

ORIGINAL

LAW OFFICES
McWHIRTER, REEVES, MCGLOTHLIN, DAVIDSON, RIEF & BARAS, P.A.

LYNWOOD F. ARNOLD, JR.
JOHN W. BARAS, JR.
C. THOMAS DAVIDSON
STEPHEN O. DECKER
LINDA E. JORGE
VICKI GORDON KAUFMAN
JOSEPH A. MCGLOTHLIN
JOHN W. McWHIRTER, JR.
RICHARD W. REEVES
FRANK J. RIEF, III
DAVID W. STEEN
PAUL A. STRASKE

100 NORTH TAMPA STREET, SUITE 2800
TAMPA, FLORIDA 33602-5126

MAILING ADDRESS: TAMPA
P.O. BOX 3350, TAMPA, FLORIDA 33601-3350

TELEPHONE (813) 224-0868

FAX (813) 221-1854

CABLE GRANDLAW

PLEASE REPLY TO:
TALLAHASSEE

TALLAHASSEE OFFICE
117 N. GARDNER
TALLAHASSEE, FLORIDA 32301

TELEPHONE (850) 222-2525

FAX (850) 222-5000

December 3, 1997

VIA HAND DELIVERY

Ms. Blanca Bayó
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 971337-EI

Dear Ms. Bayó:

Enclosed are the original and 15 copies of the following documents for filing in the above docket:

1. IMC-Agrico Company's Response in Opposition to Tampa Electric Company's Petition for Leave to Intervene. *12334-97*
2. IMC-Agrico Company's Motion to Strike Tampa Electric Company's "Response." *12335-97*
3. IMC-Agrico Company's Response in Opposition to Florida Power Corporation's Petition to Intervene. *12336-97*

ACK _____
AFA _____
APP *Bell*
CAF _____
CMT _____ assistance.
CTR _____
EAG _____
LEA _____
LFA _____
GFT _____

I have enclosed extra copies of the above documents for you to stamp and return to me. Please contact me if you have any questions. Thank you for your assistance.

CTR 5 Sincerely,
EAG *Billis Gordon Kaufman*
LEA _____
LFA _____
GFT _____ Vicki Gordon Kaufman

RCH _____ VGK/pw
SE _____ 1 Encls.
WAS _____
OTH _____

RECEIVED & FILED
[Signature]
FEDERAL BUREAU OF RECORDS

ORIGINAL

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: December 3, 1997

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

IMC-Agrico Company (IMCA), through its undersigned counsel, files its Response in Opposition to Tampa Electric Company's (TECO) Petition to Intervene. TECO lacks standing to intervene in this proceeding; therefore, its petition to intervene should be denied.

I.

Background

1. On October 15, 1997, IMCA and Duke Mulberry Energy, L.P. (Duke Mulberry) filed a petition for declaratory statement seeking a declaration that on the facts presented in their petition, they are entitled to apply for a determination of need for an electrical power plant pursuant to section 403.519, Florida Statutes, and other pertinent rules and regulations. In the alternative, IMCA and Duke Mulberry seek a declaration that no determination of need is required for their proposed combination self-generation and merchant plant project.

2. On November 25, 1997, TECO filed a Petition for Leave to Intervene. TECO lacks standing to intervene in this proceeding and its petition should be denied.

DOCUMENT FILED DATE

12334 DEC-3 97

FILED IN NG

II.

TECO Fails to Meet the Standing Requirements

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 such immediate injury that it is entitled to a 5 120.57 hearing and the interest must be of the type the proceeding is designed to protect. TECO can meet neither test.

A.

TECO has failed to demonstrate immediate injury

4. An analysis of TECO's claim of "immediate injury" must begin with the fact that IMCA has the absolute right to self-generate. PW Ventures v. Nichols, 533 So.2d 281, 284 (Fla. 1988), regardless of any consequences which may result to TECO from that choice. The "immediate injury" which TECO alleges is two-fold. First, TECO says that if IMCA/Duke Mulberry are permitted to be applicants, it will undermine TECO's ability to plan and operate its system. Second, TECO says if IMCA/Duke Mulberry are applicants it will shift costs to TECO's ratepayers.

5. TECO's first claim is nothing more than economic injury in disguise and is further purely speculative. Its second claim, which is a pure claim of economic injury, provides no basis for a claim of immediate injury.

6. As to its claim that allowing IMCA/Duke to be an applicant will interfere with TECO's ability to plan and operate its system, TECO claims that it has built its

system in anticipation of the needs of its retail interruptible customers, including IMCA.¹ Implicitly, TECO appears to be saying that it has planned and built (that is, expended funds) with IMCA in mind and that therefore, IMCA may not leave its system.² This is nothing more than an argument that TECO will be economically damaged if IMCA moves to self-generation. As discussed below, economic injury cannot confer standing.

7. As to TECO's claim that somehow IMCA's ability to be an applicant will create planning difficulties for TECO, its claims are full of speculation about future events. For example, TECO says that if IMCA/Duke Mulberry site their plant near the TECO Polk site, it may affect TECO's ability to use that site. TECO may have trouble purchasing power for its native load if there are transmission constraints. The operation of IMCA/Duke Mulberry's proposed plant could cause load following and could impact TECO's ability to serve other customers. Such speculation³ cannot demonstrate immediate injury in any event. Florida Department of Offender Rehabilitation v. Jerry, 353 So.2d 1231 (Fla. 1st DCA 1978), cert. denied, 359 So.2d 1215 (Fla. 1978) (speculation and conjecture cannot confer standing). See also, Department of Health and Rehabilitative Services v. Alice P., 367 So.2d 1045 (Fla. 1st

¹ The Commission should take administrative notice of the fact that TECO does not build capacity to serve its interruptible customers. Due to this fact, interruptible customers on TECO's system do not pay an energy conservation cost recovery charge.

² Of course, IMCA has been contributing to TECO's cost to serve during its entire time on the TECO system.

³ This same speculation is seen in TECO's discussion of its uncertainty over its need for additional resources.

DCA 1979). It is also difficult to see any connection between these vague and speculative claims and the legal question of IMCA/Duke Mulberry's right to be an applicant under the Power Plant Siting Act. TECO's claims certainly do not confer standing on it to participate in the limited issue of whether IMCA/Duke Mulberry are eligible to utilize the certification procedures of the Siting Act.

8. As to TECO's claim that some costs that IMCA might bear would be shouldered by others if IMCA moves to self-generation, this is simply and clearly a claim of economic injury. The loss of IMCA as a retail customer (and any alleged stranded costs flowing therefrom) and any economic loss that may flow from that event does not meet the immediate injury test.

9. This Commission has addressed essentially the same situation previously. In the same circumstances as are present in this docket, the Commission denied a requesting utility's petition to intervene. 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 and asked the Commission for a statement that the project 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 it would be affected by the loss of the Monsanto load. The Commission denied intervention to Gulf Power:

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 473 (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.⁴

B.

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

10. 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 order of the agency, as it applies to the petitioner's particular set of circumstances."⁵

11. The Commission's rules on declaratory statements makes this obvious because they provide that a declaratory statements apply to the petitioner "in his or her particular set of circumstances only."⁶ 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."⁷ That is the declaratory statement, by its very nature, can affect only the petitioner and no other person.⁸ Therefore, since the

⁴ Order 16581 at 2.

⁵ Section 120.565(1), Florida Statutes, emphasis added.

⁶ Rule 25-22.020(1), Florida Administrative Code, emphasis added.

⁷ Rule 25-22.021, Florida Administrative Code.

⁸ For this same reason, there is no need for the evidentiary hearing TECO seeks.

declaratory statement process can affect only the petitioners (in this case, IMCA and Duke/Mulberry), it is certainly not the type of proceeding designed to further TECO's interests.

12. Contrary to TECO's assertion, IMCA/Duke Mulberry's request to address the Commission does not confer standing on TECO. It was simply intended to point out to the Commission that the pending declaratory statement request would address a statutory issue not yet considered by the Commission.

III.

The Self-Generation Nature of the Project Will be Considered in Another Docket

13. TECO spends several pages of its petition arguing its view that the project proposed by IMCA will constitute a retail sale. In a separate petition in Docket No. 971313-EU, IMCA has asked the Commission to confirm that IMCA's project is not a retail sale. TECO has filed a petition to intervene and an "answer" in that docket. IMCA has opposed TECO's efforts. In due course, the Commission will rule on IMCA's petition, as well as the pleadings of companies attempting to intervene. TECO's recitation of the same arguments here is nothing more than irrelevant repetition and should be disregarded.

IV.

TECO's Allegations of "Disputed Facts" Do Not Give It Standing

14. Finally, TECO takes issue with several statements made by IMCA/Duke Mulberry, including some comments made about the benefits of the proposed plant. By taking issue with these statements, TECO hope to convert a straightforward

declaratory statement proceeding into an evidentiary hearing. However, TECO's attempt must fail. A claim of disputed facts does not create standing where none exists.


15. IMCA/Duke Mulberry have described their proposal in some detail. TECO may not now take such description and dispute it so as to trigger an evidentiary hearing where none is warranted.

V.

Conclusion

TECO can meet neither of the prongs of the Agrico standing test. Therefore, its petition to intervene in this proceeding should be denied.

WHEREFORE, IMCA requests that TECO's petition to intervene and its request for hearing be denied.


John W. McWhirter, Jr.
McWhirter, Reeves, McGlothlin,
Davidson, Rief and Bakas, P.A.
Post Office Box 3350 (33601-3350)
100 North Tampa Street, Suite 2800
Tampa, Florida 33602-5126
Telephone: (813) 224-0866

Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin,
Davidson, Rief and Bakas, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Telephone: (850) 222-2525

Attorneys for IMC-Agrico Company

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 for Leave to Intervene has been furnished by U.S. Mail or Hand Delivery(*) this 3rd day of December, 1997, to the following:

Richard Bellak *
Division of Legal Services
Florida Public Service Commission
1540 Shumard Oak Boulevard, Rm. 301F
Tallahassee, Florida 32399-0850

James F. McGee
Florida Power Corporation
Post Office Box 14042
St. Petersburg, Florida 33733-4042

Robert Scheffel Wright
Larders & Parsons
310 West College Avenue
Tallahassee, Florida 32301

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

Matthew M. Childs, P.A.
Charles A. Guyton
Steel Hector & Davis LLP
215 South Monroe Street
Suite 601
Tallahassee, Florida 32301


Vicki Gordon Kaufman