

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of TALQUIN ELECTRIC) DOCKET NO. 881602-EU
 COOPERATIVE, INC. to resolve)
 territorial disputes with CITY OF)
 TALLAHASSEE.)

In re: Petition of CITY OF TALLAHASSEE) DOCKET NO. 890326-EU
 for interpretation of its rights and)
 duties pursuant to Chapter 366, et al.,) ORDER NO. 21258
 Florida Statutes.)
 ISSUED: 5-19-89

ORDER GRANTING IN PART MOTIONS TO STRIKE

Talquin Electric Cooperative, Inc. (Talquin or Cooperative) filed a Petition to Resolve Territorial Disputes with this Commission on December 29, 1988. The City of Tallahassee filed an Answer, Affirmative Defenses and Counter-Petition on January 23, 1989. On February 13, 1989, Talquin moved to strike the City's affirmative defenses, replied to the counter-petition and raised nine affirmative defenses of its own. The City responded to the motion to strike on February 27, 1989, and then moved to strike portions of Talquin's reply and affirmative defenses on March 9, 1989. Talquin responded to the City's motions to strike on March 21, 1989.

The purpose of this Order is to rule upon the multiple motions to strike. The amount of paper used to write, respond and finally rule upon these matters is probably inevitable in this type of case. However, most of the matters raised in the affirmative defenses are either matters already at issue or matters beyond the Commission's jurisdiction. A brief discussion of each affirmative defense follows.

City of Tallahassee Affirmative Defenses

Paragraph 1 - It appears that the parties could agree to stipulate that Tallahassee is a municipal corporation authorized to provide electric service. Moreover, an affirmative defense serves to avoid liability, in whole or part, by new allegations of justification. See Trawick, Fla. Prac. and Proc. 11-4. This paragraph alone does not serve to avoid liability in any manner. Because it appears in other counts of other pleadings, it will be struck here.

Paragraph 2 - The Special Act, Chapter 24,910 (1947) is at the heart of this case. The motion to dismiss this paragraph as an affirmative defense is denied.

Paragraphs 3, 4 - Both paragraphs relate to the constitutionality of the Special Act discussed above. All parties to this docket agree that this Commission has no jurisdiction to pass upon constitutional issues. See Public Employees Relations Comm. v. Dade County Police Benev. Assn., 467 So.2d 987 (Fla. 1985). This issue is being raised here by Talquin for appellate record purposes. The Commission will deny all motions to strike relating to constitutional issues. However, this Commission will make no further comment on constitutional issues in this docket.

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Paragraph 5, 6 - These state facts relating to customer preference. Customer preference will be used in settling territorial disputes only when all other factors are equal. See Order No. 15210, issued October 8, 1985. Although the Commission will certainly accept evidence relating to customer preference in this case, it will be struck as an affirmative defense because it is not dispositive.

Paragraphs 7, 8 9 - These items relate to ultimate facts and legal conclusions which relate to the Special Act. Issues 14 and 15 of Order No. 20973 cover this issue. These affirmative defenses are stricken but evidence on all three can be presented at the hearing on this matter and/or in legal briefs.

Paragraph 10 - This is a factual matter that must be proved at the hearing. Again evidence on this point is welcome but the separate affirmative defense will be stricken.

Talquin Affirmative Defenses

Paragraphs 1, 2 - These relate to the constitutionality of Special Act, which was discussed above in paragraphs 3 and 4 of the City's affirmative defenses. We only note that this Commission must accept these statutes as constitutional for purposes of this docket.

Paragraphs 3, 4, 5, 7, and 9 - These affirmative defenses were raised in the answer for the most part. The issues of estoppel, laches, waiver and acquiescence (3, 4, 5, 7, 9) are legal issues that the parties can brief at the conclusion of this case. Thus these defenses can remain. The parties should also address what effect, if any, the prior circuit court litigation has relative to these issues.

Paragraph 6 - This affirmative defense is struck in that it relates to estoppel by deed. The written document relating to this defense must be attached to the pleading which raises it. Rule 1.130, Fla. R. Civ. Proc. This was not done and consequently this affirmative defense is struck.

Paragraph 8 - This item sets forth Talquin's position that enactment of Section 366.04, Florida Statutes, tacitly repeated the Special Act. This is simply Talquin's position on the Special Act and can be raised at the hearing or in briefs on these issues. Evidence and argument on this issue are welcome, but it will be struck as a separate affirmative defense.

Therefore, based on the foregoing, it is

ORDERED by Thomas M. Beard, as Prehearing Officer, that the Motion to Strike filed February 13, 1989, by Talquin Electric Cooperative, Inc., is granted, in part, as discussed in the body of this Order. It is further

ORDERED that the City of Tallahassee's Motions to Strike filed March 9, 1989, are granted to the extent discussed above.

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By ORDER of Commissioner Thomas M. Beard, as Prehearing
Officer, this 19th day of MAY, 1989.


THOMAS M. BEARD, Commissioner
and Prehearing Officer

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