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December 3, 1997

**VIA HAND DELIVERY**

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

Re: Docket No. 971313-EI

Dear Ms. Bayó:

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

1. IMC-Agrico Company's Response to Florida Power and Light Company's "Amicus Curiae Memorandum." 12331-97
2. IMC-Agrico Company's Response in Opposition to Peace River Electric Cooperative, Inc.'s Petition to Intervene and Request for Hearing. 12330-97

ACK \_\_\_\_\_ I have enclosed extra copies of the above documents for you to stamp and return to me. Please contact me if you have any questions. Thank you for your assistance.

AFB \_\_\_\_\_  
APP Bella  
CAF \_\_\_\_\_  
CMU \_\_\_\_\_ Sincerely,

CTR \_\_\_\_\_  
EAG 5 *Willis Gordon Kaufman*  
LEG \_\_\_\_\_ Vicki Gordon Kaufman

LIN \_\_\_\_\_ VGK/pw  
OPC \_\_\_\_\_ Encls.

RCH \_\_\_\_\_  
SEC L  
WAS \_\_\_\_\_  
OTH \_\_\_\_\_

RECEIVED & FILED  
*[Signature]*  
DOCUMENT NUMBER-DATE  
12330 DEC-35  
FPC BUREAU OF RECORDS  
FPC BUREAU OF 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. 971313-EU  
Filed: December 3, 1997

**IMC-AGRICO COMPANY'S RESPONSE IN OPPOSITION TO  
PEACE RIVER ELECTRIC COOPERATIVE, INC.'S  
PETITION TO INTERVENE AND REQUEST FOR HEARING**

IMC-Agrico Company (IMCA), through its undersigned counsel, files its Response to in Opposition to Peace River Electric Cooperative's (Peace River) Petition to Intervene and Request for Hearing. Both requests should be denied. As grounds therefor, IMCA states:

**Background**

1. On October 10, 1997, IMCA filed a petition for declaratory statement regarding its proposed ownership and operational structure of certain planned self-generation facilities and transmission facilities.

2. On November 24, 1997<sup>1</sup>, Peace River filed a Petition for Leave to Intervene and Request for Hearing.<sup>2</sup> Peace River lacks standing to intervene in this proceeding and its petition and request for hearing should be denied.

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RCH \_\_\_\_\_  
SEC \_\_\_\_\_  
WAS \_\_\_\_\_  
OTH \_\_\_\_\_

<sup>1</sup> The date of Peace River's filing is significant. IMCA filed its petition on October 10. The Commission is scheduled to make a decision on the petition on December 16. However, Peace River waited until November 24 (6 weeks after IMCA's filing) to file its petition to intervene. The Commission should not allow this late filing to delay its decision on IMCA's petition.

<sup>2</sup> Peace River did not serve IMCA with a copy of its pleading; rather, IMCA had to obtain one from the Clerk's office. Though the face of Peace River's pleading states that it was filed on November 21, the certificate of service indicates that it was mailed to some attorneys on November 24. The Clerk's records reflect that the pleading was actually filed on November 24.

DOCUMENT NUMBER-DATE

12330 DEC-3 97

FILED REPORTING

### **Peace River Fails to Meet the Agrico Standing Requirements**

3. In order to intervene in this proceeding, Peace River must demonstrate that it can meet the two-prong test for standing set out in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981). That is, it must show that it will suffer such immediate injury that it is entitled to a § 120.57 hearing and the injury must be of the type the proceeding is designed to protect. Peace River can meet neither prong of the Agrico test.

#### **Peace River has failed to demonstrate immediate injury**

4. Peace River does not even attempt to allege some type of injury until the final paragraph of its pleading. There it states that its injury is "possible loss of load, reduction in revenues and increased cost of service. . . ." <sup>3</sup> It is clear that vague speculation in regard to possible future economic injury cannot meet the Agrico test of immediate injury. IMCA has the absolute right to self-generate, PW Ventures v. Nichols, 533 So.2d 281, 284 (Fla. 1988), even if it means that Peace River's revenues may be reduced. The loss of IMCA as a Peace River retail customer and any economic loss that may flow from that event does not meet the immediate injury test.

5. This Commission has addressed essentially the same situation previously. In the same circumstances as are present in this docket, the Commission denied a requesting utility's petition to intervene. In re: Petition of Monsanto Company for a Declaratory Statement Concerning the Lease Financing of a Cogeneration Facility, Docket No. 860725-EU. In that docket, Monsanto filed a petition for declaratory

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<sup>3</sup> Peace River petition at ¶ 9, emphasis supplied.

statement regarding the lease-financing of a cogeneration plant and asked the Commission for a statement that the project would not result in a retail sale of electricity or cause Monsanto to be a public utility. Gulf Power sought to intervene based on the fact that it would be affected by the loss of the Monsanto load. The Commission denied intervention<sup>4</sup> to Gulf Power:

Gulf currently provides all of Monsanto's electric power needs. Its assertion of "substantial interest" is based on the economic consequences of Monsanto's proposed cogeneration facility's output on Gulf's load. Economic damage alone does not constitute "substantial interest." Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 1st DCA 1981). We find, therefore, that Gulf does not have a "substantial interest" in this proceeding and in accord with Rule 25-22.39, Florida Administrative Code, deny Gulf's request for intervention.<sup>5</sup>

**Peace River's "injury" is not the type a declaratory statement proceeding was designed to protect**

6. 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 order of the agency, as it applies to the petitioner's particular set of circumstances."<sup>6</sup>

7. The Commission's rules on declaratory statements make this obvious because they provide that a declaratory statements apply to the petitioner "in his or

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<sup>4</sup> The Commission also found Gulf Power's request for an evidentiary hearing to be moot since it was denied intervenor status.

<sup>5</sup> Order 16581 at 2.

<sup>6</sup> Section 120.565(1), Florida Statutes, emphasis added.

her particular set of circumstances only.”<sup>7</sup> 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.”<sup>8</sup> That is the declaratory statement, by its very nature, can affect only the petitioner and no other person. Therefore, since the declaratory statement process can affect only the petitioner (in this case, IMCA), it is certainly not the type of proceeding designed to further Peace River’s economic interests.

8. Peace River complains that IMCA has not provided the lease or O&M contract for Commission review and in the absence of such documents Peace River “disputes” the claim that the IMCA project is self-generation. However, just as in 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, IMCA has described the parameters of its proposal in detail because the documents remain to be negotiated. The fact that the yet-to be negotiated documents have not been provided to Peace River does not give it standing in this proceeding. What Peace River is attempting to do in the guise of a petition to intervene is to convert a straight-forward petition for declaratory statement into an evidentiary hearing that is well beyond the scope of IMCA’s petition and thus well beyond any interest this type of

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<sup>7</sup> Rule 25-22.020(1), Florida Administrative Code, emphasis added.

<sup>8</sup> Rule 25-22.021, Florida Administrative Code.

proceeding was designed to protect.

9. Finally, Peace River admits that its "need" for a hearing is based on its desire "to seek discovery of pertinent terms and conditions of the proposal."<sup>9</sup> Peace River wants to inquire into confidential business arrangements which can have no effect on the request for declaratory statement regarding the self-generation nature of IMCA's proposal. Peace River's hearing request is nothing more than a request for a license to conduct an unwarranted fishing expedition into confidential matters. The Commission should not permit a simple declaratory statement proceeding to be used in this way.

**WHEREFORE**, Peace River's petition to intervene and request for hearing should be denied.

  
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Attorneys for IMC-Agrico Company

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<sup>9</sup> Peace River petition at ¶ 7.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of IMC-Agrico Company's foregoing Response in Opposition to Peace River Electric Cooperative, Inc.'s Petition to Intervene and Request for Hearing has been furnished by U.S. Mail or hand delivery(\*) on this 3rd day of December, 1997, to the following:

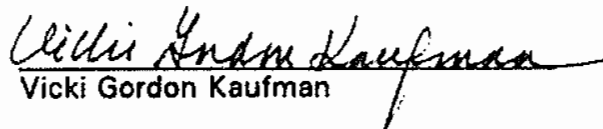
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