IN THE SUPREME COURT
STATE OF FLORIDA

TAMPA ELECTRIC COMPANY, CASE NO. 95,444

Appellant,

vs.

FLORIDA PUBLIC SERVICE COMMISSION,

Agency/Appellee.
_____/

On Appeal From a Final Order of the
Florida Public Service Commission of March 22, 1999

INITIAL BRIEF OF APPELLANT TAMPA ELECTRIC COMPANY

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This brief is prepared using 12 point Courier New, a font that is not proportionately spaced.

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PREFACE

The appellant is Tampa Electric Company, designated as "Tampa Electric." The appellees are the Florida Public Service Commission designated as the "PSC" or "the Commission," Utilities Commission, City of New Smyrna Beach, Florida designated as the "City", Duke Energy New Smyrna Beach Power Company, Ltd., LLP, designated "Duke," Duke and City collectively designated "Joint Petitioners," Florida Power Corporation designated "FPC", Florida Electric Cooperatives Association, Inc. designated "FECA", Legal Environmental Assistance Foundation, Inc. designated "LEAF", Florida Power & Light Company designated "FPL", System Council U4 designated "IBEW", U. S. Generating Company designated "U. S. Generating" and LG&E Energy Corp., amicus below, designated "LG&E".

References to the record of the proceeding below are designated (R.__). The transcript of the hearing conducted December 2-4 and December 11 and 18, 1998 will be referred to as (Tr.__). References to the Appendix to this Initial Brief are designated (A. __). The Public Utility Regulatory Policies Act of 1978 (16 U.S.C. § 824 a-3) will be designated as "PURPA" and the Federal Energy Regulatory Commission will be designated "FERC".

Reference herein to the order on appeal, Order No. PSC-99-0535-FOF-EM entered by the PSC on March 22, 1999 in Docket No. 981042-EM

[1] will be designated the "Commission's Order" or the "Order". The

[1] In re: Joint petition for determination of need for an electrical power plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., 99 FPSC 3:401 (Order No. PSC-99-0535-FOF-EM)

Florida Electrical Power Plant Siting Act, Sections 403.501-403.518, Florida Statutes, will be referred to herein as the "Siting Act".

Key Precedents

Tampa Electric refers extensively in this Brief to four precedents that are central to the company's argument. For the sake of clarity those four precedents are briefly described below:

1. Commission Order No. 23792, issued in Docket No. 900004-EU on November 21, 1990, 90 FPSC 11:286, referred to herein as "Order No. 23792," holding in part that the need for power to be supplied by a cogenerator pursuant to a standard offer contract would not be presumed, but would have to be evaluated against individual utility need in a need determination proceeding.

2. Nassau Power Corporation v. Beard, 601 So.2d 1175 (Fla. 1992), referred to herein as "Nassau I" affirming the Commission's decision in Order No. 23792.

3. Commission Order No. PSC-92-1210-FOF-EQ issued in four consolidated Commission dockets on October 26, 1992, 92 FPSC 10:643

[2], referred to herein as the Commission's "Ark and Nassau decision," wherein the PSC dismissed

(March 22, 1999)

[2] In Re: Petition of Nassau Power Corporation to determine need for electrical power plant (Okeechobee County Cogeneration Facility), Docket No. 920769-EQ; In Re: Petition of Ark Energy, Inc. and CSW Development-I, Inc. for determination of need for electric power plant to be located in Okeechobee County, Florida, Docket No. 920761-EQ; In Re: Petition of Ark Energy, Inc. and CSW Development-I, Inc. for approval of contract for the sale of capacity and energy to Florida Power & Light Company, Docket No. 920762-EQ; In Re: Petition of Nassau Power Corporation for approval of contract

the petitions of two non-utility generators, Ark Energy, Inc. (an independent power producer) and Nassau Power Corporation (a cogenerator) because they did not qualify as applicants for a need determination under Section 403.519, Florida Statutes.

4. Nassau Power Corporation v. Deason, 641 So.2d 396 (Fla. 1994), referred to herein as "Nassau II," wherein this Court affirmed the Commission's Ark and Nassau decision.

Statement of Jurisdiction

This case involves the review of a decision of the Commission relating to rates and service of utilities providing electric service in Florida. Therefore, the Court has jurisdiction over this case pursuant to Article V, §3(b)(2) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(1)B(ii). The jurisdiction of this Court to review the PSC's Order is also supported by Sections 350.128 and 366.10, Florida Statutes.

The nature of the Order is an Order of the PSC granting a determination of need for a power plant pursuant to the provisions of Section 403.519, Florida Statutes, contained in the Siting Act. The City, one of the joint petitioners to the Commission below, is an electric utility which has alleged that its rates and service will be affected by the relief requested in the joint petition filed below.

Tampa Electric alleged that its substantial interests and its ability to operate its generating units and make sales of energy

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for the sale of capacity and energy to Florida Power & Light Company, 92 FPSC 10:643 (Order No. PSC-92-1210-FOF-EQ) (October 26, 1992)

and capacity will be adversely affected by the relief granted in the PSC's Order. Tampa Electric's position for leave to intervene, which was granted by the PSC, alleges in part:

> . . .The relief sought in this case will injure Tampa Electric's ability to plan, certify, build, and operate transmission and generation facilities necessary to meet its service obligation and the needs of its customers. The relief sought in this case would adversely affect Tampa Electric by reducing natural gas availability in Florida, creating uneconomic duplication of facilities, and making it unnecessarily burdensome to plan and provide transmission capacity necessary to meet Tampa Electric's service obligations. The relief sought in this case would adversely affect Tampa Electric's planned reliance upon gas fired generation. The relief sought in this proceeding would introduce tremendous uncertainty in the planning processes for Tampa Electric and other Florida utilities, adversely affecting their ability to plan their generation and transmission facilities. . . . (R. 418-419)

By granting the determination of need sought by Duke and the City, the PSC has effected the adverse impacts alleged by Tampa Electric in the proceeding below. Clearly this is the action of a statewide agency relating to rates or service of utilities providing electric service in Florida within the meaning of Article V, §3(b)(2) of the Florida Constitution.

By asserting jurisdiction before this Court, Tampa Electric in no way concedes that Duke is an electric utility within the meaning of the Section 366.02(2), Florida Statutes, or Section 403.503(13), Florida Statutes, or that Duke is a proper applicant under the Siting Act. However, the City and Tampa Electric are electric

utilities within the meaning of the statutes and their rates and service stand to be affected by the relief granted in the Order.

This Court has asserted jurisdiction over need determination orders of the PSC under Section 403.519, Florida Statutes. In Nassau I this Court affirmed the dismissal of an application for a determination of need under the Siting Act. In Nassau II the Court, likewise, affirmed an order of the PSC dismissing a non-utility generator's petition for determination of need for a power plant under the Siting Act, citing the Court's jurisdiction under Article V, §3(b)(2) of the Florida Constitution. The same jurisdiction lies here where the PSC has granted a determination of need to the detriment of Tampa Electric and the other electric utility intervenors.

Decision Sought to be Reviewed

This is an appeal of the Commission's Order granting the Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County, Florida, filed by City and Duke. The Commission concluded that both the City and Duke were eligible to be "applicants," within the meaning of the Florida Power Siting Act and that the proposed project was needed in Florida. As discussed in more detail below, Tampa Electric respectfully maintains that these conclusions are based on several key errors of law that, if corrected, would lead inexorably to a reversal of the Order.

In particular, Tampa Electric asserts that:

The Commission erred, as a matter of law, in accepting Duke's contention that it is an "electric utility" within the

meaning of the Siting Act, Section 403.503(13), Florida Statutes, and, therefore, a lawfully qualified Applicant under Section 403.519, Florida Statutes;

The Commission erred, as a matter of law, in presuming need on a Peninsular Florida basis rather than adhering to the utility and unit specific need determination requirements of Nassau I; and

The analysis and conclusions in the Commission's Order regarding the need criteria in Section 403.519, Florida Statutes, are necessarily illogical and erroneous, given the Commission's erroneous predicate that Duke is a proper applicant under the Siting Act.

Standard of Review

Tampa Electric respectfully contends that the statutory interpretations relied on by the Commission as the basis for the Order are inconsistent with; 1) the plain meaning of the statutory language at issue; 2) the associated legislative intent; and 3) prior Commission statutory interpretations which have been affirmed by this Court. In short, the Commission's statutory interpretations in this case are erroneous and merit rejection by this Court.

The standard of review most recently applied by this court is generally articulated in Gulf Coast Electric Cooperative v. Johnson, 727 So.2d 259 (Fla. 1999) where this court stated:

> Commission orders come to this court 'clothed with the statutory assumption that they have been made with the Commission's jurisdiction and powers, and that they are reasonable and

> just and such as ought to have been made.' Moreover, an agency's interpretation of a statute it is charged with enforcing is entitled to great deference. The party challenging an order of the Commission bears the burden of overcoming those presumptions by showing a departure from the essential requirements of law.

However, deference to an agency's interpretation of statutes it is charged with enforcing is not absolute. Woodley v. Department of Health & Rehabilitative Services, 505 So.2d 676, 678 (Fla. 1987). Where, as Tampa Electric contends here, an agency's construction amounts to an unreasonable interpretation, or is clearly erroneous, it cannot stand. Id., at 678; Legal Environmental Assistance Foundation, Inc. v. Board of County Commissioners of Brevard County, 642 So.2d 1081, 1083-1084 (Fla. 1994).

There are associated standards of review that must also be applied. First of all, deference by the court to an agency's interpretation of its enabling statute is appropriate only if the statute is ambiguous. Otherwise, the court and the agency must give effect to the unambiguously expressed intent of the legislature. This Court long ago observed:

> A departmental construction of a taxing statute acquiesced in for a long time by those affected by the statute is entitled to great weight when the statute is reasonably susceptible of two constructions. But where, as here, the statute is plain, and has been construed by the highest court of the state, such departmental construction cannot take away from the judiciary the duty to declare what the law is. L. B. Price Mercantile Co. v. Gay, 44 So.2d 87 (Fla. 1950)

The Commission, itself, has endorsed and adopted this standard of review. At page 20 of the Order, quoting approvingly from Vocelle v. Knight Brothers Paper Company, Inc., 118 So.2d 664 (Fla. 1st DCA 1960) the Commission reiterates as follows:

> When the words of a statute are plain and unambiguous the courts must give to them their plain meaning. . . .A statute should be so construed as to give a meaning to every word and phrase in it and, if possible, so as to avoid the necessity of going outside the statute for aids to construction.

This Court has not hesitated to overturn erroneous Commission interpretations of its statutory authority. In Teleprompter Corporation v. Hawkins, 384 So.2d 648 (Fla. 1980) the Court quashed an order of the Commission certifying to the Federal Communications Commission that the PSC had authority to regulate "pole attachment" agreements. In quashing the order the Court looked to a prior Commission order concluding that it could not require utilities to enter into pole attachment agreements. The Court concluded:

> Since that decision there has been no relevant change in the Commission's statutory grant of jurisdiction. Therefore, the reasoning in that decision is still relevant. Id. at 384 So.2d 649

The case for deference is more compelling when an agency's interpretation is consistent with its prior published decisions. Smith v. Crawford, 645 So.2d 513 (Fla. 1st DCA 1994). In fact, when an administrative agency attempts to change its administrative interpretation of a statute which it administers without offering a sufficient record predicate or otherwise offering a reasonable

explanation for its abandonment of its announced interpretation, then the court should give greater weight to the first administrative interpretation and reject its later revision. Miller v. Agrico Chemical Company, 383 So.2d 1137 (Fla. 1st DCA 1980); Beverly Enterprises-Florida, Inc. v. Department of Health and Rehabilitative Services, 573 So.2d 19 (Fla. 1st DCA. 1990).

In Southern States Utilities v. Florida Public Service Commission, 714 So.2d 1046 (Fla. 1st DCA 1998), the First District Court of Appeal reversed and remanded an order of the Commission pertaining to a water utility. In so doing the Court cited the provision in Section 120.68, Florida Statutes, requiring the reviewing court to remand a case to the agency for further proceedings when it finds that the agency's exercise of discretion was:

> 3. Inconsistent with the officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency. . . . Id. at 714 So.2d 1055

In summary, although generally clothed with a presumption of validity, a Commission decision must be overturned upon a showing that such decision departs from the essential requirements of law. This is particularly true in a situation where the Commission departs without justification from its own prior interpretation of a statute or rule that it is charged with administering or departs from controlling judicial precedent.

STATEMENT OF THE CASE AND OF THE FACTS

Case Background and Procedural History

On August 19, 1999, Duke and the City commenced the proceeding below by the filing of a Joint Petition for Determination of Need for an Electrical Power Plant ("Joint Petition") pursuant to Section 403.519, Florida Statutes. The proposed power plant project consists of a 514-megawatt ("MW") natural gas fired, combined cycle generator, together with a natural gas lateral pipeline and associated transmission facilities (the "project"). The project is to be located in Volusia County, Florida, adjacent to Interstate 95 and will be owned and operated by Duke. Duke is an Independent Power Producer ("IPP") sometimes also referred to as an Exempt Wholesale Generator ("EWG") which is subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"). Its partners, Duke Energy Power Services Mulberry, Inc. ("Duke Mulberry"), and Duke Energy Global Asset Development, Inc. ("Duke Global") own Duke. Both Duke Mulberry and Duke Global are wholly owned affiliates of Duke Power Company.

The record shows that Duke plans to construct a 514 MW capacity generating plant (R. 1,7) with only 30 MW of that capacity committed to the City to serve its retail load. (R. 4) Duke obtained the City's involvement in this project by pricing the 30 MW as a "loss leader" (R. 2387, 2540, 2550, 2555-2556). Duke proposes to market at wholesale the balance of the output of the

plant. (Tr. 572) Duke professes no duty to serve retail customers and, indeed, as an EWG Duke is precluded by the Public Utility Holding Company Act from serving retail load. (R. 5)

The City, a municipal electric utility within the meaning of Section 366.02(2), Florida Statutes, claims to have an entitlement to purchase 30 MW of the proposed plant's capacity along with the energy associated with that capacity. (Tr.387) The City may use this purchased capacity and energy to serve its retail customers. Duke will market the balance of the capacity and energy from the proposed plant (approximately 484 MW) on the wholesale power market. Putting aside its voluntary contractual obligation to sell 30 megawatts from the project to the City, Duke, as an IPP or EWG, will have no utility obligation to serve the public within the state of Florida.

On September 8, 1998, FPL filed a Motion to Dismiss Joint Petition, Request for Oral Argument, and Memorandum of Law Supporting Motion to Dismiss. Also on September 8, 1998, FPC filed a Motion to Dismiss Proceeding (FPC Motion) and Request for Oral Argument. On September 18, 1998, Joint Petitioners filed a Memorandum of Law In Opposition To FPL's Motion to Dismiss Joint Petition. On September 21, 1998, Joint Petitioners filed a Memorandum of Law In Opposition to FPC's Motion to Dismiss Proceeding. On November 23, 1998, LG&E Energy Corporation filed an *Amicus Curiae* Memorandum of Law in opposition to the Motions to Dismiss. A hearing on the issues raised by the Joint Petition was held before the Commission on December 2-4 and December 11 and 18,

1998. Oral argument on the Motions to Dismiss was heard at the commencement of the hearing on December 2, 1998, and again on January 28, 1999, subsequent to the filing of briefs by the parties. On March 22, 1999, the Commission issued the Order, which is the subject of Tampa Electric's present appeal.

SUMMARY OF ARGUMENT

The Commission's legal error in this matter is both unquestionable and undeniable. Under the Siting Act, no power plants, other than those explicitly exempted, can be sited in Florida unless the Commission determines that the individual project is "needed" within the meaning of the Siting Act. Only a qualified "applicant" can request such certification. The project proposed by Duke in this proceeding is not exempt from the need certification requirements of the Siting Act. Therefore, the threshold question is whether Duke qualifies as an "applicant" or co-applicant within the meaning of the Siting Act.

In order to qualify as an "applicant" Duke would have to be an "electric utility" which is further defined as "cities and towns, counties, public utility districts, regulated electric companies, electric cooperatives, and joint operating agencies or combinations thereof, engaged in or authorized to engage in the business of generating, transmitting or distributing electric energy". In its interpretation of the statutory prerequisites to applicant status under the Siting Act, the Commission in Ark and Nassau very clearly concluded that one could not be an "electric utility", and therefore, a qualified "applicant" under the Siting Act, unless one had an obligation to serve the public. As an EWG regulated by the FERC and authorized to engage in wholesale power generation, Duke has no obligation to serve the public and, by definition, cannot be an applicant for Siting Act need certification. In fact, with explicit reference to the Siting Act, Section 366.82(1), Florida

Statutes, defines a "utility" as "any person or entity of whatever form which provides electricity or natural gas **at retail to the public**, . . ." (emphasis added). This Court subsequently reviewed and independently affirmed the Commission's statutory interpretation on these issues.

The Commission's conclusion that Duke is an "electric utility" under Section 366.02(2), Florida Statutes, and, therefore, is a "regulated electric company" within the meaning of the Siting Act, proceeds from a demonstrably false premise. Section 366.04, Florida Statutes, in defining the jurisdiction of the Commission, states that the Commission shall have power over electric utilities for a number of purposes including (a) prescribing uniform systems and classifications of accounts; (b) prescribing a rate structure for all electric utilities; and (c) approving territorial agreements and resolving territorial disputes. Section 366.04, Florida Statutes, implicitly further defines the term "electric utility" as used in Section 366.02, Florida Statutes. The logic of the statutory provisions in question is quite simple and inescapable. If the Commission has Section 366.04 authority over all electric utilities, and if Duke is not subject to all of the Commission's Section 366.04 powers, as is the case in this proceeding by Duke's own admission, then Duke cannot be an "electric utility" within the meaning of Section 366.02(2) and the Commission has no jurisdiction over Duke.

Aside from its lack of an obligation to serve, Duke's claim of Joint Power Agency status is doubly flawed. The Joint Power Act

contemplates joint involvement. The joint petitioners did not allege or demonstrate that the City will be involved in any way in the financing, acquiring, constructing, managing, operation or ownership of the proposed project. In fact, the record demonstrates that all of these activities will be performed solely by Duke.

Finally, the Commission's finding of need in this case is demonstrably flawed. Both the Commission and this Court have made it abundantly clear in the Nassau decisions that the "need" which must be evaluated under the Siting Act is the need of an individual utility that has an obligation to serve the public. Therefore, by definition, Duke could not have a need cognizable under the Siting Act.

The Commission stated its intention in the Order not to amend, limit or change the Nassau decisions. However the Commission attempts to distinguish those clearly controlling decisions on the ground that they apply only to Qualifying Facilities ("QFs") and not to IPPs such as Duke. However, even a cursory reading of the relevant decisions leaves no doubt that the Commission's interpretation of the statutory threshold requirements for standing as an "applicant" under the Siting Act were explicitly and unambiguously directed toward non-utility generators, including IPPs such as Duke. Given the plain language of the decisions in question it would be patently unreasonable to conclude that these decisions were intended to create a statutory interpretation that is applicable to QFs alone.

ARGUMENT

I. THE COMMISSION ERRED, AS A MATTER OF LAW, IN ACCEPTING DUKE'S CONTENTION THAT IT IS A LAWFULLY QUALIFIED APPLICANT FOR A DETERMINATION OF NEED UNDER SECTION 403.519, FLORIDA STATUTES.

Duke's Proposed Plant Must be Certified under the Siting Act.

It is undisputed that Duke's proposed plant, because of its size and characteristics, must be certified under the Siting Act and cannot be constructed without first obtaining a determination of need under Section 403,519, Florida Statutes. The Siting Act requires such a determination of need as well as ultimate site certification under the Siting Act for any steam electrical generating facility of 75 MW in capacity or greater. Duke's proposed plant clearly exceeds this threshold.

Duke's proposed plant must be certified under the Siting Act and cannot be constructed without first obtaining a determination of need under Section 403.519, Florida Statutes. Tampa Electric does not contest the City's need for 30 MW of capacity, or that it may be satisfied by the 30 MW entitlement the City has negotiated with Duke. The City could have satisfied its 30 MW need without proceeding under the Siting Act. Tampa Electric's focus is on the remaining 484 MW, which is not committed by contract to any utility serving retail customers but which Duke proposes to sell on the open wholesale market. This uncommitted capacity represents some 94 percent of the total generating capacity of the proposed plant.

Section 403.506, Florida Statutes, which addresses "applicability" and "certification" under the Siting Act, provides in pertinent part:

> The provisions of this act shall apply to any electrical power plant as defined herein, except that the provisions of this act shall not apply to any electrical power plant or steam generating plant of less than 75 megawatts in capacity or to any substation to be constructed as part of an associated transmission line unless the applicant has elected to apply for certification of such plant or substation under this act. No construction of any new electrical power plant or expansion in steam generating capacity of any existing electrical power plant may be undertaken after October 1, 1973, without first obtaining certification in the manner as herein provided, except that this act shall not apply to any such electrical power plant which is presently operating or under construction or which has, upon the effective date of chapter 73-33, Laws of Florida, applied for a permit or certification under requirements in force prior to the effective date of such act. (emphasis added)

An "electrical power plant is further defined in Section 403.503(12), Florida Statutes, for the purpose of certification as:

> . . .any steam or solar electrical generating facility using any process or fuel, including nuclear materials, and includes associated facilities which directly support the construction and operation of the electrical power plant and those associated transmission lines which connect the electrical power plant to an existing transmission network or rights-of-way to which the applicant intends to connect, except that this term does not include any steam or solar electrical generating facility of less than 75 megawatts in capacity unless the applicant for such a

> facility elects to apply for certification under this act... (emphasis added)

Therefore, any and all electrical power plants built in Florida after October 1, 1973 must be must be certified pursuant to the Siting Act, unless the proposed electrical power plant is exempt pursuant to the above language. Duke's proposed plant clearly exceeds the above mentioned 75-megawatt exemption threshold.

If, as the statute makes clear, certification of a non-exempt electrical power plant, such as Duke's, is a prerequisite to the construction and operation of such a plant, then Duke's plant must be certified or it cannot be built.

There Exists No Qualified Applicant for the 840 MW of Uncommitted Capacity and Energy to be Generated at Duke's Proposed Plant.

Section 403.519, Florida Statutes, authorized "applicants" to request certification for a non-exempt project. Section 403.503(4), Florida Statutes, defines an "applicant" as:

> . . .any electric utility which applies for certification pursuant to the provisions of this act. (emphasis added)

"Electric utility" is defined in Section 403.503(13), Florida Statutes, as follows:

> . . .cities and towns, counties, public utility districts, regulated electric companies, electric cooperatives, and joint operating agencies, or combinations thereof, engaged in, or authorized to engage in, the business of generating, transmitting, or distributing electric energy.

The City is not an applicant for the substantial amount of uncommitted capacity from Duke's proposed plant. To the contrary the City has only demonstrated a need for 30 MW of additional capacity. Duke is not a proper applicant for the remaining 484 MW of uncommitted capacity. Under current Florida law, entities such as Duke, which, by definition, have no obligation to serve retail customers and, consequently, no cognizable need of their own, cannot be applicants under the Siting Act. This requirement is spelled out in the Commission's Ark and Nassau decision. In that order the Commission dismissed petitions by Ark, an IPP, and Nassau, a cogenerator, finding that they were not proper applicants for a need determination proceeding under Section 403.519, Florida Statutes. In that order, the Commission noted the definition of an electric utility as set forth in Section 403.503, Florida Statutes, and concluded that neither Ark nor Nassau is a city, town or county. The Commission further stated:

> . . .Nor is either a public utility district, regulated electric company, electric cooperative or joint operating agency. 92 FPSC 10:645

In the Ark and Nassau case the Commission focused on the lack of an obligation to serve retail customers as being the key to applicant status under the Siting Act:

> Significantly, each of the entities listed under the statutory definition [of an electric utility] 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 Nassau and Ark 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 determinations is in accord with that decision. See Nassau Power Corporation v. Beard, 601 So.2d 1175 (Fla. 1992) 92 FPSC 10:645 (emphasis added)

The Commission in Ark and Nassau went on to explain the procedures which non-utility generators must follow to obtain a determination of need, holding that the purchasing utility as well as the non-utility generator must participate:

> 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. . . .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., at 92 FPSC 10:645

Significantly the Commission went on to state:

> 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 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. at 92 FPSC 10:645 (emphasis added)

Both the Commission and this Court have made a clear distinction between non-utility generators who may have a

voluntarily assumed contractual obligation to serve certain customers and utilities who have a general public utility obligation to provide retail service to the public. Indeed, a non-utility generator can be a co-applicant under the Siting Act only if its project is contractually dedicated to meeting a specific retail utility need. In making these findings the Court made no narrowing distinction for cogenerators, but repeatedly used broad language in referring to non-utility generators.

The Commission's reasoning in Ark and Nassau is entirely consistent with, and reinforced by, the unambiguous definition of a "utility" set forth in Section 366.82(1), Florida Statutes, which states, in relevant part:

> For the purposes of ss. 366.80-366.85 and 403.519, "utility" means any person or entity of whatever form which provides electricity or natural gas at retail to the public... (emphasis added)

Although the term "utility" is not used in Section 403.519, the term that is used, "applicant", is defined as an "electric utility" under Section 403.503(4). To the extent that an "applicant" must be an "electric utility", Section 366.82 does nothing more than further define an "electric utility" in terms of an obligation to serve retail customers

[3]. There is no statutory ambiguity, inconsistency or contradiction under the above-mentioned

[3] As Commissioner Clark observes in her dissent, pages 57-58, the terms "utility" and "applicant" were used interchangeably in the predecessor provision of Section 366.82. As Commissioner Clark explained:

statutory interpretation. However, the Commission's new interpretation ignores the explicit statement in Section 366.82 of its applicability to Section 403.519. Unless Section 366.82 is understood to modify or further define the term "applicant" in Section 403.519, the reference to Section 403.519 in Section 366.82 would be meaningless. This result would be clearly inconsistent with the Commission's view that a statute should be so construed as to give a meaning to every word and phrase in it and, if possible, so as to avoid the necessity of going outside the statute for aids to construction.

The inescapable conclusion which one must reach on the basis of the Commission's reasoning in Ark and Nassau is that Duke is not an "electric utility" within the meaning of the Siting Act and, therefore, cannot be a qualified applicant for need certification.

The Commission's interpretation of the Siting Act in Ark and Nassau was upheld in Nassau II, where this Court said:

> 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.

> In 1990, the Legislature enacted numerous revisions to the Power Plant Siting Act, the Transmission Line Siting Act, and other laws affecting environmental regulation. 1990 Fla. Laws Section 24, Chapter 90-33, amended Section 403.519, Florida Statutes, to change the term "utility" in the first sentence to "applicant." It also required the publication of notice of a request for a determination of need, and provided that the Commission's determination of need constitutes final agency action. There is no indication in either the title of the act, or in the legislative staff analyses, that the amendment was designed to broaden the entities authorized to request a need determination beyond persons or entities providing electricity at retail.

* * *

> 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.

* * *

> The Commission reasoned that a need determination proceeding is designed to examine the need resulting from an electric utility's duty to serve [retail] customers. Non-utility generators, such as Nassau, have no similar need because they are not required [by law] to serve customers. Nassau II at 641 So.2d 398. (parentheticals supplied)

It is clear from the foregoing that Duke is an improper applicant with regard to the 484 MW of excess plant capacity included in the proposed project. While the City may have a need for 30 MW, it is not an applicant for the balance of the capacity associated with the proposed facility. Duke, a non-utility generator within the meaning of the Ark and Nassau decision, is not a proper applicant for the remaining uncommitted capacity. It has no statutory obligation to serve retail customers. Duke has presented no contract with any utility serving retail load to purchase the remaining plant capacity. Duke has no utility co-applicant with respect to that excess capacity. Consequently the Commission erred in allowing Duke to proceed as an applicant with respect to the uncommitted portion of the proposed plant.

The Counter Arguments Adopted in the Commission Order Do Not Establish Duke as a Proper Applicant Under the Siting Act.

In an effort to overcome controlling precedent and clear statutory language, the Commission's Order attempts several justifications.

The Order claims Duke is a "regulated electric company" within the meaning of the Siting Act because it is an EWG regulated by the FERC.

The Commission Order also contends that Duke is an "electric utility" within the meaning of Section 366.02(2), Florida Statutes (Order beginning at page 19; R. 2676).

The Order also concludes that the project is a joint electric power supply project under Chapter 361, Florida Statutes, and, therefore, a "joint operating agency" within the meaning of the Siting Act (Order beginning at page 22; R. 2679).

Finally, the Order attempts to distinguish the applicability of the Commission's own Ark and Nassau decision and the decisions of this Court in Nassau I and Nassau II.

Each of these efforts to characterize Duke as a proper applicant under the Siting Act and to distinguish controlling precedent is erroneous, as a matter of law, and should be rejected.

Duke is Not a "Regulated Electric Company" Within the Meaning of the Siting Act.

Beginning at page 17 of the Order (R. 2674), The Commission erroneously concludes that Duke's "public utility" status under the

Federal Power Act makes it a proper applicant under the Siting Act. Apparently, in the Commission's view, being regulated by the FERC (or presumably by any other regulatory agency) is all that was envisioned by the Legislature when it adopted the Siting Act. However, Nassau, as a QF and Ark as an IPP, like Duke, were "public utilities" under the Federal Power Act, yet the Commission concluded that neither qualified as an applicant in Ark and Nassau. Again, the Commission stated:

> 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 10:645.

Merely being subject to FERC jurisdiction for purposes unrelated to the Siting Act did not render Ark or Nassau "regulated electric companies" qualified to apply for a determination of need under the Siting Act. This Court concurred in the Commission's construction of "applicant" in its Nassau II decision.

The Commission Erred in Concluding that the Proposed Project is a "Joint Power Supply Project" and, therefore, a "Joint Operating Agency" which Qualified as an Applicant under the Siting Act.

The Order refers to joint operating agencies that are qualified as applicants under the Siting Act definition. The Joint Power Act, Section 361.10, Florida Statutes, et. seq., contemplates joint involvement. The Act empowers electric utilities, or other entities whose membership consists only of electric utilities, to

join with other entities:

> For the purpose or purposes of jointly financing, acquiring, constructing, managing, operating or owning any project or projects. (emphasis added) Section 361.12, Florida Statutes

The Commission's Order concludes, at page 23 (R. 2680):

> In sum, the City, an "electric utility," has exercised its authority under Section 361.12, Florida Statutes, to join with Duke New Smyrna, a "foreign public utility" for the purpose of jointly financing and acquiring a "project," the proposed plant. . . .

This simply is not the case. The joint petitioners did not allege or demonstrate that the City will be involved in any way in the financing, acquiring, constructing, managing, operation or ownership of the proposed project. In fact, the record demonstrates that all of these activities will be performed solely by Duke New Smyrna. Duke will build, own, and operate the plant and has agreed only to sell a miniscule portion of the output to the City. Duke will bear all of the capital investment and operating risks associated with the project. (Tr. 572). Duke will design, engineer, construct, finance and own the project. (Tr. 583). The City's only role is that of an entity with entitlement to 30 MW of the project's capacity and associated energy. Clearly there will be no joint electric power supply project within the contemplation of the Joint Power Act. This is simply another example of ways in which the Order relies on inapplicable statutory definitions in an effort to justify an erroneous result.

The Commission Erred in Accepting Duke's Contention that it is an "Electric Utility" under Section 366.02(2), Florida Statutes.

Duke contended and the Commission found that Duke is an electric utility as defined in Section 366.02(2), Florida Statutes. This conclusion is intended to buttress the argument that Duke is a regulated utility within the meaning of Section 403.503(13) and that the Commission would have jurisdiction over Duke to ensure that the anticipated economic and reliability benefits attributed to the project would materialize. However, the statutory language does not support the Commission's conclusion.

Under Section 366.02(2), an "electric utility" is defined as:

> . . .any municipal electric utility, investor-owned electric utility or rural electric cooperative that owns, maintains or operates an electric generation, transmission or distribution system within this state.

If Duke truly were an electric utility as defined in Section 366.02(2), Florida Statutes, this would lead to results that even Duke contends should not occur. Section 366.04, Florida Statutes, in defining the jurisdiction of the Commission, states that the Commission shall have power over electric utilities for a number of purposes including (a) prescribing uniform systems and classifications of accounts; (b) prescribing a rate structure for <u>all</u> electric utilities; and (c) approving territorial agreements and resolving territorial disputes.

The logic of the statutory provisions in question, as they

bear on this case, is quite simple and inescapable. If the Commission has Section 366.04 authority over all electric utilities and if Duke is not subject to all of the Commission's Section 366.04 powers, as is the case by Duke's own admission, then Duke is not an "electric utility" within the meaning of Section 366.02(2) and the Commission has no jurisdiction over Duke

[4].

The Commission's Order points out on page 19 (R. 2676) that Duke:

> . . .agrees that it is subject to the Commission's Grid Bill and TYSP (Ten Year Site Plan) regulatory requirements. . . (parenthetical supplied)

However, neither Duke nor the Commission has the authority to unilaterally and selectively tailor the nature and extent of Commission jurisdiction over Duke. Jurisdiction over the subject matter of an action must be conferred by law and cannot be acquired by virtue of the consent of the parties. Butler v. Allied Dairy Products, Inc., 151 So.2d 279 (Fla. 1963). The Commission erred in accepting Duke's offer to consent, in a very limited way, to be "treated" as an electric utility solely to bolster Duke's argument that it qualifies as an applicant under the Siting Act.

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[4] Duke responded during oral argument on the motions to dismiss below that the Commission lacks authority to prescribe a rate structure for Duke and that Duke is not subject to the conservation requirements that other electric utilities face. (Tr. 94). Duke also contends that the provisions of Section 366.04, Florida Statutes, relating to the resolution of territorial disputes does not apply to them. (Tr. 94).

In summary, the Commission's consent to allowing Duke to adopt an applicable statutory definition and assume statutory roles constitutes a clear departure from the essential requirements of law and constitutes an erroneous interpretation of the governing statutes.

The Commission Order Fails to Distinguish the Controlling Precedent of the Commission's Ark and Nassau Decision and this Court's Decisions in Nassau I and II.

After acknowledging that the Nassau cases "appear to be persuasive in the instant docket," the Order attempts to distinguish those controlling precedents on the ground that they are relevant only with regard to the Commission's statutory interpretation of the threshold qualifications required of QFs seeking applicant status under the Siting Act. However, the Commission squarely established in its Ark and Nassau decision and this Court affirmed in Nassau II that non-utility generators are not qualified to apply for a need determination under the Siting Act, unless the proposed capacity addition is committed to a utility serving retail customers. In the Ark and Nassau decision, after observing that it is a utility's need for power to serve its customers that must be evaluated in a need determination proceeding, the Commission said:

> . . .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. (emphasis supplied)

Nowhere in the Ark and Nassau decision is there any suggestion that the Commission's statutory interpretation applied only to QFs, as suggested in the Order. On the contrary, the Commission explicitly applied its statutory interpretation in Ark and Nassau to all "non-utility" generators, which the Commission defined as including QFs, cogenerators and independent power producers

[5].

The Commission's reference to an independent power producer in the above quoted portion of its Ark and Nassau decision is telling. Independent power producers, like cogenerators, are non-utility generators. However, independent power producers, unlike cogenerators, lack the authority to require utilities providing retail service to purchase their output. The new found cogeneration distinction, put forth by Duke late in the proceeding below simply doesn't exist. The Commission decision reviewed by this Court in Nassau I did not set a different standard for cogenerators in need proceedings. Instead, the Commission merely determined that a cogenerator would no longer be excused from the Siting Act criteria already applicable to other non-utility generators.

In the proceeding below, a copy of Ark Energy Inc.'s Petition for Determination of Need was admitted as Exhibit 5 (A. 1-15). This is one of the Petitions the Commission dismissed in its Ark and Nassau decision. Ark's Petition shows, on its face, that Ark was an independent power producer and not a cogenerator. The Commission saw no reason to treat these two types of non-utility generators (one a cogenerator and the other not) any differently in concluding that neither was a proper applicant under the Siting Act. In Ark and Nassau the Commission only reserved for future

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[5] As Commissioner Clark points out at page 61 of the Order: "A review of the transcripts from the Agenda Conference where the Ark and Nassau petitions were discussed likewise does not support the distinction. The focus of the debate was that in order to be an applicant, the entity had to have an obligation to serve retail customers." (R. 2718)

determination the question of whether a self-service generator (which has its own need to serve) may be an applicant for a need determination without a utility co-applicant. That issue was not addressed below and is not before the Court.

The attempt in the Commission's Order to distinguish Ark and Nassau and Nassau I and II on the ground that those decisions set a standard solely applicable to cogenerators is simply contrary to the holdings of those decisions and the rationale upon which they are based. That effort should be rejected.

II. THE COMMISSION ERRED IN PRESUMING NEED ON A PENINSULAR FLORIDA BASIS RATHER THAN IN ADHERING TO THE UTILITY AND UNIT SPECIFIC NEED DETERMINATION REQUIREMENTS OF NASSAU I.

At page 41 of the Order (R. 2698), the Commission concludes that the project will provide benefits to Peninsular Florida's operating reliability. At page 45 of the Order (R. 2702), the Commission asserts that need may be shown by a petitioner based either on economics or reliability. Ultimately, the stated basis for the Commission's approval of the project is assumed economic need, although the Commission suggests that there is a reliability-based need for the project as well. Tampa Electric respectfully suggests that the Commission has abrogated its responsibilities under the Siting Act by misapplying the statutory need criteria in this case.

Both the Commission and this Court have made it abundantly clear in the Nassau decisions that the "need" which must be evaluated under the Siting Act is the utility specific and unit specific need of an individual utility that has an obligation to serve the public

[6]. Therefore, by definition, Duke could not have a need cognizable under the Siting Act. The Order makes no attempt to analyze any need for the uncommitted megawatts generated by Duke's proposed plant on a unit or utility specific basis.

The Commission's Order 22341, affirmed by this Court in its Nassau I decision, stated that

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[6] "This [legislative] scheme simply recognizes the utility's planning and evaluation process. It is the utility's need for power that must be evaluated in a need determination proceeding. . . .A non-utility generator has no such need since it is not required to serve customers." Ark and Nassau, at 92 FPSC 10:645

the need determination criteria of Section 403.519, Florida Statutes, are "utility specific." There the Commission said:

> The Siting Act and Section 403.519 require that this body make specific findings as to the system reliability and integrity, need for electricity at reasonable cost, and whether the proposed plant is the most cost-effective alternative available. Clearly these 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, 318-19.

Nassau appealed the Commission's interpretation of the Siting Act to this Court, claiming that the cogeneration rules required the Commission to determine need on a statewide basis. In Nassau I this Court expressly rejected the argument that the need criteria under the Siting Act are not utility specific:

> We reject Nassau's alternative argument that the Siting Act does not require the PSC to determine need on a utility-specific basis. In Order No. 22341, the Commission clearly adopted the position that the four criteria in Section 403.519 are 'utility and unit specific' and that need for the purpose of the Siting Act is the need of entity ultimately consuming the power. (footnote 9, at 601 So.2d 1179)

The Court went on:

> The PSC's interpretation is consistent with the overall directive of Section 403.519, which requires, in particular, that the Commission determine the cost effectiveness of a proposed power plant. This requirement would be rendered virtually meaningless if the PSC were to required to calculate need on a statewide basis without considering which

> localities would actually need more electricity in the future. (emphasis supplied) Nassau Power Corporation v. Beard, Id.

In light of the fact that there is no retail load serving utility sponsoring the 484 MW of excess plant capacity at issue in this proceeding and no contract under which Duke proposes to sell that capacity to a retail serving utility, the Commission was forced to gloss over or "bend" these need criteria to fit the case before it. As a result the Commission was forced to presume away the statutory need criteria and "find" need through circular and illogical analysis.

III. THE ANALYSIS AND CONCLUSIONS IN THE COMMISSION'S ORDER REGARDING THE NEED CRITERIA IN SECTION 403.519, FLORIDA STATUTES, ARE NECESSARILY ILLOGICAL AND ERRONEOUS GIVEN THE COMMISSION'S ERRONEOUS PREDICATE THAT DUKE IS A PROPER APPLICANT UNDER THE SITING ACT.

Although the Commission's Order ultimately backs away from a finding of need on reliability grounds, the Order, nonetheless, suggests that the project is needed for reliability purposes. However, the basis for this conclusion is circular at best. The Commission states at page 42 of the Order (R. 2699):

> Based on the record, we believe that the capacity from the Project is needed by the City to continue to serve its customers. . . We believe that the Participation Agreement (between Duke and the City) as well as the testimony and exhibits of witness Vaden sufficiently demonstrate the need for the 30 MW entitlement. We are persuaded that the entire 514 Mw are what make the 30 MW entitlement cost effective, and the entire project is, therefore needed for (the City's)

> system reliability. (emphasis added; parenthetical supplied)

The fact that the City may need 30 MW for reliability purposes has nothing to do with the question of whether or not there is a utility specific reliability need for the balance of the project's generation. It is clear that the City has no reliability need for the remaining 484 MW. The Commission's conclusion that the remaining 484 MW is needed for reliability purposes because they make the City's 30 MW cost-effective is a non sequitur. If the only documented utility reliability need is for 30 MW to serve the City's load, then one would think that the proposed 514 MW plant is not the most cost-effective means of meeting that documented demand.

The basis for the Commission's determination of need in this proceeding is multi-faceted. At page 41 of the Order (R. 2698), the Commission concludes that the project will provide benefits to Peninsular Florida's operating reliability.

At page 45 of the Order (R. 2702), the Commission asserts that need may be shown by a petitioner based either on economics or reliability. Ultimately, the stated basis for the Commission's approval of the project is assumed economic need. Tampa Electric respectfully suggests that the Commission has abrogated its responsibilities under the Siting Act by misapplying the statutory need criteria in this case.

In the Nassau decisions both the Commission and this Court made it abundantly clear that the "need" which must be evaluated under the Siting Act is the need of an individual utility that has

an obligation to serve the public. Therefore, by definition Duke could not have a need cognizable under the Siting Act.

Quite apart from the Order's Nassau-related infirmities, one cannot reasonably leap to the conclusion that the entire project will provide net benefits to Florida ratepayers generally, just because the project may allow the City to buy 30 MW at a lower price that it could find elsewhere

[7].

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[7] In the Staff Recommendation, at page 60 (R. 2387), the Staff states:

> . . .It appears that Duke has made its 30 MW entitlement to the City a loss leader. In other words, the low-cost power provided to the City is contingent upon the entire project being constructed. As such, if the Project is not constructed, the City will have to construct or contract for higher cost capacity and energy.

During the Special Agenda Conference conducted in the proceeding below on March 4, 1999, the Project is referred to as a loss leader on several occasions. On page 93 of the transcript (R.2540), the PSC's Director of Electric & Gas states:

> In this case here we have a retail serving utility that needs 30 megawatts. It can get a deal, a loss leader. Everyone is aware of why Duke is giving them a loss leader, and we can certify it as cost effective to the applicant.

Again on page 103 of the Special Agenda Conference transcript (R. 2550) Director of Electric & Gas states:

> The entire unit makes the 30 megawatts cost effective to the City applicant as a loss leader. . . .

Finally on pages 108 and 109 of the Special Agenda transcript (R. 2555-2556) Commissioner Jacobs observes:

> . . .I think it's pretty clear that that's a very favorable rate that was given to the City of New Smyrna Beach pretty much as you characterize it a loss leader.

Commissioner Jacobs goes on to note that any generation out of the proposed unit beyond the City's 30 megawatts would "very likely be more".

The Commission also advances the proposition that Florida will enjoy economic benefits from the project since retail ratepayers will be relieved of the costs associated with utility capacity investment since Duke will bear all of the financial risk associated with the project. This conclusion is also flawed. Counsel for Duke agreed with Commissioner Clark during the hearing that to the extent sales made from the proposed plant displace sales that investor-owned utilities, like Tampa Electric, might have made at wholesale, and those sales are supported by investment that the Commission has allowed in their retail rate base, the retail customers will be worse off because they would not get the benefit of those wholesale sales revenues. (Tr. 188–189). In addition, to the extent that power from the project is sold out of state and utilities have to purchase more expensive replacement power as a result, then Florida ratepayers would see no economic benefit [8].

A third and overarching layer of infirmity of the Commission's finding of need in this case is the Commission's inability to ensure that the identified need will be met. This inability completely undermines the Commission's ability to discharge its responsibilities under the Siting Act in a manner that is consistent with legislative intent.

There is no need to guess at the legislative intent behind the Siting Act. Section 403.503(2), Florida Statutes, specifies, in relevant part, that the Siting Act is intended "to effect a reasonable balance between the need for the facility and the environmental impact resulting from construction and operation of the facility. . .". Recognizing that the construction of any power plant is likely to have environmental consequences, the Siting Act is intended to ensure that such consequences are

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(R. 2556)

[8] As the Commission noted at page 41 of the Order:

> "Utility intervenors argued that there are no assurances that Duke would not sell all or a portion of its merchant plant capacity out of state. Joint Petitioners' Witness Green did acknowledge that under certain circumstances, power sales to the north could occur." (R. 2698)

not imposed on the state unless there is a sufficient need within the state for the power plant in question. The Commission is allocated the responsibility under the Siting Act to determine whether a sufficient need exists and that the proposed project will satisfy the identified need.

In the case of jurisdictional utilities, the Commission has the power to assure that the need, once identified, will be met by the proposed project or some alternative. In the case of non-utility generators, such as Duke, who are not subject to Commission jurisdiction, the Commission is powerless to ensure that the need identified by the non-utility generator will be met, even if the project is built and placed in commercial service. If the state is left with the environmental consequences of a new power plant without obtaining the need-related benefits which justified the construction of the plant in the first place, then the stated purpose of the Siting Act is utterly frustrated and the Commission has not properly discharged its statutory responsibilities.

As discussed above, the Commission has no jurisdiction over Duke and cannot, therefore, require that the project serve Florida's reliability need. By the same token, the Commission has no jurisdiction to require that the uncommitted 94 percent of the capacity of the project will be priced in a manner that will create economic benefits for Florida ratepayers. Instead, the Commission abdicates this responsibility to "the market" with the hope that economic benefits will accrue.

CONCLUSION

The Commission's conclusions that Duke is a qualified applicant under the Siting Act and that all of the capacity proposed by Duke is needed within the meaning of Section 403.519, Florida Statutes, is a clear departure from the essential requirements of law and constitutes an erroneous interpretation of the governing statutes. Based on the foregoing, the Commission's Order on appeal should be reversed and remanded for entry of an order finding as a matter of law that neither Duke nor the City is a proper applicant for a determination of need under Section 403.519, Florida Statutes, with respect to the uncommitted 484 MW portion of Duke's proposed power plant.

DATED this _____ day of July, 1999.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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ATTORNEY