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Florida Power
CORPORATION

January 3, 1990

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Mr. Steve C. Tribble
Director of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399-0872

Re: Docket No. 890737-PU

Dear Mr. Tribble:

Enclosed for filing in the above-referenced docket is an original and fifteen (15) copies of Florida Power Corporation's Brief.

Please acknowledge receipt and filing of the above by completing the form provided on the enclosed copy of this letter and returning same to this writer.

Very truly yours,

James P. Fama
James P. Fama

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FPSC-RECORDS/REPORTING

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Implementation Of)
§ 366.80-.85, Florida Statutes,)
Conservation Activities Of)
Electric And Natural Gas)
Utilities)

Docket No. 890737-PU

BRIEF OF FLORIDA POWER CORPORATION

January 3, 1990

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DOCUMENT NUMBER-DATE

00074 JAN -3 1990

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I. INTRODUCTION

On November 14, 1989, the Commission issued in this docket a Notice Of Proposed Agency Action, Order On Conservation. The order provided that any person whose substantial interests were affected by the proposed action may file, on or before December 5, 1989, a petition for a hearing. Pursuant to that order and Fla. Admin. Code Rules 25-22.029(4) and 25-22.036, on December 5, 1989, Florida Power Corporation (Florida Power) petitioned for an informal proceeding under § 120.57(2), Fla. Stat. (1987), limited to briefing of one issue--the lawfulness of the Commission's directive that electric utilities develop conservation programs which promote the use of natural gas, contained in Section B of the November 14 Order:

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 at 5.

Florida Power is one of the utilities ordered to comply with this directive, and therefore has a substantial interest in the decision at issue in this case. The electricity sold by Florida Power competes directly with natural gas for use in space conditioning and water heating, the two areas of the energy market to which Section B of the Commission's order is directed. Implementation of the Commission's order will therefore have a direct and substantial impact upon Florida Power's sales and revenues.

On December 12, 1989, the Presiding Officer issued an Order On Procedure granting Florida Power's request for an informal § 120.57(2), Fla. Stat. (1987) hearing, and ordered briefs to be filed on January 3, 1990.

II. SUMMARY OF ARGUMENT.

Section B of the Commission's November 14 Order suffers from three legal defects. First, it is contrary to the Florida Legislature's 1989 revision to the Florida Energy Efficiency And Conservation Act (FEECA), § 366.82(3), Fla. Stat. In revising FEECA, the Legislature rejected the idea that electric utilities develop conservation programs which promote the use of natural gas. Second, the Order is flawed because its implementation will violate Florida Power's constitutional right to not associate with speech with which Florida Power disagrees.

Third, conservation programs involving electric utility promotion of natural gas, even if legal, cannot be ordered until

the Commission has developed a full and complete cost-effective test against which such programs can be measured. FEECA instructs the Commission to develop a test to gauge the cost-effectiveness of gas usage from both the electric utility's perspective and from the gas utility's perspective. The Commission has failed to develop the latter. Hence, even if it were lawful to order electric utilities to develop conservation programs to promote gas, such an order cannot be promulgated until the Commission has developed a gas utility cost-effectiveness test against which such programs can be evaluated.

III. THE PROPOSED ORDER IS CONTRARY TO THE 1989 REVISION OF THE FLORIDA ENERGY EFFICIENCY AND CONSERVATION ACT.

The Senate version of the 1989 revision of FEECA, § 366.82(3), Fla. Stat. (1989), contained, in pertinent part, 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. 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;

S. B. 311-1622-89, 17 (emphasis added). See attached excerpted draft of Senate bill. The final version of the bill excluded the language underlined above. The pertinent part of § 366.82(3), Fla. Stat. (1989) now reads as follows:

Utility programs 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;

From this legislative history, it is plain that the legislature considered and rejected the concept of the promotion of gas usage by electric utilities. The Commission's November 14 order is therefore inconsistent with the statutory intent underlying FEECA.

IV. IMPLEMENTATION OF THE PROPOSED ORDER WILL VIOLATE FLORIDA POWER'S FIRST AMENDMENT RIGHTS OF FREEDOM OF SPEECH.

The Constitutional guarantee of free speech extends to corporations such as Florida Power as well as to individuals. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978). Just as the First Amendment prohibits improper restraints on the voluntary public expression of ideas, there is necessarily a concomitant freedom not to speak publicly, and to remain silent. Wooley v. Maynard, 430 U.S. 705, 714 (1977).

Florida Power has a constitutional right not to associate with speech with which it disagrees. Pacific Gas & Elec. Co. v. California Pub. Util. Comm'n, 475 U.S. 1, 11 (1986). In this case, the association with objectionable speech is the promotion of gas use through Florida Power's conservation programs. The Commission's order is unlawful on that ground alone.

However, the order goes well beyond association with objectionable speech, and indeed requires Florida Power's adoption of such speech as its own. The idea that Florida Power's goodwill and energy expertise should be utilized to market natural gas--a

business in which Florida Power is not engaged--is particularly objectionable, from both a public policy standpoint and a constitutional standpoint.

While Florida Power does not seek to avoid debate over which energy form a customer should use, Florida Power does have a constitutional right to be free from regulation which requires Florida Power to enhance the voice of its competitor. Id. at 14.

The Commission's order might be constitutionally valid if it were narrowly tailored and served a compelling state interest. However, the order fails on both counts. As discussed above, the legislature has decided that there is no compelling state interest furthered by electric utilities advocating the use of natural gas. Further, broadening conservation programs to encourage gas usage in a way far beyond the marketing efforts of the gas utilities themselves, is not a narrowly tailored means of regulation. In short, from a constitutional perspective, marketing gas should be left to gas utilities, not electric utilities.

V. ANY GAS USE CONSERVA'ION PROGRAMS DEVELOPED BY ELECTRIC UTILITIES HAVE TO BE COST-EFFECTIVE FOR GAS UTILITIES AS WELL; SUCH PROGRAMS CAN BE ENTERTAINED ONLY AFTER A GAS COST-EFFECTIVENESS TEST HAS BEEN DEVELOPED IN DOCKET 891324-EU, OR IN ANOTHER COST-EFFECTIVENESS PROCEEDING.

Assuming, arguendo, that it is lawful for the Commission to mandate electric utility conservation programs which promote natural gas, there currently is no way for the Commission to evaluate such programs adequately. While there exists a methodology to measure the cost-effectiveness of programs with

respect to electric utilities, no corresponding methodology exists to measure their cost-effectiveness to gas utilities. Hence, even if it were lawful to require Florida Power to promote gas use in its conservation programs, these programs can be filed with the Commission only after the gas utility cost-effectiveness test required by FEECA has been developed.

A. FEECA Requirements Have Not Been Met.

FEECA requires that conservation programs be cost-effective to both electric and gas utilities:

The Legislature further finds and declares that §§ 366.80-366.85 and 403.519, Fla. Stat. (1987), are to be liberally construed in order to meet the complex problems of...increasing the overall efficiency and cost-effectiveness of electricity and natural gas production and use....

§ 366.81, Fla. Stat. (1987).

While the Legislature found that the "(r)eduction in, and control of, the growth rates of electric consumption and of weather-sensitive peak demand are of particular importance," it also indicated that the Commission should "adopt goals and approve plans related to the conservation of electric energy and natural gas usage." § 366.81, Fla. Stat. (1987) (emphasis added).

The Commission's rules track this statutory directive: "The Florida Energy Efficiency and Conservation Act requires increasing the efficiency of the electric and natural gas systems of Florida and the end use of these sources of energy...." Fla. Admin. Code Rule 25-17.001(2). See also Fla. Admin. Code Rule 25-17.001(3):

"The general goals and methods for increasing the overall efficiency of the bulk electric power system and natural gas system of Florida...are an ongoing part of the practice of every well managed utility's programs...."

Notwithstanding the directive of FEECA to promote the conservation of gas as well as electricity, and the Commission's own regulations, the cost-effectiveness methodology specified in Fla. Admin. Code Rule 25-17.008 applies only to electric utilities. See Fla. Admin. Code Rule 25-17.008(1).

B. The Lack Of A Gas Utility Cost-Effectiveness Test Results In Commission Policy Being Based On Untested Assumptions.

As no gas utility cost-effectiveness methodology exists, the Commission's November 14 Order, without evaluation or rigor, implicitly assumes that expanded gas use is cost-effective for gas utilities as well as electric utilities. This assumption well may be unwarranted.

For example, the November 14 Order contemplates conversion of space heating from electric to gas. While this might be cost-effective for Florida Power, the Commission has developed no test to determine whether such conversion would also necessitate extensive, non-cost-effective expansion of gas transmission and distribution lines. Contrary to both FEECA and the Commission's regulations, widespread gas conversion may result in an expansion of gas facilities which is neither cost-effective for the gas utility, nor for the State of Florida, especially if such

conversion results in unnecessary duplication of electric facilities.

Along the same lines, the Commission's Order makes another implicit assumption, also without the benefit of a cost-effectiveness analysis. The Order assumes that even though the Florida Gas Transmission Company's pipeline is over-subscribed, economically priced gas will be available in the future to meet the peak load which would otherwise be met through an electric power plant addition.

In short, the accuracy of these gas usage assumptions must be tested if the Commission is going to rely upon them to set policy, particularly a policy so extreme as to mandate that electric utilities promote their competitors' product.

The Commission recently instituted a cost-effectiveness proceeding for electric utilities in Docket No. 891324-EU. Florida Power submits that Docket No. 891324-EU should be expanded, or a separate docket opened, to consider a gas utility cost-effectiveness test as well. Only after such a test has been developed, can the Commission even entertain electric utility conservation programs which promote gas.

VI. CONCLUSION.


For all of the reasons stated above, the Commission should delete the requirement in the November 14 Order that electric utilities develop conservation programs that promote the use of natural gas.

Dated this 3rd day of January, 1990.

Respectfully Submitted,

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