IN THE SUPREME COURT OF FLORIDA

NASSAU POWER CORPORATION, Appellant, v. THOMAS M. BEARD, CHAIRMAN, ETC., ET AL., Appellees.	)	CASE NO. 78,275 PSC DOCKET NO. 910004-EU

ANSWER BRIEF OF APPELLEE,
FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellee, the Florida Public Service Commission, is referred to in this brief as the "Commission". Appellant, Nassau Power Corporation, is referred to as "Nassau Power" or "Nassau".

References to the record on appeal are designated (R.). References to hearing transcripts are designated (Tr.).

STATEMENT OF THE CASE AND FACTS

The Commission agrees with the Statement of the Case and Facts contained in Florida Power and Light Company's Answer Brief. However, the Commission disagrees strongly with the argumentative and unsubstantiated Background section of the Statement of the Case and of the Facts in Nassau Power's Initial Brief, and believes that it should be disregarded entirely. The Court should recognize it for what it is: six pages of non-record "testimony", submitted with only one reference to the record as required by Rule 9.210(b)(3), Florida Rules of Appellate Procedure.

The Commission maintains an ongoing docket for the purpose of reviewing load forecasts and generation expansion plans and setting cogeneration prices.[1] In March, 1989, pursuant to notice, the Commission held a public hearing in that docket in which it decided to examine aspects of its cogeneration policy. The parties to the docket, including every investor-owned electric utility in the State of Florida as well as numerous cogenerators operating as Qualified Facilities ("QFs"),[2] were notified in a prehearing order

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[1] In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities. For identification purposes, the first two numerals in the docket number reflect the year. The docket will be referred to herein as the "Planning Hearing" docket.

[2] A small power producer or cogenerator who meets criteria set forth in the rules of the Federal Energy Regulatory Commission is referred to as a "qualifying facility", or QF.

that the Commission intended to consider the following issues regarding the proper role of Planning Hearing findings in proceedings held pursuant to the Florida Electrical Power Plant Siting Act, Sections 403.501 - 403.517, and Section 403.519, Florida Statutes (1989) [the "Siting Act"]:

> ISSUE 42: What role should the findings of the Planning Hearing play in reviewing need determinations for electric utilities in the state filed pursuant to Sections 403.501 - .517 or 403.519, Florida Statutes?
>
> ISSUE 43: What role should the Planning Hearing play in reviewing a need determination for a qualifying facility filed pursuant to Sections 403.501 - .517 or 403.519, Florida Statutes?

In re: Planning Hearings on Load Forecasts, Generation Expansion plans and Cogeneration Pricing for Peninsular Florida's Electric Utilities, 89 F.P.S.C. 3:371 (1989) (Order No. 20845 at 49-51, R. pp. 296-298).

Each party had the opportunity to sponsor witnesses at the hearing. The only witness who filed testimony in connection with Issues 42 and 43 was Thomas Ballinger, a Commission engineer, who testified regarding the interaction between the Commission's cogeneration rules and the Siting Act. (Tr. 549-615, Vol. V and VI).

After the hearing, the parties filed written briefs. (R. 305-482, 589). The order resulting from the hearing, Order No. 22341, was issued on December 26, 1989. In re: Planning Hearings on Load Forecasts, Generation Expansion plans and Cogeneration Pricing for

Peninsular Florida's Electric Utilities, 89 F.P.S.C. 12:294 (1989) (Order No. 22341, R. 630). That order contained, among other things, a change in the Commission's position on the proper use of findings made in the Planning Hearing:

> These findings should not be used as a surrogate for the factual findings required by the Siting Act in the need determination applications of either electric utilities or qualifying facilities.

(Order No. 22341 at 25, R. 655).

In the order, the Commission adopted 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." (Order No. 22341 at 27, R. 657). The order also acknowledged that the Commission had previously presumed need for Siting Act purposes if the contract price "was less than that of the standard offer and fell within the current MW subscription limit" determined in the planning docket. (Order No. 22341 at 26, R. 656).

In the section of the order entitled Use of planning hearing decisions, the Commission thoroughly explicated its policy decision on the use of Planning Hearing findings, and concluded:

> These findings should not be used as a surrogate for the factual findings required by the Siting Act in the need determination applications of either electric utilities or qualifying facilities.

The Commission decided that the proper use of the Planning Hearing findings was informational:

> [T]he findings of this docket should establish

> a framework within with we gauge the validity of individual electric utility and qualifying facility need determination applications filed pursuant to ... [the] Siting Act.

(Order No. 22341 at 25, R. at 655)

Noting that the Siting Act required "specific findings as to system reliability and integrity, need for electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available", the Commission found that "[c]learly these criteria are utility and unit specific." (Order No. 22341 at 25-26, R. pp. 656-656). The order also approved the concept of limiting subscription to the generating facility deemed to be avoided by the purchase of cogenerated energy (the "statewide avoided unit"). The order discussed the basis for the policy at considerable length, and set forth the arguments which persuaded the Commission. One of the parties to the docket requested reconsideration of Order No. 22341 on January 1, 1990.[3] On June 15, 1990, before the order became final, Nassau Power filed its Petition to Intervene. (R. 670).

After filing its Petition to Intervene, Nassau filed its standard offer contract on June 15, 1990, almost six months after the Commission Issued Order No. 22341. (Notice of First Execution and Demand for Subscription Status, R. 877). Nassau also filed an Addendum to Appendix of Notice of First Execution on June 18, 1990, (R. 898) and sponsored out-of-state counsel on June 19, 1990 (R.

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[3] See Motion for Reconsideration of Order 22341 filed by Florida Industrial Cogenerators Association. (R. 696).

908). Thus, when the Commission issued Orders No. 23234 and 23248 on reconsideration on July 23, 1990, Nassau was a fully participating intervenor in the docket, taking the case as it found it.[4]

Nassau failed to appeal the decision set forth in Order No. 22341. It could have done so at any time before August 22, 1990. Nassau's appeal herein is based on two later orders in which the Commission reiterated its decision in Order No. 22341.

On July 23, 1990,[5] the Commission issued Proposed Agency Action Order No. 23235, which proposed a methodology of implementing a subscription limit to the statewide avoided unit.[6]

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[4]Order No. 23367, which granted Nassau's Petition to Intervene, was issued on August 17, 1990, while it was still possible to appeal the decision first set forth in Order No. 22341. (R. 959). However, it is clear that Nassau considered itself a fully participating intervenor before its Petition to Intervene was granted, as shown by its filing of a Motion for Clarification of a different order on August 13, 1990. (R. 943).

[5]Proposed Agency Action Order No. 23235 was issued on July 23, 1990 - the same day on which the Commission issued Order No. 23248 in which it denied the requested reconsideration of Order No. 22341, and Order No. 23234, in which it reconsidered other aspects of Order No. 22341 on its own motion.

[6]Standard offer contracts for 1765 MW of cogenerated power were filed with the Commission for subscription to the 500 MW statewide avoided unit. (Order No. 23792 at 4-5, R. 1805-1806). A negotiated contract for an additional 330 MW filed by Indiantown Cogeneration, L.P. was not considered for filling the subscription limit because it was executed before the 500 MW statewide avoided unit was designated.

In re: Planning Hearings on Load Forecasts, Generation Expansion plans and Cogeneration Pricing for Peninsular Florida's Electric Utilities, 90 F.P.S.C. 7:386 (1990) (Order No. 23235, R. 913). The subscription limit concept had previously been approved by the Commission in Order No. 22341. No party to the docket protested Order No. 23235, but several parties, including Nassau Power, moved for "clarification" of the proposed agency action order, which the Commission treated as protests. (R. 927, 943, 943).

The "protests" involved no disputed issues of material fact, so on October 26, 1990, the Commission held an informal proceeding pursuant to Section 120.57(2), Florida Statutes (1989), the purpose of which was recited in the Notice of Informal Proceeding (R. 1246):

> The purpose of the proceeding shall be to determine the methodology and criteria to be employed by the Commission to determine which contracts for the purchase of Qualifying Facility (QF) power should be selected to fill the 500 MW subscription limit previously defined by the Commission. Once the methodology and criteria is established by the Commission, if no disputed issues of material fact arise, the Commission shall prioritize contract subscription to the 500 MW limit. These proceedings will be governed by the provisions of Section 120.57(2), Florida Statutes.

Thereafter, the Commission Issued Order No. 23792 on November 21, 1990, which decided the purpose and effect of the subscription limit, the effect of queuing contracts, which contracts should be considered candidates for filling the subscription limit and on what basis they should be selected, as well as the order of

priority of previously-filed contracts. In re: Planning Hearings on Load Forecasts, Generation Expansion plans and Cogeneration Pricing for Florida's Electric Utilities, 90 F.P.S.C. 11:286 (1990) (Order No. 23792, R. 1802). The Commission decided that the effect of queuing contracts for subscription limit purposes is to lock in a price pending further review (in a contract approval/need determination proceeding) as to whether the proposed project is the most cost-effective alternative to the purchasing utility.

In connection with its discussion on queuing of contracts, the Commission reiterated its ruling that Planning Hearing findings should not be used as a surrogate for Siting Act need determination findings:

> The placement of a contract in the queue does not create a presumption of need and does not mean the applicants need determination [pursuant to the Siting Act] will be "rubber stamped." This treatment is consistent with Order No. 22341 . . . .

(Order No. 23792 at 3, R. 1804). Although it had ignored the opportunity for an appellate challenge to the policy three months before, Nassau chose to request reconsideration of the Commission's application of the policy in Order No. 23792. (R. 1890). Reconsideration was denied in Order No. 24672, issued on June 17, 1991. In re: Planning Hearings on Load Forecasts, Generation Expansion plans and Cogeneration Pricing for Florida's Electric Utilities, 91 F.P.S.C. 6:386 (1991) (Order No. 24672, R. 1969). In denying reconsideration, the Commission stated:

> Nassau seeks reversal of a policy which was

> firmly in place by virtue of Order No. 22341 at the time Nassau signed its standard offer contract in June, 1990. Prior to signing the standard offer, Nassau had ample opportunity to consider the implications of our previous ruling that a standard offer must be evaluated against individual utility need. In the face of Order No. 22341, Nassau chose to sign its standard offer contract, and Nassau should not now be surprised that we choose to follow our own precedent.

(Order No. 24672 at 1, R. 1969). The order explained that there was no conflict between the Commission's cogeneration rules and the Siting Act:

> Our old cogeneration rules were ambiguous in that they did not discuss need determination proceedings pursuant to the Siting Act, and did not discuss whether cogeneration contracts should be evaluated against statewide or individual utility need. Thus Nassau's contention that the rules require that its contract be evaluated against statewide need is simply not accurate.

(Order No. 24672 at 3, R. 1971).

Thereafter, Nassau Power filed its Notice of Administrative Appeal on July 15, 1991, (R. 1973), appealing the Commission's decisions in Order No. 23792 and Order No. 24672.

SUMMARY OF ARGUMENT

In certain past Siting Act proceedings the Commission has presumed the need for, and cost-effectiveness of, individual QF power plants based upon findings previously made in Planning Hearings conducted pursuant to its cogeneration rules. The Commission has not erred in declining to continue this practice.

Nassau Power contends that the cogeneration rules preclude the Commission from changing its previous policy regarding evaluation of QF power plants in Siting Act need determination proceedings. Nassau is wrong. The Commission's cogeneration rules do not preclude the Commission from evaluating a QF power plant against the need of a utility in a Siting Act proceeding. In fact, the cogeneration rules make no mention of the Siting Act and there is absolutely no nexus between the cogeneration rules and the Act.

The Commission has determined that the statutory criteria for evaluation of the need for power plants are utility specific. This determination was made after a full hearing and was based on competent, substantial evidence. Nassau Power did not contest this determination, and in fact, executed its standard offer contract after the Commission's ruling was firmly in place.

Florida's courts have ruled, and the Commission recognizes, that rulemaking is the preferred method for implementing agency policy. Here, the Commission implemented rulemaking in 1989. As a result, the Commission's new cogeneration rules became effective October 25, 1990. In addition, the Commission modified its nonrule policy based upon substantial and competent record evidence, in

full compliance with the requirements of the Administrative Procedure Act. The Commission's modification of its policy, first announced in Order No. 22341 on December 26, 1989, does not conflict with the Commission's old or new cogeneration rules.

Nassau has shown no error, reversible or otherwise. The orders of the Commission should be affirmed.

ARGUMENT

I.

THE COMMISSION'S ACTION WAS CONSISTENT WITH ITS RULES.

Nassau Power's entire argument is based on an alleged conflict between the Commission's rules and the policies expressed in its orders. No such conflict exists. Nassau Power attempts to extrapolate from the Commission's cogeneration rules an ultimate determination of need for cogenerated power. Specifically, Nassau Power concludes that because the Commission sets standard offer energy and capacity prices on a statewide basis, it **must** presume need for a **particular** QF power plant in a proceeding held pursuant to the Florida Electrical Power Plant Siting Act. Nassau's reasoning is not only convoluted, but wrong as a matter of law.

A. THERE IS NO NEXUS BETWEEN THE SITING ACT AND THE COMMISSION'S RULES WHICH COMPELS THE COMMISSION TO RUBBER STAMP QF NEED DETERMINATION APPLICATIONS.

Rule 25-17.083(4), Florida Administrative Code, requires the Commission to choose a statewide avoided unit "for the purpose of determining the need for, timing, and pricing of firm energy and capacity purchases from qualifying facilities in connection with [Planning Hearing] proceedings".[7] However, Nassau incorrectly

[7]This rule was repealed on October 25, 1990. Nassau refers to this and other cogeneration rules in effect at the time periods relevant to this appeal as the "old" rules. References herein to the cogeneration rules are to the "old" rules. The Commission has

extracts from the development of a statewide price for cogenerated power an exemption from the statutory requirements of the Siting Act. Nassau argues that because the Commission holds a hearing in which it reviews generation planning and sets the terms of a statewide standard offer contract, it is inconsistent for the Commission to determine need in a Siting Act proceeding based on the need of the utility purchasing the QF's power. The rules do not support Nassau's argument.

The Commission first promulgated rules regarding utility obligations to cogenerators and small power producers in 1981. The rules were amended and expanded in 1983. The Planning Hearing was instituted in order to implement the cogeneration rules. Its main purpose was to determine cogeneration prices. (Testimony of Mr. Ballinger, Tr. 551, Vol. V). The statutory authority cited in the rules themselves show that they were never intended to implement the Siting Act.[8]

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not applied the "new" cogeneration rules to Nassau Power's standard offer contract with Florida Power & Light Company and agrees that they are not applicable herein. However, the policy embodied in the new cogeneration rules regarding the effect of a Planning Hearing determination of statewide need on Siting Act proceedings was firmly and properly in place at the time Nassau Power signed its standard offer contract. Therefore, such policy may be applied to Nassau Power's standard offer contract.

[8]The rules recite that they were promulgated pursuant to the specific authority of sections 366.05(9) and 350.127(2), Florida Statutes, in order to implement section 366.05(9), Florida Statutes. At that time, section 366.05(9) allowed, but did not require, the commission to "establish guidelines" for purchases of cogenerated power and "set the rates" for public utility purchases of cogenerated power. However, the rules were also intended to fulfil the duty imposed on state regulatory agencies by the Public Utilities Regulatory Policies Act ("PURPA"), Pub. L. No. 95-617, 92

The Siting Act regulates the "selection and utilization of sites" for power plants, based on the legislative policy that the location and operation of power plants should produce minimal impact on the state's human, animal and ecological population. (Section 403.502, Fla. Stat. (1989)). The act does not direct the Commission in its broader duties described in Chapter 366, Florida Statutes (1989).

Electrical generating facilities of 75 MW or greater, including cogeneration plants, must apply for site certification pursuant to the Act. The Commission's role in the site certification process is limited to the preparation of a report of the "need for the electrical generating capacity to be supplied by the proposed electrical power plant". (Section 403.507(2)(a)2, Fla. Stat. (1989)). The report is more fully described in Section 403.519, Florida Statutes. The Act does not provide an opportunity for the Commission to engage in generation planning or cogeneration development. In fact, there is no nexus between the Siting Act and cogeneration rules. The use of Planning Hearing findings is simply not envisioned in the context of the Siting Act.

In 1980, the Commission promulgated rules to implement the Siting Act. (Fla. Admin. Code Rules 25-22.080 and 25-22.081). The Siting Act rules neither reference nor allude to any Planning Hearing determination of statewide need, but rather, require applicants to describe "the specific conditions, contingencies or

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Stat. 3117 (1978) to regulate purchases and sales of electricity between QFs and utilities.

other factors which indicate a need for the proposed plant . . . ." The rule requires documentation of the need for the power which will be generated by the applicant. The applicant must provide the following information:

> historical and forecasted summer and winter peaks, number of customers, net energy for load, and load factors with a discussion of the more critical operating conditions.

(Fla. Admin. Code Rule 25-22.081(3)). This documentation allows the Commission to determine whether a particular plant is needed, as opposed to whether there is a generalized need for increased power production within the state. The rules further require applicants to discuss both generating and nongenerating alternatives to the plant, including many specific considerations which make no sense unless they refer to the alternatives of the utility purchasing the QF power.[9]

The Commission clearly acted consistently with its Siting Act rules and with its statutory duties in determining that it would not "rubber stamp" Siting Act need determinations for QFs.

B. THE COMMISSION IS NOT BOUND BY ITS PREVIOUS EXERCISE OF DISCRETION IN PRESUMING NEED IN INDIVIDUAL SITING ACT PROCEEDINGS BASED ON FINDINGS MADE IN THE PLANNING HEARING.

The Commission promulgated unrelated rules for Planning

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[9]For example, generating alternatives which must be discussed include purchases, and nongenerating alternatives include reduction in growth rates of demand and consumption. Inclusion of these factors assumes that the Commission intends to examine cost-effectiveness from the purchasing utility's point of view. The factors simply do not apply to QFs.

Hearing determinations of statewide need and for Siting Act need determinations. Later, however, the Commission made a policy decision to rely on Planning Hearing findings of statewide need when examining QF need determination applications in Siting Act proceedings. That is, the Commission was willing to presume that "as long as the negotiated contract price was less than that of the standard offer and fell within the current MW subscription limit" need and cost-effectiveness had already been determined.[10] Therefore, when conducting Siting Act proceedings for QFs, the Commission did not require applicants to prove either that there was a need for their projects or that the projects were the most cost-effective alternative available. (Order No. 22341 at 26, R. 655). In effect, the Commission elected to substitute Planning Hearing findings for some of the findings required by the Siting Act when dealing with QF need determinations. This policy determination, which was within the Commission's authority and expertise, was developed and applied in the context of both the Planning Hearing and Siting Act need determination proceedings, without challenge.[11] Later, the Commission took notice of the changing cogeneration market within the state, in which

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[10]Presumably, a standard offer contract would have been entitled to the same presumption.

[11]The policy applied only to Siting Act need determination proceedings for QFs. In Siting Act proceedings to determine need for electric utility power plants the Planning Hearing findings were used for informational purposes only. See Order No. 22341 at 27 (R. 656).

cogenerators were increasing in both number and size,[12] and properly elected to examine alternatives to this treatment. Upon reflection, the Commission announced that it would no longer simply presume that a **particular** QF power plant was needed for Siting Act purposes. Rather, the Commission decided that the proper treatment of Planning Hearing findings was for informational purposes only:

> [W]e take the position that to the extent that a proposed electric power plant constructed as a QF is selling its capacity to an electric utility pursuant to a standard offer or negotiated contract, that capacity is meeting the needs of the purchasing utility. As such, that capacity must be evaluated from the purchasing utility's perspective in the [Siting Act] need determination proceeding, i.e., a finding must be made that the proposed capacity is the most cost-effective means of meeting purchasing utility X's capacity needs in lieu of other demand and supply side alternatives.

(Order No. 22341 at 26, R. 655).

C. THE COMMISSION PROPERLY ADOPTED ITS CURRENT POLICY IN ORDER NO. 22341.

The Commission developed its current policy consistent with concepts of administrative law. Administrative agencies are constrained in their development of policy by the requirements of the Administrative Procedure Act, Chapter 120, Florida Statutes, (the "APA"). While the APA clearly indicated a preference for policy development through rulemaking, it did not, during the applicable time period, require an agency to institute rulemaking procedures each time a new policy was developed. McDonald v.

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[12]Testimony of Mr. Ballinger, Tr. 579 (Vol. V), 607 (Vol. VI).

Department of Banking and Finance, 346 So.2d 458 (Fla. 1963).

The policy of not "rubber stamping" QF Siting Act need determination applications was properly developed in a proceeding with adequate record support for its actions as required by the APA. McDonald, supra. The administrative record shows that the issues were carefully identified before the hearing[13] and supported by testimony which was subject to cross-examination.[14] The resulting order clearly explained the reasons for the Commission's actions. (Order No. 22341 at 25-27, R. 654-656). Thus, the Commission took every step necessary to interpret its rules and develop its new policy in a responsible fashion. Indeed, it is difficult to see how the Commission could have proceeded in a more responsible fashion: after considering the evidence adduced in a hearing held pursuant to Section 120.57, Florida Statutes, it announced its policy in December, 1989, and proceeded to rulemaking. New cogeneration rules which embody the policy were in effect by October, 1990.

Nassau signed its standard offer contract at a time when the policy was firmly in place and recorded in an agency order. Nassau now attempts to appeal a valid policy decision made within the Commission's exclusive jurisdiction and of which it had notice. Nassau has failed to offer any cogent argument against the policy.

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[13]Order No. 20845 at 49-51, R. 296-298.

[14]Testimony of Mr. Ballinger, Tr. 549-615, Vol. V and VI.

The Commission's orders must be affirmed.[15]

II.

THE COMMISSION IS BOUND BY STATUTE TO DETERMINE THE NEED FOR QF POWER PLANTS ON THE BASIS OF THE UTILITY PURCHASING THE POWER.

The Siting Act requires a determination of need for all power plants on an individual basis. There is no longer a reason for exempting QFs from the terms of the Siting Act.

A. THE SITING ACT REQUIRES THE COMMISSION TO MAKE FINDINGS WHICH ARE UTILITY AND UNIT SPECIFIC.

Section 403.519, Florida Statutes (1989) provides that the Commission is the exclusive forum to determine the need for an electrical power plant subject to the Siting Act. The statute further provides that in making its determination of need the Commission shall take into account (1) the need for electric system reliability and integrity; (2) the need for adequate electricity at a reasonable cost; (3) whether the proposed plant is the most cost-effective alternative available and (4) the conservation measures taken by or reasonably available to the applicant which might mitigate the need for the proposed plant. The Commission is also directed to consider such other matters within its jurisdiction as it deems relevant.

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[15]Significantly, Nassau continues to claim that its priority as first in the subscription queue entitles it to 435 MW of the total 500 MW subscription limit. However, the subscription queuing and limitation policies were developed in the same fashion, in the same docket, and are contained in the same orders which Nassau appeals. If one such policy is infirm and subject to remand, so are the others.

In Order No. 22341, the Commission examined these four criteria and determined that "[c]learly, the criteria are utility and unit specific", and further that the "need" which to which Section 403.519 refers is the need of the electric utility purchasing cogenerated power. (Order No. 22341 at 26, R. 655). In so finding the Commission held that a standard offer contract must be evaluated from the purchasing utility's perspective in a Siting Act need determination proceeding. That is, in terms of the second and third Siting Act criteria which the Commission must consider, cogenerated power must be shown to be the "most cost-effective means of meeting purchasing utility X's capacity needs in lieu of other demand and supply side alternatives." (Order No. 22341 at 26, R. 655).

In interpreting the statute to require a determination of the need of the purchasing utility, the Commission recognized not only the plain language of the statute, but the reality of the cogeneration market. Cogenerators do not provide service to the public. P.W. Ventures Inc. v. Nichols, 533 So.2d 281 (Fla. 1988). They sell power only to electric utilities. The purchasing utility would, to the extent that it needs the cogenerated power, distribute the power to its ratepayers. Only if the power was not needed would it be sold to other utilities.[16] In finding that, for Siting Act purposes, cogenerated power meets the need of the

[16]The resale to a second utility presents another problem which is avoided by the Commission's interpretation of the statute: the mismatch of a generic avoided cost with each utility's actual avoided cost.

purchasing utility, the Commission acknowledged a logistical problem: while there may be a need for increased generation in the state, the particular QF plant proposed may not be the best way to meet that need.

In order to address this logistical difficulty, the Commission struggled with the possibility of either allocating a portion of the statewide avoided unit to each utility or finding an appropriate avoided unit for each utility, both of which would "channel" cogenerated power where it was needed. However, inherent in both of these possible solutions is the acknowledgement that QFs meet **utilities'** needs for increased generation with which to serve their ratepayers.

It is impossible to consider cost effectiveness, the third criterion which the Commission must consider under the Siting Act, without examining other alternatives available to the utility purchasing the cogenerated power. The fact that a contract price was reasonable (as one may construe the statewide standard offer price set in the Planning Hearing) has no bearing on the finding required by the act: whether the proposed plant is the most cost-effective alternative available to the purchasing utility.[17]

While it was sound regulatory policy to assume cost-effectiveness in an era when cogenerators were smaller in size and

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[17]This reading of the statute is clear to the Environmental Protection Agency ("EPA") as well as the Commission. As recited in Order No. 22341 at 27, the EPA interpreted the Siting Act to require an analysis of "generation and management alternatives to the proposed plant" - a concern which is nonsensical unless it refers to the alternatives available to the purchasing utility.

fewer in number, it is equally sound for the Commission to adhere closely to the statutory criteria when cogenerators are larger and more numerous. The soundness of the Commission's 1989 decision was borne out in 1990: cogenerators were willing to supply over three times the capacity which the Commission had determined to be necessary on a statewide basis. Nassau Power's project alone subscribed 87 per cent of the entire statewide avoided unit.

Nassau Power would have this Court ignore the terms of the statute itself as well as the record before the Commission which compelled its finding that the Siting Act criteria are utility specific. That finding is wholly supported by the language of the statute as well as the evidence before the Commission. Nassau invites this Court to focus instead on an alleged inconsistency between the Commission's construction of the Siting Act and the language of its cogeneration rules. Nassau fails to recognize that in finding the Siting Act criteria to be utility specific, the Commission was satisfying its statutory responsibility to implement the Siting Act.

The legislature saw fit to make the Commission the exclusive forum for Siting Act need determination proceedings. The Commission is thus charged with the responsibility of implementing this portion of the act. The statute itself does not distinguish between need determination proceedings for QFs and those for electric utilities. If the legislature did not so differentiate, the Commission is not required to do so. The Commission's orders and statutory interpretation are well within its discretion, and

should be affirmed. The construction placed on a statute by the agency charged with the duty of executing and interpreting it is entitled to great weight, and should not be disregarded or overturned by this Court except for the most cogent reasons and unless clearly erroneous. P.W. Ventures, Inc. v. Nichols, supra, King v. Seamon, 59 So.2d 859, 861 (Fla. 1952); Robinson v. Fix, 113 Fla. 151, 151 So. 512 (Fla. 1933). Nassau Power has shown no reason to disregard or overturn the Commission's construction of the Siting Act.

B. THE STATUTORY REQUIREMENTS OF THE SITING ACT OVERRIDE ANY POSSIBLE INCONSISTENCIES WITH THE COGENERATION RULES.

Assuming, arguendo, that the cogeneration rules were contrary to the Siting Act, the Commission would nevertheless be compelled to resolve any inconsistency in favor of the Siting Act. C.F. Industries v. Nichols, 536 So.2d 234 (Fla. 1988), Guerra v. State Department of Labor and Employment, 427 So.2d 1098 (Fla. 3rd DCA 1983); E.M. Watkins Co. v. Board of Regents, 414 So.2d 583 (Fla. 1st DCA 1982); Nicholas v. Wainwright, 152 So.2d 458 (Fla. 1963). Although it was not necessary for the Commission to choose between its rules and the Siting Act, the choice in favor of the act would have been clear, and the Commission's decision would have been the same.

CONCLUSION

There is no conflict between the Commission's cogeneration rules and the Siting Act. The Commission correctly interpreted the Siting Act, properly developed policy, and applied that policy fairly to Nassau Power. Thus, the Commission acted within its discretion. Nassau Power has not overcome the presumption of correctness which attaches to the Commission's orders. City of Tallahassee v. Mann, 411 So. 2d 162 (Fla. 1981). Therefore, the Commission's orders must be affirmed.

Respectfully submitted,

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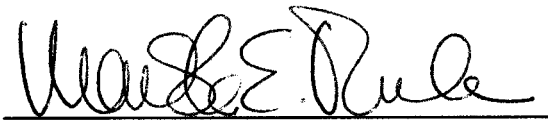

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Dated: 15 October, 1991

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Answer Brief of Appellee, the Florida Public Service Commission, has been furnished by U.S. Mail or hand delivery*, this 15th day of October, 1991, to the following:

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Miami, Florida 33128

Tampa Electric Company
Lee L. Willis, Esquire
Ausley, McMullen, McGehee,
Carothers & Procter
P.O. Box 391
Tallahassee, Fl. 32302

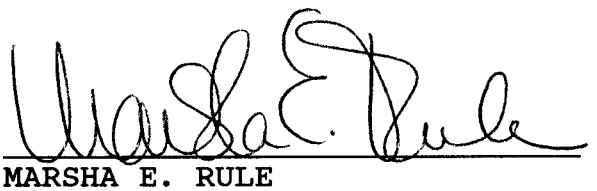
Air Products & Chemicals, Inc.
Suzanne Brownless, Esquire
Oertel, Hoffman, Fernandez
& Cole, P.A.
Post Office Box 6507
Tallahassee, Florida 32314-6507

Orlando Utilities Commission
Roy C. Young, Esquire
Young, van Assenderp, Varnadoe
& Benton, P.A.
P.O. Box 1833
Tallahassee, Florida 32302

Florida Rural Electric Coop.
Michelle Hershel, Esquire
Post Office Box 590
Tallahassee, Florida 32302

Florida Power Corporation
James P. Fama
P.O. Box 14042
St. Petersburg, Florida 33733

City of Tallahassee
Kenneth A. Hoffman, Esquire
Messer, Vickers, Caparello, Madsen, Lewis & Metz, P.A.
Post Office Box 1876
Tallahassee, Florida



MARSHA E. RULE