IN THE SUPREME COURT OF FLORIDA

Case No. 81,076

On Appeal From The Florida Public Service Commission

THE ACTION GROUP,

Appellant,

v.

J. TERRY DEASON, ETC., ET AL.,

Appellees.

ANSWER BRIEF OF APPELLEE SEBRING UTILITIES COXMISSION

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INTRODUCTION

This is an appeal from an order of the Florida Public Service Commission ("PSC") [App. A][1] approving certain aspects of a Purchase and Sale Agreement under which Appellee Florida Power Corporation ("Florida Power") would acquire the electric utility system of Appellee Sebring Utilities Commission ("Sebring") and thereafter provide service to Sebring's customers.[2] Appellant, the Action Group, was an intervenor in the proceedings before the PSC on behalf of certain Sebring ratepayers[3] who opposed the Joint Petition of Florida Power and Sebring [R 48-49, 78].

The sole issue raised by the Action Group below [R 48, 177], and asserted as the basis for this appeal [R 214], is whether the

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[1] Order Approving Certain Matters In Connection With The Sale Of Assets By Sebring Utilities Commission To Florida Power Corporation, PSC Docket No. 920949-EU, Order No. PSC-92-1468-FOF-EU, issued December 17, 1992. References herein to the Appendix of Appellant, The Action Group, are signified [App. ___]. References to the record on appeal are signified [R ___], except that references to the transcript of the hearing conducted by the PSC on December 7-8, 1992, comprising Volumes III and IV of the record, are signified [T ___].

[2] As used throughout this brief, the term "Sebring's customers" includes all existing retail electric service locations served by Sebring on the closing date of the sale of Florida Power and all new retail electric service locations in Sebring's PSC-approved territory over the next 15 years.

[3] Two other groups of affected Sebring ratepayers also intervened below [R 44, 77; 85, 93]. Citizens For Rate Equity (CURE) supported the sale to Florida Power as being in the best interests of Sebring customers [R 159; T 372-78]. Concerned Citizens of Sebring (CCS) opposed the sale [R 159, T 409-12], but has not appealed. A separate pro se appeal from the PSC's order has been filed in this Court by Delmar England. Delmar England v. Florida Service Commission, Case No. 81,075. Because Mr. England was not a party or intervenor in the proceedings below, the PSC and Florida Power have moved to dismiss that appeal for lack of standing, and Sebring has joined in those motions.

PSC has subject matter jurisdiction to approve Florida Power's imposition on Sebring's customers of a "rate rider" charge (the "SR-1 Rate Rider"), which will enable Florida Power to recover over a 15-year period "the Transition Amount"--i.e., the amount by which the purchase price exceeds the total value of assets acquired from Sebring that can be included in Florida Power's rate base (the depreciated net book value of the rate base assets and the "going concern" value allowable as a prudent investment)--plus the interest and expenses associated with financing the "Transition Amount". Because the PSC's action relates to the rates and services of electric utilities, this Court has jurisdiction to review that order.[4] Art. V, § 3(b)(2), Fla. Const.; § § 350.128(1) and 366.10, Fla. Stat. (1991).

STATEMENT OF THE CASE AND FACTS

Sebring disagrees with the Action Group's Statement of the Case and Facts, because it not only fails to convey an accurate and complete understanding of the context from which this dispute arises, but is objectionably argumentative. Accordingly, Sebring

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[4] The Action Group filed with its Initial Brief a "Suggestion of Jurisdiction Question," positing that if this Court accepts the Action Group's position that the SR-1 Rate Rider is not a "rate" subject to PSC jurisdiction, then the order does not relate to rates and thus is not reviewable here. Sebring submits that even assuming the SR-1 Rate Rider is determined not to be a "rate," the PSC's order contains other independent grounds for jurisdiction in this Court, because it affects certain territorial agreements and a power purchasing agreement that relate to "services" of electric utilities.

submits the following statement to provide the Court a more comprehensive explanation of the factual and procedural background.

The transaction that is the subject of this controversy has its genesis in what the PSC correctly characterized as Sebring's "serious financial distress." [SA 1.] To understand how that condition developed, and why the PSC has approved the solution proposed by Florida Power and Sebring, it is necessary to review briefly the historical evolution of Sebring's bond indebtedness.

The Sebring Utilities Commission was "created and made a part of the government of the City of Sebring" by a special act of the 1945 Florida Legislature. Ch. 23535, § 1, Laws of Fla. (1945). As amended in 1949, this act authorized Sebring to operate and manage all of the City's electric, gas, and water utilities. Ch. 26223, Laws of Fla. (1949). In 1951, the Legislature empowered Sebring to issue revenue bonds, subject to approval of the voters owning real estate in the City, or refunding bonds without voter approval. Ch. 27893, § 2, Laws of Fla. (1951). Then, in 1963, the Legislature amended Sebring's charter by adding a provision (Ch. 63-1926, § 3, Laws of Fla.) which, as construed by this Court, removed the requirement of voter approval and thereby authorized the issuance of either revenue or refunding bonds without referendum. Wohl v. State, 480 So.2d 639, 641-42 (Fla. 1985).

In 1979, faced with rising power demands and aging plants, Sebring retained an engineering firm to prepare plans for a diesel power plant, and in 1981 issued bonds in the amount of $92.75 million primarily for the expansion of its facilities, including

the new plant that was projected to save $30 million between 1983-93 [T 85-86]. The projections proved inaccurate, however, and Sebring's revenues were not sufficient to cover the debt service on the 1981 bonds [T 86-88]. Consequently, in 1984 and 1985 Sebring had to issue additional revenue bonds of $1.8 million and $2.35 million to pay a portion of the interest on the 1981 bonds and current operating expenses [T 88; Wohl, 480 So.2d at 642].

Because of these financial problems, Sebring's bond insurer, AMBAC, endeavored to help find a buyer for Sebring's assets [T 88]. When those efforts to sell Sebring's assets failed, Sebring refinanced its accumulated debt in February of 1986, by issuing three new series of bonds in a total amount exceeding $120 million [T 88], the validation of which was affirmed by this Court in Wohl. Due to Sebring's increasing difficulties in securing insurance and attracting capital, however, approximately $21 million of these 1986 bonds had to be sold without bond insurance and carried an interest rate of 11.5% [T 88, 268].

Confronted with increasing debt obligations, which had already forced rate increases to the point that Sebring's rates became the highest in Florida [T 20, 91, 216-18, 272], Sebring considered various alternative solutions and their accompanying drawbacks or risks: (a) continuing to operate in compliance with its bond covenants, which would necessitate drastic increases in the already exorbitant rates,[5] thus unduly burdening Sebring's ratepayers; (b)

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[5] Sebring's bond covenants require that rates must at least be equal to 1.1 times the debt service [T 175].

refinancing, which would not lower rates as much as a sale of the assets, and was opposed by ratepayers because it would mean higher costs to ratepayers over a longer period of time; (c) filing for bankruptcy, which would not only stigmatize Sebring and damage the city's credit rating, but could produce an uncertain outcome, because Sebring might not be deemed insolvent so long as it could still raise rates to pay the debt; and (d) selling the electric utility to the City, which was unacceptable to the City unless another purchaser could not be found [T 91-92, 143-45, 183]. Thus, Sebring concluded that the best course of action would be to sell its assets, pay off the bonds, and obtain a rate reduction for its customers [T 91-92].

In January of 1990, Sebring sent out a request for proposals to purchase its assets [T 21, 89]. To facilitate that process and inhibit further accumulation of debt, the 1990 Legislature amended Sebring's charter by authorizing the sale or lease of Sebring's assets with the consent of the City Council, and prohibiting any borrowing or issuance of bonds in excess of $100,000 without City Council approval. Ch. 90-474, Laws of Fla. [App 2). This resulted in a 1991 sale by Sebring of its generating plants and most of its transmission system to Tampa Electric Company ("TECO"), which entered into a Power Purchase Agreement to supply the needs of Sebring [T 20-21, 89, 278-79]. The proceeds of that sale were used to redeem a portion of the 1986 bonds [T 89], but still left Sebring with an outstanding bond debt of approximately $85.5 million [T 168].

Sebring continued with its efforts to sell its remaining utility operations in 1991. The City obtained from the 1991 Legislature the optional authority to seek voter approval of a charter amendment that would allow Sebring, in the event of a sale of its assets, to continue in existence and impose a debt repayment surcharge on Sebring customers for repayment of the outstanding bonds. Ch. 91-343, Laws of Fla. [App. 2]. In May of 1991, Sebring sent out another request for proposals to purchase its remaining assets, to which Florida Power and TECO responded [T 89]. Florida Power's proposal was selected in October of 1991 [T 21, 89]. Because it contemplated immediate payment of Sebring's outstanding bonds in full as part of the transaction, rather than continued periodic payments by Sebring through collection of a surcharge, the City never sought a referendum to effectuate and implement the optional authority conferred by chapter 91-343.

The selection of Florida Power as the proposed purchaser also offered an opportunity to resolve longstanding problems of territorial conflict, overlapping facilities, and customer confusion, which resulted from the fact that Sebring and Florida Power have operated in the same areas of Highlands County around the City of Sebring for more than 45 years [T 17-18]. They had previously attempted to resolve their disputes by entering into a Territorial Agreement in 1986, a Joint Plan To Resolve Overlapping Services in 1988, and a Settlement Agreement in 1990, all of which were approved by the PSC [T 18-20, 62]. Nonetheless, there remained a dispute over rights to serve the Sebring Airport, which

is the subject of another PSC order presently pending on appeal in this Court [T 19].[6]

After Florida Power's proposal was selected in October 1991, extensive negotiations ensued that culminated with Florida Power, Sebring, and the City entering into the Purchase and Sale Agreement dated August 28, 1992 [T 17, 21]. As required by chapter 90-474, the Agreement was unanimously approved by the Sebring City Council on September 15, 1992 [R 211-12; T 89-90]. By a separate contract that was also dated August 28, 1992, and is to be closed simultaneously with the Purchase and Sale Agreement, the City agreed to purchase Sebring's water system for $21.5 million [T 21, 90].

Under the Agreement, Florida Power will purchase Sebring's remaining electric distribution and transmission system for a sum of money consisting of a Base Purchase Price not exceeding $54 million that will be sufficient, when added to the proceeds from the sale of Sebring's water system to the City and other Sebring funds already on hand, to enable Sebring to pay off the outstanding bonds in full, plus an Additional Purchase Price sufficient to pay Sebring's other debts and an amount sufficient to refund Sebring's customer deposits [T 16-17, 23-24, 61, 90, 240]. Florida Power's

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[6] Sebring Utilities Commission v. Florida Public Service Commission, Case No. 77,197, is an appeal from PSC Order No. 23823 (Dec. 4, 1990), ruling that Sebring does not have the right under the 1986 Territorial Agreement to acquire Florida Power's customers and facilities in the Sebring Municipal Airport area. At the request of Sebring, this Court has stayed proceedings in that appeal pending the outcome of the transactions at issue here, which could resolve the entire controversy and thereby moot the appeal in Case No. 77,197.

purchase will encompass Sebring's electric system assets, including the exclusive right to operate in Sebring's service area, along with Sebring's land, facilities, personalty, receivables, and "going concern" value [T 22]. Florida Power will also assume Sebring's rights and obligations under agreements with other utilities, such as the TECO Power Purchase Agreement [T 29-30].

The Agreement was conditioned on PSC approval of certain aspects of the transaction, including the amendment of the 1986 Territorial Agreement and termination of the 1990 Settlement Agreement between Sebring and Florida Power; valuation of the rate base assets at the depreciated net book value of $17,813,753 as of September 30, 1991; inclusion of any additional "going concern" value in the rate base assets; and the imposition of the SR-1 Rate Rider on Sebring's customers as part of Florida Power's rate schedule [T 32-33]. This rate rider would be a charge in addition to Florida Power's applicable rates, and would be sufficient to enable Florida Power to recover over a 15-year period the "Transition Amount"--i.e., the amount by which the purchase price exceeds the total value of assets acquired from Sebring that can be included in Florida Power's rate base (the depreciated net book value of the rate base assets and the "going concern" value allowable as a prudent investment)--plus the interest and expenses associated with financing the "Transition Amount" [T 26-27].

On September 18, 1992, Florida Power and Sebring filed their Joint Petition with the PSC requesting approval of the terms of the Purchase and Sale Agreement, including the imposition of the SR-1

Rate Rider (also referred to in the Joint Petition as a "transition rate") [R 1-22]. The Joint Petition alleged, in addition to the relevant background facts, that (a) Sebring decided to sell its electric system because the debt service on its $88.5 million in revenue bonds had required it to raise residential rates to $110 per kilowatt hour (kwh), which are the highest rates in Florida and among the highest in the nation [R 6]; (b) the proposed sale to Florida Power would enable Sebring to pay off the outstanding bond debt in full within 35 days after closing, by including in the purchase price the amount needed by Sebring (with the proceeds from the sale of the water system and other existing funds) to retire the bonds [R 8-9, 13]; (c) the "Transition Amount" would be recovered by Florida Power through the imposition of the SR-1 Rate Rider on Sebring's customers over a 15-year period [R 13-14]; (d) Sebring's customers would receive a substantial immediate reduction in rates, even with the rider [R 14]; (e) it is proper to charge the rate rider to Sebring's customers, because the bond debt was incurred for their benefit and not for the benefit of Florida Power's customers [R 17]; and (f) the proposed purchase by Florida Power would also promote the interests of the ratepayers and the public by eliminating duplication of facilities and improving service to all customers in the area, with lower rates for Sebring's customers [R 18-19, 21]. By separate motion filed one week after the Joint Petition, Florida Power and Sebring requested expedited treatment because Sebring, to avoid increasing its rates

again, had decided to draw down its reserves to pay debt service, and thus was in technical default on its bond covenants [R 29-31].

Three ratepayer groups--one supporting and two opposing the Joint Petition--were permitted to intervene by the PSC [R 77, 78, 93].[7] Among these was the Action Group, which presented "only the one issue to address," regarding the PSC's jurisdiction to approve what the Action Group characterized as the "surcharge or 'transition fee.'" [R 48.1 After a public "customer hearing" was held in Sebring on November 4, 1992 [R 38], but prior to the regular evidentiary hearing, the parties and intervenors submitted their prehearing memoranda [R 94, 125, 141, 149]. In its late-filed Prehearing Memorandum, the Action Group declared:

> By this submission, these Intervenors wish to advise the Commission and the parties and other intervenors to the Joint Petition that they will address at the hearing only one issue: whether the Commission possesses the authority to consider and act with respect to the subject of the Joint Petition in so far as Florida Power Corporation (FPC) and Sebring Utilities Commission (SUC) therein request Commission approval of "a transition rate to be collected by FPC from certain retail electric customers in the Sebring area following the pending sale of SUC's electric transmission and distribution assets by SUC to FPC.. .." Petition at 1.
>
> Stated another way, the question that these intervenors wish to raise is whether the Commission possesses jurisdiction to consider and approve such a request. The Commission's jurisdiction being established by Ch. 366, *Florida Statutes* (1991), and there appearing to be no explicit or implied authority therein for the Commission to consider the transaction that is [the] subject of the petition,

[7] See note 3 supra.

> Intervenors respectfully submit that the Commission must decline to act with respect to Petitioners' request for the approval of the specific transition rate that FPC wishes to collect from certain customers in the event that it is authorized to purchase SUC's electrical distribution system.

[R 177-78 (emphasis added)].

At the hearing conducted by the PSC in Tallahassee on December 7-8, 1992, Florida Power and Sebring presented testimony and documentary evidence explaining in detail the background and severity of Sebring's financial difficulties, the terms and conditions of the proposed Purchase and Sale Agreement, the computation and implementation of the SR-1 Rate Rider, the benefits of the proposed sale for both Sebring and Florida Power ratepayers, and the absence of any viable alternative solution. The Action Group presented no evidence.

The justification and necessity for the sale were established through the uncontroverted testimony of Sebring's General Manager, Joseph E. Calhoun, and its Director of Finance, Nancy L. Holloway. Calhoun traced the development of Sebring's "severe, ongoing debt problems," which resulted from the issuance of bonds in the early 1980's to fund an expansion of Sebring's facilities that, contrary to expert projections, did not produce anticipated revenues or savings [T 85-90]. He testified that due to a projected cash deficit of over $5 million in Sebring's 1992-93 budget, its current rate of $110 per 1000 kwh--already the highest in the state--would need to be increased by 37.1% to $151 per 1000 kwh in order to comply with Sebring's bond covenants [T 90-91]. Finally, Calhoun

explained that because none of the other alternative solutions considered by Sebring would likely produce the same degree of rate reduction, Sebring decided the best plan would be to sell its assets, pay off the bonds, and secure reduced rates for its customers [T 91-93].

Holloway testified that the Bond Trustee had declared Sebring to be in default, because rather than increase its rates again in October 1992 to comply with the bond covenants, Sebring decided to draw from reserve funds to pay its debt service [T 127]. As a consequence of being in default, Sebring is subject at any time to actions by the bond holders or bond insurer to enforce their rights as creditors; such actions could include demanding appointment of a receiver, requiring a rate increase, and ultimately forcing bankruptcy--which may not result in discharge of the debt because Sebring could still be compelled to raise rates [T 128, 136, 144-45]. Recognizing that rates would have to be increased by 37.1% to meet the revenue requirements needed to service the $85.5 million bond debt, Holloway concluded that the sale to Florida Power was the best alternative because it was certain to provide rate relief for Sebring's customers [T 137, 167-68, 185].

The terms and benefits of the sale were outlined by three Florida Power witnesses, whose testimony established the following points:

(a) Sebring will receive from Florida Power, as payment for its electric system, sufficient funds to pay off its outstanding bonds in full, thus eliminating its financial crisis, ending its

ongoing territorial disputes with Florida Power, and relieving its obligations under agreements with other utilities. [T 16-17, 24, 29-31, 270, 305]. Florida Power will recover the "Transition Amount" by charging Sebring's customers the SR-1 Rate Rider, which is subject to review and adjustment by the PSC at least every four years' [T 26-29, 275, 305, 313-15]. This agreement was the product of extensive, arms-length negotiations [T 21, 263, 276-77].

(b) Sebring's customers will receive immediate rate relief, even with the SR-1 Rate Rider. If the sale is approved, Sebring customers who currently pay $110 per 1000 kwh will pay a reduced rate of $97 per 1000 kwh, with the opportunity to realize further reductions through participation in Florida Power's energy conservation programs. If the sale is not approved, the Sebring rate would need to be increased to $151 per 1000 kwh to achieve compliance with the bond covenants. [T 37-39, 45, 59, 263-64, 272-73, 323-24, 336-37, 339-40, 366].

(c) In addition to substantially lower rates, Sebring's customers will benefit from the transaction by, amang other things, gaining access to Florida Power's customer service and energy conservation programs, being served by a PSC-regulated utility (which gives them a greater voice), eliminating the confusion and conflict created by competing utilities in the same area, and, in

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[8] As recited in the PSC's order, Florida Power agreed at the hearing to provide reports on the rider on both a monthly and yearly basis [App.A at 7].

many cases, recovering or reducing their deposits. [T 17, 37-39, 45, 56-59, 263-64, 322-23, 361-62].[9]

(d) Florida Power will benefit from the transaction by eliminating overlapping facilities, reducing burdensome recordkeeping and accounting, deferring planned construction, consolidating resources, and enhancing its service territory in an area with good growth potential, all without any negative impact on Florida Power customers [T 35-37, 262, 291, 321, 361-62, 365].

With respect to the SR-1 Rate Rider, Florida Power's witnesses testified that imposing the charge only on Sebring's customers is not discriminatory because retiring Sebring's debt is a cost of serving Sebring's customers, which is currently included in Sebring's rates, but is not a cost of serving Florida Power's other customers [T 319, 338]. While acknowledging that Sebring's customers and Florida Power's customers will receive identical electric service, they explained that the SR-1 Rate Rider will represent a difference in the costs associated with that service, and noted that other Florida Power's customer groups also have differing rates due to differing circumstances [T 310, 331-33]. They testified that Florida Power is not simply lending its credit to Sebring, but is providing Sebring's customers better services at a lower price [T 342].

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[9] Regarding the benefits to Sebring's customers, see also the testimony of Nancy Hawk, secretary of Citizens For Utility Rate Equity (CURE), who testified in favor of approving the sale [T 372-78].

After the testimony was concluded and closing arguments were presented, including arguments in opposition by counsel for the Action Group, the PSC staff recommended that the terms and conditions of the Agreement be approved [T 419-20]. The PSC then ruled favorably on each aspect of the Agreement for which their approval was sought in the Joint Petition [T 421-67].

On December 17, 1992, the PSC issued the order that is the subject of this appeal [App. A]. The PSC initially recited findings, consistent with the uncontroverted evidence, that (a) Sebring "is in serious financial distress" to the extent that "debt service on approximately $85 million of bonds that remain has drained Sebring's resources and brought it to the verge of bankruptcy"; (b) Sebring "is in default of its bond covenants" because its current rates--though "already the highest in the state"-- are not sufficient to cover the debt service and maintain required reserves; and (c) to achieve compliance with its bond covenants, Sebring would be required to increase its rates further by an estimated 37%, up to $151 per 1000 kilowatt hours, while customers served by Florida Power in the adjacent territory pay a rate of only $71 per 1000 kwh. [App. A at 1-2.] The PSC also recounted the alternative solutions considered by Sebring and the reasons why they were rejected, which led Sebring to conclude that the sale to Florida Power is "the most reasonable, because the sale would provide immediate rate relief to Sebring's customers, while allowing Sebringto retire its debt and cease operating permanently as a public utility." [App. A at 2-3.]

After describing the terms and conditions of the Agreement, the PSC addressed the jurisdictional argument raised by the Action Group--i.e., that the PSC lacks subject matter jurisdiction to approve Florida Power's imposition of the SR-1 Rate Rider, because it does not relate to the delivery of electric service to customers and thus is not a "rate" within the meaning of chapter 366, but should be characterized as a "loan" to Sebring that Florida Power will recover from Sebring's customers. The PSC rejected that position, reasoning:

> 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. If there were, our authority to set appropriate rates and charges would be effectively subverted.

[App. A at 5].

The PSC then observed that the Action Group's argument "is a rate discrimination argument, not a jurisdictional one," and that the "proper question to ask here is not whether the proposed Sebring Rider is a rate," but "whether the proposed Sebring Rider unduly discriminates between customers who are similarly situated and who receive essentially the same service." [Id.] Having thus identified the question, the PSC held "that the matters proposed for our approval in this proceeding, including the Sebring rider rate, fall well within the purview of our jurisdiction in all respects." [Id.]

Turning to the discrimination issue, the PSC determined that the rate rider was not objectionable:

> We believe, under the particular circumstances of this case, that the proposed Sebring rider does not unduly discriminate against the Sebring customers who will be subject to it. To the contrary, we 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....
>
> We believe we are properly fulfilling our regulatory responsibility by approving the Sebring Rider rate. The record of this proceeding makes it perfectly clear, 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. It will not simply go away. In fact there is substantial evidence in the record that if FPC's acquisition of the Sebring system is not consummated, the cost to serve Sebring customers, and the rates that reflect that cost to serve, will rise dramatically. 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.

[App. A at 8.] Based on that rationale, the PSC held that the SR-1 Rate Rider is not unduly discriminatory and approved it as part of Florida Power's rate schedule. [Id.]

After analyzing and approving the other specific conditions of the Agreement, the PSC concluded that "it is in the public interest

to grant the relief" requested by the Joint Petition as "the most reasonable resolution of Sebring's financial problems." [App. A at 11.] The Action Group then filed a timely notice of appeal, seeking review of that order as one "whereby the [PSC] determined that it possesses subject matter jurisdiction pursuant to Florida Statutes, Ch. 366 (1991), to approve the imposition of the Sebring Rider and, on the basis of such determination, approved the imposition of the Sebring Rider." [R 214]. At the request of Sebring, and with the consent of all parties, this Court ordered that the appeal proceed on an expedited schedule to facilitate a disposition before April 1, 1993, in order to avoid the likelihood of a more serious monetary default by Sebring on its outstanding bonds.

SUMMARY OF THE ARGUMENT

The Action Group's theory that the PSC lacks jurisdiction to approve the SR-1 Rate Rider because it "does not relate to the delivery of electric power" erroneously assumes that all groups of customers who receive "identical electric power" must necessarily be charged the same rate. Chapter 366 provides that the PSC, in fixing rates, shall consider not only the "services rendered," but the "cost of service" and "value of service." The PSC correctly found that the SR-1 Rate Rider, as an additional charge imposed to pay Sebring's bond debt, is a cost of serving Sebring's customers that will be included in their rates whether they continue to be served by Sebring or are served by Florida Power.

The fact that Sebring's customers will receive a rate reduction even with the rider, as well as better services, also supports the differential rate based on value of service. Moreover, this Court has upheld the PSC's power to authorize inclusion of items in rates as "costs of doing business" that are far less related to delivery of services, such as charitable contributions. Whether this Court ultimately agrees or disagrees with the PSC's treatment of an item for ratemaking purposes, it is settled that the PSC has subject matter jurisdiction to determine in the first instance what charges may qualify as a "rate."

The Action Group's contention that the PSC's approval of the SR-1 Rate Rider violates chapter 91-343 is without merit because (a) the act never took effect, and thus has no validity; (b) the act's authorization for Sebring to assess a "debt repayment surcharge" was not mandated as the exclusive method for paying Sebring's debt, but was merely an optional alternative, which was no longer needed once the sale to Florida Power was negotiated; (c) the purpose of the act's provision that the "debt repayment surcharge" would not be deemed a rate under chapter 366 was to obviate the need for PSC approval of a charge that would have already been authorized by the legislature and ratified by the voters; and (d) in any event, chapter 91-343 by its terms would only apply if Sebring sold its assets and continued to exist for the sole purpose of collectingthe surcharge, without providing any corresponding electric service.

The Action Group's argument that the SR-1 Rate Rider discriminates between resident and non-resident Sebring customers should be rejected because (a) it does not relate to the subject matter jurisdiction of the PSC; (b) it was not presented and passed upon below; and (c) it should properly have been raised as an objection to the 1986 Territorial Agreement. In any event, there is no rate discrimination because resident and non-resident Sebring customers pay the same rates, receive the same service, and will be uniformly subject to the SR-1 Rate Rider.

ARGUMENT

The only issue properly preserved and presented for review here is whether the PSC erred in holding that it has subject matter jurisdiction to approve the imposition by Florida Power of the SR-1 Rate Rider on Sebring's customers. When distilled to its essence, however, the Action Group's Initial Brief actually asserts three arguments, only two of which can fairly be regarded as falling within the scope of the jurisdictional issue.

First, proceeding on the premise that Chapter 366 empowers the PSC to approve rates and charges "only for services rendered," the Action Group contends that the SR-1 Rate Rider is not a "rate" within the PSC's jurisdiction because it "is not the consideration for any service rendered to ratepayers," in that it "does not relate to the delivery of electric power." [Brief at 15-19.] Second, the Action Group argues that the PSC's assumption of jurisdiction to approve the SR-1 Rate Rider is contrary to the

legislative "mandate" in Chapter 91-343, "instructing" that the "debt repayment surcharge" authorized by that enactment "shall not be deemed to be a rate or charge for purposes of Chapter 366," but can only be imposed if approved by a majority vote of the qualified electors in the affected area [Brief at 11-12, 20, 22-23]. Finally, the Action Group suggests that, assuming the PSC has jurisdiction, its approval of the SR-1 Rate Rider discriminates against Sebring customers who are not residents of the City and thus "had no hand in creating, or opportunity to influence through the political process," Sebring's bond debt [Brief at 12-13, 20-21, 23-26]. Analysis demonstrates that none of these arguments warrants reversal of the PSC's order.

I. The PSC Has Subject Matter Jurisdiction To Approve The SR-1 Rate Rider

As its primary paint on appeal, the Action Group assails the PSC's jurisdiction to approve the SR-1 Rate Rider on the rationale that Chapter 366 provides the PSC "authority to approve rates and charges only for services rendered," and the SR-1 Rate Rider is not a "rate" because it "is not the consideration for any service rendered to ratepayers." [Brief at 15, 18.] This argument is grounded on the premise that because Sebring's customers will pay the SR-1 Rate Rider in addition to the regular rate paid by Florida Power's customers, yet "will receive identical electricity and electric service," the additional charge "does not relate to the

delivery of electric power" but is simply a "business loan.@@ [Brief at 18-19.]

The fundamental flaw in the Action Group's analysis is that it rests entirely on an unarticulated but unfounded assumption--that the only "services rendered" for which Chapter 366 authorizes PSC approval as an element of a utility company's "rate" is the actual "delivery of electric power." Stated another way, the Action Group's theory necessarily posits that if two groups of utility customers receive "identical electricity and electric service," the PSC cannot approve the imposition of any charge on one group that would require it to pay more than the other, because such a charge could not "relate to the delivery of electric power" and thus could not be part of a "rate" as defined in Chapter 366. The error of that reasoning is readily demonstrable.

First, the Action Group's reading of the relevant provisions of Chapter 366 focuses too narrowly on one facet of the ratemaking formula--the current delivered to the customer--and ignores all other statutory factors, including the cost to the utility company of providing that service. Section 366.041(1), Florida Statutes (1991), provides that in fixing the rates charged for service by utilities under its jurisdiction, the PSC

> is authorized to give consideration, amon other things, to the efficiency, sufficiency: and adequacy of the facilities provided and the services rendered; the cost of providing such service and the value of such service to the public; the ability of the utility to improve such service and facilities; and energy conservation and the efficient use of alternative energy resources. . . .

(Emphasis added.)

> Likewise, section 366.06(1) directs that [i]n fixing fair, just, and reasonable rates for each customer class, the [PSC] shall, to the extent practicable, consider the cost of providing service to the class, as well as the rate history, value of service. and experience of the public utility. . . .

(Emphasis added.)

In this case, the PSC properly concluded that it had authority to approve imposition of the SR-1 Rate Rider on Sebring's customers, because the record establishes that this additional charge attributable to the payment of Sebring's debt "is a cost to serve the Sebring customers" which "attaches to that class of customers, and distinguishes it from other classes of customers, no matter who provides the electric service." [App. A at 8.] The Action Group concedes that "[o]bviously, a utility's debt and debt service are lawful ingredients of a rate base when the utility sets its rates." [Brief at 26.1 Payment of Sebring's debt has been and would continue to be a cost included in the rates charged to Sebring's customers for services provided by Sebring; the Action Group has offered no legal or logical reason why it should not be a cost included in the rates charged to Sebring's Customers for services provided by Florida Power after the sale. As the PSC observed, the cost of paying Sebring's debt "will not simply go away." [Id.]

In this regard, it is significant that the Action Group does not suggest any alternative means of dealing with Sebring's debt, nor does it dispute the PSC's conclusion that this mechanism

provides "the most reasonable resolution of Sebring's financial problems." [App. A at 11.] The evidence is uncontroverted that if the terms of the sale are not approved and the transaction collapses, Sebring's customers will almost certainly be required to pay even higher rates--whether raised by Sebring voluntarily or under compulsion by a court to enforce compliance with the bond covenants. Any notion that Sebring's debt obligation might be passed through to Florida Power's ratepayers would not only be rejected as patently discriminatory, but would fly directly in the face of the Action Group's own argument, because it clearly is not a cost of serving Florida Power's customers and thus could not properly be included in their rates under any theory. See C.F. Industries, Inc. v. Nichols, 536 So.2d 234, 238-39 (Fla. 1988).

The recognition of Sebring's debt as a "cost of providing service to the class" is not the only statutory factor supporting the PSC's authority to approve imposition of the SR-1 Rate Rider on Sebring's customers. Although the Action Group attempts to dismiss the fact that Sebring's customers will realize an immediate rate reduction and receive the benefit of better service programs from Florida Power as an "appeal to emotion" [Brief at 11], section 366.06(1) expressly commands that the PSC, "[i]n fixing . . . rates for each customer class, . . . shall, to the extent practicable, consider . . . the rate history, value of service, and experience of the public utility." Based on the unrefuted evidence of record that Sebring's customers will receive better services and more experienced management at lower rates from

Florida Power, the PSC was authorized to approve the SR-1 Rate Rider as an additional charge applicable to that class of ratepayers. As this Court has observed in applying chapter 366, "no statute mandates a pure 'cost of service' rate structure." Occidental Chemical Co. v. Mayo, 351 So.2d 336, 340 (Fla. 1977). See also International Minerals & Chemical Corp. v. Mayo, 336 So.2d 548, 551-52 (Fla. 1976).

Moreover, even assuming that the payment of Sebring's bond debt through the SR-1 Rate Rider does not constitute a "cost of providing service" in the narrow sense that it "does not relate to the delivery of electric power," this Court has upheld the jurisdiction of the PSC to authorize the inclusion of items in utility rates that are not directly related to the delivery of services. For example, in City of Miami v. Florida Public Service Commission, 208 So.2d 249 (Fla. 1968), this Court affirmed PSC orders allowing both a telephone company and an electric power company to treat charitable contributions as "legitimate operating expenses" for ratemaking purposes on the theory that they are "a cost of doing business." Id. at 258-59. Although the PSC in 1981 changed its policy regarding the allowance of such deductions, this Court emphatically reaffirmed its broad interpretation of the agency's jurisdiction by declaring in a subsequent decision that the PSC "has the authority to determine, as a policy issue, whether charitable contributions are to be included in the operating expenses of a public utility." Southern Bell Tel. & Tel. Co. v. Florida Public Service Commission, 443 So.2d 92, 96 (Fla. 1983).

If an expense so remotely related to the delivery of utility service as a charitable contribution is a proper subject of the PSC's ratemaking jurisdiction, then certainly an expense associated with the payment of Sebring's bond debt is a legitimate object of PSC authority. While the Action Group may wish to debate whether the SR-1 Rate Rider can be regarded as a part of Florida Power's "cost of providing service" to Sebring's customers, there can be no dispute that it is a part of Florida Power's "cost of doing business" with Sebring's customers. In either case, the question of whether it may be included as part of Florida Power's "rate" charged to Sebring's customers clearly falls within the scope of what this Court has characterized as the PSC's "exclusive and superior" jurisdiction over electric utility service and rates. Florida Power Corp. v. Seminole County, 579 So.2d 105, 106 (Fla. 1991).[10]

The crucial point, as recognized in the order below, is that the PSC's "jurisdiction to determine what is a rate" must be a necessary concomitant of its "exclusive and plenary jurisdiction over the rates and charges of public utilities." [App. A at 5.] When a party contests the legality of a charge that a utility seeks to impose, urging that it is not a chapter 366 "rate," the authority to decide the question reposes in the first instance with

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[10] The decisions in which this Court has delineated the extensive power and discretion reposed in the PSC are thoroughly explicated in the Answer Brief of Florida Power Corporation. To spare the Court unnecessary repetition, Sebring does not duplicate that discussion here, but simply adopts Florida Power's argument and authorities by reference.

the PSC. Although the correctness of its decision is, of course, reviewable by this Court, the PSC's primary jurisdiction to determine if a proposed charge qualifies as a "rate" will apply regardless of whether the validity of the charge is disputed on the ground that it is discriminatory (the issue here as perceived by the PSC), City of Tallahassee v. Mann, 411 So.2d 162 (Fla. 1981), or is contested on the theory that it constitutes an "illegal tax" (the issue here as portrayed by the Action Group). City of Plant Citv v Mayo, 337 So.2d 966 (Fla. 1976).

City of Tallahassee v. Mann is dispositive of this issue. In that case, the City challenged the PSC's subject matter jurisdiction to require that the City justify the imposition of a surcharge on its electric utility customers located outside the city limits. The City argued that the PSC had no statutory authority to regulate a municipal utility's "rates," and that the PSC's jurisdiction to "prescribe a rate structure for all electric utilities" should not be construed to encompass surcharges. Treating the City's petition as a request for a writ of prohibition, this Court agreed with the PSC's ruling that the City's differential charges for non-residents constituted a matter of "rate structure" within the subject matter jurisdiction of the PSC, and thus denied the petition. 411 So.2d at 163-64.

For purposes of its discrimination argument, the Action Group seeks comfort in the fact that subsequent proceedings in the Citv of Tallahassee litigation ultimately produced a ruling by PSC, later affirmed by this Court, that the surcharge on non-residents

was "not justified on a cost-of-service basis" and was "unduly discriminatory." City of Tallahassee v. Florida Public Service Commission, 441 So.2d 620, 623-24 (Fla. 1983). The importance of the City of Tallahassee decision here, however, lies not in the fact that this Court affirmed the PSC's finding of discriminatory effect, nor even that this Court sustained the PSC's ruling that the surcharge was a matter of "rate structure" within its regulatory authority. Rather, the critical point for purposes of the Action Group's jurisdictional challenge is that this Court upheld the power of the PSC to decide whether the surcharge was a "rate" or a matter of "rate structure"--i.e., to determine whether the subject of the dispute was within its jurisdiction. To the same effect is the City of Plant City decision, in which this Court, while disagreeing with the PSC's determination that a city's franchise fee could be characterized as a "tax" for ratemaking purposes, implicitly approved the PSC's jurisdiction to make that initial determination.

The foregoing analysis demonstrates that the PSC clearly has subject matter jurisdiction under chapter 366 to determine that the SR-1 Rate Rider qualifies as a "rate" and to approve the imposition of that charge on Sebring's customers as a cost of service in addition to the regular Florida Power rate. In light of the uncontradicted fact that Sebring's customers will pay substantially lower rates even with the rider, and will receive other significant benefits from Florida Power, the PSC's authority to consider the "value of service" also justifies its action in approving the SR-1

Rate Rider. Accordingly, the Action Group's argument that the PSC lacks subject matter jurisdiction is without merit and should be rejected.

11. The PSC's Approval Of The SR-1 Rate Rider Is Not Contrary to Chapter 91-343

A second jurisdictional (or quasi-jurisdictional) argument advanced by the Action Group, though not separately articulated as such, is that the PSC has no authority to approve the SR-1 Rate Rider because the Legislature in Chapter 91-343 specifically provided that (a) the "debt repayment surcharge" which Sebring was authorized to impose thereunder "shall not be deemed to be a rate or charge for purposes of chapter 366"; and (b) the "debt repayment surcharge" could be imposed only upon "its approval by a majority vote of those qualified electors residing within the area affected by this act." [App. B.]

The Action Group asserts that the PSC's treatment of the SR-1 Rate Rider as a "rate" within its jurisdiction under chapter 366 is "[c]ontrary to the express provision of ch. 91-343" and represents an "unprecedented effort to reverse the ch. 91-343 mandate"; and that the PSC's approval of the SR-1 Rate Rider violates the legislative "policy decisions" embodied in chapter 91-343, "instructing that the ratepayers will decide whether they consent to being surcharged." [Brief at 4-5, 10-12, 20, 22-23.] In addition, the Action Group suggests that the voter approval requirement of chapter 91-343 was a legislative recognition "that

any surcharge upon nonconsenting *non-residents* would, in actuality, constitute a tax." [Brief at 23.]

The Action Group's reliance on chapter 91-343 as an impediment to the PSC's approval of the SR-1 Rate Rider is misplaced for reasons that are readily apparent from the face of the act. Simply stated, the two conditions that the Action Group contends are limitations on the legislative authorization to assess a "debt repayment surcharge" do not apply here because (a) the act never took effect; and (b) even if it became effective, the conditions are applicable only under circumstances where Sebring sells its assets but continues to exist solely for the purpose of collecting the surcharge, without any corresponding provision of electric service.

By its terms, chapter 91-343 does not purport to prescribe the <u>sole mandatory</u> method for repayment of Sebring's bond debt in the event of a sale or lease of its electric utility assets, but provides <u>one optional alternative</u> that could be used if the disposition of those assets left some portion of the bond debt unpaid. The title of chapter 91-343 clearly identifies the act as one "authorizing"--not requiring--the collection of a "debt repayment surcharge"; and section 4 expressly provides that "[t]his act shall take effect only upon its approval by a majority vote of those qualified electors residing in the area affected by this act" if a referendum is called by the City.

As the Action Group itself acknowledges, the "legislature's 'surcharge' authorization" in chapter 91-343 "has never taken

effect because it was not submitted to a vote." [Brief at 5,11.] Florida law is settled that where an enactment specifically provides that it will become effective only upon some condition or contingency, such as approval by a majority vote of the qualified electors, the law does not take effect until the condition is met; and as long as the specified contingency does not occur, the enactment is invalid and unenforceable. E.g., Brown v. City of Tampa, 149 Fla. 482, 6 So.2d 287, 289 (1942); Lewis Oil Co. v. Alachua County, 496 So.2d 184, 187 (Fla. 1st DCA 1986). The Action Group has cited no authority, and research has revealed none, to support the proposition that an agency's action can be set aside as "contrary to" an enactment that never took effect.

The reason why the City never sought voter approval to effectuate and implement the authorization for a "debt repayment surcharge" under chapter 91-343 is simply because it was rendered unnecessary by the negotiation of the Agreement with Florida Power. Sebring already possessed the authority to sell its assets with the consent of the city council pursuant to chapter 90-474, which had been approved by the voters. Because Sebring's bond debt exceeded the value of its remaining assets, however, Sebring and the City could not go forward with a sale unless some way could be found to satisfy the unpaid portion of the bond debt.

The object of chapter 91-343, then, was to enable the City, at its option, to seek voter approval for an additional "bargaining chip" that could help to facilitate a sale of Sebring's assets by providing greater flexibility in financing. Specifically, the act

provided that Sebring could sell its assets but continue to generate revenue for payment of the bond debt by assessing a "debt repayment surcharge" against Sebring's customers, which would be collected through the purchasing utility that would then be serving those customers. In effect, chapter 91-343 contemplated a situation under which Sebring would no longer provide utility services but would continue to exist solely for the purpose of assessing the "debt repayment surcharge."

Considered in light of its objective and operation, chapter 91-343 clearly cannot be regarded as a manifestation of legislative intent to prescribe a mandatory and exclusive scheme for resolving Sebring's financial problems. Certainly, there is no evidence to suggest or reason to assume that the Legislature intended to foreclose other alternative solutions, such as the one posed by the sale to Florida Power, in which the purchase price would enable Sebring to pay its outstanding bond debt in full and "fold its tent," leaving the purchaser to recover the payment as a part of the rates charged to Sebring's customers.

It is this critical difference between the alternative plans that points up the fallacy in the Action Group's theory that the PSC's approval of the SR-1 Rate Rider is contrary to the two "policy decisions" embodied in chapter 91-343. Under that act, Sebring would be assessing a legislatively authorized and voter approved surcharge for which it would not be providing any corresponding utility service. Thus, the Legislature appropriately provided that the surcharge "shall not be deemed to be a rate or

charge for purposes of Chapter 366.. .or a part of the rate structure of the Sebring Utilities Commission."

The purpose of that provision is simply to obviate the need for separate approval from the PSC if the "debt repayment surcharge" is assessed by Sebring under circumstances where Sebring is providing no electric service to the customers, but the customers have already consented to the assessment by their vote. The provision is not intended to supplant the PSC's jurisdiction to approve the imposition by Florida Power of a rate rider on customers to whom Florida Power provides electric service. By the same token, even if the Action Group is correct in its theory that the requirement of voter approval is a legislative recognition that assessment of the "debt repayment surcharge" by Sebring would constitute a "tax" against persons to whom no services are rendered, that argument clearly does not apply to the SR-1 Rate Rider charged by Florida Power as part of its rates for the services it provides.

III. The Action Group's Discrimination Argument Is Improper and Unfounded

The final point raised by the Action Group that requires a response is the argument that the PSC's approval of the SR-1 Rate Rider discriminates in favor of Sebring customers residing within the city limits and against Sebring's non-resident ratepayers [Brief at 12-13, 20-21, 23-26]. In essence, the Action Group asserts that "only City of Sebring residents...are responsible for

the debt," because non-resident ratepayers who "are presently within [Sebring's] 'territory' by reason of a 1986 territorial agreement" had "absolutely nothing whatsoever to do with [Sebring's] debt as incurred from 1978 to the present"; therefore, the PSC's approval of "a plan that would allow [Florida Power] to surcharge these same customers for revenue bond debt that they had no hand in creating, or opportunity to influence through the political process," constitutes "an illegal tax." [Id.]

Sebring submits that the Action Group's attempt to interject this rate discrimination claim should be rejected as improper for three reasons. First, the argument does not pertain to the PSC's subject matter jurisdiction, which is the only issue that the Action Group has preserved for review. It is settled that the PSC "has exclusive jurisdiction to determine the reasonableness of an electricity surcharge and whether or not it is discriminatory." Lake Worth Utilities Authority v. Barkett, 433 So.2d 1278, 1279 (Fla. 4th DCA 1983).

In addition, the precise discrimination question posed by the Action Group here--as distinguished from the issue of discrimination between Sebring's and Florida Power's customers--was not presented and passed upon below.[11] The principle is firmly established that "[m]atters not presented to the trial court by the

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[11] The "resident vs. non-resident" discrimination claim was not mentioned at all in the Action Group's Prehearing Memorandum [R 177-86] or in counsel's closing argument [T 403-09]. Although it was touched upon briefly and tangentially during a colloquy with PSC Chairman Beard [T 418], the point was never presented as an independent basis for opposing the Joint Petition.

pleadings or ruled upon by the trial court will not be considered by this court on appeal." Lipe v. City of Miami, 141 So.2d 738, 743 (Fla. 1962).

Third, the Action Group's contention that non-resident customers included within the territory served by Sebring as a result of the 1986 Territorial Agreement cannot be made to bear any part of the burden for Sebring's pre-existing bond debt is a claim that comes too late. Any such objection should have been raised during the proceedings in which the PSC considered the 1986 Territorial Agreement, and is now foreclosed by the approval of that Agreement in Order No, 18018, issued on August 20, 1987 [R 3].

In any event, the Action Group has cited no authority to support its position that rate discrimination exists where, as here, the non-resident customers of a municipal utility pay the same rates and receive the same service as resident customers. City of Tallahassee v. Florida Public Service Commission is plainly unavailing, because the finding of discrimination in that case was based on the fact that the non-resident customers were being subjected to a 15 percent surcharge over the rates imposed on resident customers, without any cost-of-service justification. 441 So.2d at 623. In this case, the SR-1 Rate Rider will, if approved, apply uniformly to Sebring's resident and non-resident customers.[12]

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[12] The Action Group's assertion that "the most serious flaw in PSC's 'finding' of no discrimination is that it is not based upon any evidence of record" [Brief at 21], and the related suggestions that the PSC should have "made on investigation of the discriminatory nature of petitioners' scheme" [Brief at 25], are

While candidly conceding that there is no authority addressing its theory that a uniformly applied rate constitutes a discriminatory and illegal tax against non-resident ratepayers who became customers after the utility's debt was incurred, the Action Group cites six cases from other jurisdictions as analogous decisions. A review of those decisions, however, reveals that none is even remotely relevant to this case, much less supportive of the Action Group's position.

In State of North Carolina *ex rel.* North Carolina Utilities Comm'n v. Transylvania Utility Co., 30 N.C. App. 824, 226 S.E. 2d 824 (1976), the court reversed the Utility Commission's ruling that it had no authority to permit the imposition of an "availability charge" on owners of undeveloped tracts who were not actually consuming or using the water and sewer services. The North Carolina Supreme Court denied review of that decision. 291 N.C. 178, 229 S.E.2d 692 (1976).

In Tumbo v. Crestline-Lakes Arrowhead Water Agency, 58 Cal. Rptr. 538 (Cal. 4th DCA 1967), the court upheld the authority of the Water Agency to incur a bond indebtedness that would require revenues exceeding the general limitation on tax rates, reasoning that an additional "standby water charge" was not a tax but a special assessment, and that even if regarded as a tax it was authorized by the legislature.

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perplexing. If the rates charged to resident and non-resident customers are identical, it certainly is not the PSC's burden to prove that the rate structure is not discriminatory.

In Graham v. City of Lakewood Village, 796 S.W.2d 800 (Tex. Cir. App. 1990), the court held that a municipality could not impose a $25 per month "standby fee" on owners of vacant lots far availability of water and sewer services, where no water or sewer service was actually furnished or used; the court relied on statutes specifically limiting charges to "utility services furnished," and the fact that the utility could not enforce collection because a service never furnished could not be disconnected.

In Forest Hills Utility Co. v. Public Utilities Comm'n, 31 Ohio. St. 2d 46, *285* N.E. 2d 702 (1972), the Ohio Supreme Court held that the Ohio Public Utilities Commission had no statutory authority to impose an "availability fee" on owners of unoccupied lots that were not connected to or receiving service from the water and sewer utility. That decision, however, has since been modified by the Ohio Supreme Court with respect to the issue of the Commission's jurisdiction to approve contracts imposing availability charges. See Mohawk Utilities, Inc. v. Public Utilities Commission, 37 Ohio St. 2d 47, 307, N.E.2d 261 (1974).

In City of New York v. Steinfeld, 126 Misc.2d 934, 486 N.Y.S.2d 598 (Sup.Ct.App. 1984), the court upheld the authority of the City to collect unpaid charges for water supplied to unmetered buildings.

In Smith v. Township of Norton, 2 Mich.App. 17, 138 N.W.2d 522 (1965), the court held that a municipality could not impose "ready to serve" and "debt service charges" on property owners who were

not connected to or using the water system, based on statutes that only authorized assessment of rates for services "furnished" to "users."

Of these six cases, three upheld the authority of the regulatory commission or utility against challenge. The three that did not involved situations in which the complaining parties were property owners who were being assessed a fee despite the fact that they received no utility service at all. To suggest that those cases can be equated or analogized to the circumstances here requires associative perception of unprecedented elasticity.

Finally, it must be noted that if the distinction drawn by the Action Group based on ascribing proportionate liability for past bond debts is approved, despite the fact that rates are the same for all Sebring customers, the line-drawing process will be very difficult. For example, it is unclear how the Action Group would treat longtime resident customers who move outside the city limits, or vice versa. As a practical matter, a favorable ruling on the Action Group's point would have decidedly unfavorable ramifications far beyond this case for utilities, ratepayers, and the public.

CONCLUSION

The PSC properly determined that it had jurisdiction to approve the imposition of the SR-1 Rate Rider on Sebring's customers as a part of Florida Power's rate schedule, based on the uncontradicted evidence that the payment of Sebring's bond debt is a cost of service attributable to them and not to Florida Power's customers. In so ruling, the PSC did not violate chapter 91-343, because that act never took effect and was not intended to preclude a transaction, such as the sale to Florida Power, that results in the immediate payment of Sebring's bond debt and immediate reduction of rates for Sebring's customers. Accordingly, the PSC's order granting the Joint Petition and approving the terms of the sale should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been served this 15th day of February, 1993, to the attached service list.

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