IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION,

Appellant,

vs. Case No. 66,583

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

Appellee.
_____/

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Preliminary Statement

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" or "the PSC." 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 Development Agreement." The October, 1978 assignment agreement between Florida Power, EFC, and Dravo will be referred to as "the assignment." The October, 1978 partnership agreement between EFC and Dravo will be referred to as "the Partnership Agreement," and the partnership created by that agreement will be referred to as "the Partnership" or as "COMCO."

References to the record will be designated "R.___," the transcript of the final hearing held on August 23, 1984, "T. ____," and the Appendix to this brief, "A.___." References to separate volumes of transcripts of earlier hearings will be identified by the date of the hearing and the original page number of the transcript. Commission Order No. 13870, dated November 26, 1984, will be designated "Order" and Order No. 14071, dated February 11, 1985, denying Florida Power's motion for reconsideration, will be designated "R. Order."

All emphasis is supplied unless otherwise noted.

Statement of the Case

This appeal arises from an investigation instituted by the Florida Public Service Commission as a part of the February, 1982 fuel cost projection hearings. [T. 353-55, 2/82]. That investigation initially centered upon whether Florida Power had justified the costs of using an experimental composite coal-oil fuel (known as Coal-Oil Mixture or COM). [Order at 1; A. 1]. The Commission later focused upon Florida Power's interest in the COM technology which had been assigned a number of years earlier to its then wholly-owned subsidiary, EFC. [Order at 2; A. 2].

By Order No. 13870, dated November 26, 1984, the Commission required Florida Power Corporation to "compensate the ratepayers" in the amount of $888,597 for the value of the technology interest which Florida Power had assigned to EFC in 1978. [Order at 7; R. 182; A. 1]. It is that part of the order which is the subject of this appeal.[1/]

In entering this order of "restitution," the Commission first found that "the Company assigned all of its interest in

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1/ The Commission also directed certain treatment of the COM fuel costs. [Order at 7; A. 1]. That part of the order is not in issue on this appeal.

the technology" to EFC and that "the Company received no compensation from EFC" for that transfer. [Order at 3; A. 1]. The Commission further found that the ratepayers, rather than Florida Power's shareholders, had paid the costs incurred to develop that technology and therefore had an "equitable interest" in it. [Order at 3; A. 1]. The Commission accordingly required Florida Power to compensate the ratepayers for its value. [Order at 3-4; A. 1].

The Commission acknowledged that "the record does not reflect the actual or potential value of the COM technology. . . ." [Order at 4; A. 1]. Instead, the Commission required Florida Power to return the entire cost of developing the technology to the ratepayers as "valid proxy for its minimum value." Id. The Commission further required Florida Power to pay an additional $510,996 in interest to compensate for "the delay in the recovery of their lost interest." [Order at 7; A. 1]. The total "compensation" to be paid to the ratepayers was $1,399,593. Id.

Florida Power filed a motion for reconsideration pointing out that it had not assigned all of its interest in the technology but had in fact specifically retained the right to use the technology for its own system. [R. 190]. Florida Power also pointed out that it had received consideration for the

assignment by virtue of the contractual provisions granting it the right to use the technology as improved in the future, without payment for that use. However, by Order No. 14071, dated February 11, 1985, the Commission denied Florida Power's motion for reconsideration. [R. Order at 2; R. 255; A. 2]. This appeal followed.

Statement of the Facts

As a result of the impact on the utility industry of the 1973-74 Arab oil embargo and subsequent oil price increases by the OPEC cartel, Florida Power adopted a policy of displacing oil with other, more reliable energy sources. [T. 13-14, 8/82]. This was consistent with the National Energy Policy, adopted during the Carter Administration, of reducing the country's dependence on oil-fired generation. [T. 14, 8/82]. It was also consistent with goals set by the Florida Public Service Commission. [T. 15, 8/82].

As part of its policy, Florida Power began to explore the possibility of developing a composite coal-oil fuel which could reduce its use of oil in existing units without the enormous cost of converting them to coal-fired units. [T. 21, 8/82]. Towards that end, Florida Power and Dravo entered into an agreement in September, 1977 for the design, construction, and operation of a temporary experimental pilot plant for the production of such a fuel. [Ex. 4, T. 192; A. 3]. Dravo agreed to design, install, and subsequently disassemble the plant at a cost to Florida Power of $240,000 and, in addition, it agreed to perform all engineering and management services at no cost. Florida Power agreed to provide a site for the temporary plant adjacent to its existing Crystal River generating units and

to permit plant personnel to assist on the project as a part of their other duties.

Under their agreement, both Florida Power and Dravo had an equitable interest in the technology to be developed through this project. [A. 3]. Dravo was given exclusive rights to the technology for purposes of constructing plants for third parties, and Dravo agreed to pay Florida Power a reasonable royalty for each such plant Dravo might construct. Id. Except for that limited situation, it was specifically agreed that neither party would use the technology "without the prior written approval of the other." Id.

Following execution of the Development Agreement, a pilot COM production plant was built at Crystal River. Thereafter, COM fuel was produced and test-burned in one of the generating units, and the project was completed in 1978. [T. 136].

The total cost which Florida Power incurred on the project during 1977 and 1978 was $888,597, including the $240,000 payment to Dravo. [T. 137]. That cost was booked for accounting purposes as a research and development ("R&D") project. [T. 137]. However, those costs were not incurred in any test year used for rate making purposes and, accordingly, were never included in any rates charged Florida Power ratepayers. [T. 196; A. 7].

To the contrary, the rates in effect during the development of this technology were based solely on Florida Power's actual expenses from a 1974 test year, and those rates were completely unaffected by the costs incurred for this project. [T. 171, 196; A. 7].

On October 20, 1978, Florida Power assigned its interest in the technology, subject to certain specific reservations of rights, to EFC, its then wholly-owned subsidiary. [Ex. 4, T. 192; A. 4]. Florida Power received no monetary payment for that assignment. However, it expressly reserved the right to use "for FPC's own benefit" all information about the technology accumulated during the performance of the Florida Power - Dravo Development Agreement.

By a contemporaneous agreement of EFC and Dravo, the COMCO Partnership was formed for further research and development of the COM technology, and EFC assigned its interest in the technology to the Partnership. [Ex. 6, T. 230; A. 5]. As a part of that Partnership Agreement, Florida Power was granted the right to use the technology - "without compensation" - as it was improved by the Partnership in the future. Id.

The terms of the Partnership Agreement explicitly provide that Florida Power is entitled to use the improved technology, without compensation on its own system. [A. 5]. Under Section

4.04, it is provided that "each Partner may use all or any portion of the Technology of the Partnership exclusively for its purpose without compensation to the Partnership. . . ."[2/] Section 4.04 further provides that use of the technology by an Associated Entity would be deemed to be use by a Partner. Since Florida Power is an Associated Entity as defined in that agreement, its use of the improved technology is deemed to be "use by a Partner," which is permitted without compensation to the Partnership.

Despite the explicit language of the Partnership Agreement, the Commission concluded that those contractual rights did not constitute consideration for Florida Power's assignment since, in its view, "nothing in the contract or the record indicates that the Company itself has the right to use the new technology without charge from EFC." (R.Order at 2; A. 2). However, the record is clear that Florida Power has at all times had the use of the improved technology pursuant to an agreement with the COMCO Partnership, which was the sole owner of the new technology, and not by any agreement with EFC. [Ex. 12A,

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2/ The phrase "Technology" was defined in Section 1.06 of the Partnership Agreement to include both the existing technology which had been developed under the original Florida Power - Dravo agreement and any new developments in the technology by the COMCO partnership. (A. 5).

T. 351]. The record was equally uncontradicted that, in actual fact, there has never been a charge to Florida Power by either the Partnership or EFC for Florida Power's use of the improved technology. [T. 300, 347; A.6].

It is undisputed that the technology has in fact been improved by the Partnership. [T. 300; A. 6]. Indeed, between 1978 and mid-1983, the partners contributed approximately $4.7 million towards COMCO's technical and business development activities. [T. 300; A. 6].

Florida Power has been using that improved COM technology as a result of its decision in 1980 to convert its Bartow 1 generating plant from oil to COM.[3/] COMCO and Florida Power entered into an agreement at that time for the supply of COM to that plant. [T. 301]. COM fuel, as produced under the improved technology, has been used in that plant ever since its conversion was completed in early 1982. The pricing formula specified in the COM supply agreement does not allow any of the research and development costs of this technology to be recovered as a part of the costs charged to Florida Power.

3/ Florida Power intended to thereby confirm the suitability of COM technology for full scale utility use. Such a demonstration was deemed to be essential before undertaking the conversion of its largest oil-burning facility, Anclote units 1 and 2. [T. 19, 8/82].

[T. 302-303, 347; A. 6].

Moreover, the COM charges, which were the specific focus of the proceeding below, were subject to actual audit by the Commission. [T. 147]. The evidence established that those charges did not include any of the development costs. [T. 213; see also, Order at 5, setting forth costs included in the COM charges; A. 1]. To the contrary, the evidence was uncontradicted that no such costs "had been either directly or indirectly charged to or recovered by the COM agreement with Florida Power." [T. 300, 347; A. 6]. Likewise, there was no evidence that Florida Power has any dealings with EFC in connection with Florida Power's use of the COM technology or that Florida Power has ever paid EFC for Florida Power's long time use of that improved technology.

The Commission now asserts that Florida Power should have obtained monetary compensation as consideration for the assignment. However, even if Florida Power had done so, such compensation would not have been passed onto the ratepayers because Florida Power was not earning its allowed rate of return at the time. [T. 197; A. 7]. To the contrary, when the assignment was executed in 1978, Florida Power's earned rate of return was only 8.18%, far below the allowed range of 8.57% to 8.75%. [T. 197; A. 7]. If its entire $888,597 cost of

developing this technology had been received by Florida Power in 1978 as compensation for the assignment, Florida Power's earned rate of return would still have only been 8.21%. [T. 197; A. 7]. Thus, rates would not have been affected by Florida Power's receipt of any such compensation because it would not have caused Florida Power to exceed the range of its allowed rate of return. [T. 197; A. 7].

Summary of Argument

The Commission's order requiring Florida Power to pay "compensation" to its ratepayers rests on a fundamental misunderstanding of the nature of the assignment with which the Commission now quarrels. The Company did not assign "all of its interest in the technology" as stated by the Commission. All that Florida Power parted with was its right to receive royalties from any future use of that technology by third parties. At the same time, Florida Power obtained rights to all of the possible utility uses of the technology for the direct benefit of Florida Power's ratepayers.

In return for its assignment, Florida Power received the right to use the existing technology on its own system at no cost whatsoever. In addition, it obtained the right to use the technology as improved by the Partnership in the future, again with no obligation to pay the Partnership for that use. The Commission's belated suggestion that Florida Power might have to pay EFC for such use is a non sequitur: EFC does not own the technology and it has no basis to charge Florida Power for the use which is authorized by the Partnership as owner of the technology. The evidence was uncontradicted that Florida Power has in fact used the improved technology for a number of years without making any payment to either the Partnership or EFC for that use.

Thus, Florida Power simply gave up the potential of possible royalties in the future in return for the right to use the technology, as improved, without payment. Although Florida Power received no monetary compensation, those contractual rights constituted consideration for the assignment as a matter of law.

Moreover, the Commissioner's "hindsight" review of this 1978 transaction is illegal retroactive ratemaking. The Commission's requirement of this payment of "compensation" to the ratepayers, as well as payment of interest retroactive to 1978, is particularly egregious because it was undertaken in a completely piecemeal fashion. The Commission focused on one isolated transaction in 1978 while ignoring the substantial revenue deficiency sustained by Florida Power during that very period. The Commission has no power to make adjustments on a "one-on-one" basis to remedy supposed inequities of the past.

Quite aside from the Commission's lack of legal authority to require this retroactive payment, its reason for doing so is not even supported by the record. Contrary to the Commission's stated assumption, the costs of this project were not paid by the ratepayers. Because those costs were <u>not</u> part of any test year's operating expenses, they were never passed on to ratepayers through the rates set by the Commission. Furthermore,

under the rates in effect at the time, Florida Power was entitled to earn a rate of return within an authorized range regardless of whether this project was undertaken. Since Florida Power did not earn even the minimum of its authorized rate of return during 1978, it is clear that the shareholders - and not the ratepayers - would have been entitled to the benefit of any monetary compensation which Florida Power might have received in 1978 for its assignment.

Finally, the Commission's award of interest was totally improper. There was admittedly no established value of the technology and thus no liquidated amount upon which to calculate interest. Moreover, the ratepayers would have received no monies in 1978 even if Florida Power had received monetary compensation for its assignment. The ratepayers therefore did not lose any use of monies for which they should now receive interest.

In sum, the Commission lacked both statutory power and a record basis to require Florida Power to "compensate" its ratepayers for the value of the assigned interest in the technology or to award interest going back to 1978 on such "compensation." The Commission's order should be reversed to the extent it seeks to do so.

ARGUMENT

POINT ONE

The Commission's action constitutes illegal, retroactive ratemaking.

The effect of the Commission's order is to adjust the current rates and revenues of Florida Power to compensate ratepayers for the amount of monetary consideration they allegedly should have received in 1978 when Florida Power assigned a part of its interest in the COM technology to EFC. That retroactive adjustment is completely outside the Commission's statutory power.

Courts have condemned, as retroactive ratemaking, orders permitting a utility to recover past losses or requiring it "to refund past excess profits collected under a rate that did not perfectly match expenses plus rate-of-return with the rate actually established." State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41, 59 (Mo. 1979), citing Board of Public Utility Commissioners v. New York Telephone Co., 271 U.S. 23, 31 (1926). Such orders are illegal because a utility commission generally has no retroactive ratemaking power to make either a utility or its customers whole for inequities that existed in the past. In

re Central Vermont Public Service Comm., 449 A.2d 904, 907-08 (Vt. 1982). Nor can retroactive ratemaking be justified by characterizing it as "restitution." Security Alarms & Services, Inc. v. Tennessee Public Service Commission, ¶ 24,549 Utility Law Reports at 58,515 (Tenn. Ct. App. 1984).

The Florida Supreme Court has recognized on numerous occasions that the PSC cannot order retroactive rate adjustments. For instance, in City of Miami v. Florida Public Service Commission, 208 So.2d 249 (Fla. 1968), the City of Miami claimed that orders of the PSC improperly allowed utilities to retain past charges found to be excessive and that the rate reductions should have been made retroactive. Id. at 259. This Court squarely rejected that contention, holding instead that "an examination of pertinent statutes leads us to conclude that the [Public Service] Commission would have no authority to make retroactive ratemaking orders." Id. Accord: Southern Bell Telephone & Telegraph Co. v. Bevis, 279 So.2d 285, 286-287 (Fla. 1973).

The recent decision of this Court in Southern Bell Telephone & Telegraph Co. v. Florida Public Service Commission, 453 So.2d 780 (Fla. 1984) is controlling here. In that case, the Commission resolved a dispute between two utilities over the division of revenues from long-distance telephone service

tolls. The Commission ordered a change in the utilities' course of dealing and, further, made that change retroactive by ordering one utility to refund certain monies it had received under the old arrangement prior to the Commission's decision.

This Court held that "the Commission departed from the essential requirements of law in making the change retroactive." Id. at 781. As the Court put it:

> We believe that the statutory authority to adjudicate such [revenue] disputes is properly related to the Commission's essential function as regulator of the rates and service of utilities. However, we believe that any such adjudication must be given prospective effect only. To hold otherwise would violate the principle against retroactive ratemaking.

Id. at 783.

This decision establishes the impropriety of the Commission's action below. As the decision in Southern Bell squarely holds, the Commission has no power to require Florida Power to make retroactive payments to its ratepayers to compensate for matters occurring many years ago just because the Commission now concludes those matters should have been handled differently.

There can be no question but that the Commission's order is retroactive in its effect. The costs of the project in

question were incurred entirely in 1977 and 1978. The assignment about which the Commission now complains occurred in 1978. In short, the Commission is now attempting to take 1985 revenues of the Company to "compensate" ratepayers for costs incurred seven years earlier!

If the Commission's order were permitted to stand, it would be free to retroactively review any isolated matter in the abstract and then make "hindsight" adjustments. The dangers posed by such a practice are graphically illustrated by the Commission's action here.

In finding that the ratepayers "paid" these costs in 1977 and 1978 and were therefore entitled to receive compensation for the assignment of this technology, the Commission engaged in review in a vacuum. It focused on a single transaction while ignoring the Company's overall revenue deficiency during that same time frame. At the very least, simple fairness would require that any such retrospective review take into consideration both revenues and costs during the period in question to determine if ratepayers were -- on balance -- charged excessive rates. Obviously that was not the case here since Florida Power did not even earn the minimum of its authorized rate of return during that period.

The Commission's order of "restitution" constitutes retroactive ratemaking in its most flagrant form. It should be summarily reversed.

POINT TWO

Florida Power received consideration for the assignment of its interest in the COM technology.

The Commission's order contains another fundamental error because it misperceives the legal nature of "consideration" and miscontrues the contractual arrangements in question.

It is true that Florida Power did not receive a direct, monetary payment for the assignment of its interest in the COM technology. However, contrary to the Commission's assumption, which was expressed throughout the hearings and was explicitly reflected in its original order,[4/] consideration is not synonomous with compensation. It is fundamental that consideration "need not be money or anything having monetary value, but may consist of either a benefit to the promisor or a detriment to the promisee." Dorman v. Publix-Saenger-Sparks Theatres, 184 So. 886, 889 (Fla. 1938), citing 1 Williston on Contracts § 102 (1921 ed).

4/ See, e.g., Order at 3 where the Commission complained that "the Company received no compensation" and that "the Company should have received compensation for the assignment . . . ." [A. 1]. Significantly, in its original order, the Commission did not even consider the contractual rights obtained by Florida Power in return for the assignment.

In view of the incontrovertible principle that consideration need not be monetary, the Commission's conclusion that Florida Power received no consideration for the assignment because it received "no compensation" is incorrect as a matter of law. While Florida Power did not receive money in return for the assigned interest, it was nevertheless benefited by contractual rights granted as a part of that assignment, and those benefits flowed directly to its ratepayers.

1. Under the express provisions of the agreements, Florida Power received direct contractual rights to use the technology without compensation.

Under the express provisions of the agreements, Florida Power received two different contractual rights which inured to the benefit of the ratepayers. Those contractual rights constituted legal consideration for Florida Power's assignment.

First, under the assignment itself, Florida Power explicitly reserved the right to use the existing COM technology for its own benefit without providing compensation to Dravo for that use. (Assignment, paragraph 1; A. 4). Since the original Dravo-Florida Power Development Agreement expressly prohibited any such use by Florida Power without Dravo's prior written consent (A. 3), Dravo's concurrence in this reservation of rights was of direct benefit to Florida Power and its ratepayers.

It is undisputed that Dravo incurred substantial costs in developing this technology; further, it had an equitable interest which precluded Florida Power from making use of the technology without Dravo's consent. [Ex. 4, T. 192; A. 3]. By the assignment, Dravo agreed, for the first time, to allow use of the existing technology by Florida Power without any compensation to Dravo for its equitable interest in that technology. In sum, Dravo waived its equitable interest in the existing technology to the extent it is used on Florida Power's own system.

In addition, an entirely different benefit was provided to Florida Power by this assignment. By that transaction, Florida Power obtained the right to future use of the technology as improved by the Partnership, without paying compensation for that use.

In the Partnership Agreement, it is expressly provided that "each Partner may use all or any portion of the Technology of the Partnership exclusively for its own purposes without compensation to the Partnership. . . ." (Section 4.04, Partnership Agreement; A. 5). It is further provided that "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 by an Associated Entity."

Id. Florida Power is an "Associated Entity" as defined in that agreement. Id. Since Florida Power consumes all products produced through use of the improved technology for its own purposes, its use is deemed to be use by a Partner and thus use without compensation to the Partnership.

The Partnership expended over $4.7 million in developing and improving the technology after Florida Power's assignment in 1978. [T. 347; A. 6]. Florida Power did not contribute in any way to the Partnership's cost of developing the improved technology. Id. Its right to use that improved technology without compensation to the Partnership is accordingly a direct and substantial benefit to Florida Power and to its ratepayers.

The Commission completely ignored these contractual rights in its original order, holding only that "the Company should have received compensation for the assignment . . . ." [Order at 3; A. 1]. In its order denying reconsideration, the Commission asserted that, under the Partnership Agreement, only EFC had the right to use the new technology without compensation and that "nothing in the contract or the record" indicates that Florida Power would not have to pay EFC for use of the improved technology. [R. Order at 2; A. 2]. That construction of the parties' agreement is plainly incorrect.

In the first place, the technology is not even owned by EFC but rather by the Partnership, and the record is crystal-

clear that the agreement under which Florida Power uses the improved technology is solely with the Partnership and not with EFC. [T. 301]. Thus, it is not EFC which provides the product to Florida Power but the Partnership, and EFC has no legal right to make any charge to Florida Power in connection with its use of the improved technology. There is no evidence that EFC has ever sought to do so.

In the second place, the Partnership specifically agreed to provide its improved technology to Florida Power without compensation. The express contractual language of Section 4.04 of the Partnership Agreement grants Florida Power that right so long as the products produced through use of the improved technology are consumed by Florida Power itself. Under that provision, Florida Power is an Associated Entity which stands on an equal footing with EFC with regard to the use of the improved technology without compensation.

2. The parties' course of conduct establishes that Florida Power has the right to use the improved technology without compensation.

Florida Power's interpretation of the Partnership Agreement is confirmed by the parties' own consistent course of dealing under it. Contrary to the Commission's assertion that there was nothing in the record to show that Florida Power has the right to use the new technology without charge, the

record is undisputed that Florida Power has in actual fact never been charged for use of the improved technology.

The testimony of Mr. Sell, the general manager for the COMCO partnership, was unequivocal that none of the $4.7 million development costs of the improved technology had been "either directly or indirectly charged to or recovered by the COM agreement with Florida Power." [T. 300, 347; A. 6]. As he explained:

> All of the development work which we undertook since the Crystal River project in 1978 . . . was fully funded by the partners. In total, this amounts to about $4.7 million to date that the partners have contributed through capital contributions to the partnership to fund this work. None of this expense is being recovered in the Bartow COM fuel supply agreement. None of it whatsoever.

[T. 347; A. 6].

There was additional evidence confirming the absence of any charge to Florida Power for the improved technology. The pricing formula in the Partnership's COM supply agreement with Florida Power was explained at length and, as shown by that testimony, none of the components of that formula included any allocation of those development costs. [T. 303]. Those components were a specific focus of the Commission in the proceeding below and were actually set out in the Commission's order itself. [Order at 5; A. 1]. Significantly, there was

no finding by the Commission that development costs of the improved technology were included within the pricing formula for COM fuel or ever passed on to Florida Power.

Florida Power believes that the provisions of the Partnership Agreement make it abundantly clear that it is entitled to use the technology as improved by the Partnership without compensation. If there were any doubt, however, the parties' own consistent course of dealing -- by which Florida Power has actually used the improved technology without charge -- confirms that this is the correct legal interpretation of that Agreement. Where the parties to a contract "have, by their own conduct, placed a construction upon it which is reasonable, such construction will be adopted by the court. . . ." Blackhawk Heat & P. Co., Inc. v. Data Lease Fin. Corp., 302 So.2d 404, 407 (Fla. 1974); Lalow v. Codomo, 101 So.2d 390 (Fla. 1958).

There need be no concern that the parties might later change their position and attempt to charge Florida Power for its use of the improved COM technology. Even if that would be legally possible in view of the express contractual provisions, the parties' course of dealing, and the sworn testimony of COMCO on this issue, an explicit commitment was made to the Commission that this same construction of the agreement would to be followed by the parties in the future.

During the reconsideration argument, the Commission specifically asked for -- and received -- a stipulation that "that is the way EFC and Florida Power both will interpret it in the future."[5/] [T. 33-34, 1/85; A. 8].

In sum, by virtue of the assignment which the Commission now questions, Florida Power's ratepayers have been receiving two distinct benefits since 1978. First, that assignment eliminated Dravo's equitable interest in any use of the existing technology on Florida Power's system. As a result, no payment had to be made to Dravo for such use.

Second, Florida Power received the benefit of the improved technology without either contributing to the $4.7 million cost of developing that improved technology or compensating the Partnership for its use of that improved technology. There is the potential of even greater benefits to the ratepayers in the future as a result of this contractual right. Improvements in the technology will be continuing and cumulative, and Florida Power may well convert additional units to the use of this alternative fuel.

5/ Quite apart from that stipulation, under the Commission's pervasive regulation of fuel adjustment charges, there is no way as a practical matter that Florida Power could ever pass those costs on to its ratepayers without the Commission's consent.

Thus, substantial benefits were received by Florida Power and its ratepayers in return for the assignment of Florida Power's interest in the existing technology. That constitutes consideration as a matter of law, and the Commission's disregard of those benefits is reversible error.

POINT THREE

The ratepayers were not affected by the costs of the COM technology project or the absence of monetary compensation for the assignment.

The Commission based its order of "restitution" on its finding that "the ratepayers paid the cost of the project" and therefore should have reaped the rewards of those expenditures. [Order at 4; A. 1]. In actual fact, the evidence was undisputed that those development costs were not incurred or included in any test year used by the Commission to set Florida Power's rates. Accordingly, none of those costs were passed on to the ratepayers, and they were instead borne by the Company's shareholders.[6/]

It is undisputed that the rates charged by Florida Power in 1977 and 1978 were based on its actual operating expenses for the test year of 1974. [T. 196; A. 7]. The development costs of this particular project were not included in any operating expenses for that or any other test year. [T. 171, 196; A. 7]. As a result, those costs could not possibly have

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6/ The ratepayers could therefore not have acquired any "equitable interest" in the technology. See, e.g., Board of Public Utility Commissioners v. New York Telephone Co., 271 U.S. 23 (1926); Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission, 427 A.2d 1244 (1981); Boise Water Corp. v. Idaho Pub. Utilities Com., 578 P.2d 1089 (Idaho 1978).

been a component of, or recovered by, the rates in effect during the performance of this project. [T. 171, 196; A. 7].

This very point was conceded by the Commission's own expert, who acknowledged that, since these costs were not included in any test year expenses, they were not "passed on to the ratepayers in a rate case." [T. 171]. Indeed, Commissioner Cresse himself recognized that the evidence established that "none of this research were passed on to the ratepayers, as you demonstrated and I think staff agrees with, because it was in a nontest year . . . ." [T. 216]. In short, the costs of the project were paid by the stockholders out of their already insufficient earnings, not by the ratepayers.

In its order, the Commission conceded that "the expense was not incurred during a test year." [Order at 4; A. 1]. It concluded that the ratepayers nevertheless paid those costs because Company assets in the rate base were used in conjunction with the project, as were some "embedded operational costs" for the Crystal River station. Id. The Commission's view ignores the actual effect of such costs on the ratepayers.

The costs referred to in the Commission's order are fixed costs which would necessarily be incurred in the normal, on-going course of business whether this particular project were performed or not. The land and personnel would have been

a part of the Crystal River operation regardless of this project. Accordingly, there could be no effect on the ratepayers if those same assets or fixed costs also supported other projects. This is plainly the case since the ratepayers were going to pay for them in any event as a part of rates which had been found by the Commission to be reasonable and just.

The Commission necessarily found in the first instance that the ratepayers should pay for these fixed costs. By now requiring Florida to "reimburse" the ratepayers for costs simply because they were also used to support additional projects, the Commission is not only engaging in retroactive ratemaking, it is now forcing Florida Power shareholders to absorb all of those fixed costs which the Commission had earlier held should be paid by the ratepayers.

The Commission also noted that the costs of this project were budgeted as "R&D" expenses and that this type of expense had been included in prior test periods even though these particular expenses were not. In essence, since other R&D expenses had been included in rates, the Commission found that these R&D costs were therefore paid for by the ratepayers. That is patently not the case, and there is no evidence in the record below that in any way supports such a notion. To the contrary, only those costs which are included in a test year

are included in rates and thus paid by the ratepayers. [T. 171, 196; A. 7].

The most significant error in the Commission's analysis is its disregard of the fact that, even if the ratepayers had paid the costs of this particular project, that could not have had any effect whatsoever on their rates. Since Florida Power did not recover sufficient revenues in 1978 to even earn its minimum allowed rate of return, it was Florida Power's shareholders -- not the ratepayers -- which would have been entitled to receive additional revenues. To now require Florida Power to "compensate" the ratepayers for isolated costs incurred during a period of inadequate earnings would unjustly penalize Florida Power's shareholders a second time, while providing a windfall to the ratepayers who were already favored with rates which were insufficient to provide Florida Power's authorized rate of return.

Not only did the Company earn below the minimum of its allowed rate of return in 1978, it would have done so even if it had received complete reimbursement of its development costs in return for the 1978 assignment. [T. 196, 198-199; A. 7]. Any such compensation would have done nothing other than slightly reduce the short-fall Florida Power experienced in the rate of return which it had been authorized to earn. [T. 196; A. 7].

In actuality, the ratepayers were completely unaffected by the costs incurred to develop the initial technology, and they would have been equally unaffected by any monies Florida Power might have obtained for its assignment. Such compensation would not have resulted in a rate decrease for the ratepayers -- even if 1978 had been a test year -- since Florida Power's rate of return was below the minimum approved by the Commission. See, e.g., Southern Bell Telephone & Telegraph Co. v. Bevis, 279 So.2d 285, 286 (Fla. 1973) ("any rate of return below the authorized minimum must, of necessity, be unfair, unjust, unreasonable and insufficient.").

Indeed, using 1978 as a test year, Florida Power would have been entitled to a rate increase even if it had received reimbursement of the entire cost of the R&D project for the assignment. This alone demonstrates the inequity of the Commission's attempt to single out one isolated transaction in the past in order to now effectuate a retroactive rate decrease through this "restitution" order.

This Court has long recognized that, even in regular ratemaking proceedings, a particular operating expense is "not to be treated separately BUT to be generally applied with all other expenses and factors involved in determining a fair return to the utility." Gulf Power Co. v. Bevis, 289 So.2d 401, 407

(Fla. 1974) (Court's emphasis). There can be no "independent 'one for one' allowance or express 'deduction'" of a cost but only "a consideration with all others in arriving at a fair return for utilities as required by the U.S. and Florida Constitution." Id. As the Court put it:

> It will depend upon the total picture. The guiding "light" or consideration, as stated at the outset, is a fair return as constitutionally dictated. With this approach, the tax falls into perspective, as other operating expenses, and any resultant "sharing" between utility and user is thereby reflected in the determination of the rate demanded by a proper return. Id.

Here there was exactly such a "one for one" deduction from Florida Power's revenues, with no consideration given to the fact that Florida Power's overall revenues were insufficient to earn its minimum rate of return during the period in question. Since the ratepayers would have received no reduction in their rates if this proposed compensation had been received in 1978, they should not receive a rate reduction by receiving such compensation now.

The Commission's requirement that Florida Power now compensate its ratepayers for the costs of this project is not only legally improper, it is manifestly unfair. Even if one accepts the Commission's view that the ratepayers were entitled to compensation because they originally paid those costs, it

is critical to recognize that the ratepayers have had the benefit of the technology over a number of years without any payment for that use.[7/] To now "reimburse" the ratepayers in the amount of the original project costs but not concomitantly require them to pay for their use of the improved technology would be an unjustified windfall to the ratepayers.

7/ There have been a variety of benefits that have flowed to Florida Power's ratepayers from this improved technology. They have received, and will continue to receive, the assurance of an alternative fuel supply -- which makes Florida Power less dependent on foreign oil and thus increases the reliability of its service. At the same time, this newly developed technology avoids the enormous cost of converting existing oil units to coal. Depending upon the market price for oil, there is a potential for enormous fuel savings which will inure entirely to the benefit of Florida Power's ratepayers.

POINT FOUR

The Commission's Award of Pre-Judgment Interest is Clearly Erroneous.

The Commission awarded pre-judgment interest to the ratepayers in the amount of $510,996 to compensate for the alleged "delay in the recovery of their lost interest." [Order at 7; A. 1]. That award was clearly erroneous.

The Commission conceded that "the record does not reflect the actual or potential value of the COM technology, and we are faced with a difficult task in fixing the compensation due from the Company to the ratepayers." [Order at 4; A. 1] It nevertheless concluded that, "absent another basis for valuation, we believe that the cost of development of the technology stands as valid proxy for its minimum value." Since the "compensation" to be awarded the ratepayers was admittedly unliquidated, the Commission's further award of pre-judgment interest going back to 1978 was improper.[8/]

Numerous Florida decisions have held that pre-judgment interest is not recoverable on an unliquidated claim.[9/] Chicago

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8/ It should be emphasized that this is not a case in which the Commission permitted an interim collection of revenues subject to refund upon the Commission's final decision. Interest is properly awarded there, not only because the amount is liquidated but because it is a prospective award.

9/ While there is some authority supporting an award of

Insurance Company v. Argonaut Insurance Company, 451 So.2d 876 (Fla. 4th DCA 1984); Honeywell, Inc. v. Trend Coin Company, 449 So.2d 876 (Fla. 3d DCA 1984); Vacation Prizes, Inc. v. City National Bank of Miami Beach, 227 So.2d 352 (Fla. 2d DCA 1969). Any amount due is unliquidated "when the amount of damages cannot be computed except on conflicting evidence, inferences and interpretations." Federal Deposit Insurance Corporation v. Carre, 436 So.2d 227, 230 (Fla. 2d DCA 1983), petition for review denied, 444 So.2d 416 (Fla. 1984). This is obviously the case here.

This principle was applied to reverse an award of pre-judgment interest in City of Pompano Beach v. Oltman, 389 So.2d 283 (Fla. 4th DCA 1980), petition for review denied, 399 So.2d 1144 (Fla. 1981). There, a rate ordinance requiring water users outside the city to pay double the rate for in-city users was invalidated. The trial judge determined the rates that the

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prejudgment interest on an unliquidated claim, these cases involve the award of prejudgment "interest on damages for breach of contract as an element of the damages." Department of Transportation v. Hawkins Bridge Company, 457 So.2d 525, 528 (Fla. 1st DCA 1984). Here, there is no suit for breach of contract and no award of "damages"; indeed it is well-settled that the Commission has no power to award money damages. Southern Bell Telephone and Telegraph Co. v. Mobile America Corp., Inc., 291 So.2d 199 (Fla. 1974); Winter Springs Development Corp. v. Florida Power Corp., 402 So.2d 1225 (5th DCA 1981).

city should have charged water users outside the city and then awarded interest on the amounts he found to be excessive for each of the years the rate ordinance was in effect prior to the date of judgment. The Fourth District Court held that "the inclusion in the judgment of interest on an unliquidated amount in dispute is clearly erroneous." Id. at 285.

These decisions control here. They confirm the legal incorrectness of the Commission's award of interest in the absence of evidence of a fixed sum due and owing.

Moreover, as shown at pp. 31-32, supra, the ratepayers would not have received any monies in 1978 even if Florida Power had obtained compensation for the assignment and thus they did not lose the use of any monies. It is fundamental that interest is awarded to compensate a party for the loss of monies he would otherwise have actually received. Hence, "the theory on which interest is allowed on any fund is that it is held in such a way that it may be put to work and earn it." Everglade Cypress Co. v. Tunnicliffe, 148 So. 192, 194 (Fla. 1932); Southeastern Mobile Homes, Inc. v. Transit Homes, Inc., 192 So.2d 53, 57 (Fla. 2d DCA 1966). Where, as here, there is no way the disputed fund could have been "put to work by the ratepayers", interest is not allowed.

Conclusion

The Commission's order requiring retroactive restitution to Florida Power's ratepayers violates established principles of law and should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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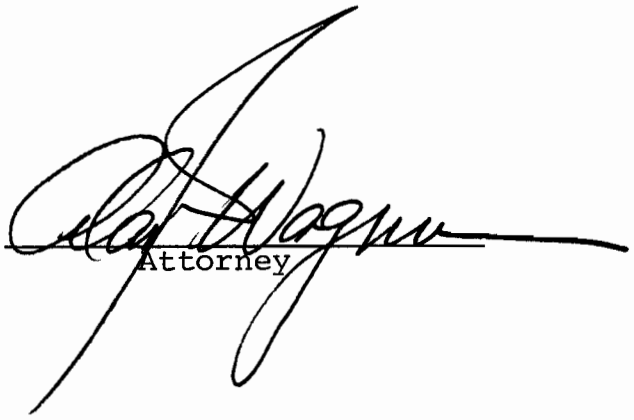

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