FLORIDA PUBLIC SERVICE COMMISSION

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

MEMORANDUM

October 26, 1989

TO : DIRECTOR OF RECORDS AND REPORTING (TRIBBLE)

FROM : DIVISION OF ELECTRIC AND GAS (WALSH, ROMIG)
DIVISION OF AUDITING AND FINANCIAL ANALYSIS (SALAK, YECCO)
DIVISION OF LEGAL SERVICES (RULE)

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

AGENDA : 11/7/89 - CONTROVERSIAL AGENDA - PARTIES MAY NOT PARTICIPATE

PANEL : FULL COMMISSION

CRITICAL DATES: NONE

ISSUE AND RECOMMENDATION SUMMARY

NOTE: For ease of reference, the issue numbering sequence adopted in the Prehearing Order No. 21755 will be used herein. (See discussion in Case Background.)

ISSUE 2: Should FPL be required to refund past collected backout revenues associated with accelerated depreciation?

RECOMMENDATION: No. FPL has appropriately included capacity deferral benefits in calculating actual net savings from the 500 kV line project, and recovered 2/3 of those net savings as accelerated depreciation as allowed by Rule 25-17.016. However, if 13.6% is determined to be the appropriate return on equity (ROE) as Staff has proposed herein (see Issue 6), revenues representing the difference between the 13.6% and FPL's current 15.6% ROE used in calculating the amount of accelerated depreciation should be refunded with interest for the April 1, 1988 through September 30, 1989 period. In addition, whether or not the ROE is changed, the unamortized balance of investment tax credits (ITC's) associated with the oil backout project should be returned to the ratepayers as soon as practicable.

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

RECOMMENDATION: The inclusion of capacity charges in FPL's base rate should be done at the time of the utility's next rate case, pursuant to Rule 25-17.016(4)(d).

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

RECOMMENDATION: Rule 25-17.016(4)(e) requires the utility to use its actual cost of capital for the recovery period. In Staff's opinion, use of a 15.6% return on equity overstates FPL's cost of equity capital and is therefore inappropriate at this time. In the absence of testimony, Staff believes that the reduced equity return of 13.6%, used for this utility in the tax savings docket, is appropriate and more closely approximates the utility's actual cost of capital.

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

RECOMMENDATION: Yes.

ISSUE 12: 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 lines?

RECOMMENDATION: Yes.

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

RECOMMENDATION: There are no tax savings associated with the oil backout project. However, Rule 25-17.016(4)(e) requires the utility to use its actual cost of capital for the recovery period. In Staff's opinion, use of a 15.6% return on equity overstates FPL's cost of equity capital and is therefore inappropriate at this time. In the absence of testimony, Staff believes that the reduced equity return of 13.6%, used for this utility in the tax savings docket, is appropriate and more closely approximates the utility's actual cost of capital.

ISSUE 16: Should FPL be required to refund these tax savings to customers?

RECOMMENDATION: There are no tax savings from oil backout to refund. However, if 13.6% is determined to be the appropriate ROE as Staff has proposed herein, revenues from April 1, 1988 through September 30, 1989 should be refunded to the customers with interest.

ISSUE 18: As a matter of law, can the Florida Public Service Commission (FPSC) 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 used and useful service for more than 25 years?

RECOMMENDATION: Yes, pursuant to Rule 25-17.016.

ISSUE 19: 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?

RECOMMENDATION: This issue is irrelevant. Staff notes, however, that the "avoided unit" rationale is the same as that used in setting firm capacity payments for cogenerators.

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

RECOMMENDATION: No. The transmission line itself is only one component of the entire project. In any event, oil backout cost recovery of project costs should not be discontinued until such time as they are included in rate base.

ISSUE 26: 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?

RECOMMENDATION: Yes.

ISSUE 27: 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?

RECOMMENDATION: Yes, absent inclusion of the project in rate base.

ISSUE 28: 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?

RECOMMENDATION: Yes. FIPUG waived any objection for those periods. However, this issue is irrelevant. Had FIPUG objected in any of the three prior proceedings in which deferred capacity savings were calculated using the deferred Martin Coal units, the Rule would have required the same result: Once approved, recovery of the project continues.

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

RECOMMENDATION: Yes.

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

RECOMMENDATION: No.

STIPULATED ISSUES

ISSUE 4: When will investment in transmission lines be fully recovered if FPL is allowed to use two-thirds of the "annual net savings" as accelerated depreciation?

RECOMMENDATION: August, 1989.

ISSUE 15: Did FPL consider OBO revenue in calculating income tax refunds to its customers in 1987 and 1988?

RECOMMENDATION: No.

CASE BACKGROUND

In connection with the February, 1989 hearing in Docket No. 890001-EI, FIPUG raised issues relating to discontinuance of FPL's oil backout cost recovery factor. FIPUG also filed a separate petition in this docket on January 27, 1989, and sought consolidation of the two dockets by a Motion to Consolidate Dockets or Hold Certain Issues in Docket No. 890001-EI in abeyance.

The parties agreed to defer FIPUG's issues in Docket No. 890001-EI until the August, 1989 hearing in order to allow for discovery. Thereafter, the Commission ordered consolidation of Dockets Nos. 890148-EI and 890001-EI for hearing purposes only, with Docket No. 890148-EI to be heard by the full Commission on the last day of the scheduled hearings in Docket No. 890001-EI. Docket No. 890148-EI was later rescheduled to the first day of the hearing, August 22, 1989, so that all Commissioners could be present.

On February 15, 1989, FPL moved to dismiss FIPUG's petition. FPL's Motion was denied in Order No. 21361 on the grounds that FIPUG had stated a cause of action upon which it was possible to grant relief.

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. 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, 20, 22, 23, 24, and 25. Tr. 226. For ease of reference, the issue numbering sequence adopted in the Prehearing Order No. 21755 will be used herein.

DISCUSSION OF ISSUES

ISSUES OF FACT

ISSUE 2: Should FPL be required to refund past collected backout revenues associated with accelerated depreciation?

RECOMMENDATION: No. FPL has appropriately included capacity deferral benefits in calculating actual net savings from the 500 kV line project, and recovered 2/3 of those net savings as accelerated depreciation as allowed by Rule 25-17.016. However, if 13.6% is determined to be the appropriate return on equity (ROE) as Staff has proposed herein (see Issue 6), revenues representing the difference between the 13.6% and FPL's current 15.6% ROE used in calculating the amount of accelerated depreciation should be refunded with interest for the April 1, 1988 through September 30, 1989 period. In addition, whether or not the ROE is changed, the unamortized balance of investment tax credits (ITC's) associated with the oil backout project should be returned to the ratepayers as soon as practicable.

POSITION OF PARTIES

FIPUG: Yes. FPL should be required to refund past collected backout revenues associated with accelerated depreciation for three reasons. First, FPL's savings calculations fail to recognize that customer conservation and other factors have enabled FPL to find less expensive ways to meet customers' needs at a later time than the "deferred" Martin units. Through September 1989, FPL has collected $285 million in accelerated depreciation. Tr. 61; Exhibit 611.

However, FPL has performed no analysis to determine what would have occurred had the Project not been built (in order to claculate Project "benefits"). FPL simply continues to apply the assumptions it used in 1982 with no analysis of the validity of such assumptions.

In order to ascertain if the Martin units are the deferred units and would have been constructed in 1982, circumstances subsequent to 1982 must be reviewed. Tr. 259 FPL failed to supply any such analysis at hearing. However, FPL's Ten-Year Power Plant Site Plan: 1989-1998 demonstrates that FPL has no plans to construct 700 MW pulverized coal-fired units (similar to the Martin units) during the forecast period. Tr. 88-89. Therefore, it is inapproporiate to treat the Martin units as "deferred" for the purpose of calculating accelerated depreciation. The units which are actually being "deferred" (if any) are the units which shold be used to calculate accelerated depreciation.

Even if the Commission accepts FPL's premise that the Martin units were deferred, FPL has not supported its "savings"claim. In calculating savings, FPL utilizes the original 1982 costs of constructing the units (based on a 1979 contract), adjusted only for inflation rates. Tr. 92, 419: Exhibit 216, Attachment II, line 4. FPL has locked the 1982 direct costs of the "deferrred" units into its savings calculation in contravention of Order No. 11210, Docket No. 820001-EU, where the Commission rejected FPL's proposal to lock in the costs. This Commission explicitly recognized the ever-changing nature of the generation planning process and the very likely possibility that the assumptions made by FPL in 1982 might change in the future.

If FPL had not constructed the Project, prudent utility planning would have required it to analyze changes in conditions over time and incorporate them into the generation planning process. However, FPL did no analysis of the other options which were available to it and provided absolutely no analysis at hearing to support its position that the Martin units were the most cost-effective alternative.

In contract to FPL's lack of analysis, the evidence presented by FIPUG illustrates that changes in circumstances occurred which should have caused FPL to question its continued use of the Martin units to calculate deferred benefits. As early as 1984, FPL recognized a significant decrease in load growth which allowed FPL to defe: Martin Unit 3. Docket 830377-EU, hearing transcrip, p. 533-535. Decreases in load forecasts indicate that the proposed construction schedule for the Martin units could have been pushed further into the future, resulting in less costly units. Tr. 115.-116.

Changes in the construction environment also occurred which would have resulted in a lower direct cost per KW and a lower per KW total cost for the units. However, rather than update its cost estimates, FPL continues to use its 1982 estimates for the Martin units, no doubt because 1982 costs result in significantly higher capacity deferral benefits. Tr. 93-94.

FPL's use of 1982 estimates does not support the collection of $285 million. An updated analysis of the timing need for additional capacity had the Project not been built is an absolute prerequisite to the collection of such savings. FPL did not perform such an analysis. Jeffry Pollock --- who

offered the only evidence on the subject --- demonstrated that changes occurred which would have enabled FPL to defer the unit until 1992 even if the Project had not been built. Based on the timing issue alone, the money collected through accelerated depreciation must be refunded.

Second, the backout revenues associated with accelerated depreciation should be refunded because they represent a return on fictional assets which are not used and useful in violation of Section 366.06(1), Florida Statutes. Only utility property which is used and useful in the public service may be used for ratemaking purposes. No money was invested by FPL in the "deferred" plants; they were never in used and useful service. Therefore, recovery based on these plants is prohibited.

Similarly, FPL should not be permitted to earn a return on plants in rate base whose use has been displaced due to the Project. Earning a return on these plants enables FPL to recover three times for the same capacity --- Southern Company capacity charges, previously active FPL plants, and two-thirds of the cost of the "deferred" plants.

Third, FPL's savings calculations are overstated. Fuel savings are overstated because computer simulations include high cost sources of energy due to the use of FPL's oil plants to meet customer demands. FPL's shrinking reserve margin is evidence that FPL oil plants are not being removed from service but are being used to meet load growth. Tr. 76; Exhibits 606,607. The capacity financing costs and the direct construction costs of the deferred phantom plants are also overstated when compared with other FPL cost estimates for similar plants. Tr. 93.

See also, Argument, Section I, of FIPUG's Brief which is incorporated herein by reference.

FPL: No. Consistent with the Oil Backout Rule and pursuant to Commission approval, since August 1987 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. Tr. 389-93 (Waters). One benefit of several recognized in the calculation of actual net savings has been the avoided costs of the Martin Coal Units 3 and 4. Id. Without the project these units would have been in-service in June, 1987 and December, 1988, respectively. Id. The avoided cost calculations for the Martin Units are reasonable and representative of what the units would have cost. Tr. 395-402 (Waters). The inclusion of these capacity deferral benefits in the computation of the Project's actual net savings is appropriate because without the Project the Martin Units would have been built and been needed as originally projected. Id. FIPUG's attempt to question the Project's capacity deferral benefits is untimely and has been waived. Its requested refund would be unlawful retroactive ratemaking.

PUBLIC COUNSEL: Yes. Since the Commission has no evidentiary basis to conclude that the Martin Units would have been in service on the dates used by FPL or that they would have cost as much as FPL contends, FPL should be required to refund past collections of accelerated depreciation.

STAFF ANALYSIS: For completeness of argument, Staff has included its discussions of Issues 6, 11, and 12 here. Three areas are addressed: capacity deferral related to the 500 kV line project, the return on equity associated with the project, and unamortized ITC balances tied to the project's accelerated depreciation.

Capacity Deferral

FIPUG argues that all the accelerated depreciation collected through the OBCRF must be refunded because the capacity deferral benefits from which the accelerated depreciaton derives cannot have been realized. The Actual Net Savings (2/3 of which are recovered as accelerated depreciation) are overstated, they allege, because variously, (1) the construction cost estimates used by FPL for the Martin Units are too high, (2) the deferred units' in-service dates (1987 and 1988) should be deferred even further in time, (3) the Martin 700 MW Coal Units are not present in FPL's current generation expansion plan, and (4) the deferred units are "phantom plants" and thus don't exist at all.

Staff is compelled to point out the contradictory nature of these arguments, particularly in light of FIPUG Witness Pollock's admission that "...the Project has enabled FP&L to import firm coal-by-wire capacity and to defer construction of the Martin Unit Nos. 3 and 4." (Tr. 84, Pollock Direct.) Nonetheless, we will address each of these areas below.

(1) Martin Cost Estimates. FPL's cost estimates for the Martin Units are based on the parameters of a 1979 Bechtel contract, updated for actual

inflation and cost of capital. (Tr. 419, Waters.) These figures were used in the original oil backout qualification proceeding precisely because they represented the contract cost of Martin Units 3 and 4 to FPL.

In three previous oil backout proceedings (beginning with the April-September, 1987 period), FPL applied those cost estimates in calculating the actual net savings as allowed by the Oil Backout Rule. FIPUG and Public Counsel, both parties to the proceedings, did not contest their use. (Tr. 353, Waters.) The Commission approved the OBCRF, and thus at least tacitly approved the cost estimates. There is no evidence in the record upon which to base any adjustment to the estimates. Staff believes that the Martin Unit 3 and 4 cost estimates are reflective of the construction costs FPL would have incurred had the units been built in the 1981-1987 timeframe, and are appropriately applied in calculating the OBCRF.

(2) Deferred Units' In-Service Dates. Had FPL not built the 500 kV line project, thus enabling their purchase of equivalent capacity from the Southern Company, construction of the Martin units would have begun in 1980 and 1982 to meet a Martin Unit 3 in-service date of June, 1987 and Martin Unit 4 in-service date of December, 1988. (Tr. 358, Waters.)

FIPUG Witness Pollock suggests that FPL should have revisited their decision to construct (or not construct) the Martin Units and adjust outward in time their in-service dates. (Tr. 112-120, Pollock.) Staff is wholly unpersuaded by his speculative argument.

The record shows that, absent the project and UPS purchases: (a) from 1982 through 1988 the Martin units were the most economical choice for FPL to meet its projected capacity needs (Tr. 395-398); (b) the units would have been needed to meet load and reserve requirements in 1987 even in the face of lower load forecasts (Ex. 209); and (c) it would have been uneconomical for FPL to defer those units rather than finish construction by the time the load forecasts were lowered (Tr. 472). Staff believes that given the economic and technologic circumstances in the 1980-1982 time period, FPL would have begun construction of the Martin Units absent the Oil Backout Project.

The in-service dates are what they are. Period.

(3) Martin 700 MW Coal Units Absent from FPL's Current Generation Expansion Plan. FIPUG Witness Pollock correctly notes that the Martin Unit No.s 3 and 4, both 700 MW pulverized coal plants, are absent from FPL's most current generation expansion plan. (Tr. 88-89.) However, FPL Witness Waters confirmed during cross-examination that the Company's determination of need for electrical power plant pending before this Commission shows two units labelled Martin No. 3 and 4. (Tr. 454-455.) These units utilize combined cycle technology (385 MW each) rather than pulverized coal. Mr. Waters explained the reasons for that change.

> ...one is the economic analysis which shows that with the reduced oil and gas forecast we expect the combined cycles to provide better economics. But beyond that, and maybe the most important reason, is this very proceeding shows how uncertainty in the

> planning process causes us to look for solutions that offer the most flexibility in addition to the best economics....
> ...the combined cycle offers us the option of burning natural gas or coal, and we consider that to be a very important factor in developing the expansion plan is flexibility. We need to be flexible, not only in the fuel sources but in load growth. One of the issues that's been raised here is load forecast, changing year-by-year. Combined cycle offers us some flexibility in responding to load growth also...
> (Tr. 456)

He also affirmed that both the "old" and "new" Martin units were and are planned to run at very high capacity factors.

These facts indicate that the only effective change to Martin Units 3 and 4 which has occurred in the current expansion plan is a technology substitution. In light of this, Staff believes that Witness Pollock's argument that the "old" units' absence from the current plan means they were not deferred, is simply wrong.

(4) "Phantom Plants". Mr. Pollock admits that "[t]he Martin units have not been, and may never be, built." (Tr. 89, Pollock.) We agree with him on this point. We also agree with FPL Witness Waters that this

> ...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. (Tr. 394-395.)

Staff is frankly at a loss as to how to respond to FIPUG's arguments that capacity deferral benefits cannot be derived from plants which do not

exist or are "illusory." This "avoided unit" concept is the same rationale used by the Commission to set firm capacity pricing for cogenerators. We can only suggest to FIPUG that it is surely impossible to calculate capacity deferral benefits based on plants which do exist.

In summary, Staff believes that the Martin Coal Units 3 and 4 have been deferred as a result of the project and the original Southern Company purchases, and that the Company has appropriately included capacity deferral benefits in the calculation of Actual Net Savings of which 2/3 are recovered as additional depreciation on the 500 kV lines.

Return on Equity

Rule 25-17.016(4)(e), Florida Administrative Code, requires the utility to use its actual cost of capital for the recovery period of the oil backout project. FPL has interpreted "the actual cost of capital" with respect to the return on equity to mean the return on equity that was authorized in the Company's last rate case. The return on equity authorized in the Company's last rate case (Docket No. 830465-EI) was 15.6%. FIPUG Witness Pollock argued that the oil backout rule clearly states that only the actual costs associated with a project are subject to recovery under the OBCRF. (Tr. 60.) Mr. Pollock contends that a 15.6% ROE does not represent the actual cost associated with the oil backout project. (Tr. 80.)

Staff agrees with Mr. Pollock's position. Staff notes that all other costs recovered under the oil backout project are based on current rates. FPL admittedly uses its current cost of debt in its oil backout filing whenever

the cost of debt changes.

> Q. (McWhirter) To your knowledge what was the highest cost of long-term debt that was associated with this project?
> A. (Babka) I believe it was back in 1982, when they started, it was around 16%, and it has come down ever since.
> Q. Has FP&L taken advantage of the opportunity to refinance its high cost debt?
> A. Yes, sir, and every time we do we reflect it in the oil backout filing as reduced cost of capital. (Tr. 298.)

There is no economic reason to recognize changes in the cost of one capital component, debt, but to ignore the change in the cost of another capital component, equity.

While cost of equity testimony was not presented in this docket, Mr. Pollock made several uncontroverted observations that indicate FPL's actual cost of common equity is lower than 15.6%. (Tr. 80.) Mr. Pollock states that he is unaware of any regulatory commission which has authorized a 15% or higher ROE since 1987. In addition Mr. Pollock shows that the median authorized ROE has ranged from 12.8% to 13.0%, and that most of these awards have been in the 12.0% to 14.49% range. Finally, Mr. Pollock shows that the current FERC benchmark ROE is 12.44%.

Perhaps the most convincing evidence that FPL's actual cost of equity is significantly lower than 15.6% is FPL's offer in 1988 (Order No. 18340) and 1989 (Order No. 20451) to voluntarily give up their entitlement to use their existing authorized equity return of 15.6% for purpose of the tax savings rule

(Rule 25-14.003, Florida Administrative Code), for calculating their AFUDC rates, and as an equity ceiling for surveillance purposes. Staff doubts very much that FPL would offer to stipulate to an ROE of 13.6% for its non-oil backout rate base if 13.6% was less than the company's actual cost of equity capital.

Given current market conditions, Staff would argue that FPL's actual cost of equity capital is lower than 13.6%. In the absence of cost of equity testimony, however, Staff notes that the 13.6% offered by this utility in the 1987, 1988 and 1989 tax savings dockets is closer to the Company's actual cost of equity than the 15.6% ROE authorized in Docket No. 830465-EI. Therefore, Staff believes that FPL is not justified in charging a 15.6% return on the equity portion of its capital invested in the 500 kV transmission lines.

Staff recommends that the 13.6% used for this utility in the tax savings docket more closely approximates FPL's cost of equity capital, and revenues from April 1, 1988 through September 30, 1989 should be refunded to the customers with interest. This timeframe reflects the stipulation entered into between FIPUG and FPL attached to Order No. 20784, which states the following:

> c. FPL agrees that if any adjustment is made to FPL's OBCRF as a result of the proceedings in a later scheduled hearing in Docket No. 890001-EI and/or Docket No. 890148-EI, as a result of consideration of the "Issues," any amounts ordered to be refunded shall be subject to refund as though the Commission had considered and reached a decision on the "Issues" in the hearing held on February 22 in Docket No. 890001-EI...

The hearings referenced in this stipulation apply to the fuel adjustment periods beginning April 1, 1988. In keeping with the intent and spirit of this stipulation, Staff believes a 13.6% ROE should be used to calculate the oil backout revenue requirements beginning April 1, 1988. Beginning October 1, 1989, the OBCRF was calculated using a 13.6% ROE; therefore, the calculation of the revenues to be refunded should end September 30, 1989. If Staff's recommendation is accepted, the amount to be refunded will be determined at the February, 1990 hearings for inclusion in the April-September, 1990 OBCRF.

ITC Amortization

The amortization of the investment tax credits (ITC's) associated with the oil backout investments was not specifically included as an issue in the Prehearing Order for this docket. The issue was raised by Public Counsel and was later withdrawn. Staff believes that the issue is an integral part of this issue since the accelerated depreciation is the driving factor for the ITC amortization. It is Staff's recommendation that additional ITC amortization should be refunded to the customers as a result of the acceleratd depreciation that FPL has recovered.

FPL amortizes its ITC's generated by the oil backout investments by using a composite amortization rate. (Tr. 286, 314.) The composite amortization rate is developed on a company-wide basis (Tr. 314) by dividingbe allowed to the book depreciation expense by the depreciable assets that generated the ITC's. (Tr. 318.) The current amortization rate is 4%,

implying a life of 25 years on a composite basis. (Tr. 318.) If only the oil backout assets were considered, the depreciable life would have been considerably shorter since the oil backout assets were recovered over a seven year period (Tr. 317-318), and the ratepayers paying for oil backout assets would have received the benefit of the amortization.

The Internal Revenue Code (IRC) and appplicable Regulations (Regs) require that ITC's for an Option 2 utility such as FPL earn a weighted rate of return for ratemaking purposes and be amortized above-the-line. The ITC amortization must be no more rapid than ratable --- over the depreciable book life. (Tr. 315.) The Regs allow the use of a composite rate. (Tr. 314.) FPL's current approach does not violate the IRC or the underlying Regs.

Staff believes that the customers who paid for the recovery of the accelerated depreciation of the oil backout assets should receive the benefits of the associated ITC amortization. The amortization method used by FPL will not accomplish this goal. When cross-examined, FIPUG Witness Babka stated the following:

> Q. (Rule) Who paid for the recovery of the of the oil backout assets?
> A. (Babka) Who paid for the recovery?
> Q. Yes.
> A. The ratepayer paid the recovery of it.
> Q. And that would be since the inception of the oil backout clause, correct?
> A. Yes.
> Q. And who would then be getting the benefit of the ITC amortization related to the oil backout assets?

A. The ratepayer gets the benefit of the ITC amortization.
Q. And that would be from 1982 on into the future, is that correct?
A. Yes. (Tr. 317)

This testimony demonstrates that there is a mismatch of the ratepayers who paid for the recovery of the oil backout assets and the ratepayers who will receive the benefit of the ITC amortization. In addition, the ratepayers are required to pay a return on the unamortized balance of ITC's. (Tr. 316.)

As of August, 1989, $17,780,000 of unamortized ITC's still remain (Tr. 318) due to FPL's method of ITC amortization, even though the plant generating the ITC's --- the 500 kV line --- has been fully recovered. Staff believes this amount should have been amortized at the same rate the oil backout assets were recovered. Therefore, Staff recommends that the unamortized balance be returned to the ratepayers as soon as is practicable. Staff recommends that the unamortized ITC balance should be returned to the ratepayers in the OBCRF established for the April, 1990 through September, 1990 timeframe. This period was chosen to account for the ITC amortization currently included in the calculation of the OBCRF for October 1, 1989 through March 31, 1990. If this amortization is not considered, a possibility exists that too much amortization could be passed to the ratepayers resulting in a normalization violation.

FIPUG Witness Babka repeatedly stated his concern that the utility's entire unamortized ITC balance --- $453 million --- could be placed at risk if an amortization rate specific to the oil backout clause was used (Tr. 314-318). He further stated that the Company requests that FPL be allowed to get a letter ruling from the IRS (Tr. 317); this is a conservative approach to ensure that the ratepayers are not harmed in the long run by loss of the ITC's.

Staff does not believe the IRS will find Staff's recommendation to be a violation of normalization requirements. However, a conservative appropach to ensure that the ratepayers are not harmed in the long run by the remote possibility of loss of $453 million of ITC's is to ask for a letter ruling. FPL should be allowed the opportunity to get a letter ruling. Staff recommends that the monies be placed subject to refund with interest while the letter ruling is pending. The subject to refund provisions should begin April 1, 1990, when the new OBCRF is put into effect. FPL should be required to submit a draft of the ruling request to Staff and parties within 60 days of the date of the vote in this docket. All parties and Staff should be allowed to participate in drafting the final version of the request for Commission approval. If the parties cannot agree upon the language to be included in the letter ruling request, Staff will address the alternatives in a recommendation. The parties should be allowed to participate in all phases of the letter ruling process, including any conferences of right. Staff and parties should be notified by FPL of any communication with the IRS on this matter.

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

RECOMMENDATION: The inclusion of capacity charges in FPL's base rate should be done at the time of the utility's next rate case, pursuant to Rule 25-17.016(4)(d).

POSITION OF PARTIES

FIPUG: Yes. The evidence demonstrated that FPL is using Southern System generating capacity to meet its basic load requirements. While there may have been some logic to collecting this charge through the fuel clause when the total price for electricity was less than FPL would spend for fuel and operating and maintenance expense only for its own units, this charge should no longer be collected through the fuel clause because the capacity charges now exceed the estimated fuel savings by $153 million. Exhibit 208, Document 4.

This Commission has previously ruled that the fuel clause may not be utilized to recover capital costs. Docket No. 74680-CI, Order No. 7544. This order was affirmed by the Florida Supreme Court. Similar logic should be followed in this case. If the capacity charges cannot be absorbed by FPL, it has the option to file a rate case.

Additionally, and most importantly, the oil backout rule itself prohibits the recovery of capacity costs through the OBCRF. Capacity charges are not included in that list.

FPL: No. FIPUG has failed to establish why the current treatment of UPS capacity charges is improper. The evidence shows that (1) UPS capacity charges have historically been treated as an oil backout cost, Order No. 11217 at 2, 3-5, 7 (Tab G), and recovered through the Factor, Order No. 11210 at 9, (2) that the treatment of UPS capacity charges as a Project O&M expense is consistent with Section (4)(a) of the Oil Backout Rule, Tr. 448-49 (Waters), (3) that under Section (4)(c) of the rule, continued recovery of Project O&M expenses even after the full depreciation of the Project is appropriate, Tr. 450 (Waters), and (4) that under Section (4)(d) of the Rule recovery of these costs through the Factor should continue until "new base rates" are placed into effect. Moreover, FPL requested this relief in its last rate case and it was denied, with the Commission specifically excluding those costs from FPL's currently effective base rates. Order No. 13537 at 60 (Tab L). The time has not yet come to move the recovery of the UPS capacity charges to base rates, and no such change should be made without the specific adjustment to base rates required by Sections (4)(c) and (d) of the Oil Backout Rule.

PUBLIC COUNSEL: No. Since the actual qualification of the project is not being challenged, the costs, including Southern System UPS charges, should continue to be recovered through the oil backout factor.

STAFF ANALYSIS: Rule 25-17.016(4)(d) states:

> Once approved by the Commission, the costs of a qualified oil-backout project shall continue to be recovered through the Oil-Backout Cost Recovery Factor until such time as they are included in the base rates of the utility.

Thus, since the qualification of the project is not being challenged in this proceeding, FPL must continue to recover the Southern System UPS charges through the OBCRF until such time as they are included in base rates.

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

RECOMMENDATION: Rule 25-17.016(4)(e) requires the utility to use its actual cost of capital for the recovery period. In Staff's opinion, use of a 15.6% return on equity overstates FPL's cost of equity capital and is therefore inappropriate at this time. In the absence of testimony, Staff believes that the reduced equity return of 13.6%, used for this utility in the tax savings docket, is appropriate and more closely approximates the utility's actual cost of capital.

POSITION OF PARTIES

FIPUG: No. Rule 25-17.016(4)(e) requires FPL to use its "actual cost of capital" for the Project. FPL currently earns a return on equity ("ROE") of 15.6% on the Project. Tr. 285. This is far in excess of the 13.6% ROE which FPL utilizes for its non-oil backout rate base. Tr. 79. As the Commission recognized at its Agenda Conference on September 19, 1989, 13.6% more closely reflects FPL's actual cost of capital. This plain language of the rule requires FPL to use its actual cost of capital.

FPL: Yes. The Commission has the long standing practice (fourteen prior orders) of authorizing FPL to earn on its equity oil backout investment the rate of return on equity authorized in FPL's most recent rate case, Tr. 319 (Babka), even though FPL initially argued its cost of equity then was higher than its authorized rate of return on equity. Id. This practice was premised on a consensus of position by all the parties to this proceeding. Now that it is alleged that FPL's equity costs are lower than its authorized return on equity, it would be unfair not to hold all the parties to their original agreement. More importantly, there is no evidence in this record supporting a cost of equity for FPL. In the absence of proof of a cost of equity other than the 15.6% authorized in FPL's last rate case and in light of the prior agreement of the parties, the Commission should find that FPL has been justified in recovering a 15.6% return on its equity investment in the 500 kV transmission lines.

PUBLIC COUNSEL: No. Rule 17.016(4)(e), Florida Administrative Code, requires the utility to use its actual cost of capital. The use of 15.6% is unsupported and unjustified.

STAFF ANALYSIS: See staff analysis of Return on Equity in Issue 2.

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

RECOMMENDATION: Yes.

POSITION OF PARTIES

FIPUG: No. While the Martin units were planned at one time, they are no longer part of FPL's generation plans and thus are not being deferred. As also discussed in Issue 2, circumstances have changed so that the in-service date of the units and their cost parameters would have been vastly different from the assumptions used by FPL in 1982 even if the line had not been built.

FPL: Yes. Mr. Pollock specifically acknowledged, Tr. 84, and Mr. Waters conclusively established, Tr. 353, 355, 357-61, 394, 396-400, 410-12; Ex. No. 209, Docs. 2 and 3, that the Martin Coal Units were deferred by the Project and the UPS purchases. The Martin Coal Units were deferred in 1981 when FPL made the decision to stop spending on the units because it had decided to accelerate the Project and enter the UPS Agreement. Tr. 359, 362 (Waters). Without the Project and the UPS purchases, the Martin Coal Units would have been built and would have been needed as originally projected. Tr. 358-62, 395-98; Ex. No. 209, Doc. Nos. 2 and 3. From 1982 through 1988 the Martin Coal Units were the most economical choice to meet capacity needs absent that Project and UPS purchases. Tr. 395-98; Ex. No. 209, Doc. No. 3. Even with lower load forecasts between 1983 and 1986, without the Project and UPS purchases the Martin Coal Units would have been needed to meet load and

reserve requirements in 1987, Ex. No. 209, Doc. No. 2, and it would have been uneconomical to defer those units rather than finish construction by the time the load forecasts were lowered. Tr. 472 (Waters); Ex. No. 218. FIPUG has failed to establish that the Martin Coal Units were not deferred by the Project and the UPS purchases.

PUBLIC COUNSEL: Public Counsel takes no position on this issue as it applies to this proceeding.

STAFF ANALYSIS: See staff analysis of Capacity Deferral in Issue 2.

ISSUE 12: 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 lines?

RECOMMENDATION: Yes.

POSITION OF PARTIES

FIPUG: No. FPL's savings calculations do not recognize the less expensive options available to FPL to meet customer needs, the prohibition of recovery on an investment not used and useful, and the overstatement of claimed savings. See discussion of Issue 2.

FPL: 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 OBCRF any return on units it has not built.

PUBLIC COUNSEL: No. The assumptions and costs upon which deferral "benefits" have been calculated are based on 1982 projections that would not have been applicable in the 1987-1989 timeframe.

STAFF ANALYSIS: See staff analysis of Capacity Deferral in Issue 2.

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

RECOMMENDATION: There are no tax savings associated with the oil backout project. However, Rule 25-17.016(4)(e) requires the utility to use its actual cost of capital for the recovery period. In Staff's opinion, use of a 15.6% return on equity overstates FPL's cost of equity capital and is therefore inappropriate at this time. In the absence of testimony, Staff believes that the reduced equity return of 13.6%, used for this utility in the tax savings docket, is appropriate and more closely approximates the utility's actual cost of capital.

POSITION OF PARTIES

FIPUG: The refund due to ratepayers is not a result of the tax rate applied by FPL but is due to FPL's refusal to apply the 13.6% ROE to its earnings on the Project.

In Order No. 20659, the Commission approved FPL's use of a 13.6% ROE for application of the tax savings rule in 1987. This same amount was approved as the appropriate ROE for 1988. Order No. 18340. However, FPL has consistently refused to apply the 13.6% ROE to its investment in the oil backout project. Instead, FPL utilizes a 15.6% ROE which is the ROE authorized in its 1984 rate case. Docket No. 830465-EI. FPL has no basis for utilizing a 15.6% ROE on the Project. Excluding the rate base and net incomne associated with the Project resulted in an understatement of FPL's tax savings refund by $6.7 million in 1987. Tr. 60.

FPL: No. Consistent with Subsection (4)(a) of the Oil Backout Rule, FPL has collectd only "actual tax expense" through its OBCRF. 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.

PUBLIC COUNSEL: No. The excess revenues collected by FPL through the oil backout clause result from FPL's use of a 15.6% equity return in determining revenue requirements for the oil backout project. (See Public Counsel's discussion on Issue 6).

STAFF ANALYSIS: For 1987 and 1988, FPL has been required to refund tax savings in accordance with Rule 25-14.003, Florida Administrative Code, Corporate Income Tax Expense Adjustments. In that rule, "tax savings" are defined as the "difference between the tax expenses for a utility calculated under the previously effective corporate income tax rates and those calculated under the newly effective, reduced corporate income tax rates." For oil backout purposes, the utility has included the current tax rates in its factor. FPL has been recovering income taxes related to oil backout at the current income tax rates. Tax savings related to oil backout do not exist. FIPUG Witness Pollock does not dispute this. (Tr. 245-246.)

Witness Pollock states that the real issue is not whether tax savings exist, but that the return on equity used for tax savings purposes is higher than the rate of return used for oil backout purposes. Mr. Pollock states

> ...removal of that [oil backout] investment from the analysis and application of the income tax rule resulted in a lower return on equity, with FPL's remaining regulated investment, which in turn would have had the affect of reducing the refund calculated under the income tax savings rule. The point is not that there is a different tax rate that's not being reflected, the point is that there is a different return on equity that's being applied to one and that's being ignored for purposes of calculating the refunds under the tax savings rule. (Tr. 246)

Staff agrees with Witness Pollock's observation and has addressed the return on equity problem in Issues 2 and 6. Staff again recommends that the 13.6% used for this utility in the tax savings dockets more closely approximates FPL's cost of equity capital and should be used for the recovery period of the oil backout project.

ISSUE 16: Should FPL be required to refund these tax savings to customers?

RECOMMENDATION: There are no tax savings from oil backout to refund. However, if 13.6% is determined to be the appropriate ROE as Staff has proposed herein, revenues from April, 1988 through September, 1989 should be refunded to the customers with interest.

POSITION OF PARTIES

FIPUG: Yes. Additionally, the Commission should direct FPL to include the oil backout investment, revenues and expenses in all pending future tax savings refund determinations.

FPL: 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 OBCRF. 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.

PUBLIC COUNSEL: There are no tax savings due from the oil backout clause. The Company has collected excess revenues by using a 15.6% equity return in determining revenue requirements for the oil backout project. FPL should be ordered to refund all revenues collected through the oil backout clause resulting from the use of an equity return above the stipulated return of 13.6% (in the tax savings docket) from January 1, 1988 to date, with interest. (See discussion on Issue 6.)

STAFF ANALYSIS: As discussed in Issue 13, there are no tax savings to refund to customers from the oil backout project. However, if FPL is allowed a 13.6%

return on equity instead of the 15.6% that the utility has been using, associated revenues from April 1, 1988 through September 30, 1989 should be refunded to the customers with interest. (See staff analysis of Return on Equity in Issue 2.)

ISSUES OF LAW

ISSUE 18: 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 used and useful service for more than 25 years?

RECOMMENDATION: Yes, pursuant to Rule 25-17.016.

POSITION OF PARTIES

FIPUG: No. Section 366.07, Florida Statutes, requires a rate adjustment when rates are found to be unjust, unreasonable or unjustly discriminatory. Requiring current customers to pay the full costs of a project which will benefit future customers is clearly discriminatory. Current customers should not pay the full cost of a project that will be used for 25 years.

In analogous situations, the Commission has utilized a policy of intergenerational equity to prohibit current customers from receiving a rate reduction at the expense of future customers; i.e., the nuclear decommissioning surcharge.

The concept of intergenerational equity should be used for the Project as well. Current customers should not be required to pay in two years for a project that will be used over many more years and will benefit future customers.

See also, Argument, Section I. D., of FIPUG's Brief which in incorporated herein by reference.

FPL: 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 OBCRF The customers paying revenues which have been taken as accelerated deprec ation 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. FIPUG has had no less than 18 prior opportunities to raise this issue, which is a direct challenge to the Oil Backout Rule. Its prior failures to raise this issue should be a waiver of any right to raise the issue now.

PUBLIC COUNSEL: Public Counsel takes no position on this issue.

STAFF ANALYSIS: Chapter 366.05(1), Florida Statutes, gives the Commission the "power to prescribe fair and reasonable rates and charges...." This broad grant of authority was validly exercised by the Commission when it promulgated Rule 25-17.016, Florida Administrative Code. The rule specificially provides for cost recovery of a qualifying oil backout project through the application of an Oil Backout Cost Recovery Factor.

FIPUG contends that application of accelerated depreciation, one of the components in the OBCRF, constitutes discriminatory ratemaking as a matter of law. Thus, FIPUG's argument basically constitutes an attack on the rule itself, and as such, is not properly raised in this docket.

ISSUE 19: 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?

RECOMMENDATION: This issue is irrelevant. Staff notes, however, that the "avoided unit" rationale is the same as that used in setting firm capacity payments for cogenerators.

POSITION OF PARTIES

FIPUG: No. Section 366.06(1), Florida Statutes, requires that rates be based on:

> the actual legitimate costs of the property of each utility company, actually used and useful in the public service ....

Emphasis supplied. A utility is entitled to a return on its propoerty which is used or useful in the public service. Keystone Water Co., Inc. v. Bevis, 278 So.2d 606, 609 (Fla. 1973).

Units which are not currently built and which FPL has no intention of ever constructing certainly do not meet the criterion of used and useful. Therefore customers may not be charged for any costs associated with such nonexistent units.

FPL: The factual premise underlying this so-called legal issue is totally erroneous and has not been established. As Mr. Waters poijted out in detail in his rebuttal testimony, there is no recovery for costs of unbuilt generating plants through the OBCRF. 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 OBCRF, the 500 kV facilities, are undeniably used and useful and properly subject to recovery under Section 366.06, Florida Statutes.

PUBLIC COUNSEL: Public Counsel takes no position on this issue as it applies to this proceeding..

STAFF ANALYSIS: Although Staff believes this issue to be irrelevant, it should be noted that the "avoided unit" rationale, which FIPUG describes as charging customers for plants which have not been built, is the same rationale used in setting firm capacity payments for cogenerators.

FPL does not recover capacity costs associated with the deferred Martin generating units. The Martin cost estimates are used only in calculating "Actual Net Savings" under the rule, two-thirds of which are recovered as accelerated depreciation. Thus, FIPUG's argument that FPL collects a return on plant not "used and useful" is fallacious.

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

RECOMMENDATION: No. The transmission line itself is only one component of the entire project. In any event, oil backout cost recovery of project costs should not be discontinued until such time as they are included in rate base.

POSITION OF PARTIES

FIPUG: Yes. Rule 25-17.016(6), Florida Administrative Code, states:

> Once the costs of a qualified oil-backout project have been recovered, the applicability of the Oil-backout Cost Recovery Factor shall terminate.

According to FPL, the project will be fully depreciated in August, 1989. At that time, according to the plain language of the rule, FPL will have recovered all the costs of the Project and the OBCRF must terminate. There is no support in the rule for continuing to recover operating and maintenance expenses and other expenses through the OBCRF as FPL suggests.

See also, Argument, Section III, of FIPUG's Brief which is incorporated herein by reference.

FPL: 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 OBCRF 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 framing of this 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 OBCRF should not be terminated until all Project costs are fully recovered, or the remaining UPS Project costs (non-depreciable land, prepaid taxes, UPS capacity charges and other O&M costs) are included in new base rates as envisioned in Section (4)(c) and (d) of the Oil Backout Rule.

PUBLIC COUNSEL: Public Counsel takes no position on this issue as it applies to this proceeding.

STAFF ANALYSIS: FIPUG correctly states that the OBCRF must terminate when costs of the project have been recovered. Although the transmission line should now be fully depreciated, the line itself is only one component of the entire project. Therefore, according to the rule, cost recovery must continue until all project costs are fully recovered or are included in rate base.

ISSUE 26: 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?

RECOMMENDATION: Yes.

POSITION OF PARTIES

FIPUG: No. Chapter 366, Florida Statutes, contains numerous sections which demonstrate that it is not only the Commission's right, but its duty, to monitor the rates charged by electric utilities to ensure that they are not discriminatory and to modify those rates if they become discriminatory. See, i.e., sections 366.04(1), 366.05(1), 366.041(1) and 366.07, Florida Statutes. The Commission's responsibility to supervise rates is ongoing.

The evidence demonstrated that the major portion of the costs which flow through the OBCRF are UPS capacity charges and that such costs are

demand-related because FPL purchases UPS capacity in order to maintain system reliability. Tr. 83-86. The evidence further demonstrated that 18.3% of oil backout costs are recovered from the GSLD/CS rate classes and that this is 28% higher than those classes' cost responsibility would be if such costs were treated in the same way as other demand-related costs. Exhibit 610. It is unduly discriminatory to charge the GSLD/CS classes rates which are 28% higher than their corresponding cost responsibility. Tr. 82.

See also, Argument, Section VI, of FIPUG's Brief which is incorporated herein by reference.

FPL: 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.

PUBLIC COUNSEL: Public Counsel takes no position on this issue.

STAFF ANALYSIS: Staff agrees with FPL's position on this issue: the Commission has consistently rejected FIPUG's claim that recovery of project costs through an energy-based charge is unfair and discriminatory. The Doctrine of Administrative Finality mandates that the Commission once more reject the argument. Staff would direct the Commission's attention to Appendix A of the utility's brief, entitled "FIPUG'S Six Prior Arguments That An Energy Based Oil Backout Charge is Unfair or Inequitable". FPL details the five previous dockets in which FIPUG has made this argument: Docket No. 810241 (the adoption of the oil backout rule), Docket No. 820155-EU (FPL and Tampa Electric Company's oil backout project qualification), Docket No.

820001-EU (FPL's initial oil backout cost recovery in the fuel docket), Docket No. 820097-EU (FPL's 1982 rate case), and Docket No. 830465-EI (FPL's 1984 rate case). FIPUG's attempts to raise the same tired arguments in this docket should similarly be rejected.

ISSUE 27: 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?

RECOMMENDATION: Yes, absent inclusion of the project in rate base.

POSITION OF PARTIES

FIPUG: No. Section 120.68(12)(b) requires the appellate court to remand a case to the agency if the agency's exercise of discretion is inconsistent with an agency rule. However, FIPUG's request that recovery of oil backout project costs not be made through an energy-based charge is not inconsistent with any Commission rule.

Rule 25-17.016 does not specify how oil backout project costs shall be recovered. It does not specify that they be recovered through an energy-based charge.

Further, recovery of the OBCRF through an energy-based charge is discriminatory and violative of numerous provision of Chapter 366. See Issue 26. Thus, an interpretation of Rule 25-17.016 to require collection of the charge in this manner would void the rule on the basis that it is an invalid exercise of legislative authority. Section 120.56(1).

FPL: 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 OBCRF, it must authorize an energy-based oil backout charge. That is the import of Subsection (4)(e) of the Rule and the interpretation given the Rule by FIPUG's witness when the rule was adopted. (Tab A; Tab S, Transcript excerpt from Docket No. 810241-EU at 186). 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.

PUBLIC COUNSEL: Public Counsel takes no position on this issue.

STAFF ANALYSIS: Rule 25-17.016 (4)(e), F.A.C., requires that "The Oil-Backout Cost Recovery Factor applicable to a qualified oil-backout project shall be estimated every six months in conjunction with the Fuel and Purchase Power Cost Recovery Clause...." and that "A true-up adjustment, with interest, shall be made at the end of each six-month period to reconcile differences between

estimated and actual data." Thus, FIPUG's claim that this rule does not specify how project costs be recovered is confusing. Although section (4)(e) does not specify that the oil backout cost recovery factor be applied on an energy basis, an energy-based charge is consistent with the rule. Indeed, it is difficult to conceive of any non-energy based recovery scheme which would be consistent with this section of the rule. Thus, FIPUG's position on this issue is inconsistent with the rule.

Section (4)(b) of the rule mandates that certain oil backout projects "shall be recovered through the Oil-Backout Cost Recovery Factor until such time as these costs are included in the base rates of the utility." Absent inclusion of these costs in FPL's base rates, any termination of FPL's Oil Backout Cost Recovery Factor would be inconsistent with Rule 25-17.016(4)(b), and therefore not permitted by Section 120.68(12)(b), Florida Statutes.

ISSUE 28: 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?

RECOMMENDATION: Yes. FIPUG waived any objection for those periods. However, this issue is irrelevant. Had FIPUG objected in any of the three prior proceedings in which deferred capacity savings were calculated using the deferred Martin Coal units, the Rule would have required the same result: Once approved, recovery of the project continues.

POSITION OF PARTIES

FIPUG: This issue relates to FIPUG's ability to contest the use of the Martin Coal units in calculating deferred capacity savings. FIPUG is not estopped from raising this issue for the same reasons it is not barred from contesting the collection of the OBCRF through an energy-based charge. See discussion of Issue 26. Any action which a utility takes which subjects customers to discriminatory rates is subject to review by this Commission, on the Commission's own motion, or upon showing by an affected party.

FPL: Yes. Beginning in 1987, in three oil backout cost recovery proceedings prior to FIPUG's petition FPL explained in its testimony that it was recognizing the Project's capacity deferral benefits in computing Actual Net Savings and seeking to recover two-thirds of the Actual Net Savings as revenue. This was consistent with the Oil Backout Rule. FIPUG and Public Counsel had notice from FPL's oil backout filing as well as a 1982 Commission Order that the issue of the Project's capacity deferral benefits would be addressed in 1987. By failing to raise the issue of whether capacity deferral benefits were properly quantified in any of the three proceedings, FIPUG and

Public Counsel waived the issue. Rule 25-22.038(5)(b)2, Florida Administrative Code. Their attempt to resurrect the issue in this proceeding is an untimely motion of reconsideration which is not permissible. Rule 25-22.060(1)(d), Florida Administrative Code.

PUBLIC COUNSEL: No. In none of those prior proceedings did the Commission make a decision that, in light of its Order No. 11210, the assumptions and costs of the deferred Martin units were reasonable at the times FPL included them in its calculation of net savings.

STAFF ANALYSIS: The issue of estoppel or waiver of ability to challenge the use of the Martin Coal units in calculating deferred capacity savings for use in the calculation of Actual Net Savings pursuant to the Oil Backout Rule is irrelevant. Even if FIPUG had objected, unsuccessfully, in any of the three prior proceedings involving the use of the deferred Martin Coal Units, the fact remains that at this point, the use of deferred capacity benefits in calculating Actual Net Savings is consistent with the rule, and has been approved by the Commission. According to Section (4)(d) of the Oil Backout Rule, "Once approved by the Commission, the costs of a qualified oil-backout project shall continue to be recovered through the Oil Backout Cost Recovery Factor until such time as they are included in the base rates of the utility." FIPUG's objection to the use of capacity deferral benefits in computing Actual Net Savings amounts to a request that the Commission retroactively disapprove recovery of these costs. Although FIPUG is not precluded from contesting the Martin Unit cost estimates in upcoming periods, FIPUG should not be allowed to contest the fact of approval.

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

RECOMMENDATION: Yes.

POSITION OF PARTIES

FIPUG: No. The refund of improperly collected accelerated depreciation does not constitute retroactive ratemaking. The issue of refunding funds improperly collected through an ongoing adjustment clause was directly addressed by the Florida Supreme Coiurt in Gulf Power Co. v. Florida Public Service Commission, 487 So.2d 1036 (Fla. 1986).

In Gulf Power, the Court addressed the propriety of refunds for monies improperly collected through the fuel adjustment charge. The Court laid to rest the argument that such a refund would constitute retroactive ratemaking. The Court held:

> Nor do we find that the [refund] order constitutes prohibited retroactive ratemaking fuel adjustment. The fuel adjustment proceeding is a continuous proceeding. . . .

Id. 1037. Thus, the Commission has the authority to adjust or disallow revenues previously collected through an adjustment clause.

FPL: 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).

PUBLIC COUNSEL: No.

STAFF ANALYSIS: Project expenses collected after March, 1988, are still properly subject to Commission scrutiny. Staff disagrees with FIPUG's position that all oil backout revenues may be properly refunded. FIPUG points to the Florida Supreme Court decision in Gulf Power Co. v. Florida Public Service Commission, 487 So. 2d 1036 (Fla. 1986) as support for the position that funds collected through the fuel adjustment clause may be refunded. However, that case dealt with the refund of fuel expenses imprudently incurred. The Supreme Court upheld the Commission's order of a $2,200,000 refund of excessive fuel costs, pointing out that the "authorization to collect fuel costs close to the time they are incurred should not be used to divest the commission of the jurisdiction and power to review the prudence of these costs." Thus, the decision was predicated on the Commission's ability to review the prudence of the utility's fuel expenditures, which is not analogous to the relief requested by FIPUG: retroactive disapproval of the project for cost recovery purposes. FIPUG has presented no evidence that FPL imprudently incurred expenses. FIPUG's claims amount to an attack on the application of the Oil Backout Rule rather than a request for scrutiny of project expenses.

On February, 1989, FIPUG and FPL entered into a stipulation regarding oil backout issues raised in connection with the February hearing in Docket No. 890001-EI. The stipulation, which was attached to Order No. 20784 as Attachment D, specified that FPL would present evidence at the February hearing regarding the setting of the Oil Backout Cost Recovery Factor, and that FIPUG would defer presentation of its position on these issues until such time as they were decided in a later scheduled hearing or ruling. The parties also agreed on the effect of deferral on any refund:

> "if any adjustment is made to FPL's OBCRF as a result of the proceedings in a later scheduled hearing in Docket No. 890001-EI and/or Docket No. 8900148-EI, as a result of consideration of the [OBCRF issues], any amounts ordered to be refunded shall be subject to refund as though the Commission had considered and reached a decision on the [OBCRF issues] in the hearing held on February 22 [1989] in Docket No. 890001-EI...."

At the February 1989 hearing, the Commission examined oil backout cost recovery for three time periods: the projected period of April, 1989 through September, 1989, the estimated period of October, 1988 through March, 1989, and the final true-up period of April, 1988 through September, 1988. Since revenues recovered as far back as April, 1988 were approved, subject to the parties' stipulation, FPL would be in no position to complain about retroactive ratemaking regarding these time periods.

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

RECOMMENDATION: No.

POSITION OF PARTIES

FIPUG: Yes. The issue of the Martin Coal Unit cost estimates are an integral part of the appropriateness of FPL's collection of revenues related to accelerated depreciation. See Issues 2, 11 and 12. Thus, it is an issue within the scope of the issues raised in FIPUG's Petition and recognized by all parties as an issue pertinent to this proceeding.

The only basis for the collection by FPL of any accelerated depreciation at all is the inclusion of these "deferred" units in its calculation of net savings. Tr. 60 61. FPL's assumptions in regard to the timing and cost of the Martin Units are related to how the amount of accelerated depreciation was calculated. For example, FPL has relied on the original cost estimates of constructing the units (adjusted only for the difference in escalation rates). This has significantly inflated the deferred capacity benefits, Tr. 92, and thus inflated the amount of depreciation. Similarly, FPL's estimate of when these units would have been built also impacts the depreciation calculation.

FPL: No. The pleadings of this case properly frame the issues and scope of the controversy. Nowhere in FIPUG's Petition was it alleged the 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.

PUBLIC COUNSEL: Yes. The Commission has never passed on the reasonableness of the assumptions used to quantify the Martin Unit cost estimates. FPL asked for approval of the assumptions underlying its estimates in 1982, which the Commission rejected. FPL has never sought nor received explicit approval of its assumptions or cost estimates based on those assumptions.

STAFF ANALYSIS: See staff analysis of Capacity Deferral in Issue 2.

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