BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for approval of contract for the purchase of firm capacity and energy between General Peat Resources, L.P. and Florida Power and Light Company.	DOCKET NO. 920977-EQ ORDER NO. PSC-94-0310-FOF-EQ ISSUED: March 17, 1994

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK
JULIA L. JOHNSON
DIANE K. KIESLING
LUIS J. LAUREDO

ORDER ACKNOWLEDGING DISMISSAL

BY THE COMMISSION:

On September 28, 1992, pursuant to Rule 25-17.0832(8), Florida Administrative Code, General Peat Resources, L.P., Destec Energy, Inc., and The Ecopeat Company (SFP), L.P. (hereinafter General Peat), petitioned the Commission to find a negotiated power purchase agreement for 52 MW of firm capacity and energy between General Peat and Florida Power and Light Company (FPL) to be prudent for cost recovery purposes. General Peat requested the Commission make this finding using its proposed agency action procedures. By Proposed Agency Action Order No. PSC-93-1251-FOF-EQ (the PAA order), issued August 30, 1993, the Commission denied General Peat's petition for contract approval. General Peat timely filed a petition on the Commission's proposed agency action on September 20, 1993, and the matter was set for hearing. General Peat filed a notice of dismissal on January 10, 1994, four days before the hearing.

Staff filed a memorandum for consideration at the February 1, 1994, agenda conference, which recommended General Peat's notice of dismissal acted as a dismissal of its protest of the PAA order, and recommended the PAA order be revived as a final order. At the February 1, 1994, agenda conference, counsel for General Peat orally amended her notice of dismissal to clarify she was not only withdrawing the petition on proposed agency action but also the original petition that initiated all actions taken in this docket. The parties disagreed whether General Peat could withdraw its

original petition. The Commission deferred the matter and directed the parties to file briefs.

General Peat's notice of dismissal consisted of one sentence:

> Pursuant to Rule 25-22.0375, F.A.C., and Rule 1.420(1)(a) [sic], F.R.C.P., General Peat Resources, L.P., Destec Energy, Inc. and The EcoPeat Company (SFP), L.P. (Petitioner) hereby file this notice of voluntary dismissal of the above-cited docket.

Counsel for General Peat clarified this pleading by stating her intention was to dismiss not only the petition on the PAA order, but also the original petition for cost recovery.

Florida Rule of Civil Procedure 1.420(a)(1) provides

> an action may be dismissed by plaintiff without order of court (A) before trial by serving, or during trial by stating on the record, a notice of dismissal at any time before a hearing on motion for summary judgment, or if none is served or if the motion is denied, before retirement of the jury in a case tried before the jury or before submission of a nonjury case to the court for decision . . . . Unless otherwise stated in the notice . . ., the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication on the merits when served by a plaintiff who has once dismissed in any court an action based on or including the same claim.

Pursuant to Rule 25-22.035, Florida Administrative Code, Rule 1.420(a)(1) is applicable to Commission proceedings unless it is superseded by or conflicts with a Commission rule.

In its brief FPL argues that Rule 1.420 expressly prohibits a party from voluntarily dismissing an action after submission of the case for a decision, and that the Commission's PAA order was its decision here. FPL reasons that once the Commission announced its decision, General Peat lost its ability to voluntarily dismiss the action and the only petition General Peat could dismiss was its petition on the PAA order. FPL also argues that Rule 1.420 has been interpreted as prohibiting a party from voluntarily dismissing an administrative action after a preliminary decision. FPL's final argument is that reading Rule 1.420 to give a party the right to void a PAA order would make Rule 1.420 inconsistent with the Commission's rule governing PAA orders, which would make Rule 1.420 inapplicable to this case.

General Peat, on the other hand, argues that it timely dismissed its petition for cost recovery, and that the voluntary dismissal divests the Commission of jurisdiction over this matter. General Peat also argues the PAA order has become moot and the only action the Commission can now take is to acknowledge the voluntary dismissal and close the docket.

We have reviewed the arguments of both parties and we agree with General Peat's analysis. The law is clear that the plaintiff's right to take a voluntary dismissal is absolute. Fears v. Lunsford, 314 So.2d 578, 579 (Fla. 1975). It is also established civil law that once a timely voluntary dismissal is taken, the trial court loses its jurisdiction to act and cannot revive the original action for any reason. Randle-Eastern Ambulance Service, Inc. v. Vasta, 360 So.2d 68, 69 (Fla. 1978).

There are two lines of administrative cases dealing with voluntary dismissals. The first line of cases concerns an agency issuing a notice of intent, and a substantially affected person petitioning for a Section 120.57 hearing and then seeking to voluntarily dismiss the petition for hearing. When a petition for a hearing is dismissed, the majority of cases hold the agency must reinstate its initial decision. These holdings relate to the statutory scheme in Chapter 381, Florida Statutes, relating to certificates of need. John A. McCoy Florida SNF Trust v. Dep't of Health and Rehabilitative Services, 589 So.2d 351 (Fla. 1st DCA 1991); Humana of Florida, Inc. v. Dep't of Health and Rehabilitative Services, 500 So.2d 186 (Fla. 1st DCA 1986).[1]

FPL relies on the McCoy decision to support its argument that General Peat can only dismiss its petition on the proposed agency action and not its original petition, and that by so doing the PAA order should be reinstated as final agency action. This case, however, is not on point. The McCoy court found that when a challenge is abandoned by a voluntary dismissal, HRS' preliminary action becomes effective as final agency action. At least two facts distinguish the McCoy case from the case at bar. In McCoy, the party taking the voluntary dismissal was not the original

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[1] It should be noted the Second District does not follow the First District concerning this issue. In Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc., 15 FALR 3115, 3121 (Fla. 2d DCA 1993), the Second District concluded "the jurisdiction of an agency is activated when the permit application is filed . . . . [and] is only lost by the agency when the permit is issued or denied or when the permit applicant withdraws its application prior to completion of the fact-finding process." (Emphasis omitted.)

applicant, and, most importantly, in McCoy the challenge to the agency action was dismissed, not the original petition. It is undisputed here that if General Peat had simply dismissed its petition on the PAA order, the Commission could reinstate the order as final agency action.

The second line of cases addresses administrative proceedings in which the petitioner has sought a voluntary dismissal of the original petition in the case. The case law is split here, although the majority of cases support the right of a petitioner to a voluntary dismissal. Orange County v. Debra, Inc., 451 So.2d 868 (Fla. 1st DCA 1983); City of Bradenton v. Amerifirst Development Corporation, 13 FALR 2807 (Fla. 2d DCA 1991); Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc., 15 FALR 3115 (Fla. 2d DCA 1993). The Fifth District disagrees with the First and Second Districts. In Middlebrooks v. St. Johns River Water Management Dist., 529 So.2d 1167 (Fla. 5th DCA 1988), after the hearing officer issued a recommended order, the petitioner sought to withdraw his original application. The court reasoned

> Middlebrooks knew when he sought to withdraw what the outcome in the case was most likely going to be. To allow him to dismiss at that point would afford him the advantage of 20/20 hindsight. No other party dismissing pursuant to Rule 1.420(a)(1) is allowed such an advantage.

Middlebrooks v. St. Johns River Water Management Dist., 529 So.2d 1167, 1170 (Fla. 5th DCA 1988). Notwithstanding the outcome in Middlebrooks, voluntary dismissals are routinely upheld when there has been an evidentiary hearing and where the plaintiff has a strong indication the final result will be unfavorable. See Orange County v. Debra, Inc., 451 So.2d 868 (Fla. 1st DCA 1983); City of Bradenton v. Amerifirst Dev. Corp., 13 FALR 2807 (Fla. 2d DCA 1991); Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc., 15 FALR 3115 (Fla. 2d DCA 1993). Not surprisingly, FPL relies on Middlebrooks in its brief. Because of the line of cases in the First and Second Districts which hold to the contrary, however, Middlebrooks is not supported by controlling case law and is not controlling here.

This case is also distinguishable from Chapnick v. Hare, 394 So.2d 202 (Fla. 4th DCA 1981), where it was determined that a party may not deprive the court of jurisdiction to enforce compliance with an order entered at the behest of that party. In Chapnick, the petitioner in a divorce case attempted to avoid an order granting him temporary custody by filing a notice of dismissal and disappearing with his child. The Forth District stated the lower

court could not be divested of its jurisdiction over the subject matter of the custody aspect of the proceeding by the husband's voluntary dismissal. Chapnick is not on point because the case at hand is not a civil custody manner where a party is in contempt for not complying with a Commission order.

In addition, we considered FPL's argument that Rule 1.420 is inconsistent with Rule 25-22.029, the Commission's rule on proposed agency action proceedings. We do not see any inconsistency between the two rules, and, therefore find Rule 1.420 to be applicable to this case.

As General Peat argues, the question here is not one of fairness, but one of right. There is no recompense for a defendant's inconvenience, attorney's fees, or the instability to daily affairs which are caused by the plaintiff's self-aborted lawsuit. Nor is there any recompense for the cost and inconvenience to the general public through the plaintiff's precipitous or improvident use of judicial resources. Randle-Eastern Ambulance Service, Inc. v. Vasta, 360 So.2d 68, 69 (Fla. 1978). As pointed out by General Peat, to resolve any resulting "unfairness" or "prejudice," Rule 1.420(a)(1) must be amended or recovery of court costs must be sought under Rule 1.420(d).

Applying the case law discussed above to the facts before us, we find that General Peat's voluntary dismissal of its original petition divests the Commission of further jurisdiction over this matter. The PAA order no longer has any effect when a de novo proceeding is required. Florida Dep't of Transportation v. J.W.C. Co., Inc., 396 So.2d 778, 785 (Fla. 1st DCA 1981). The only additional action we can take is to acknowledge General Peat's dismissal and close the docket. General Peat can file its petition at a later date without prejudice, in addition to pursuing good faith negotiations with FPL pursuant to Rule 25-17.0834, Florida Administrative Code.

Because we are concerned this decision may invite parties to abuse our proposed agency action process by using it as a test case procedure, Commission staff is directed to determine whether rulemaking is possible to prevent voluntary dismissals after a proposed agency action order is issued. If it is appropriate to initiate rulemaking to prevent petitioners from withdrawing an original petition after a PAA order is issued, staff shall initiate rulemaking to do so.

It is, therefore,

ORDERED that the Florida Public Service Commission acknowledges the voluntary dismissal of General Peat Resources, Inc.'s original petition filed in Docket No. 920977-EQ. It is further

ORDERED that Commission staff shall initiate rulemaking, if appropriate, to prevent voluntary dismissals after a proposed agency order is issued. It is further

ORDERED that Docket No. 920977-EQ shall be closed.

By ORDER of the Florida Public Service Commission, this 17th day of March, 1994.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

by: Kay Flynn
Chief, Bureau of Records

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and

the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.