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SUPREME COURT OF FLORID–

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 FPC's AND SUCOM's ANSWER BRIEFS)

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

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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.

I. As to FPC's brief

A. PSC's claim to jurisdiction

In stating that appellant "ridicule[s] . . . PSC's order," *FPC brief at* 13, FPC would prefer to ignore its own manifestation of effrontery toward the people whom it would have repay SUCOM's debt. However, we welcome our opponent's admission that "[FPC] is paying for [SUCOM's] system in excess of the depreciated net book value and going concern value of the system . . .", Id. at 2. Such being the truth of the matter, PSC has *violated* the law, in that FLA.STAT. §366.06(1)(1991) provides that PSC will not approve rate applications based upon the applicant utility's paying more than fair value for its assets.[1]

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[1] § 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. . . . The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and prudently invested by the public utility company in such property used and useful in serving the public, less accrued depreciation, and shall not include any goodwill or going-concern value or franchise value in excess of payment made therefore. 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."

We have detailed the statutes that govern the jurisdiction issue in this case. *Initial Brief at 15-17.* FPC cites to §§ 366.03, .04, .04(1), .05 and .06(1). *FPC brief at 12,* 18 and *23.*[2] Focusing on FPC's pages:

Page 12: FPC correctly states that PSC stringently regulates rates, service and service areas of investor-owned electric utilities, citing § 366.03.

Referencing § 366.03's mandate that each public utility shall "furnish . . , service upon *terms as required by* the commission" (FPC's emphasis), FPC tells us that "'terms' unquestionably include FPC's rates and charges. See §§ 366.04, 366.041, and 366.05." This statement is simply wrong. PSC dictates the "terms" of a utility's providing "service." § 366.03.[3]

Finally, FPC quotes from § 366.06(1), but stops short of the important portion that we have quoted.[4] What FPC *does* quote is limited to the mechanics as the legislature has mandated: a utility will not charge an amount for its service, unless the "rate" is on file. On the other hand, § 366.06(1)'s *only* important language for purposes of the jurisdiction question at bench is that the legislature has directed its delegated agency to allow computation of a "rate" without including what the utility has overpaid for property.

Page 18: This reference to § 366.06(1) (mentioned in passing for the proposition that FPC's proposed assumption of SUCOM's debt is a "cost allocation" matter) follows two

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[2]Apparently, FPC's table of authorities listing of § 366.041 as appearing at page 13 is a misprint.

[3]further discussion, *infra* at 6-8.

[4] *supra, n. 2*

pages of argument that is quite startling. Responding to appellant's statement that petitioners' proposal is nothing more than FPC's making a loan for SUCOM's redemption of revenue bonds, which loan it would recoup from whomever suffers the misfortune of taking electricity through a SUCOM meter, FPC argues that the loan is a "cost-of-service issue falling within the PSC's jurisdiction and expertise, and the Commission, having considered Action [Group's] contention in light of the evidence, determined that these *costs* do have something to do with furnishing electric service to the customers served by this system. Order at 6-8." *Brief at 17* (*costs* our emphasis). In other words, FPC apparently credits PSC with "expertise" in deciding that FPC's advancing the bond redemption money is a "cost" of providing electricity to the city's residents, and to those who reside in Highlands County - outside the city limits. We would have thought that "expertise" is hardly required to read § 366.06(1) to understand that "**actual legitimate costs of the property of each utility company**", *ibid.*, means "**property . . . actually used and useful in the public service . . .**", *ibid.*, and that such "costs" consist of those dollars that are **"invested by the public utility company in *such* property used and useful in serving the public . . .**", *ibid.*

Although we shall return to this specific aspect of the jurisdiction problem, suffice to state here that FPC eschews a meaningful jurisdiction discussion, preferring to lapse into such generalities as "PSC's expertise" and "quintessentially a cost-of-service issue falling within PSC's jurisdiction and expertise," *FPC brief at 17.*

Page 23: § 366.04(1) is cited in Lake Worth *Utilities v. Barkett*, 433 So.2d 1278, 1279 (Fla. 4th DCA 1983) (when Justice Barkett was a circuit court judge) for the proposition that PSC has exclusive jurisdiction to determine the reasonableness of an electricity surcharge

upon customers outside the city limits, and whether such is discriminatory; FPC cites *Lake Worth* and § 366.04(1) for the proposition that, having heard the "evidence," PSC "determined that it had jurisdiction to consider the Sebring Rate Rider as a term of the service [FPC] would provide to this class of customers, and it then determined the Sebring Rate Rider to be in accordance with Florida law and in the public interest, given the unique and difficult circumstances present here. . . ." *FPC brief at* 23-23. First, § 366.04(1) is the specific provision that the legislature has written to state PSC's jurisdiction: "[T]he commission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service. . . ." *Ibid.*[5]

Secondly, Lake *Worth* Utilities *Authority v.* Barkett is inapposite, because it pertained to the utility's imposing a 10% surcharge on electric service furnished outside city limits.[6] On the other hand, the instant case does not involve a surcharge that FPC claims to compensate it for transmitting electricity over a longer distance, *i.e.*, beyond Sebring's city limits. A *fortiori*, there is no indication in the record that FPC has a "city limits" issue, because it serves customers in many counties over an extensive geographical area. It would appear that only a city utility, generating electricity within its limits and selling electricity beyond those limits (by

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[5] § 366.04(1) being the legislature's statement or definition of jurisdiction, § 366.06(1) dictates the limitations upon what PSC may consider to be the rate base, *viz.*, "property . . . used and useful. . . ." Neither ch. 366 nor *any* judicial authority gives the slightest hint that an advance of money to redeem revenue bonds, followed by an attempted recoupment, is "property" or "property used and useful."

[6] In Lake *Worth*, the utility sought from the district court a writ of prohibition to preclude Circuit Judge Barkett from exercising jurisdiction over a customer's complaint that the non-resident surcharge should not be imposed. The Fourth District held that the PSC had exclusive jurisdiction to determine reasonableness of the surcharge, but that remaining issues in the customer's circuit court complaint were within that court's jurisdiction.

investing in transmission and distribution equipment) would ever seek a "city limits surcharge." Candidly, FPC's Luke Worth citation is perplexing.

However, and more to the point, one is not strained to agree with the Fourth District's Lake Worth conclusion that only the PSC has jurisdiction to determine the reasonableness of a surcharge. This is because, although PSC does not have jurisdiction of the reasonableness of a non-investor, *e.g.*, municipally owned, utility's rates, the commission does have jurisdiction of such a utility's *rate* structure, and a surcharge is a matter of rate structure. *City of* Tallahassee *v. Mann*, 411 So.2d 162 (Fla. 1981) (§ 366.04(2)(b) gives PSC jurisdiction over "rate structure" and that term includes "differential" or "surcharges")[7]; see *City of Tallahassee v. Florida Public Service Commission*, 441 So.2d 620,622 (Fla. 1983). To restate the principle simply, PSC must find a specific statutory provision if it is to exercise jurisdiction.

Summarizing, FPC has confirmed what PSC originally demonstrated by its ORDER: the commission does not have jurisdiction of this "loan" or "advance" or whatever one might choose to denominate the mechanism that FPC will utilize to (a) acquire SUCOM's customers (inside and outside city limits), and then (b) recoup what it has paid to redeem SUCOM's revenue bonds.

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[7] In *City of* Tallahassee *v. Mann*, the court illustrated the utter superficiality of PSC's "discrimination jurisdiction' argument, better than we could have wished. Distinguishing between "rate setting" and "surcharges," the court pointed out that only the Tallahassee citizens have the power of the ballot over their city commissioners; if the rates are unreasonable, the citizens can throw the rascals out. *411 So.2d at* 163. On the other hand, while PSC has no rate setting jurisdiction as to municipality-owned utilities, it does have jurisdiction as to "differential charges to customers within and without [city's] corporate limits . . . [because such] are a matter of 'rate structure' subject to the jurisdiction of [PSC]." *411 So.2d at 163-64.*

B. "Upon terms as required by [PSC]" *(FPC Brief at 12, 14)*

FLA. STAT. § 366.03 (1991) provides:

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

PSC Brief at 12; FPC Brief at 12.

FPC employs a frontal assault strategy, asserting emphatically: "Those 'terms' unquestionably include **FPC's** *rates* and charges." Id. (emphasis supplied). We wonder, by what authority is the matter "unquestianable" in **FPC's** context. It would seem correct to state that § 366.03 pertains to the terms of service, not the terms of rates and charges.

PSC approaches "terms" somewhat differently: "[I]t is clear that **FPC** may not impose any charge on its customers without the Commission's approval, whether the charge is called a rider, loan, surcharge, rate, recoupment, or some other term." *PSC Brief at 12.* (emphasis supplied). In other words, **PSC** is more inventive than **FPC:** § 366.03 directs that (a) each public utility shall provide service upon PSC's "terms," and (b) that its rates, charges rules and regulations shall be fair and reasonable. In other words "service upon **PSC's** terms," is a subject entirely separate from "fair and reasonable rates," but **PSC** takes these subjects and melds them to its unsupported conclusion that (a) equates the Sebring Rider with "rate," and (b) equates "rate" with "term."

The only sensible reading of § 366.03 leads to the conclusion that "terms" are not "rates." Chapter 366's overall scheme confirms this conclusion, As we stated in the Nature of the case, *Initial Brief at 1,* a regulated utility is precluded from charging a "rate" that is not on file with **PSC;** thus a utility files its schedule or "tariff" whereupon, if approved, it is

authorized to use as the basis for its monthly bills to ratepayers. The "terms" of FPC's service are not questioned in this proceeding; "terms" has never been a subject of debate.

Storey v. Mayo, 217 So.2d 304 (Fla. 1968), ***FPC Brief at*** 13, ***15,*** assists understanding of **"terms".** The court denied a **certiorari** request, challenging a territorial agreement between a city and Florida Power and Light Company; the city and utility had actively competed for customers in the suburban areas; seven ratepayers appeared in opposition to being included within the city's **service** area, **arguing** that they were denied equal protection of the **laws** in that they would be subjected to the rates of **an** unregulated city utility (over which **PSC** does not have jurisdiction). In **rejecting** the protestors' contention, for the reason that a ratepayer cannot compel service by **the** utility of his choice, the court wrote:

> The obligation of the respondent electric company is to furnish reasonably sufficient service to applicants therefor "* * * upon ***terms*** as required by the commission * * *" Fla.Stat. § 366.03(1967), **F.S.A.** When the Commission approved the subject agreement, it, in effect, informed the respondent electric company that it would not have to serve the particular **area** because under the circumstances it would not be reasonable to require it to do ***so.*** Fla.Stat. § 366.05, F.S.A., supra.
> . . . .

Storey v. Mayo, 217 So.2d at 308. (emphasis supplied)

In other words, "terms" has meaning only for "service"; "fair **and** reasonable" pertains to "rates." All of which is to return the court to the sole issue in this case, whether ch. 366 includes the legislature's directive that **PSC** possesses jurisdiction to approve a proposed component of **FPC's** tariff that is not based upon **"used** and useful property." § 366.***06(1).*** There is no such provision. **To** the contrary, the legislature has ordered the commission to deny

rate status to a proposed charge that is not based upon "the actual legitimate costs of the property of each utility company, actually used and useful in the public service. . . ." *Id.*

C. Returning to PSC's "discrimination" analysis

FPC inaccurately writes: "Turning to [the] issue of discriminatory rates raised by the Action Group, the [PSC] concluded that 'under the particular circumstances of this case, . . . the proposed Sebring rider does not unduly discriminate against the Sebring customers who will be subject to it.' Order at 8." *FPC Brief at 4.* (our emphasis). We protest! The Action Group never raised "discrimination" as an issue. Rather, appellant specifically limited the issue to jurisdiction, there being no statute or theory of law that gives PSC any basis for "approving" the petitioners' proposed business transaction.

FPC argues that PSC correctly determined that the revenue bond redemption money to be recouped from SUCOM's present customers is not "discriminatory." *FPC Brief at 22-24.* Here, FPC manifests a lack of understanding of what has transpired. First, we did not raise a "discrimination" issue at all. Secondly, PSC has apparently retreated from its "discrimination/jurisdiction" analysis. *PSC Brief at 10-16.* Appellant stated in its Rehearing Memorandum, at 1:

> [T]hese Intervenors wish to advise. the Commission and the parties and other intervenors to the Joint Petition that they will address at the hearing only one issue: whether the Commission possesses the authority to consider and act with respect to the subject of the Joint Petition in so far as [FPC] and [SUCOM] therein request Commission approval of "a transition rate to be collected by FPC from certain retail electric customers in the Sebring area following the pending sale of [SUCOM's] electric

> transmission and distribution assets by [SUCOM] to FPC. (R. 177).

A fortiori, PSC wrote in its order, under *Jurisdiction:*

> The Action Group . . . 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. . . . (R. 197).

And, the court will be satisfied that the transcript is devoid of *any* evidence about "discrimination," either by PSC, appellant or by any party. In stating such, we emphasize that PSC's concluding that "discrimination" does not follow here (because FPC's existing customer base will not be billed for the Sebring Rider) does not raise a "discrimination" issue at all, because no person has ever suggested that such would eventuate. In short, PSC's "discrimination" issue is illusory and contrived.

We were genuinely surprised when PSC's professional staff crafted an order that included a discussion of "discrimination." The commission should look to the statute of its creation to determine whether it possesses jurisdiction of the "approval" that petitioners sought. There is only one explanation for PSC's injection of such a bogus "issue" - there is no legal basis for its taking jurisdiction. FPC's counsel does not ease PSC's obvious discomfort in having manufactured a totally unsupported basis for jurisdiction. In rehashing PSC's argument[8] and mistakenly citing *Lake* Worth *Utilities Authority v. Barkett*[9], FPC hardly alleviates the pain that PSC has created for itself in publishing its "no precedential value" decision. (R. 203) Order *at 11.*

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[8] FPC's brief is nothing more than a regurgitation of PSC's order.

[9] discussion *supra* at 4-5.

However, in view of **PSC's** questionable conduct in suggesting that "discrimination" **or** lack thereof creates a nexus for jurisdiction, we are compelled to respond, advising the court what is the *only possible* discrimination that will result if **FPC** is allowed to charge SUCOM's Highlands County customers the price of redeeming the bonds; but for **PSC's** injecting the word, we would not have been compelled to analyze the Sebring Charter and **a** prior decision by the court. ***Initial Brief at 2-5, 12-13, 19-21.***

FPC writes about "teachings of this **Court** that 'rates must not only be fair and reasonable to the parties before the **PSC,** they must **also** be fair and reasonable to other **utility** customers who are not directly involved in the proceedings at hand' , , , (citation omitted)," *FPC Brief at* **22.** We do not concern ourselves with the court's "teachings" because the legislative branch has left nothing to the imagination; there is nothing arcane about § 366.06(1)'s formula for setting **rates.** The court does not **set** rates, the **PSC** does. Therefore, **FPC's** reach for help in this branch of government is unavailing.

More to the point, this case is not about fairness of **rates.** Rather, it **is** purely and simply a question whether **PSC** has jurisdiction. Assuming *arguendo* that ch. 366 did **contain** a provision giving **PSC** jurisdiction of **the** petitioners' business proposition, appellant does not question the fairness of any **rate. FPC's** rates are "fair" because **PSC** has approved the **rates** that it charges its customers; there *can* be no question about the "fairness" of the rates that **SUCOM** has **been** charging its customers, because it is **a** municipality-owned utility whose rates **are** controlled at the ballot box, *i.e.,* by Sebring residents.[10] In other words, the residents allowed their commission to incur debt, and that debt and its debt service is therefore **a** legitimate

[10] ***See City of Tallahassee v. Mann,*** supra at 6.

component of its "rate." As such, Sebring's residents have dictated the perhaps sophistic truism that SUCOM's rate is "fair." The court will search the record in vain to find to find an utterance by appellant on the subject of fairness of rates.

On the other hand, the court will observe our persistent insistence that PSC does not have jurisdiction to approve petitioners' business deal that will result in the non-resident ratepayers in Highlands County paying FPC what it has expended to redeem SUCOM's revenue bonds. If jurisdiction is lacking it is unnecessary to discuss discrimination at all.

In conclusion, "discrimination" is a phony issue, whether it comes from our public servants or from our worthy opponent. Having raised the point, it is clear that real discrimination, *a fortiori*, a tax or penalty, would result as to the Highlands County ratepayers who never had the opportunity to challenge SUCOM's conduct in running up a $130 million debt that would be repaid by a small population of electricity consumers. The Highlands County ratepayers should not be labeled with a status that differs from that occupied by FPC's present customers. The latter will not pay SUCOM's debt, and there is no rational argument for the non-residents paying that bill.

We would never have mentioned "discrimination" but for PSC's mistake in doing so, or but for the commission's totally flawed and inaccurate description of what "discrimination" could possibly be in the instant context.

C. The "Territorial Agreement" (TA) is no basis for taxing the non-residents

Apparently not thinking much on the necessary conclusions that rational cognition produces, FPC argues that because (a) SUCOM's borrowing was for the benefit of all the

ratepayers[11], and (b) SUCOM crept out beyond its city limits, and *(c)* petitioners executed their "Territorial Agreement" on December 11, 1986, it follows that the non-residents should help repay the cost of the revenue bonds. ***FPC Brief at 16-20.*** FPC writes:

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

Id. at 20.

Assuming *arguendo* that appellant's constituents really had any opportunity to oppose the TA, even to the point of arguing before the PSC, one must wonder what relevance that bears to FPC's apparent argument that the noa-residents have no basis upon which to argue that they are no different from FPC's current customers; in other words the argument to saddle them with the Sebring Rider is tantamount to taxing them. If it be assumed that certain non-residents presented themselves before PSC at a time prior to its approval of the TA, upon what basis would one now seriously argue that anyone, including PSC staff or members, would have been so prescient as to know that, in 1992, the petitioners would undertake a sale and purchase, and that the purchaser would seek PSC's "approval" to surcharge the non-residents? In other words, how could today's question have been a part of PSC's agenda and study during the days preceding its approval of the 1986 TA? It would appear that our opponent attempts to apply a *res judicata* or collateral estoppel concept, but such is clearly inapposite.

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[11]One might pray that he be saved from such a beneficent practice!

The quotation from page 20 of FPC's brief is actually a most important one for the court's consideration, because it explains much about this case; more precisely about **FPC's** expedient approach to the acquisition of some more customers. Apparently, **FPC** is eager enough to acquire **SUCOM's** customers that it presents the quoted superficial argument. However, **FPC's** argument suggests a conclusion totally the opposite to that stated: rather **than** burden the non-citizens with **SUCOM's** debt upon the theory that they should have contested the TA in 1986, they should not be surcharged for the precise reason that **no** one can **tell** either **PSC** or this court that anyone would have ever considered in 1986 that this issue would **arise** in 1992. A *fortiori,* we suspect that, had it been aware in 1986 that **FPC** would subsequently make its 1992 argument for surcharging non-residents innocent of **SUCOM's** debt, **PSC** would have entered a caveat in its order, warning that its approval of the **TA** was not to be construed as approval of **a** subsequent surcharge.

We have observed nothing in the appellees' briefs about the record of the 1986 **TA** proceeding before the commission. Certainly, there is no evidence that **a** surcharge was discussed **in** 1986. However, if **PSC** advises that such a matter was considered, **common Sense** dictates that the court relinquish jurisdiction for **a** short period **so** that the record might be supplemented.

Finally, **FPC seems** to suggest that the circuit court and this court laid the matter to rest in Wohl *v. State* ***of Florida,*** 480 So.2d 639 (Fla. 1985). ***FPC Brief at 19.*** Stating that **SUCOM's** "outstanding bonds were validated . . . [and that appellant's undersigned attorney] represented [SUCOM's] customers [] who . . . contested the validity of [SUCOM's] issuance of these bonds without a referendum," *id.,* **FPC** seemingly argues that the Wohl Court put its

imprimatur of approval upon the proposed surcharge. FPC finishes in the flurry: "Action [Group] is in effect attempting in this appeal to retry the same issue that was laid to rest in *Wohl*!" *Id.* However, we trust that the court is now fully aware that appellant has never in this proceeding raised any issue other than jurisdiction; that only PSC injected the discrimination issue; that we have not argued herein that SUCOM erred in 1985 or 1986, increasing its debt by almost the identical amount that FPC would surcharge the non-residents (and residents).

It would hardly seem necessary that we explain that a bond validation proceeding is Florida's assurance to the bond purchasers that the bonds will never be contested; and that *Wohl* involved that intervenors' contentions that (a) the new bond issue was not really "refunding" because SUCOM sold almost $33 million in new debt, and (b) a referendum was necessary because the bonds were not truly "refunding." One reads *Wohl* from stem to stern and is not able to conclude that today's PSC jurisdiction issue was laid to rest in 1985 - would be that the court had been so clairvoyant.

11. As to SUCOM's brief

Our response to FPC's brief suffices.

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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