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ORIGINAL

November 25, 1997

BY HAND DELIVERY

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

Re: Petition of Duke Mulberry Energy, L.P., and IMC-Agrico
Company for a Declaratory Statement Concerning
Eligibility to Obtain Determination of Need Pursuant to
Section 403.519, Florida Statutes;
Docket No. 971337-EI

Dear Ms. Bayo:

Enclosed for filing in the above docket on behalf of Tampa
Electric Company are the original and fifteen (15) copies of each
of the following:

1. Tampa Electric Company's Petition to Intervene; ¹²¹⁴²⁻⁹⁷ and
2. Tampa Electric Company's Response. ¹²¹⁴³⁻⁹⁷

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

Thank you for your assistance in this matter.

Sincerely,

James D. Beasley
James D. Beasley

JDB/bjm
Enclosures

cc: All Parties of Record (w/encls.)

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2TH *Orig Petition to Don*

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Duke Mulberry)
Energy, L.P., and IMC-Agrico)
Company for a Declaratory)
Statement Concerning Eligibility)
to Obtain Determination of Need)
Pursuant to Section 403.519,)
Florida Statutes.)

DOCKET NO. 971337-EI
FILED: November 25, 1997

**TAMPA ELECTRIC COMPANY'S
PETITION FOR LEAVE TO INTERVENE**

I. Introduction

1. Tampa Electric Company ("Tampa Electric" or "the Company"), pursuant to Fla. Admin. Code Rule 25-22.039, petitions the Commission for leave to intervene in the above-styled cause on the ground that the power generation project and associated power sale arrangement proposed by IMC-Agrico Company ("IMCA") and its partner, Duke Mulberry Energy, L.P. ("Duke") will undermine Tampa Electric's ability to plan and operate its system and result in the shift of significant costs to Tampa Electric's customers or to Tampa Electric itself. In addition, the requested relief, if granted, would create a direct and immediate service territory dispute between Duke and Tampa Electric, since the project will prove to be an unlawful and elaborately devised retail sale, to the detriment of Tampa Electric's remaining retail customers. The requested relief, therefore, would affect Tampa Electric's interest directly and in a manner germane to this proceeding.

2. The name and address of the petitioner are:

Tampa Electric Company
Post Office Box 111
Tampa, Florida 33601

DOCUMENT FILED DATE

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FILED IN THE OFFICE OF THE CLERK

3. All pleadings, motions, orders and other documents directed to the petitioner are to be served on:

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

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

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

II. Background

4. In the petition filed in this docket, Duke and IMCA ask the Commission to declare that Duke and IMCA are eligible to apply for a determination of need under Section 403.51C, Florida Statutes, for a power plant described in such petition, despite the clear statutory language which renders them ineligible as applicants. Alternatively, Duke and IMCA asked the Commission to simply declare, without any articulated legal basis, that no determination of need for the proposed power plant project is required.

5. IMCA has also filed a separate petition for a declaratory statement in Docket No. 971313-EI asking the Commission to determine that the ownership and operation of the proposed power plant will not constitute a sale of electricity at retail or subject the owner of the plant to regulation as a public utility under Chapter 366, Florida Statutes.

6. By Duke and IMCA's own admission, the circumstances

surrounding their Project present a matter of first impression for this Commission¹. As discussed in more detail in "Tampa Electric Company's Response, filed concurrently herewith, the precedents cited by Duke and IMCA in support of their Petition only serve, in Tampa Electric's view, to conclusively confirm Duke and IMCA's ineligibility as Applicants under the Florida Power Plant Siting Act (the "Siting Act") and provide no basis for permitting IMCA and Duke to proceed with their proposed project. As described in this pleading, Tampa Electric also believes that the plain meaning of the relevant statutory language and the unambiguous statement of legislative intent contained therein, likewise, mandate this result. In any event, Tampa Electric submits that it should be allowed to intervene so as to present these positions, given that the subject of this proceeding is a matter of first impression and Tampa Electric's interests are directly affected.

III. Tampa Electric's Ability To Plan Its System And Otherwise Meet Its Obligation To Serve Would Be Adversely Affected

7. Under the two prong test of Agrico Chemical Company V. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2nd DCA 1981), to have standing, a party must demonstrate that (1) it will suffer an injury in fact of sufficient immediacy to entitle him to

¹See Duke Mulberry Request To Address The Commission filed in Docket No. 971337-EI, In re: Petition of Duke Mulberry Energy, L.P., and IMC-Agrico Company for a Declaratory Statement Concerning Eligibility To Obtain Determination of Need Pursuant to Section 403.519, Florida Statutes.

a Section 120.57 hearing, and (2) this injury must be of the type or nature the proceeding is designed to protect. Tampa Electric respectfully submits that it meets this test for the reasons set forth above and more fully described below.

8. In light of its public utility obligation, Tampa Electric has planned, constructed and operated its electric system, in relevant part, to serve the anticipated energy needs of its retail interruptible customers, the largest of which is IMCA. The grant to Petitioners of Applicant status under the Siting Act could create serious planning and operational difficulties for Tampa Electric. For instance, siting the proposed plant, with its anticipated impacts on the environment, near Tampa Electric's already certified Polk site may affect the Company's ability to use the Polk site for future plant additions. Tampa Electric may have increased difficulty in buying power for its native load due to exacerbated transmission constraints associated with the proposed plant. In addition, the operation of the proposed plant within Tampa Electric's service area could cause significant load following and load balancing hurdles which could, in turn, have an impact on Tampa Electric's ability to serve its retail load and the cost at which that service is provided. Further confounding the planning function would be the ambiguity surrounding Tampa Electric's obligation to serve IMCA or the project, given the dual retail and wholesale functions of the project and the lack of clarity of the relationship between the coventurers, Duke and IMCA and the possibility that this relationship could change over time.

9. As discussed in Tampa Electric's Response, the Commission may not have jurisdiction to require the Petitioners to follow through with the construction of generation deemed essential to meet Florida's energy needs under the Siting Act process. Once built, the Commission may not have jurisdiction to ensure the output of the proposed project would serve Florida's energy needs during critical periods, rather than being exported to another state. Tampa Electric would be left with great uncertainty with regard to the extent to which its own need for additional generating resources would be obviated and the degree to which its existing generation might be displaced, all to the detriment of the customers whom Tampa Electric is obligated to serve.

10. The petition of Duke and IMCA asks in the alternative that the Commission decide that no determination of need is required for their construction of the proposed power plant to serve IMCA's electrical requirements within Tampa Electric's service area. Tampa Electric has a critical stake in the outcome of that request in that the granting of such a request would preclude Tampa Electric from having an opportunity to present evidence in opposition to any alleged need for the proposed plant. For example, Duke and IMCA assert that their proposed project will displace existing generation in Florida. This action would, however, leave Tampa Electric with stranded cost and reduced fuel efficiencies which would adversely affect the company and its customers.

11. Duke and IMCA's "Request to Address the Commission"

clearly sets out the substantial interests of Tampa Electric in this proceeding and further demonstrates that a petition for declaratory statement is an inappropriate procedural mechanism to address the issues presented in the petition. The Request to Address the Commission candidly admits:

. . . Duke Mulberry and INCA submit that their petition presents a case of first impression with respect to the statutory basis for, and policy implications of, granting competitive wholesale power producers such as Duke Mulberry, as an exempt wholesale generator access to the Commission's need determination process . . . (Emphasis supplied)

12. Duke and INCA are asking for a special opportunity to address the Commission predicated on the assertion that their petition presents a case of first impression that raises significant issues with respect to the statutory basis for, and policy implications of, granting competitive wholesale power producers access to the Commission's need determination process pursuant to Section 403.519, Florida Statutes. The narrow purpose of a declaratory statement is to provide guidance to a petitioner, based on facts alleged to be applicable only to petitioner. However, the implications of the Duke/INCA petition extend well beyond Petitioners' immediate interests. Tampa Electric is subject to and has participated in the need determination process and is, likewise, a provider of wholesale power services within this state. If, as Duke and INCA maintain, this proceeding is a precedent setting one which will influence future need determination proceedings, Tampa Electric and other Florida utilities will be

substantially affected by and have a clear stake in the outcome of this proceeding.

IV. Tampa Electric And Its Retail Customers Would Be Adversely Affected By The Unlawful Sale Of Retail Power From The Duke and IMCA Project

13. On information and belief, Tampa Electric also submits that the project, as defined in IMCA's petition, would involve the retail sale of electricity to at least one of Tampa Electric's industrial retail customers, IMCA, and would subject the owner of the Project to regulation as a retail public utility under Chapter 366, Florida Statutes, giving rise to a territorial dispute. IMCA is currently a retail customer of Tampa Electric and has numerous facilities located within Tampa Electric's authorized retail service territory.

14. To the extent that Duke, IMCA or their affiliates provide retail electric service within Tampa Electric's Commission approved service territory, as the company believes would be the case under IMCA's proposal, the company will have an interest in and a right to oppose such service in this proceeding. The Commission's statutory authority to resolve territorial disputes dovetails with the Commission's jurisdiction and duty under Section 366.04, Florida Statutes, to supervise the planning, development and maintenance of a coordinated electric power grid throughout Florida so as to assure an adequate and reliable source of energy for operational and emergency purposes in this state and the avoidance of uneconomic duplication of generation, transmission and

distribution facilities. Duke's petition in this proceeding and Tampa Electric's opposition thereto create a ripe and justiciable controversy under the above-referenced statutory authorities of the Commission.

15. In light of its public utility obligation, Tampa Electric has planned, constructed and operated its electric system, in relevant part, to serve the anticipated energy needs of its retail interruptible customers, the largest of which is IMCA. There are a wide variety of costs that will be stranded and ultimately shifted to Tampa Electric's remaining ratepayers if retail sales to IMCA are reduced.

16. In the year 2000, if IMCA and Duke carry through their proposal and IMCA reduces purchases from Tampa Electric by approximately 120 MW, the result could be at least a \$12.3 million reduction in annual retail non-fuel base revenue. The revenues collected from IMCA under the interruptible tariff reflect recovery of the cost of the production, transmission and subtransmission level functions the recovery responsibility for which would be transferred to the remaining firm and interruptible customer base. In the absence of such cost shifting, Tampa Electric itself would bear this burden.

17. In addition, energy sales to IMCA provide a fuel cost benefit to Tampa Electric's ratepayers through contributions to the overall average cost of fuel. The loss of energy sales to IMCA will, therefore, increase remaining ratepayers fuel costs. In part this is because the cost of incremental fuel is less than average

so reduced energy sales will serve to raise the average fuel price. In addition, IMCA also takes a higher percentage of its energy at off-peak times when system and statewide fuel costs are lower.

18. Tampa Electric has made significant investments in plant to serve the total of IMCA's load in anticipation that the load would not be lost to retail service provided by others. Loss of such load would serve to strand some or all of that investment without an opportunity to mitigate the loss through additional sales to new customers. In particular, significant transmission and subtransmission investment has been made to serve the delivery points of IMCA which would be stranded should the expected load levels be reduced.

V. Disputed Issues

19. Tampa Electric disputes the assertion in footnote 8 of the Duke/IMCA petition that the proposed plant will reduce the use of imported oil in Florida by economically displacing oil-fired generation, at no risk to electric consumers. To the extent the proposed project displaces a portion of Tampa Electric's generation then stranded costs will be created which would be allocated to the remaining ratepayers.

20. Tampa Electric disputes Duke and IMCA's very generally stated suggestion, on page 18 of their petition, that benefits of the proposed plant may include general reliability benefits, environmental benefits, energy efficiency and conservation benefits and other socio-economic benefits, including both reduction of oil

imports and downward competitive pressure on wholesale prices, and thereby on retail prices paid by consumers. Given the lack of any concrete nexus between the proposed plant and the needs of electric consumers in Florida, any and all benefits which may derive from the proposed plant may well be exported out of this state when needed most in Florida.

21. Tampa Electric disputes the assertion in paragraph 31 of the petition that there is no economic risk to ratepayers associated with the planned project and that the proposed plant can only enhance reliability within the state. To the contrary, the proposed project will result in stranded costs, additional impact to Florida's environment and potential increases in the cost of power at critical times, all without any positive impact with regard to reliability.

VI. Ultimate Facts Alleged

22. The project described in the petition requires a determination of need by the Florida Public Service Commission under Section 403.519, Florida Statutes. Based upon the facts alleged in the petition, Duke and IMCA are not proper parties to apply for a determination of need from the Commission in the absence of a determination that the proposed ownership and operation of the plant will make Duke (or the ultimate owner of the plant) a regulated public utility as defined in Section 366.02, Florida Statutes. The alternative relief requested by Duke and IMCA (that the Commission declare that no determination of need is

required for the proposed power plant) would be inconsistent with the plain language of the Power Plant Siting Act which, with certain exceptions not applicable here, applies to "any electric power plant" of 75 megawatts or greater. The proposed Duke plant is greater than 75 megawatts and Petitioners have not alleged any facts which show this plant falls within any exception contained in that Act.

VII. Request For A Formal Hearing Under Section 120.57, Florida Statutes

23. Tampa Electric respectfully requests that a hearing be convened under the provisions of Section 120.57(2), Florida Statutes. As described above, the Duke/IMCA petition raises disputed issues of first impression which have broad ranging implications. The requested hearing would give the Commission and the affected parties a much needed opportunity to more fully air the issues bearing on Duke's eligibility to be an Applicant under the Siting Act.

VIII. Statutes, Rules And Orders Involved

24. This petition is filed pursuant to Fla. Admin. Code Rule 25-22.039. The Commission has jurisdiction to resolve petitions for declaratory statement pursuant to Section 120.565, Florida Statutes and Fla. Admin. Code Rule 25-22.020. As noted in the Duke/IMCA petition this proceeding involves certain provisions of the Power Plant Siting Act, Section 403.501, Florida Statutes, et. seq. In

addition, this proceeding involves the Commission's jurisdiction and powers under Section 366.04, Florida Statutes (including the Commission's administration of the Grid Law), Section 366.02, Florida Statutes, and Fla. Admin. Code Rule 25-6.0441. Tampa Electric disputes Duke's and IMCA's reliance upon and characterizations of certain of the prior decisions listed in paragraph 4 of the Duke/IMCA petition.

IX. Relief Requested

25. Tampa Electric respectfully requests that:

(1) Tampa Electric be permitted to intervene in this proceeding and participate fully, with all the rights, privileges and obligations of any other party; and that

(2) The Commission deny the primary and alternative relief requested by Petitioners on a summary basis; or that

(3) The Commission convene a hearing under Section 120.57(2), Florida Statutes, and ,thereafter, enter its order determining that the project described in the Duke/IMCA Petition must be the subject of a determination of need pursuant to Section 403.519, Florida Statutes, and that, Duke and IMCA are not appropriate applicants for a determination of need under the Power Plant Siting Act.

DATED this 25th day of November, 1997.

Respectfully submitted,



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Post Office Box 111
Tampa, Florida 33601-0111

ATTORNEYS FOR TAMPA ELECTRIC COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Leave to Intervene, filed on behalf of Tampa Electric Company, has been furnished by U. S. Mail or hand delivery (*) on this 25th day of November, 1997 to the following:

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McWhirter, Reeves, McGlothlin,
Davidson, Rief & Bakas, P.A.
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Mr. Richard Bellak*
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201/11/97