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 REPLY BRIEF OF NASSAU POWER CORPORATION

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INTRODUCTION

Nassau Power has not attempted to respond to every argument made by the Florida Public Service Commission ("Commission") and Florida Power and Light Company ("FPL"), but has selected those points to which, in Nassau Power's opinion, additional attention is most warranted. Nassau Power relies on its Revised Initial Brief for the points not specifically addressed here.

I. THE COMMISSION ERRONEOUSLY CONCLUDED THAT NASSAU POWER IS NOT AN APPLICANT UNDER THE SITING ACT.

A. FPL and the Commission fail their own "plain meaning" test.

FPL and the Commission argue that the definition of applicant in section 403.503(4), Florida Statutes, is clear, unambiguous and requires no statutory interpretation. They argue that if an entity does not appear in the enumerated list, it cannot be an applicant. FPL and the Commission then immediately violate their own premise by resorting to elaborate glosses on the statute to support their arguments.

In Order No. PSC-92-1210-FOF-EQ (R. 2973, Appendix to Nassau Power's Revised Initial Brief [hereinafter Appendix] at 3), the Commission interpreted the statutory definition of applicant to include non-utility generators who <u>have a contract with a utility</u>:

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

Emphasis supplied. When applying the term applicant, the Commission treats an "unenumerated" non-utility generator that has a proposed contract with a utility as an applicant. Aside from the separate problem of equating a "necessary party" with a "co-applicant," this "conversion" appears nowhere in the "plain and unambiguous" list of statutory applicants, as the Commission says it must.[1]

The Commission attempts to avoid the ramifications of its "plain language" argument on the example of a self-service generator (one that consumes the electricity it generates). In doing so, the Commission indicates its willingness to again supplant the "plain language" rule with a helpful "construct." It said:

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

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[1] The Commission also argues that the rule of expresio unius est exclusio alterius applies. Quoting the opinion of the United States Supreme Court in Ford v. United States, 273 U.S. 593, 612 (1927), the First District Court of Appeal cautioned that the maxim expresio unius est exclusio alterius is:

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

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

Order No. PSC-92-1210-FOF-EQ at 4-5 (R. 2974-75; Appendix at 4-5).

In its brief, FPL does confront this scenario. FPL concedes that to preclude consideration of a self-service generator for a determination of need on the basis that it is not explicitly identified in the statutory list would be "nonsensical." (FPL Brief at 13). On this point FPL and Nassau Power agree. FPL attempts to deal with this breach in its "plain and unambiguous" argument by suggesting that the self-service generator could rely on the Commission to initiate a determination of need for its unit on the Commission's own motion -- a weak attempt to patch the hole in its argument. Having acknowledged a particular entity's right to seek a determination of need, FPL cannot harmonize its view of the statute by requiring that entity to depend on an exercise of agency discretion to gain access to the certification process. Still, FPL's notion is telling. If the Commission can initiate a "need" case for a self-service generator, as FPL says, certainly it follows that the Commission can also initiate one for an "unenumerated" independent power producer. More importantly, the statute makes no distinction between the universe of proposals that can be brought to the Commission through the filing of a petition and that which the Commission may evaluate in a case that it initiates. They are coextensive. Therefore, if those providers can be the subject of a Commission-initiated case, then they can also be subjects of

applications filed directly by those who propose to build the units.

B. Competition before the Commission will not displace the utility's obligation to serve.

FPL attempts to bolster its statutory argument by claiming that the scheme of the Siting Act reflects a utility's legal duty to provide service to its customers. FPL further argues that allowing Nassau Power to be an applicant would be inconsistent with FPL's responsibility to plan for its own system. FPL devotes an entire section of its brief (Point II) to an elaborate discussion of Commission pronouncements regarding the respective roles of the utility and the Commission in planning for the needs of and serving Florida ratepayers.[2]

FPL misses the point. Allowing non-utility generators to be applicants would hinder neither the utility's obligation to

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[2] FPL includes an Appendix to its brief in which it purports to "summarize" the testimony in the Cypress case which it believes demonstrates the excellence of its capacity procurement process. Nassau Power has referred to the Commission's decision in that case, not the evidentiary record. Suffice it to say, however, that in its order denying need for the Cypress project (the project which resulted from FPL's capacity procurement process), the Commission found that by making no effort to notify potential providers (like Nassau Power) of its need, FPL failed to adequately investigate all sources of capacity; that the fuel forecast upon which FPL based its assessment was unacceptable for planning purposes; and concluded that FPL had chosen the wrong generation technology. Order No. PSC-92-1355-FOF-EQ at 16, 11, 10; (R. 2405, 2406, 2411). FPL did not challenge these findings. Far from proving that the choice of capacity should be the exclusive domain of the utility, FPL's handling of the Cypress capacity selection illustrates the need for a process in which the agency evaluates the merits of co-equal applications and makes a final decision. In any event, Nassau Power claims -- not the right to displace FPL's planning function -- but the right to propose capacity additions with which to satisfy the reviewed plans directly to the agency.

serve nor its responsibility to plan for its own system. FPL's argument ignores the distinction between measuring customers' requirements and meeting those requirements in a timely, economical, and reliable way, on the one hand, with the opportunity to propose, license and provide the best capacity choice with which the utility will ultimately satisfy its customers' needs, on the other. Nassau Power is not attempting "back door deregulation" of retail service, as FPL claims. (FPL Brief at 42). Instead, FPL is attempting to obtain from its "obligation to serve" argument leverage with which to thwart genuine competition in the wholesale generation market.

FPL also argues that the Commission's interpretation of the definition of applicant has led to an orderly process that should not be disturbed. (FPL Brief at 12). However, the process which FPL defends is not orderly. It leads to two unsatisfactory possibilities: (1) a never-ending process, in which the Commission rejects -- perhaps more than once -- the utility's proposal but cannot award a determination of need to the demonstrably superior alternative;[3] or (2) a process spurned by viable, cost-effective alternatives because of the lack of a

[3] The Commission recently enacted a new capacity procurement rule. Rule 25-22.082, Florida Administrative Code. Three points must be made about the new rule. First, it does nothing to eliminate the potentially repetitive nature of the process because, even under the new rule, the Commission can only approve or reject the project brought to it by the utility as a result of the utility's procedure. Second, the rule was adopted in December 1993 and applies prospectively. It can have no "curing" effect on the injury occasioned by the wrongful dismissal that is the subject of this case. Third, the rule does not satisfy the legal requirement that the Commission conduct a comparative review of competing, mutually exclusive applications for licensure.

clear path to certification. A process that reaches no conclusion is disorderly; a process that discourages participation by potentially desirable alternatives is inefficient.

C. The Florida Crushed Stone case is on point.

Nassau Power has directed the Court's attention to the decision of the Siting Board in the 1984 Florida Crushed Stone case. (Appendix at 9). In that case, the Siting Board denied a party's motion to dismiss the application of a cogenerator that had no contract with the purchasing utility. An intervenor argued that the cogenerator was not a proper applicant because it was not explicitly identified in the statute. The Siting Board rejected the intervenor's argument. It construed section 403.504(4), Florida Statutes, and concluded that Florida Crushed Stone was "in the business of generating electricity" within the meaning of the statute. The Commission and FPL go to great lengths to attempt to distinguish Florida Crushed Stone from the instant case. Their attempts fail.

The Commission argues that it made no explicit finding that Florida Crushed Stone was a proper applicant for a determination of need. (Commission Brief at 9). However, in the very order in which it awarded Florida Crushed Stone a determination of need -- in fact, in the very language which the Commission cites in its brief -- the Commission said:

> While the Act requires the Commission to determine whether a need exists for the addition of any generating facility of 50 MW or larger, the statute in our opinion, is designed primarily to have the Commission determine whether a need exists for the

> addition of capacity by a regulated electric utility or by a municipality.

In re: Petition of Florida Crushed Stone for Determination of Need for a Coal-Fired Cogeneration Electrical Power Plant, 83 F.P.S.C. 2:107 (1983), Order No. 16111, emphasis supplied. The quoted language clearly demonstrates that the Commission recognized that Florida Crushed Stone was a proper applicant to proceed under the Siting Act -- notwithstanding the fact that it was not a utility -- because it would be constructing a facility falling within the Siting Act's purview.

The Commission also tries to distinguish Florida Crushed Stone by noting that it purported to serve its own electrical needs and thus did not build its plant to meet the needs of a utility. It is clear that this was not the basis for the Siting Board's conclusion. The Siting Board reached its result through a liberal construction of the statutory definition.

In addition, it is interesting to observe that following the entry of the Florida Crushed Stone order approving the determination of need, the Commission approved a contract between Florida Crushed Stone and FPL for the firm sale of energy and capacity for no less than 100 megawatts and no more than 150 megawatts. In re: Petition of Florida Power and Light Company for approval of cogeneration agreement with Florida Crushed Stone Company, 84 F.P.S.C. 10:103 (1984), Order No. 13765. While the separate Florida Crushed Stone proceedings took a less direct route than the course charted by Nassau Power, the orders demonstrate an early instance in which a

determination of need and Siting Board certification preceded the negotiation of a contract with a purchasing utility.

In its attempt to distinguish Florida Crushed Stone, FPL tries to have its cake and eat it too. FPL first argues that the Florida Crushed Stone case is either irrelevant to the Court's consideration of the matters at issue in this case or is consistent with the Commission order on appeal. However, says FPL, if the Court does not accept either of those premises, then the Siting Board's order is clearly erroneous! (FPL Brief at 14-15). By arguing that the Siting Board's interpretation allowing non-utility entities to become applicants is no hindrance to FPL's position if seen as limited to self-service situations, but is "clearly erroneous" if deemed to be applicable precedent, FPL tries to have it both ways -- with the result that each of its arguments cancels the other.

FPL claims that Nassau Power "tacitly admitted" that the Siting Board erred in its reasoning in Florida Crushed Stone. (FPL Brief at 17). Nassau Power admitted no such thing, "tacitly" or otherwise. The Siting Board construed the definition of "applicant" and determined that Florida Crushed Stone was "in the business of generating electricity" within the meaning of the statute. Nassau Power's argument goes farther than does the language of the Siting Board's order to demonstrate, through an analysis of principles of statutory construction and case law precedent, the need to embrace entities other than those explicitly enumerated in the statute, but its position is fully consistent with the Siting Board's decision.

D. The principles enunciated in the City of Jacksonville case are applicable here.

Nassau Power cited State v. City of Jacksonville, 50 So.2d 532, 536 (Fla. 1951) for the principle that:

> broad, general and comprehensive terms . . . may be held to apply to new . . . entities coming into existence since the enactment of the statute; provided they are in the same general class as those treated in the statute.

In its brief, the Commission ignores the rule of statutory construction enumerated by the Court in City of Jacksonville.

FPL addresses City of Jacksonville. Nassau Power and FPL differ as to what comprises the "general class treated by the statute" in this case. Nassau Power identifies, as the general class treated by the statute, those entities "engaged in the business of generating, transmitting or distributing electricity." FPL offers as the general class those entities that have an obligation to serve ultimate consumers.

The difference between the "general classes" is significant. Nassau Power's is a direct quotation from the statute. It is the statutory language that describes the characteristics which all items in the list share in common. The scope of Nassau Power's general class is co-extensive with the purview of the Siting Act, and so would avoid the absurd result of statutorily requiring certification of all described units but providing access to few. FPL's class is, by contrast, a gloss on the statute. The requirement of serving end-use customers appears nowhere in the law and is instead an attempt to circumscribe the broad language contained within the definition.

II. THE ASHBACKER COMPARATIVE REVIEW DOCTRINE IS APPLICABLE.[4]

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

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

Emphasis supplied.

The Commission and FPL attempt to distinguish the Ashbacker line of cases on the theory that those cases involved companies that served the public directly, whereas Nassau Power proposes to contract with a utility. (Commission Brief at 16-17; FPL Brief at 30-31). However, "direct service" had nothing to do

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[4] The Commission argues that the issue of Nassau Power's right to a comparative review is not properly before the Court and that this issue should be stricken from Nassau Power's brief. The Commission filed a motion to strike portions of Nassau Power's brief, including the comparative review section. This Court denied that motion on February 9, 1994. Therefore the Commission's renewed request to strike this part of Nassau Power's brief should be ignored. In addition, FPL misapprehends Nassau Power's argument. Nassau Power is not "appealing" the order that denied consolidation of its petition with Cypress' application. Prior to its wrongful dismissal, Nassau Power's petition was paired with that of ARK for hearing. It is the denial of that hearing that gives rise to the application of Ashbacker -- without ARK's participation as it now happens -- to this appeal.

with the court-imposed requirement of comparative review. The source of the requirement was government action that would have the effect of precluding the consideration of one of competing, mutually exclusive applications just as the Commission has attempted to do in this case. For the purposes of the Ashbacker doctrine, there is no substantive distinction between limiting health care facilities to achieve efficiency and economy, on the one hand, and limiting power plants to minimize adverse environmental impacts, on the other. Common to each is a limitation on opportunities to obtain a governmental license. It is this limitation that results in the comparative review requirement. The distinction attempted by FPL and the Commission has no merit.

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

The Consumers Power case is inapposite for several reasons. First, no Siting Act scheme similar to the Florida Electrical

Power Plant Siting Act was involved in Consumers Power. The Michigan Commission was not required, as is the Florida Commission, to determine the need for electrical power plants as part of a broader siting act statute. In Michigan, no QF license is awarded (or required).[5] In Florida, site certification, of which the Commission's determination of need is an integral part, is "the sole license of the state and any agency as to the approval of the site and the construction and operation of the proposed electrical power plant. . . ." Section 403.511(1), Florida Statutes. There can be no question that a government license is being awarded under Florida law.

Second, in this case the approval of any application would have precluded approval of any other determination of need applications. In the words of Ashbacker, the applications were mutually exclusive. The situation in Consumers Power was far different, as more than one provider was chosen to fill the need. "[T]his is not a case where approving one contract will mean the disapproval of all others . . . ." Id. at 89. The mutual exclusivity in the situation before the Court makes Consumers Power readily distinguishable.

Third, the Consumers Power court concluded that the Michigan Commission did not have the statutory authority to take the action it proposed. The Florida Commission possesses the authority to select a competing alternative for a determination

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

of need award, and to require a utility to enter into a contract with an entity who has been awarded a determination of need. Sections 403.519 and 366.04(2)(c),(5), Florida Statutes.

III. THE RELIEF NASSAU POWER SEEKS IS APPROPRIATE UNDER THE CIRCUMSTANCES OF THIS CASE.

Contrary to the Commission's assertions, Nassau Power does not seek to be "declared the winner." (Commission Brief at 25). It seeks the hearing on its determination of need petition to which it was originally entitled, based on the circumstances that governed at the time of the wrongful dismissal. At that time, there were potentially three "bona fide and timely filed application[s]"[6] -- those of Nassau Power, ARK and Cypress. Cypress dismissed its appeal. ARK did not take an appeal of its dismissal. Of the original timely applicants, only Nassau Power remains.

In suggesting that the Court provide ancillary relief, Nassau Power addressed the two objectives of requiring the Commission to entertain petitions to determine need from non-utility providers prospectively and of providing redress to the particular injury sustained by Nassau Power in this specific case. The fact that Nassau Power accepted a risk that other potential competitors did not is a reason why ancillary relief should be fashioned. The fact that Nassau Power proposed to build one of the two units as a Qualifying Facility under PURPA is another.

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[6] See Ashbacker at 333.

The assertions by FPL (who never solicited proposals before proposing the Cypress coal project) and the Commission (who said it was confined to approving or disapproving the utility's single choice) that a new proceeding should be open to all ring hollow. By suggesting that the proceeding on remand be limited to a project no greater than Nassau Power's QF and that FPL first be allowed to submit an updated assessment of need, Nassau Power has requested ancillary relief that balances PURPA and Ashbacker rights with future competition and the interests of FPL's ratepayers.

CONCLUSION

The Court should direct the Commission to recognize Nassau Power's rightful status as an applicant under the Siting Act as well as its right as a QF to meet a portion of FPL's next need. In recognition of the passage of time, the Commission should 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 any proven change in circumstances, and hold a hearing on Nassau Power's amended determination of need petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Revised Reply Brief of Nassau Power Corporation has been furnished to the following parties of record by U.S. Mail, this 31st day of March, 1994.

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