AUSLEY & MCMULLEN
ATTORNEYS AND COUNSELORS AT LAW
227 SOUTH CALHOUN STREET
P.O. BOX 391 (ZIP 32302)
TALLAHASSEE, FLORIDA 32301
(850) 224-9115 FAX (850) 222-7560

ORIGINAL

October 30, 1997

BY HAND DELIVERY

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Petition of IMC-Agrico Company for a Declaratory Statement Confirming Non-Jurisdictional Nature of Planned Self-Generation; Docket No. 971313-EU

Dear Ms. Bayo:

Enclosed for filing in the above docket on behalf of Tampa Electric Company are the original and fifteen (15) copies of each of the following:

1. Tampa Electric Company's Petition for Leave to Intervene and Request for Hearing; — 11806-97
2. Tampa Electric Company's Answer and Request for Hearing; and — 11207-97
3. Tampa Electric Company's Request for an Opportunity to Address the Commission. — 11208-97

ACK ____
AFA ____
APP ____
CAF ____
CMU ____
CTR ____
EAG ____
LEG ____
I ____
POR ____
SEC ____
WAS ____
OTH ____

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to this writer.

Thank you for your assistance in this matter.

Sincerely,

James D. Beasley

JDB/bjm
Enclosures
cc: All Parties of Record (w/encls.)

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ORIGINAL 15

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of IMC-Agrico Company for a Declaratory Statement Confirming Non-Jurisdictional Nature of Planned Self-Generation.	)))))	DOCKET NO. 971313-EU FILED: October 30, 1997

TAMPA ELECTRIC COMPANY'S
ANSWER AND REQUEST FOR HEARING

I. Introduction

1. Tampa Electric Company ("Tampa Electric" or "the company"), pursuant to Fla. Admin. Code Rule 25-22.037, files this its Answer to the Petition for Declaratory Statement filed on behalf of IMC-Agrico Company ("IMCA") on October 15, 1997, and Request for Hearing on the above styled petition. IMCA has based its request for relief on conclusory assertions with regard to the content of crucial contracts which have yet to be negotiated. In addition, IMCA has attempted to persuade this Commission, through erroneous references to inapposite Commission cases, that its proposed project involves the self-generation of electricity in contrast to the unlawful purchase at retail of electric service.

2. As discussed below, IMCA has not offered any reliable factual information which would provide the Commission with a reasonable basis for granting the relief requested. In fact, the scant assertions provided in IMCA's Petition only serve to confirm Tampa Electric's view that IMCA's proposal is nothing more than a subterfuge for a retail sale of electric power. Tampa Electric respectfully requests that if the Commission is not disposed to

denying the relief requested on a summary basis, then the Commission should not rule on this matter until an evidentiary hearing can be held to examine the details of this proposed arrangement. Of course such a hearing could only be meaningful if IMCA has finalized the details of its project-related contracts.

3. The name and address of the answering party are:

Tampa Electric Company
Post Office Box 111
Tampa, Florida 33601

4. All pleadings, motions, orders and other documents directed to Tampa Electric are to be served on:

Lee L. Willis
James D. Beasley
Ausley & McMullen
Post Office Box 391
Tallahassee, FL 32302

Harry W. Long, Jr.
TECO Energy, Inc.
Post Office Box 111
Tampa, FL 33601

Angela Llewellyn
Regulatory Specialist
Tampa Electric Company
Post Office Box 111
Tampa, FL 33601

II. Background

5. On October 10, 1997 IMCA filed a Petition for Declaratory Statement asking the Commission to issue an order declaring that the proposed ownership and operational structure of certain planned electric generating facilities and transmission facilities ("the Project") would not result in or be deemed to constitute a sale of electricity to the public at retail or cause the owner or lessor of the Project to be deemed a public utility or otherwise be subject to regulation by the Commission.

6. In particular, IMCA proposes to enter into a partnership with Duke Energy Power Services, LLC ("Duke") for the purpose of constructing and operating a natural gas fired, combined cycle electric generating unit and associated 69kV transmission lines. The proposed plant's capacity has not yet been determined but is expected to be anywhere from 240 MW to 750 mw. IMCA asserts that the proposed plant would satisfy its own needs of approximately 120 MW, with the balance of the output being sold into the wholesale power market. It does not appear that the proposed plant will be a qualifying facility, although IMCA suggests that this is a possibility.

7. In order to implement its plan, IMCA proposes to form a wholly-owned subsidiary to which IMCA will transfer land, rights of way, and other property to be used in the project. The newly formed IMCA subsidiary and a newly formed Duke subsidiary would then form a partnership ("or equivalent entity") to which each subsidiary would make equity contributions. No specification is given as to the values of these equity contributions or even as to their relative values. The IMCA subsidiary would not have control over the Project. To the contrary, both the IMCA and Duke subsidiaries would each be a general partner in the partnership which would construct and own the Project. No specification is given as to the relative rights of the partners. Significantly, the general partner role for Duke constitutes a defining distinction from the cases cited by IMCA.

8. IMCA suggests that it would lease approximately 120 MW of the plant's capacity under a lease which would have an initial term of only 10 years, with options to extend for two consecutive five-year terms. The balance of the plant's output would be leased to another subsidiary of Duke which would apply to the Federal Energy Regulatory Commission for Exempt Wholesale Generator status. There is no indication that the lease extended to the Duke subsidiary would extend for less than the useful life of the proposed plant, as would be the case for the IMCA lease. How the lease terms relate to the assertion of ownership interests in the project is unexplained.

9. IMCA asserts that under the anticipated ten year lease agreement it would be obligated to make fixed lease payments to the partnership, regardless of the plant's output of electricity. However, IMCA also acknowledges that it would not be obligated to make such lease payments during the pendency of force majeure events which are not defined in the IMCA Petition. No explanation is provided as to the inconsistency of these "outs" with a true ownership interest. In addition, lease payments are only fixed for the initial ten year term and may be adjusted for each of the two optional five-year extensions. Again, there is no indication that the lease agreement extended to the Duke subsidiary would contain similar provisions.

10. Finally, IMCA asserts that it will be obliged under the anticipated lease to operate and maintain its undivided ownership in the project. However, IMCA may contract with third parties, such

as Duke or its affiliates for the operation and maintenance of IMCA's undivided interest in the project. The clear implication is that Duke or a Duke affiliate will be the operator of the project - another defining distinction from the prior cases cited by IMCA.

III. Procedural Deficiencies in IMCA's Petition Warrant Summary Dismissal

11. IMCA's Petition fails to join an indispensable party, to wit, the lessor of the Project, and should be dismissed based on this deficiency alone. Rule 1.410(b), Fla. R. Civ. P.; Fla. Admin. Code Rule 25-22.035(3). In particular, the Petition asks the Commission to declare that the lessor would not be a public utility subject to the regulatory jurisdiction of this Commission. Section 120.565, Florida Statutes, provides that a substantially affected person may seek a declaratory statement as it applies to the petitioner's particular set of circumstances. See, also, Fla. Admin. Code Rule 25-22.021 (". . .as it does, or may, apply to petitioner in his or her particular circumstances only." (Emphasis supplied.) IMCA's Petition does not seek a declaration of IMCA's rights in IMCA's particular set of circumstances only, but also the rights and obligations of a nonparty, the lessor of the Project. This goes beyond the scope of a declaratory statement under Section 120.565, Florida Statutes, and Fla. Admin. Code Rule 25-22.021. Moreover, it limits the ability of the Commission and Tampa Electric to test, through discovery of a party to this proceeding, the real intended use by lessor of its interest in the Project. IMCA lacks standing to petition for a declaratory statement as to

the legal rights and obligations of a nonparty.

IV. IMCA's Proposed Project Is Significantly Dissimilar From The Projects Described In The Cases Cited By IMCA In Support Of Its Petition And Raises Issues Which Are Matters Of First Impression For This Commission

12. IMCA spends a great deal of time in its Petition describing the alleged similarities between its Project and the projects addressed by the Commission in Order No. 17009, In re: Petition of Monsanto Company For A Declaratory Statement Concerning The Lease Financing Of A Cogeneration Facility, issued in Docket No. 860275-EU on December 22, 1986, and Order No. 23729, In re: Petition Of Seminole Fertilizer For A Declaratory Statement Concerning The Financing Of A Cogeneration Facility, issued in Docket No. 900600-EQ on November 7, 1990. On the basis of these alleged similarities, IMCA argues that the relief which it has requested is consistent with Commission precedent. However, the similarities cited by IMCA are at best superficial. Even IMCA, in the final analysis, has tacitly acknowledged this. Its joint request with Duke in Docket No. 971337-EI to address the Commission to explain the Project is based on the admission that the project presents matters of first impression for this Commission.

13. The Monsanto case involved lease financing for a QF facility. Monsanto proposed to contract with a third party for the construction of the facilities. Once the project was completed, Monsanto proposed to lease the entire facility for a period of five years and would own and consume on site all the steam and electric power produced by the equipment. At the end of the initial lease

period, Monsanto would have three options: renew the lease; purchase the equipment at fair market value; or pay for the dismantlement and removal of the equipment. These are clear indicia of an ownership interest. Throughout the term of the lease, moreover, Monsanto would be responsible for all costs and expenses associated with maintenance, repair, replacement and operation of the leased equipment, including the repair or replacement of major capital items, taxes and insurance. Finally, Monsanto's lease payments would be fixed and unrelated to plant operation. Payments would continue to be due during planned or unplanned outages of the facility. The lease payments were analogized to mortgage payments in terms of the risks and responsibilities assumed by Monsanto under the lease agreement.

14. In contrast, IMCA's proposed project would not be limited to serving IMCA's needs. Instead, the project would be designed for the express purpose of serving load beyond IMCA's needs. Although IMCA asserts that its lease payments under the proposed Project structure would be unrelated to plant operations, its obligation differs from Monsanto's apparent absolute obligation in that IMCA's lease payments would be suspended during an event of force majeure. IMCA has not specified what events will constitute force majeure, leaving a great deal of opportunity to shift some of the risk associated with true ownership to Duke or any Duke affiliate. IMCA's ownership obligations at the expiration of the initial lease term, moreover, do not appear to be the same as Monsanto's. Unlike Monsanto, IMCA apparently would not be obligated to renew the

lease, purchase the assets outright, or pay to dismantle and retire the assets. To the extent that IMCA can simply walk away from the lease after the initial term, it cannot claim true ownership. Obviously, there are many other possibilities for IMCA to shift the risks of ownership to Duke or its affiliates since definitive partnership, lease construction an operating agreements have not been provided. For example, what risks will Duke assume if it acts as operator or construction contractor for the Project?

15. In short, IMCA's proposed project structure differs significantly from that posited by Monsanto. Monsanto's structure was adopted to facilitate project financing. The only risks shifted to the third-party lessor were limited to risks associated with changes in the tax laws with regard to ITC and depreciation benefits, lessor's inability to make use of available tax credits due to a lack of taxable income and lack of residual value in the equipment after the expiration of the initial lease term. In contrast to the IMCA/Duke project, Monsanto was the only general partner involved in its project, it was the only lessee and it was the only operator. In short, Monsanto clearly bore all of the risks of ownership while IMCA clearly would not with regard to its proposed Project.

16. In re: Petition Of Seminole Fertilizer Corporation for a Declaratory Statement concerning the Financing of a Cogeneration Facility, supra, involved a set of circumstances which were different than those presented in the Monsanto case, but which are equally inapposite to IMCA's proposal. Seminole proposed to expand

its existing qualifying cogeneration facility ("QF"). The expanded plant would produce more power than Seminole needed. Therefore Seminole planned to sell any excess power at wholesale to one or more utilities under PURPA and this Commission's conditioned its order on receipt of QF status.

17. In order to finance its project, Seminole transferred its existing cogeneration assets to a wholly owned subsidiary which, in turn, set up a limited partnership to construct and own the new facilities. Seminoles wholly owned subsidiary was the sole general partner, thus giving it total control over the project. Seminole then proposed to enter into a lease agreement with the partnership which its subsidiary controlled to operate and maintain the entire cogeneration facility to meet Seminole's power needs and sell any excess QF power at wholesale to one or more utilities on behalf of the partnership. The Commission concluded that since Seminole and the lessor limited partnership had a "unity of interests" due to Seminole's wholly owned subsidiary being the sole general partner of the lessor, the arrangement would not result in Seminole or the partnership being deemed a public utility.

18. Despite IMCA's protestations to the contrary, its proposal does not present the "unity of interest" between the lessor and the lessee found in the Seminole case. Unlike Seminole, IMCA would not be the sole general partner and, therefore, would not have total control over the plant supplying electricity to IMCA. Unlike Seminole, IMCA would have to share, to a degree not specified, ownership and control of the proposed plant with its

partner, Duke and there is not that "unity of interest" which would support the assertion that the transaction amounts to nothing more than IMCA selling power to itself. IMCA's arguments to the contrary are based on very general and conclusory assertions with regard to contracts which have yet to be negotiated. Tampa Electric respectfully urges the Commission to reject these untested assertions as a basis for the declaratory order which IMCA has requested. Before a determination can be made as to whether the Project involves an unlawful retail sale or legitimate self-generation, a detailed assessment needs to be made of the relative interests, roles, risks assumed and benefits received of IMCA, on the one hand, and of Duke and its affiliates , on the other hand.

IV. The Commission's Conclusions With Regard To IMCA's Public Utility Status In The Context Of the IMCA/Duke Proposed Project and that of Related Parties Should be Based Upon the Application of Specific, Comprehensive Guidelines and the Actual Contractual Arrangements Made By IMCA

19. In Seminole and Monsanto, the Commission's conclusions were based on the assumption that the petitioner would bear all of the risks associated with ownership and that acceptable lease financing arrangements would present a unity of interest between the lessee and the lessor. The Commission's ultimate objective was to distinguish true self generation, through lease financing, from a disguised retail sale of power. Under the more complex set of facts presented by IMCA in its petition, the Commission cannot distinguish IMCA's proposal from an unlawful retail sale without systematically examining the precise manner in which risks and

rewards are allocated under IMCA's final Project related contracts.

20. Once the facts are disclosed by IMCA, the following benchmarks, among others, should be applied by the Commission to determine whether IMCA's project represents true self-generation:

- Risk of loss of investment.
  - Risk of construction completion and commencement of operation.
  - Risk of loss due to casualty or taking post-completion.
  - Risk of force majeure.

- Right to participate in the appreciation of the value of the facility (interest in the residual).
  - Impact of term limitations (e.g., of lease) and options to purchase.
  - Relation of term of interest (e.g., lease term) to useful economic life (in absolute years and economic residual value).

- Risks associated with operations.
  - Interest in profits and losses of operation (e.g., interest in off-system sales).
  - Guarantees of performance.
  - Who bears operational cost risks for maintenance, repairs, fuel, etc.?
  - Who bears risks of inadequate performance (output, capacity factor, derating, availability, etc.)?
  - Who bears force majeure risks on operations (e.g., payment only for energy received or required payments regardless of output and reason for restraints)?

- Who is responsible for regulatory mandated changes?

- Control over facility - Right to possession and use.
  - Rights to modify and expand.
  - Control of dispatch.
  - Control over fuel usage and procurement

- Remedies for non-performance.
  - Termination rights.
  - Recourse to third parties.

- Obligations with respect to financing.
  - Capacity payments on take or pay basis v. payments based on availability.
  - Fixed payments based on market value v. fixed or variable payments based on financing costs.
  - Lease capacity payments in the event of force majeure payments.

- Economic substance of arrangement.
  - Are there independent business reasons or is it prompted by regulatory avoidance motives.
  - Adequacy and valuation of assets contributed to the enterprise
  - Allocation of total project costs among the parties
  - Relationship of lease payments to the cost and fair market value of leased assets
  - Allocation of risks, benefits, revenues, expenses, and cash flows (e.g. investments and lease

payments) among all entities related to the project.

21. To the extent that the above lines of inquiry suggest that IMCA has laid off the risks of ownership , directly or indirectly, to its partner, Duke, then, as Tampa Electric believes, IMCA's proposed project amounts to nothing more than the kind of "cream skimming", of high volume retail customers expressly prohibited in PW Ventures V. Nichols, 533 So. 2d 218 (Fla. 1988). Tampa Electric urges the Commission to require IMCA, as a pre-requisite to the Commission's consideration of IMCA's Petition, to provide final contract language which addresses the above topics.

V. Conclusion

22. IMCA and Duke's proposed Project presents complex matters of first impression. As discussed in Tampa Electric's Petition to Intervene And Request For Hearing, filed concurrently herewith, the relief requested by IMCA in this proceeding would, if granted, have a profoundly adverse financial impact on Tampa Electric and its retail customers. If IMCA's project is deemed not to constitute a retail sale on the basis of assumed and incomplete facts, then there may not be any subsequent procedural opportunity to test IMCA's assertions. Tampa Electric respectfully suggests that the stakes are much too high for the Commission to accept IMCA's assertions at face value.

WHEREFORE, Tampa Electric respectfully requests that:

A) IMCA's Petition for Declaratory Relief be denied on a summary basis; or, alternatively, that

B) A ruling on IMCA's Petition be deferred until such time as all indispensable parties are joined in this proceeding, there has been presented final contract language defining all the rights and obligations of IMCA, Duke, the project owner and their affiliates under the project documents and a hearing is held to examine such evidence.

DATED this 30th day of October, 1997.

Respectfully submitted,

LEE L. WILLIS
JAMES D. BEASLEY
Ausley & McMullen
Post Office Box 391
Tallahassee, Florida 32302
(904) 224-9115

HARRY W. LONG, JR.
TECO Energy, Inc.
Post Office Box 111
Tampa, Florida 33601-0111

ATTORNEYS FOR TAMPA ELECTRIC COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer and Request for hearing, filed on behalf of Tampa Electric Company, has been furnished by U. S. Mail or hand delivery (*) on this 30th day of October, 1997 to the following:

Mr. John W. McWhirter, Jr.
McWhirter,Reeves, McGlothlin,
Davidson, Rief & Bakas, P.A.
Post Office Box 3350
100 North Tampa Street
Tampa, FL 33602-5126

Mr. Joseph A. McGlothlin
Ms. Vicki Gordon Kaufman
McWhirter,Reeves, McGlothlin,
Davidson, Rief & Bakas, P.A.
117 South Gadsden Street
Tallahassee, FL 32301

Mr. Steven F. Davis
IMC-Agrico Company
Post Office Box 2000
3095 County Road 640 West
Mulberry, FL 33860

ATTORNEY