BEFORE THE FLORIDA
PUBLIC SERVICE COMMISSION

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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
	)	Filed: December 20, 1989

**FLORIDA POWER & LIGHT COMPANY'S
MOTION FOR RECONSIDERATION
AND STAY OF ORDER NO. 22268**

Pursuant to Florida Administrative Code Rule 25-22.060, Florida Power & Light Company ("FPL") moves for reconsideration of Order No. 22268 issued on December 5, 1989 in Docket No. 890148-EI. FPL specifically requests that the Commission reconsider the portion of Order No. 22268 that requires FPL to refund the revenues equivalent to the difference of using a 13.6% return on equity rather than the 15.6% return on equity originally authorized and employed in the development of oil backout cost recovery factors for the three recovery periods running from April 1, 1988 through September 30, 1989. FPL further requests that the Commission stay certain requirements of Order No. 22268 designed to implement the refund, pending resolution of FPL's Motion for Reconsideration of Order No. 22268. In support of FPL's

request for reconsideration and stay of Order No. 22268, FPL states:

INTRODUCTION

1. In Order No. 22268 (attached as Attachment A) the Florida Public Service Commission ("Commission") appropriately denied a petition filed by the Florida Industrial Power Users Group ("FIPUG") seeking to discontinue FPL's Oil Backout Cost Recovery Factor. FPL seeks no reconsideration of that determination.

2. However, in Order No. 22268 the Commission, even though it was not within the relief sought by FIPUG's petition and it was not raised as an issue in the prehearing order, found that FPL should use a 13.6% rate of return on equity to calculate oil backout revenue requirements from April 1, 1988 through September 30, 1989 and that "excess revenues" collected from factors using 15.6% for that period should be refunded to customers, with interest. Order No. 22268 at 6, 7, 12. FPL estimates that the refund ordered would be roughly $3.5 million.

3. Order No. 22268 further required FPL (1) to recalculate its oil backcout revenue requirements and oil backout cost recovery factors for April 1988 through September 1989 using a 13.6% return on equity and (2) to submit testimony supporting these recalculations for the February 1990 hearing

in Docket No. 890001-EI. The Commission further ordered that the refund amount was to be determined at the February 1990 hearing regarding the computation of the April through September 1990 Oil Backout Cost Recovery Factor.

4. By means of this motion FPL seeks reconsideration of the Commission's retroactive redetermination of the equity return on FPL's oil backout project and the Commission's refund of a portion of the equity return already authorized and earned on FPL's oil backout project. FPL also seeks a stay of the portions of Order No. 22268 designed to implement the partial refund of FPL's oil backout project equity return previously allowed by the Commission for the period April 1988 through September 1989. Specifically, FPL seeks to stay the refund and the requirements restated in paragraph 3 above until the Commission rules on this motion for reconsideration.

LEGAL GROUNDS FOR RECONSIDERATION

5. While the retroactive redetermination of FPL's authorized rate of return on equity for FPL's oil backout project may well be legally infirm on other grounds as well, the ground for FPL's request for reconsideration is that the refund ordered by Order No. 22268 constitutes unlawful retroactive ratemaking. The Supreme Court of Florida had held that this Commission may not engage in retroactive ratemaking.

City of Miami v. Florida Public Service Commission, 208 So. 2d 249 (Fla. 1968); Southern Bell Telephone and Telegraph Co. v. Florida Public Service Commission, 453 So. 2d 780 (Fla. 1984). Ratemaking is to be prospective. Westwood Lake, Inc. v. Dade County, 264 So. 2d 7 (1972); Gulf Power Co. v. Bevis, 289 So. 2d 401 (Fla. 1974); Gulf Power Co. v. Cresse, 410 So. 2d 492 (Fla. 1982); Southern Bell Telephone and Telegraph Co. v. Florida Public Service Commission, 453 So. 2d 780 (Fla. 1984). Indeed, that is the intention of the statutes in Chapter 366, Florida Statutes under which the Commission is given authority to set rates for electric utilities such as FPL. Section 366.06(2), Florida Statutes (...shall thereafter determine just and reasonable rates to be thereafter charged for such service....); Section 366.07, Florida Statutes (the Commission shall determine and by order fix the fair and reasonable rates...to be imposed, observed, furnished or followed in the future.). (Emphasis added.)

6. In retroactively lowering the rate of return on equity earned on FPL's oil backout project from the 15.6% previously authorized to 13.6% and ordering a refund of this rate of return differential, the Commission has clearly engaged in retroactive ratemaking. While the rule governing the Oil Backout Cost Recovery Factor contemplates some retroactive adjustments to factors and the case law prohibiting retroactive ratemaking recognizes one limited exception to the prohibition

for forward-looking adjustment clauses (at least the fuel clause), this after-the-fact adjustment to the rate of return on equity is not a permissible adjustment. Moreover, even if this adjustment were a permissible type of adjustment, the Commission no longer has jurisdiction to true-up at least two of the recovery periods for which the refund has been ordered.

APPLICATION OF THE PROHIBITION OF RETROACTIVE RATEMAKING TO THE OIL BACKOUT CLAUSE

7. The general legal principle that the Commission may not engage in retroactive ratemaking is well established. (See the cases cited in paragraph 5 above.) The issue in the City of Miami case closely parallels what the Commission has attempted to do in this case. There the Commission determined that both Southern Bell and FPL had earned a rate of return in a prior period higher than a fair rate of return. In the City of Miami case the Commission acted appropriately and changed rates prospectively and ordered no refund, despite the finding of a prior overearning. The City of Miami appealed seeking a refund for the period the Commission found the utilities had overearned. The Supreme Court rejected the argument and affirmed the Commission, holding that the refund sought would be retroactive ratemaking and that under the statutes governing the Commission (the same language being applicable today), the Commission could not engage in retroactive ratemaking.

8. Since the City of Miami case the Court has recognized an exception to the prohibition of retroactive ratemaking in the application of the Fuel and Purchased Power Cost Recovery Clause, but that case deserves close reading; it can and should be distinguished from the issue at hand, and it does not support the Commission's retroactive ratemaking in Order No. 22268. In Gulf Power Co. v. Florida Public Service Commission, 487 So. 2d 1036 (Fla. 1986), the Court rejected an argument by Gulf Power that the Commission was precluded by the prohibition of retroactive ratemaking from disallowing fuel costs that the Commission had concluded were imprudently incurred. The Court found that the "authorization to collect fuel costs close to the time they are incurred should not be used to divest the Commission of the jurisdiction and power to review the prudence of these costs." 487 So. 2d at 37. As this Commission properly recognized in another portion of Order No. 22268, the Gulf Power decision, "was predicated on the Commission's ability to review the prudence of the utility's fuel expenditures . . .". Order No. 22268 at 11. In contrast, there is no issue of utility prudence in the Commission redetermining and lowering FPL's authorized oil backout equity return; there is no "scrutiny of project expenses." The Gulf Power exception to the prohibition of retroactive ratemaking is inapplicable and cannot justify the Commission's attempt in Order No. 22268 to engage in retroactive ratemaking.

9. In Order No. 22268, the order for which FPL seeks reconsideration, the Commission properly read and applied the Gulf Power case in rejecting FIPUG's attempt to retroactively challenge the use of the Martin Coal Units in the calculation of actual net savings ultimately used in the computation of FPL's oil backout factors. See Order No. 22268 at 11. The Commission found that since FIPUG had failed to raise in three prior periods the use of the Martin Coal Units in the computation of the Oil Backout Cost Recovery Factor, had failed to object to stipulated factors and had failed to request reconsideration, a refund for those periods would constitute retroactive ratemaking. Id. [1] For the same reasons, the Gulf Power case will not justify the retroactive lowering of FPL's equity return on its oil backout project and a refund. In all three prior recovery periods for which the Commission has ordered a refund, the 15.6% rate of return on equity was used in computing FPL's Oil Backout Cost Recovery Factors; no party raised an issue; no protests to stipulated factors were made; and there were no requests for reconsideration;

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[1] The Commission did find that funds collected after March 1988 were still subject to Commission scrutiny, so the refund of those funds would not be retroactive ratemaking. As will be discussed later, this finding is based on a stipulation reached by FPL and FIPUG regarding FIPUG's challenge of the oil backout project's capacity deferral benefits. The stipulation did not and cannot reach the return on equity issue because that issue had not been raised at the time of the stipulation, and the stipulation was carefully worded to be limited to matters raised by FIPUG at that time.

therefore, a refund for those periods would constitute unlawful retroactive ratemaking, since the stipulation regarding the project's capacity deferral benefits did not address the rate of return on equity to be earned on the project.

10. Another reason the Gulf Power case is distinguishable from the present case is that two different adjustment clauses are involved, and unlike the fuel clause, the oil backout clause really presents no prudence questions. The prudence of constructing the 500 kV line and entering the UPS contracts was determined years ago, and is not subject now to another challenge, as the Commission has held. Thus, the only permissible retroactive adjustments to the oil backout cost recovery factors are the ones contemplated by the oil backout rule:

> A true-up adjustment, with interest, shall be made at the end of each six-month period to reconcile differences between estimated and actual data. (Emphasis added.)

Florida Administrative Code Rule 25-17.016(4)(e). The retroactive lowering of the authorized rate of return on equity for the oil backout project hardly constitutes a reconciliation of estimated and actual data and has not been justified on that ground.

THE STIPULATION BETWEEN FIPUG AND FPL DOES NOT AUTHORIZE A RETROACTIVE REFUND OF FPL'S RATE OF RETURN OF EQUITY

11. Up to this point in the motion, FPL has maintained that any retroactive adjustment to its earned rate of return on equity on its oil backout project is unlawful retroactive ratemaking because it is not the type of adjustment contemplated by the oil backout rule and it does not fall into any exception to the prohibition of retroactive ratemaking. However, assuming arguendo that the Commission may make a retroactive adjustment to the equity return, such an adjustment is necessarily limited to the true-up periods for which the Oil Backout Cost Recovery Factors are regularly adjusted, absent the consent of the utility to go back further.[2] This principle is already recognized in Order No. 22268; the

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[2] Another factor that might allow the Commission to go back beyond a true-up period may be extraordinary circumstances such as fraud, of which the utility is aware. See Richter v. Florida Power Corp., 366 So. 2d 798 (Fla. 2d D.C.A. 1979). However, the Richter case is of questionable validity and is hard to extend beyond its particular facts. Moreover, it involves managerial misconduct in a clause where prudence questions recur. Here, there are no extraordinary circumstances, no fraud, no managerial misconduct and no clause where prudence is at issue. Perhaps FIPUG will argue, as it did at the hearing, that FPL concealed its oil backout return on equity, but such an argument is inaccurate and suggests that the Commission was unaware or poorly informed of what it was approving. Such a suggestion ignores the long-standing Commission policy (policy in which FIPUG initially and for a number of years acquiesced) to use the rate of return on equity in the last rate case as the oil backout rate of return on equity. It also ignores that the Commission regularly audited the oil backout clause, including the earned rate of return on equity.

Commission merely makes the erroneous additional conclusion that FPL has agreed to the refund in question. See Order No. 22268 at 6, 7. In this case there are final true-ups approved for two of the three recovery periods for which the equity refund has been ordered. There are no extraordinary circumstances or the consent of FPL to refund the oil backout equity return. Therefore, for those two periods the Commission is divested of jurisdiction, and the refund is unlawful retroactive ratemaking. In addition, there is no basis on which to conclude a retroactive adjustment to the earned equity return should be made for the other historic recovery period. This is best reviewed by examining each recovery period separately.

The April Through September 1988 Recovery Period

12. The Oil Backout Cost Recovery Factor for the April through September 1988 recovery period was approved in Order No. 19042 issued on March 25, 1988. It is FPL's position that since the Commission approved the factor employing a 15.6% return on equity after a proceeding in which no party protested the equity return, the factor was stipulated and no request for reconsideration was filed, the equity return is not permissibly subject to a retroactive adjustment and an equity return refund

is unlawful retroactive ratemaking. (See Order No. 22268 for a similar conclusion regarding oil backout accelerated depreciation refunds.) However, assuming arguendo that the return on equity may be adjusted as part of the regular true-up, an equity return refund for the April through September 1988 recovery period would still constitute unlawful retroactive ratemaking because the final true-up for that recovery period was approved in Order No. 20966 issued on March 29, 1989 (attached as Attachment B) and FPL has not consented to an oil backout equity return refund for that period.

13. Despite the conclusion reached in Order No. 22268, the stipulation between FIPUG and FPL ("the Stipulation") mentioned in Order No. 20966 did not give the Commission jurisdiction to reach the April through September 1988 recovery period for an equity return refund. In this regard Order No. 22268 seriously misperceived the scope and effect of the Stipulation. (A copy of the Stipulation is attached as Attachment C.) The Stipulation dated February 14, 1989 was very specific in its terms. It requested deferral of 'the "Issues"' from the February 22nd hearing in Docket No. 890001-EI. 'The "Issues"' were specifically defined by reference to the prehearing order. The matters sought to be deferred were 'Issues 15-17 and FIPUG's position on Issues 11-14 (the"Issues")' as stated in a draft prehearing order.

(Emphasis added.) As noted in the final prehearing order, Order No. 20784, the issues were renumbered so that issues 15-17 in the draft prehearing order became issues 16-18 in the final prehearing order and FIPUG's positions on Issues 11-14 became FIPUG's positions on Issues 12-15. See Order No. 20784 at 21 attached as Attachment D. Thus, when the Stipulation refers to the "Issues", it is referring to specific issues raised by FIPUG (issues 16-18 in the prehearing order) and FIPUG's position on general oil backout issues (issues 12-15 in the prehearing order). This was overlooked in the staff recommendation, agenda conference and final order in this case.

14. Thus, when FPL agreed in paragraph 8.c. of the Stipulation:

> that if any adjustment is made to FPL's OBCRF as a result of the proceedings in a later scheduled hearing in Docket 890001-EI and/or Docket No. 890148-EI, as a result of consideration of the "Issues", any amounts ordered to be refunded shall be subject to refund as though the Commission had considered and reached a decision on the "Issues" in the hearing held on February 22nd in Docket No. 890001-EI....(emphasis added).

FPL was specifically referring to refunds as a result of either FIPUG's issues 16-18 in the prehearing order or FIPUG's positions on issues 12-15 in the prehearing order. In neither FIPUG's specific issues (16-18) nor in its positions on general issues (12-15), did FIPUG take the position that FPL's rate of return on equity of 15.6% for its oil backout investment was

too high or that it should be refunded. See Order No. 20784 (Attachment D) at 16-18. Both FIPUG's specific issues and its positions on the general oil backout issues addressed discontinuance of the Oil Backout Cost Recovery Factor and the calculation and potential refund of net savings or accelerated depreciation. Id. FPL's oil backout rate of return on equity was not addressed. Id.

15. Consequently, the Commission's construction of the Stipulation in Order No. 22268, and its determination that the use of a 13.6% rate of return on equity to recalculate oil backout revenue requirements beginning April 1, 1988 was "in keeping with the intent and spirit of this stipulation" are wrong. FPL did not agree to keep all the oil backout revenues for the April through September 1988 recovery period subject to adjustment for issues which were subsequently raised in Docket No. 890001-EI and 890148-EI. FPL agreed to keep its oil backout revenues subject to refund, if the FIPUG issues and positions on issues were deferred, and then only to the extent they could otherwise have been refunded if FIPUG's issues 16-18 or FIPUG's positions on issues 12-15 had been heard and decided adversely to FPL at the February 22nd hearing. [3]

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[3] There is a very real question as to whether the return on equity "issue" the Commission undertakes to address in Order No. 22268 was even raised by a party. It was not part of FIPUG's requested relief, and it was not raised as an issue in the prehearing order. Staff ultimately slipped a return on equity argument into the prehearing order when writing its position on tax savings issue (note it was not in Staff's Prehearing Statement), but even that argument made no mention of a potential refund. At any rate, even this activity was more than five months after the Stipulation. Surely, the Stipulation will not be construed as FPL agreeing to refunds for issues not raised at the time of the Stipulation!

16. Since the rate of return on equity for FPL's oil backout investment was not a FIPUG issue or FIPUG position on an issue preserved by the Stipulation, FPL has not consented to any refund of its oil backout equity return for the April through September 1988 recovery period. Since the Commission recognizes in Order No. 22268 that absent consent through the Stipulation the final true-up for that period has been approved and is not subject to further modification, any refund of FPL's oil backout equity return for the April through September 1988 recovery period would be unlawful retroactive ratemaking. [4]

The October 1988 - March 1989 And April 1989 - September 1989 Recovery Periods

17. Just as the final true-up for the April through September 1988 recovery period has been approved and the Commission has been divested of jurisdiction to modify it absent FPL's consent, the final true-up for the October 1988 through March 1989 recovery period has been approved. See Order No. 22058. FPL maintains that despite language in Order

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[4] It should also be noted that while FIPUG and FPL agreed to the deferral of FIPUG's issues and positions on issues, FIPUG subsequently chose to drop the specific issues it had previously raised and deferred. Tr. of August 3, 1989, Prehearing Conference in Docket No. 890148-EI, at 92-95; August 10, 1989 letter of Joseph A. McGlothlin to Ms. Marsha Rule regarding FIPUG positions on issues in prehearing order. Therefore, FIPUG actually waived its issues and any right to refund by dropping its issues subsequent to the Stipulation.

No. 22058 attempting to retain jurisdiction to adjust the oil backout revenues recovered for the recovery period, the Commission divested itself of jurisdiction to order a refund of FPL's oil backout equity return for the period because FPL's equity return on its oil backout investment and, in particular, a potential refund of previously authorized and earned equity returns were not properly raised or at issue in Docket No. 890148-EI.

18. The pleadings of the parties frame the issues before the Commission, and the Commission accurately summarizes in Order No. 22268 the relief sought by FIPUG in Docket No. 890148-EI. See Order No. 22268 at 2. The only refund sought by FIPUG was of accelerated depreciation revenues. FIPUG Petition at 15. FPL's equity return on its oil backout project is not recovered through accelerated depreciation revenues. The purpose of a prehearing order is to narrow and refine the issues to be addressed at trial, and the prehearing order in this case, Order No. 21755 (attached as Attachment E), contains no issue regarding the proper equity return to be earned on FPL's oil backout project or a potential refund of previously authorized equity returns. Therefore, the "issue" the Commission appears to resolve in Order No. 22268 by ordering a refund of FPL's oil backout equity return was not before the Commission.

19. It is true that after filing a prehearing statement that raised neither of these issues, Staff inserted an argument regarding FPL's equity return in its position on a tax savings issue (See Order No. 21755 at 21), but even that argument did not advance a refund for prior periods. This "issue" of an oil backout equity return refund was simply not before the Commission in Docket No. 890148-EI, and the attempt to resolve this issue by ordering a refund for prior periods is simple retroactive ratemaking that FPL has not even had a real opportunity to address.

20. Thus, in Order No. 22058, when the Commission approved the final true-up for the October 1988 through March 1989 recovery period, "subject to our pending decision in Docket No. 890148-EI," there was no contingent approval of the oil backout return on equity, because the oil backout return on equity was not a proper issue for the decision in Docket No. 890148-EI. While the Commission could condition approval of the final true-up on its decision on FIPUG's petition and the issues properly raised in Docket No. 890148-EI, Staff's rate of return on equity argument was not properly raised, and an equity return refund "issue" or "argument" was never raised in Docket 890148-EI. There is no basis for a refund of the oil backout equity return for the October 1988 - March 1989 recovery period.

21. Similarly, no attempt should be made to refund the earned equity return for the April through September 1989

recovery period. While the final true-up for that period has not yet been approved, as previously noted, any attempt to refund a previously approved, uncontested and earned oil backout return is not an adjustment contemplated by the oil backout rule and would constitute retroactive ratemaking. Moreover, the redetermination of the equity return and a refund of part of the equity return for that period was not properly before the Commission in Docket No. 890148-EI, so that proceeding is not a proper basis for ordering a refund.

SUMMARY OF FPL POSITION

22. Essentially, FPL asks in this motion for reconsideration that the Commission apply to the return on equity "issue" the same legal principles already recognized in other portions of Order No. 22268. In rejecting FIPUG's attempt to have the Commission redetermine the use of the Martin Coal Units in calculating FPL's oil backout factor for prior periods, the Commission noted that such a redetermination and refund would constitute retroactive ratemaking (the Commission may have also been finding that such redeterminations were precluded by the doctrine of administrative finality). Order No. 22268 at 11. The Commission also properly construed Gulf Power Co. v. Florida Public Service Commission, 487 So. 2d 1036 (Fla. 1986) as being

limited to instances where prudence was at issue. Id. The Commission also found that absent the Stipulation (FPL's consent), its jurisdiction to reach back to adjust oil backout revenues was limited to periods without a final true-up. Order No. 22268 at 6.

23. If these legal principles already recognized in Order No. 22268 are applied to the portion of the order mandating an equity refund, and it is recognized that (1) the Stipulation does not address the oil backout equity return and (2) that the "issue" of a refund of the oil backout equity return for prior periods was not raised before the Commission in the hearing of FIPUG's complaint, it is clear that the refund of the oil backout equity return ordered in Order No. 22268 is unlawful retroactive ratemaking.

24. FPL has already acquiesced to a prospective lowering of its oil backout equity return, even though the Commission's determination was probably infirm. [5] Having made that concession, FPL should not be asked to give up something more when such an order is clearly unlawful retroactive ratemaking.

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[5] In Order No. 22058 the Commission prospectively lowered FPL's oil backout equity return from 15.6% to 13.6%. This action was (1) without notice to FPL that the issue would be addressed and, (2) totally unsupported by the record. Nonetheless, FPL chose not to appeal. That decision not to appeal does not reflect a lack of willingness to assert its right to collect the rate of return approved for FPL's oil backout project in prior recovery periods.

WHEREFORE, FPL requests that the Commission reconsider its decision in Order No. 22268 to require FPL to refund a portion of the equity return the Commission previously authorized and FPL earned on FPL's investment in its oil backout project for the period April 1988 through September 1989. FPL further requests that the return on equity refund ordered in Order No. 22268 as well as the requirements imposed in Order No. 22268 to effectuate the return on equity refund be stayed pending the resolution of FPL's request for reconsideration.

Respectfully submitted,

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