AUSLEY & MCMULLEN

ATTORNEYS AND COUNSELORS AT LAW

227 SOUTH CALHOUN STREET
P.O. BOX 391 (ZIP 32302)
TALLAHASSEE, FLORIDA 32301
(850) 224-9115 FAX (850) 222-7560

ORIG

November 25, 1997

BY HAND DELIVERY

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

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

Dear Ms. Bayo:

Enclosed for filing in the above docket on behalf of Tampa Electric Company are the original and fifteen (15) copies of each of the following:

1. Tampa Electric Company's Petition to Intervene; and 12142-97
2. Tampa Electric Company's Response. 12143-97

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to this writer.

Thank you for your assistance in this matter.

Sincerely,

James D. Beasley

JDB/bjm
Enclosures
cc: All Parties of Record (w/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-EI FILED: November 25, 1997

TAMPA ELECTRIC COMPANY'S RESPONSE

I. Introduction

1. Tampa Electric Company ("Tampa Electric" or "the company"), pursuant to Fla. Admin. Code Rule 25-22.037, hereby files its Response to the Petition for Declaratory Statement filed on behalf of Duke Mulberry Energy, L.P. ("Duke") and IMC-Agrico Company ("IMCA") on October 15, 1997. Tampa Electric respectfully submits that the relief sought by Duke and IMCA in this proceeding must be denied. As discussed in more detail below, the precedents cited by Duke and IMCA in support of their Petition only serve to conclusively confirm Duke/IMCA's ineligibility as Applicants under the Florida Power Plant Siting Act and provide no basis for permitting IMCA and Duke to proceed with their proposed project in the absence of a determination of utility specific need, in Florida, for the resulting generation. This result is also mandated by the plain meaning of the relevant statutory language and the unambiguous statement of legislative intent contained therein.

2. The name and address of the responding party are:

Tampa Electric Company
Post Office Box 111
Tampa, Florida 33601

3. All pleadings, motions, orders and other documents directed to Tampa Electric are to be served on:

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

II. Background

4. IMCA and Duke propose to construct and operate a natural gas fired, combined cycle electric generating unit and associated 69kV transmission lines ("the Project"). The proposed plant's capacity has not yet been determined but is expected to be anywhere from 240 MW to 750 MW. IMCA asserts that the proposed plant would satisfy its own needs of approximately 120 MW, with the balance of the output being sold into the wholesale power market. The plant would not be built to serve the identified need for new capacity of any utility and there are no announced plans to sell the output to a Florida utility. It does not appear that the proposed plant will be a qualifying facility, although IMCA suggests that this is a possibility, at least for a portion of the plant.

5. On October 10, 1997 IMCA filed a Petition for Declaratory Statement in Docket No.971313-EU ("IMCA Petition") asking the Commission to issue an order declaring that the proposed ownership and operational structure of certain planned self-generating

facilities and transmission facilities ("the Project") would not result in or be deemed to constitute a sale of electricity to the public at retail or cause the owner or lessor of the Project, or their affiliates, to be deemed a public utility or otherwise be subject to regulation by the Commission. On October 30, 1997, Tampa Electric filed its Petition to Intervene and a separate Answer and Request For Hearing in that Docket setting forth, among other things, the utter lack of any factual basis for granting the relief requested.

6. On October 15, 1997 Duke and IMCA filed their petition ("Joint Petition") in this Docket, asking the Commission to declare that they are entitled to apply for a determination of need for an electrical power plant pursuant to Section 403.519, Florida Statutes, Commission Rules 25-22.080-081, Florida Administrative Code, and various provisions of the Florida Electrical Power Plant Siting Act ("the Siting Act"). As a fall back position Duke and IMCA have asked the Commission to declare that no determination of need is required in connection with their proposed project thereby effectively asking the Commission to ignore its statutory responsibilities.

III. The Plain Meaning Of The Relevant Siting Act Language Conclusively Refutes Duke And IMCA's Assertions Of Entitlement To Applicant Status Under The Act

7. Only an "Applicant" can file an application for electrical power plant site certification under the Siting Act. Furthermore, pursuant to Section 403.519, Florida Statutes, only an

"Applicant" can petition the Commission to determine the need for an electrical power plant subject to the Siting Act. An "Applicant" is defined under the Siting Act as an "Electrical Utility" which is, in turn, defined as:

> cities, towns counties, public utility districts, regulated electric companies, electric cooperatives, and joint operating agencies, or combinations thereof, engaged in, or authorized to engage in, the business of generating, transmitting, or distributing electric energy[1].

Neither Duke nor IMCA can be an "Applicant" under this definition.

IV. Duke and IMCA's Interpretation Of The Term "Regulated Electric Companies" Is Fatally Flawed

8. In recognition of the fact that the plain meaning of the relevant statutory provisions clearly contradict their assertions of eligibility for Applicant status under the Act, Duke and IMCA proceed to cruelly torture the unambiguous language of the Siting Act with their assertion that Duke would be a "regulated electrical company", thereby qualifying Duke as an Applicant under the Act. Duke and IMCA contend that Duke will be a "public utility" under federal law, because Duke's planned wholesale sales will be in interstate commerce and subject to FERC jurisdiction. Apparently, Duke and IMCA believe that if Duke can qualify as an Exempt Wholesale Generator ("EWG") under federal law, then Duke would somehow qualify as a "regulated electric company" under Florida law by reason of the FERC jurisdiction over and regulation of EWGs

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[1] Section 403.503 (4) and (13), Florida Statutes

under federal law. This reasoning is clearly erroneous and would lead to absurd results, if accepted.

9. The definition of electric utility for purposes of the electrical Power Plant Siting Act should be read in pari materia with the definition of electric utility under Chapter 366, Florida Statutes, which defines "electric utility" to mean any municipal electric utility, investor-owned electric utility or rural electric cooperative which owns, maintains or operates an electric generation, transmission or distribution system within the state. Doing so supports the proposition that "electric utility company," as used in the definition of electric utility under the Power Plant Siting Act, should be construed to mean an investor-owned electric utility regulated by the Florida Public Service Commission.

10. Duke and IMCA's interpretation of the Siting Act would also seriously compromise Florida's ability to insure that needed capacity would be built without unnecessarily burdening Florida's environment. The Power Plant Siting Act focuses on the present and predicted growth in electrical power demands and the associated environmental impacts incurred in meeting those demands in the state of Florida.

11. The Siting Act must also be read in pari materia with the Grid Law, set forth in Chapter 366 of the Florida Statutes. Pursuant to Section 366.04 (5), this Commission is given:

> ...jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further

> uneconomic duplication of generation, transmission and distribution facilities.

In order to discharge these responsibilities, pursuant to Section 366.05 (8), Florida Statutes, this Commission is given specific power:

> ... to require installation or repair of necessary facilities, including generation plants... and to take all necessary steps to ensure compliance...

12. Tampa Electric respectfully submits that this Commission would be severely handicapped in discharging its responsibilities under the Grid Law if it were to allow Duke and IMCA to be applicants under the Siting Act on the basis of Duke and IMCA's interpretation of the term "regulated electric company". Duke and IMCA's strained interpretation of the term "regulated electric company" would allow Duke to qualify as an Applicant under the Act while remaining conveniently beyond the jurisdiction of this Commission. Therefore, under Duke's interpretation of the Act, the Commission would have no power to require that Duke follow through with the construction of the Project, if the Project were to be certified under the Siting Act to meet a specific Florida need for capacity.

13. Furthermore, under Duke's interpretation of the Siting Act, the Commission would be powerless to insure the output of the Project, if constructed, would be dispatched to meet Florida's identified capacity needs. Instead, Duke would be free to transmit its portion of the Project's output to other states where Duke's profit margin might be higher. Under this scenario, a plant

certified and built to serve Florida's need for new capacity could instead be used to generate for export, leaving Florida to absorb the resulting environmental impacts without satisfying its capacity needs. This outcome would only serve Duke's interests at the expense of Florida's residents and ratepayers. This result would be clearly inconsistent with the objectives of both the Siting Act and the Grid Law.

V. The Cases On Which Duke/IMCA Rely Confirm Their Ineligibility As Applicants Under The Act

14. Duke and IMCA's reliance on In re: Petition of Nassau Power Corporation to Determine Need for Electrical Power Plant[2] ("Nassau Power") and In re: Florida Crushed Stone Company Power Plant Site certification application,("FCS") is seriously misplaced. In the Nassau Power case, the Commission concluded that Nassau and Ark Energy, two non-utility generators, were not proper applicants for a need determination proceeding under Section 403.519, Florida Statutes. The Commission stated that Ark and Nassau did not qualify as applicants because neither was a city, town or county, nor was either a public utility district, regulated electric company, electric cooperative or joint operating agency.

15. The Commission in Nassau Power, supra, observed that each of the entities listed under the statutory definition is obligated to serve customers. The Commission noted that it is this need, resulting from a duty to serve customers, which the need

[2]Consolidated Docket Nos. 920769-EQ, 920761-EQ, 920762-EQ and 920783-EQ.

determination proceeding is designed to examine. The Court went on to observe:

> Non-utility generators such as Nassau and Ark have no such need since they are not required to serve customers. The Supreme Court recently upheld this interpretation of the Siting Act. Dismissal of these need determination proceedings is in accord with that decision. See, Nassau Power Corporation v. Beard, 601 So.2d 1175 (Fla. 1992).

16. The Supreme Court of Florida subsequently affirmed the Commission's dismissal of Nassau and Ark as being improper applicants for a determination of need under the Power Plant Siting Act. Nassau Power Corporation v. Deason, 641 So.2d 396 (Fla. 1994). In that decision the Supreme Court squarely addressed the Commission's basis for dismissing Nassau's and Ark's petitions, reasoning that only electric utilities or entities with whom such utilities have executed a power purchase contract are proper applicants for a need determination proceeding under the Siting Act. The Court observed:

> The Commission's construction of the term 'applicant' as used in Section 403.519 is consistent with the plain language of the pertinent provisions of the Act and this Court's 1992 decision in Nassau Power Corporation v. Beard. (Emphasis added)

17. Duke and IMCA's efforts to distinguish prior decisions of this Commission are erroneous. In their search for precedent for their project proposal, Duke and IMCA place unwarranted reliance upon the Commission's decision in the Florida Crushed Stone case.[3]

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[3] In re: Petition of Florida Crushed Stone Company for Determination of Need for a Coal-Fired Generation Electrical Power Plant, Order No. 1161 (Florida Public Service Commission, February

The Florida Crushed Stone decision significantly predated the Commission's decision in the Nassau Power and Ark Energy cases and was effectively overruled by Nassau Power where this Commission determined:

> The fact that non-utility applicants may have been allowed to bring need determination petitions in the past does not compel us to do so in this case. Cogenerators have proliferated in the eight years since the Siting Board granted certification for Florida Crushed Stone. See In re: Florida Crushed Stone Company Power Plant Site certification application, PA 82-17, March 12, 1984. This Commission, which is the sole forum for determinations of need under Section 403.519, Florida Statutes (1991), may validly decide that allowing non-utility applicants to bring need determination proceedings under Section 403.519 is not in the public interest. More significantly, the legislature has not included non-utility generators in its definition of "applicants" who may initiate need determination proceedings. (Emphasis added)

VI. Duke And IMCA's Alternative Request To Be Excused Altogether From The Need Determination Required Under The Siting Act Would Completely Undermine The Legislature's Basic Intent In Enacting The Act

18. On grounds which are, at best, factually and logically bankrupt, Duke and IMCA urge this Commission to simply declare that they can proceed with their Project in the absence of a need determination and without regard to Florida's need for the resulting capacity. In so doing, this Commission would render impossible the balancing of Florida's need for additional capacity against the environmental price associated with the construction

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14, 1983).

and operation of such capacity.

19. Pursuant to Section 403.506(1), all new power plants to be constructed in Florida, except for those power plants explicitly exempted, must first obtain certification under the Siting Act. As set forth in Section 403.502(2), the legislature's basic intent in enacting the statute was:

> To effect a reasonable balance between the need for the facility and the environmental impact resulting from construction and operation of the facility, including air and water quality, fish and wildlife, and the water resources and other natural resources of the state.

20. The reasoning underlying this statement of legislative intent is elegant in its simplicity. Since all power plants will have an impact on the environment, even with the implementation of reasonable mitigation measures, the state should not tolerate any incremental environmental impacts unless the new plant in question is really needed to meet Florida's reliability requirements. Duke and IMCA's request to proceed with their Project without regard to need would obviously make it impossible to determine whether incurrence of the resulting environmental impacts would be warranted in light of need.

21. The bottom line is that Duke and IMCA do not qualify as Applicants under the Siting Act. Yet, they cannot build their project, as currently proposed, without successfully completing the Siting Act process. This result is consistent with the legislative intent that environmental impacts associated with the construction and siting of all non-exempt power plants in Florida will be tolerated only if there is a sufficient and verifiable need by a

specific public utility system[4], within the state, for the proposed new capacity.

WHEREFORE, Tampa Electric urges the Commission:

(1) To deny the primary and alternative relief requested by Petitioners on a summary basis; or

(2) To convene a hearing under Section 120.57(2), Florida Statutes, and thereafter to enter its order determining that the project described in the Duke/IMCA Petition must be the subject of a determination of need pursuant to Section 403.519, Florida Statutes, and Duke and IMCA are not appropriate applicants for a determination of need under the Power Plant Siting Act.

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[4] See Nassau Power, where the State Supreme Court concluded:

" We reject Nassau's alternative argument that the Siting Act does not require the PSC to determine need on a utility-specific basis. In Order No. 22341, the Commission clearly adopted the position that the four criteria in Section 403.519 are "utility and unit specific" and that need, for purposes of the Siting Act, is the need of the entity ultimately consuming the power... The PSC's interpretation is consistent with the overall directive of Section 403.519 which requires, in particular, that the Commission determine the cost-effectiveness of a proposed power plant. This requirement would be rendered virtually meaningless if the PSC were required to calculate need on a statewide basis, without considering which localities would actually need more electricity in the future."

DATED this 25th day of November, 1997.

Respectfully submitted,

LEE L. WILLIS
JAMES D. BEASLEY
Ausley & McMullen
Post Office Box 391
Tallahassee, Florida 32302
(904) 224-9115

HARRY W. LONG, JR.
TECO Energy, Inc.
Post Office Box 111
Tampa, Florida 33601-0111

ATTORNEYS FOR TAMPA ELECTRIC COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer, filed on behalf of Tampa Electric Company, has been furnished by U. S. Mail or hand delivery (*) on this 25th day of November, 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. Joseph A. McGlothlin
Ms. Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin,
Davidson, Rief & Bakas, P.A.
117 South Gadsden Street
Tallahassee, FL 32301

Mr. Robert Scheffel Wright
Landers & Parsons, P.A.
310 West College Avenue
Post Office Box 271
Tallahassee, FL 32302

Mr. Richard Bellak*
Division of Appeals
Florida Public Service
Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Mr. Steven F. Davis
IMC-Agrico Company
Post Office Box 2000
3095 County Road 640 West
Mulberry, FL 33860

ATTORNEY

[redacted]