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July 17, 1992

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Mr. Steven C. Tribble, Director
Division of Records and Reporting
FLORIDA PUBLIC SERVICE COMMISSION
101 East Gaines Street
Tallahassee, Florida 32301

Re: Territorial Dispute Between Okefenoke Rural Electric
Membership Corporation and The Jacksonville Electric
Authority of the City of Jacksonville, in Duval County;
Docket No. 911141-EU

Dear Mr. Tribble:

Enclosed for filing is the original and fifteen copies of our
Brief on behalf of Okefenoke Rural Electric Membership Corporation.

In addition, in accordance with recently amended Rule 25-22.028,
OREMC is submitting herewith a copy of its afore-mentioned Brief on
diskette in work processing format. This document was prepared using
Word Perfect 5.1.

Please acknowledge receipt and filing of the above by stamping the
duplicate copy of this letter and returning same to this writer.

- ACK
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- OTH _____

Thank you for your assistance in connection with this matter.

Yours truly,


J. JEFFREY WAHLEN

cc: Martha Carter Brown, w/encl., via Hand Delivery
3 Kenneth A. Hoffman, w/encl.
Bruce Page, w/encl.

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FPSC BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

07007 JUL 17 1992

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 911141-EU

Filed: July 17, 1992

BRIEF OF

OKEFENOKE RURAL ELECTRIC MEMBERSHIP CORPORATION

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I. BACKGROUND OF PROCEEDINGS

On November 19, 1991, Okefenoke Rural Electric Membership Corporation ("OREMC" or "Okefenoke") filed a petition to resolve its territorial dispute with Jacksonville Electric Association ("JEA"). The dispute involves the entire northern portion of Duval County where Okefenoke and JEA both presently provide retail electric service. The dispute arose over the question of who should serve the Holiday Inn - Jacksonville Airport in Duval County ("Holiday Inn"), but involves all of northern Duval County. The petition alleged that OREMC had been serving the Holiday Inn until JEA constructed electric facilities and lines to provide service to the Inn, thereby displacing OREMC's existing facilities. The petition also alleged that JEA claims the absolute right to provide electric service in Duval County including the right to oust OREMC.

On December 31, 1991, JEA filed a Motion to Dismiss ("First Motion") which the Commission denied in Order No. PSC-92-0058-FOF-EU, issued March 12, 1992. In that order, the Commission held that it had exclusive jurisdiction to resolve this dispute pursuant to the specific authority granted to it under the "Grid Bill," Sections 366.04 and 366.05, Florida Statutes, to approve territorial agreements and resolve territorial disputes between all electric utilities in the state.

On May 15, 1992, JEA filed a Motion to Dismiss, or in the Alternative, Motion To Strike Portion of OREMC's Petition to Resolve Territorial Dispute in Duval County ("Second Motion"). Therein, JEA argued that the "Commission lacks statutory authority

and subject matter jurisdiction" to grant the relief requested by OREMC in its Petition. In support of its general argument, JEA argued that OREMC's Petition does not expressly allege that JEA and OREMC are engaged in a territorial dispute over customers other than the Holiday Inn. Second Motion at 2, ¶12. JEA also argued that as a matter of fact and law, there is no "territorial dispute" between JEA and OREMC in northern Duval County. Second Motion at 7, ¶10. OREMC filed a Memorandum in Opposition to JEA's Second Motion on May 22, 1992.

The prehearing conference in this case was held on May 18, 1992. The Prehearing Order, Order No. PSC-92-0423-PHO-EU, was issued on May 28, 1992. The final hearing was held before Commissioners Deason and Clark on June 17, 1992. At the beginning of the hearing, the Commissioners heard oral argument on JEA's Second Motion (Tr. 6-28) and denied that Motion (Tr. 28). Thereupon, the hearing proceeded.

During the hearing, OREMC submitted testimony of five witnesses: Robert Page (direct), Pete J. Gibson (direct), Emory Middleton (direct), Robert C. Dew, Jr. (direct and rebuttal) and Glenn S. Wrightson (direct). JEA submitted direct and rebuttal testimony of one witness: Sheldon Ferdman. At the close of OREMC's direct case, JEA made another Motion to Dismiss (Tr. 262-263), which, after argument (Tr. 263-270), was denied (Tr. 270). The transcript of the final hearing, consisting of two volumes, was completed on June 25, 1992.

Parentetical references herein to the record of this proceeding will be abbreviated as follows:

- "Tr ____" Reference to a page of the transcript of record.
- "Ex ____" Reference to an exhibit entered into the record.
- "Doc ____" Reference to a document number of an exhibit.
- "Sch ____" Reference to a specific MFR schedule of an exhibit which contains the minimum filing requirements of the Company.
- "Pg ____" Reference to the page of a document of schedule.
- "Line ____" Reference to a line within a document or schedule.
- "Col ____" Reference to a column within a document or schedule.

References to the record, other than parentetical, will be clearly stated and unabbreviated.

II. OREMC

Okefenoke is a non-profit cooperative organized to supply electric services to its members. (Tr. 49, Page). The members of the Corporation elect a Board of Directors from among themselves to manage the business and affairs of the Corporation, and are consumers of the electric and other services provided by the Corporation. (Tr. 49, Page). Okefenoke was incorporated in 1939 to bring electric service to persons needing electric service in southeast Georgia and northeast Florida. (Tr. 49-50, Page).

OREMC began serving members in Duval County in the late 1940s. (Tr. 50, Page). Okefenoke currently provides electric services to members in portions of Baker, Nassau and Duval Counties in Florida, as well as six counties in Georgia. (Id.). Okefenoke has 22,800 members and approximately 2,800 miles of distribution lines, of which 600 miles is underground and 2,200 is overhead. (Tr. 50, Page). Approximately 8,500 of Okefenoke's members are located in the State of Florida. (Id.). Of those members, approximately 2,300, or about 10% of its total membership, are currently receiving service in Duval County. (Tr. 80, Page). One of OREMC's members in Duval County is the Consolidated Government of Jacksonville. (Tr. 50, Page).

Over the years, Okefenoke has provided retail electric service to persons and businesses in areas where no municipal or investor-owned utility would serve, or when the terms and conditions they offered were either unacceptable or unaffordable. (Id.) People and businesses therefore applied for membership in order to provide

themselves an essential service that they could not otherwise obtain or could not obtain in an affordable manner from anyone else. (Tr. 50-51, Page). Since introducing electric service to the areas it has historically served, Okefenoke has served new growth and development in those areas in which it first introduced service. (Tr. 51, Page).

Okefenoke's service area density varies from moderately dense in subdivision developments and commercial areas to sparsely populated areas with very few members per mile of line. (Tr. 51, Page). Okefenoke has an average of 8.1 members per mile of line. (Tr. 51, Page). Providing essential electric power service to its members, whether in a densely or sparsely populated area, is consistent with the reasons Okefenoke was founded, which is to serve its members with electric power. (Tr. 51, Page).

Okefenoke is a member-owned electric utility, and is considered an electric cooperative under Chapter 425, Florida Statutes. (Tr. 51, Page).

III. BASIC POSITION

This case presents a fundamental question for the consumers of retail electric service in northern Duval County and surrounding counties, namely whether the JEA will be allowed to continue deciding which utility can service electric customers in northern Duval County. Related questions include whether the Commission should return the Holiday Inn to OREMC and whether a territorial boundary should be drawn in northern Duval County so as to eliminate past and prevent future uneconomic duplication of facilities by JEA in northern Duval County. OREMC believes the answer to the fundamental question is "no" and the answers to the related questions are "yes."

Several key facts are undisputed and compel the conclusion that the FPSC should act. By its own admission, JEA has spent \$53,000 for facilities to serve the Holiday Inn even though the Holiday Inn was receiving adequate service from OREMC. (Tr. 303, Ferdman). As a result of JEA's duplication of facilities, JEA will gain a significant amount of revenue from (\$400,000) the Holiday Inn and OREMC will lose that same revenue. (Tr. 304, Ferdman). In general, if a customer will produce enough revenue to make it worth JEA's while, JEA will accept that customer, otherwise the customer will be released to OREMC. (Tr. 305-306, Ferdman).

OREMC has been serving members in northern Duval County since the late 1940's. (Tr. 113-114, Gibson). In many areas of northern Duval County, the facilities of JEA and OREMC are "terribly commingled." (Tr. 313, Ferdman). To minimize duplication of

facilities in northern Duval County, OREMC and JEA agreed to operating guidelines in 1978 (Tr. 314-315, Ferdman), and since that time JEA has "released" approximately 1,087 new services to OREMC because it was not practical or economical for JEA to serve those customers. (Tr. 316, Ferdman).

Instead of condemning or buying OREMC's facilities, JEA has pursued the duplication of OREMC's facilities when it is in the best economic interests of JEA to do so. (Tr. 308, Ferdman). However, JEA has not considered the impact of its decision to duplicate facilities on anyone other than JEA (Tr. 294, Ferdman), even though in some cases, it is in an individual customer's best interest to be served by OREMC. (Tr. 307, Ferdman). As a result, the Consolidated Government of Jacksonville, through the JEA, has a policy where it discriminates against its own citizens regarding the provision of electric service. (Tr. 308, Ferdman).

Other facts also suggest that the FPSC should act. Insofar as JEA claims the exclusive right to provide retail electrical service throughout Duval County (Tr. 281-282, Ferdman), every location where OREMC presently provides service in Duval County and all undeveloped areas where OREMC could efficiently provide service in Duval County are in dispute or are areas of potential dispute. (Tr. 60-61, Page). Even though OREMC had been providing retail electric service in northern Duval County since the late 1940's (Tr. 113, Gibson), JEA has over the years encroached on the areas historically served by OREMC by systematically building duplicative facilities and serving new customers when it has been "practical

and economical" for JEA to do so. (Tr. 119, Page; Tr. 180-81, Dew; Tr. 297-298, Ferdman).

Although JEA claims an exclusive right to serve in Duval County (Tr. 281-282, Ferdman), the JEA has never taken steps to acquire OREMC's facilities in Duval County through eminent domain (Tr. 296-297, Ferdman), nor has it ever made a reasonable offer to purchase OREMC's Duval County facilities outside of a condemnation proceeding (Tr. 120, Gibson). Instead, JEA has chosen to pursue what it considers to be its "exclusive" right to serve in Duval County by building new facilities (which often duplicate OREMC's facilities) and serving new customers (when those customers could have been more efficiently served by OREMC) when it is "practical and economical" for JEA to do so. (Tr. 297-298, 308, Ferdman). When it has not been "practical and economical" for JEA to do so, JEA has "allowed" OREMC to serve those customers. (Tr. 305-306, Ferdman).

The resulting duplication of facilities in Duval County has had an adverse economic impact on the members of OREMC, both inside and outside of Duval County. (Tr. 255-256, Wrightson). Whenever duplication of facilities occur, the risk of safety hazards and other harms to the public increase. (Tr. 183-184, Dew; Tr. 314, Ferdman). These adverse economic impacts, safety hazards and other harms are precisely what the Legislature intended to prevent when it passed the Grid Bill in 1974. Unless the FPSC acts to stop JEA's practice of duplicating OREMC's facilities in northern Duval

County, the harm JEA's policies have caused to the public inside and outside of Duval County will continue.

JEA's witness has admitted that it will be difficult, if not impossible, for the JEA to agree on a line dividing the territory in northern Duval County between JEA and OREMC. (Tr. 327-328, Ferdman). Even though this may be the case, the Commission should give JEA the benefit of the doubt and enter an order encouraging the parties to do so within a time certain. Then, if the parties are unsuccessful, the FPSC should resolve this dispute by (1) drawing a territorial boundary - perhaps the "magic line" established in the 1978 Operating Guidelines agreed to by JEA and OREMC - dividing the territory in northern Duval County between OREMC and JEA, and (2) establishing conditions to promote efficiency and avoidance of further uneconomic duplication of facilities on either side of the boundary. The Commission should also consider whether the 1978 Operating Guidelines should be formally approved as a territorial agreement by the FPSC.

Finally, because OREMC has had a contract with the Holiday Inn since before October 1, 1968, and because JEA has installed facilities costing \$53,000 to duplicate OREMC's existing facilities at this location, the JEA should be ordered to cease providing service to the Holiday Inn and OREMC should be allowed to resume providing service to the Holiday Inn. This practice, which is uneconomic duplication of facilities at its worst, should not be tolerated.

IV. ISSUES

Issue 1. Does the Commission have the jurisdictional authority to grant exclusive territorial rights to a rural electric cooperative within the municipal corporate limits of Jacksonville in the absence of an approved territorial agreement between the JEA and the rural electric cooperative?

Yes. The FPSC's jurisdiction to hear and resolve this territorial dispute is provided by the Grid Bill. The existence of a formal, signed territorial agreement between JEA and OREMC is not a jurisdictional prerequisite under the Grid Bill. The Legislature of the State of Florida has explicitly granted the FPSC jurisdiction to approve territorial agreements and resolve territorial disputes between all electric utilities throughout the state. The facts clearly demonstrate that a territorial dispute exists in northern Duval County.

The JEA has suggested that the 1974 Clause in the Grid Bill prevents the FPSC from carrying out its responsibilities within Duval County. This position is inconsistent with the legislative intent and public purpose of the Grid Bill because it would prevent the FPSC from exercising its primary responsibilities under the Grid Bill. The 1974 Clause simply directs the Commission to apply its authority and carry out its responsibilities in a manner consistent with the municipality's right to serve customers within its 1974 corporate limits. For its part, a municipality may have a right to provide electric service to customers within its 1974 municipal boundaries, but that right is not inviolable. A municipality must exercise whatever rights it may have in a manner that is consistent with the other provisions, and the public policy

purposes, of the Grid Bill. It is the Florida Public Service Commission's responsibility to see that it does so.

Stated another way, the 1974 Clause in the Grid Bill was not intended to create any new rights in favor of municipally owned electric utilities, but was intended only to preserve whatever rights to serve within its corporate boundaries a municipally owned electric utility may have had at the time the Grid Bill became effective.¹ With this in mind, the issue becomes "what rights did JEA have to serve in Duval County as of July 1, 1974?"

The JEA claims the exclusive right to serve throughout Duval County by virtue of certain portions of the Charter of the Consolidated Government of Jacksonville (the "Charter").² In particular, JEA has identified three specific provisions of the Charter from which its "exclusive" right allegedly flows. These three sections are set forth below:

1. **Section 21.04. Powers.** -- The authority shall have the following powers:

* * *

(3) To furnish electricity to private persons, firms and corporations, the city, and any other public or private body, organization or unit, in any part of the city or in any adjacent county and for said purposes shall have the right to construct and maintain electric lines in and along all public

¹During his opening statement, counsel for JEA appears to agree with this construction, "Okefenoke. . . hits the issue squarely on the head." (Tr. 31, Counsel for JEA).

²JEA also claims an exclusive right to serve in Duval County by virtue of Story v. Mayo, 217 So.2d 304 (Fla. 1968). Story is a pre-Grid Bill case which is clearly unpersuasive in light of the powers vested in the Commission by the Grid Bill.

highways and streets throughout the city and adjacent counties.

2. **Section 1.01. Consolidated Government. --**

* * *

(b) The consolidated government has and shall have jurisdiction as a chartered county government and extend territorially throughout Duval county, and has and shall have jurisdiction as a municipality throughout Duval county except in the cities of Jacksonville Beach, Atlantic Beach and Neptune Beach and the town of Baldwin.

3. **Section 2.04. Services in the General Services District. --** Throughout the entire general services district [Duval County] the consolidated government shall furnish the following governmental services: airports, agricultural agent, child care, courts, electricity, fire protection, health, hospitals, library, policy protection, recreation and parks, schools, streets and highways, traffic engineering, and welfare services. The foregoing enumeration is intended as a list of those governmental services which shall be performed by the consolidated government within the general services district and is not intended to limit the rights of the consolidated government to perform other governmental services within the general services district.

(Emphasis added.)

Notably, none of the sections cited above specifically grant the Consolidated Government or JEA an "exclusive" right to serve. If the Legislature had intended to grant an "exclusive" right to serve, the Legislature would have said so. Proof that the Legislature knows how to grant an exclusive right to provide electricity when it intends to can be seen in other special acts. For example, in the special act creating the City of Key West Utility Board, the Legislature granted "the full, complete and exclusive power and right to manage, operate, maintain, control,

extend, extend beyond the limits of the City of Key West, Florida, improve, finance and refinance the electric public utility now owned by the city, and to build, construct, and acquire other utilities by purchase." See Charter of City of Key West, § 21.01. In 1927, Section 113 of the Charter of the City of Tallahassee was amended by Chapter 13439, 1927 Laws of Florida, by inserting the following language:

. . . and shall have exclusive power and authority for the transmission and sale of electric energy in a zone three (3) miles wide, adjacent to and extending around and outside the corporate limits of said City . .

(Emphasis added.)

The Consolidated Government's and/or JEA's attempt to claim an exclusive right to serve in Duval County clearly violates the prohibition against inserting words or phrases into a statute, see generally 49 Fla. Jur. 2d Statutes § 120 (1984), and is inconsistent with the public policy purposes behind the Grid Bill. The JEA does not have an exclusive right to serve in Duval County and never has.

A careful analysis of Section 2.04 of the Consolidated Government Charter highlights other infirmities in JEA's "exclusive right" argument and points to the true nature of JEA's right to serve in Duval County. Section 2.04 empowers the Consolidated Government to provide a laundry list of services in Duval County, including electricity, child care, health, hospitals, recreation and parks and welfare services. It tests the limits of reasonableness to suggest that the Consolidated Government has the

"exclusive" right to provide for child care, health care, hospitals, recreation and parks and welfare services throughout Duval County. By analogy, it is also unreasonable to suggest that the Consolidated Government has an "exclusive" right to provide electric service in Duval County. Rather, Section 2.04 can be reasonably construed to allow the Consolidated Government to provide services from the laundry list of services.

Importantly, even if JEA did have the "exclusive" right to serve throughout Duval County as of October 1, 1968, or on July 1, 1974, the JEA has never enforced and, therefore, has waived that right.³ Under Florida law, "waiver" is the intentional relinquishment of a known right, or conduct which warrants an inference of the relinquishment of a known right. Thomas N. Carlton Estates, Inc. v. Keller, 52 So.2d 131, 133 (Fla. 1951); Wilds v. Permenter, 228 So.2d 408, 410 (Fla. 4th DCA 1969). As a general rule, a party may waive any rights to which he or she is entitled, whether guaranteed by constitution, statute or contract. See Carlton Estates, 52 So.2d at 133; see generally 22 Fla. Jur. 2d Estoppel & Waiver. § 87 (1980). The following elements are essential to a waiver: (1) the existence at the time of the waiver of a right, (2) actual or constructive knowledge of the right and (3) an intent to relinquish such right. Estoppel & Waiver at § 89. Waiver may be express or implied and may be inferred from conduct.

³Moreover, OREMC has not acquiesced in JEA's "exclusive" right to serve. See Exhibit 3 (late-filed).

Richards v. Dodge, 150 So.2d 477, 481 (Fla. 2d DCA 1963); Davis v. Davis, 123 So.2d 377, 381 (Fla. 1st DCA 1960).

JEA has never enforced whatever "exclusive" right it now claims to have in northern Duval County and, by its conduct has waived whatever "exclusive" right it may have had. The JEA has allowed OREMC to serve approximately 1,087 new services since 1978 when it was not economical or practical for JEA to do so. (Tr. 316, Ferdman). The JEA agreed to a set of operating guidelines in 1978 which effectively divided the territory in northern Duval County between OREMC and JEA. (Tr. 314-315, Ferdman). JEA has not taken steps to acquire OREMC's facilities in Duval County through eminent domain (Tr. 296-297, Ferdman), nor has it ever made a reasonable offer to purchase OREMC's facilities in northern Duval County outside of a condemnation proceeding. (Tr. 120, Gibson). To the contrary, JEA has facilitated OREMC's growth, development and investment in Duval County by helping Okefenoke with its Oak Grove Metering Point. (Tr. 139-142, Middleton).

These same facts also suggest that JEA should be estopped to assert an "exclusive" right to serve throughout Duval County. Equitable estoppel has been described as a principle by which:

a party who knows or should know the truth is absolutely precluded, both at law and in equity, from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon, thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion were allowed. It has also been said that estoppel is based on the principle

that he who by language or conduct leads another to do what he would not otherwise have done shall not subject to loss or damage such person so relying on his representations or conduct.

Estoppel & Waiver at § 30 (footnotes omitted). The elements of estoppel are (1) a representation by the party estopped to the party claiming estoppel as to some material fact, which representation is contrary to the condition of affairs later asserted by the estopped party; (2) reliance by the party claiming estoppel; and (3) a change in position of the party claiming the estoppel to his detriment, caused by the representation and reliance thereon. Id. at § 31.

JEA has lead OREMC to believe that OREMC has a continuing right to serve in northern Duval County by agreeing to the 1978 Operating Guidelines helping with the Oak Grove Metering Point and JEA's release of over 1,000 customers to OREMC. In reliance on these actions and representations, OREMC has improved and developed its distribution system in northern Duval County. JEA's assertion that it has an "exclusive" right to serve in Duval County, if given effect in this case, will cause OREMC to suffer in the future much as it has with the Holiday Inn episode.

The case of City of Tallahassee v. Talquin Electric Cooperative, Inc., Leon County Cir. Ct., No. 70-895 (Willis, J.) compels the conclusion that JEA has waived whatever rights it may have had and is estopped to assert an exclusive right. There, Judge Willis considered a territorial dispute between the City of Tallahassee ("City") and Talquin Electric Cooperative, Inc. ("Talquin"), which was instituted and decided before the

Legislature vested jurisdiction to decide territorial disputes with the FPSC. During that case, Judge Willis issued an order allowing Talquin to serve within the City's "exclusive" territory. In that Order, which is recorded at Leon County OR Book 538, Page 284, and which has been officially recognized by the Commission, Judge Willis found that the City was estopped to assert its expressly stated exclusive right to serve within the corporate boundaries of the City and a surrounding 3 mile wide zone, and that the City had waived its right to serve there. The facts in that case, as described in the Order, are similar to the instant facts.

The JEA never has had an "exclusive" right to serve in Duval County. If it ever had one, its conduct from 1968 to the present compels the conclusion that it has waived its rights and/or is estopped from now claiming those rights. Moreover, when the conduct of a city within its boundaries has an adverse impact on rate payers outside of the city's boundaries, as it has in this case (Tr. 255-256, Wrightson), the Commission must act. With these factors in mind, and since the 1974 Clause was meant to preserve, not create, rights as of July 1, 1974, the Commission is free in this proceeding to (1) decide in favor of OREMC's right to serve within Duval County, and (2) order the JEA to refrain from providing retail electric service to certain customers and areas located in Duval County. For the Commission to do otherwise would be inconsistent with the public policy purposes of the Grid Bill.

Issue 2. Does the Commission have the jurisdictional authority to order the JEA to refrain from providing at retail electric service to a customer located entirely within the municipal corporate limits of Jacksonville when there exists no approved territorial agreement regarding the customer's site?

Yes. Please refer to OREMC's position on Issue 1.

Issue 3. Does JEA have the exclusive right to serve in Duval County even where other utilities served prior to October 1, 1968?

No. Please refer to OREMC's position on Issue 1.

Issue 4. If the 1974 Clause preserved JEA's right to serve throughout Duval County, does JEA have an unconditional obligation to serve throughout Duval County?

The rights and obligations to serve go hand in hand. If a utility has a right to serve a particular area, it must accept the responsibility to serve. Since JEA has failed to serve certain customers in certain areas and has delegated that right to OREMC by "releasing" members (Tr. 298, Ferdman), it has permanently waived any rights it may have had. Moreover, to the extent that JEA must duplicate OREMC's facilities to serve new customers located near customers previously released to OREMC, the Commission should hold that JEA has waived the right to serve those new customers as well. JEA does not have the right under Chapter 366 to serve anywhere it wants if the FPSC decides there would be uneconomic duplication of facilities and an adverse impact on ratepayers inside and outside of Duval County. See also OREMC's position on Issue No. 1.

Issue 5. What is the geographical description of the area in dispute?

OREMC provides retail electric service to approximately 2300 members in northern Duval County. (Tr. 80, Page). The area in northern Duval County where OREMC serves includes the Black Hammock Island Area, Yellow Bluff/Starrett Road Area, Airport Area, Lannie Road Area and West Dinsmore Area. (Tr. 54-55, Page). Insofar as JEA has claimed and now claims the exclusive right to serve throughout Duval County (Tr. 281-282, Ferdman), every location where OREMC provides retail electric service in Duval County and all undeveloped areas where OREMC could efficiently provide service are in dispute or are potential areas of dispute. (Tr. 60, Page). One location in which the territorial dispute between JEA and OREMC is greatest is the Holiday Inn. JEA began serving the Holiday Inn on November 25, 1991 (Tr. 280, Ferdman), without OREMC's permission (Tr. 58, Page), even though OREMC has been providing service to that customer for over 20 years. (Tr. 137, Middleton). The Holiday Inn was OREMC's largest customer. (Tr. 244-245, Wrightson).

Issue 6. Which utility has historically served the area in dispute?

OREMC has been providing retail electric service to members in Duval County since the late 1940's. (Tr. 113-114, Gibson). OREMC built facilities into northern Duval County (the "Victor" and "K" projects) at that time to provide retail electric service to persons and businesses in northern Duval County who could not get

electric service from a municipal electric system or an investor-owned utility. (Tr. 132-135, Middleton; Tr. 114, Gibson). Since that time, OREMC has upgraded and expanded its facilities in northern Duval County to accommodate member growth, improve reliability and reflect changes in technology. (Tr. 135, Middleton). OREMC had a significant investment and operating presence in Duval County at the time JEA and the Consolidated Government came into existence. (Tr. 136, Middleton). OREMC signed a contract to provide electric service to the Holiday Inn before the Consolidated Government of Jacksonville came into existence and actually began providing service to the Holiday Inn shortly thereafter. (Tr. 136-137, Middleton).⁴

⁴While it was not specifically identified as an issue, the terms of the contract between OREMC and Holiday Inn were the subject of some discussion at the final hearing. Section 5 of that Argument states: "This agreement shall become effective on the date service is first delivered hereunder by the seller to the consumer and shall remain in effect for a period of five years, and thereafter, until terminated by either party, giving to the other three months notice in writing." (Tr. 157, Middleton). OREMC has always interpreted the termination provision of the contract as a provision which allows a member to change the character of its service or discontinue service entirely, not one which allows a member to discontinue service to take service from another utility. (*Id.*) Indeed, an interpretation which would allow a member to change suppliers at will or at the end of a discrete period would be inconsistent with the public policy purposes inherent in the Grid Bill. This is true because for a customer to change utility suppliers would require one utility to duplicate the facilities of another, as happened here with the Holiday Inn. The FPSC should not recognize provisions like Section 5 of the OREMC-Holiday Inn contract as a basis upon which a customer can change utility suppliers.

Issue 7. What is the location, purpose, type, and capacity of each utility's facilities existing as of the filing of the Petition in this case?

Okefenoke provides service to its members in Duval County from three sources. (Tr. 176, Dew). One is a substation located in Callahan, Florida, another is the Yulee Metering Point located on Highway 17 just north of the Duval County line, and the third is the Oak Grove Metering Point located near the intersection of Cedar Point Road and New Berlin Road inside Duval County. (Id.) The Callahan Substation was extensively rebuilt in 1990 and presently consists of 2-12/16/20 MVA 230-24.5 KV transformers and 3-14.4/24.5 KV distribution circuits. (Id.) One of these circuits, known as the Dinsmore Circuit, provides service into Duval County via a 4/OACSR primary line which has a capacity of 14.7 MVA. This line presently serves an electric demand of approximately 6.2 MW. (Id.)

The Yulee Metering Point consists of 3-200A voltage regulators and interconnects with Florida Power & Light Company. (Id.) The station has 2-14.4/24.5 KV circuits. (Id.) The north circuit feeds 11 consumers in Nassau County. (Id.) The south circuit serves into Duval County. (Id.) The circuit has 4/OACSR as the primary conductor to the point where this circuit splits in two directions, each with a primary conductor of 1/OACSR. (Tr. 176-177, Dew). This station serves 5.8 MVA of load in Duval County and has a capacity of 8.6 MVA. (Tr. 177, Dew). It should be noted that this 5.8 MW includes load at the Holiday Inn on Airport Road. (Id.)

The Oak Grove Metering Point consists of 3-200 amp voltage regulators which are served by JEA. (Id.) This station has 2-14.4/24.9 KV distribution circuits, both of which serve a total demand of 2.7 MW within Duval County. (Id.) The capacity of this station is 8.6 MVA.

OREMC is without knowledge as to specific details regarding the location, purpose, type and capacity of JEA's facilities throughout Duval County as of the filing of the Petition in this case; however, as discussed below in OREMC's position to Issue No. 15, OREMC has identified numerous, specific instances in which JEA has duplicated OREMC's facilities in northern Duval County. Representative examples of such duplication and a description of JEA's duplicative facilities are outlined in OREMC's position to Issue No. 15.

Insofar as the JEA's facilities at the Holiday Inn are concerned, JEA recently constructed four new spans of three-phase 2ACSR wire on concrete poles parallel to Airport Road to a riser pole located approximately 40 feet from the existing riser pole owned by OREMC. (Tr. 189, Dew). From that point, a two and one-half foot wide trench was cut for a length of about 600 feet through the parking lot of the Holiday Inn. (Id.) One three-phase underground primary cable was installed in conduit in this trench. (Id.) Two manholes were also installed to facilitate pulling of this cable. (Id.) The trench ends at the Holiday Inn's electric switch yard, which contains one 1000 KVA transformer, one 1500 KVA transformer, a new 600 volt switch yard and bus arrangement feed

permanently from JEA's transformers. (Tr. 190, Dew). All of this equipment duplicates equipment which OREMC has been using to provide service to the Holiday Inn over the years. (Id.) JEA spent \$53,000 to duplicate OREMC's existing facilities. (Tr. 303, Ferdman).

Issue 8. Are there other areas of potential conflict between the service areas of Okefenoke and JEA?

Insofar as JEA claims the exclusive right to serve throughout Duval County (Tr. 281-282, Ferdman), every location where OREMC presently provides retail electric service in northern Duval County and all undeveloped areas where OREMC could provide service in Duval County are in dispute or are potential areas of dispute. (Tr. 59-60, Page). JEA's position that there is no territorial dispute in northern Duval County, other than the Holiday Inn, is inconsistent with the evidence in this case and the positions JEA took at earlier times in this proceeding. (Tr. 289, 291, 293, Ferdman). Otherwise, there are no other areas of potential conflict between OREMC and JEA.

Issue 9. Is either utility presently serving in the area in dispute?

Even though OREMC was the first to provide retail electric service in northern Duval County in the late 1940's, (Tr. 113-114, Gibson) and had a significant investment and operating presence in Duval County at the time JEA and the Consolidated Government came into existence (Tr. 130, Middleton) and in 1974 (Tr. 138,

Middleton), JEA has over the years encroached on the areas historically served by OREMC by systematically building duplicative facilities and serving customers when it was "practical and economical" for JEA to do so. (Tr. 308, Ferdman).

A particularly vivid example of this practice is the Holiday Inn episode wherein four new spans of three-phase 2ACSR wire on concrete poles, a new riser pole, 600 feet of three-phase underground primary cable, one 1000 KVA transformer, and one 1500 KVA transformer, were installed by JEA so JEA could provide service to the Holiday Inn. (Tr. 189-190, Dew). JEA began providing service to the Holiday Inn on November 25, 1991, (Tr. 280, Ferdman) without OREMC's permission (Tr. 58, Page), even though OREMC had been providing service to the Holiday Inn for over 20 years. (Tr. 137, Middleton). The equipment installed to serve the Holiday Inn duplicated OREMC's existing facilities. The cost of these duplicative facilities to JEA was approximately \$53,000 (Tr. 303, Ferdman).

Issue 10. What is the expected customer load and energy growth in the disputed area and surrounding areas?

The issue of specific load growth rates is not an issue in this case; however, future growth in the disputed area is an important issue in this case. (Tr. 220, Dew). It is generally recognized that the growth in northern Duval County will increase now that the Dames Point Bridge has been completed. (Tr. 260, Wrightson). OREMC has plans and the ability to meet expected customer load and energy growth in the disputed areas. (Tr. 193-

194, 197, Dew). Providing territorial integrity for OREMC and JEA will allow both the plan more efficiently and with more certainty. (Tr. 200-201, Dew).

Issue 11. What additional facilities would each party have to build to serve the disputed area?

The specific additional facilities each party would have to build to serve the disputed area was not developed as an issue by the parties. OREMC has the ability to build additional facilities if needed to meet expected customer load and energy growth in the disputed areas. (Tr. 197, Dew).

Issue 12. What is the ability of each utility to extend existing facilities to the area in question?

OREMC has the ability to extend existing facilities throughout the disputed areas. (Tr. 197, Dew). In the past, OREMC's ability to do so has been restricted by JEA's policy of allowing OREMC to expand into new areas and serve new customers only when it is not "economical or practical" for JEA to do so itself. (Tr. 194-197, Dew). If OREMC is allowed to operate within a discrete area of Duval County without restriction by JEA, OREMC will be able to efficiently extend its facilities to meet future growth in that area. (Tr. 194-197, Dew).

Issue 13. How long would it take each utility to provide service to the disputed area?

Since JEA has already begun providing service to the Holiday Inn, and did so without OREMC's permission on November 25, 1991

(Tr. 280, Ferdman), how long it will take JEA to serve the Holiday Inn is not an issue in this case. Since OREMC had been serving the Holiday Inn for over 20 years before November 25, 1991 (Tr. 137, Middleton), it would not be difficult or time-consuming for the OREMC to re-connect its equipment and begin serving the Holiday Inn again.

Over the years, OREMC has been providing timely connections to essentially all new services which JEA has "allowed" OREMC to serve. (Tr. 119-120, Gibson). JEA, on the other hand, has only provided service to customers when it was "economical and practical" for JEA to do so. (Tr. 305-306, Ferdman). This policy is inconsistent with the public policy purposes of the Grid Bill and has prevented OREMC from serving at least 1,000 consumers over the years. (Tr. 183, Dew). OREMC has not waived its right to complain about this policy because one cannot waive the right to complain about something which is contrary to public policy. Estoppel & Waiver at § 87, n. 74. If OREMC is allowed to operate within a discrete area of Duval County without restriction by JEA, OREMC will continue to provide good service and timely connections in that area. (Tr. 201, Dew).

Issue 14. Has unnecessary duplication of electric facilities occurred in the vicinity of the disputed area, or in other areas of potential dispute between the parties?

Yes. Rather than condemning or buying OREMC's facilities, JEA has pursued a policy of duplicating OREMC's facilities when it was reasonable and practical for JEA to do so, without regard to the

impact on anyone else. (Tr. 297-298, Ferdman). Specific examples of duplication of facilities are listed in OREMC's Response to Fact Issue No. 15.

Issue 15. Has uneconomical duplication of electric facilities occurred in the vicinity of the disputed area, or in other areas of potential dispute between the parties?

Yes. Rather than condemning or buying OREMC's facilities, JEA has prepared a policy of duplicating OREMC's facilities when it was economical or practical for JEA to do so. (Tr. 297-298, Ferdman). JEA pursued this policy without regard to the effect on anyone else. (Id.) The cases of duplication of facilities (both unnecessary and uneconomical) caused by JEA's practice of encroaching on areas historically served by OREMC in Duval County are too exhaustive to list. (Tr. 180, Dew). One estimate in the record suggests that 50-60% of OREMC's lines in Duval County have been duplicated by JEA. (Tr. 234, Dew). A few representative examples of the duplication caused by JEA include:

- A. Along Lannie Road east of the Jacksonville Penal Farm, OREMC has a primary line which has been in place since 1951 which serves numerous members near the end of Lannie Road. (Tr. 180, Dew). Based on pole brands (birthmarks) observed in the field on JEA's line, JEA constructed approximately 1.0 miles of primary line in 1974 to Chaddy Lane. (Id.) This line serves three residential customers from two distribution transformers. (Tr. 181, Dew). These customers are located adjacent to existing OREMC lines.

- B. JEA's service to Eagle Bend Road off of Yellow Bluff Road duplicates a line OREMC has had in this area since 1955. (Id.) Around 1970, JEA constructed 3,500 feet of primary line on the opposite side of Yellow Bluff Road from OREMC's line to Eagle Bend Road so they could serve the subdivision in Eagle Bend. (Id.)
- C. On Moncrief-Dinsmore Road JEA constructed over 2,000 feet of three-phase primary line in 1987 along the west side of the road to serve a single consumer who required three-phase service. (Id.) OREMC has a three-phase line on the east side of the road which has been in place since 1969. (Id.)
- D. At 15033 Braddock Road, OREMC had been providing service to this address since 1981, and JEA had installed a transformer, a secondary pole (branded 1991) and a secondary conductor which crosses Braddock Road and goes under OREMC's line to the secondary pole. (Id.) JEA also has a length of service wire coiled up on the pole. (Tr. 181-182, Dew). The length of the service wire appears to be of sufficient length to extend to the weather head of the electric service at this address which is already served by OREMC. (Tr. 182, Dew).
- E. OREMC has been in the Utsey Road area since 1955. (Id.) JEA constructed more than one mile of single-phase line to this road in order to serve approximately five customers. (Id.) Based on the pole brands, JEA built this line in 1979. (Id.)
- F. Cisco Garden Subdivision is served by both utilities. It appears that the services are equally divided between JEA and

OREMC and that they both constructed within the subdivision in the early 1970's. (Id.)

Issue 16. Do the parties have a formal territorial agreement that covers the area in dispute, or any other areas of potential dispute?

No. (Stipulated Issue)

Issue 17. Have the parties made any attempts to reach agreement on who should serve the disputed area, or any other areas of potential dispute?

Yes. During the mid-1970's, OREMC and JEA held discussions for the purpose of entering into a territorial agreement for Duval County. (Tr. 121, Gibson). The parties drafted an agreement, (Tr. 121, Gibson; Ex. 6) and even though OREMC was willing to do so, the parties did not execute the agreement because the general counsel of the Consolidated Government of Jacksonville advised JEA against signing the agreement. (Tr. 121-122, Gibson). In addition, JEA and OREMC have considered whether a purchase/sale transaction would be in their mutual interests, but have never come close to consummating such a transaction. (Tr. 120, Gibson). Even though JEA claims it wants to buy OREMC's facilities in Duval County (Tr. 285, Ferdman), JEA has never made a reasonable offer to purchase these facilities.

JEA's position that it does not have the authority to enter into a territorial agreement dividing territory in Duval County is self serving. JEA has admitted that they have the right and power to release individual customers to OREMC in Duval County in

perpetuity (Tr. 298, Ferdman), but refuses to admit that it can grant territorial rights when those customers add up to a whole territory. (Id.) JEA's position that it has no authority to enter into a territorial agreement dividing territory in Duval County when it proposed and agreed to the 1978 Operating Guidelines places form over substance and is unreasonable. This is especially true in light of the fact that JEA does not have an exclusive right to same in Duval County. See OREMC's position on Issue No. 1.

Issue 18. Have the parties operated under any informal agreements of "understandings" regarding who should serve the disputed area?

Yes. After JEA refused to sign a formal territorial agreement, JEA offered and OREMC agreed to abide by a series of guidelines in a document called the 1978 Operating Guidelines. (Tr. 122-123, Gibson). The 1978 Operating Agreement established a boundary line between the utilities in Duval County known as the "magic line" and contained certain guidelines for cleaning up their respective territories on either side of the magic line. (Id.) The purpose of the 1978 operating agreement was to minimize the duplication of facilities in northern Duval County. (Tr. 315, Ferdman). At the time the operating guidelines were developed, OREMC believed that both JEA and OREMC would abide by them. (Tr. 154-155, Gibson). OREMC has conducted its business affairs in accordance with those guidelines. (Tr. 155, Gibson; Tr. 158, Middleton; Tr. 82, Page). However, JEA has continued to duplicate OREMC's facilities despite the agreement. (Tr. 82, Page). The

Commission should consider whether these guidelines would serve as a good foundation upon which to resolve this dispute (Tr. 207, Dew).

Issue 19. What would be the additional cost to each utility to provide electric service to the area in dispute?

JEA spent \$53,000 to OREMC's facilities at the Holiday Inn (Tr. 303, Ferdman), even though OREMC has been providing service to the Holiday Inn for over 20 years. (Tr. 137, Middleton). OREMC could re-establish service at the Holiday Inn at a minimal cost. OREMC has sufficient substation capacity and distribution facilities in close proximity to the disputed areas. (Tr. 201, Dew). OREMC is providing adequate and reliable service to those areas and has been doing so for quite some time. (Id.) With this in mind, there are no significant incremental costs for OREMC to continue serving in the disputed areas. However, OREMC will be forced to bear significant costs if it for some reason is not allowed to continue serving in northern Duval County. See OREMC's position on Issue No. 20.

Issue 20. What would be the cost to each utility if it were not permitted to serve the area in dispute?

The Holiday Inn was OREMC's largest customer. (Tr. 244-245, Wrightson). The Holiday Inn's average usage represents the equivalent of 420 of OREMC'S average residential members. (Tr. 246, Wrightson). The loss of the Holiday Inn as a member means that some of OREMC's largest and most expensive transformation

equipment is not being used. (Tr. 245, Wrightson). It also means that related depreciation expense, interest expense and other carrying costs are not being recovered through revenues from the Holiday Inn. (Id.) If, for some reason, OREMC is not permitted to continue serving in other parts of the disputed area, OREMC's investment in facilities to serve in Duval County would be stranded and OREMC would lose as much as \$1 million in net revenue per year for the foreseeable future. (Tr. 254, Wrightson).

Issue 21. What would be the effect on each utility's ratepayers if it were not permitted to serve the disputed area?

If OREMC is not permitted to continue serving the Holiday Inn in the future, OREMC will be required, all other things being equal, to collect additional non-fuel revenues of approximately \$57,300 per year from its remaining customers. (Tr. 241-242, Wrightson). If, for some reason, OREMC is not permitted to continue providing service to existing and new members in the areas it has historically served in Duval County, all other things being equal, OREMC may lose as much as \$1 million in net revenue per year in the foreseeable future. (Tr. 254, Wrightson). JEA's policy of serving only when it is economical and practical for JEA to do so has already had an adverse impact on OREMC and its members, both within and without Duval County. (Tr. 256-257, Wrightson). OREMC's rates are higher than they would have been otherwise. (Tr. 256-257, Wrightson).

Issue 22. If all other things are equal, what is the customer preference for utility service in the disputed area?

OREMC's Position

In this case, all other things are not equal. The Holiday Inn has requested and is receiving service from JEA, even though OREMC has been providing retail electrical service to the Holiday Inn for over twenty years. This is the only record evidence which addresses customer preference in Duval County. While JEA has made off-hand comments about customer petitions (Tr. 329-330, Ferdman), JEA did not attempt to introduce any such petitions into the record. If JEA had, they would have been inadmissible as uncorroborated hearsay evidence. While customers may prefer to take service from a utility with lower rates, relative rate levels are subject to change (Tr. 330, Ferdman), and should not be a determining factor in the Commission's decision making process in this case. (Tr. 202, Dew).

Issue 23. Which party should be permitted to serve the area in dispute?

OREMC offers the following suggestions for the resolution of the territorial disputes in this case:

1. The Holiday Inn service should be returned to Okefenoke. (Tr. 207, Dew).
2. The Commission should supervise the preparation of a territorial agreement between JEA and Okefenoke. This territorial agreement would contain identifiable boundaries within Duval County and should involve the

exchange of facilities with the public interest being the most important factor. The Commission should re-examine the territorial boundaries as shown by the "magic line" that was developed in the 1978 Distribution Operations Guidelines between JEA and Okefenoke. The Commission should encourage Okefenoke and JEA to negotiate a territorial boundary within Duval County and allow for the exchange of facilities to establish this territorial boundary over a reasonable period of time. (Tr. 207-208, Dew).

3. If the JEA and OREMC are not able to agree within a reasonable period of time, the Commission should draw a territorial line based upon good utility practice and Florida Law and should make both parties abide by its decision. (Tr. 208, Dew).

Issue 24. What conditions, if any, should accompany the Commission's decision regarding which party should be permitted to serve the disputed area?

The specific conditions, if any, which should accompany the Commission's decision depend on the nature of the FPSC's decision. Any conditions imposed by the FPSC should be consistent with sound utility practice and Florida law. OREMC suggests that a joint use agreement between the two parties be a condition for the safety of the general public and the employees of JEA and OREMC. Nearly any decision reached by the Commission will still leave facilities of both utilities in close approximation due to the layout of

facilities both inside and outside Duval County. A joint use agreement between the utilities will allow the utilities to more efficiently and effectively correct clearance problems between their facilities.

V. CONCLUSION

The policies and practices of JEA in northern Duval County over the past 20 years have had an adverse impact on OREMC, its members in northern Duval County and its members in other counties in Florida. (Tr. 256, 257, Wrightson). The JEA has assumed the role intended by the Florida Legislature for the Florida Public Service Commission. The JEA has conceded to the demands of the Holiday Inn for service and has indicated that it will serve any other OREMC customer in Duval County who demands service from JEA. (Tr. 305, Ferdman). The Legislature did not envision a system in which customers can demand service from a particular utility, especially when that customer is already receiving power from another utility. Instead, the Legislature intended for the FPSC to supervise a coordinated, state-wide electric power grid with a minimum of uneconomic duplication.

The City of Tampa could not duplicate the facilities of Tampa Electric Company within the City of Tampa if their franchise agreement expired. The City of Miami could not duplicate the facilities of Florida Power and Light Company within the City of Miami if their franchise agreement expired. While OREMC does not have a franchise with Duval County, the same principal applies to the Consolidated Government of Jacksonville and JEA. OREMC has facilities in place to serve the citizens of Duval County and has had those facilities in place since 1947. (Tr. 113-114, Gibson). OREMC has the plans and ability to continue providing service to its current members and future members in northern Duval County.

(Tr. 193-194, 197, Dew). A territorial boundary in northern Duval County will improve the ability of both utilities to efficiently and effectively serve their respective customers. (Tr. 200-201, Dew). The FPSC should return the Holiday Inn to OREMC and take steps to facilitate or create a territorial boundary between JEA and OREMC in Duval County.

DATED this 17th day of July, 1992.

Respectfully submitted,



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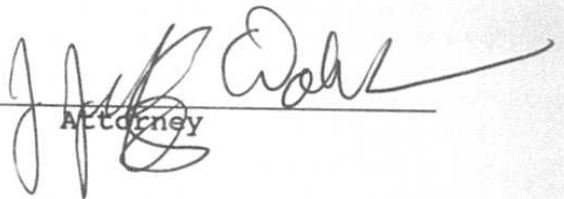
VII. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been furnished by U.S. Mail or Hand Delivery* this 17th day of July, 1992 to the following:

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