

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: March 4, 2010

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Jaeger) *PP JB*
Division of Economic Regulation (Kummer) *CS*
Division of Service, Safety & Consumer Assistance (Hicks) *RH Amt*

RE: Docket No. 090083-GU -- Complaint of Sun City Center Community Association, Inc. against Peoples Gas System for alleged improper billing. *10 MAR -4 AM 10:37*

AGENDA: 03/16/10 -- Regular Agenda -- Interested Persons May Participate *RECEIVED-FPSC*

COMMISSIONERS ASSIGNED: Edgar, Skop, Klement

PREHEARING OFFICER: Klement

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\090083.RCM.DOC

Case Background

On February 16, 2009, the Sun City Center Community Association, Inc. (Customer or SCCCA) filed its formal complaint in this docket. In the formal complaint, the Customer stated that the usage for the common areas of SCCCA was improperly switched in August 2005 from the GS-2 Service rate (commercial rate) to the Residential Service rate. The Customer requested that it be moved back to the Commercial GS-2 Service rate (tariff), and that it receive a refund with interest of the difference between the two rates from the time the switch occurred in August 2005.

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FPSC-COMMISSION CLERK

In its response, the Peoples Gas System (Peoples or Company) alleged that it switched SCCCA to the Residential Service rate to comply with Commission Order 19365.¹ Quoting that Order, Peoples stated that the Commission found “that gas utilities should consider service to commonly owned areas of condominium associations, cooperative apartments, and homeowner associations as residential service.” In the case at hand, Peoples is providing gas for the heating of the community pool.

By Proposed Agency Action Order No. PSC-09-0661-PAA-GU (PAA Order), issued October 5, 2009, the Commission proposed to dispose of the formal complaint. However, SCCCA timely protested the PAA Order and the PAA Order never became effective. The protest was assigned to a panel of Commissioners and set for a formal hearing. Order No. PSC-09-0853-PCO-GU (Order Establishing Procedure), issued December 30, 2009, set the controlling dates for the events in this proceeding.

Stating that a settlement has been reached, the Customer filed its Revised Notice of Voluntary Withdrawal of Complaint on February 16, 2010, and requested that the hearing dates be canceled and the controlling dates be deleted.² Pending the Commission’s consideration of the withdrawal, the request to cancel the hearing and delete the controlling dates was granted.³

This recommendation addresses the Customer’s withdrawal of its complaint and whether this docket may now be closed. The Commission has jurisdiction pursuant to Sections 366.04 and 366.05(1), Florida Statutes (F.S.).

¹ Issued May 24, 1988, in Docket No. 860106-PU, In re: General Investigation Into Deposit Practices.

² SCCCA initially filed a Notice of Voluntary Dismissal With Prejudice of its Petition on Proposed Agency Action. However, it did not want the Proposed Agency Action Order to become final, and filed what it styled as a Revised Notice of Voluntary Withdrawal of Complaint.

³ See Order No. PSC-10-0098-PCO-GU, issued February 22, 2010.

Discussion of Issues

Issue 1: Should the Commission acknowledge Sun City Center Community Association, Inc.'s (SCCCA's) Revised Notice of Voluntary Withdrawal of Complaint?

Recommendation: Yes, the Commission should acknowledge SCCCA's voluntary withdrawal of its complaint. With this withdrawal of the complaint, the Commission is divested of jurisdiction and the Proposed Agency Action Order No. PSC-09-0661-PAA-GU is a nullity. (Jaeger)

Staff Analysis: It is a well established legal principle that the plaintiff's right to take a voluntary dismissal is absolute.⁴ Once a voluntary dismissal is taken, the trial court loses all jurisdiction over the matter, and cannot reinstate the action for any reason.⁵ Both of these legal principles have been recognized in administrative proceedings.⁶ 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 SCCCA's withdrawal of its complaint as a matter of right, which is in accord with past Commission decisions.⁷ With this withdrawal of the complaint, the Commission is divested of jurisdiction and the Proposed Agency Action Order No. PSC-09-0661-PAA-GU is a nullity. The Commission should further find that with the voluntary withdrawal of the complaint, there are no further actions required.

⁴ Fears v. Lunsford, 314 So. 2d 578, 579 (Fla. 1975)

⁵ Randle-Eastern Ambulance Service, Inc. v. Vasta, Elena, etc., 360 So. 2d 68, 69 (Fla. 1978)

⁶ 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).

⁷ 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).

A voluntary dismissal does not affect the Commission's jurisdiction as granted by the Legislature to protect Florida ratepayers.⁸ Staff notes that the problems raised in SCCCA's complaint have been corrected in Peoples' most recent rate case.⁹ Prior to the last rate case, all of Peoples residential customers initiating service after January 1988 took service under the RS rate, pursuant to Order No. 19365, even though the characteristics of the load could be similar to use by larger GS customers. In its most recent rate case, the General Service classes were restructured to expand the eligibility of the GS-1 through GS-5 rate schedules to include residential use. This allows the largest residential customers to be included with similarly-situated non-residential customers for pricing purposes based on their term usage levels. An additional benefit of this approach is that it clarifies the rights of condominium units to purchase their gas supply from a third-party pursuant to the Company's transportation service program because all commercial customers must be offered the right to take transportation-only services under federal law.¹⁰ The deposit terms and conditions associated with residential service continue to apply to condominium customers that are reclassified to a GS rate schedule.¹¹

⁸ 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).

⁹ See Order No. PSC-09-0411-FOF-GU, issued June 9, 2009, in Docket No. 080318-GU, In re: Petition for a Rate Increase by Peoples Gas System.

¹⁰ See Rule 25-7.0335(1), F.A.C.

¹¹ See Order No. PSC-09-0411-FOF-GU, p. 55.

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Issue 2: Should this docket be closed?

Recommendation: Yes. There are no further actions required in this docket and the docket should be closed. (Jaeger)

Staff Analysis: There are no further actions required in this docket and the docket should be closed.