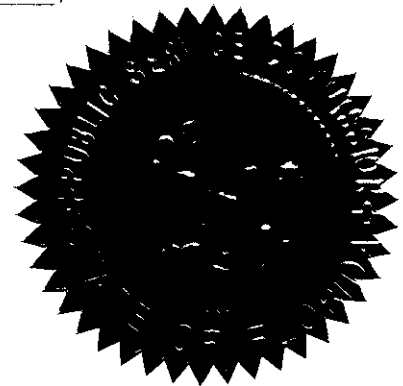


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 080117-EU

In the Matter of:

PETITION TO INITIATE RULEMAKING TO AMEND
RULE 25-17.008, F.A.C., CONSERVATION AND
SELF-SERVICE WHEELING COST EFFECTIVENESS
DATA REPORTING FORMAT, BY MARY WILKERSON,
MARY GREEN, MARK ONCAVAGE, SOUTHERN
ALLIANCE FOR CLEAN ENERGY, AND NATURAL
RESOURCES DEFENSE COUNCIL.



PROCEEDINGS: AGENDA CONFERENCE
ITEM 4

BEFORE: CHAIRMAN MATTHEW M. CARTER, II
COMMISSIONER LISA POLAK EDGAR
COMMISSIONER KATRINA J. McMURRIAN
COMMISSIONER NANCY ARGENZIANO
COMMISSIONER NATHAN A. SKOP

DATE: Tuesday, July 1, 2008

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: JANE FAUROT, RPR
Official FPSC Reporter
(850) 413-6732

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FLORIDA PUBLIC SERVICE COMMISSION

FPSC-COMMISSION CLERK

1 PARTICIPATING:

2 E. LEON JACOBS, JR., ESQUIRE

3 ROSANNE GERVASI, ESQUIRE and MARK FUTRELL,

4 representing the Florida Public Service Commission Staff.

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CHAIRMAN CARTER: And with that, Commissioners, we are on Item 4.

Staff, you're recognized to present Item 4.

MS. GERVASI: Good morning, Commissioners. Rosanne Gervasi on behalf of the legal staff.

Item 4 is staff's recommendation to deny the petition to initiate rulemaking to amend Rule 25-17.008, Florida Administrative Code, conservation and self-service wheeling cost-effectiveness data reporting format by Mary Wilkerson, Mary Green, Mark Oncavage, Southern Alliance for Clean Energy, and Natural Resources Defense Council. Mr. Leon Jacobs is here to address the Commission on this item.

CHAIRMAN CARTER: Good morning.

Mr. Jacobs, you're recognized, sir.

MR. JACOBS: Good morning, Commissioners. Thank you for the opportunity to address you today.

As staff has described to you, we filed a petition sometime back requesting that you consider amending the rule which implements your cost-effectiveness test, a cost-effectiveness test that applies in several of your decision-making situations where you look at which energy efficiency demand-side management programs are to be implemented by the utilities.

We believe that on its face the rule has not resulted

1 in the statutory intent. We believe that the -- and as our
2 petition bears out, that the rise in per capita consumption in
3 Florida is indicative of the idea that the DSM programs while
4 commendable by the industry are far below their potential. And
5 the statute expressly recommends maximizing their ability to
6 reduce overall consumption.

7 Now, I think there is a major development that has
8 occurred that causes, I believe, this to be an appropriate time
9 to address this issue. As you well know, last week the
10 Governor signed into law House Bill 7135. And in Sections 38
11 and 39 there are specific amendments to Section 366.81 and
12 366.82. Specifically, in Section 39 of that bill, 366.82 is
13 amended to require, I believe, a realignment of the methodology
14 by which you will calculate the cost-effectiveness of DSM
15 measures. I believe that in order to implement this statute,
16 it will require you to change or at least revise and upgrade
17 your analysis in approving and assessing the cost-effectiveness
18 demand-side management measures.

19 Specifically, the statute says that you must evaluate
20 the full technical potential of DSM efficiency programs. It
21 says that you must undertake what is a substantially broader
22 cost/benefit analysis in deciding which programs are
23 cost-effective. The statute says that you must consider DSM
24 programs' value to reducing greenhouse gas regulatory costs,
25 and it adds demand-side renewable energy to the whole

1 evaluation.

2 In your prior evaluations of cost-effectiveness,
3 particularly in Order PSC 941313 where you adopted the current
4 version, I believe, of Rule 25-17.008, and as you know that
5 rule adopts or incorporates by reference a very voluminous
6 manual, practice manual, which is a manual which the industry
7 adopts in calculating and submitting its cost-effectiveness
8 analyses for purposes of setting FEECA goals. That process in
9 your order was intended to be a fairly fluid process. And it
10 has been implemented in a very fluid way.

11 In your last round of FEECA proceedings in 2004 you
12 specifically waived various aspects on various issues. For
13 instance, you determined that you were going to look at avoided
14 costs on a case-by-case basis. You determined that you were
15 going to look at the overall rate impact on a
16 measure-by-measure basis. We believe that notwithstanding your
17 decision to look at this process in a very fluid way, that
18 manual and that rule prescribe a very specific process.

19 Now, the argument that the interests made is that
20 they filed the proceedings looking at a range of
21 cost-effectiveness measures -- I'm sorry, analyses, i.e., the
22 RIM, the TRC, and the participant. We agreed that those
23 filings are made; however, your order in 2004 specifically
24 determined that you were looking at those measures that passed
25 the RIM test. You acknowledged that companies could file

1 measures that passed TRC, but in your order you specifically
2 said we are setting the bar at RIM.

3 I believe that in order to implement these revisions
4 in the statutes you must at least reassess that position. And
5 I believe in order to come away from that assessment there must
6 be some statement of general applicability to the industry.
7 And in my reading of the statute, that's a rule. I believe,
8 then, that before you can establish new goals in this next
9 round of proceedings for FEECA you must address that
10 fundamental issue.

11 We believe we offer the opportunity to do that in
12 this petition. We bring this petition because we believe we
13 can bring a lot of expertise and experience to help you in
14 assessing what would be the most appropriate and efficient
15 methodology going forward to meet the statute's requirements.
16 We do not believe that it is premature. Perhaps in the
17 overall -- if you were to look at the overall time cycle, it's
18 early, but it's certainly not premature. As you know, the
19 FEECA process is a long process, and the rulemaking process is
20 a long process. I do not believe that it is too early to begin
21 to think of those. Now --

22 **CHAIRMAN CARTER:** Mr. Jacobs, you have one minute
23 remaining.

24 **MR. JACOBS:** Yes, sir.

25 One final point, then. In your last order -- I'm

1 sorry, I don't have the order number. But it was the 2004
2 order in which you adopted goals for Florida Power and Light,
3 you said this: Section 366.82 requires this Commission to
4 review and approve cost-effective utility conservation
5 programs. We adopted 25-17.008 and the cost-effectiveness
6 manual as part of the implementation of that statute. Any
7 revisions to our established methodology will be more
8 appropriately addressed in a rulemaking or other generic
9 proceeding in which all affected parties would have the
10 opportunity to participate. We believe that that is exactly
11 the case. We believe this is the opportunity and the time to
12 do that.

13 Thank you.

14 **CHAIRMAN CARTER:** Thank you.

15 Commissioners, we're in comments, concerns,
16 questions.

17 Commissioner Edgar, you're recognized.

18 **COMMISSIONER EDGAR:** Thank you, Mr. Chairman.

19 And, Mr. Jacobs, I thank you for your offer of
20 expertise and assistance as we move through all of this, and I
21 know that will be the case, so thank you. And I know our staff
22 appreciates that, as well.

23 One of the comments that you made, though, you said
24 that -- I believe you said that your interpretation of the rule
25 sets the bar at RIM, and I would like to ask our staff to speak

1 to that point, if I may.

2 **MR. FUTRELL:** Commissioner, currently the rule that
3 Mr. Jacobs cites is essentially a minimum filing requirements
4 for information to give to the Commission to make decisions in
5 setting conservation goals and approving conservation plans and
6 programs. It does identify the participant test, the Rate
7 Impact Measure Test, and the Total Resource Cost Test as the
8 minimum information that is to be provided to the Commission.
9 It does not preclude additional tests or variations on those
10 tests from being provided to the Commissioners for their
11 decision-making.

12 And going forward in that order he cited, the
13 Commission took all of that information into account, the
14 results of the Participant Test, TRC, and RIM tests in making
15 its decision on what level of goals to set. The Commission in
16 gathering that information chose to utilize the RIM test as the
17 criteria to apply in that particular docket. The Commission is
18 not precluded from, in future dockets, from considering other
19 tests, and that is the point staff is trying to make here is
20 that ongoing and in the upcoming goals proceeding that is
21 actually beginning now and it will be further developed next
22 year, the Commission may take into account whatever tests it
23 chooses to take into account, and parties are free to bring
24 forth that information for the Commission's decision-making.

25 **COMMISSIONER EDGAR:** Thank you. And, Mr. Chairman,

1 thank you.

2 Just to kind of expand on that a little bit. I know
3 there has been a lot of discussion, probably over many years
4 but, certainly, in the past year or two. I know there was at
5 the Energy Commission, at the Governor's Action Team before the
6 Legislature, and in many workshops and other proceedings here
7 in this room about RIM and TRC and the participant test. And I
8 just, for one, am not wed to any one of those, but I do think
9 that all of three of them shed good information and allow for
10 good analysis as we look at programs and how we are going to
11 move forward.

12 I know at IA yesterday we had a pretty good
13 discussion about some of the requirements that have been put on
14 this Commission for some reports and some proposed rule
15 language and some other things, and we have a pretty aggressive
16 time frame to move forward. And with that in mind, I
17 appreciate, Mr. Jacobs, your organization filing the petition
18 and helping to bring this issue to the forefront.

19 I am not comfortable right now, though, going into
20 rulemaking specifically on the language that has been
21 presented. I think there are possibly some delegation issues
22 in there and some other things, but I think it is a real good
23 discussion, and I look forward to having more of it. And,
24 again, having these two tools and others help us as we continue
25 to do our analysis.

1 Thank you, Mr. Chairman.

2 **CHAIRMAN CARTER:** Thank you.

3 **MR. JACOBS:** If I may -- I'm sorry.

4 **CHAIRMAN CARTER:** You're recognized.

5 **MR. JACOBS:** Thank you, sir.

6 I would just add one point. I think there is a
7 well-established point in administrative law that if you are --
8 if your goal is to implement the statute in context of these
9 next rounds of FEECA proceedings, I believe that there are some
10 real fundamental legal issues. There's no longer the idea of
11 simple policymaking. You have to adopt the rule if you are
12 going to implement in it in a proceeding. And so if you are
13 going to implement a statute in this next round of FEECA
14 proceedings, we would suggest to you that the law requires that
15 you implement a rule in advance of those FEECA proceedings.

16 **CHAIRMAN CARTER:** Thank you.

17 Commissioner McMurrian.

18 **COMMISSIONER McMURRIAN:** Thank you.

19 And I guess I was actually going to follow up on some
20 of the things that Commissioner Edgar said and follow along
21 that line of thought. But given that comment, I was hoping
22 Ms. Gervasi might could speak to that.

23 **CHAIRMAN CARTER:** Ms. Gervasi, you're recognized.

24 **MS. GERVASI:** Thank you, Commissioners.

25 In the recommendation we don't make any pronouncement

1 about the merits of the draft rule language that the
2 petitioners are advocating for. There is not a requirement
3 that we go to rulemaking at this time prior to the goal
4 process. After all is said and done, if there is a need for
5 rulemaking the Commission can always initiate rulemaking on its
6 own at any time.

7 **COMMISSIONER McMURRIAN:** Thank you, Chairman.

8 And now I will ask the other question I had, which I
9 agree with the things that Commissioner Edgar said, but I just
10 wanted to verify with Mr. Futrell that Mr. Jacobs' expertise
11 and experience can be used in the FEECA goal-setting process in
12 the same way we could use it in a rulemaking. But we can -- he
13 will be allowed to participate and give his input about how we
14 use the particular test in that goal-setting process.

15 **MR. FUTRELL:** Absolutely, Commissioner. It's going
16 to be critical for parties like his to join in. And, actually,
17 in the technical potential study that has begun, some of his
18 clients are members of the collaborative that are looking at
19 potential conservation measures that could be used for
20 potential utility programs, and that information will be
21 critical as the starting point in the Commission's analysis of
22 potential goals.

23 **COMMISSIONER McMURRIAN:** Thank you. That's all,
24 Chairman.

25 **CHAIRMAN CARTER:** Commissioners?

1 **COMMISSIONER ARGENZIANO:** (Inaudible. Microphone
2 off.)

3 **CHAIRMAN CARTER:** Mr. Jacobs, I think the question is
4 would you be willing to participate further as we proceed in
5 whatever direction we proceed in? I think that's appropriate.

6 **MR. JACOBS:** Without question we would be. If I may
7 just add one quick point. While our petition does speak to a
8 specific test and a specific language, I want to make it clear.
9 Today my argument is that you have a statute that requires you
10 assess whether or not you will continue with your prior
11 interpretation of 366.82. And if you choose, if you decide
12 that that prior interpretation of 366.82 is no longer
13 appropriate to implement this statute, that's the circumstance
14 that I'm focusing on. We would love to come and participate.
15 We will bring our -- but I believe that if you decide that the
16 prior interpretation of 366.82 is not -- you are not able to do
17 that under your prior procedures, you will have to do a rule
18 change before you go into FEECA. That's what the law says.
19 And we would suggest to you that if you are looking to modify
20 that process, and you come out of FEECA and do a rule change,
21 you have just set all the FEECA orders up for a rule challenge.

22 **CHAIRMAN CARTER:** Commissioner Edgar.

23 **COMMISSIONER EDGAR:** I have great respect for
24 Mr. Jacobs' experience, legal and otherwise, and certainly in
25 many roles in this room. On this point I'm not sure I exactly

1 agree with your legal interpretation, but I do look forward,
2 again, to having more discussions on all of this point, and
3 always having full participation, and, in particular,
4 participation from organizations such as you represent.

5 And so, Mr. Chairman, if it is appropriate at this
6 time I would make a motion in favor of the staff
7 recommendation.

8 **COMMISSIONER McMURRIAN:** Second.

9 **CHAIRMAN CARTER:** It has been moved and properly
10 seconded that we accept the staff recommendation.

11 Commissioners, any further questions or debate?

12 Hearing none, all in favor let it be known by the
13 sign of aye.

14 (Unanimous affirmative vote.)

15 **CHAIRMAN CARTER:** All those opposed, like sign. Show
16 it done.

17 **MR. JACOBS:** Thank you, Commissioners.

18 **CHAIRMAN CARTER:** Thank you, Mr. Jacobs. Looking
19 forward to seeing you in the future.

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1 STATE OF FLORIDA)

2 : CERTIFICATE OF REPORTER

3 COUNTY OF LEON)

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5 I, JANE FAUROT, RPR, Chief, Hearing Reporter
6 Services Section, FPSC Division of Commission Clerk, do hereby
7 certify that the foregoing proceeding was heard at the time
8 and place herein stated.

9

10 IT IS FURTHER CERTIFIED that I stenographically
11 reported the said proceedings; that the same has been
12 transcribed under my direct supervision; and that this
13 transcript constitutes a true transcription of my notes of
14 said proceedings.

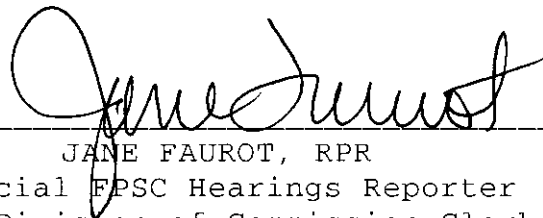
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16 I FURTHER CERTIFY that I am not a relative,
17 employee,
18 attorney or counsel of any of the parties, nor am I a relative
19 or employee of any of the parties' attorney or counsel
20 connected with the action, nor am I financially interested in
21 the action.

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23 DATED THIS 21st DAY OF JULY, 2008.

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JANE FAUROT, RPR
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