



JACK SHREVE
PUBLIC COUNSEL

STATE OF FLORIDA
OFFICE OF THE PUBLIC COUNSEL

624 Fuller Warren Building
282 Blount Street
Tallahassee, Florida 32399-1300
904-488-9330

ORIGINAL
FILE COPY

MAILING ADDRESS:
c/o FLORIDA HOUSE OF REPRESENTATIVES
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1300

February 23, 1989

Steve Tribble, Director
Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32399-0850

Re: Docket No. 890148-EI

Dear Mr. Tribble:

Enclosed for filing in the above-captioned proceeding on behalf of the Citizens of the State of Florida are an original and 12 copies of Citizens' Response to Florida Power & Light Company's Motion to Dismiss FIPUG's Petition in this docket.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.


Sincerely,


John Roger Howe

- KCK
- KFA
- RPP
- CAF
- CMU
- CTR
- EAG
- LEG
- LIN
- OPC
- RCH
- SEC
- WAS
- OTH

Enclosures

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FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
02055 FEB 23 1989
FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of the Florida)
Industrial Power Users Group to)
Discontinue Florida Power and Light)
Company's Oil Backout Cost Recovery)
Factor.)
_____)
)

Docket No. 890148-EI
Filed February 23, 1989

CITIZENS' RESPONSE TO FLORIDA POWER & LIGHT COMPANY'S
MOTION TO DISMISS FIPUG'S PETITION

Florida Power & Light Company (FPL), on February 16, 1989, moved to dismiss the Florida Industrial Power User Group's (FIPUG's) petition in this docket. The Citizens of the State of Florida, intervenors (intervention acknowledged in Order No. 20744, issued February 15, 1989), oppose FPL's motion on the following grounds:

The standard the Commission should apply when considering the motion to dismiss is whether, taking all well pleaded facts in FIPUG's petition as true, the petition alleges a cause of action upon which relief can be granted, i.e. whether the Commission is empowered to grant the relief FIPUG seeks upon the facts it alleges.

FIPUG's petition alleges that the justification for approving FPL's oil backout project for cost recovery pursuant to Rule 25-17.016, Florida Administrative Code, is no longer valid. Circumstances today are so different from those prevailing when the 500 KV transmission lines were first considered that

continuation of the cost recovery factor would result in unfair charges to FPL's customers.

FIPUG alleges that the purpose of the transmission project, to generate fuel savings through the displacement of oil-fired generation has not materialized; that net savings attributable to the project claimed by FPL are based on fictitious units that are not even in FPL's generation expansion plans; and that exclusion of the transmission project from calculation of FPL's achieved rate of return has artificially deflated FPL's earnings. FIPUG alleges that application of these facts to Rule 25-17.016 demonstrates that FPL's transmission lines do not qualify for recovery through the oil backout cost recovery factor.

The issue presented by FPL's motion to dismiss, therefore, is whether a Commission determination made pursuant to rule is binding for all relevant future periods notwithstanding the number or magnitude of changed circumstances. FPL contends (at page 3) that termination of the oil backout factor is antithetical to Rule 25-17.016. This ignores the thrust of FIPUG's petition. FIPUG is not asking the Commission to act against the explicit provisions of the rule. To the contrary, FIPUG is asking the Commission to find that the facts that attend the importation of coal-fired generation are now outside the scope of the rule altogether. Unlike a situation in which the facts fit a rule but the Commission chooses not to apply it, FIPUG alleges that the facts do not fit the rule. It is only in the former case that Section 120.68(12)(b), Florida Statutes,

comes into play by requiring that a reviewing court remand a case if it finds an agency's exercise of discretion to be inconsistent with an agency rule. That statute is inapplicable here.

FPL's motion must be denied because it does not show that the Commission cannot grant the relief F PUG seeks. Moreover, FPL's position is inconsistent with the general scheme of electric utility regulation in Florida and elsewhere. A utility commission can revisit prior determinations based on changed circumstances. The recurrence of Commission consideration of issues in rate cases is illustrative. FPL is entitled, by statute, to have the opportunity to earn a fair return on its prudent investment in assets used and useful in the public service. A Commission determination on rate base, however, is binding only until the next rate case. If, for example, the Commission had previously excluded FPL's investment in these same transmission lines from rate base pursuant to a statutory interpretation that they were not used and useful, FPL would not be precluded from filing a subsequent request for their inclusion. The Commission is always able to reach different results in subsequent cases based on changed circumstances. See Matthews v. State, 149 So. 648, 649 (Fla. 1933) ("Every promulgated order of an administrative tribunal, such as is the railroad commission [now the PSC], may be superseded by another order. Likewise the Commission has the power to modify, and indeed, it is its duty to modify, its pre-existing orders, when new evidence is presented which warrants a change."); Redwing Carriers, Inc. v. Mason, 177 So.2d 465, 466 (Fla. 1955) (Citing

to Matthews with approval); Florida Gas Co. v. Hawkins, 372 So. 2d 1118 (Fla. 1979) (Overturning the Commission's dismissal of a rate case because the utility was earning its last allowed return without affording the utility an opportunity to demonstrate that changed circumstances justified a higher return); Southern Bell Telephone & Telegraph Co. v. Florida Public Service Commission, 443 So.2d 92 (Fla. 1983) (Upholding the Commission's authority to disallow charitable contributions even though it had previously allowed them as an operating expense for ratemaking purposes); Thomson v. Department of Environmental Regulation, 511 So.2d 989 (Fla. 1987) (Limiting Matthews but also recognizing the limited applicability of res judicata to administrative proceedings).

Florida Power & Light Company's motion to dismiss the Florida Industrial Power User Group's petition should be denied.

Respectfully submitted this 23rd day of February, 1989.

JACK SHREVE
PUBLIC COUNSEL



John Roger Howe
Assistant Public Counsel

Office of Public Counsel
c/o Florida House of
Representatives
The Capitol
Tallahassee, FL 32399-1300

(904) 488-9330

Attorneys for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE

Docket No. 890148-EI

I HEREBY CERTIFY that a correct copy of the foregoing Citizens' Response to Florida Power & Light Company's Motion to Dismiss FIPUG's Petition has been furnished by U.S. Mail or hand delivery to the following parties on this 23rd day of February, 1989.

*Suzanne Brownless, Esq.
Legal Division
Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399-0863

Matthew Childs, Esq.
Steele, Hector & Davis
310 W. College Avenue
Tallahassee, FL 32301-1406

Joseph A. McGlothlin, Esq.
Lawson, McWhirter, Grandoff
& Reeves
522 E. Park Avenue, Suite 200
Tallahassee, FL 32301


John Roger Howe

*Hand-delivered