

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Territorial Dispute Between)
Okefenokee Rural Electric Membership)
Corporation and the Jacksonville)
Electric Authority of the City of)
Jacksonville, in Duval County.)

DOCKET NO. 911141-EU
Filed: May 15, 1992

**JEA'S MOTION TO DISMISS, OR IN THE ALTERNATIVE,
MOTION TO STRIKE PORTION OF
OREMC'S PETITION TO RESOLVE TERRITORIAL
DISPUTE IN DUVAL COUNTY**

**ORIGINAL
FILE COPY**

JACKSONVILLE ELECTRIC AUTHORITY ("JEA"), pursuant to Rules 25-22.035(3) and 25-22.037(2), Florida Administrative Code, and Rule 1.140, Florida Rules of Civil Procedure, hereby files this Motion to Dismiss, or alternatively, Motion to Strike that portion of the Petition to Resolve Territorial Dispute in Duval County filed by Okefenokee Rural Electric Membership Corporation ("OREMC") which requests the Commission to order the parties to enter into a territorial agreement and/or determine and define territorial boundaries within the incorporated municipal limits of the City of Jacksonville. The central ground for this motion is that the Commission lacks statutory authority and subject matter jurisdiction to grant such relief to OREMC. In support of its Motion, JEA states as follows:

1. On November 19, 1991, OREMC filed its Petition to Resolve Territorial Dispute in Duval County (the "Petition"). A portion of OREMC's Petition addresses a territorial dispute pertaining to the provision of electric service to the "Holiday Inn - Jacksonville Airport" ("Holiday Inn"). This Motion is not directed to the Petition as it pertains to the dispute regarding service to the Holiday Inn.

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FPSC-RECORDS/REPORTING

2. The Petition is not limited to the dispute pertaining to the provision of electric service to the Holiday Inn. The Petition also addresses all existing customers of OREMC located within the incorporated municipal limits of the City of Jacksonville (see Petition, par. 18). However, the Petition does not expressly allege that the two utilities are engaged in a territorial dispute with respect to the provision of electric service to such customers. Nonetheless, the Petition requests that the Commission:

Order that the parties enter a territorial agreement, to be approved by the FPSC, in order to avoid further dispute over service areas of the utilities within Duval County, failing which that the FPSC determine and define the territorial boundaries of the two utilities in Duval County, Florida

Petition, at 4-5.

3. Section 366.04(2), Florida Statutes (1991) grants the Commission authority to approve territorial agreements and resolve territorial disputes and provides, in pertinent part:

(2) In the exercise of its jurisdiction, the commission shall have power over electric utilities for the following purposes:

. . . .

(d) To approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction

(e) To resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction

4. Section 366.04(2), Florida Statutes does not, however, grant the Commission the authority to order electric utilities to enter into territorial agreements. Further, Section 366.04(2), Florida Statutes does not authorize the Commission to determine and define territorial boundaries between and among electric utilities absent a territorial dispute. Clearly, OREMC is attempting to procure relief from the Commission which the Commission may not provide to OREMC or any other electric utility.

5. Further, Section 366.11(1), Florida Statutes provides, in pertinent part, that the Commission's authority over municipal electric utilities and rural electric cooperatives is expressly limited to the jurisdictional powers set forth in Section 366.04, Florida Statutes.¹ Hence, the Commission may not use its authority to approve territorial agreements and resolve territorial disputes as a foundation to assert other jurisdictional powers such as ordering electric utilities to enter into territorial agreements or determining territorial boundaries where there is no territorial dispute.

6. Section 366.04(2), Florida Statutes, does not grant the Commission authority to order electric utilities to enter into a territorial agreement. Hence, the Commission lacks the statutory authority to order JEA and OREMC to enter into a territorial

¹It is well-established that the Commission is a creature of statute and that its jurisdiction is limited to those powers expressly or impliedly granted by statute. City of Cape Coral v. GAC Utilities, Inc. of Florida, 281 So.2d 493 (Fla. 1973); United Telephone Company of Florida v. Public Service Commission, 496 So.2d 166 (Fla. 1986).

agreement.

7. Rule 25-6.0439(1)(b), Florida Administrative Code, defines a "territorial dispute" as follows:

(b) "Territorial dispute" means a disagreement as to which utility has the right and obligation to serve a particular geographical area. [Emphasis supplied.]

8. OREMC has not alleged that a territorial dispute exists between itself and JEA with respect to the provision of electric service to OREMC members in Duval County. No allegation has been made by OREMC that JEA is attempting to provide service to such members.

9. Under Section 718.103 of the City of Jacksonville Code, the JEA may grant permission to OREMC to furnish electric service within the consolidated municipal limits of the City of Jacksonville. The OREMC members in Duval County have received and continue to receive electric service by OREMC pursuant to this grant of permission by JEA or otherwise without objection by JEA.

10. JEA has not attempted to revoke its grant of permission to OREMC to provide electric service to OREMC members nor has it otherwise objected to or interfered with such service. There is no disagreement among the parties as to OREMC's current right to serve its members in Duval County. Under Rule 25-6.0439(1)(b), as a matter of fact and law, there is no "territorial dispute" regarding the provision of electric service to OREMC members in Duval County. Without a territorial dispute, there is no statutory authority for the Commission to define or award service rights with respect to OREMC members in Duval County.

11. Further, by requesting the Commission to define territorial boundaries absent a territorial dispute, OREMC seeks a remedy which the Commission lacks statutory authority to grant. The presence of uneconomic duplication of facilities may provide good reason to enter into a territorial agreement addressing such matters as the transfer of customers and the sale and purchase of facilities. It does not, however, equate to a territorial dispute as defined by Commission rule.

12. Over the last eight years, at least four unsuccessful attempts have been made to substantially amend that portion of Chapter 366 addressing territorial agreements and territorial disputes. Those efforts are discussed in detail in Drawing the Lines: Statewide Territorial Boundaries for Public Utilities in Florida, Vol. 19 F.S.U. Law Review 407 (1991). As discussed in this law review article, the most recent attempt, Fla. HB 1863 (1991), would have authorized the Commission to establish territorial boundaries despite the lack of a territorial dispute:

Where boundaries could not be set by agreement or by dispute resolution, the proposed bill (HB 1863) directed the Commission to set the boundaries by "a line or lines approximately equidistant between an electric utility's existing distribution line and the nearest existing distribution lines of any other electric utility in every direction on the effective date of this act.

19 F.S.U. Law Review, at 422.

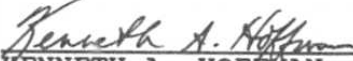
Legislative efforts, including the most recent effort in 1991, to enlarge the Commission's statutory authority to define territorial boundaries between and among electric utilities despite

the absence of a territorial dispute have failed. Yet, this is exactly what OREMC requests of the Commission in its Petition. The Commission lacks statutory authority to grant such relief.

13. Based on the foregoing, the Commission lacks subject matter jurisdiction to order JEA and OREMC to enter into a territorial agreement. The Commission also lacks subject matter jurisdiction to define territorial service boundaries between JEA and OREMC since, apart from the Holiday Inn, there is presently no territorial dispute between the two utilities regarding the provision of electric service to OREMC members located within the consolidated municipal limits of the City of Jacksonville.

WHEREFORE, JEA respectfully requests the Commission to enter an order striking, or alternatively, dismissing that portion of OREMC's Petition purporting to support and requesting the Commission to order the parties to enter into a territorial agreement and requesting the Commission to determine and define the territorial boundaries of the two utilities in Duval County, Florida.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing JEA's Motion to Dimiss, or in the Alternative, Motion to Strike Portion of OREMC's Petition to Resolve Territorial Dispute in Duval County was furnished by hand delivery this 15th day of May, 1992 to the following:

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