M E M O R A N D U M

February 16, 1990

TO : DIVISION OF RECORDS AND REPORTING

FROM : DIVISION OF LEGAL SERVICES (BROWNLESS) /dbw

RE : DOCKET NOS. 890737-PU - ORDER APPROVING AFUDC RATE

Attached is an Order Approving AFUDC Rate in the above-referenced docket which is ready to be issued.

(6058L)SBr:bmi

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Implementation of Section 366.80-.85. Florida Statutes, Conservation Activities of Electric and Gas Utilities.	)	DOCKET NO. 890737-PU
	)	ORDER NO. 22586
	)	ISSUED: 2-21-90

The following Commissioners participated in the disposition of this matter:

MICHAEL McK. WILSON, Chairman
THOMAS M. BEARD
BETTY EASLEY
GERALD L. GUNTER
JOHN T. HERNDON

FINAL ORDER

BY THE COMMISSION:

On November 14, 1989, the Commission issued Proposed Agency Action Order No. 22176 requiring that electric utilities "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. On December 5, 1989, Florida Power Corporation (FPC) filed a protest of that order and requested an informal Section 120.57(2), Florida Statutes, hearing limited to the legal issue of the authority of the Commission to require electric utilities to develop conservation programs which promote the use of natural gas. In Order No. 22306, issued on December 12, 1989, Commissioner Gunter, as prehearing officer, granted that request and scheduled January 3, 1990 as the date on which briefs would be due. Pursuant to Order No. 22306, FPC, Florida Power and Light Company (FPL), Gulf Power Company (Gulf), Tampa Electric Company (TECO), and Peoples Gas System, Inc. (Peoples) timely filed briefs on January 3, 1990.

The briefs, as one might expect, are divided into two groups: those of the four investor-owned electric utilities arguing that the Commission does not have the authority to require them to develop and promote cost-effective natural gas programs and Peoples' brief, the only gas company in the state subject to the provisions of FEECA, arguing that the Commission does, in fact, have that authority.

Florida Statutes, (FEECA), arguing that the Commission does, in fact, have that authority.

The electric utilities make essentially four arguments in support of their position. First, that the Legislature rejected this idea in the Sunset Review of Chapter 366 during the last session. Second, that requiring electric utilities to do this will violate their corporate constitutional right not to associate with speech with which they disagree. Third, that FEECA requires that conservation programs be cost-effective for both electric and natural gas company ratepayers. Since there is no cost-effectiveness test for natural gas utilities, the electric utilities argue that this order cannot be implemented until such a test has been devised. Fourth, requiring electric utilities to develop a competitor's market share of the space heating market is anticompetitive and in violation of Florida and federal antitrust laws.

Legislative intent

FPC, FPL and TECO all argue that the Legislature did not intend for electric utilities to promote the use of natural gas. As evidence of this intent they cite the fact that the Senate version of the 1989 revision of FEECA, Section 366.82(3), initially contained the following language:

> Utility programs may include, but are not limited to, 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. . . .

S.B. 311-1622-89, 17 (emphasis added).

This language was missing from the final version of that bill (S.B. 1224), from the companion House bill (PCB-SIT-1) and ultimately from the statute as finally enacted (Chapter 89-292, Section 15, Laws of Florida (1989). FPL points out that the deleted language was initially proposed by the Commission in a letter, dated January 18, 1989, sent to the President of the Senate and the Speaker of the House by the Commission's Executive Director. As proposed by the Commission, and initially reflected in the language of S.B.

311-1622-89, development of this program would occur only if the utility had failed to implement an adequate plan of its own. Having failed to implement this restricted use of natural gas development, FPL argues that the Legislature clearly intended to restrict its use on the broader scale ultimately ordered by the Commission.

Peoples counters this position by saying that the Commission's directive, on its face, is consistent with the broad language of FEECA. FEECA's intent section, Section 366.81, Florida Statutes, states that the act is to be liberally construed 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.

Chapter 89-292, Section 14, Laws of Florida (1989).

Promoting the use of natural gas where cost-effective, Peoples argues, clearly fulfills the intent expressed by the Legislature during the last session.

Peoples also argues that the deletion of the specific language requiring promotion of gas usage by electric utilities could just as easily indicate that the Legislature didn't like the restrictive use of such programs only where they could provide net benefits to both electric and natural gas ratepayers. Finally, Peoples contends that if the Legislature had intended to reject the concept of mandatory promotion of natural gas by electric utilities, it would have included language which specifically prohibited such action.

We agree with neither the interpretation of Legislative intent advanced by the electrics nor that advocated by Peoples. In our opinion, not much significance can be attached to the deletion of this language at the proposed legislation stage. We are more concerned that this body does

not have the statutory authority to require electric utilities to implement a specific type of program to meet FEECA goals if the utility has developed other programs which allow it to comply with the conservation and efficiency goals established by the Commission and outlined by Section 366.82(2), Florida Statutes (1989).

This position is supported by the language of Section 366.82(3), Florida Statues (1989), which states:

> (3) Following the adoption of goals pursuant to subsection (2), the commission shall require each utility to develop plans and programs to meet the overall goals within its service area. . . . If the commission disapproves a plan, it shall specify the reasons for disapproval, and the utility whose plan is disapproved shall resubmit its modified plan within 30 days. Prior approval by the commission shall be required to modify or discontinue a plan, or part thereof, which has been approved. If any utility has not implemented its programs and is not substantially in compliance with the provisions of its approved plan at any time the commission shall adopt programs required for that utility to achieve the overall goals. Utility programs 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; this provision shall not be construed to preclude these measures in any plan or program.

(Emphasis added.)

Except for the insertion of the word "program(s)", this language is the same as that found in the 1987 Florida Statutes. Our previous orders have interpreted this language as only giving us the authority to approve or disapprove conservation plans and programs submitted by the electric utilities, not to mandate a specific type of program. This is

similar to our authority regarding tariffs submitted under the File and Suspend Statute, Section 366.06(4), Florida Statutes (1989). In re: Conservation Plan of Tampa Electric Company, Docket No. 800701-EU, Order No. 11209, issued on September 29, 1982; In re: Conservation plan of the City of Gainesville, Docket No. 9906, issued on March 31, 1981. When a utility can demonstrate that its programs will allow it to meet its goals, are cost-effective applying the test found in Rule 25-17.008, Florida Administrative Code, and can be monitored, we have consistently approved them. See: In re: Conservation plan of Tampa Electric Company, Docket No. 800701, Order No. 11114, issued on August 26, 1982; In re: Conservation plan of Florida Power and Light Company, Docket No. 800662-EU, Order No. 11111, issued on August 26, 1982; In re: Conservation plan of Florida Power Corporation, Docket No. 800663, Order No. 11112, issued on August 26, 1982; In re: Petition of Gulf Power Company for continuation of its Good Cents New Home Program, Docket No. 860718-EG, Order No. 19742, issued on July 28, 1988.

The language of the statute quoted above allows us to dictate specific programs only when the utility either has failed to develop and get our approval for some type of cost-effective conservation plan or program, or having gotten a program or plan approved, has failed to implement or adhere to it. See: In re: Conservation plan of the City of Mount Dora, Docket No. 800684-EG, Order No. 10754, issued on April 29, 1982; id., Order No. 11121, issued on August 30, 1982.

Thus, we find that it is premature to require the electric utilities to develop or submit for approval gas promotion programs. In keeping with the initial language sent to the Legislature by the Commission in 1989, this action is only authorized by Section 366.82(3) when an electric utility has failed to meet its goals via its own programs. Although it may be true that the increased use of natural gas for space and water heating will reduce the peak demand of electric utilities, there are other means by which this can be accomplished. The language of FEECA gives the electric utilities the right to pursue those alternatives.

First Amendment Freedom of Speech Rights

TECO, FPL and FPC all argue that if forced to promote the use of natural gas for space and water heating, their federal and state First Amendment rights of commercial speech will be

violated. The electrics rely primarily on two United States Supreme Court cases: Central Hudson Gas and Electric Corporation v. Public Service Commission of New York (Hudson), 447 U.S. 557, 65 L.Ed. 2d 341 (1980) and Pacific Gas and Electric Company v. Public Utilities Commission of California (Pacific Gas), 475 U. S. 1, 89 L. Ed. 2d 1 (1986). In Hudson, the Court found that the public service commission's complete ban of promotional advertising (advertising which promoted an increase in electric demand either on or off-peak) by electric utilities violated the First Amendment. This finding was made even where the state interest, conservation, was found to be compelling. In Pacific Gas, the Court also found that an electric utility's First Amendment rights were violated where it was forced to allow a consumer group to use the "extra space" in its billing statements to raise funds and voice opinions hostile to the economic interests of the utility.

The tests to be applied to the state regulation of commercial speech as articulated in these cases is as follows: 1) is it protected commercial speech. i.e., speech which is not misleading, inaccurate, deceptive or concern illegal activity; 2) is the asserted governmental interest substantial (compelling); 3) does the regulation directly advance the governmental interest asserted and 4) is the regulation more extensive than is necessary to serve that interest (narrowly drawn). 65 L.Ed. 2d at 351; 89 L.Ed. 2d at 14.

Our finding that we do not have the statutory authority to require electric utilities in the first instance to develop cost-effective conservation programs for the promotion of the use of natural gas removes the need for us to reach this issue. That being the case, we make no finding on the constitutionality of requiring electric utilities to promote the use of natural gas.

Neither do we need to reach the cost-effectiveness or antitrust issues raised by the electrics and will make no finding on whether the required promotion of the use of natural gas by the electrics violates state and federal antitrust laws or cannot be implemented without a gas cost-effectiveness test.

Therefore, it is

ORDERED by the Florida Public Service Commission that

requiring electric utilities to develop cost-effective conservation programs for the promotion of the use of natural gas in the first instance is contrary to the 1989 revision of the Florida Energy Efficiency and Conservation Act, Sections 366.80-.85 and 403.519, Florida Statutes. It is further

ORDERED that electric utilities subject to the Florida Energy Efficiency and Conservation Act are hereby relieved of the requirement of Order No. 22176 to "either develop cost-effective programs for the use of natural gas or provide an explanation why such programs cannot be developed."

By Order of the Florida Public Service Commission, this 21st day of FEBRUARY, 1990.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)
(6058L)SBr:bmi

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an

electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.