

State of Florida



Public Service Commission

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DATE: October 5, 2009

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Brown) *MCB JB*
 Division of Economic Regulation (Bulecza-Banks) *JB*
 Office of Strategic Analysis and Governmental Affairs (Ballinger) *TV ALT*

RE: Docket No. 090172-EI – Petition to determine need for Florida EnergySecure Pipeline by Florida Power & Light Company.

AGENDA: 10/06/09 – Regular Agenda – Decision on Motion to Terminate – Oral Argument not requested

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Edgar

CRITICAL DATES: Deadlines pursuant to Section 403.9422, Florida Statutes, have been waived by Florida Power & Light Company until October 6, 2009.

SPECIAL INSTRUCTIONS: This item needs to be addressed before Item 7.

FILE NAME AND LOCATION: S:\PSC\SGA\WP\090172.RCM.DOC

Case Background

On April 7, 2009, Florida Power & Light Company (FPL) petitioned the Commission to determine the need for its proposed Florida EnergySecure Pipeline, a 280-mile long, 30-inch diameter pipeline to transport natural gas within Florida, commencing in Bradford County and extending southeast to its terminus at FPL's Martin Plant site. The supply of natural gas to the Florida EnergySecure Pipeline will be provided from an interconnection with an interstate natural gas pipeline to be constructed by a third party, known as "Company E" for confidentiality purposes. By 2014, the pipeline's initial transportation capacity will be 600 million cubic feet

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per day (MMcf/d). FPL projects that the pipeline's ultimate capacity could be expanded to 1.25 billion cubic feet per day (Bcf/d) by 2030 in order to meet the utility's future natural gas requirements. FPL proposes to include the approximate \$1.5 billion cost of the project in its electric rate base as electric plant, and it states that it anticipates filing a petition for a base rate increase in 2014, when the pipeline is placed in service.

On April 23, 2009, Florida Gas Transmission, LLC (FGT) filed a petition to intervene in the proceeding, which was granted by Order No. PSC-09-0308-PCO-EI, issued May 7, 2009. The Commission held a hearing to address FPL's petition on July 27-28, 2009. Staff has filed its post-hearing recommendation in the case, which is scheduled to be addressed by the Commission at its October 6, 2009, Agenda Conference.

On September 30, 2009, FGT filed a Motion to Terminate Case or, in the Alternative, Motion to Transfer, pursuant to Rules 28-106.204 and 28-106.211, Florida Administrative Code (F.A.C.). In its motion, FGT claims that because of the appearance of impropriety and identified prejudice of some Commission staff members, the Commission should not consider the recommendation that the staff filed. FGT asked that the Commission terminate the case without prejudice to FPL to refile the case, or send the evidentiary record to the Division of Administrative Hearings (DOAH) to review the record de novo and render a Recommended Order on FPL's original petition. FPL filed its response in opposition to FGT's motion on October 1, 2009, stating that the motion was without merit, its allegations of staff bias being based on a preliminary Commission Inspector General's report that specifically found no staff bias in the processing of the staff recommendation.

Neither party filed a request for oral argument on the motion pursuant to Rule 25-22.022(1), F.A.C., which provides that:

Oral argument must be sought by separate written request filed concurrently with the motion on which argument is requested Failure to timely file a request for oral argument shall constitute waiver thereof. Failure to timely file a response to the request for oral argument waives the opportunity to object to oral argument. The request for oral argument shall state with particularity why the oral argument would aid the Commissioners, the Prehearing Office, or the Commissioner appointed by the Chair to conduct a hearing in understanding and evaluating the issues to be decided, and the amount of time requested for oral argument.

The Commission is vested with jurisdiction over this matter by the provisions of Chapter 120, F.S., Chapter 366, F.S., Chapter 368, F.S., and Section 403.9422, F.S.

Discussion of Issues

Issue 1: Should the Commission deny FGT's Motion to Terminate Case or, in the Alternative, Motion to Transfer?

Recommendation: Yes. FGT has not demonstrated any good cause or substantive material grounds to terminate or transfer the case. The Commission should consider and decide on staff's post-hearing recommendation in this matter. (Brown, Ballinger)

Staff Analysis:

FGT's Motion:

FGT's motion to terminate this proceeding relies on a preliminary internal investigation that the Commission's Inspector General conducted to determine whether alleged improper staff conduct influenced the processing and development of the staff recommendation in this docket. The investigation arose out of the removal of the SGA's Division Director from any involvement in cases under his supervision that concerned FPL which were pending before the Commission, while the Inspector General investigated his attendance at a party held by an FPL employee in May of this year. In his report that is the subject of this motion, the Inspector General found no evidence of bias or improper conduct on the part of any staff to the docket or the former SGA Division Director, and concluded that no further action was warranted.¹

FGT asserts, however, that the fact that a question was even raised, the description of some of the contentious discussions staff conducted in developing its recommendation, and the treatment of certain preliminary summaries drafted in the recommendation demonstrated the appearance of bias and improper conduct. FGT argues that the entire proceeding should be "terminated" because any decision the Commission makes on the issues in this case will be "fundamentally flawed and forever suspect" if the Commission considers the staff recommendation. FGT states that "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." FGT Motion, p. 9.

FGT also argues that its due process rights were violated because it was not informed of the preliminary investigation or of its results, and only became aware of the investigation and its results when it read about them in the newspaper. According to FGT, the public and all parties to a docketed matter before the Commission should be informed of any investigation involving the conduct of the docket and provided the opportunity for input and involvement, since any investigation would affect the substantial interests of the parties. "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." FGT Motion, p. 9.

¹ The report was forwarded to the Commission Chairman's office on September 16, 2009, and posted on the Commission's website shortly thereafter.

On these grounds, FGT argues that:

[T]he 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.

FGT Motion, p. 8.

In the alternative, FGT suggests that if FPL agreed to waive the statutory deadline for a decision on the need determination, the Commission could forward the evidentiary record of the proceeding to the Division of Administrative Hearings (DOAH) for a recommended order on the issues in the case after a de novo review of the record. FGT cites Section 120.65(7), F.S., as authority for this unique suggestion, and states that that statute authorizes DOAH to provide Administrative Law Judges on a contract basis to any governmental agency to conduct any hearing not otherwise covered under Section 120.65, F.S.

FPL's Response

In its Response in Opposition to FGT's Motion, FPL states that FGT's motion should be summarily denied. According to FPL the motion is without merit primarily because all of its allegations of staff bias and undue influence rely on the Inspector General's report that found no basis to support any allegations of bias or undue influence.

The report did not find one single instance of impropriety or any evidence of undue influence or bias. For FGT to rely on a report that finds no evidence of undue influence or bias, as its sole basis for a Motion predicated upon undue influence and bias, is baffling at best.

FPL Response, p. 2.

FPL points out that the Inspector General recognized that the staff process of developing a recommendation in a case can be contentious, as it was in this case, depending on the complexity and difficulty of the issues to be addressed. FPL states that the Inspector General ultimately found that regardless of sharp differences along the way, the staff was generally satisfied with the status of the recommendation. FPL notes that the Commission is not bound by the staff's recommendation and can exercise its own independent judgment on the issues in the case, where supported by the evidentiary record:

Moreover, Staff provided the Commission with both primary and alternate recommendations that expressed drastically differing opinions on the key issues for decision. For FGT to claim that its views and position are not fairly addressed or presented in the Staff recommendation or that the Commission would feel constrained somehow by the recommendation is preposterous and insulting to the Commissioners, and FGT provides no evidence to support its implausible claim.

FPL Response, p. 3.

Analysis and Conclusion

On a preliminary matter, staff would note that FGT has styled its motion a Motion to “Terminate,” which is in fact just another name for a Motion to Dismiss. FGT implicitly acknowledges this on page 8 of its motion, where it argues that the only way to cure the alleged flaws in the case is to “dismiss FPL’s petition without prejudice to refile a new petition.” Rule 28-106.204(2), F.A.C., states that: “[u]nless otherwise provided by law, motions to dismiss the petition or request for hearing shall be filed no later than 20 days after service.”

The Commission recently considered the effect of this rule in Commission proceedings in Order No. PSC-09-0602-PCO-EI, where it denied the City of South Daytona’s motion to dismiss FPL’s petition for a rate increase because the motion was not filed within the time frame prescribed.² The Commission stated that the City of South Daytona had not made any request or good cause showing why its motion should be allowed out of time. Here, there is good cause to consider FGT’s motion, since the reasons for the motion did not surface until after the hearing was concluded, although ultimately, as explained below, staff recommends that the motion should be denied.

FGT presents two substantive grounds for its motion, neither of which staff believes is compelling. First, FGT bases its claims of staff misconduct completely on the preliminary Inspector General’s Report that in fact found no factual basis for that conclusion. In all matters before it, the Commission must base its decisions and take actions based on facts, not on suppositions and conclusory impressions that run exactly counter to the facts that exist. Such actions would be arbitrary and capricious and certainly subject to challenge.

Second, FGT claims that its due process rights were violated because it was not party to a preliminary internal investigation by the Inspector General that determined that no improper conduct occurred, and no further action was necessary. The Commission’s Inspector General has considerable independence and discretion to conduct investigations as he sees fit, subject to the provisions of Section 20.055, F.S., and FGT has cited no legal precedent or statutory provision requiring party notification of, or participation in, preliminary investigations. Contrary to FGT’s assertion, its substantial interests were not adversely affected in this matter, because no substantive harm was done, and certainly FGT’s interests could not be adversely affected by the sole fact that the Inspector General conducted the informal investigation. As it has in the past, if the Inspector General’s report had in fact identified some instance of staff misconduct, the Commission would inform the parties affected by that misconduct, and the appropriate remedial action would be taken.³

² Issued September 4, 2009, in Docket No. 080677-EI, In re: Petition for increase in rates by Florida Power & Light Company, and Docket No. 090130-EI, In re: 2009 depreciation and dismantlement study by Florida Power & Light Company.

³ In Docket No. 001305-TP, In re: Petition by Bellsouth Telecommunications, Inc. for arbitration of certain issues in interconnection agreement with Supra Telecommunications and Information Systems, Inc., for example, the Inspector General’s preliminary investigation revealed that a staff member assigned to a post-hearing recommendation had emailed cross-examination questions to one party to the case before the hearing. The Inspector General determined that this was improper. The staff member was removed from the case, all parties were informed, and the staff recommendation was withdrawn and replaced with a revised recommendation. The Commission took similar remedial action in Docket No. 041269-TP, In re: Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in Law, by BellSouth Telecommunications, Inc.

With respect to FGT's suggestion that the Commission could transfer the record of its hearing in this case to a DOAH Administrative Law Judge (ALJ) to review and then issue a recommended order, staff recommends that such a transfer would be procedurally inappropriate and probably outside the scope of the ALJ's authority. Section 120.65(4), F.S., provides that DOAH shall employ ALJs to conduct hearings required by Chapter 120 or other laws. Section 120.65(7), F.S. provides that: "[t]he division is authorized to provide administrative law judges on a contract basis to any governmental entity to conduct any hearing not covered by this section." Under these statutes, ALJs are authorized to conduct administrative hearings. They are not authorized to review administrative hearing records from other administrative agencies and make recommendations upon them. Staff believes that it is highly unlikely that DOAH would agree to such an arrangement. Furthermore, Section 403.9422(1)(a), F.S., provides that the Commission shall schedule and hold a hearing to determine the need for a natural gas transmission pipeline, and it also requires the Commission to hold that hearing within 75 days after the filing of the need determination request. Section 403.9422(c), F.S., provides that the Commission shall be the sole forum for the determination of need.

The staff post-hearing recommendation filed in this docket is comprehensive. It provides primary and alternate recommendations on the most controversial issues in the case, and it provides a wide variety of options for the Commission's consideration. It is perhaps the best evidence of the full and fair review that the staff conducted in the case, whether contentious along the way or not. For these reasons, staff recommends that FGT's Motion to Terminate or, in the Alternative, Motion to Transfer, should be denied.

Docket No. 090172-EI

Date: October 5, 2009

Issue 2: Should this docket be closed?

Recommendation: No. This docket should remain open. (Brown, Ballinger)

Staff Analysis: This docket should remain open to decide upon the substantive issues in this need determination.