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ORIGINAL

November 24, 1997

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By Hand Delivery

Blanca S. Bayó, Director
Records and Reporting
Florida Public Service Commission
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399-0850

Re: Petition of IMC-Argico Company for a Declaratory Statement Confirming Non-Jurisdiction Nature of Planned Self-Generation Docket No. 971313-EU

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company are the original and fifteen (15) copies of Amicus Curiae Memorandum of Law Addressing IMC-Agrico's Petition in Docket No. 971313-EU.

Also enclosed is an additional copy of the memorandum which we request that you stamp and return to our runner.

If you or your Staff have any questions regarding this filing, please contact me at 222-2300.

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Very truly yours,

Charles A. Guyton

Charles A. Guyton

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

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 24, 1997**

FLORIDA POWER & LIGHT COMPANY'S AMICUS CURIAE MEMORANDUM OF LAW ADDRESSING IMC-AGRICO'S PETITION

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
A 120 MW TAKE OR PAY CAPACITY LEASE IS A SUPPLY OF ELECTRICITY	2
UNDER THE ANALYSIS SET FORTH IN SEMINOLE FERTILIZER, IMCA'S TRANSACTION IS A RETAIL SALE	6
A. Shared Ownership Defeats "Unity of Interests"	8
B. This is Not A Transaction Organized Solely For Financial And Tax Reasons	13
CONCLUSION	14

INTRODUCTION

Florida Power & Light Company ("FPL") has previously moved to dismiss IMC-Agrico's ("IMCA") petition for declaratory statement. IMCA improperly seeks a declaratory statement as to third parties. IMCA also provides too few "facts" from which the Commission may make an informed legal judgement. Regardless of whether FPL is ultimately allowed to intervene, the Commission should act on these arguments and dismiss or deny the petition.

FPL has also sought leave to file an amicus curiae legal memorandum addressing the substantive arguments that IMCA has raised in its petition. Regardless of whether FPL is allowed to intervene and press its motion to dismiss, the submission of this legal memorandum will assist the Commission in its consideration of the IMCA petition. The question before the Commission is one of great concern to FPL, and FPL offers the Commission a unique view which the Commission may not hear unless this memorandum is allowed and considered.

The Commission is faced with a sophisticated attempt by an aggressive non utility generator (affiliated with an out of state utility) to make a retail sale in Florida. The arrangement has been carefully crafted to be similar to another arrangement which the Commission has previously found not to constitute a retail sale. Because the transaction has not yet been negotiated, much less committed to a contract, there are many unanswered questions which should cause the Commission to decline to act. However, if the Commission proceeds, a careful reading of the petition, both as to what it says and does not say, as well as a thorough review of your prior decisions in this area demonstrate that the transaction is a retail sale which should give rise to public utility status, Commission regulation and an immediate territorial dispute.

A 120 MW TAKE OR PAY CAPACITY LEASE IS A SUPPLY OF ELECTRICITY

In the arrangement set forth by IMC-Agrico in its petition, there are a number of unanswered questions which may affect a determination of whether the transaction is a retail sale. However, even from the limited information provided, it is apparent that either the partnership or the general partners of the partnership are supplying electricity to IMCA at retail. Since the supply of electricity to even one entity makes the supplying entity a public utility subject to the Commission's jurisdiction, IMCA's request for a declaratory statement should be denied. See, PW Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988).

IMCA proposes an arrangement where a partnership[1] comprised of two co-general partners[2] with unidentified partnership interests[3] will design, build and own a generating facility.[4] The partnership will lease some as yet unspecified amount[5] of capacity from the generating facility to IMCA and the remaining amount of capacity from the unit to an affiliate of the other

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[1] It is not stated whether the partnership will be a limited or general partnership.

[2] One co-general partner is an as yet unformed and unnamed wholly owned subsidiary of IMCA. The other co-general partner is either Duke Energy Power Services, LLC ("DEPS") or an affiliate of DEPS, neither of which is at all related to IMCA.

[3] The partnership interest of neither partner was set forth in the IMCA petition. IMCA could have as little as a 1% partnership interest and fit within the description in the petition.

[4] The size of the generating facility is also uncertain. A size of 240 MW is being considered, but a larger size up to as much as 750 MW is also being considered.

[5] The amount of capacity that IMCA will lease is not specified in the IMCA petition. It has not yet been negotiated. It is supposed to equal IMCA's "requirements" (another undefined term) and it is currently estimated (subject to change countless times before or after the signing of a definitive agreement) to be approximately 120 MW.

co-general partner. IMCA will use at its site electricity produced from its leased capacity; the other lessee will sell at wholesale electricity produced from, at least,[6] its leased capacity.

This arrangement is not justified as being for tax or financing reasons. The arrangement is not characterized by IMCA as a lease financing arrangement. Instead, the transactions is being structured in an attempt to make the sale of electricity from the partnership or the DEPS general partner appear to be self-generation under a prior Commission decision. See, IMCA petition at p. 5, ("following the precedent of Seminole Fertilizer").

The proposed arrangement is the retail supply of capacity (electricity) from the partnership or the general partner DEPS to IMCA. IMCA is "leasing" 120 MW of capacity. It is a classic take or pay arrangement in which IMCA has a responsibility to pay for 120 MW of electricity regardless of whether it uses all of the electricity. The charge it is paying for this 120 MW of capacity is characterized as a lease payment, but regardless of its characterization, the payment is for the supply of electricity by the partnership or DEPS to IMCA.

If this arrangement is permitted, then it has profound implications as to how public utilities may deal with their customers and avoid regulation. If the partnership can characterize its sale of electricity as a lease of an undivided ownership interest in generation and transmission facilities and escape regulation of the transaction as a retail sale, then the same method of avoiding public utility status and Commission regulation would be available to currently

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[6] The term "at least" is used because it is unclear what will happen with the electricity produced from IMCA's capacity but not used by IMCA. It is FPL's inference from the statement in the petition that IMCA has "first claim" on the capacity, that DEPS has a claim on the capacity that remains unused. Whether DEPS will pay IMCA for such power (thereby providing revenues that would offset IMCA's "fixed" lease payment) is not addressed in the petition.

regulated public utilities. Utilities could enter into "capacity leases" with large industrial customers or other customers it desired to retain and lease them, at a "lease payment" significantly lower than rates it currently charges them, an undivided ownership interest in transmission, generating and distribution assets and avoid having such transactions subject to regulation as retail sales.

Of course, when put in the context of an existing public utility attempting to lease facilities rather than sell electricity, the transparent nature of what IMCA seeks to do is readily apparent. The fact is that for public utilities, the Commission has jurisdiction over not only the sale of electricity but also the leasing of facilities used in the delivery of electricity. The Commission recognized long ago that the leasing of electric facilities constituted the sale of electricity within the scope of its jurisdiction under Chapter 366 and approved utility tariffs for such leases. For instance, FPL has a tariff governing the leasing of facilities to customers. See, First Revised Sheet Nos. 9.750 and 10.010.

The conclusion that the lease of capacity in this case is the supply of electricity is not refuted by the Commission's decision In re: Petition of Monsanto Company for a declaratory statement concerning the lease financing of a cogeneration facility, 86 FPSC 12:354. In that case the Commission distinguished between "leasing equipment which produces electricity" and "buying electricity that the equipment generates," finding the former not to be a sale of electricity under the facts of that case. 86 FPSC 12: 354, at 356. However, there were several factors in that case which distinguish it from the request at hand. First, in that case Monsanto was entering into a lease financing arrangement with a generator manufacturer; no such allegation has been made in this case that the purpose of the lease arrangement is for financing. Second, in the

Seminole Fertilizer case, the case upon which IMCA so heavily relies, the Commission found that the simplistic analysis in Monsanto did not apply and a different analysis applied in a situation, such as the one presented here by IMCA, where the power produced must be divided between its respective owners. In re: Petition of Seminole Fertilizer Corporation for a Declaratory Statement Concerning the Financing of a Cogeneration Facility, 90 FPSC 11:126, 130 (Order No. 23729). It correctly pointed out that the agreements must address the amounts of electricity produced where as Monsanto only involved a lease of equipment. Id. Third, in a case decided by the Commission subsequent to Monsanto, the Commission has held that where electricity was supplied for rent payments, there was a sale of electricity. See, In re: Petition for a Declaratory Statement Concerning Financing and Ownership Structure of a Cogeneration Facility on Polk County, by Polk Power Partners, L.P., 94 FPSC 2:332, 334-335 (Order No. PSC-94-0197-DS-EQ) ("Moreover, we are unable to conclude that no sale of electricity takes place under these facts where electricity is supplied for rent payments.").

IMCA's lease of capacity from the partnership in this case is a pretty transparent retail sale. There is no conventional lease-financing arrangement as there was in the Monsanto case. There is merely an attempt to structure the deal so that it is similar enough to the facts in earlier lease financing arrangements in Monsanto and Seminole Fertilizer that the transaction might be characterized as something other than a retail sale. IMCA is asking the Commission to ignore that the transaction is a classic take or pay supply of 120 MW and instead indulge the fiction that it is a "lease" which is not subject to the Commission's jurisdiction. The Commission has historically asserted jurisdiction over leases of electric facilities used to supply electricity, and it

should do so in this case where it is readily apparent that the lease is nothing more than the supply of capacity.

UNDER THE ANALYSIS SET FORTH IN SEMINOLE FERTILIZER, IMCA'S TRANSACTION IS A RETAIL SALE

In the Seminole Fertilizer case the petitioner invoked the Commission's Monsanto decision as precedent that its lease arrangement was not a jurisdictional retail sale. The Commission quickly recognized that the Seminole Fertilizer case was not a simple case of the lease of equipment but involved the division of electricity between its owners. Therefore, it moved beyond its Monsanto analysis: "since the electricity produced must be divided between its respective owners, these agreements must address amounts of electricity produced, as distinguished from Monsanto, which only involved a lease of equipment." 90 FPSC 11: at 130. It also found that the differences from Monsanto did not necessarily trigger its jurisdiction. Id.

In Seminole Fertilizer the Commission selected a new analytical framework. It stated that new analytical approach as follows:

> The analysis by the Commission addresses whether the separate entities created primarily for "off-balance sheet accounting" are so strongly related as to be considered one and the same for jurisdictional purposes; and whether the Commission's jurisdiction is triggered by the combination of generation for Seminole's self-consumption and generation for sale to a public utility via the separate, related entity.

Id. It was no longer enough that there was a lease of capacity, that there were fixed lease payments, or that the lessee assumed the risk of production. Instead, the Commission focused upon the relationship of the parties to the transaction to determine if they were separate enough

as to constitute two separate entities as was the case in the PW Ventures decisions or whether the two entities were "strongly related" enough to have a "unity of interests."

Ultimately, the Commission found that Seminole (the lessee) was so related to the partnership (the lessor) through Seminole's wholly owned subsidiary being the (sole) general partner that there was a "unity of interests." It also found that the structuring solely for financial and tax reasons did not result in the partnership being a public utility:

> The Commission deems Seminole and the lessor to have a unity of interests" due to Seminole's wholly owned subsidiary being the general partner of the lessor. The structuring solely for financial and tax reasons does not result in Seminole or the partnership being deemed a public utility. Finally, none of the participants would become subject to PSC jurisdiction solely because of such a transaction.
>
> The Commission finds that the lessee/QF (Seminole) and the partnership/lessor (Seminole sub L.P.) are so "related" that the arrangement surmounts the jurisdictional boundary identified in PW Ventures, Inc. Petition of PW Ventures, Inc., Order No. 18302; PW Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988). (Emphasis added.)

90 FPSC 11:126, at 131.

IMCA has gone to great lengths to structure its proposed arrangement to be similar to the arrangement addressed in the Seminole Fertilizer case. In its petition it has extensively addressed the many similarities of its proposed arrangement to the arrangement in Seminole Fertilizer.[7] However, none of the facts which IMCA touts as being similar were dispositive in the Seminole Fertilizer case.

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[7] See, Petition of IMCA, paragraphs 16 - 18, 21.

As can be seen from the critical passage from the Seminole Fertilizer case quoted above, the Commission's decision turned on two factors which are entirely different in IMCA's circumstance than they were in Seminole's: (1) that there was a "unity of interest" between Seminole (the lessee) and the partnership lessor because Seminole's wholly owned subsidiary was the (sole) general partner, and (2) that the capacity lease arrangement was structured "solely for financial and tax reasons." In the case before the Commission currently, there is no "unity of interest" between IMCA and the partnership from which it "leases capacity," because IMCA's wholly owned subsidiary is not the sole general partner in the partnership. There is another general partner in this case totally unrelated to IMCA - DEPS or its affiliate. Also, the lease arrangement is not alleged to be structured "solely for financing and tax reasons." These crucial differences suggest that applying the same analysis here that was applied in the Seminole Fertilizer yields exactly the opposite conclusion: there is a retail sale and the partnership or the other co-general partner is a public utility subject to the Commission's regulation.

A. Shared Ownership Defeats "Unity of Interests"

The significance of IMCA's wholly owned subsidiary not being the sole general partner in the proposed transaction as Seminole's wholly owned subsidiary was cannot be diminished. In Seminole's circumstances Seminole's wholly owned subsidiary as the sole general partner controlled the entire conduct of the partnership. In other words, Seminole controlled the partnership as well as itself. There was a clear "unity of interests." In the case before the Commission, the Commission knows that there are to be least two co-general partners - IMCA's wholly owned subsidiary and DEPS (or an affiliate thereof) - who control the partnership. What the Commission does not know from the petition is what the partners' respective partnership

interests are, how the general partners are to make decisions, or the ultimate extent of control IMCA has through its wholly owned subsidiary. There is no basis in the petition to conclude that IMCA and the partnership (which DEPS may control or at least have a right to affect partnership policies) have a "unity of interests."

Of particular importance to this case is a subsequent Commission decision interpreting the Seminole Fertilizer case where the Commission casts considerable doubt on the argument that an entity that has shared ownership has a "unity of interests" with one of its owners. In 1995 Tampa Electric Company petitioned the Commission for a declaratory statement that its gas supply affiliate for its Polk Power Station would not be subjected to Commission regulation. See, In re: Petition for Declaratory Statement Regarding Public Utility Status of Affiliates Involved in Gas Supply Arrangements, by Tampa Electric Company, 95 FPSC 12: 510 (Order No. PSC-95-1623-DS-PU). Under the facts alleged, Tampa Electric would have "an ownership interest not exceeding 50%" in its affiliate. Id. Among its several arguments, Tampa Electric invoked the Seminole Fertilizer case as authority that Tampa and its affiliate had a "unity of interests" such that there was no sale of gas to the public (and consequently its affiliate would not be a public utility subject to Commission regulation). Id. Premised upon one of Tampa's other arguments, the Commission found there was no jurisdiction, but it noted that it found Tampa's argument premised upon the Seminole Fertilizer case "less persuasive." 95 FPSC 12: 510 at 512. The Commission went on to explain why it did not find Tampa's argument premised upon Seminole Fertilizer as persuasive:

> First, it is not clear that the entity at issue here would have the "unity of interest" with Tampa Electric that Seminole Sub L.P. was found to have with Seminole. In the latter instance, a wholly-

> owned subsidiary of Seminole was the general partner of Seminole Sub L.P., whereas in this case, the general partner of the gas supply entity will be shared by Tampa Electric and another investor.

Id. (Emphasis in original.) Ultimately, the Commission declined to rule on this argument leaving it open, but the foregoing discussion casts tremendous doubt on IMCA's proposed arrangement. It clearly shows the following representation in IMCA's petition to be inaccurate: "[h]ere, the lessor-Partnership and IMCA, the lessee-electric consumer, would be related exactly the same way as the lessor-partnership and the lessee-consumer in the Seminole Fertilizer were related." IMCA petition at 12. It also casts into doubt the accuracy of the conclusion following IMCA's inaccurate representation.[8]

The fact is that IMCA's wholly owned subsidiary is sharing ownership with an entity, DEPS or its affiliate, that clearly is interested in providing electricity in Florida for purposes other than self-generation. That entity is more interested in selling electricity to IMCA than it is in IMCA self-generating. It may not openly do so under current law, so its alternative is to establish an arrangement that really is a retail sale but which it might be able to pass off as self-generation. IMCA argues that the "relatedness" analysis in Seminole Fertilizer "turns on the relationship between the producing and consuming entities." IMCA petition at 12. Here, unlike in the Seminole Fertilizer case, the producing entity is controlled in some part (perhaps

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[8] IMCA, immediately after inaccurately arguing that the parties in IMCA's case are "related in exactly the same way" as the parties in Seminole Fertilizer, states "[a]ccordingly, based on the Commission's criteria, the conclusion should be the same." IMCA petition at 12. Given the significant difference in the relationship of the parties and the fact that IMCA is sharing ownership with an unrelated entity that undoubtedly has an interest in providing retail service in Florida, the better conclusion is that the result should be just the opposite - this transaction constitutes a retail sale.

completely) by an entity - DEPS or its affiliate - that is not at all related to IMCA, the consuming entity.

The relationship of the consuming and producing entities in this circumstance is much more closely akin to the circumstances in the PW Ventures case where the producing entity was unrelated to the consuming entity. See, In re: Petition of PW Ventures, Inc., for declaratory statement in Palm Beach County, 87 FPSC 10:247 (Order No. 18302). There the petitioner asked the Commission to focus on the relationship between PW Ventures and Pratt and Whitney in addressing the jurisdictional question. 87 FPSC 10: at 250. Nonetheless, the Commission found the real parties in interest to be the partners participating in the producing entity - ESI and Impell. Id. It went on to reject the notion that ESI could avoid regulation as a public utility by organizing a series of partnerships with individual customers. Id. Here the Commission needs also to look to the real parties in interest and their relationship to IMCA. Here DEPS or its affiliate is a real party in interest without any relationship to IMCA. Here the Commission needs to concern itself with DEPS using a series of partnerships like the one presented to "cherry pick" retail customers from regulated public utilities with the exclusive right to provide retail service. Here as in PW Ventures, the Commission should conclude that either the partnership or DEPS, neither of which have a "unity of interests" with IMCA, would be making a retail sale of electricity to IMCA , subjecting them to public utility status and making them subject to the Commission's jurisdiction and regulation.

Finally, there is yet another Commission decision which sheds additional light on the question of whether partial ownership of a generation facility is really self-generation as urged by IMCA. In In re: Petition of Metropolitan Dade County for Expedited Consideration of Request

for Provision of Self-Service Transmission, 87 FPSC 5: 32 (Order No. 17510), Dade County made the argument that it had a partial ownership interest in a cogeneration facility (it owned the building in which the cogeneration facility was housed as well as ancillary equipment) and "equitable title" to the remaining equipment (because it had a generating equipment purchase option at the end of the contract), so it should be allowed to "self-service wheel" its "self-generated" power to another county site over a public utility's transmission facilities. The Commission found that the County's partial ownership interest was not self-generation and denied the request.[9] In this case as in Metropolitan Dade County, IMCA, through its wholly owned subsidiary that is not the sole general partner, has only a partial ownership interest in the entity that holds title to the generating equipment. This is not self-generation.

The Metropolitan Dade County case really answers the question left open in the Tampa Electric case applying the Seminole Fertilizer case. When an entity has only a partial ownership interest in the entity which holds title to the generating unit, the generation from the unit is not self-generation. Under the analytical framework of the Seminole Fertilizer case, the fact that IMCA is not the sole general partner in the partnership but shares ownership is dispositive. This is not self-generation. This is an unlawful retail sale. It should not be permitted.

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[9] The Commission's restatement in its PW Ventures decision of its holding in the Metropolitan Dade decision makes it clear that a partial ownership interest in generation is not self-generation:

> In contrast [to Monsanto], in In re: ... Metropolitan Dade County..., the Commission dismissed an application for self-service wheeling pursuant to our cogeneration rules on the ground that the provision of electricity to an end-user by a separate entity that bore all the risks of production, but in which the end-user had only a partial ownership interest, was not self-generation....

87 FPSC 10: at 252 (emphasis added).

B. This Is Not A Transaction Organized Solely For Financial And Tax Reasons

Conspicuously absent from IMCA's petition is any allegation that the transaction proposed is organized as it is "solely for financial and tax reasons." Of course, that was an essential finding that the Commission made in reaching its holding in the Seminole Fertilizer case. There the Commission, in framing the issue of whether the separate entities were so strongly related as to be considered one and the same for jurisdictional purposes, noted that the separate entities were 'created primarily for "off-balance sheet accounting."' 90 FPSC 11; at 130. In its holding the Commission stated: "[t]he structuring solely for financial and tax reasons does not result in Seminole or the limited partnership being deemed a public utility."

Given the significance of this finding to the holding in the Seminole Fertilizer case, the best explanation for the absence of such an allegation in the IMCA petition is that the transaction has been structured to be similar to the transaction in the Seminole Fertilizer case not because it is solely for financial or tax reasons but because it stands a better chance of being construed as self-generation rather than a retail sale. IMCA comes pretty close to admitting this in paragraph 7 of its petition. The transaction was organized this way to allow it to move "expeditiously and in conformity with all applicable laws and regulations" (perhaps an indirect reference to electric regulatory laws and regulations). It was also organized in this way "following the precedent of Seminole Fertilizer...." IMCA petition at 5. These admissions suggest that the transaction is organized for regulatory rather than financial and tax reasons.

Regardless of the reason for the omission from the petition that the transaction was organized for financial and tax reasons, the omission is clearly fatal. Under the analysis in the Seminole Fertilizer case, the fact that the transaction was structured for solely for tax and

financial reasons was a crucial part of the Commission determination that it was not a retail sale. There the Commission was reluctant to strike down an arrangement which it believed was organized solely for financial and tax purposes. It should have no similar reluctance here, for it is not alleged that the transaction is organized as it is for financial and tax reasons. By IMCA's own admission, it was organized "following the precedent in Seminole Fertilizer." Unfortunately for IMCA, as previously discussed, it does not follow that "precedent" as to several crucial and dispositive matters. This is an unlawful retail sale. The request should be denied.

CONCLUSION

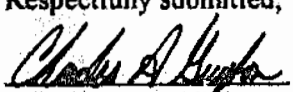
The Commission is being asked to approve a retail sale disguised as self-generation. This complex arrangement is not presented as a lease financing arrangement. It is presented as a capacity lease, but the fact is that the transaction is simply a take or pay arrangement for the supply of capacity to IMCA by an entity controlled in whole or in some part by a generator unrelated to IMCA that seeks to supply electricity in Florida. The Commission has already concluded in tariffing the leasing of electric facilities that the leasing of such facilities is within its jurisdiction over the supplying of electricity to the public.

If the Commission were to find that this "lease" transaction is not a retail sale, there would be serious repercussions on the existing regulatory scheme in Florida. It would encourage other non utility generators who desired to "cherry pick" large industrial customers to make similar arrangements, resulting in lost revenues, cost shifting to remaining customers, and possibly stranded investment. It would also provide public utilities currently subject to rate regulation an opportunity to offer their service through an unregulated " lease" arrangement.

Even though the petitioner and its supplier have gone to great lengths to make this arrangement appear to be similar to the arrangement in Seminole Fertilizer, it differs in two essential respects. First, this is not a circumstance where IMCA has control of the partnership owning the generator, because the ownership is shared by an entity totally unrelated to IMCA. There is not the "unity of interests" in this arrangement found in Seminole Fertilizer. Second, this is not an arrangement that was organized for "solely financial and tax reasons" as in Seminole Fertilizer. This arrangement was organized "following the precedent of Seminole Fertilizer." In other words, it is an artfully crafted charade constructed for regulatory purposes in the hopes of being able to get the Commission to approve a complex retail sale.

The Commission should resist this effort to subvert the established regulatory scheme in Florida. Declare this transaction for what it really is - an unauthorized retail sale by DEPS or its affiliate to IMCA. Such a decision does not preclude IMCA from entering into a real lease financing arrangement for self-generation. Such a decision does keep the Commission from authorizing an unlawful retail sale that might well change the face of the electric utility industry in Florida. The petition of IMCA should be denied.

Respectfully submitted,



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Certificate of Service

I hereby certify that on this the 24th day of November, 1997 a copy of Florida Power & Light Company's Amicus Curiae Memorandum of Law Addressing IMC-Agrico's Petition was served by U.S. Mail or hand delivery (*)

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