FLORIDA PUBLIC SERVICE COMMISSION

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M E M O R A N D U M

January 26, 1990

TO: STEVE TRIBBLE, DIRECTOR
DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (VANDIVER, BROWNLESS)
DIVISION OF ELECTRIC AND GAS (WALSH)

RE: DOCKET NO. 890737-PU - IMPLEMENTATION OF SECTION 366.80-.85, FLORIDA STATUTES, CONSERVATION ACTIVITIES OF ELECTRIC AND GAS UTILITIES.

AGENDA: FEBRUARY 6, 1990 - CONTROVERSIAL - PARTIES MAY NOT PARTICIPATE

PANEL: FULL COMMISSION

CRITICAL DATES: NONE

ISSUE AND RECOMMENDATION SUMMARY

ISSUE 1: Does the Florida Public Service Commission have the authority to require electric utilities to develop cost-effective conservation programs which promote the use of natural gas?

PRIMARY RECOMMENDATION (VANDIVER): Yes.

SECONDARY RECOMMENDATION (BROWNLESS): No. Requiring electric utilities to develop cost-effective conservation programs for

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the promotion of the use of natural gas is contrary to the Florida Energy Efficiency and Conservation Act, Sections 366.80-366.85 and 403.519, Florida Statutes, (FEECA) and violates the First Amendment freedom of speech rights of the electric utilities.

BACKGROUND

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.

DISCUSSION

PRIMARY RECOMMENDATION: While the legal issues raised in this case are not beyond debate, the Commission could conclude its order is legally sound.

The first issue which must be addressed is whether the Commission has statutory authority to require electric utilities to develop conservation programs which encourage natural gas in space and water heating. If the answer to this question is no, the other legal issues need not be reached.

Commission Authority to Require Electric Utilities to Develop Cost-Effective Conservation Programs Encouraging Natural Gas Use.

The electric utilities argue that in the 1989 Session, the Legislature "considered and rejected the concept of promotion of gas usage by electric utilities" (FPL brief at 4). They point out that the Commission proposed language to do just that and although the language initially appeared in a proposed Senate Committee Bill, it was never enacted. Admittedly, Courts have used the Legislature's failure to enact a specific proposal as evidence of legislative rejection of it. However, in this case, given the broad powers given to the Commission under FEECA and the further direction that those power be liberally construed to achieve the stated

goals, it can also be concluded that the Legislature did not include the language because it was unnecessary. The Commission already had the authority to require the implementation of programs to increase use of natural gas.

As pointed out by Peoples Gas (brief at 3), the Legislature mandates the use of the "most efficient and cost-effective energy conservation systems" and the reduction "of weather-sensitive peak demand [is] of particular importance." Also, FEECA is to be liberally construed in order to reduce electric consumption growth rates, weather-sensitive peak demand, and to increase "the overall efficiency and cost-effectiveness of electricity and natural gas production and use." Certainly a directive to encourage the use of natural gas in space and water heating when it is "a cost-effective method of slowing growth in electric demand", is within the b oad grant of authority to the Commission.

The secondary recommendation raises an issue not raised by the part·es regarding statutory authority - can the Commission direct the implementation of a specific program, where a utility has developed other programs which allow it to meet

established goals? Section 366.82(3) suggests the Commission can only approve or disapprove utility developed programs and cannot require the implementation of a specific program. However, the overriding mandate of FEECA is that utilities make use of the most efficient and cost-effective systems to reduce weather-sensitive peak demand. Where encouraging use of natural gas space and water heating is shown to be one of the most efficient and cost-effective ways of reducing weather-sensitive peak and utilities fail to include such a program, the Commission can disapprove the utilities' plan. At this point, the Commission has only directed development of a cost-effective program or an explanation of why one can't be developed.

Commission's Order Does Not Violate Utilities' Freedom of Speech.

Having reached the conclusion that the Commission has the requisite statutory authority, the legal issue becomes whether the directive violates the electric utilities' freedom of speech. The electric utilities rely on two U.S. Supreme Court's decisions, Pacific Gas & Electric Co. v. Public Utilities Commission of California, 475 U.S. 1, 106 S. Ct. 903 (1986), and Central Hudson Gas and Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S. Ct. 2343

(1980), for their position that the directive is unconstitutional.

In the _Pacific Gas_ case, the California PUC had required a privately-owned utility to include in its billing envelopes messages and information of a consumer interest organization, TURN. The utility argued that it had a first amendment right not to help spread a message with which it disagreed. The Court (in a plurality opinion, which means they agreed on the bottom line, but could not agree on how to get there) found for the utility. Corporate speech, as well as individual speech, is protected under the Constitution and freedom of speech includes the freedom not to speak. The California PUC's requirement had the effect of forcing the utility to associate with potentially hostile views. That association had the potential for forcing the utility to speak where it would prefer to remain silent. Since the freedom of speech includes the freedom not to speak, the requirement "burdened protected speech." The Court acknowledged that the requirement could still be valid, notwithstanding the burden on protected speech, if it were a narrowly tailored means of serving a compelling state interest. The Court found no compelling state interest.

In the Central Hudson case, the New York PUC, during the fuel crisis of the 1970's, ordered utilities to cease all advertising which promoted the use of electricity. Three years later, once the fuel shortage had eased, the prohibition was continued on the "basis of the state's interest in conserving energy and ensuring fair and effective rates for electricity." The utilities argued the order violated their freedom of speech because it completely suppressed all promotional advertising. The Court found for the utilities. The corporate commercial speech of the utilities was protected. Since it was protected, any restriction must directly advance the governmental interest asserted and the restriction cannot be more extensive than necessary to serve that interest. The Court held that there was a substantial state interest in promoting energy conservation ("We accept without reservation the argument that conservation, as well as the development of alternative energy sources, is an imperative national goal."). However, because the order suppressed speech that in no way impaired the state's interest in energy conservation, it was "more extensive than necessary" and, therefore, was invalid.

The Central Hudson case set out the four-part analysis to be used in commercial speech cases:

1. Is the expression protected?
2. Is there a substantial governmental interest which justifies the regulation or restriction of the protected speech?
3. Does the regulation or restriction directly advance that governmental interest?
4. Is the regulation or restriction no more extensive than is necessary?

While the New York Commission's order failed under the criteria set out by the Court, it appears the Commission order would pass constitutional muster. Assuming that the utilities' corporate speech is protected, the Commission's requirement furthers the state's substantial interest in energy conservation and the reduction of weather-sensitive peak demand. Encouraging the use of natural gas for space and water heating, where it is cost effective, directly contributes to reducing the weather-sensitive peak demand. The closer question is whether the method chosen by the Commission is no more extensive than necessary to serve that interest.

The Court, in the Central Hudson case, indicated that requiring more information in utility advertising would be acceptable where complete suppression was not: "[The

Commission] might for example, require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future."

What is crucial to this last analysis is what is the least restrictive, but still effective, method of furthering the state's energy conservation goal. It certainly can be argued that it is critical to provide information on, and encourage the cost-effective use of, natural gas for space and water heating at the time a decision is made as to what type of system to install. Furthermore, any program that does not provide that information at that time will be ineffective.

An evaluation of this part of the judicial test is probably premature. The Commission has not yet mandated a specific method of encouraging cost-effective natural gas use. The order only requires some programs be developed to encourage natural gas use for space and water heating where it is a cost-effective method of slowing growth in electric demand. The specifics of each program must be known to evaluate whether it is the least restrictive, yet effective, method of furthering energy conservation. The fact that utilities will fashion this program in the first instance provides them the opportunity to develop a program which is

the least restrictive method. Moreover, utilities are not prohibited from advertising other programs and services which likewise contribute to slowing growth in demand - including efficient space conditioning and water heating systems that use electricity.

In its petition, Florida Power Corporation also raised the issue of whether the directive constitutes an unlawful restraint of trade. However, the argument was apparently abandoned as it was not developed or pursued in the brief. With regard to the last argument concerning cost-effectiveness, the secondary recommendation fully addresses this issue.

SECONDARY RECOMMENDATION: 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.

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.

I ag-ee with neither the interpretation of Legislative intent advanced by the electrics nor that advocated by Peoples. Frankly, it appears to me that not much significance can be attached to the deletion of this language at the proposed legislation stage. I am more concerned that the

Commission 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. Previous Commission orders have interpreted this language as only giving the Commission 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 the authority of the Commission 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, this body as 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 the Commission to dictate specific programs only when the utility either has failed to develop and get Commission approval of 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, I believe that the Commission is premature in requiring 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. It does not give the Commission the right to mandate an

alternative, no matter how laudable, (the electric utilities can accomplish the goals of Section 366.81 quoted above by their own cost-effective programs.

It is on this basis that I agree with the electric utilities' conclusion that the Commission does not have the authority under FEECA to require them to promote the use of natural gas.

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 publ.c service commission's complete ban of promotional advertising (advertising which promoted an increase in eiectric 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.

The case at hand presents the melding of the facts in _Pacific Gas_ and _Hudson_. Conservation has been specifically identified by the Court in _Hudson_ as a compelling/substantial state and national interest. 65 L.Ed. 2d at 352. And, if promotional advertising is considered commercial speech, clearly conservation program information would fall in the same category. It was, in fact, one of the types of information which Pacific Gas routinely printed in its newsletter included with the customer's billing statement. 89 L.Ed. 2d at 5. The first two prongs of the test are therefore met.

Does promoting natural gas direc y affect the compelling state interests expressed in FEECA? Maybe, if one assumes that the promotion of natural gas need only reduce electric peak demand. i.e., only be beneficial to electric ratepayers or have a "net" benefit. If one assumes, as the electric utilities argue, that FEECA requires that such increased use of natural gas be beneficial to both electric and gas ratepayers, maybe not. It could be that the expansion of the natural gas companies needed to accommodate increased demand for natural gas would result in a substantial increase in the rates for natural gas utility customers beyond the benefit that they received. Thus, at this time it is not clear if this portion of the test has been met.

Finally, we come to the last prong of the test: is the regulation more restrictive than necessary to meet the state's compelling interest? Pacific Gas was forced by the California Commission to give free space to a consumer group who used the space to raise money to fight proposed rate increases by the utility, criticize utility management and lobby for political candidates who were "anti-utility". In overturning the Commission's action, the Court focused on the fact that the utility was forced not only to print speech with which it disagreed but to respond to that speech. 89 L.Ed. 2d at

12-14. Here, the Commission is forcing the electric utilities to not only voice speech with which they disagree but to promote it. It is fair to say that promote is more than telling a customer that natural gas may be the better alternative, or even that it is the best alternative, in a particular situation. Promote sounds more like provide loans for natural gas space and water heaters or require that such appliances be placed in new homes which otherwise qualify for some type of electric conservation subsidy. These are all programs which amount to giving a portion of what had previously to been the electric utilities' market share to natural gas companies.

If that were the only means of reducing electric peak demand, there would be a stronger argument under both _Pacific Gas_ and _Hudson_ that the Commission could require that such action be taken. However, FEECA itself allows the electric utilities to use whatever means they desire to reduce peak demand and other means of doing so are abundant. Residential and commercial load control, off-peak incentives, interruptible and curtailable rates, cogeneration, and energy audits are conservation measures which quickly come to mind. All of these less intrusive means of conservation are currently practiced by the state's utilities. At this time

there is no evidence to support the assumption that these methods will not be adequate in the future to fully implement the conservation goals of FEECA. If such evidence were developed through a hearing process, this requirement might pass constitutional muster. Even with that evidence, however, there is no clear assurance that the Court would find that this requirement was the least restrictive means of achieving the state's legitimate, compelling interest.

Weighing all of the above, it seems most likely that as the case now stands the Court would find that this requirement violates the First Amendment rights of the electrics.

Cost-effectiveness

As discussed above, TECO, FPL and FPC also argue that FEECA requires that conservation programs be cost-effective for both natural gas and electric utilities. That being the case, they contend that they cannot develop any programs because natural gas utilities have no cost-effectiveness test. While the first part of this argument has some merit, the second has none. Rule 25-17.008 does not have a cost-effectiveness test for natural gas utilities. It is assumed that the increased use of natural gas will decrease electric consumption and therefore, electric peak demand. What the electrics really are complaining about is not the

lack of a "measure", but the validity of that assumption and the corollary assumption that the increased use of natural gas will be the most efficient means of reducing that demand. A hearing which addresses the validity of those assumptions would take care of this problem.

Antitrust

In its initial protest of Order 22176, FPC made the argument that requiring it to promote the use of its competitor, natural gas, was violative of state and federal antitrust laws. FPC did not pursue this argument in their brief of January 3, and other than a passing reference to it in TECO's brief, no other electric utility argued the point. Antitrust law is a complicated business particularly in the area of state action exemptions, an area which is rapidly changing as industries which were previously state regulated monopolies splinter into competitive and regulated segments. This situation, however, is pretty straight-forward and would probably be found to fit squarely within previously decided state action criteria.

In conclusion, based on the rationale expressed above, requiring electric utilities to develop cost-effective conservation programs for the promotion of natural gas is contrary to FEECA and violates the First Amendment freedom of speech rights of the electric utilities.