BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In 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 ORDER NO. PSC-97-0311-PCO-EQ ISSUED: March 24, 1997

ORDER DENYING PETITION TO INTERVENE AND ADDRESSING MOTION TO DISMISS AND REQUEST FOR ORAL ARGUMENT

On November 25, 1996, Florida Power Corporation ("FPC") petitioned the Florida Public Service Commission ("FPSC") to approve a Settlement Agreement between FPC and Pasco Cogen, Ltd. ("Pasco"). Previously, FPC and Pasco entered into a Negotiated Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility (the "PPA") on March 13, 1991. On February 28, 1997, North Canadian Marketing Corporation, ("NCM") filed a Petition for Leave to Intervene, Motion to Dismiss without Prejudice, and a Request to Participate in Oral Argument in this docket. On March 5, 1997, FPC and Pasco, individually filed petitions opposing NCM's Petition to Intervene and Motion to Dismiss without Prejudice.

Petition for Leave to Intervene

In its Petition for Leave to Intervene, NCM requests intervention to facilitate the FPSC's evaluation of the Settlement Agreement. On August 28, 1991, NCM signed a Gas Purchase Agreement ("GPA"), as amended, with Pasco Cogen, Ltd. ("Pasco"), whereby NCM acquired an exclusive right to supply natural gas to Pasco. NCM contends that subsequent to the GPA, it entered into other contracts with gas suppliers, primarily Vastar Gas Marketing, Inc. ("Vastar"), to ensure NCM could meets its obligations to Pasco.

NCM states that Section 3.03 of the GPA expressly provides that NCM's consent is required prior to any amendment to the PPA which would have a materially adverse affect on NCM. NCM asserts that the proposed changes to the PPA threaten to materially alter the terms of the GPA to NCM's detriment, by altering the economic basis for NCM's GPA with Pasco and impairing NCM's ability to meet its obligations to Vastar. Consequently, NCM asserts that it has a substantial interest in this proceeding because it will experience the burden and expense of litigation if the Settlement

Agreement is approved. None of the foregoing assertions automatically confers on NCM standing to intervene or participate in this docket.

FPC's and Pasco's responses to NCM's intervention in this docket state that NCM does not have a substantial interest in this docket. FPC and Pasco state that NCM will not suffer an injury in fact of sufficient immediacy for this Commission to grant intervention. FPC and Pasco indicate that NCM's participation in this docket is not necessary for the Commission to understand and evaluate the proposed Settlement Agreement.

Pasco states that NCM's prior consent to the Settlement Agreement, which Pasco entered into with FPC, is not required. In addition, Pasco states that the GPA that Pasco entered into with NCM, provides that resolution of any dispute arising under the GPA, be submitted to binding arbitration in Houston, Texas. Therefore, Pasco argues that if it did breach a prior consent provision of the GPA, NCM can only pursue that claim in arbitration proceedings in Texas, not in proceedings before this Commission.

Pursuant to Rule 25-22.039, Florida Administrative Code, persons seeking to become parties in a proceeding must demonstrate that they are entitled to participate as a matter of constitutional or statutory right or pursuant to Commission rule, or that their substantial interests are subject to determination or will be affected through the proceeding. NCM has not alleged a constitutional or statutory right, nor any Commission rule, under which it is entitled to participate in this proceeding. Although NCM has alleged that its substantial interest will be affected through the proceeding, its petition fails to demonstrate this fact.

Whether NCM has substantial interests that will be affected by this proceeding, and is therefore entitled to intervene is governed by the two-pronged test articulated in Agrico Chemical Co. v. Dept. of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981), rev. denied 415 So. 2d 1359 (Fla. 1982). 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 injury is of a type or nature which the proceeding is designed to protect. Id. at 482. NCM's allegations fail to demonstrate that it will suffer an injury in fact which is of sufficient immediacy to

warrant a Section 120.57, Florida Statues, hearing. Thus, NCM fails to meet the first prong of the Agrico test.

NCM asserts that any change in the power sales requirements, prices, or revenue stream, or change in the business relationship between FPC and Pasco under the PPA may prompt or require corresponding changes in the volume, economics, or structure and terms of the business relationship described in the GPA. Consequently, NCM argues that is has a direct, vital, and non-substitutable interest in any proposed amendments to the PPA.

After consideration, I find that NCM has not shown that it will suffer an injury in fact which is of sufficient immediacy to warrant a Section 120.57 hearing. Further, NCM can only speculate 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. See International Jai-Alai Players Assoc. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, at 1225-1226 (Fla. 3rd DCA 1990) (fact that change in playing dates might affect labor dispute, resulting in economic detriment to players, was too remote to establish standing). See also Village Park Mobile Home Association, Inc. v. State, Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), rev. denied, 513 So. 2d 1063 (Fla. 1987)(speculation on the possible occurrence of injurious events are too remote to warrant inclusion in the administrative review process). Cf. Florida Soc. Of Ophthalmology v. State Board of Optometry, 532 So. 2d 1279, 1285 (Fla. 1st DCA 1988) (some degree of loss due to economic competition is not of sufficient "immediacy" to establish standing).

With respect to the second prong of the Agrico test, NCM contends that as the exclusive supplier of fuel to Pasco, NCM's interests are within the range of interest that this proceeding is designed to protect. NCM cites In Re: Petition for Approval, to the Extent Required, of Certain Actions Relating to Approved Cogeneration Contracts by Florida Power Corporation, Order No. PSC-95-0540-FOF-EQ, (May 2, 1995) to support its Petition. This Order, however, only concerns changes in the type of fuel used by a cogenerator. Therefore, even if NCM experiences real and immediate injuries, those injuries are not of the type this proceeding in this docket is designed to protect. Having failed to show that its substantial interest will be determined by our decision in this docket, I find that NCM has no standing and is not entitled to

intervene, in this docket under Rule 25-22.039, Florida Administrative code.

NCM states that Pasco entered into the Settlement Agreement with FPC without obtaining NCM's prior consent. However, NCM affirmatively states that any dispute over whether NCM is materially and adversely affected by the Settlement Agreement is a question of fact to be presented to an Arbitrator, selected by Pasco and NCM. I recognize that NCM has not given its consent with respect to what Pasco may or may not do under the GPA. Nonetheless, our decision in this proceeding will not alter NCM's right to consent or withhold consent.

Despite NCM's assertions, I find that NCM's participation in this proceeding as a party is not necessary for our evaluation of either the requested modification to the PPA for cost recovery purposes or our evaluation of the Settlement Agreement between FPC and Pasco. For the reasons stated above, NCM's Petition to Intervene is denied.

Motion Of North Canadian Marketing Corporation to Dismiss Without Prejudice

NCM states that FPC's Petition and Settlement Agreement should be dismissed until such time as all required consents have been obtained, including that of NCM. NCM is not a party to this proceeding, and therefore NCM's Motion to Dismiss without Prejudice is denied.

In addition, the PPA between Pasco and FPC does not require either party to obtain the consent of NCM. The consent which NCM argues was not obtained, is NCM's consent under the Gas Purchase Agreement between NCM and Pasco. Our decision in this docket will not alter NCM's right to consent or withhold consent.

Request of North Canadian Marketing Corporation to Participate in Oral Argument

NCM's Request to Participate in Oral Argument asks that we allow NCM the ability to provide oral argument to us regarding any issues related to this proceeding whereby we entertain oral argument from any source. NCM is not a party to this proceeding, therefore, NCM's Request to Participate in Oral Argument is denied.

Based on the foregoing, it is

ORDERED by Commissioner Joe Garcia that North Canadian Marketing Corporation's Petition to Intervene as a Party, is denied. It is further

ORDERED that North Canadian Marketing Corporation's Motion to Dismiss Without Prejudice is denied. It is further

ORDERED that North Canadian Marketing Corporation's Request to Participate In Oral Argument, is denied.

By ORDER of Commissioner Joe Garcia, as Prehearing Officer, this 24th day of March, 1997.

JOE GARCIA, Commissioner and
Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.