

FLORIDA PUBLIC SERVICE COMMISSION

Fletcher Building  
101 East Gaines Street  
Tallahassee, Florida 32399-0850

M E M O R A N D U M

May 4, 1989

TO: STEVE TRIBBLE, DIRECTOR  
DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (RULE) *WR*  
DIVISION OF ELECTRIC AND GAS (DEAN, BALLINGER, ROMIG,  
WALSH) *YW*

RE: DOCKET NO. 890148-EI - PETITION OF FLORIDA INDUSTRIAL  
POWER USERS GROUP TO DISCONTINUE FLORIDA POWER & LIGHT  
COMPANY'S OIL BACKOUT COST RECOVERY FACTOR

AGENDA: MAY 16, 1989 - CONTROVERSIAL - PARTIES MAY PARTICIPATE

PANEL: FULL COMMISSION

CRITICAL DATES: NONE

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ISSUE AND RECOMMENDATION SUMMARY

ISSUE 1: Should the Commission grant Florida Power & Light Company's (FPL's) Motion to Dismiss Florida Industrial Power Users Group's (FIPUG's) Petition to Discontinue FPL's Oil Backout Cost Recovery Factor?

RECOMMENDATION: No. FIPUG's Petition alleges facts which constitute a cause of action upon which the Commission could grant relief.

DOCUMENT NUMBER-DATE  
04456 MAY-4 1989  
FPSC-RECORDS/REPORTING

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#### BACKGROUND

On January 27, 1989, FIPUG filed its Petition to Discontinue 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for approving FPL's oil backout project for cost recovery pursuant to Rule 25-17.016, Florida Administrative Code, is no longer valid, and requested that the Commission discontinue the OBCR mechanism (previously approved in 1982).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.

#### DISCUSSION OF ISSUE

ISSUE 1: Should the Commission grant Florida Power & Light Company's (FPL's) Motion to Dismiss Florida Industrial Power

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Users Group's (FIPUG's) Petition to Discontinue FPL's Oil Backout Cost Recovery Factor?

RECOMMENDATION: No. FIPUG's Petition alleges facts which constitute a cause of action upon which the Commission could grant relief.

STAFF ANALYSIS: 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

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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, Staff recommends that FPL's Motion to Dismiss FIPUG's Petition be denied.

MR/sj