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MEMORANDUM

MARCH 30, 1998

REC-REC-13

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (C. KEATING) *WCK RVE*

RE: DOCKET NO. 961477-EQ - PETITION FOR EXPEDITED APPROVAL OF SETTLEMENT AGREEMENT WITH LAKE COGEN, LTD., BY FLORIDA POWER CORPORATION

98-0450-FOF-EQ

Attached is an ORDER DISMISSING PROCEEDINGS AND FINDING ORDER NO. PSC-97-1437-FOF-EQ TO BE A NULLITY to be issued in the above referenced docket. (Number of pages in order - 7)

WCK/js

Attachment

cc: Division of Electric and Gas (Dudley, Breman, Harlow, Wheeler)
Division of Auditing and Financial Analysis (Maurey, McNulty, Noriega, Slemkewicz, Stallcup)

I:961477or.wck

5 faxed

3 mailed

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
ORDER NO. PSC-98-0450-FOF-EQ
ISSUED: March 30, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

ORDER DISMISSING PROCEEDINGS AND FINDING
ORDER NO. PSC-97-1437-FOF-EQ TO BE A NULLITY

BY THE COMMISSION:

I. CASE BACKGROUND

On December 12, 1996, Florida Power Corporation ("FPC") filed a petition for approval of a settlement agreement between it and NCP Lake Power, Inc. for cost recovery purposes. NCP Lake Power, Inc. and Lake Cogen Ltd. (collectively, "Lake") were granted intervenor status on June 5, 1997. As amended by subsequent agreement of the parties, the settlement agreement would expire on October 31, 1997, absent the necessary regulatory approvals. At our September 23, 1997 Agenda Conference, we voted to deny FPC's petition. Our decision was memorialized in proposed agency action Order No. PSC-97-1437-FOF-EQ, issued November 14, 1997 ("PAA Order"). On December 5, 1997, Lake timely filed a Petition on Proposed Agency Action protesting the PAA Order.

On December 15, 1997, FPC timely filed a motion to dismiss Lake's petition. After receiving our approval for an extension of time to file a response, Lake filed a response to FPC's motion to dismiss on January 8, 1998. On the same day, Lake filed its Motion to Dismiss Proceeding and Close Docket. FPC timely filed a response to Lake's motion to dismiss on January 20, 1998.

II. ARGUMENTS OF THE PARTIES

On page 4 of its Petition on Proposed Agency Action, Lake notes that the settlement agreement has expired and that

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negotiations to further extend it have been unsuccessful. Lake suggests that it may be appropriate for us to dismiss the underlying petition, i.e. FPC's original petition, as moot and close the docket. Lake requests that we set the matter for a formal hearing if we do not, on our own motion, dismiss FPC's petition as moot.

In FPC's motion to dismiss Lake's Petition on Proposed Agency Action, FPC contends that Lake's petition should be dismissed because it fails to state a claim for which relief may be granted. FPC asserts that a formal proceeding on a non-existent settlement agreement would be futile. In addition, FPC argues that Lake's suggestion - that FPC's initial petition is now moot - is wrong, or is the implication that the PAA Order is also moot. FPC notes that the settlement agreement was viable when FPC filed its initial petition and when we reached our decision. On page 3 of its motion to dismiss, FPC asserts that the settlement agreement's expiration on October 31, 1997, rendered moot "any further proceedings seeking its approval, including the formal proceeding requested by Lake." (Emphasis supplied by FPC). FPC requests that we (1) dismiss Lake's petition, (2) find the PAA Order to be final, and (3) close this docket.

In Lake's response to FPC's motion to dismiss, Lake contends that a proposed agency action order becomes effective or final without an evidentiary hearing only if a Section 120.57, Florida Statutes, hearing is not timely requested. Lake refers to the IAA Order, which states, "The action proposed herein is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code ("F.A.C."). Lake notes that Rule 25-22.029(6), F.A.C., provides that "[i]n the absence of a timely request for a §120.57 hearing, and unless otherwise provided by a Commission order, the proposed action shall become effective upon the expiration of the time within which to request a hearing."

Further, Lake cites Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778, 786-87 (Fla. 1st DCA 1981), which states:

Clearly, there was no final agency action by DER in this proceeding prior to [the petitioners'] request for hearing. [The petitioners'] request for a hearing commenced a de novo proceeding, which, as previously

indicated is intended "to formulate final agency action taken earlier and preliminarily."

Id. (quoting McDonald v. Department of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977)). Lake also cites Commission Order No. PSC-94-0310-FOF-EQ, issued March 17, 1994, for the proposition that a proposed agency action order is no longer effective when a de novo proceeding is required. Lake concludes that once it timely filed its petition on proposed agency action, FPC was not entitled to have the preliminary factual findings of the PAA Order become final. Unless the entire proceeding is dismissed as moot, according to Lake, it must be granted an opportunity to challenge the PAA Order.

In Lake's motion to dismiss this entire proceeding, Lake argues that the entire proceeding, including FPC's petition, should be dismissed as moot because there is no longer a viable settlement agreement upon which a hearing may be held. Lake cites Godwin v. State, 593 So. 2d 211, 212 (Fla. 1992), which states that "[a] case is 'moot' when it presents no actual controversy or when the issues have ceased to exist." Lake asserts that the issues in this case ceased to exist when the settlement agreement expired, thus rendering the entire proceeding and FPC's petition moot. Lake points out that FPC offers no case law to support the assertion that only proceedings initiated after expiration of the settlement agreement are rendered moot. Lake asserts that the timely filing of its petition prevented the PAA Order from becoming final, leaving it subject to review in a de novo proceeding. However, Lake contends, the expiration of the settlement agreement obviates the need for such a proceeding and renders the entire proceeding moot. Lake requests that we (1) dismiss FPC's petition on the grounds that the entire proceeding is moot, (2) declare the PAA Order null and void, and (3) close the docket.

In FPC's response to Lake's motion to dismiss, FPC contends that Lake's argument is entirely dependent on the validity of its petition because without a valid protest the PAA Order becomes final in accordance with Rule 25-22.029(6), Florida Administrative Code. FPC argues that Lakes' petition is invalid because it fails to state a claim for which relief can be granted. FPC further contends that because the PAA Order memorializes a decision made when the settlement agreement was in effect, Lake's claim that the entire proceeding is moot is untenable. FPC notes that in Godwin, supra, Ms. Godwin appealed the trial court's order to involuntarily commit her to a state hospital but was discharged before her appeal

was decided; the State moved to dismiss her appeal on grounds that her discharge rendered her appeal moot. FPC feels it is constructive to note that no issue was made of the trial court order's validity.

III. ANALYSIS AND FINDINGS

Because the issues are so intertwined among the pleadings summarized above, we believe it is appropriate for us to decide the underlying issues before ruling separately on the motions to dismiss. We note that both parties recognize the futility of conducting a formal proceeding on a settlement agreement that has expired by its own terms. We agree that we should not conduct a formal hearing on this matter. Thus, the ultimate question for our consideration is whether our PAA Order should become final or is a nullity.

FPC and Lake present a novel issue: whether to make a proposed agency action order final, or render it a nullity, when a person whose substantial interests are affected timely files a protest but the underlying subject matter of the proposed action no longer exists, thereby rendering any formal proceedings on the matter futile.

By its own terms, Section 120.569, Florida Statutes, applies to all proceedings in which the substantial interests of a party are determined by an agency. Lake, as a party to the settlement agreement, is clearly a party whose substantial interests were determined by our PAA Order. Section 120.569(2)(b), Florida Statutes, provides that all parties shall be afforded an opportunity for a hearing. In other words, "APA hearing requirements are designed to give affected parties an opportunity to change the agency's mind." Couch Construction Co., Inc. v. Department of Transportation, 361 So. 2d 172, 176 (Fla. 1st DCA 1978).

FPC argues that Lake's petition is invalid because the expiration of the settlement agreement made it moot. Following FPC's reasoning, however, no one may challenge our PAA Order, because any challenge would be made moot by the expiration of the settlement agreement. Under this approach, no party would be afforded an opportunity for hearing to change this agency's mind, but the PAA Order would become final nonetheless. We believe that this result is completely at odds with the plain language and intent of Section 120.569, Florida Statutes. See, Winter v. Playa

del Sol, Inc., 353 So. 2d 598 (Fla. 4th DCA 1977) (stating that a statute with clear and unambiguous language must be given its plain and obvious meaning and must not be constructed in a manner that leads to an absurd result).

In addition, we note Rule 25-22.036(9)(b), Florida Administrative Code, which provides:

- (b) Where a petition on proposed agency action has been filed the Commission may:
 - 1. Deny the petition if it does not adequately state a substantial interest in the Commission determination or if it is untimely.
 - 2. Grant the petition and determine if a 120.57(1) hearing or a 120.57(2) hearing is required.

FPC does not argue that Lake's petition was untimely or fails to adequately state a substantial interest. In fact, Lake's petition was timely and, we believe, adequately states a substantial interest in our PAA Order.

For the preceding reasons, we find that Lake's petition is valid. Thus, pursuant to Rule 25-22.029(6), Florida Administrative Code, we find that the timely filing of Lake's petition prevented the PAA Order from becoming final and effective. Because no final agency action had been taken, Lake's petition commenced a de novo proceeding on the issues disputed in the petition. See Florida Department of Transportation v. J.W.C. Co., Inc., supra, and Section 120.80(13)(b), Florida Statutes.

We find that FPC cannot, at this point, ask that Lake's petition be dismissed as moot without recognizing that the entire proceeding should be dismissed. By definition, a de novo proceeding is not an appellate proceeding but an original proceeding designed to formulate final agency action. See J.W.C., supra. Section 120.80(13)(b), Florida Statutes, provides that "a hearing on an objection to proposed action of the Florida Public Service Commission may only address the issues in dispute." The expiration of the settlement agreement, however, effectively eliminated any disputed issues. Godwin, supra, states that "[a] case is 'moot' when it presents no actual controversy or when the issues have ceased to exist." Thus, based on our finding that Lake's petition is valid and initiates a de novo proceeding on the

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issues disputed therein, we believe that the plain language of Godwin leads to the conclusion that the original proceeding initiated by Lake's petition is moot and should be dismissed. Accordingly, we find (1) that FPC's original petition for approval of the settlement agreement should be dismissed as moot and (2) that our proposed agency action Order No. PSC-97-1437-FOF-EQ is a nullity.

Based on our findings above, we deny FPC's motion to dismiss Lake's petition, and we grant Lake's motion to dismiss this proceeding and close the docket.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that this proceeding, including Florida Power Corporation's petition for approval of a settlement agreement between it and NCP Lake Power, Inc., is moot and is hereby dismissed. It is further

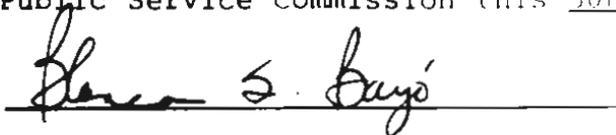
ORDERED that Order No. PSC-97-1437-FOF-EQ is a nullity. It is further

ORDERED that Florida Power Corporation's Motion to Dismiss Lake Cogen, Ltd.'s Petition on Proposed Agency Action is hereby denied. It is further

ORDERED that Lake Cogen, Ltd.'s Motion to Dismiss Proceeding and Close Docket is hereby granted. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 30th day of March, 1998.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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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 the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.