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December 12, 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 Florida Power and Light Company's Petition for Leave to Intervene. 12750-97

2. IMC-Agrico Company's Response to Florida Power and Light Company's Amicus Curiae Memorandum. 12751-97

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

Vicki Gordon Kaufman

VGK/pw
Encls.

ACK
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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: December 12, 1997

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

IMC-Agrico Company (IMCA), through its undersigned counsel, files its Response in Opposition to Florida Power and Light Company's (FPL) Petition to Intervene. FPL lacks standing to intervene in this proceeding; therefore, its petition to intervene should be denied.

I.

Background

1. On October 15, 1997, IMCA and Duke Mulberry Energy, L.P. (Duke Mulberry) filed a petition for declaratory statement seeking a declaration that 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 combination self-generation and merchant plant project.

2. On December 9, 1997 (one week before the Commission is scheduled to vote on IMCA/Duke Mulberry's petition for declaratory statement), FPL filed a Petition for Leave to Intervene. FPL lacks standing to intervene in this proceeding and its petition should be denied.

II.

FPL Fails to Meet the Standing Requirements

3. To be granted intervention, FPL 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). That is, it must show that it will suffer such immediate injury that it is entitled to a § 120.57 hearing and the injury must be of the type the proceeding is designed to protect. FPL can meet neither test.

A.

FPL has failed to demonstrate immediate injury

4. An analysis of FPL's claim of "immediate injury" must begin with the fact that IMCA has the absolute right to self-generate. PW Ventures v. Nichols, 533 So.2d 281, 284 (Fla. 1988).

5. The "immediate injury" which FPL alleges can be boiled down into concern over how the Commission' decision might affect FPL at some unknown time in the future. In In re: Petition of Monsanto Company for a Declaratory Statement Concerning the Lease Financing of a Cogeneration Facility, Docket No. 860725-EU, Order No. 16581, the Commission clearly laid to rest the notion that future precedent would confer standing:

> Dade's only interest in this case is the precedent set on issues common to this docket and Docket No. 860786-EI . . . .Potential adverse legal precedent does not constitute the "substantial interest" needed for intervention under our rule (Rule 25-22.39, Florida Administrative Code) or the case law. State Department of Health and Rehabilitative Services v. Barr, 359 So.2d 503, 505 (Fla. 1st DCA 1978).

Id. at 1-2.

6. FPL further says that if IMCA/Duke Mulberry are permitted to be applicants, it will undermine FPL's ability to serve its customers, to plan and operate its systems and will result in unnecessary duplication.

7. FPL's claims are nothing more than wild speculation. FPL does not even supply electricity to IMCA. Thus, its claims that somehow IMCA's ability to be an applicant will create planning difficulties for FPL are no more than unsubstantiated speculation. Such speculation[1] cannot demonstrate immediate injury.[2] Florida Department of Offender Rehabilitation v. Jerry, 353 So.2d 1231 (Fla. 1st DCA 1978), cert. denied, 359 So.2d 1215 (Fla. 1978) (speculation and conjecture cannot confer standing). See also, Department of Health and Rehabilitative Services v. Alice P., 367 So.2d 1045 (Fla. 1st DCA 1979).

8. As Staff stated in its recommendation on similar petitions to intervene filed by FPC and TECO, claims about reliability and planning do not meet the Agrico test. Recommendation at 3.

B.

FPL's "injury" is not the type a declaratory statement proceeding was designed to protect

9. The purpose of a declaratory statement is to permit a person to seek an agency's opinion "as to the applicability of a statutory provision, or of any rule or

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[1] This same speculation is seen in TECO's discussion of its uncertainty over its need for additional resources.

[2] It is also difficult to see any connection between these vague and speculative claims and the legal question of IMCA/Duke Mulberry's right to be an applicant under the Power Plant Siting Act

order of the agency, as it applies to the petitioner's particular set of circumstances."[3]

10. The Commission's rules on declaratory statement makes this obvious because they provide that a declaratory statements apply to the petitioner "in his or her particular set of circumstances only."[4] The rule setting out the use and purpose of a declaratory statement states that "[a] declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of any statutory provision, rule or order as it does, or may, apply to petitioner in his or her particular circumstances only."[5] That is the declaratory statement, by its very nature, can affect only the petitioner and no other person.[6] Therefore, since the declaratory statement process can affect only the petitioners (in this case, IMCA and Duke/Mulberry), it is certainly not the type of proceeding designed to further FPL's interests.

III.

FPL's Allegations of "Disputed Facts" Do Not Give It Standing

11. Finally, FPL lists what it terms "disputed facts" at the end of its petition. None of these "disputed facts" have anything whatsoever to do with whether IMCA/Duke Mulberry are proper applicants under the Siting Act (for example, FPL wants to raise an issue regarding the "socio-economic benefits" of the proposed plant). By attempting to raise these unrelated and irrelevant issues, FPL hopes to

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[3] Section 120.565(1), Florida Statutes, emphasis added.

[4] Rule 25-22.020(1), Florida Administrative Code, emphasis added.

[5] Rule 25-22.021, Florida Administrative Code.

[6] For this same reason, there is no need for the evidentiary hearing TECO seeks.

convert a straight forward declaratory statement proceeding into an evidentiary hearing. However, FPL's attempt must fail.

12. FPL may not attempt to raise issues that have nothing to do with the legal question of whether IMCA/Duke Mulberry are proper applicants.

IV.

Conclusion

FPL can meet neither of the prongs of the Agrico standing test. Therefore, its petition to intervene in this proceeding should be denied.

WHEREFORE, IMCA requests that FPL's petition to intervene and its request for hearing be denied.

Vicki Gordon Kaufman

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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 and Light Company's Petition for Leave too Intervene** has been furnished by U.S. Mail or Hand Delivery(*) this **12th** day of **December, 1997,** to the following:

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