**FLORIDA PUBLIC SERVICE COMMISSION**

**Capital Circle Office Center 2540 Shumard Oak Boulevard**

**Tallahassee, Florida 32399-0850**

**M E M O R A N D U M**

**September 11, 1997**

**TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)**

**FROM: DIVISION OF APPEALS (HELTON)**

**DIVISION OF ELECTRIC & GAS (BALLINGER, BULECZA-BANKS, COLSON, DILLMORE, FLOYD, GING)**

**DIVISION OF AUDITING & FINANCIAL ANALYSIS (MERTA, VANDIVER)**

**DIVISION OF RESEARCH & REGULATORY REVIEW (HEWITT)**

**RE: DOCKET NO. 961378-EG - PROPOSED AMENDMENT OF RULE 25-17.015, F.A.C., ENERGY CONSERVATION COST RECOVERY**

**AGENDA: 9/23/97 - REGULAR AGENDA - RULE ADOPTION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF**

**RULE STATUS: ADOPTION MAY BE DEFERRED**

**SPECIAL INSTRUCTIONS: S:\PSC\APP\WP\961378AD.RCM**

**CASE BACKGROUND**

Tampa Electric Company (TECO), Florida Public Utilities Company (FPUC), and Florida Power and Light Company (FPL) timely filed comments concerning the proposed amendments to Rule 25-17.015, Florida Administrative Code, which were published in the Florida Administrative Weekly on August 1, 1997. Staff is recommending that changes be made to Rule 25‑17.015 based on the comments as discussed below.

**DISCUSSION OF ISSUES**

**ISSUE :** Should the Commission adopt amendments to Rule 25-17.015, F.A.C., Energy Conservation Cost Recovery, with changes?

**RECOMMENDATION:** Yes, the rule should be adopted with the attached redlined changes based on timely filed comments.

**STAFF ANALYSIS:** Staff recommends the Commission adopt the changes suggested by FPUC and TECO, as discussed below. Staff, however, does not recommend adopting the changes suggested by FPL.

**Subsection (2) - Accounting for Program Specific Revenues**

Subsection (2) requires utilities to track revenues derived from each program in a separate subaccount. When the rule amendments were proposed, staff overzealously recommended striking the qualifier that only customer specific revenues must be tracked. Based on comments filed by FPUC, staff recommends this qualifier be added back to the rule by adopting the redlined changes to subsection (2).

**Subsection (4) - Cost Recovery Prior to Program Approval**

The intent of subsection (4) is to require utilities to obtain prior approval before seeking cost recovery for new or modified conservation programs. Although utilities cannot recover rebates or incentives paid out prior to program approval, utilities may recover prudent program implementation costs incurred prior to program approval. TECO suggested changes to this subsection to make it clearer. Staff agrees that TECOs suggested language is, for the most part, easier to understand. However, staff disagrees that developmental costs should also be recovered through the clause as recommended by TECO. Staff recommends that the attached redlined changes, based on TECOs comments, be adopted.

**Subsection (5) - Cost Recovery and Filing Requirements Associated with Advertising Expenses**

The proposed rule amendments preclude cost recovery of advertising expenses for advertisements that mention a competing energy source. FPL takes issue with this prohibition arguing it is too prescriptive and will result in more rather than less customer confusion. (FPL comments at 1)

This prohibition implements Section 366.82(5), Florida Statutes, which states in pertinent part:

Reasonable and prudent unreimbursed costs projected to be incurred, or any portion of such costs, may be added to the rates which would otherwise be charged by a utility upon approval by the commission, provided that the commission shall not allow the recovery of the cost of any company image‑enhancing advertising or of any advertising not directly related to an approved conservation program.

According to FPL, the proposed rule goes beyond Section 366.82(5) and, thus, revises or extends the statute instead of implementing it. FPL argues that only two types of advertisements are prohibited by the statute -- image-enhancing advertisements and advertisements not directly related to an approved conservation program.

Perhaps staff failed to state the obvious in its recommendation to propose amendments to the rule. Advertisements that tout one energy source over another are image enhancing. Electric utility advertisements that state electricity is better than natural gas, and vice versa, are clearly image enhancing.

Furthermore, contrary to FPLs assertions, under the express terms of the statute, the Commission may disallow cost recovery for advertisements other than those that are image-enhancing or that are not directly related to an approved conservation program. The Legislature clearly intended that the costs of the two types of advertisements mentioned above may not be recovered through the conservation clause. However, in doing so, the Legislature did not remove the Commissions discretion to find other types of advertisements to be unreasonable or imprudent and, therefore, to disallow costs associated with them. Florida Waterworks Assn v. Florida Pub. Serv. Commn, 473 So. 2d 237, 240 (Fla. 1st DCA 1985)(citation omitted)(The Commission has wide discretion to interpret the statutes which it administers and will not be overturned on appeal unless clearly erroneous.).

As staff recommended when the rule amendments were proposed, the proposed version makes clear the Commissions implementation of the Legislative mandate in Section 366.82(5), Florida Statutes.

FPL also disputes staffs argument that the Florida Energy Efficiency and Conservation Act (FEECA) did not intend for conservation programs to be used as a competitive tool. According to FPL, staff is reading into a neutral statute an intent which is not evidenced anywhere in the language or the history of the Act. (FPL Comments at 3) Staff maintains that utilities should not be allowed to use FEECA to gain a competitive edge over rivals, especially since competition does not ensure conservation. Again, FPLs arguments overlook the Commissions wide discretion in interpreting the statutes it administers. Florida Waterworks, 473 So. 2d at 240.

In addition, FPL argues that in Order No. PSC-97-0927-FOF-EI, closing Docket No. 970046-EI - In re: Investigation into the appropriate cost recovery of marginally cost-effective electric utility sponsored demand-side management programs, issued August 4, 1997, the Commission indicated it may consider this very issue [of fuel neutrality] in upcoming conservation goals proceedings. (FPL Comments at 3)(Emphasis added) Therefore, FPL does not believe it is appropriate to prohibit cost recovery now, especially since it denies the reality that electric and gas competition will continue through DSM even if cost recovery of advertising is improperly prohibited. (FPL Comments at 4) In Order No. PSC-97-0927-FOF-EI, the Commisison did mention that there is disagreement over whether the competitive use of DSM programs should be funded through the energy conservation cost recovery (ECCR) clause. (Order No. PSC-97-0927-FOF-EI at 2) The Commission also remarked that [m]any issues relating to the use of DSM for competitive purposes can be considered in the goal setting proceedings. Id. at 2-3. However, the Commission never stated that it would ultimately rule on the appropriateness of cost recovery of competitive DSM programs under FEECA through the ECCR clause in the next conservation goals setting docket. Moreover, the Commission stated that goals may be set as late as October 1999. Id. at 2. If the Commission later finds that cost recovery should be permitted for advertisements that mention a competing energy source, Rule 25-17.015 can be amended. The policy espoused by the proposed rule, however, is appropriate under the Commissions current reading of FEECA.

FPL also disputes staffs rationale that advertisements which mention a competing energy source may cause customer confusion. When electric utilities state that electricity is better than natural gas, and natural gas utilities state that natural gas is better than electricity, customers often become confused. FPL asserts that it is better to risk customer confusion than to leave customers in the dark about viable alternatives which the utilities are obligated to promote. Staff still recommends that the Commission should not advance a policy that may cause customer confusion.

In addition, FPL argues that if it develops gas measures in the future, the utility would not be able to promote them under the proposed version of the rule. Staff disagrees. If FPL offers a Commission-approved gas program, the rule would not prohibit the utility from recovering advertisement expenses associated with the measure since it would be FPL that is offering the gas program.

Finally, the proposed rule also requires utilities to file all data sources and calculations used to substantiate [energy savings] claims. FPL also takes issue with this requirement. According to FPL, this filing requirement is unnecessary and wasteful and commits to the rule a matter best left for discovery by interested parties. (FPL comments at 1) FPL also believes this filing requirement will have a chilling effect on advertising. Staff maintains that this information will allow staff and other interested persons to verify advertising claims. Furthermore, this requirement will ensure accountability and truth in utility advertising. In addition, the results of the filing requirement may very well demonstrate the need for additional discovery.

**ISSUE 2:** Should the Commission file the rule for adoption with changes and close the docket?

**RECOMMENDATION:** Yes. A notice of change should be published and the changed rule should then be filed for adoption with the Secretary of State and the docket be closed.

**STAFF ANALYSIS:** The docket may be closed after the notice of change is published and the rule is filed for adoption.

Attachments:

Proposed rule with redlined recommended changes