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: November 12, 1997

IMC-AGRICO COMPANY'S RESPONSE IN OPPOSITION TO TAMPA ELECTRIC COMPANY'S PETITION TO INTERVENE

Pursuant to rule 25-22.037, Florida Administrative Code, IMC-Agrico Company (IMCA), through its undersigned counsel, files its Response to Tampa Electric Company's (TECO) petition to intervene. TECO's petition to intervene should be denied because TECO fails to satisfy either prong of the standing test articulated in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981). In support, 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 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 Petition for Leave to Intervene and Request for Hearing in this docket.[1] TECO lacks standing to intervene in this proceeding. Therefore, its petition should be denied.

[1] TECO also filed a request to address the Commission in regard to its petition to intervene. Because TECO is not an appropriate intervenor, its request to address the Commission should be denied.

3. As TECO admits in its petition to intervene, it must demonstrate that it complies with 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 the type of immediate injury entitling it to a § 120.57 hearing and that the injury is of the type the proceeding is designed to protect. TECO can meet neither test.

TECO has failed to demonstrate immediate injury

4. The "immediate injury" which TECO alleges is the economic loss it will experience if IMCA reduces its retail purchases from TECO.[2] (See TECO petition at pp. 5-6) IMCA will still be a customer and may or may not reduce purchases from TECO three years from now when the self-generation plant is placed in service. Whether or not future sales to IMCA fall off, the Commission can take administrative notice of TECO's 10-year sales forecast on file which discloses that TECO projects more than offsetting growth in sales to other customers possibly with a greater margin of profit. TECO's request that the Commission consider the potential diminution in its sales to IMCA will unduly complicate the proceeding by converting it from one in which the petitioner is seeking a determination concerning a proposed business structure into a contest over TECO's revenue entitlement in the year 2000 when the self-generation plant is scheduled to be completed. In that proceeding, TECO would

[2] In TECO Energy, Inc.'s 1996 Annual Report, TECO Energy told its shareholders that regardless of the status of IMCA, "the ultimate impact on Tampa Electric is not expected to be material." Report at 22. TECO's own assessment contravenes its assertion that its substantial interests would be affected by the proposed transaction.

have to show that its earnings entitlement from IMCA will be greater than its cost to provide service to this customer at that time and that this customer has an obligation to subsidize other classes of customers by paying more than incremental off-peak fuel cost. Even if it could prove that IMCA has an obligation to pay more than cost for fuel, TECO would have to show that retail customers rather than wholesale customers would benefit from IMCA's exceptional cost burden. There is no justification to jump from a simple legal determination over business structures into a flight of fancy over TECO's post-millennium revenue entitlement dealing in part with TECO's projections of incremental fuel costs which it says are confidential and inaccessible to IMCA. The Commission should be mindful that like any other consumer of electricity, IMCA has the absolute right to supply its own needs. PW Ventures v. Nichols, 533 So.2d 281, 284 (Fla. 1988). The post-millennium impact on TECO's sales revenue from IMCA self-generation is not only bereft of immediate injury; it is totally irrelevant to the legal question posed by the petition.

5. The issue before the Commission posed by IMCA is not whether IMCA is prohibited from additional self-generation (obviously it is not), but whether the method of financing it has chosen meets the Commission's criteria relative to showing a unity of interests between the electric consumer and the holder of legal title to the assets. The financial impact on TECO is the same whether IMCA retains title to the assets or for business reasons places legal title in a third party financier.

6. The Commission addressed a virtually identical situation in a prior docket. 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 statement regarding the lease-financing of a cogeneration plant. Monsanto asked the Commission for a statement declaring that the project, designed to enable Monsanto to supply a portion of its own needs, 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 the loss of the Monsanto load would result in an economic loss. Under circumstances that are remarkably similar to those present in this docket, the Commission concluded that the "economic loss" argument now being raised by TECO was insufficient to confer standing on the utility. The Commission denied Gulf Power's petition to intervene. It stated[3]:

> 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.

Order No. 16581 at 2.

TECO's "injury" is not the type of interest that a declaratory statement proceeding is designed to protect

7. 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

[3] The Commission also found that its denial of Gulf Power's petition to intervene rendered its request for a hearing moot.

order of the agency, as it applies to the petitioner's particular set of circumstances." Section 120.565(1), Florida Statutes, emphasis added.

8. The Commission's rules on declaratory statements accurately reflect the statute's emphasis on the limited and confined nature of a declaratory statement. The rules 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. 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 TECO's economic interests.

9. As in its unauthorized "Answer,"[4] TECO alleges that the facts IMCA has set out in support of its petition are insufficient.[5] TECO further alleges that IMCA has not provided the underlying contracts. However, as was the situation in the

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[4] IMCA has simultaneously filed a motion to strike TECO's unauthorized answer.

[5] TECO also says that IMCA has suggested that the issues in this case are of "first impression." However, the question of "first impression" arises in Docket No. 971337-EU and relates to the Siting Act definition of applicant. IMCA filed a request to address the Commission in this docket and made no reference to a matter of "first impression." This case is based on well known Commission precedents.

Seminole Fertilizer case, Docket No. 900600-E9, IMCA has fully described the project's parameters in its petition. The contracts now being developed to implement the transaction described in the petition will be consistent with the parameters set forth in the petition. The Commission can opine on the allegations contained in IMCA's petition without the need for TECO to provide its interpretation. Even if this were not the case, such alleged infirmities could not confer standing on TECO in this proceeding.

10. Finally, TECO spends much time in its petition to intervene arguing the "merits" of its erroneous proposition. Its lengthy list of benchmarks, its desire to convince the Commission to postpone action on the petition until all definitive agreements have been finalized, and its references to planned discovery, all evince TECO's desire to delay and obstruct. In an effort to create a controversy, TECO asserts that it disputes IMCA's factual description of the project. However, nowhere does TECO take issue with IMCA's facts; indeed, TECO recites and uses them in strained attempts to differentiate IMCA's proposed structure from that reviewed by the Commission in the Seminole Fertilizer case. TECO claims there is a factual dispute only "in the sense that"[6] TECO regards the facts as insufficient. This is a very different assertion, and one geared to TECO's unsupported notion that the actual agreements may differ from the description in IMCA's petition. Moreover, the fundamental nature of a declaratory statement is that the tribunal applies the law to the facts as presented by the petitioner. TECO's attempt to argue facts is legally

[6] TECO's petition at 7.

inappropriate. For the reasons discussed above, the Commission should disregard TECO's argument.

CONCLUSION

11. TECO has not met either prong of the Agrico standing test via its claim of economic injury and its speculation about future events. Its arguments, which go well beyond the proper scope of a petition to intervene, are designed to delay and obstruct. More importantly, those arguments cannot convey standing to participate on TECO where none exists. Therefore, TECO's petition to intervene must be denied.

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CERTIFICATE OF SERVICE

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

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