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IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION,

Appellant

v.

GERALD L. GUNTER, JOSEPH P. CRESSE AND JOHN R. MARKS, III, in their official capacity as and constituting the Florida Public Service Commission,

Appellee.

Case No. 64,209

ANSWER BRIEF OF APPELLEE CITIZENS OF THE STATE OF FLORIDA

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PRELIMINARY STATEMENT

The Citizens are mindful of Rule 9.210(c), Fla. R. App. P. (1983). The Statement of the Case and the Statement of the Facts as contained in the Initial Brief of the Appellant, however, must be amended substantially to present a complete perspective of the case to this Court. Rather than recite point-by-point disagreements, the Citizens seek the indulgence of this Court, and offer the Statement of the Case and the Statement of the Facts which will follow.

In addition, the Citizens indentify the following designations:

Florida Power Corporation will be referred to variously, as "FPC" "the Company", "the Utility" or "the Appellant";

The Public Service Commission as "the PSC", or "the Commission";

References to the record will be designated as "R.";

References to the transcript of the hearings will be designated as "T-" followed by the page number;

The opinion of this Court, issued December 16, 1982, will be designated as "Op." followed by the page number; and

The initial brief of the Appellant will be designated as "Initial Brief".

The Appendix to this brief will be designated as "A-".

Statement of the Case

This case originated upon the Commission's own motion in Florida Power Corporation's 1977 rate case. In Order No. 8160 the PSC granted Florida Power an annual rate increase of $59,468,468. That docket was initiated "to reflect the true net savings resulting from the generation of electricity from its Crystal River Nuclear unit." Florida Power had petitioned to recover the fixed costs of Crystal River #3 (CR3) which were to be more than offset by expected fuel savings from lower cost nuclear generation. Recognizing the unique nature of the case, Order No. 8160, at page 3, stated:

> [T]he requested revenues are inextricibly [sic] interwoven with the modification of the [fuel] cost recovery clause and associated fuel savings resulting therefrom.... [T]his ... demonstrates ... the necessity of giving recognition to fuel savings in making our decision.

Pending petitions for reconsideration kept Order No. 8160 from becoming final, and, in the interim, Crystal River #3 broke down. The Commission then issued its Order No. 8260 [R-1] converting the docket into a full revenue requirements rate case because the fuel savings justification for the limited proceeding had evaporated. Order No. 8260 also recognized the impact of the nuclear outage upon the fuel adjustment charges:

> [W]e have determined that the higher fuel adjustment charges which will result in [the fuel adjustment docket] from the Crystal River No. 3 outage should be subject to a protective refund in the event it is determined that the company or any other party should bear responsibility for the incident or for any portion of resulting higher fuel costs.
>
> Order No. 8260, p. 2.

The rate case concluded with Order No. 8834. The responsibility for excess fuel costs however continued under a separate docket number as a "spin-off" from the regular fuel adjustment proceedings.

Initial hearings were held on October 17-18, 1978, in St. Petersburg. Florida Power pre-filed testimony of several company witnesses, none of whom mentioned the dropped test weight incident or any impact of that incident upon the time Crystal River #3 was off line. It was the Company's announced position that its actions in no way prolonged the outage. [T-8]. Mr. Guy P. Beatty, the manager of the nuclear unit, was the Company's primary witness, testifying to the events surrounding the removal of the unit from service and "actions necessary to return the unit to service". [T-10]. He stated that the repair effort was done in two stages: a thorough inspection and "minimal" repair to the steam generator. [T-23-24]. The duration of the outage was not affected by the damage to the steam generator. [T-24, 96]. He testified further than he was aware of nothing that should or could have been done differently from the start which would have reduced the duration of the outage. [T-24-25].

Upon cross-examination, however, Mr. Beatty conceded that an incident in which a test weight was dropped and damaged a fuel assembly postponed the start-up of Crystal River #3 completely independent of the original breakdown. [T-140]. He conceded further that it materially extended the outage. [T-144-45]. Staff requested an exhibit detailing the outage as originally planned and as worked which was filed in mid-November 1978. [Ex. 12; A-1].

Further discovery was conducted after the initial hearings and before further hearings were held on November 28, 1978. At these later hearings,

Florida Power agreed that dropping the test weight prolonged the outage [T-387], that start-up was contingent upon receipt of replacement fuel assemblies from Duke Power Company's Oconee plant [T-389], and that no one other than Florida Power Corporation was responsible for the test weight incident. [T-390]. The Company now maintained however that the outage was extended by only 14 days.

The November 28th hearing was the last one scheduled. All that remained was for the parties to file briefs and the Commission to take final action. After briefs were received, the PSC staff filed its recommendation that Florida Power be held responsible for 57 days of the outage attributable to the dropped test weight and that the Company refund $13.5 million in fuel charges already collected from its customers. Florida Power then filed a motion to reopen the record and proferred additional testimony by Mr. Beatty, alleging that the existing record was inadequate. [R-152]. That motion was granted on March 29, 1979, by Order No. 8789 [R-187], the Commission noting that further hearings would not be limited to the supplemental testimony filed by Florida Power.

At the Company's request, a pre-hearing conference was held on April 10, 1979. In response to the Company's contentions that the inquiry into the dropped test weight exceeded the scope of the docket and that someone else bore the burden of proof, the PSC issued Order No. 8850 dated April 26, 1979 [R-192], in which it held that its origional notices placed all aspects of the nuclear outage affecting fuel costs in question. In a later Order No. 8994 [R-218], issued August 3, 1979, the burden of proof was found to rest with Florida Power "and that it must rely upon affirmative evidence rather than a presumption of law."

Further hearings were then held December 10-12, 1980. Mr. Beatty was again called as a company witness after pre-filing further supplemental testimony on November 28, 1980. The purpose of his testimony was "to explain the impact if the dropped test weight (DTW) incident on the startup of CR#3." He sponsored Exhibits 40 and 41 to explain the 77 day discrepancy between the July 3, 1978, startup date reflected on Exhibit 17 and the actual September 19, 1978, start-up. [T-673-83]. An extention of 45 days was attributed to problems repairing the steam generator [T-675] even though he had testiifed previously that damage to the generator had no affect on outage duration. [T-24,96]. For the first time, part of the extension was attributed to problems with the decay heat pump. [T-677-78].

After the December 12, 1978, hearing concluded, staff recommended that Florida Power be held liable only for the 14 days it now claimed were attributable to the dropped test weight incident. The Commissioners disagreed and, based upon a computation by Commissioner Cresse, found liability for 55 days attributable to that incident. Order No. 9775, issued January 30, 1981, reflected that decision. The amount of the ordered refund was reduced in response to Florida Power's petition for reconsideration in Order No. 9936, dated April 8, 1981. [R-255].

On December 16, 1982, this Court reversed Order No. 9775, remanding the case for the Commission's reconsideration. Florida Power Corporation v. Public Service Commission, 424 So.2d 745 (Fla. 1982). Among other considerations, the Court found the Commission relied excessively on the NGRC report and the NRC notice of violation, and that those documents could not serve as the primary souce of evidence in the determination of fault [Op. 4]. The Court also specifically rejected the Commissions assessment that the test weight task should have been labeled safety-related. [Op. 3]

On remand, the Commission established the procedure for briefs and oral argument through its Order No. 11575 [R-256]. During oral argument, the Public Counsel emphasized the error of FPC's assertion that any expenses resulting from imprudence of negligency which is not attributable to the directors or officers must be borne by the ratepayers [R-Vol. XIII, pp. 39-48, 51-54].

Through Order No. 12240]R-281], the Commission again found FPC liable for 55 days of incremental replacement fuel costs, basing its decision on evidence independent of the NRC/NGRC documents [Id., pp. 1, 11.15] The Commission further found that this Court had allowed the "secondary" use of those documents and that such secondary use merely supported the Conclusion of the Commission reached independent of the documents. [Id., p. 10, 13]

STATEMENT OF FACTS

Crystal River #3 was brought off line on March 3, 1978. [T-165]. The coupling device which held a lumped burnable poison rod assembly (LBPR) within the reactor core failed. [T-11,107,108,401]. The coolant flow through the reactor vessel broke up the LBPR assembly and carried the peices of the LBPR and its heavy coupling or "spider" device into the 'B' once-through steam generator (OTSG). [T-11, 403, 404]. There in the top of the steam generator the loose pieces, driven by the coolant flow, impacted repeatedly upon the ends of the 15,000 tubes that protruded through a two-foot thick tube "sheet". [T-11, 404]. Some tube ends were nicked, some were pounded down to the level of the tube sheet. [T-458]. A small leak resulted. [T-91, 406, 407, 413]. Certain small pieces of the LBPR assembly passed through the tubes and were deposited in the base of the reactor vessel where they remain in an inaccessible area. [T-11, 405, 406, 431, 432]. Other peices lodged within the tubes. If the tube could not be cleared of these obstructions it was plugged and thereby removed from service. [T-117, 118, 405, 406].

Originally a complete repair effort was planned in which all tubes were to be ground down to the level of the tube sheet and then rewelded to it. [T-102, 103, 317, 328, 329, 378, 452, 459]. This complete repair was not done pending the development of computer-controlled tooling that can operate in the radioactive environment of the steam generator. [T-121, 414, 417]. Repairs actually performed involved removing slivers from any tube ends, defueling and inspecting the reactor vessel, removing accessible debris, and returning the unit to service. [T-23, 117, 404, 405, 459].

On April 27, 1978, Florida Power reported that 88 days would be needed to repair the 'B' OTSG. [Ex. 12, p. 3; A-3]. At that time, the complete repair of the 'B' OTSG was expected to take a great deal longer than was entailed by the partial repair actually done. [T-102, 103, 317]. On May 4, 1978, Florida Power reported to the Nuclear Regulatory Commission (NRC) that repairs of the OTSG would begin on May 15, 1978, be completed on June 7, 1978, all OTSG work would be completed by July 7, 1978, and Crystal River #3's start-up would commence on July 22, 1978. [Ex. 39, last page; A-52]]. On May 15, 1978, it reported that repairs would not begin until May 18th, but that the unit would be back on line by July 3rd. [Ex. 17; A-6]. Mr. Guy P. Beatty, nuclear plant manager, testified that no changes were made in the estimated time needed to repair the OTSG after June 9th. [T-545]. Assuming two weeks 1/ for startup, steam generator repairs should have been ongoing between May 18th and June 19th according to the May 15th schedule submitted to the NRC. [Ex. 17]. Then on June 9, 1978, a test

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1/The planned repair effort contained in Exhibit 12 gives two weeks as anticipated start-up time; Exhibit 39 states that all OTSG work should be completed on July 7, 1978, and start-up would commence on July 22, 1978; on June 28, 1978, the company submitted that it could start-up in early August if the replacement assemblies were received prior to the end of July which implies that less than two weeks are needed. [T-389-89].

weight device was dropped in the spent fuel pool damaging a fuel assembly. [T-130-151].

The test weight was a 16 foot length of pipe, 8 inches in diameter, filled with metal bars and lead pellets to simulate the weight of a 2,000 lb. fuel assembly. Fuel transfer mechanism problems had been encountered and, at the conclusion of repairs, the test weight was used to check the transfer equipment before using an actual fuel assembly.2/ An earlier work crew had inserted the test weight into the carriage with the aid of a diver in the spent fuel pool. Since a diver was not available to a later crew ordered to extract the test weight, they used a hook fabricated on site and intended to lift fuel transfer motors weighing 100 lbs. to "fish" the test weight from the carriage. As the weight was being lifted, the hook straightened dropping the test weight which damaged one fuel assembly stored in the spent fuel pool.3/

2/A fuel reactor core contains 177 fuel assemblies. Thirteen assemblies had been returned to the core in 3 days from May 20-22, 1978 with some difficulty. The refueling equipment was repaired between May 23 and June 11, and the remaining 160 (but for the 4 replacement assemblies) were loaded in 4 days from June 12-15. [Ex. 12, page 5].

3/The spent fuel pool contained racks in which fuel assemblies removed from the reactor core during cleanup operations were stored. The pool was approximately 20 feet wide and fuel assemblies extended 6 to 8 feet from the wall on one side. [T-1075-1090].

The damaged assembly was found to be unsuitable for return to the reactor core. [T-139- 140]. To maintain equal power levels within the reactor core, it was necessary to obtain four fuel assemblies from another utility to replace the damaged assembly and three others within other quadrants of the core. [T-139, 140, 164]. On June 26th and again on June 28, 1978, Florida Power Corporation reported to the NRC that its scheduled startup had to be delayed because of problems in obtaining replacement fuel assemblies necessitated by the damage caused by the dropped test weight but never altered its scheduled repair of the steam generator in these reports. [Ex. 19, p. 2; T-388-89]. Crystal River #3 actually returned to service on September 19, 1978, 77 days later than the July 3rd date reported before the test weight drop.

I. THERE EXISTS COMPETENT SUBSTANTIAL EVIDENCE OF RECORD TO SUPPORT THE COMMISSION'S FINDING THAT FPC SHOULD BEAR THE MONETARY BURDEN CREATED BY THE DROPPED TEST WEIGHT INCIDENT.

A. In reaching its decision, the Commission initially disregarded the NRC/NGRC reports altogether.

Because the Order below resulted from a remand from this Court, the initial task is to determine whether the Commission properly applied standards consistent with this Court's remand. In reversing the Commission's Order No. 9775, the Court found that the PSC "relied excessively on the NGRC report and the NRC notice of violation". [Op. p 4]. The Court further instructed the Commission that those documents "should not serve as the primary source of evidence in a fault-finding determination." Id.

Upon reconsideration, the Commission complied with the admonitions of this Court by reaching a conclusion based upon evidence altogether separate from the NRC and NGRC documents. The Commission's decision is succinctly stated on page 1 of Order No. 12240:

> 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.
>
> [emphasis added]
>
> Id.

and reiterated on page 15 of that same order:

> We reaffirm our finding, based on the testimony of the witnesses to this proceeding and independent of these NRC/NGRC documents, that FPC's failure to adequately plan and supervise its operations resulted in the dropped test weight incident and the subsequent replacement fuel cost of $11,056,000, which we find to be unreasonably and imprudently incurred.
>
> [emphasis added]
>
> Id.

It should be clear that even in the total absence of the NRC/NGRC documents, the Commission reached the conclusion that FPC's customers should not be required to pay the damages resulting from the dropped test weight incident.

The Commission did employ the NRC/NGRC documents as "secondary" evidence, the propriety of which will be addressed elsewhere in this brief. The central question here, however, is whether the Commission's decision can be supported in the total absence of the NRC/NGRC documents.

This Court has dealt with other situations in which conflicting evidence was presented to the Commission. In such situations the Court leaves to the Commission the discretion to determine the credibility of each item of evidence. In Florida Bridge Co. v. Bevis, 363 So.2d 799 (Fla. 1978), this Court held:

> Florida Bridge also contends that the Commission improperly determined that test-year maintenance expenses were extraordinarily high. On this point, there was conflicting evidence before the Commission. It is within the Commission's authority to evaluate conflicting testimony and accord to each opinion whatever weight it deems appropriate. United Telephone Co. v. Mayo, 345 So2d 648, 654 (Fla. 1977)
>
> Id., at 801

The standard for judicial review of PSC decisions is well-settled. Section 120.68(10), Florida Statutes (1981), provides:

> If the agency's action depends on any fact found by the agency in a proceeding meeting the requirements of s. 120.57 of the act, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by competent substantial evidence in the record.
>
> Id.

The cited section has been applied numerous times to the review of PSC orders. This Court has stated emphatically that it will neither re-weigh the evidence nor substitute its judgment of factual determinations for that of the Commission. In Jacksonville Suburban Utilities Corp. v. Hawkins, 380 So.2d 425 (Fla. 1980), this Court cited with favor its longstanding refusal to re-evaluate conflicting evidence presented to the Commission:

> This Court's responsibility is not to reweigh or re-evaluate conflicting evidence.... United Telephone Co. v. Mayo, 345 So.2d 648 (Fla. 1977).
>
> Id., at 426

Similarly, this Court has often held specifically that it cannot and will not substitute its judgment for that of the Commission. In rejecting a challenge to the use of a year end rate base, this Court cited with approval a previous opinion which had reached the same conclusion:

> However, this Court upheld the findings of the Commission in City of Miami v. Florida Public Service Commission, supra, and stated:
>
> "[W]e cannot substitute our judgment for that of the Commission in regard to its

> administrative determination to use the year-end test." (208 So.2d 249, 257).
>
> Shevin v. Yarborough, 274 So.2d 505, 511 (Fla. 1973).

In the same opinion this Court elaborated:

> In summary, we will not overturn an order of the Commission because we would have arrived at a different result had we made the initial decision; something more is needed.
>
> Id., at 509

The Court then stated that it would not affirm a Commission decision if that decision were arbitrary and unsupported by substantial competent evidence. Id.

The competent substantial evidence standard has been employed by this Court and is a well-established point of law. Provided there is competent substantial evidence supporting Commission decisions, this Court has approved PSC action. When the Citizens sought this Court to overturn the "two month transition adjustment", the Court refused, stating:

> A review of the record shows the order to be supported by competent, substantial evidence. We therefore approve Order No. 9306 and deny the petition for review.
>
> Citizens v. Public Service Commission, 403 So.2d 1332, (Fla. 1981).

This Court has stated explicitly that its only responsibility upon review is to determine whether the Commission acted upon competent substantial evidence and consistent with essential requirements of law:

> Our duty is only to ascertain whether the Commission's findings are supported by compentent and substantial evidence and whether the Commission acted in accordance

> with the essential requirements of law. See General Telephone Co. v. Carter, 115 So.2d 554 (Fla. 1959).
>
> United Telephone Company v. Mayo, 345 So.2d 648, 651 (Fla. 1977).

In fact, that this Court will uphold any Commission decision supported by competent substantial evidence is one of the most thoroughly settled legal principles within the regulatory process of this jurisdiction. See General Telephone Co. v. Carter, 115 So.2d 554, 557 (Fla. 1959); Rapid Delivery Service v. Carter, 123 So.2d 553, 554 (Fla. 1960); Southern Gulf Utilities v. Metropolitan Dade County Water and Sewer Board, 180 So.2d 481, 483 (Fla. 3d DCA 1965); Florida Power Corp. v. Mayo, 203 So.2d 614, 615 (Fla. 1967); United Telephone v. Mayo, 345 So.2d 648, 651 (Fla. 1977).

An examination of the record reveals that, even ignoring the NRC/NGRC documents, there does exist competent substantial evidence to support the Commission's decision to refuse to require the ratepayers to bear the burden of the dropped test weight. In fact, the Commission very clearly and explicitly delineated evidence in the record which led to the conclusion that the replacement fuel costs were the result of imprudence and therefore would be unreasonable to pass on to the ratepayers. The Commission stated:

> 1) The test weight device was specifically fabricated to test a new fuel elevator prior to the initial operation of the plant [T-1690];
>
> 2) Despite its limited design purpose, the test weight device was retained in the spent fuel area without any written instructions or procedures to govern its use and handling [T-1284, 1291];
>
> 3) Although many of the lifting hooks at CR3 were labeled or imprinted with their maximum lifting capacity, FPC had no procedure in effect requiring the testing, labeling or

> marking of such hooks to indicate their capacity [T-731];
>
> 4) FPC had no written procedure governing the fabrication of lifting devices or their use, testing and labeling T-731];
>
> 5) FPC had no effective methodology or procedure for identifying skills critical to the test weight move, which led to persons, substantially untrained in rigging, being made responsible for the rigging and lifting of an unorthodox load, while Plant Mechanics skilled in rigging were available elsewhere in the plant and when underwater divers could have been requested to assist [T-1028, 1040, 1353, 1417, 1811];
>
> 6) FPC's procedures, or lack of the same, failed to provide for the necessary continuity and exchange of information between plant functional sections and shifts that might have precluded the dropping of the test weight device [T-990]; and
>
> 7) Ignoring the nuclear and personnel safety ramifications of moving an almost 2100 pound object with a hook fabricated to lift 150 pound objects, FPC's failure to have in effect procedures governing the movement of the test weight device over irradiated nuclear fuel assembilies demonstrates an unreasonable disregard for the potentially adverse economic consequences that would necessarily stem from damaging the fuel assemblies [T-980].
>
> [Transcript cites added]
>
> Order No. 12240, p.8.

Every finding cited above is based on evidence in the record, and none of those findings are based on the NRC/NGRC documents. Therefore, even totally disregarding the NRC/NGRC documents, the record contains competent substantial evidence supporting the Commission's determination that the customers should not suffer because of the dropped test weight. At this point, then, the Court's duty is satisfied. Based on the well-settled principles for judicial review, this Court should affirm the Commission's

holding that the costs resulting from the dropped test weight should not be passed on to the ratepayers.

B. The Commission complied with this Court's directive by relying on the NRC/NGRC reports only for secondary support.

Order No. 12240 states that the Commission again relied on the NRC/NGRC documents, but this time only as secondary evidence which supports the Commission determination reached independent of those documents [Id., at 10, 11]. The Company objects to the Commission's use of those documents apparently on two basic grounds: first, that this Court's opinion remanding the case does not entitle the Commission to use the NRC/NGRC documents even secondarily; and second, that, contrary to its claims, the Commission is relying not secondarily on the documents, but rather primarily.

The Commission carefully attempted to interpret the language used by this Court in remanding the case. The Court stated that the Commission "relied excessively" [emphasis added] on the NRC/NGRC reports, which should not be used as the "primary source of evidence" [emphasis added]. [Op; p. 4]. Because the Court could have omitted "excessively" and "primary" had that been the intent, the Commission naturally inferred that the Court was allowing for "non-excessive", "non-primary" use of the evidence. FPC seems to argue that the evidence cannot be used at all:

> As further justification for its continued reliance upon these documents, the Commission seizes upon isolated words in the Court's opinion. Noting that the Court stated that these documents "should not serve as the primary source of evidence in a fault-finding

> determination," the Commission concludes that it can rely on them as "secondary" evidence.
>
> The Commission's view of this Court's holding defeats the entire purpose of Florida's policy. At the time the post-accident evaluation or recommendation is made, it cannot be known whether that will be later labeled as "primary" or as "secondary" support for findings of fault. Florida's policy encouraging such evaluations is inevitably jeopardized by <u>any</u> use of such evidence in later assessing liability.
>
> [emphasis in original]
>
> [Initial Brief pp. 26, 27]

The Citizens agree with the Commission that this Court's opinion must have intended the allowance of some use of the NRC/NGRC documents. Had the Court intended total prohibition, it almost certainly would have deleted "excessively" and "primary". The inclusion of those two words provides the clear implication that some use of the evidence was permissible.

While only the Court knows what it intended by including "excessively" and "primary", the point is rendered moot because the Commission was able to reach its conclusion totally without regard to the existence of the NRC/NGRC documents. This independent conclusion is emphasized throughout Order No. 12240 (pages 1, 11, and 15).

Since the Commission would have reached an identical result even if the NRC/NGRC documents had never existed, the secondary reliance on those documents is of no consequence. Even if this Court determines that the Commission should not have relied at all upon the evidence in question, the error is harmless. The remedy could only be to require the Commission to disregard the documents altogether. The Commission has stated that it already has analyzed the case while disregarding the reports and has found that the customers should not bear the costs of the dropped test weight.

The result would therefore be identical whether the NRC/NGRC reports are used secondarily or are instead not used at all.

FPC's other basic complaint seems to be that the Commission relied primarily on the NRC/NGRC documents, notwithstanding the PSC's several explicit statements to the contrary. Although the PSC repeatedly and explicitly stated that it arrived at its conclusion without the use of the NRC/NGRC documents, FPC simply does not believe the Commission. The Company points to the fact that Order No. 12240 devoted some detail to these reports and that the oral argument was devoted to the NRC/NGRC documents:

> [I]t is undeniable that the Commission again relies extensively upon those reports. Indeed, the entire oral argument and the bulk of the Commission's order were devoted to consideration of those reports.
>
> [emphasis added]
>
> [Initial Brief, p. 16]
>
> It is clear that the Commission has again relied heavily upon those reports. They are quoted from at great length by the Commission....
>
> Id., p. 27.

While FPC is wrong about the oral argument - the Public Counsel, for instance, devoted considerable effort to arguing that employee error should be borne by the Company in certain instances [R. Vol. XIII, pp. 39-48, 51-54] - the main point is that it makes absolutely no difference what was dealt with at oral argument. Likewise, it is of no consequence that Order No. 12240 quotes from the NRC/NGRC documents. The fact remains that Order No. 12240 reflects that the Commission arrived at its decision initially without any reference to those reports. The Order clearly points out the non-NRC/NGRC evidence upon which it relied [Id. p.8] and only after that

does the Order discuss the NRC/NGRC findings as supporting the conclusion already reached by the Commission.

The Commission has made very clear that it reached its determination without the benefit of the NRC/NGRC material. It has enumerated the competent substantial evidence upon which the determination was based. The Commission's determination at that point meets the requirements for judicial review and should be upheld. That the Order then describes how the NRC/NGRC reports would further support the determination already reached cannot possibly erode the validity of the Commission's initial determination.

C. FPC's most fundamental underlying premise, that FPC can be held accountable only for the imprudence of its directors and corporate officers, has no foundation in proper ratesetting principles.

In its opening paragraph, the Company establishes the framework upon which all of its arguments rely. FPC states that the Commission cannot disallow any expenses resulting from employee error, but rather must find management imprudence before an expense can be disallowed. [Appellant's Initial Brief p. 11]. The Company claims that that point is settled. From that point on, all of FPC's efforts are devoted to demonstrating that management, which FPC defines as the Company's directors and officers, was not responsible for the dropped test weight.

FPC's arguments are misguided, however, because it is not settled that the Company need never accept the financial consequences of its employees' errors. Since FPC contends that management consists only of its directors

and officers, it would require the Commission to attribute all imprudence or error to one of a handful of corporate vice presidents (or the corporate secretary or the president) before any expenses can be disallowed. Then the Company cites two cases to demonstrate that this position is settled. Neither case, however, involved facts similar to the instant case. In Metropolitan Dade County Water and Sewer Board v. Community Utilities Corp., 200 So.2d 831 (Fla. 3d DCA 1967), the Dade County Board, upon its own motion, attempted to reduce the utility's existing rates. Because it brought the action, the Board had the burden of showing that the existing rates were unreasonable. Without presenting any evidence, the Board attempted to limit the utility's executive salary to $10,000. The District Court affirmed the trial judge's decision to reject the Board's contention.

In Missouri ex. rel. Southwestern Bell Tel. Co. v. Public Service Commision, 262 U.S. 276, 289, 43 S.Ct. 544, 67 L.Ed. 981 (1923), a question of valuation was brought before the Court to determine whether a certain amount spent for rental fees was reasonable. The Court found that there was no evidence demonstrating that the amount spent was unreasonable:

> So far as appears, plantiff in error's board of directors has exercised a proper discretion about this matter requiring business judgment.
>
> Id., at 288, 289.

In each case cited by FPC for support of its most basic underlying premise, the respective court decided an entirely different question from that suggested in the instant case. In neither case was there an issue of who had taken the action in question; in both cases, the action in question was undenially performed by management, and the Courts were simply attempting to decide whether that action was prudent. The very important and fundamental difference is that in the instant case there is no question

whether someone acted imprudently, but there may be some question as to whether the imprudence was attributable to management or to employees.

Obviously, the facts and issues in both Metropolitan and Southwestern Bell are so far removed from those in the instant case that no precedential value is provided by those cases. FPC's primary assertion, upon which its entire argument is structured, is not "settled", but rather is without legal precedent.

The Public Service Commission is required by statute to ensure that only "just, reasonable, and compensatory" rates are passed on to ratepayers. Section 366.041(1), Florida Statutes (1981). A number of tests have been developed to determine when that statutory requirement is met, but management culpability, as opposed to employee culpability, is not among those tests. A cost created by employee negligence can be as unreasonable to pass on to consumers as can a cost created by management deficiency. A competitive business is responsible for the actions of its employees, as those actions bear on the cost of the product.

An acceptable test for determining the reasonableness of rates is the superimposition of the competitive framework on regulated utilities. See, Bluefield Waterworks and Improv. Co. v. West Virginia Public Service Commission, 262 U.S. 679, 67 L.Ed. 1176, 43 S.Ct. 675 (1923). Absent proper regulation, utility customers would be extremely vulnerable simply because they do not have alternative suppliers of utility services. Regulators therefore attempt to become a surrogate for the missing competitors and to set rates at the level that would exist were there competition for the ratepayers business.

The application of the competitive model to the instant case would render meaningless the question of management/employee culpability. Consider the following hypothetical:

(1) A large supermarket orders 10,000 pounds of meat at $1 per pound, with the intention to sell it at the price believed to maximize profit, $1.25/pound.

(2) After the delivery of the meat, a supermarket clerk negligently leaves the door to the freezer open.

(3) The meat spoils and the supermarket orders another 10,000 pounds at $1/pound.

Now address a question identical to that at bar: Who must bear the burden of the loss? There are two basic alternatives, neither of which leaves the customer to bear the loss.

In the competitive market, the grocery owner could either absorb the loss or, as a plaintiff, take action against his employee for negligence. The one option not available would be to charge the loss in the price of the product. If the price were raised to $2.25 per pound (to recoup the cost of both shipments plus the profit margin), the grocer would succeed only in driving his customers to seek an alternative supplier.

Now change the hypothetical slightly. Suppose it was unclear whether the freezer had been left open through the employee's negligence or instead through deficient management policy. That lack of clarity would bear only whether the owner or the employee would bear the loss. It would

have absolutely no bearing on the price of the product. In the competitive market, the employer takes responsibility for employee actions vis a vis the prices charged to the customers.

The Company attempts to emphasize the apparent harshness of requiring the owners to absorb losses caused by employee negligence. If this Court entertains that consideration, it need also consider the harshness of the alternative, namely, that the customers absorb those losses. Because the damages must be borne by either the owners or the customers, the Court should further consider the questions:

(1) Who is responsible for hiring the employees who caused the damages?

(2) Who is responsible for training the Company's personnel?

Obviously the customers cannot be held accountable for either of the actions questioned above. If it is harsh treatment to hold the owners financially accountable for employee negligence, it is a fortiori harsh treatment to pass employee negligence on to the ratepayers.

One further point must be kept in mind when deciding whether the customers should pay for employee error. The customers have already paid the Company to bear the risk of this type of employee error. The Company is protected from competition, but nevertheless receives a return on equity to bear business risk. When the Commission last set FPC's return, it allowed the Company the opportunity to earn its cost of equity. Included in the measurement of that cost of equity is the investors' assessment of the risk involved in an investment in FPC. Since one of the risks perceived by

investors is that a major employee error could cause a reduction in FPC's return, that risk has been included within the cost of equity which is already paid by the customers. To now require the customers to further pay the damages resulting from employee error would be charging them a second time for a cost they have already borne.

The foregoing examination demonstrates that the appellant has not cited applicable legal authority to support its underlying premise that a showing of employee error dictates that the customers be held financially accountable for all damages arising out of that error. In addition, the application of basic ratemaking principles and fundamental tenets of fairness demonstrates that the customers should not be required to bear every employee error.

II. THERE IS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S FINDING THAT CR3 WOULD HAVE RETURNED TO SERVICE 55 DAYS SOONER HAD THE TEST WEIGHT NOT BEEN DROPPED.

The Company's position is that there is no evidence that the dropped test weight delayed start-up by 55 days. The Company asserts that the evidence is uncontroverted that the incident delayed start-up by no more than 14 days. This is true as far as it goes, but it is irrelevant to any issue decided by the PSC. The Commission determined that the unit would have returned to service 55 days sooner had the test weight not been dropped. Multiple activities were in progress when that incident occurred. After it happened, Florida Power found itself with an additional two months to perform the various ongoing activities. The fact that these other activities were finally concluded 14 days before the unit returned to service does not speak to the issue of when CR3 would have been back on line but for the dropping of the test weight. The Commission properly discounted all company testimony to the effect that the as worked schedule resulted in a delay of 14 days attributable to the dropped test weight.

An analysis of the documents in the record refutes the arguments raised by FPC as to the effect of the dropped test weight upon the duration of the outage. On May 15, 1978, the Company reported to the NRC that CR3 was expected to return to service on July 3, 1978. [Ex. 17; A-6]. This is the last estimate made before the test weight drop on June 9th. [Tr-545]. Steam generator repairs were to begin on May 18th, the same day refueling was to commence. Attributing 55 days of the outage to the dropped test weight, as the Commission did in Order No. 9775, assumed CR3 could have been returned to service by July 26, 1978.

The Company seeks to explain the 41 day difference in its brief. It attributes an additional 11 days to the debris removal effort, citing to transcript page 675. [Initial Brief, p. 29] Mr.Beatty is there referring to Exhibit 12 and attempting to explain the 77 day discrepancy between the July 3rd date and the "as worked" schedule showing a completion date of September 18, 1978. He attributed an additional 15 days to repair of the refueling mechanism. [Initial Brief, p. 31] As the Company points out, these activiites preceded the dropping of the test weight and were not associated with the later test weight incident. But this fact defeats the company's position. All debris removal was completed by May 19th [Ex. 12, page 5,line 4; A-5], the refueling equipment was repaired by June 11th [line 6], and the reactor was completely refueled, except for the replacements shipped from Oconee, on June 15th [line 7]. Assuming two weeks for start-up, the unit still would have been back up by July 3rd. The minutes of the May 23rd meeting of the Nuclear General Review Committee reflect that, on that date, four days after debris removal was completed, Mr. Beatty reported that plant start-up was still scheduled for early July. [Ex. 44, p. 2; T-1571-73]. The Commission's computation gave Florida Power the benefit of the doubt until July 26th.

The claimed delay attributed to decay heat pump problems was refuted on the record by the company's own witness. The explanation for all delays was acknowledged to be based upon an "as worked" schedule. Mr. Beatty acknowledged that repairs could have been performed more rapidly. [T-1665]. As explained originally, the decay heat system is needed when fuel is in the reactor. When the canal used to transfer fuel from the spent fuel pool to the reactor is drained, decay heat from the fuel in the reactor is removed by the decay heat system. Because of problems with decay heat pump 1A (DHP

1A), one of two such pumps, there was not a redundant decay heat removal system. Therefore, the 'B' steam generator was used as a backup system. As such, the water could not be drained from that generator to provide access to the lower manway. The eddy current test could not be performed because, since damage to the steam tubes on top prevented the probe from being inserted from above, it had to be done from below and no access was available. This complex set of circumstances purportedly resulted in a 15 day delay.

In two instances, however, the explanation was refuted on the record by the same witness who offered it as an excuse. Mr. Beatty had earlier testified that damage to the steam generator had no effect on the length of the outage. Now he was maintaining that damage to the tube ends prevented a standard test from being performed normally, and the alternative procedure was delayed by decay heat pump problems. He conceded, however, that if the Commission relied on his prior testimony, it could find that delays in steam generator repairs did not delay start-up.

> Q (By Mr. Howe) Based on your prior testimony, then, the Commission can just disregard any reference to damage to the steam generator tubes in considering how long the unit should have been down, is that correct?
>
> A (By Mr. Beatty) That is correct.
>
> [T-1636].

The decay heat pump failure caused a delay only because the Company allowed it. In fact, it was not perceived necessary to avoid a delay because the repair could still be completed well before the replacement fuel assemblies were received from Oconee. Mr. Beatty agreed that decay heat removal is not needed when the fuel is in the spent fuel pool. [T-1600]. He agreed further that, had the Company chosen, it could have removed the

fuel from the reactor, stored it in the spent fuel pool, and proceeded to perform the steam generator repairs without worry over a decay heat problem. [T-1638-39].

> Q (By Mr. Howe) Mr. Beatty, as I understand it, you knew before you started refueling that you were having troubles with the decay heat pump, is that correct?
>
> A (By Mr. Beatty) Yes.
>
> Q And at that time also you knew that you had some work to do on the steam generator, is that correct?
>
> A Yes.
>
> Q And did you not know that you couldn't do the work on the steam generator because you didn't have a reliable decay heat system?
>
> A That's true, ...
>
> Q If you just left the fuel in the spent fuel pool you didn't have to worry about decay heat removal, did you?
>
> A That is correct.
>
> Q You could have just gone ahead and done the steam generator repairs?
>
> A That's true.
>
> Q And the other problem would not have existed, either, would it?
>
> A What other problem?
>
> Q The one you just described with not having a redundant decay heat removal capability.
>
> A That's correct.
>
> [T-1661-63].

The decay heat pump problem may have taken 15 days to correct, but it was while replacement fuel assemblies were awaited and by the company's own choice. This fact was recognized by the Commission itself. As Commissioner Gunter put it:

> [A] conscious decision was made to leave those 13 [fuel] assemblies in there and not use the day and a half or two days to put them in the spent fuel storage area and then lower the water level and work on the steam generator.
>
> [T-1883].

The blocks of time the Company now asserts explain the difference between 14 days and 55 days were originally offered to explain a 77 day discrepancy. Even that was a retrospective explanation of an incident that Florida Power had originally failed to divulge. The Company has simply picked various explanations offered to, and rejected by, the Commission that add up to the difference. In so doing the Company asks the Court to give probative weight to evidence rejected below.5/ The one block of time from Exhibit 12 that the Company ignores is the one shown on line 8 that it took 65 days, from June 9th to August 12, to "arrange and receive 4 [fuel] assemblies from Oconee." The Commission could easily have picked that as the measure of start-up delay attributable to the dropped test weight. But the time actually spent on particular activiites on an "as worked" basis was never at issue. The only issue was when CR3 would have returned to service but for actual occurrences that followed the June 9th incident.

The Company's reliance upon an "as worked" schedule to explain the ongoing activities and to minimize the impact of the dropped test weight have to be kept in perspective. The company's witnesses admitted repeatedly that their testimony was not based upon how fast repairs could have been performed. For example, Exhibit 12, page 5 [A-5], shows that "Sliver removal & plugging of identified OTSG tubes" took 93 days, from May 2 - August 2, 1978. Mr. Beatty conceded however that the Company's charts only showed the time from beginning to end of an activity:

> I'm sure there were many, many days there were no specific site activity involved, but the period of time is what is represented by the bar chart. [T-1616].

The "sliver removal" and "tube plugging" activity actually comprised less than two weeks of work:

> Q (By Mr. Shreve) . . . [A]lthough from the beginning of the activity to end encompasses 93 days, actual activities in those specific designated endeavors was less than two weeks, was it not?
>
> A (By Mr. Beatty) Those specific endeavors, yes, I would estimate that.
>
> [T-1797].

Mr. Beatty agreed that the Company's exhibits provided no evidence as to how fast repairs could have been performed had the test weight incident not occurred [T-1619-20]. When asked if repairs could have been performed in a shorter time span, he answered: "Yes, they could." [T-1665]. He also agreed that it was to Florida Power's benefit to have the schedules changed so that he could testify that "as performed" the delay was only 14 days. [T-1666]. His answer to a question by Mr. Shreve sums up the distinction:

> Q (By Mr. Shreve) . . . [W]ere there not repairs that could have been made on a more timely basis but it was not necessary to make them because the dropped test weight was extending the outage, isn't that so, sir?
>
> A (By Mr. Beatty) Yes, that's true.
>
> [T-1666-67].

The Company's brief and its position before the Commission are consistent in that they focus upon an irrelevant issue, the actual delays incurred considering that the test weight drop happened instead of how fast repairs could have been completed had that incident not occurred.

Instead of substituting its judgment upon the weight of the evidence, as the Company asks, the Court should focus upon the extensive evidence supporting the Commission's action. The proper appellate standard to be applied is whether competent, substantial evidence supports a Commission order. DeGroot v. Sheffield, 95 So.2d 912 (Fla. 1957). The Company originally testified that nothing happened to in any way prolong the outage. Before the test weight drop, the Company was reporting that less time was needed to return CR3 to service than originally anticipated.

On May 4, 1978, Florida Power reported to the NRC that repairs of the steam generator would begin May 15, 1978, and that July 22, 1978, was the anticipated unit start-up date. [Ex. 39, last page; A-52]. These estimates varied slightly in the May 15, 1978, correspondence to the NRC: repairs were moved forward three days to May 18th, but start-up was now July 3rd, 19 days earlier. [Ex. 17; A-6]. This is the last estimate made before the test weight drop on June 9th. [T-545]. In a letter dated June 26, 1978, Mr. William P. Stewart, Florida Power Corporation's Director of Power Production, informed the NRC of the need to alter the anticipated starting date from that given on May 15th because of the dropped test weight incident:

> During refueling operations, on June 9, 1978, a Test Weight Device was inadvertently dropped, resulting in possible damage to a fuel assembly. This event has been reported previously to NRC. Since the event occurred, inspections of the fuel assembly in question have resulted in a decision that it not be used further in the reactor in its current state. We have been evaluating methods to replace or repair this assembly. Possible options at this time include repair of the assembly and reuse, replacement of the assembly and its three symmetrical assemblies with four partially depleted assemblies obtained from another utility, and replacement with new assemblies originally intended for Bath 4 use. We are at present holding discussions with Duke Power Company to evaluate the feasibility of

obtaining four assemblies which were discharged from Oconee I for use in the remainder of Cycle I at Crystal River Unit No. 3.

* * * * *

In our May 15, 1978, letter to you, we provided a summary of our schedule expectations for certain key activities. Since that time we have experienced technical and hardware problems, mainly with fuel transfer mechanisms, which have resulted in considerable revisions to our schedule. Our best estimate at present for unit startup is early August. There is considerable uncertainty in the schedule due mainly to uncertainties associated with obtaining and licensing replacement fuel assemblies. [Ex. 19, page 2, Emphasis added].

The repairs of the transfer mechanism can be excluded from consideration as a factor because those repairs had been completed at the time the test weight was dropped on June 9, 1978. [T-141]. Refueling, except for the four replacement assemblies, was completed on June 15, 1978. [Ex. 12, page 5, item 7; A-5]. Note that as of June 26, 1978, the Company did not yet know how it would proceed, and it was not until July 21, 1978, that Florida Power Corporation requested of the NRC that it be allowed to operate with fuel assemblies from another reactor owned by Duke Power. [Ex. 25, Safety Evaluation dated September 1, 1978]. The uncertainty in the schedule was directly attributable to the dropped test weight.

In a subsequent letter dated June 28, 1978, Mr. Stewart again informed the NRC that unit start-up in early August was contingent upon receipt of Duke Power's four fuel assemblies. He stated:

C. Schedule Implications - Based on the current status of activiites leading to restart of Crystal River Unit No. 3, unit startup is anticipated for early August, 1978. This is contingent upon our being able to receive for installation in the reactor, the four fuel assemblies from Duke Power Company prior to the end of July. [T-388, 389, Emphasis added].

The fuel assemblies were not received by the end of July. An exhibit furnished by Florida Power Corporation shows that all four assemblies had not been received until August 12, 1978. [Ex. 12, page 5, item 8; A-5]. In the meantime, Florida Power Corporation's customers were paying exorbitant fuel charges. No one other than Florida Power Corporation was responsible for dropping that test weight. [T-390].

At each stage of the proceeding before the Commission, the Company, when confronted with evidence refuting its assertions would back and fill. When faced with evidence of the dropped test weight to refute its contention that nothing happened to prolong the outage, it took the position that it was not just the test weight incident that caused delay but other additional things which it had not previously divulged that limited the effect of that particular occurrence to only 14 days. At the conclusion of hearings in December 1978, when the PSC staff recommended that Florida Power be held liable for 57 days, the Company moved to reopen the record and offered additional testimony by Mr. Beatty who had already testified on three separate occasions. Suddenly the decay heat pump problem appeared to explain 15 days of increased outage time. This process culminated on the final hearing date in Exhibit 64. The Company again recalled Mr. Beatty to sponsor that exhibit. [T-1777]. It purported to show that the Company proceeded on a round-the-clock basis to effectuate repairs both before and after the test weight incident. Instead, Mr. Beatty conceded on cross-examination, that Exhibit 64 showed that, immediately after the test weight drop, people who had been working on steam generator repairs were put on hold. [T-1974]. He had earlier explained that "'on hold' means that they are not working on anything." [T-1792].

Faced with a multitude of conflicting testimony, the PSC has found that CR3 would have returned to service 55 days earlier had the test weight not been dropped. Because there competent substantial evidence to support the Commission's conclusion, this Court should affirm Order No. 12240.

CONCLUSION

The Public Service Commission's determination that Florida Power Corporation is responsible for 55 days' fuel costs associated with the dropped test weight incident is supported in the record and should not be overturned on appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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