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SUPREME COURT OF FLORIDA

FILED
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CLERK, SUPREME COURT
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Chief Deputy Clerk

THE ACTION GROUP,

Appellant

v. Case No. 81,076

J. TERRY DEASON, ETC., ET AL.

Appellees

APPELLANT, THE ACTION GROUP'S INITIAL BRIEF

LOWER TRIBUNAL - THE FLORIDA PUBLIC SERVICE COMMISSION
Case No. 920949-EU

John R. Bush
Fla. Bar. No. 010691
BUSH ROSS GARDNER WARREN & RUDY, P.A.
220 S. Franklin Street
Tampa, FL 33602
813/224-9255
Attorneys for Appellant

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STATEMENT OF THE CASE AND FACTS

Nature of the case

A "public utility" as defined, FLA. STAT. §366.02 (1991), **is** precluded from charging a "rate" that is not on file with the Florida Public Service Commission, ***id.*, $366.06,** so Florida Power Corporation **seeks** approval for a certain amount of money that constitutes an aspect of the business transaction between itself and Sebring Utilities Commission **(SUCOM).** FPC and the **SUCOM** (jointly, "petitioners") have agreed that **FPC** will purchase **SUCOM's** electric power transmission and distribution (T & D) system, and finance **SUCOM's** redemption of its revenue bond indebtedness, approximately $69 million; if PSC approves, FPC will collect that **sum** from **SUCOM's** present Customers over **a** period of 15 years; petitioners have labeled this reimbursement **(or** recoupment) the "Sebring Rider." For **PSC** to have jurisdiction of the proposed "approval," petitioners sought to transmogrify the Rider from a recoupment to a "rate."

In its bond redemption financing FPC will not render any service to Sebring's customers. In other words, **SUCOM's** present ratepayers will not receive any electric utility service in exchange for the surcharge obligation that **PSC** has "approved" FPC's imposing upon them.

By its ORDER here appealed, **PSC has** correctly stated the case: On September 18, 1992, petitioners filed their **JOINT** PETITION for approval of the agreement; appellant was **one** of the intervenors recognized by PSC; witnesses were examined during hearings and, on December **17,** 1992, **PSC** filed its decision, number PSC-92-1468-FOF-EU. (R. 193-205); App. **A,** *ORDER* ***at 1.*** Appellant timely filed its notice of appeal on January 13, 1993. (R.214)

Although most of its stated facts, relating to SUCOM's "financial problems" and its high electric utility rates (R.193-195), are not relevant to the jurisdictional argument on this appeal PSC has correctly stated that petitioners' agreement provides that FPC will purchase SUCOM's remaining assets for approximately $54 million; the price components are: (1) $17.8 million, the net book value of SUCOM's assets; (2) "going concern value" of $5.7 million; and (3) SUCOM's bonded indebtedness' of $32.4 million. *App. A, ORDER at 3, 7.*

City of Sebring and SUCOM birth, debt and proposed death'

No evidence was presented upon the subject of "rate discrimination." Therefore, we were surprised by PSC's basing its jurisdiction argument upon that subject. PSC's statement, *ORDER at 5* (R.197), compels us to state the facts pertinent to discrimination, recognizing that jurisdiction remains the issue - if it did not have jurisdiction of what petitioners have labeled the "Sebring Rider," PSC did not have jurisdiction to decide a discrimination issue.

1913: Sebring Charter granted; Municipality of Sebring created. 1913 Fla. Laws ch. 6773.

1945: SUCOM "created and made a part of the government of the City of Sebring," consisting of five (5) members named by Sebring's City Council; each appointed SUCOM member must be "a qualified voter of said City of Sebring . . . ."; although empowered to

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'Pertinent portions of the Sebring Charter, as amended and referenced herein, are reproduced in App. B. The special acts cited in this section are a matter of public record, of which the court can take judicial notice. *Atlantic Coast Line R. Co. v. Holliday, 73 Fla. 269, 74 So.* 479, *485 (1917)*(court required to take judicial notice of legislative acts that had been ignored by the parties in lower court)

borrow money under strictly limited circumstances **(purpose,** amount and duration), **SUCOM** was not empowered to incur long term unlimited debt, secured by revenue bonds. 1945 Fla. Laws ch. 23535 §§ 1-4.

1951: **Charter** amended to authorize SUCOM's issuance of revenue bonds, subject to the approval of the voters of the City of Sebring. 1951 **Fla.** Laws ch. 27893 §§ 12.01, 12.02.

1963: Charter amended to eliminate "any requirement of voter approval **of** proposed revenue bond issues unless required by the constitution of this **state."** The City of Sebring electors expressly approved this amendment, by referendum. **1963 Fla. Laws** ch. 1926 §§ 1-2. ***See Wohl v. State of Florida,*** 480 So.2d 639, 641 (Fla. 1985).[2]

1978: **SUCOM** issued revenue bonds totaling ***$8.4*** million. ***See Wohl, 480 So.2d at 642.***

1981: **SUCOM** issued additional revenue bonds totaling $92,750,000; these bonds were for the purpose of paying or redeeming approximately $8.1 million **owed** on the 1978 bonds and for paying for a portion of the cost of "the Project (as defined in the 1981 Resolution)"; the project was an expansion of electricity generating facilities. ***Id., 480 So.2d at 642.***

1984 and 1985: **SUCOM** issued additional revenue bonds **of** $1.8 million **and** $2.35 million, "Series 1984 and 1985, respectively," for the purpose of paying a portion of the interest due on the previously borrowed money and for current operating expenses. ***Id.***

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[2]The court is entitled to judicially notice its own records. ***See Loren v. State, 601 So.2d 271, 274, n. 1 (Fla. 1st DCA 1992); Lagarde v. Outdoor Resorts of America, Inc., 428 So.2d 665 (Fla. 2d DCA 1982).*** In ***Lagarde,*** Judge (now Justice) Grimes concurred, citing **as** comparison ***DeBearn v. Safe Deposit & Trust Co., 233 U.S. 24, 34 S.Ct. 584 (1914)***, for the proposition that a court has the right to take judicial notice of its prior decisions so long as at **least** one of the current parties had been involved therein. **SUCOM** was a principal **party** in *Wohl v.* ***State.***

1986 until SUCOM and FPC filed their JOINT PETITION: SUCOM incurred additional revenue bond debt, but sold its electric generation facilities, leaving it at present with only the T & D system, and debt of approximately $88,462,000. (R.6) JOINT ***PETITION, ¶ 8.***

December 11, 1986: Petitioners entered into a Territorial Agreement, attached to the JOINT PETITION; among other things, this agreement gave **SUCOM** the right to sell electricity to customers outside of Sebring's boundaries (city limits), **and** precluded FPC from selling electricity to customers in such designated areas of Highlands County, Florida. *(R.3-5)* JOINT ***PETITION ¶¶ 5-6, and attachment (in evidences).***

1990: Sebring's Charter amended to preclude **SUCOM's** incurring additional revenue bond debt (or debt generally in excess of $100,000) without Sebring's City Council's express approval; also conditioning **SUCOM's** sale of assets upon approval by Sebring's City Council. 1990 Fla. **Laws** ch. **474** §§ 1-3; (R.3) *JOINT* PETITION ***¶ 4.***

1991: The legislature determined that, in the event that **SUCOM** sold its **T** & D, the best interests of Sebring, SUCOM, the bondholders and the customers (ratepayers) were served by the imposition of a surcharge upon the ratepayers, but only if the ratepayers approved of **a** surcharge, by referendum; it was specifically provided that the "surcharge" to be charged by the purchaser of SUCOM's T & D "shall not be **deemed** to be a rate or charge for purposes of chapter 366, Florida Statutes, 1989, or **a** part of the rate structure of the [SUCOM] under such chapter." App. B, 1991 Fla. Laws ch. 343, ***referenced in JOINT PETITION* (R.6-7).**

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[3]**The** joint petition, 23 pages, is indexed by PSC's clerk (R.1-23); she advises that the attachments are in evidence, we presume Vol. V,

September 18, 1992: Petitioners proposed that SUCOM go out of business by selling its T & D to FPC, the latter to advance the funds to redeem SUCOM's revenue bonds, then recoup the advance from all of SUCOM's present ratepayers; petitioners recited that ch. 91-343 has never taken effect because it was not submitted to a vote of the "qualified electors residing within the area affected by Chapter 91-343." **(R.6-7)** ***JOINT PETITION ¶ 9.*** However, petitioners utilized the legislature's enactment of the proposed ch. 91-343 (subject to referendum approval by those ratepayers who would or would not consent to the surcharge suggested by the legislature) to suggest that their undertaking was "consistent with these legislative findings." Id.

FPC's semantics: Transition rate and Transition Amount; to Sebring Rider; to Sebring Rider Rate; to rate

The JOINT PETITION, although including several thoughts, is based primarily upon the proposition that FPC will advance the money for SUCOM's revenue bond redemption, then recoup that money from all of SUCOM's existing customers; but, the scheme is expressly conditioned upon PSC's "approval." Thus the focus that petitioners presented was the **amount** of its "loan" that FPC would **recoup,** and the means by which FPC would recoup. There being no statutory basis for PSC's authorization of such recoupment from ratepayers (outside its authorization of the imposition of rates) petitioners opened their JOINT PETITION, using the term "transition rate"; PSC concluded the proceeding by approving a "rate." (R.1, 204) ***JOINT PETITION and ORDER.***

The JOINT PETITION is silent as to the fact that SUCOM's debt was incurred solely as the result of actions taken by City of Sebring electors, and that all the debt was incurred prior to the 1986 Territorial Agreement. The JOINT PETITION makes it clear that SUCOM's

customers (who would be subject to the surcharge) reside within Highlands County, Florida, inside and outside the City of Sebring's boundaries. ***(R.3-5) JOINT PETITION ¶¶ 5, 6 and map attachments (Exhibit A in evidence).*** In other words, FPC presented its recoupment scheme as one whereby all of SUCOM's ratepayers would reimburse FPC, without making a distinction between Sebring residents and non-residents.

Petitioners initially termed FPC's suggested reimbursement a "**transition rate**" to be collected from SUCOM's present customers. *Id., at 1.* This term then evolved to "Transition **Amount**" which they estimated to be "approximately $68,976,000." ***Id., ¶ 16.*** Petitioners then described the **transition rate** or the **transition amount** as the "**Sebring Rider.**" ***(R1-23).***

Petitioners stated in paragraph 18 of their JOINT PETITION:

> Because the Outstanding Bonds constitute a debt of **[SUCOM]** and because the Purchase and Sale Agreement provides for the payment in full of the Outstanding Bonds and the payment of certain close-out debts **and** expenses of [SUCOM], and because the Bonds were issued for the benefit of [SUCOM] and its customers rather than for FPC and all of its customers, it is proper for [SUCOM's] customers to be charged **rates** that are different than the **rates** charged by **FPC** to its other customers.

JOINT PETITION at 17.

Petitioners attempted to make FPC's proposed loan **look** like a rate. "RATE **SCHEDULE** SR-1" (SEBRING RIDER), attached to the **JOINT** PETITION in evidence, contains an arithmetical calculation which results in the statement that a "rate shall be assessed: Sebring Rider: 2.126¢ per KWH. . . . This **rate shall** be **for** a maximum term of fifteen (15) years from the. Apparently, the calculation was crafted **by** using $69 million as the numerator, and an estimated number of kilowatt hours as the denominator.

PSC described the "**Sebring Rider**," observing that petitioners' reasoning for its requested imposition "is that the costs of repayment of [SUCOM's] debts are costs associated with the provision of electric service to [SUCOM's] customers, and those costs should not be borne by [FPC's] general body of ratepayers. The petitioners have asked for our approval of a '**Sebring rider rate**' to accomplish this purpose. The **rate** will be applied to the Sebring customers **as** an addition to FPC's current rates . . . " *(R.198)* ORDER at 6. (e.s.)

PSC entered its approval of "the **SR-1 rate** schedule **as part** of **FPC's rates.**" *Id.* at *12.* Thus, the proposed surcharge, a term coined by the legislature in ch. 91-343 (which never became effective because the affected ratepayers were not afforded their referendum right), was presented to PSC as the misnomer, **transition rate** (also disguised as 2.126¢ per KWH), but it emerged from PSC as a rate, as to which PSC claimed jurisdiction, despite the fact that the relevant legislative expression of intent is that a **surcharge,** if approved by the affected ratepayers, is not to be considered a **rate** or **charge** for purposes of PSC's jurisdiction under FLA. STAT. ch. 366 (1991).

Testimony demonstrated that the Sebring Rider is not a "rate."

Mr. Samuel F. Nixon, Jr. is employed by FPC as its director of rate department. He stated that "all of our customers will receive the identical rates that are in our tariff book, and one rate there will be called a Sebring Rider which will be applicable to the customers in the Sebring territory." In other words, after FPC's acquisition of SUCOM's assets and customers, but for the Sebring Rider, today's SUCOM customer will pay to FPC the identical rate for electrical power service. Stated another way, FPC's and SUCOM's present customers will

receive identical service from FPC after the transaction is closed - there will not be any difference in the service that they will receive. *(R. Vol.IV) Nixon testimony at 331-32.*

Mr. Nixon further testified that "I'm going to be delivering kilowatt hours that are identical, but they have different prices. They have different costs. They have different cost assignments . . ."; broken down into elements, the service is identical for identical cost, but the present SUCOM customers will pay the Sebring Rider. *Id. at 333-34.*

PSC's jurisdiction argument

After observing that SUCOM suffers from serious financial problems (that it does not suggest were brought on by any of SUCOM's customers), and that its approval of the Sebring Rider was a condition precedent to FPC's willingness to purchase SUCOM's assets and customers, PSC ruled that it had jurisdiction "of these matters by the provisions of Chapter 366, Florida Statutes." *(R.193-96)* App. A, *ORDER at 1-4.* Although it was not able to specify a statutory provision, PSC observed that ch. 366:

> grants us exclusive jurisdiction over the rates and charges of investor-owned electric utilities, exclusive jurisdiction over the rate structures of all electric utilities in the state, and exclusive jurisdiction over territorial agreements and disputes between all electric utilities. The Legislature intends that the provisions of Chapter 366 are to be liberally construed to protect the public welfare.

Id. at 4-5.

Brushing aside appellant's contention that PSC was without jurisdiction because the "Sebring Rider" or the "Sebring Rider Rate" is not a "rate," PSC reasoned:

1. it has jurisdiction over rates and charges of public utilities;

2. therefore, it must have jurisdiction to decide what is a "rate";

3. there is no other forum to make such a determination;

4. if there were another forum to make such a determination, PSC's "authority to set appropriate rates and charges would be effectively subverted";

5. Action Group's argument is not jurisdictional, but rather one related to "rate discrimination";

6. "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."

7. "We hold 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. at 5.

No precedent

Stating that its "decision has no precedential value," PSC observed that, in a "public interest" context, "the most reasonable resolution of [SUCOM's] financial problems" is granting the "relief" requested by petitioners: "[U]nique problems require unique solutions, and under

this particular set of extraordinary circumstances, we believe our decision **is** in the best interest of all concerned." *Id. at 11.*[4]

SUMMARY OF ARGUMENT

The issue for the court's decision is whether **PSC** has jurisdiction to approve the "Sebring Rider."

Petitioners have already argued their case here, in their motion to expedite this appeal (which appellant **does** not oppose). According to them, the burr under the saddle in appellant's presenting this appeal must be eliminated at the earliest opportunity **so** that the investment bankers might sell more bonds to facilitate FPC's advancing the funds with which to redeem **SUCOM's** outstanding revenue bonds. Any rational person would agree that **SUCOM** must ***go*** out of business ***so*** that its beleaguered ratepayers will be granted relief. Nonetheless, SUCOM's disposition is beyond PSC's jurisdiction as well as the scope of this appeal.

The jurisdictional question posed here is whether, **for purposes of the proposed surcharge,** the relationship between **SUCOM** or **FPC** and the electric customers within its service **area** is one of **(a)** utility to utility customer; or (b) taxing authority to taxpayer. That the answer is the latter is made abundantly clear by **FLA. STAT. §§ 366.04-.075 (1991),** emphasized in ch. **91-343,** which contains at least two policy decisions by the Florida Legislature: (1) the surcharge is not a rate or charge for purposes of ch. ***366;*** **and** (2) there will be no surcharge unless the affected ratepayers authorize same by a referendum. App. B, ch. **91-343.**

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[4]Such criteria do not appear in **FLA. STAT.** ch. 366. **PSC** does not possess jurisdiction over the "unique problems" of municipally owned utility commissions.

Commencing **analysis** with ch. 91-343, petitioners nevertheless were unwilling to undertake the legislature's suggestion that the affected ratepayers be given the opportunity to vote by referendum whether they consented to be surcharged. Rather, they undertook **an** indirect and obfuscatory route:

1. **FPC** characterized the debt repayment "surcharge" as a "transition rate" (R.1,13-16,22);

2. Petitioners assiduously avoided a description of who are ***the*** *ratepayers*;

3. They misleadingly characterized their undertaking as a way out of **SUCOM's** high rates, and as a service to public interest **(R.21);**

4. They dissembled, presenting the obviously appealing argument that FPC's existing customers should not assist in redeeming **SUCOM's** revenue bonds (R. 13-14);

5. **Contrary** to the express provision of ch. **91-343,** they convinced **PSC** to treat their debt repayment "surcharge" as a "rate" over which the Commission has jurisdiction under ch. **366. (R.204);** App. A, ***ORDER at 12.***

Petitioners attempt an **end** run of ch. **91-343,** engaging PSC's assistance in an unprecedented effort to reverse the ch. **91-343** mandate. Their conduct is nothing short of legerdemain. Borrowing the statutory term "transition rate" from **$366.075,**[5] without making any effort to explain how such a term can be applied to a debt repayment surcharge, and relying upon the legislature's "surcharge" authorization, ch. **91-343** (which did not become effective), they **seek** to appeal to emotion, that **SUCOM's** customers will realize an immediate reduction in their rates, FPC's basic rate being approximately one-half of the rate which **SUCOM** must

[5] *infra* at 17.

charge; the **FPC** rate is so low in comparison that its inclusion of the proposed surcharge results in a total that is substantially less than SUCOM's present rate. (R.14).

By enacting ch. 91-343, the legislature made clear its intent that **any** effort to impose a surcharge must be fair to all concerned, including those ratepayers who do not live within Sebring's city limits and have had no opportunity at any time in Sebring's or SUCOM's history (since 1945) to limit the latter's creation of debt. Petitioners' action in submitting their request to PSC can be described as nothing short of a blatant effort, under color of state law, to impose a tax upon SUCOM's ratepayers. The "surcharge" is in reality a **tax,** because no service is to be rendered in exchange therefore.

Finally, PSC's injecting a "rate discrimination" argument at a time after the proceedings were closed with no evidence as to the matter, compels a response. Discrimination would indeed follow in the event that PSC's jurisdiction conclusion is sustained. Such is found, not in what petitioners have divulged in their submission, but rather in the fact that many, perhaps a majority, of SUCOM's present customers have had no legal right to assume responsibility for the debt that has brought that Sebring instrumentality to bankruptcy. The public record, including the Sebring City Charter, a 1945 special act, and a decision by this court, demonstrate that only City of Sebring residents - qualified electors - are responsible for the debt that petitioners would now recoup against non-residents. Any detailed analysis demonstrates that non-residents are no different from FPC's present customers who likewise played no part in SUCOM's debt binge. That non-residents are presently within SUCOM's "territory" by reason of a 1986 territorial agreement between petitioners is without value for purposes of PSC's decision, the non-residents not having requested their predicament. In other words, mistakes

made by Sebring's utilities commissioners do not provide a rationale for PSC to assume jurisdiction to authorize FPC's taxation of non-residents through the medium of a "surcharge" for the purpose of securing a fund with which to pay for those mistakes.

ARGUMENT

FLA. STAT. ch. 366 (1991) is not ambiguous

The most casual observer of administrative law knows that an agency always specifies its jurisdiction. PSC tacitly concedes no jurisdiction by (a) not specifying, (b) generalizing about its plenary authority to approve rates without which privately owned and regulated utilities do not have authority to charge their customers, and (c) arguing that it has acted in the "public welfare" and solved a difficult problem with a "unique solution."

This court has never labored over jurisdiction, merely stating the conclusion, citing ch. 366. See, *e.g., Ft. Pierce Utilities Authority for the City of Ft. Pierce v. Florida Public Service Commission, 388* So.2d 1031 (Fla. 1980) (affirming PSC's denial of request that it assume jurisdiction to regulate a corporate acquisition, there being no ch. 366 authority for such jurisdiction); *Plant City v. Mayo*, 337 So.2d 966,974, n. 22 (Fla. 1976) (citing specific ch. 366 provisions),

As distinguished from the legislative mandate that it act in the "public interest," such is not a basis upon which PSC may determine that it possesses jurisdiction. In Fort Pierce *Utilities,* several cities and utility commissions (including SUCOM) petitioned the court to direct PSC to consider, in connection with an application for the issuance of securities, a merger of two other corporate entities:

> Petitioners assert, however, that the public interest will not be served by the merger and that the Commission is obliged to consider that issue in connection with the financing application. This obligation, they say, arises from the legislative declaration contained in section 366.01, Florida Statutes **(1977)**
>
> > Legislative declaration. The regulation of public utilities as defined herein is declared to be in the public interest and this chapter shall be deemed to be **an** exercise of the police power of the state for the protection of the public welfare **and all** the provisions hereof shall be liberally construed for **the** accomplishment of that purpose.
>
> Petitioners maintain that the public interest would be adversely affected by the merger because among the properties of Florida Gas which will be controlled by Continental after the merger **are** its exploration and gas transmission subsidiaries. . . ,
>
> . . . .
>
> The activity asserted by petitioners to be incompatible with the public interest is **the** merger of Florida Gas and Continental - an activity in which Peoples has no direct part and one which clearly is without the purview of the Commission to regulate. Hence, we must agree with the Commission that its statutory authority left it "one step removed from the ability to pass upon the merger of Continental **and** Florida Gas within the instant proceeding.

Ft. Pierce, 388 So.2d at 1033-35.

While agency interpretation of the statute of its creation is entitled to great weight, **"we** must have jurisdiction to determine what **is** a rate," ***App. A, Order at 5;*** **see** ***Ft. Pierce,*** **388**

So.2d at 1035, **PSC** is not faced with **a** statutory construction question in this instance. No provision of ch. 366 pertaining to "rates" or "rates and charges" is ambiguous. Therefore, the public are hardly in need of PSC's views about what the law means. PSC is either granted jurisdiction, or it is not.

As this court said in ***Radio Telephone Communication, Inc. v. Southeastern Tel. Co.,*** 170 So.2d 577, 582 (Fla. 1964):

> We are always reluctant to disagree with an administrative body in its interpretation of the statute which it has the duty to administer; and, of course, the orders of the Florida [Public Service] Commission come to this court with a presumption of regularity, Sec. 364.20, FLA. STAT., F.S.A. But we cannot apply such presumption to support the exercise of jurisdiction where none had been granted by the Legislature. If there is **a** reasonable doubt as to the lawful existence of **a** particular power that is being exercised, the further exercise of the power should be arrested. (citations omitted).

Specific sections of ch. 366 show that the legislature delegated to **PSC** authority to approve rates and charges only for services rendered:

§ **366.02:** "Public utility" **means** an entity that **supplies electricity** to the public;

§ 366.03: "All rates and charges made, demanded, or received by any public utility for any **service rendered . .** , shall be fair and reasonable."

§ 366.04: "In addition to its existing functions, the commission shall have jurisdiction to regulate and supervise each public utility with respect to its rates **and service. . . ."** In exercising its jurisdiction, PSC "shall have power over electric utilities . . . (a) To prescribe uniform systems of accounts. (b) To prescribe a rate structure for all electric utilities.

(c) **To** require electric power conservation. . . . (d) **To** approve territorial agreements. . . . ***(e)*** To resolve, upon petition . . ., any territorial dispute. . . . (f) To prescribe and require the filing of periodic reports. . . ."

§ 366.041: "(1) **In** fixing the just, reasonable, and compensatory rates, charges, fares, tolls, or rentals to be observed and **charged for service** . . . the commission is authorized to give consideration . . . 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; . . . **(3)** The term 'public utility' as used herein means all persons or corporations which the commission has the authority, power, and duty to regulate **for** the purpose of fixing rates, and charges **for services rendered** and requiring the **rendition of adequate service.**"

§ 366.05: "(1) **In** the exercise of such jurisdiction, the commission shall have power to prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, and service rules and regulations to be observed by each public utility; . . . (2) Every public utility, defined in s. 366.02, which in addition to the production, transmission, delivery or furnishing of heat, light, or power also sells appliances or other merchandise shall keep separate and individual accounts for the sale and profit deriving **from such** sales. No profit or loss shall be taken into consideration by the commission from the sale of such items in arriving at any **rate to be charged for service** by any public utility. . . ."

§ 366.06: "(1) **A** public utility shall not . . . 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, . . . In fixing fair, just, and reasonable rates for each customer class, the commission 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; the consumption **and** load characteristics of the various classes of customers; and public acceptance of rate structures. . . ."

§ 366.075 Experimental and transitional rates. - "(1) The commission is authorized to approve **rates** on an experimental or **transitional basis** for any public utility **to encourage energy conservation or to encourage efficiency.** The application **of** such rates may be for limited geographical areas and for a limited period. . . ."

Statutory construction is unnecessary

Citation of cases is hardly necessary for us to state the rule that where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resort to the rules of statutory interpretation. **PSC** has not manifested a desire to enter into the statutory construction process. (R. 196-97) App. A, Order *at 4-5.* Rather, PSC has written a strange analysis of what it has denominated "Jurisdiction." *Id.*

Stating flat out that it has "jurisdiction of these matters," ***id. at 4,*** one would necessarily assume that **PSC** means the business transaction described in the JOINT PETITION. Its next statement, that it has "exclusive jurisdiction over the rate structures of all electric utilities in the state," ***id. at 4-5,*** is probably correct; at least it is true that **PSC** possesses the legislatively delegated power to prescribe a rate structure for all electric utilities. FLA. **STAT.** §366.04(2)(b).

However, FPC's recoupment of its advance or loan that will be utilized to redeem **SUCOM's** revenue bonds is not a "rate," because the resulting surcharge is not the consideration for any service rendered to ratepayers, as defined in §§ 366.02-,075. Therefore, PSC's jurisdiction argument based upon rate structure is redundant.

Likewise inapposite is its statement that it possesses jurisdiction in respect to territorial agreements and disputes between all electric utilities. (R.197) App. A, Order at **5. FPC** and **SUCOM** have presented their JOINT **PETITION,** based upon a mutually acceptable financial agreement which affects and thereby necessitates the PSC's approval of two existing territorial agreements, hardly a basis to suggest that the **PSC** has the authority to approve the imposition of the Sebring Rider as a rate.

Next in its jurisdiction argument, **PSC** correctly states that appellant, The Action Group, "characterized the [Sebring] rider as a 'loan' from [FPC] to **[SUCOM]** that **FPC** will recover from [SUCOM's] customers to pay off [SUCOM's] bond indebtedness"; and, it correctly states our position that the Rider is not a "rate" because it does not relate to the delivery of electric power. *Id.* However, PSC's analysis of what is a "rate" ends at this point with the perplexing statement that it is taken for granted - "axiomatic" - that it "must have jurisdiction to determine what is a rate in the first place," apparently out of a general concern that the judicial branch would otherwise undermine the finality of its decisions setting rates. Id. **In** so arguing, **PSC** overlooks the fact that appellants' argument is that the PSC cannot overstep the boundaries of its jurisdiction as determined by the legislature and it is appropriate and necessary for this court to assure that PSC does not overstep such boundaries. ***Radio*** Telephone, ***170 So.2d 577.*** One would necessarily concede that the legislature knew how to define a rate; that a business loan

is not defined as a rate; and that it is clear that ch. 366 "rates" are limited to charges for services rendered to electric purchasing customers.

PSC's injection of "discrimination"

Having terminated its discussion about the meaning of "rates" without any statutory reference, PSC shifts focus to a makeweight argument about what it characterizes as "the proper question." (R. 197) App. A. ORDER ***at 5.*** **PSC** states that, "The proper question to ask here is not whether the proposed Sebring Rider is a rate." Id. Interesting syntax, but one gets the drift: having declared without reference to legal authority that it has jurisdiction to decide what is a "rate," PSC disengages, arguing that no one - neither it nor appellant - should even bother asking what is a "rate," but rather should limit the inquiry to whether the payment or surcharge imposed upon "similarly situated" customers is "discriminatory." *Id.*

While it is a given that ***all*** of **FPC's** present and future customers (after it purchases SUCOM's T & D) are "similarly situated" in that they will receive identical electricity and electric service, it is misleading to present any "discrimination" analysis in that light. Moreover, it is not productive to compare **FPC's** present customers, who did not vote for SUCOM's hugh debt, and Sebring's residents, past and present, who have allowed the predicament. On the other hand, no relevant evidence about "discrimination" is in the record: no analysis of ***who*** allowed the debt to be created. We are told by politicians that the present generation must allow itself to be **taxed** to pay for the sins of past federal administrations spending more money than revenues justified. That would be taxation, approved by voters through the representative

democratic process, SUCOM created an unrealistic debt that FPC now seeks to recover under the guise of a "rate," but it actually proposes a tax that the ratepayers have not authorized.

Furthermore, PSC's injection of "discrimination" is curious, because it did not start with ch. 91-343 wherein the legislature made clear that real discrimination would occur unless the "affected ratepayers" agreed to be surcharged. PSC's analysis is all the more perplexing when recalling that petitioners alerted it to ch. 91-343 when filing their JOINT PETITION.

PSC is knowledgeable about "rate discrimination," and it makes an interesting point: "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." Id., ORDER *at 5*. The reasonably intelligent observer understands what is discrimination, and inasmuch as FPC's Mr. Nixon made clear that SUCOM's customers will receive the identical service as FPC's other customers, it is unnecessary to be esoteric about the meaning of the word.

Ironically, the only real "discrimination" argument that PSC could logically make in the present context is that the agreement discriminates in favor of Sebring residents, *i.e.*, those residents within the city limits, and against those non-resident ratepayers within SUCOM's service area who had absolutely nothing whatsoever to do with SUCOM's debt as incurred from 1978 to the present.[6]

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[6] No doubt, petitioners and PSC will rejoin with the argument that the non-residents are within the "Territorial Agreement" that petitioners crafted in 1986 (after SUCOM incurred its debt) and that PSC approved on February 23, 1987, under which the parties allocated to SUCOM "other areas in Sebring and Highlands County as [SUCOM's] retail electric service territory. . . ." (R.3-4) *Joint Petition at 3-4 and attachment Exhibit A (in evidence),* However, by enacting ch. 91-343, the legislature effectively eliminated that argument by instructing that the ratepayers will decide whether they consent to being surcharged. Neither PSC nor the judiciary is authorized to craft a different solution.

No reasonable person would argue that, prior to 1963, the non-Sebring ratepayers **possessed** the right to vote on the subject; or that in 1963 they had the right to vote whether referenda should be abolished; or that they have ever possessed the right to vote for Sebring City Council members - those elected officials who appoint SUCOM's unelected Commissioners.[7] Yet, PSC **has** "approved" a plan that would allow FPC to surcharge these same customers for revenue bond debt that they had no hand in creating, or opportunity to influence through the political process. To place the facts in sharper focus, ***all*** of **SUCOM's** debt was incurred **prior** to petitioners executing their "territorial agreement." We would be remiss should we refrain from commenting on **PSC's** totally inappropriate statement that "Action Group does not question **our** jurisdiction to answer the question when it is posed in this way, *i.e.*, **as** one in terms **of** "discrimination"." (R.197) App. **A, *Order at 5.*** The "**question**" is entirely **PSC's,** and ***a posteriori*** at that.

Finally, the most serious flaw in **PSC's** "finding" of no discrimination is that it is not **based** upon any evidence in the **record.** On precisely that ground, the court has overturned the **PSC's** decisions. **See** *City **of** Plant City v. Mayo*, **337** So2d. **966,974** (Fla. 1976)(PSC's generic evidence insufficient).

Petitioners' argument

It would appear that petitioners carefully avoided advising PSC that actual discrimination would ensue, were their plan "approved." While they might be applauded for undertaking the worthwhile project of eliminating **SUCOM,** an entity that has caused great pain and frustration

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[7]App. B. Sebring Charter, as amended.

to many ratepayers, petitioners committed the serious error of not making full disclosure about real discrimination. They compounded their error by presenting their deal as something that it is not:

1. They seek PSC's "approval" of a "transition rate to be collected by FPC from certain retail electric customers in the Sebring area following the pending sale. . . ." (R. 1); *JOINT* PETITION *at 1*. However, it is clear that 8366.075 "transition rates" are authorized only on the basis of energy conservation or efficiency, neither of which applies here. And, petitioners gloss over the facts, lumping together all of SUCOM's present customers without regard to whether they are City residents or non-residents.

2. Petitioners incorrectly characterize ch. 91-343, representing to PSC that the legislature intended and directed "that any surcharge, or similar provision such as the Transition Rate, arising from the sale of the Electric System 'permit [SUC] to meet all covenants and make all payments required under the resolutions authorizing the issuance of outstanding revenue bonds of [SUC]. , , .' . . . Chapter 91-343 further contains an express legislative finding that the collection of a surcharge such as the Transition Rate is '[i]n the best interest of . . . the bondholders of [SUC],' , . ." *(R.* at *6-7).* That the legislature did not equate a "surcharge" with petitioners' "Transition Rate" is manifested in subparagraph (3) of the proposed Section 1.08.02 of 1945 Fla. Laws ch. 23535, *as* amended, providing that "[t]he debt repayment surcharge shall . . . not be deemed to be a rate or charge for purposes of chapter 366. . . ." App. B.

3. Having pulled their "Transition Rate" out of thin air, petitioners then assiduously avoid the most important aspect of ch. 91-343 which is that only SUCOM's

customers shall decide whether they will be surcharged; consent is ch. 91-343's underpinning, the legislature recognizing that any surcharge upon nonconsenting ***non-residents*** would, in actuality, constitute a **tax.**

In sum, petitioners **used** ch. 91-343, as yet not effective because the "qualified electors" have not approved it, to misleadingly suggest that the legislature intended to state that **a** debt repayment surcharge (which they inaccurately describe as a "Transition Rate") is in the best interests of all concerned; they omit mentioning that only the electors would make the decision.

Pertinent Case Law

Finally, **PSC** has demonstrated rather poor scholarship, inserting two decisions immediately following its "discrimination jurisdiction" statement: "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 ***CF Industries v. Nichols,*** [536] So.2d [234] (Fla. 1988). We hold 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. at 5.*** **As** thus presented by **PSC,** it might appear to the uninitiated that the court's decisions somehow support the assumption of jurisdiction, based upon a question **of** discrimination.

City of Tallahassee merely denied a writ of prohibition, sought against **PSC** when it undertook to scrutinize the city's differential charges to customers within **and** without its corporate limits. 411 So.2d at 163-64. PSC's subsequent action in that case presents an interesting twist for purposes herein: After taking testimony, it ruled that Tallahassee had not justified a 15 percent surcharge of non-resident utility customers because, on a cost-of-service

basis, the surcharge "was unduly discriminatory." *City of Tallahassee v. Florida Public* Service *Commission,* 441 So.2d 620, 623 (Fla. 1983)(court affirmed PSC's ruling, because it did not depart from essential requirements of law). Apparently, PSC seeks to brush aside the obvious in its effort to hasten SUCOM's demise, Although not justified on a cost-of-service basis, the non-residents (and not FPC's present customers) would be encumbered with SUCOM's debt. Had PSC truly believed that it possessed jurisdiction of the petition, it would have investigated the facts concerning SUCOM's debt history and how it was created. And having observed that the non-residents are in no way responsible for that debt, PSC would have been compelled to reject the JOINT PETITION, consistent with its reasoning in *City of Tallahassee.*

CF Industries, 536 So.2d 234, 239, involved a public utility's charges for sales of electricity to "qualifying facilities" (QFs) - the second issue before the court was whether certain components of the utility's rate discriminated against QFs in violation of § 366.81; as to which the court stated:

> Rates are not discriminatory simply because they are different for different classes of Customers. (citation omitted). Reading section 366.81 in pari materia with other provisions of chapter 366 which mandate that rates be fair and reasonable and reflect the cost of providing the service and load characteristics, we do not believe the legislature used "discriminates" in the sense which appellants urge. . . .
>
> The PSC found that the standby rates adopted would, in general, reward standby customers with reliable generating systems who place less irregular demands on utilities than standby customers with less reliable systems who place greater irregular demands on utilities. . . .

All of which is to repeat that PSC's citation of the court's cases wherein "discrimination" was considered is no support for its assumption of jurisdiction in this case. Moreover, the discrimination cases would be apposite only in the event that PSC had made an investigation of the discriminatory nature of petitioners' scheme. If PSC made that investigation, such is not apparent from a reading of its ORDER. Needless to say, had it entered that territory in this bizarre case, its only choice would be denial of the JOINT PETITION, and appellant would not be forced to this appeal at all.

Research does not show us any Florida authority, judicial, legislative or otherwise, *e.g.*, PSC orders, for the proposition that PSC's jurisdiction can be constructed upon its rationale that (a) an affected party should not look to ch. 366 for an argument against jurisdiction, and that (b) he should apply a "discrimination analysis" to ascertain whether PSC has jurisdiction. While such an observation might, at first blush, appear imbecilic, the unfortunate fact is that is precisely what PSC has held.

Candidly, we have searched in vain for a court decision that addresses a pragmatic jurisdiction result, such as that advanced by PSC. Apparently this is a case of first impression, perhaps raising the specter of the judicial horror story that bad cases make bad law. However, we do suggest several analogous decisions. See ***State of North Carolina ex rel. North Carolina Utilities Commission v. Transylvania Utility Company, 30*** N.C. App. 336, 226 S.E.2d 824 (1976) (public utility commission found that it lacked jurisdiction to approve the imposition of rates on persons who did not receive any service in return); ***Trumbo v.*** Crestline-Lake ***Arrowhead Water Agency, 250*** **Cal.** App. 2d 320, 58 Cal.Rptr. 538, 541 (1967) ("A levy on all property . . . .without regard to special benefits, is a tax; but a levy made only upon land on

the basis of benefits received is a special assessment and not a tax."); *Graham v. City of Lakewood Village,* 796 S.W.2d *800* (Tex. Civ. App. 1990) (monthly fee charged by city for availability of water service constituted an illegal tax because it was not consideration for the provision of service); Forest *Hills Utility Co., v. Public Utilities Commission of Ohio,* 31 Ohio St.2d 46, 285 N.E. 2d 702 (1972) (utility commission lacked jurisdiction to approve "availability fee" which did not entitle the payor to any water or sewer service from utility); *City of New York v. Steinfeld,* 126 Misc.2d 934, 486 N.Y.S.2d 598 (App Term. 1984) (rate charged for availability of water regardless of whether it was used is a tax); *Smith v. Township of* Norton, 2 Mich.App 17, 138 N.W. 2d 522, 525 (1965) ("To charge non-users for [sewer] services made available by [the utility's] presence without regard to whether any use is made of the service or facility is in legal effect a tax and can be effected only by complying with the statutory requirements and not by creation of charge within the rate structure of the public service.")

Obviously, a utility's debt and debt service are lawful ingredients of a rate base when the utility sets its rates. However, an illegal tax results from a city's utility commission's undertaking a huge debt which it imposes upon non-residents who were powerless to participate in the political process within the city limits. While the cited cases are not direct authority for our PSC jurisdiction argument, they nevertheless demonstrate that PSC is without jurisdiction to approve the imposition of taxes that result from charges for which no service is rendered. FPC's proposed "surcharge" is indeed a tax because no service is rendered, particularly insofar as the non-residents are concerned.

CONCLUSION

The PSC is without jurisdiction to consider the surcharge. Appellant requests that the order be reversed. Should the court be of the view that PSC possesses jurisdiction to approve the subject business transaction, PSC's statement that "the proposed Sebring-rider does not unduly discriminate against the Sebring customers," (R.200) *ORDER at 8*, is without record factual support, if "Sebring customers" means SUCOM's customers (which it clearly does). Therefore, the cause should be remanded to require PSC to justify its statement of no discrimination.

John R. Bush, FL Bar No. 010691
Jeremy P. Ross, FL Bar No. 095429
of Bush Ross Gardner Warren & Rudy
220 South Franklin Street
Tampa, FL 33602
(813)224-9255
Attorneys for appellants

I HEREBY CERTIFY that a complete and correct copy of the foregoing has been furnished by the method indicated to the persons/entities listed on the attached service list, on this 4 day of February, 1993.

John R. Bush

Service List

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

By Federal Express delivery

* * *

Sylvia H. Walbolt
Carlton Fields
One Harbour Place
Tampa, FL 33601

By hand delivery

and

James P. Fama
Florida Power Corporation
3201 34th Street South
St. Petersburg, Florida 33733
attorneys for Florida Power Corporation

By mail delivery
(Mrs. Walbolt's permission)

* * *

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

By Federal Express delivery

and

Andrew B. Jackson
150 North Commerce Avenue
Sebring, FL 33870
attorneys for Sebring
Utilities Commission

By mail delivery

* * *

Lee L. Willis
Ausley, McMullen, McGehee
Carothers & Proctor
P.O. Box 391
Tallahassee, Florida 32302
attorneys for Tampa Electric Company

By mail delivery

* * *

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

By mail delivery

* * *

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

By mail delivery

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APPENDIX

App. A

PSC's December 17, 1992 Order

App. B

Sebring Charter
1913 Fla.Laws ch. 6773
1951 Fla.Laws ch. 27893
1990 Fla.Laws ch. 474
1991 Fla.Laws ch. 343

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Joint Petition of Florida Power Corporation and Sebring Utilities Commission for Approval of Certain Matters in Connection with the Sale of Assets by Sebring Utilities Commission to Florida Power Corporation.

DOCKET NO. 920949-EU
ORDER NO. PSC-92-1468-FOF-EU
ISSUED: 12/17/92

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
BETTY EASLEY

ORDER APPROVING CERTAIN MATTERS IN CONNECTION WITH THE SALE OF ASSETS BY SEBRING UTILITIES COMMISSION TO FLORIDA POWER CORPORATION

BY THE COMMISSION:

CASE BACKGROUND

On September 18, 1992, Florida Power Corporation (FPC) and Sebring Utilities Commission (Sebring) filed a joint petition for approval of several aspects of a Purchase and Sale Agreement by which FPC will acquire Sebring's remaining electric utility system and provide electric service to present and future customers in the territory previously served by Sebring. Citizens for Rate Equity (CURE), The Action Group, The Concerned Citizens of Sebring (CCS), and Tampa Electric Company were granted intervenor status in the case. A customer hearing was held in Sebring on November 4, 1992. A technical hearing was held in Tallahassee on December 7-8, 1992. Nine witnesses presented testimony and evidence on the issues. After closing arguments and our staff's oral recommendation, we made our decision in the case. This final order memorializes that decision.

Sebring's Financial Problems

The Sebring Utilities Commission is in serious financial distress. Faced with escalating debt obligations in 1991, the Sebring Utilities Commission sold its generation facilities and most of its transmission facilities to Tampa Electric Company. At that time Sebring entered into a purchased power contract with Tampa Electric Company to supply all of its capacity needs. The sale to Tampa Electric Company did not solve Sebring's financial problems, however, and debt service on approximately $85 million of bonds that remain outstanding has drained Sebring's resources and brought it to the verge of bankruptcy.

Presently, Sebring is in default of its bond covenants. The rates Sebring levies upon its customer base are not sufficient to cover the debt service and maintain required reserve margins. Sebring maintains that compliance with its bond covenants would require an estimated thirty-seven percent increase in current rates, raising a typical residential electric bill to $151 per 1000 kwh. Sebring has drawn on its reserves to avoid raising its electric customers' rates, because those rates are already the highest in the state.

Sebring's rates compare most unfavorably to those of its nearest neighbor, Florida Power Corporation. Customers of Sebring presently pay $110 per 1000 kilowatt hours (kwh) of electricity, while their neighbors served by Florida Power Corporation pay $71 per 1000 kwh of electricity. Decades of territorial conflict and competition have left the two utilities' service areas entwined and confused, emphasizing the rate discrepancy between the two utilities. Property values in Sebring are depressed, and the community is dissatisfied and divided.

To provide rate relief to its customers and retire its existing bonds, Sebring issued a request for proposals to purchase its electric distribution and remaining transmission facilities. Florida Power Corporation was selected as the successful bidder. Negotiations began soon thereafter, and culminated after more than a year in the contract that is the subject of these proceedings, the "Agreement for Purchase and Sale of Electric System".

Sebring's Alternatives

Sebring considered several alternatives to solve its financial problems before concluding the agreement with FPC. Sebring considered operating in compliance with its bond covenants, but, as mentioned above, Sebring would have had to increase electric rates dramatically through 1996 to do so. Since its rates were already the highest in the state, Sebring determined that further substantial increases would be burdensome and unacceptable. Sebring considered operating in violation of its bond covenants, but this alternative did not assure lower rates to its customers in the long run, because the rate covenants of the bond agreements permit the bond trustee to sue to raise customer rates to cover the debt obligations. Sebring considered refinancing its debt, but rejected that option because refinancing would not have led to decreased rates. Sebring also considered bankruptcy, but the delays and expense, as well as the uncertainty of the outcome, made bankruptcy an unacceptable alternative. Finally, Sebring considered sale of its facilities to the City of Sebring, but the

city refused to consider this alternative unless sale to Florida Power Corporation was not possible. The uncertainty of this alternative led Sebring to conclude that it was not a reasonable one.

Of the options available to it, Sebring determined that the sale to Florida Power Corporation was the most reasonable, because the sale would provide immediate rate relief to Sebring's customers, while allowing Sebring to retire its debt and cease operating permanently as a public utility. The purchase and sale agreement was signed on August 28, 1992. The Sebring City Council approved it on September 15, 1992.

The Agreement for Purchase and Sale of Electric System

The agreement provides for FPC to purchase the remaining assets of the Sebring electric system for a base purchase price of not more than $54 million, plus an additional amount to cover Sebring's miscellaneous debts and expenses and any amounts owed by Sebring to Tampa Electric Company for power purchases under the power purchase agreement. The base purchase price is the amount the parties have estimated will be necessary to repay in full all of Sebring's outstanding bonds. The City of Sebring will pay $21.5 million to purchase Sebring's water system, and that amount and the balance of Sebring's reserve funds will also be applied to repay the bonds.

The base purchase price includes three components: 1) the net book value of Sebring's assets as of the closing date. That amount will be based on a net book value of $17,813,753 as of September 30, 1991; 2) an amount for "Going Concern" the Commission determines appropriate; and 3) the remainder that represents the amount above net book value and going concern value needed by Sebring to retire its debt.

The agreement provides that Florida Power Corporation will recover the remainder of the base purchase price above net book and going concern value specifically from customers that Sebring was serving as of the date of closing, and all new customers in the Sebring service area over a period of 15 years. That amount, plus costs to finance the purchase, interest expense, and certain fees and taxes, would be charged only to those customers as a separate rate, the "SR-1 Rate Rider", in addition to Florida Power Corporation's approved rates. The rate rider would not be charged to Florida Power Corporation's general body of ratepayers.

Other provisions of the agreement relevant to this case include Florida Power Corporation's assumption of Sebring's obligations under the TECO Power Purchase agreement, Florida Power Corporation's assumption of the Sebring/Glades Electric Cooperative territorial agreement, an amendment to the Sebring/FPC territorial agreement that gives FPC the exclusive right to operate an electric distribution system in Sebring's retail service territory, and termination of the parties' Settlement Agreement for the transfer of customers and elimination of duplicate facilities.

Conditions Precedent to Closing

The agreement contains a series of conditions precedent to closing that require our approval of certain relevant matters. The agreement provides that if the parties do not receive our approval of those matters, the parties each have the option to withdraw from the agreement. The conditions form the relief that Sebring and FPC have requested in their Petition, to wit:

1) Our approval of the imposition of the Sebring Rider rate and the methodology for changing that rate;
2) Our approval of inclusion of the SR-1 rate schedule as part of FPC's rates;
3) Our approval of the net book value of Sebring's facilities of $17.8 million as of September 30, 1991;
4) Our approval of any additional amount above net book value for going concern as a prudent investment;
5) Our approval of FPC's purchase of those rate base assets as a prudent investment;
6) Our approval of the prudence of FPC's assumption of the Purchased Power Agreement with TECO for cost recovery purposes;
7) Our approval of the amendment to the Petitioners' territorial agreement and withdrawal of the Settlement agreement; and
8) Our approval of FPC's assumption of the Sebring/Glades territorial agreement.

DECISION

Jurisdiction

We have jurisdiction of these matters by the provisions of Chapter 366, Florida Statutes. That chapter grants us exclusive jurisdiction over the rates and charges of investor-owned electric utilities, exclusive jurisdiction over the rate structures of all

electric utilities in the state, and exclusive jurisdiction over territorial agreements and disputes between all electric utilities. The Legislature intends that the provisions of Chapter 366 are to be liberally construed to protect the public welfare.

The Action Group, one of the three customer associations from Sebring that intervened in this case, argued that we are without subject matter jurisdiction to approve the Sebring rate rider, because that rider is not a "rate" as contemplated by Chapter 366, Florida Statutes. The Action Group characterized the rider as a "loan" from Florida Power Corporation to Sebring that FPC will recover from Sebring's customers to pay off Sebring's bond indebtedness. The Action Group argued that the only "service" to be rendered in return for the rider had nothing to do with the provision of electric service to a customer base. (See The Action Group's Prehearing Memorandum, p. 3.) Since the proposed rider does not relate to the delivery of electric power, the argument goes, it is not a "rate", and we have no jurisdiction over it.

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. No rate decision we made would be final until another authority had determined whether the rates we had set were actually "rates". See Lake Worth Utilities Authority v. Barkett, 433 So.2d 1278 (Fla. 4th DCA 1983).

Action Group's argument is a rate discrimination argument, not a jurisdictional one. The proper question to ask here is not whether the proposed Sebring Rider is a rate. The proper question to ask is whether the proposed Sebring Rider unduly discriminates between customers who are similarly situated and who receive essentially the same service. 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 CF Industries v. Nichols, 234 So. 2d 536 (Fla. 1988). We hold 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.

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536 So. 2d 234

The Sebring Rider

The "Agreement for Purchase and Sale of Electric System" provides that the amount of the base purchase price in excess of the net book value and going concern value that is needed to retire Sebring's debt obligations will be collected by Florida Power Corporation from all customers of Sebring as of the date of closing and all future customers in Sebring's service area. Sebring's service area was delineated in the Sebring/FPC territorial agreement. The basic reasoning behind this proposal is that the costs of repayment of the Sebring Utilities Commission's debts are costs associated with the provision of electric service to Sebring's customers, and those costs should not be borne by Florida Power Corporation's general body of ratepayers. The petitioners have asked for our approval of a "Sebring rider rate" to accomplish this purpose.

The rate will be applied to the Sebring customers as an addition to FPC's current rates. The rate is structured as a formula rate, to be recovered on a kwh energy basis over a period of fifteen years. The rate will be routinely reviewed and adjusted to ensure that the amounts collected accurately reflect the amounts remaining to satisfy the debt.

There are three basic components needed to calculate the amount of the rider: 1) The total dollars to be recovered - the difference between the purchase price and the depreciated net book value of the Rate Base Assets, plus any going concern value determined by the Commission to be a prudent investment, 2) the number of kwh's forecast, and 3) the fifteen year time period. The amount of the rider is simply the total dollars to be recovered divided by the total number of kwh's forecast for the next fifteen years.

We find that the method FPC has proposed to calculate the amount of the rider is reasonable. The rate is designed as a formula rate similar to other formula rates the Commission has approved. The record reflects that a medium load forecast was used to project growth in the Sebring area of 2.09% annually. That forecast is reasonable and comparable to other forecasts for the Sebring area. To the extent that the load forecast proves to be inaccurate, the rider can be recalculated to correct the inaccuracies.

We find that the fifteen year period FPC has proposed to collect the rider is appropriate. The time period of the rider influences the amount of the rider. If the Sebring debt were to be recovered over a longer period, as the customer association CCS proposed, the amount of principal to be recovered annually would be

less, but there would be an additional 10 years of interest and other related expenses Sebring customers would have to pay. A shorter period would retire the debt faster but increase the customers' rates for that period. We approve the 15 year period, because it provides immediate rate relief for Sebring customers and aggressively reduces the amount of the outstanding debt.

We find that the method used to identify customers who will be subject to the rider is appropriate. The Sebring rider will be assessed against all retail electric customer locations that receive electric service through a Sebring meter at the time of closing. After closing, all retail customers at new locations within Sebring's territory as delineated in its 1986 territorial agreement will be subject to the rider. Growth in the Sebring service territory will reduce the amount of the rider. The Sebring airport and retail customers in and around it that are presently served by Florida Power Corporation will not be subject to the rider.

The exact amount of dollars to be recovered, and thus the exact amount of the rider, will not be known until the closing date of the purchase; and the amount will fluctuate over the life of the rider. The initial rider is estimated to be 1.851 cents per kwh based on an estimated $32,393,631 worth of debt to recover. The amount of actual kwh growth will undoubtedly differ to some degree from estimated kwh growth over the fifteen year time period, and this will affect the amount of the rider. If actual growth in the Sebring area is less than forecasted, the amount of the rider will increase; but conversely, if actual growth is greater than the amount forecasted the amount of the rider will decrease. The kwh sales will be monitored over time.

FPC will issue medium term notes as part of its normal debt issuance to pay the rider amount. It will establish and maintain a balance account for the Sebring rider that nets revenues collected from the rider against payments made for principal, interest, and other expenses. Any monies refunded from Sebring Utilities Commission's operations will be credited to the account for the Sebring ratepayers' benefit.

We intend to retain jurisdiction over all aspects of the rider. FPC proposed that the rate of the rider would be reviewed no less frequently than every four years. At the hearing, however, FPC agreed to provide reports on the Sebring rider as part of its monthly surveillance reports. FPC also agreed to review all aspects of the rider on a yearly basis, and provide the Commission with the results of that annual review.

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. That is the fundamental regulatory principle we are bound to uphold in this most difficult decision. As the Supreme Court said in C.F. Industries v. Nichols, Supra., where it affirmed our approval of standby rates to be charged cogenerators:

> In setting rates, the PSC has a two-pronged responsibility: 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. Standby rates which did not properly recover the cost-of-service would unfairly discriminate against other customers by requiring them to subsidize the standby service.

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. We hold, therefore, that the Sebring rider rate is not unduly discriminatory, and we approve the SR-1 rate schedule as part of Florida Power Corporation's rate schedule. When the purchase of the Sebring system is completed and Florida Power Corporation submits the SR-1 tariff, our staff may administratively approve it if it conforms to the principles we have approved here.

The rate base assets

In 1991, when Sebring decided that its financial difficulties required it to sell its remaining electric system assets, it retained an independent consultant, Research Management International, Inc. (RMI), to conduct a valuation of those assets. The valuation was necessary, because over many years, contrary to the repeated advice of its accountants, Sebring had not kept its books and records in compliance with the Federal Energy Regulatory Commission's Uniform System of Accounts. Sebring's records were thus inadequate to establish an accurate net book value for its tangible assets. RMI recalculated the net book value of Sebring's tangible assets and arrived at a figure of $17,813,753 as of September 30, 1991.

We find that the cost study RMI performed to value Sebring's distribution system, transmission system, and other tangible assets was reasonable and appropriate and consistent with established practice in the valuation of utility assets. We approve the depreciated net book value as of September 30, 1992 as $17,813,753. We find that the methodology used to arrive at that amount is consistent with generally accepted accounting principles, and we approve the use of that methodology to calculate the value of the Sebring assets at the time of purchase. For federal income tax purposes Florida Power Corporation shall treat the acquisition of Sebring's tangible and intangible assets in a manner that is consistent with the provisions of the Internal Revenue Code and cost-effective for its ratepayers.

For the reasons mentioned above, we approve at this time the prudence of the acquisition of Sebring's electric system assets for recovery from Florida Power Corporation's general body of ratepayers. We will review this acquisition in Florida Power Corporation's next rate case.

Going Concern Value

The Sebring electric utility system is a mature system with an established customer base. Customer load in the Sebring area is growing at a reasonable pace. The system itself is in reasonably good repair, and Florida Power Corporation does not anticipate that it will have to make substantial upgrades to the system in the near future. Florida Power Corporation and its ratepayers will benefit from the acquisition of this system through increased revenues, improved system efficiencies, and the resolution of longstanding territorial conflict.

Sebring's customers will benefit from the sale to FPC because they will receive immediate rate relief, even with the rider. Sebring's customers will also receive improved customer services from a professionally managed public utility, and the opportunity to participate in FPC's energy conservation programs, including FPC's successful load management program. The customer association, CURE, asserted at the hearing that the customers of Sebring would benefit from the sale because they would then receive electric service from a public utility subject to full regulation by the Commission. All commercial customers of Sebring who testified at the customer hearing supported the sale. Even the Sebring customers who opposed the sale at the customer hearing implicitly recognized the benefits they will receive when they testified that they approved of the acquisition by FPC, but simply did not approve of the rider.

It is our opinion that this acquisition will benefit all concerned, and thus we will permit Florida Power Corporation to include a "going concern value" for the purchase of the Sebring system in its rate base as a positive acquisition adjustment. We approve a going concern value in the amount of $5,741,000; which includes $4,491,000 for acquisition of the established customer base, $250,000 for the value of Sebrings' maps and records, $900,000 for the value of trained and experienced Sebring personnel that FPC will employ, and $100,000 for the avoidance of the costs of further territorial and annexation disputes. CCS argued that the "going concern value" should be considerably higher than the amount we have approved, but we cannot find reasonable support for a higher amount in the record, and we must insure that the amount we approve for recovery from FPC's general body of ratepayers is related to the benefits that they receive.

For the reasons mentioned above, we hold at this time that it is prudent for Florida Power Corporation to include $5,741,000 of going concern value for recovery from its general body of ratepayers. We will review the going concern value in Florida Power Corporation's next rate case to insure that the expected benefits materialize.

Assumption of the Purchased Power Contract with TECO

The "Agreement for Purchase and Sale of Electric System" provides that FPC will assume Sebring's obligations under its purchased power contract with TECO. By the terms of that contract FPC will purchase the amount of capacity needed to serve the Sebring system load. FPC intends to treat the capacity purchases from TECO as a system purchase to be combined with FPC's other

generation, and FPC expects that the TECO capacity purchases will benefit all of its ratepayers. We have reviewed the contract and we approve at this time the prudence of FPC's assumption of it. The fuel and capacity costs associated with the contract are appropriate for recovery through the fuel and capacity cost recovery clauses.

The Territorial Agreements

The petitioners have requested our approval of an amendment to their 1986 territorial agreement that reflects FPC's acquisition of the Sebring territory. The territorial agreement will continue in effect in order to determine which customers will be charged the Sebring rider. The petitioners have also requested our approval of the termination of the settlement agreement that attempted to eliminate duplicate facilities and provide for the orderly transfer of customers in the Sebring area. The settlement agreement is no longer necessary, because FPC will acquire Sebring's facilities. We approve the proposed amendment to the territorial agreement and the termination of the settlement agreement.

We also approve Sebring's assignment of its territorial agreement with Glades Electric Cooperative to FPC. FPC's assumption of that territorial agreement will prevent territorial conflict in Highlands County.

CONCLUSION

We believe that it is in the public interest to grant the relief the petitioners have requested here. On the record before us, it is clear that FPC's acquisition of the Sebring electric system is the most reasonable resolution of Sebring's financial problems. From our regulatory perspective the case has been a difficult one. As a general rule, we do not preapprove the prudence of rate base acquisitions outside of a rate case, nor do we usually permit acquisition adjustments, particularly outside of a rate case. As a general rule, we do not permit utilities to identify a pool of debt costs and apply those costs to a particular set of customers. Nevertheless, unique problems require unique solutions, and under this particular set of extraordinary circumstances, we believe our decision is in the best interest of all concerned. To those who would view our decision here as precedent, we uncategorically state that this decision has no precedential value. It is limited to the unique set of facts in this case. It does not signal a change in our regulatory policies in any way.

It is, therefore,

ORDERED, as explained in the body of this order, that the Sebring Rider rate and the methodology for changing that rate is approved. It is further

ORDERED that the inclusion of the SR-1 rate schedule as part of FPC's rates is approved. It is further

ORDERED that the net book value of Sebring's facilities of $17.8 million as of September 30, 1991 is approved. It is further

ORDERED that $5,741,000 of going concern value is approved as a prudent investment. It is further

ORDERED that Florida Power Corporation's purchase of Sebring's assets, including going concern value is approved as a prudent investment. It is further

ORDERED that Florida Power Corporation's assumption of the Purchased Power Agreement with TECO is prudent for cost recovery purposes. It is further

ORDERED that the amendment to the Petitioners' territorial agreement and withdrawal of the Settlement agreement is approved. It is further

ORDERED that Florida Power Corporation's assumption of the Sebring/Glades territorial agreement is approved. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 17th day of December, 1992.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

MCB:bmi

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.

CHAPTER 6773—(No. 353).

AN ACT to Establish a Municipality of the Town of Sebring, in DeSoto County, Florida, to Provide for Its Government, Fix Its Territorial Limits and to Prescribe Its Jurisdiction and Power.

Be It Enacted by the Legislature of the State of Florida:

ARTICLE I.

Territorial boundaries.

Section 1. That the territory included in Section twenty-nine (29) and the south half of lots six (6), nine (9), ten (10) and eleven (11), of Section twenty (20), all in Township thirty-four (34) south, Range twenty-nine (29) east, and containing all of those certain lands described within the boundary lines of a certain map of the Town of Sebring, made by James W. Turner, Engineer, and L. C. Bogue, Draftsman, on the 15th day of March, A. D. 1912, and filed in the office of the Clerk of the Circuit Court in and for DeSoto County, Florida, on said date, shall be and constitute the town of Sebring, in DeSoto County, Florida, and the citizens and legal voters of the State of Florida residing within such territory shall be a municipal corporation by the name and style as aforesaid.

Succession.

Sec. 2. The said corporation shall have perpetual succession, sue and be sued, plead and be impleaded, may purchase, lease, receive, hold and acquire property, both real and personal within the said town and may sell, lease or otherwise dispose of the same for the benefit of the town of Sebring and the inhabitants thereof, and may purchase, lease, receive, and hold property, both real and personal, beyond the limits of the town, to be used for the burial of the dead; for the erection of waterworks and electric lights; for the establishment of poor-houses, pest-houses, houses of detention and correction; for public parks and promenades and for other public purposes, that the Mayor and Town Council may deem necessary and proper. And may lease, or otherwise dispose of such property for the benefit of the town and the inhabitants thereof, to the same extent as if natural persons. Said

for paving streets, and make two-thirds of the ... of a lien upon the land abutting or fronting ... so paved. The same to be apportioned to the ... each side of such street so paved, such lien to be ... by action at law, or suit in equity, in such court ... have jurisdiction over such causes.

ARTICLE 10.

Division and boundaries of town.

Section 1. The Town Council may by ordinance ... the town into wards, for municipal purposes.

Sec. 2. The boundaries of the town may be ... and enlarged or contracted in the manner provided ... the general law for such purposes.

ARTICLE 11.

State law.

Section 1. In addition to the rights, powers ... privileges herein conferred upon the town ... the said Municipality is hereby vested with all ... powers and privileges conferred upon cities ... under and by virtue of the general incorporation ... the State of Florida now in force, or which ... after be passed.

Sec. 2. This Act will take effect upon its ... approval by he Governor.

Approved June 5, 1913.

CHAPTER 27893—(No. 1414)

HOUSE BILL NO. 1653

AN ACT to Amend Sections 1 and 12 of Chapter 23535, Laws of Florida, Acts of 1945, (as Amended by Chapter 26223, Laws of Florida, Acts of 1949), and Providing for the Sebring Utilities Commission to be a Body Corporate; Authorizing Said Sebring Utilities Commission to Issue Revenue Bonds or Certificates to Finance the Cost of Additions, Improvements and Extensions of the Municipal Utilities Within the Management, Control and Jurisdiction of Said Commission and Providing for the Terms and Conditions of Said Revenue Bonds or Certificates; Authorizing Said Sebring Utilities Commission to Enter Into Covenents and Agreements With the Holders of Said Revenue Bonds or Certificates Concerning the Fixing, Establishing and Maintaining of Fees, Rentals and Charges for the Municipal Utilities Under Its Management, Control and Jurisdiction; Authorizing Said Commission to Pledge to the Payment of the Principal of and Interest on Such Revenue Bonds or Certificates Revenues Derived From the Municipally Owned Utilities Under the Jurisdiction, Management or Control of Said Commission; Providing That Said Commission May Finance Any of the Municipally Owned Utilities Under Its Management, Control and Jurisdiction Either as a Separate and Independent Utility System or as a Combined and Consolidated System or Systems and Providing When This Act Shall Take Effect.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 1 of Chapter 23535, Laws of Florida, Acts of 1945, (As amended by Chapter 26223, Laws of Florida, Acts of 1949,) be, and the same is, hereby amended to read as follows:

"Section 1. Sebring Utilities Commission created a Body Corporate and Politic. That there is hereby created and made a part of the government of the City of Sebring, Highlands County, Florida, a Utilities Commission to be known and designated as the "Sebring Utilities Commission," which shall consist of five (5) members. Said Commission shall constitute and is hereby created a body corporate and politic, and shall have all the powers of a body corporate, including the power to sue and be sued as a corporation in said name in any court."

certificates shall not bear interest at a rate in excess of six (6%) per centum per annum, payable semi-annually. The above limitation shall not include interest payable on moneys borrowed for such purposes aforesaid. Revenue bonds or certificates may be authorized to be issued for purpose or purposes aforesaid by resolution or resolutions of the Commission, which may be adopted at the same meeting at which they are introduced, by a majority of all members thereof then in office, and shall take effect immediately upon adoption, and need not be published or posted and shall not require the approval of the freeholders owning real estate situate in the City of Sebring, Highlands County, Florida, and who are also qualified to vote in any general City election of said City, to ratify or approve the same.

Section 12.01. The said Utilities Commission, subject to the approval of the freeholders owning real estate situate in the City of Sebring, Highlands County, Florida, and who are also qualified to vote at any general election of said City, such approval to be expressed and evidenced as hereinafter set forth, are hereby fully authorized and empowered without limitation as to amount, or as to maturities, to borrow money and to issue revenue bonds or certificates securing the money so borrowed for operating expenses, cost of alterations, repairs, construction or acquisition of repairs, additions, extensions or improvements of said municipal utilities.

Section 12.02. No resolution or resolutions adopted by the Sebring Utilities Commission authorizing the borrowing of money and the issuance of revenue bonds or certificates shall, except as hereinbefore expressly otherwise provided, take effect unless and until the borrowing of said money and the issuance of said revenue bonds or certificates, as provided in said resolution or resolutions, has been approved by the freeholders owning real estate situate within the City of Sebring, Highlands County, Florida, and who are also qualified to vote at any general City election of said City, at a special election called by said Commission to determine whether or not said resolution or resolutions and the borrowing of money or moneys and the issuance of revenue bonds or certificates, as herein provided, is approved by a majority of said freeholders and voters, as above defined, voting at said special election.

Section 12.12. Validity of Revenue Bonds or Certificates. That any revenue bonds or certificates issued pursuant to this Act, bearing the signatures of officers in office on the date of the signing thereof shall be valid and binding obligations, notwithstanding that before the delivery thereof and payment therefor any or all of the persons whose signatures appear thereon, or on any coupons appertaining hereto, shall have ceased to be officers of the Commission. The validity of said revenue bonds or certificates, or any coupons appertaining thereto, shall not be dependent on, nor affected by, the validity or regularity of any proceedings relating to the construction of repairs, additions, extensions or improvements or the acquisition of additions, extensions or improvements of such municipal utilities for which said revenue bonds or certificates are issued, or by the validity or regularity of any proceedings relating to the establishment and collection of fees, rentals or other charges for the use of the services and facilities of said municipal utilities.

The resolution authorizing said revenue bonds may provide that such revenue bonds shall contain a recital that they are issued pursuant to this Act, which recital shall be conclusive evidence of their validity and of the regularity of their issuance.

Section 12.13. Lien on Revenues. That all revenue bonds or certificates issued pursuant to this Act shall have a lien upon the revenues derived from municipal utilities to the extent and in the manner provided in resolution authorizing the issuance of such revenue bonds or certificates, which lien shall be prior and paramount, over and ahead of any claims or obligations of any nature against said revenues subsequently arising or subsequently incurred, except for necessary operational expenses and repairs of said utilities and except as may be provided in the resolution or resolutions authorizing such revenue bonds or certificates. The rank and priority of different issues of revenue bonds or certificates issued by the Commission pursuant to this Act shall be as provided in the resolution or resolutions authorizing such revenue bonds or certificates; provided, however, that all revenue bonds of the same issue shall be equally and ratably secured without priority by reason of number, date of bonds, of sale, of execution, or of delivery thereof. All revenue bonds or certificates issued by the

action or proceedings by or on behalf of the holders of such revenue bonds, certificates or other obligations are fully paid and discharged, or adequate provision made for the payment or discharge thereof."

Section 3. Construction of Act. This Act shall be construed to authorize the issuance of revenue bonds or certificates payable solely from municipal utilities revenues.

Section 4. Act Additional and Complete Authority. That the powers conferred by this Act shall be in addition and supplemental to the existing powers of the commission, and this Act shall not be construed as repealing any of the provisions of any other law, general or local, or charter provision, but to provide an alternative and complete method for the exercise of the powers granted in this Act. The existing municipal utilities may be repaired, extended or improved, and revenue bonds, certificates or other obligations issued pursuant to this Act without regard to or necessity for compliance with the limitations or restrictions contained in any other general, special or local law.

Section 5. Separability of Provisions. That if any section, clause, sentence or provision of this Act, or the application of such section, clause, sentence or provision to any persons, bodies or circumstances, shall be held to be inoperative, invalid or unconstitutional, the invalidity of such section, clause, sentence or provision shall not be held, deemed or taken to affect the application of any of the provisions of this Act to persons, bodies or circumstances other than those as to which it, or any parts thereof, shall have been held inoperative, invalid or unconstitutional.

Section 6.—This Act shall not become effective and operative until ratified and approved at a referendum election to be called by the City Council of the City of Sebring, which election may be held at any time within twelve months from the date hereof after having first given full notice of such election by publication in some newspaper of general circulation in the City of Sebring, Florida in four issues of such newspaper, which issues are published for four weeks immediately preceding the date of such election.

Became a law without the Governor's approval.

Filed in Office Secretary of State June 11, 1951.

withdraws his or her pension fund contributions. Upon confirmation of discharge of any classified employee, the Board shall give immediate written notice to such discharged employee of his or her right to freeze vested pension benefits as provided herein.

Section 2. This act shall take effect October 1, 1990.

Became a law without the Governor's approval July 7, 1990.

Filed in Office Secretary of State July 3, 1990.

CHAPTER 90-474

House Bill No. 3423

An act relating to the City of Sebring, Highlands County; amending chapter 23535, Laws of Florida, 1945, as amended; authorizing the sale, conveyance, transfer, and lease of assets of the Utilities Commission upon approval of the city council; requiring approval by the city council before the Utilities Commission incurs certain debts; providing for a referendum.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 1.08.01 of chapter 23535, Laws of Florida, 1945, as amended, is created to read:

Section 1.08.01. Sale, conveyance, transfer, and lease of assets.—The Utilities Commission is authorized and empowered to sell, convey, transfer, and lease its assets, including the transfer of its customers and service area, only with the approval and consent of a majority of the members of the city council of the City of Sebring as evidenced by a resolution of the city council adopted after a public hearing, notice of which has been published one time in a newspaper of general circulation in the City of Sebring at least 10 days prior to the date of said public hearing. This notice shall state the date, time, and place of the public hearing, shall contain a brief description of the assets proposed to be conveyed, transferred, or leased and the party to whom the conveyance, transfer, or lease is being contemplated. A copy of the written proposal for such conveyance, transfer, or lease shall be kept in the city office and shall be available for inspection by the public from at least the date of publication of the notice to the date of the public hearing. Notwithstanding the provisions of this section, the Utilities Commission may transfer customers and service areas as provided for under the terms of the Utilities Commission's present territorial agreement with Florida Power Corporation without the approval of the city council. Also notwithstanding the provisions of this section, the Utilities Commission can sell, transfer, or otherwise dispose of assets that have been determined by the Utilities Commission to be no longer necessary, useful, or profitable in the operation of the utility system, without city council approval, so long as the book value of said assets to be sold, conveyed, or otherwise disposed of does not exceed $100,000.

Section 2. Section 12.24 of chapter 23535, Laws of Florida, 1945, as amended, is created to read:

Section 12.24. Approval of borrowing and bonding.—Notwithstanding any other provision contained in this act, the Utilities Commission shall not borrow any moneys in excess of $100,000 or issue bonds, notes, certificates, or any other evidence of indebtedness for any amount in excess thereof without the express written approval and consent of a majority of the members of the city council of the City of Sebring, which consent and approval shall be evidenced by a resolution of the city council adopted after a public hearing, notice of which has been published one time in a newspaper of general circulation in the City of Sebring at least 10 days prior to the date of said public hearing. This notice shall state the date, time, and place of the public hearing and shall contain a brief description of the borrowing or bonding for which approval is being sought. A copy of the proposal for such borrowing or bonding shall be kept in the city office and shall be available for inspection by the public from at least the date of publication of the notice to the date of the public hearing. Notwithstanding the provisions of this section, the Utilities Commission shall have the authority to borrow, without approval of the city council, moneys necessary to purchase materials, supplies, and equipment which are necessary for current operation of the municipal utilities. No materials, supplies, or equipment so purchased shall exceed estimated normal requirements for such materials, supplies, or equipment for 12 months following the date of purchase.

Section 3. This act shall take effect only upon its approval by a majority vote of those qualified electors of the City of Sebring voting in a referendum election to the called by the city council of the City of Sebring and to be held in accordance with the provisions of law relating to elections currently in force, except that this section shall take effect upon becoming a law.

Became a law without the Governor's approval June 23, 1990.

Filed in Office Secretary of State June 25, 1990.

CHAPTER 90-475

House Bill No. 3443

An act relating to the Tindall Hammock Irrigation and Soil Conservation District, Broward County; amending chapter 27428, Laws of Florida, 1951, as amended; adding a millage tax; repealing all laws or parts of laws in conflict with the provisions of this act; providing for a referendum; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 5 of chapter 27428, Laws of Florida, 1951, as amended by chapter 28935, Laws of Florida, 1953, and chapters 78-477 and 86-370, Laws of Florida, is amended to read:

Section 5. To accomplish and carry out the purpose of the Act, the board is authorized and empowered, but not directed, to levy and impose upon all lands lying and being situate within the said District an acreage tax not to exceed the sum of sixty dollars ($60.00) per acre per annum and/or a millage tax not to exceed six

CHAPTER 91-343

Senate Bill No. 1936

An act relating to the City of Sebring, Highlands County; amending chapter 23535, Laws of Florida, 1945, as amended; authorizing a debt repayment surcharge and authorizing the purchaser or lessee of all or a substantial portion of the electric utility system of the Sebring Utilities Commission to charge to and collect from certain electric customers a debt repayment surcharge; providing for collections enforcement; requiring that the purchaser or lessee pay the debt repayment surcharge collected from such electric customers to the Sebring Utilities Commission in monthly installments; providing that such debt repayment surcharge shall be held, invested, and the net amount thereof applied by or for the Sebring Utilities Commission to the payment of principal, interest and premium, if any, on revenue bonds of the Sebring Utilities Commission that are then outstanding; providing that the aforementioned debt repayment surcharge shall not be deemed to be a rate or charge under chapter 366, Florida Statutes, or a part of the rate structure of the Sebring Utilities Commission under such chapter; describing the electric customers who are to be charged the debt repayment surcharge; providing that in connection with the outstanding revenue bonds of the Sebring Utilities Commission, the rent payments from the lease of any of the assets of the Sebring Utilities Commission and the debt repayment surcharge shall be deemed to be revenues of the Sebring Utilities Commission; providing for repeal; providing for elimination of staff; providing for a referendum; providing specific financial information which must be furnished to voters when this issue is subjected to a referendum.

WHEREAS, it is determined by the Legislature of the State of Florida to be in the best interest of the City of Sebring, the Sebring Utilities Commission, the bondholders of the Sebring Utilities Commission and the customers of the Sebring Utilities Commission, and of paramount public purpose, that the purchaser or lessee of all or a substantial portion of the electric utility system of the Sebring Utilities Commission charge to and collect from the customers of the electric utility system a debt repayment surcharge for the benefit of the Sebring Utilities Commission which debt repayment surcharge is to be held, invested, and the net amount thereof applied by or for the Sebring Utilities Commission to the payment of its outstanding revenue bonds, NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 1.08.02. of chapter 23535, Laws of Florida, 1945, as amended, is created to read:

Section 1.08.02. Imposition of debt repayment surcharge, upon lease or other disposition of assets.—

(1) Commencing on the first day of the month following the closing of a sale, lease, or other disposition of all or a substantial portion of the electric utility distribution system of the Sebring Utilities Commission and continuing until such time as all then outstanding revenue bonds of the Sebring Utilities Commission have

been paid, the Sebring Utilities Commission shall, not less frequently than annually, to the extent necessary, fix a debt repayment surcharge for the following year in an amount which, after taking into account all other revenues of the Sebring Utilities Commission, will permit the Sebring Utilities Commission to meet all covenants and make all payments required under the resolutions authorizing the issuance of outstanding revenue bonds of the Sebring Utilities Commission and its fair and reasonable expenses incurred in connection with the receipt and application of the revenues of the Sebring Utilities Commission to meet all covenants and make all payments required under the resolutions authorizing the issuance of such revenue bonds. Such debt repayment surcharge, and the effective date thereof, will be communicated promptly to the purchaser or lessee of all or a substantial portion of the electric distribution system. Such purchaser or lessee, as agent for the Sebring Utilities Commission, shall charge to and collect from electric service customers described below, such debt repayment surcharge monthly for the benefit of the Sebring Utilities Commission and enforce the collection thereof provided in the resolutions authorizing the issuance of the outstanding bonds, to the extent allowed by law, and shall impose penalties for nonpayment of this surcharge which may include suspension of electric service to such customer. The purchaser or lessee shall pay such debt repayment surcharge to the Sebring Utilities Commission as and when collected from the electric service customers described below.

(2) The debt repayment surcharge shall be held, invested and the amount thereof, after deducting only the fair and reasonable expenses of the Sebring Utilities Commission as described above, shall be applied by or for the Sebring Utilities Commission to meet all covenants and make all payments required under the resolutions authorizing the issuance of the outstanding revenue bonds of the Sebring Utilities Commission that are outstanding on the date of such sale or lease. The debt repayment surcharge shall be payable by the purchaser or lessee to the Sebring Utilities Commission only to the extent that the purchaser or lessee collects such surcharge from its customers under the authority of this act.

(3) The debt repayment surcharge shall be based upon kilowatt hours used, but shall not be deemed to be a rate or charge for purposes of chapter 366, Florida Statutes, 1989, or a part of the rate structure of the Sebring Utilities Commission under such chapter.

(4) The debt repayment surcharge shall be paid by all Sebring Utilities Commission electric customers in the Sebring Utilities Commission electric service territory, including all new electric customers within the Sebring Utilities Commission electric service territory, as described in the Territorial Agreement between Florida Power Corporation and the Sebring Utilities Commission dated December 11, 1986, approved by the Florida Public Service Commission in its Order No. 17215 dated February 23, 1987, and, in addition, all Sebring Utilities Commission electric customers at addresses outside that electric service territory as of the 45th day prior to the date of the referendum described in section 2, as established by the books and records of the Sebring Utilities Commission. However, no electric customer of Florida Power Corporation or Glades Electric Cooperative, Inc., as of the 45th day prior to the date of the referendum described in section 2, as established by the books and records of Florida Power Corporation and Glades Electric Cooperative, Inc., shall pay such surcharge.

(5) In connection with such revenue bonds of the Sebring Utilities Commission, the rent payments on the lease of any of the assets of the Sebring Utilities

Commission and the aforementioned debt repayment surcharge shall be deemed to be revenues of the Sebring Utilities Commission.

(6) The area affected by this act is the electric service territory of the Sebring Utilities Commission described in the Territorial Agreement between Florida Power Corporation and the Sebring Utilities Commission dated December 11, 1986, approved by the Florida Public Service Commission in its Order No. 17215 dated February 23, 1987, and, in addition, all those addresses of Sebring Utilities Commission residential electric customers outside that electric service territory on the 45th day prior to the date of the referendum described in section 2, as established by the books and records of the Sebring Utilities Commission. However, the area affected by this act shall not include any address of any Florida Power Corporation or Glades Electric Cooperative, Inc., residential electric customers on the 45th day prior to the date of the referendum.

(7) For purposes of identifying the area affected by this act, Florida Power Corporation and Glades Electric Cooperative, Inc., shall each provide a certified list of all addresses of their electric customers within Sebring Utilities Commission electric service territory, as defined above, and Sebring Utilities Commission shall provide a certified list of all addresses of residential electric customers outside of such territory as of the 45th day prior to the date of the referendum described in section 2.

Section 2. If both the electric and water systems owned and operated by the Sebring Utilities Commission have been sold or transferred and immediately after the last required payment is made on all revenue bonds issued by the Sebring Utilities Commission, chapter 23535, Laws of Florida, 1945, as amended, shall stand repealed.

Section 3. The staff of the Sebring Utilities Commission shall be eliminated over the 12 months immediately following the closing of the sale or transfer of the last commission facility. Thereafter, clerical and administrative support for the commission shall be provided by the City of Sebring.

Section 4. (a) This act shall take effect only upon its approval by a majority vote of those qualified electors residing within the area affected by this act, as described in section 1 of this act, voting in a referendum to be called by the City of Sebring and to be held in accordance with the provisions of law relating thereto, except that this section shall take effect upon becoming a law.

(b) In order that the electors within the Sebring Utilities Authority service territory may have sufficient information on which to make a decision regarding whether to vote yes or no on the debt repayment surcharge, the following data shall be furnished to each elector:

(1) The current and future debt service payments (principal and interest) required each year from the fiscal year at the time of the ballot to the time the bonds are fully repaid.

(2) The estimated monthly amount of debt repayment surcharge to be levied each year.

(3) The estimated percentage of an average monthly utility bill represented by the debt repayment surcharge.

(4) The estimated monthly utilities fee at the time of the election.

Became a law without the Governor's approval June 1, 1991.

Filed in Office Secretary of State May 31, 1991.

CHAPTER 91-344

Senate Bill No. 2370

An act relating to the Palm Beach County Health Care District, Palm Beach County; amending chapter 87-450, Laws of Florida, as amended; providing that the Palm Beach County Health Care District shall be exempt from the payment of fees, taxes, or increment revenue to community redevelopment agencies created pursuant to part III of chapter 163, Florida Statutes; providing for severability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (27) is added to section 3 of chapter 87-450, as amended by chapter 88-460, Laws of Florida, to read:

Section 3. Palm Beach County Health Care District; district board; powers.—The District Board of the Palm Beach County Health Care District is vested with the authority and responsibility to provide for the comprehensive planning and delivery of adequate health care facilities (including, but not limited to, hospitals) and services for the citizens of Palm Beach County, particularly medically needy citizens. For those purposes, the district board shall have and may utilize the following powers:

(27) The Palm Beach County Health Care District shall be exempt from the payment of any fees, taxes, or increment revenue to community redevelopment agencies established pursuant to part III of chapter 163, Florida Statutes.

Section 2. If any section, subsection, sentence, clause, or phrase of this act is held to be invalid or unconstitutional by any court of competent jurisdiction, then said holding shall in no way affect the validity of the remaining portions of this act. Additionally, if any court of competent jurisdiction shall determine that article I of section 10 of the Florida Constitution would be violated by section 1 of this act by unconstitutionally impairing the obligation of those holders of bonds or notes issued by a community redevelopment agency prior to March 31, 1990, which community redevelopment agency received payments from a health care or a hospital district which was applied to said bonds or notes prior to March 31, 1990, then the Palm Beach County Health Care District shall make only those payments to the affected community redevelopment agency as would remedy said impairment; upon the cessation of the impairment or the retirement of the bonds or notes, whichever shall first occur, the exemption created by the act to part III of chapter 163, Florida Statutes, shall be applied.

Section 3. This act shall take effect upon becoming a law.

Became a law without the Governor's approval June 1, 1991.

Filed in Office Secretary of State May 31, 1991.