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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Duke Mulberry Energy, L.P., and IMC-Agrico Company for a Declaratory Statement Concerning Eligibility To Obtain Determination of Need Pursuant to Section 403.519, Florida Statutes	DOCKET NO. 971337-EU FILED: October 15, 1997

PETITION FOR DECLARATORY STATEMENT

Pursuant to Section 120.565, Florida Statutes, and Commission Rule 25-22.020, Florida Administrative Code, Duke Mulberry Energy, L.P. ("Duke" or "Duke Mulberry"), a Florida limited partnership, and IMC-Agrico Company ("IMCA"), a general partnership organized under the laws of the State of Delaware, hereby respectfully request the Commission's declaration that, on the facts set forth below, they are entitled to apply for a determination of need for an electrical power plant pursuant to Section 403.519, Florida Statutes, Commission Rules 25-22.080-.081, Florida Administrative Code, and pertinent provisions of the Florida Electrical Power Plant Siting Act ("the Siting Act"). In the alternative, IMCA and Duke Mulberry respectfully request the Commission to declare that no determination of need is required for their proposed combination self-generation and merchant plant project. IMCA and Duke Mulberry have a real and immediate need for the Commission's declaration because it will determine how they proceed with their proposed project. In support of their petition, IMCA and Duke Mulberry state as follows.

PROCEDURAL BACKGROUND

1. The name and address of the Petitioners are:

IMC-Agrico Company
Post Office Box 2000
3095 County Road 640 West
Mulberry, Florida 33860

and

Duke Mulberry Energy, L.P.
400 Tryon Street, Suite 1800
Charlotte, North Carolina 28285 .

2. All pleadings, motions, orders, and other documents directed to Petitioners are to be served on the following.

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DECLARATORY STATEMENTS SOUGHT

3. Based upon the facts described below, Duke Mulberry and IMCA respectfully request the Commission's declaration that:

> A. Duke Mulberry, as an Exempt Wholesale Generator selling power from merchant plant capacity, and IMCA, as a self-generator leasing an undivided interest in their proposed power plant, are entitled to apply for a determination of need for their proposed power plant.

In the alternative, Duke Mulberry and IMCA seek the Commission's declaration that:

> B. No determination of need is required for Duke's and IMCA's proposed power plant.

STATUTES AND ORDERS INVOLVED

4. IMCA and Duke Mulberry seek the Commission's declaratory statement regarding their eligibility to pursue the Commission's need determination processes. The requested declaratory statement involves the following statutes and orders.

a. Section 403.519, Florida Statutes, which establishes the determination of need process that the Commission administers with respect to the siting of electrical power plants under the Siting Act.

b. Section 403.503(4)&(13), Florida Statutes, which define, for purposes of the Siting Act, the terms "applicant" and "electric utility," respectively.

c. Commission Rules 25-22.080-.081, Florida Administrative Code, which implement Section 403.519 and govern the Commission's need determination processes.

d. In Re: Petition of Florida Crushed Stone Company for Determination of Need for a Coal-Fired Cogeneration Electrical Power Plant, Order No. 11611 (Fla. Pub. Serv. Comm'n, Feb. 14, 1983) & In Re: Florida Crushed Stone Company Power Plant Site Certification Application, Case No. PA 82-17 (before the Governor and Cabinet sitting as the Siting Board, March 12, 1984).

e. In Re: Petition for Determination of Need for Electrical Power Plant (Amelia Island Cogeneration Facility) by Nassau Power Corporation, 92 FPSC 2:814.

f. In Re: JEA/FPL's Application of Need for St. John's River Power Park Units 1 and 2 and Related Facilities, Docket No. 810045-EU (Fla. Pub. Serv. Comm'n, June 26, 1981), Order No. 10108.

g. In Re: Petition of Orlando Utilities Commission for Determination of Need for Stanton Unit 1, Docket No. 810180-EU (Fla. Pub. Serv. Comm'n, Oct. 2, 1981), Order No. 10320.

h. In Re: Application for Certification of Tampa Electric Company's Proposed 417 Megawatt Net Coal-Fired Big Bend Unit No. 4, Docket No. 800595-EU (Fla. Pub. Serv. Comm'n, Jan. 16, 1981), Order No. 9749.

i. In Re: Petition of Nassau Power Corporation to Determine Need for Electrical Power Plant (Okeechobee County Cogeneration Facility and In Re: Petition of ARK Energy Inc. and CSW Development-I, Inc. for Determination of Need for Electric

Power Plant To Be Located in Okeechobee County, Florida, 92 FPSC 10:643 (Fla. Pub. Serv. Comm'n, Oct. 26, 1992), Order No. PSC-92-1210-FOF-EQ ("Nassau Power" & "ARK/CSW").

j. In Re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities, 89 FPSC 12:294.

5. While the requested declaratory statement does not necessarily require the Commission to construe federal law, the following sections of the United States Code are also relevant to the analysis of Duke Mulberry's status as a "regulated electric company," and thus as an "applicant" within the meaning of the Power Plant Siting Act.

a. Title 16, Section 824 of the United States Code, part of the Federal Power Act, which addresses the regulation by the United States Federal Energy Regulatory Commission ("FERC") of the sale and transmission of electric energy at wholesale in interstate commerce.

b. Title 16, Section 824d, of the United States Code, which provides for the FERC's regulation of wholesale electric rates.

c. Title 15, Section 79z-5a of the United States Code, which defines Exempt Wholesale Generators ("EWGs") and provides for the exemption of EWGs from the provisions of the Public Utility Holding Company Act of 1935.

FACTS

6. IMC-Agrico Company and Duke Mulberry Energy, L.P. plan to develop a natural gas fired, combined cycle electrical generating unit ("the Power Plant" or "the Plant") south of Mulberry, Florida. While IMCA and Duke Mulberry are investigating and evaluating various options that may affect the ultimate size and configuration of the Power Plant, at this time they envision that the Power Plant will have between 240 MW and 750 MW of net generating capacity. With its advanced technology design, the Power Plant will be as

efficient as any currently available generating technology, and its heat rate efficiency will compare favorably to the heat rates of all existing power plants in Florida.

7. Title to the Power Plant will be placed in a partnership or equivalent entity ("the Partnership") that IMCA and Duke Mulberry will form for that purpose. A subsidiary of IMCA will hold a general partnership interest in the entity owning the Power Plant assets. IMCA will enter into a net lease of 120 MW of the Plant's capacity for its own use.[1] The balance of the Plant will be leased to Duke Mulberry, which will market its share of the Plant's capacity as a "merchant plant," that is, a power plant that sells electric capacity and energy in the open wholesale market. Duke Mulberry will take all investment, capital, and market risk associated with building and operating its merchant portion of the Plant. Such power sales may be for short or long periods, at market-based rates, under terms to be negotiated between Duke Mulberry and wholesale purchasers at various times in the future. In order to make any such sales, Duke Mulberry will have to sell its power at prices that potential wholesale purchasers deem advantageous for themselves and for their customers.

8. Duke Mulberry will be certified as an Exempt Wholesale Generator pursuant to the Public Utility Holding Company Act. 15 U.S.C.S. § 79z-5a (1994 & Supp. 1997). As a seller of wholesale

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[1] Contemporaneously with the filing of this petition, IMCA has also filed a petition in which it asks the Commission to declare that its proposed lease financing arrangement, like the similar arrangement that the Commission previously reviewed in Seminole Fertilizer, 90 FPSC 11:126, constitutes non-jurisdictional self-generation.

electric capacity and energy in interstate commerce[2], Duke Mulberry will, for purposes of federal law, be a "public utility" subject to the regulatory jurisdiction of the FERC under the Federal Power Act. 16 U.S.C.S. § 824(e)&(b)(1) (1994). Accordingly, Duke Mulberry will file with the FERC a tariff and requisite application materials for the sale of the Power Plant's output at market-based rates. Several other such facilities have obtained FERC's approval for market-based rates. See, e.g., Cataula Generating Company, L.P., 79 FERC ¶61,261 (1997).

9. Neither IMCA, as a self-generator, nor Duke Mulberry, as an exclusively wholesale supplier of power in interstate commerce, will be subject to the Commission's rate regulation authority, but Duke Mulberry will, of course, be subject to the rate regulation jurisdiction of the FERC.

10. None of the Partnership's generation or transmission assets will be included in any Commission-regulated utility's rate base, and accordingly, Florida electric ratepayers will not be required to pay for the Partnership's assets as a consequence of the certification and construction of the Power Plant. Moreover, Florida electric ratepayers will not be required to bear any capital risk or rate base risk associated with the Power Plant. As an EWG, unlike the owner of a Qualifying Facility ("QF"), Duke Mulberry

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[2] See, e.g., Federal Power Commission v. Florida Power & Light Co., 404 U.S. 453, 463, (1971). In this case, the U.S. Supreme Court upheld the FPC's jurisdiction over the transmission of power, at wholesale, by Florida Power & Light ("FPL") over Florida Power Corporation's lines on the ground that the electrical energy thus transmitted "commingled" in interstate commerce.

would have no legal right to compel any utility to purchase its power. All of its transactions are expected to be at negotiated wholesale rates.

DISCUSSION

11. The permitting of certain power plants in Florida is subject to the processes established in the Florida Electrical Power Plant Siting Act, Sections 403.501 through 403.518, Florida Statutes, and in Section 403.519, Florida Statutes,[3] which governs the "determination of need" for such power plants. In summary, power plants proposed by certain entities "engaged in, or authorized to engage in, the business of generating, transmitting, or distributing" electricity[4] that have a steam or solar energy cycle of 75 megawatts ("MW") or more must follow the permitting procedures pursuant to the Siting Act, while those using other technologies and those with steam or solar energy cycles less than 75 MW may, but are not required to, pursue permitting under the Siting Act. Fla. Stat. § 403.503(12) (1995 & Supp. 1996). The rules by which the Commission fulfills its responsibilities under Section 403.519 are codified at Rule 25-22.080-.081, Florida Administrative Code.

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[3] Section 403.519 is part of the Florida Energy Efficiency and Conservation Act, commonly referred to as "FEECA."

[4] IMCA is "in the business of" mining and processing phosphate, and will be leasing 120 MW of the Power Plant to meet its own internal business requirements. It is Petitioners' view that a plant limited to self-generation would thus not require a determination of need, even if it included 75 MW or more of steam capacity. However, because a portion of the Power Plant will be leased to an EWG, which will be "in the business" of generating electricity for sale to the wholesale market, this declaratory statement is sought.

12. Section 403.503(4), Florida Statutes, defines an "applicant" as "any electric utility which applies for certification pursuant to the provisions of" the Siting Act. In turn, Section 403.503(13) defines the term "electric utility" as "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." The Commission has determined that the definition of "applicant" applies to entities that seek to pursue the determination of need process under Section 403.519.[5]

13. The Commission has previously recognized with approval the concept of efficient generating projects having both self-service and merchant plant functions. See Seminole Fertilizer, 90 FPSC 11:126. Thus, the issue posed by this Petition is simply whether a merchant plant developer may pursue the permitting for its project using the processes of the Siting Act and Section 403.519.

14. The Commission should note that the definition of "electric utility" under Section 403.504(12) uses the disjunctive. That is, it encompasses any "regulated electric company" engaged in, or authorized to engage in, the generation, transmission, or distribution of electricity. Clearly, then, a "regulated electric company" that is engaged only in the generation of electricity is a

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[5] Section 403.519 provides that "[o]n request by an applicant or on its own motion, the Commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act."

proper applicant under the Siting Act and Section 403.519. Equally clearly, the regulation of companies engaged only in the business of generating electricity for sale at wholesale in interstate commerce is reserved to the FERC under the Federal Power Act. 16 U.S.C.S. §824(a)&(b) (1994); see also Federal Power Commission v. Florida Power & Light Co., 404 U.S. 453, 463 (1971) (Federal regulatory jurisdiction attaches to wholesale electric power transactions where electric energy commingles in transmission facilities that are interconnected with facilities over which there are power flows between states.)

15. As an EWG, Duke Mulberry will be a "public utility" pursuant to Section 201 of the Federal Power Act. 16 U.S.C.S. §824(e) (1994). Consequently, it will be subject to the regulatory jurisdiction of the FERC pursuant to the Federal Power Act, including jurisdiction over its rates. 16 U.S.C.S. § 824d (1994). Accordingly, Duke Mulberry will have to obtain FERC approval of its tariff, which it anticipates will authorize market based rates, and it will be subject to all other applicable regulatory requirements of the FERC. Since Duke Mulberry will sell only at wholesale, however, it will not be a "public utility" within the meaning of Section 366.02(1), Florida Statutes, because it will not be "supplying electricity . . . to or for the public within" Florida.

16. Section 403.519 does not require that the applicant be a "public utility" subject to the ratemaking and regulatory jurisdiction of this Commission, nor even an "electric utility" subject to the Commission's limited jurisdiction under Chapter 366. Rather, it simply requires that an applicant be one of several types

of entities, including "regulated electric companies." Because the EWG will be regulated by the FERC, and because it will be engaged in the business of generating electricity for resale, the EWG will be a "regulated electric company" within the meaning of Section 403.503(13), Florida Statutes, under any reasonable construction of that term. Accordingly, it is a proper applicant under Sections 403.503(13) and 403.519.[6] There is no distinction between federally regulated and state-regulated electric companies either specified in the Siting Act or otherwise applicable. Purely wholesale supply projects, e.g., interstate gas pipelines, typically are or may be subject to state environmental and siting requirements. There is thus nothing unusual about a wholesale electric supply project pursuing its permits through a state's comprehensive site certification process.

17. Both the Commission and the Governor and Cabinet, sitting as the Power Plant Siting Board (the "Siting Board"), have previously allowed entities other than traditional utility systems selling at retail to pursue the need determination and site certification processes. In fact, both the Commission and the Siting Board have approved the construction of a power plant that was, at the time of its permitting, a "merchant" power plant. See In Re: Petition of Florida Crushed Stone Company for Determination of Need for a Coal-Fired Cogeneration Electrical Power Plant, Order

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[6] Power plants of "traditional" retail utilities that are subject to Siting Act requirements are frequently employed by those utilities in the wholesale market. An EWG is simply an additional species of "regulated electric company" engaged in the same wholesale market.

No. 11611 (Fla. Pub. Serv. Comm'n, Feb. 14, 1983) & In Re: Florida Crushed Stone Company Power Plant Site Certification Application, Case No. PA 82-17 (before the Governor and Cabinet sitting as the Siting Board, March 12, 1984).

18. Specifically, at the time Florida Crushed Stone ("FCS") applied for a determination of need, it held no power sales contract with a purchasing utility. Instead, FCS planned to serve its own needs and to attempt to market the surplus in the wholesale market. In a real sense, even though Florida Crushed Stone's project was a QF, it was a "merchant plant" at the time FCS sought a determination of need. In that case, the Siting Board specifically dismissed a challenge to FCS's standing as an applicant, reasoning as follows:

> Using the ordinary meaning of the words in this definition, this Board concludes that FCS constitutes an electric utility for the purposes of the Power Plant Siting Act because, upon approval of this certification and construction of the proposed cogeneration facility, FCS will be in the business of generating electricity.

Florida Crushed Stone, (Siting Board), slip op. at 2. In other words, the Governor and Cabinet recognized that Florida Crushed Stone's merchant power plant, even though exempt from state and federal ratemaking regulation as a QF, would render FCS an electric utility within the meaning of the Siting Act. Here, it is even more clear that Duke Mulberry, as a federally regulated public utility under the Federal Power Act, satisfies the statutory definition of an applicant.

19. Following the FCS application, additional QFs pursued need determinations before the Commission. However, they differed from the FCS situation in one critical respect. Subsequent applicants

either held a power purchase contract with a purchasing utility or, alternatively, sought to require a particular utility to enter a contract for the purchase of the output of their planned facilities. In Order No. 22341, the Commission stated that it would require a QF holding a contract with a utility to demonstrate that its project was needed by and cost-effective for the purchasing utility in order to qualify for a determination of need. In Re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities, Docket No. 890004-EU (Fla. Pub. Serv. Comm'n, Dec. 26, 1989). And, in Nassau Power & ARK/CSW, the Commission dismissed the petitions of Nassau Power Corporation and ARK/CSW for determinations of need, and their companion petitions for approval of power sales contracts with FPL, on the grounds that they proposed, but did not hold, contracts with FPL, the utility whose need for capacity they sought to satisfy.

20. Viewed in context, however, neither Order No. 22341 nor the Commission's decision in Nassau Power & ARK/CSW conflicts with the Florida Crushed Stone decision. Nor does either of these orders preclude the Commission from accepting and processing need determinations for additional merchant plants. In each of these situations, the Commission was addressing need determination petitions filed by entities that sought prior assurance -- via contracts with a utility approved by the Commission for cost recovery -- that a particular utility's ratepayers would be responsible for paying for their proposed units, as a condition of going forward.

21. In Order No. 22341, the Commission clarified that the determinations underlying a power purchase contract approved on the basis of the Commission's proxy "statewide avoided unit," which was the avoided cost standard then in effect, would not necessarily pass muster for need determination and Siting Act purposes when the QF was called upon to show that the contract was needed by the specific contracting utility. In Order No. 22341, the Commission observed that certain criteria of Section 403.519 are "specific" to the purchasing utility. This statement, however, was directed to the processing of need determination petitions by QFs holding contracts with particular utilities, at a time when those contracts were derived from, and based on, the Commission's designated "statewide avoided unit." Before 1990, when the Commission revised its cogeneration rules to base measurements of need and avoided cost on the individual purchasing utility's needs, the Commission addressed the potential mismatch created by the use of a generic proxy for the approval of QF contracts, on the one hand, and the possibly different costs of the purchasing utility, on tne other. The Commission decided that:

> to the extent that a proposed electric power plant constructed as a QF is selling its capacity to an electric utility pursuant to a standard offer or negotiated contract, that capacity is meeting the needs of the purchasing utility.

Order No. 22341 at 26.

22. Order No. 22341 supports the proposition that an applicant for a determination of need that proposes to impose the costs and risks of its project on a particular utility's ratepayers must

demonstrate that its contract would be advantageous to those ratepayers even if it had been approved by the Commission on a different basis, e.g., by the Commission's statewide avoided unit determination. However, the order did not in any way address need determination petitions for merchant plants, where by definition the applicant bears all of the investment, capital, and market risk associated with building its plant.

23. Other decisions establish that, where a contract with a specific utility is not the basis for satisfying need, the Commission can and does apply the statutory criteria in a manner that is not "utility specific." For instance, in the FCS order the Commission recognized that FCS's proposed unit would confer general reliability benefits, even though FCS did not hold a power purchase contract at the time. Florida Crushed Stone, Order No. 11611 at 3. And, in the application of the Orlando Utilities Commission ("OUC") for a determination of need for its Stanton Unit 1, the Commission took into account the positive benefits the proposed unit would have on ratepayers' costs through its impact on the Energy Broker. The Commission found that the unit would enable OUC to produce more coal-fueled and nuclear-fueled energy than its system would require at times of minimum load, thereby enabling it to market such excess energy as economy energy on a peninsula-wide basis. In Re: Petition of Orlando Utilities Commission for Determination of Need for Stanton Unit 1, Docket No. 810180-EU (Fla. Pub. Serv. Comm'n, Oct 2, 1981), Order No. 10320 at 3-4. The Commission has thus established that, where a contract with a particular purchasing utility is not the basis for a determination of need, an applicant

can satisfy the statutory criteria relating to reliability and cost by reference to the impact of a proposed plant on peninsular Florida or on the State as a whole.

24. This is true of other dimensions of "need" as well. For instance, the Commission approved Florida Crushed Stone's application based primarily on the general need for and benefits to be derived from the fuel efficiency associated with cogeneration.[7] Also, pursuant to the criteria of Section 403.519, "traditional utilities," i.e., vertically integrated utilities having generation, transmission, and distribution facilities that both generate electric power and sell it at retail, have proffered -- and the Commission has accepted -- additional justifications for determinations of need that are neither limited to the petitioning utility nor related to the reliability of the petitioning utility's system. For example, in Docket No. 810045-EU, FPL and the Jacksonville Electric Authority ("JEA") proposed the St. John's River Power Park project, two coal-fired units having projected in-service dates of 1985 and 1987. The Commission determined that the capacity of the proposed units would not be required for reliability purposes until at least 1991. However, the Commission granted the petitioners' determination of need. The Commission stated the following:

> We construe the "need for power" to encompass several aspects of need . . . [including] the

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[7] In this regard, IMCA and Duke Mulberry expect to show that the efficiency of IMCA's and Duke Mulberry's proposed Power Plant will be far more efficient than Florida Crushed Stone's project, even including FCS's cogeneration application of waste heat for process drying.

socio-economic need of reducing the consumption of imported oil in the State of Florida.

In Re: JEA/FPL's Application of Need for St. John's River Power Park Units 1 and 2 and Related Facilities, Docket No. 810045-EU (Fla. Pub. Serv. Comm'n, June 26, 1981), Order No. 10108 at 2.

25. Similarly, in the OUC docket cited above, OUC proposed an in-service date of November 1986 for its Stanton 1 coal-fired unit. In Order No. 10320, the Commission concluded that the capacity of the proposed unit would not be needed for reliability purposes "during the 1980's." Order No. 10320 at 3. However, the Commission also examined "another aspect of the need issue . . . the socio-economic need of reducing the State's consumption of imported oil." The Commission reasoned that OUC's project " . . . will provide significant economic benefits for peninsular Florida in terms of supplying an alternative to oil-fired capacity generation." The Commission concluded that the unit would help enable electric utilities to meet and surpass the Commission's goal of reducing statewide oil consumption.

26. Again, in the proceeding on Tampa Electric Company's ("TECO") petition for determination of need for its Big Bend 4 generating unit, the Commission recognized the socio-economic benefits of reducing Florida's consumption of imported oil as a basis for granting a determination of need. In Re: Application for Certification of Tampa Electric Company's Proposed 417 Megawatt Net Coal-Fired Big Bend Unit No. 4, Docket No. 800595-EU (Fla. Pub.

Serv. Comm'n, Jan. 16, 1981), Order No. 9749 at 4.[8]

27. Duke Mulberry, the proposed EWG merchant power supplier, does not propose to require the ratepayers of a particular utility to vouchsafe the cost and risk of the proposed unit through a contract prior to certification. It follows that, in gauging the ability of the proposed plant to satisfy the statutory criteria, the Commission is not confined or restricted to an analysis of a specific utility's reliability or the need for adequate electricity at a reasonable cost for a specific utility's ratepayers.

28. Moreover, just as FPL, JEA, OUC, and TECO persuaded the Commission that "aspects of need" other than their respective, utility-specific reliability criteria and cost-effectiveness determinations supported their petitions, IMCA and Duke Mulberry may support their petition by relying on "aspects of need" that, while not based on a contract with a specific purchasing utility, nonetheless invoke relevant matters within the Commission's jurisdiction. Without asking the Commission to pre-judge the "need" issue,[9] IMCA and Duke Mulberry believe it is appropriate to point

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[8] In this respect, IMCA and Duke Mulberry intend to demonstrate that the proposed Power Plant will similarly reduce the use of imported oil in Florida by economically displacing oil-fired generation, at no risk to electric consumers.

[9] The scope and specification of issues relating to the criteria set forth in Section 403.519 would naturally be determined on a case-specific basis. IMCA and Duke Mulberry would suggest that, because the merchant plant poses no economic risk to utility customers, and because its presence can only enhance reliability, the evaluation of merchant plant proposals may be less rigorous than for a traditional retail utility's need determination, which dovetails directly with the utility's request for authority to recover the costs of its project from its ratepayers. An approach to evaluating a "merchant plant" proposal in a determination of need case that takes into account

out that there are many "aspects of need" within the Commission's jurisdiction that a merchant plant can identify and satisfy in a proceeding on its petition for determination of need that do not depend on a contract with a specific purchasing utility and thus are not limited to a particular utility. By way of illustration only, without limiting possible avenues, other aspects of need that a merchant plant of the type planned by IMCA and Duke Mulberry can satisfy may include general reliability benefits,[10] environmental benefits, energy efficiency and conservation benefits, and other socio-economic benefits, including both reduction of oil imports and downward competitive pressure on wholesale prices, and thereby on retail prices paid by consumers.[11]

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the willingness of the applicant to insulate ratepayers from rate base and investment risk would encourage the further development of, and maximize the benefits from, this unique segment of the wholesale power market.

[10] With respect to reliability, merchant plant capacity like that planned by Duke Mulberry can provide a source of capacity that will enhance reliability in peninsular Florida. Peninsular Florida is, based on the existing retail utilities' own data, entering a period of tight capacity. According to the 1997 Ten-Year Plan, State of Florida, prepared by the Florida Reliability Coordinating Council, the reserve margin for peninsular Florida will, without the installation of additional generating capacity, fall to 11 percent in the winter of 2001-2002 and to 9 percent in the winter of 2003-2004, even with the exercise of load management and interruptible resources. Without exercising load management and interruption rights, the reserve margin for peninsular Florida will fall to 4 percent in the winter of 1999-2000, just over two years from now, and to 1 percent in the winter of 2001-2002. Without exercising load management and interruptible resources, peninsular Florida's reserve margin is projected to become negative in the winter of 2003-2004.

[11] The success of the merchant plant will depend on the EWG's ability to offer attractive prices. Accordingly, Duke Mulberry's merchant plant can be expected to benefit consumers by providing competitively-priced, low-cost power through the Florida Energy Broker System and through other non-Broker sales,

29. The Commission's order dismissing the need determination and companion contract approval petitions of Nassau Power and ARK/CSW does not alter this conclusion. As compared to Duke Mulberry's proposed merchant project, the issue in the Nassau Power and ARK/CSW dockets was whether Nassau Power or ARK/CSW could obtain a determination of need for power plants that they might build to serve a specific retail utility's identified need. The Commission's decision in Nassau Power and ARK/CSW came about as follows. In 1992, FPL signed a proposed contract with Cypress Energy Partners ("CEP"). CEP and FPL then filed a petition for determination of need, based on FPL's projection that it would require a total of 800 to 900 MW of additional capacity during 1998 and 1999 to meet its reliability criteria. In Re: Joint Petition to Determine Need For Electric Power Plant to be Located in Okeechobee County, Florida by Florida Power & Light Company and Cypress Energy Partners, L.P. , 92 FPSC 11:363 (Cypress Energy). Nassau Power Corporation and ARK/CSW intervened in the Cypress Energy need determination case with proposals to serve FPL's identified need. Order No. 92-1210 at 1. Nassau and ARK/CSW also offered competing contracts and filed independent applications for determinations of need. Significantly, in their applications, Nassau and ARK/CSW offered and proposed to meet the same FPL need for capacity that underlay the CEP contract and petition. The Commission dismissed Nassau's and ARK/CSW's petitions, reasoning that, because Nassau and ARK/CSW had no "obligation to serve customers" and only offered to enter contracts,

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and by otherwise stimulating competitive pricing in the wholesale market.

Nassau and ARK/CSW were not proper applicants under the Siting Act. The Commission said it would require that the purchasing utility be both an "indispensable party" and a joint applicant with the QF holding a contract with the utility. Cypress Energy, 92 FPSC 11:363 at 365-66. This order, too, was affirmed by the Supreme Court of Florida. Nassau Power Corp. v. Deason, 641 So. 2d 396 (Fla. 1994).

30. Neither the Commission's order nor the Court's decision affirming that order can, however, be construed to deny an EWG merchant plant access to the permitting processes of the Siting Act. Again, context is critical. As explained above, the situation addressed by the Commission, and by the Court on judicial review, involved an attempt by non-utility power producers to require customers of a particular utility to become contractually responsible for the costs of the unit that the non-utility producers proposed to build to satisfy a specific utility's need for capacity and energy. In its order dismissing those attempts, the Commission explicitly stated:

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

Nassau Power & ARK/CSW, 92 FPSC 10:646 (emphasis supplied). By the effect of the Commission's own carefully selected language, the order dismissing Nassau's and ARK/CSW's petitions does not constitute precedent for rejecting a petition for determination of need for a true "merchant plant," because the merchant plant developer's application would not be premised on meeting a particular utility's need through a decision and order of the

Commission. Moreover, allowing merchant plant developers to pursue need determinations under Section 403.519 would not have the effect of requiring any utility's customers to pay for the merchant plant.

31. Alternatively, IMCA and Duke Mulberry respectfully ask the Commission to enter an order declaring that no need determination is necessary for their planned combination self-generation and merchant plant project. Within the context of Section 403.519, the Commission could determine that no need determination is necessary simply because there is no economic risk to ratepayers associated with the planned project, and because the proposed Plant can only enhance reliability within the State. The absence of economic risk obviates concerns regarding cost-effectiveness, and the reliability enhancement benefits are particularly significant in view of impending capacity constraints in peninsular Florida. The Commission should not and cannot require IMCA and Duke Mulberry to use the Siting Act process and at the same time prohibit them from pursuing the necessary need determination portion of that process. This would be offensive to the Energy Policy Act of 1992, which encourages competition in the wholesale generation of electricity, as well as to the Interstate Commerce and Equal Protection clauses of the United States Constitution. Thus, the Commission should either grant the requested declaratory statement confirming IMCA's and Duke Mulberry's status as legitimate "applicants" or declare that no determination of need for the proposed project is required.

CONCLUSION

32. Duke Mulberry and IMC-Agrico are proper "applicants" for purposes of pursuing a determination of need proceeding under Section 403.519, Florida Statutes, because the EWG will be a "public utility" subject to FERC regulation under the Federal Power Act, and therefore also a "regulated electric company" within the meaning of Sections 403.503(13) and 403.519, Florida Statutes. Moreover, policy considerations mitigate strongly in favor of allowing such a "merchant plant" applicant to proceed under Section 403.519 and the Siting Act. It will provide needed capacity and associated reliability benefits at no risk to ratepayers, because the applicant will take all of the economic risk associated with the investment at the same time it introduces needed competition and lower prices into the wholesale market.

WHEREFORE, IMCA and Duke Mulberry respectfully request the Commission to enter its order declaring that, on the facts presented, they are proper "applicants" as that term is defined in Section 403.503(13), Florida Statutes, and are therefore entitled to submit a petition for determination of need pursuant to Section 403.519. In the alternative, IMCA and Duke Mulberry respectfully request the Commission to enter its order declaring that no determination of need is required for the proposed self-generation and merchant plant project.

Respectfully submitted this 15th day of October, 1997.

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