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January 18, 2002

IN REPLY REFER TO:

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VIA FEDEX

Blanca S. Bayo, Director
Division of Commission Clerk & Administrative Services
Florida Public Service Commission
Capital Circle Office Center
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 011622-GU – Petition for determination that the 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, by Peoples Gas System

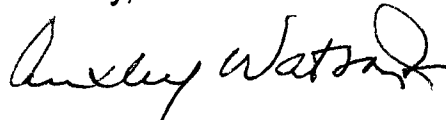
Dear Ms. Bayo:

Enclosed for filing in the above docket, please find the original and 15 copies of Peoples Gas System's Reply to Motion to Dismiss. Also enclosed is a diskette containing the Reply as a WordPerfect document.

Please acknowledge your receipt of the enclosures by date-stamping the enclosed copy of this letter, and returning it to me in the enclosed preaddressed envelope.

Thank you for your usual assistance.

Sincerely,



ANSLEY WATSON, JR.

- AUS _____
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Blanca S. Bayo, Director
January 18, 2002
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cc: Kenneth A. Hoffman, Esquire
J. Stephen Menton, Esquire
Marlene Stern, Esquire
Ms. Angela Llewellyn
Mrs. Rachel H. Gebhardt

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for determination that the 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, by Peoples Gas System.

Docket No. 011622-GU

Submitted for Filing: 1-22-02

PEOPLES GAS SYSTEM'S REPLY TO MOTION TO DISMISS

Peoples Gas System ("Peoples"), by and through its undersigned counsel, and pursuant to Rules 28-106.204(1) and 28.106.103, Florida Administrative Code, hereby files this reply to the Motion to Dismiss (the "Motion") filed herein by Withlacoochee River Electric Cooperative, Inc. ("WREC"), and states:

1. Peoples agrees with WREC that WREC is not a public utility as defined in Section 366.02(1), Florida Statutes, and that the Commission does not have jurisdiction to fix or establish WREC's rates under Section 366.04(1) or 366.05(1), Florida Statutes.

2. WREC's Motion basically urges two grounds for dismissal of Peoples' petition. First, WREC argues that Peoples does not meet the requirements for standing for purposes of initiating this proceeding by its petition. Second, WREC urges that the Commission has no jurisdiction over specific service availability charges of WREC, and no jurisdiction or authority under the Florida Energy Efficiency and Conservation Act ("FEECA") to provide the relief sought by Peoples in its petition. Peoples will reply to these arguments in reverse order.

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COMMISSION JURISDICTION - WREC'S SERVICE AVAILABILITY CHARGES

3. While Peoples agrees with WREC that “the Commission has only limited jurisdiction” over WREC (Motion ¶17), it does not agree that “[t]here is nothing in the Petition that directly relates to Withlacoochee’s rate structure,” or that Peoples has made any 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)” (Motion ¶19). On the contrary, the *focus* of the petition is on WREC’s rate structure. It is WREC’s Motion that attempts to blur the distinction between rate structure and specific rates.

4. As the Supreme Court of Florida stated in *City of Tallahassee v. Mann*, 411 So.2d 162, 163 (Fla. 1981),

there is a clear distinction between “rates” and “rate structure” though the two concepts are related. “Rates” refers to the dollar amount charged for a particular service or an established amount of consumption. Rate structure refers to the classification system used in justifying different rates. (citation omitted)

In *Polk County v. Florida Public Service Com’n.*, 460 So.2d 370 (Fla. 1984), counties challenged the Commission’s adoption of a rule permitting a municipal electric utility (over which the Commission has “rate structure” jurisdiction, but not “rate” jurisdiction) to impose a surcharge on customers outside its corporate limits equal to the service tax imposed on customers within its corporate limits. The counties asserted on appeal that the rule was beyond the jurisdiction and authority of the Commission, in that it represented an attempt by the Commission to regulate the dollar amounts charged by

municipal electric utilities. The Court disagreed with this characterization and stated (460 So.2d 372):

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.* (emphasis supplied)

It is the relative levels of the contributions-in-aid-of-construction (as described in the Motion, “service availability charges”) which are required by WREC from developers – depending upon whether the developer will or will not install facilities for the distribution of natural gas within their developments – that Peoples’ petition alleges are discriminatory. Peoples submits the Commission clearly has jurisdiction over these relative levels of charges under its Section 366.04(2)(b) authority to prescribe rate structures for cooperative electric utilities such as WREC.

5. Peoples’ petition alleges that WREC’s differential charges to developers based on whether or not they install gas distribution systems in their developments violate the Commission’s policy that a rate structure not be unduly discriminatory. In paragraph 24 of its Motion, WREC states that there is no citation to the referenced Commission policy, and that the allegation “is apparently based on the anti-discrimination provision in Section 366.81, Florida Statutes.” It is not. The policy referred to in the petition is set forth in Rule 25-9.052, *Florida Administrative Code*, which requires cooperative electric utilities such as WREC to submit “documentation” (similar to tariff provisions). Subsection (4) of that rule states:

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. In so doing the Commission may, among other things, consider the cost of providing service to each customer class, as well as the rate history, value of service and experience of the utility, the consumption and load characteristics of the various classes of customers and the public acceptance of rate structures. The following principles may also be considered: simplicity, fairness in apportioning costs, *avoidance of undue discrimination* and encouragement of efficiency. (emphasis supplied)

It is the policy set forth in the rule quoted above which Peoples alleges is violated by WREC's differential surcharges to developers.

6. In concluding paragraph 24 of its Motion, WREC asserts that there is no alleged discrimination between rate classes and, consequently, the "statutory prohibition" against discrimination is not applicable. As indicated above, the undue discrimination allegations of Peoples' petition are not based on the anti-discrimination provision of FEECA, which applies to discrimination between classes of customers. Indeed, the discrimination alleged is even more invidious because the differential service availability charges applied by WREC discriminate between members of the *same* rate class.

7. Peoples submits that the differential service availability charges of WREC to residential developers are a matter of rate structure, and that the Commission has jurisdiction to investigate the same as requested by Peoples' petition, under Section 366.04(2)(b), *Florida Statutes*.

COMMISSION JURISDICTION - UNDER FEECA

8. WREC's Motion argues that the Commission's authority under FEECA is

limited, that FEECA does not authorize the Commission to take action against even a regulated utility that interferes with another utility's conservation program (Motion ¶16), and that FEECA does not protect the use of gas appliances (Motion ¶¶21-24). WREC misconstrues the references in the petition to Section 366.81, *Florida Statutes*, which sets forth the legislative intent of FEECA.

Peoples admits that WREC is no longer subject to the powers of the Commission under FEECA with respect to submission and approval of energy conservation programs. However, Peoples is subject to such jurisdiction, and has submitted, and the Commission has approved, energy conservation programs designed to achieve the legislative intent of FEECA. The Florida Legislature has stated in Section 366.81, *Florida Statutes*, its intent that utilization of "the most efficient and cost-effective energy conservation systems" is critical to protect the health, prosperity and general welfare of the state and its citizens. That section also states the finding of the Florida Legislature that "[r]eduction in, and control of, the growth rates of electric consumption and of weather-sensitive peak demand are of particular importance." These are policies of the State of Florida, as adopted by the Legislature. While WREC is not required by FEECA to implement energy conservation plans or programs, it does not follow that it may – through a discriminatory rate structure – frustrate the legislative intent and purpose of the statute.

Peoples is not asking in its petition that the Commission require WREC to implement conservation programs. It is, however, asking that the Commission investigate the differential treatment of customers in the same rate class contained in WREC's rate structure and find that such differential treatment is unduly discriminatory. In making a

determination of undue discrimination, Peoples is asking that the Commission consider the effects of such differential treatment of developers on the purposes of FEECA set forth in Section 366.81 – both generally and in terms of their impact on Peoples’ Commission-approved energy conservation programs.

To Peoples’ knowledge, the Commission has not – in the “FEECA Order” (as defined in WREC’s Motion) or otherwise – held that it may not intervene to address a rate structure which interferes with an approved utility conservation program in a manner which is inconsistent with the intent and purpose of FEECA. Peoples submits that if the Commission is powerless to do so, then the legislative intent of the statute may be thwarted at will by any utility not required to submit programs in accordance with its terms. Peoples further submits that the Commission has the power under FEECA – whose provisions are to be liberally construed – to see that its legislative intent is not so easily thwarted. Again, however, this is only one possible issue the Commission might consider in determining whether WREC’s rate structure is unduly discriminatory.

STANDING

9. Peoples agrees that, in order to be a party as defined in Section 120.52(12), *Florida Statutes*, it must be a specifically named person whose substantial interests are being determined in this proceeding, or whose substantial interests or whose substantial interests will be affected, and that it must have standing. WREC states that Peoples does not meet the definition of a party because there is no proposed agency action creating a point of entry. WREC says that Peoples “unilaterally” seeks to initiate a proceeding against WREC “over whom the Commission has only limited jurisdictional authority,” and

that the initiation of this proceeding “would impermissibly extend Commission jurisdiction beyond what is authorized in the statutes. Peoples submits that these assertions are without merit.

10. As will be discussed hereinafter, Peoples’ substantial interests will be affected by whatever action the Commission takes in this proceeding. More importantly, as previously discussed, Peoples’ initiation of this proceeding in no way “extends” – “impermissibly” or otherwise, the Commission’s “rate structure” jurisdiction under Section 366.04(2)(b), *Florida Statutes*, over WREC. It is that jurisdiction Peoples seeks to invoke by the filing of its petition herein. Not all proceedings governed by Chapter 120, *Florida Statutes*, are initiated by the agency having subject matter jurisdiction. Peoples submits it is a proper party to invoke the Commission’s rate structure jurisdiction by the filing of its petition.¹ WREC appears to suggest that only the Commission (or WREC itself) is entitled under the statutes to initiate a proceeding involving WREC’s rate structure, but offers no authority to support this suggestion.

11. Peoples agrees with WREC that it must meet the traditional test of standing to initiate or participate in a proceeding involving WREC’s rate structure. In order to do so, Peoples must satisfy the two-pronged test enunciated in *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So.2d 478, 482 (Fla. 2d DCA 1981) (quoted in WREC’s Motion ¶¶11). While WREC asserts that Peoples meets neither test, Peoples submits it satisfies both.

¹ Although denominated a “petition,” perhaps Peoples should have titled its filing a “complaint” (see Rule 25-22.036, *Florida Administrative Code*).

12. WREC relies on *Village Park Mobile Home Ass'n., Inc. v. Dept. of Business Regulation*, 506 So.2d 426 Fla. 1st DCA 1987), for the proposition (with which Peoples agrees) that the injury in fact, or threat of injury, which must be shown to satisfy the first prong of the *Agrico* standard must be both real and immediate, not conjectural, hypothetical or abstract. Peoples' petition shows that the injury and threat thereof is both real and immediate. There is nothing hypothetical or abstract about it. Peoples' petition describes in detail WREC's differential surcharge, which affects Peoples directly and immediately in that the surcharge has meaning and effect *only* within the portions of WREC's service area where Peoples is also capable of providing natural gas service to residential developments. Reading the petition as a whole, it is clear that Peoples is *precluded* from providing natural gas service to potential customers in any residential development within WREC's service territory when the developer chooses not to pay WREC's surcharge of \$710 per lot for the right to install a natural gas distribution system in the development.² The injury to Peoples which has been caused, and which will continue to be caused, by the WREC surcharge is both real and immediate.³

Peoples occupies a different position in terms of the effect of the WREC surcharge than did the mobile home park residents in *Village Park*. In *Village Park*, the park residents sought to participate as parties in the Division of Florida Land Sales, Condominiums and

² Although not specifically alleged in the petition, Peoples has been denied the opportunity – as a direct result of WREC's differential surcharge – to provide natural gas service within residential developments in WREC's service territory. It is beyond question that developers will continue to forego the installation of natural gas in their developments as long as the WREC differential is maintained.

³ Likewise, although it is not an injury to Peoples, the elimination of customer choice in residential developments resulting from the WREC surcharge is neither hypothetical nor abstract.

Mobile Homes' (the "Division's") review of a required prospectus submitted by a mobile home park owner. The park residents contended that their substantial interests would be affected because the prospectus would substantially increase their cost of residing at the park, as well as substantially reduce services previously provided by the park owner. 506 So.2d at 427. The court in *Village Park* found that the park residents had failed to establish their substantial interests would be affected by the Division's approval of the prospectus because the prospectus was fundamentally a disclosure document, did not affect the terms of the tenancies in the park until they became subject to renewal, and the statutes governing the relationships between park owners and residents provided other remedies whereby rental increases and/or reductions in services could be challenged and resolved. That is, the approval of the prospectus would have no direct effect on the park residents. This is entirely distinguishable from the instant case, in which WREC's differential surcharge causes developers to forego the installation of natural gas service in their developments, and Peoples is thereby forever precluded from providing (and the residents are thereby forever denied the opportunity to obtain) such service.

13. Peoples is also in a different position than was AmeriSteel in *AmeriSteel Corp. v. Clark*, 691 So.2d 473 (Fla. 1997). As the Supreme Court found there, AmeriSteel's corporate interests were completely unaffected and in no way injured by the JEA-FPL territorial agreement which AmeriSteel sought to protest. Here, WREC is alleged to impose different charges for the same facilities depending on whether natural gas will be installed within a new development. Peoples has already been affected in that developers have elected, because of the additional charges, not to install natural gas in

their developments. Peoples will be affected in the future as developers inevitably continue to elect – because of the additional discriminatory charges imposed by WREC – not to install natural gas in their developments. Thus, Peoples meets the first prong of *Agrico*.

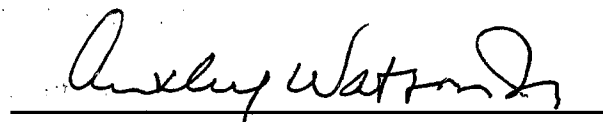
14. WREC's Motion (¶14) alleges that Peoples' petition fails to allege an injury of the type or nature sought to be protected by Chapter 366, *Florida Statutes*, or Chapter 25, *Florida Administrative Code*, and therefore fails to satisfy the second prong of the *Agrico* test for determining standing. WREC asserts that Peoples has not identified a statute or rule empowering an existing utility to petition the Commission to protect or enforce a FEECA conservation program against another utility. While Peoples alleges that WREC's differential surcharge interferes with Peoples' conservation programs and is contrary to the legislative intent of FEECA, the essential allegations of the petition are that the WREC surcharge is unduly discriminatory.

With certain exceptions (e.g., safety), rate structure jurisdiction is the only jurisdiction over cooperative electric utilities such as WREC possessed by the Commission under Chapter 366, *Florida Statutes*. In implementing that jurisdiction, the Commission has promulgated Rule 25-9.052, *Florida Administrative Code*, which requires cooperative electric utilities such as WREC to submit documentation. In the rule, the Commission has included among the matters to be addressed in determining whether an electric cooperative's rate structure is fair, just and reasonable, the "avoidance of undue discrimination." Intuitively, the purpose of avoiding undue discrimination is to thereby avoid the injury which results when discrimination is permitted. Peoples has alleged that

WREC's differential surcharge is unduly discriminatory, and that it has suffered and will suffer injury as a result thereof. Peoples submits that the Commission itself has recognized in Rule 25-9.052 that the injury alleged in the petition is of the type or nature designed to be protected by virtue of the Commission's rate structure jurisdiction. Thus, the injury alleged by Peoples' petition is of the type or nature which the proceeding, involving the issue of whether WREC's rate structure is unduly discriminatory, is designed to protect. Peoples therefore submits that its petition meets the second prong of the *Agrico* standard, and that it has standing.

WHEREFORE, having responded fully, to WREC's Motion to Dismiss, Peoples respectfully requests that the Commission enter an order denying said Motion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply to Motion to Dismiss was furnished by U.S. Mail to the following this 18th day of January, 2002:

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