LAW OFFICES
McWHIRTER, REEVES, McGLOTHLIN, DAVIDSON, RIEF & BAKAS, P.A.

LYNWOOD F. ARNOLD, JR.
JOHN W. BAKAS, 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) 224-0866
FAX (813) 221-1854
CABLE GRANDLAW

PLEASE REPLY TO:
TALLAHASSEE

TALLAHASSEE OFFICE
117 S. GADSDEN
TALLAHASSEE, FLORIDA 32301

TELEPHONE (850) 222-2525
FAX (850) 222-5606

ORIGINAL

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

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.

Sincerely,

Vicki Gordon Kaufman

Vicki Gordon Kaufman

VGK/pw
Encls.

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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 MOTION TO STRIKE
TAMPA ELECTRIC COMPANY'S "RESPONSE"

IMC-Agrico Company (IMCA), through its undersigned counsel, files this Motion to Strike Tampa Electric Company's (TECO) "Response" because it is a procedurally unauthorized pleading and because it is substantively flawed. As grounds therefor, IMCA states:

I.

Background

1. On October 15, 1997, IMCA and Duke Mulberry Energy, L.P. (Duke Mulberry) filed a petition for declaratory statement seeking confirmation that they are entitled to apply for a determination of need for an electrical power plant pursuant to section 403.519, Florida Statutes, pertinent Commission rules and provisions of the Florida Electrical Power Plant Siting Act (Siting Act). Alternatively, IMCA and Duke Mulberry requested the Commission to declare that no determination of need is required for their joint project, which is a combination self-generation and merchant plant project.

12335 DEC-3 97

2. On November 25, 1997[1], TECO filed a pleading styled "Response." This pleading is procedurally deficient because such a pleading is not authorized by statute or rule. It is an attempt by TECO to circumvent the nature and purpose of a declaratory statement proceeding which should not be permitted.

II.

TECO's "Response"
is Not Authorized by Statute or Rule

3. Neither the Commission's rules on declaratory statements nor the statute governing such statements provides TECO with the authority to file what it has called an "response" to IMCA/Duke Mulberry's petition. The pleading should be stricken as an unauthorized pleading.

4. 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 <u>petitioner's particular set of circumstances</u>."[2] Therefore, there is no need for an response (or answer), as there is in a traditional adversarial proceeding.

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[1] The timing of TECO's pleading should be noted well. IMCA and Duke Mulberry filed their declaratory statement petition on <u>October 15</u>. TECO waited until <u>November 25</u> to file its "Response." As the Commission is well aware, section 120.565(3), Florida Statutes, requires the Commission to act on a declaratory statement petition within 90 days and the Commission is on course to take action on the petition on December 16. TECO's tardy filing is simply another example of its effort to delay and extend this straightforward proceeding.

[2] Section 120.565(1), Florida Statutes, emphasis added.

5. The Commission's rule on declaratory statements makes this obvious, because it provides that a declaratory statement applies to the petitioner "in his or her particular set of circumstances only."[3] 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."[4] That is, the declaratory statement, by its very nature, can affect only the petitioner and no other person. The Commission's rules regarding declaratory statements do not provide for the filing of an "answer" because there is no respondent in an declaratory statement proceeding. Therefore, TECO's "Answer" and its hearing request are unauthorized by statute or Commission rule[5] and should be stricken.

6. In an attempt to find some authority for its pleading, TECO relies on rule 25-22.037, Florida Administrative Code. However, this rule provides no authority for TECO's unauthorized filing for two reasons. First, the rule appears in that portion of the Commission's rules dealing with decisions which affect substantial interests, not in the section of the Commission's rules which governs declaratory statements. Second, rule 25-22.037 provides for an answer to be filed by a respondent or an

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[3] Rule 25-22.020(1), Florida Administrative Code, emphasis added.

[4] Rule 25-22.021, Florida Administrative Code.

[5] In Docket No. 970171-EU, the Commission did not permit TECO to file a supplemental brief, because, among other reasons, it was not authorized by the Commission's rules. Order No. PSC-97-1095-PCO-EU.

intervenor[6]. Though TECO has called its pleading a "response", it is the same as an answer because it attempts to respond to IMCA/Duke Mulberry's petition in this docket. TECO is neither a respondent or an intervenor in this proceeding; therefore, its "response" is unauthorized.

7. The Commission has had occasion to address the question of the appropriateness of the filing of an "answer" in a declaratory statement proceeding in the past. The Commission found an "answer" to be impermissible in a declaratory statement proceeding and struck such an "answer" in situations analogous to this one.

8. In <u>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</u>, Docket No. 900877-EI, CFR Bio-Gen sought a declaratory statement regarding the method of calculating firm capacity payments under its contract with Florida Power Corporation (FPC). FPC filed an answer in opposition to the CFR petition and CFR filed a motion to strike the answer. The Commission granted the motion to strike and did not consider FPC's answer.[7] The Commission rendered the declaratory statement without the participation of FPC, in a case where FPC was the purchaser under the standard offer contract and thus required to abide by the Commission's interpretation of the payment provision. The same result is appropriate in this case.

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[6] In addition to its "Response" TECO also filed a petition to intervene. With this Motion to Strike, IMCA is simultaneously filing a response in opposition to TECO's petition to intervene.

[7] Order No. 24338 at 2.

9. TECO's "response" is not authorized by the Commission's rules and should be stricken.

III.

TECO's "Response" is Substantively Flawed

10. As discussed above, TECO's "response" is procedurally defective and should be rejected on that basis alone. Further, the "response" is substantively flawed and should be disregarded on that basis as well.

A.

IMCA/Duke Mulberry is an Appropriate Applicant

11. Despite TECO's claims to the contrary, IMCA/Duke Mulberry is an appropriate applicant under section 403.519 of the Siting Act pursuant to the clear, plain meaning of the Act.

12. Section 403.503(4) defines an applicant as an electric utility which applies for certification under the Siting Act. Section 403.503(13) lists a number of entities which are electric utilities. As TECO recognizes, included in the list of entities who may be applicants is a "regulated electric company." Because the definition of "electric utility" encompasses a company engaged or authorized to engage in the generation, transmission or distribution of electricity, a company engaged only in generation (like the IMCA/Duke Mulberry project) would be a proper applicant.

13. Additionally, because the project will be engaged in the generation of electricity for sale at wholesale, it will be regulated by FERC pursuant to 16 U.S.C.

§824(a)(b). Thus, the applicant will be a "regulated electric company" for purposes of applicant status under the Siting Act.

14. TECO seeks to limit the meaning of regulated electric company so as to restrict applicants only to investor-owned utilities for an obvious purpose -- to narrow the field of applicants. However, no support for TECO's restrictive definition can be found in the Siting Act. In fact, both this Commission and the Governor and Cabinet (sitting as the Siting Board) have recognized that the provisions of the Siting Act are available to entities other than investor-owned utilities. In re: Petition of Florida Crushed Stone Co. for Determination of Need for a Coal-Fired Cogeneration Electrical Power Plant, Order No. 1161; In re: Florida Crushed Stone Co. Power Plant Site Certifications Application, Case No. PA 82-17.

15. TECO also expresses concern that capacity be built without burdening Florida's environment. IMCA denies the implication that its project would pose such a burden; however, the pertinent point is that the negative and/or positive impacts of a particular project are the proper subjects of a proceeding to consider a specific application, not one to determine applicant status.

16. TECO's unfounded assertions regarding the grid bill are nothing more than a red herring. Further, they have nothing to do with whether IMCA/Duke Mulberry is an appropriate applicant under Florida law.

B.

Nassau Power Does Not Control in the Facts of this Case

17. TECO states that this Commission's holding in In re: Petition of Nassau Power Corporation to Determine Need for Electrical Power Plant, Docket No. 920769-EQ, controls this case. TECO is wrong.

18. In the Nassau Power case, the Commission dealt with need determinations filed by Nassau Power and Ark Energy. In that case, the non-utility generators sought the Commission's prior assurance that ratepayers would be responsible for paying for the proposed units via a contract with the utility approved by the Commission for cost recovery. The Commission concluded that in that circumstance, a non-utility generator could not pursue a need determination absent a contract with a utility.

19. The Nassau Power decision (and subsequent appeals related to it) related to a non-utility generator who sought to fill a specific utility need and be assured of cost recovery beforehand. In contrast, the IMCA/Duke Mulberry situation is one where the entity takes all the risk and the ratepayers take none. Thus, the Nassau Power case does not control. Neither this Commission or the Court in Nassau Power was faced with the factual circumstances present in IMCA/Duke Mulberry's petition.

20. As pointed out by IMCA/Duke Mulberry in their petition in this matter, both this Commission and the Governor and Cabinet sitting as the Power Plant Siting Board (Siting Board) have allowed entities other than traditional utilities to use the need determination and site certification process in the Florida Crushed Stone case.

That case was not (and could not) have been overruled by Nassau Power, as it applies here, because of the salient factual differences. The Nassau Power case simply did not address the circumstance, present here, where the developer bears all the risk of the project. IMCA and Duke addressed the Nassau Power decisions in their petition, which IMCA incorporates by reference.

C.

IMCA/Duke Mulberry's Alternative Request May Be Appropriate

21. Finally, TECO takes issue with IMCA/Duke Mulberry's request posed in the alternative, that the Commission find that no determination of need is required for it to proceed with its project. Such an alternative statement could rest on the determination that no need determination is necessary because there is absolutely no economic risk to ratepayers and construction of the proposed plant can only enhance reliability within the state. This is especially the case due to the reliability constraints currently facing the state. To reach the conclusion TECO wants -- that is, to require IMCA/Duke Mulberry to use the Siting Act but then tell them they are prohibited from doing so -- would frustrate the federal programs that created EWGs for the prupose of fostering competition in the wholesale market. This is the absurd and impermissible result that TECO seeks. The Commission must not countenance it.

22. The purpose of the Energy Policy Act is to reduce dependence on oil and decrease consumer costs. Congress created new competitors, EWGs, to accomplish this purpose via increased competition in the wholesale market. FERC Order 888 implements this objective. An EWG must be a proper applicant or be permitted to

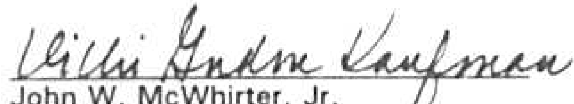
build a plant outside the Siting Act. A prohibition on plant construction by EWGs would frustrate Congress' intent and therefore be preempted by federal law.

V.

Conclusion

Procedurally, TECO's response is an unauthorized pleading and should be stricken. Substantively, it incorrectly applies the law to the facts to reach erroneous conclusions which should be disregarded.

WHEREFORE, TECO'S "response" should be stricken.



John W. McWhirter, Jr.
McWhirter, Reeves, McGlothlin,
Davidson, Reif 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 **Motion to Strike Tampa Electric Company's "Response"** has been furnished by U.S. Mail or Hand Delivery(*) this **3rd** day of **December, 1997**, to the following:

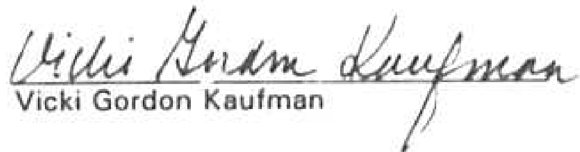
Richard Bellak*
Division of Legal Services
Florida Public Service Commission
1540 Shumard Oak Boulevard, Rm. 301F
Tallahassee, Florida 32399-0850

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

Robert Scheffel Wright
Landers & 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