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.	Appeal from an order of The Florida Public Service Commission CASE NO. 64,209

REPLY BRIEF OF FLORIDA POWER CORPORATION TO ANSWER BRIEFS OF THE FLORIDA PUBLIC SERVICE COMMISSION AND PUBLIC COUNSEL

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Preliminary Statement

The Commission and Public Counsel are jointly referred to as "Appellees." References to the Commission's Answer Brief on the prior appeal are indicated by "Ans. Br. 1." References to the Commission's Answer Brief on this appeal are indicated by "Ans. Br. 2." References to Public Counsel's Answer Brief on the prior appeal are indicated by "P.C. Ans. Br. 1" and its brief on this appeal by "P.C. Ans. Br. 2." Florida Power's Initial Brief on the prior appeal is designated "F. Br. 1." References to the Commission's Order No. 9950, Docket 810001-EU, dated April 15, 1981, aff'd, Florida Power Corporation v. Cresse, 413 So.2d 1187 (Fla. 1982) are designated "Order No. 9950."

All other references are the same as those set forth in the Preliminary Statement to Florida Power's Initial Brief on this appeal. All emphasis is supplied unless otherwise noted.

Statement of the Facts

The Commission states that Florida Power had no existing procedures for handling heavy test weights near fuel assemblies or for testing rigging equipment other than slings. [Ans. Br. 2 at 16]. It is undisputed, however, that there were existing procedures that would have been used if this work had been classified as safety-related. [Tr. 1305, 1345-1346, 1350].

In addition, as the Commission concedes, there were other existing procedures which should have been followed by the work crew.[1/] [Ans. Br. 2 at 18]. The Commission's own expert repeatedly emphasized that the cause of the incident was not the absence of management's procedures but the workers' failure to follow the existing procedures. [Tr. 1164, 1170, 1174, 1209-1210]. This Court specifically noted that the NGRC's report, upon which the Commission again relies in its order on remand, sought to "reinforce and strengthen existing procedures, not to propose new ones." [Op. 4].

1/ Thus, the Commission's assertion that Florida Power expected "perfection from its employees" is ridiculous. [R.O. 10]. Florida Power has adopted comprehensive procedures in an effort to avoid employee errors to the extent humanly possible. As the Commission has consistently acknowledged, the Company should not be held responsible for employee error if management has such procedures in place. See supra at 10-13.

Appellees wrongly assert that Florida Power continually affirmed a July 3 start-up date until the dropped test weight but then immediately projected a delayed start-up. By only one letter, dated May 15, did Florida Power indicate a July 3 start-up. This was before the debris removal was completed and before the extent of the problem with the fuel transfer mechanisms was appreciated. [Ex. 40].

The NRC was later advised that start-up was projected for early August. This projection was made several weeks after the dropped test weight. It was also made after the extent of the delays in debris removal and refueling had become apparent. The NRC was specifically advised that the delay in start-up was the result of "technical and hardware problems, mainly with fuel transfer mechanisms. . . ."[2/] [Ex. 19].

Appellees assert that all delays after July 3 were merely "back-fill" to disguise delays caused by the test weight incident.[3/] It is imperative to recognize that the Commission

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2/ Concern was also expressed as to possible delays in acquiring the replacement fuel assemblies. In actual fact, they were on site by the time they could be installed. [Tr. 1603].

3/ The Commission argues that "the Company reduced the break-neck work effort and spread out the work to fill the available time." [Ans. Br. 2 at 20]. However, the very testimony cited by the Commission establishes, without contradiction, that Florida Power sought "to return the unit to service as quickly as was feasibly possible considering the safety aspects" and

made no such finding in its order. In fact, the Commission specifically found that 22 days of the outage delay - all of which occurred after July 3 - were justified and not related to the test weight incident! [R.O. 17].

The Commission's order clearly spelled out the specific delays that it found to be unjustified - which were the delays in debris clean-up, refueling, and repair of the decay heat pump. It is those findings which must be supported by substantial, competent evidence. However, Appellees are unable to point to any evidence supporting those findings, and their briefs instead focus almost entirely upon the steam generator repairs, arguing that those repairs were not done as quickly as possible. Yet no mention whatsoever is made in the Commission's order of any unjustified delay in those repairs.

Moreover, there is simply no evidence that those repairs were deliberately delayed. Appellees' record citations relate to repairs to the turbine generator, which is completely distinct from the steam generator, and which was never on the critical path. [Tr. 1693, 1697-1698]. Activities such as the turbine generator repairs, which were not on the critical path, were

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that nothing was done "to delay outage because of the dropped test weight." [Tr. 1666].

not worked on a 24-hour basis, thereby allowing repair efforts to be concentrated on critical path activities. [Tr. 1698].

With respect to the steam generator repairs, the Commission incorrectly states that "the Company had put the OTSG-B repair crews 'on hold' [Tr. 1792-1794] and [that] during the period from May 8 through August 3, only one week was spent repairing the OTSG-B [Tr. 1797]." [Ans. Br. 2 at 20]. Once again, the Commission's own record citations refute its statement. The record shows that the crew was "on hold for drain down" for about three weeks (June 11 through July 7), not for almost three months. [Tr. 1792]. The crew was "on hold" during that period because it was physically impossible to work when the steam generator was flooded. [Tr. 1693].

Further, the Commission's statement that only one week was spent on those repairs between May 8 and August 3 is flatly wrong. Mr. Beatty testified that one week was spent in the beginning removing slivers and less than a week at the end plugging tubes. [Tr. 1797]. But he also testified that, although "actual activities in those specific endeavors" took less than two weeks, other work had to be performed in the interim in order to know what tubes had to be plugged. [Tr. 1797-1798]. Significantly, that interim period included the time which the Commission expressly found was properly spent on the eddy current test. [Tr. 1798; R.O. 17].

The evidence was unequivocal that there was no relaxation of the steam generator repairs as a result of the test weight incident. [Tr. 1699]. To the contrary, those repairs were worked on a 24-hour, 7 day-a-week basis, as fast as "it was humanly possible to do the work." [Tr. 1693]. It is undoubtedly for this very reason that the Commission made no finding below that the delays in the generator repairs were unjustified.

ARGUMENT

POINT ONE

The Commission's order on remand has the same errors as the original order reversed by this Court.

On remand, the Commission simply recast its original findings in different words, thus committing the same errors as it did in the original order reversed by this Court. Moreover, the Commission took direct issue with the Court's holding that use of the NRC/NGRC evidence violated "Florida's strong public policy in favor of post accident investigations," asserting to the contrary that "neither the primary nor the secondary use" of those documents would violate that policy. [R.O. 11]. It also disregarded the Court's holding that nuclear safety considerations involve a higher standard of care than

could properly be applied here and instead again relied on such evidence.

Significantly, the Commission does not dispute that its order expressly relied on testimony of Mr. Beatty relating to the NRC notice of violation of safety-related procedures as primary evidence of management imprudence.[4/] [R.O. 9]. Indeed, the Commission's Answer Brief emphasizes other testimony relating to those safety-related requirements. Among other things, the Commission relies on Mr. Beatty's acknowledgement that "the activities leading up to the dropping of test weight were in violation of NRC regulations."[5/] [Ans. Br. 2 at 17].

Appellees stress that the Commission said that it initially disregarded the NRC/NGRC documents in reaching its

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4/ The Commission also relied on the Company's failure to have procedures "governing the movement of the the test weight over irradiated nuclear fuel assemblies." [R.O. 8]. Since it is undisputed that Florida Power had such procedures and that they would have been applied here if this particular activity had been classified as safety-related, that is simply a round-about way of finding management imprudence for the failure to classify this work as safety-related. This Court has, however, already rejected the Commission's effort to do that. [Op. 3].

5/ It also argues that Florida Power "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." [Ans. Br. 2 at 17-18]. This was plainly a nuclear safety concern of the NRC. In any event, that letter was not mailed until June 12, three days after the test weight incident. [Ex. 20].

decision on remand. That argument is premised on the self-serving statements of the Commission that that is what it did. It is nothing more than an argument that "it is because I say it is." It is not enough, however, to say that the findings were reached independently of those documents when the order itself explicitly relies on them as primary evidence of management imprudence. The fact is, despite the Commission's self-serving disclaimer that it only relied on the NRC and NGRC reports as "secondary" evidence, its own brief, as well as its order on remand, demonstrates to the contrary.

Even if the Commission's reliance on these post-accident reports were only "secondary," it was nevertheless improper. Although Appellees urge that this Court's use of the words "primary evidence" means that "some use" of the NRC/NGRC documents was permissible, Florida Power believes that the opinion -- read as a whole and with the Court's stated reasoning kept in mind -- shows that this is not the case.[6/] Certainly, numerous Florida decisions explicitly prohibit <u>any</u> use of such

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6/ Indeed, if the distinction which the Commission attempts to draw on the basis of the governmental nature of these reports were legally sufficient, it would permit <u>any</u> use of such documents, whether "primary" or "secondary." Yet the Commission concedes that this Court's decision prohibited use of the documents as "primary" evidence. The fact is, the distinction now urged by the Commission was simply not made by the Court.

documents in a fault-finding proceeding such as this. Those decisions were cited by Florida Power for the exact proposition set forth in the Court's decision -- that use of these documents to assess fault here "would clearly violate Florida's strong public policy in favor of post accident investigations." [F. Br. 1 at 13, fn. 11].

Even if "some use" were permissible, the Commission clearly made a legally impermissible use of those documents here. Public Counsel discounts the Commission's extensive reliance on these documents in its order, stating that the Commission characterized this as only "secondary" evidence. However, the Commission cannot make its reliance "primary" or "secondary" by simply changing the order in which the evidence is discussed or by attaching the label "primary" or "secondary" to that discussion. Calling a cow a bull does not change its gender. If the Commission's order shows - as it certainly does - that there was substantial reliance on such documents to assess fault, Florida's public policy is impermissibly violated.

Apart from the Commission's assertion that it was entitled to rely on remand on the NRC/NGRC reports -- which patently ignores the mandate of this Court -- the Commission simply relies on the general proposition that the Court should not substitute its judgment for that of the Commission. However,

that rule cannot be used as a substitute for the fundamental requirement that the Commission's findings must be supported by competent, substantial evidence. Nor can it be utilized to justify the Commission's effort to hold Florida Power's management responsible on a basis which this Court has already found to be legally insufficient.

The fact which Appellees refuse to come to grips with is that this Court made its own "independent review of the record" on the first appeal and, based on that review, laid down a number of principles. On remand, the Commission was required to review the evidence in light of those principles. Instead, the Commission merely re-cycled its original findings. In essence, it found management imprudence on the same basis that it did before but simply changed the order in which it discussed those matters. The substance of the Commission's decision remains erroneous for all the reasons articulated in this Court's opinion.

In light of the principles laid down in this Court's opinion, there was simply no basis for the Commission's finding of management imprudence on remand. Apparently recognizing that this is the case, the Commission's counsel now urges a completely different legal theory than that actually applied by the Commission below. For the first time in this proceeding --

which commenced in 1978 and is now before this Court for the second time -- the Commission contends that it is not necessary to find management imprudence in order to disallow a regulated utility's operating expenses. Yet that argument is contrary to the Commission's position throughout this proceeding as well as its position before this Court on the first appeal.

For instance, in its Answer Brief on the first appeal, the issue was characterized by the Commission as "whether management was responsible or was the incident solely attributable to employee error. . . ." [Ans. Br. 1 at 11]. Likewise, the Commission acquiesced in Florida Power's assertion that this was the controlling rule of law and in Florida Power's citation to the same decisions that it has cited here in that regard. [F. Br. 1 at 17-25.] Although the Commission now accuses Florida Power of incorrectly stating the law, it did not quarrel at all on the first appeal with either the legal proposition urged by Florida Power or with its reliance on those cases.7/

7/ The Commission's own discussion demonstrates that those cases support that principle. Moreover, findings of management imprudence were the basis of the decisions cited by the Commission. Opinion Virginia State Corporation Commission, Virginia Electric and Power Company (November 2, 1979) ("a utility should . . . be held accountable for unnecessary expenses resulting from imprudent management decisions"); Case 27123 - Consolidated Edison Company of New York, Inc. - proceeding to investigate the prolonged outage during 1976 of the Indian Point

Thus, the Commission did not contest this legal principle on the first appeal. It was, however, placed directly in issue there by Public Counsel. Indeed, in his brief on the first appeal, Public Counsel made the exact argument which the Commission now makes and actually cited the same cases now cited by the Commission. [P.C. Ans. Br. 1 at 15-21].

As a result, this very issue was directly before this Court when it reviewed and reversed the Commission's original order. Had the argument that employee error was a proper basis to disallow these fuel costs been legally sufficient, this Court would have affirmed the Commission's order on that basis. Escarra v. Winn Dixie Stores, Inc., 131 So.2d 483, 485 (Fla. 1961) (court will affirm if decision "is justified on any other ground appearing in the record.").

This is particularly the case in view of the Court's decision in Florida Power Corporation v. Cresse, 413 So.2d 1187 (Fla. 1982). If this Court had held there, as the Commission incorrectly asserts it did, that employee error is a sufficient basis upon which to disallow a regulated utility's operating

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No. 2 Nuclear Generating Plant, Opinion No. 79-1 ("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.")

expenses, the Court certainly would have held to the same effect in this case and affirmed the Commission's findings.

In actual fact, the question of management responsibility was not in contest there. Although Florida Power urged that the decay heat pump repairs were not imprudent, Florida Power conceded that the matters complained of by the Commission were management's responsibility, not employee error. (Florida Power's Initial Brief at 7-11, Florida Power Corporation v. Cresse, supra.). Thus, as even the Commission concedes, this Court simply held there that "there was competent substantial evidence to support the Commission's finding of management imprudence." [Ans. Br. 2 at 33].

On the other hand, Florida Power urged there, and the Commission expressly agreed, that liability should not be imposed upon the Company for another delay during that outage which was caused by "employee error" but for which "adequate plant procedures were in place. . . ." [Order No. 9950 at 4-5]. Thus, the suggestion that an inability to penalize a utility for its employees' error would encourage "mismanagement" fails by definition. It is clear that the Commission can disallow expenses caused by employee errors which occur as a result of management's imprudent failure to impose proper procedural safeguards. However, as the Commission recognized there as

well in as the proceedings below, the Company should not be held responsible for employee errors which occur regardless of management fault.

The Commission cannot change the ground rules this late in the game. It consistently applied the "management imprudence" standard in the proceedings below.[8] Public Counsel's argument that employee error is a sufficient basis upon which to disallow these costs was not accepted by this Court on the first appeal and was not even accepted by the Commission on remand.[9] This point is clearly now law of the case, and the Commission was bound by it on remand. Airvac, INc. v. Ranger Insurance Co., 330 So.2d 467, 469 (Fla. 1976).

8/ It is imperative to recognize that the Commission itself rejected Public Counsel's argument. Although this argument was made virtually verbatim in Public Counsel's memorandum on remand, the Commission's order does not rely on that theory.

9/ Public Counsel's argument has many basic flaws which result from disregarding principles integral to the entire ratemaking scheme. Perhaps the most significant flaw is that a regulated utility is not a normal competitive business which is free to price its product as it wishes in order to cover such losses. Contrary to Public Counsel's example, a business which suffers a loss due to employee error does not attempt to recoup that loss through one immediate price increase; it has consistently priced its product to anticipate such losses because they are an inevitable cost of doing business. However, a regulated public utility is not allowed to privately price its service to use such a "cost-spreading" technique.

POINT TWO

There is no competent, substantial evidence that the dropped test weight delayed start-up by 55 days.

Appellees charge on appeal that the Company intentionally slowed down its repair efforts in order to hide a 55 day delay in the outage caused by the dropped test weight. Significantly, there was no such finding by the Commission itself nor is there any evidence to support this outrageous charge.[10/] Indeed, Mr. Beatty emphatically denied that repairs would have been performed faster but for the need to "cover up" this incident, stating unequivocally that everyone attempted "to return the unit to service as quickly as was feasibly possible considering the safety aspects. . . ." [Tr. 1666].[11/]

Appellees basically argue that the steam generator repairs could have been performed more quickly so the Commission

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10/ Public Counsel says Florida Power admitted that some repairs were not performed on as timely a basis as they could have been had the test weight not been dropped. Florida Power has always acknowledged that the fill and vent operation was delayed for 14 days as a result of that incident.

11/ Mr. Beatty's statement that there were repairs which "could have been made on a more timely basis" hardly suggests that repairs were deliberately prolonged. Rather, that statement simply confirms the acknowledged fact that the fill and vent work could have been performed earlier had this incident not occurred.

could have rightly charged Florida Power with that repair time.[12/] They then point to what they characterize as "conflicting evidence" concerning those repairs and urge that deference must be given to Commission findings. The critical point which they ignore, however, is that the Commission made no finding that Florida Power did not properly or timely perform the steam generator repairs. Rather, the Commission only rejected Florida Power's explanation of the delays in debris removal, decay heat pump repairs, and refueling. [R.O. 17].

The only question, then, is whether there is substantial, competent evidence to support the Commission's finding that the time spent on those particular activities was not justified. None is suggested in Appellees' answer briefs.

The assertion that the delay in the decay heat pump repairs was purely a subterfuge is contrary to the Commission's own explicit finding in a later investigation that the "net effect" of those pump repairs "was to extend the 1978 (loose parts) outage by some 15 days." Order No. 9950 at 3. In fact, the Commission simply refused to allow the time which the Company

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12/ The repeated assertion that Florida Power deliberately stopped work on the steam generator repairs is absolutely groundless. As shown supra at 3-5, the very record testimony cited in the Commission's Answer Brief establishes that the charge is untrue.

undeniably spent in evaluating the cause of the pump failure because it concluded "NRC clearance was not necessary. . . ." [R.O. 17]. Yet it is uncontroverted that this evaluation was required under the Company's existing safety-related procedures requiring evaluation of the pump failure. (Tr. 1706, 1751, 1772-1773). The Commission's imposition of a penalty upon the Company for compliance with such procedures is completely unwarranted in fact or in law.

The contention that the delays in debris clean-up and refueling were "prosthetic outage extenders" is likewise ludicrous on its face. It is undisputed that those delays occurred prior to the test weight incident. As Public Counsel actually concedes, there is simply no way those earlier delays could have been subterfuges to extend the outage after the later test weight incident occurred. [P.C. Ans. Br. 2 at 30].

Public Counsel attempts to show that the plant could have been operative by the projected July 3 date even if the delays in debris removal and refueling were justified. [P.C. Ans. Br. 2 at 27]. However, his hypothetical schedule contains one material misstatement and it omits several activities which were absolute pre-requisites to start-up.

Public Counsel identifies June 15 as the date refueling was complete except for the replacement assemblies. The actual date was June 17. [Ex. 41].

As for omissions, Public Counsel fails to allow any time for the eddy current test which had to be conducted before start-up. That test took 31 days to perform, one day longer than originally projected, which the Commission specifically found was justified. [R.O. 17].

Public Counsel's "ideal" time schedule also assumes that only the 14 days originally projected for start-up activities should have been required. Those activities (specifically, the heat-up and zero power testing, clean-up and closing of the unit), in fact unavoidably delayed start-up by an additional 21 days beyond original projections, and the Commission so found. [R.O. 17]. Hence, rather than being "liberal" in determining his hypothetical start-up time, Public Counsel allows substantially less time than the Commission itself found was necessary.

Public Counsel completely omits the decay heat pump repairs on his schedule.[13/] As shown in Florida Power's initial

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13/ Public Counsel contends that the Company chose a more lengthy decay heat pump repair procedure than necessary. [P.C. Ans. Br. 2 at 25-26]. In fact, the evidence was undisputed that, at the time that procedure was selected, it was expected to require less time than the alternative now urged by Public Counsel. [Tr. 1675]. Even more importantly, perhaps, once again there is no Commission finding that Florida Power's decision to use that particular procedure was imprudent; the Commission's only criticism related to the time spent in evaluating the original cause of the pump failure. [R.O. 17].

brief and as shown above, all of the time devoted to that activity was required under Florida Power's existing safety-related procedures, which in turn were required by the NRC. Thus, another 15 days was required for start-up.

Finally, Public Counsel disregards two days of critical path time for the fill and vent activities, even though that time was originally projected, actually required, and unchallenged by the Commission. This time must be allowed for as well.

When all these activities are taken into account, it is apparent that, apart from the 14 day delay in starting the fill and vent, the plant could not have started-up earlier than it in fact did. Indeed, at the end of the Commission's hearings, both the legal and engineering staffs of the Commission concluded that the evidence justified the delays in debris removal, refueling, and decay heat pump repairs, and that only 14 days delay could be attributed to the test weight incident. [R. 351, 422]. The fact that Florida Power at one point projected an earlier re-start does not establish the contrary. Anyone who has ever re-modeled a house can attest to the difficulties of meeting the projected schedule. The enormously greater difficulties of doing so with highly complex and unprecedented repairs to a nuclear unit are apparent. [Tr. 1701].

The irony of the Commission's order -- when considered as a whole -- is that the Commission seeks on the one hand to hold Florida Power responsible for failing to have stringent, time-consuming procedures in place for even the smallest aspect of repair activities but, at the same time, penalizes Florida Power for time which it spent in following its safety-related procedures on the decay heat pump repairs and assuring that these complex and unique repairs were properly performed. The Commission cannot so easily place itself in a "Heads, I win, Tails, you lose" posture. If management is to be required to insure detailed procedures for every conceivable activity at the plant, it cannot then be penalized for the inevitable delays in repairing the unit under those constraints.

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 this 12th day of December, 1983, to all counsel of record.

Sylvia Walbolt
Attorney