BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Motion of Sebring Utility Commission for Enforcement of Order No. 19432, which approved a joint Plan to resolve overlapping services of Sebring Utilities Commission and Florida Power Corporation.	)	DOCKET NO. 881192-EU
	)	ORDER NO. 21478
	)	ISSUED: 6-29-89

The following Commissioners participated in the disposition of this matter:

GERALD L. GUNTER
JOHN T. HERNDON

ORDER DENYING MOTION FOR ENFORCEMENT

BY THE COMMISSION:

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 Motion is the latest in a series of squabbles between the parties.

In September 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 a recommendation issued on September 24, 1986, in Docket No. 850605.

Based on the investigation, Staff believed that there was a potential for uneconomic duplication wherever the two utilities serviced common area. 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 but was ultimately withdrawn. 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 concensus at that time. Each utility, therefore, submitted a separate report. After reviewing both reports, our Staff believed that neither utility had adequately addressed the problems of overlapping services, duplication of facilities, and potential 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 facilities from the other's service areas.

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

In an attempt to avoid Staff's recommendation, the parties negotiated and executed a Memorandum of Understanding and Intent which we approved in Order No. 19432. The parties then executed the Joint Plan to Resolve Overlapping Services, which implemented the Memorandum, and which we approved in Order No. 19432. In the present docket, Sebring alleged that FPC refused to establish necessary procedures to fully implement the terms and conditions of the Joint Plan. A hearing was held in this docket on March 27, 1989, after which certain factual stipulations between the parties were approved.

At hearing, both Sebring and FPC acknowledged that Staff's recommended solution of immediate removal of facilities (known as the "Colson Plan") was unacceptable, but that it had formed the basis of their negotiations. The resulting Joint Plan therefore appears to be a modified Colson Plan. Under the Colson Plan, FPC and Sebring immediately would remove their facilities which were located in the other utility's service area, as defined under the Territorial Agreement. The Joint Plan, or modified Colson Plan, contains no such provision. The Joint Plan has 7 Paragraphs calling for Sebring and FPC to resolve the overlapping services in the greater Sebring area. Paragraph 1 refers to the Territorial Agreement which was approved by the Commission on August 20, 1987, by Order No. 18018, Section 5 of which describes treatment of all extra-territorial services. It states that:

> "Each party hereby retains the right and obligation to continue to provide retail electric service at existing points of delivery, which are in the retail service areas of the other party, at the time this Agreement becomes effective. Existing points of delivery shall mean service drops and underground service laterals which are physically connected to the customer's

> property, whether energized or not. Each such party may maintain, repair and replace its facilities used to service such existing points of delivery. (Emphasis added)

Paragraph 2 of the Joint Plan makes it clear that the Plan is intended to implement the Territorial Agreement. Paragraph 3 (along with Exhibits 1 and 2) identify the Lake Haven area and 11 other subdivisions in the greater Sebring area in which there was an unacceptable overlapping and duplication of facilities. In subparagraphs A, B, C, E, F, G and H of Paragraph 3 of the Joint Plan, the parties set forth the procedure by which the overlapping facilities would be removed and accounted for in the identified areas. We find that Paragraph 3 of the Joint Plan is an implementation of Section 5 of the Territorial Agreement. The purpose of the Joint Plan is to remove overlapping and duplication as identified on Exhibits 1 and 2 of the Joint Plan, but still left each party with extra-territorial customers. These customers retained by each party should be governed by the Territorial Agreement. We therefore find that FPC's refusal to transfer certain non-specified accounts does not constitute a violation of the Joint Plan.

Sebring argues that the Joint Plan mandates transfer of all extra-territorial customers. In support, Sebring cites Paragraph 3.I. of the Joint Plan, which 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".

Sebring quotes this paragraph out of context, and urges an interpretation which contradicts the Territorial Agreement and Memorandum of Understanding and Intent. Paragraph 3.I. of the Joint Plan applies to those approximately equal specific customers described in Paragraphs 3.B. and C. of the Joint Plan, such that only those specified customers are subject to this transfer provision.

The Territorial Agreement and Memorandum of Understanding and Intent make it clear that each party intended to retain customers in the other party's service territory. Further, the Memorandum, from which the plan arose, specified (at Item 6) that "The number of each utility's customer's involved shall be approximately equal". The Joint Plan, by its terms, was intended to implement the Territory Agreement. We agree with FPC that Paragraph 3.I. of the Joint Plan must be read in context of the entire plan. Paragraph 3.I. does not stand alone.

FPC argues that Sebring's uncontroverted policy of tying water service to annexation and electrical service constitutes a violation of the Territorial Agreement, the subsequent Memorandum of Understanding and Intent, and the Joint Plan. It certainly appears that Sebring's annexation policy tends to perpetuate what amounts to a "border war" between the parties, with customers caught in the middle. We also question Sebring's motives in continuing this policy, as shown in hearing exhibit 301, introduced by public witness Mr. Jim Sacco. The exhibit is a Sebring employee newsletter containing a "General Manager's Report", which discusses citizens who apparently do not wish to have Sebring electrical service. It indicates, "We will know our friends by their actions, not their words!" While our Staff does not necessarily agree with the practice of tying water service to annexation in this context, and believes that it serves to continue the historical friction between FPC and Sebring, we find that it does not constitute a violation of the Joint Plan. Further, this Commission has no authority or jurisdiction over annexation policies and practices of a municipality. While we would have at least some jurisdiction to review any precondition Sebring placed on a customer requesting electrical service within its retail service area, Sebring places no such restrictions. Finally, it appears that a municipality may require annexation as a condition precedent to supplying municipal water and sewer service. (1986 Op. Atty General Fla. 86-5).

At hearing, FPC argued that Sebring's refusal to transfer certain facilities to FPC at book value minus depreciation constitutes a violation of the Joint Plan. However, Paragraph 3.H. of the Joint Plan only requires that facilities in the other utility's territory "which are not needed by the ownership company . . ." be transferred at this price. Thus, Sebring's refusal to transfer facilities in the location of the Thunderbird Hills South Mobile Home Park does not constitute a violation of the Joint Plan because those facilities are used to serve Sebring's customers in that area. Both FPC and Sebring have complied with the terms and conditions of the Joint Plan in that they have eliminated the unnecessary facilities from the identified area. We therefore decline to enforce the Joint Plan in the manner requested by Sebring.

FPC argued that if Sebring believed that all customers were included under the transfer provision, there was no meeting of the minds on the meaning of the provision, and it would thus be unenforceable as to those customers. Our decision in this docket makes this argument moot. However, we note that a present disagreement between the parties as to an interpretation of the Joint Plan does not, by itself, indicate that there was no meeting of minds. The Joint Plan itself manifests the required meeting of the minds, even though the parties later disagreed regarding the meaning of their agreement.

Although we decline to grant Sebring's Motion for Enforcement, evidence adduced at hearing causes us concern that Sebring area utility customers may still experience some of the problems which the Territorial Agreement and Joint Plan were supposed to resolve. Therefore, on our own motion, we direct our Staff to open a new docket to determine whether the

ultimate goals of resolving overlap, eliminating duplication of service, and providing the best service to customers in the Sebring area are being met.

In consideration of the above, it is therefore

ORDERED that the motion of Sebring Utility Commission for Enforcement of Order No. 19432 is hereby denied. It is further

ORDERED that our Staff shall open a docket for the purpose of determining whether the ultimate goals of resolving overlap, eliminating duplication of service, and providing the best service to customers in the Sebring area are being met.

By ORDER of the Florida Public Service Commission, this 29th day of JUNE, 1989.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

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by: Kay Flynn
Chief, Bureau of Records

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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer 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 after the issuance 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.