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GOOD MORNING, LADIES AND GENTLEMEN. WELCOME TO THE FLORIDA SUPREME COURT. WE HAVE, FIRST ON OUR CALENDAR, TODAY, THREE CONSOLIDATED CASES. TAMPA ELECTRIC, FLORIDA POWER, FLORIDA POWER & LIGHT VERSUS GARCIA FOR ARGUMENT, AND AS I HAVE BEEN ADVISED, MR. DAVIS, YOU ARE GOING TO GO FIRST AND ASK FOR FIVE MINUTES. IS THAT CORRECT?

YES.

YOU MAY PROCEED.

MAY IT PLEASE THE COURT. I AM ALVIN DAVIS. I REPRESENT FLORIDA POWER & LIGHT COMPANY. WE ARE ONE OF THE APPELLANTS. WE ARE APPEALING FROM A DETERMINATION BY THE PUBLIC SERVICE COMMISSION NEED DECISION. A MYTH LOGICAL INN KEEPER, WHEN BEDS DIDN'T FIT, THE TRAVELERS STOPPING AT HIS INN, HE DIDN'T ADJUST THE BEDS. HE LOPPED OFF THE LIMBS OF THE TRAVELERS, SO THAT THEY WOULD FIT THE BEDS IN HIS INN, AND THAT IS WHAT THE PUBLIC SERVICE COMMISSION HAS DONE HERE. A MERCHANT PLANT, WHICH WE ARE DEALING WITH HERE, IS A FREE MARKET CONCEPT THAT DOES NOT FIT WITHIN FLORIDA'S REGULATED MONOPOLY CONCEPT OF PROVIDING RETAIL ELECTRIC SERVICE. INSTEAD OF --

MR. DAVIS, REALIZING WE HAVE LIMITED TIME, IT IS DISTRESSING, AS A MATTER OF FACT, BECAUSE WE REALIZE, NOW, ASKING QUESTIONS IS GOING TO -- LET ME GET RIGHT TO DOES THE RECORD REFLECT OR CAN YOU TELL US GENERALLY WHAT THE PRACTICE IS IN OTHER STATES, WITH REFERENCE TO THIS ISSUE? IN OTHER WORDS, CAN WE LOOK AROUND THE SOUTHEAST OR OTHER STATES IN THE COUNTRY, WITH REFERENCE TO THE INVOLVEMENT OF REGULATORY BODIES IN THIS REGARD?

THE RECORD DOES NOT REFLECT THAT IN ANY DETAIL, EXCEPT TO THE EXTENT THAT, WHERE PLANTS OF THIS MERCHANT CONCEPT HAVE BEEN PERMITTED, IT HAS BEEN IN THE CONTEXT OF DEREGULATION, INITIATED BY THE LEGISLATURE, AS OPPOSED TO DE FACTO DEREGULATION BY THE REGULATORY AUTHORITY.

IS THERE CASE LAW OUT THERE THAT REFLECTS THAT? THAT IS THAT THERE ARE CASES WHERE COURTS HAVE REVIEWED DECISIONS OF REGULATORY BODIES AND HAVE DRAWN THIS BRIGHT-LINE DISTINCTION? THAT IS THAT THERE HAS BEEN SOME VERY EXPRESS AUTHORIZATION WITH REFERENCE TO THIS PRACTICE, AND IF THERE HAS NOT BEEN, RATHER EXPRESS AUTHORIZATION, THEN IT HAS NOT BEEN ALLOWED?

THE ONLY CASE THAT COMES TO MIND AT THIS POINT IS THE CASE IN WHICH DUKE, ITSELF, MADE THE SAME ARGUMENT IN THE NORTH CAROLINA COURTS AND REVEILED ON THE THAPINGS WE ARE TRYING TO ASSERT, THAT YOU CAN'T HAVE --

IN KEEPING OUT ANOTHER UTILITY?

IN KEEPING OUT A MERCHANT PLANT, BECAUSE THE MERCHANT PLANT DIDN'T FIT WITHIN THE REGULATED MONOPOLY SCHEME, AND THAT CASE IS CITED IN DETAIL IN THE BRIEFS.

IF DUKE WERE TO CONTRACT WITH FLORIDA POWER & LIGHT OR ANY OF THE OTHER REGULATED UTILITIES THAT ARE HERE TODAY, WOULD THAT BE -- WOULD THEY, THEN, QUALIFY UNDER THE STATUTE, TO BE ABLE TO BUILD A PLANT?

IF, IN FACT, ALL OF THE CAPACITY THAT DUKE IS PURPORTING TO PUT INTO THE MARKET WERE SUBJECT TO FIRM KRTS WITH THE UTILITY -- FIRM CONTRACTS WITH THE UTILITY, THEN THE OVERALL APPLICATION WOULD FIT WITHIN THE SCHEME.

ARE WE HERE WITH A POLICY ISSUE OR AN INSTRUCT STATUTORY CONSTRUCTION QUESTION?

I BELIEVE WE ARE ON STRICT STATUTORY CONSTRUCTION. THE POLICY, IN THIS CASE, BELONGS IN THE LEGISLATURE AND THE PSC AND NOT IN THIS COURT.

SO COULD YOU SUCCINCTLY STATE WHAT DEFINITIONS WE HAVE TO LOOK TO AND WHERE THE SPECIFIC DISPUTE IS, AND I THINK IT IS WITH THE QUESTION OF WHAT REGULATED ELECTRIC UTILITY MEANS, BUT IF YOU COULD JUST QUICKLY GO THROUGH.

AS SUCCINCTLY AS I CAN. I THINK THERE ARE TWO PRINCIPLE STATUTES HERE, INVOLVED, THE CITING STATUTE AND THE FLORIDA ENERGY AND CONSERVATION ACT. IT HAS TO DO WITH WHEN A UTILITY MAY BUILD A PLANT. THAT IS REQUIRED TO -- THEY ARE REQUIRED TO ESTABLISH A NEED FOR THAT PLANT TO SERVE THEIR CUSTOMERS. AND THAT IS THE NARROW STATUTORY ISSUE THAT IS INVOLVED HERE. THE PSC VEERED DRAMATICALLY FROM THAT.

THE QUESTION WHAT IS AN APPLICANT, FOR THE PURPOSE --

THERE ARE TWO QUESTIONS. ONE IS WHO IS A PROPER APPLICANT, AND WE DON'T BELIEVE THAT DUKE IS A PROPER APPLICANT HERE.

BY SAYING THAT YOU DON'T BELIEVE IT, IT IS BECAUSE YOU ARE SAYING THAT YOU DON'T BELIEVE THE STATUTORY DEFINITION.

THE STATUTE DOES NOT COVER DUKE.

APPLICANT GOES TO, YOU REFERRED TO, THEN, UTILITY, OR YOU REFERRED -- WHAT IS IT NEXT?

AN APPLICANT, UNDER THIS STATUTORY SCHEME, IS A UTILITY THAT SERVES RETAIL CUSTOMERS IN THE STATE OF FLORIDA, WHICH DUKE DOES NOT DO AND HAS ANNOUNCED IT HAS NO INTENTION OF DOING.

COULD A FLORIDA REGULATED UTILITY BUILD A MERCHANT PLANT IN FLORIDA?

NO.

OKAY. SO BASICALLY YOUR PLAN, YOUR ARGUMENT IS THAT A MERCHANT PLAN FALLS OUT SIDE OF THIS STATUTORY SCHEME FOR THE CERTIFICATE OF NEED.

THAT'S CORRECT. A FREE-STANDING MERCHANT PLANT THAT SIMPLY IS A SOURCE OF POWER AND KMASITY, DOES NOT FIT WITHIN THE -- AND CAPACITY, DOES NOT FIT WITHIN THE SCHEME.

IF IT FALSE -- WHAT I AM TRYING -- IF IT FALLS -- WHAT I AM TRYING TO GET TO IS THERE IS AN ARGUMENT MADE BY YOUR OPPOSITION THAT, IF THE PSC WERE TO NARROWLY CONSTRUE THE CITING ACT TO EXCLUDE EWG'S REGULATED AS PUBLIC UTILITIES, NEW ELECTRIC GENERATING FACILITIES CONSTRUCTED BY EWG'S IN FLORIDA COULD FALL OUTSIDE OF THE CITING ACT AND THE PSC'S GENERAL REGULATORY OVERSIGHT. I MEAN IS THERE A METHOD, HERE, BY WHICH THEY COULD -- A MERCHANT PLANT COULD BE BUILT BUT NOT COME WITHIN THE CITING ACT AND NOT -- OR NOT COME WITHIN PSC JURISDICTION?

NO. A MERCHANT PLANT MUST BE ASSOCIATED WITH A SPECIFIC UTILITY NEEDS, IN ORDER TO BE BUILT IN FLORIDA. THAT IS THE EXISTING STATUTORY STRUCTURE. IF THERE IS A CHANGE IN

THAT, THE LEGISLATURE MAY MAKE A CHANGE, BUT THE POINT OF IT IS, AND IT HAS BEEN ARGUED VERY WELL IN THE BRIEF. MY TIME IS UP. I APOLOGIZE, BUT IF I MAY JUST FINISH MY ANSWER TO THIS QUESTION. THERE IS A OVERALL SCHEME. IT IS CLEARLY ARTICULATED, AND IT FITS TOGETHER VERY WELL, WITHIN THE CONTEXT OF A REGULATED MONOPOLY, AND THAT IS UTILITIES ARE REQUIRED TO SERVE RETAIL CUSTOMERS. THEY HAVE TO SHOW THAT THE PLANTS THAT THEY PROPOSE ARE NEEDED TO SERVE THOSE RETAIL CUSTOMERS. YOU CANNOT SIMPLY BUILD PLANTS, WILLY-NILLY, ALL OVER THE STATE OF FLORIDA, BECAUSE THE POLICY OF THE STATE OF FLORIDA, AS ARTICULATED IN THE LEGISLATION, IS THAT WE DON'T WANT TO HAVE A BUNCH OF PLAGETS ALL OVER THE STATE OF FLORIDA, BECAUSE OF CONSERVATION CONCERNS. BECAUSE OF ENVIRONMENTAL CONCERNS. THEREFORE, IF YOU ARE GOING TO BUILD A PLANT, YOU HAVE TO SHOW THAT YOU, AS A REGULATED UTILITY, PROVIDING SERVICES TO RETAIL CUSTOMERS, NEED THAT PLANT TO SERVE THOSE CUSTOMERS. THAT IS THE EXISTING SCHEME, AND THAT IS WHAT THE PSC WAS REQUIRED TO ENFORCE.

SO DID I UNDERSTAND YOU CORRECTLY EARLIER, TO SAY THAT, IF DUKE HAD AGREEMENTS WITH PEOPLE OTHER THAN NEW SMYRNA, THAT WOULD TAKE UP ALL THE CAPACITY OF THIS NEW PLANT, THEN THIS SCHEME WOULD BE OKAY?

YES. BECAUSE THEY WOULD, THEN, BE SERVING A UTILITY THAT HAS THE NEED THAT IS BEING MET. DUKE CONSCIOUSLY DETERMINED NOT TO DO THAT, SO THAT IT CAN SELL TO ANYONE IT WANTS, WHICH IS A FREE MARKET CONCEPT THAT DOES NOT FIT WITHIN THE SCHEME. THANK YOU.

MAY IT PLEASE THE COURT. MY NAME IS HARRY LONG. I AM REPRESENTING TAMPA ELECTRIC COMPANY. OUR PURPOSE ON APPEAL IS NOT TO DISPUTE THE WISDOM OF THE POLICY INHERENT IN THE COMMISSION BELOW, NOR IS IT THE INTENTION TO TEST THE COMMISSION TO FORMULATE ITS POLICIES WITHIN THE SCOPE OF AUTHORITY. OUR PROBLEM BELOW IS THAT IT IS DIRECTLY AT ODDS WITH THE ESTABLISHED FLORIDA STATUTE OTHER LAW AND PURPORTS TO MAKE A CHANGE IN THE CURRENT LAW WHICH ONLY THE LEGISLATURE CAN PROPERLY ACCOMPLISH. IN THE CASE OF NASSAU V BEARD, THIS COWARD REVIEWED AND AFFIRMED THIS CONCLUSION OF LAW THAT THE NEED TO BE EXAMINED UNDER THE CITING ACT IS THE NEED OF A UTILITY THAT HAS AN OBLIGATION TO SERVE THE PUBLIC. THAT IS THE KEY. THEREFORE THE COMMISSION COULD NO LONGER TREAT THEM DIFFERENTLY THAN OTHER NONUTILITY GENERATORS, BY INSISTING THE NEED FOR PUF POWER.

IF YOU READ THIS LITERALLY, DON'T YOU HAVE TO CONCEDE THAT DUKE IS AN APPLICANT, UNDER THE ACT? I MEAN, THEY ARE A RAEING LATED ELECTRIC -- THEY ARE A REGULATED ELECTRIC UTILITY.

THAT IS THE POINT, YOUR HONOR. IN THE BEARD DECISION AND THE SUBSEQUENT GNAWS A DECISION, THIS LAW STABBED IN THE STATE OF FLORIDA THAT, IN ORDER TO BE AN APPLICANT, UNDER THE CITING ACT, YOU HAD TO HAVE A NEED THAT WAS RECOGNIZABLE UNDER THE CITING ACT, AND THE ONLY WAY TO DO THAT WAS TO HAVE A UTILITY THAT WAS SERVING THE PUBLIC.

YOU ARE NOT ARGUING THAT THEY ARE NOT PROPERLY AN APPLICANT.

I AM, YOUR HONOR. THIS COURT SAID YOU HAVE TO HAVE AN OBLIGATION TO SERVE THE PUBLIC, BEFORE YOU CAN BE A PROPER APPLICANT UNDER THE CITING ACT. IF YOU ARE A NONUTILITY GENERATOR, LIKE DUKE, YOU CAN BE A COAPPLICANT, IF THE POWER FOR YOUR PLANT IS CONTRACTED TO OTHER UTILITIES THAT DO HAVE AN OBLIGATION TO SERVE THE PUBLIC, AND THAT IS NOT THE SITUATION THAT WE ARE FACED WITH HERE. DUKE IS A NONUTILITY GENERATOR, PROPOSING TO BUILD A PLANT OF 514 MEETING A WETS -- MEGAWATTS, ONLY 30 MEGAWATTS OF WHICH IS IDENTIFIED AS --

COULD THEY DO IT, IF THEY HAD 250 MEGAWATTS, RATHER THAN 30? THEY WOULD HAVE TO OBLIGATED ALL 514 MEGAWATTS? HAD.

YOUR HONOR, THIS IS NOT A SLIPPERY SLOPE SITUATION. I THINK, IF YOU LOOK AT THE PURPOSE BEHIND THAT CONCLUSION OF LAW, THE WHOLE PURPOSE OF THE CITING ACT IS TO MAKE SURE THAT WE PROTECT THE ENVIRONMENT IN THE STATE OF FLORIDA. AND WE ARE NOT GOING TO BUILD POWER PLANTS, UNLESS WE REALLY NEED THEM.

HOW DOES THIS OBLIGATION TO SERVE THE PUBLIC, WHICH YOU SAY IS AN INHERENT PART OF THE DEFINITION OF A REGULATED UTILITY, SQUARE WITH THE COMMISSION'S APPARENT VIEW THAT COMPETITION IS GOOD FOR THE PUBLIC, AND THAT IT WILL BRING DOWN THE COST OF ELECTRICITY AND THEREFORE BENEFIT THE CONSUMING PUBLIC? I WOULD TAKE IT THAT YOU AND THE OTHER UTILITIES THAT ARE CHALLENGING THIS ARE NOT JUST DOING IT OUT THERE, GENEROUS ARELY, FOR THE BENEFIT OF EVERYBODY AT -- GENEROUSLY, FOR THE BENEFIT OF EVERYBODY AT LARGE, BUT THIS IS GOING TO CONSTITUTE COMPETITION FOR YOUR COMPANIES. SO HOW DOES THAT SQUARE?

YOUR HONOR, THAT IS A VALID POLICY QUESTION. MY POINT IS THAT THAT IS THE KIND OF POLICY QUESTION THAT THE LEGISLATURE MUST TAKE UP, BECAUSE THE CURRENT --

WHERE IS THERE CLEAR INDICATION THAT THE LEGISLATURE DOES NOT INTEND FOR THERE TO BE THIS FREE COMPETITION WITHIN THE STATE OF FLORIDA? WELL, YOUR HONOR, I THINK --

WELL, YOUR HONOR, I THINK CHAPTER 366 SETS OUT THE NATURE AND REGULATION OF THE UTILITY SERVICES IN THE STATE, PLUS THIS COURT'S DECISION IN NASSAU V BEARD AND NASSAU VD EASON, WHICH WERE ENACTED BY THE LEGISLATURE, SUBSEQUENT, RELATIVE TO THE LAWS OF THE STATE OF FLORIDA.

WHAT IS THE LANGUAGE THAT YOU WOULD CITE TO THAT WOULD PROHIBIT THIS KIND OF COMPETITIVE ATMOSPHERE IN THE STATE?

THE CLEAREST LANGUAGE THAT I WOULD CITE IS THE COURT'S DECISIONS IN GNAWS A V BEARD, BECAUSE -- IN NASSAU V BEARD, BECAUSE THOSE ARE A PART OF FLORIDA STATUTE OTHER LAW, AND I THINK THE COURT HIT THE NAIL RIGHT ON THE HEAD.

CAN YOU CITE TO ANY LEGISLATIVE LANGUAGE THAT DOES THE SAME THING?

YOUR HONOR, THE LEGISLATIVE LANGUAGE IS CITED IN THE BRIEFS. THAT IS DONE IN DETAIL. BUT MY VIEW IS THAT THIS COURT'S DECISIONS PRESENT THE CLEAREST LAW, IN TERMS OF HOW THIS CASE OUGHT TO BE RESOLVED. THERE IS NO DISPUTE. DUKE IS A NONUTILITY GENERATOR. IT HAS NO OBLIGATION TO SERVE THE PUBLIC. AND THIS COURT HAS SAID, BY DEFINITION, THEREFORE, IT HAS NO NEED THAT CAN BE ASSESSED. UNDER THE CITING ACT.

IT TO BE THE WHOLESALE SALE OF POWER GOING ON IN FLORIDA, NOW, BY EXISTING UTILITIES?

THAT'S CORRECT, YOUR HONOR.

WHY SHOULD THAT BE REGULATED ANY DIFFERENTLY THAN THE REGULATION OF DUKE'S SALE OF WHOLESALE POWER?

WELL, THERE IS AN IMPORTANT REASON FOR THAT, YOUR HONOR. I MEAN, EVEN THOUGH TAMPA ELECTRIC, MY CLIENT, AND OTHER INVESTOR-OWNED UTILITIES, ARE MAKING WHOLESALE SALES, OUR GENERATION IS BUILT FOR THE PURPOSE OF SERVING OUR FIRM CUSTOMERS. THE COMMISSION HAS JURISDICTION OVER US, AND THEY HAVE THE ABILITY TO ENSURE THAT, AT ANY TIME OUR POWER IS NEEDED TO SUPPORT OTHER UTILITIES, TO PREVENT AN EMERGENCY

SITUATION IN THE STATE, YOU KNOW, THEY HAVE THE ABILITY TO DIRECT US TO ACT ACCORDINGLY. DUKE, UNDER THESE CIRCUMSTANCES, WOULD NOT BE SUBJECT TO THE JURISDICTION OF THE FLORIDA PUBLIC SERVICE COMMISSION, AND THEREFORE THE COMMISSION WOULD NOT BE ABLE TO ENSURE THAT THE POWER THAT DUKE PROPOSES TO BUILD WOULD BE AVAILABLE TO THE STATE WHEN IT IS NEEDED AND AT A PRICE THAT IS REASONABLE. I AM SORRY. MY TIME IS UP. THANK YOU VERY MUCH.

MAY IT PLEASE THE COURT. MY NAME IS GARY SASSO, AND I REPRESENT FLORIDA POWER CORPORATION. I WOULD LIKE TO BEGIN BY ADDRESSING THE QUESTION THAT JUSTICE ANSTEAD ASKED ABOUT, WELL, ISN'T COMPETITION GOOD, AND IS THERE ANYTHING IN THE STATUTORY SCHEME THAT DATES THAT THAT IS NOT WHAT THE LEGISLATURE -- THAT INDICATES THAT THAT IS NOT WHAT THE LEGISLATURE WANTED. I WOULD SAY FUNDAMENTALLY, YES, THERE IS SOMETHING IN THE STATUTORY SCHEME. IN FACT IT IS THE ENTIRE REGULATORY SCHEME PUT IN PLACE BY THE LEGISLATURE, FOR DEALING WITH THE PROVISION OF CAPACITY IN FLORIDA. REMEMBER, AT THE BEGINNING OF THE CENTURY WE HAD FREE COMPETITION IN THE ELECTRIC POWER INDUSTRY. THAT WAS REPLACED BY REGULATION. WE DO NOT HAVE COMPETITION IN FLORIDA. THE RETAIL UTILITIES IN FLORIDA HAVE THE EXCLUSIVE PREROGATIVE TO PROVIDE POWER TO THE CUSTOMERS OF FLORIDA. THEY HAVE EXCLUSIVE SERVICE TERRITORIES. THAT IS THE MODEL THAT THE LEGISLATURE EMBRACED, AND THE NEED PROVISION WORKS OFF OF THAT MODEL. THE LEGISLATURE SET UP -- YES, MA'AM.

LET ME ASK YOU THIS. AREN'T THERE SMALLER MERCHANT UTILITIES COMPANIES THAT CAN -- HAVE PLANTS HERE? SMALLER CAPACITY PLANTS?

THAT'S RIGHT, JUSTICE -- PLANTS?

THAT'S RIGHT, JUSTICE QUINCE. IN FACT THE POWER PLANT CITING ACT CONTAINS PROVISION FOR UNDER 75 MEGAWATTS --

WHAT WAS THE PURPOSE OF THAT?

THE ORIGINAL PURPOSE WAS TO ALLOW COMPANIES WHO WANTED TO PROVIDE CAPACITY FOR THEIR OWN NEEDS TO DEVELOP THEIR OWN CAPACITY, BUT, IN FACT, THERE IS AN EXEMPTION WHICH ALLOWS SMALLER UNITS TO BE BUILT IN THIS STATE, MERCHANT PLANTS WITHOUT THAT THRESHOLD.

WITHOUT GOING THROUGH THIS WHOLE GETTING A CERTIFICATE OF NEED FIRST.

THAT'S RIGHT.

AND THEY DON'T HAVE TO BE A UTILITY THAT IS ALREADY PROVIDING SERVICES HERE, IN THE STATE OF FLORIDA.

THAT'S CORRECT. THERE IS NOT A BAR TO ENTRY IN THIS STATE. THERE IS A THRESHOLD FOR PLANTS THAT HAVE THE MOST SIGNIFICANT IMPACT ON THE ENVIRONMENT. THE LEGISLATURE WASN'T INTERESTED SIMPLY IN COMPETITION FOR COMPETITION'S SAKE. THE FREE MARKET MODEL, WHERE THE MARKET DECIDES WHERE THE EQUILIBRIUM WILL BE IN TERMS OF MARKET DEMAND. IN SOME AREAS OF FLORIDA, THERE IS STILL EXCLUSIVITY, AND THERE IS STILL REGULATION.

SO THE SMALLER CAPACITY PLANTS ARE ALLOWED BECAUSE THEY DON'T IMPACT THE ENVIRONMENT AS MUCH. IS THAT WHAT YOU ARE SAYING?

YES, MA'AM. THEY DO NOT IMPACT THE ENVIRONMENT AS MUCH. THE LARGER PLANTS HAVE A BIGGER FOOTPRINT. EVERY POWER PLANT IS GOING TO IMPACT THE ENVIRONMENT, AND THAT IS

WHAT THE LEGISLATURE UNDERSTOOD. WE DON'T WANT UNREGULATED GROWTH GROWTH IN THIS -- GROWTH IN THIS STATE.

WHAT IS THE NATIONAL POLICY ABOUT THIS ISSUE, IF ANY?

THE NATIONAL POLICY IS WELL-DEFINED AND CIRCUMSCRIBED. CONGRESS HAS UNDERSTOOD THAT THERE IS A TRADITIONAL STATE PREROGATIVE IN DECIDING WHETHER NEW PLANTS ARE NEEDED AND WHEN AND HOW TO CITE THEM AND HISTORICALLY HAS LEFT THAT PREROGATIVE TO THE STATE. THAT IS WHY WE HAVE A NEEDS STATUTE. IN FACT DUKE'S OWN PEOPLE SAID THAT THIS TYPE OF POLICY IS IN THE STATE'S HANDS.

IT APPEARS THAT YOU ARE DEFINING "APPLICANT" AS LOOKING AT NEED, AND THEREFORE WE LOOK AT NEED BEING THE CENTRAL ISSUE. DO WE HAVE A BODY OF FIRM LAW OR LEGISLATIVE EXPRESSION THAT NEED IS LIMITED TO THE CONCEPT YOU ARE ASSERTING, AND WE CANNOT LOOK TO THE ECONOMIC FACTORS OF NEED FOR THE FLUORIDEIANS?

WELL, THERE ARE TWO QUESTIONS IN THAT ONE, SIR, AND THERE IS A WELL-DEFINED BODY OF LAW THAT NEED RUNS OFF OF IS DERIVATIVE OF THE RETAIL UTILITIES OBLIGATION TO SERVE CUSTOMERS. THE NASSAU DECISIONS BY THIS COURT ARE THE MOST CLEAR ARTICULATION OF THAT, BUT THEY CAME FROM NASSAU DECISIONS BY THE PUBLIC SERVICE COMMISSION, WHICH, IN TURN, CAME FROM THE MARTIN EXPANSION ORDER, WHICH IS CITED IN THE BRIEFS AND WE COMMAND TO THE COURT TO READ. IT IS A VERY CAREFUL EXPOSITION OF WHY RETAIL UTILITIES, BY VIRTUE OF HAVING THE OBLIGATION TO SERVE CUSTOMERS IN FLORIDA, HAVE TO BE THE FOCAL POINT OF NEED, AND THAT IS THE CRITICAL DISTINCTION WE WISH TO MAKE. LET ME SAY SAVE THE REMAINDER OF MY TIME FOR REBUTTAL. THANK YOU VERY MUCH.

THANK YOU.

MAY IT PLEASE THE COURT. I AM RICHARD BELLAK, REPRESENTING THE FLORIDA PUBLIC SERVICE COMMISSION, AND WITH ME AT THE TABLE ARE STEVEN GRIMES, REPRESENTING DUKE ENERGY, NEW SMYRNA BEACH POWER COMPANY, AND SCHEFFEL WRIGHT, REPRESENTING THE UTILITIES COMMISSION OF THE CITY OF NEW SMYRNA BEACH. I WOULD LIKE TO RESERVE TEN MINUTES OF TIME FOR MR. GRIMES TO PRESENT HIS ARGUMENT. NOW --

YOU WILL HAVE TO MAKE THAT -- THE LIGHT WILL NOT GO ON, SO YOU WILL HAVE TO CHECK YOUR CLOCK.

THANK YOU, YOUR HONOR. FOUR PRELIMINARY POINTS MAY HELP CLARIFY THE CASE FOR THE COURT. FIRST OF ALL, DOES THE COMMISSION HAVE AUTHORITY OVER WHOLESALE POWER IN FLORIDA? AND THE ANSWER IS YES. AND SOME OF THE STATUTES EXPLICITLY REFER TO WHOLESALE. 366.11, 366.055, AND, OF COURSE, THE GENERAL STATUTE IS 366.02 PAREN TWO. THERE IS NOTHING IN THE DEFINITION WHICH REQUIRES AN ELECTRIC UTILITY TO BE A RETAIL UTILITY. THE APPELLANTS HAVE IT BACKWARDS. UNDER THE WAY THE FLORIDA STATUTES ARE SET UP, IF YOU ARE A RETAIL PUBLIC UTILITY, YOU WILL AUTOMATICALLY MEET THE DEFINITION, ALSO, OF BEING AN ELECTRIC UTILITY, BUT IT IS NOT THE REVERSE. IN THE STATUTES.

WHY DOESN'T THE MERE HISTORY OR EXPERIENCE THAT WE HAVE HAD IN THE STATE OF FLORIDA REFUTE THAT? THAT IS THE MERE FACT THAT HERE WE ARE, IN THE YEAR 2000 OR WHATEVER, AND THIS IS THE FIRST TIME THAT THIS ISSUE HAS COME BEFORE THE COMMISSION. WHY DOESN'T THAT SPEAK VOLUMES ABOUT THIS, JUST IN ITSELF, THAT IS THAT WE DON'T HAVE, ALL OVER THE STATE OF FLORIDA, THESE MERCHANT UTILITY PROVIDERS?

WELL, THERE ARE A NUMBER OF FACTORS IN THAT, FOR ONE THING, THE PRO COMPETITIVE POLICY IN WHOLESALE REGULATION STARTED IN 1978, WITH PERPA AND COGENERATION, AND

PRIOR TO THAT, THERE WAS THE SENSE THAT EVERY ASPECT OF UTILITIES WAS A MONOPOLY -- WAS A NATURAL MONOPOLY, BUT THAT ENDED IN 1978. THE NATIONAL POLICY STARTED DOWN THE ROAD TOWARD CONSIDERING WHOLESAL GENERATION. TO BE COMPETITIVE, RATHER THAN A NATURAL MONOPOLY, AND NONE OF THEIR ARGUMENTS EVER TAKE INTO ACCOUNT THE FACT THAT THERE IS A CLEAR DIVISION, IN THE REGULATION OF FLORIDA, WHERE RETAIL POWER IS SUBJECT TO NATURAL MONOPOLY REGULATION, AND WHOLESAL IS NOT. IT IS SUBJECT TO PRO COMPETITIVE REGULATION. IT IS NOT DEREGULATED. AND THE EWG IS NOT A DEREGULATED ENTITY. IT IS CALLED AN EXEMPT WHOLESAL GENERATOR, BUT THE EXEMPTION IS FROM CERTAIN REPORTING OBLIGATIONS AT THE FEDERAL LEVEL. IT IS STILL SUBJECT TO REGULATION, BUT IT IS A FORM OF LIGHT-HANDED, PRO COMPETITIVE REGULATION. IT IS CONSISTENT WITH ALLOWING COMPETITION TO WORK AND YET STILL BE SUBJECT TO REGULATION.

BUT ISN'T THIS WHOLE CONCEPT OF THE SIGHTING ACT AND, QUOTE, A CERTIFICATE OF NEED, BUILT AROUND THE CONCEPT THAT IS EXPRESSED IN NASSAU, REALIZING IT WAS DEALING WITH QF'S, BUT WHAT YOU ARE DEALING WITH IS A DETERMINATION OF A SPECIFIED NEED, AND THAT IS NOT, REALLY, COMPATIBLE WITH THIS IDEA THAT YOU ARE GOING TO BUILD A PLANT AND ALLOW IT TO HAVE A SPECULATIVE CUSTOMER BASE, IS IT?

WELL, THAT IS A GOOD QUESTION. I THINK THAT IT IS ANSWERED BY THE MARKET-BASED RATE TARIFFING SYSTEM, THAT APPLIES TO ELECTRIC WHOLESAL GENERATORS, AND, FOR EXAMPLE, IN THIS PARTICULAR INSTANCE, THERE IS A -- I NOTICE THAT A LOT OF THE QUESTIONING ASKED HOW THE FACTS ON THE GROUND TIED UP WITH THE FORMAL ARGUMENTS, AND THEY SEEM TO BE AT LAGER HEADS, AND THIS IS A PERFECT EXAMPLE. THEY ARE TALKING ABOUT UTILITY UTILITY-SPECIFIC NEED, WHICH BROUGHT ABOUT TO SOLVE THE COGENERATION PROBLEM. IT IS OBVIOUS. IT IS NOT PRESENT IN THIS COURT SYSTEM AT ALL. WHEN REGULATORY FORMULAS ARE INVOKED TO SOLVE A NONPROBLEM. IF THE PROBLEM ISN'T THERE, IT IS LIKELY THAT THE FORMULA IS BEING INVOKED TO GET A RESTRAINT OF TRADE OUT OF IT, AND THAT IS EXACTLY THE CASE HERE.

BUT THE PROBLEM THAT I AM STRUGGLING WITH IS THAT WE -- IT, REALLY, BOILS DOWN TO AN ISSUE THAT HAS BEEN RAISED, HERE, OF STRANDED COST, IN THAT WE HAVE DEVELOPED, SINCE THE LATE '50s IN THIS STATE, A SCHEME BASED UPON LEGISLATIVE ENACTMENT OF REGULATED POWER, AND NOW WHAT WE ARE TRYING TO MIX IN THERE IS THAT YOU CAN BUILD PLANTS THAT DON'T REALLY FIT WITHIN THAT REGULATED BASIS, AND WHAT ABOUT THE IDEA OF --

THEY FIT WITHIN THE WHOLESAL PART OF IT. THEY WOULD NOT FIT WITHIN THE RETAIL. THEY FIT WITHIN THE WHOLESAL, BUT THE STRANDED COST THING IS INTERESTING. TAMPA ELECTRIC JUST GOT MARKET-BASED RATE AUTHORITY FROM THE FEDERAL COMMISSION, THEMSELVES, AS OF APRIL 1, SO THEIR BRIEFING DOESN'T REFLECT WHAT THEY ARE DOING. THEY ARE SAYING ONE THING AND DOING THE OTHER, SO THEY ARE PREPARING THEMSELVES TO BE IN A COMPETITIVE POSTURE WITH THE DUKES OF THE WORLD.

IS THAT IN OUR RECORD?

I FILED THAT AS SUPPLEMENTAL AUTHORITY, YOUR HONOR.

LET ME ASK YOU THAT QUESTION THAT, REALLY, IS RELATED TO THAT. EDUCATE US A LITTLE BIT. IF ONE OF THE EXISTING UTILITIES IN THE STATE OF FLORIDA, NOW, CAME TO THE COMMISSION WITH THIS SIMILAR PETITION, NOW, THAT THEY WANTED TO BUILD A HUGE CAPACITY PLANT, AND THAT WHAT THEY WERE GOING TO DO IS SIMPLY USE IT FOR WHOLESAL, SPECULATIVE, AS JUSTICE WELLS SAYS, CUSTOMERS OUT THERE, IT HAD NOTHING TO DO, REALLY, WITH THEIR ABILITY TO PROVE, FOR INSTANCE, IN THE TAMPA AREA, THERE WERE GOING TO BE HUGE DEVELOPMENTS AROUND THE CITY AND THAT THEY WERE ANTICIPATING THAT AND BEING REASONABLE, AND THEREFORE FULFILLING A REASONABLY PROJECTED NEED.

THEY JUST WANTED TO DO IT, NOW, TO BRING THE RATES DOWN AND CHALLENGE FLORIDA POWER & LIGHT AND THE OTHER COMPANIES. WHAT WOULD BE THE ATTITUDE OF THE COMMISSION?

WELL, THAT IS THE DIFFERENCE BETWEEN A LIGHT-HANDED REGULATORY SCHEME, WHICH IS WHAT THE EWG IS, AND THE FREE MARKET. IT JUST PROVES THAT THEIR CASE IS WRONG THAT THIS IS A FREE MARKET. THAT IS NOT THE WAY THE COMMISSION LOOKED AT DUKE. WHAT THE COMMISSION FOUND IN DUKE WAS THAT THERE WAS A 8,000 MEGAWATT SHORT FALL IN PEN INSIDELAR FLORIDA, REALLY, NEED -- IN PENINSULA FLORIDA, REALLY, RESERVE MARGINS. THEY FELT THAT THERE WAS AN IMMINENCE OF POSSIBLE SHORTFALLS, OUTAGES AND SO FORTH. THEY FOUND THAT THERE WAS A RELIABILITY PROBLEM ON THE HORIZON. THEY FOUND THAT THERE WAS A DERTH OF NEW PLANTS ON THE HORIZON, BECAUSE THESE COMPANIES ARE MARKING TIME FOR A WHILE, TRYING TO FIGURE OUT WHAT THEIR STRATEGY IS GOING TO BE.

IF I UNDERSTAND WHAT YOU ARE SAYING CORRECTLY, YOU ARE SAYING, IF ONE OF THESE OTHER COMPANIES HAD COME TO THE COMMISSION WITH A PLAN LIKE THIS, THE COMMISSION WOULD HAVE LOOKED FAVORABLY UPON IT.

THERE MAY BE OBSTACLES AT THE FEDERAL LEVEL, BUT I DON'T KNOW OF ANY IT AT THE STATE LEVEL. THERE MAY BE OBSTACLES AT THE FEDERAL LEVEL. TAMPA ELECTRIC IS THE FIRST ONE THAT HAS GOTTEN OUT OF THE MODE OF BEING RATE REGULATED.

IS THERE ANY TRACK RECORD BY THE COMMISSION ON THIS ISSUE? IN OTHER WORDS CAN YOU LOOK BACK AND SAY THAT THERE HAVEN'T BEEN INSTANCES WHEN WE HAVE TURNED DOWN APPLICATIONS, YOU KNOW, THAT WOULD HAVE INVOLVED THE GENERATION OF MUCH MORE POWER THAN IT COULD BE DEMONSTRATED THAT THERE WAS AN IMMEDIATE NEED FOR?

WELL, THERE WERE A LIST OF CASES IN THE ORDER, WHICH DEMONSTRATED THAT THERE ARE OTHER FACTORS THAN JUST STRICT CAPACITY FACTORS, AND THE PROBLEM WITH THEIR PART OF THIS CASE IS THEY ARE TRYING TO MAKE THIS INTO A STRAIGHT JACKET. BECAUSE THAT IS WHAT IT WAS FOR COGENERATION. THAT UTILITY-SPECIFIC NEED WAS A STRAIGHT JACKET, AND IT WAS NEEDED, BECAUSE COGENERATION IS A COMPETITION FORCING REGIME. THEY COULD FORCE A UTILITY TO BUY POWER, SO WE NEEDED THAT STRAIGHT JACKET, TO MAKE SURE THAT UTILITY NEEDED THE POWER. THAT WAS THE WAY WE MANAGED IT. THIS IS NOT A FORCING REGIME. THIS IS MEANT TO COME IN, WITH THE REGULATIONS AND WITH THE STATUTES AS THEY ARE, NOT NEEDING ANY NEW LEGISLATION, NOBODY FORCED TO DO ANYTHING. THAT IS WHY IT IS THE OPPOSITE OF COGENERATION. THAT IS WHY THE FIX THAT THEY ARE OFFERING IS NOT IN THE PUBLIC INTEREST. IT IS IN THEIR INTEREST.

ONE LAST QUESTION FROM ME, AND THAT IS, INSOFAR AS THE USE OF THIS TERM REGULATED UTILITY, WOULDN'T IT MAKE SENSE TO THINK THAT THE LEGISLATURE, WHEN THEY USE THAT PHRASE OR TERM, MEANT FLORIDA REGULATED UTILITY, AS OPPOSED TO MAINE REGULATED UTILITY, WASHINGTON REGULATED UTILITY.

THIS IS A FLORIDA REGULATED UTILITY, BECAUSE IT IS AN ELECTRIC UTILITY, AND AN ELECTRIC UTILITY IN FLORIDA CAN SELL WHOLESALE POWER, AND THAT IS ANOTHER THING THAT IS A BIG SECRET, IN THEIR SIDE OF THE CASE. EVERYTHING THAT THE COMMISSION IS DOING, WITH RESPECT TO DUKE'S WHOLESALE POWER, IS EXACTLY THE SAME REGULATORY SCHEME THAT THE COMMISSION APPLIES TO EVERYONE OF THE APPELLANTS' WHOLESALE POWER.

I HAD THE IMPRESSION, IN YOUR BRIEF, THAT YOU WERE ASSERTING THAT, SO LONG AS THE UTILITY WAS REGULATED SOMEPLACE ELSE, IT WOULD COME WITHIN THIS TERM.

NO. THE BASIS OF THIS IS 366.02 [2] THE COMMISSION OVER REGULATED UTILITIES, AND THAT BRINGS IN THE WHOLE SCHEME APPLICABLE TO REGULATED UTILITIES. IT IS APPLIED THE SAME



WAY. THE COMMISSION DOESN'T CONTRADICT THE FERT TARIFF.

YOUR POSITION IS THAT DUKE ENDS UP BEING REGULATED BY FLORIDA.

ABSOLUTELY. THERE IS NO DOUBT ABOUT THAT. AND JUSTICE WELLS, THE IDEA THAT IT IS INCOMPATIBLE WITH THE REGULATORY SCHEME, NOT ON THE WHOLESALE SIDE, BECAUSE SINCE 1978, IT HAS BEEN PRO COMPETITIVELY REGULATED. ON THE RETAIL SIDE IT WOULD BE, BUT THERE IS NOTHING IN THIS CASE WHICH AFFECTS, IN ANY WAY, SHAPE OR FORM, THE NATURAL MONOPOLY REGULATION OF RETAIL. WHAT IT DOES IS IT SAYS THAT THE APPELLANTS CAN'T GROW THEIR LEGAL RETAIL MONOPOLIES ILLEGALLY, ILL ILLICITLY, EXTRA LEGALLY, INTO MONOPOLIES OF THE WHOLESALE POWER MARKET IN THE STATE OF FLORIDA. THAT IS WHAT THIS CASE SAYS. THAT IS WHAT THEY ARE TRYING TO DO. AND THAT IS THE USE THEY ARE TRYING TO MAKE, AND IT IS A MISUSE OF THE NASSAU DOCTRINE, WHICH HAS NOTHING TO DO WITH THIS CASE.

MAY IT PLEASE THE COURT. MY NAME IS STEPHEN GRIMES, AND I REPRESENT DUKE NEW SMYRNA THE APPELLANTS ARE TRYING TO CREATE A SMOKE SCREEN BY CHARACTERIZING THE COMMISSION'S ORDER AS DEREGULATION, AND THIS SIMPLY IS NOT SO. DEREGULATION WOULD OCCUR, IF THE MONOPOLY STATUS OF THE RETAIL YOUTH ILLS WAS REMOVED, SO THAT THERE WOULD BE UNFETTERED COMPETITION IN THE RETAIL MARKET. WE ARE DEALING WITH THE WHOLESALE MARKET. THE WHOLESALE MARKET IS AND HAS BEEN A COMPETITIVE MARKET. IN FLORIDA AND THROUGHOUT THE COUNTRY. IN FACT, THE RETAIL UTILITIES, THEMSELVES, ARE SELLING IN THE WHOLESALE MARKET, AND --

ISN'T THAT MARKET, UP UNTIL THIS DATE, PARTICIPATED IN BY THE REGULATED RETAIL UTILITY?

WELL, THE ONLY THING NEW IN THIS CASE IS THAT IT INVOLVED A WHOLESALE GENERATOR OF ELECTRICITY, WHICH HAS BEEN ONLY RECENTLY APPROVED BY FEDERAL AUTHORITIES. THE FEDS REGULATE WHOLESALE, AND THE -- FLORIDA REGULATES THE RETAIL SALES, AND HAS SOME AUTHORITY OVER THE WHOLESALE PLANTS, BUT ONLY RECENTLY, IN THE LAST SEVERAL YEARS, HAS THIS KIND OF MERCHANT PLANT BEEN APPROVED, UNDER THE FEDERAL POWER ACT. THAT IS WHY WE HAVEN'T SEEN IT BEFORE, AND -- BUT, HAVING SAID THAT, ALL -- TO BUILD ANY PLANT IN FLORIDA, BE IT RETAIL OR WHOLESALE, YOU HAVE GOT TO GO THROUGH THE CITING ACT, AND THE CITING ACT HAS TWO CONDITIONS PRECEDENT. ONE, YOU HAVE TO GET THE CERTIFICATE OF NEED FROM THE COMMISSION, AND THEN YOU HAVE A KIND OF A PARALLEL PROCEEDING, JUSTICE QUINCE, IN WHICH ENVIRONMENTAL KRTHSS -- CONSIDERATIONS ARE TAKEN INTO ACCOUNT, IN A PROCEEDING BEFORE DER, WHICH IS GOING ON NOW, BUT WHAT WE HAVE HERE, AND THE COMMISSION'S OBLIGATION, UNDER 403.519, IS TO, ANY TIME ANYBODY WANTS TO BUILD A POWER PLANT OVER 75 MEGAWATTS, THEY HAVE GOT TO COME AND GET A CERTIFICATE OF NEED.

IS THAT CERTIFICATE OF NEED DIFFERENT, IF YOU ARE BUILDING FOR RETAIL VERSUS WHOLESALE?

THERE IS NOTHING IN THE STATUTE THAT INDICATES. IT IS ANY PLANT. YOU CAN'T BUILD ANY PLANT IN FLORIDA WITHOUT GOING THROUGH THE CITING ACT, AND ONE OF THE PRECONDITIONS OF GOING TO THE CITING ACT IS GETTING A CERTIFICATE OF NEED.

AND SO THAT CERTAIN I CAN'T OF NEED, REALLY, DOESN'T GO TO THE NEED OF EXISTING CUSTOMERS?

NO. NO. IT DOESN'T. THE COMMISSION'S ROLE IN THE NEED DETERMINATION IS TO DETERMINE WHETHER THE PROPOSED PROJECT IS COST EFFECTIVE, AND THE COMMISSION, HERE, FOUND THAT THERE WAS A NEED FOR ADDITIONAL POWER. THE RESERVES WERE THIN. DUKE NEW SMYRNA WOULD BEAR ALL OF THE COSTS OF THE PROJECT, AND IT WOULD INCREASE COMPETITION IN THE

WHOLESALE MARKET, WOULD BRING DOWN THE RETAIL RATES, AND THEREBY SAVE MONEY FOR THE RETAIL CUSTOMERS. THE STRANDED COST, JUSTICE WELLS, IS REALLY NOT AN ISSUE IN THE CASE. THE APPELLANTS ARE -- WILL STILL SELL ALL ELECTRICITY IN THEIR SERVICE AREAS, AND THEIR RATES ALLOW RECOVERY OF ALL THEIR COSTS, INCLUDING THEIR POWER PLANT COSTS. THAT IS NOT AN ISSUE IN THE CASE. THE --

ONE MORE QUESTION ABOUT THE CERTIFICATE OF NEED. DOES THE NEED HAVE TO AND PLAY TO A SPECIFIC GEOGRAPHIC AREA OR HOW WIDE --

THE COMMISSION USED TO BE, A LONG TIME AGO, THEY USED TO CONSIDER NEED THROUGHOUT THE GEOGRAPHIC AREA, THE PENINSULA OF FLORIDA, WHATEVER, THEN THEY GOT INTO THESE NASSAU CASES, WHICH I WOULD LIKE TO TALK ABOUT, AND THE NASSAUS WERE QUALIFYING FACILITIES. AND QUALIFYING FACILITY IS A PLANT THAT PRODUCES ELECTRICITY AND, ALSO, PRODUCES AN USEFUL INDUSTRIAL SOURCE OF ENERGY, SUCH AS STEAM, AND THE, UNDER A FEDERAL LAW WITH AN ACRONYM OF PERPA, THE NONUTILITY COGENERATORS, AND THAT IS WHAT A QF IS, THEY COULD FORCE THE RETAIL UTILITIES TO BUY THE POWER FROM THE QF'S AT THEIR VOIDED COST, AND THE NASSAU CASES WERE STRICTLY INVOLVED WITH QF'S SEEKING TO FORCE A RETAIL UTILITY TO BUY POWER THAT IT DIDN'T NEED. AND THEREFORE THEY FINALLY, IN THOSE CASES, THEY SAID, WELL, YOU KNOW, IT DOESN'T MAKE ANY SENSE TO CONSIDER NEED ON A STATEWIDE BASIS, WHEN THE QF'S WERE SEEKING TO GET A PARTICULAR UTILITY TO BUY THE POWER, AND SO THEY SAID, WHEN WE ARE DEALING WITH QF'S, WE ARE GOING TO SEE IF THE QF, IF THAT PARTICULAR RETAIL UTILITY, THEY ARE TRYING TO FORCE TO BUY THE POWER FROM, NEEDS IT, AND THEY CONCLUDED THAT THAT WASN'T APPROPRIATE, AND THEY -- THE COURT SAID, AND THE COURT PROPERLY HELD, THAT QF'S, AND WE ARE TRYING TO FORCE THE COMPANIES TO BUY THE POWER, COULDN'T QUALIFY AS AN APPLICANT, UNLESS THEY HAD AN EXISTING CONTRACT WITH THE RETAIL UTILITIES. DUKE CAN'T FORCE ANYBODY TO BUY THEIR POWER. THEY WILL ONLY BUY THEIR POWER, IF IT IS COST EFFECTIVE.

IS DUKE A NONUTILITY GENERATOR?

NO, IT IS NOT.

SO WE GO BACK TO --

IT IS --

MY QUESTION OF THE STATUTORY CONSTRUCTION. WE HAVE AN APPLICANT.

YEAH.

BEING ANY ELECTRIC UTILITY. IS THE CORE ISSUE GO BACK TO WHETHER DUKE QUALIFIES, UNDER THE STATUTE, AS A REGULATED ELECTRIC COMPANY?

YES.

NOW, TO GET THERE, WE KNOW THAT WHEN THE ACT WAS FIRST PASSED, ENTITIES LIKE DUKE DIDN'T EXIST.

THAT'S RIGHT.

SO NOW ARE WE TO STRICTLY CONSTRUE THIS TERM AND LOOK TO THE FACT THAT THIS ENTITY DIDN'T EXIST, OR BROADLY CONSTRUE IT TO SAY REGULATED ELECTRIC UTILITY MEANS A UTILITY THAT THE PSC DECIDES IT IS GOING TO REGULATE, OR HOW DO YOU DEFINE ELECTRIC --

YOU ARE RIGHT. THEY DIDN'T EXIST. BUT IT IS SIGNIFICANT THAT THEY DIDN'T LIMIT APPLICANTS

TO RETAIL UTILITIES, AND THE CASES THAT WE CITE IN THE BRIEF, I THINK IT IS TAYLOR AND THE CITY OF JACKSONVILLE CASES, POINT OUT THAT, IF YOU HAVE GOT A GRANT OF REGULATORY AUTHORITY, AND THAT IS WHAT THIS IS, A GRANT OF REGULATORY AUTHORITY, IT NECESSARILY ENCOMPASSES NEW AND DIFFERENT MEMBERS OF THE REGULATED CLASS. IT IS TRUE THAT THIS WAS IN EXISTENCE, BUT IT DOESN'T SAY RETAIL, WHOLESALE OR WHATEVER.

SO YOU LOOK TO THE DEFINITION AS BEING A VERY BROAD DEFINITION.

YEAH. YEAH. AND WE ARE REGULATED BY RATES AND BY THE FEDS, AND OTHERWISE BY FLORIDA. THIS IS --

WAIT. WHEN YOU SAY OTHERWISE BY FLORIDA, WHAT --

FOR ENERGY RESERVES, FOR PLANNING, ELECTRIC SYSTEM PLANNING, RELIABILITY, ALL OF THE THINGS UNDER 366.

BEFORE YOU SIT DOWN, WOULD YOU COME BACK AND ADDRESS JUSTICE WELLS' QUESTION, PART OF IT? THAT IS THAT THE VERY CONCEPT OF A CERTIFICATE OF NEED CONTEMPLATES THAT THERE IS A RETAIL NEED OUT THERE THAT THE UTILITY IS ASKING TO MEET. AND IF THERE IS NO DEMONSTRATION, IF I UNDERSTAND IT CORRECTLY, THE RECORD IN THIS CASE WOULD NOT DEMONSTRATE A NEED, IN TERMS OF THE NEEDS OF THE PUBLIC RIGHT NOW.

IT ISN'T --

AT THE RETAIL LEVEL, OKAY, FOR THE POWER THAT THIS PLANT IS GOING TO GENERATE, AND HOW DOES THAT SQUARE, THEN, WITH THIS CONCEPT OF RESERVES AND WHOLESALE POWER BEING PROVIDED?

THE NEED IS NOT A RETAIL NEED. IT IS THE NEED FOR -- IT DOESN'T SAY ANYTHING ABOUT THE NEED FOR RETAIL NEED.

WHAT DOES THE VERY CONCEPT -- IF A HOSPITAL IS GOING TO GET A MACHINE THAT DOES A SOPHISTICATED TEST OR SOMETHING, PRESUMABLY THEY ARE GOING TO HAVE TO GO IN AND SHOW THAT THERE IS A NUMBER OF PEOPLE OR PATIENTS AND IN A LARGE AREA THAT ARE -- HAVE HEALTH CONCERNS OR WHATEVER, AND THEY NEED TO HAVE THIS MACHINE, IN ORDER TO PROPERLY DIAGNOSE PROBLEMS OR WHATEVER. NOW, ISN'T A COMMONSENSE DEFINITION OF NEED THAT THERE IS A NEED OUT THERE BY THE CONSUMING PUBLIC IN FLORIDA, FOR THIS ADDITIONAL POWER?

THE COMMISSION FOUND THAT THERE WAS A NEED, BECAUSE THE -- OF ANOTHER POWER PLANT, BECAUSE THE RESERVE MARGINS WERE THIN, AND IN CASE OF AN EMERGENCY, THEY MAY NOT HAVE ENOUGH POWER. ALL THROUGHOUT THE ORDER, IF YOU LOOK AT THE ORDER OF THE COMMISSION, IT RECITES WHAT THE NEED IS, AND THAT THIS IS THE MOST COST EFFECTIVE WAY OF PRODUCING POWER, AND THEY CAN DO IT CHEAPER, AND THEREFORE THE RETAIL RATE WILL COME DOWN, AND THAT -- RETAIL RATES WILL COME DOWN, AND THAT IS IN THERE.

BUT UNDER THAT THEORY, YOU COULD HAVE NO ACTUAL NEED AT ALL, BUT YOU COULD WANT TO BRING RATES DOWN, AND THEREFORE SAY, WELL, THERE IS NO NEED OUT THERE, REALLY. WE HAVE GOT PLENTY OF POWER FOR THE EXISTING CUSTOMERS.

BUT, YOUR HONOR, THEY DIDN'T SAY WE HAD PLENTY OF POWER. THEY SAID WE HAD A SHORTAGE OF POWER.

DOESN'T THE RECORD SHOW THAT THERE IS PLENTY OF POWER OUT THERE IN THE EXISTING FACILITY?

NO, YOUR HONOR, ACTUALLY IT SHOWS THAT THE RESERVE MARGINS ARE THIN, IN CASE OF AN EMERGENCY. THAT WAS ONE OF THE BASIS OF NEED THAT THE COMMISSION FOUND!

WHAT IS AN EMERGENCY?

WELL, LIKE THE POUR PLAQUE OUT THAT THEY HAD -- LIKE THE POWER BLACKOUT THAT THEY HAD IN THE FREEZE, BACK IN 1989, IN CENTRAL FLORIDA. THEY DIDN'T HAVE ENOUGH POWER, AND SO THEY HAD TO BLACKOUT A GOOD PART OF THE STATE OF FLORIDA THAT DIDN'T HAVE ENOUGH POWER THAT THEY COULD PUT ON LINE TO KEEP THE POWER GOING, BECAUSE THERE WAS SO MUCH DEMAND DURING THE FREEZE.

AND THE RECORD, HERE, WILL SUPPORT THAT THERE IS THAT KIND OF NEED?

YES, SIR. IT WILL. THIS COURT HAS SAID THAT THE COMMISSION, ORDERS OF THE COMMISSION, THERE IS A PRESUMPTION THAT ORDERS OF THE COMMISSION ENTERED ARE WITHIN THE JURISDICTION OF THE COMMISSION AND THAT THE COMMISSION'S INTERPRETATION OF STATUTES IS GIVEN GREAT WEIGHT, AND WILL NOT BE REVERSED, ABS A DEPARTURE FROM THE CENTRAL REQUIREMENTS OF THE LAW, AND WE SUBMIT THAT THE COMMISSION'S ORDER IS SUPPORTED BY THE COMPETENT SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED.

THANK YOU, COUNSEL. I AM GOING TO GIVE YOU AN ADDITIONAL THREE MINUTES FOR YOUR REBUTTAL.

THANK YOU, YOUR HONOR. LET ME BEGIN BY ADDRESSING THIS ISSUE OF RESERVE MARGE -- MARGINS, BECAUSE I THINK IT IS REAL IMPORTANT. IT IS UNDISPUTED IN THIS RECORD THAT A UTILITY LIKE FLORIDA POWER, WHICH IS OBLIGATED TO SERVE THE CONSUMERS OF THE STATE OF FLORIDA, ARE NOT PERMITTED TO COUNT TOWARD THEIR RESERVE MARGINS ON COMMITTED CAPACITY. THEY CAN COUNT, TOWARD THEIR RESERVE MARGINS, ONLY IN THE FORM OF A CAPACITY OF A PLANT THAT THEY OWN, OR THAT THE CAPACITY IS DEDICATED TO MEET THE NEEDS OF THOSE UTILITIES, THROUGH A FIRM POWER PURCHASE AGREEMENT, AND THAT IS THE PROBLEM WITH MERCHANTS. THEY ARE NOT CONTRACTED TO MEET THE NEEDS OF THE UTILITY, BY DEFINITION. THEY ARE RETAINED TO SELL WHEREVER THEY WANT TO, INSIDE THE STATE OF FLORIDA OR OUTSIDE THE STATE, AT WHATEVER PRICE THE MARKET WILL BEAR. THEY ARE NOT DEDICATED TO COMMIT TO ANY SPECIFIED NEED IN THE STATE OF FLORIDA. COUNSEL SAID THAT THERE WAS A NEED FOR 8,000 MEGAWATTS OF FLORIDA. WHAT THE RECORD SHOWS IS THAT IS EXACTLY WHAT THE RETAIL UTILITIES SHOW THAT THEY WERE GOING TO ADD TO THEIR OWN SYSTEMS OVER THE NEXT TEN YEARS. THEY MUST GO FORWARD TO ADD TO THE CAPACITY, REGARDLESS OF WHETHER A MERCHANT IS BUILT, BECAUSE BY DEFINITION, THEY CAN'T COUNT ON A MERCHANT. THEY CAN'T COUNT THAT TOWARD THEIR RESERVE MARGE IPS, SO WHAT YOU GET IS A PROLIFERATION OF THE POWER PLANTS, WHICH IS EXACTLY WHAT THE POWER PLANT CITING ACT WAS INTENDED TO AVOID. REGULATED BY WHOM? THE SCC, THE FEDERAL TRADE COMMISSION? THE IRS? AS JUSTICE ANSTEAD POINTED OUT, THIS IS REASONABLE TO ASSUME REGULATED BY THE STATE OF FLORIDA. THAT IS REASONABLE, THE MOST NATURAL CONSTRUCTION. YOU DON'T HAVE TO TAKE OUR WORD FOR T THE LEGISLATURE, IN ENACTING THIS LAW, SAID THAT, IN PREFERENCE TO THE LAW, THAT THIS WAS AN ACT PROVIDING THAT THE REGULATION, THE REGULATION OF ELECTRIC UTILITIES, IS PREEMPTED BY THE STATE. THAT WAS THE LEGISLATURE'S MIND-SET, WHEN IT ENACTED THIS LAW. IT WAS SPEAKING ABOUT STATE REGULATION. AND THE PUBLIC SERVICE COMMISSION RECOGNIZES THAT THEY HAVE A BURDEN TO SHOW THAT THIS ENTITY WILL BE REGULATED BY THE STATE.

LET ME ASK YOU, IF YOUR COMPANY PETITIONED TO BUILD THIS PLANT, YOU SAY THAT YOU, ALSO, HAVE THE OBLIGATION TO MAKE SURE YOU HAVE RESERVES FOR YOUR RETAIL CUSTOMERS. WHEN THE -- WHEN THE PSC WOULD GO TO EVALUATE NEED, WOULD IT HAVE TO EVALUATE IT DIFFERENTLY THAN THEY WERE DOING FOR DUKE? IN OTHER WORDS WOULD THEY

NOT ALLOW YOU TO SAY, LOOK, IT IS UNCOMMITTED, BUT I MIGHT USE IT FOR MY CUSTOMERS? HOW WOULD IT VARY?

ANY UTILITY, LIKE FLORIDA POWER CORPORATION, THAT WANTS TO BUILD A PLANT, HAS THE BURDEN, UNDER 403.519, TO GO TO THE PUBLIC SERVICE COMMISSION AND DEMONSTRATE THAT IT HAS A UTILITY-SPECIFIC NEED FOR THAT PLANT, TO SERVE ITS CUSTOMERS. IT CANNOT BUILD A PLANT ON SPEC.

SO YOU CANNOT GO AND START BUILDING THE SAME PLANT THAT DUKE IS TRYING TO BUILD.

CORRECT. CORRECT. THAT IS EXACTLY RIGHT.

I THOUGHT THERE WAS ARGUMENT THAT REGULATED UTILITIES ARE ALSO, NOW, IN THE WHOLESALE POWER MARKET, WHICH IS UNREGULATED.

WELL, WE HAVE DISCUSSED THE LEGISLATIVE HISTORY OF THE POWER PLANT SIGHTING ACT IN OUR BRIEF, AND I COMMEND THAT TO THE COURT, BECAUSE WHAT THAT SHOWED WAS THAT ELECTRIC COMPANIES DO BUILD PLANTS TO SERVE THEIR CUSTOMERS, AND FROM TIME TO TIME BECAUSE THEY MAINTAIN RESERVES, THEY MAINTAIN EXTRA CAPACITY, THEY HAVE EXCESS ENERGY TO SELL TO EACH OTHER ON THE WHOLESALE MARKET, AND THIS ENABLES EACH COMPANY TO DEFER THE BUILDING OF PLANTS, TO THE POINT WHERE THEY ARE NEEDED, ONLY WHEN THEY ARE NEEDED, AND WHAT THIS DOES IS MINIMIZES THE IMPACT ON THE ENVIRONMENT FROM ENFEATHERED CAPACITY -- FROM UNFETTERED CONSTRUCTION. THE NEED FOR COST EFFECTIVE CONTRACTS TO DEDICATE THEMSELVES TO SERVE THE NEEDS OF FLORIDA UTILITIES, THERE IS A MARKET, THEY CAN COME IN, UNDER THE NASSAU RULE, AND PARTICIPATE IN IT.

DO I UNDERSTAND THAT, FOR SOME PURPOSES, THIS POOL OF POWER, THAT FLORIDA HAS, THEN, DUKE WOULD BE FACTORED IN. BUT LET'S SAY THERE WASN'T AN EMERGENCY IN FLORIDA. THEY COULD STILL SELL OUTSIDE, TO GEORGIA.

ABSOLUTELY, SIR. IN FACT, WHAT THE RECORD SHOWS --

WOULD NOT NECESSARILY HAVE TO MEET THAT BURDEN.

THAT'S RIGHT. WHAT THE RECORD SHOWS, THERE WAS A LOT OF DISCUSSION ABOUT LAST SUMMER, WHICH IS ACADEMIC, BECAUSE DUKE WASN'T HERE LAST SUMMER, BUT IF THEY HAD BEEN HERE LAST SUMMER, WHAT THE RECORD SHOWS IS THAT THE PRICES WERE HIGHER OUT OF SIDE THAN THEY WERE UP NORTH DURING THE HEATWAVE, AND DUKE WOULD HAVE EVERY INCENTIVE TO SELL OUTSIDE THE STATE, UNDER THOSE CIRCUMSTANCES. THAT IS WHAT A MERCHANT CAN DO. FINALLY TO ADDRESS THE ISSUE ARE THEY REGULATED UNDER STATE LAW? BECAUSE THAT IS CRITICAL, JUSTICE PARIENTE. THEY ARE REGULATED, UNDER STATE LAW.

BRING YOUR REMARKS TO A CONCLUSION.

THANK YOU. UNDER 366.042, THE FLORIDA STATUTES DESCRIBE WHAT AUTHORITY THE PUBLIC SERVICE COMMISSION HAS OVER ELECTRIC UTILITIES UNDER STATE LAW. IT SAYS THE COMMISSION SHALL HAVE POWER OVER ELECTRIC UTILITIES FOR THE FOLLOWING PURPOSES. TO PERFORM UNIFORM SYSTEMS AND CLASS OF AC OUTS, TO -- ACCOUNTS, TO PROVIDE A RATE STRUCTURE, SO IF YOU ARE ONE, YOU HAVE GOT TO LIVE BY THIS. TO APPROVE TERRITORIAL AGREEMENTS. WHAT DUKE'S COUNSEL HAS CONCEDED BELOW IS I DON'T THINK YOU CAN PROVIDE A RATE STRUCTURE FOR US. WE DON'T CONSUMATE RETAIL LEVEL, SO THAT IS IRRELEVANT. BECAUSE WE HAVE NO RETAIL SERVICE AREA, WE WOULD NOT BE SUBJECT TO TERRITORIAL DISPUTES. IN OTHER WORDS THEY DON'T WANT LIKE A DUCK. THEY DON'T TALK LIKE A DUCK. THEY DON'T LOOK LIKE A DUCK, AND THEY ARE NOT A DUCK. THEY ARE NOT A

REGULATED UTILITY IN THE STATE OF FLORIDA.

THANK YOU, COUNSEL FOR ASSISTING US IN THIS ISSUE.