

1 **APPEARANCES:**

2 **ROBERT SCHEFFEL WRIGHT** and **JOHN T. LAVIA, III,**
3 **Landers & Parsons,** 310 West College Avenue, Tallahassee
4 Florida 32302, and **STEVEN G. GEY,** Florida State
5 University, and **MARK SEIDENFELD,** Florida State
6 University, College of Law, and **ALAN SUNDBERG,** c/o
7 **Landers & Parsons,** appearing on behalf of **Utilities**
8 **Commission, City of New Smyrna Beach,** and **Duke Energy**
9 **New Smyrna Beach Power Company, Ltd., L.L.P.**

10 **JAMES A. MCGEE,** Florida Power Corporation,
11 P. O. Box 14042, St. Petersburg, Florida 33733-4042, and
12 **GARY L. SASSO,** Carlton, Fields, Ward, Emmanuel, Smith &
13 **Cutler, P.A.,** Post Office Box 2861, St. Petersburg, Florida
14 33731, appearing on behalf of **Florida Power Corporation.**

15 **JAMES D. BEASLEY,** Ausley & McMullen, 227 South
16 Calhoun Street, Tallahassee, Florida 32302, appearing on
17 behalf of **Tampa Electric Company.**

18 **WILLIAM B. WILLINGHAM** and **MICHELLE HERSHEL,**
19 P. O. Box 590, Tallahassee, Florida 32302, appearing
20 on behalf of **Florida Electric Cooperatives**
21 **Association, Inc.**

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1 **APPEARANCES CONTINUED:**

2 **CHARLES GUYTON**, Steel Hector & Davis, 215
3 South Monroe Street, Suite 601, Tallahassee, Florida
4 32301, appearing on behalf of **Florida Power & Light**
5 **Company.**

6 **JON MOYLE, JR.** Moyle, Flanigan, Katz, Kolins,
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9 **Company.**

10 **LESLIE J. PAUGH** and **GRACE JAYE**, Florida
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13 32399-0870, appearing on behalf of **Staff of the**
14 **Commission.**

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P R O C E E D I N G S

(Hearing convened at 9:30 a.m.)

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3 **CHAIRMAN GARCIA:** Good morning. Let me get
4 some preliminary matters off. Commissioner Clark is a
5 little bit under the weather, so as a courtesy to us,
6 she decided to stay home and not pass on her sickness.
7 So thank you Susan. And she'll be participating by
8 teleconference with us for this hearing.

9 I just want to touch on two preliminary
10 matters that we have from Staff; and, counsel, would
11 you please address those?

12 **MS. PAUGH:** That's correct, Mr. Chairman.
13 We have a motion from Florida Power Corporation for a
14 filing out of time. It is an unopposed motion. We
15 also have --

16 **CHAIRMAN GARCIA:** All right. So we --

17 **MS. PAUGH:** We also have a request for
18 official recognition from the joint petitioners.

19 **CHAIRMAN GARCIA:** And we don't have any
20 objection to that either?

21 **MS. PAUGH:** Not to my knowledge.

22 **CHAIRMAN GARCIA:** Okay. So we will grant --
23 do we need to identify them on the record in any --
24 more than what you've just said, or you'll do that?

25 **MS. PAUGH:** We'll take care of that.

1 **CHAIRMAN GARCIA:** Okay. So both of those
2 motions are granted. And I do that, I guess, in
3 capacity as the prehearing officer as well as the
4 officer --

5 **MS. PAUGH:** Presiding officer.

6 **CHAIRMAN GARCIA:** Okay. Very good.

7 All right. What we are doing here today, if
8 there is no objection from the other Commissioners, is
9 we are hearing some additional questions that some of
10 us might have had on the motion to dismiss.

11 I'm sure you're all aware that the
12 Commissioners have another hearing, an Internal
13 Affairs, which begins promptly at noon. And I guess
14 by the fact that I'm now chairing this, I won't be
15 able to speak as much as I have on previous
16 discussions of these topics, so it's sort of a muzzle
17 that has been imposed on me.

18 But, hopefully, I'd like the conversation to
19 be as free-flowing as possible, but we'd like to keep
20 it on the issue of standing. I mean, that clearly is
21 the issue. And probably if -- there is no one more
22 guilty of roaming far and wide from the issue of
23 standing at the first discussion of dismissal than I,
24 and so I hope I can keep the discussion there.

25 And what I'd like to ask the parties, unless

1 you need more time, try to limit your answers to five
2 minutes apiece. If a Commissioner has a question and
3 you want to add something to it, even if it's not
4 addressed to you, that's fine, but if you can try to
5 keep it to five minutes. So we can keep this moving
6 along, I think it will serve us all well.

7 I know that you've all filed extensively on
8 this and, in fact, does Staff have any additional
9 questions? Will Staff have some questions?

10 **MS. PAUGH:** I have one question.

11 **CHAIRMAN GARCIA:** All right. So that's how
12 thorough you've been, that you've even muzzled Staff.
13 They feel that all your pleadings are pretty
14 sufficient. So that said, we'll open it up.

15 Commissioners, do any of you have any --.

16 **COMMISSIONER DEASON:** Well, I guess my first
17 question is one of procedure. I thought that there
18 was going to be an opportunity -- there was an oral
19 argument --

20 **CHAIRMAN GARCIA:** Right.

21 **COMMISSIONER DEASON:** -- but this is just a
22 question-answer session? There's no oral --

23 **CHAIRMAN GARCIA:** Well, Commissioner, if
24 you'd like an oral argument, that's fine. I was --

25 **COMMISSIONER DEASON:** No. I'm just asking.

1 That was my understanding. I did not even want this
2 particular -- I mean, I would not request this at all.

3 (Laughter)

4 **CHAIRMAN GARCIA:** You're right. Well, I
5 think what we had talked about is an oral argument,
6 but we had talked about an oral argument on the issues
7 that some of us may have. The parties certainly had
8 ample opportunity and, according to you, they had more
9 than enough opportunity; and this may not go very long
10 because of that, because after going over some of the
11 documents that the parties filed, it's really all out
12 there; but there were just some questions that I
13 wanted to sort of hear again the answer to.

14 **COMMISSIONER DEASON:** That's fine.

15 **COMMISSIONER JACOBS:** I think we're here
16 having a full record, and I assume now we're only
17 going to look at the motion to dismiss for the moment.
18 But I think the parties are arguing that the record
19 should be used -- should support whatever ruling there
20 is.

21 So I guess I'm very cautious in recommending
22 this, but I think it would be useful for them to
23 summarize how they think that record supports their
24 position.

25 **CHAIRMAN GARCIA:** That would be fine. If

1 you'd like to do that, that would be fine. I don't
2 know if the parties are prepared to do that.

3 **MR. GUYTON:** I'll be glad to start with
4 that, because I think we tried to get some clarity at
5 the hearing.

6 I guess I need to make an appearance, or
7 perhaps all of us do.

8 **CHAIRMAN GARCIA:** I think that might be
9 helpful.

10 **MR. GUYTON:** My name is Charles Guyton. I'm
11 with the law firm of Steel Hector & Davis, Limited
12 Liability Partnership, and I represent Florida
13 Power & Light Company in this proceeding.

14 **MS. HERSHEL:** Michelle Hershel and Bill
15 Willingham representing Florida Electric Cooperatives
16 Association.

17 **MR. SASSO:** I'm Gary Sasso With Carlton,
18 Fields, and with me is Jim McGee from Florida Power.
19 We're both representing Florida Power Corporation.

20 **MR. BEASLEY:** I'm James D. Beasley with the
21 law firm of Ausley & McMullen representing Tampa
22 Electric Company.

23 **MR. SEIDENFELD:** I'm Mark Seidenfeld at
24 Florida State University, and I'm representing Duke
25 New Smyrna.

1 **MR. GEY:** Steve Gey, Florida State
2 University, representing Duke New Smyrna.

3 **MR. WRIGHT:** Robert Scheffel Wright and
4 John T. LaVia, III, Landers & Parsons, 310 West
5 College Avenue, Tallahassee 32301, appearing on behalf
6 of the joint petitioners, Duke Energy New Smyrna Beach
7 Power Company and the Utilities Commission, City of
8 New Smyrna Beach.

9 **MR. SUNDBERG:** I'm Alan Sundberg. I'm a
10 lawyer who's associated with Landers & Parson in
11 connection with the representation of the
12 copetitioners.

13 **MR. MOYLE:** Jon Moyle, Jr. from the Moyle,
14 Flanigan Law Firm here in Tallahassee, appearing on
15 behalf of intervenor U.S. Generating Company.

16 **MS. JAYE:** Grace A. Jaye on behalf of
17 Commission Staff.

18 **MS. PAUGH:** Leslie Paugh on behalf of
19 Commission Staff.

20 **CHAIRMAN GARCIA:** Mr. Guyton?

21 **MR. GUYTON:** Commissioner Jacobs, we asked
22 for some guidance about the scope of the oral
23 argument, and our understanding today was that this
24 was to be limited to the motion to dismiss.

25 We think that's appropriate, and in that

1 regard I'd like to share with you some of the case law
2 that has to do with what's appropriately considered on
3 a motion to dismiss.

4 The motion to dismiss judges the sufficiency
5 of the pleading, and it has to be decided by reference
6 to the pleading and attached exhibits. Standing alone
7 they must state a cause of action. An insufficient
8 pleading cannot be saved because of evidence adduced
9 at a hearing. Indeed, in passing on a motion to
10 dismiss, there should be no consideration of the
11 evidence.

12 You can consider the exhibits attached to
13 the petition as to whether or not they negate the
14 cause of action, but it would be inappropriate for the
15 Commission to consider the evidence adduced at hearing
16 in ruling on a motion to dismiss. We consider this
17 argument to be on the motion to dismiss and
18 appropriately limited to the legal issues raised
19 therein.

20 **MR. SASSO:** May I add some brief comments to
21 that, Mr. Chairman?

22 **CHAIRMAN GARCIA:** Absolutely.

23 **MR. SASSO:** There was some discussion last
24 time, Commissioner Jacobs, about whether it would be
25 appropriate to consider the merits of this case on our

1 motion to dismiss, and there was some concern about
2 doing so on a motion to dismiss.

3 I think it's important to distinguish
4 between consideration of the merits of a case and
5 consideration of evidence.

6 The intervenors, Florida Power Corporation
7 and Florida Power & Light, have both moved to dismiss
8 the joint petition as legally insufficient, and we've
9 done so on the basis of facts that are pleaded in that
10 petition.

11 It so happens that those facts were
12 reaffirmed during the hearing, that they're pleaded on
13 the face of the petition; namely, that the Utilities
14 Commission of New Smyrna Beach has an agreement for
15 only 30 megawatts and that Duke will operate the
16 balance of the plant as a merchant plant.

17 Those are the critical facts in this case
18 that appear on the face of the joint petition and, as
19 I said, it so happens that they were reaffirmed in the
20 hearing. But on the basis of those facts pleaded on
21 the face of the petition, we have moved to dismiss,
22 arguing that the petition is legally insufficient
23 under controlling laws set down in the Nassau
24 decisions and under the controlling statutory
25 standards.

1 Now, the case law is very clear that what we
2 have asked for is a ruling on the merits, and it is
3 entirely appropriate for this Commission to make a
4 ruling on the merits of that issue and to decide, as a
5 matter of law, that this petition cannot be granted
6 because it is legally insufficient based on the facts
7 pleaded in that petition.

8 That's what happened in the Nassau case.
9 The petition in that case pleaded that there was a
10 need for power by FP&L and there was a need for power
11 in Peninsular Florida. That's what it pleaded, but
12 the law is clear that on a motion to dismiss you just
13 can't accept conclusory assertions that legal
14 standards are satisfied. You have to look at the
15 underlying facts that are pleaded in the petition.

16 And there the Commission dismissed that
17 pleading on the merits. They were out of court, so to
18 speak, and the Florida Supreme Court upheld that
19 determination. So it is entirely appropriate for this
20 Commission to completely and definitively dispose of
21 this case by granting our motions to dismiss.

22 Now, the Commission has gone on to take
23 evidence in the full hearing, and we have urged the
24 Commission both to grant the motion to dismiss, but
25 also go ahead and reject the petition on the facts as

1 well just to remove any doubt that if they had a full
2 hearing, they would have prevailed. But we don't
3 think that's necessary.

4 And normally what would happen is a court or
5 the Commission would dispose of the case on the motion
6 to dismiss without considering any evidence at the
7 hearing based on the application of the law to the
8 facts in that petition.

9 **CHAIRMAN GARCIA:** Thank you, Mr. Sasso.

10 **MR. SUNDBERG:** May I, Mr. Chairman? Alan
11 Sundberg.

12 I vote for Florida Power & Light's
13 construction of what we're about here today. I do not
14 think it would be appropriate -- this is a procedural
15 matter, and although it's been expressed by the
16 intervenors in some instances as a matter of the
17 authority of this Commission to entertain this
18 application, I believe it is more properly a question
19 of whether the copetitioners have standing to invoke
20 your jurisdiction.

21 I don't think there's any question that you
22 have the jurisdictional power to entertain this
23 petition. It is within the purview of what you were
24 charged with under the statute. The only question is
25 whether or not these copetitioners have standing to

1 invoke that.

2 We have, I think, clearly demonstrated we
3 do, but the question of law going to standing is a
4 question of law that should not be impacted by
5 evidence developed at the hearing. That is a merits
6 sort of thing. This is a procedural issue that may
7 result in a conclusion of the case, but it still is
8 not a merits argument. So I would respectfully join
9 with Florida Power & Light.

10 **CHAIRMAN GARCIA:** Very good. Commissioners,
11 I've got a few questions, but if you've got
12 questions --

13 **COMMISSIONER CLARK:** Joe, could I ask just
14 one question of Mr. Sundberg?

15 **CHAIRMAN GARCIA:** Yes.

16 **COMMISSIONER CLARK:** Is the question of
17 standing to him whether the petitioners are applicants
18 under the statute?

19 **MR. SUNDBERG:** Yes, ma'am. I think that's
20 the base issue. Now, you know, the other, the
21 subsidiary issue, is the assertion that Nassau
22 prohibits them from being considered by this
23 Commission as an applicant; and, of course, my
24 argument is certainly they do not.

25 **COMMISSIONER CLARK:** Okay.

1 **CHAIRMAN GARCIA:** Maybe we should go to
2 that, because Mr. Sasso touched on it and I know
3 you've touched on it, but maybe we can cover a little
4 bit of ground again.

5 You both have exact diametrically opposed
6 interpretations of how Nassau is to be interpreted.
7 Maybe, Mr. Sasso, since you touched on it first, you
8 can tell me why Nassau precludes this Commission from
9 doing what we're doing; and then we can hear from
10 Mr. Sundberg and Mr. Guyton, if he'd like to.

11 **MR. SASSO:** Very well. Nassau does preclude
12 the Commission from granting the joint petition
13 because the Commission in Nassau, and subsequently the
14 Supreme Court -- when I refer to Nassau, I mean both
15 decisions, what we've called Nassau I and Nassau II in
16 our briefs, decided in 1992 and 1994.

17 Those decisions together considered an
18 interpretation of the very definitional terms on which
19 Duke relies, namely the entities that are identified
20 as electric utilities in the definition on which Duke
21 relies for applicant status.

22 And what the court said in Nassau -- what
23 the Commission first said in Nassau was what these
24 entities have in common is they all may be obligated
25 to serve the public, namely their retail utilities.

1 Now, we've developed a very lengthy
2 exposition in our briefs about Section 403.519 being
3 part of FEECA, being expressly restricted to that very
4 type of entity, and I won't elaborate on that unless
5 you would like. But Nassau basically reached exactly
6 that conclusion. It said all of the entities which
7 have standing under the statute to seek a
8 determination of need may be obligated to serve the
9 ultimate customers. And that is the need that we are
10 asked to look at in a need determination proceeding,
11 and that's an entirely common sense --

12 **CHAIRMAN GARCIA:** Isn't Nassau I, though,
13 sort of a unit-specific need?

14 **MR. SASSO:** Yes.

15 **CHAIRMAN GARCIA:** All you need to find -- it
16 isn't -- and wouldn't that meet the standard not to
17 dismiss this case because there's a need there and
18 you've got a -- you've got 30 megawatts; there's a
19 need?

20 **MR. SASSO:** There are two aspects of what
21 the Nassau cases hold. One is that the applicant has
22 to be an entity that may be obligated to serve retail
23 customers, and that the showing has to be made on a
24 utility-specific basis by such an entity. And that
25 follows from the fact, really, that only retail

1 utilities have a retail load; they're the only
2 entities that serve customers.

3 So if anybody purports to serve the needs of
4 the customers in this state, they have to sell to the
5 retail utilities. It's the retail utilities' need
6 that is at the issue. So it either has to be a retail
7 utility seeking a determination in its own right or
8 another entity under contract to serve the need of
9 that retail utility. It's a very sort of logical
10 construction and --

11 **CHAIRMAN GARCIA:** And we don't have that
12 here.

13 **MR. SASSO:** We do not have that here. Now,
14 the Utilities Commission of New Smyrna Beach --

15 **COMMISSIONER JACOBS:** Can I --

16 **MR. SASSO:** I'm sorry, Commissioner.

17 **COMMISSIONER JACOBS:** Your logic that FEECA
18 guides in that determination --

19 **MR. SASSO:** Yes, sir.

20 **COMMISSIONER JACOBS:** -- but does
21 Chapter 403 expressly limit this application to the
22 term "retail"?

23 **MR. SASSO:** Yes, it does. That's in
24 366.821.

25 **COMMISSIONER JACOBS:** Right; and my

1 understanding is that the cross-reference is where you
2 get that limitation --

3 **MR. SASSO:** Yes, sir.

4 **COMMISSIONER JACOBS:** But in Chapter 403,
5 aren't there -- isn't there a broader interpretation
6 of the term "utilities"?

7 **MR. SASSO:** There is a definition in the
8 Power Plant Siting Act itself of "electric utility,"
9 which we believe is quite compatible with the
10 definition used in FEECA.

11 We think the only reason that FEECA used a
12 different definition is because FEECA applied to the
13 gas industry as well as the electric industry so they
14 couldn't just adopt the definition of electric
15 utility. So they said "A utility means an electric
16 utility or a gas utility that provides service to the
17 public."

18 If you trace through the history and the
19 language of the Power Plant Siting Act, we believe
20 you'll wind up at exactly the same point, which is
21 what the court said in Nassau and what the Commission
22 said in Nassau. We think they're very compatible.

23 And keep in mind that in 1980 when FEECA was
24 enacted, it became the point of entry; 403.519 became
25 the point of entry into the Siting Act. You could not

1 get a site certification hearing unless you first had
2 a need determination under FEECA, which was limited to
3 retail utilities.

4 And there wasn't any conflict between the
5 statutes. The Legislature intended both statutes to
6 apply to the utilities that are regulated by this
7 Commission that provide service to the customers in
8 the --

9 **CHAIRMAN GARCIA:** Doesn't that statute,
10 though, premise itself by saying that the statute will
11 be liberally construed? I mean, can't we consider
12 things that you believe aren't right in the center
13 there, but the Legislature -- reading from the
14 language, "The Legislature further finds and declares
15 that the statute should be liberally construed in
16 order to meet the more complex problems of reducing
17 and controlling the growth rate, the electric
18 consumption -- and it goes on and on.

19 **MR. SASSO:** Well, the Florida Supreme Court
20 has said -- and the precise cite escapes me for the
21 moment -- but when the Commission is implementing
22 language like "public interest" or broad language,
23 that is given content by the specific provisions of
24 the law. One can't just kind of creatively interpret
25 that.

1 And, in fact, even where the Commission's
2 policy-making authority is at its height in the
3 rulemaking context -- the Commission is aware, I'm
4 sure, that the Legislature has now made clear that the
5 Commission can no longer promulgate rules that are
6 merely reasonably related to the purposes of the act.
7 Now the Commission has to act precisely within the
8 scope of its delegated authority.

9 So it's not proper to look at one word like
10 "liberally construed" and use that as an opportunity
11 to enlarge the statute. In fact, one ground for
12 challenging agency action is that it enlarges the
13 statute --

14 **CHAIRMAN GARCIA:** That's interesting. Maybe
15 I can pose that question to Mr. Guyton, because I
16 think that the issue has come up before, and
17 Mr. Childs has sat in that very seat where you're
18 sitting. And I'm going to quote from the things that
19 he said about this agency and this power, and so I
20 want you to address it because it ties in that general
21 sense; and it's about an issue that's before us.

22 "However, I would point out that the
23 Commission, this Commission, has broad authority.
24 Unlike many agencies in the state, it regulates a few
25 comprehensively rather than a lot of individuals a

1 little bit. It has been historically recognized as
2 having broad comprehensive powers to regulate in the
3 public interest."

4 Isn't that what we're doing here today?
5 Isn't that what opens the door, Mr. Guyton, for us to
6 not be stuck on a very narrow interpretation of
7 Nassau?

8 **MR. GUYTON:** Commissioner, I'm not familiar
9 with this particular passage that you're quoting from
10 Mr. Childs. I don't take issue with it generally.
11 But I think you do have to remember that, nonetheless,
12 despite your broad authority, it is authority that is
13 only created by statute. You are a creature of
14 statute, and you have only such authority that has
15 been explicitly given to you in the statute or which
16 may be reasonably implied.

17 Now, this question arose to Mr. Sasso as to
18 a question as to whether not the definition under
19 366.82 should be liberally construed under FEECA in
20 applying to the Siting Act. I don't think that you
21 can liberally construe a definition beyond its literal
22 definition.

23 That particular definition that you ask
24 about limits electric utility to a retail utility on
25 its face. That's the definition in 362.82. So I

1 think the answer there is that, no, you can't go
2 beyond that definition when you're applying that
3 definition.

4 Now, the question is, is that definition
5 necessarily the same as the definition in 403.503(13)
6 of electric utilities. I think Mr. Sasso makes a
7 reasonable argument that the two are construed
8 consistently, but I would submit to you that the
9 operative definition here is not 366.022 that the
10 petitioners would urge upon you. It's not 366.82 in
11 FEECA. It is 403.503(13), and that has been
12 definitively construed as to a nonutility generator.

13 And a nonutility generator under your Ark
14 and Nassau decision is not an applicant under the
15 Siting Act, it's not an electric utility under the
16 Siting Act, and is not a regulated electric company
17 under that particular definition in the absence of
18 having a contract, because it doesn't have an
19 obligation to serve and it doesn't have a need of its
20 own; therefore, it has to have a contract.

21 That's the holding in the Ark and Nassau
22 case. It was appealed to the Supreme Court of Florida
23 in Nassau Power versus Deason. It was affirmed by the
24 Supreme Court saying two things; one, it's consistent
25 with the plain meaning or language of the statute;

1 and, two, it is consistent with your earlier decision
2 in Nassau Power versus Beard.

3 Do you have broad authority to go beyond
4 what the Supreme Court has construed? Absolutely not.

5 **CHAIRMAN GARCIA:** Mr. Sundberg, would you
6 agree with that?

7 **MR. SUNDBERG:** Absolutely. If I can sort of
8 go in inverse order -- and I assume I will have time
9 to respond to both their positions, but let's start
10 with Mr. Guyton first.

11 He says that -- their whole argument is you
12 are bound by the Supreme Court decision in Nassau I
13 and Nassau II. The argument that has been made in --
14 (inaudible) --

15 **CHAIRMAN GARCIA:** Mr. Sundberg, you may want
16 to move over, because I believe that FPC has asked for
17 an audio and video portion, and so we need to hear you
18 more clearly.

19 **MR. SUNDBERG:** Pardon me. This is not my
20 usual venue.

21 But in any event, I suggest to you that
22 Ark's position in Nassau II was determinative of
23 nothing. They assert because Ark was an IPP that the
24 first this Commission and the Supreme Court has
25 therefore said this applies to all nonutility

1 generators.

2 First of all, there is no such decision in
3 this court's order. It treats Ark and Nassau the
4 same, and what it treats them as is somebody who is
5 seeking a contract with a retail utility. They tested
6 them just the same from that standpoint.

7 Moreover, it is clear that the Supreme Court
8 did not consider and affirm this court's decision
9 dealing with an IPP. The Supreme Court's decision in
10 Nassau, first of all, there -- Ark was not a party to
11 the appeal in Nassau II. It had appealed the -- it
12 had joined in the Cypress appeal, which was dismissed.

13 The Supreme Court says in Nassau II, "Thus,
14 the only order before us is the order dismissing
15 Nassau's petition to determine need." The Supreme
16 Court did not make any ruling, did not even consider
17 the issue they assert was decided by this Commission
18 and affirmed by the Supreme Court of Florida. It just
19 didn't happen.

20 The issue stated in Ark -- pardon me --
21 Nassau II -- is at issue here, and that's what
22 determined what the precedential effect of the
23 decision is. At issue here is whether a nonutility
24 cogenerator such as Nassau, that is, a nonutility
25 cogenerator, such as Nassau who is seeking to have

1 approved a contract with a retail utility, is a proper
2 applicant for determination of need under Section 403.
3 That's what they were considering.

4 They were considering whether a nonutility
5 generator like Nassau -- they don't in this decision
6 nor in your decision, or the Commission's order was
7 there any discussion about Ark's different status.

8 And I suggest to you for the rationale of
9 application of standing, they were to be considered
10 the same because they were both seeking to have
11 approved a contract for retail utility; and then,
12 hence, based on the rationale of Nassau I, based on
13 the rationale, then it is to be -- and that's what the
14 Supreme Court said in Nassau II. That inquiry needs
15 to be utility specific.

16 In the infamous Footnote 9 to Nassau I, they
17 didn't just say "utility;" they said it had to be
18 locale-specific territory. So I assert to you that
19 there has been no averments -- first of all, there's
20 no evidence in the opinion itself or in this
21 Commission's order that this assertion they're making
22 now that it is -- you know, that IPPs are now -- all
23 IPPs are to be considered like QFs or like Nassau.

24 **CHAIRMAN GARCIA:** So, in your opinion,
25 Nassau I only requires a unit-specific need? Is that

1 the threshold there that Nassau creates?

2 MR. SUNDBERG: Well, let --

3 CHAIRMAN GARCIA: It doesn't create that at
4 all --

5 MR. SUNDBERG: Not quite, Mr. Chairman.
6 What Nassau -- the only authoritative portion of
7 Nassau I was that Nassau appealed the wrong order. I
8 mean, once they say that, the game is up. If you
9 appeal the wrong order, you have no business being
10 here, and under that premise, any other discussion is
11 simply just dicta. So that wasn't the -- the precise
12 holding was, you're here on the wrong order.

13 They did discuss in rejecting Nassau's
14 position that -- strangely enough, they said, you
15 know, the Commission has come out different on this in
16 the past. They've said, you know, we can presume
17 statewide need and, hence, on some sort of
18 quasi-estoppel argument they're estopped now to change
19 the rules on us.

20 The court says, that's not true; it's their
21 job to construe this statute on cases that are
22 presented to them. Therein lies another point, and
23 that is, there's this assertion that the Supreme Court
24 has rendered an authoritative construction of this
25 statute. I strongly disagree with that.

1 All the Supreme Court did in Nassau -- all
2 it did in Nassau I was to say "wrong order," and in
3 discussing why this Commission had the authority to
4 essentially change its construction of the statute was
5 because they cited the -- you know, the Black Letter
6 Law rule. And, that is, an agency, particularly this
7 agency for the very reason you've quoted, has broad
8 authority with respect to the construction and
9 interpretation of the statute which it is charged by
10 the Legislature to execute.

11 The rule is plain -- and that's from whence
12 the rule comes -- that great weight will be given by
13 an appellate tribune to your construction of your
14 statute, so to speak.

15 A corollary of that is that when an
16 appellate court is reviewing your construction of the
17 statute, it will get the least intensive, the most
18 diminished, the most limited review of almost any that
19 I know of; and that is, unless the court deems that
20 this Commission has acted in a clearly erroneous --
21 not a nonrational basis, but it must be clearly
22 erroneous, because great weight must be given to what
23 you do. That's why the Legislature created you.

24 So under that standard, I submit to you that
25 in both Nassau I and Nassau II, and it's as plain

1 as -- you can read it right out of the decisions. I
2 won't take your time to read it -- that what they said
3 was, we cannot say that this Commission's action and
4 interpretation of the statute is clearly erroneous.

5 Now, had they been reviewing the decision of
6 a district court of appeal or had they been reviewing
7 a decision of a circuit court, they could have said,
8 we disagree with that; and they have the authority,
9 because of the scope of the review, to reverse it.
10 They can't reverse you just because they disagree.
11 They must make a specific finding that it was clearly
12 erroneous.

13 The whole point is, for all of those
14 reasons -- and there are others -- there is not
15 authority to tie this Commission's hands when it comes
16 to deciding this issue before you today. You write on
17 a clean slate, because merchant plants are different
18 from small generators who are seeking to impose a
19 contract on a retail generator because of the effects
20 of it on the ratepayer.

21 **MR. SASSO:** May I address those points,
22 Commissioner?

23 **CHAIRMAN GARCIA:** Absolutely.

24 **MR. SASSO:** First, Mr. Sundberg argues that
25 Nassau may not be applied to these facts, may not be

1 so limited because in that case the applicant was
2 seeking to go into a contract with the utility. That
3 was not a disqualifying factor. In fact, that made
4 Nassau a stronger case than this one.

5 And Mr. Guyton has discussed some cases in
6 his brief, which I would commend the Commission's
7 attention to, that make clear that when one is trying
8 to identify the holding of the case, one looks not at
9 simply the very narrow issue that Mr. Sundberg has
10 identified, but all reasoning that was essential to
11 enable the court to arrive at that result.

12 And the reasoning of this Commission and of
13 the court that was essential to allow the court to
14 arrive at that result was that the entities identified
15 as applicants in the statute all may be obligated to
16 serve customers in this state. That is the need that
17 the Commission and the court is to consider in a need
18 determination such as this.

19 Because the applicant there was seeking to
20 enter into a contract with the utility, it actually
21 came close, right up to the threshold of satisfying
22 its obligation to show that a utility that actually
23 serves customers in this state needed its power.

24 An IPP like the Duke plant in this case is
25 in a weaker position. I would refer the Commission to

1 the Empire case that we've discussed in our pleadings
2 that arose in North Carolina.

3 What the Commission there said, "It is
4 appropriate to require more from an IPP than from a
5 qualifying facility." This is because federal law has
6 essentially established the public need for qualifying
7 facilities by requiring all electric utilities to
8 purchase electricity from such facilities.

9 So the Commission in North Carolina
10 recognized that an entity like the Duke proposal here
11 had less of a basis for applicant standing in a
12 situation like this than an entity seeking to enter
13 into a contract, let alone a cogen with a utility.

14 Second point: Mr. Sundberg makes the
15 argument that what's important for the Commission to
16 keep in mind here is that the court will defer to this
17 Commission on review. And there's a potential for
18 some confusion in that argument, because it's very
19 critical that the Commission distinguish between the
20 appropriate standard of review that a court will use
21 and this Commission's duty in the first instance to
22 decide the law.

23 On review, the court will give deference to
24 an agency on reasonable interpretations of the
25 statute, and I'll address that in a moment. But you

1 can't, for example, go to a trial court and say, don't
2 worry about finding the facts very accurately, because
3 even if you're wrong, on review an appellate court
4 will uphold your findings as long as there's any
5 competent substantial evidence in the record to
6 sustain it; because if the trial court approaches its
7 job in that light, or this Commission approaches its
8 job in that light, the whole system breaks down.

9 This Commission's obligation, like a trial
10 court's obligation, is to follow the law in the first
11 instance and act within the scope of its delegated
12 powers. If the Commission approaches its duty in that
13 respect, that's the reason the court will defer to the
14 Commission. The Commission can't go into the exercise
15 by saying, we can do anything and it's within our
16 discretion. So there's a danger for some confusion
17 there.

18 **COMMISSIONER JOHNSON:** Mr. Sasso --

19 **MR. SASSO:** Yes. In this particular case --

20 **COMMISSIONER JOHNSON:** -- on that point --

21 and I'll allow you to complete your thought, and I
22 agree with your analysis, but -- and in doing so, in
23 effectuating our duty, do we also have a duty or an
24 obligation to ensure that whatever interpretation we
25 believe to be the accurate interpretation does not

1 violate the federal constitution?

2 And in that regard I'd like for you to
3 provide your analysis of the dormant commerce clause
4 and why, if we agree with your interpretation of the
5 statute, that that provision is not violated.

6 **MR. SASSO:** Okay. That may take more than a
7 few minutes. But just to round out the thought that I
8 was about to develop before moving into that --
9 because I think the two are connected -- in this
10 particular case you are not writing on a clean slate.

11 The Commission has interpreted the very
12 provisions that Duke relies on here in an
13 authoritative manner, and the Supreme Court has upheld
14 it. It didn't simply uphold it giving deference.
15 What happened in the Nassau cases is, as Mr. Sundberg
16 points out, the Commission had at one point presumed
17 need, like in the Florida Crushed Stone case.

18 And then in revisiting this, this Commission
19 didn't simply say, we're going to exercise our
20 discretion differently. It now had an insight and
21 said, we believe we're required by the statute to
22 interpret it the way we're now interpreting it.

23 This is what the Supreme Court said. It
24 said Nassau argues that the PSC's cogeneration
25 regulations and its previous policy prohibit the PSC

1 for determining the need for Nassau's power under the
2 Siting Act based on FP&L's individual utility needs,
3 and instead require the PSC to determine need based on
4 the projected statewide electric utility need.

5 The PSC, on the other hand, contends
6 notwithstanding its prior practice of not specifically
7 determining actual local needs when evaluating the
8 need for cogenerated power, it is not bound by the
9 cogeneration regulations and is, in fact, required to
10 assess actual local needs when making need
11 determinations under the Siting Act.

12 In our view the PSC's prior practice of
13 presuming need as opposed to determining actual need
14 cannot be used now to force the PSC to abrogate its
15 statutory responsibilities under the Siting Act. And
16 I won't repeat all of the language throughout these,
17 both decisions, but the court makes clear that it is
18 bottoming its interpretations and its averments on the
19 plain language of the statute. It was making an
20 independent legal review, as is its responsibility, of
21 the plain language of the statute, and on that basis
22 affirm this Commission.

23 We have cited authority in our brief -- the
24 Delaney case is an example -- that makes clear that at
25 this point in time, probably even the Supreme Court

1 can't go back on its interpretation, because the
2 statutes involved have been reenacted by the
3 Legislature; and the Delaney and other Supreme Court
4 cases make clear that when that happens, it's presumed
5 that the intervening interpretation by the court is
6 now part of the statute. And the authority in Florida
7 is that even the Supreme Court can't go back on its
8 interpretation. So this is not a clean slate
9 situation by any means.

10 And that leads me to the commerce clause
11 issue, because at this point in time, Commissioner
12 Johnson, we firmly believe that the Commission simply
13 does not have the discretion to overturn or depart
14 from the Nassau construction of this statute. We
15 believe it is set in the law. To do so on commerce
16 clause grounds would essentially be to say that the
17 Florida Supreme Court's authoritatively interpreted
18 statute -- or the statute as authoritatively
19 interpreted by the Florida Supreme Court -- would not
20 pass constitutional muster.

21 That is not a role that this Commission can
22 play. The Commission is not in a position at this
23 point in time to say, gosh, even though this has been
24 construed by the Florida Supreme Court and the Nassau
25 rule has been upheld and it's now embedded into the

1 law, we think that is unconstitutional because that is
2 a judicial function.

3 If the Commission truly were working on a
4 clean slate, yes, there is some authority in lower
5 appellate court decisions, although not in the Florida
6 Supreme Court decisions, but in lower appellate court
7 decisions, that the Commission can be mindful of
8 constitutional limitations; but you cannot cross the
9 threshold and exercise a judicial function of deciding
10 that a law would be unconstitutional, and that's the
11 position you would be in here.

12 We would like to allay the Commission's
13 concerns about the dormant commerce clause issue,
14 though, on the merits. We don't believe that the
15 argument has merit. There are two reasons for that.

16 First, it's important to understand as
17 background that the commerce clause itself does not
18 prohibit anything in terms. It authorizes Congress to
19 regulate interstate commerce. If Congress exercises
20 that authority and passes a statute, it actually may
21 preempt states from passing law in a certain area. It
22 may directly preclude states from acting in a certain
23 area.

24 If Congress doesn't pass a law or exercise
25 its authority under the commerce clause, in extreme

1 cases the court, Supreme Court, has said on occasion
2 even that negative dormant commerce clause or the
3 unexercised grant of congressional authority can
4 prevent states from discriminating against unduly
5 burdening interstate commerce. But those are extreme
6 cases.

7 And the bottom line is, this is in Congress'
8 hands, because if Congress relegates or delegates to
9 the states the prerogative to regulate in a certain
10 area, then that controls because this is in Congress'
11 hands.

12 We have discussed at length in our brief
13 that that is exactly what Congress has done in the
14 Energy Policy Act, Section 731. Congress has said,
15 "What we have done in federal law in no way should be
16 construed to affect or in any way interfere with the
17 authority of the states over siting of new generation
18 facilities."

19 The Pacific Gas case we talk about, the
20 United States Supreme Court case, is a preemption case
21 that I'll talk about its link to commerce in a minute.
22 That was a case where the court sustained a
23 moratorium, an absolute ban, on the development of
24 nuclear energy plants by a state, despite the Atomic
25 Energy Act, which said, we encourage the proliferation

1 of, you know, peaceful use of nuclear energy.

2 And the court went through the history of
3 regulation in this area, and they said, "Historically
4 Congress has relegated to the states authority over
5 the need for new facilities and the siting of new
6 facilities." And they had upheld in that case a ban
7 on economic grounds of construction of new nuclear
8 plants in that state, and that was a preemption case.

9 There wasn't a commerce clause challenge.
10 We would submit there wasn't one because one cannot be
11 appropriately brought in the face of that type of
12 reasoning. The Supreme Court was entirely aware, of
13 course, of its commerce clause jurisprudence.

14 Nuclear plants are an interstate commerce or
15 they wouldn't be regulated by the Nuclear Regulatory
16 Commission. Yet the Court unhesitatingly said a state
17 can actually ban new construction because this is a
18 role that has historically been given by Congress to
19 the states. And that's true here. They did it in the
20 Energy Policy Act. They've done it in the Federal
21 Power Act. They've historically given this role to
22 the states.

23 All the cases that Duke cites, not a one of
24 them involve state regulation or prohibition over than
25 new generating facilities. The New Hampshire case

1 that the Commission was interested in last time didn't
2 involve the siting of new generation facilities. It
3 involved an effort by New Hampshire to cause that
4 power company to reallocate its charging policy to
5 reduce its charge to New Hampshire for hydroelectric
6 power sold in that state. It didn't involve siting of
7 new facilities at all.

8 **COMMISSIONER JOHNSON:** So let me make sure I
9 understand your argument. So that there would have to
10 be -- as opposed to just the broad powers, dormant
11 commerce clause powers, the Congress would have had to
12 have enacted some law of specificity in this area?

13 Are you suggesting that Congress would have
14 had to say, states, you cannot prohibit a firm
15 situated like Duke to -- you can't prohibit Duke from
16 building a plant in your state? I mean, what would
17 Congress have to do more than that which is stated in
18 the commerce clause? What kind of specific action
19 would be necessary?

20 **MR. SASSO:** There are two sides to the same
21 coin. Certainly if Congress prohibited the states
22 from applying the Nassau rule, let's say, to plants
23 like Duke, that would take care of the matter. It's
24 within Congress' control to do that.

25 And if you look at cases like General Motors

1 versus Tracy and even the concurring opinion, a case
2 I'm going to mention in a moment, Commonwealth Edison
3 versus Montana, you see recurring references by the
4 Supreme Court to the fact that this is in Congress'
5 hands.

6 If Congress is concerned about what the
7 states are doing, Congress can step forward and fix
8 it. The courts don't need to intervene and strike
9 down the state regulation. Congress can do it, and
10 they certainly have shown willingness to do it in this
11 industry when it's appropriate.

12 So if Congress has acted to actually preempt
13 the state from, for example, regulating under Nassau,
14 it can do so. The flip side of the same coin is, here
15 Congress not only has failed to enact preemptive
16 language, they have actually authorized the states to
17 regulate in this area. They authorized the states to
18 regulate in the area of siting.

19 And there can't be any doubt that that's
20 exactly what the Nassau court did. The court in
21 Nassau, in fact, said, and I'll quote, "The Siting Act
22 was passed by the Legislature in 1973 for the purpose
23 of minimizing the adverse impact of power plants on
24 the environment. The act establishes a site
25 certification process that requires the PSC to

1 determine the need for any proposed power plant based
2 on the criteria set forth in Section 403.519. "

3 This is a siting proceeding. And that's
4 what Congress has expressly authorized this state to
5 do. And we've gone through some legislative history
6 in our brief. In fact, the material that Duke has
7 provided would show that's exactly what Congress was
8 trying to do in the Siting Act, make clear that there
9 was a definite and actual need for new plants before
10 we're going to allow them to impact on the environment
11 of this state.

12 One final point, Commissioner Johnson.
13 There's a lot of discussion, and your question
14 includes a concern about general policy, federal
15 policy; does that preclude the state from operating.

16 **COMMISSIONER JOHNSON:** Or do we have to
17 consider that when we're trying to interpret our
18 statute.

19 **MR. SASSO:** Right. Now, in the Commonwealth
20 Edison versus Montana case, U.S. Supreme Court case
21 that I mentioned a moment ago, it's 453 U.S. 609, this
22 is what the Supreme Court said in upholding some state
23 regulation in that case. And it involved coal, a tax
24 on coal.

25 The court says, "We can't quarrel with

1 appellants' recitation of federal statute encouraging
2 the use of coal. Appellants correctly note that
3 Section 26 of the Energy Policy & Conservation Act
4 declares that one of the act's purposes is to reduce
5 the demand for petroleum products and natural gas
6 through programs designed to provide greater
7 availability and use of the nation's abundant coal
8 resources."

9 "We do not, however, accept appellant's
10 implicit suggestion that these general statements
11 demonstrate a congressional attempt to preempt all
12 state legislation that may have an adverse impact on
13 the use of coal."

14 "As we have frequently indicated, preemption
15 of state law by federal statute or regulation is not
16 favored in the absence of persuasive reasons, either
17 that the nature of the regulated subject matter
18 permits no other conclusion or that the Congress has
19 unmistakably so ordained."

20 "In cases such as this, it is necessary to
21 look beyond general expressions of national policy to
22 specific federal statutes with which the state law is
23 claimed to conflict."

24 We have carefully reviewed the Energy Policy
25 Act, the Federal Power Act, any other statute Duke has

1 talked about. There are no provisions that expressly
2 conflict with what Nassau decided. To the contrary,
3 Section 731 explicitly authorizes the Nassau approach.

4 **COMMISSIONER JOHNSON:** Let me ask one other
5 follow-up question, Mr. Sasso, at that point.

6 In Duke's argument the joint petitioners'
7 argument, they don't appear to argue that the dormant
8 commerce clause is in and of itself an absolute, even
9 if there was a violation if we could show that there
10 was some legitimate state interest. And in some of
11 those cases that you were articulating, it appeared as
12 if what might have turned the tables was that there
13 was a legitimate state interest.

14 In this instance, assuming I disagree with
15 your Nassau interpretation and that this wasn't clear
16 and that we did need to review this particular issue,
17 from your perspective -- and if I was doing an
18 analysis of the dormant commerce clause, what are the
19 legitimate state interests that would lead one to
20 conclude that your interpretation is still the better
21 interpretation and that it would withstand a dormant
22 commerce clause argument?

23 **MR. SASSO:** Again, it's important to
24 understand that there are really two prongs to the
25 analysis, okay. The first one is, has Congress

1 authorized regulation in a certain area. If it has --
2 and it has under 731 -- that ends the analysis.

3 **COMMISSIONER JOHNSON:** That's preemption.

4 **MR. SASSO:** It ends -- commerce clause
5 analysis and preemption analysis. Courts have said
6 that is -- again, this is all in Congress' hands,
7 because we're talking about a grant of authority to
8 Congress -- Congress has told the states, you can
9 regulate in this area. That's it. That's the end of
10 it. You don't go on to the balancing analysis under
11 the dormant commerce clause.

12 If you do go on to the dormant commerce
13 clause balancing analysis, then you need to consider
14 the General Motors versus Tracy case that we've relied
15 on, which basically recognizes that retail utilities
16 play a unique role in a state, and they review the
17 whole history of regulation in this industry; how you
18 started with competition and we went to heavy
19 regulation.

20 And retail franchises are exclusive. The
21 court has said that's entirely proper and legitimate.
22 They're exclusive. Nobody else can sell to customers
23 except the retail utilities, which certainly prevents
24 people from out of state coming in and selling to
25 retail customers; but that's entirely appropriate.

1 The Nassau ruling and the whole statutory
2 structure in this state spins off that, because all
3 the Nassau decision says is that you have to
4 demonstrate a contract before, rather than after,
5 construction with the very entities that you avowedly
6 wish to sell to.

7 Duke comes in here and they say they want to
8 sell to the utilities in the state. All that Nassau
9 says is, demonstrate you have a contract before,
10 rather than after, construction. What is the local
11 interest?

12 Well, in General Motors versus Tracy, the
13 court said there there's an abiding local interest in
14 ensuring reliability of service, and you have to
15 protect the special role that retail utilities play in
16 this mechanism for reliability.

17 The local interest demonstrated through the
18 analysis that I just mentioned under 731 of the Energy
19 Policy Act is environmental, and that's evident
20 throughout the legislative history of the Siting Act
21 and the statement of policy and the provisions of the
22 Siting Act.

23 What the state was about in this area was to
24 prevent the proliferation of power plants in a state
25 like Florida where there was a lot of growth and

1 sensitive environmental issues, prevent the
2 proliferation; do not build plants in this state
3 unless there is a demonstrated need. And, of course,
4 the only entities that can need the power are those
5 that have a retail load, namely the retail utilities.

6 This is all tightly related to environmental
7 protection and, to some extent, reliability.

8 **COMMISSIONER JOHNSON:** One final question,
9 and it's a little away from that point. But what do
10 we do in Florida with respect to IPPs once they're --
11 that have contracts and those contracts expire? Are
12 they going to be able to offer on a wholesale basis
13 their energy?

14 **MR. SASSO:** You mean let's suppose that an
15 IPP came into the state, built a plant under contract
16 with the --

17 **COMMISSIONER JOHNSON:** -- (inaudible
18 overlap) -- a contract -- yeah --

19 **MR. SASSO:** -- utility and now the contract
20 expires? They would be able to continue to operate.

21 **COMMISSIONER JOHNSON:** They don't violate
22 the law as you interpret it?

23 **MR. SASSO:** As we interpret it, I don't see
24 any prohibition there. The statute --

25 **CHAIRMAN GARCIA:** So, in essence, it was

1 sort of a hurdle. The hurdle is you can't build it --
2 you can't come to Florida unless you contract with a
3 retail utility.

4 **MR. SASSO:** The statute regulates the
5 construction of new plants. And if an IPP is able to
6 demonstrate that its plant is needed in this state
7 through an entity that is obligated to serve
8 customers, then the plant can be permitted.

9 **CHAIRMAN GARCIA:** Distinguish this real
10 quickly. Aren't they demonstrating there's a
11 30-megawatt need and they're here to build it?

12 **MR. SASSO:** Yes, sir. And to that extent,
13 the Utilities Commission is a proper applicant; they
14 would be a proper coapplicant. But the problem here
15 is they're not seeking to build a 30-megawatt plant;
16 they're seeking to build a 500 --

17 **CHAIRMAN GARCIA:** At least on the dismissal
18 issue, you'd clearly meet -- they'd meet at least your
19 standard of applicant. There's a 30-megawatt need and
20 here they are.

21 **MR. SASSO:** No. I would disagree with
22 that --

23 **CHAIRMAN GARCIA:** Okay.

24 **MR. SASSO:** -- because 403.519 --

25 **CHAIRMAN GARCIA:** I'm sorry, Commissioner.

1 I sort of jumped in because --

2 **MR. SASSO:** 403.519 requires not simply that
3 they have a need for "X" megawatts; it requires that
4 they have a need for the proposed power plant. That's
5 the statutory language. I can't lay my hands right on
6 it, but the language is they have to show a need for
7 the plant. On the face of the petition they haven't
8 shown a need for the plant.

9 At best --

10 **CHAIRMAN GARCIA:** And that's how you would
11 distinguish decisions of this Commission in the past
12 where there will be 100-megawatt need and we approve a
13 250 megawatt plant?

14 **MR. SASSO:** Absolutely. We've discussed --

15 **CHAIRMAN GARCIA:** Because it's the plant,
16 not the need now?

17 **MR. SASSO:** Yes. The legislative history
18 and the language of the statute and this Commission's
19 decision in City of Tallahassee, it really is
20 esthetically very nice, because they all fit together.
21 And what they show is that the structure is that
22 there's a 10-year planning period. That's why we have
23 the 10-year site plans.

24 The utility plans for its needs over a
25 10-year period. You never build a plant that is

1 exactly what you need at that moment; you build it a
2 little larger. And the lawmakers who passed the
3 statute said, we recognize that plant as built that
4 the utility is going to grow into over a 10-year
5 period.

6 City of Tallahassee was exactly that. They
7 would --

8 **CHAIRMAN GARCIA:** Right.

9 **MR. SASSO:** -- fully need it at the end of
10 10 years.

11 You know, if I'm going to buy an outfit for
12 one of my daughters, I might buy it a little bigger,
13 that they're going to grow into, but I don't buy one
14 that's big enough for them and 17 of their friends.

15 **CHAIRMAN GARCIA:** Right.

16 **MR. SASSO:** And that's exactly what the
17 proposal here is; to build a plant that is 17 times
18 bigger than the Utilities Commission of New Smyrna
19 needs. They will never --

20 **CHAIRMAN GARCIA:** Mr. Sasso, that sort of
21 trails into the question Commissioner Johnson has. If
22 we have these -- and, in fact, there are cogeneration
23 units or IPPs that you have come to an agreement with
24 and you will no longer have a contractual
25 relationship. And here they are; they're in the

1 state. Whether they are part of your need or not,
2 they're already in the state. They're already
3 providing a need.

4 In this case, this company comes to us and
5 says, I guess -- you know, "we need a dress," but they
6 know that by looking at your filings before this
7 Commission, by looking at FPL's filings, that they
8 will need more. And so they meet the standard to
9 enter, they are an applicant, and they build bigger
10 because they know the future is bigger, and so they
11 serve that need.

12 **MR. SASSO:** They don't have a need, and they
13 haven't demonstrated that any of the utilities in this
14 state have a need for their plant.

15 **CHAIRMAN GARCIA:** But haven't -- your
16 utility has -- if I'm not mistaken, your utility has
17 filed before this Commission asking --

18 **MR. SASSO:** That's correct.

19 **CHAIRMAN GARCIA:** (inaudible overlap) -- to
20 us that you have a need.

21 **MR. SASSO:** The way Nassau works is if, in
22 fact, there is a need for that plant in that location
23 of that nature --

24 **CHAIRMAN GARCIA:** Right.

25 **MR. SASSO:** -- they should be able to

1 demonstrate that, no problem, by lining up contracts.
2 Then they come before this Commission. Then this
3 Commission is in a position to make an informed
4 decision about the cost-effectiveness of that
5 alternative versus other alternatives for that need
6 and to determine whether that need is going to be
7 reliably met by that plant.

8 As it stands, no reliability can be
9 demonstrated for this plant, because none of us can be
10 sure that it will be there when and if we need it.

11 **COMMISSIONER JACOBS:** But as a --

12 **CHAIRMAN GARCIA:** It's my own fault -- well,
13 go ahead.

14 **COMMISSIONER JACOBS:** But as a threshold
15 matter, have we required that there be evidence on the
16 face of the pleading that the whole capacity of the
17 plant is necessary, or even of the filing for a need?

18 It seems that I recall that Hines, Power
19 Corp's Hines plant, the determination of need there
20 was that some portion of that was not needed and was
21 not approved under the need petition. But would
22 they -- so under your argument, they would have been
23 subject to a petition for -- they would have been
24 subject to dismissal of that petition on its face?

25 **MR. SASSO:** Well, there were two separate

1 plants there, if I recall, two separate power
2 facilities.

3 And, again, you're -- the Commission did
4 deny need as regards one of those plants, and it said
5 there would be a need for the other and that the
6 utility would grow into the need for that particular
7 plant. That's the City of Tallahassee situation.

8 This Commission has held utilities to
9 basically the standard that was intended in the
10 statute, and it's -- I think the City of Tallahassee
11 case is the best example of this, where the Commission
12 reviews how the plant is going to be used in sort of a
13 staged-in way over the 10-year period and at the end
14 of the 10 years it will be fully needed.

15 The legislative history that we discuss in
16 our brief that Duke's applied also demonstrates this
17 very clearly. The lawmakers and the utility
18 representatives were talking about how the status quo
19 operates and this should operate under the power Plant
20 Siting Act.

21 And what they explained was the way
22 utilities operate is, for example, Florida Power may
23 build a plant one year that is a little bigger than it
24 needs and it will sell off excess energy. Another
25 power company will build another plant the next year

1 and it will operate the same way; and this way you can
2 interspace -- that was the word used -- the retail
3 utilities interspace the development of plants,
4 growing into them as they need them.

5 And we can delay the construction of plants.
6 We can avoid a proliferation of plants. They're built
7 only as they are needed operating within that
8 framework in the state.

9 It is entirely out of sync with that,
10 Commissioner Jacobs, to authorize a 514-megawatt plant
11 on a 30-megawatt need. There has to be a relationship
12 on a utility-specific basis between a showing of need
13 and the proposed plant that the utility wants to
14 build.

15 You know, why stop at 30 versus 514? Why
16 not say you can build a 10,000-megawatt plant based on
17 a 10-megawatt need. Or, you know, I think Mr. Nesbitt
18 argued -- not to get into the evidence, but let's just
19 assume hypothetically that let's suppose there were a
20 need in the state for 8,000 megawatts. Why not say
21 we'll site an 8,000-megawatt plant based on a
22 10-megawatt contract?

23 That is obviously a circumvention of the way
24 the statute is written and, I think, the letter and
25 intent of the Nassau rulings.

1 **COMMISSIONER DEASON:** Mr. Sasso, just for a
2 moment --

3 **CHAIRMAN GARCIA:** Commissioner Deason, may I
4 ask you a favor? I interrupted Julia, and just so
5 that she gets her -- she asked me -- sorry about that.

6 **COMMISSIONER JOHNSON:** Finishing up,
7 Mr. Sasso, on the answer that you provided with
8 respect to what would happen if there was a provider
9 that had a contract and the contract expired, what
10 would give us the -- under your interpretation of the
11 law generally, that kind of person in that -- or
12 company in that situation could not come into the
13 state, but once they're already in the state, the
14 contract is expired, they want to sell on a wholesale
15 basis, what will be the statutory authority for that?
16 Why is that okay?

17 **MR. SASSO:** Well, the statute addresses
18 certain issues; the statutes address certain issues.
19 That falls within a gap is the simplest answer. The
20 statutes place restrictions on the development of new
21 plants in the state because of the environmental
22 impact.

23 Once this Commission and then DER determines
24 that environmental impact is justified and the plant
25 is built and it's on the ground, then it's on the

1 ground. We don't want to make them rip it up and take
2 it out. It's on the ground, and there's been a
3 careful showing under the statutory criteria, the case
4 law, the environmental legislation, that that plant is
5 appropriately in Florida.

6 After it's here and contracts expire, there
7 are other issues that are beyond the scope of what
8 that statute is intended to address.

9 **COMMISSIONER JOHNSON:** Okay. So the statute
10 only goes to the initial threshold question, but once
11 they're --

12 **MR. SASSO:** Yes, ma'am.

13 **COMMISSIONER JOHNSON:** -- here --

14 **MR. SASSO:** What we are dealing with today
15 is the siting of a new plant.

16 **COMMISSIONER JOHNSON:** Thank you.

17 **MR. WRIGHT:** Mr. Chairman, I know
18 Commissioner Deason has a question, but we would like
19 an opportunity --

20 **CHAIRMAN GARCIA:** You can get --

21 **MR. WRIGHT:** -- to respond to the commerce
22 clause and the underlying --

23 **CHAIRMAN GARCIA:** -- to that. Let
24 Commissioner Deason ask his question, because I
25 interrupted both Commissioner Deason and

1 Commissioner Johnson, and that's my own fault.

2 **COMMISSIONER DEASON:** The question I have
3 concerns the concept of growing into utility plants,
4 and the rationale of that being it's the most economic
5 way to meet a need, and that that need is still,
6 though, in terms of the company which has a retail
7 load or a requirement to sell to the retail customer.

8 **MR. SASSO:** Yes, sir.

9 **COMMISSIONER DEASON:** And the City of
10 Tallahassee case you think is a good example of that?

11 **MR. SASSO:** Yes, sir.

12 **COMMISSIONER DEASON:** But hasn't this
13 Commission also in the past put constraints on that
14 rationale of growing into utility plants? As I
15 recall, in the early '90s the Commission -- I believe
16 it was a case involving your company -- there was a
17 petition for -- a request for need, and the Commission
18 made a decision that everything the company was
19 requesting was not needed at that time.

20 So I guess my bottom line question is, is
21 that that concept works equally well -- obviously this
22 Commission has applied that as it historically has
23 done for regulated companies that have a retail load,
24 and that just because a retail company comes in and
25 makes the assertion it has a need, this Commission has

1 not automatically said that there is a need for that
2 just because you're a retail utility.

3 **MR. SASSO:** Oh, I'm certainly prepared to
4 accept that, Commissioner Deason. I'm not familiar
5 with the particular case you mentioned. But we
6 certainly can see that just because you're a retail
7 utility and may have standing doesn't entitle you to
8 an order.

9 **CHAIRMAN GARCIA:** If you'll allow me, Staff
10 had one question, and it was on the constitutional
11 nature; and I think it addressed some -- Mr. Sasso, it
12 addressed some of the issues, and it was directed to
13 Duke, at least the way I understood it, the applicant;
14 so I wanted Staff to ask that, and maybe you can put
15 it within the answer.

16 **MS. PAUGH:** Thank you, Mr. Chairman. This
17 is very timely. My question relates to part of what
18 Mr. Sasso was saying. My question is directed to the
19 joint petitioners, and I should say that it also
20 relates to Florida Power & Light's assertions.

21 And I'm going to quote two lines from
22 Florida Power & Light's brief on Page 25. It states:
23 "The petitioners are improperly asking the Commission
24 to rule on constitutional issues. An administrative
25 agency such as the Commission may not decide

1 constitutional issues."

2 For authority Florida Power & Light cites
3 Marbury versus Madison, Palm Harbor Special Fire
4 Control District and Metro Dade County versus the
5 Department of Commerce.

6 I would be interested to hear a response to
7 that assertion of FPL and FPC as well as some state
8 case law citation, if you have that available.

9 **MR. WRIGHT:** Professor Gey will start our
10 response. Then we have some further comments in
11 response to a predicate laid by Mr. Sasso.

12 **MR. GEY:** First of all, with --

13 **CHAIRMAN GARCIA:** Professor, I just ask you
14 to try to realize the time. I know I let Mr. Sasso go
15 on, but I think we were all peppering him, so if
16 possible --

17 **MR. GEY:** Okay. First of all, with regard
18 to the issue of constitutional interpretation, we are
19 not asking the Commission to serve as a
20 constitutional -- as a body interpreting the
21 constitution.

22 What we're asking the Commission to do is
23 interpret the statute in recognition of the background
24 of law against which that statute is drawn; and the
25 background of law includes both federal statutory law,

1 federal constitutional law and other state laws,
2 including the state constitution.

3 Nassau does not in any way tie this
4 Commission's hands with regard to the dormant commerce
5 clause issue, because Nassau was not a dormant
6 commerce clause case; and I'll defer to my other
7 colleagues along here on the precise dimensions of the
8 Nassau decision.

9 But with regard to the interpretation in
10 Nassau, to the extent that the constitution
11 requires -- to the extent that the constitution limits
12 the state, all we're asking the Commission to do is
13 take that into account in interpreting the statute as
14 applied in this context. This is a very different
15 context than arose in Nassau.

16 And with regard to the constitutional issues
17 themselves, the commerce clause, let me frame the
18 commerce clause discussion in a somewhat clearer way,
19 because a lot of different themes have come in here in
20 sort of an unclear way.

21 When you have a conflict between federal law
22 and state law, you have three questions to ask. The
23 first question is whether under the commerce clause
24 authority granted to the federal government, Congress
25 has placed a statute that preempts the state in doing

1 something that the state wants to do.

2 And it is our position in this case that the
3 Energy Policy Act and Federal Power Act does, in fact,
4 preempt the Commission, or preempt Florida, from
5 barring the joint petitioners from even submitting a
6 request for determination of need without first
7 contracting with local utilities. And I'll defer to
8 Professor Seidenfeld on the details of the preemption
9 argument.

10 But that's only the first step. And
11 that's -- the commerce clause comes into play there
12 because the commerce clause affirmatively grants the
13 federal government the authority to do that.

14 Even if you decide, however, that the
15 commerce clause -- or that Congress, rather -- did not
16 exercise its commerce clause authority to preempt
17 state action, there are two more steps.

18 The second step is whether the dormant
19 commerce clause itself, independent of any federal
20 regulation or any federal statute, limits the states'
21 authority to regulate a particular economic behavior.

22 And it's our position in this case that with
23 regard especially to the motion to dismiss, it is the
24 clearest form of economic protectionism to bar
25 entirely a company from coming to Florida and seeking

1 permission to enter a particular economic market
2 without first contracting with a local entity before
3 even -- again, before even entering the market.

4 **COMMISSIONER DEASON:** Wouldn't that
5 interpretation also apply to the prohibition against
6 retail competition in the state?

7 **MR. GEY:** Yeah. That's the -- I'm sorry. I
8 was --

9 **COMMISSIONER DEASON:** The question is, under
10 the logic that I just heard you express, would that
11 logic not also extend to the question as to whether
12 the states' prohibition on retail competition is
13 preempted either by federal act or by operation of a
14 commerce clause?

15 **MR. GEY:** No. The retail -- that's right.
16 The retail aspect of the business is different,
17 because the Federal Power Act has specifically
18 authorized the states to behave in certain ways with
19 regard to retail sales --

20 **COMMISSIONER DEASON:** Well, hasn't the
21 Federal Power Act also allowed this Commission, the
22 state commissions across the country, to be the
23 authority on siting power plants within their --

24 **MR. GEY:** That's right; on siting power
25 plants, but not on siting power plants in a way that

1 discriminates against entrants to the wholesale power
2 market.

3 And this is -- this goes to the third
4 question -- first of all, with regard to the second
5 question, one final thing. Even if there are local
6 interests involved here, what the commerce clause
7 doctrine says, what the cases clearly articulate over
8 and over and over again is that even if the states
9 have a local interest, the states must --

10 **COMMISSIONER GARCIA:** Sorry. I missed the
11 answer to the Commissioner's question. Why doesn't --

12 **MR. GEY:** The answer is, essentially
13 Congress has authorized the Commission to act with
14 regard to retail sales in ways that do not apply to
15 wholesale sales. And I'll return to that in just a
16 second.

17 But with regard to the dormant commerce
18 clause issue itself, the analysis itself, even if
19 there are local interests, the states may not pursue
20 those local interests in a protectionist way; that is,
21 by totally excluding companies from entering the
22 market if there are alternative ways that are not
23 protectionist that would pursue the local interests
24 just as effectively.

25 And it's our position here that the

1 alternative way, the nonprotectionist way of pursuing
2 the local interests, is by permitting the joint
3 petitioners to go forward applying the determination
4 of need criteria to the joint petitioners and pursuing
5 whatever local concerns the Commission may have
6 directly, as opposed to forcing the joint petitioners
7 to join hands with some local entity to go forward
8 with questions that will be precisely the same once
9 you reach the question of whether there is, in fact, a
10 need for the power plant.

11 Okay. With regard to the third question --

12 **COMMISSIONER JOHNSON:** So to the extent that
13 we agreed with Florida Power Corp, and even applying
14 the dormant commerce clause, if we determine that,
15 well, we aren't prohibiting them completely; they just
16 have to have a contract, they just have to go through
17 the IOU; and if we delineated what we thought were
18 legitimate state interests and why we set up the
19 structure that way for someone coming in in the first
20 instance, you would state that that would not be
21 sufficient?

22 **MR. GEY:** That's right. That would -- it
23 is -- I don't know of a single commerce clause case
24 where a state or local entity has been permitted to
25 give a local economic concern a gatekeeper function

1 analogous to the function that the opponents want
2 here.

3 In other words, I don't know of a single
4 case where a local concern has been allowed to
5 essentially serve as the absolute arbiter of which of
6 its competitors come into a market. Again, this is
7 the purest form of protectionism. This is frankly --

8 **COMMISSIONER DEASON:** How can that be
9 protectionist if this state has a competitive bidding
10 rule for the addition of new capacity? How can you
11 say that's protectionism when we have a rule that
12 requires our utilities to competitively bid?

13 **MR. GEY:** Well, it's protectionist in the
14 sense that with regard to wholesale energy, the
15 wholesale energy market, Duke New Smyrna, or any other
16 outsider, evidently cannot even build a power plant,
17 cannot even enter the market without first joining
18 with the local entity to get permission to come in.

19 **COMMISSIONER DEASON:** But how is that
20 protectionist in that we require that of our own
21 utilities? They've got to come in and show that need.
22 They just can't build a power plant speculating that
23 there's going to be demand on the wholesale market --

24 **MR. GEY:** That's right. But, again, your
25 power with regard to retail utilities is different

1 than your power with regard to wholesale utilities
2 because of your function in protecting the ratepayers
3 who will foot the bill. And, again, that is
4 specifically anticipated in the Federal Power Act and
5 in the various statutes since that time.

6 So, again, retail and wholesale are two
7 completely separate entities for purposes of this
8 analysis, and the joint petitioners here are in the
9 wholesale market, not the retail market.

10 **COMMISSIONER DEASON:** So you're saying our
11 retail utilities could come in and say there's no need
12 to get a determination of need if they want to build a
13 power plant on a wholesale basis?

14 **MR. GEY:** No. No; because the determination
15 of need process obviously does have within it local
16 concerns that the state has authority to pursue.

17 If, for example, someone came into Florida
18 and wanted to build a power plant that would endanger
19 the stability of the electrical grid within in
20 Florida, the Commission obviously has a legitimate
21 local interest in seeing to it that that doesn't
22 happen.

23 But, again, that's not what's going on here.
24 What's going on here is an economic issue, not a grid
25 protection issue or a safety issue or an environmental

1 issue.

2 What's going on here is certain economic
3 entities are being favored simply because they're here
4 already, simply because they're local entities with a
5 vested interest in preserving their -- the market to
6 themselves; and that's what the commerce clause
7 specifically prohibits. Again, it is not a close
8 question, frankly. This is pretty cut and dried.

9 Now, the third issue -- and this goes back
10 to your first question, Commissioner Deason -- the
11 third question, which Mr. Sasso relies on extensively
12 in his briefs and also in his arguments today is
13 whether Congress in the Energy Policy Act and the
14 Federal Power Act has specifically authorized Florida
15 to engage in this protectionist behavior.

16 Now, it is true -- as an abstract matter, it
17 is true that Congress may pass statutes authorizing
18 states to do things that would otherwise violate the
19 dormant commerce clause. If Congress wanted to pass a
20 statute saying a state may exclude entirely from the
21 wholesale power market outside market entrants, that
22 would be permissible.

23 It's sort of ironic, because Congress could
24 use its active commerce clause power to authorize
25 dormant commerce clause violations, and the theory

1 there is that the nation as a whole may have an
2 interest in ceding to local political bodies in some
3 narrow circumstances the power to do things that
4 otherwise would be discriminatory against interstate
5 commerce.

6 The problem with these arguments, though, is
7 that the Supreme Court has specifically considered
8 this issue twice in the last 20 years and specifically
9 rejected that arguments.

10 The petitioners -- or the opponents, rather,
11 rely on Section 731 of the Energy Policy Act, and the
12 Supreme Court has not considered that specific
13 provision; but what they have considered is Section
14 201(B) of the Federal Power Act, which is the
15 analogous saving provision that's phrased in almost
16 exactly the same terminology as 731.

17 And this has come up in two cases. One is
18 the New England Power case and the other is Wyoming v.
19 Oklahoma. Now, in the New England power case -- and I
20 apologize for going on a little bit, but it's
21 important to understand how clear the Supreme Court
22 has been on this.

23 In Section 201(B), Federal Power Act, there
24 is a provision that says, the Federal Power Act,
25 quote, shall not apply to any other sale of electrical

1 energy or deprive a state or state commission of its
2 lawful authority now exercised over the exportation of
3 hydroelectric energy which is transmitted across the
4 state line.

5 Now, that is -- that seems to be fairly
6 clear language, and if you just read it on its face,
7 it seems to authorize the state to discriminate in the
8 sense of retaining for itself hydroelectrical power.

9 Well, in *New England Power v. New Hampshire*,
10 the New Hampshire -- the State of New Hampshire
11 attempted to do just that. It attempted to impose
12 upon New Hampshire Utility a rule that said you have
13 to keep your power in state as opposed to exporting
14 it. And one of their justifications, in fact, their
15 primary justification, was the same justification
16 that's being raised here.

17 What they said is, the Federal Power Act
18 authorizes this action. It authorizes us to
19 discriminate on behalf of our own residents. The
20 Supreme Court took that case and decided unanimously
21 that they were wrong and this -- I apologize for
22 reading it, but again it's important to understand how
23 clear this is.

24 Let me read you what they said. "Nothing in
25 the legislative history or language of the statute

1 evinces a congressional intent to alter the limits of
2 state power otherwise imposed by the commerce clause
3 or to modify the earlier holdings of this court
4 concerning the limits on state authority to restrain
5 interstate trade."

6 That's a specific interpretation of
7 Section 201(B) of the Federal Power Act which,
8 again -- in the analogous savings clause to 731, which
9 comes to mind here.

10 Now, ten years later they took another case
11 involving another act of discrimination by the State
12 of Oklahoma which tried to require utilities to buy
13 local coal as opposed to coal from other states; and
14 again the claim was the Federal Power Act authorizes
15 us to do this -- Section 201(B) -- and again the court
16 took this case and again the court rejected it.

17 And again -- let me read you exactly what
18 they said. Quote: "Congress must manifest its
19 unambiguous intent before a federal statute will be
20 read to permit or to approve such a violation of the
21 commerce clause, as Oklahoma here seeks to justify.
22 Our decisions have uniformly subjected commerce clause
23 cases implicating the Federal Power Act to scrutiny on
24 the merits."

25 "We need say no more to conclude that

1 Oklahoma has not met its burden of demonstrating a
2 clear and unambiguous intent on behalf of Congress to
3 permit the discrimination against interstate commerce
4 occurring here."

5 Now, it's impossible to get around these
6 cases. Frankly, these cases definitively decide the
7 issue against the opponents' interpretation. Congress
8 has not authorized the state to violate the dormant
9 clause in regulating the wholesale sales of power.

10 **COMMISSIONER DEASON:** Could you explain to
11 me how those cases which you've just described relate
12 to a siting of a power plant, and --

13 **MR. GEY:** Well, for instance --

14 **COMMISSIONER DEASON:** Let me continue for a
15 second.

16 I understand that, for example, if there
17 were an independent plant operating in Florida and
18 then this Commission attempted to deny a regulated
19 utility from purchasing, even though it was the
20 economic thing to do, because we didn't like you or
21 because your owners were out of state or because you
22 were using a fuel source we didn't like, whatever, I
23 would see where those cases probably would say, no,
24 Commission, you can't do that.

25 But how do those cases that you've just

1 cited relate to the question of siting a power plant?

2 **MR. GEY:** Well, because the opponents argued
3 that Section 731 -- and let me read you the language
4 that they're relying on. 731; it says "Nothing in
5 this title shall be construed as affecting or
6 intending to affect or in any way to interfere with
7 the authority of any state or local government
8 relating to environmental protection or the siting of
9 facilities."

10 What they argue is that that language
11 specifically authorizes the state to use its siting
12 authority to essentially bar out-of-state competitors
13 from applying to build a wholesale power plant without
14 first contracting with the local utility. And the
15 problem with that is, again, this language is 731,
16 which does allocate to the state authority to engage
17 in siting determinations.

18 That language in 731 does authorize the
19 state to engage in nonprotectionist siting
20 allocation -- or siting decisions, but it does not
21 authorize the state to use its siting authority to,
22 again, as in this case completely bar out-of-state
23 entrants to the wholesale power market from even
24 seeking a determination of need without first entering
25 into a contract with a local utility.

1 It's not that -- we're not questioning the
2 states' authority to engage in siting decisions. They
3 clearly can do that. What they cannot do, though, is
4 use the siting authority to bar entrants to the
5 market. And that's what we're arguing is happening
6 here, and implicitly that's what the opponents, I
7 guess, concede by arguing that 731 authorizes them to
8 do that -- or authorizes the Commission.

9 **COMMISSIONER CLARK:** Joe, I have a question.

10 **CHAIRMAN GARCIA:** Very well. Go ahead,
11 Commissioner.

12 **COMMISSIONER CLARK:** My question is, does
13 that mean that under our statute we can't interpret
14 need to mean need to serve retail customers?

15 **MR. GEY:** Well, it's -- I guess that issue
16 could come up in several ways, and let me give you one
17 way in which this issue would come up that relates to
18 the New England Power decision.

19 If the state -- if the Commission were to
20 deny a determination of need on the grounds that the
21 state -- the state's retail customers already had
22 sufficient access to power within Florida -- and by
23 the way, that is -- as probably Scheff can explain,
24 that is far removed from the present reality. But if
25 that were true and the state denied a determination of

1 need on the grounds that we're full, we've got all the
2 power we need and we don't want another power plant if
3 we can't use the power, New England Power -- the New
4 England power case says the state could not do that.

5 So I guess if it would come up in that
6 context where it was clearly an effort to prohibit
7 out-of-state entrants to the markets from using
8 Florida resources to generate power that would be sold
9 out of state, New England Power says that would be
10 unconstitutional.

11 Is that responsive?

12 **COMMISSIONER CLARK:** Yeah. I don't agree
13 with it, but it's responsive.

14 **COMMISSIONER JOHNSON:** It's responsive, but
15 that's just not the answer we were wanting to hear.

16 (Laughter)

17 **MR. GEY:** That's not the answer you want to
18 hear. Okay. (Laughter)

19 **MR. WRIGHT:** Mr. Chairman, at the outset of
20 his remarks Mr. Sasso predicated his whole response to
21 the commerce clause question by Commissioner Johnson
22 by saying the Commission has no discretion to depart
23 from Nassau, and we'd like to respond to that.

24 **MR. SUNDBERG:** Mr. Sasso says that -- or he
25 argues that the Nassau case -- and he reads, really,

1 from Nassau I and asserts that Nassau I represented an
2 authoritative construction of the statute.

3 That language is found in the now infamous
4 Footnote 9 to the decision. And I simply ask this
5 Commission to read what Footnote 9 said, because it is
6 clear that the court was simply deferring to the
7 construction that this Commission placed on the act,
8 not just the construction, but the construction it
9 placed on the act with respect to a QF that came
10 before you without having a contract but seeking a
11 contract with a retail utility.

12 And I simply have to read this. It says --
13 and this is a portion of Footnote 9, and they're
14 saying, we reject Nassau's position that -- the
15 quasi-estoppel position; hey, you have treated these
16 applications different in the past; therefore, you're
17 bound into the future to treat them. They said that.

18 In Order 22 -- pardon me -- 22341, the
19 Commission clearly adopted the position that the four
20 criteria in Section 403.519 are utility and
21 unit-specific, and that need for purposes of the
22 Siting Act is the need of the entity ultimately
23 consuming the power.

24 But in what context? In the context of a
25 QF, because Nassau was a QF. And, in fact, much of

1 the discussion in Nassau I, which is what we're
2 dealing with, had to do -- and they state the issue --
3 get a relationship, if any, between the requirements
4 of the Siting Act and the requirement of the PSC's
5 regulation governing small power producers and
6 cogenerators.

7 It was those rules and their relationship
8 they were dealing with. They were dealing with a QF
9 who was obliged to enter into a contract with retail
10 utilities.

11 But what do they say? "We note that under
12 Section 403.519 the PSC is designated the sole forum
13 for determination of need under the Siting Act. It is
14 well established that the construction placed on a
15 statute by the agency charged with the duty of
16 executing and interpreting is entitled to great
17 weight." Cites P.W. Ventures, and we all know that.

18 It goes on to say: "The PSC's interpretation
19 is consistent -- consistent, not compelled by, but
20 consistent -- with the overall directive of
21 Section 403.519, which requires, in particular, that
22 the Commission determine the cost of.....

23 If you will read that in context, in context
24 with the issue that was presented, it seems to me it
25 is beyond P.W. Ventures that the Supreme Court is

1 simply doing what is under what its limited scope of
2 review it is obliged to do, and that is to give great
3 deference to and very limited scope of review of these
4 courts' orders.

5 For that same reason, I suggest to you that
6 the position urged by the copetitioners here, that is
7 the basis for a determination that it is an applicant
8 is -- would not only meet the test of not clearly
9 erroneous, but it would be rational, because merchant
10 plants are different from the kind of applicants that
11 the Supreme Court dealt with in both Nassau I and
12 Nassau II, because they didn't deal with Ark in
13 Nassau II. They simply didn't deal with it.

14 This Commission in its order in Nassau II
15 made it clear that Nassau -- that the Nassau II order,
16 which was the Ark case, was to be limited essentially
17 to its facts.

18 Now, they go ahead and say, well, but you --
19 and it makes the -- again, if you'll bear with me, I
20 think it's worth reading, if I can find the blooming
21 thing. (Pause)

22 This is this Commission's order: "It is
23 also our intent that this order be narrowly construed
24 and limited to proceedings wherein nonutility
25 generators seek determinations of need based on a

1 utility's need."

2 That's not what this petitioner is doing.
3 The intervenors say, oh, well, but it all said -- but
4 it also says "We explicitly reserve for the future
5 questions of whether -- a self-service generator.

6 I suggest to you that this Commission knows
7 how to say what it means. What it meant -- what it
8 said was, this is a one-way ticket; it's not round
9 trip. It deals only with the passenger we've got, and
10 that passenger here happened to be someone in the
11 position of seeking to enter into a contract with a
12 retail utility which would result in being built into
13 their rate base and ultimately impact the rate base.

14 That is as far as it went. And this
15 Commission was wise to say that; "We only decide the
16 case," and that's good practice. Only decide the case
17 that's before you. And I suggest to you that merchant
18 plant owners and operators are qualitatively
19 different.

20 If I had time -- and I know -- I don't want
21 to hog some time here. What I would say to you is, is
22 that the law of stare decisis or precedent is based on
23 the actual issue decided; and, hence, I reassert to
24 you that you are, in fact, writing on a clean slate,
25 and there's nothing in either of those Nassau

1 decisions that ties your hands in any way.

2 **CHAIRMAN GARCIA:** Thank you. Let me just --
3 so that you -- I know Mr. Guyton has been quietly
4 waiting. If I can do it, before you enter your
5 answer, if Commissioners don't have any other
6 questions -- I mean, obviously if something comes
7 up -- we're going to break at 11:30. And as much as
8 I've enjoyed your discussion today, I don't think any
9 of us want to engage in any longer than that, so keep
10 that short. If the Commissioners have questions,
11 that's fine.

12 Mr. Sasso you've also waited. Let
13 Mr. Guyton, go, and then you can close for the day.

14 **MR. SEIDENFELD:** I want to address first the
15 mention of the PG&E case by Mr. Sasso who said if the
16 Supreme Court can affirm California in allowing a
17 moratorium on nuclear power plants, this certainly
18 must not violate the commerce clause nor be preempted.

19 What Mr. Sasso didn't tell you was that that
20 moratorium was placed on the building of nuclear power
21 plants by retail utilities on the grounds that the
22 economics of getting rid of the waste would be so
23 costly that the effect would be to the detriment of
24 the ratepayers, the captive ratepayers, of those
25 utilities; and it was in that context where clearly

1 the Commission has the authority from Congress.

2 So it avoids the dormant commerce clause on
3 that ground, and also where there was no question that
4 there's no preemption over the ability of the
5 Commission to license and address the costs and needs
6 for retail customers.

7 It was in that context that the
8 California -- that the U.S. Supreme Court allowed that
9 and it's quite specifically -- if you read the case --
10 and the challenge was not based on the FERC -- an
11 interaction between FERC's jurisdiction and the
12 state's jurisdiction, but rather the Nuclear
13 Regulatory Commission, and it was a totally different
14 issue that dealt with the retail -- the retail
15 customer.

16 Secondly -- and I would mention this --
17 Mr. Sasso is reading the need determination as part of
18 what he calls the exception for siting and
19 environmental matters.

20 Now, it is in the Siting Act, and the state
21 has done that -- but I would suggest that for federal
22 purposes, the mere fact that a state put something in
23 the Siting Act cannot determine whether something is
24 actually environmental or siting for the purposes of
25 federal law.

1 I don't think that is what the Energy Policy
2 Act had in mind, because if you could come along and
3 say, you must have long-term contracts -- and that's
4 what we're talking about here, because he's talking
5 about a planning window on the order of 10 years --
6 you must have long-term contracts for almost all the
7 need. That is inconsistent with a robust wholesale
8 competitive market, which was the whole purpose of the
9 Energy Policy Act.

10 Now, if perhaps the Siting Act worked where
11 the Siting Commission was allowed to balance the need
12 against the environmental harms, you might say that
13 might have be related to the environmental harms and
14 we don't want to build a plant that would be
15 unnecessary; but it doesn't work that way.

16 This Commission gets to determine whether
17 there's need, and once they determine that -- if they
18 determine that there is not need, then there is no
19 presentation of the environmental effects at all; and
20 as I pointed out in our brief, there can be situations
21 where the environmental effects of building a plant
22 can even be positive, because it's replacing very
23 polluting -- greatly polluting plants.

24 I don't think that you can force these
25 economic issues, which are really at odds with the

1 notion of a robust wholesale competitive market, into
2 the realm of being siting and environmentalism. And I
3 think that's one thing that Mr. Sasso does that's
4 incorrect.

5 Finally, a very quick point, and this goes
6 to preemption and may not be something that you want
7 to focus on. But Mr. Sasso cited several cases
8 dealing with the notion that it must be clear that
9 preemption is justified and that a mere general
10 position policy is not enough -- of the federal
11 government, is not enough to find preemption.

12 I agree with that. The reason behind that
13 is that if you read the court's decisions, they say,
14 you know, there are goals, but goals are almost never
15 done at all costs. There's always other balancing
16 criteria. If I were to cite to you and say that the
17 whole goal behind the Energy Policy Act was a robust,
18 competitive wholesale market, and that's all I said, I
19 think I would have a weak preemption argument; but I
20 am not saying that.

21 What I am saying is, look at the pains they
22 went through to precisely prevent the utilities from
23 playing a gatekeeper function and keeping others out
24 of the market. That is precisely what they did with
25 respect to transmission. They said, utilities, you

1 cannot use your power as a vertical monopoly to
2 prevent others from coming into the market.

3 And I simply don't see how allowing them to
4 do it in the context of not entering into contracts
5 with outsiders for building power plants is any
6 different from allowing that gatekeeping function in
7 the transmission sense in the ultimate effect.

8 **CHAIRMAN GARCIA:** Thank you, Professor.
9 Mr. Guyton?

10 **COMMISSIONER JACOBS:** Can I ask a quick
11 question? Is it reasonable to -- for us to give ear
12 to the argument that by doing this arrangement where
13 the contract is so small a part of the ultimate
14 capacity that we basically eviscerate the authority
15 that we acknowledge that we have?

16 **MR. SEIDENFELD:** I'm not sure how I
17 acknowledged you had the authority. The authority I
18 acknowledged you have is --

19 **COMMISSIONER JACOBS:** Is siting authority --

20 **MR. SEIDENFELD:** Yeah, you do --

21 **COMMISSIONER JACOBS:** We have --

22 **MR. SEIDENFELD:** You do have siting
23 authority, but I don't think the siting authority
24 allows you in any way to simply up front say, we don't
25 see that there's a need for this with respect to a

1 particular utility.

2 **COMMISSIONER JACOBS:** No. No. We say that
3 there's a need for 30 -- let's say we say there's a
4 need for 30 megawatts; okay. The argument that was
5 raised is that by doing that, when we know that the --
6 we're opening the door for 500,000, 2,000 megawatts of
7 capacity, we've eviscerated that authority. We no
8 longer have siting authority if we do that.

9 **MR. SEIDENFELD:** Oh, I -- oh, excuse me -- I
10 disagree with that, Commissioner Jacobs, because I'm
11 not -- this does not go to the merits.

12 If we get in on that basis, you then have to
13 determine whether a plant of this size -- size is
14 justified in terms of the criteria that you're allowed
15 to apply; reliability and statewide need, but --
16 perhaps statewide need, but I don't think that that's
17 the issue here.

18 The issue is whether we get in the door at
19 all. So I don't think it really -- anything I said
20 did not mean to take away from the authority you have
21 under the Siting Act to consider that.

22 **MR. WRIGHT:** And, Commissioner Jacobs,
23 certainly with respect to the environmental
24 regulation, which is the overall framework of the
25 Siting Act, the Siting Board governing the cabinet as

1 the Siting Board, will have the ultimate say based on
2 input from the land use hearing and site certification
3 hearings in the department as to whether this plant
4 will be sited in Florida making the balancing
5 determination that they make pursuant to their
6 statute.

7 **CHAIRMAN GARCIA:** Thank you, Mr. Wright.
8 Mr. Guyton.

9 **MR. GUYTON:** Thank you, Mr. Chairman. I'd
10 like to respond to two issues. I think I have about
11 10 minutes left, and I want to make sure that I get to
12 respond to two issues.

13 One is the question that Commissioner
14 Johnson asked and Staff asked about whether or not you
15 can address the constitutional issue; and, two, I'd
16 like to go back and address some of the arguments that
17 have been made about whether Nassau I and II are
18 definitive constructions of the Siting Act by the
19 Supreme Court, because I think they pretty clearly
20 are.

21 This Commission may not decide
22 constitutional issues. The separation of powers
23 article of the Florida Constitution gives different
24 bodies different authority to siting.
25 Constitutionality is uniquely a judicial function.

1 That's why we cited the cases of Marbury versus
2 Madison and Palm Harbor Special Fire Control District.
3 They stand for that proposition that that is reserved
4 to the judiciary.

5 Now, courts in Florida have extended that,
6 and we've cited a case to the effect of saying that's
7 reserved to the judiciary; therefore, administrative
8 agencies, which are -- in this case you are a body or
9 an extension of a Legislature -- it's not proper for
10 you to wade into that unique judicial function. And
11 that's the Department of Commerce case that we've
12 cited in our brief.

13 Petitioners offer two responses, two cases.
14 They offer the case of Smith versus Wilson -- or
15 Willis for the proposition that the Commission should
16 consider federal statutory constitutional limits on
17 its decisions, and Corn v. State that the Commission
18 should construe the statute as to support its
19 constitutionality.

20 Go look at those two cases. Neither one of
21 those cases have a thing to do about what an
22 administrative agency should do on the issue of
23 constitutionality.

24 Those are judicial standards applied by
25 courts when they are exercising their uniquely

1 judicial function of determining constitutionality.
2 This isn't a close question. The dormant commerce
3 clause and the preemption clause is not properly
4 before this Commission.

5 Now I'll briefly address the dormant
6 commerce clause. I don't have time to rebut
7 everything. I don't think you need to get past
8 Section 731. There's very clear authority.

9 It's the first case that the petitioners
10 cited in their dormant commerce clause brief in
11 their -- or argument in their original brief that when
12 Congress expressly authorizes an impact -- or
13 regulation, state regulation, that impacts commerce,
14 that's the end of the dormant commerce clause inquiry.

15 I think if you take a look at Section 731,
16 it clearly is a statement by Congress to two effects;
17 one, we're not preempting siting and environment; and,
18 two, we recognize the state siting and environmental
19 regulation is going to have an impact on commerce.

20 And we're not concerned about that. If you
21 decide not to permit something for those reasons, then
22 so be it. That doesn't violate the dormant commerce
23 clause. I don't think you have to get past
24 Section 731.

25 Now, I do want to address briefly the

1 suggestion that Nassau I -- and the footnote in
2 Nassau I is not a definitive construction of the
3 Siting Act by the Supreme Court of Florida. And I
4 won't reread the footnote to you, but I will read the
5 sentence that was footnoted, because it's clear that
6 that's part of the holding of Nassau I as well as the
7 footnote.

8 And there they're rejecting an argument by
9 Nassau that prior decisions of the Commission
10 presuming need required the Commission to presume need
11 in that case. And they said "In our view, the PSC's
12 prior practice of presuming need, as opposed to
13 determining actual need, cannot be used now to force
14 the PSC to abrogate its statutory responsibilities
15 under the Siting Act." And then they cite a footnote
16 that says "We reject Nassau's argument that this isn't
17 utility and unit-specific."

18 There couldn't be a clearer contradiction of
19 the Siting Act by the Supreme Court of Florida. But
20 if you have any doubt as to that, you only have to
21 take a look at Nassau II, because there when they
22 affirm dismissal of a nonutility generator because
23 they didn't have an obligation to serve and they
24 didn't have a need and they didn't have a contract,
25 they had this to say about Nassau I: "The

1 Commission's interpretation of Section 403.519 also
2 comports with this court's decision in Nassau Power
3 Corporation versus Beard."

4 "In that decision, we -- that meaning the
5 Supreme Court -- rejected Nassau's argument that,
6 quote, the Siting Act does not require the PSC to
7 determine need on a utility specific basis, end quote.
8 Citation omitted. "Rather, we -- the Supreme Court --
9 agreed with the Commission that the need to be
10 determined under Section 403.519 is, quote, the need
11 of the entity ultimately consuming the power, end
12 quote; in this case FPL.

13 It is simply wishful thinking on the part of
14 the petitioners to read away Nassau I and Nassau II.
15 They are definitive constructions of the Siting Act
16 which, as Mr. Sasso points out, has since been
17 enacted, and they cannot be read away by the
18 Commission now. If that provision has to be changed,
19 that's solely up to the Legislature. You're
20 duty-bound to follow the law.

21 One other point I'd point out. On the
22 dormant commerce clause issue, we've raised five
23 grounds for dismissal. The dormant commerce clause
24 argument, even if you embrace it -- which I clearly
25 think you shouldn't -- addresses only one of those

1 grounds; the applicant status argument.

2 The argument that they make that this
3 pleading is inconsistent with Nassau and Beard doesn't
4 state a cause of action because it doesn't say
5 utility-specific need. That is not addressed by the
6 dormant commerce clause issue. And, consequently, I
7 would say even if you embrace that argument, you
8 should still grant the motion to dismiss.

9 Thank you.

10 **CHAIRMAN GARCIA:** Mr. Sasso, I know that
11 Mr. Guyton appropriated 10 minutes to himself. You've
12 got five just in case a Commissioner asks any
13 question, and then we'll close this up.

14 **MR. WRIGHT:** Mr. Chairman, if I may,
15 Commissioner Jacobs asked a couple of questions to
16 which --

17 **CHAIRMAN GARCIA:** If Commissioner Jacobs has
18 a question for you, he'll ask it, but this hearing has
19 to close down.

20 So, Mr. Sasso, go right ahead.

21 **MR. SASSO:** Thank you.

22 Counsel makes a point that if he were just
23 arguing general policy from the Environmental Policy
24 Act, it would be different; and he emphasizes, as he
25 put it, I think, how Congress took pains precisely to

1 prevent certain ills from taking place.

2 That is our point. Congress was very
3 precise in the Energy Policy Act in what it did and
4 what it didn't do; and what it did was it opened
5 transmission.

6 What it didn't do was preclude states from
7 regulating in this area and, in fact, quite to the
8 contrary, in 731 they permitted states to regulate in
9 this area.

10 All of the dormant commerce clause arguments
11 advanced by the petitioners are bottomed on a false
12 premise, we believe; and that is that what the Nassau
13 rule is all about is economic protectionism.

14 They contend that it's protectionism because
15 an entity such as Duke must enter into sales contracts
16 with a local entity. Well, that arises from the very
17 nature of the fact that the retail franchise in this
18 state is exclusive.

19 Duke says it wants to sell to Florida
20 utilities. It has to deal with Florida utilities. It
21 has to deal with these entities, because under Florida
22 law the franchise is exclusively given to them. So
23 that is inherent in the nature of the statutory
24 arrangement, which they concede is proper. That is
25 not protectionism; that is simply an outgrowth of the

1 retail exclusive franchise in this state.

2 A word about Pacific Gas. The clause in
3 that case that was at issue simply said "Nothing in
4 this chapter shall be construed to affect the
5 authority or regulations of any state or local agency
6 with respect to the generation, sale, or transmission
7 of electric power produced for the use of nuclear
8 facilities licensed by the Commission."

9 On that basis the court said, this simply
10 reflects the state's historic role in regulating
11 generation facilities, the need for generation
12 facilities, and we're going to actually allow them to
13 impose a moratorium on the construction of nuclear
14 plants.

15 Counsel says, well, what they did was they
16 allowed the State of California on the basis of
17 economics to shut down nuclear development because of
18 a concern about getting rid of waste.

19 Most of the commerce clause cases they cite
20 involve prevention of states' restrictions on the
21 disposal of waste. This was a stark exception to
22 those cases and the rule of those cases based on that
23 language that I mentioned. The language in 731 is
24 much more explicit and much more supportive of what
25 this Commission has done.

1 The State of Florida simply didn't put, by a
2 coincidence, the need proceeding in the siting
3 framework. It's there by design as a conscious part
4 of an effort to prevent an undue proliferation of
5 plants in this environment.

6 Let me close just by addressing a couple of
7 comments by Mr. Sundberg about the controlling
8 authority of the Nassau decisions.

9 He read to you a portion of Footnote 9. He
10 didn't read the very last sentence of that footnote
11 which, in referring to the PSC's interpretation about
12 the cost-effectiveness determination, the court said
13 "This requirement would be rendered virtually
14 meaningless if the PSC were required to calculate need
15 on a statewide basis without considering which
16 localities would actually need more electricity in the
17 future."

18 The Supreme Court is not going to sustain --
19 or defer to an interpretation that will render the
20 statute virtually meaningless.

21 Also, Mr. Sundberg read from the
22 Commission's decision which purported to limit the
23 scope of that decision, and he mentioned the sentence
24 that follows; but I think it bears reading. It says
25 "We explicitly reserve for the future the question of

1 whether a self-service generator, which has its own
2 need to serve, may be an applicant for a need
3 determination without a utility coapplicant."

4 That's all the Commission was talking about.
5 It didn't mean in any way to limit its analysis of the
6 nature of the entities that have standing under this
7 statute.

8 We respectfully request that the Commission
9 grant our motion to dismiss.

10 **CHAIRMAN GARCIA:** Commissioners, is there
11 anything else; any other questions?

12 **COMMISSIONER JOHNSON:** I do have a question
13 for the gentleman here, and it just goes to the last
14 point -- I just wanted him to explain it again -- that
15 he made with respect to the New England case.

16 I think Commissioner Clark asked what if we
17 determine there was no need for retail generation or
18 there was no retail need demonstrated. Was your
19 response to that, we still couldn't prevent the
20 building of this --

21 **MR. GEY:** No. I took her to mean wholesale.

22 **COMMISSIONER JOHNSON:** I think she said --

23 **MR. GEY:** I may have misunderstood the --

24 **COMMISSIONER JOHNSON:** Didn't she say
25 retail?

1 **MR. GEY:** -- question.

2 **COMMISSIONER JOHNSON:** I thought she said --

3 **MR. GEY:** I took her to mean -- what I took
4 her question to mean was whether you, in the course of
5 applying need determination to this application, could
6 say that all of our customers in Florida are
7 adequately served by the present generating capacity;
8 therefore, you may not build a wholesale plant, not --

9 **COMMISSIONER JOHNSON:** Well, yeah, still
10 within that question; that there was no need, because
11 it was being met. That's how I was --

12 **MR. GEY:** With regard to --

13 **COMMISSIONER JOHNSON:** -- interpreting what
14 she said.

15 **MR. GEY:** -- wholesale plants, though.

16 **COMMISSIONER JOHNSON:** I'm sorry.

17 **MR. GEY:** Are we talking at cross-purposes?

18 **COMMISSIONER CLARK:** (Inaudible. Technical
19 difficulties.)

20 **CHAIRMAN GARCIA:** Commissioner Clark, why
21 don't you state your question again, and maybe that
22 will help Commissioner Johnson.

23 **COMMISSIONER CLARK:** If there's not a retail
24 need for that power, can we prohibit the plant from
25 being built?

1 **MR. GEY:** Could you prohibit a plant that
2 services the wholesale market?

3 **COMMISSIONER CLARK:** Well, presumably the
4 wholesale market is to serve the retail market.

5 **COMMISSIONER JOHNSON:** Right; exactly. Did
6 you understand the question?

7 **MR. GEY:** Right. I think the answer to the
8 question is that -- under the New England Power case
9 is that you probably could not ban the construction of
10 power plants serving the wholesale market.

11 **COMMISSIONER JOHNSON:** But the wholesale
12 market is just to serve the retail market, so if
13 there's not retail --

14 **MR. GEY:** The problem is the interstate
15 commerce component.

16 **COMMISSIONER JOHNSON:** So they could build a
17 plant here because they want to serve New York --

18 **MR. GEY:** Well, if that is --

19 **COMMISSIONER JOHNSON:** -- and there's
20 nothing --

21 **MR. GEY:** Again, that is not --

22 **COMMISSIONER JOHNSON:** -- we can -- so
23 there's a -- is there a nationwide needs, then?

24 **MR. GEY:** Well, there's -- this was the New
25 England Power case. This is exactly what New

1 Hampshire argued in the New England Power case. They
2 said, we want to keep this power here because it's
3 cheap power and we want it to service our customers.
4 And what the Supreme Court said is, you can't do that.

5 **COMMISSIONER JACOBS:** So what value do we
6 have --

7 **MR. GEY:** It's the monopolization of
8 resources cases. And if you look in our initial
9 brief, there was almost a page long string cite of
10 cases where the Supreme Court has said the state may
11 not monopolize its resources -- resources is defined
12 broadly to mean any economic resources -- to service
13 only its own citizens and not others.

14 But, again, this -- that's not even close to
15 this case. And in part because as a factual matter,
16 that's not the case in Florida that we're maxed out in
17 terms of generating capacity; and also because that's
18 not the intent of the joint petitioners. The joint
19 petitioners intend to sell the power to Florida
20 consumers.

21 **COMMISSIONER JOHNSON:** I understand that,
22 but my concern is with the precedent that we were
23 setting -- setting up if we were to go down that road
24 and cite to the --

25 **MR. GEY:** Well --

1 **COMMISSIONER JOHNSON:** -- dormant commerce
2 clause and it stands for the proposition that
3 basically if we determine that there was no retail
4 need, you could still allow someone to build a
5 wholesale plant even though the retail utilities
6 didn't need it, only for them to sell it out of state.

7 It strikes me that there should be some
8 legitimate state interest analysis that we could apply
9 so that our resources wouldn't have to be used in that
10 way when there's no need in our state.

11 **MR. GEY:** The court has determined that very
12 clearly, though. And what the court has said in the
13 dormant commerce clause cases is that states may not
14 isolate themselves from the rest of the country.

15 And, again, they've applied this to
16 everything from minnows in the state statute that said
17 you can't export good minnows to another state all the
18 way up to the highly valuable commodities such as
19 electrical power.

20 And, again, this is -- I emphasize, this is
21 not close; it's not a close case. This is determined.
22 It's been determined for decades, and determined
23 without any serious dissent on the Supreme Court. So
24 I'm afraid we're all bound by these rules. And,
25 again, it's not really an open question.

1 **MR. WRIGHT:** Mr. Chairman, may I at least
2 remind Commissioner Jacobs of the questions he posed
3 to the other side that we have not had a chance to --

4 **CHAIRMAN GARCIA:** No. No, thank you,
5 Scheff.

6 **MR. WRIGHT:** Okay.

7 **CHAIRMAN GARCIA:** Unless Commissioner Jacobs
8 wants you to remind him, I doubt that that will be the
9 case. I'm sure he's quite aware.

10 **COMMISSIONER JACOBS:** I'll tell you what. I
11 will ask this: If we adopt your argument of that
12 case, your interpretation of that case, why would we
13 ever have any need for the Siting Act?

14 **MR. WRIGHT:** To protect the --

15 **COMMISSIONER JACOBS:** What would we do in
16 that --

17 **MR. WRIGHT:** To protect the environment and
18 to provide the opportunity for --

19 **COMMISSIONER JACOBS:** We can't do that.

20 **MR. WRIGHT:** -- for the Siting Board to
21 balance the need for electrical power against the
22 environmental consequences of its production as
23 required under the Siting Act.

24 **COMMISSIONER JACOBS:** And we --

25 **CHAIRMAN GARCIA:** We have -- I would assume

1 we have the issues of reliability, the issues of
2 environment, the integrity of the system. I mean,
3 those are, I think, significant questions.

4 **COMMISSIONER JACOBS:** What I just heard is
5 if we come down saying that the interests of this
6 state prevail over the construction of a plant, that
7 case says those interests fall short.

8 **MR. GEY:** No, no. Those interests -- if the
9 state has legitimate local interests that are not
10 protectionist in nature, the state may apply those
11 legitimate local interests to bar construction of a
12 power plant.

13 The question, though, is whether in this
14 case -- the opponents argued that we should never even
15 reach the question because we shouldn't even be
16 allowed to ask for a determination of need process to
17 go forward.

18 And, again, without regard to what happens
19 at the determination of need process, at this stage of
20 the proceeding, again, it is not even close. You
21 cannot just bar us altogether from the market without
22 even reaching the hard questions of balancing the
23 local interests against the national interests and
24 so --

25 **CHAIRMAN GARCIA:** Thank you very much. That

1 concludes our hearing today.

2 And the Commissioners, I guess we will be
3 back in half an hour for the telecommunications
4 Internal Affairs.

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

6 (Thereupon, the hearing concluded
7 at 11:30 a.m.)

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

4 I, H. RUTHE POTAMI, CSR, RPR, FPSC
5 Commission Reporter,

6 DO HEREBY CERTIFY that the Oral Argument in
7 Docket No. 981042-EM was heard by the Florida Public
8 Service Commission at the time and place herein
9 stated; it is further

10 CERTIFIED that I stenographically reported
11 the said proceedings; that the same has been
12 transcribed by me; and that this transcript,
13 consisting of 99 pages, constitutes a true
14 transcription of my notes of said proceedings.

15 DATED this 3rd day of February, 1999.

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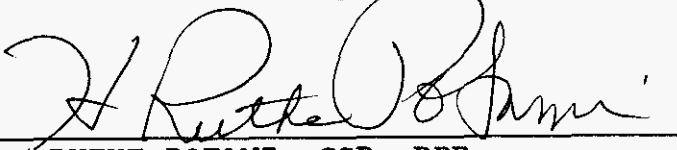
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