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November 19, 1997

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By Hand Delivery

Blanca S. Bayó, Director
Records and Reporting
Florida Public Service Commission
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399-0850

**Re: Petition of IMC-Argico Company for a Declaratory Statement
Confirming Non-Jurisdiction Nature of Planned Self-Generation
Docket No. 971313-EU**

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company are the original and fifteen (15) copies of Petition for Leave to Intervene or Motion to Participate Amicus Curiae in Docket No. 971313-EU.

Also enclosed is an additional copy of the report which we request that you stamp and return to our runner.

ACK If you or your Staff have any questions regarding this filing, please contact me at 222-2300

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Very truly yours,

[Signature]

Charles A. Guyton

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: November 19, 1997

Florida Power & Light Company's
Petition For Leave To Intervene or Motion to Participate Amicus Curiae

Florida Power & Light Company ("FPL"), pursuant to Florida Administrative Code Rule 25-22.039, petitions the Florida Public Service Commission ("Commission") for leave to intervene in Docket No. 971313-EU, and in the alternative if intervention is not permitted, moves the Commission, pursuant to Florida Administrative Code Rule 25-22.036(2), for leave to participate amicus curiae. As grounds for this requested relief, FPL states:

Introduction

- 1. The name and address of the petitioner are:

Florida Power & Light Company
9250 West Flagler
Miami, Florida 33174

- 2. All pleadings, motions, orders and other documents directed to the petitioner are

to be served on:

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

William G. Walker III
Vice President, Regulatory Affairs
9250 West Flagler
Miami Florida 33174

**FPL's Substantial Interests Will Be Adversely Affected
By The Declaratory Statement Sought By IMC-Agrico**

3. FPL is a public utility within the meaning of Chapter 366, Florida Statutes and is subject to regulation by the Commission. As a public utility subject to regulation under Chapter 366, FPL is a state authorized monopoly provider of retail electric service with an obligation to serve the public, and it has the exclusive right to make retail sales within its territory. Consistent with its obligation to provide retail service, FPL has planned and built an integrated electric generation, transmission and distribution system, invested significant sums of money in assets necessary to serve its retail customers, has filed and had approved rates for the provision of its retail electric service, has had rules and regulations relating to the provision of retail electric service approved by the Commission, and has undertaken other conduct to comply with the regulatory requirements of Chapter 366 and the Commission's implementation of Chapter 366.

4. In this proceeding a customer (IMC-Agrico) of a public utility¹ seeks a declaratory statement that its yet to be negotiated, take or pay leases of 120 MW of capacity from another entity (an unnamed and as yet unformed partnership) will not constitute a retail sale of electricity, will not make the unidentified provider of capacity (or any of its affiliates or IMC-Agrico) a "public utility," and will not subject the unnamed provider of electricity (or any of its affiliates or IMC-Agrico) subject to Commission regulation. See, IMC-Agrico Petition at page 1.

¹ Actually, IMC-Agrico is a customer of several electric utilities within the state of Florida.

5. FPL, as a state authorized monopoly provider of retail service, has a substantial interest in preserving its exclusive right to provide retail service. The issuance of the declaratory statement sought would seriously injure FPL's exclusive right to provide retail service by authorizing retail sales through complex and vague lease arrangements disguised as self-generation. A declaratory statement finding that the proposed arrangement constituted permissible self-generation and not a retail sale would injure FPL by: (1) subjecting FPL to reduced retail sales, revenues and earnings from FPL customers following this blueprint for avoiding Commission regulation of retail sales, (2) giving rise to territorial disputes with entities attempting to duplicate this complex and vague arrangement to make retail sales to FPL retail customers, (3) shifting cost responsibility for the recovery of the investment and return on investment in assets formerly used to serve retail customers whose load has been lost to new entities providing electricity to remaining customers who stay on the system, and (4) stranding investment which had been used by FPL to serve customers it has an obligation to serve.

6. FPL acknowledges that IMC-Agrico is not a retail customer of FPL; however, the Commission's issuance of the declaratory statement sought would nonetheless immediately adversely impact FPL's exclusive right to provide retail electric service. While declaratory statements are supposed to address statutes, rules or agency orders as they apply "to the petitioner's particular set of circumstances," Section 120.565(1), Florida Statutes (Supp. 1996), declaratory statements are nonetheless being invoked and accepted as precedent, binding interpretations of law applicable to other entities.

7. The most immediate and compelling example of this use of declaratory statements as "precedent" is found in the IMC-Agrico petition. At page 3 of the IMC-Agrico petition the

petitioner states that its declaratory statement request involves Commission orders in no less than three prior declaratory statement proceedings, and then throughout its petition the petitioner discusses those decisions, treating them as precedent. At page 5 of the petition the petitioner actually invokes "the precedent of Seminole Fertilizer." If the Commission does undertake to address how such supposedly petitioner-specific declaratory statements affect or apply to IMC-Agrico, then it is clear that such decisions, despite their supposedly petitioner-specific application, have precedential value. If those statements have the precedential value suggested by IMC-Agrico, then the declaratory statement sought by IMC-Agrico would also have precedential value and be a legal interpretation applicable to FPL or any other utility under the same set of facts.

8. At least one court has recognized that declaratory statements have precedential value, despite their supposed limited application to the petitioner's limited set of facts. In State Department of Health and Rehabilitative Services v. Barr, 359 So. 2d 503 (Fla. 1st DCA 1978), the First District Court of Appeal held that a declaratory statement may adversely affect a person not a party to the proceeding under the rule of stare decisis. It is of no comfort to FPL to know that its interests will be adversely affected by the issuance of a declaratory statement such as the one sought here and face the prospect of a binding precedent when one of its customers disguises a retail sale through self generation as proposed by IMC-Agrico. If the Commission provides the interpretation of law sought in this case without allowing FPL to participate, FPL, under the rule of stare decisis, will be bound by that legal interpretation without ever having the opportunity to address the questionable legal argument or vague factual premise. Given the possibility of an adverse precedent in this case, FPL should be allowed to participate and protect its interest in

exclusively providing electric service in its territory. On at least one prior occasion the Commission has declined to allow intervention premised upon the injury arising from an adverse precedent. In re: Petition of Monsanto Company for a Declaratory Statement Concerning the Lease Financing of a Cogeneration Facility, 86 FPSC 9:210 (order No. 16581). FPL asks that the Commission overrule this decision and permit intervention given that FPL otherwise passes the standing test set forth in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981).

9. This is the only proceeding in which FPL can protect its interests. If the declaratory statement sought is issued, it is either controlling under the rule of stare decisis² or entitled to great weight³ in future proceedings involving FPL customers seeking to use the same disguised retail sale arrangement. If not allowed to intervene and participate in this proceeding, FPL will be foreclosed from addressing the legal issue being addressed. Once the legal issue is addressed without FPL, FPL is faced with the decision, without an opportunity to help formulate the law. This is not only the type of proceeding in which FPL's interest is meant to be protected, it is the only proceeding in which its interest may be protected.

10. FPL should also be allowed to intervene and participate in this proceeding as it is the only party which has addressed the obvious deficiencies in the petition which warrant its dismissal or summary denial. As more fully discussed in Florida Power & Light Company's Motion to Dismiss, which is being filed contemporaneously with this petition to intervene, IMC-

² See, Department of HRS v. Barr cited previously.

³ See, Krivanek v. Take Back Tampa Political Committee, 625 So.2d 840 (Fla. 1993).

Agrico's petition for a declaratory statement should be dismissed or summarily denied (a) because it seeks a declaratory statement as to a third party or parties, and (b) because the petition does not provide sufficient facts for the Commission to make an informed decision. Several parties have addressed these deficiencies in the petition, but none have sought the dismissal that they warrant. FPL's participation in this regard will facilitate the processing of this case and allow the Commission to expend its resources on proper, mature requests.

Disputed Issues of Material Fact

11. FPL believes there are a number of disputed issues of material fact which should be resolved rather than presumed:

- a. Whether IMCA plans to develop additional facilities for the generation and delivery of electrical power to serve the requirements of its mining and processing complex in central Florida.
- b. Whether IMCA plans to enter into lease and contract transactions similar to those of another phosphate manufacturer in central Florida.
- c. What capacity the power plant to be developed by an entity other than IMCA will have.
- d. Whether the partnership or equivalent entity to which IMCA's wholly owned subsidiary will make equity contributions will lease an undivided ownership interest in the Project to IMCA commensurate with IMCA's requirements.
- e. What are IMCA's requirements?
- f. Whether IMCA will be entitled to use its leased capacity at all times.
- g. What will be the disposition of power produced by IMCA's undivided ownership interest but not used by IMCA.
- h. Whether IMCA will own the electrical output produced by the leased capacity.
- i. Whether the partnership will own the electrical output produced by the plant.

- j. Whether IMCA will be obligated to make fixed lease payments to the partnership regardless of the power plant's output and performance.
- k. Whether the initial term of the lease will be ten years with options to extend for two five year terms.
- l. Whether IMCA will be obligated to operate and maintain an undivided ownership interest in the project.
- m. Whether the risk of and ultimate responsibility for operating and maintaining an undivided ownership interest in the project will rest with IMCA.
- n. Whether IMCA will consume power from a facility that it does not own.
- o. Whether IMCA will pay for power it consumes from a plant it does not own.
- p. Whether IMCA lease payments for the power it consumes will vary or be excused for nonperformance, and if so, under what circumstances.
- q. Whether IMCA will bear the risk of fuel procurement and delivery.
- r. Whether IMCA and the partnership have a "unity of interest."
- s. Whether the proposed transaction is comparable to the transaction in Seminole Fertilizer.
- t. Whether IMCA will be consuming electricity produced by the partnership while paying the partnership for the power.
- u. Whether the proposed transaction is an attempt to disguise a retail sale as self-generation.

There may be other disputed issues of material fact if the vague parameters of the proposed relationship of IMCA, its affiliates and the partner of its affiliates are revealed.

12. It is FPL's position that IMC-Agrico's petition is so speculative ("the definitive Lease and O&M Contract have not yet been developed," IMC-Agrico petition at 7), conclusory and incomplete that it is insufficient to warrant any Commission relief. These disputed and

unsubstantiated issues of material fact should result in a dismissal of the petition or summary denial; however, if such a disposition is not undertaken, then there should be a suspension of the declaratory statement proceeding and a convening of a Section 120.57(1) hearing to resolve these disputed issues of material fact before issuance of a declaratory statement that requires a demonstration of these contested facts.

Ultimate Facts Alleged

13. Florida Power & Light Company's substantial interests will be affected by the disposition of IMCA's petition. Florida Power & Light Company should be granted leave to intervene.

Alternative Motion To Participate As Amicus Curiae

14. Pursuant to Rule 25-22.037(2), F.A.C., Florida Power & Light Company ("FPL"), alternatively to its petition to intervene, moves the Commission for leave to file an amicus curiae memorandum of law addressing the petition in this proceeding. While FPL believes that it has substantial interests which will be affected by the Commission determination in this proceeding, should the Commission determine that FPL's interests are not sufficient to satisfy the standing test in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981), the Commission would nevertheless be aided in its consideration of this petition by an FPL amicus curiae memorandum of law.

15. There are at least two grounds upon which the Commission should, on its own motion, either dismiss the petition or summarily deny it. First, IMC-Agrico is improperly

invoking the declaratory statement statute in this proceeding by seeking a declaratory statement as to third parties (IMC-Agrico seeks a declaratory statement (a) that a 120 MW take or pay lease by a partnership to IMC-Agrico is not a retail sale by the partnership to IMC-Agrico, (b) that the 120 MW take or pay lease by the partnership to IMC-Agrico will not cause the partnership or the general partners in the partnership to be deemed a "public utility" and (c) that the 120 MW take or pay lease will not cause the partnership or the general partners of the partnership to be subject to commission regulation). FPL's submission of a legal memorandum explaining how IMC-Agrico is overreaching in seeking a declaratory statement as to third parties would facilitate the Commission's handling of this petition. Second, IMC-Agrico's petition is insufficient in that it is so speculative and conjectural as to the "facts" alleged that the Commission is not presented with a justiciable controversy. FPL's submission of legal memorandum addressing the numerous deficiencies in the "facts" alleged and the speculative nature of the conclusions submitted as facts would also aid the Commission in its consideration of the petition.

16. Substantively, the IMC-Agrico petition mischaracterizes its potential transaction as "parallel" or "comparable" to the transaction approved in Seminole Fertilizer and fails to bring to the Commission's attention a subsequent Commission case construing Seminole Fertilizer that clearly states that it is not clear that an entity that shares ownership with another party has the "unity of interest" found between Seminole and Seminole Sub L.P. See, In Re: Petition for Declaratory Statement Regarding Public Utility Status of Affiliates Involved in Gas Supply Arrangements, by Tampa Electric Company, 95 FPSC 12:510 (Order No. PSC-95-1623-DS-PU).

The filing of an FPL amicus curiae legal memorandum addressing why the proposed transaction is a retail sale that would make the partnership a public utility subject to Commission regulation and to territorial disputes would also aid the Commission's consideration of this petition.

17. While the Commission's procedural rules do not address amicus curiae status, the Commission has previously allowed such participation in actions before it, including declaratory statement proceedings. See, In re: Petition of Florida Power and Light Company for a Declaratory Statement Regarding Request for Wheeling, 89 FPSC 2: 298; In re: Investigation of the ratemaking and accounting treatment for the dismantlement of fossil-fueled generating stations, 91 FPSC 7: 136; In re: Complaint by Telcom Recovery Corp. Against TRANSCALL AMERICA, INC. D/b/a ATC LONG DISTANCE regarding billing discrepancy, 93 FPSC 8: 447; But cf., In re: Investigation regarding the appropriateness of payment for Dial-Around (10XXX, 950, 800) compensation from interexchange telephone companies (IXCs) to pay telephone providers (PATS), 93 FPSC 7: 379 (denied because it was, in effect, an untimely motion for reconsideration); In re: Petition for Declaratory Statement Regarding Exemption from Public Service Commission Regulation for Cellular Radio Telecommunications Carrier by Cellular World, Inc., 92 FPSC 2: 646 (denied as essentially an untimely petition for reconsideration). FPL respectfully submits that its amicus curiae participation will aid the Commission in its disposition of this matter.

Prayer For Relief

WHEREFORE, Florida Power & Light Company petitions the Commission for leave to intervene and participate as a party in this proceeding, and in the alternative, if intervention is not granted, FPL moves for leave to file an amicus curiae legal memorandum addressing why the

Commission should dismiss or summarily deny IMC-Agrico's petition on its own initiative as well as why the transaction proposed by IMC-Agrico is an impermissible retail sale.

Respectfully submitted,



Matthew M. Childs, P.A.

Charles A. Guyton

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Attorneys for Florida Power & Light Company

Certificate of Service

I hereby certify that on this the 19th day of November, 1997 a copy of Florida Power & Light Company's Petition For Leave To Intervene or Motion to Participate Amicus Curiae was served by U.S. Mail or hand delivery (*)

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