IN THE SUPREME COURT OF FLORIDA

CYPRESS ENERGY PARTNERS,
LIMITED PARTNERSHIP,

Appellant,

v. CASE NO. 81,131

J. TERRY DEASON, ETC., ET AL.,

Appellees,

and NASSAU POWER CORPORATION,

Appellant,

v. CASE NO. 81,496

J. TERRY DEASON, ETC., ET AL.,
_____/

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

CONSOLIDATED REPLY BRIEF OF NASSAU POWER CORPORATION

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Introduction

This consolidated Reply Brief contains the replies of Nassau Power Corporation (Nassau Power) to the briefs of Florida Power and Light Company, the Florida Public Service Commission, the Florida Department of Environmental Regulation, and J. Makowski Associates.

Of necessity, Nassau Power has not attempted to respond to every argument made by these parties, but has selected those points to which, in Nassau Power's opinion, additional attention is most warranted. Nassau Power relies on its Initial Brief for the points not specifically addressed here.

Nassau Power will continue to refer to the above parties as "FPL", "the Commission", and "DER."

I. Reply to Introductory Comments of FPL

At the outset of its brief, FPL claims that the issue before the Court is the obligation of a public utility to serve its customers. (FPL Brief at 1). Instead, at stake is whether all entities subject to the requirements of the Siting Act will be given equal access to its licensing procedures. Will the agencies whom the Legislature has charged with the responsibility of licensing only the power plants that will best serve the interests of Florida carry out that responsibility by direct action on co-equal, competing requests for licensure? Or, will they act by way of limited review, through the filter of a utility that is in competition with the alternatives and that has interests,

objectives, and criteria that may well differ from those of the agencies? FPL's view depends on the existence of a monolithic monopoly whose decision-making power pervades all aspects of its operations, including the provision of generation facilities. However, FPL's view is out of date.

Already, as FPL acknowledges (FPL Brief at 13), the Commission can initiate a determination of need case on its own motion. That means that the Commission can find that a need for capacity exists and can select the alternative that should go forward, all without the utility having first put forward its preferred choice. Section 403.519, Florida Statutes. Already, federal laws enacted in 1978 (Public Utility Regulatory Policies Act) and 1992 (Energy Policy Act) have created competition in the power generation industry and have given rise to an industry of independent alternatives to the utility's own construction.

This case concerns the need to require the scheme for licensing power plants in Florida to recognize fully the reality of new participants and changed markets that were not contemplated when the Siting Act was enacted. For FPL, agency proceedings under the Siting Act represent the utility's last stand in its effort to maintain its hold on the generation portion of the electric industry. However, FPL's argument -- that allowing other applicants would defeat the utility's "obligation to serve" -- confuses the distinction between measuring customers' requirements and meeting those requirements in a timely, economical, and reliable way, on the one hand; and the opportunity to propose,

license and provide the best capacity choice with which the utility will ultimately satisfy its customers' needs, on the other. Nassau Power's separate petition to determine need is not a "backdoor deregulation" of the retail market for electricity, as FPL maintains (FPL Brief at 43); instead, FPL is attempting to use the "obligation to serve" argument to oppose the equal status of legally recognized alternatives and thereby thwart genuine competition in the wholesale generation market.

II. Reply to FPL's Description of its Selection Process

Presumably to bolster its argument that the scope of "applicant" should be confined to a utility, FPL devotes much space to a glowing description of the selection process it employed prior to filing a joint petition to determine need with Cypress Energy. (FPL Brief at 2-4). In doing so, FPL engages in some cosmetic reconstruction. For instance, FPL says that after it settled on the unit it would build, it "explored" whether it should instead contract to purchase capacity from another source. (FPL Brief at 2-3). During the proceeding before the Commission, the term used most often by FPL and others to describe the alternatives FPL considered was "unsolicited proposals." See, i.e., Tr. 66, 122-23, 131, 132; Order No. PSC-92-1355-FOF-EQ at 16; R. 2411. In its order, the Commission found that by making no effort to notify potential providers of its need, FPL failed to adequately

investigate all possible sources of capacity.[1] Order No. PSC-92-1355-FOF-EQ at 16; R. 2411. The Commission also found that the fuel forecast upon which FPL based its assessment was unacceptable for planning purposes, (Order No. PSC-92-1355-FOF-EQ at 11; R. 2406), and concluded that FPL had settled on the wrong generation technology. Order No. PSC-92-1355-FOF-EQ at 10; R. 2405. FPL has not challenged any of the Commission's findings. Far from proving that the choice of capacity should be the exclusive domain of the utility, FPL's handling of this capacity selection illustrates the need for a process in which the agency may evaluate the merits of co-equal applications and make a final decision.

At various points, FPL refers to the need for an orderly and timely process for selecting capacity additions. (FPL Brief at 17, 19). However, the process defended by FPL is neither orderly or timely. It permits two absurd and unacceptable possibilities: (1) a never-ending process, in which the Commission rejects -- perhaps more than once -- the utility's proposal but says it cannot award a determination of need to the demonstrably superior alternatives (if a utility chooses poorly once, it can do so again); (2) a process spurned by viable, cost-effective alternatives because of the lack of a clear path to certification. A process that reaches no conclusion is disorderly; a process that discourages

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[1] FPL twice says that Nassau Power chose not to submit a proposal. The record shows that during the time frame when FPL was reviewing the unsolicited proposals it had received and was negotiating with Cypress Energy, Nassau Power was attempting to obtain -- and FPL was resisting -- a determination of need based on its standard offer contract with FPL. (Tr. 327-28).

participation by potentially desirable alternatives is inefficient. What will happen to the quality and reliability of service to customers if the Commission believes it must choose between rubber-stamping the utility's poor selection and sending the utility back to the starting point as the time of need approaches?

III. Reply to the Commission and FPL: The Need for Statutory Construction and the Florida Crushed Stone Case

A. The Commission Does Not Adhere to its Own Test

FPL and the Commission argue that the definition of applicant in section 403.503(4), Florida Statutes, is clear, unambiguous and requires no interpretation. According to the Commission, if an entity does not appear in the enumerated list of section 403.503(4), it cannot be an applicant. The chief irony in the case is that the Commission then promptly proffers, not one, but two exercises in statutory construction which violate the limits its position would impose.

In Order No. PSC-92-1210-FOF-EQ at 3 (R. 2973, Appendix to Nassau Power's Initial Brief at 3), the Commission interpreted the statutory definition of applicant to include within its meaning non-utility generators who have a contract with a utility:

> As an indispensable party, the utility will be treated as a joint applicant with the entity with which it has contracted. 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.

Emphasis supplied. Thus, in its interpretation of the term applicant, the Commission turns an "unenumerated" non-utility generator into a utility because the non-utility generator has a proposed contract with a utility. This "conversion" appears nowhere within the "plain and unambiguous" language of the statute, as the Commission says it must. Further, to accomplish its result, the Commission found it necessary to equate "indispensable party" with "co-applicant," even though the terms clearly denote very different legal concepts.[2]

The Commission tried to avoid confronting the situation which would result if a self-service generator (one that would consume the electricity it generates) was held to the "plain language" of the statute. Again, according to the position which the Commission urges, a self-service generator could not be an applicant under the Siting Act, because it is not specifically enumerated. However, in sidestepping the question, the Commission indicated its willingness to not be bound by the requirements of consistency. It said:

> We explicitly reserve for the future the question of whether a self-service generator (which has its own need to serve) may be an applicant for a need determination without a utility co-applicant.

Order No. PSC-92-1210-FOF-EQ at 4-5, (R. at 2974-75; Appendix to Nassau Power's Initial Brief at 4-5). The "plain and unambiguous"

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[2] In Nassau Power's Amelia Island determination of need case, Commission Docket No. 910816-EQ, FPL (the indispensable party) actively opposed Nassau Power's petition.

language of the statute makes no distinction between entities that serve their own need and those which do not.

The Commission argues that the statute permits no construction when it is applied to Nassau Power, but provides a different statutory interpretation for non-utility generators with contracts and implies that yet another interpretation may be invoked for self-service generators.

B. Florida Crushed Stone

Nassau Power has directed the Court's attention to the decision of the Siting Board in the 1984 Florida Crushed Stone case. In that case, the Siting Board denied a party's motion to dismiss the application of a cogenerator that had no contract with a purchasing utility. The Siting Board rejected the argument that the cogenerator was not a proper applicant because it was not explicitly enumerated in the statute. It construed section 403.503(4), Florida Statutes, and found that Florida Crushed Stone was "in the business of generating electricity" within the meaning of the statute.

Nassau Power cited the Florida Crushed Stone case -- not only to establish the position of the agency most responsible for implementing the Siting Act -- but to demonstrate that the Commission's present stance is at odds with its decision to issue a determination of need to Florida Crushed Stone.

Their narrow interpretation of "applicant" has placed FPL and the Commission on the horns of a logical dilemma, which the Florida

Crushed Stone case graphically illustrates. In its brief the Commission tries to avoid its dilemma by using the dimension of time as a shield. It denies that the 1983 Florida Crushed Stone order dealt with the issue and, as described above, attempts to put off to the future a confrontation with the implications of its rationale. FPL tries to negotiate a way through the contradictions, and suffers in the encounter.

1. **The Commission and Florida Crushed Stone.** The Commission argues that it made no explicit finding in its Florida Crushed Stone decision that Florida Crushed Stone was a proper applicant for a determination of need. (Commission Brief at 14). The Commission reasons that because the question of whether a non-utility cogenerator may qualify as an applicant under the Siting Act was not formally identified as an issue in the Florida Crushed Stone determination of need case, its order serves as no precedent on that issue. However, in the order in which it awarded a determination of need to Florida Crushed Stone, the Commission said:

> 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.

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, emphasis supplied. The Commission

clearly recognized that Florida Crushed Stone was a proper applicant to proceed under the Siting Act because it would be constructing a facility falling within the Siting Act's purview.

The Commission also tries to distinguish Florida Crushed Stone by noting that Florida Crushed Stone intended to sell any energy it did not need for its own use on an "as-available" basis and thus did not build its plant to meet the need of a utility. The Commission's argument misses the point, which is that this would not be a permissible "exception" to the Commission's own rigid requirement that "applicants" be limited to those specifically enumerated. In addition, it is interesting to observe that following the entry of the Florida Crushed Stone order approving the determination of need, the Commission subsequently approved a contract between Florida Crushed Stone and FPL for the firm sale of energy and capacity for no less than 100 megawatts and no more than 150 megawatts. In re: Petition of Florida Power and Light Company for approval of cogeneration agreement with Florida Crushed Stone Company, 84 F.P.S.C. 10:103 (1984), Order No. 13765. While the separate Florida Crushed Stone proceedings took a less direct route than the course charted by Nassau Power, the orders demonstrate an early instance in which a determination of need and Siting Board certification preceded the negotiation of a contract with a purchasing utility.

2. **FPL and Florida Crushed Stone.** FPL's argument concerning Florida Crushed Stone goes like this: The Siting Board's decision is consistent with the Commission's action in this case because

Florida Crushed Stone did not propose to meet the need of a utility; however, if the Court has difficulty with that proposition, it should find that the Siting Board's reasoning was clearly erroneous! (FPL Brief at 22, 23).

As the clash of incompatible theories indicates, FPL -- like the Commission -- has collided with the implications of its argument. If there is no occasion for applying principles of construction to the statutory definition (if, in other words, only counties, cities, co-ops, utilities and joint operating agencies can possibly be applicants), then no independent cogenerator or independent power producer who wished to sell to a utility could ever be an applicant. However, in that event, neither could the proponent of a non-utility "self-service" project (as FPL describes Florida Crushed Stone), because that entity is not enumerated in the statute. Either the statute is "clear and unambiguous" (and therefore limited) or it is not. By arguing that the Siting Board's interpretation allowing non-utility entities to become applicants is no hindrance to FPL's position if seen as limited to "self-service" situations, but is "clearly erroneous" if deemed to be applicable precedent, FPL tries to have it both ways -- with the result that each of its arguments cancels the other.

In its brief, FPL refers to what it calls Nassau Power's "tacit admission" that the Siting Board erred in its reasoning in Florida Crushed Stone. (FPL Brief at 23). This is a wild swing. Nassau Power admitted no such thing, "tacitly" or otherwise. The Siting Board construed the definition of "applicant" and determined

that Florida Crushed Stone was "in the business of generating electricity" within the meaning of the statute. Nassau Power's argument goes farther than does the language of the Siting Board's order to demonstrate, through an analysis of principles of statutory construction and case law precedent, the need to embrace entities other than those explicitly enumerated in the statute, but its position is fully consistent with the Siting Board's decision.

C. City of Jacksonville

In State v. City of Jacksonville, 50 So.2d 532, 536 (Fla. 1951), this Court articulated the principle that "broad, general and comprehensive terms . . . may be held to apply to new . . . entities coming into existence since the enactment of the statute; provided they are in the same general class as those treated in the statute." Nassau Power offers as the "general class treated by the statute" entities "engaged in the business of generating, transmitting or distributing electricity." FPL[3] offers as the general class treated by the statute those entities that have an obligation to serve ultimate consumers. The difference between the "general classes" is that Nassau Power's is a direct quotation from the statute; FPL's is a gloss on the statute that appears nowhere in it. Nassau Power's class is co-extensive with the purview of the Siting Act, and so would avoid the absurd result of statutorily

[3] In its brief, the Commission did not address at all the rule of statutory construction enunciated by this Court in City of Jacksonville.

requiring certification of all described units but providing access to few.

D. The Maxim "Expresio Unius" is Inapplicable

The Commission argues that the rule of expresio unius est exclusio alterius should govern this case. However, that rule does not address the situation here, where the entity which the Commission seeks to exclude from the Siting Act did not exist at the time of the legislative enactment, but by the terms of the Siting Act is required to receive site certification before it may construct and operate a power plant.

Quoting the opinion of the United States Supreme Court in Ford v. United States, 273 U.S. 593, 612 (1927), the First District Court of Appeal cautioned that the maxim expresio unius est exclusio alterius is:

> . . . often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusio is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.

Smalley Transportation Co. v. Moed's Transfer Co., 373 So.2d 55, 57 (Fla. 1st DCA 1979).

Neither of the cases[4] relied upon by the Commission for the argument that expresio unius est exclusio alterius is applicable here addresses the situation where an entity was created after the

[4] Thayer v. State, 335 So. 2d 815 (Fla. 1976); Wanda Marine Corp. v. State Department of Revenue, 305 So. 65 (Fla. 1st DCA 1974).

legislative enactment. Similarly, neither addresses the situation where the "plain language" construction urged by the Commission would lead to an absurd result. See Nassau Power Initial Brief at 33-37. Further, in both the cases relied upon by the Commission, the courts turned to other portions of the statute at issue to resolve the question of statutory interpretation.[5] As argued in Nassau Power's Initial Brief at 42-45, a review of other pertinent portions of the Siting Act supports the construction urged by Nassau Power.

IV. The Ashbacker Doctrine Regarding the Right to a Comparative Review is Applicable

FPL denies that proceedings for certification of a power plant constitute the type of governmental licensing which was the subject of Ashbacker Radio Corporation v. Federal Communications Commission, 325 U.S. 327 (1945) and Bio-Medical Applications of Clearwater, Inc. v. Department of Health and Rehabilitative Services, 370 So.2d 19 (Fla. 2d DCA 1979). To respond, one need only point to section 403.511(1), Florida Statutes, which states that site certification is:

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[5] As the United States Supreme Court stated in United States v. American Trucking Associations, Inc., 310 U.S. 534, 543-44 (1940), footnotes omitted:

> When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."

> the sole license of the state and any agency as to the approval of the site and the construction and operation of the proposed electrical power plant. . . .

In its brief, DER recognizes that the determination of need process administered by the Commission constitutes the type of licensing activity that requires a comparative review under Ashbacker. (DER Brief at 25).

Next, FPL and the Commission attempt to distinguish the Ashbacker line of cases on the basis that they involved companies that served the public directly. (FPL Brief at 32; Commission Brief at 19-20). However, "direct service" had nothing to do with the court-imposed requirement of comparative review. The source of the requirement was government action that would have the effect of precluding the consideration of one of competing, mutually exclusive applications. For purposes of the Ashbacker doctrine, there is no substantive distinction between limiting health care facilities to achieve efficiency and economy, on the one hand, and limiting power plants to minimize adverse environmental impacts, on the other. Common to each is a limitation on opportunities to obtain a governmental license. It is this limitation that results in the requirement of comparative review.

The Commission argues that nothing in the Siting Act requires it to conduct a comparative review of competing determination of need applications. However, a review of section 403.519 belies that position. Section 403.519 requires the Commission to consider four factors (as well as other matters within its jurisdiction)

when deciding on a determination of need petition. One of the four factors is "whether the proposed plant is the most cost-effective alternative available." To determine if a proposed plant is the most cost-effective alternative, it must be compared to other alternatives. If there is no such comparison, it would be impossible to decide whether the most cost-effective choice has been made. The statute's directive to choose the most cost-effective alternative implies a comparison of various and competing proposals.[6]

More importantly, the right to a comparative review does not depend upon express words in a statute. The comparative review requirement in Ashbacker and in Bio-Medical flows not from a particular statute but from a "fundamental doctrine of fair play which administrative agencies must diligently respect. . . ." Bio-Medical at 23.[7]

The Commission also argues that if it were required to provide a comparative need determination hearing, a comparative hearing would be required at all other hearings in the site certification process. In making this argument, the Commission forgets the point it made earlier in its brief. Without an affirmative determination

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[6] In the Cypress Energy case, the Commission based its denial of Cypress Energy's application partly on the evidence of available alternatives supplied by Nassau Power and ARK Energy as Intervenors. The Commission's view is that non-utility entities may intervene to show better alternatives, but cannot themselves attain an affirmative award.

[7] The Bio-Medical court also said: "[F]airness requires that the agency conduct a comparative hearing at which the competing applications are considered simultaneously." Id.

of need from the Commission, an applicant can go no further. (Commission Brief at 9-10). It is at the determination of need hearing that the comparison is made and the best alternative selected. The "winning" alternative then moves forward. This aspect of the siting scheme does not contradict the central coordination of the permit process, as the Commission tries to suggest; nor does it result in an impasse between the Commission and the Siting Board, as the Commission argues.

The Commission and FPL attempt to rely on Consumers Power Co. v. P.S.C., 472 N.W. 2d 77 (Mich. App. 1991), to support the position that no comparative review is required. In Consumers Power, the Michigan Public Service Commission dealt with the attempts of various entities to fill the need of Consumers Power Company for 1160 MW. One of the Qualifying Facilities (QFs, or cogenerators that satisfy efficiency standards of PURPA) involved in the case argued that it was entitled to an Ashbacker comparative hearing; the Michigan Commission found otherwise and held that Ashbacker was inapplicable "because there is no license, right or privilege being doled out by the government." Consumers Power at 91.

Consumers Power is inapposite for several reasons. First, no Siting Act scheme similar to the Florida Electrical Power Plant Siting Act was involved in Consumers Power. The Michigan Commission was not required, as the Florida Commission is, to determine the need for electrical power plants as part of a broader siting act statute. In Michigan, no QF license is awarded (or

required).[8] In Florida, site certification, of which the Commission's determination of need is an integral part, is "the sole license of the state and any agency as to the approval of the site and the construction and operation of the proposed electrical power plant. . . ." Section 403.511(1), Florida Statutes. There can be no question that a government license is being "doled out" under Florida law.

Second, in the case at bar, approval of the Cypress application would have precluded approval of any other determination of need applications. FPL's Mr. Waters testified that FPL does not need the generation output from both the Cypress and the Nassau Power projects. (Tr. 317-18). Thus, in the words of Ashbacker, the applications were mutually exclusive. The granting of one would preclude the granting of the other. The situation in Consumers Power was far different. "[T]his is not a case where approving one contract will mean the disapproval of all others. . . ." Id. at 89. The mutual exclusivity in the situation before the Court makes Consumers Power readily distinguishable.

Third, the Consumers Power court concluded that the Michigan Commission did not have the statutory authority to take the action it proposed. The Florida Commission possesses the authority to select a competing alternative for a determination of need award, section 403.519, Florida Statutes, and to require a utility to

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[8] Under Michigan law, a certificate of convenience is required only for public utilities. There is no requirement that a QF obtain such a certificate prior to construction and operation. Mich. Comp. Laws Ann. § 460.502 (1992).

enter into a contract with an entity who has been awarded a determination of need. Sections 366.04(2)(C), (5), Florida Statutes.

Finally, the Commission tries to use Nassau Power's position in an earlier case[9] to discredit its claim to a comparative review here. However, the previous case on which the Commission tries to rely involved a situation much different than the one before the Court.

In Commission Docket No. 900004-EU, the Commission had to decide how to prioritize numerous standard offer contracts which FPL received subsequent to the Commission's finding that 500 MW were available for subscription under the Commission's standard offer process.[10] At issue in the docket was the process the Commission should use to identify which of the identical,

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[9] Nassau Power has elected to respond substantively rather than to challenge the Commission's request that the Court take "judicial notice" of a brief filed in a different proceeding before the Commission.

[10] Under the standard offer contract procedure in place at that time, a portion of the need for additional generating capacity was to be met through standard form contracts geared to the "statewide avoided unit." The Commission determined the statewide need for Florida's next avoided unit upon which it based the price to be paid to QFs who subscribed the unit up to the megawatt limit. All terms, conditions and prices were set by the Commission; QFs simply executed the pre-approved contract, which utilities were required to offer and to honor until the subscription limit established by the Commission was met. At the time, standard offer contracts were not limited in size. They could include projects which required a determination of need under the Siting Act as well as those that did not. Since that time, the Commission's rule has been amended. Standard offer contracts are now required to fall below 75 MW, which is the threshold of Siting Act requirements. Section 403.506, Florida Statutes.

preapproved standard offer contracts would count towards meeting the 500 MW limit. In the past, the Commission had established priority in the queue of standard offer contracts on the basis of "first in time, first in line." Nassau Power had relied on and had acted on the basis of the order in which the Commission announced its intent to follow that same procedure. When the Commission later entertained other methods of determining which standard offer contracts counted toward the limit after the contracts were executed, Nassau Power advocated that the original basis be retained. At the time, priority in the queue would not have obviated the requirement that a cogenerator proposing a facility greater than 75 MW seek and obtain a determination of need pursuant to the requirements of the Siting Act.

V. Reply to FPL, the Commission, and J. Makowski: Nassau Power's 435 MW Qualifying Facility is Entitled to Preference

The Commission acknowledges that QFs should be given some degree of preference vis-à-vis other providers. (Commission Brief at 29). The Commission asserts that Nassau Power is inappropriately seeking preferential treatment over other QFs. However, there were no other QFs involved in the proceeding below. Makowski suggests that on remand the process include providers who had no pending determination of need applications at the time of the Cypress proceeding.

According to Ashbacker and Bio-Medical, a comparative review is required for "bona fide and timely filed application[s] to

render the same service. . . ." Bio-Medical at 23, emphasis supplied. The only two bona fide, timely filed applications (other than Cypress Energy) were those of Nassau Power and ARK Energy. But for the Commission's error in failing to conduct the required Ashbacker hearing, the Commission would have conducted a hearing that included only these three applicants (Cypress, Nassau Power, and ARK Energy). After hearing, the Commission properly rejected Cypress Energy, which recently withdrew its appeal.[11] Nassau Power and ARK Energy are therefore the only two applications to which the Commission improperly denied a comparative review. Of the two bona fide and timely applications that are entitled to the comparative review, only Nassau Power's application proposed a QF.[12]

The suggestion of the Commission and J. Makowski that the process must begin anew is contrary to the Ashbacker principle delineated above and would be fundamentally unfair to the two bona fide applicants below. The parties should be put in the same position they would have been in absent the Commission's error. The Court should so remand pursuant to section 120.68(9)(b), Florida Statutes.

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[11] Cypress Energy had appealed only the aspect of the Commission's order rejecting Cypress Energy's proposal as the capacity addition that should fill the need that the Commission found.

[12] The Commission determined a need for 800-900 MW. Nassau Power's Qualifying Facility would provide 435 MW of this amount.

VI. FPL's Discussion of Capital/Fuel Flexibility Misses the Point

FPL observes that Nassau Power's proposed power purchase agreement was modelled after the proposed FPL-Cypress Energy agreement, and concludes on that basis that Nassau Power's gas-fired combined cycle project would share the lack of capital/fuel flexibility attributed by the Commission to Cypress Energy's pulverized coal unit. In addition to making a factual[13] mistake, FPL misses the pertinent point completely. In its treatment of capital/fuel flexibility, the Commission criticized the inflexibility of FPL's choice of generation technology, not the terms of the power purchase contract. The favorable trade-offs between capital costs and fuel costs enable Nassau Power's proposed gas-fired combined cycle plant to deliver the needed electrical power at an overall contract price that is far lower than an expensive-to-build coal plant, even though coal is cheaper than natural gas. Order No. PSC-92-1355-FOF-EQ at 10-11; R. 2405-06. For Nassau Power, "capital/fuel flexibility" provides technological insurance that its generation technology would not be held captive to extremely high fuel prices in the event the prices of natural gas and coal diverge dramatically in the future. The advanced combined cycle unit is designed to be capable of converting to a

[13] FPL asserts that Nassau Power did not alter the capital/fuel "profile" of the FPL/Cypress contract. That is wrong. Nassau Power retained the same coal-based energy payment schedule, and significantly reduced the capacity charges. The reductions which yielded savings of $267 million were not proportional, as FPL seems to suggest in its brief.

coal-derived gas fuel, if the overall economics of capital/fuel costs ever warrant that to be done.[14]

VII. Reply to DER

DER is correct when it says that the Siting Board's liberal interpretation of the term "applicant" in the Florida Crushed Stone case is entitled to deference. (DER Brief at 3). DER is correct when it says that the Commission order on review conflicts with that interpretation and would usurp the jurisdiction of the Siting Board. (DER Brief at 17-18). DER is incorrect when it suggests that the Commission's order can be sustained, without conflict and without usurpation, simply by restricting the Commission's interpretation of "applicant" to the term that appears in section 403.519, Florida Statutes. DER's laudable attempt to find a basis for amity and comity between the agencies would unfortunately result in a sacrifice of the very jurisdiction its brief was intended to guard.

DER's argument rests entirely on the fact that section 403.519, Florida Statutes, which contains the criteria that the Commission is to apply to a petition for determination of need, was codified as part of the Florida Energy Efficiency and Conservation

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[14] During the hearing, Nassau Power described its business strategy of paying off the debt associated with the generating plant in 15 years -- the term of its price-certain contract for fuel supply -- thereby freeing a very large payment stream as cash flow available to meet any increases in fuel costs thereafter. (Tr. 1472). For Nassau Power, the ability to convert to gasified coal simply represents an additional layer of security against a worst-case future scenario.

Act (FEECA), rather than as part of the Florida Electrical Power Plant Siting Act. Confine the Commission to its own statutory turf, reasons DER, and the problem will be avoided. It isn't so.

First, while section 403.519, Florida Statutes, is technically not a part of the Siting Act, it is an integral part of the same regulatory scheme. The only entities who will seek a determination of need from the Commission are those who wish to obtain a certification order from the Siting Board. FPL recognized the substantive connection in its brief (FPL Brief at 5, footnote 7); even DER described the provisions as comprising an "inextricable interrelationship." (DER Brief at 8). That being the case, the fact that the laws are pari materia requires a unified, consistent definition of "applicant." DER invokes the doctrine in support of a very different result. (DER Brief at 4-5.) However, there is simply no way for the Commission or this Court to construe the Commission's functions under section 403.519, Florida Statutes, without significantly affecting the balance of the power plant licensing process.

DER apparently attempts to distinguish between "independent" petitions for a determination of need filed pursuant to section 403.519, Florida Statutes, prior to the submission of a complete application for certification to DER, on the one hand, and requests for a determination of need that proceed from a comprehensive application for certification filed with the DER pursuant to section 403.504(3), Florida Statutes, on the other. Approaching the Commission through a prior complete application to DER would

not alter the result which DER agrees is unacceptable. The Commission does not act on a copy of the DER application. It acts on a separate request for a determination, the format and content of which is prescribed by Commission rule. rule 25-22.081, Florida Administrative Code. It is abundantly clear that the Commission would refuse to entertain a request for a determination of need by a non-utility entity, whether the request was made before or after the application to DER was filed. Neither of the distinctions offered by DER -- that is, FEECA vs. Siting Act, or arrival of a request prior to or following a stop at DER -- would avoid the conflict between agencies which DER agrees must not be allowed.

DER correctly recognizes that the award of a determination of need by the Commission constitutes the type of licensing activity to which the requirement of a comparative review attaches under Ashbacker, supra. DER argues that the Commission cannot both deny applicant status to Nassau Power and refuse "substantive consideration" of its project through intervention in proceedings considering Cypress' application. According to DER, then, the fact that the Commission refused to grant Nassau Power the status of a separate applicant reinforces Nassau Power's right to receive a determination of need as a result of an intervention. However, it is Nassau Power's rightful status as an applicant that entitles Nassau Power to a comparative review.

The Court should act on DER's request that it uphold the Siting Board's jurisdiction to implement the Siting Act, but

disregard its ineffectual efforts to remove the fundamental conflict between the Siting Board and the Commission.

Conclusion

Nassau Power is a proper applicant under the Siting Act and is the only bona fide, timely QF applicant. The Court should remand this case to the Commission with directions that the Commission evaluate Nassau Power's petition for determination of need on the merits.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Consolidated Reply Brief of Nassau Power Corporation has been furnished to the following parties of record by U.S. Mail, this 12th day of July, 1993.

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