

IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION,)
)
 Appellant,)
)
 vs.)
)
 GERALD L. GUNTER,)
 JOSEPH P. CRESSE and)
 JOHN R. MARKS, III, in)
 their official capacity as)
 and constituting the Florida)
 Public Service Commission,)
)
 Appellee.)
)
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CASE NO. 64,209

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ANSWER BRIEF OF APPELLEE

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DESIGNATIONS

Appellant, Florida Power Corporation will be referred to in this brief as "FPC" or "the Utility." Appellee, Florida Public Service Commission will be referred to as "the Commission."

References to the record on appeal will be indicated as "R" References to the transcript of the hearings will be indicated as "T".

Commission Orders will be referred to by their respective number.

References to an Appendix will be by "Appendix _____, Tab _____."

STATEMENT OF THE CASE

Appellee, Public Service Commission has supplemented the Statement of the Case provided by the Appellant, Florida Power Corporation (FPC) because that recitation of the nature of this case is both incomplete and argumentative and, therefore, inadequate.

As the direct result of what has come to be known as the "loose parts" outage at FPC's Crystal River No. 3 (CR3) nuclear-powered generating unit, this Commission reopened FPC's request for a base rate increase tied to the capital costs and fuel savings associated with that nuclear unit. The Commission also announced its intention, through the entry of Order No. 8260, to determine whether all or any part of the higher replacement fuel costs necessitated by this outage should be borne by parties other than customers of the Utility.

During the, then, monthly fuel adjustment proceedings designed to allow the several utilities an opportunity to recoup their incurred fuel expenses, FPC sought to recover the higher fuel costs attributable to replacing the lost CR3 nuclear generation with more costly oil-generated electricity. In view of its announced intention to ascertain responsibility for the higher-cost, replacement power, the Commission allowed FPC to charge its customers these higher costs through its fuel adjustment charges but

ordered that the increased charges be collected subject to refund. Subsequently, the Commission removed the CR3 investigation from the fuel adjustment docket (74680-CI) and established Docket No. 780732-EU as an independent docket for the resolution of the loose parts outage. However, the Commission determined that its decision in the latter docket would be implemented through the charges approved in the fuel adjustment docket.

The Commission held hearings on the loose parts outage in St. Petersburg on October 17-18, and November 28, 1978. Following the submission of briefs and staff recommendations, FPC filed a motion to reopen the hearings in order to offer additional evidence on the subject of the impact of the dropping of a test weight device upon the duration of the 1978 forced outage.

In Order No. 8850, issued April 26, 1979, the Commission rejected FPC's assertion that any fuel adjustment refund must be based upon a finding that the Utility's actions with regard to the initial difficulties with the loose parts outage were improper, holding instead that any aspect of the Utility's decisions and activities which resulted in higher expenses were within the scope of the proceeding. In Order No. 8994, issued August 3, 1979, the Commission held that, as in conventional revenue requirement proceedings, the burden was upon the Utility to demonstrate that the

replacement fuel costs it proposed to recover were reasonably and prudently incurred. The final hearings in this case were held December 10-12, 1980.

On January 30, 1981, the Commission issued Order No. 9775, which found, among other things, that:

1) The vast majority of the forced outage, which ran from March 3, 1978 to September 18, 1978, was related to the failure of the lumped burnable poison rod assemblies inside the nuclear reactor. The source of this problem lay in a defect in the design of the latching mechanism of the burnable poison rods, which was a defect generic to all Babcock and Wilcox-designed nuclear units. Accordingly, FPC was not held responsible for the defect or the resulting replacement fuel costs but was cautioned by the Commission that:

we anticipate that Florida Power Corporation will seek the fullest possible recourse against B&W to recover damages sustained as a result of the failure of the LBPR's and intend to follow its progress in that regard.;

2) There was no basis for an adjustment of fuel cost recovery charges due to welding difficulties which extended the 1979 refueling outage by 19 days; and

3) FPC be required to refund to its customers the amount of \$12,859,251, plus interest, because:

Procedures governing the work activity involving the use of the test weight device were deficient, and the planning and supervision of the project were inadequate. These are functions of Company

management, and Florida Power Corporation must bear responsibility for the consequences of the incident in terms of replacement fuel costs.

Based upon the evidence, we find that 55-days of the forced outage must be associated with the dropped test weight incident. The Company's effort to attribute only 14-days to the incident is not supported by competent, credible evidence.

The refund amount was subsequently reduced to \$11,056,000, plus interest, by the issuance of Order No. 9936 on April 8, 1981.

FPC sought judicial review of Orders Nos. 9775 and 9936, and, on December 16, 1982, this Court reversed and remanded in Florida Power Corporation v. Public Service Commission, 424 So.2d 745 (1982). The Court's opinion consists of four pages and requires little summarization. However, the gist of the Court's opinion is contained in the opinion's concluding paragraphs, which state:

After a careful review of the record and of the PSC's order no. 9775, we believe that the PSC relied excessively on the NGRC report and the NRC notice of violation. While these documents are undoubtedly useful for numerous purposes, they should not serve as the primary source of evidence in a fault-finding determination. Such use of these documents would be analogous to using evidence of subsequent repairs and design modifications for the purpose of showing that the original design was faulty. This would clearly violate Florida's strong public policy in favor of post accident investigations.

We need not consider appellant's other points on appeal.

Order no. 9775 is hereby reversed and this cause is remanded to the PSC for reconsideration in light of the views expressed in this opinion.

On remand, briefs were filed with the Commission and oral arguments were heard on March 1, 1983.

After considering its Staff's written recommendation and review of the entire record, the Commission panel voted unanimously that the Utility had failed to adequately plan the test weight move and supervise the personnel responsible for executing that activity and, further, that as a consequence of that failure, \$11,056,000 of replacement fuel costs had been imprudently incurred. The Commission ordered that the \$11,056,000 was to be refunded to the Utility's customers with accrued interest. Order No. 12240, which was issued on July 13, 1983, reimposed the refund requirement and specifically stated at page 1:

On reconsideration of the record in this case, we find that there is a basis, independent of the NRC and NGRC documents, for determining that the procedures governing the work activity involving the use of the test weight device were deficient, that the planning and supervision of the project were inadequate and, therefore, that the \$11,056,000 of related replacement fuel costs were not prudently and reasonably incurred and should be refunded. The Commission further believes that it can rely on the NRC and NGRC documents as secondary sources of evidence in requiring a refund in this case.

By this appeal, FPC seeks this Court's review of Order No. 12240.

STATEMENT OF THE FACTS

Appellant's statement of the facts is both impermissibly argumentative and not sufficiently complete to adequately appraise the Court of the facts surrounding this case. Accordingly, Appellee offers the following as being more descriptive of the facts.

Florida Power Corporation's Crystal River No. 3 nuclear generating unit was placed into commercial service on March 13, 1977 at an estimated cost of over \$404 million. In its petition seeking additional revenues to cover CR3's operating costs, FPC alleged that the plant's operation would result in fuel costs savings, based on then current fuel costs, of over \$96 million per year. Less than a year later, on February 17, 1978, certain of the unit's instrumentation indicated that portions of the reactor's fuel core were "burning hotter" than the rest of the reactor and that there were certain "loose parts" within the water system that cooled the reactor. Notwithstanding these indications, FPC continued to operate CR3 at reduced power levels until March 3, 1978, when it was completely shutdown. [T-10, 22].

As soon as CR3 went out of service, FPC was required to replace the unit's nuclear-generated electricity with much more expensive coal or oil-fired generation from other sources. To calculate the replacement energy costs

experienced during this outage, the Utility performed a computer production costing simulation which compared the actual replacement fuel costs to the nuclear fuel costs that would have been experienced had CR3 continued to operate. The resulting differential or the additional amount borne by FPC's customers through FPC's fuel adjustment clause was approximately \$59 million for the entire outage.

The initial "loose parts" problem which initiated the forced outage was caused by the failure of devices called "lumped burnable poison rod assemblies (LBPR)." [T-11]. Investigation revealed that the coupling device holding one of these assemblies failed, allowing pieces of the assembly to travel through the reactor coolant system, which, ultimately, damaged the delicate tube ends of a huge heat exchanger known as the "B" once-through steam generator [T-11]. Following the removal of CR3 from service, FPC's primary task was to remove the debris produced by the loose parts, repair the damaged steam generator tubes, and refuel the reactor. Although the Commission found that the source of the loose parts outage was a design defect generic to all Babcock and Wilcox (B&W) designed units, it did not require FPC, which had selected B&W, to refund any of the replacement fuel costs directly attributable to the initial failure. Rather, the Commission stated:

We anticipate that Florida Power Corporation will seek the fullest possible recourse against B&W to recover damages sustained as a result of the

failure of the LBPR's and intend to follow its progress in that regard. (Page 2, Order No. 9775).

The Dropped Test Weight Incident

During the 1978 forced outage, FPC found it necessary to remove the nuclear fuel assemblies from the reactor core in order to inspect and clean the reactor. [T-23]. Once removed, the highly radioactive fuel assemblies were stored in the "spent fuel storage pool", which is located in a building adjacent to the reactor containment building and which contains underwater storage racks for the safe placement of the fuel assemblies. Transport of the fuel assemblies between the two buildings is via one of two fuel transfer canals ("X" and "Y"). The water-filled transfer canals have track-mounted, motor driven carriages. When fuel assemblies are loaded in the fuel transfer carriages, an "upender" device on the transfer carriage is raised vertically to accept the assemblies and is then lowered horizontally for transit. Upon reaching its destination, the carriage upender is again raised to the vertical so that the fuel assembly can be removed. All of the fuel transfer movements are accomplished under water to take advantage of the water's shielding effect on radiation.

During the 1978 outage, both the X and Y carriages suffered frequent misalignments with their tracks, which caused the carriages to jam or otherwise operate erratically. [T-1033, 1637]. By early June, 1978, FPC's

repair activities had progressed to the point that 13 nuclear fuel assemblies had been removed from the spent fuel storage pool and reloaded in the reactor core. [T-974, 1637]. However, transfer of the balance of the unit's 177 fuel assemblies had been temporarily halted by renewed fuel transfer mechanism problems. [T-974, 1637]. However, by June 8, repairs to the Y transfer carriage had been completed and the FPC personnel determined that the carriage should be tested with a simulated load, rather than risk having the carriage fail in the transfer tunnel while loaded with an irradiated fuel assembly.

To test the transfer mechanism, Mr. Jim Hollis, a Planning Engineer from the Maintenance Department, instructed Mr. Michael Collins, [T-959] a Plant Engineer assigned to the repair of the fuel transfer mechanism, to place the test weight device¹ in the Y upender so that the operability of the transfer mechanism could be tested the next day. In giving these instruction, Hollis directed

¹The test weight device was never intended as a simulator or realistic training substitute for a fuel assembly. The proper simulator was the "dummy" fuel assembly, which was an inert duplicate of the live fuel assemblies, but which was not then available because stuck in the malfunctioning X transfer canal. (T-1291, 1808). The test weight device is similar to a fuel assembly in length and diameter, but is cylindrical in shape and not square in cross-section like the fuel assemblies. (T-961). It is about 16 feet in length and eight inches indiameter.

that Collins move the test weight device using one of several hooks he would find in the spent fuel pool area. (T-960). After having examined the available hook at the job site, Collins and Mr. Tom Wayble, a Refueling Supervisor, decided not to use the Utility-fabricated hook

¹(Cont'd) At 2080 pounds, (T-968) the test weight is heavier than the 1550 pound fuel assemblies and is, unlike the fuel assemblies, bottom heavy. The test weight was specifically fabricated by FPC to test the new fuel elevator prior to the commercial operation of the plant. (T-1689). Since the new fuel elevator moves fuel assemblies in a vertical plane, the bottom-heavy nature of the test weight was not significant. Placed horizontally in a transfer carriage, however, the uneven weight distribution made a poor substitute for a fuel assembly with its even weight distribution. (T-961, 1034-1035). Unlike the fuel assemblies and the dummy fuel assembly, which was then stuck in the X transfer canal, (T-1291) the test weight did not have special lifting receptacles in its top to which the fuel handling bridge's specialized grappling fingers could securely lock. (T-1808, 1809). Instead, the test weight had a 3/4 inch eye bolt welded to its top, (T-961, 962) which precluded its being transported by the specialized fuel handling bridge.

because it was not "stout enough". [T-960].² Because the test weight device was then out of the water on the pool area floor, Collins and his crew attached a wire rope sling, which was tagged as to its lifting strength, to the test weight device with a U-shaped shackle by bolting it through the test weight's eyebolt. [T-964, 966, 968]. Attaching the free end of the sling to the auxiliary building's fuel handling crane, which runs north and south, the test weight device was moved some distance and then transferred to the missile shield crane, which runs east and west, in order to move it to the west side of the spent fuel pool. [T-955-974].

Once transferred to the missile shield crane, the test weight device was, with the aid of underwater divers, lowered into the transfer mechanism's upender. The divers then unbolted the shackle and removed it from the eyebolt of the test weight device. Although the test weight was then _____

²This specific hook was one of two identical hooks that had been fabricated at the generating plant from stainless steel rods about 3/8 to 1/2 inch in diameter and which were approximately one foot in length from the eye formed at the top to the bottom of the "fish hook" type bend. The hooks had been fabricated at the plant site specifically for the purpose of lifting the transfer carriage air drive motors, which weighed from 100 to 150 pounds. (T-968) The hooks, which were not imprinted, or otherwise labeled, with their maximum safe lifting capacity (T-1289) were stored in and about the spent fuel pool area.

in the upender, the testing of the Y transfer carriage could not proceed because an electrical interlock problem precluded the lowering of the upender. This failure necessitated the removal of the test weight from the upender and, because the divers were still available, [T-966] it was again removed by using the shackle and wire rope sling combination. Once the interlock problem was solved, Collins was required to again return the test weight device to the upender. This task was complicated by the unavailability of the divers, [T-967] who had gone off shift. Still considering the fabricated hook to be inadequate, [T-968] Collins bolted a shackle with a longer neck to the test weight device's eyebolt, and then laced the long neck, or U-section, of the shackle directly over the large lifting hook permanently attached to the missile shield crane. In this manner, the test weight was once again lowered into the upender. However, because no divers were then available to unbolt the shackle, the crane hook was lowered out of the shackle and removed, leaving the long shackle affixed to the eyebolt of the test weight. Collins' night shift went off duty at 2:00 a.m. on June 9 1978. [T-955-974].

Although Collins' crew had successfully moved the test weight on three occasions without using the fabricated hook, this information was apparently not communicated to either Jim Hollis, who was off-shift and at home [T-968] on the

night of June 8, or to the succeeding day shift which was to start work at 8:00 a.m. on June 9, 1978. [T-979].

On the morning of June 9, 1978, Hollis instructed a plant engineer, Mr. James J. Parrish, to remove the test weight device from the spent fuel pool and place it on the southwest corner of the pool area so that certain unspecified work could be performed on the fuel transfer carriages. [T-1276]. According to Parrish, Hollis told him to take the hook he would find in the pool area, [T-1277] fish for the test weight device, and remove it from the pool.

Parrish's duties, during normal plant operations, included providing technical support for performance testing and for system maintenance. [T-1272]. During the forced outage, he worked as a refueling supervisor and as a maintenance or job supervisor. [T-1273]. One of his specific assignments was to supervise repairs to the fuel transfer carriages. [T-1273]. Although Parrish would subsequently be sent to a rigging school, he had little or no rigging training or experience prior to the dropped test weight incident. [T-1279, 1284].

Parrish, who was a salaried employee, was in charge of the test weight work crew the morning of June 9. His primary assistants for the job were John Kurtz, a maintenance engineer, whose supervisory chain of command was different than Parrish's [T-1280]; Mr. David Eggleston, a Chief Nuclear Operator; and Frank Zimmanck, an Assistant

Nuclear Operator. [T-1275]. Although Eggleston's and Zimmanck's duties normally involved the actual operation of the nuclear unit from the control room, [T-1353] they had been instructed to assist Parrish by Mr. Embach, the Refueling Supervisor. None of these men had significant training or experience in rigging loads.³ (T-1285, 1286). Also present at the spent fuel pool site were Jerry Le Cocq, a Stearns-Rogers Company technical representative, and Dan Wilder and Karl Neuschaefer, who were chemical-radiological technicians.

After Parrish communicated Hollis' instructions regarding the use of the fabricated hook, both Eggleston and Zimmanck voiced concerns that the hook was not sturdy enough for the job, [T-1283, 1406] but, ultimately, they deferred to Parrish, who was the recognized supervisor on the job. [T-1283]. Once the fabricated hook was secured to the missile shield crane's permanent hook with a wire rope sling, one of the workers "fished" [T-1025, 1279] through some 30 feet of water until he had "hooked" the long-necked

³None of the employees in this work crew had formalized training in, or any significant experience, in rigging. (T-1028, 1040, 1417). Available within the plant, but not utilized for this job, were Plant Mechanics, whose training and job descriptions qualified them for rigging tasks.

shackle still attached to the test weight's eyebolt.⁴.

After the test weight was "hooked", Frank Zimmanck manned the controls of the missile shield crane, raised the test weight slightly to see if the hook was holding, and then proceeded to lift it out of the water. [T-1025]. Once the test weight was out of the water, the work crew noticed that the fabricated hook began to straighten. While instructions were being requested on exactly where to place the test weight, the fabricated hook straightened and the test weight fell to the pool bottom and struck one of the actual fuel assemblies, rendering it and three companion fuel assemblies unserviceable. [T-1028]. Because CR3's nuclear reactor is divided into quadrants, which must be power balanced, the damage to one fuel element necessitated the replacement of a corresponding fuel element in each of the three other quadrants at a lost fuel cost of \$531,964. [T-139-140, 495, 701]. The Utility had no existing procedures for handling heavy test weights near fuel assemblies nor had it any established procedures for testing any rigging equipment other than slings. [T-971, 1284, 1285].

⁴According to Mr. Hollis, underwater divers were available at the plant on the morning of June 9, but were being utilized on the reactor side of the transfer in an attempt to free the X transfer carriage. (T-1810).

As workers realized that the test weight had in fact hit a fuel assembly, they rapidly fled the building in order to avoid exposure to a radioactive release from the damaged fuel. [T-1029, 1043]. Hollis, the FPC employee who was in charge of the activity, was not present at the site the day the test weight was first put into the transfer mechanism. [T-1804]. Hollis' instructions were relayed via telephone conversations with him from his home. [T-986]. Moreover, Hollis was unaware of the fact that Parrish, the employee present at the site who was supervising the activity, had no background in rigging. [T-1020]. Hollis stated that he just assumed that Parrish had such a background. [T-1807].

Guy Beatty was the Nuclear Plant Manager of Crystal River No. 3 at the time of these activities and was responsible for every action taken at the plant. [T-921]. Beatty acknowledged the fact that the activities leading up to the dropping of the test weight were in violation of NRC regulations. [T-926]. It is management's responsibility to see that these regulations are followed by every FPC employee. [T-715-716].

FPC had reason to require a cautious approach in the performance of the procedures involving the movement of the test weight because the Utility was put on notice of potential hazards regarding the movement of heavy objects over spent fuel as a result of a letter it had received from

the NRC. [Ex. 20].

In addition to the failure of FPC management to require its employees to follow existing policies, FPC also lacked policies, which, had they been in effect, would have avoided the dropping of the test weight. The failure of FPC management to require the testing and tagging of all hooks, and lifting devices, specifying their lifting capability, was a major inadequacy which lengthened the outage. [T-731, 1041].

The major criticism given by the participants in the test weight activity was the lack of a formal plan or written, firm directions from management as to what exactly should have been done. Also, there was a lack of supervision by management. [T-1126, 1234, 1524, 1563, 1370]. However, members of FPC management did know what was transpiring and recommended the use of the test weight. [T-945]. In fact, members of FPC management from St. Petersburg were at CR3 on a daily basis during these operations. [T-998]. There was also an absence of communications between the different shifts. [T-990]. Finally, there was no consideration given to the proximity of the test weight to the spent fuel, although the possibility of the weight hitting the fuel did exist. [T-979, 1006].

Prior to dropping the test weight, the Utility had been indicating to both the NRC and the Commission that the

outage which had commenced on March 3, 1978, would last through July 3, 1978. [T-125-138, Exhibits 17 & 19]. The Utility told the Commission that the outage duration was being controlled by the necessary repairs to the "once-through steam generator-B" (OTSG-B). [T-102-103, 317].

In a Utility publication dated June 1978, the statement was made that the damage was not as extensive as first thought and the reactor "has now been reloaded". [T-347]. The test weight was dropped on June 9, 1978. Thereafter, the Utility was projecting unit start-up in early August. [T-138]. The Utility then filed documents indicating that the outage, which extended 77-days longer than the estimates made prior to dropping the test weight, was only extended 14-days due to the damage to the fuel assemblies. [T-530]. The Utility admitted that no changes had to be made to the OTSG-B repairs [T-545] and that no delays were encountered in repairing the OTSG-B [T-1548], however, after dropping the test weight, extensive time was lost in repairing the OTSG-B. [T-1723-1729]. What had in fact happened was the Utility found itself with an extended outage caused by dropping the test weight and the need to find and load

replacement fuel assemblies. The Utility reduced the break-neck work effort and spread out the work to fill the available time. [T-1666-1667]. The generator repair work was cut back to a single shift eight days after the accident on June 17 [T-1632] and the Utility did not do all the repairs as quickly as possible. [T-1698]. In fact, the Utility did not even acquire the replacement fuel as quickly as it could have. [T-1753, 1760]. The Utility had put the OTSG-B repair crews "on hold" [T-1792-1794] and during the period from May 8 through August 3, only one week was spent repairing the OTSG-B. [T-1997]. The Utility then tried to "back-fill" the 77-days and still could only find work to take up 63-days. [T-1566-1569]. The PSC determined that 55 days of the outage were directly attributable to the dropped test weight incident. [R-434]. Each day of the outage cost FPC \$300,000. [T-1598]. The entire outage resulted in \$58,655,000 in additional fuel costs. [T-304]. The Commission in Order No. 9936, ordered FPC to refund \$11,056,000 in the replacement fuel costs to its ratepayers. [R-462].

I.

THE COMMISSION'S DECISION IN ORDER NO. 12240 COMPORTS WITH THE ESSENTIAL REQUIREMENTS OF THE LAW AND IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AND, THEREFORE, SHOULD BE AFFIRMED.

- A. There is no legal foundation for FPC's assertion that the errors of employees are not a legal basis upon which to disallow operating expenses.

In the first paragraph of its argument on Point One, the Utility states:

It is settled that there must be management imprudence before a utility's expenses may be disallowed. Management consists of the company's officers and directors. Missouri ex. rel. Southwestern Bell Tel Co. V. Public Service Comm'n, 262 U.S. 276, 289, 43 S.Ct. 544, 67 L.Ed. 981 (1923); Metropolitan Dade County Water & Sewer Brd. v. Community Utilities Corp., 200 So.2d 831 (Fla. DCA 1967). Errors of plant employees are not a legally sufficient basis upon which to disallow a utility's operating costs.

The Commission submits that the above paragraph is critically important for three reasons. First, it contains the elementary legal theory upon which FPC would hope to prevail. That theory is that a utility's ratepayers or customers must bear the adverse economic consequences of the mistakes or errors of the utility's "employees" because the Commission may only disallow operating expense resulting from the imprudence of the utility's officers and directors. Second, the paragraph demonstrates the utter lack of any legal authority to support the Utility's theory. Third, it raises in this writer's mind the question

of what level of accuracy this Court expects when one cites to or summarizes the holding of a case for the Court's reliance.

Metropolitan Dade Co. W. & S. BD. v. Community U. Corp., 200 So.2d 831 (Fla. DCA 1967), involved the water and sewer board's abortive attempt to reduce the concerned utility's gross annual revenues by \$23,000. While the opinion discusses the Utility's rate of return and the executive salary expense, it neither says that management consists of the Utility's officers and directors nor that errors of plant employees are not a legally sufficient basis upon which to disallow a utility's operating costs.

The sole connection of the Dade County Case, to the Utility's first paragraph and the conclusions of law stated therein is that it contains a quotation from the other case cited.

Missouri ex. rel. S.W. Bell T. Co v. Public Serv. Com., 262 U.S. 276, 289, 43 S.Ct. 544, 67 L.Ed. 981 (1923), involved a order of the Public Service Commission of Missouri reducing the rates of the telephone company and abolishing certain installation and moving charges. The primary issue on appeal was the valuation of the Utility's rate base. A subsidiary issue, though, was the Commission's partial disallowance of an operating expense, which the Court described as follows:

The important item of expense disallowed by the commission-\$174,04.60-is 55 per cent of the 4 1/2 per cent of gross revenues paid by plaintiff in error to the American Telephone & Telegraph Company as rents for receivers, transmitters, induction coils, etc., and for licenses and services under the customary form of contract between the latter company and its subsidiaries. Four and one half per cent is the ordinary charge paid voluntarily by local companies of the general system. There is nothing to indicate bad faith. So far as appears, plaintiff in error's board of directors has exercised a proper discretion about this matter [289] requiring business judgment. It must never be forgotten that while the state may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership. The applicable general rule is well expressed in State Public Utilities Commission ex rel. Springfield v. Springfield Gas & E. Co. 291 Ill. 209, 234, P.U.R.1920C, 640, 125 N.E. 891:

The commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the director of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers. (Emphasis supplied).

The Commission has no quarrel with the holding in this case. In fact, the cited standard of care is essentially the same standard used by the Florida Public Service Commission in Order No. 12240. Factually, it is important to note that the rents the Missouri Commission sought to partially disallow were established by the customary form of contract utilized by American Telephone & Telegraph Company and its subsidiaries. Thus, the Supreme Court found that the Company's "board of directors has exercised a proper

discretion about this matter requiring business judgment." Stated another way, there was not mismanagement resulting in unreasonable expenses.

The point of this litany, however, is that neither of the authorities cited by FPC addresses the composition of management nor, more importantly, the notion that the errors of plant employees are not a legally sufficient basis upon which to disallow a utility's operating costs. Quite simply, the Commission would submit that the Utility has constructed its legal lifejacket from whole cloth. If the Commission were to adopt the policy advocated by the Utility, it would be encouraging non-management. As such, all liability would be excused if only employee errors were committed. Such a policy would be nonsense. FPC does not stop at this point, instead, it builds on its fabricated legal theory, stating at Page 31 of its Brief:

[The crew's] failure to do the same for the hook is nothing more than an inexplicable human lapse. That is, however, a classic example of employee error for which management cannot be held liable.

The Commission is forced to ask, "If this is such a classic example, or theory, why is there not a single legitimate citation to a jurisdiction that accepts such a theory?" The Commission would submit that this Court should seriously question the acceptance of a "classic" theory for which no authority is offered.

B. There is significant legal authority to support the Commission's determination that the Utility is responsible for the management of all of its operations and employees.

Throughout this proceeding, FPC has consistently sought to lay the blame for this accident at the feet of a number of its employees, as if they constituted a separate class of humans for which no one was responsible. As noted by the Commission at Page 9 of Order No. 12240, the Virginia State Corporation Commission and the Virginia Supreme Court had little sympathy for the Virginia Electric and Power Company (VEPCO) when it, like FPC, asked to not be held responsible for the error of one of its employees.

In Virginia Electric and Power Company, v. State Corporation Commission, Division of Consumer Counsel, 220 Va. 930, 265 S.E. 2d 697 (1980), the Court sustained the Commission's disallowance of \$3.2 million of replacement fuel costs VEPCO incurred during a 9.6 day outage at the Utility's Surrey No. 2 nuclear unit in November, 1977. As reported in the Court's opinion and the Commission's order⁵ replacement energy necessitated by the November, 1977 forced outage was passed on to consumers through VEPCO's fuel adjustment clause. Subsequent investigation revealed that the forced outage resulted from

⁵Copies of each are found in Appendix 1, Tab 1, for the Court's convenience.

an employee error that occurred during VEPCO's program to identify and plug certain steam generator tubes that were either leaking or could be expected to begin leaking soon.

VEPCO's tube plugging program was extensive and fairly complicated. There were over 10,000 steam generator tubes in the nuclear unit, but not all were inspected during the refueling outage because a computer program predicted areas where tube failures would be most likely. Once these areas were identified, each tube in the area was to be given an eddy current probe test, which generated a strip chart, as well as a magnetic tape oscilloscope trace. All tubes to be tested were listed on a Eddy Current Test Sequence log. After the tubes were probed, the sequence log, strip charts and oscilloscope trace were given to an inspector whose job it was to interpret the test results. The inspector, or interpreter, recorded his interpretations of the test data on the sequence log, which was later used in determining which tubes were to be plugged.

During September, 1977, a total of 6,144 tubes were scheduled for inspection during a scheduled refueling outage. Included in this number was a tube that carried the identification number R5C26. Although R5C26 was scheduled to be probe tested, it was not. Despite the lack of a strip chart and oscilloscope trace on R5C26, the interpreter recorded that its condition was satisfactory and, accordingly, it was not plugged. Approximately a month

after the unit was returned to service, a leak developed which required that the unit be completely shutdown. In a letter to the Nuclear Regulatory Commission (NRC), VEPCO reported that the only tube leaking was R5C26, which it discovered had not actually been inspected. The Utility acknowledged its mistakes but argued that because human error exists in every business, costs attributable to error should be passed on to consumers if they do not exceed a reasonable level. The Virginia Commission rejected this argument, stating:

We fully agree with Company's position that human mistakes evermore will occur. Mistakes are part and parcel of human frailty. However, it is quite a different thing to conclude that a utility should not be held accountable for unnecessary expenses resulting from improvident management decisions, or omissions. The very realization that mistakes are likely to occur, as recognized by VEPCO, requires prudent planning and reasonable foresight by management to identify the areas where mistakes can occur, together with likely consequences, and to take reasonable precautions as least to catch those mistakes before the consequences ensue.

* * *

In our opinion, Company expectations of perfection from the interpreter add up to improvident planning on the part of VEPCO management. The resulting costs were unnecessary. The nature and mechanics of the interpreter's work - highly skilled, but very demanding - carries with it a great potential for severe economic consequences from only one mistake. We conclude that VEPCO should have taken steps to ensure that presence of a strip chart and oscilloscope trace for each tube to be inspected. (Appendix 1, Tab 2).

In affirming the \$3,287,736 refund, the Virginia Supreme Court concluded that VEPCO had neither overcome the Commission's presumption of factual correctness nor demonstrated that the refund calculation was contrary to the evidence.

The Virginia Commission is not the only regulatory body that has directly addressed the attempted defense of employee "human error." In Case 27123 - Consolidated Edison Company of New York, Inc. - Proceeding to investigate the prolonged outage during 1976 of the Indian Point No. 2 Nuclear Generating Plant, Opinion No. 79-1, the New York Public Service Commission found that Utility responsible for an additional 54 days of the forced outage and for replacement fuel costs equal to \$16,777,152.⁶ Eight of the 54 additional days were attributed to a factual situation remarkably similar to the dropped test weight

⁶Opinion 79-1 may be found at Appendix 1, Tab 3. In Opinion 79-1, the Commission ordered that remedial action regarding the \$16,777,152 of replacement fuel costs would be addressed in the Utility's pending rate case. Opinion 79-8, issued April 6, 1979, in Case 27353 (the pending rate case) ordered that the almost \$16.8 million be refunded through the Utility's fuel adjustment clause. Pages 35-36, 41-42 of Opinion 79-8 may be found at Appendix 1, Tab 4. The Staff of the New York Commission indicated that the Utility did not appeal Opinion 79-8.

incident.⁷ Addressing the Utility's defense of human error, the Commission stated, at Page 17:

On exceptions, the company argues that no amount of planning or managerial skill can eliminate 'human error,' which it attributes to the foreman who was directing the crane operator; and it emphasizes that it took diligent, well-organized remedial action. It also claims that the outage would have been extended by two weeks, rather than eight days, if the operator had waited until the water was clarified before moving the rig. But these arguments are insubstantial. First of all, any deficient conduct by a business enterprise must be attributed directly or indirectly to human error; but, obviously, employers cannot automatically be immunized from the consequences of errors committed by individuals in the course of employment.

The New York Commission tested Con Ed's conduct by the use of a standard essentially identical to that used by this Commission in Order No. 12240. Discussing the standard to be applied, the New York Commission, at Page 5 of Opinion 79-1, quoted its Law Judge on the subject:

...we are concerned that Con Ed's proposed standard, "reasonable business judgment," fails to emphasize the high degree of care, prudence, planning, supervision, control, back-up and flexibility required in this initial refueling operation. The risks incident to nuclear technology, the health and safety hazards, the cost penalties of delay and error - all contribute to requiring a standard of planning, prudence and performance beyond that of "reasonable business judgment." We are not dealing here. . .with suits against corporate officials for individual liability. We are concerned with the extent to which ratepayers should bear the higher fuel costs

⁷A 60-ton device called a "lifting rig" was being moved underwater on a crane, when, due to reduced visibility from cloudy water, it hit a shelf and split open, requiring its replacement. Opinion 79-1, Page 16, 17.

of the extended outage where such costs were within the company's control.

The proper standard is whether the higher fuel costs of fossil fuel generation could have been avoided by better planning or more prudent management of the refueling outage. . . .

The New York Commission concluded that:

...the company conduct should be judged by asking whether the conduct was reasonable at the time, under all the circumstances, considering that the company had to solve its problems prospectively rather than in reliance on hindsight. In effect, our responsibility is to determine how reasonable people would have performed the tasks that confronted the company. (Opinion 79-1, at Page 6).

In a later New York case involving Con Ed and the same Indian Point No. 2 nuclear unit, that Commission concluded:

... that the unit was out of service for the 59 days ... due to a lack of reasonable care by Con Edison in its operation of that plant which, in turn, necessitated the occurrence of higher fuel and purchased power costs in that period.⁸

The New York Commission utilized the same "reasonable people" standard, adopted in the previous case, in finding the Utility responsible for and requiring it to refund, some \$33.7 million of replacement fuel costs. The 59 days of extended outage resulted from 1) a water leak, 2) sump pump failures and 3) the failure of a warning light. In defense

⁸Opinion No. 82-2, issued January 21, 1982, in Case 27869-Consolidated Edison Company of New York, Inc. - Proceeding on motion of the Commission to investigate the outage of the Indian Point No. 2 Nuclear Generating Plant may be found at Appendix 1, Tab 5. Again, writer advised by New York Staff that this order not appealed.

of one of its pump failures, Con Ed claimed that the miswiring of the pump was an error made by its employees even though they were provided written instructions showing how the wiring was to be done. Rejecting this defense, the Commission found that:

When making an important wiring installation in a nuclear plant system that provided a critical defense against potential flooding of the reactor cavity we think it was unreasonable for Con Edison not to have ensured that the job was performed by a qualified electrician and not to have had the wiring checked upon completion to make sure it was done as specified.

The mere provision of a sketch to a workman does not satisfy the standard of care required in these circumstances."

The discarded Con Ed defense is remarkably similar to that made by FPC that:

Although the Commission points to various other procedures which 'might' have prevented this incident, the fact inescapably remains that FPC management had procedures in place which would have prevented this incident if they had been followed by the plant employees. (Appellant's Brief at Page 19.

In defense of its warning light failure, Con Ed adopted a stance sounding very much like FPC's statement that:

In the final analysis, a company must inevitably rely on the judgment and common sense of its employees who are on the spot. (Appellant's Brief, Page 15)

and,

It is undisputed that existing procedures required a consideration by those employees of what might happen in handling the test weight. (Appellant's Brief, Page 19).

In rejecting the argument that the light failure was the result of human error, the New York Commission explained:

As Staff points out, it would be reasonable to expect that the company would have procedures that specified pre-planned courses of action to take in response to observed abnormalities. The company's reply -- that staff's witness agreed that operators must be relied upon to exercise some judgment in responding to unanticipated circumstances -- is not a valid reason for its failure to have developed proper procedures and to have made its operators aware of how they should have responded to observed abnormalities. Indeed, the suggestion inherent in the company's argument -- that operators must fashion judgmental "ad hoc" responses to abnormal conditions in a nuclear generating plant -- is disturbing and plainly does not satisfy the requisite standard of care.

The above cases demonstrate that other Commissioners and Courts have rejected the notion that regulated utilities may not be held economically responsible for the planning and supervision of their operations, to include the training and supervision of their employees. More important, though, is this Court's decision in Florida Power Corp. v. Cresse, 413 So.2d 1187 (1982). In that case, which also involved FPC and the CR3 nuclear generating unit, this Court affirmed the Commission's order requiring the Utility to refund to its customers \$3.5 million of replacement fuel costs associated with a 167-day forced outage of CR3 beginning in February, 1980. In doing so, this Court sustained the Commission's finding that \$3.5 million of the much larger total of replacement fuel costs were unreasonably and imprudently incurred because of the Utility's failure to have on hand a

replacement decay heat pump. This Court recognized in its opinion that FPC had failed to order a replacement decay heat pump as a result of administrative error. (at 1189). The court found that there was competent substantial evidence to support the Commission's finding of management imprudence. With regard to the amount of the refund, this Court found that there was ample testimony supporting the positions of both parties, but deferred to the Commission, in its role as fact finder, that the necessity of obtaining a spare decay heat pump delayed CR3's return to service for seven days at an approximate cost of \$500,000 per day.

This Court's decision in Florida Power Corporation v. Cresse, supra, is controlling on the issue of whether a utility may be held accountable for the operating errors of its employees and its own failure to plan and manage. If this were not the law, utilities would be given an incentive to not manage their operations efficiently and select and train their employees carefully.

C. The Standard of Review

This Court has repeatedly stated that it will affirm the decisions of administrative agencies if they are supported by competent substantial evidence in the record as a whole. City of Plant City v. Hawkins, 375 So.2d 1072 (1979).

Citing from DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957), this Court in Duval Utility Co. v. Florida

Public Service Commission, 380 So.2d 1028 (1980) reiterated the oft cited definition of what is competent substantial evidence:

Competent substantial evidence is "such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred [or] . . . such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." [at 1031]

In determining whether there is competent substantial evidence to support the Commission's orders, this Court has traditionally attached great weight to the Commission's role as the finder of fact and the agency's

prerogative to evaluate the testimony of competing experts and accord whatever weight to the conflicting opinions it deems appropriate.

United Telephone Co. v. Mayo, 345 So.2d 648, 654 (Fla. 1977)

The Court has held that it will not substitute its judgment for that of a State agency on a finding of fact or weight thereof made within the ambit of its responsibilities and with due regard to the law and due process. Graham v. Estuary Property, Inc., 399 So.2d 1374 (Fla. 1981), cert. den 399 So.2d 1374. See also, Jacksonville Suburban Utilities Corp. v. Hawkins, 380 So.2d 425 (Fla. 1980).

Even if a reviewing Court finds competent substantial evidence of record sufficient to support a conclusion contrary to that reached by the Commission, it should not reverse if there is conflicting but competent substantial

evidence of record to support the fact finder's result.

It was for the agency fact finders to assess the reliability of the testimony and other evidence adduced. On review here, the PSC's findings of fact will not be disturbed, if those findings are supported by substantial evidence. The evidence need not be such as to compel the result reached by the PSC, so long as it is not so insubstantial that it does not support the result.

International Minerals and Chemical Corp. v. Mayo,
336 So.2d 548, 553 (Fla. 1976).

Thus, if the Court finds that there is competent substantial evidence in this record to support the basis for the disallowance of the replacement fuel costs, as well as the calculation of the customer refund amount, it should affirm Order No. 12240.

D. Order No. 12240 is in Compliance with the Court's Opinion Reversing and Remanding this Cause to the Commission.

A close reading of Order No. 12240 will reveal that the Commission strictly adhered to the instructions it found in the Court's opinion. In reaching its decision, the Commission made seven specific findings of fact, each of which was either related to the Utility's failure to supervise, plan, or institute procedures or the adverse economic consequences that flowed from those failures. Not one of these findings either addresses the standards of nuclear safety or personnel safety or accuses FPC of violating such standards. At Page 4 of its Opinion, the Court stated:

After a careful review of the record and of the PSC's order no. 9775, we believe that the PSC relied excessively on the NGRC report and the NRC notice of violation. While these documents are undoubtedly useful for numerous purposes, they should not serve as the primary source of evidence in a fault-finding determination. (Emphasis supplied).

The word excessive means "too much" and necessarily implies that a lesser amount of reliance would be acceptable. The word primary means "first" and necessarily implies that the NRC and NGRC documents may be utilized so long as some other type of evidence serves as the primary source in a fault-finding determination. This Court could have easily stated that the NRC/NGRC documents should not serve as a source of evidence, but it did not so state.

While the Commission believes that the secondary use of the NRC/NGRC documents is permissible, it wishes to emphasize that its finding of mismanagement and lack of proper care is independent of the use of the NRC/NGRC documents. Specifically, as reflected in the Statement of the Facts, the testimony of the various workers and officers provides competent substantial evidence in this record to support the Commission's finding that FPC's failure to adequately plan and supervise its operations resulted in the dropped test weight incident and the subsequent replacement fuel costs of \$11,056,000. Thus, even if the Court determines that the NRC documents may not be used as evidence at all, it should let the Commission's decision stand solely on the basis of

the testimony and other evidence.

E. The Use of the NRC/NGRC Documents As Secondary Sources of Evidence Does Not Offend the State's Public Policy in Favor of Post-Accident Investigations.

In its opinion reversing, This Court said the primary and excessive use of NRC/NGRC documents was analogous to the use of evidence of subsequent remedial repairs. The general refusal of all courts to allow such evidence is founded, in part, on the belief that to do so will discourage defendants from their attempts to prevent injury to others. While the Commission sees the wisdom of this policy, it believes that the policy is subject to logical limitations and believes that two cases highlight the appropriateness of the Commission using the NRC/NGRC documents as secondary sources of evidence. In Hartman v. Opelika Machine and Welding, 414 So.2d 1105 (Fla. 1st DCA, 1982), a products liability action was brought against a manufacturer based on an allegedly defective product. The issue presented was whether it was error for the trial judge to have admitted evidence of post-accident design changes made by one not a party to the litigation. The First District Court of Appeal noted the absence of Florida cases involving that precise factual issue, but looked to out-of-state authority in upholding the admission of such evidence. In doing so the Court found:

The rule [of exclusion] is defended in terms of relevancy and policy. Such evidence is said to be irrelevant because it is capable of explanations equally as plausible as an admission of conduct of

pre-accident neglect of duty. If relevancy were the only criteria, Professors Wigmore and McCormick both point out such evidence would meet the usual standards of relevancy. The rule is primarily grounded in the policy that owners would be discouraged from attempted repairs that might prevent future injury if they feared that evidence of such acts could be introduced against them. This policy consideration is absent in a case, such as this, where imposition of liability is not sought against the person taking the remedial action. 414 So.2d 1110 (emphasis supplied).

In Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir., 1978), Reh. denied 578 F.2d 871, a trend cost estimate was presented for admission against Ford Motor Company to prove its knowledge of the alleged dangerous condition. Ford asserted the inadmissibility of the cost estimate based on the rule against admission of evidence of subsequent remedial measures. The Fifth Circuit Court of Appeals stated two reasons for the inapplicability of the rule. First, the trend cost estimate was written prior to the accident and was, therefore, not "subsequent." Secondly, even if the estimate had been written after the accident, invocation of the policy underlying the rule of inadmissibility was not proper because:

. . . the rule of exclusion is based 'on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety'. Notes of Advisory Committee on Proposed Rules, Fed. R. Evid. 407, Invoking this policy to justify exclusion here is particularly inappropriate since the estimate was prepared not out of a sense of social responsibility but because the remedial measure was to be required in any event by a superior authority, the National Highway Traffic Safety Administration. 473 F.2d at 1343 (emphasis supplied).

As in Rozier, FPC's Nuclear General Review Committee prepared its report on the dropped test weight incident, not out of any voluntary sense of social responsibility, but, rather, because it was required to by the NRC. Thus, whether the Commission uses the NGRC Report as either primary or secondary evidence of mismanagement, the remedial action/public policy concern of the State will be met because the NRC will insist on such a report from the NGRC every time the facts call for one. The holding of Rozier is equally applicable to the NRC Notice of Violations, because the NRC is statutorily mandated to investigate and issue the Notices regardless of whether they are being used against a utility.

FPC also misses the point with regard to Hartman, supra, saying the decision is inapplicable because FPC is a party to the litigation and because the post-accident evidence relates solely to its own procedures. FPC's misunderstanding, of course, is in its failure to realize that we are considering the admissibility of a report (Notice of Violation) prepared by a non-party (the NRC) and not the use of the Utility's own remedial measures.

The Commission has not misunderstood this Court on the use of NRC/NGRC documents as secondary evidence. Even if that evidence was stricken from consideration, the Commission has indicated that its decision is based solely

on other competent substantial evidence of record and would ask that it be affirmed on that basis.

F. Requirement of efficiency and reasonableness

That regulated utilities have an obligation to operate efficiently and that Commissions are obliged to see that the utilities' rates reasonably reflect such efficiency has long been recognized in the decisions of the United States Supreme Court. In 1935, the United States Supreme Court addressed the issue of disallowable operating expenses in West Ohio Gas Company v. Public Utilities Commission of Ohio, 294 U.S. 63, 55 S.Ct. 316, 79 L.Ed 761, where it concluded:

A public utility will not be permitted to include negligent or wasteful losses among its operating charges. The waste or negligence, however, must be established by evidence of one kind or another, either direct or circumstantial.

In the 1936 case of Acker v. United States, 298 U.S. 426, the Court addressed the role of the regulator when a utility's expenses are challenged:

With respect to the cost of getting and maintaining business, the Secretary had before him a complete analysis of the actual expenditures made during an adequate test period. He had ample evidence pro and con as to the necessity and wisdom of these expenditures. It appears that he weighed the proofs, found that in certain respects the expenditures had been extravagant and wasteful, and, in the exercise of judgment, arrived at a cost he considered fair and adequate. The contention is that the amount to be expended for these purposes is purely a question of managerial judgment. But this overlooks the consideration that the charge is for a public service, and regulation cannot be

frustrated by a requirement that the rate be made to compensate extravagant or unnecessary costs for these or any purposes. Acker v. United States, 298 U.S. 426, 430-31 (1936).

The Commission is required by statute to allow only those rates that are fair and reasonable and the result of efficient service.⁹

G. The Commission did not use hindsight in reaching its decision

In addressing the Court's concern about hindsight, the Commission stated at Page 7 of Order No. 12240:

In carrying out this responsibility, we must be mindful of the Supreme Court's admonition to not allow the advantage of hindsight to give us superior knowledge of what the correct course of action should have been. We are cognizant of this warning and interpret it to refer to the superior knowledge of detailed facts, gained through post-accident investigation, which were neither know nor reasonable knowable by the utility at the time of the event. Such a prohibition seems entirely fair in "liability-finding" cases. However, we do not interpret the Court's opinion to say that we are precluded from conducting post-accident or post-event investigations. That we should not be so precluded should be obvious from the realization that one cannot conduct pre-accident investigations of specific events. We conclude, then, that our responsibility is to investigate and then determine the reasonableness and prudence of given expenditures by attempting to analyze the actions of the decision-makers in light of the circumstances then known to them or that they should have reasonably been aware of if they were proceeding in a reasonable, prudent and efficient manner.

⁹See Sections 366.03, 366.041(1) and (2), 366.05, 366.06(2) and 366.07, Florida Statutes.

The Commission has utilized the above standard and has not engaged in any impermissible hindsight in doing so.

H. The Utility's conduct leading to the dropped test weight incident was imprudent

Examination of the Utility's conduct reveals that it was imprudent and there is substantial competent evidence to support this conclusion. At Page 8 of Order No. 12240, the Commission has listed seven specific findings of fact it relied upon in finding FPC imprudent in failing to adequately plan and supervise the move of the test weight. The record of this case is replete with facts to support those findings. Simply stated, the record shows:

- 1) Extreme precautions are always taken to prevent dropping fuel or the dropping of objects on the nuclear fuel;
- 2) fuel assemblies contain specialized lifting receptacles and are handled by a specialized crane to preclude the possibility of dropping them;
- 3) an inert but identical "dummy" fuel assembly was the preferred device for training and testing when an irradiated fuel assembly was undesirable;
- 4) the test weight device had none of the specialized handling features of the actual and "dummy" fuel assemblies;
- 5) the test weight, as indicated by its name, had been "hand-made" to test an elevator not related to the fuel transfer mechanism;
- 6) the test weight weighed 2080 pounds, but could only

be lifted by an "eyebolt";

7) there were Plant Mechanics at the plant site, who had specialized training in the lifting of heavy objects;

8) the crew assigned to move the test weight had little or no training in lifting heavy objects, their primary jobs relating to the operation of the reactor when it was running;

9) there were no written procedures governing either the lifting of heavy weights around the fuel pool, generally, or the test weight, specifically;

10) there was no requirement that all lifting devices be tested for, and marked with, their maximum safe lifting capacity;

11) the "hand-made" stainless steel hook that dropped the 2080 pound test weight had been constructed to lift a 150-pound motor;

12) the stainless steel hook had not been tested as to its maximum lifting weight and was not so marked;

13) there was no evidence of procedures to insure continuity from shift to shift;

14) divers and Plant Mechanics were available on the day the test weight was dropped.

I. Conclusion

Considering the great daily expense of replacement fuel, FPC had an obligation to ascertain risks leading to replacement fuel and take all reasonable precautions to

prevent them. It had an obligation to ensure that its employees were successful in their jobs where the economic risks were so great. FPC failed in this obligation and there is competent substantial evidence of record to support the Commission's finding of imprudence. Order No. 12240 should be affirmed on this point.

II.

THE EVIDENCE SUPPORTS THE COMMISSION'S
FINDING THAT DROPPING THE TEST WEIGHT
EXTENDED THE OUTAGE BY 55-DAYS.

From the outset of the outage, the filings the Utility made to the Commission and to the NRC indicated that the unit would be returned to service on July 3, 1978. [T-137]. The Utility dropped the test weight on June 9, 1978 [T-138-139] and immediately thereafter, on June 26, 1978, the Utility was projecting an early August start-up. [T-138]. Mr. Beatty testified at the October 18, 1978 hearing before the Commission that the repair to the steam tubes in the OTSG-B would constitute the longest duration item of the outage. [T-317]. Later he would say that the steam tube repair was not undertaken during the outage [T-329] and that the work that was done, commenced on May 2 [T-542] and was completed on June 7. [T-543]. The record indicates later that during that period, and up until August 3, 1978, only one week was spent repairing the OTSG-B. [T-1797]. The balance of the time the employees were "on-hold" and not working on repairs to the steam generator. [T-1792-1794]. The Commission found, that the end date, the date the unit was returned to service, September 18, 1978, was dictated by the Schedule for obtaining the four replacement fuel units from Duke Power

Company. During the outage, so as not to reflect adversely on the duration of the outage, the Utility slowed down on the repair efforts so as to consume as much of the 77-days as possible. For example, during the outage the Utility took 60-days to repair a pump which it later claimed extended the outage 15-days. [T-1650-1651]. From the record, it is clear that each day of outage cost the rate payer approximately a third of a million dollars in additional fuel costs. [T-1598]. The outage resulted in \$58,655,000 in additional fuel costs [T-304], with the unit down from March 3, 1978 [T-125, 138] through September 18, 1978. [T-389].

The record indicates that "sliver removal" at the ends of damaged tubes and plugging damaged tubes in the OTSG-B encompassed 93-days, yet the actual work consumed less than two weeks. [T-1797-1798].

Another interesting observation regards the clean-up effort of the burnable poison rod. The Utility estimated that the clean-up extended the outage by 11-days. [T-1568]. Yet the clean-up was completed prior to dropping the test-weight. [T-1571]. In addition, the Utility told the NRC after the clean-up had been completed and before the dropped test weight incident, that the Utility still anticipated a scheduled start-up of July 3, 1978. [T-1573-1574]. From this it can easily be seen that the

clean up of the debris did not extend the outage. But since the Utility had to fill up 77-days of "float", it contended that 11 days of outage was attributable to "debris clean-up." [T-1568].

Another interesting anomaly the Utility tried to convince the Commission of concerned the refueling. Prior to the dropped test weight incident, on May 22, 1978, the Utility had reloaded 13 fuel elements back into the reactor vessel out of 177 assemblies. [T-1636]. On May 23, 1978, the NGRC meeting was held, and by report dated May 30, 1978, [Exhibit 44], the Utility was still anticipating an early July start-up. [T-1573]. At that point, at least, the fuel reloading had not adversely affected the start-up. After the test weight drop, the Utility loaded 160 fuel assemblies between June 10 and June 19, 1978. [T-1582-1583]. All the fuel assemblies were loaded (except for the four needing replacement) in nine days. Yet the Utility alleges that the refueling took 15 days longer than expected, eating up 15 days of the 77 days of extended outage. [T-1568].

If you then just add up the prosthetic outage extenders -- 11 days for cleaning, 15 days for refueling and 15 days for pump "evaluation", added to the 14 days the Company admits is attributable to the dropped test weight -- you calculated 55 days extended outage. (See Pages 16-18 Order No. 12240 for calculation).

The record in toto is a morass of information which the triers of fact, the Commission, carefully evaluated, giving weight and credibility to some testimony and giving less weight to other testimony. That is precisely the province of the Commission. It adequately explained its decision and the evidence relied upon. The law is well established on this point. In Florida Retail Federation, Inc. v. Mayo, 331 So.2d 308 (1976), this Court reiterated the rule:

We have here then, at best, a conflict in the evidence -- a matter which it is the responsibility by law for the Commission to resolve. If there is competent substantial evidence to support the Commission's conclusion with respect to the reliability of the Traffic Usage Study, then this Court will not re-evaluate the evidence upon review of the Commission's order even though we might come to a contrary conclusion if we were to engage in such re-evaluation. [at 311].

There is competent substantial evidence of record to support the Commission's finding that FPC's imprudence unreasonable extended the forced outage by 55 days at an increased replacement fuel costs of \$11,056,000. Accordingly, Order No. 12240 should be affirmed on this point.

CONCLUSION

Commission Order No. 12240 is in conformance in all respects with this Court's decision reversing and remanding this cause.

There is competent substantial evidence of record, independent of the NRC/NGRC documents, to support the Commission's finding of imprudent management leading to \$11,056,000 of disallowable replacement fuel costs.

The NRC/NGRC documents are valuable economic investigatory tools and their use as secondary sources of evidence is permissible.

Order No. 12240 comports with the essential requirements of law, is supported by competent substantial evidence of record and should be affirmed by this Court.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee, has been furnished by U. S. Mail to the following parties of record this 7th day of November, 1983.

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