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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 Submitted for Filing: February 23, 1989

FLORIDA INDUSTRIAL POWER USERS GROUP'S RESPONSE TO FLORIDA POWER AND LIGHT COMPANY'S MOTION TO DISMISS

The Florida Industrial Power Users Group ("FIPUG"), through its undersigned counsel, files its response to Florida Power & Light Company's ("FPL") Motion to Dismiss. For the following reasons, FPL's motion must be denied:

I.

INTRODUCTION

1. In 1982, the Public Service Commission ("Commission") approved FPL's use of the Oil Backout Cost Recovery Factor ("OBCRF") to recover the costs of certain 500 KV transmission lines connecting FPL's system to the Southern Company's system ("Transmission Project"). On January 27, 1989, FIPUG filed a Petition to Discontinue FPL's OBCRF as applied to the Transmission Project.

2. FIPUG's Petition alleges that in the six and one half years since the Commission qualified the Transmission Project for cost recovery via a special energy charge, circumstances have changed greatly. The projections which formed the basis for

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FPL's qualification petition and for the Commission's decision approving the application of the OBCRF have not materialized. FIPUG's Petition alleges that it would be unjust, unreasonable and unfair to continue to apply the OBCRF to the Transmission Project under existing circumstances.

3. FIPUG's Petition seeks a determination that because of changed circumstances, as measured by actual experience with the Transmission Project, the OBCRF should be discontinued. FIPUG further demands that all past oil backout revenues which were based on or attributable to the claimed deferral of Martin coal units be refunded, for the reason that they were premised on a claim of "deferral benefits" that is spurious, illusory, and without a factual foundation or justificaton. The Petition also seeks changes in the way investment, expenses and revenues associated with the Transmission Project are reported.

II.

Standard for Ruling on a Motion to Dismiss

4. Before responding to the arguments raised in FPL's Motion to Dismiss, the legal standard applicable to the Commission's ruling on FPL's motion must be articulated.

5. In Ralph v. City of Daytona Beach, 471 So.2d 1, 2 (Fla. 1983), the Supreme Court of Florida set forth the standard for ruling on a motion to dismiss when it reversed the trial court's dismissal of a third amended complaint:

> For purposes of a motion to dismiss for failure to state a cause of action,

> allegations of the complaint are assumed to be true and all reasonable inferences arising therefrom are allowed in favor of the plaintiff. Orlando Sports Stadium, Inc. v. State ex rel. Powell, 262 So.2d 881 (Fla. 1972); Popwell v. Abel, 226 So.2d 418 (Fla. 4th DCA 1969).

6. Stated another way, a motion to dismiss may not be granted:

> [U]nless the allegations in the pleadings attached show with certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claim. Citations omitted. Emphasis added.

Midflorida Schools Federal Credit Union v. Fansler, 404 So.2d 1178, 1180 (Fla. 2d DCA 1981). A motion to dismiss must be decided on questions of law only. Cazares v. Church of Scientology of California, Inc., 444 So.2d 442, 445 (Fla. 5th DCA 1983).

7. Finally, in ruling on a motion to dismiss, only the allegations within the complaint may be considered:

> It is axiomatic that when considering a motion to dismiss for failure to state a cause of action, the court must confine itself strictly to the allegations within the four corners of the complaint. . . .

Abrams v. General Insurance Co., Inc., 460 So.2d 572 (Fla. 3d DCA 1984). Speculation as to what the evidence will show at hearing or whether the allegations will ultimately be proven is not permissible. Maciejewski v. Holland, 441 So.2d 703, 704 (Fla. 2d DCA 1983).

8. Based on the legal standard described above, FIPUG's allegations, as set forth in its Petition, must be taken as true. FIPUG's allegations are:[1/]

- The OBCRF for the Transmission Project was approved on the basis that the Project would enable FPL to economically displace oil-fired generation.

- The projected escalating oil costs upon which approval of the Transmission Project was based never occurred. Oil prices plummeted. The Transmission Project has accumulated large losses.

- FPL's claim that the Transmission Project's losses are offset by the deferral of two Martin coal-fired unit is spurious. These units are not part of FPL's generation plan, and therefore are not being deferred. The deferral benefits alleged by FPL are illusory, and all revenues based on the "net savings" attributable to the claim of deferral benefits were wrongfully collected.

- The Transmission Project's value to ratepayers is not economic displacement of oil but capacity and reliability benefits.

- FPL has used the OBCRF to thwart the Commission's ability to monitor and regulate the reasonableness of FPL's earned rate of return.

- The continued application of the OBCRF in the circumstances described above results in unfair and unreasonable rates.

9. Accepting FIPUG's allegations as true (as the law requires for the purpose of passing on a motion to dismiss), they must be compared to the applicable substantive law to determine

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1/ FIPUG has supported its allegations with an extensive analysis, contained in the affidavit of expert consultant Jeffry Pollock.

if FIPUG has successfully invoked the Commission's jurisdiction. Thompson v. Safeco Insurance Company of America, 119 So.2d 113, 114 (Fla. 4th DCA 1967).

10. When FIPUG's allegations are viewed in light of the Commission's statutory authority and obligations, it is clear that the motion to dismiss must fail. Section 336.05(1), Florida Statutes, vests the Commission with the jurisdiction to "prescribe fair and reasonable rates and charges. . . ." Section 366.06(1), Florida Statutes, states:

> 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. . . .

11. Similarly, section 366.07, Florida Statutes, provides:

> 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].

12. 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.

13. FIPUG's Petition alleges that continued application of the OBCRF to the Transmission Project under current conditions which differ significantly from the assumptions on which the OBCRF for the Transmission Project was approved, constitutes unjust, unreasonable and discriminatory rates, within the meaning of the statutes which define the Commission's responsibilities. This is exactly the type of situation which the Commission has the statutory authority and duty to remedy; and, for purposes of disposing of FPL's motion to dismiss, FIPUG's assertions must be taken as true. Therefore, the Commission must assert jurisdiction over FIPUG's Petition, and FPL's Motion to Dismiss must be denied.[2/]

III.

FPL'S ARGUMENTS

A. "Once Approved, Always Approved"

14. FPL argues several times in its motion that because the Commission originally qualified the Transmission Project as an oil backout project, FPL is therefore entitled to apply the

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2/ In its motion, FPL erroneously states that FIPUG's petition cites no authority. The petition alleges that the OBCRF constitutes unjust and unreasonable ratemaking, and is explicitly brought pursuant to the above statutes, which require the Commission to investigate the allegations and act on them in accordance with its statutory responsibilities.

special energy charge of the OBCRF until all the costs of the Transmission Project are recovered, regardless of the actual circumstances in existence today. In support of this position, FPL states that the rule provides for no "periodic review of actual results." This argument must be rejected because it contravenes the Commission's statutory duties, prior Commission orders regarding the OBCRF and established case law. The argument asks the Commission to interpret its rule in a manner that is inconsistent with the most fundamental principles of ratemaking.

15. As previously discussed, it is the Commission's statutory duty to prevent unjust and unreasonable rates and to fix rates which are fair. Thus, the Commission may not permit the continued application of the OBCRF if the result of such application is unjust, unreasonable and discriminatory rates.[3/]

16. Additionally, as recently as the last fuel adjustment hearings, the Commission asserted its continuing jurisdiction over the appropriateness of expenditures associated with the OBCRF, as well as other factors considered in the docket. In Order No. 19042, Docket No. 880001-EI, the Commission stated:

3/ While the oil backout rule does not expressly provide for periodic reevaluation of an oil backout project, the statutory basis, in part, for the oil backout rule is section 366.05(1) which vests the Commission with the power to prescribe fair and reasonable rates. Further, the Commission has already acknowledged the need for and propriety of a review of mid-course performance. The Commission in 1984 required FPL to provide a "status report" on the project. FPL's Late-Filed Exhibit 6, received in evidence on August 17, 1984, compared the original projections of FPL with actual experience at that time.

> We note our continuing jurisdiction over all expenditures which are recovered through the various factors [including the OBCRF] for which no specific determination of prudence has been made. As we have observed before, the quid pro quo for immediate recovery of costs in these ongoing dockets is continuing jurisdiction over the revenues designed to recover those costs.

17. Finally, in Peoples Gas System, Inc. v. Mason, 187 So.2d 335, 339 (Fla. 1966), the Supreme Court held that the Commission has the authority to modify or withdraw any order based on a finding:

> [T]hat such modification or withdrawal of approval is necessary in the public interest because of changed circumstances or other circumstances not present in the proceedings which led to the order being modified. [Emphasis added].

See also Richter v. Florida Power Corporation, 366 So.2d 798 (Fla. App. 1979).

18. The situation described in Peoples Gas is exactly the situation before the Commission in this case. Circumstances now exist which are vastly different than those contemplated when the Transmission Project was qualified. On that basis, the Commission may modify or withdraw its initial approval of the Transmission Project. It has an obligation to investigate and consider the merits of a claim that such changes in circumstances require action to comply with its statutory obligations.

19. FPL, in effect, asserts that if the oil backout ratemaking decision is no longer tenable, the Commission and the utility's customers are stuck with a bad and unfair result. The absurdity of FPL's argument is demonstrated by extending the

logic to other ratesetting contexts. If FPL were correct, it could never seek an increase in base rates, because the Commission has already set those rates in a prior proceeding. Like the oil backout cost recovery factor, those base rates may at some point no longer be reasonable. Upon a satisfactory demonstration that that is the case--whether by the utility or another party--the Commission would have the ability and duty to modify them. Nothing in the Oil Backout rule excepts the OBCRF from that principle; nor could the rule do so. Instead, the rule must be interpreted and applied in light of and consistent with the statutory responsibilities treated above.

B. FIPUG's Participation in the Application Proceeding

20. FPL argues that because FIPUG participated in the application proceeding relating to the Transmission Project, it is somehow barred from litigating the issues raised in its Petition. The contention is without merit. In FPL's application proceeding, FIPUG participated in the issue of whether FPL's project met the criteria required by the Commission to initially qualify a project under the rule. That participation does not estop FIPUG from now raising entirely <u>different</u> issues, namely: (1) Whether the project which the Commission qualified then should continue in the face of changed circumstances; and (2) Whether specific revenues have been improperly and unjustifiably collected from customers. <u>Department of Health and Rehabilitative Services v. Wyatt</u>, 475 So.2d 1332 (Fla. 5th DCA, 1985). Another rate case analogy will make the point clear. Assume that

in FPL's last rate case FIPUG advocated a return on equity for FPL of 13%, and the Commission established it to be 15.5%. FIPUG's participation then would not preclude it from asserting in 1989 that the approved level of 15.5% is too high under now current conditions.

Capacity Deferral; Primary Purpose Test

21. In its motion, FPL attempts to contest FIPUG's factual assertions with respect to claimed capacity deferral benefits and the primary purpose test. The short and sufficient response is that FPL's contentions raise factual disputes which have no place in a motion to dismiss. FPL's motion reads like a brief submitted after a hearing on contested issues: for instance, FIPUG has asserted that the deferral benefits claimed by FPL are illusory, and have no place in the calculation of net savings; FIPUG is entitled to an opportunity at hearing to prove it. (FIPUG observes, however, that while FPL attempts improperly to make its evidentiary case concerning deferral benefits in its motion to dismiss, FPL's current plans for the Martin coal units--on which past and proposed collections have been based--do not appear in its offered rationale). Similarly, the dispute about the proper calculation of fuel savings (FPL offers its own untested quantification in its motion to dismiss) and the "weight" to be given to Mr. Pollock's analysis must take place after an evidentiary hearing, not in a motion to dismiss. To dismiss FIPUG's petition on the basis of some assumed factual

determination without first providing an opportunity for hearing would be to deny FIPUG basic due process. Florida Gas Company v. Hawkins, 372 So.2d 1118 (Fla. 1979); United Gas Pipe Line v. Bevis, 336 So.2d 560 (Fla. 1976).

CONCLUSION

FIPUG has made and supported allegations concerning the OBCRF which, if true, will require the Commission to take corrective action to protect FPL's customers and to fulfill its statutory obligations to ensure fair and reasonable rates. In its motion to dismiss, FPL attempts improperly to contest FIPUG's factual assertions. FPL also urges the Commission to apply fundamentally erroneous legal standards by contending (1) the Commission has no ability to take corrective action warranted by changed circumstances; and (2) current, changed conditions are irrelevant to the continued reasonableness of past decisions. FPL should know better. Its motion to dismiss must be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Florida Industrial Power Users Group's Response to Florida Power & Light Company's Motion to Dismiss has been hand delivered to Matthew M. Childs, Steel, Hector & Davis, 310 W. College Avenue, Tallahassee, Florida, 32301, and a true and correct copy has been furnished either by U.S. Mail or by hand delivery* to the following parties of record, this 23rd day of February, 1989.

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