

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: May 10, 2007

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Brubaker)
Division of Economic Regulation (Bulecza-Banks, Draper, Maurey, Springer)

RE: Docket No. 050890-EI – 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.

Docket No. 050891-EI – 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.

AGENDA: 05/22/07 – Regular Agenda – Acknowledgment of Withdrawals - Parties May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Carter

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\050890.RCM.DOC

Case Background

On November 21, 2005, Sears, Roebuck and Company (Sears) filed a complaint against Florida Power & Light Company (FPL) for alleged violations of Rule 25-6.097, Florida Administrative Code (F.A.C.), with respect to FPL's demand that Sears provide a customer

deposit to continue to receive electric service from FPL. By Order No. PSC-06-0383-PAA-EI,¹ the Commission denied Sears' complaint. Also on November 21, 2005, Kmart Corporation (Kmart) filed a complaint against FPL for alleged violations of Rule 25-6.097, F.A.C., with respect to FPL's demand that Kmart provide an additional deposit to continue to receive electric service from FPL. By Order No. PSC-06-0387-PAA-EI,² the Commission denied Kmart's complaint. Pursuant to Sections 120.569 and 120.57, Florida Statutes (F.S.) and Rules 25-22.029 and 28-106.201, F.A.C., Sears and Kmart timely filed petitions requesting a formal administrative hearing on the respective Proposed Agency Actions.

By Order No. PSC-07-0165-PCO-EI, issued February 23, 2007, Docket Nos. 050890-EI and 050891-EI were consolidated for the purpose of hearing, and controlling dates were established for the hearing. By notices dated March 23, 2007, Sears and Kmart indicated that they had reached a confidential settlement of their issues with FPL, and that they therefore withdraw their respective complaints and request that Docket Nos. 050890-EI and 050891-EI be closed.

This recommendation addresses the withdrawal of Sears and Kmart's complaints, and the ultimate disposition of Docket Nos. 050890-EI and 050891-EI. The Commission has jurisdiction through the provisions of Chapter 366, F.S., including Sections 366.04, 366.041, and 366.05, F.S.

¹ Order No. PSC-06-0383-PAA-EI, issued May 9, 2006, in Docket No. 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.

² Order No. PSC-06-0387-PAA-EI, issued May 9, 2006, In re: Docket No. 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.

Discussion of Issues

Issue 1: Should the Commission acknowledge Sears and Kmart's voluntary withdrawal of their respective complaints against FPL, and if so, what effect does the withdrawal have on Order Nos. PSC-06-0383-PAA-EI and PSC-06-0387-PAA-EI?

Recommendation: Yes, the Commission should acknowledge Sears and Kmart's voluntary withdrawal of their respective complaints as a matter of right. The effect of the voluntary withdrawals is to divest the Commission of further jurisdiction over this matter, rendering both Order Nos. PSC-06-0383-PAA-EI and PSC-06-0387-PAA-EI nullities. (Brubaker)

Staff Analysis: It is a well established legal principle that the plaintiff's right to take a voluntary dismissal is absolute.³ Once a voluntary dismissal is taken, the trial court loses all jurisdiction over the matter, and cannot reinstate the action for any reason.⁴ Both of these legal principles have been recognized in administrative proceedings.⁵ In Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc., 630 So. 2d 1123, 1128 (Fla. 2nd 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, no formal hearing occurred, so the fact-finding process was not complete; therefore, the Commission lost its jurisdiction to further address this matter once the petitioners, Sears and Kmart, withdrew their respective complaints. In this instance, Sears and Kmart can dismiss their complaints (and ensuing protests to Order Nos. PSC-06-0383-PAA-EI and PSC-06-0387-PAA-EI) as a matter of right, which is in accord with past Commission decisions.⁶ Therefore, staff recommends that the Commission find that the effect of Sears and Kmart's voluntary withdrawals of their respective complaints is to divest the Commission of further jurisdiction over this matter, rendering both Proposed Agency Action Order Nos. PSC-06-0383-PAA-EI and PSC-06-0387-PAA-EI nullities.

³ Fears v. Lunsford, 314 So. 2d 578, 579 (Fla. 1975)

⁴ Randle-Eastern Ambulance Service, Inc. v. Vasta, Elena, etc., 360 So. 2d 68, 69 (Fla. 1978)

⁵ 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. 2nd DCA 1991); Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc., 630 So. 2d 1123 (Fla. 2nd DCA 1993) aff'd, 645 So. 2d 374 (Fla. 1994).

⁶ See 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.

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Issue 2: Should Docket Nos. 050890-EI and 050891-EI be closed?

Recommendation: Yes. (Brubaker)

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