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IN THE SUPREME COURT OF FLORIDA

Nassau Power Corporation, Appellant, vs. J. Terry Deason, etc., et al., Appellees.	Case No. 81,496

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ANSWER BRIEF OF APPELLEE
FLORIDA POWER & LIGHT COMPANY
TO INITIAL BRIEF OF
NASSAU POWER CORPORATION

On Appeal from:
The Florida Public Service Commission

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INTRODUCTION AND BACKGROUND

In this appeal Nassau Power Corporation ("Nassau") claims the right to bypass Florida Power & Light ("FPL") and seek from the Florida Public Service Commission ("Commission") approval for its independent proposal for meeting the electrical needs of FPL's customers and adding electrical generating capacity to FPL's system. At stake is FPL's fulfillment of the statutory obligation of public utilities to be responsible for service to their customers, responsible for the development of their electric systems, and accountable to the regulator for their decisions.

In the order on appeal the Commission held that Nassau could not petition the Commission for approval of a power plant by alleging that FPL needed and should buy the power. The Commission held that to be considered an applicant in a determination of need proceeding pursuant to the Power Plant Siting Act, a non-regulated generator, such as Nassau, must have an agreement with a regulated utility for purchase of the power to be produced by the power plant, if the non-regulated generator seeks to justify its proposed plant as needed to meet the demand of a regulated utility's customers for additional generating capacity. R. VI, 1326-27 (Order PSC-92-0827-PHO-EQ ("Prehearing Order") at 102-103).[1] This decision

[1] As here, FPL will note citations to the record with an "R.", followed by volume and page number(s). Orders contained in the record on appeal will be referenced by citation to the record; all other Commission orders will be referenced by citation to the official FPSC reporter. When directing the Court to portions of Nassau's initial brief, FPL will use the designation "Nassau Brief," followed by a page

recognizes that it is FPL's responsibility to plan for and make the decisions affecting the expansion of its electric system and service to its customers, subject to review by the Commission. Id.; R. XIII, 2398; R. XXII, 2047-51.

The Commission reached, and then confirmed, its decision regarding the consideration to be given to Nassau's proposal in five separate orders, one of which is on appeal here.[2] The Commission based each of these related decisions on several factors.

First, the Commission reasoned that to allow Nassau -- acting independently of FPL -- to attempt to justify building a power plant by alleging that FPL needed to expand its electric system, would be inconsistent with the entire statutory scheme for need determinations:

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number designation (for example, "Nassau Brief at 1").

[2] The Commission first decided the issue in its prehearing order in the need hearing requested by FPL and Cypress Energy Partners, Limited Partners (from whom FPL had contracted to purchase capacity and energy), when it denied Nassau's motion to consolidate its independent need petition with the FPL-Cypress petition. R. VI, 1326-27. Nassau rebriefed this issue in a motion for reconsideration, and the Commission considered the issue again de novo at the beginning of the FPL-Cypress need hearing. R. XVI, 47-49; XIII, 2398. The Commission also reaffirmed its decision in its written final order in the FPL-Cypress case, after the close of all evidence and the briefing of all issues. R. XIII, 2398. After the Commission's decision in the FPL-Cypress case, FPL moved to dismiss Nassau's independent need and contract approval petitions, and the same issue was briefed again. R. XXXI, 2866-87, 2895-2927; XXXIIII, 3198-3216, 3234-66; XXXV, 3675-95, 3704-27. The Commission granted FPL's motion to dismiss Nassau's petitions, and Nassau briefed the issue yet again in another motion for reconsideration, which was denied. R. Vol. XXXV, p. 3761-68.

> [T]he 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 [comparative] 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.

R. VI, 1326-27 (Prehearing Order at 102-103) (emphasis added).

Second, the Commission concluded that the statute expressly limits "applicants" who can apply for a determination of need to "'cities and towns, counties, public utility districts, regulated electric companies, electric cooperatives, and joint operating agencies, or combinations thereof'", id. (quoting § 403.503, Fla. Stat. (1991)), and that Nassau does not meet that definition. Id. As the Commission pointed out when dismissing Nassau's need petition, "each of the entities listed under the statutory definition may be obligated to serve customers." R. XXXV, 3757 (Order PSC-92-1210-FOF-EQ ("Nassau Need Order") at 3). The Commission concluded that "[i]t is this need, resulting from a duty to serve customers, which the need determination proceeding is designed to examine." Id.

Third, the Commission noted that to accept Nassau's proposed reading of the statute would mean that any would-be power plant developer desiring to profit from a contract with

a Florida utility could bypass the utility by filing a need petition, thereby taking the responsibility for service away from the utility. R. XXXV, 3758 (Nassau Need Order at 4). The Commission determined that this was not its proper role, and that allowing developers to bypass the utility responsible for service would "greatly detract from the reliability of the [capacity selection] process." Id.

Finally, the Commission was careful to point out that its decision only addressed the circumstance at issue in this case -- where a non-regulated developer sought to build a power plant to generate electricity for customers of a regulated utility:

> It is also our intent that this Order be narrowly construed and limited to proceedings wherein non-utility generators seek determinations of need based on a utility's need. We explicitly reserve for the future the question of whether a self-service generator (which has its own need to serve) may be an applicant for a need determination without a utility co-applicant.

R. XXXV, 3758-59 (Nassau Need Order at 4-5).[3]

SUMMARY OF ARGUMENT

Nassau asks this Court to reject the Commission's interpretation of the Siting Act and to rule that Nassau has a statutory right to use a determination of need proceeding to

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[3] The Commission also ruled that "even assuming arguendo that a non-utility could file a need petition," Nassau had filed its petition so late in the Cypress proceeding that the Commission's staff "hasn't had sufficient time to adequately analyze ... Nassau's project[] and conduct the level of discovery necessary for a need determination proceeding." R. VI, 1327 (Prehearing Order at 103).

bypass FPL and take its independent proposals for meeting the needs of FPL's customers straight to the Commission for review and decision. The Court should uphold the Commission's decision based on several firmly-established principles of law.

First, the Commission's interpretation of the Siting Act is consistent with the plain language of the statute, rendering Nassau's attempted resort to rules of statutory construction inappropriate. The only principle of law needed to decide this case is the rule that when statutory language is clear and unambiguous, the statute must be given its plain and obvious meaning.

Second, the Court should reject Nassau's argument that a plain reading of the statute would lead to absurd results, as did the Commission. The Commission concluded that a plain reading of the statute harmonizes FPL's duty to manage its electric system in a prudent and reasonable manner, in fulfilling its legal obligation to serve its customers, with the Commission's responsibility for oversight of the development of Florida's electric power grid. The Commission concluded that Nassau's proposed expansion of the definitions in the Siting Act to include them would detract from the reliability of FPL's capacity selection process, and would improperly require the Commission to make de novo decisions dictating the development of FPL's system in individual need determination proceedings.

Third, the Court should also reject Nassau's argument that the Commission's interpretation of the Siting Act in this case is inconsistent with past Commission precedent. The only Commission order that Nassau cites to support its argument is an order in which the interpretation of the Siting Act was never raised or decided. The fact that the Commission did not address an issue in a prior case does not give that case precedential value as to how the issue ought to be decided when it is addressed. In sharp contrast to the one order cited by Nassau, there is a long line of Commission precedent regarding the role of the utility and the Commission in making and approving a utility's capacity decisions, and applying the Siting Act itself. This precedent supports the Commission's dismissal of Nassau's need petition.

Fourth, due process concerns did not require consideration of Nassau's need petition in a "comparative" hearing. Because it is FPL's responsibility to select generating capacity alternatives for its system in the first instance, the cases cited by Nassau in support of its due process argument are inapplicable. Those cases hold that when the government is deciding in the first instance between competing applications to provide a direct service to the public, it must give all applicants a comparative review. Here, the Commission's role was to review and approve or deny FPL's decision to meet its need by entering the Cypress contract.

Finally, neither the Public Utilities Regulatory Policy Act nor Nassau's offer to develop its project to meet the eligibility requirements for "qualifying facility" status under that Act, require a result different than that reached by the Commission.

The Commission's order should be affirmed.

ARGUMENT

I.

THE COMMISSION CORRECTLY CONCLUDED THAT NASSAU DOES NOT QUALIFY AS AN "APPLICANT" UNDER THE EXPRESS TERMS OF THE SITING ACT. THE COMMISSION'S PLAIN READING OF THE SITING ACT IS CONSISTENT WITH FPL'S STATUTORY OBLIGATION TO PROVIDE SERVICE AND THE COMMISSION'S DUTY TO REVIEW FPL'S CAPACITY SUPPLY DECISIONS. RESORT TO RULES OF STATUTORY CONSTRUCTION IS UNNECESSARY.

The Commission is required to initiate and conduct a need determination proceeding "[o]n request by an applicant." § 403.519, Fla. Stat. (1991) (emphasis added). It may also initiate a need proceeding at its discretion, on its own motion. Id. FPL and all other entities with a statutory duty to maintain an adequate electric system for service to customers meet the definition of an applicant. Nassau does not, but urged the Commission to expand the statute beyond its plain language by construing it to include Nassau. The Commission refused, and its decision should be upheld.

A. The Terms Defining An "Applicant" Should Be Given Their Plain And Obvious Meaning.

The definitions in section 403.503, Florida Statutes, are not ambiguous. An "applicant" is an "electric utility"

seeking to license a power plant for construction. § 403.503(4), Fla. Stat. (1991). An "electric utility" is <u>not</u> anyone who desires to build a power plant -- as Nassau argues -- but is defined to mean:

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

§ 403.503(13), Fla. Stat. (1991).

Nassau is not a city, town, or county. Nor is it a public utility district, regulated electric company, electric cooperative or joint operating agency. R. XXXV, 3757. Because it does not fall within the plain meaning of the definition of "electric utility," Nassau argues that various rules of construction should be applied to expand the definition, beyond the entities expressly named, to include it. However, the only principle of law that needs to be applied in this case is the rule that when the language of a statute is clear and unambiguous, "'there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.'" <u>Holly v. Auld</u>, 450 So. 2d 217, 219 (Fla. 1984) (quoting <u>A.R. Douglass, Inc. v. McRainey</u>, 137 So. 157, 159 (Fla. 1931)). That is what the Commission did; and its interpretation must be upheld unless a literal reading of the statute would lead to absurd results. <u>Id</u>.; <u>Clark v. Kreidt</u>,

199 So. 333, 336 (Fla. 1941); Leigh v. State ex rel. Kirkpatrick, 298 So. 2d 215, 216 (Fla. 1st DCA 1974).

B. The Commission's Interpretation Is Reasonable.

Unless statutory language is ambiguous or would lead to absurd results, the plain meaning of the statute must control. Auld, 450 So. 2d at 219. Not surprisingly, therefore, Nassau spends a great deal of time arguing that the Commission's decision will "lead to absurd results and an unwieldy regulatory scheme." Nassau Brief at 9. In reality, the opposite is true. The Commission expressly rejected Nassau's argument that a plain reading of the statute would lead to absurd results and found, to the contrary, that Nassau's proposed construction would lead to the waste of "inordinate time and resources;" would "greatly detract from the reliability" of the capacity selection process; and would require the Commission to "devote excessive resources to [the] micromanagement of utilities' power purchases." R. XXV, 3758 (Nassau Need Order at 4).

The statutory interpretation sought by Nassau suggests that a potential capacity supplier could bypass FPL and, in a need proceeding, obtain a contract, as well as a determination of need, directly from the Commission. As discussed above, the Siting Act does not obviate the need for successful contract negotiations with the purchasing utility. Moreover, the proposed interpretation directly conflicts with a regulated utility's legal duty to provide service, and

completely eclipses its ability to manage its generating resources in a prudent and economical fashion. The Commission recognized this in expressly finding that Nassau's proposed construction would "greatly detract from the reliability" of the capacity selection process and improperly require the Commission to "micromanag[e] utilities' power purchases." R. XXV, 3758 (Nassau Need Order at 4).[4] These findings were supported by uncontradicted testimony presented in the Cypress proceeding, which is part of the record on appeal.[5]

More importantly, the Commission looked beyond the circumstances of this particular proceeding and recognized

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[4] The Commission also rejected the approach urged by Nassau on the only other occasion it was presented with it. The Commission found a power plant siting application filed by a non-utility, Consolidated Minerals, Inc. ("CMI"), to be insufficient because, among other reasons, CMI did not file as part of its application a contract with its alleged purchasing utility. R. XXXV, 3692-94. Unless the utility had determined that it was going to purchase from CMI to meet its need, CMI could not pursue a determination of need. Id.

[5] The record in this appeal was compiled while the appeal was consolidated with the Supreme Court Case No. 81,131 (the "Cypress appeal"), and includes evidence from the FPL-Cypress proceeding. In this appeal, Nassau has argued that the Commission's decision to deny Nassau a "comparative hearing" was in error. Yet the Commission's decision to deny Nassau's motion to consolidate was made in the FPL-Cypress proceeding -- and is not part of the order on appeal in this case. In defending against the Commission's motion to strike arguments related to the Cypress appeal from its brief, Nassau argued that "references to the Cypress case are pertinent to the direct appeal ...." (Nassau's Response to Commission's Motion To Strike Brief at p. 7). If Nassau is to be allowed to challenge the Commission's decision in the Cypress case, the Court should have the benefit of knowing the evidence presented to the Commission on this issue -- evidence which is part of the record on appeal. Therefore, FPL has included, as appendix A to this brief, a short summary of that evidence, with citations to the record.

that Nassau's proposed interpretation would improperly take decisions about the development of FPL's system out of FPL's planning process and transfer them to a need determination proceeding. The Commission concluded that it was not equipped to take over the planning and evaluation process for each utility in Florida -- nor was that the Commission's proper role. R. XXII, 2047-53; R. XXV, p. 3757-58 (Nassau Need Order at 3-4).

Case law from other jurisdictions also supports this conclusion. For example, in Union Carbide Corp. v. Public Service Comm'n, 428 N.W.2d 322, 329 (Mich. 1988), the court said, "[t]he mere recital of the power to control and regulate public utilities does not, of necessity, entail the power to order a utility to follow particular principles of economic management. In fact, the power to regulate does not convey with it the power to exercise general management powers." In an earlier pronouncement on the relationship between the regulator and the regulated, the United States Supreme Court admonished, "[i]t must never be forgotten that while the state may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of the public utility companies, and is not clothed with the general power of management incident to ownership." Southwestern Bell Telephone Co. v. Public Service Comm'n of MO., 262 U.S. 276, 289, 43 S.Ct. 574 (1922). The Court also noted, "[t]he commission is not the financial manager of the

corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation." Id. (citation omitted). These principles are also carried forward in more contemporary analyses: "Regulation must not be so far extended as to constitute management or operation and the right of a utility honestly and in good faith to carry on its business and direct its affairs may not be wrested from it under the guise of regulation." 73B C.J.S. Public Utilities § 12b (1983) (footnotes omitted); see also Midland Cogeneration Venture Limited Partnership v. Public Service Comm'n, 501 N.W.2d 573, 578 (Mich. App. 1993) ("Moreover, the PSC's general power to fix and regulate rates does not carry with it, either explicitly or by necessary implication, the power to make management decisions.").

The current process, preserved by the Commission's dismissal of Nassau's need petition, is an orderly one in which the entity with the duty to serve is charged with making reasonable and prudent decisions regarding its own electric system, and is accountable to the Commission for its decisions. There is nothing "absurd" or "unwieldy" about that process. What would be absurd, unmanageable, and wholly at odds with FPL's and the Commission's respective statutory obligations, as the Commission concluded, would be a system that put the Commission in the business of making FPL's management decisions. R. XXII, 2039-44, 2047-53; R. VI,

1326-27 (Prehearing Order at 102-103); XXXV, 3757 (Nassau Need Order at 3).

The only circumstance under which it would be nonsensical to deny an unregulated developer an opportunity to pursue a need determination independently of a regulated entity, responsible for service, is where the developer does <u>not</u> seek to justify its plant based on the needs of a utility's customers. However, the Commission "explicitly reserve[d] for the future the question of whether a self-service generator (which has its own need to serve) may be an applicant for a need determination without a utility co-applicant." R. XXXV, 3759 (Nassau Need Order at 5).[6] Therefore, that circumstance is not before the Court.

Nassau bases its argument on unsupported speculation regarding the "absurd" consequences of the Commission's decision not to expand the definitions in the Siting Act. The Commission's findings to the contrary are not only supported by record testimony in the FPL-Cypress proceeding, but are logical, persuasive, and supported by case law addressing the proper role of the regulator and the utility in making and reviewing the utility's management decisions. Because a plain reading of the definitions in the Siting Act is rational and reasonable, it should be applied without resort to

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[6] Additionally, the statute permits a self-service generator to request that the Commission, on its own motion, initiate a need proceeding to review the developer's self-service proposal.

additional rules of statutory construction. Auld, 450 So. 2d at 219.

C. The Siting Board's 1984 Decision In Florida Crushed Stone Is Irrelevant.

In arguing for an expanded construction of the definition of electric utility, Nassau relies heavily on a 1984 order from Florida's Governor and Cabinet (sitting as the Power Plant Siting Board[7]) that approved a siting application from a non-utility industrial concern, Florida Crushed Stone Company ("FCS"). Nassau claims that in the FCS case the Siting Board decided the "precise question of whether a non-utility cogenerator can be an applicant," and that the Siting Board's interpretation should prevail. Nassau Brief at 10, 24-25. What Nassau fails to acknowledge is that FCS's application involved the very issue that the Commission expressly stated it was not deciding in the Order below -- the case of a non-utility cogenerator applying to construct a power plant to meet its own need. Therefore, the Siting Board's FCS order is clearly distinguishable from this case.

It has long been recognized that "'what may have been said in an opinion [based on one set of facts] ... should not be extended to cases where the facts are essentially different.'" Ard v. Ard, 395 So. 2d 586, 587 (1st DCA 1981) (quoting Ex parte Amos, 112 So. 289, 294-95 (Fla. 1927)). Although statements made in deciding a case that turned on

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[7] See § 403.503(6) (1991), § 403.509(1) (1992 Supp.).

different facts may be considered in deciding a factually distinguishable case, they "'ought not control the judgment in a subsequent suit where the very point is presented for decision.'" Id.

In the FCS case, FCS did not justify construction of its facility as needed to meet the capacity needs of a regulated utility; and the Commission expressly found that the facility would not affect the need of any utility of the state. Order No. 11611, 83 FPSC 2:107, 109-110. By contrast, Nassau is attempting to force the Commission to consider its application in lieu of an application from FPL reflecting FPL's decision as to the best way to meet its needs. The Commission expressly limited its decision below to petitions such as those filed by Nassau, in which a non-utility seeks to justify its proposed plant as needed by a utility's customers. This issue, squarely presented to the Commission and decided in this case, was not before the Siting Board in the FCS case. Therefore, the Commission's decision here should not be viewed as inconsistent with the result reached by the Siting Board in the Florida Crushed Stone case. There is no inter-agency conflict to be resolved.

More importantly, to the extent that Nassau seeks to apply the FCS order as precedent beyond the facts of that case, the Court should reject the reasoning cited by Nassau from the Siting Board's order as clearly erroneous. The Siting Board reasoned that FCS would be "in the business of

generating electricity" after it completed construction of its plant; and that it therefore met the definition of "electric utility" applying the "ordinary meaning" of the words "in the business of generating electricity." R. XXXV, 3724 (Siting Board's FCS Order at 2). However, that reasoning ignores at least three-fourths of the statutory definition of "electric utility."

Section 403.503(13) defines "electric utility" to mean cities, towns, regulated electric companies, and four other expressly delineated entities "in the business of generating electricity." The Legislature obviously could have defined "electric utility" to mean any entity that will upon construction of a power plant be in the business of generating electricity. It did not. Instead, the Legislature, with precise terms and clear words, limited the definition of an "electric utility" to a specifically delineated list of entities -- and the Siting Board completely ignored that language. Therefore, even if the FCS order were not completely distinguishable on the facts, neither the Commission nor the Court would be bound by the Siting Board's clearly erroneous reasoning. Southeastern Utilities Serv. Co. v. Redding, 131 So. 2d 1, 2 (Fla. 1961) ("There can be no doubt that an administrative ruling or policy which is contrary to the plain and unequivocal language of a legislative act is clearly erroneous. This proposition seems to be too elemental to require further discussion.").

Despite its tacit admission that the Siting Board's reasoning was erroneous,[8] Nassau also argues that the Siting Board's decision should be followed based on the rule of statutory construction that the Legislature is presumed to have knowledge of judicial decisions construing a statute and, therefore, to have accepted the construction if the Legislature amends or reenacts the statute without adding language to invalidate it. In effect, Nassau is arguing for a rule that would allow an agency to alter a clear, unambiguous statute with a clearly erroneous interpretation unless the Legislature comes back and adds more words to restate what is already clear. However, the Legislature is also presumed to know the rules of statutory construction[9] and, therefore, to know that an agency's interpretation of a statute that is contrary to the plain language of a statute is invalid, Redding, 131 So. 2d at 2,[10] and that courts, in any event, will not look to extraneous matters such as an agency's

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[8] Although Nassau cites the FCS order, it does not itself argue that it falls within any of the seven categories of entities who meet the definition of electric utility. Instead, Nassau argues that even though the Legislature did not include it in the list, the Court should add it to the list because Nassau's application presents a "new situation" developed after enactment of the section 403.519. Nassau Brief at 15. FPL addresses this argument, at pages 24 to 26, infra.

[9] See James v. Dep't of Corrections, 424 So. 2d 826, 828 (Fla. 1st DCA 1982); McNary v. Haitian Refuge Center, Inc., 498 U.S. 499, 111 S. Ct. 888, 898 (1991); Haynes v. Shoney's, Inc., 803 F. Supp. 393, 396 (N.D.Fla. 1992).

[10] See also, Campus Communications, Inc. v. Dept. of Revenue, 473 So. 2d 1290, 1295-96 (Fla. 1985).

interpretation to construe language that is already clear and unambiguous. Silva v. Southwest Florida Blood Bank, Inc., 601 So. 2d 1184, 1186-87 (Fla. 1992) ("A court must not resort to sources outside a statute to interpret clear and unambiguous words the legislature chose to employ.") (citing Shelby Mut. Ins. Co. v. Smith, 556 So. 2d 393, 395 (Fla. 1990)). Therefore, the Legislature is presumed to know that it is not required to amend an already clear statute to invalidate a clearly erroneous interpretation.

Finally, "[t]he doctrine of stare decisis is primarily applicable only to judicial decisions and is not generally applicable to decisions of administrative bodies." Mercedes Lighting and Electrical Supply, Inc. v. Department of General Services, 560 So.2d 272, 278 (Fla. 1st DCA 1990). Therefore, even if the Siting Board's FCS order had been well-reasoned and was not factually distinguishable from this case, the order still would not necessarily have bound the Commission in its consideration of the question presented by this case -- whether Nassau could support a determination of need before the Commission (a determination over which the Commission has exclusive jurisdiction) by alleging that it's power plant would supply capacity and energy to FPL, when it had no contract to sell capacity to FPL.

D. The Statute Should Not Be Expanded Under The Guise Of Broadening It To Apply To New Conditions Where The Purported "New Condition" Is Not Of The Same Type As Those Expressly Included In The Statute.

Nassau cites State v. City of Jacksonville, 50 So. 2d 532 (Fla. 1951) for the proposition that a statute should be "construed to apply to new conditions, things, and entities that were unknown or not contemplated when the law was passed ...." Nassau Brief at 16-17. In City of Jacksonville, the Court held that "broad, general and comprehensive terms ... may be held to apply to new situations ... or entities coming into existence since the enactment of the statute; provided they are in the same general class as those treated in the statute ...." Id. at 536.

Nassau first argues that the terms in the definition of "electric utility" fit the requirement of being "broad, general and comprehensive" because "the blanket phrase 'generating, transmitting or distributing electricity'" is broad, general and comprehensive. Nassau Brief at 39. This scopes the wrong target. The point is that the terms in the definition that Nassau is asking the Court to expand -- cities, towns, counties, public utility districts, regulated electric companies, electric cooperatives, and joint operating agencies -- are limiting and specific.

Nassau also fails the second prong of the City of Jacksonville test requiring that the "new" entities be "in the same general class as those treated in the statute." As the Commission recognized, the seven types of entities expressly

included within the definition of "electric utility" in Section 403.503 have one thing in common -- the authority to sell electricity at retail and thereby "serve customers."[11] Nassau is unlike the entities included in the definition of electric utility because they do not have an obligation to serve customers and do not themselves have a need for power. Therefore, the City of Jacksonville case does not support the construction that Nassau seeks. It represents yet another rule of statutory construction inapplicable to this case.

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[11] The fact that each of the enumerated entities has a duty to serve customers clearly reinforces the Commission's conclusion that the Siting Act was not intended as a mechanism for shifting responsibility for service away from regulated electric utilities. That the Legislature did not intend the Siting Act to become a mechanism for removing capacity decisions from the utility's management is also clear from Section 403.502, Florida Statutes (1991), where the Legislature expressly states its intent in passing the Act. The Act was passed to develop a procedure to approve power plant sites that will "produce minimal adverse effects on human health, the environment, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life ..." Id. It seems beyond reason to suggest that the Legislature would enact a radical departure from existing law and practice without giving a hint that that was what it was doing, when it specifically undertook the effort to articulate its intent in the statute. Yet there is no suggestion that the Legislature even contemplated that the Act would be used to wrest responsibility for capacity decisions away from utilities or others with an obligation to serve customers. In any event, the Commission's interpretation is completely consistent with the Legislature's own statement of intent in the statute itself.

II.

THE DEFINITION OF APPLICANT SHOULD NOT BE EXPANDED BEYOND ITS EXPRESS TERMS IN THIS CASE, BECAUSE TO DO SO WOULD BE INCONSISTENT WITH PAST COMMISSION PRECEDENT APPLYING THE SITING ACT AND OTHER RELATED STATUTES.

The Commission's interpretation of the Siting Act as applied to Nassau in this case is completely consistent with long-standing Commission precedent regarding both the Siting Act itself and the respective roles of regulated electric companies and the Commission in making and reviewing a utility's capacity decisions. Nassau urges the Court to reverse the Commission's decision arguing that it is inconsistent with past Commission precedent, citing Walker v. Dep't of Transportation, 366 So. 2d 96 (Fla. 1st DCA 1979).[12] The Walker case holds that "'longstanding statutory interpretations made by officials charged with the administration of the statutes are given great weight by the court ...'" Id. at 99 (quoting Austin v. Austin, 350 So. 2d 102, 104 (Fla. 1st DCA 1977). This authority actually supports the Commission's decision.

[12] Nassau also cites Price Wise Buying Group v. Nuzum, 343 So.2d 115 (Fla. 1st DCA 1977). However, in that case the Court simply invalidated an agency's "declaratory statement" because the court found it to be a rule not properly promulgated pursuant to Section 120.54, Florida Statutes. Nuzum has no apparent applicability to this case. The other cases cited by Nassau, Burnet v. Chicago Portrait Co., 285 U.S. 1 (1932), and Safeway Trails, Inc. v. Furman, 197 A.2d 366 (N.J. 1964), also recite the general rule that Courts give great weight to the construction consistently applied to a statute over a long period of time by the agency charged with the statute's enforcement.

A. The Commission's Construction Of The Siting Act Is Consistent With Past Commission Precedent Regarding The Roles Of The Utility And The Commission In Making And Approving A Utility's Capacity Decisions.

FPL has always had a statutory obligation to provide reliable electric service to all customers within its service territory. § 366.03, § 366.041(2), Fla. Stat. (Supp. 1992). This means that FPL must have on hand sufficient generating resources to "... meet all reasonable demands for service and provide a reasonable reserve for emergencies." Fla. Admin. Code R. 25-6.035. The Commission has consistently imposed an affirmative duty on regulated companies, such as FPL, to "...plan for and manage its generating resources in a prudent and economical fashion". Order No. 15461, 85 FPSC 12:199, 200; Gulf Power Company v. Fla. Pub. Service Comm., 453 So. 2d 799 (1984); cf. Fla. Power Corp. v. Cresse, 413 So. 2d 1187 (1982). This is not a job the Commission has sought to undertake itself; it is an important aspect of the obligation to serve which the Commission has recognized is vested in the entities it regulates.

Consistent with these statutory roles, utilities have, by order of the Commission, actively studied and planned for an adequate power supply throughout the years the Power Plant Siting Act has been in existence.[13] In addition, Section

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[13] Order No. 24989, 91 FPSC 8:560 (1991); Order No. 23625, 90 FPSC 10:412 (1990); Order No. 22341, 89 FPSC 12:294 (1989); Order No. 18805, 88 FPSC 2:57 (1988); Order No. 18804, 88 FPSC 2:56 (1988); Order No. 17480, 87 FPSC 4:388 (1987); Order No. 16295, 86 FPSC 7:11 (1986); Order No. 15650, 86 FPSC 2:113 (1986); Order No. 15409, 85 FPSC 12:5 (1985); Order No.

186.801, Florida Statutes (1991), requires each utility -- not the Commission -- to biannually file a plan outlining the utility's future needs and identifying its alternatives for meeting those needs.

In the Commission proceedings related to planning, the Commission has also consistently recognized that its role in the generation expansion process is to review, as opposed to engage in, the planning and decision making activities of the utilities it regulates. See Orders cited in footnote 16.

Most recently, on the last occasion utility generation expansion plans were reviewed,[14] the Commission was urged to require that the plans be revised to conform to the Commission's critique and evaluation of them. The Commission refused:

14893, 85 FPSC 9:25 (1985); Order No. 14524, 85 FPSC 6:263 (1985); Order No. 13303, 84 FPSC 5:133 (1984); Order No. 13073, 84 FPSC 3:51 (1984); Order No. 12468, 83 FPSC 9:86 (1984); Order No. 11701, 83 FPSC 3:118 (1983); Order No. 11232, 82 FPSC 10:60 (1982); Order No. 10661, 82 FPSC 3:121 (1982). Order No. 14524, 85 FPSC 6:263, noted that the Commission undertook review of utility plans and planning efforts to "implement the legislative mandate of Section 366.04(3) ... to exercise jurisdiction over the ... 'planning, development and maintenance of a coordinated electric power grid throughout Florida' ...."

[14] Docket No. 900004-EU. This docket is an ongoing forum in which the Commission reviews generation expansion plans of regulated utilities both to keep itself informed in a general way as to utility plans and planning efforts and to develop utility-specific costing information. See, e.g., Order No. 24989, 91 FPSC 8:560.

> Utilities are not required to file conforming generation expansion plans since we do not "approve" generation expansion plans; rather, we review them and use them for information purposes.

Order No. 24989, 91 FPSC 8:560, 629. In a subsequent docket[15] the Commission declined a similar request that would have required Commission review and approval of every change in a regulated utility's generation expansion plan. The request was part of a proposal that would have precluded a utility from negotiating for the purchase of generating capacity on the basis of a utility plan that had not been expressly approved by the Commission. The Commission denied the entire proposal, leaving the responsibility for formulating and implementing generation expansion plans with the regulated utility. Order No. 25668, 92 FPSC 2:24, 26-27. The Commission's rules take the same approach in providing for Commission review of <u>utility-developed</u> generation expansion plans on an as-needed basis, <u>see</u> Fla. Admin. Code R. 25-17.0833, and by expressly providing that:

> Proceedings to determine the need for a proposed electrical power plant, as defined in Section 403.503(7), F.S., shall begin with a petition <u>by a utility</u> or [by] the Commission's own motion ...."

Fla. Admin. Code R. 25-22.080 (emphasis added).

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[15] Docket No. 910603-EQ. The docket was opened by the Commission to address issues concerning the negotiation of power purchase contracts between utilities and non-regulated entities.

Consistent with these rules and precedent, when the need for capacity additions on an individual utility system has arisen, the utility with the statutory obligation to serve has defined the timing and magnitude of the need for additional capacity, as well as the specific planned unit addition, which would, in the utility's view, best meet the need. The Commission, as provided in the Power Plant Siting Act, has exercised regulatory oversight of the utility's choice by approving or denying the specific proposed project.[16]

Thus, the Commission's role under the Power Plant Siting Act has consistently been to review utility decisions as to how the utility's need for additional generating capacity will be met to ensure compliance with these statutory objectives. See Orders cited in footnote 16.

The Commission's decision in this case is completely consistent with Commission rules, with past Commission practice applying the Siting Act, and with other statutes which the Commission administers. Nassau's attempted expansion of the statute is not. The Commission's conclusion that there is no reason arising from a shift in regulatory

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[16] Order No. PSC-92-0002-FOF-EI, 92 FPSC 3:19 (1992); Order No. 25805, 92 FPSC 2:658 (1992); Order No. 25567, 92 FPSC 1:57 (1992); Order No. 24986, 91 FPSC 8:533 (1991); Order No. 24268, 91 FPSC 3:518 (1991); Order No. 24042, 91 FPSC 1:557 (1991); Order No. 23963, 91 FPSC 1:57 (1991); Order No. 23080, 90 FPSC 6:268 (1990); Order No. 23079, 90 FPSC 6:240 (1990); Order No. 22590, 90 FPSC 2:399 (1990); Order No. 22335, 89 FPSC 12:262 (1989); Order No. 20930, 89 FPSC 3:274 (1989); Order No. 19468, 88 FPSC 6:185 (1988); Order No. 10785, 82 FPSC 5:78 (1982); Order No. 10278, 81 FPSC 9:135 (1981); Order No. 10108, 81 FPSC 6:220 (1981).

philosophy or a change in law that gives merit to Nassau's proposal, See R. VI, 1326-27 (Prehearing Order at 102-03); R. XXXV, 3757-58 (Nassau Need Order at 3-4), should be upheld. Walker, 350 So. 2d at 104.

B. The Commission's Application Of The Siting Act To Nassau Is Consistent With The Commission's Florida Crushed Stone Order.

The only support that Nassau gives for its argument that the Commission's decision is inconsistent with past Commission precedent is to note that when the Commission granted the FCS need determination in 1983 it "did not question" whether or not FCS met the definition of an applicant in Section 403.503. Nassau Brief at 18.[17] But the fact that the Commission did not address the issue in a prior case does not give that case precedential value as to how the issue ought to be decided when the Commission does address it. City of Miami v. Stegemann, 158 So. 2d 583, 584 (Fla. 3d DCA 1963) ("[N]o decision is authority on any question not raised and considered although it may have been involved in the facts of

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[17] Nassau makes two distinct arguments based on the FCS proceeding. First, it argues that the Commission should be bound by language in the Siting Board's FCS order discussing the definition of "electric utility." That argument is addressed at pages 17 to 22, supra. Second, Nassau argues that the Commission's failure to raise or address the issue of whether FCS met the definition of an applicant, when it considered the FCS determination of need petition, precludes the Commission from ruling that Nassau does not meet the statutory definition of applicant. The second argument is addressed here.

the case.").[18] The FCS order does not preclude the Commission's construction of the statutory definition in this case, where the issue has been squarely presented.

III.

DEVELOPERS ARE NOT ENTITLED TO A "COMPARATIVE" NEED HEARING AT WHICH THE COMMISSION SELECTS BETWEEN COMPETING APPLICATIONS.

Nassau does not simply seek reversal and reinstatement of its need petition. Instead, Nassau seeks the extraordinary relief of a mandate that the Commission (1) order FPL to file a study of the needs of its electric system, including FPL's estimates of the amount of capacity it will need in the future, the year in which the capacity will first be needed, and the unit FPL would build to meet its need; (2) allow Nassau to modify its "proposal;" and (3) hold a hearing on Nassau's need petition, considering Nassau's modified proposal as the only alternative for expanding FPL's electric system. Nassau Brief at 39. The factual and legal premises for Nassau's requested relief are invalid.

Factually, Nassau argues that its proposal deserves "priority" consideration over any other plans that FPL might pursue because Nassau "has successfully run the gauntlet of its competitors [presumably, others to whom FPL might look, in addition to its own construction alternative, for adding to

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[18] Moreover, as already discussed, because the FCS case is factually distinguishable from this case, it would not have presented the same issue that was presented and decided by the Commission in this case. See discussion at pages 17 to 19, supra.

its system]." Nassau's statement is inaccurate. The testimony in the Cypress case revealed that FPL had considered approximately 15 potential capacity suppliers before contracting with Cypress -- but that Nassau had never even put an offer on the table for consideration. R. XXII, 2143-44. Instead, Nassau waited until FPL had contracted to purchase capacity from the best alternative it had identified. R. XXII, 2140-41, 2143-44. Then, Nassau intervened in the Cypress proceeding to argue that it could better the Cypress contract <u>based on a different set of fuel price assumptions than FPL had used to evaluate the proposals from other potential suppliers</u>. R. XXII, 2044-47.

Moreover, the record reveals that Nassau's "proposal" was hastily put together for filing in the Cypress proceeding. Nassau's proposal was submitted so late in the proceeding that neither FPL nor the Commission "had sufficient time to adequately analyze Nassau's project[] ... [nor] conduct the level of discovery necessary for a need determination proceeding" before the Cypress hearing. R. VI, 1327 (Prehearing Order at 103). As a result, there were a number of unanswered questions about Nassau's proposal, and serious concerns regarding the viability of its project. R. XXII, 2043-47, 2139-51, 2158. The Commission rejected Nassau's motion to consolidate for these reasons as well. R. VI, 1327 (Prehearing Order at 103). All that Nassau has done, really, is ignore the Commission's rules directing that it negotiate

with FPL,[19] thereby avoiding the scrutiny that FPL gave to the proposals from other potential suppliers -- who did follow the Commission's rules and take their proposals to FPL for review, analysis and negotiation. R. XXII, 2037-43.

The legal basis for Nassau's claimed preference is also flawed. Nassau argues that where a governmental agency has before it competing, mutually exclusive applications to provide the same governmentally-licensed service, due process

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[19] Florida Administrative Code Rule 25-17.0834(1) provides that:

> Public utilities shall negotiate in good faith for the purchase of capacity and energy from qualifying facilities and interconnection with qualifying facilities. In the event that a utility and a qualifying facility cannot agree on the rates, terms, and other conditions for the purchase of capacity and energy, either party may apply to the Commission for relief. Qualifying facilities may petition the Commission to order a utility to sign a contract for the purchase of capacity and energy which does not exceed a utility's full avoided costs as defined in 366.051, Florida Statutes, should the Commission find that the utility failed to negotiate in good faith.

Florida Administrative Code Rule 25-17.0832(2) provides that "[u]tilities and qualifying facilities are encouraged to negotiate contracts for the purchase of firm capacity and energy." The rule then sets forth criteria that the Commission will consider in determining whether to approve a utility's <u>negotiated</u> <u>contract</u> for the purchase of capacity and energy from a qualifying facility. Nassau ignored these rules. Instead of approaching FPL with a proposal for negotiation, Nassau filed a so-called "Petition For Approval of Contract," asking the Commission to approve a unilateral contract proposal as a negotiated contract pursuant to Rule 25-17.0832. Nassau had not even communicated its proposal to FPL. R. XX, 1397; R. XXII, 2143.

requires a comparative review of the competitors' proposals. Nassau Brief at 26-28. The principle has no application here. First, the Commission determined that Nassau could not file its own competing need applications to meet an FPL need. Nassau obviously has no right to a comparative review for its petition for a determination of need if it was not entitled to file its independent petition in the first place. Therefore, if the Court affirms the Commission's interpretation of the Siting Act and dismissal of Nassau's independent petitions, it need not reach this issue at all.

Moreover, this is clearly not a case about a "governmentally-licensed service" being doled out between competitors in a government-regulated competition. The cases Nassau discusses to argue that the Commission should have given it a comparative hearing involved applicants competing for the right to provide a direct public service subject to entry regulation by the government. See Ashbacker Radio Corp. v. Fed. Communication Comm'n, 326 U.S. 327, 66 S.Ct. 148 (1945); Bio-Medical Applications of Clearwater v. HRS, 370 So. 2d 19 (Fla. 2d DCA 1979). The Ashbacker case was a Federal Communications Commission ("FCC") radio licensing case. In Ashbacker the United States Supreme Court based its decision on language in the Federal Communications Act granting "timely and bona fide" applicants for a radio station license a right to hearing before denial of a station license. The Court held that the FCC was required to grant a comparative hearing when

it had before it two competing applications for an exclusive broadcast license to serve the public in a specific geographic area. 326 U.S. at 333; 66 S.Ct. at 151.

In Bio-Medical, HRS refused to combine for comparative review two timely, bona fide certificate of need ("CON") applications for dialysis treatment facilities in the same HRS district. Id. at 20. As in Ashbacker, the CON applicants were seeking to provide services directly to the public under a statutory scheme in which the government granted monopoly or quasi-monopoly status to a successful applicant. The CON statute was designed to limit competition "to achieve more efficient and economical uses of health services," and the purpose of the proceeding was to determine which competitor the government would choose to provide services directly to the public. Id. at 20-21. Under those circumstances, the court applied the Ashbacker doctrine to Florida's medical certificate of need statute.

However, the principle of Bio-Medical does not apply where, as here, a layer of decision-making is interposed between those seeking to supply the product and the government agency charged with regulatory oversight. The Commission does not stand, in relation to Nassau, in the same position as HRS did in relation to the competing dialysis providers. HRS was by statute directed to make the decision in the first instance as to who among competing suppliers should be selected; the

Commission is directed by the need statute to confirm or deny the selection made by FPL.

This distinction was recognized and the Ashbacker doctrine was held inapplicable in a case like this one, where a utility selected between multiple wholesale suppliers that were competing to sell it electric generating capacity, and brought its selection to a state regulatory Commission for approval. Consumers Power Co. v. PSC, 472 N.W.2d 77 (Mich. C. App. 1991), rev. denied, 479 N.W.2d 644 (Mich. 1992).

In Consumers Power a utility contracted with several developers to meet its need for additional capacity. When the utility filed for approval of its contracts with the Michigan Public Service Commission, developers with eighty-five power plant projects attempted to file independent petitions or intervene in the utility's case to present testimony regarding the merits of their competing projects. Id. at 84-85. All of these proceedings were consolidated for a hearing which lasted from May 2, 1988 through September 30, 1988. Approximately 60 parties participated. In the end, the Michigan Commission approved some of the utility contracts and rejected others, but refused to force the utility to contract with any of the intervening developers.

One of the disappointed intervenors appealed, citing Ashbacker and arguing that the Michigan PSC should have held a comparative hearing at which it allocated the utility's capacity need among developers and ordered the utility to

contract with the winners. Id. at 88-89. The Michigan court rejected this argument, reasoning that neither federal law nor state statutes granted the Michigan PSC authority to "make managerial decisions for utilities"; and that where the PSC was required to approve or disapprove the utility's decisions, there was "no license, right, or privilege being doled out by the government." Id. at 91. Therefore, the court held that a developer with which a utility did not contract to supply part of its need was not entitled to a comparative hearing. Id.

The point that Nassau seems to miss is that a determination of need is not equivalent to a contract award, and both are necessary for the successful development of its project.[20] Although Nassau asked the Commission to order FPL to contract with it, there is nothing in the Siting Act that requires the Commission to determine who will own or operate a generating unit it may determine to be "needed." See § 503.419, Fla. Stat. (1991). The Siting Act does not obviate the need for successful contract negotiations with the utility.

As the Commission has recognized, FPL's choice of a supplier of power is, in the first instance, FPL's decision to

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[20] Nassau will not build its proposed project unless a utility contractually commits to pay it for its capacity and energy. R. XVII, 659-62, 964-65, 975-80, 984; XXVII, Ex. 39, PNC-13 at 3 of 4 and PNC-14 at 2 of 3. Therefore, regardless of whether Nassau licenses a power plant, the plant will only be developed if FPL or another Florida utility contracts to buy capacity and energy from the facility.

make. While the Siting Act and the Commission's contract approval process give the Commission a role in reviewing and approving FPL's selection, the selection itself is not a government regulated competition. Therefore, FPL's capacity decisions are analogous to the decision that a radio station makes in choosing a vendor for its radio transmitter, or that a hospital makes in choosing vendors of x-ray equipment. Those purchase decisions do not trigger the right to an Ashbacker-type hearing even if, as in Consumers Power, there is some required governmental review and approval of the purchase decision. Therefore, the Court should reject Nassau's argument that it was entitled to a comparative hearing.

IV.

NASSAU'S OFFER TO DEVELOP ITS PROJECT TO MEET THE CRITERIA FOR QF STATUS UNDER THE PUBLIC UTILITIES REGULATORY POLICIES ACT DOES NOT ENTITLE NASSAU TO UNCONDITIONAL ACCESS TO A DETERMINATION OF NEED PROCEEDING OR TO AN AFFIRMATIVE DETERMINATION OF NEED IN THE CYPRESS PROCEEDING.

A. The Commission's Construction Of The Siting Act Is Consistent With The Public Utilities Regulatory Policies Act And State Statutes And Regulations Regarding Cogeneration.

Traditionally, FPL met its customers' demand for electricity through a mix of generating plants owned by FPL and purchases from other power producers who were investor-owned or municipal utilities. With the passage of the Public Utilities Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-3 (1992), Congress sought to encourage the development

of power producers who, by definition, were not also retail suppliers of electricity. 16 § U.S.C.824a-3(a) (1992). The net effect is that retail suppliers of electricity, such as FPL, still possess the statutory right and obligation to provide service but there is a wider array of wholesale power producers to which the retail supplier can look to meet its need for additional generating capacity.

Nassau argues that because it has "...a federal right pursuant to ...[PURPA] to sell capacity ... to a utility," Nassau Brief at 12 (emphasis supplied), the Power Plant Siting Act must be interpreted to grant it unconditional access to a determination of need proceeding.

A regulated utility's obligation to purchase power from an entity that meets the eligibility criteria for status as a qualifying facility under PURPA[21] is neither as absolute nor as simplistic as Nassau suggests. The obligation to purchase established in broad outline by PURPA, 16 U.S.C. § 824a-3(a)-(d) (1992), was defined and qualified through implementing regulations adopted by the Federal Energy Regulatory Commission (FERC), 18 C.F.R. § 292.401, and, with even greater specificity as to the qualified nature of the obligation to purchase capacity, by state regulatory commissions such as the Commission. Fla. Admin. Code R. 25-17.0825; 25-17.0832.

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[21] The eligibility criteria relate to the ownership and fuel efficiency of the proposed facility. 18 C.F.R. § 292.201-207. An entity that meets these criteria is referred to as a qualifying facility (QF).

FERC and the Commission recognized that the sale of electrical power may involve two distinct components, the sale of electrical energy and the sale of electrical generating capacity. 18 C.F.R. § 292.304 (d) - (e); Fla. Admin. Code R. 25-17.0825; 17.0832.[22] The sale of capacity represents a commitment by the QF to produce, or be able to produce at the buyer's direction, an agreed upon maximum amount of power over a specified time period. Because the commitment is made, the seller's capacity can be counted by the purchasing utility in calculating the reliability of its system.[23]

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[22] The output of an electrical generating unit, actual electricity, is often referred to as electrical energy, or simply energy (the amount is expressed in kilo-watt hours; large amounts are often referred to in mega-watt hours (1 mega-watt = 1,000 kilo-watts)). The capability of the unit to produce power is referred to as capacity (every electrical generating unit has a maximum rated capacity, expressed in kilo- or mega-watts). When power is sold on the wholesale market, it may be a sale of energy alone or it may be a sale of energy and capacity. Sales of energy alone are on an as-available basis; both the timing and magnitude of the sale are within the sole discretion of the seller. With some distinctions not germane to this discussion, see Fla. Admin. Code R. 25-17.086, PURPA, as implemented by the regulations of FERC and the Commission, gives QFs a fairly unqualified right to interconnect with and sell as-available energy to regulated utilities. Fla. Admin. Code R. 25-17.0825 (1). Florida Crushed Stone, for example, sought a determination of need solely on the basis of internal consumption of power it generated and sales of as-available energy to regulated utilities.

[23] Sales of energy and capacity customarily involve a variable payment for energy, based on the KWH output, and a fixed payment for capacity based on sustained output over a period of time. Under PURPA, as implemented by the regulations of FERC and the Commission, absent negotiation of a different price, QFs are paid the utility's avoided cost for the power they produce and sell to the utility. 16 U.S.C. § 824a-3 (a) (d); 18 C.F.R. § 292.304; Fla. Admin. Code R. 25-17.0825; 25-17.0832.

However, the obligation to purchase capacity has always been qualified; it is an if-then test with several parts: if the purchasing utility needs additional generating capacity as well as energy, and if the QF is willing to enter firm contractual commitments, and if the QF is willing to sell capacity at a cost at or below the utilities' avoided costs at terms mutually satisfactory to both parties, then the capacity contribution of the QF must be recognized and compensation provided for it.[24] Fla. Admin. Code R. 25-17.0832. But if a utility can procure capacity on terms and conditions superior to those offered by a large QF, there is no obligation to purchase capacity from that QF.

The Commission has implemented PURPA through rules requiring FPL to negotiate in good faith with QFs toward the purchase of capacity. See Fla. Admin. Code R. 25-17.0834.

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[24] As FERC noted in the comment accompanying promulgation of its regulations, state regulatory commissions are given "great latitude" in implementing the FERC regulations:

> [s]uch implementation may consist of the issuance of regulations, an undertaking to resolve disputes between qualifying facilities and electric utilities arising under Subpart C, or any other action reasonably designed to implement such subpart.

18 C.F.R. § 292.401 (a); Docket No. RM 79-55, Order No. 69, 45 Fed. Reg. 12,214, 12,230 (Feb. 25, 1980). To implement PURPA and the FERC regulations, the Commission adopted rules that prescribe standard rates for the purchase of a prescribed amount of capacity from small (less than 75 MWs) QFs, Fla. Admin. Code R. 25-17.0832, and required utilities to negotiate for the purchase of capacity from large QFs. Fla. Admin. Code R. 25-17.0834.

Specifically, Rule 25-17.0834 imposes an obligation to negotiate in good faith on both potential sellers, who, like Nassau, claim to meet the QF eligibility criteria, and on potential utility buyers, like FPL. Order No. PSC-92-0703-FOF-EI, 92 FPSC 7:514. However, the statutory interpretation sought by Nassau would permit a potential QF developer to bypass any attempt at negotiation with the purchasing utility. Therefore, Nassau's proposed interpretation directly conflicts with the very regulations adopted by the Commission to implement PURPA.

This point was confirmed in the course of adjudicating a complaint brought by a potential QF against FPL for failure to negotiate a contract to purchase its energy and capacity pursuant to Fla. Admin. Code R. 25-17.0834. The Commission specifically found that:

> A utility has the obligation to fulfill its capacity needs by the most cost-effective means available. ... [It] does not have the obligation to enter into a <u>contract</u> with every cogenerator that approaches it. If a utility were to sign a negotiated contract with every cogenerator that comes to it with a proposal, it would most probably be ignoring its mandate to obtain the most cost-effective and needed energy for its ratepayers.

Order No. PSC-92-0703-FOF-EI, 92 FPSC 7:514, 518 (emphasis in original). The order went on to hold that under "applicable state and federal law" a utility had an obligation to negotiate in good faith for a potential purchase but did not have an obligation to purchase (capacity) in every case. <u>Id.</u>

In essence, QFs as a class have a right to be considered by a utility in the utility's capacity selection process. Middle South Services, Inc., Docket No. ER 81-428-000, 81-438-000, Op. No. 246, 33 FERC ¶ 61,408 (1985). But the right not to be foreclosed from being considered for a capacity purchase does not give an individual QF a "federal right" to override a state law that requires selection of the most cost-effective alternative for new generating capacity and force a purchase of its capacity on a regulated utility. FERC has confirmed this with every grant of QF status it has issued:

> Certification as a qualifying facility serves only to establish eligibility for benefits provided by the Public Utility Regulatory Policies Act of 1978 as implemented by the Commission's regulations, 18 C.F.R. Part 292. It does not relieve a facility of any other requirement of local, state or federal law, including those regarding siting, construction, operation, licensing and pollution abatement. Certification does not establish any property rights, resolve competing claims for a site, or authorize construction.

This statement of the limited reach of QF status is routinely appended to all FERC orders concerning QF status. See, e.g., Central Florida Power, L.P., Docket No. QF 93-15-000, 62 FERC ¶ 62,092.

The Commission's regulations delineating FPL's obligation to purchase energy and capacity under PURPA are designed to mesh with the statutory directive of Section 403.519, to ensure that a plant proposed by a utility to meet the needs of its customers is the most cost-effective alternative

available. Neither PURPA nor the Commission's implementing regulations were meant to nor do they furnish statutory authority to transform a determination of need proceeding into an initial bidding process conducted under the Commission's auspices. What Nassau was entitled to, as a matter of federal law, was an opportunity to be timely considered by FPL as a potential capacity supplier; an opportunity Nassau chose not to pursue. R. XX, 1397. The Commission's order on this point should be affirmed.

B. Nassau's Offer To Develop Its Project To Meet The Criteria For QF Status Under The Public Utility Regulatory Policies Act Does Not Entitle It To An Affirmative Determination Of Need.

Nassau makes a somewhat vague argument that it is entitled to absolute victory by virtue of its offer to develop a project that would meet the eligibility criteria for status as a qualifying facility (QF) under PURPA. Nassau begins by stating that PURPA preempts every state law that would conflict with the regulated utilities' unqualified obligation to purchase power from a QF.[25] But Nassau immediately concedes that the jurisdiction of the states to authorize the licensing and construction of new power plants is not preempted by PURPA.[26] Nassau nevertheless maintains that it

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[25] "The United States Supreme Court described QFs' exemption from certain state laws and regulations as 'nothing more than preempting conflicting state enactments in the traditional way.'" Nassau Brief at 33.

[26] "In enacting PURPA, Congress did not directly preempt the jurisdiction of the states to authorize the construction of QFs." Nassau Brief at 33.

has a "federal right" as a QF to sell power to FPL which compels the Court to reach the conclusion that it alone is entitled to a contract with FPL and a corresponding determination of need.

The Commission's holding that Nassau was not entitled, by virtue of its status as the only proposed QF who intervened in the FPL-Cypress proceeding, to close out the competition if FPL begins its capacity selection process again is correct for many reasons. From the standpoint of Nassau's QF status, it is correct because Nassau is not entitled to a preference greater than any other potential QF. See Order No. PSC-92-0703-FOF-EI, 92 FPSC 7:514, 521. From the standpoint of FPL's obligation to serve, it is correct because granting Nassau's petition would put the Commission in the position of initially selecting a capacity supplier rather than approving or denying the regulated utility's choice.[27]

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[27] By arguing that it is now entitled to an outright win, or, at the least some preference in a future selection process, Nassau attempts to collapse the retail and wholesale electricity markets into one. In effect Nassau would relegate the statutory obligation to serve to nothing more than a passive obligation to give notice to the Commission that additional generating capacity was wanted. In Nassau's view, this would signal the Commission to provide a forum for any interested potential supplier to enter a need proceeding to cut a deal directly with the Commission which, in turn, through the exercise of some unidentified statutory authority would foist the deal, under the guise of identifying the most cost effective alternative, on the regulated utility. Yet PURPA expressly states that any rules adopted by FERC for its implementation "may not authorize a qualifying cogeneration facility or qualifying small power production facility to make any sale for purposes other than resale." 16 U.S.C. § 824a-3 (a) (2) (1992). The Commission's interpretation of Section 366.02(1), Florida Statutes, that sales to any retail consumer

The conclusion is also consistent with the Commission's factual findings. The Commission rejected Cypress' petition, in part, because the Cypress project and the contract between Cypress and FPL did not have what the Commission referred to as capital/fuel flexibility. R. XIII, 2411. Yet Nassau repeatedly emphasized that the contract it offered was the same in all respects except that it offered a lower price relative to Cypress.[28] Therefore, whatever infirmities the Commission found in the Cypress project are shared by Nassau in like measure. If the Commission rejects one for lack of fuel/capital flexibility, all similar contracts would, by the Commission's logic, be equally unacceptable.[29]

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subjected the seller to the Commission's regulatory jurisdiction was upheld in PW Ventures, Inc. v. Nichols, 533 So. 2d 281 (Fla. 1988). The Court should sustain the Commission's refusal to permit back-door deregulation of the retail electric power industry by allowing a potential supplier to capture an incremental segment of retail need by making a pitch directly to the Commission to serve that need.

[28] The price offered by Nassau was not lower than the price offered by intervenors ARK Energy, Inc. and CSW Development-I, Inc. R. XIII, 2046. Nassau does not explain, how, in its view of the case, this is not determinative of the ultimate outcome.

[29] Nassau does not escape this result by proposing a natural gas-fired project. The Commission posited benefits associated with a natural gas-fired generating unit because, compared to a coal-fired unit, fewer of the total (including both fixed capital investment and variable fuel costs) expenditures for the unit, were made for fixed capital investment. But, because it was an attempt to undercut Cypress as to price only, and not a restructuring of the fixed capital/variable fuel expenditure split, Nassau's proposed contract reflects proportionate capital and fuel expenditures for a coal unit. Thus, while Nassau proposed a lower "price," the profile of the consequent payment stream that would be experienced by FPL's customers would be the same for Nassau's

Nassau relies heavily on the legislative preference for the encouragement of cogeneration found in Section 366.81, Florida Statutes. The Commission has consistently interpreted Section 366.81, Florida Statutes, to mean that before considering a utility's application to build new generating capacity, the Commission will evaluate the utility's efforts to purchase the needed capacity from potential QFs. The Commission made this point in a recent determination of need proceeding wherein the Florida Industrial Cogeneration Association (FICA) argued that "these two legislative declarations provide a presumption that firm cogeneration capacity is cost-effective and is to be preferred over utility construction. Concrete proof to the contrary must be presented before a certification of need for utility construction can be issued." Order No. 25805, 92 FPSC 2:658, 783. The Commission characterized FICA's argument as "far exceed[ing] a reasonable interpretation of the intent" of the statute. The Commission went on to lay out the extent of the statutory preference:

> In response to this legislative directive the Commission considers relevant cogeneration issues as a matter of course in utility need determination proceedings. The question of whether a utility has adequately explored and evaluated the availability of non-utility generation to meet projected capacity needs is a standard line of inquiry in the Commission's investigation of the cost-effectiveness of proposed utility

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proposal as for a coal-fired unit.

> generation projects, as it was in this case. (See Issue 20 at page 6 of the Recommended Order) This is the "liberal construction" of section 403.519 that is contemplated by section 366.81.
>
> FICA is asking the Commission to gamble with the reliability of F[lorida] P[ower] C[orporation]'s system and jeopardize the economics of FPC's proposal based on the hope that suitable QFs will be there when the capacity is needed and the unsupported assumption that they would be more cost effective than utility construction.

Id.; see, also, Order No. PSC-92-0002-FOF-EI, 92 FPSC 3:19, 35.

In the present case the Commission added the further gloss that in cases of a tie, the nod might go to the QF:

> 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 Statues, 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, 92 FPSC 11:363, 380, n.4.

Nassau stresses that it has offered to sell FPL capacity below FPL's cost to construct new capacity (FPL's avoided cost). But that is not the only inquiry under the Power Plant Siting Act. The Commission must consider whether, among other things, the proposed plant, even if it is to have QF status, is the most cost-effective alternative reasonably available.

The statutory direction to encourage the development of QFs does not change the essential nature of the Commission's inquiry, which is whether the utility's proposal to meet its need for additional generating capacity meets <u>all</u> of the criteria of the Siting Act. The Commission's order on this point should be affirmed.[30]

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[30] In addition to dismissing its petition for a determination of need, one of the orders Nassau appeals also dismissed its petition for contract approval. The order notes that dismissal of the petition for contract approval is additionally appropriate because Nassau did not have a contract with FPL:

> Rather, these parties hope the Commission will order FPL to execute a contract. A contract requires an offer and an acceptance. The documents submitted by Ark and Nassau are merely offers which have not been accepted by FPL. As such, they are not contracts and there are no contracts before the us (sic) which could be approved.

Order No. PSC-92-1210-FOF-EQ, 92 FPSC 10:651, 654. Dismissal of the petitions for contract approval is consistent with Fla. Admin. Code R. 25-17.0832 which provides that utilities and large QFs may negotiate contracts for the sale of energy and capacity and with Fla. Admin. Code R. 25-17.0834 which authorizes either a large QF or a utility to petition the Commission for relief in the event the parties cannot agree on terms and conditions of a contract; the rule provides that the Commission may order a utility to enter a contract which does not exceed the utility's avoided cost "...should the Commission find that the utility failed to negotiate in good faith." Nassau did not attempt to negotiate with FPL for the

CONCLUSION

The Commission did not reach its conclusion as to the proper interpretation of the Power Plant Siting Act and consequent disposition of Nassau's need and contract approval petitions as a sterile exercise in statutory interpretation, unrelated to the Commission's ongoing regulatory efforts. The Commission has been active in oversight of the expansion of the electric power grid in Florida.

The Commission has conducted continuous reviews of the generation expansion planning efforts of all the electric utilities in the state. Through workshops and contested adjudicatory hearings, the Commission has sought both to educate itself about the process of utility generation expansion planning and to review the results of that process from the perspective of both the individual utilities and the state as a whole. See orders cited in footnote 13, supra. The Commission has delved into the intricacies of such topics as predicting the future demand for electricity (load forecasting), quantifying the critical factors that drive the cost of new supply options, determining the commercial practicability of new and developing technologies, and the shifting availability of fuel types and supplies. Id. The

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contract it asked the Commission to approve, and it did not allege failure to negotiate in good faith by FPL in seeking contract approval, which is a predicate under the rule for the relief it sought. Nassau does not address dismissal of its petition for contract approval in its brief; the Commission's order on this point should be affirmed.

Commission has also attempted to identify and understand the interplay of factors that affect the risks, to electric utilities and their customers, associated with commitment to a particular generation expansion strategy. Id.

During this same time period the Commission has presided over utility efforts to reduce the future demand for electricity and thus the need for additional generating resources. The Commission has regularly inquired into both the scope and adequacy of utility conservation efforts and expenditures from both a conceptual perspective and through regular examinations of utility expenditures for conservation. See, e.g., Order No. 23560, 90 FPSC 10:158; Order No. PSC-93-0407-FOF-EG, 93 FPSC 3:428.

In a parallel development, the Commission has been the lead agency charged with implementing the mandate of Congress to encourage the development of more fuel-efficient and non-traditional sources of electrical generation, so as to defer or avoid the need for construction of additional generating capacity by regulated utilities. The Commission first adopted regulations on this subject in 1979 and on two subsequent occasions has undertaken a comprehensive review and overhaul of them. Order No. 12634, 83 FPSC 10:150; Order No. 23623, 90 FPSC 10:405.

Finally, the Commission has been called upon to apply the Siting Act on a number of occasions where it has had to delineate the relationship between the criteria in Section

403.519 to on-going regulatory efforts in these related areas. <u>See</u> orders cited at Footnote 16, <u>supra</u>.

Along the way the Commission has accumulated a great deal of institutional wisdom and expertise as to how all of these statutory directives, preferences, and objectives can be implemented to work in harmony. Although this case can and should be decided by a plain reading of the statutory language, it should also be recognized that the same policy-type arguments Nassau makes for rejecting a plain reading of the statute were considered and rejected by the Commission, on five separate occasions during the course of this proceeding and the related FPL-Cypress proceeding. As shown in the order on appeal, the Commission's dismissal of Nassau's petitions for determination of need and contract approval was infused with consideration of the interplay of the statutory directives and preferences it is charged to implement.

For the reasons set forth above, the Commission's orders should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Appendix A: Summary Of Testimony From Cypress Proceeding

The uncontroverted testimony in the Cypress case demonstrated that a utility's capacity decision is one of the most important decisions made by the utility's management. It is at the heart of the utility's obligation to, as one witness put it, "keep the lights on." R. XXII, 2079. If FPL selects a poorly planned or designed project, contracts with an unreliable developer, or imprudently times its decision, any one of those mistakes could seriously impair FPL's quality of service. R. XXII, 2039-40, 2078-80, 2141, 2143-44, 2149-51, 2191-92, 2223-38. The capacity decision can also affect FPL's rates for years into the future. Id. When additional capacity is needed, FPL must review all of its options -- including wholesale proposals such as those from Nassau -- and must act reasonably and prudently in selecting the best option. R. XXII, 2073, 2079-81; Order No. PSC-92-0703-FOF-EI, 92 FPSC 7:514. Therefore, it is essential that the capacity selection process be an orderly one that will result in the best decision possible. Id.; R. XXII, 2039-43.

FPL's planning and capacity selection process is extremely well documented in the record. R. I, 16-148; XVI, 66-75, 84, 213-225, 227-29. First, a number of FPL departments gather extensive data and prepare reasoned assumptions about the future and about various generating technologies based on that data. R. XVI, 213-14, 216-20; XXIII, Ex. 7 at 9-52. FPL then conducts reliability

assessments of its own system; conducts technical and economic screenings to eliminate from further consideration unreliable or infeasible generating technologies; conducts detailed economic analyses of the best options identified in the screening evaluation; and conducts sensitivity analyses to test the results of its detailed economic analyses under differing assumptions. R. XVI, 213-25, XXIII, Ex. 7 at 53-79. FPL then considers a number of strategic factors such as environmental concerns, economic risk to customers, operational flexibility, and the financial integrity of FPL. R. XVI, 227-29; XXIII, Ex. 7 at 74-77. These steps all lead to standards against which FPL measures the benefits and risks of wholesale power proposals offered by entities such as Nassau. R. XVI, 231-232. Because FPL is responsible for the decisions affecting its system, it can time its comparative review of all available options to optimally match the needs that it identifies.

In making this comparison with the 1991 proposals, FPL gathered information from each developer sufficient to allow it to analyze seven aspects of each proposal: (1) economic (cost to FPL's customers); (2) financial (developer's ability to finance and operate its project successfully); (3) environmental (environmental licensing risks such as those associated with the specific site chosen by a developer, transmission line routing and plant type); (4) fuel supply (for example, adequacy of supply and risks of fuel

transportation disruption); (5) plant reliability (issues related to the specific plant design proposed); (6) dispatchability (FPL's ability to control the plant's electrical output as needed to meet its customers' energy demands); and (7) other considerations. R. XVI, 67-73; XXIII, Ex. 7 at 81-111. For example, in the environmental area, FPL reviewed data related to the proposed plant's air emissions, wetlands impacts, public support or opposition, solid waste disposal plans, and several other categories -- all to enable FPL to search for fatal flaws that might jeopardize the project, and to judge each proposal, one against the other, with respect to relative strengths and weaknesses in each sub-category. R. XVI, 84. As in the past, FPL completed its process, selected a capacity option and, after negotiating a contract to effect the purchase, took its decision to the Commission for review.

Because Nassau took its offer to contract with FPL straight to the Commission, FPL was not able to conduct a critical review of Nassau's proposed project. R. XXII, 2143-44.[1] In fact, at the time of the hearing, FPL had a number of unanswered questions about Nassau's proposal and serious concerns about the viability of its project. R. XXII, 2043-47, 2139-51, 2158. The Commission expressed similar concerns, concluding that its "staff hasn't had sufficient time to

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[1] Additionally, Nassau withheld vital information based on a claim of confidentiality. R. III, 448-59; XIX, 1207-19; XX, 1351-63, 1445-46.

adequately analyze ... Nassau's project[]." R. VI, 1327 (Prehearing Order at 103).[2]

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2 Nassau has not challenged this finding.