

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Motion of Sebring Utilities)	DOCKET NO. 881192-EU
Commission for enforcement of Order No.)	
19432, which approved a joint plan to)	ORDER NO. 20914
resolve overlapping services of Sebring)	
Utilities Commission and Florida Power)	ISSUED: 3-17-89
Corporation.)	

Pursuant to Notice, a Prehearing Conference was held on March 16, 1989, in Tallahassee, Florida, before Commissioner Gerald L. Gunter, Prehearing Officer.

APPEARANCES:

ANDREW B. JACKSON, Esquire, 150 North Commerce Avenue, Sebring, Florida 33870, and D. BRUCE MAY, Esquire, Holland & Knight, P. O. Drawer 810, Tallahassee, Florida 32302
On behalf of Sebring Utilities Commission.

PHILLIP D. HAVENS, Esquire, P. O. Box 14042, St. Petersburg, Florida 33733
On behalf of Florida Power Corporation.

MARSHA E. RULE, Esquire, Florida Public Service Commission, Division of Legal Services, 101 E. Gaines Street, Tallahassee, Florida 32399-0863
On behalf of the Commission Staff.

PRENTICE P. PRUITT, Esquire, Office of General Counsel, Florida Public Service Commission 101 East Gaines Street, Tallahassee, Florida 32399-0862
Counsel to the Commissioners.

PREHEARING ORDERBackground

On September 16, 1988, Sebring Utilities Commission (Sebring) filed a Motion for Enforcement with the Florida Public Service Commission (Commission) on grounds that Florida Power Corporation (FPC) had failed to comply with the Joint Plan to Resolve Overlapping Services (Joint Plan or plan). The purpose of this proceeding is to address Sebring's Motion for Enforcement.

On September 16, 1985, three residents of Lake Haven Estates (a subdivision in the Greater Sebring area) formally complained to the Commission that FPC was installing above-ground electrical facilities in the area that unnecessarily duplicated existing facilities of Sebring. The Commission, in Order No. 15391, ultimately dismissed the complaints for lack of standing but directed Staff to investigate the potential problems in the area and to recommend remedies in the course of its investigation. Sebring then intervened. Staff thereafter conducted its investigation and summarized its findings in its recommendation of September 24, 1986, in Docket No. 850605.

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Based on the investigation, Staff believed that there was a potential for uneconomic duplication wherever the two utilities serviced common areas. Staff subsequently requested that the parties agree to a moratorium which would apply to all of the respective service boundaries of the two utilities. The moratorium provided specific procedures for determining which utility should provide new service in the Sebring area. The moratorium was formally imposed by the Commission in Order No. 16602 dated September 16, 1986.

Once the moratorium was in place, Sebring and FPC renewed discussions with respect to a territorial agreement to prevent future overlapping services and duplication of facilities. FPC and Sebring negotiated the territorial agreement and filed it along with a petition for Commission approval on December 16, 1986. By Order No. 17215 dated February 23, 1987, the Commission proposed to approve the territorial agreement. That proposed agency action order was protested by a third party, however, the protest was ultimately dismissed. By Order No. 18018 dated August 20, 1987, the Commission approved the territorial agreement in Docket No. 861596-EU.

The Commission, in Order No. 17215, directed FPC and Sebring to submit a report in that Docket No. 850605-EU on their proposals for resolving the problems of overlapping services, duplication of facilities, and potential safety hazards. FPC and Sebring attempted to jointly address resolution of those problems but could not arrive at a consensus at that time. Each utility, therefore, submitted a separate report. After reviewing both reports, Staff believed that neither utility had adequately addressed the problems of overlapping services, duplication of facilities, and safety hazards. It was also Staff's position that the facilities each utility maintained in the other utility's service area would create more problems of overlapping services, duplication of facilities and safety hazards. Accordingly, Staff recommended that FPC and Sebring remove all of their facilities from each other's service areas. See Staff's recommendation dated October 19, 1987, in Docket No. 850605.

Both Sebring and FPC were reluctant to implement Staff's recommendation and, therefore, requested the opportunity to resolve overlapping services between themselves. The Commission granted this request but warned that if a joint solution was not forthcoming within 90 days, Staff's recommended solution would be implemented. See Order No. 18472, dated November 24, 1987.

Sebring and FPC thereafter negotiated and executed the Joint Plan and submitted that Plan to the Commission for approval. The Plan was approved by the Commission in Order No. 19432, dated June 6, 1988. Sebring now has alleged that FPC has refused to establish necessary procedures to fully implement the terms and conditions of the Joint Plan.

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Use of Prefiled Testimony

All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and exhibits, unless there is a sustainable objection. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his testimony at the time he or she takes the stand.

Use of Depositions and Interrogatories

If any party desires to use any portion of a deposition or an interrogatory, at the time the party seeks to introduce that deposition or a portion thereof, the request will be subject to proper objections and the appropriate evidentiary rules will govern. The parties will be free to utilize any exhibits requested at the time of the depositions subject to the same conditions.

Order of Witnesses

The witness schedule is set forth below in order of appearance by the witness's name, subject matter, and the issues which will be covered by his or her testimony.

<u>Witness</u>	<u>Subject Matter</u>	<u>Issues</u>
<u>Members of the Public</u>		
Jim Sacco, Bob Wessmuller and Russ Albritton	have been identified as members of the public who wish to testify.	Other members of the public who wish to be heard may also testify at the beginning of the hearing.

Direct

1. James E. Moothart (Sebring)	Joint Plan and FPC's compliance with that agreement	1-4
2. John Martz (FPC)	Joint Plan to Resolve Territorial Dispute	1-4

Rebuttal

3. James E. Moothart (Sebring)	Rebuttal to John Martz direct testimony	1-4
4. Duncan MacCallum (FPC)	Rebuttal Testimony of James Moothart	1-4

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EXHIBIT LIST

<u>Exhibit Number</u>	<u>Witness</u>	<u>Description</u>
<u>Sebring:</u>		
101	Moothart	(JM-2) Joint Plan to Resolve Overlapping Services
<u>FPC:</u>		
201	Martz	Territorial Agreement
202	Martz	Joint Plan To Resolve Overlapping Services

PARTIES' STATEMENT OF BASIC POSITION

Staff:

The Joint Plan to Resolve Overlapping Services specifically refers to overlapping facilities to be removed and particular customers to be transferred. The Joint Plan requires the transfer of only those customers specified within the plan. FPC has properly transferred those specified customers.

Sebring Utilities Commission (Sebring):

Sebring's basic position in this proceeding is that the Joint Plan is designed to resolve the problems of overlapping services in the respective retail service areas of FPC and Sebring. The Plan eliminates overlapping services by attrition, that is, when there is an "end-user" change of a foreign account the resulting new service will be served by the host utility. This is provided for in Paragraph 3.I. of the Plan and will effectuate a gradual clean-up of FPC's and Sebring's service areas without the transfer of existing customers. As foreign accounts are systematically eliminated by way of attrition, Paragraph 3.G. of the Plan provides that unnecessary facilities would be removed or sold to the host utility. The process of attrition would apply to all foreign services within the host utility's service area, except those services located in areas specifically excluded under Paragraph 3.J. Those excluded areas, commonly referred to as "pure" areas, are specifically identified in Exhibit 5.

The Joint Plan also contemplates the immediate removal of facilities in certain areas plagued by severe duplication of facilities. To this end, the Joint Plan required that those facilities identified in Exhibits 1 and 2 of the Plan be removed on or before December 31, 1988.

Those facilities identified in Exhibits 1 and 2 have now been removed and customers served by those facilities (which are identified in Exhibits 3 and 4) have been connected to the

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host utility's distribution system. The foreign utility continues to serve those customers by leaving its meters in place and continuing to bill such customers at its rates.

FPC thus far has refused to allow the process of attrition to occur with respect to any of its foreign accounts outside of those listed in Exhibit 3 of the Plan and will not do so unless otherwise ordered by the Commission. Sebring believes that FPC's position is in blatant violation of Paragraph 3.I of the Plan which states:

Except as set forth in Paragraph J below, SUC [Sebring] and FPC shall automatically transfer any customer physically located in the service area of the other to the utility in whose service area the customer location abides when the account that services that customer is transferred to a new owner or is leased to a new tenant.

(Emphasis supplied.)

Florida Power Corporation (FPC):

FPC has complied with the Joint Plan to Resolve Overlapping Services surrounding the Lake Haven Estates controversy. Those areas where duplicative facilities existed have been identified and eliminated and services are being transferred pursuant to the plan in those areas.

Sebring Utilities Commission has consistently failed to meet either the letter or the spirit of the Joint Plan and has unilaterally attempted to expand the agreement beyond its original scope to gain a gross advantage in the number of accounts transferred under the Plan. The Joint Plan was designed to eliminate overlapping facilities in specifically identified areas where duplication existed by December 31, 1988, and eliminate points of service in those areas over a 5-year period as end users changed. An equal number of customers was specifically identified in those areas in Exhibits 3 and 4 of the Joint Plan. FPC has complied with the Joint Plan in the identified areas. Sebring has attempted to unilaterally expand the Plan to gain an economic advantage. FPC has 492 customers who would be at risk under Sebring's interpretation. Sebring has 30 such customers. Such a disparity was not intended by FPC or the Commission when the plan was approved and is contrary to the parity provisions of paragraph 3.E. and 3.F.

STATEMENT OF ISSUES AND POSITIONS

1. ISSUE: Has FPC been complying with the terms and conditions of the Joint Plan?

POSITIONS

STAFF: Yes. Sebring's interpretation of the Joint Plan is incorrect. FPC has properly transferred those customers contemplated by the Joint Plan.

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SEBRING: No. FPC has refused to allow the process of attrition to occur to any of its foreign accounts in Sebring's territory except those set forth in Exhibit 3 to the Joint Plan. This is in blatant violation of Paragraph 3.I. of the Plan which states:

except as set forth in Paragraph J below, SUC [Sebring] and FPC shall automatically transfer any customer physically located in the service area of the other to the utility in whose service area the customer location abides when the account that services that customer is transferred to a new owner or is leased to a new tenant.

(Emphasis supplied.) (Moothart)

FPC: Yes. Overlapping facilities in the greater Sebring area were eliminated by December 31, 1988 as provided in the agreement and customer transfers in those areas have proceeded in an orderly manner. Facilities transferred under the agreement were transferred to Sebring at book value minus depreciation. (Martz)

2. ISSUE: Has Sebring been complying with the terms and conditions of the Joint Plan?

POSITIONS

STAFF: Yes. There has been no allegation that Sebring has refused to transfer specified customers or remove specified facilities. Neither Sebring's power to annex territory nor its demand for payment for facilities not covered by the Joint Plan are at issue in this docket.

SEBRING: Yes. Sebring has made every attempt to fully comply with the spirit and letter of the Joint Plan. However, the Plan has not been fully implemented in that FPC has refused to allow the process of attrition to occur to any of its foreign accounts in Sebring's territory except those set forth in Exhibit 3 to the Plan. As indicated above, this is in blatant violation of the plain meaning of the Plan. (Moothart)

FPC: No. Sebring has attempted to expand its territory beyond the boundaries provided in the territorial agreement underlying the Lake Haven agreement by requiring the City of Sebring to force customers in FPC territory to agree to annexations to the City and accept Sebring electric service in order to obtain city water service. Sebring has also demanded payment for its facilities to be transferred to FPC far in excess of book value minus depreciation and has refused to recognize the pure areas as defined in the agreement by asserting rights in other areas which were clearly limited to the pure areas defined in the agreement. Sebring has attempted to unilaterally expand the agreement beyond those areas encompassed by the agreement in an attempt to create an inequity in the number of customers transferred to Sebring. (Martz)

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LEGAL ISSUES

3. ISSUE: Paragraph 3.I. of the Joint Plan specifies in pertinent part as follows:

- I. Except as set forth in paragraph "J" below, SUC [Sebring] and FPC shall automatically transfer any customer physically located in the service area of the other to the utility in whose service area the customer location abides when the account servicing that customer is transferred to a new owner or is leased to a new tenant. It is the intent of the parties to transfer these accounts when there is a change in the "end user".

To which customers does this Paragraph 3.I. of the Joint Plan apply?

POSITIONS

STAFF: Agree with FPC. The Joint Plan was, by its terms, intended by the parties to "implement the approved Territorial Agreement and resolve overlapping services in the greater Sebring area." The Territorial Agreement specifies, in Section 5, that each party will retain existing customers:

"Each party retains the right and obligation to continue to provide retail electric service at existing points of delivery, which are in the retail areas of the other party, at the time this Agreement becomes effective. ... Each such party may maintain, repair, and replace its facilities used to service such existing points of delivery."

The Joint Plan describes, in Paragraphs 3.A., B. and C. the specific accounts and facilities to which the transfer plan applies. Paragraph 3.I., quoted by Sebring out of context, applies to the specific accounts and customers carefully itemized in Paragraphs 3.B. and C.

SEBRING: Paragraph 3.I. of the Plan makes it clear that the provision applies to "any customer physically located in the service area of the other [utility]" except those customers referenced in Paragraph 3.J. of the Plan. (Moothart)

FPC: Paragraph I is a subsection of Section 3, which sets forth the procedures for resolving areas of conflicting service and facilities. Those areas are specifically identified in Paragraph 3.A. by attachments 1 and 2 as areas where facilities must be removed. Paragraphs 3.B. and 3.C. and Exhibits 3 and 4 identify the customers to be transferred. The remaining paragraphs set forth the procedure for transferring those

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customers. Paragraph I was intended to apply only to those customers previously identified in Section 3. (Martz, MacCallum)

4. ISSUE: Was there a meeting of minds on the meaning of paragraph 3.I. of the Joint Plan such that this portion of the Joint Plan is enforceable?

POSITIONS

STAFF: Yes. The Joint Plan itself manifests a "meeting of the minds", and thus the subjective intention of the parties at the time the agreement was made is not relevant.

SEBRING: Sebring believes that this is not an issue in this proceeding. The validity of the Joint Plan has not been questioned by any of the parties. The mutual assent of the parties is clearly evidenced by the Joint Plan. Should the issue be made part of this proceeding, it is an issue of law and should be addressed as such in the parties' briefs. (Moothart)

FPC: Paragraph 3.I. was intended only to apply to the areas and customers identified in the preceding parts of Section 3. There was no meeting of the minds of the parties to a broader interpretation of this paragraph and therefore no enforceable agreement beyond the specifically identified areas and customers. (Martz, MacCallum)

STIPULATIONS

The parties have stipulated to the following facts:

1. "Pure areas" are distinct geographic areas located within the retail service areas of both FPC and Sebring which are exclusively served by the foreign utility; these areas are specifically identified in Exhibit 5 attached to the Plan; and the foreign utility serving these pure areas has the exclusive right to serve existing points of delivery and new services that occur within the area.
2. The Joint Plan requires that certain facilities identified in Exhibits 1 and 2 of the Plan be removed on or before December 3, 1988; and both utilities have satisfied that requirement.
3. The Joint Plan requires customers associated with facilities identified in Exhibits 1 and 2 be connected to the host utility's distribution system; and the foreign utility would retain those customers by leaving its meters in place, continuing to bill such customers at its rates, and collecting the revenues from those customers.
4. The accounts affected by the immediate removal of the facilities identified in Exhibits 1 and 2 are listed in Exhibits 3 and 4 of the Plan and have been connected to the appropriate host utility's distribution system.

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5. Those accounts identified in Exhibits 3 and 4 are foreign accounts and are not located in any "pure areas" established in Paragraph 3.J.; therefore, those accounts are subject to the process of attrition whenever that account is transferred to a new owner or leased to a new tenant.

MOTIONS

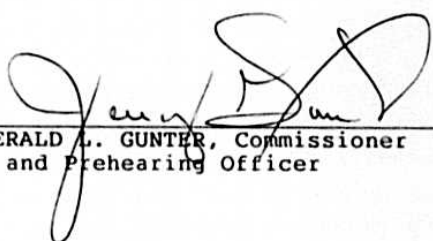
1. Sebring's Motion to Strike is denied.
2. Sebring's Motion to Exclude Witnesses is granted, to the extent that FPC may not sponsor Witnesses Sacco, Albritton or Wessmuller.

However, time will be set aside for public testimony at the beginning of the scheduled hearing, and members of the public, including Messrs. Sacco, Albritton and Wessmuller, may testify on their own behalves at that time, without sponsorship.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that these proceedings shall be governed by this order unless modified by the Commission.

By ORDER of Commissioner Gerald L. Gunter, as Prehearing Officer, this 17th day of MARCH, 1989.


GERALD L. GUNTER, Commissioner
and Prehearing Officer

(S E A L)

MER