



Public Service Commission
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COMMISSION
CLERK

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RECEIVED-FPSC

DATE: OCTOBER 25, 2001

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF SAFETY & ELECTRIC RELIABILITY (BREMENT) *RUE JB*
DIVISION OF LEGAL SERVICES (STERN) *MKS*

RE: DOCKET NO. 000808-EI - PETITION FOR APPROVAL OF CONSUMPTIVE WATER USE MONITORING ACTIVITY AND SMITH WETLANDS MITIGATION PLAN AS NEW PROGRAMS FOR COST RECOVERY THROUGH THE ENVIRONMENTAL COST RECOVERY CLAUSE BY GULF POWER COMPANY. *as JAJ*

AGENDA: 11/06/01 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\SER\WP\000808R2.RCM

CASE BACKGROUND

The subject of this recommendation is a Notice of Voluntary Dismissal and/or Withdrawal of Petition filed by Gulf Power Company (Gulf) on October 16, 2001, in Docket No. 000808-EI. Docket No. 000808-EI was opened on June 30, 2000, when Gulf filed a petition to recover the costs of consumptive water use monitoring and the Smith Unit 3 wetland mitigation plan through the Environmental Cost Recovery Clause (ECRC). Cost recovery of consumptive water use monitoring was granted, and cost recovery of the wetland mitigation plan was denied. See Order No. PSC-00-2092-PAA-EI issued on November 3, 2000 (PAA Order). On November 27, 2000, Gulf protested that part of the PAA Order denying recovery of the mitigation plan.

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On June 8, 2001, Gulf filed a petition to enter into a purchased power agreement whereby Southern Company would buy Smith Unit 3 and Gulf would purchase energy and capacity from Southern Company. This petition negated the need to recover the cost of the wetland mitigation plan through the ECRC. Consequently, the protest of Docket 000808-EI was held in abeyance, until a decision on the purchased power agreement was made. See Order No. PSC-01-1451-PCO-EI, issued on July 10, 2001, in Docket No. 000808-EI. Gulf withdrew the petition to enter into the purchased power agreement before agency action was taken on it. See Order No. PSC-01-1948-PCO-EI issued on September 28, 2001, in Docket No. 010827-EI.

The Commission has jurisdiction over the subject matter through Sections 366.04, 366.06, and 366.07, Florida Statutes.

ISSUE 1: Should Gulf Power Company's Notice of Voluntary Dismissal and/or Withdrawal of Petition be acknowledged?

STAFF RECOMMENDATION: Yes.

STAFF ANALYSIS: In its Notice, Gulf asks that its voluntary dismissal or withdrawal of that portion of its June 30, 2000, Petition, asking for cost recovery of the wetland mitigation plan through the ECRC, be acknowledged. Gulf also asks that the decision in the PAA Order pertaining to the mitigation plan be deemed null.

Pursuant to Section 120.80(13)(b), Florida Statutes, issues in a proposed agency action which are not in dispute are deemed stipulated. Gulf protested that part of the PAA Order denying recovery of the wetland mitigation plan through the ECRC, but did not protest that part of the PAA Order pertaining to consumptive water use monitoring. By protesting only the decision on the mitigation plan, and by subsequently withdrawing the underlying petition, the decision on the mitigation plan in the PAA Order is nullified. See Order No. PSC-01-1001-PCO-EI, issued April 23, 2001, in Docket 001287-EI (finding a PAA Order, that had been protested, to be null when the utility withdrew its underlying petition); see also Order No. PSC-94-0310-FOF-EQ, issued March 17, 1994, in Docket 920977-EQ (concluding that a PAA Order has no

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effect after it is protested, and voluntary dismissal of the underlying petition divests the Commission of its jurisdiction over the matter); see also *Florida Department of Transportation v. J.W.C. Company, Inc.*, 396 So.2d 778, 785 (Fla. 1st DCA 1981). As stated in *Florida Department of Transportation*:

An agency's free-form action is regarded as preliminary, irrespective of its tenor...The petition for a formal 120.57(1) hearing, as in this case, commences a de novo proceeding...Section 120.57 proceedings "are intended to formulate final agency action, not to review action taken earlier and preliminarily." *McDonald v. Department of Banking and Finance*, 346 So.2d 569 (Fla. 1st DCA 1977).

The decision on the recovery of consumptive water use monitoring was deemed stipulated, and became final with the issuance of Consummating Order No. PSC-00-2294-CO-EI on December 1, 2000.

For the reasons above, staff recommends that Gulf's Notice of Voluntary Dismissal and/or Withdrawal of Petition be acknowledged, and that the decision in the PAA Order denying cost recovery of the mitigation plan be deemed a nullity.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes, this docket should be closed upon issuance of a Consummating Order unless a person whose substantial interests are affected by the Commission's decision files a protest within 21 days of the issuance of the proposed agency action. (STERN)

STAFF ANALYSIS: If no timely protest to the proposed agency action is filed within 21 days of the date of issuance of the Consummating Order, this docket should be closed upon the issuance of the Consummating Order.