

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Expedited)
Approval of Settlement Agreement)
with Lake Cogen, Ltd. by Florida)
Power Corporation)
_____)

Docket No. 961477-EQ

Filed: March 6, 1997

NCP LAKE POWER, INC.'S MOTION TO DENY THE PETITION
TO INTERVENE OF VASTAR GAS MARKETING, INC.

NCP LAKE POWER, INC. (hereinafter "NCP Lake"), pursuant to Commission Rule 25-22.037(2), Florida Administrative Code, and subject to its pending petition to intervene filed simultaneously herewith, respectfully moves the Commission to deny the petition to intervene of Vastar Gas Marketing, Inc. ("Vastar" or "VGM") filed with the Commission on February 20, 1997. In summary, the Commission should deny Vastar's petition to intervene because Vastar lacks standing to participate in this docket. Moreover, Vastar's petition to intervene does not state a claim upon which the Commission can grant relief. NCP Lake's memorandum in support of its motion to deny Vastar's petition to intervene follows.

MEMORANDUM OF LAW IN SUPPORT OF NCP LAKE POWER, INC.'S
MOTION TO DENY THE PETITION TO INTERVENE
OF VASTAR GAS MARKETING, INC.

The Commission should deny VGM's petition to intervene because

VGM lacks standing under Florida administrative law, and because

VGM has failed to state a claim upon which the Commission can grant

relief. VGM has not demonstrated that the alleged injury to its

substantial interests is of sufficient immediacy to establish

standing, nor has VGM even alleged that the interests that it seeks

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to protect, its economic interests deriving from a contract with the fuel supplier to Lake's cogeneration facility, not with either Lake Cogen or FPC, are within the zone of interests that the underlying statutes and rules are designed to protect. Moreover, VGM has not stated a claim upon which the Commission can grant relief: any relief to which VGM may be entitled must necessarily flow from VGM's contract with North Canadian Marketing Corporation ("NCM"), a contract over which the Commission has no jurisdiction. Finally, the Commission should not permit VGM's ill founded petition to intervene to impede or delay the Commission's action on Florida Power Corporation's petition for approval of the Settlement Agreement between Lake Cogen and FPC.

STATEMENT OF THE CASE AND FACTS

NCP Lake is the managing general partner of Lake Cogen, LTD. ("Lake Cogen"). Lake Cogen is a Florida limited partnership that sells power to FPC, pursuant to a negotiated contract, from the Lake Cogeneration Facility ("Lake Facility") or ("Lake Project") located at Umatilla, Florida. On December 6, 1996, Florida Power Corporation ("FPC") and Lake Cogen entered into that certain Settlement Agreement and Amendment To Negotiated Contract for the Purchase of Firm Capacity and Energy From a Qualifying Facility Between Lake Cogen, Ltd. and Florida Power Corporation (the "Settlement Agreement"). The purpose of the Settlement Agreement is to settle all disputes between Lake Cogen and FPC that are the subject of currently pending, though stayed, litigation in the case styled NCP Lake Power, Incorporated, a Delaware corporation, et

General Partner of Lake Cogen Ltd., a Florida limited partnership v. Florida Power Corporation, a Florida corporation, Case No. 94-2354-CA01, in the Circuit Court of the Fifth Judicial Circuit in and for Lake County. Pursuant to the Commission's rules and orders, and pursuant to the terms of the Settlement Agreement itself, on December 12, 1996, FPC filed the instant petition for approval of the Settlement Agreement for cost recovery purposes.

On February 20, 1997, VGM petitioned to intervene in this docket and moved the Commission (1) to grant it intervenor status, (2) to "refrain from approving any settlement agreement . . . until a settlement is reached that is acceptable to NCM and VGM", and (3) to grant other relief that the Commission deems appropriate.

NCP Lake now respectfully moves the Commission to deny VGM's petition to intervene. Since VGM lacks standing to participate in this docket, VGM is not entitled to, and the Commission should decline to grant, any of the relief that VGM's petition to intervene purports to request.

ARGUMENT

I. VASTAR HAS NOT SATISFIED THE STANDING REQUIREMENTS OF FLORIDA ADMINISTRATIVE LAW.

To establish standing in Florida administrative proceedings, and in Commission proceedings specifically, an entity must demonstrate that it has a substantial interest in the outcome of a proceeding. This demonstration requires that the entity satisfy the two-pronged Agrico test: (1) that it will suffer injury of sufficient immediacy to entitle it to a section 120.57 hearing and

(2) that its substantial interest is of a type or nature which the proceeding is designed to protect. Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2nd DCA 1981), reh'g denied, 415 So. 2d 1359, 1361 (Fla. 1982); In Re: Application for Certificate to Operate Wastewater Utility In Franklin County by Resort Village Utility, Inc., 94 FPSC 9:278, 280-81; In Re: Application for a Staff-Assisted Rate Case by L.C.M. Sewer Authority in Lee County, 93 FPSC 7:467. Vastar has satisfied neither.

A. Any Potential Injury To VGM's Interests Is Speculative And Does Not Satisfy The Immediate Injury Requirement For Standing Under Florida Administrative Law.

VGM asks the Commission to "refrain from approving the Settlement Agreement until all parties that will be substantially affected by the Settlement Agreement have had a meaningful opportunity to evaluate and consent to its terms in accordance with their respective contract rights." VGM's Petition at 1-2. VGM asserts that the Commission's approval of the Settlement Agreement threatens to alter the gas sales agreement between VGM and NCM (the "Sale Agreement" as defined in VGM's petition) and to impair its consent rights. This is nonsense: regardless of the Commission's actions in the instant docket, the Sale Agreement will remain as it is, and VGM's consent rights will remain whatever they are. The Commission surely does not have the jurisdiction to modify or impair rights under a contract -- the Sale Agreement -- between parties that are not subject to its jurisdiction, and over the performance of which it likewise lacks jurisdiction. Thus, VGM's

alleged injuries are speculative because they depend on a host of other factors, events, and determinations by judicial bodies. They are not of sufficient immediacy to establish VGM's right to a 120.569-.57 hearing with respect to the matters before the Commission.

B. VGM's Purely Economic Interests Are Not Within the Zone of Interests That This Proceeding Is Designed To Protect.

The second prong of the Agrico standing test requires that the putative intervenor establish that its substantial interest be of the type that the proceeding is designed to protect. Agrico, 406 So. 2d at 482; Resort Village, 94 FPSC 7: 280-81. In Agrico, a sulfur-handling company sought to challenge the environmental permit application of a competing operator. The Second District Court of Appeal denied standing because, even though the challenger was "able to show a high degree of potential economic injury," it was "wholly unable to show that the nature of the injury was one under the protection of" the underlying substantive statute applicable to the permit application. Id.

Here, as in Agrico, the petitioner is wholly unable to show that its injuries, if any, would be of a type or nature that the Commission's proceeding herein is designed to protect. This proceeding exists for the purpose of determining whether the power purchase agreement between Lake Cogen, Ltd. and Florida Power Corporation (the "PPA") will, if amended per the terms of the Settlement Agreement, continue to qualify for cost recovery pursuant to Commission Rule 25-17.0836, F.A.C. This Rule, and the

Rule's authorizing statutes, are designed to protect the interests of Florida Power Corporation's general body of ratepayers in having the Commission assure that any modifications to the existing PPA are cost-effective and do not threaten the viability of Lake Cogen's project, and the State's interest in encouraging cogeneration. The Rule and statutes are not designed to protect the interests of a second-degree-relation contract supplier, just as utility rate cases are not designed to protect the interests of those who supply goods and services to utilities.

VGM's interests are purely economic and derive solely from its contractual relationship with NCM. VGM is not subject to the Commission's jurisdiction, nor is NCM, nor is the contract between VGM and NCM, nor is the contract between Lake Cogen and NCM. VGM is not in privity with either Lake Cogen or FPC. VGM's assertion that it will suffer an injury deriving from its contract with NCM, as that contract might be affected by the Settlement Agreement, even if true, simply does not rise to the level of an injury cognizable by the Commission and upon which the Commission has the authority to grant relief.

Chapter 366 is not intended to provide for the redress of the economic interests of unregulated suppliers to regulated utilities, let alone the economic interests of unregulated suppliers to unregulated QFs like Lake Cogen. See 18 CFR § 292.602(c). The derivative economic interests of an unregulated supplier cannot establish standing in this proceeding under Commission Rule 25.17.0836, any more than the competitor's economic interests in

Agrico established standing. See Agrico, 406 So. 2d at 482 ("Chapter 403 was not meant to redress or prevent injuries to a competitor's profit and loss statement.")

This is not to say, however, that economic interests can never be cognizable substantial interests giving rise to standing under the Agrico test. When the substantive statute governing the agency action recognizes such interests as being of the type that the proceedings under the statute are designed to protect, economic interests can indeed form the basis for standing. Florida Medical Center v. Department of Health and Rehabilitative Services, 484 So. 2d 1292, 1294 (Fla. 1st DCA 1986) (competitive economic interest of an existing hospital held sufficient to establish standing and demand hearing on potential competitor's certificate of need application); see also Florida Medical Association v. Department of Professional Regulation, 426 So. 2d 1112 (Fla. 1st DCA 1983).

The instant proceeding, however, is a fairly routine Commission proceeding, pursuant to Commission Rules, to review a proposed Settlement Agreement that has the effect of amending a power purchase agreement between a QF and a public utility.

A discussion of Agrico would be incomplete without addressing the criticisms of Agrico and its progeny by the late Professor Patricia Dore. P.A. Dore, Access to Florida Administrative Proceedings, 13 Fla.St.U.L.Rev. 967, 1082-1110 (1986). Professor Dore argues that there is no "zone of interest" test or requirement in section 120.57 at all, and that none was intended. See also Matter of Surface Water Management Permit No. 50-01420-S, 515 So.

2d 1288, 1292 n.1 (Fla. 4th DCA 1987). The courts -- and, at least implicitly, the Commission -- have not agreed. As the First District Court of Appeal stated:

We also recognize that limiting standing to participate in licensing proceedings in the manner we have done in this case has been criticized by Professor Patricia Dore in her analytically enlightening article on standing in Florida administrative proceedings. However, we cannot apply the broad definition of standing Professor Dore suggests, unless the Florida Supreme Court recedes from the several opinions Professor Dore has criticized or the legislature enacts appropriate amendments to chapter 120 explicitly adopting a similar broad definition of standing. A decision to accord [standing in the instant case] more properly lies in the hands of the legislature.

Florida Society of Ophthalmology v. Board of Optometry, 532 So. 2d 1279, 1288 (Fla. 1st DCA 1988) (citations omitted).

C. The Threat Of Additional Litigation Is Irrelevant To VGM's Standing To Intervene And To The Commission's Actions Herein.

VGM asserts that the Commission's approval of the Settlement Agreement may result in additional litigation involving FPC and Lake Cogen. Since FPC is not contractually involved with either NCM or VGM, the threat of additional litigation involving FPC appears remote; VGM has offered no explanation of how the approval of the Settlement Agreement "could embroil FPC in additional complex litigation to the detriment of FPC's ratepayers." See VGM's Petition at 9. The threat of additional litigation involving Lake Cogen is irrelevant to the Commission's determination because it would have no effect on Lake's performance of the amended PPA, i.e., no effect on the prices paid for power from the Lake Facility, from the perspective of FPC and its ratepayers.

Accordingly, this purported threat cannot give rise to standing for VGM, and should have no influence whatever on the Commission's determination of whether to approve the amended PPA for cost recovery purposes.

D. VGM's Allegations That The Settlement Agreement Contains Misrepresentations Would Not, Even If True, Confer Standing On VGM To Intervene In This Proceeding.

VGM alleges that the Settlement Agreement contains material misrepresentations. While NCP Lake disputes this, for the purposes of analyzing VGM's right to intervene, the important fact is that none of the alleged misrepresentations would, if true, do anything to establish VGM's standing to intervene herein. None of the alleged misrepresentations would mandate a finding that VGM would suffer an immediate injury sufficient to warrant a section 120.569 .57 hearing, nor would they dictate a finding that VGM's alleged interests are of a type that the instant proceeding is designed to protect.

II. VASTAR HAS NOT STATED A CLAIM UPON WHICH THE COMMISSION CAN GRANT RELIEF.

The FPSC has no jurisdiction over either the contract between Lake Cogen and NCM, or the contract between NCM and VGM. Accordingly, even assuming VGM's allegations to be true (which NCP Lake disputes), it lacks standing and cannot state a claim upon which the Commission can grant relief. All VGM has done is assert to the Commission that VGM's rights under VGM's once removed gas supply contract are threatened by the Commission's pending approval

of the Settlement Agreement. Tangentially, VGM has attempted to put before the Commission various matters that might influence the Commission's analysis, but which nonetheless do not state a claim upon which the Commission can grant relief to VGM.

III. THE COMMISSION SHOULD NOT ALLOW VGM TO IMPEDE THE COMMISSION'S PROCESSES OR TO INTERFERE WITH THE SETTLEMENT BETWEEN LAKE COGEN AND FPC.

Consistent with the Commission's rules and orders, FPC has properly sought the Commission's approval of the Settlement Agreement, with all known conditions precedent to its ultimate effectiveness identified therein, for cost recovery purposes. Such conditions in QF-utility settlement agreements are not new to the Commission: the settlement agreement between FPC and Orlando Cogen Limited ("OCL"), approved by the Commission in 1996, was also expressly contingent on the approval of the OCL project's lenders. FPSC Document No. 01904, Exhibit A at 9-10, FPSC Docket No. 960193-EQ, February 19, 1996. As demonstrated above, VGM has filed an ill-founded petition to intervene that essentially requests a delay of the Commission's processes. The Commission should not let VGM thus impede or delay the Commission's processes. This docket is being processed using the Commission's Proposed Agency Action ("PAA") process, and if VGM were somehow to establish standing, then it would have a full opportunity to intervene, and if necessary to protect its interests, to request a hearing on the issues before the Commission. The Commission's actions herein will have no effect on VGM's consent rights under its contract with NCM,

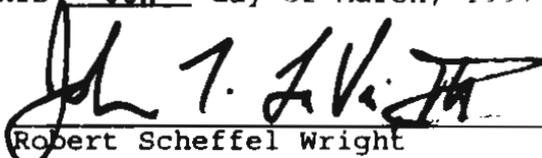
nor will they have any effect on NCM's consent rights under its contract with Lake Cogen. Those contracts will remain unchanged by the Commission's actions, and the parties' consent rights thereunder will likewise remain unmodified by the Commission's decision herein. VGM's request that the Commission delay the proceeding should be denied.

CONCLUSION

VGM has not established standing under accepted principles of Florida administrative law. VGM has not demonstrated that the injury that it will allegedly suffer as a result of the Commission's actions is of sufficient immediacy to warrant a section 120.569-.57 hearing, nor that its alleged injury is of a type that the underlying statutes and rules are designed to protect. VGM is not in privity with either NCP Lake Power, Inc. or FPC, the two signatory parties to the settlement agreement before the Commission. VGM has not stated a claim giving rise to the relief requested, and the Commission should not permit VGM's ill founded petition to impede and delay the Commission's processes.

WHEREFORE, based upon the foregoing, NCP Lake Power, Inc. respectfully moves the Commission to **DENY** the petition of Vastar Gas Marketing, Inc. to intervene in this proceeding.

Respectfully submitted this 6th day of March, 1997.



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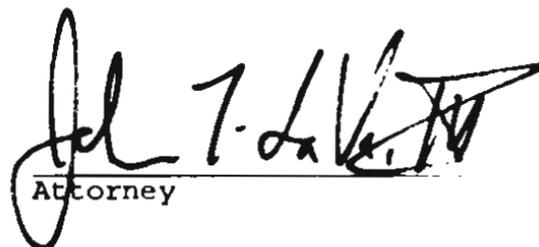
CERTIFICATE OF SERVICE
DOCKET NO. 961477-EQ

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery (*) or by United States Mail, postage prepaid, on the following individuals this 6th day of March, 1996:

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