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March 4, 1997

IN REPLY REFER TO:

Ansley Watson, Jr.
P. O. Box 1531
Tampa, Florida 33601

VIA FEDERAL EXPRESS

Blanca S. Bayo, Director
Division of Records & Reporting
Florida Public Service Commission
Capital Circle Office Center
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 951407-EQ -- Petition for expedited approval of settlement agreement with Pasco Cogen, Ltd. by Florida Power Corporation

Dear Ms. Bayo:

Enclosed for filing with the Commission in the above docket on behalf of Pasco Cogen, Ltd. ("Pasco"), please find the original and 15 copies of each of the following:

1. Pasco's Response and Opposition to North Canadian Marketing Corporations ("NCMC's") Petition for Leave to Intervene; — 02384-97
2. Pasco's Reply and Memorandum in Opposition to NCMC's Motion to Dismiss Without Prejudice; and 02385-97
3. Pasco's Response and Opposition to Vastar Gas Marketing, Inc.'s Petition for Leave to Intervene. — 02386-97

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EAG Futrell
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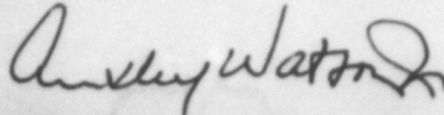
A diskette containing all three of the documents listed above is also enclosed pursuant to the Commission's rules.

Please acknowledge your receipt of the enclosures on the duplicate copy of this letter, and return the same to me in the enclosed preaddressed envelope.

Many thanks for your usual assistance.

Blanca S. Bayo, Director
March 4, 1997
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Sincerely,

A handwritten signature in dark ink, appearing to read "Ansley Watson, Jr.", with a stylized flourish at the end.

ANSLEY WATSON, JR.

AWjr/a
Enclosures

cc: Mr. E. Elliott White
James A. McGee, Esquire
Lorna R. Wagner, Esquire
John W. Jimison, Esquire
Mr. Sheldon D. Reid
D. Bruce May, Esquire
Karen D. Walker, Esquire
Norma J. Rosner, Esquire

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for expedited)
approval of settlement agreement)
with Pasco Cogen, Ltd. by Florida)
Power Corporation.)

Docket No. ~~961407~~-EQ

Submitted for Filing:
3-5-97

**PASCO COGEN, LTD.'s RESPONSE AND OPPOSITION
TO VASTAR'S PETITION FOR LEAVE TO INTERVENE**

Pasco Cogen, Ltd. ("Pasco"), by its undersigned attorneys, requests that the Commission deny the Petition for Leave to Intervene filed herein by Vastar Gas Marketing, Inc. ("VGM"), and all relief requested by VGM in such petition. VGM's petition fails to show (A) that VGM will suffer injury in fact which is of sufficient immediacy to entitle it to a Section 120.57 hearing, and (B) that VGM's substantial injury (if any) is of a type or nature which the proceeding in this docket is designed to protect. Having failed to show that its substantial interests will be determined by the Commission's determination in this docket, VGM has no standing, and is not entitled to intervene under Rule 25-22.039, F.A.C.

MEMORANDUM IN SUPPORT OF PASCO'S RESPONSE

VGM is, and has been, aware that Pasco would oppose intervention by VGM in this proceeding. Despite that fact, its petition for leave to intervene cites not a single case in which intervention was opposed by the original parties to the proceeding. Decisions by this Commission, and Florida's courts, in cases where intervention has been challenged on the basis of a lack of standing, have been (to quote from VGM's petition) "cavalierly

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ignored" by VGM.

Condensed to its essence, VGM's petition argues that VGM should be permitted to intervene because:

1. The Settlement Agreement between Florida Power Corporation ("FPC") and Pasco contains "material misrepresentations" regarding whether all required consents have been obtained. The amendments to the PPA "threaten" to materially alter the terms of a contract between North Canadian Marketing Corporation ("NCM") and Pasco (the "Sale Agreement"), to the detriment of VGM and NCM, VGM having a contract to supply gas to NCM (the "Purchase Agreement"). Pasco and FPC entered into the Settlement Agreement without seeking the "input" of NCM and VGM. According to VGM, the Sale Agreement required Pasco to obtain NCM's consent to the Settlement Agreement, and the Purchase Agreement required NCM to obtain VGM's consent to changes to the PPA.
2. FPC's petition in this docket, seeking Commission approval of the Settlement Agreement (which makes certain amendments to the Power Purchase Agreement ("PPA") between FPC and Pasco) misrepresents that the Settlement Agreement will comprehensively resolve litigation between Pasco and FPC. Approval of the Settlement Agreement may embroil FPC in additional litigation.
3. Participation by VGM in the proceeding is "essential" in order for the

Commission to evaluate the impact of the Settlement Agreement on Pasco's fuel supply arrangements.

None of the foregoing assertions (even if true, which Pasco disputes), or any other fact set forth in VGM's petition, confers on VGM standing to intervene or participate in this docket.¹

Contractual Relationships

Pasco would ask that the Commission bear in mind the contractual relationships in the various agreements mentioned in VGM's petition for leave to intervene, which Pasco believes are important in deciding whether VGM has any standing in this case. Pasco believes the Commission should also bear in mind VGM's admission that the Commission lacks jurisdiction to interpret or resolve disputes under either the Sale Agreement or the Purchase Agreement.

FPC and Pasco are parties to the PPA and the Settlement Agreement which is the subject of this proceeding, as well as parties to the litigation which the Settlement Agreement, if approved, will resolve. Neither NCM nor VGM is a party to the PPA, the Settlement Agreement, or the litigation that precipitated the Settlement Agreement.

Pasco and NCM are parties to the Sale Agreement, by which Pasco agrees to buy from NCM, and NCM agrees to sell to Pasco, gas for use in Pasco's cogeneration project. Neither FPC nor VGM is a party to the Sale Agreement.

¹ It should be noted that the grounds for intervention mentioned under paragraphs 2 and 3 above have nothing whatsoever to do with VGM's standing (or the lack thereof) to participate in this proceeding.

NCM and VGM are parties to the Purchase Agreement, pursuant to which NCM purchases from VGM approximately 75% of the gas NCM is required to deliver to Pasco's project. Neither Pasco nor FPC is a party to the Purchase Agreement.

Neither Pasco nor FPC has any contractual relationship whatsoever with VGM. When the Commission approved the PPA for cost recovery purposes in 1991, only that agreement was before the Commission. The Commission did not evaluate from whence - or at what price -- Pasco would obtain the gas required to operate its cogeneration facility. When Pasco contracted with NCM later in 1991 for the supply of gas to the facility, it was not required to bring that agreement to the Commission for review. Neither was NCM required to bring the Purchase Agreement with VGM to the Commission for review when that contract was executed.

Consent Rights of NCM and VGM

VGM states that Pasco entered into the Settlement Agreement with FPC without obtaining NCM's prior consent, as allegedly required by Section 3.03 of the Sale Agreement. Although not important here, Pasco's position is that NCM's prior consent was not required. What is important here is that the Sale Agreement itself provides the mechanism for the resolution of that dispute between NCM and Pasco, requiring explicitly that all disputes arising under the Sale Agreement be submitted to binding arbitration between Pasco and NCM in Houston, Texas, before a single arbitrator. Because Pasco is not a party to the Purchase Agreement between NCM and VGM, it has no direct knowledge of any consent rights possessed by the parties to that agreement, or of the

circumstances in which they might apply.

VGM's arguments that it should be permitted to intervene in this case are based almost exclusively on Pasco's failure to obtain NCM's prior consent to the amendments to the PPA made by the Settlement Agreement. That failure (which Pasco admits for purposes of this response) forms the basis for VGM's allegations that the Settlement Agreement contains "material misrepresentations" regarding whether all required consents have been obtained," that the Settlement Agreement, if approved, will result in the Commission's endorsing "certain changes to the PPA that threaten to materially alter the Sale Agreement and impair VGM's consent rights, resulting in "real and immediate injuries," and that "the failure of Pasco and FPC to consult NCM and VGM in the settlement process could lead to additional litigation."

The Commission, however, as admitted by VGM, has no jurisdiction to provide relief to VGM. If Pasco has breached the prior consent provision of the Sale Agreement, or if NCM has in turn breached the prior consent provision of the Purchase Agreement, NCM can initiate arbitration proceedings with Pasco, or VGM can initiate arbitration or litigation with NCM. Neither NCM or VGM, however, could initiate a proceeding before this Commission as a result of any such breach because the Commission has no jurisdiction to entertain such a proceeding. The alleged breaches of contract with which VGM appears to be concerned arise out of gas supply agreements over which, and over the parties to which, this Commission possesses no jurisdiction. Thus, VGM's own petition makes it clear that the interests it seeks to protect through intervention are not of

the type or nature this proceeding is designed to protect.

VGM's petition states that one disputed issue of material fact is "whether it is premature for the Commission to address . . . [FPC's] Petition until NCM's and VGM's consents have been obtained." Pasco submits that VGM seeks to participate in this proceeding for the sole purpose of obtaining, indirectly, the further delay of the settlement of the litigation between Pasco and FPC -- relief which the Commission would have no jurisdiction to grant if sought by either NCM or VGM directly.

Resolution of Litigation

VGM's petition states that the Settlement Agreement will not, contrary to FPC's assertion in its petition for approval, "comprehensively resolve litigation," that FPC has "failed to provide all the facts," and that the Settlement Agreement "is not a comprehensive settlement" because the failure of Pasco and FPC to "consult" NCM and VGM in the settlement process "could" lead to additional litigation.

Pasco submits that each and every mention of the resolution of litigation in FPC's petition for approval of the Settlement Agreement (see ¶¶ 3, 6 and 11 of FPC's Petition) is correct because each such reference is to the litigation pending between Pasco and FPC since November 1994. FPC has presented fully the facts necessary for the Commission to decide whether to approve the Settlement Agreement for cost recovery purposes. The Settlement Agreement "comprehensively" resolves the litigation between FPC and Pasco. Whether "potential" new litigation may ensue between Pasco or FPC and persons (such as VGM and NCM) that are not parties to the PPA or the Settlement Agreement is

irrelevant to the issue of whether VGM has standing to participate as a party in this proceeding. Pasco and FPC should not be prevented from settling the litigation between them just because some third person "might" bring an action against either or both of them. If VGM has claims against Pasco or FPC arising out of the "prior consent" provisions of the Sale Agreement or the Purchase Agreement, this Commission is not the forum in which those claims may be decided. Certainly those claims cannot confer standing on VGM to participate in the proceeding in this docket, the sole issue in which is whether FPC will be permitted to recover the payments it makes to Pasco under the PPA as amended by the Settlement Agreement.

Fuel Supply Issues

VGM asserts (VGM Petition, ¶¶ 13 and 14) that the Commission is authorized -- "indeed obligated" -- to evaluate the impact of the changes made to the PPA by the Settlement Agreement on fuel supply issues and the viability of Pasco's cogeneration facility, issues it says must be evaluated to determine whether to approve for cost recovery purposes the requested modifications to the PPA. VGM cites Rule 25-17.0836, F.A.C., and a May 1995 order² of the Commission as support for its position. While Pasco agrees that Rule 25-17.0836 requires Commission approval for cost recovery purposes of certain PPA modifications (and would note that FPC has brought such modifications to the Commission for approval in this docket), it cannot agree that the May 1995 order cited

² In Re: Petition for approval, to the extent required, of certain actions relating to approved cogeneration contracts by Florida Power Corporation, Order No. 95-0540-FOF-EQ, Docket No. 940797-EQ (May 2, 1995).

by VGM provides any basis for a finding that VGM should be permitted to intervene in this proceeding.

With reference to fuel source, the May 1995 order clearly speaks only to changes in the type of fuel to be used by a cogenerator, which is the same type of change addressed by Rule 25-17.0836. In that order, the Commission stated:

" . . . Changes in primary fuel sources would not usually affect the cost-effectiveness of a contract, but they could affect the viability of a cogeneration facility. . . . For these reasons, we need to review changes in fuel sources. . . ."
" Order No. PSC-95-0540-FOF-EQ at p. 8.

The amendments to the PPA made by the Settlement Agreement do not involve changes in the type of fuel to be used in Pasco's facility. Further, the only assertion made by VGM with respect to the impact of the Settlement Agreement is that it could "seriously interfere with existing natural gas contracts by which the Project receives its fuel supply." VGM's petition is silent on the nature of the alleged "interference" (except for the "prior approval" issue previously mentioned). It has not alleged that the viability of Pasco's facility will be affected because of the alleged impact on VGM's interests under the Purchase Agreement -- and any such allegation would be mere speculation. Even assuming the subject of VGM's speculation was relevant to its standing (which it is not), the Commission has determined previously that such conjecture is insufficient to establish standing to intervene.³ Because the interest VGM seeks to protect in connection with the

³ See, e.g., In Re: Petition of Jacksonville Electric Authority to resolve a territorial dispute with Florida Power & Light Company in St. Johns County, Order No. PSC-96-0158-PCO-EU, Docket No. 950307-EU (February 5, 1996).

determination to be made in this case by the Commission is not the type of interest the proceeding is designed to protect, VGM has no standing to participate as a party.⁴

Standard for Intervention

Intervention in proceedings before the Commission is governed by Rule 25-22.039, F.A.C., and applicable case law. The rule provides, among other things, that a petition for leave to intervene

must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding. . . .

VGM has alleged no constitutional or statutory right, nor any Commission rule, under which it is entitled to participate in this proceeding. Although VGM has alleged that its substantial interests will be determined or affected through the proceeding, its petition shows on its face that such is not the case. VGM has no contract with Pasco. Its contract for the sale of gas is with NCM, which has a contract with Pasco for the sale of gas used in Pasco's cogeneration facility. Pasco submits that not even NCM -- with which Pasco has a direct contractual relationship -- would be entitled to intervenor status in this proceeding.

Whether VGM is entitled to intervene is governed by the two-pronged test for

⁴ As previously noted, when the Commission approved the PPA for cost recovery purposes in July 1991, Pasco had no contract for the supply of gas to its cogeneration facility. The Commission at that time was perfectly capable of evaluating the PPA without the assistance of NCM, VGM or any other gas supplier. Surely it is just as capable of evaluating the amendments to the PPA made by the Settlement Agreement.

"substantial interest" articulated in Agrico Chemical Co. v. Dept. of Environmental Regulation, 406 So.2d 478, 482 (2d D.C.A. Fla. 1981), rev. den. 415 So.2d 1359 (Fla. 1982). According to Agrico, a person seeking leave to intervene must show (a) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57 hearing, and (b) that his substantial injury is of a type or nature which the proceeding is designed to protect. VGM has made neither showing.⁵

VGM alleges that the Commission's approval of the Settlement Agreement will result in the Commission's endorsing certain changes to the PPA that "threaten" to materially and adversely "alter the Sale Agreement and impair VGM's consent rights." Even assuming this is the case, the Commission has no jurisdiction over the alteration of the Sale Agreement (which is between Pasco and NCM, not VGM), and no jurisdiction to protect from "impairment" whatever consent rights VGM may possess. Thus, even if VGM will, as a result of the Commission's approval of the Settlement Agreement, experience "real and immediate injuries,"⁶ those injuries are not of the type or nature

⁵ VGM speciously argues (VGM Petition, ¶ 14) that granting it leave to intervene would be consistent with prior Commission orders concerning similar issues of standing, citing only a single Commission order granting leave to intervene to Florida Gas Transmission Company ("FGT"). VGM conveniently fails, of course, to point out that FGT's intervention was not opposed by FPC, and that FPC's petition initiating the proceeding was ultimately dismissed by the Commission for lack of jurisdiction. See In Re: Petition for determination that implementation of contractual pricing mechanism for energy payments to qualifying facilities complies with Rule 25-17.0832, F.A.C., by Florida Power Corporation, Order No. PSC-95-0210-FOF-EQ, Docket No. 940771-EQ (February 15, 1995).

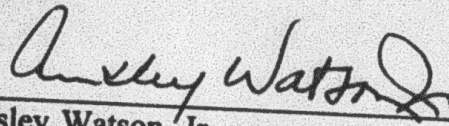
⁶ Pasco submits that any damage suffered by NCM (and therefore by VGM) as a result of Pasco's alleged violation of NCM's consent rights in executing the Settlement Agreement will be suffered by virtue of the implementation of the amendments made to the PPA by the Settlement Agreement, not by virtue of the Commission's approval of those amendments. Therefore, such damage or injury does not meet the test required for VGM to establish standing to participate. Village Park Mobile Home Ass'n., Inc. v. State, Dept. of Business Regulation, 506 So.2d 426, 433 (1st D.C.A. Fla. 1987). But for the issue of cost recovery, there would have

which the proceeding in this docket is designed to protect. VGM has not made the showing necessary to entitle it to intervene as a party. Even if the injuries described by VGM (see VGM Petition, ¶ 12) were to occur (rather than, according to VGM, being mere possibilities), it cannot follow that intervention in this proceeding is necessary in order for VGM to protect its interest in the Purchase Agreement (see VGM Petition, ¶ 13). VGM's petition admits the Commission has no jurisdiction to assist in resolving its plight.

Conclusion

VGM's petition for leave to intervene must be denied. It shows neither that VGM will suffer real and immediate injury as a result of the Commission's determination in this proceeding, nor that whatever injury it might suffer is of the type or nature that this proceeding is designed to protect.

Respectfully submitted,



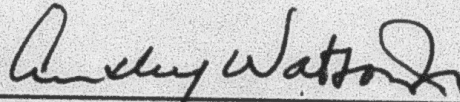
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Attorneys for Pasco Cogen, Ltd.

been no need for FPC's petition to this Commission in the first instance.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 4th day of March, 1997, by first class mail, to D. Bruce May, Esquire, and Karen D. Walker, Esquire, Holland & Knight LLP, P. O. Drawer 810, Tallahassee, Florida 32302; Norma J. Rosner, Esquire, General Counsel, Vastar Gas Marketing, Inc., 200 Westlake Park Blvd., Suite 200, Houston, Texas 77079-2648; James A. McGee, Esquire, Office of the General Counsel, Florida Power Corporation, 3201 - 34th Street South, St. Petersburg, Florida 33733; and Lorna R. Wagner, Esquire, Division of Legal Services, Florida Public Service Commission, Capital Circle Office Center, 2450 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850.



Ansley Watson, Jr.