IN THE SUPREME COURT OF FLORIDA

CYPRESS ENERGY PARTNERS, LIMITED PARTNERSHIP, Appellant, v. J. TERRY DEASON, ETC., ET AL., Appellees, and NASSAU POWER CORPORATION, Appellant, v. J. TERRY DEASON, ETC., ET AL.,	CASE NO. 81,131 CASE NO. 81,496

CONSOLIDATED ANSWER BRIEF OF APPELLEE, FLORIDA PUBLIC SERVICE COMMISSION

ANSWER TO THE INITIAL BRIEF OF NASSAU POWER CORPORATION IN CASE NO. 81,496

ANSWER TO CROSS-APPELLANTS' BRIEFS IN CASE NO. 81,131

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellee, The Public Service Commission, is referred to in this brief as the "Commission". Appellant, Cypress Energy Partners, Limited Partnership is referred to as "Cypress", or "Appellant". Florida Power and Light Company is referred to as "FPL". Intervenors, Ark Energy, Inc. and CSW Development-I, Inc. are referred to as "Ark". Intervenor, Nassau Power Corporation is referred to as "Nassau" or "Nassau Power".

The transcript of the prehearing conference is referenced as (PT.____); the hearing transcript (T.____); the agenda conference transcript (AT.___); and the transcript of the agenda conference on reconsideration (ATR.____). Cites to the record on appeal are referenced (R.___).

STATEMENT OF THE FACTS AND CASE

The Commission objects to the Statement of The Case and Facts contained in Ark's combined Answer Brief and Cross-Appeal Brief in its entirety. While Rule 9.210(b)(3), Florida Rules of Appellate Procedure, requires an initial brief to contain a complete statement of the case and of the facts, Rule 9.210(c) requires omission of statement of the case and of the facts from answer briefs unless there are clearly specified areas of disagreement.

In its Statement of the Case and Facts, Ark presents a lengthy discussion of Docket No. 920520-EQ, without ever identifying the areas of disagreement with the Initial Brief filed by Cypress Energy, or which additional facts it believes to be necessary to the resolution of its cross-appeal. In fact, its Statement of The Case and of The Facts is indistinguishable from one that normally would be found in an initial brief rather than either an answer brief or a cross-appeal brief.

Additionally, the Commission objects to statements that constitute argument of counsel, including:

> P. 1, para. 3, l. 6: "FPL rebuffed all of ARK's efforts. . . and steadfastly refused to negotiate further with ARK."
>
> P. 3, para. 2: "In recent need determination orders the Commission had stated . . . . Consistent with these pronouncements, ARK Energy filed its motion to intervene. . . ."
>
> P. 3, para. 2, l. 9: "Throughout this process, ARK was ready, willing and able to proceed to a full hearing . . . ."
>
> P. 4, para 2: ". . . in keeping with the Commission's prior pronouncements . . . ARK filed a substantially complete need determination case . . . ."

The Commission accepts LEAF's "Additional Facts Related to LEAF/Evans' Cross Appeal" except for statements that are obviously argumentative in nature. These include:

P. 4, para. 1: "The Order, in effect, equates . . . ." and footnote 2, same page, referring to "this non-rule policy . . . ."

P. 5, para. 1, l. 4: "Nevertheless, the order erroneously states . . . ."; para. 2, l. 1: "There are two clear errors . . . ."

P. 7, l. 2: ". . . in reality it only applied to the "all" . . . ."; para. 1, l. 1: "FPL's alleged need . . . ."; l. 9: "The record below is clear . . . ."

P. 8, subheading 3: "FPL's Incomplete Demand side conservation [sic] Efforts".

P. 9, l. 2: ". . . consequently, no exceptions were filed."

SUMMARY OF THE ARGUMENT

RESPONSE OF THE FLORIDA PUBLIC SERVICE COMMISSION TO NASSAU POWER'S APPEAL OF ORDER NO. PSC-92-1210-FOF-EQ IN CASE NO. 81,496, AND THE CROSS APPEALS OF NASSAU POWER AND ARK ENERGY OF ORDER NO. PSC-92-1355-FOF-EQ IN CASE NO. 81,131.

The Commission properly refused to entertain the petitions for determination of need for power plants and petitions for contract approval filed by Ark and Nassau, and therefore properly refused to consolidate Ark's need determination petition with the Cypress need determination proceeding. Neither Ark nor Nassau had a contract with FPL that could be approved, and the Florida Power Plant Siting Act does not permit these non-utility generators to bring a petition to determine the need of a utility for their projects without first having a contract with that utility. The Siting Act defines who may apply for a site certification and determination of need, and that plain, unambiguous definition excludes non-utility generators, like Ark and Nassau, who seek to meet a utility's need. It is improper to resort to special rules of statutory construction to attempt to ascribe a different meaning to the term "applicant" when the statutory language is clear, and the fact that the Power Plant Siting Board granted site certification in 1983 to a self-service cogenerator under a different set of facts does not now require the Commission to consider Ark and Nassau's petitions.

The Commission also acted correctly in refusing to hold a comparative determination of need proceeding in which Ark and Nassau could compete with Cypress to meet FPL's need. Ark and Nassau have no right to a competitive hearing under state statute, Commission rules, or the cases they cite, so the refusal to grant

such a hearing cannot constitute a denial of due process. The cases cited by Ark and Nassau to support their supposed entitlement to a competitive hearing do not apply where the legislature has already designated electric utilities as the sole providers of electricity to the public. Rather than meeting a public need, Ark and Nassau wish to meet FPL's need for electricity with which to serve its customers, which they cannot do without a contract. Ark and Nassau may still attempt to meet FPL's need because Commission rules require FPL to negotiate with them for the purchase of its energy and capacity needs. However, the Public Utilities Holding Act does not require the Commission to grant preferential treatment to Nassau over other Qualifying Facilities. In any event, since the Commission properly determined that Ark and Nassau could not apply for need determination proceedings, they could not have been harmed by any refusal to conduct a comparative hearing. Nassau in particular is taking a position of convenience in this case, as it successfully urged the Commission not to conduct a comparative need determination hearing in an earlier case.

RESPONSE OF THE FLORIDA PUBLIC SERVICE COMMISSION TO ARGUMENT ON CROSS-APPEAL OF THE LEGAL ENVIRONMENTAL ASSISTANCE FOUNDATION (LEAF) AND DEBORAH EVANS, CASE NO. 81,131.

The Commission's decision denying the joint petition for determination of need was favorable to the position advocated by LEAF. Only if the Court should reverse the Commission on the grounds advocated by Cypress in its initial brief should the Court consider the issues raised on cross-appeal by LEAF.

If the Court does address the issues raised by LEAF on cross-appeal, the standard of review is whether the Commission's decision is based on competent substantial evidence and is in accord with the essential requirements of law. None of the seven points raised on cross-appeal by LEAF shows that the Commission has committed reversible error under this standard.

The Commission's decision on FPL's conservation programs did not violate Rule 25-17.008, Florida Administrative Code. The rule does not prohibit utilities from using the rate impact test (RIM) for initial screening of conservation programs, as FPL did in this case. The Commission's Cost-Effectiveness Manual sets the minimum filing requirements for utilities which require submission of data under all three cost-effectiveness tests, including the total resource test (TRC) and the participants' test. That procedure was followed with the programs involved in this case and was not inconsistent with the Commission's rule.

The Commission did not misconstrue Section 403.519, Florida Statutes, in its consideration of conservation measures which could mitigate the need for the proposed plant. The Commission's determination that such additional cost-effective conservation measures as might be available to FPL would not "mitigate all or part" of FPL's need was based on a reasoned analysis of the evidence. The decision is consistent with the statutory discretion afforded the Commission in Section 403.519. The utility is not required to consider every conceivable conservation program in its planning process, and it is not the Commission's role to second-

guess the utility, or attempt to manage its conservation programs. The Commission's evaluation of the conservation measures taken by and reasonably available to FPL is consistent with Commission's statutory authority and rules.

LEAF's argument that the Commission violated some procedural concept by stating that it was familiar with FPL's conservation efforts is utterly trivial. The Commission is presumed to be familiar with its orders and is not prohibited from stating such an obvious conclusion.

LEAF has asked the Court to reweigh the evidence of the competing experts on the demand side management (DSM) conservation measures available to FPL. The testimony of FPL's witnesses, Waters, Hawk, Wile, and Landon, established that the testimony of LEAF's witness, Mr. Plunkett, was not credible. The Commission correctly found that the cost-effectiveness of Mr. Plunkett's programs had not been proven; that the comparison with his "leading utilities" in the Northeast was misleading; and that Mr. Plunkett's proposals were largely based on estimates and could not be considered reliable as to true cost and potential benefits.

LEAF's arguments in its final point regarding "material errors in procedure" do not appear to raise an issue for review, and if they do, the arguments presented are without merit. The Commission considered and ruled on LEAF's 136 proposed findings of fact. The Commission correctly found that many of LEAF's findings were argumentive in nature and rejected them for that reason. The Commission's recitation of findings of fact and conclusions of law

in the body of its order is sufficient to meet the standard established by this Court and others under the Administrative Procedure Act. LEAF has demonstrated no harm arising from the Commission's treatment of proposed findings of fact or the form of the order.

LEAF has failed to demonstrate any basis for overturning that part of the Commission's order dealing with conservation issues, and the order should be affirmed.

ARGUMENT

RESPONSE OF THE FLORIDA PUBLIC SERVICE COMMISSION TO NASSAU POWER'S APPEAL OF ORDER NO. PSC-92-1210-FOF-EQ IN CASE NO. 81,496, AND THE CROSS APPEALS OF NASSAU POWER AND ARK ENERGY OF ORDER NO. PSC-92-1355-FOF-EQ IN CASE NO. 81,131.

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

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

The Commission's duty under the Siting Act is limited, but significant. The Commission must determine whether the electrical energy to be generated from the proposed power plant is needed. Sec. 403.519, Fla. Stat. (1991). An affirmative determination of

need from the Commission is a condition precedent to a final certification hearing. Sec. 403.507(3), Fla. Stat. (1991). That is, unless the Commission first determines that there is a need for the proposed plant, there can be no certification hearing, and no plant or site will be considered by the Siting Board. Consequently, the Commission's determination of need is the linchpin of the process.[1]

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

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

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

This definition is clear and unambiguous. It specifies, in plain language, who may apply for site certification. First, an applicant must be one (or a combination of) the seven enumerated

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

entities: cities, towns, counties, public utility districts, regulated electric companies or joint operating agencies. Second, the entity must also be either engaged in or authorized to engage in the generation, transmission or distribution of electric energy. This definition requires none of the circuitous statutory construction proposed by Nassau. Where, as here, the words of a statute are unambiguous, they must be accorded their plain, ordinary meaning, and the sort of judicial construction and interpretation urged by Ark and Nassau is improper. Holly v. Auld, 450 So. 2d 217 (Fla. 1984); State v. Eagan, 287 So. 2d 1 (Fla. 1973); Tropical Coach Line, Inc. v. Carter, 121 So. 2d 779 (Fla. 1960). Simply put, Nassau and Ark are not proper applicants because they are not cities, towns, counties, public utility districts, regulated electric companies or joint operating agencies.

There are no general terms used in Section 403.503(b) that require elaboration or interpretation. There is no confusion or ambiguity within the statutory language. The only ambiguity is that proposed by Nassau and Ark. They argue that the term "applicant", which is so clearly defined in the statute, should be redefined by this Court so that any entity that will generate electricity if it can obtain site certification and construct a plant may apply for a site certification and determination of need. This argument is specious as well as circular, and effectively nullifies the statutory definition of applicant. Ark and Nassau would have this Court ignore the statute's unmistakable requirement that an applicant must both be an enumerated entity and must also

be authorized to generate, transmit or distribute electricity. Even the most liberal construction of the definition cannot produce this tortured result.

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

> Significantly, each of the entities listed under the statutory definition may be obligated to serve customers. It is this need, resulting from a duty to serve customers, which the need determination proceeding is designed to examine. Non-utility generators such as Nassau and Ark have no such need since they are not required to serve customers. The Supreme Court recently upheld this interpretation of the Siting Act.

> Dismassal of these need determination proceedings is in accord with that definition. See Nassau Power Corporation v. Beard, 601 So. 2d 1175 (Fla. 1992).

Order No. PSC-92-1210-FOF-EQ at 3; R. 2971 at 2973.

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

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

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

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

> [w]hile the Act requires the Commission to determine whether a need exists for the addition of any generating facility of 50 MW or larger, the statute in our opinion, is

> designed primarily to have the Commission determine whether a need exists for the addition of capacity by a regulated electric utility or by a municipality.

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

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

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

Id. at 108-109.

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

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

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

In contrast, Ark and Nassau have no need of their own to determine. Theirs is not at all similar to the arrangement approved for Florida Crushed Stone by both the Commission and the Siting Board.

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

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

decision in Florida Crushed Stone is that a cogenerator was able to obtain site certification of a self-service power plant for which the Commission had determined need. The Commission has not disturbed that decision.

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

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

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

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

II. THE COMMISSION PROPERLY DENIED ARK AND NASSAU'S REQUEST FOR A COMPARATIVE DETERMINATION OF NEED PROCEEDING.

A. NEITHER THE SITING ACT NOR THE COMMISSION'S RULES REQUIRE OR ALLOW A COMPARATIVE REVIEW OF ARK AND NASSAU'S APPLICATIONS FOR DETERMINATION OF NEED FOR AN ELECTRICAL POWER PLANT.

There is no word, phrase, or clause within the Siting Act that suggests that the Commission must hold the comparative hearing sought by Ark and Nassau. Nor is there even a hint of such a requirement in either the Commission's rules regulating power purchases or its need determination rules. Fla. Admin. Code R. 25-17.080 - 25-17.091; Fla. Admin. Code R. 25-22.080, 25-22.081. The Commission did not err when it refused to a grant Ark and Nassau a type of hearing that is not required by statute or rule.

Assuming, arguendo, that Ashbacker and Bio-Med require comparative need determination proceedings under Section 403.519, Florida Statutes, they would also require comparative permitting procedures under Sections 403.501 - 403.518. This makes no sense: applicants would theoretically be entitled to comparative land use hearings and comparative reviews by the Siting Board, a possibility not suggested in the statute. Additionally, applicants may pursue need determination proceedings simultaneously with the site permitting process, so the application of this doctrine could cause a statutory impasse if the applicant chosen by the Siting Board was not the same applicant chosen by the Commission.

The Siting Act repeatedly refers to a single applicant, and fails to make any procedural or substantive provision for the possibility of multiple applicants. Section 403.502, which states

the legislative intent of the Siting Act, contemplates only one applicant:

> The Legislature finds that the efficiency of the permit application and review process at both the state and local level would be improved with the implementation of a process whereby a permit application would be centrally coordinated. . . .

Similarly, Section 403.5063 allows "the applicant for a proposed power plant" to give advance notice of its intent to file an application, and Section 403.5064 imposes duties on both "the applicant" and the Department of Environmental Regulation that do not admit of the possibility of multiple applicants for the same certification.[5] It is manifestly clear from language throughout the Siting Act that the legislature contemplated individual, rather than comparative, applications for site certification. The statutory procedures simply cannot be applied on a competitive basis.

If Ark and Nassau believe that the Siting Act is legally inadequate because it does not provide for comparative hearings, they could have challenged the statutes directly. Apparently, Ark and Nassau do not believe the statutes to be deficient, because they have chosen to attack the Commission's implementation of them,

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[5]For example, within seven days after an application has been determined to be complete, the Department of Environmental Regulation must prepare "a schedule of dates for submission of statements of issues, determination of sufficiency, and submittal of final reports from affected and other agencies and other significant dates to be followed during the certification process. . . ." Sec. 403.5064 (2), Fla. Stat. (1991). There is no mention in this section or in any other section of the Siting Act that addresses the Department's responsibilities if another applicant appears on the scene.

rather than the statutes themselves. However, the Commission has correctly applied the statutes, which do not provide for comparative hearings.

According to the Commission's rules and long-standing policy, the relationship between a utility and power producers is contractual. The contract may be either a standard offer contract or a negotiated contract.[6] Rule 25-17.0834(1), Florida Administrative Code, requires utilities to negotiate in good faith to purchase energy and capacity from QFs with which to meet its needs, while Rule 25-17.083(1) allows a party to bring a complaint against a utility that fails to negotiate in good faith. Significantly, neither Ark nor Nassau have brought such a complaint.

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

Power plant need determination proceedings must be distinguished from governmental review of the applications for a radio broadcasting license in Ashbacker Radio Corporation v. Federal Communications Commission, 325 U.S. 327 (1945) and the applications for a health care facility certificate of need in Bio-Medical Applications of Clearwater, Inc. v. Department of Health and Rehabilitative Services, 370 So. 2d 19 (Fla. 2d DCA 1979). In both of those cases, agencies were required to select among applicants to choose the one who would be allowed to provide a

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[6]A standard offer contract is a tariff offering created by Commission rules. Rule 25-17.0832(3), Florida Administrative Code, reserves standard offer contracts for power plants under 75 MW.

service **to the general public.** However, the Florida legislature has already selected electric utilities as the sole providers of electricity to the public, and has assigned to public utilities the statutory duty of providing service.[7]

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

It is neither necessary nor desirable to have a government agency limit the number of providers of most types of goods and services. Competition among providers generally benefits the public because it results in lower prices and higher quality. Consumers may select the best and lowest cost provider of automobiles, potato chips, accounting services, and even long-distance telephone service. Providers of these goods and services will compete for customers by providing better service at a lower price.

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

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

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

That limitation may be implemented by hearing, as in the case of radio broadcast licenses and healthcare facilities, or by statute, as in the case of electric utilities.[8] Although the selected licensee must serve the public need under the regulatory scrutiny of the agency, for the most part, the regulatory agency stays out of the day-to-day management of the licensee's operations. In fact, the Florida legislature has specifically directed the Commission in Section 366.04(1), Florida Statutes, (1991) to "regulate and supervise" public utilities, not to manage them.

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

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

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

In this case, the Commission found that "FPL's selection process was less than optimal", and that "FPL did not adequately consider all potential purchased power options." The Commission then appropriately required the utility to correct its process by using a fair methodology to seek the most cost-effective alternative to meet its need. Order No. PSC-92-1355-FOF-EQ at 16 - 18, R. 2396 at 2411-2413. In so doing, the Commission recognized that it was required to review the utility's selection of a

particular supplier rather than choose one of its own. As the prehearing officer stated in Order No. PSC-92-92-0827-PHO-EQ,

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

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

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

In Consumers Power Co. v. P.S.C., 472 N.W. 2d 77 (Mich. App. 1991) a cogenerator that had negotiated a contract to supply capacity and energy to a regulated utility applied to the Michigan Public Service Commission for contract approval. Thereafter, many

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

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

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

> James River [the cogenerator] complains that much of the record in this case was a meaningless exercise, inasmuch as it consists of evidence by various QFs regarding the superiority of their facilities over the MVC or other facilities and, hence, the appropriateness of selecting their facilities as a capacity source for Consumers. James River

> complains that the PSC unaccountably ignored the record and unlawfully delegated to Consumers the duty of determining which QFs would supply future capacity, allegedly because of Consumers' greater technical and business expertise.

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

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

Id. at 91.

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

C. ARK AND NASSAU WERE UNHARMED BY THE COMMISSION'S REFUSAL TO GRANT THEIR PETITIONS FOR A COMPARATIVE NEED DETERMINATION PROCEEDING.

As demonstrated above, Section 403.503 clearly excludes Ark and Nassau as applicants for any need determination proceeding. Even if one assumes, for the purpose of argument, that the

Ashbacker and Bio-Med cases did apply to proceedings to determine need for a power plant, Nassau and Ark were not harmed by the Commission's refusal to hold an Ashbacker-type hearing because they were not entitled to any need determination proceeding at all, whether comparative or otherwise.

D. NASSAU SUCCESSFULLY URGED THE COMMISSION TO REFUSE TO CONDUCT A COMPARATIVE NEED DETERMINATION IN DOCKET NO. 910004-EU, AND NOW TAKES THE OPPOSITE POSITION.

On May 28, 1992, this Court issued its opinion in Nassau Power Corporation v. Beard, 601 So.2d 1175 (Fla.1992). The record in that case (Supreme Court Case No. 78,275, Commission Docket No. 900004-EU) consists of seventeen volumes, including 1996 pages of documents, over 1000 pages of transcript, and hundreds of hearing exhibits. That record reflects that one of the difficult decisions the Commission grappled with in Docket No. 900004-EU was whether it should conduct comparative, or "mega" need determinations.

In that case, Nassau Power Corporation had a standard offer contract to provide 435 MW of power to Florida Power & Light Company. As in the Michigan Consumers Power case, there were more suppliers than there was demand.[9] The Commission had to decide whether it should conduct sequential need determination proceedings for a few selected standard offer contracts, or whether it should conduct a comparative "mega" need determination proceeding after which it would select a provider or providers based on merit.

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[9]In that case, the Commission had set a subscription limit of 500 MW which suppliers of several thousand megawatts were competing to provide.

On October 9, 1990, Nassau filed with the Commission a supplemental brief in which it argued vehemently against the position it now urges. Referring to a comparative need determination as a "free-for-all", it stated:

> Next, the possible presence [in a need determination proceeding] of one or more intervenors critiquing the applicant does not mean the Commission would have the ability to choose among several projects. In proceedings on a particular application, the Commission can only approve or deny the single applicant's proposal. The alternative--of requiring all QFs who want to subscribe the statewide unit to first file a petition for a determination of need--would be backwards, costly and burdensome.
>
> Further, the proposal to utilize a "mega" [comparative] determination of need proceeding is substantively analogous to a proposal to institute a bidding process. This was suggested by FPL in the rulemaking proceeding and appropriately rejected. . . . The proposal of a "mega" need determination is an attempt to institute a form of bidding without the analysis which the Commission has deemed to be needed. Clearly, the "mega-determination of need hearing" is a poor and inadequate forum for the subscription decision.
>
> . . . .
>
> Obviously, if the Commission decided to sift the detailed merits of all the projects, the various "contenders" would want to inform themselves about their competitors, and each would want to make a direct presentation and respond to the offerings of others. Added to the initial debate over the appropriate criteria to be used in the comparison, this approach would inevitably result in a considerable further delay (doubtlessly measured in months) . . . .

Supplemental Brief of Nassau Power Corporation, Nassau Power Corporation v. Beard, Florida Supreme Court Case No. 78,275;

Supplemental Brief at 8-11; R. 1228 at 1236-1239; emphasis in original; footnotes omitted.

On November 21, 1990, the Florida Public Service Commission issued Order No. 23792 in Docket No. 900004-EU. In re: Planning Hearings on Load Forecasts, Generation Expansion Plans and Cogeneration Pricing for Peninsular Florida's Electric Utilities, 90 F.P.S.C. 11:286 (1990) (Case No. 78,275 R. at 1802). As Nassau had urged, the Commission decided not to conduct a comparative need determination and instead selected contracts based on execution date, to be evaluated against individual utility need in separate non-comparative need determination proceedings. Thus, at Nassau's own urging, the Commission rejected the concept of an Ashbacker-type need determination. Nassau, which benefitted from the Commission's decision not to conduct a comparative hearing when its project was first in line to be evaluated, now seeks to achieve a different result. This Court should reject the argument for what it is: aN argument of convenience, rather than substance.

III. THE COMMISSION DID NOT ERR IN REFUSING TO SINGLE OUT NASSAU POWER FOR PREFERENTIAL TREATMENT OVER OTHER QUALIFYING FACILITIES.

The Florida Public Service Commission's rules effectively give Nassau the relief it seeks here -- an opportunity fill Florida Power & Light Company's 1998 - 1999 need. Rule 25-17.0834, Florida Administrative Code, provides that public utilities shall negotiate in good faith for the purchase of capacity and energy from qualifying facilities. The rule further provides that in the event the utility and qualifying facility cannot come to an agreement

either party may apply to the Commission for relief. Qualifying facilities may petition the Commission to order a utility to sign a contract should the Commission find that the utility failed to negotiate in good faith. The rule even requires that the Commission impose an appropriate penalty on the utility if it has failed to negotiate in good faith with qualifying facilities. To date, Nassau has not applied to the Commission for relief under Rule 25-17.0834.

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

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

> We note that we may consider a Qualifying Facility (QF) to be a statutorily preferable alternative to an Independent Power Producer. Section 403.519, Florida Statutes, specifies

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

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

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

The FERC rules require that each electric utility shall purchase energy and capacity which is made available from a qualifying facility. The rules create a market for QF power by requiring its purchase by utilities. The FERC rules do not require that state commissions must determine need for every qualifying facility. It would be irresponsible for the Commission hold a determination of need proceeding for every qualifying facility that proposed a project in Florida. This is not the intent of PURPA. Rather, PURPA is designed to require that utilities purchase power

from qualifying facilities which have been found to be needed by the state utility commissions and are accordingly built. Nassau has shown no violation of PURPA or the FERC rules by the Florida Public Service Commission. The Commission has complied with the letter and spirit of PURPA giving preference to qualifying facilities over other competing providers. The Commission would not be complying with PURPA by granting Nassau preferential treatment over other qualifying facilities that might wish to compete to fill FPL's need.

ARGUMENT

RESPONSE OF THE FLORIDA PUBLIC SERVICE COMMISSION TO ARGUMENT ON CROSS-APPEAL OF THE LEGAL ENVIRONMENTAL ASSISTANCE FOUNDATION (LEAF) AND DEBORAH EVANS, CASE NO. 81,131.

I. IF THE COURT AFFIRMS THE COMMISSION'S ORDER, LEAF's CROSS-APPEAL SHOULD BE DISMISSED AS MOOT.

In its brief, LEAF has essentially argued that the Commission erroneously evaluated FPL's conservation efforts. In support of that position, LEAF argues that the Commission did not consider the total resource and participants' tests; that the Commission relied on an erroneous definition of the term "mitigate"; that the Commission did not properly weigh all conservation programs available to FPL; that the Commission relied on non-record material; that the Commission decisions was not based on competent substantial evidence and that there were procedural errors in the case.

A resolution of these issues will only become necessary if the Court finds that the Commission erred in denying FPL's and Cypress' determination of need and that the case should be remanded for further proceedings. At that point, it would be appropriate for the Court to address the concerns raised by LEAF. However, the ultimate result sought by LEAF remains denial of the need determination. The Court should not address issues which do not require resolution unless the Cypress need denial is overturned.

II. THE COMMISSION DECISION IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AND COMPORTS WITH THE ESSENTIAL REQUIREMENTS OF LAW.

The standard of review which this Court has consistently applied to Commission orders is whether the decision is supported

by competent substantial evidence and whether the decision complies with the essential requirements of law. Citizens of the State of Florida v. Florida Public Service Commission, 464 So. 2d 1194 (Fla. 1985). The Commission orders come to the Court with a presumption of validity and the burden is on the challenging party to overcome that presumption. Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So. 2d 716 (Fla. 1983); City of Tallahassee v. Mann, 411 So. 2d 162 (Fla. 1981). The arguments advanced by LEAF in its seven points on cross-appeal do not demonstrate error when judged by the standard.[10]

A. THE COMMISSION'S EVALUATION OF FPL's DEMAND SIDE MANAGEMENT CONSERVATION PROGRAMS WAS CONSISTENT WITH RULE 25-17.008, FLORIDA ADMINISTRATIVE CODE.

In Point II of its argument, LEAF attempts to argue that the Commission has abused its discretion by acting inconsistently with Rule 25-17.008, Florida Administrative Code. This assertion in incorrect and is based on a misapprehension of the Commission's conservation program approval process.

Subsection (2) of Rule 25-17.008, states the purpose of the rule as follows:

> "The purpose of this rule is to establish minimum filing requirements for reporting cost-effectiveness data for any demand side conservation program proposed by an electric utility pursuant to Rule 25-17.002 and for any self-service wheeling proposal made by a

[10]The Commission believes that the seven subpoints of LEAF's argument are encompassed in Issue I as stated above. The subpoints A-D of the Commission's argument, nevertheless, follows LEAF's points except that LEAF's Points IV. and V. are covered as part of the argument in subpoint B.

qualifying facility or public utility pursuant to Rule 25-17.0883."

The rule continues in Subsection (3) to adopt the "Florida Public Service Commission Cost-Effectiveness Manual" for demand side management (DSM) programs and self service wheeling proposals. The Manual contains the three cost-effectiveness tests referred to LEAF's brief; The Total Resource Test (TRC), The Participants' Test and The Rate Impact Test (RIM). (Brief at 19) In addition, Subsection (4) of the rule states: "[N]othing in this rule shall be construed as prohibiting any party from providing additional data proposing additional formats for reporting cost-effectiveness data."

By its own terms, the rule establishes the minimum data to be filed with the Commission for evaluation of DSM conservation programs. That, however, is all that it does. The Manual does say that the Commission "will review the results of all three tests to determine cost-effectiveness" in the case of conservation programs. (LEAF's appendix, 9th unnumbered page, DSM manual p. 3). However, that means that, whenever the utility submits a program to the Commission, it must include an analysis of the cost-effectiveness for the program according to all three tests. The Commission will then evaluate what programs should be approved based on the cost-effectiveness results submitted, and other relevant factors[11].

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[11]As reiterated in Order No. 23560 approving FPL's basic conservation plan, the Commission judges programs by three criteria:

1. Does each component program advance the policy objectives set forth in Rule 25-17.001 and the FEECA

That is in fact the way utilities submit their programs for approval and the way the Commission evaluates them. In addition, the Commission may, as indicated in the rule in Subsection (4), consider other formats, if it is appropriate for the particular conservation program.

Contrary to the arguments advanced by LEAF, neither Rule 25-17.008 nor the Cost-Effectiveness Manual requires that the utilities such as FPL use all three of these tests to initially evaluate, or screen, the programs which they wish to submit to the Commission. The utilities are required to submit an analysis under all three of the tests and other information, if they propose a program for approval by the Commission. However, the Commission has not required in Rule 25-17.008, nor in the Cost-Effectiveness Manual, nor in its recent extensive revision of the conservation rules (25-17.001 - 25-17.007, Order No. PSC-93-0641-FOF-EG) that the utilities use all three tests, or any particular test, to do their initial screening of the programs to be submitted. It was a matter of FPL's discretion that it choose to submit conservation programs for the Commission's approval which had been reviewed as cost-effective under the RIM test. It was in that sense that the Commission found that "subject to the rate impact measures

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statute?

2. Is each component program directly monitorable and yield measurable results?

3. Is each component program cost effective? (Parenthetical remark omitted). 90 FPSC 10:159 (Oct., 1990).

screening test, FPL has adequately considered cost-effective non-generation alternatives, and has reasonably compared demand side and supply side options." (R. 2402).

The Commission did not apply the RIM test as the "sole determinant of cost-effectiveness" in the case, as LEAF would have it. (Brief at 20). The programs submitted by FPL were chosen by the utility based on successful screening using the RIM test, but it was not required to do otherwise.

LEAF has not shown any error in the Commission application of its rules or the various tests for evaluating DSM programs.

B. THE COMMISSION CORRECTLY APPLIED THE PROVISIONS OF SECTION 403.519, FLORIDA STATUTES, WHICH REQUIRE THE COMMISSION TO CONSIDER CONSERVATION MATTERS "WHICH MIGHT MITIGATE THE NEED FOR THE PROPOSED PLANT".

In addition to other factors, such as cost-effectiveness and system reliability and integrity, which the Commission must consider in evaluating a petition for determination for need, Section 403.519 requires the Commission to "expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant . . . ." In the scheme of evaluation proposed by the statute, conservation measures constitute one factor that the Commission must weigh in making its decision. It is a matter of the Commission's discretion what weight to give conservation or any other factor in making its ultimate determination of need. Theoretically, the Commission could find that other factors outweigh consideration of potential deferral from conservation. The statute requires the Commission to balance the factors listed,

and any other factors which it considers relevant. Seen in this context, the Commission's finding in this case that FPL's conservation measures could not "mitigate all or part" of the its 800 to 900 MW need is consistent with the statute and Commission policy expressed in its rules and orders.

LEAF has seized upon a statement by Mr. Jenkins at agenda conference regarding the formulation of the issue relating to conservation, Issue No. 17, to argue that the Commission has applied an improper standard evaluating the effects of conservation. (AT 10). This interpretation of Mr. Jenkins's remark and the Commission's order is mistaken for two reasons. The staff recommendation on Issue No. 17 is as follows: "The evidence in the record does not sufficiently conclude [sic] that additional conservation measures with achievable market penetration are available to FPL to avoid or significantly defer its need for capacity in 1998 and 1999." (R. 2035). The formulation of the staff's recommendation consider both avoidance and deferral of the utility's capacity needs. The staff's recommendation and the Commission's ultimate finding that conservation and other non-generating alternatives could not "mitigate all or part" of FPL's need was based on a reasoned analysis of the evidence. That analysis is set forth in the Commission's order at p. 5-7. (R. 2400-2402).

The second reason why LEAF's arguments miss the mark is that it does not understand, or refuses to accept, the Commission's evaluation of conservation measures under the statutes. Utility

planning is admittedly an extremely complicated and involved process. The point at which a utility must judge mitigating effects of its conservation programs is when it develops it load and energy forecasts. When the utility identifies a specific need for a particular time, it will have normally considered and subtracted out the effects of conservation programs. (T. 218-219; 254-255). It is in the context of that planning process that the Commission evaluates conservation effects under Section 403.519. The Commission reviews and approves conservation programs that are submitted by the utilities. It is at the utility's discretion that these programs are brought forth and submitted to the Commission subject to approval based on their cost-effectiveness. While Section 366.82, Florida Statutes, allows the Commission to require utilities to develop conservation plans, it does not allow the Commission to mandate any particular programs for the utility, unless the utility has not implemented programs and is not in substantial compliance with its plan.

The Commission is not allowed by either Section 403.519 or Section 366.82 to second-guess the utility's conservation efforts. It can certainly look at the effect of the programs that it has approved to see if their mitigating effect has been correctly considered by the utility in its projection of needed capacity. It can also look at the programs which were "reasonably available" to the utility at the time of its planning decision, but it must respect the utility's planning and evaluation process. The Commission cannot go back, as LEAF would have it, and require the

utility to evaluate its projected need against conservation programs which might be cost-effective under a test other than that utilized by the utility, nor can the Commission evoke the availability of these programs after the petition for need has been filed. Conservation programs generally lead to capacity deferral in small increments and do not happen overnight. (T.251-252). It was in recognization of these circumstances that the Commission stated in its order that "while it is conceivable that additional cost-effective conservation can be implemented by FPL, we are not persuaded that over 800 MW of additional high-load factor conservation can be in place in time to cost-effectively defer FPL's need in 1998-1999." (R. 2401). The Commission's determination that FPL's conservation measures could not reasonably defer or avoid in whole or part the 800 MW of capacity needed by FPL is consistent with the concept of "mitigate" in Section 403.519.

LEAF's strained argument in its Point IV. that the Commission's has wrongly evaluated conservation measures "taken by" the utility versus those "reasonably available" to it is incorrect. The Commission had before it evidence relating both to the effect of existing, proven conservation programs and those which were approved and being implemented over the utility's planning horizon. (T. 260-262; 1877-1879; 1937-1949). The Commission's finding that FPL's need could not be effectively deferred in whole or part was based on the universe of DSM programs taken by and reasonably available to the company. Contrary to what LEAF seems to be

arguing, there is no requirement in applicable statutes or rules that the utility or the Commission perform a "rolling conservation review" and evaluate need against what might be available in the future.

LEAF's argument in its Point V. that the Commission committed procedural error by relying on its own knowledge of FPL's conservation is trivial, at best. There is no indication that the Commission attached any particular weight to its observation that "we regularly review FPL's conservation plans and programs, and are thus familiar with FPL's conservation efforts." (R. 2401). By no stretch of the imagination could it be asserted that the Commission's knowledge of FPL's general conservation efforts formed a significant basis for its findings that DSM programs could not mitigate the need for new capacity. Surely, the Commission is permitted to make an observation about matters generally addressed in its orders and contained in its files. Presumably, the Commission is familiar with such matters and could take administrative notice of relevant material, if necessary.

C. THE COMMISSION'S FINDINGS THAT FPL HAD ADEQUATELY CONSIDERED REASONABLY AVAILABLE CONSERVATION MEASURES AND THAT THESE MEASURES WOULD NOT MITIGATE ALL OR PART OF THE PROJECTED 800-900 MW NEED WAS BASED ON COMPETENT SUBSTANTIAL EVIDENCE.

This Court has long recognized that it is the Commission's job to weigh the competing testimony of experts and accord that testimony whatever weight it determines proper. United Telephone Company v. Mayo, 345 So. 2d 648 (Fla. 1977) It is not the Court's job to reweigh the evidence and substitute its judgment for the

Commissions'. Citizens of the State of Florida v. Florida Public Service Commission, 435 So. 2d 784 (Fla. 1983). That, however, it exactly what LEAF is asking the Court to do in this case.

The Commission heard the testimony of LEAF's witness, Mr. Plunkett, and FPL's witnesses, Hawk, Wile, and Landon. FPL's Mr. Waters, also presented testimony on conservation measures in the planning process. Testimony and exhibits presented by these witnesses amounted to several hundred pages.

The basic tenets of Mr. Plunkett's testimony were that FPL's reliance on the RIM test to screen conservation programs resulted in a bias against DSM and that the company's demand side resource acquisition strategies were inadequate. (T. 876-877). As to the limitations of the RIM test, Mr. Plunkett testified that it resulted in a tendency to "overstate the cost of DSM, and, therefore, limit their [sic] acquisition." (T. 876). Concerning the inadequacies of FPL's resource acquisition strategies, Mr. Plunkett found that these involved "omissions and program design shortcomings" which overlooked significant conservation market sectors, such as commercial and industrial construction and remodeling, and resulted in lost opportunities to implement significant conservation programs. (T. 877). Mr. Plunkett further summarized his testimony stating that, while he had not conducted the economic screening that would be necessary to develop a precise estimate of DSM resources reasonably available to FPL, he had developed a "rough estimate" of the conservation savings which could be achieved if FPL corrected its biased economic screening

and addressed problems with its DSM resource acquisition. (T. 878). Based on these projections, Mr. Plunkett concluded that proper utilization of DSM programs would obviate any need for additional generating capacity in 1998 and reduce the company's 1999 need to 306 MW. (T. 879-880).

FPL's witness, Mr. Waters, testified that the utility had submitted new conservation plans and programs for Commission approval in response to generic Order No. 22176, which adopted conservation goals for utilities pursuant to Rule 25-17.001, Florida Administrative Code. FPL's programs, referred to as Demand Side Management Plan For The 90s, was approved by the Commission in Order Nos. 23667 and 23560. (T. 218-219). Mr. Waters further testified that FPL utilized the reduction levels for the Commission-approved DSM programs in evaluating the need for Cypress. Mr. Waters also said that FPL had included six Commission-approved "research and development" projects in its evaluation of need for Cypress. (T. 219). The total conservation effects included directly in the utility's load forecast amounted to 422 MW, and the projection for 1999 was 1000 MW of demand reduction from DSM programs. (T. 219; 260).

FPL's witnesses Hawk, Wile and Landon took issue with the basis premises of Mr. Plunkett's analysis, as well as the details of his programs. Mr. Landon presented an analysis of the three tests used to evaluate DSM programs, i.e., the RIM, TRC and Participants' Test. Mr. Landon testified that the RIM test was superior to the TRC test preferred by Mr. Plunkett. (T. 1502).

Mr. Landon elaborated on this position and summarized his criticism of Mr. Plunkett's assertion that DSM alternatives should be evaluated using the TRC test as follows:

> The total resource cost test does not include the transfer of costs to non-participants and therefore understates the cost of programs which require such transfers. As a result, the total resource cost test is biased, since it fails to reflect true cost to all customers. The total resource cost test should not be the primary test for DSM programs. The rate impact test: (1) focuses attention on getting the price signal correct, (2) prevents the taxation of some consumers to benefit others, (3) allows customers rather than utilities or regulators to choose among alternatives, (4) reduces the cost of purchased conservation, (5) limits the potential for error by limiting the amount of subsidy and using a market test and (6) precludes the distortion of incentives between regulated and unregulated markets. By abandoning the market, use of the total resource cost test is likely to induce inefficient DSM, increase rates and reduce consumption below efficient levels. This will result in an unwarranted tax on non-participants and move further away from efficient pricing. (T. 1508-1509).

FPL's witness Hawk likewise provided extensive testimony supporting the use of the RIM test over the TRC test in evaluating DSM programs' cost-effectiveness. (T. 1861-1867). As did Mr. Landon, Mr. Hawk emphasized that the RIM test was superior to TRC for purposes of determining the future power needs. (T. 1862-163).

LEAF's witness, Mr. Plunkett, testified that, based on his concepts of cost-effectiveness screening and program acquisition, FPL could have achieved significant reductions in its power needs by 1999. His revised projection was that FPL could realize additional DSM peak savings of 426 MW by 1999. (T. 791-874; 887).

FPL's witness Hawk provided extensive rebuttal to Mr. Plunkett's claims that FPL's DSM planning and implementation were defective. (T. 1868-1920). In summary, Mr. Hawk listed five deficiencies in Mr. Plunkett's testimony: (1) Mr. Plunkett failed to recognize the RIM test as the most appropriate measure of cost-effectiveness for evaluating DSM programs; (2) FPL had developed and implemented comprehensive DSM programs which address FPL's market segments and major end uses contributing to peak demand; (3) Mr. Plunkett had misunderstood FPL's DSM implementation and misstated delivery mechanism issues, lost opportunity problems, incentive concerns and other aspects of FPL's DSM programs; (4) Mr. Plunkett's comparison of FPL with other so-called leading utilities was invalid; and (5) implementation of additional DSM programs based on the unproven estimates provided by Mr. Plunkett would be risky at best. (T. 1921-1922).

Based on the expert testimony presented by LEAF's witness and FPL witnesses, the Commission concluded in its order that the evidence did not support the finding that FPL could institute sufficient additional conservation to defer its 1998-1999 generation needs. The Commission based its findings on three primary considerations. First, the Commission determined that Mr. Plunkett's proposals did not appear to be cost-effective based on testimony submitted. An analysis of the cost of Mr. Plunkett's program submitted in FPL's Exhibit 54 showed that these programs could cost FPL's ratepayers $1.4 billion more than the avoided pulverized coal unit. The exhibit also shows that the benefit to

cost ratio of Mr. Plunkett's proposals was approximately .63 under the RIM test (Ex. 54; T. 2020). This means that FPL's customers who did not participate in the conservation programs have to subsidize those who did by making up the lost revenues associated with Mr. Plunkett's proposals. This illustrates a primary weakness of the TRC test; it doesn't recognize the effect of lost revenues on ratepayers. The problem is not resolved by labeling it a "benefit transfer". (Brief at 23). The transferee, who did not conserve, but was asked to pick up the lost revenues of those who did, would likely have a different view of the "benefit" received.

The second crucial finding for the Commission was that Mr. Plunkett's proposals appear to have understated true cost and overstated potential benefit. FPL's witness Wile testified that Mr. Plunkett's data for his cost-benefit analysis was taken from a sample of utility estimates which were largely based on engineering estimates. Thus, they were projections of future savings and did not reflect actual cost in benefits measured after the programs had been implemented. (T. 1799). Mr. Plunkett, himself, admitted that his proposed 426 MW deduction was really only a "rough estimate" (T. 886-887). In the final analysis, the Commission was convinced by Mr. Wile's testimony that the cost-benefit analysis provided by Mr. Plunkett was inaccurate and could not be relied on.

The Commission also found that Mr. Plunkett's comparison of FPL's conservation programs with those of "leading utilities" was misleading. The record showed that the so-called leading utilities were largely located in the Northeast and tended to focus

conservation efforts much more on commercial and industrial customers than FPL. FPL's conservation efforts are primarily directed toward residential customers, since they contribute the most to FPL's system peak and represent the largest segment of its sales. (T. 1887-1888). Moreover, FPL's Mr. Hawk testified that, for the most part, the utilities compared to FPL by Mr. Plunkett did not begin DSM programs until 1987 and that, therefore, their conservation efforts were largely based on forecasts. (T. 1890-1891).

In its order, the Commission recognized, as pointed out by LEAF, that some additional conservation programs had been approved since FPL filed its petition. However, as FPL's witnesses testified, even if these programs were considered, their exact effect in demand reduction could not precisely be quantified. (T. 1935-1936; 1943). The load reduction from the additional programs available to FPL, even at their most optimistic performance level, would not have been enough to defer the utility's 1998 load. (R. 1577).

Based on its weighing of the evidence in this case, the Commission could reasonably conclude that additional conservation efforts could not mitigate FPL's need for capacity in 1998-1999. There was exhaustive testimony on conservation issues, and the Commission's findings are based on competent substantial evidence. LEAF has asked this Court to reevaluate that evidence and reach a different conclusion. That, however, is not this Court's role and it should decline to do so.

D. THE COMMISSION DID NOT COMMIT "MATERIAL ERRORS IN PROCEDURE" IN ITS RULINGS ON LEAF'S FINDINGS OF FACT.

On its face, it is uncertain what relief LEAF is seeking in its Point VII. There is no specific allegation that the "correctness" and "fairness" of the Commission's action was in fact affected by rulings on LEAF's proposed findings of fact. Instead, LEAF makes the bare assertions that the final order did not make separate findings and that many of the 136 findings were "improperly rejected" as argument. Without a demonstrable claim of actual harm or error, the Court should reject LEAF's invitation to peruse the dozens of proposed facts which the Commission found to be in the nature of argument. Schomer v. Department of Professional Regulation, 417 So. 2d 1089 (Fla. 3rd DCA 1982); Health Care Management, Inc. v. Department of Health and Rehabilitative Services, 479 So. 2d 193 (Fla. 1st DCA 1985).

Even assuming LEAF has raised an issue for review in its Point VII, its arguments are without merit. The Commission specifically ruled on all 136 of LEAF's findings. (R. 2425-2450). Its rejection of the "facts" listed by LEAF on p. 36 of its Brief was entirely proper. An example of what the Commission found acceptable as a fact and what it found to be argument illustrates the point:

> 71. The recent Florida Energy Office Phase 1 DSM Potential Study recommends that "Florida utilities be encouraged to develop and implement appliance efficiency standards: [T-1978, L 4-10]
>
> We accept and incorporate this finding.
>
> 72. FPL's failure to develop and implement cost-effective appliance efficiency programs is unreasonable

since programs were deleted based upon non-optimal standards.

We reject this finding as an argument rather than a finding of fact. (R. 2438).

The Commission correctly found that No. 71 was an objective statement which was verifiable in the record. It, therefore, found it acceptable and incorporated it in its decision as a fact. No. 72, on the other hand, has no cite to the record and contains two highly subjective terms, "unreasonable" and "non-optimal" and was correctly rejected as "argument". The contrast shown in this pair of proposed findings is reflected in varying degrees in the other findings the Commission rejected as argument. Argument is an attempt to persuade to a particular point of view, and that is exactly what LEAF's rejected findings attempt to do. The Commission properly found that the objective record did not support these kinds of findings and that they could not be accepted as facts. The Administrative Procedure Act (APA) required the Commission to rule on LEAF's proposed findings and state its reasons for rejecting them. Pelham v. Superintendent of School Board of Wakulla County, 436 So. 2d 951 (Fla. 1st DCA 1983). The Commission was not required to use any particular "buzz word" in its conclusions rejecting LEAF's argumentative statements.

LEAF's claim that the Commission's order did not contain adequate findings of fact and conclusions of law is likewise without basis. In Occidental Chemical Co. v. Mayo, 351 So. 2d 336, 341 (Fla. 1977), the Court found that, while the Commission's order must contain a "sufficient statement of the ultimate facts upon

which the Commission relied," the Commission need not "include in its order a summary of the testimony it heard or a recitation of every evidentiary fact on which it ruled." Similarly, in Schomer, supra, the court found that

> [i]t is sufficient that the agency provide in its decision a written foundation upon which the reviewing court may assure that all proposed findings of fact have been considered and ruled upon and not overlooked or concealed. 417 So. 2d 1090.

Section 120.59, Florida Statutes, requires that final agency orders contain findings of fact and conclusions of law sufficient to inform the parties and the reviewing court of the basis on which the decision was made. They do not require labelling. The Order in this case, does contain extensive factual findings and legal reasoning to support the decision the Commission made and to inform the parties and the Court of the grounds for that decision. The Commission's 19 page order and 37 pages of rulings on LEAF's and Nassau's proposed findings certainly meets the standard articulated in Occidental and Schomer. In any case, it is difficult to discern any basis for LEAF's complaint, since the Commission did provide rulings on the 136 findings submitted, and there is no allegation that the form of the order has caused material harm to anyone.

CONCLUSION

Neither Ark nor Nassau have shown any error in the Commission's refusal to entertain their petitions for determination of need for power plants and petitions for contract approval, and Ark has shown no error in the Commission's refusal to consolidate its petition with the Cypress need determination proceeding.

Leaf has failed to meet its burden to show that the Commission's order is not supported by competent substantial evidence or otherwise does not comport with the essential requirements of law.

The Commission's orders should be affirmed.

Respectfully submitted,

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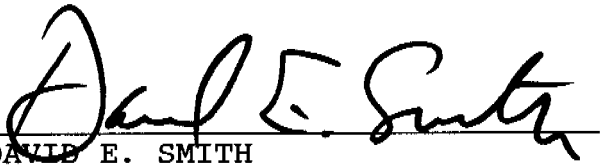

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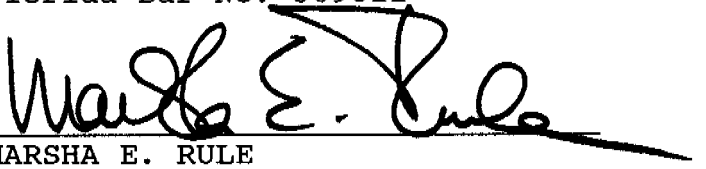

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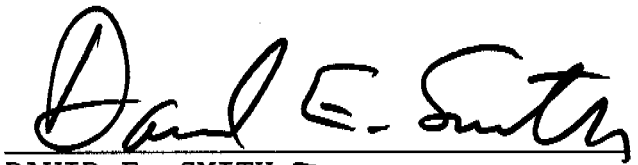
Dated: June 15, 1993

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the following parties on this 15th day of June, 1993.



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