State of Florida

Public Service Commission

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

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

DATE: NOVEMBER 10, 1999

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

FROM: DIVISION OF ELECTRIC AND GAS (HAFF, BREMAN, GOAD, MAKIN)
DIVISION OF LEGAL SERVICES (C. KEATING, COLLINS)

RE: DOCKET NO. 991462-EU - PETITION FOR DETERMINATION OF NEED FOR AN ELECTRICAL POWER PLANT IN OKEECHOBEE COUNTY BY OKEECHOBEE GENERATING COMPANY, L.L.C.

AGENDA: 11/16/99 - REGULAR AGENDA - DECISION PRIOR TO HEARING - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: PETITION FOR CONSIDERATION BY FULL COMMISSION TO BE DECIDED WITHIN 15 DAYS OF FILING; EMERGENCY RULE WAIVER PETITION DEEMED APPROVED IF NOT GRANTED OR DENIED WITHIN 30 DAYS OF RECEIPT

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\991462_1.RCM

CASE BACKGROUND

On September 24, 1999, Okeechobee Generating Company, L.L.C. (OGC), filed a Petition for Determination of Need for an Electrical Power Plant. OGC proposes to construct a 550 megawatt (MW) natural gas-fired, combined cycle electrical power plant in Okeechobee County, Florida, to commence commercial operation in April 2003. An administrative hearing on OGC's petition is set for December 6-8, 1999.

By Order No. PSC-99-2153-PCO-EU, issued November 4, 1999, Florida Power & Light Company (FPL), Florida Power Corporation (FPC), Tampa Electric Company (TECO), and the Legal Environmental Assistance Foundation, Inc. (LEAF) were granted leave to intervene in this docket. FPL and FPC have filed several petitions and

motions concerning procedural aspects of this case. This recommendation addresses the procedural issues raised by FPL and FPC.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant the petitions of Florida Power & Light Company and Florida Power Corporation to have this proceeding assigned to be heard and determined by the full Commission?

RECOMMENDATION: No. Granting the petitions to assign this proceeding to the full Commission would create the potential for a tie vote, because there are currently only four sitting Commissioners.

STAFF ANALYSIS: Section 350.01(6), Florida Statutes, provides:

> A majority of the commissioners may determine that the full Commission shall sit in any proceeding. The public counsel or a person regulated by the Public Service Commission and substantially affected by a proceeding may file a petition that the proceeding be assigned to the full commission. Within 15 days of receipt by the commission of any petition or application, the full Commission shall dispose of such petition by majority vote and render a written decision thereon prior to assignment of less than the full commission to a proceeding. In disposing of such petition, the commission shall consider the overall general public interest and impact of the pending proceeding, including but not limited to the following criteria: the magnitude of a rate filing, including the number of customers affected and the total revenues requested; the services rendered to the affected public; the urgency of the requested action; the needs of the consuming public and the utility; value of service involved; the effect on consumer relations, regulatory policies, conservation, economy, competition, public health, and safety of the area involved. If the petition is denied, the commission shall set forth the grounds for denial.

Currently, a panel of three Commissioners is assigned to hear this case. On October 21, 1999, FPL filed a petition, pursuant to Section 350.01(6), Florida Statutes, to have this proceeding assigned to the full Commission. In support of its petition, FPL asserts that this proceeding will address important issues regarding regulatory policy and will have impact the overall public interest.

On October 25, 1999, FPC filed its petition to have this proceeding assigned to the full Commission. In support of its petition, FPC argues that this proceeding raises issues of public importance, will have a potential impact on Florida's regulated utilities and on regulatory policy, and raises issues that have been and are being considered by the full Commission in other dockets. FPC points out that the Commission determined similar issues in Docket No. 981042-EU ("Duke New Smyrna" or "Duke") by a divided vote and contends that this case presents the occasion for an extension of the Duke New Smyrna decision because OGC has no contract in place with a retail utility for any of the proposed plant's capacity. FPC also asserts that OGC's petition calls upon the Commission to pre-judge issues currently being considered in Docket No. 981890-EI ("Reserve Margin docket"), such as whether uncommitted merchant capacity should be counted toward reserve margins, whether utilities may rely upon merchant plants for reliability purposes, whether reserve margins for Peninsular Florida are constrained, and whether the Commission should adopt a 20% reserve margin planning criterion for Peninsular Florida. FPC contends that because the full Commission is participating in the Reserve Margin docket, it should participate in this proceeding as well so that it will have the opportunity to evaluate the cross-impacts of the policy issues raised in these dockets and to consider related procedural issues. FPC asserts that having less than the full Commission consider this docket may lead to results inconsistent with the results of the Reserve Margin docket.

On October 28, 1999, OGC filed its response and memorandum of law in opposition to FPL's petition. First, OGC asserts that the assignment of this docket to a panel of three Commissioners is consistent with the Commission's precedent in past need determination dockets. OGC points out that only two of the last six need determination proceedings before the Commission have been assigned to the full Commission. Second, OGC notes that the assignment of this docket to a panel of three Commissioners is expressly authorized by Section 350.01(5), Florida Statutes, which authorizes the Commission's Chairman to distribute workload and expedite the Commission's calendar by assigning hearings to two or more Commissioners. Third, OGC argues that FPL does not state a

legally sufficient basis for assigning this proceeding to the full Commission, because FPL has not identified in any detail how this proceeding will impact the overall general public interest or effect regulatory policies. OGC asserts that the Commission clearly stated its regulatory policy regarding merchant plants in the Duke New Smyrna case and determined that the proposed Duke New Smyrna merchant plant was in the public interest. Finally, OGC contends that the relief requested by FPL is unavailable and is against public policy. OGC asserts that assignment of the case to the full Commission is not possible, because there are currently only four sitting Commissioners and there will not be a full, five-person Commission available until after the date for which this proceeding is set for hearing. Noting the Legislature's preference for collegial bodies to have an odd number of members, OGC asserts that empowering a four-member deliberative body is against the public interest because it creates the possibility of a tie vote.

On November 3, 1999, OGC filed its response and memorandum of law in opposition to FPC's petition. In addition to the arguments raised in its response to FPL's more brief petition, OGC addresses the arguments unique to FPC's petition. OGC asserts that FPC, in its petition, never explains how the public will be affected by OGC's need determination petition, but explains only how FPC will be affected. Accordingly, OGC asserts, FPC's petition does not state a legally sufficient basis for assigning this proceeding to the full Commission.

OGC again contends that in the Duke New Smyrna case, the Commission clearly articulated its regulatory policy regarding merchant plants and determined that the proposed Duke New Smyrna merchant plant was in the public interest. As to the argument that OGC's need determination petition represents an extension of the Duke New Smyrna decision to merchant plants that have no contract with Florida retail utilities, OGC points out that the Commission held in that case that Duke New Smyrna was, individually, a proper applicant for a need determination. Thus, according to OGC, a decision on its current petition will not extend the Commission's Duke New Smyrna decision.

OGC also contends that there are several flaws in FPC's argument that consideration of OGC's petition will call upon the Commission to pre-judge issues currently before the Commission in the Reserve Margin docket. First, OGC notes that Section 350.01(6), Florida Statutes, makes no provision for consideration of whether issues raised in one docket are being considered in other dockets. Second, OGC asserts that its petition does not require the Commission to pre-judge issues in the Reserve Margin

docket. According to OGC, constrained Florida reserve margins are just one factor that indicates a need for the proposed plant, and OGC's petition alleges several other factors that indicate a need for the project. OGC further asserts that the Commission can consider Florida's constrained reserve margins in this proceeding without pre-judging any of the issues in the Reserve Margin docket, as it did in the Duke New Smyrna case.

Between both FPL and FPC's petitions, only one of the factors listed in Section 350.01(6), Florida Statutes, is discussed: the effect of this proceeding on regulatory policies. While staff recognizes that OGC's petition raises issues of great concern to FPL and FPC, neither FPL nor FPC provides a valid reason to believe that this case will require the Commission to make any new regulatory policy concerning merchant plants. In the Duke New Smyrna case, the Commission, however divided, determined that Duke New Smyrna was, individually, a proper applicant for a determination of need. Thus, contrary to FPC's assertion, OGC's petition does not require the Commission to extend its decision in the Duke New Smyrna case. While OGC's need determination petition may raise issues unique to the merits of the proposed plant, it is no different in that manner than any other need determination proceeding.

Further, staff believes that the Commission, in deciding OGC's need determination petition, will not be required to pre-judge any policy issues raised in the Reserve Margin docket. As OGC indicates, its petition clearly alleges factors beyond constrained reserve margins to support the need for its proposed plant, such as economic need and environmental benefits. Just as the Commission did not pre-judge Reserve Margin issues in the Duke New Smyrna case, it will not be required to do so in this case.

Finally, staff believes the Commission should be concerned by the fact that assigning this proceeding to the "full" Commission means assigning it to a four-Commissioner panel and creating the potential for a tie vote. If a full, five-member Commission was available to hear and decide this case, staff would be less hesitant to recommend assignment to the full Commission. Given the present circumstances, however, staff believes the Chairman's decision to assign this case to a three-Commissioner panel is entirely appropriate.

For these reasons, the Commission should deny FPL and FPC's petitions to have this proceeding assigned to be heard and decided by the full Commission.

ISSUE 2: Should the Commission grant Florida Power & Light Company's motion for leave to file a memorandum in reply to Okeechobee Generating Company, L.L.C.'s memorandum in opposition to Florida Power & Light Company's motion to dismiss?

RECOMMENDATION: No. The Uniform Rules of Procedure do not provide for the filing of a reply to a response, and Florida Power & Light Company has not shown good cause why it should be permitted to make such a filing.

STAFF ANALYSIS: On October 8, 1999, FPL filed a motion to dismiss OGC's need determination petition. On October 15, 1999, OGC filed its memorandum of law in opposition to FPL's motion to dismiss ("OGC's response memorandum"). On October 21, 1999, FPL filed a motion for leave to file a memorandum of law in reply to OGC's memorandum of law in opposition to FPL's motion to dismiss ("FPL's motion for leave"). Along with the motion for leave, FPL filed its memorandum of law in reply to OGC's memorandum ("FPL's reply memorandum"). On October 28, 1999, OGC filed a response and memorandum of law in opposition to FPL's motion for leave, along with a motion to strike FPL's memorandum ("OGC's response and motion to strike"). Finally, on October 29, 1999, FPL filed a response to OGC's motion to strike.

In its motion for leave, FPL contends that its reply to OGC's memorandum is necessary because OGC's response memorandum goes beyond responding to FPL's motion to dismiss by asking for affirmative relief and presenting new allegations. According to FPL, Rule 28-106.204(1), Florida Administrative Code, permits requests for affirmative relief only by motion, not through a response to a motion. FPL asserts that the affirmative relief sought by OGC is in the nature of a waiver of Rules 25-22.071 and 25-22.082, Florida Administrative Code. Moreover, FPL asserts, OGC seeks this rule waiver outside of the applicable variance and waiver provisions of the Administrative Procedure Act and the Uniform Rules of Administrative Procedure.

In its response and motion to strike, OGC argues that FPL's motion for leave should be denied because FPL's reply memorandum is not authorized by the Uniform Rules of Procedure. OGC points out that the Commission has interpreted Rule 28-106.204, Florida Administrative Code, as not allowing replies to responses. OGC also points out that the Commission consistently interpreted its previous rule on motion practice, Rule 25-22.037(2), Florida Administrative Code, as not allowing replies to responses. OGC further asserts that it is not seeking a waiver of any rule through

its response memorandum. For these reasons, OGC requests that the Commission strike FPL's reply memorandum.

In its response to OGC's motion to strike, FPL again asserts that OGC improperly used its response memorandum to present a new basis for relief, stating that OGC's requested "construction" of the Commission's rules is a request for affirmative relief that should have been made in OGC's need determination petition. Therefore, according to FPL, it should be permitted the opportunity to file a reply to OGC's response memorandum.

Staff disagrees with FPL's characterization of OGC's response memorandum as it concerns Rule 25-22.082, Florida Administrative Code. FPL, in its motion to dismiss, argues that OGC's need determination petition should be dismissed because OGC failed to comply with Rule 25-22.082, Florida Administrative Code, which requires each investor-owned utility to evaluate supply-side alternatives to its next planned generating unit by issuing a request for proposals (RFP) prior to filing a need determination petition. In its response memorandum, OGC responds to FPL's argument by asserting that the rule was not intended to apply to merchant utilities like OGC and should not apply to such utilities. FPL asserts that OGC's memorandum goes beyond responding to FPL's motion to dismiss and amounts to an improper request for affirmative relief in the form of a rule waiver.

Staff does not view OGC's memorandum as a request for affirmative relief. Rather, OGC's memorandum merely explains why it did not comply with the RFP requirements of Rule 25-22.082, Florida Administrative Code. Clearly, OGC is treading on the ground laid in the Commission's Duke New Smyrna decision which stated that a merchant utility's role in the RFP process is as "another generation supply alternative for existing retail utilities" to consider in seeking out the most cost-effective supply-side alternative available. To the extent there is discussion concerning the applicability of the rule to OGC, it can be properly heard in discussion on FPL's motion to strike.

Staff also disagrees with FPL's characterization of OGC's memorandum as it concerns Rule 25-22.071, Florida Administrative Code. FPL, in its motion to dismiss, argues that OGC's need determination petition should be dismissed because OGC failed to comply with Rule 25-22.071, Florida Administrative Code, concerning the Commission's ten-year site plan filing requirements. In its response memorandum, OGC responds to FPL's argument by asserting: (1) OGC is not required by Rule 25-22.081, Florida Administrative Code, to have filed a ten-year site plan prior to filing its need

determination petition or to allege in its petition that it has filed a ten-year site plan; and (2) OGC is not required by Rule 25-22.071, Florida Administrative Code, file a ten-year site plan prior to filing its petition. FPL asserts that OGC's memorandum goes beyond responding to FPL's motion to dismiss and amounts to an improper request for affirmative relief in the form of a rule waiver.

Staff believes that OGC, in its response memorandum on this point, clearly does not request affirmative relief. Instead, OGC simply states that the Commission's rules, by their own terms, do not require OGC to have filed a ten-year site plan prior to filing its need determination petition. To the extent there is discussion concerning the applicability of the rule to OGC, it can be properly heard in discussion on FPL's motion to dismiss.

For these reasons, FPL's motion for leave should be denied. Accordingly, it is unnecessary for the Commission to rule on OGC's motion to strike FPL's reply memorandum.

ISSUE 3: Should the Commission grant Florida Power & Light Company's request for oral argument on its motion to dismiss the petition of Okeechobee Generating Company, L.L.C., for determination of need for an electrical power plant?

RECOMMENDATION: Yes. The Commission should permit oral argument on Florida Power & Light Company's motion to dismiss, limited to an amount of time to be set at the Commission's discretion.

STAFF ANALYSIS: Along with its motion to dismiss, FPL filed a request for oral argument on its motion to dismiss. Because FPL's motion to dismiss is a pre-hearing matter being considered at an Agenda Conference, the Commission has discretion to permit oral argument on the motion. Staff recommends that the Commission grant FPL's request for oral argument, limited to an amount of time to be set at the Commission's discretion.

ISSUE 4: Should the Commission grant Florida Power & Light Company's motion to dismiss the petition of Okeechobee Generating Company, L.L.C., for determination of need for an electrical power plant?

RECOMMENDATION: No. The petition of Okeechobee Generating Company, L.L.C., 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.

STAFF ANALYSIS: 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). 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).

By motion filed October 8, 1999, FPL argues that OGC's need determination petition should be dismissed because it fails to make adequate allegations in five specific areas. First, FPL asserts that OGC's petition fails to allege any facts necessary to support the alleged legal conclusion that OGC is an "electric utility." Second, FPL asserts that OGC's petition fails to allege that OGC has complied with Rule 25-22.082, Florida Administrative Code. Third, FPL asserts that OGC's petition fails to allege that OGC has complied with Rule 25-22.071, Florida Administrative Code. Fourth, FPL asserts that OGC, by the terms of its petition is not an exempt wholesale generator (EWG) as to the proposed plant for which it seeks a determination of need. Finally, FPL asserts OGC's petition fails to comply with the Rule 28-106.201, Florida Administrative Code.

In its decision in the Duke New Smyrna case, the Commission stated:

> 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 this case, OGC's petition similarly addresses the five criteria of Section 403.519, Florida Statutes, and meets all applicable requirements of Rule 25-22.081, Florida Administrative Code. Thus, on its face, OGC's petition withstands the challenges of FPL's motion to dismiss. Further, FPL's specific arguments, as discussed below, fail to demonstrate that OGC's petition does not state a cause of action upon which relief can be granted. In sum, taking all the well-pleaded allegations of OGC's petition as true, a cause of action has been adequately alleged to justify denial of FPL's motion to dismiss. T.B. Fletcher v. Williams, 153 So.2d 759, 764 (Fla. 1st DCA 1963).

I. Sufficiency of Facts Alleged to Establish OGC's Status as an Electric Utility

FPL argues that OGC's petition should be dismissed because OGC states a legal conclusion that it is an "electric utility" under Section 366.02(2), Florida Statutes, (and therefore, presumably an applicant under the Siting Act) without alleging any facts to support this legal conclusion. FPL asserts that OGC has not alleged that it owns, maintains, or operates any electric facility within the state, and thus has not pled sufficient facts to support the legal conclusion that OGC is an "electric utility" under the definition in Section 366.02(2), Florida Statutes. FPL also asserts that OGC has not alleged that it is engaged in or authorized to engage in the business of generating, transmitting, or distributing electric energy, and thus has not pled sufficient facts to support the legal conclusion that OGC is an "electric utility" under Section 403.503(13), Florida Statutes. Moreover, FPL contends that OGC cannot make such a statement because it is not currently engaged in or authorized to engage in this business.

FPL states that if, as a prerequisite to maintaining a proceeding, a petitioner is required to hold a particular status - an "electric utility" in this case - the petitioner must allege facts demonstrating its status. FPL contends that OGC, by failing to allege such facts, fails to state a cause of action and fails to properly invoke the Commission's jurisdiction, and thus must be dismissed under Rule 28-106.201(4).

In its response memorandum, OGC asserts that it has alleged facts in its petition sufficient to establish itself as an "electric utility" for purposes of invoking the Commission's jurisdiction under the Florida Electrical Power Plant Siting Act ("Siting Act"). OGC suggests two ways in which it can be considered a "regulated electric utility" and thus an "applicant" under the Siting Act - as an "electric utility" under Section 366.02(2), Florida Statutes, and as a "public utility" subject to FERC regulation under the Federal Power Act. OGC argues that it has alleged sufficient facts to establish both.

First, OGC notes that it has alleged in its petition that it "will own the Project and will market the Project's capacity and associated energy to other utilities and power marketers under negotiated arrangements" at wholesale pursuant to OGC's FERC-approved tariff. Thus, according to OGC, it has alleged that it will own a generation system within Florida, and no more is required as a matter of pleading. Second, OGC notes that its petition includes a statement that OGC will sell electric capacity and energy at wholesale and that the petition includes as an exhibit FERC's order approving OGC's tariff authorizing such sales. Thus, according to OGC, it has demonstrated its authority to engage in the business of generating and selling electricity, and no more is required as a matter of pleading. OGC further asserts that FERC's order is prima facie evidence of OGC's status as a FERC-regulated electric company and its authority to engage in that business.

As stated above, when disposing of a motion to dismiss, the tribunal must consider only the petition, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). Based on this standard, staff believes that OGC's petition alleges sufficient facts to support its statement that it is an "electric utility."

II. Compliance with Rule 25-22.082, Florida Administrative Code, as a Precondition to Seeking a Need Determination

FPL argues that OGC's petition should be dismissed because OGC fails to allege that it has complied with the requirements of Rule 25-22.082, Florida Administrative Code. The rule requires each investor-owned electric utility to evaluate supply-side alternatives to its next planned generating unit by issuing an RFP prior to filing a petition for determination of need. FPL contends that if OGC is an "electric utility" as OGC asserts, then OGC is required to comply with the rule prior to filing a need determination petition. FPL asserts that OGC has not issued an RFP pursuant to the rule and has not alleged that it has issued such an RFP. Therefore, according to FPL, OGC's petition should be dismissed.

In its response memorandum, OGC asserts that FPL's argument is misplaced because it fails to comprehend the fundamental purpose of the rule. OGC states that the purpose of the rule is to protect captive ratepayers from uneconomic decisions by their monopoly retail-serving utilities, which have the ability to bind their ratepayers to pay the costs of power supply resources. Accordingly, OGC argues, the rule was not intended to include merchant wholesale utilities, like OGC, which have no captive retail ratepayers from whom they may demand cost recovery, and it makes no sense to apply the rule to OGC. Citing the Commission's Duke New Smyrna decision, OGC asserts that the Commission envisioned the role of a merchant wholesale utility in the RFP process as another generation supply alternative for existing retail utilities to consider in seeking out the most cost-effective supply-side alternative available. Thus, according to OGC, it can only contribute to the fundamental purpose of the rule.

Staff agrees with OGC's arguments. The Commission's Duke New Smyrna decision makes clear its position on the role of merchant wholesale utilities in the RFP process described in Rule 25-22.082, Florida Administrative Code. The Commission stated in its decision:

> 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 [Siting Act], 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 would 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.

(Emphasis supplied). OGC's position is supported by the Commission's Duke New Smyrna decision, which implies that the requirements of the bidding rule are not applicable to merchant wholesale utilities. Further, staff finds instructive the maxim of statutory construction which provides that the law should not be interpreted in a manner that creates an absurd result. Requiring OGC to comply with Rule 25-22.082, Florida Administrative Code, would clearly lead to an absurd result.

III. Compliance with Rule 25-22.071, Florida Administrative Code, as a Precondition to Seeking a Need Determination

FPL argues that OGC's petition should be dismissed because OGC has not complied with Rule 25-22.071, Florida Administrative Code. FPL contends that if OGC is an "electric utility" as OGC asserts, then OGC is required, pursuant to the rule, to file a ten-year site plan with the Commission at least three years prior to application for site certification. FPL asserts that OGC has not filed a ten-year site plan in compliance with this rule, and, therefore, OGC's petition should be dismissed.

In its response memorandum, OGC asserts that it is not required (1) to have alleged compliance with this rule, nor (2) to have filed a ten-year site plan prior to filing its need determination petition. First, OGC asserts out that Rule 25-22.081, Florida Administrative Code, which governs the contents of need determination petition, does not contain any requirement that the applicant either have filed a ten-year site plan or that it allege that it has done so. Second, OGC asserts that the rule does not require OGC to file a ten-year site plan in the time frame suggested by FPL and does not require OGC to file a ten-year site plan prior to filing its need determination petition. Alternatively, OGC suggests that it is in substantial compliance with the rule's requirements because the information contained in OGC's need determination filing includes substantially all of the information that would be included in a ten-year site plan.

Staff believes that Rule 25-22.071, Florida Administrative Code, clearly does not require OGC to file a ten-year site plan prior to filing its need determination petition. Subsection (1)(b) of the rule provides:

> Any electric utility . . . that elects to construct an additional generating facility exceeding 75 mW gross generating capacity shall prepare a ten-year site plan, [to be submitted] in the year the decision to construct is made or at least three years prior to application for site certification, and every year thereafter until the facility becomes fully operational.

OGC points out that it had not made a decision to construct the project as of the April 1 filing date specified in subsection (1)(a) of the rule. Accordingly, OGC was not required to file a ten-year site plan pursuant to the rule prior to filing its need determination petition. Further, OGC is not required by any Commission rule to allege in its petition that it has satisfied the requirements of Rule 25-22.071, Florida Administrative Code. Staff notes that OGC will be required, pursuant to the rule, to file a ten-year site plan on April 1, 2000, which OGC has stated it intends to do.

IV. OGC's EWG Status as to the Proposed Plant

FPL argues that OGC's petition should be dismissed because it does not have EWG status for the amount of capacity of its proposed power plant and, therefore, cannot be "authorized to engage in the business of generating, transmitting, or distributing electric energy" as required by Section 403.503(13), Florida Statutes.

In its response memorandum, OGC asserts that FPL's assertion is irrelevant because OGC's status as an EWG has nothing to do with its status as a public utility under the Federal Power Act or as an electric utility under Chapter 366, Florida Statutes. Accordingly, OGC asserts, its status as an EWG has nothing to do with its status as a regulated electric company and an applicant under the Siting Act. OGC states that its EWG status only exempts it from regulation by the Securities Exchange Commission pursuant to the Public Utility Holding Company Act of 1935. OGC further argues that it is fully authorized to engage in the business of generating and selling electricity in Florida by virtue of FERC's approval of OGC's tariff for wholesale power sales at negotiated rates.

OGC is correct. The question of whether OGC is authorized to engage in the business of generating and selling electricity in Florida is not at all dependent upon OGC's status as an EWG. In any event, OGC has clearly indicated in its petition that it is currently seeking approval for EWG status as to the entire capacity of the proposed plant.

V. Compliance with Rule 28-106.201, Florida Administrative Code

FPL argues that OGC's petition should be dismissed because OGC has not complied with the pleading requirements of Rule 28-106.201, Florida Administrative Code. Specifically, FPL asserts that OGC's petition does not contain a statement of disputed issues of material fact or a statement that the petitioner does not believe there are disputed issues of material fact, contrary to the requirements of subsection (2)(d) of the rule.

In its response memorandum, OGC asserts that its petition clearly, specifically, and concisely addresses all of the issues identified in Section 403.519, Florida Statutes, that are the normal disputed issues of material fact in a need determination proceeding: (1) the need for system reliability and integrity; (2) the need for adequate electricity at a reasonable cost; (3) cost-effectiveness; and (4) conservation issues. OGC states its petition substantially complies with the requirements of Rule 28-106.201, Florida Administrative Code, and that its petition should not be dismissed merely because it has not separately labeled its disputed issues of material fact as such. OGC further asserts that its petition fully complies with all applicable pleading requirements set forth in Rule 25-22.081, Florida Administrative Code.

Staff agrees whole-heartedly with OGC. FPL's suggestion that OGC's petition should be dismissed simply because disputed issues of material fact were not separately labeled as such is an extreme example of elevating form over substance. Rule 28-106.201(4), Florida Administrative Code, provides for dismissal of a petition that is not in substantial compliance with the pleading requirements of the rule. At a minimum, OGC's petition is in substantial compliance with the rule's pleading requirements.

ISSUE 5: Should the Commission grant Florida Power Corporation's motion to dismiss the petition of Okeechobee Generating Company, L.L.C., for determination of need for an electrical power plant?

RECOMMENDATION: No. Florida Power Corporation's motion to dismiss is untimely. Even if the motion is viewed as timely, the petition of Okeechobee Generating Company, L.L.C., 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.

STAFF ANALYSIS: On October 15, 1999, FPC filed a motion to dismiss in this docket. FPC incorporates the arguments made by FPL in its motion to dismiss filed October 8, 1999. FPC further asserts as ground for its motion to dismiss that "Okeechobee Generating Company (OGC) is not a proper 'applicant'" under either Section 403.519, Florida Statutes, or the Florida Electrical Power Plant Siting Act (the 'Siting Act'), Sections 403.501-518, Florida Statutes.

I. Standard of Review for Motions to Dismiss

Rule 28-106.204(2), Florida Administrative Code, requires that motions to dismiss a petition shall be filed no later than 20 days after service of the petition unless otherwise provided by law. In this case, FPC filed its motion to dismiss more than 20 days after the petition was served. Staff knows of no law which would enlarge the time for filing a motion to dismiss under these circumstances. Staff believes that, consistent with other Commission orders on the issue, this motion should be denied as being untimely. Staff further believes that, even if the motion to dismiss were not denied as untimely, it fails to demonstrate that the petition alleges insufficient facts to state a cause of action.

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). 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)

As stated in the analysis on Issue 4 above, the substantive law governing this docket is Section 403.519, Florida Statutes. OGC's petition states a cause of action upon which relief can be granted because it alleges all of the required elements. The 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 petition meets all applicable requirements of Rule 25-22.081, Florida Administrative Code.

In sum, on its face, the petition withstands the challenges of FPC's motion to dismiss. It is not necessary for the petitioner 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 petition as true, a cause of action has been adequately alleged to justify denial of the FPC's motion to dismiss. Id.

In addition to the foregoing analysis, staff also believes that the motion to dismiss should be denied on each of FPC's specific arguments.

II. The Nassau Cases

FPC argues that the Nassau cases[1] are controlling in this instance. FPC contends that, pursuant to Nassau Power Corp. v. Deason, 641 So.2d 396 (1994), in order to be a proper applicant under Section 403.519, Florida Statutes, and Sections 403.501-518, Florida Statutes, a petitioner must "have an obligation to serve retail customers in Florida." Because OGC is proposing to build and operate a merchant plant without a power sales agreement in place with another utility, FPC asserts that it is, "as a matter of law . . . not in a position to file a petition for a determination of need."

OGC states that FPC is trying to resurrect its arguments that were rejected by the Commission in Duke by continuing to assert that the Nassau II decision prevents a merchant plant developer

from being an applicant under Section 403.519, Florida Statutes, without first entering into a power sales agreement with a Florida retail utility. OGC asserts that this position was expressly denied by the Commission in the Duke order:

> 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. (at page 28)

OGC contends that it, as a merchant plant developer, does not, therefore, have to execute a power sales agreement in order to be an applicant under Section 403.519, Florida Statutes. OGC relies upon the Commission's Duke decision for the proposition that as long as captive retail rate payers are not being "forced to pay for OGC's project and no retail utilities are being forced to purchase power or capacity from OGC's Project" there is no requirement for a power sales agreement in order to be a proper applicant.

Staff acknowledges that, divorced from the facts giving rise to the litigation, the holdings in the Nassau cases could appear to be persuasive in the instant docket. However those decisions must be considered on their facts and the facts are quite different. The differences are captive ratepayers and the specter of a retail utility being required to purchase unneeded electricity. The Nassau cases addressed need and standing of Qualifying Facilities (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 the Commission's decision in Order No. 22341, Docket No. 890004-EU, issued Dec. 26, 1989. In that order, the Commission reversed the practice of presuming that a particular cogenerator's power was needed. Instead of presuming need, the Commission 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. The Commission ruled that if a utility has to buy the power, that utility's needs must first be evaluated. However, the Commission 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 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 plant because OGC is not seeking to require retail utilities to purchase the proposed plant's 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.

III. Joint Power Agency Status

FPC also contends that according to the Commission's decision in Order No. 99-0535-FOF-EI, issued on March 22, 1999 in Docket No. 981042-EI (Duke), OGC cannot be a proper applicant because the Commission tied merchant plant need determinations to situations where there was a "joint power agency" within the meaning of the Siting Act.

OGC argues that FPC's interpretation of the Commission's Duke decision would improperly limit the application of that decision to those instances where there was a "joint power agency" for the production and ultimate retail sale of at least some portion of the electricity to be generated. OGC quotes from the Duke order to show that FPC's interpretation of that order is too constricted:

> 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. (at page 17)

OGC summarizes by declaring "FPC's attempt to so limit the holding of the [sic] Duke New Smyrna represents a blatant mischaracterization of the Commission's holding in Duke New Smyrna and must be rejected."

Staff believes that FPC incorrectly reads the Duke decision. In the transcript of the Duke special Agenda, the arguments concerning the nature of the Duke project and the propriety of having a pure merchant plant come in for a determination of need are addressed between pages 72 and 90. Ultimately the Commission

voted 3-2 to allow Duke New Smyrna to proceed to the determination portion of the proceedings as a proper applicant. Given the discussion in the transcript, the Commission would have permitted Duke to proceed even without New Smyrna Beach as a coapplicant. (See also, Duke transcript at 172-183). The Duke order reflects this conclusion at page 28:

> 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.

It appears that FPC's arguments are not supported by Commission precedent in this instance and should, staff believes, be rejected.

IV. Definition of an Electric Utility and an Applicant

A. FPC's Arguments

FPC further asserts that OGC does not meet the criteria for a electric utility pursuant to Section 366.02(2), Florida Statutes, as OGC argues in its petition. FPC contends that the definition found in Section 366.02(2), Florida Statutes, precludes pure merchant plants from being electric utilities because Section 366.02(2), Florida Statutes, is limited to:

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

FPC contends that OGC's assertion that it is an electric utility under Section 366.02(2), Florida Statutes, would force the Commission in granting a determination of need to preapprove a status that OGC does not yet have, that of an electric utility which is currently engaged in one of the three operative activities listed.

B. OGC's Response

OGC observes that this issue was "fully briefed" by the parties in Docket No. 981042-EM. The issue was resolved in the Commission's Duke decision. OGC summarizes Section 403.519, Florida Statutes, as follows:

> 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.(Emphasis supplied.)

OGC further quotes Section 403.503(4), Florida Statutes, for the definition of applicant:

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

OGC further interprets Section 403.503(13), Florida Statutes, to define an 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. (Emphasis supplied.)

Thus, OGC understands a "regulated electric company" to be an "applicant" specifically authorized under the Siting Act to seek a determination of need from the Commission.

OGC asserts that it is a proper applicant under the Siting Act because it is a "regulated electric company." First, as alleged in OGC's Petition, OGC is regulated by the Federal Energy Regulatory Commission ("FERC") as a "public utility" under the Federal Power Act, 16 U.S.C.S. § 824(b)(1)(1994). As a "public utility" selling power at wholesale in interstate commerce, OGC is subject to the regulatory jurisdiction of FERC, including, but not limited to, the FERC's jurisdiction over rates pursuant to the Federal Power Act.

OGC further states that it is a "regulated electric company" because it is an "electric utility" subject to the Commission's regulatory authority and jurisdiction under the plain language of

Chapter 366, Florida Statutes. OGC quotes Section 366.02(2), Florida Statutes, as defining "electric utility" to mean:

> 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.

OGC asserts that it is investor-owned, in that it is wholly-owned by PG&E Generating, a publicly traded Delaware Corporation. When the Project becomes operational, OGC contends that it will own, maintain, and operate an electric generation system within Florida. Thus, by a straightforward, "plain language" reading of the statutory language, OGC contends that it is an "electric utility."

As an electric utility under Chapter 366, OGC maintains that it is subject to the Commission's Grid Bill authority, which is found at Sections 366.04(2)&(5) and 366.05(7)&(8), Florida Statutes. OGC argues that these provisions give the Commission "jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida . . . ." Section 366.04(5), Florida Statutes. OGC also asserts that it is subject to the Commission's jurisdiction under Section 366.055, Florida Statutes, which gives the Commission authority over the "[e]nergy reserves of all utilities in the Florida energy grid . . . to ensure that grid reliability and integrity are maintained."

OGC dismisses FPC's argument that to be an "electric utility" under Section 366.02(2), Florida Statutes, OGC must now own, maintain, or operate an electric generation, distribution or transmission system in Florida. However, OGC points out that this same argument was made and rejected in Duke New Smyrna. OGC maintains that it is clear that the Commission will have regulatory authority over OGC under Chapter 366, Florida Statutes. OGC contends that this is consistent with the Commission's decision in Duke:

> Duke is an "electric utility" pursuant to, Chapter 366, and is, therefore, subject to our Grid Bill authority. (at page 20)

In reaching this conclusion, the Commission correctly and summarily rejected FPC's "verb tense" argument by stating:

> The Project will be generating electricity thus meeting the functional requirements [of Section 366.02(2), Florida Statutes]. (at page 20)

FPC's flawed construction of Section 366.02(2), Florida Statutes, is in essence an attempt to create an improper barrier to the entry of merchant plant developers into the Florida market. Under FPC's construction of 366.02(2), FLORIDA STATUTES, only entities that currently own facilities in Florida can build new generation facilities in Florida. This is an illogical result that would ultimately benefit only incumbent utilities such as FPC and harms Florida's ratepayers.

C. Staff's Analysis

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....

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.

OGC is both "regulated" and an "electric company" and therefore clearly meets the statutory definition of applicant. OGC is a public utility pursuant to the Federal Power Act, 16 U.S.C. Sec 824(b)(1) (FPA). As a public utility, OGC is regulated by the Federal Energy Regulatory Commission (FERC).

In addition to being a regulated electric company, OGC 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. OGC proposes to engage in generation, and to a limited extent, transmission, of electricity. It therefore complies with the functional requirement of the statute.

V. FERC Jurisdiction Over Rates

FPC finally argues that because OGC asserts that it is an electric utility under Section 366.02(2), Florida Statutes, it must have its rates regulated by the Commission. However, FPC points out that OGC states exactly the opposite in its petition, asserting instead that its rate structure will be determined solely by the FERC.

OGC disputes FPC's assertion that OGC cannot be a regulated electric utility because the Commission will not prescribe a rate structure for OGC pursuant to Section 366.04(2)(b), Florida Statutes. OGC contends that as a federally-regulated wholesale public utility under the Federal Power Act with FERC approved market-based rate authority, OGC's rates and rate structure are subject to FERC's regulatory authority under the Federal Power Act. Thus, OGC maintains, just like other entities that make wholesale sales of power in Florida, FERC will regulate OGC's wholesale power sales. OGC asserts that the Commission will not prescribe OGC's wholesale rates because it is unnecessary to do so. OGC maintains that it is already subject to the FERC's regulatory authority. OGC comments that "the Commission does not prescribe wholesale rates for utilities in Florida but prescribes only retail rates and rate structure for such utilities is not a novel concept." OGC summarizes by observing that:

> Under FPC's tortured argument, the Commission's failure to prescribe rates for FPC's own wholesale power sales would mean that FPC is not an "electric utility" pursuant to Section 366.02(2), Florida Statutes, an obviously absurd and incorrect result.

Staff believes that for all purposes except rate making, the Commission will retain regulatory authority over OGC. In the instance of rate making, the Commission does not maintain rate making jurisdiction over any wholesale power sales in this state. The Commission's rate making authority is limited to retail rates. Wholesale rate making is entirely within the jurisdiction of the FERC. Given the analysis in Part III above, staff recommends that FPC's argument concerning rate regulation be rejected as immaterial to wholesale rates which are at issue in this docket.

ISSUE 6: Should the Commission grant Florida Power Corporation's emergency petition for waiver of Rule 25-22.080, Florida Administrative Code, and request for stay of this proceeding?

RECOMMENDATION: No. Florida Power Corporation has not satisfied the statutory or rule criteria for its requested waiver. FPC has alleged no separate legal grounds under which the Commission may grant a stay of this proceeding absent the requested rule waiver. Accordingly, FPC's request for stay should be denied.

STAFF ANALYSIS: On October 15, 1999, FPC filed an emergency petition for waiver of the Commission's scheduling requirements in Rule 25-22.080(2), Florida Administrative Code, and request for stay of this proceeding. On October 21, 1999, FPL filed a motion to join in FPC emergency petition for waiver and request for stay. On October 22, 1999, OGC filed its comments and memorandum of law in opposition to FPC's emergency petition for waiver and request for stay.

Section 120.542(2), Florida Statutes (1997), sets forth the criteria which must be satisfied by any regulated person seeking a variance or waiver from agency rules, as follows:

> Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statutes will be or has been achieved by other means by the person and when application of the rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

Further, Rule 28-104.004(2), Florida Administrative Code, sets forth additional criteria which must be satisfied by a person requesting an emergency rule waiver:

> In addition to the other requirements of Section 120.542(5), F.S., and this chapter, the petition shall specify:

(a) The specific facts that make the situation an emergency; and
(b) The specific facts to show that the petitioner will suffer an immediate adverse affect unless the variance or waiver is issued more expeditiously than the time frames provided in Section 120.542, F.S.

Pursuant to Section 120.542(8), Florida Statutes, the Commission must grant or deny a regular petition for rule waiver within 90 days of its filing or the petition will be deemed approve. Pursuant to Rule 28-104.005(1), Florida Administrative Code, this time is cut to 30 days for an emergency petition for rule waiver. In this case, FPC and FPL have agreed to waive the 30 day time limit for two additional days so that the Commission may decide this matter at its November 16, 1999, Agenda Conference.

In its waiver petition, FPC seeks an emergency waiver of that portion of Rule 25-22.080(2), Florida Administrative Code, that requires the Commission to hold a public hearing within 90 days of receipt of a petition for determination of need for an electrical power plant. FPC claims that its requested waiver and stay will help FPC mitigate or avoid prejudice to its substantial interests.

I. Allegations to Support Emergency Treatment

As support for its request for an emergency rule waiver, FPC points out that the scheduled hearing dates for this proceeding will have come and gone if the Commission considers the waiver petition under the typical 90 day time line. Therefore, FPC asserts, it requires immediate relief from the hearing schedule in this docket.

OGC argues that FPC has not alleged any facts to establish the existence of an emergency. OGC asserts that there must be a demonstrated immediate danger to the public health, safety, or welfare for an emergency to exist, and that FPC has not alleged that such an emergency exists.

As stated above, Rule 28-104.004(2)(a), Florida Administrative Code, requires the petitioner for an emergency rule waiver to specify the specific facts that make the situation an emergency. The concept of an "emergency" is characterized throughout the Administrative Procedure Act as an immediate danger to the public health, safety, or welfare. See, e.g., Sections 120.525(3), 120.54(4)(a), 120.569(2)(l), Florida Statutes. In this case, FPC has clearly not alleged facts to support the existence of such an emergency. Thus, staff believes that FPC's waiver petition should

be treated as a non-emergency petition pursuant to Rule 28-104.005(2), Florida Administrative Code. However, as FPC points out, it may be unable to get a Commission ruling on its waiver petition prior to hearing under the typical 90 day time frame for Commission consideration. Therefore, staff recommends that the Commission consider FPL's waiver petition as a non-emergency petition prior to hearing.

II. Allegations of Substantial Hardship

FPC alleges essentially two grounds as a basis for demonstrating that application of the rule would create a substantial hardship to FPC. First, FPC asserts that it, other parties, and the Commission would be forced to suffer an undue hardship by incurring the expense and disruption associated with participating in this proceeding at this time. FPC suggests that this hardship could be avoided by awaiting the outcome of the Florida Supreme Court's decision in the Duke New Smyrna appeal. Second, FPC alleges that expediting this proceeding will not provide adequate time for the parties to participate meaningfully and effectively to protect their substantial interests. In its motion to join in FPC's petition, FPL echoes this second point.

OGC argues that FPC's allegation that it will incur expense and disruption through participation in this proceeding in conclusory and does not state with specificity facts sufficient to show that FPC will suffer a demonstrated economic, technological, legal or other hardship. Further, OGC points out that any party incurs expense and disruption when it actively participates in a need determination hearing, regardless of when it is held, and that expense and disruption does not constitute a substantial hardship. OGC also argues that FPC has not demonstrated that its alleged hardship will be greater than that suffered by any other person who participates in any need determination proceeding. OGC asserts that for an alleged hardship to be substantial, it must be greater in degree than that suffered by any person in the ordinary course of compliance with the rule. OGC asserts that the rule waiver provisions of Section 120.542, Florida Statutes, were no intended to provide relief for mere inconvenience that typically may be encountered in the ordinary course of compliance with a rule.

Staff believes that FPC has not demonstrated that application of the rule would create a substantial hardship to FPC. First, FPC's assertion that it would be forced to suffer an undue hardship by incurring the expense and disruption associated with participating in this proceeding at this time is speculative. Only if the Supreme Court had already overturned the Commission's Duke

New Smyrna decision could FPC fairly claim that proceeding on OGC's petition at this time would require unnecessary expense and disruption that would amount to a substantial hardship. Staff agrees with OGC's statement that any party incurs expense and disruption when it actively participates in a need determination hearing, regardless of when it is held, and that expense and disruption does not constitute a substantial hardship. As OGC points out, FPC has not demonstrated that its alleged hardship will be greater than that suffered by any other person who participates in any need determination proceeding.

Further, staff believes that FPC's allegation that expediting this proceeding will not provide adequate time for the parties to participate meaningfully and effectively to protect their substantial interests does not rise to the level of a substantial hardship. First, this proceeding is not being expedited but conducted pursuant to the time frame set forth in Rule 25-22.080, Florida Administrative Code. FPC has previously participated in need determination proceedings scheduled pursuant to this rule and is well aware of the rule's strict time requirements. Second, as stated above, FPC has not demonstrated that its alleged hardship will be greater than that suffered by any other person who participates in this or any other need determination proceeding.

III. Allegations of Violation of Principles of Fairness

FPC alleges essentially two grounds as a basis for demonstrating that application of the rule would violate principles of fairness. First, FPC alleges that proceeding with this case under the current schedule will require the Commission to pre-judge issues being considered in the Reserve Margin docket. FPC asserts that going forward in this fashion would be fundamentally unfair to FPC and other parties participating in the Reserve Margin docket. Second, FPC alleges that expediting this proceeding will not provide adequate time for the parties to participate meaningfully and effectively to protect their substantial interests.

OGC points out that Section 120.542, Florida Statutes, provides that principles of fairness are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule. OGC argues that FPC has not alleged and cannot allege any specific facts that distinguish its particular circumstances from those of similarly situated persons, i.e., other persons participating in this proceeding.

Staff believes that OGC's analysis is correct. FPC has not alleged any specific facts that distinguish its particular circumstances from those of similarly situated persons, and, therefore, has not demonstrated that application of the rule in this case violates "principles of fairness" as that term is clearly defined in Section 120.542, Florida Statutes. Further, as stated in the analysis on Issue 1 of this recommendation, staff believes that the Commission, in deciding OGC's need determination petition, will not be required to pre-judge any policy issues raised in the Reserve Margin docket.

IV. Allegations on Purpose of the Underlying Statute

FPC argues that the purpose of the applicable statute, Section 403.519, Florida Statutes, will be served by delaying this proceeding until the Supreme Court makes its decision in the Duke New Smyrna appeal. FPC notes that this statute does not impose time limits for rendering a decision on a need determination petition. FPC asserts that the time limits set forth in Rule 25-22.080, Florida Administrative Code, were adopted to implement the Siting Act, which imposes time limits for completion of site certification proceedings rather than need determination proceedings. FPC points out that, unlike the rule, the statutory time constraints in the Siting Act only apply to a need determination when a complete application for site certification has been made. FPC also points out that OGC has not yet commenced a site certification proceeding as states in its petition that it does not intend to do so until June 2000. Accordingly, FPC argues, continuing to final hearing as scheduled in this docket will not serve the purpose of any Florida Statute. FPC contends that OGC cannot credibly claim that it will be prejudiced by the requested delay.

OGC argues that FPC has failed to address the purpose of Section 403.519, Florida Statutes, which does not set forth procedures for need determinations but instead establishes substantive factors for the Commission's consideration in a need determination proceeding. OGC asserts that the purpose of Section 403.519, Florida Statutes, is not served by delaying OGC's need determination and cannot be achieved by other means. OGC asserts that it filed its need determination petition specifically for the purpose of obtaining a need determination from the Commission prior to fully preparing its application for site certification, because an affirmative determination of need is a condition precedent to the site certification hearing. OGC asserts that it would be prejudiced if the requested waiver is granted because it would be required to risk substantial sums of money, contingent on the

Commission's decision on the need determination petition, to prepare its site certification application for filing in June 2000. Finally, OGC asserts that FPC has the burden to demonstrate entitlement to a waiver, but instead has improperly attempted to shift the burden to OGC to prove that OGC will not prejudiced by the requested waiver.

Staff agrees in part with both FPC and OGC. Staff agrees with OGC that FPC carries the burden of demonstrating entitlement to a waiver, and that the alleged lack of prejudice to OGC is not relevant to a determination of whether the purpose of the underlying statute will be achieved under the proposed waiver. However, staff agrees with FPC that the time limits set forth in the rule were adopted to implement the Siting Act. As FPC points out, the statutory time constraints in the Siting Act only apply to a need determination when a complete application for site certification has been made. Staff believes it is clear that the time limits set forth in the Commission's rule were adopted to provide a procedure for the Commission to ensure that its final report to the Department of Environmental Protection is timely filed pursuant to Section 413.507, Florida Statutes. Therefore, staff believes that the purpose of the underlying statute would not be frustrated by FPC's requested waiver. Further, staff believes that the prejudice alleged by OGC - the risk of money spent on a site certification application - amounts to nothing more than the risk faced by any other petitioner for a determination of need. In fact, it is not uncommon for a petitioner to file its site certification application prior to the Commission's disposition of its need determination petition.

V. Conclusion

Although the purpose of the underlying statute would not be frustrated by FPC's requested rule waiver, FPC has failed to demonstrate that application of the rule would create a substantial hardship or violate principles of fairness. Therefore, FPC's petition for waiver of the time requirements in Rule 25-22.080, Florida Statutes, should be denied. FPC has alleged no separate legal grounds under which the Commission may grant a stay of this proceeding absent the requested rule waiver. Accordingly, FPC's petition for rule waiver and request for stay should be denied.