IN THE SUPREME COURT OF FLORIDA

GULF POWER COMPANY,

Appellant,

vs.

Case No.: 66,632

FLORIDA PUBLIC SERVICE COMMISSION,

Appellee.

REPLY BRIEF OF APPELLANT

G. EDISON HOLLAND, JR.
Beggs & Lane
P. O. Box 12950
Pensacola, Florida 32576-2950
904/432-2451
Attorneys for Appellant
Gulf Power Company

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PRELIMINARY STATEMENT

The Public Service Commission will be referred to as the "Commission" or "PSC". The Office of the Public Counsel will be referred to as "Public Counsel" or "PC". The Answer Brief of the Commission will be designated "PSC ____" and the Appendix thereto as "PSC A-_____". The Answer Brief of Public Counsel will be designated "PC ____" and the Appendix thereto as "PC A-_____". The Initial Brief of Gulf Power Company will be designated as "GPC _____" and the Appendix thereto as "GPC A-____".

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

ARGUMENT

I. THE COMMISSION'S DECISION HEREIN IS NOT ONLY UNSUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE, ITS USE OF 20/20 HINDSIGHT AND APPLICATION OF NEW STANDARDS TO DECISIONS MADE YEARS AGO CONSTITUTES A MANIFEST DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF THE LAW.

The Commission and Public Counsel, in their briefs, would have the Court rely upon their mere assertions that the evidence relied upon by the Commission is competent and substantial. The Court can determine that the standard has been met only after a full and complete review of the record. Florida Retail Federation, Inc. v. Mayo, 331 So.2d 308, 312 (Fla. 1976); Citizens v. Public Service Comm'n., 425 So.2d 534, 538 (Fla. 1982). Gulf, in its initial brief, took each of the principal factual determinations made in the order and showed that those determinations were not supported by competent substantial evidence and did not meet the essential requirements of the law. Public Counsel has not even attempted, and the Commission has failed to show otherwise.

The most revealing aspect of the briefs of the Commission and Public Counsel is their total failure to address the application of 20/20 hindsight and new policies and standards to Gulf's prior actions, in the determination of imprudence. Similar actions by the Commission were recently reversed by this Court. Florida Power Corp. v. Pub. Serv. Comm'n., 456 So.2d 451 (Fla. 1984).

Here, the Commission applied its own standards and procedures adopted in June of 1983 to the actions of management of Gulf Power Company taken as far back as fifteen years prior to the date of the generic determination of standards and procedures for fuel procurement. Tr. 691-694. In the generic order setting forth the new standards to be applied to fuel procurement, the Commission determined that it should adopt "broad guidelines" for fuel procurement so that "utitlities will then be placed on notice as to the basic procurement standards we [the Commission] intend to apply." (Order No. 12645, p. 5, GPC A-B) The Commission then applied the standards to the management decisions made by Gulf years before.

Two examples of application of 20/20 hindsight to Gulf's actions are the Commission's determination regarding a formal bid process and the negotiation of a "market-out" provision. Gulf Power Company did not seek bids prior to entering into the Maxine extension. It was aware of the price of alternative coals. Tr. 910-911. The Commission's new standards essentially require a "bid process." (Order No. 12645, p. 13, GPC A-B) The commission further found that Gulf should have negotiated a "market-out" agreement with Alabama Power Company. The Commission's new standards recommend that the companies require in their long-term contracts "adequate well-defined remedies" for "unacceptable high price over protracted periods of time." (Order No. 12645, p. 14, GPC A-B) The Commission's "experts" had difficulty finding any such

contracts even in the 1982-83 time period. Tr. 1158-1162.

This Commission did not have standards for fuel procurement in the 1970s. Likewise, the level of sophistication of fuel procurement and the management techniques available to Gulf's management in the early 1970s was different than today. The oil embargo of 1973 and subsequent events resulting in a continuing spiral in fuel prices changed everything. Prior to the oil embargo, fuel in the United States was a relatively inexpensive commodity. Fuel was a small component of the overall cost of producing electricity. It is understandable that the techniques for analyzing and purchasing fuel were not as fully developed as they now are. It is totally inequitable to apply today's standards to decisions made when circumstances were totally different. This action on the part of the Commission is unsupported by the competent substantial evidence, and constitutes a departure from the essential requirements of the law.

In its brief, the Commission has relied almost entirely upon the testimony of Mr. Foxx in its argument that its decision regarding prudency is supported by competent substantial evidence. In that portion of its order relating to the prudency determination, Mr. Foxx's name is not even mentioned. (Order No. 13452 p. 2-10, GPC A-A) The Commission is correct that in Gulf's initial brief it did not challenge the expertise of Mr. Foxx. (PSC 18) There was no need to do so. Now recognizing that the correspondence and memorandum

relied upon by it in its order does not support the conclusions reached by the Commission, the Commission seeks to rely almost entirely on Mr. Foxx's interpretation of the evidence. Mr. Foxx is not an expert on fuel procurement.[1] Even if Mr. Foxx were an expert, his gross mischaracterizations of the documentary evidence relied upon by him, do not constitute competent and substantial evidence. The documents speak for themselves. Only by innuendo, taking portions of correspondence out of context, and ignoring the direct testimony to the contrary was the Commission even able to find any support for its conclusions.[2]

All of the Commission's findings regarding Gulf's administration of the contract following the extension rest upon the assumption that Gulf had the right to terminate the contract on twelve months' notice based on high price. Gulf,

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[1]Mr. Foxx had no experience in fuel procurement and his education in the area was limited to several seminars. Tr. 80-121 Chitty and Co. v. Preston H. Haskell Co., 423 So.2d 460 (Fla. 1st D.C.A. 1982); Trustees of Cent. States Southeast and Southwest Areas Pension Fund v. Indico Corp., 401 So.2d 904 (Fla. 1st D.C.A. 1981)

[2]Two examples are the Commission's determination that Gulf made an irrevocable decision to extend the contract in 1972 and that it intended to extend for only three years. (PSC 20-21) The documentary evidence indicates that Southern did not request and Gulf did not give formal authorization for the extension until December 1973. (Ex. 1, Vol. 1, p. 47f, 47m, 54). The Commission's finding regarding the extension and accusations of 20/20 hindsight are nothing more than an attempted smokescreen to hide its own gross application of 20/20 hindsight to Gulf's actions. The Commission essentially admits that the documentation supports Gulf's contention that the references to extending the contract for three years relate only to the expected production life, which under the clear terms of the contract would have resulted in early termination. (PSC 4, 21)

in its initial brief, showed conclusively that such a right did not exist. No attempt has been made by either the Commission or Public Counsel to contradict this fact. The Commission recognizes the efforts made by Gulf and Southern Services to negotiate a termination of the contract. (PSC 24, 25) The uncontradicted evidence is that Gulf and Southern made every effort, short of the illegal breach of the contract, to reduce the impact of Maxine coal on Gulf's ratepayers. Had Gulf terminated the contract as the Commission, in retrospect, would have done, the impact on Gulf's ratepayers would have certainly been significantly greater. (See GPC 32-35). Recognizing its failure to show imprudence in Gulf's administration of the contract after the extension, the Commission circles back and argues that the prudence of administration is irrelevant since Gulf should not have extended the contract. (PSC 26) Once again the Commission is forced to apply 20/20 hindsight.

The Commission admits that it was presented with conflicting evidence as to the calculation of market price in determining the penalty to be imposed on Gulf Power. (PSC 27) It ultimately chose one of four possibilities presented by Mr. Foxx. One must assume that had it chosen one of the ten or more methodologies presented by Mr. Foxx and Mr. Hill, any one of the ten would be "supported by competent substantial evidence." Each of these ten resulted in far different premiums. There is certainly no bias in favor of Gulf in the

methodology selected. (PSC 30) To the contrary, it results in the largest premium of those methodologies advocated by Mr. Foxx and is over three times greater than that resulting from the methodology producing the lowest penalty. (Tr. 196)

The Commission's selection of the delivered price analysis is not supported by competent substantial evidence. Its use is contradicted by all of the other methodologies put forth by the various witnesses and the vast differences in the results. This was the very reason that all of the witnesses advocated a margin for error. Gulf urges the Court's review of Exhibit 4-B, the A. D. Little analysis of "market price." The analysis went uncontradicted and was in fact supported by Mr. Hill (GPC A-C) (Tr. 1175-1176) Moreover, contrary to the assertions of Public Counsel, Mr. Hill, advocated "some tolerance for error" regardless of the methodology selected. (Tr. 1175-1176, 1203) It is inconceivable that the Commission could select one of at least ten methodologies presented to it for calculating a "penalty," each of which has widely varying results, and conclude that no margin for error need be allowed.

II. THE FUEL ADJUSTMENT PROCEEDINGS CONSTITUTE "RATE MAKING" AND ARE THEREFORE SUBJECT TO THE DOCTRINES OF RETROACTIVE RATE MAKING AND RES JUDICATA.

The Commission contends that the fuel adjustment proceeding is a "continuous proceeding" where retroactive rate making and res judicata have no applicability. The

Commission's representations of the holdings cited in support of these contentions border on misrepresentations of the legal principles established by this Court. Among these contentions is that retroactive rate making applies only to rates as they are affected by changes in rate base and not expenses. (PSC 33, 35) Neither this Court, nor the Commission have ever attempted to so severely restrict the prohibition against retroactive rate making. Moreover, the Attorney General, in opinions accepted by all of the parties to this proceeding, determined that any attempt to retroactively adjust for excess revenues which might have been collected under twelve years of prior fuel adjustment clauses would constitute "retroactive rate making" and was thus prohibited. The Commission conveniently ignores the well-reasoned opinion of the Attorney General. (AGO 074-288, 074-309, GPC A-D)[3]

The Commission's attempt to analogize the prescription of depreciation allowances to the rate making function of the fuel adjustment proceedings is totally misplaced. In

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[3]The Commission apparently concedes that the fuel adjustment proceedings constitute "rate making." The Commission asserts, however, that the retroactive rate making prohibition does not apply to "expenses" and that the Commission may "adjust for fuel related matters on an after-the-fact basis." Even the most strained interpretation of the cases cited by the Commission do not support this proposition. The issue of retroactive rate making is not even discussed in Florida Power Corp. v. Cresse, 413 So.2d 1187 (Fla. 1982), Citizens v. Public Service Commission, 403 So.2d 1332 (Fla. 1981), or Pinellas County v. Mayo, 218 So.2d 749 (Fla. 1969). In Richter v. Florida Power Corp., 366 So.2d 798 (Fla. 2d D.C.A. 1979), the Court recognized the applicability of the prohibition against retroactive rate making to the fuel adjustment proceeding.

Citizens v. Florida Public Service Commission, 415 So.2d 1268 (Fla. 1982) and Southern Bell Telephone and Telegraph Company v. Florida Public Service Commission, 443 So.2d 92 (Fla. 1983), the Court held that depreciation represcription does not constitute "rate-making." Therefore, the prohibition against retroactive rate making was not applicable. In Citizens, the represcription had an effect on rates only as a result of a stipulation entered into between Southern Bell and the Public Council regarding a refund. This the Court held, was "known or should have been known" by all parties. Under normal circumstances, depreciation represcription would not affect the rates of a utility until a rate case, and then only prospectively. Unlike depreciation represcription, the fuel adjustment proceedings constitute rate making, and a retroactive adjustment in fuel charges previously approved constitutes "retroactive rate making."

The Commission argues that this Court's decision in Southern Bell and Telephone and Telegraph Company v. Florida Public Service Commission, 453 So.2d 780 (Fla. 1984), supports its attempted distinction between rate base and expenses. To the contrary, the order which was voided as constituting retroactive rate making in Southern Bell did not involve the retroactive adjustment of rate base. It involved, as does this case, the refund of revenues on the basis of the Commission's conclusion that the utility should have acted differently in its contractual arrangements. This Court summarily reversed

the requirement of a refund holding that "to hold otherwise would violate the principle against retroactive rate making." Id. at 784.

The Commission's attempt to distinguish Southern Bell from the instant case by arguing that herein the Commission's 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," is spurious. (PSC 37) No authority exists for such a distinction, because there is no basis for the distinction. The revenues earned a year prior to the Commission's attempt to require a refund of the revenues in Southern Bell are no different than the revenues which Gulf earned pursuant to final Commission order for the period which the Commission would now disallow. The revenues in both cases constitute "rates", subject to the prohibition against retroactive rate making.

The Commission is attempting to create a distinction, allowing it to engage in retroactive rate making when it finds "management imprudence." Were the Court to make such a distinction, it would emasculate the prohibition on retroactive rate making because a refund to ratepayers always impacts shareholders rather than ratepayers. Neither the Legislature, nor this Court has ever made such a distinction. Rates are to be set prospectively only. The requirment that rates be set prospectively only exist to protect shareholders as well as ratepayers. Board of Public Utility Commissioners v. New York

Telephone Company, 271 U.S. 23, 31 (1926); Los Angeles Gas and Electric Corp. v. Railroad Commission, 289 U. S. 287, 313 (1933).

The Commission's cite to Florida v. Cresse, supra, is puzzling. It in no way supports the Commission's assertion that retroactive rate making is not applicable to the fuel adjustment proceeding. To the contrary, it supports Gulf's position, supported by Chairman Gunter in his dissent, that the fuel adjustment procedure delineates a prescribed period during which the reasonableness of the fuel adjustment charges is in issue, and once the prescribed period has expired, the Commission is prohibited by the doctrine of retroactive rate making from altering its findings, either to the benefit of the ratepayer or the shareholder. (See Dissent of Ch. Gunter, Order No. 13452 p. 21-23 GPC A-A)

It should initially be noted that this Court, in Florida Power v. Cresse, in establishing its jurisdiction to hear the appeal, recognized that the fuel adjustment order of the Commission "related to rates" of appellant Florida Power Corp. Id. at 1188. The fuel revenues in issue were incurred during the projection period, and the adjustment appealed occurred at the subsequent "true-up" hearing. Gulf Power does not contend that the Commission is without jurisdiction to require a refund of fuel revenues from October 1981 through March 1982, the period in issue at the May 1982 "true-up" hearings. As had Florida Power in Florida Power v. Cresse,

Gulf has endorsed, along with all other parties involved, the "true-up" procedure. In Florida Power v. Cresse, this Court recognized the nature of the fuel adjustment proceedings in holding that the "companies would be required to explain the reasonableness of the fuel purchases at the hearing during which projected amounts would be compared to actual results." Id. at 1190, quoting Com'n Order No. 9273 at p. 2.

The undisputed fact is that from the inception of the fuel adjustment proceedings until the Commission's actions herein, it and the parties thereto have deemed the Commission's jurisdiction over fuel charges incurred during the projected period as lapsing at the time of the true-up.[4] In Order No. 10093, dated June 19, 1981, the Commission held:

> During the course of the hearing, the Commission indicated its desire to reserve jurisdiction to examine at a later time certain transactions between TECO and Peabody Coal Company. The matters concern aspects of a coal supply agreement, and are reflected in the true-up amount sought by TECO for the most recent projection period. (Order No. 10093, p. 3; GPC A-E; PC A-47)

[4]Public Counsel in its brief, has very capably provided the Court with the historical chronology of the evolvement of the fuel adjustment hearings. Shortly after the Attorney General's opinions in AGO 074-288 and 074-309, the parties stipulated and the Commission ordered that public notice and hearings would be required prior to future changes in fuel adjustment charges. The Commission, in Order No. 74680-CI, established monthly hearings. Therein, the Commission recognized that the task of holding monthly hearings would place a greater burden on the staff to verify the accuracy of the data submitted by the companies. Therefore, the Commission established quarterly hearings, in addition to the monthly hearings, at which time the staff was to conduct "comprehensive hearings" for the purpose of determining the prudency of fuel expenses incurred (footnote 4 con't.)

If the Commission's jurisdiction did not lapse at the true-up hearings, there would be no need to "spin-off" or "reserve jurisdiction" over any fuel revenues.

As was recognized by Chairman Gunter in his dissent, the order "spinning off" the investigation at issue herein provided that any decision of the Commission would be "as though entered in conjunction with the true-up hearings." Order No. 10783. What this Court recognized in Florida Power Corp. v. Cresse, supra, and Southern Bell Telephone and Telegraph v. FPSC, supra, and what the Commission would have the Court ignore is that where the parties know and agree in advance that rates or charges will be subject to review for a prescribed period, there is no retroactive ratemaking. Here, the parties, including the Commission, have agreed that projected fuel expenses will be recovered subject to the "true-up" proceeding. The knowledge and agreement extends no further. Certainly, the utilities would never agree and until the Commission's order herein had no reason to know that under the clause "a utility remains uncertain as to whether the

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(Footnote 4 con't)
in the month being considered as well as the "immediately preceding two billing periods." (Order No. 6357, P. 9; PC A-21) The Commission therein also recognized the serious consequences of a cloud over the revenues collected under the clause in the minds of investors who supply the necessary capital to the utilities to finance their operations. (Order No. 74680-CI, p. 11; PC A-23) Under the Commission's order herein, this "legal cloud" will forever remain over the revenues collected under the clause.

Commission will ultimately determine its expenditures to be prudent." (Order No. 13452, p. 18, GPC A-A). The Commission's review of fuel expenditures recovered prior to October 1981 is barred by the prohibition against retroactive ratemaking.

The Commission and Public Counsel have failed wholly to rebut the applicability of the doctrine of res judicata to the fuel adjustment procedure. Again, the Commission has cited cases which simply do not support the legal principles espoused. The Court's decision in Beverly Beach Properties v. Nelson, 68 So.2d 604 (Fla. 1953) relates to the Court's ability

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(Footnote 4 con't)
In Order No. 9273, issued on March 7, 1980, the Commission once again changed the fuel adjustment procedure. The Commission established a six month projection period, with a true-up mechanism. As recognized in Fla. Power Corp. v. Cresse, supra, the parties endorsed the new procedure. As quoted therein, the Commission held:

> We will continue . . . to audit and evaluate the performance of the companies, and to approve for inclusion into the clause only prudently and necessarily incurred fuel expense. Accordingly, we will conduct in the second month following a projection period a public hearing for the purpose of ascertaining the differences between projected and actual costs. At that time, the reasonableness of the companies' expenditures during the preceding projection period will also be examined.
> (Order No. 9273, p. 7; PC A-41) emphasis supplied

The change was partially justified by the Commission staff because:

> . . . the monthly hearing format provides insufficient time to enable the staff to investigate issues and controversies which arise as a result of audits, with the result that such matters must be spun off or carried over for further evaluation.
> (Order No. 9273, p. 2; PC A-36)

to modify its decision on an appeal from a remand. It has no applicability whatsoever to the Commission's right to modify final orders by retroactively endorsing refunds of revenues approved in those orders.[5]

Having failed to refute the applicability of the doctrine of res judicata to the Commission's actions herein, it then seeks to find exceptions to the doctrine. None are applicable herein. The so-called "manifest injustice" exception is certainly not applicable. In Flesche v. Interstate Warehouse, 411 So.2d 919 (Fla. 1st D.C.A. 1982), the Court held that the doctrine of res judicata "is equally applicable to the decisions of administrative tribunals and courts." Id. at 924. The Court, in applying the exception to the modification of a worker's compensation order, also held that such modification was contemplated by statute. Here, the applicable statutes contemplate no such changes in rate orders. Sections 366.041, 366.05, 366.06, Fla. Stat.

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[5]The cases cited by the Commission simply support a proposition with which Gulf agrees. Gulf's filing of a petition to recover fuel adjustment costs does not bar the Commission from determining the prudency of those costs. The doctrine of res judicata does, however, bar the refund of revenues previously approved by final order of the Commission. As with any proceeding, be it judicial, quasi judicial, or administrative, there must be a terminal point. This doctrine is applicable to the Commission. Peoples Gas System, Inc. v. Mason, 187 So.2d 335, 339 (Fla. 1966); Austin Tupler Trucking, Inc. v. Hawkins, 377 So.2d 679, 681 (Fla. 1979). Gulf and the other utilities of this state are justified in treating the true-up orders of the Commission as final orders and the revenues approved thereunder as not being subject to refund.

The "lack of issue" exception is likewise inapplicable because it applies to "rights which were not in existence and could not have been litigated at the time the prior judgment was entered." (GPC 45) citing Wagner v. Baren, 64 So.2d 267, 268 (Fla. 1953). Certainly, any rights arising out of the "imprudency" of Gulf in extending the Maxine contract in 1973 and its administration thereafter existed at the time of the fuel adjustment true-up hearings relating to the July 1980 - September 1981 period.

Gulf Power Company fuel adjustment charges constitute rates set by final order of the Commission. The Commission's "after-the-fact adjustment" of these rates based on alleged "managerial imprudence" constitutes retroactive ratemaking and violates the doctrine of res judicata.

CONCLUSION

The Commission's determinations of "imprudency" are unsupported by competent substantial evidence and constitute a departure from the essential requirements of the law. The Commission's "after-the-fact" adjustment of previously approved fuel charges for the period July 1980 - September 1981 constitute retroactive ratemaking and violate the doctrine of res judicata.

Respectfully submitted,

G. EDISON HOLLAND, JR.
Beggs & Lane
P. O. Box 12950
Pensacola, Florida 32576
904/432-2451
Attorney for Gulf Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Steve Fogel, Room 4, The Holland Building, Tallahassee, Florida 32504; William S. Bilenky, 101 East Gaines Street, Tallahassee, Florida 32301; Paul Sexton, 101 East Gaines Street, Tallahassee, Florida 32301; Lee L. Willis, Post Office Box 391, Tallahassee, Florida 32302; James D. Beasley, Post Office Box 391, Tallahassee, Florida 32302; and Prentice P. Pruitt, 101 East Gaines Street, Tallahassee, Florida 32301 by U. S. Mail this 18th day of July, 1985.

G. EDISON HOLLAND, JR.