

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Progress Energy Florida, Inc. to recover costs of Crystal River Unit 3 uprate through fuel clause. DOCKET NO. 070052-EI
ORDER NO. PSC-08-0022-FOF-EI
ISSUED: January 7, 2008

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
MATTHEW M. CARTER II
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

ORDER ACKNOWLEDGING WITHDRAWAL OF PETITION

BY THE COMMISSION:

BACKGROUND

On September 22, 2006, Progress Energy Florida (PEF) filed a Petition for Determination of Need for Expansion of an Electrical Power Plant, for Exemption from Rule 25-22.082, Florida Administrative Code (F.A.C.), and for Cost Recovery through the Fuel Cost Recovery Clause in Docket No. 060642-EI. On December 22, 2006, the hearing officer bifurcated the proceeding and a separate docket, Docket Number 070052-EI, was opened to consider the cost recovery aspect of PEF's petition. Office of Public Counsel (OPC), AARP, Florida Industrial Power Users Group (FIPUG), Florida Retail Federation (FRF), and PCS Phosphate – White Springs (White Springs) intervened in this docket.

A formal administrative hearing was held on August 7 and 8, 2007 to consider PEF's Petition to Recover Costs of Crystal River Unit 3 Uprate Through the Fuel Clause, Docket No. 070052-EI. Our staff's post hearing recommendation was scheduled to be considered on October 9, 2007, at our scheduled Agenda Conference. The post hearing recommendation was deferred to a later date and on October 19, 2007, prior to our making a final determination on the petition, PEF filed a Notice of Withdrawal. No intervenor has filed a response. We have jurisdiction pursuant to Chapter 366, Florida Statutes.

ACKNOWLEDGING WITHDRAWAL OF PETITION

The law is clear that a 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). Both of these legal principles have been recognized in administrative

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proceedings.¹ In Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc., 630 So. 2d 1123, 1128 (Fla. 2d DCA 1993), the court concluded that “the jurisdiction of any 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.”

In this case, while a formal hearing had been completed, we had not reached our final decision. Thus, PEF can dismiss its petition as a matter of right. This is consistent with our past decisions.² Therefore, we find that the effect of PEF’s voluntary withdrawal of its petition for determination of need is to divest us of further jurisdiction over this matter. We acknowledge Progress Energy Florida’s Notice of Withdrawal of its Petition to Recover Costs of Crystal River Unit 3 Uprate Through Fuel Clause.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Applicants’ voluntary withdrawal of their petition for recovery of costs of Crystal River Unit 3 Uprate through the fuel cost recovery clause is hereby acknowledged as a matter of right. It is further

ORDERED that this docket shall be closed.

¹ Orange County v. Debra, Inc., 451 So. 2d 868 (Fla. 1st DCA 1983); City of Bradenton v. Amerifirst Development Corporation, 582 So. 2d 166 (Fla. 2d DCA 1991); Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc., 630 So. 2d 1123 (Fla. 2d DCA 1993) aff’d, 645 So. 2d 374 (Fla. 1994).

² See 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-07-0877-FOF-EI, issued October 31, 2007, in Docket No. 070467-EI, In re: Petition to determine need for Polk Unit 6 electrical power plant, by Tampa Electric Co.; 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 ORDER of the Florida Public Service Commission this 7th day of January, 2008.



ANN COLE
Commission Clerk

(S E A L)

LCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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 Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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 and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, 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 Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.