

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for expedited) DOCKET NO. 961407-EQ
approval of settlement) ORDER NO. PSC-97-0310-PCO-EQ
agreement, regarding negotiated) ISSUED: March 24, 1997
contract for purchase of firm)
capacity and energy from a)
qualifying facility, with Pasco)
Cogen, Ltd., by Florida Power)
Corporation.)
_____)

ORDER DENYING PETITION TO INTERVENE
AND REQUEST FOR ORAL ARGUMENT

On November 25, 1996, Florida Power Corporation ("FPC") petitioned this Commission to approve a Settlement Agreement between FPC and Pasco Cogen, Ltd. ("Pasco"). Previously, FPC and Pasco entered into a Negotiated Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility (the "PPA") on March 13, 1991. On February 20, 1997, Vastar Gas Marketing, Inc. ("Vastar") filed a Petition for Leave to Intervene and a separate Request for Oral Argument in this docket. On March 4, 1997, FPC filed a Response and Opposition to Petition for Leave to Intervene of Vastar Gas Marketing, Inc. On March 5, 1997, Pasco filed Pasco Cogen, Ltd.'s Response and Opposition to Vastar's Petition for Leave to Intervene.

Vastar Gas Marketing, Inc.'s Petition for Leave to Intervene

In its Petition for Leave to Intervene, Vastar requests intervention for the limited purpose of advising us that the Settlement Agreement contains misrepresentations and will result in additional litigation. In addition, Vastar requests that we refrain from approving any settlement between FPC and Pasco until a settlement acceptable to Vastar and North Canadian Marketing Corporation ("NCM") is reached.

According to Vastar's Petition, on August 28, 1991, Pasco entered into a Gas Purchase Agreement ("Sale Agreement") with NCM, whereby NCM agrees to sell, and Pasco agrees to purchase, natural gas for use at the Pasco facility. On October 30, 1992, NCM entered into a Gas Purchase Agreement with Arco Natural Gas Marketing, Inc., predecessor in interest to Vastar. Pursuant to this agreement, NCM agrees to purchase natural gas from Vastar, and deliver the natural gas to Pasco.

DOCUMENT NUMBER-DATE
03053 MAR 24 97
FPSC-RECORDS/REPORTING

Vastar states that the Settlement Agreement will materially alter the terms of the PPA. Vastar also alleges that the fuel supply contracts operate together to expressly prohibit material changes to the PPA without the knowledge and prior consent of NCM and Vastar. Vastar asserts that these changes to the PPA threaten to materially alter the terms of the Sale Agreement to the detriment of Vastar, by altering the economic basis for NCM's Sale Agreement with Pasco and impairing NCM's ability to meet its obligations to Vastar. Consequently, Vastar asserts that it has a substantial interest in this proceeding because it most certainly will experience the burden and expense of litigation if the Settlement Agreement is approved.

Vastar asserts that its participation in this proceeding is necessary for our evaluation of the requested modifications to the PPA for cost recovery purposes. With respect to this assertion, I find that participation by Vastar is not essential to this Commission's appraisal of the effect of the Settlement Agreement on Pasco's fuel supply.

In addition, Vastar argues that the failure of Pasco and FPC to obtain NCM's consent prior to entering into the Settlement Agreement has deprived Vastar of its rights under the Purchase Agreement, i.e., to object to the Settlement Agreement prior to its execution. Vastar maintains that it will be materially and adversely affected if we approve the Settlement Agreement without the consent of NCM and Vastar.

FPC's and Pasco's responses to Vastar's intervention in this docket state that Vastar does not have a substantial interest in this docket. FPC and Pasco state that Vastar will not suffer an injury in fact of sufficient immediacy for this Commission to grant intervention. FPC and Pasco indicate that Vastar's participation in this docket is not necessary for the Commission to understand and evaluate the proposed Settlement Agreement.

Pasco states that Vastar'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. However, Pasco argues that NCM's prior consent to the Settlement Agreement, which Pasco entered into with FPC, is not required. In addition, Pasco states that the GPA that Pasco entered into with NCM, provides that resolution of any dispute arising under the GPA, be submitted to binding arbitration in Houston, Texas. Therefore, Pasco argues

that if it did breach a prior consent provision of the GPA, NCM can only pursue that claim in arbitration proceedings in Texas, not in proceedings before this Commission. Pasco alleges that Vastar can initiate arbitration or litigation with NCM, if it finds that NCM has breached its provisions with Vastar.

Pursuant to Rule 25-22.039, Florida Administrative Code, persons seeking to become parties in a proceeding must demonstrate that they are entitled to participate as a matter of constitutional or statutory right or pursuant to Commission rule, or that their substantial interests are subject to determination or will be affected through the proceeding. Vastar has not alleged that it is entitled to intervene as a matter of right or pursuant to Commission rule. It is appropriate, therefore, to apply the two-pronged test for "substantial interest" set forth in Agrico Chemical Co. v. Dept. of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981), rev. denied 415 So. 2d 1359 (Fla. 1982). According to the Agrico test, a party must show (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57, Florida Statutes, hearing, and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect. Id. at 482.

After consideration, I find that Vastar has not shown that it will suffer an injury in fact which is of sufficient immediacy to warrant a Section 120.57 hearing. Further, Vastar can only speculate as to the effect that the Settlement Agreement may have on NCM. Such conjecture about future economic detriment is too remote to establish standing. See International Jai-Alai Players Assoc. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, at 1225-1226 (Fla. 3rd DCA 1990) (Fact that change in playing dates might affect labor dispute, resulting in economic detriment to players was too remote to establish standing). See also Village Park Mobile Home Association, Inc. v. State, Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), rev. denied, 513 So. 2d 1063 (Fla. 1987) (speculations on the possible occurrence of injurious events are too remote to warrant inclusion in the administrative review process). Cf. Florida Soc. Of Ophthalmology v. State Board of Optometry, 532 So. 2d 1279, 1285 (Fla. 1st DCA 1988) (some degree of loss due to economic competition is not of sufficient "immediacy" to establish standing).

Further Vastar contends that granting it leave to intervene would be consistent with prior Commission orders concerning similar issues of standing. Vastar cites 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). In this docket, for reasons not discussed, FGT was considered to have a substantial interest. However, in this docket, Vastar does not have a substantial interest as articulated in the Agrico test.

With respect to the second prong of the Agrico test, Vastar fails to assert that its substantial injury is of a type or nature which this proceeding is designed to protect. Vastar's basis for asserting standing in this docket is the fact that it sells natural gas to another entity, who in turn sells natural gas to Pasco. FPC and Pasco do not have a contractual arrangement with Vastar. Also, Vastar affirmatively asserts that we do not have jurisdiction to interpret the contract between Vastar and NCM or NCM and Pasco. Therefore, even if Vastar experiences real and immediate injuries, those injuries are not of the type or nature which the proceeding in this docket is designed to protect. Having failed to show that its substantial interest will be determined by our determination in this docket, Vastar has no standing, and is not entitled to intervene under Rule 25-22.039, Florida Administrative Code.

Despite Vastar's assertions, I find that Vastar's participation in this proceeding as a party is not necessary for our evaluation of either the requested modification to the PPA for cost recovery purposes or our evaluation of the Settlement Agreement between FPC and Pasco. For the reasons stated above, Vastar's Petition for Leave to Intervene is denied.

Request of Vastar Marketing Corporation Request for Oral Argument

Vastar's Request for Oral Argument asks that we allow Vastar the ability to provide oral argument to us regarding any issues related to this proceeding. Vastar is not a party to this proceeding, therefore, Vastar's Request is denied.

Based on the foregoing, it is

ORDERED by Commissioner Joe Garcia, as Prehearing Officer, that Vastar Gas Marketing, Inc.'s Petition for Leave to Intervene is denied. It is further

ORDERED that Vastar Gas Marketing, Inc.'s Request for Oral Argument is denied.

ORDER NO. PSC-97-0310-PCO-EQ
DOCKET NO. 961407-EQ
PAGE 5

By ORDER of Commissioner Joe Garcia, as Prehearing Officer,
this 24th day of March, 1997.



JOE GARCIA, Commissioner and
Prehearing Officer

(S E A L)
LW

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.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.