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December 2, 1992

**VIA FEDERAL EXPRESS**

Steve Tribble, Director  
Division of Records and Reporting  
Florida Public Service Commission  
101 E. Gaines Street  
Tallahassee, FL 32301

RE: 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

Dear Mr. Tribble:

I am enclosing for filing in the referenced docket an original and 15 copies of a Notice of Appearance and Pre-Hearing Memorandum filed on behalf of Harold Seaman and the Action Group.

Yours truly,

BUSH ROSS GARDNER WARREN &  
RUDY, P.A.

By: 

Jeremy P. Ross

JPR/bar  
Enclosures  
cc: All parties of record

25123.01

*Receiving Memorandum*  
DOCUMENT NUMBER-DATE

14101 DEC -3 1992

FPSC-RECORDS/REPORTING

*Notice of Appearance*  
DOCUMENT NUMBER-DATE

14100 DEC -3 1992

FPSC-RECORDS/REPORTING

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 Sale of Assets by Sebring  
Utilities Commission to Florida  
Power Corporation

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Docket No. 920949-EU

Filed November 16, 1992

**SEAMAN'S AND ACTION GROUP'S  
PREHEARING MEMORANDUM**

Mr. Harold Seaman and the Action Group, consisting of a nine person steering committee (the "Intervenors"), have requested that the undersigned counsel represent them in this proceeding, now set for hearing by the Commission on December 7 and 8, 1992. By this submission, these 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 Florida Power Corporation (FPC) and Sebring Utilities Commission (SUC) 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 SUC's electric transmission and distribution assets by SUC to FPC. . . ." *Petition at 1.*

Stated another way, the question that these Intervenors wish to raise is whether the Commission possesses jurisdiction to consider and approve such a request. The Commission's jurisdiction being established by Ch. 366, *Florida Statutes (1991)*, and there appearing to be no explicit or implied authority therein for the Commission to consider the transaction that is subject

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of the petition, Intervenors respectfully submit that the Commission must decline to act with respect to Petitioners' request for the approval of the specific transition rate that FPC wishes to collect from certain customers in the event that it is authorized to purchase SUC's electrical distribution system.

**Basic Argument in Opposition to Petitioners' Assumption of Commission Jurisdiction**

Chapter 366, Florida Statutes, specifies that the Commission will have jurisdiction to regulate and supervise each public utility with respect to its rates and service (§366.04(1)). The term, "rate," while not expressly defined by the statute, is clearly identified therein as being an amount (however calculated) that may be charged by a regulated public utility only in exchange for the delivery of a service to a customer (e.g. §§366.03, .04(1), .06(1) and .07). Both FPC and SUC are electric utilities. In that capacity, the only service that they are authorized to furnish to customers is electricity generation, transmission or distribution.

In the Joint Petition, Petitioners appear to be alleging that the service for which FPC believes that it should be entitled to charge and collect the transition rate is the basic delivery of electric power that will be initiated to the SUC ratepayers once the asset acquisition is completed. Since FPC will not be able to supply that power without first paying SUC a price, albeit greatly in excess of the depreciated cost of the used and useful assets that FPC is seeking to acquire, that will enable SUC to effect a defeasance of its outstanding bond obligations, such excess becomes, in the implicit view of Petitioners, a cost of furnishing electric power that FPC should be allowed to recover, through the imposition and collection of the transition rate, over a 15 year period.

This argument is subtly and ostensibly fortified by Petitioners' declaration that once FPC begins to supply electric power to the SUC ratepayers that group will "receive a substantial immediate reduction in their monthly electric rates compared with current SUC rates . . .", *Petition at 14*, but rather than aiding in the concealment of the argument's fatal defect the statement tends to expose it by acknowledging that FPC's cost of delivering power to the SUC ratepayers, without giving effect to the transition rate, will be materially less than that presently incurred by SUC. The incontrovertible fact is that the only "service" to be rendered by FPC, for which imposition of the transition rate is sought, has absolutely nothing to do with the furnishing of electric power to a customer base. To the contrary, it represents nothing more than the willingness of FPC to make indirectly available to SUC the considerable borrowing power that FPC enjoys as a result of its financial condition so that SUC may obtain an amount of money sufficient to enable it to satisfy the bonded indebtedness that remains outstanding, may then legally sell its distribution system and may terminate its existence, and so that its appointed commissioners can rid themselves of the political pressures to which each is subjected on a continuous basis at the hands of an angry ratepayer base.

It is that hoped for result that apparently caused SUC to issue its RFP. FPC became a willing respondent to that request, recognizing, Intervenor believe, that if it could obtain the requested Commission approval of its "transition rate", FPC would be able to add facilities and customers to its service area for a modest cost<sup>1</sup> with no risk that its assets or future borrowing

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<sup>1</sup>The Intervenor have noted that FPC's net adjusted asset value, as reported in a recent edition of Moody's financial service, approximates \$3,643,000,000 which is used to serve about 1,159,000 customers. The resulting investment per customer is about \$3,143. Given the fact that SUC's customer base consists of roughly 12,700 persons, Intervenor have observed that any asset purchase price of less than \$40,075,000 would provide FPC with a reduction in the capital

power would be exposed to the terms of repayment of the refinancing obligation (i.e. that portion of the acquisition price that will exceed the depreciated cost of the assets to be purchased) that is to be amortized through the medium of the transitional rate. But given the understanding that FPC will be providing the SUC ratepayers with absolutely no service associated with the delivery of electric power, there is no "rate", transitional or otherwise, that the Commission can, under the statute, consider or approve.

That conclusion is buttressed by language contained in Chapter 91-343, 1991 Special Acts of Florida (the "Act"), a currently ineffective special legislative act. Petitioners acknowledge that condition, *Petition at 6*, but then, strangely, rely upon its content for the proposition that "any surcharge, . . . 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]", and that "collection of a surcharge such as the Transition Rate is in the best interests of the bondholders of [SUC], and funds produced from the collection of such a surcharge should be held, invested, and the net amount thereof applied by or for SUC to the payment of its outstanding revenue bonds." In doing so, Petitioners ignore (1) the characterization of the charge established by the Act as a "debt repayment surcharge" (rather than a "service" based rate), (2) the statement that such charge "shall not be deemed 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", and (3) the fact that the effectiveness of the Act was absolutely conditioned upon a favorable referendum vote by the affected ratepayers. They seem to be attempting to borrow from the Act those

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investment applicable to each ratepayer.

statements that they believe tend to justify the Commission's right to approve FPC's imposition and collection of its proposed transition rate (for the purpose, as previously noted, of indirectly amortizing SUC's outstanding bonded indebtedness) without perceiving (or at least without acknowledging) that (1) it was the state legislature, not the Commission, that established whatever rights were to be granted by the Act; (2) it was an agent of SUC rather than an independent purchaser that was to be afforded the right of collection and enforcement; (3) the charge to be imposed by the SUC agent was expressly characterized as being a "debt repayment surcharge" and expressly not a rate for purposes of Chapter 366; and(4) most importantly in the view of the Intervenors, the effectiveness of this refinancing plan was conditioned upon the voter approval. Of some interest, the date of adoption of the Act was May 31, 1991, and its current ineffective status is due to the fact that the City of Sebring has not yet called the required referendum.

Given the above quoted language in Chapter 91-343 relative to the legislature's view that the "rate" is actually a "debt repayment surcharge" and not a "rate or charge for purposes of chapter 366, Florida Statutes . . .", as well as the other arguments set forth above, it appears to Intervenors that FPC has set a somewhat risky course in attempting to have the Commission conclude that it has jurisdiction to approve FPC's imposition of the transitional rate directly upon former SUC ratepayers and, inferentially, its right to penalize those customers who fail to pay it. Intervenors believe it is a virtual certainty that if the Commission determines that it has the requisite jurisdiction and, in reliance thereon, approves FPC's use of the transitional rate, one or more SUC ratepayers will seek a court ruling with regard to FPC's ability to terminate electric power service to any ratepayer who refuses to pay the same. As noted by the legislative

analysis attaching to Chapter 91-343, such Act was adopted so as to empower SUC to impose a debt repayment surcharge on its electric utility customers and, as expressed therein, to enforce the collection thereof by imposing penalties for nonpayment, including suspension of electric service to a delinquent customer. Since the Act was never rendered effective, FPC is not now in a position to rely upon that aspect of the Act to effect a similar enforcement mechanism. Rather, it is left with the need to seek from the Commission acceptance of the proposition that FPC, following consummation of the purchase, will be providing a service to each former SUC customer for which it should be entitled to impose and collect the transition rate and, upon the customer's failure to pay, to penalize him by terminating electric service. That is a right that could have been provided by the state legislature, and was, in fact, in the form identified in the Act, but it is clearly not a right that is within the Commission's jurisdictional authority to confer.

**Additional Points** Although the following may be somewhat redundant in light of the preceding discussion, Intervenors believe it important to include within this Memorandum several additional comments with regard to statements contained within the Joint Petition that they consider misleading, inaccurate or otherwise inappropriate:

A. **The putative "Transition Rate."** Petitioners' argument that a "transition rate" arises by reason of the fact that "the amount required to achieve payment of the Outstanding Bonds greatly exceeds the depreciated net book value of the Rate Base Assets [of SUC] . . .", *Petition at 13*, is flawed. FPC would have the Commission believe that while the \$69 million estimated to represent the aggregate Transition Amount may not be a part of FPC's authorized rate base, it is nevertheless susceptible to recovery through the imposition of a "rate." But given the total

lack of service to be provided in exchange for the imposition, there is no rate that can legally be approved. The portion of the purchase price that FPC seeks authority to recover through the medium of the transition rate is wholly attributable to SUC's previous difficulties, not to service that is somehow to be provided to the affected customer base, and its requested recovery mechanism is, irrefutably, a fee or surcharge that, as properly noted by the legislature, can only be imposed, outside of the scope of Chapter 366, by someone other than the Commission.

**B. "The financial burden for repayment of the Outstanding Bonds should be imposed directly on the customers of SUC, which issued the Bonds for the benefit of SUC's operations."**Petition at 13. This statement appears to reflect Petitioners' view that the Commission has the authority to order the former SUC ratepayers to pay the \$69 million bondholder debt (inclusive of interest) to FPC. We are not aware that, even in legitimate ratemaking, the Commission possesses the authority to impose liability upon users of utility services. Rather, its jurisdiction appears strictly limited to establishing rates, considering rate structures and regulating service. We are also troubled by Petitioners' statement that the SUC bonds were issued for the benefit of SUC's operations. It is self-evident that a "beneficiary" would not include a municipal commission's "operations." Also, SUC undertook to issue bonds because it was financially embarrassed. More to the point, the statement is irrelevant. The pertinent question is whether, once the proposed acquisition is completed, the former SUC ratepayers can be required to accept a direct obligation to pay FPC's proposed charge of \$69 million (or whatever other amount may actually be demanded as interest rates change), prorated over a period of 15 years, so as to enable FPC, at the end of that period, to own the purchased assets for a net price equal to their depreciated cost.



C. **"The closing is subject to the Commission's approval of the Transition Rate authorizing FPC to recover from the Affected Customers . . . the "Transition Amount. . ."** *Petition at 14.* We question whether the Commission should be interested in the thought implicit in this statement. In addition to the suggestions above, to the effect that the Commission does not have jurisdiction to consider the matter because it does not involve ratemaking, it would appear that Petitioners are requesting an advisory opinion. In other words, Petitioners seemingly are indicating that FPC expects to be supported by the Commission in FPC's efforts to collect from ratepayers the \$69 million that it proposes to advance. How could the Commission possibly enforce the "order" that Petitioners suggest? Perhaps, Petitioners would respond that intervenors are entitled to appeal the order directly to the supreme court. However, we question whether that court would have jurisdiction, because the order would not involve ratemaking or services.<sup>2</sup>

D. **"FPC and SUC hereby jointly request that each customer to which or to whom retail electric service is furnished by FPC . . . shall be subject to the payment of the Transition Rate with respect to electric service furnished by [FPC]. . ."** *Petition at 16.* We incorporate the matters expressed above.

E. **"[SUC's] Bonds were issued for the benefit of SUC and its customers. . . ."** *Petition at 17.* Under no stretch of anyone's imagination may it be inferred that SUC issued bonds for intervenors' or any other person's "benefit." While it is a truism that SUC could have

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<sup>2</sup> "As authorized by § 3(b)(2), Art. V of the State Constitution, the Supreme Court shall review, upon petition, any action of the commission relating to rates or service of utilities providing electric or gas service." *Fla.Stat. § 366.10.*

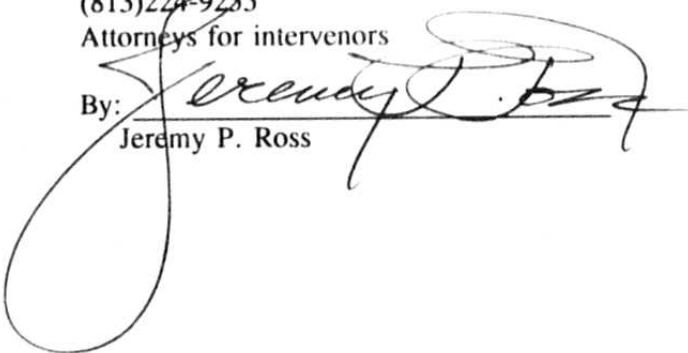
benefitted its customers by ceasing operations before foisting a huge debt upon a minuscule rate paying citizenry, the statement is simply inaccurate.

F. **"Because the Transition Rate will constitute a portion of the retail electric rates to be charged by FPC . . . to the Affected Customers, the Commission should approve the . . . Rate Schedule as a part of FPC's rate schedules."** *Petition at 18.* To the contrary, for the reasons expressed above, the \$69 million will not constitute a "rate".

G. **"WHEREFORE, FPC and SUC respectfully request that the Commission approve: . . . 4. the imposition of the Transition Rate [sic]. . ."** *Petition at 21-22.* The relationship between FPC and its customers is that of a seller and a buyer, the former being left to its common law rights in the event that the latter has refused to satisfy any Commission approved rate. The Commission approves rates; it does not "impose" them. A court has jurisdiction to enter or impose judgment; the Commission has no such authority or jurisdiction.

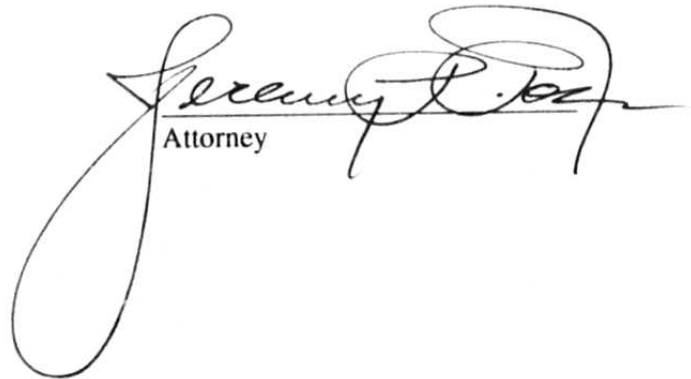
Respectfully submitted this 2nd day of December 1992.

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By:   
Jeremy P. Ross

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a complete and correct copy of the foregoing Notice has been furnished by telecopier transmission and by U.S. Mail delivery to D. Bruce May, Esquire, Holland & Knight, P. O. Drawer 810, Tallahassee, Florida 32301, attorneys for Sebring Utilities Commission; James P. Fama, Florida Power Corporation 3201 34th Street South, St. Petersburg, Florida 33733; Martha Carter Brown, Public Service Commission, 101 E. Gaines Street, Room 226, Tallahassee, Florida 32399-0863; Don Darling, Co-Chairman, Citizens for Utility Rate Equity, 1520 10th Avenue, Sebring, Florida 33872; Lee L. Willis, Esquire, Ausley, McMullen, McGehee, Carothers & Proctor, P.O. Box 391, Tallahassee, Florida 32302, attorneys for Tampa Electric Company; and Robert G. Pollard, Chairman, Concerned Citizens of Sebring, 810 N. Ridgewood Drive, Sebring, Florida 33870 on this 2nd day of December 1992.

  
Attorney

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