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November 2, 1998

RECORDS AND REPORTING

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By Hand Delivery

ORIGINAL

**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**

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company are the original and fifteen (15) copies of Florida Power & Light Company's Prehearing Statement.

Also enclosed is a diskette containing a copy of Florida Power & Light Company's Prehearing Statement. The diskette is a 3.5 inch high density diskette using Word Perfect 6.0 for Windows.

If you or your Staff have any questions regarding this filing, please contact me.

Very truly yours,

*Charles A. Guyton*  
Charles A. Guyton

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- APP \_\_\_\_\_
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- CMU \_\_\_\_\_
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Enc.

Legal Counsel for all parties of record

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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 ) DOCKET NO. 981042-EM  
Commission, City of New Smyrna Beach, ) FILED: NOVEMBER 2, 1998  
Florida, and Duke Energy New Smyrna )  
Beach Power Company Ltd., L.L.P. )  
\_\_\_\_\_ )

FLORIDA POWER & LIGHT COMPANY'S  
PREHEARING STATEMENT

Florida Power & Light Company ("FPL"), pursuant to Order Nos. PSC-98-1183-PCO and PSC-98-1221-PCO-EM, hereby files its Prehearing Statement in Docket No. 981042-EM.

(a) The name of all known witnesses that may be called by the party, and the subject matter of their testimony:

<u>Witness</u>	<u>Subject Matter</u>
William D. Steinmeier	Reasons why the Commission should not grant an affirmative determination of need for the Duke New Smyrna/UCNSB Project.

(b) A description of all known exhibits that may be used by the party, whether they may be identified on a composite basis, and the witness sponsoring each:

FPL has no prefiled exhibits and has not yet identified cross examination exhibits.

(c) A statement of basic position in the proceeding:

The need determination of Duke New Smyrna/UCNSB should be denied. The Joint Petition should be dismissed without this matter proceeding to trial. The underlying theory of the petitioners' case, that the market rather than the Commission should determine need, is inconsistent with Section 403.519, Florida Statutes. Neither Duke New Smyrna nor the UCNSB is a

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proper applicant as to the plant's merchant capacity, which comprises over 94% of the Project. The Joint Petition fails to satisfy the utility specific criteria of Section 403.519; instead, it inappropriately attempts to rely on Peninsular Florida need. The petitioners fail to allege that their plant is needed to meet Peninsular Florida need or the most cost effective alternative to meet such need; instead, they merely allege that their plant is "consistent with" such need and is "a cost-effective alternative." The Petition actually shows that reliability criteria for Peninsular Florida would be achieved without the proposed plant. The proposed plant would result in uneconomic duplication of facilities. The Petition also fails to meet the Commission's minimum plant requirements.

The petitioners' evidence fails to prove need. No attempt is made to prove that any individual utility needs the proposed merchant capacity. Duke New Smyrna fails to provide crucial information necessary to apply the statutory need criteria, including the entities to whom it will sell, the price of the sales, and other terms and conditions that affect cost-effectiveness and reliability. Instead of showing need premised upon reliability, Duke New Smyrna attempts to prove "need" based upon economics, but this effort falls short as well.

The Commission should dismiss or deny this proceeding consistent with its prior decisions and the Supreme Court's Nassau decision.

d) A statement of each question of fact the party considers at issue, the party's position on each such issue, and which of the party's witnesses will address the issue:

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

**FPL:** No. The statutory need criterion in Section 403.519, Florida Statutes requiring the Commission to consider "the need for electric system reliability and integrity" is a utility specific criterion. Duke New Smyrna proposes to build a 514 MW power plant. Duke New Smyrna has alleged and attempted to prove a utility specific need for only 30 MW of the proposed plant (less than 6%). As to the merchant plant capacity of

the proposed unit, more than 94% of the unit, Duke has not even attempted to demonstrate a utility specific need.

Duke New Smyrna's attempt to justify its proposed plant's merchant capacity based upon Peninsular Florida's alleged need for electric system reliability and integrity is legally and factually deficient. Peninsular Florida is not a utility with customers and an obligation to serve; consequently, there is no obligation to serve Peninsular Florida. Since the need determined in a need determination proceeding arises from an obligation to serve customers, an attempt to premise a showing of need solely upon Peninsular Florida is legally deficient. Factually, the Joint Petitioner's case demonstrates that Peninsular Florida meets a reserve margin criteria at or in excess of 15% well beyond the proposed plant's October 2001 projected in service date. Duke's attempted demonstration of need for the proposed power plant through Dr. Nesbitt does not really rest upon considerations or measurements of reliability but of economics.

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

**FPL:** Duke New Smyrna does not have a final purchased power agreement in place with the UCNSB, and such an agreement is a prerequisite for Duke New Smyrna to be a proper coapplicant with the UCNSB as to 30 MW of its proposed power plant.

The Participation Agreement entered into between Duke New Smyrna and the UCNSB does not meet the UCNSB's needs for electric system reliability and integrity.

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

**FPL:** No. The Joint Petition filed by the petitioners failed to provide all the information required by Commission Rule 25-22.081, Florida Administrative Code. The information required by the rule is information the Commission has previously stated is necessary for it to assess the need for a proposed power plant when

applying the need criteria of Section 403.519, Florida Statutes. More importantly, Duke New Smyrna has not identified the utilities to which it will sell the merchant portion of its power plant, the price or prices at which its merchant output will be sold, or the other terms and conditions of sale which would affect the Commission's determination of whether the proposed plant is needed under the utility specific need criteria of Section 403.519. Duke also fails to provide detail necessary to investigate the limited information which it has provided the Commission.

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

**[The parties have not reached consensus on this issue.]**

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

**ISSUE 5:** Can or should the capacity of the proposed project be properly included when calculating the reserve margin of an individual Florida utility or the State as a whole?

**FPL:** No. Absent a final purchased power contract committing the output of the proposed project to individual Florida utilities, the capacity of the proposed project is not properly included when calculating the reserve margin of an individual Florida utility or the State as a whole. Such a reliance on an uncommitted resource would not be prudent. Absent final purchased power contracts committing the proposed project's capacity to individual Florida utilities, Duke New Smyrna would be free to provide its capacity to utilities outside of Florida, leaving Florida utilities and the state without any reliability benefits and possible reliability detriments by committing transmission resources.

**ISSUE 6:** What impact will the proposed project have on the reliability of generation and transmission systems within Florida?

**FPL:** Without knowing the entities to whom Duke New Smyrna will sell the output of its proposed plant, this question may not be answered.

**ISSUE 7:** What transmission improvements and other facilities are required in conjunction with the construction of the proposed facility, and were their costs adequately considered?

**FPL:** Without knowing the entities to whom Duke New Smyrna will sell the output of its proposed plant, this question may not be answered.

**ISSUE 8:** Is there a need for the proposed power plant, taking into account the need for adequate electricity at a reasonable cost, as this criterion is used in Section 403.519?

**FPL:** No. The statutory need criterion in Section 403.519, Florida Statutes requiring the Commission to consider "the need for adequate electricity at a reasonable cost" is a utility specific criterion. Duke New Smyrna proposes to build a 514 MW power plant. Duke New Smyrna has alleged and attempted to prove a utility specific need for only 30 MW of the proposed plant (less than 6%). As to the merchant plant capacity of the proposed unit, more than 94% of the unit, Duke has not even attempted to demonstrate a utility specific need.

Duke New Smyrna's attempt to justify its proposed plant's merchant capacity based upon Peninsular Florida's alleged need for adequate electricity at a reasonable cost is deficient. Peninsular Florida is not a utility with customers and an obligation to serve; consequently, there is no obligation to serve Peninsular Florida. Since the need determined in a need determination proceeding arises from an obligation to serve customers, an attempt to premise a showing of need solely upon Peninsular Florida is legally deficient. Factually, the Joint Petitioner's case fails to demonstrate that the proposed plant will meet a need for adequate electricity at a reasonable cost.

**ISSUE 9:** Is the proposed power plant the most cost-effective alternative available, as this criterion is used in Section 403.519?

**FPL:** No. The statutory need criterion in Section 403.519, Florida Statutes requiring the Commission to consider "whether the proposed power plant is the most cost-effective alternative available" is a utility specific criterion. Duke New Smyrna has not demonstrated that its proposed merchant capacity is the most cost-effective alternative available to any individual Florida utility. Duke New Smyrna has also failed to demonstrate that its merchant capacity is the most cost-effective alternative available to Peninsular Florida, even though such a showing would not satisfy the utility specific criterion of Section 430.519, Florida Statutes. Until FPL has the opportunity to complete discovery, FPL cannot take a position as to whether the proposed power plant may be the most cost-effective alternative to the UCNSB; it appears that the UCNSB's analysis may have omitted relevant costs and that the UCNSB did not attempt to solicit alternative proposals.

**ISSUE 10:** Has Duke New Smyrna provided adequate assurances regarding available primary and secondary fuel to serve the proposed power plant on a long- and short-term basis?

**FPL:** No.

**ISSUE 11:** What impact, if any, will the proposed power plant have on natural gas supply or transportation resources of State regulated power producers?

**[The parties have not reached consensus on this issue.]**

**FPL:** It will restrict the natural gas supply and transportation that would otherwise be available.

**ISSUE 12:** Will the proposed project result in the uneconomic duplication of transmission and generation facilities?

**FPL:** Yes. Peninsular Florida utilities already have plans in place to construct generation facilities which are necessary to ensure their system reliability and

achieve their reliability criteria. This is evidenced in part by Duke New Smyrna's filing which shows that Peninsular Florida's reserve margin will be in excess of 15% from the summer of 1998 through the summer of 2007 without the Project. Consequently, the proposed plant is not needed for reliability purposes. If the proposed plant were nonetheless built, it would be an unnecessary and uneconomic duplication of generation facilities.

**ISSUE 13:** Have the UCNSB and Duke New Smyrna provided sufficient information on the site, design, and engineering characteristics of the New Smyrna Beach Power Project to evaluate the proposed Project?

FPL: No position.

**ISSUE 14:** Have the costs of environmental compliance associated with the New Smyrna Beach Power Project been adequately considered by the UCNSB and Duke New Smyrna?

FPL: No.

**ISSUE 15:** What are the terms and conditions pursuant to which the electric utilities having the need will purchase the capacity and energy of the proposed power plant?

[The Parties have not reached consensus on this issue.]

FPL: No one knows, because Duke New Smyrna has not and may never enter into such contracts. Consequently, the Commission does not have the contractual terms regarding price, power delivery and unit performance necessary to determine whether this plant is needed by or cost-effective to individual utilities.

**ISSUE 16:** Is the identified need for power of the Utilities Commission, New Smyrna Beach ("UCNSB") which is set forth in the Joint Petition met by the power plant proposed by Florida Municipal Power Association in Docket No. 980802EM?

FPL: Perhaps. This matter is open pending discovery.

**ISSUE 17:** Are there any conservation measures taken by or reasonably available to the petitioners which might mitigate the need for the proposed power plant?

**FPL:** There may well be conservation measures available that would mitigate the need for the proposed plant. It appears that the UCNSB has not sufficiently investigated its conservation potential, and without knowing the individual utilities to which Duke New Smyrna will sell its output, it cannot be determined whether there are conservation measures available which would mitigate those utilities' "need" for the output of the proposed plant.

**(e) A statement of each question of law the party considers at issue and the party's position on each such issue:**

**ISSUE 18:** Does the Florida Public Service Commission have the statutory authority to render a determination of need under Section 403.519, Florida Statutes, for a project that consists in whole or in part of a merchant plant (i.e., a plant that does not have as to the merchant component of the project, an agreement in place for the sale of firm capacity and energy to a utility for resale to retail customers in Florida)?

**FPL:** No.

**ISSUE 19:** Does the Public Service Commission have jurisdiction under the Power Plant Siting Act, Sections 403.501 - 403.518, and Section 403.519, Florida Statutes, to determine "applicant" status?

**FPL:** Yes. Seldom is a legal issue the Commission is called upon to address more clearly settled than this issue.

The Commission, on its own initiative, has previously dismissed petitions for a determination of need because it found that the petitioners were "not proper applicants for a need determination proceeding under Section 403.519, Florida Statutes." Order No. PSC-92-1210-FOF-EQ. One of the two projects whose need petitions were dismissed was an independent power producer, Pahokee Power Partners II Project; the other project owned by Nassau Power Corporation was a cogenerator. Both were characterized by the Commission as non-utility generators. The Commission found that the need to be determined in a need determination proceeding was the need "resulting from a duty to serve customers" and that non-utility generators had "no such

need since they are not required to serve customers." The Commission found that this interpretation of the Siting Act was in accord with and upheld in Nassau Power Corporation v. Beard, 601 So. 2d 1175.

The Commission's dismissal of these entities as improper applicants under Section 403.519, Florida Statutes was appealed to the Supreme Court of Florida in Nassau Power Corporation v. Deason, 641 So.2d 396 (Fla. 1994), where the Court framed the issue as follows: "[a]t issue here is whether a non-utility generator, such as Nassau, is a proper applicant for a determination of need under Section 403.519, Florida Statutes (1991)." The Court found that the Commission's construction of the term "applicant" as used in Section 403.519 was consistent with the plain language of the Siting Act and "the Court's 1992 decision in Nassau Power Corp. v. Beard." The Commission's dismissal of the need determination on the ground that the petitioner was not a proper applicant was affirmed.

**ISSUE 20:** As to its project's merchant capacity, does Duke New Smyrna have a statutory or other legally enforceable obligation to meet the need of any electric utility in Peninsular Florida for additional generating capacity?

[The parties have not reached consensus on this issue.]

FPL: No.

**ISSUE 21:** Absent a statutory or contractual obligation to serve, can Duke New Smyrna have a need within the meaning of Section 403.519, Florida Statutes and the Siting Act?

[The parties have not reached consensus on this issue.]

FPL: No. The Commission has observed on several occasions, and the Supreme Court has affirmed at least one of those decisions, that need within the meaning of the Siting Act and Section 403.519, Florida Statutes is a need arising from an obligation to serve customers. See, Order No. PSC-92-1210-FOF-EQ ("It is this need, resulting from a duty to serve customers, which the need determination is designed to examine."), *affirmed Nassau Power Corp V. Deason*, 641 So.2d 396 (Fla. 1994)

("The Commission reasoned that a need determination proceeding is designed to examine the need resulting from an electric utility's duty to serve customers. Non-utility generators, such as Nassau, have no similar need because they are not required to serve customers." ... "[W]e affirm the order under review."); Order No. PSC-92-0827-PHO-EQ ("It is the utility's need, resulting from its duty to serve customers, which must be fulfilled.").

As to its merchant capacity, Duke New Smyrna has no customers nor an obligation to serve. Therefore, it has no need within the meaning of Section 403.519, Florida Statutes.

**ISSUE 22:** As to the project's merchant capacity, is either Duke New Smyrna or UCNSB an "applicant" or "electric utility" within the meaning of the Siting Act and Section 403.519, Florida Statutes?

**[The parties have not reached consensus on this issue.]**

**FPL:** No. In Order No. PSC-92-1210-FOF-EQ the Commission found another independent power producer like Duke New Smyrna not to be an "applicant" or an "electric utility" within the meaning of Section 403.519, Florida Statutes and the Siting Act. That decision, which was affirmed in Nassau Power Corp. v. Deason, is dispositive in this case as to Duke New Smyrna.

As to the UCNSB, the UCNSB does not profess to be an applicant as to Duke New Smyrna's merchant capacity. The only capacity that the UCNSB states that it needs from the Duke New Smyrna project is 30 MW of capacity allegedly committed to it under the Participation Agreement. The UCNSB is not an applicant as to Duke New Smyrna's merchant capacity.

**ISSUE 23:** Under the Siting Act and Section 403.519, Florida Statutes, may the Commission issue a generic determination of need?

**[The parties have not reached consensus on this issue.]**

**FPL:** No. See, Order Nos. 19486; PSC-92-1355-FOF-EQ.

**ISSUE 24:** If the Commission were to accept the presumption the joint petitioners ask the Commission to make, that "the Project will necessarily be a cost-effective power supply option for the utilities to which Duke New Smyrna sells its merchant power," would the Commission be abrogating of its responsibilities under the Siting Act?

[The parties have not reached consensus on this issue.]

**FPL:** Yes. In Order No. 22341 the Commission decided that it would no longer presume need rather than actually determining need. This practice was restated in a number of subsequent Commission orders, two of which were appealed to the Supreme Court, Order Nos. 23792 and 24672. On appeal the Court stated that the Commission's prior practice of presuming need rather than determining actual need would be an abrogation of its responsibilities under the Siting Act. ("In our view, the PSC's prior practice of presuming need, as opposed to determining actual need, cannot be used now to force the PSC to abrogate its statutory responsibilities under the Siting Act.") Nassau Power Corporation v. Beard.

**ISSUE 25:** If the Commission were to grant an affirmative determination of need to Duke New Smyrna as herein requested, when the utilities in peninsular Florida had plans in place to meet reliability criteria, would the Commission be meeting its responsibility to avoid uneconomic duplication of facilities?

[The parties have not reached consensus on this issue.]

**FPL:** No.

**ISSUE 26:** Does the Joint Petition meet the pleading requirements of Rule 25-22.081, Florida Administrative Code?

[The parties have not reached consensus on this issue.]

**FPL:** No. As set forth fully in FPL/s motion to dismiss, the Joint Petition fails to meet the requirements of Rule 25-22.081, Florida Administrative Code in several important respects.

**ISSUE 27:** Does the Joint Petition state a cause of action by not alleging that the proposed power plant meets the statutory need criteria and instead alleging that the proposed power plant is "consistent with" Peninsular Florida's need for power?

**[The parties have not reached consensus on this issue.]**

**FPL:** The Joint Petition fails to state a cause of action not only because it fails to allege an individual utility's need for the merchant capacity of the proposed plant, but also because it fails to allege as to Peninsular Florida that the plant is needed for "electric system reliability and integrity" and "adequate electricity at a reasonable cost" and because it fails to allege that it is "the most cost-effective alternative." Allegations that the plant is "consistent with" need or that it "a cost-effective alternative" fail to state a cause of action. Duke's testimony and exhibits suffer from similar deficiencies.

**ISSUE 28:** Is "Peninsular Florida" a legal entity with an obligation to serve?

**[The parties have not reached consensus on this issue.]**

**FPL:** No.

**ISSUE 29:** If the Commission were to permit Duke New Smyrna to demonstrate need on a "Peninsular Florida" basis and not require Duke New Smyrna to have a contract with purchasing utilities for its merchant plant capacity, would the more demanding requirements on QFs, other non-utility generators and electric utilities afford Duke New Smyrna a special status?

**[The parties have not reached consensus on this issue.]**

**FPL:** Yes. Individual utilities demonstrating a need under the Siting Act are required to show that the plant is needed to meet their service obligations to their customers. QFs and other non-utility generators also have to be able to show that their capacity is needed by a utility and have a contract with the utility which has an obligation to serve and a need for their power. If Duke New Smyrna were allowed to proceed without its

own obligation to serve or a contract with an entity which had an obligation to serve, it would be given a special status without any compelling justification.

(f) A statement of each policy question the party considers at issue, the party's position on each such issue, and which of the party's witnesses will address the issue:

**ISSUE 30:** If Duke New Smyrna premises its determination of need upon Peninsular Florida without contracts from individual purchasing utilities, how would the Commission's affirmative determination of need affect subsequent determinations of need by utilities petitioning to meet their own need?

[The parties have not reached consensus on this issue.]

**FPL:** Peninsular Florida utilities would have to confront Commission findings that Duke New Smyrna's plant was needed to meet Peninsular Florida's need and that it was the most cost-effective alternative available, even though this case does not appear likely to yield a serious comparison of the Duke New Smyrna plant to other planned alternatives. It may reasonably be anticipated that Duke New Smyrna may argue that such findings regarding its plant preclude an affirmative determination of need until their plant is under contract. If it has no impact, then there was no need for the Duke New Smyrna plant in the first place (Steinmeier)

**ISSUE 31:** Will granting a determination of need as herein requested relieve electric utilities of the obligation to plan for and meet the need for reasonably sufficient, adequate and efficient service?

[The parties have not reached consensus on this issue.]

**FPL:** No. Granting this determination of need would not relieve utilities of their obligation to plan and meet need. It would, however, create additional uncertainty making planning more difficult. (Steinmeier)

**ISSUE 32:** Will granting a determination of need as herein requested create a risk that past and future investments made to provide service may not be recovered and thereby increase the overall cost of providing electric service and/or future service reliability?

[The parties have not reached consensus on this issue.]

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

**ISSUE 33:** If Duke New Smyrna premises its determination of need upon Peninsular Florida without contracts from individual purchasing utilities, how would the Commission's affirmative determination of need affect subsequent determinations of need by QFs and other non-utility generators petitioning to meet utility specific needs?

[The parties have not reached consensus on this issue.]

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

**ISSUE 34:** If the Commission abandons its interpretation that the statutory need criteria are "utility and unit specific," how will the Commission ensure the maintenance of grid reliability and avoid uneconomic duplication of facilities in need determination proceedings?

[The parties have not reached consensus on this issue.]

**FPL:** It would frustrate the Commission's ability to protect against uneconomic duplication of facilities and it would make assurance of grid reliability more difficult. (Steinmeier)

**ISSUE 35:** Will granting a determination of need as herein requested result in electric utilities being authorized to similarly establish need for additional generating capacity by reference to potential additional capacity needs which the electric utility has no statutory or contractual obligation to serve?

**[The parties have not reached consensus on this issue.]**

**FPL:** An affirmative determination should not be granted. However, if Duke New Smyrna is permitted to justify need based upon a basis other than an individual utility's need, then utilities should be permitted to justify need upon a basis other than an individual utility's need. (Steinmeier)

**ISSUE 36:** If Duke New Smyrna were allowed to proceed as an applicant, would the Commission "end up devoting inordinate time and resources to need cases," "wast[e] time in need determinations proceedings for projects that may never reach fruition," and "devote excessive resources to micromanagement of utilities', power purchases?"

**[The parties have not reached consensus on this issue.]**

**FPL:** This is the conclusion reached by the Commission when it dismissed the need determination petitions of other non-utility generators without a contract with a utility. Order No. PSC-92-1210-FOF-EQ. One of those entities was an independent power producer (not a QF) which met the requirements for Exempt Wholesale Generators status. There is not reason to conclude otherwise in this case.

**ISSUE 37:** What effect, if any, would granting a determination of need as herein requested have on the level of reasonably achievable cost-effective conservation measures in Florida?

**[The parties have not reached consensus on this issue.]**

**FPL:** It would further reduce the cost estimate of combined cycle technology, reducing the avoided cost of generation, making it more difficult to justify conservation measures.

**ISSUE 38:** Would granting the determination of need requested by the joint petitioners be consistent with the public interest and the best interests of electric customers in Florida?

[The parties have not reached consensus on this issue.]

**FPL:** This policy issue is inappropriate. Unlike the preceding policy issues, it does not address specific matters within the Commission's jurisdiction. The Commission is not charged under either the Siting Act or Chapter 366 to generally protect the "public interest." Without a contract with individual utilities for its merchant capacity, Duke New Smyrna cannot demonstrate any impact on Florida electric utility customers.

**ISSUE 39:** Would granting the determination of need requested by the joint petitioners be consistent with the State's need for a robust competitive wholesale power supply market?

[The parties have not reached consensus on this issue.]

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

**ISSUE 40:** Would granting the determination of need requested by the joint petitioners be consistent with state and federal energy policy?

[The parties have not reached consensus on this issue.]

**FPL:** This is an inappropriate issue. Questions of federal energy policy are beyond the jurisdiction of the Commission. Granting the determination of need would be inconsistent with well established state policy, which has long been that a non-utility generator such as Duke New Smyrna must have a contract with a utility to justify a need for its proposed power plant.

#### **FINAL ISSUES**

**ISSUE 41:** Based on the resolution of the foregoing issues, should the petition of the UCNSB and Duke New Smyrna for

determination of need for the New Smyrna Beach Power Project be granted?

FPL: No.

ISSUE 42: Should this docket be closed?

FPL: Yes.

(g) A statement of issues that have been stipulated to by the parties:

FPL is not aware of any stipulated issues.

(h) A statement of all pending motions or other matters the party seeks action upon:

FPL has a motion to dismiss pending. FPL has pending in regard to its motion to dismiss a request for oral argument. FPL also has a motion to expedite discovery pending.

(i) A statement as to any requirement set forth in the Order On Prehearing Procedure that cannot be complied with, and the reasons therefor.

FPL believes it has complied with all requirements of orders regarding prehearing procedures.

Respectfully submitted,  
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Attorneys for Florida Power  
& Light Company

By: Charles A. Guyton  
Matthew M. Childs, P.A.  
Charles A. Guyton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Prehearing Statement in Docket No. 981042-EM was served by Hand Delivery (when indicated with an \*) or mailed this 2nd day of November, 1998 to the following:

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