

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: January 31, 2008

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Brown, Fleming) *MCB JSR/VEF*
Division of Economic Regulation (Colson, Breman, Bulecza-Banks, Kummer,
Lee, Lewis, McNulty, Slemkewicz) *TS RT*

RE: Docket No. 060638-EI – Petition for approval of storm cost recovery surcharge to recover costs associated with mandatory storm preparedness initiatives, by Florida Public Utilities Company.

AGENDA: 02/12/08 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\060638.RCM.DOC

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Case Background

On April 25, 2006, the Commission issued Order No. PSC-06-0351-PAA-EI in Docket No. 060198-EI, requiring all investor-owned electric utilities (IOUs) to file plans and estimated implementation costs for ten (10) ongoing storm preparedness initiatives. On May 31, 2006, Florida Public Utilities Company (FPUC) filed its response to the Order, which provided details on how it planned to address each of the ten storm preparedness initiatives and the estimated implementation costs associated with each. In its response, FPUC stated that the incremental cost of each initiative would have a substantial financial impact on the company. FPUC proposed that the Commission provide the company with rate relief to reduce the financial

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hardship. FPUC estimated the costs of compliance with the initiatives to average approximately \$700,000 per year.

On September 19, 2006, the Commission issued Order No. PSC-06-0781-PAA-EI approving the adequacy of FPUC's plans for implementing the ten initiatives. The Order did not specifically address FPUC's request for rate relief to defray the financial impact of its plan. Therefore, on September 20, 2006, FPUC filed a petition for approval of a storm cost recovery surcharge to recover costs of implementing the storm preparedness initiatives. On October 27, 2006, FPUC amended that petition, requesting cost recovery by way of a ten year surcharge, the use of storm reserve funds, or temporary deferral of storm related costs until the next rate proceeding. This docket was opened to address FPUC's surcharge request. OPC intervened in the case, and the Commission conducted customer service hearings in Marianna and Fernandina Beach to receive customer testimony and information on the surcharge request.

The Commission was scheduled to address FPUC's request at its June 5, 2007, Agenda Conference, but deferred consideration of the matter pending further discussions between OPC and FPUC to resolve their differences over the amount of the request. OPC and FPUC agreed that FPUC would request Commission approval to modify its vegetation management plan, and, if the Commission approved the modification, FPUC would withdraw its request for a surcharge and seek cost recovery in its next rate case. FPUC filed its petition to modify its vegetation management plan on October 10, 2007.

During this time, Docket No. 070304-EI was established to address FPUC's petition for a permanent rate increase. Also, Docket No. 070300-EI was established to consider whether FPUC's storm hardening plan was in compliance with the Commission's newly enacted storm hardening rule, Rule 25-6.0345, Florida Administrative Code (F.A.C.) FPUC's new storm hardening plan included the modification to its vegetation management plan and other storm preparedness initiatives, and FPUC's rate case included requests to recover the costs associated with the storm hardening plan and the ten point initiatives. The two dockets were consolidated for a hearing, which is scheduled for February 27-29, 2008.

Intervening events had thus overtaken both FPUC's petition for a surcharge and its petition to modify its vegetation management plan that it had filed in this docket. Therefore, on January 14, 2008, FPUC filed a notice of voluntary withdrawal of those petitions without prejudice. FPUC stated in its notice that it did so with the understanding that the hearing in the combined dockets would address cost recovery for all activities associated with FPUC's compliance with the ten point storm preparedness initiatives as well as FPUC's storm hardening plan pursuant to Rule 25-6.0345, F.A.C. Staff notes that testimony in the consolidated cases has been filed and issues have been identified that address rate recovery for FPUC's storm preparedness and storm hardening activities.

This is staff's recommendation to acknowledge FPUC's voluntary dismissal of this docket. The Commission has jurisdiction pursuant to sections 366.06 and 366.07, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission acknowledge Florida Public Utility Company's voluntary withdrawal of its Petition for approval of storm cost recovery surcharge to recover costs associated with mandatory storm preparedness?

Recommendation: Yes, the Commission should acknowledge Florida Public Utility Company's voluntary withdrawal of its Petition for approval of storm cost recovery surcharge as a matter of right. (Brown)

Staff Analysis: The law is clear that a plaintiff's right to take a voluntary dismissal is absolute if the dismissal is taken before the fact-finding process is completed and the matter is not yet before the decision-maker for final resolution. 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 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, the Commission has not reached a final decision on whether to approve FPUC's request for a surcharge. Thus, FPUC can dismiss its petition as a matter of right. This is consistent with past Commission decisions.² Staff recommends that the Commission

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).

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acknowledge FPUC's voluntary withdrawal of its surcharge petition. That withdrawal divests the Commission of further jurisdiction in this docket. FPUC's modification to its vegetation management plan and the costs associated with FPUC's hardening activities will be considered at the February 27-29, 2007, hearing in Docket Nos. 070300-EI and 070304-EI.

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Issue 2: Should the docket be closed?

Recommendation: Yes. If the Commission approves staff's recommendation in Issue 1, the docket should be closed. (Brown)

Staff Analysis: If the Commission approves staff's recommendation in Issue 1, the docket should be closed.