IN THE SUPREME COURT OF FLORIDA

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

RESPONSE OF APPELLEE, FLORIDA PUBLIC SERVICE COMMISSION

TO THE ANSWER BRIEF OF
APPELLEE, STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION
IN CASE NO. 81,496

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

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

Cites to the record on appeal are referenced (R.___).

ADDITIONAL STATEMENT OF THE CASE AND FACTS

On May 10th, 1993, the Florida Department of Environmental Regulation filed a Motion for Leave to Limit Participation, in which it requested permission to file an Answer Brief to the issues raised by Nassau Power in Case No. 81,496, without filing an Answer Brief to the Initial Brief filed by Cypress Energy in Case No. 81,131. In its Motion, DER explained its interest in Case No. 81,496:

> [T]he Department believes it can usefully respond to the Initial Brief to be filed by Appellant Nassau Power Corporation and assist the Court in reaching an appropriate resolution of a question of great public significance: whether the Commission must grant comparative review of power plant proposals which seek to fulfill the same increment of utility need determined to exist by the Commission. (emphasis added).

DER Motion for Leave to Limit Participation at 2.

On May 13, 1993, this Court granted DER's motion. Thereafter, the Commission and FPL each filed a response in opposition to DER's

motion, and FPL additionally requested that this Court vacate the order. As grounds, both the Commission and FPL argued that DER, an appellee, actually supported the position of Nassau Power and should not be given the opportunity to argue against the Commission. FPL specifically argued that because it is an appellee, DER must be confined to supporting the Commission's order. On May 20th, 1993, DER filed a Response in opposition to FPL's Motion to Vacate. In its Response, DER stated:

> The effort of Florida Power and Light Company (FPL) to vacate the Court's order rests entirely on a presumption that the Department will not comply with the provisions of the Florida Rules of Appellate Procedure and applicable case law. This presumption is unfounded and unseemly.
>
> * * *
>
> All the Department requested was leave to limits its participation as appellee.

DER Response In Opposition to Appellee Florida Power And Light's Motion to Vacate at 2.

Thereafter, this Court amended its May 13th order. The Amended Order granted DER's Motion for Leave to Limit Participation and allowed the Commission and FPL to respond to any answer brief filed by DER.

SUMMARY OF THE ARGUMENT

The Court should recognize that DER's Answer Brief improperly promotes the arguments of Appellants Ark and Nassau, even though DER is an appellee in this case. DER's Answer Brief not only goes beyond the bounds of proper argument for an appellee, but exceeds the scope of its request to limit participation in this case.

Whether or not this Court considers Section 403.519, Florida Statutes, (1991) to be part of the Siting Act, the Commission correctly adhered to the Siting Act definition of the term "applicant" when it dismissed Ark and Nassau's petitions for a need determination proceeding based on FPL's need. The legislative history of both Section 403.519 and Section 403.503(4), Florida Statutes (1991) support the Commission's decision, and it is not contrary to the Siting Board's 1984 decision to grant site certification to the Florida Crushed Stone Company because the facts involved in that case are very different from the facts presented by Ark and Nassau's petitions. The Commission's refusal to entertain the need determination petitions of Ark and Nassau creates no interference with the legislative scheme of the Siting Act. The Commission also properly refused to hold a comparative hearing because the cases cited by DER, Nassau, and Ark do not require such hearings for power plant need determination proceedings. The cases only apply where the government selects an exclusive supplier of a service or good **to the general public.** Finally, the Commission did not err in denying Nassau preferential treatment.

ARGUMENT

I. THE COURT SHOULD DISREGARD DER'S IMPROPER ATTEMPT TO OPPOSE THE COMMISSION'S ORDERS

Even though it is an appellee in this case, DER has chosen to support the arguments of appellants. The agency could have appealed the Commission's orders or joined Cypress or Nassau's appeals as a co-appellant. It could have mounted a separate cross-appeal or joined Ark Energy's cross-appeal. DER rejected all of these opportunities to contest the Commission's orders, and instead chose to participate in these combined appeals as an appellee.

As an appellee, DER's role is clear. It must support and defend the Commission's order, not attack it or seek another result. Hall v. Florida Board of Pharmacy, 177 So. 2d 833 (Fla. 1965); A-1 Racing Specialties, Inc. v. K&S Imports of Broward County, Inc., 576 So. 2d 421 (Fla. 4th DCA 1991). In fact, DER acknowledged this obligation in its Response in Opposition to FPL's Request to Vacate the order allowing it to limit its participation:

> The effort of Florida Power and Light Company (FPL) to vacate the Court's order rests entirely on a presumption that the Department will not comply with the provisions of the Florida Rules of Appellate Procedure and applicable case law. This presumption is unfounded and unseemly.

DER Response In Opposition to Appellee Florida Power And Light's Motion to Vacate at 2. Additionally, the agency had earlier represented to the Court that its interests were limited to "whether the Commission must grant comparative review of power

plant proposals . . . ." DER Motion For Leave To Limit Participation at 2.

Despite this representation to the Court, and in the face of its acknowledgment of the limits of permissible argument for an appellee, DER's Answer Brief promotes the arguments made by Nassau and Ark and makes only the slightest pretense of support for the Commission's orders. For example, although it had earlier represented that it was interested only in the issue of a comparative hearing, in its Argument I, DER joins Nassau and Ark in arguing that the Commission erroneously defined the term "applicant".[1] In its Argument II, DER argues that the Commission is compelled to grant a comparative determination of need hearing, again aligning itself with Ark and Nassau. In its Argument III, DER addresses the topic of whether or not Nassau is entitled to preference as a Qualifying Facility. This issue is also beyond the scope of its Motion for Leave to Limit Participation.

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[1]DER's submission that "the Commission was within its discretion to limit the members of the class of 'applicant' for an independent need determination" (DER Brief at 14) cannot be construed as supportive of the Commission's order in view of its argument that the Commission may not deny ARK or Nassau an independent, comparative determination need proceeding:

> If fundamental fairness requires a comparative review of mutually exclusive license applications, then the PSC cannot lawfully deny ARK and Nassau both the independent right to institute their own need case **and** the dependent right to substantive comparison of their proposals with the proposal advanced in the course of a utility-instituted need proceeding like the case at bar.

DER Answer Brief at 27, emphasis in original.

DER's Answer Brief does not respond to Nassau's arguments -- it bolsters them. DER was granted permission to skip a step in the appellate process, not to switch sides and become an appellant. Yet that is exactly what the agency has done. Its Answer Brief is indistinguishable from an appellant's brief, and its positions are indistinguishable from positions taken by other appellants. This Court should find that DER is actually an appellant.

II. THE COMMISSION CORRECTLY ADHERED TO THE SITING ACT DEFINITION OF "APPLICANT".

A. SECTION 403.519, FLORIDA STATUTES, MUST BE READ TOGETHER WITH SECTIONS 403.503 - 403.518, FLORIDA STATUTES.

DER attempts to divorce Section 403.519, Florida Statutes (1991) from any connection with the Power Plant Siting Act. The agency then argues that the Commission improperly "borrowed" the definition of "applicant" found in Section 403.503(4), Florida Statutes (1991). Whether or not this Court considers Section 403.519 to be part of the Siting Act, the Commission's application of the statutory definition of "applicant" was appropriate. In fact, in its post-hearing brief to the Commission, DER emphasized the connection between these two statutes when it urged the Commission to grant a broad, non-specific determination of need:

> Because the Commission's need determination is applicable only as to plants subject to the jurisdiction of the Siting Board, elementary principles of statutory construction dictate that Section 403.519 be construed **in pari materia** with the neighboring provisions of the Siting Act. . . . The Florida Supreme Court has held as follows in this context: "Laws should be construed with reference to the

> constitution and the purpose designed to be accomplished, and in connection with other laws **in pari materia**, though they contain no reference to each other." . . .
>
> The evident statutory purpose of Section 403.519, as implemented through Section 403.508(3), Florida Statutes, is to limit candidates for certification under the PPSA to those proposed power plants for which an affirmative determination of need has been made by the Commission.

DER's Post-Hearing Brief at 13-14, R. 1640 at 1654-1655, emphasis in original, citations omitted.

As DER recognized, the Commission's duties under Section 403.519 are meaningful only in the context of a power plant site certification. The Commission thus correctly referred to the neighboring provisions of the Siting Act and read Section 403.503 (4) to lend meaning to Section 403.519, as urged by DER. The Commission's decision to do so is accord with the cases cited by DER in its brief to the Commission. See, Oldham v. Rooks, 361 So. 2d 140 (Fla. 1978); Mann v. Goodyear Tire and Rubber Co., 300 So. 2d 666 (Fla. 1974); Goldstein v. Acme Concrete Corp., 103 So. 2d 202 (Fla. 1958); Heirs of Bryan v. Dennis, 4 Fla. 445 (1852).

The Commission found the statutory definition to be clear and unambiguous, such that it did not require special statutory construction. Section 403.503(4) defines "applicant" as an electric utility, and in turn defines "electric utility" as:

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

This definition specifies, in plain language, who may apply for site certification. First, an applicant must be one (or a combination of) the seven enumerated entities: cities, towns, counties, public utility districts, regulated electric companies, electric cooperatives or joint operating agencies. Second, the entity must also be either engaged in or authorized to engage in the generation, transmission or distribution of electric energy. This definition requires none of the circuitous statutory construction proposed by Nassau. Where, as here, the words of a statute are unambiguous, the Commission properly accorded them their plain, ordinary meaning. Simply put, Nassau and Ark are not proper applicants because they are not cities, towns, counties, public utility districts, regulated electric companies, electric cooperatives or joint operating agencies.

DER attempts to cast doubt on the Commission's ruling that a non-utility generator is not a statutory applicant when it seeks to meet a utility's need, by claiming that the Commission attempted an "instant exception" to its ruling. DER's argument lacks merit.

In its order, the Commission restated its policy that a contracting utility is an indispensable party to a need determination proceeding. The Commission further stated that as an indispensable party, the utility will be treated as a joint applicant. Thus, the Commission may determine the need for a project to be built by a non-utility such as Ark or Nassau after it has signed a contract 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.

Order No. PSC-92-1210-FOF-EG at 3, R. 2971 at 2973.

Section 403.519 does not prohibit non-utilities from building power plants in Florida. The statutory scheme simply requires that a utility (having a need to serve customers) apply for the need determination. Where a utility has a need for generation and has contracted with a non-utility generator to fill its need, it is an indispensable party to the proceeding to determine need. Contrary to DER's argument, this is not an "instant exception" to the Commission's ruling that a non-utility is not a statutory applicant to a need determination proceeding, but rather, is an affirmation of that ruling.

B. THE COMMISSION'S DISMISSAL OF ARK AND NASSAU'S PETITIONS IS NOT CONTRARY TO THE SITING BOARD'S DECISION IN FLORIDA CRUSHED STONE.

The Commission's adherence to the statutory definition of "applicant" does not conflict with the Siting Board's decision to grant site certification to the Florida Crushed Stone Company in 1984 because the fact situations are quite different. Unlike Ark and Nassau, Florida Crushed Stone did not seek to build a power plant to meet the capacity needs of a utility.

The size of the plant planned by the Florida Crushed Stone Company was necessary to meet provide the level of steam extraction required for its cement manufacturing process. In re: Petition of

Florida Crushed Stone for Determination of Need for a Coal-Fired Cogeneration Electrical Power Plant, 83 F.P.S.C. 2:107 (1983). (Order No. 11611). The company sought no contract for the sale of capacity or energy to any utility. It intended to sell only its leftover, or as-available energy to Florida Power Corporation.[2] In contrast, Ark and Nassau have no analogous need to build a power plant. Instead, they seek a determination of need for the sole purpose of selling power to FPL. Their applications are not at all similar to that brought by the Florida Crushed Stone Company, and, consistent with the Commission's policy, require a different result.

In its March 9, 1984 certification order, the Siting Board allowed a cogenerator who wished to build a power plant to supply electricity to itself to apply for, and receive, site certification. In re: Florida Crushed Stone Company Power Plant Site Certification Application, PA 81-17. The Siting Board did not find that cogenerators or independent power producers who seek to meet a utility's need are proper applicants for a need determination proceeding. DER's attempt to characterize the Commission's dismissal of Nassau's petitions as defying the Siting Board's decision in Florida Crushed Stone is inaccurate and misplaced.

C. LEGISLATIVE HISTORY SUPPORTS THE COMMISSION'S ADHERENCE TO THE STATUTORY DEFINITION OF "APPLICANT".

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[2]No contract is employed for the sale of as-available energy. It is sold to a utility pursuant to tariff if, as, and when it becomes available.

DER's attempt to support its argument with references to the legislative history of the statutes must fail. It points to the fact that the 1990 Florida Legislature amended the Section 403.519 so that "an applicant", rather than "a utility" may initiate a need determination proceeding. If anything, this indicates the Legislative preference for harmony between sections 403.503 and 403.519, and supports the Commission's use of the Siting Act's definition of "applicant".

Neither does the 1990 Legislative re-enactment of Section 403.503 support DER's argument. The Legislature is charged with knowledge of judicial construction of a statute, not of agency decisions:

> When a statutory provision has received a definite judicial construction, a subsequent re-enactment will be held to amount to a legislative approval of the judicial construction. The Legislature is presumed to be acquainted with judicial decisions on the subject concerning which it subsequently enacts a statute.

Collins Investment Co. v. Metropolitan Dade County, 164 So. 2d 806, 809 (Fla. 1964). In Collins and Bermudez v. Florida Power & Light Co. 433 So. 2d 565 (Fla. 3rd DCA 1983), the cases cited by DER, courts applied this rule to find that the Legislature was presumed to be aware of decisions made by **the Florida Supreme Court.** The rule cannot readily be applied to a single, unchallenged decision by the Siting Board. Had the Siting Board's Florida Crushed Stone decision been affirmed by an appellate court, DER's argument would have credence. Without such judicial approval, it has little or

none, especially given the different circumstances presented by Ark and Nassau.

The real significance of the Legislature's 1990 re-enactment of Section 403.503 lies in the fact that it was not changed. The Legislature failed to broaden the class of applicants. Had it wished to do, the Legislature could easily have expanded the definition of "applicant" and "electric utility" beyond the seven enumerated entities by simply including cogenerators and independent power producers in the list. Its decision not to do so is significant.

III. THE COMMISSION'S ORDER DOES NOT INTERFERE WITH THE LEGISLATIVE SCHEME OF THE POWER PLANT SITING ACT.

DER cautions that non-utility generators will not be able to begin the site certification process at their own risk if the Commission successfully applies the Siting Act definition of "applicant" to Section 403.519. Thus, DER raises the specter of disruption of the power plant siting process. DER's prediction is incorrect. Applicants for site certification have always faced the risk that their petitions for determination of need will be denied by the Commission. The Commission's ruling in this case will only allow a petitioner to better predict whether it qualifies as an applicant, adding more, not less, certainty to the proceeding.

Additionally, DER glosses over the fact that the Commission specifically limited its order to proceedings where non-utility generators seek a determination of need based on the need of a utility:

> In granting dismissal [of the need determination proceedings] 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.

Order No. PSC-92-1210-FOF-EQ at 4, R. 2971 at 2974.

The language of the order makes it clear that the Commission did not intend to preempt the Siting Board's authority in any way, but intended only to harmonize the statutory language with its duties under Section 403.519. See, Nassau Power Corporation v. Beard, 601 So. 2d 1175 (Fla. 1992).[3]

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

As the Commission argued in its Answer Brief, the Ashbacker and Bio-Med cases do not apply to proceedings to determine need for electrical power plants and do not compel the Commission to hold comparative hearings. Ashbacker Radio Corporation v. Federal Communications Commission, 325 U.S. 327 (1945); Bio-Medical Applications of Clearwater, Inc. v. Department of Health and Rehabilitative Services, 370 So. 2d 19 (Fla. 2d DCA 1979). In both Ashbacker and Bio-Med, agencies were required to select among

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[3]DER's argument that adoption of this construction would "certainly call into question the legal status of **existing** power plant site certifications. . . ." is specious. The Commission could not, even if it so desired, take action to revoke site certifications previously granted by the Siting Board.

applicants to choose the one who would be allowed to provide service **to the general public.** In contrast, the Commission does not select a public provider of electricity in a need determination proceeding because the state has already assigned that role to electric utilities. See, P.W. Ventures v. Nichols, 533 So.2d 281 (Fla. 1988).[4]

DER clearly does not believe that Ashbacker requires a comparative review every time the state grants an exclusive license. It argues that Ashbacker does not require comparative certification even though the Siting Act's certification procedure is the "sole license" of the state to construct and operate an electrical power plant. Interestingly, its rationale for exempting the certification process conflicts with one of its earlier arguments. DER asserts that the Siting Board cannot provide a comparative review because the Commission's determination of need controls the identity of the project reviewed by the Siting Board.[5] However, DER emphatically declared in connection with another argument that the Commission's determination of need does not control the entire permitting process:

> [n]o PSC need determination is necessary before an applicant may participate in a land

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[4]DER, itself, apparently is uncertain whether the doctrine applies. It reflects that "[t]here is no compelling legal reason why the Ashbacker doctrine should not apply", and questions "[i]f fundamental fairness requires a comparative review". DER Answer Brief at 26, 27.

[5]DER apparently recognizes that if another entity lawfully controls the identity of the project reviewed by the agency, no comparative review is required. This is exactly the principle urged by the Commission.

> use hearing. . . ; no PSC need determination is necessary before the Siting Board can take action to review and approve a recommended order from DOAH as to a land use hearing for an applicant's proposed site.

DER Answer Brief at 8. Therefore, if the Ashbacker doctrine required comparative need determination proceedings, DER has cited no reason why it would not equally require comparative land use hearings. Thus, the application of this doctrine could cause a statutory impasse if the "winner" of the land use hearing was not the same applicant chosen by the Commission.

Like Ark and Nassau, DER was unable to cite a single instance in the past 48 years in which any court or regulatory commission applied the Ashbacker doctrine to either a utility's contract approval process or to proceedings to determine need for power plants. The agency does not attempt to distinguish or even to discuss the case of Consumers Power Co. v. P.S.C., 472 N.W. 2d 77 (Mich. App. 1991), in which the Michigan Court of Appeals refused to require the Michigan Public Service Commission to hold a comparative hearing to review a utility's choice of power suppliers, despite the fact that the Court had applied the doctrine to hospital certificate of need applications. The Michigan Court found that there was no "license" at issue because the utility, rather than the regulatory commission, had the power to make contracts to supply its energy needs. Similarly, there is no license at issue here.

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

DER argues that Nassau's claim to preferential treatment based on its QF status is not ripe for review. In response, the Commission adopts its argument in its Consolidated Answer Brief.

CONCLUSION

Since DER has adopted the posture of an appellant, its should bear the same appellate burden. DER has failed to show that the Commission's order is not supported by competent substantial evidence or otherwise does not comport with the essential requirements of law.

The Commission's orders should be affirmed.

Respectfully submitted,

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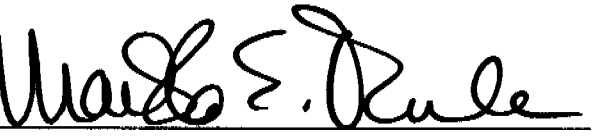

MARSHA E. RULE
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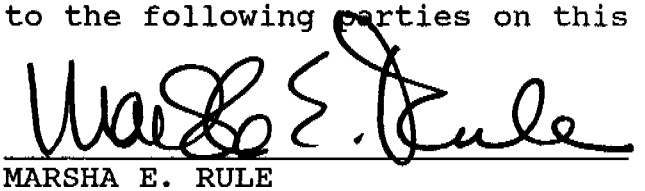
Dated: July 12, 1993.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the following parties on this 12th day of July, 1993.



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