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4075 Esplanade Way, Room 110
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Re: Petition of Duke Mulberry Energy, L.P. and IMC-Argico Company for a Declaratory Statement Concerning Eligibility to Obtain Determination of Need Pursuant to Section 403.519, Florida Statutes
Docket No. 971337-EI

Dear Ms Bayo

Enclosed for filing on behalf of Florida Power & Light Company are the original and fifteen (15) copies of Amicus Curiae Memorandum of Law Addressing Duke Mulberry/IMCA's Petition for Declaratory Statement in Docket No 971337-EI Also enclosed is an additional copy of the memorandum which we request that you stamp and return to our runner

If you or your Staff have any questions regarding this filing, please contact me at 222-2300

Very truly yours,

Charles A Guyton

Charles A Guyton

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition Duke Mulberry Energy, L.P. and IMC-Agrico Companyfor a Declaratory Statement Concerning Eligibility To Obtain Determination of Need Pursuant to Section 403.519, Florida Statutes	)))))	Docket No. 971337-EI Filed: December 1, 1997

FLORIDA POWER & LIGHT COMPANY'S AMICUS CURIAE MEMORANDUM OF LAW ADDRESSING DUKE MULBERRY/IMC-AGRICO'S PETITION FOR DECLARATORY STATEMENT

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I

THE DECLARATORY STATEMENT SOUGHT SHOULD BE DENIED BECAUSE THE APPLICANTS SEEK A GENERAL POLICY DETERMINATION APPLICABLE TO AN ENTIRE CLASS OF ENTITIES RATHER THAN A STATEMENT AS TO THEIR SPECIFIC FACTS.

In Florida Optometric Association v. Department of Professional Regulation, 567 So. 2d 928 (Fla. 1st DCA 1990), the First District Court of Appeal addressed the limited scope of declaratory statements:

> [D]eclaratory statements are not to be used as a vehicle for the adoption of broad agency policies. Nor should they be used to provide interpretations of statutes, rules or orders which are applicable to an entire class of persons. Declaratory statements should only be granted where the petition has clearly set forth specific facts and circumstances which show that the question presented relates only to the petitioner and his particular set of circumstances.

567 So. 2d at 936.

Similarly, in Tampa Electric Co. v. Florida Department of Community Affairs, 654 So. 2d 998 (Fla. 1st DCA 1995), the First District Court of Appeal held that the Department's declaratory statement providing that local governments have power to regulate use of land, including use of land for power lines, was impermissibly broad.[1] These cases hold that a declaratory statement proceeding may not be used for a statement of broad agency policy

[1] The court reasoned that the agency's declaratory statement "sets forth a general policy of far-reaching applicability. Clearly, the declaratory statement would apply to all local governments seeking to regulate any utility's construction of power lines." 654 So. 2d at 999.

Duke Mulberry and IMCA seek in their petition a broad statement of Commission policy that would apply to all "merchant plants." Despite some efforts to couch their request in terms of their facts, in the middle of their petition Duke Mulberry and IMCA clearly and unequivocally state that the issue they are posing is one not limited to their facts but a broad policy issue which would be applicable to all potential merchant plants:

> Thus, the issue posed by this Petition is simply whether a merchant plant developer may pursue the permitting for its project using the processes of the Siting Act and Section 403.519.

Duke Mulberry/IMCA petition at 9. Duke Mulberry/IMCA clearly seek a broad policy statement from the Commission. Duke Mulberry/IMCA clearly seek an interpretation of statutes, rules and orders which would be "applicable to an entire class of persons" - merchant plants. Duke Mulberry's and IMCA's request for a ruling of general applicability and a general policy statement that merchant plants may seek a determination of need without a utility co-applicant must be rejected as improper under the Florida Optometric Association and Tampa Electric Company cases. See also, Coastal Petroleum Co. v. State, 608 So. 2d 110 (Fla. 1st DCA 1992), Regal Kitchens, Inc. v. Florida Dept. of Revenue, 641 So. 2d 158 (Fla. 1st DCA 1994), Sutton v. Dept. of Environmental Regulation, 654 So. 2d 1047 (Fla 1st DCA 1995) ("A declaratory statement cannot be issued for general applicability."). Since declaratory statements may not be used to announce a rule or general policy statement (or change long-standing Commission policies), Duke Mulberry's and IMCA's request for a declaratory statement should be denied.

II

THE COMMISSION MAY NOT MAKE A POLICY CHANGE IN A DECLARATORY STATEMENT PROCEEDING. ITS DECISION MUST BE BASED SOLELY ON THE LAW. CONSIDERATIONS OF WHETHER MERCHANT PLANTS MAY BE DESIRABLE GIVEN THE PROJECTED STATE OF RELIABILITY IN FLORIDA MAY NOT BE CONSIDERED. IF THE COMMISSION IS CONCERNED ABOUT RELIABILITY, IT SHOULD ACT UNDER ITS AUTHORITY UNDER THE GRID BILL RATHER THAN ADOPT NEW POLICY.

In their petition for a declaratory statement, Duke and IMCA are clearly invoking matters which are subject to factual dispute[2], arguing about merchant plants from a broader perspective than their particular set of circumstances[3], and attempting to have the Commission change its policy regarding the determination of need of non-utility generators. When faced with a similar attempt by its staff to change Commission need determination policy in an individual need determination case, the Commission declined to overrule prior precedent and chose to keep the broad policy issue open for its planning hearing where all potentially affected parties would have the opportunity to address the broad policy issue. AES, 89 FPSC 1: 368, 370.

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[2] See the discussion on page 19 of Duke Mulberry/IMCA's petition addressing the recent ten year site plan data which they argue suggests a "period of tight capacity," which the certification of "merchant plant capacity like that planned by Duke Mulberry" (emphasis added to show generic nature of request) would help alleviate.

[3] See the policy discussion on page 19 of the Duke/IMCA petition where it discusses broad "'aspects of need" within the Commission's jurisdiction that a merchant plant can identify and satisfy...." Duke/IMCA goes on to make the policy argument "that a merchant plant of the type planned by IMCA and Duke Mulberry can satisfy" ... general reliability benefits, environmental benefits, energy efficiency and conservation benefits, and other socio-economic benefits...." (Emphasis added to show generic nature of request.)

A declaratory statement proceeding is an improper forum for consideration of such broad policy matters. See, Florida Optometric Association; Tampa Electric Company. In a declaratory statement proceeding, all that is properly at issue is a legal question - "the applicability of a specified statutory provision or of any rule or order of the agency as it applies to the petitioner in his or her particular set of circumstances only." Section 120.565, Florida Statutes (Supp. 1996).

If there is a Commission or staff concern about the state's reliability, it is important to remember that the Commission is empowered through the Grid Bill to address such concerns. Under Section 366.05(8), Florida Statutes (1995), if the Commission has probable cause "to believe that inadequacies exist with respect to the energy grids developed by the electric utility industry," it has authority, after proceedings and findings, to require "installation or repair of necessary facilities, including generating plants and transmission facilities..." by electric utilities. The Commission is empowered to supervise electric utilities over which it has regulatory jurisdiction in Chapter 366 to maintain a reliable electric grid in Florida. It is intended by the legislature for the Commission to exercise such responsibility. Rejecting a well reasoned and long applied line of Commission and Supreme Court case law in a declaratory statement proceeding without a full airing of the fundamental underlying legal and policy issues would not only be inconsistent with the law governing declaratory statements, but also would be an abrogation of the Commission's responsibility under the Grid Bill. The Duke Mulberry/IMCA petition should be denied, and the Commission should decline to consider in this proceeding with a very limited scope the general policy arguments improperly made by Duke Mulberry/IMCA.

III

AS A NON-UTILITY GENERATOR WITHOUT A CONTRACT FOR THE SALE OF POWER, DUKE MULBERRY IS NOT PERMITTED TO SEEK A DETERMINATION OF NEED.

Seldom is the Commission presented with a request for a declaratory statement where the answer is so readily apparent from the prior decisions of the Commission. In the case before the Commission, there is a prior Commission decision directly on point which requires that Duke Mulberry's and IMCA's request for a declaratory statement should be denied. In addition, there is a Supreme Court of Florida decision affirming the Commission's decision directly on point. The Commission's requirement that before proceeding with a determination of need a non-utility generator must have a contract with an entity having an obligation to serve and a corresponding need is the culmination of almost ten years of the Commission's interpretation and application of the the Florida Electrical Power Plant Siting Act ("Siting Act"). A declaratory statement as requested by Duke Mulberry Energy and IMCA would be inconsistent with that long line of precedent. The request for a declaratory statement should be denied.

A. The Commission Has Previously Addressed The Virtually Identical Factual Circumstances and Found That A Non-Utility Generator Without A Contract Is Not Entitled To Seek A Determination Of Need.

In 1992 the Commission was presented with two cases with virtually identical facts to the case now before the Commission. Ark Energy, Inc. filed a petition for determination of need with the Commission in July 1992 seeking a determination of need for an 886 MW natural gas-

fired combined cycle unit. It was assigned Docket No. 920761-EQ.[4] Also in July 1992 Nassau Power Corporation filed a determination of need petition with the Commission, which was assigned Docket No. 920769-EQ.[5] Florida Power & Light Company ("FPL"), which did not have a contract with either entity petitioning for a need determination, sought to dismiss both need determination petitions as being outside FPL's comprehensive bidding and evaluation process.

The Commission declined to accept FPL's argument. However, in a consolidated order, which is dispositive in this proceeding, the Commission dismissed both of these determination of need petitions, "because Nassau and Ark are not proper applicants for a need determination proceeding under Section 403.519, Florida Statutes." In Re: Petition of Nassau Power Corporation to determine need for electrical power plant (Okeechobee County Cogeneration Facility), 92 FPSC 10:643, 644 (Order No. PSC-92-1210-FOF-EQ) ("Ark and Nassau")

The Commission fully explained its rationale. It noted that need determinations were properly initiated by "applicants" under Section 403.519, Florida Statutes. 92 FPSC 10:644. It also noted that an "applicant" under the Siting Act was defined as an "electric utility," which in turn was defined in terms of seven different entities engaged in the business of generating, transmitting, or distributing electrical energy. 92 FPSC 10:644-45. The Commission then noted

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[4] Contemporaneous with the filing of its determination of need petition, Ark also filed a petition for approval of a "contract" for the purchase of firm capacity and energy by FPL, which was assigned Docket No. 920762-EQ.

[5] Nassau also contemporaneously filed a petition seeking approval of a "contract" for FPL's purchase of its capacity, which was assigned Docket No. 920783-EQ.

that Ark and Nassau did not qualify as applicants because they were not one of the types of entities under the definition of an "electric utility:" 92 FPSC 10:645.

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

92 FPSC 10: at 645.

The Commission went on to explain, consistent with its and the Supreme Court's earlier construction of the Siting Act, that each of the entities listed in the statutory definition of an "electric utility" had an obligation to serve and an associated need and that non-utility generators had no such need. It is this paragraph which is the heart of the Commission's rationale

> Significantly, each of the entities listed under the statutory definition may be obligated to serve customers. It is this need, resulting from a duty to serve customers, which the need determination proceeding is designed to examine. Non-utility generators such as Ark and Nassau have no such need since they are not required to serve customers. The Supreme Court recently upheld this interpretation of the Siting Act. Dismissal of these need determination petitions is in accord with that decision. See Nassau Power Corporation v. Beard, 601 So 2d 1175 (Fla. 1992).

Id.

The Commission further explained that its decision was an extension of earlier decisions of the Commission interpreting the Siting Act to the effect that a contracting utility is an indispensable party in need determination proceeding for entities that would not otherwise fit the definition of "applicant" and "electric utility" under the Siting Act:

> Since our 1990 Martin order (Order No. 23080, issued June 15, 1990) the policy of this Commission has been that a contracting utility is an indispensable party to a need determination

> proceeding. As an indispensable party, the utility will be treated as a joint applicant with the entity with which it has contracted. This will satisfy the statutory requirement that an applicant be an "electric utility" while allowing generating entities with a contract to bring that contract before this commission. Thus, a non-utility generator such as Ark or Nassau will be able to obtain a need determination for its project after it has signed a contract (power sales agreement) with a utility.

Id.

The Commission also explained that its interpretation of the Siting Act was intended to recognize the utility's planning and evaluation process, since under Nassau Power Corporation v. Beard, it is the utility's need for power to meet its obligation to serve which is properly at issue in a need determination and a non-utility generator had no such need:

> This scheme simply recognizes the utility's planning and evaluation process. It is the utility's need for power to serve its customers which must be evaluated in a need determination proceeding. Nassau Power Corporation v. Beard, supra. A non-utility generator has no such need because it is not required to serve customers. The utility, not the cogenerator or independent power producer, is the proper applicant.

Id. The Commission concluded that allowing non-utility generators to file for a need determination at any time they wanted without a contract to sell their power would be a waste of the Commission's time and resources, make the process less reliable and result in micromanagement of utilities' power purchases. 92 FPSC 10 at 645-46.

The Commission's order in the Ark and Nassau case is well thought out, fully reasoned, consistent with and builds upon earlier Commission decisions interpreting the Siting Act, and a reasonable interpretation of the Siting Act and its utility and unit specific criteria for assessing need. It is dispositive in this case. Here, as in the Ark and Nassau decision, the entity seeking a

declaratory statement does not have a contract to sell the output of its unit to an "electric utility." Here, as in the Ark and Nassau decision, the entity seeking the declaratory statement does not have an obligation to serve customers and has no need of its own. Here, as in the Ark and Nassau decision, the entity seeking the declaratory statement is not a proper "applicant" or an "electric utility" within the meaning of the Siting Act. Here, as in the Ark and Nassau decision, the Commission would waste its time and resources if it were to allow non-utility generators to petition for a determination of need at any time they desired without a contract to sell their output to a utility. Here, as in the Ark and Nassau decision, the scheme should recognize the utility's planning and evaluation process; it is the utility's need for power which is properly evaluated in a need determination proceeding; a non-utility generator may obtain a need determination after it has signed a contract with a utility for the output of its facility. Duke Mulberry/IMCA's petition should be denied.

B. The Commission's Ark and Nassau Decision Was Appealed And Upheld By The Supreme Court Of Florida.

The Commission's decision in the Ark and Nassau case was appealed by Nassau to the Supreme Court of Florida. The issue as framed by the Court was, "[a]t issue here is whether a non-utility generator, such as Nassau, is a proper applicant for a determination of need under section 403.519, Florida Statutes (1991)." Nassau Power Corporation v. Deason, 641 So.2d 396, 397-98 (Fla. 1994). The Court characterized the Commission's decision below as follows:

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

641 So. 2d at 398. The Court further explained and accurately summarized the Commission's rationale below as follows:

> The Commission determined that because non-utility generators are not included in this definition, [the definition of an "electric utility" in the Siting Act] 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.

Id.

The Court found that the Commission's construction of the term "applicant" as used in Section 403.519 was consistent with the plain meaning of the language of the Siting Act and the "Court's 1992 decision in Nassau Power Corp. v. Beard." Id. The Court went on to explain its decision in Nassau Power Corp. v. Beard, 601 So.2d 1175 (Fla. 1992) and the interpretation of the Siting Act that the Court as well as the Commission had reached:

> 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 the 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.

641 So.2d at 399 (emphasis added.).

The Court's complete affirmation of the Commission's construction of the Siting Act in the Ark and Nassau decision should leave no doubt as to the proper disposition of this declaratory statement. There is a Supreme Court of Florida decision right on point of whether a non-utility generator without a contract with an electric utility is a proper applicant under the Siting Act. It is not. Nassau Power Corporation v. Deason, 641 So.2d 396. Duke Mulberry's and IMCA's request for a declaratory statement should be denied.

C. What Few Differences In Fact There Are Between The Present Request For A Declaratory Statement And The Ark and Nassau Case Makes The Current Case More Rather Than Less Compelling To Deny A Determination Of Need.

Duke Mulberry/IMCA in their petition attempt to draw distinctions between the Ark and Nassau decision and their request for a declaratory statement, but none of the distinctions warrant departure from the reasoning and statutory interpretation in the Ark and Nassau cases. Each purported distinction is addressed in turn.

The first "distinction" that Duke Mulberry/IMCA draws is that in the Ark and Nassau decision the non-utility generators were seeking prior assurance, through submission of a contract for Commission approval, that a particular utility's customers would be paying for their proposed units as a condition of going forward. Duke Mulberry/IMCA petition at 13. A review of the Commission's decision and the affirming court decision evidences that neither the Commission not the Court ever once mentioned that Ark and Nassau were seeking prior

assurance that a particular utility's customers would pay for their plant. The rationales articulated were entirely focused upon the proper construction of the Siting Act[6] as it applied to "non-utility generators." The decisions did not mention cost recovery.

In addition to its construction of the Siting Act, the Commission added a rationale for the dismissal of Ark's and Nassau's companion contract approval petitions. "there are no contracts before us which could be approved." 92 FPSC 10:646. This language hardly suggests that the Commission was concerned about or considered any attempt by Ark and Nassau's to receive prior assurance of utility cost recovery. There is other language in the Commission's decision which suggests that the Commission's holding is meant to apply to any type of non-utility generator, either a cogenerator (for which there is a utility purchase obligation and an assurance of utility cost recovery) or an independent power producer (for which there is no purchase obligation or assurance of utility cost recovery):

> It is the utility's need for power to serve its customers which must be evaluated in a need determination proceeding. Nassau Power Corporation v. Beard, supra. A non-utility generator has no such need because it is not required to serve customers. **The utility, not the cogenerator or independent power producer, is the proper applicant.**

92 FPSC 10: at 645. (Emphasis added.)

Finally, the distinction that Duke Mulberry/IMCA suggests - that Ark and Nassau's costs would be recovered from utility ratepayers but Duke Mulberry's would not - is disingenuous.

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[6] The Siting Act does not involve in any way cost recovery of a contract with a utility. Cost recovery for utilities is addressed under an entirely different Chapter of Florida Statutes, Chapter 366. It is not surprising that neither the Commission nor the Supreme Court addressed Chapter 366 in their decisions.

The difference, if any, is one of timing. What Duke Mulberry/IMCA leaves unstated in arguing this "distinction" is that it intends to sell to utilities which will, in turn, pass the costs of Duke's plant on to their ratepayers. The only difference is that Ark and Nassau had proposed a "contract," and Duke Mulberry is not yet that far along. Suggesting that Ark and Nassau are different because they sought prior rather than after the fact cost recovery from ratepayers ignores the fundamental identity between Ark, Nassau and Duke: they all seek, ultimately, to sell to utilities for resale to ratepayers who will pay for their power. Duke Mulberry/IMCA's "distinction" was of no consequence in the original construction of the Siting Act and is really no distinction at all. It is, at most, a matter of timing with the same end result - ratepayers are to pay for their units through their sales to utilities.

Duke Mulberry/IMCA's second "distinction" is that the Ark and Nassau decision involved a determination of need for power plants which would "serve a specific retail utility's identified need," whereas their declaratory statement applies to a merchant plant (a plant that has not yet identified the utility to which it will sell power). Duke Mulberry/IMCA petition at 20. If anything, this "distinction" makes the Commission's rationale even more compelling. The heart of the Commission's decision in Ark and Nassau was its holding that an applicant under the Siting Act had to be an one of several entities mentioned in the statute, all of which had an obligation to serve and an associated need for power.[7] Ark and Nassau did not fit that definition because they (a) had no obligation to serve and a need for power and (b) they had no contract with an entity that had an obligation to serve and an associated need for power. At least Ark and

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[7] This, in turn, was premised upon the Supreme Court's holding in Nassau Power Corporation v. Beard, 601 So.2d 1175 (Fla. 1992).

Nassau had identified a utility with a need that could be assessed in a need determination proceeding; Duke has not identified any utility with a need for its power. "It is the utility's need for power to serve its customers which must be evaluated in a need determination." 92 FPSC 10 at 645. Because Duke is even less likely to be able to address a specific utility's need in a need determination because it has not yet identified what utility or utilities to which it will sell and their need, Duke is in a worse position than Ark and Nassau, who like Duke did not have contracts, but unlike Duke, had identified the utility with the underlying need. This "distinction" actually works against rather than in favor of Duke.

The third and final attempt that Duke Mulberry/ IMCA make at distinguishing the Ark and Nassau decision is a disheartening and misleading, selectvie quotation from the Ark and Nassau decision. Based upon the following selectively qouted passage, Duke Mulberry/IMCA argue that the Ark and Nassau decision left open the issue of whether a "true merchant plant" could receive a determination of need:

> It is also our intnent that this order be narrowly construed and limited to proceedings wherein non-utility genrators seek a determination of need based on a utility's need.

Duke Mulberry/IMCA petition at 22 (quoting 92 FPSC 10 646) Duke Mulberry/IMCA failed to quote the very next sentence from the Ark and Nassau decision, that sentence makes it clear that the issue being left open was not the issue of a merchant plant seeking a detemination of need but the issue of a true self-generator seeking a determination of need:

> We explicitly reserve for the future the question whether a self-service generator (which has its own need to serve) may be an applicant for a need determination withoit a utility co-applicant.

92 FPSC 10: at 6 . Duke Mulberry/IMCA's omission and their associated argument is misleading. The passage omitted makes it clear that the Commission was not saving for a later day the issue of a "merchant plant" seeking a determination of need. Moreover, a merchant plant's need is still premised upon the need of the utility or utilities to which it will ultimately sell; it has no need of its own, such as a true self-generator would. Duke Mulberry/IMCA's selective quotation and misleading narrative are not a basis to distinguish the Ark and Nassau decision.

Duke Mulberry/IMCA have not successfully distinguished the Ark and Nassau decision or the affirming Supreme Court decision in Nassau Power Corp. v. Deason. They cannot distinguish them because they are directly on point. In both cases a non-utility generator without a contract with a utility that has an obligation to serve and an associated need seeks to proceed under Section 403.519. The Commission, as the gatekeeper under Section 403.519, should once again hold that a non-utility generator may not proceed under Section 403.519 without a purchased power contract with a utility which has a need.

D. The Commission's Requirement Of A Contract As A Condition Of Progressing With A Determination Of Need Is The Product Of An Evolution Of Decisions Starting With The Seminole Need Determination. Abandoning That Requirement Would Overturn Nine Years Of The Commission's Interpretation Of The Siting Act.

1. The Seminole Case

In 1988 the Commission had its first occasion to address non-utility generators in need determination proceedings under Section 403.519, Florida Statutes. Seminole Electric Cooperative petitioned the Commission for a determination of need, asking that the Commission

make findings as to the amount and timing of its need but reserve for the conclusion of a bidding process a review of the project selected "when a contract has been successfully negotiated." In re: Petition of Seminole Electric Cooperative, Inc. to Determine Need for Electrical Power Plant, 88 FPSC 6:185, 189 (Order No. 19468).

In the Seminole Electric case the Commission noted that non-utility generating options were then available to electric utilities and found that such alternatives must be evaluated by an electric utility seeking need determination. Id. The Commission, however, characterized Seminole's proposed approach as a request for a "generic" need certification and found that the Commission could not issue a generic need determination. 88 FPSC 6: at 190. It noted that a successful bidder would have to come before the Commission with its own need determination with the same amount of detail and cost comparisons as Seminole would have to present. Id. This was the Commission's first attempt to integrate non-utility generation into consideration of meeting a utility's need for capacity. It is clear from the decision that in the resulting need determination the utility would have to demonstrate that it considered non-utility generation and the successful bidder would have to make for its unit the same demonstration of need a utility would make. Even at this early stage the Commission was construing the Siting Act and Section 403.519 as requiring utility specific and site specific showings.

2. The AES Case.

The next development in this line of cases was the AES case where staff sought to implead FPL in AES's determination of need because AES had no need of its own and it was the need of FPL upon which the need for the AES unit was premised. Staff argued that the Commission should overrule the seven prior need determination cases involving qualifying

facilities where the Commission had declined to make findings as to two of the criteria under 403.519 ("no alternative conservation" and "whether the plant is the most cost-effective alternative") and presume that the other two criteria would be met because the units by their very nature "will increase electrical system reliability and integrity and will maintain the supply of electricity at a reasonable cost." In re: Petition of AES Cedar Bay, Inc. And Seminole Kraft Corporation for determination of need for the Cedar Bay Cogeneration Project, 89 FPSC 1: 368, 369 (Order No. 20671) The Commission declined to implead FPL, but noted that the Staff's arguments may have merit and stated that it would address them in upcoming planning dockets. 89 FPSC 1: at 370.

3. Order 22341 and the Planning Hearing decisions.

In the subsequent planning hearing the Commission identified an issue and asked the parties to address the proper use, if any, of the Commission's planning hearing decisions in need determination proceedings. The Commission found that while planning hearing decisions should be used to gauge the validity of need determinations, "[t]hese findings should not be used as a surrogate for the factual findings required by the Siting Act in the need determination applications of either electric utilities or qualifying facilities." In re. Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities, 89 FPSC 12:294, 318 (Order No. 22341).

The planning hearing decision in Order No. 22341 was a watershed. In it the Commission offered an extensive interpretation of the Siting Act and overruled prior need determination proceedings in which it had presumed certain of the Siting Act criteria were satisfied. While it arose in the context of establishing prices for Qualifying Facilities ("QFs"), it

clearly was not limited to QFs but extended to all non-utility generators. It formed the foundation for the subsequent Supreme Court decision in Nassau Power Corp. v. Beard, the Ark and Nassau decision and the Supreme Court decision in Nassau Power Corp. v. Deason. Because of its importance, it will be addressed in some length.

The Commission's construction of the Siting Act in Order No. 22341 is the construction that FPL relies upon in response to Duke Mulberry/IMCA petition for a declaratory statement. The Commission stated:

> The Siting Act, and Section 403.519 require that this body make specific findings as to system reliability and integrity, need for electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. **Clearly these criteria are utility and unit specific.**

89 FPSC 12: at 319 (emphasis added).

After affording Section 403.519 the only plausible construction it could in light of the utility specific criteria contained in the statute, the Commission then overruled the seven prior need determination decisions it discussed in the AES case in which it had presumed need. 89 FPSC 12: at 319. Among the cases overruled was the Commission earlier decision in Florida Crushed Stone. The Commission explained why it was overruling those prior need determinations in which it had presumed that a QF purchase at or below avoided cost was the most cost-effective alternative under the Siting Act:

> In so doing we take the position that 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. As such, that capacity must be evaluated from the purchasing utility's perspective in the need determination proceeding, i.e., a finding must be made that the proposed capacity is the most cost-effective

> means of meeting the purchasing utility X's capacity needs in lieu of other demand and supply side alternatives.

Id.

While much of the discussion in Order No. 22341 focuses upon purchases from QFs, a particular type of non-utility generator, there are two passages in the order that makes it clear that the Commission did not intend to limit its decision to QFs but that its rationale extended to all non-utility generators. First, the Commission noted that, " an increasing share of the state's electrical needs will be supplied by either cogenerators or independent power producers."[1] It declined to continue to "rubber stamp" QF projects because to do so would cause it to lose "the ability to regulate the construction of an increasingly significant amount of generating capacity in the state." 89 FPSC 12: at 320. Second, the Commission's ultimate holding is not stated in terms of QFs, it is stated in terms of "need" under the Siting Act: ' we adopt the position that "need" for the purposes of the Siting Act is the need of the entity ultimately consuming the power, the electric utility purchasing the power.' Id.

Even if the Commission had not subsequently ruled directly on point in the Ark and Nassau case that a non-utility generator such as Duke Mulberry must have a contract for its output to pursue a need determination proceeding, Order 22341 would be sufficient authority to deny the declaratory statement sought by Duke Mulberry. It is clear from Order 22341 that the "need" to be assessed in a need determination is the "need" of the purchasing utility or utilities, and without those utilities being identified and without the contract terms to quantify the cost of

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[1] While cogenerators may or may not be QFs, independent power producers clearly are not QFs. The Commission realized that its rationale extended beyond QFs.

the power, the Commission cannot assess whether the unit is needed for reliability and integrity, whether the power provides "for adequate electricity at a reasonable cost," whether the plant is the most cost-effective alternative available, or whether there is conservation available that could meet the need for the capacity.

After the issuance of Order 22341, in the same continuing planning docket the Commission had several occasions to revisit its interpretation of the Siting Act and change or modify it; it declined to do so, further elaborating upon why it was the correct interpretation of the Siting Act.[9] In Order No. 23234 the Commission on its own motion changed the avoided unit adopted in Order No. 22341, but specifically reaffirmed the remainder of Order 22341 90 FPSC 7:382. In Order No. 23792 the Commission addressed the effect of queuing subscriptions of QF contracts and noted that the effect was "to lock in a price pending further review (in a contract approval/need determination proceeding) as to whether the proposed project is the most cost-effective alternative to the purchasing utility." In Re: Planning hearings on Load Forecasts, Generation Expansion Plans and Cogeneration Pricing for Peninsula Florida's Electric Utilities,

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[9] There are at least two other orders outside the planning hearing where the Commission reaffirmed its Siting Act interpretation. In Lee County's determination of need case the Commission carved an exception to its interpretation of the Siting Act for municipal waste cogeneration facilities, but in doing so it stated, '[w]e do not repudiate our general policy as expressed in Order No. 22341." In re: Petition for Determination of Need for a Solid Waste-Fired Cogeneration Power Plant by Lee County, 91 FPSC 1: 57, 59 (Order No. 23963). In the Cypress need determination the Commission stated: 'non-utilities are not included in the statutory definition of an "applicant" who may file for a need determination' and also held that "the statutory exclusion of non-utilities as applicants recognizes the utility's planning and evaluation process and envisions either approval or denial of the utility's selection of its generation alternatives." In Re: Joint Petition to determine need for electric power plant to be located in Okeechobee County by Florida Power & Light Company and Cypress Energy Partners, Limited Partnership, 92 FPSC 11. 363, 365 (Order No. PSC-92-1355-FOF-EQ)

90 FPSC 11: 286, 288. The Commission also restated and reaffirmed its decision in Order 22341. 90 FPSC 11: at 288-89. The prehearing officer in a subsequent planning hearing also invoked Order 22341 in holding that a planning hearing would not turn into a determination of need for a then pending power plant application by Nassau Power. Order No. 24558. Finally, in Order No. 24672 the Commission rejected a motion for reconsideration filed by Nassau Power seeking to overturn the Commission earlier order on subscription, Order No. 23792, in which the Commission had held that the effect of being included in the subscription queue was not to avoid a subsequent assessment of need for the plant in light of the purchasing utility's need. The Commission restated its decision in Order No. 22341 and noted that Nassau sought reversal of that policy. The Commission declined to reverse its, by then, well established policy. 91 FPSC 6: 368.

4. Nassau Power Corp. v. Beard.

The Commission's interpretation of the Siting Act was then appealed to the Supreme Court of Florida. Order Nos. 23792 and 24672, which rested upon the Commission's decision in Order No. 22341, were appealed to the Supreme Court of Florida by Nassau Power. Nassau Power Corporation v. Beard, 601 So.2d 1175 (Fla. 1992). There the Court had occasion to review the Commission's interpretation of the Siting Act in Order No. 22341 and add its own assessment of what the Siting Act required. The import of the Court's decision is that it goes beyond merely affirming the Commission's interpretation of the Siting Act. **The Court found that it would have been an abrogation of the Commission's duties if the Commission had interpreted the Siting Act as Nassau sought by presuming need:**

> 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.[footnote omitted]

Nassau Power Corporation v. Beard, 601 So.2d at 1178.

In the footnote explaining its holding, the Court 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. The Court stated that the Commission in Order No. 22341 had clearly adopted the position that the four criteria in 403.519 were "utility and unit specific" and that the need for the purpose of the Siting Act was "the need of the entity ultimately consuming the power." Id. The Court found the Commission's interpretation "consistent with the overall directive of section 403.519." It also concluded on its own that the requirement in 403.519, that the Commission determine the cost-effectiveness of a proposed plant, "would be rendered virtually meaningless if the PSC were to calculate the need on a statewide basis without considering which localities would actually need more electricity in the future." Id.

5. The Martin Plant decision.

The other Commission decision which is part of the decisional law that the Commission relied upon in dismissing the Ark and Nassau petitions and which the Commission should rely upon in assessing Duke Mulberry/IMCA's request is the Commission's discussion in the Martin Plant need determination order that a purchasing utility is an indispensable party in a need determination proceeding by a non-utility generator. There the Commission further elaborated upon the importance, indeed, the essential involvement of a utility, in a need determination by a non-utility generator:

> When a utility awards a contract to a bidder for the supply of all or part of that utility's capacity needs, the utility must be an indispensable party to the need determination proceeding in order for the Commission to adequately evaluate the need application The reason is simple: the need for the capacity remains that of the utility. The winning bidder has no independent need of his own. **In order for the specific mandates of the statute to be meaningful, they must be answered from the utility's perspective.** The award of the bid to a third party does not suddenly cut the utility out of the picture. The utility is in the same posture it would be in has it pursued the other options mentioned in the statute: purchased power, cogeneration, conservation, load management: a utility with a need for new capacity.
>
> Further, the **cost-effectiveness** of the bid **must be evaluated** not only from the perspective of the other bidders, i.e., did the utility pick the lowest cost viable candidate, but also **in terms of the utility's other options for the supply of that capacity: purchased power, demand-side reduction programs; Cogeneration, and utility construction. Unless the utility which awards the bid is an indispensable party, it is virtually impossible to develop the record in these areas.** This is the type of information which is exclusively in the hands of the utility. Likewise, **the basic question of need for capacity can only be proven by the entity needing the power: the utility. Independent power producers, under any moniker, do not have the ability to produce accurate load forecasts because they don't have the data base on which such an analysis is built.**

In re: Petition of Florida Power and Light Company to determine need for electrical power plant - Martin expansion project, 90 FPSC 6: 268, 284-85 (Order No. 23080) (Emphasis added.) The Commission went on to restate its decision set forth in Order No. 22341 and noted that the rationale for that decision supported its decision that a utility was an indispensable party to winning bidder's need determination. 90 FPSC 6: at 285-86

F. The Commission's and the Supreme Court's Precedents Must Be Followed.

The request for a declaratory statement by Duke Mulberry/IMCA, that it may seek a determination of need without consideration of the need of the purchasing utility or utilities not only is directly contradictory to the decisions in Ark and Nassau and Nassau Power Corp. v. Deason, but also is inconsistent with the large body of case law previously discussed. Duke Mulberry/IMCA seek a generic determination of need; this runs afoul of the Seminole Electric and the Cypress Energy decisions. Duke Mulberry/IMCA seek to have the Commission presume need as the Commission did in the Florida Crushed Stone case. This ignores that the Commission has overruled the Florida Crushed Stone decision in Order No. 22341. More importantly, this runs afoul of Order Nos. 22341 and the orders in which that decision has been applied: Order Nos. 23234, 23792, 23693 and 24672. Most importantly, the Supreme Court of Florida has held that such a presumption would be an abrogation of the Commission's responsibility. Nassau Power Corp. v. Beard. Duke Mulberry/IMCA seek to have the Commission apply the four utility and unit specific criteria in Section 403.519 by looking not to a specific utility to which Duke Mulberry will sell but to the state as a whole or "general aspects of need." This runs afoul of the clear language of Section 403.519 (which specifies mandatory criteria for review which are clearly utility specific), the Supreme Court's construction of the Siting Act in Nassau Power Corp. v. Beard and Nassau Power Corp. v. Deason, Order No. 22341 and the other planning hearing orders expounding upon the Commission's rationale in Order No. 22341, and the Commission's decision in the Martin plant proceeding, Order No. 23080. Seldom is the Commission called upon to render a legal opinion which is so clear. Duke Mulberry/IMCA's petition should be denied.

IV

THE LANGUAGE OF THE POWER PLANT SITING ACT AND SECTION 403.519, FLORIDA STATUTES COMPEL A UTILITY AND UNIT SPECIFIC APPROACH AND DO NOT CONTEMPLATE A DETERMINATION OF NEED SUCH AS THE ONE PROPOSED BY DUKE MULBERRY.

A. The Need Determination Criteria in Section 403.519 Are Utility Specific.

Conspicuously absent from Duke Mulberry/IMCA's petition is any discussion of the four criteria in Section 403.519 which an applicant must meet to secure a determination of need. It is clear from the language of these criteria that they are only applicable to an entity which has an obligation to serve and an associated need:

> 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 expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant.

Section 403.519, Florida Statutes (1995).

Although Duke Mulberry/IMCA did not address these need determination criteria in their petition, the Commission should consider them. In doing so, the Commission must give them their plain and obvious meaning. Holly v. Auld, 450 So.2d 217 (Fla. 1984); A.R. Douglass, Inc. v. McRainey, 137 So. 157 (Fla. 1931). These criteria have no applicability to a non-utility generator unless the non-utility generator has identified the utility or utilities to which it will sell and has a contract under which costs and the impact on reliability can be determined. A non-utility generator cannot make a showing that its power is needed for "electric system reliability

and integrity" unless it addresses the utility or utilities to which it will sell and address the impact of its power on those systems.[10] A non-utility generator cannot address that its power is needed "for adequate electricity at a reasonable cost" unless it addresses the utility or utilities to which it will sell and compares the alternatives the utility has to its power.[11] A non-utility generator cannot address that its "proposed plant is the most cost-effective alternative available" unless it addresses the utility or utilities to which it will sell and discusses the alternative sources of supply available to the utilities.[12] Finally, a non-utility generator cannot address "the conservation measures taken or reasonably available" as an alternative to its proposed plant unless it identifies the utility or utilities to which it will sell and addresses whether they have fully explored their conservation alternatives.

It was the need to give these criteria applicability (1) which led the Commission to determine that a utility was an indispensable party to a need determination by a QF selling power to a utility (Martin), (2) that led the Commission to conclude countless times that these criteria

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[10] A good example of this was Nassau's inability to demonstrate in its need determination for its Amelia Island project that the sale of its 435 MW of capacity would actually enhance FPL system reliability; because of its location, Nassau would not have enhanced FPL's reliability as another alternative of equal capacity would have. See, In re: Petition for Determination of Need for Electrical Power Plant (Amelia Island Facility) by Nassau Power Corporation, 92 FPSC 2:814 (Order No. 25808).

[11] The Nassau Amelia Island case is also a good example of this. Because of the project's adverse impact on tie line capability, FPL would not receive adequate electricity at a reasonable cost because it would have received only 145 MW net but it would have paid for 435 MW. In re: Petition for Determination of Need for Electrical Power Plant (Amelia Island Cogeneration Facility) by Nassau Power Corporation, 92 FPSC 2:814 (Order No. 25808).

[12] The Supreme Court has found this criterion to be "rendered virtually meaningless" if examined on a statewide rather than a local basis. Nassau Power Corp. v. Beard, 601 So.2d at 1178, n. 9.

are "utility and unit specific" (Order 22341), and (3) which led to the Supreme Court to reject Nassau's argument that the Siting Act does not require the PSC to determine need on a utility specific basis (Nassau Power Corp. v. Beard). It was the utility specific nature of these criteria which led the Commission to dismiss the applications of Ark and Nassau which did not have a contract (Ark and Nassau), and it was the utility specific nature of these criteria which led the Supreme Court to uphold that dismissal in Nassau Power Corp. v. Deason

These criteria would require Duke Mulberry to demonstrate a specific utility's or utilities' need for Duke's power. Duke has not yet identified the utility or utilities to which it will sell power. Duke can make no showing of the impact of its sale on those utilities' system reliability or cost. Duke cannot demonstrate that its sale will be the utilities' most cost-effective alternative. Duke cannot address the extent to which those utilities might be able to mitigate the need for Duke's power through conservation. Because Duke cannot satisfy these utility specific criteria, Duke's petition should be denied.

B. The Definition of an "Applicant" and an "Electric Utility" under the Siting Act Should Be Read in Conjunction with the Criteria for Determining Need, as They Have Been by the Commission and the Supreme Court.

Duke Mulberry argues that as an Exempt Wholesale Generator it will be a "regulated electric company" within the definition of an "electric utility" (Section 403.507(13), Florida Statutes) in the Siting Act. With this argument Duke Mulberry would have the Commission disregard its earlier construction of the Siting Act in the Ark and Nassau decision, as well as the Supreme Court's affirmance of that decision in Nassau Power Corp. v. Deason

In the Ark and Nassau decision, the Commission found that Ark and Nassau were "non-utility generator[s]." 92 FPSC 10: at 645 ("a non-utility generator such as Ark or Nassau") The

Commission also found these non-utility generators Ark and Nassau did not qualify as "applicants." Id. It found that Ark and Nassau did not fall into any of the categories of entities within the Siting Act's definition of an "electric utility" (including the category "regulated electric company") because each of those entities "may be obligated to serve" and "[i]t is this need, resulting from a duty to serve customers, which the need determination is designed to examine." Id.

The Supreme Court in affirming this statutory construction found, that "[t]he 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.*" The Court noted that the Commission determined that non-utility generators were not included in the definition of "electric utility" in the Siting Act and, therefore Nassau was not a proper applicant. 641 So.2d at 398. It went on to state that the Commission's interpretation of section 403.519 comported with its decision in Nassau Power Corp. v. Beard where it 'agreed with the Commission that the need to be determined under section 403.519 is "the need of the entity ultimately consuming the power." 641 So.2d at 399.

The only construction of the term "regulated electric company" within the Siting Act's definition of an "electric utility" is found in the Ark and Nassau decision, which was affirmed in Nassau Power Corp. v. Deason. There the Commission and the Court found that a "regulated electric utility" was an entity that may have an obligation to serve giving rise to an associated need for power. There the Commission and Court determined that a non-utility generator fell outside that definition. Nothing has changed. Duke Mulberry, just like Ark and Nassau, is a non-utility generator. Even as an EWG, Duke Mulberry would have no obligation to serve or an

associated need for power. It would still need to rely upon the need of the purchasing utility to satisfy the need criteria of Section 403.519. Absent contracts to sell its output, Duke Mulberry is not a proper applicant under the Siting Act.

V
THE FLORIDA CRUSHED STONE DECISIONS ARE IRRELEVANT TO THE DECLARATORY STATEMENT SOUGHT

In their petition Duke Mulberry/IMCA have relied extensively upon prior decisions of the Commission and the Siting Board in cases involving Florida Crushed Stone. Those cases were among the earliest cases under the Siting Act, and they are irrelevant to the declaratory statement sought by Duke Mulberry/IMCA for several reasons: (a) the same interpretation of the Florida Crushed Stone decisions were offered by Nassau Power in Nassau Power Corporation v. Deason and were rejected by the Supreme Court, (b) the Commission's Florida Crushed Stone decision addressed the question left open in the Ark and Nassau decision - whether a non-utility generator applying to construct a power plant to meet its own need may seek a determination of need - not whether a non-utility generator seeking to sell to utilities could seek a need determination, (c) the Commission's Florida Crushed Stone decision, if it applies at all to an entity seeking to sell to utilities, was overruled by the Commission's decision in Order No. 22341, and (d) the Siting Board's interpretation of the term "applicant" in its Florida Crushed Stone decision clearly failed to address an essential part of the definition of an "electric utility" and has been implicitly overruled by the decision in Nassau Power Corp. v. Deason, where the Court accepted the Commission's construction of the term "applicant."

In its appeal of the Ark and Nassau decision, Nassau Power argued, just as Duke Mulberry/IMCA do here, that the Commission's[13] and the Siting Board's[14] decision in Florida Crushed Stone, should be construed as holding that a non-utility generator that had no contract with a purchasing utility was a proper "applicant" under the Siting Act. See, Revised Initial Brief Of Nassau Power Corporation, pp.7-11, attached as Appendix A. FPL argued in its answer brief that the Florida Crushed Stone decisions were irrelevant. See, Attachment B. In its decision the Court agreed with FPL; the Court did not even mention the Florida Crushed Stone decisions. See, Nassau Power Corp. v. Deason.

As FPL pointed out in its brief to the Court, the Commission's Florida Crushed Stone decision was not on point, it involved the very issue which the Commission expressly left open in its Ark and Nassau decision - the instance of a non-utility generator applying to construct a power plant to meet its own need.[15] It did not address the circumstance of a non-utility generator without a contract seeking a need determination to sell to utilities. In the Florida Crushed Stone case, FCS did not justify construction of its facility as needed to meet the capacity needs of the regulated utility, and the Commission expressly found that the facility would not affect the need of any utility of the state. 83 FPSC 2:107, 109-110. "What may have been said in an opinion

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[13] In Re: Petition of Florida Crushed Stone for Determination of Need for a Coal-Fired Cogeneration Electrical Power Plant, 83 FPSC 2: (Order No. 11611).

[14] In Re: Florida Crushed Stone Company Power Plant Certification Application, PA 82-17 (March 12, 1984).

[15] "We expressly reserve for the future the question of whether a self-service generator (which has its own need to serve) may be an applicant for a need determination without a utility co-applicant. Ark and Nassau, 92 FPSC 10: at .

[based on one set of facts] ... should not be extended to cases where the facts are essentially different." Ard v. Ard, 395 So.2d 586, 587 (Fla. 1st DCA 1981) (quoting Ex parte Amos, 112 So. 289, 294-95 (Fla. 1927)).

Although the Florida Crushed Stone decision involved a different set of facts and is not applicable, if the Commission were to conclude that its Florida Crushed Stone case did involve a non-utility generator without a contract which sought to provide capacity to an "electric utility," it is clear that the issue of whether Florida Crushed Stone was a proper applicant under the Siting Act was not raised before the Commission. Consequently, the issue was not explicitly addressed by the Commission and the decision cannot be cited for an interpretation that was not made Also, if the Commission were to conclude that the Florida Crushed Stone decision did address the issue of whether a non-utility that sought to sell power to a utility was a proper applicant under the Siting Act, it is clear that the Florida Crushed Stone decision has been overruled by Order No. 22341[16] and the Ark and Nassau decision.

The Siting Board's interpretation of the term "applicant" in its Florida Crushed Stone decision clearly failed to address an essential part of the definition of an "electric utility." The Siting Board reasoned that FCS would be "in the business of generating electricity" after it completed construction of its plant; therefore, it met the definition of "electric utility." Siting

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[16] There the Commission stated, "we overrule those previous decisions in which we held that in qualifying facility need determination cases as long as the negotiated contract price was less than that of the standard offer and fell within the current MW subscription limit both the need for the cost-effectiveness of the QF power has already been proven." 89 FPSC 12: at 319 The Commission cited the AES case as an example, and as previously discussed, in the AES case the Staff had sought the Commission to overturn seven such prior decisions, including the Florida Crushed Stone decision. 89 FPSC 1: 368, 369.

Board Order at 2. That reasoning ignores at least three-fourths of the statutory definition of "electric utility." The definition of "electric utility" mentions seven expressly delineated entities "in the business of generating ... electricity." The legislature could have defined "electric utility" as any entity constructing a power plant to generate electricity. It did not. Instead, the legislature used precise terms and clear words which limit the definition of "electric utility." The Siting Board completely ignored these limiting terms. The Commission is not bound by the Siting Board's clearly erroneous reasoning. See, Southeastern Utilities Serv. Co. v. Redding, 131 So 2d 1, 2 (Fla. 1961) ("there can be no doubt that an administrative ruling or policy which is contrary to the plain and unequivocal language of a legislative act is clearly erroneous. This proposition seems to be too elemental to require further discussion").

Setting aside that the Siting Board's construction of the definition of "electric utility" in its Florida Crushed Stone case was clearly erroneous, it must be acknowledged that since that case was decided by the Siting Board, there is a Florida Supreme Court decision holding that a non-utility generator without a contract to sell power to a utility is not a proper applicant under the Siting Act. Nassau Power Corp. v. Deason. The holding is premised in part upon the Court's earlier construction of the Siting Act in Nassau Power Corp. v. Beard. Even if the Florida Crushed Stone decision is improperly read as addressing the definitions of an "applicant" or an "electric utility" under the Siting Act, the decision is inconsistent with and overruled by the decisions of the Supreme Court of Florida.

Duke Mulberry's reliance on the Florida Crushed Stone decisions is misplaced. They are irrelevant.

VI

DUKE MULBERRY MUST SEEK AND SECURE A DETERMINATION OF NEED TO PROCEED UNDER THE SITING ACT TO SECURE CERTIFICATION. THE SITING ACT IS THE SOLE MEANS BY WHICH DUKE MULBERRY MAY SECURE PERMITTING.

In their petition for a declaratory statement, Duke Mulberry and IMCA seek as alternative relief a declaration by the Commission that they do not have to seek a determination of need. This issue is easily addressed on the plain language of the Siting Act as well as the Supreme Court decisions interpreting the Siting Act and Section 403.519, Florida Statutes.

Any entity seeking to construct an electrical power plant in Florida must first seek certification under the Siting Act. Section 403.506, Florida Statutes (1995), provides in pertinent part, "[n]o construction of any new electrical power plant may be undertaken after October 1, 1973, without first obtaining certification in the manner as herein provided..." It is clear from the plain language of the Siting Act that entities such as IMCA and Duke Mulberry must proceed under the Siting Act for certification.

It is also clear from the plain language of the Siting Act as well as Florida judicial decisions that a determination of need by the Commission is a necessary essential to the certification process. "[A]n affirmative determination of need by the Public Service Commission pursuant to s. 403.519 shall be a condition precedent to the conduct of the certification proceeding." Section 403.508(3), Florida Statutes (1995). This provision of the Siting Act as well as the language in Section 403.519, Florida Statutes ("shall be the sole forum for the determination of need") led the Fifth District Court of Appeals to conclude that, " the PSC is the

sole judge as to the need for the power plant, with the hearing officer and, indeed, the Siting Board, bound by that determination." Florida Chapter of Sierra Club v. Orlando Public Utilities Commission, 436 So.2d 383, 387 (Fla. 5th DCA 1983). The Supreme Court of Florida has also stated: "The Siting 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). Nassau Power Corp. v. Beard, 601 So. 2d at 1176. The plain language of the Siting Act and these two judicial decisions leave no doubt as to IMCA's and Duke Mulberry's alternative relief. It must be denied. IMCA and Duke Mulberry must seek and secure an affirmative determination of need to proceed under the Siting Act.

VII

DUKE MULBERRY/IMCA'S APPROACH OF EITHER IGNORING THE UTILITY SPECIFIC CRITERIA FOR A DETERMINATION OF NEED OR FOREGOING A DETERMINATION OF NEED WOULD FRUSTRATE THE SITING ACT

The Supreme Court of Florida has noted that the Siting Act was passed "for the purpose of minimizing the adverse impact of power plants on the environment." Nassau Power Corp. v. Beard, 601 So. 2d at 1177. To accomplish that goal, the Siting Board is called upon to balance the need for a power plant against its adverse environmental consequences. See, Section 403.502, Florida Statutes (1995). Of course, the need for the power has consistently been

construed as the need of a purchasing utility. Order 22341; Nassau Power Corp. v. Beard, Ark and Nassau, Nassau Power Corp. v. Deason.

Either of the alternatives that Duke Mulberry/IMCA seek in its declaratory statement request would frustrate the balancing mandated by the Siting Act. In regard to the primary relief requested, if the Commission were to attempt to address the need for power by looking to general "aspects of need" rather than addressing the need of the purchasing utility, then the Siting Board would really not have a basis before it to weigh against the assured environmental impacts that a new power plant will incur. The Board would have no way to assess whether the environmental impact was justified, for it would not know the effect on reliability, whether the unit provided adequate electricity at a reasonable cost, whether the unit was the most cost-effective alternative available or whether there was conservation available which would mitigate the need for the plant. If the alternative approach advocated were adopted - no determination of need - this would also frustrate the Siting Board ability to weigh environmental damage against need. There would be no determination of need, not even a general one. Either approach frustrates the intended operation of the Siting Act.

Duke Mulberry/IMCA's request simply ignores that there are a limited, finite number of power plant sites in the State of Florida. There is environmental impact on the Florida suffered when each site is built. Under Duke Mulberry/IMCA's approach, the power plant site could be lost, the environmental damage incurred and the power could move completely out of state because no one insisted upon examining need from the perspective of the utility to purchase the power. This is not the type of balancing envisioned in the Siting Act. Duke Mulberry/IMCA's request would frustrate the intended operation of the Siting Act. Their request should be denied

VIII

CONCLUSION

For the reasons fully developed herein, the petition for a declaratory statement by Duke Mulberry and IMCA should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this the 1st day of December, 1997 a copy of Florida Power & Light Company's Amicus Curiae memorandum of Law Addressing Duke Mulberry/IMC-Agrico's Petition for Declaratory Statement was served by U.S. Mail or hand delivery (*)

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