

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, F.S.

DOCKET NO. 971337-EU
ORDER NO. PSC-98-0079-FOF-EU
ISSUED: January 13, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
DIANE K. KIESLING
JOE GARCIA

ORDER DENYING PETITION FOR DECLARATORY STATEMENT

BY THE COMMISSION:

On October 15, 1997, Duke Mulberry Energy, L.P. (Duke) and IMC-Agrico Company (IMCA) filed a Petition for Declaratory Statement (Petition). The petition sought a declaration that Duke and IMCA are entitled to apply for a determination of need for an electric power plant pursuant to Section 403.519, Florida Statutes, Commission Rules 25-22.080-.081, Florida Administrative Code, and pertinent sections of the Florida Electric Power Plant Siting Act (Siting Act).

Petitioners plan to develop a natural gas fired, combined cycle electrical generating unit south of Mulberry, Florida. Title to the power plant, currently envisioned to be between 240 MW and 750 MW, will be placed in a partnership or equivalent entity that IMCA and Duke will form for that purpose.

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TALLAHASSEE, FL 32310-1000

IMCA will enter into a net lease of 120 MW of the plant's capacity for its own use.¹ The balance of the plant will be leased to Duke, which will sell energy on the open market at wholesale. Duke will be certified as an Exempt Wholesale Generator (EWG) which will sell output at market-based rates pursuant to a Federal Energy Regulatory Commission (FERC) tariff.

Duke notes that, as an EWG, it will have no right to compel any utility to purchase its power, unlike a Qualifying Facility (QF).

Duke and IMCA ask for a declaration that they are entitled to apply for a determination of need for their proposed power plant or, in the alternative, that no such determination of need is required.

On November 25, 1997, Florida Power Corporation (FPC) filed a Petition to Intervene. On November 25, 1997, FPC filed an Answer and a Motion to Dismiss Proceeding. On the same date, Tampa Electric Company (Tampa Electric) filed a Response and Petition for Leave to Intervene. On December 1, 1997, Florida Power & Light Company (FPL) filed an Amicus Curiae Memorandum of Law.

The following were filed after December 1, 1997:

FPL's Motion to Address the Commission; FPL's Motion for Leave to Participate Amicus Curiae; IMCA's Motion to Strike Tampa Electric Company's "Response"; IMCA's Response in Opposition to Florida Power Corporation's Petition to Intervene; IMCA's Response in Opposition to Tampa Electric Company's Petition for Leave to Intervene; FPL's Notice of Supplemental Authority; Duke Mulberry Energy, L.P.'s Motion to Dismiss FPC's Petition to Intervene and to Deny FPC's Request for Administrative Hearing; Duke Mulberry Energy, L.P.'s Consolidated Motion to Strike FPC's Answer and FPC's Motion to Dismiss; Duke Mulberry Energy, L.P.'s Motion to Dismiss Tampa Electric's Petition for Leave to Intervene and to Deny Tampa Electric's Request for a Hearing; Duke Mulberry Energy, L.P.'s Motion to Strike Tampa Electric's Response; FPL's Petition for Leave to Intervene; Tampa

¹ The self-generation characterization is the subject of Docket No. 971313-EU.

Electric's Memorandum in Opposition to IMCA's Motion to Strike; Tampa Electric's Memorandum in Opposition to Duke's Motion to Dismiss; IMCA's Response to FPL's Amicus Curiae Memorandum; IMCA's Response in Opposition to FPL's Petition for Leave to Intervene; Enron Capital & Trade Resources Corp.'s Motion for Leave to File an Amicus Curiae Memorandum of Law and Request to Address the Commission; Enron Capital & Trade Resources Corp.'s Amicus Curiae Memorandum of Law; FPC's Response to the Consolidated Motion to Strike and Motion to Dismiss; IMCA's Response in Opposition to FPL's Petition for Leave to Intervene; FPC's Response to Motion to Dismiss; Duke Mulberry Energy, L.P.'s Motion to Dismiss FPL's Petition for Leave to Intervene.

DISCUSSION

FPC cites a number of cases holding that, when the result is an agency statement of general applicability interpreting law or policy, declaratory statement proceedings are inappropriate. Regal Kitchens, Inc., v. Florida Dep't of Revenue, 641 So. 2d 158 (1st DCA 1994), and Mental Health District Bd v. Florida Dep't of Health and Rehabilitative Services, 425 So. 2d 160 (1st DCA 1983). We agree with FPC that a statement to the effect that Exempt Wholesale Generators are proper applicants under the Siting Act would be a statement of general applicability interpreting law and policy. Such a statement would not merely affect petitioners in petitioners' set of circumstances only, but would carry implications for the electric power industry statewide.

On this basis, we decline to issue the requested Declaratory Statement, noting that petitioners can file a request for rulemaking. Staff was also directed to discuss with the Chairman appropriate proceedings to review law and policy as to merchant plants being applicants for certificates of need.

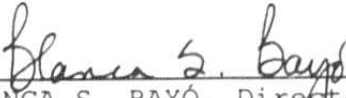
In view of the above it is

ORDERED by the Florida Public Service Commission that the Petition for Declaratory Statement of IMCA Agrico Company and Duke-Mulberry Energy, L.P. is denied. It is further

ORDERED that this docket be closed.

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By Order of the Florida Public Service Commission this 13th
day of January, 1998.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

Commissioner Garica dissented.

(S E A L)

RCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.