

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.)
)
)
) DOCKET NO. 971337-EI
) FILED: December 4, 1997
)
)
)

DUKE MULBERRY ENERGY, L.P.'s CONSOLIDATED MOTION TO STRIKE FLORIDA POWER CORPORATION'S ANSWER TO PETITION FOR DECLARATORY STATEMENT AND FLORIDA POWER CORPORATION'S MOTION TO DISMISS PROCEEDINGS

Duke Mulberry Energy, L.P., ("Duke") by and through undersigned counsel and pursuant to Rule 25-22.037, Florida Administrative Code ("F.A.C.") and Rule 1.140(f), Florida Rules of Civil Procedure ("F.R.C.P.") hereby files this consolidated motion to strike Florida Power Corporation's ("FPC's") Answer to Petition for Declaratory Statement and Motion to Dismiss Proceeding and in support thereof states:

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 (the "Petition") which opened this docket and initiated this

proceeding. In the Petition, Duke and IMCA asked that the Commission confirm that Duke and IMCA are "applicants" eligible to pursue a determination of need pursuant to Section 403.519, the Power Plant Siting Act and applicable Commission rules. On November 25, 1997, FPC filed an Answer to Petition for Declaratory Statement (the "Answer") and Motion to Dismiss Proceeding (the "Motion to Dismiss").

FPC's Answer is not legally appropriate in this

FPSC BUREAU OF RECORDS

DOCUMENT DATE

12422 DEC-45

FPSC REPORTING

ACK
 AFA
 APP
 CAF
 CMU
 CTR
 EAG
 LF
 LI
 CP
 FR
 SW
 V

Ballak

5

1

proceeding and should be stricken. In addition, FPC's Answer and Motion to Dismiss are clearly untimely and as such should be stricken as immaterial to this proceeding.

FPC's Answer is Legally Inappropriate

3. Rules 25-22.020 through 25-22.022, F.A.C., are the Commissions rules governing declaratory statement proceedings. These rules make no reference to and do not otherwise authorize the filing of an answer in response to a petition for declaratory statement. This is because an answer is not the appropriate response to a petition for declaratory statement.¹

4. As a general rule, a party is entitled to file an answer only when affirmative relief is being sought against that party. This is a proceeding for a declaratory statement that by its very nature affects only Duke and IMCA--no affirmative relief is being sought against FPC. Accordingly, FPC's Answer is not legally appropriate.

5. Assuming an answer could be filed in a declaratory proceeding, the only time an answer would be appropriate is if disputed issues of material fact exist. See Department of Administration v. University of Florida, 531 So. 2d 377, 380 (Fla. 1st DCA 1988). In its Petition to Intervene and Request for Administrative Hearing, filed in this docket on November 17,

¹Though styled an "answer", FPC's Answer is not a responsive pleading. Rather, it is a lengthy treatise setting forth FPC's opposition to the concept of merchant power plants that would more appropriately have been submitted to Commission Staff at the November 7, 1997 Commission Staff workshop that focused on merchant power plants.

1997, FPC specifically requests that the Commission convene a hearing pursuant to Section 120.57(2), Florida Statutes. A hearing under Section 120.57(2), Florida Statutes, is only appropriate if no disputed issues of fact exist. Thus by requesting such a hearing, FPC has conceded that no disputed issues of fact exist in this proceeding and under the rationale of University of Florida, FPC is not entitled to file its Answer.

FPC's Answer and Motion to Dismiss are Untimely

6. Assuming, arguendo, that FPC's Answer is authorized, Rule 25-22.037, F.A.C., specifically provides that any party or intervenor may file an answer to a petition or a motion in opposition to a petition within twenty (20) days of service of the petition.

7. Rule 1.140(g), F.R.C.P., provides that "[a] party may move to strike . . . redundant, immaterial, impertinent or scandalous matter from any pleading at any time."

8. Rule 25-22.037, F.A.C., specifically requires any answer or responsive motion to be filed within 20 days. FPC's Answer and Motion to Dismiss were filed over forty (40) days after Duke and IMCA filed their Petition and were thus clearly filed well outside the clearly prescribed period for a timely filing. Accordingly, FPC has waived its right to file an Answer and Motion to Dismiss and the Answer and Motion to Dismiss should be stricken as immaterial to this proceeding.

WHEREFORE, Duke Mulberry Energy, L.P., respectfully requests that the Florida Public Service Commission STRIKE Florida Power Corporation's Answer and Motion to Dismiss filed in this docket as untimely.

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 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

Gary L. Sasso
Carlton, Fields, Ward,
Emmanuel, Smith & Cutler
Post Office Box 2861
St. Petersburg, FL 33731


Attorney