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.
_____/

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

REPLY BRIEF OF APPELLANT, NASSAU POWER CORPORATION

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PRELIMINARY STATEMENT

This reply brief will confine its response to the central focus of the issue on appeal: whether the Public Service Commission (the "Commission") can change a long-established policy prescribed in an official agency rule and reiterated in implementing decisions, without first changing the rule.

ARGUMENT

I. REPLY TO SPECIFIC POINTS

The answer briefs filed in this cause attempt to divert the Court's attention from state and federal policies on cogeneration which were in place when Nassau accepted FPL's standard offer contract to purchase cogenerated power. However, the most important considerations ignored by the Appellees in their answer briefs are the rulemaking requirements of Chapter 120, Florida Statutes.

At page 11 of its answer brief, the Commission quotes that portion of rule 25-17.083(4), Florida Administrative Code, that explicitly identifies <u>need</u> for QF capacity as the subject of the proceedings held to designate a "statewide avoided unit." The Commission's argument fails to confront the impact of this critical portion of the rule. The explicit reference to need cannot be ignored; rather, the "plain meaning" test must apply. The clear words of the rule prove that the proceeding held to identify and quantify the future, utility-built capacity which cogenerators would be allowed to avoid under the Public Utilities Regulatory Policy Act ("PURPA") necessarily encompasses a measurement of the utilities' <u>need</u> for that capacity. The words confirm simple logic.

For that reason, the past policy of the Commission to look to the relationship between the QF contract and the statewide avoided unit to determine the need for the QF capacity was not really an "exemption;" the measurement of the need for the capacity that was the subject of a QF's Siting Act petition had already been performed; a duplicative effort was unnecessary. FPL describes this statewide need as a "generic" measurement of need, and attempts to distinguish it from the test of the Siting Act; but the difference is that under the rule applicable to Nassau the need was a statewide measurement, as opposed to the utility-specific test which the Commission proposes to apply to Nassau.

At page 19 of its answer brief, the Commission attempts to justify its new interpretation by pointing out that it avoids the potential "logistical" problem of a mismatch between the statewide capacity and cost determinations and the purchasing utility's circumstances. Here, the Commission makes Nassau's point. The "interpretation" the Commission urges is inconsistent with Commission rule 25-17.083(5), which explicitly subordinates the possibility of such a mismatch to the Commission's rule-based policy of encouraging cogeneration through a statewide market:

> To the extent that firm energy and capacity purchased from a qualifying facility by a utility pursuant to the utility's standard offer is not needed by the purchasing utility 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.

The inconsistency between this specific rule provision and the Commission's attempted policy change is the crux of Nassau's contention. Removal of the "potential mismatch" which is consciously and explicitly created by a rule designed to advance a different policy priority, in the absence of rulemaking, is cause for judicial intervention, not commendation.

On the same point, the Commission's brief says:

> In order to address this logistical difficulty, the Commission struggled with the possibility of either allocating a portion of the statewide avoided unit to each utility or finding an appropriate avoided unit for each utility, both of which would "channel" cogenerated power where it was needed.

Commission Brief at p. 20. What happened to these two alternatives is of considerable interest to this case. The Commission rejected a form of "allocation" advocated by FPL because it would have been inconsistent with the rules which require utilities to accept standard offers even when they need no capacity! Order No. 22341 at 22. The Commission briefly entertained another form of allocation--which would have limited the responsibility of utilities to honor standard offers--but quickly jettisoned it because the measure was inconsistent with the Commission's requirement that <u>all</u> utilities honor standard offer contracts until the avoided unit's limit was reached on a statewide basis! Order No. 23234 at 30.

Ultimately, the Commission moved to a policy and regulatory scheme under which each utility develops its own "avoided unit" and

associated standard offer. That was done by amending the "old" rules which were in place when Nassau signed the statewide standard offer. The amended rules took effect on October 25, 1990. The Commission acknowledges that the "new rules" do not apply to Nassau. Commission Brief at p. 12. Effectively, the attempt to impose a utility-specific test on Nassau amounted to an "interim" or "transition" measure in anticipation of rulemaking yet to occur. Such an effort is as impermissible as the other measures which the Commission rejected.

The first requirement of any interpretation is that it must not lead to an absurd result. Jacobs v. Parodi, 39 So. 833 (Fla. 1905). The old rules' policy of promulgating a uniform standard offer and then requiring uniform, statewide acceptance of the standard offer contracts makes practical sense. The new rules' policy scheme of individualized avoided units, individualized capacity limits, and individualized pricing presents a very different regulatory scheme, but it too is logically consistent. However, to require statewide, uniform, standard offer contracts that by rule are mandatory on utilities--and then superimpose by order a utility-specific test or limitation is to wreak havoc on the policy clearly expressed in the governing rules. It would turn the proceedings under the rules into a mockery and a wasted exercise. It would do violence to the rights of cogenerators who participated in and relied on the mechanism created by the rule, and turn their exercise of rights under PURPA into a game of roulette. Appellees' answer--that Nassau was on notice of this

policy change and somehow has itself to blame--doesn't wash.

The Commission argues that any inconsistency between its rules and its practice must give way to the Commission's responsibility in Siting Act determinations. Commission Brief at pp. 21-22. In its initial brief, Nassau showed that the provisions of the Siting Act do not require the changed position taken by the Commission: that is, the Siting Act does not preclude the assessment of need on a statewide basis.

The Commission recognizes the role of rulemaking in the expression of agency policy. The Commission attempts to justify its position on the basis that its announcement concerning a utility-specific test was new policy unrelated to that expressed in existing rules and that it then "proceeded to rulemaking" on the new policy. Commission Brief at p. 17. This statement acknowledges that the changed position which the Commission proposes to impose on Nassau was later codified in the amended rules. The Commission's position depends on its assertion that the requirement it seeks to impose on Nassau is "new policy" that is unrelated to the policy of the old rules. In its initial brief, Nassau demonstrated the clear statewide mechanism in the governing rules, as acknowledged by the Commission in prior implementing orders. The departure the Commission seeks to impose on Nassau is in conflict with existing, applicable rules and could be accomplished only by rulemaking, which the Commission later undertook.

FPL recognizes the binding effect of Commission-prescribed standard offers in a way that uproots its own argument that such

documents do no more than establish a price subject to additional proceedings:

> The Cogeneration Rules also set forth provisions for a mandatory 'standard offer.' . . . 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. . . . 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. . . .
>
> . . .
>
> Under Order 22341, for example, Florida utilities would have had to accept up to 385 MW of QF power beginning in 1993. . . .

FPL Brief at pp. 8-9. The last sentence bears emphasizing. Order No. 22341 is the order which FPL claims sets forth the Commission's intent to look only to individual utility need!!

Like the two Commission orders issued <u>after</u> Order No. 22341, FPL's own description recognizes that the utility's obligation to honor standard offers is <u>not</u> obviated by reference to its own circumstances. FPL's description suggests that even FPL has not been able to reconcile the Commission's firm long-standing policy concerning standard offer contracts with FPL's "Siting Act argument."

Nassau offers the following observations concerning the orders cited by FPL in support of its position:

1. <u>Scherer (Order No. 24165)</u>. In its brief, FPL uses a preposterous illustration--the long-distance purchase of a five

pound bag of sugar--to belittle the significance which Nassau attaches to the rules' statewide market for power. The Scherer order answers FPL's illustration. In Scherer, the Commission approved FPL's desire to travel from south Florida to Georgia to buy more than 600 megawatts of generating capacity from another utility. Further, the Scherer proceeding was not a Siting Act case and did not involve the conundrum of fitting a QF into a Siting Act process that obviously anticipated applications by utilities in a way that makes sense as well as good policy.

2. ICL ("Indiantown"). ICL and FPL signed a negotiated contract. FPL was ICL's ally in the associated determination of need case. Although the petition to determine need was filed after Order No. 22341 was entered, the order on ICL's petition took care to address statewide need for capacity as well as that of FPL. Order No. 24268 at 25. Reasoning that it was impossible for FPL to negotiate with ICL to avoid a statewide avoided unit before that unit had been designated, the Commission in Order No. 23792 rejected FPL's argument[1] that ICL's project counted towards the 500 MW of the new statewide avoided unit and determined instead that Nassau's project subscribed 435 MW of the unit. The ICL contract later was given a positive determination of need.

3. Seminole. Seminole is not a QF. The Commission's refusal to issue a "generic" determination of need in that case had nothing to do with whether a QF is entitled to a statewide measurement of need under the "old rules." In Seminole, the

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[1] FPL is still resisting that determination. See FPL Brief at p. 12.

Commission required a specific applicant. The parallel application would be that a utility could not obtain a determination of need and transfer it to a QF; the QF would have to file its own petition. Nassau has filed its own petition to determine need. Docket No. 910816-EQ.

Contrary to the assertion on page 26 of FPL's brief that historically the Commission has not interpreted the need finding in the cogeneration rule to satisfy the need requirement in the Siting Act, the first page of the Commission's first order implementing the cogeneration rule reiterated "[t]he Commission's long standing policy that the need for additional capacity by Florida utilities should be determined from a statewide perspective rather than simply focusing on the isolated needs of the individual Florida utility systems." Order No. 13247, Docket No. 830377-EU. (A.12). Consistent with that statement, four years later, in Order No. 17480 at 2, the Commission expressly stated:

> Pursuant to Chapter 403, Florida Statutes, the Commission is charged with the responsibility for determining the need for power plants proposed to be constructed by electric utilities in Florida. 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. 17480, Docket No. 860004-EU, (A.31), prescribing units to be awarded in 1993 and 1995. The statement quoted above disproves the Commission's contention that no nexus exists between the cogeneration rules and Siting Act requirements. The interpretation of an agency's rules in orders implementing such rules must control

until the interpretation embodied in a rule is properly amended. Parties appearing before state regulatory agencies are entitled to know the rules of the game before they participate; this Court should not permit an agency to change the rules midstream.

II. TECHNICAL ISSUES

The first two arguments raised in FPL's brief attempt to demonstrate that Nassau's appeal fails "firmly established principles of appellate review." FPL Brief at p. 19. The two arguments are: (1) Nassau has appealed only part of the orders up on review; and (2) the appeal is untimely. A quick look at Commission Order Nos. 23792 and 24672 and the authority cited by FPL demonstrates that these arguments are but stray shots in FPL's shotgun blast.

First, FPL suggests to the Court that Nassau has accepted the "fruits" of the appealed orders, while concurrently appealing the orders. FPL Brief at pp. 19-21. The alleged fruit is the Commission's decision to substitute a generic 500 MW coal unit for FPL's combined cycle unit as the statewide avoided unit.

In its argument, FPL indulges in much speculation and mind-reading concerning the Commission's motivation and the Commission's expectations. (The following examples are found at page 21 of FPL's Brief: "QFs" acquiescence . . . encouraged the Commission to select . . . ."; "The PSC's resolution . . . was also likely driven . . . ."; ". . . it is probable that . . . the PSC would have recognized ICL as filling the majority of the 1996 . . . limit.") One purpose of so much conjecture on FPL's part is to suggest the

idea of a "quid pro quo" in support of its "accepting the fruit" theory. The idea has no foundation. The initiative for basing the priority of QF contracts on the date of execution began with the Commission in Order No. 22061.

FPL argues that Nassau cannot benefit from the Commission's decision designating a coal unit in Order No. 23234 and at the same time challenge the Commission's decision to impose a second Siting Act need determination with respect to the purchasing unit's need in Order No. 23792. FPL Brief at p. 20. FPL's argument is without merit.

The Commission made the decision to reconsider designation of a statewide avoided unit on its own motion. That decision was memorialized in Order No. 23234. Order No. 23234 is not being appealed. A reading of the orders on appeal (Order Nos. 23792 and 24672) shows that the Commission's substitution of a 500 MW coal unit as the statewide avoided unit had already been accomplished and is not part of the orders at issue here. Accordingly, Nassau was not "accepting the fruits" of those orders while appealing them. QFs had already been granted the opportunity to contract for the 500 MW coal unit by virtue of Order No. 23234. FPL's attempt to indicate otherwise is misleading.

FPL also attempts to apply the "accepted fruit" argument to Nassau accepting the Commission's resolution of subscription order in Order No. 23792, while appealing the attempted imposition of a separate utility-specific need determination. FPL further argues that the Commission's subscription resolution was so intertwined

with its Siting Act policy that an appeal of one without the other is violative of fundamental appellate review processes. Again, a reading of the language of the orders hoists the argument on its own petard.

No party to the hearings ever disputed the fact that the site application process under the Siting Act would be utilized; it is mandated for facilities over 75 MW. (Nassau acknowledged that the Commission would review the merits of the QF proposal which was awarded subscription status in the associated need proceeding. Nassau was alluding to the quality and merit of the proposed project, not a different, utility-specific measurement of need.) The case involved choosing which of the cogenerators would be allowed to contract with FPL. The question of need is taken into account, by the Commission's rules, when the Commission designates the statewide avoided unit.

There is no connection between the fact that the Commission directed FPL to take subscriptions in a specified order and the Commission's new and completely unrelated requirement that there be a separate need determination for the purchasing utility. The imposition of the new requirement for cogenerators to submit to a second need determination hearing on a standard which differs from that applied in the annual need proceeding is a separate and distinct idea from the part of the order which set priorities among cogenerators vying to subscribe the statewide avoided unit. The contest among the cogenerators to see who had first priority had nothing to do with whether there was a need for a block of

generation and the determination of the unit being awarded. One aspect can be implemented without affecting the other. As such, an appeal of one aspect of the order is permissible while accepting the other. State Road Dept. v. Hartsfield, 216 So.2d 61, 65 (Fla. 1st DCA 1968), citing, Weatherford v. Weatherford, 91 So.2d 179 (Fla. 1956).

Last, with respect to FPL's contention that Nassau's appeal is untimely, FPL's cited authority is factually dissimilar to the case at hand. In the cases upon which FPL relies, the trucking companies had actually applied for a certificate. In Nassau's case, it had no determination of need application pending at the time Order No. 22341 was issued.

In Order No. 22341, an annual planning proceeding order, the Commission indicated a future change to its long-standing policy. The order was subject to a petition for reconsideration. The order did not become final until an order on reconsideration was issued on July 23, 1990. Order No. 23234. (A.77). FPL and the Commission have ignored the fact that this order was being reconsidered contemporaneously with the orders challenged in this case, and that it was issued after Nassau signed a standard offer contract to deliver 435 MW of power to FPL pursuant to the Commission's cogeneration rules.[2] The cogeneration rules were amended in late 1990--after the Nassau contract--to change the

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STRICKEN

See order dated 1-2-92

basis for measuring need, but there is no retroactive provision in the amended rules.[3] A look at the facts and the orders will demonstrate that FPL's argument that Nassau's right to an appeal lie in Order No. 22341 has no merit.

First, Nassau was not a party to the 1989 planning hearing, which in part produced Order No. 22341. These hearings were not noticed or conducted as rulemaking proceedings. Further, the proceeding did not involve any application for a determination of need--much less Nassau's application. Therefore, Order No. 22341 contained only a statement of prospective intent as to Commission Siting Act policy. Nothing came out of the hearing which gave Nassau any appealable issues.

Order No. 23234, which reconsidered Order No. 22341, was issued after Nassau entered into its standard offer contract. There were no issues in Order No. 23234 which were offensive. First, Order No. 23234 established that a 500 MW coal-fired statewide avoided unit was more consistent with the legislative mandate of section 366.81, Florida Statutes, than the unit previously selected. (A. 79). Second, the Commission determined that allocating part of the statewide avoided unit to each individual utility in order to match each individual utility's need for capacity on a statewide basis was not consistent with section 366.81, Florida Statutes. (A. 78-79). Finally, the Commission stated in Order No. 23234 that the import of the order was to

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[3] Statutes and rules are construed to apply only prospectively unless they expressly incorporate a retroactive application provision. See, Jordon v. Department of Professional Regulation, 522 So.2d 450, 453 (Fla. 1st DCA 1988).

require all Florida utilities to honor negotiated and standard offer contracts until the 500 MW limit had been reached on a statewide basis. (A. 79). This language is fully at odds with language in Order No. 22341, which in any event merely indicated an intent to require a different standard of proof in future Siting Act proceedings. With respect to Nassau, no controversy or appealable issue was raised until Order No. 23792 and Order No. 24672 were rendered.

In their efforts to portray the Commission as having effected a new and different policy in Order No. 22341, the Commission and FPL ignore the clear language of subsequent orders which retain and approve the requirement of the rules that utilities accept standard offers without reference to their individual capacity situations. Such language occurs in Order No. 23234 at 3, in which the Commission reconsidered Order No. 22341 ("We will, however, 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 Florida utilities to honor negotiated and standard offer contracts until the 500 MW limit has been reached on a statewide basis.") and again in Order No. 23792 at 3, in which the Commission determined that Nassau's contract counted against the 500 MW of the statewide avoided unit ("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.").

Obviously, this language was not intended by the Commission to

be a meaningless vestige of an abandoned policy. The Commission appropriately perpetuated the requirement of its rules that utilities accept standard offers without reference to their individual situations long after it "announced" its intent to depart from that policy in Order No. 22341. The conspicuous duality within the orders shows that even the Commission was ambivalent about departing from policy based on governing rules before they had been formally amended through appropriate rulemaking procedure.

CONCLUSION

The Court should remand Order Nos. 23792 and 24672 with directions to the Commission to limit its review of the Nassau project under the provisions of section 403.519, Florida Statutes, to the adequacy of the plant to fulfill its contractual obligation to supply power to meet the previously-designated statewide need--a need that was found to exist by the Commission through the designation of the 1996 statewide avoided unit on which Nassau's standard offer contract is based.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Reply Brief of Appellant, Nassau Power Corporation has been furnished by U.S. Mail to the following parties of record, this 4th day of November, 1991:

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