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October 4, 1989

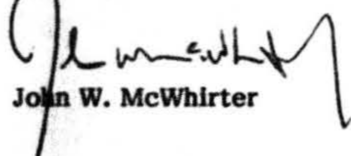
Steve C. Tribble
Director, Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399-0872

Re: Docket No. 890148-EI

Dear Mr. Tribble:

I have enclosed herewith 16 copies of the Florida Industrial Power Users Group's Brief in the above docket.

Sincerely,



John W. McWhirter

JWM/caw

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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of the Florida Industrial Power Users Group to Discontinue Florida Power & Light Company's Oil Backout Cost Recovery Factor.	))))))	DOCKET NO. 890148-EI

BRIEF OF THE FLORIDA INDUSTRIAL POWER USERS GROUP

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STATEMENT OF CASE

On January 27, 1989, The Florida Industrial Power Users' Group ("FIPUG") filed a Petition to Discontinue Florida Power and Light Company's ("FP&L") Oil Back-out Cost Recovery Factor (OBCRF).[1] FIPUG alleged that FP&L's two parallel 500 KV transmission lines ("Project"), which had previously qualified for application of the oil back-out factor, no longer were eligible for this favored treatment. The Petition was based on two essential propositions: (1) Fundamental changes in circumstances rendered continuation of the OBCRF unreasonable and unfair; (2) Past calculations of deferral benefits were improper and monies collected from customers using these calculations should be refunded. FIPUG requested the Florida Public Service Commission ("FPSC") to order FP&L to discontinue the oil back-out cost recovery factor and to refund the overcollections. FIPUG did not object to FP&L recovering the cost of its transmission lines, but argued that FP&L base rates may be sufficient to presently absorb this cost in the same fashion the St. John's generating stations, Turkey Point repairs and other capital additions have been absorbed since 1983. If they are not, FP&L may expeditiously seek appropriate adjustments.

The Public Counsel intervened in the cause on behalf of the citizens of the State of Florida and generally supported FIPUG's contentions. On January 27, 1989, FIPUG filed a motion requesting the Commission to consolidate Docket No. 890148-EI with Docket No. 890001-EI (the fuel adjustment docket) for purposes of resolving the issues related to the OBCRF. Alternatively, FIPUG requested that the OBCRF issues that were to be heard at the February 1989 fuel adjustment hearing be held in abeyance until the disposition of Docket No. 890148-EI.

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[1] Docket No. 890148-EI.

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By Stipulation of the Parties, the OBCRF issues were segregated from the February 1989 fuel adjustment hearing and deferred. FIPUG's motion to consolidate was granted for hearing purposes only. The OBCRF issues were scheduled to be heard at the August 1989 fuel adjustment hearing.[2]

On February 16, 1989, FP&L filed a Motion to Dismiss FIPUG's petition. In its written motion, FP&L did not assume the validity of FIPUG's factual allegations, as the rules of civil procedure require. Instead, FP&L offered in its motion competing factual rationales and calculations which, it argued, should prevail over those contained in FIPUG's petition and supporting affidavit. At the hearing on the motion, FIPUG argued that such contentions by FP&L could not serve as the basis for a motion to dismiss, but instead demonstrated the need for an evidentiary hearing to resolve the factual dispute. The Prehearing Officer denied FP&L's motion. The effect of denying the motion to dismiss was to uphold the legal sufficiency of FIPUG's petition--that is, assuming the validity of the allegations of the petition, FIPUG had stated a basis for relief.[3] In the Order, the Commission said:

> "FIPUG's Petition alleges that continued application of the OBCRF to the Transmission Project under current conditions constitutes unjust, unreasonable and discriminatory rates, within the meaning of the statutes which define the Commission's responsibilities.

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[2] Order No. 21217.

[3] Order No. 21361. At hearing, the Commission ruled that the following issues identified in the Prehearing Order, Order No. 217?5, remained for determination: Issues 2, 5, 6, 12, 13, 16, 18, 19, 21, 26-30. TR 226. It is unclear whether Issue 11 remains (compare TR 220 with TR 226); however, since it relates to the calculation of acceleration depreciation, FIPUG has included it.

Further, Staff agrees with FIPUG and OPC that the Commission has authority to review prior decisions based on changed circumstances. Peoples Gas System, Inc. v. Mason, 187 So.2d, 335 (Fla. 1966).

Whether or not the Commission should ultimately grant FIPUG the requested relief is irrelevant for the purposes of ruling on a Motion to Dismiss. Because the Commission could grant such relief, we hereby deny FPL's Motion to Dismiss FIPUG's Petition."

The hearing on FIPUG's Petition was held on August 22, 1989. At the beginning of the hearing, the Commission took official recognition of various materials submitted by FP&L.[4]

After initial cross-examination of FIPUG witness Jeffrey Pollock, FP&L renewed its motion to dismiss. The basis for the motion was:

> . . . .the test that was applied by the Commission and the test that was applied in implementing the rule, was just exactly what this witness has now told us was the test. The response to the motion to dismiss, in fact, said that we were submitting an untested version and that the matter should go to hearing.[5]

Based on this motion, the Commission granted FP&L's motion in regard to the majority of issues raised in FIPUG's Petition and ruled that it would not consider any evidence contesting the current reasonableness of the application of the OBCRF to the Project.

In its ruling, the Commission dismissed that portion of FIPUG's case that sought to challenge the continuation of collections under the rule in light of changed circumstances.

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4 TR18

5 TR 155

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VIII. WHETHER FIPUG HAS WAIVED ITS ABILITY TO CHALLENGE OR IS ESTOPPED FROM CHALLENGING THE USE OF THE MARTIN COAL UNITS IN CALCULATING DEFERRED CAPACITY SAVINGS TO BE USED IN THE CALCULATION OF ACTUAL NET SAVINGS SINCE THEY HAVE IN THREE PRIOR PROCEEDINGS, IN WHICH THEY WERE A PARTY, FAILED TO RAISE THE ISSUE, NOT OBJECTED, OBJECTED TO STIPULATE FACTORS AND FAILED TO REQUEST RECONSIDERATION? (Issue 28) 39

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FIPUG EXCEPTION TO RULING ON REVERSED MOTION TO DISMISS

FIPUG wishes to record its strong exception to the ruling of the Commission on FP&L's renewed motion to dismiss. While FIPUG adhered to the ruling and limited its examination of witnessess to those issues which were identified as remaining in light of the ruling, FIPUG wishes to clearly state and preserve its position that the Commission erred in a way that adversely impacted FIPUG's ability to develop the record and address issues that affected substantial interest.

The hearing officer initially denied FP&L's Motion to Dismiss. The full commission reversed this ruling at the hearing.

The basis for the reversal could not have been acceptance of FP&L's factual presentation, because FP&L had not yet placed its witness on the stand and FIPUG had no opportunity to cross-examine him. The decision that the oil back-out rule did not permit the relief requested by FIPUG essentially states that, once a back-out project is approved, there is no circumstance or set of facts under which the Commission could ever revisit or modify that decision. This approach turns the back-out mechanism into a utility entitlement rather than an aspect of rate structure that must remain fair and reasonable over time. Further, it ignores the established legal ramifications of changes in circumstances on administrative decisions[6] and the overriding statutory requirement that, whenever rates are demonstrated to be unreasonable, the Commission must act to fix reasonable rates. Section 366.07, Florida Statutes.

Further, the Commission is "strict interpretation" of the oil back-out rule was demonstrably one sided. Cross-examination of FP&L witness Waters clearly established

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6 McDonald v. Department of Banking and Finance(346 So.2d 569 (Fla. 1st DCA 1977) Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966).

that the Commission had authorized FP&L to collect hundreds of millions of dollars in capacity charges through the oil back-out clause, even though the rule expressly delineates those items which can be recovered through the clause and capacity charges are not among them. In support of the recovery, FP&L's counsel could only point to the order which allowed such recovery,[7] but Order 10554 simply proves that the Commission concluded at the time of FP&L's application that it had more discretion than is explicitly set forth in the rule. In other words, the past action of the Commission--upon which counsel for FP&L relied at hearing--supports FIPUG's interpretation of the scope of the Commission's authority under the rule.

Questioned about the provisions of the rule relative to capacity charges, FP&L witness Waters attempted to attribute to the Commission the astonishing assumption that capacity charges paid to Southern Company fell under the category of O&M expense associated with the transmission line.[8] By remarkable coincidence, of the 4 categories of costs treated as recoverable by rule 25-17.016(4)(a)--all of which are equally alien to the concept of capacity charges--the O&M item is the only one which, under the rule, the utility can continue to collect after the capital investment has been recovered. Rule 25-17.016(4)(c). The witness was quick to disavow any notion that he personally believed the connection was legitimate and, after a Commissioner rebuffed the attempt to ascribe it to the Commission, conceded that capacity charges are not a form of O&M[9] However, the Commission--which had earlier become exercised in its rejection of FIPUG's argument that construing the rule in light of statutes and case law would require use of discretion and authority not explicitly contemplated by the rule--met the news of this

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7 TR 185-86.

8 Tr. Waters 448

9 Tr. Waters 452-53.

utility-favoring, multi-million dollar "addendum" to the rule with quiet tolerance. The Commission's ruling on the renewed motion to dismiss was in disregard of the requirements of law. It denied to FIPUG fundamental due process, both substantively and procedurally. Because the balance of the hearing was conducted in adherence to the ruling, the record which was developed cannot be used to fully gauge FIPUG's contentions concerning the effect of a fundamental change in circumstances on fairness to customers.

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HISTORY OF THE PROJECT

In Docket 820155-EU, the Commission (FPSC) approved the application of FP&L to utilize the provisions of Rule 25-17.016, Florida Administrative Code, (the Oil Back-Out Rule) to collect a surcharge from its customers to pay the carrying costs on two 500 kilovolt electric transmission lines. The lines connect FP&L with the transmission lines of Georgia Power Company at the northern boundary of Florida and run some 200 miles south through the FP&L service area to Martin County. In its petition, FP&L estimated that the transmission project costs over a 10 year period would be $850 million and that the transmission line would have a useful life of 23 years. At the time the Project was qualified, the price of oil was $35 a barrel. It was projected to escalate to $60 a barrel. FP&L contended that the transmission line could be used to buy "coal by wire" at a gigantic savings because of a short term "coal bubble" that existed on the Southern Company system.

FP&L asserted that in addition to the considerable projected fuel cost savings, FP&L customers would also benefit from the postponement of two coal burning generating stations (Martin Unit 3 and Martin Unit 4) which it had in the planning process plus an unsited generating station. These units would have a combined generating capacity of over 2,000MW. FIPUG refers to these units as the phantom plants for reasons that will become apparent.

FP&L asserted that these plants would cost $2.9[10] billion to build but if the plants were not built customers would save $5.5 billion in carrying costs over the ten year period.[11] These savings would be partly offset by capacity and wheeling charges paid to the Southern Company Services Inc. (Southern), but it was estimated that even after

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10 Pollock testimony TR 93.

11 Waters exhibit 208 Document 3.

these charges were paid, there would be a capacity cost savings in excess of $2 billion to Florida customers over a ten year period. At their net present value, the fuel savings were estimated to be $793 million and the capacity savings were estimated to be $454 million. These combined savings were projected to be $851 million greater than the net present value of the transmission project costs, which were estimated to be $396 million.[12]

The Commission agreed with the general propositions asserted by FP&L and concluded that the transmission line project was a suitable candidate to receive the benefits of the oil back-out rule. In Order 11217, the Commission authorized FP&L to commence imposing a surcharge to cover the costs of the transmission project along with the Unit Power Sales (UPS) charges, energy charges capacity costs and wheeling costs imposed by Southern. FP&L was authorized to collect these costs from customers through an oil back-out surcharge ("OBCRF"). In Order 11217, the Commission declined to authorize FP&L to commence collecting the estimated capacity costs "savings" attributable to the phantom plants until a later date.

In 1987, using section (4)(d) of the oil back-out rule, the Commission granted FP&L authority to increase its surcharge to collect from its customers two-thirds of the net total "savings" it achieved by not building the phantom plants.

Between April 1987 and September 1988, FP&L collected $90 million in estimated "savings" from its customers. In the last 12 months, FP&L has collected an additional $195 million for a total of $285 million for deferred capacity "savings."

Under the oil back-out rule, these new collections were used to pay off the cost of FP&L's investment in the transmission project. Through deferred capacity payments by August of 1989, all of the costs of the transmission project were amortized except for $8

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12 Waters Exhibit 208 Document 3.

million in land and $60 million in income taxes which FP&L had paid on the oil back-out revenues.[13] FP&L proposes to continue to collect a return on these monies in addition to the operating and maintenance expenses that relate to the line through the OBCRF.

The OBCRF funds are accounted for separately. They are not included in the utility's general revenues. The revenues are not subject to any income tax refunds to customers. AFNUDC[14] rates utilized for the transmission project and the phantom plants varied dramatically from the AFUDC rates used for other FP&L construction.[15] For example, in 1983 FP&L used a 15.7% cost of capital for the transmission line project, 15.24% for Martin #3, and 15.52% for Unit 4 whereas for other FP&L facilities in construction that same year the FPSC authorized return was 10.8%.

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13 Babka TR 282.

14 AFNUDC (Allowance For Funds Not Used During Construction)

15 FP&L late filed exhibit 216, attachments III, IV, V and VII.

SUMMARY OF FIPUG'S POSITION

First, it is FIPUG's position that FP&L should be required to refund past collected revenues associated with accelerated depreciation, which amounts to approximately $285 million. The current application of the OBCRF permits FP&L to collect two and maybe three times for the same capacity. It requires customers to pay for the Southern Contract capacity charges, the alleged "savings" which arise because the Martin units were not built and the carrying costs for displaced oil burning units. FP&L has failed to bear the burden of proving that the Martin units would be needed in 1987 and 1988. FIPUG has shown that these units could be deferred until at least 1992 because of lower load forecasts during the 1983 to 1986 time frame. The "deferral benefits" have greatly changed since 1982, but FP&L is still using 1982 parameters to quantify and inflate the alleged benefits. Thus, the revenues related to the Martin units should be refunded.

Second, the capacity charges which FP&L pays to Southern System are for the purpose of obtaining capacity to meet its basic load requirements. Because these capacity payments greatly exceed net energy savings, they should not be recovered through the OBCRF.

Third, FP&L should not be permitted to charge a 15.6% return on equity on the equity portion of its capital invested in the Project. The oil back-out rule requires FP&L to use its actual cost of capital which is far below 15.6%.

ARGUMENT

I.

SHOULD FP&L BE REQUIRED TO REFUND PAST COLLECTED BACK-OUT REVENUES ASSOCIATED WITH ACCELERATED DEPRECIATION? (Issue 2:), (Issue 12)

The agrarian philosopher Andrew Lytle coined a thought that is applicable to this case. He said,

> "Only the very young can begin each day fresh as they are without memory, their senses quicken to the objects as they appear, as if they looked out upon the first day. This is a wonderful view, but it will not wear. Innocence prolonged ignores experience: knowledge denied becomes a stone in the head."

Many things have changed since 1982 which cry out for recognition. The human mind is not infallible, but the genius of mankind is that he has ability to recognize and adapt to change. The circumstances of 1982 which justified the utilization of the Commission's extraordinary oil back-out concept no longer exists. There is no present reason to require each residential customer to pay a $1 85 surcharge over and above the regular bill to obtain a rapid write off for some transmission lines. Commercial and industrial customers are required to pay much more for the rapid write off. The Commission should not deny the knowledge it has obtained since the innocent days of 1982. In the following pages, FIPUG will provide at least four salient reasons why FP&L should not be allowed to keep the money it called "customers savings". These reasons are:

A. FP&L savings calculations failed to recognize that customer conservation and other factors that enabled FP&L to find a less expensive way to meet customers' needs at a later time.

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B. Florida law prohibits a utility from recovering on an investment it has not made.

C. "Savings" calculations are overstated in at least three major ways; and

D. Intergenerational equity dictates disallowance of the fast write off.

Any one of the reasons listed above would justify the Commission to compel a refund, the combination of the four provides an irrefutable justification for refund.

A. FP&L FAILED TO RECOGNIZE THAT CUSTOMER CONSERVATION AND OTHER FACTORS ENABLED FP&L TO FIND A LESS EXPENSIVE WAY TO MEET CUSTOMERS' NEEDS AT A LATER TIME.

Through September 1989, FP&L has collected $285 million in accelerated depreciation.[16] FP&L has not justified its collection of this money. Rather than performing an analysis which would indicate what would occur had the Project not been built (in order to calculate Project "benefits"), FP&L simply continued to apply the assumptions it used in 1982 with no check or analysis of the validity of such assumptions. If FP&L had not included these units in calculating deferred capacity benefits, it would not have recovered $285 million.[17]

The evidence in this case establishes that the phantom units which form the basis for FP&L's calculation of deferred benefits and therefore net savings are units which FP&L[18] could have deferred well past 1987 and 1988. FP&L witness Waters,

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16 TR 61, Exhibit 611.

17 TR 88; 125.

18 Tr. 88; 125

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acknowledged that there is a direct relationship between deferred capacity and the amount of accelerated depreciation taken.[19] The higher the value assigned to the cost of constructing the deferred unit, the greater the impact and net savings and construction at the present time, contrary to FP&L's assumptions in 1982 and 1983 when the Project was qualified. These units have been replaced by other viable alternatives. In order to ascertain if the Martin units are the deferred units and would have been constructed in 1982, circumstances subsequent to 1982 must be reviewed.[20] FP&L failed to supply any such analysis. FIPUG's analysis shows that even without the transmission lines, using prudent practices the Martin plants would be delayed until at least 1992.

The Martin site is listed in the Site Plan as an appropriate site for combined-cycle and IGCC units, units which are far less expensive than coal-fired units. There is no mention of coal units.[21] Therefore, it is inappropriate to count such units as "deferred" for the purposes of accelerated depreciation. The units which are actually being "deferred" are the units which should be used to calculate accelerated depreciation.

FP&L argues that the less expensive options which are now available to FP&L instead of the coal-fired units are available because the Project deferred the Martin units.[22] However, even if the Commission accepts this premise, FP&L has not supported the claimed savings in the collection of $285 million.

First, in calculating savings, FP&L utilizes the original 1982 costs of constructing the unit (based on a 1979 contract), adjusted only for the difference in inflation rates.[23]

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19 TR. 418

20 Tr. 259

21 TR 88-89.

22 TR 356.

In other words, FP&L has locked in these direct costs, to calculate the savings. This is contrary to Order No. 11210 entered in Docket No. 820001-EU. In that docket, FP&L attempted to persuade the Commission to lock in the assumptions associated with the calculation of deferred capacity benefits. The Commission rejected this proposal outright:

> We do not agree with that proposal. None of the assumptions are such that we cannot fix them more accurately through retrospection than through projection. We do not consider it appropriate to lock ourselves into assumptions prior to the time we will be applying them. Order No. 11212, p. 9.

This Commission explicitly recognized the ever-changing nature of the generation planning process and the very likely possibility that the assumptions made by FP&L in 1982 might change in the future. It chose not to ignore experience.

If FP&L had not constructed the Project, prudent utility planning would have required that it analyze changes in conditions over time and incorporate them into the generation planning process. FP&L witness Waters agreed that a well-run utility would adjust to generation expansion plan to account for changes in circumstances.[24]

FP&L's own documents illustrate that because FP&L had already entered into the UPS agreements and was assured of sufficient capacity via them, it did not even begin to study alternatives to the "deferred" Martin units until February 1984. In a report entitled "Analysis of Timing and Reasonability of Generating Technologies" dated February 1984, FP&L stated:

> In recent years Florida Power & Light (FP&L) has not produced a long-range generation expansion plan. This has been due to a combination of several factors:

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23 Tr. 92; 419, Exb. 216 Attachment II line 4

24 TR 433.

1. **Our purchase of 2,000 MW of unit power from the Southern Companies;**

2. **Forecasted load growth continuing to decline due to conservation and other demand-side activities;**

3. **FP&L (and the State as a whole) is projected to have sufficient capacity through the early 90's.**

> For these reasons, there has not been a critical need to develop a long-range expansion plan. Because of the uncertainty and many options available to FPL, we do need to be examining the issues through the generation planning process. We need to know which of the emerging new technologies we should be pursuing in R&D. We need to know the impact of unit retirements and examine the issues surrounding extending the operating life of units. Joint projects and unit power purchases need to be examined closely. The impact of different load growth rates should be assessed. (Introduction, Page 1)

Thus, FP&L did not analyze or evaluate the other options which were available to it. FP&L provides absolutely no analysis to support its position that the Martin units were the most cost-effective alternative.

However, the evidence illustrates that changes in circumstances were occurring which should have caused FP&L to question its continued use of the Martin units to calculate deferred benefits. As early as 1984, FP&L's Roberto Denis described a significant decrease in FP&L load growth. Mr. Denis referred to this decrease as an independent consideration which allowed FP&L to defer Martin Unit 3.[25]

These decreases in load forecasts indicate that the proposed construction schedule for the Martin units could have been pushed further into the future. FP&L recognized

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25 FIPUG requested official notice of excerpts from this docket. The request was granted. TR 18.

that deferring the construction schedule could have made the units less costly to build. FP&L recognized that a later construction schedule could result in a lower inflation rate, a lower labor rate, a reduction in the accumulation of AFUDC charges (and less total project costs), lower equipment prices and a lower and more realistic cost allowance for the FGD system.[26]

Additionally, changes were occurring in the construction environment. Exhibit 612 illustrates that subsequent estimates which FP&L made to construct a two-unit 700 MW (net) pulverized coal-fired generating station were substantially less than the estimates for the Martin units. The per KW total cost which FP&L uses for the Martin units is $2,000 per KW. The direct cost of the these units is $1,339. More recent estimates for other costs range from $1,009 to $1,128 per KW direct cost. However, rather than update its cost estimates, FP&L continues to use its 1982 estimates for the Martin units, no doubt because 1982 costs result in significantly higher capacity deferral benefits.[27]

There is an even more striking example. The St. Johns River Power Park Units which were designed to be a coal burning units, and which had an in-service date of 1987 and 1988, had a total per KW cost of approximately $1,225.[28] This is significantly less than the direct FP&L cost used in the Martin units.

Despite FP&L's knowledge of all of the above changed circumstances, FP&L continues to use its 1982 assumptions to justify "savings" based on its original 1982

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26 TR 115-116. Citing memorandum to E. Hoffman from Project Management Department, Attachment B, dated October 11, 1984.

27 TR 93-94

28 FP&L witness Waters attempted to assert that the St. Johns and Martin projects were not comparable due to financing differences. However, he was not able to explain how this would bear on costs. TR 424-425.

assumptions. The assumption of a 1987 in-service date was never examined but was merely regarded as a given.[29]

FP&L's use of 1982 estimates is woefully inadequate to support the collection of $285 million. An updated analysis of the timing need for additional capacity had the line not been built was an absolute prerequisite to the collection of savings, because the collection begins with the otherwise in-service date of the unit. FP&L did not perform such an analysis and has not performed one to date. On the other hand, Jeffry Pollock--who offered the only evidence on the subject--demonstrated that changes occurred which would have enabled FP&L to defer the unit until 1992 even if the line had not been built.

FP&L was years early with its claim of net savings. It has collected from customers $285 million to which it is not entitled because it failed to meet its elementary burden of proof and because the evidence demonstrates its use of a 1982 assumption as to the unit's timing to be in error.

The fact is FP&L failed to support its claim of net savings. Despite the Commission's clear intent to insist on a quantification of benefits that had been made smarter and more accurate by recognition and consideration of developments over time, FP&L simply dusted off its 1982 assumptions and projections. To continue to accept the calculations uncritically and at face value would severely prejudice ratepayers, who have paid $285 million but have received no deferral benefits to date. Based on the timing issue alone, the money must be refunded and the accelerated depreciation reversed.

B. THE DEFERRED CAPACITY SURCHARGE SHOULD BE DISALLOWED BECAUSE IT GIVES A RECOVERY ON FICTIONAL ASSETS WHICH ARE NOT IN USE AND USEFUL SERVICE. (Issue 19)

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29 Tr. 399

B(1). PLANTS NOT BUILT

The language of 366.06 Fla.Stat. is mandatory. It provides:

> the Commission shall investigate and determine the actual legitimate cost of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for rate making purposes and shall be the money honestly and prudently invested by the public utility company in such property used and useful serving the public... (emphasis supplied).

No money was invested in Florida Power & Light's phantom plants. They were never in use and useful service because they were not built. If the phantom plants had been built they would have been built at much less cost than projected.

To put this case in perspective, FIPUG offers a comparison that some will think is odious. If a water and sewer company builds a sewer plant to meet future need, the FPSC refuses to permit the utility to recover any money from current customers on the oversized portion of the plant. The FPSC takes this position even though money has been invested, water is running through the plant.[30]

The statutory language governing rate making for water and sewer utilities is substantially the same as Section 366.06, Fla.Stat. Section 367.081, Fla.Stat. states:

> ...the Commission shall consider the value and quality of service and the cost of providing service, which shall include, but not be limited to, ...expenses incurred in the operation of all property used and useful in the public service; and a fair return on the investment of the utility and property used and useful in the public service. (emphasis supplied).

By statute, for water and sewer company's, the FPSC is allowed to consider the utility's investment in utility property required to be constructed up to 24 months in the future. The FPSC considers this investment, but will not let the utility collect revenues associated with the plant until it is actually in the ground.

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For water and sewer companies, the applicable statute is strictly construed even though it permits the consideration of future investment. With the power company, the statute is more restrictive but the treatment is more liberal. The statute does not permit consideration of future investment in rate making. In spite of the more restrictive statute, FP&L claimed and received revenue from its customers using calculations pertaining to a fictional plant. The FPSC should order that this money be refunded.

B(2). PLANTS BUILT BUT NOT USED

The phantom plants are not the only plants in question. If FP&L displaced oil it must have closed or cut back on the use of its oil burning plants. These active plants are already in FP&L's rate base from previous rate cases. Earning a return on these plants that are no longer in use and useful service will result in the customers getting a triple hit when FP&L is allowed to recover deferred capacity carrying costs. To get the use of 2,000MW of capacity, the customers must pay a return on Southern company plants located in Georgia, Alabama and Mississippi. The customers must pay a return on 2,000MW of previously active FP&L plants which are no longer being used and the customers must pay two-thirds of the costs that would have been incurred if 2,000MW of phantom plants had been built. This application of the rule stretches the expressed prohibitions in Section 366.06, Fla.Stat. beyond their tensile strength.

FP&L will argue that it is not seeking a return on the phantom plants because the money collected for deferred capacity carrying costs went to the cost of the transmission lines. This approach has an equal statutory problem. Because the regulatory depreciation exceeds allowable tax depreciation[31] FP&L requires customers pay a return on the additional taxes that result. The money received was acknowledged by FP&L to be taxable revenue rather than an expense. FP&L paid taxes on this revenue. Instead of reducing "savings" by this extra cost imposed on customers FP&L charges them even more.

With respect to displaced oil plants, the Commission has previously had a similar case before it. In 1984, Florida Power Corporation put seventeen oil plants into extended standby for future use. The Commission took those plants out of rate base and reduced the rate base $51 Million.[32] If the Commission doesn't take the FP&L displaced oil

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31 Babka TR. 282

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plants out of rate base it should at least consider the carrying costs on those plants as an expense when calculating the deferred capacity savings.

FP&L may argue that the displaced oil plants were not really displaced because they are presently being used. If that is the case, the net energy savings estimated by FP&L have been overstated for the reasons set out below.

C. THE SAVINGS CALCULATIONS ARE OVERSTATED.

C (1) THE FUEL SAVINGS ARE OVERSTATED.

FP&L cannot demonstrate "actual savings", it can only show estimated savings. The estimates are flawed. FP&L says there are two types of savings, fuel savings and capacity savings. The fuel savings are derived by simulated computer runs. FP&L compares the energy charges it actually paid to The Southern system to a computer simulation of energy charges it would have incurred had it not purchased electricity from Southern.[33] A reasonable person would conclude that because the rule relates to "economic displacement of oil generated electricity in Florida"[34] that FP&L oil fired generators are being displaced, i.e. shut down and removed from use in order to import electricity by transmission line from out of state. Surely the units are not being used to meet load growth because the oil back-out rule prohibits it.[35]

If instead of shutting down the displaced oil generators, FP&L continued to use its more efficient oil plants to meet the growing demands of its Florida customers. The computer simulation for the displaced oil price comparison will not be selected from base load plants. Peaking units, inefficient units, emergency power purchases and other high

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32 Docket 830470-EI, Order 13771

33 Pollock TR 75.

34 25-17.016(2)(a), emphasis supplied.

35 25-17.016(3)(6)FAC

cost sources would be used in the simulation. This overstates the oil price savings.[36] Mr. Pollock's testimony focuses on FP&L's shrinking reserve margin[37] this is strong evidence that oil plants are being used to meet growing load rather than being removed from service. Fuel savings used to calculate the deferred capacity charges have been overstated.

C. (2) THE PHANTOM CAPACITY FINANCING COSTS WERE OVERSTATED.

The second component of FP&L's savings calculation is a comparison of the Southern Company capacity charges to the carrying costs associated with the phantom plants. This comparison is also flawed. A capital investment by a utility is generally composed of labor, materials and financing costs. For the phantom units the estimated direct cost was $1.9 billion and the financing costs were $1 billion for a total installed cost of $2.9 billion or $2,000 a kilowatt.[38]

In calculating its $1 billion financing cost for the phantom plants, FP&L used a special AFNUDC rate that averaged from 450 to 500 basis points higher than its standard AFUDC rates. Had the plants been in rate base, even using a 15.6% return on equity in the later years and the inflated construction costs, financing costs would have been $326 million less.[39]

C. (3) THE DIRECT CONSTRUCTION COST OF PHANTOM PLANTS WAS OVERSTATED.

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36 Pollock TR 75 et seq.

37 Pollock TR 76 et seq., Exhibit 606.

38 Pollock TR 93.

39 FP&L Late Filed Exhibit 216. Compare Attachments IV & V to VIII.

Comparing the estimated direct costs for labor and material used in the savings calculation to the cost estimates FP&L was using for other coal units, we find that the cost estimates for other units range from $1,009 to $1,128 per kilowatt rather than the $1,339 per kilowatt cost used in its deferred capacity savings calculation. The "actual" direct cost difference that should have been used in deferred capacity savings calculations is from 19% to 33% less than the cost used to justify the deferred capacity surcharge.

SUMMARY

Computer wizardry originally projected that customers would derive a net present value benefit of $851 million from the transmission line.[40] Price changes by FP&L's own admission have dropped this savings to $249 million[41] but the latest number is very shaky for the reasons stated above and because deferred capacity charges were used to write off the transmission lines before their time.

D. INTERGENERATIONAL EQUITY DICTATES DISALLOWING THE FAST WRITE-OFF. (Issue 18)

The FPSC should use fairness in its consideration of whether it is proper to charge customers for The Southern Company capacity charges plus capacity charges on the phantom plants. As a matter of public policy, the FPSC has heretofore utilized a policy of intergenerational equity. This policy has always been used to prohibit current customers from getting a rate reduction at the expense of future customers. For example, current customers give the utility more money to pay taxes with than the utility actually pays so that current customers will not unfairly benefit when the utility

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40 Exhibit 208, Document 3, page 1.

41 Exhibit 208, Document 4.

uses accelerated depreciation for tax purposes. FP&L keeps the money for future tax payments. When tax rates were reduced the FPSC ruled that excess deferred taxes should be refunded over the useful life of utility assets rather than in a lump sum for the protection of future customers. FP&L continued to keep the money even though part of the taxes didn't have to be paid. Current customers pay FP&L a nuclear decommissioning surcharge each month to build up a fund that will be used 25 to 40 years in the future because current customers are presently using the nuclear plant. FP&L keeps the money in trust.

Logic dictates that the intergenerational equity concept should be used for the transmission line. For once FP&L should be required to give back the money. Current customers should not be required to pay in two years for a line that will be used for 20 more years.

The oil back-out rule and the proceedings which qualified the transmission lines contemplated that everyone would benefit. The current customers would receive greatly reduced fuel costs through the purchase of coal by wire. This would offset the rapid transmission line write off of costs. In 1982, the FPSC wisely determined to take a wait and see attitude before allowing the rapid write off.[42] Now that the gigantic projected savings have not materialized, logic dictates that the FPSC should determine not to use the accelerated recovery component of the oil back-out rule. "Knowledge denied is a stone in the Head".[43]

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42 Docket 820001, Order 11210.

43 R. Lytle, supra

II.

HAS THE TIME COME TO REQUIRE FP&L TO COLLECT THE CAPACITY CHARGES FOR THE SOUTHERN SYSTEM UPS CHARGES THROUGH BASE RATE MECHANISMS? (Issue 5)

A. ADMINISTRATIVE HISTORY.

This is not a virgin issue to the FPSC. The capacity charge component of purchased fuel has been included as a fuel cost before without protest. But there is a marked difference. In the past when this procedure has been used, the total price of purchased electricity for fuel, (&M expense, and capacity charges has been less than the money the utility would spend for fuel and operating and maintenance expense alone if it operated its own generating units. Under these circumstances, there is logic in favor of absorbing the capital costs as part of the fuel charge to customers. The customer pays less, not more.

In the present case, however, the capacity charges currently exceed the estimated fuel savings by $153 million.[44] The same logic does not apply.

The FPSC has addressed a similar issue directly before in Order 7644, Docket No. 74680-CI(GI).[45] In 1974 the FPSC determined to readjust its fuel recovery cost formula to incorporate nuclear fuel costs, which had previously been excluded. Florida Power Corporation (FPC) had a nuclear plant under construction and objected to the FPSC reducing its fuel cost recovery unless the clause were also modified to incorporate the operation and maintenance costs, fixed costs and return on its investment in the nuclear plant. FPC said that these costs were about $5 million a month. The fuel savings to customers would be approximately $5.5 million a month. FPC argued that it was unfair

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44 Water Exhibit 208, Document 4.

45 A copy of the order in its entirety is attached as Appendix A to this brief and FIPUG requests the FPSC to take judicial notice of it.

to reduce its fuel cost recovery without allowing the nuclear plant capital expenses. The FPSC disagreed, it said:

> "The alternatives suggested by FPC are not satisfactory methods of dealing with the contingent problem... [t] would result in the [fuel] clause being utilized to recover capital costs which violates the basic purpose of the fuel clause." (emphasis supplied).

In other words, it is inappropriate to recover capital costs through the fuel cost recovery clause. FPC appealed that decision of the Supreme Court. The Supreme Court affirmed the order, but delayed its implementation for 60 days in order to provide FPC with an opportunity to file a base rate case.[46]

During the hearing in the present case, concern was expressed by one commissioner that there is insufficient information for the commission to adjust base rates, another suggested that it would be inappropriate to adjust base rates without undertaking a cost of service study to determine the impact of the rate adjustment on the various classes of customers. The FPSC can avoid both of these concerns by prohibiting pass through of Southern Company capacity charges effective April 1, 1990. If it follows this approach, it will follow the same course the Supreme Court followed in the FPC case. It will give FP&L ample time to file a rate case. It will create little additional burden because under the provisions of Chapter 89-292, Laws of Florida, 1989, which became effective on October 1, 1989, FP&L is required to submit minimum filing requirements for commission review.

The approach suggested by FIPUG will also reduce the FPSC's workload in another area. Presently under the tax adjustment rule.[47] FP&L is required each year to refund

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46 Appendix B.

47 25-14.003, FAC.

overcollections to customers as a result of the 1986 Tax Reform Act. It did so in 1987 and 1988 and will do so in 1989, but the refund comes well after the fact. It is always based on incomplete information and subject to dispute. The tax refund mechanism is a flimsy proxy for a rate case.

B. THE BASIS FOR ORDER 7644.

Order 7644 was not arbitrary and capricious, it was logical and has a firm foundation in statutory requirements and regulatory policy. The rationale is very simple. The Utility customers have historically been divided into different classes for a reason. The price of electricity to each class of customers should be different. It is different because the cost of service to each class is different; as well as the rate history; value of service; experience of the utility; the consumption and load characteristics of various classes of customers; and the public acceptance of rate structures. Historically, utilities have utilized these factors in establishing rate structures. The law mandates that the commission recognize the differences.[48] The capacity cost recovery mechanism presently used in the oil back-out recovery clause applies a uniform rate to every customer of the system. It totally ignores the differences between customer classes. Collecting capital costs through a uniform kwh charge is arbitrary and discriminatory.

C. THE OIL BACK-OUT RATE REQUIREMENT.

There is a final and very compelling reason for excluding capacity costs from the oil back-out recovery mechanism. THE RULE DOES NOT PERMIT THEIR RECOVERY

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48 366.06(1) "In fixing fair, just and reasonable rates for each customer class, the commission shall to the extent practicable, consider the cost of providing service to the class, as well as a rate history, value of service, and experience of the utility; the consumption and load characteristics of the various classes of customers; and public acceptance of rate structures."

THROUGH THE OBCRF. The revenues to be collected through the oil back-out recovery factor are itemized in Section (4)(a) of the oil back-out rule.[49] Foreign capacity charges are no where to be found in the text of the rule.

FIPUG acknowledges that in Order 11210, the FPSC for convenience determined to collect the Southern Company charges through the OBCRF in violation of its own rule but at that time these charges were modest; they approximated real energy savings in 1982 through 1985.[50] This method of collection according to the Commission "reduced confusion and facilitated review of the costs being recovered".[51]

In light of the frequency in which rate cases were occurring in the late 1970s and early 1980s, it was apparent that there would be an opportunity to consider the issue again before these costs became significant. The project was still in its infancy in the 1983 rate proceedings. This justified keeping the project separate for further scrutiny as it progressed. It is doubtful that anyone in 1983 contemplated there would be a hiatus of more than six years before another rate case was filed. The Commission reserved the right to further review the costs. The review in this docket should dictate a new approach.

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49 25-17.016(4)(a) FAC.

50 Waters Exhibit 208, Document 4, page 2.

51 Order 11210, page 9.

III.

SHOULD THE OBCRF BE DISCONTINUED NOW THAT THE TRANSMISSION HAVE BEEN AMORTIZED? (Issue 21)

The argument on this point will be partially mooted if the FPSC grants the refund FIPUG requests in point no. I, but if the FPSC determines that FP&L was justified in the method it employed to expeditiously recover the costs of its transmission line and if the FPSC concludes that as a matter of public policy it is not unfair to impose the full cost of the transmission lines on current customers, even though those transmission lines will benefit a future generation of customers, then under the terms of the rule, the OBCRF should be discontinued because for all intents and purposes, the investment in the qualified oil back-out project has been fully repaid. Subsection 6 of the Rule mandates:

> "Once the cost of a qualified oil back-out project have been recovered, the applicability of the oil back-out cost recovery factor shall terminate."

The parties have agreed that the plant was paid off in August 1989 but for the fact that FP&L paid taxes with some of the money that was collected to amortize the lines. Whatever this amount is, Mr. Babka testified that it would soon be recovered also[52] because now book depreciation is greater than the tax depreciation. Apparently this is principally an accounting transaction with a de minimus impact on customers.

FP&L has misconstrued subsection 4(d) of the rule and failed to write off the land cost. 4(d) contemplates that savings be used to retire the entire cost of the investment, not just the depreciable assets.

The oil back-out factor should not be used to pay ad valorem taxes on a transmission line that has no regulatory value and O&M expense should be disallowed because Section 4(a) of the rule allows recovery of only the "maintenance expense

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52 Babka TR 284.

differential". No one has suggested that the maintenance cost of the transmission line is higher when it is transmitting coal-fired generation than when it is transmitting oil-fired generation. There is nothing left to collect except energy and capacity charges paid to the Southern system. The energy charges can be collected through the fuel cost recovery mechanism. The capacity charges should be collected through base rates.

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overcharges, FIPUG urges it to do so.

The Commission should also examine the financial component of the Martin plants used in calculating deferred capacity charges. The equity return initially requested to be booked AFNUDC was 19% the Commission declined. FP&L then used 15.85%.[58] In July 1984, the equity return was reduced to and has since remained at 15.6%.[59] In calculating deferred capacity charges, the higher return on equity was used in determining the amount of AFNUDC capitalized in the construction costs and then used as a return on the rate base. FIPUG has not calculated the impact of this higher return, but when you recall that the rate base used for deferred capacity savings is $2.9 billion and realize that even a 1% return on this sum is $29 million a year, the impact on the deferred capacity savings is quite substantial. The higher equity factor was applied to five years of phantom AFNUDC in addition to two years of phantom rate base in the deferred plants.

There is information in the record from which the appropriate adjustments can be made when the Commission ascertains what the actual cost of equity should have been. This calculation need not be made as to the deferred capacity, however, if the Commission concludes as FIPUG argued in the previous section that deferred capacity savings should be disallowed and refunded in their entirety.

B. ARE THERE ANY OIL BACK-OUT PROJECT TAX SAVINGS DUE TO THE CHANGE IN THE FEDERAL CORPORATE INCOME TAX RATE? (Issue 13)

This issue, composed by FP&L, misstates the real issue. The real issue is FP&L's refusal to apply the 13.6% return on equity ("ROE") to its earnings on the oil back-out

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57 Babka TR 282.

58 Allowance for funds not used during construction.

59 Exhibit 218.

IV.

APPROPRIATE RETURN ON EQUITY.

A. IS FP&L JUSTIFIED IN CHARGING A 15.6% RETURN ON THE EQUITY PORTION OF ITS CAPITAL INVESTED IN THE 500 KW TRANSMISSION LINES? (Issue 6:)

FP&L currently earns a return on equity of 15.6% on the Project.[53] Tr. 285. This in excess of the 13.6% ROE which FP&L uses for its nonoil-backout rate base.[54] This 15.6% ROE is higher than any ROE authorized by a regulatory Commission since 1987.[55] The 15.6% ROE is also in violation of the oil back-out rate itself which allows recovery only of the actual cost of capital. Rule 25-17.016(4)(e). FP&L's own witness admits that the current cost of capital must be used.[56]

After the hearing in this case, the Commission addressed one aspect of the equity return at its agenda conference on September 19, 1989. The Commission concluded that for the period from October 1, 1989 through March 30, 1990, a 13.6% return on equity better reflects the utility's actual cost of capital than the 15.6% it had been using. This ruling, however, is only the tip of the iceberg. The original investment in transmission lines was $335 million. It has now been written down to $8.5 million. Consequently, the current ruling only affects 2% of the plant plus a return on FP&L's "prepaid tax balance." Apparently, FP&L has not favored the FPSC with any analysis of this fund since 1983.[57] The FPSC has concluded that it will review earlier periods for

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53 Tr. 285.

54 Tr. 79

55 Tr. 80; Exhibit 609.

56 Tr. 320.

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overcharges, FIPUG urges it to do so.

The Commission should also examine the financial component of the Martin plants used in calculating deferred capacity charges. The equity return initially requested to be booked AFNUDC was 19% the Commission declined. FP&L then used 15.85%.[58] In July 1984, the equity return was reduced to and has since remained at 15.6%.[59] In calculating deferred capacity charges, the higher return on equity was used in determining the amount of AFNUDC capitalized in the construction costs and then used as a return on the rate base. FIPUG has not calculated the impact of this higher return, but when you recall that the rate base used for deferred capacity savings is $2.9 billion and realize that even a 1% return on this sum is $29 million a year, the impact on the deferred capacity savings is quite substantial. The higher equity factor was applied to five years of phantom AFNUDC in addition to two years of phantom rate base in the deferred plants.

There is information in the record from which the appropriate adjustments can be made when the Commission ascertains what the actual cost of equity should have been. This calculation need not be made as to the deferred capacity, however, if the Commission concludes as FIPUG argued in the previous section that deferred capacity savings should be disallowed and refunded in their entirety.

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57 Babka TR 282.

58 Allowance for funds not used during construction.

59 Exhibit 218.

project.

In Order No. 20659, the Commission approved FP&L's use of a 13.6% ROE for application of the tax savings rule in 1987. This same amount was approved as the appropriate ROE for 1988.[60] However, FP&L has consistently refused to apply the 13.6% ROE to its investment in the oil back-out project. Instead, FP&L utilizes a 15.6% ROE which is the ROE authorized in its 1984 rate case. See Docket No. 830465-EI. FP&L has no basis for utilizing a 15.6% ROE on the Project. Excluding the rate base and net income associated with the Project resulted in an understatement of FP&L's refund by $6.7 million in 1987.[61]

C. SHOULD FP&L BE REQUIRED THESE TAX SAVINGS TO CUSTOMERS? (Issue 16)

Yes. Additionally, the Commission should direct FP&L to include the oil back-out investment, revenues and expenses in all pending future tax savings refund determinations.

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60 Order No. 18340.

61 TR 60.

V.

WERE THE MARTIN COAL UNITS 3 AND 4 DEFERRED AS A RESULT OF THE PROJECT AND THE ORIGINAL UPS PURCHASE? (Issue 11)

No. FP&L admits that the Project would have been built regardless of whether it qualified under the oil back-out rule. The Project was needed to correct serious problems with FP&L's then planned transmission system. For example, in its April 1981 Petition to Commence Determination of Need for the Duval-Poinsett 500 kV Project, FP&L states:

> D. Correct Thermal Overload and Low Voltage Conditions:
>
> There are several transmission facilities which will be subject to thermal overloads in the 1980s if the Duval-Poinsett 500 kV Project is not built. They are: (1) Brevard-Malabar 230 kV #1 and #2; (2) Putnam-Volusia 230 kV #1 and #2; (3) Gillette-Big Bend-230 kV (tie with TECO); (4) Midway-Ranch 230 kV; (5) Putnam-Rice 230 kV #1 and #2; (6) Sanford-North Longwood 230 kV (tie with Florida Power Corporation).
>
> On Page 8 of the same Report, FP&L states:
>
> Paragraph E. Improved System Reliability:
>
> Sudden loss of a large generator in peninsular Florida has occasionally resulted in a system separation accompanied by underfrequency load shedding. Completion of the Duval-Poinsett 500 kV Project will substantially increase the ability of the system to withstand major system disturbances such that the need for dropping customer load will be virtually eliminated.
>
> And finally, Page 9 of the Report contains the following language:
>
> Paragraph G. Accommodate Load Growth:
>
> This 500 kV transmission will insure ample transmission capacity for future load growth in the FP&L Service Territory through which the Pubal-Poinsett 500 kV lines will pass.

As discussed in Section 1, while the Martin units were planned at one time, they are no longer part of FP&L's generation plans and are not being deferred. As also discussed in Section 1, circumstances have changed so that the in-service date of the units and their cost parameters are no longer the same as the assumptions used by FP&L in 1982.

VI.

WHETHER FIPUG'S ARGUMENT THAT THE RECOVERY OF OIL BACK-OUT PROJECT COSTS THROUGH AN ENERGY-BASED CHARGE IS UNFAIR AND UNDULY DISCRIMINATORY IS BARRED BY THE DOCTRINE OF RES JUDICATA AND ADMINISTRTIVE FINALITY? (Issue 26)

Chapter 366, Florida Statutes, contains numerous sections which demonstrate that it is not only the Commission's right, but its duty, to monitor the rates charged by electric utilities to ensure that they are not discriminatory and to modify those rates if they become discriminatory. For example, section 366.04(1) Fla. Stats. states:

> The Commission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service. . . .[62]

Inherent in the words "regulate and supervise" is the Commission's authority to continually evaluate the appropriateness of utility rates.. Similarly, section 366.05(1), Fla. Stats. which sets out the Commission's powers, states that the Commission "shall have power to prescribe fair and reasonable rates and charges. . . ."

Further, other portions of Chapter 366 Fla. Stats. charge the Commission with fixing just and reasonable rates. See section 366.041(1) Fla. Stats. If the Commission finds that a utility's rates are "unjust, unreasonable, unjustly discriminatory, or in violation of law . . .," the Commission must determine and impose just and reasonable rates. See also, 366.07. Fla. Stats.

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62 Emphasis supplied

The Commission's duty to supervise and regulate rates is not static--it is not a duty performed once, never again to be questioned. Therefore, simply because the OBCRF was approved by the Commission at one time under different circumstances does not mean that it is set in stone forever--especially when the practical effect of the OBCRF is discriminatory rates in violation of Chapter 366 Fla. Stats.

When rates are shown to be discriminatory, the Commission must act. The principles of res judicata and administrative finality, as urged by FP&L, are inapplicable in this setting.

The OBCRF applies to kilowatt hour sales at the meter. However, the OBCRF costs are demand-related.

The evidence demonstrated that the major portion of the costs which flow through the OBCRF are UPS capacity charges.[63] Such costs are clearly demand-related because FP&L purchases UPS capacity in order to maintain system reliability; i.e., meet projected peak loads and provide adequate reserves. These costs are the same as the capital costs associated with FP&L's non-nuclear generating resources, which the Commission has previously classified primarily to demand.[64]

Further, the Project itself provides FP&L with substantial reliability benefits and thus these costs are also demand-related. FP&L admits that the Project would have been constructed regardless of the OBCRF to deal with serious transmission system problems.[65]

Exhibit 610 demonstrates that 18.3% of oil back-out costs were recovered from the GSLD/CS rate classes. This is 28% higher than the cost responsibility would be if

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63 333 Milkin

64 TR 83-84.

65 Tr. 85-86.

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such costs were treated in the same way as other non-nuclear and transmission capital costs. It is unduly discriminatory to charge the GSLD/CS classes rates which are 28% higher than their corresponding cost responsibility.[66] Chapter 366 Fla. Stats. charges the Commission with the duty to remedy this situation.

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66 TR 82.

VII.

WHETHER FIPUG'S REQUESTED RELIEF TO DISCONTINUE RECOVERY OF OIL BACK-OUT PROJECT COSTS IN AN ENERGY BASED OIL BACK-OUT CHARGE IS INCONSISTENT WITH RULE 25-17.016 AND THEREFORE NOT PERMITTED BY SECTION 120.68(12)(b), FLORIDA STATUTES? (Issue 27)

Section 120.68(12)(b) requires the appellate court to remand a case to the agency if the agency's exercise of discretion is inconsistent with an agency rule. However, FIPUG's request that recovery of oil back-out project costs not be made through an energy-based charge is not inconsistent with any FPSC rule.

Rule 25-17.016 does not specify how oil back-out project costs shall be recovered. It does not specify that they be recovered through an energy-based charge.

Further, recovery of the OBCRF through an energy-based charge is discriminatory and violative of numerous provisions of Chapter 366. See Issue 26. Thus, an interpretation of rule 25-17.016 to require collection of the charge in this manner would void the rule on the basis that it is an invalid exercise of legislative authority. Section 120.56(1).

VIII.

WHETHER FIPUG HAS WAIVED ITS ABILITY TO CHALLENGE OR IS ESTOPPED FROM CHALLENGING THE USE OF THE MARTIN COAL UNITS IN CALCULATING DEFERRED CAPACITY SAVINGS TO BE USED IN THE CALCULATION OF ACTUAL NET SAVINGS SINCE THEY HAVE IN THREE PRIOR PROCEEDINGS, IN WHICH THEY WERE A PARTY, FAILED TO RAISE THE ISSUE, NOT OBJECTED OBJECTED TO STIPULATE FACTORS AND FAILED TO REQUEST RECONSIDERATION? (Issue 28)

This issue relates to FIPUG's ability to contest the use of the Martin Coal units in calculating deferred capacity savings. FIPUG is not estopped from raising this issue for the same reasons it is not barred from contesting the collection of the OBCRF through an energy-based charge. See discussion of Issue 26. Any action which a utility takes which subjects customers to discriminatory rates is subject to review by this Commission, on the Commission's own motion, or upon showing by an affected party.

IX.

WHETHER THE REQUESTED REFUND OF OIL BACK-OUT REVENUES WOULD CONSTITUTE ILLEGAL RETRO-ACTIVE RATEMAKING? (Issue 29)

No. The refund of improperly collected accelerated depreciation would not constitute retroactive ratemaking. The issue of refunding funds improperly collected through an ongoing adjustment clause was directly addressed by the Florida Supreme Court in Gulf Power Co. v. Florida Public Service Commission, 487 So.2d 1036 (Fla. 1986).

In Gulf Power, the Court addressed the propriety of refunds for monies improperly collected through the fuel adjustment charge. The Court laid to the rest the argument that such a refund would constitute retroactive ratemaking. The Court held:

> Nor do we find that the [refund] order constitutes prohibited retroactive ratemaking fuel adjustment. The fuel adjustment proceeding is a continuous proceeding. . . .

Id. 1037. Thus, the Commission has the authority to adjust or disallow revenues previously collected through an adjustment clause.

Additionally, FIPUG is not seeking to deny FP&L recovery of the revenue requirements associated with the Project. It is FIPUG's position that the value of FP&L's investment should be recovered over the normal depreciation period rather than on an accelerated schedule.

X.

WHETHER FIPUG'S ARGUMENT THAT FP&L COST ESTIMATES FOR THE MARTIN UNITS ARE OVERSTATED SHOULD BE HEARD? (Issue 30)

Yes. The issue of the Martin Coal Unit cost estimates are the integral part of FP&L's calculations supporting collection of revenues related to accelerated depreciation. See Issues 2, 11 and 12. Thus, it is an issue well within the scope of the issues raised in FIPUG's Petition and recognized by all parties as an issue pertinent to this proceeding.

The only reason FP&L can collect any accelerated depreciation at all is because of the inclusion of these "deferred" units in its calculation of net savings.[67] FP&L's

assumptions in regard to the timing and cost of the Martin Units are related to how the amount of accelerated depreciation was calculated. For example, FP&L has relied on the original cost estimates of constructing the units (adjusted only for the difference in escalation rates). This has significantly inflated the deferred capacity benefits,[68] and thus inflated the amount of depreciation. Similarly, FP&L's estimate of when these units would have been built also impacts on the depreciation calculation.

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67 TR 60-61.

68 TR 92.

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67 TR 60-61.

68 TR 92.

CONCLUSION

The Broadway musical Pajama Game dealt with a wage dispute between labor and management. The lyrics of one of the principal songs went "Seven cents an hour doesn't mean a helluva lot. Seven cents an hour doesn't mean a thing, but give it to me every hour, forty hours a week, and I will be living like a king." Those lyrics apply in spades to the oil back-out factor. Although FP&L only asked its customers to pay .7¢ an hour, when there are 61 billion kilowatt hours sold, it amounts to a helluva lot. In 1987 through the first half of 1989, it amounted to over half a billion dollars a year.

The Florida Public Service Commission is a customer's only bulwark against the monopoly power company. There is no free market competition to regulate rates.

It is wrong to make the present customers pay in full for an asset that will be used for twenty years. It is wrong to allow the utility to impose upon its customers a triple capacity charge. It is wrong to charge the customers for a plant that is not in useful service. It is wrong to allow the utility to earn a rate of return in excess of its actual capital costs. It is wrong it ignore the different cost characteristics of the different customer classes. It is wrong to chain present actions to a decision that was made at a different time under entirely different factual circumstances.

APPENDIX

478 7644
- 1 -

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: General investigation of fuel adjustment clauses of electric companies.	DOCKET NO. 74680-CI (GI)
	ORDER NO. 7644

The following Commissioners participated in the disposition of this matter:

PAULA F. HAWKINS, Chairman
WILLIAM T. MAYO
WILLIAM H. BEVIS

ORDER MODIFYING CLAUSE

BY THE COMMISSION:

This portion of Docket No. 74680-CI involves a proposal by the Commission staff to modify the cost recovery clause of the four major electric utilities by eliminating step 11, which is the generation mix adjustment. A public hearing was held on this matter on January 19, 1977, in Palm Beach Gardens, Florida, at which time all interested parties were given an opportunity to be heard.

Step 11, as noted above, is the generation mix adjustment and is executed only if the utility uses nuclear fuel. The generation mix is fossil generation divided by total generation which includes nuclear generation. The factor derived therefrom is then multiplied times the adjustment factor drived in step 10 to develop the fuel adjustment before taxes. After application of the appropriate tax multiplier, the monthly fuel adjustment is then applied to customers' bills.

Presently, only Florida Power & Light Company has nuclear generation in its system. This proceeding has no effect on that company since nuclear fuel costs are required to be reflected in the calculation of its monthly adjustment by separate order of this Commission. However the addition of a nuclear unit by any other electric utility raises a contingent problem absent any modification of the formula. For this reason, the staff has proposed to modify the clause as set out hereinabove.

In support of the suggested change, the staff presented the testimony of a utility rate analyst in the Commission's Rate Department. According to the testimony presented to us, step 11 does not meet all of the objectives of the cost recovery clause in that it does not pass on to the customers the savings realized by a utility by virtue of lower cost nuclear fuel. The witness added that while nuclear generation does lower average fuel costs through the displacement of more expensive fossil generation, the actual cost savings are not reflected in the clause. In order to meet the objectives of properly compensating for day-to-day fluctuations in the cost of fuel which cannot be anticipated in the base rates, the witness proposes that step 11 be eliminated thereby permitting nuclear fuel costs to be included in the calculation of the monthly adjustment.

The Public Counsel also supports the change. Through the testimony of its senior utility analyst, it contends the formula should be modified so as to eliminate the generation mix adjustment and to incorporate total generation and fuel costs. This approach, he asserts better tracks fluctuations in a company's fuel costs and insures that the benefits of lower fuel costs associated with nuclear power will be passed on to the ratepayers, as they should be.

Florida Power Corporation (FPC) opposes the modification of the formula at this time unless other financial factors are taken into consideration. It proposes to place in commercial operation its Crystal River Unit No. 3 prior to March 31, 1977. The addition of this large nuclear unit will increase total net investment by approximately 27.8%, and will result in the cessation of capitalization of AFUDC which totals approximately $1,425,000 per month. Further, it estimates costs of operation and maintenance will average $500,000 per month while fixed charges will approximate $1,265,000 per month. Finally, the return on investment will require revenues in excess of $5,000,000

APPENDIX A

per month. On the other side of the coin, it projects fuel savings of approximately $5.5 million per month based on a capacity factor of 87% which will flow to the customers if step 11 is eliminated. Because of the prospective financial impact on the utility, it proposes three possible steps to be taken, to wit: (1) that no action be taken thereby effectuating a break-even situation between the generation mix adjustment failing to pass on total fuel savings and the additional costs created by placing the nuclear unit in service, (2) establish a new base for a composite fuel cost clause whereby the base would be revised downward from 18.80 mills to approximately 14.44 mills, or (3) that the Commission issue a show cause order as to why FPC should not restructure its rates and to simultaneously modify the clause. In summary, while it does not disagree in concept with the change, it argues it is grossly unfair to modify the clause without taking into account the necessary recovery of the fixed charges associated with the investment in Crystal River No. 3.

Florida Power & Light Company and Gulf Power Company also presented testimony supporting the position of FPC. Essentially, they contend that fuel costs of a nuclear unit should not be included in the clause until such time as the investment of such unit has been included in the base rates through a rate proceeding.

The purpose of the cost recovery clause was first stated in Order No. 2515-A, Docket No. 5098-EU, dated April 24, 1959, and reiterated in Order No. 6357, in this docket, dated November 26, 1974. Very simply, it is intended to compensate for day-to-day fluctuations in the cost of fuel and the fuel components of purchased power which cannot be anticipated in base rates. The clause, as presently designed, does not give proper recognition to any nuclear fuel costs. All witnesses in this proceeding so acknowledged this fact (TR 38, 56, 127, 157, 182). As such, it cannot meet the objectives of the clause as were intended when we examined and approved the existing formula in the recent general investigation of fuel adjustment clauses. The elimination of step 11 will insure that all of the benefits of nuclear generation will be passed on to the ratepayers. While undoubtedly the proposed action will have a financial impact on FPC, we cannot permit the nuclear fuel costs to be ignored when calculating the monthly adjustment. The alternatives suggested by FPC are not satisfactory methods of dealing with the contingent problem. For example, alternative one would retain the status quo and thwart the intent of the cost recovery clause. The second alternative would result in the clause being utilized to recover capital costs which violates the basic purpose of the clause. The last alternative merely delays modification of the clause and will prevent any fuel savings being passed on to the ratepayers until a rate proceeding is concluded. FPC has the option of seeking a rate adjustment at any time should it deem the same necessary. However, the fact that our modification of the clause may precipitate this action should in no way deter us from modifying the clause to see that its objectives are met. We find this modification to be proper and reasonable, and one which is necessary in order that all fuel costs be recognized in the cost recovery clause. It is, therefore,

ORDERED by the Florida Public Service Commission that the cost recovery clause as adopted by Order No. 6357, dated November 26, 1974, is hereby modified to the extent that step 11, generation mix adjustment, is eliminated. It is further

ORDERED that all investor-owned electric utilities generating with nuclear power shall hereinafter compute their monthly adjustment in a manner consistent with this Order.

By Order of Chairman PAULA F. HAWKINS, Commissioner WILLIAM T. MAYO and Commissioner WILLIAM H. BEVIS, as and constituting the Florida Public Service Commission, this 14th day of February, 1977.

William B. DeMilly

(S E A L)

William B. DeMilly
COMMISSION CLERK

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, 1977

TUESDAY, MARCH 29, 1977

FLORIDA POWER CORPORATION, :

Petitioner, :

v. : CASE NO. 51,239

PAULA F. HAWKINS, ET AL., :

Respondents. :

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BY THE COURT.

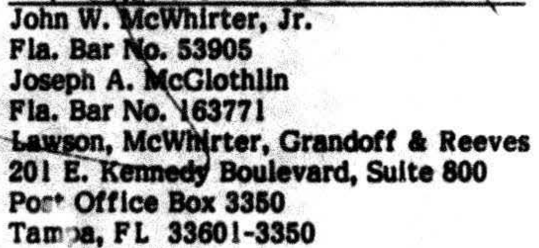
We have before us a motion of Florida Power Corporation to stay Public Service Commission Orders No. 7644 and 7644-A pending a final determination of Florida Power's petition for a writ of certiorari. We have jurisdiction to grant a stay pursuant to Section 120.68(3), Florida Statutes (Supp. 1976).

Florida Power Corporation contends that a stay is necessary because the Commission's Orders fail to consider all of the financial effects to the company which will flow from the Orders. The Commission contends that the company could have sought adjustments from the Commission in a formal rate proceeding but has failed to do so.

APPENDIX B

The customers of Florida Power & Light must look to the FPSC as their only source of relief and respectfully request that it right the wrongs which have been committed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by U.S. Mail to the following individuals on this 4th day of October, 1989:

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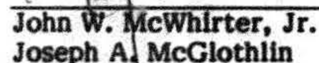

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