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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 3, 1997

IMC-AGRICO COMPANY'S RESPONSE TO FLORIDA POWER AND LIGHT COMPANY'S "AMICUS CURIAE MEMORANDUM"

IMC-Agrico Company (IMCA), through its undersigned counsel, files its Response to Florida Power and Light Company's (FPL) "Amicus Curiae Memorandum." As a procedural matter, the Commission should not consider FPL's memorandum. FPL has no substantial interest in this proceeding and thus no right to file such a memorandum.

On a substantive basis, FPL incorrectly applies the law and the facts to IMCA's proposed project to reach the conclusion it desires. As set out fully in IMCA's petition for declaratory statement, the transaction IMCA has proposed comprises self-generation in accord with principles previously articulated by this Commission. The Commission should issue a declaratory statement so finding.

I.

Background

On October 10, 1997, IMCA filed a petition for declaratory statement seeking confirmation that its proposed ownership and operational structure of certain planned self-generation facilities and transmission facilities would not subject it to this Commission's jurisdiction.

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On November 19, 1997, FPL filed a motion to intervene and a motion to dismiss with the Commission. FPL served some parties by mail and others by hand delivery.[1] On November 24, 1997, FPL filed an unauthorized "Amicus Curiae Memorandum of Law Addressing IMC-Agrico's Petition."

II.

FPL's Memorandum is Procedurally Impermissible and Should Not Be Considered by the Commission

FPL's "friend of the court" memorandum is procedurally defective because it is not authorized by statute or rule. Neither the Commission's rules on declaratory statements nor the statute governing such statements provide FPL, as a curious outsider, with the authority to file an amicus curiae memorandum and FPL has cited no authority to support its filing.[2] Nor has the Commission granted FPL permission to file a memorandum.[3] FPL's filing is simply an attempt to circumvent the nature and purpose of a declaratory statement proceeding. The Commission should not permit this unauthorized filing.

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] IMCA responded in opposition to FPL's pleadings on December 1, 1997.

[2] Amicus curiae briefs are more generally found in appellate proceedings. Rule 9.370, Florida Rules of Appellate Procedure, provides that an amicus brief may be filed with the written consent of all parties or by order or request of the court. In this case, FPL has met neither of these requirements.

[3] Essentially, FPL is attempting to provide its opinion to this Commission without any authorization to do so.

order of the agency, as it applies to the petitioner's particular set of circumstances."[4] Therefore, no purpose can be served by consideration of memoranda submitted by entities that cannot possibly be affected by the Commission's declaratory statement.[5]

The Commission's rules on declaratory statements make this obvious. They provide that a declaratory statement applies to the petitioner "in his or her particular set of circumstances only."[6] 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."[7] That is the declaratory statement, by its very nature, is binding only on the petitioner as to the particular facts presented. While the Commission's decision may provide common law precedent to be considered in future cases, FPL cannot be directly adversely affected in this case. Allowing FPL to participate at the administrative decision level would be equivalent to letting every

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

[5] In an attempt to allege some interest, FPL makes vague allegations about the "profound implications" of this case. (FPL memorandum at 3). However, as FPL well knows, the declaratory statement in this case will apply only to IMCA in its particular set of circumstances. And in fact, FPL wants the Commission to consider its memorandum even if it is not permitted to intervene because it has a "unique view" of the situation. (FPL memorandum at 1). What that "unique view" is, FPL never says.

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

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

insurance company in the state present evidence and engage in discovery in any accident case in the state if one of the parties is insured.

III.

FPL Has No Substantial Interest in This Proceeding

As set out in detail in IMCA's response in opposition to FPL's petition to intervene, and adopted in its entirety herein, FPL has no substantial interest in this case; therefore, FPL cannot meet the standing requirements set out in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981). Agrico requires an intervenor to show that it will suffer injury in fact of sufficient immediacy to entitle it to an § 120.57 hearing and that this injury is of the type the proceeding is designed to protect. In this instance, FPL meets neither prong of the Agrico test. FPL simply wants the chance to engage in conjecture about matters that cannot possibly affect it.[8] Therefore, the Commission should not consider FPL's unauthorized memorandum.

IV.

FPL's Substantive Arguments are Erroneous and Should be Rejected

FPL's memorandum should be rejected on procedural grounds alone. Nevertheless, if the Commission considers FPL's memorandum, IMCA files this

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[8] Though several utilities have sought to intervene in this proceeding, none can meet the Agrico standing requirements; thus, IMCA has responded in opposition to petitions to intervene filed by TECO and FPC. In FPL's case, it cannot even allege that it provides any electricity to IMCA. Therefore, it can allege no injury.

substantive response so as to avoid any delay in these proceedings.[9] FPL's argument is based on two premises: a) there is no unity of interest between IMCA and the partnership; and b) the petition fails to allege that the business structure is "solely for financial and tax reasons."

A.

IMCA's Proposed Project Is Self-Generation as Defined in Prior Commission Precedent

In an effort to interfere with IMCA's right to utilize self-generation to meet a portion of its electrical needs, FPL makes unfounded allegations which attempt to turn a self-generation project into a retail sale. However, FPL's attempt must fail for several reasons.

First, contrary to the assertions made by FPL, IMCA's proposal does not constitute a retail sale of electricity. As fully set out in IMCA's petition for declaratory statement, IMCA will enter into a capacity lease whereby it will acquire an undivided ownership interest in the entire project; that is, at all times, IMCA will assume ownership risk for a portion of the entire generating plant and all of its component parts. It will fully control its portion of the electrical production capacity and the electrical output produced by its leased capacity. Under Florida law, an outstanding leasehold estate "for all practical purposes is equivalent to absolute ownership." Rogers v. Martin, 99 So. 551, 552 (Fla. 1924); Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartment Associates, Ltd, 493 So.2d 417 (Fla. 1986); Trump

[9] Section 120.565(3), Florida Statutes, requires the Commission to act on IMCA's petition within 90 days.

Enterprises, Inc. v. Publix Supermarkets, Inc., 682 So.2d 168 (Fla. 4th DCA 1996). FERC has reached similar conclusions in a series of cases. Texaco Refining and Marketing Inc. Small Power Production and Cogeneration Facilities-Qualifying Status, 71 FERC ¶ 62,089 (May 1995). And, of course, the Commission reached the same conclusion 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. 17009 and In re: Petition of Seminole Fertilizer Corporation for a Declaratory Statement Concerning the Financing of a Cogeneration Facility, Docket No. 900699-EG, Order No. 23729.[10]

IMCA will be required to operate and maintain its undivided ownership interest and will have the ultimate responsibility for and risk of operating and maintaining its ownership interest. This distinguishes IMCA's proposed transaction from FPL's attempt to turn the situation into a retail sale. Unlike PW Ventures v. Nichols, 533 So.2d 281 (Fla. 1988), cited by FPL, the IMCA *alter ego* will own the facilities, not a subsidiary of a native regulated utility and its engineering company designate.

Second, FPL complains that IMCA must pay for its share of the electricity whether it uses it or not and suggests that somehow this attribute of the proposal converts the transaction into a retail sale. However, IMCA's responsibility in this regard is one of many factors that confirm the self-generation nature of this project

[10] FPL (in a manner reminiscent of TECO's alleged "need" for discovery) attempts to obscure the real issues in this case by seeking information about "facts" which do not alter the self-generation nature of this transaction. (FPL memorandum, footnotes 1-6).

not defeat it. Its assumption of the full risk of ownership and operation and maintenance responsibilities described above demonstrate that the proposed project is not some type of "take or pay" contract as FPL alleges. This contract is different than a utility take or pay contract that requires a customer to pay for a designated amount of electricity if it is available from the utility whether the customer needs it or not. In the present leasehold agreement, IMCA must pay the lessor even if the electric supply is not produced through no fault of IMCA.

Additionally, fixed lease payments are one factor that this Commission has found significant in several self-generation cases. For example, in Monsanto, the Commission found that Monsanto's lease payments "would be independent of electric generation, production rates or any operational variable." Id. at 2. Similarly, in Seminole, the Commission noted that Seminole would be obligated to make fixed lease payments. Order No. 23729 at 3. Thus, the nature of IMCA's lease obligations follows the precedent of this Commission's prior decisions. Further, just as in Monsanto, IMCA is leasing the equipment which produces electricity; it is not buying electricity.

Even if the IMCA proposed transaction were similar to a utility tariff or operation, it would not be disqualified. Formerly, the Commission regulated the intrastate transportation industry. Private carriage, like self-generation, was excluded from regulation. Regulated common carriers had trucks, drivers and carried freight. Private unregulated carriers operated with the same kind of trucks, had the same kind of drivers, and carried freight. The similarity of operation did not mean that common

carrier regulation preempted the field. By assuming the risk of ownership and operation, as IMCA proposes to do in this transaction, the private carriage was non-jurisdictional as far as the Commission was concerned.

Third, FPL's allegation that IMCA is attempting to engage in a nefarious scheme to avoid this Commission's regulation is absolutely baseless. Throughout its Memorandum, FPL criticizes IMCA for structuring its proposed project like the Seminole project (FPL Memorandum at 1, 5, 7, 13, 14).[11] However, contrary to FPL's attempt to attribute some improper motive to IMCA in following this Commission's requirements, IMCA has intentionally structured its proposal in a careful and conscientious effort to fully comply with the Commission's applicable rules and orders. The substantial similarity of IMCA's proposal to the Seminole project (as FPL admits) makes IMCA's point that the proposed project is self-generation.

B.

The Seminole Decision is on Point

1. IMCA's proposed project is substantially similar to the Seminole project approved by this Commission.

Despite FPL's claims to the contrary, the transaction proposed by IMCA is substantially similar (and intentionally so, as FPL recognizes) to the arrangements this Commission approved in Seminole. As described in detail in IMCA's petition for declaratory statement, like the phosphate manufacturer in Seminole, IMCA will use lease arrangements to acquire additional generation assets from which it will generate

[11] FPL somehow sees these "admissions" as flaws in IMCA's proposal; to the contrary, they support the declaratory statement IMCA seeks.

electrical energy that it will own and use itself. Like the phosphate manufacturer in Seminole, IMCA plans to create a partnership which will be the owner-lessor of the project. As in Seminole, an IMCA subsidiary will hold a general partnership interest in the lessor-partnership. Like the lessee-phosphate manufacturer in Seminole, IMCA will be obligated to make fixed lease payments regardless of the project's output. As in Seminole, IMCA will bear the ultimate operating risk of the project. Further, if the proposed project is constructed as an expansion of IMCA's existing cogeneration facilities, like Seminole, the project will result in a more efficient use of waste heat energy. Like Seminole, all power from the project, other than that which IMCA consumes for its own needs, will be sold on the wholesale market.

2. IMCA's proposed project meets the Seminole "unity of interest" test.

The "unity of interest" test, which the Commission articulated in Seminole, has been met by IMCA's proposed project as the following facts illustrate. IMCA's wholly-owned subsidiary will be a general partner of the project and its parent, IMCA, will be the lessee of an undivided ownership in the project's assets. IMCA, the lessee-power consumer, and the project, the owner-lessor, are closely related so as to meet the requirements set out by this Commission in Seminole. As the above facts demonstrate, contrary to FPL's claim, there is unity of interest between IMCA and the proposed project's partnership.

There is nothing in the Seminole decision to suggest, as FPL says, that shared ownership in the proposed project defeats the unity of interest standard nor that such unity can only result if there is a single general partner. As described above, IMCA's

wholly-owned subsidiary will be a general partner; this meets the unity of interest test.[12] If FPL's theory, that shared ownership destroys ownership, is carried to its logical conclusion, FPL's shared ownership of the St. John's Power Park, Turkey Point and St. Lucie nuclear facilities and the Scherer Plant should no longer be considered appropriate. These facilities would come out of rate base and consumers would only pay for electricity from those plants when they are up and running.

The single order FPL cites in support of its theory that shared ownership defeats unity of interest, In re: Petition for Declaratory Statement Regarding Public Utility Status of Affiliates Involved in Gas Supply Arrangements by Tampa Electric Company, Docket No. 951347-PU, Order No. PSC-95-1623-DS-PU, is of no help to it. As even FPL admits, the Commission relied on an Attorney General Opinion and a revision to Chapter 364 in issuing the declaratory statement Tampa Electric sought. As FPL further admits, the Commission did not reach the unity of interest question. The dicta in the order is not precedent in this case.[13]

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[12] IMCA's proposed transaction is in marked contrast to PW Ventures, where the Commission found that PW Ventures was prohibited from selling electricity to an unrelated company, Pratt and Whitney. Similarly, IMCA's proposal is unlike the situation the Commission addressed In re: Petition for a Declaratory Statement Concerning Financing and Ownership Structure of a Cogeneration Facility in Polk County, by Polk Power Partners, L.P., Docket No. 931190-EQ, Order No. PSC-94-0197-DS-EQ. In Polk Power, the Commission found that Polk would be supplying power to an unrelated entity. Clearly, that is not the case in the proposed IMCA transaction, since a wholly-owned subsidiary of IMCA will be a project partner.

[13] The dicta upon which FPL seeks to rely comprises one sentence out of the entire order. In addition, the Commission explicitly said: ". . . [We believe it is unnecessary to reach any ultimate conclusion as to the asserted alternative bases for exemption." Order No. PSC-95-1623-DS-PU at 4.

Nor is In re: Petition of Metropolitan Dade County for Expedited Consideration of Request for Provision of Self-Service Transmission, Docket No. 860786-EI, Order No. 17510, helpful to FPL in its attempt to interfere with IMCA's right to self-generate. In Metropolitan Dade County, the county sought an order from the Commission requiring FPL to wheel power for it from a QF to a county facility. Applying its self-service wheeling rules (which have nothing to do with IMCA's petition for declaratory statement), the Commission denied the request because the QF was owned by the county and a limited partnership comprised of other entities.

Contrary to FPL's claim that Metropolitan Dade County "answers the [unity of interest] question" and is "dispositive" in this case (FPL memorandum at 12), that order is inapplicable here. The Commission explicitly stated in its Seminole decision, that Metropolitan Dade County was not dispositive on the issue of self-generation. The Commission said:

> While there are some analogies to the Petition of Metropolitan Dade County for Expedited Consideration of Request for Provision of Self Service Transmission, Order 17510, issued May 5, 1987, that case is not dispositive here. In Metro-Dade, the FPSC dismissed an application for self-service wheeling. . . . However, the issue in Metro-Dade was transmission and dealt specifically with an FPSC self-service transmission rule.

Order No. 23729 at 6. Similarly, Metropolitan Dade County is not dispositive in this instance since this case does not involve the Commission's self-service transmission rule.

3. **A transaction need not be organized only for financial and tax reasons to be self-generation.**

FPL argues that the "essential finding" the Commission made in Seminole was that the transaction at issue there was organized "solely for financial and tax reasons." (FPL memorandum at 13). However, FPL has invented a requirement which does not exist.[14] This is not the holding of Seminole and the Commission did not find in Seminole that a project must be organized "solely for financial and tax purposes" to qualify as self-generation. Rather, the Commission made the comment to which FPL refers in the process of describing the Seminole project.

Additionally, the interpretation FPL urges would contravene the Florida Supreme Court's decision in PW Ventures. In that case, the Court found that every customer has the right to self-generate. The Court placed no limitation on this right:

> The Legislature determined that the protection of the public interest required only limiting competition in the sale of electric service, not a prohibition against self-generation.

Id. at 284, emphasis added.

The central holding in the Seminole case is the following:

> Our conclusion is that no retail sale occurs where, as presented here, the general partner of the partnership/lessor is a wholly owned subsidiary of the lessee/QF and the energy is either consumed by Seminole or sold to a public utility.

[14] This "fatal omission" (FPL memorandum at 13) is one of FPL's own making, not a requirement of this Commission.

Order No. 23729 at 7. Under the facts described in IMCA's petition for declaratory statement, the proposed project meets the Seminole test articulated by this Commission.

V.

Conclusion

FPL's memorandum is a procedurally impermissible pleading and should not be considered by this Commission. However, in the event that the Commission does consider it, IMCA has demonstrated above that the conclusions FPL attempts to reach in its memorandum are erroneous. IMCA has carefully followed this Commission's prior orders and precedents in structuring its proposed project. The project as proposed is substantially similar to that approved by this Commission in Seminole and constitutes self-generation. The Commission should issue the requested declaratory statement so finding.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **IMC-Agrico Company's** foregoing **Response to Florida Power and Light Company's "Amicus Curiae Memorandum"** has been furnished by U.S. Mail or Hand Delivery(*) this **3rd** day of **December, 1997,** to the following:

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