; and
3. obtain permits for, build, and operate generation facilities under the same statutes, rules, and procedures applicable to the New Smyrna Beach Power Project.

FPL's alleged effects on displacement of less efficient, higher cost generation are speculative and reflect purely competitive economic interests, and accordingly, they are not sufficient to establish FPL's standing in this proceeding. Finally, FPL's assertions regarding "primarily affected utilities" are misplaced.



The utilities that are primarily affected by the Project are the UCNSB and Duke New Smyrna; FPL has no contract to purchase power from the Project and accordingly, FPL is at most speculatively and secondarily affected by the Project. If FPL did have such a contract, it would be a primarily -- though not adversely -- affected utility.

#### **ARGUMENT**

**I. FPL'S ALLEGATIONS REGARDING THE EFFECTS OF THE OUTCOME OF THIS PROCEEDING ON ITS PLANNING ACTIVITIES ARE INSUFFICIENT TO DEMONSTRATE STANDING.**

FPL has alleged that if the Commission grants the requested determination of need for the New Smyrna Beach Power Project, its ability to plan its system will be adversely affected, ostensibly because the Commission's action granting the requested determination of need would create uncertainty. FPL's Petition at 5, 8-9. This alleged effect on FPL's planning is speculative and remote, and therefore insufficient to establish standing under Agrico. See Ameristeel, 691 So. 2d at 478. In addition, this alleged interest is outside the zone of interests that this need determination proceeding is designed to protect. See Agrico, 406 So. 2d at 482. Moreover, FPL has not explained how any effects on its planning processes might be adverse. Indeed, FPL's own planning documents submitted to the Commission reveal that FPL is perfectly capable of planning in the face of uncertainty, and of relying -- in its own planning processes -- on unknown, unspecified, unidentified power supply resources to meet its projected power supply needs.

Planning inherently deals with uncertainty. Basically, it is the process by which an entity, in FPL's case an electric utility with retail customers, makes decisions as to how to address future circumstances that cannot be known with precision. Power supply planning routinely addresses and incorporates considerations regarding the availability of electric capacity and energy from other power suppliers.

The availability of an additional resource that a utility may choose to -- but does not have to -- buy from simply cannot create an adverse effect. Either the utility will choose to buy from the supplier on mutually agreeable, beneficial terms, in which case there can be no adverse effect, or the utility will decline to purchase from the supplier (assuming rational behavior, this would occur when no mutually beneficial deal was possible) and proceed with its independent plans accordingly. Either way, there can be no adverse effect on the utility's planning processes.

FPL has itself previously demonstrated to the Commission its capability to incorporate potential future power purchases, even from unspecified, unidentified suppliers, into its planning processes. FPL therefore cannot credibly claim that the availability of potential power supplies will "adversely affect" its planning processes. As recently as 1997, FPL's Ten Year Site Plan relied on future unspecified "firm capacity purchases" as part of its planned generation resources. See Florida Power & Light Co., Ten Year Power Plant Site Plan, 1997-2006 at 65 (April, 1997) (reflecting FPL's plans to acquire needed incremental capacity from unspecified firm capacity purchases in 1997, 2002, and 2003). FPL

explained its reliance on these unspecified firm capacity purchases in its responses to the Commission Staff's requests for supplemental information regarding FPL's 1997 Ten Year Site Plan. In its response to Item No. 5 of the Staff's supplemental request, FPL stated that "All of the resource plans analyzed began with short-term firm capacity purchases from one or more unspecified parties in 2002 and in 2003." In its response to Item No. 13 of the Staff's supplemental request, FPL stated that the "currently projected additional firm power purchases shown in FPL's resource plan are a 113 MW firm purchase from an unspecified party starting in 2002 and an additional 244 MW firm purchase from an unspecified party starting in 2003. The supplying parties may not be electric utilities." If FPL can plan to serve its needs with "firm capacity purchases" from unspecified, unidentified entities, which may not even be electric utilities, it can surely deal, without adverse effect, with the possibility of buying from a known wholesale utility in those same planning processes.

If FPL is attempting to argue that it will be unable to plan because of uncertainty about the Project, this alleged "problem" is readily addressed by common, routine business communications between FPL and Duke New Smyrna; it is not an interest that is subject to "determination" in this proceeding. Clearly, as of today, approximately 39 months before the New Smyrna Beach Power Project's anticipated in-service date, FPL already knows much about the Project. The Petitioners, including Duke New Smyrna as the public utility with capacity and energy to sell, will be delighted to apprise FPL of the Project's progress, and, if FPL desires, to

commence discussions with FPL regarding FPL's purchasing part of the Project's output; this is only common business sense, and FPL cannot credibly claim that the Petitioners either have attempted, or would attempt, to keep FPL in the dark regarding the Project's progress.

Finally, this is not a planning proceeding. FPL's generation and transmission plans are reviewed by the Commission in its review of utility ten year site plans pursuant to Section 186.801, Florida Statutes, and Commission Rule 25-22.071, Florida Administrative Code.

**II. FPL'S ALLEGATIONS REGARDING THE EFFECTS OF THE OUTCOME OF THIS PROCEEDING ON ITS ABILITY TO BUILD AND OPERATE TRANSMISSION FACILITIES ARE INSUFFICIENT TO DEMONSTRATE STANDING.**

FPL has alleged that its "ability to (1) plan its transmission system to meet its customers [sic] needs, . . . (3) build and operate transmission facilities to meet customer's needs, . . . and (5) secure certification of transmission and generating facilities necessary to discharge its obligation to serve and meet its customers [sic] needs will be adversely affected" if the Commission determines that the Petitioners have met the statutory criteria under Section 403.519, Florida Statutes, and accordingly grants the requested determination of need. FPL's Petition to Intervene at 8-9. These alleged effects are speculative, conclusory, and unexplained. See Ameristeel, 691 So. 2d at 477. Moreover, they are outside the zone of interests to be protected in this need determination proceeding for the New Smyrna Beach Power Project. See Agrico, 406 So. 2d at 482. FPL's proper venue for redress of

any impacts on its transmission system is through proper proceedings before the FERC.

As to alleged effects on transmission planning, FPL will know in plenty of time what the status and progress of the Project are. Duke New Smyrna cannot simply show up at FPL's office one day and demand transmission service the next. Rather, Duke New Smyrna will have to submit a formal request for transmission service to FPL (and to any other utility whose transmission facilities Duke New Smyrna wishes to use) pursuant to FPL's open access tariff. FPL is then entitled to conduct a transmission study to determine what, if any, impacts providing the requested service will have on its system, and may, subject to FERC approval, require Duke New Smyrna not only to pay FPL's tariffed transmission rates but also to make extra contributions or payments to cover incremental costs incurred by FPL as a direct result of providing the transmission service requested by Duke New Smyrna.<sup>4</sup> The relevant point here, of course, is that FPL's interests are subject to protection in the proper proceedings before the FERC, not in this need determination proceeding.

As to FPL's ability to secure certification for transmission facilities, such issues will be determined, to the extent applicable, in future permitting proceedings under the Transmission

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<sup>4</sup> Section 17 of the Pro Forma Transmission Tariff, which has been adopted by FPL, establishes the specifics for arranging for firm point-to-point transmission service, including applications, required deposits, determination of available transmission capacity, system impact studies, facilities studies, and imposition of costs (generally on the applicant) for such studies and for required facilities.

Line Siting Act or under other applicable permitting laws and regulations. They will not be determined in this proceeding.

**III. FPL'S ALLEGATIONS REGARDING THE EFFECTS OF THE OUTCOME OF THIS PROCEEDING ON ITS ABILITY TO BUILD AND OPERATE GENERATION FACILITIES ARE INSUFFICIENT TO DEMONSTRATE STANDING.**

FPL alleges that if the Commission grants the UCNSB's and Duke New Smyrna's requested determination of need for the New Smyrna Beach Power Project, "then FPL's ability to . . . (2) plan its generation additions to meet its customers [sic] needs, . . . (4) build and operate generation to meets [sic] its customers' needs, and (5) secure certification of transmission and generating facilities . . . will be adversely affected." FPL's Petition at 8-9. FPL also alleges that its "continuing ability to make capacity and energy sales to other utilities" may be affected by this proceeding. FPL's Petition at 5. FPL also asserts that, under certain conditional, hypothetical scenarios, it might bear "an adverse burden" if the Project does not operate as anticipated. FPL's Petition at 4.

FPL's claims regarding alleged effects of the Commission's determining need for the Project on FPL's generation planning activities are spurious and contrived. The purpose of planning is to address future circumstances based on known and unknown factors and possibilities. Surely FPL knows how, in its planning processes, to deal with the possibility of other utilities having capacity and energy available for sale, and also how to deal with the possibility of contracting for capacity and energy purchases from other utilities. In planning, the possibility of obtaining

power from other utilities is generally referred to as potential assistance from other interconnected utilities.

As described in detail in Section I above, FPL has itself relied, in its ten year site plans submitted to the Commission, on future power purchases from unknown, unspecified, unidentified entities. If FPL can plan to serve its needs with "firm capacity purchases" from unspecified, unidentified entities, which may not even be electric utilities, it can surely deal with the possibility of buying from a known wholesale utility in those same planning processes. FPL cannot credibly claim here that the presence of the New Smyrna Beach Power Project, or the potential availability of capacity and energy purchases from the Project, will adversely affect its planning.

As to FPL's allegation that the Commission's granting the requested determination of need will affect its ability to build and operate generation facilities to serve its customers' needs, this too is speculative, and FPL cannot show adverse effects under Agrico. See Ameristeel, 691 So. 2d at 477. If the Project is constructed and operated as expected, FPL will still be free (subject to prudence reviews by the Commission) to buy capacity and energy from the Project or not to buy even one kilowatt-hour of the Project's output. If FPL doesn't buy any power from the Project, it cannot be adversely affected. If, on the other hand, FPL does buy power from the Project, it will only be where FPL determines that it is a reasonable, prudent, and cost-effective purchase; in such an instance, there can likewise be no adverse effect on FPL.

The only scenario that FPL can construct where there might be

any adverse effect on FPL is where the Project's output displaces sales that FPL might otherwise make to other utilities from less efficient, non-cost-effective generation facilities on its system. This is speculative, in that it depends on a host of future developments, including future fuel prices, future load growth patterns in Florida, whether FPL converts some of its existing steam generation capacity to gas-fired combined cycle capacity as it has proposed, and the degree to which potential revenues from such sales by FPL might exceed the cost of making those sales; accordingly, this allegation does not afford a basis for standing under Agrico. See Ameristeel, 691 So. 2d at 477. Moreover, even if there might be some measurable effect on FPL's profits<sup>5</sup>, FPL's interest here is a purely competitive economic interest, i.e., its potential ability to profit from off-system sales. This interest is not subject to protection or determination in this proceeding, the purpose of which is to determine whether the New Smyrna Beach Power Project comports with the criteria of Section 403.519. See Agrico, 406 So. 2d at 482; see also In Re: Peoples Gas System, Inc. Petition for Approval of Load Profile Enhancement Rider, 95 FPSC 3:352, 355 ("TECO's alleged competitive economic injury is insufficient to satisfy the second prong of the Agrico test. TECO's argument amounts to a claim that it should be protected from competitive pressure that might have an effect on TECO's growth. This is not what this proceeding is designed to do. Even if

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<sup>5</sup> Even this is doubtful, in light of the slight magnitude of FPL's revenues from wholesale transactions. FPL's FERC Form 1 report for 1997 shows that only about 2.3 percent of FPL's total revenues from sales of electricity came from sales for resale.



Peoples is trying to affect TECO's relationship with its customers as TECO alleges, TECO's interests are not affected in a manner sufficient to establish standing.")

As to FPL's ability to secure certification for generation facilities, such issues will be determined, to the extent applicable, in future permitting proceedings under the Power Plant Siting Act or under other applicable permitting laws and regulations. FPL has the same opportunity to seek certification of generating facilities that the UCNSB and Duke New Smyrna do, i.e., to file a petition for determination of need with the Commission and a site certification application with the Department of Environmental Protection, or to pursue individual agency permitting processes for generating units not subject to the Power Plant Siting Act.

FPL cannot show adverse effects under any reasonable scenario. If FPL chooses to buy from the Project instead of building new capacity, the subject purchase (assuming rational economic behavior) will be mutually beneficial, and thus will visit no adverse effect on FPL. If FPL proves that its future power plant proposals satisfy the criteria of Section 403.519 and the other requirements of the Power Plant Siting Act, it will obtain certification for such plants. Even in some hypothetical "worst case scenario" wherein the Commission were to deny some future FPL petition for determination of need on the ground that FPL's proposal is not the most cost-effective alternative (in view of the availability of power purchases from the Project or from other sources), FPL could not claim any adverse impact, because this

would only occur if the Commission determined that other power purchase opportunities were more cost-effective than FPL's proposal. Even if the hypothetical events of this highly speculative scenario were to occur, FPL could not claim to be adversely affected by the Commission's refusing to allow FPL to construct a non-cost-effective power plant.

If FPL is trying to argue that there aren't enough sites for new power plants, this is disproved by FPL's own submissions to the Commission: FPL's 1997 Ten Year Site Plan shows no fewer than twelve "Potential New Sites" for power plants. FPL's Ten Year Power Plant Site Plan, 1997-2006 at 90. Moreover, even if site availability were limited, FPL has no superior or vested right to power plant sites or environmental permits. At most, these public resources must be managed and allocated by the responsible public authorities -- the Commission, the Department of Environmental Protection, the U.S. Environmental Protection Agency, the State Water Management Districts, and so on -- in the public interest for maximum public benefits. Indeed, the legislative intent underlying the Florida Electrical Power Plant Siting Act is to "fully balance the increasing demands for electrical power plant location and operation with the broad interests of the public." Fla. Stat. § 403.502 (1997).

FPL also alleges that if the Project turns out to be "ill-advised" or does not operate as anticipated, it will bear "an adverse burden." FPL's Petition at 4. This allegation is also misplaced and unfounded. If the Project is ill-advised, then the adverse effects will fall solely upon Duke New Smyrna, which will

not make sufficient sales; FPL does not have to buy any of the Project's output, and FPL presumably will not make any ill-advised purchases.

This leaves two possible scenarios where the Project does not operate as anticipated, one in which FPL does not contract to buy power from the Project and the other where FPL does contract to buy power from the Project. In the first scenario, if FPL does not contract to buy power from the Project, its interests cannot be adversely affected by the Project's hypothetical failure to operate as projected. In the second, Duke New Smyrna and the UCNSB will cheerfully agree that if FPL had entered into a contract to buy power from the Project, it would have standing to participate in this proceeding. Of course, this is not the case, and accordingly, FPL lacks standing. And, if FPL means to argue that it might agree to buy power from the Project at some future date subsequent to the need determination proceeding, and that thereafter the Project might not operate as anticipated, this is so contrived and speculative as to be ridiculous. Even then, FPL would have contractual remedies, and its captive ratepayers would be "off the hook" to pay for the Project, where they would have been "on the hook" to pay for an FPL plant. Analyzed from any angle, FPL's "potential adverse burden" claim simply does not give rise to standing.

Finally, as to FPL's contrived allegation that the Project might be able to establish a claim on existing gas pipeline capacity, this is again speculative (depending, inter alia, on the construction of new gas pipeline capacity in Florida) and not an

interest that this need determination proceeding is designed to protect. Either of FPL's recently proposed repowering projects (Sanford and Ft. Myers) would have a substantially greater effect on every other utility in Florida with plans to build or buy from gas-fired power plants. Surely, FPL would not agree that this creates a right to a Section 120.57 hearing for every such affected utility regarding FPL's plans to use present and future gas pipeline capacity. This proceeding is not designed to protect such interests. Moreover, FPL has no superior or vested right to gas pipeline capacity until and unless it contracts for it like any other purchaser.

**IV. FPL'S ALLEGATIONS REGARDING EFFECTS ON ITS "ABILITY TO MAKE CAPACITY AND ENERGY SALES TO OTHER UTILITIES" AND POTENTIAL DISPLACEMENT OF ITS INEFFICIENT GENERATION ARE NOT COGNIZABLE INTERESTS IN THIS PROCEEDING AND ARE INSUFFICIENT TO ESTABLISH STANDING.**

FPL alleges that if the Commission grants the requested determination of need for the New Smyrna Beach Power Project, then its substantial interests will be affected because it is possible that generation from some of its less efficient, higher-cost generating units may be displaced by power supplied to Peninsular Florida utilities by the Project and because its "ability to make capacity and energy sales to other utilities" and how it makes such sales will be affected. FPL's Petition at 5, 15, 18. These are purely competitive economic interests not cognizable here. See In Re: Peoples Gas System, Inc. Petition for Approval of Load Profile Enhancement Rider, 95 FPSC 3:352, 355. FPL also asserts that the Project will, or may, result in an uneconomic duplication of

facilities. FPL's Petition at 9. Even this does not give FPL standing, because the purpose of the statute is to protect captive electric ratepayers from the adverse consequences of uneconomic duplication, not to protect individual utilities' competitive interests. Moreover, the statute doesn't -- for of course there is no reason for it to -- protect against the economic construction of more efficient, cost-effective generation facilities.

The first set of allegations -- that the Commission's determination of need for the Project will affect FPL's ability to make sales to other utilities -- is speculative and dependent on many future factors and events, including future fuel prices, future load characteristics, the future of FPL's generation fleet, and the degree to which the revenues from such sales might exceed the costs incurred to make them. Accordingly, they are insufficient to establish standing. See International Jai-Alai, 561 So. 2d at 1226 (future economic injury too remote to establish standing). These allegations also, at best, advance a purely competitive economic interest not cognizable in this need determination proceeding. See Agrico, 406 So. 2d at 482; Florida Medical Ass'n v. Department of Professional Regulation, 426 So. 2d 1112 (Fla. 1st DCA 1983); Boca Raton Mausoleum, Inc. v. Department of Banking and Finance, 511 So. 2d 1060 (Fla. 1st DCA 1987); Florida Society of Ophthalmology v. Board of Optometry, 532 So. 2d 1279 (Fla. 1st DCA 1988).

FPL's allegations regarding a potential uneconomic duplication of generation facilities requires analysis of the statute to determine whether Section 403.519 is explicitly intended to address

the competitive interests of other utilities, or whether it is intended to address the interests of electric customers in not being saddled, as captive electric ratepayers, with the responsibility of paying for uneconomic power plants. The Petitioners assert that the latter is the only reasonable interpretation of the statute.

Fundamentally, the concept of uneconomic duplication relates to situations in which the entities involved (whose facilities would possibly be duplicative) intend to recover all of their respective capital and operating costs through regulated rates from captive ratepayers. In this case, however, Duke New Smyrna is taking all of the financial risk of the Project. Customers will pay for capacity and energy supplied by the Project only if, and only to the extent that, their retail-serving utilities determine that purchases from the Project represent a cost-effective choice. Such purchases will be, by definition, economic. If the Project is not successful, the consequences will be felt not by captive ratepayers, but by Duke New Smyrna. There cannot be "uneconomic duplication" in this situation, because customers will not pay for capacity that is not used to serve them.

Interpreting the statute to mean uneconomic to another utility would invite a free-for-all in any future need determination proceeding. If FPL's theory were given credence, at a minimum, any generating utility would have standing to intervene in any need determination proceeding for a power plant to be built in, or projected to provide power to, Florida, on the ground that the proposed plant would or could displace some sales that the putative

intervenor might otherwise make. This is not contemplated by the statute, which does not purport to protect the competitive economic interests of other utilities. The only fair reading of the statute is that it is designed to protect against uneconomic duplication of resources from the perspective of captive electric ratepayers, and perhaps from the perspective of the public generally, not from the perspective of individual utilities.

The Project will not be uneconomic to such captive electric customers. If their retail-serving utilities buy power from the Project for resale to those customers, it will be because such purchases represent a prudent, cost-effective alternative; if the retail-serving utilities do not buy the power, there can be no adverse, uneconomic effect on the ratepayers. It may be uneconomic to Duke New Smyrna, because Duke New Smyrna is taking the business risk that it will be able to sell capacity and energy from the Project at less than the cost of energy from existing facilities, and at less than the cost of energy and capacity from new, not-yet-constructed power plants, and still make a profit.

**V. FPL'S ALLEGATIONS THAT, AS THE DOMINANT UTILITY IN PENINSULAR FLORIDA, ITS SUBSTANTIAL INTERESTS WILL BE DETERMINED IN THIS PROCEEDING, AND THAT IT IS AN "INDISPENSABLE PARTY" TO THIS PROCEEDING ARE UNFOUNDED AND INSUFFICIENT TO ESTABLISH STANDING.**

FPL has recited statistics demonstrating what is common knowledge, i.e., that it is the dominant electric utility in Peninsular Florida. FPL has also attempted to parlay this status into standing to intervene in this proceeding. For example, at page 17 of its Petition, FPL alleges that "as the utility

comprising roughly 50% of Peninsular Florida, FPL has substantial interests which will be determined in this proceeding." FPL then goes on to reiterate the list of areas in which it may be affected by the construction and operation of the New Smyrna Beach Power Project -- its "ability to plan, certify, build and operate transmission and generation facilities" and "displacing oil-fired and gas-fired generation on the FPL system, adversely affecting FPL's ability to operate its generating units and make sales of energy and capacity." FPL's Petition at 17-18. As discussed above, the alleged effects on FPL's ability to plan, certify, build, and operate its transmission and generation system are speculative, not within the zone of interests protected by this need determination proceeding, and not adverse. This leaves FPL's allegation that the Commission's granting the requested determination of need for the New Smyrna Beach Power Project would adversely affect FPL's ability to make sales of capacity and energy to other utilities; even if true, this is a purely competitive economic interest that is not cognizable in this proceeding. See Agrico, 406 So. 2d at 482; In Re: Peoples Gas System, Inc. Petition for Approval of Load Profile Enhancement Rider, 95 FPSC 3:352, 355.

Throughout its 23-page pleading, FPL -- whose entire mode of business consists of imposing all costs and all risks on its captive customers -- refuses to come to terms with (or, perhaps more accurately, hopes the Commission will fail to appreciate) the fundamental difference between this case, in which the applicants accept all financial and business risks associated with the Project in order to offer true "merchant" capacity and energy, and the



cases that FPL seeks to invoke. FPL tries to apply concepts developed in cases in which cogenerators tied their proposed units to contracts with specific purchasing utilities, and the law of regulated monopolies, under which multiple providers attempt to impose all of their plant costs on captive customers, to this fundamentally different proceeding. By accepting all risk and by not requiring a commitment to purchase the Project's output from any utility, Duke New Smyrna has rendered those concepts and rulings inapplicable to the case now before the Commission.

In several prior cases, applicants sought to tie their generation projects explicitly to proposed power purchase contracts with FPL. Also, in past cases, the Commission addressed the potential discrepancy between QF contracts approved on the basis of a hypothetical statewide avoided unit and the situation of an individual purchasing utility whose need might not mirror the statewide findings. In those contexts, the Commission stressed the "perspective" of the "purchasing utility." As the proposed contract purchaser from such projects, FPL was then in a position to support or oppose particular applications for determinations of need.

In this case, FPL apparently wants to oppose the Project but finds that it cannot establish a legitimate connection to the proceeding because the Petitioners have not conditioned the Project on a contract with FPL and because FPL has not elected to enter into such a contract. Faced with this dilemma, FPL tries to bootstrap its status as the dominant utility in Peninsular Florida into standing. FPL has made numerous allegations regarding

"Peninsular Florida" being a "planning convention" or a "planning artifice," going on to argue that because it is the dominant utility in Peninsular Florida, its interests will be determined in this proceeding. As explained above, FPL's claimed interests are insufficient to establish standing under applicable Florida law. Moreover, the Petitioners have, consistent with prior need determination proceedings before the Commission, addressed the needs of Peninsular Florida as evidence of the need for the Project.<sup>6</sup> The Petitioners have not "relied on" FPL's projected needs or on other utilities' projected needs; rather, the Petitioners have presented evidence regarding the total Peninsular Florida power supply system as evidence of the consistency of the

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<sup>6</sup> The Commission has considered the needs of Peninsular Florida in previous need determination proceedings initiated by retail-serving utilities, both for utility-built capacity and for contracted capacity. See, e.g., In Re: Petition for Determination of Need for Proposed Electrical Power Plant and Related Facilities, Polk County Units 1-4, by Florida Power Corporation, Docket No. 910759-EI, Prehearing Order No. 25359 at 30, 41: "ISSUE 9: Will the Polk County Project contribute to fuel diversity for FPC's system and for peninsular Florida?" and "ISSUE 24: Will the proposed combined cycle units constructed by FPC be the most cost-effective alternative to FPC and Peninsular Florida?" (emphasis supplied); In Re: Joint Petition for Determination of Need for Proposed Electrical Power Plant and Related Facilities, Indiantown Project, by Florida Power & Light Company and Indiantown Cogeneration, L.P., FPSC Docket No. 900709-EQ, Order No. 24268 at 8 (Fla. Pub. Serv. Comm'n, March 21, 1991): "ISSUE 16: Is the capacity to be provided by the Indiantown Project reasonably consistent with the needs of Peninsular Florida, taking into consideration timing, impacts on the reliability and integrity of the Peninsular Florida grid, cost, fuel diversity and other relevant factors?" (emphasis supplied) The Commission's rules also refer to Peninsular Florida in several places. See, e.g., Rule 25-22.071, Submission and Review of the Ten-Year Site Plans (requiring the compilation of aggregate data for Peninsular Florida) and Rule 25-22.076, Contents of Petition (requiring load flow studies on a Peninsular Florida basis in transmission line need determination proceedings).

New Smyrna Beach Power Project with the needs of Florida's electric customers. Moreover, since the Petitioners have no plans, and no right, to impose the costs of the Project on FPL or on other utilities, they cannot be said to be relying on those utilities needs. FPL's argument is an illogical attempt to rely on and extend the law of cogeneration and of regulated monopoly utilities to this case, which involves the UCNSB's and Duke New Smyrna's application to build an efficient, cost-effective power plant to serve the UCNSB's needs and to provide true merchant wholesale capacity and energy to other utilities, at their choice and at Duke New Smyrna's risk.

FPL also alleges that as a utility in Peninsular Florida, it is one of the "utilities primarily affected" by the proposed Project and the Commission's action herein, and that it should have been described in the Petition initiating this docket. FPL is wrong, because it is not a primarily affected utility as expressly contemplated by the Rule. The utilities primarily affected by the Project are the Petitioners, i.e., the UCNSB and Duke New Smyrna. Whether FPL is ever affected at all depends on numerous future events, e.g., whether FPL chooses to buy power from the Project, whether the Project displaces generation from FPL's units that FPL might otherwise sell to other wholesale purchasers, whether Duke New Smyrna applies for wholesale transmission service from FPL, and so on. As a general proposition, FPL is not likely to be affected except by its own choice to buy power from the Project or by generating less from its less efficient gas/oil steam generating units, or by providing transmission service for power deliveries

from the Project to other utilities. Under the first possibility, FPL could not show adverse effect because it will, assuming rational behavior, only buy from the Project when it is economic to do so. With respect to the second, it is again difficult or impossible for FPL to show adverse effects because such displacement would only occur where power from the Project is more cost-effective than power from FPL's units; even if true, this would be a purely competitive economic interest of FPL, not of FPL's customers, not subject to protection in this proceeding. Agrico, 406 So. 2d at 482. The Commission must also remember that its duties are to all electric ratepayers, and if the Project should happen to displace a sale from more costly, less-efficient FPL generation, then it will only be because the purchasing utility finds the purchase from Duke New Smyrna more cost-effective -- i.e., a better deal for its customers -- than the erstwhile purchase from FPL. As to transmission effects, FPL's interests are fully subject to protection in the proper proceedings before the FERC.

FPL's long discussion regarding the role of purchasing utilities in need determination proceedings is also a contrived, misplaced attempt to apply the law of cogeneration, and possibly the law of pre-negotiated power purchase contracts, to this case, which, with respect to FPL, involves neither. FPL is simply not a purchaser from the Project at this time. FPL is not comparable to the Utilities Commission, City of New Smyrna Beach, nor is FPL in a position comparable to its situation in the need determination cases that it has cited, in which it was the designated, obligated

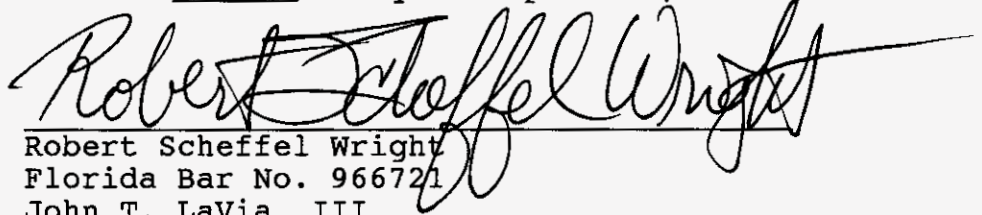
power purchaser.

If FPL means to allege that it has standing because it is a potential purchaser of power from the Project, and thus an "indispensable party" to this proceeding, this is again speculative and remote, and accordingly insufficient to establish standing. If FPL had a contract to purchase power from the Project, Duke and the UCNSB would agree that FPL would have standing to participate; however, this is not the case. FPL cannot construct a scenario in which it would have to buy power from the Project at an uneconomic cost, because, of course, FPL never has to buy the first kilowatt-hour from the Project.

#### **CONCLUSION**

The Petitioners herein are respectfully asking the Commission to determine the need for the New Smyrna Beach Power Project, on the basis of the benefits that will accrue to the Utilities Commission, City of New Smyrna Beach, and on the basis that the wholesale generating capacity and energy to be provided by the Project will contribute significantly to the reliability and integrity of the Peninsular Florida bulk power supply system and to the need of electric customers in Peninsular Florida for adequate electricity at a reasonable cost. None of FPL's legitimate, cognizable interests are being determined, nor subject to being adversely affected, by the Commission's action in this proceeding, and accordingly, FPL's petition to intervene must be denied.

Respectfully submitted this 8 th day of September, 1998.



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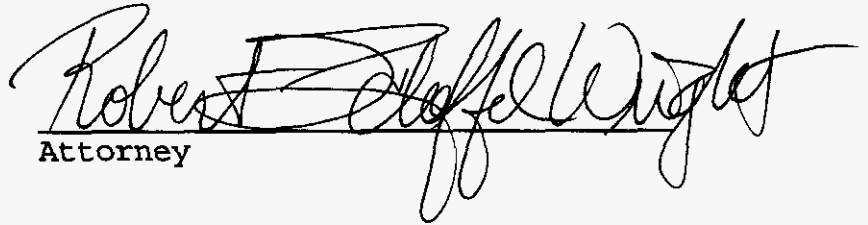
Duke Energy New Smyrna Beach Power  
Company Ltd., L.L.P.

**CERTIFICATE OF SERVICE**  
**DOCKET NO. 981042-EM**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery (\*) or by United States Mail, postage prepaid, on the following individuals this 8th day of September, 1998:

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