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Ms. Blanca S. Bayo, Director
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Florida Public Service Commission
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Tallahassee, FL 32399-0850

VIA FEDERAL EXPRESS

Re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Beach, Florida and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.; DOCKET NO. 981042-EM

Dear Ms. Bayo:

Enclosed for filing in the above docket on behalf of Florida Power Corporation are the original and fifteen (15) copies of Florida Power Corporation's Post-Hearing Brief In Opposition To Determination Of Need.

We request you acknowledge receipt and filing of the above by stamping the additional copy of this letter enclosed.

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

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Very truly yours,

Gary L. Sasso

Enclosures
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BEFORE THE 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**
	)	January 19, 1999

FLORIDA POWER CORPORATION'S POST-HEARING BRIEF IN OPPOSITION TO DETERMINATION OF NEED

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FLORIDA POWER CORPORATION'S
POST-HEARING BRIEF IN OPPOSITION TO DETERMINATION OF NEED

Introduction

Florida Power Corporation ("FPC") submits this brief in opposition to the Joint Petitioners' request for a determination of need under Section 403.519 of the Florida Energy Efficiency and Conservation Act ("FEECA"), § 366.80, et seq., Fla. Stat. As we show herein, the Joint Petitioners are not entitled to a favorable determination of need on the law or on the facts.

We demonstrate in Part I that the Commission should dismiss or deny the Joint Petition as a matter of law. The Joint Petition makes clear on its face that Duke New Smyrna Beach Power Company, L.L.P. ("Duke") would "build, own, and operate the Project" (Jt. Pet. ¶ 4); the Proposed Project would have a "net output capability of 514 megawatts" (Jt. Pet., p. 1); the Utilities Commission, City of New Smyrna Beach, Florida ("UCNSB") would have a contractual "entitlement" to only "30 MW of the Project's capacity" (Jt. Pet. ¶ 3); and that "except for the 30 MW of entitlement capacity provided to the UCNSB, the Project will be a 'merchant' plant," which would "offer[] its capacity and energy to potential wholesale customers, who are free to purchase or decline to purchase capacity and energy offered by the merchant plant" (Jt. Pet. ¶¶ 21-22). The Joint Petition plainly discloses, therefore, that UCNSB is the only retail utility in

this State that asserts a "need" for the Proposed Project, as evidenced by a contract for the purchase of capacity and energy from the Project. Moreover, that need is limited to 30 MW. Under well-settled authority, if the facts alleged in the Petition were proved to be true, these facts would fail to establish the existence of "need" for the Proposed Project as the term "need" is used and intended in Section 403.519. Accordingly, the Commission should grant FPC's Motion to Dismiss.

Although the Commission deferred ruling on FPC's Motion to Dismiss and has, in the interim, conducted a full hearing on the Joint Petition, it is important that the Commission make a ruling on the legal sufficiency of the Joint Petition to avoid the necessity of conducting a full evidentiary hearing every time a merchant plant developer files a petition for a determination of need. As the Commission recognized in dismissing the petition for need in the Nassau Power case, if the Commission permitted every case like this to proceed to a 120.57 hearing, "any entity capable of building a power plant could file a petition for a determination of need at any time for whatever plant they wanted to build," and the Commission "would end up devoting inordinate time and resources to need cases," thus "[w]asting time in need determination proceedings for projects that may never reach fruition . . . ." In Re: Petition of Nassau Power Corporation, 1992 Fla. PUC LEXIS 1557, Order No. PSC-92-1210-FOF-EQ (PSC Oct. 26, 1992), at 5 (hereafter "Nassau II (PSC)").

Because the Commission has conducted a full hearing in this case, however, and because any ruling it enters may well be appealed, FPC suggests that the Commission proceed to reject the Joint Petition based on a full review of the facts as well as the law. (This is similar to a court disposing of an issue both on the law and the facts to avoid an unnecessary remand for findings of fact in the event that an appellate court concludes that some fact material to the outcome

might have been developed past the pleading stage of a case.) In this connection, we show in Part II that Duke and UCNSB failed to prove through evidence at the hearing that the Proposed Project is "needed" within the meaning of Section 403.519. Duke and UCNSB simply confirmed at the hearing exactly what the Joint Petition indicates: Duke is developing the Proposed Project as a merchant plant and not to serve the identified need of any retail utility in this State. In fact, the record establishes that retail utilities in Florida have plans in place to install capacity to meet their own needs in the timeframe that the Proposed Project would operate. The Proposed Project will succeed only in duplicating facilities upon which Florida utilities will rely to meet their respective power-resource requirements.

Insofar as UCNSB is concerned, the record shows that its proposed 30 MW "entitlement" to capacity from the Proposed Project is a "sweetheart" deal – priced below market – calculated to get Duke's foot in the door of a Section 403.519 proceeding. Further, Duke has admitted that it has not negotiated a final power sales agreement with UCNSB. The "Participation Agreement" that the parties have executed allows Duke to abandon the project before it is constructed if this suits Duke's own "business" interests. If Duke sees fit to construct the facility, Duke may terminate even the 30 MW "entitlement" if and when Duke concludes in its sole discretion that the project no longer yields a "reasonable profit and cash flow to the owner of the Facility."

In any event, the amount of capacity that Duke has indicated it is willing to commit to UCNSB under the parties' Participation Agreement (30 MW) is insignificant to the total capacity of the plant. Under Section 403.519, this Commission is charged with the duty to determine "the need for an electrical power plant," not some miniscule proportion of a proposed facility's capacity and energy. § 403.519, Fla. Stat. (emphasis added). The applicable statutes, their

legislative history, and decisions by this Commission and the Florida Supreme Court make clear that the size of the proposed project must bear a reasonable relationship to the identifiable present and future needs of the retail utility that proposes to construct it (or place it under a firm power purchase agreement). The record makes clear that UCNSB has no expectation of needing anything close to 514 MW of capacity now or any time in the foreseeable future.

Specifically, UCNSB anticipates purchasing 30 MW of power from the Duke plant in the year 2002, when UCNSB's total load would fall short of 90 MW. (Exh. 7, RLV-3). The utility's "entitlement" to 30 MW from the Proposed Project comprises less than 6 percent of the total capacity of the proposed plant. The utility anticipates that its load will grow to less than 100 MW by the year 2008. (Exh. 7, RLV-3). At that time, UCNSB anticipates obtaining over 30 MW in capacity from its own generation resources and from its capacity interests in the St. Lucie and Crystal River nuclear units. (Exh. 7, RLV-3; Jt. Pet. ¶ 15). Even if UCNSB purchased the entire difference from the Proposed Project (approximately 65 MW), these purchases would account for under 13 percent of the plant's total output.

More fundamentally, throughout the entire period that the Proposed Project might operate, UCNSB's only contractual assurance of obtaining capacity and energy from the plant when UCNSB will need it would be limited to 30 MW. Whether and to what extent UCNSB might make additional purchases from the Proposed Project is entirely speculative. Accordingly, petitioners have not shown that the Proposed Project will meet UCNSB's present or future needs, apart from the dubious "entitlement" of 30 MW. That being so, approving the Joint Petition on the basis of UCNSB's asserted need would condone a blatant and legally impermissible circumvention of the statutory framework.

Apart from Duke's minimal, qualified capacity commitment to UCNSB, Duke has not identified a single utility in Florida that will need capacity from the proposed plant at the time that it would come on line. To the contrary, the undisputed evidence shows that all retail utilities in this State have plans in place to meet the needs of their respective systems in that timeframe, and concomitantly, the State as a whole will meet state-wide reliability criteria. Further, it is undisputed that retail utilities may not rely upon non-firm power resources in calculating their reserve margins. Thus, construction of a merchant plant would not enhance any utility's reserve margin and could not be considered by the Commission in evaluating the State's reserves. The retail utilities in this State will address any needs that they may have by carrying out the plans they have identified for adding or committing additional capacity to their respective systems.

This case is not about whether merchant plants might be good or bad for Florida. The prerogative to make that decision belongs to the Legislature. It is the Commission's role to carry out its enabling legislation, not to circumvent it. Existing law prohibits the construction of any new power plant in Florida like the Proposed Project unless the plant is needed by a particular retail utility, as evidenced by a final power purchase agreement. The Joint Petition amounts to a broadside attack on this legislative and regulatory framework. The Commission should decline the Joint Petitioners' invitation to violate the law and thus should dismiss or deny the Joint Petition.

Argument

I. The Commission Should Dismiss the Joint Petition.

In their Joint Petition, Duke and UCNSB seek a determination of need from the Commission under Section 403.519 as the necessary precondition for obtaining an authorization under the Florida Electrical Power Plant Siting Act ("PPSA") to build the proposed 514 MW

electrical power plant. As stated clearly in the Joint Petition, Duke proposes to operate the plant basically as a "merchant plant," committing only a small portion of the capacity of the plant to UCNSB, namely 30 MW, or less than 6 percent of the total capacity of the plant. In fact, Duke and UCNSB have no final power purchase agreement for even the 30 MW "entitlement" mentioned in the Joint Petition. The exhibits to the Joint Petition disclose that a "final power purchase agreement" has not been "negotiated and executed" between the Joint Petitioners. (Exh. 16 to Jt. Pet. ¶ 5.) The Joint Petition thus raises the fundamental question whether Section 403.519 and the PPSA may be used to authorize construction of a merchant plant that would generate power that no retail utility in Florida has contracted to purchase for the purpose of meeting its identifiable need, or that at most has committed a miniscule portion of its capacity to any such utility. The answer is unequivocally "no."

A. The Legal Standard on a Motion to Dismiss.

At the outset, it is important to recognize that, in ruling on a motion to dismiss a complaint or petition with prejudice for failure to state a claim on which relief may be granted, the Commission is called upon to enter an order disposing of the case on its merits. E.g., Nassau Power Corporation v. Deason, 641 So. 2d 396 (Fla. 1994) ("Nassau II") (affirming Commission's dismissal of petition for determination of need); Hardee v. Gordon Thompson Chevrolet, Inc., 154 So. 2d 174, 178 (Fla. 2d DCA 1963) ("[i]f the insufficiency (of the complaint) relates to some inherent defect in the case shown by the facts alleged, the judgment of dismissal will operate as an adjudication on the merits, and the dismissal with prejudice must be held proper") (emphasis added); Whalen v. Prosser, 719 So. 2d 2 (Fla. 2d DCA 1998) (affirming dismissal with prejudice of an action for intentional interference with an expectancy of inheritance on the ground that such a claim could not be stated, although there was no law

expressly prohibiting such an action). Thus, the fact that the Commission may have to reach the "merits" of a case in considering whether to grant or deny a motion to dismiss is not grounds for denying the motion; rather, it is a natural and necessary part of acting on the motion. In this connection, FPC has asked the Commission to dismiss the Joint Petition on the ground that, as a matter of law, the Commission may not permissibly grant the relief requested, i.e., a determination of need for the Proposed Project. If the Commission were to grant FPC's motion, as it should, such a ruling would end the case and would bar the later refiling of the same petition, absent a change in the law, under the doctrine of res judicata.

In ruling on the motion to dismiss, the Commission is expected to accept the factual allegations in the Joint Petition as true. E.g., Woolzy v. Government Employees Ins. Co., 360 So. 2d 1153, 1154 (Fla. 3d DCA 1978) ("[t]he trial court, in effect, ruled that, even assuming the facts alleged to be true, the statute upon which appellants sued afforded them no relief"); In Re: Application by Florida Cities Water Company, 1998 WL 242742, Order No. PSC-98-0513-WS (PSC Apr. 15, 1998) (granting motion to dismiss for failure to state a cause of action and stating, "[t]he standard used in addressing a motion to dismiss is whether, assuming all allegations in the petitions are facially valid, the petition nevertheless fails to state a cause of action for which relief may be had"). The Commission is not required, however, to accept as true petitioners' legal conclusion that the Joint Petition satisfies governing statutory standards. Every complaint or petition will assert that some applicable legal standard is met, but the question whether the factual allegations in the petition satisfy governing legal standards is an issue of law for the Commission, and ultimately the Florida Supreme Court, to decide. See authorities cited above. Furthermore, in making this determination, the Commission must take into account not only the

language and purpose of the relevant statutes but also any authoritative interpretations of the applicable legislation by the Florida Supreme Court. See, e.g., Nassau II (PSC).

In accordance with these principles, the Commission should grant FPC's motion and dismiss the Joint Petition with prejudice.

B. The Joint Petition Fails to Meet Applicable Legal Standards.

1. Duke is Not Covered by the Need Provision – Section 403.519.

Under the existing statutory and regulatory framework, the Commission and the utilities it regulates have responsibility for ensuring that there is adequate and reliable electric service in the State at a reasonable cost. The Commission carries out its obligations by exercising its regulatory authority over electric utilities, like FPC, that have a statutory obligation to serve. To this end, the Commission has authority over such electric utilities under Chapter 366, Fla. Stat.; Section 186.801, Fla. Stat. (the ten-year site plan law); the PPSA; and FEECA to oversee planning by the utilities and then to enforce commitments, if necessary, to build and maintain adequate generating capacity.

Section 403.519 and the PPSA are an integral part of this statutory framework. Merchant plants quite plainly fall outside this framework.

Properly understood, Section 403.519 provides the means by which the Commission monitors, reviews, and authorizes undertakings by retail utilities to site electrical power plants in this State. In fact, the Florida Legislature has made clear that no new electrical power plants (with steam capacity of over 75 MW) may be built in this State outside the regulatory framework, and the Joint Petitioners do not appear to dispute this point. In this connection, Section 403.506 of the PPSA provides in pertinent part:

> No construction of any new electrical power plant or expansion in steam generating capacity of any existing electrical power plant may be undertaken after October 1, 1973, without first obtaining certification in the manner herein provided. (Emphasis added).

Further, Section 403.508 of the PPSA makes this Commission the gatekeeper for the siting process. That section provides in relevant part:

> [A]n affirmative determination of need by the Public Service Commission pursuant to § 403.519 shall be a condition precedent to the conduct of the certification hearing. (Emphasis added).

The question in this case is: Who may obtain a determination of need and on what basis may the requesting party obtain it? The answer is that only an electric utility that has a statutory obligation to serve customers may obtain a determination of need under Section 403.519, and it must do so by making a utility-specific showing of its present and future needs. Because Duke does not serve the public at retail and cannot make a utility-specific showing of need, it may not seek a determination of need in its own right under Section 403.519. Although UCNSB may seek such a determination, the Joint Petition does not sufficiently demonstrate that UCNSB needs the Proposed Project to meet its present and future needs. To the contrary, the Joint Petition makes perfectly clear that UCNSB needs, at best, only 6 percent of the capacity of the proposed power plant. Accordingly, the Joint Petition does not state a claim for which relief may be granted under Section 403.519.

In analyzing this issue, it is critical to recognize at the outset that Section 403.519 was enacted in 1980 as part of FEECA. Ch. 80-65, Laws of Florida, Section 5, § 366.86. FEECA applies to Florida "utilities." The law was intended to force utilities in the State to encourage their respective retail customers to reduce consumption of electric energy and, only as a last resort, to construct new power plants in Florida. Thus, Section 366.81, Fla. Stat., provides in part, "The Legislature directs the commission to develop and adopt overall goals and authorizes

the commission to require each utility to develop plans and implement programs for increasing energy efficiency and conservation within its service area, subject to the approval of the commission." (Emphasis added). In enacting this law, including the provision governing the determination of need, the Legislature made clear that the legislation applied only to retail utilities, like FPC but unlike Duke. FEECA expressly provides, "For the purposes of §§ 366.80-366.85 and 403.519, 'utility' means any person or entity of whatever form which provides electricity or natural gas at retail to the public, specifically including municipalities or instrumentalities thereof and cooperatives organized under the Rural Electric Cooperative Law and specifically excluding any municipality or instrumentality thereof."

This qualification, of course, applies to the entire statute, enacted, as it was, as a unitary whole. Section 366.80 makes clear that "Sections 366.80-366.85 and 403.519 shall be known and may be cited as the 'Florida Energy Efficiency and Conservation Act.'" These are the same provisions identified in Section 366.82(1), expressly restricting coverage of the act to "retail" utilities.

Consistent with the overarching purposes of the act to avoid construction of new generating capacity unless needed, Section 403.519 directs the Commission to consider in every need proceeding "the conservation measures taken by or reasonably available to the applicant [for a determination of need] or its members which might mitigate the need for the proposed plant." Only a retail utility, of course, is obligated under FEECA to take measures to reduce consumption of electricity by its customers and is in a position to effect such measures.

It is plain on the face of the Joint Petition that Duke is not a retail utility and does not propose to be one. Specifically, Duke acknowledges:

> As a federally-regulated public utility selling electricity only at wholesale, Duke New Smyrna does not engage directly in the implementation of end-use energy

conservation programs. Moreover, Duke New Smyrna is not required to have conservation goals pursuant to Section 366.82(2), Florida Statutes.

This concession is fatal to Duke's petition. If Duke is not covered by FEECA, then it is not covered by Section 403.519, an integral part of that law.

Duke attempts to escape this conclusion by ignoring the mandate of Section 366.82(1) expressly limiting the coverage of Section 403.519 to retail utilities, and by arguing that Section 403.519 must be governed by definitions contained in the PPSA, which Duke construes to conflict with the restriction in Section 366.82(1). In particular, Duke contends that Section 403.519 uses the term "applicant," not "utility." Duke then impermissibly construes the PPSA to argue that an "applicant" under that law may include merchant plant developers and, in turn, leaps to the erroneous conclusion that merchant plant developers may therefore obtain a determination of need under Section 403.519, thus entirely circumventing FEECA's express application to retail utilities. Duke's construction sets up a hopeless conflict between the provisions of FEECA – including Section 403.519 – and the provisions of the PPSA and leads to an absurd construction of both laws. This may be seen through a careful review of the development of the PPSA and Section 403.519.

2. The Language and Legislative History of the PPSA Forecloses Application to Merchant Plants.

The PPSA was enacted in 1973. Ch. 73-33, Laws of Florida. (Exh. 1, tab 1). The PPSA included both the power plant siting provisions and the ten-year site plan requirement, now codified separately at Section 186.801, Fla. Stat. (The ten-year site plan requirement was moved to its present location in the Florida Statutes for the housekeeping purpose of consolidating this law with other comprehensive planning legislation. Section 186.801 [1984 Supp.]).

The PPSA defined "applicant" as an "electric utility which makes application for a site location certification pursuant to the provisions of this act." Ch. 73-33, Laws of Florida, Section 1, § 403.502 (1). The statute defined "electric utility," in turn, to include "cities and towns, counties, public utility districts, regulated electric companies, electric cooperatives and joint operating agencies, or combinations thereof, engaged in or authorized to engage in the business of generating, transmitting or distributing electric energy." Id. § 403.502 (4).

In Nassau II (PSC), the Commission explained that the entities listed in this definition have one important characteristic in common:

> Significantly, each of the entities listed under the statutory definition may be obligated to serve customers. It is this need, resulting from a duty to serve customers, which the need determination proceeding is designed to examine. Non-utility generators such as Nassau and Ark have no such need since they are not required to serve customers.

Nassau II (PSC), at 4 (emphasis added). (As we discuss below, the Commission's statutory construction was upheld by the Florida Supreme Court as compelled by the plain language of the PPSA.) Utilities like FPC, of course, fall within this definition. Merchant plant developers like Duke plainly do not.

This Commission's construction is confirmed by the language of the statute read as a whole and by its legislative history. As noted, the PPSA, as enacted, included the ten-year site plan law. Ch. 73-33, Laws of Florida, Section 1, § 403.505. That law required "each electric utility" to submit "a ten-year site plan which shall estimate its power generating needs and the general location of proposed power plant sites." Id. § 403.505 (1) (emphasis added). As this Commission recognized in Nassau II (PSC), only a retail utility can have "its" own power generating needs because only a retail utility is obligated to sell power to the public.

The legislative history of the PPSA makes clear that the Legislature intended the law to act as a constraint on the proliferation of power plants in Florida, limiting construction to only

those plants that retail utilities could demonstrate they needed within their ten-year planning horizon. During a discussion of the law, the Chair of the Subcommittee on Permits of the House Environmental Protection Committee, Rep. Andrews, explained to a utility representative:

> [W]e just don't want you going out and building any power plants you don't need. We've been told . . . that we should balance – remember the thing we should balance the considerations of the need for additional power with the ecological considerations? So what we want them to . . . is to make a determination that there is in fact a need that has to be served, and then they balance the ecological considerations with that need. If we've got a need that's ten years from now, we may have some trouble, and that's a different balance than if we've got one that says to me we've got a need, because if we don't have it we're going to black out next summer, and that's our point.

Transcript of Record, Excerpts from Subcommittee Meeting of the House Environmental Protection Committee, Subcommittee on Permits, Mar. 27, 1973, at 10-11 (emphasis added). During these same discussions, a representative of Florida Power & Light explained how retail utilities plan for future needs and how they might be expected to obtain certification to build a plant under the new law:

> In many instances we requested a permit for a site that will actually provide the facility with more than one generating facility in the future. We might go in and ask for a site that will allow an 800 megawatt, or 850 megawatt generator capacity now with the potential of perhaps in another five to ten years an additional 800 megawatts. . . . [I]f you can't prove your need and the reason for building the power plant, it's a difficult thing to sell any agency. I think we do that now. . . . And I think that if we look into the future and we look in planning, and we look at our ten-year proposal, and we look at the size of the plants that we're building, and I think we can get a proper balance between need, ecology, and growth of the state. I think that's really what we're after.

Id. at 11-12 (emphasis added).

As enacted, the PPSA directed the state planning division to review the site plans submitted by the various utilities required to file plans under the act and to consider the need for electrical power "in the area to be served." Id. § 403.505 (1)(a). Although this provision does not itself prescribe the scope or procedure for need determinations under the later-enacted need provision of FEECA (Section 403.519) the legislative history of this provision confirms that

members of the legislative subcommittee that developed the PPSA envisioned that retail utilities would make use of the PPSA to develop power plants designed to meet their present and future needs, and that the process of siting plants under the PPSA would be part and parcel of long-term planning by those same retail utilities in a manner designed to avoid the duplication and spread of generating plants in Florida.

To begin with, Rep. Spicola made clear during the same discussions referenced above that "we're not going to let Georgia build their plants down here and pollute us and run the power up to Georgia." Id. at 14. With that established, a representative of TECO, Mr. Woodruff, provided examples of the utilities that were expected to use the law, namely, "Tampa Electric Company," "City of Lakeland," and "Florida Power Corporation," all electric utilities that may be obligated to serve customers in Florida, exactly as this Commission stated in Nassau II (PSC). Woodruff asserted that retail utilities should be able to "inter-space" plant construction, "where one year we will build a plant and the next year maybe Florida Power Corporation will build a plant. . . . In some intermediate [period], the City of Lakeland may build a plant. But these are three systems on the west coast of Florida that are inter-tied. And what it means is that each company doesn't have to have a particular amount of steady reserve over . . . investment of capital, we can call on one another and where the City of Lakeland or Tampa Electric Company may not be able to justify the particular need in our area, that's just in the area served, we can justify it in the areas served by Florida Power Corporation, Lakeland and [TECO] on an interim building schedule. Just a part of overall planning." Id. at 15.[1] The point was,

[1] Petitioners have filed two transcripts of the subcommittee discussions, one with a request for judicial notice dated December 17, 1998, and one under a cover memorandum dated December 23, 1998. The second, expanded transcript was filed at the request of Florida Power & Light. TECO is identified in the sentence in text in the first transcript, but only elipses appear in the second transcript. In this memorandum, we cite to the more extensive transcript filed on December 23, but we have identified TECO where it was referenced in the first version.

retail utilities should be permitted to stagger construction of their power plants to avoid an uneconomic duplication or proliferation of resources, relying upon each other when necessary to avoid the premature construction of new capacity.

Rep. Spicola agreed, restating the point this way: "[W]hat you do is you build a plant big enough to meet your future needs. If you've got some excess capacity which you sell off to somebody that needs some. . . . But you anticipate that within about ten years your needs are going to outstrip this capacity, and so the other people you have been selling to are going to build in the interim, and they'll have excess capacity that they'll sell back to you. Well, that's just simply need in the area, it's just at what point in time." Id. at 15-16 (emphasis added).

This discussion confirms what should be obvious and describes how retail utilities in fact have functioned under existing law and regulation. Because of its statutory obligation to serve, a utility like FPC plans for its present and future needs and, as may be appropriate, seeks authorization to build a new plant that it can grow into over the ten-year planning horizon. In the meantime, the utility will incidentally have excess power to sell to other retail utilities, thus assisting their integrated resource planning and optimizing the use of that facility for FPC's ratepayers. The system was conceived as an integrated whole, and it makes no provision for merchant plant developers to site plants based on perceived economic opportunity as distinguished from actual, identified present and future needs of the applicant utility.

3. Duke's Construction of the PPSA is Flawed.

Duke contends, nonetheless, that it satisfies the definition of "electric utility" in the PPSA in two ways: (1) Duke says it is a "regulated electric compan[y]" and (2) Duke and UCNSB would be a "joint operating agenc[y]" within the meaning of the act. As we now show, Duke is wrong on both counts.

a. Duke Is Not a "Regulated Electric Compan[y]."

On the first point, Duke argues that it is a "regulated electric compan[y]" within the meaning of the PPSA because it is regulated by the Federal Energy Regulatory Commission ("FERC"). Petitioners insist that, even in 1973, when the PPSA was enacted, wholesale power producers were regulated by the Federal Power Commission (the predecessor to FERC) and thus wholesale power marketers were intended to be covered by the act. There is no indication in the language of the PPSA or its legislative history, however, that the Florida Legislature intended to include federally regulated electric companies in this expression of Florida law. To the contrary, the state Legislature plainly had state regulation in mind. This is evidenced by the Legislature's description of the PPSA, set forth at the outset of Ch. 73-33 of the Laws of Florida, which explains that the purpose of the act was to provide "that the regulation of electric utilities is preempted by the state." (Emphasis added). This intent is repeated in the Committee description of the law included in the legislative history of the PPSA submitted by Duke on December 17, 1998.

That being so, Duke contends that it would be regulated by the Florida Public Service Commission under Chapter 366, Fla. Stat. In this connection, Duke says it meets the definition of "electric utility" in Section 366.02 (2), which says "electric utility" means "any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within this state." But Duke does not satisfy the language or intent of this definition. Among other things, the statute does not refer to a generation "facility" but to a generation "system," and in the Joint Petition Duke provides no indication that Duke would operate an electric generation "system" within this State, even if the proposed plant were built.

More fundamentally, "electric utilities" covered by the definition are subject to numerous powers of this Commission that Duke conceded in argument would have no application to its power plant. For example, under Section 366.04 (2), Fla. Stat., the Commission "shall have power over electric utilities for the following purposes: (a) To prescribe uniform systems and classifications of accounts. (b) To prescribe a rate structure for all electric utilities. (c) To require electric power conservation . . . . (d) To approve territorial agreements . . . ." (Emphasis added). When read as a whole, therefore, Chapter 366 makes clear that, in speaking of "investor-owned electric utilit[ies]," the Legislature intended to include utilities like FPC, TECO, and FP&L, and not wholesale merchant developers that would concededly not be subject to the regulatory directives identified in the act.

Duke's response to this is to argue that it can pick and choose which provisions of state law and regulation will apply to it. For example, Duke now proposes to file a ten-year site plan with the Commission if and when its plant is approved. It is a novel concept of regulation, however, to maintain that a supposedly regulated entity gets to decide whether and when it will comply with regulatory restrictions that on their face contain no exemption. The fact is, Duke is not a regulated electric utility under Florida law, and its stated (and unenforceable) intention to follow some of the rules when it is expedient to do so cannot change that fact.

Finally, Duke contends that the term "regulated electric compan[y]" must be read to include wholesale power marketers because the definition speaks of such companies "engaged in or authorized to engage in the business of generating, transmitting or distributing electric energy." Petitioners argue that the use of the word "or" means that a company authorized to engage only in "generating" electricity, like Duke, should be covered by the definition. Petitioners contend that the word "or" would have no meaning if this construction were rejected.

But this argument overlooks the fact that, to meet the definition, a utility must be both "regulated," within the meaning of the act, and authorized to engage in the specified activities, and, as we have shown, there is no basis to conclude that the Legislature intended to refer to federally regulated EWGs. Further, the use of the disjunctive makes clear that a utility that operates only a transmission or distribution system, but does not produce its own power – say, a municipal electric company – could still avail itself of the PPSA to support the construction of a power plant that will supply its needs. This is the situation addressed in the Nassau cases, where a retail utility appears as a co-applicant with an independent power producer in a need proceeding, in which the Commission examines that utility's need for power, as evidenced by a firm power purchase agreement with the independent power producer, which is absent here.

b. Duke and UCNSB Are Not a "Joint Operating Agenc[y]."

In the alternative, Duke argues that its arrangement with UCNSB would make it a "joint operating agenc[y]" within the meaning of the PPSA. Duke has professed to be unable to ascertain the meaning of this term as it was used in the PPSA. So Duke has argued that the Proposed Project would satisfy the definition of "joint electric power supply project" as that term is used in a different statute, namely, the Joint Power Act, § 361.10, et seq., Fla. Stat. Duke's argument is unavailing for several reasons.

To begin with, the Joint Power Act was enacted in 1975 and did not exist at the time the PPSA was enacted two years earlier. Ch. 75-200, Laws of Florida. More than that, "joint electric power supply project[s]" like those authorized in the Joint Power Act were not permitted under the Florida Constitution in 1973, when the PPSA was enacted.

Specifically, the Joint Power Act permitted governmental entities, like municipalities, to use public resources to benefit private companies, like investor-owned utilities, to develop joint

power projects that would benefit the municipality. Thus, it authorized "electric utilities" (defined then, as now, to include any "municipality, authority, commission or other public body, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electrical energy generation, transmission, or distribution system within the state on June 25, 1975" – the effective date of the act) to enter into an agreement "with any other electric utility or group of electric utilities" for the purposes of "jointly financing, acquiring, constructing, managing, operating, utilizing, and owning any project or projects . . . ." Ch. 75-200, Section 3. Prior to 1974, however, Section 10 the Florida Constitution prohibited governmental bodies from entering into such arrangements with private companies. This means that, in 1973, when the PPSA was enacted, a "joint operating agenc[y]" involving a municipal utility like UCNSB was necessarily limited to a cooperative arrangement with another governmental entity, not a private developer like Duke.

The Florida Constitution was amended in 1974 to permit cooperative arrangements between governmental bodies and private companies for the "joint ownership, construction, and operation of electrical energy generating or transmission facilities." Art. VII, § 10 (d), Fla. Const. The Legislature enacted the Joint Power Act for the express purpose of "implement[ing] the provisions of Article VII, Section 10 (d) of the Florida Constitution, as amended." Ch. 75-200, Section 1; § 361.10, Fla. Stat. Even in 1975, however, a municipal utility could enter into a joint power project with an investor-owned utility only if that utility existed "within the state on June 25, 1975." Ch. 75-200, Section 3. That necessarily included only FPC, FP&L, TECO, and the like. The Joint Power Act was not amended to add "foreign public utilities" and other "persons" until 1982, almost a decade after the Legislature used the term "joint operating agenc[y]" in the PPSA. Ch. 82-53, Laws of Florida, Section 3, § 361.11 (3) and (4), Fla. Stat.

Further, it is clear on the face of the Joint Petition that Duke and UCNSB would not meet the definition of a "joint power supply project" even under the current Joint Power Act, which involves "jointly financing, acquiring, constructing, managing, operating, or owning any project or projects." Section 361.12, Fla. Stat. (as amended in 1982). The Joint Petition states that "Duke New Smyrna will build, own, and operate the Project." Jt. Pet. ¶ 4. The Joint Petition further discloses that Duke plans to finance the construction costs of the plant "with internal funds." Id. ¶ 31. Likewise, the Exhibits to the Joint Petition confirm that "The New Smyrna Beach Power Project will be developed by Duke Energy Power Services, L.L.C. ("DEPS") and owned by Duke Energy New Smyrna Beach Power Project Ltd., L.L.P., an affiliate of DEPS." Jt. Pet. Exh. at 2. "The Project will be managed, operated, and maintained by the operations and maintenance group of Duke/Fluor Daniel." Id. "The Project will be constructed and brought into commercial service solely with internal Duke New Smyrna funds." Id. at 4. For its part, UCNSB will provide consideration to Duke for the utility's "entitlement" to 30 MW of capacity and energy from the project. Jt. Pet. ¶ 3; Jt. Pet. Exh. at 16. Accordingly, it is clear that Duke is basically developing the proposed facility, providing incidental benefit to UCNSB. This is not the kind of "joint" power project envisioned by the Joint Power Act.

In any event, the issue that the Commission must address is what the Legislature intended when it enacted the PPSA, not the Joint Power Act. As we have shown, Duke's effort to answer that question by drawing upon other, unrelated legislation is misplaced. The Commission squarely addressed the issue of what the PPSA was intended to mean when it recognized in Nassau II (PSC), that the term "joint operating agenc[y]," like each of the other terms used in the definitional section of the PPSA, simply identifies utilities that may be obligated to serve customers, i. e., retail utilities. Companies like Duke are not included among such entities.

4. FEECA and Section 403.519 Plainly Limited Need Proceedings to Retail Utilities.

Even apart from all this, the clearest refutation of Duke's position is that when the Legislature acted in 1980 to pass FEECA and the need provision of that act, it expressly limited coverage of that act to "retail" utilities. As discussed above, Section 366.82(1) says "For the purposes of §§ 366.80-366.85 and 403.519, 'utility' means any person or entity of whatever form which provides electricity or natural gas at retail to the public . . . ." (Emphasis added). This is significant because it is undisputed that a determination of need under Section 403.519 provides the point of entry to the PPSA – one that may not be bypassed. There is no indication in the legislative history of FEECA that, in providing for coverage of the law to retail utilities, the Legislature intended to exclude entities from the PPSA that were previously covered.

Under Duke's construction of the PPSA, FEECA and the PPSA are in hopeless conflict, with FEECA simply overriding the former statute, commencing in 1980. Under the more natural reading of both statutes, however, the two acts are quite harmonious in their purpose and coverage, both of them providing for Commission regulation over retail utilities for planning, avoidance, and development of new generation capacity. The Legislature was obliged to craft a new definition of "utility" in FEECA for the simple reason that the law extends to the gas industry as well as the electric industry; thus, the Legislature could not use existing definitions of "electric utilities."

This construction is further confirmed by the fact that the Legislature enacted the Transmission Line Siting Act ("TLSA"), § 403.52-403.5365, Fla. Stat., in the same year that it enacted FEECA. The legislative history of the TLSA indicates that it was "patterned" after the PPSA. (Exh. 1, tab 2). The TLSA adopted definitions for "applicant" and "electric utility" that

were identical to the definitions for these same terms in the PPSA. In fact, the definition section of the TLSA – Section 403.522 – originally provided in subsection (11) that "the following words have the same meaning as appears in 403.503 [the PPSA]: (a) "electric utility . . . ." The Legislature amended Chapter 366 to add Section 366.14, providing in relevant part that "[u]pon request by an electric utility . . ., the commission shall schedule a public hearing after notice to determine the need for a transmission line regulated by the [TLSA]."

It is inconceivable that, in the very same year that the Legislature made unmistakably clear (through its enactment of FEECA, including Section 366.82 (1) of that law) that a need proceeding for the PPSA was limited to "retail" utilities, the Legislature intended to adopt a broader definition of "electric utility" for purposes of a TLSA need proceeding, when the legislative history of the latter law makes clear that it was "patterned" after the PPSA. Yet Duke's construction of the term "electric utility" in the PPSA would compel this absurd result.

The most reasonable construction of these terms is that the Legislature used the words "electric utility," "utility," and "applicant" interchangeably for purposes of electric industry need proceedings under the PPSA and the TLSA. (Again, the Legislature used "utility" in Section 403.519 instead of "electric utility" because FEECA applies to the gas industry as well as the electric industry.) In fact, when the need provision of the PPSA (and FEECA) was first enacted (and codified at Section 366.86), it used both "utility" and "applicant" in the same paragraph interchangeably. Significantly, then as now, the need provision directed the Commission to consider "conservation measures taken by or reasonably available to the applicant." (Emphasis added). This is important because it is undisputed in this case that only retail utilities are required to engage in conservation measures under FEECA and only such utilities have such

measures directly available to them. It follows that, when the Legislature used the term "applicant," it fully understood that this referred to retail utilities.

To sidestep these truths, Duke attempts to place unbearable weight on housekeeping amendments made to Section 403.519 and the definition sections of the TLSA in 1990. In that year, the Legislature made various conforming amendments to the PPSA, the TLSA, and Section 403.519. As we shall discuss, these plainly were not intended to work a sea change in coverage under these laws, opening the State up to new power plant construction by merchant plants. Among these amendments, the Legislature substituted the term "applicant" in both Section 403.519 and the need provision of the TLSA for the terms "utility" and "electric utility" respectively, simply conforming the two provisions.

Importantly, the 1990 legislative amendments made no change to Section 366.82 (1), which still provides that "For purposes of [all of FEECA, including] 403.519, 'utility' means any person or entity of whatever form which provides electricity or natural gas at retail to the public . . ." (Emphasis added). Thus, before and after the 1990 amendments, Florida law makes unmistakably clear that FEECA – expressly including Section 403.519 – applies only to retail electric utilities.

The Final Staff Analysis & Economic Impact Statement of the House Committee on Environmental Regulation explained that the 1990 "legislation, for the most part, conforms the definitions, timing, and procedural provisions of the PPSA and the TLSA." House Staff Analysis, at 3 (Exh. 1, tab 3). In other words, these changes were routine. In the section-by-section analysis, this Staff report stated:

> Section 3. – Section 403.503 – Amends definitions section to add or change definitions to make both the PPSA and TLSA consistent. A new emphasis on planning is reflected by the definitions.

Referring to Section 403.519, the House Staff Analysis stated that the section "[r]equires the PSC to publish notice of 'need' hearings in newspaper" and "[c]larifies that a need order is final agency action." Id. at 7. Again, this was merely a procedural change.

To the same effect, the final Senate Staff Analysis and Economic Impact Statement stated that the changes in definitions reflected an "attempt[] to conform the definitions and procedural provisions contained in both acts." Senate Staff Analysis, at 1 (Exh. 1, tab 3). The report further stated that "Section 403.519 is amended to require the Public Service Commission to publish certain notices regarding a proceeding to determine the need for a power plant." Id. at 3.

Significantly, the House Staff Analysis reported that application fees for proceedings under the PPSA and TLSA would increase but noted that "[f]or utilities, additional costs could be transferred to the rate payer." House Staff Analysis, at 15 (emphasis added). This plainly reflects an understanding that when the Legislature referred to "utilities" in the PPSA and TLSA, the term was used to mean retail utilities that serve ratepayers. In the same vein, the Senate Staff explained:

> The fees charged to the applicant under both the Electrical Power Plant Siting Act and the Transmission Line Siting Act are increased by this bill. The fees will vary with each power plant application and transmission line application. . . . Such costs, however, are generally passed on to the ratepayer.

Senate Staff Analysis, at 5 (emphasis added). This confirms what we have argued: that the Legislature has consistently used the terms "utilities" and "applicant" interchangeably to mean retail electric utilities that have ratepayers.

Finally, the House Staff Analysis confirmed the understanding of the Legislature that the amendments made in 1990 would have no "Effects on Competition, Private Enterprise, and Employment Markets." House Staff Analysis, at 15. This flatly refutes Duke's contention that the 1990 amendments were intended dramatically to increase wholesale competition in this State

by permitting a proliferation of merchant plants that would not be demonstrably needed by any particular retail utility.

In sum, a careful review of the applicable legislation and legislative history permits only one reasonable conclusion: Only retail utilities that are obligated to serve customers may obtain a determination of need to meet their present and future needs. Although a utility may seek permission to build a plant that has more capacity than it presently needs, the plant must be reasonably tailored to the applicant's needs in the reasonably foreseeable future. Not surprisingly, this Commission and the Florida Supreme Court have reached precisely these conclusions in a series of decisions that control the outcome of the instant case.

5. The Nassau and City of Tallahassee Decisions Compel Dismissal of this Case.

a. The Nassau Decisions Require Dismissal of the Joint Petition.

The Commission and the Florida Supreme Court have specifically held that need proceedings under Section 403.519 must be brought by a retail utility, which must make a utility-specific showing of its need for additional generating capacity. As a corollary to this holding, the Commission and Court have concluded that an independent power producer, like Duke, may participate in a need proceeding only as a co-applicant with a retail utility with whom it has executed a final power purchase agreement to meet that utility's needs. See Nassau Power Corp. v. Beard, 601 So. 2d 1175 (Fla. 1992) ("Nassau I") and Nassau Power Corp. v. Deason, supra ("Nassau II") (collectively, the "Nassau decisions").

In Nassau I, for example, the Commission and the Court explicitly recognized that "the four criteria [for assessing need] in section 403.519 are 'utility and unit specific' and that the need for the purposes of the Siting Act is the need of the entity ultimately consuming the power." 601 So. 2d at 1178 n. 9 (emphasis added). Accordingly, the Commission and the Court held that

Section 403.519 "require[s] the PSC to determine need on a utility-specific basis." Id. (emphasis added).

The Court reasoned that this interpretation of the statute was "consistent with the overall directive of section 403.519, which requires, in particular, that the Commission determine the cost-effectiveness of a proposed power plant. This requirement would be rendered virtually meaningless if the PSC were required to calculate need on a statewide basis without considering which localities actually need more electricity in the future." Id. (emphasis added). Proving the Court's point, Duke asserts in the Joint Petition that "[e]ven if the Project were not the most cost-effective alternative for Duke New Smyrna per se, such concern is generally irrelevant to the Commission's consideration of this Petition (except as it might relate to the Project's financial viability) . . . ." Joint Petition ¶ 29 (emphasis in original). In other words, having substituted its own regulatory model for the one adopted by the Florida Legislature, Duke is quick to announce that the statutory standards contained in Section 403.519 are thereby made irrelevant. In this State, however, it is still the Florida Legislature that makes the law, not Duke or UCNSB.

In the same vein, Duke seeks to circumvent other requirements applicable to any retail-utility petitioner in a proceeding such as this, making all the more clear that neither the Legislature nor the Commission ever contemplated that a need proceeding would be used to evaluate a merchant plant. As discussed, Section 403.519 -- enacted as part of FEECA – requires that an applicant utility demonstrate as a condition of a need determination that the utility has exhausted conservation measures that might avoid the need to construct a proposed plant. As Duke has acknowledged, merchant plant developers have neither the statutory obligation nor the means to mitigate the need to build a plant by working with retail customers to reduce their consumption of electricity. Nor do merchant plant developers have any incentive to

do so since the greater the demand, the more money they will make. For this reason alone, the fundamental purpose of 403.519 would be thwarted if it were applied to authorize merchant plant developers to add capacity in this State that was not under firm contract with retail utilities to meet their identified needs.

Indeed, in rejecting the argument that the Commission should be able to evaluate need on a state-wide basis because it had done so in the past, the Court in Nassau I held that this prior practice "cannot be used now to force the PSC to abrogate its statutory responsibilities under the Siting Act." Id. at 1178 (emphasis added). The Court thus made clear that interpreting Section 403.519 to limit a determination of need to a "utility and unit specific" inquiry, with particular reference to the needs of electric utilities that serve the retail public, was not simply a matter of regulatory discretion, but was compelled by the plain language of the statute and the internal logic of its provisions.

The Commission and the Florida Supreme Court confirmed this statutory interpretation in Nassau II. In that case, the Court upheld the Commission's decision rejecting an application for a determination of need submitted by an electric cogenerator – Nassau Power Corporation ("Nassau") – that proposed to sell power to Florida Power & Light, but did not have a contract to do so. The Commission and Court held that Nassau was not a proper "applicant" under the Siting Act, "reasoning that only electric utilities, or entities with whom such utilities have executed a power purchase contract are proper applicants for a need determination under the Siting Act." 641 So. 2d at 398 (emphasis added).

In upholding the Commission's ruling, the Court held that "[t]he Commission's construction of the term 'applicant' as used in section 403.519 is consistent with the plain language of the pertinent provisions of the Act and this Court's 1992 decision in Nassau Power

Corp. v. Beard." Id. (emphasis added). The Court emphasized that, in reaching its conclusion, "[t]he Commission reasoned that a need determination proceeding is designed to examine the need resulting from an electric utility's duty to serve customers. Non-utility generators, such as Nassau, have no similar need because they are not required to serve customers." Id. (emphasis added).

Therefore, the Court held that an electric utility with a duty to serve customers is an indispensable party in any need proceeding. Specifically, the Court stated:

> [A] non-utility generator will be able to obtain a need determination for a proposed project only after a power sales agreement has been entered into with a utility. The non-utility generator will be considered a joint applicant with the utility with which it has contracted. This interpretation of the statutory scheme will satisfy the requirement that an applicant be an "electric utility," while allowing non-utility generators with a contract with an electric utility to bring the contract before the Commission for approval.

Id. at 399 (emphasis added). The Court could not have made any clearer that an IPP – like Duke – has standing to participate in a need proceeding only because of and to the extent of any power purchase contract that it may have with a retail utility to develop a project to meet the needs of that utility. By the same token, a retail utility may not allow its status to be used to enable the IPP to gain a Commission determination of need for a power plant with capacity that is not committed by a power purchase contract to serve the needs of that utility.

b. Duke's Efforts to Distinguish or Limit the Nassau Decisions Are Misconceived.

In the face of these clear rulings by this Commission and the Florida Supreme Court, Duke insists that it may play by its own rules, obtaining a determination of need on its own terms. To this end, Duke argues that the Nassau decisions do not apply here because (1) the Commission and Court in those cases supposedly did not construe the statutory provisions at

issue, and (2) the decisions were supposedly expressly limited to situations where a Qualifying Facility ("QF") seeks to enter into a contract with a retail utility. Both arguments are wrong.

First, it is clear that the Commission and the Court construed the central provisions at issue in this case, namely, Section 403.519 and the definition of "applicant" in the PPSA. The Commission specifically held in Nassau II (PSC), at 4-5:

> Ark and Nassau do not qualify as applicants. Neither Ark nor Nassau is a city, town, or county. Nor is either a public utility district, regulated electric company, electric cooperative or joint operating agency.
>
> Significantly, each of the entities listed under the statutory definition [of "applicant"] may be obligated to serve customers. It is this need, resulting from a duty to serve customers, which the need determination proceeding is designed to examine. Non-utility generators such as Nassau and Ark have no such need since they are not required to serve customers. The Supreme Court recently upheld this interpretation of the Siting Act. Dismissal of these need determination petitions is in accord with that decision. (Citing the Florida Supreme Court's decision in Nassau I.)
>
> Since our 1990 Martin order (Order No. 23080, issued June 15, 1990) the policy of this Commission has been that a contracting utility is an indispensable party to a need determination proceeding. As an indispensable party, the utility will be treated as a joint applicant with the entity with which it has contracted. This will satisfy the statutory requirement that an applicant be an "electric utility" while allowing generating entities with a contract to bring that contract before this commission. Thus, a non-utility generator such as Ark or Nassau will be able to obtain a need determination for its project after it has signed a contract (power sales agreement) with a utility.
>
> This scheme simply recognizes the utility's planning and evaluation process. It is the utility's need for power to serve its customers which must be evaluated in a need determination proceeding. Nassau Power Corporation v. Beard, supra. A non-utility generator has no such need because it is not required to serve customers. The utility, not the cogenerator or independent power producer, is the proper applicant. (Emphasis added).

Further, in Nassau II (PSC), Ark Energy, Inc. presented itself in its petition for a determination of need as an "independent power" producer. (Exh. 5, at 2). As such, Ark would have been a public utility under the Federal Power Act and subject to FERC regulation. See 16 U.S.C.A. § 824 and 42 U.S.C. § 7172(a)(1)(B). Nonetheless, the Commission held that Ark was

not a "regulated electric company" within the meaning of the PPSA, and this construction was affirmed by the Florida Supreme Court. Thus, this Commission and the Florida Supreme Court squarely addressed and rejected the statutory construction that Duke and UCNSB urge in this case, holding specifically that a retail utility must initiate a need proceeding based on its need for power to serve its customers.

Second, these decisions were not limited to a case where an independent power producer seeks to enter into a contract with a retail utility to serve the need of that utility. The fact that Nassau sought to enter into such a contract was not a disqualifying factor. To the contrary, the Commission held that it was a necessary factor, but that Nassau had not gone far enough. Again, the predicate of this holding was that only retail utilities have direct access to need proceedings under the statutory framework. What follows from this is that an independent power producer that wishes to construct a plant in this State must demonstrate that it will meet the need of particular retail utilities, as evidenced by signed power sales agreements.

Duke is seeking to convert its total disregard for the current statutory framework and the plainly articulated rationale of the Nassau decisions into a strength. The argument goes, because Duke is not even attempting to demonstrate that the Proposed Project will meet the identified needs of particular retail utilities (except for the minimal capacity provided on a qualified basis to UCNSB), it should be exempt from the requirement to do so. Merely to state the argument should suffice to expose its weakness.

In support of this position, Duke is fond of quoting out of context part of the final paragraph of this Commission's decision in Nassau II, namely, the part that reads, "It is also our intent that this Order be narrowly construed and limited to proceedings where non-utility generators seek determinations of need based on a utility's need." Nassau II (PSC), at 7. What

Duke has failed to disclose in its submissions to this Commission is that the Commission went on to describe the question that it intended to reserve for the future, namely, "We explicitly reserve for the future the question of whether a self-service generator (which has its own need to serve) may be an applicant for a need determination without a utility co-applicant. To date this circumstance has not been presented to us and we do not believe the question should be decided in the abstract." Id. at 8 (emphasis added).

In context, therefore, it is clear that the Commission did not mean to suggest that its holding should not be applied to independent power producers who blatantly ignored the requirement to enter into a final power sales contract as a pre-condition to commencing a need proceeding, but that it intended only to reserve the question whether a retail customer might petition the Commission for a determination of need to meet "its own need to serve." Even the question the Commission deferred presupposes the existence of a retail need for power.

Accordingly, the Nassau decisions do quite plainly govern this case and dictate its dismissal.

6. The City of Tallahassee Decision Requires Dismissal of the Joint Petition.

The Commission amplified the need standard set forth in the Nassau decisions in In re: Petition to determine need for proposed electrical power plant in St. Marks, Wakulla County, by City of Tallahassee, Order No. PSC-97-0659-FOF-EM, 97 FPSC 115 (PSC June 9, 1997) ("City of Tallahassee"). In that case, the Commission made clear that a retail utility may petition for a need determination based on its present and future needs, thus obtaining authorization to construct an electrical power plant that it may grow into over the reasonably foreseeable future. The petition approved in that case stands in stark contrast to UCNSB's plea in this docket for

approval of a project that it does not itself and will never need, and that will supply less than 6 percent of the utility's firm requirements.

The City of Tallahassee filed a petition to determine need for a 250 MW natural gas-fired, combined cycle generating unit at its existing Purdom site, in St. Marks, Florida. The City proposed to place the plant in service in the year 2000. The City projected a "need for a minimum of 88 MW of capacity beginning in the year 2000." Id. at 4. The Commission found "that the City does have a reliability need for 88 MW of capacity in the year 2000 . . . ." Id. "The need for capacity is further impacted by the expiration of the City's contract with Entergy for 25 MW in the year 2002." Id. The Commission went on to find that the "minimum amount of capacity the City needs to maintain [its projected] 17% summer reserve margin is 88 MW in the year 2000 and increases to 187 MW in the year 2005." Id. at 5. Ultimately, the City would "need the full 250 MW [by] the year 2007." Id.

In its petition, the City explained that it hoped to achieve benefits from the proposed unit even prior to the time that it would need its full capacity. The City stated:

> The construction and operation of Purdom Unit 8 will replace power currently obtained under the City's contract with Southern Company; will allow the City to retire two smaller, less efficient units at the Purdom site; and will displace generation from other less efficient units in the City's existing generating portfolio. Because Purdom Unit 8 is a highly efficient combined cycle generator, the average energy cost for the City's electric system is projected to decrease by approximately 11% in the unit's first full year of commercial operation.

(Petition ¶ 6).

In granting the need determination, the Commission held:

> We believe that the City has adequately demonstrated that it does have a need for additional capacity, which cannot be mitigated by reasonably available conservation measures. With respect [to] the City's argument that it has [an] economic need for 250 MW, we note that it is not unusual for a utility to grow into the capacity of a large generating unit. In addition, as discussed in the section on cost-effectiveness,

> constructing the proposed combined cycle unit in separate stages to better match the City's capacity needs appears to be more costly than building the unit in one stage.

City of Tallahassee, at 5 (emphasis added).

The Commission's reasoned decision in the City of Tallahassee case compels the rejection of the Joint Petition in this case. The instant petition makes a mockery of the measured approach taken by the petitioner and this Commission in that case. The Joint Petition makes clear on its face that UCNSB will never need the Proposed Project to serve its own customers, and, even if it did, it could not rely upon more than 30 MW – less than 6 percent of the total output of the power plant. There is no principled way to grant this petition. From the point of view of law and policy, it is no different from a proposal to build a 10,000 MW facility based on a 10 MW commitment with a municipal utility. Granting such a petition simply cannot be reconciled with the Legislature's insistence in Section 403.519 and the PPSA that new capacity be added only when necessary to serve the identified needs of a retail utility, either directly or by power purchase agreement.

7. The Oil-Backout Cases Do Not Support Duke's Position.

Duke contends that the Commission nonetheless has in the past, and may again in the future, examine need on a state-wide basis, as evidenced by the oil-backout cases decided in 1981. In re: Application for certification of Tampa Electric Company's proposed 417 megawatt net coal-fired Big Bend Unit No. 4, Order No. 9749, 81 FPSC 64 (PSC Jan. 16, 1981) ("Big Bend 4"); In re: JEA/FPL's Application of need for St. John's River Power Park Units 1 and 2, Order No. 10108, 81 FPSC 220 (PSC June 26, 1981) ("JEA/FPL"); In re: Petition for Certification of Need for Orlando Utilities Commission, Curtis H. Stanton Energy Center Unit 1, Order No. 10320, 81 FPSC 18 (PSC Oct. 2, 1981) ("Stanton"). Apart from the incontestable fact

that there is no demonstrated state-wide emergency here, Duke misses the point of these decisions.

The oil-backout cases demonstrate how the Commission may work within the framework of existing law to accomplish important statutory objectives. In these cases, the Commission took steps to implement FEECA by working through the retail utilities that the Commission regulates under that legislation. As we have discussed, FEECA applies expressly to retail utilities in Florida, and does not apply to independent power producers like Duke. After FEECA was passed, the Commission – on its own motion – promulgated rules on December 2, 1980 to implement the conservation directives of the new law. These rules are set forth as Appendix A to the order in Big Bend 4.

The rules established requirements that the "electric utility sector of the State" were required to develop and implement on a "utility system by utility system basis by January 1, 1981." App. A, at 84 (emphasis added). Under the rules "each utility," was directed to calculate anticipated demand and conservation "goals and implementation targets" in a prescribed manner, to achieve, among other things, a reduction in the "use of oil as generating fuel . . . to the greatest practicable and cost effective extent." Id. at 86 (emphasis added). The Commission further stated that "The Commission shall continuously review the relationship between demand and energy, both present and anticipated" and "[i]n making its determinations of need pursuant to the Florida Electrical Power Plant Siting Act, the Commission shall take these relationships into account so that sufficient capacity will be authorized to meet anticipated needs." Id. at 83. This is exactly what the Commission did in each of the oil-backout need cases.

In each of these cases, the Commission examined need proposals advanced by particular retail utilities expressly covered under FEECA. In the Big Bend 4 case, for example, TECO

proposed the construction of a 417 MW net coal-fired power plant with an in-service date of March 1985. In its order approving the proposal, the Commission observed that "achievement of the [Commission's] conservation goals would obviate the Peninsular system's need for Big Bend 4 from an adequacy viewpoint," but "achievement of the Commission's preliminary kW conservation goals would have an inapposite effect upon Tampa Electric's generation capacity." Big Bend 4, at 65-66. "[S]hould construction of Big Bend 4 not be certified or significantly delayed, Tampa Electric's reserve margin would fall . . . for the winter peak of 1985/1986 and would continue to degrade . . . for the winter of 1988-89." Id. at 66. The testimony established that "[p]ostponement of Big Bend 4 would . . . seriously jeopardize future service to [TECO] customers" by eroding the utility's reserve margin. Id. at 65. At the same time, the Commission considered "the socio-economic need of reducing consumption of imported oil in the State of Florida" and other incidental benefits to Florida associated with construction of the plant. These included "reduction in Peninsular Florida's dependence on imported oil and correspondingly added security of fuel supplies" and "benefits resulting from . . . economy interchange [sales] that will . . . occur between . . . utilities pursuant to the energy broker." Id. at 67.

In the JEA/FPL case, the Commission considered a joint application by the Jacksonville Electric Authority ("JEA") and Florida Power and Light Company ("FPL") to construct two coal-fired generating units at St. Johns River Power Park with in-service dates of 1985 and 1987. In the course of approving the petition, the Commission stated that it considered the need for additional capacity to ensure an "adequate supply of bulk electrical power and energy to electric customers," the "economic need of providing this bulk power and energy at the lowest possible cost," and the "the socio-economic need of reducing the consumption of imported oil in the State of Florida." JEA/FPL, at 221. The Commission considered each of "these aspects of need . . .

with respect to the electrical consumers of JEA, FPL, and peninsular Florida as a whole." Id. The Commission observed that, although JEA and FPL would not have a "reliability" need for the units in the years that they were placed into service, they would have such a need by 1991 and 1989, respectively. Id. The Commission further found that "construction of these units in the time frames proposed represent[ed] the lowest cost alternative available to the continued use of expensive oil-fired generation in Peninsular Florida, and in the areas served by JEA and FPL." Id. at 221 (emphasis added). In this connection, the Commission carefully documented the cost savings that would be enjoyed by the customers of JEA and FPL, as well as by customers in Peninsular Florida. Id. at 225-26.

Finally, in the Stanton case, the Commission considered a petition by the Orlando Utilities Commission ("OUC") to build a 415 MW pulverized-coal power plant that would be placed into operation in November 1986 and that would be jointly owned by OUC, the City of Lakeland ("Lakeland"), and the Florida Municipal Power Agency ("FMPA"). In granting the need determination, the Commission stated that it was basing its decision "primarily upon the benefits identified as flowing to peninsular Florida and to OUC's service area" and to a "lesser" extent on "participation by FMPA and Lakeland." Stanton, at 28 (emphasis added). With respect to OUC, the Commission stated that the "fuel diversity" associated with the proposed plant would "assure the OUC customer of a more reliable power supply relatively free of power supply interruptions resulting from possible foreign embargoes" and the "additional capacity will give OUC latitude in marketing capacity and energy on a peninsular-wide basis and will allow maximum benefits to be derived from the existing units, thus further reducing costs of electrical service for its customers." Id. at 22-23. The Commission projected that "OUC will be capable of producing more coal-fired and nuclear-fueled energy than its system would require at times of

minimum load," and this "excess energy can then be readily marketed as economy energy on a peninsurla-wide basis," resulting in savings for ratepayers in the State through "sales of economy energy through the energy broker." Id. at 21.

As for the FMPA, the Commission concluded that "Stanton participation provides FMPA members with an adequate source of power that is needed to meet their growth requirements at a reasonable cost, which, in the long run, will provide significant savings." Id. at 25. With respect to Lakeland, the Commission found that in view of the scheduled retirement of an existing generating unit, "additional capacity will be required prior to the fourth quarter of 1987 without Stanton Unit 1" and that "results of Lakeland's economic studies indicate significant savings to its customers by participation in the Stanton project." Id. at 26.

In each of the oil-backout cases, then, the Commission acted upon applications by particular retail utilities that made utility-specific showings concerning how the proposed units were needed by, and would benefit the customers of, the petitioning utilities. Quite properly, the Commission also considered the impact and benefits that the proposed units would have on the State as a whole. The important point that Duke misses is that, under the existing legislative framework, the Commission safeguards the interests of the State as a whole by working through the electric utilities that it regulates. It is quite improper for the Commission to throw up its hands if and when it has a concern about statewide needs and turn to some solution outside the existing legislative framework, whether that be called "manna from heaven" (to use Dr. Nesbitt's term) or something else. The Commission is not authorized to seek solutions outside existing law, no matter how alluring they might seem on the surface.

For example, if the Commission develops a concern about the need for generating capacity in any area of the State, existing law tells the Commission what to do and provides the Commission with the tools to do it. Section 366.05(8), Fla. Stat., provides:

> If the commission determines that there is probable cause to believe that inadequacies exist with respect to the energy grids developed by the electric utility industry, it shall have the power, after proceedings provided by law, and after a finding that mutual benefits will accrue to the electric utilities involved, to require installation or repair of necessary facilities, including generating plants and transmission facilities, with the costs to be distributed in proportion to the benefits received, and to take all necessary steps to ensure compliance. (Emphasis added).

This section makes clear that the Commission regulation must take place through the utilities it regulates and that the current system must be seen as an integrated whole, providing for reciprocal obligations and benefits for the incumbent participants and the ratepayers in this State, via regulated rates, brokered sales, recovery for prudent costs, a restricted return on investment, and the like.

Duke seeks to thwart this existing legislative system to serve its own interests, advanced through a proposal that offers to provide illusory but unenforceable benefits to the citizens of this State. In stark contrast to the oil-backout cases, in which the Commission acted to discharge its obligations under FEECA by ruling upon applications submitted by retail utilities expressly covered by the legislation, Duke is encouraging the Commission to circumvent FEECA by applying an integral part of that law (Section 403.519) to an independent power producer that is concededly not covered by it. Thus, far from supporting Duke's cause, the oil-backout cases provide additional confirmation of what is wrong with the Joint Petition.

C. Federal Law Does not Preclude the Application of Nassau to This Case.

As a last resort, Duke contends that application of the Nassau decisions to this case is either preempted by the Energy Policy Act of 1992 under the Supremacy Clause of the United

States Constitution or precluded by the Commerce Clause of the Constitution. This contention is unavailing for two reasons: (1) This Commission does not have the power to decline to follow a state statute based on a conclusion – mistaken or valid – that the statute may violate the United States Constitution; and (2) Duke's contention is wrong on the merits.

On the first point, it is critical to recognize that the Nassau decisions were not pronouncements of common law, but authoritative interpretations of this Commission's enabling legislation. Neither Section 403.519 nor the PPSA have been amended since the Nassau decisions were handed down. To the contrary, they were reenacted by the Legislature with full knowledge of how the Florida Supreme Court has construed them. Florida Statutes, §§ 11.2421, 11.2424 (1997). "In this state, as in most others, the rule prevails that in reenacting a statute the legislature is presumed to be aware of constructions placed upon it by the highest court of the state, and, in the absence of clear expressions to the contrary, is presumed to have adopted these constructions." Delaney v. State, 190 So. 2d 578, 581-82 (Fla. 1966); see, e.g., Gulfstream Park Racing Ass'n, Inc. v. Department of Business Regulation, 441 So. 2d 627, 628-29 (Fla. 1983). "Indeed, there is substantial authority for the proposition that such reenactment of the statute bans the court from subsequently changing its earlier construction." Delaney, 190 So. 2d at 582. It follows that Section 403.519 and the PPSA mean today what they meant in 1993 when the Florida Supreme Court last construed them.

If the Commission agrees, as it should, that the Nassau decisions may not fairly be distinguished and that the Nassau construction of those statutes applies with full force to this case, then the Commission must end its work there. That is so because an administrative agency is duty-bound to adhere to its enabling legislation and does not have the power to declare that a state statute is unconstitutional, as authoritatively construed. Only the courts have the power to

determine the constitutional validity or invalidity of a particular state statute. That is a judicial, and not an administrative function.

As the Florida Supreme Court has held, an "administrative hearing officer lacks jurisdiction to consider constitutional issues." Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So. 2d 695, 699 (Fla. 1978) (discussing administrative need proceeding) (emphasis added). See e.g., Key Haven Associated Enterprises, Inc. v. Board of Trustees, 427 So. 2d 153 (Fla. 1982) (agency may not adjudicate constitutional challenge to state statute, although agency must afford due process and equal protection in conducting proceedings that implement constitutionally valid statute); State ex rel. Atlantic Coast Line R. Co. v. State Board of Equalizers, 84 Fla. 592, 597, 94 So. 681, 683 (1922) ("[t]he right to declare an act unconstitutional is purely a judicial power, and cannot be exercised by the officers of the executive department under the guise of the observance of their oath of office to support the Constitution"). In any event, as we now demonstrate, those arguments are without merit.

a. Federal Law Does Not Preempt the Application of the Nassau Decisions to this Case.

Duke contends that federal law – specifically the Energy Policy Act of 1992 and FERC Order 888 – preempts Florida from requiring Duke to obtain a contract with state-regulated electric companies in order to build the Proposed Project. Yet "there is a long-standing presumption against federal preemption of the exercise of the power of the states," and a party asserting preemption must establish "that Congress has clearly and unmistakably manifested its intent to supersede state law." Hernandez v. Coopervision, Inc., 661 So. 2d 33, 34-35 (Fla. 2d DCA 1995); see, e.g., Hillsborough County v. Automated Med. Laboratories, Inc., 471 U. S. 707, 714 (1985).

Duke does not, and cannot, say that either the Energy Policy Act or FERC Order 888 expressly precludes the states from regulating the construction of new power plants in the way that Florida has, or in any other way for that matter. This is for good reason. Section 731 of the Energy Policy Act preserves state and local authority over the siting of facilities and environmental protection. That section provides:

> Nothing in this title or in any amendment made by this title shall be construed as affecting or intending to affect, or in any way to interfere with, the authority of any state or local government relating to environmental protection or the siting of facilities.

15 U.S.C. § 79, Historical and Statutory Notes (emphasis added).

Indeed, Duke's own policy witness in this proceeding, Martha Hesse, a former Chairman of FERC, conceded at the hearing that this proceeding was exactly the kind of proceeding left by federal law to the states, and she refused to opine that federal law foreclosed the application of the Nassau decisions to this case, saying instead that federal law was silent on such matters. (Tr. 1006, 1020-25).

The fact is, the Energy Policy Act and FERC Order 888 did not mandate wholesale competition in all ways at all times, as Duke would have this Commission believe. Nor did Congress or FERC somehow overlook issues involving the construction of new generation capacity in their policymaking in this area, as Duke implied at the hearing. Quite to the contrary, Congress has consistently and purposely relegated to the states plenary regulation over the determination of need for and the siting of new generation facilities. Thus, in enacting the Energy Policy Act Congress purposely focused its work on transmission access, specifically leaving to the states their historic role of determining whether and in what circumstances new generation facilities might be needed.

In this connection, Congress has not repealed or disturbed Section 201(b)(1) of the Federal Power Act, 16 U.S.C. § 824(b)(1), which explicitly states that FERC "shall have no jurisdiction [except in respects not pertinent here] over facilities used for the generation of electricity . . . ." (Emphasis added). As FERC held during the time that Martha Hesse was Chairman, "jurisdiction over the capacity planning, determination of power needs, plant siting, licensing, construction, and the operations of [power] plants ha[s] been deliberately withheld from our control or responsibility when Congress specifically preserved the States' authority over such matters in section 201(b) of the FPA." Monongahela Power Company, Docket No. ER87-330-001, 40 FERC ¶ 61,256 (Sept. 17, 1987) (emphasis added).

Sensitive to such concerns, the United States Supreme Court rejected a more compelling federal preemption challenge than Duke's in Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Commission, 461 U. S. 190 (1983), and the Court's reasoning there applies a fortiori to this case. In that case, the Court held that states were free to impose a moratorium on the construction of nuclear power plants on economic grounds, even in the face of federal legislation, the Atomic Energy Act, explicitly promoting the proliferation of nuclear energy. The Court stated that "[t]here is little doubt that a primary purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power. The Act itself states that it is a program 'to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public.'" Id. at 221. The Court also recognized that the legislative history of that law "confirmed that it was 'a major policy goal of the United States' that the involvement of private industry would 'speed the further development of the peaceful uses of atomic energy.'" Id. The Court nonetheless held that "the states have been

allowed to retain authority over the need for electrical generating facilities sufficient to permit a state so inclined to halt the construction of new nuclear plants by refusing on economic grounds to issue certificates of public convenience in individual proceedings." Id. at 216 (emphasis added). Further, the Court recognized that, since the states were "certainly free to make these decisions on a case-by-case basis, a state is not foreclosed from reaching the same decision through a legislative judgment, applicable to all cases." Id. at 215 (emphasis added). The Court observed, "it should be up to Congress to determine whether a state has misused the authority left in its hands." Id. at 216 (emphasis added).

Here, too, in the final analysis, vague arguments about a general federal policy of promoting wholesale competition must give way to the paramount and long-recognized interests of the State in ensuring the orderly development of power plants within its jurisdiction and the enforcement of comprehensive regulatory schemes designed to assure adequate and reliable electric service for its citizens. When and if Congress sees fit to regulate in this area itself, Congress will make the judgment to do so.

b. The Nassau Rule is not Precluded by the Commerce Clause.

Duke next contends that this Court is precluded by the Commerce Clause from conditioning the development of power plants by independent power producers on a demonstration that such plants are needed, as evidenced by contracts with retail utilities. It is appropriate to begin the analysis of this issue with a recognition that the Commerce Clause does not in terms prohibit anything. Rather, it is an affirmative grant of lawmaking authority to Congress to "regulate Commerce . . . among the several States." U. S. Const. Art. I, § 8, cl. 3. Thus, when Congress elects to confer upon the states the prerogative of regulating in a particular area, the Commerce Clause itself does not act to inhibit such state regulation. E.g., Lewis v. BT

Investment Managers, Inc., 447 U. S. 27, 44 (1980). That is exactly what Congress has done here.

Congress has plainly and repeatedly preserved to the states their traditional role of regulating the need for generating facilities and the terms upon which such facilities may be sited. As discussed above, FERC itself has recognized that "Congress specifically preserved the States' authority" over "capacity planning, determination of power needs, plant siting, licensing, construction, and the operations" of generating plants in Section 201(b) of the Federal Power Act. Monongahela Power Company, at ¶ 61,256 (Sept. 17, 1987) (emphasis added). In the same vein, the United States Supreme Court explicitly recognized in Pacific Gas that the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." 461 U. S. at 205 (emphasis added); see also id. at 191 (referring to the states' "traditional authority over economic questions such as the need for additional generating capacity, the type of generating facilities to be licensed, land use, and ratemaking"); id. at 194 (referring to "the exercise of historic state authority over the generation and sale of electricity"). Accordingly, this is not a case where Congress has – through inadvertence or inattention – omitted to regulate issues that should be off-limits to states under the "dormant" Commerce Clause.

Even if Congress may be thought to have overlooked this area of regulation, however, and thus even if the "dormant" Commerce Clause may be thought to apply to this case, Florida law and regulation in this area would survive constitutional scrutiny. Duke contends, basically, that Florida law places regulated retail utilities in a favored position, making the need of those utilities determinative in a Section 403.519 need proceeding. The United States Supreme Court

recently rejected a similar challenge under the Commerce Clause in General Motors Corporation v. Tracy, 519 U. S. 278, 117 S. Ct. 811 (1997).

The Court in that case upheld a tax by the state of Ohio that applied to unbundled power marketing sales by an interstate gas distributor, but that exempted competitive sales by in-state regulated utilities. The Court began its analysis by tracing the history of regulation in the gas and electric industries, pointing out that state regulation emerged in the early part of this century after "then-recent experiments with free market competition in the manufactured gas and electricity industries had dramatically underscored the need for comprehensive regulation." 117 S. Ct. at 819. In other words, history had proved that more was not better. To the contrary, both the unregulated gas and electric industries had experienced a period of "wasteful competition," followed by market consolidation and pricing abuses. Id.

In sustaining Ohio's differential tax treatment of state utilities and interstate power marketers, the Court pointed out:

> Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities. Although this central assumption has more often than not itself remained dormant in this Court's opinions on state discrimination subject to review under the dormant Commerce Clause, when the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes.

Id. at 824 (emphasis added). In that case, the Court recognized that regulated utilities provide "bundled" services that benefit smaller consumers. "While this captive market is not geographically distinguished from the area served by the independent marketers, it is defined economically as comprising consumers who are captive to the need for bundled benefits." Id. at 825. Although regulated utilities competed directly with power marketers for larger, non-captive customers, the Court held that Ohio was justified in treating them differently, "giv[ing] greater

weight to the captive market and the local utilities' singular role in serving it." Id. at 826 (emphasis added).

The Court recognized there, as in Pacific Gas, that "should intervention by the National Government be necessary, Congress has both the resources and the power to strike the balance between the needs of the competitive and captive markets." Id. (emphasis added). The Court cautioned that " '[e]ven expert economists" may have difficulty determining 'whether the overall economic benefits and burdens of a regulation favor local inhabitants against outsiders.'" Id. at 829 (citations omitted). In this connection, the Court observed, "a challenge like the one before us 'call[s] for Congressional investigation, consideration, and action. The Constitution gives that branch of government the power to regulate commerce among the states, and until it acts [we] think we should enter the field with extreme caution.'" Id. (citations omitted).

The Court concluded "that Ohio's regulatory response to the needs of the local natural gas market have resulted in a noncompetitive bundled gas product that distinguishes its regulated sellers from independent marketers to the point that the enterprises should not be considered 'similarly situated' for purposes of a claim of facial discrimination under the Commerce Clause. GMC's argument that the State discriminates between regulated local gas utilities and unregulated marketers must therefore fail." Id. See also Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n, 461 U. S. 375, 377, 395 (1983) (rejecting Commerce Clause challenge to state's regulation of wholesale electric rates, reasoning that "the burden imposed on [interstate] commerce is not clearly excessive in relation to the putative local benefits" and noting that "the regulation of utilities is one of the most important functions traditionally associated with the police power of the States").

As in Tracy, the retail utilities in this State are assigned a critical role in need proceedings not out of some purpose to favor their economic interests, but because they alone sell power to, and are statutorily obligated to serve, the ultimate consumers in this State. The regulated utilities are simply not similarly situated with merchant plants, but have a unique and important place in a comprehensive framework of regulation that is designed as a whole to serve the needs of the citizens of this State for reliable energy and to constrain the proliferation of power plants to the detriment of the State's environment. As the Court observed in Tracy, it is neither wise nor constitutionally necessary to dismantle that framework on a piecemeal basis at the urging of some power marketer who wants the benefits, but not the burdens, of participating in this regulated market.

In support of its position, Duke relies heavily on the Supreme Court's earlier decision in New England Power Co. v. New Hampshire, 455 U. S. 331 (1982) invalidating under the Commerce Clause New Hampshire's directive that the owner of an existing hydroelectric plant that participated in the regional New England Power Pool alter its historic pattern of interstate billing in order to provide the economic benefits of its interstate power sales to New Hampshire. The utility had historically made most of its sales in Massachusetts and Rhode Island, selling only 6 percent of its output in New Hampshire.

The New England Power case did not involve the states' traditional regulatory control over the development of, and need for, new generating facilities within a state. The case did not involve any local interest at all, except sheer economics. See id. at 336, 339. Although the Court explicitly recognized that "Congress may use its powers under the Commerce Clause to '[confer] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy," id. at 340, the Court held that, with regard to the special area of hydroelectric

energy, Congress explicitly preserved only those state laws then in existence at the time the Federal Power Act was adopted, id. at 341.

Unlike the situation in New England Power, what is at issue here is the State's exercise of its traditional prerogative to regulate whether and in what circumstances new power plants may be built in this State. Further, it is Duke that is seeking to sell its Proposed Project on the basis of its supposed economic advantages to this State. If the Commission enforces the Nassau rule to reject the Joint Petition, it will not be to serve some perceived economic interest, but to effectuate the important legislative determination that new power plants should not be constructed in this State unless they are demonstrably needed.

Accordingly, federal law does not in any way preclude the Commission from fulfilling its duty of enforcing Section 403.519 according to its language, history, and its authoritative interpretation by the Florida Supreme Court.

c. Duke's Challenge to the Nassau Requirement Conflicts with the Position Duke Power Company Has Taken in its Home State of North Carolina.

Duke's constitutional challenge to the application of a requirement that an independent power producer must demonstrate the existence of a contract with a retail utility as a condition to showing need should be rejected for the additional reason that Duke Power Company ("Duke Power") has successfully argued for the establishment of the same rule in its home state of North Carolina. The Commerce Clause applies in North Carolina just as it does in Florida. Duke should not be heard to challenge the constitutionality of a requirement in this State that its affiliate was instrumental in establishing in its own service area.

Specifically, in 1992, an independent power producer filed an application for a certificate of convenience and necessity authorizing construction of a 600 MW combustion turbine electric

generating facility in Rockingham, North Carolina. The applicant stated that the power plant "will be built at Empire's own risk," i.e., it would be operated as a merchant plant under Duke's definition in this case. Re Empire Power Company, Docket No. SP-91 (N. C. Utils. Comm'n Apr. 23, 1992) (Exh. 1, tab 5, at 4). Empire argued that it could satisfy the forecasted need of particular utilities, like Carolina Power & Light Company ("CPL") and Duke Power, and that it could meet a state-wide need for power also, based on the Commission's own state-wide load forecasts. Id. Neither Duke Power nor CPL acknowledged that they had any need for the proposed facility, stating that they had "other plans to meet their capacity needs in the time frame proposed by Empire." Id. at 4.

CPL intervened in the proceeding and moved to dismiss the petition. Duke Power also intervened and adopted CPL's motion to dismiss, arguing that Empire's application was "deficient on its face because the Application does not sufficiently allege a need for the Rolling Hills facility." Id. at 3. The Commission granted the motions to dismiss on the ground that Empire had not alleged that it had a contract to sell its output to a North Carolina utility. Id. at 4. The Commission held that "[i]n a certificate proceeding, an IPP must allege more than some general need; it must allege a definite need for its own proposed facility." Id. at 6 (emphasis added). The Commission further stated that "[i]t is appropriate to require more from an IPP than from a qualifying facility . . . because federal law has essentially established the 'public need' for qualifying facilities by requiring all electric utilities to purchase electricity from such facilities." Id. (emphasis added). Discussing North Carolina statutory requirements, the Commission stated that these were "intended to effect the orderly and coordinated expansion of electric generating capacity," and to "stress demand-side management by electric utilities." Id. "These purposes

would be defeated were we to certify Empire's facility without knowing how or whether it fits into the overall scheme of energy planning." Id.

When Empire appealed, Duke Power defended the commission's decision in the North Carolina Court of Appeals. In its brief on appeal, Duke Power argued:

> [T]he Commission found that an independent power producer such as Empire must present evidence of a contract for the sale of power prior to obtaining a certificate. This is a threshold requirement. Unless Empire can establish that there exists a market for its power, Empire cannot make a showing that the public convenience and necessity requires the construction of its generating station.

(Exh. 1, tab 4, at 8) (emphasis in original). In arguing in support of a utility-specific showing of need and against the use of a "state-wide" need standard, Duke Power contended:

> Empire contends that the phrase "public convenience and necessity" means the public at large, not a limited number of utilities. (Citation omitted). The public at large receives its electricity from utilities certificated under G.S. § 62-110. Empire, which has not received a certificate as a public utility under G.S. § 62-110, cannot serve the "public at large." Unless it can show that a utility . . . is willing to buy its power, it cannot show a public need.

Id. at 29. Duke Power defended the Commission's distinction between state-regulated electric utilities and IPPs, as follows:

> Clearly the Commission properly differentiated between utilities and IPPs. Utilities, in certificating a facility, can show a need for the facility by demonstrating that their own customers require the electricity. The utility has a preexisting duty to sell to these customers. This is not so with an IPP. IPPs have no right or duty to sell to anyone. They can only sell electricity if they can find a utility or other entity to buy it. If there is no buyer, there can be no public need.

Id. at 33. Finally, Duke Power contended that the Commission's decision was "firmly tied to the public welfare and within the police power of the State." Id. at 12-16 (emphasis added).

These are all the same arguments, of course, that FPC and FP&L have urged in their motions to dismiss in this case.

In a decision issued October 19, 1993, the North Carolina Court of Appeals upheld the commission's decision dismissing Empire's petition. Utilities Commission v. Empire Power Co., 435 S. E. 2d 553 (Ct. App. N.C. 1993) (Exh. 1, tab 6). The court of appeals made a point of noting that Empire "generally asserted that there was a need for its proposed facility across the state as well as within the Duke service territory." Id. at 560 (emphasis added). The court held that Empire had not demonstrated the "public need required construction of the [proposed] facility, and the Commission's dismissal of its application was appropriate." Id. at 561. "Finding that there was no genuine issue of material fact as to the public need for the [proposed] facility," the court declined to address Empire's contention that the Commission could not appropriately impose in the case in which it was first announced a requirement that the petitioner have a contract to sell its power. Id. In its brief, Duke Power had argued on this point that the Commission appropriately applied this requirement to Empire because the "requirement to prove need for the facility . . . was already in existence" before that case. (Exh. 1, tab 4, at 34).

The position that Duke's affiliate advanced in its home state directly contradicts the arguments that Duke is advancing in this case. This demonstrates convincingly that Duke's contentions are borne of expediency and opportunism, rather than a genuine interest in the integrity of the law or welfare of Florida.

At the inception of this proceeding, we had pointed out in FPC's Motion to Dismiss that Duke Power had argued to the utilities commission in South Carolina that the commission should proceed slowly and cautiously with industry restructuring to avoid jeopardizing the interests of customers in that state through ill-conceived changes in existing law and policy. In its response to FPC's motion, Duke responded thusly:

> [M]ost cynically, FPC attempts to equate Petitioners' request for a determination of need in this proceeding with industry restructuring and deregulation. . . . Duke **has never**

> **advocated a go-slow approach to the development of a robustly competitive wholesale power market, including merchant power plants, in its home state service areas** or anywhere else. This is because the further development of a competitive wholesale power market, including merchant plants, is not a change to the industry at all. . . . Moreover, **Duke Power Company (Duke New Smyrna's affiliate that serves retail and wholesale customers in North Carolina and South Carolina) has clearly recognized the right of merchant plant developers and operators to participate in the wholesale market in its traditional home service areas in North Carolina and South Carolina. Duke Power has embraced merchant plants, supported them before the North Carolina Utilities Commission**, and entered into a power purchase agreement with the Rockingham Energy Project, a 600 MW-class combined cycle merchant facility located in Duke Power's North Carolina service area.

Petitioners' Mem. of Law in Opp. to Florida Power Corporation's Motion to Dismiss Proceeding, at 28-29 (underlining in original; bold type-face added). The best that may be said of this is that it is highly misleading. As discussed, Duke Power affirmatively opposed the introduction of a merchant plant into North Carolina by arguing for the adoption and application of a contract rule to an IPP that proposed to build and operate a wholesale generating facility at its own risk.

Duke's assertion is misleading for the additional reason that the Rockingham project that Duke is now supporting before the North Carolina Utilities Commission has been structured to satisfy, not circumvent (as here), the contract requirement that exists today in that state. The application for a certificate of public convenience and necessity was filed by Duke Power and the current developer of that project, Dynegy Inc., on October 1, 1998, and it has not been ruled upon as of the current date. The application makes plain on its face, however, that Dynegy proposed the current project in direct response to a Request For Proposal ("RFP") by Duke Power to satisfy a need in excess of 800 MW over the timeframe targeted by the project. (See Petitioners' Request for Judicial Notice, Dec. 4, 1998, attach. 11). The proposed project would consist of five, 150 MW combustion-turbine peaking units, with a total capacity of 750 MW. Duke Power has all five units under contract to meet its reliability needs for a 3 ½ year period,

with an option to extend the contract by another 5 years. Dynegy may operate only one of those five units on a merchant basis when it is not needed by Duke for reliability purposes. The application nowhere seeks to justify the proposed project on the basis of real or imagined benefits of merchant plants. Rather, it is a straightforward, traditional showing of need, bottomed on a retail utility's RFP.

At the hearing Duke made much ado about a supposed press release retrieved by Duke's attorneys off the internet – a press release of unknown circulation or authenticity that may never be brought to the attention of the regulators in North Carolina – that purports to demonstrate Duke Power's support for merchant plants. (Exh. 38). But Duke Power's actions speak louder than its words. By its contract with Dynegy Inc., Duke may lock up the capacity of the proposed Rockhingham facility for a period of 8 ½ years, deferring for at least that long the introduction of merchant capacity into North Carolina.

It is evident that Duke's parent company takes a different approach in its home states, appropriately encouraging its regulators to follow the law and proceed with caution in instituting industry change, while inviting this Commission to defy the strictures of its enabling legislation, jeopardize the efficacy of its regulatory system and the responsibilities of those who must do business within that system, and ultimately place itself at risk with its own Legislature and the Florida Supreme Court. It is a matter of record that, on three separate occasions now, Florida legislators have communicated to this Commission their view that existing law does not contemplate the development of merchant plants in Florida and that a decision to permit such development requires legislative attention.[2] What should carry more weight? The views of the Florida Legislature, or the views of an enterprising developer who says one thing at home and

something else in Florida? Duke's contentions should be seen for what they are, and this Commission should decline to yield to exhortations to do what Florida law does not permit.

II. Petitioners Have Not Established the Existence of Need on the Record in this Case.

As we have shown, the Joint Petition should be dismissed as a matter of law. Because the Commission has conducted a full evidentiary hearing, however, it may be beneficial to an appellate court for the Commission to proceed to reject the Joint Petition on the facts as well as the law. Viewing the evidence developed at the hearing, it is clear that petitioners have not met their burden of demonstrating the existence of a need for the proposed facility under the standards of Section 403.519.

A. The Applicable Standard of Need is a Utility-Specific Standard.

As a matter of law, fact, logic, and regulatory policy the applicable standard of need in a proceeding under Section 403.519 is a utility-specific standard. As the Commission recognized in Nassau II (PSC), it is the "utility's need for power to serve its customers which must be evaluated in a need determination proceeding." Nassau II (PSC), at 5 (emphasis added). "This scheme simply recognizes the utility's planning and evaluation process." Id.

Consistent with this standard, the testimony at the hearing established that "only state-regulated retail utilities can possibly have a 'need' for generating capacity for the purpose of providing adequate electricity at a reasonable cost to the consumers of this State" because "[i]n our regulatory system, only state-regulated utilities serve retail customers." (Tr. 1177, Dir. Test. of M. Rib, at 15). "For this reason, it is meaningless for a utility planner or the Commission to say that a merchant plant is 'needed' unless it is needed by a particular utility." (Id.).

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[2] Letter from Tom Lee, Chairman Regulated Industries Comm., Fla. Senate (Dec. 1, 1998); Letter from Rep. Sally Heyman, Dist. 105 (Nov. 23, 1998); Letter from James A. Scott, Chairman, Regulated Industries Comm., Fla. Senate (Dec. 12, 1997) (Exh. 36, VMD-1).

To take this one step further, "even if a particular utility or a collection of utilities may need generating capacity, they certainly do not need another power plant facility that has not committed its capacity to the retail utilities in this State." (Id.) (emphasis in original). In this connection, UCNSB's Utilities Director, Ronald L. Vaden, acknowledged at the hearing that UCNSB calculates its "15% reserve margin . . . based on firm capacity commitments" to the utility. (Tr. 417). Likewise, petitioners' witness, John C. L'Engle, the General Manager in charge of management and operations of FMPA, testified that he cannot count as a power resource available to meet FMPA's needs a generating facility that is not under firm contract with his organization. (Tr. 537-38). Because Duke was unwilling to pursue serious contract negotiations with FMPA, L'Engle has taken steps to meet FMPA's needs in the timeframe when the Proposed Project would come on line by negotiating with other power suppliers for a firm power purchase agreement. (Tr. 540, 546-49). Even if the Proposed Project were built, therefore, it would not be needed by FMPA at the time that it would come on line.

The utility-specific nature of the need standard may be seen in the specific criteria set forth in Section 403.519 itself. The first criterion concerns the need for "electric system reliability and integrity." "[T]he Commission oversees system reliability and integrity under the Grid Bill through its authority to regulate the activities of utilities such as FPC." (Tr. 1178, Dir. Test. of M. Rib, at 16). Again, since only retail utilities like FPC are authorized to provide electricity directly to the ultimate consumer, such utilities must logically be the focal point of any efforts to assure the reliable provision of electric service. For this reason, "[i]t makes no sense to talk about 'reliability' in the context . . . of a merchant plant that cannot be directed to sell its output in this State." (Id.). Because merchant plants have no statutory obligation to serve any

citizens of Florida, they cannot be counted on to meet the needs of any retail provider in times of peak demand unless they are under a firm contract with that provider.

Further, reliability concerns must necessarily be examined and redressed on a utility-specific basis because each retail utility has sole responsibility for the customers within its respective service territory (subject to oversight by the Commission). We may not say that a power plant is "needed" for reliability purposes, therefore, unless particular retail utilities must have the additional capacity to serve the identified needs of their systems.

The next criterion is the "need for adequate electricity at a reasonable cost." "Again, it makes no sense from a planning or regulatory point of view to discuss the 'need' for something neither the Commission nor a utility (with a duty to serve customers) can count on and, again, only a retail utility can possibly have a 'need' for capacity, since only such utilities serve the people in this state. Similarly, it makes no sense from a planning or regulatory point of view to talk about ensuring 'reasonable cost' in the context of entities that do not charge retail customers for power." (Id.). To amplify the latter point, the Commission could conceivably lower the costs of producing power in this State by encouraging the development of cheaper office supplies, among other inputs, but the promotion of unregulated vendors is not the type of regulation conducted under Section 403.519, which focuses on the oversight of retail utilities subject to Commission jurisdiction.

The next criterion is "whether the proposed plant is the most cost-effective alternative available." As Mr. Rib explained in his testimony, "[t]his may not be addressed without asking, 'alternative' to what? From the perspective of a merchant plant developer, the developer is considering alternative ways to make money. From the perspective of a state-regulated utility, the utility is considering alternative means to ensure sufficient generating capacity to meet its

statutory obligation to serve its customers. For planning and regulatory purposes, the statutory criterion applies to decisions made by utilities with the obligation to serve and not to consideration of alternative opportunistic ventures." (Tr. 1178-79, Dir. Test. of M. Rib, at 16-17) (emphasis in original). By this criterion, Section 403.519 directs the Commission to ensure that the retail utilities subject to FEECA have taken reasonable steps to hold down the cost of capacity they provide to their respective customers.

Finally, the statute directs that the "commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members." The petitioners concede that, as a wholesale supplier, Duke would not take conservation measures required of state-regulated utilities under FEECA. "[T]his criterion – like all the others – must be applied for planning and regulatory purposes as a retail utility-specific criterion." (Tr. 1179, Dir. Test. of M. Rib, at 17) (emphasis added).

As we now show, petitioners have failed to demonstrate that the utility-specific criteria are satisfied in this case. We further show that petitioners have failed to establish that the Proposed Project is somehow needed even on a state-wide basis.

B. UCNSB Failed To Show that it Needs the Proposed Facility.

Although UCNSB has a so-called "Participation Agreement" with Duke for a limited "entitlement" to the output of the proposed facility, it is undisputed that Duke has not "signed a . . . power sales agreement . . . with a utility," as this Commission required in Nassau II (PSC), at 5 (emphasis added). Duke's representative, Michael Green, admitted this at the hearing. (Tr. 657). Further, in response to FP&L's Requests for Admissions, petitioners admitted that "Duke New Smyrna has no final purchased power contract for any of the output from its proposed

Project." (Exh. 2, ¶ A(1)). Petitioners also admitted that "not all terms and conditions" pursuant to which Duke will sell the output of its plant "have been established." (Exh. 2, ¶ A(36)) (emphasis in original). In fact, the parties' interim "Participation Agreement" includes a number of open-ended terms that provide illusory benefits to UCNSB.

To begin with, under the agreement, Duke has the right to abandon the project if any number of conditions arise, including any "circumstance or event . . . that has had or could reasonably be expected to have a material adverse effect on the feasibility, prospects or business of the Facility." (Exh. 7, RLV-1, ¶ 3.4) (emphasis added). Duke will decide, of course, whether business conditions meet whatever internal, proprietary criteria Duke has for measuring the desirability of the project. (See Tr. 445, 621). Further, Duke may cease to honor its 30 MW "entitlement" to UCNSB whenever Duke determines that the Facility no longer operates to produce a "reasonable profit and cash flow to the owner of the Facility." (Exh. 7, RLV-1). Duke may determine when this point is reached in its "sole discretion." (Tr. 448). In fact, Duke regards the information about what the trigger point might be as "proprietary" information and has not shared it even with UCNSB. (Tr. 448-49, 621). At bottom, then, UCNSB's "entitlement" to even 30 MW of capacity from the proposed project is speculative, and dependent upon Duke's assessment of its own economic needs and self interests.

Further, UCNSB would be dependent for its 30 MW need upon the availability of Duke's lone facility in New Smyrna Beach. By contrast, UCNSB has been able to obtain contracts with FPC and FP&L that were supported by those utilities' entire systems and a contract with TECO tied to two generating units. (Tr. 477-79). In the event that Duke's proposed facility were to become unavailable due to an outage, Duke would have no obligation to provide replacement power to UCNSB. (Tr. 479-80). Finally, the Proposed Project would have no back-up fuel

supply. (Tr. 498). Far from demonstrating that the Proposed Project would provide UCNSB with a reliable power resource, therefore, the record shows that UCNSB has been enticed by a perceived short-term price advantage to gamble on dubious assurances.

Even assuming that UCNSB had a meaningful contractual commitment to 30 MW of capacity from the project (which it plainly does not), this is not sufficient to establish a sufficient need for the facility. The amount of capacity Duke is willing to commit to UCNSB is insignificant in relation to the total capacity of the plant. Under Section 403.519, this Commission is charged with the duty to determine "the need for an electrical power plant," not the ostensible need for some miniscule proportion of a proposed facility's capacity and energy.

Here, UCNSB anticipates purchasing 30 MW of power from the Duke plant in the year 2002, when UCNSB's total load would be less than 90 MW. (Exh. 7, RLV-3). The utility's "entitlement" to 30 MW from the Proposed Project comprises less than 6 percent of the total capacity of the plant. The utility anticipates that its load will grow to less than 100 MW by the year 2008. (Id.). At that time, UCNSB anticipates obtaining over 30 MW in capacity from its own generation resources and from its capacity interests in the St. Lucie and Crystal River nuclear units. (Id.; Jt. Pet. ¶ 15). Even if UCNSB purchased the entire difference from the Proposed Project (approximately 65 MW), these purchases would account for under 13 percent of the plant's total output.

More fundamentally, throughout the entire period that the Proposed Project might operate, UCNSB's only contractual assurance of obtaining capacity and energy from the plant when UCNSB will need it would be limited to 30 MW, at best. As Mr. Rib testified, a utility does not "need another power plant facility that has not committed its capacity to the retail utilities in this State." (Tr. 1177, Dir. Test. of M. Rib, at 15) (emphasis in original). To put this

another way, UCNSB may not seek a determination of need for capacity that it may not rely upon. In this connection, UCNSB's Utilities Director, Ronald L. Vaden, acknowledged at the hearing that UCNSB determines its reserve margin based on "[f]irm purchased power contracts from investor-owned utilities." (Tr. 417). Thus, "without the Participation Agreement the Utilities Commission wouldn't have any assurance that the power from the unit would be available to it" in a time of need. (Tr. 444). Accordingly, UCNSB has not shown that it needs the Proposed Project itself, even though it asserts a need for some minimal part of it.

The fact that Duke has offered UCNSB an attractively priced, "sweetheart" deal for some small part of the plant's capacity (Tr. 452, 955-56) does not warrant a different conclusion. Whatever the price of those few megawatts, UCNSB cannot demonstrate a need for the proposed 514 MW facility. The same argument advanced by UCNSB in this case could be used to justify a merchant plant of 10,000 MW (or more) based on a utility contract for 10 MW (or less). To accept this justification would be to condone a blatant circumvention of the existing statutory and regulatory framework.

C. Duke has Not Shown a Utility-Specific Need for the Proposed Project.

1. Duke's General Approach to Proving Need Does Not Comport with the Statutory Criteria.

Apart from providing the minimal and conditional "entitlement" of 30 MW to UCNSB (assuming the "business" interests of Duke are met to its satisfaction), Duke has made no pretense whatsoever of attempting to satisfy the Nassau requirements, choosing to argue instead that it must be deemed exempt from these rules. While professing that it does not propose to meet the need of any particular utility in Florida, Duke is forced to concede that it must sell to utilities in the State, if it intends to sell here at all. Duke seeks to justify its project, however, not on the basis of traditional need criteria, but by arguing instead that there is an economic

opportunity for merchant plant developers to construct plants in this State and to operate them profitably. (E.g., Tr. 747, 765-69, 867-68). In support of this thesis, Duke offers the testimony and economic model of Dr. Dale Nesbitt, an economist who is basically testing his still-developmental model out in this proceeding. (See Exh. 43, FP&L Dep. of D. Nesbitt, at 131-35 [Nov. 11, 1998, Vol. 2]).

Dr. Nesbitt estimates that, by the year 2001, approximately 5,400 MW of new generating capacity may be added and operated profitably by power plant developers in Florida. (Tr. 705, Dir. Test. of D. Nesbitt, at 14). This number will increase to 6,000 MW by the year 2007. (Exh. 43, FP&L Dep. of D. Nesbitt, at 12-14 [Nov. 11, 1998, Vol. 2]). In his direct testimony, he mistakenly asserted that "Peninsular Florida is anticipating adding combined cycle units (approximately 3,000 MW by 2006) and buying more power from out-of-state producers." (Tr. 713, Dir. Test. of D. Nesbitt, at 22). From this flawed premise he concludes that "[o]ur predicted substantial quantity of new installed capacity in Peninsular Florida – 5,400 MW – is approximately twice the quantity of new capacity that FRCC itself reported to NERC in FRCC's 1997 OE411 Annual Report." (Tr. 705, Dir. Test. of D. Nesbitt, at 14) (emphasis added). On this basis, he concludes that "there is a need for more than the 500 MW proposed by Duke New Smyrna." (Id.).

At the hearing, however, Dr. Nesbitt conceded that if the utilities in Florida in fact installed 8,000 MW of new generating capacity by the year 2007, there would be no need for the Duke plant. (Tr. 834). Mr. Rib pointed out in his direct testimony that Dr. Nesbitt's projections relied mistakenly on FRCC's 1997 10-year Plan for the State of Florida, which "projected installed capacity additions of 3,958 MW for winter, and 3,692 MW for summer." (Tr. 1183, Dir. Test. of M. Rib, at 21). By contrast, "FRCC's 1998 Regional Load and Resource Plan

projected installed capacity additions of 8,039 MW for winter and 7,611 MW for summer. The plans prepared this year demonstrate that Florida utilities are planning to add significant capacity beyond that projected in 1997. Accordingly, Dr. Nesbitt is mistaken in his discussion of aggregate statewide capacity and is potentially way off the mark on the economic viability of merchant combined-cycle plants in light of the planned generation additions proposed by the regulated electric utilities in Florida." (Id.). "Thus," Mr. Rib concluded, "merchant plant developers will not be supplying power to meet any actual shortfall that the utilities may be experiencing." (Tr. 1184, Dir. Test. of M. Rib, at 22). The inevitable consequence of this would be that the Duke plant would result in the uneconomic duplication of existing and planned resources in the State.

Significantly, Duke has not identified a single utility (other than UCNSB) in Florida that will need capacity from the proposed plant at the time that it would come on line. In their responses to FP&L's Requests for Admissions, petitioners admitted that "Duke New Smyrna has not identified in either its Joint Petition and Exhibit or its direct testimony and exhibits any individual Florida utilities, other than the Utilities Commission, New Smyrna Beach, which have a need for the output of the Project." (Exh. 2, ¶ A(4)). To the contrary, the undisputed evidence – including petitioners' own exhibits – shows that all retail utilities in this State have plans in place to meet the needs of their respective systems in that timeframe, and, concomitantly, the State as a whole will meet state-wide reliability criteria. (Exhs. 7 [RLV-7]; 3-4; Tr. 454-56, 468-70). Although Duke's counsel and Dr. Nesbitt referred recurringly to tight reserves in Florida (speaking particularly of last summer), it is undisputed that retail utilities may not rely upon non-firm power resources in calculating their reserve margins. (Tr. 417, 537-38, 1177). Thus, construction of a merchant plant without firm commitments in place would not enhance any

utility's reserve margin and could not be considered by this Commission in evaluating the State's reserves. Rather, the retail utilities in this State will address any needs that they may have by carrying out the plans they have identified for adding or committing additional capacity to their respective systems.

It is important to keep in mind that if Duke truly proposed to enhance reserve margins in Florida, Duke could have undertaken to do this under the existing rules: by entering into firm contracts with Florida utilities before commencing this need proceeding. Duke made a considered decision not to seek out such contracts, however, in advance of this proceeding, claiming that it was premature to do so without a better idea whether the project would be approved. (Tr. 595). In fact, FMPA stood ready and willing to enter into serious negotiations for a firm contract, but Duke refused to do so. (Tr. 540, 546-49). Duke's proffered explanation of why it chose to eschew firm contracts, however, is specious. By refraining from negotiating such contracts, Duke has created the very cloud over the permitting of its project that it blames for being unable to contract. In truth and fact, what Duke is doing is purposely flouting this Commission's rules to force a test case in this proceeding. If the Proposed Project were truly needed by the retail utilities of this State in the timeframe that it would come on line, then Duke would have had little difficulty demonstrating this by entering into appropriate contracts for its Proposed Project.

If Duke had followed the rules, and had been successful in procuring contracts, then this Commission would be confronted by a very different proposal, a proposal to meet the identified needs of particular retail utilities. Such a proposal could have been tested meaningfully against the criteria of Section 403.519 and this Commission's rules. The Commission, for example, would be able to determine whether the retail utility or utilities sponsoring the proposed power

plant had availed themselves of appropriate mitigation efforts before resorting to new construction; whether this was the best power resource for those utilities' particular system needs, taking into account the diversity of existing resources; and whether the Proposed Project was the most-cost effective alternative available to the sponsoring utilities for meeting their system needs.

Instead of making this showing, Duke has sidestepped any utility-specific showing, saying in essence that the market will work things out. This is not an argument of "need," within the meaning of Section 403.519. It is an argument for the dismantling of the existing regulatory approach to need.

This is made clear by Dr. Nesbitt's testimony and exhibits. His model is premised on competition in the electric power industry, "after deregulation." (Tr. 798, 829). This is what he calls the "new merchant world," where all providers of wholesale energy are profit seekers, and all purchasers are price takers. (Tr. 785-91). In this "coming merchant world," "there is no fixed-cost pass through, no obligation to serve" (Tr. 789); regulators such as this Commission, are seen as "socialists" interposed between willing "capitalists." (Tr. 787-88, 795-96, 958). Of course, Dr. Nesbitt concedes, as he must, that this is "not a world that currently exists in Florida." (Tr. 791). For this new world to work as projected, competitive bidding on new power projects should be abolished. (Tr. 768, 902-03). It will make little sense to speak of reserve margins in the traditional sense. (Tr. 852-53). The Commission's role, at best, will be admitting merchant plants into the arena, one by one, based on the willingness of entrepreneurs to take risks, gathering information as time goes on, with no identified standards (and certainly no existing legislative guidelines) about how or when to regulate market entry or behavior.[3]

[3] Although Duke is quick to assert constitutional challenges to long-standing legislative and regulatory requirements in this State, we submit that if the Commission were to accept Duke's encouragement to scuttle the

To Dr. Nesbitt, New England's experience illustrates how the new merchant world might operate, where the load approximates 25,000 MW, and where there are proposals to build 33,000 MW of capacity. (Tr. 906). He points to Louisiana to show how opening up the State to merchant construction will precipitate construction of supporting infrastructure. As he describes it (with relish), "Louisiana is made out of steel now. You can't find a place to dig that you don't hit a pipeline." (Tr. 909). "Yet," he says, "the consumers have benefited huge time." (Id.) This may be an economist's dream, but it is an environmentalist's nightmare. This so-called "merchant world" is certainly not the Legislature's vision for Florida, as reflected in FEECA and the PPSA.

It is critical to recognize that this construct of "more is better" is at the heart of Dr. Nesbitt's – and Duke's – showing of "need" in this case. It is a bald invitation to the Commission to turn away from the regulatory tools that the Legislature has provided and look instead to what Dr. Nesbitt calls "manna from heaven" (e.g., Tr. 900) to assuage any regulatory concerns that the Commission might have about utility reserve margins or ten-year site plans in this State. By the same token, it is unabashed encouragement to the Commission to abrogate its statutory responsibilities to seek extra-statutory solutions, attractive on the surface but ultimately unresponsive to existing laws, regulations, and needs in Florida.

2. Examining the Statutory Criteria, "Need" Has Not Been Proven on a Utility-Specific Basis or for Peninsular Florida.

Examining the statutory criteria, it is evident that Duke has not established that its plant is "needed" as that term is used in Section 403.519, either on a utility-specific basis or even for Peninsular Florida.

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existing rules in favor of the ill-defined system Duke proposes, this would create a situation where the Commission would be operating without sufficient legislative guidance. If we assume arguendo that legislative authority exists

a. Duke Has Failed to Show That the Proposed Project is Needed for System Reliability.

It is undisputed that the Proposed Project has no firm contracts in place to serve the needs of any Florida utility, apart from the illusory "Participation Agreement" with UCNSB. It is also undisputed that no utility in Florida may rely upon non-firm power resources to boost their reserve margins in this State. (Tr. 417, 537-38, 1177). Finally, it is undisputed that, although utilities may look at probabilistic power resource assessments – such as the Loss of Load Probability analysis – as a check on reliability, reserve margins drive decisions to develop new capacity for reliability purposes. (Tr. 1396). Because Duke has failed to establish that it has any firm contracts in place to meet the needs of particular utilities – with the possible exception of the so-called "entitlement" of 30 MW to UCNSB – Duke has failed to show that the Proposed Project is <u>needed</u> to enhance the reliability of any Florida utility.

Even on a state-wide basis, the FRCC reliability studies establish that all reliability criteria are satisfied in the applicable planning period. (Exh. 4). This evidence remains undisputed. All Duke proposes to do is to build a power plant that will duplicate facilities that retail utilities in this State are already planning to build. The important difference is, Duke's power plant will not be a <u>firm</u> resource to any Florida utility. Accordingly, Duke has not proven a reliability need for the Proposed Project even on a state-wide basis.

Indeed, Duke's sole proof of need (apart from the miniscule UCNSB "entitlement") is based on Dr. Nesbitt's work. Yet, Dr. Nesbitt conceded in response to questions from Staff counsel that his model does not measure or reflect reliability need, except indirectly insofar as an unregulated market may address it. (Tr. 867-68). In fact, petitioners admitted in response to FP&L's Requests for Admissions that "Duke New Smyrna has not proposed any reliability

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for this approach – which it does not – this would amount to an unconstitutional delegation of power to the

criteria appropriate for determining either Peninsular Florida's or any individual peninsular Florida utility's need for capacity." (Exh. 2, ¶ A(5)). Accordingly, Duke has failed to meet its burden of proof in proving a reliability need for the Proposed Project.

b. Duke Has Not Shown that the Proposed Project Will Be Needed to Provide Adequate Electricity at a Reasonable Cost.

We have already demonstrated that Duke has not proven that the Proposed Project will be needed on a utility-specific or state-wide basis to provide "adequate" electricity. Nor will it be needed on either basis to ensure the availability of electricity in this State at a reasonable cost.

To begin with, Duke has not shown that its Proposed Project will benefit economically any particular utility. Under the State's current regulatory framework, Florida utilities have the responsibility to assess whether and when they need to add new capacity for reliability and economic purposes. To the extent that particular utilities have determined that their mix of power resources needs to be improved for economic reasons or otherwise, they have developed and reported plans for achieving these improvements. (See Exh. 3; Tr. 1183-84, Dir. Test. of M. Rib, at 21-22). The Proposed Project, at best, would merely duplicate those plans.

This duplication would come at a cost. From time-to-time particular Florida utilities have opportunities to engage in economy sales and purchases of excess energy. These transactions benefit the ratepayers of both the selling utility and the purchasing utility, while enabling the selling utility better to utilize existing power production facilities. This is another example of how the regulatory framework in Florida is designed as an integrated system of obligations and benefits. A merchant plant, like the Proposed Project, would divert benefits from economy sales from the system, actually reducing the economic optimization of the existing and proposed utility resources in Florida, at ratepayer expense. (E.g., Tr. 1671-72).

Commission. See, e.g., Chiles v. Children, 589 So. 2d 260, 266-67 (Fla. 1991).

Dr. Nesbitt considered only one-half of this equation – benefits that might flow to the purchasing utilities from economy purchases. (Tr. 779-80). His model does not take into account lost benefits from the other side of the equation. (See Tr. 958).

The flaw in Dr. Nesbitt's analysis is revealed by his argument that there is an economic "need" for the Proposed Project in this State for the same reason that a man driving a 1972 Vega needs a new car. Dr. Nesbitt loses sight of who owns the car, who must replace it, and how. The fact is, Florida utilities who are operating uneconomic facilities may in fact have an economic need to replace those power resources, but they must replace them by "buying" or "leasing" a new car for their own use, not by hoping that Duke's new car will be available when they need it. In accordance with their own identified needs – reliability and economic – Florida utilities are developing and implementing plans to add economic capacity to their systems in a reliable manner.

Duke has not demonstrated, therefore, that particular Florida utilities – or utilities in this State in the aggregate – actually "need" the Proposed Project for economic reasons, or otherwise. All Duke is proposing to do is to introduce a distortion into the existing regulatory framework that, at most, offers on the surface some economic benefits to purchasing utilities, which by definition will be only marginal to whatever benefits those utilities might obtain from economy sales by other utilities, while diverting entirely whatever benefits might flow to selling utilities seeking to dispose of excess power.

If the Commission believes that particular utilities have fallen behind in their responsibility to maintain an appropriate, economical mix of power resources on their system, then the Commission has the statutory tools and responsibility to act on this concern within the

existing legislative framework. See p. 36, supra. It may not permissibly rely upon "manna from heaven" as a proper substitute to discharging its obligations under the law.

c. Duke Has Not Proven that the Proposed Project is the Most Cost-Effective Alternative to Meeting an Identified Need for New Capacity.

Because the Proposed Project is a merchant plant, Duke cannot show that the project will be the most cost-effective alternative to meeting any utility's need for new capacity, and it has not really undertaken to do so. That would involve a utility-specific showing of what alternatives the utility considered and rejected for its particular system and the proposed benefits of the Proposed Project for that utility's system needs. Duke does not attempt to make this showing because Duke does not propose really to meet the need of any particular utility for capacity that it can count on, for reliability or economic purposes. Duke does not attempt to make this showing for the further reason that Duke's sole motivation in entering into this project is to make money. Duke does not have any other need to meet. That being the case, Duke has no interest whatsoever in considering alternatives that would be superior for Florida utilities to meet their particular needs.

Accordingly, apart from UCNSB's advocacy of its "sweetheart" deal, the petitioners have not made a utility-specific showing that the Proposed Project is the most cost-effective alternative to meeting a true "need" of any utility in Florida. At most, Duke has demonstrated that Florida utilities may occasionally find it advantageous to make economy short-term purchases from the Proposed Project, but whether and on what terms Duke will enter into contracts with Florida utilities actually dedicated to the needs of Florida utilities is a matter for pure speculation on the record of this case.

In fact, UCNSB's Utilities Director, Ronald L. Vaden, conceded at the hearing that "you need[] to have a contract . . . to know your contract price of energy to be able to assess the cost-

effectiveness of the unit." (Tr. 442). Petitioners have conducted no comparison or evaluation of the cost of generation of existing or planned units in Florida with the anticipated costs of the Proposed Project, including fuel costs, variable O & M, or fixed O & M. (Tr. 460, 63, 837).

As the Florida Supreme Court held in Nassau I, it makes no sense to apply the most cost-effective alternative criterion on a state-wide basis. 601 So. 2d at 1178 n. 9. There is no meaningful way to do it. In this regard, Duke's argument reverts to its basic assertion of the economic "need" for the plant, as measured by the supposed existence of an economic opportunity for the project to operate profitably in this State. We submit that it is impermissible and illogical to equate the most cost-effective alternative criterion in Section 403.519 with an inquiry whether building the project is an advantageous business opportunity for Duke. In any event, as we have discussed, on a state-wide basis the Proposed Project will impair the optimization of the existing system, diverting resources away from utilities that may have excess power to market. Since Duke failed to account for this effect in its analysis, it has failed to meet its burden of proof for this reason as well.

d. Duke Has Failed to Show that it Has Pursued Conservation Measures that Might Mitigate the Need for the Proposed Plant.

Duke admits that it is not in a position to, or under any statutory obligation to, pursue conservation measures under FEECA that might mitigate the need to construct the Proposed Project. As we have shown, this concession is definitive proof that the Proposed Project may not be authorized under Section 403.519, which is an integral part of FEECA.

Duke argues nonetheless that its plant will be a state-of-the-art facility that will provide a net benefit to the State from an environmental perspective. Arguing that the Proposed Project will provide a "net" benefit to the State begs the question whether the same benefit may be conferred by a regulated utility that may construct the same kind of plant and that, in addition,

would be in a position to demonstrate that the plant is truly needed and may be relied upon by Florida utilities during times of peak demand.

More fundamentally, Section 403.519 provides no exemption for utilities or anyone else that seeks to build state-of-the-art facilities. Duke's own environmental expert conceded that every new power plant will have impacts on the environment that would not exist but for the construction of the power plant. (Tr. 1144). Although touting the efficiency of the plant, he acknowledged: "[T]he project will involve irreversible and irretrievable commitments of resources. It will use land. It will impact a small amount of wetlands. It will combust natural gas. It will use water, and it will emit air pollutants." (Id.) Mindful of such impacts, the Legislature has directed all utilities that wish to add new capacity to demonstrate that they have sought to avoid constructing any new plants in this State by considering demand-side and supply-side alternatives. Because Duke has not done so, and cannot do so, it is left with arguing that the Commission should employ some different or surrogate analysis in place of the statutory criterion. The Commission does not have the authority, however, to legislate as it goes, bending and twisting the statutory scheme to suit the interests of a party who does not and cannot comply with its requirements.

In sum, Duke has failed to carry its burden of showing that the Proposed Project is "needed" on a utility-specific (or even state-wide) basis. All Duke has shown is that it is prepared to make an initial investment in this project based on projections that it can operate the plant profitably. Of course, as we have discussed, Duke's only accountability on the project is to its own shareholders and, minimally, to UCNSB. With respect to UCNSB, Duke has incorporated ample "bail out" provisions in its "Participation Agreement" to allow Duke to

abandon the project or to terminate the 30 MW "entitlement" when it makes economic sense for Duke to do so.

Indeed, Duke has refused to provide the Commission with any of the information that Duke has used and will use to determine the financial soundness and viability of the project, treating all of this as proprietary and confidential. (Tr. 639, 641-42, 652-55). Duke has said basically, "trust us" on the basis of Duke's assertion that it will use its own money to finance the deal. Of course, nothing would prevent Duke from obtaining outside financing after the project is permitted or, for that matter, from seeking to sell the facility to an entrepreneur who may seek to leverage the plant sharply with debt. However good or bad Duke's assurance of financial viability may be, however, it does not suffice to establish "need" under the criteria set forth in Section 403.519.

Conclusion

For the foregoing reasons, the Joint Petition should be dismissed. The Commission should reject the Joint Petition on the facts as well as the law, based on the record adduced in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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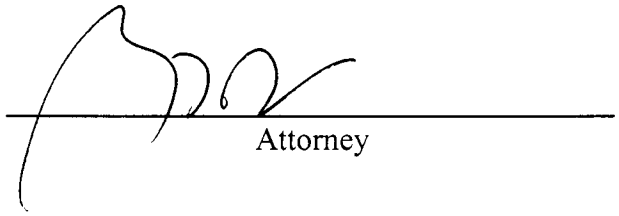

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