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 ORDER NO. PSC-09-0719-PCO-EI ISSUED: October 29, 2009

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
NANCY ARGENZIANO
NATHAN A. SKOP

ORDER DENYING MOTION TO TERMINATE OR TRANSFER PROCEEDING

BY THE COMMISSION:

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 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. We held an administrative hearing to address FPL's petition on July 27-28, 2009.

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 claimed that because of the appearance of impropriety and prejudice of some Commission staff members, we should not consider our staff's post hearing recommendation on the substantive issues in the case. FGT asked us to 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 our Inspector General's report that specifically found no staff bias in the processing of the staff recommendation.

At our October 6, 2007, Agenda Conference, we denied FGT's motion, and proceeded to consider our staff's recommendation on FPL's need determination petition, where we decided to deny FPL's petition. We have jurisdiction over this matter by the provisions of Chapter 120, Chapter 366, Chapter 368, and Section 403.9422, Florida Statutes (F.S.).

DECISION

FGT's Motion

FGT's motion to terminate this proceeding relied on a preliminary internal investigation that our 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 us 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 FGT's 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 argued, 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 stated 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 argued 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 us 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. On these grounds, FGT argued 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.

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

In the alternative, FGT suggested that if FPL agreed to waive the statutory deadline for a decision on the need determination, we 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 cited Section 120.65(7), F.S., as authority for this unique suggestion, and stated that the 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 stated 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, which found no basis to support any allegations of bias or undue influence.

FPL pointed 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 stated 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 noted that we are not bound by our staff's recommendation and can exercise our own independent judgment on the issues in the case, where supported by the evidentiary record:

Analysis and Conclusion

FGT styled its motion a Motion to "Terminate," which is in fact just another name for a Motion to Dismiss. FGT implicitly acknowledged this on page 8 of its motion, where it argued 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."

We recently considered the effect of this rule on our proceedings in Order No. PSC-09-0602-PCO-EI, where we 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] We 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, we deny the motion.

FGT presented two substantive grounds for its motion, neither of which is compelling. First, FGT based its claim of staff misconduct completely on the preliminary Inspector General's Report

[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.

that in fact found no factual basis for that conclusion. In all matters before us, we must base our decisions and take actions based on facts, not on suppositions and conclusory impressions that run counter to the facts that exist. Such actions would be arbitrary and capricious and certainly subject to challenge.

Second, FGT claimed that its due process rights were violated because it was not party to an internal investigation by the Inspector General that determined that no improper conduct occurred, and no further action was necessary. Our 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, internal Inspector General 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 internal investigation. As we have done in the past, if the Inspector General's report had identified some instance of staff misconduct, we would inform the parties affected by that misconduct, and we would take the appropriate remedial action.[3]

With respect to FGT's suggestion that we could transfer the record of our hearing in this case to a DOAH Administrative Law Judge (ALJ) to review and then issue a recommended order, we believe 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. It is unlikely that DOAH would agree to such an arrangement. Furthermore, Section 403.9422(1)(a), F.S., provides that we shall schedule and hold a hearing to determine the need for a natural gas transmission pipeline, and it also requires us to hold that hearing within 75 days after the filing of the need determination request. Section 403.9422(c), F.S., provides that we shall be the sole forum for the determination of need.

Our staff's post-hearing recommendation filed in this docket was comprehensive. It provided primary and alternate recommendations on the most controversial issues in the case, and it provided a wide variety of options for our consideration. It is the best evidence of the full and fair review that the staff conducted in the case, whether contentious along the way or not.

Based on the foregoing, it is

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[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. We 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.

ORDERED by the Florida Public Service Commission that Florida Gas Transmission, LLC's Motion to Terminate or, in the Alternative, Motion to Transfer, is denied. It is further

ORDERED that this docket shall be closed upon issuance of the Final Order in the case.

By ORDER of the Florida Public Service Commission this 29th day of October, 2009.

ANN COLE
Commission Clerk

By: _____
Dorothy E. Menasco
Chief Deputy Commission Clerk

(S E A L)

MCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.