MEMORANDUM

SEPTEMBER 19, 1997

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (PAUGH) JJP

RE: ~~UNDOCKETED~~ - TEN YEAR SITE PLAN

Please insert the attached documents into the record of the above matter.

LJP/js
Attachment
cc: Division of Electric and Gas (Haff)
I:tyspmm.ljp

ACK _____
AFA _____
APP _____
CAF _____
CMU _____
CTR _____
EAG _____
LEG _____
LIN _____
OPC _____
RCH _____
SEC 1
WAS _____
OTH _____

Rick A. Blandford
Director

Enron Capital & Trade Resources Corp.
P. O. Box 1188
Houston, TX 77251-1188
(713) 853-5814
Fax (713) 646-3483

September 9, 1997

Via Telecopy & FedEx
850/413-6250

Ms. Leslie J. Paugh, Esquire
Staff Counsel
Division of Legal Services
Florida Public Utility Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399 - 0850

Undocketed Ten Year Site Plan:
Response to Inquiries re Merchant Plants

Dear Ms. Paugh:

Please find attached the response of Enron Capital & Trade Resources Corp. ("ECT") to your August 13th Memorandum regarding the requirement for certification of "merchant plants" under the Florida Electric Power Plant Siting Act.

ECT is a wholly-owned subsidiary of Enron Corp. ("Enron") and conducts virtually all of Enron's non-regulated world-wide operations. ECT's core businesses include all types of transactions involving natural gas, electricity, crude oil and natural gas liquids. These activities include acquiring and developing energy related assets, as well as providing finance and risk management products to our customers. ECT is the leading independent marketer of natural gas and, through its wholly-owned subsidiary Enron Power Marketing, Inc., is the leading independent marketer of wholesale electricity in the United States.

We appreciate the opportunity to express our thoughts regarding your August 13th inquiries and would welcome the opportunity to further discuss our comments.

Very truly yours,

Richard A. Blandford,
Director

RAB/rde
Attachment

MEMORANDUM

TO: Leslie J. Paugh, Esquire
Staff Counsel
Division of Legal Services
Florida Public Service Commission

FROM: Enron Capital & Trade Resources Corp.

DATE: September 9, 1997

SUBJECT: Undocketed Ten Year Site Plan:
Response to August 13th Inquiries re Merchant Plants

Pursuant to the August 13th Memorandum issued by Leslie J. Paugh, Staff Counsel, Division of Legal Services, of the Florida Public Service Commission ("PSC"), the PSC Staff requested comments from various parties regarding the requirement for certification of merchant power plants under the Florida Electric Power Plant Siting Act (the "Act"). Based on informal discussions with Staff of the PSC, Enron Capital & Trade Resources Corp. ("ECT") requested that it also be able to respond to the August 13th Memorandum in an effort to provide Staff with further insight into the legal and policy ramifications surrounding the development of power plants for both merchant and self-service generator activities. ECT is currently discussing the development of merchant and self-service generated power with certain customers in Florida and has an interest in promoting further competition in the development of the electric power market while upholding standards for the protection of health, safety and the environment.

The Characterization of a Merchant Plant

Merchant power plants or self-service generated power plants (referred to herein collectively as "merchant plants" because of their similarity with regard to the issues discussed herein) are, by definition, power plants that are built with private funding and do not impose on public ratepayers the costs or risks associated with development, construction, funding, operation or decommissioning of such plants. These plants are built with the expectation that, once the plant is operational, the power will be sold into the market at market prices or consumed by the customer to satisfy all or a portion of its own power requirements. From ECT's perspective and

for purposes of these comments, there are at least three different types of merchant plants:

- Power plants built "on spec" with or without committed supply contracts, and with the anticipation of power being sold into the market at market prices.

- Power plants built and/or financed on a "turn-key" basis for an industrial or commercial customer. These include "inside the fence" power plants by which all of the power generated is consumed by the customer or, if permitted by law, where any surplus energy not consumed by the customer is sold by such customer into the market.

- Power plants built on a joint venture or other participation basis by which a portion of the capacity is owned by or committed to the industrial or commercial customer and with the remaining plant capacity being owned or committed to the developer on a merchant basis and sold into the market at market prices.

Under each of the above-referenced scenarios and absent a specific contract between a utility and a merchant plant or any obligations imposed on such utility by the Public Utility Regulatory Policies Act of 1978 ("PURPA")[1], no utility would be obligated to purchase power (either capacity or energy) from a merchant plant. A utility would, however, as with any other potential purchaser, have the option to contract with a merchant plant to purchase available power if it could do so under economic justification and in compliance with applicable regulations. Any savings generated from such a purchase would flow to the purchasing utility's ratepayers without any attendant risks resulting from ownership or operation of the plant (*i.e.*, no capital or variable carrying costs, even though the utility contracts to purchase power from the merchant plant). If no savings could be effected by a utility contracting to purchase available power from a merchant plant, then the utility's ratepayers would not suffer any loss since they would have no obligation to purchase any output from the plant or to pay for the plant's construction or operation. Stated differently, the risk of loss inherent in the construction of a utility-owned plant would not be present with the option provided by a merchant plant whether or not the utility contracted with such plant for the purchase of power.

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1 Under PURPA, a utility may be obligated to purchase power from a cogeneration or other eligible power plant facility at the utility's long-run avoided cost. This Memorandum does not attempt to analyze the obligations of utilities vis-à-vis eligible power plant facilities under PURPA.

Legal Issues

In Nassau Power Corporation v. Deason, 641 So.2dn 396 (Fla. 1994), the Florida Supreme Court affirmed a PSC Order dismissing Nassau Power's petition for a need determination pursuant to Section 403.519, Florida Statutes. The Court found that the PSC's construction of the term "applicant" in Section 403.519 was not clearly erroneous, and, therefore, the Court refused to overturn the PSC Order. The Court approved the determination by the PSC that Nassau was not an "applicant" under the Act because it was a non-utility generator. A non-utility generator is a generator that is not a utility and does not have a power sales contract with a utility at the time of the application.

An erroneous understanding of the Nassau Power decision could lead to the conclusion that a non-utility generator whose proposed plant falls within the definition of "electrical power plant" contained in the Act but that does not have a power sales contract with a utility will never be able to obtain a need determination from the PSC. Carried to its extreme, this conclusion would mean that one who desires to build a power plant falling within the Act and who intends to consume all the power for its own needs or for merchant purposes would be unable to obtain a need determination from the PSC because they would not be considered an "applicant" under the Act. ECT believes that such an interpretation would be extreme and incorrect and that the PSC should conclude that the same reasoning need not to extend to merchant plants. It is also ironic that there is no requirement for a need determination when a utility purchases power from an existing merchant plant, but that a developer of a merchant plant arguably can never meet the definition of an "applicant" under the Act without a power contract with a utility at the time of its application.

In the PSC Order appealed in the Nassau Power case, the PSC made it very clear that its Order was limited to the facts present in that case and expressly reserved its judgment in other circumstances:

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

> determination without a utility co-applicant. To date this circumstance has not been presented to us and we do not believe the question should be decided in the abstract. Order No. PSC-92-1210-FOF-EQ, October 26, 1992, pp. 4-5. (emphasis added)

The PSC reiterated this view when it denied Nassau's Motion for Reconsideration of Order No. PSC-92-1210-FOF-EQ:

> It is our intent that Order No. PSC-92-1210-FOF-EQ be narrowly construed and limited to proceedings wherein non-utility generators seek determinations of need based on a utility's need. Order PSC-93-0338-FOF-EQ, March 4, 1993, pp. 1-2.

Similar to plants proposed by a "self-service generator," merchant plants present a different set of questions and should not be evaluated under the Act in the same manner as proposed plants that rely on a utility's need.

As the PSC recognized in the orders leading to the Nassau decision, the reasoning behind the orders is not applicable to merchant plants. Merchant plants, by definition, can never show the need of a utility or that of the utility's customers until a specific utility decides to purchase power from the merchant plant. The fact that it may be impossible to demonstrate need in the restrictive manner described in the orders, however, does not mean that the need does not exist. A merchant plant developer may be able to demonstrate that its plant will meet the four factors the PSC must take into account in determining need pursuant to Section 403.519, Florida Statutes: (i) the need for electric system reliability and integrity; (ii) the need for adequate electricity at a reasonable cost; (iii) whether the proposed plant is the most cost-effective alternative; and (iv) consideration of the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed power plant. In practice, the PSC should only have to determine need for electric system reliability and integrity on a statewide basis, since the future decision by a utility to purchase power from the merchant plant, once the plant is operational, will serve as the best proof that the plant meets the other three factors. A prudent decision by a utility to purchase power from a merchant plant necessarily means that the electricity is adequate and at reasonable cost, that the plant is producing the most cost-effective power at the time, and that all conservation measures available to mitigate need have been exhausted by the purchasing utility. If these factors are not present, a prudent utility would not buy power from a merchant plant.

Under the broad authority granted the PSC to interpret Florida Statutes which grant its jurisdiction, the PSC can and should determine that merchant plants will be evaluated differently than power plants proposed by utilities to be included in ratebase. The PSC can reach this determination either by finding that these types of power plants are entitled to apply for a need determination under the Act or by using the authority granted in Section 403.519 to initiate a need determination on its own motion.

Alternatively, and based on analogy with its Nassau Power Order, ECT believes that the PSC has an existing and adequate basis to conclude that developers of merchant plants need not be "applicants" under the Act. It does not follow from this, however, that Florida law prohibits the construction and operation of such plants. Instead, where a power plant will not operate as a public utility, the developer should be allowed an election not to submit an application or otherwise become an "applicant" under the Act. In this event, the PSC would not be called upon to make a need determination of the kind required where a utility desired to expand generating capacity. This interpretation is entirely consistent with the PSC Order in the Nassau Power case.

Another interpretation leading to the same conclusion is that merchant plants do not fall within the Act at all. The Act was drafted prior to the existence of practical alternatives to utility generated power, which was largely a function of the monopolistic regulatory compact whereby utilities were allocated specific franchise service territories in return for regulated rates of return. The Act could not have foreclosed, nor should it be interpreted to foreclose, possibilities that did not exist at the time it was enacted and to do so would frustrate long-standing rules of statutory construction. It is entirely within the inherent authority of the PSC to accommodate new segments of the market that were unforeseen at the time the Act was enacted and that do not frustrate the original intent of the Act. Such accommodation should include declining to extend regulation to new segments of the market where such application would not further the original intent of the legislation and where the absence of pervasive electric utility regulation would be consistent with the public health, safety and welfare. Under this interpretation, developers of merchant plants would remain obligated to meet all permitting and licensing requirements required by Florida law, including those relating to health, safety and the environment, but would have to do so without the benefit of the consolidated proceedings allowed under the Act. This is precisely the case presented with merchant plants.

The Act was first enacted in 1973 to expedite the permitting process at a time when Florida and the entire nation were looking for lower cost alternatives to plants powered by foreign oil. At the time, no one could have conceived the changes that were to take place in the 1980's and 1990's to the economic regulation of the electric industry. No one can deny that this nation as a whole has recognized the benefits of

deregulating previously highly regulated markets. The framers of the Act could not have and did not anticipate the arrival of cogenerators, large industrial self-generators and, finally, exempt wholesale generators. Because of this failure to anticipate, it is not far reaching to conclude that the Act does not apply to merchant plants.

Under the latest interpretation of the Act by the PSC, the PSC has already drawn a line which is once removed from a literal interpretation of the Act. The PSC has chosen to draw the line when a proposed plant has a contract to sell power to a utility at the time the proposed plant applies for a need determination. The literal definition of an "electric utility" in the Act does not provide the authority for such line drawing. Following the same logic applied by the PSC, one can also easily conclude that the Act, regardless of its specificity, was not intended to apply to non-utility generators, since they can never be considered "applicants" under the Act. It would be an absurd result to interpret the Act in a manner that precludes the construction of environmentally safe plants in Florida when the framers of the Act could not have intended to do so, since they could not and did not anticipate the potential existence of these plants.

FERC Policy

There can be no question that the policy of the Federal Energy Regulatory Commission ("FERC") and the national policy for a competitive wholesale market will be frustrated if the Act is interpreted in a way that restricts the entry of merchant plants into the Florida market. If the Act is not interpreted to allow for merchant plants, then entry is not just restricted, but impossible.

In 1992, the United States Congress passed the Energy Policy Act of 1992. This act represents a major step in pursuing the federal policy to deregulate the national wholesale power market. Because of Florida's geographic characteristics (*i.e.*, its peninsular location) and because of the limited transmission line capacity to import power, Florida ratepayers will be unable to benefit from the Federal policy if merchant plants are not allowed in the state.

Conclusion

For these reasons, ECT believes that the PSC should answer the questions posed in its August 13th Memorandum in a way that favors competition through, among other things, permitting construction of merchant plants. It is within the broad discretion of the PSC to interpret its statutory authority in a way that is fully consistent with the public policy favoring competition.

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September 9, 1997

Leslie J. Paugh, Staff Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0870

Re: Undocketed - Ten Year Site Plan
August 13, 1997 Questionaire

Dear Ms. Paugh:

Through a memorandum dated August 13, 1997, you asked us to reply to the following three questions. The specific responses follow each question. In general, please be advised that the answers submitted are provided as a matter of courtesy and are not intended as a binding opinion of counsel. This letter may not be relied upon by you or the Commission for any subsequent purpose or relied upon by or furnished to others without our prior written consent. Of necessity, our answers have been developed without the benefit of any specific or real facts and circumstances. As a result, we have not undertaken an exhaustive review of the applicable law. The answers provided below may be different given a particular set of facts and circumstances to consider and following an exhaustive review of the applicable law.

1. Does the "need" portion of the Florida Electric 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.)

Reply: Yes, it appears that there is nothing in the Florida Electric Power Plant Siting Act ("PPSA", "the Act", or "the Statute") that would prohibit certification of a plant that otherwise meets the requirements of the Act merely on the basis that it is a "merchant" plant.

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

Reply: There does not appear to be a distinction in the statute as to any requirement that a power plant which otherwise meets the requirements of the Act not be built without certification merely on the basis that it is a "merchant" plant.

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

Reply: No. It does not appear that the FERC's policy is intended to contravene or supersede the interests of individual states such as those expressed in the legislative intent portion of the Act. See §403.502, Fla. Stat. (1995).

Very truly yours,

Jeffrey A. Stone
For the Firm

JAS/bl

SEMINOLE ELECTRIC COOPERATIVE INCORPORATED

DELIVERED VIA FAX AND REGULAR MAIL
September 9, 1997

Ms. Leslie J. Paugh, Staff Counsel
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Dear Ms. Paugh:

Your August 13, 1997 Memorandum asked the following three questions concerning merchant plants:

1. Does the "need" portion of the Florida Electric 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 Electric Power Plant Siting Act frustrate the FERC policy for a competitive wholesale market by restricting entry?

Questions one and two ask for a legal interpretation of Florida's Power Plant Siting Act. Seminole staff does not believe we should offer a legal interpretation. However, we believe it is in the best business interest of the state of Florida for all power plant applications to be treated in a similar manner. We believe the original intent of the Power Plant Siting Act was to streamline the process, not to complicate it, and to protect the interests of all Florida residents and insure our state's resources are used only for facilities which exhibit some level of basic need. Merchant plants should be required to apply for certification under the Act either with or without a utility coapplicant. If an IPP could license a merchant plant outside of the Power Plant Siting Act process (i.e., obtain environmental and other permits without the FPSC need portion), the IPP would have a competitive advantage over the utilities which may already have a portion of their loads at risk. The Act should be modified to include Need Certification for all generation facilities regardless of the industry sector originating the project, thereby ensuring a level playing field for all competing entities.

We would like to thank the FPSC Staff for this opportunity to express our opinion on this very timely subject.

Very truly yours,

Richard J. Midulla
Executive Vice President
and General Manager

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Legal

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 the "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:

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 for purposes of the Act. 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, and 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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September 9, 1997

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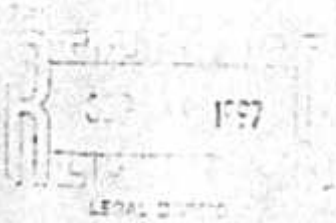

RE: UNDOCKETED - TEN-YEAR SITE PLANS

Dear Ms. Paugh and Mr. Haff:

To respond to the first two questions concerning the application of the Florida Electric Power Plant Site Act, FPL attaches the following decisions by the Supreme Court of Florida:

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

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

The third question asks about whether the Siting Act may frustrate the FERC policy for a competitive wholesale market by restricting entry. As to this last question, I am not aware that FERC had a policy of unlimited access so that even the application of a law addressing environmental concerns would be considered a barrier. Moreover, it appears that the FERC does continue to support some regulation of utilities. Therefore, FPL believes that broadly stated conclusions may have somewhat limited value.

In any event, it is not apparent that a policy promoting wholesale competition must be adhered to by other jurisdictions. To my knowledge, the FERC still allows cost of service based rate regulation.

Very truly yours,

Matthew M. Childs, P.A.

MMC:ml

Attachments

This aggravating factor is reserved for "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). The additional acts accompanying Flynn's death—Flynn knew Green had a gun, his hands were tied behind his back, and he was driven a short distance to the orange grove—do not turn this shooting death into the "'especially' heinous" type of crime for which this aggravator is reserved. *See Tedder v. State*, 322 So.2d 908, 910 (Fla.1975). Although this aggravating factor does not apply in the instant case, the three other aggravating factors support the death penalty and there is a weak case for mitigation. Thus, any error is harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So.2d 1129, 1139 (Fla.1986). Because this is so, there was no harm in instructing the jury on this factor.[3]

[8] Green next argues that the trial court improperly refused to find mitigating factors that the evidence established. In *Campbell v. State*, this Court held that a trial judge must give some weight to mitigating circumstances shown by a preponderance of the evidence. 571 So.2d 415, 420 (Fla.1990). *Campbell* was decided before sentencing in Green's case. The sentencing order in the instant case indicates that the judge considered and weighed statutory and nonstatutory mitigating factors. He determined that these factors failed to rise to the level of mitigation. The focus of *Campbell* is that a trial judge must give weight to mitigating factors. This concern is met by the trial judge's weighing. Although the sentencing order might not comply strictly with the requirements of *Campbell*, the trial judge clearly gave careful consideration to the mitigating factors.[4]

[9] Finally, in light of other cases, the three remaining valid aggravating circumstances, and no mitigators, we find that Green's death sentence is proportionate.

Accordingly, we affirm the sentences and convictions.

It is so ordered.

GRIMES, C.J., OVERTON, SHAW, KOGAN and HARDING, JJ., and McDONALD, Senior Justice, concur.

NASSAU POWER CORPORATION, Appellant,

v.

J. Terry DEASON, etc., et al., Appellees.

No. 81496.

Supreme Court of Florida.

Aug. 11, 1994.

Nonutility electric cogenerator appealed order of Public Service Commission (PSC) dismissing cogenerator's petition for determination of need for power plant under Electrical Power Plant Siting Act. The Supreme Court held that cogenerator, that had not entered into power sales contract with electric utility, was not proper applicant for determination of need under Siting Act.

Affirmed.

3. We also reject Green's challenge to the heinous, atrocious, or cruel aggravator as unconstitutionally vague because this issue was not preserved for appeal. Green did not object at trial to the form of the instruction, which is necessary to preserve a claim under *Espinosa v. Florida*, — U.S. —, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). *See, e.g., Mills v. Singletary*, 622 So.2d 943, 944 (Fla.1993). Even if the issue had been preserved, the instruction given in this case was not the instruction disapproved in *Espinosa*.

4. After discussing all aggravating and mitigating factors, the sentencing order includes this summary:

> After weighing the evidence the court finds four aggravating circumstances to exist. The court further finds that no statutory mitigating circumstances exist nor any nonstatutory mitigating circumstances. Aggravating factors are found to substantially outweigh mitigating circumstances.

1. Electricity ⇐8.4

"Cogenerator" is entity that produces electricity through cogeneration, which is efficient and conservational method of producing electricity.

See publication Words and Phrases for other judicial constructions and definitions.

2. Electricity ⇐8.1(1)

"Qualifying facility" is small power producer or cogenerator that meets threshold efficiency standards set forth by Federal Energy Regulatory Commission (FERC) pursuant to Public Utility Regulatory Policies Act (PURPA). Fla. Admin. Code Ann. r. 25-17.080(3); Public Utility Regulatory Policies Act of 1978, § 2 et seq., 16 U.S.C.A. § 2601 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

3. Electricity ⇐8.1(1)

Nonutility electric cogenerator, that proposed to build natural gas-fired power plant that would be qualifying facility (QF) under federal Public Utility Regulatory Policies Act (PURPA), and that had not entered into power sales contract with electric utility, was not proper applicant for determination of need under Electrical Power Plant Siting Act; Public Service Commission's (PSC) construction of Siting Act, only allowing nonutility generators with contract with electric utility to bring contract before Commission for approval, was not clearly unauthorized or erroneous. Public Utility Regulatory Policies Act of 1978, § 2 et seq., 16 U.S.C.A. § 2601 et seq.; West's F.S.A. §§ 403.503(4, 13), 403.519.

Joseph A. McGlothlin and Vicki Gordon Kaufman of McWhirter, Grandoff & Reeves, Tallahassee, for appellant.

Robert D. Vandiver, Gen. Counsel, David E. Smith, Director of Appeals and Marsha E. Rule, Div. of Appeals, Florida Public Service Com'n, Matthew M. Childs, Charles A. Guyton, Bonnie E. Davis and C. Alan Lawson of Steel, Hector & Davis, on behalf of Florida Power & Light Co., and Richard T. Donelan, Jr., Asst. Gen. Counsel, Tallahassee, on behalf of State of Fla. Dept. of Environmental Regulation, for appellees.

PER CURIAM.

Nassau Power Corporation appeals a final order of the Florida Public Service Commission (PSC or Commission) dismissing Nassau Power's petition for determination of need for a power plant, under the Florida Electrical Power Plant Siting Act, (Siting Act).[1] The Commission dismissed the petition reasoning that, as a non-utility generator, Nassau Power is not a proper "applicant" for a need determination proceeding under the Siting Act.[2]

[1] In *Nassau Power Corp. v. Beard*, 601 So.2d 1175, 1176-77 (Fla.1992), we recently explained:

> The Siting Act was passed by the legislature in 1973 for the purpose of minimizing the adverse impact of power plants on the environment. *See* § 403.502, Fla.Stat. (1989). That Act establishes a site certification process that requires the PSC to determine the need for any proposed power plants, including cogenerators, based on the criteria set forth in section 403.519, Florida Statutes (1989). Section 403.519 requires the PSC to make specific findings for each electric generating facility proposed in Florida, as to (1) electric system reliability and integrity, (2) the need to provide adequate electricity at a reasonable cost; (3) whether the proposed facility is the most cost-effective alternative available for supplying electricity; and (4) conservation measures reasonably available to mitigate the need for the plant.

(Footnote omitted). At issue here is whether a non-utility cogenerator,[3] such as Nassau, is

1. §§ 403.501-.519, Fla.Stat. (1991).

2. We have jurisdiction pursuant to article V, section 3(b)(2) of the Florida Constitution.

3. A cogenerator is an entity that produces electricity through cogeneration, which is an efficient and conservational method of producing electricity. *Nassau Power Corp. v. Beard*, 601 So.2d 1175, 1176 n. 4 (Fla.1992) (citing 16 U.S.C. § 796(18)(A) (1988)).

a proper applicant for a determination of need under section 403.519, Florida Statutes (1991).

[2] Nassau Power filed a petition to determine need with the Commission on July 30, 1992. Nassau proposed a power generation project designed to meet Florida Power and Light's (FPL) system requirements as they had been quantified by FPL in a contemporaneous petition to determine need that had been filed jointly by FPL and Cypress Energy Partners (Cypress). In the joint petition, FPL identified capacity requirements of 400–500 megawatts in each of the years 1998 and 1999. Nassau offered to contract with FPL at a price substantially lower than the proposed contract between FPL and Cypress. Nassau proposed to build a natural gas-fired power plant that would be a qualifying facility under the federal Public Utility Regulatory Policies Act (PURPA).[4]

The Commission denied Nassau's motion to consolidate the proceedings on its petitions with the proceedings on the joint petition of FPL and Cypress. FPL moved to dismiss Nassau's separate petition on the grounds that Nassau is not a proper applicant under section 403.519. The Commission dismissed the petition, reasoning that only electric utilities, or entities with whom such utilities have executed a power purchase contract are proper applicants for a need determination proceeding under the Siting Act. Nassau appealed the dismissal.

Nassau participated as intervenor in the proceedings on the joint petition of FPL and Cypress. After a hearing on that petition, the Commission determined that FPL needs 800–900 megawatts of additional generating capacity in 1998–1999 but rejected FPL and Cypress' joint proposal. Cypress appealed. Nassau Power and other intervenors filed notices of cross-appeal in the Cypress case. Nassau's appeal of the dismissal of its petition for determination of need was consolidated with the Cypress appeal. Cypress then voluntarily dismissed its appeal. The cross-appeals were dismissed on the Commission's motion. Thus, the only order before us is the order dismissing Nassau's petition to determine need.

[3] We have previously noted that because the PSC is the sole forum for determination of need under the Siting Act, its construction of section 403.519 is entitled to great weight and will not be overturned unless it is clearly unauthorized or erroneous. *Nichols*, 533 So.2d 281, 283 (Fla.1988). The Commission's construction of the term "applicant" as used in section 403.519 is consistent with the plain language of the pertinent provisions of the Act and this Court's 1992 decision in *Nassau Power Corp. v. Beard*.

Only an "applicant" can request a determination of need under section 403.519.[5] Section 403.503(4), Florida Statutes (1991), defines the term "applicant" as "any electric utility which applies for certification pursuant to the provisions of this act." An "electric utility," as used in the Act,

> means cities and towns, counties, public utility districts, regulated electric companies, electric cooperatives, and joint operating agencies, or combinations thereof, engaged in, or authorized to engage in, the business of generating, transmitting, or distributing electric energy.

§ 403.503(13), Fla.Stat. (1991). The Commission determined that because non-utility generators are not included in this definition, Nassau is not a proper applicant under section 403.519. The Commission reasoned that a need determination proceeding is designed to examine the need resulting from an electric utility's duty to serve customers. Non-utility generators, such as Nassau, have no similar need because they are not required to serve customers.

4. A "qualifying facility" is a small power producer or cogenerator that meets the threshold efficiency standards set forth by the Federal Energy Regulatory Commission pursuant to PURPA. *Nassau Power Corp.*, 601 So.2d at 1177 n. 7 (citing 18 C.F.R. § 292.201–.211 (1991); Fla.Admin.Code Rule 25–17.080(3)).

5. Section 403.519, Florida Statutes (1991), provides in pertinent part:

> On request by an *applicant* or on its own motion, the commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act.

(Emphasis added.)

The Commission's interpretation of section 403.519 also comports with this Court's decision in *Nassau Power Corp. v. Beard.* In that decision, we rejected Nassau's argument that "the Siting Act does not require the PSC to determine need on a utility-specific basis." 601 So.2d at 1178 n. 9. Rather, we agreed with the Commission that the need to be determined under section 403.519 is "the need of the entity ultimately consuming the power," in this case FPL. *Id.* Under the Commission's interpretation, a non-utility generator will be able to obtain a need determination for a proposed project only after a power sales agreement has been entered into with a utility. The non-utility generator will be considered a joint applicant with the utility with which it has contracted. This interpretation of the statutory scheme will satisfy the requirement that an applicant be an "electric utility," while allowing non-utility generators with a contract with an electric utility to bring the contract before the Commission for approval.

Because we cannot say that the Commission's construction of section 403.519 is clearly unauthorized or erroneous, we affirm the order under review.[6]

It is so ordered.

GRIMES, C.J., OVERTON, SHAW, KOGAN and HARDING, JJ., and McDONALD, Senior Justice, concur.

THE FLORIDA BAR, Complainant,

v.

John Wesley ADAMS, Respondent.

No. 81125.

Supreme Court of Florida.

Aug. 11, 1994.

In an attorney disciplinary proceeding, the Supreme Court held that falsely accusing attorneys of suborning perjury warrants 90-day suspension from practice of law, rather than public reprimand.

Suspension ordered.

Attorney and Client ⇐58

Falsely accusing attorneys of suborning perjury warrants 90-day suspension from practice of law, rather than public reprimand. West's F.S.A. Bar Rules 3-4.3, 4-4.1(a), 4-4.4, 4-8.4(a, c, d).

John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, and Jan Wichrowski, Bar Counsel, Orlando, for complainant.

John Wesley Adams, pro se.

PER CURIAM.

We have for review the complaint of The Florida Bar and the referee's report regarding alleged ethical breaches by John Wesley Adams. We have jurisdiction. Art. V, § 15, Fla. Const. We approve the referee's recommendation of guilt. We suspend Adams for ninety days.

Adams represented Manuel Geres in a civil suit against a hospital and an obstetrician wherein it was alleged that the defendants had placed Geres' child up for adoption without obtaining Geres' consent. The mother of the child, Kathryn Ornstein, was not married to Geres. Attorney Helen Hope arranged the adoption; Lewis Fishman represented the hospital; and Miles McGrane represented the obstetrician.

Ornstein told Adams during the pendency of the civil suit that Hope had tried to coerce her into signing an affidavit stating that Geres was not the father of the child. This prompted Adams to write Hope on October 7, 1991, and accuse her of attempting to

6. Because we affirm the Commission's order dismissing Nassau's petition, we need not address the other issues raised by Nassau, most of which were originally raised in Nassau's cross-appeal in the Cypress case.

guilty of misconduct justifying disciplinary action shall be considered as conclusive proof of such misconduct in a disciplinary proceeding under this rule.

Relying on this provision, the referee granted the motion to limit the proceedings.

After the hearing on discipline, the referee adopted the final judgment of permanent injunction and the SEC's final opinion and order suspending Tepps. The referee found that: 1) from at least January 1986 to 1988, Tepps participated in an ongoing securities fraud through the preparation of fraudulent SEC registration-form statements, which contained untrue statements of material facts, and omitted material facts; and 2) from at least January 1986 to April 1988, Tepps filed registration-form statements and amendments without authorized signatures, and in some instances, without the authority of the purported signatories, in an ongoing securities fraud. Based on these findings, the referee found Tepps guilty of the misconduct charged and recommended that he be disbarred. Tepps challenges the referee's report, maintaining that he is entitled to a full evidentiary hearing on the issue of guilt. We agree.

The SEC is not "a court or other authorized disciplinary agency of another jurisdiction" within the meaning of rule 3–4.6. It is a federal administrative agency empowered by the United States Congress to regulate all aspects of securities transactions. As part of its regulatory function, the SEC may

> deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission ... (i) not to possess the requisite qualifications to represent others, or (ii) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct, or (iii) to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws (15 U.S.C. 77a to 80b–20), or the rules and regulations thereunder.

Rule 2(e)(1) of the SEC's Rules of Practice, 17 C.F.R. § 201.2(e)(1) (1991). While this authority certainly is similar to that of a court or agency authorized to discipline lawyers, the primary purpose for its exercise is not to ensure the qualification, supervision or regulation of lawyers.

Accordingly, because the SEC is not an authorized disciplinary agency under rule 3–4.6, we reject the findings and recommendations of the referee and remand for a full evidentiary hearing.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, BARKETT, GRIMES, KOGAN and HARDING, JJ., concur.

NASSAU POWER CORPORATION, Appellant,

v.

Thomas M. BEARD, etc., et al., Appellees.

No. 78275.

Supreme Court of Florida.

May 28, 1992.

Cogenerator directly appealed from Public Service Commission orders holding, consistent with prior order, that its standard offer contract to sell anticipated generating capacity would still have to be evaluated against individual utility need and separate need determination proceedings under Siting Act and denying its motion for reconsideration on that issue. The Supreme Court, Barkett, J., held that: (1) Commission's prior practice of presuming need for cogenerators could not be used to force it to abrogate its statutory responsibilities under Siting Act, and (2) challenged policy was already in effect when cogenerator signed its standard offer contract, and

cogenerator could not challenge relevant order under guise of appealing later orders.

Affirmed.

1. Electricity ⇐8.4

Public Service Commission's prior practice of presuming need for cogenerators, as opposed to determining actual need, could not be used to force it to abrogate its statutory responsibilities under Siting Act. West's F.S.A. § 403.519.

2. Appeal and Error ⇐19

Party must appeal order in controversy, not subsequent order that merely reiterates established precedent.

Joseph A. McGlothlin, Vicki Gordon Kaufman, Stephen O. Decker and Matthew D. Soyster of McWhirter, Grandoff & Reeves, P.A., Tallahassee, and Edward Berlin and J. Phillip Jordan of Swidler & Berlin, Chartered, Washington, D.C., for appellant.

Robert D. Vandiver, General Counsel and Marsha E. Rule, Associate General Counsel, Florida Public Service Com'n, Matthew M. Childs, P.A., Charles A. Guyton and C. Alan Lawson of Steel, Hector and Davis, Tallahassee, Florida Power and Light Co., for appellees.

BARKETT, Justice.

This case is before the Court on direct appeal from two final orders of the Florida Public Service Commission (PSC or Commission)[1] relating to the manner in which the PSC determines the "need" for a power plant under the Florida Electrical Power Plant Siting Act (Siting Act).[2] At issue is the relationship, if any, between the requirements of the Siting Act and the requirements of the PSC's regulations[3] governing small power producers and cogenerators.[4]

The Siting Act was passed by the legislature in 1973 for the purpose of minimizing the adverse impact of power plants on the environment. *See* § 403.502, Fla.Stat. (1989). That Act establishes a site certification process that requires the PSC to determine the need for any proposed power plants, including cogenerators, based on the criteria set forth in section 403.519, Florida Statutes (1989).[5] Section 403.519 requires the PSC to make specific findings for each electric generating facility proposed in Florida, as to (1) electric system reliability and integrity; (2) the need to provide adequate electricity at a reasonable cost; (3) whether the proposed facility is

1. We have jurisdiction pursuant to article V, section 3(b)(2) of the Florida Constitution.

2. § 403.501–.519, Fla.Stat. (1989).

3. Fla.Admin.Code Rules 25–17.080 to 25–17.091 [hereinafter "cogeneration rules" or "cogeneration regulations"]. These regulations were amended in 1990. The 1990 amendments, however, are not at issue in this appeal.

4. "Cogeneration" is an efficient and conservational method of producing electricity. *See* 16 U.S.C. § 796(18)(A) (1988). A cogenerator is an entity which produces electricity through cogeneration.

5. Section 403.519, Florida Statutes (1989), provides:

> On request by a utility or on its own motion, the commission [PSC] shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act. The commission shall be the sole forum for the determination of this matter, which accordingly shall not be raised in any other forum or in the review of proceedings in such other forum. *In making its determination, the commission shall take into account the need for electric 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 shall also expresly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant or other matters within its jurisdiction which it deems relevant. The commission's determination of need for an electrical power plant shall create a presumption of a public need and necessity and shall serve as the commission's report required by s. 403.507(1)(b).

(Emphasis added.) Section 403.519 was originally enacted as part of the Energy Efficiency and Conservation Act, chapter 80–65, section 5, Laws of Florida, but is codified as part of the Siting Act.

the most cost-effective alternative available for supplying electricity; and (4) conservation measures reasonably available to mitigate the need for the plant.

Prior to 1990, the PSC did not determine the second and third criteria based on any separate, independent factual basis. Instead, the PSC merely presumed the need for and cost-effectiveness of cogenerators based on the prior approval of the amount of cogenerated power that would have to be purchased by Florida utilities calculated according to the criteria set forth in the cogeneration regulations.[6] *See* Order No. 22341 (Dec. 26, 1989); Fla.Admin.Code Rule 25-17.083 (repealed 1990).

These cogeneration regulations were promulgated by the PSC in accordance with the mandate of the Public Utilities Regulatory Policies Act (PURPA). 16 U.S.C. §§ 2601-2645 (1988). One of the purposes of PURPA was to foster the development of cogeneration by establishing a mandatory wholesale market for cogenerated electric power. *See* 16 U.S.C. § 2601(2) (1988); *id.* § 824a-3.

Under the cogeneration regulations, Florida utilities are required to purchase cogenerated power based on the utilities' "avoided costs"—that is, the costs that the utilities would incur to produce the same amount of electricity if they did not instead purchase the cogenerated power from a qualifying facility.[7] *See* 18 C.F.R. § 292.101(b)(1) (1991). At all times relevant to this appeal, the avoided costs were calculated on a *statewide* utility basis, not an individual utility basis. Fla.Admin.Code Rule 25-17.083(4) (repealed 1990). These costs in turn formed the basis for calculating the terms of so-called "standard offer contracts"—contracts to sell electricity that consist of preapproved terms and conditions that the PSC *requires* utilities, such as Florida Power and Light Company (FPL), to honor with all qualified cogeneration facilities.

Presuming need under the Siting Act by way of the cogeneration regulations, however, presented the awkward possibility that individual utilities would be required to purchase electricity that neither they nor their customers actually needed. *See* Fla.Admin.Code Rule 25-17.083(5) (repealed 1990). The PSC recognized this problem and in March 1989 held a public hearing to reexamine aspects of its cogeneration policy. The PSC gave notice to every investor-owned electric utility in the state, as well as numerous cogenerators operating as qualified facilities. In the resulting order, No. 22341, the Commission announced that it would no longer automatically presume, based on the cogeneration regulations, that a particular cogeneration facility power plant was needed when making determinations under the Siting Act, but would instead evaluate the need for a cogenerator's capacity based on the individual, localized need of the facility ultimately consuming the cogenerated power. In the Commission's own words, it would no longer use the findings under the cogeneration regulations "as a surrogate for the factual findings required by the Siting Act." Order No. 22341.

On January 1, 1990, one of the parties requested reconsideration of Order No. 22341. On June 15, 1990, before the order became final, appellant, Nassau Power Corporation (Nassau), filed a Petition to Intervene. Nassau, a cogenerator operating as a qualified facility under federal and state law, was seeking permission to build a 435-megawatt gas-fired electric power plant on Amelia Island situated off Florida's northeast coast. *On the same date*, June 15, 1990, after filing its Petition to Intervene, and thus with full knowledge of the PSC's policy determination in Order No. 22341, Nassau submitted its standard offer contract to sell its anticipated 435 megawatt generating capacity to FPL. The terms of

6. Nevertheless, even prior to 1990, the PSC did *not* presume, based solely on the cogeneration regulations, that the first and fourth criteria (relating to system reliability and conservation measures) had been satisfied.

7. A "qualifying facility" or "QF" is a small power producer or cogenerator which meets the threshold efficiency standards set forth by the Federal Energy Regulatory Commission pursuant to PURPA. *See* 18 C.F.R. § 292.201-.211 (1991); Fla.Admin.Code Rule 25-17.080(3).

the standard offer contract were calculated based on the projected *statewide need* for power in 1996 calculated according to the criteria set forth in the cogeneration regulations.

In Order No. 23792, issued November 27, 1990, the PSC tentatively approved Nassau's contract,[8] but held, consistent with Order No. 22341, that Nassau's standard offer would still have to be evaluated against individual utility need (i.e., the needs of FPL's customers) in separate need determination proceedings under the Siting Act. Nassau appeals this latter portion of Order No. 23792, as well as Order No. 24672 denying its Motion for Reconsideration on this issue.

Nassau argues that the PSC's cogeneration regulations, and its previous policy, prohibit the PSC from determining the need for Nassau's power under the Siting Act based on FPL's individual utility needs, and instead *require* the PSC to determine need based on the projected statewide electric utility need. The PSC, on the other hand, contends that, notwithstanding its prior practice of not specifically determining actual local needs when evaluating the need for cogenerated power, it is not bound by the cogeneration regulations and is in fact required to assess actual local needs when making need determinations under the Siting Act.

[1] In our view, the PSC's prior practice of presuming need, as opposed to determining actual need, cannot be used now to force the PSC to abrogate its statutory responsibilities under the Siting Act.[9] Moreover, because the policy which Nassau now challenges was already in effect when Nassau signed its standard offer contract, we find the PSC properly rejected Nassau's motion.

On July 23, 1990, when the Commission issued Order No. 23234 reconsidering Order No. 22341, Nassau was a fully participating intervenor in the docket. However, Nassau did not appeal the decision set forth in Order No. 22341 or the subsequent order on reconsideration. Instead, Nassau now appeals two orders that expresly rely on the policy decision which was already in effect pursuant to Order No. 22341 *six months* prior to the time Nassau signed its standard offer contract with FPL.

[2] It is clear that the PSC order actually being attacked by Nassau's present appeal is Order No. 22341. The later orders are mere restatements. It was by virtue of Order No. 22341 that the Commission first articulated the Siting Act policy and interpretation now challenged by Nassau. Under established principles of appellate review, a party must appeal the order in controversy, not a subsequent order that merely reiterates established precedent. *Central Truck Lines v. Boyd*, 106 So.2d

8. The primary issue addressed in Order No. 23792 was selecting which cogenerators would fill the 500-megawatt "subscription limit" for the purchase of cogenerated power in 1996. The PSC had previously placed a maximum limit of 500 megawatts on the amount of cogenerated power that Florida utilities would be required to purchase from cogenerators in 1996. At the time of the hearing, nine separate cogenerators had made bids totalling 1765 megawatts for 1996. The PSC determined that the contract bids should be selected based on their date of execution. Accordingly, because Nassau had submitted its standard offer contract first, Nassau was awarded the first 435 megawatts of the 500-megawatt maximum subscription limit. Nassau is not appealing that portion of Order No. 23792.

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

We note that under section 403.519, the PSC is designated the "sole forum" for determination of need under the Siting Act. It is well established that the construction placed on a statute by the agency charged with the duty of executing and interpreting it is entitled to great weight. *PW Ventures, Inc. v. Nichols*, 533 So.2d 281, 283 (Fla.1988). The PSC's interpretation is consistent with the overall directive of section 403.519 which requires, in particular, that the Commission determine the cost-effectiveness of a proposed power plant. This requirement would be rendered virtually meaningless if the PSC were required to calculate need on a statewide basis without considering which localities would actually need more electricity in the fu-

547, 548–49 (Fla.1958); *see also Great Southern Trucking Co. v. Carter*, 113 So.2d 555, 556–57 (Fla.1959). Consequently, Nassau should have challenged the PSC's determination by appealing Order No. 23234—the order which affirmed Order No. 22341. Nassau cannot do so now under the guise of appealing the present orders.

As explained by the Commission in Order No. 24672 denying Nassau's Motion for Reconsideration:

> Nassau seeks reversal of a policy which was firmly in place by virtue of Order No. 22341 at the time Nassau signed its standard offer contract in June 1990. Prior to signing the standard offer, Nassau had ample opportunity to consider the implications of our previous ruling that a standard offer must be evaluated against individual utility need. In the face of Order No. 22341, Nassau chose to sign its standard offer contract, and Nassau should not now be surprised that we choose to follow our own precedent.

Accordingly, we affirm the orders under review.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, GRIMES, KOGAN and HARDING, JJ., concur.

THE FLORIDA BAR, Petitioner,

v.

Kevin RULE, Respondent.

No. 77325.

Supreme Court of Florida.

May 28, 1992.

Attorney discipline proceeding was brought. The Supreme Court held that diate family appears as beneficiary and mismanaging trust account funds warrants 91-day suspension from practice of law.

So ordered.

Attorney and Client ⇐58

Drafting will in which attorney or member of attorney's family appears as beneficiary, commingling trust account funds with funds belonging to business ventures in which attorney has ownership interest, using clients' funds for purposes other than specific purpose for which funds have been entrusted to attorney, failing to have cash receipts and disbursements journal, ledger cards, monthly comparisons, and annual listings available for inspection, and failing to comply with minimum trust accounting requirements warrants 91-day suspension from practice of law. Code of Prof.Resp., DR 5-101(A), DR 6-101(A)(2, 3), DR 9-102(A); West's F.S.A. Bar Rules 4-1.1, 4-1.15(a), 5-1.1, 5-1.2(b)(5), (c)(1)b, (c)(2, 4); West's F.S.A. Integration Rule, Art. 11, Rule 11.02(4); West's F.S.A. Integration By-Laws, Art. 11, § 11.02(4)(c)2e, f, (4)(c)3a(ii), (4)(c)3b, d.

John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, and David R. Ristoff, Asst. Staff Counsel, Tampa, for complainant.

Kevin Rule, in pro per.

PER CURIAM.

This bar disciplinary proceeding is before us upon the complaint of The Florida Bar and the referee's report and recommendation. We have jurisdiction. Art. V, § 15, Fla. Const.

The referee made the following findings of fact:

1. Respondent is, and at all times mentioned herein was, subject to the jurisdiction of The Supreme Court of Florida.

2. In or about August, 1985, Respondent drafted a Will for Walter Klugge.

3. Respondent was named a beneficiary in the Will. Respondent's sister

Florida
Power
CORPORATION

JEFFERY A. FROESCHLE
CORPORATE COUNSEL

September 8, 1997

Leslie J. Paugh, Esq.
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

RE: Undocketed - Ten-Year Site Plan

Dear Ms. Paugh:

Enclosed please find Florida Power Corporation's response to your Memorandum of August 13, 1997 requesting reply to certain questions regarding the above captioned matter.

Please acknowledge your receipt of the above on the enclosed copy of this letter and return to the undersigned. Thank you for your assistance in this matter.

Very truly yours,

Jeffery A. Froeschle

JAF/kp
enclosure

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GENERAL OFFICE
3201 Thirty-fourth Street South • Post Office Box 14042 • St. Petersburg, Florida 33733-4042 • (813) 866-5787 • Fax: (813) 866-4931
A Florida Progress Company

UNDOCKETED - TEN-YEAR SITE PLAN

September 8, 1997

FLORIDA POWER CORPORATION'S ANSWERS TO FPSC AUGUST 13, 1997 QUESTIONS

1. Does the "need" portion of the Florida Electric 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.)

1. No.

As the Florida Public Service Commission stated in In re Petition of Nassau Power Corporation to determine need for electrical power plant, Order No. PSC-92-1210-FOF-EQ at 3, 1992 FPSC 10:643, 645 (October 26, 1992), and the Florida Supreme Court affirmed in Nassau Power Corporation v. Deason, 641 So. 2d 396 at 398 (Fla. 1994), it is the need for additional sources and supplies of electric power, resulting from a duty to serve customers, which the need determination proceeding is designed to examine. As the question defines merchant plant, under Section 403.519 FSA, not only could a merchant plant not be certified as to need, there would be no applicant eligible to apply for and receive a need certification.

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

2. No, unless the plant would fall within the exceptions cited in the Act.

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

3. No.

FERC's policy for a competitive wholesale market has been and is being developed within the framework of the Federal Power Act, as amended, which recognizes the legitimate interests of the states in assuring the availability of adequate reliable electric service for their citizens and in the protection of their environment. The Florida Public Service Commission's bidding rules provide an opportunity for energy suppliers, including non-utility generators, to competitively bid generation supply options in the context of applications by

electric utilities for certification of need for power pursuant to the Florida Electric Power Plant Siting Act. The Siting Act now provides for comprehensive and efficient review of environmental concerns with respect to proposed generation capacity when a need for the power has been determined by the FPSC. Florida Power believes that the combination of FPSC rules and the Siting Act are compatible with the spirit and intent of the FERC policy.

GENERAL COMMENT

The responses included herein set forth Florida Power's understanding of the meaning and intent of the Florida Electric Power Plant Siting Act. It is the view of Florida Power, however, that the matter of whether and how merchant plants can be constructed in Florida should not be considered in isolation, but rather should be viewed in the context of the broader issues that surround the role of competition in and its impact on Florida's electric power markets.

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September 9, 1997

HAND DELIVERED

Ms. Leslie J. Paugh
Staff Counsel
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Undocketed - Ten-Year Site Plan

Dear Ms. Paugh:

Enclosed are Tampa Electric Company's replies to the three questions set forth in your Memorandum dated August 13, 1997. Please let us know if we can be of any further assistance.

Sincerely,

James D. Beasley

JDB/pp
Enclosure

cc: Joe Jenkins (w/enc.)
Michael Haff (w/enc.)
Kay Flynn (w/enc.)
Angie Llewellyn (w/enc.)

TAMPA ELECTRIC'S RESPONSES TO FPSC STAFF QUESTIONS

Issue 1. Does the "need" portion of the Florida Electric 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.)

Response: No. The Siting act was passed by the legislature in 1973 for the purpose of protecting the environment while efficiently and reliably meeting Florida's retail electric power needs. This goal was to be achieved through a careful balancing of the need for new generating capacity to serve retail load against the incremental environmental impacts and increased cost to ratepayers associated with the construction of such capacity. "Merchant Plants", as defined above, do not lend themselves to this balancing process. By definition, these plants are not built as the result of an obligation to serve and, accordingly, retail customers have no obligation to cover the reasonable costs of such capacity. They are built on the basis of entrepreneurial speculation, not officially verified need. In the absence of verifiable need, there is no countervailing basis under the Siting Act for permitting the environmental and economic consequences associated with the construction and operation of such capacity. Therefore, the Siting Act is structured in a manner which does not permit merchant plants, as defined above, to be certified[1].

---

[1] In Nassau Power Corporation v. Deason, 641 So2d 396 (Fla. 1994), the Supreme Court of Florida affirmed the Commission's determination that only an "Applicant" could apply for a determination of need under the Siting Act and that an "Applicant" must be an electric utility.

The above notwithstanding, the Siting Act does not prevent power plants from being constructed and operated in Florida by non-utilities. For example, the Commission's existing rule concerning the selection of generating capacity, Rule 25-22.082, Florida Administrative Code, mandates a request for proposal (RFP)procedure for the construction of new generating capacity by public utilities which has the effect of broadening the opportunities for non-utility entities to build and sell the output from new power plants.

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

Response: Yes, although there is no controlling judicial precedent to this effect. By its terms, the Siting Act does not cover non-steam and non-solar power plants, including "Merchant Plants", of any size[2]. In addition, it excludes all steam and solar generating plants with capacity of less than 75 megawatts.

Issue 3: If the answer to both of the above is "no," does the Florida Electric Power Plant Siting Act frustrate the FERC policy for a competitive wholesale market by restricting entry?

Response: No. The operative FERC policy, expressed in its Order 888, is to assure equal access to transmission on comparable terms to all suppliers of capacity and energy.

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[2] See Sections 403.503 (12) and 403.506 of the Florida Electric Power Plant Siting Act

The object of FERC's policy is to insure that maximum economic efficiency is achieved by providing a "level playing field" so that supply resources can compete fairly against each other in the wholesale market. The FERC has not attempted to take away from states the right and duty to determine the need for additional generating capacity, where new capacity should be sited or how best to protect the environment if new capacity is built. These matters are left to the state to address on the basis of the needs and interests of their respective bodies of retail ratepayers[3].

[3] Section 201 of the Federal Power Act expressly limits FERC's jurisdiction "to those matters which are not subject to regulation by the States." 16 U.S.C. 824.

LAKELAND
ELECTRIC & WATER

Excellence Is Our Goal, Service Is Our Job

Ms. Leslie J. Paugh, Staff Counsel
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

August 26, 1997

Dear Ms. Paugh:

This letter is in response to the three questions regarding Florida's Electrical Power Plant Siting Act (PPSA) that were issued August 13, 1997. For purposes of clarification, responses to and about the PPSA are based on and refer to the terms, definitions and intents of Florida Statutes, Chapter 403, Sections 403.501 - 403.518.

Question 1 asks: "*Does the 'need' portion of the Florida Electric Power Plant Siting Act allow merchant plants to be certified ?* ".

I don't believe the answer to this question is a simple yes or no as would be expected. The current language of the PPSA obviously does not define a "Merchant Plant" and therefore appears to exclude them from the process. The language of the PPSA was designed, as we all know, prior to the concept of Merchant Plants and thus dealt only with known power producers of the time, traditional "Electric Utilities" as defined in 403.503(13). Simply because Merchant Plants are not defined in the PPSA may not necessarily preclude them either. Section 403.519 gives the Florida Public Service Commission the authority to "*begin a proceeding to determine the need for an electrical power plant*". While perhaps not a convenient means to do so, this may be an avenue for the Commission to determine the need for a proposed Merchant Plant if so desired.

Question 2 asks: "*Can a merchant plant be built without certification pursuant to the Power Plant Siting Act ?*"

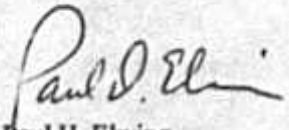
As stated earlier, without a definition of "Merchant Plant" in the PPSA, it would appear that this type of power plant would be excluded from the need process portion of the PPSA. As any power producing facility outside of solar is an emissions source, a Merchant Plant would have to satisfy any and all requirements of Florida's DEP requirements for permitting and operating such a facility. As such, it would appear that a Merchant Plant could be built and operated without a "Need Certification" but still subject to Environmental Permitting.

The third question, while conditional upon the prior two, still has merit for discussion. The PPSA may not directly frustrate the FERC policy for a competitive wholesale market by restricting entry to Merchant Plants, but its lack of addressing the changing times does not embrace it either. Perhaps the more logical question might be, "*What role does the PPSA have in today's competitive market driven environment ?*" As we move into a deregulated competitive market environment, the market will play a larger role and have more control over the decisions that power producers make. In a true open and competitive market, the "Determination of Need Process" of the PPSA is no longer needed. The issues of rates and rate base for generation assets/investments as we have known them in a monopolistic market are no longer present as customers can switch suppliers if rates are not competitive. The role of the Commission and the PPSA changes from protecting the customer against imprudent generation investment and over building to more of a role of ensuring that minimum standards and adequacies are met along with regulation of the remaining monopolistic delivery portions of the industry. The market, customer choice, ultimately will regulate power producers.

Does the PPSA and perhaps certain functions of the Commission need to change ? If we are convinced that Florida will open its arms and doors to retail level competition in power supply, then, Yes !

Thank you for the opportunity to respond to these questions. If you have any question or wish to discuss these issues further, please give me a call.

Sincerely



Paul H. Elwing
Electrical Engineer
Production Engineering Division

CITY OF TALLAHASSEE

ELECTRIC OPERATIONS
2602 JACKSON BLUFF RD.
TALLAHASSEE, FL 32304

September 8, 1997

Leslie J. Paugh, Staff Counsel
Division of Legal Services
State of Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Dear Ms. Paugh:

In response to your questions dated August 13, 1997, the City of Tallahassee respectively declines to answer them directly because it appears they call for specific legal interpretations. However, from a business perspective, the City of Tallahassee believes that the requirements of the Florida Electric Power Plant Siting Act should fairly apply to all prospective owners of power plants while protecting the State's resources as originally anticipated under the act.

Sincerely,

Kevin G. Wailes
General Manager
Electric Operations

cc: David Byrne, System Reliability
Sam Bell, Assistant City Manager
Ken Austin, General Services