

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.

DOCKET NO. 000808-EI  
ORDER NO. PSC-01-2212-PAA-EI  
ISSUED: November 15, 2001

The following Commissioners participated in the disposition of  
this matter:

E. LEON JACOBS, JR., Chairman  
J. TERRY DEASON  
LILA A. JABER  
BRAULIO L. BAEZ  
MICHAEL A. PALECKI

NOTICE OF PROPOSED AGENCY ACTION

ORDER ACKNOWLEDGING VOLUNTARY DISMISSAL AND/OR WITHDRAWAL OF  
PETITION AND NULLIFYING PORTIONS OF ORDER NO. PSC-00-2092-PAA-EI

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service  
Commission that the action discussed herein is preliminary in  
nature and will become final unless a person whose substantial  
interests are substantially affected files a petition for a formal  
proceeding pursuant to Rule 25-22.029, Florida Administrative Code.

The subject of this Order 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. That 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.

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 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. 1<sup>st</sup> DCA 1981). As stated in *Florida Department of Transportation*:

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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. 1<sup>st</sup> 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, Gulf's Notice of Voluntary Dismissal and/or Withdrawal of Petition is hereby acknowledged and the decision in the PAA Order denying cost recovery of the mitigation plan is deemed a nullity.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Gulf Power Company's Notice of Voluntary Dismissal and/or Withdrawal of Petition is hereby acknowledged. It is further

ORDERED that the portions of Order No. PSC-00-2092-PAA-EI pertaining to the wetland mitigation plan for Smith Unit 3 are hereby nullified. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this docket shall be closed.

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By ORDER of the Florida Public Service Commission this 15th  
day of November, 2001.

BLANCA S. BAYÓ, Director  
Division of the Commission Clerk  
and Administrative Services

By: Kay Flynn  
Kay Flynn, Chief  
Bureau of Records and Hearing  
Services

( S E A L )

MKS

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 that is available under Section 120.57, 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 will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

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The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on December 6, 2001.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.