

Law Offices

HOLLAND & KNIGHT

A Registered Limited Liability Partnership

315 South Calhoun Street
Suite 600
P.O. Drawer 810 (ZIP 32302-0810)
Tallahassee, Florida 32301
904-224-7000
FAX 904-224-8832

Atlanta	Orlando
Boca Raton	St. Petersburg
Fort Lauderdale	Tallahassee
Jacksonville	Tampa
Lakeland	Washington, D.C.
Miami	West Palm Beach

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FILE COPY

February 6, 1997

D. BRUCE MAY
904-425-5607

VIA HAND DELIVERY

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, FL 32399-0850

Re: Petition for Expedited Approval of an Agreement to Purchase the Tiger Bay Cogeneration Facility and Terminate Related Purchase Power Contracts by Florida Power Corporation, Docket No. 970096-EQ

Dear Ms. Bayo:

Enclosed for filing in the docket referenced above are the original and 15 copies of Vastar Gas Marketing, Inc.'s ("VGM") Petition for Leave to Intervene; the original and 15 copies of VGM's Request for Oral Argument; and a diskette containing both pleadings. For our record keeping, please acknowledge your receipt of this filing on the enclosed copy of this letter.

Thank you for your consideration in this matter.

Sincerely,

HOLLAND & KNIGHT


D. Bruce May

ACK _____
 AFD 1
 AFB _____
 CFB _____
 CFF _____
 CFI _____
 CIL _____
 (E) _____
 LDB 1 DBM/sms
 LDF 5 cc: All parties of record
 Norma Rosner, Esq.
 Chuck King, Esq.
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 WFS _____
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for expedited)
approval of an agreement to)
purchase the Tiger Bay)
cogeneration facility and)
terminate related purchased)
power contracts by Florida)
Power Corporation.)

Docket No. 970996-EQ

Filed: February 6, 1997

VASTAR GAS MARKETING, INC.'s
PETITION FOR LEAVE TO INTERVENE

Vastar Gas Marketing, Inc. ("VGM"), by and through undersigned counsel, pursuant to Rules 25-22.026, 25-22.036, and 25-22.039, Florida Administrative Code, requests leave to intervene in this proceeding wherein the Florida Public Service Commission (the "Commission") is scheduled to address the Purchase Agreement executed by Tiger Bay Limited Partnership ("TBLP"), managed by Destec Energy, Inc. or a subsidiary thereof ("Destec"), Florida Power Corporation ("FPC") and FPC Acquisition, L.L.C. ("FPC Acquisition") on January 20, 1997 (the "Purchase Agreement") and the concomitant termination of five power purchase agreements between TBLP and FPC (collectively the "PPAs"). VGM requests intervention for the purpose of apprising the Commission of: (i) the impact of the Purchase Agreement on the Gas Sales and Purchase Contract executed between TBLP/Destec and Arco Natural Gas Marketing, Inc., predecessor in interest to VGM, on September 22, 1993 (the "Gas Sales Contract"); (ii) VGM's right to consent to the assignment of the Gas Sales Contract to FPC; (iii) VGM's right to consent to the sale by Destec of its interest in the Tiger Bay project; and (iv) material misrepresentations in the testimony submitted by FPC in support of its Petition for Expedited Approval of an Agreement to Purchase the Tiger Bay

DOCUMENT NUMBER-DATE

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Cogeneration Facility and Terminate Related Purchase Power Contracts (the "Petition"). VGM respectfully submits that it is premature for the Commission to address the Petition until VGM has been provided with a meaningful opportunity to evaluate the Purchase Agreement, has consented to the assignment of the Gas Sales Contract to FPC, and has consented to the sale by Destec of its interest in the Tiger Bay project as required by the terms of the Gas Sales Contract.¹

Intervenor Information

1. VGM is a corporation formed under the laws of the State of Delaware with its principal office in Houston, Texas. VGM is authorized to do business in Florida. VGM's full name and address are:

Vastar Gas Marketing, Inc.
200 Westlake Park Boulevard, Suite 200
Houston, Texas 77079-2648

2. Copies of pleadings, notices and other documents in this proceeding directed to VGM should be served on:

D. Bruce May
Karen D. Walker
HOLLAND & KNIGHT LLP
P.O. Drawer 810
Tallahassee, Florida 32302

and

¹ VGM is not requesting that the Commission interpret or resolve any potential disputes under the Gas Sales Contract. Indeed, VGM recognizes that the Commission is without jurisdiction to do so. VGM merely requests the Commission to refrain from acting on the Petition. Until Destec and TBLP obtain VGM's consents, they lack legal capacity to fulfill the Purchase Agreement with FPC.

Norma J. Rosner
General Counsel
Vastar Gas Marketing, Inc.
200 Westlake Park Boulevard, Suite 200
Houston, Texas 77079-2648

Statement of Ultimate Facts

3. TBLP currently owns a gas-fired combined cycle cogeneration facility located near Fort Meade in Polk County, Florida (the "Project" or "Tiger Bay"). TBLP sells 217.75 MW of committed capacity to FPC pursuant to the PPAs which are administered from the Project. The PPAs, and certain amendments thereto, have been previously approved by the Commission for cost recovery purposes.²

4. On September 22, 1993, Arco Natural Gas Marketing, Inc., predecessor in interest to VGM, entered into the Gas Sales Contract with TBLP pursuant to which VGM supplies to TBLP 100% of the Project's natural gas requirements. The Gas Sales Contract is scheduled to extend through 2010.

² See In re: Petition for approval, to the extent required, of certain actions relating to approved cogeneration contracts by Florida Power Corporation, 95 F.P.S.C. 5:5, Docket No. 940797-EQ, Order No. PSC-95-0540-FOF-EQ (May 2, 1995) (approving contract modifications); In re: Petition for Approval of Contracts for Purchase of Firm Capacity and Energy between Ecopeat Avon Park and Florida Power Corporation, 91 F.P.S.C. 8:196, Docket No. 910549-EQ, Order No. 24923 (Aug. 19, 1991); In re: Joint Petition for approval of cogeneration contract between Florida Power Corporation and General Peat Resources, L.P., 91 F.P.S.C. 1:439, Docket No. 890915-EQ, Order No. 22473 (Jan. 25, 1990); In re: Joint petition for approval of standard offer contract between Florida Power Corporation and Timber Energy Resources, Inc., 89 F.P.S.C. 10:1, Docket No. 891005-EQ, Order No. 21858-A (Oct. 3, 1989); In re: Petition for approval of cogeneration contract between Florida Power Corporation and General Peat Resources, L.P., 89 F.P.S.C. 5:463, Docket No. 890094-EQ, Order No. 21296 (May 30, 1989).

5. On January 20, 1997, TBLP, FPC, and FPC Acquisition entered into the Purchase Agreement pursuant to which FPC proposes to purchase, own and operate all of TBLP's assets associated with the Project, and terminate all five PPAs. The Gas Sales Contract is among TBLP's assets that will be acquired by FPC under the Purchase Agreement. As a condition to the closing of the Purchase Agreement, TBLP, FPC, and FPC Acquisition must execute an Assignment and Assumption under which the Gas Sales Contract, along with other agreements, will be assigned to FPC. [See Purchase Agreement, § 6.01(e), Exhibit A.]

6. The Gas Sales Contract, however, contains specific provisions to protect VGM against unilateral assignments of the rights and obligations thereunder. In fact, VGM's consent is required relating to two separate aspects of the Purchase Agreement before the purchase of TBLP's assets by FPC can be consummated. First, Section 18.01 of the Gas Sales Contract prevents TBLP from assigning the Gas Sales Contract to a third party without first obtaining VGM's written consent. Second, Section 18.03 of the Gas Sales Contract makes it clear that Vastar, as a condition to entering into the Gas Sales Contract, relied upon Destec or its affiliate, Polk County CoGen, Inc., remaining as the owner and manager of the Project. Accordingly, Section 18.03 requires Destec to obtain VGM's prior consent to any sale of its interest in the Project.³

³ VGM's prior written consent is not required under Section 18.03 if Destec reduces its general partnership interest in Tiger Bay by an exercise of the Project's senior lenders' rights. This scenario, however, is not contemplated by the Purchase Agreement.

7. The Purchase Agreement recognizes that TBLP must obtain VGM's consent to the assignment of the Gas Sales Contract to FPC.⁴ The Purchase Agreement, however, fails to recognize the express requirement in Section 18.03 of the Gas Sales Contract that Destec must obtain VGM's prior consent to any sale of Destec's interest in the Project, including the sale contemplated by the Purchase Agreement.

8. Article VI of the Purchase Agreement sets forth numerous conditions which must be fulfilled prior to the closing of the Purchase Agreement. The conditions include, but are not limited to, the following: (i) the issuance by the Commission of a final, non-appealable order approving the transactions contemplated by the Purchase Agreement; (ii) the absence of any pending litigation or proceeding "to refrain or prohibit the transactions" contemplated by the Purchase Agreement or "to obtain material damages or other material relief" in connection with the transactions contemplated by the Purchase Agreement; (iii) the assignment by TBLP of the Gas Sales Agreement to FPC; and (iv) the consent of VGM to the assignment of the Gas Sales Agreement. [Purchase Agreement, § 6.01, § 6.02.] Thus, VGM's consents are essential to the closing of the Purchase Agreement.

⁴ In Section 4.01(e) of the Purchase Agreement, Tiger Bay represents and warrants that: "Except as set forth in Section 6.02(g) and (k) and on Schedule 4.01(e), no consent or approval of any third party which is not a Governmental Entity is required for the execution and delivery of this Agreement by Tiger Bay or for the performance by Tiger Bay of its obligations hereunder." [Purchase Agreement, § 4.01(e).] Schedule 4.01(e) states, in pertinent part, that: "The consents of various third parties to the assignments of the Assigned Contracts to FPC are required." [Purchase Agreement, Schedule 4.01(e).] The "Assigned Contracts" are defined by the Purchase Agreement to include "the Material Assigned Contracts and the Other Assigned Contracts." [Purchase Agreement, § 1.01.] The Gas Sales Agreement is defined as one of the Material Assigned Contracts. [Purchase Agreement, § 1.01.]

9. On January 21, 1997, FPC filed its Petition requesting that the Commission expeditiously approve the Purchase Agreement and the termination of the PPAs. The Petition also seeks Commission authorization for FPC to recover the \$445 million purchase price and associated financing costs of the TBLP buy-out through the Capacity Cost Recovery clause over a period of five years or less. In the Petition, FPC advises the Commission that VGM supplies natural gas to the Project under a long-term contract. [See Petition, p. 2.] Additionally, FPC requests a determination by the Commission that "the ongoing gas supply . . . costs associated with the Tiger Bay facility are recoverable through the fuel adjustment clause in the same manner as any other fuel expense." [Petition, p. 7.]

10. As described in detail below, the Purchase Agreement and assignment of the Gas Sales Contract to FPC could fundamentally alter the terms of the Gas Sales Contract, and VGM's rights thereunder. Despite the substantial impact that the Purchase Agreement and the intended assignment of the Gas Sales Contract will have on VGM, VGM was not involved in the negotiations between TBLP and FPC leading up to execution of the Purchase Agreement. Indeed, VGM did not learn of the Purchase Agreement and TBLP's intent to assign the Gas Sales Contract to FPC until FPC filed its Petition with the Commission on January 21, 1997. Only then did VGM learn of the Purchase Agreement through the press. VGM subsequently received a letter from Destec dated January 23, 1997, notifying VGM of the Purchase Agreement and transactions contemplated therein.

11. FPC and TBLP have not only failed to seek the input of VGM in negotiating the Purchase Agreement, but FPC has materially misrepresented to the Commission the status of negotiations with VGM. On page 16 of the Direct Testimony of Robert Dolan filed in support of the Petition, Mr. Dolan states that FPC will investigate a restructuring or buy-out of the Gas Sales Contract and that "[p]reliminary efforts toward such a renegotiation are already underway, but [VGM] has been reluctant to negotiate with a non-party to the contract." This is news to VGM, and a material misrepresentation on FPC's part. To date, no negotiations have occurred between FPC and VGM relating to the restructuring or buy-out of the Gas Sales Contract. Indeed, VGM was not aware of FPC's intent to engage in such negotiations until it received a copy of Mr. Dolan's testimony which was not obtained through FPC, but through VGM's undersigned counsel.

12. VGM has not had an adequate opportunity to fully evaluate the ramifications of the Purchase Agreement on the Gas Sales Contract. Further, at this time, VGM has not consented to the assignment of the Gas Sales Contract to FPC as required by Section 18.01 of the Gas Sales Contract, nor has it consented to the sale by Destec of its interest in the Project as required by Section 18.03 of the Gas Sales Contract. These consents are a prerequisite to the closing of the Purchase Agreement. Thus, it is premature for the Commission to address the Petition until such consents have been obtained.

Substantial Interest Affected

13. VGM has standing to intervene as a party in this proceeding. Intervention in a Commission proceeding is granted to those entities whose substantial interests are subject to determination or will be affected through the proceeding. Fla. Admin. Code R. 25-22.039. VGM has a direct and substantial interest in the Settlement Agreement which is the focus of this proceeding. Therefore, VGM is entitled to participate as a party to this proceeding.

14. The Purchase Agreement and assignment of the Gas Sales Contract to FPC could fundamentally alter the originally agreed upon purpose, nature, and economics of the Gas Sales Contract and, therefore, will substantially affect VGM. Specifically, the Purchase Agreement and assignment could materially alter the following aspects of the Gas Sales Contract:

a. Section 18.02 of the Gas Sales Contract provides that TBLP will remain the primary obligor under the Gas Sales Contract, even after the assignment to a third party. As a result of the Purchase Agreement, TBLP will no longer have a revenue stream from the Project or the Project assets. Thus, capitalization securing TBLP's obligations under the Gas Sales Contract could be jeopardized.

b. The Gas Sales Contract contains a force majeure clause which excuses performance by the purchaser of certain contractual obligations upon the occurrence of defined force majeure events. A force majeure event is defined in Section 11.01 of the Gas Sales Contract to include

interruptions or restraints caused by acts or orders of regulatory bodies. It is one set of assumed risks when two unregulated companies contractually agree that unanticipated acts of regulatory bodies may prevent their mutual contract performance. It is quite another matter for a regulated entity, whose day-to-day business is subject to governmental orders and restraints to be able to invoke such provisions. Thus, assignment of the Gas Sales Contract to FPC would greatly heighten the risks that VGM would face under the Gas Sales Contract far beyond those anticipated when the Gas Sales Contract was formed.

c. VGM will lose existing assurances as to the volumes of gas to be sold under the Gas Sales Contract. The Tiger Bay Project has been a baseload facility since its inception, running consistently at above a 90% utilization factor, not including scheduled downtime. The Gas Sales Contract was entered into by VGM upon representations that VGM could expect the Project to run at high load factors on a baseload basis due to the existence of the PPAs. If the PPAs are terminated, there will be uncertainty regarding the level at which the Project will be utilized and operated in the future. Thus, the Purchase Agreement and assignment, if consummated, could cast serious doubt on the volumes of gas to be supplied under the Gas Sales Contract.

d. The termination of the PPAs could impact the pricing provisions of the Gas Sales Contract. Currently VGM receives payments for natural

gas delivered based on the higher of a fixed gas price and a floating gas price. The floating price is based on the electric energy rate the Project receives from FPC under the PPAs. FPC's acquisition of the Project and the corresponding termination of the PPAs will radically change this previously agreed upon gas-pricing methodology under the Gas Sales Agreement and possibly interfere with VGM's right to set prices above the fixed gas price.

In summary, VGM's long-term baseload gas supply agreement with an unregulated electric generating facility, which facility must operate in strict accordance with its power purchase agreements with FPC, presents a vastly different risk profile, and set of economic values, than does a gas supply contract directly with FPC to supply that same facility, particularly when FPC no longer has any express contractual obligations to operate that facility. Thus, intervention in this proceeding is necessary for VGM to protect its interest in the Gas Sales Contract.

15. Furthermore, VGM's formal participation in this proceeding is essential in order for the Commission to evaluate whether to approve for cost recovery purposes the purchase price associated with the Purchase Agreement and the termination of the PPAs. Rule 25-17.0836, Florida Administrative Code, requires Commission cost recovery approval of power purchase agreement modifications that affect "the overall efficiency, cost-effectiveness or nature of the project." Fla. Admin. Code R. 25-17.0836. The Petition requests approval of the most radical type of power purchase agreement modifications possible -- the complete termination of power purchase agreements. In

evaluating such modifications, the Commission is authorized and obligated to evaluate the impact of changes on fuel supply issues and on the viability of the project. See In re: Petition for approval, to the extent required, of certain actions relating to approved cogeneration contracts by Florida Power Corporation, 95 F.P.S.C. 5:5, Docket No. 940797-EQ, Order No. PSC-95-0540-FOF-EQ (May 2, 1995) (modifications to power purchase agreements are considered material if they impact "the viability of the project" or "the primary fuel source of the . . . facility."); see also Fla. Admin. Code R. 25-17.0836. Indeed, FPC concedes that the Commission must evaluate the viability of the Project from a reliability perspective and ensure that the payment to TBLP for termination rights is fair and reasonable. [Petition, p. 5.] VGM is the sole and exclusive supplier of natural gas for the Project. Thus, VGM's participation as a party to this proceeding is essential in order for the Commission to be fully apprised of the impact of the proposed transaction on the Project's fuel supply.

16. Granting VGM leave to intervene in this proceeding is entirely consistent with prior Commission orders. In Docket No. 940771-EQ, the Commission granted Florida Gas Transmission Company's ("FGT"'s) Petition to Intervene in a proceeding involving a pricing dispute under the terms of power purchase agreements between various qualifying facilities and FPC. 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, 94 F.P.S.C. 11:279, Docket No. 940771-EQ, Order No. PSC-94-1401-PCO-EQ (Nov. 16, 1994). FGT's Petition to Intervene asserted that FGT had a direct interest in that

proceeding because FPC's proposed pricing mechanism "could operate to affect the projects served by [FGT's] transmission system." VGM's interest in this proceeding is strikingly similar to, but even more direct than, FGT's interest in Docket No. 940771-EQ. In that docket, the Commission was under no obligation to evaluate fuel supply issues. In this proceeding, Commission orders and Rule 25-17.0836 require the Commission to fully evaluate the impact of the Purchase Agreement and termination of the PPAs on the Project's fuel supply, which can only be adequately evaluated if VGM participates in this proceeding.

Basic Position

17. VGM's basic position is that it is premature for the Commission to consider the issues raised in the Petition until TBLP obtains all of the required consents, including VGM's consent to the assignment of the Gas Sales Contract to FPC and VGM's consent to the sale by Destec of its interest in Tiger Bay. As described above, the closing of the Purchase Agreement is expressly conditioned upon TBLP receiving VGM's consents. An additional condition to closing is that all representations and warranties made by TBLP "must be true and correct in all material respects on or as of the Closing Date." [Purchase Agreement, § 6.02(b).] The Purchase Agreement requires TBLP to represent and warrant that TBLP is in compliance with all material terms and requirements of the Gas Sales Contract. [Purchase Agreement, § 4.01(j).] Should TBLP fail to obtain VGM's consent to the assignment of the Gas Sales Contract, or VGM's consent to the sale by Destec of its interest in the Project, the closing of the Purchase Agreement cannot occur. Accordingly, consideration of the

Purchase Agreement by the Commission prior to TBLP obtaining the required consents would be futile and could result in the unnecessary expenditure of time and resources by the Commission, its staff, and the parties to this docket.

Disputed Issues of Material Fact

18. The disputed issues of material fact of which VGM has knowledge at this time include, without limitation, the following:

- (a) whether it is premature for the Commission to consider the Petition until TBLP has obtained VGM's consents as required pursuant to the terms of the Gas Sales Contract; and
- (b) whether the Direct Testimony of Robert Dolan contains material misrepresentations regarding what FPC claims to be on-going negotiations between FPC and VGM relating to the restructuring or buy-out of the Gas Sales Contract.

Issues of Policy

19. VGM urges the Commission to consider thoughtfully the mechanism by which it may authorize FPC to recover the costs associated with the Purchase Agreement and to continue to honor its long standing policy of preserving the integrity of contracts. Decisions in this matter will set precedent which may bind the Commission in stranded cost recovery and other uneconomic investment proceedings which will continue to arise in the coming years as the anticipated electric industry restructuring occurs.

20. VGM urges the Commission to consider the effect on future electric competition if it allows FPC to purchase what could be a large competing electric generating unit in the Florida marketplace.

WHEREFORE, VGM respectfully requests that the Commission:

- (a) grant VGM intervenor status in this proceeding;
- (b) refrain from addressing the Petition until VGM has consented, if at all, to the assignment of the Gas Sales Contract to FPC and the sale by Destec of its interest in the Tiger Bay Project; and
- (c) grant such other relief as the Commission deems appropriate.

Respectfully submitted,

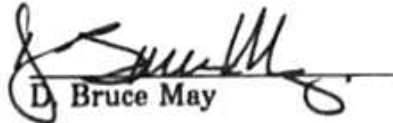


D. Bruce May
Florida Bar No. 354473
Karen D. Walker
Florida Bar No. 0982921
HOLLAND & KNIGHT LLP
P.O. Drawer 810
Tallahassee, FL 32302
(904) 224-7000

**Attorneys for Vastar
Gas Marketing, Inc.**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Leave to Intervene was furnished by U.S. mail to James A. McGee, Esq., Florida Power Corporation, P.O. Box 14042, St. Petersburg, FL 33733-4042 and by hand delivery to Lorna R. Wagner, Esq., Florida Public Service Commission, 2540 Shumard Oak Blvd., Rm. 370, Tallahassee, FL 32399-0850 this 6th day of February, 1997.


D. Bruce May

TAL-100806.5