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December 12, 1997

VIA HAND DELIVERY

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

Re: Docket No. 971337-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 in Opposition to Florida Power and Light Company's Petition for Leave to Intervene. 12750-97

2. IMC-Agrico Company's Response to Florida Power and Light Company's Amicus Curiae Memorandum. 12751-97

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.

Sincerely,

Vicki Gordon Kaufman

Vicki Gordon Kaufman

VGK/pw
Encls.

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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-EI Filed: December 12, 1997

IMC-AGRICO COMPANY'S RESPONSE TO FLORIDA POWER AND LIGHT COMPANY'S AMICUS CURIAE MEMORANDUM

IMC-Agrico Company (IMCA), through its undersigned counsel, files its Response to Florida Power and Light Company's (FPL) Amicus Curiae Memorandum. Given the Staff's recommendation that FPL be permitted to participate, IMCA will not object to FPL's participation in this matter as amicus.

In its memorandum, FPL incorrectly applies the law and the facts to reach numerous erroneous conclusions. As set out fully in the petition for declaratory statement filed by IMCA and Duke Mulberry Energy, L.P. (Duke Mulberry), IMCA and Duke Mulberry are entitled to apply for a determination of need for their proposed power plant pursuant to section 403.519, Florida Statutes. Alternatively, no determination of need is required for the proposed plant as it will be a combination self-generation and merchant plant project. The Commission should issue a declaratory statement so finding.

I.

Introduction

IMCA has determined to engage in further self-generation. Duke Energy Power Services, LLC (DEPS) has determined to build a competitive wholesale merchant plant

in Florida. To realize economies of scale and to take advantage of the best available location, to utilize limited natural resources and the most advanced technology, the two companies have combined forces to build a power plant in which they each will have an undivided ownership interest. IMCA will be responsible for and receive all of the output from its share of the plant and none of DEPS' share. DEPS will be an exempt wholesale generator (EWG) and will sell all of its output at competitive prices into the Florida power grid to Florida utilities.

IMCA could proceed independently at greater cost and with greater fuel consumption to meet its own need, but it does not believe Florida law compels its citizens to ignore conservation imperatives and least-cost construction processes because the size of the proposed plant exceeds the threshold of the Power Plant Siting Act. It seeks authority to proceed under the Act.

The joint petition does not seek to establish new policy. State and federal policies are already in place authorizing self-generation and providing for a one-stop environmental approval process. The simple answer IMCA seeks from the Commission is whether it can apply to receive the benefits of the expedited environmental approval process; if the answer is no, it seeks a prior determination from the Commission that the Commission will not later attempt to invoke the Siting Act to prohibit IMCA from proceeding with permitting through standard industrial channels. The ruling in this case will be binding only on the parties in this case and only on the narrow issues presented by the requested ruling. It will not be *res judicata* as to the rights of any non-party.

It appears that the utilities which would benefit from the availability of less expensive power for their customers with no corresponding obligation to buy the power from the merchant plant portion of the facility if it is not less expensive are seeking to convert the petition into a new policy of general application which would attain greater government protection for their monopoly in the retail market and guaranteed market power in the wholesale market. The thrust of the arguments advanced by the petition's adversaries in this case is to restrict the size of generating plants built by self-generators and to exclude merchant plants from the opportunity to seek environmental approval in the state.

It would be a public disservice if this case is converted into a rulemaking determination of general applicability to provide greater protection for the current Florida utilities' monopoly in the retail and wholesale market without giving all interested persons fair notice of the potential breadth of the requested policy. It would be unfair to the petitioners to make them wait for a ruling until the utilities' proposed protracted protection policy is fully masticated in prolonged administrative hearings.

The narrow question raised by the petition in this case is whether existing government policy providing an expedited environmental approval process is available to the petitioners in this case for the type of plant they propose, a plant in which a self-generator and wholesale merchant combine forces for their mutual benefit. It seeks guidance as to the applicability of existing policy to a specific application. It does not seek to create new policy and the petitioners oppose all efforts to convert

their limited case into a *cause celebre*.

II.

Background

On October 15, 1997, IMCA and Duke Mulberry filed a petition for declaratory statement requesting the Commission to declare that IMCA and Duke Mulberry are proper applicants and are entitled to apply for a determination of need pursuant to section 403.519, Florida Statutes and other pertinent rules and regulations. Alternatively, IMCA and Duke Mulberry asked the Commission to declare that no determination of need is required for their proposed project which will be a combination self-generation and merchant plant project. On December 1, 1997, FPL filed an Amicus Curiae Memorandum of Law.

III.

FPL's Arguments are Erroneous and Should be Rejected

A.

IMCA/Duke Mulberry's Petition Raises a Narrow Issue Appropriate for a Declaratory Statement Petition

The purpose of a declaratory statement is to seek an agency's determination 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. In this instance, IMCA/Duke Mulberry have set forth in detail a specific set of factual circumstances related to their proposed self-generation/merchant plant project and have asked the Commission to rule as to whether they may utilize the one-stop permitting provisions of the Power Plant Siting Act (Siting Act).

The issue before the Commission in this case is well-defined, narrow and limited. The specific facts of this case are set out in detail in IMCA/Duke Mulberry's petition. IMCA/Duke Mulberry's specific and sharply delineated request is not a request for the Commission to make a broad policy statement applicable to all power plants in all factual circumstances. The specific nature and the specific facts presented here are in sharp contrast to the broad issues discussed in the cases upon which FPL attempts to rely. In this instance, as recognized in Staff's recommendation, the Commission can apply the relevant law to the particular facts and circumstances of IMCA/Duke Mulberry's petition without making a broad policy pronouncement. Staff recommendation at 2.

In contrast, in Florida Optometric Association v. Department of Professional Regulation, 567 So.2d 928 (Fla. 1st DCA 1990), the declaratory statement sought concerned the ability of all opticians to use vision screening equipment. In Tampa Electric Company v. Department of Community Affairs, 654 So.2d 998 (Fla. 1st DCA 1995), the declaratory statement concerned the broad power of local governments to regulate land use. Similarly, the other cases FPL cites involve broad statements of generally applicable policy as opposed to the limited question raised by IMCA/Duke Mulberry in this case--whether IMCA/Duke Mulberry, in the circumstances described in their petition, may use the provisions of the Siting Act. Unlike the situations in the cases FPL cites, IMCA/Duke Mulberry's request relates to the specific factual circumstances set forth in their petition and is appropriate for declaratory statement.

It is FPL, not IMCA/Duke Mulberry, who hopes to turn this docket into

something it clearly is not. For purposes of delay, among other things, FPL would prefer to convert a simple declaratory statement proceeding into a broad and far-ranging policy discussion which would take many months and an evidentiary hearing (with attendant discovery) to complete. FPL's attempt to turn this docket into a broad forum for policy making should be rejected.

B.

IMCA/Duke Mulberry Are Not Seeking a Policy Change

Similar in nature to its "policy" argument discussed in Part A above, FPL argues that the Commission may not make a "policy change" in a declaratory statement proceeding. Again, FPL attempts to confuse the nature of IMCA/Duke Mulberry's specific request so as to turn this declaratory statement proceeding into a long, litigious process. IMCA/Duke Mulberry seek no change in Commission policy. Rather, as the declaratory statement statute contemplates, they ask this Commission for a ruling regarding the application of certain statutes and rules to them in their particular circumstances only.

In attempting to label IMCA/Duke Mulberry's request as a "change [in] policy regarding the determination of need of non-utility generators"[1], FPL knows full well that in the cases on which it would like to rely, the Commission was not presented with the specific factual and legal situation before it here. IMCA/Duke Mulberry seek no change in prior Commission policy (which has no application to the facts before the Commission in this case) but rather seek the Commission's ruling on the application

[1] FPL memorandum at 3.

of the law to the different facts which they have presented in their petition.

C.

IMCA/Duke Mulberry are Proper Applicants Under the Circumstances Before the Commission in this Docket

FPL spends much time in its memorandum arguing that the Commission has already determined that no non-utility generator may use the provisions of the Siting Act. FPL purports to rely on this Commission's decision in In re: Petition of Nassau Power Corporation to determine need for electrical power plant, Docket No. 920769-EQ, Order No. PSC-92-1210-FOF-EQ, as well as the related appellate decisions.[2]

However, those cases (neither the Commission's orders or the Supreme Court decisions) do not control in the circumstances before the Commission presented by IMCA/Duke Mulberry. The Commission and the Court were faced with facts very different than the situation before the Commission in this docket.

In Nassau Power, the Commission dealt with need determinations filed by Nassau Power and Ark Energy. In those cases, the Commission was concerned with the Public Utilities Regulatory Policies Act of 1978 (PURPA).[3] In this case, it is the Energy Policy Act of 1992 (EPAct) which is at issue.[4] EPAct, as discussed below, created an entirely new class of entities (EWGs) not in existence or contemplated at the time of the Nassau Power decisions.

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[2] Nassau Power Corporation v. Beard, 601 So.2d 1175 (Fla. 1992); Nassau Power Corporation v. Deason, 641 So.2d 396 (Fla. 1994).

[3] 16 U.S.C. § 824, et. seq.

[4] Pub.L.No. 102-486, 106 Stat. 2905.

Further, in Nassau Power, the non-utility generators sought the Commission's prior assurance that the ratepayers would be responsible for paying for the proposed units via a contract with the utility approved by the Commission for cost recovery. The Commission concluded that in that circumstance, a non-utility generator could not pursue a need determination without a contract with a utility.[5] Order No. 22341[6], on which FPL also relies, is consistent with the Nassau Power holding in the circumstance where an applicant's plant will impose costs on ratepayers. FPL argues that Order No. 22341 controls in this case; however, the more accurate characterization is that the order is inapplicable. It simply does not address the situation before the Commission here where the applicant bears all risk associated with the proposed plant's construction and operation.

As discussed in IMCA/Duke Mulberry's petition for declaratory statement, both this Commission and the Governor and Cabinet sitting as the Power Plant Siting Board (Siting Board) have allowed entities other than traditional utilities to use the need determination and site certification process.[7] While FPL states that this Commission first addressed non-utility generators use of the determination of need process in In

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[5] Similarly, the Nassau Court focused on the ability of a non-utility generator with a contract with a utility to bring that contract before the Commission for approval. Nassau, 641 So.2d at 399.

[6] The orders following Order No. 22341 continue to address determination of need issues in the context of preapproved QF contracts for which cost recovery is guaranteed, not determinations of need involving merchant plants.

[7] In re: Petition of Florida Crushed Stone Co. for Determination of Need for a Coal-Fired Cogeneration Electrical Power Plant, Order No. 1161; In re: Florida Crushed Stone Co. Power Plant Site Certifications Application, Case No. PA 82-17.

re: Petition of Seminole Electric Cooperative, Inc. to Determine Need for Electrical Power Plant, Order No. 19468, the Commission actually addressed this issue in 1983. For example, at the time Florida Crushed Stone applied for a determination of need in 1982, it had no power purchase contract. Despite this, the Siting Board dismissed a challenge to Florida Crushed Stone's standing to be an applicant and allowed it to proceed.

FPL suggests that the Commission subsequently overruled its Florida Crushed Stone decision in Order No. 22341; however, that order does not mention Florida Crushed Stone, much less overrule it. The discussion to which FPL refers relates to a change in the Commission's analysis of the cost-effectiveness of QF contracts. The Commission was concerned about a mismatch between prices paid to cogenerators by utilities and the price of the unit being avoided. A pricing mismatch has nothing to do with Florida Crushed Stone's ability to proceed as an applicant under the Siting Act, either before the Commission or the Siting Board.

Rather, the discussion in Order No. 22341 is related to the Commission's determination of the cost-effectiveness of QF contracts and was limited in scope:

> . . .[W]e overrule those previous decisions in which we held that in qualifying facility (QF) need determination cases as long as the negotiated contract price was less than that of the standard offer and fell within the current MW subscription limit both the need for and the cost-effectiveness of the QF power has already been proven. . . . In doing so we take the position that to the effect that a proposed electric power plant constructed as a QF is selling its capacity to an electric utility pursuant to a standard offer or negotiated contract, that contract is meeting the needs of the purchasing utility. As such, that capacity must be evaluated from the purchasing utility's

> perspective in the need determination proceeding, i.e., a finding must be made that the proposed capacity is the most cost-effective means of meeting purchasing utility X's capacity needs in lieu of other demand and supply side alternatives.

Order No. 22341 at 26, emphasis supplied.

In the facts presented here, IMCA/Duke Mulberry have set forth the specific circumstances surrounding their proposed project. The Commission's ruling on their ability to proceed as an applicant pursuant to the Siting Act will not create or change broad policy. Rather, the Commission's decision will be applicable in the circumstances which IMCA/Duke Mulberry have presented.

D

The Siting Act Does Not Require a "Utility and Unit Specific" Approach in the Circumstances of this Case

FPL states that in order for IMCA/Duke Mulberry to utilize the one-stop permitting approach set out in the Siting Act they must meet a "utility and unit specific" need.[8] This is not the case. The IMCA/Duke Mulberry situation is one where the applicant takes all the risk and the ratepayers take none. Contrary to FPL's argument, in such a case, it is not necessary that IMCA/Duke Mulberry identify a specific utility need to proceed under the Siting Act under the facts of this case.

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[8] This does not seem to be the view of the Commission Staff. The draft report on "Review of Electric Utility 1997 Ten-Year Site Plans" states at 39, emphasis supplied:

> Entrepreneurs seem willing to build a merchant plant in Florida. <u>There seems no reason why they should be prohibited from building in Florida</u> provided that they comply with all environmental laws.

"Specific need" goes hand in hand with guaranteed cost recovery, which is not an issue here.[9]

Where, as in this instance, a contract with a specific utility is not the basis for satisfying need, the Commission applies the criteria of section 403.519 in a manner that is not utility specific. See, e.g., Florida Crushed Stone (where the Commission recognized that the Florida Crushed Stone project would yield general reliability benefits even though there was no power purchase contract); In re: Petition of Orlando Utilities Commission for Determination of Need for Stanton Unit 1, Docket No. 810180-EU, Order No. 10320 (where the Commission recognized positive benefits that the unit would have on ratepayer costs through its impact on the state's Broker system). Thus, where a specific contract does not form the basis for need, the statutory criteria can be satisfied by the plant's impact on the state or peninsula as a whole[10], as illustrated by the above decisions. The same is true of the other need criteria. FPL's thinly-veiled attempt to graft requirements onto the Siting Act which do not exist should be rejected.

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[9] Contrary to FPL's criticism of IMCA/Duke Mulberry's discussion of the Nassau Power case, there has been no "disheartening and misleading, selective" quotation. The Commission plainly sought to limit its Nassau Power decision to the facts of that case (not this case) and said so in its order: "It is also our intent that this Order be narrowly construed and limited to proceedings wherein non-utility generators seek determinations of need based on a utility's need." Nassau Power at 4. The issue of a merchant plant never arose in the Nassau Power case and thus was not discussed, let alone ruled upon, by the Commission.

[10] This is particularly true in the case of an EWG for two reasons. First, EWGs compete in the wholesale market without a guarantee that their output will be purchased. Second, while a QF is a supplier meeting the needs of a specific utility's customers, an EWG is a competitor of a utility in the wholesale market.

E.

The Florida Crushed Stone Decisions are Applicable in the Circumstances of this Case

FPL goes to great lengths in its memorandum to distinguish, disregard and otherwise dismiss the Florida Crushed Stone decisions, even going so far as to suggest that they have been overruled. However, the Florida Crushed Stone cases remain the law today.

It is undisputed that at the time Florida Crushed Stone applied for a determination of need, it had no power purchase contract. It planned to serve its own needs and sell the excess on the wholesale market. Florida Crushed Stone's standing as an applicant was specifically challenged, but upheld by the Siting Board. That is, the Siting Board recognized that Florida Crushed Stone's plant would be an electric utility within the meaning of the Siting Act under similar circumstances to those presented in this case. Contrary to FPL's contention, the Siting Board's decision is not erroneous; rather, it is an appropriate interpretation of the Siting Act by the body responsible for its administration.

The fact that the Nassau Power Court[11] did not mention the Florida Crushed Stone cases does not mean the cases were overruled (either implicitly or explicitly) as FPL suggests. FPL cites no case law to support this legal pronouncement. Nor does it mean that the Florida Crushed Stone decisions are not good law today. The Nassau

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[11] "The precedential value of a case is always, and only, coextensive with its ratio decidendi; that is, with what was actually decided." Amlotte v. State, 435 So.2d 249, 256 (Fla. 5th DCA 1983). FPL's discussion of non-utility generators goes far beyond the Court's decision in Nassau Power.

Power facts are different than the facts before the Commission and the Court in IMCA/Duke Mulberry's petition[12] and the Florida Crushed Stone cases still apply.

Order No. 22341 does not overrule the Florida Crushed Stone cases either. It is simply inapplicable. Order No. 22341 dealt with QF need determination petitions and concerned how contracts related to the then in effect statewide avoided unit would be interpreted vis-a-vis cost-effectiveness. The Commission clarified that such contracts would not necessarily be the most cost-effective way for a particular individual utility to meet its need. Order No. 22341 does not address need determinations for merchant plants where the applicant bears all the risk of the plant.

F.

An Alternative Finding that No Need Determination is Required May be Appropriate

FPL takes issue with IMCA/Duke Mulberry's request in the alternative that the Commission find that no determination of need is required for it to proceed with its project. Such an alternative statement could rest on the determination that no need determination is necessary because there is absolutely no economic risk to ratepayers and construction of the proposed plant can only enhance reliability within the state. This is especially the case due to the reliability constraints currently facing the state. To reach the conclusion sought by FPL would be ironic at best--that is to require IMCA/Duke Mulberry to use the Siting Act but then tell them they are prohibited from

[12] As FPL admits, what has been said in an opinion based on one set of facts should not be extended to cases where the facts are different. (FPL memorandum at 30-31, citing Ard v. Ard, 395 So.2d 586, 587 (Fla. 1st DCA 1981)).

doing so. FPL says IMCA/Duke Mulberry must secure a determination of need to go forward with their project. It then says that IMCA/Duke Mulberry can not be applicants. Not only is the absurdity of this position apparent on its face, it also would impermissibly violate the Supremacy Clause of the United States Constitution.[13]

The purpose of EPAct is to reduce dependence on oil and to decrease consumer costs. In EPAct, Congress created a new class of competitors, EWGs. EWGs were created by Congress to implement competition in the wholesale market. This is a federal mandate to which the Commission must adhere. FERC Order 888 implemented the objective of increased wholesale competition.

In order to avoid contravening federal policy, IMCA/Duke Mulberry's project, an EWG, must be a proper applicant under the Siting Act or be permitted to build its plant outside the Siting Act. A prohibition on the use of the Siting Act by EWGs coupled with their inability to proceed outside the Act (as suggested by some utilities) would frustrate Congress' intent in enacting EPAct and, therefore, would be preempted by federal law. Independent Energy Producers Assn., Inc. v. California Public Utilities Commission, 36 F. 3d 848 (9th Cir. 1994); Sayles Hydro Associates v. Maughn, 985 F.2d 451 (9th Cir. 1993).

The Commission can either find that IMCA/Duke Mulberry are appropriate applicants under the Siting Act or that no determination of need is required for their project. Neither of these results will frustrate the requirements of the Siting Act or

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[13]Article IV, U.S. Constitution.

federal energy policy. Were the Commission to find otherwise, it would run the risk of federal preemption.

IV.

Conclusion

IMCA has demonstrated above that the conclusions FPL attempts to reach in its memorandum are erroneous. The Commission should issue the declaratory statement requested by IMCA/Duke Mulberry confirming that they may utilize the provisions of the Siting Act, or in the alternative, that no determination of need is needed for them to go forward with their project.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **IMC-Agrico Company's** foregoing **Response to Florida Power and Light Company's Amicus Curiae Memorandum has been** furnished by U.S. Mail or Hand Delivery(*) this **12th** day of **December, 1997,** to the following:

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