IN THE SUPREME COURT OF FLORIDA

CYPRESS ENERGY PARTNERS, LIMITED PARTNERSHIP, Appellant v. J. TERRY DEASON, ETC., et al. Appellees	*	CASE No. 81,131
NASSAU POWER CORPORATION, Appellant v. J. TERRY DEASON, ETC., et al. Appellees	*	CASE No. 81,496

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NOS. 920520-EQ, 920769-EQ,
920783-EQ, 920761-EQ, AND 920762-EQ

ANSWER BRIEF OF APPELLEE
STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION
CASE NO. 81,496

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PRELIMINARY STATEMENT

The following signals and abbreviations will be employed in this Answer Brief:

The Florida Public Service Commission will be referred to as "the PSC" or "the Commission." Cypress Energy Partners, Limited, will be referred to as "Cypress." Florida Power and Light Company will be referred to as "FPL." Nassau Power Corporation and ARK Energy, Inc./CSW Development I will be referred to as "Nassau" and "ARK," respectively. State of Florida Department of Environmental Regulation will be referred to as "the Department."

References to the record on appeal will be signalled by "R-" and the page number to which reference is made. References to the Initial Brief of Appellant Nassau will be indicated by "Initial Brief at" followed by the page number to which reference is made.

STATEMENT OF THE CASE AND OF THE FACTS

Pursuant to Rule 9.210 (c), Florida Rules of Appellate Procedure, a statement of the case and of the facts is omitted.

SUMMARY OF ARGUMENT

Argument I

The Florida Electrical Power Plant Siting Act (PPSA) provides an exclusive, centrally-coordinated "one-stop" licensing process for the siting of new electrical power plants, administered by the Department of Environmental Regulation on behalf of the Governor and Cabinet sitting as the Siting Board. The Siting Board takes final action on applications for power plant certification submitted by "applicants" within the meaning of Section 403.503(4) of the PPSA.

Under Section 403.519 of the Florida Energy Efficiency and Conservation Act (FEECA), the Florida Public Service Commission (PSC) is designated as the "sole forum" for determining the need for a power plant subject to the PPSA. Without an affirmative determination of need, an "applicant" may not proceed to a certification hearing before the Siting Board.

Section 403.519 is not part of the PPSA. Therefore, when the PSC construes Section 403.519, it does not construe the PPSA. The PSC is entitled to interpret Section 403.519 in a way that is consistent with legislative intent, and may limit the class of persons who may bring an independent need determination proceeding to "entities ultimately consuming power." The PSC is not entitled to interpret the Power Plant Siting Act in such a way as to displace the Siting Board's interpretation of the PPSA.

In denying Nassau Power Corporation the right to institute an independent need proceeding under Section 403.519, the order on review adopted an erroneous rationale. By attempting to borrow the definition of "applicant" from the PPSA because the term "applicant" is undefined in the FEECA, the PSC erred in three ways. First, it was unnecessary to the result that the PSC desired to reach. Second, the PSC rejected an existing construction of the same definition by the Siting Board, which interpretation was entitled to deference from the Commission. Third, the construction of §403.503(4) adopted by the Commission departs from the language of statute it interprets.

The definitional disagreement here hinges on the term "electric utility" as defined in Section 403.502(13) of the PPSA, a definition unchanged since the enactment of the PPSA in 1973. In its 1984 Florida Crushed Stone certification order, the Siting Board refused to deny certification to the Florida Crushed Stone 125 MW cogeneration plant because the company was not an "electric utility" as defined, and therefore was not a lawful "applicant" under the PPSA. The Siting Board held that, upon certification, the Florida Crushed Stone Company would be in the business of generating electricity, and therefore was an electric utility for purposes of the PPSA.

Under settled rules of statutory construction, the legislature can be charged with knowledge of, and acquiescence in, the Siting Board's interpretation of "electric utility" because the definition was reenacted in 1990 without change. The PSC should not be allowed to overturn the Siting Board's

definitive construction of its own statute merely because the PSC prefers a more restrictive definition of the term "electric utility."

The error of the PSC's rationale is demonstrated by the order's effort to derive an instant exception to its own rule that non-utility generators may not institute an independent need proceeding. Entities otherwise disqualified from seeking a need determination may do so, according to the order, **if** they have a contractual relationship with a utility. Nothing in 403.503(13), however, defines "electric utility" to include an entity in contractual privity with a utility.

If the PSC's construction of what "applicant" means under the PPSA is approved by affirmance of the order, no non-utility generator will be able to avail itself of the PPSA's processes. The "would-be electric utility" will be shut completely out of the PPSA process. This result is not demanded by statute and was specifically rejected by the Siting Board in a logical construction of the PPSA. Moreover, during the first ten years of the existence of Section 403.519, this result was never demanded by the PSC, which, until 1990, entertained need proceedings brought independently by non-utility generators.

The Commission may lawfully construe Section 403.519 to deny anyone but "entities ultimately consuming power" the right independently to initiate a need determination proceeding under Section 403.519. Based on this Court's Nassau Power Corporation v. Beard decision, the Court should affirm the

result reached by the Commission in the order on review. But the Department urges the Court conclusively to reject the Commission's effort preemptively to construe the PPSA to explain its desired result. Section 403.519 and the PPSA should be construed **in pari materia** to give effect to both statutory enactments.

Argument II

Nassau argues that the PSC is required to give comparative review of competing power plant proposals under the authority of the U. S. Supreme Court decision in Ashbacker Radio Corp. v. Federal Communications Commission, 325 U. S. 327 (1945), as applied in Florida administrative law in court decisions such as Bio-Medical Applications of Clearwater, Inc. v. Department of Health and Rehabilitative Services, 370 So. 2d 19 (Fla. 2d DCA 1979). Nassau asserts that even though it was given intervenor status in the case below, it was still deprived of due process because the merits of its proposal were not heard in "comparative consideration" with the rejected Cypress proposal.

Both Ashbacker and Bio-Medical Applications of Clearwater hinge upon

> [a] general principle that an administrative agency is not to grant one application for a license without **some appropriate consideration** of another bona fide and timely filed application to render the same service; the principle therefore, constitutes a fundamental doctrine of fair play which administrative agencies must dilgently respect and courts must be ever alert to enforce.

There is no compelling legal reason why the Ashbacker doctrine should not apply in the context presented here if it

is deemed to apply to licenses for radio stations and kidney dialysis facilities. If fundamental fairness requires a comparative review of mutually exclusive license applications, then the PSC cannot lawfully deny ARK and Nassau both the independent right to institute their own need cases **and** the dependent right to substantive comparison of their proposals with that advanced in a utility-instituted need proceeding like the case at bar.

Argument III

Even if the Court were to determine that Nassau possessed a superior right to a contractual relationship with FPL based upon its status as a qualifying cogeneration facility under 16 U.S.C. § 824a-3, Nassau would still need an "affirmative need determination" under Section 403.519, Florida Statutes. If the Court affirms the PSC's refusal to allow Nassau to institute its own need proceeding, and if Nassau is unable to obtain the cooperation of FPL via a power sales agreement, Nassau's claim will be stymied. Conversely, if the Court determines that Nassau and ARK were entitled to a comparative review proceeding before the PSC in connection with the FPL-Cypress need petition, then issues as to the supposed superior right of a QF to supply power to a utility will be addressed in any remand proceeding ordered by the Court. This issue is not ripe for resolution in this case.

ARGUMENT

INTRODUCTION: Is Section 403.519 Part of the Siting Act?

The Florida Electrical Power Plant Siting Act, Section 403.501-.518, Florida Statutes (Supp. 1992) ("the PPSA") establishes an exclusive, centrally-coordinated "one-stop" licensing procedure for the siting of new electrical power plants of 75 megawatt (MW) or greater steam electrical generating capacity. §403.506(1), Fla. Stat. (Supp. 1992). This procedure is administered by the Department of Environmental Regulation on behalf of the Governor and Cabinet of the State of Florida, sitting as the Siting Board. §403.503(6), Fla. Stat. It is the duty of the Siting Board, pursuant to Section 403.509(1), Florida Statutes, to take final action on applications for power plant site certification submitted by "applicants" as defined in Section 403.503(4) of the PPSA. The legislative purpose behind the PPSA is "minimizing the adverse impact of power plants on the environment." Nassau Power Corporation v. Beard, 601 So. 2d 1175, 1176 (Fla. 1992)

The Florida Energy Efficiency and Conservation Act, Sections 366.80-366.85 and Section 403.519, Florida Statutes (Supp. 1992), ("FEECA") establishes the Florida Public Service Commission as the "sole forum" for determining the need for an electrical power plant subject to the PPSA. Section 403.508(3) of the PPSA provides that an affirmative determination of need

pursuant to Section 403.519 "shall be a condition precedent to the conduct of the certification hearing" with respect to a new power plant site subject to the PPSA.

Under existing law and practice of the Siting Board, no PSC need determination is necessary before an applicant for power plant site certification under the PPSA may file an application with the Department. No PSC need determination is necessary before an applicant may participate in a land use hearing before the Division of Administrative Hearings (DOAH) as to whether its proposed electrical power plant site is consistent and in compliance with existing land use plans and zoning ordinances; no PSC need determination is necessary before the Siting Board can take action to review and approve a recommended order from DOAH as to a land use hearing for an applicant's proposed site. § 403.508(1), Fla. Stat. Even if a Siting Board decision favorable to the applicant issues after the land use hearing--the first of two mandatory hearings as to applications under the bifurcated procedure established under the PPSA--an applicant which fails to receive an affirmative need determination from the PSC cannot proceed to a certifcation hearing--the second mandatory administrative hearing required under the PPSA--and, hence, can never obtain certification to construct its proposed power plant. See §403.506(1) (no new electrical power plant may be constructed without certification)

The foregoing paragraphs show the inextricable interrelationship between the PPSA and the Florida Energy

Efficiency and Conservation Act. While the PPSA and Section 403.519 are statutorily juxtaposed, they are not parts of a single organic enactment. See § 366.80, Fla. Stat. (1991) (§ 403.519 part of FEECA) This distinction was overlooked by this Court in Nassau Power Corporation v. Beard, **supra,** at 1176, n.5, where it was erroneously noted that Section 403.519 was "codified as part of" the PPSA. **But see** § 403.501, Fla. Stat.: "Sections 403.501-403.518 shall be known and cited as the "Florida Electrical Power Plant Siting Act." **Cf.** § 366.80, Fla. Stat. (1991)

That Section 403.519 is not part of the PPSA has been explicitly acknowledged by the PSC in an earlier power plant need determination order entered on the petition of a non-utility applicant: In re: Petition of AES Cedar Bay, Inc. and Seminole Kraft Corporation for determination of need for the Cedar Bay Cogeneration Project, Docket No. 881472-EQ, Order No. 21491, (Fla. Pub. Serv. Comm; June 30, 1989.) (A-1) The Commission held as follows:

> Section 403.519 was passed in 1980 as part of the Florida Energy Efficiency and Conservation Act (FEECA), Sections 366.80-.85, Florida Statutes, and was intended to remedy several problems which had arisen in the implementation of the Siting Act subsequent to its initial passage.

Id. at page 2. (A-2)

This distinction is of greater than academic interest in the context of this consolidated appeal. Indeed, how the Court elects to consider the effect **vel non** of the distinction could be of crucial significance to the outcome of Nassau's appeal of

the PSC's dismissal of its independent need petition. The outcome of the instant appeal, however, is of no particular significance to the Department, and by extension, to the Siting Board. What is significant, however, is the forseeable consequence of this Court's affirmance of the PSC upon the express rationale stated in PSC Order No. 92-1210-FOF-EQ: the transfer to the PSC of the Siting Board's right authoritatively to construe the definitional provisions of §§ 403.501-403.518, the Florida Electrical Power Plant Siting Act. The Department respectfully suggests that such a result is likely to cause "several problems" in the orderly administration of the PPSA.

It is settled that the construction placed on a statute by the agency charged with the duty of executing and interpreting it is entitled to great weight. Nassau Power Corporation v. Beard, **supra**, at 1178, fn.9; **accord**, PW Ventures v. Nichols, 533 So. 2d 281, 283 (Fla. 1988). What is in controversy, in the context of this case, at least, is which agency's construction of the PPSA definition of "applicant" should be entitled to great weight on review by this Court. Appellant Nassau favors the Siting Board's construction of the term, in preference to that adopted by the Commission in the order on review.

The Department submits that this issue was not resolved by the decision in Nassau Power Corporation v. Beard, **supra**. The Department's responses to the arguments framed by Nassau are intended only to urge the Court, in determining whether to affirm the order on review, to construe the PPSA and FEECA **in**

pari materia, allowing appropriate weight to the PSC's construction of Section 403.519 and the Siting Board's construction of the PPSA, without doing collateral damage to the jurisdiction of either agency. These responses are framed under the same argument headings presented in the Initial Brief of Nassau.

I. THE COMMISSION ERRED IN CONCLUDING THAT NASSAU POWER IS NOT A PROPER APPLICANT UNDER THE FLORIDA ELECTRICAL POWER PLANT SITING ACT

In the introductory section above, the Department posed the rhetorical question of whether Section 403.519, Florida Statutes, is part of the Florida Electrical Power Plant Siting Act. In its decision in Nassau Power Corporation v. Beard, 601 So. 2d 1175, 1176, (Fla. 1992), this Court construed Section 403.519, Florida Statutes (1989), which read, in pertinent part:

> On request by a utility or on its own motion, the commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act.

The 1989 version of Section 403.519 was identical to the original enactment of the section as passed by the 1980 Legislature in section 5 of Chapter 80-65. It is worth noting here that Florida Statutes (1981), in which Section 403.519 was first codified, carried a legislative history reference to the Florida Energy Efficiency and Conservation Act which no longer appears in Florida Statutes as currently codified.

The 1990 Florida Legislature, by section 24 of Chapter 90-331, Laws of Florida, amended Section 403.519. Accordingly, the current version of the first sentence of this statutory section reads as follows, in pertinent part:

> On request by **an applicant** or on its own motion, the commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act. (emphasis added)

§ 403.519, Fla. Stat. (1991)

For purposes of this argument, it is essential to bear in mind that the 1990 Legislature also, by section 1 of Chapter 90-331, Laws of Florida, reenacted Section 403.501, Florida Statutes, which section was first enacted in 1973 by Chapter 73-33, Laws of Florida. Thus, in 1990, for the first time since the enactment in 1980 of Section 403.519, the Legislature expressly delimited the PPSA as comprising sections 403.501-403.518, inclusive. § 403.501, Fla. Stat. (1991).

The detailed exposition of the legislative history of Section 403.519 is intended to make but one salient point: in construing Section 403.519, Florida Statutes, the PSC does not construe a part of the Florida Electrical Power Plant Siting Act. This does not in any way signify that the **result** the Commission reached in the order on review is necessarily incorrect; rather, it indicates that the Commission, in its zeal to send Nassau away "without day," adopted a decisional rationale for the result which was broader than it needed to be.

The term "applicant" is not defined in section 403.519 or anywhere else in the FEECA. The Commission therefore reached out to borrow the definition of "applicant" found in the PPSA in Section 403.503(4), Florida Statutes. This was erroneous on three independent counts. First, and most important, it was entirely unnecessary to the result that the Commission desired to reach. Second, in so doing, the Commission rejected an

existing and long-standing construction of the same definition by the Siting Board, which interpretation was entitled to deference from the Commission under well-established law. Third, the construction of § 403.503(4) adopted by the Commission departs from the language of statute it purports to interpret.

As the agency of the State of Florida charged with the responsibility to implement FEECA, the Commission is entitled to construe Section 403.519 in a way that gives effect to legislative intent. Department of Legal Affairs v. Rogers, 329 So. 2d 257 (Fla. 1976) Because there is no statutory definition for the term "applicant" in FEECA, the Commission is entitled to construe the term in an appropriate way. Since this court has previously approved the PSC's view that "need" for purposes of Section 430.519 "is the need of the entity ultimately consuming the power", Nassau Power Corporation v. Beard, supra, at 1178, n.9, the Department submits that the Commission was within its discretion to limit the members of the class of "applicant" for an independent need determination to "entities ultimately consuming power," to wit: existing electric utilities. That such an interpretation is permissible is clearly buttressed by the fact that, during the ten years from 1980 to 1990, a need determination under Section 403.519 was commenced "on request by a utility . . ." **E.g.**, § 403.519, Fla. Stat (1981)

In this context, it is noteworthy that the the PSC, in its affirmative Section 403.519 need determination for the same

Florida Crushed Stone coal-fired cogeneration plant which was certified by the Siting Board order in controversy here, described its view that:

> [T]he statute, in our opinion, is designed **primarily** to have the Commission determine whether a need exists for the addition of capacity by a regulated utility or by a municipality. (emphasis added)

In re: Petition of Florida Crushed Stone Company for Determination of Need for a Coal-Fired Cogeneration Electrical Power Plant, Docket No. 820460-EU, Order No. 11611 (Fla. Pub. Serv. Comm., Feb. 14, 1983), slip op. at 1. (A-6) Thus, even as the PSC granted a need determination on the petition of a non-utility generator, it expressed misgivings as to why it was doing so.

The order on review, at R-2974, juxtaposes a supportable rationale with an unnecessary and legally unsound **additional** rationale for the result reached: the jurisprudential equivalent of "piling on" at the football game. The following quote expresses a supportable rationale for the PSC's decision to deny Nassau the right independently to initiate a need determination proceeding:

> This Commission, which is the sole forum for determinations of need under Section 403.519, Florida Statutes (1991), may validly decide that allowing non-utility applicants to bring need determination proceedings under Section 403.519 is not in the public interest.

The next sentence of the order, however, is erroneous:

> More significantly, the legislature has not included non-utility generators in its definition of "applicants" who may initiate need determination proceedings.
>
> As demonstrated above, the term "applicant" is undefined in

FEECA. Consequently, contrary to the assertion of the Commission's order, the Legislature has **not** failed to include non-utility generators in a definition of those entities which may initiate proceedings under Section 403.519; rather, the Legislature has failed to define **at all** what "applicant" means in the context of Section 403.519.

The definitional disagreement here does not really hinge on a definition of "applicant". It hinges instead on the construction of "electric utility," as contained in Section 403.503(13), Florida Statutes (1991), a definition which is unchanged since its enactment as Section 403.503(4), Florida Statutes (1973). In its 1984 Florida Crushed Stone certification order, the Siting Board refused to deny certification to the Florida Crushed Stone 125 MW cogeneration plant because the company was not an "electric utility" as defined, and therefore was not a lawful "applicant" under the PPSA. After quoting the definition of "electric utility", the Board held:

> Using the ordinary meaning of words, this Board concludes that [Florida Crushed Stone] constitutes an electric utility for purposes of the Power Plant Siting Act because, upon approval of this certification and construction of the proposed cogeneration facility, FCS will be in the business of generating electricity.

In re: Florida Crushed Stone Company Power Plant Site Certification Application, PA 82-17 (Siting Board, March 9, 1984) slip op. at 2. (A-14) As Nassau correctly points out in its Initial Brief, at page 44, the definition of "electric utility" was reenacted by the Legislature without change in 1990. Under settled rules of statutory construction, the

Legislature can be charged with knowledge of, and acquiescence in, the Siting Board's authoritative construction of the term. Collins Investment Co. v. Metropolitan Dade County, 164 So. 2d 806 (Fla 1964); Bermudez v. Florida Power and Light Co., 433 So. 2d 565 (Fla. 3d DCA 1983)

By attempting to find support for its order in the PPSA definition of "applicant," the PSC took a step it did not need to take. The PSC stepped into an unnecessary confrontation with the Siting Board's long-standing construction of the term, which construction was more expansive than the Commission desired to endorse for purposes of its intended action on the Nassau need petition. That the Commission prefers a more restrictive construction of the term "electric utility" than the Siting Board, however, should not be allowed to divest the Siting Board, charged with the ultimate responsibilty to implement the PPSA, of the traditional ability to place a definitive construction on the statute it enforces.

The order on review professes that the PSC has no intention to "restrict the Department of Environmental Regulations [sic] or Siting Board in their exercise of jurisdiction under the Power Plant Siting Act, or in their interpretation of the Act." (R-2974) Yet this is exactly what will occur if the Court unquestioningly accepts the rationale of the order on review. If the PSC's construction of what "applicant" means, as set forth in its order, is approved by appellate affirmance of the order, no legal person who is a non-utility generator will be able to avail itself of the PPSA's processes even by filing an

application with DER during the pendency of its efforts to obtain an affirmative need determination. The "would-be electric utility" like Florida Crushed Stone will be shut completely out of the PPSA process. This result is not demanded by statute, and was specifically rejected by the Siting Board in a logical construction of the PPSA. Moreover, during the first ten years of the existence of Section 403.519, this result was never demanded by the PSC, which until 1990, granted need determinations independently instituted by non-utility generators.

The error of the PSC's rationale is demonstrated by the order's effort to derive an instant exception to its own rule that non-utility generators may not institute an independent need proceeding. Entities otherwise disqualified from seeking a need determination may do so, according to the order, (R-2973), if they have a contractual relationship with a utility. Nothing in 403.503(13), however, defines "electric utility" to include an entity in contractual privity with a utility.

The order, with completely circular logic, conveniently implies an exception to its own rule. It reasons that, because a utility is an indispensable party to a need determination, the contracting utility is the **real** "applicant" when a need determination petition is filed by a non-utility generator having a power sales agreement with the utility in question: "This will satisfy the statutory requirement that an applicant be an "electric utility" while allowing generating entities

with a contract to bring that contract before this Commission." (R-2973)

Adoption of this rule and its non-statutory "contractee" exception will have immediate consequences for the administration of the PPSA. For example, currently pending in abeyance before the DOAH and the Department is the PPSA application of Appellant Cypress Energy Partners, Limited. In re: Application for Power Plant Certification of Cypress Energy Partners, Ltd., DOAH Case No. 92-4673EPP, OGC CASE No. 92-1344. Whether this application will ever get to a certification hearing under Section 403.508, Florida Statutes, depends entirely on the outcome of this consolidated appeal. If the rationale of the order on review is affirmed, however, the Department will be obligated to seek dismissal of the Cypress PPSA application on the grounds that Cypress--a non-utility generator--fails to qualify as an "applicant" and Florida Power and Light is not a party to the application for certification. Adoption of the PSC's construction would certainly call into question the legal status of **existing** power plant site certifications to which an "entity ultimately consuming power" is not a formal party. At any rate, it would appear impossible for any future power plant site certification to be issued to any non-utility generator unless an "electric utility"--as construed by the PSC--is also formally made a party to the certification and subjected to joint and several responsibility for compliance thereunder.

The Introduction to the Department's Argument, at page 8,

supra, enumerates important steps in the PPSA process that an "applicant" under the PPSA can take without having received an affirmative need determination from the PSC. If the PSC's view of "applicant" is affirmed, a non-utility generator will not even be able to commence the lengthy PPSA process at **its own risk** unless and until it has a contract with an "electric utility" in hand. This result is harsh, anti-competitive, and inconsistent with the obvious intent underlying the PPSA for the expeditious processing of applications. Indeed, the Department is specifically charged by law "to ensure that the applications are processed as expeditiously as possible." § 403.504(5), Fla. Stat. (1991) In this context, it is ironic to review how the Commission itself has explained the origin of Section 403.519:

> [T]he section was intended to allow need determinations to be initiated at the Commission **prior to** the filing of a formal application with DER. (emphasis added)

In re: Petition of AES Cedar Bay, Inc. and Seminole Kraft Corporation for determination of need for the Cedar Bay Cogeneration Project, **supra,** at p.1 (A-1)

The Commission has thus ruled that there is a disconnect between the need determination process of Section 403.519 and the PPSA application process. Yet the practical result of the affirmance of the order on review **as written** would be to sanction the obliteration of that disconnection and arbitrarily to deny access to the PPSA application process to persons--non-utility generators--who have traditionally enjoyed

access to the process under settled Siting Board practice. This will cause unreasonable consequences of no practical benefit to the Commission or anyone else. It is settled that courts should reject a statutory interpretation which leads to an unreasonable or absurd result. Foley v. State, 50 So. 2d 179 (Fla. 1951)

As noted above, the Commission may lawfully construe Section 403.519 to deny anyone but "entities ultimately consuming power" the right independently to initiate a need determination proceeding under Section 403.519. Based on this Court's Nassau Power Corporation v. Beard decision, the Court should affirm the result reached by the Commission in the order on review. But the Department urges the Court conclusively to reject the Commission's effort preemptively to construe the PPSA to explain its desired result. Section 403.519 and the rest of FEECA should be construed **in pari materia** with the PPSA to give effect to both statutory enactments. State v. Digman, 294 So. 2d 325 (Fla. 1974); Agrico Chemical Co. v. State Dept. of Environmental Regulation, 365 So. 2d 759 (Fla. 1st DCA 1978); cert. den., 376 So. 2d 74 (Fla 1979). There is no jurisprudential reason why a person who may not be able to obtain an independent need determination from the PSC should be prohibited even from making application under the PPSA at its own risk pending a favorable decision from the PSC.

Affirmance of the Commission's denial of Nassau's attempt at initiating an **independent** need proceeding, however, only underscores the significant due process considerations inherent

in the other major pending issue in this consolidated appeal: when, as here, an "electric utility" **does** validly initiate a proceeding under Section 403.519 to fill its need for electric power, does due process require a comparative review of all competing proposals to serve the need? This issue is addressed in the next section of Argument.

II. THE COMMISSION IS REQUIRED TO CONDUCT A COMPARATIVE REVIEW OF DETERMINATION OF NEED APPLICATIONS WHERE MUTUALLY EXCLUSIVE APPLICATIONS ARE FILED TO FILL A FINITE NEED.

In the second argument of its Initial Brief, Nassau raises the knotty issue of whether, having entertained the petition of FPL to establish a need for more generating capacity to be filled by Cypress' coal-fired power plant, the PSC could lawfully refuse to give a comparative review to other power plants proposed to meet the need claimed by FPL. In the proceedings below, Nassau and ARK were allowed to intervene to oppose the Cypress plant on the grounds that the plant was not "the most cost-effective alternative available" under the test of Section 430.519; the Commission so concluded in its order denying Cypress an affirmative need determination, in large measure on evidence provided by Nassau and ARK that their own proposals were more cost-effective than Cypress'.

Yet the PSC, notwithstanding FPL's self-professed need for at least 800 MW of additional electric power in the 1998-1999 time period, refused to entertain a comparative review of ARK or Nassau for the purpose of determining a "winner" to fill the need of FPL: that is, "the most-cost effective alternative available" within the meaning of Section 403.519 of the FEECA. The Commission reached this result in the face of its own conclusion that the selection process employed by FPL to pick its preferred generation alternative was flawed. (R-2411-2412)

The thrust of Nassau's argument, at pages 48-51 of the Initial Brief, is that the Commission is required to give

comparative review of competing power plant proposals under the authority of the U. S. Supreme Court decision in Ashbacker Radio Corp. v. Federal Communications Commission, 325 U. S. 327 (1945), as applied in Florida administrative law in court decisions such as Bio-Medical Applications of Clearwater, Inc. v. Department of Health and Rehabilitative Services, 370 So. 2d 19 (Fla. 2d DCA 1979). Nassau, on the strength of the opinion in Bio-Medical Applications of Clearwater, **supra**, at page 23, asserts that even though Nassau was given intervenor status in the case below, it was still deprived of due process because the merits of its proposal were not heard in "comparative consideration" with the rejected Cypress proposal. Initial Brief, at page 51.

It is clear from the record in this case that the Commission accorded neither ARK nor Nassau any preferential consideration towards filling FPL's need for power merely because they had intervened in the Cypress need proceeding. The Commission held, at R-2412: "Intervention in this docket gives these parties no greater standing with regard to meeting FPL's need than any other QF or IPP."

Both Ashbacker and Bio-Medical Applications of Clearwater hinge upon

> [a] general principle that an administrative agency is not to grant one application for a license without **some appropriate consideration** of another bona fide and timely filed application to render the same service; the principle therefore, constitutes a fundamental doctrine of fair play which administrative agencies must diligently respect and courts must be ever alert to enforce. (citation omitted) (emphasis added)

Bio-Medical Applications of Clearwater, **supra**, at 23. The first question which must be answered, therefore, is whether the "general principle" enunciated above is applicable to proceedings under Section 403.519, Florida Statutes.

First, it must be presumed that the PSC constitutes an administrative agency for purposes of the Ashbacker doctrine. § 403.503(2), Fla. Stat. (1991) Second, the "affirmative determination of need" issued by the PSC as the outcome of a successful Section 403.519 proceeding, by law a "condition precedent" to certification of a new electrical power plant, would appear itself to constitute a separate "license" as defined in Section 403.503(15) of the PPSA. See also § 120.52(9), Fla. Stat. (Supp. 1992) It must be noted, however, that a favorable need determination, standing alone, is insufficient to license the construction of a new power plant.

It is settled that the PSC is the "sole forum" for the issuance of power plant need determinations. § 403.519, Fla. Stat. (1991). **See generally** Fla. Chapter of the Sierra Club v. Orlando Utilties Commission, 436 So. 2d 383, 386-387, (Fla. 5th DCA 1983) (need determination binding on Siting Board). Thus, although the PPSA has provided since its enactment that a site certification is "the sole license of the state and any agency as to the approval of the site and the construction and operation" of a certified plant, it is also clear that a need determination is an exclusive agency approval of critical and independent legal significance to the PPSA process. Just as no radio station could broadcast on the sought-after frequency

without the exclusive license at issue in Ashbacker, no power plant big enough to meet FPL's need can be built without the need imprimatur of the PSC.

There is no compelling legal reason why the Ashbacker doctrine should not apply in the context presented here if it is deemed to apply to licenses for radio stations and kidney dialysis facilities. The PPSA application process before the Siting Board would appear to be a potential forum for the conduct of a competitive review of new power plant projects. But if, as the court held in the Orlando Utilities decision cited above, the need determination of the PSC is binding on the Siting Board, then it would appear impossible for the Siting Board to provide a forum for a constitutionally-required, due process comparative review; the outcome of a PSC need determination, coming as it does by law prior to any certification hearing, controls the identity of the project, if any, about which the Siting Board will get to hear. This necessarily leaves the Commission as the presumptively appropriate administrative forum for the Ashbacker-type review demanded by Nassau.

But, in the various component cases of this combined appeal, the Commission has refused non-utility generators like ARK and Nassau any forum at all for substantive consideration of the merits of their power plant proposals. If, as discussed in Argument I, the Commission may lawfully deny an independent need proceeding, and, hence, consideration on the merits to the proposal of a "would-be utility" that desires to build a new

power plant, then the issue of the availability of comparative review when PSC **allows** the institution of a need case becomes of critical, indeed, of paramount importance. If fundamental fairness requires a comparative review of mutually exclusive license applications, then the PSC cannot lawfully deny ARK and Nassau both the independent right to institute their own need case **and** the dependent right to substantive comparison of their proposals with the proposal advanced in the course of a utility-instituted need proceeding like the case at bar.

Nassau's Initial Brief urges that it was error for the Commission not to consolidate its independent need petition with that of Cypress and FPL. For the reasons stated in Argument I, **supra**, the Department does not agree. But the Department hastens to add that the difference between consolidation of independent petitions and the allowance of substantive intervention in an on-going case is a distinction of legal significance only. In the context of this consolidated case, comparative review could still be practically entertained if intervenors like ARK and Nassau were allowed substantive intervention in an on-going need case in accordance with reasonable procedural safeguards for all parties.

At stake here is a question of the public interest in low-cost electricity produced in an environmentally intelligent way. It is clear that the mandate of Section 403.519 is to assure that any new power plant deemed "needed" is "the most cost-effective alternative available." Nassau Power

Corporation v. Beard, **supra**, at 1178, n.9. ("overall directive" of Section 403.519 is determination of cost-effectiveness) The manner in which this statutory test is phrased subsumes the notion of substantive comparison of alternatives. The PSC's order on review, however, asserts, at R-2398, that no competitive evaluation takes place in a Section 403.519 proceeding because "we are called upon to approve or deny the choice of a single applicant, the utility, rather than select from a number of competing applicants." If there is only one project before the Commission for a need review, this assertion is true. If, as here, there are in fact competing applicants, then the Commission begs the question put to it by Section 403.519 by ignoring this fact.

It is for this Court to determine, as a case of first impression, whether the PSC must grant comparative review of competing power plant proposals when it conducts a Section 403.519 need determination sought by a utility. The Department submits that comparative review in the context of the Section 403.519 need determination process would provide an opportunity for PSC approval and, ultimately, for certification of less costly projects with fewer adverse environmental consequences. This Court has held that the purpose of the PPSA is "minimizing the adverse effect of power plants on the environment." Nassau Power Company v. Beard, 601 So. 2d 1175, 1176 (Fla. 1992) The Department urges the Court to give consideration to this issue in reaching its determination in this consolidated appeal proceeding.

III. THE COMMISSION ERRED IN FAILING TO DIRECT FPL TO NEGOTIATE A CONTRACT WITH NASSAU POWER BECAUSE NASSAU POWER IS A QUALIFYING FACILITY AND HAS A FEDERAL RIGHT TO SELL POWER TO FPL.

The Department believes that the issue presented under this heading by Nassau is inextricably linked with the procedural issues as to Section 403.519, Florida Statutes, which are raised in Arguments I and II, **supra**. Even if the Court were to determine that Nassau possessed a superior right to a contractual relationship with FPL based upon its status as a qualifying cogeneration facility under 16 U.S.C. § 824a-3, Nassau would still need to traverse the minefield of the "affirmative need determination" discussed above. Issues related to when and under what circumstances a non-utility generator may bring or participate in a Section 403.519 proceeding are, in the opinion of the Department, of more immediate importance for resolution in this matter.

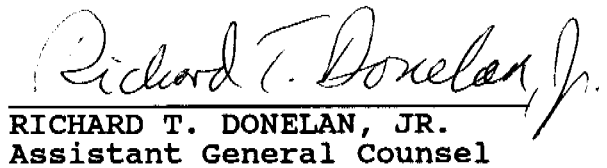
Assuming **arguendo** that Nassau possesses the right it claims here, that right must remain executory if it cannot obtain the affirmative need determination from the PSC without which its qualifying facility (QF) cannot be constructed in Florida. If the Court affirms the PSC's refusal to allow Nassau to institute its own need proceeding, and if Nassau is unable to obtain the cooperation of FPL via a power sales agreement, Nassau's claim will be stymied as a practical matter, regardless of the theoretical legal merits of the claim. Conversely, if the Court determines that Nassau and ARK were entitled to a comparative review proceeding before the PSC in

connection with the FPL-Cypress need petition, then issues as to the supposed superior right of a QF to supply power to a utility will be addressed in any remand proceeding ordered by the Court. The Department urges the Court to consider this issue as not ripe for review at this time.

CONCLUSION

The Department urges the Court to consider the foregoing argument in making its determination whether to affirm the order on review.

Respectfully submitted,



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IN THE SUPREME COURT OF FLORIDA

CYPRESS ENERGY PARTNERS, LIMITED PARTNERSHIP, Appellant	*	
v.	*	CASE No. 81,131
J. TERRY DEASON, ETC., et al. Appellees	*	
* * * * * * * * * * * * * * *	*	
NASSAU POWER CORPORATION, Appellant	*	
v.	*	CASE No. 81,496
J. TERRY DEASON, ETC., et al. Appellees	*	
* * * * * * * * * * * * * * *	*	

APPENDIX TO ANSWER BRIEF OF STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL REGULATION

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of AES Cedar Bay, Inc. and Seminole Kraft Corporation for determination of need for the Cedar Bay Cogeneration Project.	)	DOCKET NO. 881472-EQ
	)	ORDER NO. 21491
	)	ISSUED: 6-30-89

The following Commissioners participated in the disposition of this matter:

MICHAEL McK. WILSON, Chairman
THOMAS M. BEARD
BETTY EASLEY
GERALD L. GUNTER
JOHN T. HERNDON

ORDER GRANTING DETERMINATION OF NEED

BY THE COMMISSION:

On November 10, 1988, AES Cedar Bay, Inc. (AES) and Seminole Kraft Corporation (Seminole Kraft) filed a need determination application with the Department of Environmental Regulation (DER) and a petition for determination of need with this Commission pursuant to the provisions of the Florida Electrical Power Plant Siting Act (Siting Act), Sections 403.501-.517, Florida Statutes.

In its petition, AES has requested that it be allowed to build a 225 MW circulating fluidized bed coal qualifying facility (QF) located at an existing industrial site adjacent to and on the property of the Seminole Kraft paper mill in Jacksonville, Florida. All of the electricity produced by this QF will be sold to Florida Power and Light Company (FPL) under the terms of a negotiated agreement. On December 13, 1988, this agreement was submitted to the Commission for approval in Docket No. 881570-EQ.

On January 4, 1989, the Staff filed a motion to implead FPL as an indispensable party in this docket. This motion was denied by the prehearing officer on January 30, 1989, in Order No. 20671. The direct testimony of Gerald J. Gorman, Kerry G. Varkonda, Lawrence A. Stanley, and Dennis W. Bakke was filed on March 13, 1989. The direct testimony of Jeffrey V. Swain and Myron R. Rollins was filed on March 14, 1989 and March 15, 1989, respectively. The direct testimony of Juan E. Enjamio and Joseph C. Collier was filed on March 17, 1989 and March 20, 1989, respectively. All of these witnesses submitted testimony on behalf of AES and Seminole Kraft.

This docket was heard in conjunction with Docket No. 881570-EQ, Florida Power and Light's petition for approval of its cogeneration agreement with AES, on April 24 and 25, 1989 before the full Commission and was subsequently voted on at the agenda conference of June 6, 1989.

In evaluating a petition for determination of need, we are bound by the statutory requirements of Sections 403.507(1)(b) and Section 403.519, Florida Statutes, as well as our rules implementing those sections, Rules 25-22.080-.081, Florida Administrative Code. Section 403.519 was passed in 1980 as part of the Florida Energy Efficiency and Conservation Act

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(FEECA), Sections 366.80-.85, Florida Statutes, and was intended to remedy several problems which had arisen in the implementation of the Siting Act subsequent to its initial passage in 1973.

First, the section was intended to allow need determinations to be initiated at the Commission prior to the filing of a formal application with DER. Second, it codified court rulings that the "sole forum" for the determination of need was the Commission. Third, it lists specific items which "shall" be considered by the Commission in deciding the question of power plant need: "need for electric system reliability and integrity", "need for adequate electricity at a reasonable cost", "whether the proposed plant is the most cost-effective alternative available", "conservation measures . . . which might mitigate the need for the proposed plant" and "other matters within its jurisdiction which it deems relevant."

This language was intended to "flesh-out" the general language of Section 403.507(1)(b) which states, in part:

> The Public Service Commission shall prepare a report as to the present and future need for the electrical generating capacity to be supplied by the proposed electrical power plant. The report may include the comments of the commission with respect to any matters within its jurisdiction.

Reliability and integrity

The load flow studies performed by FPL for this project indicate that the 225 MW of generation produced by AES when interconnected at Jacksonville Electric Authority's Eastport substation in 1993 can be integrated into the statewide transmission system. The line losses associated with the transmission of this power to FPL's load centers in south Florida will be approximately 14.5 MW or 6.4% of the output of the project at summer peak. This compares with line losses of approximately 47.2 MW or 7.6% of the total output of one of the St. John River Power Park units. In addition, the negotiated agreement between FPL and AES provides a remedy should AES's generation at its site in northeast Florida negatively impact southward transmission flows, or FPL's purchase of less expensive electricity. Based on these facts, we find that FPL's ratepayers are adequately protected from any potential adverse effects on system integrity and reliability resulting from purchases from AES.

Adequate electricity at a reasonable cost

Over the term of the negotiated agreement between FPL and AES, the net present value of the stream of revenues associated with the agreement is less than that of the standard offer contract based on the statewide avoided unit, a 1995 coal unit, and less than the net present value of the stream of revenues associated with the units identified in FPL's generation expansion plan as its own avoided units, 1994 combined cycle units.

AES has negotiated a long-term contract for coal supply, coal transportation and coal waste disposal with Costain. Additionally, bark from the kraft mill will be available to supply a supplemental source of fuel approximately 5% of the time. Further, there are plentiful United States and international reserves of limestone which are acceptable for sulfur dioxide capture. AES intends to enter into a long-term contract for its purchase and has no reason to believe that such contract will not be easily obtained at a reasonable price. Thus we find that this project will provide adequate electricity to FPL and peninsular Florida at a reasonable cost.

Cost-effective alternative

The circulating fluidized bed boilers are the first to be constructed in Florida for the production of electricity. This project is a QF pursuant to our rules and AES has negotiated a contract at less than statewide avoided cost for the sale of firm capacity and energy to FPL which falls within the current subscription limit of 500 MW. That being the case, this Commission has already found the proposed QF to be the most cost-effective alternative available.

Conservation

In previous QF need determination cases, we have concluded that "cogeneration is a conservation measure." In re: Petition of Hillsborough County for determination of need for a solid waste-fired cogeneration power plant, 83 F.P.S.C. 10:104, 105 (1983); In re: Petition of Pinellas County for determination of need for a solid waste-fired cogeneration power plant, 83 F.P.S.C. 10:106, 107 (1983); In re: Petition by Broward County for determination of need for a solid waste-fired electrical power plant, 85 F.P.S.C. 5:67, 68 (1985); In re: Petition by Broward County for determination of need for a solid waste-fired electrical power plant, 86 F.P.S.C. 2:287, 288 (1986). We have rethought this position. Traditionally, conservation in the electric industry has been thought of in two ways: an increase in fuel efficiency and a reduction in demand. The first, increased fuel efficiency, is a net reduction in the amount of fuel used to provide the same amount of electricity. The second, a reduction in electric demand, often peak-hour demand, results in the deferral of additional plant construction. The legislative intent of FEECA, 366.80-.85, Florida Statutes, to reduce "the growth rate of electric consumption and weather-sensitive peak demand"; to increase "the overall efficiency and cost-effectiveness of electricity and natural gas production and use"; and to conserve "expensive resources, particularly petroleum fuels" reflects this understanding of conservation. Section 366.81, Florida Statutes.

However, as the testimony by Witness Bakke indicates, there is a recognition in the industry that cogeneration does not "conserve" fuel in the traditional sense, it merely utilizes fuel to "deliver a service at the least cost." In some instances the fuel efficiency of a cogeneration unit will be the factor that makes a cogeneration project a cost-effective means of producing power, but that is not necessarily the case. The price of the electricity produced by

a cogeneration unit could be lower than of comparable noncogeneration units simply because the sales price of the steam produced by the QF and sold to the steam host is high and produces a great deal of profit. That being the case, conservation and other demand-side alternatives as envisioned by FEECA, are not germaine to qualifying facility need determinations.

Associated facilities

Approximately 1/2 mile of 138 kV transmission line will be required to tie the proposed project into the electric grid at the Jacksonville Electric Authority Eastport substation.

Other jurisdictional matters

At hearing and in its brief, AES argued that the Commission should properly consider the following facts in reaching its decision in this need determination: displacement of oil currently used by the paper mill; significant reduction in the emission of pollutants (SO2, NOx, particulates, TRS) associated with the production of paper products at the paper mill; minimal land use impacts; creation and retention of jobs in the Jacksonville area; introduction into Florida of a "clean coal" technology without direct risk to ratepayers; and reduction of the thermal impact on the St. Johns River. Conversely, the Citizens Group stated at the hearing that the environmental impacts of the project were not all beneficial and questioned the size and type of plant which AES proposes to construct. To the extent that these matters are not discussed above, we find that they are outside the jurisdiction of this Commission as set forth in Sections 403.501-.517 and 403.519, Florida Statutes, and not properly considered in this proceeding.

Stipulation

We approve the following stipulation entered into by the parties to this docket:

1. That the 42 MW of electricity produced by the Seminole Kraft recovery boilers and used internally in the paper mill will replace existing capacity and represents no net change in generating capacity;

2. That the original equipment was installed prior to October 1, 1973; and that

3. These facts establish a prima facie need for this segment of the proposed AES Cedar Bay project.

Therefore, it is

ORDERED by the Florida Public Service Commission that the Petition of AES Cedar Bay, Inc. and Seminole Kraft Corporation for Determination of Need for the Cedar Bay Cogeneration Project is hereby granted. It is further

ORDERED that this order constitutes the final report required by Section 403.507(1)(b), Florida Statutes, the report concluding that a need exists, within the meaning of Section 403.519, Florida Statutes, for the construction of the 225 MW generating facility proposed by AES Cedar Bay, Inc. and the 42 MW recovery boiler by Seminole Kraft Corporation. It is further

ORDERED that a copy of this order be furnished to the Department of Environmental Regulation, as required by Section 403.507(1)(b), Florida Statutes.

By ORDER of the Florida Public Service Commission this 30th day of JUNE, 1989.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

by: Kay Flynn
Chief, Bureau of Records

SBr

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Crushed Stone Company for Determination of Need for a Coal-Fired Cogeneration Electrical Power Plant.	)	DOCKET NO. 820460-EU
	)	ORDER NO. 11611
	)	ISSUED: 2-14-83

The following Commissioners participated in the disposition of this matter:

GERALD L. GUNTER, Chairman
SUSAN W. LEISNER
JOSEPH P. CRESSE

FINAL ORDER

BY THE COMMISSION:

Under the Florida Electrical Power Plant Siting Act, Section 403.501 et seq., Florida Statutes, the Commission is charged with the responsibility of determining whether construction of a proposed electrical generating facility is necessary to meet the present or expected need for electricity in all or a part of Florida. The Department of Environmental Regulation must determine whether the proposed plant will comply with all relevant environmental standards while the Department of Community and Veteran Affairs must determine whether the proposed plant is compatible with the State Comprehensive Plan. Weighing all of these determinations, the Governor and Cabinet, sitting as the Power Plant Siting Board, ultimately determine whether approval will be granted for construction of the proposed plant.

The Act applies to any electrical generating facility equal to or greater than 50 MW of capacity (Section 403.506, Florida Statutes). Therefore, on November 5, 1982, Florida Crushed Stone Company (FCS) filed a petition seeking a determination of need for a 125 MW electrical generating facility it proposes to build and operate. The power plant is part of a cogeneration project; FCS intends to interconnect with and sell power to Florida Power Corporation (FPC). FCS was recently granted status as a Qualifying Facility (QF) by the Federal Energy Regulatory Commission (FERC).

The proposed plant would be located near Brooksville in Hernando County, Florida. It would be constructed along with a 600,000 ton per year cement plant. It would be a coal-fired plant, using coal shipped to the site by unit train. FCS anticipates that it will initially need 25 MW of power from the plant, eventually requiring 38 MW of power for its own use. The remainder of the power produced would be sold to FPC. The unit is expected to be in service in November of 1984.

While 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. It lists five criteria the Commission must consider in determining need:

1) the need for electrical system reliability and integrity;

2) the need for adequate electricity at a reasonable cost;

3) whether the proposed plant is the most cost effective alternative available;

4) conservation measures taken or reasonably available that might mitigate the need for new plant; and

5) other matters within the Commission's jurisdiction which it deems relevant (Section 403.519, Florida Statutes).

The Commission's Rules (Rule 25-22.81(3), Florida Administrative Code), require submission of forecasted peaks, number of customers, net energy for load, and load factors to substantiate the need for the proposed plant. All of these criteria put the issue before the Commission as whether the forecasted load, given a utility's present generation resources and the cost of available alternatives to meet the forecasted load, determines whether there is a need for the proposed plant.

However, significantly different issues are raised when a private entity, such as FCS, proposes to build a cogeneration facility. Cogeneration refers to the sequential use of an energy resource such as coal, oil, gas, or other fuels to produce both electricity and forms of useful thermal energy such as heat or steam to be used in an industrial, commercial, or other facility for heating or cooling purposes. Thus it has been governmental policy to encourage cogeneration both because it makes more efficient use of energy resources and because it may lessen the need for public utilities to build additional generating facilities. Under the Florida Energy Efficiency and Conservation Act (Section 366.80 et seq., Florida Statutes) the Commission has determined that cogeneration appears to be a cost effective conservation measure. Therefore, as part of our statutory authority to consider other matters within our jurisdiction we deem relevant to a need determination, we have decided that additional criteria relating to fuel efficiency should be used to evaluate the application of FCS.

A duly noticed hearing was held on FCS's application on January 26, 1983 in Brooksville, Florida. Parties to the proceeding included FCS, FPC, Florida Mining and Materials, Inc., International Minerals Corporation (IMC), The Sierra Club, Mr. Greg Copeland and the Staff. At the commencement of the hearing, comments on the proposed plant were also heard from members of the general public. Mr. Richard Entorf and Mr. Kenneth BuShea testified on behalf of FCS. Mr. Entorf outlined the proposed plant and Mr. BuShea testified concerning the fuel efficiencies the project is expected to achieve. Mr. Karl Wieland testified for FPC concerning the proposed plant's expected impact on system reliability and integrity, and on FPC's generation expansion plan.

Mr. Barney Capehart testified for The Sierra Club. Addressing the subject of fuel efficiency he suggested several methods for measuring fuel efficiency and assessing the relative desirability of this proposed cogeneration facility. Mr. Frank Seidman testified for IMC concerning the need for cogeneration and the impact it might have on the statewide need for additional generation facilities.

Evidence adduced at the hearing showed that the proposed power plant is currently owned by the American Electric Power Company. It began commercial operation in 1949 and has been placed on inactive status by AEC. FCS plans to purchase the plant and move it to its property in Hernando County. There it 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.

The combined facility is referred to as a topping cycle cogeneration facility because the power plant produces both steam and electricity and the steam is fed into the cement plant for use in the cement manufacturing process. It is also a bottoming cycle facility because waste heat from the cement plant is cycled back to the power plant for use in the production of further electricity and steam. A schematic illustration of this process is attached hereto as Appendix A.

With this background we now address the specific issues:

Electric System Reliability and Integrity

The first statutory criteria we must consider is the impact of the proposed plant on the integrity and reliability of the electric system. Mr. Wieland testified that electric system reliability and integrity will be satisfactory both before and after construction of the proposed facility. We find that the addition of 125 MW of generating capacity will enhance system reliability and integrity simply because it will increase the diversity of generating sources; however, this benefit cannot be quantified, and we view it as a minor, but desirable, result of constructing the proposed plant.

The Need for Adequate Electricity at a Reasonable Cost

The second statutory criteria we must consider is the need for adequate electricity at a reasonable cost. Commission Rule 25-17.82, Florida Administrative Code, requires utilities to purchase electricity produced by a QF at the utilities' full avoided fuel cost. Additionally, our Rules permit a utility and a QF to negotiate for capacity credits if a QF meets certain reliability standards. Thus, if FCS receives full avoided costs for the energy it produces, it will have no impact on the cost of electricity to FPC's ratepayers. We continue to believe that a QF and a utility should be encouraged to negotiate contracts for less than full avoided costs; if this occurred, production of electricity by FCS would lower the cost of power to FPC's ratepayers.

In his direct testimony Mr. Wieland stated that the present generation expansion plan of FPC does not call for the construction of additional capacity until 1993, and that construction of the FCS plant would have no effect on the expansion plan. He also stated that FPC anticipated making no capacity payments to FCS, and urged the Commission to make its determination of need subject to the condition that no capacity payments be made.

Testifying on this point for FMC, Mr. Seidman stated that the additional load growth expected for peninsular Florida, coupled with the retirement of existing plant, led him to conclude that in the foreseeable future Florida has a continuing need for additional capacity.

We find it unnecessary to make a factual finding with respect to this issue given the increased fuel efficiency inherent in cogeneration (depending on the type of fuel used by the cogenerator), the need for additional capacity is irrelevant to a

determination of need such as this, assuming the Commission allows no capacity payments to be passed along to ratepayers where capacity costs are not avoided. It must be emphasized that there is no link between our determination of need and the price to be paid, if any, for the capacity supplied by a QF. Additionally, our finding that the proposed plant will have essentially no impact on the need for an adequate supply of electricity at a reasonable cost is expressly based on the premise that neither the FERC nor the Commission's Rules would require a utility to compensate a QF for any cost associated with either energy or capacity when no energy is purchased or capacity costs are avoided by the utility.

The Most Cost Effective Alternative

The third statutory criteria we are directed to consider is whether the proposed plant is the most cost effective alternative available. We are unable to reach a factual finding on this issue. Whether the proposed plant is the most cost effective alternative available to FCS is a private economic decision not properly reviewed by us. As noted in other parts of this Order, cogeneration appears to be a cost effective conservation measure.

A somewhat related issue was raised by Florida Mining and Materials. It was whether construction or certification of the FCS plant would preempt construction of additional cogeneration facilities. Because we view cogeneration as a cost effective conservation measure, the answer to this question is no.

Other Conservation Measures

The fourth statutory criteria we must consider is whether other conservation measures, reasonably available to FCS, might mitigate the need for the proposed plant. FCS took the position that it knows of no conservation measures which are more cost effective than the proposed plant. Again, because we believe cogeneration to be a cost effective conservation measure, this statutory criterion is satisfied.

Fuel Efficiency

Several issues were raised concerning the fuel efficiency the proposed facility was likely to achieve. Staff suggested that three criteria be used to assess fuel efficiency. First, as a threshhold, a proposed cogeneration facility should meet the standard established by FERC for certification as a QF. Second, a proposed cogeneration facility should use less fuel than if its constituent parts were separately constructed. Third, the fuel efficiency of the power plant component of the proposed cogeneration facility should compare favorably to the fuel efficiency achieved by comparable generating facilities operated by public utilities.

Mr. Capehart suggested three performance measures that should be applied to the proposed facility. The first was the percentage of useful thermal energy produced compared to the amount of electric energy produced. In this case this performance measure is the same as the FERC certification standard. The second was the percent of by-product power relative to total power produced. The third standard was the Fuel Chargeable to Power of the power plant. Mr. Capehart indicated that the information necessary to calculate the Fuel Chargeable to Power for the proposed plant was not available but that the net heat rate of the power plant was an acceptable close approximation of it.

The criteria suggested by Staff embody the three elements of fuel efficiency relevant to this situation and we adopt them. To be certified as a QF, FERC requires a topping cycle cogenerator to produce at least 5% useful thermal energy relative to the electricity produced by the facility. The FCS proposed plant will produce 6.8% useful thermal energy. This figure is derived, as shown in Appendix A, by comparing the net steam extracted from the power plant to the useful power output plus the useful thermal energy output of the power plant, or:

$$\frac{31.08 \text{ MMBTU/hour}}{426.5 \text{ MMBTU/hour Power Output} + 31.08 \text{ MMBTU/hour Thermal Output}} = 6.8\%$$

There are no minimum operating standards a QF must meet in order to be certified as a bottoming cycle QF.

The second criteria is the overall fuel efficiency achieved by the cogeneration facility. Mr. Entorf and Mr. BuShea testified that the proposed facility is 9.5% more fuel efficient than if the power plant and the cement plant were separately constructed. This figure recognizes the energy captured from the waste flue gas and cycled to the cement plant and the preheated combustion air returned to the power plant from the cement plant, in addition to the net steam extracted from the power plant. As shown on Appendix A, this means a total of 144.5 MMBTU/hour are reused in the sequential energy process in the cogeneration facility. This constitutes approximately 9.5% of the total combined energy input to both facilities. In other words, the combined energy inputs required for the power plant and the cement plant is 1513.72 MMBTU/hour. If the two plants operated independently rather than as a cogeneration facility, approximately 9.5% of the energy inputs would have been wasted.

Finally, we must consider the fuel efficiency of the power plant itself. Mr. BuShea testified that the net heat rate of the power plant, assuming a cooling water temperature of 92°, is expected to be 9,892 BTU per KWH. Mr. Wieland testified that the average heat rate of FPC's fossil fuel base load plants over the last two fuel adjustment periods was 10,161 - 10,018 BTU per KWH, FPC's average system heat rate was 10,000 - 10,600 BTU per KWH and that he believed a representative heat rate for peninsular Florida generating units was 10,000 - 11,000 BTU per KWH.

Based on this record, we find that the proposed cogeneration facility can be expected to achieve a desirable level of fuel efficiency both because it will use energy that otherwise would be wasted either in the power production or cement manufacture processes and because it will produce electricity at a fuel efficiency level that compares favorably to the fuel efficiencies achieved by public utilities.

In addition to making the above factual findings, The Sierra Club urged us to make a finding as to the relative desirability of this proposed cogeneration facility. Mr. Capehart testified that in his opinion the fuel savings potential of this facility is not great, relative to what can be achieved by cogeneration technology, and that the degree of need for this type of cogeneration facility was low. While we specifically endorse Mr. Capehart's suggested performance measure of Fuel Charge Due to Power, we decline to make any factual findings with respect to the relative desirability of the proposed project. We decline to do so because we do not believe the record is sufficiently

complete as to what fuel efficiencies we ought to expect from cogeneration facilities that consist of a power plant and a cement plant. Nor was the record sufficiently developed as to the reasonable likelihood of more fuel efficient cogeneration projects than that proposed by FCS being located in Florida. For these reasons we accept The Sierra Club's Proposed Findings of Fact No.s 2, 4, 5, 6, 8, and 9. We reject The Sierra Club's Proposed Findings of Fact No.s 1, 3, 7, and 10 because the record is insufficient with respect to these points. We accept The Sierra Club's Proposed Conclusion of Law No. 1 and reject Proposed Conclusion of Law No. 2 for the same reasons.

Thus, based on the record before us, we conclude that Florida Crushed Stone Company's proposed cogeneration facility, including a 125 MW coal-fired power plant, will enhance electric system reliability and integrity by an unquantified amount, will have no impact on an adequate supply of electricity at a reasonable cost if FCS receives no greater or less than actual avoided costs for the electricity it sells, but will achieve greater fuel efficiency than a generating facility that is not part of a cogeneration facility. Additionally we find that the proposed cogeneration facility appears to be a cost effective conservation measure.

Therefore we conclude that a need exists for the cogeneration facility proposed by Florida Crushed Stone Company. The relief sought by Florida Crushed Stone Company, an affirmative determination of need, will be and the same is hereby granted. It is, therefore,

ORDERED by the Florida Public Service Commission that this Order constitute the final report required by Section 403.507(1)(b), Florida Statutes, the report concluding that a need exists, within the meaning of Section 403.519, Florida Statutes, for the construction of the 125 MW generating facility proposed by Florida Crushed Stone, Inc. It is further

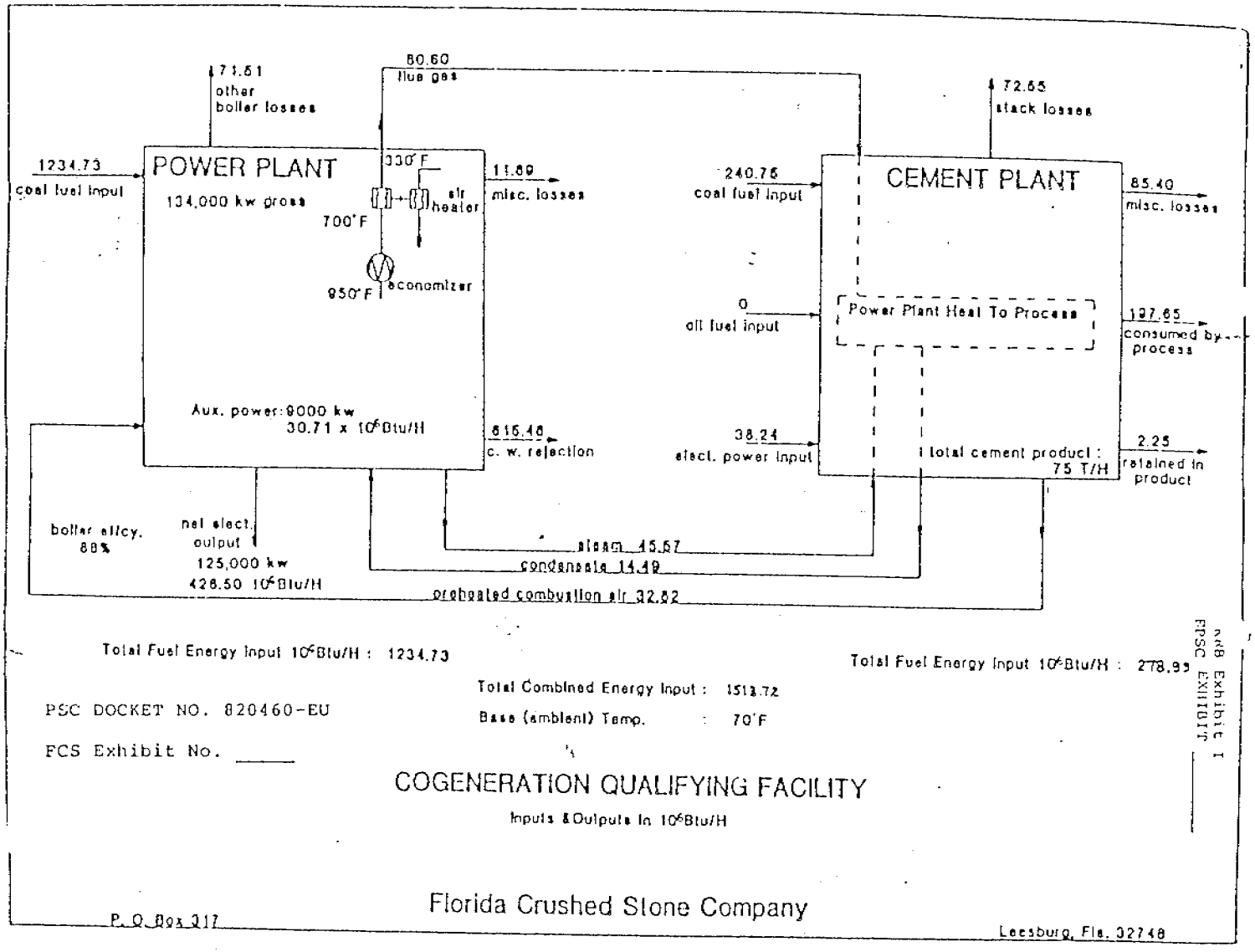
ORDERED that a copy of this Order be furnished to the Department of Environmental Regulation, as required by Section 403.507(1)(b), Florida Statutes.

By ORDER of the Florida Public Service Commission this 14th day of February, 1983.

(S E A L)

STEVE TRIBBLE
COMMISSION CLERK

BED



Total Fuel Energy Input 10^6Btu/H : 1234.73

Total Fuel Energy Input 10^6Btu/H : 278.93

Total Combined Energy Input : 1513.72

Base (ambient) Temp. : 70°F

PSC DOCKET NO. 820460-EU

FCS Exhibit No. _____

FCS Exhibit I
PSC EXHIBIT

COGENERATION QUALIFYING FACILITY

Inputs & Outputs in 10^6Btu/H

Florida Crushed Stone Company

P. O. Box 217

Leesburg, Fla. 32748

APPENDIX A

BEFORE THE GOVERNOR AND CABINET
OF THE STATE OF FLORIDA

In Re: FLORIDA CRUSHED STONE COMPANY)
POWER PLANT SITE CERTIFICATION)
APPLICATION)
PA 82-17)
)

The following persons were present and participated in the disposition of this matter:

Honorable Bob Graham
Governor

Honorable George Firestone
Secretary of State

Honorable Jim Smith
Attorney General

Honorable Gerald A. Lewis
Comptroller

Honorable Ralph D. Turlington
Commissioner of Education

FINAL ORDER OF CERTIFICATION

BY THE GOVERNOR AND CABINET:

The Governor and Cabinet, sitting as the Siting Board, having reviewed the Recommended Order (attached hereto as Exhibit 1), the Exceptions thereto, and a Motion to Dismiss, having heard argument of the Parties at the duly noticed meetings of the Governor and Cabinet on February 21, 1984, and March 6, 1984, and otherwise being fully advised herein, issues this Final Order of Certification and therefore it is ORDERED:

1. The Recommended Order is approved and adopted.

Ruling on Motion to Dismiss

2. On February 20, 1984, the Sierra Club filed a Motion to Dismiss, alleging that this Board is without jurisdiction to render a decision on Florida Crushed Stone Company's (FCS) application because FCS is a private entity which will not provide electricity at retail to the public.

As stated in the Hearing Officer's Findings of Fact, the proposed facility would generate 125 megawatts of electricity, with 100 megawatts to be sold to a utility.

3. The controlling definition is found in Subsection 403.503(4), Florida Statutes, which states:.

> (4) "Electric utility" means 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.

4. Using the ordinary meaning of the words in this definition, this Board concludes that FCS constitutes an electric utility for the purposes of the Power Plant Siting Act because, upon approval of this certification and construction of the proposed cogeneration facility, FCS will be in the business of generating electricity.

5. Based on the foregoing, the Motion to Dismiss is denied.

Rulings on Exceptions

6. Florida Mining and Materials Corporation (FMM) filed, in accordance with Subsection 120.57(1)(b)4, Florida Statutes, exceptions to the Recommended Order filed by the Hearing Officer. In reviewing and ruling on these exceptions, the Board is constrained by Subsection 120.57(1)(b)9, Florida Statutes, which provides in pertinent part:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the recommended order, but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

7. FMM's request that the Board adopt two additional Findings of Fact is rejected because said proposed findings are not material to any ultimate conclusion in this proceeding.

8. FMM's exceptions to the Hearing Officer's Findings of Fact No. 13 and No. 14 are rejected because there is competent substantial evidence in the record to support the Hearing Officer's Findings.

9. FMM's exception to the condition of certification which delegates to the Department of Environmental Regulation (DER) the authority to modify emission standards for sulfur dioxide is rejected because such delegation is authorized by Subsection 403.516(1), Florida Statutes, and because the sulfur dioxide limitations are a matter in which the DER has special expertise. Therefore, it is appropriate to delegate the decision to modify the sulfur dioxide emission standards to that Department.

10. FMM's exception to the conclusions of law that the sulfur dioxide limitations recommended by the Hearing Officer constitute Best Available Control Technology (BACT) in accordance with Rules 17-2.100(22) and 17-2.630, F.A.C., is rejected because the determination of BACT as recommended by the Hearing Officer complies with the referenced rules.

11. At the meeting on March 6, 1984, FCS and FMM agreed to resolve these disputes by including herein the following paragraph which is approved by the Board and made a condition of certification:

Intervenor, FMM, continues to have standing in this proceeding to have the opportunity to reopen the certification upon a showing of circumstances, taking into account social, economic and environmental factors, which would require a reduction of emissions in order for other facilities on a comparable basis to receive permits in the vicinity.

THEREFORE, it is ordered that certification be granted subject to the conditions incorporated in the Hearing

Officer's Recommended Order and the condition set forth in paragraph 11 of this Final Order.

DONE AND ENTERED this 9th day of March, 1984, in Tallahassee, Florida, pursuant to the vote of the Governor and Cabinet sitting as the Siting Board at a duly constituted Cabinet meeting on March 7, 1984.

BY THE GOVERNOR AND CABINET
SITTING AS THE SITING BOARD:

Bob Graham
Governor

Copies furnished:
(See Attached List)

FILING AND ACKNOWLEDGEMENT
FILED, on this date, pursuant to §120.52 (9), Florida Statutes, with the designated Department Clerk, receipt of which is hereby acknowledged.

Gloria M. Andrew 3/12/84
Clerk Date

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CERTIFICATE OF SERVICE

I DO HEREBY certify that a true and correct copy of the foregoing Answer Brief and Appendix has been sent by U.S. Mail to the following listed persons:

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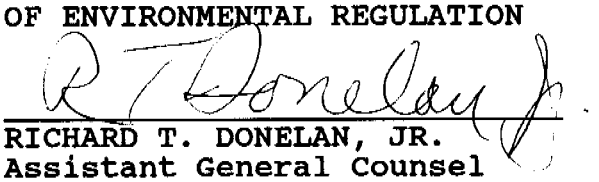
this 15th day of June, 1993.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL REGULATION



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