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September 21, 1998

Ms. Blanca Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
4750 Esplanade Way, Room 110
Tallahassee, Florida 32399

RE: Docket No. 981042-EM

Dear Ms. Bayo:

Enclosed for filing please find the original and fifteen (15) copies of Petitioners' Response in Opposition and Motion to Deny FPC's Petition to Intervene.

Sincerely,

John T. LaVia, III

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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 21, 1998

PETITIONERS' RESPONSE IN OPPOSITION AND MOTION TO DENY FPC'S PETITION TO INTERVENE

Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. ("Duke New Smyrna") and the Utilities Commission, City of New Smyrna Beach ("UCNSB"), pursuant to Commission Rule 25-22.037, F.A.C., through their undersigned counsel, respond in opposition to and move to deny Florida Power Corporation's Petition to Intervene, and state:

I. INTRODUCTION

On August 19, 1998, Duke New Smyrna and the UCNSB jointly filed their petition for a determination of need (the "Joint Petition") for a proposed 514 MW combined cycle generating unit to be located in New Smyrna Beach in Volusia County. As stated in the Joint Petition, 30 MW of the capacity and associated energy would be provided to UCNSB; the balance would be sold by Duke New Smyrna into the wholesale generation market on a "merchant" basis. The proposed unit would be state-of-the-art in terms of its advanced technology, high efficiency, and environmental friendliness. More importantly, under the proposal Duke New Smyrna would bear all of the financial and business risk associated with the construction of the unit. In other words, no ratepayer or group of ratepayers (or utility, for that matter) would be required to become obligated

for the costs of the merchant capacity as a precondition of the Project going forward. This fact distinguishes the application of Duke New Smyrna and UCNSB from those of cogenerators and IPPs whose willingness to construct capacity depends on first having in place a contract with a designated purchasing utility (which would pass the costs of the contract through to its customers). It also distinguishes the application from those of traditional utilities, who tie their "obligation to serve" retail customers to regulatory "assurances" that they will recover their costs and earn a return on their investment through their Commission-approved rate structure. See FPC's Petition to Intervene at 12.

A wish made of a genie for the purpose of truly advancing ratepayers' interests would likely resemble Applicants' proposal: state-of-the-art capacity that will enhance the reliability of service to Florida citizens and that will -- each time the unit operates -- increase system efficiency, reduce pollution through the displacement of generation from older, dirtier units, and lower customers' bills -- all at no risk to ratepayers. Certainly, Florida's ratepayers would welcome all of such risk-free benefits that the developing wholesale market can generate. Yet, FPC has petitioned to intervene in opposition to the proposed Project.[1] An analysis of FPC's pleading reveals not only that FPC's arguments for intervention fail to meet the standards that govern its request but also that FPC's opposition to the Project is inconsistent with the very ratepayer interests it purports to invoke.

[1] FPC has also filed a motion to dismiss, which of course is subject to the Commission's ruling on the requested intervention.

II. THE STANDARD APPLICABLE TO FPC'S PETITION TO INTERVENE

To establish standing to intervene, FPC 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). 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, FPC must demonstrate that this proceeding will result in an injury to its customers 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, FPC must demonstrate that the alleged injuries to its customers are of the type and nature against which this need determination proceeding is designed to protect. Stated differently, FPC's alleged injuries to its customers 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.

III. ARGUMENT

A. FPC'S ATTEMPTS TO SHOW INJURY FAIL TO MEET THE APPLICABLE STANDARDS.

FPC's Petition to Intervene is some 24 pages in length. The section that purports to address "injuries" follows about 15 pages in which FPC mostly rehearses the arguments in its motion to dismiss.[2]

Boiled down, FPC alleges essentially three "affected interests" or "injuries" in support of its requested intervention:

(a) FPC asserts that a project by an entity that does not serve retail customers would have a "deleterious" effect on FPC's ability to plan and furnish reliable electric service at reasonable cost. FPC's Petition to Intervene at 15.

(b) FPC alleges the proposed project "potentially threatens to impair" the reliability of FPC's transmission system. FPC's Petition to Intervene at 16.

[2] While such matters are inappropriate for inclusion in a petition to intervene, Petitioners will respond briefly to FPC's assertions in a later section of this response.

(c) FPC contends the proposed project threatens to impose on FPC and its ratepayers the consequences of uneconomic duplication of generating facilities. FPC's Petition to Intervene at 16.

FPC's contentions fail to satisfy the standards that FPC agrees it must meet in order to support its Petition to Intervene. As all of its arguments are unavailing, its Petition to Intervene must be denied.

1. FPC Cannot Show An Adverse Impact On Its Ability To Plan Its System And Serve Its Customers Because FPC Will Have No Obligation To Use Or Pay For the Proposed Unit Unless And Until It Enters A Voluntary Contract To Purchase At Wholesale.

Contrary to its claim, FPC cannot demonstrate a "deleterious" effect on its ability to plan and serve its retail customers. First, as FPC acknowledges -- and Duke New Smyrna readily agrees -- Duke New Smyrna will not serve retail customers.[3] FPC cannot allege that its retail customer base will be affected by the proposal at all. How, then, does FPC contend that the effect would be "deleterious"? By increasing FPC's (and its customers') costs? FPC cannot contend this is the case, because -- since FPC has no obligation to purchase the output of the unit -- it can choose to purchase none at all, or only the amounts it wishes to purchase, and only on terms that it first finds to be advantageous.

By impinging on FPC's options? FPC cannot contend this is the case. The proposed project would increase, not decrease, FPC's alternatives, by adding a supply

[3] By law, an EWG can sell only to wholesale customers. See 15 U.S.C. §79z-5a(a)(1).

option that is presently unavailable to it. If anything, the proposed project would give FPC increased negotiating leverage with other sources, because they will have to compete with the proposed project for FPC's business.

By affecting its ability to plan its system? FPC can't legitimately claim that the proposed project's existence will adversely affect its planning either. At worst, although it would probably be imprudent for FPC to do so, FPC could simply ignore the Project's presence and conduct its planning activities accordingly. Alternately, and more reasonably, FPC could consider the availability of short-, medium-, or long-term power purchases from the Project as another supply side option in its planning processes, just as it considers the availability of power purchases from other utilities, e.g., Southern Company and Tampa Electric Company. Clearly, either way, there can be no adverse effect on FPC's planning. Moreover, if FPC's alleged adverse planning effect is uncertainty created by the Project's presence, this is easily solved by normal, routine business communications -- e.g., FPC could call or write Duke New Smyrna to inquire about the status of the Project (during development) and about the availability of power sales from the Project. Such "uncertainty" is not an "injury" to be decided or determined by the Commission in this need determination proceeding.

FPC complains that in the Petition for Determination of Need, Duke New Smyrna did not "commit" to sell any of its capacity. FPC's Petition to Intervene at 13. FPC also asserts that if Duke New Smyrna is allowed to proceed under the Act, FPC will have no ability to monitor Duke New Smyrna's activities. FPC Petition to Intervene at 12. Finally,

FPC contends that Petitioners are presuming to meet FPC's "need;" therefore, FPC is an "indispensable party." FPC's Petition to Intervene at 7-8.

The answer to the first of these assertions is simple. If and when FPC elects to enter a contract with Duke New Smyrna, Duke New Smyrna will be obligated to sell power to FPC, and FPC can include the contracted-for power in its planning. Until then, the Duke New Smyrna merchant capacity will be like numerous other existing, potential sources of capacity that are not included as firm resources in FPC's planning. FPC's next point is illogical and counterintuitive; because of the wealth of information the process requires, FPC will receive far more information about the Duke New Smyrna project if Petitioners are allowed to proceed. (While Duke New Smyrna disagrees that the concept of "applicant" in the Siting Act is limited to those entities that file Ten-Year Site Plans, Duke New Smyrna has determined that it will meet the definition of "electric utility" in Section 366.02(3). If the determination of need is granted, Duke New Smyrna intends to file Ten-Year Site Plans with the Commission. For this additional reason, FPC's argument has no merit.) Finally, FPC's contention that Petitioners are trying to meet FPC's need and FPC is therefore an indispensable party is a desperate attempt to invoke cases in which a QF tried to contractually force costs on a utility. As explained below, they don't fit. By agreeing to accept the full risk of its project, Duke New Smyrna has severed any connection between the concept of "indispensable party" as it was applied to QFs in past orders and this case.[4,5]

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[4] Under FPC's distorted reasoning, if an applicant had a contract with a purchasing utility, only the single purchasing utility would be an "indispensable party"; if it had no contracts, then all potential purchasers would be "indispensable parties"! Logic works

A scrutiny of FPC's pleading reveals that the "deleterious effect" FPC sees is not on its ratepayers, or its ability to plan for and serve them. The alleged "adverse effect" is simply the entry of a wholesale supplier uninvited by FPC into the wholesale market. See FPC Petition to Intervene at 7. As Petitioners will demonstrate, and as they will show more fully in their response to FPC's motion to dismiss, there is no basis in law for FPC's position that Duke New Smyrna and UCNSB cannot proceed under the Siting Act. However, for purposes of ruling on the requested intervention it must be emphasized at the outset that the only "injury" FPC can show when making the argument is a speculative, purely competitive interest that is outside the zone of interests this proceeding is designed to protect. North Ridge, supra, 478 So. 2d at 1139.

2. Petitioners' Proposal Does Not Expose FPC's Ratepayers To The Possibility Of Paying For The Uneconomic Duplication Of Facilities.

FPC asserts that the Petitioners' proposal "potentially threatens" to "impose upon FPC and its ratepayers the consequences of the uneconomic duplication of generating facilities." FPC's Petition to Intervene at 17. FPC's assertion is wrong, and illogical as well. For regulatory purposes, "uneconomic duplication" refers to those situations in which customers pay twice. It has no application here. The very essence of the merchant proposal is that the developer will carry all of the financial and business risk

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in the other direction: If there is no obligation to purchase, there is no standing to intervene.

[5] Petitioners address the case law to which FPC alludes in a later section of this response.

associated with the proposed unit. Accordingly, by definition the costs will not be imposed on FPC and its ratepayers. If the capacity and energy of the unit proves not to be economic and not in the best interest of the utilities' customers, then utilities, including FPC, need not purchase its capacity or energy, and any losses will be felt by the owner. On the other hand, if FPC purchases from Duke New Smyrna, it will be because FPC has determined that is the prudent, economic course it should take for its ratepayers. FPC's "uneconomic duplication" charge is completely misplaced.

3. FPC Cannot Demonstrate Standing By Speculative References To Possible Impacts On Transmission, Where Federal Law Requires Utilities To Provide Access To The Transmission System And Provides The Mechanism For Identifying Responsibility For Costs Associated With That Access.

At page 17 of its Petition, FPC states, "... it appears that the project will place additional demands on those [FPC transmission] facilities, necessitating that FPC augment its facilities." Again, based on its own description, FPC's assertion is speculative, and does not meet the "immediacy" standard of Agrico. Moreover, even assuming for the sake of argument that the Project would require some modification of the transmission system, FPC cannot show standing to intervene on that basis, because the interest FPC asserts is not one which the determination of need proceeding is designed to protect. Through the Energy Policy Act of 1992 and Order No. 888 of the Federal Energy Regulatory Commission, federal law assures entities such as Duke New Smyrna access to the transmission system. Federal law also delineates the relative priorities of use by the owner and those who request access, as well as the cost

responsibility associated with such access. FPC cannot show an adverse effect because FPC's obligations and corresponding rights are spelled out by federal requirements that place jurisdiction and responsibility for transmission-related issues before the FERC. In effect, FPC can only claim that there might be an adverse effect if the FERC made what FPC considered to be the wrong decision in a subsequent transmission proceeding. In that event, FPC's remedy would lie elsewhere. Aside from being grossly speculative, this alleged injury is far outside the zone of interests that this need determination proceeding is designed to protect.

B. FPC'S STATUTORY ARGUMENTS ARE BOTH MISPLACED AND INCORRECT.

FPC derives its assertion that Applicants' project would interfere with its ability to plan to meet its retail customers' needs from a fundamentally flawed construction of the relationship between the Siting Act and Chapter 366, Florida Statutes, and a misapplication of case law.

FPC's premise is that under Florida law, Duke New Smyrna cannot apply for a determination of need before a traditional utility, exercising its exclusive legal prerogative, enters a contract with Duke New Smyrna and sponsors it in the Power Plant Siting Act process. FPC's Petition to Intervene at 6-7, 12. To that end, FPC contends, among other things, that the Power Plant Siting Act is part of a statutory scheme designed to limit access to the construction of new capacity to FPC, other "traditional," "state-regulated" utilities, and those fortunates that may be tapped by the incumbents for entrance into the exclusive club. FPC Petition to Intervene at 12. This argument is easily dispelled. First, the Siting Act only applies to units having steam-based capacity

of 75 MW or more, meaning that one can build combined cycle units exceeding 200 MW without proceeding through the Act. If the purpose of the Legislature was to fashion a unified, comprehensive statutory scheme designed to confer on FPC and other retail utilities an exclusive prerogative to build capacity, as FPC maintains, it would have included all power plants in its definition. The fact that it was selective indicates it had a very different purpose.[6]

In one of the cases cited by FPC, the Florida Supreme Court succinctly summarized the purpose of the Siting Act in a way that explains the Act's focus on certain units that exceed a threshold size and simultaneously dispels FPC's theory of exclusivity:

> The Siting Act was passed by the legislature in 1973 for the purpose of minimizing the adverse impact of power plants on the environment.

Nassau Power Corporation v. Beard, 601 So. 2d 1175, 1176 (Fla. 1992) (emphasis supplied).

As the Court recognized, the Siting Act is an exercise in environmental regulation. To that end, the Legislature chose to establish a mechanism for the consideration of the benefits and impacts of projects of a certain size. Section 403.503(12), Florida Statutes.

Numerous considerations demonstrate that the Siting Act is not an "extension" of the "retail monopoly" concept. For instance, the definition of "electric utility" in Section 403.503(13), Florida Statutes, which in turn determines the scope of "applicant" for

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[6] The contention that the construction of capacity is a "retail utility prerogative" also suffers from the fact that the same retail utilities making the argument also employ their generating units in the wholesale market.

purposes of the Act [see Section 403.503(4), Florida Statutes], differs from the definition of "electric utility" found in Section 366.02(2), Florida Statutes. The definition of "electric utility" in Section 403.503(13), Florida Statutes, includes "regulated electric companies." As a public utility under federal law that is subject to the regulatory jurisdiction of the FERC, Duke New Smyrna satisfies the definition of "applicant" in the Siting Act. (Moreover, Duke New Smyrna is, or will be, an "electric utility" within the meaning of Section 366.02(2), F.S.)

Significantly, in 1990 the Legislature amended Section 403.519, Florida Statutes, to change the term "utility" to "applicant," thereby confirming its intent to give effect to the broader scope of the definitional provisions of Section 403.503, Florida Statutes.

In addition, Section 403.503(12), Florida Statutes, defines an electric utility as "... engaged in the business of generating, transmitting or distributing electric "energy." The use of the disjunctive "or" shows the Legislature's intent to encompass those entities that generate but do not distribute; i.e., those that engage in the wholesale generation market.

The cases of Nassau Power Corporation v. Beard, 601 So. 2d 1175 (Fla. 1992) and Nassau Power Corporation v. Deason, 641 So. 2d 396 (Fla. 1994), do not support FPC's premise. Both involved situations in which a QF asked the Commission to mandate that a specific utility purchase the capacity and energy of the proposed unit. The Commission adopted the policy to prevent a utility from being required to purchase power it didn't need. However, in the orders relating to both Nassau appeals, the Commission limited the scope of its rulings to such situations in terms that simply do not

permit the misapplication sought by FPC. For instance, in Order No. 22341, in which it first articulated the policy that Nassau Power challenged, the Commission stated:

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

Order No. 22341 at 26 (emphasis supplied).

Similarly, in Order No. PSC-92-1210-FOF-EQ, the order reviewed by the Court in Nassau Power v. Deason, the Commission stated:

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

Order No. PSC-92-1210-FOF-EQ at 4 (emphasis supplied).

When in its order the Court agreed with the Commission that the need to be determined is "the need of the entity ultimately consuming the power," it necessarily was addressing situations in which the applicant seeks to rely on a standard offer or negotiated contract. That was the only scenario that the Commission addressed in Order Nos. 22341 and PSC-92-1210-FOF-EQ, and therefore the only one before the Court.

The critical distinction between the circumstances before the Commission and the Court in the Nassau Power cases and those of this case is that Duke New Smyrna is not relying on a standard offer or negotiated contract. Duke New Smyrna is willing to assume the risk of the investment. FPC and other utilities who serve retail customers are free from any requirement that they purchase power from the applicant. As a result,

the Nassau cases are inapplicable; more importantly, for purposes of FPC's Petition to Intervene, FPC can show no injury and no standing.[7]

C. THE COMMISSION SHOULD IGNORE FPC'S MISSTATEMENTS AND MISCHARACTERIZATIONS.

FPC hopes the Commission will conclude that the only proper Siting Act applicants are "state regulated Florida utilities." See FPC Petition to Intervene at 6 (emphasis supplied). However, FPC simply supplies the term "state," which does not appear in the statute. Based on the absence of supporting analysis, FPC's conclusion appears as a desired result that it simply attributes to the Commission. However, FPC's wishful thinking violates a basic tenet of statutory construction. Where a statute is clear and unambiguous, the tribunal is not free to add words to steer it to a meaning and limitation which its plain meaning does not supply. Armstrong v. City of Edgewater, 157 So. 2d. 422, 425 (Fla. 1963).

Similarly, FPC states that, when it refused to entertain the Petition for a Declaratory Statement relating to the New Smyrna Beach project, the Commission prescribed participation by the Legislature which Duke New Smyrna is now allegedly trying to circumvent. FPC's Petition to Intervene at 2. A careful review of the order shows the Commission did not refer to legislative proceedings. When noting that Duke New Smyrna's application presents again the issue of whether a merchant plant may

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[7] While Petitioners have responded to FPC's treatment of the Nassau Power decisions herein, they are not really germane to the issue of whether FPC can show injury sufficient to confer standing. Petitioners' analysis of the cases will be developed in greater detail in its response to FPC's motion to dismiss.

proceed as an applicant under the Power Plant Siting Act, FPC says, "The answer is still no." FPC's Petition to Intervene at 3. As worded, FPC appears to imply that the Commission answered the question in the negative at the time it was considering the Petition for Declaratory Statement. The Commission did not address the issue.

At page 2 of FPC's Petition to Intervene, FPC claims that Duke New Smyrna's request for a declaratory statement constitutes "a broadside assault on this State's current regulatory approach to planning and siting generating capacity." As worded, FPC implies the Commission declined to issue the declaratory statement on that basis. Of course, the characterization is FPC's, not the Commission's. Far from being an "assault," Duke Energy's proposal simply adds an attractive dimension to the existing regulatory framework -- one in which ratepayers will benefit from the Applicants' willingness to assume responsibility for all risks associated with the undertaking.

At page 4 of its Petition to Intervene, FPC asserts that, "Duke itself" acknowledged that FPC should be allowed to intervene in an "actual need proceeding." In support, FPC refers to pages 4-7 of Duke Energy New Smyrna Beach Power Company's Motion to Dismiss FPC's Petition to Intervene in the declaratory statement case. A careful review of Duke Energy's pleading in that case will reveal that at no time did Duke Energy state or imply the view that FPC would be able to show the requisite interest to warrant intervention in the application for a determination of need.

Finally, none of the orders allowing intervention cited by FPC supports its request. In each of the cases cited by FPC, the petitioner demonstrated that it would be affected, and that its interest was within the scope of those the proceeding was designed to

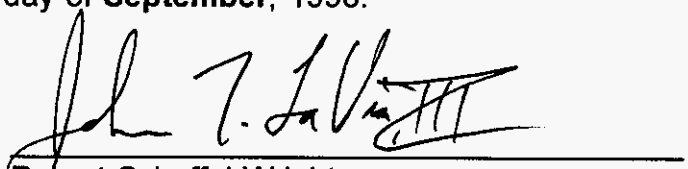
protect. For instance, in Docket No. 920520-EQ (Joint Petition by Florida Power and Light Company and Cypress Energy Partners); Docket No. 920807-GP (Petition of Ark Energy for Determination of Need); and Docket No. 961512-EM (Petition to Determine Need by City of Tallahassee), each proceeding involved either a request for a determination of need by a utility associated with that utility's specific need for capacity, or a proposal by a QF or IPP to satisfy the particular need for capacity of a specific utility. The Commission determined that on those different facts, the specific utility had standing to intervene in the proceedings initiated by those who proposed to require the utility to contract with them. Also, the Commission determined that those entities who contended they could provide a better and more cost-effective alternative to the proposal of the utility that claimed to require capacity had standing to intervene in its determination of need case. Neither situation is presented here. Further, FPC has not asserted -- nor could it -- the type of interest represented by such entities as the Legal Environmental Assistance Foundation or Floridians for Responsible Utility Growth. FPC cannot piggyback the very different interests of other parties in past proceedings; it must meet both prongs of the Agrico test on its own. FPC has not done so.

CONCLUSION

Duke New Smyrna and UCNSB have brought to the Commission a proposal that -- at no risk to ratepayers -- can only enhance reliability of the Florida grid and lower the cost of capacity and energy to Florida ratepayers. In its efforts to demonstrate standing to intervene, FPC has demonstrated no injury; only that it wants to prevent an additional provider of generation and energy from entering the wholesale market. Apart from the

deficiencies in, and obvious constitutional implications of, FPC's legal arguments, that is neither an injury nor an interest which the proceeding is designed to protect. FPC's Petition to Intervene should be denied.

Respectfully submitted this **21st** day of **September**, 1998.



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Attorneys for the Utilities Commission,
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and

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 21st day of September, 1998:

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