IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION,

Appellant,

vs.

JOSEPH P. CRESSE, JOHN R. MARKS III, and SUSAN LEISNER, in the official capacity as and constituting the Florida Public Service Commission,

and

CITIZENS OF THE STATE OF FLORIDA,

Appellees.

CASE NO. 66,583

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ON APPEAL FROM PUBLIC SERVICE COMMISSION ORDER NO. 13870 IN DOCKET NO. 840001-EI-B

ANSWER BRIEF OF APPELLEES, CITIZENS OF THE STATE OF FLORIDA

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SYMBOLS AND DESIGNATION OF PARTIES

Florida Power Corporation, Appellant, will be referred to as "FPC."

Florida Public Service Commission, Appellee, will be referred to as "the PSC." The PSC Staff will be referred to as "the Staff."

Citizens of the State of Florida, Appellees, will be referred to as "the Citizens."

Dravo Corporation will be referred to as "Dravo."

Electric Fuels Corporation will be referred to as "EFC."

The September, 1977 agreement will be referred to as "the Development Agreement."

The October, 1978 Assignment Agreement will be referred to as "the Assignment."

The October, 1978 Partnership Agreement will be referred to as "the Partnership Agreement," and the partnership itself will be referred to as "the Partnership."

The transcript of the hearing held on 23 August 1984, and the exhibits that were introduced during that hearing, are contained in their own volumes of the record transmitted to this Court. The pages of the transcript will be referred to as "[T. _____]," and the exhibits will be referred to as "[Ex. ___]." The transcripts of earlier hearings are in separate volumes and will be referred to by the hearing date and the transcript page.

Reference to the record of the proceeding below, other than to the transcript or exhibits, are contained in Volumes I and II of the record and will be referred to by volume and page number: [Vol. ___, R. ___].

References to the Appendix to this Answer Brief will be referred to by an "A" in brackets followed by the page number: [A - ___].

Unless otherwise noted, all emphasis is added.

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STATEMENT OF THE CASE AND OF THE FACTS

Having reviewed FPC's Statement of the Case and Statement of the Facts, the Citizens raise eight areas of disagreement. First, FPC received adequate notice of the PSC hearing and was afforded an opportunity to be heard. The August, 1984 hearing was the culmination of two and one-half years of investigation and hearing. On 27 April 1984, the PSC issued a Notice of Hearing for the August, 1984 hearing and scheduled a prehearing conference for 1 August 1984. [Vol. I, R. 128; A-1]. The prehearing conference was held [separate volume of the record] and two days later, on 3 August 1984, the PSC issued its prehearing order. _In re: Investigation of Fuel Adjustment Clauses of Electric Utilities. (Florida Power Corporation - COMCO)_, Order No. 13560, 84 F.P.S.C. 8:3 (1984). [Vol. I, R. 130; A-3]. Issue No. 5 in the prehearing order identified the issue that was raised before the PSC and that is the subject of the instant appeal.

> _Issue No. 5_: Do FPC's ratepayers have an equitable interest in the COM [coal-oil mixture] technology developed by FPC and Dravo and, if so, what should be done to recognize that interest?

Order No. 13560 at 3, 84 F.P.S.C. 8: at 5 [A-5]. FPC has never alleged that this issue was improperly before the PSC or that the PSC lacked the power to resolve the issue.

Second, FPC's Statement tries to make it appear that the PSC's decision hinged upon whether or not FPC had received consideration for or had to pay to use the Partnership's fuel technology. [Initial Brief at 6-8]. FPC's inference is incorrect. The PSC's decision was based upon FPC's decision to assign away, without getting anything in return, future royalty payments (or profits) for the use of the technology, which was one of the three benefits that FPC and the ratepayers could expect from the Development Agreement. [In re: Investigation of Fuel Adjustment Clauses of Electric Utilities. (Florida Power Corporation-COMCO), Order No. 13870 at 3-4, 84 F.P.S.C. 11:127, 129-30 (1984); Vol. I, R. 182, 184-85; Initial Brief at appendix 1].

Third, FPC has failed to point out that it never filed a formal petition in the fuel adjustment docket in order to obtain prior approval of its action. The Development Agreement, the Assignment, and the Partnership Agreement were never presented to the PSC until after the PSC started investigating FPC's excessive fuel costs. [Order No. 13870 at 1, 84 F.P.S.C. 11: at 127]. The investigation into fuel cost lead to a refund to customers and is not on appeal. [Initial Brief at 1 n.1].

Fourth, although FPC characterizes the order on appeal as "this order of 'restitution'" [Initial Brief at 1], the PSC's order never uses the word "restitution." FPC's statement is an opinion rather than a fact. FPC's use of the word apparently stems from the suggestion of Ms. Avis Bruce, the Staff's witness,

that FPC make restitution. [T. 144]. The Staff and the PSC, however, are separate entities. Oftentimes, the PSC rejects the Staff's position. Just because the Staff suggested this word "restitution" does not mean that the PSC accepted and use the theory.

Fifth, FPC implies that the PSC found that the ratepayers had paid the cost of developing the coal-oil mixture technology. [Initial Brief at 2 and 5]. FPC is inaccurate. As page four of the Order on appeal indicates [Order No. 13870 at 4, 84 F.P.S.C. 11: at 130], what the PSC actually found was that the technology has been developed in facilities upon which the ratepayers paid, through their utility bills, a rate of return and had made use of operating and maintenance expenses that were being recovered from customers in utility rates. Having provided FPC with the wherewithal to enter into the project, the ratepayers should be compensated for the loss of the benefit (expectation of future profits) that FPC gave away.

Sixth, in order to bolster its argument on prejudgment interest, FPC states that, "[t]he Commission acknowledged that 'the record does not reflect the actual or potential value of the COM technology....'." [Initial Brief at 2; citation omitted]. As FPC's own Brief (at page 5) acknowledges, however, all parties agreed with Ms. Bruce that FPC's development cost were $888,597. [T. 137, 144, 195]. This is the amount that FPC was ordered to refund with interest.

Seventh, FPC states that, "the evidence was uncontradicted that no such [development] costs 'had been either directly or indirectly charged to or recovered by the COM agreement with Florida Power.'" [Initial Brief at 9; citation omitted]. FPC's statement, however, has little, if any, relevance to the rationale that underlies the Order on appeal. By referred to the COM agreement, FPC limits the import of its statement. The Order on appeal is premised upon FPC's use of facilities supplied and supported by the ratepayers and FPC's giveaway of future profits. The Order has nothing to do with whether development costs were charged to the COM agreement.

Eighth and last, FPC argues that even if the Partnership had compensated FPC for the development costs, FPC still would have earned less than its authorized rate of return and thus the ratepayers would have received none of this compensation. Once again, FPL's focus is inaccurate. The PSC never said that FPC should have received $888,597 in 1978. What the PSC actually did was use this undisputed dollar amount as a "valid proxy" for the "minimum value" of the benefit (future profits) that FPC gave away. [Order No. 13870 at 4, 84 F.P.S.C. 11: at 130].

SUMMARY OF ARGUMENT

Although FPC fails to say so directly, it is asking this Court to reweigh the evidence that was presented to the PSC. This is improper. The issue that is on appeal was identified in the prehearing order that governed the proceeding below. FPC never objected to the issue or alleged that the PSC lacked the jurisdiction, power, or authority to rule on the issue. Having failed to carry its burden of proof before the PSC, it is inappropriate for FPC to ask this Court to reevaluate the evidence and to set aside the PSC's order because this Court might have reached a different result if this Court had made the initial decision.

Contrary to the impression left by FPC's Brief, the PSC's decision never centered upon the adequacy or inadequacy of consideration. The PSC took the action that it did because FPC gave away something that the ratepayers were owed. One could expect three benefits from the coal-oil mixture demonstration project: (1) original technology; (2) improvements in technology; and (3) profits from selling the technology. According to the record, FPC gave away benefit 3 in exchange for benefit 2.

The PSC determined that the ratepayers should have received all three benefits. The coal-oil mixture technology was developed in facilities upon which the ratepayers paid a return

and made use of operating and maintenance expenses recovered from customers in rates. Having provided FPC with the wherewithal to enter into this project, the PSC determined that the ratepayers should be compensated for the loss of the benefit that FPC gave away.

The PSC is under no obligation to passively acquiesce to the terms and conditions of a regulated utility's contracts. Once the PSC determined that FPC's contractual transactions had deprived the ratepayers of expected, future benefits, the PSC was within its authority to act.

The record shows that once the development project appeared to be lucrative, FPC transferred the right to receive the third-party sales profits to its unregulated subsidiary, EFC. In reponse to this situation, the PSC decided that the development costs were the minimum value of what it had taken to put FPC in the position to take advantage of these third party profits. Thus the PSC ordered FPC to refund the development costs ($888,597) with interest, which is a basic, integral component of all fuel adjustment true-ups.

FPC's retroactive ratemaking argument is based upon the fallacious assumption that the PSC imputed revenues, for 1978, to FPC. The PSC never said that FPC should have received $888,587 in additional revenues in 1978. Rather, the PSC said that it would use the 1977-78 cost figures as a valid proxy for the minimum value of the future benefits that FPC gave away. Thus the PSC's action is consistent with the prohibition against

retroactive ratemaking. Even if it were inconsistent, it is impossible to have retroactive ratemaking in the context of the fuel adjustment clause. The clause ensures that a utility will recover all of its prudently incurred fuel expenses. When a utility has failed to collect enough revenue to cover its fuel expense, it recovers that amount with interest. When a utility has collected too much revenue, it refunds that amount with interest. This is what occurred in the instant case.

This is why FPC's pre-judgment interest argument is misplaced. The interest component of the PSC's decision is a usual part of any fuel adjustment calculation. The pre-judgment interest argument about unliquidated damages applies to tort and contract actions, but not to the PSC's regulatory proceedings. If it did apply, however, the $888,597 would be considered liquidated, to which it would be proper to add pre-judgment interest.

The PSC's order is supported by competent, substantial evidence and comports with the essential requirements of law. Thus it should be affirmed in all respects.

ARGUMENT

I. THE PSC HAS ACTED WITHIN THE STATUTORY RANGE OF ITS DISCRETION, AND ITS ORDER IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND COMPORTS WITH THE ESSENTIAL REQUIREMENTS OF LAW.

Although not stated as such, FPC is asking this Court to make a de novo decision and to reweigh the evidence that was presented to the PSC. By presenting various exhibits, excerpts from testimony, and contractual provisions, FPC apparently hopes that this Court will reevaluate the evidence and reach a decision that is opposite the PSC's. This, of course, is improper. This Court has explained that it will not reweigh the evidence presented below and will not set aside a PSC order merely because it would have arrived at a different result had it made the initial decision. E.g., Gulf Power Co. v. Florida Public Service Commission, 453 So.2d 799, 803 (Fla. 1984). Provided that the order on appeal meets the essential requirements of law and is supported by competent, substantial evidence, it will be affirmed. E.g., Citizens v. Public Service Commission (Economy Energy Sales), 464 So.2d 1194 (Fla. 1985). As this Court has acknowledged, under section 120.68(12), Florida Statutes, this Court may not, on appeal, replace the PSC's judgment on an issue of discretion. E.g., Gulf Power Co., supra, at 805.

What FPC fails to allege is just as important as what FPC actually argues. FPC has never claimed that it received inadequate notice or that it was denied an opportunity to be

heard. Indeed, that would be a fallacious assertion. The PSC has been investigating FPC's coal-oil mixture ("COM") activities since February, 1982. Order No. 12870 at 1, 84 F.P.S.C. 11: at 127. The investigation has dragged on because FPC has failed to meet its burden of proof and because the PSC wanted an adequate evidentiary justification for what had and was occurring. See Id.; In re: Investigation of Fuel Adjustment Clauses of Investor Owned Utilities, Order No. 12355, page 12, 83 F.P.S.C. 8: 170, 181(1983).

After over two years of hearings and investigations, the PSC issued, on 27 April 1984, a Notice of Hearing for 22 August 1984 and set a prehearing conference for 1 August 1984. [Vol. I, R. 128; A-1]. FPC never attacked this Notice as being deficient and never filed a motion requesting a more definite statement of the PSC's interest and intent. The prehearing conference was held [separate volume of the record], at which the parties (the Staff, FPC, and the Citizens) identified five issues. The fifth issue is the one that is now on appeal.

> Issue No. 5: Do FPC's ratepayers have an equitable interest in the COM technology developed by FPC and Dravo and, if so, what should be done to recognize that interest?

Order No. 13560 at 3, 84 F.P.S.C. 8: at 5. [Vol. I, R. 130; A-5]. FPC never moved to strike the issue or argued (prior, during, or after the hearing) that the PSC was without jurisdiction, power, or authority to rule upon and to take action under the issue. See generally Citizens v. Public Service

Commission (Florida Power & Light Co.), 435 So.2d 784, 787 (Fla. 1983) (purpose of raising issues is "to put parties on notice and to ensure an adequate mustering of evidence.").

During the August, 1984 hearing the PSC heard testimony on both sides of the issue. FPC sponsored the testimony of Mr. George C. Moore [T. 12], the Staff sponsored Ms. Bruce [T. 124], and FPC sponsored rebuttal testimony, through Mr. Moore [T. 192], that specifically addressed issue no. 5. FPC addressed the issue in its Brief to the PSC [Vol. I, R. 138, 171-77], in its Motion for Reconsideration to the PSC [Vol. II, R. 190], and during its oral argument to the PSC [separate volume of the record].

Having heard all of this testimony and argument, the PSC's decision was contrary to FPC's desire. As with all fuel adjustment proceedings, FPC had the burden of proving the reasonableness and prudence of its actions and expenses.

> As its final point on appeal, FPC argues that the PSC, in refusing to permit recovery of the disputed amount, imposed upon it an improper burden of proof. According to the utility, legitimately incurred operating expenses such as fuel costs are presumed to be reasonable, and evidence that such operating costs were incurred satisfies the utility's initial burden of production. At that point, it reasons, the PSC must establish by substantial, competent evidence that the amounts paid were imprudently or unnecessarily incurred. The PSC's mistake, according to FPC, was that it required FPC to prove that the failure to have a pump was not imprudent and that it did not extend the outage rather than the PSC itself proving to the contrary. <u>We do not agree</u>. The language in PSC Order No. 9273, issued

March 7, 1980, which adopted, among other things, the true-up mechanism here under consideration, provides or indicates several times that the burden of justifying fuel cost adjustments is on the utilities.

First, the order notes that at the time the PSC adopted the fuel adjustment clause, it "approved a stipulation of parties that required utilities to justify changes to the charges at public hearings held on a monthly basis." Order No. 9273 at 1 (emphasis added). Recounting the initial staff testimony proposing the modification of the clause, the order notes that one witness "stressed the need for the true-up mechanism...and pointed out that the companies would be required to explain the reasonableness of their fuel purchases at the hearing during which projected amounts would be compared to actual results." Order No. 9273 at p. 2 (emphasis added). In another section, it notes as follows:

> We will continue...to audit and evaluate the performance of the companies, and to approve for inclusion into the clause only prudently and necessarily incurred fuel expense. Accordingly, we will conduct in the second month following a projection period a public hearing for the purpose of ascertaining the differences between projected and actual costs. At that time, the reasonableness of the companies' expenditures during the preceding projection period will also be examined.

Order No. 9273 at 7. Finally, we note that the presidents of FPC and the other utilities endorsed adoption of the true-up provision.

The requirement that utilities demonstrate the reasonableness of their fuel costs is not improper or unusual.

Florida Power Corp. v. Cresse, 413 So.2d 1187, 1190-91 (Fla. 1982). This Court has pointed out that the "'[b]urden of proof in a commission proceeding is always on a utility seeking a rate change...'", Id. at 1191 (citation omitted), and that, in a show cause action, the utility has the burden of justifying its action, City of Tallahassee v. Mann, 411 So.2d 162, 164 (Fla. 1981).

As the party seeking to establish the affirmative of the issue in the administrative proceeding before the PSC, FPC bore the burden of proof. See Balino v. Dept. of Health and Rehabilitative Services, 348 So.2d 349 (Fla. 1st DCA 1977); Florida Dept. of Transportation v. J.W.C. Co., Inc., 396 So.2d 778,788 (Fla. 1st DCA 1981). FPC failed to carry this burden. Having been unable to convince the PSC of the merits of its position, it is inappropriate for FPC to ask this Court to reevaluate the evidence and to set aside the PSC's order because this Court might have reached a different result if this Court had made the initial decision.

II. BASED UPON THE EVIDENCE THAT IT RECEIVED, THE PSC DETERMINED THAT FPC HAD DEPRIVED THE RATEPAYERS OF A FUTURE BENEFIT THAT WAS TO FLOW FROM THE DEVELOPMENT AGREEMENT.

Boiled down, FPC's basic argument (from which the retroactivity and pre-judgment interest arguments arise) is that the PSC misinterpreted the various contracts that were introduced into evidence below. This is the same claim that FPC made in its Motion for Reconsideration before the PSC. [Vol. II, R. 190]. FPC, however, has never asserted (either in the proceeding below or on appeal) that the PSC lack the power, authority, or jurisdiction to evaluate and weigh these pieces of evidence.

FPC's position is that the PSC misunderstood the Assignment Agreement [Ex. 4, part 5; Initial Brief at appendix 4], which transferred FPC's interest in the COM project to EFC. (At the time of the transfer, EFC was an unregulated subsidiary of FPC. [T. 139, 140]. Now, both FPC and EFC are wholly-owned subsidiaries of Florida Progress Corporation. _In re: Petition of Florida Power Corporation to increase its rates and charges_, Order No. 11628 at 13, 83 F.P.S.C. 2:148, 160 (1983).) FPC's interpretation of the Assignment Agreement and other evidence is (1) that FPC retained the utility-related benefits that were to flow from the COM technology (the original technology developed from the Crystal River demonstration project), and (2) that, instead of receiving money in exchange for giving away the nonutility-related interest in the technology, FPC received the right to use additional utility-related benefits from the COM technology (the Partnership's improvements in the COM

technology). Thus FPC argues that the ratepayers have been fully compensated and that the PSC acted illegally and contrary to the evidence.

Even if FPC's argument is true, which the Citizens refuse to concede, FPC's assertions are beside the point. Although it is unclear from FPC's Brief, the PSC's decision never centered upon the adequacy or inadequacy of compensation. The PSC took the action that it did because FPC gave away something that the ratepayers were owed.

As the PSC noted on pages 3 and 4 of Order no. 13870 (84 F.P.S.C. 11: at 129-30), one could expect three benefits from the COM demonstration project: (1) original technology from the demonstration project; (2) refinements in the technology as the COM process is improved; and (3) potential profits from marketing the technology and the improvements to other utility companies or power producers. According to FPC, however, it gave away benefit 3 in exchange for benefit 2. (For example, FPC's Initial Brief (page 11) states, "[a]ll that Florida Power parted with was its right to receive royalties from any future use of that technology by third parties.")

The PSC determined that the ratepayers should have received all three benefits. The COM technology was developed in facilities upon which the ratepayers paid a return and made use of operating and maintenance ("O&M") expenses recovered from customers in rates. Having provided FPC with the wherewithal to

enter into this project, the ratepayers should be compensated for the loss of the benefit that FPC gave away.

> The technology developed in conjunction with the Crystal River project was valuable. The results of the pilot testing were enough of a success for EFC to set up a partnership to produce, market and distribute this fuel. The Company should have received compensation for the assignment of its interest in the technology. R&D projects are allowed as operating expenses for ratemaking purposes because of anticipated future benefits that will flow to the ratepayers. The ratepayers are entitled to enjoy all of the benefits obtained by a utility via R&D projects. When a utility transfers away its interest in R&D technology it deprives the ratepayers of expected benefits. Further, the ratepayers paid the cost of the project. Company assets already in rate base were used as part of the project. The Company was receiving a return from the ratepayers when those assets were used. The R&D project was expensed through O&M...When the Company transferred its equitable interest in the technology to EFC it gave away a valuable asset for which the ratepayers paid.

Order No. 13870 at 3-4, 84 F.P.S.C. 11: at 129-30.

The ratepayers were entitled to the benefits from the original technology, from improvements to the original technology, and from sales to other utilities. Therefore, when FPC gave away potential sales profits in exchange for improvements in technology, the ratepayers received nothing of substance in return because the ratepayers received a benefit (improvements in technology) that they were entitled to receive anyway. Thus the transaction that transferred FPC's interest in the COM technology to EFC caused the ratepayers to lose one of

the three benefits that could be expected from the demonstration project. The PSC reiterated this explanation when it denied FPC's Motion for Reconsideration.

> According to the Company, Order No. 13870 contains two errors. First, in its findings that the Company assigned all of its interest in the technology to EFC. According to the Company, it assigned only part of its interest in the technology to EFC, and retained the "utility-related use" of the technology for its own operations. According to the Company, the only benefit the customers could have anticipated from the pilot project was the potential fuel savings from the use of the technology for Company operations. ...[Emphasis in original.]
>
> As to the Company's first point, the claim of error arises from an ambiguous reference in Order No. 13870. It is clear from the record that the Company retained the right to use the technology developed during the pilot project. We understood that fact at the time. Order No. 13870 failed to properly convey that understanding. What Order No. 13870 should have said was that the Company assigned all of its interest in the technology to EFC, but it retained the right to use the technology developed under the pilot project for utility purposes. The Company is incorrect in asserting that the only benefit of the pilot project that the ratepayers could anticipate was lower fuel prices. The contract between the Company and Dravo created greater potential benefits than that. For instance, it provided that the Company was to receive royalties from Dravo if it built plants for third parties. Since the error in question was one of the clarity and not substance, the Company's first point is without merit.

In re: Investigation of Fuel Adjustment Clauses of Electric Utilities. (Florida Power Corporation - COMCO), Order No. 14071

at 1, 85 F.P.S.C. 2: 64 (1985). [Vol. II, R. 225; Initial Brief at appendix 2].

A review of the record shows support for the PSC's position. The 9 September 1977 Development Agreement between FPC and Dravo indicates that one of the purposes of the joint development effort is to market the COM technology to third parties and that FPC is to receive "a reasonable royalty" as compensation for its "equitable interest" in the technology.

> VIII. JOINT DEVELOPMENT EFFORT
>
> In consideration of the contributions by Dravo and FPC towards the development of this pilot plant and the corresponding process, each agrees that if the results of the pilot plant test are favorable, both FPC and Dravo shall have an equitable interest in the inventions, trade secrets, know-how, designs, and test results which are developed under this Proposal (the Development). Both parties agree to hold the Development in confidence and not to reveal any such information to third parties or to use it except for the purposes contemplated herein without the prior written approval of the other.
>
> Dravo and FPC agree to explore, in good faith, the possibilities of forming a joint venture between the two parties or their nominees for the purpose of producing, marketing and distributing the subject fuels. In the event such a joint venture is entered into, the Development will be made available to the joint venture entity for the aforesaid purposes.
>
> Dravo shall have the exclusive rights to the Development for the purpose of constructing plants for third parties. Dravo further agrees to pay FPC a reasonable royalty, as compensation for its equitable interest in the

Development, for each such plant as Dravo may construct.

. . .

[Ex. 4, part 4; Initial Brief at appendix 3]. This Development, however, was superseded by two agreements that were entered into on 20 October 1978. First, FPC assigned all of its interest in the Development Agreement to one of its unregulated subsidiaries, EFC.

> 1. Assignment. For value received, FPC hereby assigns to EFC and its successors or assigns all its right, title and interest in and delegates all its obligations under that certain "Contract for Development of Coal-Oil Composite Fuel Plant" between Dravo and FPC dated September 9, 1977, and all property (tangible or intangible) or rights of FPC acquired pursuant to or by virtue of said Contract, but reserving the right to use in accordance with the Partnership Agreement referred to above for FPC's own benefit all information accumulated during the performance of such agreement before the date of this Assignment. This Assignment is made without representation or warranty and without recourse on the Assignor.

[Ex. 4, part 5; Initial Brief at appendix 4]. Second, EFC and Dravo signed a Partnership Agreement that continued the Development Agreement's earlier purpose of making profitable third-party sales.

> ARTICLE I Formation of the Partnership
>
> Section 1.01. Agreement Forming and Purpose of the Partnership.
>
> . . .
>
> B. The purpose of the Partnership shall be limited to (i) researching and developing processes and equipment for

> the manufacture, storage, transportation and use of Coal-Oil Composite Fuels as defined below, including the research and development of all engineering, design and construction techniques reasonably associated therewith; (ii) engaging in the manufacture, storage, transportation, sale and use of Coal-Oil Composite Fuels and (iii) construction of facilities for such purposes for its own use <u>and for the use of others; and (iv) marketing the knowledge, know-how, inventions, trade secrets, drawings, designs, specifications and test results obtained as a result of the development efforts. ...</u>

[Ex. 6, appendix B, page 1; Initial Brief at appendix 5]. Thus it appears that these two October, 1978 agreements were enabling EFC, <u>rather than FPC</u>, to take advantage of these third-party sales.

This analysis was presented to the PSC during the hearing below. [T. 137-41]. (The transcript from Ms. Bruce's testimony, on behalf of the Staff, can be found on pages A-7 through A-11 of the appendix to this Brief). Ms. Bruce pointed out that the potential for third party sales was a driving force behind the FPC-EFC transactions.

> Q. What happened to FPC's equitable interest in the development of the COM technology?
>
> A. Subsequent to the pilot testing at Crystal River, FPC assigned all of its interest in the technology to Electric Fuels Corporation (EFC) (Exhibit 5). This assignment was made to EFC to enable EFC to form a partnership with Dravo (COMCO) to market and distribute COM. At this point in time EFC was a wholly owned subsidiary of FPC.

> Q. Why didn't FPC form a joint venture with Dravo?
>
> A. Based on the market study and projection that FPC made on the prices of Oil, Coal, and COM, FPC felt that there was a great earning potential from the marketing and distribution of this developed alternate fuel. ...
>
> ...
>
> The Partnership was a continuation of the joint development effort between Dravo and FCP, with EFC, being the successor in the interest of FPC by the assignment agreement. All rights resulting from the agreement between Dravo and FPC were transferred to the Partnership.
>
> Considering the above, it is understandable why FPC considered it more appropriate to form a joint venture with Dravo through its unregulated wholly owned fuel supplier (EFC).
>
> ...

[T. 138-40]. Thus there is a record basis for the PSC's decision. Having heard and read the evidence, the PSC's evaluation was that FPC, "having transferred its interest in the technology to EFC, should compensate the ratepayers for its value." Order No. 13870 at 3, 84 F.P.S.C. 11: at 129. See generally Section 366.01, Florida Statutes (the PSC's regulation of utilities is an exercise of the State's police power for the protection of the public interest and welfare, with the provisions of Chapter 366 to be liberally construed).

The PSC is under no obligation to passively acquiesce to the terms and conditions of a regulated utility's contracts. Once the PSC determined that FPC's contractual transactions had

deprived the ratepayers of expected, future benefits, Order No. 13870 at 3, 84 F.PS.C. 11: at 129, the PSC was within its authority to act. "In exercising its ratemaking authority, the Commission must take into account existing facts which will affect future rates." H. Miller & Sons, Inc., v. Hawkins, 373 So.2d 913, 915 (Fla. 1979), citing to Gulf Power Co. v. Bevis, 289 So.2d 401 (Fla. 1974). In H. Miller & Sons, Inc., a water and sewer utility and an unregulated housing developer had entered into a private contract that established service availability charges to cover water and sewer plant expansion. In ruling that the PSC could modify the utility's private contract, this Court noted that all contracts with public utilities are subject to the exercise of the state's policy power and that to rule otherwise would allow a private party to circumvent this authority.

> The Commission's decision was based upon the well-settled principle that contracts with public utilities are made subject to the reserved authority of the state, under the police power of express statutory or constitutional authority, to modify the contract in the interest of the public welfare without unconstitutional impairment of contracts. ... Furthermore, the effect of ruling in favor of Miller [the unregulated developer] would have been to allow a private party to circumvent by contract the police power of the state, which is impermissible. ...

H. Miller & Sons, Inc. v. Hawkins, supra, at 914 (citations omitted). Accord, City of Plantation v. Utilities Operating Co., 156 So.2d 842 (Fla. 1963), appeal dismissed, 379 U.S. 2, 85 S. Ct. 32, 13 L. Ed. 2d 21 (1964) (the PSC can modify preexisting

franchise agreements). Given that the PSC can modify a private party's contractual bargain with a utility, the PSC should be able to affect the utility as well.

FPC, however, has never raised any state or federal Contract, Due Process, or Equal Protection clause arguments. If it had, these arguments would have been to no avail. See, e.g., Exxon Corp. v. Eagerton,, 462 U.S. 176, 103 S. Ct. 2296, 76 L. Ed. 497 (1983); Midland Realty Co. v. Kansas City Power & Light Co., 300 U.S. 109, 57 S. Ct. 345, 81 L. Ed. 540 (1937); Miami Bridge Co. v. Railroad Commission, 155 Fla. 366, 20 So.2d 356 (1944). With a reasoned basis for its action, which is explained in the order on appeal, and which is supported by competent, substantial evidence, the PSC's decision should be affirmed. See Sec. 120.68(14), Fla. Stat.

A basic aspect of the PSC's decision was that the ratepayer had put FPC in the position to reap future benefits from the third-party sales of the COM technology. See Order No. 13870 at 4, 84 F.P.S.C. 11: at 130. Although the PSC cannot now know the future value of the benefits that FPC gave away, the PSC can attempt to make the ratepayers whole. To do this, the PSC decided that the development costs were the minimum value of what it had taken to put FPC in the position to take advantage of third-party profits.

> Absent another basis for valuation, we believe that the cost of the development of the technology stands as valid proxy for its minimum value. The Company should compensate its ratepayers no less

> than that amount. In addition, we find that the Company should pay interest on that amount to compensate the ratepayers for the time value of their money invested in the technology.

Order No. 13870 at 4, 84 F.P.S.C. 11: at 130.

Both the Staff [T. 137,144] and FPC [T. 195] agree that the development costs were $888,597. FPC's witness, Mr. Moore, makes this clear in his rebuttal to the Staff's witness, Ms. Bruce.

> From her [Ms. Bruce's] review of the demonstration project, she correctly determined the following facts:
>
> ...
>
> 2. The cost of the demonstration project to the Company was $888,597, which was charged as a research and development activity to O&M expense, Account 506, "Miscellaneous Steam Expense".
>
> ...

[T. 195]. To this minimum value, the PSC added $510,996 in lost interest to cover the time value of money, for a total of $1,399,593. Order No. 13870 at 7, 84 F.P.S.C. 11: at 133.

FPC has never claimed that the value of the lost interest was miscalculated. FPC's argument is that the whole concept of interest is incorrect. As will be discussed in detail in points three and six of this Brief, FPC is wrong. The PSC's interest calculation is consistent with how the fuel adjustment clause operates. When a utility fails to collect enough money during a six-month fuel adjustment period to cover its fuel expense during that period (that is, the utility underrecovers), the utility

collects that underrecovery in the future with interest. On the flip side, when a utility collects too much money in a six-month period (that is, overrecoveries), the utility refunds the overrecovery with interest. See generally Citizens v. Public Service Commission (Oil-Backout), 448 So.2d 1024, 1026 (Fla. 1984) (discussion of the true-up, with interest, under the Oil-Backout Rule); Florida Power Corp. v. Cresse, supra, at 1190-91 (discussion of the fuel adjustment true-up procedure). This interest provision is identical to the interest provision that was applied to the COM fuel expense refund, Order No. 13870 at 7, 84 F.P.S.C. 11: at 133, which FPC declined to appeal, Initial Brief at 1 n.1. Thus interest is an appropriate component of any fuel adjustment refund.

III. THE PSC'S ACTION IS CONSISTENT WITH THE PROHIBITION AGAINST RETROACTIVE RATMAKING.

FPC's retroactive ratemaking argument is based upon the fallacious assumption that the PSC imputed revenues, for 1978, to FPC. See Initial Brief at 14. As explained in point two of the instant Brief, the PSC used the development costs, which were based upon 1977-78 figures, as a "valid proxy" for the "minimum value" of the future benefit that FPC gave away. See Order No. 13870 at 4, F.P.S.C. 11: at 130. Contrary to FPC's assertions, the PSC never said that FPC should have received $888,597 in additional revenues in 1978. Rather, the PSC said that it would use 1977-78 cost figures in lieu of determining the value of FPC's future revenues.

> Ms. Bruce was of the opinion that the ratepayers have an equitable interest in the COM technology developed under the contract with Dravo and that the Company [FPC], having transferred its interest in the technology to EFC, should compensate the ratepayers for its value.... We agree with Ms. Bruce.

Order No. 13870 at 3, 84 F.P.S.C. 22: at 129.

Southern Bell Telephone & Telegraph Co. v. Florida Public Service Commission (Division of Toll Revenues), 453 So.2d 78 (Fla. 1984), which FPC discusses on pages fifteen and sixteen of its Initial Brief, is inapplicable to the case at bar. In Southern Bell, this Court ruled that the prohibition against retroactive ratemaking prevented the PSC from affecting the division of long-distance telephone revenues that had been collected in the past. Id. at 783-84. In the case sub judice,

however, the PSC was concerned with determining the value of future revenues. The 1977-78 development costs were merely used as a minimum proxy for this future benefit.

Assuming, simply for the sake of argument, that the PSC has engaged in retroactive action, FPC's situation is akin to the retroactive represcription of depreciation rates that this Court approved in Citizens v. Florida Public Service Commission (Depreciation Represcription), 415 So.2d 1268 (Fla. 1982). In that case, the Citizens argued that a September, 1980 order that changed depreciation rates effective back on 1 January 1980 constituted retroactive ratemaking and violated the terms of a refund stipulation. Id. at 1269. This Court disagreed by drawing a distinction between (a) retroactively affecting rates and (b) taking an action that would affect future revenues.

> Public Counsel argues that depreciation represcription is not a bookkeeping entry but, rather, under the circumstances, constitutes a retroactive change in the rate base. Public Counsel argues that both section 364.14, Florida Statutes (1979), and City of Miami v. Florida Public Service Commission, 208 So.2d 249 (Fla. 1968), prohibit the PSC from establishing rates retroactively. Accord Public Utilities Commission v. United Fuel Gas Co., 317 U.S. 456, 63 S. Ct. 369, 87 L.Ed. 396 (1943). Public Counsel also asserts that the effect of the PSC's actions places an improper construction on the [Order No.] 9564 stipulation and divests Southern Bell's consumers of vested rights, contrary to City of Lakeland v. Catinella, 129 So.2d 133 (Fla. 1961).
>
> We find that public counsel's reliance on section 364.14 and City of Miami is misplaced because that section and case

> concern rate-making. Under the present facts, the PSC was not rate-making but, rather, was considering depreciation represcription. ...

Id. at 1269-70. Accord, Southern Bell Telephone and Telegraph Co. v. Florida Public Service Commission (1981 Rate Case), 443 So.2d 92, 97 (Fla. 1983)(retroactive depreciation represcription "complies with the essential requirements of law"). Likewise, under the facts of the instant case, the PSC was looking at how future events would be affected rather than at how rates from the past were to be changed. Thus retroactive ratemaking is not an issue at all.

Even if it were an appropriate issue for discussion, it is impossible to have retroactive ratemaking in the context of the fuel adjustment clause (which is more properly referred to as the fuel and purchased power cost recovery clause). The clause operates in a manner that ensures that a utility will recover all of its prudently incurred fuel expenses. A utility's fuel adjustment charge in any six-month period (for example, April-September, 1985) is based upon the projected fuel cost in that six-month period April-September, 1985) plus the difference between the fuel adjustment revenues that the utility actually collected in past periods (in our example, October, 1984-March, 1985 and April-September, 1984) and the fuel expenses that were incurred in those past periods. If the utility collected too much revenue in the past, the amount is refunded in the future with interest. On the other hand, if the utility collected too little revenue in the past, then that amount is collected in the

future with interest. Thus the fuel adjustment clause is a continuous true-up of retroactive expenses and revenues. In re: Full investigation of the fuel cost recovery clauses of electric companies, Order No. 10093, 81 F.P.S.C. 6: 158 (1981) (explains how the current fuel adjustment true-up operates) [A-12]; In re: General investigation of fuel cost recovery clause. Consideration of staff's proposed projected fuel and purchased power cost recovery clause with an incentive factor, Order No. 9273, 80 F.P.S.C. 3: 6 (1980) (explains the change from the 1974 fuel adjustment clause) [A-23]. See also In re: General investigation of fuel adjustment clauses of electric companies, Order Nos. 6332 (Oct. 29, 1974) [A-29] and 6332-A (Oct. 31, 1974) [A-34] (PSC approves Stipulation, to which FPC was a party, that establishes monthly fuel adjustment hearings); In re: General investigation of fuel adjustment clauses of electric companies, Order No. 6357 (Nov. 26, 1974) (explains how the fuel adjustment clause operated from 1974-1980) [A-36]. To give just one example of the clause's retroactive mechanics, in 1980, when the fuel clause was modified to allow for true-ups and projections, the PSC allowed the utilities, including FPC, to recover two-months' worth of fuel expense that the PSC and the utilities claimed had never been collected in the past, In re: General investigation of fuel adjustment clauses of electric utilities, Order No. 9306 at 5-6, 80 F.P.S.C. 4:2, 7 (1980) [A-51], a decision that this Court affirmed, on the basis of competent, substantial evidence, in Citizens v. Florida Public Service Commission (Transition Adjustment), 403 So.2d 1332 (Fla. 1981).

Although the Citizens agree with FPC's hornbook explanation of the prohibition against retroactive ratemaking and the impropriety of focusing on a single transaction without considering the affect upon a utility's rate-of-return, the facts of the instant case and the operation of the fuel adjustment true-up make FPC's argument inapposite and misplaced.

IV. THE PSC'S EVALUATION OF THE FACTUAL SITUATION AND THE LEGAL TRANSACTIONS IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

FPC's apparent strategy is to try to cast doubt upon a relatively insignificant aspect of the PSC's decision (specifically, the receipt of consideration), and to then attempt to use that doubt (assuming that it has been created) to undermine the major basis for the PSC's decision (specifically, giving away future benefits). As was discussed in point two of this Brief, the basis for the PSC's decision was that FPC gave away one of the three benefits that the Development Agreement was expected to produce. Nothing binds the PSC to FPC's private agreements. Order No. 13870, 84 F.P.S.C. 11: 127, was not based upon the exchange of consideration between FPC and EFC or between FPC and Dravo. Rather, the PSC's decision turned on FPC's failure to retain the benefits from the sale of the COM technology to third parties. The PSC was concerned that the Assignment and the Partnership Agreement had transferred this benefit to FPC's unregulated subsidiary, EFC.

FPC is railing against an insignificant, side issue. As was discussed early in this Brief, FPC's Motion for Reconsideration raised the issue of consideration. [Vol. II, R. 190]. In disposing of FPC's Motion, the PSC reaffirmed that its initial decision had focused upon the benefit that FPC had given away. The PSC also noted that it understood how the various transactions fit together.

> As to the Company's first point, the claim of error arises from an ambigious reference in Order No. 13870. It is clear from the record that the Company retained the right to use the technology developed during the pilot project. <u>We understood that fact at the time</u>. Order No. 13870 failed to properly convey that understanding. What Order No. 13870 should have said was that the Company assigned all of its interest in the technology to EFC, but it retained the right to use the technology developed under the pilot project for utility purposes. <u>The Company is incorrect in asserting that the only benefit of the pilot project that the ratepayers could anticipate was lower fuel prices. The contract between the Company and Dravo created greater potential benefits than that.</u> For instance, it provided that the Company was to receive royalties from Dravo if it built plants for third parties. Since the error in question was one of clarity and not substance, the Company's first point is without merit.

Order No. 14071 at 1, 85 F.P.S.C. 2: at 64.

By asking this Court to go step-by-step through the various contracts that were introduced into evidence below, FPC is attempting to have this Court reweigh and reevaluate the testimony and exhibits that were presented to the PSC. As was explained in point one of this Brief, this is inappropriate. The PSC's evaluation of FPC's relationship with EFC and the Partnership has been explained in the order on appeal and is supported by competent, substantial evidence. Thus it should be affirmed.

V. THE PSC RECOGNIZED THAT FPC HAD MISUSED THE RATEPAYERS AND HAD DEPRIVED THE RATEPAYERS OF A FUTURE BENEFIT.

FPC's third point on appeal is that FPC's various contractual transactions had no affect upon the ratepayers. See Initial Brief at 28-34. The PSC, however, found otherwise. As explained in point two of the instant Brief, the PSC found that FPC's actions deprived the ratepayers of a future benefit.

Virtually all of FPC's argument on this third point is a beefed-up rehash of the retroactive ratemaking argument that FPC presented in point one of its Initial Brief. To repeat what was said in point three of the instant Brief, although the Citizens agree with FPC's textbook explanation about retroactive ratemaking and focusing on the costs of a single transaction, the PSC never engaged in retroactive ratemaking. The 1977-78 development cost were used as a "valid proxy" for the "minimum value" of the future benefits that FPC transferred to its unregulated subsidiary, EFC. Thus FPC's retroactive ratemaking argument, in points one and three of its Initial Brief, has nothing to do with the PSC's decision.

FPC asserts, without any discussion, that "[t]he ratepayers could not have acquired any 'equitable interest' in the [COM] technology." Initial Brief at 28 n.6. As discussed in point two of the instant Brief, there is competent, substantial evidence to support the PSC's contrary opinion.

The issue of the ratepayers' or the shareholders' equitable interest in an asset (whether tangible or intangible) frequently

arises in general rate cases when the PSC considers how to treat the gain or loss on sale or transfer of utility property. The PSC's practice is to apportion any gain or loss on an equitable basis between the shareholders and the ratepayers. The following lengthy excerpt from FPC's 1982 rate case (Docket No. 820100-EU), which refers to all of the equitable interest cases that FPC's footnote six cites, presents the PSC's well-reasoned position.

> Florida Power has cited to several cases from other jurisdictions in support of its position that gains on the sale of utility property should not be treated as utility income. The case law is sparse, and the cases upon which it relies do not support such a broad contention. If anything, those cases distinguish between sales of depreciable and non-depreciable assets, holding that gains on the former may be recognized and those on the latter may not. The primary case cited, Philadelphia Suburban Water Co. v. Pennsylvania P.U.C., 427 A. 2d 1244; 43 PUR 4th 133 (Commonwealth Ct. of Pa. 1981), draws a strong distinction between land and depreciable utility property and the fact that the ratepayer would not share in any loss upon sale of land.
>
> The court seems to view depreciation as a measure of asset consumption whereas this Commission has traditionally recognized it as a measure of investment recovery over the asset life. In Boise Water Corp. v. Idaho P.U.C., 578 P. 2d 1089 (Idaho 1978) and City of Lexington v. Lexington Water Co., 458 SW 2d 778 (Kentucky DCA 1970) (cited in Philadelphia Suburban at 43 PUR 136, 137) the courts also held that since no risk of loss was borne by the ratepayers, they should not participate in the benefits as it relates to non-depreciable land.
>
> It should be noted however that neither the original investment nor the amount

recouped through depreciation is directly linked to the amount of gain or loss to be recognized, which will generally accrue from an event outside of regulatory control, such as market place appreciation or premature obsolescence. The absence of such a direct connection makes those cases that draw a distinction between depreciable and non-depreciable assets somewhat suspect.

Florida Power contends that ratepayers obtain no interest whatsoever in utility property, citing to the following passage from Board of Public Utility Comm'rs v. New York Telephone Co., 271 U.S. 23, 32 (1926):

> Customers pay for service, not for the property used to render it . . . By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company.

This opinion was issued during a period when the Court was wrestling with the "fair value" concept of rate base. In later cases, the Court recognized the propriety of using historical cost. From a regulatory standpoint, the investor's protected legal interests apply to the capital invested and not to the property purchased with that capital. Democratic Central Committee of D.C. v. Washington Metro. Area Transit Comm'n., 485 F. 2d 786, 801 (D.C. Cir. 1973). Viewed in this light, just because ratepayers do not obtain a property interest in utility assets, it does not follow that investors have an indefeasible right to gains arising from appreciated market value. 485 F.2d at 797 n. 82. The investor's rights are satisfied if he has the opportunity to recover his original investment over the life of that investment and an opportunity to earn a return on recovered investment. Re Southern California Edison, 32 PUR 4th 423, 436-37 (Calif. P.U.C. 1978)

> It does not necessarily follow that all gains belong to the ratepayers. An equitable basis upon which to apportion any benefits should be developed. We have done this.

Order No. 11628 at 31-32, 83 F.P.S.C. 2: at 178-79.

Going beyond this order, neither Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission, 427 A.2d 1244 (Pa. Commw. Ct. 1981), nor Boise Water Corp. v. Idaho Public Utilities Commission, 578 P.2d 1089 (Idaho 1978), support FPC's contention about the impossibility of an equitable interest. In Philadelphia Suburban, the Commission was reversed because of its unexplained departure from its own accounting rule. Philadelphia Suburban Water Co., supra, at 1248-49. In the instant case, however, the PSC's action is consistent with its standard policy, is explained, and is supported by the record. In Boise Water Corp., the Court reversed the Commission because the record was "devoid of any justification" for the Commission's action. Boise Water Corp., supra, at 1093. This differs from the case at bar because the PSC has explained and supported its decision.

In the proceeding below, the PSC applied its standard approach for determining the benefits (or losses) to be allocated between the shareholders and the ratepayers. Given that the PSC's decision comports with the essential requirements of law and is supported by competent, substantial evidence, the PSC's action should be affirmed.

VI. INTEREST IS AN ROUTINE, INTEGRAL PART OF EVERY FUEL ADJUSTMENT TRUE-UP.

FPC's fourth point on appeal is that the PSC erroneously awarded pre-judgment interest. The only way that FPC can make this argument is to ignore the mechanics of the fuel adjustment clause true-ups. As was explained in points two and three of this Brief, the fuel clause true-ups are always made with interest. When a utility collects too little fuel revenue, it recovers that amount with interest. Likewise, when too much is collected, it is refunded with interest.

> Interest on Over/Underrecoveries
>
> The staff witnesses stated a preference against the inclusion of an interest factor on true-up balances. However, we are persuaded by the testimony of other witnesses that such a measure is equitable, would counter any incentive to bias projections in either direction, and would thus lend credibility to the process. We agree with Mr. Culbreath and Mr. Hudiberg that the commercial paper rate, which is determined independent of the regulatory process and can readily be determined, is the most appropriate rate to be applied, particularly in view of the fact that the level of overrecovery or underrecovery will influence the level of the companies' short-term borrowings. The exact mechanics of the proper application of the interest factor to the true-up balance will be the subject of testimony during the hearings to be held for the initial projection period.

Order No. 9273 at 8, 80 F.P.S.C. 3: at 15. [A-27].

> In Order No. 9273, we determined that an interest factor based upon the Commercial paper rate should be applied to true-up balances, and directed that

> the exact mechanics of the proper application of the interest factor to the true-up balance be the subject of testimony during the March 26 hearing. At that time, witness Homer P. Williams recommended that the Commission adopt the 30-day commercial paper rate for high-grade, unsecured notes sold through dealers by major corporations in multiples of $1,000, as regularly published in the Wall Street Journal. The annual rate as published on the first day of the current business month would be added to the rate on the first day of the subsequent business month and halved to obtain the simple average rate for the first month. The rate would be divided by twelve to obtain the simple average interest rate to be applied in that month. This rate of interest would be applied to the average true-up amount, which would be the simple average of the beginning and ending amounts in the true-up account. The amount of interest resulting from this calculation would be the same as that obtained by applying the simple average interest rate to the true-up amount at the beginning of the month plus one-half of the true-up amount for the current month. The amount of interest calculated would be added to the beginning balance of the following month so as to accomplish the compounding of the interest feature of the true-up provisions.
>
> Having considered this testimony, we believe it constitutes a reasonable and workable approach to the interest issue, and should be adopted.

Order No. 9306 at 7, 80 F.P.S.C. 4: at 8. [A-57].

FPC has benefited from this standard interest provision. For example, in calculating the fuel adjustment charge for the April-September, 1984 fuel adjustment period, the PSC determined that FPC has underrecovered for its past fuel expenses and allowed FPC to collect that amount in the future with interst. <u>In re:</u>

Investigation of fuel adjustment clauses of electric utilities, Order No. 13092 at 5-6, 12, 84 F.P.S.C. 3: 107, 111-12 (1984). [A-60, 64-65, 71]. When the interest provision went its way, FPC never raised an objection.

Rather than directly addressing the fuel adjustment interest provision, FPC analogizes to pre-judgement interest. Even this argument fails. FPC refers to two cases to show that the PSC "has no power to award money damages." Initial Brief at 35 n.9. When those cases are compared to the instant situation, however, it becomes obvious that the PSC's action was proper. Southern Bell Telephone and Telegraph Co. v. Mobile America Corp., Inc., 291 So.2d 199 (Fla. 1974), involved a private tort action for Southern Bell's alleged negligent failure to meet its statutory duty to provide efficient telephone service. The complaint and the remedy that was sought had nothing to do with the telephone company's rates and charges for service. Mobile America sought to collect individually, on its own behalf, rather than on behalf of the ratepayers as a whole. In the instant case, the PSC was not faced with a private tort action between an individual and a utility. Rather, the PSC was exercising its regulatory responsibility to ensure that a public utility's rates are just, fair, and reasonable. See generally Sec. 366.06 and 366.07, Fla. Stat.

Similarly, Winter Springs Development Corp. v. Florida Power Corp., 402 So.2d 1225 (Fla. 5th DCA 1981), involved a private breach of contract action between an individual customer and a

utility rather than, as in the case sub judice, the regulatory enforcement of appropriate rates and charges. Mobile America, Winter Springs, and Florida Power Corp. v. Advance Mobile Homes, Inc., 386 So.2d 897 (Fla. 5th DCA 1980), petition for reviewed denied, 394 So.2d 1151 (Fla. 1981), show that it is deceptive to compare a PSC rate or fuel adjustment order to a private tort or contract damage suit. The PSC never awards money damages. Instead, the PSC determines which expenses a utility can collect from customers and establishes the rates and charges that are billed for service. FPC's pre-judgment interest argument applies to tort or contract judgments. Its use in a regulatory proceeding is misplaced.

Even if the $888,597 were money damages in a tort or contract action, the cases that FPC cites would award pre-judgment interest on this amount. In Federal Deposit Insurance Corp. v. Carre, 436 So.2d 227 (Fla. 2d DCA 1983), petition for review denied, 444 So.2d 416 (Fla. 1984), pre-judgment interest was denied because the value of the missing items was in dispute. The same holds for City of Pompano Beach v. Oltman, 389 So.2d 283 (Fla. 4th DCA 1980), petition for review denied, 399 So.2d 1144 (Fla. 1981). In that case, the amount of damages, among other things, was in dispute. In the instant case, however, everyone agrees that the development costs were $888,597. The only question is whether this amount should be passed-on to ratepayers.

FPC's quote from Federal Deposit Insurance Corp. (Initial Brief at 36) is actually the Court's quote from Town of Longboat Key v. Carl E. Widell & Son, 362 So.2d 719, 723 (Fla. 2d DCA 1978), which the Court refers to with favor. In Town of Longboat Key, a contract action, pre-judgment interest was awarded. The pre-adjustment interest was calculated on the dollar amount that had been alleged in the complaint and proved during the trial. There was no conflicting evidence or need to use inferences and interpretations to detemine the dollar amount. Id. at 723. Likewise, in the case below, the development costs of $888,597 was the amount that the Staff pursued and proved before the PSC.

In any event, FPC's pre-judgment interest argument is inapplicable to the PSC's fuel adjustment true-ups. Interest is an intergral component of every fuel adjustment calculation. The interest aspect of the PSC's decision should be affirmed.

CONCLUSION

Order No. 13870, 84 F.P.S.C. 11:127, is supported by competent, substantial evidence and comports with the essential requirements of law. The ratepayers provided FPC with the wherewithal to enter into the COM development project. Once it appear that this project might be lucrative, FPL acted to deprive the ratepayers of this future benefit by transferring the royalties from third-party sales to EFC. By using the undisputed value of the COM development costs as a valid proxy for the minimum value of the future benefit that FPC gave away, the PSC did nothing that violated the prohibition against retroactive ratemaking. FPC's pre-judgment interest argument is inapplicable to fuel adjustments proceedings. All fuel adjustment calculations include an interest component.

The PSC's order on appeal should be affirmed in all respects.

Respectfully submitted,

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