

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
Filed: March 11, 1997

**LAKE COGEN, LTD.'S RESPONSE IN OPPOSITION TO
THE MOTION TO SUSPEND PROCEDURAL SCHEDULE
OF LAKE INTEREST HOLDINGS, INC.**

LAKE COGEN, LTD. (hereinafter "Lake Cogen"), pursuant to Commission Rule 25-22.037(2), Florida Administrative Code, and subject to its pending petition to intervene filed on March 6, 1997, respectfully files this its response in opposition to the motion to suspend procedural schedule filed herein by Lake Interest Holdings, Inc. ("LIHI") on February 28, 1997.

The Commission should decline to grant LIHI's motion, which seeks the delay of Commission action on a properly filed and specified petition for approval of the Settlement Agreement modifying the power purchase agreement ("PPA") between Florida Power Corporation ("FPC") and Lake Cogen, Ltd., because the real

ACK _____
AFA Issue in dispute is outside the Commission's jurisdiction, because
APP _____ FPC has properly identified all conditions relating to the
CAF _____ Settlement Agreement's effectiveness, and because it appears that
CMU _____
CTR _____ LIHI may be attempting to obtain the delay to leverage its claimed
EGG with approval rights under the Lake Cogen Partnership Agreement to
LE _____ obtain a better deal for LIHI's gas marketing affiliate that has a
LE _____ separate dispute with Lake Cogen. Delay of the implementation of
the Settlement Agreement will only delay the realization of the

substantial benefits that that Agreement will yield to FPC and its ratepayers.

Lake Cogen's memorandum in support of its response in opposition to LIHI's motion follows.

**MEMORANDUM IN SUPPORT OF LAKE COGEN, LTD.'S RESPONSE
IN OPPOSITION TO THE MOTION TO SUSPEND PROCEDURAL
SCHEDULE OF LAKE INTEREST HOLDINGS, INC.**

The Commission should deny LIHI's motion to suspend the procedural schedule in this case because the issue raised by LIHI's motion involves a dispute under the Partnership Agreement between NCP Lake Power, Inc., which is the managing general partner of Lake Cogen, and LIHI, not whether the power purchase agreement between Lake Cogen and FPC should continue to qualify for cost recovery if amended per the terms of the Settlement Agreement. As FPC's petition makes clear, the effectiveness of the proposed Settlement Agreement is expressly conditioned on the satisfaction of certain specified conditions precedent. NCP Lake's parent corporation, GPU International, Inc. ("GPU I"), has options to purchase all of LIHI's interest in Lake Cogen. GPU I expects that the exercise and closing of that option will occur in the near future. The option exercise price has been funded and deposited in escrow with Harris Bank and Trust Company. Thus, the need for any LIHI approval will shortly be eliminated. Because FPC has properly identified all conditions precedent to the effectiveness of the Settlement Agreement, the Commission should recognize that its requested approval is of the nature of declaratory relief: if the Settlement Agreement is approved, and all conditions of its effectiveness satisfied, the

Commission will have approved the amended PPA for cost recovery purposes pursuant to its review herein. If the conditions are not satisfied, and thereby the Settlement Agreement does not go into effect, the current Lake Cogen-FPC PPA, which has already been approved for cost recovery purposes, will remain in effect.

Finally, the Commission should not permit LIHI's ancillary dispute with NCP Lake and Lake Cogen, which is without merit and which will, in any case, shortly be rendered moot, to impede or delay the Commission's action on FPC's petition for approval of the Settlement Agreement, nor to delay, to the detriment of FPC's ratepayers, the implementation of the Settlement Agreement.

STATEMENT OF THE CASE AND FACTS

On December 6, 1996, FPC and Lake Cogen, Ltd., through its managing general partner, NCP Lake, entered into a Settlement Agreement and Amendment To Negotiated Contract for the Purchase of Firm Capacity and Energy From a Qualifying Facility Between Lake Cogen, Ltd. and FPC (the "Settlement Agreement"). NCP Lake is a wholly-owned subsidiary of GPUI. The purpose of the Settlement Agreement is to settle all disputes between Lake Cogen and FPC that are the subject of currently pending, though stayed, 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 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 filed the instant petition for approval of the Settlement Agreement for cost recovery purposes.

On February 28, 1997, LIHI petitioned to intervene in this docket and moved the Commission to suspend the procedural schedule of this docket, arguing, among other things, that LIHI's approval is required for the amendment to the PPA to become effective and that NCP Lake was not authorized to execute the Settlement Agreement on behalf of Lake Cogen.

Lake Cogen now respectfully responds to LIHI's motion and urges the Commission to deny that motion. The issues LIHI raises in its Petition, are, as LIHI explicitly recognizes, properly resolved in the civil courts and indeed, LIHI has simultaneously commenced a declaratory judgment action in Circuit Court. Commission action herein will not impair any rights LIHI may have or modify the Partnership Agreement. Moreover, although it conspicuously failed to mention the fact in its petition, LIHI has granted GPUI an option to buy all of LIHI's interest in the Lake Cogen Project. The primary option, through which GPUI has the right to purchase all of LIHI's 1.0 percent general partner interest and 49.0 percent of LIHI's total 49.1 percent limited partner interest in Lake Cogen, will be exercised shortly. When that occurs, LIHI will no longer have a general partnership interest, nor any voting or consent rights with respect to the Settlement Agreement, the PPA, or the Lake Cogen Partnership. Thus, LIHI's general partnership interest and voting rights will

soon be eliminated.

LIHI would have the Commission believe that it had no knowledge of the Settlement Agreement before it was filed with the Commission by FPC. The fact of the matter is, however, that GPU1 and NCP Lake have been involved in ongoing negotiations with LIHI and its affiliates within the Norcen corporate family, including North Canadian Marketing Corporation ("NCMC"), the gas supplier to the Lake Cogen Project, since at least as early as mid-1995. The most recent meeting between NCP Lake/GPUI and Norcen/NCMC, at which the primary subject was the Settlement Agreement, took place only last week, on February 27, 1997, i.e., the day before LIHI filed its pleadings in this docket. LIHI was fully aware of all of the substantive terms and conditions of the Settlement Agreement well before its filing. LIHI's real complaint is that certain terms were apparently not completely satisfactory to NCMC and it is attempting to use this proceeding as a negotiation tool.

ARGUMENT

- I. THE COMMISSION SHOULD DENY LIHI'S MOTION TO SUSPEND THE PROCEDURAL SCHEDULE IN THIS CASE BECAUSE THE REAL MATTER AT ISSUE IS A DISPUTE UNDER THE LAKE COGEN PARTNERSHIP AGREEMENT, OVER WHICH LIHI ADMITS THE COMMISSION HAS NO JURISDICTION, AND WITH RESPECT TO WHICH COMMISSION ACTION WILL NOT IMPAIR LIHI'S POSITION OR RIGHTS.**

The issues between LIHI and NCP Lake/Lake Cogen do not involve whether the Settlement Agreement, and the PPA as it would be amended by the Settlement Agreement, would continue to qualify for cost recovery pursuant to Commission Rules; rather, LIHI's motion raises an alleged dispute under the Partnership Agreement, i.e.,

whether NCP Lake's execution of the Settlement Agreement was valid and effective. This is a private contract dispute that even LIHI admits is clearly outside the Commission's jurisdiction. Just as the Commission cannot affect the parties' rights under these agreements, these disputes should not affect the Commission's actions on FPC's petition. Commission action will not impair any alleged contract rights that LIHI (or its affiliates) may have.

LIHI suggests that FPC and Lake Cogen have attempted to deceive the Commission into taking precipitous action. This is untrue. The Settlement Agreement, appended to FPC's petition, clearly identifies all conditions precedent to its effectiveness, including any approval required under the Partnership Agreement. There has been no attempt to deceive the Commission with respect to the Settlement Agreement. If there has been any deception of the Commission, it has been by LIHI and its affiliates in failing to disclose the true motives behind their actions.

**II. THE TRUE PURPOSE OF LIHI'S MOTION TO SUSPEND
IS TO BOLSTER THE BARGAINING POSITION OF ITS
SISTER COMPANY, NCMC, WHICH SHOULD NOT
BE COUNTENANCED BY THE COMMISSION.**

To understand the true motives behind LIHI's motion, consider the following. First, the option granted to GPUI by LIHI to purchase all of LIHI's interest in Lake Cogen, Ltd., fixes the price to be paid for such interest. That price will be unaffected by this proceeding, and upon the exercise of the option, LIHI will receive the full consideration for which it bargained in exchange for its interest. GPUI is in the process of causing the option to

be exercised and expects that the closing of the purchase will take place in the second quarter of 1997. Thus, LIHI's interest as a voting partner in Lake Cogen, Ltd. will soon cease to exist.

Second, LIHI acknowledges that it is a wholly-owned subsidiary of North Canadian Resources, Inc. ("NCRI"), which is in turn a wholly-owned subsidiary of Norcen Explorer, which is in turn a wholly-owned subsidiary of Norcen Energy Resources Ltd. (collectively "Norcen"). North Canadian Marketing Corporation ("NMC") is also a wholly-owned subsidiary of NCRI. See Petition of North Canadian Marketing Corporation to Intervene as a Party, FPSC Document No. 02227 at 2, FPSC Docket No. 961477-EQ, In Re: Petition for Expedited Approval of Settlement Agreement With Pasco Cogen, Ltd. by Florida Power Corporation, February 28, 1997. Thus, LIHI and NMC are corporate sisters, each the wholly-owned subsidiary of NCRI. NMC is the gas supplier to the Lake Cogeneration Facility. Lake Cogen and NMC have a dispute, irrelevant here, under the gas supply agreement for the Lake Cogen Project.¹

Finally, LIHI is here expressly seeking to delay Commission action in a proceeding that cannot, by LIHI's own admission, affect LIHI's rights. Indeed, LIHI expressly admits that "[n]either this

¹ It has been NCP Lake's position that the proposed amendments to the PPA as set forth in the Settlement Agreement, if implemented, would not materially and adversely affect NMC's position under its gas supply agreement with Lake Cogen; NMC has taken the contrary position. See NMC's Petition to Intervene in FPSC Docket No. 961407-EQ, In Re: Petition for Expedited Approval of Settlement Agreement With Pasco Cogen Ltd. by Florida Power Corporation, FPSC Document No. 02227 at 4, February 20, 1997.

dispute, nor the Partnership Agreement under which it arises, are within this Commission's jurisdiction." LIHI's Motion at 8.

Considering these facts -- the imminent divestiture of LIHI's interests in the Lake Cogen partnership, LIHI's direct corporate affiliation with Lake Cogen's gas supplier, and LIHI's express admission that the Commission lacks jurisdiction over its dispute with NCP Lake and Lake Cogen -- it is difficult to believe that LIHI's purpose in filing its motion to suspend the procedural schedule herein is anything other than a thinly veiled attempt to use its present partnership interest to obtain a more favorable bargaining position for its affiliate NCMC under NCMC's gas supply agreement with Lake Cogen.

III. BECAUSE FPC'S PETITION FOR APPROVAL OF THE SETTLEMENT AGREEMENT IS IN THE NATURE OF A PETITION FOR DECLARATORY RELIEF, AND BECAUSE FPC HAS PROPERLY APPRISED THE COMMISSION OF ALL CONDITIONS AFFECTING THE EFFECTIVENESS OF THE SETTLEMENT AGREEMENT, THE COMMISSION SHOULD ACT ON FPC'S PETITION WITHOUT FURTHER DELAY.

The approval of the Settlement Agreement sought by FPC is of the nature of declaratory relief. FPC has expressly advised the Commission that there are conditions precedent to the Settlement Agreement that might ultimately preclude the Settlement Agreement from taking effect. If the Settlement Agreement is approved and performed as approved, the Commission will know exactly what is being done and will have approved it for cost recovery purposes. If the Settlement Agreement is approved but, because of an unsatisfied condition precedent does not become effective, the status quo will continue, as expressly recognized by the Commission

in its approval of the Agreement. Clearly, the PPA qualifies for cost recovery today, so the status quo cannot be objectionable. This is why, contrary to LIHI's assertions, this proceeding is entirely appropriate and not wasteful of the Commission's time and resources.

Indeed, the Commission has recently approved a proposed FPC settlement agreement notwithstanding the existence of unsatisfied conditions precedent to its effectiveness. In February 1996, the Commission approved a settlement agreement between FPC and Orlando Cogen Limited ("OCL"), the effectiveness of which was contingent on the approval of the OCL project's lenders. FPSC Doc. No. 01904, Exhibit A at 9-10, FPSC Docket No. 960193-EQ, February 19, 1996.

FPC's petition herein is analogous to a petition for a declaratory statement, in which an entity asks the Commission to declare its rights, duties, and responsibilities based on a certain set of existing or anticipated facts. Here, FPC has asked the Commission, based on a certain anticipated set of facts, i.e., the performance of the amended PPA once all conditions precedent are satisfied, to enter its order, i.e., to declare, that the PPA, as amended, will continue to qualify for cost recovery.

In this case, the prospect of the need to obtain any approval by LIHI is not likely. As noted, LIHI has granted GPUI an option to purchase all but 0.1% of LIHI's equity interest in Lake Cogen, and GPUI is proceeding toward a closing of that purchase. Once this occurs, LIHI's approval will no longer be required for approval of the Settlement Agreement. Indeed, it is exactly this

expected event -- the purchase of LIHI's partnership interest -- that led FPC and NCP Lake to frame the Settlement Agreement language as they did, i.e., expressly conditioning the Settlement Agreement "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"2

IV. THE COMMISSION SHOULD NOT ALLOW LIHI TO IMPEDE THE COMMISSION'S PROCESSES TO THE DETRIMENT OF FPC'S RATEPAYERS.

Consistent with the Commission's rules and orders, FPC has properly sought the Commission's approval of the Settlement Agreement, with all known conditions identified therein, for cost recovery purposes. To the extent that LIHI may have the right to approve the proposed amendments to the PPA, the Partnership will seek to obtain that approval. When, as expected, the anticipated closing takes place and all but LIHI's remnant 0.1 percent limited partner interest is transferred, Commission approval in the normal course of business will avoid any unnecessary delay in the implementation of the Settlement Agreement and amendments to the PPA.

LIHI's rights, to the extent that they continue to exist, will be unaffected by Commission action herein. FPC has properly advised the Commission of all conditions necessary to the

² Moreover, though irrelevant here, NCP Lake has, by virtue of expressly conditioning the effectiveness of the Settlement Agreement on LIHI's approval, to the extent that it may be required, given full respect to LIHI's rights and position under the partnership agreement.

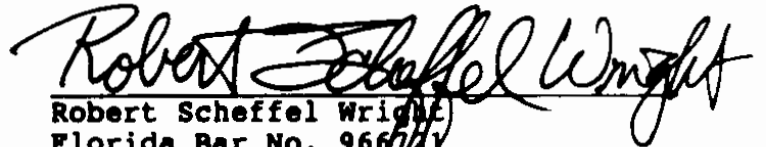
effectiveness of the Settlement Agreement. The Commission should therefore proceed to act on FPC's petition and not further delay the processes by which the Settlement Agreement will become effective. Such delays will only postpone the realization of the substantial benefits that will flow to FPC and its general body of ratepayers from the implementation of the Settlement Agreement. LIHI's request that the Commission delay the proceeding should be denied.

CONCLUSION

LIHI's motion seeks the delay of Commission action on a properly filed and specified petition for approval of the Settlement Agreement modifying the PPA between FPC and Lake Cogen. The Commission should decline to grant this relief because the real issue in dispute is outside the Commission's jurisdiction, because FPC has properly identified all conditions relating to the Settlement Agreement's effectiveness, and because it appears that LIHI may be attempting to obtain the delay to leverage its claimed approval rights under the Lake Cogen Partnership Agreement to obtain a better deal for its affiliate NCMC with respect to NCMC's gas supply contract with Lake Cogen. Delay of the implementation of the Settlement Agreement will only delay the realization of the substantial benefits that that Agreement will yield to FPC's ratepayers.

WHEREFORE, based upon the foregoing, Lake Cogen, Ltd. respectfully urges the Commission to **DENY** the motion of Lake Interest Holdings, Inc. to suspend the procedural schedule in this proceeding.

Respectfully submitted this 11th day of March, 1997.



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CERTIFICATE OF SERVICE
DOCKET NO. 961477-EO

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery (*) or by United States Mail, postage prepaid, on the following individuals this 11th day of March, 1997:

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