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October 10, 1997

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VIA HAND DELIVERY

Ms. Blanca Bayó
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

971313-EL

Re: In re: Petition of IMC-Agrico Company for a Declaratory Statement
Confirming Non-Jurisdictional Nature of Planned Self-Generation

Dear Ms. Bayó:

Enclosed are the original and 15 copies of IMC-Agrico's Petition for Declaratory Statement in the above docket.

I have enclosed an extra copy of the Petition for Declaratory Statement for you to stamp and return to me. Please contact me if you have any questions. Thank you for your assistance.

Yours truly,


Joseph A. McGlothlin

JAM/sjm

Enclosures

DOCUMENT NUMBER-DATE

10431 OCT 10 97

FPSC-RECORDS/REPORTING

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. _____
)
)
)

Filed: October 10, 1997

PETITION FOR DECLARATORY STATEMENT

Pursuant to Section 120.565, Florida Statutes, and Rule 25-22.020, Florida Administrative Code, IMC-Agrico Company ("IMCA"), by and through its undersigned attorneys, files its Petition for Declaratory Statement. IMCA requests the Commission to issue an order declaring that the proposed ownership and operational structure of certain planned self-generation facilities and transmission facilities ("the Project") described herein will not:

- (a) result in or be deemed to constitute a sale of electricity to the public at retail;
- (b) cause IMCA as the beneficial owner, or the lessor that will hold legal title to the Project, or any of the lessor's partners, to be deemed a public utility as that term is defined under Florida law; or
- (c) cause IMCA as the beneficial owner, or the lessor that will hold legal title to the Project, or any of lessor's partners, to otherwise be subject to regulation by the Commission.

DOCUMENT NUMBER-DATE

10431 OCT 10 5

FPSC-RECORDS/REPORTING

In support of its petition IMCA says:

1. The name and address of the Petitioner are:

IMC-Agrico Company
Post Office Box 2000
3095 County Road 640 West
Mulberry, Florida 33860

2. All pleadings, motions, orders and other documents directed to Petitioner are to be served on:

John W. McWhirter, Jr.
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THE STATUTES AND ORDERS INVOLVED

3. IMCA seeks a declaratory statement regarding the self-generation nature of IMCA's proposal that involves the following statutes and orders:

- a. Section 366.02, *Florida Statutes*, defining "public utility" subject to the jurisdiction of the Florida Public Service Commission:

(1) "Public utility" means every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas (natural, manufactured, or similar gaseous substance) to or for the public within this state. . . .

(2) "Electric utility" means any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state.

b. Order No. 18002-A, rendered in Docket No. 870446-EU on October 22, 1987, in which the Commission found that P.W. Ventures, Inc., was prohibited from selling electricity to an unrelated company, Pratt and Whitney. The Commission determined that the sale to even a single customer constituted a sale of electricity "to the public" under Section 366.02(1), *Florida Statutes*;

c. Order No. 17009, rendered in Docket No. 860725-EU on December 22, 1986, in which the Commission found that the leasing of a cogeneration facility by Monsanto would be classified as self-generation and therefore would neither result in nor be deemed to constitute an unlawful sale of electricity; the lessor would not be deemed to be a public utility under Florida law; and neither Monsanto nor its lessor would be subject to regulation by the Commission;

d. Order No. 23729, rendered in Docket No. 900699-EQ on November 7, 1990, in which the Commission determined that an arrangement by which Seminole Fertilizer placed the ownership of its self-generation facilities in a partnership and then leased an undivided interest in the capacity from the partnership/owner did not constitute a retail sale of electricity. There was an identity of interest between the lessor and lessee because a subsidiary of Seminole held a partnership interest in the lessor. The partnership leased capacity to Seminole and sold excess energy to the wholesale market.

FACTS

4. IMCA operates a phosphate mining and processing complex encompassing more than 400 square miles in central Florida. IMCA's predecessor began generating electricity before the turn of the 20th Century and even supplied the City of Mulberry before any other supplier had facilities capable of doing so. IMCA generates about 128 megawatts of electric power from three independent Qualifying Facilities ("QFs") that conserve energy by producing electricity from waste heat derived from IMCA's phosphate processing operations rather than from non-renewable energy resources. IMCA delivers and sells excess energy to public utilities in Florida on an "as-available" basis. IMCA owns and operates approximately 400 miles of internal electric transmission lines and associated facilities. IMCA's self-generation capacity exceeds the generating capability of 44 of Florida's 58 utility systems.

5. IMCA also buys interruptible power from two public utilities and from one electric cooperative. IMCA's overall power requirements continue to grow such that, even with its substantial self-generation capacity, IMCA's purchases from utilities have also continued to grow.

6. IMCA plans to develop additional facilities for the generation and delivery of electrical power to serve the requirements of its mining and processing complex in central Florida. IMCA plans to accomplish this by arranging for construction and operation of a high-efficiency, advanced technology, natural gas-fired combined cycle electric generating unit (the "Power Plant") and of a 69 kV transmission line (the

"Transmission Line") that will connect most of IMCA's points of electric consumption in its phosphate mining and processing complex.

7. To accomplish this expeditiously and in conformity with all applicable laws and regulations, IMCA plans to enter into lease and contract transactions similar to those of another phosphate manufacturer in central Florida. In Re: Petition of Seminole Fertilizer for a Declaratory Statement Concerning the Financing of a Cogeneration Facility, 90 FPSC 11:126. In that case, the Commission declared that the subject transactions were non-jurisdictional. Pursuant to the arrangements described herein, and following the precedent of Seminole Fertilizer, IMCA will acquire ownership in the Project by leasing an undivided interest¹ in 120 MW of the Project's generating capacity and entering into other appropriate financial arrangements.

8. The sequence of events will be as follows. First, IMCA will organize a wholly-owned subsidiary ("IMCA Subsidiary"), to which IMCA will transfer existing assets needed for development of the Project. These assets will include land, rights of way, and other property to be used in the Project.² Second, the IMCA Subsidiary

¹ See, e.g., Gray v. Callahan, 197 So. 396, 398 (Fla. 1940), where the Florida Supreme Court stated the following: "We have held that during the life of a lease the lessee holds an outstanding leasehold estate in the premises, which for all practical purposes is equivalent to absolute ownership."

² IMCA is continuing to evaluate various potential sites and configurations of the Project. One possible configuration would involve locating the Power Plant at one of IMCA's existing cogeneration facilities. If this were determined to be the optimal scenario, IMCA would also anticipate transferring existing cogeneration assets, e.g., heat recovery steam generators attached to existing sulfuric acid plants, to the Partnership in addition to land and other assets. As explained below, under any configuration being considered, IMCA satisfies the "relatedness" analysis that the Commission applies in evaluating jurisdictional aspects of proposed self-generation transactions.

and Duke Energy Power Services, LLC ("DEPS") will organize a partnership or equivalent entity (the "Partnership") to which the IMCA Subsidiary and DEPS will make equity contributions, including, as to IMCA, the assets described above. The IMCA Subsidiary and DEPS (or an affiliate thereof) will be co-general partners.

9. The Partnership will arrange for the design, engineering, procurement, and construction of a new, highly efficient, natural gas-fired combined cycle generating unit, using advanced turbine technology. At this time, IMCA and DEPS envision that the Power Plant will have a total net generating capacity of approximately 240 MW.³ As described more fully below, the Partnership will lease undivided ownership interests in the Project, respectively, to IMCA and to an Exempt Wholesale Generator ("EWG") that will be an affiliate of DEPS. The Partnership will also arrange for the design, engineering, procurement, and construction of the Transmission Line.

10. IMCA will enter into a capacity lease agreement (the "Lease") with the Partnership, pursuant to which IMCA will acquire an undivided ownership interest in the Project commensurate with its requirements, presently expected to be 120 MW of the Project's total capacity. IMCA will be entitled to use its leased capacity at all times and will own the electrical output produced by such leased capacity. Pursuant to the Lease, IMCA will be obligated to make fixed lease payments to the Partnership regardless of the Power Plant's output of electricity. The initial term of the Lease will be ten years. The Lease will provide IMCA with options to extend for two consecutive five-year terms.

³ To achieve economies of scale and enhanced operating efficiencies, IMCA and DEPS are also considering the possibility of constructing a larger project.

11. The Exempt Wholesale Generator ("EWG") will sell electricity produced by its leased capacity in the wholesale market on a merchant basis in transactions regulated by the Federal Energy Regulatory Commission ("FERC"). The EWG will be subject to FERC's regulatory authority as required by the Federal Power Act, 16 USCS § 824 & 824d (1994). The EWG will file with FERC (i) an application for certification by FERC as an EWG under the Public Utility Holding Company Act of 1935 and (ii) an appropriate tariff indicating that it will charge market-based rates for its wholesale sales of electric power pursuant to Section 205 of the Federal Power Act, 15 USCS § 79z-5a (1994 & Supp. 1997); ~~see also~~ 16 USCS § 796(25) (1994).⁴

12. Pursuant to the Lease, IMCA will be obligated to operate and maintain its undivided ownership interest in the Project. (The EWG, pursuant to its capacity lease agreement, will likewise be obligated to operate and maintain its undivided ownership interest in the Project.) Although IMCA may in turn enter into other contractual arrangements (the "O&M Contract") with other entities that may or may not be affiliates of IMCA or DEPS for the operation and maintenance of its undivided ownership interest in the Project, the ultimate responsibility for, and risk of, operating and maintaining its undivided ownership interest in the Project will rest with IMCA. It will not contract away that responsibility.

13. While the definitive Lease and O&M Contract have not yet been developed, these operative documents will reflect the following features and operational arrangements applicable to the Project:

⁴ Shortly after the filing of this petition, IMCA and the EWG will file a separate petition for declaratory statement in which they will request the Commission to declare that they are proper "applicants" for a determination of need under the Florida Electrical Power Plant Siting Act. The companion petition relates solely to the ability of IMCA and the EWG to proceed with a project of a certain size. The determination to be sought is independent of, and unrelated to, the subject of self-generation treated herein.

a. The Partnership will contract for engineering, design, procurement, and construction of the Power Plant and the Transmission Line. Subject to regulatory approvals, the Power Plant is expected to be operational as early as mid-2000.

b. IMCA will lease an undivided ownership interest in 120 MW of the Power Plant's capacity for the purpose of generating its electrical power requirements. IMCA will also lease an undivided ownership interest in the Transmission Line facilities needed to transmit the electrical power that it generates from its generation facilities, including power that it generates from its undivided ownership interest in the Power Plant. IMCA will own the electrical power generated from that interest.

c. The EWG will acquire an undivided ownership interest in the Power Plant's capacity not acquired by IMCA and will sell the power generated therefrom in the wholesale markets. No electric power generated by the Power Plant will be consumed by any partner in the Partnership other than IMCA.

d. IMCA will be responsible for the operation and maintenance of its undivided ownership interest in the Project.

e. IMCA will be obligated to make fixed lease payments reflecting the requirements of the capital markets, determined at arm's length, i.e., a return on investment acceptable to the Partnership and reflecting the value of the transaction to IMCA.

f. IMCA's lease payments will not vary and will be payable in a fixed amount regardless of the amount of energy that IMCA generates from its undivided ownership interest in the Project's capacity.

g. Lease payments will also be payable regardless of outages except during the pendency of force majeure events.

h. Lease payments will be fixed for the initial ten-year term of the Lease and will subsequently be fixed, on an adjusted basis, for each of two five-year renewal terms, if IMCA elects to extend the Lease at the beginning of each such renewal term.

i. Each of IMCA and EWG will be responsible for and bear the risk of procurement and delivery of fuel for its respective undivided ownership interest in the Power Plant. If the Project is developed in conjunction with an expansion of IMCA's existing cogeneration facilities, IMCA will also furnish waste heat to the Power Plant.

DISCUSSION

14. It is clear that a party may supply its own electrical power requirements by owning and operating generating facilities. In PW Ventures v. Nichols, *infra*, the Supreme Court stated that:

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.

PW Ventures v. Nichols, 533 So. 2d 281, 284 (Fla. 1988) (emphasis provided). In Monsanto, *supra*, the Commission recognized that it is also possible to place ownership of cogeneration facilities in an entity other than the party using the equipment to generate electricity without creating a "retail sale" of electricity. Monsanto, 86 FPSC 12:354 at 357.

15. Extending its doctrine regarding the "jurisdictional boundary" identified in PW Ventures, the Commission in Seminole Fertilizer declared that a permissible, non-jurisdictional self-service generation arrangement can be established by means of

a leasing transaction wherein the lessee-electric power consumer leases an undivided ownership interest in generating assets owned by a lessor-partnership with which the lessee-consumer has a "unity of interests" and where the lessor-partnership sells surplus power in the wholesale market.

16. IMCA intends to structure its business relationships and transactions to parallel those that the Commission approved in Seminole Fertilizer. The proposed ownership, leasing, and operating structures will fully observe the jurisdictional boundaries established in PW Ventures, Monsanto, Seminole Fertilizer, and other comparable proceedings, and these proposed structures and transactions will comprise permissible self-generation. IMCA respectfully asks the Commission to confirm that conclusion by issuing the requested declaratory statement.

17. Referring to the diagram of the transactions shown in Exhibit 1 hereto, as well as to the facts presented in paragraph 12 above, the Commission will readily see that the proposed transaction is comparable to that approved in Seminole Fertilizer in all material respects and accordingly will conclude that it constitutes non-jurisdictional self-generation. Like the phosphate manufacturer in Seminole Fertilizer, IMCA plans to use lease arrangements to acquire additional generation assets, from which it will generate electrical energy that it will own and use. Like the phosphate manufacturer in Seminole Fertilizer, IMCA plans to create a partnership to be the owner-lessor of the Power Plant (and the Transmission Line). Like the arrangements in Seminole Fertilizer, a subsidiary of IMCA will hold a general partnership interest in the lessor-partnership. Like the lessee-phosphate manufacturer in Seminole Fertilizer,

IMCA will be obligated to make fixed lease payments regardless of outages or the amount of power generated by the Power Plant, except, as in Seminole Fertilizer, with respect to force majeure events. As in the transaction reviewed by the Commission in Seminole Fertilizer, IMCA will bear the ultimate operating risk for its undivided ownership interest in the Project. (IMCA expects to seek to manage its risks through contractual arrangements for services, which were not explicitly addressed in Seminole Fertilizer, but the ultimate operating risk will reside with IMCA under its arrangements with the Partnership.) If IMCA ultimately determines that the Power Plant would optimally be constructed as part of an expansion of existing cogeneration facilities, then, like the arrangement addressed in Seminole Fertilizer, the expanded cogeneration facilities will result in more efficient use of waste heat energy derived from IMCA's phosphate manufacturing processes.

18. Like the situation addressed in Seminole Fertilizer, other than the power used by IMCA, all electric power generated by the Power Plant will be sold in the wholesale market.

19. If anything, the facts presented herein support a finding of non-jurisdictional self-generation even more strongly than the situation in Seminole Fertilizer. IMCA will have first claim on its portion of the electrical output of the Power Plant at all times. Specifically, IMCA will have an undivided ownership interest in the Power Plant's capacity, up to and including the 120 MW (or greater amount) of capacity leased by IMCA, and will own and use the power output therefrom. This arrangement clearly demonstrates the self-generation purpose of the Project.

Additionally, IMCA will be responsible for the procurement and delivery of fuel for the undivided ownership interest in the Power Plant that it leases from the Partnership. Thus, IMCA will bear even more risk -- here, the fuel procurement and delivery risk -- than the lessee-phosphate manufacturer in Seminole Fertilizer, further demonstrating the self-generation nature of the transaction.

20. As described above, IMCA's self-generation project contemplates the possibility of obtaining needed self-generation resources via the installation of a new, highly efficient combined cycle generating unit without an expanded cogeneration application. While under this scenario the proposed transaction would differ from the precise fact pattern addressed in Seminole Fertilizer, which involved a Qualifying Facility, this difference would not change the analysis. The "relatedness" analysis applied to such transactions by the Commission does not turn on whether the generating equipment is part of a cogeneration facility. Rather, it turns on the relationship between the producing and consuming entities. Here, the lessor-Partnership and IMCA, the lessee-electric consumer, would be related in exactly the same way as the lessor-partnership and the lessee-consumer in Seminole Fertilizer were related. Accordingly, based on the Commission's criteria, the conclusion should be the same.

21. Following the paradigm of Seminole Fertilizer, IMCA and the lessor Partnership will have a "unity of interests" since IMCA's wholly owned subsidiary will be a general partner of the Partnership and its parent, IMCA, will be the lessee of an undivided ownership interest in the assets of the Partnership. In the analytical terms

of Seminole Fertilizer, the lessee-power consumer, IMCA, and the owner-lessor, the Partnership, are so "related" that the arrangement surmounts the jurisdictional boundary identified in PW Ventures. See Seminole Fertilizer 90 FPSC 11:131. There is no retail sale of electricity based on the facts presented. On the one hand, there is IMCA's self-service generation from its undivided ownership interest in the Power Plant and IMCA's self-service transmission using its undivided ownership interest in the Transmission Line. On the other hand, there is the EWG's wholesale sale of electric capacity and energy in the wholesale market. None of the partners will consume the electrical energy produced or transmitted by the Project other than IMCA, if IMCA acquires a partnership interest in the Partnership. The proposed transaction does not involve a retail sale. It follows that the proposed transaction will not cause either IMCA or the Partnership to be deemed a public utility under Section 366.02, Florida Statutes. Moreover, the transaction, as presented, will not cause any of the partners in the Partnership or any other participant therein to become subject to the Commission's jurisdiction as a public utility.

CONCLUSION

22. On the facts presented above, the Project, owned and operated through the transactions described above, will not:

- a. result in or be deemed to constitute an unlawful sale of electricity;
- b. cause IMCA as the beneficial owner, or the lessor that will hold legal title to the Project, or any of lessor's partners or affiliates, to be deemed a public utility as that term is defined in Section 366.02, Florida Statutes; or

c. cause IMCA as the beneficial owner, or the lessor that will hold legal title to the Project, or any of lessor's partners or affiliates, to otherwise be subject to regulation by the Commission.

23. IMCA has a real and immediate need for the requested declaratory statement. IMCA is at the threshold of expending considerable resources and undertaking significant commitments in order to accomplish its business objectives, all of which are premised on the affirmative declaration sought herein. Accordingly, IMCA respectfully requests that the Commission act on its petition as rapidly and expeditiously as possible.

WHEREFORE, IMCA respectfully requests that the Commission enter its order GRANTING the requested declaratory statement on an expedited basis.

Respectfully submitted this 10th day of October, 1997.



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IMC-Agrico Self-Generation Project Proposed Business Structure Diagram

