BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of the Florida Industrial Power Users Group to Discontinue Florida Power & Light Company's Oil Backout Cost Recovery Factor.	Docket No. 890148-EI Filed: October 5, 1989

FLORIDA POWER & LIGHT COMPANY'S POSTHEARING STATEMENT OF ISSUES AND POSITIONS

Pursuant to Rule 25-22.056(3), Florida Power & Light Company ("FPL") hereby files its Posthearing Statement of Issues and Positions. In addition to this Posthearing Statement, Florida Power & Light Company is contemporaneously filing a Posthearing Brief.

STATEMENT OF BASIC POSITION

FIPUG's Petition should be denied in its entirety. FIPUG's Petition, supporting affidavit and testimony are full of inaccurate and misleading allegations. They ignore or misstate prior Commission determinations, invoke irrelevant factors, raise issues previously settled by the Commission, argue circumstances have changed when circumstances are unchanged and cannot justify discontinuance of recovery or a refund, and wholly fail to provide a substantive basis for the relief they request. The relief requested cannot be granted as a matter of law. FIPUG's "case" is a direct attack on the Oil Backout Rule, an untimely attempt to

seek reconsideration of the decisions made in numerous proceedings, and an expensive and inappropriate challenge to the Commission's management of the Oil Backout Rule.

FIPUG's Count 1, that the Project has not achieved its primary purpose, the economic displacement of oil fired generation, is wholly premised on a test manufactured by Mr. Pollock which is at odds with the Commission's prescribed test. The Commission has prescribed the test to determine whether the primary purpose of a Project is economic oil displacement. FPL's Project passed the test in 1982 when it qualified, and even with lower than projected oil prices, passes the test now. FPL s Project still economically displaces oil fired generation.

FIPUG's Count II, that recovery of Project costs through an energy based charge is unfair and unduly discriminatory, should not be considered. First, an energy charge for oil backout recovery is prescribed by the Oil Backout Rule. Second, the Commission has heard and rejected this same FIPUG argument on numerous different occasions; FPL should not have to respond to it again.

FIPUG's Count III, that the Martin Units are fictional and have not been deferred so they should not be used to calculate Actual Net Savings, is unfounded. The Martin Coal Units were deferred by the Project. Without the Project they would have been in service by now and FPL's customers would be paying all their

associated costs. This avoided cost is clearly a Project benefit properly included, along with other savings and project costs, in the calculation of Actual Net Savings for the Project. However, FPL's recovery of 2/3 of Actual Net Savings as additional depreciation of the 500 kV Project in no way represents FPL earning a return on units not built; it is the approved method of accelerating the recovery of the investment in the 500 kV Project under the Oil Backout Rule. Moreover, as contemplated by the Oil Backout Rule, the accelerated depreciation advances the date that recovery of a return on the investment will cease.

FIPUG's Count IV, that FPL evades regulatory scrutiny through the Oil Backout Cost Recovery Factor, is a gross misstatement of fact. FPL's Oil Backout Project has regularly been reviewed by the Commission every six months since approval in 1982. There have been other reviews as well. FPL separately accounts for the Project as required by Commission rule. Consistent with the Oil Backout Rule, the Commission's treatment of Oil Backout Project revenue requirements in FPL's last rate case, and the Commission's Rule 25-6.024 (1)(b) regarding Rate of Return Reports, FPL has excluded the Project's rate base, revenues, expenses and capital costs from its Rate of Return Reports. Finally, because FPL recovers only the actual tax expense for the Project through the Factor at the current income tax rate, there are no project tax savings; therefore, no additional tax savings refund is warranted.

As a matter of law, FIPUG's relief cannot be granted. Periodic revisitation of qualification under the rule is not

permissible. Order No. 11599 at 1. Cessation of oil backout recovery is inconsistent with Section (4)(d) of Rule 25-17.016 as well as a clearly articulated Commission intent that lower than projected oil prices would not be the basis for disqualifying a project. A redetermination of a Project's eligibility for recovery seven years after the initial qualification determination is barred by the Doctrine of Administrative Finality. It is also proscribed exercise of hindsight. FIPUG's attack on the energy based oil backout charge is also barred by the Doctrine of Administrative Finality, and it is inconsistent with Section (4)(e) of Rule 25-17.016.

FIPUG has waived its right to contest the use of the Martin units to calculate capacity deferral benefits to be used in computing Actual Net Savings. This issue was raised by FPL testimony in no less than three Oil Backout proceedings to which FIPUG was a party without FIPUG contesting it. Their belated protest is untimely, and under Rule 25-22.038(5)(b) they have waived the issue due to their lack of diligence. It is also an untimely request for reconsideration precluded by Rule 25-22.060. Moreover, the refund requested would constitute unlawful, retroactive ratemaking. Finally, the Oil Backout Project has separate accounting by rule; because the Factor only recovers actual tax expense on the Project at current tax rates, there are no oil backout tax savings to be refunded.

FLORIDA POWER & LIGHT COMPANY'S POSITIONS ON THE ISSUES

In this Posthearing Statement Florida Power & Light Company has explicitly stated its position only on the remaining issues in this case. At the hearing in this matter, the Commission granted an FPL Motion to Dismiss the portion of FIPUG's case regarding the continued qualification of FPL's Oil Backout Project and the continuation of FPL's Oil Backout Cost Recovery Factor. Tr. 226. In granting FPL's Motion, the Commission dropped from consideration the following issues identified in the Prehearing Order: 1, 3, 7, 8, 9, 10, 14, 17, 22, 23, 24, and 25. Tr. 217-226. In addition, it does not appear that there was a specific ruling on Issue 20. Therefore, FPL has stated a position in its Posthearing Statement on the following issues which appear to be still contested in this proceeding: 2, 5, 6, 11, 12, 13, 16, 18, 19, 20, 21, 26, 27, 28, 29, and 30. The parties are in agreement on Issues 4 and 15, as noted at the hearing, so they are not addressed in the Brief. While FPL has not restated its position on the issues dropped by the Commission at the hearing, its positions as stated in the Prehearing Order on those issues and the stipulated issues are accurate and remain FPL's position if for any reason those issues are considered.

ISSUES OF FACT

2. ISSUE: Should FPL be required to refund past collected [oil] backout revenues associated with accelerated depreciation? (FIPUG)

FPL POSITION: No. FIPUG has intentionally misrepresented the nature of the revenues FPL is recovering through the Oil Backout Cost Recovery Factor and taking as accelerated depreciation. The only cost FPL is recovering through accelerated depreciation is FPL's investment in the 500 kV Project. FPL has not and is not "collecting ... costs of the deferred unit" nor is it "collecting for capacity which has not been built" and is "not 'used and useful'". Tr. 389-93 (Waters).

The Project has produced actual net savings since 1987. Consistent with the Oil Backout Rule and pursuant to Commission approval, FPL has been collecting revenues through the Factor and taking as accelerated depreciation an amount equal to two-thirds of the Project's actual net savings. In calculating actual net savings, FPL has recognized, as one benefit of several, the Project's capacity deferral benefits associated with the Project deferring the construction of Martin Coal Unit Nos. 3 and 4. Without the Project these units would have been in-service in June, 1987 and December, 1988, respectively. Consequently, it is entirely appropriate to recognize the savings associated with not having to build these units in calculating the Project's actual net savings. Tr. 352-355 (Waters).

FPL's calculation of the capacity deferral benefits for the Martin units is reasonable. FPL updated its capital costs and reflected lower actual escalation rates. It used the original in-service dates because FPL's 1982 forecasted load for 1987 and 1988 was accurate, and without the coal by wire purchases this capacity would have been needed as projected. Tr. 395-402 (Waters).

FIPUG's attempt to question FPL's capacity deferral benefits is untimely and wholly speculative. This Commission, in Order 11537, held open the issue of the proper cost parameters. However, the issue was held open until "such time as the deferred units would have come on line, absent the oil backout project, i.e., 1987". FPL addressed the issue in its testimony then as instructed, and the Commission approved FPL's cost parameters. FIPUG chose to waive the issue and should not be allowed to resurrect it. Tr. 352-55 (Waters).

FPL's recovery of accelerated depreciation on the Project is consistent with the Oil Backout Rule and prior Commission orders. It reflects that the Project has produced substantial actual net savings. Since the Project's full depreciation in August 1989, all the Project's actual net savings have flowed to FPL's customers. No refund is warranted.

FPL's position on the absence of either an evidentiary or legal basis to grant FIPUG's request for a refund is developed more fully in the analysis of issue III in FPL's Brief, which is incorporated herein by reference.

5. ISSUE: Has the time come to require FPL to collect the capacity charges for the Southern System UPS charges through base rate mechanisms? (FIPUG)

FPL POSITION: No. FIPUG has failed to establish why the current treatment of UPS capacity charges is improper. FPL is using the Project and UPS purchases exactly in the fashion originally envisioned. Tr. 412 (Waters). In the original oil backout cost recovery proceeding, the Commission opted to permit recovery of the UPS capacity charges through the Oil Backout Factor. Order No. 11210 at 8, 9 (Tab I). FIPUG has provided no basis for the Commission to reconsider that decision.

Since the Commission's initial consideration of FPL's Oil Backout Project, the UPS capacity payments have been treated as a Project cost. In Order No. 11217, the final order in Project qualification, the UPS purchases were described as part of the FPL's Oil Backout Project. Order No. 11217 at 2. In computing Oil Backout Project fuel savings and the Oil Backout Project's expected net savings, the Commission recognized the cost to be incurred by FPL under the UPS contracts. Order No. 11217 at 3-5, 7 (Tab G).

In approving initial cost recovery for FPL's Oil Backout Project, the Commission also treated the costs incident to the UPS contracts as a part of the Project's costs. In addressing whether to allow recovery of UPS capacity and wheeling charges to be recovered through the Oil Backout Cost Recovery Factor, the Commission stated:

> FPL has requested that it be allowed to recover through the Oil Backout Cost Recovery Factor the capacity and wheeling charges paid to the Southern Company for the purchase of coal by wire. We find that such recovery is appropriate.
>
> The primary purpose of the 500 kV Transmission Project, as determined in the qualification

> hearing, is economic oil backout. Savings associated with importation of coal by wire over the 500 kV Transmission Project could not be obtained without paying capacity and wheeling charges to the Southern Company. Hence, capacity and wheeling charges should be collected through either the Fuel Adjustment Factor or the Oil Backout Cost Recovery Factor. Regardless of whether capacity and wheeling charges are collected through Fuel Adjustment Factor or the Oil Backout Cost Recovery Factor, total revenues collected by the Company will be the same. We find that the capacity and wheeling charges should be collected through the Oil Backout Cost Recovery Factor to reduce confusion and to facilitate the review of costs being recovered by the Company.

Order No. 11210 at 9 (Tab I).

In this case FIPUG seeks a reversal of this Commission determination. It argues that capacity costs under the UPS contract are not a cost properly recovered under Section (4)(a) of the Oil Backout Rule. However, the testimony in this case by Mr. Waters is that recovery of the UPS capacity charges through the Oil Backout Cost Recovery Factor is consistent with Section (4)(a) of the Rule. Tr. 448-49 (Waters). Mr. Waters testified that he believed the Commission had treated the UPS capacity charges as an O&M expense for purposes of applying Section (4)(a) of the Oil Backout Rule. Id. He went on to testify that under Section (4)(c) of the Rule, even upon full depreciation of a qualified oil backout project continued recovery of the capacity charges through an oil backout cost recovery factor would be appropriate because such charges would constitute the oil, non-oil operating and maintenance expense differential. Tr. 450 (Waters). Mr. Waters went on to testify that he did not believe that normally firm capacity payments would be treated as an O&M expense (Tr. 452-53); however, on redirect Mr. Waters testified that he did not know where purchased power costs were recorded in the Uniform System of Accounts. Tr. 474-75. Of course, this Commission knows that under the Uniform System of Accounts all purchased power costs are recorded in Account 555, which is an operation and maintenance expense account.

The evidence in this case shows that the Commission has historically treated the UPS capacity payments as an appropriate cost to be recovered through the Oil Backout Cost Recovery Factor, that the treatment of the UPS capacity charges as an operating and maintenance expense of the Project is appropriate and consistent with Section (4)(a) of the Rule,

and that under Subsection (4)(c) of the Rule continued recovery of those Project O&M expenses, even after the depreciable portion of the Project has been fully depreciated, is appropriate. Moreover, in FPL's most recent rate case, FPL requested to be able to recover the UPS capacity charges in base rates. The Commission specifically declined to include the UPS capacity costs in base rates and reasserted its original decision that the UPS capacity costs should be recovered through the Oil Backout Cost Recovery Factor. Order No. 13537 at 60 (Tab L).

In light of the evidence in this case, it is clear that the time has not come to move the UPS capacity charges from the Oil Backout Cost Recovery Factor to FPL's base rates. Perhaps that should be done in FPL's next rate case; it clearly should not be done without an adjustment to base rates as is envisioned in Subsections (4)(c) and (d) of the Oil Backout Rule.

6. ISSUE: Is FPL justified in charging a 15.6% return on the equity portion of its capital invested in the 500 kV transmission lines? (FIPUG)

FPL POSITION: Yes. The Commission has the long standing practice of authorizing FPL to earn on its oil backout investment at the rate of return on equity authorized by the Commission in FPL's most recent rate case. This practice was initiated in FPL's initial oil backout cost recovery proceeding and has been followed in the thirteen cost recovery proceedings since then.

The practice of authorizing FPL to earn its authorized return on equity on its oil backout investment was premised on an agreement by all of the parties to the original oil backout cost proceeding. Tr. 319 (Babka). FIPUG, Public Counsel and Staff were all parties to that proceeding and took the position that the return on equity to be earned on a capital invested in FPL's oil backout project should be the rate of return on equity authorized by the Commission in FPL's most recent rate case. Id. Initially, FPL argued that its actual cost of equity was higher than its otherwise authorized return on equity and that the higher, actual cost of equity should be used. Id. However, FPL ultimately acquiesced to the position of the other parties and agreed to a return on equity on its oil backout project equal to its rate of return on equity authorized in its most recent rate case. Id.

There is no evidence in the record currently before the Commission which develops a cost of equity for FPL. Mr. Pollock is not a cost of capital expert, and he did not profess in his testimony to be establishing FPL's cost of equity. Tr. 79 (Pollock). As this Commission knows, the cost

of equity for FPL is market determined rate and it cannot be set by mere reference to authorized rates of return on equity.

In the absence of proof of a cost of equity other than the 15.6% authorized in FPL's last rate case, the Commission should find that FPL has been justified in charging a 15.6% return on the equity portion of its capital invested in the oil backout transmission project, since 15.6% is the midpoint of the equity rate of return authorized in FPL's last rate case and the Commission has consistently applied the midpoint of the authorized range as the appropriate return on equity in oil backout proceedings. This Commission practice of using the midpoint of the authorized rate of return on equity has a compelling rationale: it avoids the Commission having to entertain evidence and make a cost of equity determination during each and every oil backout proceeding.

This issue is discussed in greater length in FPL's Brief, where FPL also addresses the legal impediments to an attempt to retroactively change the authorized rate of return on equity for the Oil Backout Project in prior recovery periods.

11. ISSUE: Were the Martin Coal Units 3 and 4 deferred as a result of the Project and the original UPS purchases? (FPL)

FPL POSITION: Yes, and surprisingly, Mr. Waters and Mr. Pollock agree on this issue. Despite all his protestations in his direct testimony and his eleventh hour declining load forecast argument in his rebuttal testimony, Mr. Pollock stated in his direct testimony, "As previously noted, the Project has enabled FP&L to import firm coal-by-wire capacity and to defer the construction of the Martin Unit Nos. 3 and 4". Tr. 84 (Pollock). Of course, throughout Mr. Waters' testimony it was maintained that the Martin Coal Units were deferred as a result of the 500 kV transmission project in the original UPS purchases. Tr. 353, 355, 357-61, 394, 396-400, and 410-12.

The removal of the Martin Units from FPL's Generation Expansion Plans from late 1985 onward is irrelevant to this issue. Tr. 356-358 (Waters). The Martin Coal Units indisputably were deferred by the Project and the UPS purchases. Tr. 355, 357 (Waters). Without the Project and the UPS purchases, the Martin Coal Units would have been built. Tr. 358 (Waters). From 1982 through 1988 the Martin Coal Units were the most economical choice to meet capacity needs if the Project had not been built and the UPS purchases had not been made. Tr. 358-362, Tr. 395-398; Ex. No. 209, Doc. No. 3. The deferral of the Martin Units by the Project and subsequent lower oil and gas prices has allowed FPL to plan to employ advanced technologies to meet load growth in the mid-1990s. Tr. 357 (Waters). This is an additional

benefit from the Project originally anticipated but not quantified in Expected Net Savings in the Project qualification proceeding. Tr. 356-57 (Waters).

The testimony is clear in this case that the Martin Coal Units were deferred when the decision was made to stop spending monies on those units. Tr. 362 (Waters). The record is also clear that the decision to construct the Project and enter into the UPS agreement was made in 1981, thereby effectively deferring the Martin Units at that point in time. Tr. 359 (Waters). FIPUG has utterly failed to establish that the Martin Coal Units were not deferred as a result of the Project and original UPS purchases.

12. ISSUE: Are the capacity deferral benefits of the Martin Coal Units appropriately included in the calculation of Actual Net Savings of which two thirds are recovered as additional depreciation on the 500 kV line? (FPL)

FPL POSITION: Yes. As is clearly demonstrated in the testimony of Mr. Waters, the Martin Coal Units were deferred by the 500 kV Project and the UPS purchases. See, FPL Position on Issue 11. In the absence of the Project and the UPS purchases, the Martin Coal Units would have been built and in service by 1987 and 1988. Because these units were deferred, FPL's customers have not had to pay the units' revenue requirements, only UPS capacity payments. In calculating Actual Net Savings, 2/3 of which are recovered through the Factor as additional depreciation on the 500 kV line, it is proper and consistent with the Oil Backout Rule to recognize all Project savings (net fuel savings and capacity deferral savings) and all Project costs (UPS energy and capacity costs as well as foregone Martin fuel savings). Under the Oil Backout Rule, any resulting net savings are to be recovered as additional depreciation on the 500 kV line. FPL is not recovering through the Oil Backout Cost Recovery Factor any return on units it has not built.

This issue is addressed in FPL's Brief in issue III. FPL incorporates that discussion by reference in this position statement.

13. ISSUE: Are there any oil backout Project tax savings due to the change in the federal corporate income tax rate? (FPL)

FPL POSITION: No. Consistent with Subsection (4)(a) of the Oil Backout Rule, FPL has collected only "actual tax expense" through its Oil Backout Cost Recovery Factor. When the corporate income tax rate was lowered, FPL reflected this lower rate in its oil backout filings. Consequently, there

are no oil backout project tax savings. Moreover, as tax savings are defined in the Commission's Tax Savings Rule, Rule 25-14.003, there are no oil backout project tax savings.

This issue is addressed more extensively in issue IV of FPL's Brief. FPL incorporates that discussion by reference in this position statement.

16. ISSUE: Should FPL be required to refund these tax savings to customers? (FIPUG)

FPL POSITION: As framed by FIPUG, this issue assumes there are oil backout tax savings. As previously discussed in Issue 13, there are no oil backout tax savings. FPL has only recovered "actual tax expense" through its Oil Backout Cost Recovery Factor. Therefore, there are no oil backout tax savings to refund.

As FPL notes in issue IV of its Brief, oil backout revenues, expenses and investment should not be recognized in the computation of FPL's tax savings refund. First, there are no oil backout tax savings to refund under either the Oil Backout Rule or the Tax Savings Rule. Second, the Commission has clearly articulated and established the policy of separate accounting for oil backout costs. This is reflected in Section (5) of the Oil Backout Rule as well as the Commission's last rate case order for FPL. Consequently, FPL's and the Commission's omission of the oil backout revenues, expenses and investment in calculating FPL's tax savings refund is consistent with Commission policy and the instruction for the tax savings report forms.

Rather than more fully developing FPL's position in this Posthearing Statement, FPL incorporates by reference in this position statement discussion in issue IV of its Brief.

ISSUES OF LAW

18. ISSUE: As a matter of law, can the Florida Public Service Commission place an accelerated depreciation surcharge on present customers to require them to pay the full cost of transmission facilities which are being used to provide reliability and capacity in three or four years when the facilities will be in use and useful service for more than 25 years? (FIPUG)

FPL POSITION: There is nothing unfair, unreasonably discriminatory or unduly preferential regarding the Oil Backout Rule or its application to FPL. Consequently, the

Commission has no statutory obligation under Section 366.07, Florida Statutes to revise the Oil Backout Cost Recovery Factor. The customers paying revenues which have been taken as accelerated depreciation on FPL's Oil Backout Project have enjoyed significant savings as a result of the Project. The Oil Backout Rule simply authorizes the sharing of those savings until the Project is fully depreciated. Even with allowing FPL to recover revenues and take accelerated depreciation equal to two-thirds of the Project's actual savings, current and past customers have benefited from the Project and are better off than they would have been if the Project had not been built. Indeed, they have paid less than they otherwise would have if the Project had not been built. Now that the depreciable portion of the Project is fully depreciated, customers will benefit even more through reduced revenue requirements on the Project.

As FIPUG has framed this issue, it is a direct challenge to the Oil Backout Rule. It raises the fundamental question of whether the cost recovery authorized in Subsection (4)(a) of the Rule is within the Commission's statutory authority. FIPUG has had no less than eighteen opportunities to raise this fundamental legal question, and its failure to raise this issue in prior proceedings should act as a waiver of any right to raise this issue in this proceeding. The Commission has a statutory obligation to act consistent with its Oil Backout Rule, and under the Oil Backout Rule an accelerated depreciation surcharge to recover the cost of an Oil Backout Project when the Project produces actual net savings to customers is envisioned. As a matter of law, the Florida Public Service Commission must allow accelerated depreciation on an Oil Backout Project if the Project has otherwise satisfied the requirements for cost recovery under the Oil Backout Rule.

FIPUG's waiver of its right to raise this issue in this proceeding requires some detail. FIPUG had no less than 4 opportunities in the original oil backout rule adoption proceeding to raise this fundamental legal issue. It could have challenged the proposed rule as being beyond the Commission's authority. Section 120.54(4)(a), Florida Statutes. FIPUG could have challenged the Commission's authority to adopt this accelerated cost recovery during the rule adoption proceeding. Section 120.54, Florida Statutes. FIPUG could have filed a post rule adoption challenge seeking an administrative determination of the invalidity of the rule on the ground that the rule was an invalid exercise of delegated legislative authority. Section 120.56, Florida Statutes. FIPUG could have appealed the Commission's adoption of the Oil Backout Rule authorizing accelerated project recovery. Section 120.68, Florida Statutes. For reasons known only to FIPUG, FIPUG declined to exercise any of its

procedural avenues to raise this fundamental legal issue when the rule was adopted.

Similarly, FIPUG had the same four opportunities to raise this fundamental legal question when the Oil Backout Rule was amended. The Oil Backout Rule was amended specifically to facilitate the accelerated recovery of Project costs when the Project yielded total net savings to customers. Once again, why FIPUG chose not to raise this fundamental legal issue in any of the four avenues available to it during the rule amendment proceeding is known only to FIPUG.

FIPUG could have also raised this fundamental legal issue to the Commission in FPL's original oil backout qualification proceeding. It chose not to. If FIPUG had raised the issue before the Commission, it could have also raised the issue on appeal.

FIPUG could have raised this fundamental legal issue regarding the Commission's authority to authorize accelerated cost recovery in FPL's initial cost recovery proceeding. In that proceeding FPL sought accelerated cost recovery when the project produced actual net savings. FIPUG chose not to raise that issue before the Commission. If FIPUG had raised the issue before the Commission and failed to prevail, it could have raised the issue to a court.

Finally, in the three oil backout cost recovery proceedings prior to the filing of its Petition in this case, the Commission authorized accelerated Project recovery under the Oil Backout Rule. In each proceeding FIPUG could have raised this basic legal issue. If it had done so and not prevailed, it could have raised the issue on appeal.

As the foregoing discussion discloses, FIPUG has had no less than eighteen potential procedural opportunities to raise this fundamental legal issue. Seven years after the rule has been implemented, seven years after the Commission authorized initial accelerated cost recovery in 1982, and after the Commission had authorized accelerated cost recovery for almost a year and half earlier, FIPUG filed the Petition in this case. Even then FIPUG did not raise in its Petition the fundamental legal issue it raised in the Prehearing Order. Under the circumstances, a finding that FIPUG had waived its right to raise this issue by failing to challenge the rule or appeal the Commission's adoption, amendment or implementation of the rule would be entirely appropriate.

Actually, the Commission is in a position where it must follow its Oil Backout Rule. The Oil Backout Rule clearly authorizes accelerated recovery of an oil backout project in instances where the project produces positive actual net savings. Under

Section 120.68(12)(b), Florida Statutes (1989), it would be reversible error for the Commission to act inconsistently with its Oil Backout Rule and not authorize accelerated recovery of an oil backout project which is clearly producing positive net savings.

19. ISSUE: Is there any legal basis for charging customers costs associated with utility generating plants that have not been built, are not under construction and are not presently projected to be built? (FIPUG)

FPL POSITION: The factual premise underlying this so-called legal issue is totally erroneous and has not been established. FPL's customers are not being charged rates for utility generating plants that have not been built, are not under construction and are not projected to be built. FIPUG's and Mr. Pollock's suggestions to this effect are simply wrong.

As Mr. Waters pointed out in detail in his rebuttal testimony, there is no recovery for costs of unbuilt generating plants through the Oil Backout Cost Recovery Factor. Tr. 389-93. "FPL does not now collect, nor has it ever collected, any of the revenue requirements associated with the deferred coal units. Mr. Pollock's statements are extremely misleading." Tr. 389 (Waters). Mr. Waters went on to explain that consistent with Section (4)(a) of the Oil Backout Rule, "FPL is recovering the cost of the transmission project in the form of additional depreciation, not any revenue requirements of the deferred units. Mr. Pollock's allegation that FPL is recovering the costs of facilities which are not used and useful is totally wrong." Id. The cost of the facilities on which FPL is recovering a return through its Oil Backout Cost Recovery Factor, the 500 kV facilities, are undeniably used and useful and properly subject to recovery under Section 366.06, Florida Statutes.

20. ISSUE: Does collection of capacity charges in excess of fuel savings through a fuel cost recovery charge comply with the law? (FIPUG)

FPL POSITION: FPL is at somewhat of a disadvantage in responding to this issue since FIPUG has not identified the law with which collection of capacity charges through a fuel cost recovery charge fails to comply. Undeniably, the capacity charges that FPL recovers through its Oil Backout Cost Recovery Factor are legitimate costs of service which FPL should be allowed to recover through its rates. This Commission has broad discretion as to the appropriate means of recovery of the legitimate costs of service.

As with most of the questions raised by FIPUG in this

proceeding, the Commission has already addressed this issue. In Order No. 11210 authorizing the initial cost recovery of UPS capacity charges to the fuel cost recovery factor, the Commission found the capacity and wheeling charges under the UPS contracts "should be collected through either the Fuel Adjustment Factor or the Oil Backout Cost Recovery Factor". Order No. 11210 at 9.

To the extent that the legal question attempted to be raised in this issue is one of discrimination, See, FPL's position on Issue 5 and issue II in FPL's Brief. FPL is unaware of any statutory law or case which addresses the question of whether capacity charges in excess of fuel savings through a fuel cost recovery charge is legally permissible. Certainly, there is no statutory law or case law to the effect that such a collection is impermissible.

21. ISSUE: Does Rule 25-17.016(6), F.A.C., require the discontinuance of the OBCRF when the transmission line costs are fully recovered? (FIPUG)

FPL POSITION: No, and this represents a slight modification from FPL's position in its Prehearing Statement because FPL misread FIPUG's issue. FPL does believe that Subsection (6) of the Oil Backout Rule requires termination of the Oil Backout Recovery Factor once the costs of the qualified projects have been completely recovered, and that was the issue to which FPL took a position in its Prehearing Statement. Unfortunately, FIPUG's issue was limited to the full recovery of transmission line costs. As Staff correctly points out, the transmission line itself is only one component of FPL's entire Oil Backout Project. The Oil Backout Cost Recovery Factor should not be terminated until all Project costs are fully recovered.

The depreciable portion of FPL's Project was fully depreciated in August 1989 because of the additional depreciation allowed by the Commission pursuant to the Oil Backout Rule. However, while the depreciable portion of the 500 kV transmission line was fully recovered in August 1989, there continue to be project costs which have not been fully recovered. There continue to be revenue requirements associated with FPL's 500 kV transmission line. They include operating and maintenance expenses, property taxes and a return requirement on non-depreciable land and prepaid Project income taxes. These costs will continue over the life of the Project. Therefore, unless the recovery of oil backout costs is transferred to base rates and new base rates are placed into effect as envisioned in Subsection (4)(d) of the Oil Backout Rule, these revenue requirements are appropriately recovered through the Oil Backout Cost Recovery Factor. In addition, as Mr. Waters testified and has been previously discussed in Issue 5, the

UPS capacity payments are also project O&M costs appropriately recovered through an Oil Backout Cost Recovery Factor. Until those costs as well are transferred to base rates and "new rates are placed into effect", the costs of FPL's qualified Oil Backout Project will not have been recovered. Consequently, under Subsection (6) of the Oil Backout Rule, the Oil Backout Cost Recovery Factor should not terminate.

26. ISSUE: Whether FIPUG's argument that the recovery of oil backout project costs through an energy based charge is unfair and unduly discriminatory is barred by the doctrines of res judicata and administrative finality? (FPL)

FPL POSITION: Yes, as outlined and developed fully in issue II in FPL's Brief. FPL's discussion of this issue in its Brief is incorporated by reference as a part of its position on this issue.

27. ISSUE: Whether FIPUG's requested relief to discontinue recovery of oil backout project costs in an energy based oil backout charge is inconsistent with Rule 25-17.016 and therefore not permitted by Section 120.68(12)(b), Florida Statutes? (FPL)

FPL POSITION: As FIPUG's witness in the original Oil Backout Rule adoption proceeding testified, the Oil Backout Rule envisions recovery of oil backout project costs through an energy based charge. Tab S, Transcript excerpt from Docket No. 810241-EU at 186. Subsection (4)(e) of the Oil Backout Rule requires a utility to estimate for each cost recovery period the kilowatt hour sales in estimating the Oil Backout Cost Recovery Factor. This is a clear indication that the Commission envisioned an energy based oil backout cost recovery charge when it adopted the Oil Backout Rule.

Section 120.68(12)(b) states that a court shall remand any case to an agency if it finds the agency's exercise of discretion to be "inconsistent with an agency rule." Under the present Oil Backout Rule, if the Commission authorizes the recovery of oil backout project costs through an Oil Backout Cost Recovery Factor, it must authorize an energy based oil backout charge. Consequently, FIPUG's requested relief to discontinue recovery of oil backout project costs through an energy based oil backout charge is inconsistent with Rule 25-17.016, and if the Commission were to grant FIPUG's requested relief, it would be grounds for remand under Section 120.68(12)(b), Florida Statutes.

28. ISSUE: Whether FIPUG has waived its ability to challenge or is estopped from challenging the use of the Martin Coal Units in calculating deferred capacity savings to be used in the calculation of Actual Net Savings since they have in three prior proceedings, in which they were a party, failed to raise the issue, not objected to stipulated Factors and failed to request reconsideration? (FPL)

FPL POSITION: Yes. In three oil backout cost recovery proceedings prior to the filing of FIPUG's Petition in this case, FIPUG was a party and failed to challenge the use of the Martin Coal Units in calculating deferred capacity benefits to be used in the calculation of the Project's actual net savings. It failed to raise this issue although FPL had clearly noted in its testimony in each of the proceedings that it was proposing a methodology for the quantification of those capacity deferral benefits. Moreover, FIPUG had notice from a 1982 Order of the Commission that the appropriate parameters for the Martin Coal Units capacity deferral benefits would be considered in 1987 when the units would otherwise come on line.

Commission Rule 25-22.038(5)(b)2 provides that any issues not raised by a party prior to the issuance of prehearing order shall be waived by the party, except for good cause shown. Under this rule provision FIPUG failed to raise issues which should have properly been raised in each of the three cost recovery proceedings. Therefore, they have waived that issue and should not now be allowed to raise it in a separate proceeding.

Similarly, Commission Rule 25-22.060 provides for Motions for Reconsideration. Subsection (1)(d) of the Rule states that failure to file a timely motion for reconsideration shall constitute a waiver of the right to do so. FIPUG's attempt in this proceeding to raise an issue appropriately considered in the three earlier oil backout cost recovery proceedings are nothing more than a belated and untimely Motion for Reconsideration. Under Rule 25-22.060(1)(d) FIPUG should not be entitled to raise these issues and its prior failure to request reconsideration should constitute a waiver.

29. ISSUE: Whether the requested refund of oil backout revenues would constitute illegal retroactive ratemaking? (FPL)

FPL POSITION: Yes. In this case FIPUG seeks a refund of revenues which have already been collected by Florida Power & Light Company. Such a refund would be an effective reduction to the rates FPL previously charged. The Commission has no authority to make retroactive ratemaking orders. City of Miami v. Florida Public Service Commission, 208 So. 2d 249 (Fla. 1968).

30. ISSUE: Whether FIPUG's argument that FPL's cost estimates for the Martin Coal Units are overstated should be heard? (FPL)

FPL POSITION: No. The pleadings of this case properly frame the issues and scope of the controversy. Nowhere in FIPUG's Petition was it alleged that FPL's cost estimates for the Martin Coal Units were overstated. This defect in FIPUG's pleading has been pointed out, and FIPUG has elected not to cure it. Consequently, this argument should not be heard because it is outside the scope of the proceedings, and FPL objected to it being outside the scope of the pleading.

As pointed out in issue III D in FPL's Brief, even if this issue is heard, the record does not support FIPUG's claims. The record shows that the cost estimates used by FPL for the Martin Coal Units are reasonable and representative of what FPL would have spent without its Oil Backout Project.

Respectfully submitted,

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of the Florida Industrial Power Users Group to Discontinue Florida Power & Light Company's Oil Backout Cost Recovery Factor	)))))	Docket No. 890148-EI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of October, 1989, a true and correct copy of Florida Power & Light Company's Posthearing Statement in Docket No. 890148-EI was served by hand delivery* and by U. S. Mail** on the persons listed below. A true and correct copy of Florida Power & Light Company's Brief was served simultaneously.

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