

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Tampa  
Electric Company d/b/a Peoples  
Gas System for determination  
that rate structure of  
Withlacoochee River Electric  
Cooperative, Inc. is  
discriminatory, interferes with  
approved energy conservation  
programs, and is contrary to the  
legislative intent of the  
Florida Energy Efficiency and  
Conservation Act.

DOCKET NO. 011622-EG  
ORDER NO. PSC-02-0910-FOF-EG  
ISSUED: July 8, 2002

The following Commissioners participated in the disposition of  
this matter:

LILA A. JABER, Chairman  
J. TERRY DEASON  
BRAULIO L. BAEZ  
MICHAEL A. PALECKI  
RUDOLPH "RUDY" BRADLEY

ORDER GRANTING MOTION TO DISMISS

On December 5, 2001, Peoples Gas System (Peoples) petitioned  
for a determination that the rate structure of Withlacoochee River  
Electric Cooperative (WREC) is unduly discriminatory, interferes  
with Peoples' conservation programs, and is contrary to the  
legislative intent of the Florida Energy Efficiency and  
Conservation Act (FEECA).

Peoples is a public utility that owns and operates a natural  
gas distribution system throughout most of Florida. WREC owns and  
operates an electric distribution system, and provides retail  
electric service in Pasco, Hernando and Citrus Counties. Peoples  
is the only provider of natural gas service to residential  
customers in certain portions of Pasco and Hernando Counties.

On December 21, 2001, WREC filed an Agreed Motion for  
Extension of Time to File Motion to Dismiss. Peoples authorized  
WREC to represent that Peoples did not oppose the Motion. The

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Motion was granted by Order No. PSC-01-2544-PCO-EG, issued on December 31, 2001. WREC filed its Motion to Dismiss on January 7, 2002, and Peoples filed its Reply on January 22, 2002.

Peoples' Petition

In its Petition, Peoples explains that because the facilities needed to run gas appliances must be installed underground, the only feasible time to install such facilities in a new development is when it is under construction. Peoples claims that WREC's rate structure discriminates against the installation of infrastructure for gas appliances in new residential developments that will have underground electric distribution facilities.

Peoples further explains that WREC's tariff requires developers who want to install underground electric distribution facilities to make a contribution-in-aid-of-construction (CIAC) payment of \$985 per lot. However, if the developer installs an energy efficient electric water heater and heat pump on a lot, WREC gives the developer a \$710 credit for that lot.

Peoples states that if a developer makes gas available in new houses (in addition to electric service) in Pasco or Hernando Counties, the developer is entitled to be paid allowances by Peoples totaling \$670. Peoples claims that because it is more expensive for a developer to build a house that uses gas than it is to build a house that uses electricity, the allowances offset part of the developer's increased cost. The allowances are part of Peoples' energy conservation program, approved by the Commission pursuant to FEECA. Sections 366.80 et seq., Florida Statutes.

WREC's Motion to Dismiss

WREC claims Peoples' Petition should be dismissed for the following reasons: 1) Peoples' lacks standing; 2) FEECA does not provide us with authority to grant the relief sought; 3) we have no jurisdiction over WREC's service availability charges; and 4) FEECA does not protect the use of gas appliances.

WREC states that the Petition cites no statute or rule under which Peoples has standing, and argues that Peoples unilaterally seeks to initiate a proceeding against Withlacoochee over whom we

have only limited authority. WREC further argues that the only statutes relied upon by Peoples to support its claim for relief are part of FEECA. WREC claims that it is not subject to FEECA, that FEECA does not authorize one utility to initiate a proceeding against another pertaining to rate structure or charges, and that therefore there is no relief available to Peoples under FEECA.

WREC also argues that Peoples fails the test for standing found in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2<sup>nd</sup> DCA 1981). That test requires that a litigant must suffer actual and immediate injury as a result of potential agency action in a proceeding; and that the injury is of a type against which the proceeding is intended to offer protection. Id. at 482. WREC claims that Peoples' Petition does not make allegations that satisfy either part of the test for standing.

With respect to the second part of the Agrico test, WREC argues that FEECA does not expressly authorize a utility to initiate a formal proceeding before us to protect or enforce a FEECA conservation program against another utility. In addition, WREC argues that Chapter 366 does not grant competitor utilities standing in proceedings involving another utility's rates. See Order No. PSC-95-0348-FCF-GU, issued March 13, 1995 in Docket No. 941324-GU.

With respect to FEECA, WREC claims that it does not grant us authority to take action against an entity that interferes with a utility's conservation programs. WREC argues that we acknowledged our limited authority under FEECA in In re: Implementation of Section 366.80-.85, Florida Statutes, Conservation Activities of Electric and Gas Utilities, Order No. 22586, issued February 21, 1990, in Docket No. 890737-PU (hereinafter 'FEECA Order'). WREC maintains that in that Order, we recognized that FEECA only grants us authority to approve or disapprove conservation programs, and not to dictate the specific terms of the plans.

WREC also claims that the Petition should be dismissed because we only have limited authority over electric cooperatives like WREC. WREC states that Section 366.04(2)(b), Florida Statutes, limits our authority over cooperatives to approval or disapproval of their rate structure. WREC maintains that jurisdiction over

rate structure does not include the authority to approve or establish rates, or specific service availability charges. It is WREC's position that the Petition takes issue with WREC's service availability charges.

Finally, WREC argues that FEECA does not protect the use of gas appliances. WREC contends that the Petition erroneously assumes that one purpose of FEECA is to promote use of natural gas over electricity. WREC argues that FEECA only protects the use of alternative sources of energy such as renewables, and does not establish a preference for natural gas appliances over electric appliances. WREC maintains that we determined, in the FEECA Order, that we were not authorized to require electric utilities to develop gas promotion programs.

#### Peoples' Reply

Peoples agrees with WREC that we can only regulate the rate structure of electric cooperatives, and asserts that it asks us to do no more than that. In support of its contention, Peoples relies on Polk County v. Florida Public Service Commission, 460 So. 2d 370 (Fla. 1984). Peoples explains that in Polk County, counties challenged a Commission rule that allowed a municipal electric utility to impose a surcharge on customers outside its corporate limits equal to the service tax imposed on customers within its corporate limits. The counties claimed the rule attempted to regulate dollar amounts charged by the municipal electric utilities. The Court disagreed and stated:

The rule in this case regulates only the relative rate levels charged to different classes of customers.... The rule does not mandate a surcharge and does not set the dollar amount of a surcharge if one is, in fact, imposed. Thus, it is clear that the rule regulates rate structure and not rates.

Peoples contends that, based on the reasoning of Polk County, its Petition focuses on rate structure because the alleged discrimination derives from the relative levels of CIAC that WREC requires.

Peoples claims that WREC's differential charges to developers, based on whether or not they install gas distribution systems, violate Rule 25-9.052(4), Florida Administrative Code, which applies to municipals and cooperatives. Peoples claims that that rule codifies the policy that a rate structure not be unduly discriminatory. Peoples' quotes the following part of the rule:

In the event the Commission determines that the rate structure of a utility may not be fair, just and reasonable, the Commission may initiate appropriate proceedings to prescribe a rate structure that is fair, just and reasonable.... The following principles may also be considered: simplicity, fairness in apportioning costs, avoidance of undue discrimination and encouragement of efficiency.

Peoples explains that its allegations of undue discrimination are based on the above rule, not FEECA. Peoples further explains that FEECA applies to discrimination between classes of customers while Rule 25-9.052 can be applied to discrimination between customers of the same rate class.

Peoples explains that while WREC is not subject to our powers under FEECA with respect to the submission and approval of energy conservation programs, Peoples is. Peoples argues that just because WREC is not required by FEECA to implement energy conservation programs, it does not follow that WREC may frustrate the intent of the statute through a discriminatory rate structure. Peoples argues that WREC's actions conflict with FEECA's policy that use of "the most efficient and cost-effective energy conservation systems" is essential to protect the welfare of Florida's citizens. See Section 366.81, Florida Statutes. Similarly, Peoples argues that WREC frustrates FEECA's intent to reduce and control the growth rates of electric consumption and of weather-sensitive peak demand.

Peoples emphasizes that it is not petitioning us to require WREC to implement conservation programs, but to ask that the differential treatment of customers in a rate class be found unduly discriminatory. In making that finding, Peoples explains that it is asking us to consider the effects of differential treatment on

the purposes of FEECA as set forth in Section 366.81, and on approved energy conservation programs.

Peoples takes issue with WREC's interpretation of the FEECA Order. Peoples contends that we have not held, in the FEECA Order or otherwise, that it may not intervene to address a rate structure that interferes with an approved conservation program in a manner that is inconsistent with the intent and purpose of FEECA. Peoples further contends that if we have no authority to do so, then the intent of the statute may be readily frustrated by any utility not required to submit programs in accordance with the terms of the statute. Peoples maintains that we do have the power under FEECA to ensure that its intent is not so easily frustrated. Peoples notes that this is one possible issue we might consider in determining whether WREC's rate structure is unduly discriminatory.

Peoples claims that it has standing to initiate this proceeding. Peoples maintains that its Petition does not extend our "rate structure" jurisdiction, as was alleged by WREC. If WREC's arguments were correct, claims Peoples, then only this Commission or WREC is entitled to initiate a proceeding involving WREC's rate structure.

Peoples claims that its Petition does allege facts that satisfy the standard for standing set forth in Agrico. With respect to actual and immediate injury, the Petition explains that Peoples is precluded from providing natural gas service to residential developments because developers would have to pay an additional \$710 to install natural gas. The Petition explains how such treatment discourages the use of gas to the detriment of Peoples. Peoples claims that it has already suffered injury because developers have elected not to install natural gas in their developments because it is more expensive to install.

Peoples claims that Rule 25-9.052, Florida Administrative Code, protects against the type of harm that Peoples is experiencing. In that rule, one of the matters to be addressed when determining whether a cooperative's rate structure is fair, just and reasonable, is the "avoidance of undue discrimination." Peoples contends that the purpose of avoiding undue discrimination is to avoid the injury that results from it.

Analysis

A motion to dismiss raises, as a question of law, whether the facts alleged in a petition state a valid cause of action. See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993); see also Order No. PSC-98-1160-PCO-WS, issued August 25, 1998, in Docket No. 971663-WS. In deciding whether to grant or deny a motion to dismiss, all allegations made in the petition must be taken as true. *Id.*

We find that Peoples lacks standing and we grant the Motion to Dismiss for that reason. Based on the facts alleged, Peoples is harmed by WREC's implementation of its tariff for underground electric service, but the harm is not the type which Rule 25-9.052, Florida Administrative Code, is intended to protect against. Therefore, Peoples does not satisfy the second part of the Agrico test, which provides that the alleged injury must be of the type which the proceeding is intended to protect against.

Peoples claims it is harmed by WREC's tariff because the tariff makes installation of gas facilities more expensive than installation of electric facilities. In addition, Peoples claims it has already lost business as a result of the tariff. We must accept these allegations as true. Peoples argues that Rule 25-9.052 is intended to protect against this type of harm.

We disagree. Rule 25-9.052 does not protect Peoples from the type of harm it alleges. The rule implements Section 366.04(2)(b), Florida Statutes, which grants us authority to prescribe rate structures for electric utilities. Rate structure is defined as the classification system used to justify different rates, including the rate relationship between various customer classes, and the rate relationship between members of a customer class. See Rule 25-9.051(7), Florida Administrative Code.

The above analysis makes clear that the rule that Peoples relies on, Rule 25-9.052, deals with discrimination by a utility against its customers. The rule is therefore intended to protect the customers of a utility from an unfair rate structure imposed by the utility. The rule does not address the effects of one utility's rate structure on another utility. Therefore the rule

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Peoples relies on is not designed to protect Peoples from the harm it alleges.

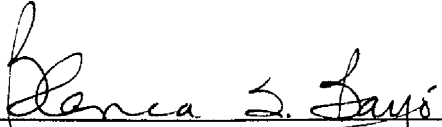
Applying Rule 25-9.052 to the situation at hand requires us to determine whether WREC is discriminating against customers subject to its tariff for underground electric service. Peoples does not allege that such customers are subjected to discrimination by WREC. Even if Peoples did allege such harm to WREC's customers, such harm would give the customers standing, not Peoples. Peoples makes no claim that it has authority to represent the developers in this proceeding. For these reasons, the Motion to Dismiss shall be granted.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Motion to Dismiss filed by Withlacoochee River Electric Cooperative is granted. It is further

ORDERED that this docket shall be closed 32 days after the issuance of this Order to allow the time for filing an appeal to run.

By ORDER of the Florida Public Service Commission this 8th day of July, 2002.

  
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BLANCA S. BAYÓ, Director  
Division of the Commission Clerk  
and Administrative Services

( S E A L )

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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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.