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: NOVEMBER 23, 1998

AMICUS CURIAE MEMORANDUM OF LAW OF LG&E ENERGY CORP.

LG&E Energy Corp. ("LG&E Energy"), subject to its Motion for Leave to File *Amicus Curiae* Memorandum of Law filed contemporaneously herewith, hereby submits its memorandum of law *amicus curiae* addressing the issue of a merchant power plant developer's or operator's standing to seek applicable state permits for its wholesale power plant.[1] LG&E Energy agrees with the Petitioners herein, the Utilities Commission, City of New Smyrna Beach, Florida ("UCNSB") and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. ("Duke New Smyrna"), that applicable state and federal law, including the Energy Policy Act of 1992 and the Commerce Clause of the United States Constitution, confirm the validity of merchant plant developers and operators as proper applicants for the necessary permits to build wholesale power plants in Florida. Accordingly, the Florida Public Service Commission ("the Commission") should reach the result advocated by the Petitioners and reject the arguments filed by their opponents.[2]

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[1] LG&E's undersigned counsel, Donald F. Santa, Jr., is a member of the Bar of the District of Columbia. He is intimately familiar with electric utility regulation. This brief *amicus curiae* is submitted subject to LG&E Energy's simultaneously filed Request for Certification of Counsel.

[2] Florida Power Corporation ("FPC") and Florida Power & Light Company ("FPL") have both filed motions to dismiss the petition for determination of need filed in this docket by the

SUMMARY

LG&E Energy concurs in the conclusions reached by the Petitioners that both the UCNSB and Duke New Smyrna are proper applicants for the Commission's determination of need under the plain language of the Florida Electrical Power Plant Siting Act (the "Siting Act"), as well as proper applicants for the necessary environmental permits pursuant to the Siting Act.

Public policy considerations strongly favor allowing the Petitioners to proceed to the need determination hearing on the merits of the proposed New Smyrna Beach Power Project (the "Project"). The Project serves one of the fundamental purposes of utility regulation, i.e., achieving a competitive result in the wholesale power supply market. Competition in the wholesale supply of electricity benefits the customers of retail-serving utilities like FPL and FPC, because it will result in lower costs and improved efficiency in the production of electricity. These competitive benefits are particularly significant where, as here, the proposed power plant imposes no risks and no obligations on Florida electric customers. In contrast, the positions advocated by the Opponents are directly contrary to the public interest, as well as state and federal energy policy.

The statutory construction advocated by the Opponents (i.e., that Duke New Smyrna is excluded from access to the Commission's need determination process because it does not serve retail customers in Florida and does not have contracts to sell the Project's entire output to local retail-serving utilities in Florida) is preempted as a matter of federal law, because it conflicts with the Congressional intent of the Energy Policy Act of 1992("EPACT") and with the Federal Energy Regulatory Commission's ("FERC") orders issued pursuant to that statute and

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UCNSB and Duke New Smyrna. These two investor-owned electric utility companies are referred to herein collectively as "the Opponents".

the Federal Power Act. Moreover, the construction of Section 403.519, F.S., advanced by the Opponents would violate the Commerce Clause of the United States Constitution by discriminating against out-of-state power producers and their affiliates as well as by impermissibly burdening interstate commerce.

Accordingly, because (1) both Petitioners are proper applicants for the Commission's determination of need under Florida law, (2) because any contrary interpretation or construction of the relevant statutes would itself be contrary to the public interest, and (3) because any such interpretation would conflict directly with federal law, national energy policy, Congressional intent, and the U.S. Constitution, the Commission should affirm the Petitioners' standing to proceed to the need determination hearing on the merits of their proposed project and deny the motions to dismiss filed by the Opponents.

ARGUMENT

I. BOTH DUKE NEW SMYRNA AND THE UTILITIES COMMISSION OF NEW SMYRNA BEACH HAVE STANDING TO PURSUE THE COMMISSION'S DETERMINATION OF NEED BECAUSE BOTH ARE PROPER APPLICANTS UNDER APPLICABLE STATE LAW.

The Commission's need determination process pursuant to Section 403.519, Florida Statutes ("F.S."), is a part of the regulatory scheme established by the Florida Electrical Power Plant Siting Act. Fla. Stat. §§ 403-501-.518 (1997). In the case now before the Commission, both Petitioners are eligible to pursue this process, because both qualify under the plain language of the applicable state laws.

The Commission's need determination statute, Section 403.519, F.S., provides in pertinent part:

> On request by an applicant or on its own motion, the Commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act.

Section 403.503,(4), F.S., defines an "applicant"[3] as:

> any electric utility which applies for certification pursuant to the provisions of this act.

In turn, Section 403.503(13), F.S., defines "electric utility" as:

> cities and towns, counties, public utility districts, regulated electric companies, electric cooperatives, and joint operating agencies, or combinations thereof, engaged

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[3] The Transmission Line Siting Act contains an identical definition of the term "applicant." Fla. Stat. § 403.522(4) (1997).

> in, or authorized to engage in, the business of generating, transmitting, or distributing electric energy.

Both Duke New Smyrna and the Utilities Commission, City of New Smyrna Beach, fall squarely within this definition and both, therefore, are eligible applicants to pursue the Commission's determination of need for their Project. As part of the City of New Smyrna Beach, Florida operating a municipal electric utility system, the Utilities Commission is a city engaged in the business of generating and distributing electric energy, and is thus a proper applicant under the Siting Act and Section 403.519, F.S. The Utilities Commission is also an "electric utility" as that term is defined in the Commission's organic regulatory statute. See Fla. Stat. § 366.02(2) (1997).

Duke New Smyrna is a "regulated electric company . . . authorized to engage in[] the business of generating . . . electric energy", because it is a "public utility" under the Federal Power Act, 16 U.S.C.S. § 824(b)(1)(1994), and because it is an "electric utility" under the Commission's organic regulatory statute. First, as a federally regulated public utility selling power at wholesale in interstate commerce, Duke New Smyrna is clearly subject to the regulatory jurisdiction of FERC, including, but not limited to, the FERC's jurisdiction over rates pursuant to the Federal Power Act. Indeed, the FERC has approved Duke New Smyrna's Rate Schedule No. 1 for sale of the Project's entire capacity and associated energy to other utilities under negotiated arrangements. See Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., 83 FERC § 61,316 (June 25, 1998). As a company selling wholesale electric power subject to the FERC's regulatory jurisdiction, Duke New Smyrna fits squarely within the plain meaning of the term "regulated electric company" in the Siting Act. Therefore, Duke New Smyrna is a proper applicant for the Commission's determination of need, as

well as the necessary environmental license or permit, under Sections 403.503(4), 403.503(13) and 403.519, F.S.

Second, if there were any doubt as to Duke New Smyrna's status under the applicable definitions under the Siting Act, it should be noted that Duke New Smyrna is also an "electric utility" under the plain language of the Commission's primary organic regulatory statute, Chapter 366, Florida Statutes. Section 366.02(2), F.S., defines "electric utility" to mean

> any municipal electric utility, investor-owned electric company, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state.

Duke New Smyrna is investor-owned, because it is owned by its partners. In addition, when the Project becomes operational, Duke New Smyrna will own, maintain, and operate an electric generation system within Florida. Thus, the plain language of the statute, on its face and without resort to other principles of statutory construction, demonstrates that Duke New Smyrna is an "electric utility" within the meaning of Section 366.02(2).[4]

The Commission should also note that it is not unusual for a wholesale generating utility to be a utility subject to state regulation to the extent that such regulation is not preempted by federal law. For example, in Re: Doswell Limited Partnership, 110 P.U.R. 4th 273 (Va. State Corp. Comm'n, February 13, 1990) the Virginia State Corporation Commission noted that, while the Federal Power Act preempted it from regulating the rates and services of entities such as Doswell, a non-QF partnership

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[4] Contrary to the Opponents' arguments, the Commission should note that neither Section 403.519, nor the definitions of "applicant" or "electric utility" under the Siting Act, nor the definition of "electric utility" in Chapter 366, F.S., purports to restrict such applicants or electric utilities to entities that serve at retail.

selling power only at wholesale, that preemption did "not otherwise remove Doswell from this Commission's statutory authority." The Virginia Commission concluded that its jurisdiction was "coextensive with that over all other Virginia electric utilities except to the extent pre-empted by federal law." Consequently, the Virginia Commission required that Doswell comply with all reporting requirements of the Commission relating to the construction and operation of the project and that it not to sell or transfer any of its utility assets without Commission approval, and held that Doswell was "subject to all of the regulatory provisions of Title 56 of the Virginia Code which are not pre-empted by federal law."

In summary, both the Utilities Commission, City of New Smyrna Beach and Duke New Smyrna are proper applicants under the plain language of the Siting Act and other applicable state law. This alone should be dispositive. Considering the importance of this issue, however, and particularly the significant role of wholesale merchant power suppliers in the overall scheme of the electric power industry, some further comments regarding public policy and federal law are warranted.

II. THE PUBLIC INTEREST, AS WELL AS THE GOALS OF STATE AND FEDERAL ENERGY POLICY, WILL BE BEST SERVED BY ALLOWING THE PETITIONERS A HEARING ON THE MERITS OF THEIR PROPOSAL.

Public policy considerations, including the fundamental purposes and goals of utility regulation, strongly favor interpreting Section 403.519, F.S., to allow the Petitioners a decision on the merits of their requested determination of need for the Project. Such a result is also specifically consistent with national energy policy. This public policy consideration is particularly applicable where the supplier seeking access to the wholesale market, here Duke New Smyrna, offers a highly efficient, cost-effective power supply with no risk to Florida

electric customers, with no strings attached to its proposal, and with no obligation to pay for, nor any prospect of being forced -- as captive electric ratepayers -- to pay for, the proposed Project.

The fundamental purposes of both state and federal utility regulation are to promote the public interest and to prevent the abuse of monopoly power. See Fla. Stat. § 366.01. Electric utilities historically have been considered "natural monopolies" because, due to economies of scale and other barriers to entry, competition would not police the exercise of market power. In this context, regulation's fundamental purpose was to be a surrogate for competition. As the Congress and the FERC now have recognized, however, competition in the wholesale production and supply of electricity is feasible, practical, and desirable. Given this reality, promoting competition in the wholesale production and supply of electricity is in the public interest, because competition will lead to lower prices and greater efficiency than in a monopoly or oligopoly market structure.

Title VII of the Energy Policy Act of 1992 was enacted to promote competition in wholesale power markets. Historically, electricity was provided almost exclusively by vertically integrated, state regulated utilities that owned generation, transmission and distribution facilities. Order No. 888, 61 Fed. Reg. 21,539, 21,543 (1992). Utilities sold a bundled service -- delivered electric energy -- to retail and wholesale customers. Id. Changes in technology and experience under the Public Utility Regulatory Policies Act of 1978 (PURPA) indicated that the generation of electricity could be provided more economically by independent producers, operating in a competitive market, without forfeiting system reliability. Id. at 21,543-46. Two significant legal impediments, however, precluded the FERC from aggressively promoting competition in wholesale power markets. First, FERC did not have clear authority to order vertically

integrated utilities to transmit power for wholesale generators. Id. at 21,546. Thus, existing utilities could postpone or defeat the plans of wholesale public utilities by refusing to transmit their power, thereby isolating their generating facilities and rendering them incapable of delivering power to the broader market. Second, the Public Utility Holding Company Act of 1935 (PUHCA) imposed severe restrictions on the ability of independent developers to own power projects that were not qualifying facilities under PURPA, and prohibited utilities from owning such facilities outside of the geographic area in which they provide regulated service. Title VII of EPACT addressed both of these problems.

EPACT's legislative history demonstrates that Congress's intent was to prevent utilities with monopoly power over power transmission from interfering with FERC's efforts to promote a competitive market for wholesale power. The House Report stated:

> Absent clarification of FERC wheeling authority, it can be expected that some utilities will try to exercise their monopoly power to block IPP's and others' legitimate transmission requests. This would permit unlawful discrimination to thwart efficiency in the electricity industry, and would defeat the Commission's [FERC's] goal of encouraging low rates for consumers through greater competition.

H.R. Rep. No. 102-474(I) at 139-40 (1992), reprinted *in* 1992 U.S.C.C.A.N. 1954, 1962-63.

FERC Order No. 888 also reflects the FERC's concern that existing utilities might be able to interfere with development of a competitive wholesale power market. In the introduction and summary of that order, FERC stated that, in order for consumers to realize the benefits from a competitive electricity market:

> we [FERC] must . . . ensure that all these [owners of transmission facilities] . . . cannot use monopoly power . . . to unduly

discriminate against others [i.e. competing generators].

The construction of Section 403.519, F.S., advocated by the Opponents would give those Opponents exactly the power that Congress and FERC carefully worked to eliminate. Under the Opponents' construction, Florida's retail utilities could act as "gatekeepers" and prevent wholesale merchant public utilities from building generating facilities within the state. This directly conflicts with the express purposes of Title VII of EPACT.

III. THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION REQUIRES THAT FEDERALLY-REGULATED PUBLIC UTILITIES SUCH AS DUKE NEW SMYRNA BE ALLOWED TO APPLY TO THE COMMISSION FOR A DETERMINATION OF NEED.

LG&E Energy's primary interest in this proceeding is to ensure that the Commission acts in a manner consistent with promoting a robust market for the wholesale sale of electricity. As noted above, public policy considerations strongly encourage such a competitive atmosphere. More importantly, however, the Commerce Clause of the United States Constitution requires that the Commission interpret its organic statutes to allow a federally-regulated public utility like Duke New Smyrna to apply for a determination of need to build a merchant power plant in Florida.

The Opponents advocate an interpretation of Section 403.519, F.S., that effectively would limit need determination applicants to in-state retail utilities and entities that have entered into contracts with in-state retail utilities. The Opponents' restrictive interpretation of Section 403.519, F.S., is the kind of blatant economic protectionism that is anathema to the Commerce Clause. If Commerce Clause jurisprudence tells us anything, it is that no state may utilize its regulatory powers

to insulate its in-state corporations from competition with out-of-state entities.

It is well-settled that the Commerce Clause of the United States Constitution is both an affirmative grant of power to Congress to regulate interstate commerce and a limitation of the states' authority to regulate interstate commerce. See CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 87 (1987). This limitation on state regulatory authority is known as the dormant Commerce Clause. Under dormant Commerce Clause jurisprudence, the United States Supreme Court has consistently held that the Constitution calls for a nationwide marketplace for the sale of all commodities including, but not limited to, the wholesale sale of electricity. See Federal Power Comm'n v. Florida Power & Light Co., 404 U.S. 453, 463 (1972); New England Power Co. v. New Hampshire, 455 U.S. 331 (1982). The dormant Commerce Clause prohibits a state from erecting regulatory barriers that protect in-state economic interests from competition by out-of-state interests. New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 274 (1988). The interpretation of Section 403.519, F.S., advocated by the Opponents would result in the erection of exactly the type of regulatory barrier expressly prohibited by the Commerce Clause.

In determining whether a state has violated the dormant Commerce Clause, the courts apply a two-step inquiry. First, the courts determine whether the state law discriminates against out-of-state commerce. Second, the courts determine whether the state law unduly burdens interstate commerce. If a state law does either, it violates the dormant Commerce Clause. In this case, prohibiting a federally-regulated public utility from applying for a determination of need fails to pass constitutional muster under either step of the dormant Commerce Clause analysis.

A. The Construction of Section 403.519, Florida Statutes, Advocated by the Opponents Discriminates Against Out-of-State Commerce in Violation of the Dormant Commerce Clause.

Under the Supreme Court's dormant Commerce Clause jurisprudence, if a state law discriminates against interstate commerce in favor of local businesses or investments, it is per se invalid, save in a narrow class of cases in which the state can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest. C&A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 398 (1994); Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). "Discrimination" for purposes of dormant Commerce Clause analysis means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Oregon Waste System, Inc. v. Department of Environmental Quality, 511 U.S. 93, 199 (1994).

The construction of Section 403.519, F.S., advocated by the Opponents (i.e., requiring Duke New Smyrna to contract with an in-state retail utility before being authorized to apply for a determination of need) would have the effect of fostering overt discrimination against out-of-state wholesale federally-regulated public utilities in favor of in-state retail utilities. The Opponents are asking the Commission effectively to bar federally-regulated public utilities from even applying to enter the wholesale electric market in Florida and to allow the in-state utilities to decide who can and cannot apply for a need determination in Florida. This is precisely the type of overt economic protectionism that the dormant Commerce Clause forbids. As the United States Supreme Court clearly stated in Philadelphia v. New Jersey, "[t]he clearest example of [protectionist] legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." 437 U.S. at 624.

Since the construction of Section 403.519, F.S., advocated by the Opponents clearly and overtly discriminates against out-of-state federally-regulated public utilities, the only way such a construction can avoid a *per se* determination of invalidity is if it can be demonstrated, under rigorous scrutiny, that no other means exists to advance the legitimate state interests involved. See Carbone, 571 U.S. at 398. As a preliminary matter, it is clear that protecting in-state retail utilities from competition with out-of-state federal public utilities is not a legitimate state interest. See Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 43-44 (1980); see also Buck v. Kuykendall, 267 U.S. 307, 315-16 (1925) (a state certification requirement which prohibits competition violates the Commerce Clause); Carbone, 511 U.S. at 394 (reaffirming the validity of Buck).

Section 403.519, F.S., enumerates three legitimate state interests that are furthered by the need determination process: 1) the need for electric system reliability and integrity; 2) the need for adequate electricity at a reasonable cost; and 3) the determination of whether a proposed plant is the most cost-effective alternative available. Not one of these identified state interests is furthered by barring Duke New Smyrna from applying to the Commission for a determination of need. Rather, the Commission can further these state interests by allowing Duke New Smyrna and the UCNSB to present the merits of their application in a formal evidentiary proceeding. If Duke New Smyrna's petition for a determination of need meets the Commission's requirements, it should be granted. If it does not, then the Commission should rule on the merits and deny the petition. Either way, the Commission is in a position to assure that the state's legitimate interests will be adequately protected.

In summary, the Opponents' construction of Section 403.519, F.S. (that Duke New Smyrna must contract with an in-state retail

utility as a condition precedent to applying for a determination of need) flies in the face of over 70 years of Supreme Court dormant Commerce Clause jurisprudence and necessarily results in a *per se* violation of the dormant Commerce Clause. No legitimate state interest is furthered by the Opponents' construction of Section 403.519, F.S., and the Commission should not accept the Opponents' invitation to erect overtly protectionist barriers to competition in the wholesale market for electricity in Florida. Rather, the Commission should avoid running afoul of the dormant Commerce Clause by allowing Duke New Smyrna to apply for a determination of need.

B. The Construction of Section 403.519, Florida Statutes, Advocated by the Opponents Impermissibly Burdens Interstate Commerce in Violation of the Dormant Commerce Clause.

It is well-settled that if a statute is found to discriminate against interstate commerce, then no reason exists to reach the second step of the dormant Commerce Clause inquiry--the determination of whether the statute impermissibly burdens interstate commerce. See Carbone, 511, U.S. at 390. As discussed above, the construction of Section 403.519, F.S., advocated by the Opponents discriminates against interstate commerce and thus fails the first step of the dormant Commerce Clause inquiry. Still, assuming, arguendo, that it is necessary to reach the second step of the dormant Commerce Clause inquiry in this case, the result is the same: the construction of Section 403.519, F.S., advocated by the Opponents violates the dormant Commerce Clause because it unduly burdens interstate commerce.

The second step of the dormant Commerce Clause inquiry is often referred to as the "Pike test." See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). The Pike test involves a four-

prong analysis: To be constitutional, a statute 1) must regulate evenhandedly to effectuate a legitimate local purpose; 2) must have only incidental effects on interstate commerce; 3) must not impose a burden on interstate commerce that is clearly excessive in relation to the putative local benefits; and 4) if legitimate local interests are involved, those interests must not be capable of being promoted in a manner that imposes a lesser impact on interstate commerce. Id.

In this case, construing Section 403.519, F.S., to require Duke New Smyrna to contract with a retail in-state utility as a condition precedent to being an applicant for a need determination in Florida does not satisfy any of the four prongs of the Pike test. First, as explained in the previous subsection, the Opponents' interpretation of Section 403.519, F.S., discriminates between in-state and out-of-state entities because only in-state retail utilities (and entities that those in-state retail utilities select, at their sole discretion, to contract with) may be applicants for a determination of need. This interpretation of Section 403.519, F.S., does not regulate evenhandedly.

Second, the Opponents' interpretation of Section 403.519, F.S., would ban federal public utilities such as Duke New Smyrna from applying for a need determination in Florida and would have the effect of prohibiting such entities from entering the Florida wholesale power market. Clearly, prohibiting entry into a market of interstate commerce has more than an incidental effect on interstate commerce.

Third, and fourth, as discussed in the previous subsection, the legitimate state interests protected by Section 403.519, F.S., (namely, ensuring electric system reliability and integrity, providing adequate electricity at a reasonable cost; and determining whether a proposed plant is the most cost-effective available) can adequately be protected by allowing Duke

New Smyrna to present the merits of its need determination case before the Commission. Thus, requiring Duke New Smyrna to contract with an in-state retail utility imposes a burden on interstate commerce that would be excessive in relation to any local benefits. Moreover, the local benefits identified in Section 403.519, F.S., can be promoted in a manner that imposes less of an impact on interstate commerce by simply allowing Duke New Smyrna to apply for a determination of need.

In conclusion, the Opponents' proposed interpretation of Section 403.519, F.S., impermissibly burdens interstate commerce and thus fails the Pike test.

IV. FEDERAL LAW PREEMPTS THE STATE FROM CATEGORICALLY EXCLUDING FEDERALLY REGULATED WHOLESALE PUBLIC UTILITIES FROM ITS POWER PLANT PERMITTING PROCESSES.

The limiting construction of Section 403.519, F.S., advocated by the Opponents would require that Duke New Smyrna contract to sell power to an in-state utility before it can apply for the necessary permits to construct and operate the project. This construction would undermine a fundamental objective of the Energy Policy Act and Order 888, i.e., preventing vertically integrated public utilities from inhibiting the development of a competitive wholesale power market.

Federal preemption doctrine derives from the Supremacy Clause of, and the affirmative grant of powers to the Congress by, the United States Constitution. See Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); Independent Energy Producers Ass'n, Inc. v. Cal. Pub. Util. Comm., 36 F.3d 848, 853 (9th Cir. 1993). When Congress acts within its constitutional powers, its statutes take precedence over any state law that conflicts with them. See Gibbons v. Ogden, 22 U.S. (9 Wheat) 1,210 (1824). State laws must also yield to duly promulgated federal regulations with which they conflict. See Louisiana Pub.

Serv. Comm. v. FCC, 476 U.S. 355, 369 (1986); Hillsborough County, Fla. v. Automated Med Labs, 471 U.S. 707, 713 (1985); Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153-54 (1982). Preemption applies where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Pacific Gas & Electric Company v. State Energy Resources Conservation & Dev. Comm'n., 461 U.S. 190, 204 (1983) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1991)).

Federal preemption may be explicit, may result from a conflict between federal and state law, or may arise when the federal regulatory provisions evidence an intent by Congress to occupy the field within which the state regulates. Cipollone, 505 U.S. at 516. The application of Section 403.519, F.S., advocated by the Opponents would conflict with the goals and purposes of federal statutes and regulations. Excluding a federally regulated, wholesale public utility, such as Duke New Smyrna, from a hearing on the merits of its petition for determination of need because the utility does not serve retail customers, or requiring such a wholesale public utility to contract with a utility regulated by the State as a prerequisite to obtain a hearing on the merits of its proposed wholesale power plant, directly and substantially undermines the purposes of Title VII of EPACT. Accordingly, the Opponents' restrictive construction is preempted as a matter of federal law.

As discussed earlier in Section II, Title VII of EPACT was enacted to promote competition in wholesale power markets. Specifically, Congress amended Sections 211 & 212 of the Federal Power Act to assure that FERC had the authority to order utilities to transmit power for other generators of electricity. See 16 U.S.C. §§ 824j, 824k (1998). The legislative history of the Act reflects Congress's intent to prevent utilities with monopoly power over transmission from impeding FERC's efforts to promote a competitive market for wholesale power. The House

Report on EPACT stated:

> Absent clarification of FERC wheeling authority, it can be expected that some utilities will try to exercise their monopoly power to block IPP's and others' legitimate transmission requests. This would permit unlawful discrimination to thwart efficiency in the electricity industry, and would defeat the Commission's [FERC's] goal of encouraging low rates for consumers through greater competition.

(Emphasis supplied.) H.R. Rep. No. 102-474(I) at 139-40 (1992), reprinted in 1992 U.S.C.C.A.N. 1954, 1962-63.

Order No. 888 promulgated in the wake of EPACT also reflects the policy concern with transmission-owning utilities' ability to interfere with the development of a competitive wholesale power market. In the introduction and summary of the order, FERC stated that, in order for consumers to see the benefits from a competitive electricity market:

> we [FERC] must . . . ensure that all these [owners of transmission facilities] . . . cannot use monopoly power . . . to unduly discriminate against others [i.e. competing generators].

The construction of Section 403.519, F.S., advocated by the Opponents would give those Opponents - the incumbent utilities - the very power that Congress and FERC have sought to eliminate. Under this construction, the Opponents and other Florida retail utilities would retain the "gatekeeper" role and the ability to prevent wholesale public utilities, like Duke New Smyrna, from entering the wholesale market in Florida. The transmission access specifically authorized by EPACT and expanded upon by FERC Order No. 888 is worthless if the existing retail utilities can prevent wholesale utilities from even applying to build power plants in Florida in the first place. This is particularly important in this instance, because of the transmission

constraints limiting power imports into peninsular Florida.

Requiring wholesale power generators to contract with state-regulated utilities before applying for a determination of need would also undermine the provisions of the EPACT that exempt federally regulated, wholesale public utilities, such as Duke New Smyrna, from the requirements of PUHCA. Prior to the EPACT, PUHCA greatly restricted the structure of, and limited utility investment in, wholesale generation companies like Duke New Smyrna. PUHCA subjected any such producer that was affiliated with a utility to onerous regulation by the Securities Exchange Commission. See generally 15 U.S.C. §§79a - 79z-6 (1998). EPACT's legislative history demonstrates that Congress was especially concerned that PUHCA would discourage experienced power producers from building generating facilities. See H.R. Rep. No. 102-474(I) at 139 (1992), reprinted in 1992 U.S.C.C.A.N. 1954, 1962. Thus, in EPACT, Congress created a new entity under PUHCA, the exempt wholesale generator ("EWG"), to let companies like Duke New Smyrna utilize their expertise in developing and operating wholesale generating facilities. See 15 U.S.C. §79z-5a (1998).

The construction of Section 403.519, F.S., advocated by the Opponents would allow existing utilities effectively to prevent the construction of power plants by other utilities' affiliates. This would directly interfere with Congress's purpose in enacting EPACT of enabling experienced companies to build and operate wholesale generating facilities without onerous regulatory consequences.

To prohibit Duke New Smyrna's plant from even applying for siting permits because Duke New Smyrna has not entered into a contract with a Florida utility would undermine the purposes of EPACT and Order No. 888, which are intended to prevent vertically integrated utilities from interfering with the creation of an open and competitive market for wholesale power. Such a contract

requirement is clearly inconsistent with the open, competitive wholesale market envisioned by Order No. 888. Considering the Duke New Smyrna application in a siting proceeding does not threaten any of the interests Congress left for states to protect when it allowed states to retain authority to impose environmental and siting requirements on wholesale generating facilities. Thus, interpreting Section 403.519, F.S., as requiring an applicant for a need determination to contract with an in-state retail utility would clearly conflict with the objectives of Congress and FERC and therefore is preempted. At a minimum, harmonizing EPACT with Section 403.519, F.S., requires the Commission to grant the Petitioners a hearing on the merits of their Project.

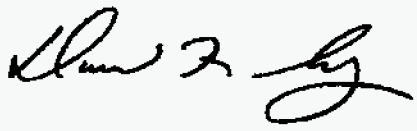
CONCLUSION

Under any reasonable construction of the applicable Florida statutes, the Petitioners are proper applicants for the Commission's determination of need for the Project. The plain language of the statutes requires this result. Accordingly, the Commission need never even reach the federal issues addressed herein. The Commission has readily available a simple, common sense, plain language construction of all applicable state and federal law that harmonizes both while promoting the public interest.

Both Petitioners are applicants under the Siting Act and electric utilities under Section 366.02(2), Florida Statutes, and Duke New Smyrna is a public utility under the Federal Power Act. Allowing the Petitioners to proceed to the scheduled hearing on the merits is consistent with applicable state law, the fundamental purposes of utility regulation, the goals of national energy policy, and the public interest. This course also is in harmony with the Commerce Clause of the United States

Constitution, the Energy Policy Act of 1992, and applicable FERC orders. The Commission should deny the Opponents' motions to dismiss and hold the scheduled hearing on the merits of the Petitioners' application for the Commission's determination of need.

Respectfully submitted this 23rd day of November, 1998.



Donald F. Santa, Jr.
The District of Columbia Bar Bar No. 376095
LG&E Energy Corp.
220 West Main Street
Post Office Box 32030
Louisville, Kentucky 40232
Telephone (502)627-2766
Telecopier (502)627-4030

Counsel for LG&E Energy Corp.

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 23rd day of November, 1998:

Leslie J. Paugh, Esquire*
Florida Public Service Commission
2540 Shumard Oak Boulevard
Gunter Building
Tallahassee, FL 32399

Gail Kamaras, Esquire
LEAF
1114 Thomasville Road
Suite E
Tallahassee, FL 32303-6290

Robert Scheffel Wright, Esquire
John T. LaVia, III, Esquire
Landers & Parsons
P.O. Box 271
Tallahassee, FL 32302

Charles A. Guyton, Esquire
Steel Hector & Davis
215 South Monroe Street
Suite 601
Tallahassee, FL 32301

William G. Walker, III
Vice President, Regulatory Affairs
Florida Power & Light Co.
9250 West Flagler St.
Miami, FL 33174

Lee L. Willis, Esquire
Ausley & McMullen
P.O. Box 391
Tallahassee, FL 32302

William B. Willingham, Esquire
Michelle Hershel, Esquire
FL Electric Cooperatives Assoc., Inc.
P.O. Box 590
Tallahassee, FL 32302

Terry L. Kammer, COPE Director
System Council U-4, IBEW
3944 Florida Blvd., Suite 202
Palm Beach Gardens, FL 33410

Susan D. Ritenour
Asst. Secretary & Asst. Treasurer
Gulf Power Company
One Energy Place
Pensacola, FL 32520-0780

John Schantzen
System Council U-4, IBEW
3944 Florida Blvd., Suite 202
Palm Beach Gardens, FL 33410

Jeffrey A. Stone, Esquire
Beggs & Lane
P.O. Box 12950
Pensacola, FL 32576-2950

J. Roger Howe, Esquire
Office of Public Counsel
111 W. Madison Ave., Room 812
Tallahassee, FL 32399-1400

Jon Moyle, Jr., Esquire
Moyle Flanigan Katz
210 South Monroe Street
Tallahassee, FL 32301

Gary L. Sasso, Esquire
Carlton Fields et al
P.O. Box 2861
St. Petersburg, FL 33733

Attorney