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November 25, 1997

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FPSC - Records/Reporting

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

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

Dear Ms. Bayo:

Enclosed for filing in the above docket are the original and fifteen (15) copies of the following documents:

1. Florida Power Corporation's Petition to Intervene and Request for Administrative Hearing; 12136-97
2. Florida Power Corporation's Motion to Dismiss Proceeding; 12137-97
3. Florida Power Corporation's Answer to Petition for Declaratory Statement. 12138-97

Also enclosed are additional copies of the above documents for acknowledgement of filing. We request you acknowledge receipt and filing of the above by stamping these additional copies and returning them to me in the self-addressed, stamped enveloped provided for your convenience.

If you or your Staff have any questions regarding this filing, please contact me at (813) 821-7000.

Very truly yours,

Gary L. Sasso

GLS:jlc

5 Enclosures
cc: Robert Scheffel Wright, Esq.
Joseph A. McGlothlin, Esq.
John W. McWhirter, Jr., Esq.

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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| 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<br>FILED: November 25, 1997 |

**FLORIDA POWER CORPORATION'S**
**ANSWER TO PETITION FOR DECLARATORY STATEMENT**

I. Introduction

1. Florida Power Corporation ("FPC") submits this Answer to the Petition for Declaratory Statement filed by Duke Mulberry Energy, L.P. ("Duke") and IMC-Agrico Company ("IMCA"). (On this same date, FPC is filing a Motion to Dismiss Proceeding, which, if granted, would obviate the need to submit an Answer at this time addressing the merits of the issues raised in the petition. This Answer is thus filed in an abundance of caution.) In their petition, Duke and IMCA seek a declaration that 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, Fla. Admin. Code, and pertinent provisions of the Florida Electrical Power Plant Siting Act ("PPSA" or the "Siting Act"). In the alternative, Duke and IMCA ask the Commission to declare that no determination of need is required for their purported combination self-generation and merchant plant project (the "Project").

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2. Though appealing ostensibly to the Commission's discretion, Duke and IMCA seek relief that this Commission is foreclosed from providing by decisions of the Florida Supreme Court and by the plain language of the PPSA. Under those decisions and the language of the Siting Act, only the Commission or a utility serving the public, or an independent power producer ("IPP") under contract with such a utility, may initiate a need proceeding under the PPSA. And no power plant may be built outside the auspices of the PPSA (unless falling within exemptions that IMCA and Duke have not attempted to invoke).

3. If, for the sake of argument, the Commission had the power in the face of controlling Florida Supreme Court decisions and statutory requirements to confer applicant status on Duke and IMCA with respect to their Project, as an "electric utility," it would nonetheless be inappropriate to attempt to exercise that power in the context of a declaratory statement proceeding. As demonstrated, inter alia, by the recent Staff workshop on merchant plant issues, the petition in this case presents very serious legal, policy, and economic issues that cannot be meaningfully addressed or resolved within the limited framework of a declaratory statement proceeding. For example, if Duke and IMCA were to obtain parity with the state-regulated investor owned utilities now subject to the PPSA for purposes of initiating need proceedings, then Duke and IMCA should be subject to the requirements that apply to all investor owned utilities, including, for example, the obligation to issue Requests for

Proposals for the construction of alternative plants and the obligation to demonstrate that all the need criteria set forth in the PPSA are satisfied. The Commission would have to address this, and numerous other, significant issues before being able to make a fully informed decision about bestowing applicant status upon IMCA and Duke, even if the Commission had the power to do so, which it does not.

4. The name and address of the answering party are:

Florida Power Corporation
3201 - 34th Street South
Post Office Box 14042
St. Petersburg, FL 33733-4042

5. All pleadings, motions, orders, and other documents directed to the petition are to be served on:

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II. The Existing Regulatory Structure

6. Under controlling Florida Supreme Court precedent, only the Commission, electric utilities, and IPPs under contract with such utilities may initiate a need proceeding under the PPSA. This principle has been established not just as a matter of regulatory policy, but as a matter of legislative interpretation of the PPSA.

7. The seminal decision is Nassau Power Corp. v. Beard, 601 So. 2d 1175 (Fla. 1992) ("Nassau I"). In that case, the Florida Supreme Court upheld the Commission's decision that the determination of need under the PPSA consists of determining the "individual, localized need of the facility ultimately consuming the cogenerated power," namely, those utilities that supply electricity to the public within the State of Florida, including investor-owned utilities. Id. at 1177.

a. Previously, the Commission had followed a policy of evaluating the need for cogeneration based on projected wholesale sales and statewide electric utility need. The Commission determined, however, that this policy and practice violated the requirements of the PPSA.

b. Thus, Section 403.519 of the PPSA requires that, in determining need:

> [T]he 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 or other matters within its jurisdiction which it deems relevant.

c. The Commission and the Court concluded in Nassau I 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," namely, the utilities that sell power to the public. 601 So. 2d at 1178 n.9 (emphasis added). Accordingly, the Commission and the Court held that the Siting Act "require[s] the PSC to determine need on a utility-specific basis." Id. (emphasis added). The Court reasoned that this interpretation of the PPSA was "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 actually need more electricity in the future." Id. (emphasis added). In rejecting the argument that the Commission should be able to evaluate need on a statewide basis because it had done so in the past, the Court held that this prior practice "cannot be used now to force the PSC to abrogate its statutory responsibilities under the Siting Act." Id. at 1178 (emphasis added). The Court thus made clear that interpreting the Siting Act to limit applicant status to electric utilities that served the retail public (and IPPs under contract with them), was not simply a matter of regulatory discretion, but was compelled by

the plain language of the Siting Act and the internal logic of its provisions.

8. The Commission and the Florida Supreme Court confirmed this statutory interpretation in Nassau Power Corp. v. Deason, 641 So. 2d 396 (Fla. 1994) ("Nassau II"). In that case, the Court upheld the Commission's decision rejecting an application for a determination of need submitted by an electric cogenerator -- Nassau Power Corporation ("Nassau") -- that proposed to sell power to Florida Power & Light, but did not have a contract to do so. The Commission and Court held that Nassau was not a proper "applicant" under the Siting Act, "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." Id. at 398.

a. In upholding the Commission's ruling, the Court held that "[t]he Commission's construction of the term 'applicant' as used in section 403.519 is consistent with the plain language of the pertinent provisions of the Act and this Court's 1992 decision in Nassau Power Corp. v. Beard." Id. at 398 (emphasis added). The Court emphasized that, in reaching its conclusion, "[t]he 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. (emphasis added).

b. Therefore, the Court held that an electric utility with a duty to serve customers is an indispensable party in any need proceeding. Specifically, the Court stated:

> [A] non-utility generator will be able to obtain a need determination for a proposed project only after a power sales agreement has been entered into with a utility. The non-utility generator will be considered a joint applicant with the utility with which it has contracted. This interpretation of the statutory scheme will satisfy the requirement that an applicant be an "electric utility," while allowing non-utility generators with a contract with an electric utility to bring the contract before the Commission for approval.

Id. at 399 (emphasis added).

9. Further, this requirement may not be circumvented. Unless a project qualifies for an express exemption to the PPSA (apparently not relevant here, Duke and IMCA having claimed no exemption), the project may not be built in this state without a determination of need by the Commission. Thus, Section 403.508(3), Florida Statutes, provides that "an affirmative determination of need by the Public Service Commission pursuant to [the Siting Act] shall be a condition precedent to the conduct of the certification hearing." (Emphasis added). The Siting Act makes clear that "[n]o construction of any new electrical power plant or expansion of steam generating capacity of any existing electrical power plant may be undertaken . . . without first obtaining certification in the manner as herein provided." Section 403.506(1), Florida Statutes (emphasis added).

10. Therefore, the limitation of applicant status under the PPSA to either a utility with a duty to serve customers, or a power producer under contract with such a utility, is not a

matter of regulatory discretion. Rather, it stems from well-considered interpretations by both the Commission and the Court of the "plain language" of the Siting Act, Nassau II, 641 So. 2d at 398. See also In Re: Joint Petition to Determine Need for Electric Power Plant to be Located in Okeechobee County by Florida Power & Light Co. and Cypress Energy Partners, Ltd., Docket No. 920520-EQ, Order No. PSC-92-1355-FOF-EQ, 92 FPSC11: 363, at 3-4 ("the statutory exclusion of non-utilities as applicants recognizes the utility's planning and evaluation process and envisions either approval or denial of the utility's selection of its generation alternatives"). The PPSA has not been amended in pertinent respects since Nassau I and Nassau II were decided, and there is no basis to argue plausibly that the intent of the Legislature has changed. Accordingly, the Commission is foreclosed at this time from repudiating the holdings of the Nassau decisions.

11. Those decisions, moreover, control the disposition of the petition filed by Duke and IMCA in this case. In their petition, Duke and IMCA disclose that Duke will operate the project as a speculative merchant plant that will vie to sell electricity on a wholesale basis (without any commitment noted to sales within this state). The Petition states that "[s]uch 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." (Petition, ¶ 7). Thus, it appears that while Duke will seek to enter into power

sales contracts with public utilities in the future, no such contracts exist at this time. Duke proposes, therefore, to meet some undifferentiated statewide need (or perhaps some need for electric power outside this state).[1/] This is exactly the kind of speculative proposal that the Commission and the Florida Supreme Court have held may not be processed through the PPSA.

12. In this connection, in its Order in Nassau II, the Commission emphatically declined to devote its resources to entertaining need applications for speculative projects "that may never reach fruition." In Re: Petition of Nassau Power Corporation, Order No. PSC-92-1210-FOF-EQ (FPC Oct. 26, 1992), at 5. The Commission recognized that admitting developers of such projects into the need determination process "would greatly detract from the reliability of the process." Id.

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[1/] IMCA and Duke assert in their petition that the retail utilities' ten-year site plan indicates that the state is entering a "period of tight capacity" and that "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." (Petition at 18 n.10). Evidently, IMCA and Duke propose to address this supposed statewide reliability issue.

Of course, as we discuss more fully in this Answer, the Legislature and this Commission have imposed upon the state-regulated utilities in this state both the obligation to plan for new generating capacity and the obligation to ensure that such needs will be met. As part of this process, the Florida Reliability Coordinating Council ("FRCC") has recently completed a study providing assurances that the state-requlated utilities are properly managing these issues. Merchant plant developers are not involved in the statutory planning process, have no obligation to participate in that process, and provide no assurances even that the energy they produce will he sold in Florida.

13. Consistent with the position asserted in its petition, Duke represented at the recent Staff workshop held on merchant plant issues that it expected, and hoped, to enter into power sales contracts with Florida regulated utilities. Under the statutory scheme as interpreted by the Commission and the Court in the Nassau decisions, Duke would be able to present an application for a determination of need if and when such a contract is reached. Until that time, Duke is no more qualified to initiate such a proceeding than the would-be applicant in Nassau II. See also In Re: Petition of Seminole Electric Cooperative, Inc. to Determine Need for Electrical Power Plant, Docket No. 880309-EC, Order No. 19468, 88-6 FPSC 185 at 14 (the Commission "cannot use 'generic' need determination for any utility").

14. This result is consistent with the overall regulatory scheme in Florida. It would be inappropriate to interpret the PPSA in a vacuum, and the Commission and the Court in the Nassau decisions were careful not to so. Thus, in Nassau II, the Commission expressly held that its construction of the Siting Act to limit applicant status to electric utilities with a duty to provide the public with efficient and reliable electric service, or to power producers under contract with them, "simply recognizes the utility's planning and evaluation process." Id. at 5.

15. The Commission was referring to the fact that each electric utility in this state is required by statute to prepare

and file with the Commission a ten-year site plan, "estimat[ing] its power-generating needs and the general location of its proposed plant sites." Section 186.801, Florida Statutes. This statutory planning obligation was enacted as part of the same legislation creating the PPSA, and was codified separately in order to collect planning legislation in one location in the Florida Statutes. Section 403.505, Florida Statutes (1973); 1973 Florida Laws Chapter 73-33, Section 1; 1976 Florida Laws Chapter 76-76, Section 2; Staff Analysis for Committee Substitute for Senate Bill No. 659, Senate Committee on Natural Resources and Conservation, p. 1 (April 19, 1976). The ten-year site-planning process necessarily includes determinations by the utilities of whether or when they will build new generating capacity or purchase power from others during the planning period, and it contemplates review by the Commission of those determinations.

16. Thus, Section 366.05(7), Florida Statutes, provides that "[t]he commission shall have the power to require reports from all electric utilities to assure the development of adequate and reliable energy grids." Section 366.05(8) provides that if the Commission determines that inadequacies exist with respect to the energy grids developed by electric utilities, the Commission shall have the power, "after a finding that mutual benefits will accrue to the electric utilities involved, to require installation or repair of necessary facilities, including generating plants . . . with the costs to be distributed in proportion to the benefits received . . . ." This provision

further states that the "electric utilities involved in any action taken . . . pursuant to this subsection shall have full power and authority . . . to jointly plan, finance, build, operate, or lease generating facilities," id. (using, if applicable, the provisions of the PPSA, which are not altered by this provision).[2/]

17. The site-plan process, then, is part of an orderly procedure for assessing need and fulfilling the statutory objectives of Chapter 366 of the Florida Statutes and the PPSA of ensuring system integrity and adequate and reliable electric energy in this state. The Commission's decisions in Nassau I and Nassau II directly support and further this regulatory scheme and concomitant planning process by confirming that the prerogative of siting new power plants will be vested where the statutory responsibility for planning and serving resides -- with the state-regulated electric utilities. Indeed, it would be untenable to require such utilities to plan for need and to meet electric power needs, while at the same time taking out of their

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[2/] Under Chapter 366, relating to Public Utilities, an "electric utility" is "any municipal electric utility, investor-owned electric utility, or rural electric cooperative" that provides electric service to the public and is otherwise subject to the Commission's powers to ensure the development of adequate and reliable energy grids and the conservation of electric power within those grids. Sections 366.02(2), 366.04(2), 366.05(7) and (8), Florida Statutes. Similarly, an "electric utility" under the PPSA includes electric companies regulated by the Commission "engaged in, or authorized to engage in, the business of generating, transmitting, or distributing electric energy" within the state. Section 403.503(13), Florida Statutes.

hands the prerogative of proposing when and how new generating capacity will be initiated.

18. Opening up the PPSA to speculative merchant plant developers would, as the Commission concluded in Nassau II, "greatly detract from the reliability of the process." Order No. PSC-92-1210-FOF-EQ, at 5. This would introduce a wild card into the site-plan process. Wholesale merchant plant developers are not subject to Commission regulation and have neither any obligation to serve, nor any obligation to advise the Commission or anyone else what their future plans for service are. In fact, at the recent Staff workshop on merchant plant issues, Duke's representative stated that it would be impractical for Duke or other merchant plant developers to prepare and submit a ten-year site plan, and that doing so might compromise competitive interests. Yet, FPC and other state-regulated electric utilities would be left to discharge their planning and service obligations without any assurance of what, if any resources, will be available in this state through merchant plant wholesalers.

19. Because merchant plants have no obligation to serve, neither the Commission nor the state-regulated utilities could rely upon the construction or operation of merchant plants to satisfy the statutory obligations to plan for and assure adequate and reliable electric power in this state, and to maintain the integrity of the electric system. Merchant plant developers would be free to abandon projects after approval by this Commission or to sell power either outside the area where a

pressing need exists, or outside the state altogether. Indeed, in its petition, Duke makes no representations or commitments that it will sell the power produced by its project within any service area or within this state. Therefore, relying even in part on merchant plants to fulfill the purposes of Chapter 366 and the PPSA would amount to an "abrogat[ion] [of the Commission's] statutory responsibilities under the Siting Act." Nassau I, 601 So. 2d at 1178.

20. In this regard, it is important to recognize that the PPSA was not enacted as a means to create economic opportunities for developers or even for public utilities that wish to construct plants in this state, but as a measure to regulate carefully the construction of such plants against the broader context of electric utility and environmental regulation in Florida. See Section 403.502, Florida Statutes. Any power plant that is constructed in this state inevitably will have some environmental impact. The PPSA ensures that such plants will be built only as part of the comprehensive process of regulatory planning and coordination with state-regulated utilities. Sections 403.501-.519, Florida Statutes. To reiterate, as the Commission recognized in Nassau II:

> 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. 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.

Order No. PSC-92-1210-FOF-EQ, at 5 (emphasis added). As the Commission and the Florida Supreme Court have held, it naturally follows that access to the provisions and processes of the Siting Act should be limited to state-regulated electric utilities and others who have contracts with them.

III. Petitioners' Contentions

21. Nonetheless, Duke and IMCA contend in their petition that the Project should qualify for applicant status because it would meet the literal definition of "electric utility" under the PPSA. Specifically, petitioners argue that the Project would constitute a "regulated electric compan[y]" within the meaning of Section 403.503(13), Florida Statutes. Although Duke concedes in its petition that the Project will not be subject to the regulation of this Commission, Duke insists that the Project will be "regulated" anyway because Duke will seek to have the Project regulated by the Federal Energy Regulatory Commission as an Exempt Wholesale Generator ("EWG"). This argument is an exercise in linguistics, not statutory interpretation. Duke and IMCA are able to make this argument only by ignoring the context in which these statutory terms are used, the significance of other language in the PPSA, the legislative history of the PPSA, and authoritative interpretations of the Florida Supreme Court and the Commission.

22. The terms "electric utility" and "regulated electric companies" must be viewed in the context in which they are used.

a. First, the PPSA is state legislation, not federal.

The PPSA was enacted as part of the comprehensive regulation of electric utilities in Florida. Thus, there is no basis to presume that in speaking about "electric utilities" and "regulated electric companies," the PPSA is intended to embrace federally regulated electric companies. Indeed, federal regulation through the Federal Energy Regulatory Commission of EWGs is fundamentally different in both policy and scope from Florida's regulation through the Florida Public Service Commission of electric utilities. Consistent with the pattern of legislation in this state applicable to state-regulated utilities, then, these statutory terms are most fairly read as addressing utilities regulated by the Florida Public Service Commission.

b. This is confirmed by the legislative history of the PPSA. The legislation creating the PPSA required each "electric utility" to submit a ten-year site plan that estimated "its" power generating needs and the location of its proposed power plants. Section 403.505, Florida Statutes (1973); 1973 Florida Laws Chapter 73-33. Those statutory planning obligations remain applicable to "electric utilities," see Section 186.801, Florida Statutes (1995), which include all state-regulated utilities in Florida.

c. In 1974, one year after the PPSA was enacted, the Florida Legislature greatly expanded the jurisdiction of the Commission in the "Grid Bill" to give it broader powers over the planning, development, and maintenance of electric power in the

State of Florida. 1974 Florida Laws Chapter 74-96 (codified at Sections 366.04(2), 366.05(7) and (8), Florida Statutes). Specifically, the Commission was given the authority to "require power conservation generally" and "assure an adequate source of energy for operational and emergency purposes" through the "planning, development, and maintenance of a coordinated electric power grid throughout Florida." Staff Evaluation for Committee Substitute for House Bill No. 1543, Senate Standing Committee on Governmental Operations, p. 1 (1974). The effect of the Grid Bill was, as noted in the legislative history, "to require all utilities in Florida to begin planning a statewide electrical grid system." Id. (emphasis added). Plainly, the Legislature used the term "utilities" synonymously with state-regulated electric utilities. Such utilities had the obligation to develop ten-year site plans and, concomitantly, were expected to resort to the PPSA to carry out these plans.

d. Also, when the Transmission Line Siting Act ("TLSA") was passed in 1980, it was patterned after the PPSA, adopting the same definitions of "applicant" and "electric utility." Sections 403.522(1), (11), Florida Statutes (1980), 1980 Florida Laws Chapter 80-65. It specifically added a provision under Chapter 366 that provided for the initiation of a determination of need for a transmission line by application of an "electric utility." Section 366.14, Florida Statutes (1980) (emphasis added). That same year the Legislature passed the Florida Energy Efficiency and Conservation Act ("FEECA"), which,

among other things, added a similar provision to the PPSA -- also under Chapter 366. Section 366.86, Florida Statutes, (1980), 1980 Florida Laws Chapter 80-65. That provision later became Section 403.519 and, at the time it was enacted, provided for an application by a "utility" to begin a proceeding to determine the need for an electrical power plant subject to the PPSA. Id. (emphasis added). "Utility" under the FEECA meant "any entity of whatever form which provides electricity . . . to the public . . . ." Section 366.82(1), Florida Statutes (1980), 1980 Florida Laws Chapter 80-65 (emphasis added). Later amendments to the TLSA, PPSA, and FEECA conformed the definitions under the Acts thereby making clear that the term "electric utility" has the same meaning under the PPSA, TLSA, FEECA, and under the Grid Bill provisions of Chapter 366. See 1990 Florida Laws Chapter 90-331; Final Staff Analysis and Economic Impact Statement for Committee Substitute for House Bill No. 3065, p. 3, (June 2, 1990); Sections 366.02(2), 366.82(1), Florida Statutes (1995).

e. Thus, the term "electric utility" in the PPSA may not be viewed in isolation from the pattern of legislation of which it is part. The term is used consistently throughout related Florida legislation enacted before, during, and after passage of the PPSA as meaning electric utilities subject to state, not federal, regulation. Duke and IMCA, however, concede that they are not an "electric utility" subject to the Commission's jurisdiction under Chapter 366. (Petition at 9). It therefore follows from the legislation described above that

Duke and IMCA are not an "electric utility" within the meaning of the PPSA.

f. This interpretation is further compelled by the Nassau decisions. Both the Commission and the Florida Supreme Court recognized in Nassau II 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." Nassau II, 641 So. 2d at 398 (emphasis added). Only state-regulated electric utilities have a statutory duty to serve their customers through the conservation of electric power and the planning and development of adequate and reliable electric service.

g. Finally, the Commission and the Court held in Nassau I and Nassau II that the criteria set forth in the PPSA that govern need determinations by the Commission make abundantly clear that the Siting Act is tailored -- indeed limited -- to need determinations by state-regulated utilities, such as FPC (and others contracting with them). As the Court stated in Nassau I, to interpret the PPSA to permit independent power producers to obtain a determination that they should be able to meet some statewide need "would . . . render[] virtually meaningless" the PPSA requirements geared to the regulated utilities that serve retail customers in defined territories. 601 So. 2d at 1178.

23. Duke and IMCA rely upon several Commission decisions, such as In Re: Petition of Florida Crushed Stone Company for Determination of Need for a Coal-Fired Cogeneration Electrical Power Plant, Order No. 1161 (Fla. Pub. Serv. Comm'n, Feb. 14, 1983) and 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), in support of their position that the Commission has in the past and should in the future permit merchant plant developers to obtain a need determination. The short answer to this argument is that all of these decisions preceded the Commission's rulings and the Court's decisions in Nassau I and Nassau II, in which both the Commission and the Court reached the conclusion that the Commission's former interpretations contravened the "plain language" and legislative purposes of the PPSA. Thus, in Nassau I, the Court specifically held that "the PSC's prior practice of [evaluating statewide need], as opposed to determining actual need [of regulated electric utilities], cannot be used now to force the PSC to abrogate its statutory responsibilities under the Siting Act." Nassau I, 601 So. 2d at 1178.

24. Indeed, the Florida Crushed Stone proceedings before the Commission and the Siting Board were not overlooked by the Commission in Nassau II. On the contrary, the Commission expressly considered and receded from its prior decision in Florida Crushed Stone, as inconsistent with the legislative intent of the PPSA. The Commission explained that:

> The fact that non-utility applicants may have been allowed to bring need determination petitions in the past does not compel us to do so in this case. Cogenerators have proliferated in the eight years since the Siting Board granted certification for Florida Crushed Stone. See In re: Florida Crushed Stone Company Power Plant Site Certification Application, PA 82-17, March 12, 1984. This Commission, which is the sole forum for determinations of need under Section 403.519, Florida Statutes (1991), may validly decide that allowing non-utility applicants to bring need determination proceedings under Section 403.519 is not in the public interest. More specifically, the legislature has not included non-utility generators in its definition of "applicants" who may initiate need determination proceedings.

Order No. PSC-1210-FOF-EQ, at 6 (emphasis added). Duke and IMCA's reliance on the Florida Crushed Stone proceedings in their petition is, therefore, misplaced: the decision in Florida Crushed Stone was overturned in Nassau II.

25. Duke and IMCA further contend that the Commission specifically limited its decision in Nassau II to the facts before it, and that the Project petitioners intend to build would be different from the one denied applicant status in Nassau II. This argument is meritless.

a. First, the fact that the Commission indicated that it was ruling only on the set of facts presented in Nassau II is not only unremarkable, but is the proper approach to any adjudication. Such inherent limitations in the adjudicatory process, however, do not rob the Commission's decision of stare decisis effect in later, similar proceedings, such as this one. And it is certainly not tantamount to a ruling that arguably different projects will warrant a different outcome. Moreover,

the Florida Supreme Court included no limitations in its decision in Nassau II.

b. Second, the proposed Project in this case is not fairly distinguishable from the project denied applicant status in Nassau II. As discussed, Nassau sought to obtain a determination of need for a power plant that was not under contract with a utility. Nassau proposed to supply power to Florida Power & Light, but had no contract to do so. The Commission and Court held that the project was too speculative to qualify for a determination of need under a statutory process designed to test utility-specific need in defined, localized areas. All the same is true of the Project in this case.

c. It is ironic, but not persuasive, that Duke and IMCA seek to distinguish Nassau II on the ground that Duke does not even pretend that its project will serve the needs of a particular utility. Rather, it plans to build the plant based solely on speculation that it will secure short-term or long-term utility contracts in the future, or will sell electricity on the open wholesale market. These plans, however, place the Duke-IMCA Project even further outside the auspices and applicant provisions of the PPSA than the plant proposed by Nassau. If the Commission were to process such speculative endeavors through the need determination procedures of the PPSA, the Commission would surely end up "[w]asting time in need determination proceedings for projects that may never reach fruition . . . ." Nassau II, Order No. PSC-92-1210-FOF-EQ, at 5.

26. Finally, Duke and IMCA assert without any argument or substantiation that denying them applicant status, and enforcing the PPSA against the Project to prevent its construction, "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." (Petition at 21). These arguments, too, are specious.

a. First, strict enforcement of the Nassau decisions is completely within this state's prerogatives and will not run afoul of any overarching federal law. Section 201(b)(1) of the Federal Power Act, 16 U.S.C. § 824(b)(1), specifically withholds from federal regulation the licensing, siting, or determination of need for new generating units, wholesale or otherwise. That Act states that the Federal Energy Regulatory Commission ("FERC") "shall have no jurisdiction [except in respects not pertinent here] over facilities used for the generation of electricity . . . ." 16 U.S.C. § 824(b)(1). As FERC has held, "jurisdiction over the capacity planning, determination of power needs, plant siting, licensing, construction, and the operations of [power] plants ha[s] been deliberately withheld from our control or responsibility when Congress specifically preserved the States' authority over such matters in section 201(b) of the FPA." Monongahela Power Company, Docket No. ER87-330-001, 40 FERC ¶ 61,256 (Sept. 17, 1987).

b. Further, Section 731 of the Energy Policy Act preserves state and local authority over environmental protection and the siting of facilities. P.L. 102-486, Title VII, Subtitle C, 106 Stat. 2921 (Oct. 24, 1992); Preamble to Final Rule Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 F.R. 21540 (May 10, 1996), 18 CFR Parts 35 and 385, Docket Nos. RM 95-8-000 and RM94-7-001, Order No. 888, FERC Regs. ¶ 31,036 (1996).

c. Vague arguments about a federal "policy" of promoting wholesale competition must give way, in the final analysis, to the paramount interests of the states in ensuring the orderly development of power plants within their jurisdiction and the enforcement of comprehensive regulatory schemes designed to protect their environment and the integrity of their electric systems and to assure adequate and reliable electric service within their borders.

d. By the same token, limiting access to the processes for building "wholesale" power plants to entities that have a statutory obligation to serve, or other power producers under contract with them, no more violates the Interstate Commerce Clause or the Equal Protection Clause of the United States Constitution than the decades-old regulatory regime of restricting retail sales within a state to those same utilities. As a threshold matter, it bears pointing out that while, as a

constitutional matter, the state could limit the construction of power plants exclusively to such utilities, the state has not undertaken to do so here. As Nassau II makes clear, a power producer may seek a determination of need by demonstrating that it has a contract with a state-regulated utility to supply electric power. Thus, Duke and IMCA can come within the ambit of the PPSA by going forward with their plans to enter into contracts with public utilities and then returning to the Commission once they have such contracts in hand.

e. Under well-settled authority, the states surely have the police power to impose such limitations on the provision of such a vital service as electric power, and to regulate in this manner the impact on the state's environment that inheres in the construction of any power plant, no matter how efficient. As the Supreme Court of the United States has specifically recognized, "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n, 461 U.S. 375, 377, 103 S. Ct. 1905, 1908 (1983). In particular, "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 205, 103 S. Ct. 1713, 1723 (1983). Certainly, then, the state's determination of whether a particular power plant is needed and where such a plant

should be built, taking into consideration the need for additional generating capacity and the environmental acceptability of a proposed facility or site, does not run afoul of the Commerce or Equal Protection Clauses.

f. Thus, in Arkansas Electric Cooperative Corp., the United States Supreme Court held that the Arkansas Public Service Commission ("PSC") did not act contrary to the Commerce Clause or the Supremacy Clause of the Constitution when it asserted regulatory jurisdiction over the wholesale rates charged by the Arkansas Electric Cooperative Corporation ("AECC"), a rural power cooperative, to its member retail distributors. 461 U.S. at 396, 103 S. Ct. at 1918. The Court specifically remarked that "state regulation of the wholesale rates charged by AECC to its members is well within the scope of 'legitimate local public interests,' particularly considering that although AECC is tied into an interstate grid, its basic operation consists of supplying power from generating facilities located within the State to member cooperatives, all of whom are located within the State." 461 U.S. at 194, 103 S. Ct. at 1917-18.

g. The Court further noted that although "the PSC's regulation of the rates AECC charges to its members will have an incidental effect on interstate commerce, we are convinced that 'the burden imposed on such commerce is not clearly excessive in relation to the putative local benefits.'" 461 U.S. at 395, 103 S. Ct. at 1918. It went on to remark:

> Part of the power AECC sells is received from out-of-State. But the same is true of most retail utilities,

> and the national fabric does not seem to have been seriously disturbed by leaving regulation of retail utility rates largely to the States.

Id. See also NRC Atomic Safety & Licensing Appeal Board, In re Consol. Edison Co. of N.Y., Inc., 7 NRC 31, 34 (1978) ("[s]tates retain the right, even in the face of the issuance of an NRC construction permit, to preclude construction on such bases as lack of need for additional generating capacity or the environmental unacceptability of the proposed facility or site"). Accordingly, enforcing the Nassau decisions to deny applicant status under the PPSA to Duke would not violate the Commerce Clause.

h. Further, in applying the Equal Protection Clause of the United States Constitution, the United States Supreme Court has consistently deferred to "legislative determinations as to the desirability of particular statutory discriminations" when "local economic regulation is challenged solely as violating the Equal Protection Clause." City of New Orleans v. Dukes, 427 U.S. 297, 303, 96 S. Ct. 2513, 2516 (1976). As the Court has held:

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude.

427 U.S. at 303, 96 S. Ct. at 2516-17.

i. Here, as discussed in detail above, the limitations imposed in the Nassau decisions are part and parcel of a site-plan process in this state designed to ensure the orderly development of generating capacity that minimizes impact on the state's environment. The Nassau decisions serve to effectuate the statutory objectives of Chapter 366 and the PPSA of ensuring system integrity and adequate and reliable electric energy in this state. Duke and IMCA have made no suggestion in their papers, nor can they, that the approach adopted in the Nassau decisions is not rationally related to a legitimate state interest. The state therefore has full authority to regulate access to the PPSA in this manner pursuant to its broad police powers.

27. Accordingly, the Commission should deny Duke and IMCA the relief they seek. As we have shown, the question whether a merchant plant developer may qualify as an applicant under the PPSA is first and foremost a matter of legislative intent and thus statutory construction, not regulatory discretion. To be sure, the courts will defer to an agency's interpretation of the agency's enabling statute, but the courts ultimately retain the responsibility to interpret legislation. See, e.g., Werner v. State, Dep't of Ins. & Treasurer, 689 So. 2d 1211, 1213 (Fla. 1st DCA 1997) ("'judicial adherence to the agency's view is not demanded when it is contrary to the statute's plain meaning'"), review denied, 698 So. 2d 849 (Fla. 1997), quoting PAC for Equality v. Department of State, Fla. Elections Comm'n, 542 So.

sake of argument, the Commission had the discretion to admit merchant plant developers into the processes of the PPSA, the Commission could not properly do so in the context of this limited proceeding. Apart from the substantial legal issues presented by the Duke-IMCA Petition, the question whether and in what circumstances merchant plant developers that are not regulated by the Commission should be integrated into this state's regulatory framework -- by, for example, being given applicant status under the PPSA -- is fraught with very significant policy and economic issues that the Commission cannot begin to penetrate in this proceeding. A number of these issues, but by no means all of them, were identified in the recent Staff workshop on merchant plant issues.

30. At a minimum, the Commission would have to consider the ramifications of how all of the provisions of the PPSA and the Commission's rules implementing this law should be applied to merchant plant applicants. The PPSA, of course, does not provide for special treatment of merchant plant developers because it does not contemplate that such developers will file applications for a need determination thereunder. Assuming arguendo, however, that the PPSA were misconstrued to confer applicant status on merchant plant developers, then by the same token there would be no basis to exempt them from all the obligations applicable to other investor owned utilities.

31. In this connection, Duke and IMCA argue for applicant status by contending that the Project would qualify as an

2d 459, 460 (Fla. 2d DCA 1989); Frank Diehl Farms v. Secretary of Labor, 696 F.2d 1325, 1331 (11th Cir. 1983) ("court remains the final authority on issues of statutory construction . . . and cannot abdicate its ultimate responsibility to construe the language employed by Congress").

28. The Florida Supreme Court has now authoritatively interpreted the Siting Act in the Nassau decisions, reaching conclusions not only consistent with the well-reasoned Commission decisions in those cases but compelled by the "plain language" of the Siting Act itself. It is too late in the day for the Commission to repudiate that interpretation in order to afford petitioners the relief they seek. To do so would exceed the Commission's authority. E.g., Haas v. Department of Business & Professional Regulation, 699 So. 2d 863 (Fla. 5th DCA 1997) ("commission went beyond its statutory authority" in imposing indefinite suspension of real estate license where statute provided for a suspension up to a maximum of ten years); Alacare Home Health Services, Inc. v. Sullivan, 891 F. 2d 850, 856 (11th Cir. 1990) ("[n]otwithstanding our normal deference to the responsible agency's interpretation of a statute, we conclude that the Secretary exceeded the statutory scope of authority and therefore that the regulation allowing for a good cause waiver of the 180 day filing deadline is invalid").

IV. Terms of Access

29. We have shown that the Commission may not properly grant petitioners the relief they seek. If, however, for the

"electric utility" within the meaning of the Siting Act. Further, Duke and IMCA make clear in their petition that the Project will be owned by investors. If the petitioners' argument were accepted -- which should not occur, for the reasons we have given -- then the Project should enjoy not only the benefits that this status would confer, but should be expected to shoulder the responsibilities and requirements applicable under the PPSA to other investor owned utilities.

32. Both the terms of the PPSA and the Commission's rules make clear that these obligations include making a site-specific showing that need exists and that it will be served by the proposed project. The Siting Act and rules require that the petitioning party demonstrate that the project will further the objectives of ensuring "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." Section 403.519, Florida Statutes; see Public Service Commission Rules 25-22.080-.082. The applicant must also address "the conservation measures taken by or reasonably available to the applicant or [the Commission] which might mitigate the need for the proposed plant . . . ." Section 403.519, Florida Statutes.

33. The Commission rules further explicate the necessary showing. For example, Rule 25-22.081 provides, inter alia, that the applicant must submit:

> 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, number of customers, net energy for load, and load factors with a discussion of the more critical operating conditions.
>
> * * * *
>
> A summary discussion of the major available generating alternatives which were examined and evaluated in arriving at the decision to pursue the proposed generating unit.
>
> * * * *
>
> A discussion of 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 plant.

These and all the other requirements of the Commission's rules must be met. If it is wholesale competition that petitioners want, then they must be prepared to compete on a level playing field and accept the burdens as well as the benefits of participating in this market.

34. Importantly, these obligations include the requirement that investor owned utilities publish a Request for Proposals, affording other power producers the opportunity to bid on supply-side alternatives to the proposed generating plant. Public Service Commission Rule 25-22.082. Further, investor owned utilities must develop plans to meet the Commission's energy conservation goals, including a demand-side management plan, and the compliance or noncompliance therewith by the utility is a consideration under Section 403.519 in determining the need for

the proposed power plant. Section 366.82(3), (4), Florida Statutes (1995); Public Service Commission Rule 25-17.001-.002.

35. To be sure, merchant plant developers will face obstacles inherent in their status in meeting the foregoing obligations of the PPSA and the Commission's rules. The fact that the criteria set forth in the PPSA and the implementing regulations of this Commission are suited to the responsibilities and status of state-regulated electric utilities was a significant consideration in the decisions of the Commission and the Florida Supreme Court holding that the Legislature intended to limit applicant status to such utilities with statutory obligations to serve their respective customers under particular requirements with respect to the conservation and reliability of their electric service. Nonetheless, if the Commission contravenes the directives of the Nassau decisions and admits merchant plants to the PPSA process, it may not do so by dispensing with the requirements that the Legislature included in the Siting Act to serve important legislative objectives.

36. Finally, since any site-specific showing of need that Duke and IMCA must make in a PPSA need proceeding must comport with the statutory standards and the rules of the Commission, this showing will necessarily involve scrutiny of the projected needs of some public utility or utilities in this state, to whom Duke and IMCA propose to sell electricity. Under the reasoning of Nassau II, the utilities involved should be included in the proceedings as indispensable parties, even if not as co-

applicants sponsoring the proposed merchant plant project. As Staff suggested during the workshop, at most Duke should receive a provisional certification until contracts with such utilities are finally achieved.

37. These are just some of the issues, however, that would have to be addressed and resolved if the Commission were inclined to grant petitioners the relief that they seek. Thus, it would not be appropriate for the Commission to do so in this type of proceeding.

V. Conclusion

38. For the foregoing reasons, the Commission should deny the relief that petitioners seek. If, for the sake of argument, the Commission determines that petitioners should be given applicant status under the PPSA, this should occur only after appropriate proceedings are held that permit a full hearing on the significant legal, policy, and economic issues involved.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to: Robert Scheffel Wright, Esq., Landers and Parson, P.A., Post Office Box 271, Tallahassee, FL 32302 as counsel for Duke Mulberry Energy, L.P.; and, Joseph A. McGlothlin, McWhirter, Reeves, McGlothlin, Davidson, Rief & Bakas, P.A. 117 South Gadsen Street, Tallahassee, FL 32301 and John W. McWhirter, Jr., McWhirter, Reeves, McGlothlin, Davidson, Rief & Bakas, P.A., Post Office Box 3350, Tampa, Florida 33602, as counsel for IMC-Agrico Company this 25th day of November, 1997.

Gary Sasso
Attorney with