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November 19, 1997

Charles A. Guyton
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By Hand Delivery

Blanca S Bayó, Director
Records and Reporting
Florida Public Service Commission
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399-0850

**Re: Petition of IMC-Agrico Company for a Declaratory Statement
Confirming Non-Jurisdiction Nature of Planned Self-Generation
Docket No. 971313-EU**

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company are the original and fifteen (15) copies of Motion to Dismiss IMC-Agrico Petition for Declaratory Statement in Docket No. 971313-EU. Also enclosed is an additional copy of the Motion which we request that you stamp and return to our runner.

ACK

AEA If you or your Staff have any questions regarding this filing, please contact me at 222-2300.

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Very truly yours,

Charles A. Guyton

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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: November 19, 1997

**Florida Power & Light Company's Motion to Dismiss
 IMC-Agrico Petition For Declaratory Statement**

Florida Power & Light Company ("FPL"), pursuant to Florida Administrative Code Rule 25-22.037(2), moves the Florida Public Service Commission ("Commission") to dismiss or summarily deny the petition for declaratory statement filed by IMC-Agrico on October 10, 1997 in Docket No. 971313-EU. As grounds for its motion, FPL states:

1. Contemporaneous with the filing of this motion FPL has petitioned the Commission for leave to intervene in Docket No. 971313-EU. FPL's petition to intervene fully address FPL's substantial interests in this proceeding and how its substantial interests will be affected by the Commission's disposition of this case.
2. The Commission's notice of the IMC-Agrico declaratory statement request was published in the November 7, 1997 Florida Administrative Weekly. FPL's motion to dismiss the IMC-Agrico petition is being filed within 20 days of the publication of the notice of the petition.

**IMC-Agrico's Petition Should Be Dismissed
or Summarily Denied Because it Seeks a
Declaratory Statement as to Parties
Other than IMC-Agrico.**

3. Both the statute and Commission rule pursuant to which IMC-Agrico seeks its declaratory statement require that the petitioner show how a statute, rule or order applies to the petitioner. Section 120.565, Florida Statutes, (1996 Supp.) states in pertinent part:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

Similarly, the Commission's declaratory statement rule, Rule 25-22.020(1), F.A.C. provides:

(1) Any person may seek a declaratory statement as to the applicability of a specific statutory provision or of any rule or order of the Commission as it applies to the Petitioner in his or her particular set of circumstances only.

4. Building upon the scope of the statutory language in Section 120.565, Florida Statutes, Florida courts recognize that it is improper to use a declaratory statement to determine the applicability of a statute or rule to the conduct of another person. In Manasota-88, Inc. v. Gardinier, 481 So.2d 948 (Fla. 1st DCA 1986), the First District Court of Appeal upheld the denial of a declaratory statement where Manasota-88, an environmental group, sought declarations as to the applicability of the air pollution permit statutes to the phosphate industry in general and as to Gardinier in particular. The court noted that the declaratory statement petitions "were denied because they sought a declaration as to the effect of the statutes on third parties, contrary to Section 120.565," and affirmed their denial.

5. The Commission has reached the same conclusion in applying its declaratory statement rule. In 1990 Intermedia Communications of Florida, Inc. sought a declaratory statement from the Commission that its lease of dark fibers from Tampa Electric Company would not make Tampa Electric a telephone company subject to Commission jurisdiction. The Commission declined to issue the declaratory statement, holding:

[A]n agency may not issue a declaratory statement to one person for the purpose of determining the rights and duties of another person. Section 120.565 states unequivocally that "[a] declaratory statement shall set out the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to the petitioner in his particular set of circumstances only." It does not say that an agency can determine the applicability of statutes, rules or orders to a third party.

In re: Petition for Declaratory Statement Regarding Lease of "Dark Fiber" and Other Facilities from Tampa Electric Company by Intermedia Communications of Florida, Inc., 90 FPSC 5: 42.

6. Applying the plain language of Section 120.565 and Rule 25-22.020(1) and this case law to the petition shows that the Commission should deny the declaratory statement sought. IMC-Agrico seeks to determine the applicability of certain statutes and orders not only to IMC-Agrico, but also to "the lessor that will hold legal title to the Project, or any of the lessor's partners." IMC-Agrico petition at page 1. IMC-Agrico's attempt to have the Commission issue a declaratory statement as to entities other than IMC-Agrico is an improper attempt to have the Commission issue a declaratory statement regarding a third party. It is inconsistent with the plain meaning of Section 120.565, Florida Statutes, the plain meaning of Rule 25-22.020, Florida Administrative Code, the holding in the Manasota case, and the Commission's decision in the Intermedia case. The request should be denied.

7. When the relief requested by IMC-Agrico ("IMCA") is closely examined, it is clear that the only substantive request is as to other parties. For example, IMCA seeks a declaratory statement that the proposed transaction will not "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...." IMC-Agrico petition at page 1. While ostensibly IMCA also seeks a determination as to itself, consider how nonsensical that request is. IMCA is the purchaser or lessee of 120 MW of capacity sold by another entity or entities. As a purchaser IMCA is not and could not be a "public utility" or subject to the Commission's regulation. If there is a retail sale that gives rise to public utility status and Commission regulation, it is a sale by either the partnership (the "lessor" in IMC-Agrico's petition) or the partners (the "lessor's partners" in the petition). Thus, the entire thrust of the declaratory statement is whether an as yet unestablished entity which cannot petition for a declaratory statement because it does not yet exist will be making a retail sale to IMCA that will give rise to the entity being a public utility subject to Commission jurisdiction. IMCA should not be permitted to request a declaratory statement as to a third party, particularly when the third party does not exist.

IMC-Agrico's Petition For Declaratory Statement Is Premised Entirely upon Conjecture And Speculation; It Fails To Allege Facts Sufficient For The Commission To Issue A Declaratory Statement; It Fails To Raise A Justiciable Controversy.

8. Buried in the middle of IMC-Agrico's fourteen page petition for declaratory statement is the surprising revelation that "the definitive Lease and O&M Contract have not yet been developed." IMC-Agrico petition at page 7. IMC-Agrico's lengthy recitation of "facts" is entirely speculation and conjecture. At present there is no proposed transaction which the

Commission can address. The deal has not yet been negotiated. The multiple transactions have not been committed to paper and signed by the parties. Even the nature of the entity which allegedly will contract for the engineering, design, procurement and construction of the power plant (IMC-Agrico petition at 8) and which will allegedly own the power plant and lease interests to IMCA and an affiliate of DEPS (IMC-Agrico petition at page 6) has not yet been determined. It will allegedly be organized as "a partnership or equivalent entity". IMC-Agrico petition at page 6.

9. By statute and rule, a declaratory statement is to be made as to a petitioner's "particular set of circumstances." With all due respect, despite the speculative representations of IMC-Agrico, IMC-Agrico has no "particular set of circumstances" to which the Commission may apply statutes or prior orders and issue a declaratory statement.

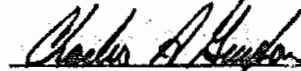
10. Courts have held that because a declaratory statement proceeding is similar to an action for declaratory judgment in circuit court, the declaratory judgment statute and case law interpreting it may be used as guidance. See e.g., Couch v. State, 377 So. 2d 32 (Fla. 1st DCA 1979). Thus, individuals seeking a declaratory statement must show that there is a bona fide, actual, present, and practical need for the declaratory statement and that the declaration deals with a present controversy as to a state of facts. See e.g., Sutton v. Department of Environmental Protection, 654 So. 2d 1047 (Fla. 5th DCA 1995). There is no present, justiciable controversy as to a state of facts for the Commission to address, as there are not yet a state of facts.

11. The fundamental issue posed by IMC-Agrico is whether a transaction to which it is not yet committed and which may never transpire may result in a retail sale by an entity other than IMC-Agrico to IMC-Agrico, thus giving rise to public utility status and Commission

regulation. The Commission cannot meaningfully address this hypothetical state of facts. Whether the transaction will result in a retail sale is almost entirely dependent upon the details of how the transaction is formulated. Those details are not yet established. In such a circumstance there is no "bona fide, actual, present and practical need for the declaratory statement," and an attempt to issue such a statement based upon such the current unsettled circumstances would be, at best, premature. At a minimum, the Commission should have some assurance that it is actually addressing a real set of circumstances.

WHEREFORE, FPL respectfully moves the Commission to dismiss or summarily deny IMC-Agrico's petition for declaratory statement.

Respectfully submitted,



Matthew M. Childs, P.A.

Charles A. Guyton

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Attorneys for Florida Power & Light Company

Certificate of Service

I hereby certify that on this the 19th day of November, 1997 a copy of Florida Power & Light Company's Motion to Dismiss IMC-Agrico Petition For Declaratory Statement was served by U.S. Mail or hand delivery (*)

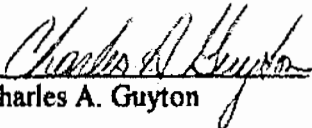
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