

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: March 25, 2010

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Brown) *MCB JSB PL CH*
Division of Economic Regulation (Lee) *SL PGE TW*
Division of Regulatory Analysis (Matthews, Ellis) *TS RT* *(mm)*

RE: Docket No. 090146-EQ – Petition by Tampa Electric Company for approval of extension of small power production agreement with City of Tampa.

AGENDA: 04/06/10 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\090146.RCM.DOC

RECEIVED-FPSC
10 MAR 25 AM 10:26
COMMISSION
CLERK

Case Background

Tampa Electric Company (TECO) filed a petition on March 23, 2009, requesting Commission approval of an extension to a small power production agreement with the City of Tampa. The power is produced at the City's McKay Bay Refuse to Energy Facility, a municipal solid waste-fired steam turbine generator, located in Hillsborough County, Florida. At its September 15, 2009, Agenda Conference, the Commission deferred consideration of TECO's petition upon the assertion by TECO that the parties would review the proposed contract and attempt to renegotiate some of its terms. Those additional negotiations were not successful, and on March 16, 2010, TECO filed its Notice of Withdrawal of Petition for Approval of Extension of Small Power Production Agreement, in which it voluntarily withdrew its petition without prejudice to refile at a later date.

DOCUMENT NUMBER-DATE

02107 MAR 25 09

FPSC-COMMISSION CLERK

Docket No. 090146-EQ
Date: March 25, 2010

This recommendation addresses TECO's voluntary withdrawal. The Commission has jurisdiction over this matter pursuant to Sections 366.051 and 366.81, Florida Statutes (F.S.).

Discussion of Issues

Issue 1: Should the Commission acknowledge Tampa Electric Company's withdrawal of its petition for approval of extension of small power production agreement?

Recommendation: Yes, the Commission should acknowledge Tampa Electric Company's voluntary withdrawal of its petition for approval of extension of small power production agreement as a matter of right. (Brown)

Staff Analysis: The law is clear that a plaintiff's right to take a voluntary dismissal is absolute if the dismissal is taken before the fact-finding process is completed and the matter is not yet before the decision-maker for final resolution. 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, the Commission has not reached a final decision on whether to approve TECO's extension of its small power production agreement with the City of Tampa. Thus, TECO can dismiss its petition as a matter of right. This is consistent with past Commission decisions.² Staff recommends that the Commission acknowledge TECO's voluntary withdrawal of its petition. That withdrawal divests the Commission of further jurisdiction in this docket.

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

Docket No. 090146-EQ
Date: March 25, 2010

Issue 2: Should the docket be closed?

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

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

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).