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MACFARLANE FERGUSON & McMULLEN

ATTORNEYS AND COUNSELORS AT LAW

111 MADISON STREET, SUITE 2300
P.O. BOX 1531 (ZIP 33601)
TAMPA, FLORIDA 33602
(813) 273-4200 FAX (813) 273-4396

400 CLEVELAND STREET
P. O. BOX 1669 (ZIP 34617)
CLEARWATER, FLORIDA 34615
(813) 441-8966 FAX (813) 442-8470

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

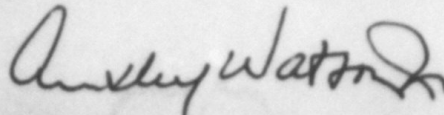
Please acknowledge your receipt of the enclosures on the duplicate copy of this letter, and return the same to me in the enclosed preaddressed envelope.

Many thanks for your usual assistance.

CAPITOL BOND

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



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

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL
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In re: Petition for expedited
approval of settlement agreement
with Pasco Cogen, Ltd. by Florida
Power Corporation.)
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Docket No. 961407-EQ

Submitted for Filing:
3-5-97

**PASCO COGEN, LTD.'s REPLY AND MEMORANDUM IN
OPPOSITION TO NCMC'S MOTION TO DISMISS WITHOUT PREJUDICE**

Pasco Cogen, Ltd. ("Pasco"), by its undersigned attorneys, respectfully replies to the Motion to Dismiss Without Prejudice filed herein by North Canadian Marketing Corporation ("NCMC") and directed to FPC's petition in this docket, and says such motion must be denied because the grounds on which it is based are spurious.

MEMORANDUM IN SUPPORT OF PASCO'S REPLY

NCMC sets forth the following reasons for dismissal of FPC's petition without prejudice:

1. the filing is "defective and unripe" because it has not met the "requirement" that all required consents, and in particular that of NCMC, be obtained;
2. the "validity of the Settlement Agreement between FPC and Pasco, which is the subject of FPC's petition, is subject to an ongoing arbitration proceeding in Texas; and
3. FPC's filing is "misleading because it alleges that it *does* meet all necessary conditions to be reviewed and approved by the Commission."

DOCUMENT NUMBER-DATE

02385 MAR-56

FPSC-RECORDS/REPORTING

None of the reasons set forth by NCMC requires dismissal of FPC's petition for approval of the Settlement Agreement between FPC and Pasco.

NCMC's Motion Is Not Authorized by the Commission's Rules

NCMC is not a party to this proceeding, having filed concurrently with its Motion to Dismiss a Petition for Leave to Intervene (on which the Commission has not yet ruled). Pasco has, concurrently with the filing of this reply to NCMC's motion to dismiss, filed a response and opposition to its petition for leave to intervene.

Only a party to a proceeding is permitted to file a motion directed to the initial pleading in the proceeding, and NCMC is not such a party to this proceeding.

Failure to Meet "Requirement" for Obtaining Consents

NCMC suggests that FPC's filing is defective and "unripe" for failure to meet some alleged "requirement" that "required consents" (in particular, NCMC's) be obtained. There is no such "requirement" in the Commission's rules. It also suggests that FPC's petition is "misleading" because it alleges that all conditions necessary for the Commission's review of the Settlement Agreement have been met.

The Power Purchase Agreement ("PPA") between Pasco and FPC -- to which NCMC is not a party -- contains no requirement for obtaining the consent of NCMC or any other person for the amendments to the PPA made by the Settlement Agreement. The Settlement Agreement itself states it is subject to the approval of Pasco's lender, The Prudential Insurance Company of America, and such consent/approval has been obtained. The only "necessary condition" which NCMC alleges is "missing" -- apparently thereby

rendering FPC's petition "misleading" -- is that of NCMC, and nothing in the PPA, the Settlement Agreement or this Commission's rules suggests that such consent is "necessary" in order to permit this Commission to address the issues raised by FPC's petition.

The consent NCMC complains was not obtained is NCMC's consent under the Gas Purchase Agreement between NCMC and Pasco (the "GPA"). Assuming such consent was required in order for Pasco to agree to the amendments to the PPA contained in the Settlement Agreement (which Pasco submits is not the case), that is Pasco's problem, and it may suffer the consequences of such failure in the arbitration proceeding in Texas.

More importantly, for the Commission to find that NCMC's consent actually was required under the GPA, it would have to construe the GPA, and determine that the amendments to the PPA would materially and adversely affect NCMC's interests under the GPA. To make this latter determination, the Commission would need to compare NCMC's position under the GPA prior to the settlement with its position after the settlement. This type of exercise is beyond the Commission's jurisdiction over the PPA between FPC and Pasco, which is extremely limited. In fact, were it not for the issue of FPC's recovery of payments under the PPA as amended by the Settlement Agreement, no filing of the Settlement Agreement with the Commission would have been required.

NCMC argues that the Settlement Agreement is, at best, a "work in progress." It says NCMC must "subscribe to" (*i.e.*, sign) the Settlement Agreement because NCMC is a "key" party to it. These assertions are contradicted by the Settlement Agreement itself, and by the facts out of which it arose. NCMC was not, and is not, a party to the litigation

between Pasco and FPC. It is not a party to the PPA between Pasco and FPC. The Settlement Agreement sets forth the terms and conditions pursuant to which the litigation between Pasco and FPC will be resolved (and includes amendments to the PPA between those parties). It is ludicrous for NCMC to even suggest that the mere "prior consent" provision of the GPA could make NCMC a "party" to the PPA or the Settlement Agreement, and it has cited no authority suggesting such is the case.

Finally, the Settlement Agreement will end contentious and expensive litigation between Pasco and FPC. While it involves amendments to the PPA initially approved by the Commission in 1991, it settles a number of other issues raised in that litigation. Even if Pasco has breached the "prior consent" requirement of its contract with NCMC, such breach cannot render the amendments to the PPA -- a contract to which NCMC is not a party -- void. The amendments to that latter contract -- the PPA with FPC -- would remain binding on the parties thereto. NCMC's motion to dismiss contains no authority supporting a contrary conclusion.

Effect of Arbitration on "Validity" of the Settlement Agreement

NCMC suggests that the validity of the Settlement Agreement between Pasco and FPC is somehow impaired because of arbitration currently pending between Pasco and NCMC, and that the settlement between Pasco and FPC may be found -- in the arbitration proceeding -- invalid for lack of NCMC's consent. As indicated above, NCMC has cited no authority which even remotely suggests that the Settlement Agreement between Pasco and a party other than NCMC can be determined invalid as between those parties.

Assuming for purposes of this reply that NCMC's consent was required (which Pasco denies), Pasco would have breached the requirements of its contract with NCMC, and may be found liable for damages or other relief in the arbitration proceeding. NCMC cites no authority suggesting that the arbitrator (or a court with authority to enforce the award of the arbitrator) would have the power to invalidate an agreement (or amendments thereto) made by one party to the arbitration with a third party (such as FPC).

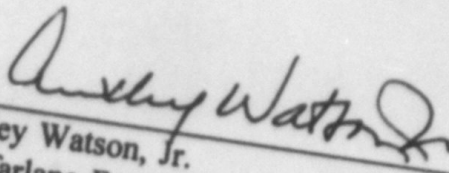
The prior consent provision in the GPA is analogous to a contractual provision which prohibits assignment of the contract by one party without the consent of the other party. Absent a contractual provision that any assignment in violation of the prohibition is "void" or "of no effect," an assignment by one party without the prior consent of the other party does not void the assignment itself (although the non-breaching party may be entitled to damages against the assigning party). See: Reuben H. Donnelley Corp. v. McKinnon, 688 S.W.2d 612, 615 (Tex. App 13 Dist. 1985).

What is important about the arbitration proceeding is that it is the forum for resolution of all disputes between Pasco and NCMC under the GPA. The disputes between NCMC and Pasco will be resolved through the arbitration proceeding. They have no place in, and no relevance to, the issues before the Commission in this docket.

Conclusion

NCMC's motion to dismiss must be denied: The grounds upon which the motion is based are without factual or legal foundation.

Respectfully submitted,

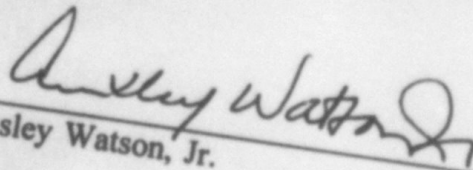


Ansley Watson, Jr.
Macfarlane Ferguson & McMullen
Post Office Box 1531
Tampa, Florida 33601-1531
(813) 273-4321

Attorneys for Pasco Cogen, Ltd.

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 John W. Jimison, Esquire, Brady & Berliner, P.C., 1225 19th Street, N.W., Washington, D.C.; Sheldon D. Reid, President, North Canadian Marketing Corporation, 425 - 1st Street, S.W., Calgary, Alberta T2P 4V4, CANADA; 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.