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**Florida
Power**
CORPORATION

December 5, 1989

James P. Fama
CORPORATE COUNSEL

Mr. Steve C. Tribble
Director of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399-0872

Re: Docket No. 890737-FU

Dear Mr. Tribble:

Enclosed for filing in the subject matter is an original and fifteen (15) copies of Florida Power Corporation's Petition For A Limited Proceeding On Proposed Agency Action.

Please acknowledge receipt and filing of the above by completing the form provided on the enclosed copy of this letter and returning same to this writer.

Very truly yours,

James P. Fama
James P. Fama

- ACK
- AFA _____
- APP _____
- CAF _____
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Enclosures

cc: Parties of Record

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DOCUMENT NUMBER-DATE

11731 DEC -5 1989

TPSC-RECORDS/REPORTING

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Implementation Of) Docket No. 890737-PU
§ 366.80-.85, Florida Statutes,)
Conservation Activities Of)
Electric And Natural Gas)
Utilities)
)

FLORIDA POWER CORPORATION PETITION FOR A
LIMITED PROCEEDING ON PROPOSED AGENCY ACTION

On November 14, 1989, in the above-referenced docket the Commission issued a Notice Of Proposed Agency Action, Order On Conservation, with which Florida Power Corporation (Florida Power) was served on November 17, 1989. The order provides that any person whose substantial interests were affected by the proposed action may file, on or before December 5, 1989, a petition for a hearing. Order at 7.

Pursuant to that order and Commission Rules 25-22.029(4) and 25-22.036, Florida Power hereby petitions for an informal proceeding under Fla. Stat. § 120.57(2), limited to briefing of one issue--the lawfulness of the Commission's directive that electric utilities develop conservation programs which promote the use of natural gas. Order at 5. Florida Power requests that this case be bifurcated, such that filing and approval of all conservation programs, except those related to electric utility promotion of gas, proceed on the current schedule, and that the legal issue

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raised by this petition be considered on an independent timetable in a separate docket.

In support of this petition, Florida Power submits the following.

A. Florida Power Has A Substantial Interest In The Commission's Determination.

Section B of the November 14 Order states:

The direct use of natural gas in space conditioning and water heating shall be encouraged by both electric and gas utilities where such use is a cost-effective method of slowing growth in electric demand. Thus, all utilities are required to either develop cost-effective programs for the use of natural gas or provide an explanation why such programs cannot be developed.

Order at 5. Florida Power is one of the utilities ordered to comply with this directive, and therefore has a substantial interest in the decision at issue in this case. The electricity sold by Florida Power competes directly with natural gas for use in space conditioning and water heating, the two areas of the energy market to which Section B of the Commission's order is directed. Implementation of the Commission's order will therefore have a direct and substantial impact upon Florida Power's sales and revenues.

B. The Proposed Order Is Contrary To The 1989 Revision To The Florida Energy Efficiency And Conservation Act.

The Senate version of § 366.82(3) of the 1989 revision of the Florida Energy Efficiency And Conservation Act (FEECA) contained, in pertinent part, the following language:

Utility programs may include, but are not limited to, increasing the use of natural gas to reduce electric

demands when such use of natural gas provides net benefits to both the electric consumers and the natural gas consumers, variations in rate design, load control, cogeneration, residential energy conservation subsidy, or any other measure within the jurisdiction of the commission which the commission finds likely to be effective; (emphasis added)

See attached excerpted draft of Senate Bill. The final version of the bill excluded the language marked in boldface above. The pertinent part of § 366.82(3) now reads as follows:

Utility programs include variations in rate design, load control, cogeneration, residential energy conservation subsidy, or any other measure within the jurisdiction of the commission which the commission finds likely to be effective;

From this legislative history, it is plain that the legislature considered and rejected the concept of the mandatory promotion of gas usage by electric utilities. The Commission's November 14 order is therefore inconsistent with the statutory intent underlying FEECA.

C. Implementation Of The Proposed Order May Violate Florida Power's First Amendment Rights Of Freedom Of Speech.

The Constitutional guarantee of free speech extends to corporations such as Florida Power as well as to individuals. Just as the First Amendment prohibits improper restraints on the voluntary public expression of ideas, there is necessarily a concomitant freedom not to speak publicly, and to remain silent.

Florida Power has a constitutional right not to associate with speech with which it disagrees. The Commission's order is unlawful on that ground alone. However, the order goes well beyond association with objectionable speech, and indeed contemplates

Florida Power's adoption of such spe. as its own. This idea, that Florida Power's goodwill and energy expertise should be utilized to market natural gas, is particularly objectionable. While Florida Power does not seek to avoid debate over which energy form a customer should use, Florida Power does have a constitutional right to be free from regulation which requires Florida Power to enhance the voice of its competitor.

The Commission's order could be valid if it were narrowly tailored and served a compelling state interest. However, the order fails on both counts. As discussed above, the legislature has decided that there is no compelling state interest furthered by electric utilities advocating the use of natural gas. Further, broadening conservation programs to encourage gas usage in a way far beyond the marketing efforts of the gas utilities themselves, is not a narrowly tailored means of regulation. In short, from a constitutional perspective, marketing gas should be left to gas utilities, not electric utilities.

D. Implementation Of The Proposed Order Constitutes Restraint Of Trade, Which May Be Unlawful.

The proposed order mandates that the "direct use of natural gas in space conditioning and water heating shall be encouraged" by electric utilities when it is a cost-effective means of slowing electric demand. Implementation of this order involves Florida Power encouraging its customers to refrain from purchasing its product, but to instead purchase the product offered by Florida Power's competitor. If Florida Power not only surrenders markets

to its competitors, but in fact, affirmatively markets gas on their behalf, a restraint of trade arises, which may be unlawful.

E. Any Gas Use Program Developed By Electric Utilities Has To Be Cost Effective For Gas Utilities As Well.

Assuming, arguendo, that it is lawful for the Commission to mandate electric utility conservation programs which promote natural gas, there currently is no way for the Commission to evaluate such programs adequately. While there exists a methodology to measure the cost-effectiveness of such programs with respect to electric utilities, no corresponding methodology exists to measure their cost-effectiveness to gas utilities. Until this shortcoming has been remedied, no gas usage conservation programs should be filed.

FEECA requires that conservation programs be cost effective to both electric and gas utilities: "The Legislature further finds and declares that §§ 366.80-366.85 and 403.519 are to be liberally construed in order to meet the complex problems of...increasing the overall efficiency and cost-effectiveness of electricity and natural gas production and use..." Fla. Stat. § 366.81. The Commission's rules are consistent with this statutory directive: "The Florida Energy Efficiency and Conservation Act requires increasing the efficiency of the electric and natural gas systems of Florida and the end use of these sources of energy..." Rule 25-17.001(2). See also Rule 25-17.001(3): "The general goals and methods for increasing the overall efficiency of the bulk electric power system and natural gas system of Florida...are an

ongoing part of the practice of ev. ; well managed utility's programs..."

The cost-effectiveness methodology specified in Commission Rule 25-17.008 applies only to electric utilities. See Rule 25-17.008(1). No corresponding methodology currently exists to assess the cost effectiveness of an electric utility or gas utility program with respect to the efficient use of gas. A program which increases gas consumption may be cost-effective to Florida Power, but may not meet the gas cost-effectiveness part of this two part cost-effectiveness test. For example, conversion of space heating from electric to gas might be cost-effective for Florida Power, but if it required extensive expansion of gas transmission and distribution lines, such a program may result in the uneconomic duplication of electric facilities.

The Commission recently instituted a cost-effectiveness docket, which is the proceeding where a gas utility cost-effectiveness test should be developed. Assuming, arguendo, that it is lawful to require Florida Power to promote gas use in its conservation programs, these programs should be filed only after a gas cost-effectiveness test has been developed against which such programs can be evaluated.

F. Florida Power Requests Bifurcation Of This Case To Allow Prompt Filing And Implementation Of All Conservation Programs Except Those Involving Electric Utility Promotion Of Natural Gas, And Separate Briefing Of The Legal Issue Raised By This Petition.

The Commission's rules governing Decisions Determining Substantial Interests are to be construed to secure the speedy and inexpensive determination of every proceeding. Rule 25-22.025. Florida Power submits that the best way to carry out this mandate is to bifurcate this case such that filing and approval of all conservation programs except those related to electric utility promotion of natural gas use proceed on the current schedule, and the legal issue raised by this petition be considered on an independent timetable in a separate docket.

While under this rule the Commission usually conducts full hearings, which include the filing of testimony and cross-examination, such an approach is unnecessary when Florida Power does not dispute any issues of material fact in this case. We concede that there are conservation programs encouraging the use of natural gas which may be cost effective to Florida Power. There is no reason to convene a fact-finding hearing to decide whether that is the case. The parties simply should proceed directly to legal briefing of the single issue discussed above. Such an abbreviated method of dealing with challenges to decisions affecting substantial interests is provided for in Fla. Stat. § 120.57(2)2, which gives affected persons an opportunity to submit

"a written statement challenging the grounds upon which the agency has chosen to justify its action or inaction."

Bifurcation is the most logical and most efficient way to proceed with this case. The alternative route--keeping this docket together for the sake of a dispute over one issue--will unnecessarily delay the filing and implementation of non-gas-related conservation programs. These programs are not only unopposed, but indeed are heartily supported by the Commission, the staff, and all parties. Further, any approach which delays conservation programs, the implementation of which the legislature in § 366.81 of FEECA deemed "critical," would hasten the need for the next plant addition in Florida. This idea is also diametrically opposed to the Commission's conservation goals contained in Rule 25-17.001.

The current Case Assignment And Scheduling Record (CASR) calls for post-hearing briefs on April 2, 1990. As no hearing is necessary, briefing can occur much earlier than originally scheduled. Florida Power proposes that briefs be due within 30 days of the Commission's order on this petition. Assuming that the Commission takes a full 15 days to act on this petition, until December 20, 1989, briefs can be filed on January 19, 1990, 73 days earlier than the currently established briefing date. Thus, Florida Power's request for a hearing does not engender delay, but in fact would accelerate the Commission's current hearing schedule.

Florida Power is well aware of the Commission's interest in moving forward expeditiously with the implementation of new

conservation programs. The November 14 order calls for these programs to be submitted within 90 days, on February 12, 1990. Florida Power is willing and able to meet this deadline with respect to all programs that do not involve the promotion of gas. Florida Power intends to continue to be a leader in utility conservation efforts in Florida, and plans to file numerous new conservation programs on February 12.

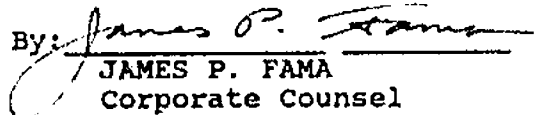
If the Commission is unwilling to bifurcate this case, in the alternative, Florida Power requests that this entire docket be set for hearing, which hearing should consist solely of briefing of the legal issue raised by this petition.

WHEREFORE, for all of the reasons discussed above, Florida Power respectfully petitions the Commission to bifurcate this case and set for briefing the issue of the lawfulness of the Commission's directive that electric utilities develop conservation programs to encourage the use of natural gas.

Dated this 5th day of December, 1989.

Respectfully Submitted,

OFFICE OF THE GENERAL COUNSEL
FLORIDA POWER CORPORATION

By: 
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FCS 06
JIF

PUBLIC UTILITY DRAFT

1 A bill to be entitled

2 An act relating to the regulation of public

3 utilities; amending s. 366.02, F.S.; revising

4 the definition of the term "public utility";

5 correcting the definition for the term

6 "commission"; amending s. 366.04, F.S.;

7 revising the jurisdiction of the Florida Public

8 Service Commission with respect to the sale and

9 issuance of securities by public utilities;

10 giving the commission jurisdiction over the

11 assumption by a public utility of liabilities

12 or obligations as guarantor, endorser, or

13 surety; expanding commission jurisdiction with

14 respect to territorial agreements and disputes;

15 defining a territorial dispute; amending s.

16 366.05, F.S.; revising the commission's

17 authority to address inadequacies in the energy

18 grid; authorizing the commission to require

19 necessary reports from utilities and their

20 affiliated companies; creating s. 366.051,

21 F.S.; setting forth the rights and obligations

22 of utilities and the jurisdiction of the

23 commission regarding the sale, purchase, and

24 transmission of power produced by cogenerators

25 or small power producers; amending s. 366.07,

26 F.S.; requiring the commission to investigate

27 the earnings of a public utility under certain

28 circumstances; amending s. 366.072, F.S.,

29 relating to rate adjustment orders; revising a

30 cross-reference; amending s. 366.093, F.S.;

31 expanding the commission's access to records;

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1 meet the complex problems of reducing and controlling the
 2 growth rates of electric consumption and reducing the growth
 3 rates of weather-sensitive peak demand; increasing the overall
 4 efficiency and cost-effectiveness of electricity and natural
 5 gas production and use; encouraging further development of
 6 waste-heat conservation facilities; and conserving expensive
 7 resources, particularly petroleum fuels.

8 Section 11. Subsections (1), (2), (3), and (5) of
 9 section 366.82, Florida Statutes, are amended to read:

10 366.82 Definition; goals; plans; programs; annual
 11 reports; energy audits.--

12 (1) For the purposes of ss. 366.80-366.85 and 403.519,
 13 "utility" means any person or entity of whatever form which
 14 provides electricity or natural gas at retail to the public,
 15 specifically including municipalities or instrumentalities
 16 thereof and cooperatives organized under the Rural Electric
 17 Cooperative Law and specifically excluding any person or
 18 entity providing natural gas at retail to the public whose
 19 annual sales volume is less than 100 million therms or any
 20 person or entity providing electricity at retail to the public
 21 whose annual sales to end-use customers is less than 500
 22 gigawatt-hours.

23 (2) The commission shall adopt appropriate goals for
 24 increasing the efficiency of energy generation and
 25 consumption, specifically including goals designed to increase
 26 the conservation of expensive resources, such as petroleum
 27 fuels, and to reduce and control the growth rates of electric
 28 consumption, and to reduce the growth rates especially of
 29 weather-sensitive peak demand. The Executive Office of the
 30 Governor shall be a party in the proceedings to adopt goals.
 31 ~~The initial goals shall be adopted no later than September 1,~~

1 ~~1980~~-for-the-succeeding-5-ye.-period. The commission may
 2 change the initial goals for reasonable cause and may reset
 3 the time period for accomplishing the goals. After the
 4 programs and plans to meet those goals are completed, the
 5 commission shall determine what whether further goals,
 6 programs, or plans are warranted and, if so, shall adopt them.

7 (3) Following adoption of goals pursuant to subsection
 8 (2), the commission shall require each utility to develop
 9 plans and programs a-plan to meet the overall goals within its
 10 service area. If any plan or program includes loans,
 11 collection of loans, or similar banking functions by a utility
 12 and the plan is approved by the commission, the utility shall
 13 perform such functions, notwithstanding any other provision of
 14 the law. The commission may pledge up to \$5,000,000 of the
 15 Florida Public Service Regulatory Trust Fund to guarantee such
 16 loans. However, no utility shall be required to loan its
 17 funds for the purpose of purchasing or otherwise acquiring
 18 conservation measures or devices, but nothing herein shall
 19 prohibit or impair the administration or implementation of a
 20 utility plan as submitted by a utility and approved by the
 21 commission under this subsection. ~~Plans-to-meet-the-initial~~
 22 ~~goals-must-be-submitted-to-the-commission-no-later-than~~
 23 ~~November-17-1980--The-commission-shall-approve-or-disapprove~~
 24 ~~each-plan-no-later-than-December-17-1980~~ If the commission
 25 disapproves a plan, it shall specify the reasons for
 26 disapproval, and the utility whose plan is disapproved shall
 27 resubmit its modified plan within 30 days. ~~Each-plan-shall~~
 28 ~~commence-January-17-1981~~ Prior approval by the commission
 29 shall be required to modify or discontinue a plan, or part
 30 thereof, which has been approved. If any utility has not
 31 implemented its programs plan and is not substantially in

1 compliance with the provisions of its approved plan at any
 2 time after ~~January 17, 1982~~, then the commission shall adopt
 3 ~~programs a program which will be~~ required for that utility to
 4 achieve the overall goals. Utility programs, which may
 5 include, but are not limited to, increasing the use of natural
 6 gas to reduce electric demands when such use of natural gas
 7 provides net benefits to both the electric consumers and the
 8 natural gas consumers, variations in rate design, load
 9 control, cogeneration, residential energy conservation
 10 subsidy, or any other measure within the jurisdiction of the
 11 commission which the commission finds likely to be effective;
 12 this provision shall not be construed to preclude these
 13 measures in any plan or program.

14 (5) ~~By January 17, 1981~~ The commission shall require
 15 each utility to offer, or to contract to offer, energy audits
 16 to its residential customers. This requirement need not be
 17 uniform, but may be based on such factors as level of usage,
 18 geographic location, or any other reasonable criterion, so
 19 long as all eligible customers are notified by ~~April 17, 1981~~.
 20 The commission may extend this requirement to some or all
 21 commercial customers ~~if such audits are required pursuant to~~
 22 ~~federal law~~. The commission shall set the charge for audits
 23 by rule, not to exceed the actual cost, and may describe by
 24 rule the general form and content of an audit. In the event
 25 one utility contracts with another utility to perform audits
 26 for it, the utility for which the audits are performed shall
 27 pay the contracting utility the reasonable cost of performing
 28 the audits. Each utility over which the commission has
 29 ratesetting authority shall estimate its costs and revenues
 30 for audits, conservation programs, and implementation of its
 31 plan for the immediately following 6-month period. Reasonable

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Implementation of) Docket No. 890737-PU
§ 366.80-.85, Florida Statutes)
Conservation Activities Of)
Electric and Natural Gas)
Utilities)

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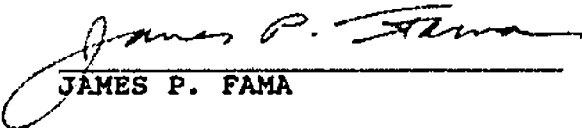
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