

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of :
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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



PROCEEDINGS: ORAL ARGUMENT

BEFORE: COMMISSIONER JOE GARCIA
Prehearing Officer

DATE: Thursday, October 1, 1998

TIME: Commenced at 12:05 p.m.
Concluded at 12:55 p.m.

PLACE: Betty Easley Conference Center
Room 152
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: JOY KELLY, CSR, RPR
Florida Public Service Commission
Chief, Bureau of Reporting

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1 **APPEARANCES:**

2 **ROBERT SCHEFFEL WRIGHT and**
3 **JOHN T. LAVIA, III, Landers & Parsons, 310 West**
4 **College Avenue, Tallahassee, Florida 32302, appearing**
5 **on behalf of Duke Energy New Smyrna Beach Power**
6 **Company Ltd., L.L.P.**

7 **JAMES A. MCGEE, Florida Power Corporation,**
8 **P. O. Box 14042, St. Petersburg, Florida 33733-4042,**
9 **appearing on behalf of Florida Power Corporation.**

10 **JAMES D. BEASLEY, Ausley & McMullen, 227 South**
11 **Calhoun Street, Tallahassee, Florida 32302, appearing on**
12 **behalf of Tampa Electric Company.**

13 **WILLIAM B. WILLINGHAM and MICHELLE HERSHEL,**
14 **P. O. Box 590, Tallahassee, Florida 32302, appearing**
15 **on behalf of Florida Electric Cooperatives**
16 **Association, Inc.**

17 **MATTHEW M. CHILDS, and CHARLES GUYTON, Steel**
18 **Hector & Davis, 215 South Monroe Street, Suite 601,**
19 **Tallahassee, Florida 32301, appearing on behalf of**
20 **Florida Power & Light Company.**

21 **LESLIE J. PAUGH, Florida Public Service**
22 **Commission, Division of Legal Services, 2540 Shumard**
23 **Oak Boulevard, Tallahassee, Florida 32399-0870,**
24 **appearing on behalf of the Commission Staff.**

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P R O C E E D I N G S

(Hearing convened at 12:05 p.m.)

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3 **COMMISSIONER GARCIA:** Good morning or good
4 afternoon. I've got just under an hour, so I'm going
5 to ask for your indulgence, and in particular you,
6 Mr. Wright, since you have to answer all of this.

7 As I guess most of us in the room have had
8 to read everyone's petition, I hope that we can limit
9 the discussion a little bit. I know you want some
10 time to answer each of them, but if we can try to
11 limit it, I hope that maybe -- ten minutes a piece as
12 a max, and we'll give you 20 and you can break that up
13 anyway you want to. Do you need more than that? I'd
14 hope you'd need even less than but --.

15 **MR. WRIGHT:** Whatever your pleasure is,
16 Commissioner Garcia. I think that our side ought to
17 have the same amount of time that their side has.

18 **COMMISSIONER GARCIA:** All right. If you
19 want, I'll limit their time even more. But I'm just
20 saying I've read all of this. I think your response
21 is going to be generally pretty similar on each of
22 these.

23 **MR. WRIGHT:** I think that's true. And to
24 the extent that's true, I'm prepared to summarise and
25 be quiet as quickly as possible.

1 **COMMISSIONER GARCIA:** Good. Do you need to
2 read anything, a notice in, or are we --.

3 **MS. PAUGH:** For the record, pursuant to
4 notice issued September 16th, 1998, this time and
5 place have been set for oral argument in Docket
6 No. 981042-EM on petitions for leave to intervene and
7 responses thereto.

8 **COMMISSIONER GARCIA:** We'll take
9 appearances.

10 **MR. CHILDS:** Commissioner, my name is
11 Matthew Childs of the firm of Steel, Hector and Davis,
12 appearing on behalf of Florida Power and Light
13 Company, and with me as Charles Guyton of the same
14 firm.

15 **MR. MCGEE:** I'm Jim McGee appearing on
16 behalf of Florida Power Corporation.

17 **MR. BEASLEY:** James D. Beasley of the law
18 firm of Ausley & McMullen representing Tampa Electric
19 Company.

20 **MR. WILLINGHAM:** Bill Willingham and
21 appearing with me is Michelle Hershel on behalf of the
22 Florida Electric Cooperatives Association.

23 **MR. WRIGHT:** Robert Scheffel Wright, law
24 firm of Landers & Parsons, appearing on behalf of
25 Duke Energy New Smyrna Beach Power Company,

1 Limited L.L.P., and the Utilities Commission, City of
2 New Smyrna Beach, Florida. Also appearing with me is
3 John T. Lavia, III, same law firm.

4 MS. PAUGH: Leslie Paugh on behalf of Staff
5 and Grace Jaye on behalf of Staff.

6 COMMISSIONER GARCIA: Okay. Let's do this,
7 we'll give each side -- we'll start with ten minutes,
8 if that's agreeable to everyone. If you can use less,
9 I would be greatly appreciative.

10 MR. CHILDS: There are two pleadings in the
11 sense that there's Florida Power and Light's Petition
12 to Intervene, there's a response to that petition, and
13 also an affirmative pleading by Duke New Smyrna, which
14 has been identified in the Notice as though it was
15 going to be argued separately. If you prefer, we can
16 argue everything at once but that's also in
17 anticipation of some points that Mr. Wright may make
18 that, you know, are addressed in his pleading but may
19 not be addressed orally today. If that's better,
20 that's what we'll do.

21 COMMISSIONER GARCIA: Let's take it all
22 together. We're better off.

23 MR. WRIGHT: One procedural question.

24 COMMISSIONER GARCIA: Sure.

25 MR. WRIGHT: Are we going to have all of the

1 parties seeking intervenor status present and then us?
2 Or are we going to do FPL then us, fPC then us, and so
3 on?

4 **COMMISSIONER GARCIA:** I think it would
5 probably be much more efficient in terms of your
6 arguments if we can handle them all at once and then
7 you can answer that. And then, Mr. Wright, if you
8 need more time, ask for more time. Again, I hope and
9 pray you won't need it. Likewise, gentlemen, if
10 Mr. Childs makes a point which clearly applies to you
11 also, I would appreciate it if you can trust that
12 Staff and myself have thoroughly read everything you
13 have filed and so that may take a little bit less
14 time.

15 **MR. CHILDS:** If you're ready, I'll begin.

16 **COMMISSIONER GARCIA:** Whenever you're ready,
17 Mr. Childs.

18 **MR. CHILDS:** Commissioner, the rationale
19 chosen by Duke in support of its request in this
20 proceeding directly conflicts with the Commission's
21 prior interpretation of Section 403.519, and with the
22 Florida Supreme Court's endorsement of that
23 interpretation.

24 For instance, there are two cases involving
25 Nassau, and in the second of those, that is the one

1 issued in 1994, the Supreme Court was asked to reverse
2 a decision by this Commission that a co-generator
3 lacking a contract with an electric utility to sell
4 capacity, would be a proper applicant for a
5 determination of need. In dismissing the petition,
6 this Commission said, "Only electric utilities, or
7 entities with whom such utilities have executed a
8 power purchase contract, are proper applicants under
9 the for need determination." The Court concluded on
10 appeal that this construction by the Commission was
11 consistent with the plain language of the pertinent
12 provisions of the Act and with the Court's 1992
13 decision involving Nassau.

14 Earlier this year Duke New Smyrna sought a
15 declaratory statement concerning construction of the
16 term "applicant" and that petition was ultimately
17 denied by this Commission on the basis that the
18 question posed would be a statement of general
19 applicability interpreting law and policy.

20 The point is that in this proceeding Duke
21 New Smyrna, of necessity, is asking the Commission to
22 interpret law and policy, and we think that it's
23 appropriate for those who are affected by that policy,
24 the electric utilities, to participate. We think this
25 is consistent with all precedent on the issue.

1 It is our position, however, that as to the
2 interpretation, that's not really open; that the law
3 is as stated by the Court. Nevertheless, we need to
4 be a party to present that argument to you.

5 Another conclusion by the Commission in
6 prior determinations, or in rejecting a prior
7 application, was that a need determination proceeding
8 is designed to examine the need resulting from a
9 electric utility's duty to serve customers. And the
10 Commissioners found that nonutility generators, such
11 as Nassau in that case, had no similar need because
12 they are not required to serve. We think the same
13 argument is applicable here. That New Smyrna has no
14 obligation to serve; it has, therefore, no need.

15 There has been some suggestion by Duke that
16 you should not apply that holding to this case because
17 they are not a co-generator or a small power producer.
18 And I would suggest that would cause an absurd result.
19 Co-generators were in a preferred position. They were
20 to be encouraged. I don't think that that's quite the
21 same for Duke New Smyrna. But in any event,
22 regardless, they are in exactly the same position as a
23 co-generator in that they have no need because they
24 have no duty to serve.

25 The Court referred to its earlier decision

1 and held specifically that it had rejected the
2 argument that the Siting Act does not require the
3 Commission to determine need on a utility-specific
4 basis, and noted that it agreed with the Commission
5 that the need to be determined is the need of the
6 entity ultimately consuming the power.

7 Here we have a situation we're ignoring
8 those pronouncements, constructions of law and the
9 legal implications of this Commission's and the
10 Court's conclusions. Nassau seeks the same result
11 that's already been before this Commission and
12 previously rejected by this Commission and by the
13 Court. It seeks to have the Commission determine need
14 absent any contract for the sale of capacity, not on
15 the basis of any individual need but it presents need
16 as though it were for Peninsular Florida.

17 I'm going to try to move on because the time
18 is short. But I want to point out that we have made
19 the argument that we are directly affected, and that
20 our interests are determined in this proceeding, not
21 just that our interests are adversely affected. There
22 are two alternative standards under the Administrative
23 Procedure Act. And I would submit that Duke can't
24 avoid that result simply by providing those facts.

25 Duke has ignored the Commission's rule which

1 requires that affected utilities be identified and
2 that there be a general description of that effect.
3 That's 25-22.081(1). Duke responds and simply says
4 the only utility affected is New Smyrna. And I would
5 respectfully disagree and call the Commission's
6 attention to Order No. 20671 entered by this
7 Commission on January of 1989, where the Staff sought
8 to implead Florida Power and Light saying Florida
9 Power and Light is a necessary party to a proceeding
10 involving a need determination by a co-generator.
11 That was before the Court's decision and before this
12 Commission's decision saying how they were going to do
13 it.

14 And in that case the -- excuse me, that
15 Order, on Page 1, the Commission specifically
16 identified Rule 25-22.081 as the rule requiring
17 information of the proposed generating capacity -- of
18 the impact of the proposed generating capacity on the
19 electric utilities and other qualifying facilities
20 connected to the statewide electric, transmission and
21 distribution grid. We would argue that your own rules
22 would contemplate and recognize that we're affected.
23 Clearly, that's the result, because in this case Duke
24 asks -- indirectly asks that you determine the need.
25 And that then under the Act that determination would

1 be presumptive and could not be challenged in any
2 other forum. A couple of other short points.

3 At some length Duke New Smyrna argues about
4 the precedent, which, first of all, it talks about
5 what the purpose of this proceeding is. And with all
6 due respect they misstate it. But they say that it is
7 to determine whether the project is consistent with
8 the needs of Florida electric customers for reliable
9 electric power supplies at reasonable costs, and to
10 assure that the project is the most cost-effective
11 alternative available to provide power. And they cite
12 that repetitively in their response. In support, they
13 identify two cases. The first is Floridians for
14 Responsible Utility Growth and the other is the
15 Commission order involving Dade County Resource
16 Recovery.

17 The second case has nothing to do with the
18 proposition they identify. It doesn't mention it.
19 Instead it, says that in the case of a waste recovery
20 facility, which the legislature by specific Florida
21 Statute had found was the best way to dispose of
22 waste, that the Commission would address need with
23 that in mind.

24 The first case, to the contrary, does not
25 support the proposition identified by Duke at all. It

1 doesn't even mention it. Instead, it identifies the
2 Supreme Court's Nassau case, and specifically Footnote
3 9 out of that case, where the Court said, "Without
4 knowing where the power is going to go, that is
5 specifically because of a contract, the Commission
6 cannot make a meaningful --" actually it said, "it
7 would render meaningless the requirement under the Act
8 that the Commission find whether that is the most
9 cost-effective way to meet the need." So here we have
10 cited as authority for the proposition as to the
11 purpose of the Act a decision which says it's not.

12 We think that Duke has chosen to proceed
13 this way, which is consistent with the method adopted
14 in their Request for Declaratory Judgment as to
15 whether they are a proper applicant, and I think it's
16 an ill-advised request. The Commission is being asked
17 to make determinations which will affect the interests
18 of all of the utilities. And the Commission has the
19 responsibility and duty to understand and know whether
20 there is an impact and the extent of it. Thank you.

21 **COMMISSIONER GARCIA:** Thank you. Mr. McGee.

22 **MR. MCGEE:** Commissioner, Florida Power's
23 Petition to Intervene describes a variety of reasons
24 why its substantial interests are affected by Duke New
25 Smyrna Beach's request to determine the need for its

1 proposed merchant plant. But in the interest of time,
2 I'll only address two of those here and try to do that
3 briefly. One is a broad-based and fairly far reaching
4 issue and the other one is fairly specific and
5 focussed.

6 With respect to the broad-based issue the
7 concern is this: Duke's request for authority to
8 build a merchant plant, if granted, would
9 fundamentally alter the structure of the state's
10 statutorily mandated approach to planning and siting
11 new generation in Florida. And this, in turn, would
12 directly and adversely affect Florida Power's
13 substantial interest in fulfilling its obligations
14 under the same statutory approach to plan and provide
15 for the reliability and integrity of its electric
16 system. And by characterizing the implication of
17 Duke's request as profound, I'm not attempting to
18 exaggerate the significance of our position. In the
19 early declaratory statement proceeding the Commission
20 itself recognized that allowing EWGs, such as Duke, to
21 file a need petition would, in its words, "carry
22 implications for the electric power industry
23 statewide."

24 Now, this same concern over the profound
25 impact of Duke's petition on the existing statutory

1 scheme in Florida is also the basis of Florida Power's
2 Motion to Dismiss Duke's petition. But yet the only
3 way that Duke can claim that utilities like Florida
4 Power are not proper parties to this proceeding,
5 despite this profound impact, is to assume that
6 Duke -- as Duke has done, to assume the outcome of
7 Florida Power's Motion to Dismiss.

8 In other words, that the joint petition does
9 not call on the Commission to alter the role of
10 utilities that they have traditionally played under
11 Section 403.591 as indispensable parties in any need
12 proceeding. But to deny Florida Power's petition to
13 intervene, without a full consideration of its Motion
14 to Dismiss, would clearly put the cart before the
15 horse, and it would do this by effectively prejudging
16 the outcome of the Florida Power's Motion to Dismiss.

17 But the important fact remains that if
18 Florida Power's position is right on the merits, then
19 granting the joint petition will change the role that
20 retail utilities play in the siting of generation in
21 the state of Florida. And there's no way for the
22 Commission to give this issue full consideration
23 unless the very parties that raised that issue have
24 the opportunity to participate in this proceeding as a
25 party.

1 The other more specific basis for
2 intervention is the effect on Florida Power's
3 substantial interest that arise from the proposed
4 merchant plant and its impact on Florida Power's
5 transmission system.

6 The plant that Duke proposes would be
7 interconnected to an existing 115 kV substation that's
8 owned by the joint petitioner, the Utilities
9 Commission and New Smyrna Beach. And this substation
10 itself would be interconnected to the transmission
11 systems of both Florida Power and Florida Power and
12 Light. And I think this, in and of itself, makes
13 Florida Power an affected utility, as that term is
14 used in Commission Rule 25-22.080 and .081.

15 But the scope of this proceeding includes
16 not only the proposed power plant for which the need
17 determination is sought, but it also includes the
18 related facilities and improvements that are necessary
19 for the operation of that plant. And among these
20 necessary improvements, Duke's petition states that
21 approximately 25 miles of additional transmission
22 lines are planned to support the plant. And this
23 upgrade encompasses Florida Power's transmission
24 system. And Duke goes on to allege with this 25-mile
25 upgrade, the transmission grid will accommodate the

1 output of its plant. Florida Power disputes this
2 allegation and contends that further improvements will
3 be necessary to avoid adversely impacting Florida
4 Power's transmission system, and by necessary
5 implication the transmission grid of the state of
6 Florida.

7 **COMMISSIONER GARCIA:** Mr. McGee, but
8 isn't -- precisely to the point that your statement of
9 it impacting the transmission grid of Florida, isn't
10 that for this Commission to decide when that petition
11 is placed before us? Aren't we, in essence,
12 representing the state in that case? And why do we
13 need your participation if our general interest is to
14 represent the state as a Commission? What's good for
15 the state I would assume is going to be good for you
16 since you've participated in that planning process
17 that the state has had.

18 **MR. MCGEE:** And, of course, the question of
19 whether it, in fact, is good for Florida Power, and
20 which ties into its substantial interest in protecting
21 its transmission system and making sure that it's good
22 is something that Florida Power needs the opportunity
23 to pursue in this proceeding. Because not only the
24 power plant but the improvements necessary to
25 accommodate that power plant are directly in front of

1 the Commission.

2 The Commission certainly has jurisdiction
3 over the transmission grid in the state of Florida.
4 But in this case, Florida Power's transmission system
5 is an integral part of that transmission grid. And we
6 need our interest protected, as well as giving us the
7 opportunity to make sure that the Commission is fully
8 informed on this subject. Because Duke has contended
9 that a level of improvement to be made to that grid is
10 adequate when Florida Power has reason to believe
11 that, in fact, it will not be adequate. That's
12 something that not only we need to know, but I think
13 the Commission needs to know as well.

14 Duke also alleges that the proposed plant
15 will not, in its words, "burden the transmission
16 system or violate any transmission constraints or
17 contingencies in Peninsular Florida or elsewhere."
18 Again, Florida Power has serious concerns that the
19 proposed plant, in fact, may adversely affect the
20 Florida-Georgia interface. And this proposed impact
21 would affect Florida Power's substantial interest in
22 the unimpaired operation of the interface in general,
23 and in the operation of Florida Power's allocated
24 share of that interface in particular.

25 As a party to the proceeding, Florida Power

1 would also have the opportunity to pursue this subject
2 in order to protect its substantial interest, as well
3 as fully advising the Commission on what we regard as
4 a very important issue.

5 But in response to this, Duke contends that
6 Florida Power's transmission issues are subject to
7 FERC jurisdiction, and, therefore, fail to provide
8 standing before this Commission. While FERC may have
9 jurisdiction over transmission access and over cost
10 responsibility for improvements that are necessary
11 because of this access, I think it's fair to say that
12 it's beyond question that this Commission has
13 jurisdiction over electric system reliability and
14 integrity, and over the reliability of the state's
15 transmission grid, as well as jurisdiction over
16 improvements to the grid that are necessary to
17 maintain that reliability.

18 The transmission issues raised by Duke's
19 petition and disputed by Florida Power fall squarely
20 within this jurisdiction. And we think that Florida
21 Power's substantial interest in these issues also
22 warrants its intervention.

23 **MR. BEASLEY:** I'll be very brief.

24 We filed other intervention on September
25 18th. Tampa Electric concurs in the arguments that

1 Florida Power and Light and Florida Power Corporation
2 have presented.

3 The company is a similarly situated
4 Commission-regulated electric utility serving over a
5 half million customers in Peninsular, Florida. The
6 petitioners' petition in this proceeding is predicated
7 on the need of Peninsular Florida. The relief they
8 seek would directly affect Tampa Electric, and we
9 would urge that you grant us intervention as a party
10 this proceeding.

11 **MR. WILLINGHAM:** Commissioner, I'm here on
12 behalf of FECA, the Florida Electric Cooperatives
13 Association and its 17 members. Our membership
14 consists of 15 distribution co-ops, which are
15 essentially retail electric utilities, and two
16 generation co-ops, which are Seminole and AEC. 14 of
17 my members own the two generation co-ops, so there's
18 an interrelationship there.

19 FECA petitioned to intervene in this
20 proceeding because we believed that every FECA member
21 will be substantially affected by the outcome of this
22 proceeding no matter what the outcome is. As set
23 forth in our petition, this proceeding involves
24 policymaking that will affect all 17 of our members.
25 An addition to proposed plant most likely will result

1 in uneconomic duplication of the generation units
2 owned either directly or indirectly by each member.
3 And it absolutely will affect the planning process
4 that each member goes through.

5 COMMISSIONER GARCIA: What did you just say?
6 It will affect --

7 MR. WILLINGHAM: The planning process.

8 COMMISSIONER GARCIA: No. Before that.
9 Uneconomic -- what was that?

10 MR. WILLINGHAM: It will possibly or most
11 likely will lead to an uneconomic duplication of our
12 generation facilities that we already have in place.

13 COMMISSIONER GARCIA: Is not New Smyrna a
14 member of --

15 MR. WILLINGHAM: No. New Smyrna is a
16 municipal. These are -- I represent the cooperatives.

17 COMMISSIONER GARCIA: Okay.

18 MR. WILLINGHAM: Duke responded to our
19 petition with two arguments. The first argument is
20 that our substantial interests are too remote or
21 speculative; that they are outside the zone of
22 interest in this proceeding.

23 The second argument is that only two of
24 FECA's 17 members own generating units. I'd like to
25 address the second argument first.

1 On Page 12 of the Petition, Duke incorrectly
2 states that only two of our members own generating
3 units. In fact, all the members own generation either
4 directly or indirectly through the generation G&Ts.

5 Duke's argument is based upon those
6 statement of the facts and it should be ignored.
7 Moreover, Duke's argument is an admission that either
8 AEC or Seminole could, on their own, intervene in this
9 petition -- in their petition. And if we're denied
10 here today, we'll simply refile, Michelle and I will,
11 on behalf of either AEC or Seminole, or possibly both.

12 Duke's other argument also lacks merit.
13 Previous Commission orders are directly on point, I
14 believe, and the statutes define the zone of interest
15 that any retail utility should fall within. In Order
16 98-0078, which was issued on January 13th of this
17 year, the Commission stated that, "A statement to the
18 effect that exempt wholesale generators as proper
19 applicants under the Siting Act would be a statement
20 of general applicability, interpreting law and policy.
21 Such a statement would not merely affect petitioner
22 and petitioner's set of circumstances only, but would
23 carry implications for the electric power industry
24 statewide." In that Order -- that's Page 2 of the
25 Order that the Commission identified the zone of

1 interest and recognized that utilities will be
2 affected in such a proceeding.

3 On the same date this Commission issued
4 Order 98-0074, which granted Peace River Electric
5 Cooperative, which is one of my members, intervention
6 into a proceeding that involved similar issues.

7 Peace River -- I'm sorry, the only
8 substantive difference between the facts at issue in
9 Order 98-0074 and the instant case is that we knew
10 that Peace River's retail customer was at issue in
11 this case, which was IMC Agrico.

12 In this case we don't know what the retail
13 need is. And until those customers are identified, we
14 have to assume that every retail utility in Florida
15 has customers that could be at issue.

16 I think that the precedent is pretty clear
17 that we're allowed to intervene. I also wanted to
18 direct you to two statutes that, I believe, create a
19 zone of interest for Florida's electric utilities.
20 The first one is 366.04(5), where it specifically
21 requires this Commission to avoid uneconomic
22 duplication of generation facilities. In addition,
23 Section 366.05(8), states that the Commission can
24 require installation of generating plants only, quote,
25 "after a finding that mutual benefits will accrue to

1 the electric utilities involved," end of quote.

2 I think it's pretty clear that the
3 legislature has created a zone of interest for
4 utilities, to protect them against uneconomic
5 duplication. And I think that we fall within that
6 zone of interest with this proceeding. Duke would
7 have the Commissioner read Section 403.159 in a
8 vacuum, ignoring the legislative directory under
9 Chapter 366. That's just simply not the way the
10 statutory interpretation works.

11 **COMMISSIONER GARCIA:** Let me ask you, do you
12 think that that concept of uneconomic investment was
13 based on the fact that ratepayers would have to pay
14 for that?

15 **MR. WILLINGHAM:** Absolutely. We raised the
16 issue of stranded costs in our petition, and for my
17 group stranded cost is even a bigger issue. We don't
18 have stockholders or someone else that can eat that.
19 It goes straight to our electric customers which are
20 our member-owners. So for us stranded cost is a very
21 difficult issue to deal with, and we would not want to
22 deal with it in this type of proceeding where we're
23 not involved.

24 I also want to just add that we haven't
25 raised any issues in this proceeding. We're not going

1 to sponsor any witnesses and we haven't filed a Motion
2 to Dismiss. So we are here more just as an interested
3 party. We don't think that we will cause any delay in
4 the proceeding. And we don't really think that we're
5 going to adversely affect the proceeding at all. We
6 just want to be involved in case something comes up
7 that we need to react to. So, therefore, we ask that
8 we be allowed to intervene.

9 COMMISSIONER GARCIA: Thank you.

10 Mr. Wright.

11 MR. WRIGHT: Thank you, Commissioner Garcia.

12 At the outset I want to say what I think is
13 the procedural posture of this proceeding, and that is
14 we're here on some petitions to intervene. A whole
15 lot of the argument that's already been presented to
16 you has to do with the merits of the IOU's motions,
17 Florida Power and Light's and Florida Power
18 Corporation's --

19 COMMISSIONER GARCIA: We can distinguish
20 that.

21 MR. WRIGHT: -- Motions to Dismiss. I know
22 you can.

23 This is a hearing, an oral argument, on the
24 putative intervenors' petitions to intervene. The law
25 of standing under Florida Administrative Law is clear:

1 In order to establish standing, a would-be intervenor
2 must demonstrate that it will suffer injury in fact,
3 that that injury is of sufficient immediacy to warrant
4 a 120.57 hearing, and that the alleged injury is of
5 the type against which the proceeding at issue is
6 designed to protect. Economic interests generally are
7 not cognizable interests under Florida standing law,
8 and, specifically, competitive economic interests are
9 not cognizable interests unless the statute expressly
10 or explicitly recognizes them as such.

11 This is a need determination proceeding for
12 the New Smyrna Beach power project. The Commission is
13 to consider the statutory criteria, which include, as
14 you know, the need for system reliability and
15 integrity, the need for adequate electricity at a
16 reasonable cost, and whether the proposed alternative
17 is the most cost-effective alternative available, as
18 well as conservation measures and other matters within
19 your jurisdiction, the Commission's jurisdiction, that
20 you deem relevant.

21 We submit to you that none of the putative
22 intervenors at the table here can establish that they
23 satisfy the criteria required under Florida
24 Administrative Law, as explicated through a long line
25 of cases, including Agrico, and very recently,

1 AmeriSteel v. Clark.

2 As to their allegations that the granting of
3 this determination of need will adversely affect their
4 ability to plan, build and operate generation and
5 transmission systems, Duke New Smyrna and the
6 Utilities Commission of New Smyrna Beach say the
7 following: The alleged effects are speculative and
8 remote. The utilities are perfectly capable of
9 planning while dealing with known resources and
10 unknown resources. They have relied on unidentified
11 future power purchases in their previous Ten Year Site
12 Plans. They can plan for us whether we exist as a
13 real resource. They can plan for us probabilistically
14 or they can ignore us. If they don't have a contract
15 with us and they believe it's imprudent to consider
16 the possibility of power being available from us, they
17 can ignore it.

18 **COMMISSIONER GARCIA:** That's right. But
19 wouldn't that make more sense if you were simply going
20 to generate the need that you have at hand and then
21 clearly -- I would agree with you, that if you were
22 generating the need you have at hand for your
23 customer, period, then your argument would be
24 stronger. But the fact is that there's a surplus here
25 you're going to be generating and clearly doesn't that

1 affect them and their interests?

2 **MR. WRIGHT:** Not adversely, because they
3 don't have to buy it. They can ignore it or they can
4 buy from us. If they ignore it, there can't be -- if
5 they ignore it and never buy from us, there can't be
6 any adverse effect. And if they buy from us, I have
7 to make the reasonable assumption that the terms and
8 conditions of such a transaction will be mutually
9 beneficial; hence, no adverse effect.

10 **COMMISSIONER GARCIA:** Mr. Wright, in the
11 long term you're coming before us here for this
12 determination and need. Would these companies be able
13 to -- would this Commission be able to do its duty in
14 terms of responsibility it has statutorily? Do we
15 have any jurisdiction and then pull you in later if we
16 have some problems?

17 **MR. WRIGHT:** In my opinion, yes, sir. And
18 I'm interpreting -- to follow along with an expanded
19 answer to your question, I interpret your question to
20 be do you have Grid Bill jurisdiction over entities
21 like this entity?

22 **COMMISSIONER GARCIA:** And the effects that
23 may have on these gentlemen sitting here or the
24 companies sitting here.

25 **MR. WRIGHT:** I believe that you have Grid

1 Bill jurisdiction, which I think can be fairly
2 summarized as stated in 366.04(5) which is you have
3 jurisdiction over the planning, development,
4 maintenance and coordination of the coordinated power
5 supply grid for assuring reliable and emergency power
6 supplies to the state. And it's a paraphrase. I
7 apologize for not getting the quote exactly right.

8 I think you have jurisdiction over the
9 system. That statute doesn't say "utilities" at all.
10 That statute says you have jurisdiction over the
11 coordination, planning, development and maintenance of
12 a coordinated power supply system.

13 **COMMISSIONER GARCIA:** Mr. Wright, I'm trying
14 to go a little bit beyond, and you can go back to your
15 answer, but I just want you to understand what I'm
16 thinking about.

17 The issues that have been brought up by the
18 parties here before you us -- you're right, they go a
19 little bit past the whole concept of intervene. And I
20 think the reason they do that is because they're
21 trying to show us how they would be affected. And my
22 question to you is if I don't address those issues now
23 that they have, how do I address them later on if
24 these gentlemen happen to be right? Do I have the
25 authority to address them later on?

1 **MR. WRIGHT:** And my answer to that is yes,
2 sir. You have jurisdiction over this type of power
3 plant; over this power plant and over this type of
4 power plant under your Grid Bill authority. And as
5 we've pointed out -- I'm really trying to stay away
6 from the merits, but as we pointed out in our
7 responses to the motions to dismiss, we are an
8 electric utility under Chapter 366,02(2) by the plain
9 meaning of that statute.

10 Now, to try to answer your question. I
11 think that you absolutely can do your job as
12 enunciated by the legislature in your Grid Bill
13 authority with respect to this plant and with respect
14 to other plants like it.

15 **COMMISSIONER GARCIA:** Tell me how I deal
16 with the question -- I forget the proper word --
17 economic duplication I guess it was or -- what's the
18 term I'm searching for?

19 **MS. PAUGH:** Uneconomic.

20 **COMMISSIONER GARCIA:** Uneconomic investment.
21 How to I deal with this after this hearing? If I
22 agree with what you have said and I send them all
23 away, how do I deal with that issue?

24 **MR. WRIGHT:** I think you can deal with that
25 issue from the Commission's perspective in this

1 proceeding. As Mr. Willingham said, it means
2 uneconomic to the ratepayers. It doesn't mean
3 uneconomic with respect to the competitive interests
4 of potential -- of other utilities that may want to
5 sell at wholesale. And I think you can deal with that
6 issue from your perspective in this proceeding or in
7 future need determinations --

8 **COMMISSIONER GARCIA:** Do you think that I'm
9 better served, my Staff is better served by having
10 each of these parties -- clearly they are going to
11 look to their shareholders as well as the ratepayers,
12 but doesn't this hearing give our Staff at the
13 Commission a greater opportunity to understand those
14 impacts specifically with what you're proposing? And
15 wouldn't this hearing be the best time to do that than
16 later on when we find that perhaps we didn't have all
17 of the facts before us? And how would I deal with it
18 then? In other words, how would I deal with it once
19 you come on line and we do have problem?

20 I know you don't want to get to the merits
21 and I'm not trying to get to the merits. I'm just
22 trying to comply with my responsibility under the law
23 in this state, and not my, but this Commission's
24 responsibility. And we certainly want to make sure we
25 can protect the ratepayers. How do I protect the

1 ratepayers as we go on down the line?

2 **MR. WRIGHT:** Well, the ratepayers are
3 protected ab initio with respect to this type of
4 facility because nobody ever has to buy the first
5 kilowatt-hour from this project.

6 Now, at some point, if today -- based on
7 everything the utilities are proposing to build, we're
8 looking at winter reserve margins in the 14.5 to 16%
9 range -- again, I'm trying to stay away from the
10 merits, but I just want to use this --

11 **COMMISSIONER GARCIA:** We get there either
12 way.

13 **MR. WRIGHT:** -- yes -- a hypothetical.
14 Today I don't think there's any serious argument that
15 more capacity would be of benefit. If it's of
16 benefit, then it's not uneconomic. Now, at some
17 point, hypothetically, if we get to a state where, you
18 know, as the utilities would have you believe, the
19 floodgates really do open and there's a whole bunch of
20 additional merchant capacity added in the state, or
21 they build additional capacity for merchant purposes
22 and for meeting the specific needs of their retail
23 customers, if we get to a point where we're looking at
24 a winter reserve margin of 30 to 35%, and a summer
25 reserve margin of 40 to 45%, I think you can do the

1 same job then that you can do today. And this is say
2 will this plant contribute to the uneconomic -- or
3 cause the uneconomic duplication of resources. I
4 think your Staff is perfectly capable of evaluating
5 this without being burdened by extensive recovery
6 requests and everything else from a whole bunch of
7 intervenors.

8 COMMISSIONER GARCIA: Are you through?

9 MR. WRIGHT: No, sir. I did --

10 COMMISSIONER GARCIA: I'll put an
11 exclamation point and we can keep going.

12 MR. WRIGHT: I understand -- I think we're
13 doing okay for time here -- and I understand you've
14 read everything, but I do want to summarise our
15 arguments on --

16 COMMISSIONER GARCIA: Absolutely.

17 MR. WRIGHT: Okay.

18 Their allegations that it will adversely
19 affect their ability to plan, build and operate
20 generation facilities are speculative. They are not
21 the subject of this proceeding. Whether FP&L or
22 Seminole Electric Co-op or Florida Power Corporation
23 or Tampa Electric Company ever builds another power
24 plant will be the subject of a future need
25 determination proceeding, if it's jurisdictional and

1 not pursued through other permitting proceedings. And
2 it will be decided on the statutory criteria at such
3 time as they may elect to pursue such a proceeding.

4 Again, this is a need determination
5 proceeding for this project. FP&L, FPC, TECO and
6 anybody else can come in and seek the opportunity to
7 build and operate their power plants under the
8 applicable permitting process. Again, there is no
9 adverse effect here. They don't have to buy from us.
10 They can still build their power plants if they can
11 satisfy the statutory criteria.

12 **COMMISSIONER GARCIA:** How about the
13 transmission constraints they allege? Mr. Wright, if
14 I'm taking you out of order and you'd like to stay in
15 come kind of order --

16 **MR. WRIGHT:** You're right on point.

17 In the first place, we think adverse effects
18 are speculative. In the second place, we have to ask
19 them for transmission service. Pursuant to the
20 pro forma tariffs that at least Florida Power
21 Corporation and Florida Power and Light Company have
22 adopted and had authorized by the FERC -- I'm not
23 positive of Tampa Electric's situation vis-a-vis the
24 FERC's pro forma transmission tariff -- we have to ask
25 them pursuant to the terms of that FERC-approved

1 transmission tariff for transmission service. They
2 are entitled to do a study. If there's a dispute over
3 possible adverse effects or over whether additional
4 facilities are required to ameliorate any cognizable
5 adverse effects that might result from our facility's
6 operation, then they have absolute redress at FERC,
7 which has full plenary jurisdiction over transmission
8 facilities as they are used in interstate commerce,
9 which all of these are, and the rates and the terms
10 and conditions under which those transmission
11 facilities are constructed and over which such
12 transmission service is provided.

13 In short, the transmission issue is under
14 the jurisdiction of the Federal Energy Regulatory
15 Commission. And essentially what they are inviting
16 you to do is say, well, FERC might make a wrong
17 decision on something that --

18 COMMISSIONER GARCIA: They've made many.

19 MR. WRIGHT: -- on something that is solely
20 within their jurisdiction. And then, worse, be upheld
21 by an appeal to the United States Courts of Appeal. I
22 submit to you that FERC has the authority to make that
23 determination, and the utilities have full opportunity
24 to seek redress of any alleged adverse transmission
25 effects that might result.

1 Finally -- well, almost finally, semi
2 finally --

3 **COMMISSIONER GARCIA:** You're doing all
4 right.

5 **MR. WRIGHT:** Thank you.

6 The utilities allege that --

7 **COMMISSIONER GARCIA:** I'm talking about
8 time. I'm not talking about the merits. You still
9 have time.

10 **MR. WRIGHT:** I understood your comment that
11 way, Commissioner. Thank you. (Laughter)

12 The utility has alleged that they will be
13 affected. They may be affected. They may not be
14 affected. They will be affected if they buy from us.
15 They may be affected if we display some less
16 efficient, more costly generation, but we submit to
17 you that is not sufficient to give rise to standing.

18 **COMMISSIONER GARCIA:** And in that case it
19 probably might be to the ratepayer's benefit, you
20 might argue.

21 **MR. WRIGHT:** Well, we do argue that. Again,
22 it's a merits-type argument, but we argue quite
23 strongly that our --

24 **COMMISSIONER GARCIA:** I'm following the
25 concept that I think you addressed. There's no

1 negative.

2 **MR. WRIGHT:** There is no negative. And, in
3 fact, no opportunity for there to be a negative impact
4 on the ratepayers. They can buy from us if it's a
5 good deal for them to buy power from us and pass it
6 through to their retail ratepayer or they can not. If
7 their generation is better than ours, if it's more
8 efficient, more cost-effective, God love them, they
9 should run their plants and use that electricity. If
10 ours is more efficient and more cost-effective, then
11 God love them, they ought to buy from us and send that
12 through to their retail ratepayers.

13 But the point is, your rules require a
14 description of the primarily affected utilities. It
15 doesn't just say "affected." And we submit that since
16 none of these guys has a contract with us -- by the
17 way, we'd be delighted to discuss contracts with them,
18 as we pointed out in our responses -- since they have
19 no contract, they are not primarily affected. The
20 cases cited by Mr. Childs all involve cases where
21 utilities had contracts. And the case, the AES case
22 from 1989 that Mr. Childs's cited was a case where the
23 Staff sought to implead Florida Power and Light as an
24 indispensable party because they were the utility who
25 was to buy the output of AES Cedar Bay facility that

1 was the subject of that proceeding. That is not the
2 case here.

3 Finally, from the perspective of precedent
4 and jurisprudence here, I pose to you the following
5 rhetorical question: Do you want to send a message
6 that all comers, at a minimum any generator, any
7 generating utility or any generator who has capacity
8 potentially available for sale will be allowed to
9 intervene as a full party intervenor in any future
10 need determination proceeding on the grounds that the
11 proposed plant would affect it? That it would affect
12 its planning, that it would affect its ability to make
13 sales. I don't think this is contemplated by the
14 statute, and I don't think this is the message that
15 you want to send.

16 Now, I would submit to you --

17 **COMMISSIONER GARCIA:** Do you think the
18 situation we're in was contemplated by that statute,
19 present?

20 **MR. WRIGHT:** Which situation?

21 **COMMISSIONER GARCIA:** The one we're in.
22 What you're requesting of this Commission. Do you
23 think this was contemplated by the statute, what
24 you're trying to do?

25 **MR. WRIGHT:** Frankly, I doubt that anybody

1 thought about it really specifically in 1973. What I
2 can tell you is the statute, by its own terms,
3 provides that anyone who is engaged in or authorized
4 to engage in the generation of electricity may be an
5 applicant under the siting act, and that are us, Your
6 Honor. We will be engaged in the generation of
7 electricity exclusively, at wholesale, and we'll sell
8 to them. I assume -- we believe -- I don't assume.
9 We believe, based on our analysis, virtually all of
10 the output will be sold within Peninsular Florida.

11 If I could -- I think I'm coming up on my 20
12 minutes.

13 What I'd suggest to you is this: We don't
14 disagree that the issue posed here is important. And
15 by the way, your orders denying our dec. statement
16 petitions were really going to the point of denying
17 the declaratory statements because in the Commission's
18 view, or at least in four members of the Commission's
19 view, those statements would have been a rule. They
20 would have legally constituted a rule. Staff didn't
21 agree with that. I don't agree with that. But,
22 nonetheless, that was the decision. It did not go
23 beyond that. It said we're not going to agree to a
24 request of declaratory statements because the
25 statements would be too much like a rule.

1 I would suggest to you that to the extent
2 they want to address the big issue, merchant plant
3 developers' access to the need determination process
4 under 403.519 they can do so by filing an amicus
5 brief, or they can do so -- and we're not in favor of
6 this, to be completely clear -- they can petition --
7 you could grant them leave to intervene for the
8 limited purpose of moving to dismiss. That's exactly
9 what was done by the Commission in the Nassau,
10 Cypress, ARK/CSW cases in 1992.

11 And since the co-op association has not --
12 does not intend to move to dismiss, I would submit to
13 you allowing them to provide an amicus brief would be
14 more than adequate to protect their interests.

15 Thank you.

16 COMMISSIONER GARCIA: Does Staff want to
17 make any comments?

18 MS. PAUGH: No.

19 COMMISSIONER GARCIA: A quick question, Mr.
20 Childs. Mr. Wright says we don't have to take this up
21 now; that that goes to the merits of this issue; that
22 we have jurisdiction to come back and address this
23 later. Is he right?

24 MR. CHILDS: No, he's not right.

25 COMMISSIONER GARCIA: I don't think your

1 mike is on.

2 MR. CHILDS: I think it's on now.

3 It's not correct. He said they were subject
4 to Section 366.045, I believe, because that was the
5 planning act, totally ignoring that Chapter 366
6 specifically defines what entities are subject to this
7 Commission's jurisdiction, and it doesn't include
8 Duke.

9 Secondly, in terms of coming back, I would
10 refer to 403.519, which is the Act we're talking
11 about. It directs the Commission to address in this
12 proceeding other matters within its jurisdiction which
13 it deems relevant. I don't think you can say, well,
14 ignore the law and come back later. I mean, that's
15 exactly what the utilities are saying. We have some
16 things that we think are relevant that you ought to
17 consider at the front end of this petition.

18 COMMISSIONER GARCIA: Mr. Wright, do you
19 want to respond to that?

20 MR. WRIGHT: Yes, Commissioner Garcia.

21 With all due respect, I believe by the plain
22 language of 366.02 -- I will say affirmatively by the
23 plain language of Section 366.02(2) Duke Energy New
24 Smyrna Beach Power Company Limited L.L.P., will be --
25 at a minimum will be -- and I think trying to

1 distinguish on verb tense is pretty much of a reach
2 myself -- an electric utility, under the definition of
3 that statute, subject to your jurisdiction, to the
4 extent that jurisdiction extends to such entities. We
5 will be investor-owned and we will operate a
6 generation system within the state. And I think
7 Mr. Childs' characterization of whatever as ignoring
8 law and coming back later is just not appropriate.

9 **COMMISSIONER GARCIA:** Very good.

10 They said it couldn't be done. But we're
11 done under an hour so I appreciate it. I'll meet with
12 Staff. We'll probably be issuing a decision later
13 this week -- not later this week, probably early next
14 week if -- is that doable? Thank you very much. I
15 appreciate it.

16 **MR. WRIGHT:** Thank you.

17 (Thereupon, the hearing concluded at
18 12:55 p.m.)

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1 STATE OF FLORIDA)
 : CERTIFICATE OF REPORTER
 2 COUNTY OF LEON)

3 I, JOY KELLY, CSR, RPR, Chief, Bureau of
 Reporting, Official Commission Reporter,
 4

5 DO HEREBY CERTIFY that the Oral Argument in
 Docket No. 981042-EM was heard by the Prehearing
 Officer at the time and place herein stated; it is
 6 further

7 CERTIFIED that I stenographically reported
 the said proceedings; that the same has been
 8 transcribed by me; and that this transcript,
 consisting of 42 pages, constitutes a true
 9 transcription of my notes of said proceedings.

10 DATED this 5th day of October, 1998.

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 Florida Public Service Commission
 Chief, Bureau of Reporting

(850) 413-6732

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