

Law Offices

# HOLLAND & KNIGHT

A Registered Limited Liability Partnership

315 South Calhoun Street  
Suite 600  
P.O. Drawer 810 (ZIP 32302-0810)  
Tallahassee, Florida 32301  
904-224-7000  
FAX 904-224-8832

March 17, 1997

ORIGINAL  
FILE COPY

Atlanta	Orlando
Boca Raton	St. Petersburg
Fort Lauderdale	Tallahassee
Jacksonville	Tampa
Lakeland	Washington, D.C.
Miami	West Palm Beach

KAREN D. WALKER  
904-425-5612

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 Regarding Negotiated Contract for Purchase of Firm Capacity and Energy from a Qualifying Facility, with Pasco Cogen Ltd. by Florida Power Corporation, Docket No. 961407-EQ

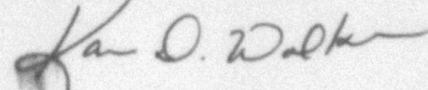
Dear Ms. Bayo:

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 and Pasco Cogen, Ltd.'s Responses to Petition to Intervene.

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

- ACK
- AFA 2
- APP \_\_\_\_\_
- CAF \_\_\_\_\_
- CMU \_\_\_\_\_
- CTR \_\_\_\_\_
- EG 1
- LEG 1
- LIN 5
- OPC \_\_\_\_\_
- RCH \_\_\_\_\_
- SEC 1
- WAS \_\_\_\_\_
- OTH \_\_\_\_\_

Enclosure  
KW/sms

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

TAL-103825

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

02786 MAR 17 97

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL  
FILE COPY

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

Docket No. 961407-EQ

Filed: March 17, 1997

**VASTAR GAS MARKETING, INC.'S OMNIBUS MEMORANDUM IN  
OPPOSITION TO FLORIDA POWER CORPORATION'S  
AND PASCO COGEN, LTD.'S RESPONSES TO PETITION TO INTERVENE**

Florida Power Corporation ("FPC") and Pasco Cogen, Ltd. ("Pasco") have each filed a Response and Opposition to Vastar Gas Marketing, Inc.'s ("VGM's") Petition For Leave to Intervene (the "Petition"). Through their "Responses," FPC and Pasco assert that VGM does not have standing and move the Florida Public Service Commission (the "Commission") to dismiss VGM's Petition. Accordingly, VGM, by and through undersigned counsel, submits this memorandum in opposition to FPC and Pasco's above-described motions to dismiss.

FPC and Pasco's motions rely exclusively on a static application of standing criteria put forth 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 Pasco would have the Commission rigidly apply the Agrico case to exclude indispensable parties from this proceeding, and thus deprive the Commission of information essential to its obligation to closely evaluate the proposed Settlement Agreement's effect on issues of fuel supply and project viability. VGM's substantial interests will be subject to determination in this proceeding. As a fuel supplier for the Pasco cogeneration project, VGM expects that it will suffer real and immediate injury as a result of the Commission's approval of the Settlement Agreement. Therefore,

VGM satisfies the grounds for intervention and is entitled to 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 Pasco 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 Pasco. FPC and Pasco are wrong.
2. Pasco 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 Pasco'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 Pasco will attempt to pass through any reduction in the price that Pasco 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 Pasco that Pasco's payments to NCM under the Sale Agreement will be reduced if the Settlement Agreement is approved by the Commission. If VGM is mistaken, and Pasco 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 Pasco intends to pass through any reductions to NCM, VGM will be injured.

4. Pasco is aware that if it passes through reductions in the payments it receives from FPC under the PPA as a result of the Settlement Agreement, NCM will be injured. Pasco, however, did not involve NCM in the negotiation of the Settlement Agreement. As a result, VGM was also excluded. Pasco 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.<sup>1</sup> These factors must be examined not only from

---

<sup>1</sup> 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

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.<sup>2</sup>

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 interest in the power purchase agreement. The Commission held that GECC met the standards for 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.

---

for need determination to describe the fuel supply of the proposed project).

<sup>2</sup> 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).

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 Pasco 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-EQ<sup>3</sup> or Docket

---

<sup>3</sup> 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

No. 940771-EQ, yet the Commission properly granted GECC and FGT party status in those respective dockets.

9. Pasco suggests that the Commission should not consider Order No. PSC-94-1401-PCO-EQ because FGT's intervention was not contested and FPC's petition that was the subject of Docket No. 940771-EQ was ultimately dismissed. FPC's petition was dismissed by the Commission due to lack of subject jurisdiction subsequent to the Commission's granting FGT intervention. Thus, the dismissal of FPC's petition in Docket No. 940771-EQ does not undermine the fact that the Commission found that FGT as a fuel supplier had a substantial interest in a proceeding that affects pricing under a power purchase agreement. 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. Pasco 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 Pasco'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

---

order in Docket No. 94155-EQ.

supply on project viability. To be sure, if NCM and VGM had not petitioned to intervene in this proceeding, the Commission would not be aware that its approval of the Settlement Agreement will injure NCM and VGM, that the project's fuel supply could be jeopardized by the Settlement Agreement, or that the legal authority of Pasco to enter into the Settlement Agreement in the first place is being adjudicated by an arbitrator in Texas.

**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 Pasco 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 Pasco would lead the Commission to believe.



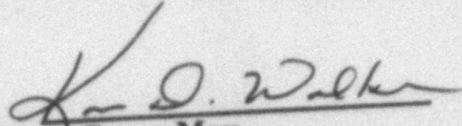
13. VGM is not suggesting that any person or entity that has some type of stake in an cogeneration project is entitled to intervene in a buy-out/buy-down proceeding. Fuel supply, however, is different. Unlike some other products and services provided to a project, fuel supply is inherently linked to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



Dr Bruce May  
Florida Bar No. 354473  
Karen D. Walker  
Florida Bar No. 0982921  
HOLLAND & KNIGHT LLP  
P.O. Drawer 810  
Tallahassee, FL 32302  
(904) 224-7000

**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 and Pasco Cogen, Ltd.'s Responses to Petitions to Intervene was furnished by U.S. mail or \*hand delivery to the following this 17th day of March, 1997:

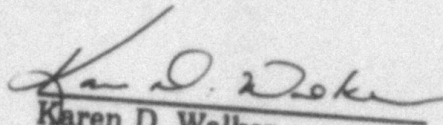
James A. McGee, Esq.  
Florida Power Corporation  
P.O. Box 14042  
St. Petersburg, FL 33733-4042

\*Lorna R. Wagner, Esq.  
2540 Shumard Oak Blvd., Room 370  
Tallahassee, FL 32399-0850

Ansley Watson, Jr., Esq.  
Macfarlane Ferguson &  
McMullen  
Post Office Box 1531  
Tampa, Florida 33601-1531

John W. Jimison, Esq.  
Brady & Berliner, P.C.  
1225 19th Street, N.W.  
Washington, D.C. 20036

Sheldon D. Reid, President  
North Canadian Marketing Corp.  
425-1st Street, S.W.  
Calgary, Alberta T2P4V4  
CANADA

  
Karen D. Walker

TAL-103647.4