IN THE SUPREME COURT OF FLORIDA

THE ACTION GROUP,

Appellant,

v.

J. TERRY DEASON, ETC. ET AL.,

Appellees.

Appeal from an order of The Florida Public Service Commission

Case No. 81,076

ANSWER BRIEF OF APPELLEE FLORIDA POWER CORPORATION

Richard W. Neiser
Vice President & General Counsel
James P. Fama
Senior Counsel
FLORIDA POWER CORPORATION
P.O. Box 14042
St. Petersburg, Florida 33731

and

Sylvia H. Walbolt
Nathaniel L. Doliner
CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A.
One Progress Plaza
Post Office Box 2861
St. Petersburg, Florida 33731
(813) 821-7000
Attorneys for Appellee
Florida Power Corporation

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PRELIMINARY STATEMENT

In this brief, appellee Florida Power Corporation will be referred to as "Florida Power" or "FPC." Appellee Sebring Utilities Commission will be referred to as "Sebring." Appellee Florida Public Service Commission will be referred to as "the PSC" or "the Commission." Appellant The Action Group will be referred to as "the Action Group" or "Action."

References to the transcript of the technical hearing will be indicated as "Tr. ___." Commission Order No. PSC-92-1468, dated December 17, 1992, which is the subject of this appeal, will be referred to as the "Order" and is included in the Appendix at Tab 3. The Agreement for Purchase and Sale of Electric System is referred to as "the Agreement" and is included in the Appendix at Tab 1; it is in the record at Tr. 7. References to the Initial Brief of Appellant The Action Group will be designated "In. Br. ____." The appendix to this brief will be referred to as "A .____ "

All emphasis in quoted material is supplied unless otherwise indicated.

STATEMENT OF THE CASE

Because the Action Group's Statement of the Case presents an inaccurate and incomplete description of the material facts and is highly argumentative, Florida Power submits the following statements of the case and facts.

On September 18, 1992, Florida Power and Sebring filed a Joint Petition with the PSC (A.2.), seeking its approval of certain terms of a proposed Agreement for Purchase and Sale of Electric System by which Florida Power would acquire Sebring's electric system and provide electric service to present and future customers in the territory previously served by Sebring. The Action Group, comprised of certain Sebring customers, intervened in the proceeding to oppose the petition on the ground that the PSC allegedly lacked jurisdiction. A "customer hearing" was held in Sebring on November 4, 1992. A "technical hearing" was held in Tallahassee on December 7-8, 1992, at which witnesses testified before and submitted documentary evidence to the Commission panel. All parties presented closing arguments, and the Commission received the oral recommendation of its staff.

Based upon the record before it, the Commission approved the material terms of the Agreement. (order No. PSC-92-1468, dated 12/17/92; A.3.) Its findings and conclusions are carefully explained in the order that is the subject of this appeal.

As the Commission expressly found in that order, Sebring "is in serious financial distress" due to its debt service on some $85 million of outstanding electric system revenue bonds,

which "has drained Sebring's resources and brought it to the verge of bankruptcy." Order at 1. Sebring's rates -- already the highest in the State of Florida -- would have to be increased approximately 37% to allow Sebring to comply with its bond covenants, which are presently in default. Order at 2. Having considered the options available to it, Sebring determined that it should sell its system to Florida Power upon terms set forth in the Agreement, as to which approval was sought from the Commission.

In particular, the Agreement provides for a separate rate rider which, upon the Commission's approval, Florida Power will charge Sebring's current customers and future customers in Sebring's former service area, for a period of 15 years, in addition to Florida Power's generally approved rates. Order at 3. This rate rider is designed to enable Florida Power to recover the amount that it is paying for Sebring's system in ***excess*** of the depreciated net book value and going concern value of the system as determined by the Commission.[1/] The rider will not be charged to Florida Power's general body of ratepayers. Id. Even with the rider, the rates charged to the Sebring

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[1/] The total purchase price for Sebring's electric system, which is in excess of $54 million dollars under the Agreement, was required by Sebring in order that it can pay off its bonds and then go out of the utility business. (A.1. at pages 7-9) Florida Power will have to incur debt in order to purchase Sebring's electric system (A.1, at pages 38-40). The Sebring rate rider is designed, as more fully discussed at pages 8-9 hereof, to allow Florida Power to recover its debt costs and certain other expenses.

customers by Florida Power will be considerably less than their current rates. **(Ex. 15;** A.4).

Although the Action Group customers do not object to being served in the future by Florida Power rather than Sebring, they do object to the rate rider. Urging that the rate rider **does** not relate to the provision of electric service and thus is not a **"rate"** within the meaning of Florida Statutes Chapter 366, they assert that the Commission lacked jurisdiction to approve it.

The Commission rejected that contention, holding that **"the** matters proposed for our approval in this proceeding, including the Sebring rate rider, fall well within the purview of our jurisdiction in all respects." Order at 5. Stating that "Action Group's argument is a rate discrimination argument, not a jurisdictional one," the Commission went on to hold that:

> 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. Action Group does not question our jurisdiction to answer the question when it is posed this way. See City of Tallahassee v. Mann, 411 So.2d **162** (Fla. **1981),** and C.F. Industries v. Nichols, **536** So.2d 234 (Fla. 1988).

Id.

The Commission then considered the reasonableness of the Sebring rider, including the method of its calculation and the period of time over which it would be charged. Order at 6-7. Specifically finding the rider to be reasonable, the Commission also expressed its intent to retain jurisdiction "over all

aspects of the rider" and emphasized that Florida Power would be required to provide it with the results of an annual review of the rider. Id. at 7.

Turning to issue of discriminatory rates raised by the Action Group, the Commission concluded that "under the particular circumstances of this case, . . . the proposed Sebring rider does not unduly discriminate against the Sebring customers who will be subject to it." Order at 8. Citing this Court's decision in C.F. Industries v. Nichols, supra, the Commission declared that "[t]o 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." Id. As the Commission explained:

> 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.

Id. In the Commission's view, "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." Id.

Based upon these findings, the Commission expressly approved "the SR-1 rate schedule as part of Florida Power Corporation's rate schedule." Order at 8. In doing so, the Commission emphasized that this order has "no precedential value . . . [and] is limited to the unique set of facts in this case." Order at 11. Declaring, however, that "unique problems require unique solutions," the Commission held that "under this particular set of extraordinary circumstances, we believe our decision is in the best interest of all concerned." Id.

Accordingly, holding that it has jurisdiction over the issues raised and that the Agreement is in the "public interest," the Commission approved it in all material respects. Order at 11-12. The Action Group has now appealed that order. By order of this Court dated January 26, 1993, an expedited schedule was established for this appeal.

STATEMENT OF THE FACTS

Florida Power is an investor-owned public utility, whose rates, service, and service areas are subject to comprehensive regulation by the Florida Public Service Commission in accordance with Chapter 366, Florida Statutes. Florida Power provides retail electric service in certain areas of Highlands County.

Sebring Utilities Commission is a body corporate and politic created pursuant to Chapter 23535, Laws of Florida, Special Acts of 1945 (the "Act"). Sebring operates an electrical system within the City of Sebring, as well as certain areas of

Highlands County. Pursuant to the Act, as amended by Chapter 90-474, Laws of Florida, Special Acts of 1990, Sebring is authorized to sell its assets, including the transfer of its customers and service areas, with the approval of a majority of the members of the city Council of the City of Sebring. Under Chapter 366, Florida Statutes, certain aspects of Sebring's utility operations, including its territorial agreements, are subject to regulation by the Commission.

Electric service is currently provided in Highlands County by Sebring and FPC in accordance with a territorial agreement which is subject to the jurisdiction of, and was expressly approved by, the Florida Public Service Commission. Thus, on August 20, 1987, in order to eliminate the overlapping service territories and duplication of facilities [which had been the subject of the Commission's Order No. 16602, Docket No. 850605-EU, dated September 17, 1986, 86 FPSC 9:270, establishing a moratorium on the extension of distribution facilities within Highlands County], the PSC entered Order No. 18018 in Docket Nos. 861596-EU and 850605-EU, 87 FPSC 8:231, approving a territorial agreement between Sebring and FPC and lifting the moratorium.

Following entry of that territorial order, the PSC directed FPC and Sebring to address various remaining areas in dispute. Order No. 18891, dated February 22, 1988, 88 FPSC 2:200. By Order No. 19432, dated June 6, 1988, 88 FPSC 6:76, the Commission approved FPC's and Sebring's Joint Plan to Resolve Overlapping Services, finding that it "embodies a workable plan

for relieving the problems of overlapping services and duplication of facilities in the Sebring area." Order No. **19432,** Page **1, 88** FPSC **6:76.**

In October, 1990, Florida Power and Sebring entered into a Settlement Agreement, approved by the PSC in Order No. 23823, dated December 4, 1990, in Docket No. 891034-EU, **90** FPSC **12:17,** with respect to various issues which had not been resolved by the Commission's 1987 order. That Settlement Agreement did not alter the territorial agreement previously approved by the PSC but rather constituted a PSC-approved plan to carry out, over **"a** period of time," the geographic divisions approved by the PSC's 1987 territorial order and thereby "resolve problems we have identified in the Sebring area." Order No. **23823, p. 4, 90** FPSC **12:20.**

During this period, however, Sebring experienced serious financial difficulties due to its escalating debt obligations. Order at 1. Although Sebring sold its generation facilities and most of its transmission facilities to Tampa Electric Company in 1991, and then began to purchase its power needs from TECO, this did not resolve Sebring's financial woes resulting from the debt service on its remaining water and electric utility systems. Id. Faced with the prospect of default of its obligations on some $85 million of utility revenue bonds and the specter of raising its already excessive rates even higher, Sebring determined, after due consideration of its options, that it should sell **its**

remaining facilities to Florida Power.?' Order at 3. This would "provide immediate rate relief to Sebring's customers, while allowing Sebring to retire its debt and cease operating permanently as a public utility." Id. The Purchase and Sale Agreement was entered into by Florida Power and Sebring on August 28, 1992 and approved by the Sebring City Council on September 15, 1992. Id.

Under the Agreement, Florida Power agreed to pay a "base purchase price" of not more than $54 million, which is the amount, together with $21.5 million dollars from Sebring's proposed sale of its water system to the City of Sebring and certain other funds, estimated to be needed to repay Sebring's outstanding bonds in full. Order at 3. For a period of 15 years, Florida Power would charge Sebring's customers and future customers in Sebring's former service area a separate rate, the "SR-1 Rate Rider," in addition to its currently approved rates. The rate rider would allow Florida Power to recover the portion of the base purchase price (together with interest thereon and certain of Florida Power costs and taxes) above the depreciated net book value of Sebring's electric system and the going concern value of the system as determined by the Commission. Id. That

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2/ Sebring considered extensively a number of alternatives to the sale to Florida Power, including continuing to operate under its bond covenants (with higher rates to its customers), a refinancing of the bonds, a sale of the electric system to the City of Sebring, and bankruptcy; it concluded, for legal and business reasons, that the sale to Florida Power offered the best available alternative. (Tr. at 91-92, 167).

rate rider would not be charged to Florida Power's other customers. Id.

Even with this rider, the rates to be charged by Florida Power to customers in Sebring's service area would be lower than those currently charged by Sebring and considerably lower than those Sebring would be required to charge in order to comply with its bond covenants. Order at 2. Sebring's rates are already the highest in the state and among the highest in the nation. (Order at 2; Tr. at 20, 91).

The Agreement was expressly conditioned upon the PSC's approval of the SR-1 Rate Rider, as well as its approval of the proposed amendment to the 1986 territorial agreement that would reflect FPC's acquisition of Sebring's facilities and service area. Order at 4. Unless that approval is obtained and the closing occurs before April 1, 1993, Sebring will be in monetary default of the bonds; this could result in a receiver being appointed for the system and, ultimately, Sebring could be forced to file for bankruptcy. (Sebring's Motion to Expedite Appeal, filed January 22, 1993).

SUMMARY OF ARGUMENT

The Action Group argues that the Florida Public Service Commission lacked jurisdiction to approve the rate rider to be charged by Florida Power to customers in Sebring's former service area. Its argument rests entirely on its premise that the debt service for the Sebring electric system is not a "cost of service" to customers served by that system. The evidence presented to the Commission established that Action's premise is flatly wrong. As the Commission expressly found, "[t]he record of this proceeding makes it perfectly clear, despite many Sebring customer's wish that it be otherwise, that the cost of the Sebring debt is a cost to serve the Sebring customers." Order at 8.

The Cornmission further found that Action's complaint was, in reality, a contention that the rate rider was discriminatory. Specifically adhering to this Court's precedent, the Commission concluded, "under the particular circumstance of this case, that the proposed Sebring rider does not unduly discriminate against the Sebring customers who will be subject to it." Order at 8. Determining that it would instead "be discriminatory to pass that additional cost [to serve the Sebring customers] to Florida Power Corporation's general body of ratepayers," the Commission declared that "[t]hat is the fundamental regulatory principle we are bound to uphold in this most difficult decision." Order at 8.

Action's attack on the Commission's order is nothing more than a demand for this Court to substitute its judgment for that of the Commission on a rate-making issue that lies at the foundation of the Commission's jurisdiction and expertise. This Court has consistently refused to do that and it should refuse to do so here. The Commission's order is supported by competent, substantial evidence, and it should be affirmed by this Court.

ARGUMENT

The PSC properly exercised jurisdiction over the petition because the rates, service, and service areas of FPC are matters within its exclusive jurisdiction.

In Florida, the rates, service, and service areas of investor-owned electric utilities such as Florida Power are stringently regulated by the Florida Public Service Commission. Chapter 366, Florida Statutes. Section 366.03, Florida Statutes (1991) expressly provides that:

> Each public utility shall furnish to each person applying therefor reasonably sufficient, adequate and efficient service upon terms as required by the commission.

Those "terms" unquestionably include FPC's rates and charges. See §§ 366.04, 366.041, and 366.05. Indeed, Florida Power is precluded from charging any rates other than those prescribed by the Commission:

> 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. All applications for changes in rates shall be made to the commission in writing under rules and regulations prescribed, and the commission shall have the authority to determine and fix fair, just and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service.

Section 366.06(1).

After examining this statutory scheme, this Court long ago observed that:

> These provisions add up to what can only be considered a very extensive authority over the fortunes and operation of the regulated entities.

City Gas Co. v. Peoples Gas System, Inc., 182 So.2d 429, 435 (Fla. 1965). In subsequent decisions, emphasizing that "the powers of the Commission over these privately-owned utilities is omnipotent within the confines of the statute and the limits of organic law," this Court further held that those powers are "exclusive." Storey v. Mayo, 217 So.2d 304, 307 (Fla. 1968), cert. denied, 395 U.S. 909, 89 S.Ct. 1751, 23 L.Ed.2d 222 (1969).

In a 1991 decision, this Court re-affirmed the "exclusive and superior" jurisdiction of the PSC over electric utility service and rates. Florida Power Corporation v. Seminole County, 579 So.2d 105, 106-107 (Fla. 1991). It did so again in 1992. City of Homestead v. Beard, 600 So.2d 450, 451 (Fla. 1992). As these controlling decisions make clear, the proposed terms for FPC's future service to Sebring customers and customers within Sebring's PSC-approved service area fall directly within the jurisdiction of the PSC, and the PSC properly exercised that jurisdiction in reviewing and approving the basis upon which Florida Power would acquire Sebring's electric system and provide service to customers in Sebring's former service area.

In fact, given these explicit statutory provisions, FPC can only provide service to Sebring customers upon the terms and conditions required by the Commission. By definition, then, the Commission necessarily has jurisdiction to determine whether the Sebring Rate Rider can be charged by FPC to this class of customers. Notwithstanding the Action Group's ridicule of the PSC's order, the Commission's reasoning and analysis is eminently

sound and fully in accord with Florida statutory and decisional law.

It is settled, of course, that the Commission's decision that it possesses jurisdiction over the proposed terms and conditions of FPC's service to Sebring's former customers must be afforded "great weight" and should not be overturned unless "clearly unauthorized or erroneous." See, e.g., PW Ventures, Inc. v. Nichols, 533 So.2d 281, 283 (Fla. 1988) (affirming PSC order invoking jurisdiction over attempt to sell electric power to single customer); Ft. Pierce Utilities Authority v. Florida Public Service Commission, 388 So.2d 1031, 1035 (Fla. 1980) (affirming PSC determination that it had no jurisdiction in matter and declaring that "[W]e are buttressed in our conclusion by the principle that administrative construction of a statute by the agency or body charged with its administration is entitled to great weight and will not be overturned unless clearly erroneous."); [3/] Board of County Commissioners v. Beard, 601 So.2d 590, 591 (Fla. 1st DCA 1992) (noting presumption of correctness of PSC determination of statute it had duty to administer and affirming PSC ruling that issue was subject to PSC jurisdiction).

As Action correctly notes, this "presumption of regularity" obviously cannot serve to allow jurisdiction to be exercised by an agency where none has been conferred by the

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[3/] The Action Group inexplicitly suggests that the Court refused to give weight to the agency's determination in that case. (In. Br. at 13-15). Quite to the contrary, that is exactly what the Court did there.

Legislature. Radio Telephone Commun., Inc. v. Southeastern Tel. Co., 170 So.2d 577, 582 (Fla. 1964). However, that case involved a statutory scheme very different from Florida's electric utility regulatory scheme, and the Court's decision there has no bearing here. Thus, the Court emphasized in Radio Telephone Commun., at page 582, that:

> In this case there can be no doubt whatsoever that the Legislature did not intend, in 1913, to regulate any type of radio service, including the "radiotelephone" service provided by Southeastern and RTC to their subscribers. And in view of the history of regulation of public utilities in this state by the Legislature, we have no **doubt** that, if and when the Florida Legislature decides to enter the field reserved to it in the Federal Communications Act of 1934, referred to above (Sec. 221(b), Title 47, U.S.C.A.), it will do so in no uncertain terms and in language appropriate to and by regulations suitable for this new type of communications service.

That is exactly what the Legislature has done with respect to regulation of electric utilities like Florida Power. As this Court's decisions addressing the electric utility regulatory scheme make clear, the Legislature has given the PSC "exclusive" jurisdiction, Storey, 217 So.2d at 307, and "very extensive authority over the fortunes and operation" of regulated electric utilities. City Gas, 182 So.2d at 435. There can simply be no doubt that the Commission possesses jurisdiction in this matter.

Thus, this case is wholly unlike the Ft. Pierce decision, which the Action Group relies on so heavily. There, it was "uncontradicted" that the PSC had no jurisdiction to regulate the

acquisition by Peoples of the gas distribution system of Florida Gas or to regulate the merger of Florida Gas and Continental. Ft. Pierce, 388 So. 2d at 1033. Instead, the petitioners urged the Commission to accept jurisdiction because of "the public interest" in an activity in which Peoples, the regulated utility, had "no direct part" and which was "clearly . . . without the purview of the Commission to regulate." Id. at 1035. In upholding the Commission's refusal to exercise jurisdiction there, the Court specifically distinguished decisions where "the objective of the order was to regulate by direct action the applicant utility over which the agency had jurisdiction and regulatory authority." Id.

Here, the PSC clearly has jurisdiction over the rates and electric service provided by Florida Power, and Florida Power is a direct participant in the Purchase and Sale Agreement over which the Commission asserted jurisdiction. Hence, the Commission was not "'one step removed'" from its statutory jurisdiction over regulated utilities such as Florida Power. Id. This Court's decision in Ft. Pierce obviously does not apply to the very different issues presented in this case. We turn now to those issues.

1. The PSC correctly determined that the cost of the Sebring debt service is a "cost to serve" this class of customers.

In truth and fact, while the Action Group's argument is styled by it as a challenge to the Commission's jurisdiction, Action actually raises a "cost-of-service" rate issue concerning

whether the costs of retiring Sebring's debt should be allocated to former Sebring ratepayers as a legitimate cost of serving that class of customers. Thus, Action contends that Florida Power is making a "loan" to Sebring or imposing a "tax" on these customers and that the "only 'service' to be rendered by FPC, for which imposition of the transition rate is sought, has nothing to do with the furnishing of electric power to a customer base." (Action's Prehearing Memorandum at 3; see also, In. Br. at 12, 26). But, this is -- as the Commission correctly pointed out in its order -- quintessentially a cost-of-service issue falling within the PSC's jurisdiction and expertise, and the Commission, having considered Action's contention in light of the evidence, determined that these costs do have something to do with furnishing electric service to the customers served by this system. Order at 6-8.

In particular, uncontroverted evidence was presented to the Commission establishing that Sebring's bonds were incurred for the benefit of Sebring's utility system and the customers served and to be served by it, that the debt service on those bonds represents a cost of serving the Sebring customers, and that this is a part of the purchase price being paid by Florida Power for the Sebring electric system, not a "loan" or a "tax" as Action argues. (Tr. at 20, 85-89, 316-317, 332-334, 338). The Commission was certainly entitled to accept that evidence and find, as it specifically did, that this debt service represents a cost of service to this particular class of customers. As such,

this cost is properly incorporated in Florida Power's rates to those customers once Florida Power owns the system, just as it was properly incorporated in Sebring's rates when it owned the system. As Action itself has conceded, ". . . a utility's debt and debt service are lawful ingredients of a rate base when the utility sets its rates."[4/] (In. Br. at 26).

The fact of the matter is, this issue is no different than other cost allocation issues routinely considered by the Commission in the course of carrying out its ratemaking jurisdiction under Chapter 366 and especially Section 366.06(1) requiring the Commission to establish a utility's rates "for the particular class of service involved . . . ." See, e.g., Order No. 24817, p. 21 (July 15, 1991), where the Commission considered whether rates were "designed to more accurately reflect the costs associated with each service and to place the burden of payment on the person who causes the cost to be incurred rather than on the entire body of ratepayers."

The Action Group repeatedly asserts that many of Sebring's customers -- those customers outside the City -- had no voice in connection with Sebring's decision to incur this bond indebtedness and that "only City of Sebring residents - qualified electors - are responsible for the debt that petitioners would now recoup against non-residents." (In. Br. at 12). That is

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[4/] The out-of-state decisions cited by Action at pages 25-26 of its initial brief are accordingly inapposite. Unlike those cases, this rate rider will not be imposed on persons who do not receive any service at all from the utility.

simply not true. Sebring's outstanding bonds were validated in a proceeding in the Highlands County Circuit Court. Action's own counsel in this case represented customers of Sebring who specifically contested the validity of Sebring's issuance of these bonds without a referendum. This Court rejected those claims and expressly upheld the validity of these bonds, holding that there was nothing in either Sebring's enabling legislation or the Florida Constitution that required a referendum for approving these revenue bonds. Wohl et al v. State of Florida, 480 So 2d. 639 (Fla. 1985). Action is in effect attempting in this appeal to retry the same issue that was laid to rest in Wohl!

Action also argues that those customers of Sebring who reside outside the city limits should not bear any burden of these bonds because "they are no different from FPC's present customers who likewise played no part in [Sebring's] debt binge." (In. Br. at 12). In this regard, they state that they are only within Sebring's service area by virtue of the 1986 territorial agreement. In actuality, however, Sebring's service to customers outside the city limits did not arise as a result of that territorial agreement. Sebring has been serving customers outside the City for many years and, under this Court's controlling precedent, customers could not have obtained service from Florida Power merely because its rates were lower than

Sebring's.[5/] Moreover, the territorial agreement which was ultimately entered into at the Commission's behest to end the service area disputes between Florida Power and Sebring was expressly approved by the Commission after notice to the public and a pubic hearing, and non-Sebring residents, including members of the Action Group, had every opportunity to oppose the Commission's approval of that agreement.

More importantly, Action's complaint totally misses the point: this bond indebtedness was incurred for the benefit of Sebring's utility system and all of the customers served and to be served by it, whether inside or outside the city. Action's disagreement with the wisdom of Sebring's decision to incur that indebtedness is not an issue in this proceeding. That decision having been made and having been upheld by this Court, the only issue here is whether Florida Power's purchase of the financially troubled system on these proposed terms is lawful and in the public interest.

Finally, in urging that the cost of this debt service is not a cost to serve which can be properly incorporated into FPC's rates to this class of customers, the Action Group ignores the incontestable record fact that the only way Sebring would agree to sell its facilities to FPC and concomitantly allow FPC to

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[5/] See, e.g., Lee County Electric Cooperative v. Marks, 501 So. 2d 585 (Fla. 1987); Gulf Power Co. v. Public Service Commission, 480 So. 2d 97 (Fla. 1985). As this Court long ago declared, "[a]n individual has no organic, economic or pol tical right to service by a particular utility merely because he deems it advantageous to himself." Storey, 217 So.2d at 307-308

provide service in its exclusive territory is if Sebring's bond indebtedness is retired. (Tr. **139-141**; 332-334, **338**). **As** such, the cost of retiring the debt on the Sebring system necessarily is a cost to FPC of doing business as an electric utility in the Sebring area. By the same token, of course, the debt service on the bonds will continue to be a cost to Sebring and its customers if this Agreement is not consummated. As the Commission correctly pointed out, this cost "will not simply go away." Order at 8.

Although Action vehemently disagrees with the Commission's determination that the bond indebtedness on Sebring's system is "a cost to serve" this class of customers, Order at **8,** it is fundamental that the PSC's order must be upheld if it complies with essential requirements of law and the agency had available competent, substantial evidence to support its findings. Polk County **v.** Florida Public Service Commission, **460** So.2d 370, **373** (Fla. **1984**); Florida Retail Federation, Inc. v. Mayo, 331 So.2d **308, 311** (Fla. **1976**). In this regard, it is not enough for the Action Group to proffer a different conclusion -- i.e., that Florida Power is making a "loan" to Sebring or imposing a "tax" on this class of customer -- based on its self-serving view of this transaction. As this Court emphasized in Florida Retail Federation:

> Even were we persuaded to one policy or the other . . . it is not our prerogative to impose that policy upon the Commission. So long as the policy adopted by the Commission comports with the essential requirements of law we may not meddle. The Legislature has

> reposed in the Commission the responsibility to make just the kind of choice between competing policies in its area of expertise as it has done here.

Id. at 312

The Commission heard -- but rejected -- Action's view, and the Commission's findings on this "cost of service" issue should not be disturbed. Action's "attacks on the PSC's analysis represent a thinly veiled attempt to have this Court reweigh and reevaluate the evidence presented to the PSC. This [it] cannot do." Gulf Power, 480 So.2d at 98.

2. The PSC correctly determined that the Sebring rate rider is not discriminatory.

Having determined, consistent with the evidence before it and contrary to Action's contention, that this debt service would in fact be a "cost of service" to FPC, the Commission then considered the question whether the Sebring Rate Rider would "unduly discriminate against the Sebring customers who will be subject to it." Order at 8. The Commission concluded that, not only was there no improper discrimination, it would instead "be discriminatory to pass that additional cost to Florida Power Corporation's general body of ratepayers." Id. Following the teachings of this Court that "rates must not only be fair and reasonable to the parties before the PSC, they must also be fair and reasonable to other utility customers who are not directly involved in the proceedings at hand," C.F. Industries v. Nichols, supra, the Commission emphasized that:

> 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, no matter who provides the electric service.

Order at 8.

On the basis of this Court's decisions and the record evidence in this case, the Commission explicitly found 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 at 8. For this reason, the Sebring Rate Rider "is not unduly discriminatory," and it was approved as a part of FPC's rate schedule. Id.

There can be no doubt that the PSC correctly concluded that the Action Group's argument against allocation of these debt costs to Sebring area ratepayers through FPC's Sebring Rate Rider is in substance nothing more than a claim of discriminatory rate-making. There can likewise be no question that rate discrimination claims such as this fall within the Commission's jurisdiction. As the Fourth District held in Lake Worth Utilities Authority v. Barkett, 433 So.2d 1278, 1279 (Fla. 4th DCA 1983):

> . . . the Commission has exclusive jurisdiction to determine the reasonableness of an electricity surcharge [upon customers outside the City limits] and whether or not it is discriminatory. This is statutorily provided in Section 366.04(1), Florida Statutes (1981) . . . . the assault upon

> the surcharge on the basis that it was discriminatory is an issue to be resolved by the Commission . . . .

In sum, after having heard the evidence and legal argument by counsel for all parties, the Commission determined that it had jurisdiction to consider the Sebring Rate Rider as a term of the service Florida Power would provide to this class of customers, and it then determined the Sebring Rate **Rider** to be in accordance with Florida law and in the public interest, given the unique and difficult circumstances present here. As much as Sebring's customers would now like to evade the burden of those costs which were incurred in order to serve them, the Commission has concluded otherwise in a classic exercise of its rate-making judgment. This Court should decline the Action Group's invitation to intervene in the ratemaking process and substitute its judgment for that of the Commission. Gulf Power, **480** So.2d at **98**; Citizens of Florida v. Public Service Commission, 435 So.2d 784 (Fla. 1983).

3. The PSC has jurisdiction over this rate because it is a rate of Florida Power, not Sebring.

One final point must be addressed. Action urges that the Sebring Rider cannot be a "rate" because the Legislature provided in Chapter 91-343, Laws of Florida, Special Acts of 1991, that any surcharge imposed by **Sebring** in order to meet its bond obligations would not be deemed to be a "rate" for purposes of PSC jurisdiction. Here, of course, no surcharge by Sebring is at issue, and the provisions of Chapter 91-343 have **no** applicability. **A** brief review of the circumstances leading to

Sebring's decision to enter into this proposed Agreement makes this plain.

Pursuant to Chapter 23535, Laws of Florida, Special Acts of 1945, as amended by Chapter **90-474,** Laws of **Florida,** Special Acts of 1990, Sebring is authorized and empowered to sell, convey, transfer, and lease its assets, including the transfer of its customers and service area, with the approval and consent of a majority of the members of the City Council of the City of Sebring. Chapter 90-474 was approved by a referendum in the City of Sebring. Prior to Chapter 90-474 becoming law, Sebring had no express power to sell or lease its assets.

In **1991,** the Legislature passed Chapter **91-343,** amending Chapter 23535, Laws of Florida. chapter 91-343 authorizes Sebring to fix, at least annually, a debt repayment surcharge to enable it to meet all of its covenants with respect to, and make all payments required on, its bonds, and further provides that the purchaser or lessee of all or a substantial portion of the electric distribution system would, as agent for Sebring, collect the surcharge from electric service customers in the Sebring territory and pay such debt repayment surcharge to Sebring as and when collected from those customers.

Even though Sebring's rate structure is subject to Commission jurisdiction under Chapter 366, Florida Statutes, its rates are not subject to Commission jurisdiction. Chapter **91-343** expressly provides that a debt repayment surcharge imposed by

Sebring would not be deemed a rate or charge or part of Sebring's rate structure under Chapter 366.

On June 28, 1991, Florida Power submitted a proposal to Sebring that was substantially different than the transaction authorized by the 1991 special act. Thus, instead of a transaction in which a substantial portion of Sebring's bonds would remain outstanding for a number of years, Florida Power's proposal and the Agreement subsequently entered into by Sebring and Florida Power calls for Sebring's bonds to be paid off within 35 days after the closing of the sale. Furthermore, instead of a debt repayment surcharge to be fixed each year by Sebring and to be collected by Florida Power as agent for Sebring, the proposal and Agreement call for an electric rate rider (SR-1) to be charged by Florida Power to Sebring customers and new electric customers in the former Sebring service territory as a part of Florida Power's rates, subject to Commission approval.

Chapter 91-343 was never submitted to a vote of the electorate because Florida Power's 1991 proposal contemplated a substantially different transaction than the one authorized in Chapter 91-343. Consequently, Chapter 91-343 never became effective and is not applicable to this Agreement.

Even if Chapter 91-343 had become effective, it did not mandate the sole method by which Sebring could sell its assets, but merely authorized an alternative way to accomplish a sale. Chapter 90-474 clearly gives Sebring the power to sell its assets. Although Chapter 91-343 provides one alternative to

accomplish this sale -- the imposition of a debt repayment surcharge by Sebring -- nowhere is there any expression by the legislature, nor is there any legislative intent, that it intended a methodology providing for a debt repayment surcharge to be the only way that Sebring could sell its assets and pay off its bonds. Quite to the contrary, the title of this Act explicitly states that it merely "authorizes" the imposition of such a surcharge by Sebring.[6/]

Furthermore, Chapter **91-343** applies only to the imposition of a debt repayment surcharge by Sebring, providing that any such surcharge would not be deemed a rate or part of Sebring's rate structure so as to trigger PSC jurisdiction over it. But this special act is no way affects the exclusive and superior jurisdiction of the Commission with respect to the review and approval of Florida Power's rates, including the imposition of the Sebring Rate Rider. Florida Power could not charge that rate without PSC approval, and the Commission properly exercised its jurisdiction over Florida Power in approving this rate for this particular class of service.

[6/] Florida law is settled that the title of legislation is to be considered in determining legislative intent. State v. Webb, 398 So.2d 820, 824 (1981), quoting Foley v. State, 50 So.2d 179, **184 (Fla. 1951).**

CONCLUSION

The Commission has jurisdiction over the Sebring Rate Rider, and its order in this proceeding should be affirmed.

Respectfully submitted,

Richard W. Neiser
Vice President & General Counsel
James P. Fama
Senior Counsel
FLORIDA POWER CORPORATION
Post Office Box 14042
St. Petersburg, Florida 33731

and

Sylvia H. Walbolt
Nathaniel L. Doliner
CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
Post Office Box 2861
St. Petersburg, Florida 33701
(813) 821-7000
Attorneys for Appellee Florida
Power Corporation

By: Sylvia H. Walbolt
Sylvia H. Walbolt
Florida Bar No. 033604

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery this 15th day of February, 1993, to the following addressees:

Martha Carter Brown
Prentice P. Pruitt
Public Service Commission
101 E. Gaines Street
Room 226
Tallahassee, Florida 32399-0863

Andrew B. Jackson
150 North Commerce Avenue
Sebring, Florida 33870

Don Darling, Co-Chairman
citizens for Utility Rate Equity
1520 10th Avenue
Sebring, Florida 33872

D. Bruce May
Holland & Knight
P. O. Drawer 810
Tallahassee, Florida 32301

Lee L. Willis
Ausley, McMullen,
McGehee, et al.
P. O. Box 391
Tallahassee, Florida 32302

Robert G. Pollard, Chairman
Concerned Citizens of Sebring
810 N. Ridgewood Drive
Sebring, Florida 33870

John R. Bush
Jeremy P. Ross
Bush Ross Gardner Warren & Rudy
220 South Franklin Street
Tampa, Florida 33602

Sylvia H. Walbolt
Attorney