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Public Service Commission

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

DATE: July 1, 2009

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Klancke)
Division of Economic Regulation (Kummer)

RE: Docket No. 070733-EI – Complaint No. 694187E by Cutrale Citrus Juices USA, Inc. against Tampa Electric Company for refusing to provide transformer ownership discount for electrical service provided through Minute Maid substation.

AGENDA: 07/14/09 ~~06/30/09~~ Regular Agenda – Notice of Withdrawal– Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Argenziano

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\070733.RCM.DOC

Case Background

In April 2006, Cutrale Citrus Juices USA, Inc. (Cutrale) filed an informal complaint with our Bureau of Complaint Resolution. Cutrale is a manufacturer of orange juice and also produces other fruit and vegetable products. Cutrale's facility is located in Auburndale, Florida. Cutrale asserted that Tampa Electric Company (TECO) refused to grant Cutrale a Transformer Ownership Discount for transformers located at Cutrale's Auburndale facility. On July 16, 2008, the Commission issued Order No. PSC-08-0397-PAA-EI providing that TECO was not in violation of its Firm Supplemental and Standby Service Tariff by refusing to grant a Transformer

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Ownership Discount to Cutrale Citrus Juices USA, Inc., and that Cutrale was not entitled to a refund from TECO's denial of a Transformer Ownership Discount at the Auburndale facility.

On July 3, 2008, Cutrale filed a request for hearing pursuant to Section 120.57, Florida Statutes (F.S.). On August 7, 2008, a joint motion was filed by Cutrale and TECO requesting that the Commission hold this proceeding in abeyance pending efforts by the parties to resolve their differences by way of settlement. Order No. PSC-08-0582-PCO-EI issued September 9, 2008, granting the abatement. On June 4, 2009, Cutrale filed a Notice of Voluntary Dismissal with Prejudice of this proceeding. On June 30, 2009, Cutrale submitted additional correspondence to the Commission confirming that Cutrale has withdrawn its complaint in Docket No. 070733-EI.

This recommendation addresses ~~Cutrale's notice of withdrawal~~ the withdrawal of Cutrale's complaint and the ultimate disposition of Docket No. 070733-EI. The Commission has jurisdiction ~~pursuant to~~ through the provisions of Chapter 366, F.S., including Sections 366.04 and 366.05, F.S.

Discussion of Issues

Issue 1: Should the Commission acknowledge Cutrale Citrus Juices USA, Inc.'s voluntary withdrawal of its petition, and if so, what effect does the withdrawal have on ~~Docket No. 070733-EI~~ Order No. PSC-08-0397-PAA-EI?

Recommendation: Yes, the Commission should acknowledge Cutrale's voluntary withdrawal of its complaint as a matter of right. The effect of the voluntary withdrawal is to divest the Commission of further jurisdiction over this matter, rendering Order No. PSC-08-0397-PAA-EI a nullity. (Klancke)

Staff Analysis: It is a well established legal principle that the plaintiff's right to take a voluntary dismissal is absolute.[1] Once a voluntary dismissal is taken, the trial court loses all jurisdiction over the matter, and cannot reinstate the action for any reason.[2] Both of these legal principles have been recognized in administrative proceedings.[3] 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, therefore, this Commission lost its jurisdiction to further address this matter once the petitioner, Cutrale, withdrew its complaint. Thus, Cutrale can dismiss its complaint (and its ensuing protest of Order No. PSC-08-0397-PAA-EI) as a matter of right, which is in accord with past Commission decisions.[4] ~~The Commission should further find that the effect of Cutrale's voluntary withdrawal of its petition~~

[1] Fears v. Lunsford, 314 So. 2d 578, 579 (Fla. 1975).
[2] Randle-Eastern Ambulance Service, Inc. v. Vasta, Elena, etc., 360 So. 2d 68, 69 (Fla. 1978).
[3] 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).
[4] 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 Lee County (voluntary dismissal cannot be utilized to divest the Commission as an adjudicatory agency of its jurisdiction granted to it by the legislature).

~~for determination of need is to divest the Commission of further jurisdiction in this matter.~~ Thus, staff recommends that the Commission find that the effect of Cutrale's voluntary withdrawal of its complaint divests the Commission of further jurisdiction over this matter, rendering Proposed Agency Action Order No. PSC-08-0397-PAA-EI a nullity.[5]

[5] See Order No. PSC-07-0485-FOF-EI, issued June 8, 2007, in Docket Nos. 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; and 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.

Issue 2: Should this docket be closed?

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

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