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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

BRIEF OF
FLORIDA POWER & LIGHT COMPANY

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PREFACE

In this Brief there are a number of short citation forms employed. Those forms are explained in this Preface.

References to the transcript of this proceeding are made with the symbol "Tr." with the appropriate page reference following. In instances where the citation is a separate sentence and the sentence being cited does not attribute a statement to a witness, the name of the witness making the statement follows the page reference in the following form: "Tr. 352 (Waters)". When the witness is mentioned in the preceding sentence, there is no parenthetical reference to the witness.

References to exhibits outside the text of a sentence are made with the symbol "Ex.", with the appropriate exhibit number following. Documents within an exhibit are referred to with the symbol "Ex. , Doc. " with the appropriate exhibit and document numbers filled in.

Finally, throughout the Brief there are references to "Tabs". This refers to the Tabs in the notebook of documents filed by FPL which the Commission ruled at the hearing it would officially notice. Each reference to a "Tab" is followed by a letter that corresponds to the lettered Tab in the notebook.

Throughout the Brief there are references to "FPL" and "FIPUG", which are acronyms for Florida Power & Light Company and the Florida Industrial Power Users Group, respectively. The term "Commission" refers to the Florida Public Service Commission.

I
INTRODUCTION

The remaining issues in this case focus on the Commission's application and implementation of its rules. FIPUG seeks a refund of oil backout revenues and an increase in the refund of tax savings. FIPUG's requests for refunds are premised on its conclusions that the Commission has erred (1) in computing and approving FPL's Oil Backout Cost Recovery Factors in effect since October 1987 and (2) in computing and approving FPL's 1987 and 1988 tax savings refunds.

FIPUG's burden in establishing its claims is weighty. Because FIPUG seeks to reverse prior Commission findings and determinations, FIPUG must overcome a presumption of validity. See, City of Miami v. Florida Public Service Commission, 208 So. 2d 249 (Fla. 1968). Commission orders are entitled to a presumption of validity. Id., City of Tallahassee v. Mann, 411 So. 2d 162 (Fla. 1982).

Rather than focus on any single theory and detail its proof, FIPUG has tried a shotgun approach. It has argued multiple theories and presented numerous allegations, a number of which are contradictory, and several of which are entirely outside of its Petition. Like a shotgun fired at too great a distance, FIPUG's shot has fallen short. FIPUG has failed to develop a record that supports its contentions that there should be refunds. Neither the evidence nor the law in this case warrants a refund.

Each of FIPUG's major contentions remaining after the Commission's dismissal of certain issues at the hearing[1] are addressed in this Brief or FPL's Posthearing Statement. However, to resolve the remaining factual issues in this case, the Commission really needs to resolve only four basic issues, and it is these issues around which FPL's Brief is organized:

I. Is the recovery of oil backout revenues on an energy basis fair?

II. Did FPL's 500 kV Transmission Project and FPL's Unit Power Sales (UPS) Agreement defer Martin Coal Units 3 and 4, which would otherwise have been needed in June 1987 and December 1988?

III. Is FPL's estimate of the avoided costs for the Martin Coal Units 3 and 4 reasonable?

IV. Is separate accounting for oil backout revenues, expenses and investment appropriate and are those oil backout revenues, expenses and investment properly excluded from the computation of FPL's tax savings refund?

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[1] At the hearing, the Commission dismissed the portion of FIPUG's Petition seeking to discontinue FPL's Oil Backout Cost Recovery Factor. FPL renewed its Motion to Dismiss at the hearing arguing that an attempt to revisit project qualification and discontinue an Oil Backout Cost Recovery Factor was inconsistent with prior Commission decisions and the Oil Backout Rule. FPL has also raised a number of other legal arguments justifying dismissal. However, with the granting of FPL's motion for summary disposition, the Commission also dropped the issues in which FPL raised those arguments.

These issues are not new. They have been addressed previously by the Commission in oil backout and tax savings proceedings, in most instances on more than one occasion. So, in a sense this entire case is essentially an untimely request for rehearing. Nonetheless, there is a much more detailed record in this case, and it unequivocally shows that the Commission has properly resolved these issues previously and that the Commission has correctly implemented its rules regarding oil backout and tax savings. In addition, as FPL addresses later in this Brief and in its Posthearing Statement, there are legal impediments to FIPUG securing the relief it seeks.

Finally, FIPUG's ill-conceived arguments should be rejected as well for policy reasons. The policy of the State of Florida is to economically displace oil fired generation. Sections 366.81-82, Florida Statutes (1989). That policy was implemented by this Commission in its adoption of its Oil Backout Rule, Rule 25-17.016. Order Nos. 10363, 10554 (Tabs B and C). The Oil Backout Rule is an innovative regulatory approach intended to facilitate the development of projects that would economically displace oil by allowing utilities building such projects (1) to recover their costs through a separate adjustment clause and (2) to recover their investment in the projects on an accelerated basis if the projects produced total savings (actual net savings) to ratepayers. The record in this case, as well as the entire seven year track record

of FPL's Oil Backout Project, demonstrates that both the Commission's Oil Backout Rule and FPL's Oil Backout Project have worked as projected.

At every major step along the way, FIPUG has objected. FIPUG opposed the Oil Backout Rule as proposed; FIPUG opposed the amendment to the Oil Backout Rule; FIPUG opposed the qualification of FPL's Project; and FIPUG opposed cost recovery for FPL's Project.

After a seven year hiatus, FIPUG has intensified its opposition. Although FIPUG acknowledges that FPL's Project has produced net fuel savings ($1.3 billion) passed on to ratepayers, Tr. 63, 64, 65 (Pollock), has deferred the construction of Martin Unit Nos. 3 and 4 on FPL's system, Tr. 84, 237 (Pollock), and has also provided other "very real", but unquantified, reliability benefits, Tr. 72 (Pollock), FIPUG nonetheless seeks to terminate FPL's Oil Backout Cost Recovery Factor and to have the Commission refund 280 million dollars. While part of this requested relief has already been denied (the termination of the Factor), the granting of any of the relief sought would be an abandonment of the policy underlying the Oil Backout Rule.

Few experiments in ratemaking work as well as the application of the Oil Backout Rule to FPL. Through May 1989, FPL's customers have enjoyed over 650 million dollars in net fuel savings due to the Project. 351 (Waters); Ex. 208, Doc. 4. Since August of 1987, the total benefits or savings of the Project have far exceeded the costs associated with the Project. Tr. 353 (Waters); Ex. 208, Doc.

4, p. 202. Ev[illegible] after paying revenues equal to two-thirds of the Project's total savings since August 1987 (while FPL was allowed to take those revenues as additional depreciation on its 500 kV Transmission project), FPL's customers have paid less than they otherwise would have without the Project. In addition, FPL's customers, indeed virtually all electricity consumers in Peninsular Florida, have enjoyed increased reliability benefits because of the Project (and most of these benefits have not been quantified in the calculation of Project savings). With the depreciable portion of the Project fully depreciated, FP[illegible]'s customers will receive all Project savings at a reduced cost. Simply stated, this innovative regulatory approach has worked, and it has worked well. Both FPL and its customers have benefited and are better off than they would have been without the Project. In light of this success, a refund would be a repudiation of Commission policy and the Commission's implementation of its Oil Backout Rule. No refund is warranted, because FIPUG's claims are meritless.

II
AN ENERGY BASED OIL BACKOUT COST RECOVERY FACTOR IS APPROPRIATE.

Perhaps the most egregious example of FIPUG raising an issue in this case which has previously been resolved by the Commission is FIPUG's argument that the collection of costs associated with FPL's Oil Backout Project through an energy charge is unwarranted and discriminatory. Tr. 81-87 (Pollock). FIPUG's argument is that FPL's oil backout costs, the 500 kV Transmission Project revenue requirements and the Unit Power Sales ("UPS") capacity costs, serve the same function as other non-nuclear power supply costs and, therefore, are demand related. Id. They maintain that the recovery of these demand related costs through an energy charge is a cost allocation on energy when the cost allocation should be allocated on demand. Consequently, they argue that the Oil Backout Cost Recovery Factor is unduly discriminatory to high load factor customers with high energy usage relative to demand. Tr. 82 (Pollock).

This is not a novel argument. This is at least the seventh time FIPUG has argued to the Commission that the recovery of costs associated with an oil backout project through an energy charge is unfair or discriminatory. As is shown on Appendix A, on each of the six prior occasions the Commission has heard this argument, the Commission has rejected it. Perhaps the Commission's most

extensive statement of its rationale for an energy charge and the most emphatic rejection of FIPUG's and Mr. Pollock's argument is found in the order approving FPL's initial oil backout cost recovery:

> The purpose of the Oil Backout Cost Recovery Rule is to encourage implementation of supply-side oil conservation projects. We have determined that the primary purpose of the transmission project is the displacement of oil fired generation. We have previously determined that conservation measures benefit all customers, and therefore should be collected in like manner from all customers. We find, likewise, that the Oil Backout Cost Recovery revenue be allocated among the customer classes on the basis of KWH sales and should be collected on a cent per KWH basis.
>
> **We find the testimony of Mr. Pollock, who testified on behalf of FIPUG, unpersuasive.** Mr. Pollock contended that Oil Backout Cost Recovery revenue responsibility should be allocated on the basis of demand because the primary purposes of the project are to fulfill a demand function and to improve reliability. **Mr. Pollock's assertion that the project is primarily demand related directly conflicts with our findings.** Additionally, implementation of Mr. Pollock's proposal would create a heavy administrative burden as separate Oil Backout Cost Recovery Factors would have to be calculated and trued-up every six months for each rate schedule. (Emphasis added.)

Order No. 11210 at 9, 10 (Tab I).

FIPUG should be precluded form raising this issue anew. There is no basis for the Commission to change its prior orders rejecting FIPUG's argument. In fact, there are established legal doctrines that limit the Commission's ability to make such changes.

In two prior decisions reviewing Commission orders, the Supreme Court of Florida has articulated what has been commonly referred to as the Doctrine of Administrative Finality. First, in Peoples Gas System, Inc. v. Mason, 187 So. 2d 325, 339 (Fla. 1966) and again in Austin Tupler Trucking, Inc. v. Hawkins, 377 So. 2d 679, 681 (Fla. 1979), the Court observed that, "orders of administrative agencies must eventually pass out of the agency's control and become final....". In the Peoples Gas case, the Court quashed a Commission decision reversing another Commission decision reached four years earlier, and in the Austin Tupler case, the Court found that the expiration of two years was too long to allow the Commission to revisit and reopen a matter previously decided.

In this case, the Commission is being asked to reopen, reconsider and reverse a final Commission order almost seven years old, an order consistent with the Commission's Oil Backout Rule and an order that has been followed by the Commission in FPL's last two rate case orders. The issue of whether an energy based oil backout is unfair or discriminatory was settled seven years ago, and the Commission has been unwavering in FIPUG's subsequent attempts to reverse that determination. See, Appendix A. This issue cries out for the invocation of the Doctrine of Administrative Finality. FIPUG's issue should be put to rest permanently, and FPL should not have to defend against it again.

No doubt, FIPUG will argue there are changed circumstances that warrant revisiting this issue. FIPUG is correct that there is a "changed circumstance" exception to the legal Doctrine of

Administrative Finality, but the evidence in this case shows there are no changed circumstances that make an energy based oil backout charge unfair. In qualifying FPL's Project and allowing FPL to recover oil backout costs, the Commission considered the first ten years of the Project's life. Rule 25-17.016, Florida Administrative Code; Order 11210 (Tab I); Order 11217 (Tab G). Just as he does now, Mr. Pollock argued seven years ago that the Project was demand related, that over the life of the Project fuel savings would diminish and that the Project would be used to meet demand. (Tab S, Transcript Excerpt of Docket No. 820001-EU at 492, 489). Indeed, FPL's evidence before the Commission seven years ago was that the Project would produce significant net fuel savings in the Project's initial years and that by 1989 when both Martin units would otherwise have been in service, fuel savings would diminish but capacity deferral benefits would increase. Tr. 381, 409 (Waters); Ex. 208, Doc. 3, p. 2 of 2. That is exactly what has happened. Tr. 408-09 (Waters); Ex. 208. Doc. 4, p. 2 of 2.

The Commission's response to the evidence seven years ago is equally warranted today. Conservation measures still benefit all customers and are still collected in a like manner from all customers. The primary purpose of the Project over its first ten years has been to economically displace oil, (Tr. 350-51, 375 (Waters); Ex. 208, Doc. 4, p. 1 of 2) not to fulfill a demand function. The operation of the Project has resulted in over $650 million dollars in net fuel savings that have been passed on to customers. Id. (Of course, high load factor customers received

a relatively high share of such savings because they are passed through by lower kwh fuel charges.) The Commission's rationales for an energy based oil backout charge articulated seven years ago in Order No. 11210 still ring true today. There are no changed circumstances that would justify the Commission not invoking the Doctrine of Administrative Finality and finally putting FIPUG's hackneyed issue to rest.

In addition to the Doctrine of Administrative Finality, there is another legal argument that precludes changing the means of recovery within the Oil Backout Cost Recovery Factor from an energy based to a demand based charge. As FIPUG's witness in the original oil backout rule adoption proceeding, Mr. Harold Cook, observed, the Oil Backout Rule envisions a cents per kilowatt hour charge. (Tab S, Transcript excerpt from Docket No. 810241-EU at 186.) That is why Subsection (4)(e) of Rule 25-17.016 specifies that the Oil Backout Cost Recovery Factor is to be estimated in conjunction with the Fuel and Purchased Power Cost Recovery Clause and why an estimate of kilowatt hour sales is required. Consequently, an Oil Backout Factor using a demand charge would be inconsistent with the Oil Backout Rule and precluded by Section 120.68(12)(b), Florida Statutes (1989). So as long as oil backout costs are recovered through an Oil Backout Cost Recovery Factor, the charge must be on an energy basis.

Of course, if oil backout cost recovery were moved to base rates, the costs could be recovered differently, and there are cost of service rationales for either demand or energy based recovery.

Mr. Pollock outlines the demand based recovery argument. The Commission has articulated energy based recovery rationales for these or similar types of costs: Order 11437 at 43 (Tab K), (oil backout costs to be recovered in a base rate energy charge); Order No. 12348 at 12, 13 (St. Lucie 2 costs to be recovered primarily through a base rate energy charge); Order No. 13537 (TECO power purchases by FPL to be recovered through a base rate energy charge.)

FPL's position is that this issue should not be heard. If it is heard and the recovery of oil backout costs is to stay in the Oil Backout Cost Recovery Factor, that Factor must be energy based. If oil backout costs are moved to base rates through a base rate adjustment, there are reasonable cost of service arguments for either an energy or demand based charge.

III
FPL'S ACCELERATED RECOVERY OF ITS 500 KV TRANSMISSION LINE INVESTMENT IS CONSISTENT WITH THE OIL BACKOUT RULE, AND FIPUG HAS FAILED TO JUSTIFY A REFUND

The primary thrust of the remaining part of FIPUG's case focuses on whether the Commission erred in Order Nos. 18136, 19042, 20133 and 20966. In those orders Oil Backout Cost Recovery Factors were approved that allowed FPL to recover revenues equal to two-thirds of the actual net savings of FPL's Oil Backout Project and apply the revenues as additional depreciation on FPL's 500 kV Transmission project. FIPUG argues that the Commission erred in either recognizing or quantifying the capacity deferral benefits used in computing the Project's actual net savings. One of several Project benefits used in the computation of actual net savings since June 1987 has been the avoided costs of the Martin Coal Units 3 and 4, which were deferred by the construction of the 500 kV project and the UPS purchases. Tr. 352-53, 391-94 (Waters).

FIPUG's theories challenging the Oil Backout Project's capacity deferral benefits have evolved creatively during this case. Tr. 402-03 (Waters). The theory in FIPUG's Petition was that the Martin units had been dropped from FPL's generation plan, were fictional and could not be used to quantify capacity deferral benefits. FIPUG Petition at 9-12. Subsequent to its Petition, FIPUG offered three other theories in Mr. Pollock's testimony, challenging the Commission's recognition of the Project's capacity deferral benefits. Of course, these three theories are outside of

FIPUG's Petition, but the evidence in the record refutes each theory anyway. However, before addressing why each of FIPUG's multiple theories fails, it is helpful to review briefly the applicable provisions of the Oil Backout Rule under which the Commission has authorized FPL to collect two-thirds of the Project's total savings and use them to accelerate the recovery of FPL's 500 kV Transmission Project.

A. FPL's Accelerated Recovery Of Its 500 kV Line Is Contemplated By The Oil Backout Rule.

Section (4)(a) of Rule 25-17.016 outlines the revenues to be recovered through the Oil Backout Cost Recovery Factor. Tr. 352, 390 (Waters). They are Project revenue requirements (depreciation, cost of capital, actual tax expense and O&M expenses) "plus two-thirds of the actual net savings associated with the Project (if positive) to be applied as additional depreciation." "Net savings" include, among other specifically enumerated items, "any other benefits specifically conferred as a result of the proposed oil backout project...." Rule 25-17.016(1)(c), Florida Administrative Code. Early in its life, the Oil Backout Rule amended specifically to allow the recognition of all Project costs and benefits in the computation of net savings. <u>See</u> Order Nos. 10932, 11188 (Tabs D and E, respectively); Order No. 11217 at 3 (Tab G).

Initially, for a brief time in 1982, and again beginning in August 1987, the Commission has approved FPL's recovery through the Oil Backout Cost Recovery Factor of two-thirds of FPL's Oil Backout

Project's actual net savings. Tr. 392 (Waters), 308 (Babka).[2/] The event that warranted FPL being able to claim positive net savings for the Project in 1987 was the recognition by the Commission that the Project had resulted in the deferral of Martin Coal Unit No. 3 in June 1987. Tr. 353 (Waters). FPL first noted in its January 1987 testimony regarding the April through September 1987 recovery period that the Project would begin producing capacity deferral benefits in June 1987. Id. In its filing for the October 1987 through March 1988 recovery period, FPL not only specifically addressed in its prefiled testimony that it was proposing to recover two-thirds of the Project's actual net savings as oil backout revenues, but also presented the methodology and assumptions for its calculation of the Martin capacity deferral benefits used in quantifying actual net savings. Tr. 354 (Waters).

FPL's recovery of two-thirds of the Project's actual net savings, including capacity deferral benefits, was entirely consistent with Sections (4)(a) and (1)(c) of the Oil Backout Rule. Tr. 352, 391 (Waters). FPL's initiation of that recovery was also consistent with the Commission's 1982 directive in FPL's Oil

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2/ While Mr. Babka's testimony is accurate, it is not complete. In June 1987 FPL began showing capacity deferral benefits due to the deferral of Martin Unit 3. It was not until August 1987 that cumulative net savings were first realized. These net savings were included in the true-up for the April through September 1987 recovery period. This true-up went into the calculation of the Factor for the October 1987 through March 1988 recovery period. So, FPL's initial Oil Backout Cost Recovery Factor reflecting the recovery of two-thirds net savings did not become effective until October 1, 1987, but it allowed FPL recovery back to August 1, 1987.

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Backout Project qualification proceeding that the proper measure of savings to be recovered was to be determined, " at such time as the deferred units would have come on-line, absent the Oil Backout Project, i.e., 1987" Order No. 11537 at 2 (Tab H); Tr. 354 (Waters). FPL properly raised this matter in its 1987 and 1988 oil backout filings by specifically addressing the computation and recognition of the Project's capacity deferral benefits, and no party (including FIPuG and Public Counsel) expressed opposition. Having reviewed the uncontroverted evidence, the Commission appropriately recognized the Project's capacity deferral benefits in approving FPL's Oil Backout Factors. Tr. 352-55 (Waters).

B. The Capacity Deferral Benefits Of FPL's Oil Backout Project Are Not Based Upon Fictional Units.

FIPUG's initial argument challenging the computation of the Project's actual net savings is that the capacity deferral benefits in the actual net savings calculation are wrong because they are premised on the Martin Coal Units 3 and 4, and those units are "fictional" or "mythical" because they had been dropped from FPL's generation expansion plans after the Oil Backout Project was approved. FIPUG Petition at 9-12; Tr. 87-92 (Pollock). Intertwined in this argument were allegations by Mr. Pollock that: (1) the Martin coal Units had been supplanted by other, lower costs options in plans subsequent to 1982, Tr. 88-90; (2) that the Martin units had not and would not likely be built and rates cannot be set on units not used and useful, Id.; and (3) that changed

circumstances warranted revisiting whether the Martin units should be used to calculate the Project's capacity deferral benefits. Tr. 91.

Mr. Waters, FPL's Manager of Power Supply Planning, completely refuted FIPUG's fictional unit allegation and Mr. Pollock's arguments that the Martin Coal Units should not be used to calculate the Project's capacity deferral benefits. Tr. 355-62, 394-401. He established that the Martin Coal Units were identified by the Commission in the qualification proceeding as the units which would have been required without FPL's Oil Backout Project and their deferral was the basis for FIPUG's and Public Counsel's arguments then that the primary purpose of the Project was to meet load growth. Tr. 355. Mr. Waters testified that the construction of the 500 kV project and the UPS purchases allowed the Martin units to be deferred into the 1990s, Tr. 355, and that absent the 500 kV project and the UPS purchases, the Martin Coal Units would have been built and in service in 1987 and 1988. Tr. 357-61, 395-98. Mr. Waters also testified that, "the Martin Coal Units were not built due to the commitment to purchase power from the Southern Companies and FPL's ability to move that power over the Project." Tr. 394. He also produced exhibits showing (1) that without the Project, the Martin Coal Units would have been necessary for FPL to have had adequate reserve margins in 1987 and 1988 and (2) that the Martin Coal Units continued to be the most cost effective generating unit alternative to the Project as late as 1985. Tr. 396-98; Ex. 209, Docs. 2 and 3.

In response to FIPUG's argument that the Martin Coal Units were fictional or mythical, Mr. Waters testified that the argument (1) was based on faulty logic and erroneous impressions, and (2) evidenced a misunderstanding of the generation planning process. Tr. 356-58. Mr. Waters also explained that the fact that the Project's deferral of the Martin Coal Units allowed FPL to take advantage of subsequent technological advances was an additional benefit of the Project, not evidence that the Martin Coal Units had not been deferred. Tr. 356-57.

In response to Mr. Pollock's argument that the Martin Coal Units no longer represented the least cost planning alternative so they should not be used to measure capacity deferral benefits, Mr. Waters testified:

> The only way to address this issue is to look at the facts as they existed when the original decisions on the project were made. The deferral of Martin Unit Nos. 3 and 4 occurred when FPL decided to cease spending on the units. While it is true that FPL's generating expansion plans have changed since 1982 and now show combined cycle units as the next planned generating additions, this is a benefit directly attributable to the deferral of the Martin Units, not a reason to assume they were never part of FPL's plans. The advanced technology combined cycle and coal-gasification combined cycle units now part of the FPL Generation Expansion Plans were not available as alternatives to the Martin units. To suggest that the Martin units are fictional or that the Martin units were not deferred because of what FPL currently plans to do would be a gross misapplication of fact.

Tr. 362. He also performed an analysis which unequivocally demonstrated that the Martin Coal Units were the most cost

effective alternatives to meet load requirements in 1987 and 1988 absent the Project and UPS purchases. Tr. 395-98; Ex. 209, Docs. 2, 3.

In response to Mr. Pollock's argument that the Martin Coal Units would likely never be built and were not used and useful, Mr. Waters essentially responded, "that is the point." Tr. 399-400.

> On one point Mr. Pollock and I agree, that the Martin coal units have not been, and may never be, built. This admission in Mr. Pollock's testimony (page 36) is the premise upon which capacity deferral benefits are based; the Martin Coal Units were not built due to the commitment to purchase power from the Southern Companies and FPL's ability to move that power over the Project. The argument that the Martin Coal Units will not be "used and useful" is a very shallow attempt to obscure the fact that the costs which FPL is recovering through additional depreciation are only those associated with [the] 500 kV Transmission Project, which is used and useful by Mr. Pollock's own admission.

Tr. 394-95 (Waters)

In response to Mr. Pollock's changed circumstance argument, Mr. Waters testified that the facts (1) that the Martin Units had not appeared in FPL's generation expansion plans since 1986 and (2) FPL had entered a new UPS Agreement beginning in 1993 were irrelevant. Tr. 410-11. He also stated that Mr. Pollock's changed circumstances argument only clouded the real issues. Tr. 412. As Mr. Waters succinctly observed:

> The only relevant question is what FPL would have built had it not completed the Project and committed to the associated power purchases from the Southern Companies. The answer is undeniably the Martin Coal Units.

Tr. 411.

Mr. Waters refutation of FIPUG's first theory challenging the calculation of actual net savings was thorough and convincing. Mr. Pollock's argument did not withstand critical review.

C. Mr. Pollock's Double Recovery Argument Regarding The Martin Coal Units' Avoided Cost Was Completely Refuted.

Although outside of FIPUG's Petition, Mr. Pollock also raised the argument that the recovery of UPS capacity costs through the Oil Backout Recovery Factor and the recovery of actual net savings which included the avoided costs of the Martin Units was tantamount to a double recovery of capacity costs. Tr. 61, 90 (Pollock). Despite the superficial allure of this argument, Mr.Waters exposed it as grossly inaccurate and misleading. Tr. 389-93.

Mr. Waters clearly established that there is no recovery of the costs of the Martin units through the Oil Backout Cost Recovery Factor. Tr. 389. The only cost being recovered as accelerated depreciation is investment in the 500 kV Project. Tr. 389, 392-93, (Waters). Mr. Waters' conclusions adequately summarize the utter invalidity of Mr. Pollock's double recovery argument:

> Q. What conclusions can be drawn concerning Mr. Pollock's allegations of double recovery of capacity costs (pages 8 and 37)?

> A. His arguments are incorrect and very misleading. FPL recovers UPS capacity charges and the revenue requirements associated with the 500 kV project through the Factor. Additional cost recovery represents only FPL's two-thirds share of actual net savings provided by the Project, which is applied as additional depreciation on the 500 kV Project. The avoided revenue requirements of the deferred coal units are only one of several elements in the calculation of how much actual net savings will be included as additional depreciation of the Project. It is incorrect and extremely misleading to characterize this additional depreciation of the project as recovery of deferred capacity costs.

Tr. 393 (Waters).

D. FPL's Avoided Cost Estimates For The Martin Coal Units Are Reasonable And Representative Of What FPL Would Have Spent Without Its Oil Backout Project.

While it is only briefly developed in the record, another of FIPUG's theories attacking the Commission's computation of the Project's actual net savings is that FPL's estimate of the Martin Coal Unit's avoided costs are overstated. Initially, it should be noted that argument is also outside the scope of the Petition; however, if it is considered, it cannot withstand scrutiny.

Mr. Pollock briefly addresses the argument at pages 92-94 of the transcript. Mr. Pollock maintains that FPL's decision to use the original cost estimates of constructing Martin Units 3 and 4 adjusted only for the difference in escalation and AFUDC rates has significantly inflated the Project's deferred capacity benefits. Tr. 92. In an attempt to develop his argument, Mr. Pollock sponsors Exhibit 612 in which he compares various construction cost

estimates of pulverized coal units. Tr. 93; Ex. 612. From this comparison Mr. Pollock concludes that FPL's construction cost estimate for the Martin Coal Units is substantially above other contemporaneous direct cost estimates. Tr. 94.

A variation of this overstated cost argument was attempted during cross-examination of Mr. Waters. Counsel for FIPUG attempted to compare the Martin Coal Unit cost estimate with the cost of the St. John's River Power Park Coal Units. Tr. 419-32 (Waters). However, the exercise during Mr. Waters' cross-examination varied from Mr. Pollock's argument in that Mr. Waters was asked to compare total costs, whereas Mr. Pollock only attempted to compare direct costs, costs which supposedly did not reflect construction escalation or AFUDC.

Mr. Waters refuted both of these attempts to establish that the estimates of the Martin Coal Units were unreasonable or overstated. In his rebuttal testimony, Mr. Waters clearly demonstrated the fallacies of Mr. Pollock's comparison in Exhibit 612. Mr. Waters testified that Mr. Pollock's cost comparison had used costs that were not comparable because of the different in-service dates of the units. Tr. 401. Indeed, Mr. Pollock acknowledged this deficiency in his testimony. Tr. 93. Mr. Waters also testified that Mr. Pollock's unit costs were taken out of context. Tr. 401. Perhaps the most damaging deficiency in Mr. Pollock's Exhibit 612 is that the Martin Coal Unit cost estimate reflected in Exhibit 612 included construction escalation rates over the life of the Project whereas the other cost estimates in

Exhibit 612 were "overnight construction costs" that did not include escalation. Id. "This omission alone accounts for the majority of the difference." Id. The costs in Exhibit 612 other than the Martin cost estimates would need to be raised by 25% to make them the same type of cost as the Martin cost estimates. Tr. 402 (Waters). Having demonstrated that Exhibit 612 was of little or no analytical value, Mr. Waters proceeded to testify in regard to the reasonableness of the capital cost estimates for the Martin Units.

Mr. Waters explained the basis for the Martin cost estimates and testified as to their reasonableness. Tr. 402, 466-67. Mr. Waters explained that the construction cost estimate for the Martin Units was based on the original Bechtel, General Electric, and Combustion Engineering estimates reflecting the economic, market and design conditions that existed in the 1979 to 1981 time frame. Id. FPL used those original estimates because FPL had signed contracts with Bechtel, General Electric and Combustion Engineering for Martin Units 3 and 4. Tr. 466 (Waters). To develop its avoided cost estimates of the Martin Coal Unit costs, FPL escalated the original construction cost estimates to reflect actual inflation. Tr. 402 (Waters). These cost estimates were then further escalated to account for AFUDC which would have accumulated

on the units during construction.[3/]

It was Mr. Waters' testimony that FPL's use of actual construction escalation rates and actual cost of capital in the computation of AFUDC instead of the original 1982 estimates for these components "significantly lowered, the Martin Unit cost estimates." Id. Mr. Waters, a system planner who regularly employs and assesses the validity of generating unit cost estimates, further testified that the resulting Martin cost estimates were "entirely reasonable" and "representative of what the actual cost would have been to construct the units." Tr. 401-02.

3/ At the hearing, Mr. Waters was asked to provide a late filed exhibit showing the computation of the AFUDC rate used to calculate the Martin Coal Unit's total cost estimate. Tr. 463-64. That has been filed and identified as Late Filed Exhibit No. 216. Several observations regarding Late Filed Exhibit No. 216 are in order. First, the capital structure used employs all available sources of capital, including cost free funds related to the Project. Second, the capital structure reflects only capital raised during the construction period; this represents incremental capital and is consistent with Section (3)(b) of the Oil Backout Rule which requires the use of the "incremental cost of capital" in computing the project's net savings. Third, FPL has used the midpoint of FPL's authorized rate of return on equity during the assumed construction periods for Martin 3 (1980-1987) and Martin 4 (1981-1988). Tr. 299 (Babka). The effect on the Martin cost estimates of using a 15.6% return on equity for 1987 and 1988 rather than a lower rate of 13.6% is minimal and would simply result in FPL recovering accelerated depreciation on the Project for a slightly longer period (through September 1989 instead of August 1989). Of course, this longer recovery also means more total recovery because FPL earns a return on its investment in the 500 kV line until it earns a complete return of its investment. So, the use of a 15.6% return on equity in the AFUDC rate used to develop the Martin units' avoided cost estimates rather than a lower equity rate has reduced total customer oil backout revenues.

The preponderance of the evidence on this issue clearly is in FPL's favor. Mr. Pollock admits he is not a system planner (Tr. 227) and his Exhibit 612 has been demonstrated to be worthless (Tr. 401-02, Waters). On the other hand, the Commission has the benefit of the thorough and expert testimony of a system planner, Mr. Waters, showing that the Martin cost estimates are reasonable.

Similarly, Mr. Waters also rejected FIPUG's attempt in cross-examination to suggest that the Martin cost estimates were significantly higher than the actual costs of the St. John's River Power Park Units. (Tr. 419-32). During cross-examination, FIPUG attempted to draw a distinction between the actual costs of the St. John's Units and the projected cost estimates of the Martin Units. Tr. 424, 432 (Waters). Mr. Waters testified that such a comparison was inappropriate for at least three reasons.

First, the St. John's project was a joint project that was financed significantly differently than the Martin Units would have been. Tr. 424 (Waters). The St. John's units were financed with a much higher debt ratio than the Martin Units would have been, and JEA enjoyed a lower (tax free) debt rate than FPL would have been able to use to finance the Project. Id. Consequently, the St. John's financing costs were much lower than FPL's AFUDC costs on the Martin Project would have been. This testimony establishes that any comparison should be made excluding financing costs or AFUDC.

Second, Mr. Waters pointed out that the cost numbers for the St. John's units were "materially different" from the cost estimates for the Martin units because the St. John's cost numbers did not reflect the original unit rating of 550 MW but an uprating to 625 MW. Tr. 426 (Waters). Mr. Waters testified that it would be inappropriate to compare Martin cost estimates on a per kw basis using Martin's original rating of 700 MW to a St. John's cost per kw reflecting an uprating and assume that the Martin units would not have also enjoyed an uprating increase of 10%. Id. Mr. Waters further testified that if a comparison were to be drawn, it would be appropriate to use the original St. John's rating to develop a cost per kw for comparison to the Martin Coal Unit estimates. Tr. 428. Mr. Waters testified that if the comparison between the St. John's unit costs and the Martin cost estimates were done correctly (i.e., the difference in the rating of the two units was accounted for and direct cost estimates without AFUDC or escalation were used), the Martin Coal cost estimates were within 2% of the St. John's costs. Tr. 432, 467-69; Ex. 217. Indeed, that is the conclusion drawn in Exhibit 217.

Third, Mr. Waters testified that the Martin Coal Units were contracted for between 1979 and 1981, immediately before a general decline in the power plant construction market. Tr. 466-67 (Waters). In contrast, the St. John's units were started somewhat later than the Martin contracts were signed, and JEA and FPL were

able to take advantage of a very depressed power plant market due to declining load forecasts and a drop in the number of coal plants being ordered and built. Id.

The overwhelming weight of the evidence on FIPUG's argument that FPL's cost estimates for Martin Units Nos. 3 and 4 are overstated is that FPL's Martin cost estimates are reasonable. Mr. Pollock's meager assertions have been thoroughly refuted by a capable system planner, and the great weight of the evidence is that FPL's Martin cost estimates are reasonable for any measure, particularly when appropriately compared to the cost of the St. John's units.

E. FIPUG's Theory That Reduced Load Forecasts In 1983 Through 1986 Would Have Deferred The Martin Units Anyway Is Totally Speculative And Wholly Unsupported.

FIPUG's final argument challenging the calculation of capacity deferral benefits in the computation of actual net savings arises for the first time in Mr. Pollock's rebuttal testimony. There, Mr. Pollock argues that because of FPL's load forecast reductions in 1983 through 1986, the Martin Coal Units would have been deferred beyond their assumed 1987 and 1988 in-service dates even without the Oil Backout Project. Consequently, so the argument goes, it should not be assumed that the Martin Coal Units were deferred by the 500 kV Transmission Project and the UPS purchases. Tr. 112-17 (Pollock).

Once again, this is an argument that is outside of FIPUG's Petition and should not be considered by the Commission. FPL is particularly prejudiced by FIPUG initially raising this argument on rebuttal, because it afforded Mr. Waters no direct opportunity to address it. Nonetheless, there are a number of parts of the record which refute the argument.

Mr. Pollock's direct testimony rebuts Mr. Pollock's load forecast argument. It is difficult to give much credence to Mr. Pollock's argument that load forecast reductions between 1983 and 1986 deferred Martin Units 3 and 4 when he previously testified in his direct testimony that, "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. Similarly, it is difficult to take Mr. Pollock's rebuttal testimony regarding reduced load forecasts to heart when in his direct testimony Mr. Pollock testified there had not been, "any significant difference between actual and projected load growth." Tr. 66.

Mr. Pollock's unequivocal testimony that Martin Units 3 and 4 were deferred by the Oil Backout Project (Tr. 84, 237) is confirmed by Mr. Waters' testimony. Mr. Waters testified that the project and the UPS purchases deferred the Martin Coal Units, that the Martin Coal Units were deferred at the time FPL made the decision to discontinue expenditures (when FPL decided to escalate the construction of the Project and enter the UPS contracts) and

that absent the Project and the UPS contracts the Martin Units would have been built and in service in 1987 and 1988. Tr. 353-55, 359-62, 394-98, 411-12 (Waters).

Another problem with Mr. Pollock's load forecast argument is that Mr. Pollock failed to recognize that the drop in FPL's load forecasts in 1983 through 1986 were occasioned by conservation induced by programs approved by the Florida Public Service Commission. Tr. 231-37; Exs. 615, 616. The conservation reductions reflected in FPL's 1983 through 1986 load forecasts were due in part to conservation programs approved by this Commission. Id. As this Commission is aware, approval of those conservation programs was premised upon a 1992 coal unit. That 1992 coal unit corresponds to the assumption underlying FPL's Oil Backout Project capacity deferral benefits - that Martin Unit 3 would be deferred from 1987 to 1992. Tr. 355, 357 (Waters).

Yet another part of the record demonstrates that even with lower load forecasts in the 1983 - 1986 time frame, it would not have been cost effective for FPL to defer the construction of coal units rather than complete construction. Mr. Waters testified that during the 1983 - 1984 time frame, when Mr. Pollock noted FPL's load forecasts were declining, FPL had performed an analysis for the Commission to consider whether deferral of a coal fired unit already under construction would be cost effective. Tr. 470-72. The analysis looked at the St. John's River Power Park units which had the same projected in service dates as the Martin units, 1987 and 1988. Tr. 470 (Waters). The analysis, which was admitted into

evidence as Exhibit 218, shows that the decision to defer construction of a unit already under construction because of the reduced load forecasts in 1984 time frame would not have been a good one. Tr. 472 (Waters).

As Mr. Waters pointed out, the deferral of a unit already under construction results in significant costs which are not present when a unit's construction has not begun. Id. For instance, there are expenses to be incurred after the delay and during the deferral as well as AFUDC which would accumulate. Thus, Mr. Waters testified that rather than simply looking at whether load forecasts have dropped to make a decision as to whether a unit should be delayed or deferred, a system planner would have to look at what the costs associated with the deferral would be. Tr. 472 (Waters).

Still another part of the record shows that in the absence of the Project and UPS contracts, Martin Units 3 and 4 would have been absolutely essential to meet load requirements and provide FPL an adequate reserve margin for actual loads experienced in 1987 and 1988. Completing an analysis begun by Mr. Pollock, Mr. Waters' Exhibit 209, Document No. 2 showed that in the absence of the Project and the Martin Coal Units, FPL's reserve margins would have been inadequate in 1987 and 1988. Tr. 396 (Waters).

Mr. Pollock can endlessly speculate as to what, if any, impact the reduced load forecasts between 1983 and 1986 would have had on the deferral of the Martin Units if there had been no Oil Backout Project. However, such speculation is pointless and of no value.

As Mr. Pollock, himself, pointed out, "rate-making should not engage in such endless speculations about what the future may have turned out to be if a different decision had been made." Tr. 95.

As the preceding discussion demonstrates, the record overwhelmingly rejects Mr. Pollock's and FIPUG's eleventh hour attempt to support their sagging case by invoking the "reduced load forecasts theory" well after the Martin Units were actually deferred. As was typically the case in this proceeding, Mr. Waters accurately summarized Mr. Pollock's multiple and meritless attempts to attack the computation of the capacity deferral benefits used in the computation of FPL's actual net savings:

> I believe it is clear that Mr. Pollock, understanding the weakness of his position, has attempted to attack the capacity deferral issue from several angles. He has claimed the units were not deferred because FPL has never built them. If we do not accept this position, then he would have us believe that a different type of capacity, i.e, combined cycle units, has been deferred. If we do not accept this position, then he would like us to believe that the capacity costs of the Martin coal units have been inflated. If we accept none of his arguments that capacity was not deferred or his argument that deferred capacity costs are incorrectly calculated, then he would like to suggest that since capacity really was deferred, this capacity deferral was really the primary purpose of the Project after all, rather than economic oil displacement. He has certainly tried to cover all the bases.
>
> The facts are that the Martin coal units are properly used in the calculation of actual net savings. The estimate of Martin coal unit costs is reasonable. FPL is not recovering any costs of the deferred units. The only costs FPL has recovered through additional depreciation are costs of the 500 kV Project, and even that recovery will soon end when the Project investment is fully depreciated.

> All of these issues have been addressed in previous FPL Oil Backout filings, and FIPUG raised no objection. There is no basis for its objection now.

Tr. 402-03.

F. FIPUG's Request For A Refund Of Revenues Equal To Two-Thirds Of Calculated Actual Net Savings Is Also Legally Infirm.

In addition to its failure to establish a factual basis for a refund, FIPUG has waived its right to challenge computation of actual net savings and capacity deferral benefits. Since 1982 FIPUG has had notice that the proper calculation of capacity deferral benefits would be subject to Commission determination in 1987. In Order No. 11537, denying Public Counsel's and FIPUG's Motions for Reconsideration in FPL's Oil Backout Project Qualification proceeding, the Commission stated:

> As we indicated in Order No. 11210, issued in the Fuel Adjustment Docket (Docket No. 820001-EU), the proper measure of savings associated with deferred capacity, 2/3 of which may be recovered through an Oil Backout Cost Recovery Factor, and applied as accelerated depreciation to project costs, will **be determined at such time as the deferred units would have come on line, absent the oil backout project, i.e., 1987.** (Emphasis added.)

Order 11537 at 2.

Consistent with this explicit instruction of the Commission, FPL addressed in its prefiled testimony in all four of its oil backout proceedings in 1987 and 1988 the calculation and proper measure of savings associated with deferred capacity. Tr. 353-55 (Waters). Beginning with the Oil Backout Cost Recovery Factor

approved for October 1987, the Factor included actual net savings which reflected FPL's methodology for calculating capacity deferral benefits. Tr. 354 (Waters). All parties to the Oil Backout proceeding were put on notice that these matters were being raised in FPL's testimony. Tr. 354-55 (Waters). Both FIPUG and Public Counsel were parties to those proceedings.

Commission Rule 25-22.038(5)(b)2 provides that any issue not raised by a party prior to the issuance of a prehearing order shall be waived by that party, except for good cause shown. Through its testimony FPL had put Public Counsel and FIPUG on notice that consistent with Order No. 11537 it was seeking a Commission determination of the appropriate methodology for calculating capacity deferral benefits associated with FPL's Oil Backout Project. Both FIPUG and Public Counsel had the opportunity to raise an issue and challenge FPL's methodology. Neither FIPUG nor Public Counsel raised such an issue. Tr. 354-55 (Waters). Under Rule 25-22.038(5)(b)2, both FIPUG and Public Counsel waived their opportunity to raise that issue. This did not happen just once. Three separate oil backout factors allowing FPL to take accelerated depreciation and reflecting capacity deferral benefits of the Oil Backout Project in the calculation of actual net savings were issued without any protests. Tr. 352, 354-55 (Waters). Indeed, several factors were stipulated.

Regardless of why FIPUG failed to raise these issues in those three proceedings, FIPUG clearly waived its right to raise those issues there, and it should not now be allowed to raise them in

this separate proceeding. FIPUG's challenges in this case would have been appropriately raised in the earlier oil backout proceeding and were not. They have been waived.

FIPUG's challenge to the Commission calculation of the capacity deferral benefits recognized in the determination of the Project's actual net savings should also be precluded by the Doctrine of Administrative Finality. Order Nos. 18136, 19042 and 20133 approving Oil Backout Cost Recovery Factors for FPL and allowing recovery of accelerated depreciation on FPL's 500 kV Transmission Project all became final before FIPUG initiated this proceeding. FPL has relied on those orders and collected millions of dollars in revenues and used those funds as accelerated depreciation because the Project produced actual net savings during those recovery periods. Those orders should pass out of the Commission's control and become final. Certainly the revenues collected pursuant to Order No. 18136 for the recovery period October 1987 through April 1988 should be treated as final, since the Commission approved a final true-up for that recovery period prior to FIPUG initiating this proceeding.

Another legal impediment of the Commission granting the refund requested in this proceeding is that it would constitute retroactive ratemaking. The Commission has no authority to make retroactive ratemaking orders. City of Miami v. Florida Public Service Commission, 208 So. 2d 249 (Fla. 1968).

Finally, any refund premised on Mr. Pollock's declining load forecast argument would be an inappropriate and impermissible

exercise of hindsight. The Commission is precluded from making decisions solely with the benefit of hindsight. Florida Power Corp. v. Public Service Commission, 424 So. 2d 745,747 (Fla. 1982). The proper perspective must be the facts and circumstances in place at the time an action or decision is made. Id. The record is clear in this proceeding that the deferral of Martin Units 3 and 4 occurred when FPL decided to discontinue spending monies for those projects. Tr. 362 (Waters). FPL's decision to discontinue spending monies on the Martin Units was made in 1981 when FPL decided to accelerate the construction schedule of the 500 kV project and enter into the UPS contracts. Tr. 359 (Waters). Thus, the consideration of the deferral of the Martin Units must be placed in the context of the circumstances when the deferral actually occurred. To conclude that the units were deferred two to five years later when load forecasts diminished would be an inappropriate exercise in hindsight.

G. Neither The Facts Nor the Law Supports FIPUG's Request For A Refund.

FIPUG has the short end of the law and the facts in this case. FIPUG has failed to establish a legal theory which supports its request for a refund, and it has utterly failed to establish a factual premise which would justify a refund. No refund of FPL's oil backout revenues can be justified in this proceeding.

IV
THERE ARE NO OIL BACKOUT TAX SAVINGS TO BE REFUNDED, AND OIL BACKOUT COSTS ARE APPROPRIATELY ACCOUNTED FOR SEPARATELY FROM OTHER UTILITY ACTIVITIES.

Even though FIPUG's Petition does not seek the relief of a tax savings refund, FIPUG has raised an issue (Issue 16) that poses a question of whether tax savings associated with FPL's Oil Backout Project should be refunded. FPL believes that this issue is inappropriate for consideration by the Commission. First, this issue is entirely outside of the pleadings. Second, FPL's tax savings refund for 1987 is final and should not be disturbed. Third, there are no oil backout tax savings; consequently, neither the Commission's Oil Backout Rule nor its Tax Savings Rule contemplates a tax savings refund when there are no tax savings. Each of these arguments will be addressed in turn.

FIPUG's Petition seeks no relief in regard to the computation of FPL's 1987 or 1988 tax savings or tax saving refunds. The only relief requested in FIPUG's Petition that is even tangentially related to the tax savings computation is Item 6 in FIPUG's prayer for relief, requesting the Commission to "direct FPL to reflect the investment and revenues associated with the 500 KV lines in its surveillance reports." Even if this request for relief is construed most favorably to FIPUG, that relief requested in January 1989 in no way impacts the 1987 or 1988 Surveillance Reports. It certainly has no impact on the tax savings computation or refund for either of the two years. FIPUG's attempt to raise an issue in

the prehearing order (Issue 16) does not salvage this issue. FPL objected to this issue at the hearing and said it did not consider the matter to be an appropriate issue for resolution. Tr. 50. FPL presented no testimony on this issue in part because no relief regarding this issue was requested in FIPUG's Petition. FPL has been guided in its trial preparation by FIPUG's pleading, as incorrect as it is. FPL should not now have to defend issues not raised in FIPUG's Petition.

Another reason Issue 16 is inappropriate is that FPL's 1987 tax savings refund is final. In Order No. 20659 issued on January 25, 1989, the Commission determined FPL's final tax savings refund for 1987. See, Tab O. Order No. 20659 was issued after an evidentiary hearing, and no party has appealed that order or sought reconsideration. Consequently, by operation of law the order has become final. Moreover, at the hearing in Docket No. 880355-EI, it was specifically brought to the Commission's attention that oil backout revenues, expenses and investment were not reflected in the computation of FPL's 1987 tax savings. There is absolutely no basis to disrupt the Commission's final order. Even FIPUG's own witness, Mr. Pollock, testified in this proceeding that FIPUG was not "suggesting that the Commission go back in this proceeding and disturb the findings it had previously made in connection with the income tax savings rule in 1987. No, that is not part of the relief which FIPUG is seeking in its Petition in this docket." Tr. 245. Nonetheless, FIPUG has raised Issue 16, and FPL feels compelled to object in order to preserve its rights.

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Perhaps the most compelling reason that neither the decision in this proceeding nor any determination of oil backout revenue requirements should be considered in an FPL tax savings refund is that under the Oil Backout Rule there are no tax savings to refund. Section (4)(a) of the Oil Backout Rule specifies that the tax expense to be recovered through the Oil Backout Cost Recovery Factor is the "actual tax expense." Consistent with that requirement of the Rule, FPL's Oil Backout Cost Recovery Factors approved by the Commission have reflected FPL's actual tax expenses. When federal corporate income tax rates have changed, FPL's Oil Backout Cost Recovery Factors have changed as well. Therefore, there have never been any oil backout tax savings.

Under the Commission's Tax Savings Rule, Rule 25-14.003, if there are no tax savings, the rule never operates and there is no determination of a utility's earnings or of a refund. The Rule authorizes the refund of "associated revenues". There can be no "associated revenues" as that term is defined under the Tax Savings Rule if there are no tax savings. Since there are no oil backout tax savings, there are no oil backout "associated revenues"; consequently, there can be no oil backout tax savings refund due. When Rule 25-14.003 is properly construed as a rule intended to refund only tax savings, it is clear that oil backout earnings, which include no tax savings, should not be recognized in the computation of a tax savings refund calculation under the Tax Savings Rule.

It is entirely appropriate, indeed it is consistent with Commission policy, not to include oil backout revenues, expenses and investment in the computation of a tax savings refund. It is clearly the Commission's policy to account for oil backout costs separately. Section (5) of the Oil Backout Rule details exacting requirements for the separate accounting of oil backout revenues, expenses and investment. The Commission's policy to separate oil backout revenues, expenses and investment from base rate revenue requirements was clearly articulated in FPL's 1983 rate case as well. There, the Commission required FPL to remove all oil backout revenue requirements from base rates. Order No. 13537 at 60 (Tab L).

It is important to note that the Commission's tax savings report form specifically instructs utilities to include and describe any adjustments necessary "to reflect current Commission policy for periods". <u>See</u>, Tab N. In light of the clearly articulated Commission policy to keep oil backout revenue requirements separate from other revenue requirements, FPL is entirely correct not to include its oil backout revenues, expenses and investment in the determination or calculation of its tax savings refund.

Despite FIPUG's attempt to have the Commission recognize FPL's oil backout revenues, expenses and investment in the calculation of FPL's tax savings refunds, it is clear that such a course of conduct should not be followed for two principal reasons. It is clearly inconsistent with the Commission's policy regarding the

treatment of oil backout revenues, expenses and investment and the Commission's instructions for the tax savings refund calculation. More importantly, oil backout revenues, expenses and investments should not be recognized in the computation of FPL's tax savings refunds because there are no oil backout tax savings which could be refunded.

What FIPUG really seeks is not a tax savings refund but a partial refund of FPL's oil backout return on equity. As this Commission knows, it has already ordered a prospective reduction in FPL's oil backout allowed return on equity. Thus, FIPUG has achieved prospectively what it has indirectly been seeking by requesting a "tax savings refund". However, the Commission should not require a refund of FPL's oil backout return on equity retroactively. Such conduct cannot be justified either under the Tax Savings Rule or upon the record in this case. There is no evidence before the Commission in this proceeding that FPL's earned rate of return on equity for prior recovery periods was too high. Mr. Pollock is not a rate of return expert and has not undertaken to determine FPL's cost of equity. Tr. 79 (Pollock). As this Commission knows, FPL's cost of equity is a market determined rate which cannot be gleaned from allowed returns on equity.

The history of the return on equity authorized for FPL's Oil Backout Project also argues against any attempt to retroactively reduce FPL's earned rate of return. The Commission has consistently used the midpoint of the return on equity authorized in FPL's most recent rate case as the return on equity for FPL's

Oil Backout Cost Recovery Factor. This has been the Commission's practice in fourteen oil backout cost recovery orders issued between 1982 and today. Moreover, it is important to recognize that the practice came about in some measure because FPL acquiesced to the position of all parties, including FIPUG, Public Counsel and Staff, that the return on equity in the oil backout factor should be the return on equity authorized by the Commission in the utility's last rate case. Tr. 319 (Babka).

In the original oil backout qualification proceeding, Mr. Howard argued on behalf of FPL that FPL's cost of equity was higher than its then authorized return on equity. Id. The Commission declined to rule on that issue in the qualification proceeding and deferred it to FPL's original cost recovery proceeding. Order No. 11217 at 9 (Tab G). In the original cost recovery proceeding, Staff and Public Counsel argued that the return on equity authorized on FPL's Oil Backout Project should be the return on equity authorized in FPL's most recent rate case order. Tr. 319 (Babka). At the hearing in that proceeding, FIPUG stated that it agreed with Staff on this issue. Id. Ultimately, before the resolution of the case, FPL relented from its position and agreed to position of the other parties. Consequently, the issue was not specifically addressed in Order No. 11210 and has not been at issue since.

Just as FPL has held to its agreed position over the course

of the last seven years, FIPUG should be held to its agreed position. There is no basis to warrant FIPUG's sought after retroactive reduction of FPL's oil backout return on equity. There is no evidence to support a lower of cost of equity for FPL for prior recovery periods, and an attempt to set a lower return on equity without competent and substantial evidence would be improper. In addition, it would be impermissible retroactive rate-making.

Just as the Commission should not attempt to retroactively adjust FPL's return on equity for prior oil backout cost recovery periods, the Commission should not indirectly reduce the oil backout return on equity by recognizing oil backout revenues, expenses and investment in the calculation of a 1988 tax savings refund. This would be particularly improper since there are no oil backout tax savings in 1988 or any other year.

V
CONCLUSION

FIPUG's ill-conceived Petition has resulted in an extensive and expensive rehash of resolved regulatory issues. Virtually every issue raised in this proceeding by FIPUG has been visited previously by the Commission. The Commission appropriately dismissed FIPUG's attempt to disqualify FPL's Oil Backout Project and discontinue FPL's Oil Backout Cost Recovery Factor as lacking a legal foundation. FIPUG's remaining issues are supported by neither the record nor the law. FIPUG's Petition should be

rejected in its entirety. No refunds of oil backout revenues should be made, and FPL's tax savings refund should be computed excluding oil backout revenues, expenses and investment.

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 Brief 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 Posthearing Statement was served simultaneously.

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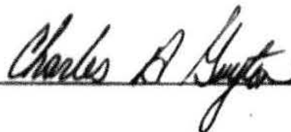

APPENDIX A

FIPUG'S SIX PRIOR ARGUMENTS THAT AN ENERGY BASED OIL BACKOUT CHARGE IS UNFAIR OR INEQUITABLE

DOCKET	FIPUG POSITION	COMMISSION ACTION
Oil Backout Rule Adoption, Docket No. 810241	Mr. Harold Cook testifying for FIPUG testifies (1) that under the proposed rule revenues are to be collected on a kilowatt hour basis (2) that such collection is a departure from cost based rates, and (3) that such collection is not equitable to high load factor customers. (Tab S, Transcript Excerpt from Docket No. 810241 at 186, 187)1/	Commission adopts Oil Backout Rule keeping intact the section FIPUG's witness construed as requiring collection of revenues on a kwh basis. Order No. 10554 (Tab C)
FPL's Oil Backout Project Qualification, Docket No. 820155-EU	Mr. McGlothlin argues that a cents\kwh charge is not "the most equitable way to allocate revenues." (Tab S, Transcript Excerpt from Docket No. 820155 at 13)	Commissioner Cresse states "it ought to be recovered on a cents per kilowatt hour basis because the primary purpose is reduction in energy costs," and that he has "never bought" FIPUG's rationale. (Tab S, Transcript Excerpt from Docket No. 820155-EU at 750-51) Order No. 11217 does not address the basis for the oil backout charge.

1/ All references to Tabs are to the notebook of documents supplied by FPL that the Commission officially recognized at the hearing. Tr. 15-18.

DOCKET	FIPUG POSITION	COMMISSION ACTION
FPL's Initial Oil Backout Cost Recovery, Docket No. 820001-EU	Mr. Pollock testifies (1) that oil backout costs are demand related and should be allocated on demand and recovered through demand charges (2) that the "coal bubble" and attendant fuel savings would be temporary and subsequent benefits would be demand related. (Tab S, Transcript Excerpt from Docket No. 820001-EU at 488-93, 496, 497)	Order No. 11210 finds that oil backout revenues should be allocated on a kwh basis and recovered on a cents per kwh basis. Commission specifically rejects Mr. Pollock's arguments as "unpersuasive" and "inconsistent with its finding." Commission also notes Mr. Pollock's proposal would create an administrative burden (Order No. 11210 at 9, 10, Tab I.)
TECO's Oil Backout Project Qualification, Docket No. 820155-EU	FIPUG "particularly objected to recovery of project costs through a cents per KWH charge. (Order No. 11223 at 3.)	Commission deferred issue until initial TECO cost recovery. (Order No. 11233 at 7.) Commission has subsequently approved a cents\kwh oil backout charge for TECO.
FPL's 1982 Rate Case Docket No. 820097-EU	"FIPUG also contended that if the unrecovered investment in Plant in Service of the 500 kV line oil backout project is included in rate base, it should be allocated among the customer classes on the basis of demand." (Order No. 11437 at 43, Tab K.)	"[W]e reject FIPUG's proposed allocation method. Because the primary purpose of the project is the economic displacement of oil, its costs should be allocated solely on the basis of energy...." (Order No. 11437 at 43, Tab K.)

DOCKET	FIPUG POSITION	COMMISSION ACTION
FPL's 1984 Rate Case Docket No. 830465-EI	FIPUG argues UPS costs should be allocated to customers partially or completely on demand. (Order No. 13537 at 60, Tab L.)	"Our decision on this issue is based on Order No. 11217, holding that the primary purpose of the project was fuel savings and approving FPL's transmission line as an Oil Backout Project pursuant to Rule 25-17.16, Florida Administrative Code. In that Order, we determined that all of the costs of the project are to be recovered in the Oil Backout Clause." (Order No. 13537 at 60, Tab L.)