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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION SEP 24 PM 2:18

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.

RECORDS AND REPORTING DOCKET NO. 981042-EM FILED: SEPT. 24, 1998

RESPONSE OF THE UTILITIES COMMISSION, CITY OF NEW SMYRNA BEACH, FLORIDA AND DUKE ENERGY NEW SMYRNA BEACH POWER COMPANY LTD., L.L.P. TO THE STAFF'S ISSUES MEMORANDUM DATED SEPTEMBER 22, 1998

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"), pursuant to the directions contained in the Staff's memorandum regarding issues to be addressed in this docket, hereby respectfully submit this response.

As a preliminary matter, UCNSB and Duke New Smyrna request that the brief list of statutory issues, dated September 11, 1998, to which they and Staff agreed be included at the outset of the proposed list. This is only fair, since a substantial portion of the "proposed issues list" that was distributed on September 22

ACK _____ consists of FPC issues with which FPL concurs, followed by FPL AFA 2 _____ issues covering the same ground, with which FPC then concurs. Of APP _____ the four issues offered by FPC that modified the statutory issues to CAF _____ which Staff and UCNSB/Duke New Smyrna originally agreed, UCNSB/Duke CMU _____ which Staff and UCNSB/Duke New Smyrna originally agreed, UCNSB/Duke CTR _____ New Smyrna accepted two and, upon reflection, objected to two. As EAG 1 _____ the Petitioners' representatives have stated, they are in agreement LEG _____ with the September 11 issues list (including the new issue relating LIN 5 _____

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to transmission improvements and costs distributed at the September 21 workshop) developed by Staff.

The undersigned understands that the Staff's September 11 issues list (including the above-referenced new transmission issue) will be included with the list of issues set forth in the Staff's September 22 memo. If these issues are included, the Petitioners will simply incorporate them by reference in their statements of position relative to the other issues that parties have put forward. In the event they are not included, it will be necessary, in order to fully explain why the Petitioners dispute the wording of proposed alternative formulations, to articulate the statutory issues in full as the preferred wording and the basis for the Petitioners' disagreement. For purposes of this written response, the statute-based alternative will be stated.

Petitioners request that the following explanations be incorporated in the list, so that the basis for their objections is clear. Petitioners also request Staff to note that the proposed issue list contains many advanced by entities whose request for intervention have not been ruled upon. Finally, Petitioners assert their right to orally present their positions to the Prehearing Officer before any decisions are made regarding the issues to be included in the Prehearing Order.

Petitioners' specific responses are as follows.

FPC LEGAL ISSUE 1: Does the Florida Public Service Commission ("PSC") have the statutory authority to render a determination of need under Section 403.519, Florida Statutes, for a project that consists in whole or in part of a merchant plant that does not have as to that component of the project an agreement in place for the sale of firm capacity and energy to a state-regulated utility with

a statutory obligation to serve retail customers in this State?

UCNSB/DUKE NEW SMYRNA: Oppose inclusion of this issue on the grounds that the Commission's ruling on pending motions to dismiss will be dispositive of the issue.

FPC ISSUE 2: Is the proposed power plant needed for electric system reliability and integrity, as this criterion is used in Section 403.519, Florida Statutes?

UCNSB/DUKE NEW SMYRNA: Object to wording, as the statutory language, which requires the Commission to "take into account... the need for system reliability and integrity" has been modified to shade the issue to favor a particular theory of the case. (With respect to this criterion, unlike the cost-effectiveness criterion in the same sentence, the statute does not say that "the Commission shall consider whether the proposed power plant is needed for electric system reliability and integrity." Rather, it simply directs the Commission to "take into account . . . the need for system reliability and integrity.") Object also because the wording differs from the way the corresponding issue has been articulated in at least several other need determination cases. As Staff and UCNSB/Duke New Smyrna agreed during the initial ID meeting, the issue should simply track the statute, and should read:

Will the proposed power plant contribute to the need for electric system reliability and integrity for Peninsula Florida and/or the Utilities Commission, New Smyrna Beach, Florida (UCNSB)?

As an alternative, the Petitioners would be agreeable to wording this issue as follows:

Will the proposed power plant contribute to meeting the need for electric system reliability and integrity, as that term is used in Section 403.519, Florida Statutes?

FPC ISSUE 3: Is the proposed power plant needed to provide adequate electricity at a reasonable cost, as this criterion is used in Section 403.519, Florida Statutes?

UCNSB/DUKE NEW SMYRNA: Object to wording, as the statutory language, "take into account . . . the need for adequate electricity at a reasonable cost," has been modified to shade the issue to favor a particular theory of the case, and object further because as worded the issue is inconsistent with the manner in which this statutory issue has been articulated in at least several other need determination cases. The issue should simply track the statute, and should read:

Will the proposed power plant contribute to meeting the need for adequate electricity at a reasonable cost for Peninsular Florida and/or the UCNSB?

As an alternative, the Petitioners would be agreeable to wording this issue as follows:

Will the proposed power plant contribute to meeting the need for adequate electricity at a reasonable cost, as that term is used in Section 403.519, Florida Statutes?

FPC ISSUE 4: (No change.)

STAFF ISSUE 5: (No change.)

NEW STAFF ISSUE 6: (No change.)

FPC ISSUE 7: (No change.)

FPC ISSUE 8: Can the capacity of the proposed project be properly included when calculating the reserve margin of an individual Florida utility or the State as a whole in the absence of an agreement with the individual utility for the sale of firm capacity and energy from the project?

UCNSB/DUKE NEW SMYRNA: Object, because the issue is argumentative, and begs the question of the authority of the Commission to approve merchant capacity under the Siting Act, which is the subject of a separate issue (LEGAL ISSUE 1). The parties who proffer this issue can argue their position in response to the issue that asks whether the project contributes to the need for reliability and integrity.

FPC ISSUE 9: What impact, if any, will the proposed power plant have on natural gas supply or transportation resources of State regulated power producers?

UCNSB/DUKE NEW SMYRNA: Object, because the issue is argumentative. It assumes without legal basis that the Siting Act is designed to discriminate in favor of "State regulated" entities and that they have claims to resources beyond those to which they have contractual rights. Additionally, if the Commission finds the subject is appropriate, parties can address it in response to a broader, neutrally worded policy issue or issues. (The Petitioners suggest such issues at the end of this response. See below.)

FPC ISSUE 10: What impact will the proposed project have on the reliability of the generation and transmission systems of State regulated utilities?

UCNSB/DUKE NEW SMYRNA: Object, because the issue is argumentative and is worded to advance a particular theory of the case. Specifically, the phrase, "State regulated utilities" is an attempt to advance the position of some that the Siting Act is intended to restrict access to the Siting Act's permitting process to state-regulated, retail-serving utilities. That contention will be ruled upon when the Commission disposes of pending motions to dismiss. With respect to reliability of generation systems, the issue is duplicative of Issue 2. With respect to transmission systems, the issue is inappropriate because transmission-related issues of access, rights, priorities, and cost responsibilities are within the jurisdiction of the FERC.

FPC ISSUE 13: (No change.)

STAFF ISSUE 7: (No change.)

STAFF ISSUE 8: (No change.)

STAFF ISSUE 9: (No change.)

NEW STAFF ISSUE 9-A: What transmission improvements and other facilities are required in conjunction with the construction of the proposed facility, and were their costs adequately considered?

UCNSB/DUKE NEW SMYRNA: (No change.)

STAFF ISSUE 10: (No change.)

FPL ISSUE 1: Absent purchased power contracts for the output of the proposed power plant, does the Commission have sufficient information to assess the need for the proposed power plant under the statutory need criteria?

UCNSB/DUKE NEW SMYRNA: Object, because (1) the phrase, "Absent purchase power contracts" is designed to slant the question so as to advance a particular theory of the case, and (2) the more legitimate portions, *i.e.*, whether the Commission has sufficient information and whether the proposed power plant contributes to the "statutory need criteria" are covered in other issues.

The Petitioners would be agreeable to a more neutrally worded version of this issue, as follows:

Does the Commission have sufficient information to assess the need for the proposed power plant under the statutory need criteria?

FPL ISSUE 2: Absent purchased power contracts for the output of the proposed power plant, does the Commission have sufficient information to assess whether the needs, if any, of electric utilities in Peninsular Florida will be met and met consistently

with the criteria of Section 403.519, Florida Statutes?

UCNSB/DUKE NEW SMYRNA: Object, because both the phrase, "Absent purchased power contracts" and the references to needs of specific electric utilities are intended to slant the issue so as to advance a particular theory of the case, which relates to the legal issue that the Commission will dispose of when it rules on pending motions to dismiss. The portions of the issue relating to sufficiency of information and criteria of Section 403.519 are covered in other issues.

The Petitioners would be agreeable to the more neutrally worded version of this issue suggested above in response to FPL's ISSUE 1.

FPL ISSUE 3: Does Duke New Smyrna have a need by 2001 for the 484 MW of capacity (476 MW summer and 548 MW winter less 30 MW) represented by the proposed facility?

UCNSB/DUKE NEW SMYRNA: While on September 21, UCNSB/Duke New Smyrna indicated that they were willing to respond to this issue, UCNSB/Duke New Smyrna agree with Staff that this issue is duplicative of issues posing whether the proposed plant contributes to the need for reliability and integrity and the need for adequate electricity at reasonable cost.

FPL ISSUE 6: What are the terms and conditions pursuant to which the electric utilities having the need will purchase the capacity and energy of the proposed power plant?

UCNSB/DUKE NEW SMYRNA: Object, because the references to "terms and conditions" and to "electric utilities having the need" beg the questions (1) whether a contract is a necessary prerequisite to a request for a determination of need, and (2) whether an applicant must necessarily propose to satisfy a particular need of a specific utility. Both of these references are designed to slant the issue so as to advance a particular theory of the case. The Commission will necessarily rule on these matters when it disposes of pending motions to dismiss.

FPL ISSUE 12: (No change.)

FPL ISSUE 13: If Duke New Smyrna premises its determination of need upon Peninsular Florida without contracts from individual purchasing utilities, how would the Commission's affirmative determination of need affect subsequent determination of need by utilities petitioning to meet their own need?

UCNSB/DUKE NEW SMYRNA: Object, for the reason that as phrased the issue is argumentative. UCNSB/Duke New Smyrna suggest that this issue is more appropriately considered within the context of broader, neutrally worded policy issues, stated below.

FPL ISSUE 14: Will granting a determination of need as herein requested relieve electric utilities of the obligation to plan for and meet the need for reasonably sufficient, adequate and efficient service?

UCNSB/DUKE NEW SMYRNA: Object, for the reason that as phrased the issue is argumentative. UCNSB/Duke New Smyrna suggest that this subject is more appropriately considered, if at all, within the context of broader, neutrally worded policy issues, stated below.

FPL ISSUE 15: Will granting a determination of need as herein requested create a risk that past and future investments made to provide service may not be recovered and thereby increase the overall cost of providing electric service and/or future service reliability?

UCNSB/DUKE NEW SMYRNA: Object, for the reason that as phrased the issue is argumentative. UCNSB/Duke New Smyrna suggest that this subject is more appropriately considered, if at all, within the context of broader, neutrally worded policy issues, stated below.

FPL ISSUE 16: If Duke New Smyrna premises its determination of need upon Peninsular Florida without contracts from individual purchasing utilities, how would the Commission's affirmative determination of need affect subsequent determinations of need by QFs and other non-utility generators petitioning to meet utility specific needs?

UCNSB/DUKE NEW SMYRNA: UCNSB/Duke New Smyrna suggest that this subject is more appropriately considered within the context of broader, neutrally worded policy issues, stated below.

FPL ISSUE 17: If the Commission abandons its interpretation that the statutory need criteria are "utility and unit specific," how will the Commission maintain grid reliability and avoid uneconomic duplication of facilities in need determination proceedings?

UCNSB/DUKE NEW SMYRNA: Object, for the reason that as phrased the issue is biased, argumentative, and duplicative of other issues that address reliability of the grid and uneconomic duplicative of facilities. To the extent that this issue raises legitimate policy issues, the Petitioners suggest that such issues would be properly addressed in broader, neutrally worded policy issues as stated below.

FPL ISSUE 18: Will granting a determination of need as herein requested result in electric utilities being authorized to similarly establish need for additional generating capacity by reference to potential additional capacity needs which the electric utility has no statutory or contractual obligation to serve?

UCNSB/DUKE NEW SMYRNA: In three previous need determination proceedings, utilities proposed, and were issued determinations of

need for, units that they acknowledged were not needed to maintain reliability criteria. The utilities justified the need for those units -- not on reliability criteria -- but on such matters as backing out of oil and increasing Broker sales. The "State regulated utilities" have demonstrated that the concept of need in the Siting Act can take on more than one dimension.

To the extent that this issues raises legitimate policy issues, such issues would be more properly addressed in broader, neutrally worded policy issues, stated below.

FPL ISSUE 19: If Duke New Smyrna were allowed to proceed as an applicant, would the Commission "end up devoting inordinate time and resources to need cases," "wast[e] time in need determinations proceedings for projects that may never reach fruition," and "devote excessive resources to micromanagement of utilities, power purchase?"

UCNSB/DUKE NEW SMYRNA: Object, because the issue is one-sided, argumentative, and an attempt to invoke an order from QF-related proceedings that is inapplicable to this case. Further, UCNSB/Duke New Smyrna suggest that issues treating the implications of granting the determination of need are more appropriately considered within the context of broader, neutrally worded policy issues, stated below.

FPL ISSUE 20: Will granting a determination of need as herein requested reduce the level of justifiable conservation measures in Florida?

UCNSB/DUKE NEW SMYRNA: Object, for the reason that as phrased the issue is one-sided and argumentative. Further, UCNSB/Duke New Smyrna suggest that this issue is more appropriately considered within the context of broader, neutrally worded policy issues, stated below.

PROPOSED NEW POLICY ISSUES:

The UCNSB and Duke New Smyrna propose the following new policy issues:

NEW POLICY ISSUE 1: What, if any, policy considerations are applicable to the Commission's consideration of whether to grant a determination of need for the project? How, if at all, should these issues be considered in this proceeding?

NEW POLICY ISSUE 2: What, if any, policy implications would follow from the Commission's granting a determination of need for the project? How, if at all, should the Commission address these issues in this proceeding?

Respectfully submitted this 24 th day of September, 1998.



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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 24th day of September, 1998:

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