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PLEASE REPLY TO:

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COGENERATION
ALTERNATIVE ENERGY
ENERGY REGULATORY LAW
PUBLIC UTILITY LAW
ADMINISTRATIVE LAW
APPELLATE LAW

June 19, 1989

Mr. Steve Tribble
Director
Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32399-0850

Re: Docket Nos. 890737-PU and 820517-EU - Conservation Goals.

Dear Mr. Tribble:

At its June 7th workshop, the Commission Staff distributed a draft rule and requested that comments on the proposed rule, if any, be submitted by June 19th. The Florida Industrial Cogeneration Association (FICA) has the following comments on the Staff's draft rule.

The Staff has proposed to amend Rule 25-17.002 to delete all substantive language and replace it with language that says that the Commission will implement FEECA pursuant to duly-noticed hearings. The Staff intends that the conservation goals be "adopted" via an adjudicatory proceeding under Section 120.57, Florida Statutes, rather than via rulemaking. FICA believes that the Staff's "rule" is inappropriate for three reasons: 1) it adds nothing to the policies of the State and puts no one on notice of anything not already clearly required by statute; 2) it is contrary to the apparent FEECA mandate that the goals be "adopted" by rule; and 3) it rests on a mistaken reading of the APA.

FICA believes that the rule should be updated to establish (and perhaps restructure) goals for the next five-year period in accordance with the substantial body of knowledge acquired since 1980 when conservation goals were first adopted. The rule can be drafted with sufficient flexibility to avoid any problems with Section 120.68(12)(b), Florida Statutes.

As to the first point, FEECA already requires the Commission to implement its provisions and the APA requires all agency action to be pursuant to duly-noticed hearings. It would be

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better to have no rule at all than to adopt a rule that has no meaning. At a bare minimum, the rule should specify basic Commission policies regarding conservation goals and specify the manner and timing of how the goals are to be set.

As to the second point, FICA believes that FEECA requires the Commission's conservation goals to be set via rulemaking and that the Staff's draft improperly relies on an adjudicatory proceeding to set the goals. The language of FEECA implies that the Legislature intended the conservation goals be adopted by rule: Section 366.82(2) requires the Commission to "adopt appropriate goals." In fact, this is precisely how the Commission read the statute in 1980 when FEECA was enacted. The Commission adopted an emergency rule establishing conservation goals to meet the November 1, 1980 FEECA deadline and followed with a formal rulemaking to make the goals permanent. Section 366.82(2) still requires the Commission to "adopt" conservation goals and the Commission should conform to its earlier interpretation of that language and adopt its next set of goals via rulemaking.

Even if FEECA does not require that the statewide goals be set by rule, they are an important statewide policy and should be embodied in a rule. Energy conservation and cogeneration are important parts of the State's energy future and the State's energy conservation and cogeneration goals should be set forth in a highly visible, easily accessible form: a rule. As a practical matter, there is no reason why they should not be established by rule. Much more is now known about conservation and cogeneration than was known in 1980. Much more is now known about desirable goals and implementation than was known in 1980. This substantial improvement in understanding will surely make goal-setting easier than in 1980 and make rulemaking a more practical alternative than in 1980.

As to the third point, Section 120.68(12)(b) does not prevent the Commission from being flexible in adopting conservation goals via rulemaking. Section 120.68(12)(b) does not mandate inflexibility -- it simply precludes ad-hoc deviation from policies fixed by rule. If a rule is flexible, then implementation is flexible. The Commission can adopt statewide goals via rulemaking and, in the same rule, provide a flexible means of implementation.

In fact, Rule 25-17.002 already contains substantial language providing for flexibility in implementation. For instance, the rule establishes statewide goals and then provides for setting utility-specific goals via adjudication. The rule


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provides that a utility can rebut the goals allocated to it. Additionally, each utility can adjust its goals because of enhanced economic activity and the Commission can adjust a utility's goals because of significant population changes. While experience since 1980 may show that these provisions may not be address all circumstances, that same experience will show how to draft better language into the rule. FICA believes that the Commission can and should adopt a rule with specific statewide conservation and cogeneration goals, while providing for flexible implementation on a utility-by-utility basis.

Even if the statewide goals themselves turn out to be inappropriate, there will be no problem with inflexibility. The Commission can easily amend the rule and, given the time that will be consumed in the goal-setting process, there would be no time lost in rulemaking. Procedurally, the only difference would be the preparation of an economic impact statement, publication of a notice of rulemaking and filing the rule amendment for adoption. These activities can easily be incorporated within the time normally allotted for an adjudicatory proceeding.

Due to the short time Staff has provided for comment, FICA is unable to provide any meaningful suggestions regarding rule language. FICA suggests that additional time be provided for interested parties to present their suggested amendments.

Sincerely,



Paul Sexton

PS:lp

cc: All parties of record (U.S. Mail)