

ORIGINAL

Florida Power
CORPORATION

JAMES A. MCGEE
SENIOR COUNSEL

June 2, 1998

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

Re: Docket No. 980509-EQ

Dear Ms. Bayó:

Enclosed for filing in the subject docket are an original and fifteen copies of Florida Power Corporation's Response in Opposition to North Canadian Marketing Corporation's Petition to Intervene or, In the Alternative, to Submit *Amicus Curiae* Brief.

Please acknowledge your receipt of the above filing on the enclosed copy of this letter and return to the undersigned. Also enclosed is a 3.5 inch diskette containing the above-referenced document in WordPerfect format. Thank you for your assistance in this matter.

Very truly yours,

James A. McGee

- ACK
- AFA
- APP *Bellad*
- CAF
- CMU
- CTR JAM/kp
- EAG 3 Enclosure
- LEG cc: Parties of Record
- LIN RECEIVED & FILED
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05956 JUN-3 98

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Power Corporation for declaratory statement that Commission's approval of Negotiated Contract for Purchase of Firm Capacity and Energy between Florida Power Corporation and Lake Cogen, Ltd., in Order No. 24734, together with Order No. PSC-97-1437-FOF-EQ, Rule 25-17.0832, F.A.C. and Order No. 24989, establish that energy payments thereunder, including when Firm or As-Available payments are due, are limited to analysis of avoided costs based upon Avoided Unit's contractually-specified characteristics.

Docket No. 980509-EQ

Submitted for filing:
June 3, 1998

**RESPONSE OF FLORIDA POWER CORPORATION
IN OPPOSITION TO NORTH CANADIAN MARKETING
CORPORATION'S PETITION TO INTERVENE OR, IN
THE ALTERNATIVE, TO SUBMIT *AMICUS CURIAE* BRIEF**

Florida Power Corporation (Florida Power) hereby responds in opposition to the "Petition of North Canadian Marketing Corporation (NCMC) to Intervene for the Limited Purpose of Submitting a Memorandum in Support of Lake Cogen, Ltd.'s Motion to Dismiss or, in the Alternative, Brief as *Amicus Curiae* in Support of Lake Cogen, Ltd.'s Motion to Dismiss" (the Petition), and states as follows:

1. This proceeding involves the request of Florida Power for a declaratory statement regarding the energy pricing provisions of a Negotiated Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility dated March 13, 1991 between Florida Power and Lake Cogen, Ltd. (the Lake PPA) that the Commission approved in Order No. 24743, issued July 1, 1991 in Docket No.

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FLORIDA POWER CORPORATION

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910401-EQ. NCMC is not a customer of either Florida Power or Lake, nor does it appear that NCMC carries on any business in the State of Florida. More importantly, NCMC is not a party to, or a third-party beneficiary of, the Lake PPA, nor was it a party to the 1991 contract approval docket in which Order No. 24743, the subject of this declaratory statement proceeding, was issued. By NCMC's own admission, the only basis of its claim of standing in this proceeding is that it has a contract to supply a portion of the natural gas used to fuel Lake's cogeneration facility. However, NCMC's contract with Lake is not before the Commission in this proceeding, nor is it relied upon or even mentioned in Florida Power's petition for declaratory statement.

2. This is not the first time NCMC has attempted to argue that its natural gas contract with one of Florida Power's QF suppliers gives it standing to intervene in a Commission proceeding involving the QF's PPA with Florida Power. In Docket No. 961407-EQ, regarding approval of a Settlement Agreement between Florida Power and Pasco Cogen, Ltd., NCMC claimed that a proposed modification of Florida Power's PPA with Pasco "may prompt or require corresponding changes in the volume, economics, or structure and terms of the business relationship described in the PGA [NCMC's Purchase Gas Agreement with Pasco]." On this basis, NCMC contended that it "ha[d] a direct, vital, and non-substitutable interest in any proposed amendments to the PPA which would have the effect of modifying the sales of power by Pasco to FPC in any manner which leads to parallel modifications in the sales of natural gas by NCMC to Pasco." Petition of NCMC to Intervene in Docket No. 961407-EQ, paragraph 6, pages 3 and 4.

3. The Commission disagreed with NCMC and denied its petition to intervene, finding that NCMC's alleged interest in the proceeding failed to satisfy either of the two-pronged test for standing articulated in *Agrico Chemical Co. v. Dept. of Environmental Regulation*, 406 So. 2d 478 (Fla. 2nd DCA 1981).¹ Order No. PSC-97-0311-PCO-EQ, issued March 24, 1997 in Docket No. 961407-EQ. With respect to the first prong (*i.e.* injury of sufficient immediacy), the Commission found that NCMC "can only speculated as to the effect that the Settlement Agreement may have on its GPA with Pasco. Such conjecture about possible future economic detriment is too remote to establish standing." *Id.* at page 3. With respect to second prong of the *Agrico* test (*i.e.* the type of interest to be protected), NCMC contended that "as the exclusive supplier of fuel to Pasco, NCMC's interests are within the range of interest that this proceeding is designed to protect." *Id.* After finding the only Commission order cited by NCMC in support of its position to be inapposite, the Commission concluded that "even if NCMC experiences real and immediate injuries, those injuries are not of the type this proceeding in this docket is designed to protect." *Id.*

4. The interest alleged by NCMC in its current intervention request is virtually the same as the interest previously found to be insufficient to confer standing on NCMC in the Pasco docket. As the basis for its requested intervention, NCMC describes its interest in the outcome of this proceeding as follows:

The GPA establishes the price of natural gas sold by NCMC to Lake in accordance with a formula which directly and substantially affected by

¹ 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 interest is of a type or nature which the proceeding is designed to protect. *Id.* at 482.

the formula in the Contract under which Lake sells power to FPC. NCMC therefore has a direct, vital, and non-substitutable interest in any proposed interpretation of the Contract which would have the effect of interpreting the formula for such power sales.

Petition at page 3. Even a cursory application of the *Agrico* test to NCMC's current intervention request compels the same conclusion reached in the Pasco docket.

5. When NCMC's alleged interest is measured for injury of sufficient immediacy under the first prong of the *Agrico* test, it is, if anything, even more speculative and conjectural than its interest was found to be in *Pasco*. NCMC says nothing more than that its PGA with Lake contains a pricing formula which NCMC claims is "directly and substantially affected" by a "formula" in Florida Power's PPA with Lake. NCMC does not tell us what this pricing formula is or anything about its content or workings, or how and when it is "directly and substantially affected" by the Lake PPA, or whether the effect is positive or negative, or what "formula" in the Lake PPA it refers to, or any other information that could be used to answer the variety of questions that might be legitimately asked in attempting to ascertain either the existence or the immediacy of NCMC's alleged injury.

6. NCMC does not bother to offer a serious argument that its interest in the outcome of this proceeding satisfies the second prong of the *Agrico* test. Indeed, NCMC's only acknowledgment that the *Agrico* test is even applicable is relegated to a footnote in its Petition. There, NCMC makes the convoluted argument that its interests in the Lake gas supply contract would be "within the ambit of the Commission's jurisdiction" if the Commission asserts jurisdiction "to reinterpret the pricing provision of the [Lake PPA]" This is so, according to NCMC's novel reasoning, because the Commission's assertion of jurisdiction over

the Lake PPA would “have the effect of asserting jurisdiction over the gas-pricing provision in the GPA between NCMC and Lake.” Petition, footnote 3, at pages 6 and 7. Taking this peculiar brand of logic to its conclusion, NCMC apparently contends that, since the Commission now has jurisdiction over the gas contract’s pricing provision, NCMC’s interest in this pricing provision must be within the range of interests that this declaratory statement proceeding is designed to protect. Like the proverbial house of cards, NCMC’s tortured argument falls apart when its faulty premise that the Commission has jurisdiction over the gas contract is removed. Obviously, the Commission has no such jurisdiction. The mere possibility that the Commission’s exercise of its jurisdiction over the Lake PPA may have some secondary effect on the contracts of Lake’s various suppliers does not somehow convert that effect into Commission jurisdiction over those contracts. NCMC’s assertion that it does is ludicrous.²

7. NCMC also asks that, in the event the Commission denies NCMC intervenor status to submit its memorandum in support of Lake’s motion to dismiss, it be granted *amicus curiae* status and be allowed to submit the memorandum as a “Brief of *Amicus Curiae*.” If the Commission does, in fact, determine that NCMC’s lack of standing does not permit the submission of the memorandum included with NCMC’s Petition, the granting of NCMC’s alternative request to submit the same memorandum with simply a different caption would effectively and inappropriately vitiate the Commission’s ruling on the issue of

² NCMC apparently knows this to be true as well. In its petition to intervene in the Pasco settlement docket, NCMC clearly and unequivocally asserted that the Commission did not have jurisdiction over its GPA in that case. Petition of NCMC to Intervene in Docket No. 961407-EQ, paragraph 25, page 12. NCMC’s astonishing suggestion to the contrary in this case is simply evidence of its desperation to find an angle for overcoming the insurmountable obstacle to its intervention posed by *Agrico*.

NCMC's standing. Succinctly put, NCMC should not be allowed to do indirectly what it is not entitled to do directly.

8. This attempt by NCMC to achieve the same end by a different means is analogous to the approach it took in the Pasco settlement docket. There, NCMC accompanied its petition to intervene with a separate pleading requesting that it be allowed to participate in any oral argument scheduled by the Commission on any issues related to the proceeding. In particular, NCMC's open-ended request to participate in any oral argument was not conditioned on the granting of its petition to intervene. The Commission, however, having already found in the same order that NCMC's interest in the proceeding was insufficient to allow its participation as a party, denied NCMC's request to participate in oral argument. Order No. PSC-97-0311-PCO-EQ, at page 5.

9. Here, NCMC has again asked the Commission to allow its participation, through consideration of its memorandum, irrespective of the sufficiency of NCMC's interest in the proceeding. If NCMC's interest in this proceeding is found to be insufficient to confer upon it a right to participate, as Florida Power believes it must, then NCMC has certainly offered no reason why its discretionary participation as an *amicus curiae* would be desirable or beneficial to the Commission.³ Nor is such a reason apparent. As an out-of-state natural gas supplier, NCMC has no unique or special expertise regarding this Commission's jurisdiction under PURPA and Florida law to regulate the purchase of energy and capacity from qualifying facilities by electric utilities. Moreover, in a limited

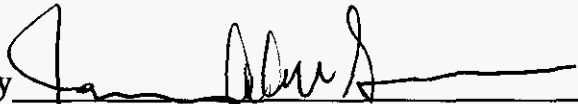
³ See, for example, Rule 29, "Brief of an *amicus curiae*," of the Federal Rules of Appellate Procedure, which provides that "[a] motion for leave [to file an *amicus curiae* brief] shall identify the interest of the applicant and shall state the reasons why a brief of an *amicus curiae* is desirable." Emphasis added.

scope declaratory statement proceeding such as this, where even intervention is less frequently permitted, the granting of *amicus curiae* status is particularly inappropriate and unnecessary. Whether or not *amicus curiae* participation in a declaratory statement proceeding might be appropriate under some particular set of circumstances, NCMC's back door attempt at such participation clearly is not. Its request for *amicus curiae* status should be denied.

WHEREFORE, Florida Power Corporation respectfully requests that the Commission deny NCMC's petition to intervene for the purpose of submitting a memorandum in support of Lake's motion to dismiss, as well as its alternative request to submit its memorandum as a brief of *amicus curiae*.

Respectfully submitted,

OFFICE OF THE GENERAL COUNSEL
FLORIDA POWER CORPORATION

By 

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CERTIFICATE OF SERVICE

Docket No. 990509-EQ

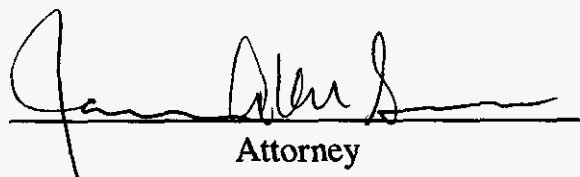
I HEREBY CERTIFY that a true copy of Florida Power Corporation's Response in Opposition to North Canadian Marketing Corporation's Petition to Intervene or, In the Alternative, to Submit *Amicus Curiae* Brief has been furnished to the following individuals by hand or express delivery(*), facsimile(**), or by U.S. Mail this 2nd day of June, 1998:

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