



# Public Service Commission

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DATE: January 9, 1998

TO: BLANCA BAYO, DIRECTOR OF RECORDS AND REPORTING

JAN 12 1998

FROM: RICHARD C. BELLAK, DIVISION OF APPEALS

FPSC - Records/Reporting

RE: DOCKET NOS. 971446-EU, 971337-EU AND 971313-EU

PSC-98-0074-FOF-EU

FILE NAME: IMCORDER.MRD  
DUKEORDE.MRD  
LLPORDER.MRD

8 pages

Attached are orders to be issued as soon as possible.

DWC  
Attachment

cc: Wanda Terrell

see (5) in 971313 + (7)

16 (3) RAR

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of IMC-Agrico  
Company for a Declaratory  
Statement Confirming Non-  
Jurisdictional Nature of Planned  
Self-Generation

DOCKET NO. 971313-EU  
ORDER NO. PSC-98-0074-FOF-EU  
ISSUED: January 13, 1998

The following Commissioners participated in the disposition of  
this matter:

JULIA L. JOHNSON, Chairman  
J. TERRY DEASON  
SUSAN F. CLARK  
JOE GARCIA  
DIANE K. KIESLING

ORDER GRANTING INTERVENTION AND DENYING  
MOTIONS TO STRIKE AND MOTIONS TO DISMISS

BY THE COMMISSION:

On October 10, 1997, IMC-Agrico Company (IMCA) filed a petition for declaratory statement (Petition). The Petitioner asks us to issue an order declaring that planned self-generation and transmission facilities will not result in a retail sale, cause IMCA or its lessor to be deemed a public utility, or subject IMCA or its lessor to our regulation. On October 20, 1997, IMCA filed a request to address the Commission at the agenda conference at which the decision on the petition was considered.

On October 30, 1997, Tampa Electric Company (Tampa Electric) filed a Petition for Leave to Intervene and Request for Hearing, Answer and Request for Hearing, and Request for an Opportunity to Address the Commission.

On November 12, 1997, IMCA filed a Response in Opposition to Tampa Electric Company's Petition to Intervene and a Motion to Strike Tampa Electric Company's Answer and Request for Hearing.

On November 14, 1997, Florida Power Corporation (FPC) filed a Petition for Leave to Intervene.

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FPSC-RECORDS/REPORTING

On November 19, 1997, Florida Power and Light Company (FPL) filed a Petition for Leave to Intervene or Motion to Participate Amicus Curiae in Docket No. 971313-EU, and a Motion to Dismiss IMC-Agrico's Petition for Declaratory Statement. FPL filed its Amicus Curiae Memorandum on November 24, 1997.

On November 19, 1997, Tampa Electric filed a Memorandum in Opposition to IMC-Agrico's Motion to Strike Tampa Electric Company's Answer and Request for Hearing.

On November 21, 1997, Peace River Electric Cooperative, Inc. (PREC) filed a Petition to Intervene and Request for Hearing.

On December 1, 1997, IMCA filed a response in Opposition to FPL's Petition to Intervene and Motion to Dismiss.

The following were filed after December 1, 1997:

FPL's Motion to Address the Commission; IMCA's Response in Opposition to Peace River Electric Cooperative, Inc.'s Petition to Intervene and Request for Hearing; IMCA's Response to Florida Power and Light Company's "Amicus Curiae Memorandum"; Florida Industrial Cogeneration Association's Petition for Leave to Intervene; Petition of Florida Global Citrus, Ltd. for Leave to Intervene.

The project at issue is described as a plan to construct and operate a natural gas-fired combined cycle electric generating unit and 69 KV transmission line to provide electric power for IMCA's mining and processing complex in central Florida. Pursuant thereto, IMCA will organize a wholly-owned subsidiary into which assets including land, rights of way and other property to be used in the project will be placed. The IMCA subsidiary and Duke Energy Power Services LLC (DEPS) will organize a partnership (or equivalent entity) as co-general partners to which both will make equity contributions.

The partnership will design and construct both the generating unit and transmission line and lease undivided ownership interests in the project to, respectively, IMCA and an Exempt Wholesale Generator (EWG) that will be an affiliate of DEPS. IMCA and DEPS currently envision that the Power Plant will have a total net generating capacity of approximately 240 MW, but

are also considering the possibility of constructing a larger project.

As a result of the two lease arrangements, it is intended that IMCA will provide self-service to the extent of its current expected requirement of 120 MW and that the EWG will sell the remaining output into the wholesale market. To that end, petitioner lists various parameters expected to govern the IMCA lease when finalized as well as various filings which will be made to secure EWG status for the DEPS subsidiary.

Tampa Electric characterizes the proposed arrangements as a subterfuge retail sale which would create a territorial dispute as to who should service IMCA, a current interruptible service customer of Tampa Electric. Tampa Electric also asserts that more facts than those provided by petitioner are needed for us either to act on the petition or to differentiate the allegedly non-jurisdictional arrangements described therein from a retail sale subject to our jurisdiction. Further, Tampa Electric asserts standing to intervene in that it will, it states, suffer injury that is both sufficient to entitle the Company to a Section 120.57 hearing and of a type which the hearing is designed to protect. [sic; See, n. 1, supra 1]

That injury would assertedly include loss of revenues from sales to IMCA of at least \$12.3 million in annual retail base revenues and the stranding of investment in transmission and subtransmission to serve the delivery points of IMCA.

FPC argues, similarly, that insufficient facts are provided in IMCA's Petition for us to decide whether the arrangement proposed is self-generation or a retail sale. Like Tampa Electric, FPC asserts that its substantial interests will be affected because of loss of revenues from sales to IMCA and the uneconomic duplication of FPC's existing generating and transmission facilities. FPC notes that it received revenues from IMCA in the amount of \$20.8 million for the sale of 522,000,000 KWH of energy for the 12 months ending September 30, 1997.

FPL acknowledges that IMC-Agrico is not a retail customer of FPL, but alleges that immediate adverse impact on FPL's exclusive right to provide retail electric service would result because of the precedent that our issuance of this declaratory statement would establish. FPL alternatively seeks to participate amicus

curiae if it is denied intervention. FPL's Motion to Dismiss asserts that the Petition for Declaratory Statement should be dismissed because it seeks a declaratory statement as to parties other than IMC-Agrico and because there are insufficient facts alleged on the basis of which we can issue a Declaratory Statement.

Tampa Electric's Memorandum in Opposition to IMC-Agrico's Motion to Strike Tampa Electric's Answer and Request for Hearing once again addresses, inter alia, the claimed insufficiency of the facts in the petition as a basis on which we can declare the proposed arrangement to be self-service rather than a prohibited retail sale.

PREC's Petition and Request for Hearing are similar to those of Tampa Electric and FPC.

#### DISCUSSION

Because there will normally be no person, other than the petitioner, who will be affected, the right of persons affected by agency action to a 120.57 hearing is generally not implicated under Section 120.565 petitions for declaratory statement. Florida Optometric Association v. Department of Professional Regulation, Board of Opticianry, 567 So. 2d 928, 936 (1st DCA 1990). Nonetheless, that general observation by the Court in Florida Optometric does not absolutely preclude intervention in declaratory statement proceedings. Both the petitioner and those seeking intervention, excepting FPC, cite Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (1st DCA 1981) as the proper standard to apply. In Agrico, the Court held that standing to participate in an administrative proceeding as a party whose substantial interests will be affected by proposed agency action requires one to show

- 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and
- 2) that his substantial injury is of a type or nature which the proceeding is designed to protect.<sup>1</sup>

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<sup>1</sup> It is assumed that the Court meant "protect against".

406 So. 2d at 482.

In its Response to both Tampa Electric and FPC's Petition to Intervene, IMC-Agrico argues that neither prong of the Agrico test is met. IMC-Agrico notes that 3-4 years will pass before the plant is built and concludes therefore that the injury is neither immediate nor of the type a declaratory statement proceeding is designed to protect against.

In this case, however, petitioners for intervention allege more than the mere economic losses from lawful self-generation found to be insufficient to create standing in Order 16581, cited by IMC-Agrico.<sup>2</sup> Intervention petitioners allege here that issuance of the declaratory statement is sought on the basis of insufficient facts necessary for us to know whether the resulting project will be self-generation or prohibited retail sales. Therefore, intervention petitioners assert that if the Declaratory Statement is issued, territorial disputes, stranded investment and unwarranted costs to the companies and their rate payers will result from those unlawful retail sales.

Where our long-standing policy requires public utilities to anticipate territorial disputes and bring them to us for resolution, it would be inconsistent to characterize these allegations as lacking "immediacy". Moreover, where IMC-Agrico seeks a disclaimer of our jurisdiction pursuant to Section 366.02, Florida Statutes and a major focus of the regulation of public utilities pursuant to Chapter 366 is the prevention of uneconomic duplication of utility facilities, it would be inconsistent to say that the 120.565 proceeding is not designed to protect against the type of injuries alleged or that those injuries lie outside the zone of interest of Chapter 366. Accordingly, we find that Tampa Electric, FPC and PREC have standing to participate in these proceedings as parties. FPL, whose more speculative intervention claim is based on concern for the precedent established, will be permitted to participate as amicus curiae, rather than as an intervenor. Order No. 16581, p. 2. Accordingly, IMC-Agrico's Motion to Strike Tampa Electric's Answer and Request for Hearing is denied. FPL's Motion to Dismiss IMC-Agrico's Petition is also denied. We believe that

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<sup>2</sup> In re: Petition of Monsanto Company for a Declaratory Statement concerning the Lease Financing of a cogeneration Facility, Docket No. 860725-EU. Order 16581, p. 2.

the mere description of an ownership structure and the effect of petitioner's activities on elements of that structure does not make the petition improper for seeking a declaration as to third parties. For example, a request for a declaratory statement to the effect that no sale to the public takes place does not make members of the public "indispensable parties" or render such a petition defective.

In Tampa Electric Petition to Intervene and Request for Hearing (Tampa Petition), Tampa Electric states that

... IMCA's Petition for Declaratory Statement does not allege facts specific or extensive enough to warrant a determination that the proposed transactions described in the petition would not constitute the retail sale of electricity within Tampa Electric's retail service territory.

Tampa Electric then continues as follows:

A formal proceeding is necessary to determine, through discovery, the presentation of evidence and cross-examination, the true nature of IMCA's proposal so that a clear determination may be made as to whether the proposed project will be owned and operated in such a way as to effect the retail sale of electricity, contrary to the purpose and intent of Section 366.04, Florida Statutes.

Tampa Petition, p. 7-8.

While the first of these two statements is limited to a characterization of the facts presented in IMCA's Petition for Declaratory Statement, the second statement goes beyond those facts. We note that Rule 25-22.022 provides for a hearing pursuant to §120.57 without specifying whether it should be a §120.57(1) hearing where the facts are in dispute, or a §120.57(2) hearing where the facts are not in dispute. We currently have the discretion to conduct a §120.57(1) hearing, and so decide. See, e.g., Sans Souci v. Division of Florida Land Sales, 448 So. 2d 1116, 1119-1120 (1st DCA 1989).

In view of the above, it is

ORDERED by the Florida Public Service Commission that the petitions to intervene of Florida Power Corporation, Tampa

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Electric Company and Peace River Electric Cooperative are granted. It is further

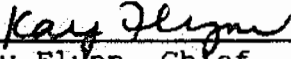
ORDERED that the petitions of Florida Power and Light Company, Florida Global Citrus, Ltd., and Florida Industrial Cogenerator Association to participate as amicus curiae are granted. It is further

ORDERED that the motions to strike filed by petitioner IMC-Agrico and the Motion to Dismiss filed by Florida Power Corporation are denied. It is further

ORDERED that this matter be set for a 120.57(1) hearing on an expedited basis.

By ORDER of the Florida Public Service Commission this 13th day of January, 1998.

BLANCA S. BAYÓ, Director  
Division of Records and Reporting

  
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Kay Flynn, Chief  
Bureau of Records

Commissioners Kiesling and Garcia dissented.

(S E A L)

RCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.



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Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.