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March 17, 1997

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Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, FL 32399-0850

Via Hand Delivery

Re: Petition for Expedited Approval of Settlement Agreement with Lake Cogen, Ltd. by Florida Power Corporation, Docket No. 961477-EQ

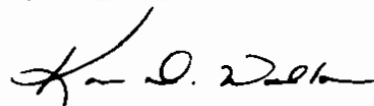
Dear Ms. Bayo:

On behalf of our client, Vastar Gas Marketing, Inc. ("VGM"), enclosed for filing in the docket referenced above are the original and 15 copies of VGM's Omnibus Memorandum in Opposition to Florida Power Corporation's Response and Opposition and NCP Lake Power, Ltd.'s Motion to Deny the Petition to Intervene of Vastar Gas Marketing, Inc.

For our recordkeeping requirements, please acknowledge your receipt of this filing on the enclosed copy of this letter. Thank you for your consideration in this matter.

Sincerely,

HOLLAND & KNIGHT LLP



Karen D. Walker

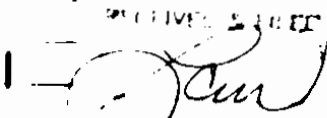
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Enclosure
KDW/sms

cc: Norma Rosner, Esq.
Chuck King, Esq.

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DOCUMENT FILED

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FPSC-RECORDS/REPORTING

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 17, 1997

**VASTAR GAS MARKETING, INC.'S OMNIBUS MEMORANDUM IN
OPPOSITION TO FLORIDA POWER CORPORATION'S RESPONSE AND
OPPOSITION AND NCP LAKE POWER, LTD.'S MOTION TO DENY
THE PETITION TO INTERVENE OF VASTAR GAS MARKETING, INC.**

Florida Power Corporation ("FPC") has filed a Response and Opposition to Vastar Gas Marketing, Inc's Petition for Leave to Intervene (the "Petition"). Through its "Response," FPC asserts that VGM does not have standing and moves the Florida Public Service Commission (the "Commission") to dismiss VGM's Petition. NCP Lake Power, Ltd. ("NCP Lake") has also filed a Motion to Deny VGM's Petition. Accordingly, VGM, by and through undersigned counsel, submits this memorandum in opposition to FPC and NCP Lake's above-described motions.

FPC and NCP Lake's motions heavily rely on the standing test articulated by the Florida Second District Court of Appeal in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981). FPC and NCP Lake urge the Commission to rigidly apply the Agrico test to exclude indispensable parties from this proceeding. VGM has a substantial interest in this proceeding and is so situated that the disposition of this proceeding in its absence will undermine its ability to protect its interests. As indicated below, VGM, as a fuel supplier, will suffer real and immediate injury as a result of the Commission's approval of the Settlement Agreement. VGM, therefore, satisfies the grounds for intervention and is entitled to

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FPSC-RECORDS/REPORTING

participate in this proceeding which is expressly governed by Rule 25-17.0836, Florida Administrative Code.

**VGM Will Suffer Injury In Fact If The
The Commission Approves the Settlement Agreement**

1. FPC and NCP Lake suggest that VGM lacks standing because it will not suffer any real and immediate injury if the Commission approves the Settlement Agreement between FPC and Lake Cogen, Ltd. ("Lake Cogen"). FPC and NCP Lake are wrong.

2. NCP Lake is the managing general partner of Lake Cogen. Lake Cogen is a party to a fuel supply agreement with North Canadian Marketing Corporation ("NCM") (the "Sale Agreement"). The pricing provisions of the Sale Agreement are tied to the pricing provisions of Lake Cogen's power purchase agreement with FPC (the "PPA"). NCM, in turn, is a party to an agreement with VGM (the "Purchase Agreement") the pricing provisions of which are also tied to the PPA. If the Settlement Agreement is approved by the Commission, VGM expects that Lake Cogen will attempt to pass through any reduction in the price that Lake Cogen is paid for electricity delivered under the PPA to the project's fuel suppliers. If this occurs, VGM will suffer real and immediate injury because NCM's ability to continue to fulfill its contract with VGM may be impaired and could induce NCM to abrogate its obligations to VGM.

3. VGM's belief that its payments under the Purchase Agreement will be reduced as a result of the Settlement Agreement is based on representations by Lake Cogen that its payments to NCM under the Sale Agreement will be reduced if the Settlement Agreement is approved by the Commission. If VGM is mistaken, and Lake

Cogen does not intend to pass through the reductions in the price it is paid under the PPA to NCM, VGM will not suffer any injury in fact. However, if Lake Cogen intends to pass through any reductions to NCM, VGM will be injured.

4. NCP Lake and Lake Cogen are aware that if Lake Cogen passes through reductions in the payments it receives from FPC under the PPA as a result of the Settlement Agreement, NCM will be injured. Lake Cogen, however, did not involve NCM in the negotiation of the Settlement Agreement. As a result, VGM was also excluded. NCP Lake and FPC urge the Commission to continue to prevent NCM and VGM from having any input in the Settlement Agreement. The Commission should not succumb to this suggestion. VGM should not be forced to bear the burden of the Settlement Agreement without, at minimum, having the opportunity to provide the Commission with competent substantial evidence on the expected injury that it will suffer.

**The Commission Must Consider Fuel Supply Issues In
Evaluating Contract Modifications Pursuant to Rule 25-17.0836**

5. It is undisputed that the Settlement Agreement will radically alter the terms of the PPA and that such modifications must be approved by the Commission pursuant to Rule 25-17.0836. In evaluating modifications to power purchase agreements pursuant to Rule 25-17.0836, the Commission must find that the modifications are prudent. This prudence determination can only be made after consideration of multiple factors, including the impact that the modifications will have

on fuel supply and project viability.¹ These factors must be examined not only from the perspectives of the cogenerator and the utility, but also from the perspectives of other entities that have a vital interest in the cogeneration project, including without limitation, lenders, fuel suppliers and fuel transporters. Indeed, Section 3.3 of the PPA, the modification of which is the focus of this proceeding, expressly recognizes that fuel suppliers and fuel transporters have a right to impact the administration and operation of the PPA.²

6. The Commission granted intervention to General Electric Capital Corporation ("GECC") -- a lender -- in Docket No. 941155-EQ in which the Commission determined whether certain modifications to a standard offer contract between Tampa Electric Company and Polk Power Partners, L.P. were prudent for cost recovery purposes. GECC petitioned to intervene in the proceeding based on its interest as a lender to the project from which the power purchase agreement was to be administered, its interest as the potential lender to the project from which the power purchase agreement would be administered if assigned, and its security interests in the power purchase agreement. The Commission held that GECC met the standards for

¹ The logical link between project viability and fuel supply is not unique to a proceeding conducted pursuant to Rule 25-17.0836. Indeed, an examination of fuel supply in relation to project viability is a necessary element of both rate case and need determination proceedings. See Fla. Admin. Code R. 25-22.081(2) (requiring a petition for need determination to describe the fuel supply of the proposed project).

² In fact, in a recent proceeding involving a similar settlement agreement, the Commission expressly considered the integrity of a cogenerator's fuel supply in approving the settlement for cost recovery. In Re: Petition for expedited approval of settlement agreement between Florida Power Corporation and Orlando Cogen, L.P., 96 F.P.S.C. 7:314, Docket No. 960193-EQ, Order No. PSC-96-0898-AS-EQ (July 12, 1996).

intervention. See In Re: Joint petition for expedited approval of contract modifications to a 1989 Standard Offer Contract by TAMPA ELECTRIC COMPANY, ORANGE COGENERATION LIMITED PARTNERSHIP, and POLK POWER PARTNERS, L.P., 94 F.P.S.C. 11:237, Docket No. 941155-EQ, Order No. PSC-94-1393-PCO-EQ (Nov. 14, 1994).

7. The Commission likewise granted intervention to Florida Gas Transmission Company ("FGT") -- a fuel transporter -- in Docket No. 940771-EQ, which involved the same power purchase agreement that the Settlement Agreement here proposes to modify. See 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, 94 F.P.S.C. 11:279, Docket No. 940771-EQ, Order No. PSC-94-1401-PCO-EQ (Nov. 16, 1994).

FGT's Petition for Leave to Intervene, which the Commission granted, states:

The declaration sought in FPC's Petition would affect the pricing mechanism of the referenced contracts and thus potentially affect the economic structure of each referenced Qualifying Facility's project. Obviously, FGT has a direct interest in any proceeding, including the instant FPC matter, that could operate to affect the projects to be served by its transmission system.

8. VGM seeks to intervene in this proceeding on virtually the same basis as FGT was granted intervention in Docket No. 940771-EQ and GECC was granted intervention in Docket No. 941155-EQ. Indeed, VGM submits that its interest as a fuel supplier to the Lake Cogen project is even more direct than FGT's interest as a fuel transporter and GECC's interest as a lender. This is because the Commission is obligated by Rule 25-17.0836 to evaluate the impact of fuel supply on project viability

in this proceeding. There was no such obligation in Docket No. 94155-EQ³ or Docket No. 940771-EQ, yet the Commission properly granted GECC and FGT party status in those respective dockets.

9. In Docket No. 940771-EQ, the Commission found that FGT as a fuel supplier had a substantial interest in a proceeding that affects pricing under a power purchase agreement.⁴ Otherwise, the Commission would not have granted FGT's petition. The Commission also found that GECC was entitled to intervene in Docket No. 941155-EQ because it granted GECC's petition. NCP Lake and FPC would have the Commission disregard this precedent by blindly applying the Agrico case. Such precedent cannot be idly swept aside, particularly since project fuel supply and viability issues, by rule, are now crucial components of a contract modification proceeding.

10. VGM's perspective is essential to the prudency determination that the Commission will make in this proceeding. The Commission can only fully and fairly evaluate the viability of Lake Cogen's project if NCM and VGM are provided the opportunity to participate in this proceeding. Fuel suppliers cannot rely on cogenerators and utilities to provide the Commission with the complete picture of the implications of fuel supply on project viability. To be sure, if NCM and VGM had not

³ Although Docket No. 94155-EQ involved modifications to a power purchase agreement, Rule 25-17.0836 had not been enacted when the Commission issued its final order in Docket No. 94155-EQ.

⁴ FPC's petition in this proceeding was ultimately dismissed by the Commission due to lack of subject matter jurisdiction subsequent to the Commission granting FGT intervention. The dismissal, however, did not affect the Commission's decision that FGT's substantial interests would be affected by the proceeding.

petitioned to intervene in this proceeding, the Commission would not be aware that its approval of the Settlement Agreement will injure NCM and VGM, or that the project's fuel supply could be jeopardized by the Settlement Agreement.

Good Regulatory Policy Dictates That Fuel Suppliers Must Be Afforded An Opportunity To Participate In Buy-Out/Buy-Down Proceedings

11. FPC claims that "there are no broad policy issues germane to the matters before the Commission in this proceeding." Although FPC would like to think of this proceeding as an isolated occurrence between a particular cogenerator and itself, FPC cannot realistically ask the Commission to ignore the impact that this proceeding will have on future proceedings. This proceeding is just one of many buy-out/buy-down proceedings that will be brought before the Commission in the foreseeable future. The decisions that the Commission makes in this proceeding will undoubtedly guide the Commission and the affected parties in future proceedings.

12. FPC not only attempts to isolate this proceeding from anticipated future buy-out/buy-down proceedings, but FPC and NCP Lake also suggest that a buy-out/buy-down agreement only involves the cogenerator and utility that are parties to the agreement. As demonstrated by this memorandum and VGM's Petition, the real and immediate impact of a buy-out/buy-down agreement, such as the Settlement Agreement, extends much further than FPC and NCP Lake would lead the Commission to believe.

13. VGM is not suggesting that any person or entity that has some type of stake in a cogeneration project is entitled to intervene in a buy-out/buy-down proceeding. Fuel supply, however, is different. Unlike some other products and

services provided to a project, fuel supply is inherently linked to project viability. The Commission has already recognized that fuel supply issues are an integral part of buy-out/buy-down proceedings. See In Re: Petition for approval of agreement to buy out Cypress Energy Company standard offer contract by Florida Power & Light Company, 96 F.P.S.C. 7:290, 294, Docket No. 940546-EU, Order No. PSC-96-0889-FOF-EU (July 9, 1996) (evaluating fuel supply as part of determination of project viability); see also Orange and Rockland Utilities, Inc. - Petition For Authorization to Defer the Costs Related to the Termination of the Power Sales Agreement Between Orange and Rockland Utilities, Inc. and Harriman Energy Partners, Ltd., N.Y.P.S.C. Case No. 94-E-0735, Order Approving Deferral of Power Purchase Contract Termination Costs (Dec. 7, 1994) (fuel supply is relevant to project viability).

14. No project can generate electricity without fuel supply. Thus, in evaluating a contract buy-out/buy-down, the Commission must consider the impact that the buy-out/buy-down will have on a project's fuel supply. A project's fuel suppliers, therefore, are necessary parties to a buy-out/buy-down proceeding and their participation is critical if the Commission is to properly evaluate the issues pursuant to Rule 25-17.0836.

Conclusion

VGM's substantial interests will be determined by the Commission in this proceeding. In addition, as a fuel supplier, VGM is a necessary party to this proceeding. VGM, therefore, has standing to intervene.

Respectfully submitted,



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**Attorneys for Vastar
Gas Marketing, Inc.**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Omnibus Memorandum in Opposition to Florida Power Corporation's Response and Opposition and NCP Lake Cogen, Ltd.'s Motion to Deny was furnished by U.S. mail or *hand delivery to the following this 17th day of March, 1997:


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