FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

December 2, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF APPEALS (BELLAK) RCB DES
DIVISION OF ELECTRIC & GAS (FUTRELL) MT JDJ

RE: DOCKET NO. 971337-EU - 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, FLA. STAT.

AGENDA: 12/16/97 - REGULAR AGENDA - PETITIONER AND PETITIONERS FOR INTERVENTION MAY PARTICIPATE AT COMMISSION'S DISCRETION.

CRITICAL DATES: JANUARY 13, 1998 - (DECISION DUE TO MEET 90-DAY REQUIREMENT IN SECTION 120.565, FLA. STAT.)

SPECIAL INSTRUCTIONS: S:\PSC\APP\WP\R971337.RCM

CASE BACKGROUND

Petitioners Duke-Mulberry Energy, L.P. (Duke or Duke Mulberry) and IMC-Agrico company (IMCA) plan to develop a natural gas fired, combined cycle electrical generating unit south of Mulberry, Florida. Title to the power plant, currently envisioned to be between 240 MW and 750 MW, will be placed in a partnership or equivalent entity that IMCA and Duke will form for that purpose.

IMCA will enter into a net lease of 120 MW of the plant's capacity for its own use.[1] The balance of the plant will be leased to Duke, which will sell energy on the open market at wholesale. Duke will be certified as an Exempt Wholesale Generator which will sell output at market-based rates pursuant to a Federal Energy Regulatory Commission (FERC) tariff.

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[1] Though staff accepts the self-generation characterization as fact for the purpose of this recommendation, that claim is contested in Docket No. 971313-EU.

Duke notes that, as an EWG, it will have no right to compel any utility to purchase its power, unlike a Qualifying Facility (QF).

Duke and IMCA ask for a declaration that they are entitled to apply for a determination of need for their proposed power plant or, in the alternative, that no such determination of need is required.

On November 17, 1997, Florida Power Corporation (FPC) filed a Petition to Intervene. On November 25, 1997, FPC filed an Answer and a Motion to Dismiss Proceeding. On the same date, Tampa Electric Company (Tampa Electric) filed a Response and Petition for Leave to Intervene. On December 1, 1997, Florida Power & Light Company (FPL) filed an Amicus Curiae Memorandum of Law.

DISCUSSION OF ISSUES

ISSUE 1: Should FPC's Motion to Dismiss Proceeding be granted?

RECOMMENDATION: No. FPC's Motion to Dismiss Proceeding should be denied.

STAFF ANALYSIS: FPC cites a number of cases holding that, when the result is an agency statement of general applicability interpreting law or policy, declaratory statement proceedings are inappropriate. Significantly, the Court, in such cases as Regal Kitchens, Inc., v. Florida Dep't of Revenue, 641 So. 2d 158 (1st DCA 1994), and Mental Health District Bd v. Florida Dep't of Health and Rehabilitative Services, 425 So. 2d 160 (1st DCA 1983), cited by FPC, upheld that part of the declaratory statement which related solely to the facts and circumstances of the petitioners, while reversing as to those parts that were generally applicable statements of policy. In this case, the Commission may apply the relevant statutes to the particular facts and circumstances of the petitioners while, at the same time, avoiding the kinds of broad policy pronouncements which have been held to be improper.

ISSUE 2: Should Tampa Electric and FPC's Petitions to Intervene be granted?

RECOMMENDATION: No. Tampa Electric and FPC's Petitions to Intervene should be denied.

STAFF ANALYSIS: Tampa Electric and FPC cite Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (2nd DCA

1981), as the source of the test for standing to intervene. According to that test, a petitioner must show that (1) it will suffer injury in fact of sufficient immediacy to warrant a hearing, and (2) that the injury is of a type or nature that the proceeding is designed to protect.[2]

In claiming to meet both parts of this test, FPC claims, inter alia, that it has an interest in meeting its statutory duties of furnishing adequate and reliable electric service at reasonable cost, maintaining the reliability of the grid and taking a measured and effective approach to the development and maintenance of generating capacity in this state. FPC seeks to intervene to "avoid impairment" to this well-considered and orderly development of generating capacity.

As a basis for its concerns, FPC cites many provisions within both Chapters 366 and 403, as well as the Florida Supreme Court's decisions 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").

FPC notes, for example, that the Nassau decisions confer a significant measure of control upon FPC over the creation of new generation capacity that the relief sought by IMCA and Duke would impair. For its part, Tampa Electric lists a number of instances relevant to its concerns that its ability to plan for and provide cost effective service would be negatively impacted by IMCA and Duke's project.

Staff, however, believes that these concerns do not meet the Agrico test because they confuse the request for a declaration that IMCA and Duke can be applicants for a need determination with the actual determination as to whether such a plant is, or is not, needed. Staff believes that while some or all of Tampa Electric and FPC's concerns may meet the tests of (1) immediacy of the claimed injury and (2) the type of injury the proceeding is intended to protect against when such a need determination application is actually acted upon, the present petition is preliminary to the stage at which the utilities' actual standing would arise.

Moreover, staff believes it is somewhat circular to argue that the Nassau cases create circumstances which IMCA and Duke's petition will impair to FPC's injury if the Nassau cases concern

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[2] It is assumed that the Court means injury of a type the proceeding is designed to protect against.

the law applicable to cogenerators and this petition does not concern the law of cogeneration.

ISSUE 3: Should IMCA/Duke be permitted to address the Commission and should FPC, Tampa Electric and FPL be permitted to participate?

RECOMMENDATION: Yes. IMCA/Duke, FPC, Tampa Electric and FPL should be permitted to participate in order to inform the Commission as to these complex issues.

STAFF ANALYSIS: In Monsanto, briefing was permitted to further inform the Commission as to the issues therein even though formal intervention was denied. In this case, FPC's Answer, Tampa Electric's Response and FPL's Amicus Curiae Memorandum could serve that function and their participation would be of assistance in view of the complexity of the issues involved in this docket.

ISSUE 4: Should the Commission issue the requested declaratory statement?

RECOMMENDATION: Yes. The Commission should issue a declaratory statement to the effect that Duke Mulberry, L.P. and IMCA may seek a determination of need for their proposed power plant pursuant to provisions of the Florida Electrical Power Plant Siting Act (Siting Act) and Commission rules.

STAFF ANALYSIS: Under the Siting Act, an "applicant" is defined at Section 403.503(4) as

> any electric utility which applies for certification pursuant to the provisions of this act. [e.s.]

Section 403.519, in turn, provides that "[o]n request by an applicant or on its own motion, the Commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act". [e.s.] Section 403.505(13) defines "electric utility" as

> cities and towns, counties, public utility districts, regulated electric companies ... engaged in, or authorized to engage in the business of generating, transmitting, or distributing electric energy. [e.s.][1]

[1] Because the definitions in both Section 403.503 and Section 366.02 are expressly in reference to the respective act and chapter

The essence of petitioners' claim to be proper co-applicants which are entitled to a determination by the Commission of the need for petitioners' proposed power plant is that Duke Mulberry, L.P. will be "a regulated electric company" subject to the FERC's regulatory authority and oversight of it as an Exempt Wholesale Generator. This claim requires the consideration, inter alia, of whether the term "regulated electric companies" in section 403.503(13) includes the federal FERC regulations at issue or is limited to state regulated electric companies, and, indeed, whether such EWG regulation is regulation at all in the sense intended in Section 403.503(13).

Examining the latter point first, there is a certain irony involved in considering such EWG regulation to be regulation for Section 403.503(13) purposes. Since it is essentially deregulatory in nature, it is "light handed" regulation, rather than traditional rate of return regulation. As illustrated in Cataula Generating Company, L.P., the Federal Energy Regulatory Commission

> allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. [e.s.]

While the processes by which the FERC makes this determination and the reporting requirements by which oversight of the seller's status is maintained differ from the means and goals of "traditional" regulation, staff believes that when Duke Mulberry becomes subject to FERC's oversight as an EWG, it may then properly be described as "a regulated electric company".[4] See, 15 USCS §79Z-5a.

Further, the short answer as to whether the term "regulated electric companies" encompasses the federal regulation at issue or

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in which they appear, there is no requirement that they be construed in pari materia.

[4] Thus, apprehension that issuing this declaratory statement will result in "uneconomic duplication" not only jumps the gun by equating "applicant" status with an actual determination of need, but also mixes regulatory metaphors. As cogeneration illustrates, different regulatory schemes based on contrasting rationales can co-exist. The Commission can oversee their separate evolutions and make policies appropriate to each as may be required by the state's changing needs.

is limited to state regulated electric companies is that the Legislature could have easily secured the latter limitation as a result of adding the word "state". It not only has not done so, but has not done so in the most recent amendments to these provisions in 1996. Staff believes, therefore, that, in the absence of such an amendment, the Commission can, in its discretion, interpret the term "regulated electric companies" to include Duke Mulberry, L.P. under the facts and circumstances presented. The benefit of having done so will be that the need -- or lack of need -- for Duke Mulberry and IMCA's proposed project may then be determined on its merits rather than having any such determination foreclosed a priori. Staff believes that such a case-by-case determination has more potential benefit for the state than foreclosure of that determination based on a more restricted reading of Section 403.503(13).

While staff is aware that in prior Commission orders affirmed by the Florida Supreme Court in Nassau Power Corp. v. Beard, 601 So. 2d 1175 (Fla. 1992), and Nassau Power Corp. v. Deason, 641 So. 2d 396 (Fla. 1994), the Commission restricted cogenerator applicants under the Siting Act to those who had obtained agreements with co-applicant utilities, that development in the law of cogeneration is clearly inapplicable to this case, which does not involve cogeneration. Indeed, where Duke Mulberry plainly stated, at p. 6-7 of the petition;

> ...unlike the owner of a Qualifying Facility (QF), Duke Mulberry would have no legal right to compel any utility to purchase its power[,] [e.s.]

it would be illogical to apply to Duke Mulberry holdings intended to address concerns only relevant to cogenerators which do have such a legal right to compel utilities to purchase their power. This is especially so where the Commission's orders were expressly limited to that specific context.[5] Indeed, staff views the deeper underlying premise of the Nassau cases as consistent with its recommendations as to Duke Mulberry here. In effect, the Nassau cases represented an adjustment to the procedural requirements on cogenerators to reflect concerns about the regulation of cogeneration which developed as a result of the Commission's experience with that category of provider. Staff's recommendations concerning Duke Mulberry likewise reflect its view that a rigid imposition of procedural requirements applicable to so-called "non-

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[5] That context was specifically described as "non-utility generators [which] seek a determination of need based on a utility's need". 92 FPSC 10:646.

utility" generators would be inappropriate where, with the filing and consideration of the merits in full of Duke Mulberry and IMCA's petition, that category is no longer limited to cogenerators and other non-utility generators which seek a determination of need based on a utility's need.[6]

ISSUE 5: Should this docket be closed?

RECOMMENDATION: Yes. This docket should be closed.

STAFF ANALYSIS: Upon the issuance of the Commission's final order in this matter, this docket may be closed.

RCB

[6] Section 120.565 requires that the Commission apply the law to petitioners' facts and circumstances, not the law found applicable in the past to others in different facts and circumstances.