

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-**

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**DATE:** December 5, 2013

**TO:** Office of Commission Clerk (Stauffer)

**FROM:** Division of Engineering (Matthews, Ellis) *POE PV*  
Office of the General Counsel (Tan, Corbari) *TTC*

**RE:** Docket No. 130198-EI – Petition for prudence determination regarding new pipeline system by Florida Power & Light Company.

**AGENDA:** 12/17/13 – Regular Agenda – Motion to Dismiss – Oral Argument Not Requested  
- Participation at Commission's Discretion

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Graham

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

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**Case Background**

On October 28, 2013, the Commission issued a Proposed Agency Action, Order No. PSC-13-0505-PAA-EI (Pipeline Order), on the proposed Sabal Trail Transmission, LLC (Sabal Trail) and Florida Southeast Connection Pipelines to be constructed to meet Florida Power & Light Company's (FPL)'s gas transmission needs. The Pipeline Order approved FPL's need for additional firm natural gas transmission capacity and its eligibility to seek recovery of costs associated with firm natural gas transportation contracts in the fuel clause. The Pipelines were selected by FPL, following a request for proposals (RFP) to develop new natural gas transportation infrastructure into southern Florida. The Commission acknowledged that FPL demonstrated a need for 400 MMcf/day of additional firm natural gas transmission capacity by 2017 and is eligible to seek recovery of costs associated with firm natural gas transportation contracts in the fuel clause. The Pipeline Order notes that FPL is not obligated by law to obtain

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approval to enter into long-term gas transportation contracts for the projects, as both contracts are governed by the Federal Energy Regulatory Commission (FERC).

On November 15, 2013, a Petition for Formal Evidentiary Proceeding Based on Disputed Issues of Fact was filed by Beth M. Gordon, Arlene Bell, Freddie Bell, Mian J. Matvejs, and Gertrude C. Dickinson, hereinafter "Petitioners." The Petitioners request a formal hearing, a referral to the Florida Department of Environmental Protection for various studies regarding the pipelines, and seek assurance that the pipeline will primarily benefit the people of the state of Florida.

On November 20, 2013, FPL filed a Motion to Dismiss the Protest. On December 4, 2013, the Petitioners late-filed a Response to FP&L's Motion to Dismiss (Response to Motion to Dismiss). On December 6, 2013, the Petitioners filed a Motion to File Petitioners' Response to FP&L's Motion to Dismiss Out of Time, Nunc Pro Tunc (Motion to Late File) and refiled its Response to the Motion to Dismiss. Order PSC-13-0651-PCO-EI, issued December 9, 2013, denied the Motion to Late File. The Petitioners' Response to the Motion to Dismiss shall not be considered in this recommendation.

The Commission has jurisdiction over this matter pursuant to Chapter 366, Florida Statutes.

Discussion of Issues

**Issue 1:** Should Florida Power & Light Company's Motion to Dismiss be granted?

**Recommendation:** Yes. FPL's Motion to Dismiss should be granted. The Petitioners have not pled facts sufficient to demonstrate that they have suffered an injury in fact or that the nature of these proceedings is designed to protect any injury the Petitioners have alleged. Staff recommends that Proposed Agency Action Order, Order No. PSC-13-0505-PAA-EI, should be deemed final and effective. (Tan)

**Staff Analysis:**

**Standard of Review**

A motion to dismiss raises as a question of law the sufficiency of the facts alleged to state a cause of action.<sup>1</sup> In order to sustain a motion to dismiss, the moving party must show that, accepting all allegations as true, the petition still fails to state a cause of action for which relief may be granted.<sup>2</sup> The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations.<sup>3</sup> A sufficiency determination should be confined to the petition and documents incorporated therein, and the grounds asserted in the motion to dismiss.<sup>4</sup>

To evaluate a motion to dismiss, all allegations in the petition must be viewed as true and in the light most favorable to the petitioner in order to determine whether there is a cause of action upon which relief may be granted.<sup>5</sup>

**The Petition**

The Petition requests an evidentiary administrative hearing pursuant to Rule 25-106.201, F.A.C., and Sections 120.569(1) and 120.57, Florida Statutes (F.S.). The Petitioners argue that they have a substantial interest in the outcome of the Commission's decision in this docket. The Petitioners further argue that FPL's Petition should be denied due to concerns regarding the safety of the methane gas pipeline, the effect on the aquifer, the potential pollution of the aquifer and soil, and the effects on drinking water and the agricultural industry. Further, the Petitioners argue that they received no notice of the Commission Order and that no EPA or state environmental impact studies have been undertaken.

In addition, the Petitioners believe that there are numerous outstanding issues of disputed fact which include methane gas pipeline safety; the unnecessary use of eminent domain; and

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<sup>1</sup> Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

<sup>2</sup> *Id.* at 350.

<sup>3</sup> Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

<sup>4</sup> Barbado v. Green and Murphy, P.A., 758 So. 2d 1173 (Fla. 4th DCA 2000); and Rule 1.130, Florida Rules of Civil Procedure.

<sup>5</sup> See, e.g. Ralph v. City of Daytona Beach, 471 So. 2d 1, 2 (Fla. 1983); Orlando Sports Stadium, Inc. v. State of Florida ex rel Powell, 262 So. 2d 881, 883 (Fla. 1972); Kest v. Nathanson, 216 So. 2d 233, 235 (Fla. 4<sup>th</sup> DCA, 1986); Ocala Loan Co. v. Smith, 155 So. 2d 711, 715 (Fla. 1<sup>st</sup> DCA, 1963).

concerns regarding safety hazards, such as the effect of the aquifer, the potential pollution of the aquifer, soil and drinking water. The Petitioners also raise concerns that Sabal Trail cannot safely relocate the Florida Gopher Tortoise or the Sherman Fox Squirrel.

Furthermore, the Petitioners allege ultimate facts that they believe warrant the reversal or modification of the agency's proposed action, ranging from a lack of environmental impact studies, company performance, to the proposed usage of PCBS (PolyChlorinated Biphenyls). The Petitioners request a formal evidentiary hearing and a referral to the Florida Department of Environmental Protection for further studies on environmental concerns. In addition, the Petitioners seek assurance that the pipeline will benefit the people of the state of Florida and will not be used to transport natural gas for export to the foreign market.

#### FPL's Motion to Dismiss

FPL requests that the Commission dismiss the Petition for Formal Evidentiary Proceeding Based on Disputed Issues of Fact. FPL argues that the Petitioners are not FPL customers and therefore do not have any interests which are substantially affected by the fuel clause recovery of costs associated with natural gas transportation contracts and have alleged speculative harm based on matters that are outside the scope of the Commission's proposed agency action and beyond the Commission's jurisdiction.

Specifically, FPL contends that the Petitioners do not address a single issue that was in dispute in this docket. FPL asserts that this docket addresses questions regarding the need for incremental gas transportation, timing of that need, the fairness of the RFP process, whether the Sabal Trail and Florida Southeast Connection projects represent the most cost-effective natural gas transportation projects, or whether the costs associated with the contracts are eligible for cost recovery. FPL notes that the Petitioners raised concerns regarding pipeline safety, environmental studies and safety records, which FPL believes falls outside the scope of this docket.

#### Standing

To have standing, the two-prong standing test set forth in Agrico Chem. Co. v. Department of Envntl. Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981) must be met. It must be shown that: (1) there is an injury in fact which is of sufficient immediacy to support a Section 120.57, F.S., hearing; and (2) that this substantial injury is of a type or nature against which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury. The "injury in fact" must be both real and immediate and not speculative or conjectural. International Jai-Alai Players Assn. v. Florida Pari-Mutuel Comm'n, 561 So. 2d 1224, 1225-26 (Fla. 3d DCA 1990). See also, Village Park Mobile Home Assn., Inc. v. State Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987) (finding that speculation on the possible occurrence of injurious events is too remote).

Staff believes that the Petitioners do not meet the two-prong standing test in Agrico. First, the Petitioners have stated that they have substantial interests that will be affected by the Commission's decision; however, none of the Petitioners are customers of FPL. Moreover, the injuries asserted by the Petitioners are environmental and safety concerns. The Pipeline Order

addresses only whether FPL has met the need for additional firm natural gas transmission capacity and whether the company is eligible to seek recovery of costs associated with firm natural gas transportation contracts in the fuel clause. As such, none of the injuries asserted by the Petitioners are within the scope of the Commission's decision. Therefore, the Petitioners do not have substantial interests that will be affected by the Commission's decision.

Furthermore, staff believes that the Protest fails to assert an injury that is of a type or nature which the proceeding is designed to protect. Both the Sabal Trail Pipeline and Florida Southeast Connection Pipelines will be FERC regulated Pipelines pursuant to the Natural Gas Act, 15 USCS Section 717f. Therefore, as the regulatory body governing these Pipelines, FERC will be handling the pipeline certification process. FPL has stated that Sabal Trail has begun the FERC process in FERC Docket No. PF14-1000. Accordingly, the Petitioners have failed to plead a substantial injury within the scope of this proceeding.

In conclusion, staff recommends that FPL's Motion to Dismiss be granted. The Petitioners have not pled facts sufficient to demonstrate that they have suffered an injury in fact or that the nature of these proceedings is designed to protect any injury the Petitioners have alleged. Staff recommends that Proposed Agency Action Order, Order No. PSC-13-0505-PAA-EI, should be deemed final and effective.

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**Issue 2:** Should this docket be closed?

**Recommendation:** Yes. If the Commission agrees with staff regarding Issue 1, then the Petition for Formal Evidentiary Proceeding Based on Disputed Issues of Fact filed by Beth M. Gordon, Arlene Bell and Freddie Bell, Mian J. Matvejs, and Gertrude C. Dickinson should be dismissed. Order No. PSC-13-0505-PAA-EI should become final and effective. (Tan)

**Staff Analysis:** If the Commission agrees with staff regarding Issue 1, then the Petition for Formal Evidentiary Proceeding Based on Disputed Issues of Fact filed by Beth M. Gordon, Arlene Bell and Freddie Bell, Mian J. Matvejs, and Gertrude C. Dickinson should be dismissed. Order No. PSC-13-0505-PAA-EI should become final and effective.