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IN THE SUPREME COURT OF FLORIDA

GULF POWER COMPANY,

Appellant,

vs.

FLORIDA PUBLIC SERVICE COMMISSION,

and

CITIZENS OF THE STATE OF FLORIDA,

Appellees.

CASE NO. 66,632

ON APPEAL FROM PUBLIC SERVICE COMMISSION
ORDER NO. 13452 IN DOCKET NO. 820001-EU-A

ANSWER BRIEF OF APPELLEES, CITIZENS OF THE STATE OF FLORIDA

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SYMBOLS, ABBREVIATIONS, AND DESIGNATION OF PARTIES

Gulf Power Company, Appellant, will be referred to as "Gulf Power" or "Gulf."

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

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

Alabama By-Products Corporation will be referred to as "ABC."

Gulf's coal supply contract with ABC will be referred to as "the Maxine Contract." The coal that was provided under this contract will be referred to as "Maxine Mine coal" or "Maxine coal."

The transcript of the hearing held on 15-16 and 28-29 September 1983, and the exhibits that were introduced during that hearing, are contained in their own volumes of the record transmitted to this Court. The pages of the transcript will be referred to as "[T. ____]," and the exhibits will be referred to as "[Ex. ____]."

References to the record of the proceeding below, other than to the transcript or exhibits, are contained in Volume I of the record and will be referred to by page number: [R. ____].

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

Unless otherwise noted, all emphasis is added.

NOTE ON CONFIDENTIALITY OF THE RECORD

According to the index of the record transmitted to this Court, portions of the record are confidential. These confidential items include all of the transcript of the final hearing and all of the exhibits that were introduced during the hearing. Under Sections 350.121 and 366.093, Florida Statutes, the PSC has the authority to exempt certain proprietary confidential business information from the public records act, Chapter 119, Florida Statutes. As explained in the prehearing order that governed the proceeding below, _In re: Investigation of Fuel Cost Recovery Clauses of Electric Utilities (Gulf Power Company - Maxine Mine)_, Order No. 12491 at 2, 83 F.P.S.C. 9:119, 120 (1983) [R. 6, 7; A-2], the PSC exercised its authority, which it assumed that it had, to treat the transcript and exhibits as confidential.

In writing appellate briefs, the Citizens' usual practice is to make liberal use of quotes and excerpts from the transcript and exhibits. Given, however, that these parts of the record are confidential, the instant Answer Brief will merely make reference to a transcript page or exhibit number without quoting from the source. In this way, the Brief will be available for the public to read.

The Citizens, however, are uncertain about what confidentiality means on appeal. Both the PSC (in the Order on appeal) and Gulf (in its Initial Brief and Appendix) quote from or provide actual parts of this confidential material. Neither the Order on appeal nor Gulf's Initial Brief and Appendix are confidential. Neither are the quotes and excerpts found in Gulf's or the Citizens' briefs below [R. 15, 47] or in the Staff's recommendation below. In re: Investigation of Fuel Adjustment Clauses of Electric Utilities (Gulf Power Company - Maxine Mine), Order No. 13070, 84 F.P.S.C. 3: 50 (1984) [R. 145; A-10]. Thus it would appear that the need for confidentiality is not as great as originally claimed and that confidentiality has been waived for various parts of the transcript and exhibits.

STATEMENT OF THE CASE AND OF THE FACTS

Gulf's Statement of the Case and Statement of the Facts ("Gulf's Statements" or "the Statements") are correct as far as they go. The Citizens, however, take issue with the Statements on two points. First, Gulf's Statements try to make it appear that all of the evidence in the record supports Gulf's position. This is inaccurate. There is ample evidence to support the PSC's actions. The Staff presented two expert witnesses, Mr. Thomas J. Foxx and Mr. Forrest E. Hill, to present the case against Gulf. (Gulf's Initial Brief - at page 29 - acknowledges that both of these witnesses are experts. The PSC expressly denied Gulf's motion to prevent Mr. Foxx from testifying as an expert. [T. 110].) Mr. Foxx, who at the time of the hearing was the Supervisor of the PSC's Section of Power Plant Efficiency and Fuel Procurement [T. 111], testified on three of the four days of the hearing [T. 79-554, 1028 - 1140] and sponsored four exhibits [Exs. 1, 5, 10, and 11], which together contain over sixty documents, analyses, and reports, each of which could have been identified as a separate exhibit in its own right. The Staff's second expert witness, Mr. Hill, testified on the third and fourth days of the hearing. [T. 1140-1217]. Mr. Hill, an independent consultant with extensive background in the coal industry [T. 1156-57], is a registered professional engineer and a member of the American Institute of Mining, Metallurgical and Petroleum Engineers, and holds a B.S. degree in industrial

engineering and an M.B.A. degree. [T. 1155]. He testified in support of Mr. Foxx's position and in rebuttal to Gulf's witnesses. [T. 1157]. Throughout the order on appeal, In re: Investigation of Fuel Cost Recovery Clauses of Electric Utilities (Gulf Power Company - Maxine Mine), Order No. 13452, 84 F.P.S.C. 6:295 [R. 146; Initial Brief at Appendix A], the PSC supports its statements and conclusions with repeated references to these two experts' testimony and exhibits.

And second, Gulf's Statements try to inject the use of hindsight into this Court's evaluation of the instant appeal. Although Gulf rails against the PSC's alleged use of "20/20 hindsight" [e.g., Initial Brief at 17 and 28], Gulf is more than happy to discuss what happened "[o]ver the twenty years prior to 1974" [Initial Brief at 10]. The problem with Gulf's introduction of hindsight is that the PSC's decision is based upon the imprudence of extending the Maxine Contract past 30 June 1974. Order No. 13452 at 2-3, 84 F.P.S.C. 6: at 296-97.

The 1974 extension [Ex. 3, Schedule 17 (JCL-17)] is a distinct contract that should be considered apart from the 1952 contract (as amended from time to time) [Ex. 3, Schedule 1 (JCL - 1)]. As a separate contract covering a different time period, the events that occurred prior to July 1, 1974 under the 1952 contract should be disregarded when reviewing the prudence of entering into the extension and when reviewing whether the extension has been properly administered. What has happened in the past is gone, it is a sunk cost. Avoidable future costs

should be considered on their own merits rather than in conjunction with unalterable, historical costs. In fact, one of Gulf's own witness, Mr. John O. Meier, agreed that under his life-of-the-contract theory, he would not look at what occurred prior to the start of the extension period, that is, his review would focus on what happened after June 30, 1974 and would ignore what had occurred prior to July 1, 1974. [T. 1003-05]. The PSC expressed the same view in its order on appeal.

> Gulf's witnesses have characterized Gulf's purchases from Maxine under the 1952 contract as demonstrating the value of the contract, its flexibility, and the prudence of Gulf's decision to participate in the contract. <u>We do not intend to review the prudence of the intitial decision to enter into the contract in 1952. We intend to focus our attention on the prudence of Gulf's action in entering into the 1974 extension and its action thereafter. We do not place much weight on the prudence or imprudence of Gulf's actions in administering the contract under its original term. We note, however, that the glowing references to the 1952 contract and its performance during the 1952-1974 period appear to be quite broad and overstated</u>. We will not treat these characterization in detail, but we will take note of the price of Maxine coal during this period.

Order No. 13452 at 3, 84 F.P.S.C. 6: at 297.

SUMMARY OF ARGUMENT

Gulf's arguments can be broken into three parts: the first two points on appeal challenge the PSC's finding of imprudence; the third point challenges the PSC's use of a market price analysis to calculate the amount of Gulf's refund; and the fourth point challenges the PSC's jurisdiction and power to order a refund for the period July, 1980 - December, 1982.

Gulf's first two points on appeal are traditional, routine arguments about the absence of competent, substantial evidence to support the PSC's actions. Rather than attacking the citations to the record that the PSC relies upon, Gulf trys to show that the record supports Gulf's theory of the case below. It is irrelevant whether there is some evidence to support the theory that Gulf advanced below. On appeal, the question is whether the record supports the PSC's decision.

During the four days of hearings, the PSC heard the testimony of six expert witnesses (two for the Staff and four for Gulf) and received thirty-eight exhibits, many of which included numerous subparts. The order on appeal is well-reasoned and its statements and conclusions are fully documented with references to exhibits and testimony. The PSC has the legal responsibility to resolve conflicts in the evidence, which it did. With a reasoned basis for its action, which is explained in the order on

appeal, and which is supported by competent, substantial evidence, the PSC's decision on imprudence should be affirmed.

All of the Commissioners who heard the evidence below, including the dissenting Commissioner, agreed that Gulf was imprudent and agreed with the market price analysis that was used to calculate the refund. The order on appeal goes to great lengths to explain why a market price analysis is appropriate and why a twenty percent range is unnecessary. The use of a delivered price analysis is supported by the evidence and is consistent with the PSC's 1974 order that established separate hearings to determine the utilities' fuel adjustment charges. There is no need to use a twenty percent range because the PSC adopted a delivered price analysis. The witnesses had suggested the use of a twenty percent range in conjunction with an F.O.B. mine price analysis. Once the PSC accepted a delivered price analysis, the PSC was acting within its discretion, and in keeping with the evidence, when it declined to use the twenty percent range.

Gulf's fourth point challenges the PSC's jurisdiction and power to order refunds of imprudently incurred fuel adjustment charges. As a review of the history and operation of the fuel adjustment clause shows, the clause had been revised several times since 1974. In essence, the clause operates as a continuous true-up of retroactive expenses and revenues. This true-up works both ways. In one instance, Gulf received $5.9 million from a retroactive adjustment.

The fuel adjustment clause operates to the utilities' benefit by eliminating regulatory lag. The clause allows the timely recovery, with interest, of all fuel and purchased power costs. The flip side of this benefit is that the PSC and the ratepayers must have assurances that the costs that have been collected are proper and were prudently incurred. The desire to collect fuel costs at virtually the same time that those costs are incurred should not be used as a weapon to divest the PSC of the jurisdiction and power to review the prudence of those costs.

Gulf's res judicata argument is misplaced. The PSC is different from a court, and one must be on guard against a doctrinaire application of principles that limit a regulatory agency's ability to protect the public.

The order on appeal should be affirmed in all aspects.

ARGUMENT

I. THERE IS COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT THE PSC'S FINDING THAT GULF'S ACTIONS WERE IMPRUDENT.

Order No. 13452, 84 F.P.S.C. 6: 295, can be divided into three basic parts: the first part discussed how Gulf was imprudent (Order No. 13452 at 2-10, 84 F.P.S.C. 6: at 296-304); the second part calculates the amount of damages and the refund (Id. at 10-17, 84 F.P.S.C. 6: at 304-11); and the third part addresses the PSC's authority to order a refund (Id. at 17-20, 84 F.P.S.C. 6: 311-14). Gulf's first two points on appeal challenge the PSC's finding of imprudence. In its two points, Gulf raises traditional, routine arguments about the absence of competent, substantial evidence to support the PSC's actions.

Gulf's approach is to present and discuss all of the evidence that supports the positions that Gulf advocated below. Rather than attacking each or most of the citations to the record that the PSC relies upon in the order on appeal, Gulf is trying to show that the record supports Gulf theory of the case below. It is irrelevant whether there is some evidence to support the theory that Gulf advanced below. On appeal, the question is whether the record supports the PSC's decision.

By taking Gulf's Brief [R. 47] and Motion for Reconsideration [R. 171] below and comparing them with Gulf's Initial Brief, it is apparent that Gulf is arguing the affirmative case, in favor

of its position, that a party would present to the lower tribunal that makes the initial findings of fact. Instead of explaining why the PSC is wrong, Gulf tries to show why Gulf is right.

As the PSC's Motion to Strike and Motion to Toll Time for Filing Answer Brief (filed on 20 May 1985) points out, most of Gulf's first point on appeal is a restatement of the arguments that Gulf presented in its Brief and Motion for Reconsideration below. The only substantive difference is that when Gulf referred to the Staff's witnesses in the filings submitted below, Gulf now, in its Initial Brief, refers to the PSC. Further, as discussed in the Corrected Version of the Citizens' Motion to Strike Initial Brief and Motion to Toll Time for Filing Answer Brief (filed on 24 May 1985), Gulf's second point on appeal [Initial Brief at i and 28] is the same as Gulf's second point in its Brief in the proceeding below [R. 47, 48, and 84].

Initial Brief:

> II. GULF'S ADMINISTRATION OF THE CONTRACT SINCE THE EXERCISE OF THE EXTENSION HAS BEEN PRUDENT AND IN THE BEST INTEREST OF GULF'S RATEPAYERS.

Brief below:

> II. GULF'S ADMINISTRATION OF THE CONTRACT SINCE THE EXERCISE OF THE EXTENSION HAS BEEN PRUDENT AND IN THE BEST INTEREST OF GULF'S RATE PAYERS [sic].

Although the Citizens tend to agree (as stated in Gulf's Response to Motions to Strike, paragraph 8, filed on 4 June 1985) that it is permissible for an appellant's initial brief to include the language and the arguments found in the brief and motion for

reconsideration that the appellant filed below, the continued use on appeal, of that language and argument is indicative of an appellant's desire to relitigate the initial findings of fact. It is one thing to reuse a legal argument. For the most part, a legal argument will be the same whether it is argued to a lower tribunal or to an appellate court. It is another thing to reuse a factual, weighing the evidence argument. In that instance, the lower tribunal and the appellate court serve different functions. The lower tribunal finds the facts, and the appellate court determines whether there is competent, substantial evidence to support the lower tribunal's findings.

It seems apparent that Gulf is treating the instant appeal as though it were a motion for reconsideration to the initial finder of facts. In a motion for reconsideration, Gulf would attempt to get the PSC to reevaluate the evidence because of a mistake, oversight, or misapprehension of law or fact, see Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315, 317-18 (Fla. 1974); Diamond Cab Co. of Miami v. King, 146 So.2d 889, 891 (Fla. 1962); Pingree v. Quaintance, 394 So.2d 161, 162 (Fla. 1st DCA 1981), which Gulf would hope would lead the PSC to recede from the initial findings of fact. Gulf is using this same strategy on appeal. Gulf is trying to get this Court to reevaluate the evidence, which Gulf hopes will lead this Court to make a new initial findings of fact.

Gulf's approach to the instant appeal flies in the fact of this Court's established standards of appellate review. This

Court has explained that it will not reweigh the evidence presented below and will not set aside a PSC order merely because it would have arrived at a different result had it made the initial decision. E.g., Gulf Power Co. v. Florida Public Service Commission, 453 So.2d 799, 803 (Fla. 1984). Provided that the order on appeal meets the essential requirements of law and is supported by competent, substantial evidence, it will be affirmed. E.g., Citizens v. Public Service Commission (Economy Energy Sales), 464 So.2d 1194 (Fla. 1985). As this Court has acknowledged, under section 120.68(12), Florida Statutes, this Court may not, on appeal, replace the PSC's judgment on an issue of discretion. E.g., Gulf Power Co., supra, at 805.

During the four days of hearings, the PSC heard the testimony of six expert witnesses and received thirty-eight exhibits, many of which included numerous subparts. The order on appeal is well-reasoned and its statements and conclusions are fully documented with references to exhibits and testimony.

The PSC has the legal responsibility to resolve conflicts in the evidence. Florida Retail Federation, Inc. v. Mayo, 331 So.2d 308, 311 (Fla. 1976). When there is a divergence of expert opinion about an action that is being considered, "[i]t is the Commission's prerogative to evaluate the testimony of competing experts and accord whatever weight to the conflicting opinions it deems appropriate." United Telephone Company v. Mayo, 345 So.2d 648, 654 (Fla. 1977)(citation omitted). Accord, Gulf Power Co., supra, at 805.

Having heard and reviewed the testimony and exhibits, the PSC's decision was contrary to Gulf's liking. As with all fuel adjustment proceedings, Gulf had the burden of proving the reasonableness and prudence of its actions and expenses. Florida Power Corp. v. Cresse, 413 So.2d 1187, 1190-91 (Fla. 1982). This Court has pointed out that the "'[b]urden of proof in a commission proceeding is always on a utility seeking a rate change...'", Id. at 1191 (citation omitted), and that, in a show cause action, the utility has the burden of justifying its action, City of Tallahassee v. Mann, 411 So.2d 162, 164 (Fla. 1981). As the party seeking to establish the affirmative of the issue in the administrative proceeding before the PSC, Gulf bore the burden of proof. See Florida Dept. of Transportation v. J.W.C. Co., Inc., 396 So.2d 778, 788 (Fla. 1st DCA 1981); Balino v. Dept. of Health and Rehabilitative Services, 348 So.2d 349 (Fla. 1st DCA 1977). Gulf failed to carry this burden. Having been unable to convince the PSC of the merits of its position, it is inappropriate for Gulf to ask this Court to reevaluate the evidence and to set aside the PSC's order because this Court might have reached a different result if this Court had made the initial decision.

Based upon Gulf's repeated reference to the dissenting opinion below, Order No. 13452 at 21-25, 84 F.P.S.C 6: at 315-19, Gulf appears to find solace in, or at least hopes to bolster its case upon, the existence of a minority position. Then-Chairman Gunter's dissent, however, goes to the legal issue, which is Gulf's fourth point on appeal, of whether the PSC's decision

violates the prohibition against retroactive ratemaking. The dissent clearly indicates that it agrees that Gulf acted imprudently and that the PSC's market price analysis is appropriate for calculating a refund. Id. at 22 and 23, 84 F.P.S.C. 6: at 316 and 317. Thus all of the Commissioners who heard the case agree that Gulf was imprudent.

Gulf comments that it acted with the best interest of the ratepayers in mind [Initial Brief at 28], as though this, in and of itself, proves prudence and justifies the collection of an expense. There is no requirement that a conclusion of imprudence be predicated upon a finding of bad faith, fraud, or any malfeasance. An action taken in good faith can still be imprudent.

> The commission is not required to find bad faith before it can disallow normally accepted operating expenses. Rather, the commission must determine if such expenses were wasteful, imprudently made, or inefficiently incurred. An expense incurred in the best of faith could be found to be imprudently undertaken or could be found to be the result of gross inefficiency. In such cases, the commission is not required to allow those expenses merely because they were made in good faith.

In Re Public Service Company of New Mexico, 50 PUR 4th 416, 436 (N.M. P.S.C. 1982). For example, a utility may have, in good faith, paid $9800 for a coffee-maker, but that does not mean that the expense is automatically passed on to ratepayers. This Court made a similar point in Florida Power Corp. v. Creese, supra, at 1190-91, when it reject the utility's argument that, merely

because the utility had incurred a fuel related expense, the utility was automatically entitled to recover the cost without being subject to scrutiny.

Gulf is also fond of mischaracterizing the refund in the order on appeal as a "penalty." [Initial Brief at 16, 26, 36, 38, 41, 42, 43, 48, and 49]. (As an aside, on the bottom of page 41 of the Initial Brief, Gulf refers to transcript page 1176 and makes it appear that one of the Staff's witnesses used the word "penalty" to describe the refund. A review of the transcript shows that the witness used no such word.) Rather than a penalty, the refund represents a disallowance of imprudently and unreasonably incurred expenses. [T. 501-02]. <u>See generally</u> Sec. 366.01, 366.06, and 366.07, Fla. Stat. In <u>Gulf Power Co. v. Florida Public Service Commission</u>, <u>supra</u>, at 806, Gulf raised a similar penalty allegation when it used the word "penalty" to describe the PSC's revenue adjustment for excess capacity. In correcting Gulf's characterization, this Court explained that a utility is entitled to earn a return only on prudently incurred, used and useful investment and that an adjustment that disallows the investment in an improper item is not a penalty.

> This Court has held that the rate base upon which a utility should be afforded an opportunity to earn a return is not every dollar investment made but only that investment in assets devoted to public service at the time rate base is quantified. [Citations omitted.]...
>
> ...
>
> Gulf has mischaracterized this $5,391,931 revenue imputation as a

> penalty. It is, rather, an adjustment to rate base to exclude capacity which is not currently serving customers. It is clearly within the delegated authority of the PSC to make such an adjustment.

Id. Likewise, a utility has no entitlement to collect every dollar that it spends. The only expenses that it can collect are those that it prudently incurred. All other expenses should be disallowed.

During the proceeding below, Mr. Foxx, one of the Staff's witnesses, testified that there were three basic issues: (1) whether the 1974 contract extension was prudent; (2) whether the extension contract had been prudently administered since 1974; and (3) whether the reclamation and closure cost accrual had been administered appropriately. [T. 499]. Gulf lost the first two of these broad issues, but won the third, Order No. 13452 at 16, 20, and 21, 84 F.P.S.C. 6: at 310, 314, and 315; In re: Investigation of Fuel Cost Recovery Clauses of Electric Utilities (Gulf Power Company - Maxine Mine), Order No. 14089 at 2, 85 F.P.S.C. 2: 98, 99 (1985) [R. 229, 230; A-11,12].

The prehearing order separated these three basic issues into twenty detailed, specific issues of law, fact, and policy that included the standard of prudence to be applied to Gulf. Order No. 12491, 83 F.P.S.C. 9: 119 [A-1]. See generally Citizens v. Public Service Commission (Florida Power & Light Co.), 435 So.2d 784, 787 (Fla. 1983) (purpose of raising issues is "to put parties on notice and to ensure an adequate mustering of evidence"). Throughout the hearing, the witnesses were

questioned upon and discussed the appropriate standard of prudence and its application to Gulf and the Maxine Contract. [E.g., T. 500-501, 1200]. The order on appeal devotes a whole section to discussing the PSC's standard of prudence, Order No. 13452 at 10, 84 F.P.S.C. 6: at 304, and the Order as a whole shows a conscientious effort to explain and apply that standard to the facts. Under McDonald v. Dept. of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977), and its progeny, e.g., Gulf Coast Electric Cooperative, Inc. v. Florida Public Service Commission, 462 So.2d 1092, 1094-95 (Fla. 1985); City of Tallahassee v. Florida Public Service Commission, 433 So.2d 505 (Fla. 1983), the PSC is allowed to develop its non-rule standards on a case-by-case basis, provided that the policy decision is supported by the record and explained in the final order.

With a reasoned basis for its action, which is explained in Order No. 13452, 84 F.P.S.C. 6: 295, and which is supported by competent, substantial evidence, the PSC's decision on imprudence should be affirmed. See Sec. 120.68(14), Fla. Stat.

II. THE PARTICULAR MARKET PRICE ANALYSIS THAT THE PSC USED TO CALCULATE THE REFUND IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE, IS FULLY EXPLAINED AND DOCUMENTED IN THE ORDER ON APPEAL, AND COMPORTS WITH THE ESSENTIAL REQUIREMENTS OF LAW.

Gulf's third point on appeal challenges the PSC's use of a market price analysis to calculate the amount of Gulf's refund. As mentioned in the first point of the instant Answer Brief, all of the Commissioners who heard the evidence below, including the dissenting Commissioner (Order No. 13452 at 22, 24, 25, 84 F.P.S.C. 6: at 316, 318, 319), agree that the use of a market price analysis is proper. Thus all of the finders of fact found that it is appropriate to use a market price analysis to calculate a refund.

Gulf's strategy in its third point on appeal is similar to its approach on its first two points. In essence, Gulf is arguing against the PSC's adoption of a market price analysis. Rather than attacking the evidence that supports the analysis, Gulf is arguing against the use of the analysis in the first place. Gulf has carried this to the extreme of reversing the burden of proof below and of miscasting the standard of proof below. In discussing the PSC's rejection of a twenty percent range around the average market price, Gulf's Initial Brief (at page 41, citations omitted) states that, "the Commission was required to produce competent evidence supporting its position." Gulf is incorrect for three reasons. First, as discussed earlier in this Brief, Gulf, not the PSC, has the burden of proof.

Second, the standard of proof below is proof by a preponderance of the evidence. Agrico Chemical Co. v. State Dept. of Environmental Regulation, 365 So.2d 759, 763 (Fla. 1st DCA 1978), cert. denied, 376 So.2d 74 (Fla. 1979); Fitzpatrick v. City of Miami Beach, 328 So.2d 578, 579 (Fla. 3d DCA 1976). The competent, substantial evidence test is the standard that an appellate court uses to determine whether the evidence below supports the lower tribunal's factual findings. And third, the two cases that Gulf cites, Florida Bridge Co. v. Bevis, 363 So.2d 799 (Fla. 1978), and General Development Utilities, Inc. v. Hawkins, 357 So.2d 408 (Fla. 1978), were instances in which the PSC based its decision on evidence that was outside the record (General Development Utilities; see Gulf Power Co. v. Florida Public Service Commission, supra, at 805) or upon facts with no basis in the record (Florida Bridge). Neither situation exits here. No one has suggested that the PSC based its decision on non-record material, and it is difficult, if not impossible, to argue that the acceptance or rejection of the twenty percent range is a fact that must be based upon evidence. Rather, the use or non-use of a range is a policy decision, which the PSC explained in its Order, and which is consistent with all of the action taken below.

The order on appeal goes to great lengths to explain why a market price analysis is appropriate and why a twenty percent range is unnecessary. On page 11 of Order No. 13452 (84 F.P.S.C. 6: at 305), the PSC notes that the witnesses presented "several approaches" for comparing coal costs. Gulf's witnesses proposed

two theories: a comparison of "the average delivered cost of fuel, as burned, on a plant by plant basis," and a "life of the contract analysis." As was within its discretion, the PSC rejected Gulf's theories and adopted, instead, a market price analysis.

In making this decision, the PSC acknowledged that the "use of a market price comparison involves imperfections." Order No. 13452 at 12, 84 F.P.S.C. 6: at 306. The PSC explained, however, that all four of the Staff's price analyses showed that the price that Gulf had paid for Maxine coal was excessive, and that, after considering the evidence, the most appropriate approach was a delivered price analysis.

> It is expected that different market values would be derived by each of the above methods, especially since two were delivered price analyses and two are F.O.B. mine price analyses. However, there is one salient point to be made with regard to all four analyses: the price Gulf paid for Maxine coal is shown to exceed the market value in all four methods.
>
> While we believe there is a validity to all the methods used by the Staff and Hill and Associates, we are left with the problem of selecting the most valid method or combination of methods, or deducing from the record the most valid estimate of a market price. We find that a delivered price analysis is the most appropriate in this case. This is the view of Mr. Hill, since his was a delivered price analysis. Moreover, Gulf's witness testified that a delivered price analysis is more appropriate (TR-1256, 1257, 1258).

Id., 84 F.P.S.C. 6: at 306.

Gulf takes issue with the PSC's statement that, "Gulf's witness testifed that a delivered price analysis is more appropriate (TR-1256, 1257, 1258)." Initial Brief at 38. Although it is true that none of Gulf's witnesses were in favor of a refund, no matter how calculated, the transcript cites do support the PSC's position. In his testimony, Mr. Gibbons argues that Gulf's delivered cost of coal has been better than other utilities' delivered prices [T. 1256, lines 2-6], that utilities make their purchase decisions based upon delivered cost [T. 1256 (line 19) - 1257 (line 6)], that the proper way to evaluate utilities is to look at delivered price [T. 1257, lines 7-10], and that one ought to look at delivered cost as a whole rather than looking at each of the components of that cost [T. 1257 (line 11) - 1258 (line 4)]. Thus the PSC's decision is consistent with the evidence.

In addition to being consistent with the evidence, the choice of a delivered price analysis is in accord with the PSC's 1974 order that, in effect, established the fuel adjustment clause as an item to be considered outside of a utility's rate case proceeding. In <u>In re General investigation of fuel adjustment clauses of electric companies</u>, Order No. 6357 (Nov. 26, 1974) [A-13], the PSC started the procedure for holding separate hearings to determine the utilitys' fuel adjustment charges. As part of that Order, the PSC explained that the delivered price of fuel was the appropriate cost of to be recovered through the fuel clause.

> The primary concern of some parties involved herein is whether any costs other than the actual invoice price of the fuel are included in the total fuel expenses and thereafter passed on through the clause to the customers. ... To eliminate any doubts in the public's mind and to eliminate the small amount of latitide now afforded the utilities, we conclude and so find that only the delivered cost of fuel to the generating plant site be used in determining a utility's fuel adjustment charge. Transportation expenses have been included as a part of the fuel costs which may be recovered through the clause since they are a volatile item and represent, in many cases, such a substantial part of the fuel costs that a slight change in the expenses can have a significant impact on the utility's earnings. Then, too, the transportation cost may be affected by a number of factors such as price increases by the transportation company, changes in methods of transporting the fuel, and charges in the type of fuel that is used by the utility. ... It is, then, appropriate to allow transportation costs to be recovered through the clause.

Id. at 4 [A-16]. Thus, for ten years, utilities have been using the fuel adjustment clause to recover the delivered price of fuel. It seems only appropriate to use a delivered price analysis to calculate a refund.

After adopting the delivered price analysis, the Order on appeal goes on to explain that there is no need to use a twenty percent range around the delivered price. Although the Staff's witnesses had used a twenty percent range, the range had been used with an F.O.B. mine price analysis, which is different from the delivered price analysis that the PSC found to be appropriate.

> Gulf's witnesses proposed that a range of at least 20% be placed about the average delivered market price before a premium is established. We do not agree. <u>The twenty percent range was adopted by Mr. Foxx as a means to adjust for the apparent data error in his F.O.B. mine analyses and for the fact that an F.O.B. mine analysis ignores the effect of varying transportation costs.</u> We would agree that a range, such as twenty percent, may be appropriate under some circumstances when making an F.O.B. mine price analysis. <u>But we see no justification for a range on an average delivered price analysis</u>.

Order No. 13452 at 12, 84 F.P.S.C. 6: at 306. The record supports the PSC's explanation. Mr. Foxx used a twenty percent range because he was recommending an F.O.B. price analysis. [T. 196-97]. Likewise, Mr. Hill was endorsing the use of a twenty percent range in the context of Mr. Foxx's F.O.B. analysis. [T. 1175-76]. Thus the record supports the PSC's reasons for declining to adopt a twenty percent range.

On page 41 of the Initial Brief, Gulf states:

> As the Commission's consultant [Mr. Hill] recognized, in order to be statistically sound, the use of a limit based on some given number of standard deviation above the mean of the sample of estimates is the more statistically sound method of measuring both prudence and a "penalty." Tr 1176.

This is an inaccurate reading of transcript page 1176. First, Mr. Hill never uses the word "penalty." Second, Mr. Hill is actually endorsing the use of a twenty percent range in conjunction with an F.O.B. mine price analysis. Although he says that the use of standard deviations <u>might</u> be better than the use

of a twenty percent range, he never says that it would be wrong or that there would be any problem with using the twenty percent range. Therefore, the PSC might draw the same conclusion. And third, given that Mr. Hill's statement about standard deviations is given in light of an F.O.B. analysis, once the PSC rejected the F.O.B. analysis in favor of a delivered price analysis, it would be reasonable for the PSC to assume that Mr. Hill's statement had limited application to the refund calculation.

After making the statement that has just been quoted, Gulf goes on to discuss statistical theory. Initial Brief at 41-42. The only source that Gulf gives for this discussion is Exhibit 4-B, which Mr. Gibbons sponsored. Mr. Gibbons acknowledged, however, that he is not a statistician [T. 1316], and, in response to questions about basic statistical principles, stated that he did not feel qualified to answer the questions. [T. 1316-17]. Thus it is no wonder that none of the Commissioners, including the dissenting Commissioner, accepted Gulf's argument about standard deviations.

The case sub judice is similar to the situation that the PSC faced in Gulf Power Co. v. Florida Public Service Commission, supra. In that case, one of the issues on appeal was the PSC's adjustment to the level of coal inventory that was used to determine the amount of working capital in Gulf's rate base. Id. at 804-05. In discussing the PSC's resolution of the coal inventory issue, this Court observed that although the PSC had rejected both sides' arguements, there was sufficient evidence

from which the PSC could choose a reasonable alternative to the positions that the parties were advocating.

> The PSC was confronted with competing testimony from Gulf and the commission staff regarding what is to be a reasonable coal inventory. It is the PSC's prerogative to evaluate the testimony of competing experts and accord whatever weight to the conflicting opinions it deems necessary. See United Telephone Co. v. Mayo, 345 So.2d 648, 654 (Fla. 1977). Although the PSC rejected both Gulf's 60-day nameplate policy and the staff's 90-day projected burn level as necessarily proper, it was presented with sufficient evidence to enable it to choose a reasonable alternative. Inasmuch as the PSC was not convinced that Gulf's position was supported by substantial competent evidence, it was left with three possible alternatives; to allow Gulf's fuel inventory proposal without competent substantial evidence, to allow Gulf no coal inventory at all or, to make some other reasonable determination. ... Cognizant of the fact that Gulf needs coal to fire its base-load facilities, the PSC was precluded by statute and common sense from totally disallowing all funds for coal inventory.

Id. at 805. Likewise, in the instant case, the PSC can use the evidence to fashion a reasonable method for calculating a refund. Given that all of the Commissioners agree that Gulf acted imprudently, the PSC should be entitled to develop an appropriate method for determining the amount of the refund. Considering that, unlike in Gulf Power Co., the PSC did not reject the Staff's position, but merely chose from among the four methods that the Staff presented, Order No. 13452 at 12, 84 F.P.S.C. 6:

at 306, the PSC's method for calculaing a refund should be affirmed.

III. THE PSC HAS THE JURISDICTION AND POWER TO ORDER GULF TO REFUND, WITH INTEREST, IMPRUDENTLY INCURRED AND EXCESSIVE FUEL ADJUSTMENT CHARGES.

Gulf's fourth point on appeal is a challenge to the PSC's jurisdiction and power to order refunds of imprudently incurred fuel adjustment charges. To put Gulf's argument into perspective, it may be helpful to briefly review the history and operation of the fuel and purchased power cost recovery clause ("the fuel adjustment clause" or "the fuel clause").

Gulf starts its argument by referring to two Opinions of the Florida Attorney General, 1974 Op. Att'y Gen. Fla. 074-288, (Sept. 20, 1974); 1974 Op. Att'y Gen. Fla. 074-309 (Oct. 9, 1974), which Gulf argues are dispositive (or, at a minimum, highly persuasive) of Gulf's retroactive ratemaking allegation. Initial Brief at 43-44. There is a problem, however, with Gulf's argument. Both of these Attorney General's Opinions pertain to the fuel adjustment clause before it was restructured in 1974. As a result of these Opinions, the PSC, the Staff, the utilities, and the Citizens took immediate action to revise the operation of the fuel clause. At the end of October, 1974, the PSC approved a stipulation, to which Gulf was a party, that established monthly fuel adjustment hearings. _In re: General investigation of fuel adjustment clauses of electric companies_, Order Nos. 6332 (Oct. 29, 1974) [A-28] and 6332-A (Oct. 31, 1974) [A-33]. Within a month of this stipulation, the PSC established a fuel adjustment procedure to overcome the deficiencies that the Attorney General had noted. Order No. 6357 [A-13]. Under this procedure, the

utilities recovered their costs two months after those costs were incurred. Id. at 5-10 [A-17-22].

This cost recovery mechanism stayed in place until it was modified in 1980, In re: General investigation of fuel cost recovery clause. Consideration of staff's proposed prjected fuel and purchased power cost recovery clause with an incentive factor, Order no. 9273, 80 F.P.S.C. 3:6 (1980) [A-35], and again in 1981, In re: Full investigation of the fuel cost recovery clauses of electric companies, Order no. 10093, 81 F.P.S.C. 6: 158 (1981) [A-45]. Under this procedure, which is still in place, a utility's fuel adjustment charge in any six-month period (for example, April-September, 1985) is based upon the projected fuel cost in that six-month period (April-September, 1985) plus the difference between the fuel adjustment revenues that the utility actually collected in past periods (in our example, October, 1984-March, 1985 and April-September, 1984) and the fuel expenses that were incurred in those past periods. If the utility collected too much revenue in the past, the amount is refunded in the future with interest. On the other hand, if the utility collected too little revenue in the past, then that amount is collected in the future with interest. Thus the fuel adjustment clause is a continuous true-up of retroactive expenses and revenues. See generally Citizens v. Public Service Commission (Oil-Backout), 448 So.2d 1024, 1026 (Fla. 1984) (discussion of the true-up, with interest, under the Oil-Backout Rule); Florida Power Corp. v. Cresse, supra, at 1190-91 (discussion of the fuel adjustment true-up procedure). To give

just one example of the clause's retroactive mechanics, in 1980, when the fuel clause was modified to allow for true-ups and projections, the PSC allowed the utilities, including Gulf, to recover two-months' worth of fuel expense that the PSC and the utilities claimed had never been collected in the past, In re: General investigation of fuel adjustment clauses of electric utilities, Order No. 9306 at 5-6, 80 F.P.S.C. 4:2, 7 (1980) [A-60-61], a decision that this Court affirmed, on the basis of competent, substantial evidence, in Citizens v. Florida Public Service Commission (Transition Adjustment), 403 So.2d 1332 (Fla. 1981). Gulf ultimately received $5.9 million from this retroactive adjustment. In re: Investigation of fuel cost recovery clauses of electric utilities, Order No. 10684 at 16, 82 F.P.S.C. 3: 220, 235 (1982)[A-80].

The fuel adjustment clause operates to the utilities' benefit by eliminating regulatory lag. The clause allows the timely recovery, with interest, of all fuel and purchased power costs. The flip side of the benefit is that the PSC and the ratepayers must have assurances that the costs that have been collected are proper and were prudently incurred. The desire to collect fuel costs at virtually the same time that those costs are incurred should not be used as a weapon to divest the PSC of the jurisdiction and power to review the prudence of those costs.

There is nothing magical about the six-month fuel adjustment periods. Rather than establishing discrete, mutually exclusive cost recovery time frames, the six-month cost recovery periods

serve to facilitate the utilities' collection of costs. The costs charged to customers in any one cost recovery period are the result of past practices, which, if imprudent, adversely affect customers' rates.

> The nature of the fuel adjustment is continuous and the segregation of charges to fuel cost into 6 month periods is for ease of administration only. Indeed, fuel purchases in any one period will affect future periods, as fuel cost is charged on an "as burned" basis at weighted average inventory cost. Thus, instead of fuel costs collected in any one period reflecting only fuel purchased during that period, those costs reflect the weighted average cost of purchases during and prior to that period. In addition, it is quite common for utilities to receive retroactive adjustments to fuel price and transportation costs well after the close of the original transaction to which they relate.

In re: Continuing Surveillance and review of fuel cost recovery clause of electric utilities, Order No. 11572 at 7, 83 F.P.S.C. 2: 11, 17 (1983). The PSC noted this in the Order on appeal.

> It should be noted that there is a distinction between when a transaction occurs and when its cost is recovered through the clause. Fuel is purchased at incremental cost, that is, payment is for the current price of fuel. Fuel cost is then charged to the fuel adjustment clause on an as-burned average inventory price. A shipment of coal is burned (from an accounting standpoint) in proportion to total inventory burn. Therefore, there is normally a mismatch between the time coal is paid for and when it is fully charged to the clause.
>
> Gulf's witness, Mr. Gilchrist, testified that Gulf's current fuel adjustment

> charge still contains the cost of Maxine Mine coal purchased during 1980, 1981, and 1982. Thus, even if the Commission could not disallow fuel expense passed through the clause before October 1, 1981, it is not precluded from disallowing costs of transactions occurring before that time. The only limitation would be whether the cost had been passed through the clause before October 1, 1981. The Commission may look at the prudence of any management decision that affects the price of fuel over which it retains jurisdiction.

Order No. 13452 at 19-20, 84 F.P.S.C. 6: at 313-14.

Gulf's retroactive ratemaking challenge strikes at a well-crafted balance between the elimination of regulatory lag and the necessary assurances that only prudently incurred expenses are recovered from ratepayers. Given the operation of the fuel adjustment clause, Gulf's retroactive ratemaking argument is inapplicable to the case at bar. Although Gulf fails to go into any discussion about the specific retroactive ratemaking cases that it cites in its Initial Brief (at page 44), those and other retroactive ratemaking cases involve base rates set in rate cases that consider overall rates of return. The fuel adjustment clause is different. The fuel adjustment charges are based upon costs rather than upon rates of return. In the fuel hearings, no attempt is made to establish, maintain, or even consider the utilities' overall rates of return. Thus Gulf's retroactive ratemaking argument is misplaced.

Gulf's res judicata argument (Initial Brief at 4748) is equally misguided. The PSC is different from a court, and one must be on guard against a doctrinaire application of principles

that limit a regulatory agency's ability to protect the public. See Reedy Creek Utilities Co. v. Florida Public Service Commission, 418 So.2d 249, 253 (Fla. 1982). Although one can argue that the doctrine of res judicata is inapplicable to the PSC, see Redwing Carriers, Inc. v. Mason, 177 So.2d 465 (Fla. 1965); Colorado Ute Electrical Assn., Inc. v. Public Utilities Commission of Colorado, 602 P. 2d 861, 865 (Colo. 1979), it is enough to note that fuel adjustment charges are set in a continuous proceeding that allows retroactive adjustments in Gulf's favor.

Gulf also argues (Initial Brief at 48-49) that the refund period exceeds the time frame established in In re: Investigation of Fuel Cost Recovery Clauses of Electric Utilities (Gulf Power Company-Maxine Mine), Order No. 11408, 82 F.P.S.C. 12: 121 (1982) [A-83]. This Order, however, was issued at an early point in the prehearing process and ten months prior to the issuance of the prehearing order, Order No. 12491, 83 F.P.S.C. 9: 119 [A-1]. A review of the prehearing order shows that the very first issue is Gulf's retroactive ratemaking issue. Id. at 3, 83 F.P.S.C. 9: at 121 [A-3]. Given that the PSC can determine what issues will be litigated in a proceeding, Citizens v. Public Service Commission (Florida Power & Light Co.), supra, at 787, the prehearing order (as well as the Staff's prefiled testimony) provided Gulf with notice of the period under review. Gulf's argument, however, is not that it was denied notice of what was occurring and an opportunity to be heard. Rather, Gulf's argument is that the PSC lacked jurisdiction over the dollars

associated with certain time periods. Aside from all this, Gulf's reliance upon Order No. 11408, 82 F.P.S.C. 12:121, rings hollow. Gulf wants to use this Order to limit the PSC's jurisdiction. Yet this Order identifies a refund period that starts nine months earlier (January 1, 1980 versus October 1, 1980) than Gulf is willing to accept. Gulf cannot have it both ways. Either the Order prevails and Gulf must give up nine months, or the Order is irrelevant for establishing time periods. The latter is the case.

As with all fuel adjustment true-ups, see Order No. 9306 at 7, 80 F.P.S.C. 4: at 8 [A-62]; Order No. 9273 at 8, 80 F.P.S.C. 3: at 15 [A-42], Gulf was directed to make its refund with interest. Gulf takes issue with this routine interest provision by calling it pre-judgment interest on an unliquidated claim. (Initial Brief at 49.) Gulf's position is without merit. As has been discussed, the PSC is different from a court. Its orders are not judgments in the judicial sense of that word. It is deceptive to compare a PSC rate or fuel adjustment order to a private tort or contract damage suit. The PSC never awards money damages. Instead, the PSC determines which expenses a utility can collect from customers and establishes the rates and charges that are billed for service. Gulf pre-judgment interest argument applies to tort or contract judgments. Its use in a regulatory proceeding is inapposite.

The PSC's action comports with the essential requirements of law. Once it determined that Gulf had imprudently incurred

certain fuel adjustment costs, the PSC had the jurisdiction and power (and indeed the obligation) under sections 366.01, 366.06, and 366.07, Florida Statutes, to order Gulf to make a refund with interest. The PSC's decision to base the refund on the period July, 1980 - December, 1982 should be affirmed.

CONCLUSION

The order on appeal is supported by competent, substantial evidence and comports with the essential requirements of law. First, there is ample evidence to show that Gulf's actions in regard to the Maxine Mine Contract were imprudent. Second, the PSC has fully documented and explained the market price analysis that it used to calculate the refund. And third, consistent with the operation of the fuel adjustment clause, the PSC has the jurisdiction and power to base the refund on the period July, 1980 - December, 1982.

Order No. 13452, 84 F.P.S.C. 6:295, should be affirmed in all respects.

Dated: June 24, 1985.

Respectfully submitted,

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CERTIFICATE OF SERVICE
Case No. 66,632

I HEREBY CERTIFY that a true copy of the Citizens' Answer Brief and Appendix has been furnished by U.S. Mail or by hand-delivery to the following parties on this 24th day of June, 1985.

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