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ORIGINAL

November 19, 1997

HAND DELIVERED

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

Re: Petition of IMC-Agrico Company for a Declaratory  
Statement Confirming Non-Jurisdictional Nature of Planned  
Self-Generation; FPSC Docket No. 971313-EU

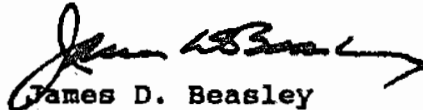
Dear Ms. Bayo:

Enclosed for filing in the above docket are the original and fifteen (15) copies of Tampa Electric Company's Memorandum in Opposition to IMC-Agrico's Motion to Strike Tampa Electric Company's Answer and Request for Hearing.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning same to this writer.

Thank you for your assistance in connection with this matter.

Sincerely,

  
James D. Beasley

ACK

AEA  
APP Bellak

CAF \_\_\_\_\_

CLM JDB/pp

CTR Enclosures

ESG 2 ~~cc:~~ All Parties of Record (w/enc.)

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EPSC BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

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EPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of IMC-Agrico Company )  
for a Declaratory Statement Confirming )  
Non-Jurisdictional Nature of Planned ) DOCKET NO. 971313-EU  
Self-Generation. ) FILED: November 19, 1997

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

**I. Introduction**

Pursuant to Fla. Admin. Code Rule 22-037(2)(b), Tampa Electric Company ("Tampa Electric" or "the company"), submits this its Memorandum in Opposition to the above-referenced pleadings. As discussed below, IMCA's objection to the company's efforts to intervene and participate in a proceeding where it and its customers' interests are directly at stake is patently unreasonable. IMCA has cited no legal authority for its assertion that Tampa Electric's Petition for Leave to Intervene and Answer in this Docket are prohibited. Instead, IMCA cites Commission precedents which, in fact, either support Tampa Electric's right to request intervention and file an answer, or are inapposite.

**II. IMCA's Reliance on prior Commission declaratory orders is misplaced and ignores the Commission's broad discretion to grant intervention in this proceeding.**

1. IMCA attempted to rely on this Commission's declaratory orders in In re: CFR BIO-GEN's Petition for a Declaratory

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Statement<sup>1</sup>, Seminole Fertilizer<sup>2</sup>, and In re: Petition of Monsanto for a Declaratory Statement<sup>3</sup> to deny intervenor status to Tampa Electric. IMCA argues that the Commission's denial of Gulf Power's petition to intervene in the Monsanto case is not only relevant, but is controlling on the question of Tampa Electric's standing to intervene in this proceeding. However, this Commission has made clear that such declaratory orders have absolutely no precedential value. In the BIO-GEN case, cited approvingly by IMCA, the Commission, in considering whether to allow Florida Power Corporation to file an answer in that proceeding, stated that:

This Commission enjoys considerable discretion in deciding who may participate in a declaratory statement proceeding, and the form that participation will take. Monsanto carries no precedential value here. Florida Power has not petitioned to Intervene in this case and there are no disputed issues of material fact that would require its participation. Our understanding of the issues raised in the petition will not be enhanced by consideration of Florida Power's Answer. Therefore, we will not consider it.

2. Notwithstanding this statement of policy, the Commission ultimately did disallow Florida Power's answer in the BIO-GEN case.

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<sup>1</sup>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, Order No. 24338

<sup>2</sup>In re: Petition of Seminole Fertilizer for a Declaratory statement Concerning the Financing of a Cogeneration Facility, Docket No. 900600-EQ, order No. 23729

<sup>3</sup>In re: Petition of Monsanto Company for a Declaratory Statement Concerning the Lease Financing of a Cogeneration Facility, Docket No. 860275-EU, Order No. 17009.

It did so, however, because Florida Power Corporation had not sought intervention in that proceeding. In the instant case Tampa Electric did file a timely and detailed Petition for Leave to Intervene setting forth the basis for the company's right to participate. Under Fla. Admin. Code Rule 25-22.037(1) a respondent or intervenor may file an answer to a petition, which is exactly what Tampa Electric did. Another stated reason for excluding Florida Power's answer in the BIO-GEN was the Commission's conclusion that there were no disputed issues of material fact in that proceeding. As discussed in Tampa Electric's Answer, there are a myriad of disputed issues of material fact in this proceeding, including IMCA's conclusory but unsupported assertion with respect to ownership of the Project by IMCA and its failure to precisely describe the allocation of the attributes of ownership, including the associated risks, between itself and Duke.

3. The Commission rejected Florida Power's answer in the BIO-GEN case based on its conclusion that its understanding of the issues raised in that proceeding would not be enhanced by consideration of Florida Power's answer. Tampa Electric respectfully submits that the concerns raised in its Petition for Leave to Intervene and Answer identify lines of further inquiry which will develop for the record the appropriate ownership criteria to be applied and the factual information essential to an informed Commission decision in this matter.

4. The issues associated with the proposed project identified in this proceeding are profoundly different from any

other set of circumstances presented to this Commission, as explained in Tampa Electric's Petition for Leave to Intervene and Answer in this proceeding. To the extent that Duke, IMCA or their affiliates propose to provide retail electric service within Tampa Electric's approved service territory, as the company believes would be the case under IMCA's proposal, the company has a direct interest in and a right to oppose such service under Section 366.04, Florida Statutes. That section gives the Commission the jurisdiction and duty to resolve, upon petition of a utility, or on its own motion, any territorial dispute involving service areas between and among electric utilities in this state.

5. In addition, as set forth in its Petition for Leave to Intervene, Tampa Electric's other customers would be profoundly affected if IMCA were permitted to engage in an unlawful retail sale. Tampa Electric has in place generation facilities the fuel efficiencies of which were designed to accommodate and are dependent upon the provision of electric service by Tampa Electric to IMCA. The company also has transmission facilities dedicated to the continued service of IMCA's electrical needs. The Project, as proposed, would remove 120 MW of load from Tampa Electric's system. The effect would be to reduce Tampa Electric's energy sales by 883 Gwh, resulting in a \$12 million annual nonfuel revenue requirement shortfall, reduced fuel efficiencies and the creation of stranded costs. The substantial interests of Tampa Electric and its customers are subject to determination and will be affected by the Commission's resolution of this proceeding.

**III. The declaratory relief process is an inappropriate vehicle for addressing the issues raised by IMCA in this proceeding.**

6. The Motion to Strike filed on behalf of IMCA and, indeed, IMCA's "Petition for Declaratory Statement" are both founded on the erroneous assumption that IMCA can simply call its initial pleading in this docket a "Petition for Declaratory Statement" and thereby suspend the due process rights of all who would be adversely affected by the proposed project. This is wrong. IMCA's approach champions form over substance and is nothing more than an attempt to shield a proposed power plant project of Duke Mulberry Energy LP ("Duke") and IMCA from legitimate scrutiny.

7. IMCA's Motion to Strike claims that there is no need for an answer in a declaratory statement proceeding because "no one else is affected." As is explained in great detail in Tampa Electric's Petition for Leave to Intervene and in the company's Answer and Request for Hearing, the relief requested by IMCA would not affect only IMCA in its particular set of circumstances. Instead, the requested declaration, if granted, could clear the way for IMCA and Duke, perhaps through as yet unidentified subsidiaries of one or both of the principals, to engage in the retail sale of electricity within Tampa Electric's Commission approved retail service area in contravention of Tampa Electric's rights and to the detriment of its retail customers.

8. In Manasota-88, Inc. v. Gardiner, Inc., 481 So.2d 948 (Fla. 1st DCA 1986) the court addressed the attempt by a party to seek a declaratory statement affecting the rights of a third party:

[1] The petitions for declaratory statement were correctly denied. Section 120.565 provides for an agency's opinion 'as to the applicability of a specified statutory provision . . . as it applies to the petitioner in his particular set of circumstances only.' Lyons and M-88 sought DER's opinion as to the applicability of statutory provisions to Gardinier, contrary to unambiguous statutory language. We affirm on this issue. (Emphasis by the Court)

9. An adversarial proceeding cannot be relabeled a declaratory statement proceeding simply to preclude participation of substantially affected persons. Tampa Electric's Petition for Leave to Intervene describes the substantial interests of Tampa Electric and its retail customers that will be directly affected by the Commission's resolution of the retail service issue presented, as discussed above. It is absurd for IMCA to suggest, under the circumstances, that Tampa Electric should not be permitted to address, by way of an Answer, the issues raised in IMCA's Petition simply because IMCA elected to call that pleading a "Petition for a Declaratory Statement." The issue in this proceeding is not, as IMCA suggests, whether IMCA can move forward with additional self-generation. The issue is whether IMCA's proposed project represents genuine self-generation or an unlawful retail sale.

IV. IMCA has fallen far short of providing the Commission with an adequate factual basis for the relief requested.

10. Make no mistake, it is no accident that IMCA has sought to deprive this Commission and interested parties of the facts which would either prove or disprove its assertions of self-generation. IMCA is counting on the possibility that the



Commission will act favorably in this proceeding on the basis of its unsubstantiated and untested representations with regard to the nature of its proposed joint venture with Duke. If it is successful in obtaining this regulatory blank check from the Commission, it and Duke will proceed with structuring their power generation deal in earnest, with no expectation that they will ever have to disclose the actual details of their arrangements. IMCA has clearly indicated in its Motion to Strike that it would not look with favor on any discovery request which sought to test the validity of its self-generation assertions in light of the actual allocation of the attributes of ownership as reflected in the partnership, O&M, construction, capacity (lease) and other key project-related agreements.

11. If the Commission does not either reject IMCA's Petition on the ground that it states insufficient facts or require that IMCA provide all of its project-related documents before any decision is rendered, then there may not be a subsequent opportunity for the Commission to test IMCA's assertions before the damage, described by Tampa Electric in its pleadings, has been done.

12. The Commission should not be expected to "shoot from the hip" with broad brushed declaratory statements that are not tied to sufficiently detailed factual allegations. IMCA and Duke have not even specified the total size of the plant. In the absence of this kind of specificity, the Commission cannot assess the various characteristics of the proposed Project to make a meaningful



determination of whether it will constitute self-generation or a retail sale. Without such facts, the Commission simply lacks the information it needs to make a well reasoned determination. The threshold issues which must be considered include the following:

--Whether the commitment to lease capacity is for a term that is less than the economic life of the Project. (Only a 10-year firm commitment has been indicated and no economic life of the assets has been presented.)

--Whether the ratio of the capacity (and payment therefor) leased by IMCA to the total capacity of the Project (and the total payment therefor) is the same as the ratio of the general and limited partnership interests owned by IMCA to the total of such outstanding interests.

--Whether the ratio of the fair market value of the assets contributed to the partnership by IMCA to the fair market value of total assets contributed to the partnership is the same as the above ratio of outstanding partnership interests.

--As to its partnership interests, whether IMCA has meaningful control over the Project through governance provisions so that its interests are not in reality a merely passive minority interest.

--Whether the full risks of ownership, including force majeure events affecting its respective ownership interests and claims on capacity, are borne by IMCA and not directly or indirectly passed on to Duke or its affiliates through Project documents (e.g. warranties, penalties and indemnifications in lease, construction and operating agreements).

--Whether IMCA has a call on capacity and energy beyond its proportional ownership and beyond the amount fixed in its lease or otherwise expects to make additional purchases from the Project.

--Whether any deratings, curtailments or available capacity reductions of the Project are proportionately borne by IMCA so that there are no preferences or superior rights to capacity or energy that would indicate it could take capacity or energy or otherwise benefit from a portion of the Project not owned by IMCA.

--Whether there are any agreements or arrangements, formal or informal, direct or indirect, that effectively shift the risks of operation or of IMCA's proportionate ownership to Duke or its affiliates or result in IMCA receiving benefits from the portion of the Project owned by Duke or its affiliates.

--Whether, taking into account all aspects of the project and all agreements and arrangements, both formal and informal, among IMCA, Duke and their affiliates or third parties, IMCA retains all of the attributes of ownership, including, but not limited to, management control over and the risks associated with IMCA's entitlement to capacity and energy provided by the project.

#### V. Conclusion

IMCA has given this Commission no factual basis for granting the relief requested in IMCA's Petition. If IMCA's project is so clearly a matter of self-generation, as IMCA asserts, then IMCA should have no difficulty in putting forth the factual evidence which would substantiate that assertion. IMCA's protestations to the contrary notwithstanding, the issues raised in IMCA's Petition do not affect IMCA alone. Tampa Electric's interest in the outcome of this proceeding is both substantial and direct. The labeling of IMCA's Petition as a "Petition for Declaratory Statement" does not bar Tampa Electric's right to participate or its ability to file an Answer responding to the allegations of the Petition.

WHEREFORE, Tampa Electric Company urges the Commission to deny IMCA's Motion to Strike Tampa Electric's Answer and Request for Hearing.

DATED this 19<sup>th</sup> day of November, 1997.

Respectfully submitted,



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ATTORNEYS FOR TAMPA ELECTRIC COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Memorandum in Opposition, filed on behalf of Tampa Electric Company, has been furnished by U. S. Mail or hand delivery (\*) on this 19<sup>th</sup> day of November, 1997 to the following:

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