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May 22, 1992

ORIGINAL
FILE COPY

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

Re: Petition to Resolve Territorial Dispute Between
Okefenoke Rural Electric Membership Corporation and
The Jacksonville Electric Authority of the
City of Jacksonville, in Duval County

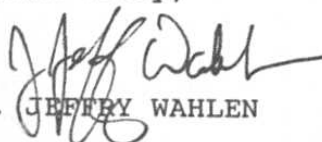
Dear Mr. Tribble:

Enclosed for filing on behalf of Okefenoke Rural Electric Membership Corporation is the original and fifteen copies of OREMC's Memorandum in Opposition to JEA's Motion to Dismiss, or in the Alternative, Motion to Strike and Response to Request for Oral Argument.

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

ACK _____
AFA _____
APP _____ Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning same to this writer.
CAF _____
CMU _____ Thank you for your assistance in connection with this matter.

Yours truly,


J. JEFFREY WAHLEN

EAG _____
LEG _____
LIN 3

OPCJJW/bgs

RCH _____
SEC _____ cc: Martha Carter Brown, w/encl., via Hand Delivery
WAS _____ Kenneth A. Hoffman, w/encl.
Bruce Page, w/encl.

RECEIVED & FILED

GP: JJW/lte/vorgmc.118
012836-11263

FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

05298 MAY 22 1992

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

DOCKET NO. 911141-EU
Filed: May 22, 1992

**OREMC'S MEMORANDUM IN OPPOSITION TO JEA'S
MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO STRIKE AND
RESPONSE TO REQUEST FOR ORAL ARGUMENT**

Okefenoke Rural Electric Membership Corporation ("OREMC" or "Okefenoke"), by and through its undersigned counsel, and pursuant to Section 25-22.037(2)(b), Florida Administrative Code, files this Memorandum in Opposition to JEA's Motion to Dismiss, or in the Alternative, Motion to Strike ("JEA's Second Motion") and Response to Request for Oral Argument, and says:

BACKGROUND

1. On November 19, 1991, OREMC filed and served its Petition to Resolve Territorial Dispute in Northern Duval County ("Petition"). On December 31, 1991, JEA filed a Response to the Petition and a Motion to Dismiss ("JEA's First Motion") which alleged that the FPSC does not have jurisdiction to hear and decide this case.

2. On February 18, 1992, the Commission heard oral argument from the parties regarding JEA's First Motion. A copy of the transcript from that Oral Argument is attached hereto as Exhibit "A." Following Oral Argument, the Commission voted to deny JEA's First Motion. The decision was memorialized in Order

DOCUMENT NUMBER-DATE

05298 MAY 22 1992

FPSC-RECORDS/REPORTING

No. PSC-02-0058-FOF-90, issued on March 12, 1992 ("Order"), which states:

We also do not agree that we should dismiss this petition because we do not have jurisdiction to resolve territorial disputes within the City of Jacksonville's municipal boundaries. Rather, we believe that the Legislature of the State of Florida has purposely and explicitly granted the Florida Public Service Commission the jurisdiction to approve territorial agreements and resolve territorial disputes between all electric utilities throughout the State.

Order at 4-5. (emphasis added).

3. On May 18, 1992, after the issues identification workshop (January 16, 1992), the filing of JEA's testimony (February 28, 1992 and March 19, 1992), and the filing of Prehearing Statements (April 10, 1992), the law firm of Messer, Vickers, Caparello, Madsen, Lewis, Goldman & Metz, P.A., filed a Notice of Appearance on behalf of JEA. One week later, JEA filed its Second Motion.

4. JEA argues in its Second Motion that the "Commission lacks statutory authority and subject matter jurisdiction" to grant the relief requested by OREMC in its Petition. Second Motion at 1. In support of this general argument, JEA argues 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 argues that as a matter of fact and law, there is no "territorial dispute" between JEA and OREMC in Northern Duval County.¹ Second Motion at 4, ¶10. For the reasons

¹ JEA also appears to argue that the absence of an approved territorial agreement precludes the FPSC from exercising its jurisdiction. While OREMC disagrees with this argument and believes the FPSC has jurisdiction by virtue of the territorial disputes herein, it is worth noting that the 1978 Operating

set forth below, JEA's Second Motion should be dismissed.

I. THE COMMISSION HAS ALREADY DECIDED IT HAS THE STATUTORY AUTHORITY AND SUBJECT MATTER JURISDICTION TO HEAR AND DECIDE THIS CASE.

This is not the first time JEA has argued that the Commission does not have the statutory authority and subject matter jurisdiction to hear and decide this case. During oral argument on JEA's First Motion to Dismiss, JEA's lawyer raised both of these issues:

MR. PAGE: We filed a petition to dismiss Okefenoke's petition before this Commission for the following reasons: We believe that in order to ascertain whether or not a body such as this Commission, a particular tribunal has jurisdiction it is necessary to consider two things. First, demand made in the petition; and, second, the limits placed on the jurisdiction of the tribunal.

Transcript of Oral Argument, February 18, 1992 (Exhibit "A") [hereinafter "Transcript"] at 6 (emphasis added). Thereupon, Mr. Page proceeded to argue why the demands made in the Petition and the provisions of Chapter 366.04, Florida Statutes, precluded the Commission from exercising its jurisdiction in this case.

Guidelines may be sufficient to invoke the FPSC's jurisdiction notwithstanding the Jacksonville Charter, the 1974 Clause or anything else. FPSC Rule 25-6.0439(1)(a) defines a territorial agreement as "a written agreement between two or more electric utilities which identifies the geographical areas to be served by each electric utility party to the agreement...." After hearing the testimony and considering the evidence, the FPSC could construe Exhibits PJG-4 and PJG-5 to be a territorial agreement between JEA and OREMC sufficient to invoke the FPSC's jurisdiction to hear this case. Even though this construction is not necessary to the exercise of the Commission's jurisdiction, this construction may be one other basis upon which the Commission may consider exercising its jurisdiction.

Following his argument and OREMC's response, Commissioner Deason and Mr. Page had the following conversation regarding JEA's argument:

COMMISSIONER DEASON: I have a question. Is your motion to dismiss basically premised upon your belief that the Commission does not have jurisdiction, or that the Commission has jurisdiction but should not exercise it in this case because it cannot grant the relief that is sought?

MR. PAGE: Primarily because what gives rise to jurisdiction is a combination of the demand made in the petition. For instance, in a circuit or a county court matter, if you have a certain jurisdictional amount you make a demand of your defendant for \$1,000, it must be heard in county court. If it is so many dollars exceeding the jurisdictional limit of the county court, then only a circuit court can hear it. The demand drives the jurisdictional question in a case like that. I believe the demand drives the jurisdictional question here when coupled with the statutory authority of the Commission.

Transcript at 19 (emphasis added). After hearing these arguments, the Commission voted to deny JEA's First Motion. See Transcript at 21.

The "central ground" for JEA's Second Motion is that "the Commission lacks statutory authority and subject matter jurisdiction to grant" the relief requested by OREMC. Motion at 1. The Commission's statutory authority and subject matter jurisdiction were argued by JEA on February 19, 1992 and resolved by the Commission at that time. With this in mind, JEA's Second Motion to Dismiss is little more than a thinly veiled motion for reconsideration of Order No. PSC-02-0058-FOF-90. JEA has not shown that the Commission's original decision was wrong and has not properly raised any new arguments which compel the dismissal of

OREMC's Petition. Accordingly, JEA's Second Motion should be denied.

II. JEA'S OBJECTIONS TO THE SUFFICIENCY OF OREMC'S PLEADINGS ARE UNTIMELY, HAVE BEEN WAIVED AND SHOULD BE IGNORED. EVEN IF THOSE OBJECTIONS HAVE NOT BEEN WAIVED, OREMC'S PETITION SUFFICIENTLY ESTABLISHES A TERRITORIAL DISPUTE WHEREVER OREMC SERVES IN NORTHERN DUVAL COUNTY.

In its Second Motion, JEA states as follows:

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.

Second Motion at 2, ¶2. Paragraph 8 of the Second Motion also contains arguments regarding the allegations in OREMC's Petition.

By attacking the allegations in the Petition on technical grounds JEA is not challenging the jurisdiction of the Commission, but rather challenging the sufficiency of the pleading. See generally Trawick, Fla. Prac. and Proc., §10-4 (1991). A motion to dismiss based on the sufficiency of the pleading, also known as a Motion to Dismiss for Failure to State a Cause of Action, must be filed within 20 days after the service initial of pleading. See Fla. R. Civ. P. 1.140(b)(1). If not raised in a motion during the prescribed time, objections as to the sufficiency of the pleading are waived. See Fla. R. Civ. P. 1.140(h)(1).

As shown below, OREMC's Petition gave JEA fair notice that wherever OREMC serves in Northern Duval County is in dispute. Perhaps for this reason, JEA did not raise the sufficiency of the

allegations in OREMC's Petition in a motion filed within the twenty day period for doing so. Likewise, JEA did not file a motion for more definite statement. Instead, JEA filed a timely Response to OREMC's Petition which admitted and denied the allegations in the Petition. That being the case, JEA has waived whatever objections it may have regarding the sufficiency of the Petition and those objections should not now be considered by the Commission as grounds to dismiss or strike all or portions of the Petition.

Even if JEA has not waived its objections to the sufficiency of OREMC's Petition, JEA's Second Motion should be denied because the Petition alleges facts which establish that there is a territorial dispute wherever OREMC serves in Northern Duval County. As JEA pointed out in its First Motion, the allegations of a complaint (petition) are taken to be true for the purposes of a Motion to Dismiss. Nunez v. Alford, 117 So.2d 208 (Fla. 2d DCA 1960). In paragraph 14 of the Petition, OREMC alleges that JEA has asserted an absolute right to provide electric service, including the right to oust any other electric utility from the county. In paragraph 2 of the Petition, OREMC alleges that it provides electric service to customers in Northern Duval County. Keeping in mind that pleadings should be construed to do substantial justice and in favor of the pleader, Dawson v. National Home Ins. Co., 138 So.2d 356, 358 (Fla. 3d DCA 1962), these allegations, when taken to be true, fairly establish a territorial dispute within the meaning of Section 25-6.0439(1)(b), Florida Administrative Code. Stated another way, the Petition establishes that OREMC serves customers

in Northern Duval County and that JEA has asserted the right to oust OREMC from the County. Clearly, those allegations are enough to establish a "disagreement as to which utility has the right and obligation to serve a particular area." See § 25-6.0439(1)(b), F.A.C. (emphasis added). That being the case, JEA's apparent argument that the Commission lacks jurisdiction because the Petition does not establish a territorial dispute wherever OREMC serves in Northern Duval County is without merit.

III. FOR JEA TO ASSERT THAT THERE IS NO TERRITORIAL DISPUTE WHEREVER OREMC SERVES IN NORTHERN DUVAL COUNTY TESTS THE LIMITS OF REASONABLENESS, BUT IS NOT GROUNDS TO DISMISS THE PETITION.

For JEA to now assert, as it has in its Motion to Dismiss, that there is no territorial dispute between JEA and OREMC wherever OREMC serves in Northern Duval County is incredulous. As shown below, the existence of a territorial dispute between JEA and OREMC throughout Northern Duval County has been one of the central issues in this case from the beginning:

- (1) OREMC's Petition establishes a territorial dispute wherever OREMC serves in Northern Duval County.
- (2) The areas of dispute in this case were discussed as an issue in the January 16, 1992 issues identification workshop between JEA, Staff and OREMC. At that time, JEA presented a map of Northern Duval County showing the duplication of facilities throughout the county.
- (3) OREMC filed prefiled testimony summarizing the area in dispute as the area in Northern Duval County wherever OREMC has distribution facilities. See Prepared Direct Testimony of Robert Page at 13 - 15 (Filed February 7, 1992).

- (4) In its direct and rebuttal testimony, JEA did not submit facts or evidence contrary to OREMC's testimony and, indeed, repeatedly asserted its exclusive right to provide service throughout Northern Duval County therein. See, e.g., Prepared Direct Testimony of Sheldon R. Ferdman at 9 (Filed February 28, 1992).
- (5) In its February 27, 1992 Response to Staff's First Request for Production of Documents, No. 1, JEA provided a map showing OREMC's distribution facilities throughout Northern Duval County and a statement that JEA believes these lines to be the area of dispute.
- (6) In its April 9, 1992 Prehearing Statement, JEA stated in response to Issue No. 5 that "the area of dispute includes the portions of the City [of Jacksonville] wherever OREMC has distribution facilities."

JEA has only recently taken the position that there is no territorial dispute other than the one over the Holiday Inn. See JEA's Revisions to Draft Prehearing Order at 5 (filed May 15, 1992). For JEA to now assert in a Motion to Dismiss that there is no territorial dispute wherever OREMC serves in Northern Duval County tests the limits of reasonableness. Both JEA and OREMC have known all along that wherever OREMC serves in Northern Duval County is in dispute. Both parties have prepared their cases accordingly. While JEA's last minute change of position on this issue may create a factual issue for resolution by the Commission after hearing the evidence, it is not cause to dismiss the Petition.

IV. JEA'S ALTERNATIVE MOTION TO STRIKE IS IMPROPER AND SHOULD BE DENIED.

Florida Rule of Civil Procedure 1.140(f) authorizes motions to strike under certain conditions and states: "[a] party may move to strike or the court may strike redundant, immaterial, impertinent

or scandalous matter from any pleading at any time." Florida Rule of Civil Procedure 1.150(a) authorizes motions to strike sham pleadings. Motion to strike cannot be used to test the legal sufficiency of a pleading. Ivey v. Southern States Power Co., 128 Fla. 345, 174 So. 834 (1937).

In the instant case, JEA has not alleged that the Petition contains redundant, immaterial, impertinent or scandalous matter. Likewise, JEA has not alleged that the Petition is a sham. Instead, JEA seeks to use a motion to strike to test the sufficiency and legality of the relief requested in Petition. As such, JEA's Alternative Motion to Strike is procedurally improper and should be denied on that basis.

More importantly, JEA's alternative motion to strike has no substantive merit. OREMC's Petition requests that the Commission:

- (1) Take jurisdiction over this matter.
- (2) Resolve the dispute in favor of OREMC.
- (3) Order JEA to refrain from serving the Holiday Inn, now or in the future.
- (4) Order that the parties enter a territorial agreement to be approved by the FPSC, failing which the FPSC should determine and define the territorial boundaries of OREMC and JEA in Northern Duval County.
- (5) Grant any other relief the Commission deems fair, just and reasonable.

Section 365.04, Florida Statutes, grants to the Commission the power to resolve territorial disputes between utilities. See Order No. PSC-02-0058-FOF-90. As noted in footnote 1 of JEA's Second Motion, the Commission can exercise those powers "expressly or

impliedly granted by statute" (emphasis added). While the amount of power implicit in the power to resolve territorial disputes has never been fully tested, there is no legal reason to believe that the relief requested by OREMC is beyond the inherent power of the Commission². The relief requested by OREMC is consistent with relief granted by the Commission in other territorial disputes and should not be stricken from the Petition.

RESPONSE TO REQUEST FOR ORAL ARGUMENT

As shown above, JEA's Second Motion is without merit and should be denied. OREMC believes that most, if not all, of the matters raised in JEA's Second Motion have already been the subject of oral argument (see § I, above). However, if the Commission decides to hold oral argument on JEA's Second Motion, OREMC respectfully suggests that oral argument be held in conjunction with the evidentiary hearing on June 17, 1992. OREMC's reasons for this suggestion are outlined below.

From a legal perspective, this is a complex case. The testimony and exhibits which will be admitted into evidence at the hearing will likely implicate legal considerations such as estoppel, waiver, laches and the relationship between the


² In its First Motion, JEA asserted the Jacksonville Charter and the Grid Bill as reasons why the FPSC cannot grant the relief requested by OREMC. OREMC believes those issues have been resolved by Order No. PSC-02-0058-FOF-90 and that the effect of the Jacksonville Charter and 1974 Clause are not at issue here. To the extent the Jacksonville Charter and 1974 Clause are at issue here, OREMC's position on Legal Issue One in its Prehearing Statement, filed April 10, 1992, which is hereby incorporated by reference, explains why the Jacksonville Charter and the 1974 Clause do not preclude the FPSC from granting the relief requested by OREMC.

Jacksonville Charter and Section 366.04, Florida Statutes. One of the central factors for the Commission to consider will be whether JEA can continue to exercise absolute discretion over where OREMC can serve in Northern Duval County without regard to which utility is the least cost provider in light of the fact that OREMC has been providing service in Northern Duval County since the 1940's. The evidence which the parties have carefully prepared for consideration by the Commission at the hearing will help frame the legal considerations and make oral argument more efficient and effective from the Commission's perspective.

Additionally, as discussed above, JEA's Second Motion is little more than a thinly veiled motion for reconsideration of FPSC Order No. PSC-02-0058-FOF-90. Unless a motion for reconsideration of a non-final order is filed fifteen days after the order is issued, and unless good cause has been shown, the Commission should rule on the reconsideration motion in its final order. In this instance, JEA did not file its Second Motion within 15 days of the issuance of Order No. PSC-02-0058-FOF-90, nor has JEA shown good cause for the Commission to hear and decide its Second Motion earlier. Holding oral argument at an Agenda Conference and requiring the issuance of another order would unnecessarily disrupt the long standing schedule of this case and impose an unnecessary burden on the Commission and its staff. If oral argument is to be held at all, it should be conducted in conjunction with the final hearing in this matter.

WHEREFORE OREMC requests that the Commission enter an order denying JEA's Second Motion.

DATED this 22^d day of May, 1992.



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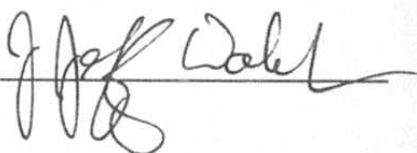
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been furnished by U.S. Mail or Hand Delivery* this 22^d day of May, 1992 to the following:

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