

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: February 27, 2014

TO: Office of Commission Clerk (Stauffer)

FROM: Office of the General Counsel (Klancke) *CKL* *SKK*
Division of Economics (Daniel, Hudson, Roberts) *DR* *SH* *PP*
Division of Engineering (Watts) *CKL*

RE: Docket No. 130086-SU – Complaint of K W Resort Utilities Corp. against Monroe County, Florida for alleged entitlement to collect certain capacity reservation fees for excess capacity used.

AGENDA: 03/13/14 – Regular Agenda – Notice of Voluntary Dismissal – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Graham

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

On April 18, 2013, KW Resort Utilities Corporation's (KWRU) initiated this docket by filing its complaint against Monroe County, Florida (County) for alleged entitlement to collect certain capacity reservation fees for excess capacity used. On May 8, 2013, the County filed an Unopposed Motion for the Extension of Time to Respond to KWRU's Complaint which was granted via Order No. PSC-13-0221-PCO-SU. Additional extensions of time were granted by separate orders issued on June 7, 2013, July 10, 2013, September 10, 2013, and December 12, 2013.¹ During this period, the County and KWRU prepared a Settlement Agreement which

¹ See Order Nos. PSC-13-0255-PCO-SU, PSC-13-0310-PCO-SU, PSC-13-0418-PCO-SU, and PSC-13-0657-PCO-SU.

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KWRU executed and which the County Commission approved at the County Commission meeting on November 20, 2013.

On January 14, 2014, KWRU filed a Corrected Notice of Voluntary Dismissal With Prejudice (Dismissal) advising the Commission of its intent to voluntarily dismiss its complaint with prejudice and requesting that the Commission close Docket No. 130086-SU.

Discussion of Issues

Issue 1: Should the Commission acknowledge KW Resort Utilities Corporation's voluntary dismissal with prejudice of its complaint against Monroe County, Florida for alleged entitlement to collect certain capacity reservation fees for excess capacity used?

Recommendation: Yes, the Commission should acknowledge KW Resort Utilities Corporation's voluntary dismissal with prejudice of its complaint against Monroe County, Florida as a matter of right. (Klancke)

Staff Analysis: It is a well established legal principle that the plaintiff's right to take a voluntary dismissal is absolute.² Once a voluntary dismissal is taken, the trial court loses all jurisdiction over the matter, and cannot reinstate the action for any reason.³ Both of these legal principles have been recognized in administrative proceedings.⁴ 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 the instant case, no hearing in this matter was scheduled or undertaken. Thus, KWRU has requested the dismissal of the complaint in this matter prior to the completion of the fact-finding process. Staff therefore recommends that the Commission acknowledge KWRU's voluntary dismissal of its complaint with prejudice as a matter of right, which is in accord with past Commission decisions.⁵ Staff notes that in the instant case, the Commission is not evaluating the prudence of the Settlement Agreement involved herein. Moreover, the Commission reserves the right to evaluate the Settlement Agreement in conjunction with any future rate case proceedings involving KWRU.

² Fears v. Lunsford, 314 So. 2d 578, 579 (Fla. 1975); see also Kelly v. Colston, 977 So.2d 692, 693 (Fla. 1st DCA 2008) (holding that a plaintiff's right to take a voluntary dismissal is nearly absolute).

³ Randle-Eastern Ambulance Service, Inc. v. Vasta, Elena, etc., 360 So. 2d 68, 69 (Fla. 1978).

⁴ 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).

⁵ See Order No PSC-10-0382-FOF-EI, issued June 15, 2010, in Docket No. 090109-EI, In re: Petition for approval of solar energy power purchase agreement between Tampa Electric Company and Energy 5.0, LLC.; Order No PSC-10-0248-FOF-EQ, issued April 22, 2010, in Docket No. 090146-EQ, In re: Petition by Tampa Electric Company for approval of extension of small power production agreement with City of Tampa; Order No. PSC-10-0199-FOF-SU, issued March 31, 2010, in Docket No. 090415-SU, In re: Application for staff-assisted rate case in Polk County by West Lakeland Wastewater, Inc.; Order No. PSC-09-0120-FOF-EI, issued March 2, 2009, in Docket No. 080621-EI, In re: Application for authority to issue and sell securities during calendar year 2009 pursuant to Section 366.04, F.S., and Chapter 25-8, F.A.C., by Florida Power & Light Company; Order No. PSC-08-0102-FOF-EI, issued February 18, 2008 in Docket No. 060638-EI, In re: Petition for approval of storm cost recovery surcharge to recover costs associated with mandatory storm preparedness initiatives, by Florida Public Utilities Company. 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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Issue 2: Should this docket be closed?

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

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