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September 28, 1998

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Ms. Blanca S. Bayo, Director  
Division of Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

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

Dear Ms. Bayo:

Enclosed for filing in the above docket are the original and fifteen (15) copies of FPC's Memorandum in Opposition to Petitioners' Motion to Deny FPC's Petition to Intervene.

Also enclosed is an additional copy of the above document for acknowledgement of filing. We request you acknowledge receipt and filing of the above by stamping this additional copy and return it to me in the self-addressed, stamped enveloped provided for your convenience.

If you or your Staff have any questions regarding this filing, please contact me at (813) 821-7000.

Very truly yours,

*Martin James Cramer*  
for Gary L. Sasso

- ACK \_\_\_\_\_
- AFA 1
- APP \_\_\_\_\_
- C/F \_\_\_\_\_
- CMM Enclosures
- CTR cc: Counsel of Record
- EAC GLS:jlc
- LEG 1
- LIN 5
- OPC \_\_\_\_\_
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FPC-RECORDS/REPORTING

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: Sept. 28, 1998

FPC'S MEMORANDUM IN OPPOSITION TO  
PETITIONERS' MOTION TO DENY FPC'S PETITION TO INTERVENE

Florida Power Corporation ("FPC") submits this memorandum in opposition to Petitioners' Motion to Deny FPC's Petition to Intervene.

Petitioners' Motion has an Alice In Wonderland quality about it. Petitioners assert that merchant plants may be properly sited in this State under Section 403.519 and the Power Plant Siting Act, and then -- on the basis of that assertion -- they reason that retail utilities, like FPC, have nothing to complain about. Of course, the principal reason that FPC and other utilities like it have sought to intervene in this proceeding is to demonstrate to the Commission that merchant plants may not be lawfully sited in this State and that only retail utilities like FPC (and independent power producers under contract with them) may avail themselves of Section 403.519 and the Power Plant Siting Act. Yet petitioners seek to exclude from this proceeding the only parties who are able to present this vitally important position to the Commission.

Have the Intervenors raised important issues that must be addressed by the Commission in this case? Apparently,

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Petitioners think so. They have retained two Florida State University law professors to write a 57 page memorandum opposing FPC's 18 page motion to dismiss the Joint Petition.

In fact, prior to instituting this proceeding, Duke asked the Commission to decide in a declaratory statement proceeding whether Duke was allowed to file a need petition. The Commission declined to grant such a declaratory statement because the requested pronouncement "would carry implications for the electric power industry statewide." In re: Petition for Declaratory Statement by Duke Energy New Smyrna Beach Power Company, L.L.P. Concerning Eligibility to Obtain Determination of Need Pursuant to Section 403.519, F.S., Rules 25-22.080 and .081, F.A.C., and Pertinent Provisions of the Florida Electrical Power Plant Siting Act, Dkt. No. 971446-EU, Order No. PSC-98-0078-FOF-EU (Jan. 13, 1998) (emphasis added).

Duke has now simply initiated the proceeding that it previously wanted Commission permission to pursue. Of course, in order to grant the relief that Duke requests, the Commission must decide expressly or by default exactly the issue that Duke raised in its petition for declaratory statement. Yet, despite the fact that the full Commission has acknowledged that the resolution of this issue "would carry implications for the electric power industry statewide," Duke would now have the Commission believe that granting the Joint Petition will have no impact on FPC that should be of any concern to this Commission.

It is utterly unrealistic to assert that, in a docket like this, where Petitioners are asking this Commission to change the existing relationship between independent power producers like Duke New Smyrna and retail utilities like FPC -- and to alter fundamentally the role that utilities like FPC fulfill under the current regulatory framework -- the utilities are not proper, indeed indispensable, parties to this proceeding. The only way to reach this result is to do what Duke has done, namely, assume the outcome of FPC's motion to dismiss -- to assume, in other words, that the Joint Petition does not call upon the Commission to alter the role that retail utilities have played under Section 403.519 as indispensable parties in any need proceeding. To deny FPC's petition to intervene, however, without a full consideration of its motion to dismiss the Joint Petition, would plainly put the cart before the horse by in effect pre-judging the outcome of FPC's motion to dismiss.

The fact remains, if FPC is right on the merits, then granting the Joint Petition will change the role that retail utilities play in the siting of generating plants in this State, and there is no way for the Commission to give this issue a full airing if the very parties who seek to raise it are excluded altogether from this proceeding. To put it another way, if FPC is correct that the Nassau decisions control this proceeding and that the result reached in the Nassau rulings must be reached in this case under the plain language of the applicable statutory provisions and their legislative history, then it will follow

that FPC is an indispensable party to this proceeding. But this is the very issue that FPC has presented to the Commission on the merits by means of its motion to dismiss.

To be sure, Duke would like to be able to present this issue to the Commission unilaterally, without the pesky interference of other interested parties. But that is neither consistent with the law on intervention, nor does it make good policy. Before addressing these serious questions, the Commission should affirmatively want to have the benefit of hearing from both sides of the controversy, not merely one proponent of its own economic interests, purporting to represent the best interests of the ratepayers of this State whom Duke has no obligation to serve.

#### **Impact on Statutory Planning Responsibilities**

There can be no question that the interests that FPC asserts -- namely, safeguarding its own role and responsibilities for planning and siting new generating capacity under the existing statutory and regulatory framework -- will be impacted directly and immediately by this proceeding. FPC demonstrated at length in its petition to intervene that its ability to plan for generation and transmission needs will be impaired if merchant plants are permitted to plan and build new generation outside the planning and regulatory framework of this State. Merchant plants would introduce a wildcard into the planning process, confounding the ability of utilities to gauge when and where more generating and transmission capacity would be needed.

Petitioners contend, nonetheless, that FPC cannot legitimately argue that merchant plant projects, like the proposed project, will impair FPC's ability to plan its system because FPC "could simply ignore the Project's presence and conduct its planning activities accordingly." Petitioners' Motion, at 6. Of course, Petitioners assert that "it would probably be imprudent for FPC to do so." Id. That is the rub. Once they are let into a regulatory framework where they do not belong, merchant plants will be a factor that FPC planners will have to take into account. But because they are not subject to state regulation, FPC has none of the conventional parameters available to it to gauge when, where, or on what terms a merchant plant may provide power to this State.

Petitioners contend that FPC can deal with this uncertainty by "normal, routine business communications," i.e., by "call[ing] or writ[ing] Duke New Smyrna to inquire about the status of the Project (during development) and about the availability of power sales from the Project." Id. Plainly, however, the Legislature did not believe that "routine business communications" would provide a sufficient planning tool for the Commission and the regulated utilities of this State when it enacted extensive planning legislation -- applicable to FPC, but not to merchant plants. Neither FPC nor the Commission has any basis to hold Duke to whatever cryptic or noncommittal assurances it may choose to provide, in its unilateral discretion, in response to such "routine business communications."

The Legislature established specific groundrules and procedures for generation planning -- through the 10-year site plan process, the Florida Energy Efficiency and Conservation Act ("FEECA"), and the Grid Bill generally -- and it did so for good reason. As FPC demonstrated in its petition to intervene (and motion to dismiss), these planning requirements are of a piece with Section 403.519 (enacted as part of FEECA) and the Power Plant Siting Act (which originally contained the 10-year site plan requirement). By definition, merchant plants fall outside these state regulatory planning requirements, and, by definition, forcing their introduction into a framework where they do not belong will have an impact on the current regulatory and planning responsibilities of utilities like FPC.

Petitioners, nonetheless, in a parenthetical -- with no explanation -- make the extraordinary assertion that Duke will deem itself subject to the 10-year site plan requirement by virtue of deeming itself a "utility" under Section 366.02(3) (actually meaning subsection (2), since subsection (3) does not define "utility"), only "[i]f the determination of need is granted." Id. at 7. It is an interesting proposition that Duke may decide for itself which obligations of state-regulated utilities it will meet and which it will not. Putting that aside, however, Duke's argument flies directly in the face of the position it took in the Staff merchant plant workshop (where it asserted that merchant plants were not covered by the 10-year site plan requirement and would resist filing such plans to avoid

disclosing competitively sensitive information), and it amounts to a desperation attempt to qualify for admission to the power plant siting process.

Section 366.02(2) defines "electric utility" to mean "any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electric generation . . . system within the state." (Emphasis added). Insofar as Duke is concerned, it will neither be a state "utility" nor will it operate an electric generation "system" within this State. Further, the 10-year site plan requirement has no application to merchant plant developers like Duke. Section 186.801 requires each utility to file with the Commission a 10-year site plan estimating "its power-generating needs." A merchant plant developer has no "power-generating needs." As the Commission and Florida Supreme Court determined in the Nassau decisions, only retail utilities have power generating "needs" because only such utilities must serve retail customers under state law. A merchant plant developer's only "needs" are profits, and it can make those any which way it chooses and to whatever extent it chooses.

This is further demonstrated by the fact that, as part of the 10-year site planning process, utilities are directed to identify, and the Commission is directed to review, "[t]he need . . . for electrical power in the area to be served." Section 186.801(2)(a), Fla. Stat. (emphasis added). Duke has no obligation, and has made no commitment, to serve any "area" in



this State through its merchant plant. Only retail utilities have such an obligation.

In short, Duke's hollow -- and unenforceable -- promise to provide an after-the-fact 10-year site plan if its need determination is granted, provides no cure to the uncertainty that will befall FPC and other retail utilities that are plainly subject to statutory planning requirements, if merchant plants are admitted to the State.

As discussed in FPC's petition to intervene, the impact of merchant plants on the ability of retail utilities to meet their statutory responsibilities to plan generation and transmission system needs provides a more than sufficient basis to warrant intervention in this administrative proceeding as a matter of right. E.g., Osceola County v. St. Johns River Water Mgmt. Dist., 486 So. 2d 616, 617 (Fla. 5th DCA 1986) (county with statutory duties and responsibilities with respect to planning for water management and conservation has a sufficient interest in state activities that affect those duties and responsibilities to provide the County standing to challenge Water District's consideration of consumptive use permit), aff'd, 504 So. 2d 385 (Fla. 1987); Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400, 403, n.4 (Fla. 1996) (school boards allegedly prevented from carrying out their statutory duties have standing to seek declaratory relief that adequate education is a fundamental right under the Florida Constitution).

Further, the question whether this interest falls within the zone of interests that this proceeding is intended to protect goes to the very heart of FPC's motion to dismiss. In its motion, FPC has demonstrated that Section 403.519 is part of an integral statutory scheme for regulating retail utilities like FPC, with a statutory obligation to serve electric consumers in this State, and that Section 403.519, in particular, is a tool to be used for retail utilities -- and by the Commission in the exercise of its regulatory authority over such utilities -- to plan and build new generation in this State. It is that very role and responsibility that FPC is seeking to protect by intervening in this proceeding. The Commission can conclude that FPC's interests are not implicated in this proceeding only if it rejects FPC's contentions on the merits.

Sensitive to these concerns, the Commission Staff stated in commenting on FPC's petition to intervene on the basis of these same interests in Duke's prior declaratory statement proceeding, "Staff believes that while some or all of . . . FPC's concerns may meet the tests [for standing to intervene] when such a need determination application is actually acted upon, the present petition [for a declaratory statement] is preliminary to the stage at which FPC's actual standing would arise." PSC Staff Memorandum, Dkt. No. 971446-EU (Dec. 2, 1997), at 3. In the same vein, Duke likewise contended, "All of FPC's purported injuries to its substantial interests are linked to the construction of a potential future merchant power plant . . . ." Duke Energy New

Smyrna Beach Power Company, L.L.P.'s Motion to Dismiss Florida Power Corporation's Petition to Intervene and to Deny Request for Administrative Hearing, Docket No. 971446-EU, Filed Dec. 8, 1997, at 4.

In now opposing FPC's petition to intervene in this need proceeding, it is clear that Petitioners' objective is protect the Commission's ears from ever hearing the other side of the story before Duke gets what it wants. This position makes for bad law and bad policy, and it should be rejected.

#### Impact on Transmission System Integrity

Finally, FPC has identified a separate ground for intervening that independently warrants granting FPC's petition, namely, that the granting of the relief requested by the Joint Petition will have a negative impact on FPC's transmission grid. Duke does not take issue with FPC's representations that this will occur, but argues that, if it does, it is a concern for the Federal Energy Regulatory Commission ("FERC"), not this Commission. This provides yet additional confirmation that Duke is seeking to operate outside the statutory and regulatory framework of this State.

Section 403.519 could not be clearer that, in ruling on a need petition, this Commission is obligated to consider "electric system reliability and integrity." Whether or not FERC has jurisdiction over aspects of transmission access has nothing to do with whether this Commission must consider in a need proceeding, and as part of its general responsibility under the

Grid Bill, any impact the proposed project may have on transmission system reliability and integrity. Plainly this issue falls within the scope of this proceeding.

It follows that FPC has every legitimate interest in participating in this proceeding where issues concerning the reliability and integrity of FPC's own transmission system will be decided. This is not just an issue of cost; rather, it is an issue of whether, where, when, and how the proposed project may be constructed.

Further, the concerns that FPC raises are not -- contrary to what petitioners assert -- merely speculative. To be sure, FPC does not know all the dimensions of the transmission problems that the proposed project will create, but this is because the Joint Petition on its face, together with its exhibits, does not provide FPC with adequate information to determine the full scope of these problems. But it is apparent from the Joint Petition that the proposed project will have an impact on FPC's transmission system that will not be alleviated by the minimal construction of 115 kV facilities that the Joint Petition proposes. Indeed, FPC believes that the proposed project will have a deleterious impact on the Southern Company/Peninsular Florida interface. This must be of concern to the Commission, and FPC should be given leave to intervene on this ground, too.

#### CONCLUSION

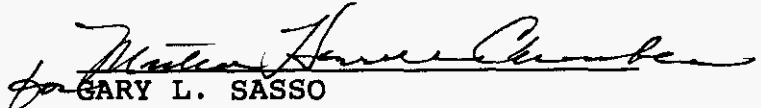
For the foregoing reasons, FPC respectfully requests that the Commission reject Petitioners' Motion to Deny FPC's Petition

to Intervene, and allow FPC the opportunity to present its motion to dismiss to the full Commission and otherwise participate in this proceeding by granting FPC's petition to intervene.

DATED this 28th day of September 1998.

Respectfully submitted,  
FLORIDA POWER CORPORATION

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to counsel of records as follows:

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