

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for Approval) DOCKET NO. 911078-WS
of Transfer of Certificates) ORDER NO. PSC-92-0699-FOF-WS
Nos. 405-W and 342-S in Marion) ISSUED: 07/22/92
County from TRADEWINDS)
UTILITIES, INC. to Resolution)
Trust Corporation, as Receiver)
for Miami Savings Bank)
_____)

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
SUSAN F. CLARK
J. TERRY DEASON
BETTY EASLEY

NOTICE OF PROPOSED AGENCY ACTION
ORDER DECLARING RESOLUTION TRUST CORPORATION
NOT A "GOVERNMENTAL AUTHORITY" AND
DENYING EXEMPTION AND TRANSFER AS A MATTER OF RIGHT

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the action discussed herein, except for our determination that this Commission does not have jurisdiction to determine damages and that we are not preempted by federal law from the regulation of Resolution Trust Corporation's (RTC) operation of a water and wastewater utility, is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

BACKGROUND

Tradewinds Utilities, Inc. (Tradewinds or Utility) is a Class C water and wastewater utility serving 366 water and 257 wastewater customers in Marion County. According to Tradewind's 1990 annual report, the utility's total annual operating revenue was \$124,156. Its net operating loss for 1990 was \$7,990.

On July 1, 1983, in Order No. 12184, Tradewinds was granted an original certificate to serve certain territory in Marion County. The utility owner, Charles Demenzes, developed this territory

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(Portion A) into the Tradewinds Subdivision. The Tradewinds Subdivision includes a residential development along with a water and wastewater facility. This territory is not under consideration in this proceeding and is currently owned and operated by Tradewinds Utilities, Inc. By Order No. 19688, issued July 19, 1988, this Commission approved an amendment to serve additional territory in Marion County. This additional territory is located several miles away from the utility's original certificated territory. Mr. Demenzes developed a portion of the additional territory (Portion B) into the Landfair Subdivision. Currently, a water and wastewater facility is located within the Landfair Subdivision. The subdivision will contain approximately 360 residential lots at build-out. The remaining portion of the amended territory (Portion C) was developed by an independent developer into the Hill Top Subdivision. The Hill Top Subdivision is being served by water and wastewater facilities located in the Landfair Subdivision. The Hill Top Subdivision consists of one apartment complex capable of housing approximately 92 low income families. The developer donated to Tradewinds the lines serving the apartment complex. The Miami Savings Bank held the title for Portion B of this additional territory. Miami Savings Bank subsequently failed and the Resolution Trust Corporation (RTC) was appointed as receiver for the bank.

The RTC is a federal agency created by Congress in order to contain, manage and resolve failed savings associations. The RTC gained ownership of Tradewinds' Portion B under a Judgment of Foreclosure issued April 16, 1991, in the Circuit Court of the Fifth Judicial Circuit in Marion County. The foreclosure granted the RTC ownership of the Landfair Subdivision including the water and wastewater facility. Further, the aforementioned court on October 30, 1991, ordered Tradewinds to transfer to the RTC all of the utility's security deposits and records of its customers, as well as any accrued interest. Currently, the RTC is serving all the customers in both the Landfair and Hill Top Subdivisions.

RTC NOT A "GOVERNMENTAL AUTHORITY" PURSUANT TO SECTIONS
367.021(7), 367.022(2), AND 367.071(4)(A), FLORIDA STATUTES

On October 22, 1991, the RTC, on behalf of Tradewinds, filed the instant application to transfer a portion of Tradewinds' territory being served under Certificates Nos. 405-W and 342-S in Marion County, to the RTC as receiver for Miami Savings Bank. In its application, the RTC requested that this Commission approve

this transfer under the governmental authority provision of Section 367.071(4)(a), Florida Statutes, which provides that the sale or transfer of a utility to a governmental authority is approved as a matter of right.

A "governmental authority" is defined in Section 367.021(7), Florida Statutes, to mean a political subdivision, as defined by Section 1.01(8), Florida Statutes, or a regional water supply authority created pursuant to Section 373.1962, Florida Statutes. Section 1.01, Florida Statutes, provides that the words "public body," "body politic," or "political subdivision" include counties, cities, towns, villages, special tax school districts, special road and bridge districts, and all other districts in this state. Section 373.1962, Florida Statutes, is inapplicable to our analysis in this proceeding.

On August 9, 1989, the United States Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, (FIRREA) Pub.L.No. 101-73, Title 1, Section 101, 1103 Stat. 183. This massive law established the RTC as an instrumentality and agency of the United States in order to contain, manage, and resolve failed savings associations. Under FIRREA, Section 501(a), the RTC has broad receivership and conservatorship powers and it will be deemed a government agency when acting in its capacity as conservator or receiver. This provision also allows the receiver to operate without interference from other agencies and to take whatever steps it deems necessary to maximize asset values and minimize losses to the insurance fund. The RTC's primary purpose is to conduct its operations so as to maximize recovery on assets it acquires, minimize the impact of its activities on local markets, make efficient use of its funds, minimize losses incurred in resolving cases, and maximize preservation of affordable housing. In the instant case, the RTC is acting as a receiver for the Miami Savings Bank, and would therefore be deemed an "agency" under FIRREA, Section 501(a).

Along with the definition of a governmental authority and the intent of FIRREA, we must consider the legislative intent behind the provisions of Sections 367.021(7) and 367.071(4)(a), Florida Statutes, in order to determine if the RTC qualifies as a governmental authority and is, therefore, exempt from this Commission's jurisdiction. The rationale behind a governmental authority receiving a transfer as a matter of right and an exemption from Commission jurisdiction is that the utility's

customers have an opportunity through the political process to elect officials to serve their interests. If their interests are not being served by a government agency, ratepayers can appeal to their local officials. For instance, in a cooperative situation, customers have redress to a board of trustees. In a municipality, customers can protest to city or county commissioners. However, in this case, we believe that the RTC as a federal government agency does not provide customers this opportunity. If the RTC were to fail in its obligation to serve Tradewinds' customers, these customers would not have effective redress to any elected persons to whom they could voice their concerns.

Although a federal agency, we find that the RTC does not meet the definition of a "governmental authority" under Section 367.021(7), Florida Statutes, does not qualify for an exemption as a "governmental authority" pursuant to Section 367.022(2), Florida Statutes, and does not qualify as a "governmental authority" under Section 367.071(4)(a), Florida Statutes. Therefore, Tradewinds shall file an application for a transfer within 90 days of this Order.

RTC SHALL HAVE CONTINUED USE OF LINES, PIPES AND
LIFT STATION IN PORTION C

Tradewinds has filed no objection in opposition to the RTC's instant application. However, by letter dated January 8, 1992, Tradewinds states that this Commission should determine if Tradewinds will continue to have the use of the pipes and lines and lift station in Portion C of its territory and, therefore, should be compensated if RTC uses these pipes and lines and lift station. In the foreclosure action, the RTC obtained ownership of the Portion B of Tradewinds' territory. Tradewinds' asserts that since the foreclosure did not include Portion C, Tradewinds should be able to continue to have the use of the underground pipes and lines located on that property. In addition, the utility argues the RTC has, in effect, taken this property by inverse condemnation, without just compensation. Further, Tradewinds requests this Commission to decide whether the RTC should be ordered to make restitution to Tradewinds for these lost customers located in Portion C of its territory.

The RTC, in a letter dated October 16, 1991, responds that there is legal authority supporting its position that where a mortgagee obtains title to a utility through foreclosure, pipes and

lines connected to the utility, but located on property not subject to the mortgage, are nevertheless included in the property acquired by the mortgagee. Further, the RTC cited two cases which it felt supported this holding. These are Trask v. Moore, 24 Cal.2d 365, 149 P.2d 854 (Cal. 1944) and Pine v. Gibraltar Savings Ass'n, 519 S.W.2d 238 (Tex. Ct. App. 1974). In both cases, the Courts held that pipes located on property not part of the mortgage were nonetheless appurtenant to and therefore part of the foreclosed real property which the mortgagee acquired at the foreclosure sale. The RTC asserted that the language of the utility's mortgage was sufficiently broad enough to include the utility's pipes and lines.

It is possible to view this situation in various ways. However, we believe that the facts and the law support the appropriateness of the RTC's continued use of the pipes and lines and lift station. Tradewinds will not be able to continue to use the pipes and lines and lift station because they are property contributed by the developer to the operation of the water and wastewater plant located on Portion B of Tradewinds' territory. Therefore, because it is in the public interest for the customers currently served by that plant to continue to receive service, we find that the RTC shall have the continued use of the pipes, lines and lift station located on Portion C of Tradewinds' territory. It will be the RTC's obligation to maintain these pipes and lines in order to continue to serve the customers currently served by the water and wastewater plants.

PSC HAS NO JURISDICTION TO DETERMINE DAMAGES

As previously stated in this Order, Tradewinds requested that this Commission decide whether the RTC should be ordered to make restitution to Tradewinds for lost customers located in Portion C of its territory. However, this Commission does not have jurisdiction to determine any claim for title to or compensation for the lines, pipes and lift station that Tradewinds may believe it has. Any such claim would involve the law of foreclosure and must be addressed by a circuit court. See Southern Bell Telephone and Telegraph vs. Mobile America Corp., Inc., 291 So.2d 199, (1974). This Commission also has no jurisdiction to determine any claim for damages for lost customers that Tradewinds may have. Such determinations of damages, if appropriate, can only be made by a circuit court.

NO FEDERAL PREEMPTION

At our May 5, 1992, Agenda Conference, RTC's counsel asserted that FIRREA and related case law preempts our jurisdiction over the utility and, thus, removed any requirement that it be declared exempt. The section of FIRREA concerning the RTC's preemption power has been incorporated in 12 U.S.C. section 1821(7)(c)(C), and provides:

when the Corporation is acting as conservator or receiver . . . it shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the Corporation's rights, powers, and privileges."

Preemption is a judicial doctrine asserting the supremacy of federal legislation over state legislation of the same subject matter; it rests upon the supremacy clause of the federal constitution, and deprives a state of jurisdiction over matters embraced by a congressional act regardless of whether the state law coincides with, is complementary to, or opposes the federal congressional expression. Thus, when Congress legislates in an area of federal concern, it may specifically preempt all state legislation (thus, occupying the field), or may bar only inconsistent legislation.

Several cases set out the legal standard in determining if federal law preempts state law. The U.S. Supreme Court has established that state law is preempted to the extent it conflicts with federal law. California Federal Savings & Loan Association v. Guerra, 479 U.S. 272, 281, 107 S.Ct. 683, 689, 93 L.Ed.2d 613 (1987). Another U.S. Supreme Court case Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S.335, 106 S.Ct. 1890, 90 L.Ed 369 (1986), held that state law is preempted "when there is outright or actual conflict between federal and state law." In Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217, 10 L.Ed 248, (1963) the court held preemption occurs when "compliance with both federal and state regulations is a physical impossibility." Further, the court in Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941), held that a conflict also exists when "the state

law stands 'as an obstacle to the accomplishment and execution of the full purposes of Congress.'

As stated in Louisiana Pub. Serv. Comm'n, Id. at U.S. 365, the critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law. We believe that, under the facts in the instant case, Congress did not intend for 12 U.S.C section 1821 to override this Commission's jurisdiction. The FIRREA legislation was created in part to permit the RTC to have the power to take over the assets of and operate failed savings institutions. We are responsible for economic regulation of water and wastewater utilities. In this role, this Commission is carrying out its police power to protect the health, safety and welfare of its citizens. We believe the regulation of banking and the economic regulation of water and wastewater utilities are two separate matters and any conflict created between the two under our facts would be completely strained. If we were in some way interfering with the RTC's power to preserve and conserve the assets and property of the utility, there might be a preemption argument. However, there is no such conflict in this situation. The RTC is only attempting to succeed to all rights of Miami Savings Bank, which, before it failed, held a mortgage on a portion of Tradewinds' property. Further, we believe that the legal standards in any of the aforementioned decisions do not apply in the instant case. There is no outright or actual conflict of federal and state law in the instant case. Nor is compliance with federal and state law an impossibility. Further, state law in this case, Chapter 367, Florida Statutes, (this Commission declaring the RTC exempt or the finding the RTC under this Commission's jurisdiction) is not standing as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The RTC is in no way hindered because its operation of this utility would be under our jurisdiction. Thus, we find no federal preemption.

At our April 7, 1992, Agenda Conference RTC's attorney argued that the Fifth Circuit case of NCNB Texas Nat. Bank v. Cowden, 895 F.2d 1488 (5th Cir. 1990) would preempt the Commission's jurisdiction. The court in Cowden, held that the Competitive Equality Banking Act of 1987, authorizing the FDIC to create "bridge banks" to take over the assets and liabilities of failed institutions, granted the Federal Deposit Insurance (FDIC) authority to transfer FRB-Midland's fiduciary appointments to NCNB. By granting the FDIC this authority, the Competitive Equality

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Banking Act of 1987 preempted Texas law regulating the transfer of fiduciary appointments to the extent it conflicted with the FDIC's authority to transfer the fiduciary appointments of FRB-Midland to the bridge bank.

We believe the Cowden decision is a narrow decision in which state banking law directly conflicted with federal banking law. These factors are not present in the instant case. We believe that this Commission's fulfillment of its statutory mandate to protect the health, safety, and welfare of its citizens does not conflict with any banking regulations.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that the Resolution Trust Corporation does not meet the definition of a "governmental authority" under Section 367.021(7), Florida Statutes, and does not qualify for an exemption as a "governmental authority" pursuant to Section 367.022(2), Florida Statutes. It is further

ORDERED that the Resolution Trust Corporation's request for a transfer as a "governmental authority" under Section 367.071(4)(a), Florida Statutes, is hereby denied. It is further

ORDERED that the Resolution Trust Corporation shall file an application for a transfer of territory within 90 days of the effective date of this Order. It is further

ORDERED that Tradewinds Utilities, Inc., shall return Certificates Nos. 405-W and 342-S for revision and shall file revised tariff sheets within 90 days of the effective date of this Order. It is further

ORDERED that the Resolution Trust Corporation will have the continued use of the pipes, lines and lift station located in Portion C of Tradewinds' territory. It is further

ORDERED that the Florida Public Service Commission does not have jurisdiction to determine Tradewinds Utilities, Inc.'s claims for title to or compensation for the pipes, lines, and lift station located in Portion C or for compensation for lost customers. It is further

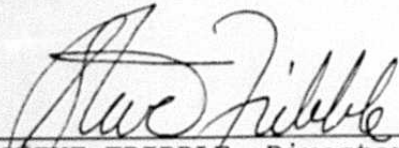
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ORDERED that the Florida Public Service Commission is not preempted by federal law from the regulation of the Resolution Trust Corporation's operation of a water and wastewater utility. It is further

ORDERED that the provisions of this Order, are issued as proposed agency action, except for our determination that this Commission does not have jurisdiction to determine damages and our determination that this Commission is not preempted by federal law from the regulation of the Resolution Trust Corporation's operation of a water and wastewater utility, and shall become final, unless an appropriate petition in the form provided by Rule 25-22.029, Florida Administrative Code, is received by the Director, Division of Records and Reporting at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the date set forth in the Notice of Further Proceedings below. It is further

ORDERED that this docket shall be closed if no protest is timely filed.

By ORDER of the Florida Public Service Commission this 22nd day of July, 1992.



STEVE TRIBBLE, Director
Division of Records and Reporting

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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.

As identified in the body of this Order, our action is preliminary in nature, except for our determination that this Commission does not have jurisdiction to determine damages and our determination that this Commission is not preempted by federal law from the regulation of the Resolution Trust Corporation's operation of a water and wastewater utility, and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on August 12, 1992.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this order becomes final and effective on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater 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 of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.