

State of Florida



Public Service Commission
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DATE: January 29, 2009

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Fleming) *KEF JSB*
Division of Economic Regulation (Maurey) *ALM 1/29/09*

RE: Docket No. 080621-EI – Application for authority to issue and sell securities during calendar year 2009 pursuant to Section 366.04, F.S., and Chapter 25-8, F.A.C., by Florida Power & Light Company.

AGENDA: 02/10/09 – Regular Agenda – Notice of Withdrawal – 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\080621.RCM.DOC

Case Background

On October 1, 2008, Florida Power & Light Company (FPL) filed its Application for authority to issue and sell securities during calendar year 2009 pursuant to Section 366.04, Florida Statutes (F.S.), and Chapter 25-9, Florida Administrative Code (F.A.C.). In its Application, FPL sought authority to issue and sell, and/or exchange any combination of long-term debt and equity securities and/or to assume liabilities or obligations as guarantor, endorser, or surety in an aggregate amount not to exceed \$6.1 billion during calendar year 2009. In addition, FPL sought permission to issue and sell short-term securities during calendar years 2009 and 2010 in an amount or amounts such that the aggregate principal amount of short-term securities outstanding at the time of, and including, any such sale shall not exceed \$3.0 billion.

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FPL's securities application also requested authority to finance construction expenditures of approximately \$30 million for the planned Seabrook Substation Reliability Improvement Project (Seabrook Substation) in the State of New Hampshire on behalf of FPL-New England Division (FPL-NED). FPL-NED is a separate division of FPL created for the purpose of keeping the Seabrook Substation located in New Hampshire operationally and financially independent from FPL's utility operations in Florida.

At the November 13, 2008, Agenda Conference, the Commission voted to approve FPL's Application, with the exception that it deferred consideration of the portion of FPL's Application related to the FPL-NED construction expenditures of approximately \$30 million.

On December 23, 2008, FPL filed a Notice of Withdrawal with respect to the FPL-NED portion of its Application for authority to issue and sell securities during calendar year 2009. FPL has filed a Petition for Approval of Financing for the Seabrook Transmission Substation Upgrade with the New Hampshire Public Utility Commission seeking regulatory approval for the financing of the improvements to the Seabrook Substation.

FPL Group Capital Inc (FPL Group Capital), a wholly-owned subsidiary of FPL Group, Inc. (FPL Group), holds the capital stock of, or has equity interests in, FPL Group's operating subsidiaries other than FPL, and provides funding for those subsidiaries. FPL Group Capital has agreed to make loans to FPL in an aggregate principal amount at any one time outstanding not to exceed a maximum line of credit of \$36 million payable on demand. The line of credit agreement between the parties requires FPL to use the loan proceeds for the sole purpose of financing the acquisition of goods, equipment, fixtures, or other property necessary to accomplish the improvements to the Seabrook Substation. These loans will be non-recourse to FPL and all of its assets except the asset additions of FPL-NED financed with the loan proceeds.

FPL will need to perfect a purchase money security interest or lien in the new assets in favor of FPL Group Capital by executing a security agreement and any necessary mortgage or other security document, and by causing the appropriate UCC filings or mortgage recordings to be made. Because this is an inter-company financing, it will not be a publicly issued security or a security that requires an exemption from registration under federal securities law. In addition, there will be no promissory note associated with these non-recourse loans.

A non-recourse loan is a loan that is secured by a pledge of collateral for which the borrower is not personally liable. If the borrower defaults, the lender can seize the collateral, but the lender's recovery is limited to the collateral. If the collateral is insufficient to cover the outstanding loan balance, the lender is out the difference. The purpose of non-recourse debt is to insulate the company's primary operations from the liability associated with debt related to other non-core lines of business.

FPL's estimated cost of financing is \$40,000, which is based on closing costs, including the costs and expenses of FPL and FPL Group Capital in connection with the preparation, execution, and delivery of the parties' line of credit agreement and related instruments and documents, including reasonable fees and out of pocket expenses of legal counsel. FPL is also responsible for any post-closing costs and expenses of FPL Group Capital in connection with administration or enforcement of the loans or recovering, protecting, or enforcing its interest in

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the collateral. FPL confirms that all costs associated with the proposed transaction, as well as all other expenditures on behalf of FPL-NED, are not recovered from or otherwise imposed on FPL's ratepayers in Florida. In addition, FPL plans to petition for a base rate increase in March, 2009.¹ Staff plans to address the ratemaking treatment of the FPL-NED investment and related capital costs in this rate case to ensure that there are no adverse effects on FPL's ratepayers.

This recommendation addresses FPL's notice of withdrawal, and the ultimate disposition of Docket No. 080621-EI. The Commission has jurisdiction pursuant to Section 366.04, F.S.

¹ Docket No. 080677-EI, In re: Petition for increase in rates by Florida Power & Light Company.

Discussion of Issues

Issue 1: Should the Commission acknowledge Florida Power & Light Company's voluntary withdrawal of a portion of its Application for authority to issue and sell securities during calendar year 2009, related to the FPL-NED construction expenditures of \$30 million, and if so, what effect does the withdrawal have on Docket No. 080621-EI?

Recommendation: Yes, the Commission should acknowledge FPL's voluntary withdrawal of a portion of its Application for authority to issue and sell securities during calendar year 2009, related to the FPL-NED construction expenditures of \$30 million as a matter of right. The effect of the voluntary withdrawal is to divest the Commission of further jurisdiction over FPL's Application, as filed, for authority to issue and sell securities related to the FPL-NED construction expenditures. (Fleming)

Staff Analysis: It is a well established legal principle that the plaintiff's right to take a voluntary dismissal is absolute.² Once a voluntary dismissal is taken, the trial court loses all jurisdiction over the matter, and cannot reinstate the action for any reason.³ Both of these legal principles have been recognized in administrative proceedings.⁴ 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 hearing has not yet occurred, so the fact-finding process is not complete. Staff therefore recommends that the Commission acknowledge FPL's withdrawal of its petition as a matter of right, which is in accord with past Commission decisions.⁵ The Commission should further find that the effect of

² Fears v. Lunsford, 314 So. 2d 578, 579 (Fla. 1975)

³ Randle-Eastern Ambulance Service, Inc. v. Vasta, Elena, etc., 360 So. 2d 68, 69 (Fla. 1978)

⁴ 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).

⁵ 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-07-0485-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

FPL's voluntary withdrawal of the FPL-NED portion of its Application for authority to issue and sell securities during calendar year 2009 is to divest the Commission of further jurisdiction over FPL's Application, as filed, for authority to issue and sell securities related to the FPL-NED construction expenditures. FPL confirms that all costs associated with the proposed transaction, as well as all other expenditures on behalf of FPL-NED, are not recovered from or otherwise imposed on FPL's ratepayers in Florida. In addition, FPL plans to petition for a base rate increase in March, 2009.⁶ Staff plans to address the ratemaking treatment of the FPL-NED investment and related capital costs in this rate case to ensure that there are no adverse effects on FPL's ratepayers. A voluntary dismissal does not affect the Commission's jurisdiction as granted by the Legislature to protect Florida ratepayers.⁷

Lee County (voluntary dismissal cannot be utilized to divest the Commission as an adjudicatory agency of its jurisdiction granted to it by the legislature).

⁶ Docket No. 080677-EI, In re: Petition for increase in rates by Florida Power & Light Company.

⁷ 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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Issue 2: Should this docket be closed?

Recommendation: No. For monitoring purposes, this docket should remain open until April 28, 2010 to allow FPL time to file the required Consummation Report. (Fleming)

Staff Analysis: For monitoring purposes, this docket should remain open until April 28, 2010 to allow FPL time to file the required Consummation Report.