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November 12, 1997

VIA HAND DELIVERY

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

In re: Docket No. 971313-EI

Dear Ms. Bayó:

Enclosed are the original and 15 copies of IMC-Agrico's Response in Opposition to Tampa Electric Company's Petition to Intervene and the original and 15 copies of IMC-Agrico's Motion to Strike Tampa Electric Company's Answer and Request for Hearing in the above docket.

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.

Yours truly,

Joseph A. McGlothlin
Joseph A. McGlothlin

ACK
AFA _____
APP Bella
CAF _____
CMH _____
CTR _____ JAM/pw
EAG 1 Enclosures
LFL _____
LH 5
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DOCUMENT NUMBER-DATE

11599 NOV 12 6

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of IMC-Agrico Company)	
for a Declaratory Statement Confirming)	Docket No. 971313-EU
Non-Jurisdictional Nature of Planned)	
Self-Generation.)	Filed: November 12, 1997
)	

**IMC-AGRICO COMPANY'S MOTION TO STRIKE
TAMPA ELECTRIC COMPANY'S ANSWER AND REQUEST FOR HEARING**

IMC-Agrico Company (IMCA), through its undersigned counsel, files this Motion to Strike Tampa Electric Company's (TECO) Answer and Request for Hearing. As grounds therefor, IMCA states:

1. On October 10, 1997, IMCA filed a petition for declaratory statement, in which it asked the Commission to declare that IMCA's participation in the proposed ownership and business structure of certain planned generation facilities and transmission facilities would constitute self-generation, and would not cause IMCA or the other entities involved to fall within the regulatory jurisdiction of the Commission. The Commission is scheduled to take official action on IMCA's petition on December 2, 1997.

2. On October 30, 1997, TECO filed a pleading styled "Answer and Request for Hearing." This pleading is procedurally deficient. Such a pleading is not authorized by statute or rule, nor appropriate to a declaratory statement proceeding. It is simply an attempt by TECO to circumvent the nature and purpose of a declaratory statement proceeding. The attempt should not be permitted. Further, the pleading is substantively deficient, due to its unfounded allegations and its inappropriate attempt to interfere with IMCA's right to supply its own power requirements.

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FPSC-RECORDS/REPORTING

TECO's "Answer" is an Unauthorized Pleading

3. The purpose of a declaratory statement petition 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." Section 120.565(1), Florida Statutes, emphasis added. Because no one else is affected, there is no need for an answer, as there is in a traditional adversarial proceeding.

4. The Commission's rules on declaratory statements make this obvious. They provide that a declaratory statement applies to the petitioner "in his or her particular set of circumstances only." Rule 25.22.020(1), Florida Administrative Code, emphasis added. 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." Rule 25.22.021, Florida Administrative Code. That is, the declaratory statement, by its very nature, can affect only the petitioner and no other person. Neither the Commission's rules on declaratory statements nor the statute governing such statements provides TECO with the authority to file what it has called an "answer" to IMCA's petition and its associated request for hearing. This is as it should be; by definition, there is no "respondent" in a declaratory statement

proceeding. Therefore, TECO's unauthorized "answer" should be stricken.¹

5. In an attempt to find some authority for its pleading, TECO tries to rely on rule 25-22.037, Florida Administrative Code. However, this rule provides no authority for TECO's unauthorized filing for two reasons. First, that rule is not part of the Commission's rules on declaratory statements, which are separate and apart from the section of rules that govern decisions that apply to proceedings which affect substantial interests. Therefore, the rule cited by TECO does not apply to declaratory statements. Second, rule 25-22.037 provides for an answer to be filed by a respondent or an intervenor²; TECO is neither in this proceeding.

6. The Commission has addressed the question of the appropriateness of the filing of an "answer" in a declaratory statement proceeding before. In similar circumstances, the Commission struck a purported "answer" as an impermissible pleading. In In re: CFR BIO-GEN's Petition for a Declaratory Statement regarding the Methodology to be used in its Standard Offer Cogeneration Contracts with Florida Power Corporation, Docket No. 900877-EI, CFR Bio-Gen sought a declaratory statement regarding the method of calculating firm capacity payments under its contract with Florida Power Corporation (FPC). FPC filed an "answer" in opposition to the CFR petition. CFR filed a motion to strike the answer. The Commission granted

¹ In Docket No. 970171-EU, the Commission did not permit TECO to file a supplemental brief, because, among other reasons, it was not authorized by the Commission's rules. Order No. PSC-97-1095-PCO-EU.

² In addition to its "Answer and Request for Hearing" TECO also filed a petition to intervene. With this Motion to Strike, IMCA is simultaneously filing a response in opposition to TECO's petition to intervene.

the motion to strike. It did not consider FPC's answer. Order No. 24338, at 2. The Commission rendered the declaratory statement without the participation of FPC. The same result is appropriate in this case. TECO's "answer" is not authorized by the Commission's rules and should be stricken.

**TECO's "Answer and Request for Hearing" is
Substantively Flawed**

7. As discussed above, TECO's pleading is procedurally impermissible and should be stricken on that basis alone. Further, the "Answer and Request for Hearing" is substantively flawed and should be stricken on that basis as well.

8. TECO first claims that IMCA has failed to join the proposed project's lessor as an indispensable party. However, it is IMCA who has sought the declaratory statement and it is IMCA who will be the beneficial owner of the proposed project. Further, as stated in IMCA's petition, the lessor is to be a partnership in which a subsidiary of IMCA will be a general partner. In other words, the unity of interests between the lessor and IMCA answers TECO's arguments. In any event, TECO has no standing to complain on behalf of another entity -- especially one it is attempting to attack.

9. TECO makes little effort to hide the reason it wants other entities to be joined. TECO seeks to engage in extensive and unwarranted discovery (see pp. 11-13 of TECO's "answer") of the business interests of others -- something that has nothing to do with IMCA's declaratory statement request.³

³ To IMCA's knowledge, the Commission has never permitted this type of discovery in declaratory statement proceedings.

10. The petition filed by IMCA is a straightforward petition for declaratory statement. It seeks confirmation of the self-generation nature of IMCA's proposed project configuration. The petition is based on a well-known precedent of this Commission. It is beyond dispute that IMCA has the absolute right to supply its own electrical power requirements by owning and operating generating facilities. See, PW Ventures v. Nichols, 533 So.2d 281, 284 (Fla. 1988). Further, the ownership of such generating facilities may be placed in a different entity without creating a retail sale. See, e.g., In re: Petition of Monsanto Company for a Declaratory Statement Concerning the Lease Financing of a Cogeneration Facility, Order No. 17009; In Re: Petition of Seminole Fertilizer for a Declaratory Statement Concerning the Financing of a Cogeneration Facility, Order No. 23729.

11. In its "answer," TECO attempts to malign the merits of the project IMCA wishes to pursue so as to interfere with IMCA's absolute right to self-generate. There can be no doubt that TECO would like to retain IMCA as its customer; however, that does not give TECO the authority to file an "answer" in a declaratory statement proceeding or to have an evidentiary hearing in this matter.⁴ Contrary to TECO's allegations, IMCA's petition fully describes and explains IMCA's proposed project in considerable detail--certainly in sufficient detail to provide the basis for the issuance of the requested declaratory statement. The information provided by IMCA provides

⁴ As discussed above, TECO has cited no authority for the filing of an "answer."


as much, if not more, detail than the information provided to the Commission in Seminole Fertilizer, Order No. 23729, which presented a factual situation very similar⁶ to the one proposed by IMCA.⁶ While TECO complains that IMCA has alleged insufficient facts, TECO recites and even relies upon the facts which IMCA has set out in its petition as a basis for its "answer." (See TECO "answer" at pp. 3-5).

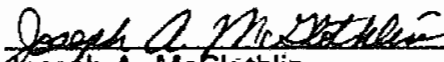
12. TECO spends some twelve pages of its "answer" (the majority of its pleading) making unfounded assertions and allegations and in general attempting to controvert nearly every statement in IMCA's petition. This is no more than a concerted attempt by TECO to interfere with IMCA's ability to move to self-generation. The Commission should not permit TECO to abuse the declaratory statement process. TECO's effort to turn a simple declaratory statement proceeding into a long, litigious process, complete with burdensome discovery, should be rejected out of hand.

⁶ TECO refers several times to IMCA's comment that the question presented in Docket No. 971337-EI is a matter of "first impression." The comment addressed -- not the self-generation aspect of the project -- but to the applicant issue that is the subject of a separate petition. TECO's reference to the pleading in Docket No. 971337-EI is an attempt to create confusion in the straightforward self-generation proposal that is the subject of IMCA's petition in this case.

⁶ TECO further complains that all the documents related to the proposed project have not yet been drafted. Of course that is the case here, just as it was in Seminole Fertilizer, where the documents implementing the transaction had not been finalized. In Seminole Fertilizer, the Commission relied on Seminole's representations that the documents would reflect the characteristics of the transaction as described in its petition. IMCA has followed the same approach.

WHEREFORE, IMCA requests the Commission to strike TECO'S "Answer and Request for Hearing."


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Attorneys for IMC-Agrico Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of IMC-Agrico Company's foregoing **Motion to Strike Tampa Electric Company's Answer and Request for Hearing** has been furnished by U.S. Mail or Hand Delivery(*) this 12th day of **November, 1997**, to the following:

Richard Bellak*
Division of Appeals
Florida Public Service Commission
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Tallahassee, Florida 32399-0850

Lee L. Willis*
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