

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 19, 2010

TO: Office of Commission Clerk (Cole)

FROM: Division of Regulatory Analysis (Graves, Ellis, Gilbert, Matthews)
Division of Economic Regulation (Matlock, Springer)
Office of the General Counsel (Brubaker, Sawyer, Williams)

Handwritten initials and signatures: REA, PoE, TPB, die, CH, [Signature]

RE: Docket No. 090109-EI – Petition for approval of solar energy power purchase agreement between Tampa Electric Company and Energy 5.0, LLC.

06/01/10 (corrected by ac on 06/04/10)

AGENDA: ~~05/11/10~~ – Regular Agenda – Notice of Voluntary Dismissal – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Skop

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\RAD\WP\090109.RCM.DOC

RECEIVED-FPSC
10 MAY 19 AM 11:35
COMMISSION
CLERK

Case Background

On March 9, 2009, Tampa Electric Company (TECO or Company) filed a petition requesting approval of a solar energy purchased power agreement with Energy 5.0, LLC (Energy 5.0). By Order No. PSC-10-0057-PAA-EI, issued January 25, 2010, the Commission approved the solar energy purchased power agreement between TECO and Energy 5.0. By Order No. PSC-10-0138-PCO-EI, issue March 10, 2010, the Commission vacated Order No. PSC-10-0057-PAA-EI. At the time the Commission vacated its prior decision, the protest period had not expired, nor had the PAA Order been consummated. Subsequently, the matter was scheduled for a formal administrative hearing on June 30 and July 1, 2010.

DOCUMENT NUMBER-DATE

04240 MAY 19 09

FPSC-COMMISSION CLERK

Docket No. 090109-EI

Date: May 19, 2010

On May 7, 2010, TECO filed its Notice of Voluntary Dismissal with Prejudice of its March 9, 2009, Petition for approval of a solar energy power purchase agreement between Tampa Electric Company and Energy 5.0, LLC.

This recommendation addresses TECO's voluntary dismissal. 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 voluntary dismissal of its Petition for Approval of solar energy power purchase agreement between TECO and Energy 5.0, filed on March 9, 2009?

Recommendation: Yes, the Commission should acknowledge TECO's voluntary withdrawal of its petition for approval of solar energy power purchase agreement with Energy 5.0 as a matter of right. (Saylor)

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); 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). 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 an 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." (emphasis in original).

In this case, although this matter was set for a formal administrative hearing, the Commission has not reached a final decision on whether to approve the solar energy power purchase agreement between TECO and Energy 5.0. Thus, TECO can dismiss its petition as a matter of right. This is consistent with past Commission decisions.² Staff recommends 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-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-08-0822-FOF-WS, issued December 22, 2008, in Docket No. 080500-WS, *In Re: Application for transfer of majority organizational control of Indiantown Company Inc., holder of Certificate Nos. 387-W and 331-S in Martin County, from Postco, Inc. to First Point Realty Holdings, LLC*; 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

Docket No. 090109-EI

Date: May 19, 2010

Commission acknowledge TECO's voluntary dismissal with prejudice of its petition. That voluntary dismissal divests the Commission of further jurisdiction in this docket.

Issue 2: Should this docket be closed?

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

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

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).