



Florida Power
CORPORATION

JAMES A. MCGEE
SENIOR COUNSEL

November 13, 1997

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 971313-EU

Dear Ms. Bayó:

Enclosed for filing in the subject docket are original and fifteen copies of Petition of Florida Power Corporation for Leave to Intervene.

Please acknowledge your receipt of the above filing on the enclosed copy of this letter and return to the undersigned. Also enclosed is a 3.5 inch diskette containing the above-referenced document in WordPerfect format. Thank you for your assistance in this matter.

ACK

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EAG Enclosures

LEG cc: Parties of Record

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Very truly yours,

James A. McGee

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DOCUMENT NUMBER-DATE

GENERAL OFFICE 11689 NOV 16 5

97-1313-EU-11689

ORIGINAL

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

Submitted for filing:
November 14, 1997

**PETITION OF FLORIDA POWER CORPORATION
FOR LEAVE TO INTERVENE**

Florida Power Corporation (Florida Power) hereby petitions the Commission, pursuant to Rule 25-22.039, Florida Administrative Code, for leave to intervene in this proceeding and participate as a full party. In seeking intervention, Florida Power does not necessarily intend to oppose the declaration requested by IMC-Agrico Company (IMCA), but rather seeks to protect its substantial interests by ensuring that the conditions necessary to establish true self-generation are fully developed and found to be present in IMCA's proposed arrangement, which Florida Power submits cannot be determined from the information provided by IMCA in its petition. In support of its request to intervene, Florida Power states as follows:

Introduction

1. The name of Petitioner and its business address is:

Florida Power Corporation
3201 - 34th Street South
Post Office Box 14042
St. Petersburg, FL 33733-4042

2. All notices, orders, pleadings and other communications in this proceeding should be directed to:

James A. McGee
Post Office Box 14042
St. Petersburg, FL 33733-4042
Telephone: (813) 866-5184
Facsimile: (813) 866-4931

For deliveries by courier service, the address is:

3201 - 34th Street South
St. Petersburg, FL 33711

DOCUMENT NUMBER-DATE

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Substantial Interests Affected

3. Florida Power currently provides retail electric service to portions of IMCA's phosphate mining and processing operations in Hardee and Polk counties. For the 12 months ending September 30, 1997, Florida Power sold IMCA 522,000,000 kWh of energy, with a peak demand of 100 MW, and received revenues of approximately \$20.8 million. Florida Power has served IMCA and its predecessors at this mining and processing operations for over 30 years and has made substantial investment in generation and transmission facilities to do so. Florida Power's opportunity to earn a return on this investment is secured by territorial agreements with adjoining utilities that have been approved by this Commission.

4. In its petition, IMCA proposes an arrangement under which it would lease an "ownership interest" in a portion of a generating plant and related transmission facilities to be constructed and owned by a partnership between subsidiaries of IMCA and Duke Energy Power Services, LLC (Duke). IMCA would use the output from its portion of the generating plant for its mining and processing operations, thereby displacing power currently purchased at retail from Florida Power and other utilities. The remainder of the generating plant would be leased to an Exempt Wholesale Generator (EWG) affiliated with Duke, who will sell the output of its portion of the plant at wholesale on a "merchant basis."

5. If the arrangement proposed in IMCA's petition were to be erroneously determined by the Commission to constitute self-generation because of an incomplete knowledge or understanding of risk limitations that may exist within that arrangement -- limitations inconsistent with "ownership" that would render the arrangement a retail sale of electricity -- Florida Power's substantial interests will be adversely affected in the following manner:

- a. Florida Power's sales to, and revenues from, IMCA will be dramatically reduced, thereby improperly depriving Florida Power of the earnings associated with this reduction in sales and increasing the cost of service to its general body of customers.
- b. Florida Power's existing generation and transmission facilities devoted to serving IMCA's mining operations will be uneconomically duplicated, thereby improperly infringing on Florida Power's retail service territory and denying Florida Power a return on its investment in those facilities.

Disputed Issues of Material Fact

6. In its petition, IMCA contends the lease it intends to enter with the partnership that will own the proposed generating facility will convey to IMCA an ownership interest in its share of the facility for the term of the lease. Indeed, in the cases cited by IMCA as precedent, it is the indicia (*i.e.*, the risks) of ownership conveyed by such a lease arrangement (and related O&M contract) that the Commission has looked to as the yardstick for its determination of whether the arrangement constitutes non-jurisdictional self-generation or a jurisdictional sale of electricity.

7. This focus on risk assumption follows naturally, since in the case of true self-generation (like IMCA's existing cogeneration facilities) where the generation owner and electric consumer are one and the same, the owner/consumer bears all of the risk associated with the generating facility. Therefore, when the Commission is asked to consider an arrangement that falls short of true self-generation, such as a lease arrangement where the generation owner and the consumer are different entities, the Commission must ensure that the consumer/lessee assumes the owner/lessor's risks to the maximum extent possible.

8. Likewise, in evaluating the instant lease arrangement, particularly given IMCA's affirmative assertion that it will acquire an ownership interest in the proposed facility, it is both fair and necessary that the Commission require IMCA to assume all the risks of ownership that can be reasonably identified. To do so, the Commission must know with particularity if any risks will, in fact, be retained by the owner of the facility under the lease or be transferred by IMCA under the O&M contract.¹ Unfortunately, the contents of neither the lease nor the O&M contract can be reviewed for this purpose because, according to IMCA, they have not yet been developed. Instead, IMCA provides only a list of general "features and operational arrangements applicable to the Project." These features, however, do not preclude an almost endless variety of conceivable lease provisions that could materially limit IMCA's assumption of ownership risks and result in an arrangement that more closely resembles a purchase power agreement² than self-generation.

¹ The need for scrutiny of the proposed arrangement is heightened by the revelation in a subsequent petition for declaratory statement by IMCA and Duke regarding eligibility for a need determination (Docket No. 971337-EU) that the capacity of the proposed generating facility may be as large as 750 MW, over three times the size suggested in the instant IMCA petition. The magnitude of the remaining portion of the facility (630 MW) suggests the possibility that overriding considerations associated with the Duke's desire to acquire a foothold for developing this marketable capacity could enhance IMCA's bargaining power to negotiate favorable (*i.e.*, risk-limiting) terms in the lease or in the O&M agreement, if entered into with an affiliate of Duke.

² The similarities between IMCA's proposed lease arrangement and a Unit Power Sale (UPS) are noteworthy. UPS agreements are common in the wholesale market where, because of considerations such as economies of scale, a generating utility constructs surplus capacity. These agreements typically involve the medium- to long-term purchase of all or a portion of a specified plant's capacity. The purchaser assumes much of the plant's ownership responsibilities by paying a fixed demand charge, irrespective of output, based on the owner's investment and related fixed costs, and an energy charge based on the plant's overall operating costs (*e.g.*, fuel and O&M). The purchaser is normally protected from full ownership responsibilities by risk-limiting provisions in the UPS agreement, such as a force majeure clause and performance guarantees. Even without the opportunity to review the specifics of IMCA's lease for risk limitations, the differences between the arrangement described generally in its petition and a typical UPS arrangement are subtle at best.

9. Simply by way of example, IMCA's petition gives no assurance that the lease or O&M contract will exclude or properly address any of the following non-exhaustive list of risk-limiting features, or variations thereof, that are indicative of an agreement for the sale of electricity and inconsistent with the ownership interest necessary for self-generation.

- a. Lease Payments - limits ownership risks through payments that do not capture the full cost of the leased portion of the plant, less the true remaining value at the expiration of each lease term.
- b. Performance Guarantees - limits ownership risks with assurances or incentives in the lease that the generating facility will achieve certain minimum availabilities or maximum heat rates, or in an O&M contract with an affiliate of the lessor that O&M expenses or forced outage rates will not exceed a specified ceiling.
- c. Construction Guarantees - limits ownership risks by providing assurances or incentives that the generating facility will meet an in-service milestone and/or not exceed a specified installed cost ceiling.
- d. Capacity Adjustments - limits ownership risks by allowing periodic increases or decreases in leased capacity to accommodate lessee's changing load requirements.
- e. Excess or Supplemental Energy - limits ownership risks similar to capacity adjustments by allowing lessee to relinquish excess energy from its leased capacity and/or acquire supplemental energy beyond its leased capacity to accommodate its changing load requirements.
- f. Capital Additions - limits ownership risks by providing less than full *pro rata* cost responsibility for capitalized improvements and repairs.
- g. Force Majeure - eliminates ownership risks during various, but at this time, unknown events.
- h. Property Taxes - limits ownership risks by allocating less than a full *pro rata* share of real property taxes associated with the facility.

10. Florida Power submits that the Commission cannot properly issue the declaratory statement sought by IMCA without the definitive information and documentation necessary to demonstrate that IMCA will, in fact, fully assume the risks of ownership in its share of the proposed generating facility. In the absence of such information, Florida Power disputes IMCA's claim that (1) IMCA will acquire

an ownership interest in the facility through its proposed lease, and (2) that IMCA's use of the energy produced by its share of the facility's capacity constitutes self-generation.

11. In light of the foregoing, Florida Power asks that it be afforded party status in this proceeding to protect its substantial interests herein through appropriate discovery and argument to the Commission regarding the assertions and representations made by IMCA in its petition.

WHEREFORE, Florida Power Corporation respectfully requests that the Commission grant this petition for leave to intervene and authorize it to participate in this proceeding as a full party.

Respectfully submitted,

OFFICE OF THE GENERAL COUNSEL
FLORIDA POWER CORPORATION

By



James A. McGee
Post Office Box 14042
St. Petersburg, FL 33733-4042
Telephone: (813) 866-5184
Facsimile: (813) 866-4931

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Docket No.971313-EU

Submitted for filing:
November 14, 1997

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the enclosed Petition of Florida Power Corporation has been furnished to the following individuals by U.S. Mail this 13th day of November, 1997:

John W. McWhirter, Jr.
McWhirter, Reeves, McGlothlin,
Davidson, Rief & Bakas, P.A.
Post Office Box 3350
100 North Tampa Street
Tampa, FL 33602-5126

Steven F. Davis
IMP-Agrico Company\
Post Office Box 2000
3095 County Road 640 West
Mulberry, FL 33860

Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin,
Davidson, Rief & Bakas, P.A.
117 South Gadsden Street
Tallahassee, FL 32301

Lee L. Willis
James D. Beasley
Ausley & McMullen
Post Office Box 391
Tallahassee, FL 32302

Angela Llewellyn
Regulatory Specialist
Tampa Electric Company
Post Office Box 111
Tampa, FL 33601

Harry W. Long, Jr.
TECO Energy, Inc.
Post Office Box 111
Tampa, FL 33601



Attorney