

approval of the Settlement Agreement for cost recovery purposes ("FPC's Petition")

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 Florida Public Service Commission ("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. Pursuant to Order No. PSC-97-1586-PCO-EQ, the Commission granted Lake Cogen until January 9, 1998 to file a response to the Motion to Dismiss. For the reasons set forth below, FPC's Motion to Dismiss is without merit and should be denied.

DISCUSSION

6. In the Motion to Dismiss, FPC concedes, and Lake Cogen would agree, that the Settlement Agreement "expired by its own terms" on October 31, 1997. (Motion to Dismiss at 3). However, FPC asserts that because the Settlement Agreement did not expire until after September 23, 1997, the date of the agenda conference during which the Commission

considered FPC's Petition, the resulting PAA Order is valid. FPC further asserts that because the Settlement Agreement is now terminated, any further proceedings in this docket, including Lake's Petition challenging the PAA Order, are moot. (Motion to Dismiss at 3) ¹

7. The calculated -- but absurd -- implication of FPC's assertions is that the factual statements and conclusions contained in the PAA Order cannot be challenged. In other words, FPC is asking the Commission to allow the proposed factual findings of the PAA Order to become the equivalent of final agency action without providing for an administrative hearing pursuant to Chapter 120, Florida Statutes. Specifically, in its request for relief, FPC asks that the Commission issue an order "finding the PAA Order to be final." Motion to Dismiss at 4. FPC's request flies in the face of Chapter 120, the Commission's rules, the plain language of the PAA Order itself, and well-established Florida case law and must be denied. FPC has no right to, and the Commission may not grant, a final order containing factual findings where no hearing has been held and where such an order would adversely affect another entity (Lake Cogen).

8. Rule 25-22.029, F.A.C., is the Commission's rule concerning proposed agency action proceedings. Rule 25-22.029, F.A.C., provides in pertinent part:

- (1) At any time subsequent to the initiation of a proceeding before the Commission, the Commission may give notice of proposed agency action. Proposed agency action shall be

¹Lake Cogen does not disagree with the general proposition that the expiration of the Settlement Agreement affected this proceeding. In fact, as stated in its Petition, Lake Cogen believes that the expiration of the Settlement Agreement has rendered this entire proceeding moot. (Lake's Petition at 4). Accordingly, contemporaneous with the filing of this response, Lake Cogen is filing with the Commission a motion to dismiss this entire proceeding as moot.

made upon a vote of the Commission, and may be reflected in the form of an order or a notice of intended action.

(2) After agenda conference, the Division of Records and Reporting shall issue written notice of the proposed agency action, advising all parties of record that they have 21 days after issuance of the notice in which to file a request for a § 120.57 hearing.

* * *

(4) One whose substantial interests may or will be affected by the Commission's proposed action may file a petition for a § 120.57 hearing, in the form provided by Rule 25-22.036.

* * *

(6) In 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.

(Emphasis supplied). Thus, Rule 25-22.029, F.A.C., clearly provides that a PAA Order becomes effective or final without an evidentiary hearing only if no such hearing is timely requested.

9. The PAA Order itself cites Rule 25-22.029, F.A.C., in clearly providing that

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.

PAA Order at 21 (emphasis supplied). Thus, FPC's Motion to Dismiss improperly asks the Commission to ignore both Rule 25-22.029, F.A.C., and the clear language of the PAA

Order, and allow the "preliminary" action proposed in the PAA Order to become final without first convening an evidentiary hearing pursuant to Chapter 120, Florida Statutes.

10. Moreover, FPC's assertion that any attempt by Lake Cogen to challenge the PAA Order is moot effectively ignores nearly twenty years of Florida administrative case law. In Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 786-87 (Fla. 1st DCA 1981), the First District Court of Appeal considered the status of "proposed agency action" taken by the Florida Department of Environmental Regulation ("DER") in the form of a notice of intent to issue a permit, which, pursuant to applicable DER rules, would become "final agency action" only if no hearing was timely requested by an appropriate party.³ The Court in J.W.C. stated that:

Clearly, there was no final agency action by DER in this proceeding prior to [the filing of a] request for hearing. [The filing of a] 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)). In In re: Petition For Approval of Contract for the Purchase of Firm Capacity and Energy Between General Peat Resources, L.P. and Florida Power and Light Company, 94 FPSC 3:507, 510 (Fla. Pub. Serv. Comm'n 1994), the Commission relied on J.W.C. in

³Not surprisingly, FPC cites no cases or other precedent in support of its Motion to Dismiss.

⁴DER's "notice of intent" closely parallels the Commission's PAA Order. Both are preliminary agency actions which cannot become final or effective if a valid petition is filed within the prescribed time period.

concluding that a "PAA order no longer has any effect when a de novo proceeding is required."

11. Just as the petitioners in L.W.C. were, Lake Cogen is entitled to a de novo evidentiary hearing to attempt to change the Commission's mind with regard to the disputed factual statements and conclusions contained in the PAA Order. See Couch Construction Co., Inc. v. Department of Transportation, 361 So. 2d 172, 176 (Fla. 1st DCA 1978) (stating that the Chapter 120, Florida Statutes, hearing requirements "are designed to give affected parties an opportunity to change the agency's mind.") In stark contrast, once Lake Cogen timely requested an evidentiary hearing pursuant to Chapter 120, Florida Statutes, FPC was not entitled to and otherwise has no cognizable legal right to have the wholly preliminary factual findings of the PAA Order become final. Accordingly, unless this entire proceeding is dismissed as moot, Lake Cogen must be granted an opportunity to challenge the PAA Order.

WHEREFORE, Lake Cogen, Ltd. respectfully requests that the Commission issue an order denying Florida Power Corporation's Motion to Dismiss Lake Cogen, Ltd.'s Petition on Proposed Agency Action.

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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