

**Florida  
Power**  
CORPORATION

**JAMES A. MCGEE**  
SENIOR COUNSEL

**December 12, 1997**

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

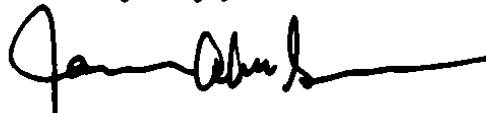
**Re: Docket No. 961477-EQ**

**Dear Ms. Bayó:**

**Enclosed for filing in the subject docket are an original and fifteen copies of Florida Power Corporation's Motion to Dismiss Lake Cogen, Ltd.'s Petition on Proposed Agency Action.**

**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**

**JAM/lkp  
Enclosure**

**cc: Parties of record**

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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In re: Petition for Expedited  
Approval of Settlement  
Agreement with Lake Cogen,  
Ltd. by Florida Power  
Corporation

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Docket No.961477-EQ

Submitted for filing:  
December 15, 1997

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of Florida Power Corporation's Motion to Dismiss Lake Cogen, Ltd.'s Petition on Proposed Agency Action has been furnished to the following individuals by regular U.S. Mail this 12th day of December, 1997:

Robert Scheffel Wright  
Landers & Parsons, P.A.  
310 West College Avenue  
P.O. Box 271  
Tallahassee, FL 32302

Wendy Greengrove, Esq.  
Director-Legal & Corporate Affairs  
GPU International, Inc.  
One Upper Pond Road  
Parsippany, NJ 07054

Wm. Cochran Keating IV, Esq.  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

  
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ATTORNEY

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In re: Petition for Expedited  
Approval of Settlement Agreement  
with Lake Cogen, Ltd. by Florida  
Power Corporation.

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Docket No. 961477-EQ

Submitted for filing:  
December 15, 1997

**FLORIDA POWER CORPORATION'S  
MOTION TO DISMISS LAKE COGEN, LTD.'S  
PETITION ON PROPOSED AGENCY ACTION**

Florida Power Corporation (Florida Power), hereby moves this Commission to dismiss the Petition on Proposed Agency Action filed by Lake Cogen, Ltd. (Lake) on December 5, 1997, which seeks to protest the Commission's Proposed Agency Action Order No. PSC-97-1437-FOF-EQ (the PAA Order). As grounds for dismissal Florida Power asserts that further proceedings in this docket to obtain Commission approval of the Settlement Agreement between Florida Power and Lake, including the hearing requested by Lake's Petition, have been rendered moot by the expiration of the Settlement Agreement in accordance with its own terms. In support of its motion to dismiss, Florida Power states as follows:

**Background**

1. On December 12, 1996, Florida Power filed a petition initiating this docket and requesting the Commission to approve a Settlement Agreement between Florida Power and Lake Cogen, Ltd. (Lake), which was intended to terminate pending litigation between the parties over the price of energy payments made pursuant to Section 9.1.2 of a Commission-approved Negotiated Contract between Florida Power and Lake. The Settlement Agreement was made expressly contingent

upon its approval by the Commission and provided in Section 2.a. that the Agreement would terminate if Commission approval was not obtained by July 1, 1997. Because of unanticipated delays in the progress of this proceeding beyond the control of Florida Power or Lake, the parties extended the Settlement Agreement's termination date to October 31, 1997. (See, letter agreement between Florida Power and Lake dated August 13, 1997, attached hereto as Exhibit A.)

2. Thereafter, at its September 23, 1997 Agenda Conference, the Commission voted to deny Florida Power's petition for approval of the Settlement Agreement. The Commission's decision was reflected in its PAA Order issued November 14, 1997. On December 5, 1997, the last day of the protest period and five weeks after the Settlement Agreement had terminated, Lake filed its Petition on Proposed Agency Action (the Petition) claiming as its "Relief Requested" that "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 ... ." (Petition, at page 17.)

#### **Discussion**

3. Florida Power submits that Lake's Petition is rendered moot by the termination of the Settlement Agreement. By requesting a formal proceeding to approve a settlement that no longer exists, Lake has asked the Commission to embark upon an exercise in futility. For this reason, Lake's Petition fails to state a claim for which relief can be granted and must therefore be dismissed.

4. In its Petition, Lake acknowledges that "there is no longer a viable settlement agreement upon which a hearing can be held ..." but suggests that

somehow it is Florida Power's initial petition that is moot, and by unstated but obvious implication, that the resulting PAA Order is moot as well.<sup>1</sup> (Petition, at page 4.) This suggestion is clearly wrong. In sharp contrast to the situation with Lake's Petition, the Settlement Agreement was viable and effective (subject to Commission approval) on December 12, 1996 when Florida Power filed its initial petition, as it was on September 23, 1997 when the Commission reached its decision to deny approval. It was not until October 31, 1997 that the Settlement Agreement expired by its own terms, thus rendering moot any further proceedings seeking its approval, including the formal proceeding requested by Lake.

5. Florida Power submits that Lake's Petition in general, and in particular, its unfounded suggestion that Florida Power's initial petition (and thus the entire proceeding to date) is moot, is nothing more than a desperate attempt to avoid the effect of language in the PAA Order that Lake considers to be detrimental to its interests. By the mere filing its request for a formal hearing on a non-existent settlement, Lake has improperly prevented, albeit temporarily, the PAA Order from becoming final pursuant to Rule 25-22.029(6), F.A.C. Moreover, by attempting to twist the acknowledged mootness of its own Petition<sup>2</sup> into a claim that Florida Power's initial petition is now moot, Lake seeks a result tantamount to a voluntary

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<sup>1</sup> In its prayer for relief, Lake asks the Commission to conduct a formal proceeding "if the Commission does not, on its own motion, dismiss the petition herein as moot ... ." (Petition, at page 18.) Presumably, the "petition herein" is intended to refer to Florida Power's initial petition (although the phrase would be more properly construed as referring to Lake's Petition). Clearly, Lake recognizes that if Florida Power's initial petition were to be dismissed as moot, then this entire proceeding to date, including the PAA Order that Lake is unhappy with, would also be moot and of no effect.


<sup>2</sup> As noted above, Lake's request for a formal Section 120.57(1) hearing admits "there is no longer a viable settlement agreement upon which a hearing can be held ... ." (Petition, at page 4.)

dismissal of that petition,<sup>3</sup> *i.e.*, the vacation the PAA Order *Nunc Pro Tunc*. This procedural ploy should not be countenanced by the Commission.

WHEREFORE, Florida Power Corporation respectfully requests that the Commission issue an order (1) dismissing Lake's Petition on Proposed Agency Action, (2) finding the PAA Order to be final, and (3) closing this docket.

Respectfully submitted,

OFFICE OF THE GENERAL COUNSEL  
FLORIDA POWER CORPORATION

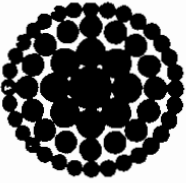
By 

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<sup>3</sup> Needless to say, only Florida Power, as the petitioner in this proceeding, has the right to voluntarily dismiss its petition -- a right Florida Power has chosen not to exercise. Lake's suggestion that Florida Power's petition can be dismissed for mootness is simply an attempt to do indirectly what it has no right to do directly.



**Florida  
Power**  
CORPORATION

**JAMES P. FAMA**  
DEPUTY GENERAL COUNSEL


**August 13, 1997**

**Lake Cogen, Ltd.  
c/o NCP Lake Power, Inc.,  
General Partner  
One Upper Pond Road  
Parsippany, NJ 07054**

**Re: December 6, 1996 Florida Power - Lake Cogen  
Settlement Agreement**

**Ladies and Gentlemen:**

I acknowledge receipt of your letter of July 22, 1997 proposing to modify section 2.a of the subject Settlement Agreement by extending the date by which FPSC Approval must be obtained from July 1, 1997 to ~~September 30, 1997~~.

*October 31, 1997* 

Florida Power is agreeable to such an extension, with the understanding that FPSC Approval, as the term is used in the Settlement Agreement, requires the issuance of a Proposed Agency Action Order approving the settlement that becomes effective, in accordance with Rule 25-22.029(6), F.A.C. In other words, the condition of the Settlement Agreement requiring FPSC Approval will not be deemed satisfied if (i) the FPSC votes against approval of the Settlement Agreement at an agenda conference, or (ii) the FPSC votes in favor of approval, but the Proposed Agency Action Order issued as a result of that vote becomes a nullity by the filing of a timely request for a section 120.57 hearing pursuant to Rule 25-22.029.

**In all other respects, the Settlement Agreement shall remain unchanged.**

**GENERAL OFFICE**


Lake Cogen, Ltd.  
August 13, 1997  
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If the foregoing accurately reflect the agreement of Lake Cogen and Florida Power concerning the above subject matter, please so indicate by signing both counterparts of this letter in the space provided below and return one signed counterpart to me.

Very truly yours,

**FLORIDA POWER CORPORATION**

By   
James P. Fama

**Confirmed and Agreed to:**

**LAKE COGEN, LTD.**

**By: NCP Lake Power, Inc.**

By 