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September 10, 1997

HAND-DELIVERED

Blanca S. Bayó, Director
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970000

Dear Ms. Bayó:

Pursuant to my conversation with Staff Counsel Leslie Paugh, I am submitting FIPUG's comments on certain questions posed by Staff during the August 8, 1997 workshop on electric utilities' Ten Year Site Plans.

Please acknowledge receipt of the above on the extra copy enclosed herein and return it to me. Thank you for your assistance.

Sincerely,

Joe McGlothlin

Joseph A. McGlothlin

Enclosure

JAM/pw

HAND DELIVERED

cc: Leslie Paugh (w/enclosure)
Michael Haff (w/enclosure)

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

COMMENTS OF THE FLORIDA INDUSTRIAL POWER USERS GROUP (FIPUG) ON QUESTIONS POSED DURING WORKSHOP ON TEN YEAR SITE PLANS

At the conclusion of the August 8, 1997 workshop on the Utilities' Ten Year Site Plans, Staff posed the following questions:

1. Does ths "need" portion of the Florida Electrical Power Plant Siting Act allow merchant plants to be certified? (A merchant plant is a non-utility power plant constructed without a utility applicant and there is no obligation by customers of any utility to pay rates based in part on the costs or prices of that plant.)

2. Can a merchant plant be built without certification pursuant to the Power Plant Siting Act?

3. If the answer to both of the above is NO, does the Florida Electrical Power Plant Siting Act frustrate the FERC's policy for a competitive wholesale market by restricting entry?

FIPUG believes Staff's questions are timely. The presentation by the spokesperson for the utilities during the August 8th workshop showed symptoms of an industry that has been insulated from genuine competition too long. Consider:

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1. The spokesperson for the utilities projected that the reserve margin for peninsular Florida's will fall well below the general reliability criterion of 15% in the near future.

2. The same spokesperson was unable to project what the loss of load probability for peninsular Florida will be, because the utility industry has refused to perform a probablistic study of the reliability of peninsular Florida for years. During the workshop the traditional utilities never committed to perform a LOLP study, even though Staff emphasized its importance.

3. The utility representative described an approach to the tightening capacity situation that disclosed the utilities' intent to wait until the last minute, then add capacity under conditions which would not permit a process of evaluating competitive alternatives without jeopardizing system reliability. Either the utilities are proceeding under the assumption that there will be no competitive alternatives, or they are pursuing a strategy designed to inhibit competition.

The complacency exhibited by the utility industry during the workshop would be reason enough to explore the questions raised by Staff. Other factors reinforce the conclusion that the existing insular regime is not serving customers well. Utilities

continue to assert that they require "incentives" to engage in transactions that would benefit customers. Their notion of "competition" is to first call on retail customers to support 100% of the generating assets, then use those assets to make additional profits through off-system wholesale transactions. Non-firm customers are at risk of interruption, not only when the serving utility's firm customers need the utility's capacity, but also when utility finds an opportunity to make wholesale transactions away from the system. Even on the Energy Broker, there is no true price-based competition; instead, the price is in part a function of the purchasing utility's more expensive cost of production. Clearly, it is time to introduce more real competition into the regulatory framework. FIPUG believes that "merchant plants" would offer the potential for a source of needed competition. The Siting Act should be implemented in a way that makes sense of past decisions in light of future needs.

First, some basic parameters and propositions are in order. Under the Siting Act, certain "electrical power plants," as defined for purposes of the Act, must receive certification by the Siting Board, and a "determination of need" from the Commission is a condition precedent to the certification hearing. Sections 403.506 and 403.508(3), Florida Statutes. Pursuant to Section 403.519, Florida Statutes, the Commission is the sole and exclusive forum for the determination of need.

"Applicants" under the Siting Act are "electric utilities", as that term is defined <u>for purposes of the Act.</u> The need for the Commission to interpret the Act arises

primarily from the fact that the list of "electric utilities" in the statutory definition does not include all of the entities that may legitimately construct, own, and operate power plants. For instance, absent from the list are those entities who wish to market electrical power at wholesale but do not fall within the list of "regulated utilities" included in the statute.

As a beginning proposition, FIPUG believes an interpretation of the Siting Act that holds that a proposed merchant plant is subject to the Act but that the entity that proposes to construct it cannot be an applicant would raise a constitutional issue of substantive due process. Accordingly, FIPUG believes it is reasonable to approach the Act from the standpoint that if a proposed "merchant plant" is subject to the Act, then the entity proposing the Act can apply for certification. Alternatively, if the entity proposing a power plant is precluded from applying for certification, then the plant should not be subject to the requirements of the Act.

FIPUG's brief comments on the specific questions follow.

I. Does the "need" portion of the Florida Electrical Power Plant Siting Act allow merchant plants to be certified? (A merchant plant is a non-utility powerplant constructed without a utility applicant and there is no obligation by customers of any utility to pay rates based in part on the costs or prices of that plant.)

FIPUG's short answer: Yes; prior decisions and interpretations do not preclude that result.

To understand where we are now, it is necessary to sift through several orders of the Commission dealing with applications by Qualifying Facilities for determinations of need, and identify the rationales and themes that make sense in law and policy.

One of the earliest QF applications for a determination of need was the application of Florida Crushed Stone. In that case, the Commission granted a determination of need to Florida Crushed Stone, based primarily on the need for the fuel efficiency associated with cogeneration. At the time, Florida Crushed Stone did not have a contract with a purchasing utility. See Order No. 11611, issued in Docket No. 820460-EU on February 14, 1983.

In subsequent orders, the Commission developed a more restrictive approach. For instance, in Order No. 22341, issued in Docket No. 890004 on December 26, 1989, the Commission indicated it would no longer conclude automatically that QFs holding standard offer contracts or negotiated contracts that were based upon the statewide avoided unit would be the most cost-effective source of capacity for the purchasing utility during Siting Act proceedings. The Commission's rationale was affirmed by the Supreme Court of Florida in Nassau Power Corp. v. Beard, 601 So. 2d 1175 (Fla. 1992). However, the order of the Commission that the Court affirmed is

not as restrictive as it may appear at first blush. One must take into account the context in which the order was issued. Order No. 22341 dealt only with the situation in which the QF held a contract with the purchasing utility. This meant that the utility's customers would be required to bear the cost of the unit if the Commission granted the determination of need. In Order No. 22341, the Commission said:

> "To the extent that a proposed electric power plant constructed as a QF is selling its capacity to an electric utility pursuant to a standard offer or negotiated contract, that capacity is meeting the needs of the purchasing utility". Order No. 22341, p. 26 (emphasis supplied)

Therefore, when the Commission observed in Order No. 22341 that the "need" (for purposes of the Siting Act) is the need of the utility purchasing the power, it was explaining why it intended to compare the QF's contract, through which the QF proposed to satisfy the purchasing utility's need for capacity, with the purchasing utility's need and costs.

The situation in Order No. 22341 differs from the Florida Crushed Stone case. At the time it asked for and received a determination of need, Florida Crushed Stone had no contract with a purchasing utility. In other words, at the time of the application, the decision of the Commission bore no cost implications for utility

customers. Obviously, Order No. 22341 differs from the situation that would be presented by a future "merchant plant" for the same reason.

Subsequently, Nassau Power Corporation was again involved in a case in which the Commission adopted a restrictive view of who may proceed under the Siting Act. Florida Power and Light Company signed a proposed contract with Cypress Energy Partners (CEP). CEP and FPL filed an application for a determination of need, based upon FPL's projection that it would require a total of about 850MW of additional capacity during 1998 and 1999 to meet reliability criteria. Nassau Power Corporation and Ark Energy intervened in CEP's determination of need case. Nassau and Ark also offered competing contracts and filed independent applications for determinations of need. Significantly, in their applications Nassau and Ark offered to meet the same FPL need for capacity that underlay the CEP contract and application. The Commission dismissed the applications of Nassau Power and Ark for determinations of need. It reasoned that, because Nassau and Ark had no "obligation to serve customers" and because they only offered to enter contracts, Nassau and Ark were not proper applicants under the Act. The Commission said it would require that the purchasing utility be both an "indispensable party" and a joint applicant with the QF holding a contract with the utility. Order No. 92-1210-FOF-EQ, supra, at pp. 3-4.

This order, too, was affirmed by the Supreme Court of Florida. Nassau Power Corp. v. Deason, 641 So. 2d 396 (Fla. 1994). However, neither the Commission's

order nor the Court's decision affirming that order should be construed as restrictively as may appear on the surface. Again, context is critical. The situation addressed by the Commission and, on judicial review by the Court, again involved an attempt by cogenerators to require customers of a particular utility to become contractually responsible for the costs of the unit the cogenerators proposed to build. While those who wish to argue that in this order the Commission intended to prohibit all non-utilities who don't hold contracts with a purchasing utility from proceeding under the Act can find support for their position in the Commission's order (and in the order in which the Court affirmed the Commission's decision to dismiss the applications), FIPUG believes a closer analysis discloses that the precise decision of the Commission was far more limited in its scope -- as was the Commission's intent regarding the precedental effect of the order.

In these dockets Nassau Power and Ark, who had no "obligation to serve customers" and no contract with a purchasing utility, had nonetheless targeted a specific utility's need for capacity to maintain reliability that they proposed to satisfy (through PSC-ordered contracts). In its order dismissing those attempts, the Commission explicitly stated:

> "It is also our intent that this order be narrowly construed and limited to proceedings wherein non-utility generators seek a determination of need

based on a utility's need". Order No. PSC-92-1210-FOF-EQ at page 4. (emphasis supplied)

FIPUG submits that, by the effect of the Commission's own carefully selected language, the order dismissing the applications of Nassau Power and Ark does not serve as precedent for the treatment to be afforded an application by an entity proposing to construct a true "merchant plant," because the application would not be premised on meeting a particular utility's need through a decision and order of the Commission.

Since an entity proposing a "merchant plant" by definition does not propose to meet the need for capacity of a specific utility, could such an entity demonstrate a "need" for the plant within the meaning of the Act? Unless the Commission were to impose a standard on such applicants that it has not imposed on traditional utilities, FIPUG submits the opportunity to do so would exist under the Siting Act. The need for "system reliability" is only one of several criteria enumerated in the act. The statutory criteria are:

> ... the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, ... whether the proposed plant is the most cost-effective alternative available ... the conservation measures taken by or

reasonably available to the applicant ... and other matters within its jurisdiction which it deems relevant. Section 403.519, Florida Statutes (emphasis supplied)

Clearly, the underscored language is not limited to the impact on a particular utility. As mentioned earlier, the Commission granted Florida Crushed Stone's application, based primarily on the need for and benefits to be derived from the fuel efficiency associated with cogeneration. Also, pursuant to these additional criteria, utilities have proffered -- and the Commission has accepted -- justifications for determinations of need that are neither limited to the petitioning utility nor related to the reliability of the utility's system. In Docket No. 810045-EU, Florida Power and Light Company and the Jacksonville Electric Authority proposed the St. John's River Power Park project -- two coal-fired units having in-service dates of 1985 and 1987. In Order No. 10108, the Commission determined that the capacity of the proposed units would not be required for reliability purposes until at least 1991. However, the Commission stated, "We construe the "need for power" issue to encompass several aspects of need .... (including) the socio-economic need of reducing the consumption of imported oil in the state of Florida." (Emphasis supplied).

Based largely upon the desirability of reducing Florida's dependence on imported oil, the Commission granted the determination of need requested by FPL and JEA.

Similarly, in Docket No. 810180, the Commission considered an application for a determination of need by the Orlando Utilities Commission. OUC proposed an in-service date of November 1986 for its Stanton coal-fired unit. In Order No. 10320, the Commission concluded that the capacity of the unit would not be needed for reliability purposes "during the 1980's". However, the Commission also examined "... another aspect of the need issue... the socio-economic need of reducing the State's consumption of imported oil." The Commission reasoned that the project "... will provide significant economic benefits for peninsular Florida in terms of supplying an alternative to oil-fired capacity generation." It concluded that the unit would help enable electric utilities to meet and surpass the Commission's goal of reducing statewide oil consumption. The Commission also took into account the effect of the unit on the FCG's Energy Broker system. It found that the unit would enable OUC to produce more coal-fueled and nuclear-fueled energy than its system would require at times of minimum load, and enable it to market such excess energy as economy energy on a peninsula-wide basis. Order No. 10320, at pp. 3-4.

If "traditional utilities" may justify proposed units on the basis of considerations that go beyond a particular utility's reliability criteria, and address benefits provided to the State of Florida and/or peninsular Florida as opposed to a single utility system, it follows that other applicants should have the same opportunity. In these brief comments, FIPUG will not attempt to identify all of the potential "aspects of need," (including aspects of socio-economic needs); that may be available with respect to a

potential application by the proponent of a merchant plant; however, FIPUG believes such aspects of "need" could possibly include general reliability benefits (as in the case of Florida Crushed Stone, even without a contract), greater efficiency, abundant low-cost sources of energy, a more competitive wholesale market (including, perhaps, an impetus toward real price-based competition), lower prices on the Energy Broker, reduction of capital investment risks to ratepayers, conservation and environmental benefits through displacement of older, dirtier plants, etc.

II. Can a merchant plant be built without certification pursuant to the Power Plant Siting Act?

FIPUG's short answer: If it is determined that the proponent of a merchant plant is not a legitimate applicant, then a related analysis of the relationship between the requirement of "need" and costs to ratepayers should support the conclusion that a merchant plant is not subject to the requirement of the Act.

The analysis of the applicability of the Siting Act definitions to a "merchant plant" differs fundamentally from the type of applications brought by a traditional utility, or even by a cogenerator holding (or offering) a contract with the purchasing utility. The impact of a proposed power plant <u>on ratepayers</u> constitutes a significant aspect of the "need" portion of the Act. Where an application is filed by a utility, or an independent developer holding (or offering) a contact with a utility, the claimed

benefits must be correlated to the plant costs that the applicant proposes to place on customers. With a merchant plant, the applicant assumes all of the risk associated with the cost of the unit. When built, the unit will operate only if the applicant succeeds in demonstrating to the wholesale market that it can supply power that is more economical than available alternatives. If it were ultimately to be determined that the proponent of a merchant plant is not an "applicant" as defined by the Siting Act, it appears to FIPUG preliminarily that a parallel analysis could well support the conclusion that, because the statutory necessity for a "determination of need" arises from the requirement that ratepayers bear the costs of units certified under the Act, "merchant plants" should not be subject to those certification requirements.

III. If the answer to both of the above is NO, does the Florida Electrical Power Plant Siting Act frustrate the FERC's policy for a competitive wholesale market by restricting entry?

FIPUG's short answer: Interpretations of the Act that operate to prohibit the construction of merchant plants would impede the development of the competitive wholesale market envisioned by FERC.

In Order 888, the FERC stated that its goal is to facilitate the development of competitively priced generation supply options. To that end, FERC has moved to implement the Energy Policy Act of 1992 by establishing rules for certain generators

may obtain Exempt Wholesale Generator status. It has moved to ease market entry for sellers of generation from new facilities. It has moved to adopt rules designed to guard against discrimination in access to needed transmission facilities. The FERC has also begun to approve market-based pricing of wholesale transactions on a case by case basis. FIPUG submits that if it is ultimately determined that a "merchant plant" requires certification under the Siting Act, <u>and</u> that the proponent of the plant is precluded from applying for certification, that result (apart from other problems) would indeed frustrate the policy of FERC favoring more competition in the bulk wholesale market for power.

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