

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Emergency Complaint ) DOCKET NO. 941165-PU  
Against Tampa Electric Company ) ORDER NO. PSC-95-0018-FOF-PU  
for Providing Unauthorized ) ISSUED: January 5, 1995  
Incentives for Electric Water )  
Heating Appliances, by PEOPLES )  
GAS SYSTEM, INC. )  
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The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman  
J. TERRY DEASON  
JOE GARCIA  
JULIA L. JOHNSON  
DIANE K. KIESLING

ORDER DENYING MOTION TO DISMISS  
AND GRANTING MOTION TO SEVER

BY THE COMMISSION:

On September 7, 1994, Tampa Electric Company (TECO) notified the Commission's Division of Electric and Gas, that TECO was initiating three new research and development (R & D) programs. The new programs provide: 1) a new EPRI/E-Tech heat pump water heater, free of charge, to customers willing to try the new water heating device; 2) a \$200 incentive to customers and a \$100 incentive to contractors willing to install an electric water heater on TECO's Electric Water Heating with Prime Time load management program; and 3) a \$300 incentive to homeowners willing to install electric water heating with a heat recovery unit.

On November 1, 1994, Peoples Gas System, Inc. (Peoples) filed a complaint, pursuant to Rule 25-22.036 (5), Florida Administrative Code, alleging that TECO was providing unauthorized incentives to customers to choose electric water heating appliances rather than alternative water heating technologies. In particular, Peoples alleged that TECO's incentive program was aimed directly at undermining Peoples' existing, Commission-approved, Residential Home Builder energy conservation program in the Meadow Pointe Subdivision in Tampa, Florida. Peoples claimed that in initiating this incentive program, without Commission approval, TECO was violating Section 366.06 (1), Florida Statutes, and Commission Rules 25-9.001, 25-9.004, and 25-9.005, Florida Administrative Code. Peoples also alleged that TECO was violating the Florida Energy Efficiency and Conservation Act (FEECA), Section 366.81,

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Florida Statutes, by encouraging customers to choose electric water heating appliances rather than more efficient water heating technologies, such as gas or solar.

On November 23, 1994, TECO filed an answer to Peoples' complaint, along with a counter-complaint. TECO alleged that the three programs were R & D programs initiated in an effort to determine the commercial viability of efficient, electric alternatives to gas water heating and for which the Company was not seeking cost recovery. As such, the Company argued that it was not necessary to get Commission approval for the programs. In addition, TECO counter-claimed that Peoples Gas was using false and misleading advertising to promote gas over electricity, and that Peoples' conservation programs were no longer cost-effective.

On December 2, 1994, Peoples filed a Motion to Dismiss and Alternative Motion to Sever. Peoples argued that TECO's counter-complaint should be dismissed for failure to allege any current violation of any Commission rule, statute, or order. In the alternative motion, Peoples sought to sever the counter-complaint and have it heard in another docket. Peoples argued that even if the counter-complaint should be heard, the issues involved were not sufficiently related to those covered in Peoples' complaint to warrant coverage in the same docket.

On December 7, 1994, TECO filed a Memorandum in Opposition to Peoples' Motion to Dismiss and Alternative Motion to Sever. TECO also filed a request for oral argument on the Memorandum in Opposition. TECO argued that the issues raised in its counter-complaint were "integrally related" to those raised by Peoples in that all issues raised went to fairness and efficiency in the energy marketplace. TECO argued that consolidation of these issues was the only way to insure complete and fair adjudication of this matter.

In its Motion to Dismiss, Peoples Gas argued that TECO's entire counter-complaint should be dismissed because TECO has not alleged any ongoing violation of a statute. Peoples also argued that both the advertising and the conservation programs involved have already been approved by the Commission and are being implemented according to Commission guidelines. In its Alternative Motion to Sever, Peoples argued that TECO's counter-complaint should be heard in another, more appropriate docket. Peoples Gas noted that the same types of issues raised in TECO's counter-complaint will be addressed in separate Commission dockets.

TECO countered that the advertising violations concerned are part of Peoples' ongoing marketing campaign. TECO claimed that

Peoples is trying to induce customers to use gas appliances, when electric products might fulfill the customer's needs more efficiently. TECO also alleged that Peoples conservation programs are no longer cost-effective. As such, TECO argued that circumstances have changed and Peoples' programs are ripe for review. In addition, TECO asserted that these issues should be retained in this docket in order to expedite a fair resolution of the issues involved.

TECO does, in fact, state a cause of action upon which relief can be granted in Count I of the counter-complaint. If Peoples is using false and misleading advertising, then the Commission has jurisdiction under Section 366.05, Florida Statutes, to review the prudence of the advertising expenses. In addition, any use of false and misleading advertising conflicts with the Commission's fuel neutrality policy as set forth in Commission Order Nos. 9974 and 12179, issued in Docket Nos. 810050-PU and 830002-PU. This policy states that a utility should refrain from promoting its product by showing another competitive fuel in a bad light. As such, the Motion to Dismiss Count I of TECO's counter-complaint is denied.

Docket No. 950002-EG, however, is already open to review the various aspects of all electric and gas utilities' energy conservation plans. Advertising activities and expenses will be covered in this comprehensive review. In fact, a request for a production of documents concerning advertising expenses was sent to all gas and electric utilities, on August 24, 1994. As such, an examination of Peoples' overall advertising methods in the current docket is redundant. Only those issues regarding the content of Peoples' advertising that specifically targets the Meadow Pointe subdivision shall be addressed in this docket. Any other advertising concerns that TECO wishes to be addressed will be considered in Docket No. 950002-EG.

TECO also states a valid cause of action in Count II of the counter-complaint. Although the Commission approved Peoples' current conservation programs in Order No. 23463, issued in Docket No. 900089-EG, on September 11, 1990, such approval does not preclude Commission review to insure that these programs are currently in compliance with all applicable statutes and Commission rules. Thomson v. Department of Environmental Regulation, 511 So. 2d 989 (Fla. 1987), cited in TECO's Memorandum in Opposition, is applicable in this case. In Thomson, the court reasoned that the doctrine of res judicata should only be applied to administrative cases when the facts and policies upon which the prior ruling was based have remained the same. Id. at 991. Likewise, Peoples' programs will be subject to review if pertinent circumstances have

changed. Additionally, Section 366.82(5) notes that "... the commission shall not allow the recovery of the cost of any company image-enhancing advertising ...." If Peoples' conservation program is not promoting the most cost-effective mix of gas and electric appliances, and is distorting the efficiency comparison for consumers, then cost-recovery for the program will be disallowed. Peoples may also be required to present a revised conservation program, as provided in Section 366.82(3), Florida Statutes. As such, Count II of TECO's counter-complaint shall not be dismissed.

But again, the Commission has already opened Docket No. 941104-EG specifically to address the cost-effectiveness of gas conservation and demand-side management programs. This particular docket was opened, in fact, due to TECO's intervention in Docket No. 940643-EG, regarding one of Chesapeake Utilities' conservation programs. TECO intervened in that docket in the belief that Chesapeake and nearly all other gas utilities' conservation rebate programs are based upon an assumed avoidance of electric generating capacity. As such, TECO claims these conservation programs create an illusion of benefits where, actually, there are none. TECO's argued result is that some gas customers receive rebates that are not balanced by benefits received by other gas and electric consumers. TECO directed the same argument against Peoples in the counter-complaint. A complete review of the cost-effectiveness of Peoples' conservation programs would, therefore, be redundant. TECO will be allowed, however, to address the limited issue of whether Peoples is improperly implementing a Commission-approved program within the Meadow Pointe subdivision. Any alteration or non-compliance in Peoples' implementation of its programs would violate Section 366.82(3), which requires utilities to obtain Commission approval for any variance in program implementation. Improper implementation could also provide Peoples with an unfair competitive advantage in the Meadow Pointe subdivision and shall, therefore, be addressed in this docket. Other issues concerning the cost-effectiveness of Peoples' conservation programs are removed to Docket No. 941104-EG.

The most efficient and fair means of handling these issues is to retain the aspects pertaining to the Meadow Pointe subdivision in this docket, and address the remaining matters in dockets opened specifically to address those issues. Only the portions of TECO's counter-complaint that raise matters of unfair competition and discriminatory marketing techniques employed in the Meadow Pointe subdivision will be retained in this docket, as these are issues similar to those raised in Peoples' original complaint. Matters that do not pertain to the Meadow Pointe subdivision shall, however, be severed from this docket.

Based on the foregoing, it is therefore

ORDERED that Peoples Gas System, Inc.'s Motion to Dismiss Tampa Electric Company's Counter-Complaint is, hereby, denied. It is further

ORDERED that Peoples Gas System, Inc.'s Motion to Sever Tampa Electric Company's Counter-Complaint is, hereby, granted. It is further

ORDERED that the only issues raised in Tampa Electric Company's Counter-Complaint that shall be addressed in this docket are those pertaining to Peoples Gas System, Inc.'s distribution of false or misleading advertising or promotional materials specifically targeting the Meadow Pointe subdivision and those issues regarding alterations or non-compliance by Peoples Gas System, Inc. in implementation of Commission-approved conservation programs at the Meadow Pointe subdivision. It is further

ORDERED that in the event this Order becomes final, this Docket shall remain open to address the remaining issues.

By ORDER of the Florida Public Service Commission, this 5th day of January, 1995.

BLANCA S. BAYÓ, Director  
Division of Records and Reporting

by: Kay J. J. J.  
Chief, Bureau of Records

**DISSENT**

Commissioner J. Terry Deason dissents from this order.

( S E A L )  
BC



NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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 this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.038(2), 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.