

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: September 17, 2008

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Hartman)
Office of Strategic Analysis and Governmental Affairs (Sickel, Lewis, Webb)
Division of Economic Regulation (Kummer)

RE: Docket No. 080187-EQ – Petition for approval of amended standard offer contract and COG-2 rate schedule, by Progress Energy Florida.

AGENDA: 09/29/08 – Regular Agenda – Acknowledgment of Withdrawal – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Argenziano

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: Procedural recommendation to close docket after party voluntarily withdrew petition

FILE NAME AND LOCATION: S:\PSC\SGA\WP\080187.RCM.DOC

Case Background

Since January 1, 2006, each investor-owned electric utility (IOU), as well as each municipal electric utility subject to the Florida Energy Efficiency and Conservation Act (FEECA), has been required to continuously offer to purchase capacity and energy from specific types of renewable sources. Section 366.91(3), Florida Statutes (F.S.), specifies that the contracts for purchase must be based on the utility's full avoided cost as defined in Section 366.051, F.S., and provide a term of at least ten years. Rules 25-17.200 through 25-17.310, Florida Administrative Code (F.A.C.), implement the statutes.

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In accord with applicable statutes and rules, on April 1, 2008, Progress Energy Florida, Inc. (PEF or Company) filed its petition requesting approval of a standard offer contract and associated tariffs based on the Ten-Year Site Plan for 2008-2017. By Order No. PSC-08-0385-PCO-EQ, issued June 10, 2008, the Commission suspended PEF's tariff pursuant to 366.06(3), F.S.

However, on July 15, 2008, in Docket No. 080501-EI, PEF filed a petition for waiver of Rule 25-17.250(1) and (2)(a), F.A.C., amending and replacing the standard offer contract that was originally filed in Docket No. 080187-EQ. Thereafter, on July 23, 2008, PEF filed a Notice of Withdrawal of its Petition for Approval of Amended Standard Offer Contract and COG-2 rate schedule originally filed on April 1, 2008, requested that no action be taken on Docket 080187-EQ, and instead requested that the Commission take action on Docket No. 080501-EQ.

This recommendation addresses PEF's notice of withdrawal and the ultimate disposition of Docket No. 080187-EQ. The Commission has jurisdiction over this matter pursuant to Sections 366.04 through 366.06, 366.91, and 366.92, F.S.

Discussion of Issues

Issue 1: Should the Commission acknowledge Progress Energy Florida, Inc.'s voluntary withdrawal of its Petition Requesting Approval of a Standard Offer Contract and Associated Tariffs, filed April 1, 2008, in Docket No. 080187-EQ?

Recommendation: Yes, the Commission should acknowledge Progress Energy Florida, Inc.'s voluntary withdrawal of its Petition Requesting Approval of a Standard Offer Contract and Associated Tariffs as a matter of right. The effect of the voluntary withdrawal is to divest the Commission of further jurisdiction over PEF's petition but not over the subject matter. (Hartman)

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, by Order No. PSC-08-0385-PCO-EQ, the Commission suspended operation of PEF's April 1, 2008, filing pursuant to Section 366.06(3), F.S. The Commission had not yet taken final action on PEF's petition. Thus, PEF can dismiss its petition as a matter of right. This is consistent with past Commission decisions.² Staff therefore recommends that the Commission approve PEF's voluntary withdrawal of its petition.

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

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Although the effect of the withdrawal of a petition is to divest the agency of jurisdiction over the petition, it does not divest the agency of subject matter jurisdiction to review standard offer contracts consistent with the provisions of Sections 366.04 through 366.06, 366.91, and 366.92, F.S.

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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Issue 2: Should this docket be closed?

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

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