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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 _____
APP Billak _____
CAF _____
CMU _____
CTB _____
EAG _____
LEG _____
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OPC _____
RCH _____
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)
Statement Concerning Eligibility)
To Obtain Determination of Need)
Pursuant to Section 403.519,)
Florida Statutes)

DOCKET NO. 971337-EU

FILED: December __, 1997

**FLORIDA POWER CORPORATION'S RESPONSE TO THE MOTION
TO DISMISS ITS PETITION TO INTERVENE AND DENY
ITS ALTERNATIVE REQUEST FOR ADMINISTRATIVE HEARING**

Introduction

1. Florida Power Corporation ("FPC") submits this Response to the Motion to Dismiss its Petition to Intervene filed by Duke Mulberry Energy, L.P. ("Duke"). Duke's Motion mischaracterizes FPC's grounds for intervention and then attacks the "straw man" that Duke has created. FPC's actual interests in this proceeding are real, immediate, and plainly within the "zone of interests" encompassed by this proceeding. Accordingly, Duke's Motion should be denied, and FPC should be granted leave to intervene in this proceeding.

2. Duke and IMCA are seeking through their Petition for Declaratory Statement a determination that an entity yet to be formed by them has standing to initiate a need determination proceeding under the Power Plant Siting Act ("PPSA" or the "Siting Act"). Alternatively, they seek a determination that they can build significant generating capacity in this state by bypassing the requirements of the Siting Act altogether.

3. As we have explained fully in FPC's Petition to Intervene and Answer, under existing law the Florida Public

Service Commission ("PSC") has a statutory responsibility to ensure the provision of adequate and reliable electric service in this state, and the PSC discharges this responsibility by regulating the activities of electric utilities such as FPC. The PPSA is part of this broad legislative and regulatory framework. Indeed, as we demonstrated in FPC's Answer, the PPSA was enacted as part of the same legislation that created the ten-year site plan requirements applicable to electric utilities such as FPC. In accordance with this framework, FPC and other state utilities must plan for and meet the needs of the people of this state, under the supervision of the PSC. The PPSA is the means by which electric utilities like FPC carry out their responsibility to implement new generating capacity when their plans call for same. Indeed, the thrust of the Nassau decisions was to hold that the PPSA revolves around and is tied to the statutory obligation of applicant utilities to serve customers -- an obligation that neither Duke nor IMCA would share.

4. By their petition, Duke and IMCA seek to insert a foreign object into this closed regulatory scheme -- namely, they seek the right for merchant plants to avail themselves of the opportunity to site new power plants under the PPSA without accepting the statutory planning duties or the obligation to serve customers to which the Siting Act is tied. This would fundamentally disturb the balance of benefits and burdens that flow from the existing legislative framework and would introduce a wild card into the planning process that utilities like FPC are obligated to discharge. This decision would have an immediate

impact upon FPC's role in this legislative framework and upon its ability to discharge its responsibilities under that framework, as more fully described in FPC's Petition to Intervene. FPC would have no way to plan where, when, how, or by whom new generating capacity may be added in the state, or to plan its own system to maintain its integrity.

5. Despite the gravity of the issues that Duke and IMCA call upon the PSC to decide in this proceeding, they insist that FPC should be foreclosed from intervening to present its views as a party. In short, Duke and IMCA seek to obtain a decision from the PSC that amounts to a major restructuring of the existing legislative and regulatory framework without the full participation of utilities such as FPC that have an enormous stake in that framework. To state this proposition is to demonstrate its absurdity.

6. Duke and IMCA suggest, nonetheless, that FPC is asserting positions that are better asserted, if at all, in a later, actual need proceeding that a merchant plant might commence. This argument, of course, begs the essential question that will be resolved dispositively by this proceeding, namely, whether the PPSA may be lawfully construed even to permit a merchant plant to initiate a need proceeding. The very right of a merchant plant to do so impacts the ability of FPC to plan meaningfully for generating capacity needs in the future, regardless of the outcome of any particular need proceeding. The issue to be decided in this proceeding thus fundamentally concerns what role utilities like FPC play in this state vis-a-

vis merchant plant developers that have no obligation to serve. And FPC has every right to be heard as a full party on this issue.

7. The simple truth to this proposition is further revealed by a recognition that Duke and IMCA are calling upon the Commission in this proceeding somehow to overrule, depart from, or distinguish Florida Supreme Court precedents that confer upon utilities like FPC a unique status under the PPSA, namely the Nassau decisions. If FPC and similarly situated utilities are not permitted to intervene as parties in this proceeding, who will present the other side of the issue whether these Florida Supreme Court decisions may be so readily discarded? If the PSC rules in Duke's and IMCA's favor in this proceeding, who will prosecute an appeal to afford the Florida Supreme Court an opportunity to determine whether its own precedent has been flaunted? Again, to state these issues is to make clear that, by opposing meaningful input by FPC at this time, Duke and IMCA are seeking to shut out of the loop on this critical issue the only entities who clearly have a right to be in that loop under existing law.

8. Indeed, if this proceeding were so inconsequential, why did Duke and IMCA institute it in the first place? It is obvious that they did so because they intend to obtain a ruling here that will foreclose meaningful opposition later in an actual need proceeding to efforts by a merchant plant to avail itself of a process that was never intended to accommodate such plants. A declaratory statement proceeding is designed to afford a

regulated entity the opportunity to clarify its obligations with its regulators before proceeding with some intended step at its peril. Duke and IMCA are not regulated by the PSC. They faced no peril in simply filing an application for a determination of need and raising whatever issues they intended to raise in the context of a concrete proceeding. They imply that FPC might have been entitled to intervene in such a proceeding. Instead of taking that approach, however, Duke and IMCA have chosen to abuse and misuse the declaratory statement procedure to present to the PSC a broad, abstract issue in a vacuum about the status of merchant plants under the PPSA. It is evident that this strategy was calculated to foreclose participation in this critical issue by utilities that will plainly be affected by its outcome, and then to prejudice the resolution of other "need" related issues in a subsequent need proceeding.

9. The fact that Duke and IMCA have instituted a procedurally inappropriate docket, however, is no cause to exclude from participation as parties those utilities that would be plainly entitled to be heard as parties if the petitioners had attempted to file an actual need proceeding. If they had done so, of course, it would have been immediately obvious that merchant plants do not fit into the process and cannot satisfy the statutory and regulatory requirements applicable to applicants under the PPSA.

10. Finally, Duke contends that FPC should not have standing to assert its concerns and arguments because Duke does not propose to ask FPC or any other particular utility to buy the

proposed merchant plant's output. On this basis, Duke suggests that FPC has no claim that it should be a party even to an actual need proceeding. This argument is extraordinary. As the PSC and Florida Supreme Court held in the Nassau decisions, the need criteria in the PPSA are utility-specific and tied to a utility's obligation to serve its customers. Duke is basically arguing that because it has no intention of showing that these criteria will be satisfied by any merchant plant that it may construct, no particular utility will be impacted by any proceeding that a Duke-created EWG may commence. This argument is based on the assumption that Duke will prevail in this declaratory statement proceeding and will succeed in convincing the PSC that the PPSA does not mean what it says and that a merchant plant need not comply with its explicit requirements. If the PPSA were properly construed, Duke would not be able to initiate a need proceeding without having a contract with a particular utility already in hand, in which event the merchant plant would have standing only as a co-applicant with the contracting utility. Surely, a party may not defeat the standing of an intervenor by assuming that the case will be decided against the intervenor on the merits. The very reason that FPC seeks to intervene in this proceeding is to demonstrate to the PSC that Duke's whole view of the PPSA is based on an inappropriate and unavailing construction of the law.

Conclusion

11. FPC is asserting non-economic interests that would be impacted immediately by a ruling in petitioners' favor in this proceeding. FPC's interests may not be adequately protected --

indeed, they would be significantly impaired -- if FPC were relegated to participating, if at all, only in a subsequent need proceeding after the horses had already escaped through the barn gate. Accordingly, Duke and IMCA's Motion to Dismiss FPC's Petition to Intervene should be denied, and FPC should be given leave to participate as a full party in this proceeding.

Respectfully submitted,

FLORIDA POWER CORPORATION

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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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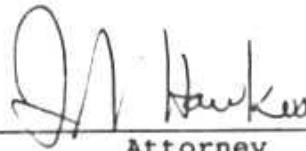
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