ORIGINAL

CARLTON FIELDS

ATTORNEYS AT LAW

215 SOUTH MONROE STREET, SUITE 500
TALLAHASSEE, FLORIDA 32301-1866
TEL (904) 224-1585 FAX (904) 222-0398

MAILING ADDRESS
POST OFFICE DRAWER 190
TALLAHASSEE, FL 32302-0190

November 25, 1997

RECEIVED
NOV 25 1997
FPSC - Records/Reporting

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

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, Florida Statutes; DOCKET NO. 971337-EU

Dear Ms. Bayo:

Enclosed for filing in the above docket are the original and fifteen (15) copies of the following documents:

1. Florida Power Corporation's Petition to Intervene and Request for Administrative Hearing; 12136-97
2. Florida Power Corporation's Motion to Dismiss Proceeding; 12137-97
3. Florida Power Corporation's Answer to Petition for Declaratory Statement. 12138-97

Also enclosed are additional copies of the above documents for acknowledgement of filing. We request you acknowledge receipt and filing of the above by stamping these additional copies and returning them to me in the self-addressed, stamped enveloped provided for your convenience.

If you or your Staff have any questions regarding this filing, please contact me at (813) 821-7000.

Very truly yours,

Gary L. Sasso

GLS:jlc

5 Enclosures
cc: Robert Scheffel Wright, Esq.
Joseph A. McGlothlin, Esq.
John W. McWhirter, Jr., Esq.

RECEIVED
NOV 25 1997
FPSC-BUREAU OF RECORDS

ORIGINAL

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, Florida Statutes	)	DOCKET NO. 971337-EU FILED: November 25, 1997

FLORIDA POWER CORPORATION'S MOTION TO DISMISS PROCEEDING

Florida Power Corporation ("FPC") moves the Commission to dismiss the petition filed by Duke Mulberry Energy, L.P. ("Duke") and IMC-Agrico Company ("IMCA") on the ground that the issues raised by the petition may not be resolved appropriately by the declaratory statement proceeding they have initiated. In support of this Motion, FPC states the following:

1. Rule 25-22.021 of the Rules of the Commission provides:

> 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. The potential impact upon petitioner's interest must be alleged in order for petitioner to show the existence of a controversy, question or doubt. (Emphasis added).

2. It is well settled that "an administrative agency may not use a declaratory statement as a vehicle for the adoption of a broad agency policy or to provide statutory or rule interpretations that apply to an entire class of persons." Regal Kitchens, Inc. v. Florida Dep't. of Revenue, 641 So. 2d 158, 162 (Fla. 1st DCA 1994) (emphasis added); see, e.g., Mental Health District Bd. v. Florida Dep't. of Health & Rehabilitative

58107298.2

Services, 425 So. 2d 160, 162 (Fla. 1st DCA 1983) (holding declaratory statement procedure may not be properly applied to resolve issues raised by particular petitioner concerning its contract rights where the issue "is not necessarily a situation peculiar to [the petitioner], but instead carries implications for providers and counties statewide, reasoning that "[d]eclaratory statement proceedings are not appropriate when the result is an agency statement of general applicability interpreting law or policy") (emphasis added); Florida Optometric Ass'n. v. Department of Professional Regulation, 567 So. 2d 928 (Fla. 1st DCA 1990) (same); Tampa Electric Co. v. Florida Department of Community Affairs, 654 So. 2d 998 (Fla. 1st DCA 1995) (same). Thus, "[a] declaratory statement cannot be issued for general applicability." Sutton v. Department of Environmental Protection, 654 So. 2d 1047, 1048 (Fla. 5th DCA 1995).

3. These limitations on use of the declaratory statement procedure are plainly exceeded by the petition that Duke and IMCA have brought before this Commission. Indeed, in requesting oral argument in this case, Duke and IMCA freely concede that their petition "raises significant issues with respect to the statutory basis for, and policy implications of, granting competitive wholesale power producers . . . access to the Commission's need determination process pursuant to Section 403.519, Florida Statutes." (Duke and IMCA's Request to Address the Commission, p. 1) (Emphasis added).

4. In their petition, Duke and IMCA ask the Commission to determine that they may have "applicant" status under the Florida Electrical Power Plant Siting Act ("PPSA" or the "Siting Act") to file a petition seeking a determination of need to build a purported combination self-generation and merchant plant project (the "Project"). Alternatively, they ask the Commission to declare that no determination of need is required for the Project.

5. The significance of the issues raised in the petition is apparent. Specifically, in seeking applicant status under the PPSA, Duke and IMCA are asking that the Commission repudiate its rulings and the decisions of the Florida Supreme Court in Nassau Power Corp. v. Beard, 601 So. 2d 1175 (Fla. 1992) ("Nassau I") and Nassau Power Corp. v. Deason, 641 So. 2d 396 (Fla. 1994) ("Nassau II"), which limit applicant status under the PPSA to regulated public utilities and to independent power producers ("IPPs") under contract with a Florida utility.

6. In alternatively asking the Commission to exempt the Project from the need provisions of the PPSA, Duke and IMCA are asking the Commission to flaunt the plain language of the PPSA, which unequivocally establishes that a need determination is a threshold requirement of the Siting Act, and which makes equally clear that no plant may be constructed outside the PPSA (unless exempt under provisions apparently not relevant here, Duke and IMCA having claimed no exemption). Thus, Section 403.508(3), Florida Statutes, specifically provides that "an affirmative

determination of need by the Public Service Commission pursuant to [the Siting Act] shall be a condition precedent to the conduct of the certification hearing." (Emphasis added). And Section 403.506(1), Florida Statutes, provides: "No construction of any new electrical power plant or expansion in steam generating capacity of any existing electrical power plant may be undertaken . . . without first obtaining certification in the manner as herein provided." (Emphasis added).

7. Thus, the rulings that petitioners seek would be far-reaching and would profoundly affect the structure of the electrical industry in Florida. Although ostensibly seeking relief pertaining to a particular Project, the petition plainly calls upon the Commission to "provide statutory . . . interpretations that apply to an entire class of persons," Regal Kitchens, 641 So. 2d at 162, namely, merchant plant developers and electric utilities, the latter being indispensable parties in all need proceedings in the state under current law. There can be no doubt that the Project that provides the impetus for the petition is "not necessarily a situation peculiar to the [petitioner], but instead carries implications for [other merchant plant developers and utilities] statewide." Mental Health District Board, 425 So. 2d at 162.

8. As FPC explains in some detail in its Petition to Intervene, the existing regulatory scheme in Florida imposes a statutory duty upon electric utilities to serve the electric power needs of the citizens of this state. Concomitant with that

responsibility, existing law confers upon electric utilities (and the Commission) the prerogative to determine whether and when to initiate the creation of new generating capacity. In this connection, electric utilities are required to engage in a ten-year site-plan process to assess and meet the long-term electric power needs of their respective customers. Indeed, the ten-year site-plan obligation was enacted as part of the PPSA and codified separately only to collect all comprehensive-planning provisions together in one place in the Florida Statutes. Section 403.505, Florida Statutes (1973); 1973 Florida Laws Chapter 73-33, Section 1; 1976 Florida Laws Chapter 76-76, Section 2; Staff Analysis for Committee Substitute for Senate Bill No. 659, Senate Committee on Natural Resources and Conservation, p. 1 (April 19, 1976).

9. Duke and IMCA, by their petition, seek to thwart this regulatory scheme. While leaving with state-regulated electric utilities the statutory obligation to serve, Duke and IMCA seek to arrogate to themselves (and other developers like them) the prerogative whether and when to build new generation capacity in this state.

10. If there could be any doubt on this issue before, there can be none after the workshop conducted by the Commission Staff on the issue whether merchant plants ought to be given applicant status under the PPSA. There, merchant plant developers announced their interest and intention to build multiple plants, adding hundreds or thousands of megawatts of generating capacity in this state, based solely on their perception of economic

opportunities, without any statutory obligation to serve, or assurance of whether or when they will sell that power inside or outside the state and without any attention to the broader issues arising from the installation of new capacity.

11. Opening up the PPSA to speculative merchant plant developers would not only wrest from the state-regulated electric utilities any meaningful control over the site-planning process that they are now statutorily required to pursue, but would impede the ability of such utilities and the appropriate regulatory agencies to anticipate and address what those developers are planning. At the Staff workshop, Duke's representative rejected the prospect that merchant plant developers could submit ten-year site plans like those prepared by electric utilities, stating that it would be impractical and would compromise competitively sensitive information.

12. Accordingly, the relief that Duke and IMCA are seeking will directly impinge upon the ability of FPC and other utilities like it to discharge their statutory responsibility to ensure the provision of adequate and reliable electric service in this state and to maintain the integrity of the electric power grid.

13. Indeed, the Commission should not overlook the significance of the very fact that a workshop was recently conducted on such issues. Numerous public utilities, municipal utilities, and would-be merchant plant developers actively participated in the workshop, raising numerous issues of law, policy, and economics that need to be addressed and resolved

before the Commission should seriously entertain the proposal advanced by Duke and IMCA in this limited proceeding to repudiate existing statutory interpretations of the PPSA. The Staff's workshop alone demonstrates convincingly that the instant petition poses very serious issues of general applicability and statewide concern, not susceptible of resolution in the limited proceeding that Duke and IMCA have commenced.

14. Further, based on the information set forth in the petition, it appears that the proposed Project will place additional demands on the transmission system maintained by FPC in the area that would serve the project. FPC may be required to modify or augment its transmission facilities at an increased cost to all of FPC's native load customers in order to transmit the output of a new generating plant. This consequence provides further reason to conclude that a ruling by the Commission in this case will have impact far beyond the immediate interests and circumstances of just the petitioners.

15. Finally, the Commission is expressly directed by law to avoid "further uneconomic duplication of generation, transmission, and distribution facilities" in this state. Section 366.04(5), Florida Statutes. The relief that Duke and IMCA seek directly threatens to impinge upon this mandate and, by the same token, to visit upon FPC and other electric utilities the consequences of the construction of redundant generating facilities. If merchant plant developers, like Duke and IMCA, are permitted to construct new generating facilities without

regard to the need of particular utilities or their customers, or are permitted alternatively to bypass any need determination whatsoever, the risk that they will unnecessarily duplicate existing facilities is palpable. For this reason, too, Duke and IMCA should not be permitted to pursue relief in a proceeding ostensibly limited to the resolution of issues involving only their interests.

WHEREFORE, the Commission should dismiss the petition without prejudice to petitioners seeking relief through an avenue that affords due process and an opportunity to be heard for all parties potentially affected by such relief.

Respectfully submitted,

FLORIDA POWER CORPORATION

Gary Sasso

JAMES A. MCGEE
Senior Counsel
JEFF FROESCHLE
Corporate Counsel
FLORIDA POWER CORPORATION
Post Office Box 14042
St. Petersburg, FL 33733
Telephone: (813) 866-5153
Telecopier: (813) 866-4931

GARY L. SASSO
Florida Bar No. 622575
Carlton, Fields, Ward,
Emmanuel, Smith & Cutler
Post Office Box 2861
St. Petersburg, FL 33731
Telephone: (813) 821-7000
Telecopier: (813) 822-3768

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to: Robert Scheffel Wright, Esq., Landers and Parson, P.A., Post Office Box 271, Tallahassee, FL 32302 as counsel for Duke Mulberry Energy, L.P.; and, Joseph A. McGlothlin, McWhirter, Reeves, McGlothlin, Davidson, Rief & Bakas, P.A. 117 South Gadsen Street, Tallahassee, FL 32301 and John W. McWhirter, Jr., McWhirter, Reeves, McGlothlin, Davidson, Rief & Bakas, P.A., Post Office Box 3350, Tampa, Florida 33602, as counsel for IMC-Agrico Company this 25th day of November, 1997.

Gary Sasso
Attorney wDH