BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.	)	Docket No. 981042-EM
	)	FILED: January 19, 1999

FLORIDA POWER & LIGHT COMPANY'S MEMORANDUM ON LEGAL ISSUES

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Florida Power & Light Company ("FPL") raises six grounds for dismissal:

1. Neither Duke New Smyrna ("DNS") nor the Utilities Commission of New Smyrna Beach ("UCNSB") is a proper applicant as to the 94% of the power plant which is uncommitted.

2. Regardless of whether DNS and UCNSB are proper applicants, there are no utility specific allegations of need and cost-effectiveness as to 94% of the proposed plant.

3. The Joint Petition fails to meet the minimum pleading requirements set forth in Rule 25-22.081, Florida Administrative Code.

4. Beyond failing to allege a utility specific need, the Joint Petition also fails to sufficiently allege a "peninsular Florida" need.

5. The theory of the Joint Petition -- that the marketplace should determine need and cost-effectiveness -- is inconsistent with the theory of the Siting Act, which makes the Commission the exclusive entity to determine need.

6. The Joint Petition demonstrates on its face that the proposed power plant is not needed and will constitute an unnecessary, duplicative facility.

Any one of these grounds would warrant dismissal by itself; collectively, they demonstrate that the Joint Petition is fundamentally inconsistent with Florida law and should be dismissed.

I
Standard of Review

The function of a motion to dismiss is to raise as a matter of law whether the facts alleged constitute a cause of action. *Connolly v. Sebeco, Inc.*, 89 So.2d 482 (Fla. 1956). Because a motion to dismiss raises legal issues for resolution, the movants, FPL and FPC in this case, are deemed to admit for purposes of the motion all matters of fact well pled, as well as reasonable inferences. *Simon v. Tampa Electric Company*, 202 So.2d 209 (Fla. 2d DCA 1967). This rule does not apply, however, to mere statements of opinions or conclusions unsupported by specific facts. *Brandon v. County of Pinellas,* 141 So.2d 278 (Fla. 2d DCA 1962).

While well pled facts must be admitted, conclusions of law do not. *Ellison v. City of Ft. Lauderdale,* 175 So.2d 198 (Fla. 1968). Therefore, it is appropriate to interpret and rule on the applicability of a statute in ruling on a motion to dismiss. *Woolzy v. Government Employees Insurance Company,* 360 So.2d 1153 (Fla. 3d DCA 1978).

The sufficiency of the pleading must be decided by reference to the pleading and attached exhibits. Standing alone, they must state a cause of action. *City of Coral Springs v. Florida Properties, Inc.*, 340 So.2d 1271 (Fla 4th DCA 1976). An insufficient pleading cannot be saved from a motion to dismiss by testimony at a hearing. *Id.* In passing upon a motion to dismiss, there should be no consideration of the evidence. *Martin v. Principal Mutual Life Insurance Company,* 557 So.2d 128 (Fla 3d DCA 1990). Exhibits attached to a pleading become a part of the pleading for all purposes, and if the attached document negates the pleader's cause of action, that may be a basis for a motion to dismiss. *Franz Tractor Company v JJ Case Co.*, 556 So.2d 524 (Fla 2d DCA 1990).

Based upon this standard of review, the Joint Petition should be dismissed. It advances legal conclusions at odds with statutory and case law. It fails to make sufficient factual allegations to state a cause of action. And an attached exhibit demonstrates on its face that the proposed plant is not needed and would unnecessarily duplicate facilities.

II
The Joint Petition Should Be Dismissed Because Neither DNS nor the UCNSB is a Proper Applicant as to the Uncommitted Portion of the Plant (470 out of 500 MW, or 94%).

Initially, it must be noted that this argument addresses a conclusion of law, not a mere factual allegation. Consequently, the assertion of the petitioners that they are proper applicants need not be admitted for the purpose of this motion to dismiss. *Ellison v. City of Ft. Lauderdale,* 175 So.2d 198 (Fla. 1968). The Commission can and should rule upon that assertion in deciding this motion to dismiss. *Woolzy v. Government Employees Insurance Company,* 360 So.2d 1153 (Fla. 3d DCA 1978).

A. Florida Law Regarding Applicants.

The law regarding proper applicants for need determinations is well developed, particularly as to entities such as DNS. Entities such as DNS, which have no obligation to serve -- and consequently no need of their own -- must look to the need of a purchasing utility. As the Commission stated in the *Ark and Nassau* decision:

> **Ark and Nassau do not qualify as applicants.** Neither Ark nor Nassau is a city, town, or county. **Nor is either a** public utility district, **regulated electric company**, electric cooperative or joint operating agency.
>
> Significantly, each of the entities listed under the statutory definition may be obligated to serve customers. **It is this need, resulting from a duty to serve customers, which the need**

> **determination proceeding is designed to examine. Non-utility generators such as Nassau and Ark have no such need since they are not required to serve customers.** The Supreme Court recently upheld this interpretation of the Siting Act. Dismissal of these need determination petitions is in accord with that decision. See Nassau Power Corp. v. Beard, 601 So.2d 1175 (Fla. 1992).

In Re: Petition of Nassau Power Corp. to determine need for electrical power plant (Okeechobee County Cogeneration Facility), 92 FPSC 10:643, 645 (FPSC 1992) (Emphasis added.).

The Commission went on to explain the proper procedure for entities such as DNS to petition for a determination of need, holding that it is the purchasing utility, as well as the independent power producer that must participate in the application:

> Since our 1990 Martin order (Order No. 23080, issued June 15, 1990) the policy of this Commission has been that a contracting utility is an indispensable party to a need determination proceeding. As an indispensable party, the utility will be treated as a joint applicant with the entity with which it has contracted. This will satisfy the statutory requirement that an applicant be an "electric utility" while allowing generating entities with a contract to bring that contract before this commission. **Thus, a non-utility generator such as Ark or Nassau will be able to obtain a need determination for its project after it has signed a contract (power sales agreement) with a utility.**
>
> This scheme simply recognizes the utility's planning and evaluation process. **It is the utility's need for power to serve its customers which must be evaluated in a need determination proceeding.** Nassau Power Corp. v. Beard, supra. **A non-utility generator has no such need because it is not required to serve customers. The utility, not the cogenerator or independent power producer, is the proper applicant.**

92 FPSC 10: at 645 (Emphasis added.)

The Commission's interpretation of Section 403.519 in the *Ark and Nassau* decision was upheld by the Supreme Court of Florida:

> The Commission dismissed the petition, reasoning that only electric utilities, or entities with whom such utilities have executed a power purchase contract are proper applicants for a need determination proceeding under the Siting Act.
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> ***
>
> The Commission's construction of the term "applicant" as used in section 403.519 is consistent with the plain language of the pertinent provisions of the Act and this Court's 1992 decision in *Nassau Power Corp. v. Beard.*
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> ***
>
> 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.

Nassau Power Corp. v. Deason, 641 So.2d 396, 398 (Fla. 1994).

It is clear from these decisions that a non-utility generator such as DNS is not a proper applicant for a determination of need under Section 403.519, Florida Statutes, unless it has a contract for its output and files as a joint applicant with the utility or utilities with which it has contracted.

The proposed power plant has a nominal capacity of 500 MW. Only 30 MW -- 6% of the plant's capacity -- is "committed." As to the remaining 470 MW, neither DNS nor the UCNSB is a proper applicant. The UCNSB's purported need for capacity from the plant is limited to 30 MW, as is their contractual entitlement. The UCNSB is an applicant only as to 30 MW; it is not an applicant as to the 470 MW of uncommitted capacity. Under the *Nassau Power Corp. v. Deason* and the *Ark and Nassau* decisions, DNS is not a proper applicant as to this 470 MW of uncommitted capacity. It has no obligation to serve. It has no need arising from an obligation to serve. It has no contract for this capacity. It has no joint applicant as to this capacity. As was done with Nassau and Ark, DNS's petition should be dismissed.

B. Petitioners' Counter Arguments Are Unavailing.

In response, the petitioners make five counter arguments. First, they argue DNS is a "public utility" under the Federal Power Act and subject to the regulation of the Federal Energy Regulatory Commission ("FERC"); therefore, it is a "regulated electric company" within the meaning of the Siting Act and a proper applicant. Second, they argue that the Project is a "joint electric power supply project" under Chapter 361, Florida Statutes; therefore, it is a "joint operating agency" within the meaning of the Siting Act they are proper applicants. Third, they argue that DNS is an "electric utility" within the meaning of Section 366.02(2), Florida Statutes. Fourth, they argue that the *Ark and Nassau* decision is narrowly limited and not applicable in this case. Fifth, they argue that the language in *Nassau Power Corp. v. Deason* upon which FPL relies is dicta and not applicable. Each counter argument is easily rebutted.

1. "Public Utility" status under the Federal Power Act does not make DNS a proper applicant under the Siting Act.

Nassau, a qualifying facility ("QF"), and Ark, an independent power producer ("IPP"), were "public utilities" under the Federal Power Act and subject to the jurisdiction of the FERC.[1]

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[1] Section 201(e) of the Federal Power Act defines a "public utility" as "any person who owns or operates facilities subject to the jurisdiction of the Commission under this part...." Section 201(b)(1) of the Federal Power Act gives the FERC jurisdiction "over all facilities for such transmission [transmission of electric energy in interstate commerce] or sale of electric energy [sale of electric energy at wholesale in interstate commerce]...." Both Ark as an independent power producer and Nassau as a QF proposing to resell power to an electric utility would have owned or operated facilities used for the sale of electric energy at wholesale; consequently, they, like DNS, would have been public utilities subject to the regulation of the FERC. As a QF Nassau would have been subject to less regulation than the independent power producer Ark, because pursuant to Section 210(e) of the Public Utility Regulatory Policy Act, the FERC has adopted a regulation which exempts QFs from some but not all FERC regulation. See, 18 CFR § 292.601(c).

Both Nassau and Ark asserted to the Commission that their QF and IPP status made them applicants under the Siting Act. The Commission's unequivocal response was:

> Ark and Nassau do not qualify as applicants. Neither Ark nor Nassau is a city, town, or county. Nor is either a public utility district, regulated electric company, electric cooperative or joint operating agency.

92 FPSC 10: at 645. Merely being subject to FERC regulation did not make Ark or Nassau "regulated electric companies" or "applicants" under the Siting Act. The Supreme Court of Florida found that this construction of "applicant" under section 403.519 was "consistent with the plain language of the pertinent provisions of the Act and this Court's decision in *Nassau Power Corp. v. Beard." Nassau Power Corp. v. Deason,* 641 So.2d at 398.

2. The Project is not a "Joint Power Supply Project," and even if it were, it would not be a "joint operating agency" under the Siting Act.

Petitioners' second argument also falls well short of the mark. The Joint Petition never even alleges that the Project is a "joint electric power supply project" under Chapter 361, Florida Statutes, or a "joint operating agency" under Chapter 403, Florida Statutes. It simply asserts that the Project is "a joint power supply project." Joint Petition, ¶ 13 at page 10. Thus, the Joint Petition fails to even make the necessary allegations.

In addition to this serious pleading insufficiency, the petitioners' construction of Chapter 361 and the Siting Act is inconsistent with fundamental principles of statutory construction. The definition of an "electric utility" in the Siting Act (which includes the term "joint operating agency") was adopted two years before Chapter 361 was adopted. It is not reasonable to assume that the Legislature's use of the term "joint operating agency" in the Siting Act in 1971 anticipated the creation of "joint electric power supply projects" under Chapter 361 two years

later. Moreover, when the Legislature did create "joint electric power supply projects", it consciously used that term rather than the Siting Act's "joint operating agency." The Legislature's choice of different terms in different acts shows that there was no intent for the terms to be used interchangeably.[2]

Finally, the Joint Petition fails even to allege facts that would make the Project a joint electric power supply project. The term joint electric power supply project is defined in Section 361.11, Florida Statutes, as:

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

(Emphasis added.) What is clear from the definition is that the facilities must be for either the joint transmission or joint generation of power or both. Looking to the allegations of the Joint Petition and construing them most favorably to the petitioners, it is clear that there is neither joint transmission nor joint generation from this project. Paragraph 4 alleges that the generating facility is owned individually by DNS. Paragraph 11 alleges that the transmission interconnection facilities are owned solely by the UCNSB. This project is not a "joint electrical power supply project" under Chapter 361. It is irrelevant whether that term is intended to mean the same as the term "joint operating agency" under the Siting Act.

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[2] E.g., State v. Dunmann, 427 So. 2d 166 (Fla. 1983) (general presumption that Legislature passes statutes with knowledge of existing law; Alterman Transport Lines, Inc. v. State, 405 So. 2d 456 (Fla. 1st DCA 1981) quoting Oldham v. Rooks, 361 So. 2d 140 (Fla. 1978) (Legislature is presumed aware of prior existing laws, and a construction is favored that gives each one a field of operation).

3. DNS is not an "Electric Utility" under Section 366.02(2).

Petitioners' third argument regarding DNS' applicant status is that it fits within the definition of an "electric utility" under Section 366.02(2), Florida Statutes. There are several problems with this argument.

The plain language of Section 366.02(2) shows that it does not apply. DNS does not own, maintain or operate an electric generation, transmission or distribution system.[3] Moreover, one generating facility is not properly characterized as a "system."

The petitioners' construction of the term "electric utility" is inconsistent with the Commission's prior construction and interpretation. For over twenty years Florida has had cogenerators that own generating facilities, and for almost ten years Florida has had independent power producers that own generating facilities. Not once in that time period has the Commission asserted jurisdiction over these entities as "electric utilities."[4] In short, there is no history of the Commission's treating entities like DNS as "electric utilities" under Chapter 366. This long standing statutory construction should not be ignored simply to shoehorn DNS into the statute.

Finally, even if DNS were an "electric utility" under Section 366.02(2), that would not convey "applicant" status on it under the Siting Act. Section 403.503(12), Florida Statutes, not

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[3] It may own a generating facility in the future, but presently neither owns nor maintains such a facility.

[4] They have not been required to submit ten year site plans; they have not had to file reports to assure the development of adequate and reliable energy grids; the Commission has not prescribed a uniform system of accounts for these entities; the Commission has not prescribed a rate structure for these entities; the Commission has not required these entities to conserve energy; the Commission has not resolved territorial disputes or approved territorial agreements regarding these entities.

Section 366.02(2), defines "electric utility" under the Siting Act, and Section 366.82(1) defines "utility" for purposes of Section 403.519. DNS does not fit either definition, so it is of no import whether or not it might fit within a strained construction of the term "electric utility" under Section 366.02(2).[5]

4. The *Ark and Nassau* decision applies to the Project.

The petitioners' fourth counter argument is that the Commission intended its *Ark and Nassau* decision to be construed narrowly. But this argument requires the petitioners to take a single sentence from that decision and read it entirely out of context. In context, it is clear that the Commission intended its decision to apply to a case such as the present one where a non-utility generator attempts to seek a determination of need without a contract for its plant's output; the Commission merely reserved for future consideration whether an entity which was a *self-generator* (serving its own need) may be a proper applicant without a utility coapplicant:

> In granting dismissal here we are only construing who may be an applicant for a need determination under Section 403.519, Florida Statutes. We do not intend in any way to restrict the Department of Environmental Regulations or Siting Board in their exercise of jurisdiction under the Power Plant Siting Act, or in their interpretation of the Act. **It is also our intent that this Order be narrowly construed and limited to proceedings wherein non-utility generators seek determinations of need based on a utility's need. We explicitly reserve for the future the question of whether a self-service generator (which has its own need to serve) may be an applicant for a need**

[5] It is worth noting that Section 403.503(12) defines "electric utility" entirely separate from the definition in Section 366.02(2), Florida Statutes. Conspicuously, it has no cross-reference to Section 366.02(2). Section 403.503(12), Florida Statutes, is the operative definition in this case.

> **determination without a coapplicant.** To date this circumstance has not been presented to us and we do not believe the question should be decided in the abstract.

92 FPSC 10 at 647 (emphasis added).

5. The Florida Supreme Court's holding in *Nassau Power Corp. v. Deason* is not dicta, and it controls the Commission's review of the Joint Petition.

The petitioners' final counter argument is that the language upon which FPL relies in *Nassau Power Corp. v. Deason* is dicta and need not be followed by the Commission. This argument is consistent with neither accepted understandings of what is dicta nor a reasonable construction of *Nassau Power Corp. v. Deason*. The Supreme Court of the United States, in a case involving Florida, has distinguished between dicta and the parts of the decisions that have precedential value:

> When an opinion issues for the Court, it is not only the result but also the portions of the opinion necessary to the result by which we are bound. Cf. *Burnham v. Superior Court of Cal., County of Marin,* 495 U.S. 604, 618, 110 S.Ct. 2105, 2112, 109 L.Ed.2d 631 (1990) (exclusive basis of a judgement is not dicta) (plurality); *Allegheny County v. American Civil Liberties Unition, Greater Pittsburgh Chapter,* 492 U.S. 573, 668, 109 S.Ct. 3806, 3141, 106 L.Ed.2d 472 (1989) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law." (KENNEDY, J., concurring and dissenting)....

Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1129, (1996). Looking at the *Ark and Nassau* and *Nassau Power Corp. v. Deason* cases in light of this distinction, it is clear that the language relied upon by FPL is not dicta but rather explicates the law relied upon by the Commission and Court in reaching their decisions.

In *Nassau Power Corp. v. Deason,* the Supreme Court of Florida explained that the only order before it on review was the order dismissing Nassau's petition to determine need. 641 So.2d at 398. The Court characterized the dismissal below and the matter at issue as follows:

> The Commission dismissed the petition, reasoning that only electric utilities, or entities with whom such utilities have executed a power purchase contract are proper applicants for a need determination proceeding under the Siting Act. Nassau appealed the dismissal.

Id. The Court extensively recounted the Commission's reasoning in the decision below and stated its holding:

> The Commission's construction of the term "applicant" as used in section 403.519 is consistent with the plain language of the pertinent provisions of the Act and this Court's 1992 decision in *Nassau Power Corp. v. Beard.*

641 So.2d at 398. This language is essential to the decision in this case; it is "necessary to the result" and an "explication of the governing rules of law." The petitioners' suggestion that this language is dicta is simply wishful thinking.

Even if the language could be characterized as dicta, it should be given special consideration. In Horton v. Unigard Ins. Co., , 355 So. 2d 154 (Fla. 4th DCA 1978), the court stated:

> Appellant says the quoted statement...is obiter dictum and we concede that it is. However, it is obiter dictum from the highest court in this State and that is no ordinary dictum! The rule seems to be that dictum in an opinion by the Supreme Court of Florida, while not binding as precedent, is persuasive because of its source.

Id. at 155 (citations omitted). See also Aldret v. State, 592 So. 2d 264, 266 (Fla. 1st DCA 1991), reversed on other grounds, 606 So. 2d 1156 (Fla. 1992) ("it is well-established that dicta of the

Florida Supreme Court, in the absence of a contrary decision by that court, should be accorded persuasive weight").

Both the Commission and the Court have spoken. The law is well settled. An entity such as Duke which has no obligation to serve and no need of its own must look to the need of a purchasing utility with which it must have a contract to be a proper applicant under the Siting Act. DNS has no obligation to serve, no need, and no contract as to 470 MW, 94%, of its proposed plant; it is not a proper applicant, and its petition should be dismissed.

III
Regardless of Whether DNS and the UCNSB Are Proper Applicants, The Joint Petition Should Be Dismissed Because It Fails To Meet The Utility Specific Requirements of *Nassau Power Corp. v. Beard.*

Conspicuously absent from the Joint Petition is any allegation that the uncommitted 470 MW of the plant's total capacity is needed by, or cost-effective to, a specific utility. No attempt is even made to identify the purchasing utility for the uncommitted portion of the proposed plant. Because these allegations are missing, the Joint Petition fails to state a cause of action and should be dismissed.

The petitioners' response is essentially to deny that need petitions must make these utility specific allegations. Their argument flies in the face of Commission and Florida Supreme Court precedent and is unavailing.

Order No. 22341 clearly established three principles. First, the need determination criteria of Section 403.519 and the Siting Act are "utility specific":

> The Siting Act, and Section 403.519 require that this body make specific findings as to system reliability and integrity, need for electricity at a reasonable cost, and whether the proposed plant is

> the most cost-effective alternative available. Clearly these criteria are utility and unit specific.

Second, "need" for the purposes of the Siting Act is the need of the purchasing electric utility:

> [W]e adopt the position that 'need' for the purposes of the Siting Act, is the need of the entity ultimately consuming the power, the electric utility purchasing the power. Cogeneration is another alternative to that purchasing utility's construction of capacity or purchase of wholesale power from another source.

Third, the Commission would not presume need or cost-effectiveness; capacity has to be evaluated from the purchasing utility's perspective; "a finding must be made that the proposed capacity is the most cost-effective means of meeting purchasing utility X's capacity needs in lieu of other demand and supply side alternatives." *In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for peninsular Florida's Electric Utilities, 89 FPSC 12:294, 318-20 (FPSC 1989).* Order No. 24672 reaffirmed this interpretation of Section 403.519.

Nassau appealed the Commission's interpretation of the Siting Act to the Supreme Court of Florida. Nassau argued that the Commission was prohibited from determining need on a utility specific basis and was required to determine need on a statewide basis. The Court found that the Commission presuming need would be an abrogation of its statutory responsibility, and it expressly rejected the argument that the need criteria were not utility specific:

> We reject Nassau's alternative argument that the Siting Act does not require the PSC to determine need on a utility-specific basis. In Order No. 22341, the Commission clearly adopted the position that the four criteria in section 403.519 are "utility and unit specific" and that the need for the purposes of the Siting Act is the need of the entity ultimately consuming the power.
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> ***

> The PSC's interpretation is consistent with the overall directive of section 403.519 which requires, in particular, that the Commission determine the cost-effectiveness of a proposed power plant. **This requirement would be rendered virtually meaningless if the PSC were required to calculate need on a statewide basis without considering which localities would actually need more electricity in the future.**

Nassau Power Corp. v. Beard, 601 So.2d 1175, 1178 (Fla. 1992) (Emphasis added).

The petitioners' efforts to distinguish away this clear precedent are unpersuasive and unavailing.

First, the petitioners argue that the decisions in *Order Nos. 22341, 24672* and in *Nassau Power Corp. v. Beard* involved only cogenerators. This is a distinction without a difference. *Order 22341* and *Nassau Power Corp. v. Beard* provide constructions of the Siting Act that apply generally; they are not limited to cogenerators but rather apply to all wholesale providers of power. The operative language in Order No. 22341 states that it applies to a "proposed electric power plant project," not merely cogenerators.[6] Similarly, in the footnote in *Nassau Power Corp. v. Beard* where the Supreme Court of Florida expressly rejected Nassau's argument that the need determination criteria of Section 403.519 did not require the Commission to make a utility specific determination of need, there is not a single reference to cogeneration. *See,* quote at pp. 14, 15 *supra.* The Court's rationale and language is equally applicable to any wholesale provider of power.

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[6] Immediately after finding the criteria of Section 403.519 to be "utility and unit specific," the Commission stated that the information being adopted was "a means of testing the reasonableness of a proposed electric power plant project" not just a cogeneration facility. 89 FPSC 12 at 319.

Second, the petitioners argue that *Nassau Power Corp. v. Beard* and Order *Nos. 22341 and 24672* are distinguishable because they involved entities that were attempting to force the utility to purchase power and that a merchant plant is not in a similar position. Again, they point to a distinction without a difference. Not once does the consideration that a utility was obligated to purchase power from a QF enter into either the Commission's or the Court's reasoning in any of these cases. More importantly, this distinction actually works against DNS. At least in the prior *Nassau* cases the Commission and the Court knew the purchasing utility, yet that was not enough to save those applications. Here no purchasing utility is identified; it is far more difficult to apply utility specific criteria here than in the *Nassau* cases.

Finally, the petitioners again resort to their "dicta" pejorative. The points made above about dicta apply likewise here. Moreover, it is clear the Supreme Court of Florida did not consider the language upon which FPL relies in *Nassau Power Corp. v. Beard* to be dicta. The Court stated in *Nassau Power Corp. v. Deason*:

> The Commission's interpretation of section 403.519 also comports with this Court's decision in *Nassau Power Corp. v. Beard*. In that decision, we rejected Nassau's argument that "the Siting Act does not require the PSC to determine need on a utility specific basis." 601 So.2d at 1178 n.9. Rather, we agreed with the Commission that the need to be determined under section 403.519 is "the need of the entity ultimately consuming the power," in this case FPL.

641 So.2d at 399. If the quoted language had been mere dicta, would the Supreme Court have cited it as precedent? Certainly not! The Commission must reject the petitioners' desperate effort to have it treat as dicta what the Supreme Court views as precedent.

The Joint Petition fails to allege that a specific utility or utilities need its uncommitted capacity, and it asks the Commission to presume cost-effectiveness. On the authority of *Nassau Power Corp. v. Beard*, it has failed to state a cause of action and must be dismissed.

IV
The Joint Petition Should Be Dismissed For Failure To Meet Minimum Pleading Requirements.

Florida Administrative Code Rule 25-22.081 prescribes mandatory pleading requirements for a need determination petition:

> The petition, to allow the Commission to take into account: the need for electric system reliability and integrity, the need for adequate reasonable cost electricity, and the need to determine whether the proposed plant is the most cost effective alternative available, shall contain the following information....

The Joint Petition should be dismissed for not meeting these mandatory pleading requirements.

A. There Is No Description Of The Utility Or Utilities Primarily Affected.

Florida Administrative Code Rule 25-22.081(1) requires "[a] general description of the utility or utilities primarily affected, including the load and electrical characteristics, generating capability, and interconnections."

The Joint Petition fails to provide this information as to 94% of the proposed power plant. An attempt is made in the Joint Petition to provide the Rule 25-22.081(1) information as it relates to UCNSB's 6% of the Project. However, the Joint Petition deliberately avoids any commitment to provide the remaining 94% to peninsular Florida utilities, much less identify which utility would get it (none of which are identified in the Joint Petition). The failure of the Joint Petition to provide this mandatory information completely frustrates the Commission's

ability to apply the utility specific need determination criteria. This serious omission is grounds for dismissal.

The Joint Petitioners' reference to the needs of UCNSB for 30 MW (6%) of the proposal output cures nothing. The simple fact remains that UCNSB is not a primarily affected utility as to the remaining 94% of the proposed plant. As discussed above, DNS is not a utility within the meaning of the Siting Act or Section 366.82. Consequently, it cannot be a primarily affected utility within the meaning of the rule. What is omitted from the Joint Petition and what is intended by Rule 25-22.081 is an identification of the purchasing utility or utilities. The petitioners acknowledge this requirement in part by including information about the one known purchasing utility, the UCNSB, but they ignore the requirement as to 94% of the proposed plant. Their failure to comply with the Commission's pleading rule remains transparent.

B. The Joint Petition Omits A Statement Of The Specific Conditions, Contingencies Or Other Factors That Indicate A Need For The Proposed Electrical Power Plant.

Florida Administrative Code Rule 25-22.081(3) requires that:

> The petition ... contain ...
> (3) A statement of the specific conditions, contingencies or other factors which indicate a need for the proposed electrical power plant including the general time within which the generating units will be needed. Documentation shall include historical and forecasted summer and winter peaks, the number of customers, net energy for load, and load factors with a discussion of the more critical operating conditions. Load forecasts shall identify the model or models on which they were based and shall include sufficient detail to permit analysis of the model or models. 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.

The Joint Petition fails to provide this information as to the 94% of the proposed plant that is not committed to UCNSB.[7] DNS cannot supply that information because it does not know if or to whom it may sell the remainder of its capacity and energy. It cannot document the purchasing utility's peaks loads, net energy for load, load factors and provide a discussion of the more critical operating conditions. It cannot identify the models on which the load forecasts are based. It fails to satisfy Rule 25-22.081(3).

In response, the petitioners argue that their discussion of the load forecast for peninsular Florida satisfies this requirement. Petitioners' Legal Memorandum at 52-53. It does not.

"Peninsular Florida" is not a legal entity with a need for a power plant. It is nothing more than a planning construct. The obligation to meet the needs of the utilities within peninsular Florida rests solely with those utilities. It is the utilities that have the obligation to serve and the responsibility to plan. It is the individual utilities which will make the build or buy decisions necessary to meet their needs.[8]

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[7] Not all of the required information is supplied even for UCNSB. Part of the specific documentation required, load factors, were omitted for all years except the year 2000. More significantly, the models used to develop the load forecast were not identified in "sufficient detail to permit analysis." See the discussion on pages 48-51 of the Exhibit to the Joint Petition.

[8] Even if a reference to peninsular Florida's rather than a specific utility's need for power could satisfy the requirements of Florida Administrative Code Rule 25-22.081(3), the discussion in the Joint Petition and its Exhibit falls well short of the rule's requirements. There is no attempt to address "the specific conditions, contingencies or other factors that indicate a need for the proposed power plant." In the Joint Petition it is stated that "Duke New Smyrna accepts the peninsular Florida load forecasts presented in the 1997 FRCC Ten-Year Plan and the 1998 FRCC Regional Plan." Joint Petition at 23. This is hardly a discussion of the specific contingencies and other factors indicating a need for the proposed plant; there is no attempt to discuss what factors lead to the load growth quantified in either plan. Moreover, the statement injects considerable confusion because it suggests reliance upon two different load forecasts.

It should also be noted that Rule 25-22.081(3) requires other information that the Joint

C. The Joint Petition Fails to Adequately Address Viable Nongenerating Alternatives.

Florida Administrative Code Rule 25-22.081(5) requires:

> A discussion of the viable nongenerating alternatives including an evaluation of the nature and extent of reductions in the growth rates of peak demand, KWH consumption and oil consumption resulting from the goals and programs adopted pursuant to the Florida Energy Efficiency and Conservation Act both historically and prospectively and the effects on the timing and size of the proposed unit.

The Joint Petition abysmally fails to satisfy this pleading requirement.

Even the portion of the Joint Petition that attempts to address this rule requirement for UCNSB's 6% of the proposed project is woefully inadequate. Two alternatives are mentioned: load control, which is currently being offered, and a solar photovoltaic project, which is planned for 2001. There is no statement that these two alternatives are the only two viable nongenerating alternatives to the Project. No evaluation is offered of the demand, kWh and oil consumption reductions associated with these programs. The requirements of this rule as to the Utilities Commission's 6% interest in the proposed plant have not been satisfied by the Joint Petition.

For the other 94% of the proposed Project, there is no attempt to meet the rule's requirements. The Joint Petition says that DNS does not engage in conservation and is not required to have conservation goals. Joint Petition at 23. That is true, but hardly satisfaction of

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Petition fails to provide. Load forecasts are supposed to be presented in considerable detail, including identification of the models used in sufficient detail to permit analysis of the models. There is no attempt in the Joint Petition to comply with this rule requirement. All that is provided for peninsular Florida is the total projected demand; there is no documentation of specifically required information such as net energy for load, number of customers, or load factors. There is no attempt to identify, much less discuss, the models used to develop the peninsular Florida load forecast upon which the petitioners attempt to rely.

the requirements of the rule. The only other attempt to meet those requirements is the statement that Duke "accepts the peninsular Florida load forecasts presented in the 1997 FRCC Ten Year Plan and the 1998 FRCC Regional Plan, which reflect the assumed implementation of currently approved energy conservation programs." Id. So what? Where is the discussion of the viable nongenerating alternatives? Not a single alternative is mentioned in the Joint Petition. Where is the "evaluation of the nature and extent of reductions in the growth rates of peak demand, kWh consumption and oil consumption resulting from the goals and programs adopted pursuant to the Florida Energy Efficiency and Conservation Act?" It is not provided. If applicants could merely invoke "peninsular Florida" load forecasts, that would eviscerate Rule 25-22.081(5).

V
The Joint Petition Should Be Dismissed For Failure To Make Allegations Sufficient To Demonstrate A "Peninsular Florida" Need.

Even if Section 403.519 permitted an applicant to demonstrate need for "peninsular Florida"[9] rather than a specific utility -- which it does not -- the Joint Petition fails to allege that the uncommitted portion of the project meets the criteria of Section 403.519 for peninsular Florida. The Joint Petition speaks vaguely of the Project being "consistent with" peninsular Florida needs.[10] Joint Petition at 14, 19. Instead of alleging that the proposed plant is "the most

[9] "Peninsular Florida" is not a legal entity with an obligation to serve and need. It is a planning construct, an adjusted compilation of over 50 utilities. There is no legal entity which has a "peninsular Florida" need.

[10] In contrast, the Joint Petition does allege that the proposed Project will meet these needs for the UCNSB. "[I]t is readily apparent that the UCNSB needs additional capacity and that the 30 MW of entitlement capacity from the New Smyrna Beach Power Project will contribute significantly toward meeting these needs." Joint Petition at 11.

cost-effective alternative available" to meet peninsular Florida's or a purchasing utility's need for power, the Joint Petition states the proposed plant "will be **a** cost-effective power supply resource for peninsular Florida."[11] Joint Petition at 19, 20 (emphasis added). Instead of alleging that there are no conservation measures reasonably available, the Joint Petition states that the "Project is **consistent with** the overall goals" of FEECA. Id. at 23 (emphasis added). In each and every instance, the Joint Petition stops short of alleging that the uncommitted portion of the Project meets the statutory need determination criteria when applied to "peninsular Florida." Consequently, the Joint Petition fails to state a cause of action and must be dismissed.

VI
The Joint Petition Should Be Dismissed Because The Joint Petition's Theory Of Allowing The Market To Determine Need Is Inconsistent With The Siting Act.

Under Section 403.502(2), a power plant's environmental impact is to be weighed against a utility specific need for that plant. A determination of need is an essential condition precedent to plant certification. Section 403.508(3), Florida Statutes. The theory underlying the Siting Act is simple: If you don't need it, don't build it.

The Joint Petition's theory of the case is different. DNS has no obligation to serve, but it wants to build a power plant that it alleges will have minimal impact on the environment. DNS may -- but does not commit to -- sell its output to Florida utilities. Peninsular Florida utilities as a whole are alleged to have a need for additional generating capacity. So, allow the market, rather than the Commission, to determine whether there is a need for the plant and whether the

[11] Once again, contrast this insufficient allegation with what the Joint Petition says as to the UCNSB. "The New Smyrna Beach Power Project is the most cost-effective alternative available to the UCNSB for meeting its future power supply needs." Joint Petition at 17.

plant will be the most cost-effective alternative. The Joint Petition's theory is from *Field of Dreams*: Build it, and they will come.

The petitioners' theory of the case is inconsistent with the Siting Act. They ask the Commission to abandon its and the Supreme Court's conclusions that the criteria of Section 403.519 are utility specific, and that need arises from an obligation to serve and therefore must be viewed from the perspective of a purchasing utility. Fundamentally, they ask that the marketplace, rather than the Commission, determine need. Any doubt about their intentions was removed by Professor Seidenfeld's repeated assertions to that effect in oral argument. Tr. 150, lines 11-13, 157, lines 14, 15.

To grant the Joint Petition, the Commission would have to abandon the role of gatekeeper assigned it by the Legislature under the Siting Act. This would be neither proper nor legal. Instead, DNS should follow the law and first secure contracts for its output before proceeding with a need determination. That approach would allow review under the utility specific need determination criteria, avoid a proliferation of power plants, mitigate environmental impacts, and avoid an uneconomic duplication of facilities. Because DNS has failed to take these steps, the Joint Petition should be dismissed as inconsistent with the Siting Act.

VII
The Joint Petition Should Be Dismissed Because It Demonstrates On Its Face That The Proposed Power Plant Is Not Needed And Will Constitute An Unnecessary Duplicative Facility.

The Commission has extensive authority to oversee Florida's electric utility grid, including jurisdiction over the planning, development and maintenance of the electric grid to assure an

adequate and reliable source of energy for Florida and to avoid the uneconomic duplication of facilities. 366.04(2)(c), 366.04(5), 366.05(1),(7),(8), 366.051, 366.055, Fla. Stat.

If the Joint Petition is granted, one of the essential purposes of the Commission's jurisdiction over the grid would be frustrated. The Commission would be approving an uneconomic duplication of facilities. Tables 8 and 9 in the Joint Petition Exhibit show that beyond the Project's scheduled in service date peninsular Florida reserve margin criteria will exceed 17% until the winter of 2007/08 without the Project. Thus, the Joint Petition shows on its face there is no need for the Project, and it should be dismissed as inconsistent with both the Siting Act and the Commission's duties concerning Florida's electric grid.[12]

VIII
The Joint Petitioners Improperly Attempt To Have The Commission Decide Constitutional Issues Reserved To Courts.

In an attempt to salvage their Joint Petition from FPL's and FPC's motions to dismiss, the petitioners resort to not one but two federal constitutional arguments. They argue (in twenty pages of brief and hours of oral argument) that granting the motions to dismiss, which are clearly warranted on state law, would violate the Supremacy Clause (preemption) and the Commerce

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[12] This is a classic case of where an exhibit attached to the petition negates the attempt to plead a cause of action. The petitioners have attempted to allege need and cost-effectiveness from a peninsular Florida perspective. Setting aside the legal deficiencies previously pointed out, **Tables 8 and 9 from the Joint Petition Exhibit actually demonstrate that peninsular Florida utilities do not need this power plant for electric system reliability and integrity and for adequate electricity at a reasonable cost**. The petitioners' own table shows that peninsular Florida utilities colletively achieve well above the FRCC's reserve margin criterion without the petitioners' plant. Because the petitioners' own exhibit attached to their pleading negates their attempt to state a cause of action, the Joint Petition should be dismissed. *See, Franz Tractor Co. v. JJ Case Co.*, 556 So.2d 524 (Fla. 2d DCA 1990); *Health Application Systems, Inc. v. Hartford Life & Accident Insurance Co.*, 381 So.2d 294 (Fla. 1st DCA 1980); *Weiner v. Lozman & Weinberg, P.A.*, 340 So.2d 1247 (Fla. 3d DCA 1977).

Clause (dormant Commerce Clause) of the United States Constitution. Unfortunately for the petitioners, this tactic is unavailing for two compelling reasons: the Commission cannot do what the petitioners asks, and the petitioners' interpretations of the Supremacy and Commerce Clauses are unsupportable.

The petitioners are improperly asking the Commission to rule on constitutional issues. An administrative agency such as the Commission may not decide constitutional issues. This principle is premised upon the Separation of Powers provision of the Florida Constitution and the cases applying that provision.

Under Article II, Section 3 of the Florida Constitution, the Separation of Powers provision, the powers of state government are divided among the judicial, legislative and executive branches, and no branch may exercise the powers given to another branch unless expressly provided by the Florida Constitution:

> **SECTION 3. Branches of government.** The powers of the state government shall be divided into the legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided.

Passing upon constitutionality is uniquely a judicial function. *Marbury v. Madison*, 5 U.S. 137 (1803); *Palm Harbor Special Fire Control District v. Kelly*, 516 So. 2d 249 (Fla. 1987).

A body of case law has arisen in Florida, premised upon the separation of powers provision of the Florida Constitution and the recognition that passing upon constitutionality is a judicial function, holding that administrative agencies may not decide constitutional questions. Typical of these cases is a case which FPL cited in argument. In *Metropolitan Dade County v.*

Dept. Of Commerce, 365 So.2d 432, 434-35 (Fla 3d DCA 1978), the court observed the following about the ability of administrative agencies to determine constitutional issues:

> The Administrative Procedure Act cannot relegate matters of constitutional proportions to administrative agency resolution, nor can it impair judicial jurisdiction to determine constitutional disputes. [citations omitted] Moreover, constitutional challenges to administrative agency actions are for the courts alone to determine and are not for administrative resolution.

In this proceeding the petitioners raise a constitutional challenge to an administrative agency action -- a potential dismissal of their Joint Petition -- which is proper only for a court to consider. The petitioners' constitutional arguments that the motion to dismiss should not be granted are not proper for administrative resolution. Deciding not to grant the motions to dismiss because the result would be unconstitutional would be a judicial function expressly reserved to the judiciary under the Separation of Powers provision of the Florida Constitution. The constitutional arguments are not properly before the Commission and must be disregarded.

IX
Congress Has Not Preempted Florida's Application of the Florida Electrical Power Plant Siting Act.

The petitioners argue that the application of the *Nassau* decisions to them would conflict with the intent of Congress and the FERC as evidenced by the Energy Policy Act and Order 888. Therefore, they argue that the Commission is preempted from applying the *Nassau* decisions to DNS and dismissing the Joint Petition.

The petitioners' preemption arguments should be rejected for at least two compelling reasons. First, preemption is disfavored without persuasive reasons, which prior United States Supreme Court decisions make clear are absent here. Second, both Congress and the FERC have

explicitly recognized that neither the Energy Policy Act nor Order 888 preempts state authority to site and license power plants, including EWGs.

A. Preemption Is Not Warranted.

Preemption doctrine arises under the Supremacy Clause of the United States Constitution. The Supreme Court of the United States has explained it as follows:

> The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to preempt state law. Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law [citation omitted], when there is outright or actual conflict between state and federal law [citation omitted], where compliance with both federal and state law is in effect physically impossible [citation omitted], where there is implicit in federal law a barrier to state regulation [citation omitted], where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law [citations omitted], or where that state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Louisiana Public Service Commission v. Federal Communications Commission, 451 U.S. 725 (1981).

In this case the petitioners argue that requiring DNS to contract with a state regulated utility in order to demonstrate need under the Siting Act "stands as an obstacle to the accomplishment and execution of the full objectives of Congress." In support, they cite *Pacific Gas & Electric Company v. State Energy Resources Conservation and Development Commission,* 461 U.S. 190, 204, 52 PUR4th 169, 184 (1983). In fact, *PG&E* demonstrates that preemption is not appropriate in this case.

In *PG&E,* the Supreme Court rejected arguments that a California statute was preempted because it conditioned construction of a nuclear power plant on a state finding that there were

adequate storage facilities and means of disposing spent nuclear fuel. Much of the Supreme Court's reasoning is equally applicable in this case. In reaching its decision, the Court rejected an argument almost identical to the petitioners': that a state siting act should be preempted because it frustrates national energy policy.

Throughout *PG&E*, the Supreme Court observed that regulating the need for, and economic feasibility of, power plants traditionally has been the states' responsibility.[13] When Congress legislates in a field that states have traditionally occupied, the preemption analysis must start "with the assumption that the historical police powers of the states were not to be superseded by the federal act unless that was the clear and manifest purpose of Congress." 52 PUR4th at 177, quoting with approval *Rice v Santa Fe Elevator Corp.*, 331 US 218, 230 (1947).

Of even greater import is the Court's rejection in *PG&E* of the argument that the state law requiring the availability of means to dispose of nuclear waste frustrated the national energy policy of promoting nuclear power. After readily acknowledging that a primary purpose of the Atomic Energy Act was to promote nuclear power, the Court went on to agree with a lower court "that the promotion of nuclear power is not to be accomplished 'at all costs,'" observing that, among other things, "the continued preservation [under the Atomic Energy Act] of state

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[13] For instance, the Court stated: "The states retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns. Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the states." 52 PUR4th at 176. The Court also stated: 'As we noted in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, "There is little doubt that under the Atomic Energy Act of 1954, state bodies are empowered to make the initial decision regarding the need for power."' 52 PUR4th at 177 (citation omitted). The Court concluded its analysis of the Atomic Energy Act with the following observation regarding state authority: "States exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, rate making, and the like." 52 PUR4th at 180.

regulation in traditional areas belies that." 52 PUR4th at 185. The Court found that, given Congress' embrace of a dual regulatory scheme, only Congress could rethink this division of authority, and the Court should not intercede via preemption doctrine. 52 PUR4th 185-86.

This case is quite similar to *PG&E*. Here, as there, Congress has legislated in a fashion to create a dual regulatory scheme. Here, as there, the determination of need for and the cost-effectiveness of plants in siting proceedings has been left to the states. Here, as there, it would be up to Congress -- not a court and certainly not the Commission -- to rethink whether siting authority should be removed from the states. Here, as there, preemption would be improper.

A case cited in *PG&E* also provides guidance here. In *Commonwealth Edison Company v. State of Montana,* 453 US 609, 40 PUR4th 159 (1981), the United States Supreme Court considered and rejected the argument that a Montana coal severance tax was unconstitutional because it substantially frustrated national energy policy to promote the production and use of coal. The Court agreed that such a national policy existed, but refused to final that general statements about the policy "demonstrate a congressional intent to preempt all state legislation that may have an adverse impact on the use of coal." 40 PUR4th at 173. The Court noted that "[p]reemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons -- either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.'" *Id.* The Court stated it is necessary to look beyond general expressions of 'national policy' to specific federal statutes with which the state law is claimed to conflict.' 40 PUR4th at 174. The Court found that the federal statute cited as the source of the coal-promotion policy explicitly contemplated state coal severance taxes, and, accordingly, that preemption was inapplicable.

The parallels here to *Com Ed* are readily apparent. It may be acknowledged that one of the purposes of the Energy Policy Act was to enhance competition in the wholesale power market. However, general statements of policy do not preempt all state actions that may have an impact on policy. Preemption is disfavored and should be embraced only for persuasive reasons. When one looks beyond the general expressions of national policy in the Energy Policy Act, one finds that Section 731 reserves to the states authority to site and environmentally license power plants.[14] Given this clear reservation, preemption is not appropriate.

For all these reasons, the petitioners' preemption argument is unavailing. Both *PG&E* and *Com Ed* show that preemption is inapplicable here.

B. Petitioners Overstate The Effect Of The Energy Policy Act And Order No. 888.

In their brief and in oral argument, the petitioners rely heavily upon text from Order 888 and legislative history of the Energy Policy Act to formulate the argument that there is a national energy policy to encourage competition in the wholesale power market. They, in turn, argue that dismissal of the Joint Petition for failure to have a contract and failure to be able to demonstrate utility specific need will conflict with "the goals and policies of federal law" (Petitioners Memorandum of Law at 42) and " the goals of a federal statute or regulation" (Id. at 43). Note that they do not even allege that dismissal would be inconsistent with or conflict with the Energy Policy Act or Order No. 888 only with "goals and policies" supposedly emanating from them.

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[14] It provides: "Nothing in this title or in any amendment made in this title shall be construed as affecting or intending to affect, or in any way interfere with, the authority of any State of local government relating to environmental protection or the siting of facilities." P.L. 102-486, Title VII, Subtitle C, 106 Stat. 2921 (Oct. 24, 1992). The FERC has recognized this section leaves states with siting authority: "Among other things, Congress left to the States authority to regulate generation and transmission siting. See, FPA section 201(b) and 211 (d)(1); Section 731 of the Energy Policy Act." Order No. 888 at 433 N. 543.

This is a real reach. They cite no legal authority that inconsistency with a goal or policy that has not been committed to a statute or regulation is a ground for preemption, and they cannot.

Congress undertook two specific actions in the Energy Policy Act designed to facilitate competition in the wholesale electric market. First, it empowered the FERC to order transmission in specific cases. Second, it exempted a class of independent power producers from regulation under the Public Utility Holding Company Act, defining such entities as Exempt Wholesale Generators ("EWGs"). Congress took no other action in the Energy Policy Act to facilitate competition in the wholesale electric market. Notwithstanding Professor Seidenfeld's speculation that if Congress had known about Florida's Siting Act it would have acted further (Tr. 149, 153), the fact is that Congress only took two specific actions to facilitate wholesale competition. Requiring a contract with a purchasing utility in order to demonstrate need under the Siting Act does not relate in any fashion to either of those specific actions. Moreover, in declining to preempt state siting authority, Congress must be presumed to have known full well that states might use that authority to refuse to site a plant even though it could facilitate competition in the wholesale market.

X
Dismissal Of The Joint Petition Would Not Violate The Commerce Clause.

The petitioners argue that dismissal of their Joint Petition would violate the dormant Commerce Clause of the United States Constitution, because it would "prohibit DNS from applying for a determination of need." (Petitioners' Legal Memorandum at 28-42). The petitioners mischaracterize the effect of dismissal and misread the commerce Clause. Their argument is unavailing. If the Joint Petition is dismissed, DNS will not be prohibited from

applying for a determination of need; it would just have to meet the same utility specific standards every other applicant must meet. Moreover, because Congress has explicitly recognized state authority to impact interstate commerce through the siting and licensing of power plants, the dormant Commerce Clause cases do not apply.

A. Dormant Commerce Clause

In Article I, Section 8 of the United States Constitution, Congress is given the express grant of authority to "regulate Commerce ... among the several states." Although this provision is an express grant of authority to Congress, a body of case law has arisen that reads this grant of congressional authority as a limitation on state taxing and regulatory authority. Under this body of case law, which has created the "dormant" Commerce Clause, federal courts have concluded that the Commerce Clause, by negative implication, limits the power of states to enact laws imposing substantial burdens on commerce. The United States Supreme Court has stated the doctrine as follows: "[t]he negative or dormant implication of the Commerce Clause prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby 'impedes free private trade in the national marketplace.'" *General Motors Corp. v. Tracy,* 117 S.Ct. 811, 818 (1997) *(quoting Reeves, Inc. v. Stake* 100 S.Ct. 2271 (1980) (citations omitted).

The dormant Commerce Clause cases do not create an absolute restriction on a state's ability to regulate so that any impact on interstate commerce is prohibited. There is a "traditional recognition of the need to accommodate health and safety regulation in applying dormant Commerce Clause principles." *General Motors*, 117 S.Ct. at 828. Legitimate state pursuit of health and safety issues is compatible with the Commerce Clause, which was "never intended to

cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the Commerce of the country.'" *Id.* (*quoting Huron Portland Cement Co. v. Detroit,* 80 S.Ct. 813,816, (1960) (*quoting Sherlock v. Alling*, 23 L.Ed. 819 (1876).

The test commonly applied in dormant Commerce Clause cases is twofold. First, does the state regulation discriminate against interstate commerce in favor of local business (provide economic protectionism)? *See, Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978). Even if it does, a state regulation will be permitted if there is no other means to advance a legitimate local interest. *Maine v. Taylor,* 477 U.S. 131 (1986). Second, does the burden on interstate commerce exceed legitimate local interests? If a statute regulates evenhandedly to effectuate a legitimate local interest and has only incidental effects on interstate commerce, it will be upheld unless the burden on commerce clearly exceeds the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Finally, as with preemption doctrine, dormant Commerce Clause concerns are overridden if Congress has expressly authorized state regulation of interstate commerce. Petitioners acknowledge this in their legal memorandum in the first case they cite in their Commerce Clause argument: "[A]ny state regulation of interstate commerce is subject to scrutiny under the dormant Commerce Clause, **unless such regulation has been** preempted or **expressly authorized by Congress**." *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County,* 48 F.3d 701, 710 (3rd Cir (1995) (emphasis added).

B. Congress Has Expressly Authorized States To Impact Interstate Commerce Through Power Plant Siting.

As discussed above, in Section 731 of the Energy Policy Act, Congress has expressly reserved siting and environmental licensing of power plants to the states. Accordingly, the operation of state laws such as the Siting Act regulating power plant siting was expressly envisioned by Congress and cannot be said to be a violation of the dormant Commerce Clause. *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County,* 48 F.3d 701, 710 (3d Cir. 1995) (State regulation of commerce not subject to dormant Commerce Clause scrutiny if expressly authorized by Congress); See also *Prudential Insurance Company v. Benjamin,* 66 S.Ct. 1142 (1946) (Tax on foreign insurance companies upheld; Congress in McCarren Act supported state taxing and regulating of insurance); *Gallagher v. Motors Insurance Corp.*, 605 So.2d 62, 66 (Fla. 1992) ("After the enactment of the McCarren-Ferguson Act, it was clear that the Commerce Clause no longer limited a state's power to condition the right of foreign insurers to do business within its borders."); *Northeast Central Pipeline Corp. v. Commission of Kansas,* 109 S.Ct.1262 (1988) (Natural Gas Act's reservation of states power over production rates indicated Congressional intent that state regulation of gas production did not violate the Commerce Clause.)

C. A Demonstration Of Need And Requiring A Contract Are Not Economic Protectionism.

The dormant Commerce Clause is not applicable here for the reasons just discussed. But even if it were, the petitioners fail to show that it would be violated by the case law interpreting the Siting Act as requiring a nonutility generator to have a contract with a purchasing utility.[15]

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[15] Initially, it should be noted that the petitioners' dormant Commerce Clause argument is limited solely to the requirement of *Nassau Power Corp. v. Deason* that a wholesale provider

The petitioners argue that the requirement for a contract discriminates against out of state providers of electricity and favors in-state providers and that such "economic protectionism" is per se invalid. They are wrong. It is true that a long line of cases find certain instances of state regulation or taxation to be economic protectionism and violative of the Commerce Clause. But those cases involve state regulations or taxes that were adopted specifically to effect economic protectionism. In contrast, there is nothing to indicate that the Siting Act is designed to, or does, effect economic protectionism.

The Siting Act balances the need for a power plant against a power plant's certain environmental impact. The Commission is given exclusive authority to determine the need for a power plant, and that need determination is a condition precedent to proceeding with the remaining of the siting process. If need is not established, no further consideration of siting is warranted. The purpose of the Siting Act is environmental protection, not economic protection of competitors.

The purpose of requiring a utility-specific need determination likewise is not economic protectionism. The Commission and the Florida Supreme Court concluded that the Section 403.519 need criteria are utility specific not to protect any competitive economic interests, but rather to make the need determination meaningful. As the Florida Supreme Court noted in

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must first have a contract with a purchasing utility before it is a proper applicant under the Siting Act. That is the only requirement attacked in the petitioners' dormant Commerce Clause argument. Thus, even if the Commission were to improperly decide that there is a Commerce Clause problem with following the Florida Supreme Court's decision in *Nassau Power Corp. v. Deason* that an entity without a need must have a contract with an entity which has need (a dubious conclusion given the Florida Supreme Court's responsibility to uphold and protect the United States Constitution), the Commission could still dismiss the Joint Petition for failure to allege utility specific need under *Nassau Power Corp. v. Beard*, for the petitioners have not alleged that an application of that decision would violate the dormant Commerce Clause.

Nassau Power Corp. v. Beard:

> The PSC's interpretation is consistent with the overall directive of section 403.519 which requires, in particular, that the Commission determine the cost-effectiveness of a proposed power plant. **This requirement would be rendered virtually meaningless if the PSC were required to calculate need on a statewide basis without considering which localities would actually need more electricity in the future.**

601 So.2d at 1178.[16]

The requirement of demonstrating need for a power plant is an essential part of the Siting Act's procedure for protecting Florida's environmental interests. The requirement of a wholesale provider having a contract to be able to demonstrate need was adopted solely to effectuate an assessment of need essential to protecting Florida's environment. Without such a contract, there is no assurance that the power is needed and there is no means by which the Commission may discharge its statutory responsibility to determine need.[17] At no time has the Commission or the Supreme Court of Florida embraced an interpretation of the Siting Act that is intended to provide

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[16] When reviewing the Commission's and the Court's construction of the Siting Act and the need determination criteria, it is important to remember that these constructions were not urged upon the Commission by the utilities which the petitioners allege are protected. FPL fought the attempt of the Commission to make it an indispensable party in wholesale power need determination proceedings. *See, In re: Petition of AES Cedar Bay, Inc. And Seminole Kraft Corp. for a determination of need*, 89 FPSC 1:368 (FPSC 1989). It was the Commission, on its own rationale, that adopted the requirement in the *Ark and Nassau* case which was ultimately upheld in *Nassau Power Corp. v. Deason*, that a wholesale provider needed to have a contract with a purchasing utility to be a proper applicant. FPL urged dismissal for an entirely different ground which the Commission rejected.

[17] Without a contract there is no identification of the purchasing utility. Without a contract, there is no ability to assess whether the purchasing utility needs the power plant. Without a contract, there is no ability to determine whether the power plant is the most cost-effective alternative available. Without a contract, there is no ability to determine if there is conservation available that will mitigate the purchasing utility's need for power.

economic protection to any competitive entity. The petitioners' argument that the requirement of a contract for entities that have no need of their own is economic protectionism simply ignores the purpose and intent of the requirement. The ultimate purpose of the requirement is to assure there is a need for power plants so that Florida is protected from an unnecessary proliferation of power plants.

D. There Is No Unreasonable Burden On Interstate Commerce.

The Siting Act's requirement that a nonutility applicant have a contract with a utility to be able to demonstrate a utility-specific need for a proposed power plant passes the test set forth in *Pike v. Bruce Church, Inc.*:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effect on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

The requirements of the Siting Act are even handed. All applicants must demonstrate need, and all applicants that have no need of their own must demonstrate need by producing a contract with an entity that has an obligation to serve and a corresponding need.

These requirements effectuate a legitimate local public interest. The state of Florida has numerous legitimate public interests served by the Siting Act, the determination of need made in the Siting Act, and the requirement that entities without a need of their own demonstrate need by producing a contract with an entity that has a need. As set forth more fully in Section 403.502, Florida Statutes, the selection of power plant sites has a "significant impact upon the welfare of the population, the location and growth of industry, and the use of natural resources of the state." Requiring a determination of need and a contract to demonstrate need when there is not an

obligation to serve allows the effectuation of "a reasonable balance between the need for the facility and the environmental impact resulting from construction and operation of the facility, including air and water quality, fish and wildlife, and the water resources and other natural resources of the state" as intended by Section 403.502(2). Environmental protection and resource conservation are areas of legitimate local concern. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). The Siting Act's interest in protecting health and safety interests through environmental protection is entitled to the accommodation traditionally recognized for health and safety regulation in dormant Commerce Clause cases.

The effects of the need determination and contracting requirement on interstate commerce are only incidental. Every entity that builds a power plant without its own need ultimately will contract with retail utilities to sell the power from its power plant. The issue is solely one of timing. Entities such as DNS can enter into contracts for the sale of their plant's output prior to seeking a determination of need; that is evidenced by the agreement between DNS and the UCNSB referred to in the Joint Petition. DNS has simply chosen, for whatever reason, not to negotiate such contracts for 94% of its plant's proposed capacity before seeking a determination of need. Whether DNS negotiates its contracts prior to or after permitting does not significantly impact interstate commerce and DNS' ability to market and sell its power. DNS's suggestion that it will be held hostage by potential contracting parties if it contracts before permitting is unsupported and speculative, and it is rebutted by the existence of the UCNSB agreement. The timing of DNS' contracting for the sale of its power is a minimal impact on interstate commerce.

While the timing of DNS's contract negotiations has minimal impact on interstate commerce, whether those negotiations occur before or after permitting quite significantly affects

the State of Florida's legitimate interests in determining whether its finite resources should be devoted to a power plant. The State of Florida has a legitimate interest in balancing the need for a power plant with the certain environmental impact a power plant will have, as intended by the Legislature in Section 403.502(2). It can only protect its legitimate interests by requiring a determination of need to assess the need for a power plant prior to permitting. If it waits and lets the marketplace determine need, it runs the risk of incurring environmental consequences to the state's natural resources without there being a need for a power plant. The state faces the same difficulty in assessing the need for a power plant when the entity proposing to build the plant has no obligation to serve and a corresponding need of its own. The requirement of a contract evidencing that the proposed plant meets a need is the only means the state has of ensuring that there is a need for a plant to be built by an entity that has no need of its own.[18] Therefore, requiring a contract not only is a legitimate local interest of the State of Florida that outweighs any incidental impact on interstate commerce, but also it is the only means to advance a legitimate local interest. Thus, this requirement passes both parts of the dormant Commerce Clause test.

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[18] Petitioners propose the alternative of letting DNS apply directly to the Commission. Petitioners' Legal Memorandum at 36. Both the Commission and the Supreme Court of Florida have found that to be unworkable. Such an approach fails to identify the purchasing utility or utilities. This runs afoul of the requirements of Order 22341 and *Nassau Power v. Beard.* Therefore, the utility specific criteria of Section 403.519 cannot be applied. This frustrates the application of 403.519, Florida Statutes and *Nassau Power v. Beard.* Resorting to an attempt to apply the utility specific standards to a statewide need results in rendering the criteria of Section 403.519 meaningless, as the Supreme Court of Florida observed in *Nassau Power v. Beard.* Presuming that certain of the need criteria are met rather than making an actual determination of need, as the petitioners urge in this case, has been found by the Supreme Court of Florida to be an abrogation of the Commission's statutory responsibility. *Nassau Power Corp. v. Beard.*

XI
Prior Need Determinations Justified In Part By Oil Displacement Provide No Precedent for Granting the Joint Petition.

At the close of the hearing Commissioner Deason requested a discussion of prior Commission decisions where a determination of need was granted for reasons other than a unit's need for system reliability; he specifically asked about rationales such as "general welfare of the state or economic opportunities." Tr. 1686.

FPL has found no need determinations premised upon the general welfare of the state. Similarly, FPL has found no need determinations based upon an applicant's "economic opportunity."

FPL has found three 1981 utility need determination decisions in which the Commission considered a proposed unit's oil displacement as "socio-economic benefits" or meeting a"socio-economic need." In each of those cases, the Commission also considered the unit's need for reliability purposes along with the economics and cost-effectiveness of the unit. In one of the cases the Commission approved a unit's need based upon the economic savings of avoided oil generation even though it did not find that the unit was immediately needed for reliability.

Each of these cases warrants a brief discussion. When they are analyzed, it is clear that they are legally and factually distinguishable from the case before the Commission. More importantly, there is nothing in these cases, all of which significantly predate the Supreme Court's *Nassau* decisions, which saves the Joint Petition from dismissal.

In January 1981, the Commission approved the need for the Big Bend Unit No. 4. *In re: Application for certification of Tampa Electric Company's proposed 417 megawatt net coal-*

fired Big Bend Unit No. 4, 81 FPSC 1:64 (FPSC 1981). The Commission considered the reliability need for Big Bend 4 from the perspective of both peninsular Florida and TECO. It found that achievement of recently approved conservation goals would obviate peninsular Florida's reliability need for Big Bend 4, but that even if those goals were achieved by TECO, TECO had a reliability need for the unit. The Commission found that the economic benefit of oil displacement from both a peninsular Florida perspective and TECO's perspective made the unit cost-effective. The Commission also found that there would be a "socio-economic benefit" from building the unit: a "reduction in peninsular Florida's dependence on imported oil."

In June 1981, the Commission issued to JEA and FPL a determination of need for the St Johns River Power Park ("SJRPP") Units 1 and 2. *In re: JEA/FPL's Application of need for St. John's River Power Park Units 1 and 2,* 81 FPSC 6:220 (FPSC 1981). In its assessment of the "need for power," the Commission considered reliability needs, "economic need" and "socio-economic need." This time the Commission found that, assuming the Commission's conservation goals were achieved, neither peninsular Florida nor JEA nor FPL needed the units for reliability purposes until 1989 and 1991, even though the units were scheduled for 1985 and 1987. This finding did not stop the Commission. It stated:

> Thus, the salient issue is the determination of the need for the SJRPP Units 1 and 2 with in-service dates of December, 1985 and May, 1987, respectively is whether the construction of these units in the time frames proposed represents the lowest alternative available to the continued use of expensive oil-fired generation in peninsular Florida and in the areas served by JEA and FPL.

81 FPSC 6 at 221. The Commission then considered the SJRPP units against a series of alternatives that would displace oil: power purchases from Seminole Electric Cooperative and

Georgia Power, conversion of oil-fired units to coal, and purchase of nuclear power from Georgia. The Commission found the proposed units to be the most cost-effective alternative:

> [W]e find that a need exists for the construction of the St. Johns River Power Park Units 1 and 2 in the time frame proposed by the applicants, in that construction of the units appears to be the best alternative available to the continued use of expensive oil-fired generation, based upon the most reasonable projections of future fuel costs and our appraisal of possible alternatives.

81 FPSC 6 at 226. It should be noted that under the fuel forecasts used, the cost of a barrel of oil in 1981 ranged from $27.90/bbl to $36/bbl and was projected to escalate in 1999 to a range of $160.00/bbl to $200.17/bbl.

In December 1981, the Commission issued Order No.10320 granting a determination of need for the 415 MW Stanton Unit 1 to the Orlando Utilities Commission ("OUC"). Once again the Commission in its assessment of "need for power" looked to reliability needs, economic needs and socio-economic needs. This time that assessment was made from the perspective of peninsular Florida, OUC and the entities which were to buy capacity out of the unit from OUC (FMPA and Lakeland).

The Commission's finding regarding reliability needs of peninsular Florida and the participants was mixed. The Commission found that the unit was not needed for reliability purposes by peninsular Florida during the 1980s (its commercial operation date was projected to be November 1986). Curiously, the Commission did not address the OUC's reliability need for the plant. It noted that most of the 137 MW that FMPA desired to purchase from OUC was needed and was within its permissible conservation goals. The Commission found that Lakeland had a reliability need for its 45 MW share of the unit.

The Commission found that there were economic benefits from the plant. As to peninsular Florida it stated, "the project will provide significant economic benefits for peninsular Florida in terms of supplying an alternative to oil-fired capacity generation." 81 FPSC 10: at 20. It found the unit to be an economical alternative to converting other OUC oil-fired units. It found that the unit was cost-effective to FMPA and Lakeland, but it stated that its decision to certify need was not premised upon benefits to FMPA customers. The Commission also found that there would be the socio-economic benefit of oil displacement for peninsular Florida, OUC, Lakeland and FMPA.

Of these three decisions, only the SJRPP decision can fairly be characterized as determining need for a reason other than immediate reliability. (A reliability need was shown several years after the unit's in service date). However, it is important to remember that in all three cases the need for the proposed units to meet immediate reliability requirements was called into question only because the Commission had just imposed demanding conservation goals. The Commission expected the utilities to assume that those goals would be achieved. Absent that assumption, there would have been an immediate reliability need for the units under consideration.

In each case the economic justification of the unit was that the unit was the most cost-effective alternative for displacing oil-fired generation. That is not surprising, given the context of when the decisions were made: the then-current price of oil ($28-30/bbl), and the then-projected price of oil ($160-200/bbl in 1999). Consideration of the economic benefit of a unit's oil displacement is appropriate under the cost-effectiveness and reasonable cost criteria of Section 403.519. The Commission also exercised its prerogative under Section 403.519 to

consider another matter within its jurisdiction - the mandate of FEECA to conserve expensive resources such as petroleum fuels.

These cases reinforce why the motions to dismiss should be granted. First, they make clear that the Commission, not the marketplace, should determine need. Letting the marketplace decide need and cost-effectiveness instead of the Commission would be inconsistent with these cases. Second, the cases instruct that a utility specific consideration of the need criteria is appropriate. In each case, the Commission considered need and cost-effectiveness from the perspective of the petitioning utilities. The Commission also considered peninsular Florida need and cost-effectiveness, but the Commission never lost sight of the petitioning utility's need. In several instances the Commission granted a need determination based on a utility specific reliability need where there was no peninsular Florida reliability need; but in no instance did the Commission accept a peninsular Florida reliability need in lieu of a utility specific one. Third, the cases looked carefully at the need of each purchasing utility. The petitioners have overlooked this lesson.

None of these cases helps the petitioners overcome the deficiencies of the Joint Petition. None of these cases involved nonutility applicants, and they do not cure the petitioners' failure to be proper applicants as to the merchant capacity. None of these cases holds that the need criteria are not utility specific, and if they did, they would have been overruled when *Nassau v. Beard* was decided. None of these cases excuses the pleading failures of the Joint Petition. None of these cases excuse the petitioners' failure to meet Rule 25-22.081. None of these cases justifies unnecessary duplication of planned utility facilities. These cases do not save the Joint Petition from dismissal.

Conclusion

The Commission reserved judgement on the motions to dismiss pending further briefing and argument. Now is the time to exercise that judgment. As a matter of law, the Commission should dismiss this matter irrespective of what the evidence presented at hearing does or does not show, because the Joint Petition is deficient on its face. DNS and UCNSB are not proper applicants as to the plant's merchant capacity. This is grounds for dismissal. *Nassau Power Corp. v. Deason*. The Joint Petition makes no attempt to allege utility specific need or cost-effectiveness as to 94% of the proposed plant. This is a failure to state a cause of action under *Nassau Power Corp. v. Beard*. While ignoring their requirement to allege utility specific need, the petitioners even fail to sufficiently allege "peninsular Florida" need. This is a failure to state a cause of action. The Joint Petition fails to meet the minimum pleading requirements of Rule 25-22.081. This is a failure to state a cause of action. The Joint Petition's theory of letting the marketplace rather than the Commission determine need and cost-effectiveness is inconsistent with the Siting Act, which requires the Commission to make that determination. The Joint Petition asks the Commission to approve an unnecessary duplication of planned utility facilities, an action inconsistent with the Commission's responsibility under Chapter 366. For all the foregoing reasons, the Joint Petition should be dismissed.

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