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October 12, 1998

Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
4750 Esplanade Way, Room 110
Tallahassee, FL 32399

RE: DOCKET NO. 981042-EM

Dear Ms. Bayó:

In accordance with the directions of Order Nos. PSC-98-1183-PCO-EI and PSC-98-1221 PCO-EI, enclosed for filing please find the original and fifteen (15) copies of the direct testimony William D. Steinmeier on behalf of Florida Power & Light Company in the above referenced docket.

Very truly yours,

Charles A. Guyton

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cc: All Parties of Record

CERTIFICATE OF SERVICE
DOCKET NO. 981042-EM

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Direct Testimony of William D. Steinmeier has been furnished by Hand Delivery (*), or U.S. Mail this 12th day of October, 1998, to the following:

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By: Charles A. Guyton
Charles A. Guyton

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 981042-EM
FLORIDA POWER & LIGHT COMPANY

OCTOBER 12, 1998

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.

TESTIMONY & EXHIBITS OF:

WILLIAM D. STEINMEIER

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DIRECT TESTIMONY OF WILLIAM D. STEINMEIER

DOCKET NO. 981042-EM

Q. Please state your name and address.

A. I am William D. Steinmeier. My business address is P.O. Box 104595, Jefferson City, Missouri 65110-4595.

Q. By whom are you employed and in what capacity?

A. I am an attorney and a consultant on issues related to public utility regulation. My practice is incorporated in the State of Missouri as William D. Steinmeier, Professional Corporation (P.C.)

Q. Please outline your educational qualifications and experience.

A. I hold a Bachelor of Arts degree in political science from Wheaton College, Wheaton, Illinois (1972), and a Juris Doctor from the School of Law of the University of Missouri-Columbia (1975). I served as a Hearing Examiner for the Public Service Commission of Missouri from 1980 to 1984, and as Chairman of the Missouri PSC from 1984 to 1992. While a member of the Commission, I was active in the National Association of Regulatory Utility Commissioners (NARUC).

I am a past president of NARUC and also served on the Executive and Electricity Committees. NARUC is the national organization of regulators of utility services. In 1992, I entered the private practice of law and consulting on issues related to the regulation of investor-owned utilities.

Q. What is the purpose of your direct testimony?

A. I am appearing on behalf of Florida Power & Light Company (FPL). FPL opposes the Joint Petition of the Utilities Commission, City of New Smyrna Beach, Florida (UCNSB) and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. (Duke). The purpose of my testimony is to provide my perspective, based upon my experience as a state regulator and my knowledge of the utility industry, on the Joint Petition in this case. I will address the Joint Petition from the perspective of state regulatory policy, and particularly, what I read to be Florida's regulatory policy. I will discuss how the Joint Petition is inconsistent with Florida policy in that it does not provide sufficient information for this Commission to make the findings required of it by the Power Plant Siting Act. I will also address how granting a determination of need for this project raises serious concerns for FPL in carrying out its obligations to serve its customers.

Q. Please summarize your direct testimony.

A. My testimony reviews what I believe the Florida Electrical Power Plant Siting Act (PPSA), enacted by the Florida Legislature, requires of the Commission. For ease of reference, when I speak of the PPSA, I am including Section 403.519, Florida Statutes as part of the Act. I believe that the Commission cannot and should not grant an affirmative decision on need for the Duke/NSB project. Duke is essentially asking the Florida Public Service Commission (FPSC or Commission) to waive the requirements of the PPSA for purposes of approving its proposed project. In my opinion, a grant of this Joint Petition would render the PPSA moot and usurp legislative authority.

Beyond the obvious failure to meet the standards set by the PPSA, I believe that the proposed Duke/NSB plant creates very real concerns for FPL in meeting its obligation to plan, finance and construct resources to meet its obligation to serve. I also raise several other public policy issues which I believe should be of concern to this Commission, including the potential for uneconomic duplication of facilities, and possible negative rate impacts on utility customers. Finally, I explain that the National Energy Policy Act of 1992 does not preempt the authority and prerogative of the State of Florida to determine the manner in which it will regulate the generation and distribution of electricity in the State and the manner

in which it will authorize the siting of new power plants.

Q. What is you understanding of what the Joint Petition seeks in this case?

A. The Joint Petition of Duke and UCNSB in this case asks the FPSC for an affirmative "need determination" under Section 403.519 for Duke's New Smyrna Beach Project, a proposed new power plant which would have approximately 500 MW of capacity. The Joint Petition does not allege that the plant is required to meet the needs of any Florida utility for maintaining system reliability and integrity, or for assuring adequate electricity at a reasonable cost. The Joint Petition does not allege that the facility is the least cost alternative available for the utility with need for capacity. Instead the Joint Petition alleges that "the Project is consistent with Peninsular Florida's needs for generating capacity to maintain system reliability and integrity," that "the Project is consistent with Peninsular Florida's need for adequate electricity at a reasonable cost," and that "the Project will be a cost-effective power supply resource for Peninsular Florida." "Peninsular Florida" is a planning convention, not a utility. Duke New Smyrna stops short of saying its plant is needed; instead, it says its project is "consistent with" some general need. Duke New Smyrna has no contracts with any Florida utility (including, apparently, UCNSB) for the output of the proposed plant. None of the

approximately 500 MW of proposed capacity is associated with any utility's obligation to provide service, except Duke's proposal to sell 30 MW of the output to UCNSB. The Joint Petition provides no information as to the extent, if any, Duke New Smyrna has sought contracts for this power beyond UCNSB.

Q. What does the PPSA require of this Commission?

A. The State of Florida, by means of its PPSA, has established a process which rightly recognizes the balance between the need for new power plants and the use of the limited natural resources of the State. Under the PPSA, the FPSC is the sole forum for the determination of need for new power plants. In making that determination, the FPSC is directed to expressly consider several issues, including the need for system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The Commission is also directed to consider the conservation measures which the applicant did, or could, take to mitigate the need for the proposed plant, **and to consider other matters within its jurisdiction which it deems relevant**. (Emphasis added.) Florida Statute 403.519.

It is important to recognize that the Commission's responsibilities are an

integral part of a larger process, the purpose of which is explained in Section 403.502 of the PPSA, as follows:

> "It is the intent [of the PPSA] to seek courses of action that will fully balance the increasing demands for electrical power plant location and operation with the broad interests of the public. Such action will be based on these premises:
>
> (1) To assure the citizens of Florida that operation safeguards are technically sufficient for their welfare and protection.
>
> (2) **To effect a reasonable balance between the need for the facility and the environmental impact resulting from construction and operation of the facility, including air and water quality, fish and wildlife, and the water resources and other natural resources of the state.**
>
> (3) To meet the need for electrical energy as

established pursuant to Statute 403.519.

(Emphasis added.)

Q. Has the Commission's role in applying the PPSA to entities desiring to make wholesale sales to utilities previously been addressed by the Commission and Supreme Court of Florida?

A. Yes, on several occasions. The decisions of the Commission and the Supreme Court are most instructive. When they are applied to Duke New Smyrna, these decisions demonstrate that Duke has not provided and cannot provide, without a contract for its output, the information necessary to address the PPSA need determination standards. Three important requirements stand out from the prior decisions of the Commission and the Supreme Court of Florida. First, the PPSA need determination criteria to be considered by the Commission are utility specific. Second, the need being determined in a need determination case arises from a utility's obligation to provide service. Third, an entity seeking a need determination to provide wholesale power must first have a contract for its output.

Q. Please address the requirements that the PPSA need determination criteria are utility specific.

A. Prior Commission and Supreme Court decisions make it very clear that the PPSA need determination criteria are utility specific. In Order No. 22341 ("In

re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities") in 1989, the FPSC stated that the need determination criteria of the Siting Act are "clearly...utility and unit specific," and held that a need determination for new capacity must be made "from the purchasing utility's perspective . . . i.e., 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." *(At page 26)*. The Commission went on to say: "we 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." *(Id., at page 27)*.

Later orders in the same docket reaffirmed the Commission's construction that the need determination criteria were utility specific, and these orders were appealed to the Florida Supreme Court in Nassau Power Corporation v. Beard, 601 So. 2d 1175 (Fla. 1992). There, the Florida Supreme Court affirmed the Commission's construction of the PPSA that the need determination criteria were utility specific, explicitly rejecting an argument to the contrary.

In its Order No. 25808 in another Nassau Power Case, the Commission stated: "Nassau has been put on notice by prior Commission decisions that

need determination proceedings are utility specific."

In Nassau Power Corporation v. Deason, et al., 641 So. 2d 396 (Fla. 1994), the Florida Supreme Court cited its earlier decision involving Nassau and said:

> 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." *(Citation omitted).* 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.

I read these decisions to mean that any project presented to this Commission for licensing under the PPSA must be targeted to meet a specific Florida utility need.

Even if these prior decisions did not exist, I believe the need determination criteria should be read as utility specific criteria. While planning and even construction and operation of plants can be done on a combined basis, the obligation to serve customers rests with individual utilities and not with Duke

New Smyrna. It is at the individual utility level that the ultimate decision to build or buy is made. Unless the Commission knows the utility or utilities which will receive a power plant's output, the price of the output or the cost of the plant, and the terms and conditions under which the output of a plant will be provided, the Commission cannot meaningfully apply the PPSA need criteria.

Q. Please address the requirements that the need being determined in a need determination arises from an obligation to provide service.

A. A wholesale provider of power, whether a qualifying facility, an independent power producer or a merchant plant, has no statutory obligation to serve; consequently, it cannot demonstrate need on its own. It is the obligation to serve which gives rise to a demonstrable need for a power plant. Once again, prior Commission and Florida Supreme Court decisions acknowledge that the need for a power plant is tied to the obligation to provide service. In Order No. PSC-92-1210-FOF-EQ, the Commission observed that it is the "need, resulting from a duty to serve customers, which the need determination proceeding is designed to examine." The Supreme Court of Florida affirmed this interpretation of the PPSA in Nassau Power Corporation v. Deason. I read these decisions to mean that an obligation to provide service is an essential part of a demonstration of need. In this case, neither Duke New Smyrna nor "Peninsular Florida" has an obligation to serve.

Q. Please address the requirement that an entity seeking a need determination for a plant which will make wholesale sales must first have a contract with a purchasing utility.

A. Prior Commission and Supreme Court of Florida decisions indicate that an entity seeking a determination of need for a power plant to make wholesale sales to a utility with an obligation to serve needs to have a contract to be able to proceed. In Order No. PSC-92-1210-FOF-EQ the Commission dismissed the need application of a Qualifying Facility (Nassau) and an independent power producer (Ark) holding that, absent a contract with a utility with an obligation to serve, they were not proper applicants under the PPSA. The decision was appealed to the Supreme Court of Florida and affirmed in Nassau Power Corporation v. Deason, where the Court described the Commission's reasoning 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 under the Siting Act.

I read these decisions to mean that an entity such as Duke New Smyrna, must first have a contract with utilities to proceed through a need

determination. In this case, Duke New Smyrna has no such contract as to, at least, its merchant capacity.

Even if the Commission and Court had not previously found that an entity seeking to build a power plant to make wholesale sales to a utility must have an executed purchased power contract to initiate a need determination, I think the need determination criteria necessitate such a contract. Without a contract, a wholesale provider of power cannot identify the utility or utilities to which it will sell. Without a contract which addresses the amount and availability of capacity and other terms and conditions affecting performance, the impact of a wholesale provider's plant on "electric system reliability and integrity" cannot be demonstrated. Without a contract identifying the utility to which a wholesale provider will provide power and the price at which the power will be sold, a wholesale provider cannot demonstrate that its plant is needed for "adequate electricity at a reasonable cost;" or that its "proposed plant is the most cost-effective alternative available;" or that there is no "conservation measures taken or reasonably available" to mitigate the need for its plant. Therefore, without a contract that identifies the purchasing utility, the price of the power to the purchasing utility, and the other terms and conditions which affect cost-effectiveness and reliability, a wholesale provider cannot provide sufficient information for the Commission to make an affirmative determination of need.

Q. It has been suggested that the cases you rely upon to draw your conclusions all involved cogeneration and entities that desired to sell to specific utilities and perhaps are not applicable to a merchant plant that has not identified the utilities to which it intends to sell. What is your reaction?

A. I have several reactions.

First, it is not just cases that I rely upon to draw my conclusions. As I pointed out earlier, I believe that these interpretations of the PPSA would be correct even if these decisions had not been entered. The need determination criteria are utility specific. Utilities are the only entities with an obligation to serve, and the need examined in a need determination is the need of a utility with such an obligation to serve. The only practical means of implementing this statutory scheme for entities that do not have an obligation to serve but desire to build a power plant to be able to sell to entities with an obligation to sell and a corresponding need is to require such entities to first have a contract or contracts for its output.

Second, while many of the cases to which I have referred involved cogenerators, several did not, and the language and the logic of the decisions apply to entities beyond merely cogenerators. For instance, several of the decisions refer to non-utility generators. Perhaps the most

thoroughly developed case, Order No. PSC-92-1210-FOF-EQ, involved a dismissal of not only a cogenerator that wanted to build a power plant but did not have a contract , but also an independent power producer in the same circumstance. That case, and the Florida Supreme Court decision that affirms it, clearly are not limited by their language to cogenerators but extend to all non-utility generators. Most importantly, though, the logic and reasoning of the cases apply to all entities that desire to build a power plant to be able to make wholesale sales to retail utilities in Florida. Without repeating what the Commission has previously said, suffice it to say that the same reasoning that led to the decisions in these cases is equally applicable to all entities without an obligation to serve desiring to make wholesale sales to Florida utilities.

Third, the primary focus of the relevant passages in these cases is the PPSA not cogeneration. For instance, when the Commission stated unequivocally that the need determination criteria were utility and unit specific, it was construing the PPSA. I fail to see how the same statute could properly be applied differently to different entities. More particularly in this case, I fail to see how the Commission could reasonably find that the PPSA's need criteria are utility specific when applied to utilities, cogenerators and non-utility generators but are not necessarily utility specific when applied to a merchant plant.

An attempt to read away these decisions and the logic and reasoning underlying them as focused upon cogeneration is misplaced. The cases interpret the proper application of the PPSA. Their logic and reasoning are compelling. If anything, the logic is even more compelling in the case of a merchant plant. At least in the decision dismissing Ark and Nassau for failure to have a contract, those entities had identified the utility to which they desired to sell and they had proffered an unexecuted contract. In this case, Duke New Smyrna neither identifies the purchasing utility nor communicates the terms and conditions necessary to apply the need determination criteria.

Q. Does the Duke/NSB project meet the utility specific standard of the PPSA?

A. No. While 30 MW of a roughly 500 MW unit have been identified to meet the needs of the City of New Smyrna Beach, more than 90% of the unit's output may be available but is not committed to address "Peninsular Florida's projected power supply needs." (Duke/UCNSB Joint Petition for Determination of Need, page 2). I think it would be difficult for anyone to argue that the primary need for the unit is the City of New Smyrna Beach. In fact, PSC approval under the PPSA would not be required if Duke was proposing to build only a 30 MW power plant. I do not believe that this Joint Petition meets the intent of the PPSA in balancing the need for the facility with the environmental impact resulting from the construction and operation

of the facility. Beyond this obvious imbalance, it appears to me that the Commission would be hard-pressed to make any findings regarding the specific requirements of the PPSA.

I have already discussed how the need for power is to be utility-specific, based on the Commission's own orders. How, then, is the Commission to assess the need for this project? Only 30 MW address a specific utility need. The remainder is to be sent out to peninsular Florida, and possibly beyond, without contract or firm commitment from any Florida utility. No utility could rely on the power to meet its need without a contract. Therefore, it would be inconsistent to find that there is a "need" for 470 MW or more of this plant by somehow "assigning" that capacity to any specific utility's need without a contract.

The second issue for the Commission under the PPSA is the "need for adequate electricity at a reasonable cost." I have already addressed the "need" portion of this standard and shown that it cannot be addressed by this project. The "reasonable cost" cannot be addressed, either. We don't know to whom the project will sell its power, for how long, or at what price. We just have an assertion by the Applicants that utilities will only buy when it is reasonable to do so. I would suggest to the Commission that this vague assertion is not sufficient to justify the utilization of scarce land, air and water

resources for a power plant. This assertion would, in fact, be true of any power plant, making all proposals indistinguishable, from the Commission's perspective.

The next issue the Commission must address is whether the proposed plant is the most cost-effective alternative available. The immediate question is, "alternative to meet what need?" The most cost-effective technology does not necessarily equate to the most cost-effective alternative to meet a specific utility's need. Duke plans to build a combined cycle plant. FPL and other utilities already have combined cycle plants in their ten year plans. Duke/NSB has not presented a total cost or proposed price which can even be used to compare to various utility projects. The Commission addressed a similar issue in its 1989 docket on load forecasts and generation expansion plans. In its Order No. 22341, cited earlier, the FPSC concluded that its need determination for a new power plant could not be made on some generic statewide basis without creating a mismatch between the prices of power from the new unit and the costs associated with alternatives available to a specific utility. Therefore, I fail to see how the Commission can find the Duke/NSB project to be "the most cost-effective alternative available" under the PPSA.

The conservation issue obviously has the same problem as the others. Without identifying the purchasing utility or utilities, no assessment can be

made of whether there are "conservation measures taken or reasonably available" which mitigate the need for the plant.

Q. Are there other matters within the Commission's jurisdiction about which the Commission should be concerned regarding this need determination application?

A. Yes. Under the PPSA the Commission is authorized to consider in need determinations not only the criteria Duke New Smyrna has failed to meet, but also other matters within its jurisdiction which it deems relevant. There a number of matters within the Commission's jurisdiction that could be impacted by this determination of need. A positive determination could adversely affect FPL's and other Peninsular Florida utilities' ability to meet their service obligations. It could affect those utilities' subsequent determination of need proceedings. It could affect their ability to plan for and meet system needs. It could affect the recoverability of their past and future investments. It could lead to the uneconomic duplication of facilities to meet need. It could adversely affect the customers of Florida utilities. All of these matters are properly within the Commission's jurisdiction and should be considered in this proceeding.

Q. How would a grant of the Joint Petition affect subsequent determinations of need by the Commission for utilities petitioning to

meet their own needs?

A. It would put the utilities in a very difficult situation. On the one hand, the utility cannot evaluate the cost-effectiveness of the project versus their own plan. Without a contract with terms and conditions, how can the utility evaluate this option? On the other hand, it would seem almost certain that the petitioners would appear before the Commission making the case that the utility should buy from them. This clearly puts the utility in a "Catch-22," where it does not have the information it needs about the Duke plant to plan for it, but it must do so anyway in order to fulfill its obligation to serve.

Another problem utilities will face in subsequent need determination proceedings will be how to address the findings of fact the Commission is being asked to make in this case. If the Commission finds that the Duke New Smyrna plant is needed for electric system reliability and for adequate electricity at reasonable cost for Peninsular Florida, that the plant is the most cost-effective alternative to meet Peninsular Florida's need, and that there are no conservation measures taken or reasonably available to mitigate the need for the plant, any Peninsular Florida utility seeking a subsequent determination of need will be faced with findings that the Duke plant meets their needs and is the most cost-effective alternative available to them. This may particularly be true of utilities which participated in this proceeding, even though the relative cost-effectiveness of the utilities' projects would not have

been vigorously tested in this case. It seems likely that Duke will argue that the Commission has already addressed the issue and made findings which make Duke the preferred alternative, even though it is apparent that no utility specific determination of need is being sought or being made in this case.

Either the findings in this case will be binding and controlling on Peninsular Florida utilities or this case will be a purely academic exercise as to a fictional entity called Peninsular Florida. If the findings are to be binding on Peninsular Florida utilities, then the affected utilities should be given notice and their specific needs should be tried, not a more general collective need for a larger geographic area. If the findings are not to be binding and may be disregarded, then what purpose will this case have served? I believe that if Duke is successful in this proceeding, Duke is likely to use the Commission's findings in this case in subsequent need determination proceedings filed by utilities. This could frustrate the ability of Florida utilities to proceed under the PPSA to meet their individual needs.

Q. How would granting a determination of need as requested by Duke/New Smyrna affect the obligation of electric utilities to plan for and meet the need for reasonably sufficient, adequate and efficient service?

A. Utilities would still have that obligation. That is part of the "Catch-22" discussed above. Utilities will still be required to plan to meet their obligation

to serve. They will be required to factor the merchant plant into their plans without knowing if this power will be available, or when it will be available, or at what price, or what the impact of this power will be on the utility's transmission system. The utility must plan and build to meet its obligation to serve. The result is destined to be duplication of facilities.

It is important to remember that the Commission has previously construed the PPSA in a fashion that allows utilities to meet their service obligations and avoid uneconomic duplication of facilities. The Commission has previously required an entity desiring to sell power to a utility to first have a contract with the utility and then proceed as a coapplicant with the utility in a determination of need. That assures that utilities meet their service obligations and avoid unnecessary duplication of facilities.

Q. How would granting the Joint Petition affect the recoverability of past and future utility investments?

A. Granting the Joint Petition in this case would create a risk that past and future utility investments made to provide service may not be recovered. This could increase the overall cost of providing electric service and impair future service reliability. In fact, the argument that the "merchant" plant is being built at Duke's total risk and that so-called "captive customers" would be held harmless is faulty. Who is responsible for the costs of utility facilities

that become underutilized because of "merchant" plants? If the answer is utility customers, then they are not "held harmless." If utility stockholders are responsible for bearing these costs, then the utility's cost of capital will reflect that risk, which, in the long-run, would impact their customers.

Another misconception that exists on this issue is that, because utility plants are "rate based," utility customers bear all of the risks. This simply is not true. Utilities are not guaranteed cost recovery. Rather, the Commission sets rates which are designed to provide the utility a reasonable opportunity to recover its prudently incurred costs, as determined by the Commission. Many factors, including regulatory decisions, the economy in the service area and the weather, affect a utility's ability to actually recover its costs and earn a return. A key point to remember here is that utilities cannot change their rates without the approval of the Commission. A wholesale merchant plant that has market-based rates can charge whatever the market will bear and is accountable only to its stockholders.

Duke's suggestion that they will bear all the risk, even if it were true, misses the point. Operating and market risk associated with a power plant is not a criteria under the need statute. Under the PPSA, the proper point of focus is whether there is a utility that needs the power to be provided by the power plant. If there is a need for the power and Duke New Smyrna contracts to

meet it, then the concept of risk has little meaning. Recovery will be from the same utility ratepayers who would pay for the same plant built by the utility, and they would face similar performance and operation risks. The real concern under the PPSA is whether there is a need for the power which justifies the environmental impact a plant will certainly have. If there is a risk properly considered in this proceeding, it is the risk that Florida may devote environmental resources for a power plant which has not been shown to be needed to meet a Florida utility specific need. Duke's discussion of "risk" distracts from the proper focus of this proceeding.

Q. If the Commission abandons its interpretation that statutory need criteria are "utility and unit specific," how will the Commission maintain grid reliability and avoid uneconomic duplication of facilities in need determination proceedings?

A. It simply cannot. Anyone who feels that they can build, and sell power from, a "merchant" plant will do so. The result will be duplication of facilities, the consumption of limited natural resources and the added costs of excess utility generating capacity. The lack of information about whether or when this power will be available, and where it will be delivered, could also make it more difficult to maintain the reliability of the grid. That is the reason that the past interpretations of PPSA Section 403.502 by this Commission, requiring the "need" to be "utility and unit specific," are so important. That

interpretation would avoid the scenario discussed here and its negative ramifications.

Another quote from FPSC precedent is enlightening here. In the 1989 docket on resource planning, cited earlier, the FPSC said:

> [A]n increasing share of the state's electrical needs will be supplied by either cogenerators or independent power producers. If we continue to "rubber stamp" QF projects . . . , this body has effectively lost the ability to regulate the construction of an increasingly significant amount of generating capacity in the state. *(At page 27).*

Q. When FPL makes an off-system sale, do its shareholders receive the benefit of the revenue from that transaction?

A. No. When FPL makes an off-system sale of power (to a municipal utility, for example), most or all of the gain on that sale is returned to FPL's customers through the Fuel Adjustment Clause or the Capacity Clause ("Clauses"). However, it should be noted that when Duke/NSB makes a sale from its proposed power plant, the gain from that sale would go to Duke shareholders. Thus, not all Florida ratepayers would necessarily "benefit" from Duke's power sales, and some would lose the benefit of gains that

would otherwise flow through to them through the Clauses.

Q. How would granting the Joint Petition affect utility customers?

A. As just indicated, utility customers could experience direct rate impacts, in addition to long-term concerns about the ability of utilities to plan accurately to meet future needs, increased risk of utility investments and the potential for uneconomic duplication of facilities. Customers of utilities which lose off-system sales would be harmed, because they will no longer receive the benefits of those sales through the Clauses. Reductions in off-system sales by utilities may also result in changes in wholesale-retail allocations of costs and rate base, resulting in higher rates for the utility's customers.

Q. Would an affirmative need determination render the PPSA moot?

A. Yes, for many of the reasons discussed above. The PPSA was enacted by the Florida Legislature to achieve a balance between needs and available resources. This Commission has spent considerable time in the evolution of its interpretation of the PPSA. There have been numerous hearings on the matter, and this Commission decided that an orderly process that is utility-need-specific was the best way to achieve this balance. The conclusions drawn by this Commission were challenged and were ultimately affirmed by the Supreme Court. If this Commission were to abandon that previously drawn conclusion, then, in my opinion, the PPSA would become

moot. What Duke is essentially asking in this case is that the FPSC waive the requirements of the PPSA for purposes of approving its proposed project. In my opinion, a grant of this Joint Petition would render the PPSA meaningless, thus usurping legislative authority.

Q. Doesn't the National Energy Policy Act of 1992 require wholesale electricity competition and merchant plants?

A. No. The National Energy Policy Act of 1992 (and decisions of the FERC implementing the Act) required "open access" to the electricity transmission grid, effectively creating a competitive wholesale bulk electric power market in the United States. The Federal Power Act of 1935, which created the Federal Power Commission (now the Federal Energy Regulatory Commission) to regulate interstate transmission and wholesale power transactions, clearly reserved to the States complete jurisdiction over the generation and distribution of electricity to retail customers. The Energy Policy Act of 1992 did not reduce the authority of the States. For example, the Act added Section 212(g) to the Federal Power Act (FPA), which prohibits any order under the FPA inconsistent with State retail service territories ("marketing areas"). The Energy Policy Act also specifically left environmental and siting authority to State and local governments, as follows:

SEC. 731. STATE AUTHORITIES.

Nothing in this title or in any amendment made by this title shall be construed as affecting or intending to affect, or in any way to interfere with, the authority of any State or local government relating to environmental protection or the siting of facilities.

Therefore, it is clearly within the authority and prerogative of the State of Florida to determine the manner in which it will regulate the generation and distribution of electricity to retail customers in the State and the manner in which it will authorize the siting of new power plants. The National Energy Policy Act of 1992 does not preempt the PPSA.

Q. **If Duke New Smyrna were allowed to proceed in a need determination proceeding by basing their case on Peninsular Florida needs, how would this compare to the showings currently required of Florida utilities, qualifying facilities and non-utility generators?**

A. It would establish a less demanding standard for Duke New Smyrna than for any other entity seeking a determination of need. Under current Commission and Supreme Court of Florida decisions, the need determination criteria are utility specific in need determination proceedings for utilities, QFs and non-utility generators. If Duke New Smyrna were allowed to proceed based not

on a utility specific showing but on Peninsular Florida showings, then Duke New Smyrna would be held to a less demanding standard for no apparently sound reason. Such an inequitable application of the PPSA would raise fundamental questions of fairness. It seems clear to me that the PPSA should be applied to all applicants in the same fashion. Duke New Smyrna should not be held to a less demanding standard. If it is, then the Commission should rethink the standard applied to all other applicants as well. However, I believe the better approach is to hold Duke New Smyrna to the same utility specific standards required of other applicants. This would be consistent with the underlying intent of the PPSA and the prior decisions applying it.

Q. Why do you find different applications of the PPSA to different types of applicants objectionable?

A. Inconsistency in application of the resource planning requirements may raise legal objections, but it is also objectionable from a policy perspective. Florida real estate, air and water resources are finite. It seems clear that the policy of the State of Florida is that, before Florida resources are committed to construction and operation of a new power plant, the developer should have to show that the generation from that plant is committed to meeting Florida's specific and growing needs for generation, that its proposed capacity addition is the most cost-effective alternative available, and that it considered

conservation measures that might mitigate the need for the proposed plant. FPL and other utilities which have an obligation to serve will be required to address all of those issues before they will be authorized to build new generation. As a matter of policy, it is not clear to me why those issues are any less important in relation to a "merchant" plant than a "utility" plant.

Q. Do you agree with Ms. Hesse that the basic purpose of utility regulation is "to promote competitive and efficient resource allocations?"

A. No. In my opinion, the overall purpose of utility regulation in Florida is to assure the provision of adequate, reliable and efficient utility service at just and reasonable rates, and to provide utility shareholders a reasonable opportunity to earn a fair return on their investment in the facilities necessary to meet the utility's obligation to serve. The FPSC is also charged with assuring the avoidance of uneconomic duplication of generation, transmission and distribution facilities. The specific purpose of the PPSA is to achieve the right balance between the need for new power plants and the use of the limited natural resources of the State. To that end, the PPSA requires the FPSC to make a utility-specific determination of need before siting any new power plant, and requires the FPSC to consider several statutory factors (discussed earlier in my testimony) in making that need determination.

Q. Do you agree with Ms. Hesse that utility regulation is intended to serve as a "surrogate for competition?"

A. Yes. I have often said so myself. However, it does not logically follow that the regulatory system must authorize "numerous sellers" in order to be that "surrogate for competition." *(Hesse Direct Testimony at p. 21.)* By definition, a "surrogate for competition" is a "substitute for" competition, which is different from "being" a system of competition. A more accurate statement is Ms. Hesse's suggestion that a goal of utility regulation is "to attempt to come as close as possible, in a constrained or structurally imperfect market, to the outcome that would be achieved in a competitive market." The achievement of an outcome that conserves resources, avoids uneconomic duplication of facilities and assures adequate and reliable electricity at just and reasonable rates accomplishes that goal. That is the goal of the Florida regulatory process, including the FPSC's need determination under the PPSA. It should also be observed that neither regulation nor competition is a perfect system. Ms. Hesse herself admits that it cannot be concluded "that an 'optimal' outcome would be attained" from siting "merchant" plants in Florida. *(Hesse Direct Testimony, p. 19.)*

Finally, it must be recognized that public policy is seldom a matter of "pure" economic theory. Economics is not physical science. It is not an immutable law of nature, nor the source of all human values. Regulatory policy must,

and does, look beyond the theoretical merits of competitive markets to broader human and practical issues. These issues include the public need for adequate and reliable power to support everyday life and commerce in Florida in 1998 and beyond, and the need to protect finite and valuable resources, including land use. The State of Florida has established policies regarding the siting of new electric power plants through the PPSA and cases applying the PPSA. Siting a speculative merchant plant, without a showing of utility-specific need for the plant, is not consistent with those established policies.

Q. Do you agree with Ms. Hesse that, "for the past 20 years, federal energy policy has favored and encouraged competition in the wholesale generation and supply of electricity in the United States"?

A. No. The purpose of the Public Utility Regulatory Policies Act of 1978 (PURPA) was not to promote competition in the supply of bulk electricity, but rather to squeeze every possible drop of energy out of domestic resources in order to achieve what President Carter called, "Energy Independence." We were trying to decrease our reliance on foreign oil in the wake of national energy crises precipitated by the Organization of Petroleum Exporting Countries' (OPEC) oil embargo in 1973 and the political revolution in Iran in 1978-1979, which had sent energy prices soaring. While Ms. Hesse, as chair of the FERC in the late 1980's, began actively promoting competition

in the wholesale bulk power electric market, national policy has only done so since the National Energy Policy Act of 1992.

Q. Does the potential interest of the FMPA in capacity from Duke/NSB demonstrate utility-specific need?

A. No. At least 90% of the capacity from Duke/NSB is not under contract and cannot be tied to any specific utility need for power. Even the Florida Municipal Power Agency, which supports the Joint Petition, will only commit to being willing to "entertain discussions" with Duke about serving a portion of its needs. Mr. L'Engle says in his testimony that, "*[s]ubject, of course*, to meeting FMPA's pricing and operational criteria, . . . the New Smyrna Beach Power Project *may be* a facility that FMPA would be interested in purchasing capacity and energy from." *(Emphasis added).* There are still at least 450 to 484 MW of this plant that are totally divorced from any utility-specific need in Florida. In my opinion, the Commission must ask whether it is wise to build 500 or more MW of capacity for every 30 MW of alleged, utility-specific need.

Q. Would you please summarize your testimony?

A. Commission and Supreme Court decisions, and the stated intent of the PPSA, require that the Commission's determination of need for siting a new power plant be utility-specific. Since an entity such as Duke has no

obligation to serve and no need of its own, the option of the utility specific need criteria necessitate that there be a contract with a specific utility with a need for power. Since more than 90% of the capacity of the proposed Duke/NSB plant is not under contract to any Florida utility, this Joint Petition should not be granted. In addition, the other requirements of the PPSA cannot be met by the Joint Application. It would be impossible in this case to meaningfully fulfill the requirements of the PPSA to consider how this proposed plant would relate to system reliability and integrity, the need for adequate electricity at a reasonable cost, whether the plant is the most cost-effective, or conservation measures. These issues are no less important regarding a "merchant" power plant than for a utility plant in terms of the PPSA's intent of balancing the need for the facility with the broad interests of the public. Duke is essentially asking the FPSC to waive the requirements of the PPSA for purposes of approving its proposed project. In my opinion, a grant of this Joint Petition would render the PPSA moot and usurp legislative authority.

Beyond the obvious failure to meet the standards set by the PPSA, I believe that the proposed Duke/NSB plant creates very real concerns for FPL in meeting its obligation to plan, finance and construct resources to meet its obligation to serve, including the "Catch-22" that utilities would be left having to include the "merchant" plant in their planning process without knowing if this power will be available, or when it will be available, or at what price, or

what the impact of this power will be on the utility's transmission system. There are several additional public policy issues which I believe should be of concern to this Commission. These include the potential for underutilized utility investments and uneconomic duplication of facilities, and possible negative rate impacts on utility customers. Finally, the National Energy Policy Act of 1992 does not preempt the authority and prerogative of the State of Florida to determine the manner in which it will regulate the generation and distribution of electricity in the State and the manner in which it will authorize the siting of new power plants.

Q. Does this conclude your testimony?

A. Yes, it does.