IN THE SUPREME COURT OF FLORIDA

NASSAU POWER CORPORATION,

Appellant,

v.

CASE NO. 78,275
PSC DOCKET NO. 910004-EU

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

Appellees.

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ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

INITIAL BRIEF OF APPELLANT,
NASSAU POWER CORPORATION

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PRELIMINARY STATEMENT

The following abbreviations are used in this brief. Appellant, Nassau Power Corporation, is referred to as Nassau Power. Appellee, Florida Public Service Commission, is referred to as the Commission. Florida Power and Light Company is referred to as FPL. Citations to the Appendix are designated (A.) and citations to the Record on Appeal are designated (R.).

The orders which are the subject of this appeal were issued as the result of an informal proceeding which constitutes a small subpart of a long continuum. The Commission's regulation of transactions between cogenerators and investor-owned utilities spans approximately ten years. To place the issue on appeal in context, Nassau Power has included a general "Background" section as the first portion of its Statement of the Case and of the Facts.

STATEMENT OF THE CASE AND OF THE FACTS

BACKGROUND

"Cogeneration" is the term used to describe the use of energy in sequential steps to both generate electricity and apply useful thermal energy to a commercial or industrial process. 16 U.S.C. § 796(18)(A). In cogeneration the natural energy resource being consumed performs two jobs instead of one. Congress has seen in the high efficiency achieved by cogeneration a conservation measure worthy of national policy. In 1978 Congress passed the Public Utility Regulatory Policies Act ("PURPA"), Pub.L. No. 95-617, 92 Stat. 3117 (1978), in which it sought to foster the development of cogeneration by establishing a mandatory wholesale market for cogenerated electrical power. PURPA requires electric utilities to purchase cogenerated power from cogenerators who qualify to participate in the mandatory market by meeting threshold efficiency standards ("Qualifying Facilities" or "QFs") at prices based on the utilities' "avoided costs"--i.e., the costs which the utilities would incur to produce electricity if they did not instead purchase cogenerated power. 16 U.S.C. § 824a-3(b).

PURPA required the Federal Energy Regulatory Commission ("FERC") to adopt implementing rules with which state regulatory agencies must comply. To comply with the FERC rules, the state agencies must in turn promulgate regulations governing the

relationship between QFs and utilities and regulating the transactions between them. 18 C.F.R. Part 292.

In Florida, the Florida Public Service Commission has the responsibility under PURPA to regulate transactions between utilities and cogenerators. It has done so through a combination of formal rules and implementation hearings leading to orders designed to carry out those rules.

The Commission's rules have been modified over time. In this brief, a distinction will be made between the rules which were in place during the period May 1990 - October 1990 and which therefore govern the orders which are the subject of this appeal (the "old rules") and the rules which took effect prospectively in October 1990 (the "new rules"). (Because the "old rules" remain operative as to certain contracts and transactions, they will frequently be referred to in the present tense.)

The "avoided costs" which form the basis of the utilities' payments to QFs include the cost of building a planned generating unit which can be deferred or rendered unnecessary through purchases of cogenerated power on a firm contractual basis. The "old rules" create a statewide market for cogenerated power. They require the Commission to designate a "statewide avoided unit," derived from a statewide assessment of the need for additional generating capacity, to serve as a basis for quantifying the amount of generating capacity which utilities are obligated to purchase from QFs at a given point in

time and the price they must pay to the cogenerators for that capacity.

The determination of the "statewide avoided unit" prescribed by the "old rules" is performed during proceedings held to review the utilities' generation expansion plans. Such plans involve a projection of growth in demand for electricity over time and an analysis of the resources which should be added to meet the projected demand while maintaining standards of reliability. An assessment of the need for generating capacity performed on a statewide basis will naturally differ from an assessment limited to the needs and characteristics of an individual utility service area. For example, it would be possible for a particular utility to have no need for additional generating capacity to meet its individual native requirements at a time when the state measured as a whole exhibits a need for more capacity.

While QFs and utilities may negotiate the terms of a contract between them under the rules, a consistent feature of the Commission's regulations over time has been a "standard offer contract." A "standard offer" is a contract consisting of preapproved terms and conditions which the Commission requires utilities under its jurisdiction to hold out to all QFs until the amount of generating capacity identified and reserved for the statewide avoided unit has been contractually committed by QFs ("subscribed"). When under the "old rules" the Commission designates a "statewide avoided unit," the parameters affecting

the cost to construct the unit (size, type, in-service date, etc.) are translated into a uniform "standard offer contract" which regulated utilities are required to offer to all QFs, regardless of their location, until the contracts received from QFs are sufficient in the aggregate to fully displace the designated statewide avoided unit. The process is then repeated based on new projections and a new measurement of statewide need. Over time, the Commission designated--and QFs subscribed--a succession of statewide avoided units. This appeal involves orders associated with the last statewide avoided unit designated by the Commission prior to the effective date of amended rules which prescribe a markedly different approach.

Following rulemaking activities, the Commission ultimately adopted significant changes to the "old rules." The "new rules," which became effective on October 25, 1990, focus on the individual utilities' service areas. Under the "new rules," each utility submits for approval an "avoided unit" derived from its individual generation expansion plan and a correspondingly individualized (size, timing, price) standard offer. This approach prospectively supplanted the use of a statewide avoided unit and uniform statewide standard offers. However, it is uncontroverted that the "new rules" have no application to Nassau Power's standard offer contract or to the orders which are the subject of this appeal.

Years prior to the enactment of PURPA, the Florida Legislature passed the Florida Electrical Power Plant Siting

Act, Section 403.501 et. seq., Florida Statutes. The purpose of this law is to minimize the adverse impacts of power plants on the environment. The Act requires an entity desiring to construct a steam-producing power plant larger than 74 megawatts (including cogeneration facilities which fall within the Act's purview) to obtain a determination by the Commission that a need exists for the proposed generating capacity.

The Commission has ruled in past determination of need cases that QF applicants for a determination of need satisfy the requirement that a need for the capacity of their contracts be demonstrated if they establish that their contracts subscribe the statewide avoided unit designated by the Commission as representing the need for capacity on a statewide basis. In December 1989 the Commission expressed dissatisfaction with that approach in Order No. 22341. (A. 45-76). The Commission indicated its intent to begin evaluating the need for QF capacity from the standpoint of the need of the purchasing utility. The observation concerning the Commission's future intent predated any rulemaking activities related to a change in the basis for determining the need for QF power.[1]

[1] Order No. 22341 was issued in a proceeding conducted for the purpose of designating the next statewide avoided units required by the "old rules." Order No. 22341 designated three sequential units for that purpose.

CASE HISTORY

On its own motion, the Commission reconsidered the statewide avoided units it had designated in Order No. 22341. Pursuant to the "old rules," and based on the evidentiary hearings conducted in Docket No. 890004-EU which led to the issuance of Order No. 22341, the Commission voted on May 25, 1990 to designate instead a 500 MW pulverized coal unit having an in-service date of 1996 as the new statewide avoided unit. The Commission directed utilities to file conforming tariffs based on the new statewide avoided unit by June 4, 1990. This vote was subsequently codified in Order No. 23234, issued on July 23, 1990. (A. 77-81; R. Vol. V, 908-912). Order No. 23234 required all utilities to honor the new standard offers until the 500 MW subscription limit was reached on a statewide basis. Order No. 23234, p. 3.

The utilities submitted contracts and tariffs based on the newly designated statewide avoided unit. They were reviewed and administratively approved as conforming to the Commission's decision by Commission Staff. On June 13, 1990, Nassau Power executed a Commission-approved standard offer contract with FPL. Nassau Power filed a Notice of First Execution and Demand for Subscription Status on June 15, 1990, (R. Vol. V, 877-897), in which it asserted that its contract subscribed the first 435 MW of the 500 MW statewide avoided unit.

In addition to designating a new statewide avoided unit on May 25, 1990, the Commission addressed how the subscription process associated with the unit would work. However, issues concerning how to assign priority to contracts signed against the 500 MW 1996 unit were segregated from the order in which the Commission designated the unit as the next statewide avoided unit. Order No. 23235, Notice of Proposed Agency Action on Subscription, in which the Commission proposed a subscription process, was issued on July 23, 1990.[2] (R. Vol. V, 913-916). The order drew numerous motions for clarification, directed primarily to the order's discussion of which contracts should subscribe the 500 MW statewide unit. (R. Vol. V, 927-957). The Commission considered the motions at its September 11, 1990 Agenda Conference. Rather than ruling on the motions for clarification at the September 11 Agenda Conference, the

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[2] Order No. 23235 (R. Vol. V, 913-916) considered the following five issues related to the subscription process:

1. How should standard offer contracts and negotiated contracts be prioritized to determine the current subscription level?

2. How should utilities who are subject to Commission designated subscription amounts notify the Commission on the status of capacity signed up against the designated statewide avoided unit?

3. What happens when a utility reaches its own subscription limit?

4. Does the subscription limit prohibit any utility from negotiating, and the Commission from approving, a contract for the purchase of firm capacity and energy from a qualifying facility?

5. Should a negotiated contract whose project has an in-service date which does not match the in-service date of the statewide avoided unit be counted toward that utility's subscription limit?

Commission directed the parties to file briefs on the issue of subscription priority. (R. Vol. XVI, Tr. 1-93). Briefs were filed by the parties on September 25, 1990. (R. Vol. VI, 1044-1058, 1063-1092, 1097-1178).

Commission Staff forwarded a recommendation to the Commission on the pending motions which was considered by the Commission on October 2, 1990. (R. Vol. XVI, Tr. 1-22). The Commission decided to hold an informal hearing on subscription priority and directed the parties to file additional briefs. (R. Vol. XVI, Tr. 1-22). Additional briefs were filed on October 9, 1991, (R. Vol. VI, 1182-1201; Vol. VII, 1202-1245), a notice of informal hearing was issued on October 15, 1991, (R. Vol. VII, 1246-1248), and a prehearing conference was held on October 19, 1991, (R. Vol. XVII, Tr. 1-98). At the prehearing conference, the issues to be addressed at the upcoming informal hearing were delineated. Issue No. 2 was:

> What is the effect of queuing contacts for subscription limit purposes?

The informal hearing was held before the Commission on October 26, 1990 and November 1, 1990. (R. Vol. XVII, Tr. 1-114, 1-60). Parties presented oral argument to the Commission on the designated issues. At the conclusion of the informal hearing, the Commission announced its decision. That decision was subsequently embodied in Order No. 23792, issued on November 21, 1990 (A. 82-87; R. Vol. X, 1802-1807), which is on appeal here.

Order No. 23792 rules that Nassau Power's standard offer contract subscribes the first 435 MW of the 500 MW statewide avoided unit. However, Order No. 23792 also states that the effect of placing Nassau Power first in the subscription queue has no bearing on the question of the need for capacity; it simply establishes a contract price. The order states that the need for the contract capacity--notwithstanding the fact that the contract is derived from a Commission-designated statewide avoided unit--must be evaluated against the need of the individual purchasing utility during a subsequent determination of need proceeding. Nassau takes issue with this portion of Order No. 23792.

On December 6, 1990, Nassau Power filed a motion for reconsideration of Order No. 23792, directed to the portion of the order dealing with Issue 2, described above. (R. Vol. X, 1890-1905). FPL filed a response. (R. Vol. X, 1944-1958). Nassau Power's motion for reconsideration was denied by Commission Order No. 24672, issued on June 17, 1991. (A. 88-91; R. Vol. X, 1969-1972). Nassau Power filed a Notice of Appeal, directed to Order Nos. 23792 and 24672, on July 15, 1991. (R. Vol. X, 1973-1977).

ISSUE PRESENTED

WHERE GOVERNING RULES OF THE FLORIDA PUBLIC SERVICE COMMISSION REQUIRE THE COMMISSION TO QUANTIFY THE AMOUNT OF COGENERATED POWER WHICH UTILITIES MUST PURCHASE BY MEANS OF A STATEWIDE AVOIDED UNIT BASED ON A STATEWIDE ASSESSMENT OF THE NEED FOR CAPACITY; WHERE THOSE RULES ESTABLISH A STATEWIDE WHOLESALE MARKET FOR COGENERATED POWER; WHERE THE RULES RECOGNIZE THE POSSIBILITY THAT THIS SYSTEM MAY REQUIRE A UTILITY TO PURCHASE POWER IT DOES NOT INDIVIDUALLY NEED; DID THE COMMISSION ERR IN STATING THAT A QF SIGNING AN APPROVED STANDARD OFFER CONTRACT SUBSCRIBING THE STATEWIDE AVOIDED UNIT DESIGNATED PURSUANT TO THE "OLD RULES" WOULD BE REQUIRED IN RELATED "DETERMINATION OF NEED" PROCEEDINGS UNDER THE FLORIDA ELECTRICAL POWER PLANT SITING ACT TO DEMONSTRATE THAT THE QF'S CAPACITY IS NEEDED BY THE INDIVIDUAL PURCHASING UTILITY?

SUMMARY OF ARGUMENT

The rules of the Florida Public Service Commission which are applicable to the orders on appeal require the Commission to quantify the amount of generating capacity which regulated utilities must purchase from cogenerators on the basis of a statewide avoided unit. Obviously, embodied in the requirement that utilities purchase this amount of capacity from cogenerators is the determination that the capacity is needed within the state. The rules create a statewide market under which any cogenerator, regardless of location, may invoke the Commission-prescribed "standard offer contract" that is associated with the statewide avoided unit of any of the utilities which are required to extend it. The rules explicitly contemplate the possibility that the statewide market which they

create could possibly require an individual utility to purchase standard offer capacity it doesn't need for its own requirements, but consciously subordinate that consideration to the policy objective of encouraging the development of cogeneration by means of the statewide market. These statewide features of the rules have been acknowledged by the Commission in numerous orders, including Order No. 23792, the order in which the Commission ruled that Nassau Power's standard offer contract subscribes 435 MW of the most recently designated statewide avoided unit.

However, in that order the Commission also stated that Nassau Power's contracted capacity would have to be evaluated from the standpoint of need of the purchasing utility in related "determination of need" proceedings under the Florida Electrical Power Plant Siting Act. This statement creates within Order No. 23792 a fundamental conflict. It is impossible for the Commission to require that all utilities honor standard offer contracts until the subscription limit associated with the statewide avoided unit is met on a statewide basis, on the one hand, and simultaneously conclude that the cogenerators deemed by the Commission to subscribe the statewide avoided unit must demonstrate that the purchasing utility individually needs their capacity on the other.

The conflict must be reconciled by reference to the principle that an agency's actions must be consistent with its substantive rules. The attempt to denigrate the efficacy of

uniform, statewide standard offer contracts plainly contradicts the Commission's governing rules. In fact, this aspect of Order No. 23792 would effectively render meaningless the statewide market which those rules carefully construct. In Order No. 23792 the Commission unlawfully attempted to anticipate future rulemaking and to alter the substantive policy requirements of its applicable rules. Its attempt is not supported by the matters on which it attempts to rely. Like Order No. 23792, prior Order No. 22341, also could not constitute rulemaking. The provisions of the Florida Electrical Power Plant Siting Act, do not require the result sought by the Commission; in fact, by specifically authorizing the Commission to utilize the device of a statewide avoided unit, the Florida Legislature implicitly approved the application of a statewide approach to the need for QF capacity. Ultimately, the Commission amended its rules to focus on individual utility requirements, but the "new rules" are not applicable here.

The Court should rule that the governing Commission rules mandate a statewide approach to need that is incorporated within the statewide avoided unit designated pursuant to the rules and the standard offer contracts which subscribe the unit. This determination will allow Nassau Power, which relied upon the mechanism of the rules, to proceed through the requirements of the Florida Electrical Power Plant Siting Act without the prejudice associated with a narrow, restrictive standard of need

that is foreign to the rules and proceedings from which its standard offer contract was derived.

ARGUMENT

THE COMMISSION'S RULING IN ORDER NOS. 23792 AND 24672 THAT QFS HOLDING STANDARD OFFER CONTRACTS WHICH SUBSCRIBE A STATEWIDE AVOIDED UNIT UNDER THE "OLD RULES" MUST SUBSEQUENTLY DEMONSTRATE THAT THE PURCHASING UTILITY INDIVIDUALLY REQUIRES THE CAPACITY IS UNLAWFULLY INCONSISTENT WITH THE COMMISSION'S APPLICABLE RULES.

A. Standard of Review.

This Court's review of the two Commission orders on appeal is governed by section 120.68, Florida Statutes (1990). Section 120.68(12)(b) addresses agency orders which are inconsistent with applicable agency rules. It provides:

> (12) The court shall remand the case to the agency if it finds the agency's exercise of discretion to be:
>
> . . .
>
> (b) Inconsistent with an agency rule.

A review of the record in this case demonstrates that the Commission's orders which require Nassau Power's cogeneration project to be evaluated against an individual utility need, rather than a statewide need, is inconsistent with the applicable Commission rules.[3] If an agency's action is

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[3] This is not a case where new administrative rules have become applicable to Nassau Power's project. As pointed out by the Commission in Order No. 24672 at 1, Nassau Power's project was designated as being within the 500 MW subscription limit designated by the Commission pursuant to the cogeneration rules in effect before October 25, 1990. These rules are the rules that are "operative and binding" on Nassau Power. Hulmes v. Division of Retirement, Department of Administration, 418 So.2d 269, 270 (Fla. 1st DCA 1982).

inconsistent with its rules, the Court must remand the case to the agency. Decarion v. Martinez, 537 So.2d 1083 (Fla. 1st DCA 1989). Further, Section 120.68(13)(a)1 gives this Court the authority to set aside the Commission's action and decide the rights of the parties.

B. The Commission May Not Act In a Manner Contrary to Its Own Rules.

It is well settled that an agency must follow its own substantive rules and may take no action inconsistent with such rules. The agency has no discretion to disregard its own rules. One of the primary reasons for requiring agencies to engage in rulemaking is so that persons affected by an agency's rules will be on notice of the rules. MacDonald v. Dept. of Banking and Finance, 346 So.2d 569, 580 (Fla. 1st DCA 1977).

This principle has been frequently enunciated. For example, in Decarion v. Martinez, 537 So.2d 1083 (Fla. 1st DCA 1989), the court reversed and remanded a final order of the Board of Trustees of the Internal Improvement Trust Fund ("Trustees"). In that case, appellants sought to build a dock as part of a residential development and applied to do so pursuant to the provisions of the governing rule of the Trustees. However, appellants' request was inappropriately treated as a lease request and denied. The court found that the Trustee's treatment of the request was inconsistent with its rules and reversed and remanded the case.

Similarly, in Woodley v. Department of Health and Rehabilitative Services, 505 So.2d 676 (Fla. 1st DCA 1987), a final order of the Department of Health and Rehabilitative Services ("HRS") was reversed and remanded due to action inconsistent with agency rules. In Woodley, the appellant appealed a denial of her application for Aid to Families with Dependent Children due to HRS' failure to seek a policy exception request as required by its rules. The court found that HRS' rules clearly required the submission of such a request and that HRS' failure to do so violated its own rules, thus requiring reversal.

The Commission itself has on other occasions explicitly recognized and adhered to the principle that an agency may not act in a manner contrary to its own substantive rules. In Order No. 22341, issued on December 26, 1989, (A. 45-76, R. Vol. IV, 630-661), the Commission was faced with the task of designating a statewide avoided unit (see pp. 4-5, supra). The evidence submitted to the Commission indicated that the next units in time would be 660 MW combined cycle units with an in-service date of 1992.

However, the Commission did not select these units as the statewide avoided units because to do so would have violated rule 25-17.083(3)(a), Florida Administrative Code. That rule requires standard offer contracts to be executed by the QF at least two years before the in-service date of the associated statewide avoided unit. The timing of the proceeding and of the

order designating the units would have made it impossible for any contracts to comply with the rule if the 1992 units had been designated.

The Commission found it could not act inconsistently with rule 25-17.083(3)(a):

> . . . [W]e note here that we are unable to waive the provisions of Rule 25-17.083(3)(a) which require cogeneration power sales agreements to be entered into two years before the in-service date of the avoided unit. This Commission, as any other state agency, may not waive or act inconsistently with its own substantive rules unless such rules are contrary to state statute or preemptive federal law or rule. The two-year limitation imposed by the rule is clearly not procedural and thus cannot be waived by this body without inviting a finding of reversible error upon appellate review.

Order No. 22341 at 12. The Commission has failed to adhere in this case to a principle which it meticulously followed in a similar setting.

C. The Applicable Commission Rules Require that the Need for Nassau Power's Project Be Evaluated on the Basis of Statewide Need.

The Commission's decision on Issue 2 in Order No. 23792 at 4 states:

> . . . [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.

Emphasis supplied. During the time frame relevant to this appeal, the Commission's cogeneration rules clearly required a statewide market for cogenerated power available through standard offer contracts which embodied a determination of statewide need. The Commission's ruling that the standard offer contract deals only with pricing is in error.[4] The "old rules" prescribe the mechanism for quantifying the need for QF capacity as well.

That the mechanism of the "old rules" identifies a statewide need for capacity and meets it through a statewide market approach is apparent in many of the cogeneration rules' provisions. First, as described in Nassau Power's Statement of the Case and of the Facts, see p. 4, supra, the Commission's "old rules" require it to hold annual proceedings to select the

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[4] In a similar context when Commission Staff suggested to the Commission that the selection of a statewide avoided unit related only to the price to be paid to cogenerators, the Commission rejected this position as "specious." Order No. 17480 at 10.

statewide avoided unit.[5] Rule 25-17.083(4), Florida Administrative Code, ("old rule") states:

> 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.

Emphasis supplied. (A. 5).[6] The rule explicitly and unequivocally states that one purpose for the selection of the statewide avoided unit is to determine the need for capacity purchases from QFs. The Commission's own rule, quoted above, contradicts that portion of Order No. 23792 which finds that subscription to the statewide avoided unit is unrelated to the need for capacity and merely "locks in" a contract price. The process of designating a statewide avoided unit does much more. It identifies the (statewide) need for QF capacity which is to be met by the statewide market--including standard offer contracts--established by the rules.

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[5] Following its adoption of the original cogeneration rules, the Commission designated the following statewide avoided units:

> Order No. 13247 at 4, May 1, 1984: 2 700 MW coal units, (A. 12-18);
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> Order No. 17480 at 11, April 30, 1987: 1 500 MW coal unit, (A. 30-44);
>
> Order No. 22341 at 20, December 26, 1989: 3 385 MW combined cycle units, (A. 45-76);
>
> Order No. 23234, July 23, 1990: 1 500 MW coal unit, (A. 77-81).

[6] The "old rules" are included in the Appendix to this brief. (A. 1-11).

Another section of the "old rules" demonstrates that these rules consciously and definitely subordinate individual utility considerations to the policy of a statewide approach.

Rule 25-17.083(5) ("old rules") recognizes that the policy of encouraging cogeneration through a regulatory scheme which utilizes the concepts of a statewide market and statewide need may result in mismatches with respect to an individual utility's requirements and costs. The rule states:

> To the extent that firm energy and capacity purchased from a qualifying facility by a utility pursuant to the utility's standard offer is <u>not needed by the purchasing utility</u> or that the avoided energy and capacity cost associated with the statewide avoided unit exceed the purchasing utility's avoided energy and capacity cost, these rules shall be construed to encourage the purchasing utility to sell all or part of the energy and capacity purchased from a qualifying facility to the utility planning the statewide avoided unit. The utility which is planning the designated statewide avoided unit is expected to purchase such energy and capacity at the original purchasing utility's cost.

Rule 25-17.083(5), emphasis supplied, (A. 5). Thus, this rule recognizes that there may be instances where, due to the nature of the statewide market created for the purpose of encouraging the development of cogeneration, a utility will be required to buy power which it does not individually need or which has a price which is not comparable to its own costs. The rule recognizes this possibility, confirms the requirement that the utility make the purchase anyway, and then provides that the utility should attempt to sell the unneeded power to a utility

that does need it. This aspect of a statewide market is anticipated, and handled, within the rules in a way that leaves no room for the argument that a utility may refuse to purchase the standard offer capacity on the grounds that its own system does not require it. Very simply, if the obligation to purchase QF standard offer capacity were dependent upon the purchasing utility's need, rule 25-17.083(5) would not have been adopted[7] by the Commission. The rule would have been unnecessary because the situation could never arise in which a utility would be required to buy more standard offer capacity from QFs than necessary to meet its individual need.

The Commission's decision on Issue 2 in Order No. 23792, requiring need to be viewed from an individual utility basis, would have the effect of eviscerating the mandatory statewide market for cogenerated power which the Commission's "old rules" clearly and carefully establish--and which past implementing orders have acknowledged. How could a QF having a project larger than 74 MW avail itself of the opportunity to accept the uniform standard offer imposed by the Commission from any utility required to extend it, as provided by the rule, if its subsequent petition for a determination of need would fail as a result of the individual utility's capacity situations? The QF would have to either disregard the statewide invitation of the

[7] When the Commission changed its "old rules" from the designation of a statewide avoided unit to the "new rules'" individual utility avoided units, rule 25-17.083(5) was deleted. Order No. 23623.

rule, attempt to investigate the individual utilities' capacity requirements and cost structures, compare that information with the terms of the standard offer, and sign only with a utility having a sufficient need for its project--or take the risk that its project might be rejected in later proceedings on the basis of need <u>or</u> price. Either eventuality would completely frustrate the statewide market scheme established by the governing rules. The ruling would undermine the time, resources, and effort which the Commission and parties placed into the task of assessing the statewide need for capacity and identifying the statewide avoided unit. Indeed, the Commission could conceivably conduct the exercise, identify the unit, review and approve contracts, and referee a subscription process, only to find that the "individual utility" test precludes the certification of any of the subscribing contracts. The tension between the rules and the orders on appeal is obvious, and the disruptions to the orderly, policy-based process would be absurd.

<u>Prior orders</u> of the Commission, issued following proceedings held to implement the "old rules," also contradict this aspect of Order No. 23792. In Order No. 13247 (A. 12), the first Commission order designating a statewide avoided unit, the Commission took the opportunity to describe the importance of the statewide avoided unit designation:

> This [statewide] approach to pricing QF capacity and energy reflects the Commission's <u>long standing policy that the need for additional capacity by Florida utilities should be determined from a</u>

> statewide perspective rather than simply focusing on the isolated needs of the individual Florida utility systems.

Order No. 13247 at 1, emphasis supplied.[8]

In this same order, the Commission chided the utilities for their "apparent disregard for coordinated statewide planning. . . ." Order 13247 at 4. The Commission said:

> . . . [W]e take this opportunity to place each and every utility in Florida on notice that we intend to use every power available to us to insure the coordinated and equitable sharing of QF capacity and energy by all Florida electric utilities.

Order No. 13247 at 5.

Order No. 13247 also makes it absolutely clear that, pursuant to the cogeneration rules ("old rules"), any QF may accept any utility's standard offer, regardless of individual utility need:

> Each utility in Florida is required to offer the statewide standard offer for the purchase of firm energy and capacity from any QF regardless of its location. A QF may accept the standard offer of any utility in Florida.

Order No. 13247 at 16, emphasis supplied.

In subsequent planning hearings, held pursuant to the cogeneration rules ("old rules"), the Commission consistently adhered to the rule's requirement that QF capacity additions be viewed from a statewide prospective. In Order No. 17480 at 2

[8] The Commission went on to note that such policy was derived from section 366.04(3), Florida Statutes [now Section 366.04(5)], which gives the Commission jurisdiction over the Florida statewide grid.

(A. 31), which designated the second statewide avoided unit, the Commission said:

> Considering only individual power plant applications does not provide the Commission with an adequate statewide perspective of the need for additional generation and transmission facilities.

Order No. 23234 (issued <u>subsequent</u> to Order No. 22341, the order on which the Commission mistakenly relies in the orders on appeal) designates the most recent statewide avoided unit; the one which Nassau Power's project subscribes. Order No. 23234 clearly recognizes that the 500 MW unit designated therein has been designated to meet a statewide need.

In Order No. 23234 the Commission discarded the "allocation" methodology which it had briefly considered. "Allocation" was described an attempt "to match the statewide need identified by the statewide avoided unit more closely with the needs of the individual utilities." Order No. 22341 at 21. Under this approach, utilities would be required to buy only a proportional amount of the capacity of the statewide avoided unit which roughly reflected their individual needs. Like rule 25-17.083(5), discussed below, this concept recognized that the statewide approach might result in a utility buying more QF capacity than it individually needed.

In rejecting allocation, Order No. 23234 held:

> The import of our decision is to require <u>all</u> peninsular Florida utilities to honor negotiated and standard offer contracts until the 500 MW limit has been reached on a <u>statewide basis</u>.

Order No. 23234 at 3, emphasis supplied. The Commission's attempt in Order No. 23792 to impose a utility-specific need test on contracts subscribing the statewide avoided unit is not only inconsistent with the statewide market mandated by the Commission rules; it contradicts the very order in which the Commission designated the statewide avoided unit which became the basis for Nassau Power's standard offer contract.

D. Order No. 22341 Does Not Support the Abandonment of the Rules' Statewide Market for Standard Offer Contracts.

Order No. 23792, which purports to impose on contracts which subscribe the statewide avoided unit the burden of showing a need on the part of the purchasing utility, attempts to rely on two sentences[9] contained in Order No. 22341, issued on

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[9] Order No. 22341 states:

> In so doing we 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 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.

December 26, 1989 in Docket No. 890004-EU. (A. 70; R. Vol. IV, 630-661).[10]

There is irony in the Commission's reliance on this order. Elsewhere in Order No. 22341, the Commission (1) refused to waive its substantive rules (see p. 16-17, supra) and (2) held that those rules (the same "old rules" which are involved here) would require a utility to accept standard offers during years in which that utility needed no capacity! In its treatment of the "allocation" issue in Order No. 22341, the Commission confirmed and adhered to the requirement of the rule that individual utilities accept standard offers, irrespective of their individual capacity situations.

As discussed briefly in the treatment of Order No. 23234, above, the concept of "allocation" was an outgrowth of the fact that the cogeneration rules mandate a statewide market for standard offer contracts. In an effort to temper the degree to which the statewide market created by the rule might result in a mismatch between the contracts tendered by QFs and the individual utilities' needs, the Commission briefly entertained a mechanism which would attempt to apportion the megawatts of the statewide avoided unit among the utilities and place a limit on their obligation to honor standard offer contracts accordingly. During the hearing that led to the issuance of Order No. 22341, FPL recommended an allocation procedure that

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[10] Order No. 22341 was issued neither in a rulemaking proceeding nor in a determination of need case.

would have halted a utility's obligation to accept standard offers during any year in which its own generation expansion plan showed no need for additional capacity. In Order No. 22341, the Commission rejected FPL's proposal, on the basis that it was inconsistent with the requirement of the Commission's rules:

> First, we disagree with FPL's statement that allocation is only needed if a generic statewide unit is selected. As discussed above, the operation of our current cogeneration rules create the potential misallocation of power simply because of the statewide nature of the standard offer. . . .
>
> Second, under FPL's methodology utility's [sic] whose individual generation expansion plans did not show a need in a particular year would not have to offer standard offer contracts. This is clearly contrary to the express language of Rule 25-17.083 and the whole statewide marketing plan envisioned by our current cogeneration rules. Whatever the merits of that concept, it is the concept currently in place and must be followed until such time as those rules are changed pursuant to Section 120.54, Florida Statutes.[11]
>
> . . . .

Order No. 22341 at 22, emphasis supplied. The concept was still "currently in place" during the time frame when the 1996 500 MW

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[11] Consistent with its rules, the Commission proceeded in Order No. 22341 to designate three sequential statewide avoided units--hardly an undertaking of an agency determined to dismantle the statewide market.

The Commission adopted a different allocation scheme than that proposed by FPL in Order No. 22341. On reconsideration, it discarded the measure in the same order in which it designated the 1996 statewide avoided unit.

statewide avoided unit was designated by the Commission and subscribed by Nassau Power.[12] The Commission's attempt to alter the statewide features of the rule is refuted by the very order on which the effort attempts to rely.

The effort is also refuted by the order in which the Commission reconsidered its decision in Order No. 22341 and by the order which is the subject of this appeal. See, Order No. 23234, supra. Significantly, the unambiguous language of Order No. 23234 was quoted by the Commission with approval in Order No. 23792, which is the subject of this appeal:

> ISSUE 1: What is the purpose and effect of the subscription limit?
>
> The purpose and effect of the subscription limit is to place a maximum limit of 500 MW on the amount of capacity Florida's investor owned utilities are required to purchase pursuant to standard offer contracts.
>
> ISSUE 2: What is the effect of queuing contracts for subscription limit purposes?
>
> 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. When we designated the 1996 statewide avoided unit in Order No. 23234 we approved the subscription limit concept by stating "we will, at least for the present, limit the subscription of the standard offer to 500 MW on a statewide basis. The import of our decision is to require all peninsular

[12] Ultimately, rulemaking activities led to a change, but the "new rules" did not become effective on a prospective basis until October 1990. They are not applicable to this appeal.

> Florida utilities to honor negotiated and standard offer contracts until the 500 MW limit has been reached on a statewide basis". In keeping with Order No. 23234 we now specifically find that those standard offer contracts which do not fall within the 500 MW subscription limit are invalid and have no force or effect.

Order No. 23792, p. 3.

With this language, the Commission juxtaposed two diametrically and irreconcilably opposite requirements. Only the provision requiring utilities to honor standard offers until the subscription limit is reached on a statewide basis is consistent with the Commission's governing rule. The Commission erred when it indicated an intent to abandon the framework of a statewide need met through the workings of a statewide market.

E. <u>Concerns Addressed in Order No. 22341 Can Be Met Without Abrogating the Requirement of a Statewide Market.</u>

A review of Order No. 22341 reveals that the Commission was primarily concerned--not with the policy of the statewide market--but with its ability to review the merits of proposals which subscribed the statewide unit:

> [A]n increasing share of the state's electrical needs will be supplied by either cogenerators or independent power producers. If we continue to "rubber stamp" QF projects with the only criterion being that the price of that electricity is equal to or less than that of the standard offer, this body has effectively lost the ability to regulate the construction of an increasingly significant amount of generating capacity in the state.

Order No. 22341 at 27.

The Commission has the ability to avoid "rubber stamping" standard offer-based determinations of need without subverting the statewide aspects of its rule. The question of need is separate from the consideration of merit. The Commission would have full ability to review a proposal to satisfy the statewide need in order to assure that the proposal is a meritorious manner of meeting that need.

In Order No. 24672, in which the Commission denied Nassau Power's petition for reconsideration, the Commission elaborated on the justification for its statement. It set out these bases for its position:

1. The Commission was following the "precedent" of Order No. 22341 of which Nassau Power had notice.

2. Reliance on the statewide avoided unit could cause mismatches because it may not align with the need or avoided cost of the particular purchasing utility.

3. The criteria of Section 403.519, Florida Statutes (of the Florida Electrical Power Plant Siting Act) are utility specific.

Two of the arguments simply reiterate the mistaken rationale of Order No. 22341. None of these arguments enable the Commission to contradict its rules. To alter the policy and mechanism incorporated in the rules requires rulemaking. If Order No. 23792 could not accomplish the change because no rulemaking had occurred, Order No. 22341 could not accomplish the change for the same reason.

The second argument attempts to abandon the rules of the Commission on the basis of a consideration which was specifically considered, accepted, and accommodated within the rules. (See pages 19-21, supra). Again, the policy trade-offs of the rules could only be altered by rulemaking, as the Commission has recognized on other occasions.

Nothing in Section 403.519, Florida Statutes, precludes the mechanism and standards of the "old rules." This brief demonstrates that those rules are far from "ambiguous," as Order No. 24672 claims. Moreover, they have been interpreted in the light of the Act's requirements in specific applications for determinations of need. The language in Order No. 22341 and Order No. 23792 evince an attempted shift in stance, not a revelation. However, the Act is quite compatible with the "old rules." Section 403.519, Florida Statutes, states in part:

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

"Electric system reliability and integrity" can properly be viewed from a statewide perspective, and in fact the Commission has relied on Section 366.05(4), Florida Statutes, which gives the Commission the power to require electric power conservation

and reliability within a coordinated grid, to prod utilities to engage in coordinated, statewide generation planning. Order No. 13247, supra. With respect to the use of the statewide avoided unit to determine cost and price, the Florida Legislature amended Chapter 366, Florida Statutes, to specifically authorize the use of a statewide avoided unit to quantify "full avoided cost" payments to cogenerators. Section 366.051, Florida Statutes. Cogeneration is a conservation measure, and the legislative mandate to encourage cogeneration (Section 366.051, Florida Statutes) is certainly a relevant matter within the jurisdiction of the Commission that can be brought to bear on the issue of the need for capacity.

Finally, Order No. 23792 discriminates against contracts for capacity of 75 MW or more. Under the governing rules, a utility clearly would have to accept a standard offer contract of up to 75 MW irrespective of its individual need, then resell the power if necessary--all in conformity with the requirements of rules 25-17.082 and 25-17.083(5). The effect of Order No. 23792 is to use the plant siting mechanism to "undo" (for larger contracts only) what is in place for all standard offers under governing rules. The Commission must instead apply the statewide market concept consistently to large and to small standard offer contracts.

In summary, the "old rules" built a regulatory scheme around a statewide avoided unit. Measurements of need and price

were consistently and logically based upon the statewide features of the regulatory scheme.

In October 1990, long after Nassau Power executed a standard offer which subscribed the statewide avoided unit of the "old rules," the Commission prospectively adopted rules prescribing a different scheme. Under the "new rules," each utility individually measures its need; each utility has an "avoided unit" based on its own system plan; each utility has a standard offer derived from its system plan.

Each of these approaches to rulemaking resulted in a logical and cohesive expression of policy. However, with respect to the last statewide avoided unit adopted under the "old rules," the Commission has improperly attempted to mix and match old and new policies. The result is action that is illogical, that is inconsistent with the Commission's rules, and that would effectively dismantle those rules. Order Nos. 23792 and 24672 must be reversed to avoid prejudice to Nassau Power, who is entitled to rely on the statewide mechanism of those rules.[13]

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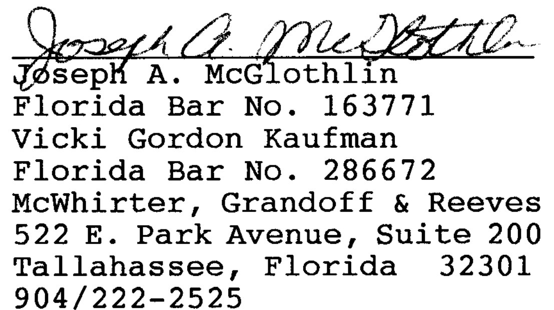
[13] Nassau Power filed a petition for a determination of need on July 31, 1991. Docket No. 910816-EQ. If the Commission determines its proposed capacity is needed by the purchasing utility, no prejudice will have resulted from the inconsistent statement in Order No. 23792. On the other hand, if the 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.

CONCLUSION

The Court should conclude that the provisions of Order Nos. 23792 and 24672 which require cogenerators subscribing the statewide avoided unit designated under the "old rules" to demonstrate that their contracted capacity is needed by the purchasing utility in subsequent determination of need proceedings are unlawfully inconsistent with governing rules of the Commission, and determine that Nassau Power is entitled to rely upon the statewide considerations of its standard offer contract in proceedings under the Florida Electrical Power Plant Siting Act.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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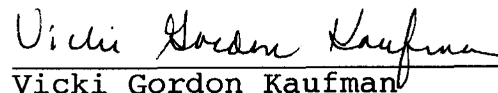

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