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MEMORANDUM

December 2, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF APPEALS (BELLAK) *RCB DES*  
DIVISION OF ELECTRIC & GAS (FUTRELL) *MT* *JDJ*

RE: DOCKET NO. 971313-EU - PETITION OF IMC-AGRICO COMPANY FOR  
A DECLARATORY STATEMENT CONFIRMING NON-JURISDICTIONAL  
NATURE OF PLANNED SELF-GENERATION

AGENDA: 12/16/97 - REGULAR AGENDA - PETITIONER AND PETITIONERS  
FOR INTERVENTION MAY PARTICIPATE AT COMMISSION'S  
DISCRETION.

CRITICAL DATES: JANUARY 8, 1998 - (DECISION DUE TO MEET 90-DAY  
REQUIREMENT IN SECTION 120.565, FLA. STAT.)

SPECIAL INSTRUCTIONS: S:\PSC\APP\WP\R971313.RCM

CASE BACKGROUND

On October 10, 1997, IMC-Agrico Company (IMCA) filed a petition for declaratory statement (Petition). The Petition asks the Commission to issue an order declaring that planned self-generation and transmission facilities will not result in a retail sale, cause IMCA or its lessor to be deemed a public utility, or subject IMCA or its lessor to regulation by the Commission. On October 20, 1997, IMCA filed a request to address the Commission at the agenda conference at which the decision on the petition is considered.

On October 30, 1997, Tampa Electric Company (Tampa Electric) filed a Petition for Leave to Intervene and Request for Hearing, Answer and Request for Hearing, and Request for an Opportunity to Address the Commission.

On November 12, 1997, IMCA filed a Response in Opposition to Tampa Electric Company's Petition to Intervene and a Motion to Strike Tampa Electric Company's Answer and Request for Hearing.

On November 14, 1997, Florida Power Corporation (FPC) filed a Petition for Leave to Intervene.

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On November 19, 1997, Florida Power and Light Company (FPL) filed a Petition for leave to Intervene or Motion to Participate Amicus Curiae in Docket No. 971313-EU, and a Motion to Dismiss IMC-Agrico's Petition for Declaratory Statement. FPL filed its Amicus Curiae Memorandum on November 24, 1997.

On November 19, 1997, Tampa Electric filed a Memorandum in Opposition to IMC-Agrico's Motion to Strike Tampa Electric Company's Answer and Request for Hearing.

On November 21, 1997, Peace River Electric Cooperative, Inc. (PREC) filed a Petition to Intervene and Request for Hearing.

On December 1, 1997, IMCA filed a Response in Opposition to FPL's Petition to Intervene and Motion to Dismiss.

The project at issue is described as a plan to construct and operate a natural gas-fired combined cycle electric generating unit and 69 KV transmission line to provide electric power for IMCA's mining and processing complex in central Florida. Pursuant thereto, IMCA will organize a wholly-owned subsidiary into which assets including land, rights of way and other property to be used in the project will be placed. The IMCA subsidiary and Duke Energy Power Services LLC (DEPS) will organize a partnership (or equivalent entity) as co-general partners to which both will make equity contributions.

The partnership will design and construct both the generating unit and transmission line and lease undivided ownership interests in the project to, respectively, IMCA and an Exempt Wholesale Generator (EWG) that will be an affiliate of DEPS. IMCA and DEPS currently envision that the Power Plant will have a total net generating capacity of approximately 240 MW, but are also considering the possibility of constructing a larger project.

As a result of the two lease arrangements, it is intended that IMCA will provide self-service to the extent of its current expected requirement of 120 MW and that the EWG will sell the remaining output into the wholesale market. To that end, petitioner lists various parameters expected to govern the IMCA lease when finalized as well as various filings which will be made to secure EWG status for the DEPS subsidiary.

Tampa Electric characterizes the proposed arrangements as a subterfuge retail sale which would create a territorial dispute as to who should serve IMCA, a current interruptible service customer of Tampa Electric. Tampa Electric also asserts that more facts than those provided by petitioner are needed for the Commission

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either to act on the petition or to differentiate the allegedly non-jurisdictional arrangements described therein from a retail sale subject to the Commission's jurisdiction. Further, Tampa Electric asserts standing to intervene in that it will, it states, suffer injury that is both sufficient to entitle the Company to a Section 120.57 hearing and of a type which the hearing is designed to protect. [sic; See, n. 1, supra.]

That injury would assertedly include loss of revenues from sales to IMCA of at least \$12.3 million in annual retail base revenues and the stranding of investment in transmission and subtransmission to serve the delivery points of IMCA.

FPC argues, similarly, that insufficient facts are provided in IMCA's Petition for the Commission to decide whether the arrangement proposed is self-generation or a retail sale. Like Tampa Electric, FPC asserts that its substantial interests will be affected because of loss of revenues from sales to IMCA and the uneconomic duplication of FPC's existing generating and transmission facilities. FPC notes that it received revenues from IMCA in the amount of \$20.8 million for the sale of 522,000,000 KWH of energy for the 12 months ending September 30, 1997. Presumably, this includes base rates and applicable cost-recovery charges.

FPL acknowledges that IMC-Agrico is not a retail customer of FPL, but alleges that immediate adverse impact on FPL's exclusive right to provide retail electric service would result because of the precedent that the Commission's issuance of this declaratory statement would establish. FPL alternatively seeks to participate amicus curiae if it is denied intervention. FPL's Motion to Dismiss asserts that the Petition for Declaratory Statement should be dismissed because it seeks a declaratory statement as to parties other than IMC-Agrico and because there are insufficient facts alleged on the basis of which the Commission can issue a Declaratory Statement.

Tampa Electric's Memorandum in Opposition to IMC-Agrico's Motion to Strike Tampa Electric Company's Answer and Request for Hearing once again addresses, inter alia, the claimed insufficiency of the facts in the petition as a basis on which the Commission can declare the proposed arrangement to be self-service rather than a prohibited retail sale.

PREC's Petition and Request for Hearing are similar to those of Tampa Electric and FPC.

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### DISCUSSION OF ISSUES

ISSUE 1: Should Tampa Electric, FPC, PREC and FPL's petitions for leave to intervene be granted?

RECOMMENDATION: Yes, in part. Tampa Electric, FPC and PREC's petitions for leave to intervene should be granted. FPL's petition for leave to intervene should be denied, but its petition to participate amicus curiae should be granted. IMCA-Agrico's Motion to Strike and FPL's Motion to Dismiss should be denied.

STAFF ANALYSIS: Because there will normally be no person, other than the petitioner, who will be affected, the right of persons affected by agency action to a 120.57 hearing is generally not implicated under Section 120.565 petitions for declaratory statement. Florida Optometric Association v. Department of Professional Regulation, Board of Opticianry, 567 So. 2d 928, 936 (1st DCA 1990). Nonetheless, that general observation by the Court in Florida Optometric does not absolutely preclude intervention in declaratory statement proceedings. Both the petitioner and those seeking intervention, excepting FPC, cite Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (1st DCA 1981) as the proper standard to apply. In Agrico, the Court held that standing to participate in an administrative proceeding as a party whose substantial interests will be affected by proposed agency action requires one to show

- 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and
- 2) that his substantial injury is of a type or nature which the proceeding is designed to protect.<sup>1</sup>

406 So. 2d at 482.

In its Response to both Tampa Electric and FPC's Petitions to Intervene, IMC-Agrico argues that neither prong of the Agrico test is met. IMC-Agrico notes that 3-4 years will pass before the plant is built and concludes therefore that the injury is neither immediate nor of the type a declaratory statement proceeding is designed to protect against.

In this case, however, petitioners for intervention allege more than the mere economic losses from lawful self-generation

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<sup>1</sup> It is assumed that the Court meant "protect against".

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found to be insufficient to create standing in Order 16581, cited by IMC-Agrico.<sup>2</sup> Intervention petitioners allege here that issuance of the declaratory statement is sought on the basis of insufficient facts necessary for the Commission to know whether the resulting project will be self-generation or prohibited retail sales. Therefore, intervention petitioners assert that if the Declaratory Statement is issued, territorial disputes, stranded investment and unwarranted costs to the companies and their ratepayers will result from those unlawful retail sales.

Where long-standing Commission policy requires public utilities to anticipate territorial disputes and bring them to the Commission for resolution, it would be inconsistent to characterize these allegations as lacking "immediacy". Moreover, where IMC-Agrico seeks a disclaimer of Commission jurisdiction pursuant to Section 366.02, Florida Statutes and a major focus of the regulation of public utilities pursuant to Chapter 366 is the prevention of uneconomic duplication of utility facilities, it would be inconsistent to say that the 120.565 proceeding is not designed to protect against the type of injuries alleged or that those injuries lie outside the zone of interest of Chapter 366. Accordingly, staff recommends that Tampa Electric, FPC and PREC be found to have standing to participate in these proceedings as parties. FPL, whose more speculative intervention claim is based on concern for the precedent established, should be permitted to participate as amicus curiae, rather than as an intervenor. Order No. 16581, p. 2. Accordingly, staff recommends that IMC-Agrico's Motion to Strike Tampa Electric's Answer and Request for Hearing be denied. Staff also recommends that FPL's Motion to Dismiss IMC-Agrico's Petition be denied. Staff believes that the mere description of an ownership structure and the effect of petitioner's activities on elements of that structure does not make the petition improper for seeking a declaration as to third parties. For example, staff believes that a request for a declaratory statement to the effect that no sale to the public takes place does not make members of the public "indispensable parties" or render such a petition defective.

**ISSUE 2(A):** Should the Commission grant a 120.57(1) hearing appropriate to disputed facts as requested by Tampa Electric?

**RECOMMENDATION:** No. The hearing should be held pursuant to Section 120.57(2), Fla. Stat., as appropriate to facts not in dispute.

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<sup>2</sup> In re: Petition of Monsanto Company for a Declaratory Statement concerning the Lease Financing of a Cogeneration Facility, Docket No. 860725-EU. Order 16581, p. 2.

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**STAFF ANALYSIS:** In Tampa Electric's Petition to Intervene and Request for Hearing (Tampa Petition), Tampa Electric states that

... IMCA's Petition for Declaratory Statement does not allege facts specific or extensive enough to warrant a determination that the proposed transactions described in the petition would not constitute the retail sale of electricity within Tampa Electric's retail service territory.

Tampa Electric then continues as follows:

A formal proceeding is necessary to determine, through discovery, the presentation of evidence and cross-examination, the true nature of IMCA's proposal so that a clear determination may be made as to whether the proposed project will be owned and operated in such a way as to effect the retail sale of electricity, contrary to the purpose and intent of Section 366.04, Florida Statutes.

Tampa Petition, p. 7-8.

While the first of these two statements is limited to a characterization of the facts presented in IMCA's Petition for Declaratory Statement, the second statement goes beyond those facts into areas which are intended to be the objects of the future discovery of additional facts. The Uniform Administrative Rules, while not yet adopted by the Commission, are instructive on this point and not inconsistent with either staff's understanding of declaratory statements or current Rule 25-22.020:

28-105.003 Agency Disposition [of Petitions for Declaratory Statements]

... If a hearing is held, it shall be conducted in accordance with Sections 120.569 and 120.57(2), F.S. The agency may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts.  
[e.s.]

On this basis, staff believes that Tampa Electric's first statement that the facts presented in IMC-Agrico's petition are insufficient for issuance of a declaratory statement is relevant, whereas, in the second statement, the attempt to develop additional facts is

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inconsistent with a declaratory statement proceeding. Staff notes, however, that the Commission's current Rule 25-22.022(1) provides for a hearing pursuant to §120.57 without specifying whether it should be a §120.57(1) hearing where facts are in dispute, or a §120.57(2) hearing where the facts are not in dispute. While staff believes the latter is more appropriate for the reasons stated, the Commission currently has the discretion to conduct a §120.57(1) hearing, if it so chooses. See, e.g., Sans Souci v. Division of Florida Land Sales, 448 So. 2d 1116, 1119-1120 (1st DCA 1989).

**ISSUE 2(B):** What issues in IMCA's petition remain to be decided in a hearing?

**RECOMMENDATION:** The hearing should consider whether the petition contains facts sufficient to establish that IMCA's lease of capacity is true self-generation rather than a prohibited retail sale.

**STAFF ANALYSIS:** Staff believes that the facts included in the petition are already sufficient to demonstrate that sales of electricity in the wholesale market by DEPS sub., an Exempt Wholesale Generator (EWG), are not subject to this Commission's jurisdiction pursuant to Section 366.02, Fla. Stat. This EWG will not be "supplying electricity...to or for the public within this state..." It is subject instead to the regulatory authority of the Federal Energy Regulatory Commission pursuant to 16 USCS §824 and 824d (1994).

The facts presented are also sufficient to demonstrate that the IMCA sub.-DEPS sub. co-general partnership is not structured like the limited partnership in Seminole Fertilizer. In the facts presented in IMCA's petition, IMCA's subsidiary is a co-general partner with DEPS sub. In Seminole Fertilizer, Seminole's subsidiary was the sole general partner in Seminole Sub L.P. While in the latter case, Seminole was found to be so "related" to the Seminole sub L.P. as to have a "unity of interests" with it, it cannot be said that IMCA is so "related" to the co-general partnership of IMCA's subsidiary and DEPS as to have a "unity of interests" with it. Accordingly, staff views the facts presented as providing for two separate transactions: sales by the DEPS sub EWG and a lease claimed to constitute self-generation. The activities of each would have to be found to meet separately the criteria of an EWG and a lease of equipment like Monsanto. A Seminole-based analysis is not available to shield sales of electricity owned by the EWG to IMCA or vice-versa from this Commission's jurisdiction or for any other such purposes.

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**ISSUE 2(C):** If the Commission denies the petitions to intervene, should interested persons be permitted to address the Commission at the agenda conference?

**RECOMMENDATION:** Yes. Interested persons should be allowed to address the Commission.

**STAFF ANALYSIS:** Pursuant to Rule 25-22.022(3), F.A.C., the Commission may deny requests for oral argument as inappropriate to the disposition of a petition for declaratory statement. However, to the extent that presentation of such argument in this case would be helpful in clarifying the legal issues and policy implications of the matters at issue, the Commission may, at its discretion, permit oral argument. In Monsanto, supra, intervention was denied, but Gulf Power was permitted to file a brief on the issues raised by Monsanto's petition "in the interest of more fully educating the Commission..." Order No. 16581, p. 2.

**ISSUE 3:** Should this docket remain open?

**RECOMMENDATION:** Yes. If the petitioners waive the 90-day time limit in current Section 120.565, F.S. the matter should be set for hearing. Alternatively, if the petitioners do not waive the 90-day time limit, the petition should be denied solely to meet the procedural requirements of current Section 120.565, F.S., rather than as an adjudication on the merits. The denial should therefore be without prejudice to refile the petition.

RCB