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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint petition for determination of need for an electric power plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.

Docket No. 981042-EM

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RECORDS AND REPORTING

NOTICE OF APPEAL

NOTICE IS GIVEN that Florida Power Corporation, Appellant, appeals to the Florida Supreme Court, the Final Order of this Florida Public Service Commission, Order No. PSC-99-0535-FOF-EM, rendered March 22, 1999. The nature of the order is a Final Order relating to rates or service of utilities providing electric service.

A conformed copy of the March 22, 1999 Final Order is attached hereto and incorporated herein as Exhibit "A."

for:

Sylvia H. Walbolt
Florida Bar No. 033604
Robert Pass
Florida Bar No. 183169
Gary L. Sasso
Florida Bar No. 0622575
Joseph H. Lang, Jr.
Florida Bar No. 59404
CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A.
P. O. Box 2861
St. Petersburg, Florida 33731
Telephone: 727/821-7000
Facsimile: 717/822-3769
Attorneys for Appellant
Florida Power Corporation

AFA
APP
CAF
CMU
CTR
EAG
LEG
MAS
OPC
RRR
SEC 1
WAW
OTH

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing has been filed with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and a true and correct copy of the foregoing has been filed with the Supreme Court of Florida and furnished by U. S. Mail this 19th day of April, 1999, to the following:

Robert Scheffel Wright, Esq.
Alan C. Sundberg, Esq.
LANDERS AND PARSON, P.A.
310 West College Avenue
Post Office Box 271
Tallahassee, FL 32302
Counsel for Duke Energy New Smyrna Beach Power Company, L.L.P. and
Utilities Commission, City of New Smyrna
Beach, Florida
Telephone: (850) 681-0311
Fax: (850) 224-5595

Leslie J. Paugh, Esq.
Florida Public Service Commission
2540 Shumard Oak Boulevard
Gunter Building
Tallahassee, FL 32399
Telephone: (850) 413-6199
Fax: (850) 413-6250

Charles A. Guyton, Esq.
Steel Hector & Davis
215 South Monroe Street, Ste. 601
Tallahassee, FL 32301
Telephone: (850) 222-2300
Fax: (813) 222-8410
Counsel for Florida Power & Light

Robert S. Lilien, Esq.
Duke Energy Power Services, LLC
422 Church Street, PB05B
Charlotte, NC 28242
Telephone: (Unknown)

William G. Walker, III
Vice President, Regulatory Affairs
Florida Power & Light Co.
9250 West Flagler Street
Miami, FL 33174
Telephone: (Unknown)

William B. Willingham, Esq.
Michelle Hershel, Esq.
Florida Electric Cooperatives Association, Inc.
2916 Apalachee Parkway
(32301)
Post Office Box 590
Tallahassee, FL 32302
Telephone: (850) 877-6166
Fax: (850) 656-5485

Gail Kamaras
LEAF
1114 Thomasville Road, Suite E
Tallahassee, FL 32303-6290
Telephone: (850) 681-2591
Fax: (850) 224-1275
Counsel for Legal Environmental Assistance Foundation

Susan D. Cranmer
Assistant Secretary & Assistant Treasurer
Gulf Power Company
One Energy Place
Pensacola, FL 32520-0780
Telephone: (850) 505-5336
Fax: (850) 505-5505

Jeffrey A. Stone
Beggs & Lane
Blount Building, Suite 700
3 West Garden Street (32501)
Post Office Box 12950
Pensacola, FL 32576-2950
Telephone: (850) 432-2451
Fax: (850) 469-3331

Lee L. Willis
James D. Beasley
Ausley & McMullen
227 South Calhoun Street
Post Office Box 391
Tallahassee, FL 32302
Telephone: (850) 224-9115
Fax: (850) 222-7560

Donald F. Sant, Jr., Esq.
LG&E Energy Corpo.
220 West Main Street
Louisville, KY 40232
Phone: (502) 627-2766
Fax: (502) 627-4030
Counsel For LG&E Energy Corp.

Terry L. Kramer
COPE Director
System Council U-4, IBEW
3944 Florida Boulevard
Suite 202
Palm Beach Gardens, FL 33410
Telephone: (unknown)

J. Roger Howe, Esq.
Office of the Public Counsel
111 West Madison Avenue
Room 812
Tallahassee, FL 32399-1400

Jon Moyle, Jr., Esq.
Moyle Flanigan katz
210 South Monroe Street
Tallahassee, FL 32301
Telephone: (850) 681-3828
Fax:
Counsel for US Generating
Company's

Attorney

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint petition for determination of need for an electrical power plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.	DOCKET NO. 981042-EM ORDER NO. PSC-99-0535-FOF-EM ISSUED: March 22, 1999

The following Commissioners participated in the disposition of this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JULIA L. JOHNSON
E. LEON JACOBS, JR.

APPEARANCES:

ROBERT SCHEFFEL WRIGHT, ESQUIRE, and JOHN T. LaVIA, III, ESQUIRE, Landers & Parsons, P.A., 310 West College Avenue, Tallahassee, Florida 32301
On behalf of Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company, ltd., L.L.P. (DUKE/UCNSB).

JAMES A. McGEE, ESQUIRE, Post Office Box 14042, St. Petersburg, Florida 33733; and GARY L. SASSO, ESQUIRE, Carlton Fields Ward Emmanuel Smith & Cutler, P.A., Post Office Box 2861, St. Petersburg, Florida 33731
On behalf of Florida Power Corporation (FPC).

JAMES D. BEASLEY, ESQUIRE, Ausley & McMullen, Post Office Box 391, Tallahassee, Florida 32302
On behalf of Tampa Electric Company (TECO).

MICHELLE HERSHEL, ESQUIRE, Post Office Box 590, Tallahassee, Florida 32302
On behalf of Florida Electric Cooperatives Association, Inc. (FECA).

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GAIL KAMARAS, ESQUIRE, 1114 Thomasville Road, Suite E, Tallahassee, Florida 32303
On behalf of Legal Environmental Assistance Foundation, Inc. (LEAF).

CHARLES A. GUYTON, ESQUIRE, and MATTHEW M. CHILDS, ESQUIRE, Steel Hector & Davis, LLP, 215 South Monroe Street, Suite 601, Tallahassee, Florida 32301
On behalf of Florida Power & Light Company (FPL).

TERRY L. KAMMER, PAC DIRECTOR, 3944 Florida Boulevard, Palm Beach Gardens, Florida 33410
On behalf of System Council U-4, (IBEW).

JON C. MOYLE, JR., ESQUIRE, and ROBERT J. SNIFFEN, ESQUIRE, Moyle, Flanigan, Katz, Kolins, Raymond & Sheehan, 210 South Monroe Street, Tallahassee, Florida 32301
On behalf of U.S. Generating Company (US GEN).

LESLIE J. PAUGH, ESQUIRE, and GRACE A. JAYE, ESQUIRE, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission Staff (STAFF).

ORDER GRANTING DETERMINATION OF NEED

BY THE COMMISSION:

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ABBREVIATIONS/ACRONYMS

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

Commission - Florida Public Service Commission

DEP - Florida Department of Environmental Protection

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

FEECA - Florida Energy Efficiency and Conservation Act

FERC - Federal Energy Regulatory Commission

FGT - Florida Gas Transmission Company

FMPA - Florida Municipal Power Agency

FPC - Florida Power Corporation

FPL - Florida Power and Light Company

FRCC - Florida Reliability Coordinating Council

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

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

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. 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 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, 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 order 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; Florida Power Corporation; Tampa Electric Company; Florida Electric Cooperatives Association, Inc.; Legal Environmental Assistance Foundation, Inc.; U.S. Generating Company; and System Council U-4, International Brotherhood of Electrical Workers. The amicus curiae is Louisville Gas & Electric Energy Corporation. A hearing was held on December 2-4 and December 11 and 18, 1998. On December 2, we heard oral argument on Motions To Dismiss filed by FPL and FPC and Responses in Opposition of Joint Petitioners and LG&E Energy. We 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 order because they represent threshold issues. A Motion For Reconsideration and a Motion To Strike are addressed following the discussion of the Motions To Dismiss. Next, the order 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.

MOTIONS TO DISMISS

I. BACKGROUND AND SUMMARY OF HOLDING

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 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 section of the order addresses the Motions To Dismiss. This section of the order is divided into three broad subject-matter categories: statutory and rule analysis; decisional law analysis; and constitutional law analysis.

As set forth in detail below, we deny the Motions To Dismiss 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 an "investor-owned 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. Finally, it is not necessary for us to address on the constitutional issues in order to adjudicate the Motions To Dismiss.

II. 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, Florida Statutes, 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), Florida Statutes, 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, Florida Statutes, 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, 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, Sections 403.501-403.518, Florida Statutes. Section 403.519, Florida Statutes, 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....

III. SUMMARY OF ARGUMENTS OF THE PARTIES

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

1. FLORIDA POWER & LIGHT COMPANY

FPL argues that the Joint Petition does not meet the requirements of Florida Statutes or Florida Administrative Code and therefore, must 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. With respect to the rule requirements, FPL argues that the Joint Petition fails to satisfy the criteria of Rule 25-22.081, Florida Administrative Code.

2. 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] 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'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.

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[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. 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 municipality serving retail customers. Duke New Smyrna is an "electric utility" because it is a "regulated electric company", regulated by the Federal Energy Regulatory Commission. 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] and TYSP jurisdiction. 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. 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.

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

1. 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

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[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.

Court. Nassau Power Corporation v. Deason, 641 So.2d 396 (Fla. 1994). (Nassau II) According to FPL, a non-utility generator without a contract with a state-regulated electric utility is not a proper applicant under the Siting Act.

2. 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. 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.

3. 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.[4] 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.

C. DORMANT COMMERCE CLAUSE AND FEDERAL PREEMPTION

1. 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 more properly 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

[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).

wholesale competition do not demonstrate preemption of all state legislation on that subject. 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.

2. 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 thereof cannot be overturned. Second, FPC argues that an administrative agency cannot declare a state statute unconstitutional. Third, FPC argues that federal law does not preempt states' control over siting new generation. 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, FPC argues that even if Congress did intend to regulate need determinations, Florida's scheme would withstand constitutional scrutiny.

3. 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.

IV. 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 our 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, 764 (Fla. 1st DCA 1963). 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.

In addition to the foregoing analysis, we also deny the Motions To Dismiss 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. We disagree with the interpretations of statutes and precedent presented by the movants and agree that the ordinary meaning of the statutes encompass an EWG applying for a need determination.

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 City 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 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.

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 403.503(13), Florida Statutes, 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 is both "regulated" and an "electric company" and therefore clearly meets the statutory definition of applicant. 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 a public utility and 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, 1325 FN4 (Fla. 3rd DCA 1997) *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 us 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. We find 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 order. FPC's argument is discussed below.

Section 403.503(13), Florida Statutes, 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 and submits an "interchangeable definition" argument. Section 403.519, Florida Statutes, was enacted in 1980 as part of FEECA. According to FPC, because Section 366.82, Florida Statutes, 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, Florida Statutes. "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's conclusion is that Duke lacks standing to bring the instant proceeding because it is a wholesale and not a retail power producer.

FPC's analysis is incorrect. First, while Section 403.519, Florida Statutes, is not part of the PPSA, its definitions are governed by the PPSA, not FEECA. Section 403.519 Florida Statutes, 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) The PPSA defines and governs "applicants". By contrast, FEECA defines and governs "utilities". Neither the PPSA nor Section 403.519 Florida Statutes, use the word "utility" as a defining entity and, thus, are not governed by the FEECA definition.

Second, FPC's assertion that "applicants" are the same as FEECA "retail utilities" utterly disregards the law relative to entities required to file need determinations under the PPSA. Section 366.82 of FEECA exempts small electric cooperatives and municipalities with sales of less than 2,000 gigawatt hours. The

cities of Tallahassee, Lakeland and Kissimmee, and Seminole Electric Cooperative are all exempt from FEECA. Notwithstanding that, all four entities must file for need determinations with this Commission. The City of Lakeland currently has a petition for need determination pending before us. (Docket No. 990023-EM) The City of Kissimmee was granted a need determination in late 1998. (Docket No. 980802-EM, Order No. PSC-98-1301-FOF-EM, issued October 7, 1998) The City of Tallahassee was granted a need determination in the summer of 1997. (Docket No. 961512-EM, Order No. PSC-97-0659-FOF-EM, issued June 9, 1997) Seminole Electric Cooperative was granted a need determination in 1994. (Docket No. 931212-EC, Order No. PSC-94-0761-FOF-EC, issued June 21, 1994) Under FPC's construction of FEECA, none of these entities would have to file petitions for need determination. Clearly FPC's analysis is inconsistent with the requirements of the PPSA.

Third, the FPC's interchangeable definition argument ignores two fundamental tenets of statutory construction. 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, (Fla. 1st DCA 1960) In addition, when different definitions are provided for different sections, the distinctions must be presumed to be intentional. Florida State Racing Commission v. Bourquardez, 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 from amending the statute by administrative decision as advocated by FPC. Thus, we hold that 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 agrees that it is subject to the Commission's Grid Bill and TYSP regulatory requirements. We agree. This fact effectively negates FPL's 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 is an "electric utility" pursuant to Chapter 366 and is, therefore, subject to our 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. In addition, the Project will be generating electricity thus meeting the functional requirements.

An important nuance of this argument is that FPL's and FPC's restrictive interpretations have the effect of diminishing our grid responsibility. Duke New Smyrna interprets our 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, if 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)

We agree 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.

Like its interchangeable definition argument, FPC's statutory analysis relating to the 1973 enactment of the Power Plant Siting Act is also 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. Thus, notwithstanding the fact that the PPSA does not use the term "retail" in any of its provisions, FPC urges us to insert the word into the PPSA.

FPC's argument fails in two ways. First, as stated above, Section 403.503(13), Florida Statutes, 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 for us 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. It is inappropriate for us to amend the statute, as advocated by FPC, by administrative decision in the absence of ambiguity.

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

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, Florida Statutes, 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:

> 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.

Joint Petitioners fit squarely within the definitions contained in Chapter 361. The City is clearly an entity within the definition of "electric utility". And, Duke New Smyrna is a "foreign public utility". This is so because Duke New Smyrna is an affiliate of Duke Bridgeport Energy, L.L.C., a person (i.e. corporation) with a principal 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. In sum, 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.

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'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. 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 are insufficient because "peninsular Florida" is merely a planning convention, not a utility. Third, FPL opines that the Joint Petition "abysmally fails" to adequately address the subsection (5) requirement of an analysis of viable nongenerating alternatives. Finally, FPL asserts that the Joint Petition fails to meet the subsection (7) requirements of the Rule of an economic impact statement.

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 for 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 precedent.

We have previously approved need based on peninsular Florida needs for peak demand. For example, in approving Jacksonville Electric Authority and FPL's petition for need determination for the St. John's River Power Park, we 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, we have 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. According to FPL, the Ark and Nassau decision is dispositive in the instant case and Duke New Smyrna is not an applicant because it does not have an obligation to serve customers or 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."

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 declares that the Nassau decisions conclusively determine that a need proceeding under Section 403.519 may only be brought by a retail utility.

We acknowledge 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.

> Under the cogeneration regulations, Florida utilities are required to purchase cogenerated power based on the utilities' "avoided costs"--that is, the costs that the utilities would incur to produce the same amount of electricity if they did not instead purchase the cogenerated power from a qualifying facility....Presuming need under the Siting Act by way of the cogeneration regulations, however, presented the awkward possibility that individual utilities would be required to purchase electricity that neither they nor their customers actually needed.

Nassau I, 601 So.2d at 1177. (emphasis added)

In Nassau I, the Supreme Court affirmed our decision in Order No. 22341, Docket No. 890004-EU, issued Dec. 26, 1989. In that order, we reversed the practice of presuming that a particular cogenerator's power was needed. Instead of presuming need, we 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.

That Nassau I is limited to the law of QF 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:

> [R]eview 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. We ruled that if a utility has to buy the power, that utility's needs must first be evaluated. However, we expressly limited our decision to 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." Order No. PSC-92-1210-FOF-EQ, Docket No. 920783-EQ, issued October 26, 1992 at page 4 (Emphasis added).

Thus, the language quoted by FPL and FPC regarding non-utility generators and utility-specific need 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, we are not overruling prior precedent with respect to need determination proceedings involving a QF.

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 in order 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 we lack 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).

We disagree 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 our administrative expertise.

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 and federal preemption 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, opine Joint Petitioners, makes the regulated

utilities the gatekeepers of the wholesale power market in Florida. 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 series of United States Supreme Court cases they allege validates their construction.

Having considered the well-reasoned arguments of counsel and authority cited by them, we find that while it is incumbent upon us to remain cognizant of Commerce Clause analysis, is not appropriate for us to reach a decision on the issue because there is insufficient evidence in the record to fully adjudicate it. Likewise, to arrive at a decision on the Motions To Dismiss, it is not necessary for us 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.

In sum, we hold that FPL's and FPC's Motions To Dismiss the Joint Petition For Determination Of Need are denied. The Joint Petitioners have standing to bring this need determination. In addition, the Joint Petition satisfies all of the elements for a need determination proceedings pursuant to Florida Statutes and Florida Administrative Code. This decision does not overrule, limit or alter the Nassau decisions because this case must be distinguished on its facts.

FLORIDA WILDLIFE FEDERATION'S PETITION FOR RECONSIDERATION

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 it met the pleading requirements of Chapter 120, Florida Statutes, and Rules 25-22.0376 and 25-22.039, Florida Administrative Code. We address FWF's motion below.

I. STANDARD FOR MOTIONS FOR RECONSIDERATION

It is well settled that an agency may reconsider its final Order if the Order is found to have been based on mistake, inadvertence or a specific finding based on adequate proof of changed conditions or other circumstances not present in the proceedings which led to the Order being modified. People's Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966). 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. Nor is reweighing the evidence a sufficient basis for reconsideration. State v. Green, 104 So.2d 817 (Fla. 1st DCA 1958).

FWF has not demonstrated mistake of fact or law or inadvertence. We believe that we properly applied the law of standing to FWF in denying FWF intervention by Order No. PSC-98-1598-PCO-EM, issued December 1, 1998.

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. FWF Petition to Intervene at 2).

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, and outside the area of our expertise.

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.' *citing* 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 putative intervenor has not shown that its rights will be determined under

Section 403.519, Florida Statutes, which is the authority under which we conduct the need determination portion of the multiagency power plant siting process. FWF's interests may be determined during the proceedings before the Department of Environmental Protection. 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 that their interests would be adversely affected in a manner different from the general public. As such, 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." (Id. at 1285)

In the present petition, FWF has not alleged any injury to itself or its members that is any different from 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 a potential harm to the wildlife of Florida arising from our decision in this docket. 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. Not only is this harm one that is not

peculiar to FWF or its members, this allegation of harm is also 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 approximately 30 acres of land would 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.

II. STANDARD FOR ASSOCIATION STANDING

Florida Homebuilders Ass'n. v. Dept. of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982), held that an association's 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 association 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, Florida Statutes, 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 by an agency's action. The court 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, relating to the requirement that the subject matter of the proceeding be 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's 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. test associations must meet the Agrico test outlined above. When the FWF's petition is read under Agrico, the Florida Homebuilders Ass'n. and Florida Soc. of Ophthalmology cases, it fails to meet the tests of Agrico, the Florida Homebuilders Ass'n. and Florida Soc. of Ophthalmology 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 association 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 association standing.

A. 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.

(Petition at 1)

We find that 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.

(Petition at 2)

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 asserted in the petition for reconsideration that the mention of conservation measures in Section 403.519, Florida Statutes, requires us 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 our 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.

III. CONCLUSION

In sum, FWF has not shown that we based our decision to deny FWF intervenor status on a mistake of law or fact or upon inadvertence. FWF has not shown any changed circumstances which would require a reconsideration of the Order Denying Intervention. 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. Further, 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.

We do not believe that FWF has shown that its substantial interests are consistent with LEAF's. As discussed herein, we find that it was not arbitrary and capricious for us to deny intervention to FWF and to grant it to LEAF when LEAF specifically alleged that both 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.

Therefore, Florida Wildlife Federation's Petition for Reconsideration of Hearing Officer's Order Denying Intervention is hereby denied.

MOTION TO STRIKE ADDITIONAL AUTHORITY

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 stated 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.

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

Upon consideration, FPL's Motion To Strike Additional Authority is 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 shall be stricken from the record of this proceeding.

NEED FOR THE PROPOSED POWER PLANT

I. INTRODUCTION

Section 403.519, Florida Statutes, enacted in 1980 as part of FEECA, established this Commission as the exclusive forum for determining the need for an electrical power plant subject to the PPSA. The statute requires us to take into account the following criteria in making a determination of need as part of the plant siting 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, we must take into account all of the above listed criteria. We may base our determination of need for an electrical power plant on a single criterion or any combination of the above criteria. As set forth in Section VI, A below, many times in the past, we have approved need determination petitions on bases other than strict reliability need.

Our underlying policy in deciding need determination petitions is to protect electric utility ratepayers from unnecessary expenditures and ensure a safe reliable grid. In approving the proposed plant, we are effectuating our longstanding policy. Duke New Smyrna, as proposed, would be a wholesale provider of electricity. Retail utilities, with the obligation to serve, may purchase from Duke New Smyrna, if it is economic to do so. The Project provides a choice to retail utilities in meeting the needs of their customers. If a retail utility purchases from Duke New Smyrna, those retail customers would realize economic benefits due to the existence of the Duke New Smyrna project.

Furthermore, there is sufficient record evidence before us to determine that the statutory criteria required by Section 403.519, Florida Statutes, have been met. This Project is the most cost-effective alternative available to meet both Duke New Smyrna's and the City's need. We find that we have sufficient information to assess the need for the proposed power plant under the criteria set forth in Section 403.519, Florida Statutes. We address each of the five statutory criteria.

II. THE NEED FOR ELECTRIC SYSTEM RELIABILITY AND INTEGRITY

Both the City and Duke New Smyrna presented extensive testimony pertaining to the need for electric system reliability and integrity as required by the statute.

A. THE CITY

The City's 1998 summer peak demand was 78 MWs. By the year 2008, the City's peak summer demand is expected to grow to 98 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 purchased power is obtained through contracts with FPC, TECO, and Enron. 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).

The City has a well-defined need for energy and capacity to serve its native retail load. The City must acquire additional resources in order to provide adequate service to its retail customers. The record reflects the 30 MW entitlement is necessary for the City to continue to serve its native retail load in an efficient and cost-effective manner. We find that 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. Even with the 30 MW entitlement from Duke New Smyrna, however, 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. Pursuant to the contract, 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.

B. DUKE NEW SMYRNA AND PENINSULAR FLORIDA

The FRCC approved a 15 percent reserve margin as suitable for Peninsular Florida reliability. We are currently reviewing this level of reserve margin in Docket No. 981890-EU. The utility intervenors argued 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. In Order No. 22708, issued March 20, 1990, in Docket No. 900071-EG, we determined that during the Christmas freeze of 1989, sustained low temperatures combined with unit outages, resulted in the loss of firm load in certain areas of the State. Witness L'Engle characterized the currently planned reserves of Peninsular Florida as being "on the edge" and 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.

The Project will provide benefits to Peninsular Florida's operating reliability. Joint Petitioners' Witnesses Vaden, Green and Nesbitt addressed projected peninsular reserve margins, and the opportunity for wholesale sales in Florida. 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. The capacity should be considered for hourly and short term operating reserves, but not for long term planning reserve margins, unless contracted for. Duke New Smyrna and its shareholders will finance and own the Project, as well as carry the risk of that investment. Duke New Smyrna will, therefore, 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 argued that there are no assurances that Duke New Smyrna would not sell all or a portion of its merchant capacity out-of-state. Joint Petitioners' Witness Green did acknowledge that under certain circumstances, power sales to the north could occur. Record evidence establishes, 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. As such, the probability of sales to Georgia is reduced. As a long term business strategy, we believe that it makes no sense for Duke New Smyrna to sell power out-of-state because those sales would have to overcome the costs of natural gas transportation 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 retail IOU, on the other hand, would have to charge cost based rates for in-state sales. We plan to address this disparity whereby some utilities are allowed to charge wholesale market prices while other utilities cannot in an upcoming workshop, as discussed in the last section of this Order.

Based on the record, we believe that the capacity from the Project is needed by the City to continue to serve its retail customer loads. Without the entitlement, we believe that the City would either have to purchase or build capacity at a much greater cost to its ratepayers, or seriously compromise its reliability. Further, the entitlement promotes the integrity of the City's system by allowing for adequate electricity to meet retail demand at a reasonable cost. We believe that the Participation Agreement as well as the testimony and exhibits of Witness Vaden sufficiently demonstrate the need for the 30 MW entitlement. We are persuaded that the entire 514 MWs are what make the 30 MWs entitlement cost-effective, and the entire project is, therefore needed for New Smyrna Beach's system reliability.

III. THE NEED FOR ADEQUATE ELECTRICITY AT A REASONABLE COST

The reliability and integrity of the City's system will be greatly enhanced by the proposed Project. The Project will, by providing needed reliability, also give the City adequate electricity at a reasonable cost. The 514 MWs are what makes the 30 MWs cost effective. 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.

A. THE CITY

Witness Vaden testified that Duke New Smyrna's price of $18.50 per MWH is much lower than other purchase power contracts. For example, the City's existing contract for base load capacity with TECO is at $25 per MWH. The City's cost-benefit analysis provided by Witness Vaden showed a savings of approximately $3.1 million per year net present value for the first ten years, and approximately $7.75 million net present value for the following ten years, for a total estimated savings of approximately $39 million net present value.

The record supports the conclusion that the purchase of energy from the Project will be the most cost-effective alternative for the City to meet its needs for energy and capacity. The 30 MW entitlement to the City is contingent upon the entire 514 MW Project being constructed. Thus, the Joint Petitioners have shown a need based upon economics. As such, if the Project is not constructed, the City will have to construct or contract for higher cost capacity and energy at a greater cost to its retail ratepayers. No party to this proceeding challenged the validity of this evidence.

B. DUKE NEW SMYRNA AND PENINSULAR FLORIDA

Duke New Smyrna, which is an EWG and not a QF, does not have the legal right to require utilities to purchase its plant output. 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 us to consider in order to approve Duke New Smyrna's Project. The "bidding rule," Rule 25-22.082, Florida Administrative Code, requires that an investor-owned utility 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. 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 generation supply alternative for existing retail utilities. Florida ratepayers will not be 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. Retail ratepayers will only be obligated for the term of any contract, and not the full economic life of the facility.

Duke New Smyrna, as an EWG, can contract with utilities on a long term basis (equal to or greater than one year), or on a short term or on an hourly, as-available basis. All IOU purchases will be subject to our approval in our ongoing 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 will 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 because it would be cost neutral and, therefore, there would be 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 also applies if Duke New Smyrna were not proposing to commit any of the Project's capacity to a utility.

We approve the Project because Duke New Smyrna has shown an economic need for the Project. Retail customers are not at risk, and we do not have to determine and assess the avoided costs of a proposed unit over several decades where changes in the world economy, changes in generation efficiencies, and changes in the cost of fuel can render decisions uneconomic in the future which were projected to be economic when made. In this case, the market will determine whether or not Duke New Smyrna's decision to use natural gas continues to be economic over the next several decades with all of the risk borne by Duke New Smyrna and its shareholders. We find this Project to be a benefit to the ratepayers of this state.

Duke New Smyrna, as proposed, would be a wholesale provider of electricity. Retail utilities, with the obligation to serve, may purchase from Duke New Smyrna, if it is economic to do so. The Project provides a choice to retail utilities in meeting the needs of their customers. If a retail utility purchases from Duke New Smyrna, those retail customers would realize economic benefits due to the existence of the Duke New Smyrna project. Ratepayers will continue to be protected against uneconomic utility decisions by our ongoing audits and review of purchased power contracts of retail-serving investor-owned Florida utilities. The fact that the proposed plant is completely financed by Duke New Smyrna at no cost to retail ratepayers, leads us to believe that the Project is good for the City's retail ratepayers and that it is also economically good for the state as a whole.

Duke has demonstrated that its plant may lower wholesale electric prices paid by retail-serving utilities. This does not mean that subsequent merchant plants will be able to demonstrate that they will do the same. Merchant plant applicants do not have a right to build merchant plants in Florida. Each applicant must demonstrate that its project conveys a benefit to Florida ratepayers, given the existence of the prior power plant additions. We recognize that there may be certain applications in the future, which may fail to demonstrate an economic need, despite the fact

that the retail ratepayers are not at risk. This demonstration may involve the inability of the applicant to demonstrate that it will dispatch within the Florida grid. We also recognize that there may be certain times when a proposed plant could adversely effect the reliability of the Florida grid. This could involve a plant, by its proposed location within the Florida grid, which degrades the transmission system within Florida. The record in this case, however, is devoid of such concerns.

IV. PROPOSED PLANT IS THE MOST COST-EFFECTIVE ALTERNATIVE AVAILABLE

Based on the evidence adduced at hearing, we find 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. The utility intervenors argued that, absent a power sales agreement to meet a utility specific kilowatt need, no comparison can be made to determine whether the Project is the most cost-effective alternative. We disagree.

The record shows that the City evaluated numerous alternatives in choosing Duke New Smyrna. Duke New Smyrna was shown to be the most cost-effective option for the City. If the plant is not constructed, the City will have to find more expensive power either by contract or construction. This will adversely impact the City's ratepayers.

Need may be shown by a petitioner based either on economics or reliability. In this case, the Joint Petitioners have demonstrated need based largely on economics. They have demonstrated in the record that by participating in the entitlement, the City will save $39 million over the life of the entitlement when the cost of purchased power from Duke New Smyrna is compared to the cost of purchased power at the rates the City is currently paying. No party to this proceeding challenged the cost-effectiveness of this plant.

A. 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. The City compared this price with its existing contracts to show the Duke New Smyrna purchase to be cost-effective.

In its analysis of the projected savings from the Participation Agreement, Witness Vaden testified that the City used an escalation rate of 3.4%. 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." In addition, the City calculated the net present value of the annual savings of the project using a discount rate of 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.

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 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. The City also considered purchasing from the FMPA, but determined it not to be economical compared with the Duke New Smyrna purchase.

The City is not required, nor did it elect to issue a request for proposals to solicit supply-side alternatives. 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, we believe that the decision to choose Duke New Smyrna's offer was clearly the most economical.

B. 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. Duke New Smyrna is willing to invest $160 million of its shareholders' money on the belief that it can generate and sell its power below current wholesale prices. This

contrasts with other need determinations where long-term forecasts of generation and fuel were made. Florida retail customers will not be obligated through their retail-serving utilities to pay for the $160 million plant through their rates. In addition to lower cost electricity for the ratepayers of the City, other benefits include approximately twenty jobs when the plant is operational and property taxes.

C. PENINSULAR FLORIDA

As noted above, relying on the Nassau decisions, the utility intervenors argued that because there is no power purchase agreement for the merchant capacity, no utility specific kilowatt need can be met, and, we cannot determine whether the Project is the most cost-effective alternative. The distinctions between Duke New Smyrna and QFs make the need for a power purchase agreement in this case moot. A power purchase agreement with a utility assumes a commitment on the part of the utility's ratepayers which binds 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.

Rule 25-22.082, Florida Administrative Code, the "bidding rule," requires an IOU to evaluate supply-side alternatives in order to determine that a proposed unit, subject to the PPSA, is the most cost-effective alternative available. Duke New Smyrna 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. An IOU, or any other utility subject to Commission cost-recovery 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 as is done for the costs for rate based power plants.

As stated above, the Project will be economic for other Florida retail customers, because Duke New Smyrna will operate the plant as a merchant plant. Merchant plants increase wholesale competition thereby in theory lowering wholesale electric prices from what they otherwise may be. Merchant power plants do not sell to retail customers in Florida. No Florida retail customers are obligated to bear the costs of this project in rate base.

We believe that the criteria to be considered pursuant to the PPSA give us the flexibility to approve power plants based on reasons other than simple kilowatt need. As previously discussed, we believe that 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. We heard extensive testimony at the hearing concerning the cost-effectiveness of this Project. We also heard testimony concerning when and how the Project's capacity and energy will be dispatched, i.e. sold within the Florida grid. The evidence in the record shows this plant, because of its efficiencies, will be dispatched a great deal of the time. However, because of its merchant nature, it will only be dispatched when it is economical to do so. As a result, we believe that it will exert a downward pressure on electricity pricing in the wholesale power market in Florida. This, in turn, will flow through to retail IOU customers in retail rates through the fuel adjustment clause. Therefore, we believe that the record evidence shows other Peninsular Florida utility ratepayers will benefit from the 484 MWs which will add to grid reliability, and displace higher cost fuels.

V. CONSERVATION MEASURES TAKEN OR REASONABLY AVAILABLE

With respect to conservation measures, Section 403.519, Florida Statutes 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 . . . .

A. THE CITY

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. 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, as required by Section 366.81, Florida Statutes.

Solar photovoltaics are not the City's only option for conservation. According to the record in this proceeding, the City currently offers load management and energy audits to customers. Peak demands can be reduced by approximately ten percent.

B. DUKE NEW SMYRNA AND PENINSULAR FLORIDA

With respect to Duke New Smyrna, we believe, as does LEAF, that the wholesale nature of the merchant portion of the Project limits its conservation obligations. The PPSA contains five criteria for us to consider. As discussed previously in this order, we have granted need determinations on other than kilowatt need, as evidenced in the oil-backout cases of the 1980s.

VI. OTHER MATTERS WITHIN OUR JURISDICTION WHICH WE DEEM RELEVANT

We agree that this case is not as straightforward as a conventional need determination involving a vertically integrated monopolistic electric utility seeking to provide additional generation resources to meet its native retail kilowatt need 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. We have 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 cases, on which the utility intervenors focused, were but two of many cases in which we dealt with unique and challenging issues affecting need. We believe that our approach and findings in each of these cases has a bearing on how "need for power" should be assessed 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. The record evidence is that, except for new steam-cycle 75 MW and above, merchant power plants can and are being built in Florida. Some of these power plants are not as efficient as combined cycle power plants such as Duke New Smyrna. Evidently, these less efficient merchant power plants are being built without a steam cycle in order to avoid the PPSA. Approving Duke New Smyrna sends a signal that Florida wants efficient and clean power plants. It also allows us to require all power plants to be

subject to the Grid Bill. This is important so that we can require coordination through the FRCC in matters such as relaying, transmission use, spinning reserve, and capacity and fuel use reporting. Otherwise, it is unclear whether we can require non-PPSA covered merchant power plants to belong to and participate in the FRCC.

A. NEED DETERMINATION ON OTHER THAN KILOWATT NEED AND RELIABILITY

The following excerpts from some of our Orders highlight the fact that we have previously approved power plants based on other than kilowatt need:

In granting JEA/FPL's application of need for St. John's River Power Park Units 1 and 2, we 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)

We 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, we 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)

We 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, we 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)

We 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, we 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 argued that building 514 MWs when only 30 MWs are needed was a sham transaction. We disagree. As previously discussed, 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 our oil-backout decisions.

B. THE POLICY ISSUES IN THE NASSAU CASES

The utility intervenors cited the Nassau I and II orders as their primary argument in opposition to the Project. The legal aspects of this argument are discussed in Section I above, however, here we will 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.

The question presented in the Nassau cases is different from the questions presented in this proceeding. In this docket, we have not been asked to determine the need for a QF that seeks to bind a utility's ratepayers for the cost of an avoided unit over several decades. That was the issue in the Nassau cases. Here, we are determining the need for a merchant plant which does not seek to bind utility ratepayers to bear the cost of an avoided unit. We believe that because of this distinction between the present case and the Nassau cases, the Nassau cases are inapplicable.

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

In Nassau II, Nassau petitioned 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, because Nassau was a QF. Consistent with our underlying policy of protecting utility ratepayers from unnecessary expenditures, we 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. In summary, we believe that Nassau I and II apply to QFs only and do not require utility specific kilowatt need for this Project.

As outlined above, the Joint Petitioners have presented all of the information required by Section 403.519, Florida Statutes, and Rule 25-22.081, Florida Administrative Code. The Joint Petitioners have shown that there is a reliability need for 30 MW of the proposed plant's capacity for the City and an economic need for the remaining 484 MW. Even if Duke New Smyrna had come in for a need determination on its own without the City, we believe that it is a proper applicant and could have shown an economic need for the proposed plant. Accordingly, granting the determination of need requested by the joint petitioners is consistent with the public interest and the best interests of electric customers in Florida. All of the statutory criteria have been met by the Joint Petitioners. Therefore, we grant the Joint Petition for a determination of need.

FURTHER PROCEEDINGS CONSISTENT WITH THIS DECISION

In granting this petition, we understand that questions will arise about the number of merchant plants needed in Florida. We will hold a workshop subsequent to the closure of this docket in order to discuss issues related to the selection and siting process for future merchant plants choosing to locate in Florida. We note that the question of reserve margins 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." 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. This suggests that a controlling reserve margin cap could be used as a guide to merchant plant entrance into the Florida wholesale power market. This issue will be evaluated as part of the workshop or rule-development proceedings.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Florida Power & Light Company's Motion to Dismiss Joint Petition and Florida Power Corporation's Motion to Dismiss Proceeding are denied. It is further

ORDERED that the Florida Wildlife Federation'S Petition for Reconsideration of Hearing Officer's Order PSC-98-1598-PCO-EM Denying Intervention is denied. It is further

ORDERED that Florida Power & Light Company's Motion to Strike "Additional Authority" Letter is granted and the Additional Authority Letter filed by the Joint Petitioners is stricken from the record. It is further

ORDERED that the 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., is granted. It is further

ORDERED that this docket shall be closed after the time for the filing of an appeal has run.

By ORDER of the Florida Public Service Commission this 22nd day of March, 1999.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)
LJP/GAJ

DISSENTS

COMMISSIONER CLARK:

I dissent from the majority's decision to deny the Motions to Dismiss filed by Florida Power and Light Company (FPL) and Florida Power Corporation (FPC). Neither the legislative history of the Power Plant Siting Act, nor the logic and legal analysis of the majority's decision convinces me that Duke New Smyrna is a proper applicant for a determination of need. The Motions to Dismiss should be granted because Duke New Smyrna is not a proper applicant under Section 403.519, Florida Statutes.

The majority concludes that Duke New Smyrna is a "regulated electric company" and is therefore included in the definition of "applicant" in Section 403.503(13), Florida Statutes, which in turn applies to Section 403.519, Florida Statutes.[6] Close inspection of legislative history and case law refutes this conclusion.

The Power Plant Siting Act was first enacted in 1973. The legislative intent for the Act recognized the need for a statewide perspective on the selection and utilization of sites for generating facilities given the "significant impact upon the welfare of the population, the location and growth of industry and the use of the natural resources of the state." 1973 Fla. Laws Section 1, Chapter 73-33. Initially, the Commission's role was simply to prepare a "report and recommendation as to the present and future needs for electrical generating capacity in the area to be served by the proposed site . . ." 1973 Fla. Laws Section 1, Chapter 73-33.

Then, in 1980, as part of the Florida Energy Efficiency and Conservation Act (FEECA), the Legislature changed the requirement of a "report and recommendation" to a proceeding resulting in a determination of need. Because of the rapid rise in the cost of electric power production resulting from the dual impact of

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[6]I do agree with the majority's conclusion that in order for a determination of need to issue for this project, Duke New Smyrna must, in its own right, be an applicant under Section 403.519, Florida Statutes. The 30 MW earmarked for the City of New Smyrna, an entity that does fall within the definition of applicant, is insufficient to justify applicant status for the entire 514 MW project.

inflation and effects of the Arab Oil Embargo, the Legislature found it in the public interest to vigorously pursue energy efficiency and conservation measures. The Legislature gave the Commission the responsibility of requiring utilities to pursue energy efficiency and conservation to reduce growth rates of consumption. As part of the responsibility to encourage energy efficiency and conservation, the Legislature required the Commission to increase its scrutiny of the need for prospective power plants. The Commission was directed to review proposed new plants to ensure that they were needed for system reliability and integrity, that their cost was reasonable and cost effective, and that the utility had undertaken all conservation measures that could reasonably be employed to mitigate the need for the new plant. 1980 Fla. Laws Section 5, Chapter 80-65.

The provision in FEECA that identified the Commission as the exclusive forum for a determination of need used the term "utility" and "applicant" interchangeably.

366.86 Exclusive forum for determination of need.--

(1) On request by a utility 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, which accordingly shall not be raised in any other forum or in the review of proceedings in such other forum. In making its determination, the Commission shall take into account the need for electric system reliability and integrity, the need for adequate reasonable cost electricity 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 and shall serve as the Commission's report required by s. 403.507(1)(b).[7]

The term "utility" was expressly defined for purposes of FEECA, including this section, as "[a]ny person or entity of whatever form which provides electricity or natural gas at retail to the public, specifically including municipalities or instrumentalities thereof and cooperatives under the Rural Electrical Cooperative Law; . . . " 1980 Fla. Laws Section 5, Chapter 80-65 (emphasis supplied).

The fact that the term "utility", which is specifically defined in FEECA, is used interchangeably with "applicant" suggests that the two terms mean the same thing. The definition of utility in FEECA encompassed the same entities as the definition of "applicant" in the Power Plant Siting Act. An "applicant" is a "utility" that has applied for a determination of need. One cannot be an applicant under the Power Plant Siting Act without a determination of need from the Commission, and only a utility providing power at retail may apply to the Commission for such a determination.

The conclusion is inescapable. The two definitions mean the same thing. In order for an electric utility to come under Commission regulatory authority (that is, to be a "regulated electric utility"), the sale must be a sale at retail. Wholesale sales are a matter within the sphere of federal regulation.

In 1990, the Legislature enacted numerous revisions to the Power Plant Siting Act, the Transmission Line Siting Act, and other laws affecting environmental regulation. 1990 Fla. Laws Section 24, Chapter 90-33, amended Section 403.519, Florida Statutes, to change the term "utility" in the first sentence to "applicant." It also required the publication of notice of a request for a determination of need, and provided that the Commission's determination of need constitutes final agency action. There is no indication in either the title of the act, or in the legislative staff analyses, that the amendment was designed to broaden the

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[7]This statute was originally numbered as Section 366.86, Florida Statutes, when it was created by Section 5 of Chapter 80-65, Laws of Florida. When it was published in the Florida Statutes, it was renumbered as Section 403.519, Florida Statutes. It remains part of FEECA, however, subject to FEECA definitions.

entities authorized to request a need determination beyond persons or entities providing electricity at retail.

Decisions of the Commission and the Florida Supreme Court subsequent to the enactment of 1990 Fla. Laws Section 24, Chapter 90-331, support the notion that the change to Section 403.519, Florida Statutes, did not mean a broadening of the term "applicant," but rather was further confirmation that an applicant must be an entity obligated to serve retail load. In 1992, Ark Energy Inc. (Ark) and Nassau Power Corporation (Nassau) each filed a petition for a determination of need. In Order No. PSC-92-1210-FOF-EQ, issued October 26, 1996, in Docket Nos. 920769-EQ, 920761-EQ, 920762-EQ, and 920783-EQ, the Commission dismissed the petitions of Ark and Nassau because they were not proper applicants for a need determination under Section 403.519, Florida Statutes. The order points out that the definition of "applicant" in Section 403.503, Florida Statutes, encompasses only entities that may be obligated to serve customers:

> Section 403.503, Florida Statutes, defines "applicant" as an electric utility, and in turn defined "electric utility" as:
>
> > 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.
>
> 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 obligated to serve customers. It is this need, resulting from a duty to serve customers, which the need determination proceeding is designed to examine. Non-utility generators such as Nassau and Ark have no such need since they are not required to serve customers. The Supreme Court recently upheld this interpretation of the Siting Act. Dismissal of these need determination petitions is in accord with

that decision. See Nassau Power Corporation v. Beard, 601 So.2d 1175 (Fla. 1992).

Order No. PSC-92-1210-FOF-EQ, issued October 26, 1992, in Docket Nos. 920769-EQ, 920761-EQ, 920762-EQ, and 920783-EQ, pp. 2-3.

The Florida Supreme Court affirmed the Commission's order dismissing the petitions. Nassau Power Corporation v. Deason, 641 So.2d 396 (Fla. 1994). The Court found "construction of the term applicant as used in section 403.519 is consistent with the plain language of the pertinent provisions for the Act and this Court's 1992 decision in Nassau Power Corp. v. Beard". (641 So.2d at 398).

The Court also cited favorably the Commission's reasoning that a "need determination proceeding is designed to examine the need resulting from an electric utility's duty to serve customers." (641 So.2d at 398).

The majority distinguishes the present case from Nassau Power Corp. v. Deason on the basis that the case involved qualifying facilities (QFs) that were seeking to "require FPL to purchase their output and bind the retail ratepayer."[8] Staff recommendation at p. 32. The rationale of the Nassau case propounded by both the Commission and the Court does not support such a distinction. The rationale focused on the types of entities enumerated in Section 403.503, Florida Statutes, and concluded that the common denominator present in each was an obligation to serve customers.

[8]Need determinations do not bind the retail ratepayers, and an order determining a need is not a guarantee of cost recovery from retail ratepayers. If, when, and to what extent cost recovery is authorized is a matter to be resolved when the utility seeks to recover the costs of their investment through a ratemaking proceeding, or seeks approval of costs incurred for a power purchase contract in a capacity cost recovery proceeding. The Power Plant Siting Act specifically acknowledges that the siting and cost recovery are distinct processes. Section 403.511(4), Florida Statutes, provides that: "The Act shall not affect in any way the ratemaking powers of the Public Service Commission under Chapter 366;"

The need to be examined under Section 403.519, Florida Statutes, was a need resulting from the duty to serve those customers.[9]

By seizing on the term "regulated" as including regulation by the FERC (and presumably regulation by any other governmental authority), the Commission is relying on a federal act, not the laws of Florida, for its authority. It is unlikely that the legislature delegated to the federal government the authority to determine who might come within the definition of applicant, but that is precisely the effect of the majority's decision. Duke New Smyrna is an Exempt Wholesale Generator (EWG), a category of electric generators that was created by the Energy Policy Act of 1992.[10] Clearly, this category of generators was not in existence when the Power Plant Siting Act was created in 1973. Nonetheless, the majority concludes it is within the definition of applicant because the federal government has subsequently decided to authorize this category of generators.

This Commission has previously tried to rely on federal acts to broaden its authority, and the Florida Supreme Court overturned that decision. In Florida Power and Light Company v. Florida Public Service Commission, 5 FALR 227-J (4/4/83), 471 So. 2d 526 (Fla. 1985), the court reversed a decision adopting rules on the purchase of power from cogenerators and small power producers. The adoption of rules was precipitated by the Public Utilities Regulatory Policy Act enacted by Congress in 1978. The act directed FERC to adopt rules encouraging cogeneration but gave the states the task of implementing that policy particularly by setting the price to be paid by utilities for cogenerated energy. The court found the Commission lacked state statutory authority to implement the directives of PURPA[11]

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[9]A review of the transcripts from the Agenda Conference where the Ark and Nassau petitions were discussed likewise does not support the distinction. The focus of the debate was that in order to be an applicant, the entity had to have an obligation to serve retail customers.

[10]A generator desiring status as an EWG must apply to the FERC for that designation and sales from the facility are limited to wholesale sales.

[11]The opinion noted the fact that the legislature subsequently provided the authority for rules in this area, but the subsequent

The need for the Commission to give careful consideration to legislative authority is even more important today given the 1996 amendments to the Administrative Procedures Act. The majority has acknowledged the need to further develop policy with respect to merchant plants. To codify that policy into rules will require specific authority. It will not be enough that the rules are reasonably related to enabling legislation or founded on an expression of legislative intent.

Neither the petition nor the majority's decision complies with the requirements of Section 403.519, Florida Statutes, or our rules implementing Section 403.519, Florida Statutes, regarding the elements that must be considered in finding a need for a plant. This is not surprising since Duke New Smyrna clearly does not fit within the definition of "applicant." Essentially, the majority concludes that with respect to the 30 MW earmarked for the City of New Smyrna, it is cost-effective to the City because of the extraordinarily low price to be paid by the City. This price was characterized by staff in its recommendation and at the Special Agenda as a "loss leader." With respect to the remaining 484 MW, no need must be established because it will only be purchased by those entities having an obligation to serve when it is needed. The majority leaves the determination of need to a later date and to the market.[12]

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enactment did "not breath new life into the already adopted rules." 5 FALR at 228-J, 471 So.2d 526-536 (1985). Upon request of the Court, the opinion was withdrawn from the bound volume of the Southern Reporter and the case was voluntarily dismissed in 1985.

[12]In their analysis and in response to questions at Agenda, the staff relies on need cases involving plants designed to replace oil-fired generation as precedent for the analysis of need done in this case. That reliance is misplaced. Those cases also involved consideration of a specific legislative direction to reduce consumption of petroleum fuels. Additionally, the projects were evaluated against other proposals to accomplish reduced consumption of petroleum fuels.

They also rely on the Florida Crushed Stone determination of need. However, that case was decided at a time when the Commission had a practice of "presuming need as opposed to determining actual need" and the Florida Supreme Court affirmed the Commission's repudiation of that practice in Nassau Power Corp. V. Beard, 601

I agree with the majority that the record in this case demonstrated that there are potentially substantial benefits to be derived from merchant plants such as the one proposed. The record also suggested several issues involved in the decision to introduce pure merchant plants into the power production scheme in Florida. Issues such as the impact on the environment; the impact on conservation goals and programs; the impact on investment in, and operation of, existing plants; how many merchant plants should be permitted; the criteria for choosing among potential plants if the number permitted is to be limited; the impact on economic development; and diversity of ownership to address market power issues.

I concur in the majority's decision to move quickly to workshops to identify all the issues that need to be addressed regarding merchant plants. However, the fact that these issues arise and that some involve matters beyond the realm of economic regulators is further demonstration that the current regulatory scheme does not contemplate the siting of merchant plants.

Our task in this case was to decide what the law is, not what it ought to be. In my view, the law is clear that Duke New Smyrna is not a proper applicant under Section 403.519, Florida Statutes, and the petition must be dismissed. We should, however, move forward with our workshop so that we can make recommendations to the Legislature as to what the law ought to be.[13]

So.2d 1175 (Fla. 1992).

[13]This is the proper role for the Commission in the consideration of major changes in the scheme of regulation for a particular industry. This is the procedure we have followed in the telecommunications industry. We first investigated the issues and policy considerations regarding the introduction of competition into the long distance market, the pay telephone market and, most recently, the local exchange market, then made recommendations to the Legislature as to what legislative changes were appropriate.

COMMISSIONER JACOBS:

Opinion of Commissioner Jacobs, dissenting in part and concurring in part:

Having concluded that granting the determination of need petition is not consistent with the public interest, I write to offer views on two issues: (i) whether Duke New Smyrna is a proper applicant under the Power Plant Siting Act; and, (ii) whether the proposed plant is the most cost effective option for providing 514 MW of capacity.

I agree with the majority that in the instant docket Duke New Smyrna is a proper applicant, although my reasoning differs from that of the majority. More importantly, I have concluded that the determination of need should be denied because I have not been persuaded that the proposed plant is the most cost effective option for providing the 514 MW.

Section 403.519, Florida Statutes holds that 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. While the applicant in this proceeding is a partnership between the City of New Smyrna and Duke Energy, the issue has arisen of whether Duke Energy alone, as an Exempt Wholesale Generator (EWG) could be an applicant.

Initially, I would restrict the determination of standing to the petition as filed, i.e., a request by the partnership to certify need of the full plant capacity. I would not render a decision relative to Duke's standing as an applicant individually, nor would I make a decision on standing by bifurcating the application into the electricity required for the City of New Smyrna and the additional capacity of the plant (which has been dubbed "merchant capacity"). However, to the extent that the issues are addressed by the majority, I believe the holding of the Florida Supreme Court in *Nassau Power Corporation v. Beard* (cited herein as Nassau II), controls. Thus, to be a proper applicant, an EWG must be tied by contract to a co-applicant who is a utility. In the instant docket, Duke New Smyrna is a proper applicant only because of the relationship between the parties to the partnership.

Alternatively, I do not agree, as argued by FPL and FPC, that Nassau II requires Duke New Smyrna to contract with retail utility

providers for the merchant capacity in order to properly make the application for need. There is no precedent for predicating standing in need determinations on the allocation of the need petition among the joint applicants. The exact purpose of the need proceeding is to determine if the full capacity requested should be built.

For these reasons I conclude that Duke New Smyrna is a proper applicant in the instant docket because of the partnership with the City of New Symrna.

Section 403.519, Florida Statutes, inter alia, sets forth the criteria upon which the Commission is to base its determination of need:

> ...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.

Historically, the Commission has conducted extensive inquiries of alternative means to meet capacity requirements. The Commission has explored options that avoid building generation facilities, and options for the use of alternative generation technologies. See In re: Petition to determine need for Proposed Electrical Power Plant in St. Marks, Wakulla County, by City of Tallahassee, Order No. PSC-97-0659-FOF-EM, issued June 9, 1997. See also In re: Petition for Certification of Need for Orlando Utilities Commission, Curtis H. Stanton Energy Unit 1, And Related Facilities, Order No. 10320, Docket No. 810180-EU, issued September 2, 1981.

In this proceeding, the Commission is asked to engage in a new analysis to determine if the proposed plant is the most cost effective alternative for the need to be certified. The Commission is asked to find that the petition is cost effective because, as the petitioners contend, the purchase of the proposed plant's capacity on the wholesale market will render economic benefits to all buyers (wholesale purchasers). They also expect further economic benefits from the translation of the wholesale market pricing into lower retail prices. Although, it is certainly possible for a least cost alternative to emerge from a wholesale market, this scenario appears to be based on an assumption that the market clearing price of capacity will always favor buyers. In

addition, it is also assumed that the contract terms, which are yet to be determined, will always be beneficial to ratepayers.

These are especially important points given the considerable reliance by the petitioners on the economic benefits of the wholesale market that are used to justify the need for the full plant capacity. Even though the petitioners support their case by calling on the broader need of Peninsular Florida, it is argued that the ratepayers will not be required to cover the costs of the plant; the public will only incur costs when retail providers tap into an efficient wholesale market.

In this docket it is questionable as to whether the intended benefits of an efficient wholesale market will come to fruition in the manner that has been described. In my opinion, the petitioners have failed to provide the weight of evidence required to depart from the Commission's long-standing policy of relying on its own cost effectiveness analysis of a proposed plant.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within five (5) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice

of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.