

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation of Gulf Power Company.)
) DOCKET NO. 890832-EI
) ORDER NO. 21459
) ISSUED: 6-28-89
)

ORDER GRANTING IN PART CITIZENS' MOTION TO
 SPIN-OFF INVESTIGATION OF IRREGULARITIES AT
 GULF POWER COMPANY

On June 16, 1989, the Citizens of Florida (Citizens) through Jack Shreve, Public Counsel, filed a motion to spin-off the investigation of irregularities at Gulf Power Company (Gulf) and to spin-off all related discovery and procedural matters associated with Docket No. 881167-EI, Petition of Gulf Power Company for a rate increase. This motion was filed in Docket No. 881167-EI subsequent to Gulf Power Company's notice of voluntary dismissal filed on June 12, 1989. Pursuant Rule 25-22.035(3), Florida Administrative Code, and Florida Rule of Civil Procedure 1.420(a)(1), a petitioner can withdraw his petition at any time prior to the submittal of his case to the trier of fact without approval of the court. Once a voluntary dismissal has been filed, a state agency loses its jurisdiction over the subject matter of the case. Rudloe v. Department of Environmental Regulation, 517 So.2d 731, 732-3 (Fla. 1 DCA 1987); Humana of Florida, Inc. v. Department of Health and Rehabilitative Services, 500 So.2d 186, 187-8 (Fla. 1 DCA 1986); Fears v. Lunsford, 314 So.2d 578, 579 (Fla. 1973). That being the case, no filings can be made in a case in which the petitioner has filed a voluntary dismissal and where no counterclaims have been filed by other parties to the proceeding. No counterclaims have been filed in this proceeding.

Thus we shall treat Citizens' motion as a petition requesting the establishment of a docket which would explore and act upon the reported "irregularities and allegations of irregularities" at Gulf. Citizens have argued in their motion that this docket should

determine whether current rates should have been adjusted at the time of Gulf's last rate case, Docket No. 840086, In Re: Petition of Gulf Power Company to Increase its Rates and Charges, 85 F.P.S.C. 1:247. The Commission should determine the extent of management's knowledge of irregularities and whether such knowledge, if disclosed to the Commission would have affected the rates ultimately allowed. The PSC could conclude the current rates should be decreased and that excess collections since 1984 should be refunded with interest. In addition, the Commission might also determine that Gulf's authorized ROE should be reduced because of mismanagement. [Emphasis added].

Petition at 5-6.

It is unclear exactly what relief Public Counsel is seeking. Portions of Public Counsel's petition indicate that he wishes to "continue at least that portion of this docket [881167-EI] which deals with investigations of irregularities and related matters as such affect current and future rates charged to Gulf Power's customers." Petition at 2. Elsewhere the petition indicates that Public Counsel wishes to "continue all procedural orders, directives and time-tables in

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the spin-off docket." Petition at 5. Finally, the section of the petition quoted above indicates that Public Counsel desires to reopen Gulf's last rate case proceeding, Docket No. 840086-EI, on the grounds that Gulf knowingly presented fraudulent information which was used by the Commission to set existing rates. Thus it is unclear whether the Public Counsel is seeking to reopen Gulf's last rate case in order to properly set existing rates, continue the just-dismissed request for a rate increase, initiate a "reverse-make-whole" or rate decrease proceeding, adjust whatever regulatory accounts might need to be adjusted, if any, as a result of an investigation into the "irregularities" at Gulf and reduce rates and ROE if warranted, or merely gather information.

As statutory authority for their petition, Citizens cite Section 366.07, Florida Statutes. Section 366.07 states in part:

Whenever the commission after public hearing either upon its own motion or upon complaint, shall find the rates, rentals, charges or classifications, or any of them, proposed, demanded, observed, charged or collected by any public utility for any service, or in connection therewith, . . . are unjust, unreasonable, insufficient, or unjustly discriminatory or preferential, or in anywise in violation of law, . . . the commission shall determine and by order fix the fair and reasonable rates, rentals, charges or classifications, and reasonable rates, rentals, charges or classifications, . . . to be imposed, observed, furnished or followed in the future.
[Emphasis added.]

This is essentially the same language which is found in Section 366.06(2), Florida Statutes, the "reverse-make-whole" provision, whereby any substantially affected person can allege that a utility is charging inappropriate rates and request that those rates be reduced to a just, reasonable and sufficient level. The language of both of these statutes, however, gives the Commission the power only to change rates on a prospective basis, not to revisit rates previously approved after a public hearing. Moreover, both of these statutes have traditionally been used only in the context of full rate proceedings where MFRs are filed and all regulatory areas are addressed, i.e., rate of return, return on equity, rate design, CWIP, working capital, capital structure, etc.

Section 366.076, Florida Statutes, states in part:

(1) Upon petition or its own motion, the commission may conduct a limited proceeding to consider and act upon any matter within its jurisdiction, including any matter the resolution of which requires a public utility to adjust its rates to consist [be consistent] with the provisions of this chapter. The commission shall determine the issues to be considered during such a proceeding and may grant or deny any request to expand the scope of the proceeding to include other matters.

Thus, this statute would appear to be appropriate where the relief may be retroactively applied and where only some regulatory issues are involved.

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There is no specific statutory authority for the Commission to open an "investigation". It could be argued that the authority to do so is implied in the general grant of regulatory powers given to the Commission in Chapters 350 and 366, Florida Statutes. If gathering and evaluating information is the goal of the Public Counsel, it would appear that an "inquiry" under Section 350.121, Florida Statutes, is the appropriate procedure to follow. However, this is the one procedure which the Public Counsel emphatically desires not be instituted. Petition at 3-4.


Therefore, having reviewed Public Counsel's petition, we hereby grant Public Counsel's request and open a limited proceeding docket under Section 366.076, Florida Statutes. A limited proceeding will give both the Public Counsel and the Commission the proper forum in which to pursue the irregularities at Gulf. Because of the case law cited above, we deny Public Counsel's request to transfer the outstanding discovery from Docket No. 881167-EI to this docket. Public Counsel should be able to review his outstanding discovery and reissue it in this docket in an expeditious manner. Likewise, Gulf should be able to provide expeditious responses to discovery previously requested by Public Counsel in less than the 30 days granted by the rules of civil procedure. For specific discovery requests we expect both parties to confer, arrive at and honor appropriately adjusted reponse dates. Finally, we deny Public Counsel's request to continue all procedural orders and hearing dates associated with Docket No. 881167-EI. New procedural orders will be issued in this docket as appropriate.

Therefore, it is

ORDERED that the petition of the Office of Public counsel requesting that a docket be opened is hereby granted as described in the body of this order. It is further

ORDERED that the request that all procedural orders, outstanding discovery and discovery response requirements and time-tables be transferred to this docket from Docket No. 881167-EI is hereby denied.

By Order of Chairman Michael Mck. Wilson, Commissioner,
this 28th day of JUNE, 1989


CHAIRMAN MICHAEL MCK. WILSON,
Commissioner

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