LAW OFFICES
McWHIRTER, REEVES, McGLOTHLIN, DAVIDSON, RIEF & BAKAS, P.A.

100 NORTH TAMPA STREET, SUITE 2800
TAMPA, FLORIDA 33602-5126

MAILING ADDRESS: TAMPA
P.O. BOX 3350, TAMPA, FLORIDA 33601-3350

TELEPHONE (813) 224-0866
FAX (813) 221-1854
CABLE GRANDLAW

PLEASE REPLY TO
TALLAHASSEE

TALLAHASSEE OFFICE
117 S. GADSDEN
TALLAHASSEE, FLORIDA 32301

TELEPHONE (850) 222-2525
FAX (850) 222-5606

LYNWOOD F. ARNOLD, JR.
JOHN W. BAKAS, JR.
C. THOMAS DAVIDSON
STEPHEN O. DECKER
LINDA E. JORGE
VICKI GORDON KAUFMAN
JOSEPH A. McGLOTHLIN
JOHN W. McWHIRTER, JR.
RICHARD W. REEVES
FRANK J. RIEF, III
DAVID W. STEEN
PAUL A. STRASKE

ORIGINAL

December 3, 1997

VIA HAND DELIVERY

Ms. Blanca Bayó
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 971337-EI

Dear Ms Bayó:

Enclosed are the original and 15 copies of the following documents for filing in the above docket:

1. IMC-Agrico Company's Response in Opposition to Tampa Electric Company's Petition for Leave to Intervene. 12334-97

2. IMC-Agrico Company's Motion to Strike Tampa Electric Company's "Response." 12335-97

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3. IMC-Agrico Company's Response in Opposition to Florida Power Corporation's Petition to Intervene. 12336-97

I have enclosed extra copies of the above documents for you to stamp and return to me. Please contact me if you have any questions. Thank you for your assistance.

Sincerely,

Vicki Gordon Kaufman

VGK/pw
Encls.

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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-EU Filed: December 3, 1997

IMC-AGRICO COMPANY'S RESPONSE IN OPPOSITION TO FLORIDA POWER CORPORATION'S PETITION TO INTERVENE

IMC-Agrico Corporation ("IMCA"), through its undersigned counsel, submits its response to the Petition to Intervene filed by Florida Power Corporation ("FPC"), on November 25, 1997, and states:

1. On October 15, 1997, IMCA and Duke Mulberry Energy, L.P. "Duke Mulberry" filed a Petition for Declaratory Statement seeking a declaration that based on the facts presented in their petition, they are entitled to apply for a determination of need for an electrical power plant pursuant to section 403.519, Florida Statutes, and other pertinent rules and regulations. In the alternative, IMCA and Duke Mulberry seek a declaration that no determination of need is required for their proposed project.

2. On November 25, 1997, 41 days after IMCA and Duke Mulberry filed their petition and barely four working days prior to the date the Staff is scheduled to submit its written recommendation in this docket, Florida Power Corporation filed a 20-page Petition to Intervene, a 34-page "Answer," and an eight-page Motion to Dismiss. As FPC implicitly acknowledges in its Petition to Intervene, the Commission's consideration of the Motion to Dismiss is necessarily subject to the Commission's decision on the intervention issue; only if FPC attains party status is it

entitled to have such a motion considered. Accordingly, IMCA will not address the Motion to Dismiss here. The Answer is not a pleading that is authorized or contemplated by the Commission's rule on declaratory statements. The Commission should disregard it.

3. In order to support its Petition to Intervene, FPC must demonstrate that it complies with the two-prong test for standing set out in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981). It must show that it will suffer an injury of such immediacy that it is entitled to a § 120.57 hearing. Further, the interest asserted must be of the type the proceeding is designed to protect. FPC can meet neither test.

4. FPC attempts to satisfy the requirement that it demonstrate that its substantial interests would be affected by contending that a declaratory statement to the effect that IMCA and Duke are eligible to utilize the determination of need processes would thwart FPC's ability to plan and serve the need of its retail customers; impair FPC's control over the reliability and integrity of its transmission facilities; and impose upon FPC and its ratepayers the consequences of uneconomic duplication of facilities. Each of these efforts fails to demonstrate the requisite standing.

FPC Fails to Show How Its Planning Would Be Adversely Impacted:

5. At page 12, FPC states that its interest is ensuring that it will be able to continue to meet its statutory duties of furnishing adequate and reliable electric service in its territory at reasonable cost. It then asserts, without explanation, that this

interest would be "directly and deleteriously affected" by any ruling that denies its status as an indispensable party in a need proceeding. The standing test requires more than a conclusory, unsupported claim. Moreover, as set forth in the Petition for Declaratory Statement filed by IMCA and Duke, the merchant plant they propose will be developed without imposing any obligation or risk on FPC, or any other utility, or the ratepayers of any utility. If FPC or any other utility purchases power from the merchant plant, it would occur -- not because the utility is obligated to do so -- but because the merchant plant can supply the power to the purchaser on economically attractive terms. Accordingly, rather than having a "deleterious" impact upon the FPC's ability to meet its statutory duty to serve its retail customers, the merchant plant can only enhance FPC's ability to do so by providing a source of economical power and by supplying an increment of capacity that can only improve the reliability of the grid. Further, it is undisputed that FPC and other utilities frequently engage in wholesale sales and purchases with each other. The certification and construction of a merchant plant will not "affect" FPC's ability to plan any more than the certification and construction of (for example) an FPC unit -- from which FPC then makes wholesale sales to other utilities -- affects their ability to plan to serve their retail customers[1]. The only impact would be to enter a new kind of participant into the wholesale market, rendering it more competitive. From the perspective of a purchaser,

[1] In addition, many capacity additions are permitted, constructed, and operated without receiving a determination of need because the units do not trigger Siting Act review; yet, FPC and other utilities carry out their planning functions. For this reason, too, FPC's argument does not withstand analysis.

this would have a beneficial impact on FPC. From the perspective of a competitor, FPC doubtless has an interest in keeping the merchant capacity out of the market. However, such an interest is insufficient to confer standing. Agrico, supra.

FPC's Argument Concerning "Transmission Impacts" Is Specious:

6. At page 13, FPC claims standing on the basis that the project "will likely require access to FPC's transmission facilities." Even assuming this to be true, it is not grounds for allowing FPC to intervene. As a result of policies designed to end the ability of "transmission haves" to disadvantage "transmission have nots" and to inject more competition into the wholesale market, the ability of an EWG such as the one proposed by IMCA and Duke to access the transmission systems of FPC and other utilities has already been mandated by federal law (specifically, the Energy Policy Act of 1992 and Order 888 of the Federal Energy Regulatory Commission). Federal law also governs the assignment of responsibility for any cost impact upon the transmission system. More importantly, it is clear from FPC's petition that FPC seeks -- not an opportunity to flesh out the specific impacts of a particular project on its transmission system -- but to circumvent these provisions of federal law by precluding the ability of the EWG to develop units of a certain size in Florida altogether. FPC states that a determination by the Commission "that would confer upon merchant plant developers the ability to initiate such projects" would impair the ability of utilities like FPC to plan and manage their transmission systems. FPC petition, at page 13. FPC also opposes the alternative result of an exemption for the proposed merchant plant that IMCA and Duke Mulberry identified in their petition. FPC petition, at page

1. In essence, then, FPC hopes to construct the "Catch-22" whereby IMCA and Duke Mulberry could proceed with their project neither pursuant to nor outside of the Siting Act. As stated in the Petition for Declaratory Statement, such an absurd interpretation is impermissible because it would conflict with, and present an obstacle to the accomplishment and full execution of the objectives of (and would therefore be preempted by), overriding requirements of federal law. Independent Energy Producers Association v. California Public Utilities Commission, 36 F.3d 540 (9th Cir., 1994); Lewis v. Brunswick, 107 F.3d 1494 (11th Cir., 1997). FPC's statements reveal that its true motive is to resist the development of competition by blocking the project. Furthermore, the Petition for Declaratory Statement filed by IMCA and Duke relates only to the issue of whether they have access to the procedures of the Siting Act as a proper applicant. Any impacts on the transmission system associated with their project would be site-specific and would be considered -- not in this proceeding, which involves only a determination of whether they are proper applicants -- but in the proceeding on the subsequent substantive Application for a Determination of Need, and/or FERC proceedings, as appropriate.

The Declaratory Statement Sought by IMCA and Duke Poses No Threat of "Uneconomic Duplication of Facilities";

7. FPC states -- again, in conclusory fashion -- that "opening up the siting process directly to merchant plant developers would pose a palpable threat of the uneconomic duplication of facilities, to the detriment of FPC and its ratepayers." FPC petition, at pages 13-14. Again, in its lengthy exposition FPC does not explain how it or its ratepayers would be exposed to the possibility of "uneconomic duplication."

As stated in the Petition for Declaratory Statement, the developer of the merchant plant will absorb all risk associated with the investment in the plant. Accordingly, the plant would not "pose a threat" to FPC or its ratepayers in any manner.

8. At page 14, FPC asserts that the "interests that FPC seeks to defend are within the zone of interests that will be addressed by this proceeding." (Emphasis supplied.) Here, FPC purports to paraphrase the Agrico decision. However, there is one difference, and FPC's departure from the language of Agrico is revealing. The Agrico court said that, in order to demonstrate standing, the injury must be one that the proceeding is intended to protect, not a subject the proceeding will "address." See Agrico, supra, at 482. The sole legitimate purpose of the proceeding on the Petition for Declaratory Statement is to consider the contention of IMCA and Duke that prior decisions do not prohibit them from applying for certification of the merchant capacity they propose under the Power Plant Siting Act, and that the EWG that will operate the merchant plant qualifies as a "regulated electric company" within the meaning of Section 403.503(13), Florida Statutes. They have presented a straightforward petition, the disposition of which will affect only them. By contrast, notwithstanding its feeble waves in the direction of "planning," "uneconomic duplication," and "transmission impacts," the desire of FPC to stifle competition by perpetuating the "exclusive club" concept of the Siting Act is obvious. That interest is not one that the proceeding initiated by the petition of IMCA and Duke Mulberry is "designed to protect."

FPC Erroneously Characterizes the Import of "Current Law":

9. In the course of its lengthy petition, FPC proceeds to argue the merits of the statutory interpretation which it wishes the Commission to apply to the petition of IMCA and Duke. The lengthy exposition exceeds the scope of a petition to intervene; however, IMCA will address this aspect of FPC's petition briefly in its response. At the outset of its petition, FPC introduces its theme that "current law" limits the initiation of proceedings for a determination of need to utilities regulated by the Commission or power producers under contract to sell to such utilities. The implication of FPC's argument is that IMCA and Duke ask the Commission to depart from "current law" in their petition. FPC is mistaken. In their petition, IMCA and Duke show that the prior decisions in which the Commission limited access to the determination of need process involved efforts by non-utility entities to require ratepayers of specific utilities to bear the cost of proposed projects and so are inapplicable to the very different type of project presented by the proposed merchant plant. Rather than duplicate the analysis of the Nassau Power decisions set forth in the Petition for Declaratory Statement submitted by IMCA and Duke Mulberry in this docket, IMCA incorporates that document in this response by reference. Nothing in "current law" prohibits proponents of a merchant plant from proceeding under the Siting Act; in fact, the EWG that will market the merchant capacity will be a public utility under the Federal Power Act and thus clearly within the meaning of the term "regulated electric company" contained in "current law" (Section 403.503(13), Florida Statutes).

CONCLUSION

FPC has failed to establish that it has standing to intervene. Its Petition to Intervene is a transparent attempt to thwart competition in the wholesale market. The Commission should deny the petition.

Joseph A. McGlothlin for
John W. McWhirter, Jr.
McWhirter, Reeves, McGlothlin,
Davidson, Rief and Bakas, P.A.
Post Office Box 3350 (33601-3350)
100 North Tampa Street, Suite 2800
Tampa, Florida 33602-5126

Joseph A. McGlothlin
Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin,
Davidson, Rief and Bakas, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301

Attorneys for IMC-Agrico Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **IMC-Agrico Company's** foregoing **Response in Opposition to Florida Power Corporation's Petition to Intervene** has been furnished by U.S. Mail or Hand Delivery(*) this **3rd** day of **December, 1997**, to the following:

Richard Bellak*
Division of Legal Services
Florida Public Service Commission
1540 Shumard Oak Boulevard, Rm. 301F
Tallahassee, Florida 32399-0850

James F. McGee
Florida Power Corporation
Post Office Box 14042
St. Petersburg, Florida 33733-4042

Robert Scheffel Wright
Landers & Parsons
310 West College Avenue
Tallahassee, Florida 32301

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

Matthew M. Childs, P.A.
Charles A. Guyton
Steel Hector & Davis LLP
215 South Monroe Street
Suite 601
Tallahassee, Florida 32301

Joseph A. McGlothlin

Joseph A. McGlothlin