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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  
January 8, 1998

**LAKE COGEN, LTD.'S  
MOTION TO DISMISS PROCEEDING AND CLOSE DOCKET**

LAKE COGEN, LTD., by and through its general partner, NCP LAKE POWER, INC. (hereinafter collectively "Lake" or "Lake Cogen") and pursuant to Rule 25-22.037, Florida Administrative Code ("F.A.C."), hereby moves the Commission to dismiss the "Petition for Expedited Approval of Settlement Agreement with Lake Cogen, Ltd. by Florida Power Corporation" ("FPC's Petition"), and to close Docket No. 961477-EQ. As grounds for dismissal, Lake Cogen asserts that the expiration of the Settlement Agreement renders this entire proceeding moot. Moreover, Florida Power Corporation ("FPC") does not have standing to request that the Commission approve a non-existent Settlement Agreement. In support of this motion to dismiss, Lake Cogen states:

**BACKGROUND**

On December 6, 1996, FPC and Lake Cogen 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"). The purpose of the Settlement Agreement was to settle all disputes between Lake Cogen and FPC that are the subject of pending 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

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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 a petition for approval of the Settlement Agreement for cost recovery purposes ("FPC's Petition"). It is uncontroverted that the Settlement Agreement expired by its own terms, on October 31, 1997. See FPC's Motion to Dismiss at 3 (wherein FPC acknowledges that the Settlement Agreement expired on October 31, 1997).

2. 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.

3. On November 14, 1997, the Commission issued proposed agency action Order No. PSC-97-1437-FOF-EQ (the "PAA Order") in which the Commission gave notice of its intent to deny FPC's petition for approval of the Settlement Agreement for cost recovery purposes.

4. On December 5, 1997, Lake Cogen timely filed a Petition on Proposed Agency Action ("Lake's Petition") challenging both the factual underpinnings and the legal conclusions of the PAA Order.

5. On December 15, 1997, FPC filed a Motion to Dismiss Lake's Petition ("FPC's Motion to Dismiss"), wherein FPC argues that expiration of the Settlement Agreement renders Lake's Petition moot, but somehow does not otherwise affect this proceeding.

Contemporaneously with the filing of this motion, Lake Cogen has also filed its response to FPC's Motion to Dismiss, urging that FPC's motion is without merit and contrary to applicable law and the Commission's rules, and accordingly, that FPC's motion should be denied.

### MOOTNESS

6. In Godwin v. State, 593 So. 2d 211, 212 (Fla. 1992), the Florida Supreme Court stated that

A case is "moot" when it presents no actual controversy or when the issues have ceased to exist.

Id. (citing Black's Law Dictionary, 1008 (6th ed. 1990)) (emphasis supplied). The Godwin court further stated that a "moot case generally will be dismissed".<sup>1</sup> Id. (emphasis supplied). The discussion of mootness in Godwin has been cited by numerous Florida appellate courts and is a basic tenet of Florida law. See, e.g., Martinez v. Singletary, 691 So. 2d 537, 538 (Fla. 1st DCA 1997); Archer v. State, 681 So. 2d 296, 297 (Fla. 1st DCA 1996); Bevan v. Wolfson, 638 So. 2d 527 (Fla. 2d DCA 1994); Fonte v. Department of Environmental Regulation, 634 So. 2d 663, 665 (Fla. 2d DCA 1994). Applying the rationale of Godwin to this case, the issues in this case "ceased to exist" when the Settlement Agreement expired by its own terms on October 31, 1997. Accordingly, this entire proceeding has been rendered

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<sup>1</sup>In Godwin, the Court recognized three situations in which otherwise moot cases will not be dismissed: 1) when the issue raised is of great public importance; 2) when the issue raised is likely to recur; or 3) if collateral legal consequences affecting the rights of a party flow from an issue to be determined. Godwin, 593 So. 2d at 212. Clearly, none of these exceptions is applicable to this case.

moot and FPC's Petition must be dismissed.

7. In its Motion to Dismiss, FPC concedes that the expiration of the Settlement Agreement renders any **further** proceedings in this docket moot (FPC's Motion to Dismiss at 3); however, FPC argues that the PAA Order itself remains valid and is not moot. FPC offers no case law to support this novel theory of "partial mootness" and the Commission must reject it. The expiration of the Settlement Agreement in this case rendered this entire proceeding moot and all proposed agency action "null and void." See In re: Complaint of Skyway Power Corporation to Require Florida Power Corporation to Furnish Avoided Cost Data Pursuant to Commission Rule 25-17.0832(7), F.A.C., 97 FPSC 3:402 (Fla. Pub. Serv. Comm'n 1997) (finding a PAA Order "null and void" after a voluntary dismissal). As Lake stated in its response to FPC's Motion to Dismiss filed in this Docket, the timely filing of Lake's Petition prevented the PAA Order from becoming final agency action. Thus, the PAA Order remains non-final, proposed agency action subject to review in a de novo proceeding. However, the expiration of the Settlement Agreement obviates the need for such a hearing and renders the entire proceeding moot.

WHEREFORE, Lake Cogen, Ltd., respectfully requests that the Commission issue an Order (1) dismissing the "Petition for Expedited Approval of Settlement Agreement with Lake Cogen, Ltd. by Florida Power Corporation" on the grounds that this entire proceeding was rendered moot by the expiration of the Settlement Agreement; (2) declaring the PAA Order to be null and void, and (3) closing this docket.

Respectfully submitted this 8th day of January, 1998.



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U S Mail or hand-delivery (\*) on this 8th day of January, 1998 to the following:

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