

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Industrial) DOCKET NO. 890148-EI
Power Users Group to Discontinue)
Florida power & Light Company's Oil) ORDER NO. 21361
Backout Cost Recovery Factor.)
ISSUED: 6-9-89

The following Commissioners participated in the disposition of this matter:

MICHAEL MCK. WILSON, Chairman
THOMAS M. BEARD
JOHN T. HERNDON

ORDER DENYING MOTION TO DISMISS

BY THE COMMISSION:

On January 27, 1989, Florida Industrial Power Users Group (FIPUG) filed its Petition to Discontinue Florida Power & Light Company's (FPL's) Oil Backout Cost Recovery Factor (OBCRF). FIPUG alleged that justification for approving FPL's oil backout project for cost recovery pursuant to Rule 25-17.016, Florida Administrative Code, is no longer valid, and requested that the Commission discontinue the OBCR mechanism (previously approved in 1982). FIPUG also requested that the Commission order a refund of certain revenues associated with the OBCR mechanism. The Office of Public Counsel (OPC) intervened in this docket. Thereafter, FPL filed a Motion to Dismiss FIPUG's petition, alleging (among other things) that the relief requested by FIPUG is contrary to Rule 25-17.016, Florida Administrative Code, and prohibited by Section 120.68(11)(b), Florida Statutes. FPL further disputed many of FIPUG's factual allegations, and claimed that FIPUG's contentions have already been argued to and decided by the Commission. Both FIPUG and OPC filed responses opposing FPL's Motion to Dismiss.

In their responses to FPL's Motion to Dismiss, both FIPUG and OPC correctly point out the standard for ruling on FPL's Motion to Dismiss. The motion should be granted if FIPUG's petition fails to state a cause of action upon which the Commission can grant relief. Because a Motion to Dismiss is intended to test the legal sufficiency of a pleading, all facts pled by FIPUG must be assumed to be true for the purpose of ruling on FPL's Motion.

By its terms, FIPUG's petition was filed pursuant to Sections 366.06(2), 366.07, and 366.076, Florida Statutes, and Rule 25-22.036(4)(b), Florida Administrative Code. FIPUG alleges that, under present circumstances, application of the OBCRF constitutes unjust and unreasonable ratemaking which the Commission has authority to review.

Section 366.05(1), Florida Statutes, vests the Commission with the jurisdiction to "prescribe fair and reasonable rates and charges..." Section 366.06(1), Florida Statutes, states:

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Whenever the Commission shall find ... that the rates demanded, charged, or collected by any public utility company for public utility service ... are unjust, unreasonable, unjustly discriminatory, or in violation of law ... the Commission shall ... determine just and reasonable rates...

Similarly, Section 366.07, Florida Statutes, states:

Whenever the Commission, after public hearing either upon its own motion or upon complaint, shall find the rates, rentals, charges or classifications, or any of them, proposed, demanded, observed, charged or collected by any public utility for any service, or in connection therewith, or the rules, regulations, measurements, practices or contracts, or any of them, relating thereto, are unjust, unreasonable, insufficient, or unjustly discriminatory or preferential, or in anywise in violation of law, or any service is inadequate or cannot be obtained, the Commission shall determine and by order fix the fair and reasonable rates, rentals, charges or classifications, and reasonable rules, regulations, measurements, practices, contracts or service, to be imposed, observed, furnished or followed in the future. [Emphasis added].

Section 366.076(1) states, in pertinent part:

Upon petition or its own motion, the Commission may conduct a limited proceeding to consider and act upon any matter within its jurisdiction, including any matter the resolution of which requires a public utility to adjust its rates to consist with the provisions of this chapter.

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

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

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

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By ORDER of the Florida Public Service Commission,
this 9th day of JUNE, 1989.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

MER

by: 
Chief, Bureau of Records

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

M E M O R A N D U M

June 2, 1989

TO: DIVISION OF RECORDS AND REPORTING
FROM: DIVISION OF LEGAL SERVICES (RULE) *WMP*
RE: DOCKET NO. 890148-EI - PETITION OF FLORIDA INDUSTRIAL
POWER USERS GROUP TO DISCONTINUE FLORIDA POWER & LIGHT
COMPANY'S OIL BACKOUT COST RECOVERY FACTOR.

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Pursuant to Commission vote, attached is a Final Order Denying Motion to Dismiss to be issued in the above-referenced docket.

MER/sj

Attachment/Order

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