BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

FLORIDA POWER & LIGHT COMPANY'S MEMORANDUM OF LAW SUPPORTING ITS MOTION TO DISMISS THE NEED PETITION

Docket No. 000442-EI
Filed: July 10, 2000

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Pursuant to Florida Administrative Code Rule 28-106.204, Florida Power & Light Company ("FPL") files this memorandum of law supporting its Motion To Dismiss The Need Petition. This memorandum more fully develops the grounds for dismissal.

INTRODUCTION

The parties to this proceeding, who are in the process of expending significant resources, would be well served by the Commission seriously considering whether as a matter of law this proceeding should move forward. Aside from the significant deficiencies in the Petition which warrant dismissal, the petitioners advance a theory of their case - that an entity (a) without an obligation to serve, (b) without a need of its own, and (c) without a contract with an entity which has a need and an obligation to serve, may properly file a need determination petition - which is at odds with Section 403.519, Florida Statutes, the Florida Electrical Power Plant Siting Act ("Siting Act") Section 403.501-403.518, Florida Statutes, and the Commission's authority under the Grid Bill and other statutes to avoid the uneconomic duplication of facilities.

The law in Florida regarding determinations of need for an entity which has no obligation to serve and which proposes to sell its power to utilities but has no contract is well developed. The Petition should be dismissed. FPL's request is simple and straightforward - follow the law. If the Commission declines to follow the law and instead allows this case to proceed to trial, it would be, in the words of the Supreme Court of Florida, abdicating its responsibility.

Before addressing each of the grounds justifying dismissal of the Petition, it is helpful to place this matter in context. The Siting Act was passed "for the purpose of minimizing the adverse impact of power plants on the environment."[1] To achieve that purpose the Siting Board is required to weigh the need for a power plant against the power plant's environmental impact. Section 403.502, Florida Statutes. To assure that the Siting Board would conduct such weighing of need against environmental impact, the Legislature made a determination of need a condition precedent to securing environmental permitting. Section 403.508(3), Florida Statutes. In plain language, the premise underlying the Siting Act is - if you don't need it, you don't build it.

The Legislature chose the Commission as the exclusive forum to make the determination of whether a power plant is needed. Section 403.519, Florida Statutes. The Legislature's choice of the Commission was most logical. The Commission was the agency which regulated the utilities which built power plants to meet obligations to provide service.[2] The Commission was the agency charged

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[1] Nassau Power Corp. v. Beard, 601 So. 2d 1175, 1177 (Fla. 1992).

[2] The Commission has extensive regulatory authority over "public utilities" pursuant to Chapter 366, Florida Statutes. The Commission also has more limited authority under Chapter 366 to regulate "electric utilities," which include not only public utilities but also municipal electric utilities and rural electric cooperatives. See, Section 366.02, Florida Statutes.

with overseeing and maintaining the integrity of the electrical grid.[3] The Commission was the agency charged with the avoidance of uneconomic duplication of facilities.[4] The Commission was the agency charged with resolving territorial disputes and approving territorial agreements so that uneconomic duplication of facilities would be avoided.[5] The Commission was charged with approval of conservation goals and plans to meet those goals by regulated electric utilities in Florida.[6] All these responsibilities integrate well with the function of determining the need for a power plant.

The statutory criteria mandated by the Legislature for the Commission to follow in determining need for a power plant reflect that the Commission was already exercising these responsibilities and that in implementing the Siting Act the Commission should reconcile its need determination decision with these responsibilities. Of course, if there were any doubt as to whether the Commission should consider its other responsibilities when making a determination of need, it is removed by the explicit instruction in Section 403.519, Florida Statutes, which requires the Commission to "expressly consider ... other matters within its jurisdiction which it deems relevant."

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[3] The Commission's authority to oversee the integrity of the Florida grid is found in several statutes including Sections 366.04(2)(c), 366.04(5), 366.05(1),(7),(8), 366.051, 366.055, Florida Statutes. Several of these sections were passed as part of the same legislation which is commonly referred to as "the Grid Bill." See, 1974 Laws of Florida Chapter 74-96 (codified at Sections 366.04(2), 366.05(7) and (8), Florida Statutes).

[4] See, Section 366.04(5), Florida Statutes.

[5] See, Section 366.04(2)(d),(e), Florida Statutes.

[6] See, Sections 366.81, 366.82, Florida Statutes.

As intended by the Legislature, the Commission has interpreted its Siting Act responsibilities consistently with its other jurisdiction. This is best seen in the Commission's integration of non-utility generators into the Siting Act.

When the Siting Act was originally passed in 1973, the electric utilities providing retail service were seen as the entities that would, because of their obligation to provide service, be building the power plants to be licensed under the Siting Act. Historically, those utilities were the entities which had built the vast majority of power plants in the state.[7] It was years before Congress or the Federal Energy Regulatory Commission ("FERC"), under federal law, designated non-utility generators such as Qualifying Facilities ("QFs"),[8] Independent Power Producers ("IPPs"),[9] or Exempt Wholesale Generators ("EWGs").[10] Because the Siting Act could not contemplate these various entities which would emerge much later to make sales to electric utilities, the language of

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[7] At the time the Siting Act was passed there were a few generating plants in the state that were not utility owned, and these few facilities were designed primarily for self service. These facilities were small and constituted a very minor part of the generating capacity in the state.

[8] Qualifying Facilities were the fruit of the Public Utility Regulatory Policy Act of 1978 ("PURPA"), Public Law 95-617, 92 Statute 3117.

[9] The term "Independent Power Producer" was coined by the Federal Energy Regulatory Commission in 1988 when it proposed regulations regarding streamlined federal regulation of "a class of non-traditional utility suppliers." See, *FERC Statutes and Regulations, Vol. IV, Proposed Regulations ¶ 32,456;* 53 F. R. 9327 (March 22, 1988). Although the proposed regulations were withdrawn, the term Independent Power Producer has continued in use.

[10] Exempt Wholesale Generators were created by the Energy Policy Act of 1992, Public Law 102-486, October 24, 1992.

the Siting Act evidenced the Legislature's understanding that "electric utilities," the entities subject to some aspect of the Commission's regulation, would be the entities seeking need determinations.[11]

However, when these new entities seeking to sell power to utilities emerged, the Commission struggled to integrate these entities into the Siting Act. In its initial decisions attempting to apply the Siting Act to QFs, the first of the non-utility generators to emerge, the Commission's ability to apply the Siting Act was sorely taxed. In some cases the Commission made no findings on the criteria regarding "the need for adequate electricity at reasonable cost" and "whether the plant is the most cost-effective alternative available."[12] In other cases the Commission engaged in a tautological exercise to make the necessary findings, presuming rather than actually determining need.[13] In all these decisions the Commission used findings made in its planning hearing as a surrogate for the

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[11] For instance, the term "applicant" in the Siting Act is defined as "any electric utility which applies for certification pursuant to the provisions of this act." Section 413.503(4), Florida Statutes. The term "electric utility" is defined in the Siting Act by reference to the entities providing electric service to the public: '"[e]lectric utility" 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.' Section 403.503(13), Florida Statutes.

[12] In re: Petition of Florida Crushed Stone Company for determination of need for a coal-fired cogeneration electrical power plant, 83 FPSC 2:107 (Order No. 11611); In re: Petition of Pasco County for determination of need for a solid waste-fired cogeneration power plant, 87 FPSC 6:281 (Order No. 17752).

[13] In re: Petition by Hillsborough County for a determination of need for a solid waste-fired cogeneration power plant, 83 FPSC 10:104 (Order No. 12610); In re: Petition by Pinellas County for a determination of need for a solid waste-fired cogeneration power plant, 83 FPSC 10:106 (Order No. 12611); In re: Petition by Broward County for determination of need for a solid waste-fired electrical power plant, 85 FPSC 5:67 (Order No. 14357); In re: Petition of Palm Beach County Solid Waste Authority for determination of need for solid waste-fired small power producing electric power plant, 85 FPSC 10:247 (Order No. 15280); In re: Petition by Broward County for determination of need for a solid waste-fired electrical power plant, 86 FPSC 2:287 (Order No. 15723).

statutory findings required by Section 403.519, Florida Statutes.[14] The Commission's questionable interpretation of the Siting Act was never challenged in court.

Over time, the Commission grew uncomfortable with its application of the Siting Act to non-utility generators. Beginning with the AES need determination and continuing into the Commission's annual planning hearings and other need determination proceedings, the Commission rethought its interpretation of the Siting Act. It reversed its prior questionable decisions[15] and held that: (a) the Commission was not going to make generic determinations of need or presume that statutory criteria were met,[16] (b) the purchasing utility was an indispensable party to the need determination of a non-utility generator,[17] (c) the statutory criteria for determining need under

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[14] This was the Commission's characterization of these decisions in the AES need determination. See, 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, 370 (Order No. 20671).

[15] In Order No. 22341 the Commission overruled "those previous decisions in which we held that in qualifying facility (QF) 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 and the cost-effectiveness of the QF power has already been proven." In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities, 89 FPSC 12:294, 319 (Order No. 22341). Subsequently, the Supreme Court of Florida held that the Commission's prior practice of presuming need rather than determining actual need was an abrogation of the Commission's responsibilities under the Siting Act. Nassau Power v. Beard, 601 So. 2d at 1178.

[16] In re: petition of Seminole Electric Cooperative, Inc. To Determine Need for Electrical Power Plant, 88 FPSC 6:185, 190 (Order No. 19468) (Commission cannot make a generic determination of need); In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities, 89 FPSC 12:294, 319 (Order No. 22341) (Commission would no longer presume need).

[17] In re: Petition of Florida Power and [sic] Light Company to determine need for electrical power plant - Martin expansion project, 90 FPSC 6:268, 284-86 (Order No. 23080); In re: petition of Nassau Power Corporation to determine need for electrical power plant (Okeechobee County Cogeneration Facility), 92 FPSC 10:643, 645 (Order No. PSC-92-1210-FOF-EQ) (Ark and Nassau)

Section 403.519 were utility and unit specific,[18] (d) the need for a power plant derived from an obligation to provide service,[19] (e) the need for a power plant was to be examined from the perspective of the purchasing utility,[20] (f) an entity without its own need which desired to sell to a utility must have a contract with a purchasing utility to be able to demonstrate need,[21] and (g) an

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("[A] contracting utility is an indispensable party to a need determination proceeding."), *affirmed* Nassau Power Corporation v. Deason, 641 So. 2d 396 (Fla. 1994).

[18] In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities, 89 FPSC 12:294, 319 (Order No. 22341); In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Florida's Electric Utilities, 91 FPSC 6:368 (Order No. 24672), *affirmed* Nassau Power Corporation v. Beard, 601 So. 2d 1175, 1178 (Fla. 1992).

[19] In re: petition of Nassau Power Corporation to determine need for electrical power plant (Okeechobee County Cogeneration Facility), 92 FPSC 10:643, 645 (Order No. PSC-92-1210-FOF-EQ) (Ark and Nassau) ("It is this need, resulting from a duty to serve customers, which the need determination is designed to examine."), *affirmed* Nassau Power Corporation v. Deason, 641 So. 2d 396 (Fla. 1994); 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 8:370 (Order No. PSC-92-0827-PHO-EQ) "[I]t is the utility's need, resulting from its duty to serve customers, which must be fulfilled").

[20] In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities, 89 FPSC 12:294, 319 (Order No. 22341); In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities, 90 FPSC 11:286(Order No, 23792); In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Florida's Electric Utilities, 91 FPSC 6:368 (Order No. 24672), *affirmed* Nassau Power Corporation v. Beard, 601 So. 2d 1175, 1178 (Fla. 1992); In re: petition of Nassau Power Corporation to determine need for electrical power plant (Okeechobee County Cogeneration Facility), 92 FPSC 10:643, 645 (Order No. PSC-92-1210-FOF-EQ) (Ark and Nassau), *affirmed* Nassau Power Corporation v. Deason, 641 So. 2d 396 (Fla. 1994); 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).

[21] In re: petition of Nassau Power Corporation to determine need for electrical power plant (Okeechobee County Cogeneration Facility), 92 FPSC 10:643, 645 (Order No. PSC-92-1210-FOF-EQ) (Ark and Nassau), *affirmed* Nassau Power Corporation v. Deason, 641 So. 2d 396 (Fla. 1994).

entity without an obligation to serve giving rise to its own need for power was not a proper applicant under the Siting Act unless it was a co-applicant with the purchasing utility.[22] These holdings are directly applicable here; they were premised upon the language of Section 403.519 and the Siting Act.

Not surprisingly, entities which wanted to build power plants and sell to utilities resisted this interpretation of the Siting Act. They were unsuccessful in their attempts to have the Commission rethink this interpretation in a number of its decisions. Ultimately, they took their arguments to the Supreme Court of Florida and argued that the Commission was misinterpreting the Siting Act. The Court disagreed not once but twice, upholding the Commission's interpretation and holding that the Commission's prior application of the Siting Act had been an abrogation of the Commission's responsibility.[23] With the Court having so strongly affirmed the Commission's interpretation of the Siting Act, the law was well settled.

Despite this well settled law, in 1998 the Commission was presented with a dramatic departure from the Commission's rules, the language of Section 403.519 and the Siting Act, prior Commission decisions, and prior Supreme Court decisions. Duke Energy New Smyrna Beach sought a determination of need without identifying the purchasing utility, without a contract which would provide terms that would allow the statutory criteria to be applied, and without a co-applicant for over 94% of the proposed plant's capacity. Because the Petition was inconsistent with Section

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[22] In re: petition of Nassau Power Corporation to determine need for electrical power plant (Okeechobee County Cogeneration Facility), 92 FPSC 10:643, 645 (Order No. PSC-92-1210-FOF-EQ) (Ark and Nassau), *affirmed* Nassau Power Corporation v. Deason, 641 So. 2d 396 (Fla. 1994).

[23] Nassau Power Corporation v. Beard, 601 So. 2d 1175, 1178 (Fla. 1992); Nassau Power Corporation v. Deason, 641 So. 2d 396 (Fla. 1994).

403.519, Florida Statutes, the Siting Act, and the Commission's responsibility to avoid uneconomic duplication of facilities in overseeing the grid in Florida, FPL and other interveners argued that the Duke Energy New Smyrna Beach Petition failed to state a cause of action and should be dismissed. The Commission declined to dismiss the Petition, attempted to distinguish Duke New Smyrna from prior non-utility generators, attempted to distinguish the prior Nassau decisions of the Supreme Court, and in a 3-2 vote granted Duke New Smyrna's determination of need.[24]

The Commission's departure from prior precedent in the Duke New Smyrna case was appealed to the Supreme Court of Florida. In a 6-1 *per curiam* opinion, the Supreme Court of Florida reversed Duke New Smyrna's determination of need, reaffirmed the Court's (and the Commission's) earlier analysis of the Siting Act in the Nassau cases, and found that the Commission had exceeded its authority.[25] The Court stated, "A determination of need is presently available only to an applicant that has demonstrated that a utility or utilities serving retail customers has specific committed need for all of the electrical power to be generated at a proposed plant." Id. at S296. The Court went on to state that, "the present statutory scheme was intended to place the PSC's determination of need within the regulatory framework allowing Florida regulated utilities to propose new power plants to provide electrical service to their Florida customers at retail rates." Id.

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[24] In Re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., 99 FPSC 3:401, *rev'd sub nom.* Tampa Electric Co. v. Garcia, 25 Fla. L. Weekly S294 (Fla. April 20, 2000), *motions for rehearing pending.*

[25] Tampa Electric Company v. Garcia, 25 Fla. L. Weekly S294 (Fla. April 20, 2000), *motions for rehearing pending.*

The Court summarized its decision as follows:

> Accordingly, we find that the statutory scheme embodied in the Siting Act and FEECA was not intended to authorize the determination of need for a proposed power plant output that is not fully committed to use by Florida customers who purchase electrical power at retail rates. Rather, we find that the Legislature must enact express statutory criteria if it intends such authority for the PSC. Pursuant only to such legislative action will the PSC be authorized to consider the advent of the competitive market in wholesale power promoted by recent federal initiatives. Such statutory criteria are necessary if the Florida regulatory procedures are intended to cover this evolution in the electric power industry. [footnote omitted] The projected need of unspecified utilities throughout peninsular Florida is not among the authorized statutory criteria for determining whether to grant a determination of need pursuant to section 403.519, Florida Statutes.

Id. at S297.

After the Tampa Electric Company v. Garcia decision, there can be no dispute that the law in Florida regarding need determinations by non-utility generators is well settled. Granting a determination of need to a non-utility generator, such as Calpine, who does not have its capacity committed to a retail serving utility by contract exceeds the Commission's authority. An entity seeking to sell its power to a utility having the obligation to serve must focus upon the need of the purchasing utility. The need for power arises from this obligation to serve. It must be planned for by the utility. For the utility specific need determination criteria to have any meaning, an entity attempting to demonstrate need for its power plant must have a contract with a purchasing utility or utilities. This interpretation gives effect not only to the plain language of Section 403.519, Florida Statutes, but also reconciles the Commission's other grants of authority which it is expressly authorized to consider in a determination of need proceeding. The large body of decisional law interpreting the Siting Act and Section 403.519, Florida Statutes cannot accurately or legitimately

be distinguished as being applicable only to QFs. The language of the decisions on its face shows that the cases extend beyond QFs,[26] and as the Court observed in Tampa Electric Company v. Garcia, the logic of the decisions is applicable to any entity without a contract but seeking to sell to electric utilities. 25 Fla. L. Weekly at S296.

The Commission should dismiss the petition before it, for it does not have the statutory authority to grant the Petition. In dismissing the petition, the Commission should make it clear that it is not holding that an Independent Power Producer ("IPP") may not secure a determination of need under the Siting Act. The Commission needs to state that an IPP must make the same showing that any entity seeking a determination of need must make - it must satisfy the utility specific criteria of Section 403.519, Florida Statutes. For an entity desiring to sell to utilities, it must have a contract for its capacity so that the statutory criteria may be applied from the perspective of the purchasing utility. In so holding, the Commission will fulfill its statutory obligation under the Siting Act as contemplated not only by the Legislature, but also by Congress.[27]

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[26] The decision in Order No. 22341 is clearly not limited to QFs. There the Commission observed as part of its rationale for discontinuing the presumption of need that "an increasing share of the state's electrical needs will be supplied by either cogenerators **or independent power producers**." 89 FPSC 12:at 320 (Emphasis added.). It went on to make a broad statement of interpretation of the Siting Act that clearly transcends QFs: '[W]e 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. Similarly, the Ark and Nassau decision applies to more than QFs: "**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." Ark and Nassau, 92 FPSC 10:643, 645 (Emphasis added).

[27] Section 731 of the Energy Policy Act of 1992, the act creating EWGs, expressly preserves state and local authority over environmental protection and the siting of facilities. Of course, in Florida a determination of need is an essential part of environmental protection and the siting of facilities.

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CALPINE IS NOT A PROPER APPLICANT.

It is clear from the Petition that Calpine is not a proper applicant. **Calpine has no final purchased power contract as to any of the capacity of its proposed plant.**[28] The Commission and the Supreme Court of Florida have previously held that an entity such as Calpine, which has no obligation to serve and no contract for its capacity but which desires to sell to an electric utility, is not a proper applicant under the Siting Act. In re: Petition of Nassau Power Corporation to determine need for electrical power plant (Okeechobee County Cogeneration Facility), 92 FPSC 10:643, 645 (Order No. PSC-92-1210-FOF-EQ) (Ark and Nassau), *affirmed* Nassau Power Corporation v. Deason, 641 So. 2d 396 (Fla. 1994). The logic of this analysis was recently relied upon again in Tampa Electric Company v. Garcia when the Court concluded that the Commission lacked authority to grant a determination of need to a non utility generator which was not a Florida retail utility regulated by the PSC and which did not have all its capacity committed by contract. 25 Fla. L. Weekly S294. Consequently, the Petition should be dismissed.

A. The Commission Has Determined That An Entity Such As Calpine Without A Contract But Desiring To Sell To A Utility Is Not A Proper Applicant Under The Siting Act.

In 1992 the Commission was presented with two cases with very similar 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,

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[28] Calpine has no contracts as to its proposed plant's output. Indeed, Calpine is not even engaged in active negotiations for such contracts. "Calpine is diligently pursuing discussions (which Calpine believes will lead to active negotiations) towards contractual arrangements committing the output of the Osprey Project to serve the needs of Florida retail electric customers." Petition at 4.

combined cycle unit. It was assigned Docket No. 920761-EQ. Also in July 1992 Nassau Power Corporation filed a determination of need petition with the Commission for a qualifying facility, which was assigned Docket No. 920769-EQ.

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 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. (emphasis added).

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 proceedings 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. (emphasis added).

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 was the utility's need for power to meet its obligation to serve which was 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. (emphasis added). 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 micro management 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 need determination 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 need determination 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 need determination 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 Calpine and other 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. The Petition should be dismissed.

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) (emphasis added). The Court characterized the Commission's decision 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 (emphasis added). 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 need determination petition. There is a Supreme Court of Florida decision right on point as to whether a "non-utility generator" (a QF or an IPP) 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 (Fla. 1994). Moreover, there is a more recent Supreme Court decision affirming the Nassau cases' analysis of the Siting Act. Tampa Electric Company v. Garcia, 25 Fla. L. Weekly S294 (Fla. April 20, 2000). The Petition should be dismissed.

C. The Ark and Nassau , Nassau Power Corp. v. Deason, And Tampa Electric Company v. Garcia, Decisions Are Not Sufficiently Distinguishable To Warrant Abandonment Of The Proper Construction Of The Siting Act.

In response the petitioner clearly will attempt to distinguish these three decisions from its Petition. While there are some factual distinctions, none warrant departure from the Court's and the Commission's prior construction of the Siting Act.

1. "Public Utility" status under the Federal Power Act does not make Calpine a proper applicant under the Siting Act.

One distinction the petitioner may urge is that Calpine is a public utility regulated by the FERC and , therefore, is a "regulated electric company" within the meaning of the Siting Act. This argument has been made and rejected in all three prior decisions that require dismissal.

Nassau, a qualifying facility ("QF"), and Ark, an independent power producer ("IPP"), were "public utilities" under the Federal Power Act and subject to the jurisdiction of the FERC.[29] Both Nassau and Ark asserted to the Commission that their QF and IPP status made them applicants under the Siting Act. The Commission's unequivocal response was:

> 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,

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[29] Section 201(e) of the Federal Power Act defines a "public utility" as "any person who owns or operates facilities subject to the jurisdiction of the Commission under this part...." Section 201(b)(1) of the Federal Power Act gives the FERC jurisdiction "over all facilities for such transmission [transmission of electric energy in interstate commerce] or sale of electric energy [sale of electric energy at wholesale in interstate commerce]...." Both Ark as an independent power producer and Nassau as a QF proposing to resell power to an electric utility would have owned or operated facilities used for the sale of electric energy at wholesale; consequently, they, like Calpine would have been public utilities subject to the regulation of the FERC. As a QF Nassau would have been subject to less regulation than the independent power producer Ark, because pursuant to Section 210(e) of the Public Utility Regulatory Policy Act, the FERC has adopted a regulation which exempts QFs from some but not all FERC regulation. See, 18 CFR § 292.601(c).

> regulated electric company, electric cooperative or joint operating agency.

92 FPSC 10: at 645. Merely being subject to FERC regulation did not make Ark or Nassau "regulated electric companies" or "applicants" under the Siting Act. The Supreme Court of Florida found that this construction of "applicant" under section 403.519 was "consistent with the plain language of the pertinent provisions of the Act and this Court's decision in *Nassau Power Corp. v. Beard."* Nassau Power Corp. v. Deason, 641 So.2d at 398. In addition, Duke New Smyrna and the Commission made the same argument to the Supreme Court in Tampa Electric Company v. Garcia. There the Court rejected the argument there as well, quoting the language from Nassau Power Corp. v. Deason wherein it noted that the Commission had determined that non-utility generators were not included in the definition of "electric utility" and, therefore, were not proper applicants. 25 Fla. L. Weekly at S296.

2. Calpine is not an "electric utility" under Section 366.02(2).

In its Petition Calpine alleges that it is an "electric utility" under Section 366.02(2), Florida Statutes. This is an erroneous conclusion of law.

The plain language of Section 366.02(2) shows that it does not apply to Calpine. Calpine does not own, maintain or operate an electric generation, transmission or distribution system.[30] Moreover, one generating facility is not properly characterized as a "system."

The petitioner's construction of the term "electric utility" is inconsistent with the Commission's prior construction and interpretation. For over twenty years Florida has had

[30] It may own a generating facility in the future, but presently neither owns nor maintains such a facility.

cogenerators that own generating facilities, and for almost ten years Florida has had independent power producers that own generating facilities. Not once in that time period has the Commission asserted jurisdiction over these entities as "electric utilities."[31] In short, there is no history of the Commission's treating entities like Calpine as "electric utilities" under Chapter 366. This long standing statutory construction should not be ignored simply to shoehorn Calpine into the statute.

Also, even if Calpine were an "electric utility" under Section 366.02(2), that would not convey "applicant" status on it under the Siting Act. Section 403.503(12), Florida Statutes, not Section 366.02(2), defines "electric utility" under the Siting Act, and Section 366.82(1) defines "utility" for purposes of Section 403.519. Calpine does not fit either definition, so it is of no import whether or not it might fit within a strained construction of the term "electric utility" under Section 366.02(2).[32]

Finally, it must be noted that both Duke New Smyrna and the Commission made the same argument in Tampa Electric v. Garcia: that Duke New Smyrna was an "electric utility" within the meaning of 366.02(2), Florida Statutes, and, therefore, it was a "regulated electric company" within

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[31] None of these entities owning power plants have been subjected to any aspect of the Commission's jurisdiction over "electric utilities." They have not been required to submit ten year site plans; they have not had to file reports to assure the development of adequate and reliable energy grids (Section 366.04(5)); the Commission has not prescribed a uniform system of accounts for these entities (Section 366.04(2)(a)); the Commission has not prescribed a rate structure for these entities (Section 366.04(2)(b)); the Commission has not required these entities to conserve energy (Section 366.04(2)(c)); the Commission has not resolved territorial disputes or approved territorial agreements regarding these entities (Section 366.04(2)(d),(e)); the Commission has not promulgated safety standards for these entities (Section 366.04(b)).

[32] It is worth noting that Section 403.503(12) defines "electric utility" entirely separate from the definition in Section 366.02(2), Florida Statutes. Conspicuously, it has no cross-reference to Section 366.02(2).

the meaning of the Siting Act. The Supreme Court rejected this argument and chose, instead, to focus upon the definition of utility that is found in FEECA: 'The term "utility" was expressly defined for purposes of FEECA, including section 403.519, as "any person or entity of whatever form which provides electricity or natural gas at retail to the public."' 25 Fla. L. Weekly at S296.

The suggestion that Calpine is an "electric utility" under section 366.02(2), Florida Statutes, is an erroneous and irrelevant legal conclusion that is inconsistent with the plain language of the statute, the Commission's long standing application and implementation of the statute, and prior Supreme Court's decisions. This erroneous legal assertion should not save Calpine from dismissal.

3. The Ark and Nassau decision applies to Calpine.

Calpine may argue that the Commission intended its Ark and Nassau decision to be construed narrowly and that it should not apply to Calpine. Such an argument would require Calpine to take a single sentence from that decision and read it entirely out of context. In context, it is clear that the Commission intended its decision to apply to a case such as the present one where a non-utility generator attempts to seek a determination of need without a contract for its plant's output; the Commission merely reserved for future consideration whether an entity which was a *self-generator* (serving its own need) may be a proper applicant without a utility co-applicant:

> 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 its own need to serve) may be an applicant for a needdetermination without a coapplicant.** To

> date this circumstance has not been presented to us and we do not believe the question should be decided in the abstract.

92 FPSC 10 at 647 (emphasis added). Any attempt by Calpine to argue that the Ark and Nassau decision is inapplicable because of the observation that it is to be narrowly construed would be misleading.

4. The Florida Supreme Court's holding in Nassau Power Corp. v. Deason is not dicta, and it controls the Commission's review of the Petition.

Another argument that Calpine may offer is that the language upon which FPL relies in Nassau Power Corp. v. Deason is dicta and need not be followed by the Commission.[33] This argument is consistent with neither accepted understandings of what is dicta nor a reasonable construction of Nassau Power Corp. v. Deason. The Supreme Court of the United States, in a Florida case, has distinguished between dicta and the parts of the decisions that have precedential value:

> When an opinion issues for the Court, it is not only the result but also the portions of the opinion necessary to the result by which we are bound. Cf. *Burnham v. Superior Court of Cal., County of Marin,* 495 U.S. 604, 618, 110 S.Ct. 2105, 2112, 109 L.Ed.2d 631 (1990) (exclusive basis of a judgement is not dicta) (plurality); *Allegheny County v. American Civil Liberties Unition, Greater Pittsburgh*

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[33] Even if the language could be characterized as dicta, it should be given special consideration. In Horton v. Unigard Ins. Co., , 355 So. 2d 154 (Fla. 4th DCA 1978), the court stated:

> Appellant says the quoted statement...is obiter dictum and we concede that it is. However, it is obiter dictum from the highest court in this State and that is no ordinary dictum! The rule seems to be that dictum in an opinion by the Supreme Court of Florida, while not binding as precedent, is persuasive because of its source.

Id. at 155 (citations omitted). See also Aldret v. State, 592 So. 2d 264, 266 (Fla. 1st DCA 1991), reversed on other grounds, 606 So. 2d 1156 (Fla. 1992) ("it is well-established that dicta of the Florida Supreme Court, in the absence of a contrary decision by that court, should be accorded persuasive weight").

> *Chapter*, 492 U.S. 573, 668, 109 S.Ct. 3806, 3141, 106 L.Ed.2d 472 (1989) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law." (KENNEDY, J., concurring and dissenting)....

Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1129, (1996). Looking at the Ark and Nassau and Nassau Power Corp. v. Deason cases in light of this distinction, it is clear that the language relied upon by FPL is not dicta but rather explicates the law relied upon by the Commission and Court in reaching their decisions.

In Nassau Power Corp. v. Deason, the Supreme Court of Florida explained that the only order before it on review was the order dismissing Nassau's petition to determine need. 641 So.2d at 398. The Court characterized the dismissal below and the matter at issue 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. Nassau appealed the dismissal.

Id. The Court extensively recounted the Commission's reasoning in the decision below and stated its holding:

> 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.*

641 So.2d at 398. This language is essential to the decision in this case; it is "necessary to the result" and an "explication of the governing rules of law."

Finally, it should also be noted that the language from Nassau Power Corp. v. Deason upon which FPL relies has been cited as precedent in Tampa Electric Company v. Garcia. 25 Fla. L. Weekly at S296. If the language were dicta, would the Supreme Court have relied upon it as

precedent? Certainly not! Any suggestion that this language is dicta would be simply wishful thinking.

5. The condition sought by Calpine does not make Calpine a proper applicant.

In its Petition Calpine seeks to evade the reach of the Court's recent decision in Tampa Electric Company v. Garcia by erroneously arguing that by generally committing its capacity to unspecified Florida utilities serving retail customers it is no longer a merchant plant[34] and by asking the Commission to impose a condition on its determination of need. Calpine asks the Commission to condition its determination of need "upon Calpine's demonstrating that the project's output is committed to Florida utilities with the responsibility for serving retail utilities." Petition at 52. Calpine never explains in its Petition how such a condition would allow Calpine to become a proper applicant. In fact, there is no basis upon which to conclude that such a condition would make Calpine a proper applicant, and the processing of such an application would frustrate the rational administration of Section 403.519.

Calpine has not and cannot factually distinguish itself from Duke New Smyrna and the host of other merchant plant applicants. Duke New Smyrna was not an appropriate applicant because it had no need of its own for power and because it had not contractually committed to meet the need of a specific Florida utility (other than the modest commitment of less than 6% of its output to the Utilities Commission of New Smyrna Beach). Duke, like every other merchant plant developer, represented that all or virtually all of its output would be provided to Florida retail utilities. (Indeed,

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[34] As the Commission defined a merchant plant in the Duke New Smyrna case, "a plant with no rate base and no captive customers," Calpine would still be a merchant plant even if it generally committed its output to unspecified Florida utilities. It would not be in rate base and it would have no captive customers.

OGC's primary policy witness went so far in deposition as to state that OGC had committed its power to peninsular Florida utilities.) Duke New Smyrna's and the other merchants' sales were to be made in the future based upon contracts yet to be negotiated, and those contracts could vary as to length and whether or not they were for firm capacity and energy. Duke's witness even acknowledged at hearing that Duke would likely enter into longer term firm contracts. That is precisely Calpine's situation. It has no contract or any other legally enforceable obligation to sell its output to a specific Florida utility. It hopes to enter into such contracts in the future. By its own admission, Calpine is not even in active negotiations with any Florida utility for such a contract; instead, it is "diligently pursuing discussions (which Calpine believes will lead to active negotiations) toward contractual arrangements committing the output of the Osprey Project to serve the needs of Florida retail electric customers." *Petition* at 4.

Apparently, Calpine would have the Commission read Tampa Electric Company v. Garcia in isolation, without consideration of the Nassau decisions that the Court relied upon in reaching its decision in Tampa Electric. This would be inappropriate. Calpine reads certain language in Tampa Electric as if the Court's prior Nassau decisions did not exist and as if the Commission had not previously dismissed an IPP's need petition for lack of a contract with a retail serving utility in Ark and Nassau.

Calpine appears to be urging upon the Commission the wholly untenable proposition, inconsistent with the Nassau decisions and Ark and Nassau, that its capacity does not have to be committed by contract to a specific utility for the Commission to determine need as long as its capacity is generally committed to Florida utilities by a condition in a need order. That is certainly not the holding of the Court in the Tampa Electric case, and it is diametrically opposed to the

Commission's determination in Ark and Nassau that was affirmed by the Supreme Court in Nassau Power Corp. v. Deason.

There are two sentences in the Tampa Electric case which might be the basis for Calpine's spurious assertion. However, if either sentence is read in conjunction with the remainder of the decision and prior Supreme Court and Commission decisions, it is clear that what Calpine needs to proceed is not a condition on its need determination but a contract or contracts that would allow the Commission to exercise its responsibilities under section 403.519. We will address each sentence in turn.

In the Tampa Electric decision the Court stated: "A determination of need is presently available only to an applicant that **has demonstrated** that a utility or utilities serving retail customers has **specific committed need** for all of the electrical power to be generated at a proposed plant." 25 Fla. L. Weekly at S296 (emphasis added). The Court also observed, "We find that the statutory scheme embodied in the Siting Act and FEECA was not intended to authorize the determination of need for a proposed power plant output that is not fully committed to use by Florida customers who purchase electrical power at retail rates." 25 Fla. L. Weekly at S297. Perhaps Calpine reads one or both of these sentences as allowing Calpine to proceed with a determination of need as long as it promises to, after the fact, show that it has contracts committing its capacity to specific utilities. Such a construction of these isolated sentences would be improper for a number of reasons. We will address three.

First, it ignores that the Court stated that it reached its conclusion "based upon our Nassau analysis of the Siting Act." 25 Fla. L. Weekly at S296. In the Nassau cases the Court affirmed the Commission's determination that need determinations were utility specific (Nassau Power Corp. v.

Beard) and that it is proper for the Commission to dismiss a need determination application by a non-utility generator if it does not have its own need or a contract with a utility that has a need (Nassau Power Corp. v. Deason). The decision in Tampa Electric cannot be read in isolation from and without regard to the prior Nassau cases relied upon by the Court. When read in conjunction with those decisions, it is clear that the Tampa Electric case requires a contractual commitment by the non-utility generator to specific utilities, not a promise to ultimately enter into some contract.

Second, this interpretation of the language is inconsistent with the language used by the Court. Consider each sentence in context.

In the first sentence, the Court said a determination of need is available only to an applicant "that has demonstrated" that retail utilities have "specific committed need" for all the plant's output. Calpine seeks to change the verb tense and ignore the specificity required. Instead of first demonstrating need by identifying the utility and producing a contract before the affirmative determination by the Commission, Calpine proposes to produce a contract after an affirmative determination of need. More significantly, Calpine proposes not to make a utility specific showing of need but a general peninsular Florida showing of need. This is clearly in conflict with the language in this sentence that requires the applicant to demonstrate that a retail utility has specific committed need. It is also in conflict with the Court's later observation that, "the projected need of unspecified utilities throughout peninsular Florida is not among the authorized statutory criteria for determining whether to grant a determination of need...." 25 Fla. L. Weekly at S297.

In the second sentence Calpine may be relying upon, Calpine apparently believes that capacity can be fully committed by act of the Commission. However, it is clear from the very next sentence in the opinion that if the Commission is to grant an affirmative determination of need to

an entity like Duke New Smyrna or Calpine, the Legislature, not the Commission, must act. The Court states that it will take a legislative enactment, not an action by the Commission, for entities like Duke New Smyrna (and Calpine) to seek a determination of need. 25 Fla. L. Weekly at S297. The Court has earlier stated that the Commission exceeded its statutory authority, 25 Fla. L. Weekly at S296, and now it is stating that for circumstances to change the Legislature must act, 25 Fla. L. Weekly at S297. Calpine would have you ignore this clear instruction and have the Commission, not the Legislature, act to allow Calpine to proceed by imposing an unprecedented condition. Clearly, the Court did not believe the Commission could act on its own initiative to allow this type of need determination to proceed. Calpine's suggestion is completely at odds with the Court's decision.

Third, Calpine's construction of this language would completely frustrate the meaningful determination of utility specific need. Calpine proposes that the determination of need be made on a peninsular Florida basis rather than a utility specific basis, with Calpine only subsequently showing it has secured a utility specific contract. This is at odds with the Court's prior holding in Nassau Power Corp. v. Beard where it affirmed the Commission's determination that the criteria of section 403.519 are utility specific. This is also at odds with the Court's observation in Tampa Electric that, "the projected need of unspecified utilities throughout peninsular Florida is not among the authorized statutory criteria for determining whether to grant a determination of need...." 25 Fla. L. Weekly at S297.

D. Calpine Is Not a Proper Applicant and its Petition Should Be Dismissed.

Both the Commission and the Court have spoken. The law is well settled. An entity such as Calpine, which has no obligation to serve and no need of its own, must look to the need of a purchasing utility with which it must have a contract to be a proper applicant under the Siting Act. Calpine has no obligation to serve, no need, no contract, and not even any active negotiations for its output; it is not a proper applicant, and its petition should be dismissed.

II
REGARDLESS OF WHETHER CALPINE IS A PROPER APPLICANT, THE PETITION SHOULD BE DISMISSED BECAUSE IT FAILS TO MEET THE UTILITY SPECIFIC CRITERIA OF SECTION 403.519.

Conspicuously absent from the Petition is any allegation that the proposed plant's total capacity is needed by a specific utility or utilities. No attempt is even made to identify the purchasing utility for the proposed plant. Because these allegations are missing, the Petition fails to state a cause of action and should be dismissed.

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

Section 403.519, Florida Statutes sets forth four criteria which an applicant must meet to secure a determination of need. It is clear from the plain 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 (1999). 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 an entity such as Calpine which proposes to sell its proposed plant's output to utilities, unless the utility to which it will sell has been identified and there is a contract under which costs and the impact on need can be determined. An entity such as Calpine 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 addresses the impact of its power on those systems.[35] An entity such as Calpine 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.[36] An entity such as Calpine 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.[37]

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[35] 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).

[36] 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).

[37] 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.

Finally, an entity such as Calpine 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.

B. The Commission Has Held That The Criteria Of Section 403.519 Are Utility Specific.

In Order No. 22341 the Commission clearly established three principles. First, the need determination criteria of Section 403.519 and the Siting Act are "utility specific":

> 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.

Second, "need" for the purposes of the Siting Act is the need of the purchasing electric utility:

> [W]e 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. Cogeneration is another alternative to that purchasing utility's construction of capacity or purchase of wholesale power from another source.

Third, the Commission would not presume need or cost-effectiveness; capacity has to be evaluated from the purchasing utility's perspective: "a finding must be made that the proposed capacity is the most cost-effective means of meeting purchasing utility X's capacity needs in lieu of other demand and supply side alternatives." In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for peninsular Florida's Electric Utilities, 89 FPSC 12:294, 318-20 (FPSC 1989). Order No. 24672 reaffirmed this interpretation of Section 403.519, and other Commission decisions extended this interpretation..[38]

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[38] It was the need to give these utility specific criteria applicability (1) which led the Commission to determine that a utility was an indispensable party to a need determination by a QF

C. The Supreme Court Has Held That The Criteria Of Section 403.519 Are Utility Specific.

Nassau appealed the Commission's interpretation of the Siting Act in Order Nos. 22341 and 24672 to the Supreme Court of Florida. Nassau argued that the Commission was prohibited from determining need on a utility specific basis and was required to determine need on a statewide basis. The Court found that the Commission presuming need would be an abrogation of its statutory responsibility, and it expressly rejected the argument that the need criteria were not utility specific:

> **We reject Nassau's alternative argument that the Siting Act does not require the PSC to determine need on a utility-specific basis.** 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 the need for the purposes of the Siting Act is the need of the entity ultimately consuming the power.
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> ***
>
> 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 future.**

Nassau Power Corp. v. Beard, 601 So.2d 1175, 1178 n. 9 (Fla. 1992) (emphasis added).

Any lingering doubt as to whether the Court believes that the criteria in Section 403.519 are utility specific or whether they can be met by examining a peninsular Florida analysis was completely removed in Tampa Electric Company v. Garcia. There, the Court said, "[t]he projected

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selling power to a utility (Martin; Ark and Nassau), (2) which led the Commission to state that when a need determination involved a plant from which it was proposed to make sales to a utility, need should be examined from the perspective of the purchasing utility (Order Nos. 22341, 23792), and (3) which led the Commission to dismiss the applications of Ark and Nassau because they did not have a contract with a specific utility (Ark and Nassau).

need of unspecified utilities throughout peninsular Florida is not among the authorized statutory criteria for determining whether to grant a determination of need pursuant to section 403.519, Florida Statutes." 25 Fla. L. Weekly at S297.

D. The Commission's And The Supreme Court's Prior Determinations That The Criteria Of Section 403.519 Are Utility Specific Cannot Be Distinguished.

It cannot be reasonably argued that the decisions in Order Nos. 22341, 24672 and in Nassau Power Corp. v. Beard involved only cogenerators. This is a distinction without a difference. Order 22341 and Nassau Power Corp. v. Beard provide constructions of the Siting Act that apply generally; they are not limited to cogenerators but rather apply to all wholesale providers of power. The operative language in Order No. 22341 states that it applies to a "proposed electric power plant project," not merely cogenerators.[39] Similarly, in the footnote in Nassau Power Corp. v. Beard where the Supreme Court of Florida expressly rejected Nassau's argument that the need determination criteria of Section 403.519 did not require the Commission to make a utility specific determination of need, there is not a single reference to cogeneration. *See,* quote at p 32 *supra.* The Court's rationale and language is equally applicable to any wholesale provider of power. If there was any continued doubt as to whether the Nassau decisions are limited to cogenerators, it was dispelled in Tampa Electric Company v. Garcia when the Court held that the analysis of the Siting Act in those cases was applicable to Duke New Smyrna. Tampa Electric Company v. Garcia, 25 Fla. L. Weekly S294, S296 (Fla. April 20, 2000).

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[39] Immediately after finding the criteria of Section 403.519 to be "utility and unit specific," the Commission stated that the information being adopted was "a means of testing the reasonableness of a proposed electric power plant project" not just a cogeneration facility. 89 FPSC 12 at 319.

Nassau Power Corp. v. Beard and Order Nos. 22341 and 24672 are not distinguishable because they involved entities that were attempting to force the utility to purchase power and Calpine is not in a similar position. Again, this is a distinction without a difference. Not once does the consideration that a utility was obligated to purchase power from a QF enter into either the Commission's or the Court's reasoning in any of these cases. More importantly, this distinction actually works against Calpine. At least in the prior Nassau cases the Commission and the Court knew the purchasing utility, yet that was not enough to save those applications. Here no purchasing utility is identified; it is far more difficult to apply utility specific criteria here than in the Nassau cases.

Finally, the language in Nassau Power Corp. v. Beard regarding utility specific statutory criteria is not dicta. The points made above about dicta apply likewise here. Moreover, it is clear the Supreme Court of Florida did not consider the language upon which FPL relies in Nassau Power Corp. v. Beard to be dicta. The Court stated in Nassau Power Corp. v. Deason:

> 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.

641 So.2d at 399. If the quoted language had been mere dicta, the Supreme Court would not have cited it as precedent. The Commission must reject any effort by Calpine to have it treat as dicta what the Supreme Court views as precedent.

E. Calpine's Petition Disregards The Utility Specific Nature Of The Criteria in Section 403.519.

Despite the clear import of the language of Section 403.519, the Commission's determinations that the criteria of section 403.519 are utility specific, and the holdings in Nassau Power Corporation v. Beard and Tampa Electric Company v. Garcia, Calpine proposes to proceed to demonstrate need on a peninsular Florida basis without having a contract that identifies the purchasing utility, the price at which the utility would purchase, and the terms and conditions that would affect the reliability and availability of the power purchased. This would totally frustrate the utility specific determination of need required under section 403.519. Without knowing the purchasing utility, the Commission could not determine whether that utility had "specific committed need for all the electrical power to be generated at a proposed plant." Without knowing the purchasing utility, the Commission could not determine whether that utility needed the power for system reliability and integrity. Without knowing the purchasing utility and the price to be paid, the Commission could not determine whether the purchasing utility had a need for adequate electricity at a reasonable cost. Without knowing the purchasing utility and the price to be paid, the Commission could not determine whether the purchase was the most cost-effective alternative for the purchasing utility and its customers. Without knowing the purchasing utility, the Commission could not assess whether there were conservation alternatives available to the purchasing utility that might mitigate the need for all or part of the proposed plant. Simply stated, Calpine offers no information necessary to determine the utility specific statutory criteria of section 403.519.

Calpine further frustrates the utility specific determination of need in this case by suggesting as a condition not that the Commission reconsider its peninsular Florida consideration of the

statutory need criteria once there is a contract, but only that Calpine ultimately show it has negotiated a contract. It does not matter to Calpine how much the terms of the contract ultimately differ from the assumptions used in the Commission's general assessment of need. In short, Calpine's approach would totally frustrate the utility specific administration of Section 403.519, despite the holding in Nassau Power Corp. v. Beard.

Even if Calpine were a proper applicant under the Siting Act, the Petition fails to state a cause of a action because the Petition does not allege Calpine meets the utility specific need determination criteria. Calpine intends to sell to utilities. It has no obligation to provide service or a corresponding need for its power. Calpine has no contracts for the sale of its power, so the purchasing utility cannot be identified and it cannot be determined whether Calpine's sale of power will allow the purchasing utility to meet the need determination criteria. Since the Petition does not allow the Commission to determine whether the utility specific need determination are met, the Petition must be dismissed.

III
THE PETITION SHOULD BE DISMISSED BECAUSE IT ASKS THE COMMISSION TO PRESUME COST EFFECTIVENESS.

In the AES need determination order, the Commission acknowledged that in a number of prior cases it had used findings in the Annual Planning Hearings as surrogates for findings in need determination cases. In re: Petition of AES Cedar Bay, Inc. and Seminole Kraft Corporation for determination of need for the Cedar Bay Cogeneration Project, 89 FPSC 1:369, 370 (Order No. 20671). The Commission stated that it would reconsider this practice in its then upcoming Annual Planning Hearing. It did so.

In Order No. 22341 the Commission overruled "those previous decisions in which we held that in qualifying facility (QF) need determination cases as long as the negotiated contract price was less than the standard offer and fell within the current MW subscription limit both the need for and the cost-effectiveness of the QF power has already been proven." In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities, 89 FPSC 12:294, 319 (Order No. 22341). Simply stated, the Commission stated that it would stop presuming cost-effectiveness. Instead of presuming cost-effectiveness, capacity was to be evaluated from the purchasing utility's perspective: "a finding must be made that the proposed capacity is the most cost-effective means of meeting purchasing utility X's capacity needs in lieu of other demand and supply side alternatives." Id., at 320 (FPSC 1989).

The Commission's policy of no longer presuming the need criteria, including cost-effectiveness, were met was challenged by Nassau Power Corporation in Nassau Power Corp. v. Beard. There, the Court found that the prior practice of presuming need, if continued, would be an abrogation of the Commission's statutory responsibilities under the Siting Act. 601 So.2d at 1178.

In its Petition, the only utility specific allegation that Calpine makes is that purchases by purchasing utilities, whoever they turn out to be, will be the most cost-effective alternative to the purchasing utility or they would not make the purchase. Petition at 34. This is precisely the type of presumption of cost-effectiveness that the Commission abandoned in Order No. 22341 and which was affirmed by the Supreme Court in Nassau Power Corp. v. Beard.

The Commission cannot presume, as it is being asked by Calpine to presume, that a purchase from Calpine will be cost-effective to whatever utility ultimately makes the purchase. Instead, Calpine has to show with an analysis that a specific utility's or utilities' purchases are the most cost-

effective alternative. This is necessarily a comparative analysis involving other supply alternatives. Calpine's attempt to have the Commission embrace a presumption rather than offer a utility specific analysis is a failure to allege that one of the utility specific criteria are met. It constitutes a failure to state a cause of action and is grounds for dismissal.

IV
THE PETITION SHOULD BE DISMISSED FOR FAILURE TO MEET THE MANDATORY PLEADING REQUIREMENTS OF FLORIDA ADMINISTRATIVE CODE RULE 25-22.081.

In Florida Administrative Code Rule 25-22.081, the Commission has prescribed mandatory pleading requirements for a petition to commence a need determination. The rule's language clearly states that the information set forth in the rule is mandatory and that this mandatory information is necessary for the Commission to consider the statutory need determination criteria prescribed by Section 403.519:

> The petition, to allow the Commission to take into account the need for electric system reliability and integrity, the need for adequate reasonable cost electricity, and the need to determine whether the proposed plant is the most cost effective alternative available, **shall** contain the following information....

The Petition fails to meet several of these mandatory pleading requirements. The following paragraphs set forth the mandatory requirements which the Petition fails to satisfy, the reason the information is needed by the Commission, and why the Petition's failure to meet the requirement should result in dismissal.

A. There Is No Description of the Utility Or Utilities Primarily Affected.

Florida Administrative Code Rule 25-22.081(1) requires that a need determination petition include, "[a] general description of the utility or utilities primarily affected, including the load and

electrical characteristics, generating capability, and interconnections." This information is necessary for the Commission to address whether the proposed power plants meet both "the need for electric system reliability and integrity" and "the need for adequate electricity at a reasonable cost" criteria found in Section 403.519, Florida Statutes.

The Petition fails to provide this information. Calpine proposes to build a 527 MW unit, and Calpine acknowledges that not only does it not have any contracts for any of the capacity, but also it is not even in active negotiations with any specific utility. Petition at 4. Calpine states that it will commit the capacity of the unit to Florida regulated utilities, but it does not mention the specific utilities to which it is committing its capacity. (The Petition does identify some utilities Calpine thinks it may be able to initiate discussions with, but the output of its unit is not committed to those or any other specific Florida utilities.)

In its Petition, Calpine acknowledges that the utilities ultimately purchasing from Calpine would be primarily affected utilities within the meaning of the Commission's rules and orders. Petition at 11, ftn 5. The Petition makes no attempt to provide for Calpine's purchasing utilities the information required by Rule 25-22.081(1). The purchasing utility are not identified; their specific load and electrical characteristics, their generating capability and their interconnections are not discussed. Consequently, their need for the proposed power plant cannot be assessed by the Commission. The failure of the Petition to provide this mandatory information will completely frustrate the Commission's ability to apply the utility specific need determination criteria. This serious omission is grounds for dismissal.

Instead of providing the information that is required by Rule 25-22.081(1), Calpine cynically maintains that it is the primarily affected utility within the meaning of the Rule. As previously

discussed, Calpine is not an "electric utility" within the meaning of the Siting Act; it is not a "utility" within the meaning of FEECA, which includes section 403.519, the statute being implemented by Rule 25-22.081, F.A.C. In addition, even though it is irrelevant to this argument, Calpine is not even an "electric utility" within the meaning of Section 366.02(2), Florida Statutes.

Calpine will likely argue in response that it has satisfied Florida Administrative Code Rule 25-22.081(1) by including a discussion of the various factors mentioned in the rule from the perspective of "peninsular Florida." There are at least two fatal problems with such an argument. First, "peninsular Florida" is nothing more than a planning construct. It is not "the utility or utilities primarily affected;"[40] it is not even a legal entity. The rule in question and the statutory criteria the rule implements are utility specific.[41] A discussion of "peninsular Florida" is not utility specific. It fails to satisfy the rule. Second, even if a discussion of "peninsular Florida" could satisfy the rule, the description provided in the Petition is incomplete and fails to satisfy the rule. There is no description of "peninsular Florida's" electrical characteristics or its interconnections, and the only attempt at describing peninsular Florida's load and generating capability is to quantify the total projected amounts of the two items over a ten year horizon. The Petitioner simply fail to meet this mandatory pleading requirement.

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[40] "Peninsular Florida" is a planning construct representing the cumulative needs of 59 utilities in the geographic area called peninsular Florida. Not all nor even most of these utilities will be primarily affected by the proposed merchant capacity. The petitioners cannot reasonably maintain that their discussion of this planning construct satisfies the utility specific requirement of the rule.

[41] The need determination criteria are "utility and unit specific." In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities, 89 FPSC 12:294, 319 (Order No. 22341); Nassau Power Corporation v. Beard, 601 So.2d 1175, 1178 n. 9 (Fla. 1992).

B. The Petition Omits A Statement Of The Specific Conditions, Contingencies Or Other Factors Which Indicate A Need For The Proposed Electrical Power Plant.

Florida Administrative Code Rule 25-22.081(3) has another detailed pleading requirement for a need determination petition. Because of the specificity required by the rule, the entire section is set forth below:

> The petition ... shall contain ...
> (3) A statement of the specific conditions, contingencies or other factors which indicate a need for the proposed electrical power plant including the general time within which the generating units will be needed. Documentation shall include historical and forecasted summer and winter peaks, the number of customers, net energy for load, and load factors with a discussion of the more critical operating conditions. Load forecasts shall identify the model or models on which they were based and shall include sufficient detail to permit analysis of the model or models. If a determination is sought on some basis in addition to or in lieu of capacity needs, such as oil backout, then detailed analysis and supporting documentation of the costs and benefits is required.

This information is critical to the Commission's ability to make the utility specific assessments associated with the mandatory, statutory need criteria regarding need for system reliability and integrity and need for adequate electricity at a reasonable cost. Failure to provide this essential information frustrates the Commission's ability to make its required assessment and constitutes grounds for dismissal.

The Petition fails to provide this information. No attempt is made to identify this detailed information for the purchasing utility or utilities, because Calpine does not know if or to whom it may sell the remainder of its capacity and energy. So, Calpine, because it does not have a contract for the sale of the plant's output, cannot identify the specific conditions, contingencies and factors which indicate a need for its plant. It cannot document the purchasing utility's peaks loads, net

energy for load, load factors and provide a discussion of the more critical operating conditions. It cannot identify the models on which the load forecasts are based.

In response Calpine may argue that its discussion of the load forecast for peninsular Florida satisfies this requirement. It does not. "Peninsular Florida" is not a legal entity with a need for a power plant. The obligation to meet the needs of the utilities within peninsular Florida rests solely with those utilities. It is the utilities that have the obligation to serve and the responsibility to plan. It is the individual utilities which will make the build or buy decisions necessary to meet needs.

Even if a discussion of peninsular Florida's need for power could satisfy the requirements of Florida Administrative Code Rule 25-22.081(3), the discussion in the Petition and its Exhibit falls well short of the rule's requirements. First, there is no attempt to address "the specific conditions, contingencies or other factors which indicate a need for the proposed power plant." Instead, Calpine invokes some very broad, non-specific factors: "Peninsular Florida's need for additional efficient, cost-effective generating capacity for system reliability and integrity, the general public need for the project's economic benefits with respect to the suppression of wholesale (and thus retail) electricity prices, and the need for the project's environmental benefits." Petition at 20.

Second, Rule 25-22.081(3) requires that when an applicant is seeking a determination , as is Calpine, "on some basis in addition to or in lieu of capacity needs, such as oil backout, then detailed analysis and supporting documentation of the costs and benefits is required." No such detailed analysis and supporting documentation is provided. Instead, Calpine briefly mentions the model it used (but did not provide) to perform its analysis and offers a very few sheets of summary model runs. This is not the detailed analysis and supporting documentation that the Commission needs to assess the statutory criteria.

Third, **Tables 7 and 8 provided in the Petition Exhibit clearly demonstrate that there is no need for the proposed power plant**. Petition Exhibit at 57, 58. Instead of providing a discussion of "the specific conditions, contingencies or other factors which indicate a need for the proposed plant" the Petition gives an incomplete summary of the results of an FRCC planning study, stating only that 10,000 MW of new installed generating capacity will be needed to meet winter reserve margins through 2008-2009. Such a summary of a planning document which the petitioners did not prepare and do not present is hardly the detailed statement called for by the rule. However, what is really troubling is how incomplete the Petition's summary of the FRCC study is. The FRCC study shows that all the capacity needed to meet reliability criteria through 2008-2009 is already planned without the proposed Project. While this critically important fact is omitted from the discussion in the Petition, it is acknowledged in Tables 7 and 8 in the Petition Exhibit. Petition Exhibit, pp. 57, 58. Those tables, which are built upon information taken from the FRCC study showing all planned unit additions, **show that without the Calpine facility reserve margins will be met.** Instead of providing a detailed statement of the factors which indicate a need for the proposed power plant, the Petition includes tables which demonstrate there is no need for their proposed facility.

It should also be noted that Rule 25-22.081(3) requires other information which the Petition fails to provide. Load forecasts are supposed to be presented in considerable detail, including identification of the models used in sufficient detail to permit analysis of the models. There is no attempt in the Petition to comply with this rule requirement. All that is provided for peninsular Florida is the total projected demand; there is no documentation of specifically required information such as net energy for load, number of customers, or load factors. There is no attempt to identify,

much less discuss, the models used to develop the peninsular Florida load forecast upon which the petitioner attempts to rely.

The Petition's failure to include the detailed information required under Rule 25-22.081(3), Florida Administrative Code, is grounds for dismissal. Because this information is necessary for the Commission to conduct its utility specific analysis under Section 403.519 and because this information is required to be submitted in a need determination petition, the Petition should be dismissed. Moreover, the information presented in an attempt to satisfy this rule, while insufficient, demonstrates that there is no need for the proposed plant, providing an additional basis for dismissal.

C. The Petition Fails To Adequately Address Viable Nongenerating Alternatives.

Florida Administrative Code Rule 25-22.081(5) requires:

> A discussion of the viable nongenerating alternatives including an evaluation of the nature and extent of reductions in the growth rates of peak demand, KWH consumption and oil consumption resulting from the goals and programs adopted pursuant to the Florida Energy Efficiency and Conservation Act both historically and prospectively and the effects on the timing and size of the proposed unit.

The Petition abysmally fails to satisfy this pleading requirement.

It is stated that Calpine does not engage in conservation and is not required to have conservation goals. Petition at 23. That clearly does not meet the requirements of the rule. Calpine states that its capacity is committed to utilities serving retail Florida customers. If so, then the relevant inquiry under this subsection of the rule is whether those utilities have viable nongenerating alternatives. Not a single alternative is mentioned in the Petition. Where is the "evaluation of the nature and extent of reductions in the growth rates of peak demand, KWH consumption and oil consumption resulting from the goals and programs adopted pursuant to the Florida Energy

Efficiency and Conservation Act?" It is not provided. The Commission does not know from the Petition what conservation alternatives are available which might mitigate the need for the proposed plant. Instead of addressing viable nongenerating alternatives, the Petition has a discussion of how the plant may help achieve general FEECA goals. With all due respect, so what? The rule calls for a discussion of viable nongenerating alternatives, not how a plant will fulfill general FEECA goals. The Petition completely fails to meet this rule requirement, and without the information required, the Commission cannot perform the assessment of the conservation criteria in Section 403.519, Florida Statutes. The Petition should be dismissed for failure to satisfy Florida Administrative Code Rule 25-22.081(5).

D. The Petition Fails To Discuss The Impacts Required By Rule 25-22.081(7).

Florida Administrative Code Rule 25-22.081 was amended in 1994 to require, in circumstances where a generation unit was the result of a purchased power agreement between an investor owned utility and a non-utility generator, a discussion in the need petition of "the potential for increases or decreases in the utility's cost of capital, the effect of the seller's financing arrangements on the utility's system reliability, any competitive advantage the financing arrangements may give the seller and the seller's fuel supply adequacy." Calpine clearly intends to enter into such purchased power agreements, yet it seeks to avoid the requirements of this rule by filing for a determination of need before it has contracts. This attempt to evade this rule requirement is another reason why the requirement that a non-utility generator must first have a contract to proceed with a need determination is good law. Calpine should not be allowed to evade the requirements of this rule. The failure of the Petition to include this mandatory discussion is grounds for dismissal.

V

CALPINE HAS FAILED TO COMPLY WITH THE COMPETITIVE BIDDING REQUIREMENTS OF RULE 25-22.082, FLORIDA ADMINISTRATIVE CODE, AND PROPOSES TO ENTER INTO CONTRACTS WITH FLORIDA RETAIL UTILITIES IN CIRCUMVENTION OF RULE 25-22.082.

In disregard to its assertion that it is an "electric utility" qualified to apply for certification under the Siting Act, Calpine has made no attempt to comply with the bidding rules applicable to all investor-owned utility generation projects. It is undisputed that Calpine is an investor-owned entity. Thus, if it were an "electric utility" as it alleges in its Petition, it would be required to "evaluate supply-side alternatives to its next planned generating unit by issuing a Request for Proposals," before "filing a petition for determination of need for an electrical power plant pursuant to section 403.519, Florida Statutes." Rule 25-22.082(2), F.A.C. It has not done so.

While FPL maintains that Calpine is not an "electric utility" within the meaning of the Siting Act or Section 366.02(2), Florida Statutes, Calpine maintains that it is. Calpine cannot have it both ways and claim to be an electric utility for purposes of seeking certification, but then disregard the prerequisites to such certification applicable to all investor-owned utilities. Whether because Calpine is not an "electric utility" or because it has failed to comply with Rule 25-22.082, the result is the same: Calpine's Petition must be dismissed.

Apparently, Calpine acknowledges the inconsistency of its position. It has filed yet another petition seeking a declaratory statement that Rule 25-22.082(2), Florida Administrative Code, is not applicable to it, or, in the alternative, a waiver of Rule 25-22,082(2), Florida Administrative Code. Calpine's declaratory statement and rule waiver petition is untimely. It should have been filed and resolved prior to initiating a determination of need proceeding. It was not. As a result, Calpine may not petition for a determination of need.

Neither the Commission nor interveners should have to wait upon the Commission addressing Calpine's request for a declaratory statement or alternative rule waiver before addressing the motion to dismiss Calpine's petition. Calpine controlled the timing of its petitions, and it chose to file its declaratory statement and rule waiver petition at a time when it was clear that it had not complied with or been excused from complying with Rule 25-22.082(2), Florida Administrative Code. Because of its insistence that it is an electric utility and its failure as an electric utility to comply with Rule 25-22.082(2), Florida Administrative Code, Calpine's Petition should be dismissed.

It should also be noted that Calpine's offer to commit its capacity generally to Florida utilities providing retail service would place any number of those utilities who are investor owned electric utilities in the position, if they were to enter into a contract with Calpine, of entering into a contract without having undertaken the competitive evaluation of alternatives e required by Rule 25-22.082(2), Florida Administrative Code. Clearly Calpine cannot secure a determination of need on a peninsular Florida basis and then ultimately enter into a contract with any investor owned utility without the arrangement clearly circumventing Rule 25-22,082(2), Florida Administrative Code. Since Calpine does not propose to omit investor owned electric utilities from the utilities with which it may ultimately enter into contracts, Calpine's approach is an attempt to circumvent Rule 25-22.082(2), Florida Administrative Code which should not be indulged.

Calpine has failed to comply with the competitive bidding requirements of Rule 25-22.082(2), Florida Administrative Code, and, if it is an electric utility as it maintains it is, its failure to do so makes its need petition infirm, for it has not secured either a declaratory statement or a rule waiver making Rule 25-22.082(2), Florida Administrative Code inapplicable. Moreover, it advances

an approach that would cause a contracting investor owned utility to circumvent Rule 25-22.082, Florida Administrative Code. Therefore, Calpine's Petition should be dismissed for failure to comply with or circumvention of Rule 25-22.082(2), Florida Administrative Code.

VI
THE PETITION'S THEORY IS INCONSISTENT WITH THE SITING ACT.

Under the Siting Act a power plant's environmental impact is to be weighed against a utility specific need for a power plant. A determination of need is so essential that it is a condition precedent to the certification of a power plant. There is a consideration of a plant's environmental impact only if there is a demonstrated need for the plant by a utility with an obligation to serve. The theory underlying the Siting Act is simple - if you don't need it, then you don't build it.

The Petition's theory of the case is different. Calpine has no obligation to serve but wants to build a power plant that it alleges will have minimal impact on the environment. Calpine will sell its output to Florida utilities, but it cannot identify the utilities to which it will sell. However, peninsular Florida utilities as a whole have an alleged need for additional generating capacity. So, permit Calpine to build its proposed plant, and disregard the terms and conditions of the contracts Calpine will ultimately enter, and only require Calpine to show you, after you have determined a peninsular Florida need, that it has entered a contract. The Petition's simple theory is -- if you don't need, somebody must, just show the Commission a contract after it finds need and you can build it.

As the foregoing discussion shows, Calpine's theory of the case is inconsistent with the Siting Act. It asks the Commission to abandon its and the Supreme Court's conclusion that the criteria of Section 403.519 are utility specific. It asks the Commission to abandon its and the Supreme Court's conclusion that the need to be determined in a need determination arises from an

obligation to serve and must be viewed from the perspective of the purchasing utility. It asks that Calpine be relieved of the requirement of first having a contract for the purchase of its power.

If the Petition were granted, the consequence would be just the opposite of that intended by the Legislature. There would be a proliferation of power plants and their environmental impacts. Calpine and other entities without an obligation to serve would be allowed to build power plants premised not upon a utility specific need but upon some general measure of need. They could build without regard for whether the utilities with the obligation to serve their need had plans in place to meet their need. All they would have to show is that they ultimately negotiated a contract.

If the Commission were to allow this matter to proceed under the present theory of the case, then the Commission would be giving Calpine special status. Other non-utility generators cannot initiate a need determination without a contract from which the Commission may assess whether the proposed plant meets the utility specific, statutory need determination criteria. Utilities also must show that they have a need for their proposed plant. There is no basis to give Calpine a special status, and an attempt to do so would raise serious equal protection concerns.

Under the Siting Act, the Commission is the gatekeeper. Its responsibility in determining need is to make sure not only that there is sufficient cost-effective, capacity available, but also to prevent uneconomic duplication of facilities that would have harmful environmental impacts. The Commission and the Supreme Court of Florida have developed a well reasoned interpretation of the Siting Act that does just that. It should not be abandoned to accommodate Calpine. See also, Lee County Electric Co-op v. Marks, 501 So. 2d 585, 587 (Fla. 1987) (Commission has duty to avoid uneconomic duplication of facilities, and Court has repeatedly approved Commission's efforts to end uneconomic waste.). Make Calpine follow the law and first secure contracts for its output before

proceeding with a need determination. That approach will allow review under the utility specific need determination criteria, avoid a proliferation of power plants, mitigate environmental impacts, and avoid an uneconomic duplication of facilities. The Petition should be dismissed as being inconsistent with the Siting Act.

VII
THE PETITION SHOULD BE DISMISSED FOR PROPOSING AN UNNECESSARY AND UNECONOMIC DUPLICATION OF FACILITIES.

The Commission has extensive authority to oversee Florida's electric utility grid. Sections 366.04(2)(c), 366.04(5), 366.05(1),(7),(8), 366.051, 366.055, Florida Statutes. The Commission has jurisdiction over the planning, development and maintenance of the electric grid to assure an adequate and reliable source of energy for Florida and to avoid the uneconomic duplication of facilities. Section 366.04(5), Florida Statutes.

The Commission's interpretation of the Siting Act as requiring entities who desire to sell to utilities to have a contract with a purchasing utility before petitioning for a need determination allows the Commission to meet its responsibilities under Section 366.04(5), Florida Statutes. By examining utility specific needs in need determinations, the Commission allows utilities to plan to meet their needs, maintain grid reliability and avoid uneconomic duplication of facilities. Under its authority to maintain the grid, the Commission may order utilities to make repairs or install additional equipment, but it does not exercise such authority over entities like Calpine, so it is particularly important in discharging its Siting Act obligations in this need determination that the Commission know just what need is being addressed.

If this proceeding were allowed to move forward, one of the essential purposes of the Commission having jurisdiction over the grid would be frustrated. The Commission would be allowing the uneconomic duplication of services. Tables 7 and 8 in the Petition Exhibit show that reserve margin criteria will be met without the Calpine plant being built. Thus, the Petition shows there is no need for the proposed plant, because utilities with their obligations to serve have already planned to meet their needs. Calpine fails to show its Project is more cost-effective than any of the utilities' proposed projects, for it offers an incomplete assessment of cost-effectiveness. If Calpine were allowed to proceed, then the proceeding necessarily contemplates an uneconomic duplication of facilities. Therefore, the Petition should be dismissed and Calpine should secure contracts for the sale of its power before initiating a need determination proceeding.

CONCLUSION

The Petition should be dismissed. Calpine is not a proper applicant. Calpine does not have a contract for the sale of its power, and absent such a contract the Commission cannot apply the utility specific, statutory need determination criteria from the perspective of the purchasing utility. The Petition improperly asks the Commission to presume cost-effectiveness. The Petition fails to include mandatory pleading requirements. In fact, the Petition actually shows that there is no need for the Calpine plant. The Petition advances a theory of the case which is inconsistent with the Siting Act. The Petition's theory of the case is also inconsistent with the Commission's responsibility to

avoid uneconomic duplication of facilities. Each of these deficiencies is a ground for dismissal. The Petition fails to state a cause of action and as a matter of law should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this FPL's Memorandum of Law Supporting its Motion to Dismiss the Petition in Docket No. 000442-EI was served by Hand Delivery (*) or mailed this 10th day of July 2000 to the following:

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