

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Duke Mulberry Energy, L.P., and IMC-Agrico Company for a Declaratory Statement Concerning Eligibility to Obtain Determination of Need Pursuant to Section 403.519, Florida Statutes. )  
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 ) DOCKET NO. 971337-EI  
 ) FILED: December 4, 1997  
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**DUKE MULBERRY ENERGY, L.P.'s  
 MOTION TO DISMISS TAMPA ELECTRIC COMPANY'S  
 PETITION FOR LEAVE TO INTERVENE AND TO DENY  
 TAMPA ELECTRIC COMPANY'S REQUEST FOR A HEARING**

Duke Mulberry Energy, L.P., ("Duke") by and through undersigned counsel and pursuant to Rule 25-22.037, Florida Administrative Code ("F.A.C.") hereby files this motion to dismiss Tampa Electric Company's ("TECO") Petition for Leave to Intervene ("Petition to Intervene") and deny TECO's request for a hearing, and in support thereof states:

Introduction

1. On October 15, 1997 Duke and IMC-Agrico Company ("IMCA") jointly filed with the Florida Public Service Commission ("FPSC" or "Commission") a Petition for Declaratory Statement

ACK \_\_\_\_\_ which opened this docket and initiated this proceeding. In the  
 AFA \_\_\_\_\_  
 APP Bell Petition, Duke and IMCA requested that the Commission confirm  
 CAF \_\_\_\_\_ that Duke and IMCA are entitled to apply to the Commission for a  
 CMU \_\_\_\_\_ determination of need pursuant to Section 403.519, Florida  
 CTR \_\_\_\_\_  
 EAG 5 Statutes, and the Florida Electrical Power Plant Siting Act  
 LEG \_\_\_\_\_ ("Siting Act"). In the alternative, Duke and IMCA requested that  
 LIN \_\_\_\_\_ the Commission find that no determination of need is required for  
 OFC \_\_\_\_\_  
 RCH \_\_\_\_\_ the project described in the Petition.

REC'D - On November 25, 1997, TECO filed its Petition to  
 BUREAU OF RECORDS

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Intervene in which it attempted to intervene in this docket. As a matter of law, TECO does not and cannot demonstrate standing to participate in this proceeding and TECO's petition should be dismissed.

TECO Lacks Standing to Intervene in this Proceeding.

3. Though TECO alleges a wide variety of injuries purportedly attributable to Duke's and IMCA's proposed project as a basis for its standing in this proceeding, TECO's alleged injuries can be grouped in two general categories: (1) alleged adverse impacts on TECO's ability to plan and operate its system; and (2) alleged economic injuries to TECO and its customers. Neither of these categories of injuries is sufficient to provide TECO with standing to participate in this proceeding.

4. In Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), rev. denied, 415 So. 2d 1359 and 415 So. 2d 1361 (Fla. 1982), the court enunciated a two-prong test for establishing standing in a Chapter 120 proceeding. To have a substantial interest in the outcome of an administrative proceeding, the court held that a petitioner must demonstrate:

- 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 the type and nature which the proceeding is designed to protect.

Id. TECO's Petition fails to satisfy either prong of the Agrico test.

5. To satisfy the first prong, a petitioner must assert that the agency action will result in an injury which is immediate, not remote. The injury cannot be based on speculation or conjecture. Ward v. Board of Trustees of the Internal Improvement Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995); International Jai-Alai Players Association v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1226 (Fla. 3rd DCA 1990) (finding alleged injuries to be "too remote and speculative" to qualify under the first prong of the Agrico test). TECO's Petition contains numerous allegations of injury all of which are too speculative to meet the first prong of the Agrico standing test.

6. With regard to TECO's first category of alleged injuries, TECO has constructed a scenario in which the relief requested in this proceeding, i.e., a declaration that Duke and IMCA are entitled to apply to the Commission for a determination of need, somehow inexorably results in the immediate construction of a merchant power plant. This simply is not accurate. Rather, the purpose of this proceeding is simply to answer the question posed by Duke and IMCA, nothing more. If the Commission determines that Duke and IMCA are "applicants" eligible to pursue a determination of need, it by no means follows that Duke and IMCA will be authorized to immediately construct a merchant power plant, nor that the construction of such a power plant would then adversely affect TECO's ability to plan and operate its system. Accordingly, TECO's first category of alleged injuries is too

speculative and remote to meet the "immediacy" prong of the Agrico standing test.

7. The second prong of the Agrico test requires a showing that the injury is of the type and nature against which the proceeding is designed to protect. Stated alternatively, a petitioner's injury must fall within the "zone of interest" to be protected by the proceeding and the rules and statutes at issue.

8. This proceeding is a declaratory statement proceeding. Section 120.565(1), Florida Statutes, provides that declaratory statements are intended to provide a petitioner with "an agency's opinion as to the applicability of a statutory provision, or of any rule or order of an agency, as it applies to the petitioner's particular set of circumstances."<sup>1</sup> As such "there will normally be no person, other than the petitioner (in this case Duke and IMCA) who will be affected by the declaratory statement." Florida Optometric Association v. Department of Professional Regulation, 567 So. 2d 928, 936 (Fla. 1st DCA 1990).

9. None of the injuries that TECO has alleged will occur are of the "type and nature" which a declaratory statement proceeding is designed to protect. By its very nature this declaratory statement proceeding is designed solely to provide a response to specific questions posed by Duke and IMCA. As a matter of law, TECO does not fall within the "zone of interest" of the proceeding and thus has no cognizable substantial interest

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<sup>1</sup>The Commission rule concerning declaratory statements, Rule 25-22.020, F.A.C., contains similar language.

that can be affected. Accordingly, TECO has failed to meet the second prong of the Agrico standing test.

10. As stated above, TECO's second category of alleged injuries includes purported economic injuries to TECO and its customers, allegedly attributable to the construction by Duke and IMCA of a new merchant power plant. Under the second prong of the Agrico test, economic injury is simply not sufficient to form the basis for standing unless the proceeding and underlying statutory framework are specifically designed to address economic issues. See Agrico, 406 So. 2d at 482. This declaratory statement proceeding is in no way related to economic issues and any alleged economic consequences to TECO as a result of this proceeding do not constitute a cognizable substantial interest under the second prong of the Agrico test. See In Re: Peoples Gas System, Inc., 1995 WL 121390 (Fla. P.S.C., March 13, 1995), Order No. PSC-95-0348-FOF-GU at 3 ("TECO is only speculating what might happen if the rider is implemented. Speculation as to future economic detriment is too remote to establish standing."); In Re: Petition of Monsanto Company for a Declaratory Statement Concerning the Lease Financing of a Cogeneration Facility, Docket No. 860725-EU. (Fla. P.S.C.), FPSC Order No. 16581 at 2.

A Hearing is Not Proper in This Proceeding.

11. In its Petition, TECO has requested a hearing pursuant to Section 120.57(2), Florida Statutes (Petition at 11).<sup>2</sup>

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<sup>2</sup>Interestingly, the hearing requested by TECO pursuant to Section 120.57(2), Florida Statutes, is specifically limited to matters that do not involve disputed issues of

TECO's request should be denied.

10. Duke and IMCA's Petition for Declaratory Statement pose a narrowly drawn question, the resolution of which does not affect TECO's substantial interests. The question presented, viz., whether Duke and IMCA are "applicants" eligible to initiate a need determination proceeding, relates solely to Duke's and IMCA's status and rights under a statute administered by the Commission. IMCA and Duke have properly framed their request for a declaratory statement on the basis of the Commission's application and interpretation of the statute to the facts alleged in their petition: this is thus a question of law for the Commission. Accordingly, a hearing pursuant to Chapter 120, Florida Statutes, is unnecessary and TECO has no right to request such a hearing. See Florida Optometric Association, 567 So. 2d at 936.

WHEREFORE, Duke Mulberry Energy, L.P., respectfully requests that the Florida Public Service Commission DISMISS Tampa Electric's Company's Petition for Leave to Intervene in this docket and DENY Tampa Electric Company's request for a hearing.

material fact. Yet, TECO devotes a page of its Petition to identifying "disputed issues." (Petition at 9-10).

Respectfully submitted this 4th day of December, 1997.



ROBERT SCHEFFEL WRIGHT  
Florida Bar No. 966721  
LANDERS & PARSONS, P.A.  
310 W. College Avenue (ZIP 32301)  
Post Office Box 271  
Tallahassee, Florida 32302  
Telephone: (850) 681-0311  
Telecopier: (850) 224-5595

Attorneys for Duke Mulberry  
Energy, L.P.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail, telecopier (\*\*) or hand delivery (\*) on this 4th day of December, 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. Richard Bellak\*  
Division of Appeals  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

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

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

  
Attorney