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March 4, 1997

IN REPLY REFER TO:

Ansley Watson, Jr.  
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## 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.

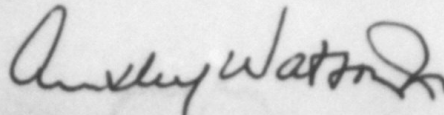
Please acknowledge your receipt of the enclosures on the duplicate copy of this letter, and return the same to me in the enclosed preaddressed envelope.

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**

In re: Petition for expedited )  
approval of settlement agreement )  
with Pasco Cogen, Ltd. by Florida )  
Power Corporation. )  
\_\_\_\_\_ )

Docket No. 961407-EQ

Submitted for Filing:  
3-5-97

**PASCO COGEN, LTD.'s RESPONSE AND OPPOSITION  
TO NCMC'S PETITION FOR LEAVE TO INTERVENE**

Pasco Cogen, Ltd. ("Pasco"), by its undersigned attorneys, requests that the Commission deny the Petition for Leave to Intervene filed herein by North Canadian Marketing Corporation ("NCMC"), and all relief requested by NCMC in such petition. NCMC's petition fails to show (A) that NCMC will suffer injury in fact which is of sufficient immediacy to entitle it to a Section 120.57 hearing, and (B) that NCMC's substantial injury (if any) is of a type or nature which the proceeding in this docket is designed to protect. Having failed to show that its substantial interests will be determined by the Commission's determination in this docket, NCMC has no standing, and is not entitled to intervene under Rule 25-22.039, F.A.C.

**MEMORANDUM IN SUPPORT OF PASCO'S RESPONSE**

Condensed to its essence, NCMC's petition argues that NCMC should be permitted to intervene because:

1. The Settlement Agreement between Florida Power Corporation ("FPC") and Pasco has not received the prior consent of NCMC. Several of the amendments to the Power Purchase Agreement between FPC and Pasco (the

"PPA") "may affect" the pricing and quantity of power sold under the PPA, and thereby the economics and volumes of gas required by Pasco's cogeneration facility. The PPA, as amended by the Settlement Agreement, are materially adverse to NCMC's interest as the primary seller of gas to Pasco (under the Gas Purchase Agreement, or "GPA," between NCMC and Pasco.

2. NCMC must be allowed to participate so the Commission can understand the implications of the Settlement Agreement for the fuel supply to Pasco's project, the viability of that project, and the cost-effectiveness to the ratepayers.

None of the foregoing assertions, or any other fact set forth in NCMC's petition, confers on NCMC standing to intervene or participate in this docket.<sup>1</sup>

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<sup>1</sup> It should be noted that the basis for intervention mentioned under paragraph 2 above has nothing whatsoever to do with NCMC's standing (or the lack thereof) to participate in this proceeding.

Although not included in the above summary, NCMC's petition makes various other assertions: (a) that Pasco has received a significant sum of money reflecting past underpayments by FPC for power, but has refused to pay monies owed to NCMC for the gas which was used to generate that power (NCMC Petition Footnote 4); (b) that NCMC was not served with the Settlement Agreement and FPC's petition in this docket, and that neither Pasco nor FPC informed NCMC that they had reached a settlement; (c) that the Commission should permit NCMC to intervene because Pasco and FPC are "trying to present NCMC with a *fait accompli*" (NCMC Petition ¶ 15); and (d) that, because Pasco has initiated arbitration of NCMC's disputes under the GPA, the Commission should not review the Settlement Agreement until after the arbitrator has ruled in the arbitration proceeding.

Although Pasco will not argue its position in the arbitration proceeding (in which no arbitrator has yet been selected by the parties to the GPA), it will respond to the foregoing points.

The monies received by Pasco from FPC were received pursuant to the Settlement Agreement, which NCMC has, as of this date, refused to recognize. It is true that NCMC was not served with the Settlement Agreement or FPC's petition in this docket. However, NCMC is not a party to the Settlement Agreement or the PPA. NCMC was advised long before the Settlement Agreement was executed by FPC and Pasco that Pasco

### Commission's Lack of Jurisdiction

Pasco would ask that the Commission bear in mind the following quotation from NCMC's petition for leave to intervene:

"NCMC is *not* asking the Commission to review, judge, take jurisdiction over, or settle any issues arising under the GPA between NCMC and Pasco. NCMC is not asking for standing in this proceeding as a function of any need, requirement, or authority for the Commission to govern the performance of the GPA. The Commission does not have jurisdiction over the GPA, nor does it need to have jurisdiction merely to recognize that, as a function of the consent rights embedded in the GPA, the Commission cannot review the validity of the proposed amendments to the PPA in the Settlement Agreement without NCMC participating as a party. The GPA is clear on its face that Pasco cannot legally participate in nor agree to the proposed amendments to the PPA without NCMC's prior consent. . . ." NCMC Petition ¶ 25.

NCMC, in the language of its own petition quoted above, recognizes that the Commission has no jurisdiction over the GPA, its performance, or issues arising

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did not intend to seek NCMC's prior consent because it did not believe NCMC's position under the GPA was materially and adversely affected under the GPA by the amendments to the PPA.

With respect to any attempt by Pasco to present NCMC with a *fait accompli*, that is exactly the manner in which Pasco views its settlement of its litigation with FPC under the PPA (to which NCMC is not a party). If an arbitrator ultimately determines Pasco breached the GPA because of its execution of the Settlement Agreement without NCMC's prior consent, then Pasco may suffer the consequences of its decision; but it will not be without a settlement of its litigation with FPC, which could never have been accomplished had NCMC been involved in the negotiations.

Finally, whether Pasco was, or was not, required to obtain NCMC's consent to the Settlement Agreement is a matter which involves only Pasco and NCMC, as it arises as an issue under the GPA between those parties. That issue has nothing to do with the Commission's determination of whether FPC should be permitted to recover the payments to be made to Pasco under the PPA as amended by the Settlement Agreement. Nor, if Pasco is determined by an arbitrator to have breached the PPA, does the Commission's approval of the Settlement Agreement control the payments to be made by Pasco to NCMC for gas consumed at Pasco's facility. It is disingenuous for NCMC to suggest that the Commission "punish" FPC and Pasco because Pasco may not have obtained a consent which may have been required under an agreement over which the Commission has no jurisdiction. It is even more disingenuous to suggest that this fact somehow confers standing on NCMC to intervene in this proceeding to obtain relief which it acknowledges the Commission lacks jurisdiction to provide, and which the GPA provides must be obtained in arbitration.

thereunder. However, in the same breath, NCMC (a) asks the Commission to "recognize" that the Commission cannot review the validity of the proposed amendments to the PPA without NCMC's participating as a party, and (b) states that the GPA "is clear on its face" with respect to what Pasco may or may not do under the GPA without NCMC's consent. In order to make either of these determinations, the Commission must do what NCMC has said it has no jurisdiction to do -- "review, judge, take jurisdiction over, or settle any issues arising under" the GPA between NCMC and Pasco.

When the Commission approved the PPA for cost recovery purposes in 1991, only that agreement was before the Commission. The Commission did not evaluate from whence -- or at what price -- Pasco would obtain the gas required to operate its cogeneration facility. When Pasco contracted with NCMC later in 1991 for the supply of gas to the facility, it was not required to bring that agreement to the Commission for review. Pasco submits that NCMC's allegation of a "need" on the part of the Commission for NCMC's participation in this docket -- on any issue -- is a non sequitur in view of the Commission's lack of jurisdiction over the GPA.

#### Consent Rights of NCMC

NCMC states that Pasco entered into the Settlement Agreement with FPC without obtaining NCMC's prior consent, as allegedly required by Section 3.03 of the GPA. Although not important here, Pasco's position is that NCMC's prior consent was not required. What is important here is that the GPA itself provides the mechanism for the resolution of that dispute between NCM and Pasco, requiring explicitly that all disputes

arising under the GPA be submitted to binding arbitration between Pasco and NCM in Houston, Texas, before a single arbitrator.

NCMC's arguments that it should be permitted to intervene in this case are based almost exclusively on Pasco's failure to obtain NCMC's prior consent to the amendments to the PPA made by the Settlement Agreement. That failure (which Pasco admits for purposes of this response) forms the basis for NCMC's allegations that the Settlement Agreement contains "flaws" and "misstatements of fact," and that the Settlement Agreement, if approved, may materially and adversely affect NCMC's interest under the GPA.

The Commission, however, as admitted by NCMC, has no jurisdiction to provide relief to NCMC. If Pasco has breached the prior consent provision of the GPA, NCMC can pursue that claim in arbitration proceedings with Pasco. NCMC could not, however, initiate a proceeding before this Commission as a result of any such breach because the Commission has no jurisdiction to entertain such a proceeding. The alleged breaches of contract with which NCMC appears to be concerned arise out of a gas supply agreement over which, and over the parties to which, this Commission possesses no jurisdiction. Thus, NCMC's own petition makes it clear that the interests it seeks to protect through intervention are not of the type or nature this proceeding is designed to protect.

Pasco submits that NCMC seeks to participate in this proceeding for the sole purpose of obtaining, indirectly, the further delay of the settlement of the litigation between Pasco and FPC -- relief which the Commission would have no jurisdiction to

grant if sought by NCMC directly.

### Resolution of Litigation

NCMC's petition states that the Commission should consider, as a disputed issue of material fact, "the effectiveness of the proposed Settlement in its claim to terminate litigation and avoid litigation expenses with potential effect on ratepayers."

Pasco submits that each and every mention of the resolution of litigation in FPC's petition for approval of the Settlement Agreement (see ¶¶ 3, 6 and 11 of FPC's Petition) is correct because each such reference is to the litigation pending between Pasco and FPC since November 1994. FPC has presented fully the facts necessary for the Commission to decide whether to approve the Settlement Agreement for cost recovery purposes. The Settlement Agreement comprehensively resolves the litigation between FPC and Pasco. Whether "potential" new litigation may ensue between Pasco or FPC and persons (such as NCMC) that are not parties to the PPA or the Settlement Agreement is irrelevant to the issue of whether NCMC has standing to participate as a party in this proceeding. Pasco and FPC should not be prevented from settling the litigation between them just because some third person "might" bring an action against either or both of them. If NCMC has claims against Pasco or FPC arising out of the "prior consent" provisions of the GPA, this Commission is not the forum in which those claims may be decided. Certainly those claims cannot confer standing on NCMC to participate in the proceeding in this docket, the sole issue in which is whether FPC will be permitted to recover the payments it makes to Pasco under the PPA as amended by the Settlement Agreement.



### Fuel Supply and Other Issues

NCMC asserts (NCMC Petition, ¶¶ 21, 22 and 23) that its interest, "as the exclusive supplier of fuel" for Pasco's facility, is within the range of interests that the Commission's jurisdiction over agreements between regulated utilities and cogenerators is designed to protect, citing a May 1995 order<sup>2</sup> of the Commission as support for its position. Pasco agrees that the Commission must approve the amendments to the PPA made by the Settlement Agreement for cost recovery purposes (and would note that FPC has brought such modifications to the Commission for approval in this docket). However, it cannot agree that the May 1995 order cited by NCMC provides any basis for a finding that NCMC should be permitted to intervene in this proceeding.

With reference to fuel source, the May 1995 order clearly speaks only to changes in the type of fuel to be used by a cogenerator. The amendments to the PPA made by the Settlement Agreement do not involve changes in the type of fuel to be used in Pasco's facility. Further, the only assertion made by NCMC with respect to the impact of the Settlement Agreement is that

"... FPC's and Pasco's failure to obtain NCMC's consent to the Settlement Agreement and its amendments to the PPA have assured that 'the primary fuel source of the QF facility' has been placed seriously at risk, and with it 'the continuing cost-effectiveness to the ratepayers' and 'the viability of the project.'" NCMC Petition ¶ 22.

NCMC's petition is silent on how the "continuing cost effectiveness to the ratepayers" or

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<sup>2</sup> In Re: Petition for approval, to the extent required, of certain actions relating to approved cogeneration contracts by Florida Power Corporation. Order No. 95-0540-FOF-EQ, Docket No. 940797-EQ (May 2, 1995).

"the viability of the project" has been or could be affected by Pasco's failure to obtain NCMC's consent to the PPA amendments included in the Settlement Agreement, and Pasco submits that any such allegations -- if made -- would be mere speculation. Even assuming the subject of NCMC's speculation was relevant to its standing (which it is not), the Commission has determined previously that such conjecture is insufficient to establish standing to intervene.<sup>3</sup> Because the interest NCMC seeks to protect in connection with the determination to be made in this case by the Commission is not the type of interest the proceeding is designed to protect, NCMC has no standing to participate as a party.<sup>4</sup>

#### Standard for Intervention

Intervention in proceedings before the Commission is governed by Rule 25-22.039, F.A.C., and applicable case law. The rule provides, among other things, that a petition for leave to intervene

must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding. . . .

NCMC has alleged no constitutional or statutory right, nor any Commission rule,

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<sup>3</sup> See, e.g., In Re: Petition of Jacksonville Electric Authority to resolve a territorial dispute with Florida Power & Light Company in St. Johns County, Order No. PSC-96-0158-PCO-EU, Docket No. 950307-EU (February 5, 1996).

<sup>4</sup> As previously noted, when the Commission approved the PPA for cost recovery purposes in July 1991, Pasco had no contract for the supply of gas to its cogeneration facility. The Commission at that time was perfectly capable of evaluating the PPA without the assistance of NCMC or any other gas supplier. Surely it is just as capable of evaluating the amendments to the PPA made by the Settlement Agreement.

under which it is entitled to participate in this proceeding. Although NCMC has alleged that its substantial interests will be affected through the proceeding, its petition shows on its face that such is not the case.

NCMC recognizes that whether it is entitled to intervene is governed by the two-pronged test for "substantial interest" articulated in Agrico Chemical Co. v. Dept. of Environmental Regulation, 406 So.2d 478, 482 (2d D.C.A. Fla. 1981), rev. den. 415 So.2d 1359 (Fla. 1982). According to Agrico, a person seeking leave to intervene must show (a) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57 hearing, and (b) that his substantial injury is of a type or nature which the proceeding is designed to protect. Despite its assertions to the contrary, NCMC has made neither showing.

NCMC argues that it will suffer "significant injury" if the Settlement Agreement is approved by the Commission and the PPA is restructured, since such restructuring will preemptively establish conditions that will make the current terms of the GPA "unworkable, contrary to the intent of the parties, or out of step with the controlling reality." NCMC Petition ¶ 20. Even assuming this is the case (and NCMC appears to be unclear with respect to which of these effects might be precipitated by the restructuring of the PPA), the Commission has no jurisdiction over the alteration of the GPA between Pasco and NCM, and no jurisdiction to prevent that agreement (or NCMC's interest therein) from becoming "unworkable," etc. Thus, even if the Commission's approval of

the Settlement Agreement will come "at the expense" of NCMC,<sup>5</sup> the injuries which may be experienced by NCMC are not of the type or nature which the proceeding in this docket is designed to protect. NCMC has not made the showing necessary to entitle it to intervene as a party. Even if the injuries described by NCMC (see NCMC Petition, ¶ 20) were to occur (rather than, according to VGM, being alternative possibilities), it cannot follow that intervention in this proceeding is necessary for NCMC to protect its interest in the GPA.<sup>6</sup> NCMC's petition shows on its face that the Commission has no jurisdiction to assist in resolving its plight.

### Conclusion

NCMC's petition for leave to intervene must be denied. It shows neither that NCMC will suffer real and immediate injury as a result of the Commission's determination in this proceeding, nor that whatever injury it might suffer is of the type

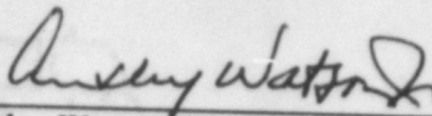
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<sup>5</sup> Pasco submits that any damage suffered by NCMC as a result of Pasco's alleged violation of NCMC's consent rights in executing the Settlement Agreement will be suffered by virtue of the implementation of the amendments made to the PPA by the Settlement Agreement, not by virtue of the Commission's approval of those amendments. Therefore, such damage or injury does not meet the test required for NCMC to establish standing to participate. Village Park Mobile Home Ass'n., Inc. v. State, Dept. of Business Regulation, 506 So.2d 426, 433 (1st D.C.A. Fla. 1987). But for the issue of cost recovery, there would have been no need for FPC's petition to this Commission in the first instance.

<sup>6</sup> In fact, because all of the potential injuries NCMC alleges it might suffer allegedly flow from Pasco's failure to obtain NCMC's prior consent to the amendments to the PPA made by the Settlement Agreement, the Commission, before it could decide whether NCMC has established the requisite standing to participate in this proceeding, would also have to (a) construe the "prior consent" provision of the GPA, and (b) then determine whether the amendments to the PPA materially and adversely affected NCMC's position under the GPA. This latter determination would require the Commission to compare NCMC's position under the GPA immediately before Pasco's settlement with FPC, to NCMC's position under the GPA immediately after the effectiveness of such settlement, and then make a further determination if any difference in position rose to the level of being "material and adverse" to NCMC's position. This is not the role of this Commission in determining whether FPC should be permitted to recover the payments under the PPA (as amended by the Settlement Agreement) from its ratepayers.

or nature that this proceeding is designed to protect.

Respectfully submitted,

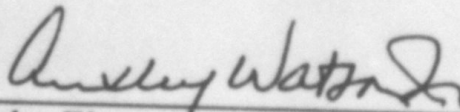


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Attorneys for Pasco Cogen, Ltd.

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, Eady & 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.