

State of Florida



Public Service Commission

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RECORDS AND REPORTING

DATE: APRIL 8, 1999

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF ELECTRIC AND GAS (FUTRELL, HAFF, LOWERY)
DIVISION OF LEGAL SERVICES (PAUGH, ELIAS)

MAWA *TS APP*
RVE *RET*

RE: DOCKET NO. 971004-EG - ADOPTION OF NUMERIC CONSERVATION GOALS BY FLORIDA POWER & LIGHT COMPANY.

DOCKET NO. 971005-EG - ADOPTION OF NUMERIC CONSERVATION GOALS BY FLORIDA POWER CORPORATION.

DOCKET NO. 971006-EG - ADOPTION OF NUMERIC CONSERVATION GOALS BY GULF POWER COMPANY.

DOCKET NO. 971007-EG - ADOPTION OF NUMERIC CONSERVATION GOALS BY TAMPA ELECTRIC COMPANY.

AGENDA: 04/20/99 - REGULAR AGENDA - DECISION PRIOR TO HEARING - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\971004R2.RCM

CASE BACKGROUND

On October 26, 1998, Order No. PSC-98-1435-PCO-EG (Order) was issued in these dockets denying Legal Environmental Assistance Foundation's (LEAF) Motion For Procedural Order and granting Florida Power & Light Company's Motion To Strike LEAF's Reply. LEAF requested that the Commission require the four investor owned electric utilities to file total resource cost (TRC) portfolios on a broad range of conservation measures suggested by LEAF. The Commission held that cost- effectiveness testing on conservation measures was neither required nor was it prohibited by the

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applicable rules governing these goals proceedings or Commission or Supreme Court precedent on the issue. LEAF disagrees with the Commission's holding and on November 9, 1998, filed a Motion For Reconsideration (Motion) of the Order. On November 16, 1998, Tampa Electric Company (TECO) filed a Memorandum In Opposition To LEAF's Motion For Reconsideration. No other party to these dockets filed a responsive pleading to LEAF's Motion For Reconsideration. This recommendation addresses the Motion and the Memorandum In Opposition.

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DISCUSSION OF ISSUES

ISSUE 1: Should Legal Environmental Assistance Foundation's Motion For Reconsideration be granted?

RECOMMENDATION: No. LEAF's Motion For Reconsideration of Order No. PSC-98-1435-PCO-EG fails to meet the standard for reconsideration because it does not demonstrate that the Commission overlooked or failed to consider any fact or law. LEAF's Motion For Reconsideration merely asserts LEAF's disagreement with the Order and therefore should be denied. [PAUGH]

STAFF ANALYSIS: The purpose of a reconsideration proceeding is to bring to the attention of the agency some matter which it overlooked or failed to consider when it rendered its order. Diamond Cab Co. v. King, 146 So.2d 889(Fla. 1962). The mere fact that a party disagrees with the order is not a basis for rearguing the case. Id. Nor is reweighing the evidence a sufficient basis for reconsideration. State v. Green, 104 So.2d 817 (Fla. 1st DCA 1958)

LEAF's Motion For Reconsideration is based on several points of contention. First, the Motion states that the Order improperly limits the scope of the Commission's jurisdiction and misstates LEAF's proposal. Second, the Motion states that the Order misstates LEAF's position contained in its Motion For Procedural Order and errs in its analysis of Commission precedent established in the last goals case. Finally, LEAF disagrees with the Commission's holding on the law on replies.

TECO's Memorandum In Opposition To LEAF's Motion For Reconsideration states that LEAF's Motion should be denied because it reargues matters that have already been considered.

... LEAF simply vents its disagreement with the outcome of the decision embodied in the Order and attempts to reargue the basis for the relief sought in LEAF's Motion to Establish Procedure....The Order properly interprets all of the arguments presented and sets forth a well reasoned basis for the relief it grants.

(TECO Memorandum, pg. 1)

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Staff agrees with TECO's assessment of LEAF's Motion For Reconsideration.

LEAF's first assertion, the alleged improper limitation of Commission jurisdiction and alleged misstatement of LEAF's proposal, merely reargues points LEAF made in its Motion For Procedural Order. In both pleadings, LEAF asks the Commission to determine which DSM measures utilities would test for cost-effectiveness. Two procedures for making that determination are advocated by LEAF. In its Order, the Commission declined to require the utilities in these dockets to exceed the requirements of the Rule. (Order pgs. 8, 10) LEAF disagrees with the Commission's decision and reargues the points it made in its prior Motion. As such, LEAF has not demonstrated a basis for reconsideration.

LEAF also argues that the Order misstates LEAF's proposal. LEAF states that the Order "erroneously assumes that LEAF requested program/DSM Plan type evaluation as contemplated by Rule 25-17.008, FAC." (Motion pg. 3) Then, in the same paragraph, LEAF states that it does, in fact, assume that the cost-effectiveness tests of Rule 25-17.008, Florida Administrative Code, should be used to evaluate conservation measures. The Order specifically rejected this argument in response to LEAF's prior Motion. Rather than identifying a point of fact or law which the Commission may have overlooked in rendering its decision, this argument merely reaffirms the soundness of the reasoning of the Order.

LEAF's second argument, that the Commission misstates LEAF's position and the scope of the Commission's findings in the last goals case, likewise fails to establish a basis for reconsideration. LEAF is merely attempting to relitigate issues raised in its unsuccessful Motion For Procedural Order. LEAF believes that the Commission "must become informed about which TRC measures meet the DSM policy". (Motion pg. 4) (emphasis added) LEAF is mistaken. The effect of LEAF's position would be to exceed the requirements of the rule and dictate analyses of a list of measures. The Commission was fully informed of LEAF's position, and chose not to accept it. There is no requirement in rule that the Commission be informed about which TRC measures meet the DSM policy. Rather, the "DSM policy" as set forth in Legal Environmental Assistance Foundation, Inc. v. Clark, 668 So.2d 982 (Fla. 1996) encourages, but does not require, "utilities to evaluate implementation of TRC measures when it is found that the

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savings are large and the rate impacts are small." Id. at 988. The Order in the instant dockets reaffirms Commission policy: "[o]ur policy, as demonstrated herein, does not require nor does it preclude utilities from proposing programs which pass TRC but fail RIM." (Order pg. 11) LEAF's Motion For Reconsideration fails because it merely attempts to relitigate its position on TRC.

LEAF's third argument, is that the Order misstates the law on replies. In Order No. PSC-98-1435-PCO-EG, the Commission held that "parties may file motions in opposition to a motion within seven days; this rule, however, does not allow parties to file a reply to a response." at 3, quoting In Re: Application for Amendment of Certificate No. 427-W To Add Territory In Marion County by Windstream Utilities Company, Docket No. 960867-WU, Order No. PSC-97-0470-FOF-WU. Only a single response to a motion is contemplated by the rules.

LEAF's contention in its two sentence claim is that the Commission has discretion to grant replies. In support of its argument, LEAF provides only a footnote string citation to Commission and court orders. LEAF does not distinguish or analyze any of the cited orders or demonstrate their applicability in this case. In fact, a number of the holdings cited by LEAF are inapposite to its unsupported assertion. As such, LEAF's third argument fails to plead a cognizable claim.

In sum, LEAF's Motion For Reconsideration fails to meet the standard for reconsideration because it does not demonstrate that the Commission overlooked or failed to consider any fact or law. Therefore, LEAF's Motion For Reconsideration should be denied.
[PAUGH]

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. These dockets are scheduled for hearing in August, 1999. [PAUGH]

STAFF ANALYSIS: These dockets are scheduled for hearings in August, 1999, and should remain open pending resolution of all issues. [PAUGH]