

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 060151-EI

In the Matter of:

PETITION FOR APPROVAL OF REVISIONS TO  
ACCESS TO PREMISES SECTION OF TARIFF  
SHEET NO. 6.020, BY FLORIDA POWER &  
LIGHT COMPANY.



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PROCEEDINGS:                   AGENDA CONFERENCE  
                                  ITEM NO. 10

BEFORE:                         CHAIRMAN LISA POLAK EDGAR  
                                  COMMISSIONER J. TERRY DEASON  
                                  COMMISSIONER ISILIO ARRIAGA  
                                  COMMISSIONER MATTHEW M. CARTER, II  
                                  COMMISSIONER KATRINA J. TEW

DATE:                            Tuesday, October 3, 2006

PLACE:                          Betty Easley Conference Center  
                                  Room 148  
                                  4075 Esplanade Way  
                                  Tallahassee, Florida

REPORTED BY:                   LINDA BOLES, CRR, RPR  
                                  Official Commission Reporter  
                                  (850) 413-6734

1 PARTICIPATING:

2                   PATRICK M. BRYAN, ESQUIRE, representing Florida Power  
3 & Light Company.

4                   MARY ANDREWS BANE, EXECUTIVE DIRECTOR; ROSANNE  
5 GERVASI, ESQUIRE; and JIM BREMAN, representing the Florida  
6 Public Service Commission Staff.

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## P R O C E E D I N G S

CHAIRMAN EDGAR: And we are on Item 10.

MS. GERVASI: Commissioners, Rosanne Gervasi with the Commission legal staff.

Item 10 is staff's recommendation to deny Florida Power & Light Company's proposed tariff filing to revise Section 2.8 of its current Ninth Revised Tariff Sheet, Number 6.020, entitled "Access to Premises," because the Commission lacks the statutory authority to approve it."

Mr. Patrick Bryan, counsel for FPL, is here to address the Commission on this item. Staff is available for any questions.

CHAIRMAN EDGAR: Thank you.

Mr. Bryan.

MR. BRYAN: Thank you, Madam Chair, Commissioners. My name is Patrick Bryan. I am an attorney for Florida Power & Light Company.

I would first like to thank the Commission and staff for their careful and reasoned consideration of this petition. FPL does believe that it has made a defensible argument that the Commission does have the authority to grant this petition under the broad powers conferred upon the Commission in Chapter 366 of the Florida Statutes.

However, we also understand and are mindful of staff's concerns regarding the issue of statutory authority and

1 the corresponding constraints on the Commission that staff  
2 asserts currently exists. We also understand and appreciate  
3 staff's concerns regarding private property rights and customer  
4 complaints. Staff has also made defensible legal arguments and  
5 has raised valid concerns.

6           Recognizing that there is authority for both  
7 positions, FPL will accept the Commission's ultimate  
8 determination on this petition, even if the Commission takes  
9 the more conservative view than that advanced by FPL here today  
10 and denies our petition.

11           However, we would respectfully suggest to the  
12 Commission that the status quo with respect to a utility's  
13 right to trim and remove trees must somehow and sometime in the  
14 near future change. We recognized early that the subject  
15 matter of this petition and the relief sought would be  
16 controversial, but we brought it to you because the issues are  
17 critically important to not only electric utilities in their  
18 hardening efforts, but also to all electric customers in the  
19 State of Florida.

20           Increased vegetation management rights carried out in  
21 a responsible and legal fashion on the part of the utility is  
22 absolutely essential to prevent outages and to allow for more  
23 rapid restoration of electric facilities that have sustained  
24 damage during storms. Such rights would further the statutory  
25 goal of Chapter 366 of an adequate and reliable energy source

1 in the State of Florida. Regardless of the outcome here today,  
2 FPL will continue its vegetation management efforts -- it will  
3 continue to coordinate its vegetation management efforts with  
4 local governments in accordance with the staff's  
5 recommendation. We've been doing so for quite some time  
6 already. However, we would submit to you that attempting to  
7 coordinate with the hundreds of local governments in FPL's  
8 territory, all of which may have varying and different  
9 vegetation management requirements, is problematic and unwieldy  
10 for reasons that should be apparent to all.

11           If the Commission today determines it lacks the  
12 statutory authority to grant this petition, FPL would encourage  
13 the Commission and all stakeholders in the very near future to  
14 engage in a healthy and robust discussion of these issues. If  
15 new legislation is, in fact, required to grant the Commission  
16 this authority, FPL would welcome the opportunity to work with  
17 the Commission and the staff and all other stakeholders in the  
18 State of Florida to garner their support for these critical  
19 objectives. We strongly believe these are matters over which  
20 the Commission should have authority, if it doesn't already.

21           Thank you for the opportunity to speak.

22           CHAIRMAN EDGAR: Thank you, Mr. Bryan.

23           Commissioner Tew.

24           COMMISSIONER TEW: Thank you, Chairman. I have, I  
25 guess first a comment and then a few questions, some of which I

1 just want to ask while we're all here and talking about this  
2 issue.

3 First, I agree with the ultimate outcome of the staff  
4 recommendation, but I do have some concerns about some language  
5 on Page 5. The first full paragraph on Page 5, midway down it  
6 begins, "Nowhere in Section 366.04, Florida Statutes, is it  
7 expressly or impliedly conferred that the Commission may  
8 authorize a public utility to trim or remove vegetation outside  
9 of its right-of-way for the purposes of ensuring reliability or  
10 for any other purpose."

11 As I said before, I agree with the ultimate outcome.  
12 I'm not sure if it doesn't impliedly confer the Commission with  
13 jurisdiction. I read the statutory references there, and I'm  
14 just not sure. And that's what led me to the next sentence:  
15 "And any reasonable doubt as to the lawful existence of a  
16 particular power that is being exercised by the Commission must  
17 be resolved against the exercise thereof." And I do, I do have  
18 that reasonable doubt, and so I think that that leads us to the  
19 ultimate outcome of the staff recommendation. But I'm not  
20 comfortable saying with absolute certainty that there's not  
21 implied jurisdiction there. And I just wanted to -- and if  
22 staff would like to respond, that would be fine, and then I  
23 have some other questions later.

24 MS. GERVASI: Commissioner, I think what we're  
25 recommending is that the Commission would need express

1 statutory authority in order to do it and not just implied  
2 statutory authority. And that was kind of a subjective opinion  
3 on my part really that in my opinion it didn't seem to me that  
4 the language of the statute even implied it, because there's  
5 nothing to suggest that there's any jurisdiction conferred with  
6 respect to areas outside of easements and rights-of-way. I  
7 think we could remove that sentence if the Commission would  
8 prefer to do it that way. I think that the, that the  
9 jurisdiction would need to be express.

10 COMMISSIONER TEW: And I agree with that. I just  
11 throw that out -- I would be more comfortable without the  
12 impliedly, without the certainty that there is no implied  
13 jurisdiction there. I myself am just not sure. But, again, I  
14 do agree with the fact that when there's reasonable doubt, it  
15 needs to be express. So I just throw that out for other  
16 Commissioners to consider.

17 And then I have a few questions for FPL and perhaps  
18 staff also.

19 In the latter part of the rec on Page 7 there was a  
20 reference about -- actually it was a statutory reference to  
21 Section 163.3209 that requires, "Upon the request of the local  
22 government, the utility shall meet with the local government."  
23 Is there any reason the utility can't initiate that meeting  
24 with the local government? The way the wording is, is laid out  
25 there, it just caught my attention that it had to be upon the

1 request of the local government. I'm assuming it can work  
2 either way technically.

3 MR. BRYAN: I would agree. I think there's no  
4 prohibition in the statute for FPL to approach local  
5 governments.

6 COMMISSIONER TEW: Another question that's been on my  
7 mind, and we've discussed these tree trimming issues a couple  
8 of times and I just wanted to get it straight today, I was  
9 wondering what happens when an individual customer requests  
10 tree trimming near electric facilities even if it's not  
11 touching the line or making contact? Can you tell me what  
12 FPL's policy is on that?

13 MR. BRYAN: I'm not the company arborist, but I  
14 believe that our policy is that if vegetation is getting  
15 dangerously close -- that may be too broadly stated. But where  
16 the vegetation, where trimming it might cause a danger for a  
17 customer, we would want to trim that ourselves, or at least  
18 advise the customer to get a professional, professional to do  
19 the trimming. But I believe it's our obligation to remove  
20 vegetation that is getting close to our lines, facilities.

21 COMMISSIONER TEW: Okay. One more. Do local  
22 governments have the authority to require citizens to grant  
23 utilities access beyond the right-of-way or easements now? Do  
24 they currently have that authority so that if you were to work  
25 with them, that they could make a decision along those lines?



1           MR. BRYAN: I believe the local governments do have  
2 that authority. However, again, many of those governments,  
3 especially in South Florida, are not very willing to grant us  
4 those rights. And it's still -- you have a patchwork as you're  
5 moving down the very populated areas of the state in which we  
6 serve, you have different, different requirements, again, in  
7 each town.

8           COMMISSIONER TEW: Thank you.

9           CHAIRMAN EDGAR: Commissioner Carter.

10          COMMISSIONER CARTER: Just from listening to staff  
11 and reading the report, wouldn't you think it would be more  
12 appropriate to go to the Legislature and have the specific  
13 language in there? Remember what happened when they did the,  
14 the trees from the Department of Agriculture when they had the  
15 citrus canker? Remember that, what happened? Wouldn't you  
16 think it would be more appropriate to have it specifically  
17 delineated in the statute that you had this authority? That  
18 way you wouldn't be at cross-purposes between local governments  
19 and the PSC in this process.

20          MR. BRYAN: Commissioner, I think that would be  
21 preferable certainly. I don't know that it would be more  
22 appropriate. I think we, again, have made an argument that the  
23 Commission enjoys the authority to grant the petition.  
24 However, clearly it would be better for all involved if there  
25 were express authority in the statute.

1 COMMISSIONER CARTER: Thank you.

2 CHAIRMAN EDGAR: Thank you.

3 Commissioner Arriaga.

4 COMMISSIONER ARRIAGA: Commissioner Tew made a very  
5 important comment at the beginning regarding the certainty of  
6 staff's statement expressly or impliedly. Here I go, you know.  
7 And it brings to my attention a fact that we have proposed very  
8 stringent orders to the utilities to comply with vegetation  
9 management. What I'm trying to figure out here is how is it  
10 that we can tell the utility we're going to hold you liable for  
11 this vegetation management program, and at the same time we're  
12 telling them, but you have no -- we have no jurisdictional way  
13 of helping you accomplish that? And I'm not saying that we do  
14 have -- I think I agree 100 percent with you on our  
15 jurisdictional capacity here. I think the Legislature should  
16 clear this up for us. But how can we at the same time turn  
17 around to the utilities and say, you better comply with the  
18 six-year vegetation management program, and the next time the  
19 lights go out, we're going to hold you liable for that and  
20 penalize you and all these things that we do from here? Isn't  
21 there a contradiction in this?

22 MS. GERVASI: Commissioner, I don't see a  
23 contradiction. I know the Commission has been very proactive  
24 about the companies stepping up their vegetation management  
25 programs, but that's within the easements and rights-of-way and

1 within the authority that they have under their current tariffs  
2 as opposed to branching out beyond that.

3 COMMISSIONER ARRIAGA: Is it enough just to do it in  
4 the right-of-ways? I think I remember OPC during the storm  
5 recovery docket here saying that they didn't do such a good  
6 job. And they tried to demonstrate that they did because they  
7 cleared the right-of-ways, but some of the damage came from  
8 vegetation outside of the right-of-way. And that was a very  
9 strong point that OPC was making here.

10 MR. BREMAN: Commissioner?

11 COMMISSIONER ARRIAGA: Yes.

12 MR. BREMAN: My name is Jim Breman. And my name is  
13 not on the recommendation, but I have been working on the  
14 vegetation matters.

15 COMMISSIONER ARRIAGA: I can't hear you. I'm sorry.

16 MR. BREMAN: My name is Jim Breman. I'm not on the  
17 recommendation, but I have been working on the vegetation  
18 matters.

19 What has been represented to you is correct; what  
20 we're here is talking about something that is outside of the  
21 right-of-way. And you're correct, outside the right-of-way is  
22 becoming an increasing area where we're taking notice as a  
23 regulator and as a utility that additional action is probably  
24 necessary. Different utilities are taking different approaches  
25 to this. And in a filing that hasn't been made to you that we

1 expect to file next week for the October 24th recommendation,  
2 we're going to be talking a little bit about outside of  
3 right-of-way activities that Gulf Power has proposed. They're  
4 different than what FPL has proposed, but they are directed in  
5 the same direction. The companies are talking to the  
6 utilities. This recommendation endorses and recognizes that  
7 the utilities do talk to the communities. FPL is representing  
8 to you that they have a plethora of municipalities to deal  
9 with. And trying to reconcile the different interests of these  
10 small, these municipalities that abut each other and are  
11 contiguous across their structures creates a dilemma for them  
12 that they can't really reconcile with individual municipal  
13 dealings. And that's why they're seeking a different tool.

14 COMMISSIONER ARRIAGA: Thank you. One last question,  
15 please. Thank you. One last question of Mr. Bryan here.

16 Mr. Bryan, I'm just trying to figure out how  
17 committed is your company to this tariff, to this proposal?  
18 And the reason I ask that is because staff asked you if we  
19 approve this and a neighbor does not allow you to go in, are  
20 you going to turn off the lights, are you going to cut off the  
21 electricity, and you said no. So why are you proposing this  
22 tariff? How committed are you?

23 MR. BRYAN: Well, I believe the company is very  
24 committed to these objectives. I believe the answer given to  
25 that staff request is based more on customer relations.

1 Disconnecting power is always a remedy of last resort. If, if  
2 the -- in the particular instance you cite or the scenario, if  
3 there were an imminent danger to a person or property, I would  
4 think our company would take action to remove the danger. And  
5 that may be we remove the tree and take our lumps when we get  
6 sued and what not. But we'd have to, you know, make the  
7 situation safe. If there were no imminent danger, we would  
8 have other remedies, you know, versus a disconnect. I mean, we  
9 could bring an action for declaratory relief in the local  
10 courts to determine whether we have the rights and solve it  
11 that way. So, again, disconnecting customers is a remedy of  
12 last resort. We are committed to this.

13 COMMISSIONER ARRIAGA: And I understand. But -- so  
14 if you have all those remedies that you just mentioned, why  
15 bring it to the Commission? Why propose a tariff? I mean,  
16 there's no need for a tariff if you have other remedies.

17 MR. BRYAN: Well, currently we don't have the right  
18 to remove trees outside of the right-of-way, and that's what  
19 we're asking for. So we would need that approval from the  
20 Commission.

21 COMMISSIONER ARRIAGA: Thank you. But I'm convinced  
22 that it's a legislative issue. It's not a Commission issue.

23 MR. BRYAN: Thank you.

24 CHAIRMAN EDGAR: Commissioners, further questions or  
25 discussion?

1 COMMISSIONER CARTER: Move staff.

2 CHAIRMAN EDGAR: Commissioner Carter has made a  
3 motion in favor of the staff recommendation. Is there a  
4 second?

5 COMMISSIONER DEASON: Second.

6 CHAIRMAN EDGAR: We have a motion and a second.  
7 Further discussion?

8 Commissioner Tew.

9 COMMISSIONER TEW: Just one question about the point  
10 I made earlier. I was just wondering if it would be possible  
11 to amend that motion to -- if it needs to be amended. I'm not  
12 sure. It may be that in the staff analysis section that gets  
13 placed in the order just wouldn't need to use that exact same  
14 language. Maybe strike out the "or impliedly" part, for  
15 instance. I just want to throw that out for discussion. I  
16 don't think it changes the actual staff recommendation wording  
17 or anything in any way. It would just be a matter of what the  
18 order would contain.

19 CHAIRMAN EDGAR: Commissioner Tew, I'm comfortable  
20 with that.

21 Commissioner Carter.

22 COMMISSIONER CARTER: I was just going to ask a  
23 question out loud to staff is that should we even -- should we  
24 just -- and I'm still with my motion, but I'm just kind of  
25 thinking aloud. As the next logical step once we approve this,

1 assuming we do, is that are we empowered or are you  
2 recommending that we recommend to the Legislature that they  
3 visit this issue? Because obviously you just talked about  
4 Florida Power & Light, now you mentioned Gulf Power. So who's  
5 next out of the box? Progress. So, I mean, if this is an  
6 issue that's going to keep coming up to the Commission, we  
7 don't have jurisdiction, it's certainly something that we  
8 should have an opinion about or something we could recommend to  
9 the Legislature that they deal with this because it may keep  
10 coming up. And, I mean, if we're going to go piecemeal by  
11 piecemeal, certainly we should have a better perspective on  
12 this.

13 DR. BANE: Commissioner, we can address that, but it  
14 shouldn't be through this specific recommendation. We would  
15 look at that generically as we are discussing with you possible  
16 topics for the Legislature.

17 COMMISSIONER CARTER: Thank you, Dr. Bane.

18 CHAIRMAN EDGAR: Thank you, Commissioner Carter.  
19 Thank you, Dr. Bane.

20 Further discussion.

21 COMMISSIONER DEASON: Let me ask a question. For --  
22 I guess it's getting late and I'm getting hungry and I -- when  
23 the motion was made, it was to approve staff and I seconded it.  
24 I just assumed that it was going to incorporate the suggestion  
25 that Commissioner Tew made. And I agree with her suggestion.

1 I think that we shouldn't be -- we should not make a finding  
2 that there is no implied authority. Who knows? At some point  
3 we may want to say there is implied authority and that's enough  
4 for us to act. Circumstances can change. And I just think at  
5 this point the end result is correct and that we can say  
6 there's not expressed authority. I think that's a fact. But  
7 I'm not so sure going to the -- stating that there's no implied  
8 authority, that may be, may be going too far at this point. So  
9 if I need to withdraw my second, I will.

10 COMMISSIONER CARTER: No. No. That's fine. I think  
11 we all understand that. I think that's appropriate. That's  
12 where we started.

13 CHAIRMAN EDGAR: Okay. I think we're all on the  
14 same, same page. Additional comment or clarification needed by  
15 anyone? No.

16 Okay. We have a motion and a second. All in favor  
17 of the motion, say aye.

18 (Unanimous affirmative vote.)

19 Opposed? Show the motion adopted.

20 That concludes our business for today, and this  
21 Agenda Conference is adjourned.

22 (Agenda Conference adjourned at 12:50 p.m.)  
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1 STATE OF FLORIDA )  
2 COUNTY OF LEON )

CERTIFICATE OF REPORTER

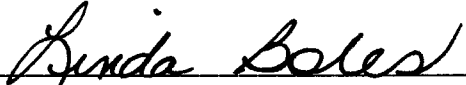
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I, LINDA BOLES, CRR, RPR, Official Commission Reporter, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 10TH DAY OF OCTOBER, 2006.

  
LINDA BOLES, RPR, CRR  
FPSC Official Commission Reporter  
(850) 413-6734