State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: 02/19/99

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF ELECTRIC AND GAS (FUTRELL, BREMAN, MAKIN)
DIVISION OF AUDITING AND FINANCIAL ANALYSIS (NORIEGA, LESTER, SAMAAN)
DIVISION OF LEGAL SERVICES (PAUGH, JAYE)

RE: DOCKET NO. 981042-EM - JOINT PETITION FOR DETERMINATION OF NEED FOR AN ELECTRICAL POWER PLANT IN VOLUSIA COUNTY BY THE UTILITIES COMMISSION, CITY OF NEW SMYRNA BEACH, FLORIDA, AND DUKE ENERGY NEW SMYRNA BEACH POWER COMPANY LTD., L.L.P.

AGENDA: 03/04/99 - SPECIAL AGENDA - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: MARCH 22, 1999 - ORDER TO BE SUBMITTED TO THE DEPARTMENT OF ENVIRONMENTAL PROTECTION PURSUANT TO SECTION 403.507(2)(A)2, FLORIDA STATUTES

SPECIAL INSTRUCTIONS:

FILE NAME AND LOCATION: S:\PSC\EAG\WP\981042.RCM

TABLE OF CONTENTS

CASE BACKGROUND

On August 19, 1998, the Utilities Commission, City of New Smyrna Beach, Florida and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. (Joint Petitioners) filed a Joint Petition For Determination Of Need For An Electrical Power Plant pursuant to Section 403.519, Florida Statutes. The proposed plant is a 514 megawatt (MW) natural gas fired, combined cycle plant together with a natural gas lateral pipeline and associated transmission facilities to be located in Volusia County, Florida, adjacent to Interstate 95. The Utilities Commission, City of New Smyrna Beach (the City), a municipal electric utility within the meaning of Section 366.02(2), Florida Statutes, has an entitlement to 30 megawatts of the proposed plant's capacity and energy associated with the capacity. The City will use the capacity and energy to serve its retail customers. Duke New Smyrna will build, own, and operate the plant and will market the balance of the capacity and energy (approximately 484 MW) on the wholesale power market. As such, except for the 30 megawatts entitlement provided to the City, the proposed plant will be a merchant plant. The term "merchant plant" as used in this recommendation is a power plant with no rate base and no captive retail customers.

There are seven intervenors and one amicus curiae in this docket. The intervenors are: Florida Power & Light Company (FPL); Florida Power Corporation (FPC); Tampa Electric Company (TECO); Florida Electric Cooperatives Association, Inc. (FECA); Legal Environmental Assistance Foundation, Inc. (LEAF); U.S. Generating Company (USGEN); and System Council U-4, International Brotherhood of Electrical Workers (IBEW). The amicus curiae is Louisville Gas & Electric Energy Corporation (LG&E Energy). A hearing was held on December 2-4 and December 11 and 18, 1998. On December 2, the Commission heard oral argument on Motions To Dismiss filed by FPL and FPC and Responses in Opposition of Joint Petitioners and LG&E Energy. The Commission then heard testimony of 11 witnesses during the remaining four days of the hearing. Oral argument on the Motions To Dismiss was continued to January 28, 1998, following submission of post-hearing briefs by the parties.

There are a broad range of legal, policy and factual issues in this docket. The Motions To Dismiss will be addressed first in this recommendation because they represent threshold issues which, if granted, render the remaining issues moot. A Motion For Reconsideration and a Motion To Strike are addressed following the discussion of the Motions To Dismiss. Next, the recommendation addresses factual issues relating to whether the proposed plant meets the criteria of Section 403.519, Florida Statutes, the

adequacy of the ancillary facilities associated with the plant, and the nature of the participation agreement between the Joint Petitioners. Eight legal issues are then addressed, followed by ten policy issues raised by the parties in this docket.

Abbreviations

City - The Utilities Commission, City of New Smyrna Beach, Florida

Commission - Florida Public Service Commission

DSM - Demand Side Management

Duke New Smyrna - Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.

Enron - Enron Power Marketing

EWG - Exempt Wholesale Generator

EXH - Exhibit

FDEP - Florida Department of Environmental Protection

FECA - Florida Electric Cooperatives Association, Inc.

FEECA - Florida Energy Efficiency and Conservation Act

FERC - Federal Energy Regulatory Commission

FGT - Florida Gas Transmission Company

FPC - Florida Power Corporation

FPL - Florida Power and Light Company

FRCC - Florida Reliability Coordinating Council

IBEW - System Council U-4, International Brotherhood of Electrical Workers

IOU - Investor-Owned Utility

IPP - Independent Power Producer

JEA - Jacksonville Electric Authority

Joint Petitioners - The Utilities Commission, City of New Smyrna Beach, Florida and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.

LEAF - Legal Environmental Assistance Foundation, Inc.

MW - Megawatt

MWH - Megawatt-hour

OUC - Orlando Utilities Commission

PPSA - Florida Electrical Power Plant Siting Act

Project - New Smyrna Beach Power Project

QF - Qualifying Facility

TECO - Tampa Electric Company

TR - Transcript

UCNSB - The Utilities Commission, City of New Smyrna Beach, Florida

DISCUSSION OF ISSUES

ISSUE 1A: Should the Commission grant the Motions to Dismiss filed by Florida Power & Light Company and Florida Power Corporation?

PRIMARY RECOMMENDATION: No. The Motions To Dismiss should be denied because Joint Petitioners have stated a cause of action upon which relief can be granted. Joint Petitioners have adequately alleged all of the applicable elements required for a need determination pursuant to Section 403.519, Florida Statutes. They have also demonstrated that they are "electric utilities" pursuant to the Power Plant Siting Act, that Duke New Smyrna is a "regulated electric company" pursuant to Chapter 366, and that the Project is a "joint electric power supply project" pursuant to Chapter 361, Florida Statutes. Furthermore, decisional law does not require dismissal of the petition. It is not necessary for the Commission to render a decision on the constitutional issues in order to adjudicate the Motions To Dismiss. (Paugh)

ALTERNATIVE STAFF RECOMMENDATION: Yes. The Commission should grant Florida Power & Light Company's and Florida Power Corporation's motions to dismiss. Alternative staff agrees with Florida Power & Light Company and Florida Power Corporation that, even assuming all well pled facts are true, the Joint Petitioner's petition for a determination of need fails to meet the criteria set forth in Section 403.519, Florida Statutes, Rule 25-22.081, Florida Administrative Code, Commission precedent, and the Florida Supreme Court's interpretation of both Sections 403.501-518, and 403.519, Florida Statutes, for a determination of need. Alternative staff also believes that the Joint Petitioner's federal preemption and dormant Commerce Clause arguments are unpersuasive because the authority to regulate need and environmental impact of new generating facilities has been reserved to the states. (Jaye)

STAFF ANALYSIS:

I. BACKGROUND

On September 8, 1998, Florida Power & Light Company filed a Motion To Dismiss Joint Petition, Request For Oral Argument, and Memorandum Of Law Supporting Motion To Dismiss(FPL Sept. Memorandum). Also on September 8, 1998, Florida Power Corporation filed a Motion To Dismiss Proceeding (FPC Motion)and Request For Oral Argument. On September 15, 1998, Joint Petitioners filed a Memorandum Of Law In Opposition To Florida Power & Light Company's Motion To Dismiss Joint Petition (Joint Pet. FPL Memorandum). On

September 21, 1998, Joint Petitioners filed a Memorandum Of Law In Opposition To Florida Power Corporation's Motion To Dismiss Proceeding (Joint Pet. FPC Memorandum). On November 23, 1998, LG&G Energy Corporation filed an *Amicus Curiae* Memorandum Of Law in opposition to the Motions To Dismiss (LG&G Memorandum). Oral argument was heard by the Commission at the commencement of the hearing on December 2, 1998, and again on January 28, 1999, subsequent to the filing of briefs by the parties. This portion of the recommendation addresses the Motions To Dismiss. The recommendation is divided into three broad subject-matter categories: statutory and rule analysis; decisional law analysis; and constitutional law analysis.

A. STATUTORY AND RULE BASES FOR NEED DETERMINATION PROCEEDINGS

Need determination proceedings in Florida are governed by Section 403.519, Florida Statutes, *Exclusive Forum For Determination Of Need*. In order to analyze the extensive legal arguments made by the parties in conjunction with the Motions To Dismiss, it is instructive to summarize the terms contained in the statute relative to entities which may initiate need proceedings.

Section 403.519 provides in pertinent part:

> On request by an applicant or on its own motion, the commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act....The commission shall be the sole forum for the determination of this matter....In making its determination, the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant. The commission's determination of need for an electrical power plant shall create a presumption of public need and necessity....

Section 403.503(4), Florida Statutes defines an "applicant" as:

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

"Electric utility" is defined in Section 403.503(13) as follows:

> cities and towns, counties, public utility districts, regulated electric companies, electric cooperatives, and joint operating agencies, or combinations thereof, engaged in, or authorized to engage in, the business of generating, transmitting, or distributing electric energy.

Section 403.519 was enacted in 1980, Chapter 80-65, Laws of Florida, and amended in 1990, Chapter 90-331, Laws of Florida. The Florida Electrical Power Plant Siting Act (PPSA) was enacted in 1973, Chapter 73-33, Laws of Florida, and amended in 1976, Chapter 76-76, Laws of Florida, and in 1990, Chapter 90-331, Laws of Florida. Section 403.519 is not part of the PPSA.

Need determination proceedings in Florida are also governed by Rule 25-22.081, Florida Administrative Code. The Rule provides in pertinent part:

> Petitions submitted to commence a proceeding to determine the need for a proposed electrical power plant...shall contain the following information:
>
> (1) A general description of the utility or utilities primarily affected....
>
> (2) A general description of the proposed electrical power plant....
>
> (3) A statement of the specific conditions, contingencies or other factors which indicate a need for the proposed electrical power plant....If a determination is sought on some basis in addition to or in lieu of capacity needs, such as oil backout, then detailed analysis and supporting documentation of the costs and benefits is required.

> (4) A summary discussion of the major available generating alternatives....
>
> (5) A discussion of viable nongenerating alternatives....
>
> (6) An evaluation of the adverse consequences which will result if the proposed electrical power plant is not added....
>
> (7) If the generation addition is the result of a purchased power agreement between an investor-owned utility and a nonutility generator, the petition shall include a discussion of the potential for increases or decreases in the utility's cost of capital....

B. ARGUMENTS OF THE PARTIES

1. WHETHER DUKE NEW SMYRNA AND THE CITY ARE PROPER APPLICANTS PURSUANT TO FLORIDA STATUTES AND FLORIDA ADMINISTRATIVE CODE

a. FLORIDA POWER & LIGHT COMPANY

FPL argues that the Joint Petition does not meet the requirements of Florida Statutes or Florida Administrative Code and therefore, should be dismissed. With respect to Florida Statutes, FPL states that the Joint Petition fails to allege with specificity the manner in which it meets the statutory criteria. (FPL Sept. Memorandum, pg. 45) With respect to the rule requirements, FPL argues that the Joint Petition fails to satisfy the criteria of Rule 25-22.081 regarding (1)description of utility primarily affected; (2)statement of conditions that indicate a need for the proposed plant; and (3)statement of viable nongenerating alternatives. (FPL Sept. Memorandum, pgs. 35-41; FPL Brief, pgs. 17-21)

b. FLORIDA POWER CORPORATION

By contrast to FPL's criteria-specific attack on the Joint Petition, FPC's arguments for dismissal are based on its global construction of the statutory framework of generation siting and planning. FPC's first argument is that the Florida Energy

Efficiency and Conservation Act's[1] (FEECA), limitation to retail utilities, likewise limits Section 403.519 to only retail utilities. Therefore, only retail utilities may be applicants for a need determination. (FPC Brief, pgs. 9 & 21) FPC's second statutory argument for dismissal relates to the 1973 enactment of the Power Plant Siting Act[2] which included the Ten Year Site Plan (TYSP) requirements. (FPC Brief pg. 12)

c. DUKE NEW SMYRNA/THE CITY

Joint Petitioners advance three arguments in support of their position that they are proper applicants pursuant to Florida Statutes. First, they maintain that both the City and Duke New Smyrna are proper applicants under Section 403.519, Florida Statutes. Only "electric utilities" may be "applicants" for a need determination. The City is an "electric utility" because it is a city. Duke New Smyrna is an "electric utility" because it is a "regulated electric company", regulated by the Federal Energy Regulatory Commission (FERC). (Joint Pet. Brief, pg. 15) Joint Petitioners' second argument is that they are "electric utilities" pursuant to Section 366.02(2), Florida Statutes and therefore subject to the Commission's Grid Bill[3] jurisdiction. (Joint Pet. FPL Memorandum, pg.16) Third, Joint Petitioners argue that they have standing to pursue the requested need determination because the project is a "joint electric power supply project" under Chapter 361, Florida Statutes. (Joint Pet. FPL Memorandum, pg. 23) In addition to the statutory arguments, Joint Petitioners rebut FPL's and FPC's assertions that the Joint Petition does not meet the pleading requirements of Florida Statutes and Florida Administrative Code.

---

[1]Sections 366.80-366.85 and 403.519, Florida Statutes; Chapter 80-65, Section 5, Laws of Florida.

[2]Sections 403.501-403.518, Florida Statutes, Chapter 73-33, Laws of Florida.

[3]The provisions of Chapter 366, Florida Statutes, referred to as the Grid Bill consist of Sections 366.04(2), 366.04(5), 366.05(7), and 366.05(8); Chapter 74-96, Laws of Florida.

2. WHETHER DUKE NEW SMYRNA/THE CITY ARE PROPER APPLICANTS PURSUANT TO DECISIONAL LAW

a. FLORIDA POWER & LIGHT COMPANY

The foundation of FPL's argument for dismissal of the Joint Petition is its assertion that Duke New Smyrna is not a proper applicant pursuant to decisional law. As authority for its position, FPL cites In Re: Petition of Nassau Power Corporation To Determine Need For Electrical Power Plant (Okeechobee County Cogeneration Facility), Docket Nos. 920769-EQ , 920761-EQ, 920762-EQ and 920783-EQ, Order No. PSC-92-1210-FOF-EQ, issued October 26, 1992 (Ark and Nassau) and Nassau Power Corporation v. Beard, 601 So.2d 1175 (Fla. 1992) (Nassau I). Under FPL's interpretation of the decisions, no non-utility generator may seek a need determination without first obtaining a contract with a state-regulated utility with an obligation to serve. The Ark and Nassau decision was appealed by Nassau and upheld by the Florida Supreme Court. Nassau Power Corporation v. Deason, 641 So.2d 396 (Fla. 1994). (Nassau II) FPL states that the Court's "complete affirmation of the Commission's construction of the Siting Act in the Ark and Nassau decision should leave no doubt as to the proper disposition of this need determination petition." A non-utility generator without a contract with an electric utility is not a proper applicant under the Siting Act. (FPL Sept. Memorandum, pg. 21)

b. FLORIDA POWER CORPORATION

Like FPL, FPC argues that the Nassau decisions conclusively determine that a need proceeding under Section 403.519 may only be brought by a retail utility or an entity with a contract with a retail utility. (FPC Brief, pgs. 25-28) In addition, FPC acknowledges that controlled overbuilding may be prudent because of economies of scale, but that does not negate the necessity of demonstrating utility specific need for the reasonably foreseeable future. (FPC Brief, pgs. 31-33)

c. DUKE NEW SMYRNA/THE CITY

Joint Petitioners distinguish the Nassau cases and state that the cases do not constitute precedent in this proceeding because they arose on different facts. The difference is captive ratepayers. According to Joint Petitioners, Nassau I and II represent the law of non-utility generators seeking to bind retail utilities, and thus captive ratepayers, to long term power

contracts. The Nassau cases addressed need and standing of qualifying facilities(QF).[4] (Joint Pet. Brief, pg. 20) Nassau I held that a QF with a contract based on statewide need had standing to pursue a need determination for its proposed plant, but the contract did not relieve the QF from showing that the purchasing utility required the capacity. (Joint Pet. Brief, pg. 19) In Nassau II, the court affirmed the Commission's interpretation that Section 403.519 required a QF proposing to bind a specific utility contractually, to enter into a contract with that utility as a precondition for filing for a need determination. (Joint Pet. FPL Memorandum, pg.48; Joint Pet. Brief, pg. 20) The instant petition is distinguishable according to the Joint Petitioners because Duke New Smyrna is not seeking to force retail utilities to purchase the Project's merchant output.

3. DORMANT COMMERCE CLAUSE AND FEDERAL PREEMPTION

a. FLORIDA POWER & LIGHT COMPANY

FPL contests Joint Petitioners' constitutional arguments in three ways. First, FPL asserts that the Joint Petitioners are improperly attempting to have the Commission decide constitutional issues reserved to the courts. Second, relying on Commonwealth Edison Co. v. State of Montana, 453 U.S. 609 (1981), FPL argues that general Congressional policy statements regarding wholesale competition do not demonstrate preemption of all state legislation on that subject. (FPL Brief, pgs. 27-30) Third, relying on General Motors Corp. v. Tracy, 519 U.S. 278 (1997), FPL asserts that the dormant Commerce Clause does not create an absolute restriction on a state's ability to regulate. Instead, there is a traditional recognition of state's dominion over health and safety issues. (FPL Brief, pg. 32)

b. FLORIDA POWER CORPORATION

FPC advances three arguments in rebuttal to Duke's assertion that application of the Nassau decisions to the instant petition is preempted by the Energy Policy Act of 1992 under the Supremacy Clause of the United States Constitution. First, FPC argues that the Legislature's reenactment of Section 403.519 and the PPSA subsequent to the Nassau decisions' definitive interpretation

---

[4] A qualifying facility is defined as a small power producer or cogenerator that meets the threshold efficiency standards set forth by the Federal Energy Regulatory Commission pursuant to PURPA, 18 C.F.R. Sec. 292.201-.211 (1991).

thereof cannot be overturned. Second, FPC argues that an administrative agency cannot declare a state statute unconstitutional. And, third, FPC argues that federal law does not preempt states' control over siting new generation. (FPC Brief, pgs. 39-43) With respect to the dormant Commerce Clause, FPC argues that generation siting and need determination are not areas Congress intended to regulate. Instead, they have been left to the states. In the alternative and relying on the Tracy decision, FPC argues that even if Congress did intend to regulate need determinations, Florida's scheme would withstand constitutional scrutiny.

C. DUKE NEW SMYRNA/THE CITY

Joint Petitioners advance two constitutional law arguments in support of their position that a contract with a retail utility is not required to invest them with standing to bring this need determination proceeding. The first constitutional law argument is that prohibiting Duke New Smyrna from applying directly for a need determination would violate the dormant Commerce Clause because such action would unconstitutionally discriminate against out of state commerce and would unconstitutionally burden interstate commerce. Relying on Philadelphia v. New Jersey, 437 U.S. 617 (1978) and Pike v. Bruce Church, 397 U.S. 137 (1970) Duke New Smyrna argues that regulations giving local economic interests a competitive advantage are unconstitutional. Duke New Smyrna's second constitutional law argument is that requiring it to first obtain a contract with a retail utility to build the project is preempted by federal utility law which mandates a robust competitive wholesale market. Relying on Pacific gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm., 461 U.S. 190 (1983), Duke New Smyrna maintains that FPL's and FPC's interpretations of "applicant" stand as an obstacle to the accomplishment of federal purposes. (Joint Pet. FPL Memorandum, pgs. 43-46; Joint Pet. Brief, pg. 46))

II. PRIMARY STAFF ANALYSIS

A. STANDARD OF REVIEW

A motion to dismiss raises as a question of law, whether the petition alleges sufficient facts to state a cause of action. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993); In re: Petition By Tampa Electric Company For Approval Of Cost Recovery For A New Environmental Program, The Big Bend Units 1 & 2 Flue Gas Desulfurization System, Docket No. 980693-EI, Order No. PSC-98-

1260-PCO-EI, issued September 22, 1998, pg. 6. The standard for disposing of motions to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. Id. When making this determination, the tribunal must consider only the petition. All reasonable inferences drawn from the petition must be made in favor of the petitioner. Id.

In order to determine whether the petition states a cause of action upon which relief may be granted, it is necessary to examine the elements needed to be alleged under the substantive law on the matter. All of the elements of a cause of action must be properly alleged in a pleading that seeks affirmative relief. If they are not, the pleading should be dismissed. Kislak v. Kredian, 95 So.2d 510, (Fla. 1957)

The substantive law governing this docket is Section 403.519, Florida Statutes. The Joint Petition for Determination Of Need For An Electrical Power Plant states a cause of action upon which relief can be granted because it alleges all of the required elements. The Joint Petition directly addresses the five criteria of Section 403.519, Florida Statutes: 1) the need for electric system reliability and integrity; 2) the need for adequate electricity at a reasonable cost; 3) whether the Project is the most cost-effective alternative available; 4) conservation measures; and 5) other matters within the Commission's jurisdiction. In addition, the Joint Petition meets all applicable requirements of Rule 25-22.081, Florida Administrative Code.

In sum, on its face, the Joint Petition withstands the challenges of the Motions To Dismiss. It is not necessary for the Joint Petitioners to have anticipated all conceivable defenses and allege facts which would be sufficient to negate or avoid them. T.B. Fletcher v. Williams, 153 So.2d 759 (1st DCA 1963) at 764. Taking all the well-pleaded allegations of the Joint Petition as true, a cause of action has been adequately alleged to justify denial of the Motions. Id.

Even if the Commission disagrees with the foregoing recommendation to deny FPL's and FPC's Motions To Dismiss, primary staff recommends that the Motions be denied on the specific arguments of the parties. At issue in this docket is whether an Exempt Wholesale Generator can be an applicant for a need determination. Distilled to their essence, the parties' positions are as follows: Joint Petitioners allege that they are proper applicants, individually and collectively, under the plain language of the governing statutes. FPL and FPC argue that, as to the

merchant portion of the Project's output, Duke New Smyrna must have a contract with a retail utility before it can seek a need determination. This is a case of first impression for the Commission. Primary staff disagrees with the interpretations of statutes and precedent presented by the movants and agrees that the ordinary meaning of the statutes encompass and EWG applying for a need determination. Therefore, primary staff recommends that the Motions be denied.

B. DUKE NEW SMYRNA AND THE CITY ARE PROPER APPLICANTS PURSUANT TO FLORIDA STATUTES AND FLORIDA ADMINISTRATIVE CODE

1. Florida Statutes

Joint Petitioners' arguments supporting their status as applicants are compelling. Joint Petitioners argue that individually and collectively they are proper applicants within the broader regulatory framework as well as the specific provisions of Section 403.519, Florida Statutes. Joint Petitioners also effectively rebut FPL and FPC's arguments to the contrary.

a. Section 403.519, Florida Statutes And the Power Plant Siting Act

It is uncontroverted that the Utilities Commission, City of New Smyrna Beach is a proper applicant for a need determination. The City is a retail-serving municipal electric utility and thus, one of the seven enumerated entities within Section 403.503(13). The City has an entitlement to 30 megawatts (MW) of the Project's capacity and has the contractual right to purchase energy associated with that capacity. The City will use the capacity and energy to serve the needs of its retail customers. (Joint Petition, pg. 4)

While no party to these proceedings has questioned the propriety of the City's participation as a statutory applicant for the 30 MW if the Project only consisted of 30 MW, FPL and FPC claim that the 30 MW entitlement is insufficient to justify applicant status for the entire 514 MW Project. (FPL Brief, pg. 5; FPC Brief, pg. 4) As discussed in Issue 1, infra, it is clear that the capacity from the Project is needed by the City to continue to serve its retail customer loads and that the purchase of the energy from the Project will be cost-effective to the City. If not for the 484 MW, there would be no 30 MW and thus the customers of the City would not benefit from the lower cost power. The Project is

cost-effective to the City. For the remainder of the Project, it can be sold on an as-available basis and there will be no adverse impact to the state's retail ratepayers. There is Commission precedent, as discussed below, supporting a finding of need based primarily on cost-effectiveness rather than immediate capacity needs as advocated by FPL and FPC.

As stated, the Commission can, based on precedent, deny the Motions To Dismiss based solely on the City's demonstrated need and not reach the issue of whether the merchant co-applicant is a "proper applicant" pursuant to Florida Law. However, if the Commission chooses, instead, to address the issue, primary staff recommends that the Commission find that Duke New Smyrna is also a proper applicant for a need determination.

Duke New Smyrna maintains that it is a proper applicant for a need determination both as a joint applicant with the City, and individually as a "regulated electric company". Duke New Smyrna argues that it is an "applicant" in its own right based on the plain meaning of the definitions contained in the PPSA and the Grid Bill. In addition, Duke New Smyrna alleges that the Project is a Joint Electrical Power Supply Project within the meaning of Chapter 361, Florida Statutes.

As set forth above, Section 403.519 defines "applicant" as any "electric utility" which, in turn, is defined, among other things, as "regulated electric companies". Thus, a regulated electric company is a proper applicant pursuant to the plain language of the statute.

Duke New Smyrna argues that it is both "regulated" and an "electric company" and therefore clearly meets the statutory definition of applicant. (Joint Pet. FPL Memorandum, pg. 6) (Joint Pet. Brief, pg. 14) Duke New Smyrna is a public utility pursuant to the Federal Power Act, 16 U.S.C. Sec 824(b)(1) (FPA) and an EWG pursuant to the Public Utility Holding Company Act of 1935, 15 U.S.C. Secs. 79z-5a. As an EWG, Duke New Smyrna is regulated by the Federal Energy Regulatory Commission.

In addition to being a regulated electric company, Duke New Smyrna will be engaged in at least one of the qualifying activities listed in Section 403.503(13). The definition is phrased in the disjunctive. An "electric utility" is one of the enumerated entities which must be engaged in the business of generating, transmitting, or distributing electric energy. "In its elementary sense, the word 'or,' as used in a statute, is a disjunctive article indicating an alternative." TEDC/Shell City, Inc. v.

Robbins, 690 So.2d 1323 (3rd DCA 1997) at 1325 FN4 *quoting* 49 Fla. Jur.2d Statutes § 137, at 179(1984). Clearly, the Legislature intended the Power Plant Siting Act to govern electric utilities performing one or more of those functions. Duke New Smyrna proposes to engage in generation, and to a limited extent, transmission, of electricity. It therefore complies with the functional requirement of the statute.

FPL's and FPC's arguments that Duke New Smyrna should not be granted applicant status require the Commission to add limiting language to the PPSA statutory definitions. FPL's argument is that "regulated electric company" means "state regulated electric company". FPC's argument is that "electric utility" means "retail electric utility". In combination, FPL and FPC would require that in order to build a power plant in the State of Florida, it is necessary to be a vertically-integrated utility, serving retail customers, subject to traditional rate regulation of the Commission. While this argument is seductive in its simplicity, primary staff believes that the argument is not supported by the facts or the law. FPL's interpretation is based primarily on its analysis of decisional law and is addressed in a different section of this recommendation. FPC's argument is discuss below.

Section 403.503(13) does not use the word "retail" before the phrase "electric utility". Yet, FPC argues that the word "retail" should be read into the statute. To reach its conclusion, FPC analyzes the enactment of Florida Energy Efficiency and Conservation Act (FEECA) and submits an "interchangeable definition" argument. Section 403.519 was enacted in 1980 as part of FEECA. (FPC Brief, pgs. 9 & 21) According to FPC, because Section 366.82 of FEECA limits the definition of "utility" to a retail provider, that same limitation applies to the definition of "applicant" as that term is used Section 403.519. "The most reasonable construction of these terms is that the Legislature used the words "electric utility," "utility," and "applicant" interchangeably for purposes of electric industry need proceedings...." (FPC Brief, pg. 22) FPC's conclusion is that Duke lacks standing to bring the instant proceeding because it is a wholesale and not a retail power producer. (FPC Motion, pg. 6)

FPC's analysis is strained. First, while Section 403.519 is not part of the PPSA, its definitions are governed by the PPSA, not FEECA. Section 403.519 states, in part: "On request by an applicant...the commission shall begin a proceeding to determine the need for an electrical power plant subject to the Power Plant Siting Act...." (emphasis added) Second, the interchangeable definition argument ignores two fundamental tenets of statutory

construction. First, when a definition of a word or phrase is provided in a statute, that meaning must be ascribed to the word or phrase whenever it is repeated in the statute unless contrary intent clearly appears. Vocelle v. Knight Brothers Paper Company, Inc., 118 So.2d 664, (1st DCA 1960) Second, when different definitions are provided for different sections, the distinctions must be presumed to be intentional. Florida State Racing Commission v. Bourguardez, 42 So.2d 87 (Fla. 1949)(The presence of a provision in one portion of a statute and its absence from another are an argument against reading it as implied by the section from which it is omitted). The greater weight of authority is clearly in favor of refraining to amend the statute by administrative decision as advocated by FPC. In sum, it is not necessary to be a retail electricity provider to be an applicant under the PPSA.

b. Chapters 366 and 186, Florida Statutes; The Grid Bill And TYSP

Duke New Smyrna has not come to this proceeding seeking to build a power plant while at the same time exempting itself from ongoing regulatory jurisdiction of the Commission. On the contrary, Duke New Smyrna alleges that it is subject to the Commission's Grid Bill and TYSP regulatory requirements. This fact effectively negates FPL and FPC's arguments for dismissal that Duke New Smyrna cannot be an applicant under the PPSA because it is not subject to the broader regulatory framework.

Duke New Smyrna persuasively argues that it is an "electric utility" pursuant to Chapter 366 and is, therefore, subject to the Commission's Grid Bill authority. Section 366.02(2) defines "electric utility" as:

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

This statute is also worded in the disjunctive. Owning one of the three electricity functions is sufficient to bring an investor-owned electric company within its express terms. Duke New Smyrna is an "investor-owned electric company" in that it is owned by its partners, Duke Energy Power Services Mulberry GP, Inc. and Duke Energy Global Asset Development, Inc. (Joint Pet. FPL Memorandum, pg. 16) In addition, the Project will be generating electricity thus meeting the functional requirements.

An important nuance of this argument is that FPL and FPC's restrictive interpretations have the effect of diminishing the Commission's grid responsibility. Duke New Smyrna interprets the Commission's Grid Bill jurisdiction more broadly:

> The Opponents' argument that one power plant does not constitute a "system" is spurious and would irrationally deprive the Commission of jurisdiction over such power plants. For example, is an existing power plant in Florida was sold to an EWG that then operated the plant as a merchant facility, the Opponents' rationale would leave the Commission without authority or jurisdiction to fulfill its Grid Bill responsibilities with respect to such plant.

(Joint Pet. Brief, pg. 18)

Primary staff agrees with Duke New Smyrna's interpretation of Section 366.02(2), Florida Statutes. That analysis gives efficacy to the plain meaning of the whole statute. "When the words of a statute are plain and unambiguous the courts must give to them their plain meaning....A statute should be so construed as to give a meaning to every word and phrase in it and, if possible so as to avoid the necessity of going outside the statute for aids to construction. Vocelle, at 667.

FPC's statutory analysis relating to the 1973 enactment of the Power Plant Siting Act is problematic. The enactment of the PPSA included the Ten Year Site Plan (TYSP) requirements now codified at Section 186.801, Florida Statutes. FPC's hypothesis is that because the TYSP provisions require each electric utility to submit plans estimating its generation needs, TYSP submissions are therefore impliedly limited to retail utilities because "only a retail utility can have "its" own power generating needs because only a retail utility is obligated to sell power to the public." (FPC Brief pg. 12) FPC's logic is that because the PPSA was enacted at the same time as the TYSP provisions, and the TYSP provisions are by implication limited to retail utilities, the PPSA is likewise limited to retail utilities. (FPC Brief pgs. 12-13) Thus, notwithstanding the fact that the PPSA does not use the term "retail" in any of its provisions, FPC opines that the PPSA is limited to retail utilities.

FPC's argument fails in two ways. First, as stated above, Section 403.503(13) is worded in the disjunctive. If the Legislature had intended the PPSA to be limited to vertically-integrated retail utilities, it would have used the conjunctive

"and" or it would have specified "retail" utilities. Elsewhere in the statutory regulatory framework, the limitation to retail is express.[5] In the absence of ambiguity, it is inappropriate to look outside the four corners of the statute for guidance as to its application. Armstrong v. City of Edgewater, 157 So.2d 422 (Fla. 1963) Second, an electric utility that is engaged only in generation, is necessarily a wholesale power producer. It is logical that the Legislature intended to address the broader spectrum of power producers in order to fully effectuate its purposes of environmental protection. This position is supported by the fact that the Legislature has recognized specific exemptions to the PPSA - steam or solar electrical generating facilities of less than 75 megawatts in capacity. Section 403.503(12), Florida Statutes. Obviously, the Legislature was aware of the different types of generation which may seek to be permitted under the PPSA. Duke New Smyrna unequivocally states that it will be subject to the TYSP filing requirements. (Joint Pet. FPL Memorandum, pg.12)

c. Joint Electrical Power Supply Projects Pursuant To Chapter 361, Part II, Florida Statutes

In addition to its arguments that it is an applicant pursuant to Section 403.519, Duke New Smyrna argues that the Project is a Joint Electrical Power Supply Project pursuant to Chapter 361, Part II, Florida Statutes. Joint operating agencies are one of the enumerated applicants under the PPSA. Section 361.12, Florida Statutes provides that an "electric utility" is authorized to join with a "foreign public utility" for the purpose of "jointly financing constructing, managing, operating, or owning any project or projects." "Electric utility" is defined as:

> any municipality, authority, commission, or other public body,...which owns or operates an electrical energy generation, transmission, or distribution system within the state on June 25, 1975.
>
> Section 366.11(12), Florida Statutes.

"Foreign public utility" is defined as:

[5] Section 366.82, Florida Statutes defines "utility" as an entity that provides electricity "at retail to the public".

> any person, as defined in subsection(3), the principal location or principal place of business of which is not located within this state, which owns, maintains, or operates facilities for the generation, transmission, or distribution of electrical energy and which supplies electricity to retail or wholesale customers, or both, on a continuous, reliable, and dependable basis; or any affiliate or subsidiary of such person, the business of which is limited to the generation or transmission, or both, of electrical energy and activities reasonably incidental thereto.

Section 361.11(4), Florida Statutes.

Finally, "project" is described as:

> a joint electric power supply project and any and all facilities, including all equipment, structures, machinery, and tangible and intangible property, real and personal, for the joint generation or transmission of electrical energy, or both including any fuel supply or source useful for such a project.

Duke New Smyrna argues that the City fits squarely within the definition of "electric utility". Furthermore, Duke New Smyrna is a "foreign public utility" because it is an affiliate of Duke Bridgeport Energy, L.L.C., a person (i.e. corporation) with a principle place of business outside the state which currently owns, maintains and operates facilities for the generation of electrical energy and which supplies electricity to wholesale customers on a continuous, reliable and dependable basis. (Joint Pet. FPL Memorandum, pg. 22-23) In sum, Joint Petitioners state that the City, an "electric utility", has exercised its authority under Section 361.12, Florida Statutes, to join with Duke New Smyrna, a "foreign public utility" for the purpose of jointly financing and acquiring a "project", the proposed plant. As such, the City and Duke New Smyrna are a "joint operating agency" and are thus proper applicants for a need determination pursuant to Section 403.519. (Joint Pet. FPL Memorandum, pg. 23)

FPL contests the application of Chapter 361 to Joint Petitioners. FPL's first argument is that the limiting language of Chapter 361 to the effect that the statute does not limit or alter any provisions of any other law, also applies to the caselaw

interpreting the Siting Act, specifically, the Nassau decisions. (FPL Sept. Memorandum, pg. 30) FPL's second argument is that the Joint Power Act does not apply to Joint Petitioners because they do not currently own, maintain or operate facilities. (FPL Sept. Memorandum, pg. 30)

FPL's arguments are not persuasive. First, the Nassau decisions were rendered well after the Joint Power Act was enacted; therefore, the Joint Power Act limiting language cannot be read to have incorporated those holdings. Second, FPL's argument ignores the fact that Duke New Smyrna is an affiliate of a foreign electric utility, Duke Bridgeport Energy, L.L.C., which currently owns, maintains and operates facilities outside the state. Section 361.11(4), Florida Statutes, specifically provides that a "foreign electric utility" is "a person...or any affiliate or subsidiary of such person, the business of which is limited to the generation or transmission, or both, of electrical energy...." Clearly, Duke New Smyrna falls within the unambiguous meaning of the statutory definition.

2. Florida Administrative Code

One of FPL's arguments for dismissal of the Joint Petition construes the provisions of Rule 25-22.081, Florida Administrative Code as they relate to, and allegedly are not satisfied by, the Joint Petition. First, FPL alleges, there is no description of the specific utility or utilities primarily affected by the proposed plant. (FPL Sept. Memorandum, pgs. 33-35) Second, according to FPL, the Joint Petition fails to identify the utility specific conditions or contingencies, such as forecasted summer and winter peaks, the number of customers, net energy for load and load factors, which indicate a need for the proposed power plant required by subsection (3) of the Rule. According to FPL, the Petitioners' statements of peninsular Florida's conditions and contingencies is insufficient because "peninsular Florida" is merely a planning convention, not a utility. (Sept. Memorandum pgs. 35-41) Third, FPL opines that the Joint Petition "abysmally fails" to adequately address the subsection (5) requirement of an analysis of viable nongenerating alternatives. (FPL Sept. Memorandum, pgs. 41-42) Finally, FPL asserts that the Joint Petition fails to meet the subsection (7) requirements of the Rule of an economic impact statement.(FPL Sept. Memorandum, pg. 43)

FPL's arguments regarding rule requirements are disingenuous. First, the Joint Petition does identify "primarily affected utilities". They are the City and Duke New Smyrna. That the Joint Petition does not specifically identify secondarily affected

utilities in peninsular Florida is a function of the fact that the purchase of power from the Project is voluntary. No retail utility can or will be required to contract with the Project's output.

Second, FPL's complaint that the Joint Petition does not allege need but rather "attempts to finesse" the need allegation by stating that the Project is "consistent with" the need for electric system reliability and integrity is neither supported by the rule nor Commission precedent. The Rule states:

> ...If a determination is sought on some basis in addition to or in lieu of capacity needs, such as oil backout, then detailed analysis and supporting documentation of the costs and benefits is required.

Rule 25-22.081(3), Florida Administrative Code (emphasis added)

Thus, the Rule specifically allows a need determination proceeding to be brought on a basis other than megawatt need. That is precisely what the Joint Petitioners have proposed with respect to the Project's merchant capacity, and their Petition is supported by the rule as well as Commission precedent.

The Commission has approved need based on peninsular Florida needs for peak demand. For example, in approving Jacksonville Electric Authority (JEA) and FPL's petition for need determination for the St. John's River Power Park, the Commission stated:

> We construe the "need for power" issue to encompass several aspects of need....Should the Commission's FEECA goals governing the growth of seasonal kilowatt demand be achieved, and we are of the opinion that they can reasonably be achieved, additional generating capacity for the purpose of insuring adequate supplies of power and energy to peninsular Florida electric consumers does not appear to be required until 1991. Similarly, JEA and FPL do not appear to require additional generating capacity for reliability purposes until 1991 and 1989 respectively....

In re: JEA/FPL's Application Of Need For St. John's River Power Park Units 1 and 2 And Related Facilities, Order No. 10108, Docket No. 810045-EU, issued June 26, 1981. *See also* In re: Petition For Certification Of Need For Orlando Utilities Commission, Curtis H. Stanton Energy Center Unit 1, And Related Facilities, Order No. 10320, Docket No. 810180-EU, issued September 2, 1981.

In short, the Commission has a long history of approving need determination petitions based on economic need rather than strict and immediate capacity requirements.

FPL's argument that the Joint Petition must be dismissed because it fails to allege, among other things, the cost of capital increases pursuant to subsection (7) of the Rule is misplaced. By its terms, subsection (7) applies only to investor-owned utilities which propose to contract with non-utility generators. The Project is not the result of a purchased power agreement of this type and thus the rule does not apply. And, contrary to FPL's allegations, it does not appear that Duke New Smyrna is attempting to avoid this mandatory rule requirement by omitting to enter into contracts with retail utilities. The omission arises from the fact that retail utilities' purchase of power from the Project is purely discretionary.

C. DUKE NEW SMYRNA/THE CITY ARE PROPER APPLICANTS PURSUANT TO DECISIONAL LAW

FPL dedicates a substantial portion of its legal arguments for dismissal to its thesis that, pursuant to decisional law, Joint Petitioners are not proper applicants as to the plant's merchant capacity - the 484 MW not committed to the City. According to FPL, Duke New Smyrna is not a proper applicant because it has no obligation to serve and no contract with a state regulated utility for its capacity. As authority for its position, FPL cites Ark and Nassau, Nassau I and Nassau II.

FPL relies primarily on the Commission's Ark and Nassau decision. According to FPL, the decision stands for the following three propositions. First, need determination proceedings may only be initiated by "applicants" under Section 403.519, Florida Statutes. Second, it is the need arising from the obligation to serve customers that a need determination proceeding is designed to examine. Third, without a contract with the utility with an obligation to serve, the non-utility generators had no need of their own. The requirement of a contract with a utility was intended to recognize the utility's planning process. (FPL Sept. Memorandum, pgs. 15-18; FPL Jan. Memorandum, pgs. 3-5) According to FPL, the Ark and Nassau decision is dispositive in the instant case. Duke New Smyrna is not an applicant, it does not have an obligation to serve customers, and it does not have a contract with a utility to sell its output. The Ark and Nassau decision was appealed by Nassau and upheld by the Florida Supreme Court. Nassau Power Corporation v. Deason, 641 So.2d 396 (Fla. 1994). FPL states that the Court's "complete affirmation of the Commission's

construction of the Siting Act in the Ark and Nassau decision should leave no doubt as to the proper disposition of this need determination petition." (FPL Sept. Memorandum, pg. 21)

FPC also relies on the Nassau decisions as support for its Motion To Dismiss. According to FPC the cases represent the following three holdings: (1) need is utility and unit specific and therefore cannot be determined on a statewide basis; (2) only entities with an obligation to serve customers can demonstrate need; (3) if an entity does not have a duty to serve, it must have a contract with an entity that does have a duty to serve. (FPC Brief pgs. 25-28) FPC declares that the Nassau decisions conclusively determine that a need proceeding under Section 403.519 may only be brought by a retail utility. (Motion pg. 7, Brief, pg. 25)

Primary staff acknowledges that, divorced from the facts giving rise to the litigation, the holdings in the Nassau cases could appear to be persuasive in the instant docket. However those decisions must be considered on their facts and the facts are quite different. The differences are captive ratepayers and the specter of a retail utility being required to purchase unneeded electricity. The Nassau cases addressed need and standing of QFs under the cogeneration regulations.

Pursuant to the cogeneration regulations, retail utilities are required to purchase the cogenerated power based on the utilities' avoided costs. Avoided costs are those the utilities would incur if they produced the same amount of electricity instead of purchasing the cogenerated power from a QF. Prior to issuance of Order No. 22341, Docket No. 890004-EU, issued Dec. 26, 1989, the Commission presumed that a particular cogenerator's power was needed. Order No. 22341 reversed that position and held that when a QF which by law was seeking to require a utility to purchase its output, filed a need determination, it must prove need based on the requirements of the targeted purchasing utility.

The Supreme Court affirmed the Commission's decision in Nassau I. That Nassau I is limited to the law of cogeneration cannot seriously be disputed: "At issue is the relationship, if any, between the requirements of the Siting Act and the requirements of the PSC's regulations governing small power producers and cogenerators." (footnotes omitted) 601 So.2d at 1175. Nassau I does not apply to a non-utility generator that does not seek to force any retail utility to purchase its capacity.

Likewise, Ark and Nassau is about cogenerators seeking to force a retail utility to purchase power. The language of Ark Energy's Petition for need determination is telling. Ark Energy petitioned the Commission to:

> review and approve the attached firm capacity and energy contract between Florida Power & Light Company...and Pahokee Power Partners II, Limited Partnership,...and find that this Contract is reasonable and prudent and in the best interest of FPL's customers; require FPL to enter into this contract with Pahokee Power Partners II....

(emphasis added)

In Re: Petition of Ark Energy, Inc. And CSW Development-I, Inc. for Approval Of Contract For The Sale Of Capacity And Energy To Florida Power & Light Company, Docket No. 920762-EQ, Document No. 08299-92, filed July 27, 1992 at pg. 1.

Neither Ark nor Nassau had a contract with FPL prior to commencing the proceeding yet they sought to require FPL to purchase their output and bind the retail ratepayers. The Commission wisely ruled that if a utility has to buy the power, that utility's needs must first be evaluated. However, the Commission admonished that its decision should not be read beyond its facts:

> It is also our intent that this Order be narrowly construed and limited to proceedings wherein non-utility generators seek determinations of need based on a utility's need. We explicitly reserve for the future the question of whether a self-service generator (which has its own need to serve) may be an applicant for a need determination without a utility co-applicant.

Order No. PSC-92-1210-FOF-EQ, Docket No. 920783-EQ, issued October 26, 1992 at 4.

Thus, while the language quoted by FPL and FPC regarding non-utility generators and utility-specific need is compelling, it is not applicable in this docket. There are no captive ratepayers being required to pay for the merchant portion of the Project because Duke New Smyrna is not seeking to require retail utilities to purchase the proposed plant's merchant output. On the contrary, if retail utilities purchase the merchant output of the Project, those purchases will be strictly voluntary and they will only be made if it is economic to do so. This is a case of first

impression arising on facts clearly distinguishable from the cogeneration precedent. As such, the Commission is not overruling prior precedent with respect to cogeneration and need determination proceedings.

D. DORMANT COMMERCE CLAUSE AND FEDERAL PREEMPTION

Joint Petitioners and Amicus Curiae raise two constitutional law arguments with respect to the issue of whether a contract with a retail utility is required to invest Duke New Smyrna with standing to bring this need determination as advocated by FPL and FPC. FPL raises a threshold challenge to the constitutional analysis by stating that the Commission lacks authority under the Separation of Powers provision of Article II, Section 3 of the Florida Constitution to undertake such an analysis. As authority for its position FPL cites, inter alia, Palm Harbor Special Fire Control District v. Kelly, 516 So.2d 249 (Fla. 1987).

Primary staff disagrees with FPL's conclusion regarding administrative adjudication of constitutional issues. This issue was thoroughly addressed in the recent First District Court of Appeals case Communications Workers of America, Local 3170 v. City of Gainesville, 697 So.2d 167 (1st DCA 1997). The Communications Workers court recognized that administrative agencies lack jurisdiction to invalidate statutes, but that it is not uncommon for administrative agencies to be called upon to construe the application of statutes they are charged with enforcing and interpreting. "The notion that the constitution stops at the boundary of an administrative agency's jurisdiction does not bear scrutiny." Id. at 170 *citing* Patsy v. Board of Regents of Florida, 457 U.S. 496 (1982). In the instant case, Duke New Smyrna is not challenging the constitutional validity of Section 403.519, Florida Statutes. Rather, it is challenging the constitutionality of interpreting the statute to require an EWG to contract with a retail utility as a condition precedent to applying for a need determination. This decision clearly falls squarely within the Commission's administrative expertise.

1. Dormant Commerce Clause

The negative or dormant Commerce Clause prohibits state regulation that discriminates against, or unduly burdens interstate commerce thereby impeding free private trade in the national marketplace. General Motors Corporation v. Tracy, 519 U.S. 278 (1997) The crucial inquiry is determining whether a protectionist measure can fairly be viewed as protecting legitimate local concerns, with effects on interstate commerce that are only

incidental. But, "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) The dormant Commerce Clause restriction on state regulatory authority evolves from the Constitution and, therefore, applies even in the absence of any federal statute preempting a particular state regulation. Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County, 48 F.2d 701, 710 (3rd Cir. 1995)

The parties argue animatedly either for or against application of the dormant Commerce Clause on the issue of whether an EWG can be required to enter into a contract with a retail utility before applying for a need determination. A contract requirement, opines Joint Petitioners, makes the regulated utilities the gatekeepers of the wholesale power market in Florida. "...[T]he Opponents' interpretation would give a favored group of local economic interests (i.e. themselves) an absolute veto over any other company that seeks to apply for a determination of need to enter the wholesale market for energy in Florida." (Joint Pet. Brief, pg. 39) Joint Petitioners and Amicus cite numerous United States Supreme Court cases in support of their position that such an application of state regulation is economic protectionism and *per se* invalid. FPL and FPC counter with a line of Supreme Court cases they allege validates their construction. In particular, FPL and FPC rely on Tracy, supra. Having considered the well-reasoned arguments of counsel and authority cited by them, primary staff recommends that it is not necessary to go beyond the recent Tracy decision for guidance as to the issue because Tracy most closely approaches the facts of the instant case, and because of its currency.

Tracy involves Ohio's scheme of taxation on natural gas which was upheld by the Supreme Court. Under Ohio law, sales of natural gas by state-regulated local public utilities were exempt from the state's general sales and use taxes that other in-state and out-of-state sellers of natural gas had to pay. General Motors purchases virtually all of its gas for its Ohio operations from out-of-state marketers. This is a case of a gas marketer cherry picking retail customers.

The Tracy opinion starts with the admonition that state regulation of retail sales in not immune from constitutional Commerce Clause jurisprudence. 519 U.S. at 291. In addition, the Court reaffirms its holding in Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375 (1983) that state regulation of wholesale sales of electricity transmitted in interstate commerce is not precluded by the Commerce Clause. Id.

The Court then defines the fundamental, distinguishing fact of the case: "...the local utilities continue to provide a product consisting of gas bundled with the services and protections... a product thus different from the marketer's unbundled gas...." Id. at 297. The Tracy Court quantifies the test that is instructive in the instant proceeding:

> Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities....[W]hen the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes. This is so for the simple reason that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed.

Id. at 298-299. (emphasis added)

Part of what drives the analysis in the Tracy decision is the fact that differently situated entities are competing for the same end user--GMC. The holding of Tracy recognizes that regulated gas providers are at a disadvantage when competing for the same customers as the unregulated gas marketers and thus the discrimination was justified.

The analysis of Tracy can be applied to the instant proceeding with two possible outcomes. Primary staff starts with the premise that Duke New Smyrna is correct; FPL and FPC's construction of a requirement of a contract with a retail utility is protectionist. The inquiry, though, is whether the discrimination is justified. If the Commission finds that Duke New Smyrna and (for example) FPL/FPC provide different products; wholesale (unbundled) versus retail (bundled) electricity, the discrimination may be justified. However, if the Commission finds that Duke New Smyrna and FPL/FPC provide the same product, that is, they all seek to compete in the same wholesale market and they do not compete for the same end users (no cherry picking), the discrimination may not be justified.

In either event, while primary staff believes it is incumbent upon us to remain cognizant of Commerce Clause analysis, the recommendation is that the Commission refrain from a definitive determination in this docket because it is inappropriate to render such a decision on Motions To Dismiss in the absence of sufficient record evidence to fully adjudicate the issue.

2. Federal Preemption

Duke New Smyrna's federal preemption argument is grounded on its assertion that FPL's and FPC's interpretation of Section 403.519 creates a conflict between the application of the state law and the goals of federal regulation. To run afoul of the Constitution it is sufficient if the state law stands as an obstacle to the accomplishment of federal purposes. Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm., 461 U.S. 190 (1983)). The federal purpose referred to by Duke New Smyrna is the national goal of the development of a competitive wholesale market.

The Energy Policy Act of 1992 authorized FERC to order transmission wheeling. The intent of the grant of wheeling jurisdiction was an effort by Congress to offset possible exercise of monopoly power by vertically integrated utilities to block competition from non-retail generators in the wholesale market. Having thus opened up transmission to wholesale power producers, there is an inherent conflict with federal intent if the state statute is interpreted as allowing vertically integrated or monopolistic utilities to nonetheless block construction of wholesale plants under a siting act.

It is illogical to assume that Congress intended to open up transmission without also providing for generation. A cursory review of the Introduction And Summary of FERC Order 888-A, Docket Nos. RM95-8-001, RM94-7-002, issued March 4, 1997, expresses the federal intentions to promote a competitive wholesale market:

> At the heart of these rules is a requirement that prohibits owners and operators of monopoly transmission facilities from denying transmission access, or offering only inferior access, to other power suppliers in order to favor the monopolists' own generation and increase monopoly profits--at the expense of the nation's electricity consumers and the economy as a whole.
>
> The electric utility industry today is not the industry of ten years ago, or even five years ago. While historically it was assumed that local utilities would be the only ones to generate and transmit power for their customers, today there is a broad array of potential competitors to supply power and widespread transmission facilities that can carry power vast distances. But competitors cannot reach customers if they cannot have fair access to the transmission wires necessary to reach

> those customers. It is against this industry backdrop that the Commission in Order No. 888 exercised its public interest responsibilities pursuant to sections 205 and 206 of the federal Power Act (FPA), to reexamine undue discrimination in interstate transmission services and the effect of that discrimination on the electricity customers whom we are bound to protect under the FPA.

Order 888-A, pgs. 1-2.

While primary staff finds the foregoing Order 888-A language and Duke New Smyrna's arguments compelling, they do not appear to rise to the level of an express or implied federal mandate that states cannot, in some manner, restrict the construction of wholesale generation in a jurisdiction that has declined to restructure its electric industry. Indeed, Duke New Smyrna's arguments that it is subject to the Commission's Chapters 186, 361, 366 and 403 regulatory jurisdiction seem to conflict with its stance on preemption.

To arrive at a decision on the Motions To Dismiss, it is not necessary for the Commission to reach a definitive conclusion on federal preemption. The decision as to whether Joint Petitioners are applicants for a need determination in the absence of a contract with a retail utility can be made by construing Florida's existing statutory, regulatory framework for retail and wholesale generation being mindful of, but without resort to, a finding of federal preemption.

III. ALTERNATIVE STAFF ANALYSIS

A. ANALYSIS OF MOTIONS TO DISMISS

Alternative staff points out that the intent of the Siting Act is found in Section 403.502, Florida Statutes. In this section of the act, the legislature made it clear that "while recognizing the pressing need for increased power generation facilities" the state must ensure that the siting and operation of electric generation plants have:

> minimal adverse effects on human health, the environments, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life and will not unduly conflict with the goals established by the applicable local comprehensive plans . . . . Such action will be based on these premises:

1. To assure the citizens of Florida that operation safeguards are technically sufficient for their welfare and protection.

2. To effect a reasonable balance between the need for the facility and the environmental impact resulting from construction and operation of the facility, including air and water quality, fish and wildlife, and the water resources and other natural resources of the state.

3. To meet the need for electrical energy as established pursuant to s. 403.519.

The Commission's sole purpose in this proceeding is to determine if the proposed power plant in needed in Florida. Consistent with this Legislative intent, the Commission has a lengthy set of precedents which tie need firmly to retail customers and an obligation to serve. Those precedents are not mirrored in the present facts.

Alternative staff believes that FPL's and FPC's motions to dismiss should be granted. Alternative staff believes that if the Commission takes all the Joint Petitioner's well-pled facts as true, as well as all of the reasonable inference which can be drawn from those facts, the Joint Petitioners have failed to state a cause of action for which relief may be granted. Alternative staff also believes that the Joint Petitioner's arguments concerning the unconstitutionality and, in the alternative, the inapplicability of the Florida Supreme Court's interpretation of the Siting Act in both Nassau Power Corp. v. Beard, 601 So. 2d 1175 (Fla. 1992) and Nassau Power Corp. v. Deason, 641 So. 2d 396 (Fla. 1994), are unavailing.

B. THE JOINT PETITIONERS ARE NOT PROPER APPLICANTS PURSUANT TO BOTH SECTION 403.519, FLORIDA STATUTES, AND RULE 25-22.081, FLORIDA ADMINISTRATIVE CODE

1. Requirements of Section 403.519, Florida Statutes

Duke New Smyrna asserts that it is a regulated electric company and is, therefore, subject to the operation of the statutes. Duke New Smyrna asserts that it is a "public utility under the Federal Power Act, 16 U.S.C.S. § 824(b)91) (1994)." (Petition at 4). The Joint Petition also asserts that Duke New Smyrna is an "exempt wholesale generator ("EWG") under the Public Utility Holding Company Act of 1935. 15 U.S.C.S. § 79z-5a (1994 &

Supp. 1997)." (Petition at 5). These factors, according to the Duke New Smyrna, are enough to bring it within the definition of "regulated electric company" (Brief at 14). The Joint Petitioners contend that they are subject to the Commission's Grid Bill authority, Sections 366.04(2), 366.04(5), 366.05(7), and 366.05(8), Florida Statutes. Section 366.02(2), Florida Statutes, provides that:

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

The Joint Petitioners assert that this statute subjects them to Commission authority:

> [B]oth UCNSB and Duke New Smyrna are "electric utilities" under Section 366.02(2), Florida Statutes, by the plain language of the statute. The UCNSB is a municipal electric utility, and Duke New Smyrna is, or will be, an investor owned electric company that owns, maintains, and operates an electric generation system within the state.

It is not disputed that the City is a proper applicant pursuant to Section 403.519, Florida Statutes. However, alternative staff points out that the "disjunctive" reading urged by the Joint Petitioners in order to arrive at the conclusion that Duke New Smyrna is a proper applicant, results in the violation of principles of statutory construction. Alternative staff believes that the meaning of words in legislation that are not purely technical in nature often depends upon the manner in which the words are used in reference to the subject matter treated in the statute derived from the context of the material. Alsop v. Pierce, 19 So.2d 799, 155 Fla. 184 (Fla. 1944). Alternative staff points out that when a statute has both a specific and a general provision and the general provision includes matters addressed by the specific provision, the specific controls. State v. Cohen 696 So. 2d 435 (Fla. 4th DCA 1997). Alternative staff refers back to the provisions of Section 366.02(2). Municipal electric utility is given in the definition of electric utility immediately before investor-owned electric utility is mentioned. Investor-owned electric utility is mentioned immediately before rural electric cooperative. When this section is read with Section 366.05, Florida Statutes, which defines the Commission's powers over "public utilities", alternative staff believes that the term "investor-owned electric utility" results in the inescapable

conclusion that the term must be interpreted as it comports with the plain meaning of Section 366.02(2) and 366.05, Florida Statutes; that is, investor-owned electric utility means a utility with retail customers and an obligation to serve. Duke New Smyrna has no retail territory, no retail customers, and no obligation to serve. Alternative staff believes that a more expansive interpretation of the statute, such as that urged by the Joint Petitioners would not be consistent with the legislative intent and this Commission's past determinations.

Not only does alternative staff not believe that Duke New Smyrna is a proper applicant, alternative staff also does not believe the information required by Section 403.519, Florida Statutes, has been provided to the Commission by the Joint Petitioners. Even assuming that Duke New Smyrna is a proper applicant as it alleges in the Joint Petition, Duke New Smyrna must provide the Commission with "conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant" pursuant to Section 403.519, Florida Statues. If Duke New Smyrna does not provide this information to the Commission, the Commission cannot fulfill its statutory duty. The legislature specifically ordered that the Commission "shall also expressly consider the conservation measures taken by . . . the applicant." Duke New Smyrna cannot do this, and, indeed, affirmatively states at page 23 of the Joint Petition that "As a federally-regulated public utility selling electricity only at wholesale, Duke New Smyrna does not engage directly in the implementation of end-use energy conservation programs."

Not only can Duke New Smyrna not provide the Commission with the required information on conservation, alternative staff also believes that both of the Joint Petitioners have failed to allege facts which would bring their association under the definition of "joint electric power supply project" as contemplated by Section 361.11, Florida Statutes:

> Any and all facilities, including all equipment, structures, machinery, and tangible and intangible property, real and personal, for the joint generation or transmission of electrical energy, or both, including any fuel supply or source useful for such project.

The Joint Petition at paragraph 4 states that the entire generating facility is owned and operated exclusively by Duke New Smyrna. The joint petition alleges at paragraph 11 that the transmission facilities are entirely owned and operated by the City. There is no joint generation or transmission in this situation as presented

in the pleadings. Alternative staff believes that the relationship being described in the petition is merely a contractual relationship for the sale and purchase of capacity and energy to be derived from the proposed project. Neither Duke New Smyrna nor the City are working together by commingling assets in a joint project to build either generation or transmission assets.

Alternative staff also finds decisions such as that reached in Petition for Approval of Cogeneration Agreement between Florida Power and Light Company and Indiantown Cogeneration, L.P., Order No. 24065, issued in Docket No. 900731-EQ, issued February 5, 1991, distinguishable from the instant case. In that order, the Commission approved a cogeneration agreement between Indiantown and FPL for the entire output of the plant. Under the contract, FPL had the authority to dispatch the plant as if it were one of its own units. Clearly this is not an analogous situation. In the Joint Petition, there is no firm contract for the entire energy and capacity of the proposed plant. Alternative staff also points out that far from being authorized to dispatch the proposed plant as one of its own units, the City may not even rely upon the 30 MW if Duke New Smyrna finds it more economical to shut down the plant than to run it. (EXH 16)

For these reasons, alternative staff does not believe that the Joint Petition and exhibits thereto provide the Commission with the information required by Section 403.519, Florida Statutes.

2. Requirements of Rule 25-22.081, Florida Administrative Code

The Joint Petitioners assert that Duke New Smyrna is a utility within the meaning of the Siting Act and FEECA, however, the Joint Petitioners have failed to include the information necessary to fulfill Rule 25-22.081(1), Florida Administrative Code. This rule requires the petition to include: "a general description of the utility or utilities primarily affected, including the load and electrical characteristics, generating capability, and interconnections." Because Duke New Smyrna has no load and electrical characteristics as to over 90% of the capacity of its proposed plant, it fails to supply the Commission with this necessary data.

Alternative staff also believes that the Joint Petition fails to provide the Commission with enough information under Rule 25-22.081(4), Florida Administrative Code, so that the Commission can determine if the proposed plant is the most cost effective alternative available under Section 403.519, Florida Statutes.

Subsection (4) provides that the petitioner or petitioners shall provide a:

> summary discussion of the major available generating alternatives which were examined and evaluated in arriving at the decision to pursue the proposed generating unit. The discussion shall include a general description of the generating unit alternatives, including purchases where appropriate; and an evaluation of each alternative in terms of economics, reliability, long-term flexibility and usefulness and any other relevant factors . . . .

In this case, the Joint Petitioners cannot provide this information for both utilities because this information for over 90% of the proposed plant is unavailable. This leaves the Commission with no possible means of determining if there is any purchasing utility with a need for the energy and capacity of the project which would mitigate the utility's need through load control, DSM, alternative generation or other conservation measures.

Alternative staff notes that the Joint Petitioners' repeated resort to "Peninsula Florida" need for the plant, reliability concerns which the plant will alleviate, and cost savings because of the plant are unpersuasive, for there is no utility in Florida called "Peninsular Florida." This planning convention covers numerous utilities, investor-owned electric utility, municipal electric utility and rural electric cooperative. Some of these utilities may need additional energy and capacity, some may not, and unless a more specific study were presented to the Commission to support the broad brush claims of the Joint Petitioners for a "Peninsular Florida" need, a need for "Peninsular Florida" cannot be determined on the grounds of the information presented.

C. DUKE NEW SMYRNA IS NOT A PROPER APPLICANT UNDER DECISIONAL LAW

Alternative staff believes that the Supreme Court of Florida has already ruled on the question of whether or not a non-utility generator may seek a determination of need. In both Nassau Power Corp. v. Beard, 601 So. 2d 1175 (Fla. 1992), and Nassau Power Corp. v. Deason, 641 So. 2d 396 (Fla. 1994), the Court upheld the Commission's interpretation of Section 403.519, Florida Statutes. In Order No. PSC-92-1210-FOF-EQ, issued in Docket Nos. 920769-EQ, 920761-EQ, 920762-EQ, and 920783-EQ on October 26, 1992, the

Commission stated what has become the law of applicant status for need determination in Florida:

> Ark and Nassau do not qualify as applicants. Neither Ark nor Nassau is a city, town, or county. Nor is either a public utility district, regulated electric company, electric cooperative or joint operating agency. Significantly, each of the entities listed under the statutory definition may be obliged to serve customers. It is this need, resulting from a duty to serve customers, which the need determination proceeding is designed to examine. Non-utility generators such as Nassau and Ark have no such need since they are not required to serve customers. The Supreme Court recently upheld this interpretation of the Siting Act. Dismissal of these need determination petitions is in accord with that decision. See Nassau Power Corp. v. Beard, 601 So. 2d 1175 (Fla. 1992).

The Commission's Order was appealed to the Florida Supreme Court. The Supreme Court characterized the Commission's dismissal of petitioner Nassau as "consistent with the plain language of the pertinent provisions of the Act and this Court's 1992 decision in Nassau Power Corp. v. Beard." Nassau Power Corp. v. Deason, 641 So. 2d 396, 398 (Fla. 1994). There is no mention in this finding of limiting the Commission's interpretation of "applicant" under Section 403.519, Florida Statutes, to QFs, IOUs, or EWGs. The Commission properly interpreted "applicant" to mean a utility with a need to serve retail customer load. The Court's holding states that the Commission's interpretation of "applicant" as expressed in the Nassau cases is consistent with Section 403.519, Florida Statutes. Alternative staff believes that if "applicant" were defined differently for each different type of petitioner under Section 403.519, Florida Statutes, the result could be a discriminatory application of the statute.

Joint Petitioners contend that the Florida Supreme Court's Nassau cases are distinguishable from the present case because they arose on a different set of facts. Alternative staff points out that the Florida Supreme Court's approval of the Commission's interpretation of the statutory definition of applicant was based upon the need of a retail-serving utility with an obligation to serve, not upon the special regulatory situation of the generator. The Court, in upholding the Commission's Order, affirmed the Commission's decision to refrain from addressing self generators and how they might be affected by the statute. The Order stated the Commission's intent that:

> This Order be narrowly construed and limited to proceedings wherein non-utility generators seek determinations of need based on a utility's need. We explicitly reserve for the future the question of whether a self-service generator (which has its own need to serve) may be an applicant for a need determination without a utility co-applicant. (at 4-5)

Alternative staff believes that the Joint Petitioners urge an interpretation Commission which is a distinction without a difference. The Joint Petitioners argue that because no ratepayers are going to pay the construction and O & M costs of the proposed power plant, it does not come under the definition of proper applicant approved by the Court in the Nassau decisions, and may, therefore, be sited as a different type of entity. The Joint Petitioners wish to limit Nassau to deal exclusively with QFs.

Alternative staff agrees with Florida Power & Light that the Nassau cases clearly stand for the proposition that an applicant under Section 403.519, Florida Statues, must be a utility serving retail need. There is no escaping this language. The Indiantown Order cited above and other cases like it are distinguishable from the present case because they involved a retail serving utility filing as a joint applicant with a cogenerator where there was a contract for the entire output of the facility.

Alternative staff believes that Duke New Smyrna is not and cannot be a proper applicant under Section 403.519, Florida Statutes, unless either the Florida Legislature or the Florida Supreme Court make the decision to include non-utility generators under the aegis of Section 403.519, Florida Statutes.

D. DORMANT COMMERCE CLAUSE AND PREEMPTION ARGUMENTS

Alternative staff believes that the Joint Petitioners' attempts to avoid the application of Section 403.519, Florida Statutes, by repeated resort to federal constitutional law are unpersuasive. The Joint Petitioners appear to make two constitutional arguments. The first is that the Commission's role in need determination where it concerns EWGs has been preempted by federal legislation. The second argument is that the Siting Act is unconstitutional by operation of the dormant Commerce Clause of the United States Constitution.

Alternative staff would like to point out that there are enough exceptions in the Siting Act that the Joint Petitioners could have easily avoided the act altogether had they chosen

another type of unit to build. Because the Joint Petitioners chose to bring themselves under the Siting Act rather than to avoid it by many of the existing exceptions, alternative staff firmly believes that the Commission should apply Section 403.519, Florida Statutes, as it has in the past, and let the courts decide if the legislature has drafted a law which is unconstitutional.

1. Federal Preemption

Alternative staff agrees with the primary staff that the Commission's authority to determine need in power plant siting proceedings has not been preempted by federal legislation. Alternative staff points out that Section 731 of the EPAct specifically reserves to the states the right to regulate the siting and environmental licensure of new power plants. In support of this reading, alternative staff refers to two United States Supreme Court cases where the Court upheld the notion that Congress envisioned a dual regulatory scheme involving both the federal authorities and the states. Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Com'n, 461 U.S. 190; 205 S.Ct. 1713 (1983) (Congress intended that the need for new power facilities, including economic feasibility and rates and services, to be a state function), and Commonwealth Edison Company v. State of Montana, 453 U.S. 609, 40 PUR4th 159 (1981) (Preemption is limited to areas where the subject matter makes it necessary or to areas where Congress has been explicit in regulating the subject matter). Alternative staff believes that it would actually be consistent with the EPAct to dismiss this petition. Monongahela Power Company, Docket No. ER87-330-001, 40 FERC ¶61,256 (Sept. 17, 1987). In that case, the FERC recognized that "Congress specifically preserved the State's authority" over "capacity planning, determination of power needs, plant siting, licensing, construction, and the operations" of generating plants in Section 201(b) of the Federal Power Act.

2. Dormant Commerce Clause

Alternative staff also agrees with primary staff that the dormant Commerce Clause does not prevent the Commission from making a determination of need in this case. The Joint Petitioners have also argued that the Siting Act and Section 403.519, Florida Statutes, discriminate against foreign businesses seeking need determination in Florida in violation of the dormant Commerce Clause. Alternative staff believes that the Siting Act operates the same for all proper applicants no matter what jurisdiction they call home. Neither the criteria set forth in Section 403.519, Florida Statutes, as interpreted in the Florida Supreme Court's

Nassau decision, nor Rule 25-22.081, Florida Administrative Code, discriminate between EWG, IOU, municipal, QF etc., applicants on the basis of non-utility generator status or state or country of origin. Alternative staff believes that the Commission has properly employed the Siting Act in the past to address the need of retail-serving utilities in the state, not to close the Florida market to out-of-state generating interests.

Alternative staff believes that the bidding rule is proof enough of this Commission's intent to not engage in protectionist behavior in the siting process. Alternative staff believes with Lord Denman that "the mere repetition of the Cantilena of lawyers cannot make it law . . . ." O' Connell v. The Queen, 11 Clark and Finnelly Reports. If the Commission investigating the criteria in the Rule for determining if Section 403.519, Florida Statutes has been met is discriminatory against out-of-state generation, alternative staff believes it is up to the Joint Petitioners to make that argument in the appropriate forum, but not before the Commission, because the Commission's jurisdiction is limited to looking at the economic and reliability issues involved in deciding if the proposed plant is the least-cost, best alternative available to meet a need for electricity in the state.

Alternative staff believes that need is need no matter what type of facility is contemplated, and that the Joint Petitioners have not adequately shown they have a need for the proposed 514 MW plant to fulfill a 30 MW need.

E. Conclusion

Alternative staff believes that the joint petition should be dismissed without prejudice so that the Joint Petitioners may negotiate a project which more closely fits the City's need as alleged in the petition. Alternative staff believes that the Joint Petition does not meet the specific pleading requirements of either Section 403.519, Florida Statutes, Rule 25-22.081, Florida Administrative Code, or the utility-specific need criteria set forth by both this Commission and the Florida Supreme Court. The need asserted by the Joint Petitioners for "Peninsular Florida" is remote, speculative and indefinite. Alternative staff believes it is not enough to allow the Joint Petition to go forward with the project basing its petition in large part upon this indeterminate "need."

Barring a utility like the City which can demonstrate a need for energy and capacity, a need determination cannot be made under the criteria of Section 403.519, Florida Statues, and Rule 25-

22.081, Florida Administrative Code, using the information contained in the joint petition and exhibits thereto. This, in combination with the insufficiency of the Joint Petitioner's constitutional arguments, the fact that Duke New Smyrna is not an applicant under Section 403.519, Florida Statutes, and the settled definition of need as used in Section 403.519, Florida Statutes, by the Florida Supreme Court, leads alternative staff to recommend that Florida Power & Light Company and Florida Power Corporation's motions to dismiss should be granted.

ISSUE 1B: Should the Commission grant Florida Wildlife Federation's Petition for Reconsideration of Hearing Officer's Order Denying Intervention?

RECOMMENDATION: No. Motions or petitions for reconsideration are granted only if the petitioner can show that the tribunal based its original decision on mistake of fact or law. (Jaye)

STAFF ANALYSIS: Florida Wildlife Federation (FWF) filed a Petition to Intervene on November 13, 1998. No parties opposed FWF's petition. FWF's petition was denied by the Prehearing Officer in Order No. PSC-98-1598-PCO-EM, issued December 1, 1998. FWF filed a Petition for Reconsideration of Hearing Officer's Order Denying Intervention on December 11, 1998. FWF's petition for reconsideration was timely and meets the pleading requirements of Chapter 120, Florida Statutes, and Rules 25-22.0376 and 25-22.039, Florida Administrative Code.

I. STANDARD FOR MOTIONS FOR RECONSIDERATION

The purpose of a reconsideration proceeding is to bring to the attention of the agency some matter which it overlooked or failed to consider when it rendered its Order. Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962). The mere fact that a party disagrees with the Order is not a basis for rearguing the case. Id.

In this case, staff does not believe that FWF has shown that the Commission made a mistake of fact or law. Staff believes that the Commission properly applied the law of standing to FWF in denying FWF intervention by Order No. PSC-98-1598-PCO-EM, issued December 1, 1998. Staff reiterates the law of standing in this recommendation and thereby shows that the Commission was not mistaken in fact or law in denying FWF intervention.

A. FWF's Substantial Interests are not Within the Zone of Interests to be Protected by Section 403.519, Florida Statutes

FWF alleged in both its Petition to Intervene and its Petition for Reconsideration of Hearing Officer's Order Denying Intervention that its substantial interests will be affected by the Commission's decision in this docket. FWF alleges that its substantial interests are as follows:

> FLORIDA WILDLIFE FEDERATION (FWF) is a non-profit Florida corporation with over 13,000 members who reside within

> the state and whose main purpose is to protect, manage and conserve Florida's wildlife, for the benefit of the people of the State of Florida, the wildlife, FWF and its members. Numerous members of the organization hunt, fish, observe, study and photograph wildlife throughout the state. Approval of the Joint Petition would result in injury or harm to Florida's wildlife population, causing them to decline and not be available for the benefits of FWF and its members as stated further below. FWF and its members are substantially affected by the issues to be determined in these proceedings.

Staff believes that FWF's statement of substantial interest alleges interests which lie outside the purview of Section 403.519, Florida Statutes. FWF's substantial interests are asserted to be the conservation of wildlife and wetlands for its members to enjoy. These environmental concerns are beyond the scope of Section 403.519, Florida Statutes.

Pursuant to Section 403.519, Florida Statutes, the Commission has specific and limited statutory authority under Chapter 403, Florida Statutes. The Commission is authorized to determine the need for an electrical power plant under Chapter 403, Florida Statutes. In making this determination, the PSC "shall take into account" the following:

> the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant.

The Commission's authority under Chapter 403, Florida Statutes, is defined in Section 403.519, Florida Statutes. This section does not extend the Commission's authority to determine issues involving environmental protection.

1. Standing

Following Florida standing law as it was expressed in Agrico Chem. Co. v. Dept. of Envt'l. Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981), petitioners to intervene in a docket must have standing. In order to have standing, petitioners must have a substantial

interest in the outcome of the proceeding. To have substantial interest in the outcome of the proceeding, the petitioner must show:

> 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury. (at 482)

Standing is further defined and clarified in Florida Soc. of Ophthalmology v. State Bd. of Optometry, 532 So. 2d 1279 (Fla. 1st DCA 1988). In that case, the court elaborated on both the reasons for and the history of standing:

> The concept of standing is nothing more than a selective method for restricting access to the adjudicative process, whether it be administrative or purely judicial, by limiting the proceeding to actual disputes between persons whose rights and interests subject to protection by the statutes involved are immediately and substantially affected. Thus it has been stated, the 'purpose of the law of standing is to protect against improper plaintiffs.' 59 Am.Jur.2d, parties Sec. 30 (1987) (at 1284)

It is beyond dispute that the present petition presents rights which will be determined through the power plant siting process under Chapter 403, Florida Statutes. However, the intervenor has not shown that its rights will be determined under Section 403.519, Florida Statutes, which is the authority under which the Public Service Commission conducts the need determination portion of the multiagency power plant siting process. FWF's interests will be determined through DEP's section of the process. The court in Florida Soc. of Ophthalmology used a three part definition for "party" to the litigation:

> The basic definition of party in section 120.52(12) includes three categories of persons. Reduced to a simplistic statement, persons entitled to standing as a party are those who (1) are denominated as such by the constitution, a statute, or a rule (regulation); or, (2) have a substantial interest that is directly affected by proposed agency action; or, (3) in the exercise of the agency's discretion, are accorded the right to become a

> party by intervention in an existing proceeding . . . . Although one need not have his rights determined to become a party to a licensing proceeding, party status will be accorded only to those persons who will suffer an injury to their substantial interests in a manner sought to be prevented by the statutory scheme. (at 1284)

In the Florida Soc. of Ophthalmology case, the court approved a denial of standing to challenge a licensing procedure because the intervenors alleged economic injury and:

> their alleged objections to the certification of optometrists under section 463.0055 fail to show that, other than the potential economic impact on their practice, their substantial interests will be injuriously affected in any manner that differs from the interests of he public generally in seeing that all applicants are certified in accordance with the statutory requirements. (at 1285)

Therefore, in that case, the intervenors did not satisfy the immediacy requirement. The court further held that they did not show "a zone of interest personal to them that would be invaded by the certification process." (at 1285)

In the present petition, the FWF has not alleged any injury to itself or its members that is any different form that which could be suffered by the public generally. As the court in Florida Soc. of Ophthalmology stated, the "petition contains no allegations of any facts personal to any particular applicant, petitioner, or patient that show that any certified optometrist's exercise of this new privilege would be medically deficient and cause anyone injury." (at 1286)

FWF alleges harm to the wildlife of Florida. FWF alleges this would, in turn, harm its members and the citizens of Florida who would no longer be able to enjoy the wildlife for recreational and educational purposes. This allegation of harm is also, in staff's opinion, so remote and speculative as to fail to meet the immediacy requirement. FWF has produced no evidence to support the claim that one 514 MW electric power plant on roughly 30 acres of land would not decimate the wildlife population of the entire state. FWF's arguments about the "floodgate" effect of siting numerous merchant plants and the negative impact they might have on the wildlife population of Florida are also too remote and speculative to provide an adequate basis for standing.

2. Standard for Associational Standing

Florida Homebuilders Ass'n. v. Dept. of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982), held that an associations standing to bring a rule challenge under Section 120.56(1), Florida Statutes, requires a person to show that it was "substantially affected" by the challenged rule. This test for associational standing was extended in Farmworker Rights Org. v. Dept. of Health, 417 So. 2d 753 (Fla. 1st DCA 1982). The Farmworker case established that there is no difference between a rule challenge and a Section 120.57 hearing for the purposes of determining standing.

Subsequently, the First District Court of Appeal recognized that, in the context of standing, there can be a difference between the concepts of "substantially affected" persons and persons whose "substantial interests" are affected and suggested that Farmworker is not applicable to every case in which an association seeks to institute a Section 120.57 proceeding. Florida Soc. of Ophthalmology supra. Florida Soc. of Ophthalmology appears aimed at the first prong of the Florida Homebuilders Ass'n. test which provides that an association must demonstrate that a substantial number of its members are substantially affected by the agency's action; the Court does not address the applicability of the second and third prongs of Florida Homebuilders, that the subject matter of the proceeding is within the association's general scope of interest and activity; and, that the relief requested is of the type appropriate for an association to receive on behalf of its members.

Florida Homebuilders Ass'n. and Florida Soc. of Ophthalmology, when read together, suggest that the appropriate test for association standing in this case is whether the FWF, in its petition, has demonstrated (1) that a substantial number of its members have substantial interests which are affected by the present action, (2) that the subject matter of the proceeding is within the association's general scope of interest and activity, and (3) that the relief requested is of the type appropriate for an association to receive on behalf of its members.

Under the first prong of the Florida Homebuilders Ass'n. case, associations must meet the Agrico test outlined in part I above. When the instant petition is read under Agrico, the Florida Homebuilders Ass'n. and Florida Soc. of Ophthalmology cases, it fails to meet the test because the petitioners have not shown: (1) "a zone of interest personal to them that would be invaded" by this proceeding under Section 403.519, Florida Statutes, which would

rise to the substantial interest test; and (2) that the need determination to be decided under Section 403.519, Florida Statutes, is within the association's general scope of interest and activity. The third prong of the Florida Homebuilders Ass'n. and Florida Soc. of Ophthalmology test for associational standing, determining that the relief requested is of the type appropriate for an association to receive on behalf of its members, could arguably be met here if all other prongs had been met. This determination is not dispositive of the question of whether FWF is entitled to intervene in this instance however, because the association does not meet the first two prongs of the test for associational standing.

B. FWF Asserts that Its Substantial Interests are Consistent with LEAF's

FWF asserts that its statement of substantial interest was consistent with that contained in LEAF's petition and, therefore, that the Prehearing Officer's decision to grant LEAF intervention and deny FWF intervention was arbitrary and capricious. The decision of the Prehearing Officer to allow LEAF to intervene and deny FWF intervention is not "arbitrary and capricious" as alleged by FWF. LEAF's statement of substantial interests alleged that:

> LEAF has a substantial interest in the Commission's determination of need and in securing the environmental and health benefits of increased efficiency in the delivery of energy services and increased use of cleaner energy resources to meet energy service needs.

There is no "consistency" between LEAF's statement of substantial interests affected and that provided by FWF which reads as follows:

> FLORIDA WILDLIFE FEDERATION (FWF) is a non-profit Florida corporation with over 13,000 members who reside within the state and whose main purpose is to protect, manage and conserve Florida's wildlife, for the benefit of the people of the State of Florida, the wildlife, FWF and its members. Numerous members of the organization hunt, fish, observe, study and photograph wildlife throughout the state. Approval of the Joint Petition would result in injury or harm to Florida's wildlife population, causing them to decline and not be available for the benefits of FWF and its members as stated further below. FWF and its members are substantially affected by the issues to be determined in these proceedings.

LEAF asserted that its interest in how energy is generated and delivered in Florida would be determined by this proceeding. LEAF's members asserted that they had a substantial interest not only in how electric power is provided and what energy resources are relied upon, but specifically in the possibility of renewable energy. LEAF's concerns are within the purview of Section 403.519, Florida Statutes.

Counsel for FWF asserts in the petition for reconsideration that the mention of conservation measures in Section 403.519, Florida Statutes, requires this Commission to determine whether or not siting a power plant would have a deleterious effect upon wildlife and wetlands. Not only would the exercise of such authority be outside of the Commission's jurisdiction and expertise, it misconstrues the statute. Contrary to FWF's arguments, this section has nothing to do with protecting wildlife or wetlands. The conservation discussed in Section 403.519, Florida Statutes, is meant to encourage utility "avoided units," or units which may not have to be built by a utility because that utility implemented demand side management (DSM) or other programs to reward consumers for installing energy-saving equipment or using load management to reduce the consumption of electricity.

II. Conclusion

Thus, FWF has not shown that the Commission based its decision to deny FWF intervenor status on a mistake of law or fact. FWF has not shown any changed circumstances which would require a reconsideration of the Commission's Order. FWF has not shown that it meets the test for standing to be allowed to intervene in this proceeding. It has alleged an interest that is remote and speculative. It has not demonstrated that it or its members will suffer immediate injury in fact sufficient to entitle it to a Section 120.57, Florida Statutes, hearing. It has not shown that the injury it alleges that it will suffer is of the nature or type which these proceedings are designed to protect. As an association, FWF has not shown that its members have a zone of interest personal to them that would be invaded and rise to the substantial interest test, or that the need determination decided in this case is within the association's general scope of activities.

Staff also does not believe that FWF has shown that its substantial interests are consistent with LEAF's. As discussed herein, it was not arbitrary and capricious to deny intervention to FWF and to grant it to LEAF when LEAF specifically alleged it and its members had a substantial interest in how energy is generated,

and delivered and whether renewable energy sources are advocated. FWF alleged no interest in the generation of electric energy, only an interest in protecting wildlife for the benefit of its members and Florida's citizens. This interest is not determined in this docket, but before DEP in a further proceeding on the need determination.

For the reasons stated herein, staff recommends that Florida Wildlife Federation's Petition for Reconsideration of Hearing Officer's Order Denying Intervention should be denied.

ISSUE 1C: Should Florida Power & Light Company's Motion to Strike "Additional Authority" letter be granted?

RECOMMENDATION: Yes. The Additional Authority letter and attachments are an untimely posthearing filing and should be stricken. [Paugh]

STAFF ANALYSIS: On February 5, 1999, Florida Power & Light Company filed a Motion To Strike "Additional Authority" Letter and attachments filed by Joint Petitioners in this docket. As grounds for its Motion, FPL states that the letter, which was filed in response to staff counsel's question posed at oral argument in this docket on January 28,1999, is an improper rebuttal or reply brief not authorized by the procedural rules or the procedural orders of this case. As authority, FPL cites Rule 28-106.215, Florida Administrative Code. FPL also states that the letter and attachments are improper ex parte communication to the staff that is not cured by providing notice and a copy of it to the parties.(FPL Feb. Motion To Strike, pg. 3)

On February 12, 1999, Joint Petitioners filed a Response In Opposition To FPL's Motion To Strike. Joint Petitioners allege that the Motion is inappropriate pursuant to Rule 1.140(f) Florida Rules of Civil Procedure and that it is not an improper ex parte communication.

Staff recommends that FPL's Motion To Strike Additional Authority be granted. Rule 1.140(f), Florida Rules of Civil Procedure is not applicable in this instance. The Order Establishing Procedure, Order No. 98-1183-PCO-EM, issued September 4, 1998, as amended *ore tenus* during a continuance of the proceeding, governs the posthearing procedures and posthearing filing dates. The Order is controlled by Rule 28-106.215, Florida Administrative Code and does not provide for filings out of time. The deadline for filing posthearing submissions was January 19, 1999. Thus, the Additional Authority letter and attachments are untimely and should be stricken from the record of this proceeding. Further, a response to a staff counsel's question is not contemplated by Commission or Uniform Rules.

Staff advises that neither the letter nor the attachments were considered by any member of staff during the preparation of this recommendation.

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

RECOMMENDATION: Yes, the 514 MW Project is needed. The City needs at least the 30 MWs offered by Duke New Smyrna to partially replace 83 MWs of existing capacity contracts which will expire between September 1999 and 2004. The price which Duke New Smyrna has offered to sell the City this 30 MWs of replacement power is significantly less than what the City's retail customers are currently paying for purchased power. The low-cost power to be provided to the City is contingent upon the entire Project being constructed. As such, if the Project is not constructed, the City will have to construct or contract for higher cost capacity and energy.

With respect to the remaining 484 MWs of capacity associated with the Project, the record also indicates that the availability and sale of this capacity to other Peninsular Florida utilities on an as-needed, as-available basis is cost-effective and will enhance the reliability of the Peninsular Florida electric grid. This recommendation to approve the Project based on cost-effectiveness to the retail serving utility (the City), comports with what has been done in prior power plant siting proceedings. However, the Commission may wish to approve the 484 MWs as a stand-alone merchant plant based on a Peninsular Florida need. (Futrell, Noriega)

POSITION OF THE PARTIES

DUKE/ UCNSB: Yes. Available data, as well as recent experience, indicate that capacity in Peninsular Florida is tight. Whatever the level of reliability, the Project will improve it by adding quantity and redundancy at no risk to ratepayers.

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

FPC: No. Neither the Commission nor regulated utilities may rely upon the uncommitted capacity of a merchant plant for reliability purposes.

FPL: No. This need criterion is utility specific; no attempt has been made to show a utility specific need for 470 MW, 94% of the plant's capacity. The attempt to justify the plant's merchant capacity based upon "peninsular Florida's" alleged need for electric system reliability and integrity is legally and factually deficient.

LEAF: Yes. Florida needs some levels of additional electric power supply and cleaner, efficient supplies should be preferred over other supplies.

TECO: No. Duke New Smyrna has not even attempted to demonstrate a utility specific need for approximately 94% of the capacity of its proposed power plant. Neither the Commission nor utilities in Florida can rely upon the uncommitted capacity of a merchant plant for reliability purposes.

IBEW: No position submitted.

USGEN: No position.

STAFF ANALYSIS: The positions of the parties in this proceeding revolve around two very distinct and different philosophies of the case. The Joint Petitioners contend that the Project's capacity is needed to meet the power supply requirements of the City and that the balance of the capacity from the Project, 484 MWs, is needed to improve the reliability of the Peninsular Florida grid. (TR 397-8, EXH 16) The Joint Petitioners further contend that sales from the unit on an hour-by-hour as-needed basis will result in the economic displacement of higher cost fuels in the state and fewer air emissions to the environment. Intervenors USGEN and LEAF support the Joint Petition. LEAF cites the efficiency improvement of the Project and the City's planned 150 kW solar photovoltaic generating facility.

Utility intervenors, FPL, FPC, TECO, and FECA, argue that because there are no advance firm power purchase agreements in place for the sale of the Project's capacity, no MW reliability need is being met by the plant. The utility intervenors contend, that without such a direct contractual linkage to any utility's retail consumers, there is no need for the plant. Further, they contend that without these prearranged contracts for capacity and energy sales, it cannot be determined that the Project is the most cost-effective alternative. (TR 1525-6) These arguments are primarily based on the intervenors interpretations of the

Commission's rulings in the Nassau I and II orders discussed in Issue 1A.

The City currently (1998) serves a summer peak demand of 78 MWs and a winter peak demand of 68 MWs. By the year 2008, the City's peak summer demand is expected to grow to 98 MWs while its winter peak demand is expected to be 110 MWs. The City's generating resources currently consist of 31.5 MWs of City owned generating capacity (19 MWs diesel, 7.1 MWs of St. Lucie #2 nuclear, and 5.4 MWs of Crystal River Unit 3 nuclear), and 83 MWs of purchase power for a total of 114.5 MWs. The City's 83 MWs of purchase power is purchased through contracts with FPC, TECO, and Enron. (TR 411; EXH 7, 16) These contracts are to expire between September 1999 and 2004. Without these contracts, the City's resources (31.5 MWs) are less than half of its current retail demand (78 MWs). Clearly, the City must acquire additional resources in order to provide service to its retail customers. Therefore, even with the 30 MW entitlement from Duke New Smyrna, the City must continue to plan for additional capacity on its system.

The Participation Agreement with Duke New Smyrna entitles the City to 30 MWs of capacity to replace part of the City's need for capacity beginning in November 2001. The Participation Agreement is the result of a business arrangement between Duke New Smyrna and the City. (TR 437) Pursuant to that arrangement, the City agreed to:

1) Furnish the site to Duke New Smyrna;
2) Furnish an interconnection point for the Project to the City's Smyrna substation; and
3) Provide reuse water from its wastewater treatment plant, and other water requirements.

For these considerations, Duke New Smyrna agreed to:

1) Finance, design, construct, own and operate the Project;
2) Grant a 30 MW entitlement of the Project's capacity to the City; and
3) Price energy to the City from its 30 MW entitlement at $18.50/MWH. (TR 582-3)

Witness Vaden offered that Duke New Smyrna's price of $18.50 per MWH is much lower than other purchase power contracts, specifically its existing contract for base load capacity with TECO at $25 per MWH. The City's cost-benefit analysis provided by Witness Vaden shows a savings of approximately $3.1 million per

year for the first ten years, and approximately $2 million per year for the following ten years, for a total estimated savings of approximately $39 million. (TR 396; EXH 7, 15) A more detailed discussion of the City's analysis is contained in Issue 8.

Based on the record, Staff believes that it is clear that the capacity from the Project is needed by the City to continue to serve its retail customer loads and that the purchase of energy from the Project will be very cost-effective to the City. It appears that Duke has made its 30 MW entitlement to the City a loss-leader. In other words, the low-cost power provided to the City is contingent upon the entire Project being constructed. As such, if the Project is not constructed, the City will have to construct or contract for higher cost capacity and energy.

Witness Vaden stated in his direct testimony that the City plans to construct a 150 kW solar photovoltaic generating station on a site adjacent to the Duke New Smyrna Project in 2001 or 2002. The City plans to offer a "green pricing" program once the facility comes into service. City customers would be given the option of having their electric rates based on the power generated by the solar photovoltaic facility. (TR 391) The record is unclear whether approval of the Duke New Smyrna Project is a condition precedent to construction of the City's 150 kW solar photovoltaic facility. If the facility is constructed, however, it will advance the state's policy goals of encouraging the development of renewable energy resources. (Section 366.81, Florida Statutes)

With respect to the Project's impact on other Florida retail customers, because Duke will operate the plant as a merchant plant, no Florida retail customers are obligated to bear the costs of the project in rate base. While no utility will be forced to purchase firm capacity and energy from the Project, to the extent that such firm capacity and energy sales are made they will be made pursuant to a negotiated contract with the purchasing utility at rates, terms, and conditions agreed to by both Duke and the purchasing utility. It is logical to assume that a prudent utility would only agree to purchase capacity and energy from the Project at rates, terms, and conditions that are cost-effective to the purchasing utility and in the best interests of its ratepayers. (EXH 33, pp. 32-5; TR 574-5)

Staff agrees that this case is not as straight forward as a conventional need determination involving a vertically integrated monopoly electric utility seeking to provide additional generation resources to meet its native retail load within its retail service territory. Nevertheless, it is not so unusual as to be unique

within the twenty-six year history of Commission need determination proceedings under the Florida Power Plant Siting Act. The Commission has historically analyzed and quantified a wide range of reliability, economic, and socio-economic factors affecting the need for power in the State of Florida. The Nassau case, on which the utility intervenors focus, is but one of many cases in which the Commission dealt with unique and challenging issues affecting need. Staff believes that the Commission's approach and findings in each of these cases has a bearing on how "need for power" should be looked at in this case.

The PPSA, enacted in 1973 and amended many times since, requires electric generating facilities with steam cycles of 75 MW or greater to be certified by the Governor and Cabinet. The PPSA does not apply to facilities with steam cycles less than 75 MW, combustion turbines, or repowerings where there is no increase in steam capacity. (TR 1367-8)

Section 403.519, F.S., enacted in 1980 as part of FEECA, established the Commission as the exclusive forum for determining the need for an electrical power plant subject to the PPSA. The statute requires the Commission to take into account the following criteria in making its determination of need as part of the PPSA process:

1) The need for electric system reliability and integrity;

2) The need for adequate electricity at reasonable cost;

3) Whether the proposed plant is the most cost-effective alternative available;

4) Conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant; and

5) Other matters within its jurisdiction which it deems relevant.

In evaluating a need determination petition, the Commission must take into account the above listed criteria. The Commission may base its determination of need for an electrical power plant on a single criteria or any combination of the above criteria. Utility intervenors, on the other hand, argue and build their entire case on the idea that the Commission must solely evaluate the Joint Petition on reliability need, and because there is no identified retail need for the 484 MWs, the Joint Petition must be

denied. Many times in the past, the Commission has approved need determination petitions on bases other than strict reliability need. The Commission's underlying policy in deciding need determination petitions is to protect electric utility ratepayers from unnecessary expenditures. The following excerpts from Commission orders highlight that fact:

In granting JEA/FPL's application of need for St. John's River Power Park Units 1 and 2, the Commission stated:

> We construe the "need for power" issue to encompass several aspects of need. In our evaluation of the need for SJRPP Units 1 and 2 and related facilities, we have considered the principal areas of the electrical need for additional capacity to insure an adequate supply of bulk electrical power and energy to electric consumers and the economic need of providing this bulk power and energy at the lowest possible cost. In addition, the socio-economic need of reducing the consumption of imported oil in the State of Florida has been considered. Each of these aspects of need for SJRPP 1 and 2 was evaluated with respect to the electrical consumers of JEA, FPL, and peninsular Florida as a whole. (Order No. 10108, June 26, 1981, Docket No. 810045-EU, p. 2) (emphasis added)

The Commission further stated:

> Should the Commission's FEECA goals governing the growth of seasonal kilowatt demand be achieved, and we are of the opinion that they can reasonably be achieved, additional generating capacity for the purpose of insuring adequate supplies of power and energy to peninsular Florida electric consumers does not appear to be required until 1991. Similarly, JEA and FPL do not appear to require additional generating capacity for reliability purposes until 1991 and 1989 respectively, should they achieve their respective FEECA seasonal kilowatt demand goals. Thus, the salient issue is the determination of the need for SJRPP Units 1 and 2 with in-service dates of December, 1985, and May 1987, respectively is whether the construction of these units in the time frame proposed represents the lowest cost alternative available to the continued use of expensive oil-fired generation in Peninsular Florida, and in the areas served by JEA and FPL. (Order No. 10108, June 26, 1981, Docket No. 810045-EU, p. 2) (emphasis added)

In granting OUC's petition for certification for Stanton Unit 1, the Commission stated:

> The FCG study concluded that while the proposed Stanton Unit will undoubtedly enhance the adequacy and reliability of the Bulk Power Supply System, the facility does not appear to be needed for peninsular-wide reliability purposes during the 1980's. (Order No. 10320, October 2, 1981, Docket No. 810180-EU, p. 3) (emphasis added)

The Commission further stated:

> Even though the Stanton Center is not required in the 1980's to meet the peninsula's capacity needs, the project will provide significant economic benefits for peninsular Florida in terms of supplying an alternative to oil-fired capacity generation. (Order No. 10320, October 2, 1981, Docket No. 810180-EU, p. 3) (emphasis added)

In approving Metropolitan Dade County's petition for an expansion of its existing solid waste facility the Commission stated:

> In determining the need for a solid waste facility, the Commission also considers Section 377.709, Florida Statutes, which provides that: "...the combustion of refuse by solid waste facilities to supplement the electricity supply not only represents an effective conservation effort but also represents an environmentally preferred alternative to conventional solid waste disposal in this state." (Order No. PSC-93-1715-FOF-EQ, November 30, 1993, Docket No. 930196-EQ, p. 2) (emphasis added)

The Commission further stated:

> Energy generated by Dade County's expanded facility will meet two needs: displace fossil fuels and reduce the amount of garbage through combustion of solid waste. The new boiler is expected to provide an additional 140 gigawatt-hours (GWh) per year assuming an 80% capacity factor. Since the facility is located in Florida Power and Light Company's service territory, Dade County will likely sell the energy to FPL. Since there is no contract to sell firm capacity, the Dade County facility

> will likely sell energy on an as-available basis to FPL; this energy will displace fossil fuels in Florida. We find that the state has a need for the additional energy to be generated from Dade County's expanded solid waste facility. (Order No. PSC-93-1715-FOF-EQ, November 30, 1993, Docket No. 930196-EQ, p. 3) (emphasis added)

In approving Florida Crushed Stone Company's petition for determination of need, the Commission stated:

> However, significantly different issues are raised when a private entity, such as FCS, proposes to build a cogeneration facility...Thus it has been governmental policy to encourage cogeneration both because it makes more efficient use of energy resources and because it may lessen the need for public utilities to build additional generating facilities...we have decided that additional criteria relating to fuel efficiency should be used to evaluate the application of FCS.
>
> ...We find that the addition of 125 MW of generating capacity will enhance system reliability and integrity simply because it will increase the diversity of generating sources; however, this benefit cannot be quantified, and we view it as a minor, but desirable, result of constructing the proposed plant.
>
> ...Thus, if FCS receives full avoided costs for the energy it produces, it will have no impact on the cost of electricity to FPC's ratepayers.
>
> ...the need for additional capacity is irrelevant to a determination of need such as this...
>
> ...our finding that the proposed plant will have essentially no impact on the need for an adequate supply of electricity at a reasonable cost is expressly based on the premise that neither the FERC nor the Commission's Rules would require a utility to compensate a QF for any cost associated with either energy or capacity when no energy is purchased or capacity costs are avoided by the utility.
>
> Based on this record, we find that the proposed cogeneration facility can be expected to achieve a desirable level of fuel efficiency both because it will use energy that otherwise would be wasted either in the

> power production or cement manufacture processes and because it will produce electricity at a fuel efficiency level that compares favorably to the fuel efficiencies achieved by public utilities. (Order No. 11611, February 14, 1983, Docket No. 820460-EU, pp. 2-5) (emphasis added)

The utility intervenors argue that building 514 MWs when only 30 MWs are needed is a sham transaction. Staff disagrees. For cost-effective oil-backout purposes with zero kilowatt need, approximately 2000 MWs were approved. The recommended 514 MWs with 30 MWs of kilowatt need comports with those oil-backout decisions.

The utility intervenors state as their primary argument in opposition to the Project, the Nassau I and II orders. The legal aspects of this argument are discussed in Issue 1A. Staff will now discuss the underlying policy of these decisions. Nassau was a qualifying facility under PURPA. QFs have been given a special status by PURPA which requires a utility to purchase QF plant output at the utility's avoided cost.

In Nassau I, Nassau had a standard offer contract based on a statewide avoided unit, and petitioned the Commission for a determination of need. Consistent with the Commission's underlying policy of protecting utility ratepayers from unnecessary expenditures, the Commission compared the costs of the statewide contract to the purchasing utility's, FPL, avoided costs. It was found that the project was not the most cost-effective alternative to FPL, and the need was denied.

In Nassau II, Nassau petitioned the Commission for a determination of need for a project without a signed power sales agreement. Utilities would have been required to purchase the capacity and energy from Nassau's proposed project, as Nassau was a QF. Consistent with the Commission's underlying policy of protecting utility ratepayers from unnecessary expenditures, the Commission thought it wise to know the purchase power costs prior to obligating utility ratepayers for these costs over a long term. Nassau's petition was dismissed for lack of a purchase power agreement.

Duke New Smyrna, being an EWG and not a QF, does not have the legal right to require utilities to purchase its plant output. (TR 1365-6) No utilities and no ratepayers will be obligated to purchase from the Project. No purchase power agreement for long-term firm sales, therefore, is necessary for the Commission to consider and approve Duke New Smyrna's Project. The Commission's bidding rule (25-22.082, F.A.C.) requires an investor-owned utility

to evaluate supply-side alternatives in order to determine that a proposed unit, subject to the PPSA, is the most cost-effective alternative available. If Duke New Smyrna were to construct the Project, it could propose to meet a utility's need pursuant to the bidding rule, but the IOU would have the final decision on how it would meet its needs. (TR 1366) An IOU, or any other utility in Florida should prudently seek out the most cost-effective means of meeting its needs. The Duke New Smyrna project simply presents another alternative for existing utilities, without putting Florida ratepayers at risk for the costs of the facility, unless it is proven to be the lowest cost alternative at the time a contract is entered.

Duke New Smyrna, as an EWG, could contract with utilities on a long-term basis (equal to or greater than one year), or on a short term or on an as-available basis. All IOU purchases would be subject to Commission approval in its on-going purchased power cost recovery docket. If Duke New Smyrna were to sign an as-available contract, the utility would be expected to pay no more than its avoided energy cost. In other words, Duke New Smyrna would be compensated no more than the utility's cost of producing the next increment of electricity, essentially fuel and variable operating and maintenance costs. The utility's ratepayers would be indifferent to a transaction which was priced at incremental cost since it would be cost neutral and therefore no adverse consequences to the utility's retail customers. Retail customers would realize benefits if the negotiated price was less than the utility's incremental cost. This analysis would also apply if Duke New Smyrna were not proposing to commit any of the Project's capacity to a utility.

The FRCC has voted to approve a 15 percent reserve margin as suitable for Peninsular Florida reliability. (TR 468, 557) This level of reserve margin, however, is still under review by the Commission in Docket No. 981890-EU. Utility intervenors argue that because Peninsular Florida reserve margins are forecasted to be at or above the FRCC's threshold, the Project is not needed for peninsula reliability. Based on the testimony of witness L'Engle, however, past peninsula reserve margins of between 20 and 25 percent did not prevent the loss of firm load. (TR 555) Specifically, during the Christmas freeze of 1989, a combination of extreme, sustained low temperatures combined with unit outages resulted in the loss of firm load in certain areas of the State. (Order No. 22708, March 20, 1990, Docket No. 900071-EG) Witness L'Engle characterized the currently planned reserves of Peninsular Florida as being "on the edge" and suggests that additional capacity would be beneficial to Florida, but that existing

utilities are unwilling to make the investment due to cost and competitive pressures. (TR 555-7)

The Project may provide benefits to Peninsular Florida's operating reliability. Currently, Florida utilities must maintain, on an hour-by-hour basis, reserves to replace the state's largest unit, approximately 900 MW. The addition of the Project is likely to improve the state's ability to meet its operating reserves. Duke New Smyrna will have an economic incentive to be available as much as necessary in order to remain economically viable. This economic incentive is greater during peak periods or times of emergency because utility incremental fuel costs tend to be higher during these periods.

Utility intervenors argue that there are no assurances that Duke New Smyrna would not sell all or a portion of its merchant capacity out-of-state. Witness Green did acknowledge that under certain circumstances, power sales to the north could occur. (TR 586) Record evidence indicates however, that a significant amount of the power from the Project will be sold to Peninsular Florida utilities. Generation costs are lower in the Southern Company region compared to Florida. In addition, the Southern Company is physically closer to potential out of state purchasers of Duke New Smyrna's capacity. (TR 585-6, 915-6) As a long term business strategy, it makes no sense for Duke New Smyrna to sell power out-of-state as those sales would have to overcome the costs of natural gas transportation costs for gas to the site, and wheeling costs for transmission out-of-state.

Whether Duke New Smyrna makes in-state or out-of-state sales, those sales would be at market based rates. A Florida IOU, on the other hand, would have to charge cost based rates for in-state sales. If an IOU had excess capacity, there would be an economic incentive to sell out-of-state at market based rates. Duke New Smyrna, therefore, would have a greater incentive to sell in-state due to wheeling charges.

In summary, utilities want to limit the Commission's flexibility by imposing the Nassau I and II utility specific kilowatt need only requirements on the Project. This restriction would have prevented the Commission from certifying some 2000 MW of utility owned oil-backout units. However, the criteria to be considered pursuant to the power plant site act give the Commission the flexibility to approve power plants based on reasons other than simply kilowatt need. The Commission's underlying policy of protecting utility ratepayers from unnecessary expenditures should continue. The 30 MWs entitled to the City are needed and are cost-

effective to the City only because of the remaining 484 MWs of the Project. Other Peninsular Florida utility ratepayers will also benefit from the 484 MWs which will add to grid reliability, and displace higher cost fuels.

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

RECOMMENDATION: Yes. The Participation Agreement is a legally binding agreement between Duke New Smyrna and the City which identifies a megawatt entitlement of the proposed plant, and a price per megawatt-hour at which the City will pay for the energy from the proposed plant. While the entitlement may be terminated if the Project does not produce a reasonable profit to Duke New Smyrna, the Participation Agreement is the most cost-effective means of supplying 30 MWs to the City. However, if the joint petition is denied, the City will have to pursue higher cost options. (Futrell)

POSITION OF THE PARTIES

DUKE/ UCNSB: Yes.

FECA: No position on this issue.

FPC: Duke has a participation agreement in place with UCNSB, not an executed power purchase agreement. The agreement is conditional and does not provide assurance that even UCNSB's needs for generating capacity will be met.

FPL: DNS does not have a final purchased power agreement in place with the UCNSB. The Participation Agreement between DNS and UCNSB does not meet the UCNSB's needs for electric system reliability and integrity.

LEAF: Yes.

TECO: No. The participation agreement between New Smyrna Beach and the UCNSB calls for the subsequent negotiation of a power purchase agreement, which agreement has yet to be negotiated. No agreement of any kind exists with regard to the vast majority (94%) of the output of the proposed plant.

IBEW: No position submitted.

USGEN: No position.

STAFF ANALYSIS: On February 17, 1998, Duke New Smyrna and the City signed the Participation Agreement to facilitate the development of the Project. (EXH 7) The Joint Petitioners argue that the Participation Agreement is a binding contract. (TR 594) It is intended that a power purchase agreement will be negotiated depending upon Commission approval of the petition. (TR 595) The Intervenors contend that the Participation Agreement is not a power purchase agreement and does not guarantee the City that its power supply needs can be met.

The Participation Agreement is the result of a business arrangement between Duke New Smyrna and the City. (TR 437) Pursuant to that arrangement, the City agreed to:

1) Furnish the site to Duke New Smyrna;
2) Furnish an interconnection point for the Project to the City's Smyrna substation; and
3) Provide reuse water from its wastewater treatment plant, and other water requirements.

For these considerations, Duke New Smyrna agreed to:

1) Finance, design, construct, own and operate the Project;
2) Grant a 30 MW entitlement of the Project's capacity to the City; and
3) Price energy to the City from its 30 MW entitlement at $18.50/MWH. (TR 582-3)

Under the Participation Agreement, Duke New Smyrna is not required to provide replacement capacity in the event of a scheduled or unscheduled outage, which is no different than if a utility built its own plant. (EXH 7) In addition, the Agreement may be terminated if the Project is not capable of producing electricity at a cost resulting in a "reasonable" profit to Duke New Smyrna. (EXH 7) Not withstanding this provision, the entitlement is the most cost-effective alternative for the City. Not approving the Joint Petition will deny, with certainty, the City's retail customers the economic benefits of the Project.

The parties intend to negotiate a power purchase agreement, subject to FERC approval, which will include the details on the 30 MW entitlement. (TR 438) The power purchase agreement will not change the entitlement amount or the pricing provisions agreed to in the Participation Agreement. (TR 438)

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

RECOMMENDATION: Yes. Sufficient information has been provided showing that 30 MW from the Project is needed by the City and that the $18.50 per MWH is due solely to the existence of the 484 MWs. (Futrell)

POSITION OF THE PARTIES

DUKE/ UCNSB: Yes.

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

FPC: No. Petitioners have not adduced sufficient information to show a utility specific need for the plant, nor even to show UCNSB's need for the plant.

FPL: No. The information necessary to show a utility specific need for DNS' merchant capacity was not introduced. Not all information necessary to show UCNSB need was introduced. Due to self-imposed confidentiality concerns, insufficient information was submitted to prove economic viability, adequate gas supply, and unit operating parameters.

LEAF: Yes.

TECO: No. Duke New Smyrna has not even identified the utilities to which it will sell the output of its proposed plant or the terms or conditions of any sale. Without this information the Commission cannot assess need under the utility specific criteria of Section 403.519, Florida Statutes.

IBEW: No position submitted.

USGEN: No position.

STAFF ANALYSIS: The Joint Petitioners argue that sufficient information on the technical aspects of the Project, as well as the need of the City, and that of Peninsular Florida have been

provided. Utility intervenors contend that because a showing, by a power purchase agreement, of a utility specific need was not made, sufficient information was not provided to assess the need for the Project. This is more thoroughly discussed in Issue 1.

This issue goes to the theory of the case, whether Duke New Smyrna must have power purchase agreements with retail utilities for the entire capacity of the Project prior to filing a need determination with the Commission. These agreements would obligate a retail utility's ratepayers to long-term purchase arrangements for a portion of the Project's capacity. Witness Green testified that with respect to the merchant portion of the Project, no retail electric customers will be obligated to purchase the output of the plant, nor to pay for the capital costs. (TR 574-5)

Duke New Smyrna provided sufficient information on the additional reliability the Project will provide to Peninsular Florida. Witnesses Vaden, Green, and Nesbitt addressed projected peninsula reserve margins, and the opportunities for wholesale sales in Peninsular Florida. (TR 397-8, 585-6, 704-14)

Sufficient information was provided to assess the need for the 514 MW Project. The 514 MW Project is needed because 30 MWs are needed by the City. The remaining 484 MWs makes the 30 MWs cost-effective to the City and its retail customers. The Participation Agreement as well as the testimony and exhibits of Mr. Vaden sufficiently demonstrated a need for the 30 MW entitlement. (EXH 7, pp. 9-15)

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

RECOMMENDATION: Yes. The need exists because 30 MWs are needed by the City. The 484 MWs makes the 30 MWs cost-effective to the City and its retail customers. (Futrell)

POSITION OF THE PARTIES

DUKE/ UCNSB: Yes. Duke New Smyrna needs the project to fulfill its obligations to the UCNSB and to participate in the Florida wholesale market. Moreover, the issue properly before the Commission is whether the Commission should grant the requested need determination for the Project, considering the criteria in Section 403.519.

FECA: No.

FPC: No. Duke has no "need" for any generating capacity because it has no obligation to serve customers.

FPL: No. DNS does not have customers for its merchant plant capacity, and DNS does not have a statutory or contractual obligation to serve from its merchant capacity. Since need arises from an obligation to serve, Duke does not have a need for its 484 MW of merchant capacity.

LEAF: Yes.

TECO: No. Duke New Smyrna has no need for any generating capacity given their lack of any obligation to serve.

IBEW: No position submitted.

USGEN: No position.

STAFF ANALYSIS: See Issue 1.

ISSUE 5: Can or should the capacity of the proposed project be properly included when calculating short term operating and long term planning reserve margins of an individual Florida utility or the State as a whole?

RECOMMENDATION: The capacity should be considered for hourly and short term operating reserves, but not for long term planning reserve margins, unless contracted for. The absence of a contract for the entire capacity of the project, however, is not dispositive of the Commission considering the additional reliability to Peninsular Florida that will be provided by the proposed plant. (Futrell)

POSITION OF THE PARTIES

DUKE/ UCNSB: Yes.

FECA: The capacity of the proposed project cannot and should not be included in the calculation of the reserve margin of an individual Florida utility or the State as a whole until such time that the plant's output is contractually obligated to be delivered to a utility that serves retail customers in Florida.

FPC: No. Absent an executed power purchase agreement, whether, when, or where the capacity of the proposed project would be available would be speculative.

FPL: No. Absent contracts committing the output of the project to individual Florida utilities, it would be imprudent to count the Project's capacity in individual Florida utilities' or Florida's reserve margins. (L'Engle, Vaden) DNS could commit its capacity outside Florida, providing Florida no reliability benefits and possible reliability detriments.

LEAF: Yes. The capacity should be included at least in calculating peninsular or statewide reserve.

TECO: No. Even Duke New Smyrna's own witness, Mr. L'Engle, confirmed that the output of the proposed plant cannot be properly counted toward reserve margins in the absence of an executed power purchase agreement. (Tr. 562, lines 5-9)

IBEW: No position submitted.

USGEN: No position.

STAFF ANALYSIS: The capacity from the Project may be relied upon for economy purchases of a short term nature. (TR 538) A retail utility, however, should only include capacity, for which it has a firm contract, in its reserve margin. (TR 538)

The Commission, however, may consider the impacts additional generating capacity would have on the reliability of Peninsular Florida. The Commission recognized, in approving the need determination petition of Florida Crushed Stone, that the addition of a power plant necessarily improves reliability in Florida. (Order 11611, February 14, 1983, Docket No. 820460-EU) Also, non-firm capacity from the project may be included in future reliability studies in much the same way as non-firm capacity from the Southern Company is modeled by the FRCC. (EXH 4) A similar finding should be made in the instant docket that the merchant capacity from the Project will improve reliability in Peninsular Florida.

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

RECOMMENDATION: Additional transmission lines connecting the proposed plant to existing substations, as a well as a natural gas lateral are required. Duke New Smyrna will pay for any transmission upgrades required as a result of long term sales, pursuant to FERC rules. (Futrell)

POSITION OF THE PARTIES

DUKE/ UCNSB: Planned transmission improvements include approximately 25 miles of 115 kV transmission line connecting the Smyrna Substation to the Cassadaga and Lake Helen substations. Other facilities include a 42-mile gas lateral and approximately 500 feet of water transmission pipe. The costs of these improvements have been adequately considered.

FECA: No position on this issue.

FPC: Without knowing the entities to whom Duke would sell the output of its proposed plant, this question cannot be answered.

FPL: Without knowing the entities to whom DNS would sell the output of its proposed plant, this question cannot not be answered. None of the downstream transmission improvements the petitioners identify as required are permitted or are part of this application.

LEAF: No position.

TECO: Petitioners have not sustained their burden of proof on this issue. Without knowing the utilities to whom Duke New Smyrna will sell the output of its proposed plant, this question has not been answered

IBEW: No position submitted.

USGEN: No position.

STAFF ANALYSIS: The Joint Petitioners state that the Project will require will be interconnected with the Smyrna substation, adjacent to the proposed site. This interconnection will utilize 18 kV-to-115 kV step-up transformers, 115 kV conductor, and switchgear. A

second circuit will be added to the 18 mile 115 kV Smyrna-Cassadaga transmission line. A new 7.5 mile 115 kV circuit will connect the Cassadaga substation with the Lake Helen substation. It is anticipated that these additions will allow for the delivery of power to Peninsular Florida utilities. (EXH 16; TR 1092-3)

Other facilities include a 42-mile long, 16 inch lateral pipeline to deliver natural gas to the Project. The lateral will originate in Mt. Plymouth, in Lake County. (EXH 16; TR 1110) In addition, reuse water from the City's wastewater treatment plant, currently under construction, will be used at the Project, as well as groundwater sources. (TR 405, 1053)

The direct construction cost of the Project is estimated at $160 million, which will be funded with Duke New Smyrna internal funds. (TR 587, EXH 16) The transmission upgrades previously discussed are estimated at $6.7 million. It has not been determined whether Duke New Smyrna will pay for these costs entirely or will pay only a portion. (TR 641-2) The costs of the natural gas lateral are the responsibility of the FGT. (TR 1109)

The utility intervenors argue that the entities Duke New Smyrna will sell the output from the Project are not known, and therefore the issue cannot be answered. Witness Rib, however, stated that Duke New Smyrna would pay for any transmission upgrades required as a result of long term sales, pursuant to FERC rules. (TR 1372) Given that no retail utility's customers will pay for these costs, the costs have been adequately considered.

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

RECOMMENDATION: Yes. See Issue 1. (Futrell)

POSITION OF THE PARTIES

DUKE/ UCNSB: Yes. Florida has many old, inefficient plants that are expensive to operate. Ratepayers need lower costing electricity. The Project will provide it by displacing generation from the inefficient units at no risk to the ratepayers.

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

FPC: No. No utility may appropriately rely upon uncommitted capacity of a merchant plant to provide "adequate" electricity at a reasonable cost.

FPL: No. This need criterion is utility specific; no utility specific need for 470 MW, 94% of the plant's capacity, has been shown. The attempt to justify the plant's merchant capacity based upon "peninsular Florida's" alleged need for adequate electricity at a reasonable cost is legally and factually deficient.

LEAF: Yes.

TECO: No. The criteria in Section 403.519, Florida Statutes, are utility specific. Duke New Smyrna has not attempted to demonstrate a utility specific need but, instead, has simply relied on a "more is better" standard.

IBEW: No position submitted.

USGEN: No position.

STAFF ANALYSIS: See Issue 1.

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

RECOMMENDATION: Yes. The proposed plant appears to provide the City with the most cost-effective option. The merchant portion of the plant will not be contracted for by retail utilities unless it is the most cost-effective option available to the purchasing retail utility. IOUs must comply with the bidding rule for proposed power plants subject to the PPSA. (Futrell, Breman, Makin, Noriega, Samaan, Lester)

POSITION OF THE PARTIES

DUKE/ UCNSB: Yes.

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

FPC: No. Petitioners have failed to show that this criterion is satisfied on a utility-specific basis or on a Peninsular-Florida basis.

FPL: No. No attempt has been made to show the plant's merchant capacity is the most cost-effective alternative for a specific utility. UCNSB failed to show the capacity is its most cost-effective alternative. The petitioners failed to show the plant is peninsular Florida utilities' most cost-effective alternative.

LEAF: Yes. It is a cost-effective supply alternative.

TECO: No. Whether the proposed power plant is the most cost-effective alternative is a utility specific criterion which cannot be evaluated in the absence of firm power sales agreements.

IBEW: No position submitted.

USGEN: No position.

STAFF ANALYSIS: The Joint Petitioners contend that the Project is the most cost-effective alternative to the City for its 30 MW entitlement, and to Duke New Smyrna in making wholesale sales to Peninsular Florida. Utility intervenors argue that absent a power sales agreement to meet a utility specific need, no comparison can

be made to determine whether the Project is the most cost-effective alternative.

The City

Evidence was presented that the price for the associated energy from the Project will be $18.50/MWH subject to adjustments detailed in the Participation Agreement. (TR 441, 474; EXH 7) The City compared this price with its existing contracts to show the Duke New Smyrna purchase to be cost-effective. (EXH 7)

In its analysis of the projected savings from the Participation Agreement, Witness Vaden testified that the City used an escalation rate of 3.4%. (TR 488; EXH 11) This escalation rate was based on FPC's rate, as well as the City's past increases. Witness Vaden characterized the escalation rate as "extremely conservative." (EXH 9, p. 22) In addition, the City calculated the net present value of the annual savings of the project at 6% for the years 2002 to 2021, to arrive at the net present value savings. This discount rate is consistent with the most recent interest rates reflected in the Federal Reserve Statistical Release. (EXH 10, p. 4)

The financial and economic assumptions underlying the project were not challenged by other witnesses. Accordingly, based upon the representations and analyses provided by witness Vaden, the project's financial and economic assumptions appear reasonable for planning purposes.

The City's analysis provided by Witness Vaden shows a savings of approximately $3.1 million per year for the first ten years, and approximately $2 million per year for the following ten years, for a total estimated savings of approximately $39 million. (TR 396; EXH 7, 15) In its analysis, the City held the purchase prices pursuant to existing contracts constant. (TR 496) The City's analysis appears to be reasonable.

The City also considered other alternatives to its 30 MW entitlement of the Project. In 1993 General Electric performed an analysis of future self-build power supply options for the City. As a result of that analysis, an approximately 40 MW gas-fired unit was recommended. The City relied on this study in determining that the 30 MW Duke New Smyrna purchase was the most cost-effective alternative. (EXH 9, p. 72-4) The City also considered purchasing from the FMPA, but determined it not to be economical compared with the Duke New Smyrna purchase. (EXH 9, pp. 71, 75)

The City is not required, nor did it elect to issue a request for proposals to solicit supply-side alternatives. (TR 451-3; EXH 9, p. 75) Witness Vaden, however, offered that once Duke New Smyrna offered its price to the City, the $18.50 per MWH offered price was so much lower than other purchase power contracts, specifically its contract for base load capacity with TECO at $25 per MWH, the decision was a "no-brainer". Indeed it appears Duke New Smyrna has made its 30 MW entitlement to the City a loss-leader.

Duke New Smyrna

Duke New Smyrna, and entities acting on its behalf, evaluated alternative generating technologies before selecting the natural gas-fired combined cycle unit for the Project. Duke New Smyrna stated that the direct construction cost of the Project will be $160 million, but did not provide specific cost breakdowns for proprietary reasons. Given that these costs will not be the obligation of any retail customers in Florida, the Project as proposed can be considered the most cost-effective alternative to Duke New Smyrna.

Peninsular Florida

As noted in staff's analysis in Issue 1, utility intervenors argue that because there is no power purchase agreement for the merchant capacity, no utility specific need can be met, and therefore it cannot be determined that the Project is the most cost-effective alternative. (TR 1525-6) A power purchase agreement with a utility assumes a commitment on the part of the utility's ratepayers binding them to supporting all or a portion of the costs of generation. Duke New Smyrna, however, will internally finance the costs of the Project. No utilities and no ratepayers will be obligated to purchase from the Project.

The Commission's bidding rule (25-22.082, F.A.C.) requires an investor-owned utility to evaluate supply-side alternatives in order to determine that a proposed unit, subject to the PPSA, is the most cost-effective alternative available. If Duke New Smyrna were to construct the Project, it could propose to meet an IOU's need pursuant to the bidding rule, but the IOU would have the final decision on how it would meet its needs. (TR 1366) An IOU, or any other utility in Florida should prudently seek out the most cost-effective means of meeting its needs. The Duke New Smyrna project presents another alternative for existing utilities, without putting Florida ratepayers at risk for the costs of the facility.

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

RECOMMENDATION: No. A generic rulemaking docket should be opened to establish the proper criteria and mitigation strategies needed to ensure reliable electric service during severe weather conditions or when the primary fuel delivery is substantially interrupted. All Florida electric utilities subject to the Commission's Grid Bill authority should be a party to this generic rulemaking, including Duke New Smyrna. (BREMAN)

POSITION OF THE PARTIES

DUKE/ UCNSB: Yes.

FECA: No position on this issue.

FPC: No.

FPL: No. No gas transportation contract was provided. No evidence was provided showing the volume of gas in the fuel supply contract or that the volume will be sufficient to meet anticipated operations. There is no secondary fuel.

LEAF: No position.

TECO: No. Duke New Smyrna does not even address a secondary fuel.

IBEW: No position submitted.

USGEN: No position.

STAFF ANALYSIS: This issue explores the nature of Duke New Smyrna's fuel procurement policies so that the Commission can better determine the extent to which the proposed project is reasonably expected to be a cost-effective and reliable resource.

Cost-effectiveness

Staff believes the cost-effectiveness portion of the issue is substantially moot because the cost-effectiveness of proposed power plant was not based on an evaluation of fuel price forecasts. As indicated by the City's witness, Mr. Vaden, the lowest energy cost

option for meeting the City's 30 MW requirement was evaluated on a delivered megawatt hour basis rather than a detailed review of fuel prices, technologies and other supply-side alternatives. (EXH 9, pp. 49, 50, 59, 60, 71, 75, 80) The fuel price forecasts presented by Duke's witness, Mr. Nesbitt, were not used by Duke in their internal reviews. (EXH 21, pp. 9-11, 15-16) In addition, Mr. Nesbitt's fuel prices were intended to reflect a fully commodified spot/cash market rather than firm contract obligations and commitments. (EXH 9, pp. 19, 21, 29) Since Mr. Nesbitt's analysis was wholly independent of Duke's internal efforts, there is no record in this case of what Duke's delivered natural gas costs are likely to be, either on a short-term or long-term basis.

In addition, none of the parties presented testimony, cross-examination or exhibits in opposition to Duke New Smyrna's selection of natural gas as the primary fuel. Therefore, staff believes there are no fuel-specific cost-effectiveness issues in this case.

However, parties have raised concerns with respect to natural gas transportation to the site and the lack of an on-site backup fuel option which should be considered by the Commission. Both the transportation concern raised by FPL and the lack of on-site back-up fuel concern raised by FPL and TECO impact the extent to which the proposed facility can be depended on by either the City or other utilities.

Reliability

The proposed project site is approximately 42 miles from the proposed natural gas transmission-line tie-in location. (TR 1115) The entire subject of the 42 mile line-extension in-service date and transportation costs to Duke is a matter which may or may not be filed with the FERC and the FDEP for their respective reviews and disposition. Therefore, uncertainties exist with respect to the actual in-service date of the proposed facility as well as the natural gas transportation charges Duke is likely to experience. Instead of estimating the delivered costs for firm gas, Mr. Nesbitt's fuel price analysis substantially ignores the costs of securing firm natural gas transportation. He assumes all Florida natural gas units have the same spot price of delivered natural gas. (EXH 21, pp. 21; TR 890, 909, 910, 913, 926-927) Staff does not believe this is a realistic assumption because Florida is not a fully opened cash-based market. (Tr 764) Staff believes risks such as extreme weather and transportation interruptions must be planned for, especially by the retail utilities. Typical mitigation strategies include securing a level of firm natural gas

transportation and installing backup fuel capabilities. If the wholesale generating sources do not have similar contingencies, then the costs of providing for them must be carried by the purchasing retail utility. This clearly would be an issue in negotiating a contract with Duke. (TR 558, 615)

Duke New Smyrna has not planned for any alternate or backup fuel capability. (TR 498, 513, 514, 558, 559, 615, 1116, 1117; EXH 9, pp. 82) The reasons Duke New Smyrna cited for not having a backup fuel were:

1) it is not economic to Duke New Smyrna,
2) having a backup fuel should not be a factor in determining state wide need,
3) backup is the purchasing utility's concern,
4) backup provisions can be addressed through contracts, and
5) FPL does not have backup fuel provisions at their Ft. Myers and Sanford repowering projects.(TR 514, 559, 615, 1116)

Staff takes no position with respect to what a merchant plant should or should not consider in its decisions. However, the Commission should be concerned with claims of improving statewide reliability when there is nothing physical (i.e. backup fuel, firm natural gas transportation) supporting such claim. The record indicates that Duke is not alone in its reliance on a single fuel. Questions were raised with respect to at least two of FPL's repowering projects which do not have on-site backup fuel provisions. Whether or not FPL's plans are prudent has not been determined by the Commission, nor was the subject explored in the record of this case. The prudence of FPL's actions are likely to be reviewed when FPL seeks cost recovery of their repowering projects.

Conclusions

The plant, as currently proposed, is wholly dependent on the availability of natural gas on a spot market basis even during the same times when the demand for natural gas will be at its highest and potentially subject to curtailment and redirection to heating loads in other states. The City clearly expects 30 MW of service. (EXH 9, p. 85) However, as indicated in Issue 1, 30 MW is only a portion of the City's total need. Thus, the City maintains a diversified approach to meet its needs and is not wholly dependent on the proposed facility. (TR 499)

Duke New Smyrna has not provided reasonable assurances regarding available primary and secondary fuel to serve the

proposed power plant on a long-term and short-term basis. While staff is not recommending denying the need determination based the lack of on site backup fuel, the Commission should consider opening a rulemaking docket to establish the proper criteria and mitigation strategies needed during a severe weather condition or primary fuel delivery interruption. The docket should be generic and applicable to all natural gas-fired electric generation in Florida, including Duke New Smyrna.

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

RECOMMENDATION: The record is inconclusive as to whether there will be any impact on natural gas supply or transportation resources. (Makin)

POSITION OF THE PARTIES

DUKE/ UCNSB: The Project's construction and operation will not adversely affect gas supply or transportation resources. When the Project is operating, it will displace less efficient electric generating facilities, resulting in more efficient use of both electricity generation and gas transportation resources in Florida.

FECA: No position on this issue.

FPC: It will divert these resources from utilities that have an obligation to serve.

FPL: The proposed plant would restrict the natural gas supply and transportation that would otherwise be available to utilities with an obligation to provide service.

LEAF: No position.

TECO: The proposed power plant would divert natural gas supply and transportation resources from utilities having an obligation to serve customers in this state.

IBEW: No position submitted.

USGEN: No position.

STAFF ANALYSIS: The positions taken by FPL, FPC and TECO, were not supported by any record evidence. Staff believes this issue is moot. The Joint Petitioners position seems reasonable but does not address the long-term. At some time in the next decade, additional natural gas pipeline capacity will be need with or without Duke New Smyrna. FPC raised this issue but did not pursue it.

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

RECOMMENDATION: No. All costs associated with the proposed plant, and transmission upgrades needed to deliver power to purchasing retail utilities will be the responsibility of the investors of Duke New Smyrna and not ratepayers. Retail utilities should only purchase from the proposed plant if it is the most cost-effective alternative available. If duplication exists due to the Project being approved, it is economic, not uneconomic, duplication. (Futrell)

POSITION OF THE PARTIES

DUKE/ UCNSB: No. "Uneconomic duplication" is measured from the ratepayers' perspective. Because Duke New Smyrna is taking all risks associated with the Project, the Project cannot cause uneconomic duplication.

FECA: No position on this issue.

FPC: Yes. The project would simply duplicate other existing or planned facilities.

FPL: Yes. Petitioners' evidence shows that peninsular Florida's utilities' collective reserve margin without the Project will be in excess of 17% from the scheduled in-service date of the proposed plant through the summer of 2007. The proposed plant is an unnecessary and uneconomic duplication of generation facilities.

LEAF: No position.

TECO: Yes. The petitioners proposed power plant is intended to displace existing plants that still have a useful life. This would constitute uneconomic duplication of existing facilities.

IBEW: No position submitted.

USGEN: No.

STAFF ANALYSIS: The Joint Petitioners contend that there is no possibility of uneconomic duplication if the Project is constructed. They state that entrance to the Florida market will in theory depress market prices and the lower electricity costs

will be passed on to customers of purchasing utilities. Also, utilities are under no obligation to purchase from Duke New Smyrna, and if no purchase is made, no capital investment to construct the Project is borne by ratepayers.

Utility intervenors argue that plans are in place to meet established reliability criteria and that the Project is duplicative of those resources designated to meet forecasted load. Also, they argue that the Project will not result in the retirement of any existing, less efficient units. Witness Rib also raised the possibility of stranded investment of utility assets as a result of the proliferation of merchant plants. (TR 1266-7)

As discussed in Issue 1, the FRCC has established a 15 percent reserve margin as adequate for Peninsular Florida reliability. This level of reserve is at question in Docket No. 981890-EU. Witness L'Engle, however, characterized the planned reserves of Peninsular Florida as being "on the edge". (TR 557) The 1989 Christmas freeze shows that even with reserves in the range of 20-23 percent, firm load was not served due to a variety of circumstances. The summer of 1998 also saw extremely tight conditions on the Peninsular Florida system due to high, sustained temperatures. Witness L'Engle suggested that additional capacity would be beneficial to Florida, but that existing utilities are unwilling to make the investment due to cost and competitive pressures. Additional capacity with no investment borne by the ratepayers will benefit Peninsular Florida reliability.

This presents the opportunity for merchant plants, but begs the question, how much merchant capacity is too much? Witness Dolan raised several policy questions in his testimony. (TR 1438-9) These issues, along with other concerns, could be incorporated in a rulemaking docket on merchant plants. Rulemaking would allow the Commission to make explicit its policy on merchant plants and address any limits on such capacity the Commission deems necessary.

Witness Rib argues that allowing merchant plants would result in economic waste. (TR 1184) He stated that the statutory and regulatory framework in Florida is not oriented toward encouraging a proliferation of opportunistic short-term projects in Florida. (TR 1184) Witness Rib, however, admitted that the very statutory and regulatory framework which must be upheld to prevent Duke New Smyrna from causing uneconomic duplication allows many other types of plants and market entrants. Specifically, an 800 MW combustion turbine facility would not require approval under the PPSA, regardless of whether the owner was an existing Florida utility or another entity. (TR 1368; EXH 33, pp. 49-50) Also, plants with

steam cycles less than 75 MW may bypass approval under the PPSA, as well as repowerings where no net increase in steam capacity occurs. In addition, once cogeneration contracts with utilities end, those plants will be merchant plants with capacity available on the Florida market. The utility intervenors' objections to the Duke New Smyrna facility, specifically the specter of stranded investment, are curious given the extent of opportunities available under the existing statutory and regulatory framework for additional generation to be constructed in the State without PPSA approval. An unreasonable result of the utility intervenor arguments that merchant plants are not proper plant site applicants is that inefficient non-steam cycle or older inefficient power plants sold by utilities, will become merchant plants while more efficient, less polluting merchant plants are denied entry into the wholesale market.

A prudent utility should only purchase from Duke New Smyrna if it is the most cost-effective alternative available. The analysis to determine cost-effectiveness should take into account the impact the purchase would have on the economics of a utility's entire system, including the redispatch of existing units. In addition, the Commission's bidding rule (25-22.082, F.A.C.) acts to protect ratepayers and ensure that any plant subject to PPSA approval is economic to ratepayers who will bear the costs of construction.

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

RECOMMENDATION: No. The City intends to fulfill its identified need by purchasing from the proposed plant pursuant to the Participation Agreement with Duke New Smyrna. (Futrell)

POSITION OF THE PARTIES

DUKE/ UCNSB: No.

FECA: No position on this issue.

FPC: It may be.

FPL: Perhaps. There is no prohibition of either the FMPA or the Utilities Commission of Kissimmee providing the UCNSB with 30 MW of capacity from the Cane Island unit.

LEAF: No position.

TECO: No position.

IBEW: No position submitted.

USGEN: No position.

STAFF ANALYSIS: Witness L'Engle of the FMPA testified that 50 percent of the Cane Island unit is owned by the All-Requirements Project which FMPA manages. He also testified that even with the addition of the Cane Island unit, the All-Requirements Project is still capacity short and therefore there is no firm capacity available to sell to the City. (TR 543-4) Mr. L'Engle offered that he doubted there was any prohibition on KUA from selling 30 MW to the City or at what price. (TR 544-5) There was no evidence presented, however, whether KUA had excess capacity to sell or would consider selling to the City. The City's need for 30 MW will be met by the Participation Agreement with Duke New Smyrna and the power sales agreement to be negotiated.

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

RECOMMENDATION: No. Duke New Smyrna, as a wholesale provider, cannot institute conservation measures at the retail level. The City through its load management and proposed 150 kW solar photovoltaic installation has taken adequate measures to mitigate the need for the capacity under the Participation Agreement. (Futrell)

POSITION OF THE PARTIES

DUKE/ UCNSB: There are no additional conservation measures reasonably available to the Joint Petitioners that would mitigate the need for the proposed power plant.

FECA: The record does not justify a position on this issue.

FPC: Petitioners have not engaged in efforts to take such measures; nor may a merchant plant do so. Such measures may be available to Florida retail utilities.

FPL: Probably. The UCNSB has not proven it has sufficiently investigated its conservation potential; without knowing the other purchasing utilities, it cannot be determined whether there are conservation measures available that would mitigate those utilities' "need" for the output of the proposed plant.

LEAF: No. LEAF recognizes the primarily wholesale nature of the project and agrees that Petitioners' conservation obligations are limited. Also, to the extent that UCNSB is committed to add 150 kW of solar generation, the project meets the goals of state conservation policies.

TECO: The petitioners have not shown a utility specific need for the proposed power plant. Consequently, they have not demonstrated that there are no conservation measures available to mitigate any need for the proposed plant.

IBEW: No position submitted.

USGEN: No position.

STAFF ANALYSIS: Section 403.519, F.S. states:

> The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant...

The City currently offers load management and energy audits to customers. (TR 390-1) Peak demands can be reduced by approximately ten percent. (TR 391) The City also plans to construct a solar photovoltaic generating unit that will produce approximately 150 kW. This installation will be constructed adjacent to the site for the Project and will be completed in 2001 or 2002. (TR 391) Customers will be given a "green pricing" option to have their electric rates based on the power provided by the solar unit.

The Commission should also give particular note to the City's efforts to encourage solar photovoltaic generation. It is, however, unclear whether construction of the solar photovoltaic generating unit is dependent upon approval and construction of the Project.

As for Duke New Smyrna, staff agrees with LEAF that wholesale nature of the merchant portion of the Project limits the conservation obligations.

LEGAL ISSUES

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

RECOMMENDATION: Yes, if the Primary Recommendation for Issue 1A is approved. If the Alternative Recommendation for Issue 1A is approved, this and all other issues are moot. (Paugh, Jaye)

POSITION OF THE PARTIES

DUKE/ UCNSB: Yes.

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

FPC: No, it does not, under the express terms of Sections 366.82(1) and 403.519, Florida Statutes and the decisions of the Supreme Court in the Nassau.

FPL: No. The need determination criteria are utility specific; need is the need of the purchasing utility; the Commission may not presume need. *Nassau v. Beard.* Need arises from an obligation to serve; absent a statutory or contractual obligation to serve, a merchant plant is not a proper need applicant. *Nassau v. Deason.*

LEAF: Yes, the Commission has authority to render a determination.

TECO: No. Such would be contrary to the expressed terms of Sections 366.82(1) and 403.519, Florida Statutes, and the decisions of the Supreme Court in the Nassau cases.

IBEW: No position submitted.

USGEN: Yes.

STAFF ANALYSIS: This issue is addressed in Issue 1A.

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

RECOMMENDATION: Yes, if the Primary Recommendation for Issue 1A is approved. If the Alternative Recommendation for Issue 1A is approved, this and all other issues are moot. (Paugh, Jaye)

POSITION OF THE PARTIES

DUKE/ UCNSB: Yes.

FECA: Yes.

FPC: Yes, but the Commission must follow the directives of the statute and the Florida Supreme Court restricting its jurisdiction in the present case.

FPL: Yes. The Commission has dismissed need petitions because the petitioners were "not proper applicants for a need determination proceeding under Section 403.519, Florida Statutes." *Ark and Nassau*. The Commission's dismissal of these improper applicants under the Siting Act was affirmed by the Supreme Court of Florida. *Nassau v. Deason*.

LEAF: Yes.

TECO: Yes. This issue has been decided by the Commission in the affirmative and affirmed by the Supreme Court of Florida in the Nassau decisions.

IBEW: No position submitted.

USGEN: Yes.

STAFF ANALYSIS: This issue is addressed in Issue 1A.

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

RECOMMENDATION: No. (Paugh, Jaye)

POSITION OF THE PARTIES

DUKE/ UCNSB: Not at this time, nor is such an obligation a necessary prerequisite for the Commission's granting the determination of need for the Project requested by the Joint Petitioners.

FECA: No.

FPC: Clearly not.

FPL: No. DNS has no statutory service obligation; it has economic choice of where to sell its output. DNS has no contract to sell its merchant capacity. Because DNS has no statutory or legally enforceable (contractual) obligation to serve, DNS has no "need" as to its merchant capacity. *Nassau v. Deason*.

LEAF: No position.

TECO: No.

IBEW: No position submitted.

USGEN: No position.

STAFF ANALYSIS: This issue is addressed in Issue 1A.

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

RECOMMENDATION: Yes, if the Primary Recommendation for Issue 1A is approved. If the Alternative Recommendation for Issue 1A is approved, this and all other issues are moot. (Paugh, Jaye)

POSITION OF THE PARTIES

DUKE/ UCNSB: Yes. Both Duke New Smyrna and the UCNSB are "applicants" and "electric utilities" within the meaning of the Siting Act and Section 403.519, Florida Statutes.

FECA: Duke New Smyrna is not a proper "applicant" or an "electric utility" within the meaning of the Siting Act and Section 403.519, F.S. UCNSB is a proper applicant, but it does not have a need that justifies the proposed plant.

FPC: No. The Florida Supreme Court in the Nassau decisions made clear that Section 403.519 and the Siting Act are limited to resolving applications by utilities that have an obligation to serve retail customers, thus excluding merchant plants.

FPL: No. In Order No. PSC-92-1210-FOF-EQ an IPP like DNS was found not to be an "applicant" or an "electric utility" under Section 403.519 and the Siting Act. That determination was affirmed in *Nassau. v. Deason*, which controls as to DNS. UCNSB has not alleged need for the merchant capacity.

LEAF: Yes.

TECO: No. UCNSB does not hold itself out to be an applicant as to the merchant plant portion of the proposed project and, in the absence of a firm power sales agreement with Duke New Smyrna, it cannot be an applicant for the remaining portion.

IBEW: No position submitted.

USGEN: Yes.

STAFF ANALYSIS: This issue is addressed in Issue 1A.

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

RECOMMENDATION: Yes. (Paugh, Jaye)

POSITION OF THE PARTIES

DUKE/ UCNSB: Yes. The Commission would be fulfilling its statutory responsibilities by assuring adequate electricity at reasonable cost and by providing for enhanced system reliability without economic risk to Florida electric customers, and by assuring to Florida customers the additional benefits of a robust competitive wholesale power supply market.

FECA: No.

FPC: No. This would encourage an uneconomic duplication of facilities.

FPL: No. Petitioners' evidence shows that peninsular Florida utilities have plans in place to meet their reliability criteria without DNS. Permitting Duke to build a unit to meet the same need would be uneconomic duplication of facilities, inconsistent with the Commission's responsibility under the Grid Bill and the Siting Act.

LEAF: Yes.

TECO: No. Such a decision would foster uneconomic duplication of existing facilities.

IBEW: No position submitted.

USGEN: Yes.

STAFF ANALYSIS: The legal aspects of this issue is addressed in Issue 1A, the technical aspects are addressed is Issues 1 and 26.

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

RECOMMENDATION: Yes, if the Primary Recommendation for Issue 1A is approved. If the Alternative Recommendation for Issue 1A is approved, this and all other issues are moot. (Paugh, Jaye)

POSITION OF THE PARTIES

DUKE/ UCNSB: Yes.

FECA: No.

FPC: It does not and cannot because the proposed project is a merchant plant.

FPL: No. Rule 25-22.081 was adopted as the minimum information necessary in a need petition for the Commission to discharge its responsibilities under Section 403.519. The Joint Petition fails to meet the requirements of Rule 25-22.081 in several important respects, as set forth in FPL's Legal Memorandum.

LEAF: No position.

TECO: No.

IBEW: No position submitted.

USGEN: No position.

STAFF ANALYSIS: This issue is addressed in Issue 1A.

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

RECOMMENDATION: Yes, if the Primary Recommendation for Issue 1A is approved. If the Alternative Recommendation for Issue 1A is approved, this and all other issues are moot. (Paugh, Jaye)

POSITION OF THE PARTIES

DUKE/ UCNSB: Yes, the Joint Petition states a cause of action.

FECA: No.

FPC: Under the Nassau decisions it does not.

FPL: No. It doesn't allege that "peninsular Florida" needs the plant for "electric system reliability and integrity" and "adequate electricity at a reasonable cost" and it is "the most cost-effective alternative." Allegations that the plant is "consistent with" need or is "a cost-effective alternative" fail to state a cause of action.

LEAF: No position.

TECO: No.

IBEW: No position submitted.

USGEN: Yes.

STAFF ANALYSIS: This issue is addressed in Issue 1A.

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

RECOMMENDATION: No, if the Primary Recommendation for Issue 1A is approved. If the Alternative Recommendation for Issue 1A is approved, this and all other issues are moot. (Paugh, Jaye)

POSITION OF THE PARTIES

DUKE/ UCNSB: No.

FECA: Yes.

FPC: Yes.

FPL: Utilities must show their plant is needed to meet service obligations. Nonutility generators must contract with a utility to show their plant is needed to meet service obligations. If DNS were permitted without a statutory or contractual obligation to serve, it would enjoy a special status without any rational reason.

LEAF: No position.

TECO: Yes. Duke New Smyrna would be afforded an unwarranted special status.

IBEW: No position submitted.

USGEN: No position.

STAFF ANALYSIS: This issue is addressed in Issue 1A.

POLICY ISSUES

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

RECOMMENDATION: It will have no effect. Retail utilities petitioning for need under the Siting Act, must fulfill the requirements of Section 403.519, F.S. and Commission rules, specifically the bidding rule, regardless of the outcome of the instant docket. Municipal and cooperative electric utilities not covered by the bidding rule must select their most cost-effective option, which may or may not be purchasing from a merchant power plant. (Futrell)

POSITION OF THE PARTIES

DUKE/ UCNSB: Basically, not at all. Regardless of the grounds for the Commission's decision to grant the requested determination of need, subsequent need determination petitions would be evaluated on the same statutory criteria that are applicable to the petition for determination of need for the New Smyrna Beach Power Project.

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

FPC: It would create havoc in future need proceedings since retail utilities would not know whether or to what extent they were able or obligated to take into account merchant plants in planning future generation.

FPL: It should have no effect, and the Commission should so hold. Absent such a holding, peninsular Florida utilities, which retain the obligation to serve, could be disadvantaged by this case's decision, facing arguments by DNS that the Commission's determination precludes the utilities from pursuing alternative supply options.

LEAF: No position.

TECO: Such a result would expose Commission regulated utilities to significant risks and uncertainties and adversely affect their ability to plan for future demand, thereby jeopardizing reliable electric service to utility customers in Florida.

IBEW: No position submitted.

USGEN: No position.

STAFF ANALYSIS: The Commission's decision in the instant docket should have no effect on subsequent petitions for determination of need by utilities. Investor-owned utilities petitioning the Commission for a determination of need must evaluate supply side alternatives pursuant to the bidding rule (Rule 25-22.082, F.A.C.), unless a waiver is granted. Non-IOUs petitioning for a need determination, are not subject to the bidding rule. These utilities, however, must show that a proposed power plant is the most cost-effective option available. Duke New Smyrna's project, if constructed, could participate in any capacity solicitation conducted by a Florida utility. As stated in previous issues, no Florida utility will be obligated to purchase capacity from Duke New Smyrna.

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

RECOMMENDATION: No. Retail utilities, with their statutorily granted monopoly status and corresponding obligation to serve, must still provide adequate, reliable electric service at the lowest cost possible. All retail utilities retain their obligation to serve and can satisfy that obligation through a self-build option or purchasing capacity from another utility, a QF, or a merchant plant. However, IOUs must comply with the bidding rule for proposed power plants subject to PPSA approval. (Futrell)

POSITION OF THE PARTIES

DUKE/ UCNSB: No. Retail-serving electric utilities will have the same obligation to provide retail service if the Project is built as if the Project is not built. All utilities in Peninsular Florida will have the opportunity to buy power from the Project, and presumably will do so when it is cost-effective

FECA: No.

FPC: Although the obligations of utilities would remain unchanged, the impact of such a determination on a utility's obligation to serve would be unclear.

FPL: No. Granting this determination of need would not relieve utilities of their obligation to plan and meet need. It would, however, create additional uncertainty, making planning more difficult. It could also make securing determinations of need for alternatives preferred by utilities more difficult to secure.

LEAF: Stipulated

TECO: No. Granting the requested determination of need would only complicate the ability of electric utilities in Florida to carry out their obligation to serve.

IBEW: No position submitted.

USGEN: No position.

STAFF ANALYSIS: Statutory requirements of utilities and the Commission will not change as a result of the decision in the instant docket.

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

RECOMMENDATION: No. There will be no stranded costs in the retail jurisdiction due to the project. Approval of the petition in this docket does not obligate the retail utilities of Peninsular Florida to purchase from the proposed project. Retail utilities should only purchase if it is the most cost-effective alternative, taking into consideration past and future investments made to provide service. Since Duke is proposing to sell as-available energy, there should be no immediate wholesale stranded costs as well. If the Commission is concerned about stranded costs, this issue can be the subject of another docket. (Futrell)

POSITION OF THE PARTIES

DUKE/ UCNSB: No. Neither the Commission's granting the requested determination of need, nor the Project's construction and operation, will create a risk of non-recovery of past or future investments. The Project will result in lower overall costs of providing electric service and of maintaining reliable electric service in Florida.

FECA: Yes.

FPC: Yes. This risk is inherent in siting new plants designed to displace viable existing ones and to supplant plans by utilities to meet their future needs.

FPL: Yes. Since DNS cannot show a reliability need for its plant, it argues that there is an "economic need" to displace generation from existing units. Such displacement would have the potential of stranding investment in existing generation facilities, increasing the risk faced by utilities and their overall cost of capital.

LEAF: No. This issue is inappropriate, especially as to alleged nonrecovery of investments not yet made.

TECO: Yes.

IBEW: No position submitted.

USGEN: No position.

STAFF ANALYSIS: Florida utilities which either construct generation or purchase power to meet customer needs must select the most cost-effective resource available. That determination should take into account the dispatch of existing units on a system and the recovery of costs associated with existing units. Approval of the Duke New Smyrna Project will present another alternative for an existing utility to consider in deciding its resource mix. Since Duke is proposing to sell only as-available energy at this time, there are no stranded costs in the retail jurisdiction due to the project. Capacity used to sell short term energy sales are non-separated from the retail rate base. In other words, the retail ratepayers are already supporting the full capital costs of these facilities. If a short term energy sale is replaced by the Duke project, the cost obligation for retail ratepayers will be unaffected. If and when retail competition begins in Florida, retail stranded costs will be debated at that time.

If Duke were to enter into long term wholesale contracts, this could affect the separation factors of retail serving utilities. This issue was not addressed during the hearing. However, this probably would not happen until the purchasing utility's existing contract expired and/or the selling utility grew into the capacity for its retail needs. Either scenario currently exists when existing retail serving utilities have excess capacity for a period of time.

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

RECOMMENDATION: There would be no effect because the contracts between retail utilities, and QFs and other non-utility generators would obligate retail ratepayers to the costs of the facilities. In addition, the Commission's bidding rule would apply to an IOU, whose needs were to be met by a QF or non-utility generator seeking a determination of need. (Futrell)

POSITION OF THE PARTIES

DUKE/ UCNSB: Basically, not at all. See DUKE/UCNSB's position on Issue 22 above.

FECA: No position on this issue.

FPC: It would create havoc in future need proceedings by making unclear whether or to what extent reliance could be placed upon merchants to meet the need of retail utilities. Also, Qfs would be relatively disadvantaged under the Nassau rule.

FPL: It would put them at a disadvantage, as they are required to have contracts for their output with a utility. Such a disadvantage would contravene the legislative mandate to encourage cogeneration.

LEAF: No position.

TECO: Such a determination of need would confuse and adversely affect subsequent need determination proceedings, to the detriment of electric utility customers statewide.

IBEW: No position submitted.

USGEN: No position.

STAFF ANALYSIS: QFs and any other non-utility attempting to obligate Florida ratepayers to long term costs associated with a new generating resource must meet existing statutory and Commission

criteria. QFs have been given a special status by PURPA which allows them to force utilities to purchase QF plant output at the utility's avoided cost. Merchant plants do not enjoy such special status. They cannot obligate a utility to purchase their electricity. Existing statutory and Commission rules, designed to protect ratepayers, requiring utilities to determine the most cost-effective alternative (e.g. the bidding rule) will not be affected by the Commission's determination in the instant docket.

ISSUE 26: If the Commission abandons its interpretation that the statutory need criteria are "utility and unit specific," how will the Commission ensure the maintenance of grid reliability and avoid uneconomic duplication of facilities in need determination proceedings?

RECOMMENDATION: The statutory need criteria are utility and unit specific when retail ratepayers are to be obligated to pay for the cost of new generation. When it is the lowest cost option to purchase from a merchant plant, any duplication is economic, not uneconomic duplication. (Futrell)

POSITION OF THE PARTIES

DUKE/ UCNSB: Granting the requested need determination would not represent such an "abandonment." The Commission has only applied the statutory criteria on a utility-specific basis where the petitioning entity attempted to bind utility ratepayers through long-term commitments. The Commission will fulfill its Grid Bill responsibilities as it does now.

FECA: No position on this issue.

FPC: It could not adequately do so.

FPL: The Commission may not abandon the Supreme Court's interpretation that the statutory need criteria are utility specific. Such an attempt would frustrate the Commission's ability and responsibility to apply the Siting Act, avoid unnecessary facility duplication and assure grid reliability.

LEAF: No position.

TECO: The Commission's ability to ensure the maintenance of grid reliability and avoid uneconomic duplication of facilities would be adversely affected by such an abandonment and there is no evidence that such effects could be overcome.

IBEW: No position submitted.

USGEN: No position.

STAFF ANALYSIS: The Commission will have jurisdiction over Duke New Smyrna in carrying statutorily mandated electric grid

responsibilities as discussed in Issue 1A. Existing statutory and Commission rules, designed to protect ratepayers, requiring utilities to determine the most cost-effective alternative (e.g. the bidding rule) will not be affected by the Commission's determination in the instant docket. Staff is not recommending that the Commission "abandon" or overrule the Nassau decisions of utility and unit specific criteria as it relates to non-utility generators seeking to bind retail ratepayers.

The instant issue presumes that capacity that is not needed to serve peak demand is uneconomic. As demonstrated by the oil-backout dockets, capacity may be needed for cost-effective or economic reasons. When capacity is the lowest cost option with no kilowatt need, the perceived duplication is economic, not uneconomic duplication.

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

RECOMMENDATION: No. Regardless of the outcome of the instant docket, retail utilities which obligate ratepayers to pay for new generation costs over the long term must show that the generation meets the statutory criteria in Section 403.519, F.S. IOUs proposing to construct generation subject to the PPSA, must evaluate supply-side alternatives pursuant to the bidding rule. (Futrell)

POSITION OF THE PARTIES

DUKE/ UCNSB: No. The Commission's granting the requested determination of need will not have this result, because utilities already have the opportunity to establish need for electrical power plants in this way, based on the criteria in Section 403.519.

FECA: No position on this issue.

FPC: The implications of such a decision are unclear and potentially far-reaching. The Commission should not attempt to change existing law in the context of this proceeding.

FPL: An affirmative determination should not be granted. However, if DNS is permitted to justify need based upon a basis other than an individual utility's need, then utilities should be permitted to justify need upon the same basis.

LEAF: No position.

TECO: Yes.

IBEW: No position submitted.

USGEN: No position.

STAFF ANALYSIS: Florida utilities have in the past received affirmative determination of need orders from the Commission which were based on criteria other than utility specific reliability need. Section 403.519, F.S. does not identify any of the specified

criteria the Commission is to take into account as superior to the other. As previously discussed in Issue 1, the Commission has identified economic as well as oil-backout policy considerations in granting need for additional generation. Granting the Joint Petitioners' determination of need will not establish a new criteria utilities must use in future need determination proceedings.

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

RECOMMENDATION: It could have a positive or negative effect depending on the negotiated price for power. The proposed plant, if built, would be another option available to retail utilities in providing service to customers. Those utilities, in evaluating resources, must consider cost-effective conservation measures in meeting customer needs. The issue seems to presume that lower electricity prices, due to merchant plants, is an undesirable outcome. (Futrell)

POSITION OF THE PARTIES

DUKE/ UCNSB: None. The level of reasonably achievable cost-effective conservation measures in Florida depends on the relative costs and effectiveness of supply-side (generation) and demand-side (conservation) alternatives, not on what entity is proposing them. No evidence has been introduced with respect to this issue.

FECA: No position on this issue.

FPC: It would undermine that objective by opening the way for the siting of merchant plants that are not accountable under FEECA, including Section 403.519.

FPL: If need can be premised upon statewide "economic need" without consideration of utility specific need and individual utilities' conservation potential, the resulting proliferation of power plants will diminish and may ultimately eliminate conservation as a system resource. This would frustrate FEECA and the Siting Act.

LEAF: None. As noted above, the wholesale nature of the project and the solar generation commitment by UCNSB satisfy this concern.

TECO: The effective would be negative.

IBEW: No position submitted.

USGEN: No position.

STAFF ANALYSIS: The Florida Legislature stated in FEECA, specifically Section 366.81, F.S., that:

> it is critical to utilize the most efficient and cost-effective energy conservation systems in order to protect the health, prosperity, and general welfare of the state and its citizens.

FEECA further states that:

> The Legislature further finds and declares that ss. 366.80-366.85 and 403.519 are to be liberally construed in order to meet the complex problems of reducing and controlling the growth rates of electric consumption and reducing the growth rates of weather-sensitive peak demand; increasing the overall efficiency and cost-effectiveness of electricity...

The Legislature clearly states its policy preference that conservation systems be utilized, but provides balance that it be cost-effective. The Legislature also recognized the importance that electricity be efficient and cost-effective to the State. The Project will meet these goals by providing an additional resource which could provide cost-effective electricity without burdening ratepayers with the long-term cost obligation of the facility.

The cost-effectiveness of conservation is fluid depending upon a variety of factors including avoided generation costs, fuel costs, conservation program savings assumptions, program saturation, and program costs. If the Project were to result in downward pressure on avoided costs, less conservation could be cost-effective, however, if the Project resulted in higher overall electricity costs, more conservation could be cost-effective, all other things being equal.

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

RECOMMENDATION: Yes. The proposed plant would provide a generating option which retail utilities could purchase from if it is the most cost-effective alternative available. IOUs would determine the most cost-effective alternative for their ratepayers pursuant to the bidding rule, in which Duke New Smyrna could submit a proposal. (Futrell)

POSITION OF THE PARTIES

DUKE/ UCNSB: Yes.

FECA: No.

FPC: No. It would violate the law of Florida and thus subvert the public interest.

FPL: The Commission is not charged to generally protect the "public interest," but granting the request would frustrate rational application of the Siting Act and invite a proliferation of unneeded, duplicative power plants. Without a contract for its merchant capacity, DNS cannot demonstrate any impact on Florida electric utility customers.

LEAF: Yes.

TECO: No. Granting the requested determination of need would be contrary to Florida law and contrary to the interests of the citizens of Florida.

IBEW: No position submitted.

USGEN: Yes.

STAFF ANALYSIS: As discussed in previous factual, legal, and policy issues, the Commission may grant a determination of need to the Joint Petitioners. The Project will be under Commission jurisdiction. The Project's merchant capacity will provide an additional generating resource without obligating utilities to purchase or without imposing long-term construction costs on ratepayers.

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

RECOMMENDATION: A wholesale electricity market, that lowers prices, is in the State's best interest provided environmental laws are fully complied with. The project is consistent with this objective. Depending, in large part, on whether merchant plant capacity is capped (see Issue 33), the wholesale market may or may not become robust. (Futrell)

POSITION OF THE PARTIES

DUKE/ UCNSB: Yes.

FECA: No position on this issue.

FPC: This issue inappropriately assume that there is an unmet need for wholesale competition in this State. The record is to the contrary. Further, this is not a proper inquiry in a statutory need proceeding.

FPL: This issue is inappropriate. It has a factual premise that assumes Duke's theory of the case. More importantly, the wholesale market in Florida is a matter beyond the Commission's jurisdiction. The evidence in the case shows there already is a robust wholesale market in Florida.

LEAF: Yes

TECO: This is not a proper issue in a statutory need determination proceeding under Section 403.519, Florida Statutes.

IBEW: No position submitted.

USGEN: Yes,

STAFF ANALYSIS: FERC Order 888 provided that commission's preference for wholesale competition in the electric sector. Approval of the Joint Petitioners' need determination will contribute to a competitive wholesale market. Depending, in large part, on whether merchant plant capacity is capped (see Issue 33), the wholesale market may or may not become robust.

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

RECOMMENDATION: Yes. (Futrell)

POSITION OF THE PARTIES

DUKE/ UCNSB: Yes.

FECA: No.

FPC: No. It would flatly violate state law and do nothing to advance an area of regulation that federal law leaves expressly to the states.

FPL: Granting the petition would be inconsistent with state energy policy that the Siting Act calls for utility specific determinations of need premised upon statutory or contractual obligations to serve. Federal energy policy is outside the Commission's jurisdiction, but allows the Commission to apply state energy policy in siting proceedings.

LEAF: Yes.

TECO: Tampa Electric has opposed inclusion of this issue. However, since it was included, Tampa Electric's position is no. Granting the petition would be inconsistent with state policy. Moreover, federal policy defers to state policy in the area of generation siting. Accordingly, such action would also be inconsistent with federal policy.

IBEW: No position submitted.

USGEN: Yes.

STAFF ANALYSIS: Approving the Project will not be inconsistent with federal energy policy. The question is whether federal energy policy requires the Project to be approved. The record is unclear on this last question. However, if so, we did not need to have the hearing. Section 403.519, F.S., and Commission precedent allows for a determination of need based on criteria other than strict utility specific reliability need.

FINAL ISSUES

ISSUE 32: Based on the resolution of the foregoing issues, should the petition of the UCNSB and Duke New Smyrna for determination of need for the New Smyrna Beach Power Project be granted?

RECOMMENDATION: Yes. See Issue 1. (Futrell, Breman, Makin, Noriega, Samaan, Lester)

POSITION OF THE PARTIES

DUKE/ UCNSB: Yes.

FECA: No.

FPC: No.

FPL: No.

LEAF: Yes.

TECO: No.

IBEW: No position submitted.

USGEN: Yes.

STAFF ANALYSIS: See staff analysis in Issue 1.

ISSUE 33: Should this docket be closed?

RECOMMENDATION: Yes. However, a rule docket should be opened if the Commission wishes to formally establish a merchant plant policy, including a policy promoting solar photovoltaic generating plants coupled with a reserve margin cap. (Futrell, Paugh, Jaye)

POSITION OF THE PARTIES

DUKE/ UCNSB: Yes. When the Commission's order granting the requested determination of need for the New Smyrna Beach Power Project has become final and no longer subject to appeal, this docket should be closed.

FECA: Yes.

FPC: Yes, after dismissing or denying the Joint Petition.

FPL: Yes.

LEAF: Yes.

TECO: Yes.

IBEW: No position submitted.

USGEN: Yes, after the Commission grants Duke's Petition.

STAFF ANALYSIS: The instant docket should be closed no matter what the decision. However, if the joint petition is approved, questions about "opening the door" to merchant plants may need to be resolved (i.e., how many is enough?) In a subsequent rule docket we would answer these questions by first noting that the reliability of Peninsular Florida's reserve generating resource margin is questionable. This question is scheduled to be addressed in Docket No. 981890-EU, with hearings scheduled for September 22-23, 1999. Witness L'Engle testified, as a daily electric utility dispatcher, the FRCC's 15 percent planned reserve margin is "on the edge". (See Issue 1) He stated he would be more comfortable with a 20 percent reserve margin, but suggested that utilities are unwilling to increase reserves due to cost and competitive pressures. (TR 556-7) This suggests that a controlling reserve margin cap could be a solution to merchant plant entrance into Florida.

A problem and a solution arises with a reserve margin cap. The Commission had difficulty in the 1980s with caps for cogenerated power that was over-subscribed. A first-in-line policy was adopted, but this too presented problems. A solution could be to select from the merchant petitions over-subscribing the cap according to the kWs of solar photovoltaic capacity each would propose. To ensure clean merchant capacity, the Commission could restrict merchant plants to natural gas-fired combined cycle with a heat rate similar to the Duke New Smyrna project. Thus the Commission could solve several problems with a single rule - Florida's questionable reserve margin reliability, lack of widespread solar photovoltaics, and market power in the wholesale market.