MACFARLANE, FERGUSON, ALLISON & KELLY
ATTORNEYS AND COUNSELORS AT LAW

215 MADISON STREET
AND
2400 FIRST FLORIDA TOWER
P. O. BOX 1531
TAMPA, FLORIDA 33601
(813) 223-2411
FAX (813) 223-7926
FAX (813) 224-9060

200 NORTH GARDEN AVENUE
P. O. DRAWER 2197
CLEARWATER, FLORIDA 34617
(813) 441-1763
FAX (813) 441-9959

604 FIRST FLORIDA BANK BUILDING
P. O. BOX 82
TALLAHASSEE, FLORIDA 32302
(904) 224-1215
FAX (904) 222-8826

ORIGINAL FILE COPY

January 2, 1990

IN REPLY REFER TO
Ansley Watson, Jr.
P. O. Box 1531
Tampa, FL 33601

Mr. Steven C. Tribble, Director
Division of Records & Reporting
Florida Public Service Commission
Fletcher Building
101 E. Gaines Street
Tallahassee, Florida 32301

Re: Docket No. 890737-PU -- Implementation of Section 366.80-.85, Florida Statutes, Conservation Activities of Electric and Natural Gas Utilities

Dear Mr. Tribble:

Enclosed for filing in the above docket please find the original and 15 copies of the Brief of Peoples Gas System, Inc.

Please acknowledge your receipt and the date of filing on the duplicate copy of this letter enclosed for that purpose, and return the same to me in the enclosed envelope.

With appreciation for your assistance, I am

Sincerely,

Ansley Watson, Jr.

ANSLEY WATSON, JR.

AWjr/ts
Enclosure

cc: Mr. Scott D. Wilson
Mr. Dan R. Pountney
Mr. J. Keith Gruetzmacher

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Implementation of Section 366.80-.85, Florida Statutes, Conservation Activities of Electric and Natural Gas Utilities.	Docket No. 890737-PU Submitted for filing: 1-3-90

BRIEF OF PEOPLES GAS SYSTEM, INC.

This brief is filed on behalf of Peoples Gas System, Inc. ("PGS"), pursuant to the schedule established by Order No. 22306, entered in this docket on December 12, 1989, by the prehearing officer. The arguments presented in this brief are limited to the legal issue of the Commission's authority to require electric utilities to develop cost effective conservation programs which encourage the use of natural gas.

Because the authorities cited herein are not numerous, a table of authorities has been omitted from this brief.

STATEMENT OF THE CASE

On November 14, 1989, the Commission entered in this Docket its Order No. 22176 as a Notice of Proposed Agency Action. Order No. 22176 was issued for the purpose of adopting conservation goals pursuant to Sections 366.80-.85, Florida Statutes, which were revised and extended by the Florida Legislature in Chapter 89-292, Laws of Florida (1989). Order No. 22176 notes that Section 366.82(2), Florida Statutes, requires the Commission to adopt goals for the purposes therein stated, finds that the goals currently expressed in Rule 25.1? `01, Florida Administrative Code, meet the requirement of the st.tutes, and adopts the goals expressed in that rule.

Order No. 22176 also requires that each electric and natural gas utility subject to the provisions of Sections 366.80-.85, Florida Statutes ("FEECA"), submit programs as detailed in the order. Among other things, the Commission's order directs as follows:

> "The direct use of natural gas in space conditioning and water heating shall be encouraged by both electric and gas utilities where such use is a cost-effective method of slowing growth in electric demand. Thus, all utilities are required to either develop cost-effective programs for the use of natural gas or provide an explanation why such programs cannot be developed." Order No. 22176, page 5.

The language quoted above will hereinafter be referred to as the "gas-promotion requirement".

On December 5, 1989, Florida Power Corporation ("FPC") timely filed its Petition for a Limited Proceeding on Proposed Agency Action, requesting a Section 120.57(2), Florida Statutes, hearing limited to the legal issue of the Commission's authority to require electric utilities to develop cost-effective conservation programs which promote the use of natural gas.

The Commission's Order No. 22306 agreed with the assertion in FPC's Petition that there are no disputed issues of material fact such that a Section 120.57(1), Florida Statutes, hearing was required, and granted FPC's request for an informal hearing under Section 120.57(2).

In its Petition referenced above, FPC asserts that the gas-promotion requirement of Order No. 22176 is invalid because:

A. It is contrary to the 1989 revision to the Florida Energy Efficiency and Conservation Act ("FEECA");

B. Its implementation may violate FPC's First Amendment rights of freedom of speech;

C. Its implementation may constitute an unlawful restraint of trade; and

D. Any gas use program developed by electric utilities must be cost effective for gas utilities as well as electric utilities.

PGS submits that the gas-promotion requirement of Order No. 22176 is valid in all respects.

ARGUMENT

SECTION B OF ORDER NO. 22176 IS CONSISTENT WITH THE 1989 REVISIONS OF FEECA

The intent of the Florida Legislature in promulgating FEECA (the Florida Energy Efficiency and Conservation Act) is evident from the Act itself, as are the Commission's responsibilities in implementing the Act. Section 366.81 contains the legislative finding and declaration that it is critical to utilize the most efficient and cost-effective energy conservation systems in order to protect the health, prosperity and general welfare of the State of Florida and its citizens. It is stated that reduction in, and control of, the growth rates of electric consumption and of weather-sensitive peak demand are of particular importance. This section contains the Legislature's directive to the

Commission to develop and adopt overall goals, and an authorization to the Commission to require each utility to develop plans and implement programs for increasing energy efficiency and conservation within its service area. Finally, this section contains the legislative finding and declaration that FEECA is to be liberally construed in order to meet the complex problems of reducing and controlling the growth rates of electric consumption and reducing the growth rates of weather-sensitive peak demand; increasing the overall efficiency and cost-effectiveness of electricity and natural gas production and use; encouraging further development of cogeneration facilities; and conserving expensive resources, particularly petroleum fuels.

PGS submits that the Commission's directive in Order No. 22176 that both electric and gas utilities encourage the direct use of natural gas in space conditioning and water heating "where such use is a cost-effective method of slowing growth in electric demand" is, on its face, consistent with the plain language of Section 366.81, and with the legislative intent expressed in this section and throughout FEECA.

FPC argues in its Petition herein that the 1989 Florida Legislature considered and rejected the concept of the mandatory promotion of gas usage by electric utilities, and that the gas-promotion requirement of Order No. 22176 is therefore inconsistent with the intent underlying FEECA. FPC's argument is that drafts of the Senate Bill relating to Chapter 366, Florida Statutes (actually, Senate Bill 1224), contained proposed amendatory language in Section 366.82(3) stating that utility conservation programs "may include but are not limited to", various stated measures, including "increasing the use of natural gas to reduce electric demands when such use of natural gas provides net benefits to both the electric consumers and the natural gas consumers". FPC then argues that this portion of Section 366.82(3), as finally amended by the 1989 Florida Legislature, now reads as follows (changes made by the Legislature being indicated in legislative format):

> "Utility programs, which may include variations in rate design, load control, cogeneration, residential energy conservation subsidy, or any other measure within the jurisdiction of the commission which the commission finds likely to be effective; ...."

Again, PGS submits that the legislative intent, and the consistency of the gas promotion portion of the Commission's Order with that intent, is clear from the plain language of FEECA itself. If, however, the Commission deems it necessary to look beyond the statute to determine the intent of the Legislature, then it can just as easily (and certainly more persuasively) be argued that the Legislature omitted the specific gas promotion language mentioned by FPC because the inclusion of such language might well hamper the efforts of utilities and the Commission to accomplish FEECA's objectives due to the proposed requirement that use of natural gas provide net benefits to both electric and natural gas consumers. Further, the Legislature left the statutory language broad, in terms of Commission discretion, by providing that utility programs may include not only the matters specifically enumerated, but also "any other measure within the jurisdiction of the Commission which the Commissions finds likely to be effective". PGS submits that the Legislature did not "consider and reject" the concept of the mandatory promotion of gas usage by electric utilities. Rather, the Legislature -- if it "considered and rejected" anything -- considered and rejected the concept of limiting the Commission's discretion to determine just what measures are "likely to be effective" in accomplishing the objectives of FEECA. In view of the broad discretion given to the Commission by the statute, PGS submits that if the Legislature had intended to reject the concept of mandatory promotion of gas usage by electric utilities, it would have done so directly.

IMPLEMENTATION OF THE GAS PROMOTION REQUIREMENT OF ORDER NO. 22176 WOULD NOT VIOLATE FPC'S RIGHTS OF FREEDOM OF SPEECH UNDER THE FIRST AMENDMENT

FPC argues that the gas promotion portion of Order No. 22176 violates its right of freedom of speech guaranteed by the First Amendment to the United States Constitution. PGS acknowledges that the free speech protection of the First Amendment is made available to state impairment of protected rights by the due process clause of the Fourteenth Amendment [Gitlow v. New York, 268 U.S. 652, 69 L. Ed. 1138 (1925)], and that freedom of speech is also protected by the Florida Constitution's Declaration of Rights [Art. I, §4, Fla. Const. (1968)].

To the extent, therefore, that ᵉ Commission's Order might be deemed to compel FPC to make statements which it would prefer not to make, FPC's First Amendment rights may be involved. Even FPC, however, correctly recognizes in its Petition that the Commission's Order could be valid -- even if it compelled particular speech of FPC, or burdened protected speech -- if it were narrowly tailored and served a compelling state interest. Pacific Gas & Electric Co. v. California P.U.C., 475 U.S. 1, 89 L. Ed. 2d 1 (1986). PGS submits that the gas promotion requirement of the Commission's Order serves a compelling state interest in using cost-effective methods of slowing growth in electric demand, and is narrowly tailored to serve this interest.

Although FPC argues in its Petition that the Legislature has decided that there is no compelling state interest furthered by electric utilities' advocating the use of natural gas, PGS has previously shown, supra, that no such decision by the Legislature can be found.

Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557, 65 L. Ed. 2d 341 (1980), involved a situation the reverse of the instant one. In Central Hudson the New York Public Service Commission ("NYPSC") ordered New York electric utilities to cease all advertising promoting the use of electricity because the state's interconnected utility system had insufficient fuel stocks or sources of supply to meet all customer demands for the winter. Later, once the fuel shortage had eased, the NYPSC, after seeking comments from the public and affected utilities, extended the prohibition against "promotional" advertising on the basis of the state's interests in conserving energy and insuring fair and effective rates for electricity. An electric utility's challenge to this ban on promotional advertising was upheld in the New York state courts. On appeal, the U.S. Supreme Court reversed. The Supreme Court held that the ban on promotional advertising by electric utilities violated the First Amendment. In reaching its decision, the Court found the State of New York's interest in conserving energy sufficient to support suppression of advertising designed to increase consumption of electricity, and found also that the State's interest in energy conservation was directly advanced by the Commission's Order banning promotional advertising. The Court determined, however, that the NYPSC had not demonstrated that its interest in conservation could not be adequately protected by a more limited regulation of the electric utility's commercial expression, and therefore disapproved of the complete suppression of the utility's promotional advertising. 65 L. Ed. 2d 354.

PGS submits that, in the instant case, the Commission's Order is sufficiently narrowly drawn. It requires encouragement of the direct use of natural gas for limited purposes, and only where such use would be a cost effective method of slowing growth in electric demand. Unlike the situation in Central Hudson, supra, FPC would be free to advertise other products, programs, services or conservation methods which it believes could also contribute to slowing such growth in demand -- even in the areas of space conditioning and water heating. FPC would not be prohibited from promoting electric services or conservation measures that would reduce electr demand by diverting such demand from less efficient source. Thus, the gas-promotion requirement of the Commission's Order No. 22176 presents a much less restrictive alternative to advance Florida's interest in energy conservation that did the complete suppression of all promotional advertising involved in Central Hudson. Order No. 22176 does not require that any specific program be developed by either electric or natural gas utilities. It requires only that some programs be developed by such utilities to encourage the direct use of natural gas for certain applications, and such encouragement is required only if direct use of natural gas in such applications is a cost-effective method of slowing growth in electric demand.

Based upon the foregoing, PGS submits that the gas promotion requirement of the Commission's Order does not violate FPC's right to freedom of speech guaranteed by the First Amendment.

IMPLEMENTATION OF THE GAS PROMOTION REQUIREMENT OF ORDER NO. 22176 DOES NOT CONSTITUTE AN UNLAWFUL RESTRAINT OF TRADE

Section 542.18, Florida Statutes, and Section 1 of the Sherman Act (15 U.S.C.A. §1) declare every contract, combination, or conspiracy in restraint of trade or commerce to be unlawful. Section 542.19, Florida Statutes, and Section 2 of the Sherman Act (15 U.S.C.A. §2) proscribe monopolization and attempts to monopolize trade or commerce. Section 542.20, Florida Statutes, provides that any activity or conduct exempt from the provisions of the antitrust laws of the United States is exempt from the provisions of Chapter 542.

In its Petition herein, FPC argues that the gas-promotion requirement of the Commission's Order No. 22176 constitutes a restraint of trade which may be unlawful. PGS assumes for purposes of this brief that FPC's contention is that the alleged restraint of trade may be unlawful under Sections 1 or 2 of the Sherman Act, or Sections 542.18 or 542.19, Florida Statutes, mentioned above. PGS, however, submits that implementation of the Commission's Order need not be deemed a restraint of trade. Implementation of the order does not, as asserted by FPC, involve FPC's encouraging its customers to refrain from purchasing its product. Nor does implementation of the order require FPC to surrender any markets to its competitors. PGS submits that FPC may implement the order without affirmatively marketing gas on behalf of PGS or any other gas utility. Both gas and electricity will continue to be available to a customer (if gas is available in the customer's area at all), and such customer will continue to have a choice with respect to which form of energy he will use for any particular purpose. The Commission's Order does not require that FPC refrain from selling electricity for any purpose (even if FPC should encourage its customers to refrain from purchasing electricity for certain purposes). FPC would not be required to surrender markets to any other utility or to any other product. PGS submits simply that implementation of the Order involves no restraint of trade.

Even if the Commission ha' required FPC and PGS, for example, not to compete in a pa. .cular segment of the energy market in order to achieve the objectives of FEECA, PGS submits that such Order would be exempt from the statutory "restraint of trade" provisions mentioned above under the "state action" exemption to the federal antitrust laws established by Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315 (1943), and, therefore, under Section 542.20, Florida Statutes. It has previously been demonstrated that the gas-promotion requirement of the Commission's Order is consistent with the Legislative purpose and the Commission's duties under FEECA. For the "state action" exemption to the antitrust laws to be applicable, the anticompetitive conduct (or what would otherwise constitute a restraint of trade) must be engaged in pursuant to a "clearly articulated" state policy. See, e.g., Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 55 L. Ed. 2d 364 (1978). This "clear articulation" requirement does not mean that the action taken pursuant to the State's requirement be compelled, only that it be taken pursuant to a clearly articulated state policy. Town of Hallie vs. City of Eau Claire, 471. U.S. 34, 85 L. Ed. 2d 24 (1985). Finally, the otherwise anticompetitive conduct must be actively supervised by the State.

PGS submits that the Commission's Order herein meets the clear articulation and active state supervision requirements necessary for any restraint of trade occasioned by such Order to be immunized from the antitrust la under the "state action" exemption of Parker v. Brown, supra, as made applicable to wholly intrastate activities by Section 542.20, Florida Statutes.

GAS USE PROGRAMS DEVELOPED BY ELECTRIC UTILITIES NEED ONLY BE COST EFFECTIVE

FPC asserts in its Petition that there is no methodology in existence to measure the cost-effectiveness of gas-promotion programs to gas utilities, and urges that until this shortcoming has been remedied, no gas usage conservation program should be filed. FPC also argues that FEECA requires that conservation programs be cost-effective to both electric and gas utilities -- that is, that there is a "two-part cost-effectiveness test". PGS submits that neither assertion is correct.

While FPC is correct in asserting that the cost-effectiveness methodology specified in Rule 25-17.008, Florida Administrative Code, applies only to electric utilities, it is only partially correct. That methodology permits an assessment of the cost-effectiveness of a particular program to be made from the standpoint of its costs and benefits to an electric utility and its ratepayers. However, the methodology specified in the rule has been used by the Commission in evaluating the cost-effectiveness of natural gas utility conservation programs as well, since such programs have (since their initial development in 1981) provided benefits primarily in the area of reducing or controlling growth rates of electric consumption and electric demand.

Likewise, FPC is partially correct in asserting that no methodology corresponding to that set forth in Rule 25-17.008 currently exists by virtue of Commission rule for the purpose of assessing the cost-effectiveness of a conservation program with respect to the efficient use of gas. There is, however, nothing "magic" to a determination of cost-effectiveness. It is necessary merely to quantify the costs incurred or caused to be incurred by implementation of a particular program, then to quantify the benefits to be derived by implementing the program. If the benefits exceed the costs, the program is cost-effective. If the costs exceed the benefits, the program is not cost-effective.

FEECA does not specify to whom a utility's plan or program must be cost-effective. Nor does it require the Commission to adopt any particular cost-effectiveness methodology. FEECA simply requires that programs be cost-effective. It is possible that no single cost-effectiveness methodology would be appropriate for the evaluation of every conceivable utility program. This fact is anticipated by Rule 25-17.008 itself. Subsection (3) of the rule states that the rule does not require the Commission to approve a program shown to be cost-effective under it, nor does it preclude the Commission from approving a program shown by the rule not to be cost-effective. Subsection (4) provides that nothing in the rule shall be construed as prohibiting any party from propc 'ng additional formats for reporting cost-effectiveness data (L .c shifts the burden of proof as to why a proposed additional format is superior to the format prescribed by the rule). PGS submits that the absence -- in rule form -- of a gas cost-effectiveness methodology should not prevent the filing of gas conservation programs. Whether the cost-effectiveness methodology used by the utility proposing a program is valid is a separate issue which is beyond the scope of this brief, and which can be decided by the Commission at the time such a program is filed.

FPC appears to argue that there is a two-part cost-effectiveness test contemplated by FEECA and the Commission's rules. FPC refers, for example, to that portion of Section 366.81 which finds that FEECA is to be liberally construed in order to meet the complex problems of, among other things, increasing the overall efficiency and cost-effectiveness of electricity and natural gas production and use. FPC's argument appears to be that if a program does not increase the cost-effectiveness of both electricity and natural gas production and use, such program would be inconsistent with FEECA. PGS submits that this assertion boarders on the ridiculous. Common sense alone would indicate that if a program is cost-effective in one area, it need not have any impact in another. That is, each program approved by the Commission need not be a universal panacea.

FPC also argues that a p jram which increases gas consumption may be cost-effective to FPC, but may not meet an as yet unspecified gas cost-effectiveness test. PGS submits that whether such program is cost-effective to FPC or to a gas utility and its ratepayers is an issue of fact to be determined by the Commission, and is beyond the scope of the this brief.

In summary, the lack of a Commission rule setting forth a specific cost-effectiveness methodology for the evaluation of gas utility or gas usage programs is no reason for finding the gas promotion requirement of Order No. 22176 invalid or ill advised.

CONCLUSION

For the foregoing reasons, PGS submits that Order No. 22176 is valid in all respects and consistent with the provisions of FEECA.

Respectfully Submitted,

Ansley Watson, Jr.

ANSLEY WATSON, JR.
Macfarlane, Ferguson, Allison & Kelly
Post Office Box 1531
Tampa, Florida 33601-1531
(813) 223-2411
Attorneys for Peoples Gas System, Inc.

CERTIFICATE O' SERVICE

I HEREBY CERTIFY that a true py of the foregoing has been furnished this 3rd day of January, 1990, to all parties of record in the above docket, by regular U.S. Mail.

Ansley Watson, Jr.

Ansley Watson, Jr.