

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: August 2, 2007

TO: Office of Commission Clerk (Cole)

FROM: Division of Economic Regulation (Ballinger, Brown) *TJS SBB*
Office of the General Counsel (Brubaker) *SB S.M.C.*

RE: Docket No. 060635-EU – 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.

AGENDA: 08/14/07 – Regular Agenda –Notice of Withdrawal – Parties may participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: McMurrrian

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\060635.RCM.DOC

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Case Background

On September 19, 2006, Florida Municipal Power Agency (FMPA), JEA, Reedy Creek Improvement District (RCID), and City of Tallahassee (collectively Applicants) filed a petition for a need determination for the proposed Taylor Energy Center (TEC), a 765 megawatt supercritical pulverized coal plant, with a proposed in-service date of May 2012. The Applicants consist of three municipal electric utilities, JEA, RCID, and the City of Tallahassee, along with FMPA, a wholesale power company composed of 30 municipal electric utilities. All of TEC's 765 megawatt capacity would be fully subscribed by the Applicants, and will serve retail customers of the municipal utilities.

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The Sierra Club, Inc., John Hedrick, Brian Lupiani, Rebecca J. Armstrong and Anthony Viebesie (collectively, Sierra Club), the Natural Resources Defense Council, Inc. (NRDC), and John Carl Whitton, Jr. (Whitton) intervened.¹

A formal administrative hearing was held on January 10 through 12, and 18, 2007. The Commission deferred its consideration of staff's posthearing recommendation from the February 13 to the March 13, 2007, Agenda Conference. On March 9, 2007, the Applicants filed a motion for limited reopening of the record and for leave to file supplemental testimony, together with supplemental prefiled testimony, and a cover letter waiving any applicable deadlines for Commission action established by Rule 25-22.080, Florida Administrative Code. Upon request of the Applicants, the posthearing recommendation was deferred to permit an opportunity for the Commission to address the Applicants' motion.

By Order No. PSC-07-0483-PCO-EU, issued June 8, 2007, the Commission ordered that the record in this docket would be reopened for the limited purpose of taking evidence on the revised production cost modeling for the City of Tallahassee and its effect on the Applicants' petition for determination of need. The Commission further provided that additional procedures and controlling dates would be established by separate order of the Prehearing Officer, allowing discovery and hearing on the limited matters raised in the Applicants' motion and supplemental testimony and exhibits.

On July 12, 2007, however, the Applicants filed a Notice of Withdrawal of their petition of need. This recommendation addresses the Applicants' notice of withdrawal, and the ultimate disposition of Docket No. 060635-EU. The Commission has jurisdiction pursuant to Section 403.519, Florida Statutes.

¹ Intervention was granted by Order No. PSC-06-0867-PCO-EU, issued October 20, 2006 with respect to Rebecca J. Armstrong; by Order No. PSC-06-0898-PCO-EU, issued October 26, 2006, with respect to the Sierra Club, John Hedrick, and Brian Lupiani; by Order No. PSC-06-0954-PCO-EU, issued November 15, 2006, with respect to Anthony Viegbesie; by Order No. PSC-06-0957-PCO-EU, issued November 16, 2006, with respect to John Carl Whitton, Jr.; and by Order No. PSC-06-0971-PCO-EU, issued November 21, 2006, with respect to the NRDC.

Discussion of Issues

Issue 1: Should the Commission acknowledge the Applicants' voluntary withdrawal of their petition for need, and if so, what effect does the withdrawal have on Docket 060635-EU?

Recommendation: Yes, the Commission should acknowledge the Applicants' voluntary withdrawal of their 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.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 this case, while a formal hearing has occurred, the fact-finding process has not been completed, due to the limited reopening of the record pursuant to Order No. PSC-07-0483-PCO-EU. In this instance, the Applicants can dismiss their petition as a matter of right, which is in accord with past Commission decisions.⁵ Therefore, staff recommends that the Commission find that the effect of the Applicants' voluntary withdrawal of their petition for determination of need is to divest the Commission of further jurisdiction over this matter.

² Fears v. Lunsford, 314 So. 2d 578, 579 (Fla. 1975)

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-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.