

State of Florida



Public Service Commission
CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

RECEIVED - FPSC
JUN - 5 11:14 AM '02
COMMISSION CLERK

DATE: JUNE 6, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK &
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (STERN) *UKS*
DIVISION OF ECONOMIC REGULATION (KUMMER) *WMB*
DIVISION OF COMPETITIVE MARKETS AND ENFORCEMENT (BULECZA-
BANKS, WRIGHT, BROWN) *JBW* *W*

RE: DOCKET NO. 011622-EG - 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.

AGENDA: 06/18/02 - REGULAR AGENDA - PARTICIPATION IS LIMITED TO
COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\011622.RCM

CASE BACKGROUND

On December 5, 2001, Peoples Gas System 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

DOCUMENT NUMBER-DATE

05892 JUN-5 02

FPSC-COMMISSION CLERK

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 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. This recommendation addresses the Motion to Dismiss.

DISCUSSION OF ISSUES

ISSUE 1: Should the Motion to Dismiss filed by Withlacoochee River Electric Cooperative be granted?

RECOMMENDATION: Yes, the Motion should be granted because Peoples lacks standing.

STAFF ANALYSIS: 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 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 the Commission with authority to grant the relief sought; 3) the Commission has 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 the Commission has 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 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. 2nd DCA 1981). That test requires that a litigant must: 1) suffer actual and immediate injury as a result of potential agency action in a proceeding; and, 2) 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 the Commission 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-FOF-GU, issued on March 13, 1995 in Docket No. 941324-GU.

With respect to FEECA, WREC claims that it does not grant the Commission authority to take action against an entity that

interferes with a utility's conservation programs. WREC argues that the Commission acknowledged its 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 in Docket No. 890737-PU on February 21, 1990 [hereinafter 'FEECA Order']. WREC maintains that in that Order, the Commission recognized that FEECA only grants it 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 the Commission only has limited authority over electric cooperatives like WREC. WREC states that Section 366.04(2)(b), Florida Statutes, limits the Commission's authority over cooperatives to approval or disapproval of their rate structure. WREC maintains 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 the Commission determined, in the FEECA Order, that it was not authorized to require electric utilities to develop gas promotion programs.

Peoples' Reply

Peoples agrees with WREC that the Commission can only regulate the rate structure of electric cooperatives, and asserts that it asks the Commission 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 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 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 the Commission's 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 the Commission 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 the Commission 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 the Commission has 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 the Commission has 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 the Commission does have the power under FEECA to ensure that its intent is not so easily frustrated. Peoples notes that this is one possible issue the Commission 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 the Commission's "rate structure" jurisdiction, as was alleged by WREC. If WREC's arguments were correct, claims Peoples, then only the 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 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 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 on 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.*

Staff believes that Peoples lacks standing and that the Motion to Dismiss should be granted 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.

Staff disagrees. 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 the Commission 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 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 the Commission 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, staff recommends that the Motion to Dismiss be granted.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: This docket should be closed 32 days after the issuance of the order to allow the time for filing an appeal to run.

STAFF ANALYSIS: This docket should be closed 32 days after the issuance of the order to allow the time for filing an appeal to run.