

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: March 4, 2010

TO: Office of Commission Clerk (Cole) *OK*

FROM: Division of Economic Regulation (Hudson, Bulecza-Banks, Daniel, Fletcher, Simpson) *MBB*
Office of the General Counsel (Sayler) *FD BG*

RE: Docket No. 090415-SU – Application for staff-assisted rate case in Polk County by West Lakeland Wastewater, Inc. *GS JB*

AGENDA: 03/16/10 – Regular Agenda – Notice of Withdrawal – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Argenziano

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\090415.RCM.DOC

RECEIVED-FPSC
 10 MAR -4 AM 10:37
 COMMISSION
 CLERK

Case Background

West Lakeland Wastewater, Inc. (West Lakeland or Utility) is a Class C wastewater utility currently serving approximately 300 customers in Polk County. This area is in the Southwest Florida Water Management District and is considered a water use caution area. Water service is provided by the City of Lakeland. The Utility's 2006 annual report shows operating revenue of \$67,521 and net operating loss of \$34,442.

The Utility, previously known as ABCA, Inc., has been providing service to customers in Polk County since 1972. On January 9, 1990, the Polk County Commission granted a franchise to Ameribanc Investors Group for a system known as Village Lakeland. Polk County came

DOCUMENT NUMBER-DAT
 01483 MAR -4 0
 FPSC-COMMISSION CLERK

under Commission jurisdiction on July 11, 1996. In 1998, the Commission granted the Utility its grandfather Certificate No. 515-S for wastewater service.¹ ABCA's certificate was transferred to West Lakeland in 2001.²

By letter dated March 26, 2009, West Lakeland gave notice of abandonment effective June 30, 2009. On May 13, 2009, the County Attorney filed a Petition for Appointment of Receiver for West Lakeland Wastewater, Inc. in the Circuit Court of the Tenth Judicial Circuit (Circuit Court). The Circuit Court issued an order in Case No. 53-2009CA-005284, on June 22, 2009, in which it declared West Lakeland Wastewater, Inc. abandoned and appointed Mr. Michael Smallridge (Mr. Smallridge or receiver) as receiver of the wastewater system. The Commission has acknowledged the receiver.³

On August 20, 2009, the Commission received an application for a staff-assisted rate case (SARC) from West Lakeland. By letter dated September 15, 2009, the Utility waived the statutory time frame for its interim request through November 10, 2009. By Order No. PSC-09-0793-PCO-SU, issued December 1, 2009, the Commission granted an interim rate increase request.

On February 11, 2010, the Utility, by direction of its receiver, voluntarily withdrew its SARC application. On February 16, 2010, the Utility informed the Commission that it did not implement the approved interim rate increase because it was unable to obtain the financing to hold the collected funds subject to refund pursuant to Rule 25-30.360(6), Florida Administrative Code.

This recommendation addresses West Lakeland's voluntary notice of withdrawal and its effect on Order No. PSC-09-0793-PCO-SU. The Commission has the authority to consider this case pursuant to Sections 367.0814 and 367.082, Florida Statutes (F.S.)

¹ See Order No. PSC-98-0752-FOF-SU, issued June 1, 1998, in Docket No. 971531-SU, In re: Application for grandfather certificate to operate wastewater utility in Polk County by ABCA, Inc.

² See Order No. PSC-01-1576-FOF-SU, issued July 30, 2001, in Docket No. 010382-SU, In re: Application for transfer of Certificate No. 515-S in Polk County from ABCA, Inc. to West Lakeland Wastewater, Inc.

³ See Order No. PSC-09-0607-FOF-SU, issued September 8, 2009, in Docket No. 090154-SU, In re: Notice of abandonment of wastewater system for The Village of Lakeland Mobile Home Park in Polk County, by West Lakeland Wastewater, Inc.

Discussion of Issues

Issue 1: Should the Commission acknowledge the voluntary withdrawal of West Lakeland's SARC application, and if so, what effect does the withdrawal have on Order No. PSC-09-0793-PCO-SU?

Recommendation: Yes, the voluntary withdrawal of West Lakeland's SARC application should be acknowledged as a matter of right, and West Lakeland's withdrawal renders Order No. PSC-09-0793-PCO-SU a nullity. (Sayler, Hudson)

Staff Analysis: It is a well established legal principle that a plaintiff's right to take a voluntary dismissal is nearly absolute. See e.g., Kelly v. Colston, 977 So. 2d 692, 693 (Fla. 1st DCA 2008). Once a voluntary dismissal is taken, the trial court loses jurisdiction over the matter and cannot reinstate the action for any reason. See id. Both of these legal principles have been recognized in administrative proceedings. In Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc., 630 So. 2d 1123, 1128 (Fla. 2d DCA 1993), the court concluded that "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 in original).

In this case, West Lakeland applied for a SARC, was granted an interim rate increase, and without implementing interim rates, voluntarily withdrew its application. Although the Commission had granted West Lakeland interim rates, West Lakeland can withdraw its application as a matter of right, which is consistent with past Commission decisions.⁴

Upon receipt of West Lakeland's notice of withdrawal, Commission staff contacted the receiver to determine whether the Utility had implemented interim rates. The receiver indicated

⁴ See Order No. PSC-08-0822-FOF-WS, issued December 22, 2008, in Docket No. 080500-WS, In Re: Application for transfer of majority organizational control of Indiantown Company Inc., holder of Certificate Nos. 387-W and 331-S in Martin County, from Postco, Inc. to First Point Realty Holdings, LLC; Order No. PSC-07-0725-FOF-EU, issued September 5, 2007, in Docket No. 060635-EU, In re: Petition for determination of need for electrical power plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee; Order No. PSC-07-0485-FOF-EI, issued June 8, 2007, in Docket Nos. 050890-EI, In re: Complaint of Sears, Roebuck and Company against Florida Power & Light Company and motion to compel FPL to continue electric service and to cease and desist demands for deposit pending final decision regarding complaint and 050891-EI, In re: Complaint of Kmart Corporation against Florida Power & Light Company and motion to compel FPL to continue electric service and to cease and desist demands for deposit pending final decision regarding complaint; Order No. PSC-94-0310-FOF-EQ, issued March 17, 1994, in Docket No. 920977-EQ, In re: Petition for approval of contract for the purchase of firm capacity and energy from General Peat Resources, L.P. and Florida Power and Light Company; Order No. PSC-97-0319-FOF-EQ, issued March 24, 1997, in Docket No. 920978-EQ, In re: Complaint of Skyway Power Corporation to require Florida Power Corporation to furnish avoided cost data pursuant to Commission Rule 25-17.0832(7), F.A.C.; Order No. PSC-04-0376-FOF-EU, issued April 7, 2004, in Docket No. 011333-EU, In re: Petition of City of Bartow to modify territorial agreement or, in the alternative, to resolve territorial dispute with Tampa Electric Company in Polk County. But see Order No. PSC-07-0297-FOF-SU, issued April 9, 2007, in Docket No. 020640-SU, In re: Application for certificate to provide wastewater service in Lee County by Gistro, Inc. and Order No. PSC-96-0992-FOF-WS, issued August 5, 1996, in Docket No. 950758-WS, In Re: Petition for approval of transfer of facilities of Harbor Utilities Company, Inc., to Bonita Springs Utilities and cancellation of Certificates Nos. 272-W and 215-S in Lee County (voluntary dismissal cannot be utilized to divest the Commission as an adjudicatory agency of its jurisdiction granted to it by the legislature).

by letter that it had not implemented the Utility's approved interim rate increase. Therefore, based upon these facts, Commission staff recommends that the Commission does not need to establish whether an interim rates refund is appropriate pursuant to Section 367.082, F.S., before acknowledging withdrawal. Moreover, the effect of West Lakeland's voluntary withdrawal is to render the interim rates order a nullity.⁵

Thus, consistent with past Commission practice, staff recommends that the Commission acknowledge West Lakeland's voluntary withdrawal as a matter of right. Further, staff recommends that the Commission find that effect of the voluntary withdrawal renders Order No. PSC-09-0793-PCO-SU, a nullity and divests the Commission of further jurisdiction over its application.

⁵ See Order No. PSC-97-0319-FOF-EQ, issued March 24, 1997, in Docket No. 920978-EQ, In re: Complaint of Skyway Power Corporation to require Florida Power Corporation to furnish avoided cost data pursuant to Commission Rule 25-17.0832(7), F.A.C. (holding the effect of dismissal rendered the order a nullity). Order No. PSC-04-0376-FOF-EU, issued April 7, 2004, in Docket No. 011333-EU, In re: Petition of City of Bartow to modify territorial agreement or, in the alternative, to resolve territorial dispute with Tampa Electric Company in Polk County. (holding the effect of a voluntary dismissal divests the Commission of further jurisdiction over the proceeding, rendering the proposed agency action (PAA) order a nullity.)

Docket No. 090415-SU
Date: March 4, 2010

Issue 2: Should the docket be closed?

Recommendation: Yes, if the Commission votes to approve staff's recommendation in Issue 1, then no further action is required and the docket should be closed. (Sayler, Hudson)

Staff Analysis: If the Commission votes to approve staff's recommendation in Issue 1, then no further action is required and the docket should be closed.