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CALIFORNIA OFFICES  
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February 27, 1997

Ms. Blanca S. Bayó, Director  
Division of Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

Re: **Petition to Intervene in Docket 961407-EQ**  
**Motion to Dismiss Without Prejudice**  
**Request to Participate in Oral Argument**

RECEIVED  
FLORIDA PUBLIC SERVICE COMMISSION  
97 FEB 28 MID 14  
MAIL ROOM

Dear Ms. Bayó:

Enclosed for filing are the original and eight copies of each of three pleadings:

- ACK
- AFA   1   \*
- APP      \*
- CAF
- CMU
- CTR
- EAG   Dudley
- LEG   1
- LIN   5
- OPC
- RCH
- SEC   1
- WAS
- OTH

- The "Petition of North Canadian Marketing Corporation to Intervene as a Party;" - 02227-97 *OK DON*
- The "Motion of North Canadian Marketing Corporation to Dismiss Without Prejudice;" - 02228-97
- and
- The "Request of North Canadian Marketing to Participate in Oral Argument," all in the - 02229-97
- above referenced proceeding, Docket 961407-EQ.

Please date-stamp and return one copy of each of the attached pleadings as acknowledgement of their receipt, retaining the seven copies required under Rule 25-22.0375(3). I have served this pleading upon those identified in the initial filing as attested in the attached certificate of service, and will serve it upon all other parties on the service list as soon as a copy of that list, which was requested today, can be received from your office.

In accordance with the rules, I have included diskettes containing a copy of the attached filings in WordPerfect format. It is provided separately in WP 4.2, WP 5.0, and WP 6.0 for your

BRADY & BERLINER

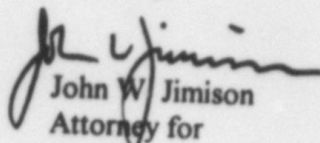
Ms. Blanca S. Bayó  
February 27, 1997  
Page 2

convenience.

In addition, the undersigned hereby provides notice of intent to represent North Canadian Marketing Corporation before the Commission in this matter as a Class A Practitioner pursuant to Rule 25-22.008. I attach an affidavit attesting to the fact that I am licensed to practice law in the District of Columbia and Virginia, and that I have represented clients before federal and state regulatory commissions. I further attach the required sponsorship by a licensed Florida attorney.

Thank you for your assistance in this matter.

Sincerely,



John W. Jimison  
Attorney for  
North Canadian Marketing Corporation

Attachments

**Affidavit of  
John W. Jimison, Esq.**

Pursuant to Rule 25-22.008(2)(b), I, John W. Jimison, Esq., hereby request that I be qualified as a Class A Practitioner to appear before the Florida Public Service Commission for the purpose of representing North Canadian Marketing Corporation and other clients doing business in Florida. In support of that request, I certify that I am and have been since 1975 a licensed attorney in the State of Virginia (Virginia Bar No. 15165) and that I am and have been since 1980 a licensed attorney in the District of Columbia (D.C. Bar No. 316141). I further certify that I have for more than nine years represented clients before State regulatory Commissions (in particular the California Public Utilities Commission) and before the Federal Energy Regulatory Commission.

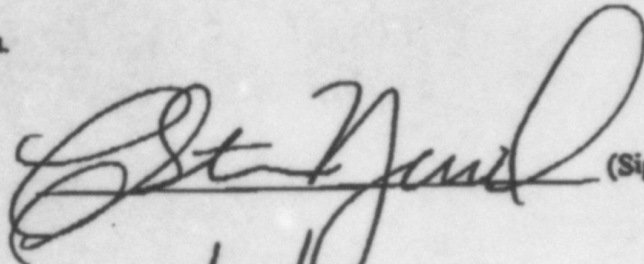
John W. Jimison (Signature)

February 27, 1987 (Date)



**Sponsorship of John W. Jimison, Esq.,  
to Practice before the  
Florida Public Service Commission**

Pursuant to Rule 25-22.008 (2) (b) of the Florida Administrative Code, I. C. Steven Yerrid, Esq., a licensed attorney in the State of Florida, Bar Member No. 207594, do hereby sponsor John W. Jimison, a licensed attorney in the State of Virginia and in the District of Columbia, to practice as a Class A Practitioner before the Florida Public Service Commission in Proceeding No. 961407-EI and in such other matters as may be required in the representation of his clients doing business in Florida.

 (Signature)  
12/18/96 (Date)



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

MOTION OF  
NORTH CANADIAN MARKETING CORPORATION  
TO DISMISS WITHOUT PREJUDICE

Pursuant to Rule 25-22.037, Florida Administrative Code, North Canadian Marketing Corporation ("NCMC") respectfully moves that the subject petition be dismissed without prejudice, to be refiled with the Commission at the conclusion of an ongoing arbitration process among the parties and when all required consents have been obtained, including that of NCMC. In support of this petition, NCMC states as follows:

Introduction

1. NCMC is a California corporation engaged in the sale of natural gas in the United States. NCMC is a wholly-owned subsidiary of North Canadian Resources, Inc., itself a wholly-owned subsidiary of Norcen Energy Resources Limited. NCMC has separately petitioned the Commission for leave to intervene in this proceeding.

- ACK \_\_\_\_\_
- AFA \_\_\_\_\_
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- OTR \_\_\_\_\_

DOCUMENT NUMBER-DATE

02228 FEB 28 86

FPSC-RECORDS/REPORTING

2. In this motion, NCMC argues that the Commission should dismiss the FPC Petition and the Settlement Agreement ("FPC filing") without prejudice for several reasons:

- (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 submitted by the filing is subject to an ongoing arbitration process in Houston, Texas; and
- (3) the filing is misleading because it alleges that it *does* meet all necessary conditions to be reviewed and approved by the Commission.

#### **Background**

3. On November 25, 1996, Florida Power Corporation ("FPC") filed with the Commission a "Petition for Expedited Approval of Settlement Agreement with Pasco Cogen, Ltd. by Florida Power Corporation" ("FPC Petition"). FPC attached to its Petition a document entitled "Settlement Agreement and Amendment to Negotiated Contract for the Purchase of Firm Energy from a Qualifying Facility between Pasco Cogen, Ltd., and Florida Power Corporation" ("Settlement Agreement").

4. As was more fully described by NCMC in its petition to intervene in this proceeding, the Settlement Agreement purports to resolve ongoing litigation between FPC and Pasco Cogen, Ltd. ("Pasco") concerning the payments to be made for power under the Power Purchase Agreement ("PPA") between Pasco and FPC. NCMC has the exclusive right to supply more than 95% of its natural gas requirements to the Pasco Cogen plant each day. The terms and conditions for sale of natural gas by NCMC under



its Gas Purchase Agreement ("GPA") with Pasco are closely related to the terms and conditions under which Pasco sells power to FPC under the PPA.

5. Because of this relationship between the GPA and the PPA, NCMC reserved in Section 3.03 of the GPA the right to provide its express consent prior to any amendment of the Power Purchase Agreement between Pasco and FPC, including one which would have a material and adverse effect on NCMC's interest. Pasco was thereby obligated to seek and obtain NCMC's consent prior to any such amendment.<sup>1</sup>

6. Pasco and FPC have proceeded to finalize the Settlement Agreement, without NCMC's consent, and to file it before the Commission via the above-referenced Petition. The Settlement Agreement, among other things, amends the PPA and modifies the pricing formula for the power sold under the PPA. The Settlement Agreement operates in a manner directly and materially adverse to NCMC's interest as the primary seller of gas for cogeneration by Pasco.

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<sup>1</sup> The text of Section 3.03 of the GPA states as follows: "Agreements to Amendments. Unless required to do so by a final, non-appealable order of a court or Regulatory Authority having jurisdiction, neither Seller nor Buyer shall, without the consent of the other, make or acquiesce in any amendment or other variation in or to the Power Purchase Agreement, the Transportation Agreement, or any other such agreement if such amendment or variation would materially and adversely affect such other party's position (including its anticipated economic benefits) under this Agreement or if the variation is inconsistent with the terms of this Agreement." A complete text of the GPA can be made available to the Commission if requested, but would only be releasable to other parties or the general public under the Commission's confidentiality rules after certain provisions were redacted.



7. However, notwithstanding Pasco's obligation not to agree to amend the PPA without NCMC's consent, and notwithstanding FPC's duty not to induce Pasco to breach its obligations to NCMC by agreeing to amend the PPA without NCMC's consent, NCMC's prior consent was not sought in good faith nor obtained to the Settlement Agreement.<sup>2</sup>
8. Pasco initiated on December 18, 1996, an arbitration process under the terms of the GPA to determine the issue of whether NCMC's rights to consent to amendments to the PPA are violated by the pending Settlement Agreement and its amendments to the PPA. The letter initiating this process and threatening legal action against NCMC if it opposed the Settlement Agreement at this Commission was Attachment A to NCMC's Petition to Intervene in this docket, filed concurrently with this Motion.

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<sup>2</sup> As FPC acknowledges in its Petition (Footnote #3, at p. 3), the project lender's prior consent to amendment of the PPA was sought and obtained.

**Motion to Dismiss Petition**

9. In light of these facts and allegations, and for the reasons further indicated below, NCMC hereby moves that the Commission dismiss the FPC Petition and its accompanying Settlement Agreement, without prejudice to it being refiled at such time as the arbitration process begun at Pasco's initiative in Houston is concluded and NCMC's consent has been sought and obtained, as is provided in the GPA.

10. Because of Pasco's failure to meet its obligation to obtain NCMC's consent to any Settlement Agreement, and FPC's knowing participation in the filing of the Settlement Agreement with this Commission without NCMC's consent to it, NCMC submits that the Settlement Agreement should not now be considered further by this Commission because it is incomplete and defective. The Settlement Agreement, as presented, has not been duly executed by all parties whose signatures are required to make it valid, and should not be considered until it has been subscribed to by NCMC as well as Pasco, FPC, and Prudential. At best, the so-called "Settlement Agreement" is a work in progress, and is not ripe for submission to this Commission. It should therefore be dismissed, without prejudice, subject to agreement among all key parties to it, including NCMC.

11. Neither the FPC Petition nor the Settlement Agreement contain any reference to NCMC, its right to prior consent to any amendment, arbitration over that right, or the failure of the parties to seek or obtain that prior consent. NCMC submits that the

omission of that information constituted a deliberate attempt to prevent this Commission from becoming aware of critical issues bearing on the Settlement Agreement. This provides additional grounds for dismissal without prejudice of the Petition, subject to being corrected to include not only references to NCMC's role and the requirement of consent, but also to include NCMC's actual consent, as provided in its agreement with Pasco.

12. To propose that the Commission dedicate its staff and other resources to the consideration and approval of a Settlement Agreement subject to a serious defect that will inevitably require further changes is to propose to waste the Commission's time and resources. There is no reason that the disputes among the parties as to the structure of their arrangements should occupy the Commission when the parties have clearly not done what is contemplated by the current agreements to reach a consensus among themselves prior to seeking Commission review and approval. The FPC Petition and Settlement Agreement should therefore be dismissed until such time as the defect is cured and an agreement can be presented to the Commission which has been consented to by all parties whose consent is required, including NCMC.

13. Indeed, the omission of a material and critical element required before the Settlement agreement can be valid -- NCMC's consent -- renders FPC's petition false and misleading insofar as FPC and Pasco have represented to the Commission in their Settlement Agreement that they have obtained, or have made reasonable efforts to obtain,



all necessary consents (Settlement Agreement, Paragraph 14, at p. 9).

14. NCMC notes that Pasco has demanded arbitration with NCMC over NCMC's consent rights under the arbitration terms of the GPA.<sup>3</sup> This arbitration process is underway, and is intended to determine whether or not Pasco required NCMC's consent prior to agreeing to any amendment to the PPA, including the subject Settlement Agreement. In light of this arbitration process, NCMC submits that the Commission should grant this motion and dismiss the FPC Petition and Settlement Agreement without prejudice pending the results of the arbitration. For the Commission to continue to review and consider the FPC Petition and Settlement Agreement while the arbitration process proceeds risks approving a settlement that may be, and NCMC believes will be, found invalid for lack of NCMC's consent. Since Pasco initiated arbitration, Pasco should not be heard to argue that the Commission's consideration of the FPC petition and Settlement Agreement should continue despite the arbitration process.
15. The FPC Petition claims that FPC's ratepayers will realize significant benefits from the approval of the Settlement Agreement as a result of the termination of litigation between FPC and Pasco. Given the violation of NCMC's rights and interests in the project thereby occasioned, however, the pendency of arbitration on the validity of the amendments to the PPA agreed to in the Settlement Agreement itself, and the potential

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<sup>3</sup> See letter to NCMC from Pasco, Attachment A to concurrent NCMC Petition to Intervene in this proceeding.

remedies NCMC would otherwise be required to seek, NCMC doubts that any such claim of ratepayer benefits has any validity. This is an issue of fact on which the Commission must have a record prior to any decision, yet there is no record, and such a record cannot be complete without evidence relative to the gas supply to the plant and the implications of the Settlement Agreement for that supply. If the Commission declines to accept the need to have the FPC Petition dismissed pending arbitration, or corrected to include evidence of NCMC's required consent to the Settlement Agreement, the Commission should nonetheless grant this motion on the grounds that the FPC Petition and Settlement Agreement provide no information on the basis of which the Commission could reach a reasoned decision concerning the effects of the settlement on the plant's gas supply and viability.

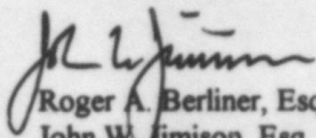
16. In particular, the Commission should refuse expedited treatment as requested for the FPC Petition and Settlement Agreement. No basis whatsoever has been offered by FPC warranting special expedited treatment of the FPC Petition. NCMC submits that the real reason for the request for expedited treatment is to preclude NCMC's meaningful involvement in the proceeding, and to rush the Commission to a premature judgment on it in the absence of critical information about its effects.

17. Therefore, judged in the narrow context of the pleadings before this Commission in this docket, the Commission should act to dismiss the FPC Petition and Settlement Agreement without prejudice subject to them being refiled when the arbitration process is

complete and the pleadings have been corrected to include or reflect the required consent.

18. *Wherefore*, NCMC respectfully moves that the Commission dismiss the petition and its accompanying Settlement Agreement without prejudice subject to the completion of the arbitration process or subject to Pasco and FPC curing its defects by reopening its terms and obtaining, as required, NCMC's prior consent to any and all proposed amendments of the PPA.

Respectfully submitted,



Roger A. Berliner, Esq.

John W. Jimison, Esq.

Peter G. Hirst, Esq.

Brady & Berliner

1225 19th Street, N.W.

Washington, D.C. 20036

Attorneys for

**North Canadian Marketing Corporation**

February 27, 1997



CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled in this proceeding.

Dated at Washington, D.C. this 28th day of February, 1997.

Evonne Edmonds

Evonne Edmonds