IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION,

Appellant,

vs. CASE NO. 66-383

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

Appellee.
_____/

REPLY BRIEF OF APPELLANT FLORIDA POWER CORPORATION

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PRELIMINARY STATEMENT

The Public Service Commission and Public Counsel will be jointly referred to as "appellees." The Answer Brief of the Commission will be designated "PSC ___" and the Answer Brief of Public Counsel, "PC ____".

The page restrictions on this rely brief have precluded Florida Power from responding to all of the myriad of arguments advanced by appellees. Florida Power does not, however, waive any of the arguments set forth in its original brief on appeal.

STATEMENT OF THE CASE AND FACTS

Appellees' answer briefs are founded on the erroneous factual premise that this case only concerns "overcharges for fuels" and that the Commission was only requiring a refund of fuel adjustment charges after an ordinary "true-up" proceeding. [PSC 24; PC 7]. Thus, appellees repeatedly characterize this case as one in which a utility "has collected too much revenue" and is required to refund that amount with interest. [PC 7]. Far from having collected "too much revenues," the Commission's complaint is that Florida Power did not receive enough compensation for its 1978 assignment.

This was a hybrid proceeding. It was originally instituted in 1982 to consider fuel adjustment issues relating to the reasonableness of the expenses for the COM fuel utilized at the Bartow plant. Those fuel expenses, which were collected by Florida Power "subject to refund," are the subject of a portion of the Commission's order which is not in issue on appeal and is no longer even subject to this Court's jurisdiction.

An unrelated issue involving the development and assignment of COM technology in 1977-78 was subsequently added to the ongoing proceeding by direction of the Commission shortly before the final hearing in 1984. As confirmed by the Commission's own Statement of the Case, as well as its Motion

to Relinquish Jurisdiction, however, that issue is completely independent from the COM fuel expenses reviewed by the Commission. The mere fact that this extraneous issue happened to be considered at the time of a fuel adjustment proceeding does not serve to make the Commission's requirement of "compensation" for the technology a fuel adjustment question.

The record and the Commission's own findings establish that the cost of developing the COM technology was not a fuel adjustment issue. Rather, according to the testimony of its own staff witness, which was specifically adopted as a Commission finding, those costs were paid by the ratepayers through the Company's 1977-78 base rates established by final order in 1975.

In short, this is not a situation in which Florida Power collected or attempted to collect any fuel charges from customers which are now the subject of a refund order. Instead, the Commission is requiring a payment out of current earnings so as to "compensate" ratepayers for what the Commission believes in hindsight to have been improper consideration for the Company's 1978 assignment of that technology.

Finally, there is nothing in the Commission's order supporting Public Counsel's repeated assertion that the $888,587 compensation payment represents the value of future royalties and therefore does not constitute retroactive ratemaking. The

Commission specifically addressed the value of the COM technology which was transferred in 1978, not the value of future royalties, and concluded that "the Company should compensate its ratepayers for the lost value of the COM technology. . . ." [Order at 7]. Indeed, if the "compensation" payment was supposed to compensate for the loss of future revenues, the Commission would not have awarded interest from 1978 on "the amount of the compensation here-to-for unpaid to the ratepayers." [Order at 3].

ARGUMENT

POINTS ONE AND THREE

The Commission not only engaged in illegal, retroactive ratemaking, it improperly focuses separately on a single transaction in the past.

In 1977-78 Florida Power developed a new technology for a composite coal-oil fuel. All of the development costs were booked by Florida Power in 1977-78, and the Commission specifically found that the ratepayers paid for those costs "through their rates" in 1977-78. (Order at 4). Florida Power assigned its interest in the COM technology to EFC in 1978. Information relating to the development of the technology and its assignment was available at all times for the Commission's inspection and audit. See § 350.117, Fla. Stat.

Now, more than seven years later, the Commission has concluded that Florida Power should have obtained monetary

compensation of $888,597 - the cost of developing the technology - for the 1978 assignment of its interest in the technology. [Order at 3-4]. Accordingly, the Commission has required Florida Power to now "compensate" the ratepayers in that amount, plus interest thereon since 1978. [Order at 4].

The Commission required the payment of "compensation" even though it was undisputed that Florida Power did not collect sufficient revenues in 1978 to even earn its minimum authorized rate of return. If the Company had received compensation of $888,597 for the assignment in 1978, that would have only benefitted the Company's shareholders by reducing the earnings deficit. It would not have reduced the rates paid by the ratepayers in the slightest, and thus the ratepayers would not have benefitted from the Company's receipt of such compensation.

Nevertheless, the Commission has now directly decreased the Company's current earnings by $888,597, plus interest since 1978, by requiring the payment of "compensation" to remedy the perceived impropriety in the Company's 1978 contractual arrangements. That not only constitutes illegal retroactive ratemaking, it violates fundamental concepts of utility ratemaking by focusing on a single transaction in isolation without considering its actual effect on the ratepayers.

1. The Commission misreads and therefore misapplies the decisions of this Court prohibiting retroactive ratemaking under circumstances such as this.

The PSC's effort to avoid the illegal effect of its retroactive adjustment to Florida Power's earnings is founded in flat misstatements of the legal principles established by this Court in condemning retroactive ratemaking. In particular, the PSC incorrectly asserts that retroactive ratemaking is only illegal when future base rates are set so as to compensate for past errors. [PSC 14, 16]. This Court did not undertake to establish any such restrictive definition of retroactive ratemaking in either of the cases cited by the PSC but instead merely dealt with the particular facts before it.

Citizens v. Public Service Commission, 415 So.2d 1268, 1270 (Fla. 1982) involved an order represcribing the depreciation allowance which a utility could book. That bookkeeping change had no direct effect in and of itself upon ratepayers and therefore, as this Court found, did not constitute "ratemaking." Ratepayers were indirectly affected, however, because the represcription altered the utility's expenses during a period which had already been made subject to a potential refund by stipulation under a prior rate order. This Court held that there was no retroactive ratemaking "under the present facts" because the effect of the represcription upon the stipulated

refund "was a factor that all parties knew or should have known (about) . . . ." Id. at 1270. No such prior knowledge is present here.

In Gulf Power Co. v. Cresse, 410 So.2d 492 (Fla. 1982), the Court simply affirmed the Commission's decision to require billings under new rates to be based on meter readings taken 30 days after their effective date. Unlike this case, there was no review of prior contractual arrangements and no requirement of "compensation" to retroactively adjust a perceived inequity to the ratepayers as a result of those agreements.

Plainly, those decisions do not involve circumstances such as those presented here. Far more analogous is this Court's recent decision in Southern Bell Telephone & Telegraph Co. v. Florida Public Service Commission, 453 So.2d 780 (Fla. 1984), which demonstrates the error of the PSC's narrow view of retroactive ratemaking.

The order that was voided as retroactive ratemaking in Southern Bell did not involve the setting of future base rates. Instead, much like this case, the Commission had required a refund to be made on the basis of its conclusion that the utility should have agreed to a different contractual arrangement than it did. This Court summarily reversed the requirement of a refund because "to hold otherwise would violate the principle against retroactive ratemaking." Id.

The PSC attempts to evade Southern Bell by urging that its present order has not "affected the earnings of the utility except to the extent that the stockholders are bearing the risk of management imprudence and not the ratepayers." [PSC 21]. The Commission cites no authority -- and none exists -- which carves out such an exception to the prohibition on retroactive ratemaking. Indeed, if any such purported "exception" did exist, it would have certainly applied in Southern Bell where, as here, the Commission sought to require a refund on the basis of its retrospective condemnation of the utility's earlier contractual arrangements. There is no rational basis to distinguish the Commission's action in Southern Bell from its action below - both constitute illegal retroactive ratemaking.

The fact is, the PSC cannot simply use the label of "management imprudence" as a device to engage in retroactive ratemaking.[1/] To allow such a justification would emasculate the prohibition on retroactive ratemaking because a refund to

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1/ That is not to suggest that the PSC may not consider management prudence in setting future rates or in determining whether a utility has carried its burden of justifying specific fuel adjustment charges which it seeks to collect directly from the ratepayers. See, e.g., Florida Power Corporation v. Cresse, 413 So.2d 1187 (Fla. 1982), discussed infra at ___. The Commission cannot, however, engage in retroactive ratemaking under the guise of considering the prudence of management's past decisions.

ratepayers always impacts shareholders rather than ratepayers. Yet that prohibition - which is founded in constitutional due process requirements - exists to protect shareholders as well as ratepayers. Board of Public Utility Commissioners v. New York Telephone Co., 271 U.S. 23, 31 (1926). For that reason, the PSC has no authority to make either the utility or its customers whole for inequities that may have existed in the past.

As the PSC concedes, its order directly impacts Florida Power's present earnings by requiring a deduction from those earnings to "compensate" the ratepayers for what the PSC now says was a failure to obtain adequate consideration for the 1978 assignment. In Southern Bell, the PSC's order similarly impacted the utility's current earnings as a result of the Commission's conclusion that the utility should have agreed to a different contractual arrangement in the past. This Court squarely held the requirement of a refund under those circumstances to be retroactive ratemaking, and that holding controls under the factual circumstances presented here.

2. This Court has never authorized the Commission to make "after-the-fact adjustments" under circumstances such as these.

The PSC asserts that the retroactive ratemaking prohibition does not apply to "expenses" and that the Commission

is therefore free to make "after-the-fact adjustments to expenses." [PSC 14, 16, 19]. None of the cases cited by the PSC for that proposition contain any such holding. To the contrary, the issue of retroactive ratemaking was not even discussed in Florida Power Corporation v. Cresse, 413 So.2d 1187 (Fla. 1982), Citizens v. Public Service Commission, 403 So.2d 1332 (Fla. 1981), Richter v. Florida Power Corp., 366 So.2d 798 (Fla. 1979), or Pinellas County v. Mayo, 218 So.2d 749 (Fla. 1969).

The Commission also incorrectly cites two other decisions of this Court for that proposition. Citizens v. Florida Public Service Commission, 415 So.2d 1268 (Fla. 1982); Southern Bell Telephone & Telegraph Co. v. Florida Public Service Commission, 443 So.2d 92 (Fla. 1983). Those decisions simply confirmed the Commission's right to represcribe the depreciation allowance that the utility could enter on its books, a non-ratemaking function which is regularly performed in connection with to federal statutory requirements. Although a refund which had been stipulated to under a prior rate order might have been affected by the represcription affirmed in Citizens, there was no retroactive ratemaking since that possibility was "known or should have been known" by all parties.

Similarly, retroactive ratemaking was not an issue in Florida Power v. Cresse, supra, because it was known in advance that justification would have to be provided for fuel expenses which the Company sought to recover under its fuel adjustment clause. In affirming the Commission's ultimate disallowance of certain of those fuel expenses, this Court pointed to the Commission's earlier order which required utilities "to justify changes to the (fuel adjustment) charges at public hearings held on a monthly basis." Id. at 1190. Noting that Florida Power had endorsed that "true-up" procedure, this Court concluded there was nothing "improper or unusual" in requiring Florida Power to establish the reasonableness of its fuel costs before allowing it to recover those costs through increased fuel adjustment charges. Id. at 1191.

The nature of the orders reviewed in those decisions highlights the critical distinction ignored by the PSC here: where the parties know and agree in advance that rates or charges will be subject to review, there is no retroactive ratemaking. It is for exactly that reason that fuel adjustment "true-ups" are not retroactive ratemaking -- the fuel expenses are incurred and fuel charges are conditionally collected with the express knowledge and agreement that a "true-up" proceeding will be held at a later time and that an adjustment - including a possible refund - may then be required.

The Commission ordered exactly such a "true-up" in the separate part of its order below dealing with the recovery of COM fuel expenses. The Commission had allowed Florida Power to collect, subject to refund, the COM fuel expenses for its Bartow plant, pending the Company's justification of those costs at the "true-up" hearings. [Order at 1-2]. Accordingly, any subsequent adjustment by the Commission in the amount of COM fuel expenses which Florida Power would be authorized to recover upon "true-up" would not constitute retroactive ratemaking since the fuel charges had been only conditionally collected with the knowledge that they were subject to refund.

The Commission's requirement that Florida Power now pay "compensation" to its ratepayers for the value of the COM technology is a totally different situation. That does not involve a refund of fuel revenues collected subject to refund. Instead, as the Commission concedes, its order directly decreases the Company's current earnings in order to shift the burden of a perceived deficiency in Florida Power's 1978 contractual arrangements from the ratepayers to the shareholders. [PSC 21]. That constitutes retroactive ratemaking.

In an effort to avoid the prohibition of retroactive ratemaking, appellees repeatedly characterize the Commission's action as a simple disallowance of fuel expenses in a "true-

up" proceeding. [PSC 21-24, PC 7]. Asserting that the Company's development costs for this project were "recoverable on a dollar for dollar basis through the fuel adjustment clause," [PSC 21-22, fn. 4], appellees argue that there can be no retroactive ratemaking in the context of a fuel adjustment "true-up." Appellees' characterization of these development costs as fuel expenses recovered under the regular fuel adjustment clause is completely erroneous. Indeed, the PSC's explicit findings in the order below, as well as its brief on appeal, belie appellees' assertion that a fuel adjustment charge or recovery is in question here.

Florida Power has never recovered or sought to recover the 1977-78 development costs of the COM technology under the fuel adjustment clause, and appellees are unable to cite to any evidence that Florida Power ever did so. Although the Commission has ordered the payment of the "compensation" for the COM technology to be made in the form of a reduction in the charges collected for COM fuel expenses, there has never been any question that this "compensation" is totally unrelated to those fuel expenses or to any fuel revenues which had previously been collected by the Company.

First, the development costs for this project were not even a fuel expense. The Commission expressly found in its

order that those costs were booked as a "Research and Development" project with all costs "expensed through O&M (Operation and Maintenance.)" [Order at 3, 4]. There is absolutely no evidence that those development costs were fuel expenses. Noticeably, in its brief, the Commission cites to no record evidence in repeatedly characterizing them as such.

Second, there is no evidence that Florida Power ever recovered those development costs under its fuel adjustment clause or that it was seeking to do so in this proceeding. Again, the Commission's own findings were exactly the contrary.

The foundation for the Commission's conclusion that the ratepayers had obtained an "equitable interest" in the technology for which they should now be compensated was its finding that the development costs of this project were recovered from Florida Power's customers through base rates -- not fuel adjustment charges -- which they paid in 1977-78. (Order at 4). In making that finding, the Commission accepted the testimony of Ms. Bruce, a member of the Commission's staff, that "the project was an R&D project which was expensed through O&M and recovered through rates charged to Florida Power's customers." (T. 142, 8/84). Indeed, that testimony is exactly the "competent, substantial evidence" which the Commission relies on appeal. [PSC 7-8, 37-42].

Thus, the PSC's contention that it could not review these development costs until Florida Power sought "to pass the costs on to the consumer in a fuel adjustment proceeding . . . years after the contract was executed" [PSC 22], is a blatant misrepresentation of the record as well as the Commission's own findings. There was no effort by Florida Power to ever pass these costs on to ratepayers through fuel adjustment charges. The Commission itself specifically found that the costs of developing that technology had been paid by the ratepayers in 1977-78 as a part of the Company's base rates.

Florida Power's base rates are set by final order of the Commission and are not collected subject to refund. The Commission's "after-the fact adjustment" of Florida Power's earnings in order to correct a perceived past inequity to the ratepayers is plainly retroactive ratemaking.

3. The Commission improperly reviewed a single transaction in isolation.

Quite apart from the retroactive nature of the Commission's action, it also violates other accepted ratemaking requirements. The Commission condemned this transaction and required compensatory payments to the ratepayers without determining whether there would have any actual benefit to the ratepayers if the Company had in fact received $888,597 for

the 1978 assignment. Such a determination was constitutionally required in order to avoid a confiscatory charge against the utility.

The Commission seeks to justify its action by claiming that it routinely adjusts utility operating expenses to recognize gains on sales of utility property. (PSC 38-39). In fact, however, none of the orders to which it cites gave effect to gains realized prior to the test year in question, and thus none involved retroactive ratemaking. Instead, each was a full-blown rate case in which the Commission simply required the utility to include as income in its test year under consideration those gains which had been realized on the sale of utility properties either during or immediately after that test year.

Moreover, those proceedings did not single out one transaction and require a dollar-for-dollar credit of gains against current rates. Rather, the gains were evaluated in the context of the utility's overall financial condition, and the gains simply had the effect of reducing the total amount of additional revenues the utility was entitled to receive. If the Commission had followed that practice here, the recognition of $888,597 as compensation for the 1978 assignment would likewise have only off-set a portion of the additional revenues the Company would have been entitled to receive in 1978 in order to assure a fair return.

Thus, not only do those orders fail to support what the Commission did here, they underscore this Court's proscription of consideration of individual expenses or transactions in isolation from the utility's over-all revenue requirements. As this Court held in Gulf Power Co. v. Bevis, 289 So.2d 401 (Fla. 1974), 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. at 407. Accordingly, any requirement of the payment of "compensation" to ratepayers to remedy a claimed failure to compensate them in the past - even if not regarded as retroactive ratemaking - must take into account all revenues and expenses.

That was not done here. The record is clear, and the Commission does not dispute, that the Company's rates were not sufficient to provide it with even the minimum of its authorized rate of return for 1978. Even if Florida Power had received $888,597 for the assignment in 1978, that would not have benefitted the ratepayers in the slightest but would have instead only lessened the earnings short-fall experienced by the shareholders.

The Commission argues that, even though the Company failed to collect sufficient revenues to earn its minimum rate of return, the Commission is still authorized to make adjustments

for Florida Power's "management imprudence" on a specific transaction during that period. Once again, the Commission's argument ignores its own order.

The foundation of the Commission's order is its conclusion that the compensation which Florida Power ostensibly should have received in 1978 for the assignment would have been paid to the ratepayers at that time. It was on that very basis that the Commission required Florida Power to pay interest on that compensation going back to 1978: "We find that the Company should pay interest on the amount of the compensation here-to-for unpaid to the ratepayers," (Order at 3). As the Commission put it, the "delay in compensation to the ratepayers" required award of interest back to 1978. (Order at 4).

Thus, the Commission specifically assumed that the ratepayers would have received the benefit of any monetary compensation which the Company would have obtained in 1978 for the assignment. In fact, however, since the rates being collected in 1978 were insufficient to even provide Florida Power's minimum rate of return, any such compensation would not have been "paid" to the ratepayers at that time but rather would have simply reduced the 1978 earnings deficit. In view of that undisputed fact, the payment of such compensation at this time amounts to an absolute windfall to the ratepayers

who were in no way adversely impacted in 1978 by the Company's failure to obtain such compensation from EFC.

POINT TWO

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

As a part of the assignment, Florida Power reserved the right to use the existing COM technology in the future without compensation. Florida Power also obtained the right to future use of the COM technology, as improved by the Partnership, without paying any compensation to the Partnership for that use.[2/] [Section 4.04 Partnership Agreement; A.5]. It is undisputed that the technology was thereafter improved at a cost of some $4 million to the Partnership and that Florida Power used that improved technology for the direct benefit of its ratepayers without paying any compensation to the Partnership for that use.

2/ Although the Commission attempts to view each agreement in isolation in determining what consideration Florida Power received for the assignment, the two contemporaneously executed agreements must be read as a whole. Florida Mortgage Financing, Inc. v. Flagler Plaza Corp., 308 So.2d 571, 572 (Fla. 3d DCA), cert. denied, 317 So.2d 443 (Fla. 1945); Holcomb v. Bardill, 214 So.2d 522 (Fla. 4th DCA 1968), cert. denied, 225 So.2d 526 (Fla. 1969), citing Spadaro v. Baird, 97 Fla. 50, 119 So. 788 (1929), and Johnson v. Smith, 84 So.2d 722 (Fla. 1956).

Public Counsel argues that the ratepayers were entitled to the benefits of the original technology, improvements in the technology, and royalties from sales to third parties and thus the assignment provided no benefits to Florida Power. That ignores the fundamental fact that Florida Power would have had to pay the -- over $4 million -- costs of any improvements to the original technology in order to obtain any benefits of such improvements. By virtue of the assignment, all of those costs were instead borne solely by the COMCO partnership and Florida Power's ratepayers received the benefits of the technology as improved by COMCO.

The Commission seeks to avoid the obvious benefits flowing to Florida Power from the contractual provision granting the right to use of the Partnership's improved technology by arguing that it does not establish the price of the COM fuel under the 1980 fuel contract between COMCO and Florida Power. The point is, that provision explicitly precludes any charge for Florida Power's use of the improved technology for its own purposes, whether through the Partnership's pricing of COM fuel or otherwise. The parties to the contract unequivocally declared that this was exactly how they had consistently construed and applied that provision.[3/] [T. 300, 347; A.6].

3/ The Commission argues that this consideration cannot be gleaned from the face of the Assignment itself and that "the parties (sic) subsequent actions should not be allowed to inject

Although the Commission attempts to create an ambiguity in the meaning of the words "use" of technology and "consumption" of COM fuel, none exists. By its express terms, the provision gives Florida Power the right to use the improved technology without charge so long as that use is "exclusively for its own purposes." If any question does exist as to the meaning of this provision, the parties' consistent course of conduct of providing the improved technology to Florida Power without charge confirms the correctness of Florida Power's interpretation.

The evidence was uncontradicted below that none of the Partnership's costs of improving the technology have ever been passed on to Florida Power or its ratepayers. [T. 300, 347; A.6]. The Commission made no finding to the contrary. Instead, the Commission simply found that there was nothing in the record or the contract to indicate that EFC could not charge for such use in the future. [R.O. 2]. That is simply not the case.

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uncertainty and create ambiguity." [PSC 30-31]. However, parol evidence is always admissible "to show the consideration for an agreement where none appears therein" and "to connect several writings and to show that they are part of the same transaction." Industries, Investments & Agencies, Ltd. v. Panelfab International Corp., 529 F.2d 1203, 1211 (5th Cir. 1976) (applying Florida law), citing Northwestern Bank v. Cortner, 275 So.2d 317 (Fla. 2d DCA 1973), and Asphalt Paving, Inc. v. Ulery, 149 So.2d 370 (Fla. 1st DCA 1963).

As the Commission concedes at page 33 of its brief, "the new COM technology belonged to COMCO," not to EFC. Thus, it is the Partnership, and not EFC, which provides the improved COM technology to Florida Power. Accordingly, EFC would have no right or reason to make any charge to Florida Power for use of the technology. Only the Partnership would have such a right, and it gave that right up in the Partnership Agreement. Moreover, even if EFC could be construed to have some legal right to charge for Florida Power's use of the Partnership's technology, there was a formal stipulation below that there would be no such charge in the future. [T. 33-34, 1/85; A.8].4/

Quite apart from the express contract terms granting Florida Power the right to use the improved technology without charge by the Partnership, the parties' testimony unequivocally established that Florida Power has in actual fact been using that improved technology at no cost since 1980. [T. 300, 347, A.6]. There was absolutely no contrary evidence, and the Commission does not even attempt to refute that testimony. The Commission's finding on reconsideration that "nothing in the contract or in the record indicates that the Company itself

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4/ Even without that stipulation, the Commission clearly has the regulatory power to prohibit any charges for use of the improved technology from ever being passed on to the ratepayers in the future. Southern Bell, 453 So.2d at 784.

has the right to use the technology without charge from EFC" is clearly erroneous and ignores the uncontradicted evidence that the Partnership - not EFC - owns that improved technology and that Florida Power has the right and has in fact used the technology without payment to the Partnership.

Although appellees effectively concede that none of the Partnership's $4.7 million costs of improving the technology were ever passed on to Florida Power, the Commission urges that Florida Power paid for "some of the new technology" when it paid certain construction costs of the Port Sutton production plant as a part of its purchase price of COM fuel.[5/] [PSC 32-33]. Since modifications were made in the plant design in order to lower processing costs, the Commission argues that Florida Power paid "the cost of the new technology developed by the partners. . . . " [PSC 33].

First, the Commission offers no explanation of what relevancy that would even have to the issue of whether the Company received any consideration for the assignment. The Commission concedes that "the cost of Port Sutton plant is

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5/ The Commission notes that Florida Power paid the entire cost of the COM fuel it used. [PSC 32]. That is true. As shown by the Commission's own order analyzing those fuel costs, however, those costs contain no component for use of the new technology. [Order at 5; A.1].

distinct from the $4.7 million that the partners put into the partnership." [PSC 32, fn 10]. Thus, it is undisputed that Florida Power received the benefit of that $4.7 million investment by the Partnership in the new technology, and that benefit alone constitutes legal consideration for the assignment of the technology interest.

Second, the Commission miscites the record in claiming that Florida Power paid "the cost of the new technology developed by the partners . . . ." [PSC 33]. The cited testimony does not indicate that Florida Power bore the cost of developing the technical improvements which were incorporated into the plant's construction. The only indication in the record is that COMCO developed and paid for those improvements. [T. 300, 308, 1328, 347]. The fact that Florida Power paid construction costs of the plant cannot be equated with payments for the costs of improvements in the technology. One may lead to the other, but the fact remains - as the Commission grudging concedes in footnote 10 - two entirely different types of costs are involved.

The Commission's argument ends with a lengthy and completely irrelevant discussion of the pricing of the COM fuel. As the Commission has previously acknowledged, the issue of the pricing of COM fuel has nothing to do with the narrow question of whether Florida Power received legal consideration

for the 1978 assignment of its COM technology interests. [See Commission's Motion to Relinquish Jurisdiction].

Florida Power's ratepayers have had the benefit of COMCO's improved technology since 1980 when that technology was used to convert the Bartow Plant to COM fuel use. Ratepayers will have the right to use any further improvements in this technology. That improved technology has been and will continue to be of direct benefit to the ratepayers. It being uncontradicted that Florida Power has made no payment to the Partnership for its use of that improved technology, the Commission's finding that Florida Power received no consideration for the 1978 assignment is not supported by any evidence.

CONCLUSION

This is not a competent, substantial evidence case. The case involves only questions of law, without factual dispute on the material issues, whether (i) the Commission's action constitutes retroactive ratemaking or equally illegal piecemeal ratemaking; and (ii) Florida Power received consideration for the assignment of its interest in the COM technology. The first is purely an issue of law to be determined by application of this Court's decisions proscribing retroactive or piecemeal ratemaking. The second is also a matter of law to be determined by construing together the contractual documents dealing with the development, assignment and use of the COM technology. The Commission's decisions on those legal issues are erroneous

and contrary to the essential requirements of the law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Reply Brief of Appellant, Florida Power Corporation has been furnished by regular U.S. Mail this 10 day of June, 1985 to all counsel of record.

Sylvia Walbolt
Attorney