

FLORIDA PUBLIC SERVICE COMMISSION  
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Tallahassee, Florida 32399-0850

MEMORANDUM

FEBRUARY 26, 1998

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FPSC - Records Reporting

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (C. KEATING) *WCK RVE TJS*  
DIVISION OF ELECTRIC AND GAS (DUDLEY, BREMAN, HARLOW, *JMN*  
WHEELER) *RT*  
DIVISION OF AUDITING AND FINANCIAL ANALYSIS (MAUREY, *ALM*  
MCNULTY, NORIEGA, SLEMENICZ, STALLCUP) *WBSN*

RE: DOCKET NO. 961477-EQ - PETITION FOR EXPEDITED APPROVAL OF  
SETTLEMENT AGREEMENT WITH LAKE COGEN, LTD., BY FLORIDA  
POWER CORPORATION

AGENDA: 03/10/98 - REGULAR AGENDA - MOTION TO DISMISS -  
INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\961477-2.RCM

CASE BACKGROUND

On December 12, 1996, Florida Power Corporation ("FPC") filed a petition for approval of a settlement agreement between it and NCP Lake Power, Inc. for cost recovery purposes. NCP Lake Power, Inc. and Lake Cogen Ltd. (collectively, "Lake") were granted intervenor status on June 5, 1997. As amended by subsequent agreement of the parties, the settlement agreement would expire on October 31, 1997, absent the necessary regulatory approvals. At its September 23, 1997 Agenda Conference, the Commission voted to deny FPC's petition. The Commission's decision was memorialized in proposed agency action Order No. PSC-97-1437-FOF-EQ, issued November 14, 1997 ("PAA Order"). On December 5, 1997, Lake timely filed a Petition on Proposed Agency Action protesting the PAA Order.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

DOCKET NO. 961477-EQ  
DATE: FEBRUARY 26, 1998

On December 15, 1997, FPC timely filed a motion to dismiss Lake's petition. After receiving Commission approval for an extension of time to file a response, Lake filed a response to FPC's motion to dismiss on January 8, 1998. On the same day, Lake filed its Motion to Dismiss Proceeding and Close Docket. FPC timely filed a response to Lake's motion to dismiss on January 20, 1998.

DOCKET NO. 961477-EQ  
DATE: FEBRUARY 26, 1998

### **DISCUSSION OF ISSUES**

**ISSUE 1:** What is the appropriate status of Order No. PSC-97-1437-FOF-EQ?

**RECOMMENDATION:** Order No. PSC-97-1437-FOF-EQ was rendered a nullity by the expiration of the settlement agreement between Florida Power Corporation and NCP Lake Power, Inc. When the settlement agreement expired, the issues in this case ceased to exist, thus rendering this entire proceeding, including FPC's original petition, moot.

### **STAFF ANALYSIS:**

#### **Arguments of the Parties**

On page 4 of its Petition on Proposed Agency Action, Lake notes that the settlement agreement has expired and that negotiations to further extend it have been unsuccessful. Lake suggests that it may be appropriate for the Commission to dismiss the underlying petition, i.e. FPC's original petition, as moot and close the docket. Lake requests that the Commission set the matter for a formal hearing if the Commission does not, on its own motion, dismiss FPC's petition as moot.

In FPC's motion to dismiss Lake's Petition on Proposed Agency Action, FPC contends that Lake's petition should be dismissed because it fails to state a claim for which relief may be granted. FPC asserts that a formal proceeding on a non-existent settlement agreement would be futile. In addition, FPC argues that Lake's suggestion - that FPC's initial petition is now moot - is wrong, as is the implication that the PAA Order is also moot. FPC notes that the settlement agreement was viable when FPC filed its initial petition and when the Commission reached its decision. On page 3 of its motion to dismiss, FPC asserts that the settlement agreement's expiration on October 31, 1997, rendered moot "any further proceedings seeking its approval, including the formal proceeding requested by Lake." (Emphasis supplied by FPC). FPC requests that the Commission (1) dismiss Lake's petition, (2) find the PAA Order to be final, and (3) close this docket.

In Lake's response to FPC's motion to dismiss, Lake contends that a proposed agency action order becomes effective or final without an evidentiary hearing only if a Section 120.57, Florida Statutes, hearing is not timely requested. Lake refers to the PAA

DOCKET NO. 961477-EQ  
DATE: FEBRUARY 26, 1998

Order, which states, "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 ("F.A.C."). Lake notes that Rule 25-22.029(6), F.A.C., provides that "[i]n 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."

Further, Lake cites Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778, 786-87 (Fla. 1st DCA 1981), which states:

Clearly, there was no final agency action by DER in this proceeding prior to [the petitioners'] request for hearing. [The petitioners'] 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)). Lake also cites Commission Order No. PSC-94-0310-FOF-EQ, issued March 17, 1994, for the proposition that a proposed agency action order is no longer effective when a de novo proceeding is required. Lake concludes that once it timely filed its petition on proposed agency action, FPC was not entitled to have the preliminary factual findings of the PAA Order become final. Unless the entire proceeding is dismissed as moot, according to Lake, it must be granted an opportunity to challenge the PAA Order.

In Lake's motion to dismiss this entire proceeding, Lake argues that the entire proceeding, including FPC's petition, should be dismissed as moot because there is no longer a viable settlement agreement upon which a hearing may be held. Lake cites Godwin v. State, 593 So. 2d 211, 212 (Fla. 1992), which states that "[a] case is 'moot' when it presents no actual controversy or when the issues have ceased to exist." Lake asserts that the issues in this case ceased to exist when the settlement agreement expired, thus rendering the entire proceeding and FPC's petition moot. Lake points out that FPC offers no case law to support the assertion that only proceedings initiated after expiration of the settlement agreement are rendered moot. Lake asserts that the timely filing of its petition prevented the PAA Order from becoming final, leaving it subject to review in a de novo proceeding. However,

DOCKET NO. 961477-EQ  
DATE: FEBRUARY 26, 1998

Lake contends, the expiration of the settlement agreement obviates the need for such a proceeding and renders the entire proceeding moot. Lake requests that the Commission (1) dismiss FPC's petition on the grounds that the entire proceeding is moot, (2) declare the PAA Order null and void, and (3) close the docket.

In FPC's response to Lake's motion to dismiss, FPC contends that Lake's argument is entirely dependent on the validity of its petition because without a valid protest the PAA Order becomes final in accordance with Rule 25-22.029(6), Florida Administrative Code. FPC argues that Lakes' petition is invalid because it fails to state a claim for which relief can be granted. FPC further contends that because the PAA Order memorializes a decision made when the settlement agreement was in effect, Lake's claim that the entire proceeding is moot is untenable. FPC notes that in Godwin, supra, Ms. Godwin appealed the trial court's order to involuntarily commit her to a state hospital but was discharged before her appeal was decided; the State moved to dismiss her appeal on grounds that her discharge rendered her appeal moot. FPC feels it is constructive to note that no issue was made of the trial court order's validity.

#### Staff Analysis and Conclusions

Because the issues are so intertwined among the pleadings summarized above, staff believes that the Commission should decide the underlying issues before ruling separately on the motions to dismiss. Staff notes that both parties recognize the futility of conducting a formal proceeding on a settlement agreement that has expired by its own terms. Staff agrees that the Commission should not conduct a formal hearing on this matter. Thus, staff believes that the ultimate question for the Commission to decide is whether its PAA Order should become final or is a nullity.

FPC and Lake present the Commission with a novel issue: whether to make a proposed agency action order final, or render it a nullity, when a person whose substantial interests are affected timely files a protest but the underlying subject matter of the proposed action no longer exists, thereby rendering any formal proceedings on the matter futile.

By its own terms, Section 120.569, Florida Statutes, applies to all proceedings in which the substantial interests of a party are determined by an agency. Lake, as a party to the settlement agreement, is clearly a party whose substantial interests were

DOCKET NO. 961477-EQ

DATE: FEBRUARY 26, 1998

determined by the Commission's PAA Order. Section 120.569(2)(b), Florida Statutes, provides that all parties shall be afforded an opportunity for a hearing. In other words, "APA hearing requirements are designed to give affected parties an opportunity to change the agency's mind." Couch Construction Co., Inc. v. Department of Transportation, 361 So. 2d 172, 176 (Fla. 1st DCA 1978).

FPC argues that Lake's petition is invalid because the expiration of the settlement agreement made it moot. Following FPC's reasoning, however, *no one* may challenge the Commission's PAA Order, because any challenge would be made moot by the expiration of the settlement agreement. Under this approach, no party would be afforded an opportunity for hearing to change the agency's mind, but the PAA Order would become final nonetheless. Staff believes that this result is completely at odds with the plain language and intent of Section 120.569, Florida Statutes. See, Winter v. Playa del Sol, Inc., 353 So. 2d 598 (Fla. 4th DCA 1977) (stating that a statute with clear and unambiguous language must be given its plain and obvious meaning and must not be constructed in a manner that leads to an absurd result).

In addition, staff notes that Rule 25-22.036(9)(b), Florida Administrative Code, provides:

- (b) Where a petition on proposed agency action has been filed the Commission may:
1. Deny the petition if it does not adequately state a substantial interest in the Commission determination or if it is untimely.
  2. Grant the petition and determine if a 120.57(1) hearing or a 120.57(2) hearing is required.

FPC does not argue that Lake's petition was untimely or fails to adequately state a substantial interest. In fact, Lake's petition was timely and, staff believes, adequately states a substantial interest in the Commission's PAA Order.

For the preceding reasons, staff believes that Lake's petition is valid. Thus, pursuant to Rule 25-22.029(6), Florida Administrative Code, staff believes that the timely filing of Lake's petition prevented the PAA Order from becoming final and effective. Because no final agency action had been taken, Lake's

DOCKET NO. 961477-EQ  
DATE: FEBRUARY 26, 1998

petition commenced a de novo proceeding on the issues disputed in the petition. See Florida Department of Transportation v. J.W.C. Co., Inc., supra, and Section 120.80(13)(b), Florida Statutes.

Staff believes that FPC cannot, at this point, ask that Lake's petition be dismissed due to mootness without recognizing that the entire proceeding should be dismissed. By definition, a de novo proceeding is not an appellate proceeding but an original proceeding designed to formulate final agency action. See J.W.C., supra. Section 120.80(13)(b), Florida Statutes, provides that "a hearing on an objection to proposed action of the Florida Public Service Commission may only address the issues in dispute." The expiration of the settlement agreement, however, effectively eliminated any disputed issues. Godwin, supra, states that "[a] case is 'moot' when it presents no actual controversy or when the issues have ceased to exist." Thus, accepting that Lake's petition is valid and initiates a de novo proceeding on the issues disputed therein, staff believes the plain language of Godwin leads to the conclusion that the original proceeding initiated by Lake's petition is moot and should be dismissed. Accordingly, staff recommends that the Commission (1) dismiss FPC's original petition for approval of the settlement agreement as moot and (2) find its proposed agency action Order No. PSC-97-1437-FOF-EQ a nullity.

**ISSUE 2:** Should the Commission grant Florida Power Corporation's motion to dismiss Lake's Petition on Proposed Agency Action?

**RECOMMENDATION:** No. Based on staff's recommendations in Issue 1, the Commission should deny Florida Power Corporation's motion to dismiss Lake's petition.

**STAFF ANALYSIS:** In its motion to dismiss Lake's petition, FPC requests as relief a Commission order (1) dismissing Lake's petition, (2) finding the PAA Order to be final, and (3) closing this docket. Based on its recommendations in Issue 1, staff believes that the entire proceeding should be dismissed as moot and that the PAA Order should be rendered a nullity. Therefore, staff recommends that the Commission deny FPC's motion to dismiss.

DOCKET NO. 961477-EQ  
DATE: FEBRUARY 26, 1998

**ISSUE 3:** Should the Commission grant Lake's motion to dismiss this proceeding and close the docket?

**RECOMMENDATION:** Yes. Based on staff's recommendations in Issue 1, the Commission should grant Lake's motion to dismiss this proceeding and close the docket.

**STAFF ANALYSIS:** In its motion to dismiss, Lake requests as relief a Commission order (1) dismissing FPC's original petition for approval of the settlement agreement on the grounds that this entire proceeding is rendered moot by the expiration of the settlement agreement, (2) declaring the PAA Order to be null and void, and (3) closing this docket. Based on its recommendations in Issue 1, staff believes that the entire proceeding, including FPC's original petition, should be dismissed as moot and that the PAA Order should be rendered a nullity. Therefore, staff recommends that the Commission grant Lake's motion to dismiss.

**ISSUE 4:** Should this docket be closed?

**RECOMMENDATION:** Yes. This entire proceeding was rendered moot by the expiration of the settlement agreement. Therefore, this docket should be closed.

**STAFF ANALYSIS:** This entire proceeding was rendered moot by the expiration of the settlement agreement. Therefore, this docket should be closed.