

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.)
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) DOCKET NO. 971337-EI
) FILED: December 4, 1997
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**DUKE MULBERRY ENERGY, L.P.'s
 MOTION TO STRIKE TAMPA ELECTRIC COMPANY'S RESPONSE**

Duke Mulberry Energy, L.P., ("Duke") by and through undersigned counsel and pursuant to Rule 25-22.037, Florida Administrative Code ("F.A.C.") and Rule 1.140(f), Florida Rules of Civil Procedure ("F.R.C.P.") hereby files this motion to strike Tampa Electric Company's ("TECO's) response and in support thereof states:

1. On October 15, 1997 Duke and IMC-Agrico Company ("IMCA") jointly filed with the Florida Public Service Commission ("FPSC" or "Commission") a Petition for Declaratory Statement (the "Petition") which opened this docket and initiated this proceeding. In the Petition, Duke and IMCA asked that the

Commission confirm that Duke and IMCA are "applicants" eligible to pursue a determination of need pursuant to Section 403.519, the Power Plant Siting Act, and applicable Commission rules. On November 25, 1997, TECO filed what purports to be a Response (the "Response") to the Petition.

2. TECO's Response is clearly untimely, is not authorized by any Commission rule, and should be stricken as immaterial to this proceeding.

3. Rule 25-22.037, F.A.C. specifically provides that any

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party or intervenor may file an answer to a petition or a motion in opposition to a petition within twenty (20) days of service of the petition. TECO did neither; rather, TECO waited 41 days to file its purported "Response."

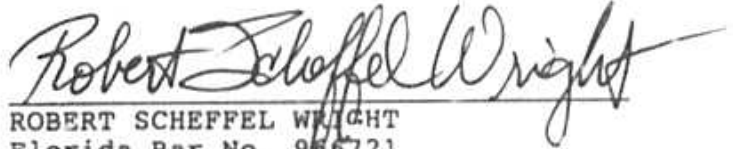
4. Rule 1.140(g), F.R.C.P. provides that "[a] party may move to strike . . . redundant, immaterial, impertinent or scandalous matter from any pleading at any time."

5. Neither Rule 25-22.037, F.A.C. nor any other Commission Rule authorizes the filing of a "response" to a petition. Similarly, the FPSC's rules governing declaratory statements, Rules 25-22.020 through 25-22.022, F.A.C., make no reference to and otherwise do not authorize the filing of a response to a petition for declaratory statement. In fact, the Commission's rules governing declaratory statements authorize no responsive pleading to a petition for declaratory statement. Accordingly, TECO's Response is unauthorized and should be stricken as immaterial to this proceeding.

6. More importantly, Rule 25-22.037, F.A.C., specifically requires any answer or responsive motion to be filed within 20 days. Assuming that TECO's mistitled pleading is an answer or a motion in opposition to the Petition, it should nevertheless be stricken as untimely. The Response was filed over forty (40) days after Duke filed its Petition and as such was filed well outside the clearly prescribed period for a timely filing. TECO has thus waived its right to file this Response, and the Response should be stricken as immaterial to this proceeding.

WHEREFORE, Duke Mulberry Energy, L.P., respectfully requests that the Florida Public Service Commission STRIKE Tampa Electric's Company's Response filed in this proceeding as unauthorized and untimely.

Respectfully submitted this 4th day of December, 1997.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail, telecopier (***) or hand delivery (*) on this 4th day of December, 1997 to the following:

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