

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1070

SPONSOR: Communications and Public Utilities Committee and Senator Bennett

SUBJECT: Natural Gas Companies

DATE: January 6, 2004 REVISED: 1/30/04 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Caldwell</u>	<u>Caldwell</u>	<u>CU</u>	<u>Fav/CS</u>
2.	<u>Matthews</u>	<u>Lang</u>	<u>JU</u>	<u>Favorable</u>
3.	_____	_____	<u>CP</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill codifies into law what had been the common judicial practice of allowing specified natural gas transmission pipeline companies to use the eminent domain procedures, including the “quick-take” process, in chapters 73 and 74, F.S., when exercising a right of eminent domain. It also grants to natural gas transmission pipeline companies who have not obtained a certification under the state’s Natural Gas Transmission Pipeline Siting Act but who are otherwise subject to regulation under the federal Natural Gas Act the right of eminent domain and the use of the eminent domain provisions in chapters 73, and 74, F.S.

This bill substantially amends section 361.05 of the Florida Statutes.

II. Present Situation:

Power of Eminent Domain

The Florida Legislature is vested with the power of eminent domain and constitutional limitations on that power. Section 6 of Article X of the Florida Constitution provides:

- (a) No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.
- (b) Provision may be made by law for the taking of easements, by like proceedings, for the drainage of the land of one person over or through the land of another.

The Legislature can delegate that authority to agencies of government through legislative enactments.¹ Under chapter 361, F.S., various public utilities have the statutory right of eminent domain. Generally, it is the right of the president and directors of any corporation organized for the purpose of constructing, maintaining or operating public works to exercise eminent domain of any lands, public or private, necessary to the business contemplated in the charter, and to appropriate the same or take from any land most convenient to their work certain material which may be necessary for the construction and the keeping in repair of its works and improvements, upon making due compensation according to law to private owners.²

Statutory Eminent Domain Procedures

Not all public utilities with the right of eminent domain, however, are expressly authorized under statute to use the eminent domain procedures under chapters 73 and 74, F.S. Some of the statutory eminent domain procedures in chapter 73, F.S., include presuit negotiations between the entity exercising its rights and the fee owner, offers of judgment, jury trials, compensation, severance and business damages, and costs and attorneys' fees related to the proceeding. Procedures under eminent domain require a trial by a jury of 12 in the local venue. Eminent domain procedures take precedence over all other civil matters.³ Supplementary procedures for eminent domain actions in chapter 74, F.S., are commonly referred to as "quick-take" provisions. Under the quick-take provisions, certain entities, including municipalities and public utilities, may take possession and title to land subject to an eminent domain proceeding in advance of the entry of final judgment. Eminent domain procedures, especially quick-take, offer certain advantages. For the property owner, the only issue in dispute is the amount of compensation for the property taken. Under quick-take, an entity is required to provide appraisals of the property and deposit (with the court) twice the estimated value of the property until a financial determination is made.

Although the statutory right of eminent domain for natural gas companies in s. 361.05, F.S., has existed since 1951⁴, the quick-take eminent domain provisions in chapter 74, F.S., were not enacted until 1965. However, the Legislature never amended s. 361.05, F.S., to include a cross-reference to either chapter 73 or 74, F.S. However, when the Legislature subsequently amended chapter 361, F.S., in 1979 and 1982, to give two more categories of "public utilities" (railroad companies and coal pipeline companies, respectively), the right of eminent domain,⁵ the Legislature expressly included language that said that these utilities could exercise the eminent domain procedures and quick-take provisions in chapters 73, and 74, F.S. respectively. The Legislature did not go back and include this in any of the other pre-existing statutory provisions delegating the power of eminent domain.

¹ See *Spafford v. Brevard County*, 92 Fla. 617, 110 So. 451 (1926).

² See s. 361.01, F.S.

³ By comparison, in federal court, criminal and civil are not separated and criminal cases are scheduled based upon the right to a speedy trial, all others are heard as court time allows. Federal eminent domain cases are not required to have a jury and the venue is at the site assigned by the court. If a natural gas transmission pipeline project involves interstate transmission, then the company and project are federally regulated and have to acquire property pursuant to federal eminent domain laws. Federal law protects pipelines from service disruption should a state road or other state project require a line to be moved. Conflicts can arise, however, when a natural gas transmission pipeline has a permit to be within a state (or local government) right-of-way since the agency only needs to give 30 days notice to move the pipeline because of some road project. If the natural gas transmission pipeline company cannot secure the necessary right of way, the road project can be held up.

⁴ See s. 361.05, F.S.

⁵ See s. 361.025, F.S., and s. 361.08, F.S., respectively.

The intentional or unintentional legislative omission to revise the other statutory provisions in Part I of chapter 361, F.S., to include an express cross-reference to chapters 73 and 74, F.S., did not present an issue until recently because it had been common judicial practice to interpret Part I of chapter 361, F.S., to allow for all those specified public utilities to use the eminent domain and quick-take provisions. However, in August 2003, the Second District Court of Appeal limited a natural gas pipeline company's right to use the quick-take proceedings available in chapter 74, F.S.⁶

The court found that Florida Gas Transmission Company (FGTC) did not fall within the definition of public utility as construed through various statutory provisions relating to public utilities. In particular, the court noted that the definition for public utility in chapter 366, F.S., relating to the regulation of public utilities, excluded any natural gas transmission pipeline company making only sales or transportation delivery of natural gas at wholesale and to direct industrial consumers and any entity selling or arranging for sales of natural gas which neither owns nor operates natural gas transmission or distribution facilities within the state.⁷ FGTC, the company in the appellate case, was a private out-of-state, natural gas transmission company that transports, and delivers natural gas at wholesale to direct industrial customers. Moreover, the court construed from the plain reading of s. 361.05, F.S., that it did not contain a cross-reference to chapter 74, F.S., which otherwise would have made it clear that the Legislature intended for natural gas companies to be able to use the quick-take procedures in that chapter. Section 361.05, F.S., simply reads that *right of eminent domain exists for natural gas companies who are corporations organized for the purpose of supplying any city, town, village or the inhabitants, or any community with natural gas for domestic or industrial purposes to lay its pipelines and works and to do other specific works provided in the section. Included in these corporations are any natural gas transmission pipeline companies that have received certification under ss. 403.9401 through 403.9425, F.S.* (state's Natural Gas Transmission Pipeline Siting Act).

Notably, no mention is made in the appellate court opinion that certifications issued pursuant to the state's Natural Gas Transmission Pipeline Siting Act are admissible as evidence of public need and necessity in proceedings under chapter 73 or chapter 74, F.S. *See* s. 403.9423, F.S., Therefore, s. 403.9423, F.S., seems to imply that, at a minimum, natural gas transmission pipeline companies certified under the Act do have authority to use the quick-take provisions of chapter 74, F.S., even though not expressly stated as such in s. 361.05, F.S.

Natural Gas Transmission Pipeline Siting Act

Sections 403.9401-403.9425 comprise the Natural Gas Transmission Pipeline Siting Act (Act). This Act establishes a centralized and coordinated permitting process for the location of natural gas transmission pipeline corridors and the construction and maintenance of natural gas transmission pipelines in Florida. Under s. 403.9405, F.S., the certification requirements of this Act do not apply to a natural gas transmission pipeline company if the company:

- Has obtained a certificate of public convenience and necessity under s. 7(c) of the Natural Gas Act, 15 U.S.C. s. 717f;

⁶ *See Pichowski v. Fla. Gas Transmission Co.*, 857 So. 2d 219 (Fla. 2nd DCA 2003).

⁷ *See* s. 366.02, F.S.

- Has been certified as an associated facility to an electrical power plant pursuant to the Florida Electrical Power Plant Siting Act, ss. 403.501-403.518, unless the applicant elects to apply for certification of that pipeline under ss. 403.9401-403.9425.
- Is owned or operated by a municipality or any agency thereof, by any person primarily for the local distribution of natural gas, or by a special district created by special act to distribute natural gas, unless the company elects to apply for certification of that pipeline under ss. 403.9401-403.9425.

Natural Gas Transmission Pipeline Intrastate Regulatory Act

The Public Service Commission has regulatory authority over the rates and services of natural gas transmission companies under The Natural Gas Transmission Pipeline Intrastate Regulatory Act in part II of chapter 368, F.S. The term “natural gas transmission company” is defined to mean any person owning or operating for compensation facilities located wholly within this state for the transmission or delivery for sale of natural gas, but excludes 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.⁸

The Federal Natural Gas Act

The federal Natural Gas Act, 15 U.S.C. s.717 et seq. was passed in 1938, giving the Federal Power Commission (now the Federal Energy Regulatory Commission or FERC) regulatory jurisdiction over companies engaged in *interstate* sale or transportation of natural gas. The act instituted federal oversight of rates charged by interstate gas-transmission companies, and also instituted limited certification authority. Nobody was allowed to build an interstate pipeline to deliver gas into a market already served by another gas pipeline without first obtaining a certification from the commission.

III. Effect of Proposed Changes:

Section 361.05, F.S., is amended to give “other business entities” the right to exercise eminent domain if they are qualified to supply local government or its citizens with natural gas for domestic or industrial purposes. Additionally, natural gas transmission pipeline companies that did not have the right to exercise eminent domain because they could not otherwise qualify to receive certification under the state Natural Gas Transmission Pipeline Siting Act (Act) will now be allowed to do so if they are subject to regulation under the federal Natural Gas Act, 15 U.S.C. s. 717. Moreover, any corporation who previously qualified to exercise right of eminent domain and all those entities now added to this section are expressly authorized to use the eminent domain provisions in chapter 73, F.S., and the quick-take provisions in chapter 74, F.S.

The bill states that in order to be eligible to exercise the right of eminent domain the natural gas transmission pipeline company must “be subject to regulation” under the federal act. The bill does not actually require that the company have secured a certificate of public convenience and necessity as the federal Act requires. This is in contrast to those natural gas transmission pipeline

⁸ See s. 368.103(4), F.S.

companies who are granted the right of eminent domain by virtue of having actually received a certification under the state's Natural Gas Transmission Pipeline Siting Act (Act).

By expressly adding that natural gas companies including specified natural gas transmission pipeline companies with the right of eminent domain can use the provisions of chapters 73 and 74, F.S., it may impliedly suggest that the following 'public utilities' with authority to exercise right of eminent domain do not have the express authority to use eminent domain provisions under chapters 73 and 74, F.S., because they are not cross-referenced in their sections:

- Electric railway companies (s. 361.03, F.S.),
- Waterworks companies (s. 361.04, F.S.),
- Petroleum and petroleum products pipeline companies (s. 361.06, F.S.), and
- Sewer or wastewater reuse companies (s.361.07, F.S).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Property owners will be able to sell, develop, dispose of or otherwise encumber their property without having to wait for a final judgment.

The natural gas transmission pipeline industry asserted that without this bill, the recent appellate court decision could adversely affect not only the natural gas transmission pipeline companies, but also governmental agencies, local governments, electric utilities, industries and businesses, and property owners. Planning for electric generation may become uncertain if right-of-way cannot be timely obtained for a pipeline to service a new power plant. Property owners cannot dispose of or otherwise obligate their property until all claims are settled.

C. Government Sector Impact:

State agencies and local governments will be able to continue with public projects without having to wait for natural gas transmission pipeline companies to receive a final order granting them all the property needed for a particular project.

VI. Technical Deficiencies:

None

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
