SUPREME COURT OF FLORIDA

THE ACTION GROUP, Appellant, v. J. TERRY DEASON, ETC., ET AL. Appellees.	)	CASE NO. 81,076 PSC DOCKET NO. 920949-EU

ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellant, The Action Group, is referred to in this brief as "Appellant". Appellee, the Florida Public Service Commission, is referred to as the "Commission", and Appellee, the Sebring Utilities Commission, is referred to as "SUCOM". Appellee Florida Power Corporation is referred to as "FPC".

References to the record on appeal are designated (R.), references to hearing transcripts are designated (Tr.), and references to exhibits are designated (Ex.).

STATEMENT OF THE CASE AND FACTS

A. APPELLANT'S STATEMENT SHOULD BE DISREGARDED

The Commission strongly disagrees with the argumentative and unsubstantiated Statement of the Case section of The Action Group's Initial Brief, and believes that it should be disregarded entirely. It is a rambling recitation that contains inappropriate legal debate, immaterial non-record matters, and a slanted, incomplete presentation of the Commission's decision. *See,* for example, Appellant's Initial Brief page 1 through page 3, paragraph 5 (argumentative and lacks record citations to factual assertions); page 4, paragraph 4 (argumentative, incomplete, and conclusory); page 5, paragraph 2 (argumentative and conclusory); and page 7, paragraph 2 (argumentative).

The Commission believes that the Court has not been fully or objectively informed of the facts of this case. Therefore, the Commission has provided its own Statement of the Case and Facts in order to inform the Court of the "nature of the case, the course of the proceedings, and the disposition in the lower tribunal" as required by Rule 9.210(b)(3), Florida Rules of Appellate Procedure.

B. OBJECTION TO REQUEST FOR JUDICIAL NOTICE

On page 3, footnote 2, Appellant appears to ask the Court to take judicial notice of the records of another proceeding, but has not made its request in the proper manner, and has not provided the Commission with the opportunity to review the records or respond to the request. The Commission objects to the request as improperly

made.

C. THE COMMISSION'S STATEMENT OF THE CASE AND FACTS

The Sebring Utilities Commission (SUCOM) is unable to pay debt service on approximately $85 million of outstanding bonds. (Tr. 100, 101, 178, 143). SUCOM presently is operating in default of its bond covenants. (Tr. 127). The utility's electric rates are the highest in the state, (Tr. 20, 37, 91) and SUCOM maintains that it will be forced to raise those rates approximately thirty-seven percent to comply with the covenants. (Tr. 91, 136, **137**).

Having considered several alternatives to resolve its financial difficulties, SUCOM agreedto sell its electric system to Florida Power Corporation (FPC) for a price that included the amount of its outstanding debt. (Tr. **89-92, 93, 167, 183-185**). The **sale** would allow an immediate rate reduction to its customers and would allow SUCOM to cease operating permanently as an electric utility. (Tr. 37, **59, 92, 185, 323**).

On August 28, 1992 SUCOM and FPC entered into an "Agreement for Purchase and Sale of Electric System". (Ex. 1, pp. 1-75). By the terms of that agreement, FPC will acquire SUCOM's electric distribution and transmission system and provide electric service to present and future customers in the territory previously served by SUCOM. (Ex. 1; Tr. 22). The Sebring City Council approved the agreement on September 15, **1992**. (Tr. **90**).

The agreement provides that FPC will purchase SUCOM's electric system for **a** price that will cover the net book value and the going concern value of the system, as well as the cost to retire SUCOM's

bonds. (Ex. 1; Tr. 23-25). FPC will finance the amount of the purchase price attributable to SUCOM's debt costs, an estimated $32 million after SUCOM sells its water system to the City of Sebring, by internal medium term financing. (Tr. 29, 308-311).

The agreement also provides that FPC will recover the costs attributable to SUCOM's debt from all retail electric customer locations served by SUCOM at the date of closing, as well as all new retail customer locations within SUCOM's former service territory after the closing. (Tr. 315-316). Those costs will be recovered from those customers as a separate charge (the "SR-1 Sebring Rider") in addition to FPC's regular rates. (Tr. 26, 306). The rider will not be assessed against Florida Power Corporation's existing body of ratepayers. (Tr. 27, 315,319).

The agreement requires that the parties obtain the approval of the Sebring Rider, and certain other aspects of the transaction, from the Florida Public Service Commission before closing. Thus the Sebring Utilities Cornmission and Florida Power Corporation filed their "Joint Petition for Approval of Certain Matters in Connection with the Sale of Assets by Sebring Utilities Commission to Florida Power Corporation" at the Commission on September 18, 1992. (R. 1). A customer hearing was held in Sebring an November 4, 1992, (Tr. 1-111) and a formal hearing was held in Tallahassee on December 7 and 8, 1992. Tampa Electric Company and three Sebring customer associations, including Appellant, intervened in the case. The Commission approved all aspects of the Joint Petition in a bench decision at the conclusion of the formal

hearing. (Tr. 419-468). That decision was memorialized in the Commission's Order No. PSC-92-1468-FOF-EU, issued December 17, 1992. Joint Petition of Florida Power Corporation and Sebring Utilities Commission, 92 F.P.S.C. 12:270 (1992), (R. 193-205).

The Commission held that it had subject matter jurisdiction to review and approve the Sebring Rider, and specifically approved the Sebring rider as a rate to be charged by FPC. Order No. PSC-92-1468-FOF-EU at 4, 12 (R. 196, 204).[1]

The Commission also held that the Sebring Rider did not unduly discriminate against customers in the SUCOM service territory:

> [W]e believe the rider accurately represents the additional cost to serve the Sebring customers because of Sebring's financial difficulties, and we believe that it would be discriminatory to pass that additional cost to Florida Power Corporation's general body of ratepayers. That is the fundamental regulatory principle we are bound to uphold in this most difficult decision. . . .
>
> The record of this proceeding makes it perfectly clear,

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[1] In response to the Action Group's contention that it did not have jurisdiction over the Sebring rider because the rider was not a "rate", the Commission said:

> It is axiomatic that if we have exclusive and plenary jurisdiction over the rates and charges of public utilities, and we are charged with the obligation to ensure that the rates and charges are fair just and reasonable, we must have jurisdiction to determine what is a rate in the first place. There is no other forum to make that determination. . . .
>
> Action Group's argument is a rate discrimination argument, not a jurisdictional one. The proper question to ask here is not whether the proposed Sebring Rider is a rate. The proper question to ask is whether the proposed Sebring Rider unduly discriminates between customers who are similarly situated and who receive essentially the same service.

Order No. PSC-92-1468-FOF-EU at 5 (R. 197).

> despite many Sebring customers' wish that it be otherwise, that the cost of the Sebring debt is a cost to serve the Sebring customers. That cost attaches to that class of customers, and distinguishes it from other classes of customers, no matter who provides the electric service. . . . The cost of debt is a cost of service, even when that cost is very high. We find that the Sebring rider rate appropriately identifies the additional cost to serve Sebring customers, appropriately allocates that cost to those customers, and appropriately insulates Florida Power Corporation's general body of ratepayers from the costs that were not incurred for their benefit.

Order No. PSC-92-1468-FOF-EU at *8.* (R. 200).

No party moved for reconsideration of the Commission's order. The Action Group timely filed its Notice of Appeal of the Commission's decision to take jurisdiction of the Sebring Rider rate on January 12, 1993.

SUMMARY OF THE ARGUMENT

Appellant has filed a disorganized brief that fails to raise any issue for review as required by the Florida Rules of Appellate Procedure. The extent of its failure makes it difficult for the Commission to form a reply, and this Court should decline to consider the brief at all.

The only issue which can be gleaned from Appellant's brief regards the Commission's jurisdiction to review this case. The Commission is the sole forum for approval of rates and charges imposed by public utilities, and is the proper forum to determine what constitutes a rate. According to the clear terms of Order No. PSC-92-1468-FOF-EU, the Commission determined that the Sebring rider was a fair, just, reasonable and not unduly discriminatory rate. The Commission's order fully comports with the essential requirements of law and its decision is based on competent substantial record evidence. Order No. PSC-92-1458-FOF-EU should be affirmed.

ARGUMENT

I. THE COURT SHOULD DECLINE TO CONSIDER APPELLANT'S BRIEF BECAUSE IT FAILS TO PROPERLY RAISE ANY ISSUE FOR REVIEW AS REQUIRED BY RULE 9.210, FLORIDA RULES OF APPELLATE PROCEDURE

The initial brief filed by The Action Group does not comply with Rule 9.210(b)(1), (3), (4) and (5), and therefore it is extremely difficult for the Commission to form a response. The Commission requests that this Court either decline to consider the appeal based on Appellant's failure to properly raise any issues for review, or in the alternative, accept the issue as framed by the Commission.

Appellant's initial brief neither lists the issues presented for review as required by Rule 9.210(b)(1), Florida Rules of Appellate Procedure, nor contains argument with respect to each issue, as required by Rule 9.210(b)(5). Instead, Appellant's Table of Contents includes an outline of topic headings that Appellant believes to be pertinent to the appeal, but which cannot possibly be the issues presented for review:

> Ch. 366, Florida Statutes (1991) is not ambiguous . 14 (sic)
> Statutory construction is unnecessary . . . . . 18 (sic)
> PSC's injection of "discrimination" . . . . . 20 (sic)
> Petitioners' argument. 22
> Pertinent case law . . . . . 24 (sic)

Appellant's Initial Brief at i. The topic headings are reproduced in the body of the brief, although in most cases not at the pages indicated. It is impossible to glean the alleged error made by the Commission by reading the "issues" listed by Appellant.

In the text of its Summary of Argument, however, beginning on page 10, Appellant does identify one issue: **"The** issue for **the court's decision is** whether **PSC** has jurisdiction to approve the 'Sebring Rider'". (emphasis in original.) This is the only issue identified by Appellant.

This Court may refuse to consider matters not properly raised and organized for appeal. For example, in F.M.W. Properties, Inc. v. Peoples First Financial Savings and Loan Assoc., 606 So. 2d 372 (Fla. 2nd DCA 1992), an appellant's brief listed issues presented on appeal which did not comport with the topic headings listed as "Argument" in the Table of Contents. The First District Court of Appeal cautioned the appellant about the effect of failure to properly prepare and organize its brief:

> [E]ach matter upon which an appellant relies for reversal must be argued under an appropriate issue presented for review. Argument which addresses a point not set out in an issue on appeal will not be considered.

606 So. 2d 372, 377. Accord, Williams v. Winn-Dixie Stores, Inc., 548 So. 2d 829 (Fla. 1st DCA 1989) (motion to strike appellant's brief granted where statement of facts was argumentative and contained immaterial matters, and argument section of brief was not organized so as to provide argument with regard to each issue raised); Singer v. Borbua, 497 So. 2d 279 (Fla. 3rd DCA 1986), (court did not rule on merits of argument which was not made a separate issue on appeal, stating that "[i]t is well settled that, in order to obtain appellate review, alleged errors relied upon for reversal must be raised clearly, concisely and separately as points

on appeal." 497 So. 2d 279, 281.)

As noted above in the Commission's Statement of the Case and Facts, Appellant's statement of the case and of the facts is rambling and argumentative, consisting primarily of irrelevant and improper information not found in the record and inappropriate legal argument. Further, Appellant fails to cite to the record as required by Rule 9.210(b)(3), Florida Rules of Appellate Procedure. Finally, Appellant's summary of argument is defective under Rule 9.210(b)(4), Florida Rules of Appellate Procedure, because it fails to condense the argument actually made in the body of the brief.

Appellant's failure to comply with appellate rules is not merely academic or technical. Rather, it results in a failure to adequately present any issues for appellate review. Appellee is forced to guess at Appellant's arguments in order to form a response.

Although it normally would be appropriate for the Commission to move to strike the brief on those grounds, to do so in this case would delay the Court's decision, which would cause irreparable harm to SUCOM and its ratepayers.[2]

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[2] On January 26, 1993, this Court granted in part Appellee Sebring Utilities Commission's Motion to Expedite this appeal. In its Motion, Sebring Utilities Commission asserted that this appeal should be expedited to avoid harm to its ratepayers:

> Due to the Action Group's appeal of the PSC order, the closing of the sale cannot be accomplished in February 1993 as originally scheduled. Failure to consummate the transaction before April 1, 1993, however, will result in irreparable harm to both Sebring and its ratepayers.

II. THE COMMISSION ACTED WITHIN ITS SUBJECT MATTER JURISDICTION IN REVIEWING AND APPROVING THE SEBRING RIDER RATE.

According to Appellant, the Sebring rider is not a "rate" because it "is not the consideration for any service rendered to ratepayers". (Appellant's Initial Brief at 18). Since the Sebring rider is not a rate, Appellant argues, the Commission has no jurisdiction to review it or approve it. Nothing in Chapter 366 supports Appellant's narrow reading of the Commission's jurisdiction.

Chapter 366, Florida Statutes, grants the Commission the broad, plenary authority to regulate public utilities. That authority includes the exclusive ability to set utilities' rates and charges, and necessarily includes the ability to determine whether something is a "rate" or "charge" within its authority to approve.

Section 366.01, Florida Statutes, states that the Commission's authority is to be broadly construed:

> The regulation of public utilities as defined

> **On** April 1, 1993, the next interest and principal payment will be due on Sebring's outstanding Bonds. Sebring's revenues will not be sufficient to make the April 1 payment on the Bonds unless the Trustee allows Bond Reserve Account moneys to be used for such purpose. If the Trustee is unwilling to allow such use of reserve funds, as it has indicated, Sebring will be in monetary default on its obligations to the Bondholders under the Bond Resolution.

Sebring Utilities Commission's Motion to Expedite Appeal at 3-4.

> herein is declared to be in the public interest and this chapter shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for the accomplishment of that purpose.

That broad grant of regulatory authority is reinforced throughout chapter 366. Section 366.04(1), Florida Statutes (1991) states that the Commission has jurisdiction "to regulate and supervise each public utility with respect to its rates and services. . .", and that the Commission's jurisdiction is "exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns, villages or counties", in order that the Commission's acts, orders, rules and regulations shall prevail in case of conflict. It is clear that the legislature intended the Commission's regulatory power to be both comprehensive in scope and superior to other regulatory authorities.

Section 366.041(2) also specifies that the Commission's authority to set "just, reasonable, and compensatory rates, charges, fares, tolls, or rentals" is to be broadly interpreted:

> The power and authority herein conferred upon the commission . . . shall be construed liberally to further the legislative intent that adequate service be rendered by public utilities in the state in consideration for the rates, charges, fares, tolls and rentals fixed by said commission and observed by said utilities under its jurisdiction.

Section 366.05(1), Florida Statutes (1991) correspondingly supports the Commission's exercise of jurisdiction:

> In the exercise of such jurisdiction, the commission shall have power to prescribe fair

> and reasonable rates and charges, classifications, standards of quality and measurements and service rules and regulations to be observed by each public utility . . . .

Likewise, it is clear that FPC may not impose any charge on its customers without the Commission's approval, whether the charge is called a rider, loan, surcharge, rate, recoupment, or some other term:

> A public utility shall not, directly or indirectly, charge or receive any rate not on file with the commission for the particular class of service involved, and no change shall be made in any schedule.

Section 366.06(1), Florida Statutes (1991).

Appellant's argument leads to a ludicrous result: public utilities could easily evade the Commission's jurisdiction to set rates and charges by isolating them from base rates and renaming them. According to Appellant, the Commission would be without subject matter jurisdiction to stop the practice.

The Courts have consistently given a liberal interpretation to the Commission's jurisdiction to regulate rates and rate structure under Chapter 366. For example, in Florida Power & Light Co. v. Malcolm, 144 So. 657 (Fla. 1932), this Court took a broad view of the Commission's rate setting jurisdiction:

> [T]he right to fix a reasonable rate of charge for public utility service, such as gas, water, and electricity, must necessarily include the right to state what shall be the basis for application of the rates, and where the rate charged is graduated according to quantity consumed, or purpose for which it is to be used, the limitation on the use is essentially as much a part of the rate as the amount charged per unit for what is used. It

> is therefor sufficient to say that there is ample legal justification for regulation of rate practices, as well as rate scales, to be drawn from the general power to determine and prescribe reasonable rates to be charged for the service provided.

144 So. at 658, 659. The Commission's ability to decide what constitutes a rate is also drawn from the general power to determine and prescribe reasonable rates. This is consistent with the judicial deference given to the Commission's ability to construe its own statutes. See, Florida Public Service Commission v. Bryson, 569 So. 2d 1253 (Fla. 1990).

The Sebring rider rate clearly falls within the broad definition of "rate" approved by this Court in City of Tallahassee v. Mann:

> "Rates" refers to the dollar amount charged for a particular service or an established amount of consumption. Rate structure refers to the classification system used in justifying different rates.

City of Tallahassee v. Mann, 411 So. 2d 162, 163 (Fla. 1981). FPC intends to charge former SUCOM customers for electric service. The amount charged will reflect the cost to serve those customers. The Commission properly considered the Sebring rider to be a rate because it is part of the total dollar amount FPC proposes to charge to SUCOM customers for electric service. The utility does not propose to furnish service to the SUCOM customers for free, nor does it propose to furnish service at the same rate charged its other residential customers. FPC's cost to serve the SUCOM customers is higher than the cost to serve its other residential

customers, so the price charged for the service will be higher. FPC's charge for electric service is clearly a rate, whether it consists of one component or, as in this case, two components -- FPC's base rates **plus** the Sebring rider. The Commission clearly had the authority to review and approve it if the Commission determined, as it did, that the rate was fair, just, reasonable, and not unduly discriminatory.[3]

The courts have long upheld the Commission's exercise of jurisdiction over all aspects of utility rates, charges, and services. See, Florida Power Corporation v. Continental Testing Laboratories, 243 So. 2d 195 (Fla. 4th DCA 1971), (utility's tariff requiring customers to provide protective safeguards for their motors binding on customers as having been approved by the Commission); Lake Worth Utilities Authority v. Barkett, 433 So. 2d 1278 (Fla. 4th DCA 1983), (upheld Commission's exclusive

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[3] While appellant makes it clear that it does not wish to raise the question of whether the Sebring Rider rate is unduly discriminatory in this appeal, Appellant complains that the Commission unfairly twisted its argument into a rate discrimination argument. The Commission considered Appellant's argument to be a rate discrimination argument, because that is exactly what it is.

Appellant states that no evidence of discrimination was presented in the case, and the implication thus seems to be that the Commission should not have addressed the issue. While there is testimony on the record that the Sebring rider does not unduly discriminate against customers in SUCOM's service territory because the rider reflects the cost to serve those customers, it is true that no party presented specific evidence that the rider was discriminatory. Nonetheless, the Commission has the regulatory responsibility to ensure that the sates it approves are not unduly discriminatory, the parties and the Commission staff raised the issue, and the ultimate facts of the case required that it be addressed. (R. 159, 160).

jurisdiction to review surcharge on electric service furnished outside city limits); Polk County v. Florida Public Service Commission, 460 So. 2d 370 (Fla. 1984), (upheld Commission's jurisdiction to issue rule allowing surcharge by municipal electric utilities on customers outside city limits); and City of Tallahassee v. Florida Public Service Commission, 441 So. 2d 620 (Fla. 1983), (upheld Commission's finding that surcharge imposed by municipal utility on nonresidents was unjustified and unduly discriminatory). Thus, decisional law does not support Appellant's argument that Chapter 366 somehow limits the Commission's authority to the task of setting rates as narrowly defined by Appellant. Whether labelled a surcharge, rate, toll, charge, loan, or rate structure, the Commission has the jurisdiction to review and approve or disapprove any type of charge imposed by FPC upon its customers.

Appellant places great reliance on Chapter 343, Laws of Florida (1991), to support its jurisdictional argument. That law does not affect the Commission's plenary jurisdiction to approve or disapprove the rates and charges of electric utilities, nor does the Commission have the authority to enforce its provisions. That is a matter for the circuit court, and is irrelevant to the issue on appeal here. Furthermore, the law is inapplicable because it never went into effect, and because it addressed a bond repayment scheme very different from the one approved by the Commission.

The act, by its terms, is not and never was effective unless approved in a referendum. Ch. 343, Sec. 4.(a), Laws of Fla.

(1991). The City of Sebring never called such a referendum, so the law never became effective. (Tr. 408). Appellant's reliance on Section 1.(3) of the act is therefore misplaced.[4] At best, Appellant can argue that if the sale to FPC did not include sufficient funds to pay the bonds; if the City of Sebring held the election authorized in the act; if the voters had approved the scheme; if SUCOM had remained liable on the bonds; and if SUCOM imposed and collected a surcharge (to services furnished by another utility), then the Commission would not have had authority to regulate that surcharge.

CONCLUSION

It has long been held that the Commission's orders are clothed with the presumption of validity. Fla. 1982); City of Tallahassee v. Mann, 411 So. 2d 162 (Fla. 1981). Nb error appears plainly on the face of Order No. PSC-92-1468-FOF-EU to overcome this presumption. Therefore, Appellant bears the burden of showing, by clear and satisfactory record evidence, that the order is invalid, arbitrary, or unsupported by the evidence. Citizens of Florida v. Public Service Commission, 425 So. 2d 534 (Fla. 1982). Appellant

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[4] If it had gone into effect, Section 1.(3) of Chapter 91-343, Laws of Florida would have mandated that the debt repayment surcharge imposed by and collected on behalf of SUCOM would not be deemed to be a rate or charge for purposes of Chapter 366, Florida Statutes, nor would it be part of SUCOM's rate structure.

The effect of this provision would have been to prevent the Public Service Commission from exercising jurisdiction over the imposition and collection of the surcharge. Presumably it was included to ensure that the Cornmission could not prevent SUCOM from paying its bond indebtedness in this manner.

has failed to make that showing. According to the clear terms of Order No. PSC-92-1468-FOF-EU, the Commission determined that the Sebring rider was a fair, just, reasonable and not unduly discriminatory rate. The Commission's order fully comports with the essential requirements of law and its decision is based on competent substantial record evidence. Order No. PSC-92-1458-FOF-EU should be affirmed.

Respectfully submitted,

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Dated: 15 February, 1993

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the APPELLEES ANSWER TO INITIAL BRIEF, was forwarded by hand delivery, facsimile transmittal or U.S. mail this 15th day of February, 1993, to the following:

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