STEEL HECTOR & DAVIS

REGISTERED LIMITED LIABILITY PARTNERSHIP

ORIGINAL

RECEIVED-FPSC

98 SEP -8 PM 3:37

RECORDS AND REPORTING

Steel Hector & Davis LLP
215 South Monroe, Suite 601
Tallahassee, Florida 32301-1804
850.222.2300
850.222.8410 Fax
www.steelhector.com

Charles A. Guyton
850.222.3423

September 8, 1998

Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
4750 Esplanade Way, Room 110
Tallahassee, FL 32399

RE: DOCKET NO. 981042-EM

Dear Ms. Bayó:

Enclosed for filing please find the original and fifteen (15) copies of Florida Power & Light Company's Memorandum of Law Supporting Motion to Dismiss Joint Petition.

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

Very truly yours,

Charles A. Guyton

Charles A. Guyton

CAG:ml
Enclosure
cc: All Parties of Record

ACK
AFA 2
APP
CAF
CMU
CTR
EAG Futrell
LEG 2
LIN 5
OPC
RCH
SEC 1
WAS
OTH

DOCUMENT NUMBER-DATE

09772 SEP-8 98

FPSC-RECORDS/REPORTING

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.	)	DOCKET NO. 981042-EM FILED: SEPTEMBER 8,1998

FLORIDA POWER & LIGHT COMPANY'S MEMORANDUM OF LAW SUPPORTING MOTION TO DISMISS JOINT PETITION

Pursuant to Florida Administrative Code Rule 28-106.204, Florida Power & Light Company ("FPL") files this memorandum of law supporting its Motion To Dismiss Joint Petition. This memorandum more fully develops each of the grounds upon which the Commission should dismiss the Joint Petition.

Introduction

The parties to this proceeding, who are in the process of expending significant resources, would be well served by the Commission seriously considering whether as a matter of law this proceeding should move forward. Aside from the significant deficiencies in the Joint Petition which warrant dismissal, the petitioners advance a theory of their case - that an entity (a) without an obligation to serve, (b) without a need of its own, and (c) without a contract with an entity which has a need and an

obligation to serve, may properly file a need determination petition - which is at odds with Section 403.519, Florida Statutes, the Florida Electrical Power Plant Siting Act ("Siting Act") Section 403.501-403.518, Florida Statutes, and the Commission's authority under the Grid Bill and other statutes to avoid the uneconomic duplication of facilities.

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

Before addressing each of the grounds justifying dismissal of the Joint Petition, it is helpful to place this matter in context. The Siting Act was passed "for the purpose of minimizing the adverse impact of power plants on the environment."[1] To achieve that purpose the Siting Board is required to weigh the need for a power plant against the power plant's environmental impact. Section 403.502, Florida Statutes. To assure that the Siting Board would conduct such weighing of need against environmental impact,

---

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

the Legislature made a determination of need a condition precedent to securing environmental permitting. Section 403.508(3), Florida Statutes. In plain language, the premise underlying the Siting Act is - if you don't need it, you don't build it.

The Legislature chose the Commission as the exclusive forum to make the determination of whether a power plant is needed. Section 403.519, Florida Statutes. The Legislature's choice of the Commission was most logical. The Commission was the agency which regulated the utilities which built power plants to meet obligations to provide service.[2] The Commission was the agency charged with overseeing and maintaining the integrity of the electrical grid.[3] The Commission was the agency charged with the avoidance of uneconomic duplication of facilities.[4] The Commission was the agency charged with resolving territorial disputes and approving territorial agreements so that uneconomic duplication of

---

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

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

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

facilities would be avoided.[5] The Commission was charged with approval of conservation goals and plans to meet those goals by regulated electric utilities in Florida.[6] All these responsibilities integrate well with the function of determining the need for a power plant.

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

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

When the Siting Act was originally passed in 1973, the electric utilities which the Commission regulated were seen as the

---

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

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

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

---

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

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

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

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

Commission's regulation, would be the entities seeking need determinations.[11]

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

---

[11] For instance, the term "applicant" in the Siting Act is defined as "any electric utility which applies for certification pursuant to the provisions of this act." Section 413.503(4), Florida Statutes. The term "electric utility" is defined in the Siting Act by reference to the entities providing electric service to the public: '"[e]lectric utility" means cities and towns, counties, public utility districts, regulated electric companies, electric cooperatives, and joint operating agencies, or combinations thereof, engaged in, or authorized to engage in, the business of generating, transmitting, or distributing electric energy.' Section 403.503(13), Florida Statutes.

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

[13] In re: Petition by Hillsborough County for a determination of need for a solid waste-fired cogeneration power plant, 83 FPSC 10:104 (Order No. 12610); In re: Petition by Pinellas County for a

Commission used findings made in its planning hearing as a surrogate for the statutory findings required by Section 403.519, Florida Statutes.[14] The Commission's questionable interpretation of the Siting Act was never challenged in court.

Over time, however, the Commission grew uncomfortable with its application of the Siting Act to non-utility generators. Beginning with the AES need determination and continuing into the Commission's annual planning hearings and other need determination proceedings, the Commission rethought its interpretation of the Siting Act. It reversed its prior questionable decisions[15] and held

---

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

[14] This was the Commission characterization of these decisions in the AES need determination. See, In re: Petition of AES Cedar Bay, Inc. And Seminole Kraft Corporation for determination of need for the Cedar Bay Cogeneration Project, 89 FPSC 1:368, 370 (Order No. 20671).

[15] In Order No. 22341 the Commission overruled "those previous decisions in which we held that in qualifying facility (QF) need determination cases as long as the negotiated contract price was less than that of the standard offer and fell within the current MW subscription limit both the need for and the cost-effectiveness of the QF power has already been proven." In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities, 89 FPSC 12:294, 319 (Order No. 22341). Subsequently, the Supreme Court of Florida held that the Commission's prior practice of presuming need rather than determining actual need was an abrogation of the Commission's

that: (a) the Commission was not going to make generic determinations of need or presume that statutory criteria were met,[16] (b) the purchasing utility was an indispensable party to the need determination of a non-utility generator,[17] (c) the statutory criteria for determining need under Section 403.519 were utility and unit specific,[18] (d) the need for a power plant derived from an obligation to provide service,[19] (e) the need for a power plant was

---

responsibilities under he Siting Act. Nassau Power v. Beard, 601 So. 2d at 1178.

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

[17] In re: Petition of Florida Power and [sic] Light Company to determine need for electrical power plant - Martin expansion project, 90 FPSC 6:268, 284-86 (Order No. 23080); In re: petition of Nassau Power Corporation to determine need for electrical power plant (Okeechobee County Cogeneration Facility), 92 FPSC 10:643, 645 (Order No. PSC-92-1210-FOF-EQ) (Ark and Nassau) ("[A] contracting utility is an indispensable party to a need determination proceeding."), *affirmed* Nassau Power Corporation v. Deason, 641 So. 2d 396 (Fla. 1994).

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

[19] In re: petition of Nassau Power Corporation to determine need for electrical power plant (Okeechobee County Cogeneration Facility), 92 FPSC 10:643, 645 (Order No. PSC-92-1210-FOF-EQ) (Ark and Nassau) ("It is this need, resulting from a duty to serve

to be examined from the perspective of the purchasing utility,[20] (f) an entity without its own need which desired to sell to a utility must have a contract with a purchasing utility to be able to demonstrate need,[21] and (g) an entity without an obligation to serve giving rise to its own need for power was not a proper applicant under the Siting Act unless it was a co-applicant with the

---

customers, which the need determination is designed to examine."), *affirmed* Nassau Power Corporation v. Deason, 641 So. 2d 396 (Fla. 1994); In re: Joint petition to determine need for electric power plant to be located in Okeechobee County by Florida Power & Light Company and Cypress Energy Partners, Limited Partnership, 92 FPSC 8:370 (Order No. PSC-92-0827-PHO-EQ) "[I]t is the utility's need, resulting from its duty to serve customers, which must be fulfilled").

[20] In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities, 89 FPSC 12:294, 319 (Order No. 22341); In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities, 90 FPSC 11:286(Order No, 23792); In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Florida's Electric Utilities, 91 FPSC 6:368 (Order No. 24672), *affirmed* Nassau Power Corporation v. Beard, 601 So. 2d 1175, 1178 (Fla. 1992); In re: petition of Nassau Power Corporation to determine need for electrical power plant (Okeechobee County Cogeneration Facility), 92 FPSC 10:643, 645 (Order No. PSC-92-1210-FOF-EQ) (Ark and Nassau), *affirmed* Nassau Power Corporation v. Deason, 641 So. 2d 396 (Fla. 1994); In re: Joint petition to determine need for electric power plant to be located in Okeechobee County by Florida Power & Light Company and Cypress Energy Partners, Limited Partnership, 92 FPSC 11:363, 365 (Order No. PSC-92-1355-FOF-EQ).

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

purchasing utility.[22] These holdings are directly applicable here; they were premised upon the language of Section 403.519 and the Siting Act.

Not surprisingly, entities which wanted to build power plants and sell to utilities resisted this interpretation of the Siting Act. They were unsuccessful in their attempts to have the Commission rethink this interpretation in a number of its decisions. Ultimately, they took their arguments to the Supreme Court of Florida and argued that the Commission was misinterpreting the Siting Act. The Court disagreed not once but twice, upholding the Commission's interpretation and holding that the Commission's prior application of the Siting Act had been an abrogation of the Commission's responsibility.[23] With the Court having so strongly affirmed the Commission's interpretation of the Siting Act, the law no longer merely gives great weight to the Commission's construction of the Siting Act, the law is settled.

The well settled law in Florida is that a determination of need for an entity seeking to sell its power to a utility having the obligation to serve must focus upon the need of the purchasing

---

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

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

utility. The need for power arises from this obligation to serve. It must be planned for by the utility. For the utility specific need determination criteria to have any meaning, an entity attempting to demonstrate need for its power plant must have a contract with a purchasing utility or utilities. This interpretation gives effect not only to the plain language of Section 403.519, Florida Statutes, but also reconciles the Commission's other grants of authority which it is expressly authorized to consider in a determination of need proceeding.

The Joint Petition before the Commission is a dramatic departure from the Commission's rules, the language of Section 403.519 and the Siting Act, prior Commission decisions, and prior Supreme Court decisions. It seeks a determination of need without identifying the purchasing utility, without a contract which would provide terms that would allow the statutory criteria to be applied, and without a co-applicant for over 90% of the proposed plant's capacity. Because the Joint Petition is inconsistent with Section 403.519, Florida Statutes, the Siting Act, and the Commission's responsibility to avoid uneconomic duplication of facilities in overseeing the grid in Florida, it fails to state a cause of action and should be dismissed.

The large body of decisional law interpreting the Siting Act and Section 403.519, Florida Statutes cannot accurately or legitimately be distinguished as being applicable only to QFs. The

language of the decisions on its face shows that the cases extend beyond QFs,[24] and the logic of the decisions is applicable to any entity without a contract but seeking to sell to electric utilities.

In dismissing the Joint Petition, the Commission should make it clear that it is not holding that an EWG may not secure a determination of need under the Siting Act. The Commission needs to state that an EWG must make the same showing that any entity seeking a determination of need must make - it must satisfy the utility specific criteria of Section 403.519, Florida Statutes. For an entity desiring to sell to utilities, it must have a contract for its capacity so that the statutory criteria may be applied from the perspective of the purchasing utility. In so holding, the Commission will fulfill its statutory obligation under

---

[24] The decision in Order No. 22341 is clearly not limited to QFs. There the Commission observed as part of its rationale for discontinuing the presumption of need that "an increasing share of the state's electrical needs will be supplied by either cogenerators or independent power producers." 89 FPSC 12:at 320. It went on to make a broad statement of interpretation of the Siting Act that clearly transcends QFs: '[W]e adopt the position that "need" for the purposes of the Siting Act, is the need of the entity ultimately consuming the power, the electric utility purchasing the power.' Id. Similarly, the Ark and Nassau decision applies to more than QFs: "a non-utility generator such as Ark or Nassau will be able to obtain a need determination for its project after it has signed a contract (power sales agreement) with a utility." Ark and Nassau, 92 FPSC 10:643, 645.

the Siting Act as contemplated not only by the Legislature, but also by Congress when it authorized the creation of EWGs.[25]

I
Neither Duke New Smyrna Nor The Utilities Commission, New Smyrna Beach Is A Proper Applicant As To The Merchant Plant Capacity Of The Proposed Plant.

It is clear from the Joint Petition that the Utilities Commission, New Smyrna Beach ("UCNSB") is not an applicant as to the entire capacity of the Proposed Plant. It is alleged that 30 MW out of the proposed plant's entire capacity of 514 MW is committed to the UCNSB (although it is also acknowledged that there is no final purchased power contract for even that 30 MW). It is not alleged that the merchant plant capacity (484 MW) is needed to meet the UCNSB need, and it could not be alleged given that the total alleged need of the City is no more than 110 MW. Clearly, the UCNSB is not an applicant as to the merchant plant capacity of the proposed plant.

It is also clear that Duke Energy New Smyrna Beach ("Duke") is not a proper applicant as to the proposed power plant. **Duke has no final purchased power contract as to any of the capacity of its**

---

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

proposed plant.[26] The Commission and the Supreme Court of Florida have previously held that an entity such as Duke, which has no obligation to serve and no contract for its capacity but which desires to sell to an electric utility, is not a proper applicant under the Siting Act. In re: Petition of Nassau Power Corporation to determine need for electrical power plant (Okeechobee County Cogeneration Facility), 92 FPSC 10:643, 645 (Order No. PSC-92-1210-FOF-EQ) (Ark and Nassau), *affirmed* Nassau Power Corporation v. Deason, 641 So. 2d 396 (Fla. 1994). Consequently, the Joint Petition should be dismissed.

Even if it were determined that Duke's Participation Agreement was a contract with the UCNSB sufficient for it to proceed as a co-applicant, Duke is properly a co-applicant only as to 30 MW and has no co-applicant as to the remaining 484 MW of its proposed plant. Since neither Duke nor the UCNSB is a proper applicant as to the proposed plant's "merchant capacity," under the rationale of the

---

[26] Duke has no contracts as to its merchant plant capacity. "Duke ... will market the balance of the project's capacity, approximately 480 MW, and associated energy to other utilities under negotiated arrangements...." Joint Petition at 4. The Joint Petition acknowledges that this merchant capacity may remain uncommitted:"if the project's capacity remains uncommitted...." Joint Petition at 12. "A merchant plant simply offers its capacity and energy to potential wholesale customers, who are free to purchase or decline to purchase capacity and energy offered by the merchant plant." Joint Petition at 15. In the Joint Petition Exhibit it is also acknowledged that Duke has no final contract with the UCNSB as to the 30 MW: "when the final power purchase agreement is negotiated and executed, Duke New Smyrna will, consistent with the FERC regulations, file that agreement with the FERC." Joint Petition Exhibit at 16.

Ark and Nassau case and Nassau Power Corp. v. Deason, the Joint Petition must be dismissed.

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

In 1992 the Commission was presented with two cases with very similar facts to the case now before the Commission. Ark Energy, Inc. filed a petition for determination of need with the Commission in July 1992 seeking a determination of need for an 886 MW natural gas-fired, combined cycle unit. It was assigned Docket No. 920761-EQ. Also in July 1992 Nassau Power Corporation filed a determination of need petition with the Commission for a qualifying facility, which was assigned Docket No. 920769-EQ.

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

The Commission fully explained its rationale. It noted that need determinations were properly initiated by "applicants" under Section 403.519, Florida Statutes. 92 FPSC 10:644. It also noted

that an "applicant" under the Siting Act was defined as an "electric utility," which in turn was defined in terms of seven different entities engaged in the business of generating, transmitting, or distributing electrical energy. 92 FPSC 10:644-45. The Commission then noted that Ark and Nassau did not qualify as applicants because they were not one of the types of entities under the definition of an "electric utility:" 92 FPSC 10:645.

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

92 FPSC 10: at 645.

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

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

> See Nassau Power Corporation v. Beard, 601 So.2d 1175 (Fla. 1992).

Id. (Emphasis added.)

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

> Since our 1990 Martin order (Order No. 23080, issued June 15, 1990) the policy of this Commission has been that a contracting utility is an indispensable party to a need determination proceeding. As an indispensable party, the utility will be treated as a joint applicant with the entity with which it has contracted. This will satisfy the statutory requirement that an applicant be an "electric utility" while allowing generating entities with a contract to bring that contract before this commission. Thus, a non-utility generator such as Ark or Nassau will be able to obtain a need determination for its project after it has signed a contract (power sales agreement) with a utility.

Id.

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

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

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

The Commission's order in the Ark and Nassau case is well thought out, fully reasoned, consistent with and builds upon earlier Commission decisions interpreting the Siting Act, and a reasonable interpretation of the Siting Act and its utility and unit specific criteria for assessing need. It is dispositive in this case. Here, as in the Ark and Nassau decision, the entity seeking a need determination does not have a contract to sell the output of its unit to an "electric utility." Here, as in the Ark and Nassau decision, the entity seeking the need determination does not have an obligation to serve customers and has no need of its own. Here, as in the Ark and Nassau decision, the entity seeking the need determination is not a proper "applicant" or an "electric utility" within the meaning of the Siting Act. Here, as in the Ark

and Nassau decision, the Commission would waste its time and resources if it were to allow Duke and other non-utility generators to petition for a determination of need at any time they desired without a contract to sell their output to a utility. Here, as in the Ark and Nassau decision, the scheme should recognize the utility's planning and evaluation process; it is the utility's need for power which is properly evaluated in a need determination proceeding; a non-utility generator may obtain a need determination after it has signed a contract with a utility for the output of its facility. The Joint Petition should be denied.

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

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

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

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

> The Commission determined that because non-utility generators are not included in this definition, [the definition of an "electric utility" in the Siting Act] Nassau is not a proper applicant under section 403.519. The Commission reasoned that a need determination proceeding is designed to examine the need resulting from an electric utility's duty to serve customers. Non-utility generators, such as Nassau, have no similar need because they are not required to serve customers.

Id.

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

> The Commission's interpretation of section 403.519 also comports with this Court's decision in *Nassau Power Corp. v. Beard.* **In that decision, we rejected Nassau's argument that the "Siting Act does not require the PSC to determine need on a utility-specific basis."** 601 So. 2d at 1178 n. 9. **Rather, we agreed with the Commission that the need to be determined under section 403.519 is "the need of the entity ultimately consuming the power," in this case FPL.** *Id.* Under the Commission's interpretation, a non-utility generator will be able to obtain a need determination for a proposed project only after a power sales agreement has been entered

> into with a utility. The non-utility generator will be considered a joint applicant with the utility with which it has contracted. This interpretation of the statutory scheme will satisfy the requirement that the applicant be an "electric utility," while allowing non-utility generators with a contract with an electric utility to bring the contract before the Commission for approval.
>
> Because we cannot say that the Commission's construction of section 403.519 is clearly unauthorized or erroneous, we affirm the order under review.

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

The Court's complete affirmation of the Commission's construction of the Siting Act in the Ark and Nassau decision should leave no doubt as to the proper disposition of this need determination petition. There is a Supreme Court of Florida decision right on point as to whether a non-utility generator without a contract with an electric utility is a proper applicant under the Siting Act. It is not. Nassau Power Corporation v. Deason, 641 So. 2d 396 (Fla. 1994). The Joint Petition should be dismissed.

C. The Ark and Nassau and Nassau Power Corp. v. Deason Decisions Are Not Sufficiently Distinguishable To Warrant Abandonment of the Proper Construction of the Siting Act.

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

One distinction the petitioners may urge upon the Commission is that Duke, unlike Nassau and Ark, is an EWG and an EWG is a public utility under the Federal Power Act and is regulated by the FERC; therefore, it is a "regulated electric company" within the definition of an "electric utility" under the Siting Act, making it a proper "applicant." Such an argument should be rejected for a number of reasons.

First, the only construction of the terms "applicant" and "electric utility" under the Siting Act by the Supreme Court of Florida is in Nassau Power Corp. v. Deason where the Court affirmed the Commission's construction of those terms in the Ark and Nassau cases.

> **The Commission's construction of the term "applicant" as used in Section 403.519 is consistent with the plain language of the pertinent provisions of the Act** and this Court's 1992 decision in *Nassau Power Corp. v Beard.*

641 So. 2d at 398 (Emphasis added). The Court specifically acknowledged that the Commission had reasoned that a need determination proceeding is designed to examine the need from an electric utility's duty to serve customers, "and non-utility generators had no such need or duty to serve, and that "only electric utilities, or entities with whom such utilities have executed a power purchase contract are proper applicants for a need determination proceeding under the Siting Act." 641 So. 2d at 398.

The Court found the Commission's reasoning consistent with the Court earlier decision in Nassau Power Corp. v. Beard, where the Court had agreed with the Commission that "the need to be determined under section 403.519 is "the need of the entity ultimately consuming the power...." 641 So. 2d at 399. The language and the logic of this decision applies to any entity attempting to seek a need determination which does not have an obligation to serve or a contract with an electric utility.

Second, when the Legislature was defining the terms "applicant," "electric utility," and "regulated electric company" when the Siting Act was passed in 1973, it was clear that the Legislature did not contemplate any non-utility generator such as a QF, an IPP or an EWG. It could not, for these entities did not yet exist. The "regulated electric companies" at the time the Siting Act was passed were those companies regulated by the Commission under Chapter 366. Reading into a statute a meaning which was obviously not within the purview of the Legislature when it was passed is improper. Radio Telephone Communications, Inc. v. Southeastern Telephone Company, 170 So. 2d 577, 581 (Fla. 1965). Any attempt by the petitioners to argue that the term "regulated electric company" within the Siting Act was intended to include an EWG would be just such an improper attempt to read into a statute a meaning not contemplated or intended when passed.

Third, the Siting Act is not federal legislation, it is state legislation. It was enacted as a part of a comprehensive regulation of Florida electric utilities. There is no basis to conclude that when the Siting Act speaks about "electric utilities" or "regulated electric companies" it intends to address utilities or regulated electric companies under federal law. Of course, federal regulation of EWGs by the FERC is hardly regulation in the sense deemed relevant in applying the Siting Act, and it is fundamentally different than the regulation of utilities in Florida. The Commission is called upon to interpret state legislation which on its face does not acknowledge or embrace federal legislation of utilities. It is only fairly read as addressing "electric utilities" as regulated by the Commission.

Fourth, the legislative history of the Siting Act suggests that the term "electric utilities" should be read as applying to state regulated electric utilities. The legislation creating the Siting Act 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. These statutory planning obligations remain applicable to "electric utilities," see Section 186.801, Florida Statutes (1997), which include all state regulated utilities in Florida, but not EWGs.

Fifth, when the Legislature passed the Grid Bill[27] a year after the Siting Act, the Commission was given authority to require "electric utilities" to repair or install facilities to maintain grid reliability. Section 366.05(8), Florida Statutes. In so empowering the Commission, the Legislature noted that this authority did not supersede or control any provision of the Siting Act. This further suggests that the "electric utilities" subject to the Grid Bill, the ten year site plan requirement and the Siting Act are all the same - state regulated utilities.

Sixth, the Transmission Line Siting Act, which is patterned after the Siting Act, uses the same definitions of "applicant" and "electric utility." Section 403.522(1), (11), Florida Statutes (1980). It also added a provision to Chapter 366 that permits an application by an "electric utility" for a determination of need for a transmission line. This common usage of the term "electric utility" between Chapter 366 and Chapter 403 further reinforces that the intent underlying the Siting Act when the term "electric utilities" was used was to refer to the "electric utilities" subject to regulation under Chapter 366.

Seventh, when FEECA was passed, it added provisions to both Chapter 366 (Sections 366.80 - 85) and to the Siting Act (Section 403.519). A "utility" under FEECA meant "any entity of whatever

---

[27] 1974 Laws of Florida Chapter 74-96 (codified at Sections 366.04(2), 366.05(7) and (8), Florida Statutes.

form which provides electricity ... to the public ...." Section 366.82(1), Florida Statutes(1980). The provision ultimately added to the Siting Act originally referred to a "utility" rather than an "applicant" initiating a need determination proceeding. Section 366.96, Florida Statutes, (1980), 1980 Florida Laws Chapter 80-65. Although the provision which became Section 403.519 was later conformed to "applicant" rather than "utility", this is further evidence that the term "electric utility" in the Siting Act is intended to be a reference to the state regulated utilities in Chapter 366. Moreover, subsequent amendments to the Siting Act, the Transmission Line Siting Act and FEECA conformed the definitions under the Acts thereby making clear that the term "electric utility" has the same meaning under the Siting Act, the Transmission line Siting Act, FEECA and 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 (1997).

As the foregoing discussion in the third through seventh points shows, the term "electric utility" in the Siting Act may not be viewed in isolation from the comprehensive scheme of legislation of which it is a part. The term "electric utility" is used throughout Florida legislation enacted before, during and after the Siting Act and clearly is intended to mean electric utilities

subject to state, not federal, regulation. Duke is not subject to Commission regulation under Chapter 366 as an "electric utility." It follows that Duke is not an "electric utility" within the meaning of the Siting Act.

Finally, Duke as an EWG is not readily distinguishable from either Ark or Nassau. Ark was not a QF. It was a non-utility generator which would have qualified under the Energy Policy Act as an EWG. So, in a sense, the Commission and the Court have already addressed this issue.

Nassau was to be a QF. Duke might the Commission believe there are significant differences between a QF and an EWG, making the Ark and Nassau and Nassau Power Corp. v. Deason decisions distinguishable. There are more similarities than differences. Both QFs and EWGs sell power at wholesale to electric utilities. Both QFs and EWGs selling to utilities have no obligation to serve nor any need of their own for the power being sold. Both QFs and EWGs are exempt from the Public Utilities Holding Company Act. Both QFs and EWGs fit the definition of a "public utility" under the Federal Power Act. The only difference is that under PURPA Congress authorized the FERC to pass regulations to exempt QFs from FERC's regulation as a public utility and under the EPACT EWGs are subject to minimal FERC "regulation." If Duke maintains that it is a "regulated electric company" under the Siting Act because it fits the definition of a "public utility" under the Federal Power Act,

this is not a basis to distinguish either Ark or Nassau. Both Ark and Nassau would have fit the definition of a "public utility" under the Federal Power Act. Of course, the Commission and the Supreme Court have already passed on whether Ark and Nassau were proper applicants. The same conclusion is properly drawn as to Duke.

Another way the petitioners may attempt to distinguish the decisions in the Ark and Nassau and Nassau Power Corp. v. Deason, is to argue that the Commission has, in prior need determination proceedings, permitted an entity which anticipated selling to a utility to proceed as an applicant without having a contract with a utility. There are seven such Commission decisions starting with the Florida Crushed Stone decision (see footnotes 12, and 13, previously). The response is simple. Those decisions have been overruled by both the Commission and the Supreme Court.

In Order No. 22341, the Commission stated it was overruling prior decisions involving QF need determinations, citing the AES need determination case. In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities, 89 FPSC 12:294, 319 (Order No. 22341). The seven decisions which it was overruling are set forth in an earlier order in the AES need determination. See, In re: Petition of AES Cedar Bay, Inc. And Seminole Kraft Corporation for determination of need for the Cedar Bay Cogeneration Project, 89

FPSC 1:368, 370 (Order No. 20671). The Commission also expressly considered and retreated from these decisions in the Ark and Nassau decision. Ark and Nassau, 92 FPSC 10:at 646. Of course, the Commission's decision in Ark and Nassau was affirmed in Nassau Power Corp. v. Deason.

The Supreme Court was even more emphatic in its rejection of the reasoning of these prior cases in its decision in Nassau Power Corp. v. Beard where it stated: "the PSC's prior practice of presuming need, as opposed to determining actual need, cannot be used now to force the PSC to abrogate its statutory responsibilities under the Siting Act." 601 So. 2d at 1178.

Another argument the petitioners might use to attempt to distinguish their case from the Ark and Nassau and Nassau Power Corp. v. Deason decisions is that their Project is a Joint Electric Power Supply Project under Chapter 361, Florida Statutes and as such, it is a "joint operating agency" within the definition of an "electric utility" under the Siting Act, making them proper applicants. Such an argument would also be in error.

The most simple response to such an argument is to refer to Section 361.16. It provides, in pertinent part:

> The power conferred by this act shall be in addition, and supplementary, to existing power and statutes, and this act shall not be construed as altering, repealing, or limiting any of the provisions of any other law, general, local or special, or of any articles of incorporation of an electric utility.

This statute makes it clear that the Joint Power Act, Sections 361.10-361.18, Florida Statutes, does not alter or repeal existing law, including the law interpreting the Siting Act. The Siting Act has been interpreted as not permitting an entity desiring to sell power to a utility to be an applicant without a contract with the utility. The Joint Power Act does not change that interpretation.

In addition, both the terms "electric utility" and "foreign public utility" are defined within the Joint Power Act as an entity "which owns, maintains, or operates" facilities. Such a definition is not applicable to Duke. It does not currently own, maintain or operates facilities; it is still seeking authority to construct such facilities. This statute clearly applies to entities already owning, maintaining and operating such facilities, not entities seeking to enter into such arrangements. The reference to "electric utilities" in the Joint Power Act is a reference to the entities already in place and recognized under state law as "electric utilities." The Project simply does not fit within the meaning or intent of Chapter 361.

Finally, the petitioners may argue that a failure to allow Duke, an EWG, to proceed under the Siting Act frustrates Congressional intent under the Energy Policy Act of 1992. Such an argument is not valid. In Section 731 of the Energy Policy Act of 1992, the statute creating EWGs, Congress specifically reserved

state and local authority over environmental protection and the siting of facilities.

> Nothing in this title or in any amendment made by this title shall be construed as affecting or intending to affect, or in any way to interfere with, the authority of any State or local government relating to environmental protection or the siting of facilities.

P.L. 102-486, Title VII, Subtitle C, 106 Stat. 2921 (Oct. 24, 1992). Of course, this need determination is an integral part of Florida's siting procedure.

Regulation of siting has been reserved to the states under the Federal Power Act, as both the FERC and the United States Supreme Court have observed. Section 201(b)(1) of the Federal Power Act, 16 U.S.C. § 824(b)(1), states that the FERC "shall have no jurisdiction [except in instances not applicable here] over facilities used for the generation of electricity...." FERC has recognized that this provision withholds from its control plant siting, licensing and construction. Monogohela Power Company, Docket No. ER87-330-001, 40 FERC ¶ 61,256 (Sept. 17, 1987). The United States Supreme Court has recognized that, "[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. Commission, 461 U.S. 190, 205, 103 S. Ct. 1713, 1728 (1983).

The Commission's exercise of its statutory responsibility under the Siting Act is consistent with the Energy Policy Act, the Federal Power Act, and United States Supreme Court precedent. If the Commission follows the law and requires that Duke have a contract for its merchant capacity before allowing Duke to initiate a need determination proceeding, the Commission will not be frustrating the Energy Policy Act, it will be reconciling its exercising state siting authority as contemplated by the Energy Policy Act.

II
The Joint Petition Should Be Dismissed For Failure To Meet The Mandatory Pleading Requirements of Florida Administrative Code Rule 25-22.081.

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

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

shall contain the following information....

The Joint Petition fails to provide several of these mandatory pleading requirements yet Duke seeks relief in a time constrained proceeding. The following paragraphs set forth the mandatory requirements which the Joint Petition fails to satisfy, the reason the information is needed by the Commission, and why the Joint Petition fails to meet the requirement and should be dismissed.

A. There is no description of the utility or utilities primarily affected.

Florida Administrative Code Rule 25-22.081(1) requires that a need determination petition include, "[a] general description of the utility or utilities primarily affected, including the load and electrical characteristics, generating capability, and interconnections." This information is necessary for the Commission to address whether the proposed power plants meet both "the need for electric system reliability and integrity" and "the need for adequate electricity at a reasonable cost" criteria found in Section 403.519, Florida Statutes.

The Joint Petition fails to provide this information as to 94% of the proposed power plant. Duke proposes to build a 514 MW unit and provide only 30 MW (6%) to the UCNSB. An attempt is made in the Joint Petition to provide the information required by Rule 25-22.081(1) as it relates to the UCNSB. However, the remaining 484

MW (94%) of the Project is uncommitted and **may**[28] be provided, in whole or in part, to peninsular Florida utilities (none of which are identified in the Joint Petition). The Joint Petition makes no attempt to provide for the Project's merchant capacity the information required by Rule 25-22.081(1). The purchasing utility or utilities of the merchant plant capacity are not identified; their specific load and electrical characteristics, their generating capability and their interconnections are not discussed. Consequently, their need for the proposed power plant cannot be assessed by the Commission. The failure of the Joint Petition to provide this mandatory information will completely frustrate the Commission's ability to apply the utility specific need determination criteria. This serious omission is grounds for dismissal.

In response, the petitioners will likely argue that they have satisfied Florida Administrative Code Rule 25-22.081(1) by including a discussion of the various factors mentioned in the rule from the perspective of "Peninsular Florida." There are at least two fatal problems with such an argument. First, "Peninsular Florida" is nothing more than a planning construct. It is not "the

---

[28] At several points in the Joint Petition it is acknowledged that the merchant plant capacity of the Project may remain uncommitted. For instance, in paragraph 17 the prospect of the capacity of the Project remaining uncommitted is addressed ("if the Project's capacity remains uncommitted....").

utility or utilities primarily affected;"[29] it is not even a legal entity. The rule in question and the statutory criteria the rule implements are utility specific.[30] A discussion of "Peninsular Florida" is not utility specific. It fails to satisfy the rule. Second, even if a discussion of "Peninsular Florida" could satisfy the rule, the description provided in the Joint Petition is incomplete and fails to satisfy the rule. There is no description of "Peninsular Florida's" electrical characteristics or its interconnections, and the only attempt at describing Peninsular Florida's load and generating capability is to quantify the total projected amounts of the two items over a ten year horizon. The Joint Petitioners simply fail to meet this mandatory pleading requirement.

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

---

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

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

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

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

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

Once again the Joint Petition provides much (but not all[31]) of this information as to the modest portion of the Project (6%) allegedly committed to the UCNSB, but the Joint Petition fails to provide this information as to the remainder of the proposed plant (94%). No attempt is made to identify the same detailed information for the purchasing utility or utilities, because Duke does not know if or to whom it may sell the remainder of its capacity and energy. So, the petitioners, because they do not have a contract for the sale of the plant's output, cannot identify the specific conditions, contingencies and factors which indicate a need for their plant. They cannot document the purchasing utility's peaks loads, net energy for load, load factors and provide a discussion of the more critical operating conditions. They cannot identify the models on which the load forecasts are based.

In response the petitioners may argue that their discussion of the load forecast for Peninsular Florida satisfies this requirement. It does not.

"Peninsular Florida" is not a legal entity with a need for a power plant. The obligation to meet the needs of the utilities within peninsular Florida rests solely with those utilities. It is

---

[31] Part of the specific documentation required, load factors, were omitted for all years except the year 2000. More significantly, the models used to develop the load forecast were not identified in "sufficient detail to permit analysis." See the discussion on pages 48 - 51 of the Exhibit to the Joint Petition.

the utilities that have the obligation to serve and the responsibility to plan. It is the individual utilities which will make the build or buy decisions necessary to meet needs.

Even if a discussion of the Peninsular Florida's need for power could satisfy the requirements of Florida Administrative Code Rule 25-22.081(3), the discussion in the Joint Petition and its Exhibit falls well short of the rule's requirements. First, there is no attempt to address "the specific conditions, contingencies or other factors which indicate a need for the proposed power plant." In the Joint Petition it is stated that "Duke New Smyrna accepts the Peninsular Florida load forecasts presented in the 1997 FRCC Ten-Year Plan and the 1998 FRCC Regional Plan." Joint Petition at 23. This is hardly a discussion of the specific contingencies and other factors indicating a need for the proposed plant; there is no attempt to discuss what factors lead to the load growth quantified in either plan. Moreover, the statement injects considerable confusion because it suggests reliance upon not one but two different load forecasts.

Second, it is maintained in both the Joint Petition (page 12) and in the Joint Petition Exhibit (page 53) that Table 11 of the Joint Petition Exhibit shows that Peninsular Florida needs more than 8,000 MW of new installed capacity to meet winter reserve margins through 2007 - 2008. An examination of Table 11 of the Joint Petition Exhibit shows that Table 11 makes no such

demonstration. Table 11 has no reserve margin information at all. It merely lists planned utility additions for the years 1998 through 2007. Those additions total winter capability of 6,141 MW, not 8,000 MW.

Third, and most important, **Tables 8 and 9 provided in the Joint Petition Exhibit clearly demonstrate that there is no need for the proposed power plant.** Joint Petition Exhibit at 54, 55. Instead of providing a discussion of "the specific conditions, contingencies or other factors which indicate a need for the proposed plant" the Joint Petition gives an incomplete summary of the results of an FRCC planning study, stating only that 8,000 MW of new installed generating capacity will be needed to meet winter reserve margins through 2007-2008. Such a summary of a planning document which the petitioners did not prepare and do not present is hardly the detailed statement called for by the rule. However, what is really troubling is how incomplete the Joint Petition's summary of the FRCC study is. The FRCC study shows that all the capacity needed to meet reliability criteria through 2007-2008 is already planned without the proposed Project. While this critically important fact is omitted from the discussion in the Joint Petition, it is acknowledged in Tables 8 and 9 in the Joint Petition Exhibit. Joint Petition Exhibit, pp. 54, 55. Those tables, which are built upon information taken from the FRCC study showing all planned unit additions, **show that without the Duke**

facility reserve margins will be met. Instead of providing a detailed statement of the factors which indicate a need for the proposed power plant, the Joint Petition includes tables which demonstrate there is no need for their proposed facility.

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

The Joint Petition fails to include the detailed information required under Rule 25-22.081(3), Florida Administrative Code. Because this information is necessary for the Commission to conduct its utility specific analysis under Section 403.519 and because this information is required to be submitted in a need determination petition, the Joint Petition should be dismissed. Moreover, the information presented in an attempt to satisfy this

rule, while insufficient, demonstrates that there is no need for the proposed plant, providing an additional basis for dismissal.

C. The Joint Petition Fails to Adequately Address Viable Nongenerating Alternatives.

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

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

The Joint Petition abysmally fails to satisfy this pleading requirement.

Even the portion of the Joint Petition which attempts to address this rule requirement as it regards the UCNSB is woefully inadequate. Two alternatives are mentioned, load control, which is currently being offered, and a solar photovoltaic project, which is planned for 2001. There is no statement that these two alternatives are the only two viable nongenerating alternatives to the Project. No evaluation is offered of the demand, kWh and oil consumption reductions associated with these programs. There is no mention of the goals and programs adopted pursuant to FEECA for the Utilities Commission. The requirements of this rule as to the Utilities Commission's 6% interest in the proposed plant have not satisfied by the Joint Petition.

In regard to the 94% of the proposed Project which is to be merchant plant capacity, there is an even sparser attempt to meet the specific requirements of this rule. It is stated that Duke does not engage in conservation and is not required to have conservation goals. Joint Petition at 23. That clearly does not meet the requirements of the rule. The only other statement is that Duke "accepts the Peninsular Florida load forecasts presented in the 1997 FRCC Ten Year Plan and the 1998 FRCC Regional Plan, which reflect the assumed implementation of currently approved energy conservation programs." Id. With all due respect, so what? Where is the discussion of the viable nongenerating alternatives? Not a single alternative is mentioned in the Joint Petition. Where is the "evaluation of the nature and extent of reductions in the growth rates of peak demand, KWH consumption and oil consumption resulting from the goals and programs adopted pursuant to the Florida Energy Efficiency and Conservation Act?" It is not provided. The Commission does not know from the Joint Petition what conservation alternatives are available which might mitigate the need for the proposed plant. The Joint Petition completely fails to meet this rule requirement, and without the information required, the Commission cannot perform the assessment of the conservation criteria in Section 403.519, Florida Statutes. The Joint Petition should be dismissed for failure to satisfy Florida Administrative Code Rule 25-22.081(7).

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

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

III
The Joint Petition Should Be Dismissed Because It Fails To Allege Need, And It Demonstrates That There Is No Need For The Proposed Plant.

The Joint Petition fails to allege that the capacity and energy from the merchant plant portion of the proposed plant, some

94% of the project, is needed to meet need or satisfies the other criteria of Section 403.519, Florida Statutes. Consider how the Joint Petition attempts to finesse alleging that the proposed merchant plant meets the need determination criteria. The Joint Petition alleges:

> The Project **is consistent with** Peninsular Florida's needs for generating capacity to maintain system reliability and integrity. Joint Petition at 12.
>
> ***
>
> The Project **is consistent with** Peninsular Florida's need for adequate electricity at a reasonable cost. Joint Petition at 14.
>
> ***
>
> The Project will be **a** cost-effective power supply resource for Peninsular Florida. Joint Petition at 19. *** the Project will necessarily be **a** cost-effective power supply option for the utilities to which Duke New Smyrna sells its merchant power. Joint Petition at 20.
>
> ***
>
> The New Smyrna project **is consistent with** the **overall goals** of the Florida Energy Efficiency and Conservation Act.... Joint Petition at 23.

Not once does the Joint Petition allege that the proposed merchant plant portion of the Project meets the statutory need determination criteria. Instead of alleging that the project is needed to meet "the need for electric system reliability and integrity" or "the need for adequate electricity at a reasonable cost," the Joint Petition alleges that the Project "is consistent

with" those needs.[32] Instead of alleging that the proposed plant is "the most cost-effective alternative available" to meet Peninsular Florida's or a purchasing utility's need for power, the Joint Petition states the proposed plant "will be a cost-effective power supply resource for Peninsular Florida."[33] Instead of alleging that there are not conservation measures that are reasonably available to mitigate the need for the proposed plant, the Joint Petition states that the "Project is consistent with the overall goals" of FEECA. Joint Petition at 23. In each and every instance, the Joint Petition stops short of alleging that the merchant plant capacity of the proposed plant meets the statutory need determination criteria. This failure to plead that the proposed plant meets the statutory need determination criteria is fatal. It causes the Joint Petition to fail to state a cause of action and is grounds for dismissal.

The Joint Petition's failure to make the necessary allegations is explained by at least two factors. First, absent contracts

---

[32] In contrast, the Joint Petition does allege that the proposed Project will meet these needs for the UCNSB. "[I]t is readily apparent that the UCNSB needs additional capacity and that the 30 MW of entitlement capacity from the New Smyrna Beach Power Project will contribute significantly toward meeting these needs." Joint Petition at 11.

[33] Once again, contrast this insufficient allegation with what the Joint Petition says as to the UCNSB. "The New Smyrna Beach Power Project is the most cost-effective alternative available to the UCNSB for meeting its future power supply needs." Joint Petition at 17.

providing the identity of the utilities to which Duke will sell its merchant plant power and the terms of the sales, the petitioners cannot show that the utility specific need determination criteria are met. Second, several tables in the Joint Petition Exhibit, Tables 8 and 9, tables which the petitioners prepared and submitted, show that the Duke merchant plant capacity is not necessary for Peninsular Florida to meet its reliability criteria through 2007-2008. The Joint Petition failed to allege that the Duke merchant plant capacity meets the need determination criteria for two very important reasons - they have no contracts that allow them to make such a demonstration and their own petition demonstrates that their plant is not needed. The Joint Petition fails to state a cause of action and must be dismissed.

IV
The Joint Petition Must Be Dismissed Because It Fails To Identify The Purchasing Utility and How The Contract For The Purchase Of Duke's Power Will Meet The Utility Specific Criteria of Section 413.519.

Even if Duke were a proper applicant under the Siting Act, the Joint Petition fails to state a cause of a action because the Joint Petition does not allege Duke meets the utility specific need determination criteria. Duke intends to sell to utilities. It has no obligation to provide service or a corresponding need for its power. Duke has no contracts for the sale of its power, so the

purchasing utility cannot be identified and it cannot be determined whether Duke's sale of power will allow purchasing utility to meet the need determination criteria. Since the Joint Petition does not allow the Commission to determine whether the utility specific need determination are met, the Joint Petition must be dismissed.

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

Section 403.519, Florida Statutes sets forth four criteria which an applicant must meet to secure a determination of need. It is clear from the plain language of these criteria that they are only applicable to an entity which has an obligation to serve and an associated need:

> In making its determination, the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant.

Section 403.519, Florida Statutes (1995). The Commission must give them their plain and obvious meaning. Holly v. Auld, 450 So. 2d 217 (Fla. 1984); A.R. Douglass, Inc. v. McRainey, 137 So. 157 (Fla. 1931).

These criteria have no applicability to an entity such as Duke which proposes to sell its proposed plant's output to utilities unless the utility to which it will sell has been identified and there is a contract under which costs and the impact on need can be determined. An entity such as Duke cannot make a showing that its power is needed for "electric system reliability and integrity" unless it addresses the utility or utilities to which it will sell and addresses the impact of its power on those systems.[34] An entity such as Duke cannot address that its power is needed "for adequate electricity at a reasonable cost" unless it addresses the utility or utilities to which it will sell and compares the alternatives the utility has to its power.[35] An entity such as Duke cannot address that its "proposed plant is the most cost-effective alternative available" unless it addresses the utility or utilities to which it will sell and discusses the alternative sources of

---

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

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

supply available to the utilities.[36] Finally, an entity such as Duke cannot address "the conservation measures taken or reasonably available" as an alternative to its proposed plant unless it identifies the utility or utilities to which it will sell and addresses whether they have fully explored their conservation alternatives.

It was the need to give these criteria applicability (1) which led the Commission to determine that a utility was an indispensable party to a need determination by a QF selling power to a utility (Martin; Ark and Nassau), (2) which led the Commission to conclude that these criteria are "utility and unit specific" (Order Nos. 22341, 24672), and (3) which led to the Supreme Court to reject Nassau's argument that the Siting Act does not require the PSC to determine need on a utility specific basis (Nassau Power Corp. v. Beard), and (4) which led the Commission to state that when a need determination involved a plant from which it was proposed to make sales to a utility, need should be examined from the perspective of the purchasing utility (Order Nos. 22341, 23792). It was the utility specific nature of these criteria which led the Commission to dismiss the applications of Ark and Nassau which did not have a contract (Ark and Nassau), and it was the utility specific nature

---

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

of these criteria which led the Supreme Court to uphold that dismissal in Nassau Power Corp. v. Deason.

Even if Duke were a proper applicant, these statutory criteria for determining need require a demonstration of a purchasing utility's or utilities' need for Duke's power. Duke has not yet identified the utility or utilities to which it will sell its merchant power, which comprises 94% of its Project. Duke can make no showing of the impact of its sale on those utilities' need for electric system reliability or need for adequate electricity as reasonable cost. Duke cannot demonstrate that its sale will be the utilities' most cost-effective alternative. Duke cannot address the extent to which those utilities might be able to mitigate the need for Duke's power through conservation. Because Duke cannot satisfy these utility specific criteria, Duke's petition should be dismissed.

V
The Joint Petition's Theory Of Allowing The Market To Determine Need Is Inconsistent With The Siting Act.

Under the Siting Act a power plant's environmental impact is to be weighed against a utility specific need for a power plant. A determination of need is so essential that it is a condition precedent to the certification of a power plant. There is a consideration of a plant's environmental impact only if there is a demonstrated need for the plant by a utility with an obligation to

serve. The theory underlying the Siting Act is simple - if you don't need it, then you don't build it.

The Joint Petition's theory of the case is different. Duke has no obligation to serve but wants to build a power plant that it alleges will have minimal impact on the environment. Duke may sell its output to Florida utilities, but it cannot identify the utilities to which it will sell. However, Peninsular Florida utilities as a whole have an alleged need for additional generating capacity. So, permit Duke to build its proposed plant and allow the market, rather than the Commission, to determine whether there is a need for the plant and whether the plant will be the most cost-effective alternative. The Joint Petition's simple theory is from *Field of Dreams* - build it, and they will come.

As the foregoing discussion shows, Duke's theory of the case is inconsistent with the Siting Act. It asks the Commission to abandon its and the Supreme Court's conclusion that the criteria of Section 403.519 are utility specific. It asks the Commission to abandon its and the Supreme Court's conclusion that the need to be determined in a need determination arises from an obligation to serve and must be viewed from the perspective of the purchasing utility. It asks that Duke be relieved of the requirement of first having a contract for the purchase of its power.

If the Joint Petition were granted, the consequence would be just the opposite of that intended by the Legislature. There would

be a proliferation of power plants and their environmental impacts. Duke and other entities without an obligation to serve would be allowed to build power plants premised upon some general measure of need without regard for the fact that they did not have contracts to meet that need, without a commitment that they would actually meet such need, and without regard for whether the utilities with the obligation to serve their need had plans in place to meet their need.

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

Of course, the Commission could avoid equal protection concerns by allowing not only EWGs but also QFs and utilities to build power plants to meet broader needs than a specific utility's needs. Such an action would clearly frustrate the Siting Act by allowing a proliferation of power plants.

Under the Siting Act, the Commission is the gatekeeper. Its responsibility in determining need is to make sure not only that

there is sufficient cost-effective, capacity available, but also to prevent uneconomic duplication of facilities that would have harmful environmental impacts. The Commission and the Supreme Court of Florida have developed a well reasoned interpretation of the Siting Act that does just that. It should not be abandoned to accommodate Duke. See also, Lee County Electric Co-op v. Marks, 501 So. 2d 585, 587 (Fla. 1987) (Commission has duty to avoid uneconomic duplication of facilities, and Court has repeatedly approved Commission's efforts to end uneconomic waste.). Make Duke follow the law and first secure contracts for its output before proceeding with a need determination. That approach will allow review under the utility specific need determination criteria, avoid a proliferation of power plants, mitigate environmental impacts, and avoid an uneconomic duplication of facilities. The Joint Petition should be dismissed as being inconsistent with the Siting Act.

VI
The Joint Petition Should Be Dismissed For Being Inconsistent With The Commission's Responsibility to Oversee Florida's Grid.

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

source of energy for Florida and to avoid the uneconomic duplication of facilities. Section 366.04(5), Florida Statutes.

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

If this proceeding were allowed to move forward, one of the essential purposes of the Commission having jurisdiction over the grid would be frustrated. The Commission would be allowing the uneconomic duplication of services. Tables 8 and 9 in the Joint Petition Exhibit show that reserve margin criteria will be met without the Duke plant being built. Thus, the Joint Petition shows there is no need for the proposed plant, because utilities with their obligations to serve have already planned to meet their needs. If despite this demonstration Duke were allowed to proceed,

then the proceeding necessarily contemplates an uneconomic duplication of facilities. Therefore, The Joint Petition should be dismissed and Duke should secure contracts for the sale of its power before initiating a need determination proceeding.

VII
Conclusion

The Joint Petition should be dismissed. Neither Duke nor the UCNSB are proper applicants as to the entire proposed plant. Duke does not have a contract for the sale of its power, and absent such a contract the Commission cannot apply the utility specific, statutory need determination criteria from the perspective of the purchasing utility. The Joint Petition fails to include mandatory pleading requirements and fails to allege that the statutory need determination criteria will be met by the proposed merchant plant capacity. In fact, the Joint Petition actually shows that there is no need for the Duke plant. The Joint Petition advances a theory of the case which is inconsistent with the Siting Act. The Joint Petition's theory of the case is also inconsistent with the Commission's responsibility to avoid uneconomic duplication of facilities. Each of these deficiencies is a ground for dismissal.

The Joint Petition fails to state a cause of action and as a matter of law should be dismissed.

Respectfully submitted,

Steel Hector & Davis LLP
Suite 601
215 South Monroe Street
Tallahassee, Florida 32301

Attorneys for Florida Power
& Light Company

By: Charles A. Guyton
Matthew M. Childs, P.A.
Charles A. Guyton

CERTIFICATE OF SERVICE
DOCKET NO. 981042-EM

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Memorandum of Law Supporting Motion to Dismiss Joint Petition has been furnished by Hand Delivery (*), or U.S. Mail this 8th day of September, 1998, to the following:

Leslie J. Paugh, Esq.*
Legal Division
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 370
Tallahassee, FL 32399-0850

Robert Scheffel Wright, Esq.*
John T. LaVia, III, Esq.
Landers & Parsons, P.A.
P.O. Box 271
Tallahassee, FL 32302

Mr. Ronald L. Vaden, Utilities Director
Utilities Commission
City of New Smyrna Beach
Post Office Box 100
New Smyrna Beach, FL 32170-0100

Kelly J. O'Brien, Manager
Structured Transactions
Duke Energy Power Services LLC
5400 Westheimer Court
Houston, TX 77056

By: Charles A. Guyton
Charles A. Guyton