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January 3, 1990

Mr. Steve C. Tribble, Director
Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32301

Re: Docket No. 890737-PU

Dear Mr. Tribble:

Enclosed for filing are the original and fifteen (15) copies of Florida Power & Light Company's Brief in the above docket.

Please acknowledge receipt of this document by stamping the extra copy of this letter.

Thank you for your assistance.

Yours very truly,

Charles A. Guyton

Charles A. Guyton

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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
	)	Filed: Jan. 3, 1990

BRIEF OF FLORIDA POWER & LIGHT COMPANY

Florida Power & Light Company ("FPL"), in accordance with the procedure specified in Order No. 22306, hereby files this Brief on the issue raised by Florida Power Corporation ("FPC") in its December 5, 1989 Petition For a Limited Proceeding on Proposed Agency Action: the lawfulness of the Commission's directive that electric utilities develop conservation programs which promote the use of natural gas. As discussed below, FPL agrees with FPC that the Commission's directive constitutes an inappropriate invasion of utilities' management prerogative that is inconsistent with the Legislature's intent and that could unconstitutionally compel utilities to engage in speech with which they disagree.

INTRODUCTION

On November 14, 1989, the Commission issued Order No. 22176, a notice of proposed agency action requiring certain

electric and natural gas utilities file detailed conservation plans. The Order identifies four categories of information that are supposed to be included in the plans for electric utilities, denominated as Sections A, B, C and D. Section B is entitled "Natural Gas Programs." It declares that "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 way of slowing growth in electric demand." Section B goes on to require utilities 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 at 5.

FPL fully supports the general thrust of Order No. 22176, which is to move away from arbitrarily-set conservation goals toward the establishment of a process in which utilities are directed to develop and implement cost-effective demand-side activities. This general thrust of the Order protects utilities' planning flexibility, leaving it to them to determine how best to accomplish the objectives of conservation and efficiency. FPL believes that this approach is much more likely to result in utilities pursuing the right mix of demand-side activities and programs than approaches that would impose

external constraints on utilities' f ibility. In fact, FPL proposed much the same approach in a petition to initiate rulemaking filed with the Commission on September 14, 1988.

However, FPL believes that the requirements of Section B are inconsistent with this general thrust. Whereas the rest of Order No. 22176 is intended to leave each utility the discretion to develop, subject to Commission review, the mix of demand-side activities best suited to its own service territory and management philosophy, Section B imposes a specific requirement for utilities to pursue programs that promote the use of natural gas unless such programs can be shown not to be cost-effective. This usurps the very management prerogative that the Order strives to protect.

As discussed in greater detail below, the Florida Legislature has recently considered and rejected an amendment to Chapter 366, Florida Statutes, that would have directed the Commission to require electric utilities to pursue natural gas programs. Thus, the Commission has no legislative mandate for Section B of Order No. 22176. To the contrary, through the rejection of the proposed amendments, the Legislature has sent a strong message to the Commission that imposing an obligation on electric utilities to pursue natural gas programs would not be in the best interests of the State of Florida.

Moreover, aside from the Legislature's intent, Section B of Order No. 22176 could have the effect of compelling utilities to engage against their wishes in speech with which they disagree. FPL sees no way that natural gas programs could be effectively "encouraged" without promotion of them by the sponsoring utilities. Clearly, effective promotion would require utilities to advocate the advantages of the natural gas end uses involved in the programs, advocacy that might be inimical to the management philosophy or strategic goals of those utilities. As discussed in greater detail below, this would abridge the First Amendment to the United States Constitution.

For the reasons discussed herein, FPL urges the Commission to delete Section B from Order No. 22176. Electric utilities may find natural gas programs to be desirable additions to their conservation plans, and if so, they can include discussions of them in the information required under Section A of Order No. 22176. There is no need for Section B other than to compel action by electric utilities that the Legislature has not given the Commission authority to compel, that may violate constitutional protections against compelled speech, and that is inconsistent with the salutary effect of the

rest of Order No. 22176 in encouraging utilities to respond flexibly and creatively to the conservation challenge.

LEGISLATIVE INTENT

In 1980, when Chapter 366 of the Florida Statutes was reviewed comprehensively by the Florida Legislature, the law reenacting it provided for Chapter 366 to be repealed effective October 1, 1989. By "sunsetting" Chapter 366, the Legislature ensured that it would receive another comprehensive review no later than the 1989 legislative session. The Legislature conducted just such a review of Chapter 366 during the 1989 session, culminating in passage of Chapter 89-292 of the 1989 Laws of Florida.

Committees of both the House and Senate conducted extensive hearings on the reenactment of Chapter 366. At the outset of that process, this Commission's Executive Director communicated formally with the Presidents of the Senate and House to express the Commission's views on how Chapter 366 should be amended. By letter dated January 18, 1989, the Executive Director transmitted a mark-up of Chapter 366, reflecting the Commission's proposed amendments. The mark-up proposed to amend Section 366.82(3) so that, if the Commission adopted a conservation plan for a utility that had failed to

implement an adequate plan on its own. the Commission could include programs for "increasing the use of natural gas to reduce electric demands where the use of natural gas provides benefits to both the electric and natural gas consumers...."

The Senate's Economic, Professional and Utility Regulation Committee initially proposed a bill (PCB-EPUR-6) that included the provision quoted above, but a substitute bill was proposed at the first workshop held by the Committee and the above-quoted provision never reappeared in the bill considered and ultimately adopted by the Senate. On the House side, the Public Utility Subcommittee of the Science, Industry and Technology Committee initially proposed a bill (PCB-SIT-1) that did not include the above-quoted provision, and no such provision was ever introduced into the bill considered and adopted by the House. The final product of the House's and Senate's joint efforts on reenactment of Chapter 366--Chapter 89-292--likewise contained no such provision.

Thus, the Commission specifically asked the Legislature for authority to consider the use of natural gas programs to reduce electric demand, and each house of the Legislature independently refused. There can be no more clear rejection of a legislative proposal than this.

Nonetheless, the Commission has persisted in Section B of Order No. 22176 to require electric utilities to do exactly what the Legislature refused to authorize the Commission to do. In fact, Section B would be an even more egregious imposition on electric utilities than the proposal rejected by the Legislature. The Commission asked the Legislature for direction to impose natural gas programs on an electric utility that had failed to implement adequate conservation programs on its own, whereas Section B would impose an obligation to pursue natural gas programs without regard to the adequacy of the rest of a utility's conservation programs.

FPL urges the Commission to heed the Legislature's statement of intent. It is clear and unequivocal. Section B of Order No. 22176 is directly inconsistent with that intent and should be deleted from the Order.

CONSTITUTIONAL PROTECTIONS AGAINST COMPELLED SPEECH

Most typically, the First Amendment is invoked to protect the rights of people (including corporations) to say what they wish. However, there is also a well-recognized right under the First Amendment to be protected against compulsion to say things with which one does not agree. These so-called

"negative First Amendment rights" have been recognized as extending to corporate speech as well as to that of individuals.

A recent United States Supreme Court case on negative First Amendment rights is particularly relevant here. In Pacific Gas & Electric Co. v. Public Utilities Commission of California, 475 U.S. 1, 106 S.Ct. 903 (1986), the Court held that the PUC could not constitutionally compel PG&E to include in its billing envelopes inserts from a consumer group which expressed views contrary to those of the utility, absent a compelling state interest (which the court did not find to be present). The plurality opinion of the Court reached this decision because

> (f)or corporations as well as individuals, the choice to speak includes within it the choice of what not to say . . . . Were the government freely able to compel corporate speakers to propound political messages with which they disagree, this protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next. . . . The danger that (PG&E) will be required to alter its own message as a consequence of the government's coercive action is a proper object of First Amendment solicitude, because the message itself is protected under our (prior) decisions . . . . Where, as in this case, the danger is one that arises from a content-based grant of access to private property, it is a danger that the government may not impose absent a compelling interest.

475 U.S. at 16-17, 106 S.Ct. at 912.

To the extent that this Commis on's directive in Section B of Order No. 22176 can be construed as compelling utilities to engage in speech with which they disagree, it is even more intrusive on speech and is far less justifiable than the regulation at issue in PG&E. When a regulation goes beyond directing dedication of private property to another's speech and commands that speech be published as one's own, it simply cannot be justified under the First Amendment. See Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428 (1977).

Although involving restrictions on a utility's freedom to speak rather than compulsion of speech, the Supreme Court's decision in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343 (1980) is also relevant here. The PSC had adopted a regulation banning utility advertising that promoted the use of electricity. The Court overturned the regulation as an unconstitutional interference w th Central Hudson's First Amendment rights. While the Court found that the promotion of energy sales was commercial speech and hence not accorded the same level of protection as other constitutionally guaranteed expression, it held that commercial speech is nonetheless entitled to protection. Regulation of commercial speech is permitted by the First Amendment only if the government's interest in regulation is substantial, if the regulation

directly advances the government's asserted interest, and the regulation is no more extensive than necessary in order to serve that interest. The Court found that the PSC's ban on promoting electric consumption had a direct link to the goal of limiting energy consumption, but that the ban was more extensive than necessary to achieve that goal. 447 U.S. at 569-70, 100 S.Ct. 2353-54.

If Section B of Order No. 22176 were construed as requiring utilities to promote natural gas programs, it would be a far more burdensome restriction on speech than mere regulation of commercial propositions. It would, in effect, compel utilities to engage directly in speech with which they may disagree. This is, in fact, what Section B appears to do. It directs utilities to "encourage" the use of natural gas, unless they can show that doing so would not be cost-effective. FPL knows of no way to "encourage" the use of a product without promoting it and knows of no way to promote it effectively without advocating its advantages. Thus, a utility would be compelled by Section B to promote natural gas programs by, among other things, advocating the advantages of natural gas usage, even if this advocacy were inimical to the management philosophy or strategic goals of the utility. Understood this way, Section B constitutes regulation of speech that could be justified only

by the most compelling of state interests, and no such interests exist here.

However, even if Section B were treated as regulation of commercial speech, it fails to meet the Central Hudson test as a permissible restriction on such speech. While Florida has a valid interest in controlling electrical demand growth, increasing the use of natural gas is, at best, an indirect way to further that interest. There is no reason for the Commission to require that utilities pursue any particular demand-control strategy, so long as the utilities adequately control demand. Thus, Section B does not directly advance Florida's interest in controlling electric demand, as Central Hudson requires. Moreover, Section B is more extensive regulation than is necessary to serve Florida's interest in controlling electric demand. There are clearly options available to the Commission that do not involve compelling utilities to engage in speech with which they disagree, as Section B would do.

CONCLUSION

Section B of Order No. 22176 is an unnecessary intrusion into utilities' management prerogative. It is contrary to the Legislature's intent, and may be

unconstitutional because it could be co.strued as compelling utilities to engage in speech with which they may not agree. For these reasons, the Commission should delete Section B from Order No. 22176.

Respectfully submitted,

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