BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Approval of Demand-Side Management Plan by Florida Power & Light Company	Docket No. 941170 - EG Filed: July 17, 1995

MOTION IN OPPOSITION TO PETITION ON PROPOSED AGENCY ACTION OF PEOPLES GAS SYSTEM, INC.

Florida Power & Light Company ("FPL"), pursuant to Florida Administrative Code Rule 25-22.037(2), moves that the Commission deny, or in the alternative dismiss, the Petition on Proposed Agency Action of Peoples Gas System, Inc. ("Peoples") requesting a hearing "on issues relating to potentially discriminatory provisions of the electric utilities' DSM Plans and programs." Peoples' petition does not comply with the requirement of Florida Administrative Code Rule 25-22.036(7)(a)2. to include "an explanation of how his or her substantial interests will be or are affected by the Commission determination." Peoples does not having standing. The Commission may deny a petition on proposed agency action "if it does not adequately state a substantial interest in the Commission determination ...." Florida Administrative Code Rule 25-22.036(9)(b)1.

Peoples' petition also attempts to raise numerous issues that have previously been litigated before the Commission and decided by the Commission. The Commission has previously determined in the goals proceeding that (a) FPL's load control measures are conservation that reduce peak load and energy, (b) that no gas measures were used to set FPL's goals and that Florida-specific research needs to be done before further considering gas measures as electric utility conservation options, and (c) that the conservation measures comprising FPL's plan are cost-effective. Peoples' attempt to place these issues before the Commission again is barred by the doctrines of collateral estoppel and administrative finality, consequently, these allegations fail to state a cause of action.

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Peoples' petition is also premised upon an erroneous statement and construction of the discrimination prohibition found in Section 366.81, Florida Statutes (1993). This statute only prohibits approval of rates that discriminate against customers using explicit conservation options. None of the programs about which Peoples alleges discrimination involve approval of a rate. Peoples has not shown that any gas measures fall within the protected conservation options or that FPL customers use such measures. Most importantly, Peoples has not and cannot show that it is entitled to represent a class of FPL's customers. Section 366.81, Florida Statutes, the only statute alleged as a basis for Peoples' discrimination claims, does not protect the economic interests of a competing utility or provide a basis for Peoples' request for relief.

Peoples' petition advances internally inconsistent applications of FEECA in asserting Peoples interest (that Peoples has a substantial interest in preserving an approved load building program) and in asserting a potential cause of action against FPL (that FPL cannot have an approved load building program). Statutes are to be applied consistently.[1] Any consistent interpretation of FEECA defeats Peoples' petition.

FPL's grounds are more fully developed in the attached supporting Memorandum.

Respectfully submitted,
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[1] There are at least two provisions of the Florida Constitution that require statutes to be applied consistently. See, Art. I, §§ 3, 9, Fla. Const.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of Florida Power & Light Company's Motion In Opposition To Petition On Proposed Agency Action Of Peoples Gas System, Inc. and supporting Memorandum, were served by Hand Delivery (when indicated with an *) or mailed this 17th day of July, 1995 to the following:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Approval of Demand-Side Management Plan of Florida Power & Light Company	)))	**Docket No. 941170 - EG** **Filed: July 17, 1995**

MEMORANDUM OF LAW SUPPORTING FLORIDA POWER & LIGHT COMPANY'S MOTION IN OPPOSITION TO PEOPLES' PETITION ON PROPOSED AGENCY ACTION

Under the Administrative Procedures Act, specifically Section 120.57(1)(b)1, Florida Statutes (1993), the Commission has discretion whether to grant or deny a request for a Section 120.57(1) request for hearing. Peoples has filed a request for hearing in the form required by the Commission's procedural rules; it has filed a petition on proposed agency action.[1] Peoples' petition on proposed agency action should be denied or dismissed because it (1) fails to allege facts sufficient to demonstrate standing, as required by Commission rules, (2) attempts to put in controversy factual and policy matters previously decided by the Commission, such efforts being barred by the doctrines of collateral estoppel and administrative finality, (3) is premised upon a legal theory that misreads and misconstrues the sentence in Section 366.81, Florida Statutes regarding rate discrimination, and (4) advances internally inconsistent interpretations of the Florida Energy Efficiency Conservation Act ("FEECA"). Each of these deficiencies is addressed in the following discussion.

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[1] Rule 25-22.029 Point of Entry Into Proposed Agency Action Proceedings, provides in subsection (4) that, "[o]ne whose substantial interests may or will br affected by the Commission's proposed action may file a petition for a § 120.57 hearing, in the form provided by Rule 25-22.036." Rule 25-22.036, in turn, applies to all § 120.57 proceedings before the Commission (subsection (1)), and requires the initial pleading where the Commission has issued notice of proposed agency action to be entitled "Petition on Proposed Agency Action" (subsection (2)). Subsection (7) of Rule 25-22.036 addresses the form and content of initial pleadings other than notices and orders, including petitions on proposed agency action.

I

PEOPLES' PETITION MUST DEMONSTRATE STANDING

Under Rule 25-22.036(7)(a)2. all initial pleadings, including petitions on proposed agency action, must include "an explanation of how his or her substantial interests will be or are affected by the Commission determination." The Commission may deny a petition on proposed agency action "if it does not adequately state a substantial interest in the Commission determination..." Rule 25-22.036(9)(b)1.

To have standing to participate in a Section 120.57 proceeding on the basis that the person's substantial interests will be affected, the person must show: "1) that he will suffer an injury in fact of sufficient immediacy to entitle him to a Section 120.57 hearing; and 2) that his injury must be of the type or nature the proceeding is designed to protect." Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981), rev. den. 415 So.2d 1359, 1361 (Fla. 1982). "The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." Id. Both requirements must be satisfied for a person to successfully demonstrate a substantial interest that will be affected by the determination in the proceeding. Id. Case law in Florida is fairly well developed regarding what it takes to satisfy each of these requirements.[2]

[2] Any suggestion that the action in this case is quasi-legislative and, therefore, need not follow the Commission's rules, the Administrative Procedures Act, and the case law regarding § 120.57 proceedings should be rejected out of hand. The Commission has followed its rules regarding adjudicatory hearings by making this a PAA docket and issuing a PAA order. A Section 120.57 hearing has been requested. The statutes, rules and cases addressing Section 120.57 hearings are clearly applicable and must be followed.

immediate danger of a direct injury to meet this test. Three frequently cited cases demonstrate the need for immediate, rather than speculative, injury.

In Village Park Mobile Home Ass'n v. Department of Business Regulation, 506 So.2d 426 (Fla. 1st DCA 1987), rev. den., 513 So.2d 1063 (Fla. 1987), the residents of a mobile home park attempted to initiate a Section 120.57 proceeding to challenge an approval by the Department of Business Regulation of a mobile home park prospectus. The prospectus addressed, among other things, the circumstances and manner under which rents and other charges in the park may be raised. The residents alleged that approval of the prospectus immediately made the park less attractive, diminishing their property values, and that certain of the provisions in the prospectus may have a chilling effect on the resolution of grievances. The court found such allegations insufficient to demonstrate immediate injury in fact as require by Agrico. It found the allegations to be "speculative" and, at best, an allegation of what "may" happen rather than an allegation that an injury has in fact occurred. Id.

On rehearing the court reinforced its reliance on the Agrico standing test and elaborated on the immediate injury in fact requirement. It stated that, "Agrico requires that a party show that he will suffer an immediate injury as a result of the agency action." 506 So.2d at 432. The court went on to state:

> [A]bstract injury is not enough. The injury or threat of injury must be both real and immediate, not conjectural or hypothetical. A petitioner must allege that he has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged

> official conduct. *See O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38L.Ed.2d 674 (1974) and *Jerry*, 353 So.2d at 1235. The court in *Jerry* therefore concluded that a petitioner's allegations must be of "sufficient immediacy and reality" to confer standing.
>
> Accordingly, our construction of *Agrico, Firefighters,* and *Jerry* leads us to the conclusion that a petitioner can satisfy the injury-in-fact standard set forth in *Agrico* by demonstrating in his petition either: (1) that he has sustained actual injury in fact at the time of filing his petition; or (2) that he is immediately in danger of sustaining some direct injury as a result of the challenged agency's action.

506 So.2d at 433. The court went on to distinguish the effect of the *approval* of the prospectus ("does not automatically result in the increase of rents, reduction in services, or changes in park rules or regulation") from the potential, subsequent ***implementation*** of the provisions of the prospectus which could potentially lead to injury. Id. The court found that the prospect of any injury rested on the likelihood of implementation (not approval) and subsequent intervening acts (a mediation/arbitration process). The court concluded its analysis by stating:

> Attempting to anticipate whether and when these events will transpire takes us into the area of speculation and conjecture. The threat of injury alleged by appellants is not of sufficient immediacy to warrant invocation of the administrative review process."

506 So.2d at 434.[3]

In Florida Society of Ophthalmology v. State Board of Optometry, 532 So.2d 1279 (Fla. 1st DCA 1988), rev. den., 542 So.2d 1333 (Fla. 1989), several physician organizations, requested a Section 120.57(1) formal proceeding with respect to the entitlement of certification of each and

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[3] In a subsequent decision discussing the Agrico injury in fact standard, the First District Court of Appeals shed further light on its holding in the Village Park case, stating that, "[i]n *Village Park*, it would be speculative as to whether the landlord would actually raise rental fees. In that case, as in *Jerry*, the injury was contingent upon the action of a third party." Boca Raton Mausoleum v. Department of Banking, 511 So.2d 1060 (Fla 1st DCA 1987).

every optometrist the State Board of Optometry proposed to certify pursuant to a rule and an application form that had been adopted without a rule. The physician organizations argued that their substantial interests would be affected by each such certification, specifically, that (1) the right of the physicians to practice medicine pursuant to Chapter 458 was encroached upon, (2) the quality of eye care would decline, presenting a danger to the public, including the physicians' patients, and (3) the public was confused as to the distinction between ophthalmologists and optometrists, causing the physicians to suffer economic injury. The Board of Optometry and the First District Court of Appeals found that these allegations did not establish standing to participate.

In its analysis, the court first found there was no statute specifically authorizing physicians to participate in the optometrists' certification proceedings. Id at 1285. Therefore, the court reasoned that the organization's standing was "necessarily predicated upon a finding that their substantial interests will be injuriously affected by the Board's action." It then observed that other than the potential economic impact on their practices, the interests of the physicians would not be affected any differently than the interests of the general public. Id. The court then concluded that the allegations failed to meet the first prong of the Agrico test:

> While appellants may well suffer some degree of loss due to economic competition from optometrists certified to perform services that appellants alone were previously permitted to perform, we fail to see how this potential injury satisfies the "immediacy" requirement.

Id.

Similarly, in International Jai-Alai Players Association v. Florida Pari-Mutual Commission, 561 So.2d 1224 (Fla. 3d DCA 1990), the court found that an association of jai-alai players had not alleged that its members would "suffer an injury in fact of sufficient immediacy to entitle it to a hearing under Section 120.57...." 561 So.2d at 1225. There, the players association sought to

challenge an application to change opening and closing playing dates, operating dates and makeup performance dates. The players argued that their substantial interests would be injured because the date changes would "aid the fronton owners in their labor dispute with the Association and thus will either break or prolong the ongoing strike of the Association to the economic detriment of its members." The court found that this alleged interest was "far too remote and speculative in nature to qualify under the first prong of the Agrico standing test," and that the other injuries alleged were "equally remote, speculative, or irrelevant." 561 So.2d at 1226.

B. "Zone of Interest"

The second prong of the Agrico standing test requires that, "the injury must be of the type or nature the proceeding is designed to protect." 406 So.2d at 482. This requirement is sometimes called the "zone of interest" test. See, Society of Ophthalmology, 532 So.2d at 1285. One important conclusion in the established case law is that absent clear statutory authority, competitive economic interests do not satisfy the "zone of interest" requirement.

Typically, when applying the "zone of interest" test, the agency or court examines the nature of the injury alleged in the pleading and then determines whether the statute or rule governing the proceeding is intended to protect such an interest. If not, because the party is outside the zone of interest of the proceeding, the party lacks standing. For instance, in Suwannee River Area Council Boy Scouts of America v. State Department of Community Affairs, 348 So.2d 1369 (Fla 1st DCA 1980), the Department of Community Affairs and the First District Court of Appeals held that an adjoining landowner did not have standing to request a formal hearing regarding the Department's issuance of a binding letter addressing whether a development constituted a Development of Regional Impact under Chapter 380: "[w]e recognize it is not the purpose of chapter 380 to provide

a forum for parties whose complaints focus on alleged detriment to activities they wish to conduct on adjoining land." Similarly, in Grove Isle, Ltd. v. Bayshore Homeowners' Association, 418 So.2d 1046 (Fla 1st DCA 1982), the court held that a homeowners association, alleging that construction of a marina would interfere with their enjoyment of and lead to the pollution of Biscayne Bay, did not have standing to request a formal hearing as to whether a lease of state submerged lands was needed for a developer to build a marina. The court noted that under the statutory scheme a determination that no lease was required did not insulate the developer from permitting regarding marina construction and that the homeowners association had not shown how it was affected any more than the general public by a decision not to require a lease. In Boca Raton Mausoleum v. Department of Banking and Finance, 511 So.2d 1060 (Fla. 1st DCA 1987), the court affirmed a decision that the College of Boca Raton did not have standing in a cemetery licensing proceeding under the Florida Cemetery Act to raise concerns as to whether the cemetery would increase "traffic congestion" or create an "atmosphere not conducive to higher education." 511 So.2d at 1065. The court found "these types of injuries to be far outside the regulatory purpose of the Act and therefore the Department's rules do not create a right of participation for the College." 511 So.2d at 1066. In each instance the court looked to the controlling statute or rule to gauge whether the injuries alleged by the person were of the nature to be protected .

Many cases, beginning with Agrico, reject participation under the "zone of interest" test when the person is alleging an adverse competitive economic injury. In this line of cases competitive economic injury is insufficient to show standing unless the controlling statute specifically requires the protection of competitors from economic injury.

In Agrico the court reversed a determination by the Department of Environmental Regulation that a competitor of Agrico had standing under Chapter 403, Florida Statutes to contest the issuance of a permit to Agrico for construction of sulphur handling facilities. The court found that the injuries alleged by the competitor of Agrico - economic injury if the permit were issued - were not of the type intended to be protected by Chapter 403:

> While the petitioners in the instant case were able to show a high degree of potential economic injury, they are wholly unable to show that the nature of the injury was one under the protection of chapter 403.
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> Chapter 403 simply was not meant to redress or prevent injuries to a competitor's profit and loss statement. Third-party protestants in a chapter 403 permitting proceeding who seek standing must frame their petition for a section 120.57 formal hearing in terms which clearly show injury in fact to interests protected by chapter 403. If their standing is challenged in that hearing by the permit applicant and the protestants are then unable to produce evidence to show their substantial environmental interests will be affected by the permit grant, the agency must deny standing and proceed on the permit directly with the applicant.

406 So.2d at 481.

In Shared Services, Inc. v. State Department of Health and Rehabilitative Services, 426 So.2d 56 (Fla. 1st DCA 1983), the court applied the Agrico standing test and upheld a determination that a competing air ambulance service lacked standing to request a formal hearing on the application of Shands Hospital for a license under Chapter 401 to operate an air ambulance service. Even though the operative rule made reference to consideration of duplication of services, the court noted that the rule, "does not specifically purport to protect competitors from economic injury." 426 So.2d at 58. It concluded that, "[a]bsent clear authority for the insertion of competitive economic consideration into the licensing and certification procedures involved here, the final order

> Competitive economic considerations do not fall within the zone of protection that the district is authorized to consider under Chapter 373, Florida Statutes. The permitting process contemplates addressing the problem of water supply, not economic injuries.

615 So.2d at 747.

Some statutory schemes have been construed by the courts as properly considering competitive economic interests, and in such instances, courts have found allegations of adverse economic interests to be sufficient to meet the "zone of interest" prong of the Agrico case. See, e.g., Boca Raton Mausoleum v. Department of Banking and Finance, 511 So.2d 1060 (Fla. 1st DCA 1987) (reduced sales of burial spaces resulting in fewer contributions to the perpetual fund are the type of injury contemplated by the Florida Cemetery Act); Baptist Hospital, Inc. v. Department of Health and Rehabilitative Services, 500 So.2d 620, 625 (Fla 1st DCA 1986) (economic injury is a sufficient substantial interest for standing to intervene in a certificate of need proceeding). Thus, the general rule regarding whether consideration of economic interests falls within the zone of interest standard of Agrico in Section 120.57 licensing or permitting proceedings has been stated:

> [I]n licensing or permitting proceedings a claim of **standing** by third parties **based solely upon economic interests is not sufficient unless the** permitting or licensing **statute itself contemplates consideration of such interests,** or unless standing is conferred by a rule, statute, or based upon constitutional grounds.

Boca Raton Mausoleum, 511 So.2d at 1064 (emphasis added).

1. No Immediate Injury In Fact

Regardless of whether FPL's DSM Plan is approved in this proceeding, Peoples' conservation plan will continue to be approved, and Peoples will continue to offer conservation pursuant to it. This proceeding and the approval of FPL's DSM plan in no way restricts Peoples from continuing its "conservation" offerings or its alleged conservation benefits. Any impact of approving FPL's DSM Plan on Peoples' success in administering its approved conservation plan is indirect and speculative. There is no direct impact on Peoples' programs, such as changing the terms and conditions of the programs, or on Peoples' administration of those programs; Peoples will have total discretion to continue to offer the programs as it has or change its administration within the scope of the existing program descriptions. Remote, speculative and conjectural injuries do not pass the "injury in fact" requirement of Agrico. Village Park, 506 So.2d at 430, 433; International Jai-Alai Players, 561 So.2d at 1226. Here, as in Village Park, any potential impact on Peoples' programs is not from approval of FPL's DSM Plan, it will be from the implementation of the plan, and even then it will be contingent upon the intervening future actions of third parties, customers, as they exercise their choice among alternative efficiency options. Speculative injuries contingent upon intervening actions of third parties do not satisfy the "injury in fact" test of Agrico. Boca Raton Mausoleum v. Department of Banking, 511 So.2d 1060 (Fla 1st DCA 1987), discussing Village Park.

The closest Peoples comes to an allegation of injury, although it is neither immediate nor actual and is dependent upon the actions of intervening third parties (customers), is its allegations that its programs might be undermined by restricting and inhibiting customer choice. This allegation needs to be carefully considered. First, it is deficient because not one specific FPL program has

been alleged to have such an effect. Second, it is deficient because it fails to acknowledge that many of FPL's programs are continuations of existing programs with the primary changes being lower incentives, which would have the effect of making Peoples' alternative programs, if there are any, more rather than less attractive. Third, the allegation defies logic on its face; if an FPL program does offer an alternative to Peoples' plan, as suggested but not shown, this increases customer choice rather than restricting or inhibiting it. Fourth, the allegation is remote, speculative, and conjectural, contingent upon the intervening exercise of judgement by customers. There is no actual injury which Peoples has sustained to its approved conservation plan or any immediate danger of Peoples' plan suffering some direct injury; consequently, this alleged interest fails the "injury in fact" prong of Agrico. Village Park, 506 So.2d at 433.

The only remaining part of Peoples' allegation regarding its offering of conservation services is the broad, conclusory statement that, "[i]n many cases, the electric utilities' proposed DSM programs conflict with and undermine Peoples' approved energy conservation programs by ... discriminating against customers on the basis of gas use." This allegation is also deficient. First, this allegation does not involve any interest of Peoples' Gas System, Inc.; it focuses upon the interests of a separate group - customers (whether Peoples' or FPL's is unstated). Peoples may not represent the interests of its or FPL's customers.[5] There is an additional set of requirements (over

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[5] In the Society of Ophthalmology case physicians attempted to demonstrate standing by arguing that their patients (customers) would suffer injury. 532 So.2d at 1282,1286. The Court denied standing on this ground for two reasons: (1) lack of allegations of facts personal to specific doctors or patients, and (2) a lack of allegation of facts that the doctors would be prevented from providing their services to patients but for the complained of agency action. 532 So.2d at 1286. Peoples' allegations suffer the same deficiencies. It has no allegation of fact that show that approval of FPL programs would discriminate against any particular customer. More importantly, Peoples has not alleged and cannot show that Peoples would be prevented from offering conservation services but for the approval of FPL's DSM Plan. Peoples has offered no

and above the Agrico requirements) that must be plead to show standing to represent others,[6] and Peoples' petition makes no effort to allege that it has a basis to represent its or FPL's customers. Second, this allegation identifies no specific FPL program that purportedly discriminates. Third, this allegation does not even allege facts meant to show discrimination; instead it merely offers the legal conclusion that there is discrimination against customers on the basis of gas use.[7] Fourth, this allegation does not refer to any legal authority that prohibits discrimination against the use of gas.[8] Fifth, the alleged discrimination is purely speculative , as can be seen by referring to subsequent

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authority to show it may represent its customers. There is already an entity established by statute with the responsibility to represent utility customers - the Office of Public Counsel.

[6] The only cases recognizing that an entity may represent others in Florida administrative proceedings involve associations. See, Florida Home Builders Assoc. v. Dept. Of Labor and Employment Security, 412 So.2d 351 (Fla. 1982); Farmworker Rights Ass'n. v. Dept. Of Health and Rehabilitative Services, 417 So.2d 753 (Fla. 1st DCA 1982). To demonstrate associational standing, an organization must show (1) a substantial number of its members are affected by the agency action, (2) the subject matter of the agency action is within the association's general scope of interest, and (3) the relief requested is of the type appropriate for a trade association to receive on behalf of its members. Id. Peoples cannot meet these requirements.

[7] Later, in a footnote to its petition (footnote 1 on page 7) Peoples does refer to what it calls four "examples of potential discrimination." However, the discussion never attempts to explain how the provisions in question constitute discrimination against the customers' use of gas. The fact is that FPL does "discriminate" among DSM measures; however, the measures it "discriminates" against are not gas measures, but measures which do not pass both the Participants and RIM tests. In each of the four examples referred to by Peoples', FPL is limiting program eligibility to measures found by FPL's analysis, and approved by the Commission, as being cost-effective under these two tests. This limitation of program offerings to measures found to be cost-effective is not unlawful discrimination; it is implementation of the Commission's findings in the goals proceeding.

[8] Later in its petition Peoples does allege that Section 366.81, Florida Statutes, "prohibits discrimination on the basis of customers' use of efficient technologies, such as natural gas applications." Peoples petition at 13. However, Section 366.81's prohibition against discrimination (1) makes no mention of the use of gas, and (2) is limited to rate and rate structure discrimination. None of four FPL programs Peoples mentions as "examples of potential discrimination" employ rates. Peoples misapplication of this portion of Section 366.81 is discussed in more depth later in this memorandum.

statements in Peoples' petition.[9] Peoples does not allege that FPL's programs as proposed discriminate against costumers' gas use; Peoples alleges that program participation standards **which will be filed in the future may discriminate against customers'** gas use. This type of conjectural, uncertain interest does not satisfy the "injury in fact" standard of Agrico. Village Park, 506 So.2d at 430, 433; International Jai-Alai Players, 561 So.2d at 1226. "Abstract injury is not enough. The injury or threat of injury must be both real and immediate, not conjectural or hypothetical. A petitioner must allege that he has sustained or is immediately in danger of sustaining some direct injury as a result of agency action." Village Park, 506 So.2d at 433.

2. No Protected Interest

Turning to the second aspect of the Agrico standing test, whether the alleged interest falls within the zone of interest protected by the proceeding, this proceeding is not intended to protect Peoples' conservation plan and offerings; this proceeding is unrelated to Peoples' conservation offerings. This proceeding is pursuant to **Rule 25-17.0021 Goals for Electric Utilities**. That rule, as indicated by its title, is limited to electric utilities; it does not apply to gas utilities. The rule states, in pertinent part, that "[W]ithin 90 days of a final order establishing or modifying goals, or such longer period as approved by the Commission, each utility shall submit for Commission

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[9] In paragraph 14 on page 6 of its petition, Peoples states: "Peoples believes that the electric utilities **will**, [in the future] by provisions of their program participation standards, [not yet filed] intentionally discriminate against customers who choose gas." In paragraph 15 at page 8 of its petition, Peoples states: "Until the standards are filed, **Peoples cannot know whether they are discriminatory or objectionable**; Peoples does, of course, have good reason to believe that some of the proposed standards **will** [in the future] indeed be discriminatory and objectionable." In paragraph 16 at page 8 of its petition, Peoples states that it protests provisions of the PAA Order that "**may provide the opportunity** for the electric utility to discriminate against customers on the basis of gas use." (Emphasis added.) In each and every instance Peoples' discrimination allegation is speculative and conjectural; Peoples even admits that it does not know whether the program standards to be filed will be discriminatory.

approval a demand side management plan designed to meet the utility's approved goals." The purpose of this proceeding is solely to consider approval of FPL's DSM Plan submitted to achieve the goals established by the Commission in the recent goals proceeding. Peoples' interest in its continued conservation offerings is not an interest this proceeding is designed to protect. Peoples' alleged interest in its continued offering of conservation is irrelevant to FPL's DSM Plan approval proceeding, and an irrelevant allegation will not support standing. International Jai-Alai Players, 561 So.2d at 1226. Thus, this Peoples' allegation also fails the second prong of the Agrico standing test.

Undoubtedly, Peoples will argue in rebuttal that this proceeding is also pursuant to FEECA and that under FEECA Peoples' offering of conservation is relevant and intended to be protected. There are two problems with such an argument. First, it ignores that Rule 25-17.0021 limits the scope of this proceeding to electric utility DSM plans designed to meet Commission established goals. Second, it ignores that the Commission has established different processes for developing gas and electric conservation programs. Electric utilities have been given a very structured approach set out by rule for establishing goals and filing complying plans. See, Rule 25-17.0021. On the other hand, gas utilities have no comparable rule, no numerical goals, and no cost-effectiveness test established by Commission rule. They have been allowed to submit programs piecemeal. It is through this distinct, clearly different, process that gas utilities have been allowed to protect their interests in offering conservation program. Given that the Commission has implemented FEECA using two different processes for approving gas and electric conservation programs, it is inconsistent with the Commission's prior application of FEECA to allow gas utilities to attempt to protect their

interests in electric utility plan compliance proceedings. The proper place for gas utilities to protect their program offerings is in their conservation plan proceedings.

3. FPL Will Demand Strict Proof And Contest This Allegation

If this Peoples' allegation were deemed sufficient to demonstrate standing, then Peoples would have the burden in the case of proving up its allegation. See, State Department of Health and Rehabilitative Services v. Alice, 367 So.2d 1045, 1052 (Fla. 1st DCA 1979) ("the burden is upon the challenger, when standing is resisted, to prove standing."); Friends of the Everglades, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 595 So.2d 186, 190 (Fla. 1st DCA 1992) (facts alleged, "if determined to be true," demonstrate standing.) Peoples would have to prove not only that it offers "conservation" programs, but also its other allegation that its, "programs provide significant energy conservation benefits via the efficient use of natural gas to displace electric generating capacity and energy." While FPL steadfastly maintains that this allegation is insufficient to constitute standing in this proceeding, if it is determined otherwise, FPL will contest Peoples' proof of this allegation at trial.

B. Peoples' Competitive Economic Interests

Peoples' second allegation of interest is:

> 11. The instant dockets involve the review and approval of conservation plans and programs by which FPL, FPC, and TECO will be expected to achieve their established goals. Many of these proposed programs would, if implemented, affect Peoples' conservation programs by providing incentive payments, bill credits, and other inducements to customers to select electric end-use measures, with the practical effect of favoring such electric measures over natural gas appliances that serve the same end-use applications. For example, electric "conservation" measures that provide incentives to residential customers to use electric water heating and electric space heating will reduce the cost to such customers of using electric appliances and will thereby induce some of those customers

> to select electric end-use appliances over natural gas appliances, including those for which Peoples provides incentives, advice, and support via its Commission-approved conservation plan and programs. Thus, the approval of conservation plans and programs for the electric utilities will directly affect the substantial interests of Peoples in implementing its Commission-approved energy conservation programs, as well as Peoples' general body of ratepayers.

Before applying the Agrico test to this allegation of interest, it is important to examine just what interest is being alleged. Peoples states that approval of electric utility programs would affect Peoples programs by providing "inducements to customers to select electric end-use measures, with the practical effect of favoring such electric measures over natural gas appliances that serve the same end-use applications." As an example, Peoples refers to electric programs that provide incentives for residential water and space heating and alleges that such programs "will reduce the cost to such customers of using electric appliances and will thereby induce some of those customers to select electric end-use appliances...." It then concludes that approval of the electric DSM plans "will directly affect the substantial interest of Peoples in implementing its Commission approved energy conservation programs." This is a thinly masqueraded allegation of competitive economic interest. Peoples' interest in implementing its acknowledged load building "conservation" plan is its economic interest in retaining or adding customers to its system. Through its approved "conservation" programs, Peoples sells more gas. Reduced to its basics, this allegation is that "if you approve electric utility DSM programs, customers who might otherwise choose gas might choose electricity, with the effect on Peoples being reduced growth of gas sales." Peoples has no other interest in implementing its "conservation" programs. It has no numeric goals it must achieve. It does not face a penalty for failure to achieve a conservation goal. It does not benefit from deferred electrical generating capacity. Its programs are not designed to reduce natural gas consumption;

2. Peoples Seeks To Protect Interests Not Within The Zone of Protection

Turning to the second prong of the Agrico standing test, Peoples' alleged interest does not fall within the "zone of interest" intended to be protected. Peoples' interest is simply a competitive economic interest masquerading as implementation of a conservation plan. Adverse competitive economic interests do not pass the "zone of interest" test unless there is clear statutory authority indicating that such interests are to be protected by the proceeding. Agrico, 406 So.2d at 481; Shared Services, 426 So.2d at 59; Society of Ophthalmology, 532 So.2d at 1279-80; International Jai-Alai Players, 561 So.2d at 1226; City of Sunrise, 615 So.2d at 747. The purpose of this proceeding is not to protect Peoples' economic interest in selling more gas.

This is a proceeding under FEECA and a rule applicable only to electric utilities to approve a cost-effective electric DSM plan designed to implement specific goals. None of the measures that were used to develop the goals were gas measures, and no goal of increasing gas sales was approved. The purposes of FEECA are myriad, as set forth in detail in Section 366.81, Florida Statutes (1993). Conspicuously absent from FEECA's purposes is the promotion of sales by natural gas utilities. In fact, FEECA intends the conservation of natural gas by empowering the Commission to establish goals and approve plans related to the conservation of natural gas usage. Id. This proceeding is not the forum intended to protect Peoples' speculative economic injury.

C. The Commission Needs To Apply Standing Decisions Fairly

As the court noted in the Society of Ophthalmology case, standing is a selective method for restricting access to the adjudicative process. For a number of years the Commission has interpreted administrative standing broadly allowing almost universal intervention in utility proceedings. FPL

has sought in a number of proceedings to limit interventions under the authorities cited earlier. The Commission has consistently declined.

Recently, however, the Commission has demonstrated renewed interest in the well developed body of case law on administrative standing. In the decision of In Re: Peoples Gas System, Inc. Petition for Approval of Load Profile Enhancement Rider, 95 FISC. 3: 352 (1995), the Commission denied intervention for lack of standing when an electric utility attempted to protect its competitive economic interests by seeking to intervene in a gas utility proceeding before the Commission. This was an important departure from prior Commission decisions on standing, and it should be seriously considered in this case.

FPL relies upon the same authority in seeking denial of Peoples' petition on proposed agency action in this case. Here, Peoples advances interests far more speculative than the interests alleged by TECO in that proceeding. Here, Peoples, like TECO in that proceeding, advances a competitive economic interest (no injury) that is not intended to be protected in this proceeding.

The Commission has the opportunity to adopt an evenhanded approach to standing when competing gas and electric companies attempt to participate in each other's proceedings. Alternatively, the Commission can adopt an approach to standing that makes the doctrine a sword and a shield to protect the gas utility industry at the expense of the electric utility industry. The proper choice is clear. Anything less than an evenhanded approach to standing would be a denial of due process and equal protection of law. Peoples' petition on proposed agency action should be denied for lack of standing.

D. Peoples Does Not Yet Have Party Status

Peoples will undoubtedly argue in response to FPL's challenge of their standing that the Commission has already determined they have standing and made them a party to this proceeding by virtue of entering Order No. PSC-94-1574-CO-EG. Indeed, Peoples notes the entry of that order in its petition on proposed agency action. There are two crucial problems with such an assertion. First, at the time Peoples was ostensibly allowed to intervene, there was not yet a formal proceeding into which it could intervene, so the purported intervention is a nullity. Second, the Commission's rules regarding requests for hearings through petitions on proposed agency action still require "an explanation of how his or her substantial interests will be or are affected by the Commission determination" and permit the Commission to "[d]eny the petition if it does not adequately state a substantial interest in the Commission determination...." Rule 25-22.036 (7)(a) 2., (9)(b)1.

At the time Peoples sought (11/21/94) and was ostensibly granted (12/19/94) intervention, there was no formal proceeding before the Commission regarding the approval of FPL's DSM Plan. FPL did not file its petition seeking approval of its DSM Plan until January 31, 1995, after Peoples' ostensible intervention was granted. Under the Commission's procedural rules, a formal proceeding subject to a potential Section 120.57 hearing is not initiated until the filing of an "Initial Pleading." Rule 25-22.036(1),(2). An "Initial Pleading" is defined as:

> The initial pleading shall be entitled as either an application, petition, complaint, order, or notice, as set forth in subsections (3),(4),(5), and (6). Where the Commission has issued notice of proposed agency action, the initial pleading shall be entitled "Petition on Proposed Agency Action."

Rule 25-22.036(2). Prior to FPL filing its petition (initial pleading) in this proceeding, there was no formal proceeding into which Peoples could intervene; there was merely an administrative action

of assigning a docket number which had not been performed by Commission order or notice. Peoples could not be made a party prior to the initiation of the formal proceeding.

A similar situation existed in Manasota-88, Inc. V. Agrico Chemical Co., 576 So.2d 781, 783 (Fla. 1st DCA 1991). There Manasota-88 attempted to intervene before the agency gave formal notice of its intended action. The reviewing court stated, "[a] party may not intervene in that type of proceeding until the DER gives formal notice of the action it intends to take regarding a pending permit application." 576 So.2d at 783. Peoples' position in this case is worse than Manasota-88's position in that case. Here Peoples attempted intervention before any request was made of the Commission to approve a Plan; it did not wait to intervene, like Manasota-88, until after a petition was filed and a proceeding was initiated.

The Commission's rules regarding the initiation of formal proceedings and point of entry for proposed agency action clearly intend for any entity protesting proposed agency action to demonstrate that its substantial interests will be affected by the proposed agency action. Rule 25-22.029 Point of Entry Into Proposed Agency Action Proceedings requires "[o]ne whose substantial interests may or will be affected by the Commission's proposed action may file a petition for a § 120.57 hearing, in the form provided by Rule 25-22.036." Of course, Rule 25-22.036 requires such a petition to include, "an explanation of how his or her substantial interests will be or are affected by the Commission determination." Rule 25-22.036(7)(a)2. The Commission may then deny the petition on proposed agency action for failing to demonstrate a substantial interest in the Commission's determination. Rule 25-22.036(9)(b)1. Peoples was aware of the requirements of these rules when it filed its petition for proposed agency, and it attempted to comply with them; it

should not now be heard to argue it does not have to demonstrate standing because of the prior intervention order.

As a policy matter, the Commission should not accord Peoples' ostensible intervention order any weight and should discourage premature attempts to intervene in proposed agency action proceedings. For instance, when Peoples sought intervention, it did not know the content of FPL's yet to be proposed plan. Therefore, each and every alleged interest regarding the potential impact of FPL's yet to be proposed plan was speculative and conjectural. There is no way that Peoples, or any entity filing before the initial pleading, could satisfy the Agrico requirement of showing an actual or immediate injury. Moreover, a party with the responsibility of filing an initial pleading, such as FPL in this case, (a) should not have to respond to intervention requests while it is preparing its filing, (b) and cannot respond to speculative allegations of interest until it has determined just what action it will seek from the Commission.

The order ostensibly granting intervention to Peoples should not relieve Peoples of its obligation to demonstrate standing in its petition on proposed agency action. It predated the proceeding and has no force and effect. Peoples still had the obligation to plead its substantial interest, acknowledged this requirement, and then failed to meet it. Relying upon premature intervention would encourage similar conduct in the future when neither the parties nor the Commission may realistically assess whether substantial interests would be affected. Peoples' intervention order should be treated as a nullity.

> [O]rders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision on such an agency as being final and dispositive of the rights and issues involved therein. This is, of course, the same rule that governs the finality of decisions of courts. It is as essential with respect to orders of administrative bodies as with those of courts.

Peoples Gas, 187 So.2d at 339. Subsequent cases have noted exceptions for changed circumstance and extraordinary circumstances, but the doctrine has repeatedly been applied by Florida courts to the decisions of administrative agencies. See, Austin Tupler Trucking, Inc. v. Hawkins, 377 So.2d 679 (Fla. 1979); Richter v. Florida Power Corp., 366 So.2d 798 (Fla. 2d DCA 1979); Russell v. Dept. Of Business and Professional Regulation, 645 So.2d 117 (Fla. 1st DCA 1994).

Both doctrines, collateral estoppel and administrative finality, have the effect of precluding the relitigation of issues before administrative agencies. Both doctrines should be applied to various attempts Peoples makes in its petition on proposed agency action to relitigate issues already decided by the Commission.

A. FPL's Load Control Programs Have Been Determined To Be Conservation That Reduce Peak Demand and Energy Consumption

Peoples attempts in paragraphs 17 and 18 of its petition to allege that FPL's Commercial/Industrial and Residential load control programs are not conservation programs in that they may increase electric peak demand and electric energy consumption.[10] This argument is

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[10] Peoples makes a similar argument in paragraph 21 but does not address to which FPL programs it is making reference. That allegation is deficient on its face; however, FPL's response to Peoples' allegations in paragraphs 17 and 18 (the remainder of the argument in this subsection) are equally applicable to other FPL programs. With the exception of adding only water heating heat recovery units, FPL has proposed programs that include conservation measures recognized by the Commission in the goals docket as being conservation and used by the Commission to establish FPL's conservation goals.

inconsistent with the Commission's determination in the recent goals proceeding that FPL's load control measures constitute conservation.

FPL has three load control programs in its plan filing; two are Commercial/Industrial: Commercial/Industrial Load Control ("CILC") and General Service Load Management; one is Residential: the Residential Load Management Program ("On Call Program"). In the recent goals proceeding FPL included in its proposed goals demand and energy reductions for each of these three load control options. The Commission approved goals for FPL that included peak demand and energy consumption reductions attributable to the same three load control measures.[11] In approving FPL's goals that included peak demand and energy savings attributable to these three load control measures, the Commission determined that (1) these measures are conservation and (2) that these measures result in reduced, not increased, peak demand and energy consumption. As intended under the doctrine of administrative finality, FPL has relied upon the Commission's determination that these three load control programs offer conservation measures that reduce peak demand and energy. That reliance is significant. The two Commercial/Industrial load control programs constitute 27% of the FPL's conservation through the year 2003 intended to meet FPL's C/I summer demand goals

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[11] In making its findings in that case, the Commission found that (a) "FPL's planning process and data are reasonable for purposes of evaluating DSM measures and establishing numeric goals," (b) "Input assumptions regarding the cost and performance of the measures were updated to reflect those specific to FPL's service territory," (c) "FPL evaluated a total of 217 measures, including the entire list of potential utility programs (UP) as directed by Order No. PSC-93-1679-PCO-EG and individual utility specific measures," (d) "in the preparation of its proposed goals, FPL adequately assessed the end-uses listed in the rule, except for natural gas substitution measures," (e) "we will set overall conservation goals for each utility based on measures that pass both the participant and RIM tests," and (f) "we accept FPL's RIM based goals for each year during the period 1994-2000." Order No. PSC-94-1313-FOF-EG at 11, 11, 20, 22 and 32, respectively.

set by the Commission. Residential load management provides 42% of FPL's projected residential summer peak demand savings designed to meet the Commission's goals.

Both FPL and Peoples actively participated in the goals docket. What constituted conservation and the appropriate amounts of conservation on FPL's system for the next ten years were fully and fairly litigated. The Commission made a final decision as to the conservation measures to be included in FPL's goals. FPL has relied upon that determination and seeks approval as programs the same three load control measures used to establish FPL's goals. All the necessary element for the operation of collateral estoppel and administrative finality have been met. Peoples should not be allowed to relitigate whether FPL's load control offerings are conservation.

B. Peoples' Allegation That FPL's Programs Which Offer Incentives For Electric Technologies But Not Gas Technologies Are Discriminatory Is Merely An Attempt To Relitigate Whether Gas Technologies Should Be Offered

In paragraph 22 of its petition, Peoples argues that various unspecified FPL programs offer incentives to choose electric technologies but not to choose gas technologies. Peoples argues that this constitutes discrimination. FPL will separately address why Peoples' discrimination argument is without merit. Here FPL will address why consideration of whether gas measures should receive incentives as conservation alternatives is barred by collateral estoppel and administrative finality.

In the conservation goals proceeding, the Commission established conservation goals for FPL that included no conservation potential from any gas measure. In the goals proceeding FPL undertook, at the Commission's directive, an assessment of whether various gas measures constituted conservation measures that would cost-effectively reduce summer peak demand and energy consumption. FPL's analysis showed that none of the gas measures it analyzed passed both the Participants and RIM tests. Order No. PSC-94-1313-FOF-EG at 31. The Commission found

FPL's analysis of gas measures not to be adequate. Id. at 20. To address the inadequacy of FPL's and other utilities' analyses, the Commission directed FPL and other electric utilities to engage in research projects to develop Florida-specific data. Id. At 29, 30. The Commission's determination in the goals proceeding as to gas technologies was (1) they were not included in the conservation potential used to establish FPL's goals , and (2) Florida-specific data needs to be gathered through research projects before considering whether gas measures should be included as potential conservation measures available to FPL.

Peoples' vague allegation of discrimination purportedly arising from unspecified FPL programs offering incentives for electric but not gas measures is simply an attempt to relitigate the gas issues resolved by the Commission in the goals proceeding. Apparently, Peoples is not satisfied with the Commission's determination that FPL's goals do not reflect any gas conservation potential and with the Commission's decision to have gas research conducted before the issue is addressed again. In reliance upon the goals decision, FPL has proposed programs that provide incentives for measures found by the Commission to be cost-effective; that does not include any gas measures. In reliance upon the goals decision, FPL has also filed a separate gas research and development plan to develop the Florida-specific data the Commission deemed necessary to further address this issue. Peoples' attempt to argue that FPL programs discriminate because they do not offer incentives for gas measures is simply an attempt to relitigate issues fully and fairly litigated between FPL and Peoples. Peoples' attempt to relitigate this issue in this proceeding is barred by the doctrines of collateral estoppel and administrative finality.

C. Peoples' Attempt to Relitigate Cost-Effectiveness Is Barred

At paragraphs 23 and 25 of it petition on proposed agency action, Peoples alleges that some unspecified FPL programs are not cost-effective. Once again, the cost-effectiveness of all but one[12] of the measures offered in FPL's proposed programs was presented to the Commission in the goals proceeding, and the Commission approved FPL's goals "based on measures that pass both the participant and RIM tests." The Commission has already found the measures comprising FPL's programs are cost-effective. This issue has been fully and fairly litigated in the goals proceeding which included both FPL and Peoples; the Commission's finding of cost-effectiveness is final, and FPL has relied upon that determination in resubmitting these measures in its DSM Plan. The doctrines of collateral estoppel and administrative finality bar Peoples attempt to relitigate cost-effectiveness.

IV
PEOPLES FAILS TO STATE A CAUSE OF ACTION IN ALLEGING DISCRIMINATION

The only legal authority cited by Peoples as providing a basis for relief for its allegations of discrimination is Section 366.81, Florida Statutes. The sum and substance of Peoples statement of authority is the following sentence found in paragraph 28 of Peoples' petition:

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[12] The one measure that FPL found not to be cost-effective in the goals proceeding that is now in FPL's conservation plan is water heating heat recovery ("HRU"). In the final order from the goals proceeding the Commission asked FPL to reassess the water heating end use, Order No. 94-1313-FOF-EG at 20, and as a result of that reassessment FPL found that if it modified its offering of HRU it would be cost-effective, so this one additional measure was included in FPL's Plan.

> Section 366.81, Florida Statutes, prohibits discrimination on the basis of customers' use of efficient technologies, such as many natural gas applications.

Peoples has seriously overstated and misstated the prohibition of discrimination in Section 366.81, Florida Statutes. The statute provides, in pertinent part:

> Since solutions to our energy problems are complex, the Legislature intends that the use of solar energy, renewable energy resources, highly efficient systems, cogeneration, and load-control systems be encouraged. Accordingly, in exercising its jurisdiction, the commission shall not approve any rate or rate structure which discriminates against any class of customers on account of the use of such facilities, systems, or devices. This expression of legislative intent shall not be construed to preclude experimental rates, rate structures, or programs.

As can be seen from the plain language of the statute, the prohibition of discrimination is limited to (1) approval of rates or rate structures that discriminate against (2) certain specified measures, none of which are identified as gas measures. Through its brevity, Peoples glosses over the fact that this statute is not intended to provide relief for the type of conduct it alleges.

Nowhere in its petition does Peoples allege that any specific FPL program discriminates against gas use. The more assertive paragraphs regarding purported discrimination never identify a specific FPL program. See, ¶s 10, 22. It is only in two of the less assertive paragraphs where Peoples alleges that some program standards **"may** provide the opportunity for the electric utility to discriminate against its customers on the basis of gas use" that Peoples mentions specific FPL programs. See, ¶s 14, 16. Of the FPL programs identified in any of the paragraphs alleging actual or potential discrimination, none is a program for which FPL requests a "rate approval." There is only one FPL program mentioned in these two paragraphs that involves a rate - Residential Load Management. However, FPL seeks no "rate approval" for that program in this proceeding. That

particular program is already in effect and is already a part of FPL's approved conservation plan. FPL seeks no change to the program; consequently, FPL has filed no tariff revision for the program. Since the discrimination prohibition in Section 366.81 applies solely to approval of rates and rate structures and Peoples' allegations of discrimination involve no programs for which FPL seeks "rate approval," Section 366.81 does not provide any basis for relief to Peoples.

In addition, Peoples has also failed to allege facts sufficient to demonstrate (a) which gas measures, if any, may fit within the term "highly efficient systems" used in Section 366.81, (b) if such gas measures are used by a class of FPL customers, (c) and that Peoples is entitled to represent such a class of FPL customers. Peoples merely makes the conclusory statement that many "gas applications" (unspecified) are "efficient technologies"(not "highly efficient"). Peoples' petition at 13. However, this allegation is deficient. Unless and until Peoples can demonstrate that (1) FPL seeks approval of a rate as part of its DSM Plan filing that (2) discriminates against a class of customers because of (3) the customers' use of gas measures that (4) qualify as a "highly efficient systems" under Section 366.81 and (5) that Peoples is entitled to represent that class of FPL customers, Peoples cannot rely upon Section 366.81 for relief.

V

PEOPLES' CLAIM FOR RELIEF ADVANCES INTERNALLY INCONSISTENT INTERPRETATIONS OF FEECA

In its petition Peoples alleges that FPL's load management programs may increase peak demand and energy consumption contrary to Section 366.81, Florida Statutes. Peoples' petition, ¶¶ 17, 18 and 21. At the same time Peoples alleges its substantial interest is that its "conservation"

programs, which clearly increase the use of natural gas, may be undermined by approval of FPL programs.

Both electric utility and natural gas utility conservation plans and programs are governed by the same provisions of FEECA. Section 366.81, Florida Statutes provides, in pertinent part:

> The Legislature further finds that the Florida Public Service Commission is the appropriate agency to adopt goals and approve plans related to the conservation of electric energy and natural gas usage. The Legislature directs the Commission to develop and adopt overall goals and authorizes the commission to require each utility to develop plans and implement programs for increasing energy efficiency and conservation within its service area, subject to the approval of the commission.

Peoples argues that under this statute it can have programs that increase natural gas usage but FPL cannot have programs that increase electrical usage. This inconsistency cannot be reconciled. If Peoples has a substantial interest in not having undermined its usage increasing programs approved under this statute, then it cannot maintain that any alleged usage increasing programs by FPL are contrary to the statute. Stated differently, if programs that allegedly increase electrical usage are contrary to FEECA, as Peoples maintains, then programs that increase gas usage are also contrary to FEECA, and Peoples cannot have a substantial interest protected by FEECA in having those programs preserved.

There are two ways to make Peoples' interpretation of FEECA consistent. One would be to acknowledge that programs that increase load are not per se "contrary to FEECA." Of course, this would remove Peoples' alleged cause of action regarding FPL's load control programs. The other approach would be to acknowledge that FEECA must be applied consistently to both the electric and gas industries and that no program may be approved that increases load. This, of course, would cause Peoples to no longer be able to plead it had a substantial interest in avoiding having its

load building programs undermined. Either internally consistent interpretation of FEECA would defeat Peoples' request for hearing.

The Commission should not grant a request for hearing that advance internally inconsistent interpretations of FEECA. Statutes are to be interpreted and applied consistently.[13] Any consistent interpretation of FEECA defeats Peoples' request for hearing.

CONCLUSION

Peoples' petition on proposed agency action should be denied, or in the alternative, dismissed for failure to state a cause of action. Peoples has failed to demonstrate standing by making the necessary showing that it has a substantial interest that will be affected by the Commission's proposed agency action of approving FPL's DSM plan. Peoples attempts to relitigate a host of issues resolved by the Commission in the recent goals proceeding; such efforts are barred by the doctrines of collateral estoppel and administrative finality, and those portions of Peoples' petition should be dismissed for failure to state a cause of action. Peoples misapplies the discrimination provision in Section 366.81, Florida Statutes, and fails to state either facts or legal authority that would support its allegation of discrimination; its discrimination claims should be dismissed for failure to state a cause of action. Peoples' petition advances a purported substantial interest premised upon an interpretation of FEECA that is fundamentally at odds with the interpretation of FEECA that is the premise for its cause of action; therefore, Peoples' petition should be dismissed for failure to state a cause of action. Under the circumstances, the Commission

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[13] Anything less than consistent application of statutes to similarly situated pesons is denial of equal protection and due process guaranteed by Art. I, §§ 2, 9, Fla. Const. See, 10 Fla. Jur.2d, Constitutional Law, §§339, 342, 343, 364.

should exercise its discretion under Section 120.57(1)(b)1, Florida Statutes and deny Peoples' request for hearing.

Respectfully submitted,

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