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PLEASE REPLY TO:
TALLAHASSEE

December 1, 1997

VIA HAND DELIVERY

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

Re: Docket No. 971313-EI

Dear Ms. Bayó:

Enclosed are the original and 15 copies of IMC-Agrico's Response in Opposition to Florida Power and Light Company's Petition to Intervene and Motion to Dismiss in the above docket.

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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FPSC-RECORDS/REPORTING

ORIGINAL

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: December 1, 1997

IMC-AGRICO COMPANY'S RESPONSE IN OPPOSITION TO FLORIDA POWER AND LIGHT COMPANY'S PETITION TO INTERVENE AND MOTION TO DISMISS

Under the provisions of rule 25-22.037, Florida Administrative Code, IMC-Agrico Company (IMCA), through its undersigned counsel, files its Response to Florida Power and Light Company's (FP&L) Motion to Dismiss and Petition to Intervene. FP&L's Motion to Dismiss is premature. It is not a party and therefore has no standing to file such a motion. For the reasons stated herein, FP&L should not be granted party status.

1. Declaratory Relief Sought. On October 10, 1997, IMCA filed a petition under the Commission's declaratory statement rule 25-22.021, Florida Administrative Code, requesting the Commission to affirm that IMCA does not subject itself to Commission jurisdiction, if for financing and other business reasons, it forms an affiliated company with which it has a unity of interest to generate electricity for IMCA's own use.

IMCA also asked the Commission to declare that joint ownership of a generating plant for economies of scale does not change the nature of the self-generation component of the portion of the plant owned by IMCA through its affiliated *alter ego* company. The generating plant to be constructed will be jointly owned with another company, which will be an exempt wholesale generator (EWG) under the provisions of 15 U.S.C. § 79 z-5a(1). Jointly-owned generating plants are not unusual in Florida.

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All Florida nuclear plants are jointly owned. FP&L jointly owns the St. Johns Power Park with JEA and the Scherer plant with Georgia Power.

2. Disposition Schedule. Section 120.565(3), Florida Statutes, provides that IMCA's declaratory statement petition be handled by the Commission within 90 days. The Commission established a schedule designed to take official action on the straightforward questions posed in IMCA's petition on December 16, 1997. FP&L filed its petition to intervene on November 19, and served it by mail on the first-named undersigned counsel. FP&L requests party status and the opportunity to explore IMCA's confidential business relationships as though they are "disputed facts." The Commission should reject out of hand patent devices to hinder and delay proceedings that are mandated by law to be conducted with dispatch.

3. FP&L Lacks Standing. FP&L lacks standing to intervene in this proceeding. Therefore, its petition should be denied.

4. Criteria for Standing. To gain standing to intervene, FP&L must demonstrate that it complies with the two-pronged test for standing set out in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981); Florida Department of Offender Rehabilitation v. Jerry, 353 So.2d 1230 (Fla. 1st DCA 1978). It must show:

> 1) that [it] will suffer injury which is of sufficient immediacy to entitle [it] to a § 120.57 hearing, and
> 2) that [its] substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Agrico at 482.

5. FP&L Can Meet Neither Test. As FP&L acknowledges, IMCA is not even a customer of FP&L. Injury to FP&L is non-existent. Further, FP&L would have no standing even if the proceeding were designed to protect FP&L from injury.

6. FP&L's Fishing Expedition. Like the other public utilities which have sought to intervene in this case, FP&L seeks to expand its government-protected monopoly status. While paying lip service to a customer's right to self-generation in paragraph 5 of its motion to intervene, FP&L then seeks to undermine this right in paragraph 11 by asking 21 irrelevant questions, such as, "Whether IMCA plans to enter into lease and contract transactions similar to those of another phosphate manufacturer in central Florida?" FP&L refers to these questions to as "disputed facts." The questions seek far more confidential information from an unregulated customer than any regulated utility provides about its relations with affiliated companies.

7. FP&L's Proposed Scope of Declaratory Statement Proceedings. FP&L's approach to self-generation would appear to subject customers seeking self help to submit to an all pervasive regulatory procedure in which every public utility in the state could intervene. Declaratory proceedings designed to address specific petitioner concerns would be converted into protracted litigation in which all utilities could delve into the private business affairs of another utility's customer and raise hypothetical "disputed material facts." Other parties interested in policies of general application but relying on the statutory limitations of section 120.565, Florida Statutes, proceedings would not be aware that the Commission was setting such policy.

8. FP&L's Attempt to Broaden Government Protection. The thinly-veiled purpose of FP&L's proposed intervention in this case is to create a regulatory policy to increase government protection for all electric utilities by ensuring that customers have an obligation to buy from public utilities. Three of the four adverse effects postulated in paragraph 5 of FP&L's concatenated litany of hypothetical potential pitfalls are daily occurrences for regulated utilities as customers change their load patterns or leave the system. They are not unique. Even if they were unusual, a declaratory statement proceeding is not designed to establish policy of general applicability dealing with customers' obligations to continue to buy from public utilities. The present proceeding should not be expanded into a back door rule proceeding.

9. Limited Issue Before Commission. The issue before the Commission posed by IMCA is not whether IMCA is prohibited from additional self-generation (obviously it is not). IMCA has an immediate and present need for a determination of whether the proposed business organization chosen to construct a $100 million facility achieving the greatest available economies of scale subjects IMCA to the Commission's jurisdiction or whether it must choose another method to self-generate electricity. This private request does not entitle FP&L or any other electric utility to discover the detailed components of IMCA's private and confidential contract relations. Under Commission rule 25-22.021, Florida Administrative Code, a declaratory statement, by its very nature, can affect only the petitioner, IMCA, and no other person. The business organization and plant size presented in this case is not the *sine quo non* model that all self-generation aspirants should be required to follow.

10. <u>Declaratory Statement Precedent.</u> FP&L cites a case that provides considerable value to the Commission in understanding the nature of petitions to intervene. In <u>Department of Health and Rehabilitative Services v. Barr</u>, 359 So.2d 503 (Fla. 1st DCA 1978), the court held that formal agency statements rendered in declaratory statement proceedings cannot be collaterally attacked. It then went on to evaluate the rights of persons who are not parties to those proceedings. The court opined on the nature of declaratory statements. It said:

> Respondents have expressed concern that persons not parties to a Section 120.565 proceeding, who therefore are not in a position to seek judicial review of the resulting declaratory statement, may later be adversely affected. . . . That is true . . . Agency orders . . . may in the same way indirectly determine controversies and affect persons yet unborn. But the rule is stare decisis, not res adjudicata. If such a person's substantial interests are to be determined in the light of a prior agency order or declaratory statement, Section 120.57 proceedings will afford him the opportunity to attack the agency's position by appropriate means, and Section 120.68 will provide judicial review in due course.

<u>Id.</u> at 505.

In the present case, IMCA relies upon the *stare decisis* established in the cases cited in its petition. It modeled its business structure on those cases, but other customers should not be restricted from exploring other approaches as technology changes and opportunity for distributive generation matures. If FP&L can prove that its substantial interests are affected by some case in the indefinite future by one of its customers, it may well have standing to intervene at that time if it can meet the criteria for intervention, but no such standing presents itself in this case. This is not a

proceeding designed to explore speculative impacts on FP&L if some of its customers plan self-generation.

CONCLUSION

FP&L has met neither prong of the Agrico standing test Therefore, its petition to intervene must be denied and its motion to dismiss must fall with it. Its rationale for intervening really seeks to turn this proceeding into rule making and goes well beyond the scope of a petition for declaratory statement. FPL's concerns are not germane to the current proceeding. They raise speculative matters designed to delay and obstruct the current case and should be rejected out of hand.

WHEREFORE, FP&L'S Petition to Intervene should be denied and its motion to dismiss ignored.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **IMC-Agrico Company's** foregoing **Response in Opposition to Florida Power & Light Company's Petition to Intervene and Motion to Dismiss** has been furnished by U.S. Mail or hand delivery(*) on this **1st** day of **December, 1997**, to the following:

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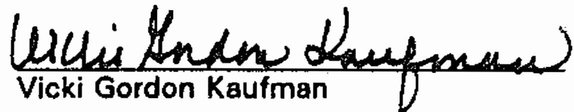

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