SUPREME COURT OF FLORIDA

THE ACTION GROUP,

Appellant

v. Case No. 81,076

J. TERRY DEASON, ETC., ET AL.

Appellees

APPELLANT, THE ACTION GROUP'S REPLY BRIEF (AS TO PSC's ANSWER BRIEF)

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ARGUMENT

American citizens recall their early schoolbooks and the depictions of the Massachusetts Colonists dumping the king's tea into Boston Harbor. The issue was taxation without representation. PSC's order allows the levy of a tax upon SUCOM's ratepayers; the Highlands County non-residents are asked (ordered) to pay off SUCOM's debt.

PSC's Brief, pp. 10-16

The commission's counsel is now silent as to the seriously flawed language in its order:

> 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. . . .*

(R. 196-97) *Order at 4-5 (Initial Brief App. A.)* (emphasis supplied)

Having demonstrated the inaccuracies, and lack of record support for PSC's statements that (a) it should analyze its jurisdiction from the "discrimination" perspective (there being no discrimination issue to discuss), and (b) appellant does not question jurisdiction when PSC poses the "discrimination question," *Initial Brief at 9, 12-13, 19-21,* it is gratifying to observe PSC's declination to make any effort whatsoever, to support that patently unsupportable analysis.

Brief, pp. 10-11: FLA. STAT. ch. 366 (1991) gives PSC broad plenary authority to regulate public utilities. Appellant agrees.

Brief, p. 10: By her unnumbered footnote, PSC's briefwriter suggests that April 1, 1993 is possibly a terminal day for SUCOM. While there is no record support for this statement, we would simply add that SUCOM's history has been one of serious financial difficulty; it has been in hock to the bondholders for a long time. Unfortunately, SUCOM's five unelected commissioners have failed to exercise the common sense that would have saved all the travail. But, such is not within PSC's jurisdiction.

Brief, p. 11: Counsel writes that § 366.041(1) specifies reasonable rates, and the commission's power to set such rates, We agree.

Brief, p. 11-12: She writes that § 366.05(1) directs that PSC prescribe reasonable rates and charges. We agree.

Brief, p. 12: Counsel states that § 366.06(1) proscribes a public utility's receiving any rate not on file with the commission. We agree, but shall discuss in more detail her citations.

Brief, p. 12: Here is counsel's "ludicrous result" argument, about which we shall respond in detail.

Brief, p. 12: She states that the courts have consistently given a liberal interpretation to PSC's jurisdiction to regulate rates and rate structures. We agree, but shall discuss herein the citations.

Brief, p. 13: Regarding the commission's authority to decide what is a rate, which we discuss in detail.

Brief, p. 14: We agree that courts have long upheld the commission's exercise of jurisdiction over all aspects of utility rates, charges and services.

Brief, p. 15-16: Appellant will respond to **PSC's** discussion of 1991 Fla. Laws ch. **343.**

A. "Terms" (Brief at 12)

Appellant discusses in detail **FPC's** use of "terms," ***Reply to FPC's brief,*** *at 6-8,* **so** does not repeat that argument here.

B. **PSC's** "ludicrous result" argument (Brief at 12)

Counsel states that our "argument leads to a ludicrous result, . . ." Our argument is that **PSC** lacks jurisdiction to approve the Sebring Rider; that no statutory or other authority warrants the commission's holding that it does. In the preceding part, we addressed the meaning of "terms" as incorporated in **§ 366.03's** mandate that utilities provide **service** upon terms imposed by **PSC.** Ignoring the statute's obvious meaning - "terms" pertaining to "service" - **PSC** argues that **a** public utility could easily evade commission jurisdiction by the simple expedient of "isolating" rates and charges from **"base** rates." **We** suggest that **PSC's** argument is "ludicrous."

This argument style practiced by **PSC's** writer is familiar: the same method appears in its jurisdiction argument where it is stated that appellant does not question the commission's jurisdiction when its ***post hoc*** question is "posed this way." (R. 197) ***Order*** *at* 5. Contrary to its statement, appellant has never argued that **PSC does** not have jurisdiction of the dishonest evasions of public utilities! Moreover, our opponent's "ludicrous result" analysis, ***Brief at 12,*** **is** rather silly at best. The legislature's statutory scheme makes clear that rates and charges not

on file with the commission shall not be billed to ratepayers. In the event that a public utility, *e.g.* **FPC,** attempted to bill the Sebring Rider, and it was not on file with the commission, a customer would simply refuse to pay it; there would then be no basis for FPC to "cut off electricity." **See** Fla.Admin.Code 25-6.105. Candidly, we have never observed such an argument **as** this one and, **PSC** not citing any authority or writing on the subject, we assume that such a ludicrous specter has never arisen. In any event, we doubt that the court would reject a contention that the commission does not have subject matter jurisdiction **of** a charge that is not based upon a § 366.06(1) "used and useful property" rate base.

C. PSC's "liberal interpretation" argument (Brief at 12-15)

Of **course,** the judiciary has given a liberal interpretation to PSC's jurisdiction. While **we** hasten to agree with this **salutary** principle, our opponent's analysis **of** case law is faulty. For example, in ***Florida Power & Light Co. v. Malcom***, 107 Fla. **317,** 144 **So.** 657 (1932), the court held that a public utility **has** the authority "to **fix** a reasonable rate or charge for public utility service. . . .", ***quotation, PSC Brief at 12.*** This makes appellant's jurisdiction point, but our opponent would ignore that language - rate in return for service. Certainly, **PSC** can take no solace in *Malcom,* there being no language suggesting that the Sebring Rider is a "rate," or that it is within the commission's jurisdiction.[1]

[1] ***Malcom's*** question, decided by the court, was whether the circuit court had erred in awarding landlords a peremptory mandamus writ, compelling the public utility to supply gas and electricity through master (rather than separate) meters. This court reversed, because mandamus is not available where the relators (plaintiffs seeking the writ) announce their refusal to abide by **the** utility's reasonable rules and regulations; because the landlords announced refusal to abide by the rule prohibiting re-metering, they were not entitled to relief. In other words, *Malcom* does not support **PSC's** statement, ***Brief at 12,*** that "this Court **took** a broad view of the

Next, PSC argues that its "ability to decide what constitutes a rate is also drawn from the general power to determine and prescribe reasonable rates. This is consistent with the judicial deference given to the Commission's ability to construe its own statutes," citing (as support for the proposition) *Florida Public Service Commission v. Bryson,* 569 So.2d 1253 (Fla. 1990). PSC Brief at 13. Recognizing that, by this statement, PSC seemingly argues that it is free to determine that the Sebring Rider is a "rate," because it has the unquestioned power to determine reasonableness of rates, Bryson is no help. The Bryson Court determined that the circuit court was without jurisdiction to entertain a condominium owner's complaint that a management company had overcharged him for gas and electricity. This court noted: "The parties in interest agree that the PSC has no jurisdiction if Falk's complaint does not concern the (1) rates and service of (2) a public utility." *569 So.2d at 1255.* Of course, the court agreed with PSC's argument that it alone is obliged to make that jurisdictional determination, subject to appeal to the court: "The PSC has the authority to interpret the statutes that empower it, including jurisdictional statutes, and to make rules and issue orders accordingly." *Id.* But, *Bryson* was a reasonableness of rates case, not one involving whether ch. 366 defines a charge to mean what is encompassed by the Sebring Rider.

As we read *Bryson,* it appears that the ratepayer complainant did not argue that the management company's charge was not a "rate." Apparently, he agreed that it was a rate. On

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Commission's rate setting jurisdiction." PSC's quote from *Mulcom,* 144 *So.* at 658-59 is not about PSC's "rate setting jurisdiction." Rather, the court stated that a *public utility* has a right to *(a)* fix a reasonable rate, and (b) to state what shall be the basis for the application of that rate. 144 So. at 658. *See* also *Pan American World Airways v. Florida Public Service Commission,* 427 So.2d 716, 719, n. 1 (Fla. 1983) (In Mulcom, "this Court upheld as reasonable a public utility's *duly adopted and promulgated regulation. . . ."* (court's emphasis)).

the other hand, the ratepayer sought a decision that PSC did not have jurisdiction for the reason that the management company was reselling electricity, *i.e.*, that it was not a public utility. ***569 So.2d at 1255.*** It appears from the decision that, in 1970, PSC had filed an order holding that a landlord does not become a public utility under ch. 366 by virtue of his reselling electricity to his tenants; but that order was subsequently overruled; the court concluded that PSC had "a colorable claim of exclusive jurisdiction to consider allegation that a management company overcharged a condominium owner for gas and electricity. If Geller wishes to contest the PSC's jurisdiction, the proper vehicle would be by direct appeal to this Court after the PSC has acted." ***Id. at 1255-56.***

PSC follows the inapplicable *Bryson* citation with the statement: "FPC intends to charge former SUCOM customers for electric service. The amount charged will reflect the cost to serve those customers. . . ." ***Brief at*** 13. In *Bryson,* Mr. Geller the ratepayer was apparently exercised about the amount that his condominium management company was charging him and, for some reason, was not happy with the prospect that PSC would decide the question; so he unsuccessfully sought the assistance of a circuit court judge. However, the instant question is not at all about the reasonableness of the rate for electricity that FPC will charge its customers, including the former SUCOM customers.

Obviously, and by definition, FPC's rate is reasonable because it is based upon its "used and useful" rate base. § 366.06(1). On the other hand, FPC seeks PSC's approval to add to its billings to former SUCOM customers a charge based upon the cost of redeeming revenue bonds - approximately $69 million over a period of 15 years. FPC's proposed Sebring Rider charge (surcharge) is no more a "rate" than would be the case in the event that *Bryson's* Mr. Geller

received a bill representing an amount that the condominium management company had overpaid for its investment. FLA. STAT. § 366.06(1)(1991).

We conclude this analysis by demonstrating the flaw in PSC's statement and argument that

> FPC's cost to serve the SUCOM customers is higher than the cost to serve its other residential customers, so the price charged for the service will be higher. FPC's charge for electric service is clearly a rate, whether it consists of one component or, as in this case, two components -- FPC's base rates plus the Sebring rider.

PSC Brief at 14.

PSC is flat wrong in its first sentence: FPC's cost to serve both classes of customers is, or would be, identical. No law or contract compels FPC to redeem SUCOM's revenue bonds; PSC has no legislatively mandated interest in the transaction being consummated.

D. PSC's discussion regarding 1991 Fla. Laws ch. 343 (Brief at 15-16)

Petitioners FPC and SUCOM advised PSC that, although ch. 91-343 has not taken effect because it was never submitted to the affected ratepayers, the statute nonetheless "reflect[s] legislative intent and directive 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]. . . .'. . ." (R. 6) *Joint* Petition *at 6.*

Without referencing where we supposedly argued the point, PSC states that we place great reliance upon 91-343 to support our jurisdiction argument. *PSC Brief at 15.* While it is

true that we wrote that petitioners have sought to make an end run on 91-343, *Initial Brief at 11*, and that it provides that only SUCOM's affected ratepayers shall decide whether they consent to be surcharged, *id. at* 23-23, the fact is that PSC must look to ch. 366 for its jurisdiction basis. All three appellees argue that 91-343 never became effective, because Sebring's City Council or Clerk never called the prescribed referendum. *e.g., PSC Brief at 16.* However, this argument glosses over the true facts that ch. 91-343 demonstrate.

Petitioners also cited 1990 Fla. Laws 474. (R. 3). Together, 90-474 and 91-343 manifest SUCOM's and Sebring's attempt to afford relief to the ratepayers. The 1990 statute authorized SUCOM, with the Sebring City Council's approval, to sell its assets and to transfer its customers to FPC. However, as 91-343 shows, it had become apparent to Sebring and SUCOM, perhaps to FPC, that the 1990 plan was in serious difficulty because SUCOM's debt was approximately $33 million more than the value of its assets. Appellees have made this clear in their papers. (R. 13) *Joint Petition at ¶ 14;* (R. 195) *PSC Order at* 3. The amount of the Sebring Rider is the difference between FPC's purchase price, $54 million, and SUCOM's net book value, $17.8 million plus an amount for "going concern." (R.195) *id.* Thus, the Sebring Rider is nothing more than FPC's overpayment for SUCOM's assets, this predicament having occurred by reason of sales of revenue bond debt far in excess of SUCOM's property base. The highlands County ratepayers did not participate, or have the ability to participate, in the creation of that debt.

Therefore, the 1991 Florida Legislature was presented with ch. 91-343, a special act that recognized SUCOM's (more likely Sebring City Council's) desire to go out of business. But, the proponents of this legislation also told the legislature that there is a very serious question who will pay this $33 million shortfall, the revenue bond indebtedness. As it was clear as

sparkling spring water that the Highlands County non-residents had not created the debt, 91-343 directs that a "surcharge" not be imposed unless the affected ratepayers vote to repay the debt:

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

ch. 91-343, ***Initial Brief, App. B.***

Now, PSC would ignore these special acts, particularly 91-343. However, to do so is tantamount to its refusal to consider the record. The commission's attempt to brush aside the Act by stating that "City of Sebring never called such a referendum, so the law never became effective," *PSC* Brief *at* ***16,*** is to reject the reality that the "debt repayment surcharge" is not a ch. 366 "rate or charge" for purposes of PSC's jurisdiction, and that legislative intent expressed in ch. 91-343 compels such a reading of ch. 366.

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 24 day of February, 1993.

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