

ORIGINAL
FILE COPY

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**

**MOTION OF
LAKE INTEREST HOLDINGS, INC.
TO SUSPEND THE PROCEDURAL SCHEDULE**

Pursuant to Rules 25-22.037, Florida Administrative Code, Lake Interest Holdings, Inc ("LIHI"), respectfully moves to suspend the procedural schedule. LIHI has separately filed today to intervene in this proceeding. In support of this motion, LIHI states as follows

Background

1. LIHI owns or controls 50.1% of the equity of Lake Cogen Ltd., 49.1% as a limited partner and 1% as a general partner. LIHI is a wholly-owned subsidiary of North Canadian Resources, Inc. NCRI is a wholly-owned subsidiary of Norcen Explorer, which is in turn a wholly-owned subsidiary of Norcen Energy Resources Ltd. Norcen is a major Canadian energy and resources producer and marketer.
2. On December 12, 1996, Florida Power Corporation ("FPC") filed with the Commission a "Petition for Expedited Approval of Settlement Agreement with Lake

DOCUMENT NUMBER
02231 FEB 28 1996
FPSC-RECORDS/REPORTING

Cogen, Ltd. by Florida Power Corporation" ("FPC Petition"). FPC attached to its Petition a document entitled "Settlement Agreement and Amendment to Negotiated Contract for the Purchase of Firm Energy from a Qualifying Facility between Lake Cogen, Ltd. and Florida Power Corporation" ("Settlement Agreement")

3. **This Settlement Agreement purports to resolve, among other matters, ongoing litigation between FPC and Lake Cogen, Ltd. ("Lake") concerning the terms, conditions, and payments to be made for purchased power from the Lake plant under the "Negotiated Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility between Lake Cogen, Ltd., and Florida Power Corporation" ("Power Purchase Agreement" or "PPA"), from August, 1994, to the date of the Settlement Agreement. The Settlement Agreement also provides revised terms, conditions, and payments for power purchases from the plant into the future.**

4. **LIHI is a General Partner in Lake Cogen, Ltd. pursuant to the First Amended and Restated Limited Partnership Agreement of Lake Cogen Ltd., dated July 24, 1992, as amended by the First Amendment thereto, dated June 13, 1994 and subsequent amendments (inclusively, "Partnership Agreement"). A complete copy of the Partnership Agreement, including amendments, can be made available to the Commission if desired**

5. **The remaining equity in the Lake partnership is held by GPU International ("GPU") through subsidiaries including Lake Investment, L.P. which holds a 48.9% share**

of Lake Cogen, Ltd. as a limited partner and NCP Lake Power Incorporated ("NCP Lake"), which is a 1% General Partner. The equity of Lake Investment, L.P., is held by two entities, NCP Lake, and NCP Gem Incorporated ("NCP Gem"). NCP Lake holds the 1% General Partner interest in Lake Investment, L.P., while NCP Gem holds the limited partnership interest. Thus, in total, LIHI owns 50.1% of Lake Cogen, Ltd., and GPUJ through Lake Investment and NCP Lake owns 49.9% of Lake Cogen, Ltd., of which both parties hold equal 1 percent interests as General Partners.

6. In accordance with Section 11.2 of the Partnership Agreement, the general management and control of Lake is delegated by the General Partners to a Management Committee. Each General Partner shall appoint two members to the Management Committee, which can only act with a quorum of three-quarters of the four members attending the meeting in person, and with votes of not less than three members. The Management Committee has never met nor voted concerning this matter.

7. NCP Lake is named the Managing General Partner in the Partnership Agreement as amended. However, the Managing General Partner is specifically *not* empowered to amend any of the Operative Documents on behalf of the Partnership without General Partner approval. The Operative Documents are defined in a separate agreement to include the Contracts, which are in turn defined to include the Power Purchase Agreement.

8. To the extent the Management Committee has not formally acted, the prior approval in writing is required from all General Partners to any significant action affecting the legal status, obligations, or entitlements of Lake Cogen, Ltd., and no General Partner can act without the consent of the others. Section 11.1(c) of the Partnership Agreement states as follows:

"Except for those actions taken by the Management Committee pursuant to the authority delegated to it herein, all actions to be taken by the General Partners or by the Partnership or the other Partners shall be taken only with the prior approval in writing of all the General Partners. No General Partner shall have the authority to act on behalf of the Partnership or any Partner without the prior written approval of all of the General Partners."

9. Thus the Management Committee did not act to approve the Settlement Agreement nor the amendments to the PPA, the Managing General Partner of Lake Cogen, Ltd. (NCP Lake) is specifically prohibited from amending the Power Purchase Agreement on its own, and such action cannot be taken without the consent of LIHI as a General Partner, which consent was not sought or obtained.

10. Despite its lack of authority to do so on its own and without the consent of LIHI, NCP Lake negotiated and executed the Settlement Agreement and amendments to the PPA.

11. In footnote 3 at page 3 of the FPC Petition, FPC states as follows:

"The Settlement Agreement is also conditioned upon approval by Lake's Owner Trustee and, to the extent necessary, its partner

Lake Interest Holdings, Inc. FPC will advise the Commission when notice of such approval is received” (Emphasis added).

Similarly, at page 2 of the Settlement Agreement, the document is prefaced by the following statement:

“Whereas, except as explicitly noted herein, the Parties intend for this Settlement Agreement and for their respective undertakings, covenants, and agreements made herein to be strictly conditioned upon the approval of this Settlement Agreement in its entirety by (i) Nationsbank of Florida, National Association (“Owner Trustee”) as Owner Trustee under that certain Participation Agreement, dated as of July 29, 1992, by and between Lake, Owner Trustee, TIFD III-C Inc. and General Electric Capital Corporation, as amended, and (ii) *to the extent required* under the First Amended and Restated Limited Partnership Agreement of Lake Cogen, Ltd., as amended (the “Partnership Agreement”), by Lake Interest Holdings, Inc., a Delaware Corporation (“LIHI”), or any successor to LIHI’s partnership interest in Lake (Emphasis added).

Finally, at p. 5 of the Settlement Agreement, the document states as follows:

Approval by the Owner Trustee and General Partner

- a. This Settlement Agreement is further expressly conditioned on its being approved by the Owner Trustee and, *to the extent required* under the Partnership Agreement, by LIHI or any successor to LIHI’s partnership interest in Lake, in its entirety without modification or condition. Except as otherwise noted, this Settlement Agreement shall have no force or effect if such approval is not obtained (Emphasis added).
- b. Lake shall promptly contact the Owner Trustee and LIHI and provide this Settlement Agreement to the Owner Trustee and LIHI or its successor. Lake shall make all reasonable efforts to obtain expeditious consideration and approval of this

**Settlement Agreement by the Owner Trustee and
LIHI or its successor.**

12. **These provisions suggest that FPC and NCP Lake, representing itself as Lake Cogen, Ltd., believe there may be some question whether LIHI's approval is required to an amendment of the PPA. In LIHI's view, the provisions of the Partnership Agreement leave no room for any such question. As a requirement of the Partnership Agreement, Lake Cogen Ltd. and its Managing General Partner, NCP Lake, were required to obtain LIHI's prior written consent to any amendment of the Power Purchase Agreement between Lake and FPC.**

13 **As this motion establishes, FPC's and Lake's claim in their settlement (at Paragraph 14) to have obtained or to be in a position to obtain "all necessary corporate or partnership approvals, as appropriate, to execute the Release when said Release is executed" is a false and misleading statement. By the same token, the Representations and Warranties stated in Paragraph 14 of the Settlement Agreement that the necessary approvals of third parties are limited to those of the Owner Trustee and the FPSC are also false and misleading.**

14. **Despite their own stated recognition that the Settlement Agreement may be conditioned on LIHI's approval, and despite the provisions of the Partnership Agreement that make clear that LIHI's approval is required, LIHI has not as of the date of this Petition and Motion been contacted with regard to its approval of the**

Settlement Agreement by FPC nor by Lake, nor has LIHI's approval been obtained.¹

15. **Pursuant to the above, LIHI submits that Lake lacked the necessary authority to enter into the Settlement Agreement with FPC. As a result, the Settlement Agreement is invalid and must be presently considered of no force or effect as it has not been executed by any person with the proper authority to execute it on behalf of Lake.**
16. **The failure to seek LIHI's consent despite acknowledgement of its consent right, and the failure to inform or serve LIHI with a filing so clearly involving its interests and rights despite explicit representations to the effect that such notice would be or has been given, coupled with the wholly unsupported petition for expedited approval, leads LIHI to believe that Lake and FPC have attempted to lead the Commission into precipitous action on their proposal and to present LIHI with a *fait accompli*. They seek an unjustifiably hasty review and approval of their Settlement Agreement in their motion for expedited approval, in part in order to prevent LIHI from adequately representing its own interest in**

¹ The FPC Petition and Settlement Agreement were not served upon or otherwise provided by FPC or Lake to LIHI. This failure was directly contrary to the Settlement's own provisions at p. 5. Neither FPC nor Lake informed LIHI that they had reached and filed a settlement agreement with this Commission. Instead, LIHI became aware of the FPC Petition and the Settlement Agreement as a function of oral communications with FPSC Staff during a meeting concerning Pasco Cogen Ltd. LIHI first obtained a copy of the FPC Petition and Settlement Agreement from the Commission itself upon request to the Commission staff.

the matter.

17. **Neither this dispute, nor the Partnership Agreement under which it arises, are within this Commission's jurisdiction.**

18. **As a result, in defense of its interest in the project, LIHI has today filed a Complaint for Declaratory Relief in the Circuit Court of the Fifth Judicial Circuit in and for Lake County, Florida, seeking a determination that the Settlement Agreement, as purportedly executed and filed, was entered into without authority by NCP Lake on behalf of Lake Cogen, Ltd., and is therefore without legal force or effect. A copy of this Complaint is attached hereto as Attachment A.**

Motion to Suspend the Procedural Schedule

19. **In light of the above facts, LIHI hereby moves that the Commission suspend the procedural schedule adopted in this proceeding. This suspension would continue pending the resolution of LIHI's Complaint for Declaratory Relief ending the dispute over the validity of the Settlement Agreement. The Commission does not have jurisdiction to review and resolve such a dispute over LIHI's right to prior consent to the Settlement Agreement and amendments to the PPA. As noted above, LIHI has moved to place this dispute before the Circuit Court of the Fifth Judicial Circuit in and for Lake County, Florida in a Complaint filed today (Attachment A).**

20. It is clear that the Commission cannot and should not move to review and approve the Settlement Agreement and amendments to the PPA if they are invalid for lack on Lake's part of the requisite authority to execute them. The Commission would not proceed to review a Settlement Agreement and amendment to the PPA unilaterally filed by FPC without Lake's participation; this proceeding presents precisely such an instance to the extent that NCP Lake lacked the necessary authority to enter into the Settlement Agreement or amend the PPA on behalf of Lake Cogen, Ltd.
21. LIHI will proceed to obtain the most rapid resolution possible of the dispute in the Circuit Court of the Fifth Judicial Circuit in and for Lake County, Florida. LIHI is willing to cooperate with Lake in obtaining an expedited ruling on its Petition for a Declaratory Order from the court, and therefore believes that there will be no harm from a temporary suspension of the procedural schedule in this matter.
22. This Commission should therefore suspend the procedural schedule herein until such time as there is dispositive action by the Circuit Court on LIHI's Complaint for Declaratory Relief. Not to suspend the procedural schedule, and to move forward in reviewing the merits of the Settlement Agreement and amendments to the PPA despite the pendency of the Petition for a Declaratory Order in court is to risk gross waste of the Commission's time and resources, as well as those of the parties, since a Court decision in LIHI's favor would moot any contrary determination by the Commission.

23. ***Wherefore***, the Commission should suspend the procedural schedule pending a determination by the Circuit Court of the Fifth Judicial Circuit in and for Lake County, Florida, in the Complaint for Declaratory Relief filed today by LIHI, which alone can determine whether the Settlement Agreement filed before the Commission in this proceeding has any force or effect without LIHI's consent.

Respectfully submitted,



Roger A. Berliner, Esq.
John W. Jimison, Esq.
Peter G. Hirst, Esq.
Brady & Berliner
1225 19th Street, N.W.
Washington, D.C. 20036

Attorneys for
Lake Interest Holdings, Inc.

February 27, 1997

ATTACHMENT A

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT, IN AND
FOR LAKE COUNTY, FLORIDA

CIVIL DIVISION

CASE NO.:

LAKE INTEREST HOLDINGS, INC.,

Plaintiff,

v.

LAKE COGEN, LTD., NCP LAKE POWER
INCORPORATED, LAKE INVESTMENT,
L.P., AND FLORIDA POWER
CORPORATION,

Defendants.

COMPLAINT

Plaintiff Lake Interest Holdings Inc. brings this Complaint for declaratory relief under the Florida Declaratory Judgments Act, Fla. Stat § 86.011 et seq. For its Complaint, plaintiff alleges as follows:

1. This is an action for declaratory relief pursuant to Chapter 86, Florida Statutes. This court has jurisdiction over this cause pursuant to Fla. Stat. §§ 86.011 and 86.021.
2. Plaintiff Lake Interest Holdings Inc. (hereinafter "LIHI") is a Delaware corporation authorized to do business in Florida and doing business in Lake County, Florida.
3. Defendant Lake Cogen, Ltd. ("Lake Cogen") is a Florida limited partnership doing business in Lake County, Florida.
4. Defendant NCP Lake Power Incorporated ("NCP Lake") is a Delaware corporation authorized to do business in Florida and doing business in Lake County, Florida.

CASE NO.

5. Defendant Lake Investment, L.P. ("LIL") is a Delaware limited partnership doing business in Lake County, Florida.

6. Defendant Florida Power Corporation ("FPC") is a Florida corporation doing business in Lake County, Florida.

7. LILH seeks a declaration (a) of its rights and powers pursuant to a Partnership Agreement entered into between LILH, NCP Lake and LIL, and admitting LILH as a general and limited partner in Lake Cogen; (b) that NCP Lake was and is without power or authority to effectuate amendments to certain contracts of Lake Cogen specifically including the Power Purchase Agreement described in paragraph 9 and attached as Exhibit 1; and (c) that a certain amendment to a contract for the purchase of electric power executed by and between Lake Cogen and FPC, which amendment NCP Lake purported to execute on behalf of Lake Cogen on or about December 5, 1996, was executed without authority under the Partnership Agreement (described in paragraph 11 and attached as Exhibit 3) and is therefore void and without force and effect.

8. Venue is proper in Lake County since all defendants do business here, the subject matter of the action is located here and the cause of action accrued here.

9. Lake Cogen is the owner and operator of an electric power cogeneration plant (the "Project") in Lake County that has a power production capacity of 106 megawatts of net electric power. On or about March 13, 1991, Lake Cogen and FPC signed a Power Purchase Agreement (the "PPA"), under which FPC purchases all

CASE NO.

of the Project's generating capacity and electric power output. The PPA is the Project's sole power sales contract and establishes and governs the Project's sole source of revenue, sales of capacity and power to FPC. A copy of the PPA is attached and incorporated herein as Exhibit 1.

10. Lake Cogen was established as a Florida limited partnership by the filing of a Certificate of Limited Partnership on March 13, 1991, all as more fully set forth in paragraph A of the Recitals at page 2 of the First Amended and Restated Limited Partnership Agreement (the "First Agreement"). A copy of the First Agreement is attached and incorporated herein as Exhibit 2

11. As of June 13, 1994, LHH, NCP Lake and LLL executed the First Amendment to First Amended and Restated Limited Partnership Agreement (the "Partnership Agreement"). The Partnership Agreement is the subject and basis of this Complaint. A copy of the Partnership Agreement is attached and incorporated herein as Exhibit 3.

12. Under the Partnership Agreement, LHH was admitted to Lake Cogen as a General Partner and a limited partner, with a one percent general partnership interest and a majority general and limited partnership interest.

13. NCP Lake is one of two General Partners in Lake Cogen, the other General Partner being LHH.

14. Under Section 11.2 of the Partnership Agreement, the General Partners' full management authority, except as specifically provided by the agreement,

CASE NO.

was delegated to a Management Committee comprised of two representatives of LIHI and two representatives of NCP Lake. Also under that provision, approval by the Management Committee is required for all acts of management not specifically delegated to the Managing Partner, which approval can be given only by vote of a majority of the Management Committee. All authority not specifically so delegated was retained by the General Partners, and may only be exercised jointly by agreement of both General Partners. Thus, all management authority, including the authority to amend the PPA, can be exercised only by agreement of either the General Partners themselves or by a majority of their representatives on the Management Committee.

15. Under Section 11.3 of the Partnership Agreement, NCP Lake was designated Managing General Partner, and is delegated certain of the Management Committee's management authority, including certain limited authority to contractually bind Lake Cogen. The authority to amend the PPA was specifically excluded from that delegation by Section 11.3 (b) (1) of the Partnership Agreement. Under that provision, the Managing Partner is expressly and specifically denied the authority to agree to or cause any amendment of the "Operative Documents", of which the PPA is one. "Operative Documents" is defined in the Partnership Agreements as those documents so identified at pages 37-38 in appendix A to a certain Participation Agreement dated July 29, 1992. A copy of the Participation Agreement is attached as Exhibit 4 hereto and incorporated herein. That provision of the Participation Agreement includes "the Contracts" as Operative Documents. That same Appendix A expressly includes the PPA in its definition of "the Contracts". The PPA is therefore one of the Operative

CASE NO.

Documents which NCP Lake, as Managing Partner, specifically and expressly is without the power to amend. That authority is retained solely in the Management Committee.

16. Under the Management Committee provision (11.2) and the Managing General Partner provision (11.3) of the Partnership Agreement, the Managing General Partner is without authority to amend the PPA, and no amendment of the PPA is authorized without the affirmative vote of not fewer than three of the Management Committee members. The Management Committee never considered or made any such vote, and neither the General Partner, the Management Committee nor the Partnership Agreement ever delegated any such authority to the Managing General Partner.

17. Pursuant to Section 11(c) of the Partnership Agreement, neither General Partner acting alone is authorized to effectuate any amendment to the Operative Documents, including the PPA.

18. On or about December 5, 1996, NCP Lake, purporting to act on behalf of Lake Cogen, and FPC signed a Settlement Agreement, purporting, among other things, to amend the PPA. The Settlement Agreement, if effective, would affect the terms of payment to the Project and thereby significantly affect the Project's sole source of revenue. A copy of the Settlement Agreement is attached and incorporated herein as Exhibit 5.

19. Neither the Partnership Agreement nor the Management Committee authorized execution of the Settlement Agreement, and the Partnership Agreement expressly withheld from the Managing Partner, or any single General Partner, any and all authority to effect any such amendment.

CASE NO.

20. The signatories to the Settlement Agreement for and on behalf of Lake Cogen were entirely without authority to execute that agreement, and the Settlement Agreement is void and without force and effect.

21. As a party to the Partnership Agreement, LIHI has a direct and substantial interest in its right to give or withhold its consent, through its representatives on the Management Committee, to any act or exercise of power of management that has not been delegated to the Managing Partner. As the majority equity owner of the Project, LIHI has a direct and substantial interest in the value, benefits and validity of any and all agreements entered into or purportedly entered into by or on behalf of Lake Cogen, particularly including the PPA.

22. LIHI's direct and substantial interests in the Partnership Agreement and the PPA are or will be directly and adversely affected by defendants' unauthorized act, in and of itself, of signing the Settlement Agreement, as well as by the substance and operation of the purported terms of the Settlement Agreement. LIHI therefore has a direct and substantial interest in a determination of the validity of the Settlement Agreement.

23. LIHI is uncertain as to its rights, status and equitable and legal relationship to defendants as they are affected by the Partnership Agreement and the purported amendment thereto, and is therefore in need of a declaration of its rights pursuant to Florida Statutes, Chapter 86.

CASE NO.

24. The questions raised herein are real and not theoretical, and LIHI has a genuine bona fide interest in the Partnership Agreement, the Project and the resolution of the issues presented herein.

25. LIHI has retained the undersigned attorneys to represent it in this action and is obligated to pay its attorneys a reasonable fee for this service.

26. Pursuant to Section 16.13 of the First Agreement, the prevailing party in litigation arising therefrom is entitled to recover its attorney's fees and litigation expenses from the nonprevailing party.

27. All conditions precedent to this action have been performed, waived or have occurred.

WHEREFORE, plaintiff LIHI respectfully requests this court to issue a judgment pursuant to Chapter 86, Florida Statutes adjudging, ordering and declaring that:

1. Under the terms of the Partnership Agreement (Exhibit 3 hereto), the General Partners retain in themselves and in their representatives on the Management Committee, and have not delegated to the Managing Partner or any other person, the sole authority to effect any amendment to the Power Purchase Agreement (Exhibit 1 hereto) for and on behalf of Lake Cogon, Ltd;

2. Any party or person, specifically including NCP Lake as Managing General Partner, other than the General Partners acting either jointly themselves or through a majority of their representatives on the Management Committee, purporting

CASE NO.

to act on behalf of Lake Cogen, was and is without authority or power to amend the Power Purchase Agreement;

3. The Settlement Agreement (Exhibit 5 hereto) purportedly entered into between NCP Lake for and on behalf of Lake Cogen, Ltd. and Florida Power Corporation, was signed without authority and is void and of no force and effect; and

4. Awarding LIHI its attorney's fees and costs incurred in this action and such other and further relief as this Court deems proper.

MCDERMOTT, WILL & EMERY

By: James E. McDonald

James E. McDonald, Esq.
Florida Bar No. 171226
Suzanne H. Youmans, Esq.
Florida Bar No. 661104
McDermott, Will & Emery
201 S. Biscayne Boulevard
Suite 2200
Miami, Florida 33131
Telephone: (305) 358-3500
Attorneys for Plaintiff

February 27, 1997

1272619190001



CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled in this proceeding.

Dated at Washington, D.C. this 28th day of February, 1997.

Evonne Edmonds

Evonne Edmonds