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COGENERATION & ALTERNATIVE ENERGY
ENERGY REGULATORY LAW

VIA FEDERAL EXPRESS

January 23, 1998

Ms. Blanca S. Bayo, Director
Division of Records & Reporting
Florida Public Service Commission
Capitol Circle Office Center
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

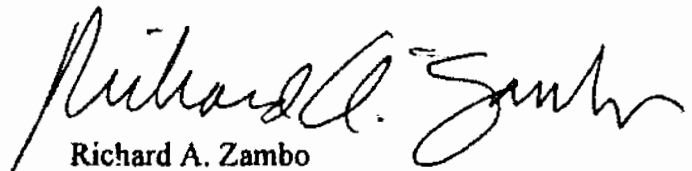
In Re: Petition of IMC-Agrico Company for a Declaratory Statement
FPSC Docket N [REDACTED]

Dear Ms. Bayo:

Enclosed for filing in the above Docket please find an original and 7 copies of the Florida Industrial Cogeneration Association's Motion for Reconsideration of Order No. PSC-98-0074-FOF-EU issued on January 13, 1998 in the referenced proceeding. Also enclosed find a double-sided high density 3.5 inch floppy disk containing this document in WordPerfect 6.1 format as prepared on a Windows-based computer. If you have any questions regarding this filing, please do not hesitate to call.

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Sincerely,


Richard A. Zambo

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CERTIFICATE OF SERVICE
DOCKET NO. 971313-EU

I HEREBY CERTIFY that a copy of the Motion For Reconsideration By Florida Industrial Cogeneration Association in the referenced proceeding has been furnished by U.S. Mail to the following parties of record, this 24th day of January, 1998.

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Division of Appeals
Florida Public Service Commission
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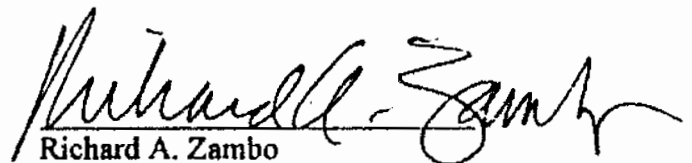
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By:


Richard A. Zambo

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of IMC-Agrico Company)	Docket No. 971313-EU
for a Declaratory Statement Confirming)	
Non-Jurisdictional Nature of Planned)	
Self Generation.)	Submitted for filing:
)	January 23, 1998

**MOTION FOR RECONSIDERATION BY
FLORIDA INDUSTRIAL COGENERATION ASSOCIATION**

The Florida Industrial Cogeneration Association (FICA) and its members, through their undersigned attorney and pursuant to Rule 25-22.060, F.A.C., hereby move the Commission: (a) to reconsider those portions of its Order No. PSC-98-0074-FOF-EU, issued on January 13, 1998 in the captioned proceeding (the "Order"), which fail to grant FICA's Petition For Leave To Intervene as a full party; or, (b) in the alternative, to reverse those portions of the Order which set a hearing and grant intervention to FPC, PRECO and TECO. As grounds therefore FICA says:

1. The exact name of and address of Petitioner are:

Florida Industrial Cogeneration Association
598 S.W. Hidden River Avenue
Palm City, FL 34990

2. The person to whom all pleadings, notices, orders, schedules, recommendations and other documents to be filed or served in this Docket are to be sent is:

Richard A. Zambo
Richard A. Zambo, P.A.
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DOCUMENT NUMBER · DATE

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BACKGROUND

3. On December 8, 1997, FICA timely filed its Petition For Leave To Intervene in the captioned proceeding ("FICA's Petition" or "Intervention Petition") in support of IMC-Agrico. It appears that the Intervention Petition, although timely filed, was submitted to the Commission subsequent to completion of Staff's detailed analysis of the issues presented, and completion of the near final version of the Recommendation. As a result, FICA's Petition was given little attention in the order, and in view of the language in the Order, FICA is also concerned that its Intervention Petition may have been misconstrued. FICA apologizes for any confusion that may have resulted.

4. In its Intervention Petition, FICA urged that a hearing would not be appropriate in the instant case¹ but acknowledged that due to the interest generated by the issues raised that the Commission might grant a hearing². FICA continues to fear that hearings will result in unwarranted and unnecessary delays in the issuance of a final order, thereby affecting not only IMC-Agrico, but FICA's members as well.

5. Anticipating the possibility of a hearing, albeit expecting it to be unlikely, FICA's Petition requested, in the alternative: (a) leave to intervene in any such hearings; or, (b) if intervention was not granted to any other party, the opportunity to participate on the same basis as any other party is permitted to participate. Contrary to the implication of the Order, FICA did not request amicus curiae status but rather requested intervention status to the fullest extent any other party is granted intervention. Because Florida Power Corporation (FPC), Peace River Electric Cooperative (PRECO) and Tampa Electric Company (TECO) were granted intervention, FICA respectfully requests that the Commission reconsider and

¹ FICA remains of the opinion that a hearing and intervention are improper in this proceeding and that granting intervenor status to the FPC, PRECO and TECO will do little more than delay the issuance of a final order in this Docket.

² It is not intuitive that a hearing will produce any more information than would have been provided by IMC-Agrico, upon request of Staff, on an informal basis.

reverse those portions of the Order which fail to grant FICA's requested intervention; or, in the alternative, to reverse those portions of the Order which set a hearing and grant intervention to FPC, PRECO and TECO (who may be referred to herein as the "Utilities").

6. As set forth in the Intervention Petition, FICA's members own and/or operate cogeneration facilities in conjunction with various industrial operations at locations throughout the State of Florida. FICA members, including CF Industries Inc., Cargill Fertilizer, Inc., Mulberry Phosphates, Inc., and U.S. Agri-Chemicals Corporation, sell electric power to and purchase electric power from TECO and/or FPC, and belong to the body of ratepayers FPC and TECO seek to protect through their participation in this proceeding.

7. FICA's members manufacture "commodity" products and as such face vigorous competition from many other producers - both domestic and foreign. Control and minimization of production costs - of which electric power constitutes a substantial component - is paramount to the continued competitiveness and financial viability of FICA's members.

8. For many years FICA's members have, as a matter of necessity, taken steps to increase the efficiency of energy usage, reduce total energy costs, and capture waste energy streams for useful purposes. All of FICA's members have installed cogeneration facilities and many of them expect to expand their cogeneration capacity in the future. In doing so, they will rely, among other things, on the financing arrangements and ownership structures and precedents established in the Monsanto and Seminole cases, in determining the economic feasibility of facilities expansions.

9. Whether viewed as: (a) customers/ratepayers of FPC and/or TECO, (b) as Florida industry which relies on traditional financing and/or ownership structures (as articulated in Monsanto and Seminole) for the procurement of capital equipment; or, (c) as sellers of cogenerated electricity to FPC and/or TECO, FICA's members easily meet the two prong test of substantial interest as articulated in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (1st DCA 1981). More specifically, FICA's

members will: (i) suffer injury in fact which is of sufficient immediacy to entitle it to a section 120.57 hearing and (ii) the injury is of the type or nature which this proceeding is designed to protect.

10. Accordingly, the Commission's decision in this proceeding will have one or all of the following impacts on FICA's members: (a) increasing their cost of electricity; (b) impeding their ability to use lease financing or master limited partnership arrangements for cogeneration or other energy efficiency improvements; or, (c) impacting upon the price of electricity sold to FPC and TECO. Any or all of these impacts will substantially and immediately affect the substantial interests of FICA's members. Moreover FICA's members may be forced to file multiple petitions for declaratory statement to clarify any uncertainty as to the status of the principals on which the Monsanto or Seminole cases were decided. This will impose an unwarranted burden and duplicative costs on FICA's members and on Commission resources.

DISCUSSION

11. Six parties sought leave to intervene in this proceeding - FPC, Florida Power & Light (FPL), PRECO, TECO, Florida Global Citrus, Ltd. (Florida Global) and FICA. Of those six parties, FPC, PRECO and TECO were granted leave to intervene while FPL, FICA and Florida Global were only authorized to participate as amicus curiae. Once having decided to conduct a hearing³, the Commission erred in failing to allow FICA to intervene in that hearing as a full party in interest.

12. In its Order, the Commission granted intervenor status to FPC, PRECO and TECO based on the erroneous conclusion that they each met the two prong test for standing to participate in an administrative proceeding, as articulated by the Court in the AgriCo case.

³ FICA does not concede that a hearing should be held or that FPC, PRECO and TECO should have been granted intervention.

The Commission characterized FPL's request for intervention as "speculative" and therefore denied intervention but granted amicus curiae status⁴. FICA concurs that FPL (as well as FPC, PRECO and TECO) lacks the requisite standing to be granted intervention status. As to the remaining parties - FICA and Florida Global - the Order gives no indication of the rationale or reasoning leading to denial of the requested intervention. FICA and Florida Global are simply "lumped" together with FPL, being granted their petitions "...to participate as amicus curiae..."⁵. This decision of the Commission is in error. FICA requested and is entitled to full intervenor status in the hearing based on the Agrico decision.

13. As restated in the Commission's Order, the Court in Agrico held that standing to participate in an administrative proceeding as a party whose substantial interests will be affected by proposed agency action requires one to show:

- i) that he/she will suffer injury in fact⁶ which is of sufficient immediacy to entitle him/her to a section 120.57 hearing, and
- ii) that his/her substantial injury is of the type or nature which the proceeding is designed to protect against.

14. Although FICA is concerned with the "sequence" of events regarding its request for intervention⁷, the Commission found FPC, PRECO and TECO to have standing to intervene in the case, based on speculation "...that if the Declaratory Statement is issued⁸, territorial disputes, stranded investment and unwarranted costs to the companies [FPC,

⁴ Unlike FICA's Intervention Petition, FPL's petition specifically sought, in the alternative, either intervention or amicus curiae status.

⁵ Contrary to the implication of the Order, FICA did not request amicus curiae status. FICA requested intervention status to the fullest extent any other party is granted intervention. Counsel for FICA attempted to clarify this point at the December 16th agenda, but due to the shortness of time and the large number of agenda items requiring Commission action, was unable to do so.

⁶ Apparently mere economic loss would not satisfy this prong of the test.

⁷ At the December 16, 1997 agenda conference, the issue of intervention appeared to have been decided by the Commission prior to its decision to conduct a § 120.57(1) hearing.

⁸ FICA assumes this means a statement "favorable" to IMC-Agrico.

PRECO and TECO] and their rate payers will result..." if the IMC-Agrico proposal is later found to result in unlawful retail sales. Relying on these speculative costs as justification, the Utilities inexplicably and most irrationally seek to guarantee that the ratepayers - such as FICA's members - will be exposed to costs of a similar magnitude (i.e. intervention in this case) - in order to avoid hypothetical and speculative possible future costs. Contrary to the principals articulated in Agrico, granting intervention to the Utilities will not prevent immediate injury - it will guarantee injury to the ratepayers, including FICA's members.

15. As stated in its Intervention Petition, FICA's members too will suffer immediate injury in fact for the separate and distinct reasons set forth below - each of which will be discussed at length in subsequent paragraphs. Moreover, the hearing scheduled by the Commission in this case is designed to protect FICA's members from such injuries.

First, as ratepayers of FPC and TECO, any negative impact on ratepayers resulting from this proceeding will flow directly to FICA's members.

Second, all of FICA's members currently cogenerate electricity at their Florida operations. In addition, FICA's members regularly evaluate opportunities for expanding cogeneration capacity or adding other energy efficiency enhancement facilities, and would consider, among others, the financing and ownership structures set forth in the Monsanto and Seminole cases. A Commission decision which dilutes, diminishes or otherwise raises questions of the legal relevance of those cases will have an immediate impact on FICA's members. Such impacts may include the need to seek declaratory statements from the Commission to resolve such matters.

Third, the Commission's decision in this proceeding will impact the market for and price/value of cogenerated electricity, thereby directly impacting upon those FICA members who sell excess electricity.

16. Because FICA's members are some of the ratepayers that FPC and TECO allegedly seeks to protect from bearing the cost of territorial disputes, stranded investment and other unquantified unwarranted costs, it is unassailable that FICA's members also

possess sufficient standing to be allowed full intervention status - possibly to an even greater extent than FPC, PRECO and TECO. A studied review of the intervenors thus far allowed by the Commission reveals that there is no intervenor whose interests lie purely with the ratepayers, such as FICA's members. FICA is greatly concerned that FPC and TECO may act to protect their shareholders at the expense of their ratepayers. As the Commission is aware, the utilities are under a fiduciary obligation to their shareholders and a regulatory obligation to their ratepayers. Clearly, since ratepayer and shareholder interests often conflict, FPC and TECO cannot be relied upon to aggressively, and without prejudice, pursue a resolution of this case which is in the best interest of their ratepayers. Such a conflict-of-interest makes it incumbent upon FICA and this Commission to insure that the interests of the ratepayers take precedence over the interests of the shareholders. (This is especially true in the instant case where projects of the type proposed by IMC-Agrico may pose a competitive threat to the shareholders of FPC and TECO.) As to IMC-Agrico, if its petition is granted, it will no longer be a ratepayer in the "traditional" sense - it will be self-sufficient. As a result of this proceeding, FICA's members will suffer immediate injury in fact, and the hearing scheduled by the Commission in this case is designed to protect FICA's members from such injury. Accordingly, FICA meets both prongs of the Agrico test and must be granted intervention.

17. FICA's members routinely evaluate opportunities for expanding cogeneration capacity or adding other energy efficiency improvements. In the evaluation process, FICA's members would consider, among others, financing and ownership structures substantially identical to those set forth in the Monsanto and Seminole cases⁹. The precedents of those cases, which are relied on by IMC-Agrico in its Petition For Declaratory Statement, go beyond addressing the specific facts presented in those cases; they also provide insights into

⁹ Monsanto involved a traditional lease arrangement and Seminole involved a master limited partnership arrangement - both traditional means of financing and/or owning facilities by private industry.

Commission policy with regard to legitimate financing arrangements which may be used by industry with respect to electricity consuming and producing facilities. In the past, the Commission has indicated a desire to avoid interfering with industry's ability to employ traditional, legitimate financing arrangements in the procurement of facilities. A change in such policy as a result of the IMC-Agrico Petition would interfere with FICA's members use of such financial mechanisms. Accordingly, a decision of the Commission which dilutes, diminishes or otherwise raises questions of the legality of lease financing or master limited partnership arrangements will have immediate impacts on FICA's members. Such impacts could include uncertainty as to lawful financing or ownership arrangements for energy efficiency projects and cogeneration expansion projects and, as a result, requiring FICA members to file petitions for declaratory statement with the Commission to clarify then current policy. This would not only result in additional, and unquantifiable unwarranted costs to FICA's members, but potentially lengthy delays¹⁰ could deter FICA's members from implementing energy cost reduction and energy efficiency improvements in a timely fashion. This in turn would negatively affect FICA's members ability to remain competitive and financially viable. Forcing FICA's members to initiate multiple, separate proceedings for declaratory statements, or otherwise, is administratively inefficient and will impose unquantifiable and unwarranted costs and burdens upon the resources of both FICA's members and the Commission. Clearly, FICA's members will suffer immediate injury in fact, and the hearing scheduled by the Commission in this case is designed to protect FICA's members from such injury. Accordingly, FICA and its members meet both prongs of the Agrico test and must be granted intervention.

18. FICA's members sell excess cogenerated electricity to Florida utilities including FPC and TECO. The Commission's decision in this case will work to increase or decrease the demand and price for such electricity, and possibly increase or decrease the amount of available transmission capacity on the grid. On the one hand, a decision favorable

¹⁰ This is in addition to FICA's concern that a final disposition could be delayed well into 1999 - assuming motions for reconsideration and/or an appeal of the Commission's decision.

to IMC-Agrico will result in additional electric generating capacity in the state but will also eliminate a substantial portion of interruptible load and could "free-up" transmission capacity. On the other hand, a decision unfavorable to IMC-Agrico could work to increase the value of cogenerated electricity over the near term, by deterring the addition of electric generating capacity associated with the IMC-Agrico proposal. Clearly, FICA's members will suffer immediate injury in fact, and the hearing scheduled by the Commission in this case is designed to protect FICA's members from such injury. Accordingly, FICA's members meet both prongs of the Agrico test and must be granted intervention.

CONCLUSION

19. FICA's members will suffer immediate injury in fact - injury of the type the hearing in this case is designed to protect against. Accordingly, FICA and its members meet both prongs of the Agrico test and must be granted intervention.

20. As a result of the Commission's Order, FPC, PRECO, TECO and IMC-Agrico are currently the only parties to this proceeding. Undoubtedly, FPC, PRECO and TECO will focus their efforts on preventing the loss of large revenue producing ratepayers, and on deterring competition from entities such as Duke Energy. IMC-Agrico will focus its attention on securing regulatory endorsement of their self-generation project which will provide sufficient generating capacity to render them self-sufficient. It is not intuitive that the interests of these four parties will be consistent with the interests of FICA's members - yet there is no question that FICA's members will suffer injury in fact from a proceeding designed to protect it from such injury, but from which it is currently excluded.

21. This is the only proceeding in which FICA's members can protect their interests. A Commission order, whether granting or denying IMC-Agrico's Petition, will either be controlling under the rule of stare decisis or be entitled to great weight in future proceedings involving similar proposals by FICA members or others. Failing to permit FICA to intervene will foreclose FICA's members from addressing, among other things, the factual

issues presented by the IMC-Agrico petition as they compare to the precedents of Monsanto and Seminole, or to otherwise address issues so as to protect their interests as those interests have been identified in the preceding paragraphs. This is not only the type of proceeding designed to protect FICA's member's interests, it is the only proceeding in which such interests can be protected and FICA is the only party who can protect them. As a matter of fundamental due process, FICA and its members are entitled to intervention as parties.

22. Both the Monsanto Company and Seminole Fertilizer, Inc. (or their successors¹¹) - the parties who precipitated the cases bearing their names and which are relied on by IMC-Agrico in the instant proceeding - are current members of FICA. Accordingly, in addition to protecting their multitude of interests in this matter, FICA's members are well qualified to bring valuable insights and expertise to the process as relates to the use, terms and conditions of alternative financing arrangements traditionally employed by industry, which may prove useful to the Commission in determining the disposition of the IMC-Agrico Petition.

23. Although FICA disagrees that a hearing should be conducted in this case, because such a hearing has been set, failure by the Commission to grant FICA's request for intervention as a full party in interest will result in a determination of FICA's members rights without due process - due process to which FICA and its members are entitled and guaranteed under the law. Moreover, with the hearing currently scheduled for mid-March, it is crucial that the Commission act favorably on this request as expeditiously as possible if FICA's member's participation is to be meaningful.

¹¹

As a result of corporate restructuring, Monsanto's Pensacola, Florida facility is now part of a corporate entity "spun-off" from Monsanto, known as Solutia, Inc. The assets of Seminole - a former member of FICA - have been acquired by another FICA member.

PRAYER FOR RELIEF

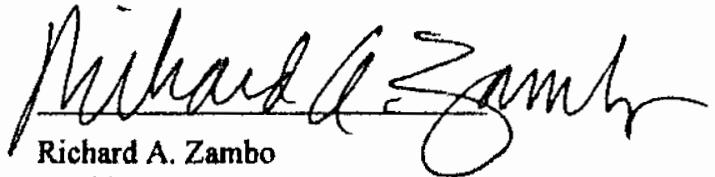
WHEREFORE, FICA and its members respectfully request that the Commission:

(a) Reconsider, on an expedited basis, those portions of Order No. PSC-98-0074-FOF-EU which fail to grant FICA's Petition For Leave To Intervene as a full party in interest; and, issue an order granting FICA and its members leave to intervene as full parties in interest; or, in the alternative

(b) Reconsider, on an expedited basis, those portions of this Order which provide for a hearing in this matter and which allow intervention by FPC, PRECO and TECO; and, issue an order declaring such hearings unnecessary, and denying intervention to any party - including FPC, PRECO and TECO.

Date: January 23, 1998

Respectfully submitted,



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Florida Bar No. 312525

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