

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: December 5, 1997

NCP LAKE POWER, INC.'S AND LAKE COGEN, LTD.'S
PETITION ON PROPOSED AGENCY ACTION

LAKE COGEN, LTD., by and through its general partner, NCP LAKE POWER, INC. (hereinafter collectively "Lake" or "Lake Cogen"), pursuant to Commission Rules 25-22.029(4) and 25-22.036(7), Florida Administrative Code, respectfully files this Petition on Proposed Agency Action protesting the proposed action of the Florida Public Service Commission ("Commission") set forth in PAA Order No. PSC 97-1437-FOF-EQ ("the Order"), issued on November 14, 1997. Pursuant to page 21 of that PAA order, it would become final if no petition for a formal proceeding, pursuant to Rules 25-22.029(4) and 25-22.036(7), is filed by the close of business on December 5, 1997, i.e., today.

In support of its Petition, Lake Cogen states as follows:

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PROCEDURAL BACKGROUND AND INFORMATION

1. The name and address of the Petitioners are:

Lake Cogen, Ltd.
c/o GPU International, Inc.
One Upper Pond Road
Parsippany, New Jersey 07054 .

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By Don

2. All pleadings, motions, orders, and other documents directed to Petitioners are to be served on the following.

Robert Scheffel Wright LANDERS & PARSONS, P.A. 310 West College Avenue Post Office box 271 Tallahassee, Florida 32302	Chip Thomson, Esquire Corporate Counsel GPU International, Inc. One Upper Pond Road Parsippany, NJ 07054
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David N. Hicks, Business Manager
Lake Cogen, Ltd.
c/o GPU International, Inc.
One Upper Pond Road
Parsippany, NJ 07054

For deliveries by hand and by courier service, the Zip Code for 310 West College Avenue is 32301.

3. Lake Cogen received notice of the protested order by obtaining a copy from the Commission on or about November 14, 1997.

4. The other party whose direct substantial interests will be affected by these proceedings is Florida Power Corporation ("FPC"). Florida Power Corporation's address is as follows:

Florida Power Corporation
3201 34th Street South
Post Office Box 14042
St. Petersburg, Florida 33733-4042
(813) 866-5151.

5. On December 6, 1996, Florida Power Corporation and Lake Cogen, through its managing general partner, NCP Lake, entered into that certain Settlement Agreement and Amendment To Negotiated Contract for the Purchase of Firm Capacity and Energy From a Qualifying Facility Between Lake Cogen, Ltd. and Florida Power Corporation (the "Settlement Agreement"). NCP Lake is a wholly owned subsidiary of GPU International, Inc. ("GPUI"). The purpose of the Settlement Agreement is to settle all disputes between Lake

Cogen and FPC that are the subject of currently pending, though stayed, litigation in the case styled NCP Lake Power, Incorporated, a Delaware corporation, as General Partner of Lake Cogen Ltd., a Florida limited partnership v. Florida Power Corporation, a Florida corporation, Case No. 94-2354-CA01, in the Circuit Court of the Fifth Judicial Circuit in and for Lake County. Pursuant to the Commission's rules and orders, and pursuant to the terms of the Settlement Agreement itself, on December 12, 1996, FPC initiated this docket by filing the instant petition for approval of the Settlement Agreement for cost recovery purposes.

6. NCP Lake Power, Inc. filed its petition to intervene in this docket on March 6, 1997, and Lake Cogen Ltd. filed its petition to intervene in this docket on March 11, 1997. Intervention was granted to Lake Cogen Ltd. by Commission Order No. PSC-97-0645-PCO-EQ and to NCP Lake Power, Inc. by Commission Order No. PSC-97-0644-PCO-EQ, both issued on June 5, 1997.

7. Lake Cogen's substantial interests will be affected by the Commission's actions in this proceeding because it involves the proposed modification of Lake's power sales contract with FPC, as well as the resolution of the above-described litigation disputes with FPC.

8. As described more fully below, Lake disputes numerous factual statements set forth in the body of the Order. Because, by the filing of this petition on proposed agency action, the Order is rendered a legal nullity, Lake believes that all issues are subject to further consideration and argument; accordingly, Lake also

believes that several disputed issues of law and policy must be addressed.

9. Lake Cogen hereby requests a formal proceeding, as provided by the Commission's rules, to protect its substantial interests. As part of its duty of candor, Lake Cogen directs the Commission's attention to the fact that the Settlement Agreement that is the subject of this docket has, as of October 31, 1997, expired by its own terms. During the intervening period, i.e., from October 31 to the present date, Lake Cogen and FPC have attempted to negotiate a further extension of the terms of the Settlement Agreement and, in the spirit of those negotiations, neither side has invoked the termination of the Settlement Agreement. Now, however, due to lack of progress in those negotiations, Lake regretfully advises the Commission that any further extension of the Settlement Agreement appears unlikely and, accordingly, suggests to the Commission that (a) dismissal of the underlying petition as moot -- because there is no longer a viable settlement agreement upon which a hearing can be held -- and (b) closure of this docket may be appropriate.¹

¹ For the record, as stated below, Lake Cogen remains convinced that the Settlement Agreement is in the public interest as well as in the best interests of FPC and its customers, and accordingly, Lake Cogen continues to believe that the Commission should have voted to approve the Settlement Agreement. Further, Lake Cogen remains willing, for its part, to continue to negotiate with FPC toward another fair settlement agreement that might be acceptable to FPC and to the Commission.

FACTUAL BACKGROUND

10. This case involves a settlement agreement negotiated by and between Lake Cogen and FPC for the purpose of resolving all disputes that are the subject of the pending lawsuit styled NCF Lake Power, Incorporated, a Delaware corporation, as General Partner of Lake Cogen Ltd., a Florida limited partnership v. Florida Power Corporation, a Florida corporation, Case No. 94-2354 CA01, in the Circuit Court of the Fifth Judicial Circuit in and for Lake County. The petition that initiated this docket asked the Commission to approve the Settlement Agreement, for cost recovery purposes, pursuant to the Commission's rules. The Commission has issued its Proposed Agency Action Order No. PSC-97-1437-FOF-EQ by which it proposes to reject the Settlement Agreement for cost recovery purposes. The factual background of the underlying transaction and the dispute to be settled by the Settlement Agreement, is as follows.

11. Lake Cogen Ltd. owns and operates a 112 MW gas-fired cogeneration facility in Umatilla, Lake County, Florida (the "Facility"), and sells firm capacity and energy from the Facility to FPC pursuant to that certain Negotiated Contract For The Purchase Of Firm Capacity And Energy From A Qualifying Facility Between Lake Cogen And Florida Power Corporation dated March 13, 1991 (the "Contract"). The Contract provides for Lake Cogen to produce and deliver to FPC, and for FPC to purchase, approximately 112 megawatts (MW) of firm electric capacity and energy at a minimum committed on-peak capacity factor of 90 percent from the

Facility. Thermal energy produced by Lake Cogen's Facility (in the form of steam) is sold to Golden Gem Growers, Inc. for use in its citrus processing plant. Lake Cogen is a qualifying cogeneration facility or "QF" as contemplated by the applicable rules of the Commission and the Federal Energy Regulatory Commission ("FERC").

12. In accord with Commission Rule 25-17.0832(2), the Contract was approved for cost recovery by Commission Order No. 24734, issued on July 1, 1991 in Docket No. 910401-EQ. In Re: Petition for Approval of Contracts for Purchase of Firm Capacity and Energy by Florida Power Corporation, 91 FPSC 7:60 (July 1, 1991). By the same order, the Commission approved seven other negotiated contracts for the purchase by FPC of firm capacity and energy from other QFs. These eight negotiated contracts, together with three others approved in separate proceedings, are referred to collectively herein as "the Negotiated Contracts."

13. In reliance on the Contract and the Commission's approval thereof, Lake Cogen constructed the Facility, at a cost in excess of \$102 million, and has operated it in accord with the Contract since July 1, 1993.

14. Florida Power Corporation, initially in its own name and later through an affiliate, was intimately involved in the evaluation of the Lake Cogen project as to feasibility and profitability, and in the development of the Lake Cogen project, and in the preparation and submission of the Lake Cogen project proposal that led to the formation of the Contract. In mid-1990, representatives of Peoples Cogeneration Company ("PCC") and Florida

Power Corporation began meeting together for the purpose of jointly developing cogeneration facilities in Florida. PCC and FPC intended that any such facilities ultimately developed by the two companies would be owned equally by the two companies, or by respective affiliates of each, and entered into written agreements reflecting that intent.

15. In developing the Lake Cogen and Pasco Cogen proposals submitted to FPC, PCC relied on the advice and counsel of FPC, and subsequently on the advice and counsel of Power Cogen, Inc., with respect to projections and evaluation of the various operating parameters of FPC's avoided unit. FPC and Power Cogen knew that PCC would rely on these projections, and FPC and Power Cogen knew that these projections would affect the projects' profitability as well as the joint venture's ability to obtain financing for the projects.

16. On March 13, 1991, PCC and FPC executed two contracts for the purchase of firm capacity and energy by FPC from QFs, the Contract with Lake Cogen and another with Pasco Cogen. In compliance with Commission Rules 25-17.0832(1)&(2), both contracts were submitted to the Commission and were approved for cost recovery by Commission Order No. 24734, issued on July 1, 1991. 91 FPSC 7:60. The Commission's order found that Lake Cogen's Contract is expected to provide savings to FPC's ratepayers of more than \$3 million (Net Present Value). 91 FPSC 7:71.

17. When the Facility became commercially operational, FPC commenced making firm capacity and energy payments to Lake Cogen in

accordance with the Contract. All of FPC's payments for energy delivered by Lake Cogen to FPC since the Facility began commercial operation in July 1993, through the payment made in August 1994 for energy delivered in July 1994, were calculated using the formula set forth in section 9.1.2(i) of the Contract, i.e., the formula for calculating the "firm energy price" under the Contract.

18. In a letter to Lake Cogen dated July 18, 1994, FPC claimed to have determined that it (FPC) "would not be operating" "an avoided unit" with certain limited characteristics during certain hours, and further declared that, as a result of this determination, FPC would pay for energy delivered in those hours at a rate based on FPC's as-available energy costs, which are less than the firm energy prices that FPC would otherwise be obligated to pay to Lake Cogen. FPC claimed that these actions were being taken pursuant to the provisions of Section 9.1.2 of the Contract. FPC sent similar letters, announcing similar claims and intentions, to the other QFs that are parties to the Negotiated Contracts. FPC's July 18, 1994 letters to Lake Cogen and the other QFs represented the first occasion on which FPC ever indicated to Lake Cogen or any of the other QFs that FPC considered the avoided unit contemplated by the Negotiated Contracts to be anything other than a fully characterized pulverized coal unit operated as FPC would have operated such a unit on its system, had that unit been installed.

19. FPC filed a petition for a declaratory statement in Docket No. 940771-EQ on July 21, 1994, seeking the Commission's

declaration that its new interpretation of the disputed Section 9.1.2 of the Contract complies with the Commission's rules and with the Commission's orders approving the Contract and the other Negotiated Contracts. Lake Cogen and other QFs moved to dismiss FPC's July 21 petition. Lake Cogen filed suit against FPC in the Circuit Court of the Fifth Judicial Circuit, in and for Lake County, Florida, on October 7, 1994.² After the Commission Staff issued a recommendation stating the Staff's position that FPC's petition for declaratory statement was legally inappropriate, FPC filed a second petition, styled "Amended Petition," on October 31, 1994. Lake Cogen and other QFs moved the Commission to dismiss FPC's Amended Petition, and, following oral argument, the Commission granted the QFs' motions to dismiss by its Order No. PSC-95-0210-FOF-EQ. FPC did not appeal the Commission's dismissal of its petition.

**STATEMENT OF ULTIMATE FACTS ALLEGED AND
DISPUTED ISSUES OF MATERIAL FACT**

20. Pursuant to Rule 25-22.036(7)(a)3&4, Lake Cogen submits the following as its statement of ultimate facts alleged and disputed issues of material fact. (Lake believes that most of these issues of fact may be disputed either by FPC or by the Commission Staff, and rather than burden this pleading with a redundant listing of these facts, Lake submits them as its statement of both ultimate facts alleged and as its statement of

² Lake's Circuit Court action is currently pending, but it being held in abeyance pursuant to agreement by Lake and FPC.

disputed issues of material fact pursuant to the Rules.) As a preliminary matter, Lake alleges, as disputed issues of material fact, all facts stated in paragraphs 1 through 19 above that are disputed by either FPC or the Commission Staff.

21. When the 1991 Pulverized Coal Unit contemplated by the Contract would have been in operation, Lake Cogen is entitled to energy payments based upon the Firm Energy Cost, as defined in Section 9.1.2(i) of the Contract. When the avoided unit would not have been in operation, Lake Cogen is to receive payments based upon FPC's As-Available Energy Cost. Based on Lake's and FPC's mutual understanding that the avoided unit contemplated by the Contract was a fully characterized pulverized coal unit, with scrubbers, designed for baseload operation, as well as on FPC's established practice of avoiding cycling its baseload coal units off line, from the commercial in-service date of Lake's cogeneration facility through August 8, 1994, FPC paid Lake the firm energy price for all energy delivered from the Lake facility.

22. The only appropriate method of determining energy payments under the Contract is with reference to the operational status of the real, operable 1991 Pulverized Coal Unit specified in the Contract, as FPC would have operated that unit had it been installed on FPC's system in 1991. Accordingly, any settlement of this dispute must be evaluated with respect to the payments that would be made with reference to such real, operable 1991 Pulverized Coal Unit.

23. In 1991, when FPC entered into the Contract with Lake

the avoided unit, i.e., the generating facility that FPC would have built, but for its contracts with Lake Cogen and the other QFs, was a pulverized coal fired generating unit or units referenced in FPC's generation expansion plan filed with the Commission in Docket No. 910004-EU.

27. On August 9, 1994, FPC changed the methodology by which it made energy payments to Lake Cogen and other qualifying facilities ("QFs") with negotiated power sales contracts (the "Negotiated Contracts") having the same energy pricing language as that in the disputed Section 9.1.2 of the Contract. FPC's new methodology reflected a characterization of the avoided unit contemplated by the Contract that was radically different from the characterization of the avoided unit contemplated by the parties when the Contract was entered into, as well as radically different from the characterization of the avoided unit with reference to which FPC had consistently made energy payments to Lake Cogen and the other QFs under the Negotiated Contracts from their respective commercial in-service dates until August 9, 1994. FPC's newly fabricated avoided unit, which it refers to as "the 4-parameter unit," has limited characteristics that are not reflective of the avoided unit contemplated under the Contract. It was on the basis of this new, limited, artificial, fraudulent characterization that FPC's modeling of the avoided unit indicated that the avoided unit would be cycled off in FPC's dispatch.

28. FPC operates, and has consistently operated, its system in such a manner as to avoid, to the maximum extent practicable, if

not to the maximum extent possible, cycling any of its large pulverized coal units -- i.e., Crystal River Units Nos. 1, 2, 4, and 5 -- off-line for any reason.

29. Based upon the financial projections and other information submitted by FPC, the Commission approved the Contract between FPC and Lake Cogen on July 1, 1991, by Order No. 24734. The Commission's approval of the Contract, and the other Negotiated Contracts, was predicated on its findings that:

- a. The capacity and energy generated by the facilities is needed by FPC and Florida's utilities;
- b. The contracts appear to be cost effective to FPC's ratepayers;
- c. FPC's ratepayers are reasonably protected from defaults by the QFs; and
- d. The contracts meet all the requirements and rules governing qualifying facilities.

30. FPC fabricated its new energy payment methodology long after the Contract was entered into and approved, for cost recovery purposes, by the Commission. Until FPC announced its newly fabricated interpretation and unilaterally implemented it in the summer of 1994, there was no evidence that any such interpretation was ever understood, contemplated, or intended by any of the QFs or, indeed, by FPC.

31. While it is true that the Contract, as modified by the Settlement Agreement, would require the payment of a firm energy price for all energy delivered to FPC, that payment methodology

represents an administrative convenience for the purpose of computing payments consistent with the Settlement Agreement's intent to compromise on the allocation of the amounts in dispute. The firm energy price to be paid under the modified Contract is not the firm energy payment rate associated with the avoided unit contemplated under the Contract, but is in fact much less than that rate, reflecting the compromise inherent in the Settlement Agreement.

32. FPC's new energy payment methodology does not more closely approximate the avoided costs associated with the avoided unit contemplated by the Contract, which avoided costs formed the basis for the Contract and for the Commission's approval thereof in 1991.

33. The Settlement Agreement is substantially identical, in all material respects, to the settlement agreement between Pasco Cogen Ltd. and FPC recently approved by the Commission in Docket No. 961407-EQ. Lake disputes whether any meaningful or substantive factual distinctions exist between the Settlement Agreement and the FPC-Pasco Cogen settlement agreement.

34. The curtailment benefits provided by the Settlement Agreement are significant, beneficial to FPC and its ratepayers, and not overstated by FPC.

35. FPC's modeling of its fabricated, hypothetical avoided unit does not result in payments that are closer to the avoided costs of the avoided unit contemplated by the Contract. Moreover, FPC's modeling of its fabricated, hypothetical avoided unit is

patently inconsistent with the Commission's Order No. 24734 approving the Contract.

36. The "buyout" provision of the Contract, pursuant to which FPC would make certain payments to Lake Cogen from 1996 through 2008 in return for being relieved of its obligation to purchase the Facility's output from January 1, 2010 through July 31, 2013, is cost effective to, and in the best interests of, FPC and its ratepayers. Accordingly, the Commission should approve the Settlement Agreement, including the "buyout" provision thereof.

37. The Settlement Agreement will provide significant benefits to FPC and its ratepayers and would resolve contentious litigation between FPC and Lake Cogen. Accordingly, it is in the public interest, as well as in the best interests of FPC and its customers. Accordingly, it should be approved.

DISPUTED ISSUES OF LAW AND POLICY

38. Lake Cogen herein sets forth several disputed issues of law, some of which also have policy implications or ramifications. Lake does not invite the Commission to try the case on the merits; rather, Lake sets forth these issues because they are addressed in the Order, and accordingly, Lake believes that it must address those issues to protect its substantial interests. Lake believes that the Order is much broader and far-reaching than necessary to resolve the issues in this proceeding, *i.e.*, whether the Settlement Agreement should be approved for cost recovery purposes. More specifically, Lake believes that the following statements pose issues of law (and, in some cases, policy) that are in dispute in

this proceeding.

39. This case presents, at its core, a case where the purchasing utility has attempted to alter contract payments to a QF due to changed circumstances. FPC understood -- and probably still understands -- that the avoided unit contemplated by the Contract was -- and is -- a fully characterized pulverized coal unit that, like all other pulverized coal units on FPC's system, would be operating all, or very nearly all, of the time that it was available.

40. The Settlement Agreement provides for payments that are less than the avoided costs calculated at the time the Contract was entered into and approved for cost recovery by the Commission, as well as less than the payments that are due and owing under the Contract.

41. It would be arbitrary and capricious for the Commission to refuse to approve, for cost recovery purposes, the Settlement Agreement that is the subject of this docket, where it recently approved another settlement agreement (between FPC and Pasco Cogen, Ltd.) that is in all material respects identical to the Settlement Agreement between FPC and Lake Cogen in this case.

42. The curtailment benefits provided by the Settlement Agreement are significant, beneficial to FPC and its ratepayers, and not overstated by FPC. Neither the Commission's nor the FERC's rules governing QF curtailments permit a utility to curtail purchases merely for economic reasons; rather, curtailments are only permitted where continuing to receive QF power "will impair

the utility's ability to give adequate service to the rest of its customers or, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases or otherwise place an undue burden on the utility."

43. The Commission cannot disallow cost recovery by FPC for payments made to Lake Cogen (or any other QF) pursuant to a court order requiring such payments as a matter of contract law.

44. Rejection of the Settlement Agreement by the Commission would be contrary to established principles of administrative finality and further contrary to the Commission's prior pronouncements with respect to the effect of its approval, for cost recovery purposes, of contracts between QFs and utilities.

45. Lastly, Lake Cogen disputes the legal conclusions stated in the Order regarding the jurisdiction of the Commission to take this action, and whether or not denial of the Settlement Agreement violates Lake Cogen's rights under the equal protection clauses of the Florida and United States Constitutions.

RELIEF REQUESTED

46. Lake Cogen is entitled to a formal proceeding and hearing pursuant to Chapter 120, Florida Statutes, and to have the Commission fully consider the issues raised herein as to why the Commission should approve the Settlement Agreement, for cost recovery purposes, pursuant to Rule 25-17.0836, Florida Administrative Code.

WHEREFORE, based upon the foregoing, Lake Cogen, Ltd. and its general partner, NCP Lake Power, Inc., respectfully request that, if the Commission does not, on its own motion, dismiss the petition herein as moot, the Commission set this matter for hearing and a formal proceeding pursuant to Section 120.57(1), Florida Statutes.

Respectfully submitted this 5th day of December, 1997.



Robert Scheffel Wright
Florida Bar No. 966721
LANDERS & PARSONS, P.A.
310 West College Avenue (ZIP 32301)
Post Office Box 271
Tallahassee, Florida 32302
Telephone (904) 681-0311
Telecopier (904) 224-5595

Attorneys for NCP Lake Power, Inc.
and Lake Cogen, Ltd.

CERTIFICATE OF SERVICE
DOCKET NO. 961477-EO

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery (*) or by United States Mail, postage prepaid, on the following individuals this 5th day of December, 1997:

Robert V. Elias, Esquire*
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 370, Gunter Building
Tallahassee, Florida 32399-0850

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

D. Bruce May, Esquire
Karen D. Walker, Esquire
Holland & Knight LLP
P. O. Drawer 810
Tallahassee, Florida 32302


Attorney

Cogen, FPC's forecasts indicated that there would be, over the relevant forecast period, at least some periods of time during which FPC's as-available energy prices would be less than the projected firm energy prices that would be due and payable under the Contract.

24. At the time that the Contract was entered into, the parties' intention with respect to the disputed Section 9.1.2 of the Contract was that energy payments thereunder would be determined with respect to the operational status of a fully characterized pulverized coal fired generating unit, with flue gas desulfurization scrubbers, constructed in 1991, as that unit would have been operated on FPC's system, had that unit been installed. This unit is referred to in the Contract as the "Avoided 1991 Pulverized Coal Unit."

25. The Circuit Court of the Fifth Judicial Circuit has confirmed that this is the intent of the Contract in its order granting partial summary judgment on the issue of liability in favor of Lake Cogen and against FPC. The Court specifically held that:

Section 9.1.2 of the Agreement, together with the other pertinent sections of the Agreement, requires the Defendant FPC to make electric energy payments to the Plaintiff with reference to modeling the operation of a real, operable 1991 Pulverized Coal Unit, having the characteristics required by law to be installed on such a unit as well as all other characteristics associated with such a unit, as selected by the Plaintiff in Section 8.2.1 of the Agreement and described in Appendix "C", Schedules 3 and 4 of the Agreement.

26. In its submissions to the Commission, FPC indicated that