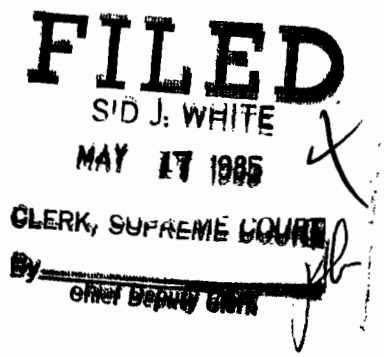
IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION, Appellant, v. JOHN R. MARKS, et al., in the official capacity as and constituting the Florida Public Service Commission, Appellee.	)	CASE NO. 66,583



ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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DESIGNATIONS

Appellant, Florida Power Corporation, will be referred to as "Florida Power" or "the Company." Appellee, Florida Public Service Commission, will be referred to as "the Commission." Florida Power's former subsidiary, Electric Fuels Corporation, will be referred to as "EFC."

The September, 1977 agreement between Florida Power Corporation and Dravo Corporation ("Dravo") will be referred to as "the 1977 Crystal River Agreement." The October 1978 assignment agreement between Florida Power, EFC, and Dravo will be referred to as "the 1978 Assignment." The October, 1978 partnership agreement between EFC and Dravo will be referred to as "the 1978 Partnership Agreement," and the partnership created by that agreement will be referred to as "the Partnership" or as "COMCO." The 1980 contract between COMCO and Florida Power will be referred to as the "1980 COM agreement."

References to the record will be designated "R.___," and the Appendix to this brief, "A-___." References to separate volumes of transcripts of hearings will be identified by the date of the hearing and the original page number of the transcript.

STATEMENT OF CASE

This proceeding arose during a routine hearing held in the Commission's Fuel Adjustment Docket. At its February, 1982 hearing, the Commission noted that Florida Power was projecting payments for a new fuel. The fuel was called coal/oil mixture, or COM, and was intended to replace the No. 6 fuel oil being burned in one of Florida Power's generating units. (Tr. 347, 348, 2/82). The Commission inquired why the COM was priced higher than the oil it was to replace (Tr. 348, 2/82). Florida Power was not prepared to explain the price of the COM and the Commission provided Florida Power with an opportunity to justify the price of COM at a later date (Tr. 355, 2/82).

Florida Power presented testimony on COM at four subsequent fuel adjustment hearings.[1] The testimony described COM, the purpose of its use and the justification for the price paid. The Commission declined to approve the price of COM as reasonable but allowed Florida Power to recover the full price of the COM, subject to refund, pending further proof as to the reasonableness of its cost (Tr. 384-385, 6/83).

Finally, in April, 1984, Florida Power proposed a special treatment of COM costs whereby the excess costs would be returned to the ratepayers and the COM price adjusted for the future (R. Vol I, p. 114). In response, the Commission staff proposed some

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[1]These hearings were the August 18, 1982 hearing (Tr. 8/82), the January 6, 1983 hearing (Tr. 1/83), the February 13, 1983 hearing (Tr. 2/83) and the June 2, 1983 hearing (Tr. 6/83).

changes, proposed that interest be paid on the excess COM costs and questioned Florida Power's actions in assigning COM technology to its subsidiary, Electric Fuels Corporation (R. Vol.I, p. 130).

A final hearing was held on August 23, 1984 (Tr. 8/24). Briefs were filed and the Commission ultimately issued Order No. 13870 on November 26, 1984 (R. Vol. I, p. 182).

Order No. 13870 approved Florida Power's proposal to return the excess COM costs to its ratepayers, with modifications, and required Florida Power to include interest with that amount. It also found that Florida Power had acquired certain rights to COM technology it developed during an experiment at its Crystal River generating unit. It found that the ratepayers paid the cost of the Crystal River project, that they shared in the risk of the project and that they were entitled to receive the benefits of the project. The Commission further found that Florida Power assigned its interest in the technology developed by the Crystal River project to Electric Fuels Corporation, but received nothing in return, thereby depriving the ratepayers of the benefits of the Crystal River project. The Commission then required Florida Power to compensate its ratepayers for the lost value of the technology plus interest.

Florida Power filed a Motion for Reconsideration, challenging the propriety of the Commission's findings of fact. (R. Vol. II, p. 190). Oral argument was heard on January 8, 1984. The Commission denied the Motion for Reconsideration in Order No. 14071, issued February 11, 1985. (R. Vol. II, p. 225). This appeal ensued.

STATEMENT OF FACTS

Following the Arab oil embargo of 1973-74, Florida Power investigated the possible use of a coal/oil composite fuel for use in its oil burning power units (Tr. 21, 8/82). In furtherance of that effort Florida Power entered into an agreement with Dravo Corporation in September, 1977, for the design, construction and operation of an experimental plant to produce a COM for use in Florida Power's Crystal River Unit No. 1, one of its smaller oil units (Tr. 135-136, 8/84).

The stated purpose of the 1977 Crystal River Agreement was to develop and test burn COM to gain technical knowledge for both parties, for the marketing of the product, and the possible use of the product by Florida Power at its large Anclote Plant (Tr. 135-136, 8/84). Under the agreement, Florida Power was to provide its Crystal River Unit No. 1 to burn COM, provide land adjacent to the Unit for the COM production plant, provide storage and transportation of fuel, provide labor and maintenance for the production plant and compensate Dravo in the amount of $240,000 for the construction and dismantlement of the COM production plant. In return Dravo was to design, construct, manage and dismantle the COM production plant (Tr. 136-137; Ex. 5, 8/84; Appendix A-1,2).

The 1977 Crystal River Agreement between Florida Power and Dravo provided:

1. each party would have an "equitable interest in the inventions, trade secrets, know-how, designs and test results developed" under the agreement;

2. each party could use the above technology for purposes contemplated in the agreement;

3. the parties would explore the possibility of forming a joint venture to produce, market and distribute COM;

4. Dravo had exclusive rights to the results of the project for constructing plants for third parties;

5. Florida Power was entitled to reasonable royalties for each plant constructed by Dravo; and

6. If Florida Power or any of its subsidiaries proceed to have a larger COM plant built, Dravo will be employed to design the facility and may bid on its construction.

(Tr. 138, Ex. 4, 8/84; Appendix A-1,2).

The project began in 1977 and ran until mid 1978 (Tr. 136, 8/84). The total cost of the project to Florida Power (excluding fuel) was $888,597, including payments to Dravo (Tr. 137, 8/84). Florida Power booked this amount to account 506 - Miscellaneous Steam Expense (Tr. 137, 8/23/84).

As a result of the Crystal River project and studies of the potential market for COM, Florida Power concluded that COM represented an economical means of displacing oil and that substantial profits could be gained in producing and selling COM (Tr. 139, 8/84). Among others, Florida Power conducted a study for the potential of marketing COM throughout the United States (Ex. 4, 8/84; Appendix A-3). In October 1978 Florida Power entered into an agreement (the 1978 Assignment) with Electric Fuels Corporation (EFC), a Florida Power subsidiary. Under the 1978 Assignment EFC was assigned all of Florida Power's rights under the 1977 Crystal River agreement with Dravo (Tr. 138, 139, 82/3/84). However, Florida Power retained its right under the

1977 Crystal River Agreement to use the technology developed by the Crystal River project for its own benefit (Tr. 205, 206, 8/84). Florida Power received no compensation for the assignment to EFC (Tr. 141, 8/84).

Simultaneous with the 1978 Assignment, EFC entered into a partnership agreement with Dravo (Tr. 139, 8/84). The partnership was formed specifically to:

1. research and develop processes and equipment for the manufacture, storage transportation and use of COM;
2. manufacture, sell, transport and use COM;
3. construct facilities; and
4. market the knowledge, know-how, inventions and trade secrets developed by the partnership.

(Tr. 139, Ex. 6, 8/24; Appendix A-7)

The 1978 Partnership Agreement also provided that all knowledge, know-how, inventions and trade secrets developed under the 1977 Crystal River agreement would become the property of the partnership, as would all such developments thereafter obtained by the partnership (Ex. 6, 8/24; Appendix A-8, 9). Florida Power was not a party to the 1978 Partnership Agreement and the agreement granted no specific rights to any persons other than the partners (Ex. 6, 8/24; Appendix A-4, 5).

After completion of the Crystal River project, Florida Power decided to convert its Bartow I Unit to burn COM as a continuation of the Crystal River project before committing to convert its Anclote Plant (Tr. 144, 145, 159, 8/84). The primary reason for converting Bartow was, again, to reduce dependence on foreign

oil. However, Florida Power also expected COM to produce a net savings in fuel cost over the five-year period following conversion (Tr. 145, 8/84). The Bartow conversion began in August, 1980 (Tr. 146, 8/84). The total cost of the conversion to Florida Power was $11,235,630 (Tr. 146, 8/84). This amount was included in the Company's base rates and the ratepayers are currently paying a return on that amount (Tr. 146, 8/84).

In November, 1980, Florida Power entered into a COM supply agreement with COMCO, a Florida partnership comprised of Dravo Technology, a subsidiary of Dravo, Massey Fuels Corporation and Alternative Fuels Corporation, a subsidiary of EFC (Ex. 12, 6/83; Ex. 3, 8/84). The 1980 COM contract provided that, commencing in December, 1981, COMCO would produce COM and deliver it to Florida Power (Ex. 12, 8/84).[2] In exchange, Florida Power was to pay COMCO for the cost of the coal and oil used to make the COM, the processing cost to make the COM, the interest cost on the COM production plant and COMCO's working capital investment, and the depreciation expense for the COM production plant, which was to be recovered over the five-year term of the agreement (Tr. 347, 2/82; Ex. 12, 8/84). In addition, COMCO was to receive half of the difference between the cost of COM and the cost of No. 6 Oil, which was the fuel it replaced (Ex. 12, 8/84. Thus, to the extent that money could be saved by burning COM instead of oil, COMCO would get half the savings and the ratepayers would get the

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[2]The commencement date was subsequently moved back to April, 1982 (Ex. 3, 8/84).

other half (Tr. 379, 6/83; Tr. 37, 8/84).

Although the parties expected COM to cost less than No. 6 Oil, the 1980 COM contract contained no provision guaranteeing that Florida Power would not, in fact, pay more for COM (Tr. 324, 6/84). As a result, when Florida Power began purchasing the COM in early 1982, it was paying more for COM than the No. 6 Oil it was replacing and, by February, 1984, had paid over $1.6 million more for COM than for No. 6 Oil (Tr. 19, 146-147, 8/84).

As a result of Florida Power's April, 1984 proposal to return the excess cost of COM to its ratepayers, and to resolve other questions previously raised, the Commission Staff conducted an investigation of Florida Power's books and records (Tr. 128, 8/84). The results of this investigation were testified to by Ms. Bruce, an accountant employed in the Commission's Electric and Gas Department (Tr. 127-128, 8/84).

In addition to reviewing Florida Power's proposal to return the excess COM costs to the ratepayers, Ms. Bruce sought to determine if its rate payers had an interest in the COM technology developed at Crystal River (Tr. 130, 8/84) She viewed all of the events surrounding the 1977 Crystal River project, the 1978 Assignment to EFC, the 1978 EFC/Dravo Partnership Agreement and the 1980 COM contract between Florida Power and COMCO. Ms. Bruce testified that it was her opinion that the Crystal River technology was valuable, that the ratepayers had an interest in the technology and that they were entitled to its benefits (Tr. 141-144, 8/84). The basis of Ms. Bruce's opinion that the ratepayers had an interest in the Crystal River technology was two-fold:

1. Florida Power allowed its Crystal River Unit I to be used as an experimental lab to test burn the COM, and also provided land for a temporary pilot plant site. Because Florida Power's customers pay a return on those assets, they have an interest in the COM technology developed. (Tr. 142, 8/84).

2. The project was an R & D project which was expensed through O & M and recovered through rates charged to Florida Power's customers. Although incurred outside of a test year, expenses for R & D projects have been included in Florida Power's rates since 1972. Also, many R & D projects actually involve company operations embedded in other operating expenses. (Tr. 142, 8/84).

Ms. Bruce elaborated on these points. For instance, she stated that the use of company plant caused the ratepayers to share in the risk of the project due to the possible need of future repairs that they may have to share (Tr. 168, 8/84). She reviewed the level of R & D expenditures over the years, finding them to be fairly constant (Tr. 164, 8/84). They ranged from $900,000 to over a million dollars (Tr. 166, 8/84). However, she emphasized that many R & D costs are embedded in other plant operations and reallocated to R & D projects (Tr. 167, 8/84). She testified that it is not appropriate to point to a project and state that the stockholders paid for it. She stated that dollars cannot be traced in that manner. It was her opinion that it is more appropriate to state that the stockholders underwrote some portion of all O & M expenses (Tr. 167, 8/84).

Ms. Bruce testified that Florida Power gave the Crystal River technology to EFC without compensation, thereby depriving its ratepayers of the benefits of the technology (Tr. 141, 143-144, 8/84). She testified that it was her opinion that Florida Power's ratepayers should be compensated for the lost value of the Crystal River technology (Tr. 143-144, 8/84).

SUMMARY OF ARGUMENT

POINT I:

Retroactive rate making is when a regulatory agency makes up for past over or under earning by applying future rates to past consumption. Citizens v. Public Service Comm., 415 So.2d 1268 (Fla. 1984); After-the-fact adjustments to expenses, although having an incidental effect on earnings, are not retroactive rate making.

If a utility enters into a contract with another entity for the provision of products or services, the Commission may review the expenses associated with that contract without violating the constitutional provision giving sanctity to the right of contract City of Plant City v. Mayo, 337 So.2d 966 (Fla. 1976).

In Florida Power Corporation v. Cresse, 413 So.2d 1187 (Fla. 1982), the Court acknowledges that fuel costs are incurred and their recovery is sought after-the-fact.

This after-the-fact adjustment allows the company to recover past expenses incurred, but not collected from the ratepayer. The proceeding also provides an opportunity for the adjustment downward of rates to the ratepayer for over-collection of fuel expenses by the utility. This correction of past errors and imprudence is a two edge sword protecting the ratepayer from over-collection of expenses and protecting the company from the under-collection of expense dollars.

In Southern Bell Telephone and Telegraph Co. v. Florida Public Service Commission, 453 So.2d 780 (Fla. 1984), the Commission resolved a controversy between Bell and General Telephone

concerning the division of revenues and applied the adjustment to revenues earned a year prior to obtaining jurisdiction. The Court found it was retroactive rate making.

Here, the Commission has not affected the tariffs of the utility nor has it affected the earnings of the utility except that the stockholders are bearing the risk of management imprudence and not the ratepayer.

POINT II:

In reviewing the actions of Florida Power, the Commission was concerned with the prudence of Florida Power's decisions and the legitimate interests of its ratepayers. The Commission's action was not intended to, nor did it have an effect upon the validity or the enforceability of any of the contracts it considered.

The Commission's findings regarding the assignment and the EFC/Dravo partnership agreement are findings of fact and they are to be upheld if supported by competent, substantial evidence. Citizens of the State of Florida v. Public Service Commission, 425 So.2d 534 (Fla. 1982).

Florida Power possessed specific rights to valuable technology created during the 1977-1978 experiment at its Crystal River generating plant. Florida Power gave away all of these rights in the 1978 Assignment to EFC, with one exception: it reserved its existing right to use the Crystal River technology for its own benefit.

The 1978 EFC/Dravo partnership agreement provided no value to Florida Power in exchange for the Assignment. By its terms, the

Assignment permitted Florida Power to use only the technology accumulated "before the date of [the] Assignment." The Assignment was dated October 20, 1978, as was the EFC/Dravo Partnership Agreement. There was no technology accumulated under the EFC/Dravo Partnership Agreement before the date of the Assignment.

The actions of the parties after 1978 are irrelevent to the questions presented. The 1978 Assignment is unambiguous and it is not appropriate to consider extrinsic evidence. Further, the 1980 COM fuel contract is not covered by the Section of the 1978 Partnership Agreement that Florida Power relies upon. Finally, Florida Power did pay some costs for improvements in technology and fully expected to pay much more.

POINT III:

In considering expenses incurred in a test period, the Commission may include those expenses prudently incurred that "fairly represent the future period for which the rates are being fixed" Gulf Power Co. v. Bevis, 289 So.2d 401, 404 (Fla. 1974).

The expenses sought to be recovered in this proceeding if considered non-recurring, out of period expenses related to fuels, they would be recovered for rate making purposes through the fuel adjustment clause.

The question of whether the ratepayers have an interest in the results of the 1977/78 Crystal River project is a question of fact. The Commission was presented with competing evidence on the question. Faced with competing testimony, the Commission weighed the evidence and made its findings.

Ms. Bruce's testimony stands as a competent substantial basis for the Commission's findings. Citizens of the State of Florida v. Public Service Commission, 425 So.2d 534 (Fla. 1982).

Florida Power has made no challenge to the validity of Ms. Bruce's testimony, nor to the Commission's detailed factual findings in Order No. 13870. Instead, it has simply reiterated the case it presented before the Commission and asks this Court to reweigh the evidence which itmay not do. Jacksonville Suburban Utilities Corp. v. Hawkins, 380 So.2d 425, 426 (Fla. 1980).

POINT IV:

In Florida Power Corp. v. Zenith, 377 So.2d 203 (Fla. App.2d 1979), the District Court that the jurisdiction to order refunds of over charges associated with fuels, "does not lie in the court but on the Florida Public Service Commission." Any overcharge may be awarded with interest thereon.

Therefore, the issue of the Commission's jurisdiction to impose a reasonable interest on those charges has been addressed and settled.

The Power Company contends that the measure of "damages" is based on conflicting, inferences and interpretations and as such is not subject to the imposition of interest. Appellant cites to Federal Deposit Ins. Corp. v. Carré, 436 So.2d 227 (Fla. App. 2d 1983) as controlling precedent.

The parties here do not challenge the cost of the project. It was $888,597 and the company booked precisely this amount to Account 506 - Miscellaneous Steam Expense. What the appellant

really is challenging is that cost should not be a surrogate for value. This Court, See: United Telephone Co. of Fla. v. Mann, 403 So.2d 962 (Fla. 1981), has accepted cost as a valid, quantifiable and reasonable substitute for opinion judgment as to value. The rate making statute itself recognizes that the Commission is directed to use cost as the determinate of value.

The record supports the fact that the value of the technology developed under the Crystal River project was at least the cost of the project.

This is not pre-judgment interest based upon speculative evidence, but recovery of interest on dollars improperly withheld from the ratepayers. It is the sword cutting the other way.

I.

THE COMMISSION ROUTINELY MAKES LAWFUL AFTER-THE-FACT ADJUSTMENTS TO EXPENSES.

INTRODUCTION:

The Commission has on a continuing basis, made adjustments to expenses after they have been incurred and paid for by the utility. Some of these adjustments have had an effect on earnings but do not constitute retroactive rate making. Retroactive rate making is when a regulatory agency sets about to make up for past over or under earning by applying future rates to past consumption. Citizens v. Public Service Commission, 415 So.2d 1268 (Fla. 1984); Gulf Power Co. v. Cresse, 410 So.2d 492 (Fla. 1982). After-the-fact adjustments to expenses, although having an incidental effect on earnings, are not retroactive rate making. For example, all fuel related issues are treated by the Commission after the utility has incurred the expenses associated with the purchase, acquisition or contracting for fuels. To do otherwise, the Commission would be making business decisions for the utility's future operations and would be engaging in the management of the utility's business.

However, once a utility enters into a contract with another entity for the provision of utility related products or services, the Commission may review the expenses associated with that contract without violating the constitutional provision giving sanctity to the right of contract.

In City of Plant City v. Mayo, 337 So.2d 966 (Fla. 1976), Tampa Electric Company had a contract with the City of Plant City

and others for the provision of electric service to all persons within the corporate limits. The cities in return were paid a fee based upon the consumption within the city. This fee was applied to city consumption as well. To recover the fee, the utility passed on the cost as an expense, spreading it uniformly over all ratepayers of the utility. The Commission felt that that was a discriminatory rate structure and required the utility to impose the fee on the consumers within the city. The City of Plant City challenged the change in the method of collection, arguing, among other things, that it was an impairment of the right of contract. The Court reversed on other grounds but as to that issue held:

> (b) Impairment of contract. The amount paid by Tampa Electric to each city under its franchise fee contract is the same whether the utility collects the sum from some or all of its customers. Customers of Tampa Electric in each city have always paid some part of the amount the utility collects; the new procedure merely increases their burden. Nothing has changed as between the cities and the utility. We must conclude that the cities' contracts are no more impaired in the constitutional sense by the Commission's new collection procedure than they would be if rates were redesigned in other ways to increase their burden, for example by shifting rate levels among residential and industrial or commercial users. The fact that the cities themselves are consumers and subject to higher charges does not "impair" their contract; it merely reduces the benefit of their bargain as any rate increase or rate design shift might do. (footnotes omitted).

At 973.

ELECTRIC RATE COMPOSITION:

Electric utility rates are composed of two components:

1. Charges to compensate the utility for "money honestly and

prudently invested...in...property used and useful in serving the public..." § 366.06(1), Fla. Stat. This component is commonly referred to as "base rates."

2. Fuel related expenses passed on to the customer on a periodic basis through the "fuel adjustment clause."

BASE RATES:

Base rates contain no charges for fuel.[3] Base rates are set on a prospective basis to give the company an opportunity to earn a fair rate of return on its investment and to recover costs. Included in base rates are allowances for working capital which the company needs to meet expenses on a daily basis. The prohibition against retroactive rate making applies exclusively to the setting of future base rates to compensate for past errors. It is in base rates that the company gets a right, and that right is the opportunity to earn a return on its investment.

FUEL COMPONENT:

Fuel adjustment is an example of an expense for electric utilities where the utility is compensated on a dollar-for-dollar basis for its expenditure through the fuel adjustment clause. This after-the-fact compensation clearly has been held not to be retroactive rate making.

In Florida Power Corporation v. Cresse, 413 So.2d 1187 (Fla. 1982),

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[3]There is a component in the rate base related to fuel inventories. This is intended to compensate the utilities for their investment in fuels held for future use. There are also insignificant expenses compensated for through base rates such as handling costs.

the power company lost the use of a nuclear reactor, thereby incurring higher fuel costs through the purchase of more expensive replacement fuels. The length of the outage was increased due to the failure to have a replacement pump on-hand. The utility petitioned the Commission for the recovery of $46.3 million in revenues which the company had earlier failed to recover through the fuel adjustment clause.

After a hearing, the Commission allowed the company to pass on to the consumer all of its additional fuel expenses except $3.5 million dollars associated with the extension of the outage (for 167 days) due to the failure of the utility to have on-hand a replacement pump. The Commission found that the company had acted imprudently and should not be allowed to recover those past expenses. The Court, in discussing the burden of proof, acknowledges that fuel costs are incurred and their recovery is sought after-the-fact.

> It was up to the utility under those conditions, to show that the excess costs incurred were reasonable and were not the fault of management. Simple cost records and documentation cannot satisfy the requirements imposed on a utility in a true-up proceeding.

At 1191.

On April 1, 1980, the Commission went from a 2 month lag in the recovery of fuel expenses to a six month projection with a true-up. Citizens v. Public Service Commission, 403 So.2d 1332 (Fla. 1981). Fuel costs are estimated for a period, and after those expenses are incurred, the Commission reviews those past expenses and conducts a true-up of the actual expenses incurred

against the projected charges. This after-the-fact adjustment allows the company to recover past expenses incurred, but not collected from the ratepayer. The proceeding also provides an opportunity for the adjustment downward of rates to the ratepayer for over-collection of fuel expenses by the utility. Richter v. Florida Power Corp., 366 So.2d 798, 800-801 (Fla. 1979).

This correction of past errors, mis-estimations and imprudence is a two edge sword protecting the ratepayer from over-collection of fuel expenses and protecting the company from the under-collection of expense dollars as a result of mis-estimation.

> Adjustment clauses were developed to protect the customer in the case of sharp decreases in fuel or commodity costs, and the utility in cases of sharp increases.

Pinellas County v. Mayo, 218 So.2d 749, 750 (Fla. 1969).

The reason for the seemingly disparate treatment between base rate and the recovery of expenses, is the difference in functions. Base rates are set for the future to give the utility the opportunity to earn a reasonable rate of return on its investment in the future. Adjustments to expenses are intended to compensate the utility after-the-fact and to make the utility whole for past incurred costs. There is no profit associated with the recovery of expenses. When fuel expenses exceed projections, the funds used to pay those expenses come from and are booked to other accounts. Often the working capital account is used to pay for fuel until it is recovered through the fuel adjustment clause. When the Commission finds that a cost has been imprudently incurred, the issue is whether to pass that cost on to

the ratepayer. In the event that the finding is made that the decision was imprudent, that payment comes from the company's earnings and results in a diminution in earnings.

The Appellant has misapplied the law dealing with retroactivity by applying it to an expense. Power companies are often placed in the situation of having to adjust for the recovery of past expenses and purchases. As an example, the Commission adjusts for fuel related matters on an after-the-fact basis. There are analogous adjustments for the telephone companies.

In Citizens v. Florida Public Service Commission, 415 So.2d 1268 (Fla. 1982), the Commission opened a docket in September, 1980 to consider the represcription of depreciation rates (an expense) for calendar year 1980. On January 1981, the Commission entered an order approving the represcription of depreciation rates making those expenses recoverable effective on January 1, 1980. This effective date was nine months prior to the institution of the docket. Public Counsel (like the utility here) argued that depreciation represcription "is not a bookkeeping entry but, rather, constitutes a retroactive change in the rate base," citing to, as the Appellant has, City of Miami v. Florida Public Service Commission, 208 So.2d 249 (Fla. 1968). This Court held that the reliance was misplaced in that the case did not concern rate making even though depreciation is recovered as a component of base rates. It is still merely the recovery of an expense.

Shortly after the Citizens case was decided the Commission was again faced with represcribing depreciation rates for telephone

companies. This time, the represcription of depreciation expenses lowered the rates to be charged the consumer and Southern Bell appealed. In Southern Bell Telephone & Telegraph Co. v. Fla. Public Service Commission, 443 So.2d 92 (Fla. 1983), Bell contended that the Commission had not comported with the essential requirements of law in making an adjustment to past depreciation expense. It was precisely the reverse situation from the Citizens case. However, the Company did not even make the challenge to the adjustment as retroactive rate making. It had become established law that the Commission could adjust past incurred expenses. The Court found that the Commission decision was supported by competent evidence and was in compliance with the essential requirements of law. The represcription of depreciation expenses like fuel adjustment is an after-the-fact adjustment to an expense. In the case for fuels it is done periodically and like represcription, results in both increases and decreases to the charges.

In Citizens, the ratepayers were complaining that the Commission had increased an historical expense (causing rates to go up) and the utility supported that after-the-fact treatment of the expense. In Southern Bell, the utility was complaining about an after-the-fact reduction of an expense and the Citizens were supporting that position. This second situation is the case here. "It makes a difference whose ox is gored." Luther, Martin, Works, Vol. LXII, (1854 ed.)

The Appellant cites to Southern Bell Telephone and Telegraph Co. v. Florida Public Service Commission, 453 So.2d 780 (Fla. 1984),

for the proposition that the Commission may not adjust rates on a retroactive basis. The case is in fact supportive of the Commission's position. In Bell, Southern Bell and General Telephone Company had been dividing intrastate long distance toll revenues pursuant to two settlement agreements. These revenues were derived from tariffs filed with the Commission. The tariffs had been established and approved during rate case proceedings and constituted part of the company's base rates. The revenues derived from those agreements contained substantial profits and contributed to the companies' earnings. The two companies got into a dispute concerning the method of calculating the division of those revenues. The parties could not reach agreement on the division for almost a year prior to bringing the issue to the Commission for resolution. The Commission resolved the controversy and applied the adjustment to revenues earned a year prior to obtaining jurisdiction over the controversy. This, the Court found, was retroactive rate making.

Here, the Commission has not affected the filed tariffs of the utility nor has it affected the earnings of the utility except to the extent that the stockholders are bearing the risk of management imprudence and not the ratepayer.[4] Here, the

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[4]In a rate case proceeding, certain allowances are made and revenues are passed on through rates to give the company additional funds to meet operating expenses on a day to day basis. These working capital allowances are used by the company to meet everyday expenses of operations. They can, for instance, be used to pay for extraordinary fuel expenses. This could occur if the utility has an opportunity to purchase a barge load of oil or coal on the spot market at considerable (footnote cont'd)

expenditures were booked as fuel related expenses, ending up in Account 506 - Miscellaneous Steam Expense.

LONG-TERM CONTRACT REVIEW:

Another justification for the Commission having the ability to review the expenses associated with fuel contracts occurs when a utility plans for the construction of a new facility. When the boilers are initially designed, they are designed to burn a particular fuel. Coals significantly vary in characteristics requiring the specification of coal at the time of design. Often utilities will purchase reserves of coal before the construction of the boiler commences to ensure the availability of the particular fuel when the facility goes into service six or seven years later. The Commission cannot review the prudence of the purchase or the contract provisions for that fuel until the utility seeks to pass the costs on to the consumer in a fuel adjustment proceeding. That could be years after the contract was executed.

The Commission's review of the contract has no effect upon the enforceability of that contract between the utility and the

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[4](cont'd) savings over contract prices. The terms of that purchase may require three ten, net-thirty, meaning that the company is given a 3% discount for a payment within 10 days or makes payment in cash (or check) in full within thirty days of the purchase. Cash in the working capital account would be used to cover the check. Since fuel expenses are recovered on a dollar for dollar basis through the fuel adjustment clause, the expense would probably just be booked (for accounting purposes) as a receivable. The same is true in this case where the initial investment in the COM project was clearly a fuel related process booked as research and development (R & D) but recoverable on a dollar for dollar basis through the fuel adjustment clause.

provider of fuel. Plant City, supra. The Commission has no jurisdiction to regulate the contracts executed between the utility and its suppliers. The Commission's authority lies with regulating the effect that that contract has on utility rates and charges. After the utility has incurred the expenses pursuant to the agreement and attempts to recover those expenses, the Commission determines the prudence of that contract. In determining prudence, the Commission applies a "public interest" test. The logical justification for this procedure lies in the Commission's statutory authority. The Commission only has need determination authority for the certification of new power plants pursuant to section 403.519, Florida Statutes. There is no prior determination of the specific fuel requirements nor is there a review of the prudence of any decision regarding fuel contracts prior to the request for the recovery of those costs.

OTHER AUTHORITY CITED:

The Appellant cites to the City of Miami v. Florida Public Service Commission, supra, for the proposition that the Commission cannot engage in retroactive rate making. The Commission agrees with the proposition and contends that the case is supportive of the Commission's position in this case. In City of Miami, Southern Bell and Florida Power and Light were found to have rates in effect which were unreasonably high. The Commission ordered the rates reduced and made certain accounting adjustments which the City contended were departures from the essential requirements of law. Point D raised by the Petitioner asserted that the Commission erred in allowing the Companies to keep excessive base

rate earnings realized through lawfully imposed tariffs collected prior to the test year. The Court correctly recognized that for rate making purposes, rates are set prospectively; giving the company an opportunity to earn a reasonable rate of return on investment used and useful in the public service. (At 259-260). Had the Commission attempted to adjust future earning to make up for past over-earnings by the company from the ratepayer, it would have engaged in retroactive rate making.

In this proceeding, the Commission is neither considering base rates to be "thereafter charges for services" nor is it looking at over-earnings or earnings at all. It is concerned with past expenses for fuel related matters and overcharges for fuels. The Commission is not dealing with a case of the prospective operation of rates.

The Commission is simply exercising its jurisdiction in an even-handed manner with a policy for adjusting historical expenses consistent with a policy of uniformity and consistency. Sometimes it inures to the benefit of the utility and sometimes the ratepayer receives the advantage. It makes good sense and good law to have a regulatory policy that, acting as a surrogate for competition, applies fairly to the ratepayer and to the utility.

POINT II

FLORIDA POWER RECEIVED NOTHING IN RETURN FOR THE ASSIGNMENT OF ITS INTERESTS IN THE COAL/OIL MIXTURE TECHNOLOGY.

In reviewing the actions of Florida Power, the Commission was concerned with the prudence of Florida Power's decisions and the legitimate interests of its ratepayers. The Commission's action was not intended to, nor did it have an effect upon the validity or the enforceability of any of the contracts it considered.[5] It was concerned that since the ratepayers bore the costs and risks of the project, the benefits of Florida Power's Crystal River project should flow to the ratepayers. The Commission was not questioning whether it was a good bargain for the parties but rather what effect the bargain Florida Power struck with EFC had on the ratepayers.

The Commission's findings regarding the 1978 assignment and the EFC/Dravo Partnership Agreement are findings of fact, as reflected in the order under review. As such, they are to be upheld if supported by competent, substantial evidence. Citizens of the State of Florida v. Public Service Commission, 425 So.2d 534 (Fla. 1982). Substantial evidence has been described as

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[5]Florida Power makes much of the Commission's use of the word "compensation." Compensation includes consideration and encompasses many forms of value received: Indemnification; payment of damages; making amends' making whole; giving an equivalent or substitute of equal value. That which is necessary to restore an injured party to his former position. Remuneration for services rendered, whether in salary, fees, or commissions. Consideration or price of a privilege purchased. Black's Law Dictionary, p. 256 (5th Ed. 1979). (emphasis supplied).

"evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred" or "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." Competent evidence is described as evidence that is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." DeGroot v. Sheffield, 95 So.2d 912 (Fla. 1957). The Commission's findings of fact in Order No. 13870 are supported by competent, substantial evidence.

In Order No. 13870, the Commission found that Florida Power received no compensation from EFC for the transfer of its equitable interest in the COM technology. On reconsideration, the Commission reiterated this finding: "The Company received no consideration, monetary or otherwise, for the assignment" (R. Vol. II, p. 225).

A. Florida Power received nothing new under the 1978 Assignment to EFC.

Florida Power had the following rights under its 1977 Agreement with Dravo:[6]

1. An equitable interest in all of the technology developed by the Crystal River Project;

2. The right to use that technology for all purposes contemplated by the Agreement;

3. The specific right to use that technology for construction of COM production plants for its

[6]See Appendix A-4, 5.

own consumption, provided that it paid Dravo for design services and allowed Dravo to bid on the construction;

4. The right to reasonable royalties for each COM plant that Dravo built for third parties;

5. The right to a share of any future profits is a future joint venture with Dravo.

Florida Power gave away all of these rights in the 1978 Assignment to EFC, with one exception: it reserved its existing right to use the Crystal River technology to build COM plants for its own consumption. (see no. 3 above). However, even this right was limited by a reference to the EFC/Dravo Partnership Agreement, which requires Florida Power to employ Dravo, on a cost plus a profit basis, to perform all research, development, design, engineering, construction management and testing services.[7]

Florida Power's own witness was of the opinion that it had the right to use this technology before the Assignment:

> COMMISSIONER CRESSE: Well, the company didn't get any potential later on when they assigned this, did they?
>
> WITNESS MOORE: The potential that the company retained was for the use of the technology itself. That was the--
>
> COMMISSIONER CRESSE: You had that before you signed away the rest of the benefits, didn't you? In the original contract you had--
>
> WITNESS MOORE: Yes.
>
> COMMISSIONER CRESSE: The use of the technology.

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[7]See the Assignment, Appendix A-4, 5, and Section 4.04 of the EFC/Dravo Partnership Agreement, Appendix A-17.

WITNESS MOORE: Yes.

COMMISSIONER CRESSE: You give away everything else--

WITNESS MOORE: We had the whole thing.

COMMISSIONER CRESSE: --and said, we have got, we are still going to retain the use of the technology. We're going to give everything away except the use of the technology up to the date, of the knowledge of the date it was given away. You retained no benefit at all in any further knowledge that might be obtained, correct?

WITNESS MOORE: That is correct.

COMMISSIONER CRESSE: So you give away everything, but you retained the use for the company of the benefit of the knowledge that had been learned up to that date?

WITNESS MOORE: That is correct, but like we were not tied down to participating in funding any further development costs.

(Tr. 205-206,8/84).

Florida Power was free to use the Crystal River technology for the Bartow project and any subsequent Anclote conversion. Those projects were within the purposes contemplated by the 1977 agreement and prior approval by Dravo was not needed. One of the stated purposes of the 1977 agreement was to develop and test burn COM for possible use by FPC at Anclote (Tr. 136, 8/84). The Bartow project was a continuation of the Crystal River project (Tr. 145, 8/84). It was a necessary step to test COM for commercial production before converting Anclote to COM (Tr. 29, 38, 8/82).

B. The consideration for the 1978 Assignment was limited to the terms of the Assignment itself.

During the course of her review of Florida Power records, Ms. Bruce sought to determine if Florida Power received anything of value in exchange for the assignment. Finally, the question was put to Mr. Moore during a deposition. He provided a written statement that was ultimately placed in the record (Ex. 4, 8/84. Appendix A-6). According to the statement, Florida Power's only compensation was reflected within the Assignment itself.

By its terms, the Assignment permitted Florida Power to use only the technology accumulated "before the date of [the] Assignment." The Assignment was dated October 20, 1978, as was the EFC/Dravo Partnership Agreement. There was no technology accumulated under the EFC/Dravo Partnership Agreement before the date of the Assignment. Any subsequent accumulation of technology was necessarily excluded from Florida Power's use (at no charge) by this unambiguous language.

C. Florida Power received no rights under the 1978 EFC/Dravo Partnership Agreement.

As found by the Commission in the Order on Reconsideration, Florida Power is not a signatory to the Partnership Agreement. The Agreement, by its terms, creates rights and duties only between the partners. Section 4.04 of the 1978 Partnership Agreement grants each partner the right to "use all or any portion of the technology of the partnership exclusively for its own purposes without compensation to the partnership..." (Ex. 6, p. 11, 8/84). However, in exchange, the partner must employ the

other partner, on a cost plus a profit basis, to perform whatever technical services the "using" partner cannot perform. This "use" occurs when "products [are] produced through use of the technology." By its terms, Section 4.04 contemplates that a partner will "use" the technology to produce COM and allows the partner to "use" the technology free of charge as long as the COM is not sold to an unaffiliated entity. There is nothing in section 4.04 that governs the price of the COM produced by the partner and sold to the affiliated company. The price at which EFC might sell COM to Florida Power is not governed by the partnership agreement and, thus there is no guarantee under the 1978 Partnership Agreement that Florida Power will not pay for the new technology.

D. The 1980 fuel contract between Florida Power and COMCO does not confirm Florida Power's assertions.

The 1980 COM contract between Florida Power and COMCO is irrelevant to the 1978 Assignment. Florida Power's own statement, placed in the record, declares the compensation for the Assignment to be limited to the provisions of the Assignment itself (Appendix A-6). By its terms, the Assignment limits Florida Power's "use" of technology to that developed before November, 1978. A Court may look to the conduct of the parties to construe a contract, if it is ambiguous. Blackhawk Heat & P. Co. v. Data Lease Fin. Corp., 302 So.2d 404, 407 (Fla. 1974). Absent ambiguity, a court will not look beyond the terms of a contract. Gendzier v. Bielecki, 97 So.2d 604 (Fla. 1957). The 1978 Assignment is not ambiguous and characterization of the parties subsequent actions

should not be allowed to inject uncertainty and create ambiguity.

Even considering the parties actions subsequent to 1978, they do not demonstrate an interpretation of section 4.04 of the 1978 Partnership Agreement.[8] The 1980 fuel contract between Florida Power and COMCO is completely unrelated to section 4.04 of the Partnership Agreement. That section governs a partner's use of technology to produce COM and consume the COM itself or sell the COM to an affiliate. The 1980 fuel contract concerned a plant built and owned by the partnership under section 4.03 of the 1978 Partnership Agreement. That section governs technology used by the Partnership to build plants for the partnership. There is no provision in that section that even remotely involves the price of COM sold to any person, let alone an affiliate.

Florida Power's assertion of a free benefit under the 1978 Partnership Agreement is based on the claim that section 4.04 of the Agreement equates "use" of technology with "consumption" of COM. Read as a whole, that section clearly treats "use" as distinct from "consumption." A partner "uses" technology to build and operate a COM production plant, while a partner or an affiliate "consumes" the COM. The very sentence that Florida Power cites in its brief shows that distinction:

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[8]Florida Power relies upon a provision of section 4.04 as showing a benefit exchanged for the Assignment.

> A Partner shall be deemed to use the Partnership's technology for its own purposes if all products produced through use of the technology are consumed by it or an Associated Entity. (emphasis supplied).[9]

Appendix A-17. Brief at 21.

Regardless of how the word "use" is construed, Florida Power did pay for some of the new technology, and it originally expected to pay much more.

To begin with, Florida Power paid the entire cost of producing the COM it used. It paid the cost of the oil, the cost of the coal, the cost of production, the cost of transportation to Bartow, the cost of COMCO's debt service on the Port Sutton production plant, the debt service on COMCO's working capital requirement and the depreciation expense on the Port Sutton Plant (Tr. 336, 6/83). In fact, COMCO's entire investment in the Port Sutton plant was to be recovered from Florida Power by the end of the five-year COM contract (Tr. 336, 6/83). Florida Power paid for everything it got and actually underwrote COMCO's investment in the Port Sutton plant (Tr. 337, 6/83).

Embedded within the cost of the Port Sutton plant is the profit earned by EFC and Dravo for designing and building the plant.[10]

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[9]This provision simply allows a partner to use the technology for free as long as it doesn't cut into the partnership's COM sales market.

[10]The cost of Port Sutton plant is distinct from the $4.7 million that the partners put into the partnership.

Both Sections 4.03 and 4.04 of the Partnership Agreement provide that each partner is to be employed on a cost plus a profit basis for all plants built for the partnership, companies owned by a partner or third parties (Sec. 4.03, Appendix A-17) and that the "using" partner must pay the other partner for research, development and other services on a cost plus a profit basis (Sec. 4.04, Appendix A-17).

The record demonstrates several improvements in COM technology that occurred at the Port Sutton plant (Tr. 308, 6/83). These improvements occurred during the design, and pre-production phase of the plant. Florida Power is paying the capital cost and depreciation for the plant and, ultimately, the cost of the new technology developed by the partners during their initial design and construction of the plant.

Under the 1980 COM contract, Florida Power fully expected to pay more than the cost of the COM. All of the parties expected COM to cost less than No. 6 Oil and under the COM contract COMCO would receive half of the savings (Ex. 5, 8/84; Tr. 145, 8/84; Tr. 306-307, 6/83). Thus, based on everyone's expectations, not only would Florida Power pay the entire cost of producing the COM it purchased, but it would also pay in excess of that cost (Tr. 305-306, 6/83). These expected payments above cost would provide COMCO with a pure profit on its sales to Florida Power and compensate COMCO for improvements in technology.

The new COM technology belonged to COMCO. Florida Power had no ownership interest in it, despite the benefits that the Port Sutton operation would provide to COMCO. All Florida Power did

was purchase COM. These above-cost payments certainly would have compensated COMCO for part of its $4.7 million in development costs. The only reason Florida Power didn't pay any profit toward the $4.7 million is because the COM cost more that No. 6 oil: $1.6 million more by the end of 1983.[11] Had COM cost less that No. 6 oil, COMCO would have recouped a portion of its initial $4.7 million investment.

COMCO is a diverse company. Its purpose is to develop COM technology for production, sale and use and for construction of plants for third parties (Tr. 297, 299). For instance, of the $4.7 million spent by COMCO since 1980, over 20% was spent for marketing (Ex. 5, 8/84). Since COMCO already had a contract with Florida Power, these expenditures were for the benefit of COMCO's other enterprises. Even without the expected profit on the Port Sutton contract COMCO had much to gain under that contract. The Port Sutton contract allowed COMCO to work through a number of problems with a first-of-a-kind plant (Tr. 309, 6/83). A proven track record at the Port Sutton plant was essential for COMCO to develop an expanding market (Tr. 308, 6/83). These benefits flowed to COMCO and helped offset part of the $4.7 million.

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[11]Even after January, 1982, when Florida Power and COMCO rewrote the 1980 contract to let Florida Power recoup the $1.6 million, Florida Power will still end up paying as much for COM as for No. 6 oil. Further, Florida Power is still out the $11.2 million it paid to convert Bartow to burn COM and the ratepayers are still paying a rate of return on that investment.

III.

THE COMMISSION MAY LAWFULLY REQUIRE A UTILITY TO PASS THE BENEFITS OF RESEARCH AND DEVELOPMENT PROJECTS TO ITS RATEPAYERS, IF SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE IN THE RECORD.

Appellant contends that because the cost of the Crystal River project was not in a test year, the stockholders and not the rate payer paid this expense. This perverts the law concerning test periods.

NON-RECURRING EXPENSES:

In considering expenses incurred in a test period, the Commission may include those expenses prudently incurred that "fairly represent the future period for which the rates are being fixed" Gulf Power Co. v. Bevis, 289 So.2d 401, 404 (Fla. 1974).

The invested dollars which the company expended on the Crystal River technology, if considered non-recurring, would not be incurred in future periods. In such cases, the Commission generally adjusts these expenses out of consideration for future recovery. This is in keeping with the established rule set forth in Gulf:

> The recognized rule then is that the test-year must be adjusted for known and imminent changes in order to be representative of the conditions which will prevail in the immediate future when the rates will be effective. Inapplicable factors must be removed from test-year considerations while appropriate new ones must be added. (emphasis supplied).

At 405.

The obvious conclusion that can be drawn is that even had the

Crystal River expenses been incurred in a test period, the Commission in all likelihood, would have adjusted these as non-recurring expenses from consideration in setting future rates. Instead, these expenses would probably have been treated as fuel related and tested for prudency in a fuel adjustment hearing.

In Florida Bridge Co. v. Bevis, 363 So.2d 799, 801 (Fla. 1978), this Court restated the rule:

> We have held that the Commission has discretion in rate-making proceedings to remove from a test year computation items which are non-recurring in nature. (emphasis supplied).

The expenses sought to be recovered in this proceeding, if considered non-recurring, out of period expenses related to fuels, would be recovered for rate making purposes through the fuel adjustment clause.

RECURRING EXPENSES:

Recovery of recurring prudent expenses is made on a dollar-for-dollar basis by the ratepayer through rate proceedings. Fuel and fuel related expenses are not recovered in rate cases. Except for the footnoted exception in Point I, no fuel related matters are included in test years. Test years serve to predict the future and to set rates to compensate the utility prospectively and give the company an opportunity to earn a reasonable rate of return on investment. In Citizens v. Hawkins, 356 So.2d 254, 256 (Fla. 1978), this Court enunciated the purpose of a test year:

> The test year or period is an analytical device used in rate-making proceedings to compute current levels of investment and income in order to determine that amount of revenue that will be required to assure the company a fair rate of return on investment.

If the Appellant contends that the project was lumped in as an unspecified project with other R & D projects, it was a recurring expense. If so, it would have been included in rates set in 1974, to be thereafter charged, and as such, would still have been expenses paid by the ratepayer.

In rate cases the Commission approves the rates charged by an electric utility in order to permit it an opportunity to earn a fair rate of return on its investment. United Telephone Co. of Fla. v. Mann, supra at 966. In setting those rates, the Commission permits a utility to pass along all of the costs of providing service. These costs include, but are not limited to:

Operating and maintenance expense;

depreciation and amortization;

amortization of property loss;

taxes other than income taxes;

income taxes;

loss on disposal of utility plant; and

interest expense.[12]

Included in operating and maintenance expense are a myriad of costs,

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[12] Interest expense is recovered via the calculation of an overall rate of return. It is an expense, just as any other, but capital sources cannot be traced to particular plant.

including wages and salaries, contract payments, maintenance expense and R & D expense. R & D expenses are recoverable as reasonable expenses designed to improve future utility service and, ultimately, benefit the ratepayers. This was clearly demonstrated in the record:

> COMMISSIONER CRESSE: All right. Is it true that this Commission does allow R&D costs to be included in rate cases, if it is reasonable, and seems to be necessary and reasonable?
>
> WITNESS BRUCE: It's staff's understanding that it is.
>
> COMMISSIONER CRESSE: All right. Now, if those costs are justified at all to be included in rate cases, and therefore to be incorporated and to be recovered from the customers, is it not true that they are justified on the expectation that the ratepayers will reap some of the future benefits of the results of that R&D?
>
> WITNESS BRUCE: It's staff opinion that it would.
>
> COMMISSIONER CRESSE: So that's the only thing that justifies it in the first place, is that correct, or a corporate R&D? If you go in and spend money for R&D, you don't do it as a charitable contribution, you expect to reap some future benefit from it, is that correct?
>
> WITNESS BRUCE: Yes.

(Tr. 172, 8/84).

Recognizing that an investment made by the ratepayer is an asset of the ratepayer for which he has an expectation of a future return is not a new concept introduced in this proceeding. The Commission has had a consistent policy of adjusting operating

expenses to recognize gains on sale of utility property.[13]

Ratepayer entitlement to the benefits of utility R & D projects is similar to their entitlement to gains on sale of utility assets. Utility assets are normally paid for by stockholder investment. Ratepayers become involved by paying a rate of return on that investment and depreciation expense on the assets. R & D projects, however, are expensed and included in operating and maintenance (O & M) expenses that are paid directly by the ratepayer. As the record demonstrates, recovery of R & D costs from ratepayers is justified by an expectation of future benefits to the ratepayers. No doubt, some projects will produce no valuable results. The ratepayers will have paid for the cost of the projects but will have received no benefit in return. But other R & D projects, and the Crystal River project in particular, are fruitful and can be expected to produce substantial benefits.

Where the ratepayers have borne the cost of R & D projects, they are entitled to all of the benefits that flow from those projects. Further, the fairness of ratepayer entitlement to R & D benefits is magnified where a project involves utility assets. Experimentation with utility assets can create the risk of damage or greater maintenance expense. The ratepayers, having paid a return on utility property and the cost of maintenance and repair,

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[13]See Appendices A-26-35. Generally, the rationale passing these gains onto the ratepayers is that the ratepayers have paid a return on the property and have paid the depreciation expense of the property, though in Order No. 11628, the Commission questioned the rationale for distinguishing between depreciable and non-depreciable assets. Appendix A-32, 33.

share the risks of the project, risks which may not come to fruition for years to come.

The question of whether the ratepayers have an interest in the results of the 1977/78 Crystal River project is a question of fact. The Commission was presented with competing evidence on the question. Mr. Moore, of Florida Power, testified that the stockholders paid for the project, while Ms. Bruce, of the Commission staff, testified that the ratepayers paid for the project and shared in the risks of the project. Faced with competing testimony, the Commission weighed the evidence and made its findings.

The question before the court is not whether Mr. Moore's testimony justifies contrary findings but whether Ms. Bruce's testimony stands as a competent substantial basis for the Commission's findings. Citizens of the State of Florida v. Public Service Commission, supra.

Ms. Bruce was of the opinion that the ratepayers had an interest in the technology created by the Crystal River Project. The basis of her opinion was two-fold:

1. The project used utility property on which the ratepayers have paid a return and caused the ratepayers to incur the risk of subsequent costs for maintenance and repair due to the effects of the experiment;

2. The project was an R & D project, the cost of which was recovered via company's rates.

Ms. Bruce defended her opinion on cross-examination and testified why the theory proposed by Mr. Moore was

incorrect.[14] Responding to the assertion that the stockholders paid for the Crystal River project because the Company failed to achieve its authorized rate of return, Mr. Bruce stated that dollars cannot be traced in that manner.[15]

Florida Power has made no challenge to the validity of Ms. Bruce's testimony, nor to the Commission's detailed factual findings in Order No. 13870. Instead, it has simply reiterated the case it presented before the Commission and asks this Court to reweigh the evidence. The Commission, as the body charged by law to regulate Florida Power's rates, is obliged to hear the evidence, weigh its value and decide the facts. An Appellant may not seek to have this Court reweigh the evidence. Jacksonville Suburban Utilities Corp. v. Hawkins, 380 So.2d 425, 426 (Fla. 1980).

Ms. Bruce's testimony was that of an expert qualified to

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[14]See statement of the facts, pp. 8-9.

[15]Ms. Bruce's opinion is consistent with the Commission's findings in earlier rate proceedings. For instance, in Order No. 13771, issued October 2, 1984, the Commission reiterated that dollars invested in rate base could not associated with to specific sources:

> "The ultimate goal of providing a fair return is to allow an appropriate return on equity investment in rate base. Because, as a general rule, all sources of capital cannot be clearly associated with specific utility property, the Commission has traditionally considered all sources of capital (with appropriate adjustments) in establishing a fair rate of return."

In re: Petition of Florida Power Corporation for an increase in its rates and charges at 18. (footnote cont'd)

express an opinion on accounting and rate making matters. Her testimony constituted competent, substantial evidence upon which the Commission based its findings. United Telephone Co. of Fla. v. Mayo, supra, at 654.

OTHER THEORIES:

The Appellant asserts that since the costs were not incurred in a test year, the stockholders, not the ratepayer, bore the costs. Carried to its logical conclusion, since Central Telephone Company of Florida has not had a rate case since 1975, the expenses incurred by Centel have been borne by the stockholders over the last 10 years.

Additionally, it is the company and not the ratepayer or the Commission that determines test year. Further, it is the Company, not the ratepayer or the Commission, that decides to, and executes, contracts. Therefore, it is the Company that controls the expenditures of ratepayer funds. Accepting the company's argument that this somehow changes the character of the ratepayer's money to stockholders' money gives the company the

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[15] (cont'd) When public counsel proposed a different treatment, the Commission declined stating:

> "We believe that any significant investment by the Company has a multitude of effects on its financial position, and attempting to trace each of these effects is impractical and, in many cases, impossible. Consequently, while it may be possible to implement Public Counsel's proposal, we believe that singling out the tax benefits and customer deposits sources of financing for specific identification is an incomplete solution to the problem. Therefore, we continue to believe that a pro-rata reconciliation is the appropriate method to determine the Company's capital structure when we adjust rate base." Id. at 18.

ability to change the character of any dollars by simply electing or not electing to file for a rate case.

The power company next asserts that it was the stockholders and not the ratepayers who paid for the project because the company was underearning at the time. Because of the fungible nature of money, it is difficult to assess how the Appellant came to the conclusion that the stockholders paid this expense, causing underearnings and the ratepayers paid the salaries of corporate officials or any of the myriad of other expenses. It is equally likely that the ratepayers paid this expense and it was the salaries of the corporate officials that caused the company's under-achievement.

The ratepayer is the source of all funds, even profits. The question then is should the ratepayer pay for the company's imprudence through higher fuel cost while maintaining the company's profit level unaffected by management's faulty judgment, or should the ratepayer be protected. The Commission did what it usually does by protecting the ratepayer's interest in the results of R & D expenses by flowing through the value of benefits to the customer.

The power company advances the proposition that because the imprudence occurred during a period when the company was not achieving its authorized rate of return, the recovery of this benefit constituted inequitable treatment. What the company is asking for is a license to act in total disregard for the legitimate interests of its ratepayers as long as it is failing to achieve its authorized rate of return. It is simply a plea for non-accountability.

POINT IV

THE COMMISSION MAY LAWFULLY IMPOSE INTEREST IN THIS CASE.

In Florida Power Corp. v. Zenith, 377 So.2d 203 (Fla. App.2d 1979), the Company had allegedly paid inflated prices for oil through what came to be known as the "daisy-chain." The Company passed these higher costs on to the consumer through the fuel adjustment charge. Zenith sued the Florida Power for a refund of these fuel over charges and for damages (general, special and punitive) resulting from these same over charges.

The District Court affirmed the dismissal of the complaint seeking a refund of the over charges on the ground that the Circuit Court is without jurisdiction. That jurisdiction, the authority to order refunds of over charges associated with fuels, "does not lie in the court but on the Florida Public Service Commission." At 204.

The Court went on to say:

> ...As applied to the facts of the present case, it is difficult to imagine that the damages directly, naturally and necessarily flowing from an over charge could possibly be anything other than the amount of the overcharge itself and legal interest thereon. As we have noted, that will be recovered by Zenith, if at all, through the PSC."

Id. at 205.

Therefore, the issue of the Commission's jurisdiction to impose a reasonable interest on those charges has been addressed and settled.

In fuel adjustment proceedings, if the utility experiences

under recovery of fuel expenses, at the true-up, the rates are readjusted to allow the utility to recover these past under-recoveries through future fuel adjustment charges. The utility collects not only the under recovery, but it is also allowed to recover the time value of those under recoveries through interest charges to the consumer which are rolled in as part of the fuel charges. If there are over recovery of fuel charges, there is an adjustment to future fuel adjustment charges and the customer is given a credit on his future rates for these past over recoveries and interest on those over charges as if the customer had put that money in an interest bearing account.

Here, the utility is complaining about the inclusion of interest charges on the refund of dollars due to the ratepayer. Once again, interest like the fuel adjustment charge itself, is a double edged sword, it cuts both ways. It inures to the benefit of the utility when there are under collections and to the ratepayer when there are over collections.

The utility stockholders, when they invest in the company, expect a return on their investment in the form of dividends. Purchasers of utility bonds expect interest on their investment. The utility customer, when he over pays for fuels or doesn't receive dollars he is due, becomes an involuntary investor in the company as well. Like all investment, the utility has the use of that money over time. There is a time value to holding and using that money which the utility generally recognizes. That time value equates to the interest demanded in the marketplace for the use of money.

The Power Company contends that the measure of "damages" is based on conflicting, inferences and interpretations and as such is not subject to the imposition of interest. Appellant cites to Federal Deposit Ins. Corp. v. Carré, 436 So.2d 227 (Fla. App. 2d 1983) as controlling precedent.

In Carré, the estranged wife fraudulently obtained access to her husband's safety deposit box, removing property of the husband. Mr. Carré filed suit against the bank alleging negligence and breach of contract. The bank responded saying that its liability was limited by an exculpatory clause in the contract for the box rental. The jury found for Mr. Carré and awarded a judgment in the amount of $480,000 against the bank. Mr. Carré's testimony was the only evidence of the value and contents of the box and that testimony was contradicted by the testimony of the then ex-wife, Mrs. Carré. The trial court excluded evidence which may have tended to impeach the credibility of Mr. Carré and the appellate court reversed the decision. The appellate court did affirm the decision of the trial court that pre-judgment interest was not appropriate when the amount of unliquidated damages cannot be computed except on conflicting evidence, inferences and interpretations.

That case although good law for the proposition it decided, is simply inapplicable here. The parties here do not challenge the cost of the project. It was $888,597 and the company booked precisely this amount to Account 506 - Miscellaneous Steam Expense. What the appellant really is challenging but won't say, is that cost should not be a surrogate for value. It seems to be

contending that the value of the project is subject to speculation and ignores the fact that the Commission, with the approval of this Court, See: United Telephone Co. of Fla. v. Mann, 403 So.2d 962 (Fla. 1981), has accepted cost as a valid, quantifiable and reasonable substitute for opinion judgment as to value. The rate making statute itself recognizes that the Commission is directed to use cost as the determinate of value:

> The Commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for rate making purposes.... (emphasis supplied)

§366.06(1), Fla. Stat.

The record supports the fact that the value of the technology developed under the Crystal River project was at least the cost of the project.

> COMMISSIONER CRESSE: Well, now, let me ask you this question. If all R & D money was only a break-even item, you know, if you get a dollar's worth of benefit for a dollar's worth of research, you wouldn't make the research in the first place, would you?
>
> WITNESS BRUCE: No, I wouldn't think so.
>
> COMMISSIONER CRESSE: You expect to get a greater benefit that the investment, wouldn't you?
>
> WITNESS BRUCE: I would think so, yes.
>
> COMMISSIONER CRESSE: Therefore, it seems to me then that if you start giving away benefits, that it ought to be -- you ought to charge more than what you paid for it.

WITNESS BRUCE: You should.

COMMISSIONER CRESSE: Or else you wouldn't have made the investment in the first place, would you?

WITNESS BRUCE: Right.

(Tr. 174, 8/84).

Though Ms. Bruce used the cost of the project as a means of valuing the technology, no testimony was elicited that challenged the use of cost to establish value. Unlike Carré, there is no dispute on the record as to the value of the technology.

This is not pre-judgment interest based upon speculative evidence, but recovery of interest on dollars improperly withheld from the ratepayers. It is the sword cutting the other way.

In the same order complained of here, the Commission required the utility to compensate the ratepayer for high fuel costs incident to the use of COM in the amount of $1,446,190. This amount represented $1,303,653 of COM costs passed on to the ratepayer and $142,538 in interest for these past over charges. The utility in challenging the interest recovery on the value of the technology has ignored the interest charges on the fuel over charges. The fuel over charges were incurred in the past and interest was assessed on the over charges just as the technology charges were incurred in the past with corresponding interest charges assessed against it. The company has taken inconsistent positions on the same issue in the same case.

CONCLUSION

The Commission has acted consistently with the essential requirements of law. It has not engaged in retroactive rate making but has followed the mandates of the statutes and this Court's interpretations of the law. The Commission has supported its decision with substantial and competent evidence. It has not invaded the contract rights of any party to the contracts but has determined the effect those contracts would have on the rate payers consistent with this Court's mandate in City of Plant City v. Mayo, supra. The Commission has based it order on figures as booked in the company's own books and has not based a decision on speculation. The award of interest of that refund is consistent with the law and facts. The decision should, therefore, be affirmed.

Respectfully submitted,

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Date: May 17, 1985

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEE, FLORIDA PUBLIC SERVICE COMMISSION has been furnished by U.S. Mail this 17th day of May, 1985 to the following:

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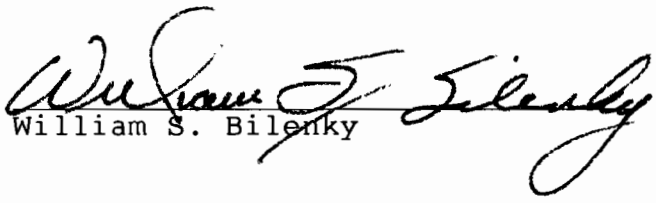
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