

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

¹While 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 Laredo 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

ORDER NO. PSC-92-1210-FOF-EQ

DOCKET NOS. 920769-EQ, 920761-EQ, 920762-EQ, 920783-EQ

PAGE 6

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.