



FECA

Florida Electric Cooperatives Association, Inc.

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January 19, 1999

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

RE: Docket No. 981042-EM, Joint Petition for Determination of Need by Utilities
Commission, City of New Smyrna Beach and Duke Energy New Smyrna Beach Power
Company

Dear Ms. Bayo:

Enclosed please find the original and fifteen (15) copies of Florida Electric Cooperatives
Association, Inc.'s Posthearing Brief to be filed in the above-captioned docket.

Thank you for your assistance.

Sincerely,

Michelle Hershel

Director of Regulatory Affairs

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APP _____

DAF _____ Enclosure

DMU _____ cc: Parties of Record

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FECA-DIVISION OF RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint Petition for)	Docket No. 981042-EM
determination of need for an)	
electrical power plant in Volusia)	Dated: January 19, 1999
County by the Utilities Commission,)	
City of New Smyrna Beach, Florida,)	
and Duke Energy New Smyrna)	
Beach Power Company Ltd., L.L.P.)	
_____)	

FLORIDA ELECTRIC COOPERATIVES ASSOCIATION, INC.'s POSTHEARING BRIEF

The Florida Electric Cooperatives Association, Inc. ("FECA"), on behalf of its 17 electric cooperative members, pursuant to Order Nos. PSC-98-1183-PCO-EM (Order Establishing Procedure), PSC -98-1221-PCG-EM (Second Procedural Order), PSC-98-1595-PHO-EM (Prehearing Order), PSC-98-1595A-PHO-EM (Amended Prehearing Order) and Rule 25-22.056, Florida Administrative Code, respectfully submits the following Posthearing Brief in the above-captioned docket.

I. Issues and Positions

Issue 1: Is there a need for the proposed power plant, taking into account the need for electric system reliability and integrity as this criterion is used in Section 403.519?

No. Alternatively, if the Commission accepts the standard for approval suggested by Duke New Smyrna, that same standard must be applicable for need petitions filed by electric cooperatives that do not directly serve retail customers.

The Commission cannot approve a need petition that does not meet the criteria set forth in Section 403.519, F.S. These criteria are:

1. The need for electric system reliability and integrity;
2. The need for adequate electricity at a reasonable cost;

3. Whether the proposed plant is the most cost-effective alternative available;
4. The conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant.

System Reliability and Integrity

The proposed plant does not provide a reliable resource for Florida. Duke New Smyrna has not entered into a contract with any Florida utility. Duke New Smyrna's witness admitted that the proposed plant cannot be relied upon without such a contract. (L'Engle, Tr. 538). Therefore, the plant is not needed for system reliability or integrity.

Reasonable Cost

Duke New Smyrna intends to sell energy at the prevailing market price. (Green, Tr. 611). The prevailing market price can be extremely volatile (Hearing Exhibit 32), and the price can be very unreasonable. The record does not provide a basis for the Commission to determine that the proposed plant would provide electricity at a reasonable cost.

Most Cost-Effective Alternative Available

Duke New Smyrna has not provided an analysis of possible alternatives available, and the record does not provide a basis for the Commission to determine that the proposed plant is the most cost-effective alternative available.

Conservation

Duke New Smyrna has not conducted an analysis of demand-side conservation programs that may be available to mitigate the alleged need for the proposed plant. Instead, Duke New Smyrna relies upon the fact that it will utilize "state-of-the-art generation technology." Duke New Smyrna Petition at p.23. While FECA believes that Duke New Smyrna's proposal does not satisfy the conservation requirements of Section 403.519, F.S., FECA supports Duke New

Smyrna's position so long as generation electric cooperatives¹ are held to the same standard when they petition the Commission for a determination of need.

ISSUE 2: Does Duke New Smyrna have an agreement in place with the UCNSB, and, if so, do its terms meet the UCNSB's needs in accordance with the statute?

No position on this issue.

ISSUE 3: Does the Commission have sufficient information to assess the need for the proposed power plant under the criteria set forth in Section 403.519, Fla. Statutes?

The Commission has sufficient information to deny the petition for need, but the Commission cannot approve the Petition based upon the record evidence.

ISSUE 4: Does Duke New Smyrna have a need by 2001 for the 484 MW of capacity (476 MW summer and 548 MW winter less 30 MW) represented by the proposed facility?

No.

ISSUE 5: Can or should the capacity of the proposed project be properly included when calculating the reserve margin of an individual Florida utility or the State as a whole?

The capacity of the proposed project cannot and should not be included in the calculation of the reserve margin of an individual Florida utility or the State as a whole until such time that the plant's output is contractually obligated to be delivered to a utility that serves retail customers in Florida. (L'Engle, Tr. 540, 560, 565; Dolan, Tr. 1442).

ISSUE 6: What transmission improvements and other facilities are required in conjunction with the construction of the proposed facility, and were their costs adequately considered?

¹Generation electric cooperatives do not directly serve retail consumers.

No position on this issue.

NEED FOR ADEQUATE ELECTRICITY AT A REASONABLE COST

ISSUE 7: Is there a need for the proposed power plant, taking into account the need for adequate electricity at a reasonable cost, as this criterion is used in Section 403.519?

No. Duke has offered no evidence as to the price that retail or wholesale customers will pay for the energy from the proposed plant.

Energy and capacity from the proposed plant will be sold at the prevailing market price. (Green, Tr. 611). There is no definitive upper price limit on the sales price, (See Hearing Exhibit 32) and Duke New Smyrna has not provided any assurance that the cost of electricity will be reasonable.

The cost at issue is the cost of electricity to the ultimate retail consumer. For existing state-regulated utilities, the cost of building and operating a plant directly corresponds to the end-user's cost of electricity. This is not true for a merchant plant that sells in an unregulated environment to the highest bidder. In order for Duke New Smyrna to satisfy this criteria, it must first enter into a contract with one or more electric utilities that are regulated by the Commission.

The absence of a firm purchase power contract between Duke and any Florida electric utility makes it impossible to predict what the price of electricity will be from this project (Green, Tr. 636). Duke New Smyrna has not taken this essential step, and there is no basis for the Commission to determine that the plant will provide electricity at a reasonable cost.

MOST COST EFFECTIVE ALTERNATIVE AVAILABLE

ISSUE 8: Is the proposed power plant the most cost-effective alternative available, as this criterion is used in Section 403.519?

No. Duke New Smyrna has not provided a comparative analysis.

ISSUE 9: Has Duke New Smyrna provided adequate assurances regarding available primary and secondary fuel to serve the proposed power plant on a long- and short-term basis?

No position on this issue.

ISSUE 10: What impact, if any, will the proposed power plant have on natural gas supply or transportation resources on State regulated power producers?

No position on this issue.

ISSUE 11: Will the proposed project result in the uneconomic duplication of transmission and generation facilities?

No position on this issue.

ISSUE 12: Is the identified need for power of the Utilities Commission, New Smyrna Beach ("UCNSB") which is set forth in the Joint Petition met by the power plant proposed by Florida Municipal Power Association in Docket No. 980802-EM?

No position on this issue.

CONSERVATION MEASURES

ISSUE 13: Are there any conservation measures taken by or reasonably available to the petitioners which might mitigate the need for the proposed power plant?

The record does not justify a position on this issue.

The Commission historically has required an analysis of demand-side conservation measures in need determination proceedings. Duke New Smyrna has not provided an evaluation of the cost-effective demand-side conservation measures that could be used to mitigate the alleged need for the proposed plant. FECA would support Duke New Smyrna's proposal to forgo such an analysis, so long as the same standard will be applied to a need determination petition for other generators that do not sell at retail in Florida.

E. QUESTIONS OF LAW

ISSUE 14: Does the Florida Public Service Commission have the statutory authority to render a determination of need under Section 403.519, Florida Statutes, for a project that consists in whole or in part of a merchant plant (i.e., a plant that does not have as to the merchant component of the project, an agreement in place for the sale of firm capacity and energy to a utility for resale to retail customers in Florida)?

No. The Commission cannot render a determination of need unless there is an identified retail need that is sufficient to justify the proposed plant.

The need at issue in a Section 403.519 need determination proceeding is “the need of the entity ultimately consuming the power.” Nassau I, at 1178, n. 9; Nassau II at 399.

ISSUE 15: Does the Public Service Commission have jurisdiction under the Power Plant Siting Act, Sections 403.501 - 403.518, and Section 403.519, Florida Statutes, to determine “applicant” status?

Yes.

Nassau I and Nassau II.

ISSUE 16: As to its project’s merchant capacity, does Duke New Smyrna have a statutory or other legally enforceable obligation to meet the need of any electric utility in Peninsular Florida for additional generating capacity?

No.

ISSUE 17: As to the project’s merchant capacity, is either Duke New Smyrna or UCNSB an “applicant” or “electric utility” within the meaning of the Siting Act and Section 403.519, Florida Statutes?

*Duke New Smyrna is not a proper “applicant” or an “electric utility” within the meaning of the Siting Act and Section 403.519, F.S. UCNSB is a proper

applicant, but it does not have a need that justifies the proposed plant.*

ISSUE 18: If the Commission were to grant an affirmative determination of need to Duke New Smyrna as herein requested, when the utilities in peninsular Florida had plans in place to meet reliability criteria, would the Commission be meeting its responsibility to avoid uneconomic duplication of facilities?

No.

ISSUE 19: Does the Joint Petition meet the pleading requirements of Rule 25-22.081, Florida Administrative Code?

No.

ISSUE 20: Does the Joint Petition state a cause of action by not alleging that the proposed power plant meets the statutory need criteria and instead alleging that the proposed power plant is “consistent with” Peninsular Florida’s need for power?

No.

ISSUE 21: If the Commission were to permit Duke New Smyrna to demonstrate need on a “Peninsular Florida” basis and not require Duke New Smyrna to have a contract with purchasing utilities for its merchant plant capacity, would the more demanding requirements on QFs, other non-utility generators and electric utilities afford Duke New Smyrna a special status?

Yes.

F. POLICY QUESTIONS

ISSUE 22: If Duke New Smyrna premises its determination of need upon Peninsular Florida without contracts from individual purchasing utilities, how would the Commission's affirmative determination of need affect subsequent determinations of need by utilities petitioning to meet their own need?

Approval of the Duke New Smyrna project based upon a wholesale statewide need would constitute a violation of the Commission's established policy that need is utility specific.

The Commission has previously determined that the need at issue in a Section 403.519 proceeding is need associated with a utility's retail customers, which is a utility specific need. (Nassau I; 90 FPSC 11; 286, Order No. 23792; *reconsideration denied*, 91 FPSC 6; 368, Order No. 24672). The Commission cannot abort its established policy absent rulemaking. See Walker v. State Department of Transportation, 366 So. 2d 96, 99 (Fla. 1st DCA 1979).

ISSUE 23: Will granting a determination of need as herein requested relieve electric utilities of the obligation to plan for and meet the need for reasonably sufficient, adequate and efficient service?

No.

ISSUE 24: Will granting a determination of need as herein requested create a risk that past and future investments made to provide service may not be recovered and thereby increase the overall cost of providing electric service and/or future service reliability?

Yes.

ISSUE 25: If Duke New Smyrna premises its determination of need upon Peninsular Florida without contracts from individual purchasing utilities, how would the Commission's affirmative determination of need affect subsequent determinations of need by QFs and other non-utility generators petitioning to meet utility specific needs?

No position on this issue.

ISSUE 26: If the Commission abandons its interpretation that the statutory need

criteria are "utility and unit specific," how will the Commission ensure the maintenance of grid reliability and avoid uneconomic duplication of facilities in need determination proceedings?

No position on this issue.

ISSUE 27: Will granting a determination of need as herein requested result in electric utilities being authorized to similarly establish need for additional generating capacity by reference to potential additional capacity needs which the electric utility has no statutory or contractual obligation to serve?

No position on this issue.

ISSUE 28: What effect, if any, would granting a determination of need as herein requested have on the level of reasonably achievable cost-effective conservation measures in Florida?

No position on this issue.

ISSUE 29: Would granting the determination of need requested by the joint petitioners be consistent with the public interest and the best interests of electric customers in Florida?

No.

ISSUE 30: Would granting the determination of need requested by the joint petitioners be consistent with the State's need for a robust competitive wholesale power supply market?

No position on this issue.

ISSUE 31: Would granting the determination of need requested by the joint petitioners be consistent with state and federal energy policy?

No.

FINAL ISSUES

ISSUE 32: Based on the resolution of the foregoing issues, should the petition of the

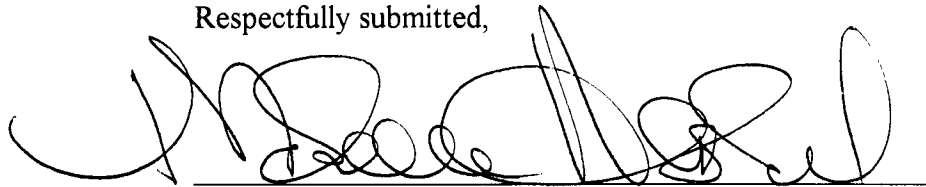
UCNSB and Duke New Smyrna for determination of need for the New Smyrna Beach Power Project be granted?

No.

ISSUE 33: Should this docket be closed?

Yes.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Michelle Hershel', written over a horizontal line.

MICHELLE HERSHEL, ESQ.

WILLIAM B. WILLINGHAM, ESQ.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Electric Cooperatives Association, Inc.'s Posthearing Brief has been furnished by U.S. Mail or Hand Delivery (*) this 19th day of January, 1999 to the following:

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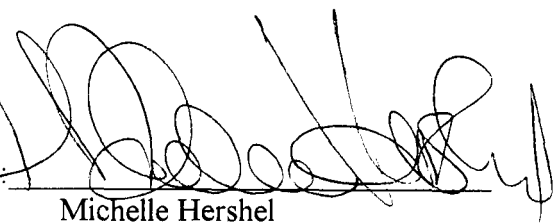
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