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December 21, 2001

Ms. Blanca Bayo, Director
Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

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COMMISSION
CLERK

Re: Docket No. 011622-GU

Dear Ms. Bayo:

Enclosed for filing on behalf of Withlacoochee River Electric Cooperative, Inc. ("Withlacoochee") are the original and fifteen copies of Withlachoee's Motion to Dismiss in the above-referenced docket. Also enclosed is a diskette containing this motion as a Word Perfect document.

Please acknowledge receipt of these documents by date-stamping the enclosed copy of this letter and returning it to the undersigned.

Sincerely,


J. Stephen Menton

JSM/knb
Enclosures

cc: Parties of Record

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for determination that the rate)	
structure of Withlacoochee River Electric)	Docket No. 011622-GU
Cooperative, Inc. is discriminatory, interferes)	
with approved energy conservation)	Filed: January 7, 2002
programs, and is contrary to the legislative)	
intent of the Florida Energy Efficiency and)	
Conservation Act, by Peoples Gas System)	
_____)	

**WITHLACOOCHEE RIVER ELECTRIC COOPERATIVE, INC.'S
MOTION TO DISMISS**

Withlacoochee River Electric Cooperative, Inc. ("Withlacoochee"), by and through its undersigned counsel, and pursuant to Rules 28-106.201(4) and 28-106.204(2), Florida Administrative Code, hereby files this Motion requesting the Florida Public Service Commission ("Commission") to dismiss the Petition of Peoples Gas System (the "Petition") which initiated this docket. In support of its Motion to Dismiss, Withlacoochee states:

1. Withlacoochee is a non-profit electric distribution cooperative which owns and operates an electric distribution system and provides retail electric service to customers within Pasco, Hernando and Citrus counties, Florida.

2. Withlacoochee is not a "public utility" as defined in Section 366.02(1), Florida Statutes. Withlacoochee is a cooperative organized and existing under the Rural Electric Cooperative Law, Chapter 425, Florida Statutes. Thus, while Section 366.04(2)(6), Florida Statutes, authorizes the Commission to prescribe a rate structure for all electric utilities (including Withlacoochee), the Commission does not have jurisdiction to fix or establish the rates of Withlacoochee under Section 366.04(1) or 366.05(1), Florida Statutes. See, City of Tallahassee v.

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Mann, 411 So.2d 162, 163 (Fla. 1981); Lewis v. Public Service Commission, 463 So.2d 227 (Fla. 1985).

3. Withlacoochee is in full compliance with all applicable Commission rules relating to electric cooperatives. Withlacoochee has timely submitted copies of its tariffs to the Commission in accordance with Section 366.04(2)(b), Florida Statutes, and Rule 25-9.050 et seq., Florida Administrative Code. There are no outstanding Commission initiated requests or proceedings pending with respect to Withlacoochee.

4. On or about December 6, 2001, Peoples Gas System (“PGS”) filed its Petition with the Commission alleging that Withlacoochee’s rate structure is discriminatory, interferes with the Commission approved conservation programs of PGS and is contrary to the legislative intent of the Florida Energy Efficient and Conservation Act, Section 366.81, Florida Statutes (FEECA).

5. The Petition should be dismissed and this docket closed because the Petition is deficient as a matter of law and PGS has failed to provide any basis upon which the Commission can provide the relief sought. There are multiple infirmities inherent in PGS’ Petition. First, PGS has failed to cite a statutory, regulatory or constitutional provision that grants it standing to initiate a proceeding against Withlacoochee. Before addressing the substantive law provisions cited in the Petition, the Commission can and should conclude that the Petition must be dismissed on the grounds that a natural gas utility such as PGS does not have standing to initiate a proceeding challenging the rate structure, charges or tariffs of an electric utility. This conclusion is particularly warranted since Withlacoochee is a cooperative over whom the Commission has only limited jurisdiction and authority. PGS has failed to allege any legal basis for expanding Commission jurisdiction in order to grant the extraordinary relief sought in the Petition. PGS has also failed to

allege any injury in fact within the zone of interest designed to be protected by the applicable statutes. In this regard, it is important to recognize that Withlacoochee is not subject to the requirements of the FEECA. In any event, the Petition misconstrues the scope, intent and goals of the FEECA. PGS is essentially trying to use the FEECA to create a new, unprecedented preference for natural gas as opposed to electric appliances. The Commission should dismiss PGS' novel, unwarranted attempt to utilize the Commission's regulatory process to further a competitive business position.

PGS HAS NO STANDING TO INITIATE THIS PROCEEDING

6. The statutory basis upon which PGS initiated this docket is not entirely clear from the Petition. PGS has not cited any specific statute, rule or constitutional right that recognizes or establishes a right for a natural gas utility to initiate a proceeding challenging the rate structure or charges of an electric utility. A review of Chapter 366, Florida Statutes and Chapter 25, Florida Administrative Code, fails to reveal any such authority or any grant of standing to initiate such a proceeding.

7. Generally, administrative hearings are limited to circumstances "in which the substantial interests of a party are determined by an agency" Section 120.569(1), Florida Statute. There is no pending or proposed Commission action with respect to Withlacoochee's rate structure or service availability charges and there is no statutory or legal basis for PGS to unilaterally initiate a proceeding.

8. Section 120.52(12), Florida Statutes, defines the term "party" in administrative proceedings as:

(a) **Specifically named persons** whose **substantial interests** are being determined in the proceeding.

(b) Any other person who, **as a matter of constitutional right, provision of statute, or provision of agency regulation**, is entitled to participate in whole or in part in the proceeding, or whose **substantial interests will be affected** by proposed agency action, and who makes an appearance as a party.... [emphasis added]

9. PGS does not meet this definition of a party under Section 120.52(12), Florida Statutes. There is no proposed agency action that created a point of entry to begin this docket. Instead, PGS unilaterally seeks to initiate a proceeding against Withlacoochee over whom the Commission has only limited jurisdictional authority. This attempt, if allowed to proceed, would impermissibly extend Commission jurisdiction beyond what is authorized in the statutes.

10. As noted above, no specific statutory or rule authority is cited in the Petition to support the initiation of this docket. The only statutes relied upon by PGS to support its claim for relief relate to conservation planning required under the FEECA. Under the FEECA, the Commission can adopt goals and approve plans related to the conservation of electric energy and natural gas usage. The Commission is also authorized to require utilities governed by the statute to develop plans and implement programs for increasing energy efficiency and conservation within their service areas. See, Section 366.81, Florida Statutes. As discussed in more detail below, Withlacoochee is a cooperative that is not subject to the FEECA. See, Section 366.82(1) Florida Statutes. Furthermore, nothing in the statute authorizes one utility to initiate formal hearings regarding the rate structure or charges of another utility. While a natural gas utility such as PGS is subject to the planning and reporting requirements of FEECA, the statute provides no basis for initiating Commission proceedings against an electric cooperative.

11. In addition to lacking any statutory basis for initiating this proceeding, PGS also fails the traditional test of standing to participate in an administrative proceeding that challenges Withlacoochee's rate structure. To determine whether PGS has standing to initiate this proceeding, the Commission should first evaluate whether PGS has any legitimate substantial interest that is entitled to protection by the Commission. It is a well-established principle of administrative law that:

... before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Agrico Chemical v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981).

12. The Petition in this proceeding does not allege an injury in fact that meets the Agrico standard. In order to satisfy this first aspect of the Agrico standard, a petitioner must allege with specificity either: 1) an actual injury in fact at the time the petition is filed; or 2) that the petitioner is immediately in danger of sustaining some direct injury as a result of an agency's action. Village Park Mobile Home Assoc. Inc. v. Dept. of Business Regulation, 506 So.2d 426, 433 (Fla. 1st DCA 1987). The injury or threat of injury must be both real and immediate, not conjectural, hypothetical or abstract. Village Park, 506 So.2d at 433. A petition for formal hearing should be dismissed if it does not contain allegations that petitioner has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged conduct. Village Park, 506 So.2d at 433-34.

13. The Petition in this case does not include allegations of actual damages or actual loss of business from a specific development or project. Thus, the Petition fails to articulate an interest of PGS that is entitled to protection by the Commission. See, Florida Society of Ophthalmology v. State Board of Optometry, 532 So.2d 1279, 1285 (Fla. 1st DCA 1988)(speculative loss due to economic competition is not of sufficient “immediacy” to establish standing).

14. The Petition also fails to allege an injury of the type or nature sought to be protected by Chapter 366, Florida Statutes, or Chapter 25, Florida Administrative Code. As noted above, PGS has not pointed to any statutory or rule provision that can rationally be construed to empower existing utilities to initiate formal proceedings before the Commission to protect or enforce a FEECA conservation program against another utility. Only a utility that proposes a program and the Commission are parties in interest under the applicable statutory and regulatory framework. PGS’ claim that its FEECA program is less effective because of Withlacoochee’s business practices is not the kind of injury designed to be protected by the Commission’s authority under the FEECA. Thus, the Petition should be dismissed under the second prong of the Agrico test. See, Ameristeel Corporation v. Clark, 691 So.2d 473, 476-478 (Fla. 1997)(upholding a Commission order denying standing when the claimed interest was not the kind designed to be protected by Commission proceedings); see, also, In Re: Peoples Gas System, Inc. Petition for Approval of Enhancement Rider to Rate Schedule, Order No. PSC-95-0348-FOF-GU, Docket No. 941324-GU issued March 13, 1995 (Chapter 366 does not specifically grant competitor utilities standing in proceedings involving another utility’s rates.)

15. Florida appellate decisions confirm that it is appropriate to dismiss a petition to initiate formal administrative hearings that does not satisfy the Agrico test. See, e.g., Village Park,

506 So.2d 246; Friends of Matanzas, Inc. v. Dept. of Environmental Protection, 729 So.2d 437 (Fla. 5th DCA 1999); Kruer v. Board of Trustees, 647 So.2d 129 (Fla. 1st DCA 1994); City of Sunrise v. South Florida Water Management Dist., 615 So.2d 746 (Fla. 4th DCA 1993); Braman Cadillac Inc. v. Dept. of Highway Safety and Motor Vehicles, 584 So.2d 1047 (Fla. 1st DCA 1991); Greene v. Dept. of Natural Resources, 414 So.2d 251 (Fla. 1st DCA 1982). Accordingly, the Petition in this docket should be dismissed because PGS has no standing to challenge Withlacoochee under the FEECA.

FEECA DOES NOT PROVIDE THE COMMISSION WITH AUTHORITY TO GRANT THE RELIEF SOUGHT

16. A close examination of FEECA reveals that the Commission does not have the authority to grant the relief sought by PGS in this docket. The Commission's authority over utilities under FEECA is limited. While the Commission can refuse to approve a rate structure which discriminates against customers that use solar energy, renewable energy sources, highly efficient systems, co-generation and load-control systems, the Commission does not have authority to enforce or take action against any entity, even a regulated utility, that interferes with another utility's conservation program. The Commission has already recognized that FEECA only grants it authority to approve or disapprove conservation programs and not to dictate the specific terms of a plan. See, In Re: Implementation of Section 366.80-.85, Florida Statutes, Conservation Activities of Electric and Gas Utilities, Order No. 22586 in Docket No. 890737-PU issued February 21, 1990 (the "FEECA Order"). The Commission's recognition of the limited scope of its authority under FEECA confirms that it does not have the statutory authority to grant the relief sought by PGS in this docket. As pointed out above, PGS has not cited to any statutory or legal precedent that allows

the Commission to evaluate or take action against one utility based upon alleged impacts on another utility's conservation programs under FEECA.

**THE COMMISSION HAS NO JURISDICTION OVER WITHLACOOCHEE'S
SERVICE AVAILABILITY CHARGES**

17. The Commission's limited authority under FEECA is further constrained in the context of an electric cooperative such as Withlacoochee over whom the Commission has only limited jurisdiction.

18. The Commission's rate jurisdiction over cooperatives such as Withlacoochee is limited to approval of their rate structure. See, Section 366.04(2)(b), Florida Statutes. The definition of a "public utility" in Section 366.02, Florida Statutes, specifically excludes cooperatives. Thus, while a "public utility" must file and obtain approval from the Commission for all of its rates under Section 366.06(1) and 366.075, Florida Statutes, electric cooperatives are not subject to the same requirements. Consequently, the Commission's jurisdiction over cooperatives does not include authority to establish or approve rates under Sections 366.041 and 366.05, Florida Statutes and the Commission does not have any authority over the specific rates of Withlacoochee. See, Lewis v. Public Service Commission, supra. The Commission also does not have jurisdiction over the specific service availability charges of a cooperative such as Withlacoochee.

19. PGS fails to articulate a basis for invocation of the Commission's limited jurisdiction over Withlacoochee. There is nothing in the Petition that directly relates to Withlacoochee's rate structure. The main allegations of the Petition focus on assertions as to the intent and effect of Withlacoochee's service availability charges. The Petition is utterly devoid of any basis for the Commission to assert jurisdiction over the specific service availability charges of an electric

cooperative. PGS' attempt to blur the distinction between rate structures (over which the Commission has jurisdiction) and specific charges (over which the Commission does not have jurisdiction) must be rejected.

20. The Petition also fails to acknowledge that Withlacoochee is not subject to FEECA. Withlacoochee is not a "utility" as defined for purposes of FEECA. See, Section 366.82(1), Florida Statutes. While PGS is subject to the requirements of FEECA, its obligations under that statute do not provide a basis for Commission jurisdiction over Withlacoochee.

THE FEECA DOES NOT PROTECT THE USE OF GAS APPLIANCES

21. As noted above, Withlacoochee is not subject to the requirements of Section 366.82(2) and, consequently, there is no relief available to PGS under FEECA. While the lack of any available relief mandates dismissal of the Petition, Withlacoochee is compelled to point out that the Petition does not accurately characterize the FEECA's requirements as they relate to the encouragement of natural gas versus electric usage.

22. The Petition implicitly assumes that one of the purposes or goals of FEECA is to promote natural gas usage as an alternative to electric power. No legal precedent is cited to support this assumption. In fact, the statute only protects the use of alternate energy systems such as solar energy and does not establish a preference for natural gas appliances.

23. The Commission has already determined that the FEECA was not intended to require electric utilities to develop programs to promote natural gas usage. In the FEECA Order discussed above, the Commission concluded that it did not have the statutory authority "to require electric utilities to implement a specific type of program to meet FEECA goals." In view of this conclusion, the Commission specifically found that it was not authorized to require an electric utility to develop

or submit a gas promotion program. The Commission did not have to address the difficult constitutional questions that would inherently be involved in any order that required an electric utility to develop programs for the promotion of the use of natural gas.

24. Finally, in paragraph 20 of the Petition, PGS alleges that the service availability charges of Withlacoochee unduly discriminate against natural gas and violate the “Commission’s policy that a rate structure not be unduly discriminatory, and that it cannot be justified on the cost of service basis or on the basis of a classification of developments as ‘all electric’ or ‘partially electric.’” While there is no citation to support the Commission’s alleged policy, the allegation is apparently based upon the anti-discrimination provision in Section 366.81, Florida Statutes. As noted above, the FEECA is not applicable to Withlacoochee. In any event, the anti-discrimination prohibition in that statute only extends to discrimination against customers that use solar energy, renewable energy sources, highly efficient systems, cogeneration, and low-control systems and only applies to discrimination between “classes of customers” who use these alternate energy systems. The allegations of the Petition are insufficient to demonstrate that PGS is a proper party to assert discrimination under this provision. This statute does not provide protection for use of natural gas appliances as opposed to electric appliances. Even assuming the accuracy of the allegations in the Petition, there is no alleged discrimination between rate classes and, consequently, the statutory prohibition against discrimination is not applicable.

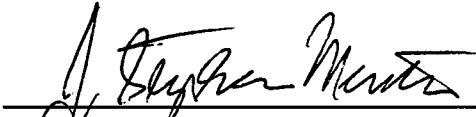
CONCLUSION

25. The Petition filed in this matter is defective as a matter of law and should be dismissed for several separate but equally valid reasons: PGS does not have standing to challenge Withlacoochee’s service availability charges; the FEECA does not provide a basis for the relief

sought from the Commission by PGS; the Commission has no jurisdiction over the rates or service availability charges of Withlacoochee; the FEECA does not require an electric utility to adopt a program to facilitate or encourage the use of natural gas. For all of these reasons, the Petition is deficient as a matter of law and must be dismissed. Should this docket be allowed to proceed, Withlacoochee reserves the right to raise additional defenses, including, but not limited to, the failure of PGS to demonstrate the cost effectiveness of its conservation program.

WHEREFORE, Withlacoochee respectfully request the Commission to enter an Order that dismisses the Petition filed by PGS and close this docket.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Withlacoochee River Electric Cooperative, Inc.'s Motion to Dismiss was furnished by U. S. Mail to the following this 7 day of January, 2002:

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