

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-

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**DATE:** October 11, 2007

**TO:** Office of Commission Clerk (Cole)

**FROM:** Office of the General Counsel (Brubaker)  
Division of Economic Regulation (Brown, Graves)

**RE:** Docket No. 070467-EI – Petition to determine need for Polk Unit 6 electrical power plant, by Tampa Electric Company.

**AGENDA:** 10/23/07 – Regular Agenda – Notice of Withdrawal - Parties May Participate

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Skop

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\070467.RCM.DOC

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### Case Background

On July 20, 2007, Tampa Electric Company (TECO) filed a petition for a determination of need for a proposed electrical power plant in Polk County pursuant to Section 403.519, Florida Statutes (F.S.), and Rule 25-22.080, Florida Administrative Code (F.A.C.). The matter was scheduled for a formal administrative hearing on October 10-11, 2007.<sup>1</sup>

On October 4, 2007, TECO filed a Notice of Withdrawal of its petition. This recommendation addresses TECO's notice of withdrawal, and the ultimate disposition of Docket No. 070467-EI. The Commission has jurisdiction pursuant to Section 403.519, Florida Statutes.

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<sup>1</sup> Order No. PSC-07-0639-PCO-EI, issued August 6, 2007.

### **Discussion of Issues**

**Issue 1:** Should the Commission acknowledge Tampa Electric Company's voluntary withdrawal of its petition for need, and if so, what effect does the withdrawal have on Docket 070467-EI?

**Recommendation:** Yes, the Commission should acknowledge TECO's voluntary withdrawal of its petition for need determination as a matter of right. The effect of the voluntary withdrawal is to divest the Commission of further jurisdiction over this matter. (Brubaker)

**Staff Analysis:** It is a well established legal principle that the plaintiff's right to take a voluntary dismissal is absolute.<sup>2</sup> Once a voluntary dismissal is taken, the trial court loses all jurisdiction over the matter, and cannot reinstate the action for any reason.<sup>3</sup> Both of these legal principles have been recognized in administrative proceedings.<sup>4</sup> 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 hearing has not yet occurred, so the fact-finding process is not complete. Staff therefore recommends that the Commission acknowledge TECO's withdrawal of its petition as a matter of right, which is in accord with past Commission decisions.<sup>5</sup> The Commission should further find that the effect of TECO's voluntary withdrawal of its petition for determination of need is to divest the Commission of further jurisdiction over this matter.

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<sup>2</sup> Fears v. Lunsford, 314 So. 2d 578, 579 (Fla. 1975)

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

<sup>4</sup> 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).

<sup>5</sup> 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-07-0485-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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**Issue 2:** Should the docket be closed?

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

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