BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of the Florida Industrial Power Users Group to Discontinue Florida Power and Light Company's Oil Backout Cost Recovery Factor.	)	DOCKET NO. 890148-EI Filed: December 28, 1989

FIPUG'S RESPONSE TO FPL'S MOTION FOR RECONSIDERATION AND STAY OF ORDER NO. 22268 AND FIPUG'S CROSS-MOTION FOR RECONSIDERATION

I.

RESPONSE

The Florida Industrial Power Users Group ("FIPUG"), through its undersigned attorney, responds to FPL's Motion for Reconsideration and Stay of Order No. 22268 as follows:

1. FPL complains that it was not placed on notice that its use of 15.6% return on equity in the oil backout proceeding would be an issue. Yet, in FIPUG's petition, FIPUG characterized FPL's continued use of the 15.6% return on equity--while segregating the revenues from the commitment to use 13.6% for purposes of the tax savings rule--as an abuse of the oil backout mechanism and an attempt to circumvent regulation. (FPL was sufficiently aware of the issue to respond indignantly.) Contrary to FPL's statement, the propriety of the 15.6% ROE was identified as an issue in the prehearing order issued in Docket No. 890148-EI. (Order No. 21755, Issue 6; See FPL's Appendix, Tab E, p. 15). The particular remedy FIPUG suggested in its Petition--in the event the Commission did not terminate the charge--was to incorporate the oil backout revenues and expenses in the tax savings

calculations, but FIPUG agrees with the Commission that the Commission was not limited to this measure.

2. In its motion FPL alludes to the "policy" of using the last authorized rate of return on equity for purposes of the oil backout clause. Is FPL claiming that the Commission is now "reneging" on a 15.6% return on equity which it earlier knowingly and intentionally approved? The Commission's action in Order No. 22268 speaks most clearly and directly as to whether its "policy" ever was to approve or acquiesce to a 15.6% return on the oil backout investment following acceptance of the 13.6% return on equity offered by FPL for purposes of determining the portion of revenues related to the decrease in federal income tax rates which should be refunded to customers. Moreover, the Commission has properly invoked and relied upon that portion of the oil backout rule which requires "actual costs" to be recovered.

3. In arguing that the Commission has no power to order the refund, FPL misconstrues Gulf Power v. Florida Public Service Commission, 487 So.2d 1036 (Fla. 1986). The jurisdiction of the Commission to reach back and modify prior amounts collected through an adjustment clause exists on two levels. There is that level of ongoing review prescribed procedurally in terms of routine prior period true-ups; and there is the broader ability which the Supreme Court of Florida recognized in the Gulf Power case as a kind of "quid pro quo" for the unique opportunity provided to the utility in the form of a cost recovery clause to recover expenses on a current and ongoing basis. In its order, the Commission chose to parallel the time frames which were the

subject of a stipulation of parties as to the true-up periods affected; FIPUG believes the Commission was not so limited and, if anything, should extend the refund requirement back to 1987, when FPL's offer of 13.6% took effect for tax savings purposes.[1/]

4. FPL fails in its attempt to "distinguish" the Gulf Power case. The rationale used by the court to affirm an adjustment involving a fuel cost recovery clause logically extends also to other mechanisms that similarly provide current recovery on an ongoing basis--especially when that recovery is accomplished (by rule) within and as an aspect of the fuel cost recovery proceeding. Further, while the precise issue in the Gulf Power case was one of managerial imprudence, the analysis supporting the Commission's ability to reach those past amounts would apply with equal force to any factor (mistake, unreasonableness of amount, etc.) bearing on the correctness and propriety of the amount claimed. FPL (and other utilities) would of course prefer to confine and limit the application of the Gulf Power and Richter [2/] cases; this would provide them with all the advantages

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1/ Similarly, FIPUG has sought the refund of all accelerated depreciation revenues (which FPL began to collect in 1987) based on those powers. In the Stipulation to which FPL refers, FIPUG did not waive the right to demand refunds based on longer time frames in accordance with the Commission's broader powers. See paragraph 8(d) of the Stipulation. Nor did FIPUG "drop" those issues (or waive a refund) when they were subsumed in Order No. 21755.

2/ In Richter v. Florida Power Corporation, 366 So.2d 798 (Fla. 2d DCA 1979), the court also alluded with approval to the proposition that, in return for the advantages of expeditious recovery provided by such a clause, the utility must accede to a greater degree of later review. (FPL states that Richter is of "questionable validity," but doesn't say why.)

of extraordinary recovery devices while limiting the Commission's ability to fully review them. In order to carry out its responsibilities and fully protect customers' interests the Commission must not allow it.

5. FPL is also mistaken when it contends that there are no "prudence" issues involved in the oil backout proceeding. Apparently, FPL would have the Commission view the process as a mere reconciliation of estimated costs with actual costs, whatever the actual costs may be. Does this mean that if (following qualification) FPL chose to replace existing conductor with 14K gold wire, the Commission would be uninterested in the cost and--worse--powerless to prevent the customers from paying for it? Obviously, qualification of a project does not constitute a blanket approval of the prudence of any and all associated costs which may be incurred later.

To grant FPL's motion, the Commission would have to first accede to a sharp curtailment of its jurisdiction and power to undertake needed initiatives and reach for purposes of review the results of ongoing cost recovery clauses; and then accept a utility-crafted standard of review which would further place the expenses beyond reach. FPL's arguments for limiting the Commission are ill-founded; the motion should be denied.

II.

FIPUG'S CROSS-MOTION FOR RECONSIDERATION OF ORDER NO. 22268

Pursuant to Rule 25-22.060(1)(b), Florida Administrative Code, FIPUG requests the Commission to reconsider two aspects of

Order No. 22268: (1) The decision to make no adjustment to the amounts collected as accelerated depreciation; and (2) The decision to continue the collection of enormous capacity charges paid to Southern Company through the oil backout clause.

(1) Order No. 22268 recites that FPL's cost estimates for the Martin units were based on 1979 Bechtel estimates. The order overlooks that the Commission, in rejecting FPL's request to lock in the Martin costs close to the time of the approval of the project, viewed the parameters as preliminary and subject to change. It expressly stated (in Order No. 11210) that it would not formulate its final approval of quantified deferral benefits until it had knowledge of developments over time. It was then incumbent upon FPL to analyze the impact on those assumptions of intervening developments (such as those described by Jeffry Pollock). FPL did not do so. By ignoring that decision and simply adhering to the 1982 parameters, FPL disregarded this order and failed to carry the burden of proof the Commission had placed on FPL. By stating, "There is no evidence in the record upon which to base any adjustment to the (FPL's) estimates," the Commission improperly transferred that burden away from the petitioning utility. Moreover, it ignored evidence on such material parameters as the lower-than-expected (in 1982) cost of flue gas desulfurization systems.

The same is true of the related issue of the in-service date. FPL acknowledged that the assumption of a 1987 in-service date was simply carried forward from the time of project approval; FPL has never performed an analysis which verified the

continued validity of that assumption over the time frames when decisions to defer would have been made. The dismissal of Mr. Pollock's evidence to the contrary as "speculative" again misplaces the burden of proof--to the severe prejudice of FPL's customers.

Capacity Charges

In denying FIPUG's contention that the $300+ million paid to Southern Company in capacity charges should be recovered through base rates, the Commission relies on Rule 25-17.016(4)(d), which states:

> Once approved by the Commission, the costs of a qualified oil-backout project shall continue to be recovered through the Oil-Backout Cost Recovery Factor [OBCRF] until such time as they are included in the base rates of the utility. . . .

The order then observes: ". . . FPL must continue to recover the Southern system UPS charges through the OBCRF until such time as they are included in base rates, which would normally be at the time of the utility's next rate case. Implicit in this statement is the fact that the roll-in can be accomplished now. Order No. 22268 recognizes that the inclusion of the capacity charges in base rates would not necessarily have to await a rate case.

More importantly, however, Order No. 22268 erroneously assumes that the capacity charges fall within the definition of "costs of a qualified oil backout project" recoverable through

the OBCRF mechanism under the rule. They do not. Recoverable costs are explicitly delineated by Rule 25-17.016(4)(a), which states:

> . . . The revenues to be collected through the Oil-Backout Cost Recovery Factor for a qualified oil-backout project shall be the sum of the straight line depreciation expense over the "used and useful" life of the qualified oil-backout project, plus the cost of capital for the qualified oil-backout project, plus the actual tax expense of the qualified oil-backout project, plus the oil/non-oil operating and maintenance expense differential of the qualified oil-backout project which would normally be included in base rates plus two-thirds of the actual net savings associated with the project (if positive) to be applied as additional depreciation.

Plainly, the capacity charges paid by FPL to Southern Company to reserve capacity in Southern system generating units fall into none of these categories. The feeble and half-hearted attempt by FPL's witness to wedge them in was rebuffed by the Commission on the spot. (Tr. 452-53).

In all other instances in this case, both FPL and the Commission have based their positions on what they deem to be the strict requirements of the oil backout rule. To FIPUG's allegations of changed circumstances, the Commission has said that the oil backout rule does not allow the Commission to terminate recovery once a project has been qualified--regardless of circumstances.[3/] In resisting the Commission's determination

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3/ In FIPUG's view, the Commission failed to interpret the rule in light of overriding legal considerations imposed by statute and case law. These considerations were developed in FIPUG's brief, but FIPUG does not here seek reconsideration of that aspect of the Commission's decision.

that the equity return should be adjusted, FPL argues that the oil backout rule does not contemplate such an adjustment. Yet on the most fundamental question of interpretation--the definition of recoverable costs--the Commission and the utility have thus far ignored or denied the straightforward application of the rule on a point on which credible disagreement is impossible. FIPUG does not here seek the refund of capacity charges already collected. FIPUG does call on the Commission to now give effect to the rule by requiring FPL to roll the capacity charges into base rates on a basis that fairly reflects the capacity-related function of the charges. To fail to do so would severely prejudice high load factor customers, <u>especially</u> if the Commission affirms the now accomplished recovery of the costs of the transmission line over essentially a period of seven years.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of FIPUG's Response to FPL's Motion for Reconsideration and Stay of Order No. 22268 and FIPUG's Cross-Motion for Reconsideration has been furnished by U.S. Mail to the following parties of record, this 28th day of December, 1989.

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