BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition to resolve territorial dispute between Okefenoke Rural Electric Membership Corporation and Jacksonville Electric Authority.	) DOCKET NO. 911141-EU) ORDER NO. PSC-92-1213-FOF-EU) ISSUED: 10/27/92

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK
J. TERRY DEASON

ORDER RESOLVING TERRITORIAL DISPUTE

BY THE COMMISSION:

CASE BACKGROUND

On November 19, 1991, Okefenoke Rural Electric Membership Corporation (Okefenoke) filed a petition to resolve its territorial dispute with Jacksonville Electric Association (JEA). The dispute arose over the question of who should serve the Holiday Inn - Jacksonville Airport in Duval County. The petition alleged that Okefenoke had been serving the Holiday Inn until JEA constructed electric facilities and lines to provide service to the Inn, thereby displacing Okefenoke's existing facilities.

On December 31, 1991, JEA filed a Motion to Dismiss the Petition, which we denied in Order No. PSC-92-0058-FOF-EU, issued March 12, 1992. We held there that the Commission has exclusive jurisdiction to resolve the 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.

The prehearing conference in this case was held on May 18, 1992. The hearing was held on June 17, 1992. Before testimony was taken in the hearing we heard oral argument on a second motion to dismiss filed by JEA. We denied the second motion to dismiss, holding again that we had jurisdiction to resolve the dispute.

DECISION

We are called upon here to resolve a territorial dispute between a rural electric cooperative and a municipal electric utility that has arisen within the municipality's 1974 political boundaries. Okefenoke Rural Electric Membership Corporation has asked us to resolve its territorial conflict with Jacksonville Electric Authority in northern Duval County, where Okefenoke has been providing electric service to customers since the 1940's. The case requires us to interpret and apply the last paragraph of section 366.04 (2)(f), Florida Statutes. That paragraph states:

> No provision of the chapter [Chapter 366, Florida Statutes] shall be construed or applied to impede, prevent, or prohibit any municipally owned electric utility system from distributing at retail electrical energy within its corporate limits, as such corporate limits exist on July 1, 1974. . . .

We have already decided that this paragraph does not provide municipalities an exclusion from our authority under the Grid Bill to resolve territorial disputes within their 1974 political boundaries. In Order No. PSC-92-0058-FOF-EU mentioned above, we said:

> We believe that the provision of section 366.04(2)(f), Florida Statutes, at issue here does not exempt municipal electric systems from the Commission's jurisdiction, and thus it does not prevent the Commission from resolving territorial disputes, preventing uneconomic duplication of facilities, or ensuring the reliability of the energy grid - in municipalities, as well as elsewhere in the state. The provision simply directs the Commission to apply its authority, and carry out its responsibilities, in a manner consistent with a 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 it in a

> manner that is consistent with the other provisions, and the public policy purposes, of the Grid Bill. . . .

We must now resolve this dispute in a manner that promotes the public policy purposes of The Grid Bill while at the same time acknowledging the municipality's right to serve customers within 1974 municipal boundaries. We will do so by respecting the city's right to serve, but insisting on the lawful exercise of that right.

A municipality's right to provide utility service is a proprietary right. In the exercise of that right a municipality is held to the same standards and laws as all other utility providers. Hamler v. City of Jacksonville, 122 So. 220 (Fla. 1922); City of Lakeland v. Amos, 143 So. 744 (Fla. 1932); Edris v. Sebring Utilities Commission, 237 So.2d 585 (Fla. 2d DCA 1970). See also, Williams v. The City of Mount Dora, 452 So. 2d 1143, 1145-1146 (Fla. 5th DCA 1984), where the court explained:

> The providing of utility services by a municipality is a private or proprietary function in the exercise of which the municipality is subject to the same legal rules applicable to private corporations. The fact that a municipal utility may enact its rules and regulations as ordinances does not itself give it rights or duties with respect to users any different than those possessed by private utility companies.

The central question to ask in this case is not whether JEA has the right to serve in Duval County to the exclusion of all other utilities, but whether JEA has exercised the right it does have in a manner that is consistent with the standards and laws that apply to the provision of electric utility service in the state. The facts of this case lead us to the conclusion that, with respect to its dealings with Okefenoke, JEA has not exercised its right to serve in a lawful manner.

JEA has a legal duty to provide adequate and reliable electric service to its customers at reasonable and non-discriminatory rates. It has the obligation to avoid uneconomic and unnecessary duplication of facilities. It has the obligation to deal reasonably and fairly with other electric utilities. Under the

authority granted to us in Chapter 366, Florida Statutes, where the evidence shows that the city has abused its right to serve, exercised its right in an unlawful manner, or is not ready, willing and able to serve, we have the responsibility to correct the harm that results, and to ensure that the city will exercise its right to serve lawfully in the future. We may use all reasonable means to fulfill our responsibility, including drawing territorial lines and granting territorial rights to another utility within Duval County. We may also order JEA to refrain from providing electric service to a customer within the city of Jacksonville, if that customer is served by another electric utility, or if service by JEA would duplicate the existing electric facilities of another electric utility and JEA has not attempted to serve that customer by the means available to it under the law.

Our exercise of authority under the circumstances mentioned above does not completely extinguish the municipality's right to serve customers within its 1974 municipal boundaries. The city remains free to exercise its proprietary right to provide utility service if it does so in a manner that is always consistent with the law and public policy of the state. The law has provided JEA with several tools to exercise its right and fulfill its concomitant obligation to serve in Duval County. JEA may enter into territorial agreements or franchise agreements with other utilities. JEA may purchase the facilities of other utilities presently providing service in Duval County. JEA may exercise its right of eminent domain to condemn property of another electric facility for just compensation. JEA may not duplicate facilities to provide electric service in Duval County. JEA may not permit another utility to provide service at its pleasure and then displace that utility's service with its own without compensating the utility for the loss. The public interest is not served by such actions.

The evidence presented at the hearing clearly shows the problems that have developed between Okefenoke and JEA over the years. Both utilities presently serve in northern Duval County, and JEA has permitted, encouraged and assisted Okefenoke in serving the area when it was not "economical and practical" for JEA to serve. When it <u>was</u> "economical and practical" for JEA to serve, JEA has duplicated Okefenoke's facilities to do so. JEA has "cream-skimmed" the most lucrative services in northern Duval County, leaving Okefenoke to serve the rest. JEA has taken over service previously provided by Okefenoke if a customer disconnects Okefenoke's facilities, and when that occurs JEA has not provided

any compensation to Okefenoke for the loss of facilities or customer revenues. Extensive duplication of facilities now exists in northern Duval County, to the detriment of Okefenoke's and JEA's ratepayers, the citizens of Duval county, and the public interest.

Although JEA contends that the only area in dispute is the Jacksonville Airport Holiday Inn, the record clearly shows that the northern Duval County service area is in dispute. Uneconomic and unnecessary duplication of facilities abounds in northern Duval County, and while JEA has attempted to argue that duplication of electric facilities does not automatically make a territorial dispute, we find that in this case it clearly does demonstrate the existence of a dispute. While Okefenoke originally filed its petition to resolve who should serve the Holiday Inn - Jacksonville Airport, we can not ignore the many other areas in northern Duval County where a similar situation may arise. We find that the portions of northern Duval County where Okefenoke currently serves, and those portions of northern Duval county where Okefenoke could efficiently and economically provide electric service, are the areas in dispute in this proceeding.

In 1990, Okefenoke had approximately 2,249 members in Duval County, and had invested approximately $3.2 million. JEA presently serves more than 300,000 retail customers in Duval, Clay, and St. Johns Counties. There are five general areas where Okefenoke serves in Duval County. They are Black Hammock Island, the Yellow Bluff/Starrett Road Area, the Airport Area, the Lannie Road Area, and the West Dinsmore Area. Within these areas, there are numerous cases of duplication of facilities, and in most of the areas of conflict, Okefenoke had its lines in place before JEA. Even JEA's witness admitted that JEA has duplicated Okefenoke's lines. For instance, Okefenoke constructed its primary lines along Lem Turner, Lannie, Yellow Bluff, and Starrett Roads in 1951. JEA's witness testified that JEA's distribution lines along these same roads were constructed after 1951. In fact, it appears JEA constructed its primary lines on Lannie and Yellow Bluff Roads at least 20 years after the Okefenoke lines were constructed. At present, duplication exists along the following roads and areas: Lannie Road, Eagle Bend Road, Yellow Bluff Road, Starrett Road, Moncrief-Dinsmore Road, Braddock Road, Utsey Road, Lem Turner Road, Cisco Garden Subdivision, Carver Manor Subdivision, as well as the Jacksonville Airport area. While these areas have varying amounts of duplication even JEA's witness admitted that there are some areas in northern Duval County where the lines are terribly commingled.

The duplication of facilities that exists in northern Duval County stems from JEA's belief that it has the exclusive right to serve anywhere in Duval County. Pursuant to Section 718.103 of Jacksonville's Ordinance Code, JEA has been "delegated the authority to grant permission to other electric utility companies to furnish electric service to additional premises and to extend their lines when it is not practical or economical for the Authority to furnish this service." (Emphasis added) Thus, when JEA determines that it is not practical or economical to serve a customer in northern Duval County, it releases that customer to Okefenoke. According to Okefenoke, JEA serves approximately 1,000 customers in northern Duval County that could have easily and economically been served by Okefenoke. System planning is problematic for Okefenoke because under the current system, JEA has the sole discretion to determine which new customers Okefenoke will serve. As one witness stated at the hearing, "It is very difficult, if not impossible, to serve an area which is absolutely unpredictable."

A blatant example of the duplication in northern Duval County is the duplication that surrounds the Holiday Inn - Jacksonville Airport. The Holiday Inn is located at the intersection of I-95 and Airport Road. Both Okefenoke and JEA have facilities on Airport Road. The Holiday Inn had received service from Okefenoke for over 20 years when it partially disconnected its service from Okefenoke in November of 1991. In early 1991, the Holiday Inn manager contacted JEA expressing a desire to become a customer of the municipality. The manager was told that "if he could make arrangements to have his electric service disconnected from Okefenoke, JEA would serve the Holiday Inn." While the Holiday Inn hired a contractor to make the necessary changes to switch to JEA, JEA installed facilities in order to serve the hotel. JEA spent approximately $53,000 to serve the Airport Holiday Inn.

Although the bulk of the load related to the Holiday Inn is now served by JEA, Okefenoke continues to serve the Holiday Inn's sign located next to I-95. Okefenoke also serves a sewer treatment plant adjacent to the Holiday Inn from a padmounted transformer located on the Holiday Inn's property. The Holiday Inn was Okefenoke's largest customer, yet JEA expanded its facilities to serve the Holiday Inn without even consulting Okefenoke. JEA did not compensate Okefenoke for this loss.

Duplication is uneconomic and wasteful. Duplication creates safety risks. There are also other problems associated with

duplication of electric facilities, such as: availability of right-of-way, compliance with the National Electrical Safety Code, coordination of construction between the utilities, trouble shooting outages, and increased line losses.

When the utilities developed Operating Guidelines in 1978, they did attempt to eliminate duplication of facilities in the disputed area. However, the record shows that very little progress has been made toward eliminating the duplication of facilities in northern Duval County. JEA has continued to expand its system into the area that Okefenoke has traditionally served. There have been several discussions concerning the sale of Okefenoke's facilities in Duval County to JEA, but Okefenoke has rejected any offers made by JEA. According to JEA, Okefenoke has refused to negotiate. According to Okefenoke, JEA has never made a reasonable offer.

The parties discussed entering a territorial agreement in the mid-1970's. While Okefenoke was willing to enter a territorial agreement, the agreement was never executed because Jacksonville's General Counsel recommended that JEA not sign it. During the last two years, JEA has made attempts to reach a territorial agreement with Okefenoke, but the attempt has failed because Okefenoke insisted that any agreement grant Okefenoke a continuing right to serve customers and territory within Duval County. According to JEA, it does not have the authority to meet this requirement.

During the course of the territorial agreement negotiations in the 1970's, JEA formulated the 1978 Operating Guidelines. An operating line was drawn through northern Duval County (the "magic line"), and an attempt was made to clean up the utilities' boundaries over time. At JEA's request, Okefenoke agreed to adopt the guidelines. However, while Okefenoke attempted to abide by the guidelines, the JEA has continued to duplicate electric facilities in northern Duval County above the magic line.

Okefenoke can re-establish service to the Holiday Inn at minimal cost. There would be no additional costs to JEA, other than the $53,000 already expended, to serve the Holiday Inn, because JEA is presently providing service. The record does not indicate the cost JEA or Okefenoke would incur to serve all customers in northern Duval County. The record does indicate that Okefenoke's service territory in Duval County is the cooperative's most dense area, and the loss of the area would hurt Okefenoke and Okefenoke's remaining ratepayers. The evidence demonstrated that there would be a negative impact on Okefenoke if it were to lose a

year's worth of revenues associated with its facilities in northern Duval County. Such loss would affect Okefenoke's entire system. Okefenoke's 1991 revenues in northern Duval County were $3.3 million dollars. Annual revenues from the Holiday Inn are approximately $400,000. This represents the equivalent of 420 residential customers. If Okefenoke loses the Holiday Inn as a customer, the fixed cost of operations would have to be spread over fewer customers, which would result in higher rates for the remaining customers.

We will not allow JEA to continue its "cream skimming" approach to the provision of electric service. The practice has harmed JEA's and Okefenoke's ratepayers and led to widespread duplication of facilities, adverse to the public interest and contrary to the intent of the Grid Bill and the policies and purposes of this Commission. Okefenoke Rural Electric Membership Corporation shall continue to serve all of its present customers in Duval County. Service to the Airport Holiday Inn shall be returned to Okefenoke. Okefenoke shall serve all new customers JEA requests it to serve in the future. Once a customer is released to Okefenoke, all new customers in the surrounding area shall be served by Okefenoke, and Jacksonville Electric Authority shall be prohibited from serving Okefenoke's customers, unless and until JEA exercises its right to provide electric service in the county by lawful means. Those lawful means include a territorial agreement or franchise, the purchase of Okefenoke's customers and facilities at fair and reasonable prices, or the acquisition of those customers and facilities by the exercise of JEA's eminent domain powers. JEA shall not serve customers who have disconnected Okefenoke's facilities. JEA shall not duplicate the facilities of Okefenoke in northern Duval county to serve new customers, or under any circumstances.

JEA bears the responsibility to correct the uneconomic duplication of facilities that it has created in northern Duval County. To that end, we shall retain jurisdiction of this case and require JEA to submit, within 120 days of the date of issuance of our final order in this case, a specific, detailed proposal for the elimination of duplicate facilities in northern Duval County. Okefenoke shall cooperate with JEA in the creation of this proposal.

This docket shall remain open pending our review and approval of JEA's plan to eliminate duplicative electric facilities in northern Duval County.

It is, therefore,

ORDERED that this territorial dispute between Okefenoke Rural Electric Membership Corporation and Jacksonville Electric Authority shall be resolved in the manner set forth in the body of this order. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 27th day of October, 1992.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

MCB:bmi

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 Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.