

MESSER CAPARELLO & SELF, P.A.

Attorneys At Law
www.lawfla.com

September 30, 2009

RECEIVED-FPSC
09 SEP 30 PM 3:01
COMMISSION
CLERK

BY HAND DELIVERY

Ms. Ann Cole, Commission Clerk
Office of Commission Clerk
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 090172-EI

Dear Ms. Cole:

Enclosed for filing on behalf of Florida Gas Transmission Company, LLC is an original and 7 copies of Florida Gas Transmission Company, LLC's Motion to Terminate Case or, in the Alternative, Motion to Transfer in the above referenced docket.

Please indicate receipt of this document by stamping the enclosed extra copy of this document and the letter.

Thank you for your assistance with this filing.

Sincerely yours,

[Handwritten signature of Floyd R. Self]

Floyd R. Self

FRS/amb
Enclosure

cc: Mr. Michael T. Langston
Parties of Record

[Handwritten notes and stamps on the left margin]

DOCUMENT NUMBER-DATE

10080 SEP 30 09

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to determine need for Florida)
EnergySecure Pipeline by Florida Power &)
Light Company.)
_____)

Docket No. 090172-EI
Dated: September 30, 2009

**FLORIDA GAS TRANSMISSION COMPANY, LLC'S
MOTION TO TERMINATE CASE OR, IN THE ALTERNATIVE,
MOTION TO TRANSFER**

Florida Gas Transmission Company, LLC ("FGT"), by and through undersigned counsel and pursuant to Rules 28-106.204 and 28-106.211, Florida Administrative Code, files this Motion with the Florida Public Service Commission ("Commission" or "PSC") to immediately terminate this proceeding because of the appearance of impropriety and identified prejudice of some Commission staff members. On September 25, 2009, FGT, a party to this proceeding, became aware only through media reports that the PSC's Inspector General, during the pendency of the PSC Staff's deliberations on its recommendations in the present action, had conducted an undisclosed internal investigation into allegations of staff intolerance, intimidation, and potential bias in favor of Florida Power & Light Company ("FPL") during the development of the staff's recommendations. FGT and the public had no prior notice or knowledge of the investigation, the issues considered, or the parameters of the investigation. On September 16, 2009, the Commission's Inspector General reported the results of the investigation to the PSC Chairman. Although the Inspector General report makes the conclusory statement that "we found no basis to question the motivation of SGA staff or to support allegations of bias", even in the absence of actual bias, FGT and the rate paying public have been denied due process and fundamental procedural fairness as a result of the staff impropriety and prejudice, and

this proceeding should immediately be terminated without prejudice. This relief is especially appropriate in light of other recent allegations involving FPL, which resulted in the resignation of the Director of the Commission's Office of Strategic Analysis and Governmental Affairs ("SGA") following an investigation of his attendance at a social function hosted by an FPL executive that was referenced in the Inspector General report. In the alternative, FGT moves to transfer this proceeding to the Division of Administrative Hearings ("DOAH") for the assignment of an Administrative Law Judge to conduct a *de novo* review of the existing record, and to prepare and submit a recommended order to the Commission for the issuance of a final order. In support of this motion and alternative motion, FGT states:

1. This proceeding was initiated by petition of FPL filed on April 7, 2009, for a determination of need for a \$1.53 billion intrastate natural gas transmission pipeline pursuant to Sections 403.9401 to 403.9425 Florida Statutes ("Pipeline Siting Act").

2. On April 23, 2009, FGT petitioned for intervention in this matter, and such intervention was granted on May 7, 2009. Order No. PSC-09-0308. FGT is a full party of record and is the only intervening party in this docket, and thus should receive notice of matters impacting the docket which would include this type of internal investigation.

3. Pursuant to Section 403.9422 of the Florida Pipeline Siting Act, the Commission has conducted proceedings in this docket to review and ultimately determine whether the requested determination of need for the new pipeline should be granted or denied. After the submission of testimony and the exchange of extensive discovery, on July 27 and 28, 2009, the Commission conducted its evidentiary hearing and established the evidentiary record. On August 10, 2009, the

parties submitted their post-hearing statements on the issues and positions setting forth each party's analysis of the law and facts. By letter dated August 28, 2009, counsel for FPL advised the Commission that it had agreed to an extension of time through October 6, 2009, for the Commission to reach a final decision in this matter. Pursuant to a revised case schedule, the Commission staff filed its recommendations regarding each of the issues on September 24, 2009. This matter is scheduled for a decision by the Commission at the October 6, 2009, Agenda Conference. Pursuant to the Commission's procedures, only the Commissioners and staff are permitted to participate in the Agenda Conference consideration of the Staff Recommendation. Parties are not permitted to participate.

4. The day after the filing of the staff's September 24, 2009, recommendations, FGT learned through news reports that the PSC's Inspector General had conducted an undisclosed, internal investigation "to examine the actions of the staff in development of recommendations" in this docket. The investigation focused specifically on members of the SGA office, which was led by Ryder Rudd until he resigned recently due to controversy surrounding his attendance at an FPL social function. According to the investigation report, SGA staff members were accused of trying to "censor" views that were not supportive of FPL's position. FGT has subsequently obtained a copy of the Inspector General's report that was the basis of the news reports. *See* September 16, 2009, Memorandum, To Matthew M. Carter, III, Chairman, From Steven J. Stolting, Inspector General, attached hereto as "Exhibit A" (hereinafter, "IG Report").

5. The IG Report examined allegations that some SGA staff members "attempted to exert undue influence" on the staff recommendations made to the Commission. As staff members

were working on the written recommendation to the Commission in late July, they raised concerns that SGA staff members were attempting to “intimidate other staff members to adopt their position.” IG Report, at 1. It was alleged that SGA staff members were biased in favor of positions advanced by FPL, and were trying to censor differing views, using a “forceful tone” in their argument that was “unprecedented.” IG Report, at 2. It was these concerns that triggered the investigation. The IG Report did not disclose when the investigation began, who requested it, who was interviewed, what statements were made, etc., but that its purpose was to “determine whether there is evidence of possible misconduct on the part of any staff and whether further action or investigation is warranted.” IG Report, at 1.

6. In the give and take process that leads to the drafting of a recommendation to the Commission, individual staff members should, and indeed have the duty, to offer their best analysis and advice so that the Commissioners can ultimately reach a decision that is fair, just, and reasonable – and in compliance with applicable law. However, the IG Report reveals unprecedented hostility, censorship, and concealment of legal concerns on the part of some staff members resulting in the appearance of bias and impropriety, and thus having a chilling effect on their advisory duties. Regardless of actual bias, as reported by the Inspector General, SGA staff members were aggressive and confrontational to an unprecedented degree. This alone raises significant concern about staff members not being able to meaningfully perform their advisory duty. The IG Report describes highly inappropriate conduct by certain staff members that clearly had the effect of intimidating and stifling a free and impartial flow of information and discussion. The effect of this conduct has denied FGT and the rate-paying public due process and fundamental procedural fairness by undermining the

impartiality of the advisory staff process. As a result, any decision by the Commission based upon the September 24, 2009, Staff Recommendation would be flawed.

7. The IG Report highlights other problems with the process as well. For example, the Inspector General found that comments and concerns raised by the Commission's Office of General Counsel ("OGC") were stripped from the recommendation by SGA staff. IG Report, at 2. The Inspector General did not address this serious issue of removing and ignoring legal concerns from the recommendation to the Commission. Instead, the report merely accepted the explanation of the SGA staff that OGC concerns were removed "because they were too far apart from the [SGA] positions in the draft to incorporate," and that the SGA "said there needed to be a management determination of what positions or alternatives would be included in the final recommendation, and the form in which they would be reflected." IG Report, at 2. To cavalierly remove legal advice on the basis of an alleged "management decision" deprives the Commissioners of the ability to ensure that their final action is in compliance with applicable law. Removing the OGC's legal concerns from the final recommendation affected the substantial interests of the parties and is yet another reason why this process has denied fundamental procedural fairness to the parties and the ratepayers.

8. The fact that that the Inspector General's investigation was ongoing while the staff was considering and deliberating its recommendation to the Commission also raises the possibility that the investigation itself may have affected staff's conduct in developing its recommendation. Obviously, there was sufficient concern with the process that one or more Commission staff members felt compelled to file a complaint. The investigation then commenced while discussions of the merits of the various positions were still ongoing. It is without question that people under

scrutiny act differently than they otherwise would – they might feel inhibited to offer valid opinions and justifications, or they might resort to “off the record” conversations and lobbying to attempt to avoid the scrutiny. This only compounds the ability of the staff to offer their full, fair, and best advice to the Commissioners.

9. FGT has serious concerns regarding an internal investigation of the very staff members tasked with litigating, evaluating, and ultimately advising the Commissioners on the issues in a docketed matter. As parties to a docketed matter, any investigation by the Commission involving the conduct of the docket by the Commission should have been noticed to the parties and public with the opportunity for input and involvement by FGT and FPL as necessary and appropriate since any investigation affects the substantial interests of both FGT and FPL. If there was a justifiable reason for not initially disclosing the investigation, once the IG Report was concluded, due process and procedural fairness require that the Inspector General file the report with the Commission Clerk in this docket and provide a copy to all parties of record. Given the nature of this proceeding and the potential multibillion dollar consequences for customers, had this occurred at least the parties and public would be privy to the results of the investigation. Having a party learn of a case-specific investigation and Inspector General report from the press more than a week after its conclusion further raises concerns about the actions of the staff and the procedural justice of this process.

10. The summary nature of the IG Report provides limited information or support for any conclusion regarding undue bias or improper motivation by the SGA staff. While the IG Report found no basis to question the motivation of SGA staff or to support allegations of bias, the IG Report did not disclose when the investigation began, how many people were interviewed, whether

every staff person who participated in the case was interviewed as well as their supervisory personnel, the circumstances surrounding each interview, or whether the investigation involved anything other than interviewing certain individuals, such as review of possible communications with outside parties. FGT does not question the integrity of the Inspector General, only that reading the IG Report raises more questions than it answers regarding possible bias or other misconduct. The holding of a public inquiry regarding the allegations would have provided an opportunity to fully address such concerns.

11. The matters described in the IG Report describe a situation that goes far beyond simple disagreements about the evidence and law, or what specific recommendations should be made on each issue. The IG Report discloses that some staff members immediately accepted the FPL position on the need and rate base treatment for the multibillion dollar cost of the pipeline. Further, those staff members advocating the FPL position never wavered or changed in their aggressiveness as the case developed, despite the fact that the case involved an issue of first impression for the Commission and that it was “complex and evolving throughout the process.” The prospect of staff members prejudging a matter or not being open to the development of issues and evidence as a case progresses calls into question the integrity of the entire staff advisory process.

12. The Florida Supreme Court has recognized that the staff advisory process is crucial to the impartial adjudication of proceedings by the Commission. Due to its critical role in the administrative process as the Commission performs quasi-judicial responsibilities, the Court has required that in certain instances the advisory staff be separated from the litigation staff in order to afford parties their due process right to an impartial decision maker. *Cherry Communications v.*

Deason, 652 So. 2d 803, 804 (Fla. 1995) (revised opinion). While the present case does not involve the revocation of a certificate as in *Cherry*, nevertheless the determination of need for a multibillion dollar pipeline, the costs of which FPL proposes to have its customers pay through base rates, carries the same procedural fairness considerations as an enforcement case. The brief facts disclosed in the IG Report suggest that staff has not provided fair and impartial advice to the Commission. As a result, the deliberative process is inherently flawed.

13. Given all of the present facts and circumstances, any decision derived from the current process will be fundamentally flawed and forever suspect. The Pipeline Siting Act mandates that the Commission render a decision by October 6, 2009. Accordingly, the only appropriate action to cure the problems identified to date, as well as to ensure due process and avoid any appearance of impropriety, is to dismiss FPL's petition without prejudice to refile a new petition. A new petition could be considered by the Commission pursuant to an untainted staff support process.

14. Alternatively, if FPL would agree to an extension of time, FGT would move that the Commission transfer the record in this matter to the Division of Administrative Hearings with the request for the assignment of an Administrative Law Judge. *See Fla. Stat. § 120.65(7)* (providing that DOAH is authorized to provide Administrative Law Judges on a contract basis to any government entity to conduct any hearing not covered under Section 120.65). The Administrative Law Judge could review the record and conduct such further proceedings as justice would require, and prepare and submit to the Commission a proposed recommended order under Section 120.569, Florida Statutes. Free from any potentially tainted Commission staff involvement, the Commissioners could then adopt, modify, or reject the recommended order, consistent with the

requirements of Section 120.569, and issue a final order. To the extent this case moves forward, it is only by transferring this matter to DOAH that the Commission can remove the stain of perceived impropriety, and be guaranteed to receive the independent evaluation, analysis, and recommendation regarding the issues and evidence that the Commissioners and parties are entitled to as a matter of due process and procedural fairness and openness.

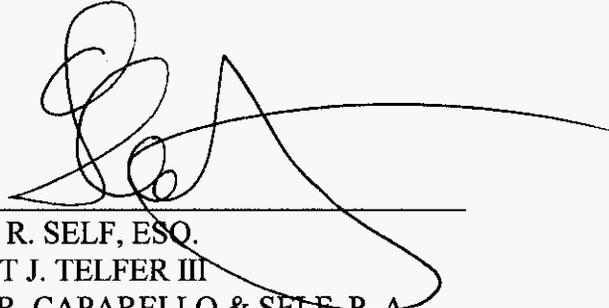
15. The substance of this Motion is extraordinary and presented to the Commission with great reluctance. We can find no other case where such circumstances have ever existed. The development of staff recommendations certainly can and should reflect the “give and take” that is inherent in investigating and resolving new, complex, or difficult issues. However, the unique circumstances presented by the IG Report present a picture of potential staff bias, intolerance, and intimidation that cannot be ignored, even if it is determined that there is no actual bias. While FGT believes that such staff conduct is likely limited to a small number of individuals, the integrity of the process is now at issue at a time when the Commissioners have spoken of the need for greater transparency and public confidence in the Commission’s deliberative process. A decision based upon the current process shall forever be suspect. Since these allegations and the investigatory process have not involved the Commissioners, the Commissioners are in the best position to take the direct and immediate action that is necessary to return confidence to the staff advisory process and the Commission’s ultimate decision. Only through a new proceeding, or an assignment of this matter to an independent DOAH Administrative Law Judge, can the public have confidence that a fair and legal result will be achieved.

16. Undersigned counsel has advised counsel for FPL of this motion and FPL objects and

reserves its right to respond.

WHEREFORE, FGT respectfully requests that that the Florida Public Service Commission issue an order terminating these proceedings without prejudice or, in the alternative, that this matter be transferred to the Division of Administrative Hearings for the assignment of an Administrative Law Judge to review the record and conduct such further proceedings as justice would require, and then prepare and submit to the Commission a proposed recommended order under Section 120.569, Florida Statutes, that would be adopted or modified by the Commission consistent with the requirements of Section 120.569, Florida Statutes.

Respectfully submitted, this 30th day of September 2009.

A handwritten signature in black ink, appearing to be 'R. Telfer III', written over a horizontal line. The signature is stylized and extends to the right of the line.

FLOYD R. SELF, ESQ.
ROBERT J. TELFER III
MESSER, CAPARELLO & SELF, P. A.
2618 Centennial Place
Tallahassee, FL 32308
(850) 222-0720

Attorneys for Florida Gas Transmission Company, LLC

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: September 16, 2009
TO: Matthew M. Carter II, Chairman
FROM:  Steven J. Stolting, Inspector General
RE: Review of conflicts among staff on FPL Pipeline Docket #090172 (OIG #09/10-20)

The purpose of this review is to examine the actions of staff in development of recommendations in the above docket. It has been alleged that some staff in the Office of Strategic Analysis and Governmental Affairs (SGA) attempted to exert undue influence on the recommendations and to intimidate other staff to adopt their position. It was alleged that the positions advanced were consistent with those preferred by Florida Power and Light (FPL), and that staff were biased in favor of those positions for unknown reasons. This review is intended to determine whether there is evidence of possible misconduct on the part of any staff and whether further action or investigation is warranted.

To assess this situation, we conducted interviews with staff involved in the docket and reviewed relevant documentation in the docket file and Commission policies governing docket assignment and duties. Commission policy provides that for each docket an Office of Primary Responsibility (OPR) and, when appropriate, Office(s) Collateral Responsibility (OCR) are to be designated. Selection of the OPR office generally depends on the subject matter of the docket. The OPR "leads staff action on each assigned matter, item, task, or case from assignment or receipt to final disposition....The OCR(s) participates in staff actions, under the leadership of the OPR, to the full extent of the knowledge, expertise, and capability which resides in the OCR(s) division/office" [APM Section 2.02(C)].

The docket in question was opened on April 7, 2009. SGA was designated as the OPR. OCRs were the Division of Economic Regulation (ECR) and the Division of Service, Safety, and Consumer Assistance (SSC). As is typical, staff from the Office of General Counsel (OGC) were also assigned to the docket. Each of the assigned entities designated staff to work on this docket.

Staff interviewed agreed that this docket represented a new type of issue because it involved a utility proposing to construct and operate a gas pipeline. They also stated that the issues in this docket were complex and evolving throughout the process. They said it became evident in initial meetings that staff differed significantly in their views. Stated very generally, SGA staff took the position that costs of pipeline construction should be incorporated in FPL electric rates, which was more consistent with FPL's position. According to staff, this is analogous to how costs of constructing an electric transmission line would be recovered. Other staff generally took

EXHIBIT "A"

the position that the pipeline should be within a separate affiliate that would not include costs in the FPL electric rate base.

A number of meetings were held among staff during development of the recommendation. Staff said some of these, reportedly held in about late July and involving Commission staff and management, became very contentious and heated. Staff interviewed agreed that it is not unusual in this process for staff to take adversary positions and to argue forcefully that their view should be incorporated in the proposed recommendation to the Commission. Some staff interviewed said their prior experience with one SGA manager participating in the meetings was that he would often take an adversary or argumentative approach in these types of discussions.

Some staff said that the discussions among staff in this case were unnecessarily hostile. One said, while conceding that arguments among staff are common, in this case SGA staff seemed to be trying to "censor" views that differed from theirs, and that the forceful tone of their argument was unprecedented. However, all staff said that, despite their disagreements in this docket, they did not have any indication that SGA staff were acting out of bias or improper motivation or took positions that were untenable.

SGA staff agreed that they had taken strong positions on the recommendation issues and had at times been confrontational. They denied any improper motivation, and said that adversary discussions can be an effective means of testing arguments and developing the best recommendation. They also said they were cognizant of deadlines to advance the process and produce a work product, and needed to finalize the positions that would be included.

Staff were also asked about the role of the former Director of SGA, who resigned effective September 8, 2009, after an investigation of his attendance at a social function hosted by an FPL executive (see OIG #09/10-15). Prior to that, he was removed from participation in all dockets concerning FPL effective August 25, 2009. SGA staff said the former Director was at no time heavily involved in the docket or in formulation of the SGA proposed position, nor did he attempt to pressure or influence his staff. No staff interviewed from other offices said that they perceived him as inappropriately advocating positions or pressuring staff.

According to staff, in an effort to make progress in drafting the recommendation, at one point SGA staff volunteered to draft the executive summary. SGA staff said initially they offered to let other staff draft versions of the executive summary that would reflect their views, but only SGA ultimately did so. That draft generally reflected their position on the issues. Staff said that subsequently OGC staff added language reflecting their concerns, which was largely removed by SGA staff in a later revision. This was viewed by some as SGA staff suppressing alternative views, while SGA staff said the additions were notes that were removed because they were too far apart from the positions in the draft to incorporate. They said there needed to be a management determination of what positions or alternatives would be included in the final recommendation, and the form in which they would be reflected.

Another issue involved the practice in many dockets of including alternative recommendations to offer differing arguments to the Commission for consideration. In other cases, options are

offered within the text of the recommendation. Generally, options are viewed as having less viability than presentation of an alternative. Some staff said they were unclear as to whether they would be able to include their viewpoints and in what form. Other staff and managers said that typically the process of negotiation and development of positions demonstrates whether alternatives or options should be included. At the time of our interviews, the draft included alternative recommendations, and all staff interviewed indicated that they were generally satisfied with the status of the draft recommendation at that point although sharp differences of opinion remained.

Conclusions: It is clear that the development of the recommendation in this docket was contentious and difficult, as is often the case among staff holding differing or conflicting viewpoints. However, we found no basis to question the motivation of SGA staff or to support allegations of bias. Based on this conclusion, no recommendation is offered.

cc: Commissioner Lisa Polak Edgar
Commissioner Katrina J. McMurrian
Commissioner Nancy Argenziano
Commissioner Nathan A. Skop
Mary A. Bane
Charles Hill
Booter Imhof

CERTIFICATE OF SERVICE

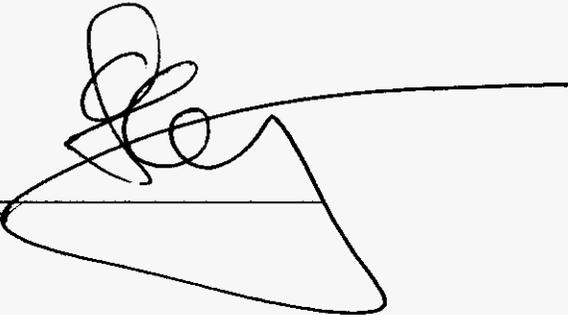
I HEREBY CERTIFY that true and correct copies of the foregoing have been served by Electronic Mail and/or U. S. Mail this 30th day of September, 2009 upon the following:

Martha Brown, Esq.
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

John T. Butler, Esq.
Mr. R. Wade Litchfield
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408-0420

Gary V. Perko, Esq.
Brooke E. Lewis, Esq.
Hopping Green & Sams
P.O. Box 6526
Tallahassee, FL 32314

Floyd R. Self

A handwritten signature in black ink, appearing to read 'Floyd R. Self', is written over a horizontal line. The signature is stylized and extends to the right of the line.