

**Florida
Power**
CORPORATION

JAMES A. MCGEE
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January 19, 1998

**Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850**

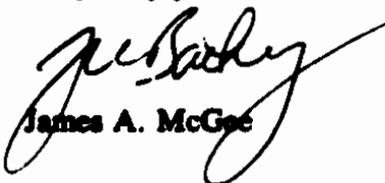
Re: Docket No. 961477-EQ

Dear Ms. Bayó:

Enclosed for filing in the above subject docket are fifteen copies of Florida Power Corporation's Response in Opposition to Lake Cogen, Ltd.'s Motion to Dismiss Proceeding and Close Docket.

Please acknowledge your receipt of the above filing on the enclosed copy of this letter and return to the undersigned. Also enclosed is a 3.5 inch diskette containing the above-referenced document in WordPerfect format. Thank you for your assistance in this matter.

Very truly yours,


James A. McGee

**JAM/kp
Enclosures**

DOCUMENT NUMBER-DATE

01052 JAN 20 98

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

Submitted for filing:
January 20, 1998

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Florida Power Corporation's
Response in Opposition to Lake Cogen, Ltd.'s Motion to Dismiss Proceeding and
Close Docket has been furnished to the following individuals by regular U.S. Mail
this 19th day of January, 1998:

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Tallahassee, FL 32399-0850



ATTORNEY

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**FLORIDA POWER CORPORATION'S
RESPONSE IN OPPOSITION TO LAKE COGEN, LTD.'S
MOTION TO DISMISS PROCEEDING AND CLOSE DOCKET**

Florida Power Corporation ("Florida Power"), hereby responds in opposition to the Motion to Dismiss Proceeding and Close Docket (the "Motion") filed by Lake Cogen, Ltd. ("Lake") on January 8, 1998, and states as follows:

In its Motion, Lake asserts that the expiration of the Settlement Agreement between Lake and Florida Power on October 31, 1997 renders this entire proceeding moot, even though the Commission had already reached its decision to deny approval of the Settlement Agreement. The Commission's decision is of no consequence, according to Lake, because "the timely filing of Lake's Petition [requesting a hearing to consider approval of the Settlement Agreement] prevented the PAA Order from becoming final agency action." Motion, at page 4.

The infirmity of Lake's argument is that it is entirely dependent on the validity of its Petition, because without a valid protest of the Commission's PAA order, it becomes final in accordance with Rule 25-22.029(6), F.A.C. And since the order memorializes a decision made when the Settlement Agreement was still in effect, Lake's claim that the entire proceeding is moot becomes clearly untenable.

Unfortunately for Lake, the validity of its Petition entails more than simply being "timely filed." As Florida Power stated in its motion to dismiss Lake's Petition, the Petition was not filed until after the Settlement Agreement had expired. Therefore, the Petition's request for a formal proceeding to approve a settlement that no longer exists failed to state a claim for which relief can be granted. Or, to paraphrase the ground for dismissal asserted in Lake's own Motion, Lake "does not have standing to request that the Commission approve a non-existent Settlement Agreement." Motion, at page 1.

Lake's Petition is patently deficient on its face¹ and should be seen for what it is — a hollow procedural ploy by Lake to temporarily block the effectiveness of the Commission's PAA order and thereby bootstrap itself into a mootness argument for dismissing the entire proceeding, all in a desperate attempt to avoid the effect of language in the Commission's order that Lake considers detrimental to its position in the pending circuit court litigation. This kind of procedural gamesmanship is inappropriate and should be sternly discouraged by the Commission.

The meritless nature of Lake's Petition requires that Florida Power's motion to dismiss the Petition be granted. Dismissal of the Petition, in turn, will render the Commission's decision final, at which point Lake's argument that the entire proceeding is moot because of the subsequent expiration of the Settlement Agreement quickly evaporates. Indeed, the principle case cited in Lake's Motion illustrates the infirmity of its argument.

¹ Incredibly, in the same Petition in which Lake requested a hearing on the Settlement Agreement, Lake effectively admitted that its hearing request was baseless and intended only to prevent the PAA order from becoming final when it acknowledged that "there is no longer a viable settlement agreement upon which a hearing can be held" Lake's Petition, at page 4.

In *Godwin v. State*, 593 So. 2d 211 (Fla. 1992), the trial court involuntarily committed Godwin to a state hospital under The Baker Act and she appealed to the First DCA. Before her appeal was decided, however, Godwin was discharged from her commitment by the hospital. The State then moved to dismiss Godwin's appeal on the grounds that her discharge rendered the appeal of the commitment order moot. The DCA agreed and dismissed the appeal, but certified a question to the Florida Supreme Court regarding certain exceptions to dismissal for mootness that are not relevant here.³

It is instructive to note that when the issue of mootness was raised before the DCA, no one, not even Godwin, suggested that her discharge from commitment rendered the prior trial court proceeding moot or invalidated the court's commitment order, which remained non-final pending the appeal. Clearly, the DCA, and later, the Supreme Court, understood that the issue before them was whether further proceedings were warranted in light of the mootness of Godwin's commitment.

The issue is the same here. The Commission reached a decision to deny approval of the Settlement Agreement while the Agreement remained viable. That decision would now be final but for the filing of Lake's baseless Petition for a hearing on the Settlement Agreement after it had expired. The immediate issue before the Commission, therefore, is whether the Petition's request for further proceedings to consider approval of the Settlement Agreement have been rendered moot by its expiration, as Florida Power contends in its pending motion to dismiss

³ Lake apparently agrees that these exceptions to dismissal of otherwise moot cases, which are the subject matter of the Supreme Court's decision, are not applicable to this case. See, Motion, at page 3 (footnote 1).

Lake's Petition and as Lake itself concedes. When that issue has been resolved, as it must be, by dismissal of the Petition, thus rendering the Commission's decision final, the denial of Lake's Motion becomes a self-evident conclusion.

WHEREFORE, Florida Power Corporation respectfully requests that, after consideration of its pending motion to dismiss Lake's Petition on Proposed Agency Action, the Commission deny Lake's Motion to Dismiss Proceeding and Close Docket.

Respectfully submitted,

OFFICE OF THE GENERAL COUNSEL
FLORIDA POWER CORPORATION

By  _____
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