IN THE SUPREME COURT OF FLORIDA

NASSAU POWER CORPORATION,

Appellant

v.

THOMAS M. BEARD, CHAIRMAN, ETC., ET AL.

Appellees

CASE No. 78,275

ANSWER BRIEF OF APPELLEE
FLORIDA POWER AND LIGHT COMPANY

In the lower tribunal:
Florida Public Service Commission
Docket No. 910004-EU

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STATEMENT OF THE CASE AND FACTS[1]

At issue in this appeal is the Florida Public Service Commission's ("PSC" or "Commission") interpretation of the Florida Electrical Power Plant Siting Act, sections 403.501 to 403.519, Florida Statutes (1989) ("Siting Act"),[2] and a PSC policy applying the Siting Act to cogenerators and small power producers (designated as qualifying facilities ("QFs") under federal and state law).

The appellant, Nassau Power Corporation ("Nassau"), owned by Texas-based Falcon Seaboard Power Corporation, is a QF seeking to build a 435 megawatt ("MW") gas-fired electric power plant on Amelia Island, Florida, off of Florida's northeast coast. R. Vol. V, 877-878; R. Vol. X, 1962.[3]

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1 Nassau's Statement of the Case and Facts excludes numerous relevant references from the record, underemphasizes other pertinent facts and includes extraneous and sometimes erroneous references to background matters outside the record. Given the nature of Nassau's submission and FPL's need to supplement the relevant record citations, disregard irrelevant statements, and place uncontested facts in context, FPL has prepared an alternative Statement of the Case and Facts.

2 Section 403.519, Florida Statutes, was enacted after the Siting Act, as part of the Energy Efficiency and Conservation Act, Chapter 80-65, § 5, Laws of Florida. However, the Legislature codified the section with the Siting Act, and clearly intended it as an addition to the Siting Act. Therefore, for ease of reference, section 403.519 will be referred to throughout this brief as part of the Siting Act. The Siting Act was reenacted in 1990 with a few amendments irrelevant to the issues on appeal. Because Nassau challenges the Commission's interpretation of the Siting Act as codified in 1989, FPL will cite to the 1989 statute.

3 Citations to the record will be designated, as here, with an "R." followed by a volume number and page number. Citations to the Appendix filed by Nassau will be designated with an "A." followed by page numbers. Where necessary,

Nassau plans to sell the electricity generated by this facility to appellee Florida Power and Light Company ("FPL"), at a projected cost over thirty years in excess of $4,000,000,000.00. R. Vol. V, 870-871; R. Vol IV, 774-781.[4] If the plant is built, these costs will be borne entirely by FPL's customers. Fla. Admin. Code Rule 25-17.083(8) (A. 6).

The Commission, also an appellee, is the state regulatory agency charged, among other things, with "the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities." § 366.04(5), Fla. Stat. (1989).

Nassau appeals two Commission orders reiterating the PSC's Siting Act interpretation and policy. If the PSC's interpretation is correct, before Nassau can begin constructing its plant, Nassau must demonstrate to the Commission, at an evidentiary hearing held pursuant to the Siting Act, that: the electricity generated from Nassau's

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transcript volume and/or page number(s) will also be included in the citation. Transcript will be abbreviated as "Tr." The type of proceeding will also be indicated: "Hr." for hearing and "Conf." for a PSC Agenda Conference.

[4] This $4 billion figure is calculated by applying Nassau's projected 435 MW capacity to the FPL tariff in the record. The mathematical calculation accepts all assumptions made in the tariff regarding fuel and other costs.

proposed facility will be needed by FPL's customers and, if needed, will be the least-cost alternative for meeting that need; the facility will not adversely affect the reliability and integrity of FPL's electric system; and the applicant has explored conservation alternatives reasonably available to mitigate the need for the plant. See § 403.519, Fla. Stat. (1989).

Nassau argues that the PSC's Cogeneration Rules[5] prohibit the PSC from making this "need determination" based on the actual needs of FPL's customers and the site and plans for Nassau's plant -- but must certify the plant for construction based on generic findings from 1988 data projecting that the state as a whole would need additional power in 1996. FPL argues that Nassau's position, advanced to thwart the PSC's review of its planned project, is spurious. Under the Siting Act, FPL's customers cannot be forced to pay for power they do not need from a facility that should not be built.

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[5] In this brief, FPL uses the term "Cogeneration Rules" to refer to Florida Administrative Code Rules 25-17.080 - 25-17.091, as they existed at all times relevant to this appeal. Nassau refers to these rules as "old rules." Because the record is clear that the only rules the PSC applied or intended to apply to Nassau were the Cogeneration Rules in force throughout the time that all decisions addressed by this appeal were rendered, R. Vol. XVI, 5-25-90 Conf. Tr., p. 70; R. Vol. XVI, 9-11-90 Conf. Tr., pp. 4, 29, 31-33 and 69; R. Vol. XVII; 10-19-90 Hr. Tr., p. 15, it is superfluous -- if not misleading -- to distinguish between "old rules" and "new rules." The PSC did not amend these rules until October 1990, almost a year after the PSC's policy change that Nassau challenges.

A. The PSC's Siting Act Determination.

The two orders that Nassau appeals were entered in a PSC continuing docket established to implement the PSC's Cogeneration Rules and policy. In 1989, the PSC initiated its third "planning hearing" within this continuing docket.[6] After notice, the PSC held a prehearing conference on February 20, 1989, at which 43 issues were set for hearing, including:

> 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 . . . [the Siting Act]?
>
> * * *
>
> ISSUE 43: What role should the Planning Hearing play in reviewing a need determination for a qualifying facility filed pursuant to . . . [the Siting Act].

Order 20845 at pp. 49 - 50 (R. Vol II, 296-297).

At the three-day planning hearing held in March 1989, an engineer from the PSC's Division of Electric and Gas, Thomas Ballinger, testified regarding the PSC's policies implementing the Siting Act. Mr. Ballinger briefly discussed the PSC's obligation under the Siting Act to make specific determinations, for each electric generating facility proposed for construction in Florida, relating to (1) the need to preserve electric system reliability and integrity; (2) the need to provide adequate electricity at a reasonable cost; (3)

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[6] The docket is typically referred to as the annual planning hearing (or "APH") docket. All orders entered in this docket will be referred to by order number and parenthetical record or appendix citation only.

whether the proposed facility is the most cost-effective alternative available for supplying the electricity, if needed; and (4) conservation measures reasonably available to the applicant to mitigate the need for the facility. R. Vol. XIII, 3-8-89 Hr. Tr., Vol. V, pp. 549-550. Based, at a minimum, on these criteria, the PSC must determine whether or not to certify the facility for construction. § 403.519, Fla. Stat. (1989). The legislature has granted the PSC sole responsibility for making this "need determination." Id.

Mr. Ballinger testified that in prior Siting Act hearings for QF facilities, the PSC had relied on the pricing of certain QF contracts in the APH docket and a generic planning hearing finding that there was a "need" for additional power in Florida as a presumption that the second and third Siting Act criteria (as summarized above) were satisfied, and had only taken additional evidence on criteria one and four. R. Vol. XIII, 3-8-89 Hr. Tr., Vol. V, p. 551. Ballinger further testified that if the PSC made generic rather than utility-specific findings in the APH docket, relying on those findings in lieu of unit-specific and utility-specific data from a Siting Act hearing could result in the "uneconomic duplication of generating capacity" and rates to Florida ratepayers that were higher than the "least cost generation alternative." Id. at p. 553.

For example, a generic finding that "the state" needed more power in 1996 would not mean that a specific project

located in North Florida would be the least-cost alternative for meeting this "need," particularly if South Florida projected most of the state's additional need for 1996. R. Vol. XII, 3-8-89 Hr. Tr., Vol. IV, pp. 371-374, 378, and 389-397 (FPL's witness Smith). A plant in North Florida might not be cost-effective, for example, given the problems encountered and expenses incurred in transporting the electricity the length of the state. Id.

Although these types of problems had not been significant in the past -- because "QFs have been small in size and load growth has been so much" -- the Commission was now faced with much "larger qualifying facilities that are going to impact individual utilities more and more." R. Vol. XIII, 3-9-89 Hr. Tr., Vol VI, p. 607. Therefore, because of changed circumstances in the industry, the PSC's staff recommended that the PSC make separate utility-specific and facility-specific determinations in all future Siting Act hearings for QF facilities. R. Vol. II, 295-296; A. 69.

None of the QFs participating in the hearing chose to have their witnesses address this issue. R. Vol. II, 251-255. Nassau did not intervene in the docket until after the hearing. R. Vol. V, 870-876.

FPL and several other parties participating in the hearing argued that because the Siting Act itself contemplated a utility-specific and facility-specific determination, the PSC could not be bound by generic findings from the planning

hearing when discharging its obligation under the Siting Act. R. Vol. II, 296-297. The Commission agreed.

In Order 22341, issued December 26, 1989, the PSC determined that:

> The Siting Act, and Section 403.519 require that this body make 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. <u>Clearly these criteria are utility and unit specific.</u>

Order 22341, p. 26 (emphasis added) (A. 70). After discussing other reasons supporting its policy change, in addition to its interpretation of the Siting Act, the PSC announced that:

> Based on the considerations discussed above, we are persuaded that the appropriate decision is to use planning hearing results in QF need determination [Siting Act] hearings in the same manner that they are used when electric utilities come before us: for informational purposes only.

Order 22341, pp 26-27 (A. 70-71).

Although Nassau did not appeal Order 22341, it is this interpretation of the Siting Act and PSC policy, first announced in the APH docket in December 1989, and reaffirmed in Order 23234 (after Nassau intervened), that Nassau now attacks.

B. Avoided Unit Designation.

At the same time that the Commission announced its policy decision under the Siting Act, it also designated a generating facility proposed in FPL's individual expansion plan as the next generating facility (or "unit") needed in Florida. Order 22341 at 13 (A. 57). The proposed unit was a 385 megawatt

("MW") combined cycle (designed to burn natural gas or oil) plant, planned for completion prior to 1993. Id. This plant is called the "avoided unit," because it is the unit that will not be built if QF electricity is provided to FPL (the utility planning the statewide avoided unit) at or below the cost (to FPL ratepayers) of having FPL build the unit itself (the "avoided cost"). See Fla. Admin. Rule 25-17.083(6) (A. 5-6).

Although the PSC's policy and preference is to encourage QFs and Florida utilities to negotiate contracts for the purchase of QF power, R. Vol. XVI, 5-9-90 Conf. Tr., pp. 30 and 60, Nassau's "contract" with FPL, at issue in this case, is not a negotiated contract. The Cogeneration Rules also set forth provisions for a mandatory "standard offer." See Fla. Admin. Code Rule 25-17.083 (A. 3-6). The PSC sets the terms of the standard offer based on the costs associated with the avoided unit designated in the planning hearing -- in this instance, FPL's planned 385 MW combined-cycle unit. Id. Under PSC rules, QFs can simply sign the standard offer to sell electricity to a Florida utility at the price and terms set by the PSC. The utility does not have to agree to the price or other terms. Fla. Admin. Rule 25-17.083(3) (A. 4).

When the PSC set standard offer terms in the planning hearing proceeding, it also selected a "subscription limit" to cap the amount of power that Florida utilities must purchase from QFs at or below the standard offer price. Order 22341 at p. 20 (A. 64); R. Vol. XVI, 5-25-90 Conf. Tr., p. 60. Under

Order 22341, for example, Florida utilities would have had to accept up to 385 MW of QF power beginning in 1993, either in negotiated or standard offer contracts. Id.

Although no QF objected to the PSC's interpretation of the Siting Act, or change in policy implementing the Act, a number of QFs strenuously objected to the Commission's designation of FPL's planned combined cycle unit as the avoided unit for standard offer pricing purposes. R. Vol. IV, 696-726; R. Vol. XVI, 5-25-90 Conf. Tr., pp. 34-43. The basis for these objections is apparent from the record.

QFs are paid for electricity by two types of payments -- capacity and energy. The "capacity" payment in the standard offer contract is based on the cost of constructing the designated avoided unit. It is a set figure paid each month as long as the QF satisfies minimum performance criteria.[7] The "energy" payment is based on the amount of electricity sold to the utility each month and the avoided cost of fuel and some variable operating and maintenance expenses at the time that the power is sold. Fla. Admin. Code Rule 25-17.083 (A. 3-6); R. Vol. XVI, 5-25-90 Conf. Tr., pp. 34-37. A combined cycle unit is cheaper to build than a coal-fired unit; but the fuel is more expensive. Therefore, the capacity payments -- which remain relatively constant throughout the contract -- are higher for a coal-fired unit than the

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[7] As long as the QF operates at a minimum level specified in the contract, the amount and timing of capacity payments do not vary based upon the amount of capacity provided.

combined-cycle unit. Id. QFs wanted this steadier stream of higher capacity payments. Id. The QFs argued that designating a coal-fired unit would permit them to secure financing more readily, further encouraging cogeneration. Id.

On May 25, 1990, the Commission reconsidered its December 1989 order and designated a coal-fired unit as the avoided unit for standard offer pricing purposes. Because no Florida utility's expansion plan called for a coal-fired unit, the Commission designated a generic or theoretical "statewide" 500 MW coal-fired unit as the statewide avoided unit.[8] R. Vol. XVI, 5-25-90 Conf. Tr., at pp. 25-27. Although its staff had pointed out the dangers of designating a generic "avoided unit" as the basis for the standard offer, rather than a unit actually planned by a Florida utility, the PSC had already determined and announced to QFs that all proposed QF projects would have to be approved based on a site and utility-specific "need determination" at a Siting Act hearing, Order 22341 at pp. 26-27 (A. 70-71), and no QF had challenged this decision. Utilities were then directed to file, and did file, tariffs reflecting this new generic standard offer price. Order 23234 at p. 3 (A. 79).

It was at this point in the docket -- after QFs convinced the PSC to designate a coal unit for standard offer pricing

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8 The new subscription limit of 500 MW replaced the prior 385 MW subscription limit adopted with the combined-cycle avoided unit from FPL's expansion plan.

purposes and after the Commission had made its decision regarding the use of planning hearing findings in utility and QF Siting Act hearings -- that Nassau tendered its standard offer to FPL and intervened in the APH proceeding. R. Vol. V, 870-876. Nassau signed its standard offer on June 13, 1990, R. Vol. V, 871, immediately after the PSC approved FPL's tariffs reflecting the new standard offer price based on the theoretical 500 MW coal-fired unit. Id.

C. The ICL Negotiated Contract.

Prior to the PSC's reconsideration of Order 22341 and designation of a generic coal-fired avoided unit, FPL had been negotiating with a QF planning a generating facility close to FPL's "load center" in South Florida. R. Vol. VI, 1071; In re: Joint Petition for determination of need for proposed electrical power plant and related facilities, Indiantown Project, 91 FPSC 3:518 (Order 24268) ["ICL Order"] at p. 23. FPL signed a contract with Indiantown Cogeneration, L.P. ("ICL") on May 21, 1990, to purchase the entire output from a 300 MW QF facility to be built by ICL. Id. On August 21, 1990, FPL and ICL jointly applied for a determination of need under the Siting Act. The hearing was scheduled for December 5, 1990. ICL Order at p. 1.

D. The Oversubscription Problem.

Mr. Ballinger's testimony during the 1988-89 planning hearing predicting increased numbers of QFs proposing plants with larger generating capacities proved true. In

unprecedented numbers, QFs responded to the PSC's designation of a coal-fired unit by scrambling to file standard offers. A. 85-86; R. Vol. VII, 1215; R. Vol. XVII, 10-19-90 Hr. Tr., pp. 46-47. Within 10 days after Nassau signed its standard offer on June 13, 1990, QFs had signed eight additional standard offers, with capacities totalling approximately 2,500 MW -- five times the "statewide need." Id.

This created a dilemma for the PSC. Although, by policy, the PSC had limited QF contracts when it designated a 500 MW subscription limit, this was the first time that QFs had submitted standard offers with capacity totals so greatly exceeding the limit. The PSC's existing rules did not contain any method for determining which of the standard offers would be recognized as valid contracts. The FPL-ICL negotiated contract also called for completion of the ICL facility in December 1995. ICL Order at p. 5. Therefore, this facility -- if built -- would necessarily avoid a large portion of the designated "statewide need" for 1996.

E. Resolving The Dilemma.

On July 23, 1990, the PSC issued two orders in the APH docket: Order 23234 ("Order on Reconsideration") reflected the PSC's prior May 1990 action, on reconsideration of Order 22341, to select a 500 MW coal-fired unit as a generic avoided unit for determining the price and terms of standard offer contracts. In the order, the PSC also expressly reaffirmed every other portion of Order 22341, including the PSC's Siting

Act interpretation and policy decision. None of the participants in the docket, which now included Nassau, contested the PSC's Siting Act determination, or any other portion of the Order On Reconsideration.

The second July 23 order, Order 23235 ("Notice of Proposed Agency Action Order On Subscription"), contained a proposed solution to the over-subscription problem. Nassau, FPL and a number of the other QFs and utilities participating in the docket, including ICL, moved for clarification of the proposed subscription order. R. Vol. V, 923-927, 934 & 943.

Over the next three months, each party was offered an opportunity to submit two briefs and a position statement on the proper resolution of the over-subscription dilemma. Additionally, the PSC entertained argument of counsel at two agenda conferences, a prehearing conference, and a hearing under Section 120.57(2), Florida Statutes. R. Vols. XVI & XVII.

Nassau -- the QF to sign the first standard offer based on the coal-fired unit pricing -- argued that the first contract in time should be awarded the first portion of the 500 MW subscription, but that ICL should be excluded since it was not "negotiated against" the generic 1996 avoided unit. R. Vol XVII, 10-26-90 Tr., at pp. 74-83. Other QFs argued that the decision should be based on a hearing on the merits -- where each QF would attempt to prove that it best met the state's needs by meeting a specific utility's demand for

electricity at the lowest cost to ratepayers. Id. at pp. 43-35.

After considering all of the arguments presented, Commissioner Beard was convinced that a "mega-need determination" was required; if the PSC was to fulfill its obligations to ratepayers, it could not make the subscription decision without considering which contract actually best met the state's needs:

> I would rather go to World War III to determine what is best for the citizens of this state than have a first in time first in line arbitrary piece of crap out there, okay, that impacts clean air, that impacts all of the other things that potentially could occur.

R. Vol. XVII, 11-1-90 Hr. Tr., pp. 41-42.

Commissioner Beard voted against Nassau's proposal on this basis. Id. at 57. The other four Commissioners voted in favor of Nassau's approach, but indicated on the record that they were setting subscription priority based on a first-in-time rule only because the project proposed in the standard offer would still have to meet all of the criteria set forth in the Siting Act in a separate proceeding.

> CHAIRMAN WILSON: I would like to say I agree with you, Commissioner [Beard], that first in time first in right is an absurd way to execute public policy, that these things ought to be done on merit. I think because of the determination of need process and the primacy of the Power Plant Siting Act and the determination of need under that act, that this vote will not have a lot of effect on that, that we will, in fact, reach the merits of projects and make a determination about which ones are best for the people of the State of Florida . . . .

> COMMISSIONER MESSERSMITH: We will adopt your comments.

Id. at pp. 57-58 (emphasis added).; see also, id. at 45.

Nassau participated in all hearings on this issue and heard the Commissioners agree that Nassau's first-in-time solution was only acceptable because the PSC would review the merits of the winning standard offer in accordance with its Siting Act policy. In its argument to the PSC, one of Nassau's attorneys, Joseph McGlothlin, even reminded Commissioners that: "a project that goes forward because its (sic) first in time will receive an in-depth review in the appropriate determination of need proceedings," R. Vol. XVII, 10-26-89 Hr. Tr., pp. 82-83. In making this point, Nassau's counsel specifically referenced Order 22341 (the December 1989 Order) and the PSC's Siting Act interpretation and policy decision reflected in that order. Id. at 77-79. At an earlier hearing, Mr. McGlothlin had agreed with the Commission that subscription priority was just a precondition to a need determination:

> CHAIRMAN WILSON: I think Mr. McGlothlin's suggestion is that the queuing determines who gets to go first in the need determination.
>
> MR. McGLOTHLIN: That's how we have perceived the process to work, Commissioner.

R. Vol. XVIII, 10-19-90 Hr. Tr., p. 48. Moreover, Nassau argued in its brief that "'merit' is appropriately addressed in determination of need proceedings." R. Vol. VII, 1237.

The PSC also accepted Nassau's position on the ICL contract and excluded ICL from the subscription limit. Vol. XVII, 11-1-90 Hr. Tr., p. 53. Again, the PSC grounded this determination on its earlier Siting Act policy decision. Because ICL had a negotiated contract, it did not need to fall within the subscription limit in order to have a binding contract to take to a Siting Act proceeding. ICL's Siting Act hearing was already scheduled. Id. at 48. Because Nassau would have to seek certification of its project through a Siting Act proceeding, the PSC fully expected Nassau to intervene in the ICL proceeding to attempt to show that its "contract" to supply power to FPL -- and not ICL's -- was the least-cost alternative for FPL's customers.[9] Id. at 14-22 and 48-51.

On November 21, 1990, the PSC issued its "Order on Subscription," Order 23792, reflecting its decisions in Nassau's favor: (1) to fill the subscription limit on a

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[9] Nassau did intervene in the ICL Siting Act proceeding, as the PSC anticipated. It participated fully in discovery, filed testimony, and -- in its prehearing statement -- claimed that its proposed project was the least-cost alternative to FPL's customers. However, Nassau withdrew from the proceeding "at the outset of the final hearing." ICL Order at p. 5. The ICL project was approved by the PSC on March 21, 1991. The final order specifically addressed other QF alternatives, concluding that:

> The record is devoid of evidence to support a finding that when considering this project with these benefits versus a discounted standard offer contract [such as Nassau's] that the Indiantown Project is not cost effective.

Id. at p. 21.

first-in-time basis; (2) to exclude ICL when awarding the subscription limit; (3) to award the first 435 MW of the 500 MW subscription limit to Nassau; and (4) to nullify the other standard offers signed against the 500 MW subscription limit. The order also reiterated the PSC's prior Siting Act policy:

> [P]rioritization of a contract within the 500 MW subscription limit does not establish a presumption of need. Contracts within the "queue" must still be evaluated against individual utility need at a need determination proceeding.

Order 23792 at p. 4 (A. 85-86). This is the first of the two orders Nassau appeals.

Nassau accepted the PSC's resolution of the over-subscription problem, but filed a "Motion for Reconsideration Of A Portion of Order 23792" arguing, for the first time, that the PSC's Siting Act policy "illegally contravene[s]" the Cogeneration Rules. R. Vol. X, 1890-1905.

On June 17, 1991, the PSC issued Order 24672, denying Nassau's request for reconsideration and stating:

> [N]assau seeks reversal of a policy which was firmly in place by virtue of Order 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 22341, Nassau chose to sign its standard offer contract, and it should not now be surprised that we choose to follow our own precedent.

Order 24672 at p. 1 (A. 88). The PSC also addressed Nassau's argument that the Siting Act policy violated the Cogeneration Rules:

> 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 24672 at p. 3 (A. 90). This is the second of two orders Nassau appeals.

SUMMARY OF ARGUMENT

Nassau asks this Court to reject the PSC's application of the Siting Act to QFs as contradicting the PSC's Cogeneration Rules. The Court should uphold the PSC's determination based on several firmly-established principles of law.

First, courts accord great weight to a statutory construction by an administering agency. The PSC is the agency solely responsible for the need portion of the Siting Act, and has interpreted the Act as requiring site and utility-specific reviews of proposed QF power plants. It is clear from the language of the Act that this is the only reasonable interpretation. Therefore, even if the Cogeneration Rules were inconsistent with the PSC's Siting Act interpretation, the rules would yield to the statute.

Second, courts accept an agency's interpretation of its rules unless clearly erroneous. The PSC interprets its Cogeneration Rules as not limiting its application of the Siting Act to QFs. In fact, the PSC never intended these rules to address Siting Act determinations. Nassau cannot

base its appeal on a construction of the Cogeneration Rules that contradicts the PSC's interpretation of those rules.

Finally, the Court need not reach the merits of this case. Nassau is attempting to appeal, in unnatural isolation, a single facet of intertwined Commission decisions. Because Nassau has accepted the benefit of these interrelated determinations, Nassau cannot challenge the PSC's Siting Act decision. Nassau's appeal is also untimely.

ARGUMENT

I.

NASSAU CANNOT APPEAL THE PSC'S POLICY AND PROCEDURE IMPLEMENTING THE SITING ACT WITHOUT APPEALING THE ENTIRE ORDER ON SUBSCRIPTION AND THE PSC'S EARLIER ORDER ON RECONSIDERATION.

One of the "firmly established principles of appellate review" is the "fundamental principle that one may not accept the fruits of a decree and at the same time appeal from it." Brooks v. Brooks, 100 So. 2d 145, 145 (Fla. 1958). This rule applies to all civil cases "in the absence of a contrary statute or court rule." Id. An analogous mandate is that if two determinations are intertwined or "inextricably bound" together, the court must dismiss any appeal that does not include the entire matter -- a party cannot accept part of a decision and appeal part of it. State Road Dep't v. Hartsfield, 216 So. 2d 61, 65-66 (Fla. 1st DCA 1968).

It would be difficult to imagine a more compelling case for applying these principles than the one here.

First, QFs "accepted the fruits of" the PSC's Siting Act policy when they convinced the PSC to substitute a generic coal unit for FPL's combined cycle unit as the statewide avoided unit, but did not challenge the contemporaneous Siting Act decision. The uncontroverted testimony at the planning hearing was that selecting a generic avoided unit could result in wasteful duplication of generating facilities and unnecessarily high electric rates for Florida residents _if_ the PSC presumed need in Siting Act hearings based on the findings from the planning hearing. Given this testimony, it is highly unlikely that the PSC would have designated the generic avoided unit used to develop standard offer pricing terms desired by QFs absent its prior determination that QFs must prove the merit of their proposed projects in Siting Act hearings. Nassau eagerly accepted the benefit of the more favorable pricing associated with the coal-fired unit but now collaterally attacks the PSC's interpretation and policy.

Second, Nassau "accepted the fruits of" the PSC's Siting Act policy when it convinced the PSC to resolve the oversubscription problem using nothing more than a "first-in-time" criterion. Not once when the PSC or other parties to the hearing acknowledged that the PSC would review the merits of QF plants on a utility-specific and unit-specific basis did Nassau tell the PSC that it believed this policy to be inconsistent with the Cogeneration Rules. _See_ R. Vol. XVI, 5-25-90 Conf. Tr., p. 88; R. Vol. XVI, 10-2-90 Conf. Tr., pp. 7-

8; R. Vol. XVII, 10-19-90 Hr. Tr., pp. 27-29, 42, 48, 50-51, 69; R. Vol. XVII, 10-26-90 Hr. Tr. pp. 9-10, 27, 36 and 44. Moreover, Nassau itself expressly encouraged the Commission to rely on its prior Siting Act interpretation and policy in resolving the over-subscription dilemma, and now benefits from the consequent first-in-time solution, which eliminated seven QF projects from its competition. <u>See</u> Order 23792 at pp. 4-5 (A. 85-86).

Finally, Nassau "accepted the fruits of" the PSC's Siting Act policy when it convinced the PSC that ICL (which signed its contract with FPL before Nassau signed its standard offer) should not be counted toward the subscription limit. Given the PSC's policy favoring negotiated contracts, it is probable that without its prior Siting Act policy the PSC would have recognized ICL as filling the majority of the 1996 subscription limit. The PSC's resolution of this issue -- again, in Nassau's favor -- was also likely driven by the practical consideration that Nassau would intervene in ICL's Siting Act proceeding, where both projects would be contrasted on the merits. Nassau accepted this conclusion -- or allowed the PSC believe that it did -- and once again embraced the benefits of the Siting Act policy. R. Vol. XVII, 11-1-90 Hr. Tr., pp. 14-22 & 48-51.

QFs' acquiescence in the PSC's Siting Act policy encouraged the Commission to select a generic avoided unit with more favorable pricing terms. Nassau cannot take that

fruit, yet challenge the policy. Brooks, 100 So. 2d at 145. By encouraging the Commission to rely on its Siting Act policy, Nassau also convinced the PSC to apply a first-in-time rule eliminating Nassau's competition for the standard offer without a merits hearing. Therefore, Nassau cannot appeal the Commission's Siting Act policy without undermining the very basis for its contract and contract award. Because the PSC's Siting Act policy was inextricably bound to the PSC's resolution of the subscription priority in Nassau's favor, Nassau cannot appeal the policy decision reiterated in Order 23792 without appealing the entire order. Hartsfield, 216 So. 2d at 65-55. For these reasons, Nassau's appeal should be dismissed. See id. at 66-67.

II.

NASSAU'S APPEAL IS UNTIMELY.

Nassau's appeal should also be dismissed as untimely. To appeal a PSC determination, a party must appeal the order in controversy, not a subsequent order merely reiterating the prior determination. Central Truck Lines v. Boyd, 106 So. 2d 547 (Fla. 1958).

In Central Truck Lines, the PSC's predecessor, the Railroad and Public Utilities Commission ("RPUC") issued an order granting a certificate of public convenience and necessity, without prior notice or hearing, to a railway company. Six months later, Central Truck Lines challenged the granting of the certificate by petitioning the RPUC to

reconsider and revoke it. The RPUC denied the petition for reconsideration by a second order, and Central Truck Lines appealed to this Court. After hearing oral argument on the petition, the Court dismissed it sua sponte "for want of jurisdiction." Id. at 546. The Court reasoned that no matter how either side attempted to frame the issues, the real controversy was over the first Commission order, decided six months before the appeal. Id. at 548.

This Court followed the Central Truck Lines decision one year later in Great Southern Trucking Co. v. Carter, 113 So. 2d 555 (Fla. 1959), rejecting as untimely an appeal seeking review of a prior RPUC decision "reaffirmed" in the order appealed. The Court stated that: "It is manifestly evident that, although the petition for writ of certiorari filed herein challenged Order 4533 as well as Order 4020, its underlying purpose is to secure the quashal of Order 4020 which was issued ... [more than 30 days prior to the appeal]." Id. (emphasis added). In light of appellants' apparent "underlying purpose," the Court concluded that "it is clear that petitioners cannot at this late date by the method adopted herein attack the validity of Order 4020." Id. at 557.

The import of these cases is clear. The PSC order collaterally attacked by Nassau's appeal is Order 22341. The later Orders 23792 and 24672 appealed by Nassau are mere restatements. It was in Order 22341 that the Commission first

articulated the Siting Act policy and interpretation now challenged by Nassau. Because the PSC reconsidered Order 22341 on its own motion and reaffirmed its Siting Act construction and policy, Nassau could have challenged the PSC's determination by appealing Order 23234. Instead, Nassau chose to accept the benefit of the more favorable generic "statewide" avoided unit designated in that order and not to appeal the order. As in Central Truck Lines and Great Southern Trucking Co., this Court should dismiss Nassau's appeal as untimely.

III.

THE COMMISSION'S IMPLEMENTATION OF THE SITING ACT DOES NOT CONTRADICT THE PSC'S COGENERATION RULES.

A. The Commission's Cogeneration Rules Were Not Intended To, And Do Not, Interpret Or Implement The Power Plant Siting Act.

Nassau's appeal is narrow. Nassau's claim is only that the PSC's Siting Act interpretation and policy violate the PSC's Cogeneration Rules. However, the Cogeneration Rules do not even address the Siting Act.

The Siting Act is not listed in any of the PSC's Cogeneration Rules as a basis for the PSC's authority in promulgating the rules, or as a "law implemented" by the rules; there is no evidence in the record that the Cogeneration Rules were ever intended to address the Siting

Act;[10] and, according to the PSC, the Cogeneration Rules do "not discuss need determination proceedings pursuant to the Siting Act." Order 24672 at p. 3 (A. 90).

This should end the Court's inquiry on the only substantive issue raised by Nassau's appeal. The PSC does not -- and has never -- interpreted its Cogeneration Rules as limiting its jurisdiction under the Siting Act. As a matter of logic, the PSC's interpretation and implementation of the Siting Act cannot be inconsistent with the Cogeneration Rules when the rules do not even speak to the subject. Moreover, the Commission's interpretation of its Cogeneration Rules as not limiting its implementation of the Siting Act is entitled to great weight, Pan Am. World Airways, Inc. v. Florida Public Service Comm'n, 427 So. 2d 716 (Fla. 1983), and must be followed here. Id.

B. The Cogeneration Rules Are Intended To, And Do, Govern The Relationship Between Florida Utilities and QFs.

Not surprisingly, since the Cogeneration Rules do not address the Siting Act, Nassau cannot identify the rule it claims to be in conflict with the PSC's Siting Act policy. Instead, Nassau argues that the Commission's Siting Act interpretation and policy are inconsistent with the general

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[10] To the contrary, during the entire planning hearing proceeding, no PSC Commissioner, staff member, or counsel; no utility lawyer or representative; and no QF lawyer or representative -- all intimately familiar with the PSC's Cogeneration Rules -- even once suggested that the Cogeneration Rules conflicted with or spoke to the Commission's interpretation and implementation of the Siting Act.

approach of the Cogeneration Rules, and attempts to support this argument by referring to rules 25-17.083 (4) and (5). Both of these provisions are entirely consistent with the purpose of the Cogeneration Rules; that is, to govern the relationships between utilities and QFs.

The first rule provision discussed by Nassau, Florida Administrative Code Rule 25-17.083(4), states that:

> The Commission shall initiate proceedings on an annual basis to determine the statewide avoided unit for the purpose of determining the need for, timing, and pricing of firm energy and capacity purchases from qualifying facilities.

Nassau's argument presumes that because the word "need" appears in the rule, the rule is intended to relate to or implement the Siting Act. Again, this is not supported by the history of the rule or the PSC's interpretation of it. Moreover, because the price required by PURPA is the utility's avoided cost (the cost that the utility would spend to supply additional power that it needed), the PSC would necessarily have to look at the <u>need</u> for QF power to set <u>rates</u> for QF purchases. The Commission expressly recognized this in 1984, when they first implemented the Cogeneration Rules:

> Therefore, <u>the starting point for pricing firm QF capacity and energy is a determination of when additional generating capacity of any kind is needed in Florida</u>.

Order No. 13247, Docket No. 830377-EU at p. 2. (A. 13) (emphasis added).

It is only this generalized inquiry, for the limited purpose of finding a maximum price for QF power in Florida,

that is contemplated by the Cogeneration Rules and carried out in the APH docket. This fact was specifically reiterated by the Commission at its hearing on Nassau's motion for clarification:

> CHAIRMAN WILSON: I think we need to make sure that we are not confusing the determination of need process with the designation of an avoided unit and the megawatts that are associated with that. . . . We designated that statewide avoided unit as a result of the annual planning hearing and it was principally to give a firm, give a price --
>
> MR. BALLINGER: Yes.
>
> CHAIRMAN WILSON: -- to a block of --
>
> MR. BALLINGER: Capacity.
>
> CHAIRMAN WILSON: -- capacity for cogenerators to sign up against. And the need for power remains to be determined as we see projects come in for a determination of need.

R. Vol. XVII, Hr. Tr., pp. 10-11.

That this is the proper perspective from which to view this rule is further reinforced by the only statute ever identified by the PSC (or by anyone else in the record on appeal) as being implemented by the rule. That section is Section 366.05(9), Florida Statutes (1983), which states:

> The commission may establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers and may set the rates at which a public utility shall purchase power or energy from a cogenerator or small power producer. (emphasis added)

It does not follow that the PSC's assessment of "need" for purposes of pricing QF power would be sufficient to meet the broad objectives or specific criteria of the Siting Act for any specific QF project at any specific location in Florida.

For example, one may "need" a five-pound bag of sugar. But if one lives in Tallahassee, one does not need the sugar on Aisle 13 of the Publix Market in Miami. Even if the price of sugar is the same at both locations, the cost and hassle of transporting it to Tallahassee makes the Miami sugar a very unwise purchase.

This example is no more absurd than Nassau's suggestion that the Cogeneration Rules mandate a statewide approach to need determinations under the Siting Act. The Siting Act entrusts the PSC with the task of deciding whether a particular electric plant is a wise purchase for the people who will pay for it. "[W]ith respect to each proposed site" the PSC must take a position on the critical issues associated with a "need determination" -- electric system reliability and integrity; the need for adequate electricity at a reasonable cost; whether each proposed site is the most cost-effective alternative available for the ratepayers; and conservation measures which might mitigate the need for the plant. § 403.519, Fla. Stat. (1989). The fact that a PSC rule on a different subject contemplates a generic determination of statewide "need" for a different purpose -- to set a price -- in no way limits the PSC's application of the Siting Act.

The other rule discussed by Nassau in support of its argument is Rule 25-17.083(5), the rule directing utilities purchasing QF power pursuant to standard offer contracts to attempt to sell the power to the utility planning the

statewide avoided unit if "not needed by the purchasing utility." Nassau's argument is that because this rule recognizes a possibility that QFs may sign standard offers with utilities that do not need additional power, the rule somehow mandates that the PSC certify unnecessary, duplicative or wasteful QF facilities for construction under the Siting Act.

In actuality, the rule sets forth the method that the PSC expected utilities under its jurisdiction to employ to solve any potential mismatch between the need and supply for QF power. This simply cannot be read as prohibiting the PSC from taking any action (through Siting Act determinations, or presumably -- as Nassau would have it -- through the exercise of any PSC power) to stop a mismatch that would cause a facility to fail any of the Siting Act criteria and result in the unnecessary duplication of electric generating facilities in Florida.

C. Even If the Cogeneration Rules Did Address the Siting Act, Nassau's Argument That The "Approach Of The Rules" Contradicts The PSC's Siting Act Interpretation and Policy Would Not Be Sufficient, Under The Authorities Cited By Nassau, To Reverse the PSC's Determination.

As discussed earlier, Nassau's argument is that the Commission's Siting Act policy and interpretation should be rejected as inconsistent with the overall approach of its Cogeneration Rules. According to Nassau, the Cogeneration Rules "explicitly contemplate" a "statewide market" (Nassau's Initial Brief at p. 12); contain "statewide features" (Id.)

and mandate a "statewide approach to the need for QF capacity." (Id. at 13). It is the PSC's "attempt to denigrate the efficacy" of this "statewide approach" and "statewide standard offer" that "contradicts the Commission's governing rules." (Id. at 12-13). These arguments stand in stark contrast to the three cases cited by Nassau.

In McDonald v. Dept. of Banking and Finance, 346 So. 2d 569 (Fla. 1st DCA 1977), the First DCA simply noted that the Administrative Procedure Act encouraged rule-making because rules better enabled the public to understand what an agency will expect. Here, there is no question but that Nassau knew exactly what to expect regarding the Commission's application of the Siting Act when it signed a standard offer.

In Decarion v. Martinez, 537 So. 2d 1083 (Fla. 1st DCA 1989), the First DCA reversed a decision of the Governor and Cabinet, sitting as the Board of Trustees of the Internal Improvement Trust Fund, for violating one of the Board's rules that was "mandatory," not advisory, and spoke directly to the matter decided by the Board. Id. at 1084. The Board's rules explicitly stated that certain criteria "shall be used to determine . . .[whether a lease is required for the use of state submerged lands]." The Board had acted in direct violation of its rules by requiring a lease where the rules expressly dictated that no lease was required.

In Woodley v. Dept. of Health and Rehabilitative Services, 505 So. 2d 676 (Fla. 1st DCA 1987), the First DCA

reversed an agency's rule construction that "clearly contradict[ed] the unambiguous language of the rule." Id. at 678. Again, the rule directly addressed the decision of the agency and "unequivocally require[d]" a specific result. Id.

Unlike the rules relied on in the cases cited by Nassau, the Cogeneration Rules do not contain mandatory, unambiguous language contradicting the Commission's Siting Act interpretation challenged. They do not state that the PSC shall exempt QF's from provisions of the Siting Act; that the PSC shall presume that QFs signing standard offers meet criteria for certification under the Siting Act; or that the PSC shall use generic statewide data developed in its APH docket when making a determination under the Siting Act for QF facilities. Short of some explicit provision similar to these, the cases cited by Nassau do not support Nassau's position that the PSC's Siting Act interpretation and policy must be held inconsistent with the Cogeneration Rules.

D. The "Approach" Of The Cogeneration Rules Is Both Statewide and Utility-Specific.

Finally, even if the Cogeneration Rules had been intended to address the Siting Act, and even if policy could be invalidated for being inconsistent with the "approach" of a set of rules, the "approach" of the Cogeneration Rules is not inconsistent with the Commission's Siting Act interpretation and policy. Nassau's argument is based on the assertion that the rules approach cogeneration exclusively from a statewide

perspective. However, the rules contain both statewide and utility-specific aspects.

Each utility is required to annually submit "an analysis to the Commission identifying its next planned uncertified generating unit to be added to its system pursuant to its most current long range generation expansion plan." Fla. Admin. Code Rule 25-17.083(4)(a). Based on this utility-specific data, and after hearing, the PSC would designate the individual utility in Florida planning the next "statewide avoided unit." Fla. Admin. Code Rule 25-17.083(3)(a)3., (b)2., (5) & (6). Standard offer terms would then be derived from this utility-specific unit. Although the rules permitted QFs to sign standard offers with any investor-owned utility in the state, the PSC ultimately expected "[t]he utility planning the designated statewide avoided unit . . . to purchase such energy and capacity . . . ." Fla. Admin. Code Rule 25-17.083(5). The rules, therefore, clearly contemplated that a utility-specific project would serve as the "statewide avoided unit" and that the utility actually planning that unit would receive any QF power resulting from standard offer contracts.[11]

Moreover, the rules specifically provide that:

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[11] It bears repeating that this is what the PSC did in this docket when it selected FPL's planned combined cycle unit as the statewide avoided unit. At the urging of QFs, however, the PSC rescinded this order and designated a generic coal-fire avoided unit that Nassau has so readily embraced.

> The policy of this Commission as set forth in . . . [the Cogeneration Rules] is to encourage small power production to the extent that it is cost effective to electric utility ratepayers of the State of Florida.

Fla. Admin. Code Rule 25-17.088.

This hardly suggests an "approach" to cogeneration that would bind the PSC from considering whether ratepayers need the additional electricity that a QF proposes to sell them and, if so, whether the QF's proposed plant is the least-cost alternative for meeting that need. Rather, the rules are specifically designed to encourage cogeneration to the extent that it is cost-effective to Florida ratepayers.

E. The Cogeneration Rules And The Commission's Interpretation And Policy Under The Siting Act Have Worked Together To Provide Cost-Effective QF Power To Florida Ratepayers.

It is also clear from the record before this Court that the Commission's Cogeneration Rules and Siting Act interpretation and policy have worked to encourage the development of cost-effective QF power. The PSC's policy has consistently been to encourage negotiated QF contracts -- with the standard offer terms as the highest price that can be paid for QF power. If utilities do not negotiate better deals for their customers, standard offer contracts -- whether agreed to or not -- will be used to fill the need.

The ICL contract was negotiated to meet the same 1996 need for power Nassau seeks to meet. In approving the ICL facility at a need determination, the Commission specifically found that power purchased from ICL was cost-effective for

FPL's customers relative to a standard offer such as Nassau's. That Nassau chose to withdraw from the ICL need determination on the eve of trial and file this appeal is telling in several respects. Important here, it indicates that the Cogeneration Rules and the Siting Act interpretation of policy have, thus far, worked to encourage development of the most cost-effective QF projects to meet the needs of Florida ratepayers. It is difficult to take issue with that result.

IV.

THE SITING ACT, NOT THE COGENERATION RULES, GOVERN THE DETERMINATION OF THE NEED FOR A QUALIFYING FACILITY.

The PSC's determination that inclusion within the 500 MW subscription limit entitled Nassau to a price but not a presumption of need under the Siting Act was an interpretation of the Siting Act's need determination provisions, not just a statement of PSC policy. The PSC is the agency responsible for the enforcement and interpretation of the need provisions of the Siting Act. See Sections 403.507(1)(b), 403.519, Fla. Stat. (1989). Therefore, the Court should give great weight to this statutory construction.

In this case the Commission construed the Siting Act as requiring a utility-specific determination of need, and concluded that in instances of a power plant being built by a QF to sell power to a utility, the plant "must still be evaluated against an individual utility need at a need determination proceeding." Because the PSC's decision is a

construction of the Power Plant Siting Act, even if it were inconsistent with the PSC's Cogeneration Rules, the PSC's decision would not properly be remanded, for the Commission must give precedence to statutes over its own rules.

A. The Commission's Siting Act Interpretation Is Correct.

The Commission's construction of the Siting Act is correct. Whatever "need" for QF power is incident to a planning hearing cannot be a surrogate for a Siting Act need determination. The Siting Act mandates specific criteria for need determinations that are unit and utility specific.[12]

The unit and utility specific nature of the Siting Act need determination is apparent on the face of the statute. Section 403.507(1)(b), Florida Statutes (1989), requires the Commission to prepare a report addressing "the present and future need for the electrical generating capacity to be supplied <u>by the proposed electrical power plant</u>." Section 403.519, Florida Statutes (1989), listing specific criteria for consideration in a need determination proceeding, speaks of "the need for <u>an</u> electric power plant," requires notice in

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12 The Commission has previously construed the Siting Act in this fashion:

> The Siting Act, and Section 403.519 require that this body make 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. Clearly these criteria are utility and unit specific .

Order No. 22341 at 26 (A. 70), <u>reaffirmed</u> Order No. 23234 at 4 (A.80).

the county in which "the proposed plant" will be located and provides that the Commission's need determination should serve as the report required by Section 403.507(1)(b), Florida Statutes (1989).

The Commission's rules implementing the Siting Act, Florida Administrative Code, Rules 25-22.080, 081, are also unit and utility specific, requiring a description of the utility or utilities affected, Rule 25-22.081(1), information about the proposed power plant, Rule 25-22.081(2), information about the utility's need for the plant, Rule 25-22.081(3), a statement of the factors showing need for the proposed plant, Rule 25-22.081(4), a discussion of generating and non-generating alternatives considered and their relative cost-effectiveness, Rule 25-22.081(4) and (5), and an evaluation of the adverse consequences that will result if the proposed plant is not added. Rule 25-22.081(6).

Applying the Siting Act and these rules in a strikingly similar case, the Commission has previously declined to grant a generic need determination. In 1988 Seminole Electric Cooperative ("SEC") asked the PSC to grant a generic need determination that could be used either by SEC to build units or by a successful bidder in a bidding process designed to supplant the SEC units. The Commission declined and construed the Siting Act in a fashion quite relevant to Nassau's appeal:

> The modifications suggested by SEC are premised on several legal assumptions: that this Commission can issue a "generic" need certification for X amount of MW and that this "generic" certification

> can be transferred to another in whole or in part or amended to accommodate different technologies and sites at some later date without further action by this Commission. That simply is not the case. We cannot issue a "generic" need determination for any utility.
>
> The intent of Section 403.519 was to flesh-out the broad language of Section 403.507(1)(b) as well as allow utilities to initiate their need determination proceedings before filing their application with DER. Section 403.519 was not intended to create a separate "generic" need status independent of the provisions of the Power Plant Siting Act. The only reason for a need determination is to satisfy the report requirements of Section 403.507(1)(b). This report is intended to evaluate the need for a specific plant at a specific site. Any other type of report would not satisfy the statutory requirements of Section 403.507(2)(b) to report on "the present and future need <u>for the electrical generating capacity to be supplied by the proposed electrical power plant.</u>"

In re: Petition of Seminole Electric Cooperative, Inc. to Determine Need for Electrical Power Plant, 88 FPSC 6:185, 189-190 (Order 19468).

The language of the Siting Act as well as the PSC's rules and prior decisions implementing the Siting Act show that the PSC's construction of the Siting Act in the orders on appeal is correct. Nassau's suggestion that it be allowed to "rely upon," in a Siting Act determination, the separate, generic assessment of QF "need" underlying the statewide avoided unit identification that was used to determine Nassau's standard offer contract price is an improper construction of the Siting Act, and the Commission did not err in rejecting it.

B. The Commission's Interpretation Of The Siting Act Is Entitled To Great Weight.

The Commission is the agency responsible for the enforcement and interpretation of the need provisions[13] of the Siting Act. Consequently, the PSC's construction of these statutory provisions is entitled to great weight, and should be followed unless clearly unauthorized or erroneous.[14] P.W. Ventures, Inc. v. Nichols, 533 So. 2d 281 (Fla. 1988). The PSC's construction should be followed even if there is a reasonable alternative construction. Such deference is due the Commission "for its greater familiarity with the statutory scheme and its expertise in the field regulated." Rice v. Dep't of Health & Rehabilitative Services, 386 So. 2d 844 (Fla. 1st DCA 1980).

In this particular instance, even greater deference should be given to the PSC's construction of the Siting Act.

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13 Sections 403.507(1)(b), 403.519, Florida Statutes (1989).

14 This is not an instance where the Commission is attempting to change its administrative interpretation of a statute for no known or readily discernible reason. See Miller v. Agrico Chemical Co., 383 So. 2d 1137 (Fla. 1st DCA 1980). The interpretation of the Power Plant Siting Act challenged by Nassau was a restatement of an interpretation first made in December 1989 in Order 22341 and reaffirmed in July 1990 in Order 23234. It is also consistent with the PSC's 1988 decision in the SEC need determination, Order 19468. While it could be argued that the interpretation of the Siting Act in Order 22341 was a change of administrative interpretation of the Siting Act, it was done upon notice, in a generic industry-wide proceeding after evidence was heard and parties were given an opportunity to address the issue in brief. The PSC thoroughly articulated and justified its interpretation based upon the record before it. Order 22341 at 25-27 (A. 69-71).

After the Commission initially interpreted the Siting Act as requiring a utility and unit specific determination of need and held that need assessments for QF power incidental to setting standard offer prices would not be a surrogate for need determinations under the Siting Act,[15] the legislature reenacted the Siting Act without amending in any relevant fashion the portions of the Act the Commission was interpreting. Chapter 90-331, Laws of Florida. When the legislature reenacts a statute, it is presumed both to know and adopt the construction placed on the statutes by courts or administrators. State ex rel. Szabo Food Services, Inc. of North Carolina v. Dickinson, 286 So. 2d 529 (Fla. 1973); Peninsular Supply Co. v. C.B. Day Realty of Florida, Inc., 423 So. 2d 500 (Fla. 3d DCA 1982).

C. Even If The Commission's Interpretation Of The Siting Act Were Inconsistent With The Commission's Cogeneration Rules, The Siting Act Must Prevail.

It has already been established that the Commission's holding that a QF must be evaluated against the purchasing utility's need for power in the QF's Siting Act need determination is not inconsistent with the Cogeneration Rules. See pages 24 - 34 of the brief. However, assuming, arguendo, that the PSC's holding were inconsistent with the Cogeneration Rules, that would not be a ground for remand in this instance. In reaching its holding, the Commission was relying upon and interpreting the statute that governs QF need determinations,

15 See Order No. 22341 issued December 26, 1989 at 25-27.

the Siting Act. If there were a conflict between the requirements of the Siting Act and the Cogeneration Rules, the statute would control. When an administrative body's rule is in conflict with the body's governing statute, the statute governs. C.F. Industries, Inc. v. Nichols, 536 So. 2d 234, 238 (Fla. 1988); Star Employment Serv., Inc. v. Florida Indus. Comm'n, 109 So. 2d 608, 610 (Fla. 3d DCA 1959).

V.

NASSAU'S POSITION AND UNDERLYING INTERPRETATION OF THE SITING ACT ARE SERIOUSLY FLAWED.

Buried in a footnote late in its brief is Nassau's alternative interpretation of the Siting Act. Nassau maintains that in its Siting Act need determination:

> If the Commission determines that the purchasing utility does not need the capacity of its contract, Nassau Power is entitled to rely on the statewide aspects of the governing rules, including the subscription of the statewide avoided unit on which its standard offer is based.

Nassau brief at 33, fn. 13. Nassau would have the Commission presume a statewide need for its power simply because it has a standard offer contract and the Commission, in establishing the standard offer, determined QF capacity was "needed."

Nassau's position is unworkable. It represents bad law, worse policy and invites serious adverse consequences to Florida ratepayers. The court should reject this attempt to circumvent the Siting Act, frustrate the Cogeneration Rules and pin the tab on Florida's electric ratepayers.

A. Nassau Overstates The Cogeneration Planning Hearing Findings.

The planning hearing in which the statewide avoided unit was set and the standard offer terms were developed was not noticed as or intended to be a need determination pursuant to the Siting Act. R. Vol. I, 183. On the contrary, the Commission expressly found in that proceeding that its 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 22341 at 25 (A.69), <u>reaffirmed</u> Order 23234 at 4 (A. 80). Nassau acquiesced in this, filed a standard offer and opted not to appeal the Commission's reaffirmation of policy.

Nassau's subsequent argument that it can rely upon the planning hearing's assessment of need to satisfy the Siting Act, at best, misperceives what the PSC did in the planning hearing. The only "need" determined was the PSC's identification of a generic, unlocated statewide avoided unit. It was done for purposes of setting or judging the reasonableness of QF pricing. That "need" was then transferred to, as yet unknown, QFs which would subsequently subscribe the 500 MW limit. The PSC, at the time it made its identification of the avoided unit, knew absolutely nothing about the QF units that would subscribe the 500 MW limit. It did not know their fuel type, their operating characteristics, their location or the utility to whom they would sell, all

critical factors impacting system reliability and cost-effectiveness. It cannot reasonably be argued that the Commission was discharging its unit specific Siting responsibilities in its generic planning hearing without knowing anything about the QF units that might sign standard offers. Nassau seeks to circumvent the Siting Act.

B. Nassau's Position Is Nothing More Than An Argument For A Generic Determination Of Need, A Position Previously And Correctly Rejected By The Commission.

Nassau's position of being able to rely on the generic assessment of statewide need for capacity made in the planning hearing to satisfy the need determination requirements of the Siting Act is completely at odds with the Commission's construction of the Siting Act in the SEC need determination (see pages 36, 37). In the SEC case, the Commission said it could not issue a "generic" need determination and that a "generic" need determination for X amount of MW could not be transferred to another in whole or in part, or amended to accommodate different technologies and sites at some later date without further Commission action. Order 19468 at 5, 6. That is precisely what Nassau seeks in this case.

The planning hearing findings did not "evaluate the need for a specific plant at a specific site." Order 19468 at 6. It was not a report on "the present and future need for the electrical generating capacity to be supplied by the proposed [Nassau] electrical power plant." Id. Nassau's attempt to use those findings as a generic determination of need to

satisfy the Siting Act is a complete contradiction of the SEC case.[16]

C. Nassau's Position Is To Have The Commission Ignore Reality And Numerous Relevant Intervening Events.

The assessment of need undertaken in the planning hearing to develop QF pricing was based upon data developed in 1988. Order 22341 at 2, reaffirmed Order 23234 at 4. Nassau argues that it should be able to rely on this decision based upon 1988 data in its November 1991 need determination. Nassau would have the Commission ignore all intervening events, as if the world stood still. It does not matter if the purchasing utility does not need Nassau's power. It does not matter if the statewide need for capacity has changed. It does not matter if there are more cost-effective alternatives available. Like an ostrich with its head buried deep in the sand, ignoring all that has gone on around it, Nassau wants to be able to rely on this outdated, generic, statewide assessment of need.

Much has changed since the 1988 studies used in the cogeneration planning hearing, and the Court should take judicial notice that a number of relevant intervening events have occurred before its considers shackling the Commission to a decision which is based upon data three years old. For

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16 SEC had an argument far more compelling than Nassau. At least the assessment of need it sought to have transferred (1) was made pursuant to the Siting Act (rather than the Cogeneration Rules) and (2) was based upon an individual utility's need.

instance, on FPL's system alone, FPL has been granted certificates of need to repower and increase the capacity of two existing power plants[17] and to build two new power plants.[18] For the year 1996, the year Nassau would come on-line, Indiantown Cogeneration, L.P. (ICL), which has a contract to sell firm power and energy to FPL, is scheduled to bring a 300 MW unit on-line.[19] The Commission has also approved the purchase of 646 MW of Scherer Unit No. 4 from Georgia Power Company.[20] Of course, other changes affecting

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[17] The PSC made a determination of need under the Siting Act for the repowering of FPL's Fort Lauderdale Units 4 and 5, increasing each unit's capacity from 137 MW to 423 MW, a 572 MW increase to FPL's system generation capability. These units are to be available to meet FPL's 1993 peak. In re: Petition of Florida Power & Light Company to determine need for electrical power plant - Lauderdale repowering, 90 FPSC 6:240 (Order 23079).

[18] The PSC made a determination of need under the Siting Act for the construction of Martin Units 3 and 4, twin 385 MW combined cycle units, to be brought in service before FPL's 1994 and 1995 summer peaks. In re: Petition of Florida Power & Light Company to determine need for electrical power plant - Martin expansion project, 90 FPSC 6:268 (Order 23080).

[19] The PSC has approved, and authorized cost recovery of the payments pursuant to, the ICL/FPL contract. In re: Petition for approval of Cogeneration Agreement between Florida Power and Light Company and Indiantown Cogeneration, L.P., 91 FPSC 3:544 (Order 24269), amended 91 FPSC 4:1 (Order 24269-A). The PSC has also determined, under the Siting Act, the need for the ICL project. In re: Joint Petition for determination of need for proposed electrical power plant and related facilities, Indiantown Project, 91 FPSC 3:518 (Order No. 24268) (hereinafter, ICL Order).

[20] The Commission approved FPL's Scherer Unit 4 purchase applying Siting Act criteria, although the Siting Act was not applicable. In re: Petition of Florida Power and Light Company for inclusion of the Scherer Unit No. 4 purchase in rate base, including an acquisition adjustment, 91 FPSC 2:602

other utilities and the state as a whole have occurred as well. It would be patently absurd for the Commission to ignore these relevant, intervening events in applying the need criteria of the Siting Act.

D. Nassau's Position, If Upheld, Will Likely Cost Ratepayers Significant Sums Of Money And Result In The Unnecessary Duplication Of Electric Facilities.

Nassau's contract is with FPL, and the contract envisions firm capacity deliveries beginning in 1996 and lasting for thirty years. R. Vol. X, 1821. If Nassau performs fully, FPL will pay Nassau in excess of $4,000,000,000.00 (four billion dollars). Under the Commission's Cogeneration Rules, this money will be recovered from FPL's ratepayers. Fla. Admin. Code Rule 25-17.083(8) (1990), (A.6).

Since Nassau's standard offer contract was submitted to FPL, the PSC has approved contracts for the purchase by FPL of 300 MW of power from ICL and of 646 MW of Georgia Power's Scherer Unit No. 4. Both of these purchases were designed to meet FPL's need for additional capacity in 1996. In the proceedings assessing the need for the ICL and Scherer purchases, the Commission found each alternative was more cost effective than an equivalent amount of standard offer capacity, capacity such as Nassau's. ICL Order (Order 24268) at 5; Scherer Order (Order 24165) at 6, 7.

(Order 24165) (Scherer Order), amended 91 FPSC 3:1 (Order 24165-A).

Nassau Power participated in the ICL contract approval and need determination dockets, withdrawing on the eve of the hearing. It ultimately chose not to try to show its project was more cost effective than ICL's, and the Commission decided the ICL project was more cost effective than an equivalent amount of standard offer capacity. Order No. 24268 at 5. Nassau also participated in FPL's Scherer proceeding. Nassau tried to show it was more cost effective than Scherer, and the Commission determined otherwise. Order No. 24165 at 6, 7.

The handwriting is on the wall. Nassau desperately wants to ignore it and have this Court require the Commission to ignore present circumstances. If Nassau is successful and gets its Power Plant certification, FPL's customers will pay, and they will pay billions of dollars for power not yet shown to be needed or cost-effective. Such a travesty should be avoided, and Nassau should be required to demonstrate, if it can, the need for its power.

CONCLUSION

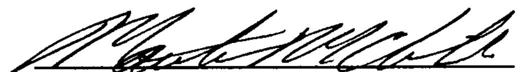
Nassau Power seeks a judicial ruling that would totally frustrate the PSC's implementation of the Siting Act and the Cogeneration Rules. Nassau ignores the presumption of validity appropriately accorded PSC orders and fails to meet its burden of overcoming the presumption. Nassau greedily seeks to retain the considerable benefits given it by the orders it attacks, yet launches an untimely, collateral attack upon well reasoned and fully supported Commission policy and

statutory interpretations merely restated in the challenged orders. If successful, Nassau will circumvent the Siting Act and likely force FPL's customers to pay for power that may not be needed or cost-effective.

The Commission has correctly interpreted the Cogeneration Rules and the Siting Act. Its interpretation of the Siting Act cannot be inconsistent with the Cogeneration Rules, for those rules do not address the Siting Act. Even if the Commission's interpretation of the Siting Act were inconsistent with the Cogeneration Rules, the statute must prevail.

The Commission's orders should be affirmed. Nassau should be taxed for costs.

Respectfully submitted,



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DOCKET NO. 910004-EU

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