IN THE SUPREME COURT OF FLORIDA

NASSAU POWER CORPORATION,	)	
	)	
v.	)	CASE NO. 81,496
	)	
J. TERRY DEASON, ETC., ET AL.,	)	
	)	
Appellees.	)	
	)	

REVISED ANSWER BRIEF OF

APPELLEE, FLORIDA PUBLIC SERVICE COMMISSION

ROBERT D. VANDIVER
General Counsel
Florida Bar No. 344052

DAVID E. SMITH
Director of Appeals
Florida Bar No. 309011

FLORIDA PUBLIC SERVICE COMMISSION
101 East Gaines Street
Tallahassee, Florida 32399-0861
(904) 488-7464

TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA PUBLIC SERVICE COMMISSION ORDERS

OTHER AUTHORITIES

FLORIDA STATUTES

FLORIDA ADMINISTRATIVE CODE

SYMBOLS AND DESIGNATIONS OF THE PARTIES

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

The hearing transcript of the Commission's proceedings is designated (T.___). Cites to the record on appeal are referenced (R.____). Case No. 81,131, Cypress Energy Partners, Limited Partnership v. J. Terry Deason, etc., et al., which has now been dismissed in its entirety is referred to as the "Cypress appeal". The "Revised Initial Brief of Nassau Power Corporation" filed January 25, 1994 is referred to as the "Revised Brief".

STATEMENT OF THE FACTS AND CASE

The Commission generally accepts the facts as stated by Nassau in its Revised Brief. However, as noted in its Motion to Strike Revised Brief of Nassau Power Corporation filed February 4, 1994, the Commission points out that Nassau's statement at page 4 of its Revised Brief that "[t]he Commission also argued that Nassau Power's direct appeal . . . should also be dismissed" is incorrect. The Commission made no such claim.

The Commission further calls the Court's attention to the adoption on December 21, 1993 of Rule 25-22.082, Florida Administrative Code, Selection of Generating Capacity. Further determination of need for additional generating capacity in Florida will proceed under the competitive bidding procedures of this rule. The Court will recall that in the Commission's order denying the determination of need for the Cypress coal plant, the Commission found that the selection process employed by FPL was inadequate to assure that the most cost-effective alternative would be selected. R. 2411-2412. While the Commission did not at that time specify what procedure FPL should follow in its generation capacity selection process, it has now done so by rule for all Florida investor-owned electric utilities. Rule 25-22.082 requires the utility to initiate the capacity selection process by issuing a Request for Proposals, to which all potential generators may respond. A copy of Rule 25-22.082 and concurrently amended Rule 25-22.081 is contained in the Appendix to this brief.

SUMMARY OF THE ARGUMENT

The Commission properly refused to entertain Nassau's petition for determination of need and petition for contract approval. Nassau did not have a contract with FPL that could be approved, and the Florida Power Plant Siting Act does not permit a non-utility generator acting alone to bring a petition to determine the need of a utility for its projects without first having a contract with that utility. The Siting Act defines who may apply for a site certification and determination of need. The plain, unambiguous language in that definition excludes non-utility generators, like Nassau, who seek to meet a utility's need. It is improper to resort to special rules of statutory construction to attempt to ascribe a different meaning to the term "applicant" when the statutory language is clear.

The fact that the Power Plant Siting Board granted site certification in 1983 to a self-service cogenerator under a different set of facts does not now require the Commission to consider Nassau's petition. The Commission's interpretation of its statute is consistent with the 1990 amendments to the Siting Act. Nassau has not met its heavy burden to show that the Commission's interpretation of its statute is clearly erroneous.

Nassau uses its argument for special relief from the Court to raise issues not properly before the Court. Neither the requirement for comparative need hearings nor the effect of Nassau's QF status should be heard in this case. The instant case

was decided solely on the basis that Nassau was not a proper applicant under the Siting Act. Only that issue should be heard.

Even if the Court were to find that the additional issues resurrected by Nassau should be heard, it would not change the outcome of the case. The doctrines espoused in Ashbacker Radio Corporation v. Federal Communications Commission, 325 U.S. 327 (1945) and Bio-Medical Applications of Clearwater, Inc. v. Department of Health and Rehabilitative Services, 370 So.2d 19 (Fla. 2d DCA 1979) have not been, and cannot logically be applied to a determination of need for electric generating capacity under the Siting Act.

There is no basis in law for granting the "ancillary relief" sought by Nassau. The effect of providing Nassau such relief would be to usurp the Commission's authority under the Siting Act. Nassau cannot be allowed to bypass the competitive process in place to determine the most cost-effective generation alternative. Nassau is not entitled to a determination of need as a result of its actions.

ARGUMENT

I. THE COMMISSION PROPERLY FOUND THAT THE SITING ACT DEFINITION OF "APPLICANT" EXCLUDES NASSAU POWER.

Chapter 403, Florida Statutes, entitled Environmental Control, is largely devoted to environmental regulation of various activities. Part II, Sections 403.501 - 403.519, Florida Statutes, governs Electrical Power Plant Siting (the Siting Act). The Siting Act provides a unified permitting procedure, coordinated by the Department of Environmental Protection, by which utilities may apply for certification to construct and operate a power plant. The statutory scheme requires an applicant to proceed through several preliminary phases of certification, including a determination of need proceeding before the Public Service Commission, a land use hearing before the Division of Administrative Hearings, and a review of the hearing officer's findings by the Siting Board. If the site and project survive these initial proceedings, the applicant is entitled to a separate certification hearing before the Division of Administrative Hearings. The Siting Board will then review the hearing officer's recommended order approving or denying issuance of a certificate.

The Commission's duty under the Siting Act is limited, but significant. The Commission must determine whether the electrical energy to be generated from the proposed power plant is needed. Sec. 403.519, Fla. Stat. An affirmative determination of need from the Commission is a condition precedent to a final certification hearing. Sec. 403.507(4), Fla. Stat. That is, unless the Commission first determines that there is a need for the proposed

plant, there can be no certification hearing, and no plant or site will be considered by the Siting Board. Consequently, the Commission's determination of need is the linchpin of the process.[1]

A. THE POWER PLANT SITING ACT'S DEFINITION OF APPLICANT IS CLEAR AND UNAMBIGUOUS, AND REQUIRES NO SPECIAL STATUTORY CONSTRUCTION.

Section 403.519 of the Siting Act specifies that the Commission shall begin a need determination proceeding on its own motion or on request by an applicant. Section 403.503(4) defines "applicant" as an electric utility, and in turn defines "electric utility" as:

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

This definition is clear and unambiguous. It specifies, in plain language, who may apply for site certification. First, an applicant must be one (or a combination) of the seven enumerated entities: cities, towns, counties, public utility districts, regulated electric companies, electric cooperatives or joint operating agencies. Second, the entity must also be either engaged in or authorized to engage in the generation, transmission or

---

[1]Nassau places undue significance on the fact that one may file an application for site certification at the Department of Environmental Protection before, after, or simultaneously with a petition for certification of need filed at the Commission. Because an affirmative determination of need is a condition precedent to a final certification hearing, recent petitioners (including Nassau) have filed petitions for determination of need before filing an application for site certification.

distribution of electric energy. This definition requires none of the circuitous statutory construction proposed by Nassau. Where, as here, the words of a statute are unambiguous, they must be accorded their plain, ordinary meaning, and the sort of judicial construction and interpretation urged by Nassau is improper. Holly v. Auld, 450 So.2d 217 (Fla. 1984); State v. Eagan, 287 So.2d 1 (Fla. 1973); Tropical Coach Line, Inc. v. Carter, 121 So.2d 779 (Fla. 1960). Simply put, Nassau is not a proper applicant because it is not a city, town, county, public utility district, regulated electric company, electric cooperative or joint operating agency.

There are no general terms used in Section 403.503(4) that require elaboration or interpretation. There is no confusion or ambiguity within the statutory language. The only ambiguity is that proposed by Nassau. Nassau argues that the term "applicant", which is so clearly defined in the statute, should be redefined by this Court so that any entity that will generate electricity if it can obtain site certification and construct a plant may apply for a site certification and determination of need.

This argument is specious as well as circular, and effectively nullifies the statutory definition of applicant. Nassau would have this Court ignore the statute's unmistakable requirement that an applicant must both be an enumerated entity and must also be authorized to generate, transmit or distribute electricity. Even the most liberal construction of the definition cannot produce this tortured result.

When it mistakenly urged this Court to apply special rules of statutory construction to the definition of applicant, Nassau neglected one of the most primary of those rules: expressio unius est exclusio alterius. It is black letter law that the enumeration of a group of items is construed as excluding all those not specifically included. Thayer v. State, 335 So.2d 815 (Fla. 1976); Wanda Marine Corp. v. State Department of Revenue, 305 So.2d 65 (Fla. 1st DCA 1974). Even if special statutory construction were permissible, the result urged by Nassau would fail because the legislature's enumeration of the seven types of entities that may apply for certification must be held to exclude all those not expressly mentioned, such as cogenerators and independent power producers. As the Commission pointed out in Order No. PSC-92-1210-FOF-EQ, when it dismissed Nassau's petitions for determination of need and for contract approval, non-utility generators do not share the characteristics of the enumerated applicants because they are not required to serve customers:

> Significantly, each of the entities listed under the statutory definition may be obligated to serve customers. It is this need, resulting from a duty to serve customers, which the need determination proceeding is designed to examine. Non-utility generators such as Nassau and Ark have no such need since they are not required to serve customers. The Supreme Court recently upheld this interpretation of the Siting Act. Dismissal of these need determination proceedings is in accord with that definition. See Nassau Power Corporation v. Beard, 601 So.2d 1175 (Fla. 1992).

Order No. PSC-92-1210-FOF-EQ at 3; R. 2973.

Had the legislature wished to include cogenerators or other non-utility generators among the enumerated applicants, it could have done so. Nassau now asks this Court to substitute itself for the legislature and to amend the statute. This Court should decline the invitation to legislate.

B. THE SITING BOARD'S DECISION IN THE FLORIDA CRUSHED STONE CASE DOES NOT REQUIRE THE COMMISSION TO GRANT APPLICANT STATUS TO NASSAU POWER BECAUSE THAT CASE DID NOT INVOLVE THE SAME FACT SITUATION.

Nassau argues that it is entitled to applicant status because of the Siting Board's 1983 refusal to dismiss a cogenerating manufacturer's site certification application after the Commission had determined a need for the plant. Even if the Commission were generally bound by the Siting Board's interpretation, it would not be so bound in this case because the fact situations as well as the relief sought are very different.

In 1982 and 1983, the Commission reviewed a petition for determination of need brought by Florida Crushed Stone, a cement manufacturer. In re: Petition of Florida Crushed Stone for Determination of Need for a Coal-Fired Cogeneration Electrical Power Plant, 83 F.P.S.C. 2:107 (1983). (Order No. 11611). The Commission believed then, as it believes today, that:

> [w]hile the Act requires the Commission to determine whether a need exists for the addition of any generating facility of 50 MW or larger, the statute in our opinion, is designed primarily to have the Commission determine whether a need exists for the addition of capacity by a regulated electric utility or by a municipality.

Id. at 107. The Commission made no explicit finding that Florida Crushed Stone was a proper applicant for a determination of need proceeding. However, without discussion of the issue, it stated that "significantly different issues are raised when a private entity, such as FCS, proposes to build a cogeneration facility". Id. at 108.

The Commission found that Florida Crushed Stone proposed to build a power plant to meet the needs of its own manufacturing process:

> [The power plant] would become a power source for the cement plant FCS plans to construct. Mr. Entorf testified that a power plant the size of 125 MW was necessary to achieve the desired level of steam extraction for the size of the cement plant FCS wants to construct. The power plant would produce electricity, steam, and waste heat, the latter known as flue gas. The steam and flue gas would be transferred to the cement plant and would be used to dry components in the cement production process. Steam condensate and waste heat would be produced as a by-product of the cement production process and would be returned to the power plant to be used in the production of electricity.

Id. at 108-109.

Unlike Nassau, Florida Crushed Stone did not seek to build a power plant to meet the capacity needs of a utility. The size of the plant was determined by its own needs, and it sought no contract for the sale of capacity or energy to any utility. It

intended to sell its leftover, or as-available energy to Florida Power Corporation.[2]

The fact that the Commission determined need for the Florida Crushed Stone self-service plant in no way requires it to consider Nassau's project. The Commission determined that there was a need for Florida Crushed Stone's plant based solely on the needs of the manufacturer and the need for fuel efficiency available through the self-service cogeneration process, and specified that "the need for additional [utility] capacity is irrelevant to a determination such as this . . . ." Id. at 109 - 110.

In contrast, Nassau has no need of its own to determine. Nassau's situation is not at all similar to the arrangement approved for Florida Crushed Stone by both the Commission and the Siting Board.

As long as a power plant is needed, the Siting Board must weigh the various environmental effects of the plant under the Power Plant Siting Act. Power plants cause environmental disturbance regardless of the ultimate consumer of the energy. The state must be equally concerned for the environment whether a cogenerator builds a power plant exclusively for its own use, an independent power producer builds a plant to sell capacity and energy to a utility, or a utility builds a plant with which to serve its customers. The real import of the Siting Board's decision in Florida Crushed Stone is that a cogenerator was able to

---

[2] QFs are under no obligation to sell as-available energy, but utilities are required to purchase it pursuant to tariff as it becomes available from QFs.

obtain site certification of a self-service power plant for which the Commission had determined need. The Commission has not disturbed that decision.

In contrast, Nassau seeks to build a power plant based solely on FPL's need for capacity and energy with which to serve its ratepayers.[3] There is no conflict between the Commission's refusal to consider this free-lance need determination petition and its past review of Florida Crushed Stone's petition for determination of its own need. The Commission had no policy then, nor has it announced one now, that would prevent a cogenerator that desires to build a self-service power plant from obtaining a determination of need and site certification.[4] Neither the Commission's order nor the decision of the Siting Board in Florida Crushed Stone requires the Commission to entertain Nassau's petition.

---

[3]Energy is electricity, while capacity is the ability to generate or the dedicated production of electricity. Cogenerators who sell energy and capacity are entitled to payment from a utility in the amount of that utility's avoided cost.

If a utility purchases energy, it avoids the cost of fuel for its own plant. If it purchases capacity, it avoids the cost of building a plant. Power plants are extremely expensive to construct, so capacity payments (the avoided cost of construction) are much higher than energy payments (the avoided fuel cost). Cogenerators who build plants to meet a utility's need must "oversize" their plants in order to provide capacity. In return, they may receive millions of dollars in capacity payments over the life of a contract.

[4]In the order under appeal dismissing the petitions for need determination and contract approval, the Commission expressly limited its decision to "proceedings wherein non-utility generators seek determinations of need based on a utility's need." Order No. PSC-92-1210-FOF-EQ at 4, R. 2971 at 2974.

C. THE COMMISSION'S DECISION IS NOT INCONSISTENT WITH THE 1990 SITING ACT AMENDMENTS.

The arguments advanced by Nassau regarding the effect of the 1990 amendments to the Siting Act do nothing to save its faulty exercise in statutory interpretation. The Legislature did change the term "utility" to "applicant" in its re-enactment of Section 403.519. If anything, that change reflects a desire of the Legislature to harmonize the language of the need determination statute with that of the Siting Act definition in Section 403.503(4) where "Applicant" is defined as "any electric utility which applies for certification pursuant to the provisions of this act." That the term applicant was used in 403.519 in the 1990 amendments does not create a new class of entities which may apply for a determination of need and site certification. Section 403.503(13) still sets forth what the Legislature considers an "electric utility", and Nassau, as an independent power producer or cogenerator, is still not included.

Nassau's reliance on Collins Investment Co. v. Metropolitan Dade County, 164 So.2d 806 (Fla. 1964) and Bermudez v. Florida Power & Light Co., 433 So.2d 565 (Fla. 3rd DCA 1983) is strained at best. Neither case supports the proposition advanced by Nassau that the Legislature is presumed to have known of the existence of a single unchallenged decision of an administrative agency and to have taken the agency's construction of its statute into account in re-enacting the law. Both cases involve the presumption that the Legislature knows of the judicial decisions construing a statute when it re-enacts or modifies a statute. Moreover, even if the

Legislature did know of the Commission's Florida Crushed Stone decision, the foregoing illustrates that the Commission's decision would not have injected the expanded definition of applicant which Nassau wants.

D. THE COMMISSION'S INTERPRETATION OF THE STATUTORY DEFINITION OF APPLICANT IS NOT CLEARLY ERRONEOUS AND MUST BE UPHELD.

The standard of review applicable to this case was set out by the Court in PW Ventures v. Nichols, 533 So.2d 281, 283 (Fla. 1988):

> . . . [W]e note the well established principle that the contemporaneous construction of the statute by the agency charged with its enforcement and interpretation is entitled to great weight . . . (citation omitted) . . . . The Courts will not depart from such a construction unless it is clearly unauthorized or erroneous.

The agency's interpretation of its statutes will not be overturned merely because of the existence of other reasonable interpretations. Pershing Industries, Inc. v. Dept. of Banking and Finance, 591 So.2d 991 (Fla. 1st DCA 1991).

Notwithstanding its emotionally charged attack on the Commission's interpretation of the meaning of "applicant" under the Siting Act, Nassau's arguments do not approach the showing necessary to meet its burden under the applicable standard of review. See, Nassau Power Corporation v. Beard, 601 So.2d 1175 (Fla. 1992) (Court upheld Commission's interpretation of its duty under the Siting Act to determine the actual need of a utility for a cogenerator's capacity); Floridians for Responsible Utility Growth v. Beard, 621 So.2d 410 (Fla. 1993) (Court affirmed Commission's order interpreting and applying terms of Siting Act).

Nassau has been forced to resort to tortuous paths of statutory construction where a straightforward approach is all that is required. In the end, it can only ask the Court to effectively rewrite the statute, not interpret it.

II. THE "REMEDIES" SOUGHT BY NASSAU INVOKE PREVIOUSLY DISMISSED ISSUES NOT PROPERLY BEFORE THE COURT.

A. THE COURT SHOULD NOT HEAR THE ISSUE OF A COMPARATIVE NEED DETERMINATION.

In Order No. PSC-92-1210-FOF-EQ, the Commission dismissed Nassau's Petition to Determine Need in Docket No. 920769-EQ (this appeal) **solely** on the grounds that Nassau is not a proper applicant for a need determination proceeding under Section 403.519, Florida Statutes. The order did not rule on the issue of whether or not the Commission must hold a comparative hearing to determine which of several projects is the most cost-effective, and thus the matter is not before this Court on appeal. (See, Agency For Health Care Administration v. Orlando Regional Healthcare System, Inc., 617 So.2d 385 (Fla. 1st DCA), where the court granted a motion to strike non-record material from the appendix because "[i]t is basic that an appeal asserting error on the part of a lower tribunal can only be based on evidence presented to that lower tribunal." Id. at 389.) Order No. PSC-92-1255-FOF-EQ offers Nassau no grounds to raise the comparative hearing issue in its Revised Brief, and it should be stricken.

The comparative hearing issue was, however, raised and decided adversely to Nassau in Order No. PSC-92-1355-FOF-EQ (appealed by Cypress in Case No. 81,131). Nassau chose not to file a direct

appeal of that order, and its cross-appeal was dismissed. The comparative hearing issue thus is no longer before the Court, yet Nassau continues to argue in its favor. Revised Brief at 26-34. This amounts to nothing more than an attempt to revive its cross-appeal in the Cypress case. The Court should not allow Nassau to bootstrap this issue into this case.

The comparative hearing issue was dismissed along with the Cypress case and was never involved in Nassau's direct appeal. It would be further inappropriate for the Court to address the issue under the guise urged by Nassau because the question of comparative hearings is not ripe for review.

In this case, the Commission dismissed Nassau's Petition for Determination of Need because it was not a proper applicant under the Siting Act. If this Court determines that Nassau is, indeed, a proper applicant for a determination of need, and if Nassau then pursues its petition, the Commission will be faced, for the first time, with the question whether a proper applicant is entitled to a comparative hearing. It is premature for this Court to consider the issue before the Commission has done so.

B. THE ISSUE OF SPECIAL TREATMENT FOR QUALIFYING FACILITIES IS NOT PROPERLY BEFORE THE COURT.

Like the comparative hearing issue, the issue of whether the Commission erred in refusing to order FPL to negotiate a contract with Nassau as a Qualifying Facility (QF) belongs solely in the Cypress case. Order No. PSC-92-1355-FOF-EQ at 18; R. 2412. The is nothing in the Commission's order dismissing Nassau's separate application for determination of need which addresses "Nassau

Power's specific federal rights under PURPA" because it was not an issue in that proceeding. Revised Brief at 32. The issue of special treatment for QFs arose only in the Cypress case and should not be inserted into Nassau's direct appeal in this case. No matter in what guise it chooses to raise the issue, Nassau cannot ask the Court to provide a "remedy" based on a theory that the Commission has had no opportunity to address. As the Court would doubtless agree, it is the Commission's job in the first instance to interpret and apply regulatory law to the facts before it, not the Court's.

III. NEITHER THE ASHBACKER "COMPARATIVE REVIEW" DOCTRINE NOR NASSAU'S QF STATUS SUPPORT THE GRANTING OF A NEED DETERMINATION AS A REMEDY.

A. THE ASHBACKER & BIO-MED CASES DO NOT APPLY TO PROCEEDINGS TO DETERMINE NEED FOR ELECTRICAL POWER PLANTS.

Even if the effect of the Commission's denial of a comparative hearing in the Cypress case is somehow properly before the Court, the relief sought by Nassau is not supported by applicable law. There is certainly no basis on which this Court could declare Nassau the winner in a competition that never took place, which is apparently the object of this appeal. See, Revised Brief, especially at 32 (Nassau has "successfully run the gauntlet"); p. 39 (it would be appropriate for the Commission to hold a need hearing on Nassau's application and assign it priority).

Power plant need determination proceedings must be distinguished from governmental review of the applications for a radio broadcasting license in Ashbacker Radio Corporation v. Federal Communications Commission, 325 U.S. 327 (1945) and the

applications for a health care facility certificate of need in Bio-Medical Applications of Clearwater, Inc. v. Department of Health and Rehabilitative Services, 370 So.2d 19 (Fla. 2d DCA 1979). In both of those cases, agencies were required to select among applicants to choose the one who would be allowed to provide a service **to the general public**. However, the Florida Legislature has already selected electric utilities as the sole providers of electricity to the public, and has assigned to public utilities the statutory duty of providing service.[5]

The Commission does not select a public provider of electricity in a need determination proceeding. By statute, the state has already granted to utilities the type of governmental license under dispute in Ashbacker and Bio-Med. The distinction is significant. The Commission is not faced with the same task that confronted the Federal Communications Commission in Ashbacker or the Department of Health and Rehabilitative Services in Bio-Med. and is not required to follow the same procedures.

It is neither necessary nor desirable to have a government agency limit the number of providers of most types of goods and services. Competition among providers generally benefits the public because it results in lower prices and higher quality.

---

[5]Section 366.03, Florida Statutes, states that:

> Each public utility shall furnish to each person applying therefor reasonably sufficient, adequate, and efficient service upon terms as required by the Commission.

Consumers may select the best and lowest cost provider of automobiles, potato chips, accounting services, and even long-distance telephone service. Providers of these goods and services will compete for customers by providing better service at a lower price.

In some cases, however, increasing the number of providers does not result in better service and lower prices for all. For example, if there are too many radio broadcast facilities at the same frequency, the public would be unable to tune into any clear signal. An oversupply of some types of health care facilities or a proliferation of electric utilities could result in duplicative investment, which must eventually be paid for in the price of the service. In these cases, competitive providers could oversupply profitable areas, while less profitable segments of the population could be without service. Accordingly, the government has chosen to limit the number of providers who may serve the public in these and similar situations.

That limitation may be implemented by hearing, as in the case of radio broadcast licenses and healthcare facilities, or by statute, as in the case of electric utilities.[6] Although the selected licensee must serve the public need under the regulatory scrutiny of the agency, for the most part, the regulatory agency

---

[6]Arguably, the Ashbacker and Bio-Med competitive hearing requirement would be applicable when the Commission must decide which of two public utilities may serve a particular customer or territory, because the Commission would be making the kind of determination contemplated in those cases. Sec. 366.04(2)(e), Fla. Stat. (1991). The Commission routinely holds comparative hearings in these cases.

stays out of the day-to-day management of the licensee's operations. In fact, the Florida legislature has specifically directed the Commission in Section 366.04(1), Florida Statutes, to "regulate and supervise" public utilities, not to manage them.

Electric utilities are business entities with shareholders, directors, professional managers, and technical employees hired for their specific expertise. It is the utility's job to provide electrical service to the public and it is the Commission's job to see to it that they do. There was no analogous entity charged with this duty in the Ashbacker and Bio-Med cases.

Nassau invites the Court to improperly apply these cases to limit how a utility carries out its duty to serve the public, rather than how the government selects a provider of electricity. These cases are simply inapplicable to the Commission's regulatory oversight of the planning functions of an electrical utility. Generation planning is a normal business function of electric utilities. That function is reviewed but normally would not be pre-empted by the Commission in need determination proceedings. Business management decisions made by a utility cannot constitute a violation of Nassau's right to due process.

In the Cypress case, the Commission found that "FPL's selection process was less than optimal", and that "FPL did not adequately consider all potential purchased power options." The Commission then appropriately required the utility to correct its process by using a fair methodology to seek the most cost-effective alternative to meet its need. Order No. PSC-92-1355-FOF-EQ at 16 -

18, R. 2396 at 2411-2413. In so doing, the Commission recognized that it was required to review the utility's selection of a particular supplier rather than choose one of its own. As the prehearing officer stated in Order No. PSC-92-92-0827-PHO-EQ,

> The principal Florida case relied upon by Nassau and Ark, Bio Medical Application of Clearwater, Inc. v. Dept. of Health and Rehabilitative Service, [citation omitted] does not apply to the statutory scheme for determination of power plant need. In Bio Med., the agency was required to determine between competing medical facilities which would provide direct service to the public. By comparison, the statutory scheme for power plant need determination recognizes the utility's planning and evaluation process and requires either approval or denial of the utility's selection of generation alternatives. No Bio Med type hearing is required since the Commission is called upon to approve or deny the choice [of] a single applicant, the utility, rather than select from a number of competing applicants. This scheme recognizes that it is the utility's need, resulting from its duty to serve customers, which must be fulfilled. A non-utility generator has no such need since it is required to serve no customers.

Order No. PSC-92-92-0827-PHO-EQ at 102 - 103, R. 1225 at 1326-1327.

Although Ashbacker was decided in 1945, Nassau has been unable to cite a single case in which any court or regulatory commission has ever applied the Ashbacker doctrine to either a utility's contract approval process or to proceedings to determine need for power plants. To the contrary, the only case cited by either party actually supports this Commission's decision to deny a comparative hearing.

In Consumers Power Co. v. P.S.C., 472 N.W. 2d 77 (Mich. App. 1991), a cogenerator that had negotiated a contract to supply

capacity and energy to a regulated utility applied to the Michigan Public Service Commission for contract approval. Thereafter, many other QFs and independent power producers applied in various ways to fill the utility's need. The Michigan Public Service Commission refused to approve the contract selected by the utility, and instead attempted to allocate the utility's needed capacity among some of the competing providers by ordering that it would approve only contracts that would meet certain criteria.

According to the Michigan Court of Appeals, "[t]o the extent that the PSC actually ordered Consumers to enter, or not enter, into any particular contract, it exceeded its authority." Id. at 91. The court held that Consumers Power could properly enter into a contract with a third party to have its entire capacity supplied by the cogeneration facility.

One cogenerator unsuccessfully argued to the appellate court that Ashbacker required the Michigan Commission to hold a competitive hearing in order to select a supplier for the utility. Noting that it had previously "applied the Ashbacker doctrine to parties making mutually exclusive applications for certificates of need under the Public Health Code in order to build hospitals", the court nevertheless refused to require a comparative hearing to review the utility's selection of suppliers. Id. at 89. It rejected arguments remarkably similar to the arguments raised by Nassau in this case:

> James River [the cogenerator] complains that much of the record in this case was a meaningless exercise, inasmuch as it consists of evidence by various QFs regarding the superi-

> ority of their facilities over the MVC or other facilities and, hence, the appropriateness of selecting their facilities as a capacity source for Consumers. James River complains that the PSC unaccountably ignored the record and unlawfully delegated to Consumers the duty of determining which QFs would supply future capacity, allegedly because of Consumers' greater technical and business expertise.

Consumers Power at 88 - 89. The Court disposed of the disgruntled cogenerator's claim as follows:

> There is also no merit to the argument of James River that the PSC unlawfully delegated the selection of QFs to Consumers. The PSC had no such authority to delegate. Consumers is free to deal with the QFs of its choosing, subject to the federal requirement that it pay full avoided costs in the event it is unable to negotiate another rate with the QF and subject to s. 6j of the state law disallowing the pass-through to ratepayers of capacity charges that are not approved by the PSC. For this reason, the Ashbacker doctrine is not applicable here, because there is no license, right or privilege being doled out by the government.

Id. at 91.

There are no essential differences between Consumers Power and the present case. The Michigan court recognized that utilities, rather than regulatory commissions, have the power to make contracts to supply their energy needs. This decision supports the Florida Commission's dismissal of Nassau's petition for contract approval as well as its petition for a determination of need.

B. THE COMMISSION'S DECISION DID NOT FRUSTRATE ANY FEDERAL RIGHTS OF NASSAU UNDER PURPA.

It appears that what Nassau actually seeks in this appeal is preferential treatment over other qualifying facilities. Revised

Brief at 34; 39-40. Nassau cites no statute or case that would entitle it to such preferential treatment. Numerous qualifying facilities actively compete for a limited number of power plant projects in Florida. At the Cypress need hearing, for example, FPL presented testimony that eleven other qualifying facilities submitted proposals to fill its 1998-1999 need, but that it selected Cypress as best suited to fill its need (R. 66). Although the Commission denied the Cypress petition for determination of need, it would be unfair at this stage in the proceedings to single out Nassau for preferential treatment over other qualifying facilities that might wish to compete for the project.

The Commission has in fact expressed its willingness to give preferential treatment to qualifying facilities over other competing providers. In its order denying the Cypress petition for determination of need the Commission stated:

> We note that we may consider a Qualifying Facility (QF) to be a statutorily preferable alternative to an Independent Power Producer. Section 403.519, Florida Statutes, specifies the matters to be taken into account by the Commission in making its determination of need. Although these criteria give no preference to QF projects, Section 403.519 also provides that the Commission shall consider other matters within its jurisdiction which it deems relevant.
>
> Section 366.81, Florida Statutes, provides that the Commission should encourage cogeneration. Thus, this is a matter within the Commission's jurisdiction which may be considered in a need determination proceeding. Of course, this is only one of many factors the Commission may consider in making its determination of need. It should not be dispositive except in close cases.

Order No. PSC-92-1355-FOF-EQ, p. 17, footnote 4; R. 2411-A.

Nassau's reliance on the Public Utilities Regulatory Policies Act (PURPA) and the Federal Regulatory Commission's ("FERC") rules implementing PURPA to support its claim for special relief is without merit. Neither PURPA nor the FERC rules encourage or even permit state regulatory commissions to favor one qualifying facility over another; and they most certainly do not require state commissions to allow every proposed qualifying facility to be built.

The FERC rules require that each electric utility shall purchase energy and capacity which is made available from a qualifying facility. The rules create a market for QF power by requiring its purchase by utilities. The FERC rules do not require that state commissions must determine need for every qualifying facility. It would be irresponsible for the Commission hold a determination of need proceeding for every qualifying facility that proposed a project in Florida. This is not the intent of PURPA. Rather, PURPA is designed to require that utilities purchase power from qualifying facilities which have been found to be needed by the state utility commissions and are accordingly built. Nassau has shown no violation of PURPA or the FERC rules by the Florida Public Service Commission. The Commission has complied with the letter and spirit of PURPA giving preference to qualifying facilities over other competing providers. The Commission would not be complying with PURPA by granting Nassau preferential

treatment over other qualifying facilities that might wish to compete to fill FPL's need.

IV. GRANTING THE "ANCILLARY RELIEF" REQUESTED BY NASSAU WOULD IMPROPERLY USURP THE AUTHORITY OF THE COMMISSION.

At page 34 of its Revised Brief Nassau makes it very clear that it wants to be declared the winner among potential competitors for FPL future power needs:

> For Nassau Power to prevail on the essential question on appeal in a manner that simply provides an opportunity for those who elected not to present timely alternatives to the joint Cypress/FPL proposal, or not to appeal the Commission's orders, to lay claim to the opportunity achieved by Nassau Power's efforts would fail to adequately redress the Commission's wrongful action.

Ironically, Nassau, the champion of the comparative hearing, now seeks to exclude any competitors from a future decision on how FPL's need will be met. Assuming that some ground for remand of the Commission's order exists, it would be improper for the Court to impose such a drastic remedy. While in some circumstances it may be proper for a court to grant "ancillary relief" under Section 120.68(13)(a), Florida Statutes, a court should not put itself in the position of exercising the agency's authority. That principle is fundamentally embodied in Section 120.68(12)(c), Florida Statutes, which states that "the Court shall not substitute its judgment for that of the agency on an issue of discretion". See, Florida Real Estate Commission v. Webb, 367 So.2d 201 (Fla. 1979) (Court found that Third District Court of Appeal had improperly substituted its judgment for that of the agency where it reduced a 60-day suspension imposed by the Real Estate Commission to a

written reprimand). It is indisputably within the purview of the Commission to determine what process will be followed in need determination proceedings. The Commission has adopted rules of procedure governing need determinations and has since the Cypress adopted a bidding rule which defines what the Commission finds to be a fair procedure for determining the most cost-effective alternative. Rules 25-22.080-.081 and 25-22.082, Florida Administrative Code, respectively.

Nassau asks the Court to sanction an "end run" around the Commission's authority and the policies and procedures it has adopted for determinations of need. It does appear, as Nassau indicates, that FPL's projected need that was the subject of the Cypress proceeding has changed. Revised Brief at 37-38. That is all the more reason for the Court not to interfere with the Commission's orderly administration of its duties under Section 403.519. As the Court is well aware, determinations of need are complex proceedings involving extensive fact finding by the Commission. The Commission must ultimately assure that the ratepayers of Florida will be served by the most cost-effective alternative available. See, Floridians for Responsible Utility Growth, supra. It would be improper to allow Nassau to defeat the Commission's exercise of that duty by exempting it from competition to meet FPL's future power needs, whatever they may be.

The cases cited by Nassau do nothing to bolster its claims for ancillary relief. Both Baxter's Asphalt and Concrete, Inc. v. Department of Transportation, 475 So.2d 1284 (Fla. 1st DCA 1985),

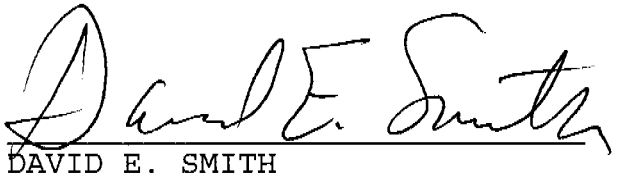
and Overstreet Paving Co. v. Dept. of Transportation, 608 So.2d 851 (Fla. 2d DCA 1992), recognize that a unsuccessful bidder on a contract might be entitled to relief where the agency acted outside its delegated discretion in selecting the winner. However, neither found that such relief was warranted under the facts of the case. By no stretch of the imagination can the cases be analogized to a regulatory agency's exercise of its legitimate statutory authority to control the orderly development of electric power resources. The Commission has no contract to award, nor has there been any competition for the capacity at issue in this case. It would indeed be presumptuous for the Commission to bypass the interests of the utility and its ratepayers and simply award the right to provide additional capacity to Nassau, as it wishes.

CONCLUSION

Nassau has not met its burden to show that the Commission's interpretation of the term "applicant" in Section 403.519 is clearly erroneous. It has not demonstrated that the deference afforded the agency's interpretation of its own statutes is misplaced in this case, nor has it overcome the presumption of correctness which attaches to the Commission's orders. PW Ventures, supra; City of Tallahassee v. Mann, 411 So.2d 162 (Fla. 1981). The Commission's order dismissing Nassau's petition for determination of need should be affirmed.

Respectfully submitted,

ROBERT D. VANDIVER
General Counsel
Florida Bar No. 344052



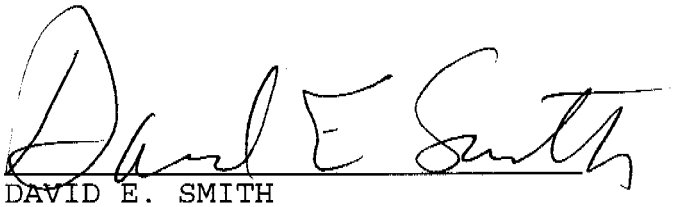
DAVID E. SMITH
Director of Appeals
Florida Bar No. 309011

Dated: March 11, 1994

B81496.MRD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the following parties on this 11th day of March, 1994.



DAVID E. SMITH

Matthew M. Childs
Steel, Hector & Davis
First Florida Bank Building
Suite 601
215 S. Monroe Street
Tallahassee, FL 32301

Patrick K. Wiggins
Wiggins and Villacorta
Post Office Drawer 1657
Tallahassee, FL 32302

Richard Donelan
Department of Environmental Protection
Office of General Counsel
2606 Blairstone Road
Suite 654
Tallahassee, FL 32399-2400

Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Grandoff & Reeves
315 S. Calhoun Street
Suite 716
Tallahassee, FL 32301

APPENDIX

NOTICE OF ADOPTION OF RULE AND RULE AMENDMENTS

APPENDIX

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Amendment of Rule 25-22.081, F.A.C., Contents of Petition; and Adoption of Rule 25-22.082, F.A.C., Selection of Generating Capacity.	DOCKET NO. 921288-EU ORDER NO. PSC-93-1846-FOF-EU ISSUED: December 29, 1993

NOTICE OF ADOPTION OF RULE AND RULE AMENDMENTS

NOTICE is hereby given that the Commission, pursuant to section 120.54, Florida Statutes, has adopted the rule amendments to Rule 25-22.081, relating to contents of petition, and adopted new Rule 25-22.082, F.A.C., relating to selection of generating capacity with changes.

The rules were filed with the Department of State on December 21, 1993, and will be effective on January 20, 1994. A copy of the relevant portions of the certification filed with the Secretary of State is attached to this Notice.

This docket is closed upon issuance of this notice.

By Direction of the Florida Public Service Commission, this 29th day of December, 1993.

STEVE TRIBBLE, Director
Division of Records & Reporting

(S E A L)

MER

25-22.081 Contents of Petition. Petitions submitted to commence a proceeding to determine the need for a proposed electrical power plant or responses to the Commission's order commencing such a proceeding shall comply with the other requirements of Chapter 25-22, Florida Administrative Code, ~~Chapter 25-2, F.A.C.~~, as to form and style except that a utility may, at its option, submit its petition in the same format and style as its application for site certification pursuant to Sections 403.501 through 403.517, Florida Statutes ~~F.S.~~, so long as the informational requirements of this rule and Chapter 25-22, Florida Administrative Code ~~Chapter 25-2, F.A.C.~~, are satisfied. The petition, to allow the Commission to take into account the need for electric system reliability and integrity, the need for adequate reasonable cost electricity, and the need to determine whether the proposed plant is the most cost effective alternative available, shall contain the following information:

(1) A general description of the utility or utilities primarily affected, including the load and electrical characteristics, generating capability, and interconnections.

(2) A general description of the proposed electrical power plant, including the size, number of units, fuel type and supply modes, the approximate costs, and projected in-service date or dates.

(3) A statement of the specific conditions, contingencies or other factors which indicate a need for the proposed electrical power plant including the general time within which the generating units will be needed. Documentation shall include historical and forecasted summer and winter peaks, number of customers, net energy for load, and load factors with a discussion of the more critical operating conditions. Load forecasts shall identify the model or models on which they were based and shall include sufficient detail to permit analysis of the model or models. If a determination is sought on some basis in addition to or in lieu of capacity needs, such as oil backout, then detailed analysis and supporting documentation of the costs and benefits is required.

(4) A summary discussion of the major available generating alternatives which were examined and evaluated in arriving at the decision to pursue the proposed generating unit. The discussion shall include a general description of the generating unit alternatives including purchases where appropriate; and an evaluation of each alternative in terms of economics, reliability, long-term flexibility and usefulness and any other relevant factors. Those major generating technologies generally available and potentially appropriate for the timing of the proposed plan and other conditions specific to it shall be discussed. In addition, each investor-owned utility shall include a detailed description of the selection process used and a detailed description of the

generating unit alternatives proposed by each finalist, if any, selected to participate in subsequent contract negotiations pursuant to Rule 25-22.082, Florida Administrative Code.

(5) A discussion of viable nongenerating alternatives including an evaluation of the nature and extent of reductions in the growth rates of peak demand, KWH consumption and oil consumption resulting from the goals and programs adopted pursuant to the Florida Energy Efficiency and Conservation Act both historically and prospectively and the effects on the timing and size of the proposed plant.

(6) An evaluation of the adverse consequences which will result if the proposed electrical power plant is not added in the approximate size sought or in the approximate time sought.

(7) If the generation addition is the result of a purchased power agreement between an investor-owned utility and a nonutility generator, the petition shall include a discussion of the potential for increases or decreases in the utility's cost of capital, the effect of the seller's financing arrangements on the utility's system reliability, any competitive advantage the financing arrangements may give the seller and the seller's fuel supply adequacy.

Specific Authority: 120.53(1)(c), 350.127(2), 366.05(1), F.S.

Law Implemented: 403.519, F.S.

History: New 12/2/80, Transferred 12/21/81, formerly 25-22.81, Amended 1/20/94.

25-22.082 Selection of Generating Capacity

(1) Definitions. For the purpose of this rule, the following terms shall have the following meaning:

(a) Next Planned Generating Unit: the next generating unit addition planned for construction by an investor-owned utility that will require certification pursuant to Section 403.519, Florida Statutes.

(b) Request for Proposals (RFP): a document in which an investor-owned utility publishes the price and non-price attributes of its next planned generating unit in order to solicit and screen, for subsequent contract negotiations, competitive proposals for supply-side alternatives to the utility's next planned generating unit.

(c) Participant: a potential generation supplier who submits a proposal in compliance with both the schedule and informational requirements of a utility's RFP. A participant may include utility and non-utility generators as well as providers of turnkey offerings and other utility supply side alternatives.

(d) Finalist: one or more participants selected by the utility with whom to conduct subsequent contract negotiations.

(2) Prior to filing a petition for determination of need for an electrical power plant pursuant to Section 403.519, Florida

Statutes, each investor-owned electric utility shall evaluate supply-side alternatives to its next planned generating unit by issuing a Request for Proposals (RFP).

(3) Each investor-owned utility shall provide timely notification of its issuance of an RFP by publishing public notices in major newspapers, periodicals and trade publications to ensure statewide and national circulation. The public notice given shall include, at a minimum:

(a) the name and address of the contact person from whom an RFP package may be requested;

(b) a general description of the utility's next planned generating unit, including its planned in-service date, MW size, location, fuel type and technology; and

(c) a schedule of critical dates for the solicitation, evaluation, screening of proposals and subsequent contract negotiations.

(4) Each utility's RFP shall include, at a minimum:

(a) a detailed technical description of the utility's next planned generating unit or units on which the RFP is based, as well as the financial assumptions and parameters associated with it, including, at a minimum, the following information:

1. a description of the utility's next planned generating unit(s) and its proposed location(s);

2. the MW size;

3. the estimated in-service date;

4. the primary and secondary fuel type;

5. an estimate of the total direct cost;

6. an estimate of the annual revenue requirements;

7. an estimate of the annual economic value of deferring construction;

8. an estimate of the fixed and variable operation and maintenance expense;

9. an estimate of the fuel cost;

10. an estimate of the planned and forced outage rates, heat rate, minimum load and ramp rates, and other technical details;

11. a description and estimate of the costs required for associated facilities such as gas laterals and transmission interconnection;

12. a discussion of the actions necessary to comply with environmental requirements; and

13. a summary of all major assumptions used in developing the above estimates;

(b) a schedule of critical dates for solicitation, evaluation, screening of proposals and subsequent contract negotiations;

(c) a description of the price and non-price attributes to be addressed by each alternative generating proposal including, but not limited to:

1. technical and financial viability;

2. dispatchability;

3. deliverability (interconnection and transmission);

4. fuel supply;

5. water supply;

6. environmental compliance;

7. performance criteria;

8. pricing structure; and

(d) a detailed description of the methodology to be used to evaluate alternative generating proposals on the basis of price and non-price attributes.

(5) As part of its RFP, the utility shall require each participant to publish a notice in a newspaper of general circulation in each county in which the participant's proposed generating facility would be located. The notice shall be at least one-quarter of a page and shall be published no later than 10 days after the date that proposals are due. The notice shall state that the participant has submitted a proposal to build an electrical power plant, and shall include the name and address of the participant submitting the proposal, the name and address of the utility that solicited proposals, and a general description of the proposed power plant and its location.

(6) Within 30 days after the utility has selected finalists, if any, from the participants who responded to the RFP, the utility

shall publish notice in a newspaper of general circulation in each county in which a finalist has proposed to build an electrical power plant. The notice shall include the name and address of each finalist, the name and address of the utility, and a general description of each proposed power plant, including its location, size, fuel type, and associated facilities.

(7) Each electric utility shall file a copy of its RFP with the Commission.

(8) The Commission shall not allow potential suppliers of capacity who were not participants to contest the outcome of the selection process in a power plant need determination proceeding.

(9) The Commission may waive this rule or any part thereof upon a showing that the waiver would likely result in a lower cost supply of electricity to the utility's general body of ratepayers, increase the reliable supply of electricity to the utility's general body of ratepayers, or is otherwise in the public interest.

Specific Authority: 120.53(1)(c), 350.127(2), 366.05(1), 366.051, F.S.

Law Implemented: 403.519, 366.051, F.S.

History: New 1/20/94.