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July 17, 1992

REPLY TO: Tallahassee

Mr. Steve Tribble, Director
Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32399-0850

HAND DELIVERY

ORIGINAL FILE COPY

Re: FPSC Docket No. 911141-EU

Dear Mr. Tribble:

Enclosed herewith for filing in the above-referenced docket are the following documents:

1. Original and fifteen copies of the Post-Hearing Brief of Jacksonville Electric Authority; and

2. A disk in WordPerfect 5.0 containing a copy of the document named "Page" and "Page.1".

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely,

Kenneth A. Hoffman

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Enclosures

cc: Bruce D. Page, Esq.

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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 Filed: July 17, 1992

POST-HEARING BRIEF

OF

JACKSONVILLE ELECTRIC AUTHORITY

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PRELIMINARY STATEMENT

Respondent Jacksonville Electric Authority files this post-hearing brief including a statement of issues and positions pursuant to Rule 25-22.056, Florida Administrative Code. The issues are addressed in the same order as they appear in Prehearing Order No. PSC-92-0423-PHO-EU. Jacksonville Electric Authority will be referred to as "JEA", and Okefenoke Rural Electric Membership Corporation will be referred to as "OREMC". The Florida Public Service Commission will be referred to as the "Commission". Citations to the transcript of the final hearing will be designated as (Tr. ____).

SUMMARY AND ARGUMENT

Both JEA and OREMC serve electric customers within the consolidated corporate limits of the City of Jacksonville. All OREMC customers in Jacksonville are located within the municipal corporate limits established October 1, 1968. OREMC has derived revenues from these customers for many years pursuant to an agreement and arrangement whereby JEA granted permission to OREMC to serve individual customers in the city on a case by case basis "until such time as the JEA acquir(ed) the electric system facilities and properties of ... Okefenoke Rural Electric Membership Corporation which are located within the city ..." Sections 718.102 (1968), 718.103 (1969), Jacksonville Municipal Code.

Dating back to 1969 when the foregoing arrangement was codified in the Jacksonville Municipal Code, OREMC has consistently acquiesced in first receiving permission from the JEA prior to providing electric service to customers residing within the corporate limits of the City of Jacksonville.[1] Prior to this case, OREMC historically operated under this

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[1]Late-filed Exhibit 3, an unsigned letter dated December 10, 1976 from Pete J. Gibson, former manager of OREMC, represents the only evidence OREMC produced purporting to rebut its ongoing acquiescence to the "permission" arrangement set forth in the Jacksonville Municipal Code. This letter, if it was indeed sent to JEA, makes no specific reference to the historical arrangement although it does request that JEA accept OREMC's "right" to serve in Duval County. JEA has never acknowledged that OREMC has a permanent right to serve as it has no authority to do so under the Municipal Code. Further, OREMC's isolated claim of a right to serve lacks credibility in light of the fact that OREMC waited approximately 16 years to exercise its right to seek confirmation of any such right by filing a petition with the Commission.

arrangement and did not seek a territorial dispute resolution by this Commission with respect to all of its customers in the City of Jacksonville.

The precipitating fact which brought the entire customer base of OREMC in the City of Jacksonville before the Commission was OREMC's loss of the Airport Holiday Inn as a customer. The Airport Holiday Inn, which was under construction at the time of Jacksonville's consolidation, disconnected OREMC's electric lines and began accepting JEA's service on November 25, 1991.

Having heard the evidence, the Commission should understand that the parties are not embroiled in a dispute with respect to service to OREMC's customers in northern Jacksonville. There was no evidence that JEA is soliciting or otherwise attempting to oust OREMC from its current status of providing retail electric service to approximately 2,200 customers in northern Jacksonville. Instead, the Commission erroneously seeks to adjudicate service rights as to all OREMC customers based on two facts: (1) a true territorial dispute as defined by Commission Rule 25-6.0439(1)(b) over service to the Airport Holiday Inn, and (2) the fact that the parties' lines are com-mingled in certain parts of northern Jacksonville.

Mr. Dew testified that OREMC plans to accommodate growth in the areas of northern Jacksonville where the two utilities' facilities are commingled. (Tr. 222-223). OREMC's growth

accommodation plans are not designed to avoid further uneconomic duplication of facilities but rather to serve every Jacksonville customer it can for as long as it can. JEA's attempts to purchase all of OREMC's facilities in the city were intended in part to end this duplication. OREMC has flatly refused to negotiate a sale of its property to JEA.[2]

OREMC's desire that the Airport Holiday Inn be ordered back into their service will do nothing to correct or unscramble this situation. OREMC's request that the Commission grant OREMC an exclusive service territory within the municipal city limits of Jacksonville is without legal precedent or foundation. OREMC has never petitioned the City Council for a franchise.

The central question presented by this case is whether OREMC's historical presence gives rise to a right superior to the constitutional, statutory and judicially confirmed right and obligation of a sovereign municipality to control the distribution of electricity within its boundaries as such boundaries existed on July 1, 1974.

The "area in dispute", the Airport Holiday Inn, is located in the City of Jacksonville as the state government has defined the city since October 1, 1968, the same year the Florida Constitution was revised. The right and responsibility of the City of Jacksonville, through the JEA, to serve

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[2]For example, Mr. Page complained that JEA has never made a reasonable offer for OREMC's facilities. Yet, he admitted OREMC has never made a counteroffer to JEA. (Tr. 64).

Jacksonville citizens flow from: (1) the Florida Constitution, ratified by the electorate on November 5, 1968, (2) the decision of the Florida Supreme Court in Storey v. Mayo, 217 So.2d 304 (Fla. 1968), decided on November 6, 1968 (rehearing denied December 12, 1968), (3) the Municipal Home Rule Powers Act, Ch. 73-129, Laws of Florida, codified in Chapter 166, Florida Statutes, and (4) Section 366.04(2), Florida Statutes, part of the 1974 "Grid Bill" (Chapter 74-196, Laws of Florida) which preserved such right and obligation of a municipality to provide retail electric service within its July 1, 1974 corporate limits. OREMC's purported right to serve based on historical presence must accede to the legal right and obligation of the JEA to provide retail electric service within the consolidated corporate limits of the City of Jacksonville.

OREMC's financial interests and property rights in Jacksonville are determinable and fully compensable. The only compensation OREMC seeks is a piece of the territory, a perpetual business interest and opportunity to derive income from Jacksonville.

OREMC's argument and evidence can be distilled to this: "we were there first and we don't want to leave." OREMC failed to present evidence on factual issues traditionally considered by the Commission in resolving territorial disputes such as the ability of the two utilities to expand, proximity to other urban areas, etc. See Section 366.04(2)(e), Florida

Statutes and Rule 25-6.0441, Florida Administrative Code. Moreover, petitioner OREMC failed to provide evidence of data and information required by Rule 25-6.0441(1), specifically:

> [A] description of the existing and planned load to be served in the area of dispute and a description of the type, additional cost, and reliability of electrical facilities and other utility services to be provided within the disputed area.

OREMC's right to serve electric customers in Jacksonville is based on its historical presence in Duval County before consolidation and the grants of permission to serve by JEA. Ironically, a significant portion of the electricity provided by OREMC to its customers in Jacksonville is generated by JEA, sold in bulk to OREMC and then resold to Jacksonville citizens.

SOVEREIGN POWER OF MUNICIPALITIES

As between a municipality and a rural electric cooperative within the city limits, the city is sovereign and supreme. This is the law in Tennessee[3], Indiana[4], and JEA

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[3] Duck River Electric Membership Corporation v. City of Manchester, 529 S.W. 2d 202 (Tenn. 1975). This case holds that a municipality has the power to condemn the property of an electrical cooperative within its boundaries. In its comparison of the two types of utilities, the court pointed out that the corporation could refuse service to prospective customers while a city's electric utility must provide service to all inhabitants "without discrimination and without the imposition of restrictions and conditions excepting those relating to payment." In Storey v. Mayo, the Florida Supreme Court said that when an individual "lives within the limits of a city which operates its own electric system, he can compel service by the city." 217 So.2d at 308. The obligations and opportunities of the two utilities within the city's limits are not equal.

believes, in Florida. Despite attempts in the Florida Legislature to eliminate the right of local governments to acquire facilities of an electric utility through eminent domain in order to provide electric service within their governmental boundaries[5], that right endures. JEA is an

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[4] Dubois Rural Electric Cooperative, Inc. v. City of Jasper, 348 N.E. 2d 663, 169 Ind. App. 353 (1976). This case affirmed a city's right to acquire an electric cooperative's assets through eminent domain. Defendant cooperative argued that the city had annexed the area several years before seeking condemnation, that the two parties' service area agreement precluded condemnation, and that the city had not made a good faith attempt to negotiate prior to seeking condemnation. The Dubois court made a statement highly germane to the present case: "While public policy regarding utility service favors a general restraint on competition for the benefit of consumers through the public service commission laws, in Section 18a the legislature determined that the public interest is best served if the electric utility authorized to serve a city or town be permitted (upon payment of proper compensation) to serve additional areas incorporated into and becoming a part of the city or town." JEA believes that the legislative intent regarding a municipality's right to serve in Indiana and Florida is indistinguishable.

[5] Bellak and Brown, Drawing the Lines: Statewide Territorial Boundaries For Public Utilities in Florida, 19 Fla. St. U.L. Rev. 407 (1991). The legislative history portions of this article explain that Fla. H.B. 1863 (1991) proposed to prohibit municipalities from exercising their powers of eminent domain to acquire private electric company facilities within the city limits. The article acknowledged that such use of a municipality's power of eminent domain is based on the principle that "the provision of electric service within a municipality is a governmental function that the local government may perform itself or may grant a franchise to a private company to perform." Id. at 426.

electric utility operated by the City of Jacksonville. Amerson v. Jacksonville Electric Authority, 362 So.2d 433 (Fla. 1st DCA 1978).

Under Article VIII, Section 2(b) of the Florida Constitution and Section 166.021 of the Florida Statutes, Jacksonville has the governmental, corporate and proprietary powers to enable the city to perform municipal services. The Storey v. Mayo decision requires the City (through JEA) to respond to requests of its citizens for electric service. Section 366.04(2), Florida Statutes, preserves the legal right and obligation of the JEA to provide service within the consolidated city limits of Jacksonville in existence on July 1, 1974. OREMC has no right or power to serve customers in the city superior to the city's right to provide electric services. Jacksonville has granted no franchise or exclusive service territory to OREMC. Jacksonville has not waived any of its rights nor has Jacksonville been relieved of its responsibility to serve its citizens. OREMC asks the Commission to create a right for OREMC which is contrary to the sovereign rights of a municipality to provide services and to determine how these services are provided.

OREMC petitions the Commission to grant OREMC the right to provide service within the city limits of Jacksonville by construing the Commission's powers under Chapter 366 of the Florida Statutes despite language in the statute that "(n)o provision of this chapter shall be construed or applied to

impede, prevent, or prohibit any municipally owned electric system from distributing at retail electrical energy within its corporate limits." Section 366.04(2), Florida Statutes. OREMC's request must be denied.

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?

JEA'S POSITION: No. The central question raised by this issue has not yet been answered. The Commission's staff position expressed in the prehearing order states that the issue has been resolved by the Commission's ruling on JEA's Motion to Dismiss. That order (No. PSC-92-0423-PHO-EU) declared that the Commission has the responsibility to ensure that municipalities exercise their right to provide electric service within their 1974 boundaries in a manner consistent with all relevant provisions of the Grid Bill. The order did not declare, however, that the Commission has the power to grant OREMC's request of an exclusive service territory within the City of Jacksonville. Only the City Council may do that.

The Commission may have the authority to devise and order a proper remedy to this dispute. As stated in the order, the Commission's authority must be applied in a manner

consistent with a municipality's right to serve customers within its 1974 corporate limits. Encircling some of the City of Jacksonville with a line and granting a rural electric cooperative the exclusive right to serve the defined area is not consistent with the City's legal right to serve recognized by the Commission.

Under Section 366.04(2), Florida Statutes, there are only two procedures by which the Commission may grant exclusive territorial rights to a rural electric cooperative. The first is through the approval of a territorial agreement submitted by a rural electric cooperative and another electric utility. The second is through resolution of a territorial dispute involving the specific territory. In this case, a territorial dispute exists between the parties only as to the provision of service to the Airport Holiday Inn. JEA acknowledges that OREMC currently provides retail electric service to its existing customers within the consolidated municipal limits of the City of Jacksonville and that JEA has granted OREMC permission to provide such service or has not otherwise objected to the provision of such service. There was no evidence that JEA is attempting to interfere with OREMC's service to its existing customers. The Commission lacks the statutory authority and subject matter jurisdiction to grant OREMC's requests that the Commission order the utilities to enter into a territorial agreement and/or determine and define territorial boundaries

between the two utilities within the consolidated municipal limits of the City of Jacksonville.

The Commission's statutory authority to resolve territorial disputes, is limited by the following language found in Section 366.04(2), Florida Statutes:

> No provision of this chapter 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; however, existing territorial agreements shall not be altered or abridged hereby. (hereinafter "1974 municipality provision").

JEA and OREMC were not parties to a territorial agreement defining their respective service rights on or before July 1, 1974. Nor was there any Commission order determining and defining service territories of the two utilities prior to July 1, 1974. Hence, the issue is whether <u>any provision</u> in Chapter 366 may be construed to impede, prevent or prohibit JEA from distributing retail electric service within its consolidated corporate limits as such existed on July 1, 1974. The 1974 municipality provision very clearly and plainly provides the answer - "no provision of this chapter" may be so construed.

Applying the plain meaning of the 1974 municipality provision, it is clear that the statutory criteria used by the Commission to resolve territorial disputes <u>shall not be construed to impede, prevent or prohibit JEA from</u>

providing retail electric service within the consolidated municipal limits of the City of Jacksonville. Likewise, the Commission's statutory authority over the planning, development, and maintenance of a coordinated electric power grid and its responsibility to deter uneconomic duplication of facilities, all specifically set forth in § 366.04(5), shall not be construed to impede, prevent or prohibit JEA from providing retail electric service within the consolidated municipal limits of the City of Jacksonville.

The Commission must be cognizant of three established principles of statutory construction. First, it is always presumed that statutes enacted by the Florida Legislature are not superfluous and have some meaning and effect different than or in addition to law in effect at the time of enactment. Vocelle v. Knight Brothers Paper Company, 118 So.2d 664, 667 (Fla. 1st DCA 1960). OREMC alleges that the 1974 municipality provision does not grant municipalities the unfettered right to provide electric service within July 1, 1974 corporate limits but that such right is subject to a territorial dispute to be resolved by the Commission. OREMC's construction of the statute renders the 1974 municipality provision meaningless and unnecessary since the Commission already has jurisdiction under Section 366.04(2)(c), Florida Statutes, to resolve territorial disputes between and among all types of electric utilities.

Secondly, a court will not read words into a statute where such words and the intent presumed therewith could have easily been inserted by the Legislature. Sumner v. Board of Psychological Examiners, 555 So.2d 919, 921 (Fla. 1st DCA 1990). Here, OREMC construes the 1974 municipality provision in a manner which essentially inserts the following underlined language:

> No provision of this chapter - except the Commission's mandate to avoid further uneconomic duplication of generation, transmission and distribution of facilities - 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 ....

OREMC's interpretation of the 1974 municipality provision violates the aforementioned principle of statutory construction.

Third, it is also well established that an administrative agency may not modify the plain meaning of statutory language to achieve what the agency conceives to be a more practical or proper result. Vocelle, supra, at 668. JEA maintains that a grant of an exclusive territory to OREMC within the consolidated corporate limits of the City of Jacksonville would be contrary to the plain meaning of the 1974 municipality provision.

In 1968, the Florida Supreme Court in discussing the law applicable to the furnishing of retail electric service

within the corporate limits of a municipality, stated the following:

> Under Florida law, municipally-owned electric utilities enjoy the privileges of legally protected monopolies within municipal limits. The monopoly is totally effective because the government of the City, which owns the utility, has the power to preclude even the slightest threat of competition within the city limits.
>
> . . .
>
> An individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself. If he lives within the limits of a city which operates its own system, he can compel service by the city.
> [Emphasis added.]

Storey v. Mayo, 217 So.2d 304, 307-308 (Fla. 1968). The enactment of the Grid Bill in 1974 preserved and codified that principle of law pursuant to the 1974 municipality provision. The Florida Supreme Court's pronouncement in Storey v. Mayo as codified by the 1974 municipality provision remains the law today. Since JEA was in a position to provide service to the Airport Holiday Inn at its request, and JEA and OREMC were not parties to a Commission-approved territorial agreement, JEA is clearly under a legal obligation to provide such service.

Further, absent a Commission approved territorial agreement, there is no lawful basis upon which JEA may refuse to provide service to the Airport Holiday Inn without

subjecting itself to the clear risk of violating federal anti-trust laws. OREMC relies on the 1978 operating guideline between the parties in support of its position that it should be awarded the right to provide service to the Airport Holiday Inn. The 1978 operating guidelines arrangement is not a Commission-approved territorial agreement. See Rule 25-6.0440(1), F.A.C. (all territorial agreements between two electric utilities shall be submitted to the Commission for approval). It is not a territorial agreement entered into between the two utilities and approved by the Commission pursuant to the clearly articulated and affirmatively expressed policy of the State of Florida to displace competition through Commission-approved territorial agreements. See Section 366.04(2)(d), Florida Statutes. Hence, the 1978 operating arrangement fails to protect the parties from federal anti-trust claims under the "state action" exception. See, e.g., California Retail Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed. 2nd 233 (1980); Fuchs v. Rural Electric Convenience Co-op., Inc., 858 F.2d 1210, 1213 (7th Cir. 1988).

For these reasons, JEA may not rely on the 1978 agreement as a basis to refuse service to the Airport Holiday Inn. Conversely, OREMC may not rely on the 1978 operating arrangement as a basis to support its position that the Commission should require the Airport Holiday Inn to take

service from OREMC.

Under Sections 1.01, 2.04, and 21.04 of the Chapter of the Consolidated Government of Jacksonville, and under Section 718.103 of the City of Jacksonville Code, the JEA has the authority to provide retail electric service within the consolidated corporate limits of the City of Jacksonville and may grant permission to OREMC to furnish electric service within such limits. The JEA's authority to provide electric service as authorized and described above predates the passage of the Grid Bill effective July 1, 1974. The 1974 municipality provision included in the Grid Bill which remains substantially the same today in no manner diminished or diluted JEA's preexisting rights to provide retail electric service within the consolidated corporate limits of the City of Jacksonville. Accordingly, the Commission lacks jurisdictional authority to grant exclusive territorial rights to OREMC in this proceeding.

Finally, OREMC maintains that JEA has waived its right to provide electric service to the Airport Holiday. JEA disagrees and maintains that it has not waived its statutory authority to serve the Airport Holiday Inn and that the Order cited by OREMC, City of Tallahassee v. Talquin Electric Cooperative, Inc., (Case No. 70-855, Second Judicial Circuit in and for Leon County, Florida; August 4, 1972), does not support OREMC's position. On the contrary, the 1972 Order in City of Tallahassee v. Talquin Electric Cooperative, Inc.

confirms the JEA's authority to condemn OREMC's facilities and commence service throughout the City of Jacksonville as long as JEA is ready, willing and able to provide service. See 1972 Order, at 5.

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?

JEA'S POSITION: No. Same position as set forth under Issue 1 which is incorporated herein by reference.

ISSUE 3

DOES JEA HAVE THE EXCLUSIVE RIGHT TO SERVE IN DUVAL COUNTY EVEN WHERE OTHER UTILITIES SERVED PRIOR TO OCTOBER 1, 1968?

JEA'S POSITION: Yes. Prior to adoption of the 1968 Constitution, municipal utilities had only such powers as were expressly conferred by the Legislature. Article VIII, Section 8, Florida Constitution (1885). The statutory authority of municipalities to provide electric utility service dates to at least as early as 1897, in Chapter 4600, Laws of Florida. Those provisions, subsequently codified in Chapter 172, Florida Statutes, had as their centerpiece Section 172.01, Florida Statutes:

> Any city or town may, under the limitations of this chapter, construct, purchase, lease, or establish and

> maintain within its limits one or more plants for the manufacture or distribution of gas or electricity for furnishing of light for municipal use, and for the use of such of its inhabitants as may require and pay for the same as herein provided.

In addition, Section 172.09 authorized municipalities to acquire existing gas and electric facilities, and prescribed valuation criteria.

In 1968, Florida adopted a new constitution which enhanced the status of municipalities. Article VIII, Section 2 of the 1968 Constitution provides in pertinent part:

> Municipalities shall have governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.

Thus, although in the past municipalities were "inherently powerless absent a specific grant of power from the Legislature," now their powers are limited only by the requirement that they serve a municipal purpose unless the Legislature affirmatively acts to impose limitations, Lake Worth Utilities v. City of Lake Worth, 468 So.2d 215 (1985).

In 1973, the Legislature enacted the Municipal Home Rule Powers Act. Chapter 73-129, Laws of Florida, now codified in Chapter 166, Florida Statutes. Section 166.021, Florida Statutes, provides in pertinent part:

> (1) As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to

> conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.
>
> (2) "Municipal purpose" means any activity or power which may be exercised by the state or its political subdivisions.
>
> . . .
>
> (4) The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rules powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.

The Act also repealed Chapter 172, but in Section 166.042(1) expressly addressed the status of powers previously granted in that chapter:

> It is the legislative intent that the repeal by chapter 73-129, Laws of Florida, of chapters ... 172, ... of Florida Statutes shall not be interpreted to limit or restrict the powers of municipal officials, but shall be interpreted as a recognition of constitutional powers. It is, further, the legislative intent to recognize residual constitutional home rule powers in municipal government, and the Legislature finds that this can best be accomplished by the removal of legislative direction from the statutes. It is, further, the legislative intent that municipalities shall continue to exercise all powers heretofore conferred

> on municipalities by the chapters enumerated above, but shall hereafter exercise those powers at their own discretion, subject only to the terms and conditions which they choose to prescribe.

Thus, far from attempting to limit or undermine the powers of municipalities to operate electric utility systems, the Municipal Home Rule Powers Act accords those powers increased dignity.

Also in Chapter 166, municipalities are given the power of eminent domain. Section 166.041, Florida Statutes provides:

> (1) All municipalities in the state may exercise the right and power of eminent domain; that is, the right to appropriate property within the state, except state or federal property, for the uses or purposes authorized pursuant to this part. The absolute fee simple title to all property so taken and acquired shall vest in such municipal corporation unless the municipality seeks to condemn a particular right or estate in such property.

Section 166.411(1) authorizes the exercise of eminent domain by municipalities for "good reason connected in anywise with the public welfare or the interests of the municipality and the people thereof." Municipalities even have the power to condemn property already devoted tc a public use by a privately owned utility, City of Palm Bay v. General Development Utilities, 201 So .2d 912 (Fla. 4th DCA

1967), cert. denied, 207 So.2d 452 (Fla. 1967).[6]

The provision of electric service is generally considered a proprietary function, Edris v. Sebring Utilities Commission, 237 So.2d 585 (Fla. 2d DCA 1970), cert. denied, 240 So.2d 643 (Fla. 1970), but more importantly it is a municipal function, a power these local governments have enjoyed for a century. See Saunders v. City of Jacksonville, 25 So.2d 648 (Fla. 1946) (municipal purpose served where service extended outside municipal limits). The municipality may exercise the municipal function by providing electric service itself, or by contracting with a private company to do so. State v. Pinellas County Power Co., 100 So.504 (Fla. 1924). See also Williams v. Public Utility Protective League of Florida, 178 So. 286 (Fla. 1938).

With the enactment of the 1974 municipality provision of the Grid Bill, the Legislature expressly confirmed and preserved the constitutional and statutory right of a municipality to provide retail electric service within its July 1, 1974 corporate limits, while implicitly leaving territory annexed into a municipality after July 1, 1974 subject to territorial dispute resolution by the Commission. As evidenced by the City of Green Cove Springs decision, the

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[6]A recent example of the exercise of eminent domain by a municipal electric utility is City of Green Cove Springs v. Clay Electric Cooperative, Inc., Case No. 86-457-CA (Fourth Jud. Cir. 1986). There, the municipality condemned the electric utility property of an electric cooperative, so that the city could provide electric service to a newly annexed area.

eminent domain authority of a municipal electric utility remains unfettered without regard to July 1, 1974 corporate limits.

Hence, under Article VIII, Section 2(b), Florida Constitution, the above-cited provisions of Chapter 166, Florida Statutes, the 1974 municipality provision in Section 366.04(2), Florida Statutes, and the Supreme Court's decision in Storey v. Mayo, the JEA has the exclusive right and obligation to serve the citizens of Jacksonville. As discussed above, this power and responsibility can be exercised by the JEA or by allowing some other utility (OREMC) to serve within the city limits by grant of franchise, license, or by territorial agreement. JEA believes that these options remain local government decisions of the sovereign. The city's grant of permission to OREMC to serve Jacksonville citizens does not waive the municipal power nor does it relieve the city of its responsibility to render service in the City of Jacksonville as defined by the City Charter. It is only through the exercise of these powers and responsibilities by the city that OREMC serves Jacksonville citizens. The JEA has an exclusive right to serve in the city if the city so chooses. Any other utility's right to serve the City of Jacksonville must be granted by the City through the JEA.

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?

JEA'S POSITION: Yes. As discussed above and as stated by the Florida Supreme Court, a citizen of a city which operates its own electric system can compel service by the city. Storey v. Mayo, 217 So.2d 304, 308 (Fla. 1968). The city may elect one of many options to provide the service, but it must provide service. No rural electric cooperative has this obligation to serve a resident of a municipality.

ISSUE 5

WHAT IS THE GEOGRAPHICAL DESCRIPTION OF THE AREA IN DISPUTE?

JEA'S POSITION: As stated in JEA's Motion to Dismiss or in the Alternative, Motion to Strike, the only area in dispute under the pleadings is the Airport Holiday Inn. No allegation has been made that JEA is attempting to improperly provide service to other OREMC customers in the city. As shown throughout the hearing, JEA's attempts to purchase OREMC's facilities have been rebuffed for years.

ISSUE 6

WHICH UTILITY HAS HISTORICALLY SERVED THE AREA IN DISPUTE?

JEA'S POSITION: Both JEA and OREMC have a long history of service in the consolidated corporate limits of the City of Jacksonville which, apart from the Airport Holiday Inn, are not the subject of a territorial dispute. JEA began

serving the Airport Holiday Inn on or about November 25, 1991. Prior to that time, the Airport Holiday Inn was served by OREMC. Before consolidation in 1968 both utilities served the area north of the pre-1968 city limits.

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?

JEA'S POSITION: As the petitioner seeking affirmative relief from the Commission, OREMC bears the burden of proof in this proceeding. See, e.g., Florida Power Corp. v. Cresse, 413 So.2d 1187 (Fla. 1982); Citizens v. Florida Public Service Commission, 440 So.2d 371 (Fla. 1st DCA 1983); South Florida Natural Gas v. Florida Public Service Commission, 534 So.2d 695 (Fla. 1988). The Commission's own rule, Rule 25-6.0441(1), F.A.C., requires a utility to submit, inter alia, data pertaining to the location, purpose, type and capacity of its existing facilities as a predicate to resolution of a territorial dispute. It is difficult to conceive how the Commission may reach an informed decision determining territorial rights throughout northern Jacksonville without such data and other data (additional cost of facilities, reliability of facilities, existing and planned load) required by Rule 25-6.0441(1), F.A.C. OREMC failed to present evidence addressing such information required by Rule 25-6.0441(1), F.A.C., and consequently, the Commission should dismiss OREMC's petition as OREMC has

clearly failed to meet its burden of proof as defined by Commission rule.

ISSUE 8

ARE THERE OTHER AREAS OF POTENTIAL CONFLICT BETWEEN THE SERVICE AREAS OF OKEFENOKE AND JEA?

JEA'S POSITION: No.

ISSUE 9

IS EITHER UTILITY PRESENTLY SERVING THE AREA IN DISPUTE?

JEA'S POSITION: JEA is presently serving the Airport Holiday Inn.

ISSUE 10

WHAT IS THE EXPECTED CUSTOMER LOAD AND ENERGY GROWTH IN THE DISPUTED AREA AND SURROUNDING AREAS?

JEA'S POSITION: JEA incorporates by reference its response to Issue 7. Further, city growth involves more than just additional electric service. Jacksonville, like other municipalities, is responsible for planning and zoning, public safety, roads, schools, and the many other governmental functions within its boundaries. OREMC has only a financial interest in Jacksonville's future growth. JEA is an agency of municipal government which has an interest in and responsibility for all aspects of growth.

ISSUE 11

WHAT ADDITIONAL FACILITIES WOULD EACH PARTY HAVE TO BUILD TO SERVE THE DISPUTED AREA?

JEA'S POSITION: No facilities are required in the immediate future. Building new facilities would be an unnecessary duplication.

ISSUE 12

WHAT IS THE EXISTING ABILITY OF EACH UTILITY TO EXTEND EXISTING FACILITIES TO THE AREA IN QUESTION?

JEA'S POSITION: An extension of facilities by either party is unnecessary at this time. The issue involves service to existing customers rather than future customers.

ISSUE 13

HOW LONG WOULD IT TAKE EACH UTILITY TO PROVIDE SERVICE TO THE DISPUTED AREA?

JEA'S POSITION: JEA is presently serving the Airport Holiday Inn. The other areas within the consolidated corporate limits of the City of Jacksonville are not the subject of a territorial dispute. These areas are already being served.

ISSUE 14

HAS UNNECESSARY AND UNECONOMICAL DUPLICATION OF ELECTRIC FACILITIES OCCURRED IN THE VICINITY OF THE DISPUTED AREA OR IN OTHER AREAS OF POTENTIAL DISPUTE BETWEEN THE PARTIES?

JEA'S POSITION: Duplication of facilities has occurred in Jacksonville. The questions of necessity and economics depend on the different points of view. If all facilities that now exist were owned by one utility, virtually all of the facilities including the lines would remain in use. The key to avoiding future duplication is unitary ownership.

ISSUE 15

Included in Issue 14.

ISSUE 16

(STIPULATED) DO THE PARTIES HAVE A FORMAL TERRITORIAL AGREEMENT THAT COVERS THE AREA IN DISPUTE, OR ANY OTHER AREAS OF POTENTIAL DISPUTE?

JEA'S POSITION: No.

ISSUE 17

HAVE THE PARTIES MADE ANY ATTEMPTS TO REACH AGREEMENT ON WHO SHOULD SERVE THE DISPUTED ARE, OR ANY OTHER AREAS OF POTENTIAL DISPUTE?

JEA'S POSITION: Yes. JEA has offered to compensate OREMC to acquire their interests. OREMC has refused to discuss the matter unless JEA will grant OREMC some exclusive territory in the city. JEA does not have the power nor the desire to make such an offer.

ISSUE 18

HAVE THE PARTIES OPERATED UNDER ANY INFORMAL AGREEMENTS OR "UNDERSTANDINGS" REGARDING WHO SHOULD SERVE THE DISPUTED AREA?

JEA'S POSITION: Yes. Both parties have operated under the Municipal Code and a working agreement.

ISSUE 19

WHAT WOULD BE THE ADDITIONAL COST TO EACH UTILITY TO PROVIDE ELECTRIC SERVICE TO THE AREA IN DISPUTE?

JEA'S POSITION: JEA currently provides service to the Airport Holiday Inn. No additional cost is necessary to

continue service. With respect to the other areas which are not the subject of a territorial dispute, JEA would incur the cost to acquire OREMC facilities to provide service.

ISSUE 20

WHAT WOULD BE THE COST TO EACH UTILITY IF IT WERE NOT PERMITTED TO SERVE THE AREA IN DISPUTE?

JEA'S POSITION: The cost to a utility if it were not permitted to serve the area where it now serves is impossible to determine. Each utility can and should be made whole if its assets are acquired by the other utility.

ISSUE 21

WHAT WOULD BE THE EFFECT ON EACH UTILITY'S RATEPAYERS IF IT WERE NOT PERMITTED TO SERVE THE DISPUTED AREA?

JEA'S POSITION: The immediate effect on a utility's ratepayers would be minimal if the utility were made whole or compensated for its lost assets. The long term effect on ratepayers is impossible to predict because of the uncertainty in value of deferred capacity versus the cost of constructing or purchasing new generation.

ISSUE 22

IF ALL OTHER THINGS ARE EQUAL, WHAT IS THE CUSTOMER PREFERENCE FOR UTILITY SERVICE IN THE DISPUTED AREA?

JEA'S POSITION: The Airport Holiday Inn prefers to be served by JEA. With respect to the other areas in the northern part of the consolidated corporate limits of the City of Jacksonville the unsolicited signatures of

Jacksonville citizens and letters from elected representatives suggest a strong preference for JEA service.

ISSUE 23

WHICH PARTY SHOULD BE PERMITTED TO SERVE THE AREA IN DISPUTE?

JEA'S POSITION: JEA, Jacksonville's municipal electric utility, should serve all citizens in the city which are not otherwise served pursuant to a Commission approved territorial agreement.

ISSUE 24

WHAT CONDITIONS, IF ANY, SHOULD ACCOMPANY THE COMMISSION'S DECISION REGARDING WHICH PARTY SHOULD BE PERMITTED TO SERVE THE DISPUTED AREA?

JEA'S POSITION: Mr. Ferdman was asked by a Commissioner, what would be the best resolution of this problem for all of the citizens of Duval County. (See Tr. 319-325). "This problem" from the Commission's perspective is the coexistence of two electric utilities serving the same geographical area and the likelihood of "further uneconomical and unnecessary duplication of facilities." The "problem" from OREMC's point of view is the recent loss of a major customer and the uncertainty of their future in Jacksonville. There is one resolution which will satisfy the Commission's duty to assure the avoidance of further uneconomic duplication, and will not offend the principle of municipal sovereignty or conflict with the legislative prohibition against construing or applying Chapter 366, Florida Statutes,

to prevent or prohibit JEA from distributing at retail electrical energy to a Jacksonville citizen. As stated by Mr. Ferdman, only one electric utility should own the facilities currently owned by both. The sovereign and superior right of JEA to own all of the facilities should be acknowledged by the Commission. If OREMC fails to negotiate a satisfactory sale within a reasonable time, then either JEA or the city should exercise those sovereign powers necessary to obtain ownership. Once ownership is consolidated, duplication will end.

The interests of individual customers can be protected by allowing continuing membership in the rural cooperative for those who so elect. This can be accomplished by allowing OREMC to use JEA's lines for delivery similar to the arrangement in effect between the City of Tallahassee and Talquin Cooperative, Inc.

OREMC's property interest can be fully compensated either to its satisfaction, or by a finding of full value in an appropriate court of law. Both utilities will then be able to plan properly, and both will have specific resources with which to plan.

CONCLUSION

OREMC's petition should be denied. OREMC's request that it be granted exclusive rights to serve certain Jacksonville citizens without the consent of JEA or the City Council is contrary to both state and local law, and conflicts with constitutional, statutory and judicially recognized sovereign powers and responsibilities of the City of Jacksonville and the JEA. All citizens of Jacksonville will be better served when the electric distribution facilities in the city are owned by JEA.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Post-Hearing Brief of Jacksonville Electric Authority was furnished by United States Mail this 17th day of July, 1992 to the following:

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