

RECEIVED-FPSC

11 SEP 22 AM 8:41

State of Florida



Public Service Commission

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

COMMISSION
CLERK

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

DATE: September 22, 2011

TO: Office of Commission Clerk (Cole)

FROM: Division of Economic Regulation (Draper, Barrett, Kummer)
Office of the General Counsel (Crawford, Barrera)
Division of Regulatory Analysis (Ma)

EJD
MAB *JSC* *UNDA*
[Handwritten signatures]

RE: Docket No. 100358-EI – Investigation into the design of Commercial Time-of-Use rates by Florida Power & Light, pursuant to Order No. PSC-10-0153-FOF-EI.

AGENDA: 10/04/11 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Balbis

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\100358.RCM.DOC

Case Background

On May 11, 2011 the Commission issued Order No. PSC-11-0216-PAA-EI (PAA Order), Notice of Proposed Agency Action Order Declining To Require Florida Power & Light Company to File a New Commercial Time-Of-Use Rate, which found that there was not enough evidence that would support a new TOU rate for Florida Power & Light's (FPL), commercial customers and declined to require FPL to file a new commercial TOU rate. The Commission further ordered FPL to investigate whether fuel TOU factors based on marginal costs and/or summer and winter differentiation would benefit customers and provide system benefits and report back in testimony filed in the 2011 fuel proceeding.

DOCUMENT NUMBER-DATE

06850 SEP 22 =

FPSC-COMMISSION CLERK

Docket No. 100358-EI
Date: September 22, 2011

On June 1, 2011 the Association For Fairness In Rate Making (AFFIRM) filed a Petition on Proposed Agency Action (Petition). On June 21, 2011, FPL filed a Motion to Dismiss AFFIRM's Petition on Proposed Agency Action, or in the alternative, Motion for a More Definite Statement. On July 1, 2011, AFFIRM filed a Response to FPL's motion. On July 15, 2011, AFFIRM filed a Clarification of AFFIRM'S Response To Florida Power & Light Company's Motion To Dismiss and Motion For More Definite Statement.

On September 8, 2011, AFFIRM filed a Notice of Voluntary Dismissal Without Prejudice (Notice), dismissing its Petition.

This recommendation addresses AFFIRM's Notice dismissing its protest and the appropriate disposition of this docket. The Commission has jurisdiction over the subject matter pursuant to Sections 366.041, 366.05, 366.06 and 366.075, Florida Statutes (F.S.).

Discussion of Issues

Issue 1: Should the Commission acknowledge AFFIRM's Notice of Voluntary Dismissal Without Prejudice?

Recommendation: Yes, the Commission should acknowledge AFFIRM's voluntary dismissal of its Petition and make Order No. PSC-11-0216-PAA-EI final and effective. (Barrera)

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. Staff therefore recommends that the Commission acknowledge AFFIRM's Notice of Voluntary Dismissal Without Prejudice as a matter of right, which is in accord with past Commission decisions.⁴

AFFIRM was the only entity that filed a protest of the PAA Order issued May 11, 2011. The protest period for that order expired June 1, 2011. There were no other protests to the PAA Order. AFFIRM has now dismissed its protest. As such, Order No. PSC-11-0216-PAA-EI should now become final and effective.

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).

Docket No. 100358-EI
Date: September 22, 2011

Staff recommends that the Commission should acknowledge AFFIRM's voluntary dismissal of its Petition and make Order No. PSC-11-0216-PAA-EI final and effective.

Docket No. 100358-EI
Date: September 22, 2011

Issue 2: Should this docket be closed?

Recommendation: Yes. No further action by the Commission is required in this docket and the docket should be closed. (Barrera)

Staff Analysis: No further action by the Commission is required in this docket and the docket should be closed.