BEFORE THE

FLORIDA PUBLIC SERVICE COMMISSION

In The Matter of	:	DOCKET NO. 890148-EI
In Re: Petition of the Florida Industrial Power Users Group to Discontinue Florida Power and Light Company's Oil Backout Cost Recovery Factor	:	MOTIONS HEARING

FPSC Hearing Room 106
101 E. Gaines Street
Tallahassee, Florida 32399

Monday, March 5, 1990

Met pursuant to notice at 9:30 a.m.

BEFORE: COMMISSIONER MICHAEL WILSON, Chairman
COMMISSIONER THOMAS M. BEARD
COMMISSIONER BETTY EASLEY
COMMISSIONER GERALD L. GUNTER
COMMISSIONER JOHN T. HERNDON

APPEARANCES:

CHARLES GUYTON of the firm of Steel, Hector & Davis, 215 South Monroe Street, Suite 601, Tallahassee, Florida 32301-1804, Telephone No. (904) 222-2300, appearing on behalf of Florida Power & Light.

JOSEPH McGLOTHLIN of the firm Lawson, McWhirter, Grandoff & Reeves, 522 Park Avenue, Tallahassee, Florida, Telephone No. (904) 222-2525, on behalf of the Florida Industrial Power Users Group.

APPEARANCES CONTINUED:

ROGER HOWE, Assistant Public Counsel, Florida House of Representatives, The Capitol, Tallahassee, Florida 32399-0861, Telephone No. (904) 487-9330, appearing on behalf of the Citizens of the state of Florida.

MARSHA RULE, Legal Staff, Florida Public Service Commission, 101 E. Gaines Street, Tallahassee, Florida 32399, Telephone No. (904) 487-2740, appearing on behalf of the Staff.

PRENTICE P. PRUITT, General Counsel's Office, Florida Public Service Commission, 101 E. Gaines Street, Tallahassee, Florida 32399, Telephone No. (904) 488-7464, Counselor to the Commissioners.

REPORTED BY: JOY KELLY, CSR, RPR
Official Commission Reporter

I N D E X

P R O C E E D I N G S

(Hearing convened at 9:40 a.m.)

CHAIRMAN WILSON: Read the notice.

MS. RULE: This is Docket 890148-EI, petition of the Florida Industrial Power Users Group to discontinue Florida Power and Light Company's oil-backout cost recovery factor. The purpose is to allow the Commission an opportunity to hear oral arguments on the motions filed by various parties to the proceeding.

Commissioners, there are two motions before you today. FP&L has filed a Motion for Reconsideration and Stay of Order No. 22268. FIPUG has filed a Cross-motion for Reconsideration. FIPUG and Public Counsel filed responses to FP&L's motion and FP&L and Public Counsel filed responses to FIPUG's cross-motion.

If you would like to make a bench decision today, we can make an oral recommendation to you. If you would prefer that we write a recommendation and place it on the agenda, we can do that, too. To my knowledge there has been no time limit placed on the parties. It might be appropriate now to ask them how much time they will need.

MR. GUYTON: Commissioners, I think my opening remarks -- I timed them this morning -- are probably going to run 15 minutes. We filed a lengthy document that I'm going to ask you to go to specific pages in and it's going to take a little time to present it.

PROCEEDINGS

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CHAIRMAN WILSON: Mr. McGlothlin.

MR. McGLOTHLIN: I think that 15 minutes would be more than adequate for me.

MR. HOWE: Also for me.

CHAIRMAN WILSON: That was definitely the right answer.

MR. GUYTON: I would hope to have some minimal time to rebut as well.

CHAIRMAN WILSON: Yes.

All right. Mr. Guyton.

MR. GUYTON: May it please the Commission, my name is Charles Guyton and I represent Florida Power and Light in this matter.

FP&L is here today to seek reconsideration of Order No. 22268 in Docket No. 890148-EI. This docket is a proceeding by the Florida Industrial Power Users Group to discontinue FPL's oil-backout cost recovery factor.

In Order 22268 the Commission ordered the retroactive reduction of FP&L's earned return on its oil-backout cost recovery project for three prior recovery periods. You ordered FP&L to refund some $3.3 million due to this retroactive reduction in FPL's earned return on its oil-backout project. And it's this particular aspect of Order 22268 for which FP&L seeks reconsideration.

FPL's grounds for reconsideration are straightforward. First, a refund of FPL's previously authorized and earned ROE,

return on equity on its oil-backout project was totally outside the scope of this proceeding. And second, this retroactive adjustment to FPL's oil-backout return on equity is unlawful retroactive ratemaking.

Commissioners, the potential refund of FPL's earned return on equity was never raised as an issue in this proceeding. In a petition filed by FIPUG which should constitute the outside boundaries of the scope of the proceeding, FIPUG did not request a refund of FPL's oil-backout return on equity. FIPUG did seek a refund. Its request was very specific, and I will quote from the Prayer for Relief in FIPUG's petition. They ask the Commission to "direct FP&L to refund to customers all accelerated depreciation revenues associated with the inclusion of the alleged Martin deferral benefits in the calculation of net savings." There was no mention by FIPUG of a refund of oil-backout return on equity.

In the Prehearing Order, which is supposed to narrow and refine the issues, there was no issue raised by any party addressing or suggesting a potential refund of FPL's oil-backout return on equity. FIPUG did raise an issue regarding oil-backout return on equity and whether the 15.6 that FP&L was currently charging was appropriate. But neither that issue nor any position taken by a party specifically addressed or raised the question of whether or not there would be a refund of the oil-backout return on equity for prior recovery periods. Because

of the import of this issue in this particular case, in our Motion for Reconsideration, I would like to read that issue in its entirety as well as the other party's positions. Issue 6 is as follows: "Is FP&L justified in charging a 15.6 return on the equity portion of its capital invested in the 500 kV transmission lines?" "FIPUG: No, Rule 17.016(4)(e) requires the utility to use its actual cost of capital for the recovery period. Use of 15.6 is unjustified. Staff: Rule 25-17.016(4)(e) requires the utility to use its actual cost of capital to the recovery period. In Staff's opinion use of a 15.6 return of equity overstates the cost of capital is and, therefore, inappropriate at this time. In the absence of testimony Staff believes that the reduced equity return of 13.6 used for the utility in the tax savings docket is appropriate and more closely approximates the utility's actual cost of capital. OPC: Public Counsel adopts and supports FIPUG's position on this issue."

As you just heard, there was no mention in FIPUG's issue. FIPUG's position or any other party's position, but there should be a refund of FPL's oil-backout return on equity. Staff even went so far as to say that 15.6 was inappropriate at that time.

Commissioners, this issue is pretty straightforward. A potential refund of FPL's oil-backout return on equity for prior recovery periods was never put at issue in this proceeding. The refund for prior recovery periods was well beyond the relief

sought about by FIPUG. FIPUG had no general prayer for relief such as asking you to grant such other relief as may be appropriate when it filed its petition. The Commission even recognized in Order 22268 that that particular issue was beyond the scope of the proceeding. After restating the relief sought by FIPUG, the order specifically notes at Page 2, "decline to grant the remaining relief requested by FIPUG." That was it. That resolved that petition. FP&L was prejudiced by the Commission's resolving an issue that was not put at issue, and FP&L did not have a proper opportunity to address, therefore, we'd ask that you reconsider this aspect of your decision.

FPL's other ground for reconsideration is that this retroactive reduction of FPL's oil-backout return on equity is unlawful retroactive ratemaking.

Commissioners, I know you're familiar with the case law in this area so I'll try to be brief. Two of the primary statutes under which this Commission sets rates for electric and gas utilities, Section 366.062 and 366.07 Florida Statutes, have been construed by the Supreme Court of Florida as prohibiting the Commission from engaging in retroactive ratemaking. In the City of Miami versus Florida Public Service Commission, 208 So.2d 249, the Supreme Court found that the Commission could not order a refund for prior periods even though the Commission had found that two different utility companies had overearned in those prior periods. Such a refund, the Court concluded, would be

retroactive ratemaking conduct which was precluded by statute.

Since the City of Miami case there have been two Florida appellate decisions which have carved out narrow exceptions to this general prohibition against retroactive ratemaking. Richter versus Florida Power Corporation, 366 So.2d 798, the Second District Court of Appeals, found that in extraordinary circumstances, such as fraud, the Commission can order a refund of previously approved fuel clause revenues.

Commissioners, there is no, and there has been no allegation of fraud in this case. The Commission has known since the beginning of the oil-backout cost recovery factor in 1982 that the factor included a cost of equity as was approved in FPL's most recent rate case. That principle has been recognized in 14 separate recovery orders up until October of last year. There is no fraud in this case, so the Richter case is inapplicable.

The other exception to the prohibition against retroactive ratemaking is found in Gulf Power Company vs Florida Public Service Commission, 487 So.2d 1036. There the Court found a refund of fuel clause revenues was not retroactive ratemaking. However, the Court's decision was clearly tied to the fact that the issue giving rise to the refund was imprudence. The Court stated, and I quote, "This 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." In this case the equity issue is not an issue of prudence. There is no question of managerial misconduct here, so the Gulf Power case is also inapplicable.

At Page 11 of your order, Order 22268, you have already acknowledged the limited scope of the Gulf Power case and you have found that a refund of oil-backout revenues would constitute unlawful retroactive ratemaking. Now, while that finding was made in conjunction or consideration of the issue of whether the accelerated depreciation revenue should be refunded, the same legal principles govern regardless of the nature of the issue. And the same legal principles governed the attempted refund of the equity return. The law is that absent consent by a utility the oil backout revenues potentially subject to retroactive adjustment -- I'm sorry, absent consent by an utility, the only oil-backout revenues that are potentially subject to refund, or retroactive adjustment, are revenues for recovery periods that are not yet trued up.

That brings me to my final point, Commissioners. In ordering a refund of FPL's oil-backout equity return for three prior recovery periods, the Commission Order relied heavily on what is a very serious misreading and misapplication of a stipulation between FIPUG and FP&L approved in February of 1989. That stipulation cannot reasonably be construed as FPL's consent to a refund of its earned return on equity.

In the middle of Page 6 of Order 22268 where the

Commission determines that a partial refund of FPL's oil-backout equity return should be made, and finds that the refund should be from April 1, '88 through September '89, you find that the time frame reflects a stipulation, a part of which you then quote. And then in the next paragraph you make the following finding: "In keeping with the intent and the spirit of this stipulation, we find that a 13.6 return on equity should be used to calculate oil-backout revenue requirements beginning a April 1, 1988." Commissioners, this is simply not a reasonable interpretation of the February 9, 1989, stipulation, nor a complete quote of the all the relevant passages in that stipulation. When the other relevant passage is read, it is clear that FP&L has never consented to a refund of its oil-backout equity revenues. Attachment C to our motion, and we have lengthy attachments to our motion and I'd refer you to those, contains a complete copy of the stipulation entered between FP&L and FIPUG. There are three pages of a joint motion and then following that is a stipulation.

On Page 3 of the stipulation, at the top of the page, is the paragraph that's quoted in Order 22268. Please note that in two places in that quoted paragraph there is a reference to the "issues". The word "issues" is capitalized and placed in quotes because it is a defined term, defined on Page 1 of the stipulation in the first paragraph. And if you turn back to the introductory paragraph of the stipulation you'll see that to

properly construe the potential refund agreed to on Page 3, one must review what's referred to as the issues here, and the issues are referred to as, "Issues 15 through 17, and FIPUG's position on Issues 1 through 14." And that refers to a draft Prehearing Order.

So to properly construe the stipulation and the paragraph in the back, one must look at these issues and FIPUG's position on them. And we can do that by turning to Attachment D. Attachment D is the final Prehearing Order in the February 1989 oil-backout hearing, and if you would turn, please, to Page 21 of that Order. There at the bottom of the page, the last paragraph, it's noted that FIPUG raised Issues 16 through 18, previously numbered as Issues 15 through 17, regarding FP&L. So you'll note that the referenced Issues 15 through 17 in the stipulation are actually at Issue 16 through 18 in this Order, and I would note to you that Issues 11 through 14 referred to in the stipulation were renumbered as Issues 12 through 15 in this Prehearing Order as well. So with that in mind, if you would turn back to Page 16 where we begin the discussion of the oil-backout issues, I think we can put it in context.

If you will review FIPUG's position on Issues 12 through 15 you will note -- and that's the only thing that FP&L consented to -- you will note that there is no reference to FPL's oil-backout return on equity, much less a reference to a refund of the oil-backout return on equity for prior recovery periods.

If you look at Issues 16 through 18, FIPUG's oil-backout issues, you'll see they didn't raise a return on equity issue in the 1989 prehearing statement. So the stipulation does not reach back and give this Commission authority to order a refund as to FPL's oil-backout return on equity.

Commissioners, FIPUG never raised an oil-backout equity issue in the February 1989 proceeding. It was not until July 1989, five months after that stipulation was entered and approved by the Commission, when FIPUG first raised any issue at all in regard to an oil-backout return on equity. And I quoted that issue to you earlier, Issue 6; it makes no mention of a refund of the equity return for prior periods.

Commissioners, the construction of the stipulation in Order 22268 is simply wrong. It was never FPL's intent to agree to, and FP&L did not agree to, a potential refund of an oil-backout equity return for prior recovery periods. It certainly didn't do that in February 1989 because FIPUG didn't raise that issue for another five months. The stipulation was very carefully drafted. It was limited to refunds resulting from specific issues previously raised, raised prior to that time and it could not reasonably be construed to reach the issues raised five months later.

Commissioners, the law supports FP&L on this point. Any attempt to refund oil-backout return on equity revenues is retroactive ratemaking. FP&L has not consented to such a refund,

and absent such consent, a retroactive reduction to FPL's oil-backout return on equity is unlawful.

Commissioners, I reserve the remainder of my time for rebuttal.

COMMISSIONER GUNTER: I've only got one question, Mr. Guyton. Listening as carefully as I can to your oral argument, is it your position that the Commission is prohibited from taking up any issue in the proceeding of an adversarial 120.57 proceeding? Are we bound with only those issues that are in the Prehearing Order? Is that your position?

MR. GUYTON: Commissioner, I think you're bound to the issues properly raised by the pleadings in the Prehearing Order and anything else that you may give the parties notice of. And I would simply submit being bound by the pleadings in the Prehearing Order, that issue has not been raised.

COMMISSIONER GUNTER: Well, you're raising that in the Prehearing Order -- there was not an issue in the Prehearing Order on equity return. Now, it would be your position -- and I'm trying to be very clear about it --

MR. GUYTON: Yes, sir.

COMMISSIONER GUNTER: It would be your position that the Commission is bound in the conduct of any evidentiary proceeding to only those issues that are in the Prehearing Order. That's a "yes" or "no".

MR. GUYTON: Yes, sir, I think the argument we're

making is clearly that.

COMMISSIONER GUNTER: Okay.

MR. GUYTON: And it's a question of basic fairness as to what the issues are that the Commission has been asked to resolve by the petitioner in this case, and that FP&L is apprised what it may very well have at issue in the proceeding, and FP&L here in this instance was surprised by this particular --

COMMISSIONER GUNTER: I just asked you a "yes" or a "no".

CHAIRMAN WILSON: I think you've got to -- and correct me if I'm wrong, I have been listening to what you're saying, I've read your brief -- you're concerned with those issues that were deferred from the fuel adjustment, and the limitation on the Commission from considering certain issues has to do with the periods over which the Commission can exercise jurisdiction of revenues and order the refund.

MR. GUYTON: Yes.

CHAIRMAN WILSON: Certainly on a prospective basis the Commission can raise issues in a hearing. I mean issues arise during a hearing as a matter of questioning on cross examination that are not contained in the Prehearing Order. So the idea that the Commission is prohibited from considering issues that are not in the Prehearing Order is not, I don't think strictly speaking, what your position is. It's only to the extent that those issues were defined at that prior fuel adjustment proceeding and those

issues were deferred and the Company agreed to the deferral and money -- the Commission continued to excercise jurisdiction over certain monies in the oil backout that related to the issues that were raised by the parties at that time. Is that a correct interpretation of what your position is?

MR. GUYTON: Mr. Chairman, I believe so. If you allow me --

CHAIRMAN WILSON: It may not have been very clear.

MR. GUYTON: Allow me to restate it because it was lengthy. Commissioner Gunter, this goes back to the question you raised.

Obviously issues arise at hearing, and if the parties go ahead and try those issues that arise at hearing, and they are outside the scope of the Prehearing Order, and they are outside the scope of the pleadings, then they are properly at issue. That has not arisen in this case.

FP&L was surprised with this effort. It didn't see a suggestion of an equity refund until the Staff recommendation. So I want to make sure you understand, we feel like we have been denied an opportunity to address the issue as a matter of procedure and we think it's a basic question of fairness.

Now, as to your specific concern, Commissioner Wilson, the question arises here because we have a true-up factor that does look back to prior recovery periods, what's the extent to which the Commission can go back and true that up? We would

submit for the equity question that there is not an appropriate true-up. The Commission considered it, it was originally stipulated to, it was a matter never put at issue and there was never a question of prudence associated with this equity issue. But even if one were to go to the argument and say well, nonetheless, the Commission has the power to true-up, certainly that true-up power goes back only to the recovery periods for which there is not yet a final true-up.

CHAIRMAN WILSON: And what was that period?

MR. GUYTON: At the time that this order was issued, both the April through September 1988 recovery period was final, as was the October 1988 through March 1989 recovery period. They were both subject to final orders approving a final true-up for those --

CHAIRMAN WILSON: So the retroactivity of the Commission's order would only be effective from April 1989 forward?

COMMISSIONER GUNTER: No, '88.

CHAIRMAN WILSON: You're saying that the April-September '88 was final.

MR. GUYTON: At the time this order was issued, yes, Commissioner.

CHAIRMAN WILSON: The October to March '89 was final.

MR. GUYTON: October '88 to March '89 was final at the time this order was issued.

CHAIRMAN WILSON: So is it your position that the only revenues over which we have continuing jurisdiction would be those from April of '89 forward?

MR. GUYTON: Those are the only revenues.

CHAIRMAN WILSON: If we have any jurisdiction --

MR. GUYTON: If you have any jurisdiction as to this question at all, those would be the only revenues that would be subject to refund in a oil-backout proceedings. You will note that this is a separate proceeding. There is not your 890001. It was consolidated with 890001 only for purposes of hearing.

COMMISSIONER BEARD: Was the October '88 to March '89 true-up period over, was it trued up at the time the decision was rendered in this case as opposed to the order being issued?

MR. GUYTON: I believe the answer to that is yes, but if you'll give me a minute I'll look up that order and -- (Pause)

Commissioner, I can't look it up. I would refer to originally Page 14 of our motion where we note that in Order 22058 the March '89 recovery period -- the October '88 through March 1989 recovery period, the final true-up had also been approved in Order No. 22058.

In that order, and I think it's important to point it out, is that there was an attempt by the Commission to retain jurisdiction to adjust oil-backout revenues recovered for that period subject to the decision in this docket, 890148. We would submit that an attempt to retain jurisdiction there, once you've

approved a final true-up order, is beyond your powers. Once the final true-up is approved, it's approved.

CHAIRMAN WILSON: Your position is that there are only two ways that the Commission can continue -- I guess there are three ways that the Commission could continue to exercise authority over those revenues. One is if the proceeding that we had and the issues we were considering fall under some exception to retroactive ratemaking prohibition.

MR. GUYTON: Yes. Those are very narrow and one of questionable validity.

CHAIRMAN WILSON: The second would be as if in fact we were still exercising jurisdiction over that recovery period that we had not issued a final order.

MR. GUYTON: That's true. And I'm not entirely sure that that's necessarily true as to the equity return but more on question of prudence that you would normally consider in a true-up proceeding.

CHAIRMAN WILSON: And the third ground would be if the stipulation -- by agreeing to the stipulation that the company, in fact, allowed the Commission to exercise jurisdiction over those revenues and time periods.

MR. GUYTON: Yes, Commissioner, and that's clearly not what FP&L agreed to as we previously discussed.

CHAIRMAN WILSON: All right.

COMMISSIONER GUNTER: Let me just ask one thing: The

line has been fully amortized now; is that right?

MR. GUYTON: Yes, sir. Except for the nondepreciable portion of it, yes, sir.

COMMISSIONER GUNTER: Except for the nondepreciable portion, which is the land.

MR. GUYTON: Yes, sir.

COMMISSIONER GUNTER: Is that right? So is the appropriate treatment prospectively that the land goes in the rate base and that you just go on and there is no oil-backout recovery, your O&M is the normal fashion and it goes on from there?

MR. GUYTON: That may very well be the appropriate treatment in FPL's next rate case, Commissioner Gunter. I think until the next rate case the treatment envisioned by your rule as you found in this order was that it should be recovered from the oil-backout cost recovery factor.

COMMISSIONER GUNTER: I'm trying to understand the justification for that. I don't understand the justification for that.

MR. GUYTON: The justification is that FPL's base rates do not reflect a recovery of any of this investment or cost. It was excluded from the consideration of the Commission's determination of our base rates. And that the rule itself provides that until all those costs associated with the project are recovered, they are to be recovered through the oil-backout

cost recovery factor.

COMMISSIONER GUNTER: I'm going to go read the order, but it's my recollection -- I can be terribly wrong because that's been a long while ago -- and I thought the sole justification in the order was to -- the reason, and the cost sharing and the logic in the cost sharing, in that order, was to allow you to recover and be able to amortize over that time period those depreciable assets. That will be the subject of another -- I'm not on that panel. I'll just ask those folks to read the --

CHAIRMAN WILSON: I believe you'll see it later this year.

COMMISSIONER GUNTER: Probably.

CHAIRMAN WILSON: Any other questions? Mr. McGlothlin.

MR. McGLOTHLIN: Joe McGlothlin for the Florida Industrial Power Users Group.

The nature of the adjustment is this: The Commission, in the course of the hearing in Docket 890148, determined that Florida Power and Light Company had proceeded to calculate revenue requirements on the oil-backout project using a 15.6% return on equity after having volunteered to accept 13.6% for other purposes beginning in 1987, and while the rule requires the utility to incorporate the actual costs of the line.

The Commission ordered a refund of a difference between 13.6 and 15.6%, and required it to be made effective in, I

believe, April 1988. And what we have here is a very narrow grounds for reconsideration. Page 3 of the Motion for Reconsideration, Mr. Guyton says, "The ground for FPL's request for reconsideration is that the refund ordered by Order No. 22268 constitutes unlawful retroactive ratemaking," and that's the entire basis for reconsideration offered by the Company.

The dialogue so far has already pointed out the stipulation that was in effect and carried over from the fuel proceeding and the exceptions to the doctrine of retroactive ratemaking recognized in case law.

I'll be very brief with respect to the stipulation. I would point out it is my view that the order recognizes by the use of the language, such as keeping with the intent and the spirit of the stipulation, that the stipulation was something that the Commission did not have to adhere to but chose to. And it's my belief that the Commission had independent grounds for making that adjustment, and that it does not constitute retroactive ratemaking. FP&L tries to describe the exceptions to retroactive ratemaking as extremely limited and very narrow in scope but they read the case law much too closely. The cases that have been discussed are the Gulf Power case that involved the Maxine Mine decision and the Richter case, and I'd like to visit each of those for just a moment.

The Richter case involved a complaint that was brought in Circuit Court by Florida Power Corporation customers who

maintained that the Circuit Court ought to require Florida Power Corp to make extensive refunds to its customers from overcollections of fuel expense. And Florida Power Corporation moved to dismiss that case on the basis that this Commission had exclusive jurisdiction over fuel charges. This Commission filed an amicus brief agreeing with the utility. The Second District Court of Appeal agreed that the Commission had exclusive jurisdiction and upheld a motion to dismiss filed by the corporation. Mr. Guyton says that the case should be very limited because the only grounds involved in that case were fraud.

Well, the particular allegation with respect to Florida Power Corporation was fraud because that was the instance of the "daisy chain" allegation at the time. But the case contemplated more grounds than simply that. For instance, the decision quoted in an ALR article indicating the ability of an administrative agency to revisit its orders in light of substantial changes in circumstances, fraud, surprise, mistake, or inadvertence. And it also cited with approval an Ohio case in which the Court had viewed the necessity of allowing an utility to remain somewhat current on recovery of fluctuating fuel expenses, and it observed there is a requirement of fairness involved. To the extent the Utility is allowed to recover those fluctuating fuel expenses quickly, there is a need for retrospective reconciliation to exclude charges identifiably resulting from unreasonable

computations or inclusions. So it is simply incorrect to describe the Richter case as being very limited, limited to the grounds of fraud.

The other case is the Maxine Mine case. And in that decision the Supreme Court of Florida observed that the fuel adjustment is a continuous proceeding and operates to the utility's benefit by eliminating regulatory lag. And I suggest to you that the quid pro quo associated with offering the utility the ability to collect costs through -- on a current basis through an extraordinary clause such as the fuel adjustment clause and such as the oil-backout cost recovery clause is the corresponding ability of the Commission to revisit those in light of needs which arise later in time.

In the Maxine Mine case this Commission made adjustments to fuel costs that have been collected in 1980, 1981 and 1982, and it's decision was upheld by the Supreme Court of Florida as valid, and did not constitute retroactive ratemaking. FP&L argues that that case also is limited because it involved the prudence issue. But I suggest to you that in order for this Commission to carry out its full jurisdiction, at the same time it allows utilities this extraordinary ability to collect costs on a current basis, it should not view the case as narrowly as FP&L suggests.

CHAIRMAN WILSON: Mr. McGlothlin, there was an ALR article that you cited that was cited in Richter, discusses an

administrative agency's ability to revisit certain issues. That doesn't really necessarily address the retroactivity argument, I don't think.

MR. McGLOTHLIN: I think it addresses it in this way: I think the subject of that ALR was the general concept of reopening past orders, and so to the extent that this Commission would be revisiting a determination made earlier, which was the authority to collect those costs, and reviewing that again in light of additional information in the categories cited there it does relate to the retroactivity argument.

CHAIRMAN WILSON: There is not any question that at the time the utility collected the revenues associated with the oil-backout cost recovery clause that they were -- there is no question they were authorized to do that at the time.

MR. McGLOTHLIN: There were orders approving the amounts that were claimed by the utility. I question whether this Commission recognized the distinction being made by the utility on one hand during the tax saving cases and its decision to go forward with 15.6% in the separate oil-backout clause.

It's my reading of the order that this is something that was not Commission policy and that you disapproved when you learned about it, and that became the basis for the adjustment you made reaching back to April 1988.

CHAIRMAN WILSON: That may very well be so, but what I'm interested in talking about is exactly what legal authority

we have to do that.

Do you agree, or would you agree with Mr. Guyton's position, is that the rule is there will be no retroactive ratemaking but that there are exceptions carved to that rule?

MR. McGLOTHLIN: I would state it differently. I think that the rule about retroactive ratemaking is primarily geared to the type of full revenue requirements rate case determinations that are prospective in effect, such as the one treated in the city of Miami case. I view the recovery through these extraordinary clauses to be outside, almost by definition, of the retroactive ratemaking ability. And built into that permission, which is, in terms of the approach to regulation, again the extraordinary nature of it, the necessary ability of the Commission to do more than simply make prospective determinations when it realizes that some of these decisions that are made in a very limited way in the course of a consideration or a clause don't reflect Commission policy; reflect either imprudence or unreasonable calculations.

CHAIRMAN WILSON: Okay. So what I'm hearing you say I think is that when you look at a recovery mechanism, such as fuel adjustment or oil backout, I suppose conservation cost recovery, that the quid pro quo for a very rapid and current collection of those costs is it expands somewhat the Commission's ability to revisit expenditures previously made or revenues previously collected.

MR. McGLOTHLIN: Yes, sir.

CHAIRMAN WILSON: Review them for prudence or whatever. What's the limit of that review?

MR. McGLOTHLIN: I think you have to take that --

CHAIRMAN WILSON: I think you would agree as a practical matter there has to be some limitations for that review. You get an entirely new Commission that goes back and says, "Well, we disagree with what the prior Commission did in 1981, so we want you to refund all the monies between '81 and '85." That's probably pretty unreasonable.

MR. McGLOTHLIN: I think you have to take that on a case-by-case basis, Commissioner, and I don't want to try to avoid the answer, but I don't think I could define the limits. I think the Maxine Mine case is one example where prudency of management decisions came into play. I think the fraud that was the specific grounds alleged against Florida Power Corporation is another example. But I believe the discussion of the principles in both those cases gives rise to the recognition that those are not the only possible examples. And I believe that in this case the requirement of the rule that actual expenses be recovered, and the recognition by the Commission that FP&L had agreed to the 13.6%, for different purposes, during these same periods, and had continued the 15.6% gives you grounds to invoke the ability to the make some adjustment at this point.

CHAIRMAN WILSON: So the exception that we're dealing

with here, or the expansion of the Commission's authority is that the 15.6 ROE being used in the oil backout was inconsistent with the 13.6% ROE that was being used in other areas.

MR. McGLOTHLIN: Inconsistent with the requirement that actual costs be used as compared to the 13.6% used for other purposes.

CHAIRMAN WILSON: And the argument that Mr. Guyton makes that there were final orders approving the amounts for recovery under oil backout.

MR. McGLOTHLIN: There were orders --

CHAIRMAN WILSON: How do you address that?

MR. McGLOTHLIN: There were orders approving the collection of the costs associated with the Maxine Mine transactions, too, Commissioner, but those orders do not prevent the Commission from revisiting that on proper showing.

CHAIRMAN WILSON: Okay. Any questions?

MR. McGLOTHLIN: I want to spend just a moment on the Cross-motion for Reconsideration, and I'll rely primarily on written argument on the point regarding the collection of past accelerated depreciation, but I would point out that this Commission, in a very early order dealing with the qualified line, denied an attempt by Florida Power and Light Company to lock in the quantification of deferral benefits. They said, "No, we're not going to do that. We would be able to do that job better with the benefit of experience over time." So it was

incumbent on FP&L to factor into its calculation of the in-service date of the avoided unit and the cost parameters of the avoided unit experience gained through that time, and that didn't happen. It simply gave some recognition to rates of inflation applied to the 1982 parameters. And when you consider the amount of money that customers pay, and when you consider the burden that was specifically placed on FP&L, I submit that FP&L did not do enough. And that to warrant the accelerated depreciation of the line when it happened, and when the Commission in its order simply dismisses our witness' evidence, observe the opportunities it had to realize cost services as speculative, we think that puts the burden of proof on the wrong party.

There is one more thing to cover and that is the capacity charges paid to Southern Company.

Time and again throughout all the issues involved in the Commission's review of this oil backout subject, its primary contention and the primary basis for its decisions has been that this or that contention does not fall within the four corners of the rule. Well, Florida Power and Light Company is paying to Southern Company well over $300 million a year in capacity charges associated with these contracts to import coal by wire. Those capacity charges do not fall within the four corners of the rule. The rule designates the expenses to be recovered through the oil-backout cost recovery clause. They are the depreciation

associated with the oil-backout project, which is the transmission line; the cost of capital associated with the project, which is the cost of capital of the transmission line; the actual tax expense of the oil-backout project, which is the transmission line and the O&M differential and any savings that can be associated.

Now, there is no way that these capacity charges paid by contract to Southern Company falls within any of these categories. I submit to you that the decision to allow the company to roll that into the oil-backout cost recovery clause was shear expediency, and if the Commission, especially if the Commission affirms its decision to allow the accelerated recovery, and allow FP&L to write off that line over seven years, then the continuation of those capacity charges on a energy basis is very prejudicial to high load factory customers.

The order recognized that normally those capacity charges would be placed in the base rates in the next rate case and there is a rate case coming down the track. But if that starts in August, we're looking at another year during which high load factory customers will be burdened with these pure capacity charges reflected on a energy basis.

We submit that's unfair, not contemplated by the rule, and there should be some decision, especially in light of the order allowing the write-off in seven years, to deal with that subject more quickly than in the next rate case. Thank you.

MR. HOWE: Commissioners, I'm Roger Howe from the office of Public Counsel.

CHAIRMAN WILSON: Mr. Howe, can I interrupt you? Can we take five minutes and come back.

MR. HOWE: Certainly.

(Brief recess.)

CHAIRMAN WILSON: Mr. Howe.

MR. HOWE: Commissioners, considering the way this oral argument has gone, I'm sorry I didn't cite to your order in more detail, but at Page 3 to my response to Florida Power and Light's Motion for Reconsideration, I refer to your Order No. 12645. That was issued on November 3rd, 1983. I believe that order provides ample authority for your ability to revisit cost recovery charges and the costs that underlie those charges.

In that order the Commission basically said with fuel cost recovery factors you will address issues as they come up as necessary, and only when you have addressed them in detail, put the parties to their proof and issued a final order on that particular issue will it be conclusive on the Commission for future periods.

You have a rule dealing with conservation cost recovery that says you'll handle conservation cost in the same fashion as fuel cost recovery. Inasmuch as the oil-backout cost recovery factor is a component of the fuel adjustment factor, I would suggest that that order controls. Moreover, I don't believe that

the prohibition against retroactive ratemaking can apply in a cost recovery proceeding. The reason is under Section 366.060(2), which Florida Power and Light correctly cites to, it states that the Commission will set rates to be thereafter charged. And it's that language that the Court seized upon in the City of Miami case and virtually any case dealing with retroactive ratemaking.

In a rate case you do set rates to be thereafter charged. Once the company goes out the door, if the company is able to earn its rate of return, well and good. If it earns slightly below, if it wants relief, it can petition for additional rates in the future. If it earns above, the Commission itself or an effected party can petition for another prospective filing.

Cost recovery is different. You never really set rates to be thereafter charged. You said, "Here's rates until we true it up again the next time." And the true-up proceeding itself is an ongoing mechanism. I don't think it can be time limited because necessarily the true-up at any six-month period is the sum total of all past costs, revenues, true-ups. So it never really ends in that sense.

But more importantly I think the point is that you set rates to be trued up. Now, Florida Power and Light has come to this Commission in succeeding periods, for example, and said, "We did not earn what we thought we should have," or what you thought

they should have on their oil-backout cost recovery project and they would be able to true it up.

I would submit that if the Commission cannot revisit the cost of common equity, then equity being a residual determining the utility's earnings, that if in a recovery period Florida Power and Light had not recovered all its costs, or had recovered all its costs other than the equity but underearned on equity under the 15.6% it was claiming in past periods, it couldn't have asked you to true those up. Florida Power and Light's past requests for true-up have been an acknowledgement that the concepts of retroactive ratemaking simply do not apply.

Now, dealing with a couple of other factors on 15.6% return on equity and the Commission's adjustment to 13.6, Mr. Guyton said that the PSC has known that the oil-backout cost recovery factor included the rate of return used in the utility's last rate case. How have you known? I think everybody was kind of surprised at the hearings when I believe it started in cross examination of Mr. Babka by Mr. McWhirter, Mr. Babka said FP&L uses 15.6% for the oil-backout cost recovery purposes.

The reason everybody was surprised by that was this Commission has never required Florida Power and Light to come forward and say "Here's our costs. Here's why they are prudent. We want a final determination." The oil-backout cost recovery factor has been rocking along just like fuel adjustment. As things come up that look like they might be out of line, the

company is allowed to recover its cost, and the Commission digs into those particular issues in detail. I don't believe the company ever clearly established to this Commission, certainly not after it agreed to a 13.6% return for tax savings purposes, that it was going to continue using the 15.6 for oil backout purposes.

As to whether or not the Commission could make a decision based on a changed return on equity, I'd say the standard is whether the Company had notice and an opportunity to be heard. It certainly had that. It had that opportunity at the hearing. If the Company thought it was being prejudiced in any way, had felt the issue had arisen late in the process for them to meet it, they could have asked for a continuance, they could have asked for an opportunity to put on additional testimony. Instead I think the Company relied on the testimony of Mr. Waters who, I believe, was the witness following Mr. Babka.

Moreover, the cost recovery proceeding -- you can't really separate FIPUG's petition from the cost recovery proceeding. By that I mean is had FIPUG filed no petition and the Commission, just in the course of the normal cost recovery proceeding, the oil-backout cost recovery proceeding as part of the fuel adjustment, if they had learned that, they could have made an adjustment. The fact that specific issues were defined with respect to FIPUG's petition in no way prejudiced the Company. It was asking for recovery of costs. It was claiming a

cost of 15.6%, and as the party seeking affirmative relief it had an obligation at every point to establish that that cost was prudent and necessarily incurred as part of that oil-backout project.

So I don't think you have a problem in terms of the scope of the proceeding because there was notice and a opportunity to be heard. I don't think you have a problem in the sense of retroactive ratemaking because that concept, if it does apply here, means that you can't have a cost recovery procedure. And more importantly, Florida Power and Light's adjustments in the past to true-up its return on equity are a concession by the Utility that the concept of retroactive ratemaking does not apply.

If I might, I'd like to -- we find ourselves in a unusual position in the sense that we filed a response to both parties' Request for Consideration.

With respect to FIPUG's Cross-motion for Reconsideration, we agree with FIPUG's position on whether the Utility has established its entitlement to accelerate depreciation.

Just as the Company never put the Commission on notice that it was going to be charging 15.6 return on equity, the Company never put the Commission on notice or asked for a definitive ruling on whether the deferral of its Martin 3 and 4 units, and the unsited 1990 unit, should be used to calculate

true net savings and accelerated depreciation.

In 1982 this Commission, in its Order No. 11210 said and I quote, this is at Page 9, "FP&L has requested that the assumptions associated with the calculation of deferred capacity benefits be fixed at this time. 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."

I would submit that Florida Power and Light never came to this Commission and said, "Here are our assumptions. Here's why we think they are reasonable." All they did is they just began including those assumptions in the mathematics.

We cite to some of the comments that were made by Company's witnesses in our response -- I'm sorry, in our original brief. All that happened was Mr. Babka, in 1987, began including it in the calculation of the cost recovery factor. This Commission never addressed the issues. I think the Commission has itself, though, in a bit of a inconsistency between the rate of return issue and the accelerated depreciation, because basically the Commission is saying we gave -- the Commission give tacid approval for the use of accelerated depreciation, whereas where the rate of return issue, is the Commission is saying, "We never gave tacid approval." In point of fact, I don't think this Commission can give tacid approval where it's a matter of rates

that utility customers must bear. If the utility is seeking to recover costs, the Utility has to prove it. And the proper question I think to ask is when did this utility, Florida Power and Light Company, ever come forward, identify issues that this Commission said in 1982 it wanted to address later when they started to recover any -- wanted to recover any accelerated depreciation and put on its proof that the recovery of that accelerated depreciation was appropriate. It just hasn't happened.

On FIPUG's Motion for Reconsideration or its Cross-motion for Reconsideration, on the issue of the Southern Company capacity charges, I would just rely on our written response, which essentially is that the Commission, also in 1982, made a specific finding that the Southern Company capacity costs were a cost, and that's, I think, the general tenor of the rule. Recovery of all costs. And if the Commission should roll it into base rates at some future date, so be it. But as for now a decision to roll them in at this time, to roll the Southern Company capacity costs in at this time would be inconsistent with consistent decisions since 1982.

CHAIRMAN WILSON: Is there any limitation on the Commission review of past expenses in something like fuel adjustment?

MR. HOWE: I would suggest not. I really am sorry, I don't have that Order 12645 with me. But basically what the

Commission said there was that there would be no limit. When the Commission first went to the conservation and fuel adjustment recovery mechanism there was some question. What's the effect of a true-up? And in this order the Commission retreated from the idea that there was any limitation at all. And I think they have acted as though there is no limitations. For example, the recent Florida Power Corporation case, with their fourth barge for Electric Fuels Corporation, I think the period at issue there was period 1984 through 1988.

But I would suggest also it goes both ways because if a company were to come forward and say, "Wait a minute, we haven't been recovering all our costs." We used to see it with the aerial surveys of coal piles and so forth. The Commission would say, "All right, if you really haven't recovered your cost but you incurred them, we'll adjust them." So I would suggest that in both direction the mechanisms of cost recovery allows for modification based on facts as they become known, and only if the Commission makes a conscious and definite decision that this is a final order on that issue, such as the fourth barge for Florida Power Corporation is it foreclosed from future review.

COMMISSIONER HERNDON: What about Mr. Guyton's argument the two prior periods from, I think, April '88 through April '89 have been foreclosed by virtue of the Commission issuing orders. Do you say that that -- those orders don't, in fact, dispose of the return on equity?

MR. HOWE: I would suggest that they do not. I think what Mr. Guyton was saying was those are orders confirming a final true-up from a previous period where we have -- at each hearing I'm sure you're well aware of projections, the partial projections and final true-up. But those final true-ups, at least under the Commission's Order 12645 from 1983, are just based on what the Commission knows at that time. If you had identified return on equity as an issue then, put the Company to its proof, issued a final order resolving it, then I would suggest it would be final. But it's just part and parcel of the regular cost recovery proceeding; no, it's not final.

COMMISSIONER HERNDON: And to the extent that the use of a return on equity in either of those two orders had been an implicit portion of calculation, does that act as an endorsement or not as an endorsement?

MR. HOWE: I would suggest it doesn't. And in our initial brief, which we adopted these pages in our response to the Motions for Reconsideration, we said at Page 2, said if the Commission agrees, for example, that Florida Power and Light has not really proven its case in this proceeding, but decides it cannot order refunds, it should restructure the entire process by which it considers and approves cost recovery factors for fuel, conservation and oil backout purposes.

The reason for taking that position is that if the Company can come back later and say there was implicit approval

because nobody caught the numbers we were using in our math, we can't have quick recovery proceedings. We've got to say -- put a burden on the Company to come forward and identify every issue that they could reasonably anticipate should be considered, that they need a final ruling on and do that. They can't have both the benefit of a rapid cost recovery proceeding and then after the fact say "You didn't catch us earlier."

COMMISSIONER HERNDON: So you're saying, and I'm reluctant to use this phrase, but I guess in this instance it may be more applicable, that the cost recovery process, the backout process, are intended to be quick and dirty analyses that are then left in some sort of pending mode based on future more in-depth review. And I go back to Commissioner Wilson's question I guess, because I think in some respects it's really a threshold question. I'm troubled by this notion that 10 years later something occurs, and you've got 10 years of twice-annually orders that have endorsed, even if through omission or inaction, some activity of the Company. And we all of a sudden find something out and we go back and attempt to reopen it, you know, 20 orders later, in fact, and that troubles me.

CHAIRMAN WILSON: It bothers me both ways to because for a Company to come in say, "Well, you know, back in 1982 we had this little thing that we did and, gosh, we have been reviewing our records we never got to collect those costs, so now we want to stick them in 1991's fuel adjustment recovery or

conservation cost recovery or oil backout or whatever. What I'm looking for is what is the reasonable limitation on review of some of these things. The only thing I've heard you say is that if it's a specific issue and it's been specifically dealt with and there is a final order that addresses that, then that's the only limitation. It seems to me like there probably is -- has to be some further limitation.

MR. HOWE: There can be, I believe. The Commission has never adopted one. Again referencing this Order 12645 from 1983. I believe the Commission could adopt any kind of reasonable mechanism. For example, you know, what would you like? A period of years, for example, that you think that's conclusive --

CHAIRMAN WILSON: No, I think broad -- if you go back and say well, the Company basically fraudently represented these items and they have been doing it since whenever. Well, the Commission obviously ruled on something that was -- they were intentionally misled as were the rest of the parties. If something like that has gone on, I think clearly that probably gives you the authority to go back further than you ordinarily could. If you're looking at the prudence of an item, it may be a little more limited than that. If you're just looking at whether it was, in fact, raised as an issue and specifically ruled on, there may be some different time frame. I don't think you can say five years and that's it for everything.

MR. HOWE: I don't know what a reasonable standard

would be. I think the Commission can adopt one. But I would suggest you probably don't want one because as soon as you adopt a standard, what you're going to find is, for example, some utility finds, "Wait a minute, four years ago we made an adjustment we have been using --" for example, had Florida Power and Light through some error been claiming a 16, 17% return on equity perhaps because a computer program just cranked these numbers out, would this Commission ever say, "Wait a minute, that wasn't related to your last return on equity; it wasn't related to your stipulated tax savings return on equity." We just need to fix it. And I'm suggesting that the quick and dirty nature of cost recovery means that I don't think the Commission can ever be in a posture of saying because the Commission itself didn't catch it the utility has it conclusively.

CHAIRMAN WILSON: See, the things you have described have been fraud, mistake, imprudence.

MR. HOWE: Misinterpretation would fit in there.

CHAIRMAN WILSON: Well, maybe. Maybe. I just don't want to see a company coming in here with a 1981 expense and based on, you know, some precedent, whatever we establish in this case or have established, say, "Well, okay there was a cost you didn't recover." I think you can clearly say, "Well, the common law theory of laches applied. You just waited too damn late and it's too bad."

MR. HOWE: That might be. I don't know if laches would

apply in the regulatory context here, but, for example, with the Gulf Power case that has been cited at 487 So.2d, I believe that was a decision in 1986 dealing with refunds for overcharges to Gulf Power attributable to the Maxine Mine for the period '81, '82 and '83, and the Commission's position before the Court was that they could go after those having learned about at a later date and the Court upheld them.

CHAIRMAN WILSON: There was a prudence argument there, wasn't there? I mean that those -- it was imprudent for the company to have incurred those expense. It's been a long time since I've looked at the case.

MR. HOWE: I think the position of the utilities in these cases have been that all they have to do is initially show that they incurred the costs and seek its recovery. And I think the Court has fairly uniformly rejected that. The Commission rejected it and the Court upheld it in Maxine Mine in another case dealing with Florida Power Corporation, which was dealing with I think it was the decay heat pump issue. Florida Power took the position that having come forward and claimed they incurred all these replacement fuel costs, that the burden shifted to somebody else to prove that the costs were imprudent. And the Court's position was no, that's not the case. The Utility has an obligation to establish that the costs were prudent and did not result from management imprudence. And I'd suggest that in the oil-backout cost recovery area you don't have

that type of evidentiary presentation by Florida Power & Light in past periods.

COMMISSIONER EASLEY: Maybe that's what's bothering me. If oil backout is intended to be a quick and dirty recovery based on primary projection and then a final order, and the numbers are never in cement, when is the final order a final order under your scenario?

MR. HOWE: Well, in case of oil backout fortunately when the project is fully recovered. At least then you do get to a point at which there is finality with oil backout projects. It would be when all the costs are recovered.

COMMISSIONER HERNDON: But in the meantime, do you revisit each decision or do you make an adjustment in the next decision and go forward until completion?

MR. HOWE: I suggest as a practical matter you go forward in succeeding periods based on the previous one. However, should a specific issue come to your attention that has not been addressed, that could affect past periods, current periods or future periods, that you have the jurisdiction to address it at that time.

CHAIRMAN WILSON: Any other questions?

COMMISSIONER BEARD: Yeah. I'm trying to follow the theory behind this. Why would you stop at April of '88 then if you deem 15.6 imprudent? Why not April of '87?

MR. HOWE: I believe that in the initial brief that I

had filed I said you should go back -- on the return on equity I think I said you should go back to January of 1988. I think I tried to --

COMMISSIONER BEARD: Why not January of '87?

MR. HOWE: Well, I was going to the time period at which they have stipulated to 13.6 return. I was trying to match them. Now, maybe I missed it.

COMMISSIONER BEARD: In January, you're saying January of '88 is the point in time where they in some form or fashion accepted the fact that 15.6 was imprudent?

MR. HOWE: Commissioner Beard, I honestly don't remember how I came to pick January of '88. I think that was the reason. I don't want to commit that that was it. But I think at the time I was writing this brief I understood that to be the time period which the 13.6 began applying, and I thought it should apply for all purposes from the time at which they agreed to it for tax savings purposes.

CHAIRMAN WILSON: I think I recall that being your position in the brief.

COMMISSIONER BEARD: Can I ask Mr. Guyton a question?

CHAIRMAN WILSON: He's going to have an opportunity to respond to all of this here.

COMMISSIONER BEARD: I want him to respond to me first, if I can.

Isn't the true-up, isn't that a retroactive process?

MR. GUYTON: The true-up is a retroactive process envisioned originally by the Commission when it established the clause, and the true-up goes back two recovery periods. And if you applied that in this case, you wouldn't reach two of the recovery periods that you reached in this order.

COMMISSIONER BEARD: Well, let me -- and I want to understand because I got confused. The hearing was in February of '89, right?

MR. GUYTON: No, Commissioner, the hearing was -- there were some issues raised in February of '89. The hearing was in August of 1989.

COMMISSIONER BEARD: Yeah, but where these issues, where they came to light, okay, was as a result of the February '89 hearing, was it not?

MR. GUYTON: No, sir. That's the point of the stipulation. The equity issue was raised for the first time in July of 1989 when FIPUG raised it in its prehearing statement and an equity refund issue was never raised by the parties.

COMMISSIONER BEARD: So that was the August hearing dealing with the April to September of '88 -- correction. No, April to September of '89 was dealt with.

MR. GUYTON: No, that would have been the October '89 through March 1990 prospec actively. The final true-up for that period would have been October '89 to March -- I'm sorry, October '88 to March '89.

COMMISSIONER BEARD: Okay. Then the August hearing would have gotten before us in some form or fashion all but one of those periods. The only period that it wouldn't have gotten before us would have been April of '88 to September of '88, correct, because we were doing a final figure on October of '88 to March of '89.

MR. GUYTON: Commissioner, in that August hearing, which was held in conjunction with this proceeding, but was not consolidated with this proceeding, you issued an order approving a final true-up. In that approval of final true-up we would submit that once that was finally trued up you could not go back to it even though you subsequently in December of '89 tried to effectuate a return on equity refund for that period. There were two separate proceedings. You reached the decision first in the oil-backout proceedings. It became final at that point. And an attempt to effectuate a refund after that order in the other proceeding is retroactive ratemaking. That's why we say the first two of these three recovery periods simply cannot be reached given the timing of the entering of your order.

MR. HOWE: No, I'm through.

COMMISSIONER HERNDON: All right.

MR. McGLOTHLIN: May I comment before Charlie wraps up, very quickly?

To be precise, the return on equity subject matter was raised in FIPUG's oil-backout discontinuation petition, which was

filed in January of 1989. We cited the continued use of 15.6% return on equity for backout purposes as grounds why the backout clause should be terminated. We did not ask for a refund at that point. That was developed, but the return on equity subject matter was raised in our petition.

The second thing that occurred to me while you were asking questions of Roger that I think belongs in this dialogue is that one consideration as to whether this instance meets the Commissioners' test of something it can deal with is, I think, is whether the Commission was aware that it was continuing to prove 15.6% return on equity. And one thing that bears on that is, as I recall, 15.6% was not identified in any of the testimony or evidence submitted by FP&L during the time frames in question. So I think when you ask yourself is this something we have reason to deal with, one question is did I know it was 15.6 when we put these orders in approving these true-ups. Those are my additional comments.

MR. GUYTON: Commissioners, one of the best tests of an argument and its validity is to take it to its logical extreme. And I'd like you to ask you to take FIPUG's and Public Counsel's argument to its logical extreme, its arguments regarding that oil backout is a retroactive looking recovery clause, therefore, it essentially never becomes final.

Consider the following factors on equity: If that's the law, this Commission today could go back to 1982 when FP&L

had a cost of debt in excess of its authorized return on equity, and the Commission, accepting those legal principles, could reach the decision that FP&L had earned too low a return on equity, and it could adjust that equity return up to 16, 18%, whatever it now determines is a reasonable cost of equity. You go back seven, eight years.

Commissioners, I think it's pretty clear --

CHAIRMAN WILSON: You mean just for purposes of the oil-backout clause?

MR. GUYTON: Just for purposes of the oil-backout clause, if the argument postulated by Public Counsel in FIPUG is true. I mean, if they could go back to '88, why can't they go back to '82? There's no cutoff -- as you've heard them say, there is no cutoff point under their line of reasoning. It's always subject to adjustment.

I think it's pretty clear that this Commission has not embraced the idea that your adjustment clauses would go back as far as 1982 for an adjustment here.

The Richter case has been cited to you. The Richter case is supposedly read as a broad exception to this prohibition against retroactive ratemaking. It is not a broad exception; it is a very narrow-crafted exception for extraordinary circumstances, and I think it's important for this Commission to hear some language out of the Richter case. There, the Court, even though it allowed or said the Commission had jurisdiction to

issue a refund, also had this to say about retroactive ratemaking. "It is, of course, vital to both the regulated utility and the consumers that the PSC's rate orders be final. Chapter 366, though it has changed to some degree since the City of Miami decision, still indicates that the PSC cannot retroactively alter previously entered final rate orders just because hindsight makes a different course of action look preferable."

The Maxine Mine case and the Gulf case has also been construed by Counsel here.

Commissioners, we're asking you to construe that case as you construed it in Order 22268. There you stated that you disagreed with FIPUG's position, that all oil-backout revenues may be properly refunded. And you noted specifically that the Gulf case was limited to questions of prudence.

Now, there has been a lot of discussion here today of the recognition of 13.6 and FPL's acceptance of that in tax savings docket as a basis for you to reduce the return on equity in the oil-backout proceeding.

Commissioners, I hadn't raised this before but I think it's important to put that in context. FP&L acquiesced to that for purposes of a 1987 tax savings proceeding, and in doing so it signed a stipulation, and all the parties signed a stipulation, and that stipulation said that that return on equity is to be used only for purposes of a tax savings proceeding and not to be

used in any other fashion.

When that was brought to this Commission for approval and consideration, the Commission, at an agenda conference, specifically noted that it was only having to do with a tax savings issue.

"Commissioner Herndon: Am I correct that all we're dealing with for this discussion is the tax issue? Not AFUDC that Commissioner Gunter brought up earlier this morning or anything else.

"Mr. Willis: That's correct. Just the tax issue.

"Commissioner Herndon: Nothing else.

"Mr. Willis: That's correct.

"Chairman Nichols: The tax issue for 1987. Mr. Childs.

"Mr. Childs: We would accept that number."

That's at Page 62 of the agenda conference transcript, and that was specifically revisited at Page 72 by Mr. Twomey in seeking directions for how to write the order. It was to be limited only for tax savings purposes.

COMMISSIONER GUNTER: Was that the year '87, you say.

MR. GUYTON: Yes, Commissioner Gunter.

When a similar stipulation or agreement was brought to the Commission for 1988, there was a lengthy discussion as to the purpose for which it would be used. Mr. Childs, sitting here at the table, noted that the offer was not to be used --

specifically noted that it was not to be used as to oil backout. There was a discussion; there was an exchange among several Commissioners. It's clear from that transcript as well that the 13.6 was not to be used for purposes of the oil-backout proceeding.

So to suggest that our acquiescence in 13.6 is evidence of a lower return on equity --

CHAIRMAN WILSON: What was the date of that? Do you know?

MR. GUYTON: I'll have to provide that to you, Commissioner Wilson. I don't have it with me. I have the 1987 agenda, but I don't have the 1988 with me.

CHAIRMAN WILSON: I'd like to end up with copies of both of those.

COMMISSIONER EASLEY: Haven't we had a conversation that was similar to that in 1989 since I've been here?

MR. GUYTON: Commissioner, you may have. I wasn't --

MS. RULE: Staff is going to attempt to get a copy of those transcripts for you.

COMMISSIONER EASLEY: Thank you.

CHAIRMAN WILSON: I don't need it right now, but I don't believe we're going to make a bench decision so we have got time to get those.

COMMISSIONER BEARD: I've got to go back and look at some transcripts because I remember raising the issue multiple

times, why not everything else. If it's fair for one, it's fair for everything. And I thought we got past -- maybe not in '87, but I thought some point in time after the first time we started saying no. I could be wrong but I want to read the transcript.

COMMISSIONER GUNTER: Me, too, because there was even some discussion about affiliate transactions and what have you.

MR. GUYTON: Commissioners, I apologize. I simply didn't get it in the briefcase this morning.

COMMISSIONER EASLEY: Well, I've got a slightly different recollection that I'd like to be corrected on or have verified. I've got a recollection of a discussion of this subject -- it may not be this company -- that Public Counsel and/or FIPUG and/or another party took the position that the return on equity we were using was too high to be used in anything else, and I have a recollection of a discussion at that point about it being limited for that purpose only. And I don't know.

COMMISSIONER BEARD: The reason that would strike me as not the way I remember is it because the return on equity they were using for taxes, although they considered it too high, it was still lower than anything else they had on the books at the time. That's why --

COMMISSIONER EASLEY: It was higher than what they wanted us to use; it was lower than that established in the last rate case because everything is.

CHAIRMAN WILSON: This is the reason we have transcripts so we can go back and read them. I mean, some people like to read them anyway just for the entertainment value, but that is really the reason why.

MR. GUYTON: Commissioners, a few more points in rebuttal.

It has been suggested to you this morning that everyone was surprised that FP&L was earning 15.6 on its oil-backout return on equity. I don't speak for the Commission, but I would be surprised if you were surprised. I mean, the oil-backout cost recovery factor has been audited consistently over a period of time by the Commission's Audit Staff. The return on equity there is covered in an audit review. It's been suggested to you that it was rocking along for seven years and we never really disclosed the return on equity.

Commissioners, this issue came up at the very first oil-backout cost recovery factor consideration. FP&L held out and said that its actual cost of equity was higher than its allowed return and, therefore, that's what you should use. All the other parties said, "No, you ought to use what's authorized in the rate case."

Before that decision became final we agreed with that position, that you ought to use what's allowed in the last rate case, even though at the time that worked to our disadvantage. That was a stipulation among the parties.

Public Counsel and FIPUG was a party to that stipulation, and that's documented in the transcript in this proceeding in Mr. Babka's testimony. This Commission has been fully apprised of what FP&L has been doing on return on equity for oil backout for a number of years.

It's also been suggested that you really can't separate the two proceedings, 890148, FIPUG's proceeding, from the regular oil-backout proceeding.

Commissioners, FIPUG filed this petition. They are the petitioner in this case. They have the burden of going forward with the evidence; they have the burden of proof. FIPUG tried to consolidate the two. You specifically chose not to consolidate the two cases. The burden of proof in this case rests, as it always should, with the petitioner, and FIPUG was a petitioner. They didn't carry the burden of proof. To suggest that there was no notice to the Commission as to the return on equity, that there was no notice to the Commission as to the capacity deferral benefits associated with the Martin plant and that they were being used in the calculation of the actual net savings is simply misleading.

FP&L clearly stated when it first sought recovery of actual net savings that it was reflecting Martin unit capacity deferral benefits in the calculation of actual net savings. It was in Mr. Babka's testimony. It was not a mere mathematical calculation. The Commission was certainly apprised of it. FP&L

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fully discharged of its burden of proof in that case. And now the burden, when FIPUG is trying to collaterally attack a Commission order is on FIPUG, not on FP&L to prove up that issue again.

Finally, I'd close with the observation FIPUG is suggesting in its cross-motion that a project -- that capacity charges recovered, associated with the UPS, is not a project O&M cost properly recoverable through the oil-backout rule.

Commissioners, you've construed your rule since Order No. 11210, the first oil-backout cost recovery proceeding, that capacity charges were an appropriate project cost to be recovered through that clause. That was the construction of your rule then. It's consistently been applied over seven years in 14 or 15 cost recovery orders, and that's the decision that you reached in this case after hearing the evidence. We don't think that's a grounds, proper grounds for reconsideration on the part of FIPUG.

Thank you very much.

CHAIRMAN WILSON: Thank you. We're going to take this under advisement. Thank you.

(Thereupon, the hearing concluded at 11:10 a.m.)

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F L O R I D A)
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COUNTY OF LEON)

CERTIFICATE OF REPORTER

I, JOY KELLY, CSR, RPR, Official Commission Reporter DO HEREBY CERTIFY that the Motions Hearing, in the captioned matter, Docket No. 890148-EI, was heard by the Florida Public Service Commission at the time and place herein stated; it is further

CERTIFIED that I reported in shorthand the proceedings held at such time and place; that the same has been transcribed under my direct supervision, and that this transcript, consisting of 56 pages, constitutes a true and accurate transcription of my notes of said proceedings; it is further

CERTIFIED that I am neither of counsel nor related to the parties in said cause and have no interest, financial or otherwise, in the outcome of this docket.

IN WITNESS WHEREOF, I have hereunto set my hand at Tallahassee, Leon County, Florida, this 7th day of March, A.D., 1990.

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