

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: December 6, 2007

TO: Office of Commission Clerk (Cole)

FROM: Division of Economic Regulation (Lester, Ballinger, Bulecza-Banks, Draper, Kyle, Maurey, McNulty, Slemkewicz, Springer)
Office of the General Counsel (Bennett, Young)

RE: Docket No. 070052-EI – Petition by Progress Energy Florida, Inc. to recover costs of Crystal River Unit 3 uprate through fuel clause.

AGENDA: 12/18/07 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Carter

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\070052.RCM.DOC

Case Background

On September 22, 2006, Progress Energy Florida (PEF) filed a Petition for Determination of Need for Expansion of an Electrical Power Plant, for Exemption from Rule 25-22.082, Florida Administrative Code (F.A.C.), and for Cost Recovery through the Fuel Cost Recovery Clause in Docket No. 060642-EI. On December 22, 2006, the hearing officer bifurcated the proceeding and a separate docket, Docket Number 070052-EI, was opened to consider the cost recovery aspect of PEF's petition. Office of Public Counsel (OPC), AARP, Florida Industrial Power Users Group (FIPUG), Florida Retail Federation (FRF), and PCS Phosphate – White Springs (White Springs) intervened in this docket.

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A formal administrative hearing was held on August 7 and 8, 2007 to consider PEF's Petition to Recover Costs of Crystal River Unit 3 Uprate Through the Fuel Clause, Docket No. 070052-EI. The staff's posthearing recommendation was scheduled to be considered by the Commission at its October 9, 2007, Agenda Conference. The posthearing recommendation was deferred to a later date and on October 19, 2007, prior to the Commission making a final determination on the petition, PEF filed a Notice of Withdrawal. No intervenor has filed a response. The Commission has jurisdiction pursuant to Chapter 366, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission acknowledge Progress Energy Florida's voluntary withdrawal of its Petition to Recover Costs of Crystal River Unit 3 Uprate Through Fuel Clause, and if so, what effect does the withdrawal have on Docket No. 070052-EI?

Recommendation: Yes, the Commission should acknowledge Progress Energy Florida's voluntary withdrawal of its Petition to Recover Costs of Crystal River Unit 3 Uprate Through Fuel Clause as a matter of right. The effect of the voluntary withdrawal is to divest the Commission of further jurisdiction over this petition. (Bennett)

Staff Analysis: The law is clear that a plaintiff's right to take a voluntary dismissal is absolute. Fears v. Lunsford, 314 So. 2d 578, 579 (Fla. 1975). It is also established civil law that once a timely voluntary dismissal is taken, the trial court loses its jurisdiction to act and cannot revive the original action for any reason. Randle-Eastern Ambulance Service, Inc. v. Vasta, 360 So. 2d 68, 69 (Fla. 1978). Both of these legal principles have been recognized in administrative proceedings.¹ 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, while a formal hearing had been completed, the Commission had not reached its final decision. Thus, PEF can dismiss its petition as a matter of right. This is consistent with past Commission decisions.² Therefore, staff recommends that the Commission find that the

¹ 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).

² 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-07-0877-FOF-EI, issued October 31, 2007, in Docket No. 070467-EI, In re: Petition to determine need for Polk Unit 6 electrical power plant, by Tampa Electric Co.; 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).

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effect of PEF's voluntary withdrawal of its petition for determination of need is to divest the Commission of further jurisdiction over this matter.

Staff recommends that the Commission approve Progress Energy Florida's Notice of Withdrawal of its Petition to Recover Costs of Crystal River Unit 3 Uprate Through Fuel Clause. Staff also recommends that the Commission find that the effect of Progress Energy Florida's voluntary withdrawal of its petition is to divest the Commission of further jurisdiction over this petition.

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Issue 2: Should the docket be closed?

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

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