BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by Peoples Gas System.	DOCKET NO. 080318-GU FILED: March 20, 2009

FLORIDA INDUSTRIAL GAS USERS (FIGU's) POST HEARING STATEMENT OF ISSUES AND POSTITIONS, CONCLUSIONS OF LAW AND BRIEF

STATEMENT OF THE CASE

In compliance with ORDER NO. PSC-09-0121-PHO-GU and Commission rule 28-06.215 FIGU files this pleading. For the majority of issues identified in this case FIGU continues to adopt the positions stated in its prehearing statement and will not restate them in this pleading.

In some instances, such as, the return on equity and others FIGU confirms that it has adopted the position of the Office of Public Counsel ("Public Counsel") as well as Public Counsel's post-hearing briefing on those issues. These issues will not be restated in this pleading.

FIGU will add a "Brief" discussion to two previously stated positions, 1 & 54 in opposition to the PGS requests. There are another two precedential issues, issue 34 and issue 55 for which FIGU has a different position than originally submitted. FIGU now opposes the creation of a storm reserve and opposes the Carbon reduction rider because of the poor precedents they set for regulatory treatment.

FIGU BASIC POSITIONS

FIGU accepts the PGS rate design. FIGU opposes the future test year. FIGU supports the OPC recommended ROE. FIGU opposes two tariff riders moving estimated base rate items to cost recovery clauses and opposes creation of a storm cost reserve with no evidence that it will cost less than insurance.

STATEMENT OF RELEVANT FACTS

FIGU large industrial customers do not buy gas from PGS. They purchase natural gas from producers and transport it through the interstate pipeline system to the so called "city gate' where it enters the Peoples system. PGS then transports the gas through the large diameter (transmission) pipes of its distribution system to the customers' plant sites. The contract with these customers provides that PGS can take FIGU gas to meet the needs of its firm customers when there is a supply shortage provided that it will replace it later, but of course this procedure interrupts FIGU business operations often at considerable cost. FIGU supplies reserve pipeline capacity on the interstate system, its system and low cost emergency gas to PGS for the benefit of its firm customers.

In this case PGS performed cost of service studies that determined that at present rates FIGU participants are providing PGS an over all return of from 10.36% to 15% (depending on the level of service) in addition to the foregoing reserve capacity and low priced gas benefits provided by FIGU . The return presently provided by FIGU is far greater than the 8.88% overall return that PGS is seeking. PGS proposes to keep the rates at current levels for FIGU participants. Although this plan requires the large business class to subsidize other classes at proposed rates, they have not challenged the admittedly unfavorable cost allocation.

SUMMARY OF ARGUMENT

The Florida Administrative Procedures Act requires regulatory agencies to express their governing policies by adopting rules.[1] The FPSC has rules, but in rate making by and large statements of general applicability are set using common law principles case by case. Current rulings and findings set precedents for future cases with similar issues.

PGS is breaking ground in this case with proposed regulatory policies that will set far reaching precedents in the area of acceptable test years, items eligible for cost recovery and seeks to

[1] 120.52 (16) *Florida Statutes* "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy…

enhance cash flow by establishing cash reserves for future casualties without proving that it has explored reasonable alternatives. If PGS is successful the precedents will flow over to other upcoming rate proceedings; may lead to windfall profits for unregulated affiliated holding companies and may obviate the need for PGS to ever have another base rate case – all to the detriment of consumers and sound regulatory policy.

FIGU compliments PGS's revision to the residential rate structure. The new rate design reduces the therm charge to the largest number of customers and moves more fixed costs to a fixed charge. This not only obviates the need for unnecessary decoupling it will avoid future rate increases based on a decline in sales.

FIGU understands the need for a financially healthy utility system. It supports just and reasonable rates. The OPC has presented testimony in this case recommending a fair return on equity. FIGU endorses the OPC position for the benefit of all customers. This recommendation is based on standard economic models and return comparisons of comparable gas utilities. The OPC method transcends the complicating factors inherent in PGS's two tiered public utility holding company set up. The PGS presentation acknowledges that it is subject to the equity investing community's decisions that will be based less upon PGS' operations than its decision whether to invest in an unregulated holding company that is recovering from remarkable economic losses in the recent past coupled with an electric utility that formerly competed with PGS and now faces the specter of meeting environmental costs of unknown magnitude in the near term. Paradoxically one of the newly proposed tariff riders is based on the environmental benefits that will be achieved by displacing its parent company's sales. The irony of a "carbon reduction" rate increase to appease a parent whose sales you plan to snipe should not go unnoticed.

In the opinion of the undersigned Public Utility Holding Companies continue to present some of the same financial and accounting excesses to the detriment of consumers and shareholders that the Federal Trade Commission and the United States Congress found to exist when Public Utility

Holding Companies were outlawed eighty three years ago by PUCHA. Albert W. Higgins the president of Florida Power Company from 1937 to 1950 applauded PUCHA and reiterated the problems in the 1975 biography of that company.[2] The recent repeal of the Glass Stegall Act, contemporary legislation to PUCHA, led to excesses in banking industry. The recent repeal of PUCHA may lead to the same result for public utilities. Both banks and utilities are major players in financial markets that may require more restraint than seen recently. Securities and Exchange Commission oversight of the securities offerings of a twice removed parent company may be insufficient for a Florida based regulated utility, but the FPSC has no authority over the unregulated holding company.

FIGU challenges certain new regulatory policies that PGS proposes. The Gas System Reliability Rider and Carbon Reduction Rider are bad because they provide a return on a future investment. These cost recovery riders are not authorized by law. The expenditures are not of the type that prevent the utility from earning a return on its investment as a result of regulatory lag and finally as the staff pointed out in the recent TECo rate case agenda they deprive the Commission of the opportunity to evaluate the return on cost recovery investments in conjunction with other things that are going on at the utility. If the riders are adopted the Commission will be required to use tunnel vision. It cannot deny the return because the utility is presently over earning, or sales have increased or because major components of the overall rate base investment hve been recovered from customers through a depreciation charge with no reduction in rates. The new PGS cost recovery investments will be considered on short notice at the same time over $8 billion dollars in other cost recovery items are before the Commission. PGS proposes to add its phantom forecasted investments to the rate increase potpourri where they will receive truncated review at best. If successful PGS will begin earning a return before any investment is made.

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[2] An extract of the PUCHA findings reprinted in the Florida Power Biography is attached to this brief as appendix I.

Finally during the hearing it became apparent that PGS was not going to present any evidence on the availability of insurance or the comparative cost of this alternative to justify a new cash flow preserve upon which it can earn a return or shoot up to a non regulated parent. Having considered the dearth of justification and the new Commissioners limited experience into the rationale behind the need for a storm damage reserve FIGU determined that this new program should be opposed as well on general regulatory principles.

ISSUES AND POSITIONS

TEST PERIOD

ISSUE 1: Are the historical base year ended December 31, 2007, and the projected test year ending December 31, 2009, the appropriate test years to be utilized in this docket?

FIGU: *FIGU cautions against projected test years which vary from the statutory mandate of §366.06 Florida Statutes that the Commission should only approve rates using the depreciated investment in utility plant that is actually in use and useful service.*

BRIEF DISCUSSION: §366.06 provides:

> "… the commission shall have the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service. The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, … (emphasis supplied)

The PGS notice of intention to file a rate case came in June 2008. Minimum filing requirements were prepared in June and July 2008 and filed in August estimating what the system would look like eighteen months later on December 31, 2009. Recently FPL took this one step further in Docket 080677-EI. It is seeking a test year more than two years after it initiated the case. The precedent set in this case will tend to justify further test year creep away from the statutory requirement. FIGU prays that you will not let this happen. The Florida Supreme Court first addressed a test year in the case of *City of Miami vs. Florida Public Service Commission* 208 So2d 249 (1968). In that case FPL used a year end historic test year. The court upheld an historic year end rate base in deference to a Commission order saying;

> "Concluding our discussion on this point, it is our belief that in the absence of the most extraordinary or emergency conditions or situations, average investment during the test year should be the method employed by the Commission in determining rate base. Our study of the subject discloses that average investment during the year is the better choice of methods and we commend it to the Commission in future cases-and suggest it should not be departed from except in the most unusual and extraordinary situations where not to do so would result in rates so low as to be confiscatory to the utility." (at page 258)

There have been numerous subsequent cases on the point even one approving a projected test year for interim relief on the hypothesis that the interim rates could be refunded after the full consideration of the case.[3]

Although the Commission is given wide discretion by the court, it is still subject to the legislative mandate that assets be presently in use and useful service and the court's proscription to use only a year end rate base when conditions warrant. A test year based upon what might happen 18 months after information is filed in an economic downturn falls far short of meeting that criteria.

The recent ruling in favor of PGS's parent company Tampa Electric does not bind the commission in this case for two reasons.[4] The 2009 test year was stipulated by the parties. It was not challenged. Secondly the Commission upon the recommendation of its staff removed major future investments from the rate base and granted a step increase to take effect later and then only if the investment is placed in service. Step increases are authorized by law for water and sewer utilities,[5] but not for electrics except with nuclear plants where express legislation in contravention of §366.06 *Florida Statutes* dictates the result.

FIGU suggests that it is cleaner, more precise and in keeping with statutory authority to turn down future projected test years than it is to try to reach the same result through if and when step increases. We don't know what the conditions will be in the future.

<u>EXPENSES</u>

[3] Citizens vs. Public Service Commission 435 So2d 784 (1983)
[4] Docket 080317-EI
[5] 367.081 (2)(a)2 *Florida Statutes*

ISSUE 34: Should the Commission allow PGS to establish a storm damage reserve, and if so, what is the appropriate amount of annual storm expense accrual?

FIGU: *No*

BRIEF DISCUSSION:

The issue arises under the heading expenses, because the idea for a storm damage reserve first came up after Hurricane Andrew in the early 1990s. Before Andrew utilities insured against storm damage. Insurance has been around since it was instituted by Dutch Merchants as a way to share the risk in the 17th century. An insurance pool with many participants reduces costs for all. For director's liability, fire and other casualties customers pay the cost of insurance premiums as an ordinary and necessary expenses. It is generally not wise for a company to self insure when insurance is available. Mr. N prepared an exhibit on the amounts spent on storm damage. I could find no justification for setting aside money rather than purchasing insurance or why the storm damage reserve is better for customers instead of lower cost insurance. There was no testimony that insurance is not available, only that electric utilities have such a reserve and so does Florida Public Utilities. PGS basis its request on other rate case precedent without adhering to the quantum of proof required in those cases.

There is no restraint on the storm damage reserve money it can be used for any purpose. It can even be sent to a non regulated affiliate for profit making ventures. If the funds are kept in house they can be used for construction work in progress at zero cost while the considerably greater AFUDC rate is being added to bricks, motor and labor costs. Without reasonable restrictions on its use it can get out of hand.

RATES

ISSUE 54: Should the Commission approve PGS's proposed "Gas System Reliability Rider," which would permit recovery of revenue requirements associated with eligible infrastructure system replacements (e.g., replacements for existing facilities, relining projects to extend useful life of existing facilities, road relocation projects) and

incremental O&M expenses, if any, incurred to comply with mandatory pipeline safety regulations? If approved as proposed by PGS, such recovery would continue until the effective date of revised base rates established in the Company's next base rate proceeding. The rider would also provide for the refund of O&M expenses, if any, incurred to comply with mandatory pipeline safety regulations, in excess of such expenses included in the Company's most recent base rate proceeding.

POSITIONS:

PGS: Yes. The Gas System Reliability Rider would permit the Company to recover, in a timely manner, the revenue requirements associated with municipal, county, state, or federal mandated relocations of Company facilities or safety requirements, over which it has no control. When Peoples is mandated to relocate its facilities, the Company has no choice as to whether or not it incurs costs, and – absent the Gas System Reliability Rider – would be required to file a full rate case or limited proceeding to recover the revenue requirements (including depreciation expense) associated with these mandated investments. (Binswanger)

FIGU: ***FIGU opposes this tariff rider because the costs are not volatile. The depreciation charge collected from customers is normally sufficient for pipeline replacement and repair.***

BRIEF DISCUSSION: FIGU included the PGS position on this issue as well as its own because it presumes a circumstance that should not happen. It also omits a major capital addition that will be removed from base rates and added to guaranteed cost recovery.

Line relocations have been going on since PGS began to locate its lines in public rights of way at no cost. It is nothing new. It doesn't trigger rate cases because the cost of relocations is more than offset by the money customers pay each year to cover deprecation. Depreciation is an accounting device used by most companies to project a major capital expenditure over the useful life of an asset so that it doesn't unduly burden earnings in the year the asset comes into being.

Depreciation is different for utilities. It has the character used by other companies, but it is also used as an expense charged to customers. According to Schedule C-1 of the MFRs for historic test year 2007 PGS collected just under $ 40 million from customers for depreciation charges. This is money available to cover this cost. If it is used for this purpose as soon as the pipes go in the ground PGS is entitled to a return on it. It has money available without new equity investment and without borrowing to cover pipe relocations. If and only if the return falls below the currently minimum

authorized return is there a need to come in for a rate case. On the other hand if customer growth and sales increase in the future as they have in the past PGS's base rate revenue may exceed the authorized return obviating the need for a rate increase. If cost recovery is used for pipe relocation the revenue will not be considered to determine whether earnings are too high PGS may be able to avoid a rate case even though its total revenue exceeds the authorized amount.

Another justification for cost recovery not mentioned in the PGS position is cost recovery to extend the useful life of lines or to comply with safety regulations. The FPSC rules have a whole chapter on safety rules that have been in place for over 25 years, Chapter 25-12 F.A.C. These rule expressly incorporate federal rules adopted by the USDOT. These costs have been and are included in base rates. Approving this rider will create an auditing nightmare to separate base rate safety compliance from cost recovery compliance. PGS would never consider taking advantage of the fact that a cost already approved for safety compliance and included in base rates can be charged again under the new reliability, but the adoption of the rider will establish a precedent for utilities that might be less prudent than PGS.

It is a bad precedent and should be rejected out of hand.

ISSUE 55: Should the Commission approve PGS's proposed "Carbon Reduction Rider," which would permit recovery of revenue requirements associated with incremental capital expenditures, if any, for installation of supply mains (as defined in the rider) to serve primarily residential developments? If approved as proposed by PGS, such recovery would continue until the earlier of (i) the end of a five-year recovery period, or (ii) the effective date of revised base rates established in the Company's next base rate proceeding.

POSITIONS:

FIGU: ***FIGU changes its position opposes this rider** because it is not the type of volatile expense normally associated with cost recovery clauses, there is no incurable regulatory lag associated with new pipes and it sets an awful precedent*

BRIEF DISCUSSION: FIGU is probably not impacted by this rider through a prospective rate increase, but the precedent is terrible for reasonable regulation. After competing with Tampa Electric

for customers for sixty or so years PGS is bought by TECo and probably feels bad about building pipelines to subdivisions that TECo serves and will take away TECo revenue. It recognizes that its parent may even have to give up part of its cash flow to fund construction to pick up revenue TECo will lose. The solution is to charge customers for the cost under the umbrella of protecting the environment. While it guesses what the taxes will be and charges the customers more.

There may be regulatory lag in collecting for the new pipes, but there is also regulatory lag in reducing base rates to account for depreciation on the principal rate base. Although AFUDC may be accruing to the benefit of the utility under base rates, under the rider PGS doesn't have to wait it can increase its rates when the pipes go in the ground even if they are not needed or if they connect to customers who bring in additional revenue that may result in base revenue overearnings.

CONCLUSION

Base rates should be based upon the historic 2007 test year with consideration of 2008 plant additions and known expense increases. For revenue determination use the 9.25% ROE recommended by OPC. The new cost recovery riders should be rejected out of hand.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing The Florida Industrial Gas Users' Prehearing Statement has been furnished by electronic mail the 20th day of March 2009 to the following:

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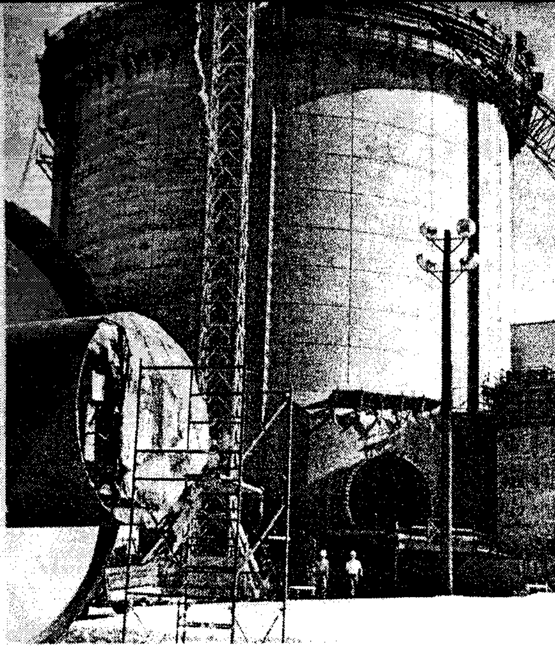
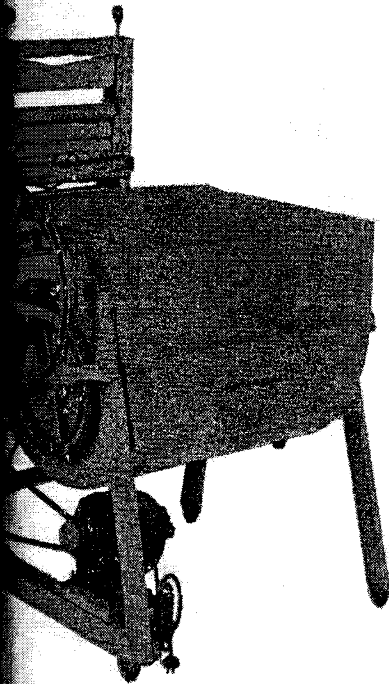
FlGU Brief
Appendix 1



LIGHTNING IN THE SUN

A HISTORY OF FLORIDA POWER CORPORATION 1899-1974



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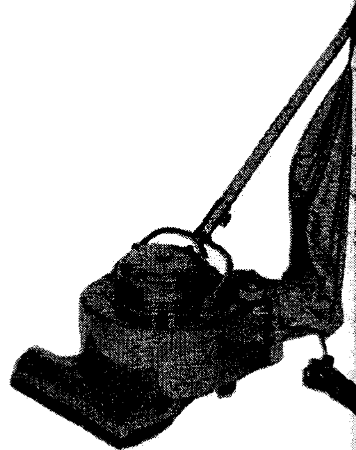

It was a proud day for President Higgins and the other members of his management team who were:

Alfred Healey, vice president; H. R. Cloud, vice president; E. K. IlgenFritz, vice president, secretary and treasurer; W. C. Schoeppe, comptroller; and directors, H. A. Busch, New York; Cloud, Orlando, T. C. Ervin, St. Petersburg, H. K. Halligan, New York, Higgins, St. Petersburg, IlgenFritz, St. Petersburg, G. A. (Bert) Louden, Clearwater, R. C. Pourtless, St. Petersburg, and Schoeppe, also of St. Petersburg.

The year 1944 signified something else as well for Higgins: he finished paying off his Insull stock debt. Little by little for over 12 years he had been paying off a debt incurred to a holding company which was no longer in existence.

Higgins had no love for holding companies. Their abuses and excesses were too clearly remembered.

The sins of holding companies are largely dim now. Some have even conveniently forgotten them. To make them a little more rememberable, here is the Federal Trade Commission's summary of them:

(1) Pyramiding companies owning or controlling the operating companies for the purpose of enabling a minimum of investment to control a maximum of operating facilities, involving a greedy and highly speculative type of organization detrimental to the financial and economic welfare of the nation.

(2) Loading the fixed capital account of public utilities with arbitrary or imaginary amounts in order to establish a base for excessive rates.

(3) Writing up the fixed assets without regard to the cost thereof, with the result of watering the stock or creating a fictitious surplus.

(4) Engaging in transactions of purchase and sale of property or securities with controlled or subsidiary companies for the purpose of recording arbitrary profits or fixing valuations unjustified by market values.

(5) Exaction of payments from affiliated or controlled companies for services in excess of cost or value of such services.

(6) Gross disregard for prudent financing in excessive issues of obligations, imperiling the solvency of the company and involving excessive charges for interest, discount, commissions, redemption, etc.

(7) Manipulating the security markets to deceive stockholders, bondholders, or potential purchasers of its securities.

(8) Putting funds in the call-load market with the result of greatly stimulating speculation.

(9) Excessive use of conversion privileges for bonds and preferred stocks and of purchase warrants and options with the effect of inducing

investors to part with conservative investments for speculative ones.

(10) Misstatement of earned surplus, or failure to distinguish earned from capital surplus, and making payment of dividends from the latter.

(11) Deceptive or illusory methods of dividing, or pretending to divide, earnings or profits.

(12) Including imaginary (or "putative") interest in construction costs of a public utility and counting it as a part of earnings.

(13) Deceptive or unsound methods of accounting for assets and liabilities, costs, operating results and earnings, including write-ups, unrealized or fictitious profits, stock dividends, etc.

(14) Corporate organization which gives powers inconsistent with a just division of responsibilities and emoluments as between various groups or parties furnishing capital by loan or by contribution, either directly or indirectly by purchase, succession, or otherwise.

(15) Issuing special voting or management stock giving control at small cost in order to promote the interests of selfish cliques, against the interest and safety of the general stockholders.

(16) Unsafe or michievous methods of securing loans to the detriment of the lender.

(17) Intercompany financing on a basis disadvantageous to operating company borrowers or lenders.

(18) Evasion of State laws in effecting sales of security issues.

(19) Effecting pretended corporate reorganizations principally for the purpose of evading the payment of Federal income taxes.

Higgins wanted to be totally free. He wanted to run his own shop; he was 64 years old and it was time.

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