IN THE SUPREME COURT OF FLORIDA

NASSAU POWER CORPORATION,

Appellant,

v. CASE NO. 81,496

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

_____/

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 920769-EQ

REVISED INITIAL BRIEF OF NASSAU POWER CORPORATION

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 CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Throughout this brief, the following designations will be used. Nassau Power Corporation will be referred to as "Nassau Power." The Florida Public Service Commission will be referred to as "the Commission." Florida Power and Light Company will be "FPL" and Cypress Energy Partners, Limited Partnership, will be referred to as "Cypress." The joint venture of ARK Energy, Inc. and CSW Development-I, Inc. will be called "ARK." The Department of Environmental Protection will be referred to as "DEP"[1] and the Legal Environmental Assistance Foundation is called "LEAF." The record is referred to as (R.) and the appendix to the brief is (A.).

On January 10, 1994, the Court dismissed the cross-appeals related to the appeal by Cypress of Order No. PSC-92-1355-FOF-EQ. The Court directed Nassau Power to reformat its brief so as to include only the issues related to Nassau Power's appeal of Order No. PSC-92-1210-FOF-EQ. In this brief, Nassau Power has done so. However, because the petition of Nassau Power that the Commission dismissed in Order No. PSC-92-1355-FOF-EQ was expressly designed to compete for the capacity need that was also the subject of the Cypress/FPL determination of need proceeding, certain references to that proceeding and order remain necessary.

---

[1] At the time of its intervention, DEP's name was the Department of Environmental Regulation (DER).

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 certification of the unit 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.

Nassau Power filed a "petition to determine need" with the Commission on July 30, 1992. (R. 3297). In its petition, Nassau Power proposed a power generation project in two alternative configurations. Nassau Power proposed to build one 435 MW natural gas-fired power plant for service in 1998. The alternative proposal would add a second such unit in 1999. The project was designed (size and timing) to meet FPL's system requirements, as they had been quantified by FPL in a contemporaneous petition to determine need filed jointly by FPL and Cypress on May 22, 1992. In that petition, FPL identified capacity requirements of 400-450 MW in each of the years 1998 and 1999. In its petition, Nassau Power adopted and reiterated FPL's calculation as to its customers' requirements, and offered to contract with FPL at a price substantially lower than the proposed contract between FPL and Cypress.

Nassau Power proposed to utilize cogeneration in developing its first 435 MW unit. The unit would be a Qualifying Facility under the federal Public Utility Regulatory Policies Act

("PURPA"). (Qualifying Facilities, or QFs, that offer to meet or beat the utilities' "avoided cost" are entitled by law to sell their output to electric utilities, who must contract with them on terms, conditions, and prices overseen by the state regulatory agency.)

ARK also filed a petition to determine need designed to present a "competitive alternative" to the FPL/Cypress project. The Commission denied motions by Nassau Power and ARK to consolidate the three dockets (Nassau Power, ARK and Cypress). (R. 694).

FPL moved to dismiss Nassau Power's separate need determination petition on the grounds that Nassau Power is not a proper applicant under governing statutes. (R. 3669). FPL filed a similar motion as to the separate need determination petition filed by ARK. (R. 2866). DEP intervened in the Nassau Power and ARK dockets. (R. 2965, 3749). In its pleading DEP advocated the broad and inclusive interpretation of "applicant" which the Siting Board had articulated in a previous case. DEP 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 Nassau Power's petition to determine need (as well as ARK's) 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. 3755; A. 1). Nassau Power filed a motion for reconsideration of the order of

dismissal, which the Commission denied in Order No. PSC-93-0338-FOF-EQ. (R. 3777; A. 7). Nassau Power appealed the dismissal of its petition to determine need to this Court. (Case No. 81,496; R. 3781).

The Cypress case proceeded to hearing. Nassau Power and ARK participated as intervenors. After the hearing, the Commission determined that FPL needs 800-900 MW of additional generating capacity in 1998-1999 to maintain the reliability of its system. However, the Commission rejected the power plants jointly proposed by Cypress and FPL. In its final order, the Commission memorialized its earlier ruling on the requests for consolidation. (R. 2396).

Cypress appealed the denial of its determination of need petition. (Case No. 81,131; R. 2546). Nassau Power, ARK and LEAF filed notices of cross-appeal in Case No. 81,131. (R. 2616, 2622, 2627). As mentioned above, Nassau Power filed a notice of appeal of the Commission's dismissal of its individual determination of need petition in Case No. 81,496.

On April 5, 1993 Nassau Power filed a motion to consolidate Case Nos. 81,131 and 81,496. The Court granted the motion on April 19, 1993. On June 14, 1993 Cypress voluntarily dismissed its appeal. On September 7, 1993 the Court set the case for oral argument on December 3, 1993.

On November 15, 1993, the Commission filed a motion to dismiss the cross-appeals of Nassau Power, ARK and LEAF. The Commission also argued that Nassau Power's direct appeal, while

in a different posture, should also be dismissed. Several parties, including Nassau Power, responded in opposition to the Commission's motion.

On November 17, 1993, the Court removed the consolidated case from the oral argument calendar and directed all parties to submit memoranda regarding the status of the case. The parties complied. On January 10, 1994, the Court granted the Commission's motion to dismiss the cross-appeals, thereby extinguishing the claims of cross-appellants, and instructed Nassau Power to brief the issues pertaining to its direct appeal in Case No. 81,496.

SUMMARY OF ARGUMENT

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.

In dismissing Nassau Power's petition, the Commission reached the opposite conclusion. The Commission's conflicting, restrictive interpretation presents the absurd premise that a cogenerator or other non-utility power generator 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.

The Commission's definition is unworkable. As long as the Commission restricts itself to approving or disapproving the single project which the utility puts forward in a need case, its interpretation gives rise to the possibility of a series of inconclusive proceedings that will chill the potential for competitive alternatives. To make sense of the Siting Act, as applied to a changing industry, the Court should give effect to the Siting Board's earlier, more liberal construction of the statutory framework for which the Board has primary authority.

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. Nassau Power's proposed 435 MW unit would be a Qualifying Facility under the Public Utility Regulatory Policies Act and implementing rules of the Federal Energy Regulatory Commission. The Commission's order dismissing Nassau Power's petition to determine need frustrates Nassau Power's rights under PURPA.

Nassau Power has been adversely affected by the Commission's erroneous interpretation of the term applicant and its wrongful dismissal of Nassau Power's petition to determine need. But for the Commission's error, Nassau Power's petition would have been the subject of the "comparative review" required

by law and its project would have been a timely available candidate to fill the need identified by FPL at the time.

The Court must correct this error and provide relief for Nassau Power that is appropriate for the circumstances. The Court should put Nassau Power in the position it would have been in if the Commission had not erred. Under the facts of the case, the reversal of the Commission's order will be applicable only to Nassau Power. The possibility that FPL's circumstances may have changed due to the passage of time does not render the effect of the wrongful dismissal moot, but should be factored into the relief fashioned by the Court.

The Court should direct the Commission to permit FPL to update its need assessment, and to allow Nassau Power to amend its petition as to the first 435 MW of such need (the QF portion of Nassau Power's originally proposed project) so as to meet any proven change in circumstances.

ARGUMENT

I. THE COMMISSION ERRED IN DISMISSING NASSAU POWER'S PETITION TO DETERMINE NEED.

A. INTRODUCTION AND OVERVIEW.

The significant issue of statutory construction presented by the Commission's dismissal of Nassau Power's petition to determine need holds important 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 the capacity addition which best meets the needs of the State from co-equal, competing proposals?

The Siting Board and the Commission have answered the essential 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 "applicant" issue was raised by an Intervenor, fell within the Siting Act's definition of "applicant." The Siting Board awarded certification to Florida

Crushed Stone, which had already received a determination of need from the Commission.

After FPL filed a motion to dismiss Nassau Power's petition to determine need in the Cypress case, DEP--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 In re: Florida Crushed Stone Company Power Plant Site Certification, PA 82-17 (hereinafter FCS Order) (A. 9). Its construction of the term "applicant" to embrace non-utility applicants should be confirmed 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. The Commission's interpretation must be overturned because it thwarts the exercise of jurisdiction of the Siting Board and because it fails to give effect to the legislative scheme for power plant siting.

B. 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 Florida Crushed Stone case the precise question of whether a non-utility cogenerator 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, Nassau Power is 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 statutory definitions, the Commission dismissed Nassau Power's petition to determine need.

C. THE COMMISSION'S CONSTRUCTION OF THE TERM APPLICANT VIOLATES BASIC PRINCIPLES OF STATUTORY CONSTRUCTION.

1. The Commission's interpretation would yield 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 runs 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. Indisputably, 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.[2] Further, as a cogenerator meeting federally prescribed standards of efficiency, Nassau Power has a federal right pursuant to the Public Utility Regulatory Policies Act (PURPA)[3] to sell capacity and energy to a utility at prices

---

[2] The Siting Act applies to any electrical power plant having a steam-based generating capacity of 75 megawatts or more. Section 403.506, Florida Statutes.

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

designed to be equal to or below the utility's own cost of generation. 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--but because it could not even begin the process under the Siting Act due to the Commission's restrictive interpretation of "applicant." It would be 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. Industrial concerns who may build "self-service" generating units are not specifically "listed" in the definitions of "applicant" and "utility." If an industrial entity determines to build and own a cogeneration facility having steam-based capacity of 75 megawatts or more to satisfy only its own internal power needs[4] (that is, it would not sell any power to a utility), Nassau Power believes it is beyond question that such a "self-service" applicant would be entitled to proceed through the required permitting and licensing process. Obviously, it would have no contract with a utility.

---

[4] Numerous large industrial concerns in Florida use cogeneration, which is simply the use of otherwise wasted process heat in combination with power generation, to meet some or all of their power needs.

This illustration shows that it is necessary to liberally construe the scope of potential applications to avoid an absurd result.[5]

The Commission's restrictive approach would lead to a cumbersome regulatory scheme. While the Cypress case is no longer a part of this appeal, the Commission's decision illustrates the present shortcomings of the Commission's approach. The Commission considered the petition to determine need filed by Cypress based on an 800-900 megawatt need identified by FPL. 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).

In other words, 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

---

[5] 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).

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 inconclusive proceedings which would be inefficient and uneconomical both for participants and for the Commission.

The Commission carried forward this view of its own limitations in a recent rulemaking proceeding. In Order No. PSC-93-1846-FOF-EU, the Commission adopted a "capacity procurement" rule directing utilities to utilize a bidding procedure (unless exempted by the Commission). Under the rule, the Commission is still limited to approval or disapproval of the utility's choice. Losing bidders may intervene in the resulting Siting Act proceeding and demonstrate that the utility made the wrong choice, but cannot themselves be selected to fill the need for their efforts.[6]

2. The intent of the Legislature was 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

---

[6] 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 the utility is not the most desirable or economical choice, if it cannot by its efforts gain a path to the certification of its project.

the Court discerns an intent to be equally comprehensive with respect to the universe of 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 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. Since 1973, the power generation industry has changed dramatically. First, in 1978 Congress passed the Public Utility Regulatory Policies Act, in which it created a mandatory wholesale market of purchasing utilities for cogenerated energy meeting prescribed efficiency standards. The law gave rise to a new class of non-utility providers called Qualifying Facilities. Subsequently, Congress passed the Energy Policy Act of 1992, in which it created a broader class of independent Exempt Wholesale Generators (EWGs) and took other steps to enhance the prospects for even greater competition between utility and non-utility entities in the power generation market. These developments bearing on the identification of entities entitled to access to certification procedures simply were not contemplated by the Florida Legislature in 1973.

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. The order dismissing Nassau Power's petition is 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, a court must 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 the departure 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 -- is 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 at 4. (R. 2974; A. 4). The Commission says 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; A. 4).

Apparently, the Commission believes it can modulate the statutory definition of applicant to attempt to regulate the number of applications it receives. However, the definition of applicant is a matter of legislative intent, not agency discretion.

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. Utilities possess the information and data regarding their customers' requirements and the ability of existing system resources to meet those requirements. However, possession of needed data 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, cost, 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.

For that reason, Nassau Power Corporation v. Beard, 601 So.2d 1175 (Fla. 1992), does not support the Commission's position. 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 had identified as justification for the proposed FPL/Cypress project.

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

4. The Commission's interpretation is 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[7] expresses the Legislature's intent to encourage cost-effective and efficient energy use. Section 366.81 specifically requires the Commission to "encourage[e] further development of cogeneration facilities," such as the 435 MW Qualifying Facility (QF) proposed by Nassau Power in this case. Further, the section states that section 403.519, Florida Statutes, which sets out the standards and criteria the Commission must apply to a

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

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. 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; A. 4).

Finally, the primacy which the Commission's interpretation attaches to the utility's evaluation function is inconsistent with the express 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.

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 larger than 75 megawatts in this state.

5. The Commission's Interpretation is 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).[8] 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 explicitly done so; it did not and in fact made no changes to the definition of electric utility.

In fact, 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

---

[8] 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.

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 the proper province of the Siting Board.

In Order No. PSC-92-1210-FOF-EQ at 4 (R. 2974; A. 4), 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 DEP simultaneously with the filing of a petition to determine the need for the proposed capacity with the Commission. Presently, because of the inconsistency of the agencies' rulings, an application by a non-utility generator would be accepted by DEP 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 DEP. 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 DEP, 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 but 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.

For all of the foregoing reasons, the Commission erred in dismissing Nassau Power's petition to determine need. The Court should reverse the Commission's order and fashion relief for Nassau Power that is appropriate under the circumstances.

II. THE EFFECT OF THE WRONGFUL DISMISSAL ON NASSAU POWER WOULD NOT BE ADEQUATELY REMEDIED BY SIMPLY REVERSING THE COMMISSION'S ORDER.

A. THE ASHBACKER "COMPARATIVE REVIEW" DOCTRINE APPLIES TO THE AWARD OF A DETERMINATION OF NEED.

Section 403.511, Florida Statutes, states that the certification order issued by the Siting Board under the Siting Act constitutes:

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

A determination of need and the subsequent certification of the proposed plant therefore constitute governmental licensing within the meaning of 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 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 to require a hearing on a petition for a government license. 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)[9] intent to consider the applications seriatim, just as the Commission has stated that its only responsibility is to approve or deny the single applicant before it.

---

[9] 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.

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 application to render the same service; the principle, therefore, constitutes a fundamental doctrine of fair play which administrative agencies must diligently 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 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 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 Ashbacker doctrine holds significant ramifications for the Commission's role in and procedures for the selection of new electrical generating capacity. The crux of this case is the insistence by the Commission that capacity selection is basically the function of the utility's management, on the one hand, and Nassau Power's assertion that technological developments and changes in federal and state law have created competitive alternatives which come to the Commission on an equal footing, on the other. In dismissing Nassau Power's petition to determine need, the Commission in effect restated its view that its role is to review, on a limited basis, the choice of the regulated utility (whether that choice is to build capacity or purchase capacity from a utility or independent provider). If the Court concludes that Nassau Power's status as a valid petitioner does not depend on its first having a contract with the utility, the Commission will be required to modify its procedures accordingly. It will have to conduct comparative reviews of co-equal proposals, much as HRS adjusted its procedures. HRS' successor agency periodically assesses the need for new health care facilities and conducts comparative reviews of the competing applications that are timely filed to meet the limited need for them. See, Bio-Medical Applications of Clearwater, Inc. v. Department of Health and Rehabilitative Services, supra.

Logically, Nassau Power envisions a bifurcated procedure under which the utilities (which possess all of the pertinent

data) inform the Commission and potential providers of their identified capacity needs; after any proceedings needed to confirm or modify the identified need, the Commission affords providers (including the utility) an opportunity to present competing, "mutually exclusive" capacity proposals; and the Commission conducts a comparative review of timely proposals and decides which should receive a determination of need.

However, Nassau Power's appeal has two dimensions. Certainly one involves the overall ramifications for changed procedures under the Siting Act that would result from the liberal interpretation of "applicant" on which its petition relies. The second, however, is the specific effect of the Commission's dismissal on Nassau Power under the circumstances that governed at the time.

B. THE CASE BELOW INVOLVED SPECIFIC, ALTERNATIVE CAPACITY PROPOSALS THAT WERE SUBJECT TO AN ASHBACKER REVIEW.

To understand the nature of Nassau Power's specific injury, it is helpful to trace through what would have occurred had the Commission not dismissed its petition. Nassau Power's petition was designed to compete with Cypress and ARK for the opportunity to provide FPL with capacity to meet the next need identified in FPL's generation expansion plan. Prior to the wrongful dismissal, the Commission had refused to consolidate Nassau Power's petition with Cypress: therefore, the Cypress decision "track" would have been unchanged. The Commission would have

entered the order in which it determined that FPL needs capacity (in the amount described in Nassau Power's petition) and denied Cypress' expensive coal-fired project (based in part upon Intervenor Nassau Power's presentation of a more cost-effective alternative). Had the Commission recognized their rightful status as independent petitioners and the applicability of the Ashbacker requirements, the Commission would have shortly processed the petitions of Nassau Power and ARK, the only other timely petitioners seeking to compete for the FPL need, and conducted an Ashbacker "comparative review" of those contending applications. In other words, the Ashbacker review is necessarily limited to the alternatives that are timely available to be considered. But for the Commission's erroneous interpretation of the statute at the time, Nassau Power would have been within the universe of available alternatives that were timely presented.

To place itself in that position, Nassau Power incurred significant costs in the development of a project (securing an option to purchase land, negotiating a letter of intent for the purchase and delivery of generating equipment, entering into a letter of intent with a steam host), and accepted the risk and cost of competing with other petitioners who might timely file competing applications. Now, Cypress' proposal has been denied because it was not the most cost-effective alternative available, and Cypress has voluntarily dismissed its appeal of that order. ARK's petition, like that of Nassau Power, was

dismissed prior to hearing; however, unlike Nassau Power, ARK did not file an appeal of the order of dismissal. As a result, a reversal of the Commission's order would be applicable only to Nassau Power. Annat v. Beard, 277 F.2d 554 (5th Cir. 1960).

After having incurred the costs and accepted the risks of competing for the opportunity of meeting FPL's identified next need, Nassau Power has in a sense successfully run the gauntlet of its competitors.

C. THE COMMISSION'S ORDER OF DISMISSAL FRUSTRATED NASSAU POWER'S SPECIFIC FEDERAL RIGHTS UNDER PURPA.

As part of its original petition to determine need, Nassau Power proposed an initial 435 MW cogeneration unit that would be a QF under federal law.[10] Order No. PSC-92-1355-FOF-EQ at 30. (R. 2424; Tr. 1375, 1381-82).

Section 210 of PURPA (16 U.S.C. §824a-3) and the Federal Energy Regulatory Commission's (FERC) rules implementing PURPA[11] 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:

---

[10] Nassau Power's 435 MW unit was the only QF proposed to meet FPL's need.

[11] 18 C.F.R. §§292.303 and 292.304.

> 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.

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 two of PURPA's fundamental federal purposes clear: (1) Qualifying Facilities are to be encouraged, and (2) Qualifying Facilities are entitled to avoided cost rates. Through its petition, Nassau Power offered to sell capacity and energy to FPL at a price far below

its avoided cost. As a QF, Nassau Power has a federal right to do so.

The Commission has 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's order of dismissal effectively denied Nassau Power's rights under PURPA. The Court's order should redress that denial.

III. THE COURT SHOULD FASHION RELIEF THAT IS ADEQUATE AND APPROPRIATE UNDER THE CIRCUMSTANCES.

A. THE COURT HAS THE AUTHORITY TO PROVIDE APPROPRIATE ANCILLARY RELIEF.

For Nassau Power to prevail on the essential question on appeal in a manner that simply provides an opportunity for those who elected not to present timely alternatives to the joint Cypress/FPL proposal, or not to appeal the Commission's orders, to lay claim to the opportunity achieved by Nassau Power's efforts would fail to adequately redress the Commission's wrongful action.

The Florida Administrative Procedure Act empowers the Court to correct an agency's wrong by granting the relief it deems necessary to remedy the injury to the party affected by the agency's error. Section 120.68(13)(a), Florida Statutes (1993), provides:

> The decision of the reviewing court may be mandatory, prohibitory, or declaratory in form; and it shall provide whatever relief is appropriate irrespective of the original form of the petition. The court may:
>
> > 1. Order agency action required by law, order agency exercise of discretion when required by law, set aside agency action, remand the case for further agency proceedings, or decide the rights, privileges, obligations, requirements or procedures at issue between the parties; and
> >
> > 2. Order such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld.

(Emphasis supplied).

This authority to tailor ancillary relief has been recognized by Florida courts. In Baxter's Asphalt and Concrete, Inc. v. Department of Transportation, 475 So.2d 1284 (Fla. 1st DCA 1985), Baxter's submitted a bid to the Department of Transportation (DOT) for a road construction project. After a hearing, DOT determined that although Baxter's had submitted the lowest bid, it was not a responsible bidder. The contract was awarded to the second lowest bidder and Baxter's appealed. Baxter's sought relief under the ancillary relief provision of Section 120.68, Florida Statutes, requesting the court to replace the winning bidder with Baxter's or, alternatively, to award damages for DOT's error.

Although the court affirmed DOT's finding that Baxter's was not the lowest responsible bidder and denied relief, it

acknowledged the availability of the type of remedy sought by Baxter's. The winning bidder had filed a motion to dismiss on grounds of mootness because the contract at issue was already being executed. The court denied the motion, explaining that the issue was not moot in light of Baxter's petition for ancillary relief, thus demonstrating the viability of Baxter's request. Id. at 1286.

In Overstreet Paving Co. v. Dept. of Transportation, 608 So.2d 851 (Fla. 2d DCA 1992), DOT rejected Overstreet's bid due to a technical omission, and awarded the project to the next lowest bidder. The court found that the omission was minor and due to no fault of Overstreet, but noted that because the bid had already been awarded, "Overstreet no longer ha[d] a meaningful remedy by administrative hearing to receive the award of this bid. Accordingly, we remand for 'ancillary relief' pursuant to section 120.68(13)(a)2, Florida Statutes (1991). . . ."

Similarly, in the present case the Court has the authority to grant the ancillary relief necessary and appropriate to overcome the effects of the Commission's dismissal.

B. NASSAU POWER IS ENTITLED TO ADEQUATE RELIEF, EVEN IF A CHANGE IN THE IN-SERVICE DATE OF FPL'S NEXT CAPACITY NEED IS PROVEN IN THE FUTURE.

There is nothing in the record on appeal regarding any changes to FPL's need for capacity, as that need was determined by the Commission in Order No. PSC-92-1355-FOF-EQ. (R. 2396).

The Commission referred to such a claim in its motion to dismiss. The revised FPL planning document to which it referred has not been the subject of formal Commission action. At this time, the order in which the Commission determined that FPL needs capacity in 1998-1999 has not been modified.

The Commission's motion to dismiss was also based on its argument that the cross-appeals of the Cypress order were "derivative of" the appeal that has been abandoned by Cypress. Significantly, the Court did not accept the Commission's argument that it should dismiss Nassau Power's separate appeal on the basis that it would result in a useless advisory opinion under the circumstances. Nassau Power believes that the Court thereby implicitly rejected the Commission's "mootness" argument that stems from its reference to a claimed change in the in-service date of FPL's next need for additional generating capacity. However, Nassau Power believes it is appropriate under the circumstances to briefly address the issue introduced by the Commission's motion.

Even if one assumes that the in-service date of the next generating unit in FPL's generation expansion plan has changed since the time Cypress and Nassau Power filed their petitions, that development is not the appropriate basis for a decision that the Court's decision must be directed solely to general future guidance. Rather, the effect of the passage of time should be a consideration when the appropriate relief fashioned by the Court for Nassau Power is carried out by the Commission.

If the Commission allows the utility's planning process to be fluid, dynamic, and subject to constant change, it cannot simultaneously impose rigidity on the proposals by petitioners to supply the capacity needs identified in the utility's plans. Otherwise, a utility could avoid an unwanted decision by the Commission at any time through the simple expedient of modifying its expansion plan and claiming that the change caused the proposals to self-destruct.

In its petition, Nassau Power adopted FPL's analysis of its customers' need for capacity. If the Commission had awarded a determination of need to Nassau Power and that award had been followed by an announcement (and subsequent proof) by FPL that the in-service date of its need had "slipped," that development would have been handled by the Commission in a manner that would necessarily have recognized and been subject to Nassau Power's rights under its determination of need order. Had the utility's change occurred prior to the award, FPL would undoubtedly have sponsored that information in the proceeding on Nassau Power's petition. Nassau Power would have either disputed FPL's claim or, alternatively, offered to amend its petition and proposal to conform to the change in circumstances.

Accordingly, Nassau Power submits that the Court should regard the extra-record issue of a possible change in circumstances as a matter to be accommodated within the appropriate relief fashioned for Nassau Power when the case is remanded to the Commission.

C. THE APPROPRIATE RELIEF UNDER THE CIRCUMSTANCES IS TO PERMIT FPL TO UPDATE ITS NEED ASSESSMENT, ALLOW NASSAU POWER TO AMEND ITS PETITION AS TO THE FIRST 435 MW OF THAT NEED AND DIRECT THE COMMISSION TO HOLD A HEARING ON NASSAU POWER'S AMENDED PETITION.

Nassau Power has demonstrated that but for the Commission's error in dismissing Nassau Power's determination of need petition, Nassau Power would have been entitled by its "bona fide and timely filed application" to an Ashbacker hearing. In the absence of the error, the Commission would have held a hearing and rendered a decision on Nassau Power's petition. However, on remand, FPL should be permitted to present and support its current need. The new need assessment should include the amount of capacity needed, the year in which it is needed and a description of the unit FPL would build to meet this need. Nassau Power in turn should be permitted to amend its proposal to build a 435 MW Qualifying Facility to meet any proven, changed need parameters. The Commission should be directed to hold a hearing on Nassau Power's petition.

These measures which assign priority to Nassau Power's proposed Qualifying Facility are appropriate for several reasons. First, they provide relief for the effects of the dismissal on Nassau Power while assuring that ratepayers will not pay for capacity that is not needed. This is accomplished through the provisions for any updating and amendment that is warranted.

Second, the measure protects and implements Nassau Power's federally prescribed rights as a Qualifying Facility. The

remedy suggested by Nassau Power will require the Commission to give Nassau Power's QF status the priority required by law.

Third, the measures will, while providing redress for the wrongful dismissal and protecting Nassau Power's rights as a QF, establish for future proceedings the ability of all potential providers to vie for the opportunity to provide capacity to FPL and other utilities by means of separate, co-equal petitions before the Commission.

CONCLUSION

The Court should reverse the Commission's order which denies Nassau Power the status of applicant. It should direct the Commission to recognize Nassau Power's status as a proper applicant under the Siting Act and its separate right, as a Qualifying Facility, to meet a portion of FPL's next need.

In recognition of the passage of time, the Court should direct the Commission to permit FPL to update its need assessment, allow Nassau Power to amend its determination of need petition regarding the ability of its cogeneration project to meet changed circumstances, and hold a hearing on Nassau Power's amended petition.

Respectfully submitted,

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

Attorneys for Nassau Power
Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Revised Initial Brief of Nassau Power Corporation has been furnished to the following parties of record by U.S. Mail, this 25th day of January, 1993.

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

Robert Scheffel Wright
Fine, Jacobson, Schwartz, Nash & Block
215 S. Monroe Street, Suite 804
Tallahassee, FL 32301-1859

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

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

Patrick K. Wiggins
Wiggins and Villacorta
Post Office Drawer 1657
Tallahassee, FL 32302

Joseph A. McGlothlin

APPENDIX TO REVISED 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. McGlothlin, 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