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December 11, 1997

VIA HAND DELIVERY

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

Re: Docket No. 971337-EU
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

ACK ____
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CMU ____
CTR ____
EAG ____
LEG ____
LIN 5
OPC ____
RCH ____
SEC 1
WAS ____
OTH ____

Dear Ms. Bayo:

Enclosed for filing in Docket No. 971337-EU are the original and fifteen copies of Enron Capital and Trade Resources Corp.'s Motion for Leave to File an Amicus Curiae Memorandum of Law and Request to Address the Commission, and Enron Capital and Trade Resources Corp.'s Amicus Curiae Memorandum of Law.

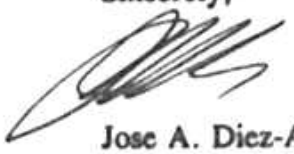
Also enclosed is an additional copy of each document which we request you date stamp and return to us.

Motion for leave
12718-97

memo of law
12719-97

If you have any questions, please feel free to call me.

Sincerely,



Jose A. Diez-Arguelles

JAD/sb
Enclosures

cc: Richard A. Blandford
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Gary P. Timin

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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 11, 1997

ENRON CAPITAL AND TRADE RESOURCES CORP.'S AMICUS CURIAE MEMORANDUM OF LAW

I. INTRODUCTION

Enron Capital and Trade Resources Corp. ("ECT") respectfully submits this Amicus Curiae Memorandum of Law in support of the Petition for Declaratory Statement ("Petition") filed by Duke Mulberry Energy, L.P. ("Duke") and IMC-Agrico Company ("IMCA") (hereinafter jointly referred to as "Duke/IMCA").

In the Petition, Duke/IMCA asks the Commission to declare that it is a proper applicant for a need determination pursuant to Section 403.519, Florida Statutes, and the Florida Electrical Power Plant Siting Act, Sections 403.501-403.518, Florida Statutes ("the Siting Act"). Alternatively, if the Commission determines that Duke/IMCA may not apply for a need determination, Duke/IMCA requests a declaration that they are not required to obtain a need determination in order to construct the plant.

ECT respectfully submits that the legal analysis set forth in the Petition is correct and that Duke/IMCA must be allowed either to apply for a need determination or to proceed without a need determination. Also, ECT respectfully submits that a Commission decision

interpreting the Siting Act as prohibiting Duke/IMCA from applying for a need determination and, at the same time, requiring a need determination as a condition precedent to the construction of the plant, as contended by other entities participating in this Docket, would result in the absolute prohibition of construction of the plant in Florida. Such a result would conflict with and frustrate the federal policy to increase competition in the wholesale electrical generating market and is preempted by federal law.

II. ANALYSIS OF THE SITING ACT

This section of the memorandum briefly reiterates and expands on the legal analysis contained in the Petition. Section III addresses the federal preemption issue.

Duke/IMCA will construct an Exempt Wholesale Generator ("EWG") in Florida. Under federal law, an EWG is a "regulated electric company." Thus, the power plant that will be constructed by Duke/IMCA will be an "electric utility" as defined in Section 403.503(13), Florida Statutes. As such, Duke/IMCA is an "applicant" under Section 403.519, Florida Statutes, and may apply for a need determination.

The Siting Act should be liberally construed to accomplish its public policy purpose of streamlining the siting process. See Palm Beach County School Board v. State, 576 So. 2d 362, 364 (Fla. 4th DCA 1991). The Siting Act should be implemented in a manner that allows parties desiring to construct and operate non-exempt facilities to be applicants and take advantage of the strong environmental and public policy benefits of participating in the integrated permit process.

The definition of "applicant" contained in Section 403.519, Florida Statutes, is unambiguous. This definition must be interpreted in accordance with its plain meaning. C.W. v. State, 655 So. 2d 87, 88 (Fla. 1995) (the plain and ordinary meaning of a statute must be given

effect unless to do so would lead to an unreasonable or ridiculous conclusion). The Commission should conclude that Duke/IMCA is an "applicant" because IMCA will be serving its own needs and Duke is a "regulated electric company," as that phrase is ordinarily defined. Because the Siting Act does not distinguish between federal regulation and state regulation, the fact that Duke/IMCA is regulated by the Federal Energy Regulatory Commission ("FERC") and not the Commission does not alter this conclusion. The Commission may not legislate; it cannot limit "applicants" to state regulated electric companies when the legislature did not.[1]

Even if the Commission finds that the definition of "applicant" is ambiguous, it should employ well-established rules of statutory construction and resolve any ambiguity in Duke/IMCA's favor. The Siting Act is not part of the Commission's regulatory statutes. Rather, it is contained in Chapter 403, Florida Statutes (entitled "Environmental Control"), which is a Florida Department of Environmental Protection regulatory chapter. Thus, the Commission should not rely strictly on its interpretation of the term "electric utility," as used in Commission statutes and regulations, when construing the term "regulated electric company," as used in the Siting Act. Instead, the Commission should interpret the Siting Act in light of its broad public purpose to facilitate the siting of electrical power plants and limit duplication of administrative regulation, thus saving time and expense both for the applicants and for the governmental

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[1] Courts and agencies may not, in the process of construction, insert words or phrases in a statute, or supply an omission that to all appearances was not in the minds of the legislators when the law was enacted. Public Health Trust of Dade County v. Lopez, 531 So. 2d 946, 949 (Fla. 1988); Brooks v. Anastasia Mosquito Control Dist., 148 So. 2d 64, 66 (Fla. 1st DCA 1963). If the language of a statute is clear and not entirely unreasonable or illogical in its operation, a court has no power to go outside the statute in search of excuses to give different meaning to the words used in the statute. Zopf v. Singletary, 686 So. 2d 680, 681 (Fla. 1st DCA 1996).

entities involved. To effectuate this public policy, the Commission must liberally construe the statute so that its beneficial results may be realized to the fullest extent possible. Vocelle v. Knight Bros. Paper Co., 118 So. 2d 664, 668 (Fla. 1st DCA 1960). If the Act is applied liberally, the Commission should conclude that Duke/IMCA, as a "regulated electric company," is a proper applicant.

If the Commission determines, in the alternative, that Duke/IMCA may not be an applicant under the Siting Act, then it must be allowed to build the plant using the "regular" permitting process. See, e.g., In re: International Minerals and Chemical Corporation, New Wales Operations, OGC File No.: 85-0611, Declaratory Statement issued September 4, 1985. There, the Siting Board determined that the developer of a proposed plant expansion was not within the purview of the Siting Act because the developer would consume all the power itself and did not propose to sell power to the public or another utility. The Siting Board also determined that:

> [t]he consequence of IMC's proposed conversion not coming within the purview of the Act is that IMC cannot benefit from the consolidated "one stop" licensing envisioned by the Act. IMC must still receive all necessary permits and comply with all requirements of appropriate state, local and federal governmental authorities.

Id. at 4. The clear implication of this decision is that a proposed plant that does not fall within the Siting Act is not prohibited, but may be built without the benefit of "one-stop" licensing.

Failure to find that Duke/IMCA is an "applicant" would produce an unreasonable and arbitrary result. It would be clearly unreasonable for the Commission to determine that Duke/IMCA is required to use the Siting Act process while simultaneously prohibiting it from

doing so by a restrictive interpretation of the term "applicant." The Commission may not interpret the term "applicant" in an unreasonable manner when the language of the definition is susceptible to an alternative, reasonable interpretation. State v. Iacovone, 660 So. 2d 137, 1373 (Fla. 1995); Amente v. Newman, 653 So. 2d 1030 (Fla. 1995).

In conclusion, Duke/IMCA either is within the Siting Act and may apply for a need determination or falls outside the Siting Act and must follow "regular" permitting procedures.

III. FEDERAL PREEMPTION

A. Overview

The Commission should not interpret the Siting Act and Section 403.519, Florida Statutes, in a manner that is inconsistent with federal law. An interpretation that results in an absolute prohibition of the construction of FWGs in Florida would impermissibly block implementation of federal law favoring competition in wholesale electric power generation.

The Supremacy Clause of Article VI of the United States Constitution provides Congress with power to preempt state law. Independent Energy Producers Ass'n, Inc. v. California Pub. Util. Comm'n, 36 F.3d 848, 853 (9th Cir. 1994). Congress's preemption power may be manifested in several ways. Preemption can result from the plain language of a statute or through a federal agency acting within the scope of its congressionally delegated authority. Id. (quoting Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369 (1986)). Absent explicit preemptive language, Congress's intent to supersede state law may be found from a scheme of federal regulation so pervasive as to support a reasonable inference that Congress left no room to supplement it. Pacific Gas and Elec. Co. v. State Energy Resource

Conservation & Development Comm'n, 461 U.S. 190, 203 (1983). Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such conflict can arise in two ways: where compliance with both federal and state regulation is a physical impossibility, or where state law stands as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Boggs v. Boggs, 117 S.Ct. 1754, 1762 (1997) (emphasis added). The Eleventh Circuit refers to these varieties of preemption (in the order identified above) as "express preemption," "field preemption," and "conflict preemption." Lewis v. Brunswick Corp., 107 F.3d 1494, 1500 (11th Cir. 1997). An interpretation of the Siting Act that requires all plant developers to apply under the Siting Act, but then does not allow Duke/IMCA to apply because it is not considered an "applicant," would result in "conflict preemption." Such interpretation would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

The Energy Policy Act of 1992[2] ("EPAct") has the purpose of reducing American dependence on oil and decreasing consumer costs.[3] Congress's plan to accomplish this purpose provides for new competitors in the form of EWGs and access to transmission systems. Congress's objective in creating EWGs and giving them access to transmission systems is to increase competition in the wholesale market. FERC Order 888 achieves this objective by mandating functional unbundling of transmission and generation services while

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[2] Pub. L. No. 102-486, 106 Stat. 2905 (codified in scattered sections of Titles 15 and 16 of the United States Code).

[3] H.R. Rep. No. 474(I), 102d Cong., 2d Sess. 132 (1992), reprinted in 1992 U.S.C.C.A.N. 1954, 1962, 2015.

providing for stranded cost recoveries for existing utilities. A Commission determination that the Siting Act absolutely prohibits the construction of EWGs would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress and therefore is preempted.

B. The Energy Policy Act of 1992

In response to the Iraqi invasion of Kuwait, Congress passed comprehensive energy legislation to reduce American dependence on oil.[4] The nineteen titles of the legislation address nearly every aspect of energy use.[5] Title VII of the legislation promotes competition and efficiency in the wholesale energy market.

Subtitle A of Title VII modifies the Public Utility Holding Company Act ("PUHCA") to create a new class of power generators -- EWGs.[6] Congress's intent in exempting EWGs from PUHCA was to allow easier entry into the wholesale generation market, thereby increasing competition.[7] An EWG is exempt from all provisions of PUHCA. The overall intent of Congress is to stimulate greater participation in the wholesale market.[8]

Subtitle B of Title VII of the bill amends the Federal Power Act by allowing a utility, federal power marketing agency, or any other person generating electricity to apply to FERC

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[4] H.R. Rep. No. 474(I), 102d Cong., 2d Sess. 132 (1992), reprinted in 1992 U.S.C.C.A.N. 1954, 1962, 2015.

[5] See EPAct, supra note 2.

[6] 15 U.S.C. s. 79z-5a(e).

[7] The Shape of Competition Under Title VII of the Energy Policy Act of 1992, 47 ADMIN. L. REV. 493, 497 (1995) (hereinafter "Competition").

[8] Competition, supra note 7 at 497-98.

for an order ("wheeling order") requiring a transmitting utility to provide transmission service.[9] Such an order allows transmission-dependent utilities access to the wholesale generation market on the same basis as transmitting utilities. This results in increased competition for wholesale customers and uses generating and transmitting resources more efficiently. The desired effect is a reduction in price for the electricity consumer.

Once a generator applies for a wheeling order under section 211 of the EPAct, FERC considers whether the generator meets the criteria of section 212 and whether the order would otherwise be in the "public interest." FERC has interpreted the public interest requirement to include whether the requested wheeling order is pro-competitive.[10] FERC has determined that the availability of transmission service will enhance competition in the market for power supplies and lead to lower costs for consumers.[11]

C. FERC Order 888

In 1996, FERC issued Order 888[12] to remove impediments to competition in the wholesale marketplace and to bring more efficient, lower cost power to the nation's electricity consumers. In addition to opening access to transmission lines, FERC provided for recovery of transition costs of moving from a monopoly-regulated regime to "one in which all sellers can compete on a fair basis and in which electricity is competitively

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9 16 U.S.C. s. 824j, 824k.

10 See Competition, supra note 7 at 499-500.

11 Florida Municipal Power Agency v. Florida Power & Light Co., 67 FERC 61,167, 61,477, order on reh'g, 74 FERC 61,006 (1996).

12 61 Fed. Reg. 21540 (May 10, 1996)

priced."[13] FERC's goal under Order 888 is to "facilitate the development of competitively priced generation supply options, and to ensure that wholesale purchasers of electric energy can reach alternative power suppliers and vice versa."[14]

FERC anticipates changes in the electric industry as older, less efficient power producers are displaced by EWGs, QFs, etc. To address this problem, FERC provides for the recovery of wholesale stranded costs that are "legitimate, prudent, and verifiable."[15]

FERC acknowledged that its regulation was a unique exercise in federalism that manifested its strong interest in preventing balkanization of the interstate power market.[16] In effect, FERC's order mandates a restructuring of the electric power industry. It orders functional unbundling of wholesale generation and transmission services.[17] The new industry structure is based on equal access to the transmission services, resulting in competition for wholesale customers among generating companies.

D. Analysis

The EPAct of 1992 and FERC Order 888 have clear purposes and objectives. The EPAct is designed to increase competition by creating a new class of electricity generators exempt from Holding Company Act restrictions and authorizing the FERC to require

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[13] 61 Fed. Reg. 21541

[14] Id. at 21,547 (recognizing the Congressional goal in the EPAct of "creating competitive bulk power markets").

[15] Id. at 21,629.

[16] Id. at 21,733-34 (Statement of Commission Hoecker).

[17] Id. at 21,552. Theoretically, a functionally unbundled transmission company would be either neutral or in favor of constructing EWGs since they would represent additional customers for its services.

utilities to provide transmission services. FERC Order 888 implements Congress's intent by mandating equal access to transmission systems. EWGs are designed to compete with the existing power industry. Taken as a whole, the clear objective of the EPAct is to increase competition and reduce consumer costs. The EPAct creates competitors in the form of EWGs and grants equal access to the transmission grid. If the Siting Act is interpreted to prevent an EWG from being built in Florida, then the Siting Act prevents, rather than encourages, competition. A state process that in effect vetoes a federal scheme is subject to attack on preemption grounds and must be modified to be consistent with federal objectives.

In Sayles Hydro Associates v. Maughan, 985 F.2d 451 (9th Cir. 1993), FERC issued a license to build and operate a small hydroelectric power project. The California State Water Resources Board refused to issue an operating permit because the applicant failed to meet state permitting requirements which consisted of an onerous process of environmental, economic and other studies. The applicants argued that FERC's licensing process had considered many of the state requirements and that those requirements were preempted by the federal process. The Ninth Circuit agreed and stated that a "state process itself [could] be an obstacle to the accomplishment of the full purposes and objectives of Congress in authorizing [FERC] to license the project to proceed." Id. at 456. The essence of the Ninth Circuit's opinion is that a state would not be allowed to "veto" a project through "undue" licensing procedures. Id.[18]

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[18] The Sayles court went on to state that "most or all of the state's concerns were considered by [FERC] in granting the license, and conditions were imposed in the license to protect these multiple values." Id. While the Sayles decision is distinguishable from the current case, its holding supports the argument that a state "process" cannot be used to veto or unreasonably withhold the ability to implement a federal scheme. An interpretation of

In this case, Congress has authorized the creation of a new exempt generating entity if it sells energy only in the wholesale market. If Florida's Siting Act were interpreted to prevent EWGs from being built in Florida, then the Siting Act is an obstacle to the accomplishment of the full purposes and objectives of Congress in authorizing the formation of EWGs.

In Independent Energy Producers Association, supra, the California Public Utilities Commission (CPUC) argued that it had the authority to allow utilities to pay less than full avoided costs to QFs that failed to meet federal operating and efficiency standards. The Ninth Circuit held that CPUC's authority was preempted by FERC's regulations. Id. at 854. The Ninth Circuit noted that "nowhere do these regulations contemplate a role for the state in setting QF standards or determining QF status." Id. at 855. Similarly, if FERC approves an application for an EWG, and Florida law were interpreted to absolutely prohibit the plant's construction, the Commission's decision would improperly intrude upon FERC's exclusive authority to determine the status of an EWG.

In California v. F.E.R.C., 495 U.S. 490 (1990), the Supreme Court denied California's attempt to supplement federal requirements levied on a hydroelectric project because the purpose and structure of the Federal Power Act ("FPA") envisioned a broad and active federal oversight role in hydropower development. Id. at 491. FERC had set minimum water flow limits; the state sought to impose additional requirements before it would grant a state water use license. The Court held that "allowing California to impose significantly higher [licensing] requirements would . . . constitute a veto of the project that

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Florida's Siting Act that absolutely barred construction of an EWG would be such a process.

was approved and licensed by FERC." Id. at 506. Therefore, California's additional licensing requirements were preempted by the federal requirements. Similarly, if Florida sets up an impenetrable legal roadblock to EWGs seeking to build plants in the state, these technical roadblocks are preempted by the federal regulatory scheme.

Although Congress has not preempted state authority over the siting of power plants,[19] a state may not use its regulatory authority to wholly prohibit the construction of EWGs. This position is clearly stated in Order 888:

> Although jurisdictional boundaries may shift as a result of restructuring programs in wholesale and retail markets, we do not believe this will change fundamental state regulatory authorities including authority to regulate the vast majority of generation asset costs, the siting of generation and transmission facilities, and decisions regarding retail service territories. We intend to be respectful of state objectives so long as they do not balkanize interstate transmission of power or conflict with our interstate open access policies.

61 Fed. Reg. 21542 (May 10, 1996) (emphasis added). Under the federal scheme, the state's authority extends to costs, siting, and retail service territories. The state's authority does not include authority to prohibit EWGs from being built in the state when the plants meet applicable environmental and zoning requirements.

In conclusion, the EPAct and Order 888 seek to promote competition and cost reduction in the electric power production and transmission industries. One of the key components of this scheme is a provision creating EWGs and encouraging their formation by exempting them from the provisions of PUHCA. If Florida places barriers to the formation

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[19] See EPAct, supra note 2, s. 731. "Nothing in this title or in any amendment made by this title shall be construed as affecting or intending to affect, or in any way to interfere with, the authority of any State or local government relating to environmental protection or the siting of facilities." Id. This provision is contained in the EPAct but has not been codified.

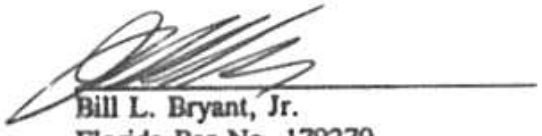
of EWGs via restrictive interpretation of the term "applicant" in the Siting Act, then that interpretation of the Siting Act would stand as an obstacle to realizing Congressional intent and such a restrictive interpretation is therefore preempted.

ECT wants to emphasize that it is not suggesting that the Commission is preempted from carrying out its duties under the Siting Act. Rather, ECT argues that a restrictive interpretation of the Siting Act is preempted.

IV. CONCLUSION

For the reasons set forth above, Duke and IMCA's Petition for a Declaratory Statement should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Enron Capital & Trade Resources Corp's Amicus Curiae Memorandum of Law was served by Hand Delivery (when indicated with an *) or mailed the 11th day of December, 1997 to the following:

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