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December 11, 1997

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

Dear Ms. Bayo:

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

1. Florida Power Corporation's Response to The Consolidated Motion to Strike Its Answer to Petition for Declaratory Statement and Motion to Dismiss Proceedings; and - 2713-87
2. Florida Power Corporation's Response to The Motion to Dismiss its Petition to Intervene and Deny its Alternative Request for Administrative Hearing. 12714-87

Also enclosed are additional copies of the above documents for acknowledgement of filing. We request you acknowledge receipt and filing of the above by stamping these additional copies and returning them to me in the self-addressed, stamped enveloped provided for your convenience.

ACK _____
AFA _____
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CAF _____
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CTB _____
EAG _____
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SEC _____
WAS _____
OTH _____

Very truly yours,

Gary L. Sasso
Gary L. Sasso *for*

Enclosures
cc: Counsel of Record

GLS:jlc

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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) DOCKET NO. 971337-EU
 Statement Concerning Eligibility)
 To Obtain Determination of Need) FILED: December ____, 1997
 Pursuant to Section 403.519,)
 Florida Statutes)

FLORIDA POWER CORPORATION'S RESPONSE TO
 THE CONSOLIDATED MOTION TO STRIKE ITS ANSWER
 TO PETITION FOR DECLARATORY STATEMENT
AND MOTION TO DISMISS PROCEEDINGS

I. Introduction.

1. Florida Power Corporation ("FPC") submits this Response to the Consolidated Motion to Strike FPC's Answer to the Petition for Declaratory Statement and Motion to Dismiss Proceedings filed by Duke Mulberry Energy, L.P. ("Duke"). Because FPC's Answer and Motion to Dismiss were timely and properly filed in response to the declaratory statement proceedings initiated by Duke and IMC-Agrico Company ("IMCA"), Duke's Consolidated Motion to Strike must be denied.

2. Duke and IMCA claim that they are entitled to apply for a determination of need for an electrical power plant pursuant to Section 403.519, Fla. Stat., Rules 25-22.080-.081, F.A.C., and pertinent provisions of the Florida Electrical Power Plant Siting Act ("PPSA" or the "Siting Act"). Alternatively, Duke and IMCA assert that a determination of need is not required for their purported project. Their claims run counter to controlling decisions of the Florida Supreme Court and the plain language of the PPSA: Only the Commission, a utility serving the public, or an independent power producer ("IPP") under contract with such a

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FPC REPORTING

utility, may initiate a need proceeding under the PPSA and no power plant may be built outside the auspices of the PPSA (unless it falls within exemptions that IMCA and Duke have not invoked).

3. Duke and IMCA filed a petition for declaratory statement, ostensibly seeking relief with respect to their peculiar circumstances only, but they have admitted that their Petition "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." (Duke and IMCA's Request to Address the Commission, p. 1) (Emphasis added). Thus, the far-reaching impact of the ruling petitioners seek in their petition have not escaped Duke and IMCA, yet they seek through use of the declaratory statement proceeding to prevent the Commission from considering input from anyone but themselves on the "significant issues" raised by their Petition. That outcome should not be permitted by the Commission, especially on the erroneous procedural grounds raised by the Consolidated Motion to Strike.

II. FPC's Petition to Intervene, Motion to Dismiss and Answer to Duke and IMCA's Petition for Declaratory Statement were Timely Filed under the Commission's Rules.

4. Duke and IMCA's use of the declaratory statement proceeding here is improper -- a point made clear in FPC's Motion to Dismiss to which Duke and IMCA have failed to respond substantively. Instead, Duke and IMCA seek to manipulate the Rules of this Commission in their Consolidated Motion to Strike in an attempt to prevent the Commission from reaching the merits

of FPC's Motion to Dismiss and FPC's Answer to the Petition. It follows that the Consolidated Motion to Strike must be denied.

5. Duke and IMCA filed -- albeit improperly -- a petition for declaratory relief. The Commission's Rules allow an affected party to petition to intervene and participate as a party in a declaratory statement proceeding if intervention is granted. Rule 25-22.039, F.A.C. ("Persons, other than the original parties to a pending proceeding, who have a substantial interest in the proceeding, and who desire to become parties may petition the presiding officer for leave to intervene."). See also In re: Petition for a Declaratory Statement Concerning Sale of Cogenerated Power by South Florida Cogeneration Associates to Metropolitan Dade County, 93 FPSC 7:519, Order No. PSC-93-1067-PCO-EQ (July 22, 1993) (granting petition of South Florida Cogeneration Associates to intervene in declaratory statement proceeding initiated by Metropolitan Dade County); In re: Petition of General Development Utilities, Inc., for Declaratory Statement Concerning Regulatory Jurisdiction Over Its Water and Sewer System in DeSoto, Charlotte, and Sarasota Counties, 89-12 FPSC 14, Order No. 22258 (Dec. 4, 1989) (granting City of Northport's motion to intervene in declaratory statement proceeding). A petition to intervene must, under the Commission's Rules, be filed at least five (5) days before the final hearing. Rule 25-22.039, F.A.C. FPC timely filed its petition to intervene in the declaratory statement proceeding as an affected party on November 25, 1997, along with its "Answer"

to the Petition and its Motion to Dismiss. FPC's pleadings were therefore timely filed under the applicable Commission Rules.

6. Because Duke and IMCA did not petition the Commission for relief under Section 120.57(2), Fla. Stat., they cannot invoke the Rules of the Commission applicable to a request for relief under that section as a bar to the pleadings filed by FPC in response to their Petition for Declaratory Statement. Rule 25-22.037, F.A.C. does require an answer or motion to be filed within twenty days of service of a petition for relief under Sections 120.57(1) or 120.57(2). But Duke and IMCA did not file and serve a petition for relief under Sections 120.57(1) or 120.57(2), Fla. Stat. It therefore follows that Rule 25-22.037, F.A.C. is inapplicable to the declaratory statement proceeding initiated by Duke and IMCA.

7. Duke and IMCA cannot invoke Commission Rules that are inapplicable to the proceeding that they initiated to bar FPC's pleadings. FPC's Petition to Intervene, Motion to Dismiss, and Answer to the Petition for Declaratory Statement were timely filed under the Commission Rules applicable to the proceeding initiated by Duke and IMCA. Accordingly, Duke's Consolidated Motion to Strike must be denied.

II. However FPC's "Answer" is titled, it is appropriate and proper for the Commission to take it under consideration in response to the "significant issues" raised by Duke and IMCA's Petition.

8. Ignoring the merits of the points raised by FPC in response to Duke and IMCA's Petition for Declaratory Statement, Duke takes issue with the name given by FPC to that response.

Duke argues that FPC's "Answer" is neither "legally" appropriate in response to its Petition for Declaratory Statement nor proper in a proceeding in which no disputed issue of material fact exists. Duke and IMCA would have no procedural concern about FPC's "Answer" if the caption were changed to "Memorandum in Opposition to Petition for Declaratory Statement." Yet, Duke and IMCA concede that, in substance, FPC's "Answer" is a legal memorandum on the issues raised by the petition. Consolidated Motion, p. 2, n.1. It is clear, therefore, that the Motion to Strike elevates form over substance and should be rejected by the Commission.

9. At the outset it bears emphasis that Duke assumes that Duke and IMCA have properly brought a Petition for Declaratory Statement -- an assumption that, as FPC demonstrates in its Motion to Dismiss, is patently erroneous. Putting aside for the moment the impropriety of Duke and IMCA's Petition for Declaratory Statement, however, the Commission has frequently considered memoranda on the issues raised in declaratory statement proceedings when they might prove helpful to the Commission's decision. See, e.g., In re: Petition for a Declaratory Statement Concerning the Mission Energy, Inc., Standard Offer Contract by FP&L, 93 FPSC 4:236, Order No. PSC-93-0527-DS-EQ (April 7, 1993) (considering response filed by intervenor Cypress Energy Company in declaratory statement proceeding initiated by FP&L); In re: Petition of Florida Home Builders Association for Declaratory Statement, 85 FPSC 340, Order No. 15497 (December 24, 1985) (allowing U.S Home

Corporation to intervene in a declaratory statement proceeding at the "eleventh hour"). FPC's Answer will assist the Commission in addressing the "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" raised by Duke and IMCA's Petition. (Duke and IMCA's Request to Address the Commission, p. 1) (Emphasis added). Even Duke concedes this much, noting that FPC's Answer would have been appropriate for the Commission Staff to consider at the ten-year site plan workshop in which some of the issues raised by Duke and IMCA's Petition were discussed. Consolidated Motion, p. 2, n.1. It necessarily follows that consideration of the merits of FPC's Answer by the Commission itself -- whatever that memorandum may be called by FPC or the Commission -- is equally appropriate and in fact warranted under the circumstances presented by Duke and IMCA's Petition.

III. Conclusion.

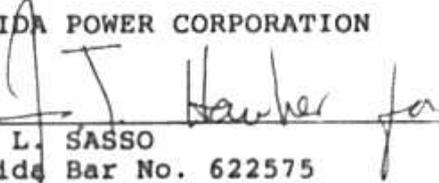
10. For the foregoing reasons, the Commission should deny Duke's Consolidated Motion to Strike FPC's Answer to Petition for Declaratory Statement and FPC's Motion to Dismiss Proceedings. The relief requested by Duke and IMCA in their petition should be decided only after the Commission has fully considered the merits of the significant legal, policy, and economic issues involved. Duke's awkward and, as demonstrated above, erroneous attempts in its Consolidated Motion to Strike to preclude the Commission from fully considering the merits of the petition on grounds raised by

FPC's Answer and Motion to Dismiss should be rejected by the Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to the following service list:

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this 11th day of December, 1997.



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