

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Adoption of Numeric  
Conservation Goals by Florida  
Power & Light Company.

DOCKET NO. 971004-EG

In re: Adoption of Numeric  
Conservation Goals by Florida  
Power Corporation.

DOCKET NO. 971005-EG

In re: Adoption of Numeric  
Conservation Goals by Gulf Power  
Company.

DOCKET NO. 971006-EG

In re: Adoption of Numeric  
Conservation Goals by Tampa  
Electric Company.

DOCKET NO. 971007-EG  
ORDER NO. PSC-98-1435-PCO-EG  
ISSUED: October 26, 1998

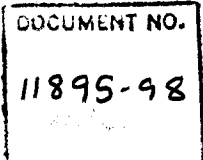
The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman  
J. TERRY DEASON  
SUSAN F. CLARK  
JOE GARCIA  
E. LEON JACOBS, JR.

ORDER GRANTING MOTION TO STRIKE REPLY AND  
DENYING MOTION FOR PROCEDURAL ORDER

BY THE COMMISSION:

In order to implement Rule 25-17.0021, Florida Administrative Code, we are required to set conservation goals for each jurisdictional utility at least once every five years. As such, these four dockets were opened and formal evidentiary hearings have been set for May, 1999, for Florida Power & Light Company (FPL), Florida Power Corporation (FPC), Gulf Power Company (Gulf), and Tampa Electric Company (TECO). The Order Establishing Procedure



(Order) for these dockets, Order No. PSC-98-0384-PCO-EG, was issued on March 10, 1998.

On July 21, 1998, the Legal Environmental Assistance Foundation, Inc., (LEAF) filed a Motion For Procedural Order and Brief In Support Of LEAF's Motion For Procedural Order. On August 3, 1998, Gulf filed its Response To Motion For Procedural Order By Legal Environmental Assistance Foundation, Inc. On August 3, 1998, TECO filed a Memorandum In Opposition To Legal Environmental Assistance Foundation's Motion For Procedural Order and FPL filed its Response To LEAF's Motion For Procedural Order. On August 10, 1998, LEAF filed a Reply To Utility Responses To Leaf's Motion For Procedural Order. On August 14, 1998, FPL filed a Motion To Strike LEAF's Reply To Utility Responses To LEAF's Motion For Procedural Order. On August 26, 1998, LEAF filed a Response In Opposition To FPL's Motion To Strike LEAF's Reply. The Prehearing Officer determined that the decisions regarding these pleadings should be made by the full Commission. This order addresses all seven pleadings.

I. Florida Power & Light's Motion To Strike LEAF's Reply To Utility Responses To LEAF's Motion For Procedural Order.

As previously stated, FPL, Gulf and TECO filed responses in opposition to LEAF's Motion For Procedural Order. Thereafter, LEAF filed a Reply To Utility Responses To LEAF's Motion For Procedural Order. FPL filed a Motion To Strike LEAF's Reply To Utility Responses To LEAF's Motion For Procedural Order and LEAF filed a Response In Opposition To FPL's Motion To Strike LEAF's Reply. This portion of the order addresses LEAF's Reply, FPL's Motion To Strike LEAF's Reply, and LEAF's Response To FPL's Motion To Strike.

As grounds for its Motion To Strike, FPL states that Uniform Rule 28-106.204, Florida Administrative Code, provides only for motions and responses in opposition to motions. The Rule does not recognize the filing of replies to responses to filed motions. FPL Motion To Strike, pg. 1. FPL further states that the Commission's procedural rule, Rule 25-22.037(2), Florida Administrative Code, the predecessor to the Uniform Rule, likewise did not recognize replies to responses to filed motions. FPL Motion To Strike, pgs. 1-2. FPL cites several Commission orders which have interpreted the predecessor procedural rule as not allowing replies to responses.

We find FPL's arguments compelling. The precedent cited by FPL clearly states that replies are not permitted under our rules. In 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, issued April 23, 1997, we held: "...pursuant to Rule 25-22.037(2), Florida Administrative Code, 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. The pleading cycle must stop at a reasonable point and our rules reflect that." See also In Re: Application for a rate increase in Brevard County by GENERAL DEVELOPMENT UTILITIES INC. (Port Malabar Division), Docket NO. 911939-WS, Order NO. PSC-92-0205-FOF-WS, Issued April 14, 1992, and In Re: Application for amendment of Certificate No. 247-S by North Fort Myers Utility, Inc. and cancellation of Certificate No. 240-S issued to Lake Arrowhead Village, Inc. in Lee County, Docket No. 930373-SU, Order No. PSC-96-0348-FOF-SU, issued March 11, 1996.

The unequivocal precedent disallowing replies to responses to filed motions is not affected by the application of the Uniform Rules. This is so because the Uniform Rule language relating to responses to motions is substantially the same as the former Commission rule. Commission Rule 25-22.037(2)(b), Florida Administrative Code, states: "[o]ther parties to a proceeding may, within seven(7) days after service of a written motion, file written memoranda in opposition." Uniform Rule 28-106.204(1), Florida Administrative Code states: "[w]hen time allows, the other parties may, within 7 days of service of a written motion, file a response in opposition." Neither rule contemplates replies to responses. On the contrary, both rules address only a single response to a motion. As such, we believe that our precedent interpreting our own rule of procedure on answers and motions applies with equal force and effect to the Uniform Rule on motions which now governs formal Commission proceedings.

Based on the foregoing, we hold that Florida Power & Light Company's Motion To Strike LEAF's Reply is granted. Granting FPL's Motion To Strike LEAF's Reply, renders LEAF's Response In Opposition To FPL's Motion To Strike LEAF's Reply moot.

## II. LEAF's Motion For Procedural Order and Brief

LEAF's Motion For Procedural Order is essentially a request that we compel the utilities to evaluate substantially more data

than is currently required by the Order or Rule 25-17.0021, Florida Administrative Code. LEAF's Motion requests us to:

- a) establish procedures to guide which energy and demand savings measures (including measure combinations) merit cost-effectiveness evaluation in this case so Commission review of utility goals proposals is not based on incomplete and legally insufficient information; and
- b) either provide a reasonable opportunity for all parties to provide input to the Commission on said measures (as provided on Attachment A) or, in the alternative, direct utilities to test the cost-effectiveness of specific measures as provided on Attachment B.

LEAF Motion, pg. 1.

Appended to the one page Motion are Attachments A and B and a Brief In Support Of Leaf's Motion For Procedural Order.

The Attachments describe two alternative courses of action LEAF proposes we take with respect to the substantive and procedural requirements for these four dockets. Attachment A allows the utilities to select, from the extensive list supplied by LEAF, which conservation measures to evaluate and test for cost effectiveness. Attachment A states that we should require the utilities to file a report detailing the specific measures that the utilities will be evaluating. LEAF Attachment A, pg. 1. After the utilities' reports are filed, according to LEAF, we must then order the utilities to test selected measures for cost-effectiveness based on the Total Resource Cost (TRC), Rate Impact Measure (RIM) and Participants Tests. LEAF Attachment A, pg. 2.

Attachment B requires us to dictate, in advance, the specific conservation measures which must be considered by the utilities. Attachment B lists the measures which, in LEAF's opinion, must be analyzed by the utilities. LEAF's list includes 98 specific measures as well as all of the measures set forth in Attachment A.

The Brief In Support Of Leaf's Motion For Procedural Order expands upon LEAF's positions set forth in the Attachments. LEAF opines that we should (1) determine which measures merit cost effectiveness testing; and (2) solicit input from non-utility parties on proposed candidate measures before we specify which

measures are to be tested for cost effectiveness. LEAF Brief, pgs. 2-4. If we do not solicit input from non-utility parties, according to LEAF, we should at a minimum, prohibit a RIM-only measure screen. LEAF Brief, pgs. 5 - 13. In short, LEAF is advocating that we require the utilities to generate TRC portfolios.

### III. Utilities' Responses To LEAF's Motion and Brief.

FPL, TECO and Gulf filed separate responses in opposition to LEAF's Motion For Procedural Order. Each Response is summarized below.

#### A. Florida Power & Light.

FPL's Response To LEAF's Motion For Procedural Order advances five points of opposition to LEAF's proposal. First, FPL states that LEAF has requested us to issue a procedural order which is inconsistent with Rule 25-17.0021, Florida Administrative Code. FPL states that issuance of an order inconsistent with a Commission rule would be reversible error. FPL Response, pg. 2. As grounds for its position, FPL cites subsection (3) of Rule 25-17.0021, Florida Administrative Code:

In a proceeding to establish or modify goals, each utility shall propose numerical goals for the ten year period and provide ten year projections, **based upon the utility's most recent planning process**, of the total, cost-effective, winter and summer peak demand (KW) and annual energy (KWH) savings reasonably achievable in the residential and commercial/industrial classes through demand-side management. (emphasis supplied by FPL)

FPL states that LEAF's Request For Procedural Order requires us to improperly interject ourselves into the utilities' planning processes. "If LEAF's motion were granted, FPL's projections would not be premised upon FPL's planning process as contemplated by Rule 25-17.0021, Florida Administrative Code; FPL's projections would be based upon a planning process conceived by LEAF and imposed upon FPL by the Commission." FPL Response, pg.2 In short, FPL's position is that we would commit error by superceding the controlling rule if we comply with LEAF's proposal.

FPL's second objection to LEAF's Motion For Procedural Order is that it is an untimely motion for reconsideration. FPL states that the Order specifically addressed the manner in which the utilities are to perform their projections for these proceedings. The Order instructs the utilities to follow Rule 25-17.0021, Florida Administrative Code. As such, the Order requires the utilities to propose numerical goals and provide ten year projections of demand and energy savings reasonably achievable through demand-side management (DSM), based on the utility's most recent planning process. LEAF's Motion, according to FPL, requests us to reconsider our directives regarding that planning process. "LEAF chose not to request reconsideration of the Commission's procedural order. Instead, four months later, well after the time had run for requesting reconsideration, LEAF filed a motion for a procedural order which would have the Commission change its instruction to utilities in Order No. PSC-98-0384-PCO-EG." FPL Response, pg. 4

FPL's third objection to LEAF's request is that it would delay the proceeding. FPL states that it identified its candidate measures by the end of May, 1998, by building upon the planning processes approved in the prior goals proceedings. FPL's planning process started with measures identified in the prior goals docket, screened those measures and added new, potentially viable measures. Having identified a list of candidate measures, FPL states that it will analyze them using all of the Commission's approved cost effectiveness methods. "Given the roughly twenty four percent decline in avoided costs since the last Goals Proceeding, it makes absolutely no sense to reanalyze measures found in the last Goals Proceeding not be cost effective." FPL Response, pg. 7. If LEAF's request is granted, according to FPL, it will more than triple the analyses to be performed and time required to perform them with no positive result. FPL Response, pg. 8.

FPL's fourth objection is that LEAF's proposal is wasteful. FPL argues that the extensive analyses performed during the last goals proceeding should provide a basis of data and decisional precedent in the instant proceeding. Reanalysis of measures found not to be cost effective in the last proceeding, particularly in light of the decline in avoided costs, would be unnecessary and very costly with no discernable benefit. FPL Response, pg. 9.

FPL's fifth point of contention relates to LEAF's arguments against the RIM screen. FPL points out that LEAF spent almost half of its brief arguing that a RIM screen was rejected by the

Commission in adopting the conservation goals rule and in the last goals proceeding. FPL disagrees with LEAF's conclusion. FPL states that the conservation goals rule does not require or reject any specific cost-effectiveness measures. Rather, the rule simply requires cost effective DSM. Likewise, in the last goals proceeding, FPL states, the Commission specifically addressed the question of whether the RIM or TRC approaches resulted in more cost effective DSM. The Commission decided that the difference between the RIM and TRC portfolios was negligible. LEAF appealed that decision to the Supreme Court and the Commission's order was affirmed. Legal Environmental Assistance Foundation, Inc. v. Clark, 668 So.2d 982 (Fla. 1996).

B. Tampa Electric Company.

TECO's Memorandum in Opposition to LEAF's Motion contains two primary objections. First, TECO avers that LEAF's motion is an attempt by LEAF to mandate the substantive requirements of the proceedings. TECO states that: "...LEAF's motion appears to be more of a request that the Commission dictate which conservation measures are required to be evaluated....[T]his is an effort to dictate the content of a utility's direct testimony and exhibits." TECO Memorandum, pg.1. Second, TECO objects to the fact that LEAF's Motion does not recognize the data and analysis gleaned from the prior proceeding which should form the basis for the instant goals dockets. TECO states that LEAF has demonstrated no basis to alter the procedural schedule and that the substantive modifications advocated by LEAF are unnecessary. TECO Memorandum, pg. 2.

C. Gulf Power Company.

Gulf Power Company offers four objections to LEAF's Motion For Procedural Order. First, Gulf states that LEAF's Motion should be denied for failure to state a legal basis upon which relief can be granted. Gulf Response, pg. 1. Second, Gulf states that LEAF should not be permitted to direct Gulf's planning process through a procedural order. Gulf, like FPL, cites Rule 25-17.0021, Florida Administrative Code, which states that the utilities should develop their proposed plans based on the utility's planning process. "The Commission should not specify through a procedural order which savings measures must be tested by the utilities for cost-effectiveness" Id. Third, Gulf takes issue with LEAF's proposal that the utilities must develop a TRC portfolio. The RIM cost-effectiveness test is the appropriate screening mechanism,

according to Gulf. In support of its position, Gulf cites Legal Environmental Assistance Foundation, Inc. v. Clark, supra, which upheld the Commission's policy of not requiring TRC. Fourth, like FPL and TECO, Gulf advocates that the Order properly enables the utilities to build upon the considerable experience gained during the last goals proceeding. "The exhaustive technical potential phase undertaken in the prior proceeding is not necessary at this time. Information learned in the prior proceeding should be utilized in this proceeding." Gulf Response, pg. 3.

#### IV. Analysis.

We agree with many of the arguments in opposition to LEAF's Motion For Procedural Order raised by the utilities. However, we find the argument that LEAF's motion requests us to take action inconsistent with Rule 25-17.0021, Florida Administrative Code, to be the most compelling basis for denying LEAF's Motion. In addition, LEAF's Motion is inconsistent with the law of the case.

##### A. LEAF's Proposal Is Inconsistent With Rule 25-17.0021, Florida Administrative Code.

LEAF's proposal that we dictate the content and analyses of the utility's filings in these goals proceedings is inconsistent with Rule 25-17.0021, Florida Administrative Code. The Rule establishes bifurcated conservation proceedings. Sections (1) through (3) of the rule establish the procedures and guidelines for the conservation goals dockets. Sections (4) and (5) govern the utilities' actual conservation plans, containing specific programs, which are designed to meet the utilities' goals. The conservation plans and other post-goals proceedings filings are separate, docketed matters and subject to different requirements than the goals-setting process. The utilities' numeric goals are to be set based on the utilities' planning processes. The specific plans filed by the utilities following the establishment of numeric goals are the forum in which the Rule requires evaluations of specific programs of the nature advocated by LEAF.

The clear language of Rule 25-17.0021, Florida Administrative Code demonstrates the bifurcated structure of the rule. With respect to utilities' conservation goals, the Rule states:

- (1) The Commission shall establish numerical goals for each affected electric utility....



- (2) The Commission shall set goals for each utility at least once every five years....
- (3) In a proceeding to establish or modify goals, each utility shall propose numerical goals for the ten year period and provide ten year projections, based on the utility's most recent planning process.... Each utility's projections shall be based upon an assessment of, at a minimum, the following market segments and major end-use categories.

Section (3) of the Rule concludes with the specific market segments (residential and commercial/industrial) to be evaluated and a listing of the major end-use categories to be considered by the utilities. There is no reference in the goals-setting portion of the Rule regarding the requirements for evaluation of specific programs to be included in utilities' plans.

The requirements regarding specific programs designed to meet utilities' established goals and the manner of evaluation of those programs are contained in the second part of the Rule, Sections (4) and (5). Section (4) states, in part:

- (4) Within 90 days of a final order establishing or modifying goals,...each utility shall submit for Commission approval a demand side management plan designed to meet the utility's approved goals....

Section (4) of the Rule then sets forth in detail the information utilities are required to file in conjunction with programs specified in their plans. The filing requirements include, among other things, "(j) an estimate of the cost-effectiveness of the program using the cost-effectiveness tests required pursuant to Rule 25-17.008...." The cost-effectiveness tests referred to in subsection (j) are the RIM test, the TRC test and the participant tests. The cost-effectiveness tests are not required by the Rule to be performed by the utilities for establishing numeric goals.

The language of Rule 25-17.0021, Florida Administrative Code, clearly distinguishes the goals setting proceedings from the plan submission proceedings and the requirements for the two proceedings are vastly different. It is the requirements relating to utilities plans which LEAF is requesting us to apply to the utilities' goals. As such, we hold that LEAF's Motion is denied because it is

tantamount to a request that we exceed our jurisdiction in these goals setting proceedings.

B. LEAF's Motion Misapprehends The Substantive Law of The Case.

In addition to the foregoing, LEAF's Motion fails because it misapprehends, and requests us to misapply, the law of the case. The fundamental substantive premises of LEAF's pleadings are: a RIM-only screen is improper; Commission policy is to require TRC portfolios in these goals dockets; and the Commission should require the utilities to perform cost effectiveness testing on a broad range of measures suggested by LEAF. We disagree with LEAF's arguments. It is not our policy to require TRC portfolios on the broad range of measures suggested by LEAF. A brief analysis of the prior goals setting proceeding is instructive to understanding the precedent established therein.

Parties have previously advocated before the Commission the untapped benefits of utilizing DSM measures which passed the TRC test, but failed the RIM test. Our implementation of our numeric DSM goals rule became the forum in which we fully and finally determined the savings difference between the RIM and TRC tests.

Before the commencement of the prior goals proceedings, the Synergic Resources Corporation (SRC), with funding provided by the Florida Energy Office (FEO), produced a report on potential DSM savings in Florida. During the project, meetings were held between representatives of SRC, utilities, the FEO, other interested parties, and staff to comment on the assumptions and methodologies of the report. The report attempted to quantify the potential demand and energy savings from a wide variety of DSM measures in the state of Florida.

It was agreed by the Commission and the parties, that in implementing the new numeric DSM goals rule, the SRC report would provide a common baseline from which the utilities would perform analyses. It was our intent that a comprehensive analysis, in a formal docketed proceeding, would be performed of DSM measures which would ultimately provide us with the evidence of the potential savings under the RIM and TRC tests.

Through our procedural orders, we required extensive analyses and production of information, even though the rule only required the utilities to propose Residential and Commercial/Industrial numeric goals, based on the utility's planning process, which were

cost-effective and reasonably achievable. The results of each utilities' individual DSM measure analyses were aggregated into those measures passing RIM and TRC, and those measures passing TRC but failing RIM. The estimated savings from the two portfolios of measures provided us the answer to how much additional savings was available under a TRC policy. We ultimately set goals based solely on RIM measures:

We will set overall conservation goals for each utility based on measures that pass both the participant and RIM tests. The record in this docket reflects that the differences in demand and energy saving between RIM and TRC portfolios are negligible. We find that goals based on measures that pass TRC but not RIM would result in increased rates and would cause customers who do not participate in a utility DSM measure to subsidize customers who do participate. Since the record reflects that the benefits of adopting a TRC goal are minimal, we do not believe that increasing rates, even slightly, is justified....

Although we are setting goals based solely on RIM measures, we encourage utilities to evaluate implementation of TRC measures when it is found that the savings are large and the rate impacts are small.

Order No. PSC-94-1313-FOF-EG, Docket Nos. 930548-EG, 930549-EG, 930550-EG and 930551-EG, issued October 25, 1994, pg. 22. In short, savings from TRC measures were not sufficient to overcome rate impact considerations and the issue of cross-subsidization.

Our decision was upheld on agency reconsideration and by the Supreme Court of Florida. In Legal Environmental Assistance Foundation, Inc. v. Clark, 668 So.2d 982 (Fla. 1996) quoting the same language as that set forth above, the Supreme Court stated that it rejected as without merit LEAF's argument that the Commission erred in finding there was a negligible energy and demand savings difference between demand-side management portfolios based on the different cost effectiveness tests. Id. at 987. The Supreme Court specifically found our policy was based on competent, substantial evidence in the record and upheld it in its entirety.

Our policy, as demonstrated herein, does not require nor does it preclude utilities from proposing programs which pass TRC but fail RIM. Pursuant to FEECA and precedent, utilities may propose

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for Commission approval, any program it wishes to offer its customers. In sum, LEAF's argument that we have a policy of requiring TRC portfolios in these goals dockets is incorrect and merely attempts to reargue matters which are stare decisis. For this reason, and because of the procedural infirmities demonstrated herein, LEAF's Motion is denied.

Based on the foregoing, it is

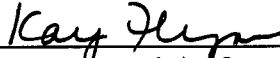
ORDERED by the Florida Public Service Commission that Florida Power & Light Company's Motion To Strike LEAF's Reply To Utility Responses To LEAF's Motion For Procedural Order is granted. It is further

ORDERED that LEAF's Response In Opposition To FPL's Motion To Strike LEAF's Reply is rendered moot. It is further

ORDERED that Legal Environmental Assistance Foundation, Inc.'s Motion For Procedural Order is denied. It is further

ORDERED that this docket shall remain open pending resolution of all issues at hearings scheduled for May of 1999.

By ORDER of the Florida Public Service Commission this 26th day of October, 1998.

  
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KAY FLYNN, Chief  
Bureau of Records

( S E A L )

LJP/RVE

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.