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IN THE SUPREME COURT OF FLORIDA

CYPRESS ENERGY PARTNERS,
LIMITED PARTNERSHIP,

Appellant,

v. CASE NO. 81,131

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

Appellees,

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 BRIEF OF NASSAU POWER CORPORATION

ANSWER BRIEF TO THE INITIAL BRIEF OF CYPRESS ENERGY
IN CASE NO. 81,131

INITIAL BRIEF IN CASE NO. 81,496

CROSS-APPELLANT'S BRIEF IN CASE NO. 81,131

Joseph A. McGlothlin
Fla. Bar No. 163771

Vicki Gordon Kaufman
Fla. Bar No. 286672

McWhirter, Grandoff & Reeves
315 S. Calhoun Street
Suite 716
Tallahassee, FL 32301
904/222-2525

Attorneys for Nassau Power
Corporation

Table of Contents

Table of Contents

Table of Contents

Table of Citations

Table of Citations

Table of Citations

Cases — Page No.

Florida Statutes

Table of Citations

PRELIMINARY STATEMENT

Throughout this brief, the following designations will be used. The Florida Public Service Commission will be referred to as "the Commission." Florida Power and Light Company will be "FPL." Cypress Energy Partners, Limited Partnership, will be shortened to "Cypress," and Nassau Power Corporation to "Nassau Power." The Department of Environmental Regulation will be referred to as "DER." The joint venture of ARK Energy, Inc. and CSW Development-I, Inc. will be called ARK.

The transcript of the final hearing will be designated (Tr.). The transcript of the October 22, 1992 Agenda Conference will be designated (AT.). The record is referred to as (R.) and the appendix to the brief is (A.).

Nassau Power will provide a Statement of the Case and of the Facts in its brief. The statement is needed for two reasons. First, following the filing of Cypress' initial brief in Case No. 81,131, the Court granted Nassau Power's motion to consolidate that case with Nassau Power's appeal of Florida Public Service Commission Order No. PSC-92-1210-FOF-EQ (R. 3755; A. 1) in Case No. 81,496. Appropriate references to the case in which Nassau Power's own petition to determine need was dismissed are necessary to convey to the Court the full context of the proceedings below.

In addition, Cypress' statement is argumentative. For instance, Cypress claims that its factual statement is "taken generally from the PSC's orders of November 23 and December 28,

1992," but its statement that FPL picked the Cypress project after ". . . [a] comparative evaluation of all available alternatives" (Cypress' Initial Brief, p. 2) is at odds with the Commission's findings. Further, Cypress' repeated characterizations of its competitors' projects as "hypothetical" and "immature" derive, not from the orders on appeal, but from partisan advocacy.

STATEMENT OF THE CASE AND OF THE FACTS

The Florida Electrical Power Plant Siting Act (Siting Act) requires an entity that desires to construct and operate a power plant covered by the Siting Act to first obtain a certification order from the Governor and Cabinet, who compose the Siting Board. As a condition precedent to the hearing on a request for site certification, the applicant must receive a favorable "determination of need" from the Commission.

On May 22, 1992, Cypress and FPL jointly filed with the Commission a petition to determine need. (R. 1). The petition was a proposal to satisfy the need for 800-900 megawatts (MW) of additional generating capacity which FPL said its system would require to reliably meet its customers' requirements in the 1998-1999 time frame. Cypress proposed to construct two coal-fired power plants near Lake Okeechobee, Florida and to sell the output to FPL on a wholesale basis under the terms of a proposed contract which the joint petitioners had negotiated.

Nassau Power and ARK intervened in Cypress' proceeding to present their respective natural gas-fired power generation projects as alternatives to the proposed Cypress coal-fired units. (R. 304, 389). Nassau Power and ARK offered to contract with FPL on terms and conditions that largely mirrored the proposed FPL/Cypress contract, but that included significantly lower prices for electricity.

DER also intervened in the proceeding. (R. 482). DER asked the Commission to determine FPL's need for capacity and forward all of the proposals proffered to fill FPL's need to the DER for further consideration.[1]

In addition to intervening in the Cypress need determination docket, Nassau Power and ARK filed separate petitions to determine need for their gas-fired projects. Each sought a determination by the Commission that its project should be selected to fill FPL's next need for capacity. (R. 2666, 3297).

By motions, Nassau Power and ARK asked the Commission to consolidate the three "need petition" dockets, to utilize the existing hearing dates to take evidence on the issue of the need for capacity, and to conduct a subsequent comparative review of the three proposals that were vying to meet FPL's need. (R. 537, 679, 2656, 3643). The Commission denied consolidation (R. 694), thereby

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[1] Several other parties, such as Florida Gas Transmission and Springs Power Partners, L.P., intervened but later withdrew. Additional Intervenors included the City of Okeechobee, J. Makowski (an independent power project developer), and the Legal Environmental Assistance Foundation (LEAF).

limiting the status of Nassau Power and ARK to that of Intervenors in the docket on Cypress' petition.

Shortly afterwards, FPL moved to dismiss the separate petitions to determine need of Nassau Power and ARK. (R. 2866, 3669). DER filed a notice of intervention in the ARK and Nassau Power dockets. (R. 2965, 3749). In its notice, DER advocated the broad and inclusive interpretation of "applicant" which the Siting Board had taken in a previous case. DER urged the Commission to avoid any action which would interfere with the Siting Board's jurisdiction.

Acting on FPL's motion to dismiss, the Commission dismissed the petitions to determine need filed by Nassau Power and ARK[2] on the grounds that only utilities, or entities with whom utilities have executed a power purchase contract, satisfy the definitional requirements of the Siting Act. (R. 2971, 3755). Nassau Power filed a motion for reconsideration of the order of dismissal, which the Commission denied in Order No. PSC-93-0338-FOF-EQ on March 4, 1993. (R. 3777; A. 7). Nassau Power appealed. (R. 3781).

In the Cypress case, the Commission held an evidentiary hearing in August of 1992. Intervenors Nassau Power and ARK presented evidence of their site-specific alternatives to the coal-fired plant proposed by Cypress. They proposed contract prices which were lower than the Cypress price by $266 million and $302

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[2] The Commission also dismissed the separate petitions for contract approval filed by Nassau Power (R. 3795) and ARK. (R. 3025).

million, respectively (net present value of contract payments). Unlike Cypress and ARK, who included no cogeneration, Nassau Power proposed a 435 MW cogeneration unit that would be a Qualifying Facility under the federal Public Utility Regulatory Policies Act as an integral part of its project.

Following the hearing and the submission of briefs by parties, the Commission Staff forwarded a written recommendation to the Commissioners. Staff recommended that the Commission deny Cypress' petition.

On October 16, 1992, four days prior to the Commission's decision conference, Cypress filed a document captioned "CEP's Request to Address the Commission." (R. 2126). Within the document, Cypress faulted the substance of the Staff's recommendation. Nassau Power and LEAF responded to Cypress' pleading. (R. 2131, 2141). During the decision conference of October 20, 1992, the Commission denied Cypress' request to participate and excluded the post-recommendation pleadings from its deliberations.

In its decision, the Commission affirmatively determined that FPL needs 800-900 MW of additional generating capacity in 1998-1999 to maintain the reliability of its system. Based on its assessment of the evidence of available alternatives, the Commission rejected the coal-fired plant jointly proposed by Cypress and FPL. The Commission ruled that the position of Intervenors Nassau Power and ARK was no different than that of any other potential supplier. It refused to require FPL to negotiate with either of the Intervenors

who had presented evidence of specific alternatives. The Commission directed FPL to use a "fair and open selection procedure which results in closure" to fill its need. (R. 2412).

Cypress, FPL, LEAF, and Nassau Power filed motions seeking reconsideration of the Commission's order. (R. 2145, 2187, 2324, 2453). In its motion, Cypress pointed out that one exhibit to which the Commission referred in its order contained numerical errors and complained that an inaccurate, extra-record price of gas had been communicated to the Commissioners by the Staff during the decision conference. In its order on reconsideration, the Commission acknowledged the errors but stated that they did not affect the outcome of the case. The Commission denied all of the motions for reconsideration in Order No. PSC-92-1493-FOF-EQ. (R. 2536).

Cypress filed a notice of appeal in Case No. 81,131 on January 21, 1993. (R. 2546). ARK filed a notice of cross-appeal on January 27, 1993 (R. 2616) and LEAF filed a notice of cross-appeal on January 29, 1993. (R. 2622). Nassau Power filed a notice of cross-appeal in Case No. 81,131 on February 4, 1993 (R. 2627) and a notice of appeal in Case No. 81,496 on March 26, 1993. (R. 3781). Nassau Power filed a motion to consolidate Case Nos. 81,131 and 81,496 on April 5, 1993. The Court granted the motion on April 19, 1993.

SUMMARY OF ARGUMENT

A. ANSWER TO CYPRESS' BRIEF

The Commission's post-hearing procedures did not violate Cypress' right to due process. Cypress mistakenly contends that this Court has never before reviewed the Commission's practice of including Staff in decision conferences. In South Florida Natural Gas Company v. Public Service Commission, 534 So.2d 695 (Fla. 1988), this Court ruled that due process was not violated when the Commission Staff who had cross-examined witnesses during the evidentiary phase of the case later participated in the Commission's assessment of the evidence. This case, which was not cited by Cypress, is dispositive of Cypress' chief procedural complaint.

Cypress is wrong when it says the Commission violated its own rule on the same subject. The Staff's participation at the decision conference did not violate Commission Rule 25-22.057(5), Florida Administrative Code, because that rule expressly does not apply to a proceeding in which Commissioners preside over the evidentiary hearing, as was the case here.

Given the extensive evidentiary record in this case (including the evidence of Nassau Power's alternative gas-fired Okeechobee proposal), the Commission's explicit evaluation of the impact of the matters complained of on reconsideration, and in light of case law governing the effect of evidentiary errors, the evidentiary miscues identified by Cypress were mere harmless error.

The Commission properly rejected the two large pulverized coal plants which Cypress proposed to build near Lake Okeechobee. The record demonstrates that far more desirable and cost-effective alternatives are available. Nassau Power's proposed gas-fired Okeechobee project would save ratepayers $266 million. Nor did the Commission prejudice Cypress by an undue emphasis on the cost of the project to ratepayers relative to the cost of other alternatives. The record is replete with evidence of other advantages of alternatives--including Nassau Power's use of cogeneration, superior thermal efficiency, and environmental benefits--which underscores the conclusion that the Cypress project would have been a poor choice for the State of Florida.

The Commission's finding that FPL's next generating unit should utilize a technology other than the one proposed by Cypress was a case-specific adjudication based on evidence, not "de facto rulemaking." Nor did the Commission engage in rulemaking when it called on FPL to take steps in its capacity procurement method that would, in the Commission's view, enhance the likelihood of achieving finality in the adjudicatory process. However, for reasons stated below, Nassau Power believes the desired "closure" should be achieved by very different means.

B. NASSAU POWER'S APPEAL OF THE DISMISSAL OF ITS PETITION TO DETERMINE NEED IN DOCKET NO. 920769-EQ AND NASSAU POWER'S CROSS-APPEAL

Limiting the Siting Act's definition of "applicants" to utilities or their designees would frustrate legislative intent,

usurp the function of the Siting Board, stifle developing competition, and lead to absurd and unworkable results. In 1984, the Siting Board expressly ruled that a cogenerator that had no contract with a utility was a proper applicant for an order of certification under the definitions of the Siting Act. That interpretation is consistent with the principle, applicable here, that a generally worded statute, prospective in nature, will be construed to apply to new conditions, things, and entities that were unknown or not contemplated when the law was passed if they come within the purpose and scope of the statute.

The absurdity of the Commission's conflicting, restrictive interpretation lies in the proposition that a cogenerator, other independent provider, or (by implication) industrial self-user cannot construct or operate a power plant without certification by the Siting Board, but is prohibited by the same Siting Act that imposes that requirement from applying for certification.

That the Commission's definition is unworkable is illustrated by the Cypress decision. The Commission has restricted itself to approving or disapproving the single project which the utility puts forward in a need case initiated by petition. What if, following a disapproval, a non-utility generator--whether excluded from consideration or unselected--proves that the utility has made a poor choice in its second attempt? Or the third? The dilemma would be avoided, and ratepayers' interests would be served, if the Commission's selection was based on a comparative review of co-equal alternatives, competing to meet a specified need. To make

sense of the Siting Act, the Court should give effect to the Siting Board's earlier construction of the statutory framework for which it has primary authority. In doing so, the Court will also remove the bottleneck in the process that is preventing Florida's ratepayers from receiving the full benefits of the competition in the power generation industry created by federal law.

Federal law places an obligation on utilities to purchase capacity and energy from cogenerators who meet prescribed standards of efficiency. Florida law requires the Commission to encourage cogeneration in determination of need cases. Alone among the potential providers (including Cypress) who presented proposals to meet the need for capacity identified by FPL and determined by the Commission, Nassau Power offered to provide a portion of the needed capacity through cogeneration. Nassau Power's 435 MW unit would be a Qualifying Facility under the Public Utility Regulatory Policies Act and implementing rules of the Federal Energy Regulatory Commission. In the Cypress order, the Commission acknowledged that cogeneration is entitled to preferential treatment vis-à-vis non-QF alternatives. It erred in its conflicting conclusion that Nassau Power has no greater claim to a contract with FPL than any other potential provider. It should have directed FPL to come to terms with Nassau Power.

The Commission's order dismissing Nassau Power's petition to determine need must be reversed. The Court should also affirm the Commission's denial of the Cypress project. In Cypress' wake, Nassau Power's rights as a legitimate petitioner and as a QF who

timely appeared to meet the need for capacity identified by the Commission should be enforced. If, however, the Court reverses the Commission's denial of Cypress for any reason and directs the Commission to consider Cypress' petition further, Nassau Power is entitled to have its petition compared to the Cypress petition in any remand.

ARGUMENT

I. THE COMMISSION'S DECISION-MAKING PROCESS DID NOT VIOLATE CYPRESS' RIGHT TO DUE PROCESS OF LAW.

To show a basis for overturning the Commission's denial of the Cypress petition, Cypress must demonstrate that the Commission departed from the essential requirements of law or that its order is not supported by substantial, competent evidence of record. Section 120.68(10), Florida Statutes; State v. Hawkins, 364 So.2d 723, 727 (Fla. 1978). In its review of the Commission's order, the Court will not reweigh the evidence or substitute its judgment for the Commission's as to the effect of the evidence. Gulf Power Company v. Florida Public Service Commission, 453 So.2d 799, 803 (Fla. 1984).

Cypress' due process arguments fail. Cypress' assertion that the Court has never reviewed the Commission's post-hearing procedure is mistaken. In its brief, Cypress mischaracterizes the role of the Commission Staff and attempts to invoke an Agenda Conference rule that by its express terms does not apply to a case

in which Commissioners preside over a hearing, as happened in this case.

A. This Court has already rejected contentions analogous to Cypress' complaint regarding the role of the Staff attorney.

Much of Cypress' brief is devoted to assailing the practice of allowing the Staff who cross-examined witnesses to participate in the Commission's Agenda Conference. Contrary to Cypress' claim, this is not a new issue.

In South Florida Natural Gas Company v. Public Service Commission, 534 So.2d 695 (Fla. 1988), South Florida Natural Gas filed a petition seeking a rate increase. In the course of the rate case, it filed detailed financial information as well as the prefiled testimony of a company official and an outside expert. During the hearing, these company witnesses were cross-examined by the Commission Staff. The Commission ultimately rejected the requested increase.

South Florida Natural Gas appealed the Commission's order. On appeal, it argued, among other things, that its due process rights had been violated because information obtained as a result of cross-examination had been treated as substantive evidence and because Commission Staff who had cross-examined witnesses at the hearing had assisted the Commissioners in the evaluation of the evidence--the very same claims Cypress makes here. In South Florida Natural Gas this Court held:

> We reject the utility's contention that it was deprived of due process of law because

> the commission allowed its staff to make inquiry of utility witnesses and assist in evaluating the evidence. . . .
>
> . . .
>
> We find that the commission is clearly authorized to utilize its staff to test the validity, credibility, and competence of the evidence presented in support of an increase. Without its staff, it would be impossible for the commission to "investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service."

Id. at 698, citation omitted, emphasis supplied.

As in South Florida Natural Gas, the Commission in this case was required to review a highly technical record and make statutorily required findings. Section 403.519, Florida Statutes. Its use of its Staff was analogous to the practice approved by the Court in South Florida Natural Gas. Nassau Power submits that case is dispositive of Cypress' argument.

The cases on which Cypress attempts to rely are inapposite. Both Forehand v. School Board of Gulf County, 600 So.2d 1187 (Fla. 1st DCA 1992) and McIntyre v. Tucker, 490 So.2d 659 (Fla. 1st DCA 1986), are lower court cases involving local school board disciplinary actions of public school teachers. In McIntyre, the teacher was terminated; in Forehand, the teacher was suspended without pay. Both cases involve the employee's property right in the position at issue. No such property right is at issue here. Cypress did not have a determination of need which the Commission was trying to revoke: it sought to obtain a determination of need from the Commission. In order to evaluate whether Cypress was

entitled to a determination of need, the Commission was permitted to utilize its Staff.

Cypress contends that the Staff's participation violated former Rule 25-22.057(5), which governed participation during Agenda Conferences in particular instances. That rule was expressly limited to cases in which the Commission delegates the responsibility for presiding over the evidentiary portion of a proceeding to a hearing officer and then receives a recommended order. It stated:

> This rule shall apply to hearings under § 120.57, F.S., except hearings which are held before two or more Commissioners.

Rule 25-22.057(1), Florida Administrative Code, emphasis supplied.[3] In its brief, Cypress recites that a panel of Commissioners Deason and Easley presided over the Cypress hearing (Cypress Initial Brief, p. 12), but fails to note that the rule it attempts to invoke was therefore inapplicable to this case.

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[3] Rule 25-22.057, Florida Administrative Code, was repealed on March 23, 1993. New rule 25-22.001(2), Florida Administrative Code, provides:

> When a recommendation is presented and considered in a proceeding where a hearing has been held, no person other than staff who did not testify at the hearing and the Commissioners may participate at the agenda conference. Oral presentation by any other person, whether by way of objection, comment or otherwise, is not permitted.

B. **The evidentiary errors identified by Cypress do not constitute grounds for reversal because the Commission's order is supported by competent substantial evidence of record.**

Cypress complains that its procedural rights were violated during the proceeding below because of Staff's provision of an erroneous fuel price at the Agenda Conference and because of the Commission's consideration of the so-called "acid test" (Ex. 31) during its deliberations. Cypress is again mistaken. The Commission's decision to reject the Cypress project is based on competent substantial evidence of record and must be sustained. Section 120.68(10), Florida Statutes.

As to the erroneous fuel number provided at the Agenda Conference, several points need to be made. First, Cypress raised the issue in its motion for reconsideration. (R. 2187). The Commission said:

> If, in reaching our determination, we had relied on the incorrect information provided by staff, or if that information had a bearing on our decision, we would not hesitate to reconsider it. We can state unequivocally however, that we did not place reliance on the incorrect information provided by staff in reaching our determination here. In fact, we based our determination of cost-effectiveness on evaluation of fuel prices over the long term.[4] A given price as it existed in a point

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[4] And in fact, when voting on Issue 11, Commissioner Deason said:

> . . . I understand Staff's position that the ultimate determination of cost-effectiveness has to be evaluated in the long-term, and that a given situation as it exists today, a price differential, is not the determining factor. And I agree with that.

(AT. 86-87).

> of time was not a deciding factor, and we did not rely on the incorrect information provided by Staff in reaching our determination.

Order No. PSC-92-1493-FOF-EQ at 3. (R. 2358). The erroneous data[5] was not relied on by the Commission and was harmless error.

In Capitoli v. State, 175 So.2d 210 (Fla. 2d DCA 1965), an analogous situation arose. The court erroneously admitted evidence obtained through an illegal search and seizure but disregarded such evidence in reaching a decision. The reviewing court said:

> Since the trial judge, sitting without a jury, stated that he based his findings exclusively upon such [other sufficient] evidence and that he disregarded the challenged evidence, the error, if any, in the admission of such evidence was harmless.

Id. at 212, citations omitted. Similarly, the Commission in the present case expressly stated that it did not rely on the erroneous figures, but rather based its decision on other independent evidence of record.

In Peoples Bank of Indian River County v. Department of Banking and Finance, 378 So.2d 329 (Fla. 1st DCA 1980), affm'd, 395 So.2d 521 (Fla. 1981), the court addressed the issue of the effect of error where the Department of Banking erroneously incorporated extra-record data into its final order denying a bank application. Unlike this case, in Peoples Bank the agency apparently relied on

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[5] There was also a mathematical error in Exhibit 31 which had no impact on the Commission's decision. Order No. PSC-92-1493-FOF-EQ at 3. (R. 2539).

the data. The court found the error harmless and affirmed the Department, stating that:

> The [erroneous] population projections were not the only basis for the Department's finding that local conditions did not assure reasonable promise of successful operation for the . . . proposed bank. . . .

Id. at 329. The court concluded that the Department had before it other competent substantial evidence upon which to base its rejection of the application. See also, Decola v. Castor, 519 So.2d 709, 710 (Fla. 2d DCA 1988) (inclusion of improper memorandum in record was harmless error where there was competent substantial evidence to support the agency decision).

Here, as in the Peoples Bank case, there is other evidence of record which supports the Commission's decision. For example, Nassau Power's expert witness, Mr. Phipps, discussed current gas prices, stating that "gas prices . . . are now like $1.80." (Tr. 1575). In addition, Mr. Phipps included in his Exhibit No. 46 information about U.S. Gulf Coast wellhead gas pricing. Ex. 46, Table V-8. Thus, there was evidence in the record reflecting the current price of gas, in addition to the extensive evidence treating long-term considerations described below.

Finally, reading only the selective excerpts from the Agenda Conference included in Cypress' brief might lead one to conclude that Issue 11 was the only fuel-related issue in the case. It was not. Issue 1 was the omnibus issue bearing on the relationship of

fuel prices to plant choice.[6] Staff member Mr. Jenkins said: "Issue 1 is perhaps the key issue in the case." (AT. 13). He commented that Issue 1 related to fuel forecasting and the way expected fuel prices could influence the ultimate choice of plant. (AT. 20-21). The Commissioners discussed Issue 1 extensively. (AT. 13-35). At the conclusion of the discussion on Issue 1, the following exchange occurred:

> COMMISSIONER DEASON: . . . Do we have the fuel cost information?[7]
>
> MR. JENKINS: No, they are still working on it.
>
> COMMISSIONER DEASON: Well, Madam Chairman, to dispose of Issue 1, I don't think it is critical to have that information. . . .

(AT. 34). Thus, the Commission voted on one of the most significant fuel-related issues in the case without even having received the erroneous fuel number.[8]

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[6] Issue 1 treated the choice of fuel in the context of evaluating project risk. It asked:

> Does FPL's and Cypress' need determination proposal appropriately address risk and other strategic concerns including, but not limited to fuel flexibility and transportation, adverse weather, assistance from the Southern Company, and constraints in transmission?

(R. 2002).

[7] Commissioner Deason was referring to the erroneous gas price later provided.

[8] In contrast to the lengthy discussion on Issue 1, the discussion of Issue 11 covers less than two pages of the Agenda Conference transcript. (AT. 86-87).

Similarly, Cypress seeks to portray the Commission's consideration of Exhibit 31 (the "acid test") as somehow dispositive of the cost-effectiveness issue. It was not. As the Commission notes in its order denying Cypress' motion for reconsideration:

> The acid test was not a deciding factor in determining whether the Cypress project was the most cost-effective alternative. Rather, the acid test was simply an analytical tool utilized to compare projects under a fictional scenario wherein fuel prices maintain a constant differential.

Order No. PSC-92-1493-FOF-EQ at 3. (R. 2358). In addition to the "acid test" scenario, there was abundant evidence of record sustaining the Commission's finding that the Cypress coal proposal was not the most cost-effective alternative to meet FPL's need.

The Commission received extensive evidence consisting of fuel forecasts, fuel scenarios, information concerning specific fuel contract negotiations, and proposed power purchase contracts, all of which buttress the Commission's decision. In short, a wealth of competent, substantial evidence of record supports the Commission's explicit decision that FPL's forecast of gas prices was too high and created an undue bias against gas-fired alternatives. (See, i.e., Tr. 1550, 1558, 1560-61, 1575; Ex. 8 (DRI fuel forecast), Ex. 9 (DRI fuel forecast), Ex. 46 (Phipps fuel forecast), Ex. 55 (DRI fuel forecast), Ex. 39, Document 11 (Nassau Power proposed contract), Ex. 39, Documents 13, 14 (Nassau Power's letters of intent with gas producers).

The evidence included Nassau Power's presentation.[9] Nassau Power described in detail its proposal for a natural gas-fired project in Okeechobee, and documented its ability to provide fuel by means of a long term, price-certain gas supply contract. (Tr. 1374-97). Its project would meet FPL's identified need at a cost $266 million lower (net present value) than the price of the Cypress project. (Ex. 39, Document 11). In the order denying Cypress' petition, the Commission specifically stated that it considered the evidence of Intervenors' alternatives when it gauged the relative cost-effectiveness of Cypress' project. Order No. PSC-92-1355-FOF-EQ at 17. (R. 2411).

Finally, it is worth noting that Cypress, which is complaining about Exhibit 31 on a procedural basis, did not object to the admission of Exhibit 31 when it was introduced at hearing. (Tr. 1126).

Cypress seeks to have the Court give extraordinary weight to two items (one of which the Commission did not even consider) and ignore the remainder of an extensive record. In essence, while it couches its arguments in procedural terms, Cypress would have the Court reweigh the evidence. However, as this Court as often said:

> We will not overturn an order of the PSC because we would have arrived at a different result had we made the initial decision and we will not reweigh the evidence.

Gulf Power Co. v. Florida Public Service Commission, 453 So.2d 799, 803 (Fla. 1984). Cypress' "procedural" arguments must be rejected.

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[9] ARK made a similar presentation.

II. THE COMMISSION DID NOT ENGAGE IN RULEMAKING.

Courts have observed that it is possible to define "rule" so literally that it would "encompass virtually any utterance by an agency." McDonald v. Dept. of Banking and Finance, 346 So.2d 569, 581 (Fla. 1st DCA 1977), appeal after remand, 361 So.2d 1370 (Fla. 1979), quoting, Pacific Gas and Elec. Co. v. Federal Power Commission, 506 F.2d 33, 37 (D.C. Cir. 1974). Cypress' attempt to portray aspects of the Commission's order as rulemaking don't mesh with the definition of a rule.

Section 120.52(16), Florida Statutes (1992), defines "rule," in pertinent part, as follows:

> 'Rule' means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. . . .

The Commission's order is not a statement of general applicability. It is a determination that is specific to the joint request of FPL and Cypress for a determination of need. Its findings relate to the ability of a specific utility to meet its customers' needs in the most reliable and economical manner.

A guideline that is a starting point for future analysis is not a rule. Florida League of Cities v. Administration Commission, 586 So.2d 397 (Fla. 1st DCA 1991). The requirement of rulemaking is "imposed only on policy statements . . . which are intended by

their own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law." Florida Public Service Commission v. Indiantown Telephone, 435 So.2d 892, 899 (Fla. 1st DCA 1983), quoting McDonald, supra. In its order, the Commission took pains not to dictate to FPL. For FPL, ignoring the Commission's guidance with respect to choice of technology and procurement procedures would result--not in a penalty for non-compliance with the order--but in a possible failure to meet its burden of proof concerning cost-effectiveness in the future adjudicatory proceeding that was contemplated by the Commission.

For reasons that it will develop in Section I of its argument relating to the appeal of the order dismissing its petition and its cross-appeal of the final order in the Cypress case (page 29, infra), Nassau Power believes the proper remedy for the lack of "closure" or "finality" that concerned the Commission lies in recognizing the ability of entities other than the utility to present alternative bases for decision through their timely appearance in the utility's need case and/or their co-equal, competing petitions. Notwithstanding this very different issue, by no stretch does the Commission's deliberately indefinite prompting of FPL constitute a "rule."

III. & IV. THE COMMISSION'S REJECTION OF THE CYPRESS PROJECT WAS NOT AN ABDICATION OF ITS STATUTORY RESPONSIBILITY, NOR DID THE COMMISSION ERR IN FINDING THAT MORE COST-EFFECTIVE ALTERNATIVES WERE AVAILABLE.

(Single response to Cypress' Point III and Point IV)

Cypress argues that because the Commission did not adopt a specific fuel forecast in its rejection of the Cypress plant it somehow abdicated its statutory responsibility under the Siting Act. Such a position finds no support in section 403.519, Florida Statutes or in any other statute governing the Commission's statutory duties.

Section 403.519, Florida Statutes, requires the Commission to consider whether the proposed capacity addition is the most cost-effective alternative available. The Commission considered the various forecasts and evidentiary presentations of the parties and concluded that the forecast used by FPL, the one on which FPL based its selection of the Cypress project, was too high.

With respect to the appropriateness of FPL's fuel forecast as the basis for selecting the next capacity addition, the Commission said:

> We believe that FPL's base fuel forecast is high and does not reflect current market trends. FPL's primary reliance on its base fuel forecast appears to have created a bias against gas-fired alternatives. As a result, all gas-fired options were eliminated from FPL's selection process at an early stage. We believe this was a mistake.

(R. 2406). In its order, the Commission found that: "[t]he sustained divergence between gas and coal prices predicted in FPL's forecast is not borne out by the historical figures . . . ." Order No. PSC-92-1355-FOF-EQ at 12. (R. 2407). The Commission concluded, based on evidence of record, that FPL's use of that forecast had caused it to select a project that was too costly and that other more cost-effective projects, such as Nassau Power's, were available. This is exactly the type of analysis section 403.519, Florida Statutes, requires the Commission to make.

Cypress' argument regarding the availability and ability of modern combined cycle technology to convert to coal gasification is factually wrong and also misses the point. First, the Commission's finding that "given present fuel prices, capital costs and current market trends, the Cypress pulverized coal plant is not the most cost-effective alternative available to meet FPL's 1998-1999 need" is independent of its consideration of the advantages of convertibility to gasified coal. Second, Cypress tries to convey the impression that there is no evidence regarding the gasification technology in the record. That is not so. In fact, FPL's generation expansion plan described a gasification unit that was its construction choice prior to the time it decided to adopt a coal unit as the basis for its negotiations with Cypress. (Ex. 3, p. 53). The subject was developed elsewhere as well. (See, i.e., Ex. 58; Tr. 1119, 1122, 1144, 1151, 1155, 2193-95, 2233-36).

Cypress seems to have the impression that the Commission required the gasification unit be built now and that its

incremental cost must be known in order to calculate cost-effectiveness. Its argument misses the mark completely.

A precise quantification of the cost of a gasification unit is not necessary to the consideration of the technology. The value of the ability to convert, on which the Commission commented, lies in future flexibility, not immediate cost-effectiveness. The ability to convert from natural gas to gas derived from coal would enable the owner to respond to a dramatic future change in fuel price relationships should the overall economics--which would include capital and fuel costs--ever justify the change. FPL's witness, Mr. Denis, made this point clearly. (Tr. 2128).

Cypress' argument that the Commission has somehow engaged in illegal rulemaking must be rejected. The Cypress order contains no statement of general applicability as to fuel or plant type, but is obviously specific to the Commission's record-based analysis of the FPL/Cypress proposal. Each need determination petition is evaluated on its merits pursuant to the statutory criteria of section 403.519, Florida Statutes.

Contrary to Cypress' argument, the Commission did make findings about FPL's future needs for generating capacity. It found that FPL needs 800-900 MW of capacity in the 1998-1999 time frame. Order No. PSC-92-1355-FOF-EQ at 2. (R. 2397). It further concluded that the Cypress project was not the most appropriate way for FPL to meet those needs. Order No. PSC-92-1355-FOF-EQ at 17. (R. 2411).

Finally, in point III of its initial brief Cypress again argues about the use of the "acid test", giving it extraordinary weight (which was clearly not accorded to it by the Commission) and about the role of Commission Staff at the decision conference. Nassau Power will not reiterate its response to those arguments here, but simply incorporates by reference its argument in Section I, page 11, supra.

V. THE COMMISSION CONSIDERED FACTORS OTHER THAN COST IN ITS REJECTION OF THE CYPRESS PROJECT.

Cypress argues that the Commission failed to appropriately balance the factors it is required to consider under the Siting Act when it rejected the Cypress/FPL request for a determination of need. Cypress is simply asking this Court to reweigh the evidence heard by the Commission during the evidentiary proceeding and reach a conclusion different than the one the Commission reached based on that evidence. Such a request is outside the bounds of appropriate judicial review, as set out in section 120.68(10), Florida Statutes, and reflected in this Court's repeated statements that it will not second guess the Commission or reweigh the evidence. Gulf Power Co. v. Florida Public Service Commission, 453 So.2d 799, 803 (Fla. 1984).

As the Commission's order indicates, the Commission considered the factors called for by statute and determined that the Cypress project did not pass muster. Two of the four criteria enumerated

in section 403.519, Florida Statutes, concern cost (the need for adequate electricity at a reasonable cost and a consideration of whether the proposed project is the most cost-effective available). Therefore, the Commission's discussion of important cost considerations in the context of the Cypress project is not surprising. Among other things, the Commission heard evidence which proved that the Nassau Power alternative was $266 million less expensive than the Cypress proposal.

However, cost-effectiveness was not the only factor the Commission considered in evaluating the Cypress project. Contrary to Cypress' arguments, the Commission also compared other aspects of the Cypress project with the alternatives offered by Nassau Power and ARK. For example, the Commission noted that:

> The record reflects that Hamilton S. Oven, Jr., Professional Engineer and Administrator with the Florida Department of Environmental Regulation, testified that DER 'would favor a gas-fired plant as being less environmentally disruptive than a coal-fired plant.' While this was not a dispositive factor to our decision herein, we have given due consideration to the preference of our fellow administrative agency. We respect the expertise, specialized knowledge, and legislative authority of DER in environmental matters, and we take heed of their preference in this matter.

Order No. PSC-92-1355-FOF-EQ at 15. (R. 2410).

The Commission also expressly considered thermal efficiency, and found that the heat rate of Nassau Power's proposed plant was

far lower than that of the pulverized coal plant.[10] Order No. PSC-92-1355-FOF-EQ at 15. (R. 2410).

The Commission's denial of Cypress' petition rests firmly on its consideration of the appropriate criteria.

[10] The lower the heat rate, the more efficient the plant.

ARGUMENT RELATING TO NASSAU POWER'S APPEAL OF ORDER NO. PSC-92-1210-FOF-EQ AND NASSAU POWER'S CROSS-APPEAL OF ORDER NO. PSC-92-1355-FOF-EQ

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

The significant issue of statutory construction presented by the Commission's dismissal of Nassau Power's petition to determine need holds profound ramifications for the power generation industry in Florida and for Florida's ratepayers. The issue is: Must an independent provider of generating capacity obtain a utility's blessing in the form of a proposed contract for the purchase of capacity and energy before it can gain access to the Siting Act's certification procedures? Or, may a cogenerator (or other non-utility generator) initiate a petition under the Siting Act and demonstrate to the Commission that its proposal is the most desirable, cost-effective, and timely available means of meeting the identified needs of a utility's ratepayers?

Stated only slightly differently, the question becomes: Are decisions regarding the provision of additional generating capacity in Florida solely the function and prerogative of the management of a monopoly utility, subject only to limited agency review of the utility's decision? Or, are non-utility participants in the power generation industry subject to direct licensure by an agency empowered by the Legislature to select from co-equal, competing proposals the capacity addition which best meets the needs of the State?

The Siting Board and the Commission have answered the pivotal question of statutory construction very differently. In 1984 the Siting Board ruled that Florida Crushed Stone, a non-utility cogenerator that had no contract with a purchasing utility at the time the issue was raised by an Intervenor, fell within the Siting Act's definition of "applicant." The Siting Board awarded Florida Crushed Stone, which had already received a determination of need from the Commission, an order of certification.

After FPL filed a motion to dismiss Nassau Power's petition to determine need in the case below, DER--the agency charged with administering the Siting Act for the Siting Board--appeared before the Commission to advocate the Siting Board's liberal interpretation of the term "applicant" and to stress the importance of preserving the Siting Board's jurisdiction. (R. 2965, 3749). However, the Commission dismissed the petition of Nassau Power for a determination of need--insuring that it would not have access to the Siting Board's certification procedures.

Nassau Power submits that the Siting Board correctly construed the Siting Act in its 1984 Florida Crushed Stone decision. (A. 9). Its construction of the term "applicant" to embrace non-utility applicants should be sustained here. The more restrictive definition which led the Commission to dismiss Nassau Power's petition fails basic principles of statutory construction. It would lead to absurd results and an unwieldy regulatory scheme. It fails to take into account significant developments in the power generation industry. The opportunities for vigorous competition in

that industry made possible by the federal Public Utility Regulatory Policies Act and the 1992 Energy Policy Act hold the promise of potential benefits for Florida's ratepayers in the form of lower costs, greater efficiency, and environmental benefits, all of which would help meet legislative objectives. The Commission's interpretation must be overturned--not only because it thwarts the exercise of jurisdiction of the Siting Board--but because it is an impediment to the realization of those benefits.

A. The Siting Board correctly recognized in its 1984 decision that the Siting Act's definition of applicant encompasses non-utility generators.

Section 403.519, Florida Statutes, states:

> On request by an applicant or on its own motion, the commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act. . . . The commission shall be the sole forum for the determination of this matter. . . . In making its determination, the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider . . . other matters within its jurisdiction which it deems relevant.

Section 403.503(4), Florida Statutes, of the Siting Act defines an "applicant" as "any electric utility which applies for certification pursuant to the provisions of this act." The definition of "electric utility" in section 403.503(14), Florida Statutes, provides:

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

In the case In re: Florida Crushed Stone Company Power Plant Site Certification, PA 82-17 (hereinafter FCS Order) (A. 9), the precise question of who can be an applicant under the above provisions of the Siting Act was raised and clearly decided. In that case, the Sierra Club filed a motion to dismiss the site certification application of a cogenerator, Florida Crushed Stone (FCS), on the basis that

> FCS is a private entity which will not provide electricity at retail to the public. . . . [T]he proposed facility would generate 125 megawatts of electricity, with 100 megawatts to be sold to a utility.

FCS Order at 1-2. (A. 9-10).

The Siting Board considered the same definition of "electric utility" at issue here and found that:

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

FCS Order at 2. (A. 10). Like FCS, upon approval of certification and construction of its proposed facility Nassau Power will be in the business of generating electricity and is, according to the Siting Board's interpretation, a proper applicant under the Siting

Act. However, because cogenerators like Nassau Power are not specifically identified in the definition of electric utility, the Commission dismissed Nassau Power's petition to determine need.

B. The Commission's construction of the term applicant violates basic principles of statutory construction.

1. Absurd and unreasonable results.

An interpretation of a statute which produces an unreasonable result must be avoided when alternative interpretations consistent with the legislative purpose of the statute are available. The Legislature will not be deemed to have enacted a statute which leads to an absurd result. City of St. Petersburg v. Siebold, 48 So.2d 291 (Fla. 1950) (citing, Sutherland on Statutory Construction); McKibben v. Mallory, 293 So.2d 48 (Fla. 1974). The Commission's interpretation of the Siting Act in this case would run afoul of these principles.

Section 403.506, Florida Statutes, of the Siting Act provides:

> No construction of any new electrical power plant . . . may be undertaken after October 1, 1973, without first obtaining certification in the manner herein provided . . . .

It is clear that before proceeding to construct a power plant that is subject to the Siting Act's requirements, a cogenerator, or other non-utility generator, must obtain site certification. It is undisputed that Nassau Power, a cogenerator and a participant in the independent power generation industry, may own and operate an electrical power plant falling within the parameters of the Siting

Act.[11] Further, as a cogenerator, Nassau Power has a federal right pursuant to the Public Utility Regulatory Policies Act (PURPA)[12] to sell capacity it may generate at or below avoided cost to a utility. 16 U.S.C. § 824a-3; 18 C.F.R. § 292.303.

Because Nassau Power must receive certification to construct or operate its proposed power plant, it would be an absurd result indeed if Nassau Power was unable to obtain the required site certification--not because of any proven defect in its project or because a better project to meet the identified need was available--but because it could not even begin the process under the Siting Act due to the Commission's strained interpretation of "applicant." It is wholly contradictory to require Nassau Power to obtain certification on the one hand, and to then prohibit it from seeking certification on the other.

The absurdity of the Commission's interpretation of the term "applicant" is also illustrated by another possible factual situation under the Siting Act. Self-service industrial power plants are not specifically identified in the definitions of "applicant" and "utility." If an industrial entity wants to build a cogeneration facility larger than 75 megawatts to serve only its own power needs (that is, it would not sell any power to a

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[11] The Siting Act applies to any electrical power plant whose steam generating portion is greater than 75 megawatts. Section 403.506, Florida Statutes.

[12] PURPA was enacted to encourage the development of alternative energy sources in the form of cogeneration and small power production.

utility), it is nonetheless required to proceed through the Siting Act.[13] To begin the process, it would file a determination of need petition with the Commission pursuant to section 403.519, Florida Statutes. However, this cogenerator would obviously have no contract with a utility. Under the Commission's interpretation of the word "applicant," the cogenerator would be prohibited from proceeding with its project because it is not specifically identified, it would have no contract with a utility and therefore, could not be an applicant.[14]

That the Commission's approach would lead to an unacceptably cumbersome regulatory scheme is clearly illustrated by the aftermath of the Commission's Cypress decision. The Commission considered the petition to determine need filed by Cypress based on

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[13] Many large industrial concerns in Florida cogenerate to meet some or all of their power needs.

[14] In apparent recognition of the difficulties implicit in its view of the term applicant, the Commission attempts to avoid the self-service scenario just described by stating:

> 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. 2974-75). However, the Commission may not interpret the term applicant one way in one situation and another way in another situation as suits its pleasure. The definitional sections upon which the Commission attempts to rely in no way indicate that the definition of the term applicant is subject to change depending on the particular factual situation.

an 800-900 megawatt need identified by FPL. It allowed Nassau Power (and another independent power producer) to intervene in Cypress' case to demonstrate that the Cypress project was not the most cost-effective alternative available. In order to meet that burden, Nassau Power proposed a gas-fired cogeneration project (complete with a proposed purchase power contract substantially similar to the contract proffered by Cypress and FPL) that would cost many millions of dollars less than the Cypress project. Based in part upon the evidence of Intervenors' alternatives, the Commission rejected the Cypress project. However, the Commission stated:

> Intervention in this docket gives these parties [Nassau Power and ARK] no greater standing with regard to meeting FPL's need than any other QF or IPP.

Order No. PSC-92-1355-FOF-EQ at 18. (R. 2412).

Thus, the Commission views its statutory authority as limited to simply granting or denying the single utility-sponsored application before it. This view resulted in an order in which a need for 800-900 megawatts of additional generation was found but no generation alternative was selected to fill the need. The Commission's interpretation of "applicant" creates the real possibility of a series of contested and inconclusive proceedings which would be inefficient and uneconomical both for participants

and for the Commission--an unworkable result easily remedied by a reasonable definition of applicant.[15],[16]

2. Intent of Legislature to encompass new developments.

The objective of statutory construction is to give effect to legislative intent. The intent to require certification of all power plants that fall within the purview of the Siting Act is clear. The absurd result described above will be avoided if the Court discerns an intent to be equally comprehensive with respect to possible applicants. This is easily accomplished.

The Siting Act was passed in 1973, prior to the enactment of federal laws that gave rise to an industry of non-utility generators; in other words, at a time when only utility-type

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[15] As a practical matter, an alternative provider will have little incentive to undertake the very expensive participation needed to demonstrate--to the benefit of ratepayers--that the capacity proposed by an applicant is not the most desirable or economical choice, if it cannot by its efforts gain a path to the certification of its project. This is another example of why the Commission's interpretation would lead to an unworkable regulatory scheme.

[16] In its order, the Commission regards an "open" procurement process on the part of FPL as the measure that will help enable the Commission to realize "closure." However, that step would not preclude the possibility that a potential provider who participated in the process may later prove that its alternative is more cost-effective than the one proposed by the utility in the need hearing, as a result of poor planning assumptions, improper evaluation criteria, etc. See, In re: Petition for Determination of Need for a Proposed Electrical Power Plant and Related Facilities, Polk County Units 1-4, by Florida Power Corporation, Order No. 25805 at 43; In re: Petition for Determination of Need for a Proposed Electrical Power Plant and Related Facilities in Polk County by Tampa Electric Company, Order No. PSC-92-0002-FOF-EI at 16.

applicants were known and contemplated. The list in section 403.503(14), Florida Statutes, was a general attempt to include all of the candidates that would be "generating, transmitting, or distributing" electricity that were contemplated at the time of the Siting Act's passage. Competing non-utility generators, such as Qualifying Facilities created by the Public Utility Regulatory Policies Act of 1978, appeared on the scene later.

This Court has recognized and applied the following principle of statutory construction:

> While the general rule is that the words of a statute should ordinarily be taken in the sense in which they were understood at the time the statute was enacted, the rule is subject to the well-accepted qualification that where the statute to be construed is couched in broad, general and comprehensive terms and is prospective in nature, it may be held to apply to new situations, cases, conditions, things, subjects, methods, persons or entities coming into existence since the enactment of the statute; provided they are in the same general class as those treated in the statute, can be reasonably said to come within the general purview, scope, purpose and policy of the statute, and there is nothing in the statute indicating an intention that they should not be brought within its terms.

State v. City of Jacksonville, 50 So.2d 532, 536 (Fla. 1951). In that case, this Court construed the 1925 statute which established the scope and limits of the City of Jacksonville's municipal authority. The statute authorized the City to construct "radio broadcasting stations." The Court applied the above principle and held that the statute authorized the City to construct television facilities at the existing radio station, even though television

was unknown at the time the authorizing law was enacted. See also, Englewood Water District v. Halstead, 432 So.2d 172 (Fla. 2d DCA 1983); City Consumer Services, Inc. v. Dept. of Banking, 342 A.2d 542 (N.J. 1975); Safeway Trails, Inc. v. Furman, 197 A.2d 366 (N.J. 1964).

The rule which this Court applied in the City of Jacksonville is applicable here. The Siting Act is prospective in nature, as it applies to the licensing of new and future generating units; the language is broad, as evidenced by the blanket phrase "generating, transmitting or distributing electricity;" and including the new entities is consistent with the statutory purpose, since the statute clearly is designed to apply its balancing test and certification requirements to all power plants, including those built by non-utility generators, that fall within its purview.

3. Contrary to the Commission's prior interpretation.

Administrative agencies' interpretations of the statutes they administer are entitled to deference. However, in the event an agency's interpretation changes, as has occurred in this case, the courts give weight to the first or original interpretation. Walker v. Department of Transportation, 366 So.2d 96 (Fla. 1st DCA 1979); Price Wise Buying Group v. Nuzum, 343 So.2d 115 (Fla. 1st DCA 1977). If an administrative interpretation is not uniform and consistent, the court will take it into account only to the extent

that it is supported by valid reasons. Burnet v. Chicago Portrait Company, 285 U.S. 1, 16 (1932); Safeway Trails, supra, at 374.

In the Florida Crushed Stone case discussed above, the Commission issued a determination of need to FCS before the Siting Board issued the ultimate site certification order. The Commission did not question FCS' ability to proceed as an applicant. It is undisputed that FCS had no contract, was obviously not a utility, and was permitted to proceed before the Commission and ultimately through site certification. Implicitly, the Commission's original construction of "applicant"--the one entitled to greater weight--was consistent with the Siting Board's definition.

The Commission attempts to distinguish the FCS order by saying:

> The fact that non-utility applicants may have been allowed to bring need determination petitions in the past does not compel us to do so in this case. Cogenerators have proliferated in the eight years since the Siting Board granted certification for Florida Crushed Stone.

Order No. PSC-92-1210-FOF-EQ. (R. 2974). The Commission goes on to state that as the entity responsible for determinations of need under section 403.519, Florida Statutes, it may validly decide that "allowing non-utility applicants to bring need determination proceedings under section 403.519 is not in the public interest." Order No. PSC-92-1210-FOF-EQ at 4. (R. 2974).

Apparently, the Commission believes it can modify the statutory definition of applicant to meet changes in conditions. However, the definition of applicant is a matter of legislative

intent, not agency discretion. The Commission cannot alter the Legislature's intent regarding the scope of "applicant."

It is important to note that the Commission did not rule that cogenerators and other non-utility generators are absolutely excluded from the Siting Act's definitions. Instead, the Commission's position is that a utility must anoint a non-utility applicant, by signing a power purchase contract or filing a joint petition, to confer statutory legitimacy on it. This gloss has no statutory basis.

In its order, the Commission alluded to the fact that it had regarded utilities as indispensable parties in past need cases involving cogenerators. The fact that utilities possess the information and data regarding their customers' requirements and the ability of existing system resources to meet those requirements must not be confused with status as an applicant. The information requirements of a need determination case mean that a utility's participation is required to enable the Commission to identify the size, type, and timing of the next capacity addition. It does not follow that the utility is entitled to dictate who will provide that capacity by signing a proposed contract or submitting a joint petition.[17]

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[17] This distinction is the reason why Nassau Power suggested a bifurcated proceeding in the motion to consolidate it filed before the Commission. (R. 679, 3643). In the first phase, the utility would describe its system requirements and the Commission would make findings regarding the need for and timing of additional capacity. In the second phase, the Commission would compare the proposals of applicants who timely appeared to offer to meet the need identified in the first phase.

For that reason, Nassau Power Corporation v. Beard, 601 So.2d 1175 (Fla. 1992), does not support the position taken by the Commission. In Nassau Power, the Court affirmed the decision of the Commission to require Nassau Power to demonstrate that FPL individually required the capacity of Nassau Power's "statewide" standard offer QF contract in a determination of need case under the Siting Act. In this case, Nassau Power proposed to meet the identical, utility-specific need that FPL and Cypress had identified as justification for the proposed Cypress project.

Nassau Power Corporation v. Beard, supra, is inapplicable. In fact, the Nassau Power case demonstrates the fallacy in the Commission's reasoning that the utility's role as indispensable party also makes it a joint applicant.

4. Contrary to other portions of the Florida Statutes delineating the Commission's responsibilities.

When construing a statute, the court must, to the extent possible, give effect to all parts of the statute. Kepner v. State, 577 So.2d 576 (Fla. 1991); State v. Robarge, 450 So.2d 855 (Fla. 1984). All portions of a statute must be read so that they make sense together. The Commission's interpretation of the word applicant fails to comply with this well-established rule of statutory construction.

Section 366.81, Florida Statutes,[18] expresses the Legislature's intent to encourage cost-effective and efficient energy use. Section 366.81, Florida Statutes, specifically requires the Commission to "encourage[e] further development of cogeneration facilities," such as the 435 MW Qualifying Facility proposed by Nassau Power in this case. Further, section 366.81, Florida Statutes, states that section 403.519, Florida Statutes, which sets out the standards and criteria the Commission must apply to a petition to determine need, is to be "liberally construed" so as to meet the legislative goals of the Florida Energy Efficiency and Conservation Act, which include encouraging cogeneration. This means that the Commission is required by statute to liberally construe the word "applicant" in section 403.519, Florida Statutes, in a way that will encourage the development of cogeneration. Instead, the Commission cited the "proliferation" of cogeneration as a reason why it should make the definition more restrictive. Order No. PSC-92-1210-FOF-EQ at 4. (R. 2974).

Finally, the primacy which the Commission's interpretation attaches to the utility's evaluation function is inconsistent with the power of the Commission under section 403.519, Florida Statutes, to initiate a need case and determine the most cost-effective addition on its own motion.

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[18] Section 366.81, Florida Statutes, like section 403.519, Florida Statutes, is part of the Florida Energy Efficiency and Conservation Act.

The narrow interpretation of the term applicant which the Commission has adopted does not harmonize or implement these subsections. Instead, it runs directly counter to the statutory directives. Rather than encouraging cogeneration, the Commission's interpretation would greatly inhibit the development of cogeneration projects of over 75 megawatts in this state.

5. Inconsistent with the 1990 Amendments to the Siting Act.

In 1990, the Legislature adopted numerous amendments to the Siting Act. Significantly, the Legislature did not change the definition of "electric utility" contained in section 403.503(13), Florida Statutes (previously numbered section 403.503(4), Florida Statutes), even though the Legislature must be deemed to have been aware of the FCS order discussed above. Collins Investment Co. v. Metropolitan Dade County, 164 So.2d 806 (Fla. 1964); Bermudez v. Florida Power and Light Co., 433 So.2d 565 (Fla. 3d DCA 1983).[19] If the Legislature had wanted to change the Siting Board's and the Commission's definition of applicant to exclude cogenerators (as the Commission has attempted to do in this case), it would have

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[19] Nor did the Legislature substantively change the definition of applicant. The 1990 amendments (shown in legislative format) grammatically change the definition as follows:

> "Applicant" means any electric utility which applies for ~~makes application for an electric power plant site~~ certification pursuant to the provisions of this act.

explicitly done so; it did not and in fact made no changes to the definition of electric utility.

However, section 403.519, Florida Statutes, was amended to broaden the category of entities who may file a petition to determine need under section 403.519, Florida Statutes. The following shows the change (in legislative format) made to the first sentence of section 403.519, Florida Statutes as a result of the 1990 amendments:

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

The 1990 Legislature replaced the word "utility" with the word "applicant"--a much broader term. In no way can this change of terminology be seen as a narrowing of the category of entities who may proceed under the Siting Act. Rather, the category was broadened and the language of section 403.519, Florida Statutes, is consistent with the FCS Order.

6. Determining the range and scope of possible applicants is proper province of Siting Board.

In Order No. PSC-92-1210-FOF-EQ at 4 (R. 2974), the Commission is careful to profess that:

> We do not intend in any way to restrict the Department of Environmental Regulations [sic] or Siting Board in their exercise of jurisdiction under the Power Plant Siting Act, or in their interpretation of the Act.

However, the Commission's narrow definition of applicant does exactly that. To illustrate, an application for site certification technically can be filed with DER simultaneously with the filing of a petition to determine the need for the proposed capacity with the Commission. Because of the inconsistency of agency rulings, an application by a non-utility generator would be accepted by DER for processing, but the corollary request for the requisite determination of need would be dismissed by the Commission.

Under the Siting Act's scheme, the Commission has the jurisdiction and the responsibility to determine the need for proposed generating capacity. After it does so, it submits a report on this topic to DER. Section 403.507(2)(a)2, Florida Statutes. The Commission's report becomes part of a much larger analysis--including land use considerations and environmental impacts--that is coordinated by DER, considered by the hearing officer assigned to the case, and ultimately reviewed and acted on by the Governor and Cabinet as the Siting Board. Sections 403.5065-403.509, Florida Statutes. It is no slight to the Commission to point out that the determination of need proceeding, while an essential and critical component, is one cog in the plant siting machinery designed to process proposals for the Siting Board's consideration. While the Commission is the exclusive forum for considerations regarding the need for capacity and such related matters as the reliability and cost-effectiveness of alternatives, Nassau Power submits that the determination of the universe of possible applicants is more properly the province of the Siting

Board. The Commission's narrow interpretation of the term applicant would restrict the range of choices for power generation alternatives that may reach the Siting Board and is therefore inconsistent with the statutory scheme.

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

Nassau Power's briefing of this point on appeal is contingent in nature. That is, it will only be necessary for the Court to consider and rule on the Commission's failure to consolidate Nassau Power's petition with Cypress' prior to the hearing on Cypress' proposal if the Court reverses the Commission's denial of Cypress' petition for an affirmative determination of need. The requirement of a comparative review would remain applicable, however, to the other petitioners who timely responded to the need identified by the Commission, but were improperly dismissed.

In this case, FPL identified a need for 800-900 megawatts of capacity in the 1998-1999 time frame. Order No. PSC-92-1355-FOF-EQ at 4. (R. 2399). It proffered Cypress to fill that need. However, in addition to Cypress, Nassau Power came forward (as did ARK) with a project capable of meeting the identified need. Each of these parties was vying for the ability to satisfy FPL's finite need for additional generating capacity in the 1998-1999 time frame. Selection of one project to fill the need would preclude

the others from meeting the same need.[20] Nassau Power intervened in the Cypress docket and requested that the Cypress docket be consolidated for hearing with its own need determination application so that a comparative review could be conducted. (R. 679). This request was denied. (R. 694). While the Commission permitted Nassau Power to intervene and participate in the Cypress proceeding, it precluded Nassau Power from being selected to fill the identified need. Under federal and Florida law, this was error. The Commission was required to conduct a comparative review of the projects competing to meet the same finite need.

The seminal case on comparative review under circumstances similar to the one before the Court is Ashbacker Radio Corp. v. Federal Communications Commission, 325 U.S. 327 (1945). In Ashbacker, one entity filed an application for a license to operate a new radio station. Before the application was granted, another entity filed for the same authority. The Federal Communications Commission (FCC) found that the two applications were mutually exclusive and that the license could be granted only to one of the applicants. Despite this, the FCC granted the first application and set the second application for hearing. The Court reversed the FCC, finding that:

> . . . if the grant of one [application] effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before denial of their applications

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[20] FPL's Mr. Waters testified that FPL did not need the generation output from both the Cypress and Nassau Power projects. (Tr. 317-18).

> becomes an empty thing. We think that is the case here.
>
> . . .
>
> We only hold that where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him.

Id. at 330, 333.

The Florida courts have applied the Ashbacker doctrine in similar circumstances. For example, in Bio-Medical Applications of Clearwater, Inc. v. Department of Health and Rehabilitative Services, 370 So.2d 19 (Fla. 2d DCA 1979), the court required a comparative review of two mutually exclusive applications for a certificate of need for a kidney dialysis facility. In Bio-Medical, the hearing officer refused to consolidate the two applications for the facilities even though the need the applications were attempting to fill was mutually exclusive, just as in the case of generating capacity. Rather, one application was heard and approved before the hearing on the second application was scheduled. It was the Department of Health and Rehabilitative Services' (HRS)[21] intent to consider the applications seriatim,

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[21] Just as the Commission determines the need for capacity, the Agency for Health Care Administration quantifies need for health care facilities. See, section 408.031-.039, Florida Statutes. This function was formerly performed by the Department of Health and Rehabilitative Services.

just as the Commission has stated that its only responsibility is to approve or deny the single applicant before it.[22]

Based on Ashbacker, the court found that the failure to consolidate the two applications was error:

> [A] comparative hearing should have been held at which the two applications could be considered simultaneously.
>
> . . .
>
> In Ashbacker, the Supreme Court laid down a general principle that an administrative agency is not to grant one application for a license without some appropriate consideration of another *bona fide* and timely filed[23] application to render the same service; the principle, therefore, constitutes a fundamental doctrine of fair play which administrative agencies must diligently

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[22] Order No. PSC-92-1355-FOF-EQ at 3 (R. 2398) states:

> No competitive selection is required since we are called on to approve or deny the choice of a single applicant, the utility, rather than select from a number of competing applicants.

The Bio-Medical court at 25 commented on a similar view by HRS:

> HRS apparently feels that its duty is only to react to each proposal as it is submitted and as if it were isolated from any other. The public would be better served if HRS discarded such tunnel vision.

[23] In the event the Court finds it necessary to consider the point relating to comparative review, only Nassau Power and ARK met Bio-Medical's criteria of a "bona fide and timely filed application." If the Court remands the Cypress case, the only parties entitled to a comparative review are Nassau Power and ARK because they were the only parties with timely filed applications at the time the Commission considered the Cypress application.

> respect and court must be ever alert to enforce. Railway Express Agency, Inc. v. United States, 205 F.Supp. 831 (S.D.N.Y. 1962).

Bio-Medical at 20, 23. The court went on to find that Ashbacker was applicable whenever the granting of authority to one applicant prejudiced another applicant. "[F]airness requires that the agency conduct a comparative hearing at which the competing applications are considered simultaneously." Biomedical at 23. The court also held that the fair opportunity for hearing envisioned by Ashbacker was not fulfilled by simply letting an applicant intervene in a proceeding pertaining to a competing application "since the merits of the intervenor's proposal are not thereby presented for comparative consideration." Bio-Medical at 23. This doctrine of comparative review has often been affirmed by the Florida courts. See, Gulf Court Nursing Center v. Department of Health and Rehabilitative Services, 483 So.2d 25 700 (Fla. 1st DCA 1985); Federal Property Management Corporation v. Health and Retirement Corporation of America, 462 So.2d 493 (Fla. 1st DCA 1984); Bio-Medical Applications of Ocala, Inc. v. Department of Health and Rehabilitative Services, 374 So.2d 88 (Fla. 1st DCA 1979).

The principles of Ashbacker and Bio-Medical directly apply to Nassau Power's motion to consolidate its determination of need petition with Cypress'. Nassau Power was entitled to have its petition consolidated with Cypress' for hearing because affirmative action by the Commission on Cypress' petition, without having Nassau Power's petition fully before it, could have prejudiced

Nassau Power. Selection of Cypress would have precluded selection of the Nassau Power project. As the Ashbacker court recognized, granting Nassau Power intervenor status in the Cypress docket did not serve to put the parties on an equal basis.

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

After finding that the Cypress project was not the best choice to meet the capacity needs of FPL ratepayers, the Commission turned to the question of what FPL should do to fill the need for 800 to 900 MW which the Commission found to exist. The Commission refused to direct FPL to negotiate with Nassau Power. The Commission said:

> We specifically reject suggestions made by Ark/CSW and Nassau that would give their projects priority over others. Intervention in this docket gives these parties no greater standing with regard to meeting FPL's need than any other QF or IPP.

Order No. PSC-92-1355-FOF-EQ at 18. (R. 2412). Such a finding was error and should be reversed.

Nassau Power was the only provider of capacity in the case (Cypress included) who offered to meet a portion of FPL's next need for capacity through cogeneration. Nassau Power proposed a 435 MW cogeneration unit that would be a Qualifying Facility (QF) under federal law, on a stand-alone basis or as an integral part of a larger, two-unit project. Order No. PSC-92-1355-FOF-EQ at 30. (R. 2424; Tr. 1375, 1381-82). It offered to accept a price for its cogenerated power that was far below FPL's avoided cost. Nassau

Power's status as a QF adds an important dimension to the Commission's refusal to require FPL to come to terms with Nassau Power.

Section 210 of PURPA (16 U.S.C. §824a-3) and the Federal Energy Regulatory Commission's (FERC) rules implementing PURPA, specifically 18 C.F.R. §§ 292.303 and 292.304, give a QF a federal statutory right to sell its power at avoided cost rates to a utility. Section 210(a) of PURPA required FERC to adopt rules which would implement PURPA's requirement that electric utilities purchase electric energy from QFs. The FERC rules enacted to implement this requirement make the utility's obligation to purchase from a QF mandatory:

> Each electric utility shall purchase . . . any energy and capacity which is made available from a qualifying facility. . . .

18 C.F.R. § 292.303(a), emphasis added.

PURPA creates a federal obligation that requires utilities to purchase electricity from QFs at avoided cost rates. This federal obligation gives QFs a corresponding right to sell power at avoided cost rates. Congress has directly preempted a state's ability to determine that electric utilities do not have to purchase power from QFs at the avoided cost rate. Therefore, pursuant to federal law, the Commission was required to direct FPL to contract with Nassau Power with respect to its 435 MW Qualifying Facility rather than sending FPL off to begin its quest for needed capacity anew.

The United States Supreme Court described QFs' exemption from certain state laws and regulations as "nothing more than

preempt[ing] conflicting state enactments in the traditional way." FERC v. Mississippi, 456 U.S. 742, 759 (1982). Subsequently, the United States Supreme Court upheld FERC's rules implementing PURPA against the challenge that setting the utility's obligation to purchase at 100% of avoided cost was improper. American Paper Institute v. American Electric Power Service Corp., 461 U.S. 402 (1983).

In enacting PURPA, Congress did not directly preempt the jurisdiction of the states to authorize the construction of QFs. However, the Congressional intent, manifest in section 210 of PURPA and in FERC's implementing rules, makes it clear that two of PURPA's fundamental federal purposes are that qualifying facilities are to be encouraged and that qualifying facilities are entitled to avoided cost rates. In this case, Nassau Power has offered to sell capacity and energy to FPL at far below its avoided cost. As a QF, Nassau Power has a federal right to do so.

In the Cypress order, the Commission correctly noted that QFs are to receive preferential treatment under state law as well. The Commission recognized that section 366.81, Florida Statutes, requires the Commission to encourage cogeneration. Order No. PSC-92-1355-FOF-EQ at 17, footnote 4. (R. 2411).

The Commission erred in failing to give Nassau Power's QF status the priority required by law. The Commission's failure to require FPL to negotiate with Nassau Power "stands as an obstacle to the accomplishment of the full purpose and objectives of

Congress." Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299-300 (1988) (citations omitted).

The Court should reverse that portion of Order No. PSC-92-1355-FOF-EQ which concludes that Nassau Power's position is not superior to any other potential provider. It should direct the Commission to require FPL to negotiate with Nassau Power to fill the capacity need which the Commission has identified.

CONCLUSION

The Court should affirm the Commission's denial of Cypress' petition. It should direct the Commission to recognize Nassau Power's status as a proper applicant under the Siting Act and its separate right, as the only Qualifying Facility to offer to meet a portion of the need identified by the Commission, to contract with FPL.

If the Court reverses the decision of the Commission to deny Cypress' petition and remands for further consideration of Cypress' proposal, Nassau Power is entitled to a comparative review that would encompass the merits of its petition on an equal basis.

Respectfully submitted,

Joseph A. McGlothlin
Fla. Bar No. 163771
Vicki Gordon Kaufman
Fla. Bar No. 286672
McWhirter, Grandoff & Reeves
315 S. Calhoun Street
Suite 716
Tallahassee, Florida 32301
904/222-2525

Attorneys for Nassau Power Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Answer Brief/Initial Brief of Nassau Power Corporation has been furnished by hand delivery* or by Overnight Delivery** to the following parties of record, this 10th day of May, 1993.

David Smith*
Division of Legal Services
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32301

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

Richard D. Melson*
Hopping, Boyd, Green and Sams
123 S. Calhoun Street
Post Office Box 6526
Tallahassee, FL 32314

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

Jon Moyle*
Moyle, Flanigan, Katz, FitzGerald & Sheehan, P.A.
118 North Gadsden Street
Suite 100
Tallahassee, FL 32301

Scheff Wright*
Wiggins and Villacorta
Post Office Drawer 1657
Tallahassee, FL 32302

Ross S. Burnaman*
Debra Swim
Legal Environmental Assistance Foundation, Inc.
1115 N. Gadsden Street
Tallahassee, FL 32303

Frederick M. Bryant*
Moore, Williams, Bryant, Peebles & Gautier, P.A.
Post Office Box 1269
Tallahassee, FL 32302

John K. Aurell*
John Beranek
Aurell, Radey, Hinkle, Thomas & Beranek
Suite 1000, Monroe-Park Tower
101 North Monroe Street
Post Office Drawer 11307
Tallahassee, FL 32301

John D. Cassels, Jr.**
County Attorney
Cassels & McCall
400 North West Second Street
P. O. Box 968
Okeechobee, FL 34972

Joseph A. McGlothlin
Joseph A. McGlothlin

APPENDIX TO ANSWER BRIEF/INITIAL BRIEF
OF NASSAU POWER CORPORATION

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Nassau Power Corporation to determine need for electrical power plant (Okeechobee County Cogeneration Facility).	DOCKET NO. 920769-EQ
In Re: Petition of Ark Energy, Inc. and CSW Development-I, Inc. for determination of need for electric power plant to be located in Okeechobee County, Florida.	DOCKET NO. 920761-EQ
In Re: Petition of Ark Energy, Inc. and CSW Development-I, Inc. for approval of contract for the sale of capacity and energy to Florida Power & Light Company.	DOCKET NO. 920762-EQ
In Re: Petition of Nassau Power Corporation for approval of Contract for the sale of capacity and energy to Florida Power & Light Company.	DOCKET NO. 920783-EQ ORDER NO. PSC-92-1210-FOF-EQ ISSUED: 10/26/92

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
SUSAN F. CLARK
J. TERRY DEASON
BETTY EASLEY
LUIS J. LAUREDO

ORDER DISMISSING PETITIONS

On May 22, 1992, Florida Power & Light Company ("FPL") and Cypress Energy Partners, Ltd. ("Cypress") filed a Joint Petition to Determine Need for an electrical power plant (Docket No. 920520-EQ), asserting a need for capacity in 1998-1999. FPL and Cypress proposed to fill that need with the Cypress pulverized coal units. Both Ark Energy Inc. (with CSW Development I, Inc.) ("Ark") and Nassau Power Corporation ("Nassau") filed petitions to intervene in that docket (Ark on July 10, 1992, and Nassau on July 27, 1992). Ark's petition to intervene was granted in Order No. PSC-92-0748-PCO-EQ. Nassau's petition was granted in Order No. PSC-92-0827-PCO-EQ.

On July 27, 1992, Ark filed a Petition for Determination of Need for approximately 866 MW of natural gas-fired combined cycle generating capacity, to be located in Okeechobee County, Florida,

to be known as Pahokee Power Partners II Project. This petition was assigned Docket No. 920761-EQ. On that same day, Ark also filed a petition for approval of a contract for the purchase of firm capacity and energy by FPL, which was assigned Docket No. 920762-EQ.

On July 30, 1992, Nassau filed a Petition to Determine Need (Docket No. 920769-EQ) and a separate Petition for Contract Approval (Docket No. 920783-EQ). The petitions submitted by both Ark and Nassau seek to fill FPL's need for capacity in 1998-1999, which is the same need FPL is attempting to fill with the Cypress project. Neither Ark nor Nassau has a power sales contract with FPL.

On August 18, 1992, FPL filed motions to dismiss both Ark's and Nassau's petitions for determination of need and for contract approval. On September 4, 1992, Nassau filed responses to FPL's Motions to Dismiss. On September 8, 1992, Ark filed memoranda of law in opposition to FPL's motions. This order addresses the Motions to Dismiss in all four dockets because the issues presented are the same.

FPL argues that Ark's and Nassau's petitions should be dismissed because they have completely bypassed its "comprehensive bidding and evaluation process" and have submitted their proposed projects after the evaluation process was complete and the winning proposal made public. We do not believe that this is a proper ground for dismissal. Both Ark and Nassau contend that FPL did not conduct a publicly noticed or fair procurement process. There are clearly questions of fact with regard to this issue. We will not indirectly approve whatever evaluation process FPL actually used by granting its motion to dismiss on this ground.

Rather than dismiss the petitions on the basis of the policy reasons raised by FPL, we find that the petitions should be dismissed because Nassau and Ark are not proper applicants for a need determination proceeding under Section 403.519, Florida Statutes. That section provides that:

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

Section 403.503, Florida Statutes defines "applicant" as an electric utility, and in turn defines "electric utility" as:

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

Ark and Nassau do not qualify as applicants. Neither Ark nor Nassau is a city, town, or county. Nor is either a public utility district, regulated electric company, electric cooperative or joint operating agency.

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

Since our 1990 Martin order (Order No. 23080, issued June 15, 1990) the policy of this Commission has been that a contracting utility is an indispensable party to a need determination proceeding. 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. Thus, a non-utility generator such as Ark or Nassau will be able to obtain a need determination for its project after it has signed a contract (power sales agreement) with a utility.

This scheme simply recognizes the utility's planning and evaluation process. It is the utility's need for power to serve its customers which must be evaluated in a need determination proceeding. Nassau Power Corporation v. Beard, supra. A non-utility generator has no such need because it is not required to serve customers. The utility, not the cogenerator or independent power producer, is the proper applicant.

If we accepted Nassau and Ark as statutory applicants, any entity capable of building a power plant could file a petition for a determination of need at any time for whatever plant they wanted

to build. We are statutorily required to promptly conduct a hearing and issue an order for each such petition. We would end up devoting inordinate time and resources to need cases. Wasting time in need determination proceedings for projects that may never reach fruition is not an efficient use of the administrative process. To allow non-utilities to file need petitions would greatly detract from the reliability of the process and would require us to devote excessive resources to micromanagement of utilities' power purchases.

The fact that non-utility applicants may have been allowed to bring need determination petitions in the past does not compel us to do so in this case. Cogenerators have proliferated in the eight years since the Siting Board granted certification for Florida Crushed Stone. See In re: Florida Crushed Stone Company Power Plant Site certification application, PA 82-17, March 12, 1984. This Commission, which is the sole forum for determinations of need under Section 403.519, Florida Statutes (1991), may validly decide that allowing non-utility applicants to bring need determination proceedings under Section 403.519 is not in the public interest. More significantly, the legislature has not included non-utility generators in its definition of "applicants" who may initiate need determination proceedings.

An additional reason for dismissal applies to Ark's and Nassau's petitions for approval of contracts: neither Ark nor Nassau has a contract to approve. Rather, these parties hope the Commission will order FPL to execute a contract. A contract requires an offer and an acceptance. The documents submitted by Ark and Nassau are merely offers which have not been accepted by FPL. As such, they are not contracts and there are no contracts before the us which could be approved.[1]

In granting dismissal here we are only construing who may be an applicant for a need determination under Section 403.519, Florida Statutes. We do not intend in any way to restrict the Department of Environmental Regulations or Siting Board in their exercise of jurisdiction under the Power Plant Siting Act, or in their interpretation of the Act. It is also our intent that this Order be narrowly construed and limited to proceedings wherein non-utility generators seek determinations of need based on a utility's need. We explicitly reserve for the future the question of whether

[1]While standard offer contracts do not require an acceptance, they are not truly contracts. Rather, such arrangements are legally created by Commission rules. Neither ARK nor Nassau contend that they have standard offer contracts.

a self-service generator (which has its own need to serve) may be an applicant for a need determination without a utility co-applicant. To date this circumstance has not been presented to us and we do not believe the question should be decided in the abstract.

It is therefore

ORDERED by the Florida Public Service Commission that the Petitions filed by Ark Energy, Inc./CSW Development I, Inc., and Nassau Power Corporation, in Docket Nos. 920761-EQ, 920762-EQ, 920769-EQ and 920783-EQ are hereby dismissed. It is further

ORDERED that Docket Nos. 920761-EQ, 920762-EQ, 920769-EQ and 920783-EQ shall be closed.

By ORDER of the Florida Public Service Commission this 26th day of October, 1992.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

Commissioners Clark and Lauredo dissented.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the

First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition to determine need for electrical power plant (Okeechobee County Cogeneration Facility) by Nassau Power Corporation.	DOCKET NO. 920769-EQ
In Re: Petition for approval of contract for sale of capacity and energy to Florida Power and Light Company by Nassau Power Corporation.	DOCKET NO. 920783-EQ ORDER NO. PSC-93-0338-FOF-EQ ISSUED: 03/04/93

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
THOMAS M. BEARD
SUSAN F. CLARK
LUIS J. LAUREDO

ORDER DENYING NASSAU'S MOTION FOR RECONSIDERATION

BY THE COMMISSION:

On May 22, 1992, Florida Power and Light Company (FPL) and Cypress Energy Partners, Ltd. (Cypress) filed a joint petition to determine need for an electrical power plant (Docket No. 920520-EQ), asserting a need for capacity in 1998-1999. Nassau Power Corporation (Nassau) intervened in that docket. In addition, on July 30, 1992, Nassau filed a petition to determine need (Docket No. 920769-EQ) and a separate petition for contract approval (Docket No. 920783-EQ). The capacity which Nassau sought to fill with its petition was the same need FPL attempted to fill with the Cypress project. Nassau did not have a power sales contract with FPL.

By Order No. PSC-92-1210-FOF-EQ we dismissed both Nassau's petition to determine need and its petition for contract approval. We ruled that Nassau's petition should be dismissed because it was not a proper applicant for a need determination proceeding under Section 403.519, Florida Statutes. It is the utility's need for power to serve its customers which must be evaluated in a need determination proceeding. A non-utility generator has no such need because it is not required to serve customers. The utility, not the cogenerator or independent power producer, is the proper applicant. It is our intent that Order No. PSC-92-1210-FOF-EQ be

narrowly construed and limited to proceedings wherein non-utility generators seek determinations of need based on a utility's need.

Nassau filed a motion seeking reconsideration of our order dismissing Nassau's petition for need determination. Nassau argued that the following errors require us to reconsider Order No. PSC-92-1210-FOF-EQ:

> The Commission's assumption that a regulated utility must be an applicant or co-applicant under the Siting Act wrongly equates an "indispensable party" with an "applicant;" the order fails to recognize that it overturns the interpretation of the Siting Board, which has responsibility for this aspect of the certification process created by the Siting Act; and it subordinates the Commission's own prior determination of legislative intent to its concerns over possible administrative burdens.

FPL responded to Nassau's motion by stating that Nassau's motion for reconsideration should be denied.

Nassau's objections to the Commission's final order do not contain a single material point of fact or law that we overlooked or failed to consider in this case. The arguments presented by Nassau in its motion are arguments which Nassau has presented to us before, and they are arguments which we have fully considered and rejected. The purpose of a motion for reconsideration is to bring to our attention some material and relevant point of fact or law which was overlooked, or which we failed to consider when we rendered the order in the first instance. See Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So.2d 161 (Fla. DCA 1981). It is not an appropriate avenue for rehashing matters which were already considered, or for raising immaterial matters which even if adopted would not materially change the outcome of the case. Because Nassau has not brought before us some material and relevant point of fact or law which we overlooked, or which we failed to consider when we rendered the order in the first instance, we deny Nassau's motion for reconsideration.

Pursuant to Rule 25-22.060(1)(c), Florida Administrative Code,

> [a] final order shall not be deemed rendered for the purpose of judicial review until the Commission disposes of any motion and cross motion for reconsideration of that order....

Thus, it is the issuance of this order that deems Order No. PSC-92-1210-FOF-EQ rendered for the purpose of judicial review.

Because we have denied Nassau's motion for reconsideration, these dockets shall be closed.

It is, therefore,

ORDERED by the Florida Public Service Commission that Nassau Power Corporation's motion for reconsideration of Order No. PSC-92-1210-FOF-EQ is hereby denied. It is further

ORDERED that these dockets shall be closed.

By ORDER of the Florida Public Service Commission this 4th day of March, 1993.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)
MAH:bmi

by: Kay Flynn
Chief, Bureau of Records

NOTICE OF JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

BEFORE THE GOVERNOR AND CABINET
OF THE STATE OF FLORIDA

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

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

Honorable Bob Graham
Governor

Honorable George Firestone
Secretary of State

Honorable Jim Smith
Attorney General

Honorable Gerald A. Lewis
Comptroller

Honorable Ralph D. Turlington
Commissioner of Education

FINAL ORDER OF CERTIFICATION

BY THE GOVERNOR AND CABINET:

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

1. The Recommended Order is approved and adopted.

Ruling on Motion to Dismiss

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

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

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

> (4) "Electric utility" means cities and towns, counties, public utility districts, regulated electric companies, electric cooperatives, and joint operating agencies, or combinations thereof, engaged in, or authorized to engage in, the business of generating, transmitting, or distributing electric energy.

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

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

Rulings on Exceptions

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

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

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

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

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

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

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

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

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

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

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

BY THE GOVERNOR AND CABINET
SITTING AS THE SITING BOARD:

Bob Graham
Governor

Copies furnished:
(See Attached List)

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

Gloria M. Andrew 3/12/84
Clerk Date

Copies furnished:

Lawrence N. Curtin, Esquire
John A. Radey, Esquire
Holland & Knight
P. O. Drawer BW
Lakeland, Florida 33802

John C. Bottcher, Esquire
Department of Environmental
Regulation
Twin Towers Building
2600 Blair Stone Road
Tallahassee, Florida 32301

C. Laurence Keesey, Esquire
Department of Community Affairs
Howard Building
2572 Executive Center Circle
Tallahassee, Florida 32301

J. Edward Curren
Southwest Florida Water
Management District
2379 Broad Street
Brooksville, Florida 33512-9712

Lynne Capehart, Esquire
Bradford Thomas, Esquire
1601 NW 35 Way
Gainesville, Florida 32605

Robert Bruce Snow, Esquire
P. O. Box 2060
Brooksville, Florida 33512

William H. Green, Esquire
P. O. Box 6526
Tallahassee, Florida 32301

John R. Lawson, Jr., Esquire
Joseph A. McGlothin, Esquire
C. Thomas Davidson, Esquire
Lawson, McWhirter & Grandoff
P. O. Box 3350
Tampa, Florida 33601

Bonnie E. Davis, Esquire
Public Service Commission
101 E. Gaines Street
Tallahassee, Florida 32301

L. M. Blain, Esquire
Thomas E. Cone, Jr., Esquire
Blain & Cone, P.A.
P. O. Box 399
Tampa, Florida 33601

Gary P. Sams, Esquire
Elizabeth C. Bowman, Esquire
P. O. Box 6526
Tallahassee, Florida 32301

Honorable Bob Graham
Governor
State of Florida
The Capitol
Tallahassee, Florida 32301

Honorable Doyle Conner
Commissioner of Agriculture
The Capitol
Tallahassee, Florida 32301

Honorable George Firestone
Secretary of State
The Capitol
Tallahassee, Florida 32301

Honorable Gerald Lewis
Comptroller, State of Florida
The Capitol
Tallahassee, Florida 32301

Honorable Jim Smith
Attorney General
State of Florida
The Capitol
Tallahassee, Florida 32301

Honorable Ralph Turlington
Commissioner of Education
The Capitol
Tallahassee, Florida 32301

Honorable Bill Gunter
State Treasurer and Insurance
Comissioner
The Capitol
Tallahassee, Florida 32301

Hamilton S. Oven
Department of Environmental
Regulation
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32301