

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: December 8, 2005

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Moore, Brown)
Division of Competitive Markets & Enforcement (Bulecza-Banks)
Division of Regulatory Compliance & Consumer Assistance (Mills)

RE: Docket No. 050584-GP – Petition for declaratory statement by Peninsula Pipeline Company, Inc. concerning recognition as a natural gas transmission company under Section 368.101, F.S.

AGENDA: 12/20/05 – Regular Agenda – Decision on Declaratory Statement – Parties May Participate at Commission's Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: December 1, 2005 – Petitioner has waived 90-day period provided in Section 120.565, F.S., to permit consideration at December 20, 2005, agenda conference.

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\050584.RCM.DOC

Case Background

By petition filed September 2, 2005, Peninsula Pipeline Company, Inc. ("Peninsula") seeks a declaratory statement by the Commission that Peninsula qualifies as a natural gas transmission company under section 368.103(4), Florida

Statutes. The question posed by the petition is whether Peninsula, a corporation in its own right, is precluded from operating as a natural gas transmission company as defined in section 368.103(4), Florida Statutes, by the fact that its parent corporation owns or operates facilities primarily for the local distribution of natural gas or that an affiliated corporation is subject to the jurisdiction of the FERC under the Natural Gas Act, 15 U.S.C. ss. 717 et seq. Corporations that own or operate facilities primarily for the local distribution of natural gas or that are subject to the jurisdiction of FERC under the Natural Gas Act cannot operate as a natural gas transmission company as defined in section 368.103(4), Florida Statutes.

Peninsula's petition is filed pursuant to section 120.565, Florida Statutes, and Rule 28-105.002, Florida Administrative Code, governing declaratory statements. Notice of the Petition for Declaratory Statement was published in the Florida Administrative Weekly on September 23, 2005. The Commission has jurisdiction pursuant to sections 120.565 and 368.104, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission grant Peninsula Pipeline Company, Inc.'s Petition for Declaratory Statement that it may qualify as a natural gas transmission company as defined in section 368.103(4), Florida Statutes?

Recommendation: Yes, the Commission should grant the Petition for Declaratory Statement based upon the particular circumstances presented. (Moore, Bulezca-Banks, Mills, Brown)

Staff Analysis:

Threshold Declaratory Statement Requirements:

Section 120.565, Florida Statutes, governs the issuance of a declaratory statement by an agency. In pertinent part it provides:

- (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.
- (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances.

Peninsula's substantial interests will be affected by the Commission's disposition of this petition as it will determine whether Peninsula will be allowed to operate as a natural gas transmission pipeline subject to the Commission's jurisdiction. Peninsula considers it essential to obtain a definitive determination of its ability to operate in Florida as an intrastate transmission company prior to making the capital investment necessary to launch its operations.

The statute applicable to Peninsula's particular circumstances is Part II of Chapter 368, Florida Statutes, the "Natural Gas Transmission Pipeline Intrastate Regulatory Act", and specifically section 368.103(4) defining "natural gas transmission company." Peninsula's petition meets the statutory requirements for a declaratory statement and therefore the Commission should issue the statement to resolve the question presented. The Commission's resolution of the question presented will apply to Peninsula's particular circumstances. The Commission may rely entirely upon the facts presented by the petitioner and any material changes in the facts could substantially alter or void the declaratory statement.

Peninsula's Petition:

Peninsula is a Delaware corporation authorized to conduct business in Florida. It is a wholly-owned subsidiary of Chesapeake Utilities Corporation ("Chesapeake"), also a Delaware corporation authorized to conduct business in Florida. Chesapeake is engaged in both natural gas distribution and transmission; propane distribution and wholesale marketing; advanced information services; and other related businesses. Chesapeake's Florida Division operates as a local natural gas distribution company ("LDC") doing business as Central Florida Gas Company. It serves residential, commercial and industrial customers in four counties and only industrial customers in nine additional counties. It is regulated by the Commission pursuant to Chapter 366, Florida Statutes.

Chesapeake also has a wholly-owned subsidiary that is an interstate natural gas pipeline company, Eastern Shore Natural Gas Company. Eastern Shore is regulated by the Federal Energy Regulatory Commission (FERC), and it transports and delivers natural gas to industrial and local distribution customers located in Delaware, the Eastern Shore of Maryland and Pennsylvania.

Peninsula believes that an increased demand for natural gas provides market opportunities for investment to deliver gas service to certain niche markets. It asserts that increased demand has resulted from new and re-powered electric generation projects in Florida since 1990; the promotion by LDCs of natural gas usage to residential, commercial and industrial customers; and substantial expansion of gas distribution systems to keep pace with Florida's rapid population growth and the accompanying expansion of interstate pipeline facilities. In order to serve the markets it has identified, Peninsula needs to know whether, as a subsidiary of an LDC, whose parent corporation has another subsidiary subject to the jurisdiction of FERC, it is precluded from being recognized by the Commission as an intrastate natural gas transmission company.

If the Commission determines Peninsula would qualify as a natural gas transmission company under section 368.103(4), Florida Statutes, it intends to file for Commission approval a tariff for intrastate pipeline operations, submit service agreements for individual customers, and otherwise operate in compliance with the Natural Gas Transmission Pipeline Intrastate Regulatory Act. Peninsula also intends to operate all of its intrastate pipeline facilities as open access pipelines and will not engage in the retail sale of natural gas to any customer. In the event a dispute arises between Peninsula and another natural gas utility over the right to serve a particular customer or territory, Peninsula believes the Commission has sufficient authority under section 366.04(3), Florida Statutes, to resolve the dispute.

Analysis:

The Natural Gas Transmission Pipeline Intrastate Regulatory Act ("The Act"), sections 368.101-368.112, Florida Statutes, was adopted by the Florida Legislature in 1992 in conjunction with sections 403.9401-9425, Florida Statutes, the Natural Gas

Transmission Pipeline Siting Act ("Pipeline Siting Act"). Chapter 92-284, Laws of Florida. At the time they were enacted, these laws contemplated the filing of a proposal for a major gas pipeline that would serve local distribution companies and major electric power generators in Florida, and that would be regulated by the Florida Public Service Commission rather than FERC.¹ The statute enables an intrastate pipeline company to be exempt from FERC jurisdiction under what is known as "the Hinshaw Amendment." The Hinshaw Amendment, contained in section 1(c) of the Natural Gas Act, 15 U.S.C. § 717(c), "exempts from FERC regulation intrastate pipelines that operate exclusively in one State and with rates and services regulated by the State." 15 U.S.C. §§ 717-717z. The Florida Act provides for Commission regulation of an intrastate pipeline's rates and service. Payment of regulatory assessment fees to cover the cost of regulation and jurisdiction over pipeline safety is also provided for in Chapter 368, Florida Statutes.

The Act and the Pipeline Siting Act have rarely been invoked since they were enacted 13 years ago. The major pipeline project was never constructed, and today there are no intrastate pipelines operating in the state. Thus, Peninsula Pipeline's declaratory statement request is one of first impression and unique because it requires the Commission to interpret the scope and applicability of this seldom-used statute. Staff suggests that the Commission's task is to provide meaningful guidance to Peninsula with respect to its proposal and establish the broad parameters of the statute's application without placing undue limitations on future use of the statute. The Commission should also consider initiating rulemaking in the future.

A "natural gas transmission company" is defined in section 368.103(4), Florida Statutes:

"Natural gas transmission company" means any person owning or operating for compensation facilities located wholly within this state for the transmission or delivery for sale of natural gas, but shall not include any person that owns or operates facilities primarily for the local distribution of natural gas or that is subject to the jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act, 15 U.S.C. ss. 717 et seq., or any municipalities or any agency thereof or a special district created by special act to distribute natural gas.

(Emphasis supplied.) Subsection 368.103(5) defines "person" as:

a natural person, corporation, partnership, association, or other legal entity and its lessee, trustee, or receiver.

¹ See, In re: Application for a Determination of Need for an Intrastate Natural Gas Pipeline by SunShine Pipeline Partners, Order No. PSC-93-0987-FOF-GP issued July 2, 1993, in Docket No. 920807-GP.

(Emphasis supplied.) These definitions, and the law in general, view each corporation as a separate legal entity, and corporations maintain their identities as distinct legal entities, even when wholly-owned or controlled by other corporations. In general, the separateness that is a basic part of the corporate form is not to be disregarded, and a court will disregard it or "pierce the corporate veil" only in exceptional circumstances. 8A Fla. Jur. 2d Business Relationships §§ 13, 16.

The above definition of natural gas transmission company also expressly excludes an LDC or an entity that is subject to FERC jurisdiction. The definition does not say, however, that a natural gas transmission company cannot be a wholly-owned subsidiary of an LDC or the sister corporation of a FERC-regulated corporation; nor is there a statute that says an LDC cannot be a parent of such a subsidiary company. Thus, Peninsula, as a corporation with a separate legal identity, may qualify as a natural gas transmission company, even though its parent corporation, Chesapeake, is an entity that owns or operates facilities primarily for the local distribution of natural gas and cannot itself be a natural gas transmission company under the terms of the statute.

While the statute clearly states that the same entity may not be both an LDC and a transmission pipeline, it does not describe the types of facilities that may be operated by each, and it does not differentiate between the facilities or operations of related entities. Thus, it is important to distinguish between the operations of the two types of companies so that the captive ratepayers of Florida's LDCs and the competitive market for natural gas in Florida are not harmed by the transmission company's operations. A transmission pipeline's projects should not lead to less investment in the LDC's facilities or stranded costs, "cherry picking" of the LDC's large industrial customers, territorial disputes, or unfair competition with other transmission providers.

Peninsula agrees with staff's concerns and, in its petition and as subsequently clarified in correspondence with staff, has proposed the following parameters of service within which it proposes to operate, in addition to statutory and rule requirements:

1. Peninsula will be permitted to construct facilities to serve industrial, electric generation, or other large volume customers if:

- a) the customer is currently not being served with natural gas service by another entity; and,

- b) the location of the facilities to be served is greater than one mile in distance from existing gas facilities operated by an investor-owned gas utility, a gas municipality, or gas district. "Existing gas facilities" is defined as a City Gate Station or gas main actively providing service or substantially under construction at the date of the execution of a Peninsula Service Agreement with the customer.

2. Peninsula will be permitted to interconnect with other FERC regulated interstate pipelines or FPSC intrastate pipelines to provide service to an LDC.

It is Peninsula's position that these projects would not require prior Commission approval. Staff recommends the Commission determine that these operations are appropriate for a natural gas transmission company operating under Chapter 368, Florida Statutes. Staff notes that the Commission will have the opportunity to review the details of Peninsula's operations when it files its tariffs for Commission approval.

Staff recommends that the Commission not make any determination with respect to any other operations in this declaratory statement. When and if the Commission is presented with specific facts and the details of a proposal, the Commission may consider those facts on a case-by-case basis and make an informed and reasoned determination about whether or not the projects are properly within the operations of a natural gas transmission company at that time. The Commission may also consider initiating a rulemaking proceeding pursuant to section 120.54, Florida Statutes.

Issue 2: Should this docket be closed?

Recommendation: Yes, if the Commission votes to dispose of the petition for declaratory statement, the docket should be closed.

Staff Analysis: If the commission answers the petition, a final order can be issued and the docket closed.