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October 9, 1990

HAND DELIVERED

Mr. Steve Tribble, Director
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101 East Gaines Street
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Re: Docket No. 900004-EU, Hearings on load forecasts, generation expansion plans and cogeneration prices for Peninsular Florida's electric utilities.

Dear Mr. Tribble:

Enclosed for filing and distribution is the original and 15 copies of the Supplemental Brief of Nassau Power Corporation.

Also enclosed is an extra copy for acknowledgement of receipt; please return it to me.

Yours truly,

Joseph A. McGlothlin

Joseph A. McGlothlin

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Enclosures

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Hearings on load forecasts, generation expansion plans and cogeneration prices for Peninsular Florida's electric utilities.	)	DOCKET NO. 900004-EU
	)	FILED: October 9, 1990

SUPPLEMENTAL BRIEF

OF

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INTRODUCTORY STATEMENT

On October 2, the Commission authorized parties to file supplemental briefs on the subject of the criteria which the Commission should apply to the question of contract priority presently before it. Nassau Power incorporates its September 25 brief by reference, and supplements it with the following.

While Nassau has attempted to avoid unnecessary duplication, a summary treatment of some of the points covered in the September 25 brief is necessary to a cohesive presentation.

SUPPLEMENTAL ARGUMENT

The Commission should recognize that its decision on contract priority involves two questions:

First, what is the universe of contracts to which the subscription limit associated with the 1996 500 MW coal-fired statewide avoided unit is applicable?

Second, what criteria should be applied to the universe of contracts to identify the contracts which subscribe the statewide avoided unit?

A. WHAT IS THE UNIVERSE OF CONTRACTS TO WHICH THE SUBSCRIPTION LIMIT IS APPLICABLE?

The number of contracts in the "universe" is limited by the following parameters:

1. The subscription limit is inapplicable to negotiated contracts which were executed prior to the time the Commission designated the 1996 coal-fired unit as the statewide avoided unit.

It is fundamental that a particular contract counts--if at all--against the designated statewide avoided unit in place at the time it is executed. Only after a statewide avoided unit has been identified can contracts begin to be negotiated against that unit. For this reason, the Indiantown contract must be excluded from the universe of contracts to which the subscription limit is applicable.

2. Contracts based on (negotiated against) units other than the 1996 statewide avoided unit do not subscribe that unit and are not within the universe of contracts to which the subscription limit is applicable.

Indiantown proposes to participate in the regulatory framework of the statewide avoided unit--with an important exception. Indiantown obviously doesn't want to adopt the economics of the standard offer associated with the 1996 statewide avoided unit. The reason is simple; as Indiantown has acknowledged elsewhere, its contract is more expensive than the standard offer.[1] The Indiantown contract was based on FPL's individual expansion plan and designed to avoid a different unit; one having vastly different economics than the statewide avoided unit and the associated standard offer.

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[1] Based on Indiantown's own submission in Docket No. 900709-EQ, this is an undisputed fact.

Clearly, Indiantown seeks the best of two very different worlds. For a QF to insist on being counted toward the subscription of the statewide avoided unit at the same time it proposes to justify being paid more than the standard offer associated with that unit is patently incongruous. (As the Commissioners have frequently observed, one effect of the alternative of the standard offer on relevant negotiations is to establish "that's the most you could get"). Indiantown's contract would clearly be a misfit in--and should not be wedged into--the regulatory scheme for the subscription of the statewide avoided unit.

For two independent reasons, Indiantown's contract does not belong in the universe of contracts to which the subscription limit is applicable. The Commission's first decision should be to exclude it from consideration. In Nassau's view, the decision would not eliminate the possibility that Indiantown's negotiated contract could be considered on a separate basis.

3. <u>The universe of contracts does not include standard offer contracts which parties attempted to execute prior to the date the standard offer tariffs and contracts were approved by the Commission.</u>

In support of this premise, Nassau adopts by reference its brief of September 25. With the withdrawal of CMI's contract this apparently is a moot point for purposes of screening the contracts presently vying for subscription priority. However, notwithstanding past determinations, a statement by the Commission

to this effect may be needed to provide additional guidance for future actions of QFs.

4. The universe of contracts to which the subscription limit is applicable consists of standard offer contracts executed following the approval of the standard offer tariff and any negotiated contracts specifically negotiated against the statewide avoided unit.

To Nassau's knowledge, the contracts other than Indiantown's are standard offer contracts.

B. WHAT CRITERIA SHOULD BE APPLIED TO DECIDE WHICH CONTRACTS SUBSCRIBE THE STATEWIDE AVOIDED UNIT?

1. The primary criterion has been and should remain "first in time, first in line."

It has been suggested that the Commission blithely disregard the existing procedure for basing subscription on the execution date of contracts. To this point, the analyses have not focused fully on the extent to which the Commission has developed the time-based approach or the reasons why it makes sense to keep that mechanism.

The Commission has always regarded the subscription process as being based on the timing of the contracts. The emphasis on timing is implicit in Order No. 22061, in which the Commission observed that it is the QFs' responsibility to monitor the amount of the standard offer capacity still available--that is, the amount not already subscribed by earlier contracts. The Commission described

the process as "first in time, first in line." (Order No. 22061, p. 4).

In Order No. 22341, issued December 26, 1989, the Commission continued the subscription process but acknowledged the need to flesh out the governing criteria. Answers to some of the procedural issues were deferred; a hearing was contemplated. However, (with the exception of issues about notice) each of the outstanding questions identified in Order No. 22341 centered on the appropriate timing standard to use when gauging which contracts subscribe the unit. The order asked: Should contracts be prioritized on the basis of execution date, filing date, or notice date? (Order No. 22341, p. 22).

Subsequently, the Commission decided to propose criteria through a PAA order rather than schedule a hearing on the matter. During the discussion of the criteria on May 25, the concept "first in time, first in line" was so much the focus of the proposal that Staff and Commissioners discussed the wisdom and desirability of having parties note on contracts not only the date of execution, but the time of day as well--all in anticipation of ruling on competing contracts by reference to the criterion of time. (Tr. 67).

The May 25 decision was embodied in PAA Order No. 23235, which stated:

> The first issue raised is: How should standard offer contracts and negotiated contracts for the purchase of firm capacity and energy be prioritized to determine the current subscription level? Essentially, all

> contracts should be prioritized according to the execution date of the contract. With regard to standard offer contracts, the execution date is the date on which the cogenerator signs the standard offer and tenders it to the utility. With regard to negotiated contracts, the execution date is the date on which the last party to the contract signs the agreement. All execution dates are contingent upon final approval by this Commission.[2]
>
> Due to the fact that under existing Rule 25-17.083(8), Florida Administrative Code, payments made pursuant to standard offer contracts are recoverable without further action by the Commission, a standard offer contract will have the same approval date as execution date. Negotiated contracts will "lock in" their execution date upon approval of the Commission. Negotiated contracts will not officially count toward the subscription limit until approved by the Commission but will be considered as "executed" contracts when determining the priority of all contracts. A standard offer contract executed on the same date as a negotiated contract will take precedence over the negotiated contract.

Order No. 23235 at pp. 1-2.[3]

Clearly, the Commission has proceeded to this point on the basis that contracts would subscribe the statewide avoided unit on the basis of chronological order. The Commission should not deviate from that course now.

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[2] While in this sentence the Commission reserved the ability to act as the arbiter, it did not indicate that it intended to use any standard other than execution date.

[3] Significantly, while PAA Order No. 23235 became the subject of motions for clarification on other points, no party challenged or questioned the emphasis on subscription by execution date in the pleadings which were directed to the PAA.

2. Priority based on timing gives effect to the policy underlying the approval of standard offer and negotiated contracts.

The standard offer has long been a fixture of Commission policy. The premise underlying the standard offer is that the price, terms, and conditions have already been scrutinized and have been preapproved as being in the public interest. Attaching priority to such preapproved contracts on the basis of execution date simply gives effect to that policy.

Similarly, the practice of the Commission is to review negotiated terms and approve them if they are found to be in the public interest. In other words, before a contract is deemed to officially "subscribe" the statewide avoided unit, significant review of price, terms and conditions from the standpoint of the public interest has already taken place--either before (in the case of standard offer contracts) or after (in the case of negotiated contracts) the contract was executed.

3. The "determination of need" hearing is not the appropriate place to prioritize contracts.

The proposal to completely abandon the subscription process in favor of the determination of need proceedings suffers from several deficiencies. First, if the suggestion is intended to be a generic one, it overlooks the fact that determinations of need are required only for units which exceed 75 MW. The "solution" would likely have no application to any situation involving smaller units.

More importantly, throwing the subscription issue into the determination of need proceeding(s) would simply shift the timing factor from one forum to another, as prospective QFs would feel constrained to rush a petition for determination of need.

Next, the possible presence of one or more intervenors critiquing the applicant does not mean the Commission would have the ability to choose among several projects. In proceedings on a particular application, the Commission can only approve or deny the single applicant's proposal. The alternative--of requiring all QFs who want to subscribe the statewide unit to first file a petition for a determination of need--would be backwards, costly and burdensome.[4]

Further, the proposal to utilize a "mega" determination of need proceeding is substantively analogous to a proposal to institute a bidding process. This was suggested by FPL in the rulemaking proceeding and appropriately rejected. The Commission found the process of competitive bidding to be so complex that it required further study and analysis, and directed its Staff to conduct such a study. The proposal of a "mega" need determination is an attempt to institute a form of bidding without the analysis which the Commission has deemed to be needed.[5] Clearly, the "mega-

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[4] Logically, a determination of subscription priority should be a condition precedent to a determination of need filing.

[5] The need for such an analysis is developed further in the following section.

determination of need hearing" is a poor and inadequate forum for the subscription decision.

4. A comprehensive hearing on the comparative details of the various projects is not appropriate to the determination of subscription priority.

The suggestion that the Commission choose among the projects "based on merit" of course has appeal. However, the suggestion overlooks that "merit" is already built into the preapproved pricing,[6] terms and conditions of the standard offer transaction; "merit" is already embodied in the review for approval of negotiated contracts; and "merit" is appropriately addressed in determination of need proceedings.

In addition, comparisons based on "merit" must be based on objective, not subjective, standards. Here, the analogy to a bidding process is again relevant and instructive. The undertaking would require the development and identification of all the considerations that influence "merit" examination. The factors would have to be articulated and the procedure for applying the factors--including the development of objective criteria needed to measure each such consideration and any appropriate weighting factors--would have to be established before the actual comparison could get underway.

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[6] The standard offer contracts before the Commission are priced 20% below the costs of the identified avoided unit.

Next, to undertake a detailed qualitative comparison would involve extensive fact finding. At this time, the Commission and parties possess scant information with respect to many of the proposals. Obviously, if the Commission decided to sift the detailed merits of all the projects, the various "contenders" would want to inform themselves about their competitors, and each would want to make a direct presentation and respond to the offerings of others. Added to the initial debate over the appropriate criteria to be used in the comparison, this approach would inevitably result in a considerable further delay (doubtlessly measured in months) in the determination of the QF(s) who are entitled to subscribe the statewide avoided unit. That unit was designated on May 25 and became available through standard offer tariffs on June 13. This distant scenario would be a far cry from the prompt, orderly, time-based subscription contemplated--and indeed heretofore practiced--by the Commission. The delay would hardly constitute progress, in view of the degree to which the contracts are either preapproved or subjected to review and approval, and in view of the later opportunity of the Commission to satisfy itself as to the quality of the applicant's proposal in determination of need proceedings. Layering on top of the various levels of review already in place an additional costly and time-consuming examination would slow down the process and possibly thwart the ability of QFs to timely meet the pressing need for new capacity.

This discussion demonstrates that the Commission's decision to study the requirements and ramifications of a bidding process

before considering a rule on the subject was based on sound reasoning. There is, however, the additional consideration of fundamental fairness in appraising the timing of the suggestion. In this instance, QFs had no notice of any intent to base subscription priority on competitive comparisons, much less any indication of what the criteria for such a comparison would be and the relative significance of each. Given such information, QFs might have attempted to structure their transactions differently, so as to match their projects to the measures identified by the Commission as bearing on selection. Now, there is no such opportunity.

There seems to be an assumption in the proposal for a free-for-all that to allow one project to proceed is to deny all others for all time. This is not the case. Instead, nonsubscribing QFs would have to look to the next need to be met. In addition to the ongoing process of identifying the next avoided units, the Commission Staff has recommended that the Commission make clear its policy to allow individual negotiations which may exceed the subscription limit. If the subscription limit is filled, additional opportunities will follow; but they must come after the contracts which timely subscribed the statewide avoided unit.

5. Subscription decisions based on execution date would not impede the Commission's ability to assure that the subscribing QF reasonably can be expected to timely avoid the designated statewide unit.

The governing criterion--within the universe of contracts to which it is applicable--should be the chronological sequence of execution date. Obviously, in order to subscribe the unit, contracts must be based on projects which can reasonably be expected to timely avoid the statewide unit.

Panda Energy uses the phrase "reasonable possibility" (that the QF's unit will be built) to describe this consideration. (Panda then proceeds to define "reasonable possibility" in terms it obviously expects only Panda's project could meet.)

Nassau does not fault the concept embodied in the phrase "reasonable possibility." However, with respect to a transaction as multifaceted and complex as a cogeneration project--one requiring experience, expertise and financial wherewithal, and involving the development of performance specifications, vendor commitments as to price and delivery, steam host arrangements, fuel supply and the securing of financing, among other things--it would be inappropriate to define "reasonable possibility" in terms of a particular milestone. Ultimately, the QF must successfully bring together a myriad of elements, of which the power purchase contract is one. Probably each of the developers vying for the subscription status could now claim to have an advantage or "lead" in at least one aspect of the overall development. (For instance, Nassau Power could attempt to define "reasonable possibility" in terms of

arrangements for fuel supply in hopes of screening out other projects from the queue). If and when a question arises, the test should simply be whether--on an overall basis--the QF which qualifies by virtue of execution date has committed to and has undertaken reasonably and credibly to timely develop the project. Nassau submits that it has already demonstrated both.

Disputes of material fact

Nassau Power outlined the facts it believes to be pertinent in its Statement of the Case and of the Facts (brief of September 25), and believes them to be undisputed.

If the Commission's consideration extends beyond execution date to a consideration of the comparative merits of all the projects, Nassau submits that such an exercise would involve disputes of material fact.

CONCLUSION

The Commission's historical emphasis on a contract's execution date as the basis for subscribing the statewide avoided unit is grounded in long-standing policies, and incorporates a significant level of review as well as a merit-based threshold. The suggestion that the Commission jettison that approach is an invitation to an unneeded additional layer of review, at the cost of needless and unaffordable delays--an invitation which, if it required petitions for determinations of need as a condition of "eligibility," would place burdens on parties without avoiding the "race" or even devising a permanent solution.

The best way out of the thicket is the one the Commission fashioned on the way in. That course will provide fundamental fairness to the parties who relied upon it; give effect to the policy underlying the procedure for approval of contracts; and avoid the serious pitfalls associated with the alternative criteria which the Commission has been invited to entertain. This course is the most likely to effectively lead to the timely construction of needed QF capacity in Florida at a price advantageous to ratepayers.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Supplemental Brief of Nassau Power Corporation has been furnished by U.S. Mail to the following parties of record, this 9th day of October, 1990:

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